

NO. 70712-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

IVAN BARASHKOFF,

Appellant.

REC'D  
JAN 27 2014  
King County Prosecutor  
Appellate Unit

2014 JAN 27 PM 4:20  
COURT OF APPEALS  
STATE OF WASHINGTON  
JEN WINKLER

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jim Rogers, Judge

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MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN  
THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW

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I. IDENTITY OF MOVING PARTY AND RELIEF SOUGHT

Nielsen, Broman & Koch, PLLC, appointed counsel for appellant Ivan Barashkoff, respectfully request permission to withdraw as appellate counsel under RAP 15.2(i).

II. FACTS RELEVANT TO MOTION

On July 31, 2013, the King County Superior Court authorized the appointment of appellate counsel on this appeal from the superior court's order to involuntarily medicate appellant to render him competent for trial. On August 20, this Court appointed Nielsen, Broman & Koch to represent the appellant.

In reviewing this case for issues to raise on appeal, attorney Jennifer Winkler:

- (a) read and reviewed all pertinent clerk's papers and verbatim reports;
- (b) researched all pertinent legal issues and conferred with other attorneys concerning legal and factual bases for appellate review;
- (c) wrote to appellant by letter dated January 27, 2014 explaining the Anders procedure and appellant's right to file a pro se Statement of Additional Grounds for Review.

### III. GROUND FOR RELIEF

RAP 15.2(i) allows an attorney to withdraw on appeal where she can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); State v. Hairston, 133 Wn.2d 534, 946 P. 2d 397 (1997); State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970); and State v. Pollard, 66 Wn. App. 779, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Mr. Barashkoff to proceed pro se. Counsel submits the following brief to satisfy the obligations under Anders, Hairston, Theobald, Pollard, and RAP 15.2(i).

### IV. BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW

#### A. POTENTIAL ASSIGNMENT OF ERROR

The court erred in finding the State satisfied each of the Sell<sup>1</sup> criteria permitting involuntary medication of a criminal defendant found incompetent to stand trial.

#### Issue Pertaining to Potential Assignment of Error

Where the State failed to prove each of the four Sell criteria, should the order to involuntarily medicate the appellant be vacated?

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<sup>1</sup> Sell v. United States, 539 U.S. 166, 180-81, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

B. STATEMENT OF THE CASE

The State charged Barashkoff with two counts of felony harassment for an incident occurring January 14, 2013. CP 1-27.

In February of 2013, following a court-ordered evaluation by Western State Hospital staff, the court found Barashkoff incompetent to stand trial and committed him to the hospital for competency restoration. CP 28-33. The initial Western State report opined medication was necessary to render Barashkoff competent. CP 235-36. The State moved for an involuntary medication order, and the court held a hearing in July. Supp. CP \_\_\_ (sub no. 17, State's Motion); RP 2.

Western State psychologist Nitin Karnik testified on behalf of the State. Barashkoff was first admitted to Western State in 1998. RP 8; Ex. 5. His most recent admission occurred in March of 2013. RP 8. Based on an in-person evaluation and records review, Dr. Karnik opined Barashkoff suffered from mood and thought disorders. RP 9, 27. The thought disorder included disorganization as well as paranoid and grandiose delusions. RP 9-12. Barashkoff was, moreover, unable to carry on meaningful conversations with another person. RP 10, 16. Thus, based on his illness, Barashkoff was incapable of understanding the legal proceedings against him and was unable to participate in his defense. RP 16.

Karnik recommended Barashkoff be treated with a mood-stabilizing anti-psychotic. RP 16, 18, 36. Karnik opined there was a “substantial likelihood” such medication would treat Barashkoff’s mental illness. RP 56.

Barashkoff did not believe he suffered from mental illness and therefore refused medication. RP 16-17. Because he would not voluntarily take medication, Karnik recommended one of four medications available via injection: Zyprexa, Abilify, Haldol, or Geodon. RP 17. Karnik planned to try Zyprexa first and believed starting with a small dose would avoid possible side effects and other adverse health effects. RP 18-20, 31. Barashkoff’s records indicated Zyprexa had been effective in the past. RP 33-35. Western State would also monitor Barashkoff’s physical health to avoid adverse effects. RP 23. Karnik testified that, although Barashkoff’s mental health might improve without medication, such improvement was unlikely to be permanent. RP 24-25. Karnik also opined there was no feasible alternative to medication, and testified an appropriate dose would not hinder Barashkoff’s ability to assist in his defense. RP 25-26.

Karnik testified Barashkoff’s mental illness was itself likely causing brain damage and opined the recommended medications would not have that effect. RP 24. Karnik acknowledged on cross-examination,

however, that repeated treatment followed by decompensation might have an adverse effect on Barashkoff's "baseline" mental health. RP 53-55. Karnik acknowledged that Barashkoff was hospitalized at Western State in the late 1990s for competency restoration but decompensated shortly after his return to jail when he was no longer receiving medication. RP 41-50; Exs. 6 and 7.

The court found the State satisfied each of the Sell criteria and entered an order that Barashkoff receive medication. CP 276-77 (attached as Appendix A). Following a motion for revision, the court narrowed its order to specify that Barashkoff receive only Zyprexa. CP 291 (Appendix B). The court stayed its order pending this appeal. CP 289.

### C. POTENTIAL ARGUMENT

THE COURT ERRED IN WHEN IT FOUND THE STATE SATISFIED EACH OF THE FOUR SELL CRITERIA.

An individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs. Washington v. Harper, 494 U.S. 210, 221–22, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990). The involuntary injection of such drugs represents an interference with a person's right to privacy, right to produce ideas, and ultimately the right to a fair trial. Riggins v. Nevada, 504 U.S. 127, 134, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992) (quoting Harper, 494 U.S. at

229); State v. Adams, 77 Wn. App. 50, 56, 888 P.2d 1207, review denied, 126 Wn.2d 1016 (1995).

The State may involuntarily administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges when four requirements are satisfied. Sell v. United States, 539 U.S. 166, 180-81, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003). The State must show that: (1) important governmental interests are at stake; (2) administration of medication is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that may undermine the fairness of the trial; (3) involuntary medication is necessary to further the State's interests; and (4) administration of the medication is medically appropriate. Sell, 539 U.S. at 180-81.

The second Sell criterion requires courts to determine only whether the medication is “substantially likely to render the defendant competent to stand trial” and “substantially unlikely to have side effects that will interfere significantly with [his] ability to assist counsel in conducting trial defense.” United States v. Ruiz-Gaxiola, 623 F.3d 684, 704 (9<sup>th</sup> Cir. 2010) (quoting Sell, 539 U.S. at 181). In contrast, the fourth Sell criterion requires the court to consider all of the medical consequences of the proposed involuntary medication, including those consequences that may

not affect trial but result in long term side effects. Ruiz-Gaxiola, 623 F.3d at 704.

The State bears the burden of proving each element justifying involuntary medication with clear, cogent, and convincing evidence. State v. Hernandez-Ramirez, 129 Wn. App. 504, 510-11, P.3d 880 (2005). Orders authorizing involuntary medication under this standard are “disfavored.” United States v. Rivera-Guerrero, 426 F.3d 1130, 1137 (9th Cir.2005).

Here, Barashkoff could argue that the State failed to prove each of the Sell requirements by clear, cogent and convincing evidence. In particular, he could argue, as counsel did below, that the State failed to prove that administration of the medication was medically appropriate in the long term. RP 73-74. Dr. Karnik acknowledged that if Barashkoff were repeatedly treated and then stopped receiving treatment, his mental health could deteriorate. RP 53-55. Based on Barashkoff’s history of improvement on medication while hospitalized, followed by deterioration once no longer required to take medication, it is reasonable to infer that even if treated, Barashkoff will again decompensate. RP 41-50; Exs. 6 and 7. Such cyclical improvement followed by deterioration could have long-term detrimental effects on Barashkoff’s mental health. RP 55. Barashkoff could therefore argue the State failed to prove medication was

in his long-term medical best interests and thus failed to prove the fourth Sell factor. Ruiz-Gaxiola, 623 F.3d at 704 (finding government failed to prove fourth Sell requirement).

D. CONCLUSION

Counsel respectfully moves this Court for permission to withdraw as attorney of record and to permit the appellant to proceed pro se.

DATED this 27<sup>th</sup> day of January, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER

WSBA No. 35220

Office ID No. 91051

Attorneys for Appellant

# **APPENDIX A**

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**FILED**  
KING COUNTY, WASHINGTON

JUL 24 2013

*Schroeder*  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

STATE OF WASHINGTON

NO. 13-1-00833-1 SEA

V.

ORDER ON INVOLUNTARY  
MEDICATION FOR COMPETENCY  
UNDER SELL V. UNITED STATES

IVAN BARASHKOFF

This matter comes before the Court on a forced medication hearing under Sell. Dr. Karnik from Westerns State Hospital was the only witness. The exhibits 1-12 admitted by the parties was considered. The standard of proof is clear, cogent and convincing evidence.

Mr. Barashkoff spoke a great deal over the top of the witness and lawyer. The Court was able to hear the lawyers and the witness clearly (because they were located very close to this judge).

1. Important governmental interests are at stake. The charges, Felony Harassment, is one of the enumerated charges by statute. The charge itself involves threats of physical violence and threats to kill. The facts of this case, based upon the Certification for Determination of Probable Cause, establish an important governmental interest in prosecution at this preliminary stage.

HON. JIM ROGERS  
KING COUNTY SUPERIOR COURT  
DEPT. 45  
KING COUNTY COURTHOUSE  
SEATTLE, WASHINGTON 98104

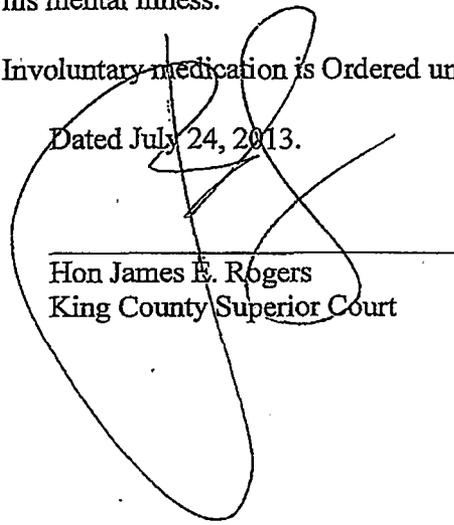
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- 2. Involuntary medication is likely to render the defendant competent, according to Dr. Karnik. Dr. Karnik was qualified and credible. Mr. Barashkoff suffers from Bipolar Disorder with psychotic features. This disorder interferes with his ability to understand the proceedings and assist counsel. He is focused on other federal litigation and prior cases. He spoke throughout this proceeding about these matters, cancer in his eye, constantly interrupting. His speech was pressured and rapid.
- 3. Zyprexa or one of the other medications noted by the Doctor are likely render him able to understand the proceedings and assist counsel. Doctor Karnik described in detail how side effects are monitored. Mr. Barashkoff has been administered Olanzapine, which is zyprexa, in the past to success in competency, in 1999. The major problem was getting him to take the medication. The defense is right that specificity is required under Sell, but there is a sufficient history of his medication for the Court to make a determination.
- 4. There is no less intrusive means of treatment. He has a history of refusing medication at WSH, and once released, immediately going off of his medication.
- 5. The medication is medically appropriate. It should in fact assist with the treatment of his mental illness.

Involuntary medication is Ordered under Sell as requested by Dr. Karnik..

Dated July 24, 2013.



Hon James E. Rogers  
King County Superior Court

HON. JIM ROGERS  
KING COUNTY SUPERIOR COURT  
DEPT. 45  
KING COUNTY COURTHOUSE  
SEATTLE, WASHINGTON 98104

# **APPENDIX B**

**FILED**  
KING COUNTY WASHINGTON  
AUG 08 2013

SUPERIOR COURT CLERK

SUPERIOR COURT OF THE STATE OF WASHINGTON COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

v.

Ivan Barashkoff  
Defendant.

NO. 13-1-00833-1584

ORDER Modifying Order for  
Involuntary Medication  
(ORCM)

Clerk's Action Required

Plaintiff  Defendant moves the Court for an order modifying the  
court's 7/24/13 order for Involuntary Medication

\_\_\_\_\_ ; now, therefore, it  
is hereby

**ORDERED** Paragraph 2 is modified to replace "Involuntary  
Medication" with Zyprexa. Paragraph 3 is modified to delete  
"or one of the other medications". Western State is hereby  
permitted to administer involuntary Zyprexa if necessary, but  
not other anti-psychotic medications.

DONE IN OPEN COURT this 8 day of August, 2013.

JUDGE JAMES E. ROGERS

\_\_\_\_\_, WSBA# \_\_\_\_\_  
Deputy Prosecuting Attorney

\_\_\_\_\_, WSBA# \_\_\_\_\_  
Attorney for the Defendant

291 J1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70712-4-1
	)	
IVAN BARASHKOFF,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27<sup>TH</sup> DAY OF JANUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] IVAN BARASHKOFF  
NO. 213001583  
KING COURNTY JAIL  
500 5<sup>TH</sup> AVENUE  
SEATTLE, WA 98104

**SIGNED** IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF JANUARY, 2014.

x *Patrick Mayovsky*