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After United States v. White, Will the Fourth Circuit Ever Permit Forcible Medication to Restore Competency for Defendants Charged with Nonviolent Crimes

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AFTER *UNITED STATES V. WHITE*, WILL THE FOURTH CIRCUIT EVER PERMIT FORCIBLE MEDICATION TO RESTORE COMPETENCY FOR DEFENDANTS CHARGED WITH NONVIOLENT CRIMES?*

INTRODUCTION

Imagine you are imprisoned awaiting trial in North Carolina on several counts of identity theft, conspiracy, and credit card fraud.[1] You are taken to several hearings before a judge, but none of it makes any sense. You have no idea how long you have been in prison or how long you will have to stay. The prison officials suddenly come into your cell and inform you that you are being transferred to a facility in Texas for competency restoration treatment. You have no idea what "competency restoration" means, but you follow the guards out to the bus. There is no point in resisting; one way or another, the guards always win those battles.

You board a plane headed for Texas. When you arrive, numerous doctors and counselors, whom you have never met, start asking you questions about the most private details of your life. You refuse to answer. They keep asking you to take medication. You refuse all medical intervention. The government decides it is going to force you to take the medication, despite the fact that you have never been violent to any of the staff, you are not charged with any violent crimes, and the medical staff agrees you present no imminent risk to yourself or others. Your lawyer and a three judge panel on the Fourth Circuit are all that stands in the way of the medical staff entering your room without permission, restraining you on the bed, and injecting you with a powerful antipsychotic medication by forcibly sticking a needle into your body.

Despite the Kafkaesque nature of the above facts, this Recent Development argues that forcible medication to restore competency in the above circumstances is constitutional. In some limited circumstances, even nonviolent offenders can—and should—be forcibly medicated. Using the Fourth Circuit's recent decision in *United States v. White*[2] as an example, this Recent Development

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1. This hypothetical is loosely based on the facts in the recent Fourth Circuit opinion *United States v. White*, 620 F.3d 401, 405–07 (4th Cir. 2010).

2. 620 F.3d 401 (4th Cir. 2010).

attempts to define the contours of when the Constitution permits forcible medication of nonviolent offenders.

In *White*, a divided Fourth Circuit panel reversed a district court's order to forcibly medicate a defendant charged with nonviolent crimes.[3] Underlying much of the majority's opinion was the concern that "the district court's order . . . [came] perilously close to a forcible medication regime best described not as 'limited,' but as 'routine' . . . ."[4] This is a slippery slope argument.[5] The court was concerned that the decision to forcibly medicate White would eventually lead to a Fourth Circuit standard under which incompetent criminal defendants are routinely subjected to forced medication, no matter how minor the nature of the charges.[6]

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3. *Id.* at 422. The three judge panel produced one majority opinion, a concurring opinion, and a dissent. *Id.* at 404. Thus, each judge on the panel wrote separately. In dissent, Judge Niemeyer wrote "this case presents the paradigmatic case that . . . would appropriately justify involuntary medication to enable a defendant to stand trial." *Id.* at 430–31 (Niemeyer, J., dissenting).

4. *Id.* at 405 (majority opinion). The court bookends the opinion with this justification, presenting it in the introductory paragraph of the opinion and restating it in the conclusion, both times as a primary reason for its holding. *See id.* at 405, 422.

5. A "slippery slope" may be defined as "a particular act, seemingly innocuous when taken in isolation, [which] may yet lead to a future host of similar but increasingly pernicious events." Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 361–62 (1985). Slippery slope arguments are frequently brought up in the context of First Amendment freedom of speech cases. *See id.* at 363. For example, in *Communist Party of the United States v. Subversive Activities Control Board*, Justice Black famously wrote: "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." 367 U.S. 1, 137 (1961) (Black, J., dissenting). This is a classic slippery slope argument: the act of denying First Amendment protection to the ideas of the Communist Party—arguably innocuous by itself, at least to the majority—may lead to a future in which speech upholding democratic ideas is denied First Amendment protection based on the same reasoning. For additional opinions relying on slippery slope arguments, see, for example, Texas v. Johnson, 491 U.S. 397, 417 (1989) ("To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution?"); Bifulco v. United States, 447 U.S. 381, 401–02 (1980) (Burger, C.J., concurring) ("Particularly in the administration of criminal justice, a badly drawn statute places strains on judges. The temptation to exceed our limited judicial role and do what we regard as the more sensible thing is great, but it takes us on a slippery slope." (internal citations omitted)); Bates v. State Bar of Ariz., 433 U.S. 350, 405 (1977) (Rehnquist, J., dissenting in part) ("I cannot join the implication in [Justice Powell's] opinion that some forms of legal advertising may be constitutionally protected. The *Valentine* distinction was constitutionally sound and practically workable, and I am still unwilling to take even one step down the 'slippery slope' away from it.").

6. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1028–29 (2003).

The United States Supreme Court sought to guard against this precise result in *Sell v. United States*,[7] the leading case on forced medication to restore competency.[8] The *White* court, concerned that the district court did not properly apply the test set forth in *Sell* and worried about a possible slippery slope leading to routine forcible medication, created a more demanding iteration of the *Sell* test that considers whether the crime was nonviolent when determining whether a defendant can be forcibly medicated.[9] However, there is a significant problem with the *White* court's opinion. The court ignores a possible slippery slope in the opposite direction: the *White* decision could lead to a Fourth Circuit in which defendants charged with nonviolent crimes are never forcibly medicated.[10]

This Recent Development, drawing on Eugene Volokh's *The Mechanisms of the Slippery Slope*,[11] explains how the *White* decision starts down this reverse slippery slope. It also uses the *White* decision to analyze whether defendants charged with nonviolent crimes who do not present a public safety risk and who are presumed innocent until proven guilty should ever be subject to forced medication. The Recent Development ultimately agrees with the *White* dissent that the defendant should have been forcibly medicated[12] and argues that the

7. 539 U.S. 166 (2003).

8. For a discussion of the *Sell* factors, see *infra* Part I.B. Consistent with *Sell*, the district court engaged in an extensive analysis of the *Sell* factors before ordering the forcible medication of White. *See White*, 620 F.3d at 424 (Niemeyer, J., dissenting) (noting that the district court conducted an "especially careful and thorough review" as it applied the *Sell* factors).

9. *See infra* Part II.B.

10. Admittedly, most nonviolent offenders should not be forcibly medicated. The forcible medication process involves restraining the defendant and inserting a syringe into the defendant's body. *See, e.g.*, *White*, 620 F.3d at 407 ("After the force team secured White's arms and legs in restraints, the treatment team would enter and collect labs (if necessary), medicate White, [using intravenous medications,] and then evaluate her for injuries."). Such a direct physical invasion of the defendant's bodily integrity violates the Due Process Clause of the Fifth and Fourteenth Amendments, absent a showing of an important governmental interest. *See infra* Part I.B. For minor, nonviolent offenses, the government will not be able to justify forcible medication. However, there is an important distinction between "most nonviolent offenses" (those that will not justify forcible medication) and never forcibly medicating nonviolent offenders. This Recent Development focuses on serious nonviolent offenses—such as identity theft—that may cause immense financial, social, and economic harm. While these crimes are nonviolent, they may be serious enough to justify forcible medication of incompetent defendants. The government has an important interest in prosecuting defendants who have drained bank accounts, ruined credit histories, or stolen a person's most treasured possessions. This Recent Development argues that the *White* opinion may prevent forcible medication for defendants charged with these serious (though nonviolent) crimes.

11. Volokh, *supra* note 6, at 1028.

12. *White*, 620 F.3d at 430–31 (Niemeyer, J., dissenting).

White decision may lead to the undesirable result that defendants charged with nonviolent crimes in the Fourth Circuit will never forcibly medicated to restore competency.

This Recent Development is organized in four parts. Part I provides the factual and legal background of the *White* decision. This part describes White's specific diagnosis, as well as the procedure the psychiatric staff would have followed to forcibly medicate White. Part I also explains the Supreme Court's decision in *Sell v. United States*, which provides a multi-factor test for determining whether the Constitution permits involuntary medication to restore competency.[13] Part II analyzes how the court applied the specific *Sell* factors in the *White* case. It argues that the court misapplied the *Sell* factors and relevant Fourth Circuit precedent, partly because White was charged with a nonviolent crime. Part III explains how *White* represents what Eugene Volokh calls an "attitude-altering slippery slope"[14] in the direction of never forcibly medicating nonviolent offenders. Finally, the Recent Development concludes by arguing that *White* represents a substantial departure from Fourth Circuit precedent and could lead to a Fourth Circuit in which nonviolent defendants are never forcibly medicated.

I. THE FACTUAL AND LEGAL BACKGROUND OF *WHITE*

A. Factual Background

In 2007, Kimberly White and a codefendant engaged in a credit card fraud and identity theft scheme.[15] The defendants stole credit cards from two victims and used the credit cards to purchase numerous items at Costco, Home Depot, and Zales Jewelers in the Raleigh, North Carolina area.[16] White was subsequently charged with six felonies: one count of conspiracy to commit credit card fraud, three counts of credit card fraud, and two counts of aggravated identity theft.[17] After her arrest, the public defender filed a motion to determine competency, and the subsequent psychiatric evaluation revealed White was not competent to stand trial.[18] White was then transferred to a government psychiatric hospital for the purpose of

13. 539 U.S. 166, 180–81 (2003).

14. Volokh, *supra* note 6, at 1077.

15. Indictment at 1–4, United States v. White, 620 F.3d 401 (4th Cir. 2010) (No. 5:08CV81), 2008 WL 7312256, at *1–4.

16. *Id.*

17. *White*, 620 F.3d at 405.

18. *Id.*

determining whether competency could be restored.[19] This transfer functioned as an involuntary psychiatric commitment because White was transferred from the jail where she was awaiting trial to a psychiatric facility against her will.[20] However, White was not dangerous to herself or others and, thus, did not meet criteria for civil commitment.[21]

While at the psychiatric unit, the depth of White's mental illness became apparent. From the beginning, White refused any medical staff attempts at evaluation, and she refused to speak with anyone who appeared to be in a position of authority.[22] In her cell, White mixed portions of her food together and claimed that she had discovered the cure for AIDS and breast cancer.[23] White also wrote notes on the wall about her alleged cure for AIDS and her desire to patent it.[24] When writing utensils were removed, she wrote these notes in her own blood.[25] White refused to leave her room or allow staff into the room for fear staff would steal her cure.[26] The stench of rotten food permeated the unit; only when staff threatened to forcibly remove White from the room did White comply and allow them in at

19. *Id.*

20. *See id.* The district court had authority to order this type of psychiatric commitment under 18 U.S.C. § 4241(d) (2006).

21. *White*, 620 F.3d at 407. It is important to distinguish civil commitment from commitment to restore competency. Civil commitment is the process by which the state determines whether an individual presents an imminent risk of harm to herself or others, and places her in a psychiatric facility against her will. *See, e.g.*, N.C. GEN. STAT. § 122C-261(a)–(b) (2009) (explaining the North Carolina procedure by which an individual may be civilly committed if she is a danger to herself or others). The civil commitment process is governed by state law. *See id.* In contrast, commitment for competency restoration occurs when an individual has been charged with a crime, but suffers from a mental illness that renders her incompetent to stand trial. *See* 18 U.S.C. § 4241(d). As was the case with Kimberly White, the defendant may present no danger to herself or others, yet still suffer from severe mental illness that renders her incompetent to stand trial. *White*, 620 F.3d at 407. This Recent Development focuses on forced medication in the context of competency restoration proceedings when the defendant is not a danger to herself or others. When defendants in federal prison become dangerous, forced medication may be justified on safety grounds, rather than on grounds of competency restoration. Sell v. United States, 539 U.S. 166, 181–82 (2003) (explaining that forced medication of federal prisoners on dangerousness grounds is constitutionally permissible (citing Washington v. Harper, 494 U.S. 210, 225–26 (1990))).

22. *White*, 620 F.3d at 405–06.

23. *Id.* at 406.

24. *Id.*

25. *Id.*

26. *Id.*

the last minute.[27] Despite this behavior, the medical staff determined that White did not present a danger to herself or others.[28]

Because White refused to interact meaningfully with any of the medical staff, the treating clinicians diagnosed White based primarily on information obtained from staff observation.[29] Dr. Powers, the treating psychologist, made the diagnosis. She relied on her own observations of White and medical staff reports of White's behavior on the unit.[30] Although it is not completely clear from the opinion, it appears Dr. Powers also collected past medical reports and information from White's family before making the diagnosis.[31] Dr. Powers diagnosed White with Delusional Disorder, Grandiose Type.[32]

To fully understand White's mental illness, a brief description of Delusional Disorder, Grandiose Type is necessary. Delusions are false beliefs; the patient believes something about herself or the world that is not true.[33] The *Diagnostic and Statistical Manual of Mental Disorders* defines Delusional Disorder as "[n]onbizarre delusions (i.e., involving situations that occur in real life, such as being followed, poisoned, infected, loved at a distance, or deceived by spouse or lover, or having a disease) of at least 1 month's duration."[34] The Grandiose Type of Delusional Disorder means the patient has "delusions of inflated worth, power, knowledge, identity, or special relationship to a deity or famous person."[35]

Medical staff attempted to persuade White to accept medication that would treat her disorder and restore her competency to stand

27. *Id.*

28. *Id.* at 407 ("[The treating psychologist] reiterated that because White presents no danger to herself or to others, forcible medication is not justified on such grounds."). The court does not explain how the psychologist arrived at the determination that White was not dangerous, a determination which seems questionable given the fact that White cut herself so she could write notes on the wall in her own blood. *See id.* at 406. Presumably, White did not threaten or physically assault any staff members, and the medical staff determined that the cutting was not sufficiently serious to warrant a finding of dangerousness to self.

29. *Id.* at 406–07.

30. *Id.* at 407.

31. *Id.* The court is dismissive of the opinions of both the psychologist and the psychiatrist who evaluated White. *See id.* When the court discussed Dr. Powers' evaluation, it put the term "examined" in quotation marks. *Id.* The court also emphasized that Dr. Kempke, the psychiatrist, did not contact the family or obtain additional medical records. *See id.*

32. *Id.*

33. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 323–29 (Michael B. First et al. eds., 4th ed. text rev. 2000).

34. *Id.* at 329.

35. *Id.*

trial.[36] However, White refused all medication, and the treating medical staff ultimately concluded that forced medication was the only way to restore her competency.[37] The district court subsequently held a *Sell* hearing, which is an evidentiary hearing where the court determines if the government has met its burden to administer forcible medication.[38] The *Sell* hearing focused on White's diagnosis, her behavior at the psychiatric unit, the medical staff's opinion that forced medication was the only option to restore competency, the medications that would be used for such restoration, and the procedure by which White would be medicated.[39]

Involuntary medication is extremely intrusive. Hospital policy required that staff first attempt to persuade White to take an injectable antipsychotic drug voluntarily.[40] Assuming she refused, staff would try to convince White to cooperate, ultimately forcibly medicating her if she resisted.[41] Five staff members would put on protective equipment, enter the room, restrain White, and forcibly inject her with the medication.[42] This process was to be repeated every two weeks, possibly for several months preceding the trial, and then throughout the trial's duration.[43]

The *Sell* hearing was critical to the government's case against White. Because White was incompetent to stand trial and did not meet the statutory criteria for civil commitment, she would have been set free without trial if the district court denied the forced medication request.[44] The district court ultimately held that the government had

36. *See White*, 620 F.3d at 406.

37. *Id.* The medical staff also attempted non-medical interventions such as competency restoration classes, but White refused to attend any of those classes. *Id.* at 407.

38. *Id.* at 406. See *infra* Part I.B for discussion of the precise factors the government must meet. See *infra* Part II for how the Fourth Circuit applied the *Sell* factors in *White*.

39. *See White*, 620 F.3d at 406–09.

40. *Id.* at 407.

41. *Id.*

42. *Id.*

43. *Id.* The medication Dr. Kempke proposed using was Risperdal Consta. *Id.* at 426. (Niemeyer, J., dissenting). It carries some risk of side effects, including Tardive Dyskinesia and Metabolic Syndrome. *Id.* at 407–08 (majority opinion). Tardive Dyskinesia is a condition characterized by involuntary muscle contractions, which can be extremely disturbing to patients, but not fatal. *Id.* Metabolic Syndrome can cause weight gain, cardiovascular disease, and diabetes. *Id.* at 408. Both Tardive Dyskinesia and Metabolic Syndrome are rare. *Id.*

44. *See id.* at 424 (Niemeyer, J., dissenting) ("[The *White* majority] concludes that the government's interest in prosecuting White is so diminished that, as a matter of law, she must now be set free, without facing a trial or the consequences of a conviction."); *see also id.* at 407 (majority opinion) (explaining that White did not meet the statutory criteria for involuntary commitment).

carried its burden under the *Sell* test and ordered that White be forcibly medicated.[45] However, anticipating an appeal from White, the district court stayed the order.[46] White subsequently filed an interlocutory appeal challenging the district court's order.[47] The Fourth Circuit reversed, holding that the government had not met its burden under the *Sell* test.[48] Although there is no reported decision describing the ultimate outcome, presumably White was released pursuant to the Fourth Circuit's reversal, since White did not meet criteria for civil commitment and refused any medical intervention aimed at restoring competency.[49]

B. Legal Background

Because forced medication constitutes a direct and unwanted physical invasion of a person's bodily integrity, the government must meet a heavy evidentiary burden to justify forced medication. The Supreme Court articulated the government's burden in *Sell v. United States*.[50]

In *Sell*, the Supreme Court held that forced medication to restore competency is constitutional, but only in limited circumstances.[51] Sell was a dentist who, similar to Kimberly White, suffered from Delusional Disorder.[52] Prior to his arrest, Sell commented "that the gold he used for [his patients'] fillings had been contaminated by communists . . . ."[53] He also called police claiming a leopard was outside his office and asked the police to shoot it.[54] Ultimately, he was charged with insurance fraud and attempting to murder both the FBI agent who arrested him and a former employee who intended to testify against him in the fraud case.[55] At a bail revocation hearing, he spit in the magistrate judge's face and screamed personal and racial insults.[56] Sell was ultimately transferred to a federal psychiatric facility, where doctors determined that antipsychotic medication

45. *Id.* at 409 (majority opinion).
46. *Id.*
47. *Id.*
48. *Id.* at 405. The specific reasoning the court gives is discussed *infra* Part II.
49. *See id.* at 424 (Niemeyer, J., dissenting) (explaining that White was to be set free if the court reversed the forcible medication order).
50. 539 U.S. 166, 169, 179–82 (2003).
51. *Id.* at 179.
52. *Id.* at 169–71.
53. *Id.* at 169.
54. *Id.*
55. *Id.* at 170.
56. *Id.*

would be necessary to restore competency.[57] However, Sell refused to voluntarily take any medication.[58] Thus, forced medication was the only option to restore competency and prosecute Sell.

The Supreme Court vacated the Eight Circuit's order to forcibly medicate Sell, and remanded the case for rehearing.[59] In doing so, the Supreme Court made clear that defendants have a "constitutionally protected liberty 'interest in avoiding involuntary administration of antipsychotic drugs' . . . ."[60] Thus, the government must show an "essential" or "overriding" state interest before forced medication is constitutionally permissible.[61] In an effort to clarify when the government has met this burden, the Supreme Court delineated four factors that must be present before a defendant can be involuntarily medicated: (1) "*important* governmental interests are at stake" and special circumstances do not mitigate the importance of the interest; (2) "involuntary medication will *significantly further* those concomitant state interests [because] administration of the drugs is substantially likely to render the defendant competent to stand trial [and] substantially unlikely to have side effects that will interfere significantly with defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair"; (3) "involuntary medication is *necessary* to further those interests [because] alternative, less intrusive treatments are unlikely to achieve substantially the same results"; and (4) "administration of the drugs is *medically appropriate,* i.e., in the patient's best medical interest in light of his medical condition."[62]

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57. *Id.* at 171.

58. *Id.*

59. *Id.* at 186.

60. *See id.* at 178 (quoting Riggins v. Nevada, 504 U.S. 127, 134 (1992)).

61. *See id.* at 178–79 (internal citation omitted); Riggins v. Nevada, 504 U.S. 127, 135 (1992) ("[F]orcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification.... The Fourteenth Amendment affords at least as much protection to persons the State detains for trial. ... Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others. Similarly, the State might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means." (internal citations omitted)).

62. *Sell*, 539 U.S. at 180–81. Because criminal defendants have a constitutionally protected liberty interest in avoiding forced medication, the four factor test is intended to create a heavy burden on the government. *Id.* at 178–79. The court must find that each factor is independently established, and no factor weighs more heavily than any other factor. *See id.* at 180–81 (explaining that each factor must be independently established before a court can order forced medication to restore competency). Of course, the facts of

The *White* court held that the government had not carried its burden as to the first factor, and did not discuss the second, third, or fourth factors.[63] As such, this Recent Development only addresses the first factor of the *Sell* analysis. In *Sell*, the Court explained that the government has an important interest in prosecuting defendants accused of "serious" crimes because the government's interest in protecting society from serious crimes outweighs the defendant's liberty interest.[64] The Court stated:

> The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law the basic human need for security.[65]

Thus, serious crimes can be crimes against property or crimes against persons.[66] However, the Court never explicitly defined what constitutes a "serious crime," leaving that question open for the lower courts to resolve.[67]

The *Sell* Court went on to explain that "[s]pecial circumstances may lessen the importance of [the government's] interest."[68] Thus, even if the government has made the requisite showing of a "serious crime"—however that term is defined in a particular jurisdiction—a court can still refuse to hold that this factor is satisfied because a "special circumstance" is present.[69] To assist lower courts, the Court provided two examples of special circumstances: (1) the possibility for a lengthy civil commitment in a psychiatric institution and (2) "the

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a particular case may necessitate more detailed analysis of a given factor, especially where that factor is outcome determinative. *See, e.g.*, United States v. White, 620 F.3d 401, 410–22 (4th Cir. 2010) (providing extensive discussion of the first factor because that factor was outcome determinative). For a more detailed discussion of the *Sell* factors, see generally *Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1121–33 (2008).

63. *See White*, 620 F.3d at 410–20.

64. *See Sell*, 539 U.S. at 180.

65. *Id.* (internal citation omitted).

66. *See id.* For this reason, nonviolent crimes can be serious crimes for purposes of factor one. Thus, the Fourth Circuit cannot develop a per se rule that defendants charged with nonviolent crimes can never be forcibly medicated. However, this Recent Development argues that the *White* decision begins a slippery slope process whereby courts in the Fourth Circuit, forced to follow *White*, will eventually reach a point in which nonviolent defendants can never be forcibly medicated. *See infra* Part III.

67. *See Sell*, 539 U.S. at 180.

68. *Id.*

69. *See id.*

possibility that the defendant has already been confined for a significant amount of time" awaiting trial and/or competency determination.[70] The *Sell* Court's use of the phrase "for example," and its instruction for lower courts to "consider the facts of the individual case in evaluating the Government's interest" when describing the special circumstances, indicate that this list is non-exclusive.[71] When lower courts examine whether special circumstances diminish the importance of the government's interest, they are free therefore to consider additional special circumstances beyond the two described in *Sell*.[72] In theory, where such discretion is given to the lower courts, one would expect wide variability in the number and type of special circumstances analyzed under factor one. In practice, however, most courts have focused on the two special circumstances listed in *Sell*, or ignored the special circumstance analysis altogether.[73] That is, at least, until the *White* decision was handed down.[74]

The Fourth Circuit has interpreted the *Sell* factors in two recent decisions.[75] In *United States v. Evans*,[76] the defendant was charged

70. *See id.*

71. *See id.* ("Courts, however, must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest. The defendant's failure to take drugs voluntarily, *for example*, may mean lengthy confinement in an institution for the mentally ill . . . ." (emphasis added)).

72. *See id.*

73. *See, e.g.*, United States v. Fazio, 599 F.3d 835, 839–40 (8th Cir. 2010) (holding the defendant was charged with a serious crime but providing no discussion of how special circumstances could mitigate the importance of the government's interest); United States v. Hernandez-Vasquez, 513 F.3d 908, 917–19 (9th Cir. 2008) (providing instructions for the district court in applying the important government interest factor with mention only of the two special circumstances listed in *Sell* that may lessen the government's interest); United States v. Palmer, 507 F.3d 300, 303–04 (5th Cir. 2007) (applying the important government interest test with no mention of special circumstances); United States v. Gomes, 387 F.3d 157, 160–61 (2d Cir. 2004) (addressing only the special circumstance of civil commitment). Thus, prior to *White*, most federal courts either ignored the special circumstances analysis altogether or focused only on the special circumstances listed in the *Sell* opinion itself. *White* may have a positive effect in this regard, reminding courts that the special circumstance analysis is an important part of the *Sell* factor one analysis and ensuring that the government meets a high evidentiary burden before obtaining an order for forcible medication. In a recent Eighth Circuit case, the court, citing *White*, conducted a more extensive special circumstance analysis. *See* United States v. Nicklas, 623 F.3d 1175, 1179–80 (8th Cir. 2010) (focusing on the possibility of civil commitment, protection of the public from future harm, the length of confinement, and the nature of the offense (violent or nonviolent) in conducting the special circumstances analysis, while "[a]ssuming, without deciding," that the nature of the offense is a legitimate special circumstance).

74. *See* United States v. White, 620 F.3d 401, 411–21 (4th Cir. 2010).

75. *See* United States v. Bush, 585 F.3d 806, 813–18 (4th Cir. 2009); United States v. Evans, 404 F.3d 227, 235–42 (4th Cir. 2005).

with threatening to kill a federal judge, an offense punishable by up to ten years in prison.[77] The *Evans* court's analysis of the first *Sell* factor is particularly relevant for purposes of analyzing the *White* decision.[78] Recall that the first factor in the *Sell* analysis is whether there is an important government interest in prosecuting the defendant, which can be satisfied if the defendant is charged with a "serious crime."[79] The *Evans* court provided a general guideline for defining the term "serious crime." Although the court declined to "set forth any rigid rule as to what the statutory maximum must be for a crime to be a serious one[,]" it explained that the crime at issue, with a statutory maximum penalty in excess of ten years, was " 'serious' under any reasonable standard."[80] The court specifically refused to use the sentencing guidelines for purposes of determining the length of the likely sentence. It did so because the sentencing guidelines require findings of fact by the trial court based on a detailed investigation of the defendant and testimony offered at trial or in a plea; the *Sell* hearing typically occurs before these findings of fact are made.[81]

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76. 404 F.3d 227 (4th Cir. 2005).

77. *Id.* at 238. Evans was also charged with assaulting an agricultural officer, but the court focused on the threatening of a federal judge because the maximum penalty is much greater. *See id.*

78. The *Evans* court ultimately held that the government had made an insufficient showing on the second and fourth factors of the *Sell* analysis, but it allowed the government, on remand, to present further evidence on the second and fourth factors. *See id.* at 240–43. Because the medical report did not identify the specific antipsychotic medication that would be used to restore competency, the *Evans* court found that the district court "clearly erred" in finding that use of "antipsychotic medication," described only generally, was medically appropriate. *Id.* at 240. The court required that the medical report identify the specific medication, and detail how that medication was specifically "medically appropriate" (i.e., medically safe) for Evans to satisfy factor four. *Id.* at 240–42. Similarly, the court held that factor two was not satisfied by the government's conclusive statement that antipsychotic medication was the "primary" class of drugs for treating Evans' disorder and was therefore " 'substantially likely' to restore Evans' competency . . . ." *Id.* at 241. The court required that the government show how the specific drug would restore competency for Evans, given his specific medical history. *Id.* The court remanded on the second and fourth factors, with specific instructions for how the government could improve the reports to satisfy those factors. *Id.* at 240–43. Despite the fact that the court remanded on the second and fourth factors, the court analyzed the first factor and determined that the government had an important interest in prosecuting Evans and that this interest was not diminished by any special circumstances. *Id.* at 236–40.

79. *See* Sell v. United States, 539 U.S. 166, 180 (2003).

80. *Evans*, 404 F.3d at 238. In addition, the court declined to create a bright line rule for crimes that carry statutory maximum penalties of less than ten years. *See id.*

81. *See id.* As discussed *infra* Part II.A, the *White* court disregards this aspect of *Evans*.

The *Evans* court then turned to the possible special circumstances that could lessen the seriousness of the crime. The court considered the two special circumstances listed in *Sell*: (1) the possibility for a lengthy civil commitment in a psychiatric institution, and (2) the possibility that the defendant has already "been confined for a significant amount of time" awaiting trial and/or competency determination.[82] The *Evans* court did not consider any additional special circumstances despite the fact that the *Sell* Court's list was non-exclusive.[83] In considering whether Evans had already served a significant amount of time, the *Evans* court compared the amount of time Evans had already served to the maximum possible statutory sentence and concluded the government still had an important interest in prosecuting someone facing eight years in prison (Evans had served two years).[84] *Evans* therefore appears to hold that the time already served can only diminish the government's interest if the time served reduced the maximum possible sentence significantly.[85] As to the possibility of a lengthy civil commitment, the court rejected this special circumstance as well because there was no evidence suggesting Evans would be civilly committed; similar to Kimberly White, Evans was to be set free without any determination of guilt if the court did not order involuntary medication.[86]

In *United States v. Bush*,[87] the Fourth Circuit also addressed the first factor of the *Sell* analysis.[88] Similar to *Evans*, *Bush* involved a mentally ill defendant who had threatened to kill federal judges.[89] Like White, Bush suffered from Delusional Disorder.[90] Bush's delusions centered on federal judges, whom she believed were withholding from her, among other things, medical services, money,

82. *Id.* at 239 (quoting *Sell*, 539 U.S. at 180).

83. *See id.* at 239–40.

84. *See id.* at 239. The *White* court takes a wholly different approach to analyzing this special circumstance. *See infra* Part II.

85. The court again refused to provide a bright line test for how much the maximum statutory sentence must be reduced for this special circumstance to diminish the government's interest. The most that can be said is that a two-year reduction of a ten-year maximum sentence is not sufficient. *See Evans*, 404 F.3d at 238–40. Additionally, even if the time served does reduce the maximum sentence by a substantial margin, the court specifically noted that additional purposes for criminal punishment might still justify a finding that the government has important interests in prosecuting the crime. *See id.* at 239 n.9.

86. *See id.* at 239.

87. 585 F.3d 806 (4th Cir. 2009).

88. *Id.* at 814–15.

89. *See id.* at 810–11.

90. *See id.* at 809 (stating that Bush suffered from Delusional Disorder, Persecutory Type).

and housing opportunities.[91] As a result of these delusions, Bush filed more than 100 lawsuits between 1995 and 2009.[92] In the course of several of these lawsuits, Bush came to believe that the judges hearing her cases were abusing and assaulting her by dismissing the suits, and in the litigation underlying *Bush*, she made threatening statements toward several judges.[93] The FBI became involved and warned Bush not to send threatening letters to judges.[94] However, when Bush later lost the lawsuit, she wrote another threatening letter to the judge assigned to the case.[95] The authorities were not impressed with Bush's attempt to conceal the threat by writing "NO THREAT" in capital letters at the top of the page, and she was charged with two counts of threatening a federal judge.[96]

In evaluating the case, the *Bush* court first reaffirmed the *Evans* court in finding that, when the defendant's maximum statutory sentence is at least ten years, the defendant has been charged with a serious crime, and the government has an important interest in prosecuting the crime.[97] The *Bush* court next turned to the special circumstances analysis. Similar to *Evans*, the *Bush* court focused on the special circumstances in the *Sell* decision, rather than creating an extensive list of new special circumstances to consider.[98] The court analyzed the amount of time Bush had already served because that was the only special circumstance applicable to her case.[99] The court recognized that Bush had spent so much time in prison that any prison sentence would be covered, or nearly covered, by time already served.[100] Despite the presence of this special circumstance, the court held that the government had met its burden on the first factor.[101]

The court explained that even if a defendant has served most of the maximum time she would receive if convicted, the government can still show an important interest based on the message a conviction

91. *See id.*

92. *See id.* at 809–10 (stating that Bush, "by her own account," had filed this number of lawsuits).

93. *See id.* at 810–11.

94. *Id.* at 810.

95. *See id.*

96. *See id.* at 810–11.

97. *See id.* at 814 (internal citation omitted).

98. *See id.* at 815. The *Bush* court did, however, appear to consider whether Bush presented a threat to public safety, but it did not significantly elaborate on this point. *See id.* (explaining that a conviction would limit Bush's ability to own firearms and would mean that Bush would likely be subject to post-release supervision).

99. *See id.*

100. *See id.*

101. *See id.*

conveys to society, the fact that a defendant may be supervised post-conviction (such as through probation or parole), and the fact that a conviction would limit the defendant's ability to own firearms.[102] Thus, at least prior to the *White* decision, the government could show an important interest if the maximum statutory penalty exceeded ten years, and it could defeat the claim that such interest was diminished by time already served by arguing that the conviction implicates other government interests beyond punishing the offender.[103]

The *White* court disregarded the *Bush* reasoning on the first factor and imposed a new, stricter burden the government must meet before satisfying the first factor.[104] As the next part argues, the burden imposed is a substantial departure from both the *Bush* and *Evans* precedents, and it may result in a Fourth Circuit standard under which the forcible medication of nonviolent offenders is never constitutionally permissible.

II. THE SUBSTANTIAL DEPARTURE FROM *EVANS* AND *BUSH* IN *UNITED STATES V. WHITE*

As mentioned above, the *White* court held that the government made an insufficient showing on the first factor of the *Sell* analysis and reversed the district court's order to forcibly medicate White.[105] After explaining that White had been charged with a serious crime, the court examined White's likely period of confinement relative to her projected sentence (one of the special circumstances listed in *Sell*).[106] However, by calculating White's likely future confinement—using a speculative analysis of how long White could be confined through trial and the appellate process—rather than focusing on the amount of time already served, the court's analysis of this special circumstance departed significantly from the *Bush* and *Evans*

102. *See id.*

103. *See id.* at 814–15.

104. *White* was decided a mere eleven months after the *Bush* decision, which further supports the idea that *White* was a response to the expansive reading of the first *Sell* factor in *Bush*. United States v. White, 620 F.3d 401, 401 (4th Cir. 2010); *Bush*, 585 F.3d at 806. Also note that Judge Niemeyer, the author of the dissent in *White*, wrote the opinion in *Bush*. *White*, 620 F.3d at 424 (Niemeyer, J., dissenting); *Bush*, 585 F.3d at 806.

105. *See White*, 620 F.3d at 405, 410. This holding means White, charged with six felonies, is going to be set free without any trial. *See id.* at 424 (Niemeyer, J., dissenting); *supra* text accompanying notes 44–49. The medical staff determined that White did not meet criteria for civil commitment. *See White*, 620 F.3d at 419 (majority opinion). Therefore, since the court found that forcible medication to restore competency was unconstitutional under *Sell*, *id.* at 422, the charges will be dropped and White will be set free.

106. *See White*, 620 F.3d at 410, 413–19.

precedent.[107] The court went on to create a new list of special circumstances applicable to White, none of which is present in either *Bush* or *Evans*.[108] These new special circumstances included: the nature of the crime (i.e., violent vs. nonviolent), the unique medical condition that White suffered from, and whether the case was "sufficiently exceptional" to justify forced medication.[109] Thus, unlike *Bush* and *Evans*, the *White* court went far beyond the two special circumstances listed in the *Sell* opinion that can mitigate the government's important interest.[110]

The court's special circumstance analysis is troubling, and it provides little guidance to district courts and magistrate judges that must implement the holding. First, the *White* court engaged in a highly complex, confusing calculation of the defendant's likely time served and likely sentence—a calculation that is wholly inconsistent with both *Bush* and *Evans*. Second, the court considered the nonviolent nature of White's offenses as a special circumstance mitigating the government's interest in prosecuting White, a process inconsistent with *Sell* itself.

A. The Time White Had Already Served Versus Her Likely Sentence

Recall that to satisfy the first factor of the *Sell* analysis, the government must show that an "*important* governmental interest[]" is at stake in prosecuting the defendant and that the government can meet this burden by showing the defendant is charged with a serious crime.[111] Pursuant to *Bush* and *Evans*, the *White* court first found that White was charged with serious crimes because the statutory maximum sentence for the crimes charged exceeded ten years.[112] Thus, because White was charged with serious crimes, the first factor of the *Sell* analysis was satisfied unless special circumstances "lessen[ed] the importance of" the government's interest.[113] The

107. *See id.* at 413–19.

108. *See id.* at 413; *Bush*, 585 F.3d at 814–15; United States v. Evans, 404 F.3d 227, 239–40 (4th Cir. 2005).

109. *See White*, 620 F.3d at 413.

110. *See id.* at 412. As discussed earlier, the *White* court correctly notes that the list of special circumstances in *Sell* is non-exclusive. *Id.* (citing Sell v. United States, 539 U.S. 166, 180 (2003)).

111. Sell v. United States, 539 U.S. 166, 180 (2003). For a more detailed discussion of the *Sell* factors and the term "serious crime," see *supra* Part I.B.

112. *See White*, 620 F.3d at 410–11.

113. *See Sell*, 539 U.S. at 180.

initial special circumstance the court focused on was the amount of time of White's confinement, relative to her likely sentence.[114]

In contradiction to both *Bush* and *Evans*, and ignoring the plain meaning of *Sell*, the *White* court engaged in a highly complex and speculative analysis of White's length of confinement.[115] Instead of simply counting the amount of time served from arrest to the *Sell* hearing, as the *Bush* and *Evans* courts did, the *White* court calculated the amount of time White would *likely* serve throughout the trial and appellate process—and then added this figure to the time already served.[116] Although *Bush* and *Evans* did not explicitly give reasons for using the time served until the hearings rather than the time the defendants would likely serve through trial, one can assume that the calculation of this latter number would be fraught with speculation. Jury trials can last anywhere from several days to several months. There is no guarantee, as the *White* majority appears to assume, that White would have appealed had she lost.[117] The court came up with a highly speculative figure of fifty-seven months for White's length of confinement despite the fact that White had only actually served approximately forty-one months at the time of the *Sell* hearing.[118]

The *White* court engaged in an even more complicated and speculative calculation of White's likely sentence, which was also inconsistent with *Bush* and *Evans*.[119] To determine her likely sentence, the court analyzed the sentencing guidelines for the offenses White was charged with, the amount of time her codefendant received for similar charges, and the average length of prison sentences for defendants charged with the same crimes as White

114. *See White*, 620 F.3d at 413–19.

115. *See id.* at 414–18.

116. *See id.*; United States v. Bush, 585 F.3d 806, 814 (4th Cir. 2009); United States v. Evans, 404 F.3d 227, 239 (4th Cir. 2005). The *Bush* court also explained that even if a defendant had served most of his likely sentence, other factors associated with a conviction, such as the message a conviction conveys to society and the fact that the defendant may be supervised post-conviction, could justify forcible medication. *Bush*, 585 F.3d at 815. The *White* court likely wanted to limit this expansive application of the *Sell* test because the *Bush* reasoning makes it relatively easy to conclude the state has an important governmental interest in forcible medication. *See supra* notes 100–03 and accompanying text.

117. *See White*, 620 F.3d at 414 n.11. The court cites the fact that the public defender assigned to White "vigorously pursued" the appeal to the Fourth Circuit as evidence that the attorney will continue this "vigorous representation." *Id.* However, absent some statement from the attorney guaranteeing appeal, adding additional months to the length of time White has already been confined based on the possibility of appeal is questionable.

118. *See id.* at 414–15.

119. *See id.* at 415; *see also id.* at 428 (Niemeyer, J., dissenting) ("[T]he majority's findings to support these conclusions bubble with speculation of the grandest type.").

based on data from the United States Sentencing Commission.[120] The use of the sentencing guidelines is consistent with *Bush*.[121] However, in *Bush*, the court was able to accurately apply the sentencing guidelines because the guidelines themselves, "the government's concessions, and the district court's observations indicate[d] that if Bush were found guilty, she would likely be sentenced to only time served."[122] As the dissent in *White* pointed out, the court did not have similar information to guide its calculation with respect to White.[123] Additionally, unlike the *White* court, neither *Bush* nor *Evans* used data from the Sentencing Commission or the sentence of a codefendant.[124] The government in *White* therefore did not know it needed to examine or use this data when addressing the first factor at the *Sell* hearing.

For all of the above reasons, in examining the first special circumstance—comparison of the time already confined relative to the likely sentence—the *White* court departed significantly from both *Bush* and *Evans*. To justify this departure, the *White* court distinguished *Bush* and *Evans* primarily on the nonviolent nature of the offenses charged.[125] The *White* court stated:

> Both [*Bush* and *Evans*], involving a defendant who had allegedly threatened the life of a federal judge (and in *Evans*, one who had also allegedly assaulted a federal employee), provide guidance to us here but do not control the outcome of our fact-intensive inquiry into the special circumstances of this case.[126]

It appears, then, that this searching and speculative calculation of White's likely sentence may have been motivated by the fact that her crimes were nonviolent. As the next section argues, the disparate treatment of nonviolent and violent crimes is not only inconsistent with *Sell* itself, but also ignores the real problem: nonviolent crimes, in some circumstances, can cause as much societal harm as violent crimes. The violent/nonviolent distinction has no place in the

120. *See id.* at 415–18 (majority opinion).

121. *See Bush*, 585 F.3d at 814.

122. *Id.* at 814.

123. *White*, 620 F.3d at 428 (Niemeyer, J., dissenting).

124. *See id.* at 416–18 (majority opinion); *Bush*, 585 F.3d at 814–15; United States v. Evans, 404 F.3d 227, 239–40 (4th Cir. 2005).

125. *White*, 620 F.3d at 419 ("Not every crime is equally serious. The nature of White's crimes lessens the government's interest in prosecuting her because her alleged crimes were non-violent offenses.... The non-violent nature of White's crimes principally distinguishes this case from *Bush* and *Evans*.").

126. *Id.* at 411.

determination of whether a defendant should be forcibly medicated to restore competency.

B. The White *Court's Reluctance to Medicate a Nonviolent Offender*

The *White* court's focus on the nonviolent nature of the charged offenses is inconsistent with the *Sell* Court's explanation of the first factor, as the *Sell* Court explicitly stated that the government can have an important interest in prosecuting nonviolent offenders.[127] The distinction between nonviolent and violent crimes is irrelevant to determining whether the crime is serious under the first factor.[128] Despite this clear Supreme Court principle, the *White* court nevertheless held that the nature of the offense can be a special circumstance that diminishes the importance of the government's interest in prosecuting a serious crime.[129] The court creates this special circumstance without citation to any case law suggesting nonviolence should be a special circumstance in the *Sell* analysis. The court simply stated: "The nature of White's crimes lessens the government's interest in prosecuting her because her alleged crimes were non-violent offenses. Assuming her guilt, White's crimes did not physically harm any individuals."[130] While the court correctly noted that the *Sell* list of special circumstances is non-exclusive,[131] it seems unlikely that the nature of the offense is a legitimate special circumstance when the Supreme Court specifically refused to apply this distinction to the "serious crime" element of the first factor.

Additionally, the line between violent and nonviolent crimes is not always clear.[132] While Kimberly White's crimes were clearly crimes only against property because they caused no personal physical harm,[133] district courts applying *White* may have a more difficult time categorizing other types of crimes. As Eugene Volokh wrote, "how does one classify drug crimes, which don't inherently involve any outright violence, but do involve the risk of physical

127. Sell v. United States, 539 U.S. 166, 180 (2003).

128. *Id.* See *supra* Part I.B for a more detailed discussion of the first factor.

129. *See White*, 620 F.3d at 419 (holding, in the context of the special circumstances analysis, that "[t]he nature of White's crimes lessens the government's interest in prosecuting her because her alleged crimes were non-violent offenses").

130. *Id.*

131. *See id.* at 412–13.

132. *See* Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1969–70 (2004) (noting the difficulty in determining whether drug-related crimes are violent or nonviolent).

133. Note, however, a rare exception could occur in a case in which a person may be so emotionally distraught from having his identity stolen that he becomes physically ill.

injury or even death to the drug users or to others? How does one classify residential burglary, which involves some risk of violence . . . ?"[134] One can think of any number of similar contexts. What about extortion or communicating threats? These crimes pose the risk of violence, but offenders may never physically harm the victims.[135]

This is not only a theoretical problem. In *Harmelin v. Michigan*,[136] the Supreme Court considered the constitutionality of a life sentence for possessing 672 grams of cocaine.[137] The question of whether drug crimes constituted violent crimes divided the Court. In concurrence, Justice Kennedy wrote, "[the] suggestion that his crime was nonviolent and victimless, echoed by the dissent, is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society."[138] In dissent, Justice White, joined by Justices Blackmun and Stevens, distinguished the possession of drugs from the "tangential effects" of drug use or drug dealing when considering the seriousness of the offense:

> It is one thing to uphold a checkpoint designed to detect drivers then under the influence of a drug that creates a present risk that they will harm others. It is quite something else to uphold petitioner's sentence because of the collateral consequences which might issue, however indirectly, from the drugs he possessed.[139]

Thus, for some crimes, courts will have to gauge the connection between a particular crime and the possible violent consequences of that crime when determining whether the crime is violent or nonviolent. Since *White* held that the nonviolent nature of the offense can be a special circumstance that mitigates the government's interest in prosecution, district courts in the Fourth Circuit must now deal with analyzing such a connection in determining whether a given offense is nonviolent.

Additionally, the *White* court partly justified its holding that nonviolence should be a special circumstance lessening the

134. Volokh, *supra* note 132, at 1969–70.

135. *See, e.g.*, N.C. GEN. STAT. § 14-118.4 (2009) (defining extortion as "threaten[ing] or communicat[ing] a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion"); § 14-277.1(a) (defining communicating threats, in relevant part, as "willfully threaten[ing] to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threaten[ing] to damage the property of another").

136. 501 U.S. 957 (1991).

137. *See id.* at 961–62.

138. *Id.* at 1002 (Kennedy, J., concurring in the judgment).

139. *Id.* at 1023 (White, J., dissenting).

government's interest on the basis that there was a need to protect federal judges from future harm in *Bush* and *Evans*, whereas in *White* no victims needed protection.[140] This analysis ignores the fact that a civil commitment (which can be ordered by the district court) could have provided protection for the federal judges in both *Evans* and *Bush* if the court found the defendants presented an imminent risk of harm to the judges.[141] More importantly, the focus of the *Sell* hearing is whether the defendant should be forcibly medicated to stand trial for previously committed crimes, not whether the defendant presents some risk of future harm.[142] The safety concern should be addressed through the civil commitment process, not through the process whereby the court decides to forcibly medicate a defendant to restore competency.

While it is true that White's crimes did not physically harm any person, property crimes can cause immense emotional and economic harm.[143] As the dissent points out, the Bernie Madoff Ponzi scheme likely caused significantly more human suffering than most simple assaults.[144] As the next part argues, the *White* decision can potentially lead to a Fourth Circuit standard in which courts cannot order forced medication to restore competency for defendants charged with even the most atrocious nonviolent property crimes, simply because their crimes are nonviolent.

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140. *See* United States v. White, 620 F.3d 401, 419 (4th Cir. 2010) (observing that "White's crimes did not physically harm any individuals").

141. *See* United States v. Evans, 404 F.3d 227, 239 (4th Cir. 2005) (explaining that Evans could have been civilly committed but that he did not currently meet the statutory criteria, thus implying that the court did not think Evans presented an imminent risk to the judge he threatened). The *White* majority also appears to fear the ultimate result in *Evans*, in which the court ordered forcible medication, and the defendant was eventually found not guilty by a jury of his peers. *See White*, 620 F.3d at 418 (stating that the *White* court was troubled by the necessity of basing its analysis on the presumption White was guilty—an assumption deemed "particularly unsettling in light of [*Evans*], where we permitted the forcible medication of Evans, a schizophrenic, for the purpose of standing trial," only to have separate juries find him not guilty). Of course, the possibility that the defendant may be found innocent should not affect the decision whether he should be forcibly medicated. The government has an important interest in prosecuting people for serious crimes whether or not they ultimately are found to be guilty. *See* United States v. Sell, 539 U.S. 166, 180 (2003).

142. *See Sell*, 539 U.S. at 169; *Evans*, 404 F.3d at 235.

143. *See White*, 620 F.3d at 430 (Niemeyer, J., dissenting) ("A given crime against property, however, can be serious or even more serious than a given crime against the person. Enormous harm and distress can be caused by fraud and Ponzi schemes, as can be witnessed on a grand scale in the case of Bernard Madoff in New York.").

144. *See id.* For a discussion of the suffering Madoff's Ponzi scheme caused, see Leslie Wayne, *Madoff's Victims Speak in Court Letters*, N.Y. TIMES, Mar. 21, 2009, at B2.

III. *WHITE* AS A SLIPPERY SLOPE

One of the central concerns for the *White* court was that forcibly medicating White would create a slippery slope[145] in which the forcible medication of incompetent defendants would become "routine" in the Fourth Circuit.[146] At both the beginning and the end of the opinion, the *White* court expressed its concern that allowing the forcible medication of White would relax the application of the *Sell* test in the Fourth Circuit, setting a precedent whereby incompetent defendants charged with serious crimes would be routinely forcibly medicated.[147] This is a slippery slope argument. The court was concerned that the initial decision to forcibly medicate White will lead to the routine involuntary medication of incompetent defendants, in contradiction to *Sell*.[148] However, the court overlooks a central problem with this reasoning: the decision creates a slippery slope in the opposite direction. The reasoning in *White* could lead to a Fourth Circuit standard under which nonviolent offenders charged with serious crimes will rarely—if ever—be forcibly medicated.

This reverse slippery slope is an example of what Eugene Volokh, in his Article *The Mechanisms of the Slippery Slope*, refers to as an "attitude-altering slippery slope."[149] An attitude-altering slippery slope occurs where an initial judicial or legislative rule desensitizes rulemakers and the public to a certain state of affairs, making it easier to adopt a related, but more undesirable legal standard in the future.[150] For example, defenders of the *White* decision could argue the *Sell* analysis is intended to be a highly factual, rigorous analysis in which defendants are forcibly medicated in only limited circumstances.[151] Under that argument, the *White* court

145. *See* Schauer, *supra* note 5, at 361–62 (defining the term "slippery slope").

146. *See White*, 620 F.3d at 405, 422.

147. *See id.* at 422. ("We decline to start down a path that would essentially permit the government to forcibly medicate any and every defendant deemed incompetent to stand trial, no matter how little public good or benefit will be achieved in doing so.").

148. *See id.* at 405, 422; *see also* Schauer, *supra* note 5, at 361–62 (defining the term "slippery slope").

149. *See* Volokh, *supra* note 6, at 1077, 1081.

150. *See id.* at 1077–1105.

151. The *White* court would agree with this argument. *See White*, 620 F.3d at 411 (stating that *Bush* and *Evans* "provide guidance . . . but do not control the outcome of our fact-intensive inquiry into the special circumstances of this case"). Defenders of *White* may include defense attorneys and public defenders who have a much better chance of preventing the forced medication of their clients under *White* than they did under *Bush* or *Evans*. Civil rights and mental health activists would also likely support *White* and the general position that the special circumstances analysis is intended to be a highly factual, rigorous analysis.

justifiably conducted a highly factual analysis. However, lower courts only have to adopt the general procedure of the analysis, not the specific "special circumstances" of it or the lengthy, complicated determination of White's likely sentence.

The problem with this argument is that it ignores the mechanism by which an attitude-altering slippery slope operates. The Fourth Circuit obviously considered the nature of the offense when it reversed the district court's order to forcibly medicate White. This slight change in application of the *Sell* factors creates a state of affairs in which judges are permitted to consider the nature of the offense when making decisions about forced medication. Standing alone, this seems like an innocuous—maybe even desirable—position. However, through the mechanism of an attitude-altering slippery slope, this slight change in the *Sell* analysis could lead to the undesirable result that nonviolent offenders are never subject to forced medication in the Fourth Circuit. As judges implement the *White* standard, their attitudes regarding the use of the nonviolent nature of the offense as a special circumstance will likely change. Judges will likely become more amenable to using the nonviolent nature of the offense in the first factor analysis because the *White* decision allows for (and requires, in the case of district courts in the Fourth Circuit) this precise result. Then, as a result of the "is-ought heuristic" described below, judges may use the nonviolent nature of the offense as the primary justification for refusing to forcibly medicate nonviolent offenders—to the exclusion of the other important *Sell* special circumstances. Eventually, nonviolent offenders would never be forcibly medicated in the Fourth Circuit because the courts would use the nonviolent nature of the offense as the primary special circumstance mitigating the government's important interest. This is how an "attitude-altering slippery slope"[152] operates.

The "is-ought heuristic" is an important concept underlying the theory of attitude-altering slippery slopes,[153] and it provides a possible explanation for why judges may make the psychological shift from treating the nonviolent nature of the offense as simply one additional special circumstance to using it as the primary special circumstance in mitigating the government's important interest. The "is-ought heuristic" describes one way in which lawyers, judges, and the public use the legal system to inform their judgments about the world.[154] The

152. *See* Volokh, *supra* note 6, at 1077.
153. *See id.* at 1080.
154. *See id.* at 1079–82 (analyzing the application of the "is-ought heuristic").

process works as follows: Suppose a person will admit that he does not know the answer to some particular question and does not have time to develop expertise on his own (this is the current state of affairs, the "is"); however, since Congress or the courts have addressed the question and answered it in a certain way, the person will trust that Congress or the courts are correct because either lawmakers or judges likely researched the area prior to making the decision (this is how the person imagines the law "ought" to be).[155] Magistrate or district court judges in the Fourth Circuit may fall into this cognitive error when interpreting *White*. Courts may assume that the *White* court faithfully applied precedent. The judges may then assume that nonviolence should be a central factor in determining whether a defendant should be forcibly medicated (in contradiction to *Sell*, *Bush*, and *Evans*). The underlying principle justifying the decision in *White* becomes more persuasive and entrenched just by virtue of the fact that *White* was decided at all.[156]

The process is further entrenched by the tendency people have to simplify complex multi-factor tests into one single justification, to the exclusion of more complicated or limiting parts of such tests.[157] This process could easily occur as busy district court and magistrate judges interpret *White*. The complex calculation of a defendant's likely sentence may easily be overlooked in favor of the much easier determination that the nonviolent nature of the offense justifies the refusal to order forced medication. Through this process, the nonviolent nature of the offense could become one of the most significant factors judges look to when deciding these cases. Of course, judges are required to faithfully apply all the factors of any given test, based on the prior case law. The problem with the *White* decision is that the complexity occurs within one specific factor that allows for wide judicial discretion in creating additional special circumstances. Within that factor, it may be easier to focus on a single, simpler justification.

CONCLUSION

This Recent Development has argued that the *White* decision represents a problematic case for the future of involuntary

155. *See id.*

156. *See id.* at 1081 ("The is-ought heuristic leads people to support B still further, because the very enactment of A makes its underlying moral or pragmatic principle . . . more persuasive.").

157. *Id.* at 1091 (noting that it is "easy for people's simplified mental image . . . to stress only a subset of the factors").

medication of nonviolent offenders. *White* was a substantial departure from both the *Bush* and *Evans* precedents in the Fourth Circuit. By engaging in the highly speculative, complicated analysis of White's length of confinement and her likely sentence, the court showed that any forced medication order that comes before it will be subject to very strict review. The *White* court also improperly focused on the nonviolent nature of the offense. The court added the nature of the offense to the list of possible special circumstances that can mitigate the government's interest, in contradiction to the Supreme Court's decision in *Sell.*

If the *White* decision becomes the guide for all review of involuntary medication orders in the Fourth Circuit, the district courts will likely become especially suspicious of ordering forced medication of nonviolent offenders. This slippery slope could lead to a Fourth Circuit in which nonviolent offenders are never forcibly medicated, regardless how egregious their crimes. In *Sell,* the Supreme Court specifically rejected this approach.[158] Unfortunately, the Fourth Circuit may have started down a path that could ultimately lead to that exact state of affairs.

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158. *See* Sell v. United States, 539 U.S. 166, 180 (2003).

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