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*127 RESTORATION OF COMPETENCY THROUGH INVOLUNTARY MEDICATION: APPLYING THE SELL FACTORS

I. INTRODUCTION

On Wednesday, January 16, 2002, former law student Peter Odighizuwa shot and killed Dean L. Anthony Sutin, Professor Thomas F. Blackwell, and first-year student Angela Dales, at the Appalachian School of Law in Grundy, Virginia. Odighizuwa also shot and injured three other female law students. The General District Court of Buchanan County, Virginia, initially diagnosed Odighizuwa as a paranoid schizophrenic and found him incompetent to stand trial. Odighizuwa was treated at a Virginia State Hospital with antipsychotic medication for nearly a year, during which time his condition improved, and he was found competent to stand trial in July 2003. [1] In the time since January 16, 2002, students, faculty, and family members of the victims of the shooting at the Appalachian School of Law have come to learn of the importance of restoring criminals to competency to stand trial. As is evident in the case of Peter Odighizuwa, the State has a great interest in bringing criminals to trial. However, when does the government's interest in restoring competency to stand trial outweigh the individual's right to bodily integrity and the right to refuse medical treatment?

At what point may the government forcibly medicate a criminal defendant in order to restore competency to stand trial? The Supreme Court answered this question, in part, in *Sell v. United States* [2] by establishing a four-part test to determine when a court may order administration of antipsychotic medication to restore competency. Before the court will order forcible medication, it must be satisfied that the government has ***128** established the following four factors: first, that important governmental interests are at stake; second, that involuntary medication will significantly further those interests and that medication is substantially unlikely to cause side effects that will interfere significantly with the defendant's ability to assist in his trial defense; third, that involuntary medication is necessary to further those governmental interests and that alternative, less intrusive treatments are unlikely to restore competency; and fourth, that the administration of medication is medically appropriate. [3]

Lower courts, however, are struggling to apply the *Sell* test due to the Court's failure to clearly define certain essential terms. This article attempts to provide answers to the most serious questions left by *Sell*. First, in weighing the government interests at stake, courts should base the *seriousness of the offense* on the same standard as the Sixth Amendment right to a jury trial, which has been held to include those offenses for which a term of imprisonment exceeding six months may be imposed. This standard should also include crimes against the person, property, and government. In addition, when receiving a forcible medication order, reviewing courts should view the seriousness of the crime in relation to the maximum potential sentence, not the maximum sentence imposed. Second, the courts should require that, under the second, third, and fourth factors, the medication to be used and specific dosages to be administered be particularized with regard to the individual patient. The potential side effects relative to that medication and the individual defendant's medical condition, history, and situation should also be taken into consideration. Further, the court should require the government to show that some form of regulation or oversight regarding that type of medication and dosage exists to monitor the defendant's condition.

II. LEADING THE WAY TO *SELL*

Prior to the decision in *Sell*, the courts looked to *Washington v. Harper*[4] and *Riggins v. Nevada*[5] for guidance in determining when and how they might order medication of criminal defendants to restore competency to stand trial. *Harper* dealt with whether treating a medically ill prisoner with antipsychotic drugs against his will was a violation of his due process rights.[6] Harper had refused to take the antipsychotic medication required for his treatment.[7] In his case, the Court held that forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty.[8] However, focusing on the State's ***129** interest in rendering the inmate less dangerous, the Court determined that forcing a defendant to take antipsychotic drugs does not violate the defendant's due process rights as long as that individual is found to be dangerous to himself or others and the treatment is in the defendant's medical interest.[9] By implementing procedural protections designed to protect an inmate's liberty interest in situations where antipsychotic medications are involved, *Harper* paved the way for what would later be described as the "trial competency test."[10]

Two years later the Supreme Court strengthened and extended the *Harper* decision in *Riggins*.[11] *Riggins* dealt with whether forced administration of antipsychotic medication during trial violated rights guaranteed by the Sixth and Fourteenth Amendments.[12] Riggins moved to stop medical treatment until the end of his trial.[13] The *Riggins* Court followed *Harper*, stating, "An individual has a constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs, an interest that only an essential or overriding State interest might overcome."[14] The Court held that the State satisfies the Due Process Clause by showing that the treatment was medically appropriate and, considering less intrusive alternatives, essential for the defendant's safety or the safety of others.[15] The State also might be able to justify the treatment, if medically appropriate, by showing that an adjudication of guilt or innocence is not obtainable using less intrusive means.[16]

While these decisions left many significant questions unanswered, they laid the groundwork for *Sell*, which the court decided eleven years after *Riggins*.[17] The decision in *Sell* took the issue of involuntary medication a step further, and set forth what many scholars describe, and appropriately so, as the "trial competency test."[18] The *Sell* Court established this test as a standard that the government must meet before a court will order the administration of antipsychotic medication to individuals to restore their competency to stand trial.

130 III. *SELL V. UNITED STATES

In 1997, the government charged Charles Sell, once a practicing dentist, with submitting fictitious insurance claims.[19] Between 1982 and 1997, Sell had been periodically hospitalized, treated with antipsychotic medication, and subsequently discharged.[20] On a number of occasions, he complained that public officials were trying to kill him.[21] After Sell sought to intimidate a witness, the judge revoked his bond, based on a psychiatrist's opinion that Sell's psychiatric condition had worsened.[22] In 1998, a grand jury issued a new indictment charging Sell with attempting to murder an FBI agent and a former employee who planned to testify against him.[23] In 1999, Sell requested the magistrate judge reconsider his competency to stand trial.[24] After a psychiatric evaluation, the magistrate judge found him mentally incompetent to stand trial and hospitalized him for treatment.[25] Two months later, medical staff recommended that Sell take antipsychotic medication, and he refused to do so.[26] The staff then sought permission to administer the medication against his will.[27]

In 2000, a magistrate judge found that Sell was a danger to himself and others and that antipsychotic medication was the only way to render him less dangerous; however, the magistrate judge stayed the medication order to allow Sell to appeal to the district court.[28] The district court found that Sell was not dangerous; nonetheless, it affirmed the magistrate judge's order permitting involuntary medication.[29] The court noted that "anti-psychotic drugs are medically appropriate, that they represent the only viable hope of rendering the defendant competent to stand trial, and that administration of such drugs appears necessary to serve the government's compelling interest in obtaining an adjudication of the defendant's guilt or innocence of numerous serious charges (including fraud and ***131** attempted murder)."[30] The Eighth Circuit affirmed the district court's decision and agreed that, although Sell was not a danger to himself or others, medication was necessary to render him competent to stand trial because of the government's essential interest in bringing him to trial.[31] The Supreme Court granted *certiorari* to

determine whether the Eighth Circuit erred in rejecting Sell's argument that allowing the government to administer antipsychotic medication against his will solely to render him competent to stand trial for non-violent offenses violated the Constitution. [32]

The *Sell* Court found that prior precedent in *Harper* and *Riggins* indicated that the Constitution permits the government to administer antipsychotic drugs involuntarily to a criminal defendant. [33] However, *Harper* and *Riggins* both limited involuntary administration to defendants facing serious criminal charges when it is necessary to render them competent to stand trial, but only if treatment is medically appropriate, substantially unlikely to have side effects that may undermine the fairness of the trial, and is necessary to significantly further important government related interests. [34] In an effort to resolve the conflicting standards applied by the lower courts, the *Sell* Court enumerated a four-part test, set forth *supra*, which will allow involuntary medication only when the government can establish all four factors. [35] However, the Court noted that while this new standard will permit involuntary administration of drugs for the sole purpose of restoring competency to stand trial, those circumstances might be rare. [36]

"First, a court must find that important governmental interests are at stake." [37] The Court considered the government's interest in bringing an individual accused of committing a serious crime to trial is an important interest. [38] "That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances, the Government seeks to protect through application of the criminal law the basic ***132** human need for security." [39] In applying this standard, courts should consider the facts of each individual case to determine the government's interest in prosecution. [40] The Court did note that special circumstances might lessen the importance of the government's interest. [41] For example, a defendant's failure to take medication voluntarily might translate into a longer confinement in an institution, thus diminishing the risks associated with freeing one who has committed a crime without proper punishment. [42] Further, the government has a substantial interest in timely prosecution because it may be difficult or impossible to try a defendant who regains competency after years of commitment and whose memory has faded or is lost. [43] Likewise, the same is true when a defendant is confined for a significant amount of time, for which he would receive credit towards any sentence imposed. [44]

"Second, the court must conclude that involuntary medication will significantly further those concomitant State interests." [45] This implies two necessary findings: the administration of the drugs must be substantially likely to render the defendant competent to stand trial, and administration of medication must be substantially unlikely to have side effects that will interfere with the defendant's ability to assist counsel in conducting a trial defense. [46]

"Third, the court must conclude that involuntary medication is necessary to further those interests." [47] In other words, courts must first consider other, less intrusive, alternative forms of treatment and determine that such alternate forms of treatment are unlikely to achieve substantially the same results. [48] The court also must consider the least intrusive means for administering the drugs, for example, the use of pills as opposed to injections. [49]

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." [50] This is essential because different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success depending on the patient. [51]

133 IV. APPLICATION OF *SELL

The Court in *Sell* intended to establish a bright line rule, to strike a balance between the State's interests and protections guaranteed to the individual. Among the individual liberty interests at stake are freedom of speech, fair trial rights, privacy rights, and substantive and procedural due process rights. The *Sell* Court noted that this new test would permit involuntary administration of drugs solely for restoring competency to stand trial only in certain rare instances. [52] In doing so, the Court placed a heavy burden on the government to establish the State's interest, medical appropriateness, and the need for antipsychotic medication before a court would grant a request for forcible administration of antipsychotic medication. In establishing the *Sell* test, the Court seems to have struck a proper balance: however, the Court failed to clearly define essential terms and standards needed to employ its new test.

There are two essential flaws in the *Sell* decision: failure to provide a definition of what constitutes a serious crime in order to determine if important government interests are at stake and, failure to define a standard for determining medical appropriateness as well as what, if any, side effects of medication are reasonable. These flaws will each be discussed below, as applied by lower courts after the *Sell* decision. I will also discuss possible resolutions to these flaws.

A. *Definition of a Serious Crime*

Many of the lower courts applying the *Sell* standard are having difficulty applying the first factor: whether important government interests are at stake. [53] While the *Sell* Court recognized the importance of the government's interest in bringing to trial an individual accused of a serious crime, the court left open the definition of what constitutes a serious crime. To avoid conflicting standards, courts should base the seriousness of the offense on the same standard as used for the Sixth Amendment right to a jury trial, which has been held to include those offenses for which a term of imprisonment exceeding six months may be imposed. One of the early courts to address this issue following the decision in *Sell* was *United States v. Evans*. [54]

1. *United States v. Evans*

In *Evans*, the government charged Herbert Evans with a misdemeanor of forcibly intimidating and interfering with an employee of the ***134** United States. [55] At his initial appearance, the magistrate judge ordered Evans committed for psychological or psychiatric examination to determine competency to stand trial. [56] At a competency hearing, Evans was found incompetent to stand trial and was committed for hospitalization to determine whether he could attain competency in the foreseeable future. [57]

During that time, Evans refused to be medicated, and the staff at the Federal Medical Institution sought to determine whether he could be involuntarily medicated to restore him to competency. [58] The medical staff had determined that Evans was not dangerous to himself or others but believed medication was necessary to restore him to competency. [59] The magistrate judge ordered an evidentiary hearing and, after the hearing, entered an order denying the government's motion to forcibly medicate Evans. [60] The magistrate judge relied on the decision in *Sell* and applied the four factors that must be established before a court can order that a defendant be involuntarily medicated to restore competency to stand trial. [61] The court began its analysis by considering whether important governmental interests were at stake. It noted that the Court in *Sell* did not offer any definition or explanation of what it considered a serious crime. [62]

The court in *Evans* noted that the Supreme Court had addressed the issue of what amounts to a serious crime within the context of the Sixth Amendment right to jury trial in *Duncan v. Louisiana*. [63] In fact, the Court has held that the right to trial by jury extends only to persons charged with serious offenses. [64] The Court in *Duncan* defined serious offenses, for purposes of determining the right to trial by jury, as those offenses for which a term of imprisonment exceeding six months may be imposed. [65] It appeared that in reaching this decision, the *Duncan* court was persuaded somewhat by the fact that there was no substantial evidence that the Framers ***135** intended to depart from the established common law practice that so-called petty offenses were tried without juries. [66] *Duncan*, however, stopped short of settling on the exact location of the line between petty offenses and serious crime. [67] Other courts have gone one-step further than *Duncan* and have said that a crime carrying a maximum sentence of more than six months could mark the delineation between a petty offense and a serious offense. [68]

The court in *Evans* noted that while the cases outlined above did not provide a definitive standard for defining a serious offense, they did offer guidance to the court in suggesting that the decision should be based on the seriousness of the penalties that *may* be imposed. [69] The *Evans* court found that because the offense of forcibly intimidating and interfering with an employee of the United States was a misdemeanor with a maximum penalty of up to one-year imprisonment and a fine of up to $100,000.00, the offense constituted a serious offense. [70] In this instance, however, the court noted that special circumstances might lessen the importance of the government's interest for prosecution; for example, if the defendant already had been confined for a significant amount of time for which he would receive credit toward any sentence ultimately imposed, this would constitute a special circumstance. [71] The court found that there was not an important government interest at stake because Evans already

had been confined for more than a year; therefore, were he convicted, he would not serve any additional term of imprisonment because he would receive credit for time already served. [72]

Unfortunately for Evans, his story does not end here. The magistrate judge scheduled another hearing to determine whether to commit Evans on the ground that his release would create a substantial risk of bodily injury. [73] Immediately prior to the hearing, Evans was charged with threatening to kill the magistrate judge. [74] The magistrate judge recused herself and the district court assumed both cases. [75] The district court reconsidered the issue of involuntary medication in light of the new criminal charge and ***136** found that, although previously there was not an important governmental interest in bringing Evans to trial, he was now charged with a felony for which the maximum term of imprisonment was ten years. [76] The court held that:

> (1) defendant Evans is presently suffering from a mental disease that renders him incompetent to the extent that he is unable to assist properly in the defense of the pending serious criminal charges; (2) that there is a substantial probability that the administration of antipsychotic medicine will restore Evans to competency within a reasonable time; (3) that Evans will not voluntarily take such medicine; (4) that there are not less intrusive forms of therapy likely to restore Evans to competency; (5) that the administration of such medicine is not substantially likely to cause any serious side effects that would interfere significantly with Evans' ability to assist in his defense; (6) that such medicine is medically appropriate; and (7) that the government has important interests at stake in the restoration of Evans's competency. [77]

The district court Judge stayed his order pending Evans's appeal.

The Fourth Circuit heard *Evans's* appeal on December 3, 2004. [78] Evans argued, among other things, that the district court failed to properly analyze the evidence under the *Sell* factors. [79] First, he argued that the government's interest in trying Evans does not outweigh his liberty interest in refusing medication. [80] In fact, Evans argued that the lower court was wrong to focus solely on the maximum statutory term of imprisonment to determine whether the offense is serious. [81] Evans argued that, because sentencing in the federal criminal justice system is conducted pursuant to mandatory sentencing guidelines, the probable guideline sentence range should be considered. [82] In addition, Evans also argued that the government failed to show that side effects would not likely interfere with his ***137** ability to assist in his own defense [83] and failed to show that forced medication is medically appropriate given the condition and circumstances of this defendant. [84] At the time of this writing, the Fourth Circuit decision had not yet been announced. To illustrate the disagreement among the courts and the need to establish a clear definition of a serious offense for the courts to follow, the court in the next case refused to follow the standard in *Evans* and applied its own.

2. *United States v. Barajas-Torres*

In *United States v. Barajas-Torres,* Angel Barajas-Torres was charged with illegal re-entry into the United States. [85] Barajas-Torres moved for a mental examination and was committed, but subsequently refused antipsychotic medication. [86] A hearing was held to determine whether he should be forcibly medicated. [87] The court found that there was no question that the proposed antipsychotic medication was the only effective treatment for Barajas-Torres's schizophrenia, and that no alternative would restore him to competency. [88] Further, the potential side effects would be minimal and Barajas-Torres's schizophrenia, if left untreated, might result in a permanent mental disorder and therefore would likely be in his best interest. [89]

Similar to the court in *Evans*, the *Barajas-Torres* court was forced to attempt to define a serious offense. However, the *Barajas-Torres* court rejected the standard in *Evans,* saying that a serious crime in the context of a defendant's right to a jury trial does not necessarily translate to a serious crime for purposes of a defendant's right to refuse medication. [90] Further, the court said that if it were to apply the right to jury trial standard as set forth in *Evans,* the fact specific nature of the test would preclude a bare reference to the maximum sentence provided by statute. [91] The court felt that the more accurate reflection of the seriousness

of an offense, given the fact-specific analysis required by *Sell*, would be the relevant guideline range, particularly in light of Congress' instruction that sentences imposed under the sentencing guidelines reflect the seriousness of the offense. [92]

The *Barajas-Torres* court was presented with another issue of what constitutes a serious crime, the charge of illegal re-entry, which addresses ***138** neither crimes against the person nor crimes against property. [93] For these reasons, the court found that there was not a sufficient government interest. The *Barajas-Torres* court limited the *Sell* standard, arguing that the Court intended the standard to be rarely applied and, therefore, strictly construed. [94] Further, the court argued that the *Sell* standard is fact-specific and is to be considered on a case-by-case basis. [95]

3. Conclusion

Other than the right to jury trial standard as proposed in *Evans*, [96] courts have yet to suggest any other methods for determining what constitutes a serious crime. It is important that the courts establish a consistent standard. To look only at the nature of the crime creates nothing more than a subjective standard. The Court in *Sell* stated that the offense must be serious and it must be against a person or property. [97] Is this factor to be read literally? Is the Court saying that crimes against the country are never serious enough to justify forcible medication?

I argue that the courts should apply the same standard used by *Evans* and as set forth in *Duncan*. [98] It is an objective standard; it promotes the balance sought by the court between private and government interests; and it will promote consistency among the courts applying the standard already established. In addition, the government's interest also may be lessened by special circumstances such as time-served. Further, the courts should not limit serious crimes to only those against persons or property; otherwise, the standard will work contrary to antiterrorist interests, border control, and immigration law. Without a uniform standard for all courts to follow, the government may too easily impose its will on criminal defendants, while at the same time, individuals such as Barajas-Torres, will escape medication because of a flaw in the test. For these reasons, the proper standard to determine the seriousness of the offense should be based on the Sixth Amendment right to jury trial standard for all crimes, which has been held to include those offenses for which a term of imprisonment exceeding six months may be imposed. [99] In addition, the sentence should be viewed in relation to the maximum potential sentence, not the maximum sentence imposed.

***139** B. *Defining Medical Appropriateness and Reasonable Side Effects*

The next area of difficulty under *Sell* is determining what treatment is medically appropriate and what side effects are reasonable. The Court in *Sell* indicated that the medication must be in the patient's best medical interest in light of the defendant's medical condition. [100] The specific kind of drug may be at issue because different kinds of drugs may produce different side effects. [101] This fourth factor is somewhat similar to the second factor, which states that the administration of the drugs must be substantially unlikely to have side effects that will interfere with the defendant's ability to assist in his own defense. [102] While the second factor deals with side effects that may interfere with the defendant's assistance in his own trial, the fourth factor also includes side effects that may not be in the patient's best medical interest. [103] In order for the administration of the drugs to be medically appropriate, they should be tailored to each individual patient. In addition, the Court should establish in specific detail the drugs to be used and the potential side effects in relation to the specific defendant, based on his or her prior medical and psychiatric history. Side effects of medication would be considered reasonable if they do not impede the defendant's right to a fair trial or cause terminal illness or disease. For example, in *United States v. Gomes,* [104] the court methodically applied each of the *Sell* factors and went to great lengths to explain the differences in medication, their potential side effects, and their effectiveness in use.

1. *United States v. Gomes*

On remand from the U.S. Supreme Court shortly after the *Sell* decision, the *Gomes* court applied all the factors of the *Sell* test and found that the defendant could be forcibly medicated. [105] Aaron Gomes was indicted for unlawful possession of a firearm by a convicted felon and subsequently found incompetent to stand trial, having been diagnosed with a delusional disorder. [106] The government sought to forcibly medicate him in order to make him competent, and the district court concluded that Gomes

could be involuntarily medicated.[107] Gomes appealed the district court's decision, and the Second Circuit, announcing its own standard under which involuntary medication may be ordered, vacated the order and remanded ***140** the case for further proceedings.[108] The Supreme Court granted *certiorari*, but stayed the petition pending consideration of *Sell*.[109] Following the *Sell* decision, the Supreme Court vacated the judgment of the Second Circuit and remanded the case to the Second Circuit, which in turn remanded the case to the district court.[110] On remand, the district court held that "in light of the application of the *Sell* factors, including the efficacy, the side effects, the possible alternatives, and the medical appropriateness of antipsychotic drug treatment, the government has shown by clear and convincing evidence a need for drug treatment sufficiently important to overcome Mr. Gomes's liberty interest in refusing it."[111]

In its analysis, the district court laid out each of the *Sell* factors. The first factor in this case was not as difficult to decide as cases such as *Evans* and *Barajas-Torres*, because the actual sentence Gomes faced was greater than the statutory minimum of fifteen years.[112] Having passed the first factor, the *Gomes* court went on to consider the other three.[113]

Continuing on to the second factor, the court directed a great deal of attention to determine whether the administration of drugs would be substantially unlikely to have side effects that would interfere significantly with Gomes's ability to assist in his own defense.[114] At the involuntary medication hearing, Dr. David F. Mrad, a staff psychologist, and Dr. Robert G. Sarrazin, a staff psychiatrist from the Bureau of Prisons Medical Center, testified as to the use of atypical antipsychotic medications.[115] Dr. Sarrazin stated that atypicals produce fewer side effects than may occur with the older, typical antipsychotics.[116] Those side effects include neuroleptic malignant syndrome, tardive dyskinesia, and extra-pyramidial side effects such as patients feeling like their feet have to keep moving (akathisia), dryness of the mouth, constipation, and urinary difficulties.[117] Some of these side effects also may occur with atypical antipsychotics, but are much less likely.[118] The possible side effects of atypical antipsychotic medications ***141** include sedation, dryness of the mouth, problems with gastrointestinal abdominal complaints, diarrhea, and constipation.[119] Some atypical medications are also now available in either injectable intramuscular form or dissolvable tablets that permit doctors to monitor whether someone is complying with oral medication.[120] In addition, the *Gomes* court noted that based on expert testimony, "once a patient reaches a stable dosage of anti-psychotic medication treating his disorder and where his competence has been restored, he would usually not have further side effects."[121] The court found that medication was substantially unlikely to significantly interfere with the defendant's ability to assist in his defense, but in fact would enable Gomes to better assist in his own defense.[122]

Having determined that involuntary medication would significantly further the State's interest in bringing Gomes to trial, the court moved on to the third factor.[123] Based on expert testimony, the court found that alternative forms of treatment would not likely be effective in restoring Gomes to competency because of his lack of insight into his illness.[124] In fact, the court found by clear and convincing evidence that any alternative, less intrusive means of treatment was unlikely to restore Gomes to competence.[125]

Having satisfied the first three factors, the court laid the foundation for the fourth factor, which is determining if the drugs are medically appropriate. Similar to the second and third factors, the court found that, after considering the potential side effects and success rates of different kinds of antipsychotic drugs, involuntary administration of drugs to Gomes was medically appropriate.[126] In addition to the *Gomes* court, the court in *United States v. Mackie*[127] also relied on expert testimony to determine the reasonableness of medication.

2. *United States v. Mackie*

The court found Steven Mark Mackie, who was on trial for possession of stolen firearms, incompetent to stand trial.[128] After evaluation of Mackie, mental health experts determined that, with medication, he could be restored to competency within a reasonable time.[129] At trial, Dr. Sarrazin ***142** [130] recommended multiple oral, atypical antipsychotic medications.[131] Dr. Sarrazin also testified about potential side effects of the medications, classifying most as nuisance side effects, such as upset stomach, dry mouth, and constipation, all of which tended to go away as one's body adjusted to the medication.[132] Dr. Sarrazin again indicated that there is always a potential for more serious side effects, but they are very rare.[133] The *Mackie* court

found the following: Mackie was accused of a serious crime; medication, even if administered involuntarily would significantly further the government's interests in proceeding to a fair and timely trial; the potential side effects were substantially unlikely to interfere with his ability to assist in his defense; less intrusive treatments were unlikely to restore Mackie to competency; and that the proposed medications were medically appropriate and substantially likely to restore competency with minimal, if any side effects. [134]

3. *United States v. Evans*

The case of Herbert Evans's appeal to the Fourth Circuit is similarly applicable here. In *United States v. Evans*, the medical evidence showed that Evans suffered from paranoid schizophrenia and that his present incompetency resulted from his strong delusional beliefs of persecution arising from that illness. [135] The district court found that the government had met its burden under the *Sell* test and ordered Evans involuntarily medicated. [136] On appeal in the Fourth Circuit, Evans argued that the government ***143** failed to show that side effects would not likely interfere with Evan's ability to assist in his defense and failed to show that forced medication was medically appropriate given the condition and circumstances of this defendant. [137] Specifically, Evans argued that Bureau of Prisons evaluators provided absolutely no detail with regard to the specific medication proposed, the potential side effects relative to that medication, and how the particular medication would relate to Evan's particular medical and psychiatric history. [138] In addition, Evans argued that evaluators for the government should not be given carte blanche approval to experiment with various kinds of drugs, old or new, typical or atypical. [139] At the time of this writing, the Fourth Circuit decision had not yet been announced.

4. Conclusion

I argue that, although the *Sell* court attempted to create a bright-line rule for all courts to follow in determining whether and when involuntary administration of antipsychotic drugs is medically appropriate, as we can see in *Gomes*, *Mackie*, and *Evans*, this is impossible to do. There is no one-size-fits-all application of the second, third and fourth factors. Because of the individual makeup of the human body, patients react differently to different drugs. Therefore, it is important to determine whether the side effects are reasonable on a case-by-case basis.

First, it must be determined if potential side effects are substantially likely to interfere with the defendant's ability to assist in his own defense because antipsychotic drugs physically infiltrate the defendant's body and change the biochemical makeup of the body, making the defendant appear bored or restless, which can prejudice the defendant in the eyes of the jury. [140] Justice Kennedy recognized this hazard in *Riggins*, noting that the defendant may appear unsympathetic to the jury or even the judge because of the effect of the drugs on the defendant. [141]

Second, under the medical appropriateness factor, it must be determined that potential side effects are substantially unlikely to harm the defendant medically. As this can be determined only on a case-by-case basis, the court should require that the medication to be used and its dosages be specifically particularized with regard to the individual patient. The court should also require that the potential side effects relative to that medication and the individual defendant's medical condition, history, and situation be taken into consideration. Further, the court should require the government to show the dosage of the drug to be administered, and ***144** that some form of regulation or oversight regarding that type of medication and dosage exists to monitor the defendant's condition.

V. CONCLUSION

The Court in *Sell* is on the right track in establishing a test that will balance these interests; however, the Court must further define and clarify this test in order for it to meet its desired end. First, without a uniform standard for all courts to follow, the government may too easily impose its will on criminal defendants, while at the same time, individuals such as Barajas-Torres will escape medication because of a flaw in the test. Therefore, the proper standard to determine the seriousness of the offense should be based on the Sixth Amendment right to jury trial standard for all crimes, which has been held to include those offenses for which a term of imprisonment exceeding six months may be imposed. [142] This standard should also include crimes against

the person, property, and the government. In addition, the seriousness of the crime should be viewed in relation to the maximum potential sentence, not the actual maximum sentence imposed.

Second, because of the individual makeup of the human body, patients react differently to different drugs. Therefore, it is important to determine whether the side effects are reasonable on a case-by-case basis. The Court should require that, under the second, third, and fourth factors, the medication to be used and specific dosages to be administered be particularized with regard to the individual patient. The potential side effects relative to that medication and the individual defendant's medical condition, history, and situation should also be taken into consideration. Further, the court should require the government to show that some form of regulation or oversight regarding that type of medication and dosage exists to monitor the defendant's condition.

As in the case of Peter Odighizuwa, it is often necessary for the government to restore the competency of a criminal defendant to enable them to stand trial. Courts currently applying the *Sell* factors must be careful to maintain the proper balance between securing an individual's right to refuse medication and the government's interest in bringing criminal defendants charged with a serious crime to trial.

Footnotes

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1 One and a half years after the incident and after being medically restored to competency, Peter Odighizuwa entered a plea agreement in which he plead guilty to firearms, capital murder, and attempted capital murder charges. He was sentenced to six consecutive life sentences plus 28 years without the possibility of parole. Although Odighizuwa was not forcibly medicated, there was an issue as to where medication would take place, in jail or in the hospital. Odighizuwa refused to be medicated while in jail and therefore the judge ordered inpatient hospital treatment.

2 539 U.S. 166 (2003).

3 *Id.* at 180-81.

4 494 U.S. 210 (1990).

5 504 U.S. 127 (1992).

6 494 U.S. at 213.

7 *Id.* at 214-15.

8 *Id.* at 229.

9 *Id.* at 227.

10 Scott Ditfurth, *When Can the Government Force Someone to be Competent:* Sell v. United States, 25 Whittier L. Rev. 667, 677 (2004).

11 504 U.S. 127.

12 *Id.* at 132-33.

13 *Id*. at 130.

14 *Sell*, 539 U.S. at 178-79 (quoting *Riggins*, 504 U.S. at 134-35.).

15 *Riggins*, 504 U.S. at 135.

16 *Id*.

17 *Sell*, 539 U.S. 166.

18 Ditfurth, *supra* n. 9, at 677.

19 *Sell*, 539 U.S. at 170.

20 *Id*. at 169-70.

21 *Id*. at 170.

22 *Id*. (The Judge reported that at his initial appearance Sell was "totally out of control, involving 'screaming and shouting,' the use of 'personal insults' and 'racial epithets,' and spitting 'in the judge's face.'").

23 *Id*.

24 *Id*.

25 *Id*. at 171 (Sell was hospitalized "for treatment for up to four months to determine whether there was substantial probability that Sell would attain the capacity to allow his trial to proceed.").

26 *Id*.

27 *Id*.

28 *Id*. at 173 (The magistrate judge found that the benefits to Sell far outweighed the possible side effects because of the substantial probability that the drugs would return him to competency.).

29 *Id*. at 174 (The district court's decision was limited to Sell's dangerousness to himself and those around him in his institutional context.).

30 *Id*.

31 *Id*.

32 *Id*. at 175.

33 *Id*. at 179.

34 *Id*.

35 *Id*. at 180-81 (The Court emphasized "that the court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant competent to stand trial." The Court noted that if forced medication is warranted for different purposes, such as those related to the individual's dangerousness or own medical interest, the standards in *Harper* would still apply.).

36 *Id*. at 180.

37 *Id*.

38 *Id*.

39 *Id*.

40 *Id*.

41 *Id*.

42 *Id*.

43 *Id*.

44 *Id*.

45 *Id*. at 181.

46 *Id*.

47 *Id*.

48 *Id*.

49 *Id*.

50 *Id*.

51 *Id*.

52 *Id*. at 179.

53 *U.S. v. Evans*, 293 F. Supp. 2d 668 (W.D. Va. 2003); *U.S. v. Barajas-Torres*, 2004 WL 1598914 (W.D. Tex. Jul. 1, 2004); and *U.S. v. Morris*, 2005 WL 348306 (D. Del. Feb. 8, 2005).

54 293 F. Supp. 2d 668.

55 *Id*. at 670.

56 *Id*.

57 *Id*.

58 *Id*.

59 *Id*.

60 *Id*. at 670, 674.

61 *Id*. at 672.

62 *Id*. at 673.

63 *Id*. (discussing *Duncan v. La.*, 391 U.S. 145, 159 (1968) (Holding that the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment.)). In determining what constitutes a serious crime, the *Evans* court also relied on *U.S. v. Kourey*, 276 F. Supp. 2d 580, 585 (S.D. W.Va. 2003) (Holding that a defendant facing misdemeanor charges does not rise to the level of a serious offense; and, therefore, the government did not have a significant interest.).

64 *Id*. (citing *Duncan*, 391 U.S. at 157-58).

65 *Duncan*, 391 U.S. at 159 (Historically the right to a jury trial had been extended to any person charged with a crime other than a petty offense.).

66 *Id*. at 160.

67 *Id*. at 161-62.

68 *Lewis v. U.S.*, 518 U.S. 322, 326 (1996); *Muniz v. Hoffman*, 422 U.S. 454, 476-77 (1975); *Baldwin v. N.Y.*, 399 U.S. 66, 69 (1970); *D.C. v. Clawans*, 300 U.S. 617, 626-27 (1937); *D.C. v. Colts*, 282 U.S. 63, 73 (1930).

69 293 F. Supp. 2d at 673.

70 *Id*. at 674.

71 *Id*.

72 *Id*.

73 *U.S. v. Evans*, 2004 WL 533473 at *1 (W.D. Va. Mar. 18, 2004).

74 *Id*. (Judge Sargent was the Magistrate Judge assigned to conduct Evans's pretrial hearings, who denied the original application by the government to involuntarily administer antipsychotic medication.).

75 *Id*.

76 *Id*. at *1-2.

77 *Id*. at *2.

78 *U.S. v. Evans*, ___ F.3d ___ (4th Cir. 2005) (decision pending).

79 Br. of Appellant at 23, *U.S. v. Evans*, ___ F.3d ___ (4th Cir. 2005) (decision pending).

80 *Id*.

81 *Id*.

82 *Id*. at 24. This argument, however, is now moot because of the Supreme Court's January 2005 decision in *U.S. v. Booker*, 125 S. Ct. 738 (U.S., 2005). The *Booker* Court held that under the Sixth Amendment, any fact, other than a prior conviction, necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by a defendant or proved to a jury beyond a reasonable doubt. *Id*. at 756. In addition, the sentencing guidelines are effectively advisory rather than mandatory; and the district courts are required to take the guidelines into account but are not bound to apply them. *Id*. at 757.

83 Br. of Appellant at 27, *U.S. v. Evans*, ___ F.3d ___.

84 *Id*. at 31.

85 2004 WL 1598914 at *1 (W.D. Tex. Jul. 1, 2004).

86 *Id*.

87 *Id*.

88 *Id*. at *2.

89 *Id*.

90 *Id*. at *3.

91 *Id*.

92 *Id*.

93 *Id*. The *Sell* court stated that the government's interest in bringing an individual accused of committing a serious crime to trial is an important interest, whether the offense is a serious crime against the person or a serious crime against property. 539 U.S. at 180.

94 *Barajas-Torres*, 2004 WL 1598914 at *3.

95 *Id*.

96 293 F. Supp. 2d 668.

97 539 U.S. at 180.

98 *Duncan*, 391 U.S. at 159.

99 *Evans*, 293 F. Supp. 2d at 673.

100 539 U.S. at 181.

101 *Id*.

102 *Id*.

103 *Id*.

104 305 F. Supp. 2d 158 (D. Conn. 2004) (on remand from the U.S. Supreme Court).

105 *Id*.

106 *Id*. at 160.

107 *Id*. at 161.

108 *Id*.

109 *Id*.

110 *Id*.

111 *Id*. at 169.

112 *Id*. at 163-64.

113 *Id*. at 165.

114 *Id*.

115 *Id*. at 163, 165 (Atypicals include, but are not limited to, Risperidone, Quetiapine, Ziprasidone, Aripiprazole, and Olanzapin. Typical antipsychotic medications include, but are not limited to, Halperidol, Fluphenazine, and Thiothizene.).

116 *Id*. at 166.

117 *Id*. (Neuroleptic malignant syndrome concerns temperature regulation and muscle break-down. Tardive dyskinesia, which can be permanent, is the abnormal involuntary movements of the face and tongue and can occur with the use of typical antipsychotics, but generally only those who receive higher dosages over a longer period.).

118 *Id*.

119 *Id*.

120 *Id*. at 166-67.

121 *Id*. at 167.

122 *Id*.

123 *Id*.

124 *Id*. at 168.

125 *Id*.

126 *Id*.

127 2004 WL 368477 at *1 (W.D. Va. Feb. 26, 2004).

128 *Id*.

129 *Id*.

130 Dr. Sarrazin, a staff psychiatrist at the Federal Bureau of Prisons, is the same medical expert who testified at Gomes's trial. 305 F. Supp. 2d at 163.

131 *Mackie*, 2004 WL 368477 at *1.

132 *Id*.

133 *Id*. (Injectable medications present a higher risk of side effects, but that risk is still rare and somewhat lessened because patients usually agree to take oral medication after only a few doses of the injectable medication.).

134 *Id*. at **2-3.

135 2004 WL 533473 at *1.

136 *Id*. at *2. On appeal, the Fourth Circuit requested the parties submit supplemental briefs addressing the Government's appropriate burden of proof, post *United States v. Sell*, 539 U.S. 166 (2003). The government argued, “The absence of a clear and convincing requirement in *Sell* may suggest that a preponderance of evidence standard is sufficient.” Supp. Br. of Appellee at 3, *U.S. v. Evans*, ___ F.3d ___ (4th Cir. 2005) (decision pending). Conversely, in an argument I find more compelling, Evans argued, “A clear and convincing standard should apply to the government's burden of proof for involuntary medication under the *Sell* factors.” Supp. Br. of Appellant at 10, *U.S. v. Evans*, ___ F.3d ___ (4th Cir. 2005) (decision pending). To support his argument, Evans noted that the language used by the Court in *Sell* seemed to indicate a heightened standard. The Court held that occasions where the Constitution permits forcible medication solely for trial competence purposes may be rare. *Id*. at 9. “Further, the incompetent defendant should not be placed in the position

where he or she is heavily burdened with disproving the alleged appropriateness of the unwanted forcible administration of drugs. Rather, the government's evidence should firmly convince the Court this intrusion is appropriate." *Id*.

137 Br. of Appellant at 27, *U.S. v. Evans*, ___ F.3d ___.

138 *Id*. at 28.

139 *Id*.

140 Brandy M. Rapp, Sell v. United States: *Involuntary Administration of Antipsychotic Medication to Criminal Defendants,* 38 U. Rich. L. Rev. 1047, 1066 (2004).

141 *Id*. at 1066-67.

142 *Evans*, 293 F. Supp. 2d at 673.

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