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Sell v. United States: Involuntary Administration of Antipsychotic Medication to Criminal Defendants

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SELL V. UNITED STATES: INVOLUNTARY ADMINISTRATION OF ANTIPSYCHOTIC MEDICATION TO CRIMINAL DEFENDANTS

I. INTRODUCTION

The right to bodily integrity and the right to refuse medical treatment are well recognized in America.[1] These rights protect a person's ability to control what is done to his body. "Our legal system is premised upon a principle of autonomy for individuals, particularly in making decisions which principally affect their own lives."[2] Based on the recognition of personal autonomy in *Washington v. Harper*,[3] the Supreme Court held that a substantive due process interest exists in refusing unwanted antipsychotic medication[4] when a prison inmate poses a proven danger to himself or to others.[5] In *Riggins v. Nevada*,[6] however, the Court indicated that the constitutionality of forcibly medicating a nondangerous defendant to promote other governmental interests remained unsettled.[7]

Recently, in *Sell v. United States*,[8] the Court resolved the issue by holding that the government may in certain circumstances forcibly administer antipsychotic drugs to a mentally ill criminal

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1. *See* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 836 (2003); David M. Siegel et al., *Old Law Meets New Medicine: Revisiting Involuntary Psychotropic Medication of the Criminal Defendant*, 2001 WIS. L. REV. 307, 325 (2001).

2. Siegel et al., *supra* note 1, at 357.

3. 494 U.S. 210 (1990).

4. *See id.* at 221–22. Antipsychotic drugs are typically grouped under the broader category of psychotropic drugs. *See* Justine A. Dunlap, *Mental Health Advance Directives: Having One's Say?*, 89 KY. L.J. 327, 332 n.23 (2001). Psychotropic drugs are "pharmacological agents used to treat psychiatric disorders." *Id.* (quoting 2 KAPLAN AND SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2241 (Benjamin J. Sadock & Virginia A. Sadock eds., 7th ed. 2000)).

5. *See Harper*, 494 U.S. at 227.

6. 504 U.S. 127 (1992).

7. *See id.* at 136.

8. 123 S. Ct. 2174 (2003).

defendant to render him competent to stand trial for serious crimes.[9] Part II of this note discusses the legal competence standard and the effect involuntary administration of antipsychotic drugs has on this standard. Part III discusses the background of *Sell* and analyzes the majority and dissenting opinions. Part IV examines potential impacts of the *Sell* decision on criminal law.

II. LEGAL COMPETENCE AND INVOLUNTARY MEDICATION

While the issue of whether a criminal defendant is competent to stand trial is purely a legal question, the issue is not resolved by consulting the law.[10] Instead, a court must rely on the results of a mental competence assessment performed by a mental health professional to decide if the criminal defendant is competent to stand trial.[11] "[A] criminal defendant must be mentally competent at all stages of the proceedings,"[12] thus requiring the defendant to demonstrate "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[13]

If a court finds the defendant incompetent, "he is typically sent to a . . . mental hospital to be 'restored' to competency."[14] Most defendants found to be incompetent suffer from some type of delusional disorder, usually treated with antipsychotic medications to suppress symptoms such as hallucinations and delusions.[15] Ordinarily, "when a person is 'civilly committed' to a mental health fa-

9. *See id.* at 2178.

10. *See* Jessica Wilen Berg et al., *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 RUTGERS L. REV. 345, 348–49 (1996).

11. *See id.* Mental health professionals focus on various criteria—the most common of which are cognitive. *See id.* at 349. The four cognitive factors of the competence standard are: "(i) ability to communicate a choice, (ii) ability to understand relevant information, (iii) ability to appreciate the nature of the situation and its likely consequences, and (iv) ability to manipulate information rationally." *Id.* at 351.

12. Elaine Cassel, *Medicating the Mentally Ill for Trial and Execution: What Are the Implications of the Supreme Court's Recent Decision?*, *at* http://writ.news.findlaw.com/cassel/20030703.html (Mar. 29, 2004); Dunlap, *supra* note 4, at 365.

13. Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam).

14. Cassel, *supra* note 12.

15. *Id.* Antipsychotic drugs "alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes." Washington v. Harper, 494 U.S. 210, 229 (1990).

cility, he . . . cannot be medicated against his . . . will unless necessary to keep him from harming himself or others."[16] Following the *Sell* decision, defendants facing criminal charges may now be forced to take antipsychotic medication solely to render them competent to stand trial.[17]

The administration of antipsychotic medication is considered voluntary if the medication is administered with the defendant's informed consent. In *Weiss v. Missouri Department of Mental Health*,[18] the United States District Court for the Eastern District of Missouri held that employees of a mental hospital may administer an antipsychotic drug to a patient with the patient's informed consent.[19] The United States Court of Appeals for the Ninth Circuit in *Benson v. Terhune*[20] held that where a defendant accepts or fails to refuse the administration of antipsychotic medication without information about the drugs, there is no forced administration of the drugs.[21] The court stated that although jail is a coercive setting, a prisoner is not presumed to be coerced.[22] Furthermore, situations may exist where the medication might render the prisoner incapable of refusing further treatment.[23] These circumstances require judicial review of the specific facts of the case.[24]

Administration of antipsychotic medication is considered involuntary once a court denies a defendant's motion to terminate it. The Supreme Court in *Riggins v. Nevada*[25] held that once a defendant moves to terminate the administration of antipsychotic medication during a trial, the act of forcibly administering antipsychotic medication becomes involuntary.[26] Therefore, the state becomes obligated to establish the need for the drug and the

16. Cassel, *supra* note 12. In *Addington v. Texas*, 441 U.S. 418 (1979), the Court defined civil commitment as "a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital." *Id.* at 419–20.

17. *See* Sell v. United States, 123 S. Ct. 2174, 2184–85 (2003).

18. 587 F. Supp. 1157 (E.D. Mo. 1984).

19. *See id.* at 1161. Interestingly, the defendant in *Weiss* voluntarily took the drug without being advised of its potential side effects. *Id.*

20. 304 F.3d 874 (9th Cir. 2002).

21. *See id.* at 884–85.

22. *See id.* at 882.

23. *See id.* at 885.

24. *See id.* at 882.

25. 504 U.S. 127 (1992).

26. *See id.* at 133.

medical appropriateness of the drug.[27] In *Sell v. United States*, the Court expanded the *Riggins* analysis into a four-part test used to determine when antipsychotic drugs can be administered involuntarily to criminal defendants.[28]

III. *SELL V. UNITED STATES*

A. *Background*

In May 1997, Dr. Charles Sell, D.D.S., was charged in a federal criminal complaint with submitting fictitious insurance claims for payment.[29] The government filed a motion to compel a psychiatric examination of Sell to determine his competence to stand trial.[30] The court ordered that Sell be sent to the United States Medical Center for Federal Prisoners ("Medical Center") for a psychiatric evaluation.[31] After Sell's psychiatric evaluation, the United States District Court for the Eastern District of Missouri found Sell competent to stand trial, but noted "that there was a possibility that [Sell] would develop a psychotic episode in the future."[32] The grand jury indicted Sell on fifty-six counts of mail fraud, six counts of Medicaid fraud, and one count of money laundering.[33] In August 1997, Sell was released on bond.[34]

The United States filed a bond revocation petition alleging that Sell had violated the conditions of his release by intimidating a witness in January 1998.[35] At the bail revocation hearing, Sell's behavior was "out of control."[36] "He screamed, shouted, and used

27. *See id.* at 135.

28. *See* 123 S. Ct. 2174, 2184–85 (2003).

29. United States v. Sell, 282 F.3d 560, 562 (8th Cir. 2002). The government alleged that "Sell and his wife submitted false claims to Medicaid and private insurance companies for dental services not provided." *Id.*

30. *Id.* Sell has a long history of mental illness. In September 1982, Sell was hospitalized for the first time. *See* 123 S. Ct. at 2179 (2003). Then in June 1984, Sell was hospitalized again. *Id.*

31. 282 F.3d at 562.

32. *Id.* at 562–63.

33. *Id.* at 563.

34. *See id.*

35. *Id.*

36. *Id.*

racial epithets."[37] Consequently, "the court ordered that Sell's bond be revoked and that he be detained."[38] Then, in April 1998, a second indictment was issued charging Sell with attempting to murder both the FBI agent who had arrested him and a former employee who planned to testify against him in the fraud case.[39]

In February 1999, Sell filed a motion asking the court to reconsider whether he was competent to stand trial.[40] The court found that Sell suffered from a mental disease, which rendered him incompetent for trial.[41] Therefore, Sell was ordered to return to the Medical Center to determine whether he could "attain the capacity to stand trial."[42]

The Medical Center staff sought permission from institutional authorities to administer antipsychotic drugs to Sell involuntarily.[43] At an administrative hearing,[44] before a medical hearing officer, the staff testified that using antipsychotic medication was the only way Sell could be restored to competency.[45] However, Sell testified that he did not wish to take the medication.[46] The hearing officer authorized involuntary administrations of antipsychotic drugs, stating that Sell's "delusional thinking could make him dangerous and that no other drug could treat his delusional symptoms."[47] The Medical Center then reviewed the finding of the medical hearing officer and concluded that antipsychotic medica-

37. *Id.* When Sell was advised of his rights, he leaned towards the judge and spit in her face. *Id.*

38. *Id.* At the hearing, the court heard testimony from a psychiatrist that Sell could soon become a danger to himself and others. *Id.*

39. *Id.* The attempted murder and fraud cases were joined for trial. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* "The court ordered that Sell be hospitalized . . . for a reasonable period of time not to exceed four months . . . ." *Id.*

43. *See id.* at 563–64.

44. 28 C.F.R. § 549.43 provides the standards and procedures used to determine whether a person in custody may be involuntarily medicated. *See* 28 C.F.R. § 549.43 (2003). Before an individual can be medicated, a psychiatrist must determine whether medication "is necessary in order to attempt to make the inmate competent for trial or is necessary because the inmate is dangerous to self or others, is gravely disabled, or is unable to function in the open population of a mental health referral center or a regular prison." 28 C.F.R. § 549.43(a)(5).

45. 282 F.3d at 564.

46. *Id.*

47. *Id.*

tion represented the treatment "most likely to ameliorate Sell's symptoms."[48]

In July 1999, Sell contested the Medical Center's "right involuntarily to administer antipsychotic drugs."[49] Medical Center staff testified that Sell's condition would deteriorate without antipsychotic medication and that the medication was likely to restore Sell to competency.[50] The magistrate judge, finding that Sell was a danger to himself and others at the Medical Center, issued an order authorizing the Medical Center to involuntarily administer antipsychotic drugs to Sell, but the judge stayed the order to allow Sell to appeal the issue.[51]

The district court issued an opinion affirming the magistrate's order to allow Sell's involuntary medication.[52] The court found that antipsychotic drugs were not only "'medically appropriate'" but also the "'only viable hope of rendering [Sell] competent to stand trial.'"[53] The court opined that the "'[a]dministration of such drugs appears necessary to serve the government's compelling interest in obtaining an adjudication of defendant's guilt or innocence of numerous and serious charges.'"[54] The district court "reversed the magistrate's finding that Sell posed a danger to himself and others."[55] Both parties appealed the district court's finding.[56]

The United States Court of Appeals for the Eighth Circuit affirmed the district court's order requiring medication to render Sell competent to stand trial.[57] The court concluded that the "government has an essential interest in bringing a defendant to trial."[58] As the court determined, no less intrusive means existed;

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48. Sell v. United States, 123 S. Ct. 2174, 2180 (2003) (internal quotations omitted). The prison official characterized Sell as a potential risk to the safety of the community. *Id.* (citation omitted).

49. *Id.*

50. 282 F.3d at 564.

51. *See Sell*, 123 S. Ct. at 2180–81; *see also* United States v. Sell, No. 4:97CR290-DJS, 2000 U.S. Dist. LEXIS 22425, at *1–3 (E.D. Mo. Aug. 23, 2000).

52. *Sell*, 123 S. Ct. at 2181.

53. *Id.* (citation omitted).

54. *Id.* (citation omitted).

55. United States v. Sell, 282 F.3d at 565.

56. *See id.*

57. *Id.* at 572. The court of appeals agreed with the district court that Sell was not a danger to himself or others at the Medical Center. *See id.* at 565.

58. *Id.* at 568.

therefore, antipsychotic drug treatment was medically appropriate.[59] The court added that the "medical evidence presented indicated a reasonable probability that Sell [would] fairly be able to participate in his trial."[60] Judge Bye dissented, arguing that the charges against Sell were "not sufficiently serious to forcibly inject him with antipsychotic drugs on the chance it [would] make him competent to stand trial."[61] Sell appealed; the United States Supreme Court granted certiorari and vacated the judgment of the United States Court of Appeals for the Eighth Circuit.[62] The determinative question before the Court was whether the government is permitted "to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious . . . crimes."[63]

B. *Majority Opinion*

1. Jurisdiction

Justice Breyer began the majority opinion[64] by examining whether the appellate court had jurisdiction to hear Sell's appeal of the district court's pretrial order.[65] Justice Breyer acknowledged that although "[t]he law normally requires a defendant to wait until the end of the trial to obtain appellate review of a pretrial order,"[66] federal statutory law[67] permits federal appellate courts to review "final decisions of the district courts."[68]

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59. *See id.* at 568, 571.

60. *Id.* at 572.

61. *Id.* (Bye, J., dissenting).

62. Sell v. United States, 123 S. Ct. 2174, 2187 (2003).

63. *Id.* at 2178.

64. Chief Justice Rehnquist, Justices Stevens, Kennedy, Souter, and Ginsburg joined Justice Breyer in delivering the majority opinion. *Id.*

65. *See id.* at 2181–82. In analyzing the issue of jurisdiction, Justice Breyer supplied the factual and procedural background of the order in question:

> [The District Court's] judgment affirmed a Magistrate's order requiring Sell involuntarily to receive medication. The Magistrate entered that order pursuant to an earlier delegation from the District Court of legal authority to conduct pretrial proceedings. The order embodied legal conclusions related to the Medical Center's administrative efforts to medicate Sell; these efforts grew out of Sell's provisional commitment; and that provisional commitment took place pursuant to an earlier Magistrate's order seeking a medical determination about Sell's future competence to stand trial.

Id. at 2187 (citation omitted).

66. *Id.*

Sell had not yet been tried for the crimes charged because of the pretrial issue involving his mental competency. Recognizing this problematic scenario, the Court pointed out that the law has created exceptions to the general appellate review rule.[69] As Justice Breyer also noted, "a preliminary or interim decision is appealable as a 'collateral order' when it (1) 'conclusively determine[s] the disputed question,' (2) 'resolve[s] an important issue completely separate from the merits of the action,' and (3) is 'effectively unreviewable on appeal from a final judgment.'"[70]

Justice Breyer concluded that Sell's pretrial order fell within the collateral order exception.[71] First, Justice Breyer explained that the pretrial order "conclusively determine[d] the disputed question . . . whether Sell ha[d] a legal right to avoid forced medication."[72] Secondly, the pretrial order resolved an important issue, since "involuntary medical treatment raises questions of clear constitutional importance."[73] Justice Breyer also noted that the issue of whether Sell could be forced to take antipsychotic medication was separate from the question of whether Sell was guilty of the crimes charged.[74] Lastly, the pretrial order would be unreviewable on appeal from a final judgment. After all, "[b]y the time of trial Sell [would] have undergone forced medication—the very harm that he [was seeking] to avoid. He [could not] undo that harm even if he [were] acquitted. Indeed, if he [were] acquitted, there [would] be no appeal through which he might obtain review."[75] Therefore, the pretrial order that Sell appealed was an appealable collateral order, and the appellate court had jurisdic-

67. *See* 28 U.S.C. § 1291 (2000).

68. *Id.* Justice Breyer defined the term "final decision" as referring to a "final judgment, such as a judgment of guilt, that terminates a criminal proceeding." 123 S. Ct. at 2182.

69. *See* 123 S. Ct. at 2182.

70. *Id.* (alterations in original) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

71. *See id.*

72. *Id.* (internal quotations omitted).

73. *Id.* (internal quotations omitted).

74. *See id.* (citation omitted). Additionally, Justice Breyer clarified that the question presented—whether Sell had a right to avoid forced medication—was different from the question of whether forced medication made a criminal trial unfair. *Id.* at 2182–83. "The first question focuses upon the right to avoid administration of the drugs. What may happen at trial is relevant, but only as a prediction." *Id.* at 2183. However, the second question asks what actually *did* happen because the medication was administered. *Id.*

75. *Id.* at 2182.

tion to hear the appeal. Consequently, the Supreme Court had jurisdiction to decide whether involuntary medication violated Sell's constitutional rights.[76]

2. The Constitutional Issue

Once the majority determined that the pretrial order was an appealable collateral order and the appellate court had proper jurisdiction to hear the appeal, the Court addressed the important question presented: "Does forced administration of antipsychotic drugs to render Sell competent to stand trial unconstitutionally deprive him of his 'liberty' to reject medical treatment?"[77] The Supreme Court determined that the involuntary administration of drugs to an individual accused of a crime to make him competent to stand trial does not violate that individual's Fifth Amendment "liberty" rights as long as it is necessary to "further important governmental trial-related interests."[78] The Court determined that the lower courts had not ordered Sell to involuntarily receive antipsychotic medication solely to render him competent to stand trial.[79] Consequently, the Court vacated the Eighth Circuit's holding that Sell was properly medicated.[80] The Court relied on two prior cases to reach this conclusion, *Washington v. Harper*[81] and *Riggins v. Nevada*.[82]

a. Precedent

In *Harper*, the Court first recognized that an individual has "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."[83] However, the Court held that "the

76. *Id.* at 2183.

77. *Id.* Justice Breyer cited the Fifth Amendment, which states that the government may not "deprive[e]" any person of "liberty . . . without due process of law." U.S. CONST. amend. V.

78. 123 S. Ct. at 2184.

79. *See id.* at 2187.

80. *Id.*

81. 494 U.S. 210 (1990).

82. 504 U.S. 127 (1992).

83. 494 U.S. at 221–22.

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 dangerous to himself or others and the treatment is in the inmate's medical interest."[84] While the Court recognized that the defendant had a significant liberty interest in precluding any involuntary administration of antipsychotic drugs,[85] the Court determined that the state's interest was legitimate in light of "the danger that an inmate suffering from a serious mental disorder represents to himself or others."[86]

Two years later, in *Riggins,* the Court reiterated that "forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness."[87] The Court suggested that an overriding justification for involuntary administration of drugs exists when "treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of [the defendant's] own safety or the safety of others."[88]

The *Sell* Court stated that these two cases

> 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 the 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.[89]

The Court enumerated a four-part test, which will allow involuntary medication only in instances where all four of the factors are fulfilled.[90]

84. *Id.* at 227.
85. *Id.* at 221.
86. *Id.* at 236.
87. 504 U.S. at 135.
88. *Id.*
89. Sell v. United States, 123 S. Ct. 2174, 2184 (2003) (emphasis added).
90. *See id.* at 2184–85.

b. The Resulting *Sell* Test

First, the involuntary administration of medication to a defendant must further an important governmental interest.[91] The government's interest in bringing to trial an individual accused of committing a serious crime is considered an important interest.[92] In *Illinois v. Allen*,[93] Justice Brennan stated that the "[c]onstitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace."[94] However, Justice Breyer in *Sell* concluded that courts "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."[95] For example, if the defendant refuses to take antipsychotic medication voluntarily, then he may be confined to a mental institution.[96] Being institutionalized "diminish[es] the risks that ordinarily attach to freeing without punishment one who has committed a serious crime."[97] The Court recognized that the government has a "substantial interest in timely prosecution."[98] However, this interest is weakened when the defendant regains mental competency after years of being institutionalized[99] or when the defendant has "been confined for a significant amount of time," receiving credit toward any sentence imposed.[100]

Second, a court must conclude that involuntary medication will "significantly further" these important governmental interests.[101] The administration of antipsychotic drugs must be found "substantially likely to render the defendant competent to stand trial."[102] Additionally, the administration of the medication must be found "substantially unlikely to have side effects that will in-

91. *See id.* at 2184.
92. *Id.*
93. 397 U.S. 337 (1970).
94. *Id.* at 347 (Brennan, J., concurring).
95. 123 S. Ct. at 2184.
96. *Id.*
97. *Id.*
98. *Id.*
99. *See id.* The Court remarked that during commitment, "memories may fade and evidence may be lost," making it "difficult or impossible" to try the defendant. *Id.*
100. *Id.*; *see also* 18 U.S.C. § 3585(b) (2000) (outlining the guidelines for receiving credit for prior custody).
101. 123 S. Ct. at 2184.
102. *Id.*

terfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair."[103] In *Riggins,* Justice Kennedy stated that antipsychotic drugs "can prejudice the accused in two principal ways: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and (2) by rendering him unable or unwilling to assist counsel."[104] Furthermore, Justice Kennedy noted that in every case, the state must show that "there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel."[105]

Third, a court must conclude that involuntary medication is *necessary* to further the governmental interests.[106] This requires the trial court to consider any alternative, less intrusive, form of treatment.[107] A court must also find that such alternative treatment is "unlikely to achieve substantially the same results" as antipsychotic medication.[108] If the court concludes that antipsychotic medication is necessary to further the important governmental interests, then it must consider less intrusive means for administering the drugs.[109]

Finally, a court must decide that the administration of antipsychotic drugs is "medically appropriate" or in the patient's best medical interest.[110] This requirement ensures that the defendant is not harmed by medication intended to improve his mental state. The side effects caused by each type of antipsychotic drug are important in this analysis as is the level of success of each drug.[111]

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103. *Id.* at 2184–85.

104. Riggins v. Nevada, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring). In *United States v. Santonio,* No. 2:00-CR-90C, 2001 U.S. Dist. LEXIS 5892 (C.D. Utah May 4, 2001), the court held that the defendant could not be forcibly medicated with antipsychotic medication and that antipsychotic drugs might create a negative demeanor in a defendant that could be prejudicial. *See id.* at *14–16. The court considered that the medication might cause the defendant to appear nervous, bored, or unfeeling. *Id.* at *15. The medication could also diminish the defendant's ability to communicate with counsel or to the jury, thereby limiting the defendant's ability to fully participate in his own defense. *Id.*

105. *Riggins,* 504 U.S. at 141 (Kennedy, J., concurring).

106. 123 S. Ct. at 2185.

107. *Id.*

108. *Id.*

109. *See id.*

110. *Id.*

111. *See id.*

c. Involuntary Medication May Be Justified on Other Grounds

The Court emphasized that applying the four-part test only determines "whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant *competent to stand trial*."[112] Involuntary medication may be warranted for different purposes, such as the dangerousness of the defendant or the health of the defendant.[113] In *Harper,* the Court stated that "[w]here an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness."[114] Consequently, the drugs are being administered for the sole purpose of medical treatment.

Justice Breyer advised lower courts to first consider these alternative grounds before turning to the trial competence question.[115] The analysis for whether medication is permissible to make the accused nondangerous is "both objective and manageable."[116] Justice Breyer suggested that medical personnel may find it easier to provide an opinion about whether antipsychotic drugs are necessary to control the defendant's dangerous behavior than to render an opinion that the drugs are necessary to make the defendant legally competent to stand trial.[117] If a court authorizes medication on these alternative grounds, there is no need to consider the trial competence issue.[118] Alternatively, if the court finds that medication is not authorized on these alternative grounds, the findings underlying its decision will help to decide

112. *Id.*

113. *See id.*

114. Washington v. Harper, 494 U.S. 210, 225–26 (1990).

115. *See* 123 S. Ct. at 2185.

116. Riggins v. Nevada, 504 U.S. 127, 140 (1992) (Kennedy, J., concurring).

117. *See* 123 S. Ct. at 2185; *see also* United States v. Kourey, 276 F. Supp. 2d 580, 580–81 (2003) (finding that grounds existed for involuntarily administering antipsychotic medication to the defendant because he was "'gravely disabled' by his mental condition and pose[d] a danger to himself").

118. *See* 123 S. Ct. at 2185–86; *see also In re* Robert S., 792 N.E.2d 421, 436–37 (Ill. App. Ct. 2003) (determining the forcible administration of antipsychotic drugs to be appropriate without considering the purpose of rendering the defendant competent to stand trial).

the trial competence issue.[119] Justice Breyer suggested that lower courts focus on questions such as:

> Why is it medically appropriate forcibly to administer antipsychotic drugs to an individual who (1) is *not* dangerous *and* (2) *is* competent to make up his own mind about treatment? Can bringing such an individual to trial *alone* justify . . . administration of a drug that may have adverse side effects, including side effects that may to some extent impair a defense at trial?[120]

Accordingly, the trial competence issue should then be easier for a court to decide.

d. Majority's Conclusion

The majority concluded that the Medical Center and the magistrate approved involuntary medication based primarily upon Sell's dangerousness to others.[121] However, both the district court and the court of appeals disagreed with the magistrate's conclusion regarding Sell's dangerousness and authorized involuntary medication in order to render Sell competent to stand trial.[122] Begrudgingly accepting the determination below that Sell was not dangerous,[123] Justice Breyer vacated the Eighth Circuit's holding that Sell was properly medicated.[124] Specifically, Justice Breyer noted that the magistrate had not approved involuntary medication on "trial competence grounds alone,"[125] expert witnesses had failed to "focus upon trial competence,"[126] and "the lower courts did not consider that Sell ha[d] already been confined . . . for a long period of time, and that his refusal to take antipsychotic drugs might result in further lengthy confinement."[127]

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119. *See* 123 S. Ct. at 2186.

120. *Id.*

121. *See id.*

122. *See id.*

123. *See id.* Justice Breyer accepted that Sell was not dangerous "*only* because the Government did not contest, and the parties [did] not argue[], that particular matter. If anything, the record . . . suggest[ed] the contrary." *Id.*

124. *Id.* at 2187.

125. *Id.*

126. *Id.* The Court explained that, as a consequence, "the experts did not pose important questions—questions, for example, about trial-related side effects and risks—the answers to which could have helped determine whether forced medication was warranted on trial competence grounds alone." *Id.*

127. *Id.* Sell's time served would count as credit toward a future sentence, *see* 18 U.S.C.

C. *Dissenting Opinion*

1. Lack of Final Judgment

Justice Scalia authored the dissenting opinion and was joined by Justices O'Connor and Thomas. The dissent argued that the district court never entered a final judgment in the case.[128] The court of appeals, the dissent argued, should have asked "whether it had any business entertaining [Sell's] appeal,"[129] and Justice Scalia attributed the failure to consider the jurisdiction question to the United States' refusal to contest the issue.[130] Justice Scalia concluded that the Supreme Court lacked jurisdiction to hear the case and advocated vacating the appellate court's decision.[131]

2. Appeal of the Administrative Hearing

As an initial matter, Justice Scalia criticized Sell for not appealing the administrative hearing, which authorized involuntary medication.[132] Sell could have obtained a review of the administrative hearing by filing suit under the Administrative Procedure Act,[133] or by filing a *Bivens*[134] action.[135] Either suit would have provided Sell with immediate appellate review of the administrative hearing decision.[136] Instead of appealing the result of the ad-

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§ 3585(b) (2000), whereas further confinement even without medication could weaken "the importance of the governmental interest." 123 S. Ct. at 2187.

128. *See*, 123 S. Ct. at 2187 (Scalia, J., dissenting).

129. *Id.* (Scalia, J., dissenting).

130. *See id.* at 2188 (Scalia, J., dissenting).

131. *See id.* (Scalia, J., dissenting) ("[*T*]*his* Court's cases do not authorize appeal from the District Court's April 4, 2001, order, which was neither a 'final decision' under § 1291 nor part of the class of specified interlocutory orders in § 1292.").

132. *See id.* (Scalia, J., dissenting). Sell did request an administrative appeal pursuant to 28 C.F.R. § 549.43(a)(6) (2003), which provides: "The inmate . . . may submit an appeal to the institution mental health division administrator regarding the decision within 24 hours of the decision." *See id.* at 2188 n.2 (quoting 28 C.F.R. § 549.43(a)(6) (2003)).

133. 5 U.S.C. § 702 (2000).

134. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

135. 123 S. Ct. at 2191 (Scalia, J., dissenting). A *Bivens* action is "available to federal pretrial detainees challenging the conditions of their confinement." *Id.* (Scalia, J., dissenting). For additional discussion of recent Supreme Court jurisprudence concerning *Bivens*, see Matthew G. Mazefsky, Note, Correctional Services Corporation v. Malesko: *Unmasking the Implied Damage Remedy*, 37 U. RICH. L. REV. 639, 639–62 (2003).

136. *See* 123 S. Ct. at 2191 (Scalia, J., dissenting).

ministrative hearing to federal court, Sell requested a hearing regarding the right to refuse antipsychotic medication in the district court where his criminal charges were pending.[137] The pretrial order, which resulted from the hearing Sell requested, is the same order appealed to the Supreme Court.[138] Since Sell chose "to challenge his forced medication in the context of a criminal trial, he must abide by the limitations attached to such a challenge—which [would] prevent him from stopping the proceedings in their tracks."[139] Justice Scalia concluded that Sell's "mistaken litigation strategy, and [the majority's] desire to decide an interesting constitutional issue, [did] not justify a disregard of the limits that Congress has imposed on courts of appeals' . . . jurisdiction."[140]

3. Collateral Order Exception

The dissent did recognize the collateral order exception to the final judgment rule, but not as broadly as the majority. Justice Scalia identified the collateral order exception as a "narrow exception" invented by the Supreme Court.[141] Justice Scalia concluded that the pretrial order in dispute did not satisfy the third requirement of the collateral order exception.[142]

Relying on *Riggins v. Nevada*, Justice Scalia concluded that the pretrial order would only be reviewable on appeal from conviction and sentence.[143] In *Riggins,* the defendant was involuntarily medicated while being institutionalized before his criminal trial.[144] On appeal from his murder conviction, Riggins argued

137. *See id.* at 2188 (Scalia, J., dissenting).

138. *See id.* (Scalia, J., dissenting). Justice Scalia stated that "[i]t is not apparent why this order was necessary, since the Government had *already* received authorization to medicate [Sell] pursuant to [the administrative hearing]." *Id.* at 2188 n.3 (Scalia, J., dissenting). Justice Scalia argued that if the district court had not entered the pretrial order, the administrative hearing decision ordering Sell to take antipsychotic medication would remain in effect. *Id.* (Scalia, J., dissenting).

139. *Id.* at 2191 (Scalia, J., dissenting).

140. *Id.* (Scalia, J., dissenting).

141. *See id.* at 2189 (Scalia, J., dissenting). Justice Scalia noted "I use the term 'invented' advisedly. The statutory test provides no basis." *Id.* at 2189 n.4 (Scalia, J., dissenting).

142. *Id.* at 2189. The third requirement of the collateral order exception is that the order must be unreviewable on appeal from a final judgment. *Id.* (Scalia, J., dissenting) (citing Riggins v. Nevada, 504 U.S. 127 (1992)).

143. *See* 123 S. Ct. at 2189 (Scalia, J., dissenting).

144. *See Riggins*, 504 U.S. at 133.

that the government had violated the "full and fair" trial standard set forth in *Harper*.[145] The *Riggins* Court held that involuntary medication of a criminal defendant that violates the *Harper* test entitles the defendant to a reversal of his criminal convictions.[146] Therefore, Justice Scalia concluded that the majority was wrong to say Sell's pretrial order fell within the collateral order exception.[147] Justice Scalia recognized that if Sell "must wait until final judgment to appeal, he will not receive the *type* of remedy he would prefer—a predeprivation injunction rather than the post-deprivation vacatur of conviction provided by *Riggins*."[148] However, the defendant's preference of the type of remedy has been rejected by several Supreme Court cases.[149]

Justice Scalia criticized the majority for not interpreting the collateral order exception "'with the *utmost strictness*.'"[150] As Justice Scalia explained: "In the 54 years since we invented the exception, we have found only three types of prejudgment orders in criminal cases appealable: denials of motions to reduce bail, denials of motions to dismiss on double-jeopardy grounds, and denials of motions to dismiss under the Speech or Debate Clause."[151] Sell's pretrial order does not involve any of the recognized exceptions, thus, the dissent argued, the collateral order exception did not apply.

Justice Scalia speculated as to what the four-part *Sell* test could be extended to permit:

> A trial-court order requiring the defendant to wear an electronic bracelet could be attacked as an immediate infringement of the constitutional right to "bodily integrity"; an order refusing to allow the defendant to wear a T-shirt that says "Black Power" in front of the

145. *See id.*

146. *See id.* at 135–38.

147. *See* 123 S. Ct. at 2189 (Scalia, J., dissenting).

148. *Id.* (Scalia, J., dissenting).

149. *See id.* (Scalia, J., dissenting). Specifically, the Court cited: *Flanagan v. United States*, 465 U.S. 259, 270 (1984) (disallowing an appeal of an order disqualifying defense counsel); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982) (disallowing an appeal of an order denying a motion to dismiss the indictment on grounds of prosecutorial vindictiveness); and *Carroll v. United States*, 354 U.S. 394, 414–15 (1957) (disallowing an appeal of an order denying a motion to suppress evidence).

150. 123 S. Ct. at 2189 (Scalia, J., dissenting) (quoting Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989) (citation omitted)).

151. *Id.* at 2189–90 (Scalia, J., dissenting) (citations omitted). Justice Scalia considered the collateral order exception to have been created in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See* 123 S. Ct. at 2190–91 (Scalia, J., dissenting).

> jury could be attacked as an immediate violation of First Amendment rights; and an order compelling testimony could be attacked as an immediate denial [sic] Fifth Amendment rights.[152]

Under the *Sell* holding, each of these scenarios would be immediately appealable. Thus, the dissent concluded that prior Supreme Court cases, such as *Flanagan v. United States*[153] and *Carroll v. United States*[154]—which held that orders that may infringe upon a defendant's constitutionally-protected rights had to wait under final judgment—were "seemingly overruled" by the *Sell* holding.[155] The dissent concluded that the Court's holding revises the collateral order exception test set forth in *Cohen v. Beneficial Industrial Loan Corp.*[156] "to dispense with the third requirement (unreviewable on appeal) *only when the important separate issue in question involves a 'severe intrusion' and hence an 'important constitutional issue.'*"[157]

IV. THE OVERLOOKED IMPLICATIONS OF *SELL*

While the Supreme Court established a four-part test in *Sell* to determine when antipsychotic medication may be involuntarily administered,[158] lower courts are struggling to apply the test due primarily to the Court's failure to clearly define essential terms. Assuming a court finds that all four parts of the test are satisfied, antipsychotic drugs will then be involuntarily administered to the criminal defendant.[159] However, the *Sell* Court neglected to consider the dangerous side effects common to many antipsychotic drugs, as well as the detrimental consequences involuntary administration of antipsychotic medication will have on the criminal justice system as a whole.

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152. 123 S. Ct. at 2190 (Scalia, J., dissenting).
153. 465 U.S. 259 (1984).
154. 354 U.S. 394 (1957).
155. *See* 123 S. Ct. at 2190 (Scalia, J., dissenting).
156. 337 U.S. 541 (1949).
157. 123 S. Ct. at 2191 (Scalia, J., dissenting).
158. *Id.* at 2184–85.
159. *See id.*

A. *Applying the* Sell *Analysis*

1. Definition of a Serious Crime

The *Sell* test only applies to criminal defendants charged with committing serious crimes.[160] However, the Court did not provide a definition of a serious crime. Justice Breyer did, however, state that a crime is serious "whether the offense is a serious crime against the person or a serious crime against property."[161] In *United States v. Kourey*,[162] the United States District Court for the Southern District of West Virginia found that the defendant was not facing serious criminal charges since the defendant was charged with violating the terms of his supervised release imposed for the commission of a Class A misdemeanor.[163] Attempting to apply the *Sell* analysis, the United States District Court for the Western District of Virginia in *United States v. Evans*[164] adopted the definition of a serious crime used in the context of the Sixth Amendment right to jury trial.[165] "[T]he Court has defined serious offenses for purposes of determining the right to trial by jury as those offenses for which a term of imprisonment exceeding six months may be imposed."[166] Likewise, the *Evans* court concluded that the defendant was charged with a serious crime since the maximum penalty was up to one year of imprisonment.[167]

2. Interpreting "Special Circumstances"

The *Sell* Court recognized that "[s]pecial circumstances may lessen the importance" of the government's interest in prosecuting the defendant.[168] For example, the defendant's refusal to take

160. *See id.* at 2184.
161. *Id.*
162. 276 F. Supp. 2d 580 (S.D. W.Va. 2003).
163. *Id.* at 585.
164. No. 1:02CR00136, 2003 U.S. Dist. LEXIS 21570 (W.D. Va. Dec. 1, 2003).
165. *Id.* at *14.
166. *Id.* at *14–15.
167. *Id.* at *16.
168. Sell v. United States, 123 S. Ct. 2174, 2184 (2003).

antipsychotic drugs may result in further institutionalization.[169] Being institutionalized "diminish[es] the risks that ordinarily attach to freeing without punishment one who has committed a serious crime."[170]

The Court also recognized that the government has a "substantial interest in timely prosecution."[171] However, in *United States v. Miller*,[172] the United States District Court for the District of Maine found that the government had not shown that a delay in the prosecution of the defendant would prejudice the government to fairly enforce the law.[173] The Court opined that "[t]here [was] no showing that the memories of witnesses [were] fading or that witnesses [were], or [were] likely to become, unavailable for a trial when it [was] reached without forcibly medicating the Defendant."[174] Consequently, the court denied the government's motion to forcibly administer antipsychotic drugs to the defendant.[175]

B. *The Side Effects of Antipsychotic Medication*

1. Boredom and Unresponsiveness

The American Psychological Association ("APA") noted as amicus curiae, that antipsychotic medication "operate[s] on the individual's thought processes, and thus implicate[s] fundamental issues of personhood and individuality."[176] Furthermore, antipsychotic drugs physically infiltrate the defendant's body and change the biochemical makeup of the body, making the defendant appear bored or restless, which "can prejudice the defendant in the eyes of the jury."[177] Justice Kennedy recognized the hazard in

169. *See id.*
170. *Id.*
171. *Id.*
172. 292 F. Supp. 2d 163 (D. Me. 2003).
173. *See id.* at 164–65.
174. *Id.* at 165.
175. *Id.*
176. Brief of Amicus Curiae American Psychological Association at *8, Sell v. United States, 123 S. Ct. 2174 (2003) (No. 02-5664), *available at* 2002 WL 31898300 [hereinafter APA Brief].
177. *Id.* at *5.

Riggins that the defendant may "appear unsympathetic to the jury or even the judge."[178] Justice Kennedy concluded that these drugs might make the defendant "'so calm or sedated as to appear bored, cold, unfeeling, and unresponsive.'"[179] Other common side effects of antipsychotic drugs include blurred vision, dry mouth and throat, and dizziness.[180]

The APA warned that these side effects may be overlooked by mental health professionals.[181] Therefore, a court must consider the side effects of antipsychotic drugs and the effects the drugs have on the jury's evaluation of the defendant. Fortunately, the Supreme Court of Connecticut recognized the trial rights of the defendant in *State v. Jacobs*[182] and remanded the case to the appellate court for an evaluation of the effects of forcible administration of antipsychotic drugs on the defendant's right to a fair trial.[183] The APA suggested that newly developed drugs,[184] which have a lower risk of side effects,[185] need to be considered by a court instead of only the traditional antipsychotic drugs.[186]

2. Neuroleptic Malignant Syndrome

Antipsychotic drugs can also cause neuroleptic malignant syndrome.[187] This disease can cause high fevers, labile blood pressure, rapid heartbeat, profuse sweating, shortness of breath, coma, and even death.[188] The mortality rate of neuroleptic malig-

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178. *See id.* at *10.

179. *Id.* (quoting Riggins v. Nevada, 504 U.S. 127, 143 (1992) (Kennedy, J., concurring) (internal citations omitted)).

180. *See id.* at *21.

181. *Id.* at *10. "[C]ertain health-care professionals have a well-documented tendency to overprescribe drugs and disregard other, less intrusive modalities of treatment that may also be beneficial." *Id.* at *11.

182. 828 A.2d 587 (Conn. 2003).

183. *Id.* at 589.

184. The newly developed drugs are known as "second-generation antipsychotic drugs." APA Brief, *supra* note 176, at *4.

185. Common side effects of second-generation antipsychotic drugs include seizures, hypotension, and weight gain. *Id.* at *23.

186. *See id.* at *4.

187. *See* Brief of Amicus Curiae Association of American Physicians & Surgeons, Inc. at *11, United States v. Sell, 282 F.3d 560 (8th Cir. 2002) (No. 01-1862EMSL), *available at* 2001 WL 34091094.

188. *Id.*

nant syndrome is twenty percent.[189] In *Harper,* the Court stated that "[f]orced administration of antipsychotic medication may not be used as a form of punishment."[190] However, administering medication that carries a substantial risk of death is an obvious form of punishment left unconsidered by the *Sell* Court.

C. *Detrimental Consequences of the* Sell *Holding*

1. Defendants Who Remain Incompetent

The Court did not consider criminal defendants who fail to regain competence after long periods of time. Medication initially considered medically appropriate might not be when later shown to be ineffective. Elaine Cassel, a legal scholar, suggested that "[i]n the end, civil commitment must be the answer for a defendant who cannot, even when forcibly drugged, become competent enough to stand trial."[191] Additionally, the APA noted that "[m]any mental disorders that bear some resemblance to one another respond very differently to medication."[192] While antipsychotic drugs are often effective in alleviating the psychotic symptoms of mental disorders, not all persons with mental disorders respond positively to such drugs.[193] A court must feel confident that the defendant has been correctly diagnosed before ordering the involuntary administration of antipsychotic drugs.[194] If the defendant is ordered to take antipsychotic drugs, the court should review the order to ensure the defendant is successfully responding to the drugs.

2. Impairing the Defendant's Ability to Present an Effective Defense

Antipsychotic drugs may suppress psychotic symptoms to the point that the defendant's ability to raise an effective insanity de-

189. *Id.* Death usually occurs soon after beginning the medication "often due to renal failure, arrhythmias, pulmonary emboli, or aspiration pneumonia." *Id.*

190. Washington v. Harper, 494 U.S. 210, 241 (1990).

191. Cassel, *supra* note 12.

192. APA Brief, *supra* note 176, at *4.

193. *See id.* at *15–16.

194. *See generally id.* at *16–17 (comparing a diagnosis of delusional disorder with a diagnosis of paranoid schizophrenia).

fense is impaired.[195] While the defendant can introduce testimony of therapists who treated him before the administration of antipsychotic drugs, it is unlikely to be as effective as the presence of the pre-medicated defendant.[196] "Empirical research shows that jurors who think the accused is displaying psychotic symptoms at the time of trial are significantly more likely to return a verdict of not criminally responsible on account of mental disorder than are those who think the accused is symptom-free during the trial."[197]

Criminal defendants also have the right to present a diminished capacity defense.[198] This defense is the defendant's right to present his own testimony regarding his state of mind at the time of the alleged crime.[199] The defendant simply introduces evidence to establish that the requisite mens rea was lacking.[200] Forcing the criminal defendant to take antipsychotic medication will prevent him from presenting the evidence necessary to establish an effective diminished capacity defense. In *Faretta v. California*,[201] the Supreme Court held that the Sixth Amendment protects the defendant's right to present his own defense.[202] "It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'"[203] The right to present his own defense belongs directly to the criminal defendant, "for it is he who suffers the consequences if the defense fails."[204] Consequently, involuntary administration of antipsychotic drugs will violate this protected right, which the Court did not consider in *Sell*.

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195. *See id.* at *26 n.26 ("[R]endering a previously delusional individual competent may impair her ability to mount an effective insanity defense by removing the best evidence of that insanity: the physical manifestations of her own mental state.").

196. *Id.*

197. *Id.*

198. *See* Brief of Amicus Curiae National Association of Criminal Defense Lawyers at *2, Sell v. United States, 123 S. Ct. 2174 (2003) (No. 02-5664), *available at* 2002 WL 31898312.

199. *See id.*

200. *See* Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 6 (1984).

201. 422 U.S. 806 (1975).

202. *See id.* at 819.

203. *Id.* (quoting U.S. CONST. amend. VI).

204. *Id.* at 820.

3. The *Sell* Holding Does Not Promote Judicial Economy

Justice Scalia predicted that the majority's ruling will allow criminal defendants "to engage in opportunistic behavior."[205] Justice Scalia argued that criminal defendants can now "take their medication until halfway through trial, then abruptly refuse and demand an interlocutory appeal from the order that medication continue on a compulsory basis."[206] *Sell* allows criminal defendants to delay the trial for months, claiming appellate review after final judgment would not prevent a constitutional violation. The appellate courts are likely to become overwhelmed with interlocutory appeals regarding the involuntary administration of antipsychotic drugs. Furthermore, an increase in the number of interlocutory appeals will lengthen the amount of time an appeal filed after a final judgment has been entered must wait to be heard.

4. Serving More Time Than Permitted by the Maximum Possible Punishment

While the government sought to medicate Sell, he spent five years institutionalized, which included twenty months of solitary confinement.[207] In his dissent, Justice Bye of the United States Court of Appeals for the Eighth Circuit noted that Sell's "sentencing range would be 33–41 months."[208] Requiring a defendant to take antipsychotic medication to find him competent to stand trial simply adds to the time he will remain institutionalized. Time served beyond the maximum sentence permitted for the crimes charged must be viewed as a punishment.[209] As the Court

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205. Sell v. United States, 123 S. Ct. 2174, 2190 (2003) (Scalia, J., dissenting).

206. *Id.* (Scalia, J., dissenting). The dissent warned that if the new rule of law is applied faithfully, "any criminal defendant who asserts that a trial court order will, if implemented, cause an immediate violation of his constitutional . . . rights may immediately appeal." *Id.* (Scalia, J., dissenting).

207. *See* Brief of Amici Curiae Association of American Physicians & Surgeons, Inc. and Eagle Forum Education & Legal Defense Fund at *16, Sell v. United States, 123 S. Ct. 2174 (2003) (No. 02-5664), *available at* 2002 WL 32101073 [hereinafter Eagle Brief].

208. 282 F.3d 560, 573 (8th Cir. 2002) (Bye, J., dissenting).

209. Eagle Brief, *supra* note 207, at *16. The government attempts to force medication into a defendant the government can no longer punish. *Id.*

recognized in *Harper*, "[f]orced administration of antipsychotic medication may not be used as a form of punishment."[210]

In *United States v. Evans*, the district court acknowledged that the defendant's refusal to take antipsychotic drugs would result in his remaining institutionalized.[211] The court concluded that, "were Evans convicted and sentenced to the maximum term of imprisonment for the crime charged, he would not serve any additional term of imprisonment because he would receive credit for the time he ha[d] remained in custody since his arrest."[212] Consequently, the court denied the government's request to force the defendant to take antipsychotic medication.[213]

V. CONCLUSION

While the Court intended the *Sell* test to permit involuntary administration of antipsychotic drugs in certain rare instances,[214] the Court left room for evasion. The *Sell* decision allows a criminal defendant to appeal an order forcing him to take antipsychotic medication during any stage of the criminal trial. Additionally, the Court failed to define and clarify key terms contained in the *Sell* four-part test. This failure may result in courts forcing criminal defendants to take antipsychotic drugs with irreversible harmful side effects before being determined innocent or guilty of the crimes charged. Criminal defendants found innocent of the crimes charged will have no recourse against the government due to the nature of the drugs. Thus, it is imperative that lower courts applying and interpreting the *Sell* decision do so with the utmost caution and concern for mentally ill criminal defendants.

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210. Washington v. Harper, 494 U.S. 210, 241 (1990).
211. No. 1:02CR00136, 2003 U.S. Dist. LEXIS 21570, at *18 (W.D. Va. Dec. 1, 2003).
212. *Id.*
213. *Id.* at *19.
214. Sell v. United States, 123 S. Ct. 2174, 2184 (2003).

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