RECENT DEVELOPMENTS

FORCIBLE ANTIPSYCHOTIC MEDICATION AND THE UNFORTUNATE SIDE EFFECTS OF *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174 (2003)

The right to refuse medical treatment is a constitutionally protected liberty which has long been recognized in the common law as an important element of individual autonomy.[1] Yet the exercise of this right has traditionally been limited to individuals "of adult years and in sound mind."[2] As such, the degree to which mentally ill individuals—particularly those within the criminal justice system[3]—also have the right to refuse treatment, such as the administration of antipsychotic medications, has long lacked clear definition.[4]

In 1990, the Supreme Court held that a mentally ill inmate may be forcibly medicated as long as an administrative hearing with sufficient procedural safeguards yields the finding that he poses a serious danger to himself or others and that antipsychotic drugs are

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1. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278-79 (1990) (holding that the Fourteenth Amendment grants competent individuals a protected liberty interest in refusing unwanted medical treatment, including lifesaving hydration and nutrition). Previously, most courts had derived the right to refuse treatment either exclusively from the common law right to informed consent (such that any forced medication or unauthorized touching by a physician would constitute trespass and/or battery) or from a combination of the common law and a generalized constitutional right to privacy. *See id.* at 271.

2. Cobbs v. Grant, 502 P.2d 1, 9 (Cal. 1972) ("[A] person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment."); *see also* Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ."). Only recently have state courts and legislatures granted mentally ill and otherwise incompetent individuals a qualified right to refuse medical treatment, reasoning that "the right of self-determination should not be lost merely because an individual is unable to sense a violation of it." *Cruzan*, 497 U.S. at 273. *But see id.* at 275 (citing the proposition that "to claim that [a patient's] 'right to choose' survives incompetence is a legal fiction at best").

3. The Supreme Court had previously assumed, but never actually defined, a constitutionally recognized right for involuntarily committed mental patients to avoid the administration of antipsychotic drugs. *See* Mills v. Rogers, 457 U.S. 291, 299-300 (1982) (refusing to decide the case on constitutional grounds, instead remanding to the Third Circuit for consideration in light of intervening changes in state law likely to have created broader liberty interests than those clearly protected directly by the federal Constitution).

4. *See* BRUCE J. WINICK, THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT 1-3 (1997).

substantially likely to reduce that risk.[5] Two years later, in *Riggins v. Nevada*, the Court specifically reaffirmed the right of a mentally ill criminal defendant to avoid antipsychotic medication, but held that the right could be overcome by a compelling governmental interest.[6] *Harper* and *Riggins*, however, left unresolved whether a mentally ill defendant may ever be involuntarily medicated only to restore trial competence—that is, where the medication's exclusive purpose is to enable the government to proceed with prosecution.

Last term, in *Sell v. United States*, the Supreme Court held that, as long as four conditions are satisfied, the Constitution permits the involuntary administration of antipsychotic medication to a mentally ill defendant in an attempt to render him competent to stand trial for serious criminal charges.[7] Sadly, the Court's well-intentioned attempt to protect mentally ill defendants by delineating the conditions under which the government may forcibly administer antipsychotic drugs contains two prominent flaws.

First, it directly undermines its own holding—that, in limited circumstances, a defendant can be forced to ingest antipsychotic medication against his will—by inviting the government to sidestep its deliberately stringent requirements. Since *Sell*'s four-part test only applies to incompetent defendants who are not dangerous, the government can likely proceed under the less stringent *Harper/Riggins* standard by merely labeling a specific defendant "dangerous." Justice Breyer, writing for the majority, also suggests several other practices which, if adopted literally, may prove to marginalize rather than protect the rights of mentally ill criminal defendants.

Second, in its eagerness to reach the merits, the Court ignored the traditional interpretation of the collateral order doctrine, under which the Court lacks jurisdiction. Although the Court has "repeatedly stressed" that the collateral order exception must be construed narrowly to prevent it from "swallow[ing] the general rule" that a party's appeal must be deferred until final judgment has been entered,8 it relaxed those conditions here without a clearly-defined justification for so doing. As such, the Court created an incentive for other defendants to obstruct justice by filing inappropriate

5. Washington v. Harper, 494 U.S. 210, 227 (1990).
6. 504 U.S. 127, 135, 138 (1992).
7. 123 S. Ct. 2174, 2184-85 (2003).
8. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994).

interlocutory appeals.[9]

I. RELEVANT FACTS AND PROCEDURAL HISTORY

In May 1997, Charles Thomas Sell, a dentist with a "long and unfortunate history of mental illness,"[10] was charged with making false representations regarding payment for medical services. In mid-July 1997, the district court adopted, without objection, a psychiatric evaluation finding Sell "currently competent" and agreed to release Sell on bail.[11] Two weeks later, Sell was indicted on fifty-six counts of mail fraud, six counts of Medicaid fraud, and one count of money laundering, all derived from a scheme to submit hundreds of false claims to Medicaid and private insurance companies between 1989 and 1997.[12]

In January 1998, the government alleged witness intimidation and sought to revoke bail. At the bail hearing which followed, Sell shouted, swore, and spat in the judge's face when she attempted to advise him of his rights.[13] Given this and other evidence that Sell's mental condition was deteriorating, the court revoked bail and ordered detention. In April 1998, the government brought yet another indictment against Sell for conspiracy and attempted murder of a FBI agent (Sell's arresting officer) and a federal witness (a former employee expected to testify against Sell on the initial fraud charges).

In early 1999, at his request, Sell was sent by the court to the United States Medical Center for Federal Prisoners in Springfield, Missouri ("the Center"), for another psychiatric examination, after which Sell was deemed mentally incompetent to stand trial.[14] Sell was

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9. *Cf.* Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law.").

10. More than thirteen years previously, for example, he called the police to report that a leopard was boarding a bus outside his office; when police responded, he asked them to shoot him. On another occasion, he claimed that the gold he used for dental fillings had been contaminated by communists. After each incident, he was hospitalized, treated with antipsychotic medication, and then released. Sell repeatedly alleged that various public officials were plotting to kill him. In April 1997, he reported to law enforcement officials that God had specifically encouraged him to kill FBI agents: "God told me every [Federal Bureau of Investigation] person I kill, a soul will be saved." *Sell*, 123 S. Ct. at 2179.

11. Sell was actually released in August 1997. United States v. Sell, 282 F.3d 560, 563 (8th Cir. 2002).

12. *See id.* The indictment alleged that Sell (and employees, under his direction) manufactured x-rays and altered dental records before submitting them to Medicaid and private insurance companies for payment. Sell thus sought reimbursement for unperformed dental services for nonexistent problems.

13. *Id.*

14. *Id.* Both Sell's psychologist and the government's psychologist independently

subsequently committed to the Center for up to four months of treatment "to determine whether there was a substantial probability that he would attain the capacity to allow his trial to proceed."[15] Medical personnel recommended antipsychotic drugs as a likely means to restore competence, but Sell refused such medication. The Center then sought authorization for involuntary medication.

In a June 1999 hearing, a Center psychiatrist authorized Sell's involuntary medication on the grounds that (a) Sell was "mentally ill and dangerous, and medication is necessary to treat the mental illness," and (b) such medication would likely render Sell competent for trial. The psychiatrist noted that he considered Sell dangerous if unconfined, but not necessarily so within a prison or other institution.[16] Officials from the Bureau of Prisons reviewed and upheld that decision in a subsequent administrative proceeding, finding that (a) antipsychotic medication was the treatment "most likely" to succeed in Sell's case, (b) "less restrictive interventions" promised little success, and (c) Sell would benefit from such medication.[17]

Sell moved for a judicial hearing in which to challenge the Center's authority to administer antipsychotic drugs against his will.[18] The federal magistrate judge conducted such a hearing in September 1999, reviewing the evidence presented at the administrative proceedings as well as testimony about subsequent incidents which had resulted in Sell's transfer to a locked cell. Center staff now testified that Sell had become "a safety risk" inside the institution.[19] In August 2000, the magistrate judge found that (a) Sell was in fact a danger to himself and others, (b) antipsychotic medication was "the only way" to render Sell less dangerous, and (c) such medication also had a "substantial probability" of restoring Sell's trial competence.[20] Although judicial authorization for involuntary administration of antipsychotic medication was therefore granted, the order was stayed so Sell could appeal to federal district court.

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diagnosed Sell with delusional disorder, persecutory type, a mental disorder characterized by one or more "non-bizarre delusions" that persist for one month or more, accompanied by the belief of "being conspired against, cheated, spied on, followed, poisoned or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long term goals." *Id.* at 563 n. 3.

15. *Id.* at 563.

16. Sell v. United States, 123 S. Ct. 2174, 2180 (2003).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 2180-81.

In April 2001, in an unpublished decision, the District Court for the Eastern District of Missouri labeled the prior finding of dangerousness as clearly erroneous, given that Sell had been returned to an open ward within the Center.[21] Yet the district court affirmed the order authorizing involuntary medication, finding that antipsychotic drugs were (a) medically appropriate, (b) "the only viable hope" to restore Sell's competence to stand trial, and (c) necessary to achieve the government's compelling interest in adjudicating Sell's guilt or innocence regarding numerous and serious charges.[22] Both parties appealed.

In March 2002, a split panel of the Court of Appeals for the Eighth Circuit[23] affirmed the district court's findings that Sell was not dangerous but that involuntary medication was constitutionally permissible to render him competent to stand trial.[24] Relying heavily on *Riggins v. Nevada*, the court outlined three requirements for involuntary medication:

> First, the government must present an essential state interest that outweighs the individual's interest in remaining free from medication. Second, the government must prove that there is no less intrusive way of fulfilling its essential interest. Third, the government must prove by clear and convincing evidence that the medication is medically appropriate.[25]

The split panel held that the government's interest in prosecuting sixty-two counts of fraud and one count of money laundering was sufficiently "serious" to satisfy the first prong.[26] As to the second

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21. *Id.* at 2181.

22. *Id.*

23. Judge Bye specifically dissented on the grounds that the charged offenses were "not sufficiently serious" to warrant forced medication. United States v. Sell, 282 F.3d 560, 572 (8th Cir. 1998) (Bye, J., dissenting). He contrasted this case with *United States v. Weston*, in which the defendant shot three police officers inside the U.S. Capitol, killing two of them; there, the court noted that "[t]he statutory sentences for the crimes Weston is accused of committing—*life in prison and death*—reflect the intensity of the government's interest in bringing those suspected of such crimes to trial." *Id.* (alteration in original) (quoting U.S. v. Weston, 255 F.3d 873, 881 (D.C. Cir. 2001)). Bye found that Sell's offenses more closely paralleled a Sixth Circuit case in which involuntary medication was deemed unavailable because the alleged offense (sending a threatening letter through the mail, an offense for which the maximum penalty was five years imprisonment) was not sufficiently serious. *Id.* at 573 (citing United States v. Brandon, 158 F.3d 947, 961 (6th Cir. 1998)).

24. *Sell*, 282 F.3d 560.

25. *Id.* at 567 (citations omitted). Further, under the Eighth Circuit's standard, medication is medically appropriate if (a) it is likely to render the defendant competent, (b) its benefits are not overwhelmed by the probability and seriousness of side effects, and (c) it is in the defendant's medical interests. *Id.*

26. *Id.* at 568. The court claimed not to have considered the attempted murder charges,

prong, each expert who testified at the initial hearing indicated that antipsychotic medication was the only means by which Sell could be expected to ever regain competence to stand trial.[27] Finally, the Eighth Circuit found no reversible error in the district court's finding that involuntary medication was "medically appropriate."[28]

II. THE SUPREME COURT DECISION

The Supreme Court granted certiorari[29] and subsequently vacated and remanded the Eighth Circuit's ruling by a 6-3 decision.[30] Justice Breyer, writing for the majority, first held that the district court's order authorizing Sell's involuntary medication fit within the collateral-order doctrine such that appellate jurisdiction existed (for both the Eighth Circuit Court of Appeals and the Supreme Court).[31] Yet Sell's appeal arose from a pretrial order which, by definition, failed to qualify as a "final order" as required by 28 U.S.C. §1291.[32] After summarily outlining the established three-part test for collateral orders,[33] the Court concluded that the district court's order authorizing Sell's involuntary medication satisfied all three prongs: it conclusively determined a disputed question, resolved an important issue separate from the merits of the action, and was "effectively unreviewable" on appeal from a final judgment.[34]

Second, the Court held that the government may, under certain conditions, administer antipsychotic medication to a mentally ill

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noting that those incidents could have arisen from the defendant's delusional disorder. *Id.* at 568 n.8. Yet Judge Bye noted that the government had largely focused on the attempted murder and conspiracy charges, thereby seeming to concede that money laundering and fraud alone might be insufficient to warrant involuntary medication. *Id.* at 574 (Bye, J., dissenting).

27. *Id.* at 568.

28. *Id.* at 571.

29. Sell v. United States, 537 U.S. 999 (2002).

30. Sell v. United States, 123 S. Ct. 2174 (2003). The majority included Justices Breyer, Ginsberg, Kennedy, Rehnquist, Souter, and Stevens. Justice Scalia, joined by Justices O'Connor and Thomas, dissented.

31. *Id.* at 2183.

32. 28 U.S.C. § 1291 grants appellate jurisdiction over all "final decisions" of the district courts. In criminal cases, a final decision requires conviction and imposition of sentence. *See, e.g.*, Flanagan v. United States, 465 U.S. 259, 263 (1984).

33. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949). The collateral order doctrine forms a narrow exception to the rule that only final orders are appealable; as such, it only arises in the absence of a statutory right of appeal. To qualify as an appealable collateral order, the order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468.

34. *Sell*, 123 S. Ct. at 2182 (quoting *Coopers & Lybrand*, 437 U.S. at 468).

defendant against his will solely to render him competent to stand trial. Relying on *Washington v. Harper* and *Riggins v. Nevada*, Justice Breyer stressed an individual's right to refuse the administration of antipsychotic medication as a "significant constitutionally protected liberty interest."[35] In *Harper*, the Court had evaluated a state law regarding the involuntary administration of antipsychotic drugs to mentally ill inmates who posed a substantial danger to themselves or others. Emphasizing procedural safeguards, the *Harper* Court found that an administrative proceeding (as opposed to a judicial hearing) was sufficient to authorize the involuntary medication of a mentally ill inmate as long as the hearing adequately ensured due process.[36]

Riggins described a balancing test in which an individual's fundamental liberty to avoid medication could only be overcome by an "essential" or "overriding" state interest.[37] In *Riggins*, a criminal defendant who had been found competent because psychotropic medication had been forcibly administered sought to terminate his ongoing treatment to better persuade the jury of the severity of his mental illness (in conjunction with his insanity defense), but the trial court denied his request without explanation.[38] The Supreme Court overturned the conviction since the trial court failed to acknowledge Riggins's liberty interests before authorizing continued medication; the record was devoid of a finding that the "administration of antipsychotic medication was necessary to accomplish an essential state policy."[39]

Riggins also suggested that involuntary administration of antipsychotic medication would be constitutionally permissible even when solely intended to render a defendant competent to stand trial. In Justice Kennedy's words, "Absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial."[40] *Sell* therefore offered the Court a valuable opportunity to define what kind of "extraordinary showing" is required to satisfy due process as it applies to mentally ill but non-dangerous defendants.

The Court concluded that the Constitution only permits the

35. *Id.* at 2183 (internal quotations omitted).
36. 494 U.S. 210, 233 (1990).
37. 504 U.S. 127, 128, 135 (1992).
38. *See id.* at 130-31.
39. *Id.* at 138.
40. *Id.* at 139 (Kennedy, J., concurring).

involuntary administration of antipsychotic drugs to mentally ill defendants facing serious criminal charges in an attempt to achieve trial competence if it is medically appropriate, substantially unlikely to have side effects that may undermine the fairness of the trial, and necessary (when compared to less intrusive alternatives) "significantly to further important governmental trial-related interests."[41] Writing for the Court, Justice Breyer stated that this standard "says or fairly implies" four conditions inferred from *Harper* and *Riggins*: (1) that "important" government interests are at stake, such as the interest in bringing an accused individual to trial for a serious offense; (2) that the administration of antipsychotic drugs would "significantly further" those interests *and* that the drugs are "substantially unlikely" to cause side effects which would "interfere significantly" with the defendant's Fifth and Sixth Amendment rights to a fair trial; (3) that such medication is "necessary" in that no less intrusive alternatives are likely to achieve substantially the same results; and (4) that the forced administration of such medication is medically appropriate.[42] Given these conditions, Justice Breyer concluded that the cases where the government may involuntarily medicate a mentally ill defendant solely to render him competent for trial may be rare.[43]

Based on the record, the Court assumed that Sell was not dangerous,[44] then found that the federal magistrate judge did not find involuntary medication appropriate on trial competence grounds alone. The medical experts and the lower courts had focused on the level of danger posed by Sell, thereby failing to consider crucial questions about the need to bring Sell to trial. As such, the Court vacated the standing order authorizing the forcible administration of antipsychotic drugs to Sell, noting that the government was free to pursue involuntary medication on any ground supported by Sell's current mental condition.[45]

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41. *Sell*, 123 S. Ct. at 2184.

42. *Id.* at 2184-85. Justice Breyer's construction closely follows that proposed by the government, *see* Brief for Respondent at 18, Sell v. United States, 123 S. Ct. 2174 (2003) (No. 02-5664), 2003 WL 193605, and reiterated or conceded by various amici curiae, including the American Psychiatric Association and the Rutherford Institute.

43. *Id.* at 2184.

44. Interestingly, this assumption was made *only* because the Government failed to contest the district and circuit court, both of which concluded that Sell was not dangerous. However, Justice Breyer noted that "[i]f anything, the record before us . . . suggests the contrary." *Id.* at 2186.

45. *Id.* at 2187.

In dissent, Justice Scalia, joined by Justices O'Connor and Thomas, argued lack of jurisdiction since 28 U.S.C. § 1291 requires a "final order" as the basis for appellate review.[46] Justice Scalia also characterized Sell's initial motion to the federal magistrate judge requesting a hearing as a misplaced appeal.[47] Criticizing the majority for its attempt to squeeze this case into the collateral-order exception, Justice Scalia found that the order at issue does not satisfy the third requirement of the established test for collateral orders. Specifically, for a district court order to merit appellate review prior to final judgment, the order must be "effectively unreviewable on appeal from a final judgment."[48] The majority's premise that pretrial involuntary medication cannot be reviewed in a post-conviction appeal is directly negated by *Riggins*, Justice Scalia noted, in which the Court held that a conviction must be automatically vacated if the forcible administration of antipsychotic drugs violated the substantive due process standards established by *Harper*.[49] Only upon a defendant's acquittal would an order authorizing his involuntary medication truly become unreviewable, but the mere chance that a defendant will have no basis for appeal does not satisfy the collateral order doctrine.[50]

After summarizing the collateral-order doctrine as previously applied in criminal cases,[51] Justice Scalia found that the only appealable prejudgment orders involved the denial of a motion to reduce bail or dismiss the charges.[52] Since this appeal falls into neither category, he continued, the majority's decision to find jurisdiction constituted an improper expansion of an intentionally-narrow exception, particularly where Sell had other available means by which he could have obtained pretrial appellate review of the initial order.[53] Justice Scalia lamented the possibility (which he

46. *Id.* at 2187-88 (Scalia, J., dissenting).

47. *Id.* at 2188. Justice Scalia explained that the regulation governing determinations about the involuntary medication of individuals like Sell, who have been committed to the custody of the Bureau of Prisons, also allows such individuals to appeal any unfavorable administrative determinations. *See* 28 C.F.R. § 549.43 (2002).

48. *Sell*, 123 S. Ct. at 2189 (Scalia, J., dissenting) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

49. *Id.*

50. *See id.* Justice Scalia readily grants that requiring Sell to delay his appeal would necessarily preclude the type of remedy he seeks: "a predeprivation injunction rather than the postdeprivation vacatur of conviction provided by *Riggins*." *Id.*

51. "We have until today interpreted the collateral-order exception to § 1291 'with the *utmost strictness*' in criminal cases." *Id.* (quoting Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989)) (emphasis added).

52. *Id.* at 2190.

53. Justice Scalia proffered two options: a suit under the Administrative Procedure Act,

viewed as an almost inevitable result) that *Sell*'s holding would encourage criminal defendants to "engage in opportunistic behavior" to delay criminal proceedings at will.[54] Significantly, this opportunistic behavior would not be limited to mentally ill defendants; as long as the majority's reading of the collateral order exception is utilized, any defendant could halt the proceedings against him at any time by simply seeking a pre-deprivation injunction.

III. ANALYSIS

In *Sell v. United States*, the Supreme Court developed a four-part test to ensure due process for mentally ill criminal defendants, particularly as it relates to the administration of antipsychotic drugs. By creating a standard that restricts the government's ability to involuntarily medicate such defendants, the Court reaffirmed the right of mentally ill individuals to exercise some control over what, if any, medical treatment they will receive. Yet both *Sell*'s test and its jurisdictional basis are fundamentally flawed.

A. Sell*'s Fourt-Part Test is Ill-Defined and Ill-Advised.*

The test itself, as stated by Justice Breyer, includes four prerequisites for the administration of antipsychotic drugs to mentally ill defendants. First, an important government interest must be at stake; second, that interest must be significantly furthered by the administration of antipsychotic drugs and the chosen drugs must be substantially unlikely to cause side effects which would interfere significantly with the defendant's right to a fair trial; third, the medication must be necessary; and fourth, the forced administration of the medication must be medically appropriate and in the patient's best interest.[55] Although seemingly straightforward, these prerequisites are ill-defined; where defined at all, they provide little practical guidance for their application. Nowhere does Justice Breyer explain how important a particular government interest must be to qualify under the first prong. Instead, he announces that "[t]he Government's interest in bringing to trial an individual accused of a serious crime is important."[56] Once again, the key descriptor lacks

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5 U.S.C. § 551 *et. seq.* or a claim challenging the conditions of pretrial confinement pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *Sell*, 123 S. Ct. at 2191 (Scalia, J., dissenting).

54. *Id.* at 2190.

55. *Id.* at 2184-85.

56. *Id.* at 2184.

meaningful definition. How serious is a "serious crime?"[57] The complexity is further compounded because the government's interest, however important, is to be reduced if appropriate based on the individual facts of the case. Again, the Court provided no guidelines to direct such adjustments.

The second prerequisite, like the first, is overly ambiguous. It requires a determination of whether antipsychotic medication will "significantly" further the identified government interests; if so, one must choose an appropriate drug for the given defendant, carefully accounting for known side effects that might "interfere significantly" with the defendant's right to a fair trial under the Sixth Amendment.[58] Antipsychotic medication can significantly affect a defendant's ability to effectively interact with counsel; it can also alter his speech, demeanor, and concentration. Some mental health advocates have alleged that such side effects can alter an individual's personality so fundamentally that he seems to become a different person altogether. Instead of merely restoring an individual's "normal" mental capacity, they argue, antipsychotic medications distort an individual's true personality.[59] As such, *Sell* implicated many philosophical questions about mental illness and its appropriate treatment, including implications regarding free thought, individual autonomy, and the connection between mind and body.[60] "Why is promoting autonomy necessarily a greater good than restoring competency, for example, or diminishing psychosis, or alleviating despair?"[61] These and other related questions make the third part of Justice Breyer's test—whether medication is "necessary"—even less clear. Sadly, the Court skirted these broader philosophical issues altogether. It is unlikely the Court could have resolved any of these questions satisfactorily, given the ongoing debate between medical, scientific, academic and other mental health professionals. Still, failing to acknowledge the existence of these issues and their implications for the Court's

57. *Id.* Justice Breyer specifies that the government's important interest in prosecution remains unchanged whether the serious crime is against a person or against property. *See id.* This distinction may have been included because the crimes with which Mr. Sell was charged—at least initially—were property crimes.

58. *Id.* at 2184-85.

59. *E.g.*, Daphne Eviatar, *If Sanity is Forced on a Defendant, Who is on Trial?*, N.Y. TIMES, June 21, 2003, at B9.

60. *Id.*

61. Dora W. Klein, *Involuntary Treatment of the Mentally Ill: Autonomy is Asking the Wrong Question*, 27 VT. L. REV. 649, 676 (2003) (suggesting that courts should consider whether no treatment is preferable to involuntary treatment instead of whether autonomy is preferable to involuntary treatment).

decision seems to trivialize the rights of the mentally ill. The fourth and final prong of Justice Breyer's test is also problematic, in that the government is expected to pursue its interest in the prosecution of a given defendant while simultaneously acting in the best interests of that defendant.

Recognizing the inherent difficulty in applying this test, Justice Breyer explicitly limited its use to cases where the government seeks involuntary medication solely to render a defendant competent for trial. He emphasized that where the administration of antipsychotic drugs is warranted on an alternative ground, such as the defendant's level of dangerousness, and authorized by a court on that basis, the four-part test need not be satisfied even if the medication is also expected to affect trial competence.[62] He then recommended that courts attempt to use alternate justifications for involuntary medication before even considering competence, offering three grounds for this proposal.

First, Justice Breyer stated that inquiries about matters other than competence (such as the likelihood that a given medication will render a defendant less dangerous) are typically more "objective and manageable" because medical experts can discuss the risk of side effects more easily than they can advise the courts on "quintessentially legal questions of trial fairness and competence."[63] Justice Breyer's desire for simplified decision-making seems irrelevant, however, since the ultimate determinations of fairness and competence are still made by judges, as they were under *Harper* and *Riggins*. As before, medical professionals will be asked to testify about the benefits of a specific type of antipsychotic drug, its suitability for a given defendant, the risks of side effects, the likelihood that a given medication will benefit the defendant, and the necessity of antipsychotic drugs (in that no less intrusive options exist). However, courts will still be responsible for the final competence determination.[64]

Second, Justice Breyer noted that involuntary medical treatment is typically handled as a civil matter, particularly where an individual poses serious danger to himself or others such that civil commitment

62. *Sell*, 123 S. Ct. at 2185.

63. *Id.*

64. "This decision, while requiring the court to make use of the assistance which medical testimony may provide, is ultimately a legal one, not a medical one." Artway v. Pallone, 672 F.2d 1168, 1176 n.9 (3d Cir. 1982) (discussing the process for determining dangerousness) (internal citations omitted).

can be justified pursuant to a state's police power or a guardian appointed to make medical decisions.[65] Although judges may have more experience evaluating mental illness in civil proceedings, the underlying assumption—that a court may be more hesitant or less capable to make judgments about an individual's mental capacity where the proceeding is labeled criminal—is disturbing. It suggests that courts may not consider the legal rights of mentally ill individuals to be independently important; only status as a criminal defendant triggers meaningful regard for one's interest in freedom from governmental intervention.

Equally troubling is the possibility of converting de facto the criminal prosecutions of all mentally ill defendants into civil commitments. Justice Breyer discounted this result,[66] but hinted that civil commitment may be inevitable for mentally ill defendants who refuse medication. In such cases, he continued, the government's interest in prosecution necessarily declines, and forced medication under *Sell* might not be warranted.[67] If unable to prosecute an unmedicated defendant due to incompetence *and* unable to administer medication to him involuntarily pursuant to *Sell*, the government will likely wish to pursue civil commitment. Yet civil commitment must be grounded in either the state's *parens patriae* or police powers, either proffering care to those so "gravely disabled" by mental illness that they are unable to care for their own physical needs or protecting the community from those who are dangerous because of mental illness.[68] Under either justification, involuntary commitment is not intended to continue indefinitely, and courts are to review commitment orders regularly for any change in circumstances.[69] Yet

65. *Sell*, 123 S. Ct. at 2185.

66. *See id.* at 2184 ("We do not mean to suggest that civil commitment is a substitute for a criminal trial.").

67. *Id.*

68. Addington v. Texas, 441 U.S. 418, 426 (1979).

69. Civil commitments are governed by state law, so the intervals for review vary. Generally, however, if committed under *parens patriae* powers, an individual must be released if he regains ability to care for himself or if his treatment is not progressing; if committed pursuant to police powers, an individual regains his freedom when he is deemed no longer dangerous. For a thorough discussion of the difference between these sources for involuntary civil commitment, see generally John Kip Cornwell, *Understanding the Role of the Police and* Parens Patriae *Powers in Involuntary Civil Commitment Before and After* Hendricks, 4 PSYCH. PUB. POL'Y & LAW 377 (1998). Mental abnormality serves as a base condition which justifies commitment if combined with either dangerousness or the inability to care for oneself. Note that not every state recognizes *parens patriae* as a justification for involuntary civil commitment. *Id.* at 385-86; *see also* Eric Turkheimer & Charles D.H. Parry, *Why the Gap? Practice and Policy in Civil Comittment Hearings*, 47 AMER. PSYCHOLOGIST 646, 646-47 (1992) (noting that

if no treatment is provided to civilly committed individuals for their mental abnormalities, either because no treatment has been proven effective or because the state has elected not to offer treatment, rehabilitation becomes extremely unlikely, and individuals may instead experience "commitment for life."[70] As John Cornwell stated, "If a state may confine a 'mentally abnormal' individual without regard to the availability or efficacy of psychiatric treatment, his detention may become, in effect, a life sentence."[71]

As the protections provided by *Sell* are not required where a defendant has been adjudicated "dangerous," defining that term broadly so as to include defendants like Sell (whose dangerousness apparently fluctuated) would give even less meaning to the rights of mentally ill individuals whom this case, at first glance, seems to protect. Defining dangerousness is an amorphous exercise.[72] Are we concerned about one's ability to cause actual harm to others or merely his motivation to do so? A person who would unquestionably be considered dangerous if released from a mental institution may function relatively normally within that institution, depending upon the restrictions placed upon him. For example, an individual confined to a small padded cell is virtually incapable of causing harm to others while under such restraint, yet would be considered dangerous were he to leave that cell; his anticipated level of dangerous likely necessitated those restraints in the first place.

Justice Breyer's third justification for considering alternative grounds for involuntary medication before performing the four-part *Sell* analysis is that the final inquiry regarding the use of antipsychotic medication solely to render a defendant competent for trial would necessarily be more effective and focused because of the preliminary determinations in other areas.[73] As such, Justice Breyer concluded,

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statutory reforms emphasized dangerousness over disability, but that both are still used to justify commitment).

70. Kansas v. Hendricks, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring).

71. Cornwell, *supra* note 69, at 404.

72. *See generally* Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61 (1999). "The Supreme Court has not informed us what magnitude of harm, or how probable its occurrence, justifies civil commitment of a mentally disordered person as 'dangerous.'" *Id.* at 65.

73. Justice Breyer wrote:

> At the least, they will facilitate direct medical and legal focus upon such questions 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 in whole (or at least in significant part) administration of a drug that may have adverse side effects, include side effects that may to some extent impair a defense at trial?

any court asked to approve involuntary medication to render a defendant competent should first ascertain "whether the government seeks or has sought permission" for such drugs on alternate grounds and, if not, why not.[74] The benefit of additional information is substantial, but it may be outweighed by efficiency concerns, given the time, resources, and expertise required to perform multiple analyses. Further, Justice Breyer's repeated emphasis on dangerousness and civil commitment may have identified sufficiently large loopholes whereby the government may be required to formally comply with *Sell*'s four-part test infrequently, if at all. In short, the Court may have rendered its own four-part test effectively obsolete. The ambiguity and unanswered questions inherent in *Sell* permit a court to reach any result it deems satisfactory, without regard to any objective standard.

Recent lower court decisions which claim to be implementing *Sell* therefore vary widely. Many identify apparent gaps in the Supreme Court's decision and note some concern that their interpretation may not necessarily comply with the Court's intentions. For example, one Virginia district court lamented the absence of a "definitive standard" to decide whether a given defendant had been charged with a sufficiently "serious crime" to warrant involuntary medication to restore competency."[75] Similarly, since the Supreme Court never expressed a standard by which the government must satisfy *Sell*'s four-prong test, one court simply assumed that "clear and convincing evidence" would be an appropriate standard.[76]

Some judges only use the three requirements *Sell* explicitly derived from *Harper* and *Riggins*,[77] while others recite the four conditions made explicit by Justice Breyer. Some have even demonstrated reluctance to use *Sell* at all to evaluate involuntary medication. In *United States v. Kourey*, for example, the court initially refused to consider *Sell* since no dangerousness hearing pursuant to *Harper* nor other administrative procedures had been conducted.[78] It later emphasized that *Sell* would necessarily be inapplicable, since the

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Sell, 123 S. Ct. at 2186.

74. *Id.*

75. United States v. Evans, 293 F. Supp. 2d 668, 673 (W.D. Va. 2003).

76. United States v. Gomes, No. CRIM 3:98 CR 195(CF), 2004 WL 345301, at *3 (D. Conn. Feb. 17, 2004).

77. Specifically, that the involuntary administration of antipsychotic medication must be medically appropriate, substantially unlikely to have side effects that may undermine the fairness of the trial, and necessary to achieve "important governmental trial-related interests." *Sell*, 123 S. Ct. at 2184.

78. 276 F. Supp. 2d 580, 581 (S.D. W.Va. 2003).

defendant was charged only with violating the terms and conditions of supervised release imposed upon his admission to a misdemeanor, not awaiting trial for serious criminal charges.[79]

To date, the Eighth Circuit is the only court of appeals to actually address the proper application of *Sell*; in several other circuits, district courts have wrestled with these issues. The Eighth Circuit concluded that *Sell*'s protections only apply where medication is, in fact, forcibly administered, not merely provided to a defendant who prefers not to take it.[80] The defendant in *Morin* alleged *Sell* violations because his antipsychotic medication was not "discontinued" immediately upon his request; a standing district court decision had previously indicated that he was under no obligation to take antipsychotic medications, although they would be provided should he wish to take them.[81]

Twice, the Maine District Court has refused to authorize involuntary medication pursuant to *Sell*. In *United States v. Miller*,[82] the court found that the government met none of the three requirements: it failed to show whether the proposed treatment was medically appropriate, whether any consideration whatsoever had been given to possible side effects, and whether any important governmental interest was implicated. Just months later, in *United States v. Dumeny*,[83] the court found the requisite showings, but concluded that the government's interest to involuntarily medicate a defendant charged only with firearms possession was insufficient, even though the charge carried "significant potential penalties."[84]

United States v. Gomes, also involving a single count of unlawful firearm possession, ended with a very different result.[85] In a detailed

79. *Id.* at 585.

80. United States v. Morin, 338 F.3d 838, 842-43 (8th Cir. 2003).

81. *Id.* at 843. Similar reasoning was employed by the Southern District of New York to distinguish the involuntary administration of antipsychotic medication from a mere order to take such medication. There, the court imposed as a condition of pre-trial release that the defendant take antipsychotic medication. United States v. Colon, No. 03 MAG. 1328(LMS), 2003 WL 21730603, at *4 (S.D.N.Y. Jul. 21, 2003).

82. 292 F. Supp. 2d 163 (D. Me. 2003).

83. 295 F. Supp. 2d 131 (D. Me. 2004).

84. The statutorily-prescribed penalties include a fine and/or imprisonment for up to ten years. 18 U.S.C. § 924(a)(2) (2000). The court specifically noted that no improper use of a firearm had been alleged and that the defendant had only been charged under 18 U.S.C. § 922(g)(4) (regulating possession of a firearm by a person previously committed to a mental health institute). The court also praised the thorough evaluation and professional recommendations provided for the defendant. *Dumeny*, 295 F. Supp. 2d at 132-33.

85. No. CRIM 3:98 CR 195(CF), 2004 WL 345301 (D. Conn. Feb. 17, 2004). The defendant was charged under 18 U.S.C. § 922(g)(1) as a convicted felon in possession of a firearm.

opinion, the court found substantial government interests at stake, given the seriousness of the offense[86] and the expected sentence faced by the defendant.[87] As required by *Sell*, the court found that antipsychotic medication was substantially likely to render the defendant competent and that any side effects were unlikely to affect his ability to participate in his own defense. Further, such medication was both necessary and medically appropriate.[88]

The case of Herbert Evans, Jr., demonstrates how another district court attempted to evaluate the importance of the government's interests on two separate occasions. The court first found that Defendant Evans had been charged with a sufficiently serious crime[89] but that no important government interest in pursuing prosecution existed. Among other things, the judge reasoned that the defendant's pretrial confinement had already exceeded the statutory penalty for the charged offense, his history of paranoid schizophrenia suggested that he would be required to remain in a mental institution if he refused medication, and the government had produced no evidence that further delay would prejudice its ability to prosecute.[90] A hearing regarding the possibility of civil commitment based on dangerousness was scheduled for the following month. Before its occurrence, however, the defendant was charged with threatening to murder the judge assigned to his case.[91] Given the new criminal charge, which carries a maximum penalty of ten years' imprisonment, the court reconsidered the issue of involuntary medication and found that the government's interests were now sufficiently important to permit such

86. The defendant allegedly possessed the firearm while selling illegal drugs. *Id.* at *5.

87. Under the Armed Career Criminal Act, the defendant faced a mandatory minimum of fifteen years' imprisonment if convicted. Given his criminal history, the court found that his actual sentence under the Federal Sentencing Guidelines would likely be at least twenty-one years. *Id.* at *1. That the defendant had already spent over five years in pretrial confinement was deemed insignificant. *Id.* at *6.

88. *Id.* at *9-10. No other treatment plan could reasonably be expected to restore competency, at least partially because the defendant refused to admit that he had any mental disorders whatsoever. *Id.*

89. Specifically, a violation of 18 U.S.C. § 111(a)(1), which proscribes forcibly intimidating and interfering with an employee of the United States while engaged in the performance of her official duties. United States v. Evans, 293 F. Supp. 2d 668, 670 (W.D. Va. 2003). The court reasoned by analogy to Sixth Amendment jurisprudence that the right to trial by jury only extends to persons charged with offenses for which a term of more than six months' imprisonment may be imposed; here, the alleged offense carries a maximum penalty of imprisonment for one year and a fine of $100,000. *Id.* at 673-74.

90. *Id.* at 674.

91. United States v. Evans, No. 102CR00136. 104M00014 , 2004 WL 533473, at *1 (W.D. Va. Mar. 18, 2004). Not surprisingly, the original judge quickly recused herself and the case was reassigned.

medication.[92] Meticulously trying to satisfy each factor found in *Sell*, the court found that (a) Mr. Evans was incompetent due to mental disease; (b) the administration of antipsychotic medication had a substantial probability that it would restore him to competency within a reasonable time; (c) Mr. Evans would not take such medication voluntarily; (d) no less intrusive means for restoring Mr. Evans' competency existed; (e) there was no substantial likelihood that medication would cause serious side effects interfering significantly with Mr. Evans' ability to assist with his own defense; (f) antipsychotic medication was medically appropriate; and (g) the government had sufficient important interests at stake in the restoration of the Mr. Evans' competency.[93] Given these findings, the court appropriately authorized the involuntary administration of antipsychotic medication to Mr. Evans.

Sell created a neat four-part test that, at first glance, seems both simple and practical.[94] Yet upon closer inspection it becomes clear that the test outlined by Justice Breyer is neither simple nor practical. Instead, it is ill-advised and ill-defined; as a result, it leaves lower courts with insufficient guidance to render consistent, principled decisions.[95]

B. The Sell *Court Improperly Assumed Jurisdiction Where None Existed.*

Sell's other holding—that pretrial involuntary medication orders constitute collateral orders such that appellate jurisdiction exists—could, in time, become more significant than the four-part test itself. The Court's stated rationale for expanding jurisdiction here was simply that post-conviction review would necessarily only occur after Sell had suffered "the very harm that he seeks to avoid," to use Justice

92. *Id.* at *2. The Court also noted that the government's expected use of informants regarding the second charge increases its interest in relatively swift prosecution.

93. *Id.*

94. At least one district court seems to have found *Sell*'s test easy to apply. *See* United States v. Mackie, No. CRIM 7:03CR00007, 2004 WL 368477 (W.D. Va. Feb. 26, 2004). The defendant—charged with possession of a stolen firearm—posed no danger to himself or others, but steadfastly refused treatment of any kind (including group therapy) for his mental disorder. The court cursorily listed several factual and legal findings, then ordered the defendant to take the recommended antipsychotic medication; if he refused, he was to be medicated forcibly. *Id.*

95. That some judges have valiantly attempted—perhaps successfully—to find meaning in *Sell* is a testament to their dedication, but does not prove that the Supreme Court's decision was clear or complete. Indeed, the variations that have already appeared between lower courts, all of which resemble *Sell* to some extent, suggest the opposite.

Breyer's words.[96] This justification, if taken seriously, would readily allow criminal defendants to demand appellate review for any alleged violation of constitutional rights, thereby interrupting the normal administration of justice.

Justice Breyer framed the issue as one of necessity, distinguishing attempts to prevent the administration of antipsychotic drugs because it *may* render a trial unfair from a post hoc judicial finding that a trial was in fact unfair due to such medication:

> The first question focuses upon the right to avoid administration of the drugs. . . . The second question focuses upon the right to a fair trial. It asks what *did* happen as a result of having administered the medication. An ordinary appeal comes too late for a defendant to enforce the first right; an ordinary appeal permits vindication of the second.[97]

He conceded that unfairness in the first category is just a possibility, not necessarily an expected result, and that actual unfairness would transfer a given case to the second category such that an appeal would provide some relief. Ironically, the majority then found this empty assertion of possible unfairness sufficient to warrant immediate appeal.[98]

In response to Justice Scalia's criticism that the collateral-order doctrine had been improperly expanded, Justice Breyer noted only that considerations about "the severity of the intrusion and corresponding importance of the constitutional issue" warranted the outcome in *Sell*.[99] He failed to present any coherent explanation whether or why this issue was unique, reasons which might justify this expansion of the collateral-order doctrine.[100] As such, it remains

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96. *Sell*, 123 S. Ct. at 2182.

97. *Id.* at 2183 (internal citations omitted).

98. *Id.*

99. *Id.* at 2182. In contrast, just days after *Sell* was decided, the Fourth Circuit concluded that national security was insufficient to find jurisdiction by expanding the collateral-order doctrine to include an order making an enemy combatant available to the defendant as a potential witness (under specific conditions). United States v. Moussaoui, 333 F.3d 509, 515 (4th Cir. 2003).

> We are cognizant that this case involves substantial national security concerns. However, we cannot consider these legitimate concerns in our jurisdictional analysis because application of the collateral order doctrine "is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded or a particular injustice averted by a prompt appellate court decision.

Id. at 516 (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994)).

100. I do not question the Court's authority to expand the collateral-order doctrine should it wish to do so; however, any such changes should be explained or linked to

unclear whether this expansion was intentional, thereby encouraging future petitioners to persuasively categorize their alleged harms as "severe intrusions accompanied by important constitutional issues,"[101] inadvertent, or issue-specific.[102]

Finally, the Court's readiness to find jurisdiction without delineating a rational basis for the expansion of the collateral-order doctrine demonstrates a casual disrespect for statutory limits.[103] That the appellate jurisdiction of Article III courts is controlled by Congress, and not the courts themselves, is a classic example of the separation of powers native to American government. Where any branch oversteps its designated authority, therefore, even if plausibly attributable to ignorance[104] or good intentions, the stability and integrity of our entire system is challenged. Here, the majority's interest in evaluating antipsychotic medication seems to have clouded its own judgment and resulted in several unfortunate side effects.

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existing legal principles, not merely assumed. Where change is not simply driven by judicial fiat, but by some enumerated principle, the result is generally more palatable, regardless of whether one accepts or questions the appropriateness of that particular justification. *See, e.g.*, United States v. Bolden, 353 F.3d 870 (10th Cir. 2003) (classifying an order disqualifying an entire U.S. Attorney's office from a given criminal case as a collateral order justifying appellate jurisdiction based on separation of powers). "The interests protected by the [separation of powers] doctrine simply will not abate during the possibly lengthy resolution of this matter, and appellate vindication cannot undo such an invasion of Executive authority." *Id.* at 878.

101. *Sell*, 123 S. Ct. at 2182.

102. Even prior to *Sell*, several circuits had suggested a subcategory within the collateral-order exception for mental health and competency. *See, e.g.*, United States v. Rinaldi, 351 F.3d 285 (7th Cir. 2003) (holding that commitment orders for psychiatric evaluations qualify under the collateral-order doctrine); United States v. Ferro, 321 F.3d 756 (8th Cir. 2003) (regarding involuntary hospitalization to determine competence); United States v. Davis, 93 F.3d 1286, 1289 (6th Cir. 1996) ("An order of commitment for psychiatric examination easily satisfies the requirements of the collateral order doctrine . . .").

103. In Justice Scalia's words, "this Court's desire to decide an interesting constitutional issue do[es] not justify a disregard of the limits that Congress has imposed on courts of appeals' (and our own) jurisdiction." *Sell*, 123 S. Ct. at 2191 (Scalia, J., dissenting).

104. The jurisdictional issue was not raised or briefed by the parties until so requested by the Court, but the Court has a *sua sponte* duty to ensure compliance with its limited statutory authority for appellate review. Justice Scalia notes that the government had not contested jurisdiction for Sell's appeal before the Eighth Circuit, likely because the Fourth and Sixth Circuit had held that pretrial involuntary-medication orders qualified as collateral orders under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *See* United States v. Brandon, 158 F.3d 947, 950-51 (6th Cir. 1998); United States v. Morgan, 193 F.3d 252, 258-59 (4th Cir. 1999). An erroneous determination by a lower court is not binding on higher courts, nor should a lower court's acceptance of a given argument be viewed as conclusive authority about the correctness of that position. *See Sell*, 123 S. Ct. at 2188.