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# Fit to Be Tried: Bypassing Procedural Safeguards to Involuntarily Medicate Incompetent Defendants to Death

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# Notes and Comments

## Fit to be Tried: Bypassing Procedural Safeguards to Involuntarily Medicate Incompetent Defendants to Death

### INTRODUCTION

As increasing numbers of mentally ill patients find themselves within the criminal justice system coupled with the ready availability of antipsychotic medications capable of rendering these patients competent to stand trial, courts are charged with a duty to safeguard the rights of mentally ill defendants against the prosecutorial interests of the state. Specifically, courts must prescribe explicit standards and procedures for balancing a state's prosecutorial interests with the liberty interests of those who are adjudged to be legally incompetent by virtue of a mental illness. Two recent cases coming out of the United States Court of Appeals for the Eighth Circuit have grappled with this precise dilemma.

In *United States v. Sell*,[1] a three judge panel of the Eighth Circuit held that the government could involuntarily medicate Charles Sell, a mentally incompetent defendant charged with a non-violent felony, with antipsychotic drugs for the sole purpose of restoring his competency to stand trial.[2] Several months later the same court relied partly upon its decision in *Sell* to conclude that the State of Arkansas could involuntarily medicate a condemned mentally incompetent inmate to control his violent behavior, even though the medication would likely have the ancillary effect of

1. 282 F.3d 560 (8th Cir. 2002), *vacated by* 539 U.S. 166 (2003).
2. *Id.* at 572.

rendering the inmate competent enough to be executed.[3]

In both *Sell* and *Singleton*, the Eighth Circuit premised its holdings upon a fairly expansive interpretation of the United States Supreme Court's doctrine concerning the limits secured by the Due Process Clause upon a state's power to subject mentally ill inmates to unwanted psychiatric medication. Although the Supreme Court had addressed this issue on two prior occasions,[4] the guidelines established for lower courts to follow were unclear, if not contradictory.[5] Accordingly, the Supreme Court reviewed the Eighth Circuit's holding in *Sell*, concluding that involuntarily medicating a mentally incompetent defendant for the sole purpose of restoring trial competency does not, in principle, offend due process.[6] However, because the Eighth Circuit paid too little attention to how involuntary medication would impact Sell's ability to participate effectively in his own defense, the Supreme Court vacated the Eighth Circuit's judgment, reinstated the district court's involuntary medication order, and remanded the case for a thorough determination of how the potential side-effects of antipsychotic medication would affect Sell's right to receive a fair trial.[7]

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3. Singleton v. Norris, 319 F.3d 1018, 1025-27 (8th Cir. 2003).

4. *See* Riggins v. Nevada, 504 U.S. 127, 133-38 (1992) (distinguishing *Washington v. Harper* to hold that the forced administration of antipsychotic medication during the defendant's trial violated rights guaranteed by the Sixth and Fourteenth Amendments); Washington v. Harper, 494 U.S. 210, 227 (1990) (holding that treatment of a prisoner with antipsychotic drugs against his will without judicial hearing did not violate substantive due process where the prisoner was found to be dangerous to himself or others and treatment was in the prisoner's best medical interest).

5. *See infra* Part II.A.3.

6. *See Sell*, 539 U.S. at 179-80. The Supreme Court set out the standard as follows:

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

*Id.* at 179.

7. *Sell*, 539 U.S. at 185-86; *see infra* Part I. In addition to the therapeutic benefits of relieving the acute symptoms of psychosis, many types of antipsychotic drugs are accompanied with severe and often debilitating side effects that can profoundly impact a patient's ability to comprehend and ef-

Although the *Sell* Court's holding has (at least temporarily) prevented the government from medicating Sell, the decision may prove a hollow victory for those who fear that psychiatric medication will no longer be used primarily for therapeutic purposes, but rather as an instrument employed by the state solely in furtherance of its own prosecutorial interests. Indeed, these fears have been validated by the Supreme Court itself, as *Sell* unambiguously stands for the proposition that a state may, use psychiatric medication as a means of restoring trial competency,[8] a purpose wholly unrelated to a mentally ill defendant's need for treatment. Moreover, by virtue of the Supreme Court's recent decision to deny certiorari in *Singleton*,[9] the Court has granted the states *carte blanche* to treat *Sell* as a license to administer antipsychotic drugs to mentally incompetent condemned inmates for the sole purpose of carrying out a death sentence.

This note argues that the Supreme Court's opinion in *Sell* requires lower courts to apply a unique hybrid of intermediate and strict scrutiny in all cases involving the involuntary medication of criminal defendants who are mentally incompetent to stand trial by virtue of a treatable mental illness. Specifically, lower courts must entertain a four-part inquiry to balance a defendant's interests with that of the state.[10] This standard ultimately permits state officials to seek involuntary medication of mentally ill inmates by proffering purposes related to treatment as a pretext for medication when the ultimate purpose is simply to further the state's prosecutorial interests.

Part I of this Note will outline the procedural history of *Sell* leading up to its arrival in the Supreme Court. Part II will delineate the important distinction between the need to medicate mentally ill inmates and others in institutional settings who pose a

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fectively participate in the judicial process through which his fate will be decided. *Harper*, 494 U.S. at 229. The common side effects most relevant to the issue of preserving a defendant's right to a fair trial are tardive dyskinesia (the involuntary movement of facial muscles), acute dystonia (severe involuntary spasms of the upper body, tongue, throat, or eyes), akathesia (motor restlessness or the inability to sit still), *id.* at 229-30, parkinsonism (involuntary tremor of limbs, slowed speech, and abnormal facial expressions), and severe sedation. *Riggins*, 504 U.S. at 142-43 (Kennedy, J., concurring).

8. *See Sell*, 539 U.S. at 179-80.

9. Singleton v. State, 540 U.S. 832 (2003).

10. *See infra* Part III.B.

danger to themselves on the one hand, and the desire of prosecutors to use psychiatric drugs to restore trial competency so that the defendant may be convicted despite his or her true mental capacity on the other. Specifically, because courts must safeguard a pretrial detainee's right to receive a fair trial, the Supreme Court's case law prior to *Sell* strongly suggested that lower courts should subject all requests to medicate pretrial detainees to a stronger level of judicial scrutiny than in cases involving convicted inmates.[11] Part III will analyze how the Supreme Court's holding in *Sell* incorporates elements of both intermediate and strict scrutiny as the Court struggles to strike a compromise between the government's interest in prosecuting serious crimes and an individual's liberty interest in refusing unwanted medication. Additionally, Part III will demonstrate how the *Sell* Court obfuscates the essential distinctions between medicating inmates to mitigate their propensity for dangerousness and medicating solely for trial competency purposes. Finally, Part IV will assert that the Supreme Court has failed to prescribe uniform standards in measuring the competency of mentally ill inmates residing on death row. Because of the lack of uniform standards in measuring the competency of condemned inmates, lower courts may begin to expand the Court's holding in *Sell* into a justification to medicate mentally incompetent condemned inmates for the sole purpose of restoring competency for execution.

## I. FACTS AND TRAVEL OF *SELL V. UNITED STATES*

In the spring of 1997, Dr. Charles Sell, a practicing dentist with an extensive history of mental illness, was indicted on multiple counts of Medicaid fraud and money laundering.[12] After being diagnosed with a severe mental illness, a federal district court found that Sell was incapable of assisting in his own defense, thus declaring him incompetent to stand trial.[13] During the course of his detention in a prison hospital, Sell's psychiatrists concluded that he was in need of antipsychotic medication.[14] Because Sell refused to accept any form of treatment for his mental illness, prison

11. *See infra* Part II.A.
12. *Sell*, 539 U.S. at 170.
13. United States v. Sell, 282 F.3d 560, 563 (8th Cir. 2002), *vacated by* 539 U.S. 166 (2003).
14. *Id.* at 563.

officials initiated an administrative hearing in order to determine whether Sell could be involuntarily medicated.[15] At the conclusion of the hearing, the reviewing psychiatrist approved the involuntary medication order upon concluding that Sell was "mentally ill and dangerous," and that medication was necessary in order to restore Sell's competency to stand trial.[16] In August, 2000, a federal magistrate reviewed and affirmed the government's order authorizing involuntary medication.[17] Upon further review, however, a district court judge reversed the magistrate's finding that Sell's dangerousness justified involuntary medication, but nonetheless held that the government could medicate Sell for the sole purpose of restoring trial competency.[18]

In March, 2002, the Eighth Circuit affirmed the district court's holding that the government could medicate Sell on the sole grounds of restoring trial competency.[19] After concluding that the government's interest in bringing Sell to trial outweighed his liberty interest to refuse unwanted medication,[20] the Eighth Circuit held that the decision to medicate Sell was medically appropriate, and that the benefits of restoring Sell's competency outweighed the potential risk that the side effects of antipsychotic drugs might impair his ability to participate effectively in his own defense at trial.[21]

The Supreme Court granted certiorari to examine the limited issue of whether the government could medicate Sell solely for the purpose of restoring his competency to stand trial for "non-violent offenses."[22] In the wake of the Eighth Circuit's holding in *Sell*, the Supreme Court was faced with the task of determining the circumstances under which the government's interest in prosecuting alleged crimes could, in theory, override an individual's constitutional right to refuse unwanted medication under the Due Process Clause.[23] Moreover, the Court was charged with the daunting task

15. *Sell*, 539 U.S. at 171.
16. *Id.* at 171-72.
17. *Id.* at 173.
18. *Id.* at 173-74.
19. *Id.* at 174.
20. *Sell*, 282 F.3d at 568 (defining the government's interest in restoring Sell's competency so that he may be brought to trial as "paramount").
21. *Id.* at 570-72.
22. *Sell*, 539 U.S. at 175.
23. *Id.* at 177.

of ascertaining the degree to which the administration of powerful antipsychotic drugs might impair Sell's constitutional right to receive a fair trial.[24] To comprehend these critical issues, one must first examine the Court's prior case law concerning the constitutional limitations on a state's power to medicate mentally ill patients within the context of the criminal justice system.

## II. INVOLUNTARY MEDICATION UNDER THE DUE PROCESS CLAUSE

### A. *Substantive Due Process Prior to* Sell

#### 1. Washington v. Harper[25]

Because the Supreme Court has declared that all persons enjoy a significant liberty interest in avoiding unwanted medical treatment of any kind,[26] the involuntary medication of the mentally ill must comport with the minimal standards of substantive due process.[27] On the one hand, states are often justified in imposing treatment upon mentally disabled persons who are incapable of making rational decisions concerning their own medical treatment.[28] In such cases, a state may certainly invoke its *parens patriae* power by imposing treatment upon a mentally ill person against his will to protect both the mentally ill person and the community from that person's dangerous tendencies.[29] On the other hand, the judiciary has historically played an essential role in ensuring that a state's power to impose treatment upon the mentally disabled is used narrowly in the furtherance of public health and safety, and not simply to further some other hidden purpose.[30] There are, however, instances where a mentally ill person's need for treatment and a state's police powers intersect, such as when a mentally ill person would pose a danger to himself or

24. *See id.* at 180.
25. Washington v. Harper, 494 U.S. 210 (1990).
26. Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 278 (1990).
27. *See Harper*, 494 U.S. at 221-22.
28. *See* Youngberg v. Romeo, 457 U.S. 307, 317 (1982).
29. Addington v. Texas, 441 U.S. 418, 426 (1979); *see also Sell*, 539 U.S. at 178.
30. *See* O'Connor v. Donaldson, 422 U.S. 563, 574 n.10 (1975) ("Where 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present.").

others if left untreated. In those instances, the state's power to impose treatment is at its highest.[31]

The case of *Washington v. Harper* was the first in which the Supreme Court dealt with the issue of a state's authority to involuntarily medicate a convicted inmate suffering from a severe mental illness.[32] *Harper* involved the constitutionality of a state policy mandating involuntary medication for inmates "suffer[ing] from a 'mental disorder,'" who were "'gravely disabled' or pose[d] a 'likelihood of serious harm'" to themselves or others.[33] Although the Court in *Harper* conceded that an inmate has "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs,"[34] the Court held that an inmate's liberty interest could be outweighed by the state's legitimate and important interest in maintaining safety and security within a penal institution.[35] Moreover, while acknowledging the plethora of potentially harmful side effects commonly associated with most forms of antipsychotic medication, the Court concluded that involuntary medication was a far more appropriate method of controlling a mentally ill inmate's behavior than the prolonged use of physical restraints or isolation.[36] Therefore, the Court held that the Due Process Clause allows a state to involuntarily medicate a mentally ill inmate after finding that the inmate is "dangerous to himself or others and [that] the treatment is in the inmate's medical interest."[37]

The Court rejected Harper's argument that the state "may not override his choice to refuse antipsychotic drugs" in the absence of a finding that he was incompetent to make rational decisions concerning his own treatment.[38] Rather, because a state's desire to medicate a dangerous, mentally ill inmate is "reasonably related to legitimate penological interests" in maintaining institutional safety,[39] the Court held that Harper's case was on point with prior cases in which the Court applied a rational basis test to decisions

31. *See id.* at 582; *Addington*, 441 U.S. at 426.
32. *See Harper*, 494 U.S. at 213.
33. *Id.* at 215.
34. *Id.* at 221.
35. *Id.* at 225.
36. *Id.* at 226-27.
37. *Id.* at 227.
38. *Id.* at 222.
39. *Id.* at 224 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

made by state officials concerning the care and treatment of individuals confined in state institutions.[40] Most significantly, the state's interest in medicating Harper was at its highest because the prison regulation in question was exclusively applied to inmates who had become dangerous as a result of a mental illness, and the underlying rationale was solely to medicate inmates "for no purpose other than treatment, and only under the direction of a licensed psychiatrist."[41] Moreover, considering that prison officials face the uniquely perilous task of regulating a state's prison population,[42] the *Harper* Court concluded that an administrative panel composed of medical professionals would be more qualified than judges and lawyers to determine when an inmate is in need of involuntary medication.[43] Reasoning that the administrative review conducted by medical decision makers that was warranted by the *Harper* prison policy was adequate to protect prison inmates' due process interests,[44] the Court refused to intervene because the decision to medicate Harper "was at all times consistent 'with the degree of care, skill, and learning expected of a reasonably prudent psychiatrist . . . .'"[45]

2. Riggins v. Nevada[46]

In contrast with *Harper*, in which the Court examined the circumstances under which a state could involuntarily medicate a *convicted inmate*,[47] the Supreme Court was asked in *Riggins v. Nevada* to determine whether a state could prevent a pre-trial detainee charged with capital murder from discontinuing treatment for a mental illness so as to preserve his competency to stand trial.[48] Because state officials never alleged that Riggins posed a

40. *Id.* at 224-25.
41. *Id.* at 226.
42. *Id.* at 225 ("There are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, 'by definition,' is made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct.'" (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984))).
43. *Id.* at 231.
44. *Id.* at 233.
45. *Id.*
46. Riggins v. Nevada, 504 U.S. 127 (1992).
47. *Harper*, 494 U.S. at 210.
48. *Riggens*, 504 U.S. at 132-33.

danger to himself or others within his prison setting, the sole justification for forced medication was Nevada's interest in preventing Riggins from rendering himself incompetent to stand trial by allowing his mental illness to go untreated.[49] In deference to Nevada's interest in prosecuting a capital offense, the *Riggins* Court opined that Nevada "might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means."[50] This was a profound statement. The *Riggins* Court seemed to postulate that the holding in *Harper* could conceivably be expanded to empower a state to medicate an inmate for a purpose completely unrelated to medical treatment or prison safety. The Court annunciated this possibility even though the prosecution had not proven that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means in that particular case.[51] Even more disturbing is the fact that the Court's hypothetical expansion of *Harper* was completely unnecessary because the pertinent issue facing the Court was whether the side effects caused by the medication given to Riggins subjected him to unfair prejudice at trial.[52]

Unlike in *Harper*, where the state sought to medicate a convicted inmate, a state's decision to medicate a pretrial detainee must be examined in relation to the detainee's right to a fair trial.[53] For example, in holding that the State had not proven that administration of antipsychotic medication was necessary to accomplish an essential state purpose, or that the "substantial probability of trial prejudice in [*Riggins*] was justified,"[54] the *Riggins* Court was deeply concerned with the fact that the side effects of many common antipsychotic drugs can adversely affect an individual's cognitive and communicative abilities so as to cast doubt upon the defendant's ability to assist counsel, react to testimony, and to testify on his own behalf.[55] Moreover, in his concurring

49. *See id.* at 130.
50. *Id.* at 135.
51. *Id.*
52. *Id.* at 133 (stating that "Riggins' core contention [was] that involuntary administration of Mellaril denied him 'a full and fair trial'").
53. *Id.* at 140-41 (Kennedy, J., concurring).
54. *Id.* at 138.
55. *Id.* at 137-38; *see also* David M. Siegel et al., *Old Law Meets New Medicine: Revisiting Involuntary Psychotropic Medication of the Criminal De-*

opinion, Justice Kennedy conveyed his fear that since many antipsychotic drugs can cause an individual to become lethargic and severely agitated, or to appear listless and apathetic, a jury may unfairly pass judgment upon a defendant solely on the basis of his drug-induced demeanor.[56] Consequently, Justice Kennedy was highly skeptical that a state could ever justify the use of involuntary medication as an appropriate method to restore trial competency.[57] As such, the Court was particularly disturbed by the trial court's refusal to allow Riggins to discontinue treatment for his mental illness even in light of inconclusive expert testimony as to whether involuntary treatment was even necessary in maintaining Riggins' competency to stand trial.[58] Accordingly, the Court refused to defer to the trial court's "laconic" finding that the state's interest in preserving Riggins' competency simply outweighed Riggins' right to refuse medication.[59]

In sum, the necessity of preserving a pretrial detainee's right to receive a fair trial juxtaposed with an already convicted inmates interest in refusing medication distinguishes *Riggins* from *Harper*. As such, the *Harper* Court had little reason to second guess the assertions made by Harper's prison psychiatrists that the need to pacify his violent behavior with medication simply outweighed whatever unpleasant side effects he would experience.

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*fendant*, 2001 WIS. L. REV. 307, 326-27 (2001).

56. *See Riggins*, 504 U.S. at 142 (Kennedy, J., concurring); *see also* Siegel et al., *supra* note 55, at 327 n.111. A defendant's in-court demeanor can be especially crucial in capital murder cases because many juries may be more inclined to vote in favor of imposing the death penalty when the side effects of antipsychotic medication cause a defendant to appear remorseless and apathetic. State v. Garcia, 658 A.2d 947, 974-75 (Conn. 1995) (Berdon, J., concurring). This is also an especially vital concern in cases where the defendant is attempting to prove lack of mental capacity as an affirmative defense. *Id.* at 975 (Berdon, J., concurring).

57. *See Riggins*, 504 U.S. at 141 (Kennedy, J., concurring). Justice Kennedy stated:

> In my view elementary protections against state intrusion require the State in every case to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel. Based on my understanding of the medical literature, I have substantial reservations that the State can make that showing.

*Id.*

58. *Id.* at 130-31, 136-37.

59. *Id.* at 136.

However, the administration of antipsychotic medication to maintain trial competency entails a plethora of risks not otherwise associated with the inducement of "some bare level of functional competence."[60] Likewise, while a psychiatrist may have been in a better position to determine the propriety of involuntary medication in *Harper*, the impact a particular drug might have upon a defendant's ability to present an effective and vigorous defense to a criminal charge is an issue not to be deferred to psychiatrists who are otherwise ignorant as to the complexities of a criminal trial, but is best resolved by the attorneys and judges who participate in the trial process itself.[61] Therefore, *Riggins* stands for the proposition that a court may not authorize the involuntary medication of a pretrial detainee without specific evidence of a "compelling" or "essential" state interest,[62] and that the detainee cannot be brought to trial through "less intrusive means."[63]

### 3. *Conflicting Standards of Judicial Scrutiny in the Aftermath of* Riggins

The Court's opinion in *Riggins* has been widely noted for its failure to prescribe a precise standard of judicial scrutiny for cases involving the involuntary medication of pretrial detainees.[64] Although the *Riggins* Court held that Nevada's desire to medicate a defendant charged with capital murder was not "*necessary* to accomplish an *essential* state policy,"[65] the Court explicitly denied that it was adopting *any* standard of judicial review, let alone strict scrutiny.[66]

The *Riggins* Court's equivocation, however, has not escaped criticism. In his dissenting opinion in *Riggins*, Justice Thomas

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

61. *See id.* at 141 (Kennedy, J., concurring) ("Indeed, the inquiry itself is elusive, for it assumes some baseline of normality that experts may have some difficulty in establishing for a particular defendant, if they can establish it at all.").

62. *Id.* at 138.

63. *Id.* at 135.

64. *See, e.g.*, Siegel et al., *supra* note 55, at 326; Aimee Feinberg, Note, *Forcible Medication of Mentally Ill Criminal Defendants: The Case of Russell Eugene Weston, Jr.*, 54 STAN. L. REV. 769, 775 (2002); William B. Bystrynski, Note, Riggins v. Nevada: *Toward a Standard for Medicating the Incompetent Defendant to Competence*, 71 N.C. L. REV. 1206, 1220 (1993).

65. *Riggins*, 504 U.S. at 138 (emphasis added).

66. *Id.* at 136.

balked at the majority's insistence that it had not adopted a standard of strict scrutiny.[67] In support of his view that the majority had essentially applied a strict scrutiny analysis, Justice Thomas highlighted the majority's requirement that Nevada's interest in maintaining Riggins' trial competency must rise to the level of a compelling state interest, and that Nevada was required to prove that the proposed medication was the least intrusive means available in bringing Riggins to trial.[68] Because the terminology employed by the *Riggins* Court usually implies the application of strict scrutiny,[69] Justice Thomas was quite justified in his refusal to believe the majority's denial that it was not adopting a strict scrutiny standard of review.

Justice Thomas was not alone in refusing to take the *Riggins* Court's majority at face value. In *United States v. Brandon*,[70] for instance, the United States Court of Appeals for the Sixth Circuit held that all petitions to medicate a pretrial detainee must survive strict scrutiny.[71] Beginning from the premise that the government's request to medicate a pretrial detainee implicates a "fundamental right to be free from bodily intrusion,"[72] the Sixth Circuit concluded that the *Riggins* Court had "alluded to a strict scrutiny approach."[73] While acknowledging that the *Riggins* Court

67. *See id.* at 156 (Thomas, J., dissenting).

68. *Id.* at 156-57 (Thomas, J., dissenting).

69. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 237-38 (1995) (holding that under strict scrutiny, states may not use "benign" racial classifications except in the furtherance of a compelling state interest, and only after the consideration of "race neutral" alternatives); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (holding that in applying strict scrutiny to racial classifications, such classifications "must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose" (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964))); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (holding that racial classifications must further a "'permissible and substantial'" state policy, and that the classifications must be "'necessary . . . to the accomplishment of [the state's] purpose'" (quoting *In re* Griffiths, 413 U.S. 717, 721-22 (1973))); Roe v. Wade, 410 U.S. 113, 155 (1973) (holding that state intrusions upon "fundamental rights" are valid only in the face of a "compelling state interest," and that such legislative intrusions must be "narrowly drawn to express only the legitimate state interests at stake").

70. United States v. Brandon, 158 F.3d 947 (6th Cir. 1998).

71. *Id.* at 960.

72. *Id.* at 957.

73. *Id.*

had expressly declined to adopt a specific standard of review,[74] the Sixth Circuit nonetheless concluded that *Riggins* stood for the proposition that the government's request to medicate a pretrial detainee must be "narrowly tailored to [further] a compelling governmental interest" in restoring the detainee's trial competency.[75] In addition, the Sixth Circuit distinguished the *Riggins* Court's analysis from the rational basis test applied in *Harper*, a case in which a state's petition to medicate a mentally ill convicted inmate found to be dangerous was held to be entitled to review under a rational basis test because the state's interest was limited to a legitimate penological interest in maintaining prison safety.[76] Unlike cases involving the involuntary medication of convicted inmates, where maintaining prison safety is a primary concern, the Sixth Circuit concluded that the government's goal in *Brandon* was not to maintain prison safety, but rather to "render[] [the defendant] competent to stand trial in a proceeding that is fair to both parties."[77] In such circumstances, strict scrutiny was held to be the proper standard.[78] Therefore, in light of Justice Thomas' dissent in *Riggins* and the Sixth Circuit's astute analysis in *Brandon*, Sell's argument before the Supreme Court – that his case required the application of strict scrutiny – was not without merit.[79]

Conversely, the equivocal language of the Supreme Court in *Riggins* led the Eighth Circuit in *Sell* to conclude that the government's request to medicate Sell did not trigger strict scrutiny, but rather a lower form of "heightened" scrutiny.[80] However, the

74. *Id.* at 959.

75. *Id.* at 960. The *Brandon* Court supported its holding with a quote from *Riggins*: "Nevada certainly would have satisfied due process if . . . the district court had found . . . that treatment with antipsychotic medication was medically appropriate and, *considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others.*" *Id.* (quoting *Riggins*, 504 U.S. at 135 (emphasis added)).

76. *Id.* at 957 (citing Washington v. Harper, 494 U.S. 210, 223 (1990)).

77. *Id.* at 960.

78. *See id.*

79. *See* Brief of Petitioner at 35-37, Sell v. United States, 539 U.S. 166 (2003) (No. 02-5664).

80. United States v. Sell, 282 F.3d 560, 567 n.3 (8th Cir. 2002) ("[W]e believe that we must apply some sort of heightened standard of review, but unlike the Sixth Circuit, we do not adopt the strict scrutiny standard."), *vacated by* 539 U.S. 166 (2003). The Eighth Circuit also supported its choice of a heightened scrutiny standard by mentioning that the Supreme Court denied adopting a strict scrutiny test in *Riggins*; it also recognized, however, that

Eighth Circuit did not break new ground in its conclusion that *Riggins* required something less than strict scrutiny. Rather, the Eighth Circuit relied heavily upon the opinion in *United States v. Weston*,[81] a case in which the United States Court of Appeals for the District of Columbia applied a heightened scrutiny analysis to the government's request to medicate a mentally incompetent defendant charged with capital murder.[82] Ironically, the language used by the D.C. Circuit closely resembled a strict scrutiny analysis: "Accordingly, to medicate Weston, the government must prove that restoring his competence to stand trial is *necessary* to accomplish an *essential* state policy."[83] Unlike the Sixth Circuit, however, the D.C. Circuit refused to give its test the label of strict scrutiny, despite the fact that the terminology employed by both circuits is virtually identical.[84] Rather, the D.C. Circuit simply took the *Riggins* Court at face value, acknowledging that it had

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the Court did not appear to apply any lesser, reasonableness-based test either. *See id.* (citing United States v. Weston, 255 F.3d 873, 888 (D.C. Cir. 2001)).

81. United States v. Weston, 255 F.3d 873 (D.C. Cir. 2001).

82. *Id.* at 880. The defendant in *Weston* was Russell Eugene Wilson, the infamous "Capitol Hill Shooter" who had been charged with shooting and killing two officers of the United States Capitol Hill Police, and injuring a third. *See id.* at 874.

83. *Weston*, 255 F.3d at 880 (emphases added).

84. *Compare id.* (holding that, to medicate the defendant, "the government must prove that restoring his competence to stand trial [was] necessary to accomplish an essential state interest"), *with* United States v. Brandon, 158 F.3d 947, 960 (6th Cir. 1998) (holding that the government must present a "compelling" state interest, and that involuntary medication must be "narrowly tailored" to the furtherance of the government's interest). The only facial difference between *Brandon* and *Weston* is that the Sixth Circuit labels the requisite governmental interest as "compelling," while the D.C. Circuit requires an "essential" governmental interest. *See Weston*, 255 F.3d at 880; *Brandon*, 158 F.3d at 960. This seems to be a mere difference in semantics, however, because both terms are used interchangeably in *Riggins*. *See* 504 U.S. 127, 136 (1992) ("Nor did the order indicate a finding that safety or other *compelling* concerns outweighed Riggins' interest in freedom from unwanted antipsychotic drugs") (emphasis added); *id* at 138:

> To be sure, trial prejudice can sometimes be justified by an *essential* state interest. Because the record contains no finding that might support a conclusion that administration of anti psychotic medication was necessary to accomplish an *essential* state policy, however, we have no basis for saying that the substantial probability of trial prejudice in this case was justified.

*Id.* (citations omitted) (emphases added).

not endorsed the application of strict scrutiny, appearances to the contrary notwithstanding.[85]

Following in the footsteps of the D.C. Circuit, the Eighth Circuit in *Sell* held that the government may not involuntarily medicate a pretrial detainee in the absence of an "essential state interest that outweighs the individual's interest in remaining free from medication."[86] The Eighth Circuit further held that involuntary medication must also be narrowly tailored in furtherance of the state interest, that there be "no less intrusive way of fulfilling its essential interest."[87] The Eighth Circuit labeled its test as "some sort of heightened standard of review," as opposed to strict scrutiny.[88]

Even if the terminology employed by the circuit courts in *Sell* and *Weston* would seemingly imply the application of strict scrutiny, a closer review of the respective opinions will reveal that neither court employed the "searching judicial inquiry" required under a strict scrutiny analysis.[89] For example, in concluding that involuntary medication was narrowly tailored to the government's interest in restoring Sell's competency to stand trial,[90] the Eighth Circuit simply deferred to the opinions given by Sell's prison psychiatrists that involuntary medication was the least intrusive method of fulfilling the government's interest in restoring Sell's competency to stand trial.[91] In deferring to the government's psychiatrists, however, the Eighth Circuit paid little attention to evidence provided at trial by Sell's personal psychiatrist that antipsychotic medication was not an appropriate method of treating Sell's condition.[92] In endorsing the conclusions given by the government's experts, the Eighth Circuit provided no explanation of why it found the government's conclusions to be more persua-

85. *Weston*, 255 F.3d at 880 (noting that under *Riggins*, the government must present an "*overriding* justification" for involuntary medication, and that the medication must be "necessary to accomplish an essential state policy" (quoting *Riggins*, 504 U.S. at 135)).

86. *Sell*, 282 F.3d at 567.

87. *Id.*

88. *Id.* at 567 n.7.

89. *See e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995).

90. *Sell*, 282 F.3d at 568.

91. *See id.*

92. *See id.* at 564.

sive than the expert testimony given on Sell's behalf.[93]

Likewise, the D.C. Circuit in *Weston* simply deferred to the opinions given by the government's expert witnesses that involuntary medication was necessary to bring Weston to trial, while giving no consideration to conflicting expert testimony that treatment with antipsychotic medication would be ineffective.[94] Moreover, both circuit courts seemed to place a burden upon both Weston and Sell of proving that trial competency could be restored through less intrusive alternatives.[95] However, in applying the strict scrutiny analysis established by the Sixth Circuit in *Brandon*,[96] a federal district court concluded that the testimony given by a prison psychiatrist was insufficient to establish that involuntary medication was narrowly tailored to the government's interest in bringing an incompetent pretrial detainee to trial because the psychiatrist provided no basis for his conclusion and failed to discuss the full range of relevant medical research.[97] In contrast to the circuit courts in *Weston* and *Sell*, the district court did not burden the detainee with proving that trial competency could be restored through less intrusive, non-drug alternatives.[98]

Thus, in the wake of *Riggins*, the terminology used by the various courts is remarkably similar: a pre-trial detainee may be involuntarily medicated only in furtherance of a 'compelling' or

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93. *See id.*

94. *See* United States v. Weston, 255 F.3d 873, 882-83 (D.C. Cir. 2001); *see also* United States v. Weston, 134 F. Supp. 2d 115, 122-23 (D.D.C. 2001), *aff'd on other grounds*, 225 F.3d 873 (D.C. Cir. 2001).

95. *See Weston*, 255 F.3d at 882; *Sell*, 282 F.3d at 568.

96. 158 F.3d 947, 960 (6th Cir. 1998) (holding that to justify forcible medication of a non-dangerous pretrial detainee for the purpose of restoring his competence to stand trial, the government must present a "compelling" state interest, and the involuntary medication must be "narrowly tailored" to the furtherance of the government's interest).

97. United States v. Santonio, No. 2:00-CR-90C, 2001 U.S. Dist. LEXIS 5892, at *10-13 (D. Utah May 4, 2001); *see also* Woodland v. Angus, 820 F. Supp. 1497, 1511-12 (D. Utah 1993) (applying strict scrutiny and holding that the State of Utah failed to prove "to a reasonable degree of medical certainty" that involuntary medication would restore a defendant's trial competency because the state's psychiatrists could not "promise" or "guarantee" that the proposed medication would successfully restore the defendant's competency).

98. *See Santonio*, 2001 U.S. Dist. LEXIS 5892, at *13. Instead, the court in *Santonio* required the government to prove that it could not "obtain an adjudication of the pretrial dentainee's guilt or innocence using any other means." *Id.* This factor weighed against the prosecution when it produced no evidence with regard to such proof. *Id.*

'essential' state interest, and the medication must be the 'least intrusive' or 'necessary' means of furthering the state's prosecutorial interest. However, the actual *substance* behind the abstract terminology is contingent upon whether the reviewing court defines its standard of review as 'strict' or 'heightened' scrutiny. In other words, courts that have construed *Riggins* as requiring the application of strict scrutiny have been more emboldened to distrust the assertions of government psychiatrists that involuntary medication with antipsychotic drugs is the only means available to restore trial competency. Conversely, courts applying a lower 'heightened' standard of review have been disinclined to second guess the opinions given by the government's psychiatrists, while further burdening an incompetent pre-trial detainee with the obligation of proving that trial competency could be restored through less intrusive alternatives. Despite the disparities in the application of *Riggins*, there has been a general consensus among most courts that the standard of review in cases involving a non-dangerous pretrial detainee must be higher than the rational basis test established in *Harper* for medicating dangerous inmates who have already been tried and convicted of crimes.[99]

99. *E.g.*, United States v. Gomes, 298 F.3d 71, 82 (2d Cir. 2002) (holding that "heightened, but not strict, scrutiny is the appropriate standard for determining when a non-dangerous criminal defendant may be forcibly medicated with antipsychotic drugs for the purpose of rendering him competent to stand trial), *vacated by* 539 U.S. 939 (2003), *order aff'd*, 387 F.3d 157 (2d Cir. 2004); United States v. Sell, 282 F.3d 560, 567 n.7 (8th Cir. 2002) ("Like our sister courts, we believe that we must apply some sort of heightened standard of review, but . . . we do not adopt the strict scrutiny standard." ), *vacated by* 539 U.S. 166 (2003); *Weston*, 255 F.3d at 880 (concluding that *Riggins* required the application of "some form of heightened scrutiny," which was something more than the reasonableness test of *Harper* as it pertained to non-dangerous pretrial detainees); *see also* State v. Jacobs, 828 A.2d 587, 589 (Conn. 2003); State v. Garcia, 658 A.2d 947, 966-67 (Conn. 1995), *rev'd on other grounds*, *Jacobs*, 828 A.2d at 588-89; State v. Odiaga, 871 P.2d 801, 804-05 (Idaho 1994).

At least one court, however, has seen no distinction between *Harper* and *Riggins*, holding that a petition to medicate a pretrial detainee solely for the purpose of restoring trial competency should merely be subjected to a reasonableness standard under *Harper*, because restoring trial competency is a "legitimate incident of institutionalization." Khiem v. United States, 612 A.2d 160, 168 (D.C. 1992) (quoting United States v. Charters, 863 F.2d 302, 305 (4th Cir. 1988)).

## III. THE SUPREME COURT SPEAKS AGAIN: *SELL V. UNITED STATES*

### A. *Prolegomenon*

As noted above, the disparate standards of judicial review employed by the lower courts were a product of the Supreme Court's equivocation in *Riggins*. However, unlike in *Riggins* where the Court "ha[d] no occasion to finally prescribe . . . substantive standards" of review,[100] the Court in *Sell* was faced with an opportunity to resolve the existing confusion among the lower courts once and for all by determining the standard of judicial review to which a mentally incompetent detainee facing the threat of involuntary medication is constitutionally entitled.[101] The *Sell* Court seized this opportunity by attempting to establish a clear and explicit standard of judicial scrutiny to be applied whenever a state seeks to forcibly medicate a pretrial detainee for the sole purpose of restoring or maintaining trial competency.[102]

In reality, the *Sell* Court's analysis is no less equivocal than that of the *Riggins* Court. In deciphering the *Sell* Court's analysis, it becomes clear that *Sell* requires lower courts to apply a hybrid of both intermediate and strict scrutiny in determining when a state's prosecutorial interests can override a pretrial detainee's liberty interest in refusing unwanted medication. As argued below, the Supreme Court's holding in *Sell* has significantly strengthened a state's authority to use psychiatric medication to further policies and goals that are unrelated to the therapeutic interests of mentally ill inmates. Moreover, the *Sell* Court's opinion may enable overzealous prosecutors to obfuscate the important distinctions between involuntarily medicating an inmate to mitigate dangerousness and using psychiatric medication to restore trial competency. Consequently, the prison psychiatrists who are responsible for treating mentally incompetent inmates may become unwitting accomplices to a state's plan to use the therapeutic benefits of psychiatric medication as a crude method to further its prosecutorial goals.

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100. *Riggins*, 504 U.S. at 136.
101. *See* Sell v. United States, 539 U.S. 166, 179 (2003).
102. *See id.* at 179-80; *see also supra* note 4 and accompanying text.

B. *Basic Principles*

The Supreme Court in *Sell* granted certiorari to decide the issue of whether the government's petition to medicate Sell for the sole purpose of rendering him competent to stand trial for "nonviolent offenses" deprived Sell of an important liberty interest protected by the Due Process Clause.[103] The Court held that, in principle, the government may involuntarily medicate a mentally ill defendant "facing serious criminal charges" for the sole purpose of restoring trial competency.[104] With this holding, the *Sell* Court unambiguously acknowledged that a state may premise its desire to medicate a mentally ill detainee upon a motivation unrelated to the individual's best medical interests. The *Sell* Court's holding is a distinct and significant departure from the analysis in *Harper*, in which the Court justified the involuntary medication of a convicted inmate for the purpose of mitigating his dangerous propensity because the state's interest in maintaining safety within a penal institution was closely related, if not identical, to Harper's own personal therapeutic needs.[105]

In contrast with *Harper*, the *Sell* Court's holding established the following four-prong test to determine whether involuntary medication is appropriate in an individual case: 1) a state's petition to medicate must be in furtherance of an "*important* governmental interest[];" 2) there must be a finding that involuntary medication will "*significantly further*" the state's proffered interest; 3) involuntary medication must be "*necessary*" to further the state's proffered interest; and 4) the proposed medication must be deemed "*medically appropriate.*"[106] Clearly, the *Sell* Court failed to prescribe an unambiguous standard of review; rather, *Sell* appro-

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

104. *Id.* at 179.

105. Washington v. Harper, 494 U.S. 210, 225-26 (1990). The *Harper* Court further stated that the prison's institutional policy of involuntarily medicating dangerous inmates was

> a rational means of furthering the State's legitimate objectives. Its exclusive application is to inmates who are mentally ill and who, as a result of their illness, are gravely ill or represent a significant danger to themselves or others. The drugs may be administered *for no purpose other than treatment*, and only under the direction of a licensed psychiatrist.

*Id.* at 226 (emphasis added).

106. *Sell*, 539 U.S. at 179, 180-81.

priates the terminology of both intermediate and strict scrutiny.[107] Moreover, the *Sell* Court seems to concur with Justice Kennedy's skepticism in *Riggins* regarding the ability of judges and physicians to deal adequately with the deleterious consequences that antipsychotic medication may have upon a pretrial detainee's right to a fair trial.[108]

### C. *Establishing the Strength of the Government's Prosecutorial Interest*

Under the first prong of the *Sell* Court's test, a state must establish that its petition to medicate an individual is pursuant to an *important* governmental interest.[109] Here, the *Sell* Court seems to define the weight of the government's prosecutorial interest under the requirements of an intermediate scrutiny analysis.[110] Moreover, the *Sell* Court retreated from its prior statements in *Riggins* that the involuntary medication of a pretrial detainee

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107. *See id.* at 179:

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

*Id.* (emphases added). The Court's use of the words "substantially" and "important" appear to suggest an intermediate level analysis, while the phrase "less intrusive alternatives" implicates the narrowly tailored prong of a strict scrutiny analysis. *See supra* note 69.

108. *See id.* at 179. In *Riggins*, Justice Kennedy asserted his view that the Constitution required the State, in each case, to prove that there was no significant risk that the medication and its side effects would materially impair the defendant's capacity to assist in his own defense. Riggins v. Nevada, 504 U.S. 127, 141 (1992) (Kennedy, J., concurring). He expressed "substantial reservations that the State can make that showing." *Id.* Moreover, he called the inquiry "illusive," and possibly something even experts would have difficulty establishing, if it could be established at all. *Id.*

109. *Sell*, 539 U.S. at 180 ("First, a court must find that *important* governmental interests are at stake.").

110. *Cf.* Clark v. Jeter, 486 U.S. 456, 461 (1988) (stating that intermediate scrutiny requires that classifications based on gender or illegitimacy must be "substantially related to an *important* governmental objective") (emphasis added); Craig v. Boren, 429 U.S. 190, 197 (1976) (requiring that gender-based classifications must further "*important* governmental objectives" in order to pass muster under the Equal Protection Clause) (emphasis added).

must further a "compelling" or "essential" state interest.[111] By lowering the weight of the required governmental interest from "compelling" or "essential" to "important," it appears that the *Sell* Court capitulated to the Eighth Circuit's lower standard of heightened scrutiny.[112]

The *Sell* Court concluded that the government presumptively has an important interest in prosecuting *serious* crimes against either persons or property.[113] However, the Court provided no guidance as to how lower courts should determine whether a crime is serious enough to warrant involuntary medication in individual cases. Nonetheless, the Court does not challenge the Eighth Circuit's conclusion that the charges of Medicaid and insurance fraud with which Sell faced could, in principle, be severe enough to warrant involuntary medication.[114] The *Sell* Court gives much more deference to the government's prosecutorial interest than the *Riggins* Court, for the *Riggins* Court simply rejected Nevada's petition for involuntary medication while giving no consideration to Nevada's interest in prosecuting a defendant charged with capital murder.[115]

Furthermore, in rejecting Sell's argument that a pretrial detainee enjoys a *fundamental* right to be free from unwanted medication,[116] the Court reiterated its holding in *Harper* that an incarcerated person has only a "significant liberty interest" in re-

111. *See Riggins*, 504 U.S. at 136, 138.

112. *See* United States v. Sell, 282 F.3d 560, 567 n.3 (8th Cir. 2002) ("[W]e believe that we must apply some sort of heightened standard of review . . . ."), *vacated by* 539 U.S. 166 (2003); *see also Sell*, 539 U.S. at 179 (describing the four-pronged heightened standard of review that does not quite rise to the level of strict scrutiny).

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

114. *See id.* (stating that while the government has an important interest in bringing an individual accused of a serious crime to trial, the inquiry of what is "serious" depends upon the circumstances, which "may lessen the importance of that interest"); *Sell*, 282 F.3d at 568 (characterizing the sixty-two charges of fraud and single charge of money-laundering against Sell as "serious," and implicating a "paramount" governmental interest in restoring Sell's competency to stand trial). *But see id.* at 574 (Bye, C.J., dissenting) ("[T]he [Eighth Circuit] majority inexplicably turns a blind eye to the apparent agreement of all parties that the fraud and money laundering charges alone are insufficiently serious to warrant forcible medication.").

115. *See Riggins*, 504 U.S. at 138.

116. *See* Brief of Petitioner at 35-37, Sell v. United States, 539 U.S. 166 (2003) (No. 02-5664).

fusing the administration of antipsychotic medication.[117] The Court's characterization of Sell's rights under due process as a "significant liberty interest" is of great significance. In general, a liberty interest that does not rise to the level of a "fundamental right" can be overridden by a "legitimate" state interest.[118] In prior cases involving the involuntary care and treatment of mentally ill and disabled persons, the Court has consistently characterized the right to refuse treatment as a mere "liberty interest," while refusing to stamp such a right with the more lofty imprimatur of a "fundamental right."[119]

By not labeling the right to refuse unwanted medical treatment a "fundamental right," the Court has generally concluded that the judiciary has a very limited role in determining the precise methods employed to care for the mentally ill because judges are ill-equipped to second guess the decisions of trained professionals.[120] Whenever the Court has found a mere "liberty interest" to be at stake, rather than a "fundamental right," the treatment decisions made by a state's officials have been granted an initial

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117. *Sell*, 539 U.S. at 178 (quoting Washington v. Harper, 494 U.S. 210, 221 (1990)).

118. *See, e.g.*, *Harper*, 494 U.S. at 221-22, 225; Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 279 (1990); Youngberg v. Romeo, 457 U.S. 307, 321 (1982).

119. *See, e.g.*, *Cruzan*, 497 U.S. at 278 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."); *Youngberg*, 457 U.S. at 318 (stating that in relation to a mentally retarded person institutionalized by the state, "there is a constitutionally protected liberty interest in safety and freedom from restraint."); Addington v. Texas, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that [involuntary] civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); O'Connor v. Donaldson, 422 U.S. 563, 580 (1975) ("There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which . . . must be justified on the basis of a legitimate state interest.").

120. *See Youngberg*, 457 U.S. at 321-23.

In his concurring opinion in *O'Connor v. Donaldson*, Chief Justice Burger suggested that the states are under no obligation whatsoever to provide treatment for civilly committed patients, concluding instead that the state's police power in protecting society from the "significant antisocial acts" of severely mentally ill persons obliges the states only to provide civilly committed patients with "a more humane place of confinement" than the old-fashioned jails and poorhouses in which the mentally ill had been historically confined. 422 U.S. at 582-83 (Burger, C.J., concurring).

presumption of validity.[121] In such cases, therefore, the Court's initial attitude toward the aggrieved party's complaint has been more dismissive than in cases where the Court has found the existence of a "fundamental" right.

Because a pretrial detainee's right to refuse unwanted medication under substantive due process is no greater than the amorphous "liberty interest" of a convicted inmate to refuse treatment under *Harper*,[122] it appears initially that a pretrial detainee is entitled to no greater level of judicial scrutiny than a reasonableness standard.[123] Similarly, under the *Sell* Court's analysis, the government's "important" interest in prosecuting a "serious crime" is qualitatively similar to a state's "legitima[te]" and "importan[t]" interest under *Harper* in medicating a dangerous inmate.[124] Conversely, in holding that a state must present a "compelling" or "essential" interest in overriding a pretrial detainee's "liberty interest" in refusing medication,[125] the Court in *Riggins* veered away from its prior body of case law which simply required a state to present a "legitimate" interest when seeking to infringe upon a simple "liberty interest."[126] Thus, by requiring only an "important" governmental interest *vis-à-vis* a pretrial detainee's "liberty inter-

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121. *See, e.g.*, *Youngberg*, 457 U.S. at 323 (stating that courts should not second-guess medical professionals who are better qualified than judges or juries to make treatment decisions, and thus those professionals' decisions are "presumptively valid"); *see also Harper*, 494 U.S. at 222-23:

> The Policy under review requires the State to establish, by a medical finding, that a mental disorder exists which is likely to cause harm if not treated. Moreover, the fact that the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement. These standards, which recognize both the prisoner's medical interest and the State's interests, meet the demands of the Due Process Clause.

*Id.*

122. *Harper*, 494 U.S. at 221.

123. *See* Khiem v. United States, 612 A.2d 160, 168-69 (D.C. 1992) (adopting the view that the government's petition to medicate a pretrial detainee for the sole purpose of restoring trial competency is subject only to a review for "arbitrary and capricious action").

124. *See* Sell v. United States, 539 U.S. 166, 180 (2003); *Harper*, 494 U.S. at 225.

125. Riggins v. Nevada, 504 U.S. 127, 136, 138 (1992).

126. *See, e.g.*, *Harper*, 494 U.S. at 221, 225.

est,"[127] the *Sell* Court, to some extent, corrected the anomaly created by the Court's analysis in *Riggins*. This departure from *Riggins* may lend even greater support to the proposition that the scale has been tipped in favor of a standard of judicial scrutiny which is generally deferential to the government's desire to administer medication to a mentally incompetent detainee.

It must be emphasized, however, that under *Sell*, a state is required to present an *important* governmental interest before a pre-trial detainee's liberty interest in avoiding medication can be overridden for the purpose of restoring trial competency.[128] The *Sell* Court reasoned that this is because a state's interest in prosecuting serious crime can, under certain circumstances, be diminished to such a degree as to eliminate the state's need for involuntary medication altogether.[129] In particular, the *Sell* Court concluded that a state's prosecutorial interest can be diminished by the likelihood that the defendant could be subjected to future confinement under a civil commitment statute in lieu of a criminal trial.[130] Although the Court acknowledged that "civil commitment is [not] a substitute for a criminal trial,"[131] this was a victory for Sell because the Court clearly rejected the government's contention that medicating a mentally incompetent pretrial detainee for the purpose of restoring trial competency was the only method of satisfying the government's prosecutorial interests.[132]

Although the alternative of civil commitment may protect a pretrial detainee's liberty interest in bodily integrity, the *Sell* Court's analysis may be flawed as it pertains to the defendant's liberty interest in being free from physical confinement. Indeed, an individual who is confined under a civil commitment statute can be confined indefinitely as long as he poses a danger to him-

127. *See Sell*, 539 U.S. at 180.
128. *See id.*
129. *Id.*
130. *Id.* In addition to the likelihood of indefinite confinement under a civil commitment regime, the *Sell* Court also suggested that the government's prosecutorial interest may be diminished if the detainee was already confined for a significant period of time for which he would receive credit toward the imposed sentence upon conviction. *Id.*
131. *Id.*
132. *See* Brief for the United States (Respondent) at 24-26, Sell v. United States, 539 U.S. 166 (2003) (No. 02-5664); *accord* United States v. Weston, 255 F.3d 873, 881-82 (D.C. Cir. 2001); United States v. Gomes, 289 F.3d 71, 81 (2d Cir. 2002).

self or others if left unsupervised in the community.[133] Therefore, a pretrial detainee who is subjected to civil commitment in lieu of a criminal trial could conceivably be confined for a longer period of time than would have otherwise been the case if the criminal charges had been adjudicated at trial.[134] In addition, some may object to the notion of transforming the nation's psychiatric hospitals into repositories for the warehousing of mentally incompetent criminal defendants simply because they cannot be brought to trial. However, by refusing to hold that civilly committed patients have a constitutional "right to treatment,"[135] the Court has consistently viewed civil commitment solely as a legal instrument by which states may confine and control individuals who have been found to pose a danger to the community by reason of a mental illness or disability.[136] Therefore, it comes as no surprise that the *Sell* Court regarded indefinite confinement under a civil commitment regime as a reasonable alternative to the state's interest in punishing criminal acts through incarceration.[137]

In sum, *Sell* requires lower courts to employ a form of intermediate scrutiny in weighing the severity of an alleged crime against the likelihood that a state's prosecutorial interests could be adequately satisfied through a civil commitment regime.[138] Although the Court was deliberate in not limiting the option of involuntary medication only to allegations of *violent* crimes,[139] lower

133. *See* O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975); *see also* 18 U.S.C. § 4246 (2000) (regulating hospitalization of an inmate due for release from prison but suffering from mental disease or defect).

134. *See* Brief for the United States (Respondent) at 26, Sell v. United States, 539 U.S. 166 (2003) (No. 02-5664) (arguing that allowing courts to take the likelihood of involuntary confinement under a civil commitment statute into consideration in weighing the government's prosecutorial interests in involuntarily medicating that inmate to restore trial competence could cause many mentally ill defendants to be "warehoused indefinitely" ).

135. *See O'Connor*, 422 U.S. at 573 ("Specifically, there is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a non-dangerous, mentally ill individual for the purpose of treatment.").

136. *See id.* at 573-74, 576; Addington v. Texas, 441 U.S. 418, 425-26 (1979).

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

138. *See id.* at 179.

139. *Id.* at 180 (holding that the government has an important interest in prosecuting "serious" crimes against either the "person" or against "prop-

courts may not simply defer to a state's cursory assertion that any felony charge would categorically warrant involuntary medication.[140] Despite the fact that Sell had a mere "liberty interest," as opposed to a "fundamental right," in avoiding unwanted medication,[141] a state must present something more than a "legitimate" state policy before it can compel a mentally ill defendant to accept an unwanted medication.[142] As was the case in *Riggins*, the *Sell* Court's analysis departs from prior holdings in which a simple "liberty interest" could be outweighed by a "legitimate" state policy, although the *Sell* Court does not go so far as to require an "essential" or "compelling" interest.[143]

Although it appears initially that the *Sell* Court simply adopted a form of intermediate scrutiny, the two prongs of the Court's analysis discussed below may suggest something more. During the remainder of its analysis, the *Sell* Court struggled with the perceived inability of both judges and prison psychiatrists to manage the often debilitating side effects associated with most forms of antipsychotic medication, thus increasing the likelihood of unfair prejudice at trial.[144] Possibly as a result of this, the *Sell* Court injected elements of strict scrutiny into its analysis, while relying upon Justice Kennedy's extremely skeptical view in *Harper* regarding whether trial prejudice could ever be averted whenever a state involuntarily medicates a mentally incompetent defendant.[145]

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erty"). *But cf.* Brief of Petitioner at 41, Sell v. United States, 539 U.S. 166 (2003) (No. 02-5664) ("The government's interest is lessened even further because the government's only basis for medicating Dr. Sell is the government's belief that Dr. Sell is guilty of *non-violent* crimes, involving only economic losses.") (emphasis added).

140. For an example of one such cursory assertion made by the government in a case, see Brief for the United States (Respondent) at 24, Sell v. United States, 539 U.S. 166 (2003) (No. 02-5664) (arguing that the government has a "compelling" interest in adjudicating and convicting felonies).

141. *Sell*, 539 U.S. at 178.

142. *See id.* at 179 (requiring the state to meet a series of inquiries before permissibly administering antipsychotic drugs involuntarily to mentally ill defendants facing serious criminal charges in order to render the defendants competent to stand trial).

143. *See Sell*, 539 U.S. at 178-79.

144. *See id.* at 179.

145. *See id.*; *see also* Riggins v. Nevada, 504 U.S. 127, 140-42 (1992) (Kennedy, J., concurring).

D. *Preserving the Right to a Fair Trial*

Assuming that a state has presented an important governmental interest in restoring trial competency, the second prong of the *Sell* test requires a court to find that involuntary medication will *significantly further* the state's interest.[146] Accordingly, the government must show that the proposed medication is "*substantially likely* to render the defendant competent to stand trial."[147] In describing this second prong of the test, the *Sell* Court cited with approval a portion of Justice Kennedy's lengthy concurrence in *Riggins*,[148] in which he explicitly described the ways in which the side effects of antipsychotic medication can adversely effect a defendant's in-court demeanor, his abilities to react to the proceedings, testify on his own behalf, and communicate with counsel.[149] As such, Justice Kennedy's concurrence in *Riggins* is highly instructive in predicting how lower courts should apply *Sell* in resolving petitions for the involuntary medication of pretrial detainees.

The substance of Justice Kennedy's thesis in *Riggins* is that medical and pharmacological data suggests that the involuntary medication of mentally ill defendants would entail "a serious threat to a defendant's right to a fair trial."[150] Hence, granting a state the power to medicate a pretrial detainee would, in effect, enable prosecutors to manipulate the defendant's demeanor in a manner that would "prejudice all facets of the defense."[151] Under Justice Kennedy's analysis, therefore, a state bears an almost insurmountable burden of proving that a proposed medication is not only efficacious, but also that the side effects from the medication will not impair the defendant's opportunity to receive a fair trial.[152] Conversely, the Eighth Circuit, when confronted with the

146. *Sell*, 539 U.S. at 181 ("Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests.").
147. *Id.* (emphasis added).
148. *See id.*
149. *See Riggins*, 504 U.S. at 142-45 (Kennedy, J., concurring).
150. *Id.* at 138.
151. *Id.* at 142.
152. *Id.* at 141. Justice Kennedy stated:

> [E]lementary protections against state intrusion require the State in every case to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the

issue in *Sell*, concluded that issues of possible trial prejudice would be best resolved after the medication had been administered,[153] with no real concern paid to the possible side effects and their burden on ensuring a fair trial. Due to the tremendous weight accorded by the *Sell* Court to Justice Kennedy's analysis in *Riggins*,[154] the Supreme Court rejected the Eighth Circuit's "wait and see" approach with respect to a state's duty to protect a medicated defendant from unfair prejudice at trial.[155] Moreover, the *Sell* Court criticized the lower courts for simply deferring to the conclusions proffered by Sell's prison psychiatrists that the benefits of involuntary medication would presumably outweigh the potential risks, despite the likelihood of significant side effects.[156]

E. *The Intrusiveness of Involuntary Medication*

Under the third prong of the *Sell* analysis, a court must find that "involuntary medication is *necessary* to further [the state's] interests" in bringing the defendant to trial.[157] Here, the Court affirmed its prior hypothesis in *Riggins* that a state could, in principle, medicate a pretrial detainee for the sole purpose of restoring trial competency.[158] However, considering the Court's reliance upon Justice Kennedy's concurrence in *Riggins* regarding the perils associated with forcibly medicating pretrial detainees, the overall contour of the Supreme Court's analysis does not appear to be

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> testimony at trial or to assist his counsel. Based on my understanding of the medical literature, I have substantial reservations that the State can make such a showing . . . . These uncertainties serve to underscore the difficult terrain the State must traverse when it enters this domain.

*Id.*

153. United States v. Sell, 282 F.3d 560, 572 (8th Cir. 2002), *vacated by* 539 U.S. 166 (2003).

154. The fact that the *Sell* Court cites to Justice Kennedy's concurrence in *Riggins* on four separate occasions is indicative of the significance accorded to Justice Kennedy's analysis in *Riggins*. *See Sell*, 539 U.S. at 179, 181, 182, 185.

155. *See id.* at 181 (holding that in order for the involuntary medication to pass constitutional muster, the court must conclude that involuntary "administration of drugs is substantially unlikely to have side effects that would interfere significantly with the defendant's ability to assist counsel in conducting a trial defense.").

156. *Id.* at 185.

157. *Id.* at 181.

158. *See id.* at 178-79; *Riggins*, 504 U.S. at 135.

be consistent with the Eighth Circuit's optimism that Sell's prison psychiatrists could easily manage whatever adverse side effects he might experience during trial.[159] Rather, the *Sell* analysis seems to be more aligned with the Sixth Circuit's holding in *Brandon* that the *Riggins* standard required some sort of "narrow tailoring" test which is more akin to strict scrutiny.[160] Thus, this third prong suggests that although a state need only present an *important* governmental interest in restoring trial competency,[161] the state must nonetheless prove that involuntary medication is *narrowly tailored* to the accomplishment of its prosecutorial interests.[162]

*Sell's* failure to establish an easily identifiable standard of review may have worrisome implications for lower courts seeking guidance. *Sell* seems to stand for the proposition that lower courts must use a level of vigilance and judicial intervention that is more akin to strict scrutiny as it pertains to the preservation of a mentally incompetent detainee's trial-related rights.[163] However, lower courts may continue to apply something akin to intermediate scrutiny insofar as it relates only to a state's assertion that the circumstances of an alleged crime could, in theory, override an individual's liberty interest in avoiding unwanted medication. By stringing together elements of intermediate and strict scrutiny,[164] the *Sell* Court struggles to strike a compromise between the government's "compelling interest in finding, convicting, and punishing those who violate the law,"[165] and the unquestioned duty of the courts to protect a criminal defendant's fundamental right to a fair trial from the "deleterious" side effects of antipsychotic drugs.[166]

159. *See* Sell v. United States, 282 F.3d 560, 571-72 (8th Cir. 2002), *vacated by* 539 U.S. 166 (2003).

160. *See* United States v. Brandon, 158 F.3d 947, 960 (6th Cir. 1998).

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

162. *See id.* at 181. Under traditional notions of intermediate scrutiny, states would only be required to show that involuntary medication was "substantially related" to an important governmental interest. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

163. *See Sell*, 539 U.S. at 179.

164. *See id.*

165. *See* Brief for the United States (Respondent) at 19, Sell v. United States, 539 U.S. 166 (2003) (No. 02-5664) (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).

166. *See* Brief of Petitioner at 46, Sell v. United States, 539 U.S. 166 (2003) (No. 02-5664) (quoting Estelle v. Williams, 425 U.S. 501, 504 (1976)).

F. *Medical Appropriateness*

Finally, the fourth prong of the *Sell* test requires a finding that the proposed drugs used would be *medically appropriate*.[167] Under this final step of the analysis, a court must evaluate the proposed medication in relation to the defendant's specific medical condition in order to weigh the probability of efficacy against the severity of likely side effects.[168] Because the nature and severity of side effects vary with the type of drug used,[169] the *Sell* Court implicitly endorsed Sell's contention that the government cannot medicate him without first informing the trial court as to the exact drug it intends to administer.[170]

The *Sell* Court's "medical appropriateness" prong begs the question as to the extent a prison psychiatrist's medical judgment may be improperly influenced by a state's interest in bringing a mentally incompetent detainee to trial.[171] In an attempt to accommodate a state's prosecutorial interest, for example, a prison psychiatrist may propose to administer a drug with fewer immediate side effects (thereby enabling the state to bring the defendant to trial without the court finding a risk of unfair prejudice), despite the availability of an alternative drug more appropriate for the patient's long-term psychiatric condition, but yielding more immediate side effects. The *Sell* Court's analysis does nothing to dissuade prison psychiatrists from conspiring with prosecutors to

167. *Sell*, 539 U.S. at 181 ("Fourth, . . . the court must conclude that administration of the drugs is *medically appropriate,* i.e., in the patient's best medical interest in light of his medical condition."); *accord* Riggins v. Nevada, 504 U.S. 127, 133 (1992); Washington v. Harper, 494 U.S. 210, 227 (1990).

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

169. *Id.*

170. *See id.* (holding that the court must conclude that administration of antipsychotic drugs is medically appropriate based upon the defendant's medical condition and that the drugs are necessary to further the state purpose of rendering the defendant competent to stand trial); Brief of Petitioner at 49, Sell v. United States, 539 U.S. 166 (2003) (No. 02-5664) (noting the court's obligation to conclude that administration of medication is "necessary and appropriate" and arguing that "[c]ertainly, a showing of medical appropriateness requires that the government provide the Court . . . with the name and proposed dosage of the antipsychotic drug to be administered").

171. *See* Joanmarie Ilaria Davoli, *Still Stuck in the Cuckoo's Nest: Why Do Courts Continue to Rely on Antiquated Mental Illness Research?*, 69 TENN. L. REV. 987, 1046-49 (2002) (commenting on the various conflicts of interest that ensue whenever a psychiatrist's treatment decisions are influenced by the legal strategies of both prosecutors and defense counsel).

jeopardize a mentally ill patient's long-term mental condition by prescribing a particular drug for the sole and immediate purpose of hauling that person into a courtroom.[172]

### G. *The Strong Presumption Against Medicating to Restore Trial Competency*

Despite its failure to prescribe a consistent standard of judicial review,[173] the *Sell* Court's opinion will force many lower courts to reconsider their previous rulings regarding the circumstances under which the government may involuntarily medicate pretrial detainees. Although the *Sell* majority gave little consideration to the detainee's "liberty interest" in avoiding unwanted medication,[174] any state that wishes to medicate a pretrial detainee is burdened with the initial presumption that the involuntary administration of antipsychotic drugs will entail a "substantial probability of trial prejudice."[175] Moreover, in his concurrence in *Riggins*, Justice Kennedy was explicitly doubtful about whether a state could *ever* present a set of circumstances under which its interest in bringing a criminal defendant to trial would outweigh the danger of trial prejudice inherent within the administration of antipsychotic medication.[176] Considering the extent to which Justice Kennedy's pessimism was adopted by the majority in *Sell*,[177] as

172. On the other hand, "[a] standard that requires forced psychiatric treatment only be available when the motivation is purely therapeutic eliminates the situation in which the government is requesting treatment in order to achieve its own goals of prosecution or execution instead of out of concern for the afflicted individual." *Id.* at 1049. This danger is inherent in situations where the prosecution wishes to medicate a defendant for the sole purpose of restoring his or her competency to stand trial. The motivation in such cases is purely selfish, in that the state wants an opportunity to convict the defendant, and likely is motivated very little, if at all, by concerns for the defendant's mental well-being.

173. *See Sell*, 539 U.S. at 179 (establishing a standard utilizing aspects of both intermediate level and strict scrutiny review); *supra* notes 159-165 and accompanying text.

174. *See Sell*, 539 U.S. at 179 (setting a standard of review that does not specifically require inquiry into the defendant's liberty interest).

175. *See Riggins*, 504 U.S. 127, 138 (1991).

176. *See id.* at 141 (Kennedy, J., concurring); *supra* note 55 and accompanying text.

177. *See Sell*, 539 U.S. at 180 ("This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. *But those instances may be rare.*") (emphasis added).

well as the Court's conclusion that the likelihood of civil commitment can greatly diminish the government's need to bring a defendant to trial,[178] the *Sell* Court's analysis suggests that trial competency *alone* is an allowable, yet disfavored, rationale for involuntarily medicating a pretrial detainee who poses no danger to himself or others.

H. *The Dangers of Pretextuality*

The most troubling aspect of the *Sell* Court's opinion is the Court's recommendation that in all cases involving pretrial detainees, states should first seek permission to medicate an individual for dangerousness under the *Harper* standard before seeking to medicate on the grounds of restoring trial competency.[179] The Court's suggestion was premised upon its belief that determining a detainee's dangerousness is "more objective and manageable" than the more precarious and unpredictable inquiry into a proposed medication's impact on a detainee's right to a fair trial.[180]

As argued above, *Sell* seems to stand for the proposition that a state bears the heavy burden of producing specific evidence to prove that the involuntary medication of a pretrial detainee will not impinge upon the detainee's right to a fair trial.[181] This proposition, however, is severely undermined by the *Sell* Court's procedural recommendation that a state should first seek to medicate a pretrial detainee for dangerousness under *Harper*;[182] such a procedure appears to presume that treating a dangerous inmate and restoring trial competency are interchangeable state interests.[183]

In fact, dangerousness and trial competency *are not* inter-

178. *Id.*

179. *See id.* at 183; *see also* Washington v. Harper, 494 U.S. 210, 227 (1990) (holding that the Due Process Clause allows a state to medicate a mentally ill inmate after finding that the inmate is "dangerous to himself or others and [that] the treatment is in the inmate's medical interest").

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

181. *See supra* Part III.G.

182. *See Sell*, 539 U.S. at 183; *see also Harper*, 494 U.S. at 227.

183. *But see Sell*, 539 U.S. at 181-83. Noting the difference between the two inquiries – whether to medicate a pretrial detainee to pacify or to restore competency – the Court justified requiring a court to, as a threshold question, "determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type [or dangerousness] grounds; and if not, why not." *Id.* at 183.

changeable interests, as evidenced by the *Sell* Court's own conclusion that the lower courts had improperly relied upon the government's attempt to conflate the issues of dangerousness and trial competency into a single inquiry.[184] The question of whether an inmate is dangerous to himself or others under *Harper* is different than the question of whether medication should be administered to render a defendant competent for trial because a finding of dangerousness under *Harper* is subject only to a rational basis test, in which courts must give significant deference to a state's findings of dangerousness.[185] The *Harper* rational basis standard is markedly different and a much lower burden to carry than the *Sell* Court's intermediate-strict hybrid standard of review.[186] Consequently, the *Sell* Court's procedural recommendation does nothing to remedy the danger that courts may continue to obscure the important distinctions between a state's interest in mitigating dangerousness and its interest in restoring trial competency.

Most regrettably, the Court may have empowered prosecutors to use the deferential standard of review in *Harper* as a convenient pretext to have a pretrial detainee medicated for dangerousness when the true motive is the restoration of trial competency.[187] Notably, one way that courts may be able to discourage states from misusing *Harper* in such a way is by strictly limiting the inquiry of the detainee's alleged dangerousness to the immediate

184. *See id.* at 183-85.

185. *Harper*, 494 U.S. at 226-27.

186. *See id.* at 227 (holding that the Due Process Clause allows a state to medicate a mentally ill inmate after finding that the inmate is "dangerous to himself or others and [that] the treatment is in the inmate's medical interest"); *Sell*, 539 U.S. at 179, 180-81 (setting forth a four-pronged test for whether a pretrial detainee may be involuntarily medicated to restore his or her competence to stand trial).

187. A prosecutor may easily attempt to medicate a defendant under a claim that he or she is dangerous to herself or others, especially with the help of state-employed prison psychiatrists to testify that the medication is needed for its calming effect. Moreover, the Court would welcome this initial claim, and based upon its opinion in *Sell*, apparently the Court would prefer that prosecutors try the dangerousness claim before using the possibility of rendering the defendant competent to stand trial as a justification for involuntary medication. *See Sell*, 539 U.S. at 183 (requiring courts asked to permit forcible administration of antipsychotic drugs to first inquire into whether the prosecution has made a claim that the medication is necessary due to the defendant's dangerous propensities, and to ask why the prosecution has not made such a claim when it fails to do so).

conditions of incarceration.

## I. *Defining Dangerousness Under* Sell *and* Harper

Perhaps the most critical issue facing lower courts is the extent to which a state's finding that a pretrial detainee is dangerous under the *Harper* standard may be improperly used to circumvent the heightened levels of scrutiny required by *Sell*.[188] In particular, courts must be aware that governmental officials have, in the past, frequently used a mentally incompetent detainee's prior history of aggressive behavior *outside the current conditions of incarceration* as a primary basis to seek involuntary medication under the *Harper* dangerousness standard.[189] When a detainee's acts prior to incarceration are used as a basis to justify involuntary medication under *Harper*, the detainee can be burdened with an almost overwhelming presumption of dangerousness.[190] All the prosecution would need to do to satisfy *Harper* is to find some events in the defendant's past, no matter how distant, that tend to show the defendant's propensity for dangerousness.[191]

The problem with this tactic is obvious. The only real value in such evidence is to show how dangerous the defendant may have been in the *past*, which presumably has nothing to do with whether the defendant should be involuntarily medicated under

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188. *See id.* at 179.

189. *See, e.g.*, Morgan v. Rabun, 128 F.3d 694, 698 (8th Cir. 1997) (finding that the defendant was dangerous based in part upon the nature of the crime that led to his commitment and his hostile demeanor when institutionalized in a hospital); United States v. Weston, 134 F. Supp. 2d 115, 130 (D.D.C. 2001) (basing a finding of Weston's dangerousness upon, in part, his past violent behavior), *aff'd on other grounds*, 225 F.3d 873 (D.C. Cir. 2001); United States v. Keeven, 115 F. Supp. 2d 1132, 1135-36 (E.D. Mo. 2000) (involving an Involuntary Medication Report based partly upon a mentally incompetent detainee's history of aggressive behavior prior to incarceration and hostility toward her own attorneys which sought to justify involuntary medication upon the detainee's "profound psychosis resulting in loss of judgment, increased aggression and potential assaultive behavior.").

190. *See, e.g.*, *Morgan*, 128 F.3d at 698 (using detainee's prior violent acts, including the alleged crime leading to commitment, as a basis to affirm a staff psychiatrist's decision to medicate); Donaldson v. Denver, 847 P.2d 632, 633-35 (Colo. 1993) (holding that the trial court did not abuse its discretion in using a mentally incompetent detainee's prior history of aggressive behavior as a basis to conclude that involuntary medication was necessary to mitigate the detainee's dangerousness).

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

his current conditions of incarceration. A state may attempt to medicate a mentally incompetent detainee although the detainee has not shown a proclivity to assault prison staff or fellow inmates during the course of incarceration, or even if the inmate has been completely segregated from the general prison population.[192] If prosecutors and prison officials are permitted to use prior violent acts (such as the alleged crime of the prison detainee) as a primary basis for involuntary medication under *Harper*, they may be able to circumvent the first prong of the *Sell* Court's test requiring the state to establish that its petition to medicate an individual is pursuant to an important governmental interest.[193] When the government's true interest is to medicate the defendant to render him or her competent to stand trial, and not to medicate to ameliorate a defendant's dangerousness, using prior violent acts as a basis to medicate pretrial detainees belies the first prong of *Sell* by not permitting the court to determine whether the government's *true* interest is an "*important*" one.[194]

Because the *Sell* Court suggested that all petitions for involuntary medication should first be examined under *Harper*,[195] the extent to which lower courts might consider a mentally incompetent detainee's prior propensity for violent behavior is crucial in determining whether prosecutors will be more or less inclined to use *Harper* as a pretext to medicate for dangerousness when the ultimate purpose may be simply to restore trial competency.[196] To prevent prosecutors from using the rational basis test in *Harper*

192. Although overruled on appeal to the D.C. Circuit, the District Court's ruling in *United States. v. Weston* is illustrative of a lower court's susceptibility to entertaining presumably irrelevant evidence of dangerousness despite a defendant's isolated incarceration pending trial. *Weston*, 134 F. Supp. 2d at 129-30 (using defendant's prior violent acts as a basis to approve the government's involuntary medication petition under *Harper*, despite the fact that Weston was held in isolation). *But see Weston*, 255 F.3d at 878-79 (holding that defendant's complete seclusion from the general prison population precluded a finding of dangerousness under *Harper*, but that he nonetheless could be medicated to restore trial competency).

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

194. *See id.*

195. *Id.* at 183.

196. *See* Donaldson v. Denver, 847 P.2d 632, 636 (Colo. 1993) (Scott, J., dissenting) (disputing the state's contention that involuntary medication was for the purpose of preventing a gross deterioration in the defendant's condition and concluding instead that the "total goal" was to restore trial competency).

as a means to circumvent the requirements of heightened scrutiny required by *Sell*, courts should be careful not to confuse the issue of dangerousness under *Harper* with that under a civil commitment procedure. A mentally ill person's prior propensity for violence would be relevant in a civil commitment hearing because the threshold question is whether the person should be institutionalized because he otherwise poses a significant danger to himself or others while left unsupervised in the community.[197] In contrast, the inquiry under *Harper* is more narrow because courts are only required to determine whether the detainee poses a danger to himself or others exclusively within the detainee's current conditions of incarceration.[198]

As such, a state has a rational basis justification for involuntarily medicating an inmate under *Harper* only if the court finds that the methods employed within a particular facility for controlling violent behavior are insufficient to prevent the detainee from harming himself or others within the facility.[199] To determine whether a particular facility is equipped to control a mentally ill inmate's behavior, a court should narrow the scope of its inquiry to whether the inmate poses an immediate threat to the prison's psychiatrists, staff, and other inmates within the institution, and whether prison officials have attempted to control the inmate's

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197. *See* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

198. *See* Washington v. Harper, 494 U.S. 210, 227 (1990); *see also Sell*, 539 U.S. at 174-75. The *Sell* Court accepted the District Court's determination of Sell's dangerousness after noting the District Court had "limited its determination to Sell's 'dangerousness *at this* [present] *time* to himself and to those around him *in his institutional context*.'" *Id.* The Court in *Harper* stated:

> We hold that, *given the requirements of the prison environment*, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.

*Harper*, 494 U.S. at 227 (emphasis added).

The Supreme Court premised its holding in *Harper* upon prior cases in which the Court found that the unique exigencies of maintaining safety within a penal institution justified the infringement of an inmate's individual liberty interest, such as the right to avoid bodily restraints, or even the right to marry. *See id.* at 223-27.

199. *See* United States v. Weston, 255 F.3d 873, 879 (D.C. Cir. 2001) ("Absent a showing that Weston's condition now exceeds the institution's ability to contain it through his present state of confinement, the prior decision appears to preclude a finding of dangerousness.").

behavior through non-drug alternatives. This limited inquiry will better insure that a state's finding of dangerousness is truly deserving of the lower standard of review under *Harper*, and is not merely a Trojan horse used to circumvent the searching inquiry required under *Sell* into an incompetent detainee's prospect of receiving a fair trial while under the influence of a potent psychiatric drug. Evidence of alleged violent acts occurring before the inmate was imprisoned, perhaps occurring in an unsupervised setting, is not likely to be probative in determining whether a mentally ill detainee poses a danger to himself or others in a prison facility, where the detainee's propensity for violence may be successfully supervised and controlled through the use of isolation or other non-drug alternatives.

## IV. PAVING THE WAY TO THE DEATH CHAMBER

The need for courts to construe *Harper* narrowly does not only apply to cases in which a state wishes to use antipsychotic medication as a means of restoring trial competency. Indeed, perhaps the most egregious use of the rational basis test of *Harper* would be if a state employed the rationale of dangerousness as a pretext to render a mentally incompetent condemned inmate fit for execution. Because life on death row often exacerbates the symptoms of mental illness, thereby rendering many otherwise competent inmates incompetent,[200] there remains after *Sell* a legitimate fear that some states may seek to use the rational basis test of *Harper* as a means to circumvent the Supreme Court's prohibition against executing the mentally insane.[201]

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200. *See, e.g.*, Roberta M. Harding, *"Endgame": Competency and the Execution of Condemned Inmates – A Proposal to Satisfy the Eighth Amendment's Prohibition Against the Infliction of Cruel and Unusual Punishment*, 14 ST. LOUIS U. PUB. L. REV. 105, 115-16 (1994).

> Any individual condemned to face execution must have been tried and sentenced. In such previous judicial proceedings, the condemned individual must have been determined to be competent or else such proceedings would have been suspended until competency was achieved. Therefore, for the issue of competency to face execution to surface, the condemned individual must have become incompetent following his death sentence.

Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 366-67 (1994) (citations omitted).

201. *See* Harding, *supra* note 200, at 122-25. The Supreme Court expressly prohibited the execution of the mentally insane in 1986. *See* Ford v.

The seminal case concerning the medicate-to-execute question is *State v. Perry*,[202] in which the Supreme Court of Louisiana refused to allow state officials to use a *Harper* finding of dangerousness as a justification to medicate a condemned mentally incompetent inmate.[203] Although *Perry* was ultimately decided upon state constitutional grounds,[204] the Louisiana Supreme Court regarded the state's petition to medicate under *Harper* as a cynical ploy to use an alleged concern for the inmate's health and safety as a mere pretext to render him mentally fit for execution.[205] If the *Perry* rationale is not adopted by other courts, involuntary medication of inmates awaiting the death penalty to render them competent to carry out their sentence is not an unimaginable possibility. Furthermore, after *Sell*, state officials may no longer even need to use *Harper* as a pretext to conceal their true motives when seeking to medicate condemned inmates. Rather, state officials may actually find it easier to gain judicial approval under *Sell* in cases involving the involuntary medication of condemned inmates than in cases involving pretrial detainees.

To understand how *Sell* might impact the lives of mentally incompetent inmates who are currently residing on death row, one must first look briefly to the Supreme Court's original prohibition against executing the mentally insane. The Supreme Court, in *Ford v. Wainwright*,[206] held that executing the mentally insane violates the prohibition of the Eighth Amendment against cruel and unusual punishment.[207] Although the *Ford* Court held that

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Wainwright, 477 U.S. 399, 410 (1986) ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.").

202. 610 So. 2d 746 (La. 1992).

203. *Id.* at 755.

204. *Id.*

205. *See id.* at 754. The Louisiana Supreme Court stated:

> It is obvious that none of the participants considered that prison safety or the long term best medical interests of Perry were significant or determinative issues in the proceeding. Having conducted this proceeding with the single-minded purpose of forcibly medicating Perry in order to execute him, . . . the state cannot now contend that it genuinely seeks to uphold the trial court's forced medication order merely to further Perry's best medical interest and the safety of Perry and others in the prison setting.

*Id.*

206. 477 U.S. 399 (1986).

207. *Id.* at 410.

states may not execute a prisoner who is "insane,"[208] the Court declined to establish any required procedure or criteria in determining whether a condemned inmate is mentally fit for execution.[209] The only guidance provided by the Court came in the form of a proposition from Justice Powell's concurrence that the Eighth Amendment allows the states to execute only those who "know the fact of their impending execution and the reason for it."[210] Subsequently, this statement from Justice Powell's concurrence became commonly known as the "cognitive test," and was adopted by many states as the sole criteria in determining a condemned inmate's eligibility for execution.[211] In addition to adopting the cognitive test, however, some jurisdictions have held that a condemned inmate is death eligible only if he can effectively communicate with counsel, an additional requirement know as the "assistance prong."[212]

The disparate interpretations of *Ford* will have a significant impact upon how *Sell* is applied in cases involving the involuntary medication of condemned inmates. As argued above,[213] the *Sell* Court essentially created a two-tiered standard of review: courts must first apply *intermediate scrutiny* to determine whether a state's prosecutorial interest is important enough in a particular case to outweigh an individual's liberty interest to refuse unwanted medication, followed by a form of *strict scrutiny* to ensure that the side effects of a proposed medication would not significantly impact an individual's ability to communicate with counsel, or otherwise result in unfair trial prejudice.[214] The rationale for incorporating the "assistance prong" into an inquiry regarding a condemned inmate's mental fitness for execution is that it is im-

208. *Id.*

209. *See id.* at 416-17 ("[W]e leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.").

210. *Id.* at 422 (Powell, J., concurring).

211. *See e.g.*, Singleton v. State, 437 S.E.2d 53, 56 (S.C. 1993) (citing Johnson v. Cabana, 818 F.2d 333 (5th Cir. 1981)).

212. *See id.* at 56-57 (citing authorities and stating that "[o]ther states have adopted similar views where, in order to execute a defendant, he must have the intelligence to convey any knowledge of a fact which would make his punishment unjust or unlawful to his attorney.").

213. *See supra* Part III.B.

214. *See supra* Parts III.A.-F.; *see also* Sell v. United States, 539 U.S. 166, 179 (2003).

perative that a condemned inmate can assist counsel throughout the post-conviction appeals process.[215] In a jurisdiction that has incorporated this "assistance prong" into its analysis, the potential side effects of a proposed drug would be crucial in determining whether involuntary medication would render a condemned inmate death eligible under *Ford*.[216] As such, under the assistance prong a condemned inmate would be entitled to the same judicial protections as a pretrial detainee under *Sell*, thus triggering strict scrutiny in order to ensure that involuntary medication would not impair a condemned inmate's ability to participate effectively throughout the appeals process. Because of the Supreme Court's current pessimism regarding the ability of psychiatrists to mitigate the side effects commonly associated with antipsychotic drugs,[217] it is highly unlikely that a court bound by the "assistance prong" would approve a state's request to medicate a condemned inmate. However, in the wake of the Eighth Circuit's holding in *Singleton v. Norris*,[218] the results will be starkly different in jurisdictions that ascribe solely to the "cognitive test."[219]

Several months prior to the Supreme Court's holding in *Sell*, the Eighth Circuit, in *Singleton v. Norris*, affirmed a district court's order permitting the State of Arkansas to execute a condemned inmate who had been previously restored to competency through involuntary medication under a *Harper* finding of dangerousness.[220] Beginning with the premise that the state's interest in punishing crime is "at its greatest in the narrow class of capital murder cases in which the aggravating factors justify imposition of the death penalty,"[221] the Eighth Circuit concluded that invol-

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215. *See Singleton*, 437 S.E.2d at 57-58.

216. *See* Riggins v. Nevada, 504 U.S. 127, 140-42 (1992) (Kennedy, J., concurring); *see also* Ford v. Wainwright, 477 U.S. 399, 410 (1986).

217. *See, e.g.*, *supra* note 56 and accompanying text.

218. *See* Singleton v. Norris, 319 F.3d 1018, 1020 (8th Cir. 2003) (affirming the district court's rejection of defendant "Singleton's contention that the administration of mandatory antipsychotic medication to a prisoner, even if originally constitutional under *Harper*, becomes unconstitutional once an execution date is set because at that time it ceases to be in the prisoner's medical interest").

219. The "cognitive test" involves determining whether a defendant on death row "know[s] the fact of their impending execution and the reason for it." *Ford*, 477 U.S. at 422 (Powell, J., concurring).

220. *Singleton*, 319 F.3d at 1020.

221. *Id.* at 1025.

untary medication of a condemned inmate was narrowly tailored to further an essential state interest.[222] The most contentious issue, however, was whether it could ever be medically appropriate to medicate a condemned inmate when doing so would ultimately result in furthering the inmate's ability to be put to death.[223] In concluding that involuntary medication was medically appropriate, the Eighth Circuit restricted its analysis solely to the immediate effects the medication had in relieving Singleton's symptoms of psychosis, while refusing to consider the ancillary effect of facilitating his eventual death by execution.[224] This approach by the Eighth Circuit stands in stark contrast to that of the Louisiana Supreme Court, which held that the state's medicate-to-execute regime "[came] closer to being the cause of death in furthering the state's punishment goal than to the practice of medicine or treatment in the patient's best [medical] interest."[225]

Moreover, in *Singleton*, the Eighth Circuit gave no consideration to the possibility that involuntary medication might inhibit Singleton's ability to communicate with his counsel, or to participate effectively in the appeals process. Because the Eighth Circuit applied the "cognitive test" as the sole criteria in defining Singleton's mental fitness under *Ford*,[226] Singleton's ability to assist his counsel throughout the appeals process became irrelevant since the court's only concern was whether Singleton was aware of his

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222. *See id.*

223. *See id.* at 1026 ("Central to Singleton's argument is his contention that medication 'obviously is not in the prisoner's ultimate best medical interest' where one effect of the medication is rendering the patient competent for execution.").

224. *See id.* The *Singleton* court reasoned that:

> Several doctors . . . have found the medication to be effective in controlling Singleton's psychotic symptoms. Singleton's argument regarding his long-term medical interest boils down to an assertion that execution is not in his medical interest. Eligibility for execution is the only unwanted consequence of the medication . . . . In the circumstances presented in this case, the best medical interests of the prisoner must be determined without regard to whether there is a pending execution.

*Id.*

225. State v. Perry, 610 So. 2d 746, 753 (La. 1992).

226. The Eighth Circuit applied the "cognitive test" without explicitly naming it. *See Singleton*, 319 F.3d at 1027 ("*Ford* prohibits only the execution of a prisoner who is unaware of the punishment he is about to receive and why he is to receive it.").

impending punishment and the reasons behind it.[227] Because Singleton was foreclosed from presenting any evidence as to the possible impact that involuntary medication might have upon his ability to assist counsel in obtaining a successful appeal of his death sentence, the Eighth Circuit was left to conclude that the only negative side effect from the proposed medication would be Singleton's eventual trip to the death chamber.[228]

Because the Supreme Court has already denied Singleton's request for certiorari,[229] the Eighth Circuit's holding in *Singleton* now stands as "good law." In addition, the Supreme Court's holding in *Sell* fortifies the Eighth Circuit's analysis in *Singleton* in two significant ways. First, the *Sell* Court's conclusion that courts should evaluate the severity of an alleged crime in determining the appropriateness of medicating for trial competency purposes works in favor of medicating a condemned inmate who has already been convicted of capital murder, the most reprehensible crime imaginable.[230] Second, by encouraging states to cloak all involuntary medication petitions under the pretext of a *Harper* finding of dangerousness,[231] the *Sell* Court has turned a blind eye to the alarming reality that the treatment decisions made by some prison psychiatrists may be motivated not by an undivided loyalty to the patient's psychiatric well-being, but rather by the desire of government officials to ensure that all condemned inmates receive their "just desserts." Furthermore, in weighing the strength of a state's prosecutorial interests under the *Sell* Court's heightened scrutiny analysis,[232] lower courts will likely find that the alternative of indefinite confinement under a civil commitment order cannot diminish the state's interest in executing a condemned in-

227. *Id.*

228. *Id.* at 1026 ("Eligibility for execution is the only unwanted consequence of the medication.").

229. Singleton v. Norris, 540 U.S. 832, 832 (2003).

230. *See* Sell v. United States, 539 U.S. 166, 180 (2003) ("First, a court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important."); *cf.* Ford v. Wainwright, 477 U.S. 399, 429 (1986) (O'Connor, J., concurring in part and dissenting in part) ("But I consider it self-evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly.").

231. *See* discussion *supra* Part III.H.

232. *See Sell*, 539 U.S. at 179.

mate because the state's interest in punishing those convicted with capital murder undoubtedly exceeds any form of indefinite incarceration.

The most disturbing aspect of the Supreme Court's refusal to review the Eighth Circuit's holding in *Singleton*,[233] however, is the Court's apparent inability to recognize that those courts which merely apply the "cognitive test" in defining an inmate's mental fitness for execution will not apply any form of judicial scrutiny in regard to the possible impact that involuntary medication might have upon the inmate's ability to communicate and assist his counsel during appeal. It is highly troublesome that many condemned inmates who have the most to lose will be denied the same level of judicial protection granted to all pretrial detainees under *Sell*, especially as it relates to the important right to assist and communicate with counsel during the entire course of the judicial process in which one's ultimate fate will be decided.[234] Under the current state of the law, a state's ability to restore a condemned inmate's mental competency through the use of drugs will hinge solely upon the jurisdiction's favored interpretation of mental competency under *Ford*. The only way to remedy this obvious disparity is for the Court to revisit *Ford* by requiring all jurisdictions to apply the "assistance prong,"[235] in addition to the "cognitive test,"[236] thereby ensuring that the *Sell* Court's vigorous protection of a pretrial detainee's right to assist and communicate with counsel is extended to a condemned inmate's last efforts to avoid execution.[237]

## V. CONCLUSION

Collectively, *Sell* and *Singleton* are indicative of a disturbing movement in the law in which the prosecutorial interests of the state may someday overshadow the historical duty of physicians and psychiatrists to base all treatment decisions on the fulfillment of a patient's best medical interest. In seeking to accommodate a state's interest in prosecuting mentally incompetent defendants

233. *See Singleton*, 540 U.S. at 832.
234. *See* U.S. CONST. amend. VI.
235. *See* Singleton v. State, 437 S.E.2d 53, 56-57 (S.C. 1993).
236. *See* Ford v. Wainwright, 477 U.S. 399, 422 (Powell, J., concurring).
237. *See Sell*, 539 U.S. at 181.

with an individual's right to refuse unwanted medication, the *Sell* Court has taken a definite, yet cautious, step toward granting prosecutors the discretion to dictate the terms and conditions under which mentally incompetent defendants are to be medicated. Notwithstanding this unprecedented expansion of state power, the *Sell* Court has given lower courts clear notice that the Supreme Court may not turn a blind eye to the ways in which the state's authority to administer antipsychotic drugs might be used to impair a defendant's constitutional right to receive a fair trial. However, the *Sell* Court's holding coincides with recent developments in the manufacture and distribution of a newer generation of antipsychotic drugs that are not accompanied by the same debilitating side effects often associated with the older medications traditionally prescribed by psychiatrists.[238] In light of these current developments, the Supreme Court may someday choose to reconsider its current skepticism regarding the ability of prison psychiatrists to prevent heavily medicated defendants from being subjected to unfair prejudice at trial.[239]

Moreover, the current state of the law is even more unsettled in regard to the numbers of mentally incompetent inmates who currently reside on death row.[240] In declining to review the Eighth Circuit's holding in *Singleton*,[241] the Supreme Court missed an important opportunity to clarify the disparate ways states have measured the mental competency of condemned inmates awaiting execution, thus providing condemned inmates with the same judicial protections granted to pretrial detainees under *Sell*. Instead,

238. The newer generation of drugs, commonly known as "atypical" or "novel" antipsychotics, tend not to cause the same severe neurological side effects, such as tardive dyskinesia, as do their older counterparts. Siegel *supra* note 53, at 348-49. However, although these newer drugs are effective in alleviating many of the acute symptoms of psychosis, not much is known about their long-term efficacy; nor are they widely available in injectable form. *Id.* at 349. Until these newer drugs become more available in injectable form, prison psychiatrists will not be able to administer these drugs to unwilling patients. *Id.* at 349 n.235; Paul A. Nidich & Jacqueline Collins, *Involuntary Administration of Psychotropic Medication: A Federal Court Update*, 11 (No. 4) HEALTH LAW. 12, 13 n.21 (May 1999).

239. *See* Nidich & Collins, *supra* note 238, at 13 (arguing that in light of the recent improvements in the manufacture of psychotropic drugs, the Supreme Court "should revisit this issue with an open mind").

240. *See* Harding, *supra* note 200, at 113-16 (discussing increases in the number of mentally incompetent condemned inmates).

241. *See* Singleton v. Norris, 540 U.S. 832, 832 (2003).

prosecutors have a greater incentive to use a mentally incompetent condemned inmate's propensity for dangerousness as a pretext merely to render the inmate mentally fit for execution. By granting the government the limited authority to medicate mentally incompetent defendants for trial competency purposes, the Court may have unknowingly accorded the government the unlimited power to use the therapeutic benefits of psychiatric medication to bring condemned inmates to the threshold of the death chamber.

Cameron J. Jones