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## Sell v. United States: Is Competency Enough to Forcibly Medicate a Criminal Defendant

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# ***SELL v. UNITED STATES: IS COMPETENCY ENOUGH TO FORCIBLY MEDICATE A CRIMINAL DEFENDANT?***

Sell v. United States, 123 S. Ct. 2174 (2003)

## I. INTRODUCTION

In *Sell v. United States*, the United States Supreme Court found that the Constitution allows for governmental administration of antipsychotic drugs involuntarily to a mentally ill criminal defendant in order to render the defendant competent to stand trial for nonviolent but serious crimes, in limited circumstances.<sup>1</sup> The Supreme Court examined whether the forcible administration of antipsychotic drugs to render a defendant competent to stand trial is constitutional, specifically whether the defendant was deprived of an important “liberty” guaranteed by the Fifth Amendment.<sup>2</sup> The Court vacated the Eighth Circuit’s decision upholding the decision of the District Court allowing the administration of antipsychotic drugs involuntarily to a mentally ill patient.<sup>3</sup>

This Note criticizes the decision in *Sell* in light of the precedents set forth in *Harper*<sup>4</sup> and *Riggins*.<sup>5</sup> The Court should have completely prohibited involuntary medication of a mentally ill criminal defendant with antipsychotic drugs solely to render the defendant competent to stand trial. An individual has a constitutionally protected liberty interest to be free from any unwanted bodily intrusion that will override a state’s interest in bringing a defendant to trial. The decision was wrong because a criminal defendant also has a constitutionally guaranteed right to a fair trial that is undermined by forcible administration of antipsychotic drugs due to their significant and harmful side effects. Furthermore, *Sell*’s crimes were not serious enough to warrant forcible administration of antipsychotic drugs, assuming that forcible administration of medication should be allowed at

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<sup>1</sup> 123 S. Ct. 2174, 2178 (2003).

<sup>2</sup> *Id.* at 2174.

<sup>3</sup> *Id.* at 2181.

<sup>4</sup> *Washington v. Harper*, 494 U.S. 210 (1990).

<sup>5</sup> *Riggins v. Nevada*, 504 U.S. 127 (1992).

all. Finally, the dissent by Justice Scalia will be criticized for its failure to adhere to the collateral order doctrine and its narrow interpretation of the final judgment rule, thereby depriving a criminal defendant of his right to a fair trial.

## II. BACKGROUND

### A. ANTIPSYCHOTIC MEDICATION

Two broad general categories of antipsychotic drugs exist: the older “conventional” drugs, and the more recently developed “atypical” drugs.<sup>6</sup> Common side effects of conventional antipsychotic drugs include extrapyramidal reactions along with the extremely serious tardive dyskinesia.<sup>7</sup> Extrapyramidal reactions can include nervous ticks, tremors, spasms, and the need to be in constant motion. These reactions have been found to occur in fifty to seventy-five percent of patients treated with conventional antipsychotic drugs.<sup>8</sup> Tardive dyskinesia is a vicious form of an extrapyramidal reaction and is characterized by involuntary and jerky movement of the facial and oral muscles, along with the upper and lower extremities and trunk.<sup>9</sup> Furthermore, the seriousness of this condition is demonstrated by the fact that it often manifests itself after treatment with the antipsychotic drugs has ceased and is potentially irreversible.<sup>10</sup> Even the Supreme Court has observed that the proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from ten to twenty-five percent.<sup>11</sup> In addition to these extrapyramidal reactions, conventional antipsychotic drugs can often produce other harmful side effects such as sedation, interference with an individual’s concentration, blurred vision, dry mouth and throat, constipation, urine retention, weakness, and dizziness.<sup>12</sup>

The newer “atypical” antipsychotic drugs have been reported to have a more favorable side effect profile than conventional antipsychotic drugs.<sup>13</sup>

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<sup>6</sup> Brief for Amicus Curiae American Psychological Association at 20, *Sell v. United States*, 123 S. Ct. 2174 (2003) (No. 02-5664).

<sup>7</sup> *Id.* Extrapyramidal reactions are a family of neurological disorders that can cause muscular rigidity, resting tremors, motor retardation, a need to be in constant motion, and severe spasms of the head and neck muscles. *Id.* at 20 n.18.

<sup>8</sup> *Id.* at 20-21.

<sup>9</sup> *Id.* at 20 n.18.

<sup>10</sup> *Id.*

<sup>11</sup> *Washington v. Harper*, 494 U.S. 210, 230 (1990).

<sup>12</sup> Brief for Amicus Curiae American Psychological Association at 21, *Sell* (No. 02-5664).

<sup>13</sup> *Id.* at 22.

The American Psychiatric Association noted that major progress had been made, particularly in reducing the traditionally most troublesome side effects through the introduction of the newer atypical medications in the last decade.<sup>14</sup> However, these atypical antipsychotic drugs have their own side effects.<sup>15</sup> These side effects can include the potentially fatal disappearance of white blood cells, extrapyramidal effects, cataracts, heart rhythm irregularities, sedation, seizures, hypotension, and weight gain.<sup>16</sup> It should also be noted that due to the relatively short time period that these atypical antipsychotic drugs have been in use, there may still be some late-developing side effects that have not yet been discovered.<sup>17</sup>

Until very recently, only conventional antipsychotic drugs had been approved for intramuscular injection, and as a result these were the only drugs available for involuntary administration.<sup>18</sup> Consequently, conventional antipsychotics, with their more harmful side effects, were the drugs used to forcibly medicate a criminal defendant.<sup>19</sup> However, one atypical drug, ziprasidone, was recently approved for intramuscular injection, and it has a much more favorable side effect profile than the conventional antipsychotic drugs.<sup>20</sup> Potentially, this could significantly alter a trial court's analysis of forcible administration of antipsychotic medication, but as these drugs are still new there needs to be more clinical data available in order for a court to consider atypical drugs free from serious side effects.<sup>21</sup>

In sum, antipsychotic drugs cover a wide array of medications, each producing different and serious side effects. These drugs have different physical and chemical properties and potential side effects and are effective for treating a wide range of specific mental disorders.<sup>22</sup> These drugs are not "panaceas" and a court should take into consideration all these factors when determining their effectiveness in rendering a defendant competent to stand trial.<sup>23</sup>

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<sup>14</sup> Brief for the American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae Supporting Respondent at 17-18, *Sell* (No. 02-5664) [hereinafter Brief for the American Psychiatric Association].

<sup>15</sup> *Id.*

<sup>16</sup> Brief for Amicus Curiae American Psychological Association at 22-23, *Sell* (No. 02-5664).

<sup>17</sup> *Id.* at 23.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 24.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See id.* at 24-25.

B. THE LAW PRIOR TO *SELL*

The law in the area of forcible administration of antipsychotic medication to individuals generally fell into two categories: that of defendants awaiting trial,<sup>24</sup> and that of inmates already convicted.<sup>25</sup> To forcibly administer antipsychotic medication to a defendant awaiting trial, the governmental interests must have outweighed the interests of the defendant.<sup>26</sup> Similarly, the interests of the government must outweigh the liberty interests of an inmate to allow the forcible administration of antipsychotic medication.<sup>27</sup> Prior to *Sell* the Court had never dealt with the issue of forcible medication solely to render a defendant competent to stand trial. The law had focused on the issue of dangerousness to one's self and to others as the reason for administration of the drugs.<sup>28</sup>

The Supreme Court first examined the forcible administration of prison inmates in *Washington v. Harper*.<sup>29</sup> The Court concluded that the Due Process Clause permits the state to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is found to be dangerous to himself or others and the treatment is in the inmate's best medical interest.<sup>30</sup> In *Harper*, the Court considered a Washington state policy that authorized forced administration of antipsychotic drugs to mentally ill inmates who are gravely disabled or who represent a significant danger to themselves or others.<sup>31</sup> The Court held that an individual has a significant constitutionally protected liberty interest in avoiding unwanted administration of antipsychotic drugs.<sup>32</sup> That liberty interest, however, is subject to state concerns as well.<sup>33</sup> The governmental interest in forcibly administering the medication was found to be both legitimate and important.<sup>34</sup> The Court found the state regulation permitting forcible administration of antipsychotic drugs to an inmate to be permissible under the Constitution.<sup>35</sup> The regulation was found to be an "accommodation" between the inmate's liberty interest and the State's

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<sup>24</sup> *Riggins v. Nevada*, 504 U.S. 127 (1992).

<sup>25</sup> *Washington v. Harper*, 494 U.S. 210 (1990).

<sup>26</sup> Hollybeth G. Hakes, Annotation, *Forcible Administration of Antipsychotic Medication to Pretrial Detainees—Federal Cases*, 188 A.L.R. FED. 285, 285 (2003).

<sup>27</sup> See *Harper*, 494 U.S. 210.

<sup>28</sup> See *id.*; *Riggins*, 504 U.S. at 127.

<sup>29</sup> *Harper*, 494 U.S. at 210.

<sup>30</sup> *Id.* at 227.

<sup>31</sup> *Id.* at 226.

<sup>32</sup> *Id.* at 221.

<sup>33</sup> *Id.* at 222-23.

<sup>34</sup> *Id.* at 225.

<sup>35</sup> *Id.* at 236.

interest in reducing the danger a mentally ill inmate may pose to himself or others.<sup>36</sup>

In a lengthy dissent, Justice Stevens pointed out that the majority undervalued Harper's liberty interest.<sup>37</sup> His argument centered on the different dimensions of a person's liberty interest.<sup>38</sup> A violation of a person's bodily integrity is an invasion of that person's liberty.<sup>39</sup> Justice Stevens stated that the liberty of citizens to resist the involuntary administration of mind-altering drugs is rooted in the Nation's "most basic values."<sup>40</sup> He also focused on the dangerous side effects of these antipsychotic drugs and the fact that they can be both irreversible and fatal.<sup>41</sup> He found that a competent individual's right to refuse antipsychotic medication is a fundamental liberty interest demanding the highest possible level of protection.<sup>42</sup>

Justice Stevens also argued that the state regulation "sweepingly sacrifices the inmate's substantive liberty interest . . . to institutional and administrative concerns."<sup>43</sup> While he admitted that security concerns were a legitimate state interest, he concluded that the regulation allowing prison administrators to address these concerns by forcibly administering psychotropic drugs to mentally ill inmates for prolonged periods was without a doubt an "exaggerated response" to those concerns.<sup>44</sup> This contention went to Justice Stevens' main point: the forcible administration of drugs solely to suppress an inmate's potential for violence, rather than to achieve therapeutic results, should not be considered on its own.<sup>45</sup> This reasoning results in a "muddled rationale" that allows the forced administration of psychotropic medication solely on the basis of institutional concerns, and consequently "eviscerates the inmate's substantive liberty interest in the integrity of his body and mind."<sup>46</sup>

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<sup>36</sup> *Id.* The Court found that the essential procedural requirements of the Due Process Clause were embodied in the state regulation.

<sup>37</sup> *Id.* at 237 (Stevens, J., dissenting).

<sup>38</sup> *Id.* (Stevens, J., dissenting) (referring to the liberty interests as being both physical and intellectual).

<sup>39</sup> *Id.* (Stevens, J., dissenting).

<sup>40</sup> *Id.* at 238 (Stevens, J., dissenting); *see also id.* at 238 n.3 (Stevens, J., dissenting) (relying on *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.")).

<sup>41</sup> *Id.* at 239-40 (Stevens, J., dissenting).

<sup>42</sup> *Id.* at 241 (Stevens, J., dissenting).

<sup>43</sup> *Id.* at 245-46 (Stevens, J. dissenting).

<sup>44</sup> *Id.* at 247 (Stevens, J. dissenting).

<sup>45</sup> *Id.* at 248-49 (Stevens, J. dissenting).

<sup>46</sup> *Id.* at 249-50 (Stevens, J. dissenting).

In *Riggins v. Nevada*, the Court reiterated that an individual has a constitutionally protected liberty interest to avoid involuntary administration of antipsychotic medication.<sup>47</sup> *Riggins* differed from *Harper* in that it involved the forced administration of antipsychotic drugs to a defendant in a criminal trial as opposed to a prison inmate.<sup>48</sup> The Court, in an opinion by Justice O'Connor, overturned *Riggins*' conviction and relied on *Harper*'s holding that the state must show an essential state policy interest, and the interest must be both legitimate and important enough to overcome the defendant's liberty interest.<sup>49</sup> The *Riggins* Court suggested that forced medication of a defendant in order to render him competent to stand trial might be constitutionally permissible, if the prosecution demonstrated that the treatment was medically appropriate and necessary for the safety of the defendant or the safety of others.<sup>50</sup> Consequently, once *Riggins* moved for termination of his medication during trial, the court was obligated to establish the need for antipsychotic medication and the medical appropriateness of such medication.<sup>51</sup> The record before the Court did not clearly indicate a finding that safety considerations or any other compelling concerns outweighed *Riggins*' liberty interest in being free from unwanted antipsychotic drugs.<sup>52</sup> Thus, the Court concluded that the trial court's error might well have impaired the constitutionally protected trial rights invoked by *Riggins*.<sup>53</sup>

Justice Kennedy's concurring opinion in *Riggins*, cited by the Court in *Sell*, focused on the possible side effects of antipsychotic drugs and their potential interference with a defendant's ability to receive a fair trial.<sup>54</sup> He stated that, absent an extraordinary showing by the state, the Due Process Clause prohibits the involuntary administration of antipsychotic drugs solely for the purpose of rendering the defendant competent to stand trial.<sup>55</sup> He also expressed doubt that the showing could be made due to the present understanding of the drugs' properties.<sup>56</sup>

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<sup>47</sup> 504 U.S. 127, 133-34 (1992).

<sup>48</sup> See *id.* at 129-33.

<sup>49</sup> *Id.* at 137-38.

<sup>50</sup> *Id.* at 135.

<sup>51</sup> *Id.* (noting that the district court failed in its obligation).

<sup>52</sup> *Id.* at 136.

<sup>53</sup> *Id.* at 137.

<sup>54</sup> *Id.* at 138-45 (Kennedy, J., concurring) (relying on the medical and pharmacological data presented in the *amicus* briefs).

<sup>55</sup> *Id.* at 139 (Kennedy, J., concurring).

<sup>56</sup> *Id.* (Kennedy, J., concurring).

Justice Kennedy also went further than the majority and directly addressed the issue of a defendant's competence to stand trial.<sup>57</sup> Competence is a legitimate state interest drawn from the state's right to bring an accused to trial and from *Pate v. Robinson*,<sup>58</sup> which held that conviction of an incompetent defendant violates due process.<sup>59</sup> In a clear foreshadowing of the issue in *Sell*, Kennedy questioned whether the state's interest in bringing the accused to trial allows it to secure the defendant's competence through involuntary medication.<sup>60</sup> Kennedy further argued that the state must, in every case, make a showing that the medication being forcibly administered will not pose a significant risk of impairing or altering the defendant's ability to react to testimony and assist counsel.<sup>61</sup> Justice Kennedy concluded that if the state is unable to "render the defendant competent without involuntary medication, then it must resort to civil commitment."<sup>62</sup> Justice Kennedy believed that the Constitution requires that society bear such a cost "in order to preserve the integrity of the trial process."<sup>63</sup>

### III. FACTS AND PROCEDURAL HISTORY

#### A. FACTS OF THE CASE

The defendant, Doctor Charles Sell, a practicing dentist, had a long history of mental illness. He was first hospitalized for mental illness in 1982, after telling doctors that the gold he used for fillings had been contaminated by communists.<sup>64</sup> He was again hospitalized in June of 1984 after calling the police and reporting he saw a leopard board a bus.<sup>65</sup> In April of 1997 he told law enforcement personnel that God spoke to him and said that for every Federal Bureau of Investigation agent he killed, a soul would be saved.<sup>66</sup>

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<sup>57</sup> *Id.* at 140 (Kennedy, J., concurring).

<sup>58</sup> 383 U.S. 375, 378 (1966).

<sup>59</sup> *Id.*

<sup>60</sup> *Riggins*, 504 U.S. at 139-40 (Kennedy, J., concurring) (assuming there is a sound medical basis for treatment).

<sup>61</sup> *Id.* at 141 (Kennedy, J., concurring).

<sup>62</sup> *Id.* at 145 (Kennedy, J., concurring).

<sup>63</sup> *Id.* (Kennedy, J., concurring).

<sup>64</sup> *Sell v. United States*, 123 S. Ct. 2174, 2179 (2003).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*



On May 16, 1997, the Government charged Sell with submitting fictitious insurance claims for payment, under 18 U.S.C. § 1035.<sup>67</sup> The government filed a motion for a psychiatric examination of Dr. Sell to determine his competence to stand trial.<sup>68</sup> He was sent to the U.S. Medical Center for Federal Prisoners for an evaluation.<sup>69</sup> After receiving a psychological evaluation from the center, a federal magistrate judge found Sell “currently competent” to stand trial.<sup>70</sup>

On November 6, 1997, a grand jury produced a superseding indictment charging Sell and his wife with “fifty-six counts of mail fraud, . . . six counts of Medicaid fraud, . . . and one count of money laundering.”<sup>71</sup> In early 1998 the Government claimed that Sell attempted to intimidate a witness and a bail revocation hearing was held.<sup>72</sup> Based on Sell’s “out of control”<sup>73</sup> behavior, which included screaming, shouting, using racial epithets, and spitting in the magistrate’s face, the magistrate revoked bail.<sup>74</sup>

A second grand jury indicted Sell on April 23, 1998, charging him and his wife with conspiring to murder an FBI agent and a former employee who planned to testify against him in the fraud case.<sup>75</sup> The attempted murder and fraud cases were then joined for trial.<sup>76</sup>

In February of 1999, Sell moved for another hearing to reevaluate his competence to stand trial.<sup>77</sup> The magistrate sent Sell back to the U.S. Medical Center for Federal Prisoners in Springfield, Missouri, for another competency examination.<sup>78</sup> After the magistrate received the psychological evaluation on April 14, 1999, he found, by a preponderance of the evidence, that Sell was suffering from a mental disease that rendered him mentally incompetent to stand trial.<sup>79</sup> The magistrate ordered Sell hospitalized to determine whether there was a substantial probability that Sell would attain the capacity to allow the trial to go forward.<sup>80</sup>

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<sup>67</sup> 18 U.S.C. § 1035(a)(2) (2004). Specifically, Sell was charged with submitting “false statements relating to health care matters.”

<sup>68</sup> Brief for the United States at 2, *Sell* (No. 02-5664).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Sell*, 123 S. Ct. at 2179.

<sup>73</sup> *United States v. Sell*, 282 F.3d 560, 563 (8th Cir. 2002).

<sup>74</sup> Brief for the United States at 3 n.1, *Sell* (No. 02-5664).

<sup>75</sup> *Id.* at 2.

<sup>76</sup> *Id.* at 2-3.

<sup>77</sup> *Id.* at 3.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Sell v. United States*, 123 S. Ct. 2174, 2179 (2003).

A reviewing psychiatrist held a hearing in June of 1999 and concluded that antipsychotic medication was required to restore Sell to competence to stand trial.<sup>81</sup> At the hearing, both of Sell's treating psychiatrists testified that antipsychotic medication was the only way to restore Sell to competency.<sup>82</sup> Sell presented an affidavit from his psychiatrist who stated that he believed Sell would not respond well to medication.<sup>83</sup> He also presented witnesses who testified that Sell did not want to take antipsychotic medication and "have his chemistry altered."<sup>84</sup> On July 12, 1999, a Bureau of Prisons reviewing official found that antipsychotic medication was the treatment most likely to ameliorate Sell's symptoms and that other less restrictive treatments would likely be ineffective.<sup>85</sup> The official consequently upheld the decision of the hearing officer that Sell would benefit from antipsychotic medication.<sup>86</sup>

The magistrate held a hearing on September 29, 1999, to rule on Sell's motion contesting the Medical Center's right to involuntarily administer the antipsychotic medication.<sup>87</sup> The evidence presented was the same as that in the administrative hearing, with the addition of an incident that had taken place at the Medical Center after the administrative hearing.<sup>88</sup> The incident involved Sell professing his love for a nurse and displaying inappropriate behavior.<sup>89</sup> This "boundary-breaching" behavior was considered "not harmless" by the medical staff and consequently Sell was moved to a locked cell.<sup>90</sup>

In August of 2000, the magistrate found that Sell was a danger to himself and others and that the Government had shown that the medication was the only way to render Sell harmless to himself and others and competent to stand trial.<sup>91</sup> The magistrate, therefore, authorized the involuntary administration of antipsychotic drugs, but stayed the order to allow Sell to appeal to the federal district court.<sup>92</sup>

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<sup>81</sup> Brief for the United States at 5, *Sell* (No. 02-5664).

<sup>82</sup> *United States v. Sell*, 282 F.3d 560, 564 (8th Cir. 2002).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Sell*, 123 S. Ct. at 2180.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 2181.

<sup>92</sup> *Id.*

## B. DISTRICT COURT DECISION

In April of 2001, the District Court for the Eastern District of Missouri issued an opinion that found the magistrate's dangerous finding clearly erroneous.<sup>93</sup> The court noted that Sell's behavior was at most an "inappropriate familiarity and even infatuation" with a nurse.<sup>94</sup> This finding of Sell's non-dangerousness was made after he had been returned to the open population, was limited to Sell's dangerousness to himself and those around him in the institutional setting, and applied only to the present time of the ruling.<sup>95</sup> However, the district court affirmed the order authorizing involuntary medication of the drugs because they represented "the only viable hope of rendering [Dr. Sell] competent to stand trial."<sup>96</sup> The district court held that the government's compelling interest in restoring Sell to competency in order to obtain an adjudication of Sell's guilt or innocence was, by itself, sufficient to justify involuntary medication.<sup>97</sup>

## C. EIGHTH CIRCUIT DECISION

Sell subsequently appealed to the Court of Appeals for the Eighth Circuit.<sup>98</sup> Sell contended that the district court erred in holding that he could be forcibly injected with antipsychotic drugs solely to render him competent to stand trial.<sup>99</sup> The government argued that the district court did not err on those grounds, yet its decision finding Sell not dangerous was erroneous and thus provided alternate grounds for affirmance of the district court's decision.<sup>100</sup>

In March 2002, a divided panel affirmed the district court's decision.<sup>101</sup> They agreed that Sell was not dangerous, citing the fact that the evidence did not support a finding that Sell posed a danger to himself or others at the Medical Center.<sup>102</sup>

The Eighth Circuit also affirmed the order of the district court allowing forcible injection of antipsychotic medication to render Sell competent to stand trial.<sup>103</sup> The court held that in order for the government to involuntary

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<sup>93</sup> *United States v. Sell*, 282 F.3d 560, 565 (8th Cir. 2002).

<sup>94</sup> *Id.*

<sup>95</sup> 123 S. Ct. at 2181.

<sup>96</sup> Brief for the United States at 8, *Sell* (No. 02-5664).

<sup>97</sup> *Sell*, 282 F.3d at 565.

<sup>98</sup> *Id.* at 560.

<sup>99</sup> *Id.* at 565.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 572.

<sup>102</sup> *Id.* at 565.

<sup>103</sup> *Id.* at 572.

medicate an individual it must show three things: (1) an essential state interest that outweighs an individual's interest in remaining free from medication; (2) that there is no less intrusive manner of fulfilling its essential interest; and (3) that the medication is medically appropriate.<sup>104</sup>

The court first focused on the essential state interest and held that the sixty-two charges of fraud and the single charge of money laundering were *serious* and that the government's interest in restoring his competency so that he could be brought to trial was paramount.<sup>105</sup> The court next examined whether or not there were less intrusive means by which the government could achieve its essential interest.<sup>106</sup> The court looked at the testimony of Sell's two government-appointed psychiatrists, who stated that antipsychotic medication was the only method to render Sell competent to stand trial, and it looked at the affidavit presented by Sell's own psychiatrist, which did not suggest any alternative means of restoring competency.<sup>107</sup> The court found that there were no less intrusive means of meeting the government's essential interest.<sup>108</sup>

Finally, the court looked to whether or not the medication was medically appropriate for Sell's treatment.<sup>109</sup> The court found that there was a sufficient likelihood that antipsychotic medication would restore Sell to competence.<sup>110</sup> It found that the medication could reasonably be expected to reduce Sell's delusions and render him competent to stand trial, that the treating doctors would be able to reduce the incidence of unpleasant and harmful side effects caused by the drugs, and that the medical benefits outweighed the risks normally associated with antipsychotic medication.<sup>111</sup>

The dissent, by Judge Bye, argued that the charges against Dr. Sell were not "sufficiently serious" enough to forcibly inject him with antipsychotic drugs on the chance they would make him competent to stand trial.<sup>112</sup> Judge Bye reasoned that the charges were nonviolent and purely economic and as such there was no identifiable victim; only society's interest was harmed.<sup>113</sup> Judge Bye also attacked the majority's *analysis* of the seriousness of the charges.<sup>114</sup> It is not the number of counts that

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<sup>104</sup> *Id.* at 571.

<sup>105</sup> *Id.* at 568 (focusing only on the fraud charges).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 568-69.

<sup>110</sup> *Id.* at 570.

<sup>111</sup> *Id.* at 570-71.

<sup>112</sup> *Id.* at 572-73 (Bye, J., dissenting).

<sup>113</sup> *Id.* at 573 (Bye, J., dissenting).

<sup>114</sup> *Id.* (Bye, J., dissenting).

determines the sentence, but the total dollar value of the fraud, and as a consequence if Sell were found guilty he would have faced a range of sentencing from thirty-three to forty-one months.<sup>115</sup> He concluded that the charges were not serious enough to warrant forced medication of the defendant who was a non-dangerous pre-trial detainee “cloaked with the presumption of innocence.”<sup>116</sup>

#### D. SUPREME COURT GRANTED CERTIORARI

Dr. Sell then filed a petition for certiorari with the United States Supreme Court. The Supreme Court granted certiorari to determine whether the Eighth Circuit erred in rejecting Sell’s argument that involuntarily medicating him solely to render him competent to stand trial for non-violent criminal offenses violated the Constitution by depriving him of “liberty” as expressed in the 5th Amendment of the United States Constitution.<sup>117</sup>

### IV. SUMMARY OF OPINIONS

#### A. MAJORITY OPINION

The Supreme Court held that the government does have a constitutionally permissible right to involuntarily administer antipsychotic drugs to a mentally ill defendant.<sup>118</sup> However, the Court overturned the Eighth Circuit’s decision allowing forced administration of antipsychotic medication to Charles Sell and remanded the case for further proceedings.<sup>119</sup> Writing for the majority, Justice Breyer<sup>120</sup> concluded that the government failed to meet its burden stemming from the test created in *Harper* and *Riggins* and consequently could not administer antipsychotic drugs to Sell involuntarily solely to render him competent to stand trial.<sup>121</sup>

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<sup>115</sup> *Id.* (Bye, J., dissenting).

<sup>116</sup> *Id.* at 574 (Bye, J., dissenting).

<sup>117</sup> *Sell*, 123 S. Ct. at 2181.

<sup>118</sup> *Id.* at 2184-85.

<sup>119</sup> *Id.* at 2187.

<sup>120</sup> Joined by Rehnquist, C.J., and Stevens, Kennedy, Souter, and Ginsburg, JJ.

<sup>121</sup> 123 S. Ct. at 2187. The Court also held that the Eighth Circuit had jurisdiction over the appeal as it was a proper “collateral order” as held in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). *Id.* at 2182-83. The Court found that the question presented in this case, whether Sell has a legal right to avoid forced medication in part because it might make the trial unfair, differed from the question of whether forced medication *did* make a trial unfair. *Id.* An ordinary appeal after the trial would come too late to answer the question presented in this case. *Id.* at 2183.

The Court relied on *Washington v. Harper*<sup>122</sup> and *Riggins v. Nevada*<sup>123</sup> to provide the legal framework in this case.<sup>124</sup> The Court summarized these two cases by stating:

*Harper* and *Riggins* indicate that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.<sup>125</sup>

When a trial court must examine the question of trial competency it should ask whether the government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness, has shown that the need for that treatment is sufficiently important to overcome the individual's protected interest in refusing it.<sup>126</sup>

The first thing a court must examine is whether the government has "important" interests at stake in the trial.<sup>127</sup> The Court stated that the government has an important interest in bringing to trial an individual accused of a serious crime, whether it is a serious crime against a person or property.<sup>128</sup> However, courts must also consider the facts specific to the individual case in that they may lessen the government's important interest.<sup>129</sup> Most important, the Court found, was that the government has "a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one."<sup>130</sup>

Second, the trial court must conclude that forcible medication will significantly further the concomitant state interests.<sup>131</sup> The court must first find that the drugs will be substantially likely to render the defendant competent to stand trial, and it must also find that the drugs will be unlikely

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<sup>122</sup> 494 U.S. 210 (1990).

<sup>123</sup> 504 U.S. 127 (1992).

<sup>124</sup> 123 S. Ct. at 2183-84.

<sup>125</sup> *Id.* at 2184.

<sup>126</sup> *Id.* at 2186.

<sup>127</sup> *Id.* at 2184.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* The Court gave the example of a defendant's failure to take drugs voluntarily, resulting in lengthy confinement in an institution for the mentally ill, which would reduce the "risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

to have serious side effects that will interfere with the defendant's ability to assist in the trial.<sup>132</sup>

Third, the trial court has to conclude that the forcible administration of the antipsychotic drugs is necessary to further the government's essential interests.<sup>133</sup> Any alternative, less intrusive measures must be found unlikely to achieve substantially similar results.<sup>134</sup> Justice Breyer also pointed out that the trial court must consider less intrusive means for *administering* the drugs, once that course of action has been decided upon.<sup>135</sup>

Fourth, the trial court must find that the administration of antipsychotic drugs is medically appropriate and in the best medical interest of the defendant.<sup>136</sup> The Court suggested that the specific type of drugs used might come into consideration, because of their different levels of success and side effects.<sup>137</sup>

The Court emphasized that these standards are to be used when a trial court is trying to decide whether involuntary administration of the medication is necessary to further the government's interest in rendering a defendant competent to stand trial.<sup>138</sup> In doing so, the Court narrowed its holding in the case by saying that a trial court need not consider whether to allow forced medication for competency purposes if forced medication is warranted for a different purpose, such as an individual's dangerousness.<sup>139</sup> The Court stated that there are often persuasive reasons for a court to determine whether involuntary medication is justified on alternative grounds before examining the trial competence question.<sup>140</sup> Consequently, if the authorization of involuntary medication is made on alternative grounds then the need to consider medication in order to render a defendant competent to stand trial disappears.<sup>141</sup> The Court concluded that when a court is asked to authorize involuntary administration of antipsychotic drugs in order to render a defendant competent to stand trial it should ordinarily determine whether the government sought permission for forced

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<sup>132</sup> *Id.* at 2184-85.

<sup>133</sup> *Id.* at 2185.

<sup>134</sup> *Id.* (relying on amicus briefs for both the American Psychological Association and the American Psychiatric Association, coming to opposite conclusions on the efficacy of antipsychotic medication).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (relying on the purposes for involuntary medication stated in *Harper*).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 2185-86.

administration of drugs on other *Harper*-like grounds; and, if not, why not.<sup>142</sup>

The government did not contest the Eighth Circuit's decision that the magistrate's finding of Sell's dangerousness was clearly erroneous, and the majority therefore made the assumption that this decision was correct.<sup>143</sup> Based on this "hypothetical assumption" the Court found that the Eighth Circuit's decision was incorrect in approving forced medication solely to render Sell competent to stand trial.<sup>144</sup> The Court emphasized that the magistrate based his order to medicate Sell on his dangerousness and that the experts at the hearing focused on that aspect as well.<sup>145</sup> This failure to focus on competency was found by the majority to potentially have made an impact on the outcome of the hearing.<sup>146</sup> Thus, the Court held that the present orders authorizing forced administration of antipsychotic drugs to Sell could not stand.<sup>147</sup> They remanded the case and left open the option of the government pursuing forced medication on other grounds, including Sell's dangerousness.<sup>148</sup>

In addition, the Court found that the final judgment rule, normally allowing appeals only after a final judgment is issued, did not apply in the case because of the collateral order doctrine.<sup>149</sup> The judgment from which Sell appealed was a pretrial order issued by the District Court.<sup>150</sup> The law normally requires that a defendant wait until the end of the trial to appeal a pretrial order.<sup>151</sup> The jurisdictional statute governing this area authorizes federal appellate courts to review the final decisions of the district courts.<sup>152</sup> However, the Court held, in *Coopers & Lybrand v. Livesay*,<sup>153</sup> that a preliminary decision is immediately appealable when it: "(1) conclusively determines the question at issue; (2) resolves an important issue wholly

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (stating that the record actually suggests the contrary).

<sup>144</sup> *Id.* at 2187.

<sup>145</sup> *Id.* (arguing that important questions concerning trial-related risks and competency were not asked).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* As of the date of publication, no decision has been issued by the District Court concerning the forcible administration of antipsychotic drugs to Dr. Sell.

<sup>149</sup> *Id.* at 2183.

<sup>150</sup> *Id.* at 2182.

<sup>151</sup> *Id.*

<sup>152</sup> 28 U.S.C. § 1291 (1994).

<sup>153</sup> 437 U.S. 463 (1978).



separate from the merits of the case; and (3) is effectively unreviewable on appeal from a final judgment.”<sup>154</sup>

The Court found that the order conclusively determined the disputed question, which was whether Sell had a legal right to refuse forced medication.<sup>155</sup> The order also resolved an important issue separate from the merits, namely that involuntary medical treatment raises important questions of constitutional relevance with no relevance towards his guilt or innocence.<sup>156</sup> Finally, the Court found that the order was effectively unreviewable on appeal from a final judgment.<sup>157</sup> By the time final judgment had been entered, the harm Sell sought to avoid would already have occurred.<sup>158</sup> The Court therefore concluded that the district court order from which Sell appealed was a collateral order and both the Eighth Circuit and the Supreme Court had jurisdiction to hear the appeal.<sup>159</sup>

## B. DISSENTING OPINION

The dissent, by Justice Scalia,<sup>160</sup> focused solely on the jurisdictional issue and found that the Eighth Circuit had no business entertaining Sell’s appeal.<sup>161</sup> He would have vacated the Eighth Circuit’s decision and remanded with instructions to dismiss because the Supreme Court lacked jurisdiction.<sup>162</sup> Justice Scalia lamented that the narrow exception allowing for appeals on collateral orders was actually not met in the case.<sup>163</sup> He relied on the final judgment rule<sup>164</sup> and found that the third requirement of the collateral order doctrine was not met by the District Court’s order.<sup>165</sup> Justice Scalia discussed that, in *Riggins*, the appeal refusing antipsychotic medication came *after* the trial and, therefore, the majority was wrong to conclude that an ordinary appeal of this issue came too late for a defendant to enforce his right.<sup>166</sup> Justice Scalia narrowly interpreted the collateral

<sup>154</sup> *Id.* at 468.

<sup>155</sup> *Sell*, 123 S. Ct. at 2182.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 2183.

<sup>160</sup> Joined by Justice O’Connor and Justice Thomas.

<sup>161</sup> *Id.* at 2188-90 (Scalia, J., dissenting) (arguing that Sell’s appeal was not an interlocutory appeal as defined by the Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)).

<sup>162</sup> *Id.* at 2188 (Scalia, J., dissenting).

<sup>163</sup> *Id.* at 2189 (Scalia, J., dissenting).

<sup>164</sup> 28 U.S.C. § 1291 (1994).

<sup>165</sup> *Sell*, 123 S. Ct. at 2189 (Scalia, J., dissenting).

<sup>166</sup> *Id.* (Scalia, J., dissenting).

order doctrine to cover only three types of prejudgment orders previously recognized by the court, refusing to expand the doctrine in this case.<sup>167</sup>

Justice Scalia concluded that the majority's decision would allow criminal defendants to engage in what he termed "opportunistic behavior."<sup>168</sup> This behavior would encourage a defendant to abruptly refuse to take medication halfway through the trial and then appeal the order that the medication continue involuntarily.<sup>169</sup> Justice Scalia argued that the Court's decision created a "breathtaking expansion" of appellate jurisdiction.<sup>170</sup> This expansion would thus allow a defendant to hold up a trial for months and would constitute a disregard of the limits Congress imposed on courts of appeals' jurisdiction.<sup>171</sup>

#### V. ANALYSIS

The Court in *Sell* failed to take the necessary steps to define an individual's liberty interest in such a way as to preclude forced medication, under any circumstances, of a criminal defendant awaiting trial *solely* to render him competent to stand trial. The Court refused to build on the framework defined in both *Harper* and *Riggins*. Instead, the majority set up a very narrow test that a trial court must follow, but refused to go further and state that the Constitution prohibits involuntary medication of a pretrial detainee. The Court also seemed to advise trial courts to find the defendant dangerous, or to find some other essential state interest, before attempting to consider the competence issue.<sup>172</sup> In so doing the Supreme Court failed to prohibit the invasion of an individual's bodily integrity solely on the grounds of trial competency. While the state has a legitimate interest in bringing a defendant to trial, that interest is outweighed by the freedoms granted by the United States Constitution to be free from unwanted bodily intrusions.

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<sup>167</sup> *Id.* at 2190 (Scalia, J., dissenting) (stating that the three types of prejudgment orders were: (1) denials of motions to reduce bail; (2) denials of motions to dismiss on double-jeopardy grounds; and (3) denials of motions to dismiss under the Speech or Debate Clause).

<sup>168</sup> *Id.* (Scalia, J., dissenting).

<sup>169</sup> *Id.* (Scalia, J., dissenting).

<sup>170</sup> *Id.* (Scalia, J., dissenting).

<sup>171</sup> *Id.* at 2190-91 (Scalia, J., dissenting).

<sup>172</sup> This has been the case in at least one lower court decision, in which the case was remanded to the trial court for determination of involuntary administration of antipsychotic medication on grounds other than competence, such as dangerousness. See *State v. Jacobs*, 828 A.2d 587 (Conn. 2003).

## A. THE INDIVIDUAL'S LIBERTY INTEREST TO BE FREE FROM UNWANTED MEDICATION

An individual's constitutionally protected "liberty interest" to be free from forcible medication has been recognized in all Supreme Court cases dealing with the issue.<sup>173</sup> The Court in *Harper* stated that an individual has a significant and constitutionally protected "liberty interest" in avoiding the forcible administration of antipsychotic drugs.<sup>174</sup> In *Riggins*, the Court found that the trial court's failure to consider the defendant's liberty interest in being free from unwanted antipsychotic medication might have impaired the constitutionally protected rights invoked by the defendant.<sup>175</sup> Though the Court has split on when this liberty interest is outweighed by a legitimate, important, and essential state interest—outweighed in *Harper*, not outweighed in *Riggins*—the clear implication from the Court is that this liberty interest will always outweigh the governmental interest of rendering a defendant competent to stand trial.

### 1. Constitutional Basis for an Individual's Liberty Interest

The Fifth Amendment of the United States Constitution specifically provides that an individual in a criminal case may not be deprived of liberty without due process of law.<sup>176</sup> Similarly, the Fourteenth Amendment of the United States Constitution prohibits the states from depriving *any person* of liberty without due process of law.<sup>177</sup> This right to due process is split into both procedural and substantive parts and courts have examined both of these aspects of due process when dealing with the forced medication of an individual.<sup>178</sup>

Courts have explicitly recognized that a criminal defendant awaiting trial has a substantive due process right to refuse the administering of antipsychotic drugs. The Court in *Riggins* held that a pretrial detainee has a constitutionally protected liberty (due process) interest to refuse unwanted antipsychotic medication.<sup>179</sup> In addition, the Second Circuit, in *United States v. Gomes*,<sup>180</sup> found that a criminal defendant has a substantial interest

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<sup>173</sup> See *Riggins v. Nevada*, 504 U.S. 127 (1992); *Washington v. Harper*, 494 U.S. 210 (1990).

<sup>174</sup> *Harper*, 494 U.S. at 221.

<sup>175</sup> *Riggins*, 504 U.S. at 137.

<sup>176</sup> U.S. CONST. amend. V.

<sup>177</sup> U.S. CONST. amend. XIV, § 1.

<sup>178</sup> See *Hakes*, *supra* note 26.

<sup>179</sup> 504 U.S. at 135.

<sup>180</sup> 289 F.3d 71 (2d Cir. 2002). Certiorari granted, judgment vacated and remanded for further consideration in light of *Sell v. United States*, 123 S. Ct. 2174 (2003).

under the due process clause of the Fourteenth Amendment to be free from the bodily intrusion of forcible injection of antipsychotic drugs, given the level of invasiveness and the seriousness of the possible side effects.<sup>181</sup> Similarly, the Ninth Circuit held, in *Benson v. Terhune*,<sup>182</sup> that the Fourteenth Amendment substantively protects an individual's right to be free from unjustified bodily intrusions.<sup>183</sup> The court also added that this liberty interest is heightened with antipsychotic drugs because of their mind-altering properties.<sup>184</sup> In sum, it is clear from the case law that courts have repeatedly recognized a substantive due process right in criminal defendants wanting to avoid involuntary administration of antipsychotic medication.

In addition to a substantive due process right, courts have recognized a procedural due process right for criminal defendants that must be met in order to involuntarily medicate them with antipsychotic drugs to render them competent to stand trial.<sup>185</sup> This procedural due process right was laid out clearly in *Sell*. The *Sell* Court found that the Due Process Clause of the Fifth Amendment permits the government to involuntarily administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges to render him competent to stand trial.<sup>186</sup> The test posited in *Sell* assumed the government's right to forcibly medicate a pretrial detainee but laid out substantial limitations.<sup>187</sup> In so doing, the Court failed to recognize that the substantive due process rights of an individual should actually override the state's interest in rendering a defendant competent to stand trial, regardless of whether the procedural due process rights were met or not. The test the Court presented in *Sell* recognized the substantive liberty interests of the individual in that it is a strict test and the circumstances where it will be met "may be rare."<sup>188</sup> In setting up such a strict test where the requirements will rarely be met, the Court effectively blocked the forcible medication of criminal defendants merely to render them competent for trial, but failed to take the extra step and declare that an individual's liberty interest in avoiding bodily intrusions outweighs any state judicial interest.

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<sup>181</sup> *Id.* at 80.

<sup>182</sup> 304 F.3d 874 (9th Cir. 2002).

<sup>183</sup> *Id.* at 884.

<sup>184</sup> *Id.* at 881.

<sup>185</sup> See Hakes, *supra* note 26.

<sup>186</sup> 123 S. Ct. at 2184-85.

<sup>187</sup> See *supra* Part IV.A (discussing the majority's opinion).

<sup>188</sup> *Sell*, 123 S. Ct. at 2184.

While the Court in *Harper* authorized forcible medication of an inmate,<sup>189</sup> it was Justice Steven's dissent in *Harper* that addressed the importance of an individual's liberty interest in light of the possibility of forcible medication of anti-psychotic drugs.<sup>190</sup> He stated that every violation of a person's bodily integrity is an invasion of that person's liberty.<sup>191</sup> He further emphasized the invasion of an individual's liberty when the intrusion involves a substantial risk of permanent injury and premature death, as is the case with antipsychotic drugs.<sup>192</sup> Justice Stevens also focused on the mind-altering properties of the drugs and on the fact that this constituted a deprivation of liberty in "the most literal and fundamental sense."<sup>193</sup> Justice Stevens' dissent carries even more weight when viewed in the context of *Harper*. *Harper* involved the forcible administration of antipsychotic drugs to a mentally ill inmate. It can be reasonably argued that an inmate's liberty interest is substantially less than that of a pretrial detainee who is presumed innocent. Thus, Justice Stevens was correct in concluding that "the liberty of citizens to resist the administration of mind altering drugs arises from our Nation's most basic values."<sup>194</sup>

## 2. An Individual's Liberty Interest Outweighs Any Governmental Interest

While the government has a substantial and legitimate interest in bringing a defendant to trial, this interest will always be outweighed by an individual's liberty interest to remain free from unwanted mind-altering medication that has serious physical and mental side-effects. In reviewing the government's interest, the trial court must first find that there is an *important* governmental interest at stake.<sup>195</sup> It has been said that "[c]onstitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace."<sup>196</sup> However, as the *Sell* Court stated, trial courts must consider the specific

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<sup>189</sup> This note does not intend to show disagreement with the ruling in *Harper*. That case dealt with a convicted inmate in the federal prison system and was decided on the grounds of his dangerousness. Instead, this note focuses on the reasoning behind Justice Stevens' dissent and how it applies to a pretrial detainee being forcibly medicated solely to render him competent to stand trial.

<sup>190</sup> 494 U.S. 210, 237 (1998) (Stevens, J., dissenting).

<sup>191</sup> *Id.* (Stevens, J., dissenting).

<sup>192</sup> *Id.* (Stevens, J., dissenting).

<sup>193</sup> *Id.* at 237-38 (Stevens, J., dissenting).

<sup>194</sup> *Id.* (Stevens, J., dissenting).

<sup>195</sup> *Id.* (Stevens, J., dissenting).

<sup>196</sup> *Riggins v. Nevada*, 504 U.S. 127, 135-36 (1992) (quoting *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring)).

facts of the individual case when evaluating the government's interest in bringing the accused to trial.<sup>197</sup> The Court conceded that certain circumstances might lessen the importance of the government's interest.<sup>198</sup> The Court recognized that a defendant's failure to take drugs voluntarily could result in a lengthy institutional confinement, which would diminish the risks that ordinarily attach to freeing, without punishment, one who has committed a serious crime.<sup>199</sup> Though the Court qualified the example, the point nonetheless was made.<sup>200</sup> A mentally ill defendant found incompetent to stand trial does not run free in society. There are strict guidelines and regulations governing civil commitment, along with continuous treatment and psychiatric review.<sup>201</sup> In light of these circumstances, it is clear that an individual's liberty interest outweighs the governmental interest to bring a criminal defendant to trial.

This point goes to the underlying rationale behind the test laid out in *Sell*: in order to involuntarily administer antipsychotic medication to a criminal defendant the state must show that such medication is *necessary* to further important government related trial-interests.<sup>202</sup> Again, Justice Stevens' dissenting opinion in *Harper* provides a clear analysis of the balancing involved in authorizing forcible administration of antipsychotic drugs to an individual.<sup>203</sup> While Justice Stevens' dissent did not deal with trial-interests, it did examine the balancing of liberty interests with state institutional concerns.<sup>204</sup> He concluded that the majority allowed the exaggerated response of involuntary administration of antipsychotic drugs on the basis of purely institutional concerns, thus creating a "muddled rationale."<sup>205</sup> While the state's interest in running a safe and secure prison—and also in bringing a defendant to trial—is clearly both *legitimate* and *important*, it is not clear that a violation of an individual's liberty interest through forcible medication is *necessary* to further those interests.<sup>206</sup>

In conclusion, an individual's liberty interest to avoid unwanted administration of mind-altering drugs is deeply rooted in the Constitution.

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<sup>197</sup> 123 S. Ct. at 2184.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* (qualifying with the statement, "[w]e do not mean to suggest that civil commitment is a substitute for a criminal trial").

<sup>201</sup> 18 U.S.C.S. § 4247 (2003).

<sup>202</sup> *Id.*

<sup>203</sup> *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., dissenting).

<sup>204</sup> *Id.* at 249 (Stevens, J., dissenting).

<sup>205</sup> *Id.* (Stevens, J., dissenting).

<sup>206</sup> *See id.* (Stevens, J., dissenting).

Both the Fifth and Fourteenth Amendments guarantee that an individual not be deprived of liberty through due process of law. An individual's bodily integrity is a part of this liberty interest. While the government does have a legitimate interest in bringing the accused to trial, this interest is not strong enough to ignore an individual's right to avoid state-imposed medication that will alter her mind and will.

## B. AN INDIVIDUAL'S RIGHT TO A FAIR TRIAL IS UNDERMINED BY INVOLUNTARY ADMINISTRATION OF ANTIPSYCHOTIC MEDICATION

The right to a fair trial is a cornerstone of the justice system in the United States.<sup>207</sup> A defendant's right to a fair and just trial becomes an issue when the defendant's competency to stand trial is questioned.<sup>208</sup> A defendant's right to a fair trial is jeopardized when antipsychotic medication is administered involuntarily to a defendant solely to render him competent to stand trial. As Justice Kennedy stated in his concurring opinion in *Riggins*, medication with antipsychotic drugs creates a serious threat to a defendant's right to a fair trial.<sup>209</sup> A defendant rendered competent through chemistry is at a serious disadvantage, in that their ability to communicate and assist in their defense is severely limited. The potential harmful side effects of antipsychotic drugs puts the criminal defendant forcibly medicated with such drugs at a serious disadvantage.

### 1. Competency

The Supreme Court first put forth a two-prong test for competency in *Dusky v. United States*.<sup>210</sup> In *Dusky*, the Court stated that two issues must be examined: (1) whether the defendant has sufficient "present ability" to confer with his lawyer to a reasonable degree in a way that allows for rational understanding; and (2) whether the defendant "has a rational as well as factual understanding of the proceedings against him."<sup>211</sup> The underlying policy of the *Dusky* test was to increase social respect for the criminal justice system, ensuring that criminal punishment would only be

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<sup>207</sup> See U.S. CONST. amend. V; *Rock v. Arkansas*, 483 U.S. 44 (1987); *Taylor v. United States*, 414 U.S. 17 (1973) (per curiam).

<sup>208</sup> *Sell v. United States*, 123 S. Ct. 2174, 2174 (2003).

<sup>209</sup> *Riggins v. Nevada*, 504 U.S. 127, 138-39 (1992) (Kennedy, J., concurring).

<sup>210</sup> 362 U.S. 402 (1960) (per curiam).

<sup>211</sup> *Id.* at 402.

imposed on those who were aware of and could participate in the process.<sup>212</sup> Under the *Dusky* competence test, any impairment of an individual's ability to function as a defendant, such as altered demeanor, would cause him or her to be viewed as incompetent.<sup>213</sup> Thus, competency became equated with trial fairness, in that only a competent defendant would be able to participate fully in her defense and ensure a just outcome.

In some circumstances, when an individual's trial incompetence is the result of a mental illness, antipsychotic medication may be effective in alleviating the symptoms of the illness and rendering the defendant competent to stand trial.<sup>214</sup> Antipsychotic drugs create competence by altering the chemical balance in an individual's brain, which cause changes, supposedly beneficial, in her cognitive processes.<sup>215</sup> Restoration of competence is often unlikely without antipsychotic medication, and the lack of other effective alternatives could mean a defendant may remain incompetent to stand trial indefinitely.<sup>216</sup>

## 2. *The Harmful Side Effects of Antipsychotic Drugs Significantly Interfere with a Defendant's Right to a Fair Trial*

The ability of a defendant to actively participate in the trial, if she so chooses, is a fundamental and constitutionally protected right of a criminal defendant. The potential side effects of antipsychotic drugs can have a significant impact on a defendant's right to a fair trial.<sup>217</sup> Justice Kennedy's concurring opinion in *Riggins* explored this issue in detail.<sup>218</sup> In his view, absent an extraordinary showing by the state, the Due Process Clause prohibits the prosecution from forcibly administering antipsychotic drugs for purposes of rendering the accused competent to stand trial.<sup>219</sup> These

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<sup>212</sup> Linda C. Fentiman, *Whose Right is it Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. MIAMI L. REV. 1109, 1111 (1986).

<sup>213</sup> M. Catherine Healy, *Riggins v. Nevada: Are "Synthetically Sane" Criminal Defendants Competent to Stand Trial?*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 402 (1994).

<sup>214</sup> Brief for Amicus Curiae American Psychological Association at 7, *Sell* (No. 02-5664).

<sup>215</sup> *Id.* (quoting *Washington v. Harper*, 494 U.S. 210, 229 (1990)).

<sup>216</sup> Brief for the American Psychiatric Association at 25, *Sell* (No. 02-5664).

<sup>217</sup> *Sell*, 123 S. Ct. at 2187.

<sup>218</sup> 504 U.S. 127, 138-39 (1992) (Kennedy, J., concurring). Again, this Note does not imply disagreement with the Court's outcome in *Riggins*. Its intent instead is to focus on Justice Kennedy's concurrence and to highlight the policy concerns behind forcible administration of antipsychotic medication to a criminal defendant solely for competency purposes.

<sup>219</sup> *Id.* at 139 (Kennedy, J., concurring).



elementary protections against state intrusion require that the state in every case make a showing that there is no significant risk that the drugs would impair or alter the defendant's ability to react to the testimony at trial or to interact with his counsel on behalf of his defense.<sup>220</sup>

The side effects of antipsychotic drugs can significantly affect the defendant's demeanor and cognitive functions during a trial.<sup>221</sup> Justice Kennedy found that these drugs could prejudice a defendant in two possible ways. First, they could alter his or her demeanor in a manner that would prejudice his or her reactions in the courtroom, and second, the drugs could render him or her unable and unwilling to effectively assist counsel in the defense.<sup>222</sup> Antipsychotic drugs could interfere with important aspects of the trial. They could sedate the defendant, interfere with communication with counsel, prevent rapid reaction and response to the proceedings, and also prevent the demonstration of emotions such as remorse or compassion.<sup>223</sup> Justice Kennedy concluded that the documented probability of side effects would render involuntary administration of antipsychotic drugs "unacceptable" unless the State were able to show that the drugs would not alter the defendant's demeanor or reduce his ability to assist in his defense.<sup>224</sup>

The Court in *Sell*, while recognizing the effect of antipsychotic drugs on a defendant's demeanor and cognitive abilities, failed to find that these side effects were significant enough to *always* hinder a defendant's right to a fair trial.<sup>225</sup> This terse dismissal of the side effects of antipsychotic drugs is one of the major flaws with the Court's opinion. It was unwilling to take the extra, bold step necessary to bring the law in line with medicine. These drugs are not perfect and have serious consequences that significantly undermine a defendant's right to a fair trial. The American Psychiatric Association stated in *Riggins*:

By administering medication, the State may be creating a prejudicial negative demeanor in the defendant—making him look nervous, restless . . . or so calm or

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<sup>220</sup> *Id.* at 141 (Kennedy, J., concurring).

<sup>221</sup> *Id.* at 142 (Kennedy, J., concurring).

<sup>222</sup> *Id.* (Kennedy, J., concurring); see also Brief for Amicus Curiae American Psychological Association at 15, *Sell* (No. 02-5664).

<sup>223</sup> *Riggins*, 504 U.S. at 142-143 (Kennedy, J., concurring).

<sup>224</sup> *Id.* at 143 (Kennedy, J., concurring).

<sup>225</sup> 123 S. Ct. at 2187 (explaining that "[w]e cannot tell whether the side effects of antipsychotic medication were likely to undermine the fairness of a trial in *Sell*'s case").

sedated as to appear bored, cold, unfeeling, and unresponsive . . . . That such effects may be subtle does not make them any less real or potentially influential.<sup>226</sup>

The fact that the medical community recognizes such a prejudice should serve as a clear announcement to the Court that antipsychotic medication is unpredictable and complex and consequently should not be relied on to create the perfect, competent defendant.

Justice Kennedy pointed out in *Riggins* that there existed a difference between competency to stand trial and the purpose of involuntary medication in *Harper*, which was to halt the dangerousness of an incarcerated individual to himself and others.<sup>227</sup> In *Sell*, the Court did not examine the dangerousness issue as it was not on appeal before them. However, the Court made strong overtures that a trial court should focus on dangerousness when considering involuntary medication of a defendant, as evidenced by its strict standard for medicating solely for competence.<sup>228</sup> The Court was hedging its bets when it should have come out forcefully with a prohibition on forcible medication of a mentally ill defendant solely to make him competent for trial.

In sum, an individual has a constitutionally protected right to a fair trial. An individual's competency is an essential aspect of this right. Consequently, if the state compels the individual to involuntarily take antipsychotic medication it is significantly hindering the ability of a defendant to assist in his or her defense and thus have a fair trial. And as the Court in *Sell* stated, "the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one."<sup>229</sup> As such, the Court in *Sell* did take a significant step in solidifying the defendant's right to a fair trial, but missed an opportunity to transform Justice Kennedy's concurrence in *Riggins* into the law of the United States. Justice Kennedy's belief—that a state's interest in bringing a competent defendant to trial will most likely never be compelling enough to overcome the defendant's right to a fair trial, given the substantial side effects of antipsychotic drugs—was tailor made for the issues presented in *Sell*. In failing to adopt a standard prohibiting forcible medication of a mentally ill defendant with antipsychotic drugs for the sole purpose of rendering him competent to stand trial, the Court missed an opportunity to align this area soundly with the Constitution.

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<sup>226</sup> Brief for American Psychiatric Association at 13, *Riggins v. Nevada*, 504 U.S. 127 (1992) (No. 90-8466). *But see* Brief for the American Psychiatric Association, *Sell* (No. 02-5664) (giving an alternative conclusion to the effects of antipsychotic medication).

<sup>227</sup> 504 U.S. 127, 140 (1992) (Kennedy, J., concurring).

<sup>228</sup> 123 S. Ct. at 2187.

<sup>229</sup> *Id.* at 2184.

### C. THE COURT EXTENDED ITS STANDARD OF SERIOUSNESS OF THE CRIME TOO FAR

The test laid out by the Court in *Sell* allowed the government to involuntarily administer antipsychotic drugs to a mentally ill defendant facing *serious* criminal charges.<sup>230</sup> If one admits that the Court was correct in formulating such a test, there still remains the glaring issue of whether Sell's alleged crimes were serious. The Court stated that the Government's interest in bringing to trial an individual accused of a serious crime was important.<sup>231</sup> This important interest remained whether the offense was a serious crime against a person or a serious crime against property.<sup>232</sup> While admittedly there might be some circumstances where there is a serious crime against property, it seems that these circumstances would be rare and would most certainly not be serious enough to override an individual's liberty interest along with a defendant's right to a fair trial.

The sentencing guidelines for crimes against property could provide a solid bright line test as to whether the crime reaches the level of serious. The Court should have defined this line and clearly stated that based on the sentencing guidelines, crimes of fraud do not reach the level of seriousness that would allow for a violation of an individual's liberty interest.<sup>233</sup> It is clear that Sell's individual liberty interest to be free from unwanted medication greatly outweighed the State's interest in prosecuting him for fraud and money-laundering.<sup>234</sup> The sentencing guidelines for such crimes are monetary-based and as such should not lead to a deprivation of a defendant's liberty interest.<sup>235</sup>

The above facts clearly distinguish *Sell* from *Riggins*, a case in which the defendant was accused of murder.<sup>236</sup> It can be legitimately argued that the State has a strong and essential interest in bringing an accused murderer to trial. Murder is a crime with a clear victim and one that has historically been recognized as the most heinous offense committed by persons. However, when the crime is one solely involving property, that essential interest lessens and the individual's liberty interest cannot be ignored. An individual's right to bodily integrity and to be free from intrusion is a sacred

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<sup>230</sup> *Id.* at 2185.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *United States v. Sell*, 282 F.3d 560, 572 (8th Cir. 2002) (Bye, J., dissenting) (stating that based on the money involved in the alleged crimes, Dr. Sell would serve somewhere in the range of thirty-three to forty-one months).

<sup>234</sup> *Id.* (Bye, J., dissenting).

<sup>235</sup> *Id.* at 573 (Bye, J., dissenting).

<sup>236</sup> 504 U.S. 127 (1992).

right and crimes such as wire fraud and money-laundering, which are crimes that need to be punished, do not warrant pushing aside that right. An individual should not be forced to take antipsychotic drugs in order to be prosecuted for such crimes.<sup>237</sup> The possible debilitating and life-long side effects, along with the impairing of a right to a fair trial, do not justify the forcible medication of an individual to further the state's interest.<sup>238</sup>

In conclusion, it was error for the Court in *Sell* to use the seriousness of the crimes in *Riggins* as a basis for the test used in *Sell*. Although the Court refused to uphold the authorization of antipsychotic drugs in both cases, it set out a dangerous precedent. Theoretically, an individual could be forcibly medicated with antipsychotic drugs to become competent to stand trial for nonviolent crimes involving such limited punishment as thirty-three months in prison.<sup>239</sup> The "seriousness of the crime standard" laid out by the Court in *Sell* significantly curtails the liberty interest of an individual to be free from any unwanted bodily intrusion and deprives a defendant of a right to a fair trial.

#### D. THE DISSENT AND THE FINAL JUDGMENT RULE

The main point of the dissent, written by Justice Scalia,<sup>240</sup> was that an order authorizing involuntary medication of antipsychotic drugs is not appealable as a collateral order.<sup>241</sup> Justice Scalia relied on the final judgment rule which states that only *final judgments* by the trial court are appealable.<sup>242</sup> However, the collateral order doctrine, first formulated by the Court in *Coopers & Lybrand v. Livesay*, allows for certain appeals *prior to* the final judgment.<sup>243</sup> As stated above, the collateral order doctrine allows appeals prior to a final judgment if they concern orders that (1) conclusively determine the matter in dispute, (2) resolve an important issue wholly separate from the issue of the case, and (3) are effectively unreviewable on appeal from final judgment.<sup>244</sup> While the majority found that the District Court's order met these requirements, Justice Scalia found that it failed the third requirement of the doctrine.<sup>245</sup>

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<sup>237</sup> *Sell*, 282 F.3d at 574 (Bye, J., dissenting).

<sup>238</sup> For a list of the side-effects of antipsychotic medication, see *supra* Part II-A.

<sup>239</sup> *Sell*, 282 F.3d at 574 (Bye, J., dissenting).

<sup>240</sup> Joined by Justice O'Connor and Justice Thomas.

<sup>241</sup> *Sell v. United States*, 123 S. Ct. 2174, 2187 (2003) (Scalia, J., dissenting).

<sup>242</sup> 28 U.S.C. § 1291 (1994).

<sup>243</sup> 437 U.S. 463 (1978).

<sup>244</sup> *Id.* at 468.

<sup>245</sup> *Sell*, 123 S. Ct. at 2189 (Scalia, J., dissenting).

Consequently, Justice Scalia would have such an order heard on appeal only *after* a final judgment (guilt or innocence) was made.<sup>246</sup> Justice Scalia relied on the decision in *Riggins*, in which an order authorizing forcible medication of antipsychotic drugs was appealed after the case, as demonstrating the allowance of such an appeal after conviction and sentencing.<sup>247</sup> He argued that the majority in *Sell* was “wrong” to say that an appeal of such an order comes too late for the defendant to enforce his right to be free of unwanted mind-altering medication.<sup>248</sup> He conceded that the defendant would not get the *type* of remedy sought, but he did not explain exactly what type of remedy the defendant would receive.<sup>249</sup> In doing so, Justice Scalia completely ignored the reality of the third prong of the collateral doctrine. The majority got it right by concluding that an appeal comes too late for the defendant wishing to refuse antipsychotic medication.<sup>250</sup> Not only did Justice Scalia ignore the black letter law but he refused to recognize an individual’s liberty interest to be free from forced medication by the state.<sup>251</sup> As stated above, the Constitution and numerous court decisions have recognized this right and it has been strictly enforced. Justice Scalia was so worried about the “invented” narrow exception to the final decision rule that he ignored the fact that the defendant would already have been harmed, possibly irreparably, by the time Justice Scalia would allow such an appeal.<sup>252</sup>

Similarly, Justice Scalia feared the broad repercussions that would result from the Court’s holding.<sup>253</sup> He was concerned that a defendant would voluntarily take the medication until halfway through the trial and then cease, abruptly demanding an interlocutory appeal.<sup>254</sup> This reasoning completely ignores any liberty interest a defendant may have. Justice Scalia was so afraid of the disruption of the judicial system that he failed to recognize that the criminal defendant has rights and is presumed innocent. His logic seemed to rest on the assumption that a defendant has reduced rights. While it can be argued that a convicted inmate might have reduced liberty interests, as found in *Harper*, this in no way should extend to a pretrial detainee.

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<sup>246</sup> *Id.* at 2188 (Scalia, J., dissenting).

<sup>247</sup> *Id.* at 2189 (Scalia, J., dissenting).

<sup>248</sup> *Id.* (Scalia, J., dissenting).

<sup>249</sup> *Id.* (Scalia, J., dissenting).

<sup>250</sup> *Id.* at 2183.

<sup>251</sup> *Id.* at 2189-90 (Scalia, J., dissenting).

<sup>252</sup> *Id.* at 2190 (Scalia, J., dissenting).

<sup>253</sup> *Id.* (Scalia, J., dissenting) (stating that “[t]oday’s narrow holding will allow criminal defendants in petitioner’s position to engage in opportunistic behavior”).

<sup>254</sup> *Id.* (Scalia, J., dissenting).

Justice Scalia also was deeply concerned that the majority's ruling would create a "breathtaking expansion" of appellate jurisdiction over interlocutory orders.<sup>255</sup> Justice Scalia believed that any criminal defendant who asserts that a trial order would cause an immediate violation of his constitutional rights could immediately appeal.<sup>256</sup> However, as the majority noted, the considerations of the severity of the intrusion and the importance of the constitutional issue involved, distinguished Sell's case from Justice Scalia's examples.<sup>257</sup> The Court was correct in dismissing Justice Scalia's argument in one sentence. His "the sky is falling" approach to judicial economy completely ignored the important constitutional rights of a criminal defendant. If Justice Scalia were to have his way a defendant could only challenge the order forcibly medicating him *after* he had been medicated and possibly irreparably harmed, both during trial and after, by their serious side effects. This reasoning completely ignores both the collateral order doctrine and the fundamental principle of liberty embodied in both the Fifth and Fourteenth Amendments of the Constitution.

#### V. CONCLUSION

The Court in *Sell* held that a mentally ill criminal defendant facing serious criminal charges could be forcibly medicated with antipsychotic drugs if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking into account less intrusive alternatives, is significantly necessary to further important governmental trial-related interests.<sup>258</sup> While the Court made strong overtures that it would be unlikely that a lower court would ever be able to meet the strict standard set forth in its decision, it failed to take the extra step and prohibit forcible administration of antipsychotic drugs solely to render a defendant competent to stand trial.

Every individual has a constitutionally based liberty interest in being free from unwanted bodily intrusions. This liberty interest will always outweigh the State's interest in bringing a defendant to trial. In addition, every criminal defendant has a constitutionally guaranteed right to a fair trial. When a defendant is forcibly medicated to become competent to stand trial this right is severely jeopardized because of the harmful side effects of antipsychotic drugs. Finally, the dissent completely ignored the black letter law of the final judgment rule and the collateral order doctrine, along with

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<sup>255</sup> *Id.* (Scalia, J., dissenting).

<sup>256</sup> *Id.* (Scalia, J., dissenting).

<sup>257</sup> *Id.* at 2182.

<sup>258</sup> *Id.* at 2184-85.

ignoring any rights a criminal defendant may have in favor of judicial economy.

In sum, the Court in *Sell* set up a strict standard but should have held that forcible medication of a mentally ill defendant solely to render him or her competent to stand trial would always violate her liberty interest and deprive the defendant of a right to a fair trial.

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