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## **Sell v. United States: Is the Supreme Court Giving a Dose of Bad Medicine?: The Constitutionality of the Right to Forcibly Medicate Mentally Ill Defendants for Purposes of Trial Competence**

Dina E. Klepner

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# ***Sell v. United States*:<sup>1</sup> Is the Supreme Court Giving a Dose of Bad Medicine?: The Constitutionality of the Right to Forcibly Medicate Mentally Ill Defendants for Purposes of Trial Competence**

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1. 539 U.S. 166 (2003).

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## I. INTRODUCTION

The right to privacy in one's own body is a well-established principle protected by the Constitution.<sup>2</sup> Implied in this right is the notion that decisions affecting a body should belong solely to the person whose body is affected. As such, it is almost unimaginable for courts, rather than individuals, to retain the power to dictate what people can and cannot do with their bodies. Envision, for instance, a court requiring a child diagnosed with Attention Deficit Disorder to take Ritalin before attending school.<sup>3</sup> The court's rationale justifying such action would be that the child would otherwise be incompetent to attend school. This situation seems inherently unfair: should courts be allowed to take away a person's right to make autonomous decisions about the body?

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2. See *Griswold v. Connecticut*, 381 U.S. 479, 481-84 (1965) (holding that the right to privacy is protected by the First Amendment right to freedom of thought, the Fourth Amendment right to be free from unreasonable searches and seizures, and the Fourteenth Amendment right to due process).

3. Ritalin is a drug commonly used to treat Attention Deficit Disorder. See View Our Products: Ritalin Hydrochloride, available at <http://www.pharma.us.novartis.com/products/name/ritalin.jsp> (last visited Feb 3, 2005).

Recently, in *Sell v. United States*,<sup>4</sup> the Supreme Court upheld the notion that a court can order individuals to be medicated against their will.<sup>5</sup> Despite the fact that *Sell* involved a criminal defendant rather than a child, and antipsychotic drugs rather than Ritalin, the scenario in *Sell* is not entirely unlike the fictional scenario mentioned above.<sup>6</sup> *Sell*, a former dentist with an established and documented history of mental illness, was charged with fraud in 1997.<sup>7</sup> Initially, despite his illness, the magistrate judge declared *Sell* competent to stand trial, but the judge later reversed this decision.<sup>8</sup> Once ruled incompetent, *Sell* was hospitalized for treatment.<sup>9</sup> Subsequently, the hospital staff concluded that *Sell* would benefit from the use of antipsychotic drugs, as such medication would likely render him competent to stand trial.<sup>10</sup> When *Sell* refused to take the drugs, the hospital staff sought the district court's permission to forcibly administer the medication.<sup>11</sup> The magistrate issued an order to forcibly medicate *Sell*, and the district court and court of appeals affirmed the order.<sup>12</sup> Considering *Sell*'s case on appeal, the Supreme Court determined that the Constitution permitted involuntary medication of a mentally ill defendant to restore the individual's competence, so that a state would then be able to try the accused. However, these situations are limited to cases in which a four-factor test is met.<sup>13</sup>

4. 539 U.S. 166 (2003).

5. *Id.* at 169.

6. *Id.* at 169-71.

7. *Id.*

8. *Id.* at 170-71.

9. *Id.* at 171

10. *Id.* There is much controversy surrounding the drugs typically used to treat mental illnesses. These pharmaceuticals are a class of medications called antipsychotics that fall under the general category of psychotropic drugs. David M. Siegel, et. al., *Old Law Meets New Medicine: Revisiting Involuntary Psychotropic Medication of the Criminal Defendant*, 2001 WIS. L. REV. 307, 345 (2001) (discussing that, aside from antipsychotics, the category of psychotropics includes sedatives, tranquilizers, hypnotics, mood stabilizers, and antidepressants). Although often beneficial, treatment using antipsychotic medication varies by patient, but the drugs carry the risk of serious side effects, some of which can even prove fatal. *Washington v. Harper*, 494 U.S. 210, 229-30 (1990). Some of the more serious side effects may include acute dystonia (severe involuntary spasms of the upper body, tongue or eyes), akathisia (motor restlessness often accompanied by an inability to sit still), neuroleptic malignant syndrome (a less common disorder that may be fatal as a result of cardiac dysfunction), and tardive dyskinesia (a condition characterized by involuntary movement of muscles, usually in the face). *Id.* Other effects of antipsychotic drugs are impairment of a patient's ability to remember, to relate effectively with others, to learn, and to reason. Michelle K. Bachand, Note, *Antipsychotic Drugs and the Incompetent and Prosecution of Incompetent Defendants*, 47 WASH. & LEE L. REV. 1059, 1077 (1990). Finally, antipsychotics may have other effects such as increased lethargy, dry mouth and throat, stuffy nose, blurred vision and urinary retention. *Id.* at 1063; *Harper*, 494 U.S. at 240 (Stevens, J., dissenting).

11. *Sell*, 539 U.S. at 171.

12. *Id.* at 174.

13. *See id.* at 177-86. The side effects caused by antipsychotics should be given great weight when a court is determining whether involuntary administration of antipsychotic drugs is appropriate in a given situation. Bachand, *supra* note 10, at 1077-78. The court must carefully consider the severity of side effects caused by the drugs, and how those effects will adversely affect a defendant's

Prior to *Sell*, the Supreme Court had already established that it held the power to take away the right of an individual to make autonomous decisions about actions affecting the body.<sup>14</sup> Specifically, the right to force unwanted antipsychotic drugs on a prison inmate was first recognized in *Washington v. Harper*.<sup>15</sup> In *Harper*, the Court recognized the right of an individual to refuse unwanted antipsychotic medication.<sup>16</sup> The Court further clarified the right of a court to take away a person's right to refuse unwanted medication in *Riggins v. Nevada*.<sup>17</sup> In *Riggins*, the Court approved involuntary administration of antipsychotic drugs to a mentally ill defendant facing criminal charges to ensure the defendant's continued competence to stand trial.<sup>18</sup> Despite these holdings, until *Sell*, the Court never explicitly

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demeanor. *Id.* For example, in the trial setting, side effects such as impairment of the ability to remember or reason efficiently and lethargy may affect a defendant's ability to assist counsel, to comment on adverse witnesses, or cause general apathy by the defendant towards the outcome of the trial. *Id.*

14. See generally *Washington v. Harper*, 494 U.S. 210 (1990) (holding that a mentally ill prison inmate can be treated with antipsychotic drugs against his will if the inmate is dangerous and treatment is in the inmate's medical interest); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (determining that an individual's right to refuse medication may be overridden if treatment is "medically appropriate and, considering less intrusive alternatives, essential for the sake of [the defendant's] own safety or the safety of others.").

15. *Harper*, 494 U.S. at 236. The scenario in *Harper* represents one of the three main settings in which the clash between the right of a defendant or inmate to avoid the unwanted administration of drugs and the government's interest in forcibly medicating an individual has come before the Court. The first setting, found in *Harper*, involves medicating "inmates who . . . are gravely disabled or represent a significant danger to themselves or others" for their own protection and for protection of the other inmates. *Id.* at 226 (addressing the issue of when forcible medication of mentally ill inmates is appropriate). In the second situation, the government desires forcible medication of a convicted defendant, who is mentally insane and sentenced to death, in order to render the defendant sane enough to be executed. See *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that, under protection by the Eighth Amendment, the State did not have the power to execute the insane). See also *Singleton v. Norris*, 319 F.3d 1018 (2003), *cert. denied*, 540 U.S. 832 (2003) (upholding the opinion of the Court of Appeals for the Eighth Circuit, which authorized forcible administration of antipsychotic drugs to the defendant by denying certiorari); David P. S. Charitat, *Fraying the Hangman's Knot?: State v. Michael Owen Perry*, 54 LA. L. REV. 1701 (1994) (discussing death penalty legislation and its relation to insanity and forcible medication using antipsychotic drugs). Finally, the government may seek the use of antipsychotic drugs to treat "defendant[s] facing serious criminal charges in order to render th[ose] defendant[s] competent to stand trial." *Sell*, 539 U.S. at 179. Although the Court has upheld the constitutionality of forcible medication in the first two scenarios, they have only hinted at the state's right to forcibly medicate a pretrial detainee, as in the third situation. See *infra* notes 143-47 and accompanying text.

16. *Harper*, 494 U.S. at 221-22. In *Harper*, the Court recognized the right to refuse medication as a liberty interest protected by the Due Process Clause in the Fourteenth Amendment. *Id.* Several other provisions in the Constitution have been relied upon as the basis for the right of a defendant or inmate to refuse unwanted medical treatment. See *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984) (holding that the First Amendment protects the right of a pretrial detainee to refuse antipsychotic drugs); *Sell*, 539 U.S. at 177-79 (finding that the Fifth Amendment protects an individual's right to refuse unwanted medication); *Riggins v. Nevada*, 504 U.S. 127, 145 (1992) (concluding that the Sixth Amendment protects a defendant's right to refuse undesired drugs); *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976) (determining that the Eighth Amendment protects the right of a person committed to a psychiatric hospital to refuse involuntary medication); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (upholding the right of an individual to be free from bodily restraint as protected by the Fourteenth Amendment). Additionally, the common law doctrine of informed consent has been used to uphold the right to avoid forcible medication. Charitat, *supra* note 15, at 1711.

17. 504 U.S. 127 (1992).

18. *Id.* at 129-32. Differentiating *Sell* from *Harper* and *Riggins* were the facts that in *Sell*, the

addressed the notion of forcing a pretrial detainee, found to be mentally incompetent, to take antipsychotic drugs solely to render that defendant competent to stand trial.<sup>19</sup> Thus, *Sell* further clarified the *Riggins* holding, finding that involuntary medication solely for purposes of establishing trial competency was constitutionally permissible.<sup>20</sup>

But before the *Sell* Court could consider the substantive issue concerning forcible medication, the Court analyzed a major procedural issue in the case: whether jurisdiction existed to hear *Sell*'s case.<sup>21</sup> The Court noted that the court of appeals would have only had authority to review the district court's order, originally permitting forcible medication of *Sell*, if that order was considered "final."<sup>22</sup> If the Court had determined that the pretrial order was not a final order, *Sell* would have had to wait until after his trial to pursue an appeal on the forcible medication issue.<sup>23</sup> Here, the Court concluded that the pretrial order was final because it satisfied the collateral-order doctrine, an exception to the rule that only final judgments are appealable.<sup>24</sup> As such, the Court established jurisdiction to substantively review *Sell*'s case.<sup>25</sup>

Because the *Sell* decision had two significant aspects, the effects of the case may be felt by two distinct groups: those affected by the approval of forcible medication to render a defendant competent to stand trial, and those affected by the Court's determination that a pretrial order for forcible medication is reviewable as a collateral-order. The effects of the first issue, forcible medication for trial competency purposes, may be extreme. As for the general public, the stretch of the Court's ability to take away a person's right to choose what medications to take are unknown, and the hypothetical concerning the boy being forced to take Ritalin to attend school might not be

defendant was found not dangerous by the lower courts, and that he was charged with serious, but non-violent crimes. See Charles Lane, *Court Sets Guidelines for Forced Medication*, WASH. POST, June 17, 2003, at A01. It should be noted that, aside from the fraud charges, *Sell* was also indicted for attempted murder. *Id.* However, the attempted murder charge was not technically part of the appeal at issue, and thus the justices' opinion treats the charge as if it does not exist. Charles Lane, *Justices Debate Medicating Mentally Ill Man for Trial*, WASH. POST, March 4, 2003, at A04. The treatment of this charge, or lack thereof, has drawn criticism on the opinion of the case as being "unrealistically framed." *Id.*

19. See *infra* notes 141-44 and accompanying text.

20. *Sell*, 539 U.S. at 177-83.

21. *Id.* at 175-77.

22. *Id.* at 176; see also *infra* notes 114-40 and accompanying text. A court of appeals only has authority to review a district court's pretrial order if that order is considered "final." 28 U.S.C. § 1291. As such, if the court of appeals never had jurisdiction to review the district court's order permitting forcible medication, then the Supreme Court would be lacking jurisdiction to hear *Sell*'s case. See *infra* notes 114-40.

23. *Sell*, 539 U.S. at 175-77.

24. *Id.* at 176.

25. *Id.* at 177. This ruling, permitting review of the order to forcibly medicate as a collateral order, brought vigorous dissent from three of the Justices. *Id.* at 186-93.

so unimaginable.<sup>26</sup> Further, although the Court approved the notion of forcible medication for trial competency, the *Sell* Court also enumerated a stringent four-factor test that a prosecutor must meet in order for a court to permit forcible medication.<sup>27</sup> This test affects mentally ill defendants because, by only permitting forcible medication to render a defendant competent to stand trial in specific, rare instances, it recognizes greater rights for mentally ill defendants.<sup>28</sup> Prosecutors will be affected by this test because the degree of difficulty in satisfying the four factors may actually deter them from seeking forcible medication order through courts.<sup>29</sup>

The second issue, the right of a court of appeals to review a pretrial order for forcible medication, may also have significant effects on various different groups. This holding has the potential to cause vast trial disruptions, enabling any defendant claiming that a pretrial court order has taken away a liberty interest to have a right of appeal.<sup>30</sup> Further, this holding may cause great confusion surrounding the well-settled exception to the final judgment rule since, prior to *Sell*, only three exceptions existed in the criminal law field.<sup>31</sup>

This case note will analyze the Supreme Court's decision in *Sell v. United States* and its potential future impact on forcible medication of defendants for the sole purpose of rendering them competent for trial. Part II examines the historical background of the case law regarding the development of an individual's right to refuse antipsychotic medications, in conjunction with a state's ability to override that liberty interest.<sup>32</sup> Part III provides a summary of the factual background leading up to the Court's opinion.<sup>33</sup> Part IV analyzes Justice Breyer's opinion for the Court and Justice Scalia's dissenting opinion.<sup>34</sup> Part V considers the impact of *Sell* on: the well-settled exception to the final judgment rule, the collateral order doctrine, the burden of proof required of prosecutors seeking a forcible medication order, defendants declared incompetent for trial purposes, and the mentally ill in general.<sup>35</sup> Finally, Part VI concludes the analysis with final considerations of the significance of the Court's decision in *Sell*.<sup>36</sup>

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26. See Associated Press, *Ruling Could Force Treatment On Mentally Ill*, (Feb. 17, 2004), available at <http://www.cnn.com/2004/LAW/02/17/mentally.ill.law.ap/index.html> (last visited Feb. 3, 2005) (discussing a new law passed in New York permitting "caseworkers, family members and even roommates to seek a court order to force a mentally ill patient to comply with treatment").

27. *Sell*, 539 U.S. at 179-81.

28. See *infra* notes 268-73 and accompanying text.

29. See *infra* notes 251-58 and accompanying text.

30. See *infra* notes 236-57 and accompanying text.

31. See *id.*

32. See *infra* Part II and accompanying text.

33. See *infra* Part III and accompanying text.

34. See *infra* Part IV and accompanying text.

35. See *infra* Part V and accompanying text.

36. See *infra* Part VI and accompanying text.

## II. HISTORICAL BACKGROUND

A. *Establishment of a Competence Standard*

Early on in American jurisprudence, the Supreme Court established that the trial of an incompetent defendant is procedurally unfair.<sup>37</sup> More recent cases have determined that a state trial of an incompetent defendant violates due process, and thus, a defendant's right to be competent during trial is constitutionally protected.<sup>38</sup> The Court has found support for this right by reasoning that an incompetent defendant would not be able to participate meaningfully in the trial.<sup>39</sup> Thus, trying a defendant who lacks the capacity to present an effective defense would violate the Fourteenth Amendment's guarantee to a fair trial.<sup>40</sup>

The Court clarified the standard of competence in *Dusky v. United States*.<sup>41</sup> The Court held that a defendant must possess two characteristics in order to be found competent to stand trial: (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and (2) "rational as well as factual understanding of the proceedings against him."<sup>42</sup> In addition, the Court held that a finding of trial competency required a defendant to be able to appreciate the potential consequences that would stem from a conviction.<sup>43</sup>

37. *Youtsey v. United States*, 97 F. 937, 941 (6th Cir. 1899); *United States v. Chisolm*, 149 F. 284, 287 (5th Cir. 1906) (advising that because the defendant was the sole means of defense, his competence was necessary for a procedurally fair trial).

38. See *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966) (holding that a trial of an incompetent defendant violates the Fourteenth Amendment's guarantee to a fair trial).

39. *Drope*, 420 U.S. at 171. A defendant's meaningful participation in a trial includes such activities as providing an attorney with facts that might exonerate the defendant, commenting and understanding the testimony of witnesses, and making strategic and intelligent choices concerning the trial. Linda C. Fentiman, *Whose Right Is It Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. MIAMI L. REV. 1109, 1114 (1986).

40. See Fentiman, *supra* note 39, at 1109.

41. 362 U.S. 402 (1960).

42. *Id.* at 402; see Nancy Gibbs, David S. Jackson & Romesh Ratnesar, *In Fits and Starts: Kaczynski throws the Unabomb trial into disarray. Is he a master manipulator or just desperately confused?*, TIME, Jan. 19, 1998, at 26 (noting that the standard of competence to stand trial is "a low-threshold legal matter").

43. *Dusky*, 362 U.S. at 402. See generally Brian Domb, *A New Twist in the War on Drugs: The Constitutional Right of a Mentally Ill Criminal Defendant to Refuse Antipsychotic Medication That Would Make Him Competent to Stand Trial*, 4 J.L. & HEALTH 273, at 279 (1990) (noting that "*Dusky* is significant in that the Court held that a defendant needed to be able to do more than identify facts; he must have some capacity to reason from a simple premise to a simple conclusion") (emphasis added).



*B. The Use of Forcible Medication to Restore Competency: The State's Interests*

Ten years after establishing the *Dusky* standard for competence, the Supreme Court recognized that a state has a substantial interest in bringing to trial a defendant accused in good faith of violating the law.<sup>44</sup> The Court reasoned that the power to try an accused is essential in a system of "ordered liberty," and that it is necessary to maintain peace and social justice.<sup>45</sup> Thus, when an accused is declared mentally incompetent under *Dusky*, the state's interest in trying the individual essentially develops into the state's interest in re-establishing that defendant's competency.<sup>46</sup> Restoration of competency is accomplished through treatment of the defendant's mental illness.<sup>47</sup>

Historically, courts considered any person diagnosed with a mental illness serious enough to warrant hospitalization incompetent.<sup>48</sup> A defendant classified as such would then be hospitalized for treatment until a determination could be made that they had attained capacity.<sup>49</sup> Once hospitalized, the importance of the state's interest in the treatment of committed patients allowed for involuntary treatment of those individuals while they remained hospitalized.<sup>50</sup> Ultimately, if a defendant never actually attained capacity, commitment within the hospital continued indefinitely, ending only upon the patient's death.<sup>51</sup>

Modern law has established that mental illness does not automatically equate with incompetence.<sup>52</sup> In 1972, the Supreme Court also determined that the indefinite commitment of a defendant found mentally incompetent is unconstitutional.<sup>53</sup> A defendant for whom it is determined that there is no substantial likelihood of restoration of competency in the near future must be

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44. *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring).

45. *Id.* (Brennan, J., concurring).

46. *Dusky*, 362 U.S. at 402.

47. Many state statutes have defined competency in terms of a defendant's mental illness. See Fentiman, *supra* note 39, at 1118. Thus, in many cases, in determining whether a defendant is competent or incompetent, the judge and examining psychiatrist have focused on the presence or absence of mental illness, rather than in terms of the accused's ability to function at trial. *Id.* Complicating the process further, there is much debate over the type and quantity of evidence that must be presented to the Supreme Court for it to make a finding of mental illness, and the Court has yet to recognize an exact definition. See *Foucha v. Louisiana*, 504 U.S. 71 (1992). In a concurring opinion in *Foucha*, Justice O'Connor noted that "[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . . ." *Id.* at 87 (O'Connor, J., concurring) (quoting *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983) (quoting *Greenwood v. United States*, 350 U.S. 366, 375 (1956))).

48. Paul S. Appelbaum, *Civil Mental Health Law: Its History and Its Future*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 599, 601 (1996).

49. *Domb*, *supra* note 43, at 283.

50. Appelbaum, *supra* note 48 at 601.

51. *Id.*

52. *Id.*

53. *Jackson v. Indiana*, 406 U.S. 715, 723-39 (1972). In *Jackson*, the Court held that a defendant, confined for failure to meet the *Dusky* standard of competence, could not be held for more than a period of time necessary to establish whether it is likely that the defendant will regain capacity in the near future. *Id.* at 738.

either released or committed civilly.<sup>54</sup> Subsequently, states became suspicious of the growing number of pending criminal charges dropped due to the increasing amount of defendants, especially those facing lengthy prison sentences, who were declared permanently incompetent.<sup>55</sup> Ironically, these developments in the law, which recognized greater rights for incompetents, made the notion of forcible medication against a defendant's will increasingly popular to states seeking to hold incompetent defendants responsible for their accused crimes.<sup>56</sup>

### C. A Liberty Interest in One's Own Body: The Individual's Interests

The area of law concerning the right of individuals to make autonomous decisions concerning their bodies has progressed dramatically in the last thirty years.<sup>57</sup> Although not explicitly stated in the Constitution, the Supreme Court has held that the right to privacy is a fundamental right.<sup>58</sup> This right includes the power to make choices about one's own body.<sup>59</sup> However, the Court has explicitly held that the right to privacy is not an absolute right, and that, in certain circumstances, the right may yield to the state's interests in health, welfare, and safety of its citizens.<sup>60</sup> In those instances, the state must show a compelling interest, and the Court will conduct a balancing test to determine whether that interest is indeed sufficient to override an individual's right to privacy.<sup>61</sup> This test is judged by standard of reasonableness, and the state's alleged need to override

54. *Id.*

55. *Domb*, *supra* note 43, at 283-84.

56. *See id.* at 284 (discussing effects of state-wide skepticism after *Jackson v. Indiana*, fueled by cases of "miraculous recoveries after pending criminal charges were dropped because of a determination that the defendant would not soon regain competency to be tried," on weaknesses of the right to refuse antipsychotic medication).

57. *See infra*, notes 63-93 and accompanying text.

58. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Bachand*, *supra* note 10, at 1059-60.

59. *Bachand*, *supra* note 10 at 1060 n.8 (noting *Griswold's* determination of the right to privacy's inclusion of the right to make decisions about the body such as whether to use contraceptives). *See also* *Rogers v. Okin*, 738 F.2d 1, 9 (1st Cir. 1984) (including decisions concerning medical treatment in the right to privacy).

60. *See* *Winston v. Lee*, 470 U.S. 753, 765-67 (1985) (holding that the right to privacy may be overridden by a compelling state interest). In *Mills v. Rogers*, the Court determined that, in a situation where a fundamental constitutional right is at stake, both procedural and substantive protections must be afforded. 457 U.S. 291, 304-06 (1982). The Court specified that, in order to satisfy the substantive prong, the "protected constitutional interest" and the "conditions under which competing state interests might outweigh it" identified and defined. *Id.* at 299. The procedural aspect deals with the "minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance." *Id.*

61. *Winston*, 470 U.S. at 756-67 (determining that the state's interest in obtaining a bullet lodged in the defendant's body, which could potentially link the defendant to an attempted robbery, did not override the defendant's interest in refusing potentially harmful surgery necessary to remove the bullet).

protected privacy rights is determined on by a case-by-case approach.<sup>62</sup> It is from the application of this balancing test through which the Court has established the standard for a situation in which an individual's right to refuse medical treatment for mental illness must yield to a state's interest in restoring the defendant's competence.

#### *D. Case Law Developments: Increasing Protection for an Individual's Right to Choose*

In 1982, the Supreme Court considered the issue of constitutionally protected liberty interests afforded to the mentally retarded in *Youngberg v. Romeo*.<sup>63</sup> Romeo, a mentally retarded man involuntarily institutionalized since childhood, sued the institution for violations of his liberty interests in safe conditions of confinement and unreasonable bodily restraints.<sup>64</sup> Weighing the justifications offered by the State for restraining Romeo's liberty against his individual, constitutionally protected rights, the Court determined that Romeo's rights had been violated.<sup>65</sup> Thus, the Court recognized the right of an individual to be free from bodily restraint, a liberty interest protected by the Fourteenth Amendment.<sup>66</sup>

Though *Youngberg* dealt with the right of the mentally retarded to be free from physical restraints, the reasoning employed by the Court has been applied to cases involving the issue of forcible medication of the mentally ill.<sup>67</sup> In 1990, in *Washington v. Harper*, the Court tackled the novel issue of

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62. *Id.* at 760.

63. 457 U.S. 307 (1982).

64. *Id.* at 309. The Court noted that although Romeo's commitment was brought about through the proper procedures, he was not deprived of liberty interests guaranteed under the Fourteenth Amendment. *Id.* at 315. In arriving at this conclusion, the Court looked towards *Vitek v. Jones*, which established that, although a "criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement. . . they do not authorize the State to classify him as mentally ill and subject him to involuntary psychiatric treatment without. . . additional due process protections." *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980). In *Vitek*, a prisoner challenged the constitutionality of a state statute permitting the prison director to transfer any prisoner found to be mentally ill to a mental hospital, which would then subject the prisoner to treatment for the alleged illness. *Id.* at 483-86. Balancing the state's interest in treating the mentally ill against the prisoner's interest in avoiding an arbitrary diagnosis of mental illness and unwanted medical treatment, the Court concluded that the prisoner's interest was powerful enough to require additional procedural safeguards. *Id.* at 493-96. The Court explained that the possibility of error in the state's conclusions concerning the prisoner's mental health, which could deprive the prisoner of liberties guaranteed under the Fourteenth Amendment, necessitated actions, such as notice and a hearing, before the transfer and subsequent treatment could occur. *Id.*

65. *Youngberg*, 457 U.S. at 320-24. This is the same balancing test established in by the Court in *Winston v. Lee*, performed when a substantive right is at stake. *Winston v. Lee*, 470 U.S. 753 (1985). See *supra* notes 60-62 and accompanying text.

66. *Youngberg*, 457 U.S. at 324. In *Youngberg*, the Court chose to analyze the situation under a low level of scrutiny. *Id.* at 322-23. As such, liability would only be imposed when the person responsible for the decision to treat a patient substantially departed from the accepted professional standards, practices, or judgment on which the decision to treat is usually based. *Id.*

67. See *Domb*, *supra* note 43, at 277 (discussing application of *Youngberg* to forcible medication cases). Recognizing the applicability of *Youngberg* to cases involving forcible medication, the Supreme Court remanded two cases, in which defendants opposed the unwanted administration of antipsychotic drugs, to be reconsidered in light of the *Youngberg* decision. *Id.* at 277 & n. 19 (noting

an inmate's right to refuse antipsychotic drugs to treat his mental illness.<sup>68</sup> Harper, a mentally ill state prisoner, claimed that a prison policy permitting medication of prisoners against their will, through use of antipsychotic drugs, violated due process because the policy did not require a judicial hearing in order to administer the drugs.<sup>69</sup> The *Harper* Court divided the question arising from involuntary medication of the inmates into two aspects: a substantive due process issue and a procedural due process issue.<sup>70</sup> First tackling the substantive due process issue, the Court recognized a prisoner's right to refuse involuntary antipsychotic medication as a right protected by the Due Process Clause.<sup>71</sup> Using the same framework as it did in *Youngberg*, the Court weighed an inmate's liberty interest against the State's relevant interests to determine if Harper's constitutional rights were violated.<sup>72</sup> Citing the State's legitimate interests in maintaining a safe prison environment, the Court found that this interest could outweigh the individual's liberty interest in avoiding administration of unwanted antipsychotic drugs.<sup>73</sup> However, the Court limited instances in which curtailment of the liberty interest was appropriate, stating that "the Due Process Clause permits the State to treat a prison inmate [with] 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."<sup>74</sup>

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that the two cases remanded were *Rennie v. Klein*, 653 F.2d 836 (3d Cir. 1981), *vacated by* 458 U.S. 1119 (1982), and *Scott v. Plante*, 641 F.2d 117 (3d Cir. 1981), *vacated by* 458 U.S. 1119 (1982)).

68. 494 U.S. 210 (1990). Though the Court had established an individual's constitutionally protected liberty interest in refusing medical treatment many years earlier, it had never explicitly addressed the issue of refusal of treatment with antipsychotic medication until *Harper*. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (recognizing a constitutionally protected right of an individual to refuse unwanted medical treatment).

69. *Harper*, 494 U.S. at 213.

70. *Id.* at 220 (defining the substantive issue as "what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will" and defining the procedural issue as "whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient").

71. *Id.* at 221-22. Here, the Court cited *Youngberg* as standing for the principle that a prisoner "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)) (citations omitted).

72. *Id.* at 221-27. See also *supra* notes 51-54, 57 and accompanying text.

73. *Harper*, 494 U.S. at 225-26. Other courts have applied this same balancing test established in *Youngberg*, in cases dealing with a defendant's right to refuse medications. See, e.g., *United States v. Charters*, 829 F. 2d 479, 498 (4th Cir. 1987) (holding that a defendant's liberty interest in refusing medication must be balanced in the state's interest in trying the accused); *Bee v. Greaves*, 744 F.2d 1387, 1394-95 (10th Cir. 1984) (noting that the state must demonstrate a compelling interest in order to override a defendant's liberty interest), *cert. denied*, 469 U.S. 1214 (1985).

74. *Harper*, 494 U.S. at 227 (noting that because the instant prison policy comported with these two requirements, the policy satisfied the substantive due process aspect of the forcible medication issue).

The Court then examined the procedural due process issue raised in *Harper* to ensure that a decision to involuntarily medicate a defendant would not be made arbitrarily or erroneously.<sup>75</sup> The Court focused on the severity of antipsychotic drugs and the side effects the user may experience.<sup>76</sup> Finding these risks to be best assessed by medical professionals, rather than a court, the Court found that the procedures in the prison policy which determined the need for medication, met the requirements of procedural due process.<sup>77</sup>

*Riggins v. Nevada*<sup>78</sup> provided the next opportunity for the Court to limit a state's authority to administer antipsychotic medications against an individual's will.<sup>79</sup> Unlike *Harper*, which involved involuntary medication of a convicted inmate, *Riggins* involved the right of the state to forcibly medicate a defendant with antipsychotics to ensure his continued competence to stand trial.<sup>80</sup> First acknowledging the constitutionally protected liberty interest to avoid unwanted antipsychotic drugs established in *Harper*,<sup>81</sup> the Court inferred that in light of the due process protections afforded mentally ill inmates, the Fourteenth Amendment provides at least as much protection for pre-trial detainees held by a state.<sup>82</sup> Again referencing *Harper*,<sup>83</sup> the *Riggins* Court acknowledged the substantial interference with an individual's liberty interest associated with the severe

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75. *Id.* at 228. The instant prison policy provided regulations for treatment using antipsychotic drugs, and stated that involuntary treatment was only appropriate after an examining psychiatrist found the inmate to be suffering from a mental disorder. *Id.* at 232-33. In addition, the psychiatrist was required to find the inmate gravely disabled, or a substantial likelihood that the defendant would cause harm to himself, others, or their property. *Id.* at 232. An inmate who subsequently refused antipsychotic medication was entitled to a hearing, and involuntarily treatment could only be continued if period reviews were given. *Id.* at 232-33.

76. *See supra* note 10 and accompanying text.

77. *Harper*, 494 U.S. at 234. In arriving at its conclusion that the decision to medicate was appropriately left to the discretion of a medical professional, rather than a judge, the Court again cited *Youngberg*, noting that "the Constitution does not prohibit the State from permitting medical personnel to make the decision under fair procedural mechanisms." *Id.* at 231 (citing *Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982)).

78. 504 U.S. 127 (1992).

79. *See id.*

80. *Id.* at 129-32. Charged with murder, *Riggins* began treatment with antipsychotic drugs while in custody awaiting his trial. *Id.* at 129. Before trial, *Riggins* filed a motion to discontinue his treatment with the drugs, which was denied by the district court. *Id.* at 131. Thus, *Riggins* was involuntarily administered the drugs during his entire trial. *Id.*

81. *Id.* at 133-34.

82. *Id.* at 135. The Court cited *Bell v. Wolfish*, 441 U.S. 520, 545 (1979), as support for the notion that constitutionally protected liberty interests of pre-trial detainees cannot be limited without findings of an overriding interest and medical appropriateness. *See Riggins*, 504 U.S. at 135. Prior to *Riggins*, in *Bell*, the Court analyzed constitutional rights afforded to pre-trial detainees. *See Bell*, 441 U.S. at 523. The Court determined that detention practices must be analyzed in light of the state's interest in maintaining safety, discipline, and order in the prison system. *See id.* at 547. The Court concluded that, in certain circumstances, the state's interests may override the liberty interests enjoyed by both prisoners and pre-trial detainees, and thus limitation of these rights may be appropriate. *Id.* at 546. *See also* Angelina N. McDonald, *In Search of a Standard of Review: Decisions to Forcibly Medicate Pre-Trial Detainees in Light of Riggins v. Nevada*, 72 U. CIN. L. REV. 285, 288 (2003) (discussing *Bell* in the progression of case law that eventually culminated in *Riggins*).

83. *See supra* note 10 and accompanying text.

side effects caused by antipsychotics.<sup>84</sup> The Court also focused on the strong likelihood of trial prejudice that could result from the side effects of antipsychotic drugs on Riggins' outward appearance, on the content of his testimony, and on his ability to follow the proceedings or communicate with counsel.<sup>85</sup>

The *Riggins* Court held that, an individual's liberty interest in refusing antipsychotics may be overridden with a showing by the State that "treatment with antipsychotic medication [is] medically appropriate and, considering less intrusive alternatives, essential for the sake of [the defendant's] own safety or the safety of others."<sup>86</sup> Likewise, due process would be satisfied if the State could establish that "it could not obtain an adjudication of [the defendant's] guilt or innocence by using less intrusive means."<sup>87</sup> However, by permitting administration of antipsychotic drugs to Riggins without determining the necessity of the treatment or considering any reasonable alternatives, the district court failed to acknowledge Riggins' liberty interest in refusing treatment with the drugs.<sup>88</sup> As such, without any demonstration by the government that "administration of antipsychotic medication was necessary to accomplish an essential state policy," the Court

84. *Riggins*, 504 U.S. at 134.

85. *Id.* at 137. See also Bachand, *supra* note 10, at 1077-82 (discussing many problems associated with trying defendants medicated with antipsychotics). If a state tried a defendant who is taking antipsychotics, the state actually may be trying an incompetent defendant. *Id.* at 1078. In addition to affecting the defendant's mental abilities, antipsychotics may lead to prejudice by the judge or jury due to effects the drugs may have on the defendant's appearances. *Id.* at 1079-80. See, e.g., *In re Pray*, 336 A.2d 174 (Vt. 1975); *State v. Murphy*, 355 P.2d 323, 325 (Wash. 1960) (en banc) (discussing the effects of a defendant's medicated appearance on a jury).

86. *Riggins*, 504 U.S. at 135. This was the standard established in *Harper*. See *supra* note 74 and accompanying text.

87. *Riggins*, 504 U.S. at 135. Consequently, if these conditions are met, the Constitution permits forced medication in order to render a defendant charged with murder, such as Riggins, competent to stand trial. See *id.* Although the Court did not expressly state such a conclusion, they alluded to this principle by reasoning that, if the district court established that treatment was medically appropriate and, considering reasonable alternatives, was essential for either Riggins' safety or for the safety of others, the due process requirements necessary for forcible medication in the trial or pre-trial setting would have been met. *Id.* at 135. As such, it can be inferred that the district court would have been justified in administering antipsychotic drugs to Riggins, against his will, solely for the purpose of trying him for the murder of which he was accused.

88. *Id.* at 136-37. Due to the district court's failure to make any conclusions about reasonable alternatives or any findings on the medical appropriateness of Riggins' treatment, the *Riggins* Court declined to adopt a standard of strict scrutiny to review decisions of forcible medication using antipsychotics. *Id.* at 136. But see *id.* at 156 (Thomas, J., dissenting). Justice Thomas noted that the majority:

[A]ppears to adopt a standard of strict scrutiny. . . specifically fault[ing] the trial court for failing to find either that the "continued administration of [antipsychotics] was required to ensure that the defendant could be tried" . . . or that "other compelling concerns outweighed Riggins' interest in freedom from unwanted antipsychotic drugs."

*Id.* (Thomas, J., dissenting).

concluded that the state erred in its attempt to forcibly administer antipsychotic drugs to Riggins.<sup>89</sup>

Taken together, *Harper* and *Riggins* indicate the Court's consent to the principle that, if certain conditions are satisfied, due process permits a state to involuntarily administer antipsychotic drugs to a mentally ill defendant facing criminal charges to restore that defendant's competence to stand trial.<sup>90</sup> However, *Riggins* failed to answer many significant questions surrounding the issue of forcible medication of pre-trial detainees. First, *Riggins* left undecided whether establishing competence to stand trial alone would be considered an "essential state policy" for purposes of forcible medication.<sup>91</sup> Second, *Riggins* failed to explicitly address involuntary administration of antipsychotic drugs to non-dangerous, mentally ill defendants facing criminal charges.<sup>92</sup> Third, the *Riggins* Court refused to define what is needed to ensure that the requirement of "medically appropriate" treatment is satisfied.<sup>93</sup> Finally, *Riggins* clearly did not attempt to establish the standard of review courts should exercise in reviewing decisions to forcibly medicate a defendant.<sup>94</sup> After *Riggins*, eleven years passed before the Court received its opportunity to answer these questions.

### III. STATEMENT OF THE FACTS

In September 1982, a dentist named Charles Sell told other doctors that communists had contaminated the gold used in his patients' fillings.<sup>95</sup> Subsequently hospitalized for his mental illness and treated with antipsychotic drugs, Sell was discharged.<sup>96</sup> Over the next thirteen years, Sell's illness led to various encounters with law enforcement, including a charge of insurance fraud for submitting false claims in 1997.<sup>97</sup> Found mentally competent by the magistrate judge, and released on bail, Sell was later indicted on charges of mail fraud, Medicaid fraud, and money laundering, charges which superseded the previous fraud charge.<sup>98</sup>

The following year, Sell's behavior at a bail revocation hearing, which included screaming, using racial epithets, and spitting in the judge's face, led the magistrate to revoke his bail.<sup>99</sup> A few months later, in April, Sell was

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89. *Id.* at 138.

90. *See id.*

91. *See supra* notes 78-89 and accompanying text.

92. *Riggins v. Nevada*, 504 U.S. 127, 133 (1992).

93. *See id.*

94. *See id.* at 136-37.

95. *Sell v. United States*, 530 U.S. 166, 169 (2003).

96. *Id.*

97. *Id.* at 170. Sell's illness resurfaced in June 1984, when he called the police to complain of a leopard outside of his office window. *Id.* at 169. Examples of Sell's later run-ins with police included his claim that a State Governor and police chief were attempting to kill him, and Sell's claim that a voice told him that a soul would be saved in exchange for every FBI personnel Sell killed. *Id.* at 170.

98. *Id.*

99. *Id.* The magistrate's decision was also based on the report of a psychiatrist who informed the judge that "Sell's condition had worsened." *Id.* In addition, in early 1998, at some time between

indicted on two other, more serious charges: the attempted murders of an FBI officer who had previously arrested him and of a former employee who intended to testify against Sell in the prior fraud case.<sup>100</sup> Sell asked the magistrate to reconsider the prior finding of his competence to stand trial, and after a psychiatric exam, the magistrate found Sell incompetent for trial purposes.<sup>101</sup> The judge ordered Sell to be sent to a medical center for prisoners, for a determination whether his capacity to stand trial would return.<sup>102</sup> In June 1999, after Sell refused to take antipsychotic medication, the institution staff sought the court's approval of administration of the medication against Sell's will.<sup>103</sup> The decision to forcibly medicate Sell then became subject to five levels of hierarchical review.<sup>104</sup>

First, a psychiatrist examined Sell's medical history and current mental state, and determined that, because of Sell's dangerousness and the necessity of the medication to treat his illness, forcible administration of the drugs was appropriate.<sup>105</sup> Next, prison officials administratively reviewed the psychiatrist's decision.<sup>106</sup> Taking into account Sell's past and present behavior, the officials believed Sell posed a threat to others, and affirmed the psychiatrist's opinion that antipsychotic medication would help Sell's illness.<sup>107</sup> Third, Sell filed a motion with the court seeking an order to reverse the medical center's decision to forcibly administer the drugs, which prompted the magistrate to hold a hearing.<sup>108</sup> Testimony from medical center personnel showed that Sell's inappropriate behavior in the institution gave no signs of ceasing, and indicated that Sell was a safety risk.<sup>109</sup> Thereafter, in August 2000, the magistrate found that treatment with

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Sell's 1997 charges and the bail revocation hearing, the government accused Sell of having sought to intimidate a witness. *Id.*

100. *Id.* The fraud charges were joined with the attempted murder charges for trial. *Id.*

101. *Id.* at 170-71.

102. *Id.* at 171.

103. *Id.*

104. *Id.*

105. *Id.* at 171-72. The psychiatrist did, however, consider Sell dangerous outside, but not necessarily inside, the jail, and found that Sell was capable of functioning in the prison environment. *Id.* at 172.

106. *Id.*

107. *Id.* At this hearing, evidence was introduced concerning the antipsychotics recommended for Sell. *Id.* The State introduced evidence that the drugs appeared to be the treatment most likely to improve Sell's behavior and that other less intrusive measures were unlikely to help his illness. *Id.*

108. *Id.*

109. *Id.* at 172-73. During the hearing, the State introduced evidence about an incident that occurred after the administrative hearing. Sell had allegedly approached a nurse working at the institution and told her he was in love with her, then criticized her for not responding to his advances. *Id.* He had then told the nurse that he couldn't help acting the way he did. *Id.* The State also offered evidence concerning the effectiveness of treatment with antipsychotic medication. *Id.* at 172. Finally, the State informed the court that Sell had been transferred to a locked cell. *Id.* at 173.



antipsychotics was the only way to ensure that Sell would not only be less dangerous, but also competent to stand trial.<sup>110</sup>

In the fourth level of escalation of the decision to medicate, Sell appealed the magistrate's decision to the federal district court.<sup>111</sup> Noting that Sell had been moved from a locked cell back into the open ward, the court held that the magistrate's finding of Sell's dangerousness was in error.<sup>112</sup> Nevertheless, the court affirmed the order to involuntarily medicate Sell because antipsychotic drugs were "the only viable hope of rendering [Sell] competent to stand trial."<sup>113</sup> Finally, during the last level of review in March 2002, the Eighth Circuit Court of Appeals reviewed the district court's decision.<sup>114</sup> Using the framework established by the Court in *Riggins*, the Eighth Circuit found that antipsychotic drugs were medically appropriate, that no less intrusive means of treating Sell were available, and that the government had an essential interest in trying the accused.<sup>115</sup> As a result, forced medication was warranted.<sup>116</sup> Thereafter, the Supreme Court granted certiorari to determine whether the Eighth Circuit's decision to allow forcible medication, solely for trial competency purposes, violated Sell's constitutional rights.<sup>117</sup>

#### IV. THE COURT OPINIONS

##### A. Justice Breyer's Majority Opinion<sup>118</sup>

###### 1. The District Court's Decision is Appealable as a Collateral-Order

After a district court has issued an order, a federal court of appeals is authorized to hear the appeal and subsequently render its own decision, but only if the district court's order is considered "final."<sup>119</sup> "Final decisions"<sup>120</sup> generally refer to final judgments that terminate a proceeding, such as an adjudication of guilt or innocence in a criminal trial.<sup>121</sup> As such, a defendant

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110. *Id.* at 173.

111. *Id.*

112. *Id.* at 173-74. The district court limited its conclusion that the magistrate was in error to dangerousness in regards to Sell himself and those in the institution. *Id.* at 174.

113. *Id.* (citations omitted). The Court also made findings that the drugs were medically appropriate and necessary for the state's interest in bringing an accused to trial. *Id.*

114. *United States v. Sell*, 282 F.3d 560 (8th Cir. 2002).

115. *Id.* at 568-72.

116. *Id.*

117. *Sell*, 539 U.S. at 175.

118. Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, and Ginsberg joined Justice Breyer's opinion.

119. 28 U.S.C. § 1291 (2000). Specifically, the statute permits federal courts of appeal to review "final decisions of the district courts." *Id.*

120. *Id.*

121. *Sell*, 539 U.S. at 176; *see also* *Catlin v. United States*, 324 U.S. 229, 233 (1945).

like Charles Sell usually must wait until the end of a trial before a court of appeals has jurisdiction to review a pretrial order.<sup>122</sup>

As a pretrial order, the order authorizing the forcible medication of Sell, issued by the district court in April 2001, did not fall within the statutory definition of a final decision.<sup>123</sup> Therefore, before the Supreme Court could delve into the substantive issue of forcible medication for trial competency, the Court needed to determine whether the court of appeals had jurisdiction to hear Sell's appeal of the order.<sup>124</sup>

Writing for the Court, Justice Breyer<sup>125</sup> first acknowledged an exception to the general rule that only final judgments made by the district court are reviewable on appeal.<sup>126</sup> This exception, called the "collateral-order" exception, enables a judgment made by a district court, which fails to satisfy the traditional definition of a final decision, to be appealable nonetheless.<sup>127</sup> In order to fall within the collateral-order exception, an order must (1) "conclusively determine[] the disputed question," (2) "resolve[] an important issue completely separate from the merits of the action," and (3) "[be] effectively unreviewable on appeal from a final judgment."<sup>128</sup>

Using this three-part analysis, Justice Breyer found that the district court's order fell within the exception.<sup>129</sup> First, the disputed question was whether Sell had a legal right to refuse forcible treatment with antipsychotics.<sup>130</sup> The order that Sell be forcibly medicated against his will conclusively determined this very question.<sup>131</sup> Next, Justice Breyer found that the order resolved an important issue.<sup>132</sup> In past cases involving the right to refuse medical treatment, the Court has repeatedly noted the importance of the constitutional issues raised.<sup>133</sup> Furthermore, this issue,

122. *Sell*, 539 U.S. at 176.

123. *See id.* (citing *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951)).

124. *Id.* at 175.

125. *Id.* at 169.

126. *Id.* at 176.

127. *See id.*; *see also* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949) (articulating the three characteristics decisions must have to fall within the collateral-order exception to the final judgment rule); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (defining the "collateral order doctrine. . . not as an exception to the 'final decision' rule . . . but as a 'practical construction' of it. . .").

128. *Sell*, 539 U.S. at 176 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

129. *Id.* It may seem unusual to permit review of the district court's order in Sell's case because the collateral-order doctrine is generally used in civil cases, and courts rarely apply the exception in criminal cases. Kathy Swedlow, *Forced Medication of Legally Incompetent Prisoners: A Primer*, HUM. RTS. 3, at 3, 5 (2003); *see also Sell*, 539 U.S. at 186-93 (Scalia, J., dissenting) (arguing that the court of appeals did not have jurisdiction to review the district court's order).

130. *Sell*, 539 U.S. at 176.

131. *See id.*

132. *Id.*

133. *Id.* Here, the Court cites to a number of cases involving involuntarily administered medical treatment, and in which the Court has noted the significance of the liberty interests at stake. *See e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 134 (1992) (finding that only "essential" state interests could

whether Sell must undertake treatment against his will, is also separate from the merits of the case, which involves a completely separate issue: whether Sell is guilty or innocent of the crimes he is alleged to have committed.<sup>134</sup> Finally, Justice Breyer determined that the issue of Sell's right to refuse medication would be essentially unreviewable on appeal from a final judgment.<sup>135</sup> Since Sell will have already been forcibly medicated by the time of his trial, thus, he will have already suffered the same harm he is attempting to avoid.<sup>136</sup> Even if Sell was to be found not guilty, the harm could not be undone, as he would have no opportunity to appeal if acquitted.<sup>137</sup>

Sell's case is distinguishable from other pretrial orders that are not appealable collaterally because of "the severity of the intrusion and corresponding importance of the constitutional issue."<sup>138</sup> The issue at hand,

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override the constitutionally protected liberty interest to forcible medication of antipsychotic drugs possessed by an individual); *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 278-79 (1990) (drawing attention to the importance of the liberty interest in refusing unwanted medical treatment, previously recognized by this Court, before applying that right to the issue of forced administration of life-sustaining medical treatment to an incompetent person); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (noting the significance of an inmate's liberty interest in avoiding "unwanted administration of antipsychotic drugs [protected by] the Due Process Clause of the Fourteenth Amendment"); *Winston v. Lee*, 470 U.S. 753, 759 (1985) (holding that "[a] compelled surgical intrusion into an individual's body . . . implicates expectations of privacy and security" of great importance).

134. *Sell*, 539 U.S. at 176.

135. *Id.* at 176-77. A judgment from a district court permitting involuntary administration of drugs to a mentally ill defendant is different from other types of pretrial orders issued concerning criminal defendants because its results are "effectively unreviewable on appeal." Swedlow, *supra* note 129, at 5.

136. *Sell*, 539 U.S. at 176-77. An example of the differences between an order to forcibly medicate in a criminal trial and other pretrial orders issued during criminal cases, which are not considered exceptions to the final judgment rule, may be found by examining a motion to suppress. Swedlow, *supra* note 129, at 5. If the district court denied a defendant's motion to suppress, thereby permitting introduction of the evidence at trial, the court of appeals is able to later assess the trial record to determine if the evidence was improperly admitted and the resulting effect of that evidence on the trial. *Id.* However, in the case of a pretrial order that grants the State permission to forcibly medicate with antipsychotics, the court of appeals cannot effectively review a complete record because the antipsychotics may have affected the defendant's ability to understand the proceedings, and the defendant's outward appearance or demeanor. *Id.*; see also *supra* notes 12-13 and accompanying text. Justice O'Connor articulated this risk in *Riggins*, by focusing on the possible side effects of antipsychotics on patients, and the risk of trial prejudice the drugs may induce. See Swedlow, *supra* note 129, at 5.

137. *Sell*, 539 U.S. at 177. Justice Breyer cites *Stack v. Boyle*, 342 U.S. 1 (1951), for support of this argument. *Id.* In *Stack*, a defendant sought appeal of the district court's order denying a reduction of the bail that had been set for the defendant, claiming the bail amount was excessive. *Stack*, 342 U.S. at 3-4. The Court held that the order was appealable as a final decision. *Id.* at 6-7. Justice Breyer presumably analogizes this scenario with that of a forcibly medicated defendant because if a court of appeals fails to review an order fixing bail before a final sentence or judgment is rendered, it will never be reviewed at all. See *id.* at 12 (Jackson, J., concurring in part and dissenting in part).

138. *Sell*, 539 U.S. at 177. Specifically, Justice Breyer is contrasting Sell's case with the examples raised by Justice Scalia in his dissent. See *id.* at 190-91 (Scalia, J., dissenting). These examples included pretrial orders forcing a defendant to wear an electronic bracelet, a district court's order making it impermissible for a defendant to wear a shirt with the words "Black Power" on it, and an order compelling a defendant to testify. *Id.* Despite this comparison, Justice Breyer fails to adequately support his argument distinguishing *Sell* from other orders immune to the collateral-order

whether Sell has a right to refuse medical treatment because the drugs may cause his trial to be unfair, must also be contrasted with the separate issue of whether forced medication actually caused a trial to be unfair.<sup>139</sup> The issue in the instant case focuses on Sell's right to refuse unwanted medication.<sup>140</sup> What may occur at the trial as a result of administration of the drugs is mere speculation.<sup>141</sup> Thus, if the first right is not appealable as a collateral-order, but only as an "ordinary appeal," then Sell will be unable to enforce his right to refuse medication.<sup>142</sup>

This result must be compared with the second question, which focuses upon a defendant's right to a fair trial by looking at what actually occurred in the trial as a consequence of the defendant's usage of the drugs.<sup>143</sup> Unlike the result in the above scenario, a post-trial appeal would still permit a defendant to vindicate the second right in question.<sup>144</sup> In light of the foregoing argument, Justice Breyer found the district court's order appealable as a collateral-order, and thus the court of appeal's jurisdiction was appropriate.<sup>145</sup> As such, the Court had jurisdiction to address next issue

exception. See Swedlow, *supra* note 129, at 5. Years ago, in his *Harper* opinion, Justice Stevens attempted to articulate the unique aspects of antipsychotic medication, describing the drug's effects as both a physical and psychological, and accusing the government of having the ability to control the minds of those medicated by the drugs. See *Washington v. Harper*, 494 U.S. 210, 237 (1990). However, even this more detailed breakdown of the characteristics exclusive to antipsychotics failed to demonstrate why forcible administration of antipsychotics is an exception to the rules of jurisdiction. *Id.*; see also *infra* note 231.

139. *Sell*, 539 U.S. at 177.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*; see also *United States v. Brandon*, 158 F.3d 947, 951 (6th Cir. 1998) (finding the district court's order, which held that an administrative hearing satisfied the due process rights of a defendant who was to be forcibly administered antipsychotics, immediately appealable as a collateral-order "[b]ecause . . . it would be of little value to [the defendant] for th[e] court. . . to review his due-process claim after he ha[d] been forcibly medicated and the trial ha[d] concluded").

145. *Sell*, 539 U.S. at 177; see also *Brandon*, 158 F.3d at 949-51. *Brandon* involved a pretrial detainee who sought to determine whether due process required that a judicial hearing be conducted before the State could forcibly medicate him with antipsychotic medication to render him competent to stand trial. *Id.* Before the *Brandon* court examined the judicial hearing issue, the court focused on whether the district court's order, which held that an administrative hearing on the issue of forcible medication satisfied Brandon's due process rights, was a collateral-order and thus immediately appealable. See *id.* at 950-51. The court applied the three-step test and found the order fit within the collateral-order exception to the final judgment rule. *Id.* at 951; see also *supra* note 127 and accompanying text. The court found that the order conclusively determined the disputed issue because it decided that an administrative hearing satisfies due process requirements. *Brandon*, 158 F.3d at 951. Next, the order resolved an issue completely separate from the merits of the charge against Brandon, sending threatening mail, since the order was concerned with an administrative hearing's sufficiency to protect Brandon's due process rights. *Id.* Finally, the order would be effectively unreviewable on appeal because review of the district court's order would be without value after Brandon had been forcibly administered the drugs and the trial concluded. *Id.*

at hand: whether Sell possessed a constitutionally protected right to refuse involuntary medication.<sup>146</sup>

2. The Due Process Clause Issue: Does the Forcible Administration of Antipsychotic Drugs to Render Sell, A Non-Dangerous Pretrial Detainee, Competent to Stand Trial Violate His Constitutionally Protected Right to Refuse Medical Treatment?

a. *Tightening the Standards for Forcible Medication*

Although the Supreme Court addressed the issue of involuntary medication of criminal defendants with antipsychotic drugs twice before the *Sell* decision, the Court never explicitly addressed the constitutionality of forcible medication solely for trial competency purposes.<sup>147</sup> The more recent of the two cases, *Riggins*, failed to clearly establish the standard a state would have to meet in order to justify overriding a defendant's constitutionally protected liberty interest to refuse medical treatment.<sup>148</sup> The *Riggins* opinion offered general terms, never articulating the exact standard of review that courts should use when looking at decisions to forcibly medicate, or which test or factors should be applied in employing that standard of review.<sup>149</sup> Thus, though many courts have faced the same question since *Riggins*, whether a state can forcibly medicate incompetent criminal defendants, the method of analysis used to determine the answer has varied between each court.<sup>150</sup>

In an attempt to alleviate any confusion left behind from the *Harper* and *Riggins* holdings,<sup>151</sup> Justice Breyer used the analyses set forth in these

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146. *Sell*, 539 U.S. at 177.

147. *See generally* *Washington v. Harper*, 494 U.S. 210 (1990); *Riggins v. Nevada*, 504 U.S. 127 (1992).

148. *See Riggins*, 504 U.S. at 127, 138. Though the Court alluded to an "essential state policy" that could justify involuntary medication of a criminal defendant, it failed to identify what would be considered such a policy. *Id.* Further, the Court recognized that a state would be able to justify forcible treatment with a showing that "it could not obtain an adjudication of [the defendant's] guilt or innocence by using less intrusive means," but failed to note what substantive test the state would have to meet in order to possess such a right. *Id.* at 135-36 (citations omitted). *See also* David M. Siegel, *Psychoactive Medication and Your Client: Better Living and (Maybe) Better Law Through Chemistry*, 27 DEC CHAMPION 22, 23 (2003).

149. *See Riggins*, 504 U.S. at 127, 136 (noting the majority opinion's language stating that "we do not 'adopt a standard of strict scrutiny,'" and subsequently failing to articulate either the standard of review the Court used in *Riggins*' case, or that which should be used in future cases) (citations omitted); Aaron M. Nance, Comment, *Balking at Buying What the Eighth Circuit is Sell-ing: United States v. Sell and the Involuntary Medication of Incompetent, Non-Dangerous, Pretrial Detainees Cloaked With the Presumption of Innocence*, 71 UMKC L. REV. 685, 694 (2003) (stating that, as a result of *Riggins*' failure to clarify the standard of review, "[t]here is no shortage of case law regarding whether the State can 'forc[ibly] medicate' incompetent detainees of one sort or another, but there is no consensus regarding how to analyze or decide the situation properly").

150. *See United States v. Weston*, 255 F.3d 873, 879-80 (D.C. Cir. 2001) (citing a comprehensive list of cases that have used different methods of analysis to deal with the issue of forcible medication, both pre- and post-*Riggins*).

151. *See id.*

opinions as the framework for his opinion in *Sell*.<sup>152</sup> Justice Breyer drew an inference from the two cases that it is constitutional for “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 Government can prove that: (1) medication is medically appropriate, (2) the defendant will not fail to receive a fair trial as a result of the drugs, (3) involuntary medication is the least intrusive alternative available to further the state’s interests, and (4) treatment is necessary to further the state’s interest in a fair trial.<sup>153</sup> Thus, although this standard technically permits forcible medication of incompetent defendants who pose no danger, solely for purposes of trial competence, the occasions in which the government will be able to meet this burden will be rare.<sup>154</sup> This standard becomes even more difficult to meet, when the four implications within the words of these requirements are examined.<sup>155</sup>

First, a court faced with the issue at hand must find that “important governmental interests are at stake.”<sup>156</sup> Bringing to trial an individual accused of a serious crime, against either property or another person, is considered an important government interest.<sup>157</sup> Application of criminal law

152. *Sell*, 539 U.S. at 177-78. The *Sell* Court chose to focus on Sell’s Fifth Amendment due process right to refuse involuntary medication. *Id.* However, Justice Breyer’s failure to address Sell’s First Amendment right of freedom of thought has drawn criticism. See Heidi Lypps, *Better Justice Through Chemistry, Does the New Court Standard Really Protect Our Rights?*, available at Ragged Edge Online, <http://www.ragged-edge-mag.com/extra/sell-lypps.html> (last visited Feb. 3, 2005). “[I]nterfering with Sell’s brain chemistry is tantamount to mind control—the ultimate prior restraint on freedom of speech.” *Id.* (reiterating the view of The Center for Cognitive Liberty & Ethics, a nonprofit organization that filed a brief with the Court on Sell’s behalf).

153. See *Sell*, 539 U.S. at 179. This holding is well-supported because Justice Breyer drew on the standards articulated by the Court in both *Harper* and *Riggins* for this standard, obvious after a review of those two decisions. In *Harper*, the Court permitted the state to forcibly medicate a mentally ill inmate who was dangerous to himself and others, as long as the treatment was in the inmate’s medical interest. *Washington v. Harper*, 494 U.S. 210, 221 (1990). Justice Breyer presumably fails to include the requirement that the defendant be a danger to himself or others because *Sell* was found to be non-violent. *Sell*, 539 U.S. at 185. In *Riggins*, the Court noted that, if the state had shown that medication was medically appropriate and essential for either the defendant’s safety or the safety of others, as long as there were no less intrusive alternative available, forcible medication would have been approved. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

154. *Sell*, 539 U.S. at 180. This standard has been said to make approval of forcible medication harder to achieve. See Robert B. Bluey, *Supreme Court Makes It Tougher to Forcibly Drug Inmates*, June 17, 2003, available at <http://www.CNSNEWS.COM> (last visited Feb. 3, 2005) (quoting Sell’s attorney as saying that this standard not only makes it difficult for the government to forcibly medicate defendants who pose no danger, such as *Sell*, solely for trial competence purposes, but it also demonstrates the Court’s view that it is highly unlikely that the government will actually ever meet this burden).

155. *Sell*, 539 U.S. at 180-82.

156. *Id.*

157. *Id.* Though this notion has been well-established in prior cases, Justice Breyer does not fully explain the standard of a “serious crime.” See *supra* Part II (B); *Illinois v. Allen*, 397 U.S. 337 (1970) (finding that the Government’s interest in trying the accused is significant). “The Court in *Sell* did not . . . offer any definition or explanation of what it considered to be a ‘serious’ crime.” *United States v. Evans*, 293 F. Supp. 2d 668, 673 (W.D. Va. 2003). See also *United States v.*

to those accused of crimes enables the government to satisfy the human need for security.<sup>158</sup> Despite the significance of the government's interest in prosecuting criminals, courts must analyze each case individually to determine if the presence of certain factors might lessen the importance of that interest.<sup>159</sup> For example, a defendant's refusal to take drugs voluntarily may lead to a lengthy confinement in a mental institution.<sup>160</sup> As such, the risks normally associated with permitting one who has committed a criminal act to escape without punishment are less likely to occur.<sup>161</sup> Though potential confinement may reduce the government's interest, it does not completely eliminate it.<sup>162</sup> The government also has a significant interest in assuring that every defendant receives a fair trial.<sup>163</sup>

Second, the court must find that "involuntary medication will significantly further those concomitant state interests."<sup>164</sup> As such, the court must conclude that administration of antipsychotics is "substantially likely" to restore the defendant's competence to stand trial.<sup>165</sup> The court must also find it highly unlikely that any side effects of the drugs will inhibit the defendant's ability to participate in the preparation of his trial defense, therefore causing the defendant to have an unfair trial.<sup>166</sup>

Third, the court must determine that "involuntary medication is necessary to further those interests," meaning the "court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the

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Kourey, 276 F. Supp. 2d 580, 585 (S.D. W. Va. 2003) (finding that the *Sell* standard did not apply to a defendant seeking to avoid forcible medication in part because the defendant, charged with violating the terms of a period of supervised release from prison imposed for his commission of a misdemeanor, did not face "serious criminal charges. . .").

158. See *Sell*, 539 U.S. at 180. Again, Justice Breyer supports this statement with a quote from *Illinois*. "Power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." *Id.* (quoting *Illinois*, 397 U.S. at 347 (Brennan, J., concurring)).

159. *Id.*

160. *Id.*

161. *Id.* Here, Justice Breyer cautioned that he was not attempting to suggest that commitment to an institution should be thought of as a replacement for a criminal trial. *Id.* The government's interest in a timely trial is substantial; due to the chance of faded memories and lost evidence, it may prove difficult to try a defendant whose competence is restored years after commitment has begun. *Id.*

162. *Id.* Another example of a situation in which the government's interest in prosecution may be reduced is when the defendant "has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed)." *Id.* (citing 18 U.S.C. § 3585(b)).

163. See *id.*

164. *Id.* at 181 (emphasis in original).

165. *Id.*

166. *Id.*; see also *Riggins v. Nevada*, 504 U.S. 127, 142-45 (1992) (Kennedy, J., concurring) (noting the ways in which forcible treatment with antipsychotic drugs can cause trial prejudice). Justice Breyer's mere mention of the possibility of trial prejudice does not give ample weight to the issue. A state that tries a defendant taking antipsychotics may actually be trying an incompetent defendant. Bachand, *supra* note 10 at 1059, 1079. Impairment of mental abilities, exterior appearance of a medicated defendant that may prejudice a jury, and the potential decrease in motivation leading to weaker trial defense are proven side effects of antipsychotics. See *id.* at 1078-1080. Thus, although the State may be forcibly administering the drugs in order to restore competence, the medicated state of the defendant may actually still be that of an incompetent. *Id.*

same results.”<sup>167</sup> The court must also consider the least intrusive manner of administering the drugs.<sup>168</sup> An example of a less intrusive manner of compelling a defendant to take antipsychotics is a court order supported with contempt sanctions.<sup>169</sup>

Finally, the court must find that “administration of the drugs is *medically appropriate, i.e.,* in the patient’s best medical interest in light of his medical condition.”<sup>170</sup> Justice Breyer noted the significance of the specific types of drugs used, since different drugs produce varying benefits or consequences.<sup>171</sup>

The Court emphasized that this four-part standard applies to cases involving forcible administration of drugs in order to render a defendant competent to stand trial.<sup>172</sup> However, if forcible medication is necessary for another reason, such as “the purposes set out in *Harper* related to the individual’s dangerousness or purposes related to the individual’s own interests where refusal to take drugs puts his health gravely at risk,” then the court will not have to consider whether forcible medication is warranted for

167. *Sell*, 539 U.S. at 181. Justice Breyer does not emphasize the different options courts must consider by explicitly mentioning other cases in which alternatives to antipsychotic drugs have been used to treat mentally ill patients, prisoners, and pretrial detainees. *Id.* See, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982) (allowing soft physical restraints to be used on an institutionalized mental patient); *Washington v. Harper*, 494 U.S. 210, 226-27 (1990) (noting the lower court’s finding that antipsychotic drugs would be more effective than physical restraints or seclusion in meeting the state’s interest in maintaining order in a prison and control over an inmate); *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1980) (concluding that only if less intrusive means such as sedatives, tranquilizers, or isolation could not meet the needs of an emergency situation would permission be granted to forcibly administer antipsychotics to a pretrial detainee).

168. *Sell*, 539 U.S. at 181.

169. *Id.* Though the Court does mention that non-drug therapies can prove to be effective in restoring a defendant’s competence, the Court does not specifically address these alternatives. Other, less intrusive alternatives used to help restore competency are verbal psychotherapy and behavior modification techniques that utilize positive reinforcement. *Domb*, *supra* note 43, at 304. Another alternative to forcibly administering antipsychotics to a defendant would be to “view a defendant’s decision to refuse antipsychotic medication as a waiver in advance of his due process right to be tried while competent should the absence of medication cause decompensation.” *Id.* at 305. This option effectively addresses concerns of the state that defendants may use the incompetency doctrine to avoid trial. *Id.* “It seems reasonable to extend this ability to waive being tried while competent in order to avoid the acknowledged powerful side effects that the antipsychotics produce.” *Id.* at 306 (citing to *Commonwealth v. Louraine*, 453 N.E.2d 437 (1983) (upholding an accused’s right to waive being tried while competent in order to demonstrate his demeanor accurately by presenting testimony to the jury while he was in an unmedicated state)).

170. *Sell*, 539 U.S. at 181. This notion, drawn directly from both *Harper* and *Riggins*, is amply supported. *Washington v. Harper*, 494 U.S. 210, 227 (1990); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

171. See *Sell*, 539 U.S. at 181. This argument is clearly supported with medical research. See Douglas Mossman, *Unbuckling the “Chemical Straitjacket”*: *The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033, 1062-69 (discussing the benefits and impact of antipsychotic drugs, and how the drugs work to alleviate many of the negative symptoms suffered by those afflicted with mental illnesses).

172. *Sell*, 539 U.S. at 181.



competency purposes.<sup>173</sup> Justice Breyer then stated that courts should first determine whether forcible medication may be justified on similar alternative grounds before examining the trial competence issue, and gave two main reasons in support of this notion.<sup>174</sup> First, Justice Breyer argued that the analysis used to determine whether medication is appropriate in cases where an individual is dangerous, is more “objective and manageable” than the analysis used to determine whether medication should be administered for competency purposes.<sup>175</sup>

The second reason for inquiring into alternative grounds to forcibly medicate before examining an individual’s competence is that courts generally treat issues of involuntary medication as a civil matter, justified on alternative grounds such as those listed above.<sup>176</sup> Every state provides a manner in which a doctor or hospital that determines that medication is in an incompetent defendant’s best interest can take civil action to attain an order to medicate by petitioning the court for the appointment of a guardian for the defendant.<sup>177</sup> If appointed, the guardian takes over decision-making concerning medication for a patient who lacks the capacity to make any such decision, and the guardian can then authorize medication.<sup>178</sup> In these civil proceedings, permission to involuntarily medicate may be granted by the court if a patient’s refusal to take antipsychotics poses a danger to the patient or others.<sup>179</sup>

As mentioned, a court can authorize medication on one of these grounds, it will not need to consider the issue of trial competency.<sup>180</sup> However, regardless of whether forcible medication is actually authorized, the analysis of alternative grounds will be helpful because the findings may aid the court in its subsequent inquiry into the trial competence of a particular defendant.<sup>181</sup>

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173. *Id.* at 182. Here, Justice Breyer’s argument is supported by the *Harper* Court, whose opinion upheld the constitutionality of forcible medication of “a prison inmate who has a serious mental illness . . . if the inmate is dangerous to himself and others. . . .” *Harper*, 494 U.S. at 227.

174. *Sell*, 539 U.S. at 182.

175. *Id.* (citing *Riggins*, 504 U.S. at 140 (Kennedy, J., concurring)). Justice Breyer lends further support for this theory by stating that it may be easier for a psychiatrist or medical expert, knowing the side effects associated with particular drugs, to assess whether those drugs are necessary to control a defendant’s potentially dangerous behavior, than to weigh the likelihood antipsychotics could affect trial fairness or competence to stand trial. *Id.* Justice Breyer supports this contention further by noting that, in the second scenario, a doctor would be attempting to analyze “quintessentially legal questions.” *Id.*

176. *Id.*

177. *Id.*

178. *Id.* (citing ALA. CODE §§ 26-2A-102(a), 26-2A-105, 26-2A-108 (1992); ALASKA STAT. §§ 13.26.105(a), 13.26.116(b) (Michie 2002); ARIZ. REV. STAT. ANN. §§ 14-5303, 14-5312 (West 1995); ARK. CODE ANN. §§ 28-65-205, 28-65-301 (1987)).

179. *Sell*, 539 U.S. at 182.

180. *Id.* at 183.

181. *Id.* Justice Breyer poses various questions that may be answered by the preliminary inquiry to support this notion of helpfulness. *Id.* Such questions include 1) why it would be medically appropriate to forcibly medicate an individual who is neither dangerous nor incompetent to accept or reject medical treatment, and 2) whether solely restoring trial competency will justify administration of the drugs, despite harmful side effects associated with the drugs such as trial prejudice. *Id.*

*b. The Case at Hand: Given the New Standard, Should Sell be Forcibly Medicated?*

Before applying the new standard for forcible medication of incompetent defendants for purposes of restoring trial competency, Justice Breyer analyzed the standards utilized by the institution<sup>182</sup> and the magistrate judge<sup>183</sup> in deciding Sell's case.<sup>184</sup> Both the institution and the magistrate appear to have used Sell's alleged dangerousness as the basis to approve forcible medication.<sup>185</sup> However, because the district court concluded that Sell was not dangerous, a finding later affirmed by the court of appeals, both courts used trial competency as the sole basis for approving forcible medication.<sup>186</sup>

Assuming the court of appeals correctly found Sell non-dangerous,<sup>187</sup> it erred in approving forced medication for the sole purpose of trial competency for two reasons.<sup>188</sup> First, the magistrate judge approved forcible medication because it was the "only way to render [Sell] *not dangerous and competent to stand trial*," and not for trial competence purposes alone.<sup>189</sup>

Justice Breyer believes that, because of these benefits of the preliminary inquiry, any court asked to approve forcible medication of a defendant solely for trial competence purposes must determine whether the government has already sought authorization of involuntary administration of the drugs on these alternative grounds. *Id.*

182. *See supra* notes 103-111 and accompanying text.

183. *See id.*

184. *See Sell*, 539 U.S. at 183.

185. *Id.* Justice Breyer notes that these decisions were made using *Harper* as a guide. *Id.* Justice Breyer probably drew this conclusion because a review of the hearings conducted both by the institution staff and the magistrate, shows that in both instances the fact that Sell posed a danger to himself and others was cited as a main reason for administering antipsychotics. *Id.*; *see also supra* notes 95-100 and accompanying text.

186. *Sell*, 539 U.S. at 183; *see also supra* notes 109-116 and accompanying text (discussing the district court and court of appeals holdings).

187. Justice Breyer assures that he only makes this assumption because the government did not contest the court of appeals' finding that Sell was non-dangerous. *Sell*, 539 U.S. at 183. Justice Breyer then criticized both the court of appeals' and the district court's opinions. *Id.* Despite the fact that the court of appeals' found that an incident with a nurse was merely "inappropriate familiarity," and consequently concluded that Sell was non-dangerous, the court failed to distinguish how this type of behavior was different than that of someone not suffering from a mental illness. *Id.*; *see also supra* note 100 and accompanying text (mentioning an incident in which Sell made advances towards a nurse at the institution); *United States v. Sell*, 282 F.3d 560, 565 (8th Cir. 2002) (finding "Sell's inappropriate behavior . . . amounted at most to an 'inappropriate familiarity and even infatuation' with a nurse"). The court of appeals also failed to explain why it concluded that Sell's incident with the nurse should be minimized despite testimony from psychiatrists that Sell was, in fact, dangerous. *Sell*, 539 U.S. at 184. Although the district court's opinion was more thorough than the court of appeals' opinion, it still does not explain certain aspects leading up to the finding that Sell is non-dangerous. *Id.* For example, it is not explained whether the institution's return of Sell from isolation to the general prison population was a reflection of an improvement in Sell's condition, nor is it clear whether the move was seen by the medical center staff as permanent or temporary. *Id.*

188. *Id.* at 185.

189. *Id.* (citations omitted).

Second, it is clear from the record of the hearing held before the magistrate that the experts participating in that hearing focused upon the issue of Sell's dangerousness.<sup>190</sup> As such, the experts failed to ask questions focused around the issue of trial competence.<sup>191</sup> Questions concerning the potential side effects antipsychotics may have on a defendant are critical to an analysis of trial competence analysis because of the tendency for these effects to undermine the fairness of a trial.<sup>192</sup> Due to the failure of the experts present at the hearing to pose such questions, the Court is unable to determine if there was a likelihood that the drugs would cause Sell's trial to be unfair.<sup>193</sup>

Finally, Justice Breyer attacked the lack of consideration the lower courts gave to the length of Sell's past and potential future confinements at the institution.<sup>194</sup> Sell's refusal to take the recommended medication may result in further confinement for a lengthy period.<sup>195</sup> This is important to consider in the decision to forcibly medicate because it reduces the chance of Sell committing future crimes.<sup>196</sup> In addition, Sell has already spent considerable time institutionalized, and thus he should receive credit for that time towards any sentence he receives.<sup>197</sup> These factors lessen the significance of the government's interest in trying the accused.<sup>198</sup>

The above considerations led Justice Breyer to conclude that the court of appeals' order permitting forcible administration of antipsychotic drugs was

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190. *Id.*

191. *Id.* This is a weak argument. Justice Breyer suggests that, if the experts had focused on the competence issue, they should have asked questions pertaining to "trial-related side effects and risks." *Id.* However, the magistrate's findings from the hearing clearly note that "newer drugs and/or changing drugs will 'ameliorat[e]' any 'serious side effects' . . . and that 'there is a substantial probability' that the drugs will 'retur[n]' Sell 'to competency.'" *See id.* at 173 (citations omitted).

192. *See id.* This argument is well supported. There is no shortage of data that links the side effects of antipsychotics with an unfair trial. *See Riggins*, 504 U.S. at 142-45 (Kennedy, J., concurring) (discussing trial-prejudicing side effects resulting from taking antipsychotics). Justice Breyer also articulates his own list of side effects a defendant may suffer from the drugs: "[w]hether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions." *Sell*, 539 U.S. at 185. Though Justice Breyer addresses the risks associated with undertaking treatment with antipsychotics, he never addresses the risks associated with discontinuing the drugs. *See infra* note 221 and accompanying text.

193. *See Sell*, 539 U.S. at 185. This is a feeble contention by Justice Breyer. The Court blames much of the fact that it is unable to determine whether the side effects of antipsychotics were likely to cause prejudice in Sell's trial. *Id.* However, the Court never considers its ability to research the particular drugs the institution sought to administer to Sell, and determine the known side effects that drug may cause. *See, e.g., Mossman, supra* note 171, at 1066-84 (comparing the effects of old antipsychotic drugs with effects of newer drugs and discussing the manner in which the newer drugs affect the first-time user's body); Siegel, *supra* note 10, at 348-50 (elaborating on the risks and benefits of novel antipsychotics such as Clozapine, Risperidone, Olanzapine, Quetiapine, and Ziprasidone).

194. *Sell*, 539 U.S. at 186.

195. *Id.*

196. *Id.*

197. *Id.* (citing 18 U.S.C. § 3585(b)).

198. *Id.*; *see id.* at 179-84.

issued in error.<sup>199</sup> Thus, Justice Breyer vacated the judgment and remanded the case.<sup>200</sup>

### B. Justice Scalia's Dissent

#### 1. The Court Lacked Jurisdiction to Hear Sell's Case Because the District Court's Order Did Not Fall Within the Exception to the Final Judgment Rule

Although he wrote the dissenting opinion for *Sell*,<sup>201</sup> Justice Scalia never expressed a view on the issue of forcible medication itself.<sup>202</sup> Instead, Justice Scalia attacked the Court's jurisdiction over the case, claiming that because the district court's pretrial forced medication was not immediately appealable, the court of appeals lacked jurisdiction to hear the case.<sup>203</sup>

Before addressing the issue of the jurisdiction, Justice Scalia briefly reviewed Sell's case and the journey taken by the order for forcible medication before reaching the Supreme Court.<sup>204</sup> Both Sell and the government contend that courts of appeals are statutorily permitted to review

199. *Id.* at 186. Justice Breyer did state that the government may continue its quest for forcible medication, based on the newly established standard, or based on Sell's alleged dangerousness. *Id.*

200. *Id.*

201. Justice Scalia was joined by Justices O'Connor and Thomas in his dissent.

202. *Sell*, 539 U.S. at 186-93 (Scalia, J., dissenting).

203. *See id.* at 186-87 (Scalia, J., dissenting) (criticizing the analysis used by Justice Breyer in reaching the conclusion that the Court had jurisdiction to hear Sell's case). As support for his opinion that Sell's case is not appealable, Justice Scalia cites to other cases concerning pretrial orders permitting forcible medication which were not appealable under the collateral-order doctrine. *Id.*; *see, e.g.*, *United States v. Morgan*, 193 F.3d 252, 258-59 (4th Cir. 1999); *United States v. Brandon*, 158 F.3d 947, 950-51 (6th Cir. 1998). In addition to criticizing Justice Breyer's opinion, Justice Scalia also "admonish[ed] the Eighth Circuit [Court of Appeals] for failing even 'to wonder whether it had any business entertaining [Sell's] appeal.'" *The Supreme Court, 2002 Term-Leading Cases*, 117 HARV. L. REV. 307, 312 (2003) (citing *Sell*, 539 U.S. at 186).

204. *See Sell*, 539 U.S. at 186-93 (Scalia, J., dissenting). Justice Scalia repeated the chain of events leading to the Supreme Court's review of Sell's case. *Id.* Beginning with the magistrate's order that Sell was incompetent to stand trial, Justice Scalia noted that this decision was based on Sell's inability to "understand the nature and consequences of the proceedings against him" or to assist counsel to prepare his defense. *Id.* at 187. The magistrate then ordered that Sell be institutionalized to determine whether there was a substantial likelihood of his competence returning in the near future. *Id.* Thereafter, a psychiatrist opined that Sell should take antipsychotics in order to render him competent for trial purposes. *Id.* Sell's appeal of the psychiatrist's recommendation was denied, thereby leaving the government with the authority to forcibly medicate. *Id.* Sell then submitted a motion to the district court, seeking a hearing concerning the medication. *Id.* at 188. A magistrate granted Sell's motion, held a hearing, and subsequently granted the government's order permitting involuntary medication of Sell. *Id.* The district court later approved this order. *Id.* Sell then appealed to the court of appeals. *Id.* Justice Scalia also mentioned that the magistrate's subsequent order approving the government's order to medicate was probably unnecessary because the government already had statutory authorization to medicate Sell by means of the unappealed administrative decision. *See id.* at n.3 (citing 28 C.F.R. § 549.43 (2003)); *see Steel Co. v. Citizens for Better Env't*, 523 U.S. 83 (1998).

“all final decisions of the district courts of the United States.”<sup>205</sup> There is an exception to the this “statutory command,” called the “collateral-order” doctrine, which allows courts of appeals to review district court orders that (1) “conclusively determine the disputed question,” (2) “resolve an important issue completely separate from the merits of the action,” and (3) are “effectively unreviewable on appeal from a final judgment.”<sup>206</sup> The district court’s order permitting forcible medication does not satisfy the third prong of the exception.<sup>207</sup>

*Riggins v. Nevada*<sup>208</sup> may be used to support the reasoning that the district court’s order “is reviewable on appeal from conviction,” but not immediately appealable as a collateral-order.<sup>209</sup> *Riggins* was involuntarily medicated as a pretrial detainee.<sup>210</sup> After receiving his conviction for murder, he appealed, claiming that forcible medication violated the due process standards articulated in *Washington v. Harper*, 494 U.S. 210 (1990).<sup>211</sup> The *Riggins* Court found that involuntary administration of antipsychotics to a criminal defendant without compliance with the *Harper* standards creates a risk of an unfair trial.<sup>212</sup> Thus, the defendant’s conviction is automatically vacated.<sup>213</sup> As such, Justice Breyer was incorrect in his conclusion that an ordinary appeal, meaning one that is brought after a conviction and sentence are entered, is brought too late to enforce the defendant’s right to refuse involuntary medication.<sup>214</sup>

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205. *Sell*, 539 U.S. at 188-89 (citing 28 U.S.C. § 1291 (1993)) (emphasis in original). Justice Scalia refers to this rule as the “final judgment rule,” which excludes appellate review of orders in criminal cases until the defendant has been convicted and a sentence imposed. *Id.* (citing *Abney v. United States*, 431 U.S. 651, 656-57 (1977)).

206. *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Justice Scalia draws attention to the fact that this exception is “invented,” as there is no statutory basis for it. *Id.*

207. *Id.*

208. 504 U.S. 127 (1992)

209. *See Sell*, 539 U.S. at 189.

210. *Id.*

211. *See id.*

212. *Id.*

213. *Id.*

214. *See id.* (citing *Id.* at 177). This argument is flawed. While the *Riggins* court found that involuntary medication administered without the proper due process measures was unconstitutional, which warranted automatic vacatur of *Riggins*’ conviction, *Riggins* was nonetheless already medicated against his will. *See Riggins v. Nevada*, 504 U.S. 127, 130-32 (1992). Thus, *Riggins* seems to stand more for the principle that a defendant who has already undergone medication should not incur harm from an unfair trial. *Id.* at 133-38. However, Justice Breyer seeks to protect *Sell* from forcible medication in the first place. *See Sell*, 539 U.S. at 176-77. Justice Breyer does not view an appeal of the pretrial order, once *Sell* has already been medicated, as a means of vindication. *See id.* Rather, Justice Breyer seeks to prevent medication at all: the actual ingestion of the medication itself being the harm. *See id.* Permitting *Sell* to be medicated against his will, and then subsequently declaring the order unconstitutional, does not effectively protect *Sell* from that specific harm. *Id.* Justice Scalia also notes that the majority’s statement that the order to forcibly medicate will be unreviewable if *Sell* is acquitted does not justify the third prong of the collateral-order doctrine. *Id.* at 190 n.5. To be “effectively unreviewable on appeal from a final judgment” does not equate with the “possibility that the aggrieved party will have no occasion to appeal.” *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). It should also be noted, however, that Justice Breyer did not use such reasoning, namely the possibility of *Sell*’s acquittal, as a means to satisfy the third prong of the collateral-order exception. *Id.* at 176. Justice Breyer was merely

Though it is true that an appeal after conviction would not provide Sell with the desired remedy,<sup>215</sup> this reasoning is not the basis for permitting an interlocutory appeal.<sup>216</sup> The collateral-order exception is construed very strictly in criminal cases.<sup>217</sup> In the fifty-four years since the exception has been recognized by the Court,<sup>218</sup> only three types of pretrial orders have been found to be appealable in criminal cases: “denials of motions to reduce bail,”<sup>219</sup> “denials of motions to dismiss on double-jeopardy grounds,”<sup>220</sup> and “denials of motions to dismiss under the Speech or Debate Clause.”<sup>221</sup> Justification for the first exception may be found in the fact that a denial of a motion to lower the amount of bail becomes moot if the defendant is forced to wait until after conviction to appeal.<sup>222</sup> *Riggins* demonstrates that the scenario at hand is not comparable to the situation involving a denial of a motion to reduce bail.<sup>223</sup> The latter two exceptions to the final judgment rule

emphasizing the point that the harm caused by permitting the order for forcible medication to be carried out could not be undone. *See id.* at 176-77. If Sell was declared competent and tried, regardless of whether he later appealed after a conviction was entered or was later acquitted, the damage done to his body by the drugs could not be reversed. *Id.* Thus, the example of an acquittal was merely another means of showing the permanence of the effects of the antipsychotics. *See id.*

215. *See id.* at 190. Justice Scalia contrasts the preferred remedy, “a predeprivation injunction” with the remedy he would receive if his appeal was delayed, “[a] postdeprivation vacatur of conviction.” *Id.* (noting that the second remedy is that which was received by *Riggins*). Here, Justice Scalia reiterates exactly what Justice Breyer already articulated: that the type of remedy Sell would receive would not vindicate the type of harm that he is seeking to avoid. *See id.* at 177. Thus, it seems logical that, because Sell is seeking to protect a different type of harm than was protected in *Riggins*, he should not receive the same type of remedy as *Riggins*, despite Justice Scalia’s contention.

216. Justice Scalia provides support for this notion, that an appellant’s failure to receive the specific remedy preferred if forced to wait to appeal after a “final judgment” does not permit early appeal of an order, is supported by past case law. *See id.* at 190 (citing *Flanagan v. United States*, 465 U.S. 259, 263 (1984) (refusing to permit interlocutory appeal of an order that disqualified defendant’s counsel); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (per curiam) (refusing to permit interlocutory appeal of an order that denied a motion to dismiss an indictment for purposes of prosecutorial vindictiveness); *Carroll v. United States*, 354 U.S. 394 (1957) (refusing to permit interlocutory appeal of an order which denied a motion to suppress evidence)).

217. *Sell*, 539 U.S. at 190 (citing *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989)).

218. *Id.* (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)).

219. *Id.* (citing *Stack v. Boyle*, 342 U.S. 1 (1951)). It is interesting to note that, in a concurring opinion in *Stack*, Justice Jackson notes one of the justifications for reviewing an order fixing bail is that “unless [the order] can be reviewed before sentence, it can never be reviewed at all.” *Stack*, 342 U.S. at 12 (Jackson, J., concurring in part and dissenting in part). This is similar logic to that used by Justice Breyer: if the order to forcibly medicate Sell is not reviewed before he is actually medicated for trial, then later review of the order is presumably ineffective. *See Sell*, 539 U.S. at 177.

220. *Id.* at 190 (Scalia, J., dissenting) (citing *Abney v. United States*, 431 U.S. 651, 656-57 (1977)).

221. *Id.* (citing *Helstonski v. Meanor*, 442 U.S. 500, (1979)).

222. *Id.* at 190-91 (citing *Flanagan v. United States*, 465 U.S. 259, 266 (1984)); *see also supra* note 209-11 and accompanying text

(noting that this logic is similar to that employed by Justice Breyer in the Majority opinion).

223. *Id.* at 191.

are justified “on the ground that it was appropriate to interrupt the trial when the precise right asserted was the *right not to be tried*.”<sup>224</sup> These exceptions are also inapplicable to Sell because he has asserted a right to refuse medication, not the right to not be tried.<sup>225</sup>

The majority’s holding will permit other defendants in Sell’s position to engage in “opportunistic behavior,” such as taking antipsychotics until a trial is halfway over, then refusing to continue the medication and demand immediate appeal from an order permitting medication to continue on a compulsory basis.<sup>226</sup> The majority did not discuss concern for this sort of disruption of criminal trials, yet this is the very reason for the Court’s past narrow interpretation of the collateral-order doctrine in all prior criminal cases.<sup>227</sup>

The effects on criminal proceedings from the Court’s holding are small compared to the adverse effects of the new rule underlying the Court’s holding concerning appellate jurisdiction.<sup>228</sup> The analysis used by the Court in finding appellate review appropriate, namely that because an appeal after Sell has already undergone forced medication will subject him to, rather than protect him from, the harm he seeks to avoid, “effects a breathtaking expansion of appellate jurisdiction over interlocutory orders.”<sup>229</sup> The Court’s logic permits other courts applying similar reasoning to find that any criminal defendant claiming that a trial court order violates a particular constitutional right is entitled to an immediate appeal.<sup>230</sup> The majority’s

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224. *Id.* (citing *Abney*, 431 U.S. at 660-61; *Helstonski*, 442 U.S. at 507-08).

225. *Id.*

226. *Id.* While Justice Breyer did not mention the risks of discontinuing medication, Justice Scalia mentions the issue here, but does not delve into it. *See id.* at 177-86 (failing to discuss the risks of discontinuing antipsychotics). Just as beginning treatment with antipsychotics may lead to severe side effects, the risks of discontinuing treatment may also be harsh. *See Siegel, supra* note 10, at 350-52. There is medical concern that discontinuing antipsychotic drugs may cause irreparable harm. *Id.* at 351. Medical studies provide evidence that patients whose psychotropic drugs have been discontinued may incur relapses. *Id.* It may also be difficult for those individuals to return to their prior level of functioning. *Id.* While some patients may benefit from discontinuing the drugs, having their previous symptoms of mental illness disappear for an unpredictable period of time, others may develop new symptoms, symptoms that are different from those they had at the time they committed the offense they are charged with. *Id.*

227. *Sell*, 539 U.S. at 191 (Scalia, J., dissenting) (citing *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989); *Flanagan v. United States*, 465 U.S. 259, 264 (1984)).

228. *Id.*

229. *Id.*

230. *Id.* Justice Scalia cautions that this type of scenario may cause trial delays for months. *Id.* Some examples of the defendant’s ability to immediately appeal on a claim of a violation of rights that would not be vindicated if appeal was impermissible until after a final judgment include an order “requiring the defendant to wear an electronic bracelet [which] could be attacked as an immediate infringement of the constitutional right to ‘bodily integrity.’” *Id.* at 192. Likewise, a trial court order “refusing to allow the defendant to wear a T-shirt that says ‘Black Power’ in front of the jury could be attacked as an immediate violation of First Amendment rights; and an order compelling testimony could be attacked as an immediate denial [of] Fifth Amendment rights.” *Id.* In his opinion, Justice Breyer made a feeble attempt to refute this argument, claiming that “the severity of the intrusion and corresponding importance of the constitutional issue” made Sell’s case distinguishable from such examples. *Id.*; *see supra* note 135 (discussing why Justice Breyer’s argument does not completely differentiate Sell’s case from Justice Scalia’s examples).

holding also effectively overrules *Flanagan*<sup>231</sup> and *Carroll*,<sup>232</sup> which held that orders potentially infringing upon a defendant's constitutional rights could nevertheless only be appealed after a final judgment.<sup>233</sup>

Essentially, Justice Breyer's opinion seems to covertly revise the three-prong test for a collateral-order exception since the majority has not met the third requirement,<sup>234</sup> yet it still permitted appeal of the district court's order.<sup>235</sup> The majority supported its decision by differentiating Sell's case from others: immediate appeal was permissible for Sell because the intrusion caused by forcible medication is severe, and the constitutional issue at stake is important.<sup>236</sup> This statement "must mean that [the Court] is revising the *Cohen* test, to dispense with the third requirement. . . *only when the important separate issue in question involves a 'severe intrusion' and hence an 'important constitutional issue.'*"<sup>237</sup>

Sell could have used a variety of other methods in order to obtain immediate review of the district court's order before his trial.<sup>238</sup> However, because Sell chose to oppose the order to be forcibly medicated during a criminal trial, he should have to bear the restraints placed on such challenges, and thus his proceedings should not have been delayed.<sup>239</sup> The Court's desire to hear Sell's case and issue a decision on the issue of forcible medication for trial competency purposes should not have persuaded the Court to disregard statutory limitations on appellate jurisdictions.<sup>240</sup> As such, the judgment of the Court should be vacated, and the case remanded to the court of appeals for dismissal.<sup>241</sup>

231. *Flanagan v. United States*, 465 U.S. 259 (1984).

232. *Carroll v. United States*, 354 U.S. 394 (1957).

233. *Sell*, 539 U.S. at 192 (Scalia, J., dissenting).

234. The third requirement is "being unreviewable on appeal." *Id.*; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

235. *See Sell*, 539 U.S. at 192 (Scalia, J., dissenting).

236. *Id.* at 192, 177.

237. *Id.* at 192. Though Justice Scalia praises such narrowing of the Court's revision, he also opposes any revision of the three-prong test because there is no basis for the revision in prior opinions and because it provides an opportunity for criminal defendants to take advantage of it to avoid trial. *Id.* at 192-93; *see supra* note 213 and accompanying text. Justice Scalia admonishes the Court again, noting that if he were changing the *Cohen* requirements, he would "at least do so in an undisguised fashion." *Sell*, 539 U.S. at 193 (Scalia, J., dissenting).

238. *Id.* (noting that, as a pretrial detainee challenging conditions of his confinement, filing a claim under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* or an action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) could have earned Sell immediate appeal of a denial of relief).

239. *See id.*

240. *Id.*

241. *Id.*



A. *Judicial*1. Justice Scalia Predicts that the Court's Approval of Immediate Appeal of the District Court's Order Will Widen "The [N]arrow [G]ate of [E]ntry to the [C]ollateral-order [D]octrine"<sup>242</sup>

*Sell* leaves much uncertainty regarding the permissibility of immediate review of pre-trial orders by courts of appeals in criminal cases.<sup>243</sup> Justice Scalia predicts that the Court's holding will greatly increase the number of pretrial orders that appellate courts have jurisdiction to hear, thereby causing a large number of criminal proceedings to be interrupted.<sup>244</sup> Justice Breyer believes that although appellate review by the court of appeals was necessary in this particular case because of the circumstances surrounding it, future effects of the Court's opinion will be minimized for that very reason: the distinctive nature of *Sell*'s case.<sup>245</sup> Specifically, *Sell*'s holding threatens to upset the timeliness of criminal proceedings and the requirements of the collateral-order doctrine.

a. *Effect on the Court: Cause for Uncertainty*

If interpreted broadly, the *Sell* decision could potentially cause disruption of every criminal trial in which the defendant makes a claim for a violation of a constitutional right.<sup>246</sup> Nonetheless, if the decision is read narrowly, as Justice Breyer encouraged, only orders involving "severe" intrusions into a defendant's privacy and important constitutional issues shall be considered appropriate for appeal.<sup>247</sup> Nevertheless, since Justice Breyer did not fully define what these terms mean, or why they make an order for forcible medication unique, they are open for wide interpretation.<sup>248</sup>

In *Harper*, Justice Stevens described the liberty interest in one's body as both "physical and intellectual," stemming from a person's right to privacy and providing a means for the government to essentially control a medicated

242. *Id.* at 192.

243. *See id.*; *see generally* *The Supreme Court, 2002 Term Leading Cases*, 117 HARV. L. REV. 307 (2003) [hereinafter *Leading Cases*] (discussing the effects of *Sell* on the collateral-order doctrine).

244. *See Sell*, 539 U.S. at 191 (Scalia, J., dissenting).

245. *Id.* at 176 (noting that in *Sell*, appellate review of the district court's order was justified by satisfaction of the collateral-order doctrine, the severity of the intrusion caused by forcible medication and the importance of the constitutional right at stake).

246. *Id.* at 191 (Scalia, J., dissenting).

247. *Id.* at 176.

248. *See id.*; *Leading Cases*, *supra* note 244, at 313.

defendant's mind.<sup>249</sup> However, this opinion still failed to explain the individuality of the right to refuse antipsychotic drugs.<sup>250</sup> Justice Breyer failed to establish the uniqueness of the right any further, or define it in any more precise terms.<sup>251</sup> Thus, without establishment of any restrictions regarding what cases satisfy Justice Breyer's standard of exclusivity, it appears that many claims of an intrusion into a liberty interest may satisfy the standard.<sup>252</sup>

In addition to adding uncertainty regarding the types of intrusions and constitutional rights that may warrant appellate review, the Court's decision has created confusion around the well-settled exception to the "final judgment" rule.<sup>253</sup> Prior to *Sell*, the Supreme Court had articulated only three exceptions that satisfied the three-prong collateral-order exception in the criminal arena.<sup>254</sup> However, *Sell* has established a fourth exception: pretrial orders approving involuntary medication are subject to appeal prior to a conviction or sentencing.<sup>255</sup> The Court's reasoning for permitting this fourth exception may open up a proverbial can of worms.

Prior to the *Sell* Court's holding, the third element of the collateral-order exception, "effectively unreviewable on appeal from a final judgment," could not be satisfied on the basis that ordinary appeal would come too late for the preferred remedy.<sup>256</sup> However, now courts may consider the effect of an ordinary post-judgment appeal upon the defendant to find whether the third prong has been satisfied.<sup>257</sup> Under *Sell*, any time a court believes that a post-trial appeal would come too late to avoid the alleged harm, the court may find that the third requirement has been satisfied, and thus that appellate

249. *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part and dissenting in part); see also *Leading Cases*, *supra* note 243, at 313.

250. See *Leading Cases*, *supra* note 243, at 312.

251. *Id.*; *Sell*, 539 U.S. at 175-86.

252. See *id.* at 191-92 (accusing the Court's ruling of causing "uncertainty," and thus, Justice Scalia would not have adopted such a holding). One suggestion for how the Court could have avoided such confusion, and such a multiplicity of claims that would satisfy *Sell*'s standard would be to "develop[] a substantive theory of the due process violation that forced medication may effect." *Leading Cases*, *supra* note 243, at 314. By stipulating "that the collateral order doctrine would extend jurisdiction only if an appellant asserted a liberty interest of [refusal of unwanted medical treatment]," the Court could have therefore eliminated a great number of potential appeals. *Id.*

253. See *Sell*, 539 U.S. at 187-91 (Scalia, J., dissenting).

254. *Id.* at 190; *Stack v. Boyle*, 342 U.S. 1 (1951); *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Abney v. United States*, 431 U.S. 651 (1977).

255. *Id.* at 176-77.

256. *Id.* at 190 (Scalia, J., dissenting). This point is well established by precedent. See *Flanagan v. United States*, 465 U.S. 259 (1984) (finding an order disqualifying defense counsel must be appealed after conviction or sentencing); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (per curiam) (holding that an order denying motion to dismiss for prosecutorial vindictiveness must be appealed after conviction or sentencing); *Carroll v. United States*, 354 U.S. 394 (1957) (concluding that an order denying a motion to suppress evidence must be appealed after conviction or sentencing).

257. See *Leading Cases*, *supra* note 244, at 312-13.

jurisdiction exists.<sup>258</sup> Because the Court failed to clarify exactly which cases this new standard may apply to, Justice Scalia's prediction, stating that the Court's decision has prompted a massive expansion of the collateral-order doctrine as it is currently known, will likely come true.<sup>259</sup>

*b. Effects on the Defendants:*

This type of uncertainty within the Court itself may effectively create an "opportunity for gamesmanship" amongst the defendants whose rights are at stake.<sup>260</sup> Under *Sell*, a defendant who seeks to avoid or delay trial may easily do so. All the defendant must do is claim that a pretrial order, if carried out, will result in a privacy intrusion and support the argument with a constitutional right that protects that liberty.<sup>261</sup> The Court's failure to limit these instances solely to a *Sell*-type of case has thus not only affected the Court, but those accused as well. Consequently, a defendant who voluntarily takes his medication until halfway through trial, and then decides to stop, could immediately appeal a trial order forcing him to continue his medication.<sup>262</sup> As such, the Court's holding may cause great disruption and delay of criminal trials of mentally ill defendants.<sup>263</sup>

2. The Court's Holding Will Affect the Future of Permissible  
Involuntary Treatment with Antipsychotics for Trial Competency  
Purposes

*a. Effects on the Government's Burden of Proof and Right to Override  
a Defendant's Liberty Interest*

Prior to *Sell*, no explicit standard existed for judges to follow in determining whether forcible medication for trial competency purposes alone was justified.<sup>264</sup> However, *Sell* has established four stringent conditions that the government must satisfy before an order permitting forcible medication to restore a defendant's competency for trial will be

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258. *Id.*

259. *Sell*, 539 U.S. at 191 (Scalia, J., dissenting). One way in which the Court could have avoided such problems would have been to distinguish *Sell*'s case on the basis of a factor other than timeliness. Rather than view *Sell*'s appeal as subject to immediate review because otherwise the harm sought to be avoided would actually be incurred, the court could have viewed "*Sell*'s appeal from the collateral order [as] dispositive of whether any trial would ensue." See *Leading Cases*, *supra* note 243, at 316. "The same could not generally be said of defendants who, according to Justice Scalia's examples, appeal from orders regarding electronic bracelets, courtroom attire, or compelled testimony." *Id.* (citing *Sell*, 539 U.S. at 191-92 (Scalia, J., dissenting)).

260. *Sell*, 539 U.S. at 192-93 (Scalia, J., dissenting).

261. *Id.*; see *Leading Cases*, *supra* note 243, at 312.

262. *Sell*, 539 U.S. at 191 (Scalia, J., dissenting).

263. *Id.*

264. See Robert B. Bluey, *Supreme Court Makes It Tougher to Forcibly Drug Inmates*, June 17, 2003, available at <http://www.cnsnews.com/Nation/Archive/200306/NAT20030617b.html> (last visited Feb. 3, 2005) (quoting an attorney supporting *Sell*'s right to refuse medication).

granted.<sup>265</sup> These requirements will likely discourage the government from seeking orders for forcible medication, thereby lessening the number of defendants who will be involuntarily medicated in the future.<sup>266</sup>

Because of this heavier burden, the *Sell* decision may also increase the number of civil proceedings that are filed in search of an order for forcible medication.<sup>267</sup> Critiqued as a sign for prosecutors to consider seeking alternatives to forcible medication through a court order, *Sell* may lead the government to pursue the civil procedural model of involuntary medication.<sup>268</sup> The “civil procedure usually involves the appointment of a guardian with the power to make medical decisions for patients who may lack the mental competence to do so.”<sup>269</sup> Once appointed, the guardian may authorize medication of a defendant, if the guardian feels administration of the drugs are in the defendant’s best interests.<sup>270</sup> Thus, discouraged by the stringent four-factor test in *Sell*, a prosecutor seeking to try an incompetent criminal defendant may prefer to have a guardian with decision-making authority appointed for the criminal defendant, rather than to seek an order approving forcible medication from the court itself.<sup>271</sup>

Despite the notion that *Sell* effectively weakens the position of the government, the decision has also been viewed as recognition of *greater* governmental power.<sup>272</sup> “The decision. . . could give weight to what appears to be an expanding notion that [the] government can override the constitutional liberty of individuals on medical matters.”<sup>273</sup> As such, the *Sell* decision may actually encourage the government to file an increasing number of claims, seeking court-ordered approval of forcible medication in a variety of scenarios.

These implications demonstrate the powerful effects *Sell* will have on the position of the government, the party seeking to involuntarily medicate

265. *Id.*; *Sell*, 539 U.S. at 180-81.

266. See Bluey, *supra* note 264. The U.S. Justice Department reports that out of the 285 defendants held to be mentally incompetent to stand trial, 80% of them voluntarily took antipsychotic medication to treat their illnesses. *Supreme Court Allows Defendant's Forced Medications*, REUTERS, June 16, 2003, available at <http://12.42.224.225/HealthNews/reuters/NewsStory0616200326.htm> (last visited Feb. 3, 2005) (quoting the U.S. Justice Department). This leaves fifty-nine defendants who were treated involuntarily, many of whom did not seek judicial review of the orders to forcibly medicate. *Id.*

267. See David L. Hudson Jr., *Rules Tightened On Forcibly Medicating Defendants: High Court Offers Guidelines on Involuntary Medication for Competency*, 2 A.B.A. J. EREPORT 24 (2003).

268. *Id.*

269. *Id.*

270. See *id.*

271. See *id.*

272. See *Drugging Defendants: Supreme Court Sets Limits, But is that Enough?*, THE CHRISTIAN SCIENCE MONITOR, June 18, 2003, available at <http://www.csmonitor.com/2003/0618/p08s03-comv.html> (last visited Feb. 3, 2005).

273. *Id.*

individuals. Likewise, the *Sell* decision will have a severe impact on those persons seeking to avoid forcible medication.

### *b. Effects on Mentally Ill Defendants*

*Sell*'s holding will reach beyond the courtroom and the government, giving far more weight to the rights of criminal defendants awaiting trial. *Sell* recognizes the "important role that a defendant himself plays in his own trial and the contributions he makes to his lawyer and his own defense."<sup>274</sup> In addition to the significance of the role in one's trial, to some *Sell* is a "symbol of clinging to personal autonomy in the face of overweening government power."<sup>275</sup>

*Sell* has also been viewed by medical ethicists as acknowledgment of involuntary medication of non-violent defendants as a form of censorship.<sup>276</sup> As such, *Sell* effectively recognizes a defendant's right to control his own cognitive processes.<sup>277</sup>

Despite the seemingly positive effects of *Sell*, Justice Breyer's opinion may also have ramifications on mentally ill defendants awaiting trial. The scenario involving forcible medication leaves the government looking out for the defendants' medical interests, while the defendants' attorneys seek to protect the defendants' right to continue their existence in a delusional state.<sup>278</sup> Thus, though essentially recognizing greater rights for mentally ill defendants, *Sell* actually permits defendants to remain in a sickened, unmedicated state, thereby making the alleged benefits earned by the decision questionable.<sup>279</sup>

## *B. Social Impact*

### 1. Effects on Members of the General Public Suffering from Mental Illnesses

Despite the fact that *Sell*'s holding seems to have implications only upon mentally ill defendants, the decision will impact the mentally ill nationwide, beyond the legal setting. "Inside and outside prisons, many people who cannot be deemed imminently dangerous nevertheless desperately need

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274. Hudson, *supra* note 267; see also Linda Greenhouse, *Justices Restrict Forced Medication Preceding A Trial*, THE NEW YORK TIMES, June 17, 2003, at A6 (noting the widespread under appreciation of the right of the defendant to be functional at his own trial).

275. Greenhouse, *supra* note 274.

276. Bill Mears, *Supreme Court Limits Forced Medication of Non-violent Defendants*, June 26 2003, available at <http://www.cnn.com/2003/LAW/06/16/scotus.forced.medication/> (last visited Feb. 3, 2005).

277. See *id.*; but see Lypps, *supra* note 152 (finding that Justice Breyer's opinion failed to address *Sell*'s First Amendment right of freedom of thought).

278. *When To Drug A Prisoner*, THE WASH. POST, June 17, 2003, at A20, available at <http://www.washingtonpost.com/ac2/wp-dyn/A2818-2003Jun16?language=printer> (last visited Feb. 3, 2005).

279. See *id.*

medication or hospitalization they refuse.”<sup>280</sup> Although *Sell* recognizes the risk of court-ordered forcible medication becoming too easy for the government to attain for those in jail, there may also be problems with making the receipt of medical treatment extremely complicated for the mentally ill living outside of prisons.<sup>281</sup> Many state laws make it too difficult to ensure that the mentally ill, whose symptoms impair their judgment so that they do not even realize that they need help, will even receive treatment.<sup>282</sup> As such, courts devise alternative theories to justify unwanted treatment, reasons that support treatment in order to serve society’s interests rather than those of the patients.<sup>283</sup> The mentally ill “should be treated not for utilitarian reasons but because it is inhumane not to help them.”<sup>284</sup>

## 2. Effects on Society at Large

*Sell* has the potential to affect the general public’s view of the mentally ill. Rather than focusing on the *Sell* decision as establishment of greater autonomy for individuals, our society as a whole may focus upon the government’s position in *Sell*’s case, which lends itself to the potential for negative connotation of the opinion. “[T]he decision. . . raises a small caution flag for a society that, to its detriment, turns more and more often to drugs to solve its problems.”<sup>285</sup>

## VI. CONCLUSION

The Supreme Court’s decision in *Sell v. United States*<sup>286</sup> presents a variety of impacts on many areas of the law and society. At first glance, *Sell* seemingly provides clarity within the court system for the previously hazy standard in cases seeking to forcibly medicate non-violent, mentally ill defendants to render them competent to be tried. However, the Supreme Court’s holding has created confusion both in and out of the courtroom. Though the case contributes to the body of law permitting a court to take away a constitutionally protected liberty interest, the case may also be viewed as standing for the seemingly contradictory recognition of greater rights for the mentally ill. Further perplexing is *Sell*’s effect on the

280. *Id.*

281. *Id.* There is the potential risk to those mentally ill living in general society that if forcible medication is easily obtained, those “capable of living productively in their communities without harming anyone get locked up.” *Id.*

282. *Id.*

283. *See id.*

284. *Id.*

285. *Drugging Defendants*, *supra* note 272.

286. 539 U.S. 166 (2003).

possibility that a court may be able to forcibly administer drugs to individuals in other scenarios. For instance, will *Sell* enable the government to force a child to take Ritalin in order to attend school? Finally, confusion surrounding the procedural impact of *Sell* remains to be seen. The predictions concerning the onslaught of trial interruptions will be proven true or false once courts begin to interpret the alleged widening of the collateral-order doctrine.

The substantive impacts of *Sell* will best be measured over time, as future cases concerning the rights of the mentally ill surface before the court. In this struggle between the rights of the mentally ill and a state's right to try the criminally accused, the weight of the *Sell* decision will only truly be seen as similar scenarios surface, involving different drugs and different illnesses, but where the same right remains at stake: the right of an individual to make autonomous decisions about the body.

Dina E. Klepner<sup>287</sup>

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