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Unforeseen Side Effects: The Impact of Forcibly Medicating Criminal Defendants on Sixth Amendment Rights

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UNFORESEEN SIDE EFFECTS: THE IMPACT OF FORCIBLY MEDICATING CRIMINAL DEFENDANTS ON SIXTH AMENDMENT RIGHTS

I. INTRODUCTION

You are the foreperson on a jury in a brutal murder trial where a man has been accused of killing his wife and children. The defendant is raising the defense of insanity. The trial starts with the prosecution laying out the background of the case. Your eyes wander to the defendant. He stares into space and his tongue darts from between his lips every few seconds. He does not seem to be concerned about the trial going on around him, though his very life depends on its outcome.¹

As the trial progresses, the evidence becomes increasingly gruesome. Pictures of the crime scene, enlarged to poster size, are displayed. Several of the jurors become very emotional and physically ill at the sight of the pictures. You observe the defendant, calmly sipping on a glass of water. You find his lack of reaction very disturbing.

The judge adjourns the trial for the day. In the elevator, you are with another juror. After a little small talk he suddenly says, "Did you notice how the defendant just sat there and didn't seem to bat an eye when those pictures were up there? I mean, he acted like he was in another world!" You nod and then the door opens. You go home and have a restless night.

The next day, the prosecution rests and the defense opens its case with a doctor, a psychiatrist. The doctor testifies to the mental state of the defendant at the time of the crime, indicating that the defendant has recently been diagnosed with paranoid schizophrenia. He describes the symptoms, which do not comport with the current behavior of the defendant. The defense then turns the questioning to the current condition of the defendant.

¹ All events described in this hypothetical are fictional. However, commonly used anti-psychotic medications such as Mellaril and Thorazine, the least potent of the antipsychotic medications, cause side effects such as agitation, disorientation, sedation, muscle spasms, drooling, and various other neurological and non-neurological side effects. William P. Ziegelmueller, Comment, *Sixth Amendment – Due Process on Drugs: The Implications of Forcibly Medicating Pre-Trial Detainees with Antipsychotic Drugs*: *Riggins v. Nevada*, 112 S. Ct. 1810 (1992), 83 J. CRIM. L. & CRIMINOLOGY 836, 838-39 (1993).

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The defendant's doctor reveals that the defendant is now heavily medicated with a powerful psychotropic drug. The doctor lists the very behavior you have been witnessing as side effects. After extensive testimony, you begin to see a picture of the defendant's mental state. You realize that he is perhaps not in full control of his faculties.

The time for deliberations arrives. Debate is heated from the beginning.

"I don't think I can convict him," begins one juror. "That doctor said he acts that way because he is medicated. I don't even know how they could put him on trial—he obviously isn't with it."

"You can't try someone unless they are competent. It's in the Constitution. If there was something wrong with him, he would be in a mental hospital!" exclaimed the juror you met in the elevator. "When this trial first started, I was disturbed by the defendant's lack of emotion. Those side effects are just an excuse. If someone shows you a picture of your dead wife and kids slashed to bits, you are going to react, no matter how medicated you are."

People start to nod in agreement. After more debate, you call for a vote. The vote is unanimous for conviction.

Approximately sixteen percent of inmates in state prisons are identified as mentally ill.² In fact, an estimated 280,000 people currently incarcerated in prison suffer from mental illness.³

In the past decade, many cases have presented the issue of whether the government can forcibly medicate a person with antipsychotic medications for the purpose of rendering him competent to stand a criminal trial.⁴ As a result, issues have arisen concerning the

² Bureau of Justice Statistics, *Mental Health and Treatment of Inmates and Probationers* (1999), available at <http://www.ojp.usdoj.gov/bjs/abstract/mhtip.htm>. Additionally, approximately 7% of federal prisoners, 16% of those in jail, and 16% of probationers are also identified as mentally ill. *Id.* Inmates identified as mentally ill in state prisons, are more likely to be incarcerated for violent offenses than those without a mental illness. *Id.* Nearly 30% of mentally ill persons incarcerated for violent crimes are recidivists. *Id.* at 5. Further, mentally ill inmates present much more of a disciplinary problem while incarcerated than those without mental illness. *Id.* at 9.

³ *Id.* at 3.

⁴ See *Sell v. United States*, 539 U.S. 166 (2003) (articulating the standard for determining when forcible medication of pre-trial detainees is permissible); *Riggins v. Nevada*, 504 U.S. 127 (1992) (reversing a conviction of a defendant who was forcibly medicated with

constitutional rights of these mentally ill detainees, and whether forcible medication is an acceptable constitutional remedy to the problem presented.⁵ The current standard articulated by the United States Supreme Court is not working and results in the violation of the detainee's Sixth Amendment right to a fair trial.

Part II of this Note provides the legal background to the issue of forcible medication.⁶ Part III analyzes the application of the standards set forth by the Supreme Court in regards to forcible medication.⁷ Finally, Part IV proposes two new means to lessen the negative impact on the Sixth Amendment rights of the criminal defendant.⁸

II. BACKGROUND

Forcible medication of pre-trial detainees, as well as incarcerated and mentally ill individuals, has been an issue in American jurisprudence for several decades.⁹ Part II.A discusses the medications often at issue in

antipsychotic medications throughout his trial); *United States v. Bradley*, 417 F.3d 1107 (10th Cir. 2005) (permitting forcible medication of a pre-trial detainee to render him competent to stand trial); *United States v. Evans*, 404 F.3d 227 (10th Cir. 2005) (denying the government's request to forcibly medicate a pre-trial detainee so that he was competent to stand trial); *United States v. Gomes*, 387 F.3d 157 (2d Cir. 2004) (affirming a trial court decision to forcibly medicate a pre-trial detainee so that he would be competent to stand trial); *United States v. Morgan*, 193 F.3d 252 (4th Cir. 1999) (reversing an order to forcibly medicate a pre-trial detainee). See generally Hollybeth G. Hakes, Annotation, *Forcible Administration of Antipsychotic Medication to Pre-trial Detainees – Federal Cases*, 188 A.L.R. FED. 285 (2003) (listing cases where forcible medication of pre-trial detainees was a significant factor).

⁵ See generally Debra A. Breneman, *Recent Development: Forcible Antipsychotic Medication and the Unfortunate Side Effects of Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174 (2003), 27 HARV. J.L. & PUB. POL'Y 965 (2004) (discussing the impact of *Sell* on Sixth Amendment rights); Aaron R. Dias, *Just Say Yes: Sell v. United States and Inadequate Limitations of the Forced Medication of Defendants in Order to Render Competence for Trial*, 55 S.C. L. REV. 517 (2004) (explaining the impact on First Amendment rights in light of forcible medication); Bruce J. Winick, *The Right To Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1 (1989) (providing a comprehensive discussion of forcible mental health treatment and the freedom of speech); Scott Ditfurth, Note, *When Can the Government Force Someone To Be Competent: Sell v. United States*, 25 WHITTIER L. REV. 667 (2004) (criticizing the forcible medication of pre-trial detainees for the purpose of establishing competence for trial).

⁶ See *infra* Part II.

⁷ See *infra* Part III.

⁸ See *infra* Part IV.

⁹ See Julie D. Cantor, M.D., *Of Pills and Needles: Involuntarily Medicating the Psychotic Inmate When Execution Looms*, 2 IND. HEALTH L. REV. 119 (2005). Cantor discusses the history of mental illness and the legal system. *Id.* at 125-26.

cases concerning forcible medication.¹⁰ Part II.B explains the rights of individuals regarding forcible medical treatment, including private citizens, convicted inmates, and pre-trial detainees.¹¹ Then, Part II.C discusses the rights implicated by forcibly medicating various persons with psychotropic medications.¹² Further, Part II.D discusses the evolving standards as declared by the Supreme Court regarding the issue of forcibly medicating pre-trial detainees with psychotropic medications.¹³ Part II.E presents the application of the standards to various cases.¹⁴

A. Antipsychotic or Psychotropic Medications

Many mental illnesses are treated with medications termed antipsychotic or psychotropic and the Supreme Court has distinguished the forcible use of these medications from other bodily intrusions to which pretrial defendants may be subjected.¹⁵ For example, while a blood test is considered a routine procedure with little to no lasting side effects, the side effects of antipsychotic medications are plentiful and much more severe.¹⁶ Some side effects that can result from “conventional” antipsychotic medications include nervous ticks, spasms, restlessness, and a condition called tardive dyskinesia.¹⁷ Studies show

¹⁰ See *infra* Part II.A.

¹¹ See *infra* Part II.B.

¹² See *infra* Part II.C.

¹³ See *infra* Part II.D.

¹⁴ See *infra* Part II.E.

¹⁵ *Schmerber v. California*, 384 U.S. 757, 772 (1966). The Court in *Schmerber* held that minor intrusions into a person’s body, such as a blood test, are not forbidden by the Constitution under extremely limited circumstances. *Id.* See also John R. Hayes, Sell v. United States: *Is Competency Enough to Forcibly Medicate a Criminal Defendant?*, 94 J. CRIM. L. & CRIMINOLOGY 657, 658 (2004).

¹⁶ See Elizabeth G. Schultz, *Sell-ing Your Soul to the Courts: Forced Medication To Achieve Trial Competency in the Wake of Sell v. United States*, 38 AKRON L. REV. 503, 540 (2005) (discussing the different side effects produced by typical anti-psychotic medications); see also Hayes, *supra* note 15, at 658-59 (explaining the different side effect possibilities and probabilities resulting from the administration of antipsychotic medication); Rebekah W. Page, Comment, *Forcible Medication and the Fourth Amendment: A New Framework for Protecting Nondangerous Mentally Ill Pretrial Detainees Against Unreasonable Governmental Intrusions into the Body*, 79 TUL. L. REV. 1065, 1069 (2005) (discussing “cognitive dampening,” a side effect that impairs memory, reasoning, and functioning in complex situations).

¹⁷ Hayes, *supra* note 15, at 658. The Supreme Court has even recognized that 10-25% of people taking anti-psychotic drugs exhibit symptoms of tardive dyskinesia. *Washington v. Harper*, 494 U.S. 210, 230 (1990). Involuntary movements of muscles, particularly in the facial region, characterize tardive dyskinesia. *Id.* at 230. Tardive dyskinesia can also result in involuntary sucking movements, grimacing, and involuntary jerking in the limbs. T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental*

that these side effects occur in up to seventy-five percent of people who take these medications and are potentially irreversible.¹⁸ In addition to these side effects, other possible reactions include sedation, decreased ability to concentrate, dry mouth, blurred vision, weakness, and dizziness.¹⁹ Further, there are some newer, "atypical" medications used to treat psychotic disorders that have reduced some of the traditional side effects of antipsychotic medications, though they present problems of their own.²⁰

Despite side effects that may manifest as a result of antipsychotic medications, these drugs can also produce beneficial effects.²¹ For

Disorders: Searching for Rational Health Policy, 24 AM. J. CRIM. L. 283, 305 (1997). About 10% of people who suffer from this side effect experience it in its "severe" form. *Harper*, 494 U.S. at 230.

¹⁸ Hayes, *supra* note 15, at 658. Additionally, the side effects may also be "subjectively quite stressful . . . incompatible with clinical improvement and with a useful life outside the hospital, and can be more unbearable than the symptoms for which the patient was originally treated." Brief for American Psychological Association as Amicus Curiae, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) [hereinafter APA Brief].

¹⁹ Hayes, *supra* note 15, at 658. Further, conventional psychotropic medications can cause Neuroleptic Malignant Syndrome, a disease that can lead to respiratory and kidney failure if left untreated. APA Brief, *supra* note 18, at 3. Further, another side effect is akathisia, an emotional condition that causes extreme irritability, a constant desire to be in motion, and an adverse effect on the thinking process. Dennis E. Cichon, *The Right to "Just Say No": A History and Analysis of the Right To Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 322 (1992). In addition, another possible side effect is akinesia, which can cause lethargy and cause the patient to feel like he is "dead inside." Page, *supra* note 16, at 1068. On the opposite end of the spectrum, another possible side effect is strong agitation where the patient feels "revved up" and unable to remain still. *Id.* at 1068-69.

²⁰ Hayes, *supra* note 15, at 658-59. Another serious side effect that can manifest due to medication with atypical psychotropics is diabetes that has developed in patients after one dosage of the medication. Page, *supra* note 16, at 1070. Additional side effects that manifest due to these "atypical" antipsychotic medications include cataracts, decrease in white blood cell counts, sedation, seizures, involuntary muscle spasms in the facial region, hypotension, and weight gain. Hayes, *supra* note 15, at 659. Additionally, since these "atypical" medications have been in use for a relatively short period of time, it is possible that long-term side effects may exist but have not yet been discovered. *Id.* Specifically, the medication Clozapine, used principally in the treatment of schizophrenia, can result in agranulocytosis, a serious condition that causes a dramatic reduction in the amount of white blood cells that can, if not treated quickly, result in death. Robert N. Swidler, *Medical Innovations and Ethics: A State Government Perspective*, 57 ALB. L. REV. 655, 657 n.44 (1994).

²¹ Ziegelmueeller, *supra* note 1, at 837. However, it is also suggested that the often cited benefits of antipsychotic medications are actually overstated. Laura Ryan, Comment: *Washington State Prison Procedure for the Forcible Administration of Antipsychotic Medication to Prison Inmates Does Not Violate Due Process*, *Washington v. Harper*, 110 S. Ct. 1028 (1990), 59 U. CIN. L. REV. 1373, 1405 (1991). However, some scholars believe that it is the side effects that are overstated as opposed to the benefits. John Baker, *Tardive Dyskinesia: Reducing*

example, antipsychotic drugs are very effective in treating symptoms of psychoses by clearing delusions that may cause irrational behavior and interfere with regular courses of treatment.²² Additionally, antipsychotic drugs allow for more humane treatment of those with delusional disorders.²³

Regardless of the benefits and detriments, it still remains that the very purpose of antipsychotic drugs is to alter the chemistry of the brain to produce beneficial changes in the cognitive process.²⁴ While there may be some benefit to the administration of these antipsychotic medicines, the medicines often produce serious, even fatal, side effects.²⁵ As a result, the use of these medications presents constitutional difficulties when considering the rights implicated by the practice of forcibly medicating individuals.²⁶

B. Forcible Medical Treatment in General

Generally, individuals possess certain rights regarding their medical care.²⁷ These rights are balanced against relevant government interests, depending on whether the person is a private citizen, a convicted prisoner, or pre-trial detainee.²⁸ However, pre-trial detainees are

Medical Malpractice Exposure Through a Risk-Benefit Analysis, 1 DEPAUL HEALTH CARE L. 799, 801 (1997).

²² Ziegelmueller, *supra* note 1, at 837. Specifically, administration of Clozapine, a drug used for treating schizophrenia, has resulted in substantial improvements in patients who have not reacted to other antipsychotic medications by reducing hallucinations, disjointed thinking, and bizarre behavior. Swidler, *supra* note 20, at 667. Some patients have made such remarkable recoveries while using Clozapine that they are now able to live independently. *Id.* at 667 n.41. Additionally, Clozapine has reduced symptoms of tardive dyskinesia in patients who were previously administered conventional antipsychotic medications. *Id.* at 667.

²³ Ziegelmueller, *supra* note 1, at 837. Antipsychotic medications, by relieving the symptoms of psychoses, allow a patient to be free of restraints and makes it possible for the patient to eventually function in society. *Id.* at 837-38. Ziegelmueller also notes that the benefits and side effects vary dramatically depending on the dosage of the medication. *Id.*

²⁴ *Washington v. Harper*, 494 U.S. 210, 229 (1990) (citing *Harper v. Washington*, 759 P.2d 358, 361 n.3 (Wash. 1988)).

²⁵ *Id.* at 230. The Court further discussed other side effects caused by antipsychotic drugs in general. *Id.* at 229. For example, these drugs can produce an effect called acute dystonia which causes severe involuntary spasms of the upper body, throat, tongue, or eyes, and causes the necessity to introduce another drug to combat these effects. *Id.* at 229-30.

²⁶ *See infra* Part II.C.

²⁷ *See infra* Part II.B.1.

²⁸ *See infra* Part II.B.2.

considered under different standards than convicted prisoners and private detainees when the issue of forcible medication arises.²⁹

1. Rights of Patients

The Supreme Court has held that people have the right to decide what types of medical treatment they wish to receive and the ability to refuse such recommended treatment.³⁰ In *Cruzan v. Missouri Department of Health*,³¹ the Court held that competent people generally have the right to exact control over their own bodies, and one who ignores those wishes can be held liable.³² While *Cruzan* stands for the proposition that a competent person generally has the right to refuse medical treatment, an incompetent person does not enjoy the same right.³³ Furthermore, the

²⁹ See *infra* Part II.B.3.

³⁰ *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). In *Cruzan*, Nancy Cruzan was in an automobile accident and sustained injuries leaving her incompetent. *Id.* at 265. Her parents, serving as her guardians, after learning that their daughter would likely never regain consciousness or cognitive functions, sought to have the feeding and hydration tubes removed from their daughter. *Id.* The Supreme Court of Missouri declined to allow the withdrawal, holding that because there was no clear and convincing evidence that Nancy Cruzan would have requested that the feeding and hydration tubes be withdrawn, her parents had no authority to carry out their request. *Id.*

³¹ 497 U.S. 261 (1990).

³² *Id.* at 269 (quoting *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)). Justice Cardozo stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Id.*

³³ *Id.* (citing *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). The Court stated that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* The focus of *Cruzan* was whether it was constitutionally permissible for the State of Missouri to require clear and convincing evidence that an incompetent person would have desired the cessation of life-sustaining treatment. *Id.* The Court held that while a competent person generally possesses the right to refuse life-sustaining medical treatment, it does not follow that an incompetent person should have the same right as one who is competent to make an informed and voluntary choice to exercise the right. *Id.* at 278-80. Courts have, however, found that involuntarily committed mental patients have the right to refuse anti-psychotic drugs. *Rennie v. Klein*, 653 F.2d 836, 840 (3d Cir. 1981). In *Rennie*, the petitioner was a frequent patient at a New Jersey state-run psychiatric hospital. *Id.* at 838. He was forcibly medicated with anti-psychotic drugs and filed suit alleging that several specific rights had been violated by the forced medication: the right to refuse treatment in non-emergency situations; the right to receive treatment; the right of access to counsel; and the right to be free from abuse while in state custody. *Id.* at 839. The lower court found that involuntarily as well as voluntarily committed individuals have a right to refuse anti-psychotic medications. *Id.* at 840. See also *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979). In *Okin*, the court prevented the forcible medication of antipsychotic

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Court in *Cruzan* acknowledged that the idea of bodily integrity is the reason that informed consent is generally necessary before medical treatment commences.³⁴ The Court then explained that a logical companion to the idea of informed consent is the right to refuse treatment.³⁵

Courts have also considered the rights of those in a mental institution to refuse treatment, initially granting institutional authorities the right to supervise and regulate the treatment regimen for those committed involuntarily.³⁶ However, a federal district court has held that patients who have been involuntarily committed to mental institutions also enjoy the right to refuse medication.³⁷ In cases considering forcible medication in mental facilities, antipsychotic or psychotropic drugs are most often at issue.³⁸ The nature of the antipsychotic drugs themselves is often cited as the objection to accepting the drugs voluntarily.³⁹ Nonetheless, courts have recognized

medications to involuntarily committed individuals holding that, "Whatever powers the Constitution has granted our government, involuntary mind control is not one of them, absent extraordinary circumstances." *Id.* at 1367.

³⁴ *Cruzan*, 497 U.S. at 269; see also G. Steven Neely, *The Constitutional Right to Suicide, the Quality of Life, and the "Slippery Slope": An Explicit Reply to Lingering Concerns*, 28 AKRON L. REV. 53, 54 (1994) (discussing the long-standing recognition by the common law of the right for a person to be free from non-consensual bodily intrusions and the extension of that recognition to the refusal of life-saving treatment).

³⁵ *Cruzan*, 497 U.S. at 270. Informed consent encompasses the right to choose, accept, or refuse medical treatment. Cantor, *supra* note 9, at 127. However, the rights of bodily integrity and personal autonomy that form the basis of the informed consent doctrine are not absolute. *Id.* at 127-28. A few limited situations have been identified where informed consent is not required, such as in emergency situations where a patient may be unconscious or delirious and a delay in treatment would jeopardize her health. *Id.* at 128. When a doctor decides that certain information may cause severe distress to a patient, she may also withhold decision-making information. *Id.*

³⁶ Schultz, *supra* note 16, at 511 n.48. However, the practice of allowing institutional authorities to have discretion over the treatment regimen began to erode in the mid-twentieth century when mental health issues became more prevalent in the United States. Jessica Litman, Note, *A Common Law Remedy for Forcible Medication of the Institutionalized Mentally Ill*, 82 COLUM. L. REV. 1720, 1725 (1982). Issues such as involuntary commitment, patient rights, and institutional conditions were litigated. Schultz, *supra* note 16, at 511 n.49.

³⁷ See *Okin*, 478 F. Supp. 1342.

³⁸ Cichon, *supra* note 19, at 286 n.14. The most common form of treatment in mental facilities is the administration of antipsychotic medications, both for patients diagnosed as schizophrenics and those who are not. Litman, *supra* note 36, at 1725.

³⁹ William M. Brooks, *Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients To Refuse Drugs*, 31 IND. L. REV. 937, 938 (1998). "[B]oth the legal and medical professions recognize that psychotropic medication in general, and antipsychotic

the rights of both those who are incompetent due to mental illness and those incapacitated by physical injuries to refuse treatment.⁴⁰

2. Rights of Patients in Light of Government Interests

While the *Cruzan* decision discussed the right to refuse medical treatment, the Court's primary focus was on the right to refuse life sustaining treatment.⁴¹ However, even in other contexts, courts have found that competent persons have the right to refuse medical treatment despite the government's interest in the treatment taking place.⁴²

In *Winston v. Lee*,⁴³ the Supreme Court held that despite the government's interest in prosecuting an alleged offender, the government could not compel the suspect to undergo a surgical procedure to remove a bullet from his chest that could provide exculpatory evidence.⁴⁴ The Court distinguished *Winston* from *Schmerber*

medication in particular, often produce side effects ranging in nature from short-term and merely discomforting to permanent and life-threatening." *Id.*

⁴⁰ See *supra* note 33 and accompanying text (noting that the Court has recognized the right to refuse treatment for those incapacitated by physical injury, such as in *Cruzan*, as well as those who are incapacitated by a mental impairment, as in both *Rennie* and *Okin*).

⁴¹ *Cruzan v. Mo. Dep't of Health*, 287 U.S. 261, 279 (1990). The Court found that Missouri has an important interest in preserving the life of its citizens. *Id.* at 280. The Court further held that since the choice between life and death is such a personal and final decision, Missouri has an interest in safeguarding the personal nature of this choice by requiring the heightened evidentiary standard of clear and convincing evidence when a personal representative or guardian seeks to render that decision over the incompetent person. *Id.* at 281.

⁴² See *Winston v. Lee*, 470 U.S. 753 (1985). The Court balanced the government's interest in obtaining evidence in a criminal investigation with the right of an individual to be free from bodily intrusions. *Id.* at 766. See *infra* notes 43-44, 47-48.

⁴³ 470 U.S. 753 (1985). In *Winston*, Lee was charged with attempted robbery and other related charges resulting from an alleged attempt to rob a store where the shopkeeper was wounded during the robbery. *Id.* at 755. During the altercation, the shopkeeper, Watkinson, fired a shot at one of the perpetrators who retreated from the scene with an apparent wound in his left side. *Id.* Police later responded to a call from Lee who was wounded by gunshot on the left side of his chest. *Id.* at 756. Lee claimed that persons attempting to rob him shot him; however, while in the emergency room, Watkinson identified Lee as the man who attempted to rob his store. *Id.* After an investigation, the police determined that Lee was the person who attempted to rob Watkinson and he was subsequently charged. *Id.*

⁴⁴ *Id.* at 755. The bullet that the government wanted removed from Lee's chest was approximately one inch beneath the surface of the skin and would require general anesthesia, despite earlier indications that the wound was more superficial. *Id.* at 757. An earlier motion to compel the surgery was granted by a lower court judge because the surgeon testified that only a local anesthetic would be necessary and the dangers would be minimal. *Id.* at 756.

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v. California,⁴⁵ in which the Court allowed an unwilling person under suspicion of drunk driving to undergo a blood test.⁴⁶ In contrast, the Court in *Winston* found that the surgical procedure that the defendant would have to undergo to extract the bullet would be a substantial intrusion into his person and would constitute an unreasonable search and seizure under the Fourth Amendment.⁴⁷ As a result, the Court concluded that surgical intrusions implicate privacy expectations that may be considered unreasonable, despite producing evidence of a crime.⁴⁸

Other important government interests are implicated regarding issues of forcible medication, such as maintaining a secure and orderly prison environment.⁴⁹ In *Washington v. Harper*,⁵⁰ the Supreme Court found that the proper standard for determining if a prison regulation infringes on the constitutional rights of an inmate is whether the regulation is “reasonably related to legitimate penological interests,” even if the alleged infringed-upon right is fundamental and would ordinarily require a higher standard of review.⁵¹ The Court reviewed the

⁴⁵ 384 U.S. 757 (1966) (holding that a State may, over the suspect’s protest, have a physician extract blood from a person suspected of drunken driving without violation of the suspect’s rights secured by the Fourth Amendment not to be subjected to unreasonable searches and seizures.).

⁴⁶ *Id.* at 772 (finding that minor intrusions into a person’s body under extremely limited conditions are not forbidden by the Constitution). In *Schmerber*, the petitioner and his companion, after leaving a bowling alley where they had been drinking, skidded across the road and hit a tree shortly after midnight. *Id.* at 759 n.2. The petitioner was then taken to the hospital for treatment when an officer directed the blood test so that the petitioner’s blood alcohol level could be tested. *Id.* at 759.

⁴⁷ *Winston*, 470 U.S. at 767. The Court considered the extent that the procedure could threaten Lee’s health and safety. *Id.* at 761. The Court contrasted the routine blood test that was in dispute in *Schmerber* to the procedure that Lee would need to undergo so that the State could retrieve the bullet. *Id.* at 761, 764. Lee’s procedure would entail general anesthesia, extensive probing of his muscle tissue that carried “the concomitant risks of injury to the muscle as well as injury to the nerves, blood vessels and other tissue in the chest and pleural cavity.” *Id.* at 764 (quoting *Lee v. Winston*, 717 F.2d 888, 900 (4th Cir. 1984)).

⁴⁸ *Id.* at 759. “A compelled surgical intrusion into an individual’s body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime.” *Id.*

⁴⁹ *Washington v. Harper*, 494 U.S. 210, 213 (1990); see also *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (finding that “prison regulations . . . are judged under a ‘reasonableness’ test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights”).

⁵⁰ 494 U.S. 210.

⁵¹ *Id.* at 223. In *Harper*, Walter Harper was incarcerated for robbery in 1976 and was housed for the greater part of 1976-1980 in the mental health ward at Washington State

policy of the state with regard to forcibly medicating prisoners with anti-psychotic medication and found that the safeguards in place and the important penological interests served allowed for the forcible medication of that prisoner.⁵²

3. Pre-trial Detainees

While courts have articulated certain standards for forcibly medicating convicted prisoners, courts have articulated different standards for those detained pending trial.⁵³ In *Riggins v. Nevada*,⁵⁴ the

Penitentiary. *Id.* at 213. During this time, he consented to the administration of anti-psychotic drugs. *Id.* He was paroled in 1980 and, after violating parole by assaulting two nurses at a hospital, he was returned to a Special Offender Center that was established to treat and diagnose felons with serious mental disorders. *Id.* After first consenting to being medicated, he later refused to take anti-psychotic medications. *Id.* His treating physician then sought to forcibly medicate Harper pursuant to the Special Offender Center Policy. *Id.*
⁵² *Id.* at 227. The Court qualified its ruling by determining that the forcible medication of the prisoner was constitutionally permissible only when the inmate was “dangerous to himself or others and the treatment is in the inmate’s medical interest.” *Id.* Furthermore, the Court noted that forcibly medicating this prisoner was consistent with the Due Process requirements of the Fourteenth Amendment, because it was reasonably related to ensuring that the personnel and staff of the prison facility remained safe and secure and that the regulations in place were a rational method by which to achieve the goal. *Id.* The Court further explored the procedural requirements that are necessary to compel medication and found that the procedures that the Special Offender Center had in place were sufficient. *Id.* at 228. The procedures in place included a hearing that allowed for the medication only if the prisoner was determined to suffer from a mental disorder and posed a danger to the safety of himself or others, administration only by a psychiatrist, notice requirements, and periodic review. *Id.* at 215-16.

⁵³ See *Riggins v. Nevada*, 504 U.S. 127 (1992) (holding that Nevada could have satisfied Due Process requirements had it made a finding that treatment with an anti-psychotic medication of the pre-trial detainee was medically appropriate and essential when other less intrusive alternatives were explored or by establishing that Nevada could not adjudicate the defendant by using any other less intrusive means); see also *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (“[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.”).

⁵⁴ 504 U.S. 127 (1992). In *Riggins*, David Riggins challenged his conviction for murder and robbery because he was forcibly medicated with the anti-psychotic drug Mellaril during his trial. *Id.* at 129. Riggins was convicted of stabbing Paul Wade to death in his Las Vegas apartment. *Id.* A few days after his arrest, he conveyed to the county’s psychiatrist that he heard voices in his head and had some difficulty sleeping. *Id.* His psychiatrist prescribed Mellaril to Riggins in increasing doses as he continued to complain of his symptoms. *Id.* A court found Riggins competent to stand trial while under the effects of the medication. *Id.* at 130. Riggins then moved for the suspension of the medication while he was on trial arguing that the effects of the drugs compromised his right to a fair trial. *Id.* With no rationale provided, the district court denied Riggins’s

Supreme Court held that the Fourteenth Amendment provides at least as much protection to a pre-trial detainee as to one already convicted of a crime.⁵⁵ The Court alluded to methods by which a state could justify the forcible medication of a pre-trial detainee, such as the state proffering the justification that adjudication could not occur without the medication.⁵⁶ Additionally, the Court asserted that any trial prejudice that may occur because of the medication may be outweighed by the need to accomplish an essential state policy.⁵⁷

Further, the government may propose other justifications, such as dangerousness to oneself or others, for forcibly medicating a pre-trial detainee with antipsychotic medications.⁵⁸ In *Sell v. United States*,⁵⁹ the

motion, thereby compelling him to continue taking the medication. *Id.* at 131. Riggins was convicted of murder and sentenced to death. *Id.*

⁵⁵ *Id.* at 135. The Court cited to its holding in *Harper* that it is impermissible to forcibly medicate a prisoner with an antipsychotic medication unless there is an important justification and a finding that the forced medication is medically appropriate. *Id.* Additionally, because a pre-trial detainee awaits trial and has not yet been convicted of any crime, the pre-trial detainee has a greater interest at stake than a person who has already been convicted because the detainee will be adversely affected by any act that could influence the fairness of a trial. Ziegelmueller, *supra* note 1, at 844.

⁵⁶ *Riggins*, 504 U.S. at 135. The Court then cited to Justice Brennan's concurring opinion in *Illinois v. Allen*, stating that "Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." *Id.* at 136 (citing *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring)).

⁵⁷ *Id.* at 135 ("Nevada certainly would have satisfied due process if the prosecution had demonstrated, and 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."). However, Justice Kennedy pointed out in his concurrence that "absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial." *Id.* at 139 (Kennedy, J., concurring). Justice Kennedy further explained that he doubted that in most cases a proper showing could be made to justify forcibly medicating a pre-trial detainee with antipsychotic medication under the present understanding of the drugs themselves. *Id.*

⁵⁸ See *Sell v. United States*, 539 U.S. 166, 182 (2003). For example, the Court indicated that dangerousness is an appropriate factor to consider in determining if forcible medication is appropriate. *Id.* The Court also suggested that civil commitment may provide another alternative. *Id.*

⁵⁹ *Id.* In *Sell*, Dr. Charles Sell, a dentist with a long history of mental illness, was charged in 1997 with mail fraud, Medicaid fraud, and money laundering. *Id.* at 169-70. After a psychiatric evaluation, Sell was found competent at the time with the Federal Magistrate, but the evaluation noted that Sell might suffer a psychotic break in the future. *Id.* at 170. While Sell was free on bail, the Government alleged that he attempted to intimidate a witness. *Id.* At the bail revocation hearing, Sell's mental condition had indeed worsened and was manifested by such behavior as spitting in the judge's face, using racial epithets, and personal insults. *Id.* Sell's bail was revoked and he was subsequently found

Supreme Court explained that if forced medication is necessary for purposes related to the individual's dangerousness or a possible risk to her own health, then the forcible medication can be justified without relying on the trial competence justification.⁶⁰ The Court explained that the facts of each individual case must be examined in evaluating the government's interest in forcibly medicating a pre-trial detainee as special circumstances may lessen the importance of the government's interest.⁶¹

C. *Rights Implicated by Forcibly Medicating a Pre-Trial Detainee*

Because courts have distinguished the *standards* for forcible medication of pretrial detainees from convicted prisoners, it follows that different *rights* are implicated as well.⁶² Though the Sixth Amendment is the focus of this Note, many other rights are implicated as well.⁶³

incompetent to stand trial. *Id.* at 171. He was hospitalized for evaluation, where it was recommended that Sell take antipsychotic medications, which he refused. *Id.*

⁶⁰ *Id.* at 182. "If a court authorizes medication on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear." *Id.* at 183.

⁶¹ *Id.* at 180. For example, the Court cited to how a defendant's refusal to voluntarily take antipsychotic medications may result in lengthy commitment to a mental health facility, thereby diminishing the risk that an alleged criminal will go free without punishment. *Id.* The Court also pointed out that while the government has an interest in prosecuting defendants, it also has an interest in assuring that the defendant receives a fair trial. *Id.*

⁶² See *supra* Part II.B.

⁶³ The scope of rights that are affected by forcible medication is broad. See generally Aaron M. Nance, Comment, *Balking at Buying What the Eighth Circuit Is Sell-Ing: United States v. Sell and the Involuntary Medication of Incompetent, Non-Dangerous, Pretrial Detainees Cloaked with the Presumption of Innocence*, 71 UMKC L. REV. 685, 687 (2003). The First Amendment is implicated as the side effects of the medication can hamper the communicative abilities of the medicated individual. See *Washington v. Harper*, 494 U.S. 210, 229 (1990) (antipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate). For an in-depth discussion of forcible medication and the First Amendment, see Winick, *supra* note 5. Constitutional scholars believe that by seeking to alter the way a person thinks, the government is seeking to control the person's thought process and therefore communicative abilities when the government forces doses of antipsychotic medications on a person. Schultz, *supra* note 16, at 533; see also *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984) (holding that forcibly medicating a pre-trial detainee would affect the detainee's ability to produce ideas and, therefore, affect the detainee's freedom of speech). Additionally, the Fourth Amendment's prohibition against unreasonable searches and seizures is implicated by forcible medication because it is more than a minor intrusion into the body. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (stating that the Fourth Amendment "guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority"); *Schmerber v. California*, 384 U.S. 757, 772 (1966) (holding that "the Constitution does not forbid the

States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions"). In addition to the First and Fourth Amendment implications, the Court has explicitly held that the substantive due process rights under the Fifth Amendment are also implicated by forcible medication. *Riggins v. Nevada*, 504 U.S. 127, 137 (1992). The Court has found a liberty interest in declining antipsychotic medication due to the side effects and function. *Benson v. Terhune*, 304 F.3d 874 (9th Cir. 2002) (stating that the Due Process Clause of the Fifth Amendment substantively protects a person's right to be free from unjustified intrusions into the body, to refuse medical treatment, and to be informed so as to be able to sufficiently make a decision regarding any bodily intrusion). Additionally, procedural due process under the Fifth Amendment is also implicated by forcible medication. *Hakes*, *supra* note 4, at 290. Concerns important as to whether procedural due process has been fulfilled include administrative hearings, notice, and an articulation of specific reasons for medicating a detainee. *United States v. Charters*, 863 F.2d 302, 305 (4th Cir. 1988). Four specific factors crucial in determining whether due process has been satisfied are: (1) the private individual's interests; (2) the government's interests; (3) the value of the suggested procedural requirements; and (4) the risk of erroneous deprivation of rights to the individual present in the current procedures. *United States v. Brandon*, 158 F.3d 947, 953 (6th Cir. 1998). In *Brandon*, the Sixth Circuit relied on adherence to the extensive safeguards provided under 28 C.F.R. § 549.43. *Id.* at 953. The code requires:

- (1) 24 hour advanced written notice of the time, date, place and purpose of the hearing, with the reasons for the proposed medication;
- (2) Notice of the right to appear at the hearing, present evidence, and be represented by a staff member;
- (3) The hearing is to be conducted by a psychiatrist not currently involved in the diagnosis or treatment of the individual;
- (4) The medical professional treating or evaluating the individual must attend the hearing and present clinical data and background information in support of the need for medication;
- (5) The psychiatrist conducting the hearing will determine and prepare a written report regarding whether such medication is necessary in the effort of restoring the individual's competence, or because the individual is dangerous, gravely disabled, or unable to function in his housing facility;
- (6) Inmates are given a copy of the report and notified of their right to appeal the determination to the administrator of the mental health division in the institution within 24 hours of the decision;
- (7) No medication will be administered until resolution of the appeal;
- (8) A non-attending psychiatrist must monitor the individual's treatment at least once every 30 days and document the same; and
- (9) Only in emergency situations may an individual be medicated prior to a hearing; or while an appeal is pending. During an emergency, an individual may be forcibly medicated only when doing so is an 'appropriate treatment' and no less restrictive means are available.

28 C.F.R. § 549.43 (1998); *see also* *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (articulating the procedural safeguards and interests that must be considered). Finally, another right, considered fundamental though not expressly articulated in the Constitution, implicated by forcible medication is the right to privacy. *Schultz*, *supra* note 16, at 534 n.170. The

Accordingly, this section discusses the impact of forcible medication on Sixth Amendment rights.⁶⁴

The Sixth Amendment, which guarantees the right to a fair trial, is implicated when defendants are forcibly medicated.⁶⁵ In fact, the Supreme Court has discussed how the forcible medication of a pre-trial detainee can violate a detainee's right to a fair trial under the Sixth Amendment.⁶⁶ In his concurrence in *Riggins v. United States*, Justice Kennedy compared the administration of these drugs to concerns of the prosecution manipulating evidence.⁶⁷ The possibility that the side effects of the medication may alter the demeanor of the defendant was troublesome to the Court.⁶⁸ The drugs are thought to prejudice the defendant in two main ways: (1) by altering his or her demeanor so that

Supreme Court has held that a person, under the right to privacy, has a protected liberty interest in refusing antipsychotic medication. *Washington v. Harper*, 594 U.S. 210, 229 (1990).

⁶⁴ See *infra* Part II.C.

⁶⁵ U.S. CONST. amend. VI. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

⁶⁶ See *Riggins v. Nevada*, 504 U.S. 127 (1992) (ruling that it was error to order the detainee to be administered antipsychotic drugs during the course of the trial). "[T]he concerns are much the same as if it were alleged that the prosecution had manipulated material evidence." *Id.* at 139 (Kennedy, J., concurring).

⁶⁷ *Id.* at 139. Justice Kennedy further explained that in order for these sorts of forcible medications to meet the requirements of the Sixth Amendment, the government must show that "there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel." *Id.* at 141.

⁶⁸ *Id.* at 142. Justice Kennedy discussed extensively how the antipsychotic drugs can prejudice the defendant by altering his demeanor. *Id.* at 142-43. A brief from the American Psychiatric Association alleged that the amount of medication that Riggins was dosed with could have affected Riggins's thought process. Vickie L. Feeman, Note, *Reassessing Forced Medication of Criminal Defendants in Light of Riggins v. Nevada*, 35 B.C. L. REV. 681, 688 (1994). The Court also heard psychiatric testimony that indicated that under this medication, Riggins was also likely to suffer from confusion. *Id.* Because of these reasons, the Court concluded that it was possible that not only was Riggins's testimony impacted, but also that he was unable to effectively communicate with his attorney. *Id.*

his or her appearance and reactions in the courtroom are affected; and (2) by affecting his or her ability to provide assistance to counsel.⁶⁹

First, the Court recognized that the side effects of antipsychotic drugs could alter the outward appearance and the reactions of the defendant.⁷⁰ Justice Kennedy noted in his concurrence that while the jury could interpret the manifestation of these side effects in many ways, the side effects have the propensity to create a negative impression.⁷¹ Additionally, Justice Kennedy remarked that the physical effects of medication may prejudice the jury against the defendant.⁷² This notion was supported in *Willis v. Cockrell*,⁷³ in which a Texas court reversed the

⁶⁹ *Riggins*, 504 U.S. at 142. “[S]ide effects [of drugs], it appears, can compromise the right of a medicated criminal defendant to receive a fair trial. The drugs can prejudice the accused in two principal ways: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and (2) by rendering him unable or unwilling to assist counsel.” *Id.*

⁷⁰ *Id.* Justice Kennedy explained the side effects of the drug Mellaril, the drug that this particular defendant was administered. *Id.* “The drugs can induce a condition called parkinsonism, which . . . is characterized by tremor of the limbs, diminished range of facial expression, or slowed functions, such as speech.” *Id.* Justice Kennedy cited to testimony of a doctor at the trial who listed the possible side effects as “[d]rowsiness, constipation, perhaps lack of alertness, changes in blood pressure. . . . Depression of the psychomotor functions.” *Id.* at 143. The doctor also stated “[i]f you take a lot of it you become stoned for all practical purposes and can barely function.” *Id.* (internal citations omitted). Further, studies indicate that the appearance of a medicated defendant does influence the jury. Daniel Abraham, *Riggins Protects the Insanity Defendant*, 44 N.Y.L. SCH. L. REV. 131, 132 (2000).

⁷¹ *Riggins*, 504 U.S. at 142. “As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant’s capacity to react and respond to the proceedings and to demonstrate remorse or compassion.” *Id.* at 143-44. Justice Kennedy further explained how this altered demeanor could be most influential during the sentencing phase where the trier of fact is attempting to know what was in the mind of the defendant and make a judgment about his character, if he has remorse, or if he may be dangerous in the future. *Id.* at 144. In addition, studies also indicate that behavior such as passivity, agitation, restlessness, or emotionlessness can impact the severity of the sentence imposed by the jury during the penalty phase of the trial. Abraham, *supra* note 70, at 132-33. A notable example of a defendant’s outward appearance affecting the jury’s deliberations and verdict was the case of Scott Peterson, who was not medicated, but whose lack of emotion influenced the jury and ultimately led to a death sentence. MSNBC, *Jurors: Peterson’s Stoicism was the Final Straw* (Dec. 14, 2004), <http://msnbc.msn.com/id/6711259> (last visited Sept. 21, 2006) [hereinafter *Peterson’s Stoicism*].

⁷² Schultz, *supra* note 16, at 539; see also APA Brief, *supra* note 18, at 3. “[B]ecause antipsychotic drugs may affect a defendant’s courtroom demeanor and ability to communicate with his attorney, forcible medication may implicate his . . . Sixth Amendment trial rights.” *Id.*

⁷³ *Willis v. Cockrell*, No. P-01-CA-20, 2004 U.S. Dist. LEXIS 15950 (W.D. Tex. Aug. 9, 2004). In *Willis*, the defendant was charged with murder in the course of committing arson. *Id.* at *3. The defendant maintained that he was asleep on the couch and was awakened by

conviction of a defendant partially due to his demeanor while forcibly medicated.⁷⁴ The *Willis* Court noted the importance of the demeanor of the defendant during the trial and how these drugs affected his courtroom presence;⁷⁵ in fact, the prosecution had used the defendant's emotionless demeanor in its summation to influence the jury's determination of guilt.⁷⁶ Similarly, the Court in *Sell* also found that the consideration of whether to medicate a pre-trial detainee requires a balance of the possible prejudice against the defendant with the interest that the government has in adjudicating an alleged offender.⁷⁷

Another danger posed by these side effects, also recognized in *Riggins*, is that the defendant will be unable to assist his counsel in preparing the defense.⁷⁸ Specifically, the Supreme Court has stated that a defendant must be able to communicate with his lawyer to provide the attorney with needed information and must be able to make decisions on his own behalf.⁷⁹ However, the known side effects of these anti-

the smell of smoke in the house; two of the four persons in the house escaped the fire, but Willis was eventually charged with the murder of one of the occupants who succumbed to smoke inhalation as the result of the blaze. *Id.*

⁷⁴ *Id.* at *148. The court granted the defendant's habeas corpus petition on several grounds, including that he was forcibly medicated without the *Sell* standard being met, the prosecution's suppression of key evidence, and ineffective assistance of counsel at both the guilt-innocence phase as well as the sentencing phase. *Id.*

⁷⁵ *Id.* The court noted that the medication affected his demeanor in making him appear "flat" or unemotional at the proceedings. *Id.* The court found that the side effects actually prejudiced the defendant because of their alteration of his demeanor. *Id.*

⁷⁶ *Id.* In this case, the prosecution pointed out how unemotional the defendant acted during the trial in order to bolster its case against the defendant. *Id.*

⁷⁷ *Sell v. United States*, 539 U.S. 166, 180 (2003). The Court in *Sell* pointed out that the government interests in these cases are two-fold. *Id.* The government has a substantial interest in prosecuting alleged offenders in a timely fashion as it may be problematic to attempt to prosecute an offender years after the alleged offense occurs if he gains competence again because evidence may be lost or memories of witnesses may fade. *Id.* at 180. The government also, however, has an interest in assuring that a defendant receives a fair trial. *Id.* at 180. *See also* *United States v. Brandon*, 158 F.3d 947, 960 (6th Cir. 1998). "[T]he district court needs to consider the risks that forced medication poses to a pretrial detainee . . . because a drug that negatively affects his demeanor in court . . . will not satisfy the government's goal of a fair trial." *Id.*

⁷⁸ *Brandon*, 158 F.3d at 960 (stating that a drug that negatively affects the defendant's capacity to assist in his own trial does not satisfy the government's goal of a fair trial); *see also* *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) ("We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer.").

⁷⁹ *Riggins*, 504 U.S. at 144 (Kennedy, J., concurring). "The side effects of antipsychotic drugs can hamper the attorney-client relation, preventing effective communication and rendering the defendant less able or willing to take part in his defense. The State interferes with this relation when it administers a drug to dull cognition." *Id.*

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psychotic medications have the potential to affect the way in which the defendant communicates with his attorney.⁸⁰ Justice Kennedy articulated that when the government forcibly medicates a pre-trial detainee with antipsychotic medications, there is the risk that this administration will interfere with the defendant's ability to interact with his counsel, and therefore will violate the defendant's Sixth Amendment rights.⁸¹ According to Justice Kennedy, though the Government has an interest in trying defendants, it also must consider its interest in assuring that a defendant receives a fair trial.⁸²

Currently, there are two main approaches utilized to attempt to cure the Sixth Amendment problems created by the forcible medication of pre-trial detainees. First, the testimonies of experts and the defendant's treating psychiatrists are utilized to attempt to convey to the jury the demeanor of the defendant before she was medicated.⁸³ This method provides an aural representation to the jury of a condition that is clearly visual.⁸⁴

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 145. Justice Kennedy asserted that in order to maintain the integrity of the trial process, if a defendant cannot be tried without involuntarily medicating him so that his demeanor and behavior is affected, then the defendant should be civilly committed unless the defendant becomes competent through other means. *Id.*

⁸³ *Id.* at 148 (Thomas, J., dissenting). Justice Thomas explained how the lower court offered Riggins the opportunity to prove his psychiatric condition through testimony rather than by allowing the jury to see Riggins in an unmedicated state. *Id.* Riggins did so by presenting evidence as to his medication, the possible side effects and how they would have affected his demeanor, and what his mental state likely was at the time of the crime when he was unmedicated. *Id.* However, he was subsequently convicted. *Id.* Other jurisdictions have also provided that the testimony of an expert may suffice to clarify any side effects that an anti-psychotic drug may have on the demeanor of a defendant. See *New Mexico v. Jojola*, 553 P.2d 1296, 1300 (N.M. 1976); *South Carolina v. Law*, 244 S.E.2d 302, 306 (S.C. 1978). Cf. *In re Pray*, 336 A.2d 174, 177 (Vt. 1975) (reversing a conviction because the defendant was not afforded the opportunity to present evidence regarding the effects of an antipsychotic drug on his demeanor).

⁸⁴ Linda C. Fentiman, *Whose Right Is It Anyway?: Rethinking Competency To Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. MIAMI L. REV. 1109, 1135 (1986). Expert testimony is an inadequate way to allow for the jury to comprehend the effects of medication on the defendant. *Id.* This sort of testimony results in a "battle of the experts" with the prosecution arguing that the defendant is only minimally dosed, and the defense arguing that the defendant is dosed so much that his cognitive abilities have been distorted. *Id.* "[T]he only way for the jury to accurately assess the defendant's mental state when unmedicated is to permit him to stand trial in that condition." *Id.*

The second curative attempt is the utilization of jury instructions.⁸⁵ In *United States v. Charters*,⁸⁶ the Fourth Circuit noted that some courts believe that jury instructions are able to cure any effects on the jury that the defendant's demeanor might cause when he is forcibly medicated.⁸⁷ Yet the court also noted that the demeanor of the defendant can be very influential and may not be able to be effectively cured by a jury instruction.⁸⁸

D. *Evolving Standards*

To protect fundamental rights, the Supreme Court has developed standards for determining when forcible medication with antipsychotic drugs is permissible.⁸⁹ The Court first considered the forcible medication

⁸⁵ Abraham, *supra* note 70, at 138. See *Michigan v. Hardesty*, 362 N.W.2d 787, 797 (Mich. Ct. App. 1984) (implying that jury instructions should be implemented to cure the prejudice the jury may develop as the result of the altered demeanor of a defendant subjected to antipsychotic medication).

⁸⁶ 829 F.2d 479 (4th Cir. 1987), *reh'g en banc*, 863 F.2d 302 (4th Cir. 1988). In *Charters*, the Appellant Charters was indicted for threatening the President of the United States. *United States v. Charters*, 863 F.2d 302, 304 (4th Cir. 1988). Charters was subsequently ordered to undergo a psychiatric evaluation and was adjudged incompetent to stand trial. *Id.* Per the court's order, he was detained at a psychiatric facility and regular reports regarding his status were made to ascertain if he had regained competency. *Id.* After first refusing the government's request to forcibly medicate Charters with antipsychotic medications, the district court held a hearing where testimony revealed that Charters was suffering from degenerative schizophrenia, an incurable ailment with symptoms that could be controlled via medication. *Id.* His treating psychiatrist testified that he would require indefinite confinement if not treated with the proposed medications and that his condition could improve, even to the point where he could return to society, if he was subjected to this medicinal regimen. *Id.* at 304-05. The district court ordered the medication but, on appeal, the decision was reversed stating, "Charters could not be subjected forcibly to the prescribed medication without a more elaborate procedural protection." *Id.* at 305.

⁸⁷ *Charters*, 829 F.2d at 494 n.20. "It has been argued that the problem of a medicated defendant can be cured by an instruction to the jury." *Id.* See *Hardesty*, 362 N.W.2d at 797 (stating that informing the jury of the medicated state of the defendant is an adequate safeguard for protecting the defendant's Sixth Amendment Rights).

⁸⁸ *Id.* "[T]he crucial and powerful evidence of the defendant's demeanor may not be sufficiently erased by a curative instruction." *Id.* "Cautionary instructions are notoriously insufficient to protect a defendant against the damaging impact of inadmissible evidence." Fentiman, *supra* note 84, at 1134. "The naïve assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigating fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949).

⁸⁹ See generally *Sell v. United States*, 539 U.S. 166 (2003) (presenting standards for forcibly medicating pre-trial detainees for the purpose of rendering them competent for trial); *Riggins v. Nevada*, 504 U.S. 127 (1992) (announcing standards for forcibly medicating pre-trial detainees); *Washington v. Harper*, 494 U.S. 210 (1990) (articulating standards for when it is appropriate to forcibly medicate convicted prisoners).

of antipsychotic drugs in the context of prisoners in *Washington v. Harper*,⁹⁰ which laid the groundwork for cases involving pre-trial detainees.⁹¹ In *Harper*, the Court decided that the Due Process Clause allows the government to forcibly medicate an inmate who has a serious mental illness if the inmate is found to be dangerous to himself or others and the treatment is in the best medical interest of the inmate.⁹² Notable in *Harper* is the Court's holding that an individual has a "significant constitutionally protected liberty interest in avoiding unwanted administration of antipsychotic drugs."⁹³ Nonetheless, the Court ultimately decided that the interest of the government was also legitimate and important, and that the regulation that allowed forcibly medicating the prisoner was a permissible compromise to reduce the dangerousness that the inmate may pose to himself and others.⁹⁴

Relying on *Harper* in many respects, the Court next considered the permissibility of forcibly medicating a pre-trial detainee in *Riggins v. Nevada*.⁹⁵ The Court relied on *Harper*, reiterating that a person has a liberty interest in desiring to avoid the forcible medication of antipsychotic medications.⁹⁶ Specifically, the Court reasoned that under *Harper*, inmates can be subjected to forcible medication of antipsychotic

⁹⁰ 494 U.S. 210 (1990); see *supra* note 51 for a discussion of the facts of *Harper*.

⁹¹ Hayes, *supra* note 15, at 660. Previous cases involving forcible medication primarily focused on individuals forcibly committed to psychiatric facilities. See *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979) (disallowing the forcible medication of patients involuntarily committed to a mental facility).

⁹² Hayes, *supra* note 15, at 660. The government has a legitimate and important interest in maintaining the security of a prison facility. *Id.* The Court considered a Washington state policy that authorized forced administration of antipsychotic drugs to mentally ill inmates who are gravely disabled or who represent a significant danger to themselves or others. *Harper*, 494 U.S. at 237.

⁹³ Hayes, *supra* note 15, at 660. However, the Court also pointed out that this interest is not absolute but is instead subject to the concerns of the state itself. *Id.* The forcible medication of the prisoner was seen as a compromise between the liberty interest of the prisoner and the governmental interest in reducing potential danger in its facility. *Id.* The Court found that Due Process was satisfied by the regulations as well. *Harper*, 494 U.S. at 236.

⁹⁴ Hayes, *supra* note 15, at 660-61. The Court analyzed the specific procedures that were in place at the facility and when balancing those procedures with the substantial privacy right of the inmate to be free from forcible medication, found that the procedures in place comported with the requirements of due process, despite the adverse side effect risks presented by the medication. *Harper*, 494 U.S. at 234.

⁹⁵ 504 U.S. 127 (1992).

⁹⁶ *Riggins*, 504 U.S. at 134 (quoting *Harper*, 494 U.S. at 229) ("The forcible injection of medication into a nonconsenting person's body . . . represents a substantial interference with that person's liberty."). The Court further explained how severe the interference can be with drugs such as Mellaril, the drug with which *Riggins* was injected. *Id.* at 134.

medicines only after there is a determination that it is both medically appropriate and there is an overriding government justification, and that pre-trial detainees are afforded at least as much protection under the Fourteenth Amendment.⁹⁷ The *Riggins* Court found that the forced medication of a criminal defendant in order to enable him to be competent to stand trial may be permissible if the state can establish that the treatment was medically appropriate and necessary for safety concerns.⁹⁸

Justice Kennedy's concurrence in *Riggins* further addresses government interests with respect to forcibly medicating a criminal defendant.⁹⁹ Furthermore, Justice Kennedy weighed the concomitant interests of the government in forcibly medicating a pre-trial detainee.¹⁰⁰ He determined that absent a showing that the forcible medication would not hamper the rights of the individual to secure a fair trial, the state must instead resort to other means, such as civil commitment, in order to preserve some integrity in the trial system.¹⁰¹ Additionally, he expressed doubt that the government could ever make a showing that would allow for forcible medication of a pre-trial detainee for the purposes of competency.¹⁰²

⁹⁷ *Id.* at 135.

⁹⁸ *Harper*, 494 U.S. at 227. The Court 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." *Id.*; see also *Hayes*, *supra* note 15, at 661.

⁹⁹ *Hayes*, *supra* note 15, at 662. Justice Kennedy acknowledged that the government has a legitimate interest in restoring competence of those defendants who are not competent to stand trial, deriving from the right of the state to bring an accused to trial. *Riggins*, 504 U.S. at 139. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Id.* at 139-40.

¹⁰⁰ *Riggins*, 504 U.S. at 140 (Kennedy, J., concurring). The state has an interest in not only bringing a criminal defendant to trial, but also to protect the rights of individuals. *Id.*

¹⁰¹ *Id.* at 145. "If the State cannot render the defendant competent without involuntary medication, then it must resort to civil commitment . . . unless the defendant becomes competent through other means." *Id.* Justice Kennedy understood that the Constitution necessitated that the cost of civil commitment be borne by society so that trial integrity remains intact. *Hayes*, *supra* note 15, at 662.

¹⁰² *Riggins*, 504 U.S. at 139 (Kennedy, J., concurring). Justice Kennedy stated:

I file this separate opinion . . . to express my view that absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of

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In 2003, the Supreme Court announced the current standard regarding forcibly medicating criminal defendants in *Sell v. United States*.¹⁰³ In particular, the Court articulated a four-part test for allowing forcible administration of antipsychotic drugs to pre-trial detainees for the purpose of competency and stated that it would only be met in rare instances.¹⁰⁴ The first *Sell* factor is that a court must determine that there are important governmental interests at stake in prosecuting the alleged offender.¹⁰⁵ Second, the court must determine that the forcible medication will further the important government interests of timely prosecution and the interest of ensuring that the defendant receives a fair trial.¹⁰⁶

Third, the court must find that medicating the defendant is necessary to achieve the government interests.¹⁰⁷ The Court determined that in making its decision whether it is permissible to forcibly medicate a pre-trial detainee, a court must consider whether there are any less intrusive treatments that may achieve the same result.¹⁰⁸ Additionally, before the

antipsychotic medicines for purposes of rendering the accused competent for trial, and to express doubt that the showing can be made in most cases, given our present understanding of the properties of these drugs.

Id. at 138-39.

¹⁰³ 539 U.S. 166 (2003).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* The Court explained that the seriousness of the crime is a factor in determining the importance of the government interest. *Id.* Further, the Court articulated that each situation must be determined on the facts of the individual case. *Id.* "Special circumstances may lessen the importance of that interest." *Id.* The Court gave as examples that the detainee's refusal to take the antipsychotic medication may lead to a lengthy stay in a mental facility and that detention would lessen the government's interest in prosecution because the alleged offender would not be free to commit more crimes. *Id.*

¹⁰⁶ *Id.* at 181. "It (the court) must find that administration of the drugs is substantially likely to render the defendant competent to stand trial. At the same time, it must find that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." *Id.* (citing *Riggins*, 504 U.S. at 142-45 (Kennedy, J., concurring)).

¹⁰⁷ *Id.* "[T]he court must conclude that involuntary medication is *necessary* to further those interests." *Id.*

¹⁰⁸ *Id.* "The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results." *Id.* The Court cited to amici curiae briefs with different views on the alternatives to medication in psychiatric patients—one which claims that non-drug therapies may be effective in restoring psychotic patients to a competent state while the other suggests that alternative treatments to medication are generally not as effective as the medication. *Id.*

more intrusive forcible medication is effectuated, the court must consider a less severe method of medicating the defendant.¹⁰⁹

Finally, before forcibly medicating the pre-trial detainee, a court must conclude that the administration of the drugs is medically appropriate.¹¹⁰ The Court in *Sell* explained that it will be necessary to consider the specific drugs that the state proposes for administration to the pre-trial detainee.¹¹¹ More specifically, the different side effects caused by the different medications may be determinative in deciding the appropriateness of the forcible medication.¹¹²

The Court qualified its four-part standard, however, stating that this standard applies only when the sole purpose of the government is to force the detainee to regain competence so that she may stand trial.¹¹³ Additionally, the Court stated that there are strong reasons for a court to allow forced medication other than for the purpose of rendering a defendant competent to stand trial.¹¹⁴ As a result, the Court explained

¹⁰⁹ *Id.* The Court stated that a court in making this decision ought to consider issuing a court order backed by the contempt power of the court before actually ordering that the patient be forcibly administered the medication. *Id.* Most of these antipsychotic medications are administered by injection, an intrusive procedure. *See supra* note 25 and accompanying text.

¹¹⁰ *Sell*, 539 U.S. at 181. “[T]he 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.” *Id.* For the government and its doctors to be able to satisfy the medical appropriateness factor, it would have to show that the proposed medications are both safe and humane, with minimal side effects that pose no grave risks to the patient and that if the drugs are not forcibly injected, then “the defendant would languish in the horrors of insanity and the failure to rescue the defendant from such a condition would be entirely opposed to his ‘medical interests.’” Nance, *supra* note 63, at 707.

¹¹¹ *Sell*, 539 U.S. at 181. “The specific kinds of drugs at issue may matter here as elsewhere.” *Id.* The Court acknowledged that the different types of drugs used have varying levels of success and side effects. *Id.*

¹¹² Nance, *supra* note 63, at 707. “Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.” *Sell*, 539 U.S. at 181.

¹¹³ *Sell*, 539 U.S. at 181.

We emphasize 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*. A court need not consider whether to allow forced medication for that kind of purpose, if forced medication is warranted for a *different* purpose.

Id. at 181-82.

¹¹⁴ *Id.* at 182. The Court pointed out those factors such as dangerousness and manageability of a detainee provide stronger justifications for allowing for forced medication. *Id.*

that it is necessary for the lower courts to look at other grounds for administering antipsychotic drugs forcibly before turning to the issue of trial competence for justification.¹¹⁵ The ultimate question should examine the burden in the light of the articulated standards that its interests outweigh the rights of the individual whom the government seeks to forcibly medicate.¹¹⁶

E. Application of the Current Standard

Many courts have had the opportunity to review cases involving the forced medication of pre-trial detainees with antipsychotic medications after the *Sell* standard was set in 2003.¹¹⁷ Some courts have used the standard to find that forcible medication was appropriate in the particular circumstances, while other courts have used the standard to

¹¹⁵ *Id.* at 183. The *Sell* court stated that “the inquiry into whether medication is permissible . . . to render an individual nondangerous is usually more ‘objective and manageable’ than the inquiry into whether medication is permissible to render a defendant competent.” *Id.* at 182 (quoting *Riggins v. Nevada*, 504 U.S. 127, 140 (Kennedy, J., concurring)).

¹¹⁶ *Id.* “Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual’s protected interest in refusing it?” *Id.*

¹¹⁷ See *United States v. Bradley*, 417 F.3d 1107, 1109 (10th Cir. 2005) (affirming a district court decision finding the involuntary medication of a pre-trial detainee appropriate); *United States v. Evans*, 404 F.3d 227, 232 (4th Cir. 2005) (finding that a trial court erred in ordering forced medication for a pre-trial detainee because of a failure to utilize the *Sell* standard); *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1134 (9th Cir. 2005) (remanding the decision for further determinations after the *Sell* standard was applied and a continuance refused to appeal a forcible medication order); *United States v. Gomes*, 387 F.3d 157, 158 (2d Cir. 2004), *cert. denied*, 543 U.S. 1128 (2005) (affirming the district court ruling that forced medication was appropriate for the pre-trial detainee); *United States v. Ghane*, 392 F.3d 317, 320 (8th Cir. 2004) (reversing an order requiring forced medication of a pre-trial detainee in light of the government failing to meet the *Sell* standard); *U.S. v. Martin*, No. 1:04mj00183, 2005 U.S. Dist. LEXIS 16477, at *1 (W.D. Va. Aug. 10, 2005) (granting a motion to forcibly medicate a pre-trial detainee using the *Sell* standard); *United States v. Dumeny*, 295 F. Supp. 2d 131, 133 (D. Me. 2004) (denying forced medication for a defendant charged with possession of a firearm due to the nature of the crime); *Willis v. Cockrell*, No. P-01-CA-20, 2004 U.S. Dist. LEXIS 15950, at *1 (W.D. Tex. Aug. 9, 2004) (reversing a death sentence and conviction because of improper forced medication of the criminal defendant); *United States v. Barajas-Torres*, Crim. No. EP-03-CR-2011(KC), 2004 U.S. Dist. LEXIS 13232, at *1 (W.D. Tex. July 1, 2004) (denying the forcible medication of a pre-trial detainee using the *Sell* standard).

find it inappropriate.¹¹⁸ The particular facts of each case are determinative in reaching the respective outcomes.¹¹⁹

1. Cases Approving Forced Medication

Courts have used the *Sell* standard to approve the forced medication of pre-trial detainees in some circumstances.¹²⁰ The first case to analyze *Sell* and approve the forcible administration of antipsychotic drugs was *United States v. Gomes*.¹²¹ In *Gomes*, the Second Circuit Court of Appeals, stating that the Supreme Court did not articulate a standard of proof for the analysis of the *Sell* factors on appeal, applied the standard of “clear and convincing” evidence as supported by the Supreme Court’s findings in *Riggins*.¹²² The *Gomes* Court considered each of the *Sell* factors and concluded that it was appropriate to forcibly medicate the pre-trial detainee because there was a seventy percent chance that he would be rendered competent, therefore, the involuntary medication would further the strong government interest in trying the defendant.¹²³ The

¹¹⁸ See *supra* note 117 and accompanying text.

¹¹⁹ See *supra* note 117 and accompanying text.

¹²⁰ See *Bradley*, 417 F.3d 1107; *Gomes*, 387 F.3d 157; *Martin*, 2005 U.S. Dist. LEXIS 16477.

¹²¹ 387 F.3d 157. In *Gomes*, Gomes was charged with possession of a firearm by a convicted felon. *Id.* at 159. Gomes had previously been convicted of at least three violent felonies or drug offenses, and was therefore eligible for a mandatory fifteen-year prison term. *Id.* Gomes refused to cooperate with psychiatric evaluations, but after commitment for observation, he was found to suffer from delusions and a psychotic disorder, and he lacked an understanding of the proceedings against him. *Id.* The district court issued an order to forcibly medicate Gomes that was affirmed by the appellate court. *Id.* However, while his case was being appealed to the Supreme Court, the Supreme Court decided *Sell* and vacated and remanded the order for further findings consistent with the *Sell* factors. *Id.* The district court again found, on remand, after further evaluation and expert testimony, that forcible medication would be appropriate in this case, citing the seventy percent chance that Gomes could be restored to competency with the use of antipsychotic medicines. *Id.* Gomes appealed to the Second Circuit Court of Appeals. *Id.*

¹²² *Id.* at 160. The court stated that “The Supreme Court did not articulate a standard of proof to govern consideration of these factors.” *Id.* Because no standard of proof was explicitly stated, this lower court was required to determine the appropriate standard. *Id.* The Second Circuit Court of Appeals found that the court in *Gomes I* had used the clear and convincing evidence standard and found that even though *Gomes I* was vacated and remanded, the lower court was correct in applying this standard to the case. *Id.*

¹²³ *Id.* at 162. The court in *Gomes* first had to determine if *Sell* applied to the facts of this case, indicating that the threshold question was “whether the forced treatment is justifiable for other reasons” besides trial competency. *Id.* at 160. Finding that Gomes was not a danger to himself or others and that his health would not be in danger if he did not take this medicine, this court found that the only reason that the government was seeking to forcibly medicate Gomes was to render him competent to stand trial. *Id.* The court then discussed what government interests were at stake in prosecuting Gomes, citing the strong government interest in prosecuting a person accused of a serious crime while noting that

Court specifically considered the government's interest in trying Gomes to be very strong because of the seriousness of his crime.¹²⁴

After *Gomes*, the Tenth Circuit Court of Appeals, in *United States v. Bradley*,¹²⁵ analyzed the facts of the situation, considering the medical appropriateness of the medication, including whether less intrusive means were available, the likelihood of whether the medication would render Bradley competent to stand trial, the likelihood that the side effects would compromise a fair trial, and the government's interest in proceeding with the trial.¹²⁶ After an analysis of these factors, the Tenth Circuit found that the lower court was not in error in determining that

this interest may be weakened if the defendant faces a long civil commitment. *Id.* The court relied on its findings in *Gomes I* to determine that the crime was serious enough to provide a strong government interest. *Id.* Further, the court did not find persuasive Gomes's argument that he should not be forcibly medicated because if he regained competence at a later date, he could still be tried, despite any length of time that may have passed. *Id.* at 161. Instead, this court determined that the government interests were strong enough to pass this prong of the *Sell* test. *Id.* Then, the court answered whether the forcible medication would substantially further the governmental interest in trying Gomes in the affirmative. *Id.* The court noted that there was a substantial probability that the medication would render Gomes competent and that the side effects of the medication would not interfere significantly with Gomes's ability to assist his counsel. *Id.* at 162. The court then analyzed whether it was necessary to medicate Gomes forcibly or if there were other less intrusive means that would further the government's interest. *Id.* Finding that other forms of treatment would likely be ineffective, the court found that the government passed this portion of the *Sell* test as well. *Id.* at 162-63. Finally, this court analyzed the medical appropriateness of the forced medication and accepted the evaluation of the psychiatrists who said that the treatment was indeed appropriate. *Id.* at 163.

¹²⁴ *Id.* at 160. "In this case, we believe that the government has an essential interest in bringing Gomes to trial. . . . Both the seriousness of the crime and Gomes's perceived dangerousness to society are evident from the substantial sentence Gomes faces if convicted." *Id.* (quoting *Gomes I*, 289 F.3d at 86). Gomes faced up to fifteen years if convicted on the charges. *Id.*

¹²⁵ 417 F.2d 1107 (10th Cir. 2005).

¹²⁶ *Id.* at 1114-17. In *Bradley*, the defendant was accused of hurling a hand grenade at a group of salesmen in a car dealership parking lot because he had been dissatisfied with a purchase. *Id.* at 1110. Bradley attached a note to the grenade demanding the return of \$26,000 that he believed the car dealership owed to him. *Id.* While being interviewed by law enforcement regarding the incident, Bradley admitted to the actions and told the authorities that he had weapons at his home because he believed that someone was trying to kill him. *Id.* Bradley was indicted for violating several federal laws regarding interruption of interstate commerce and unlawful possession of a weapon by a person convicted of a violent crime. *Id.* Bradley was found incompetent to stand trial, and, after extensive evaluation and court proceedings, ordered to take antipsychotic medications, which he refused. *Id.* at 1111-12.

forcible medication of this pre-trial detainee was appropriate, thus the *Sell* standard was considered met.¹²⁷

2. Cases Denying Forced Medication

Although some post-*Sell* cases have allowed for the forcible medication of pre-trial detainees, others have denied the use of forcible medication.¹²⁸ In *United States v. Evans*,¹²⁹ the Fourth Circuit Court of Appeals found that because the defendant's crimes were serious, the government had an important interest in trying him, but had failed to prove that the involuntary medication would significantly further the interest in trying the defendant and that the drugs were medically appropriate.¹³⁰ More specifically, Evans's circumstances failed both the

¹²⁷ *Id.* at 1117. The appellate court found that the lower court adequately examined each of the requirements under *Sell*. *Id.* The court reviewed the findings of Bradley's treating psychiatrist and found that they were adequate in assessing the medical appropriateness of the treatment. *Id.* at 1114. Additionally, the court noted that the lower court first considered less intrusive manners in which to treat Bradley before resorting to forced medication. *Id.* at 1116. The court then considered whether Bradley would be eligible for civil commitment in his state and found that he would not as his psychiatrist found that he was not a substantial danger to himself or others. *Id.* Further, the appellate court considered the length of time he had already been confined (nine months) and weighed it against his potential sentence (fifty years) and found that the forcible medication furthered the government's interest in prosecuting this crime. *Id.* at 1117.

¹²⁸ See *supra* note 117 and accompanying text.

¹²⁹ 404 F.3d 227 (4th Cir. 2005).

¹³⁰ *Id.* at 237-42. In *Evans*, the defendant, a seventy-four year old military veteran, was charged with assaulting a government employee and threatening to murder a United States judge after he went to a government office to complain about a late notice on a government housing loan. *Id.* at 232-33. Evans, while in the government office, became very loud and claimed that the late notice was proof that the government was out to get him. *Id.* at 232. He indicated that "he was experienced . . . with chemical and biological warfare and . . . [they] [should] get the situation straightened out with his loan [because] . . . they didn't [know what terrorism was] until they saw what he could do." *Id.* at 233 (internal citations omitted). Evans was charged and ordered to undergo a psychiatric evaluation to determine if he was competent to stand trial. *Id.* Evans refused the medication he was prescribed and proceedings commenced to force him to take the antipsychotic medications for his paranoid schizophrenia from which he had suffered for over thirty years. *Id.* A magistrate judge ordered that Evans be forcibly medicated, and Evans subsequently threatened to murder the judge who he thought was responsible for his continued holding in the facility. *Id.* The Fourth Circuit Court of Appeals first addressed the argument that the crime Evans was charged with was not sufficiently serious to provide the basis for an important government interest in prosecuting this defendant. *Id.* at 237. The court found that threatening to murder a United States judge, a crime that carries a penalty of up to ten years imprisonment, "is 'serious' under any reasonable standard." *Id.* at 238. However, when considering the medical appropriateness of the medication and whether forcibly medicating the defendant would further the government's interest in trying this crime, the *Evans* court found that the lower court erred in finding in the affirmative. *Id.* at 240. The

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second and fourth prong of the *Sell* standard.¹³¹ The *Evans* court, interpreting *Sell*, held that in order for a court to properly assess whether involuntarily medication of antipsychotic agents is appropriate, the government must state the particular medication and its proposed dosage, because without that information, it would be giving the medical staff too much license to experiment.¹³² Further, the court emphasized that the treatment plan proposed must be tailored to the specific defendant so that it can be determined whether the proposed course of treatment, as applied to the specific defendant, would meet the standards set out by *Sell*.¹³³

lower court relied on a report that only generally described the medications that may have been used on Evans, and did not list which specific drug would be utilized in his treatment. *Id.* The court held that, "the government must propose a course of treatment in which it specifies the particular drug to be administered." *Id.* at 240. Further, the court found that the report relied upon only generalities and was not specific to Evans's case, and therefore did not prove that it was either medically appropriate to forcibly medicate Evans, nor would it necessarily further the government's interest in prosecuting his offense. *Id.* at 241.

¹³¹ *Id.*

With respect to whether involuntary medication would "substantially further" the Government's interest, the . . . report concluded that atypical antipsychotic medication would be "substantially likely" to restore Evans's competency merely because such medication is the "primary" way to treat Schizophrenia. . . . The report never addressed why it concluded that Evans, an elderly man with diabetes, hypertension, and asthma who takes a number of medications to treat these conditions, would not experience side effects that would interfere with his ability to assist counsel. With respect to whether involuntary medication would be "medically appropriate" for Evans, the IM report states only that involuntary medication is "medically appropriate" because "the standard treatment of anyone with [Evans] condition of Schizophrenia would involve the prescription of antipsychotic medication."

Id.

¹³² *Id.* at 241. The court stated that, "To approve of a treatment plan without knowing the proposed medication and dose range would give prison medical staff carte blanche to experiment with what might even be dangerous drugs or dangerously high doses of otherwise safe drugs and would not give defense counsel and experts a meaningful ability to challenge the propriety of the proposed treatment." *Id.*

¹³³ *Id.* at 242. The court stated, "the government, considering all of the particular characteristics of the individual defendant relevant to such a determination, must first show that the treatment plan will 'significantly further' its interests." *Id.* To do so, it must show that the treatment plan, as applied to the defendant in question would not only be substantially likely to render the defendant competent to stand trial, but would also be substantially unlikely to produce negative side effects that could significantly interfere with the defendant's ability to assist his counsel. *Id.*

While the court in *Evans* denied the forced medication based on the government's failure to prove the medical appropriateness and failure to show that the medication would further the government's interest, in *United States v. Barajas-Torres*,¹³⁴ the court denied the forcible medication of a pre-trial detainee based on the government's interest in prosecuting the particular crime.¹³⁵ In *Barajas-Torres*, the court found that the treatment with anti-psychotic drugs was the only effective treatment for the defendant's disorder and that it was the only likely way that the defendant would be restored to competency.¹³⁶ Further, the court found that the side effects would be minimal and that it would likely be in the best interest of the defendant to be medicated.¹³⁷ However, the court considered the seriousness of the crime that the defendant was charged with and decided that in light of Supreme Court decisions and in the context of involuntary medication, that seriousness was defined as "a serious crime against the person or a serious crime against property," and the defendant in this matter was not charged with a serious crime.¹³⁸

The current standard clearly has been applied in favor of forcible medication and against it as well.¹³⁹ However, when forcible medication is approved for pre-trial detainees, even after the current *Sell* standards are applied, dangers still exist that can compromise the defendant's constitutional rights.¹⁴⁰ Specifically, though certain safeguards are presented by the *Sell* factors, the Sixth Amendment Rights of pre-trial

¹³⁴ *United States v. Barajas-Torres*, Crim. No. EP-03-CR-2011, 2004 U.S. Dist. LEXIS 13232 (W.D. Tex. July 1, 2004).

¹³⁵ *Id.* at *10. In *Barajas-Torres*, the defendant was charged with illegal reentry into the United States. *Id.* at *2. The defendant moved for and was granted a mental examination that determined that the defendant was suffering from schizophrenia. *Id.* at *2-4.

¹³⁶ *Id.* at *4. The court noted that "Under the circumstances of the present case, there is no question that the proposed anti-psychotic medication is the only effective treatment for defendant's schizophrenia, and no alternative would restore the defendant to competency." *Id.*

¹³⁷ *Id.* The court stated, "in light of medical testimony that schizophrenia, if left untreated in a patient defendant's age, may result in a permanent mental disorder, the administration of anti-psychotic medication would likely serve defendant's best interest." *Id.*

¹³⁸ *Id.* at *6-10. The court considered the possible sentence that Barajas could receive if convicted, the guidelines of which are zero to six months. *Id.* at *11. Because Barajas-Torres had already served nine months in pre-trial confinement, he would be released for time served. *Id.* In light of these circumstances, the court held that "[p]rosecution for purposes of releasing defendant could not be considered an important interest." *Id.*

¹³⁹ See *supra* note 117 and accompanying text.

¹⁴⁰ See *supra* notes 70-82 and accompanying text. The dangers of interference with ability to communicate with counsel and the prejudicial effect of the defendant's altered demeanor still exist despite compliance with the four *Sell* factors.

detainees remain in danger while they are forcibly medicated during their trials.¹⁴¹

III. ANALYSIS

Though Supreme Court guidelines for determining the appropriate circumstances when a criminal defendant can be forcibly medicated for trial competency are now established, the standards are inadequate to protect the Sixth Amendment rights of criminal defendants.¹⁴² Part III.A will discuss the inherent problems with the forcible medication of pre-trial detainees after the *Sell* decision as they relate to Sixth Amendment rights, including why the current *Sell* standard is inadequate in protecting the Sixth Amendment rights of pre-trial detainees.¹⁴³ Part III.A.1 will present the issue of prejudice to the defendant by altering his appearance and demeanor for the trier of fact and how this, in and of itself, violates the Sixth Amendment rights of the defendant.¹⁴⁴ Part III.A.2 explores the impact of the forced medication on the ability for a defendant to assist counsel in preparing her defense and how this also violates the detainee's Sixth Amendment Rights.¹⁴⁵ Finally, Part III.B will present the current remedies that are employed in combating these issues and why they do not relieve the dangers of violating the Sixth Amendment rights of criminal defendants.¹⁴⁶

A. *The Current Standard Fails to Adequately Protect the Sixth Amendment Rights of Pre-trial Detainees*

Even with the application of the stringent four-part *Sell* test, the Sixth Amendment right to a fair trial may still be impaired if a defendant is forcibly medicated.¹⁴⁷ The four-part standard articulated in *Sell* makes it more difficult for the government to forcibly medicate a pre-trial detainee for the sole purpose of rendering the defendant competent to stand trial.¹⁴⁸ However, the Supreme Court made it perfectly clear that other justifications, such as potential dangerousness to one's self or others, may allow for the forcible medication of pre-trial detainees, with

¹⁴¹ See *infra* Parts III.A-III.B.

¹⁴² See *supra* notes 122-23 and accompanying text.

¹⁴³ See *infra* Part III.A.

¹⁴⁴ See *infra* Part III.A.1.

¹⁴⁵ See *infra* Part III.A.

¹⁴⁶ See *infra* Part III.B.

¹⁴⁷ See *supra* notes 84-86 and accompanying text.

¹⁴⁸ See *supra* notes 120-24 and accompanying text. This standard is rigid when considering medicating a person so that she is competent to stand trial. *Id.*

the end result still establishing competence.¹⁴⁹ Moreover, the Supreme Court encourages the government to seek out other reasons to justify forcibly medicating defendants other than trial competence.¹⁵⁰

Additionally, even when the government overcomes the four-part *Sell* standard, the effects of the medication on the defendant do not change.¹⁵¹ For example, overcoming the burdens of *Sell* does not mean that the defendant's personal reaction to the medication, including drowsiness, muscle spasms, or tardive dyskinesia, will be any less severe.¹⁵² It simply does not follow that court-ordered approval of forcible medication will in any way lessen the side effects of the medication to the point where the drugs will not affect demeanor, nor interfere with communications between counsel and the defendant.¹⁵³ As a result, a few remedies, such as jury instructions and expert testimony, have been implemented to combat the negative effects on the fair trial rights of criminal defendants.¹⁵⁴

1. Altering the Demeanor of a Pre-trial Detainee Negatively Impacts Trial Fairness

The potential side effects of antipsychotic medications pose a real risk to a pre-trial detainee's right to a fair trial because they alter both the demeanor and appearance of the defendant.¹⁵⁵ For example, some of the medications produce side effects, such as tics, that may make the

¹⁴⁹ See *supra* note 130 and accompanying text. See also *Sell v. United States*, 538 U.S. 166 (2003). The Court indicated that there are other reasons why a person can constitutionally be forcibly medicated, such as dangerousness, and encourages prosecutors to look to other justifications to forcibly medicate a person besides trial competence. *Id.*

¹⁵⁰ See *supra* notes 131-32 and accompanying text. The Court suggested using other justifications, especially one that the defendant may be dangerous to himself or others, in order to justify forcible medication instead of relying on the sole justification of restoring competency. *Sell*, 528 U.S. at 183.

¹⁵¹ See *supra* Part II.A (listing the side effects of medications on persons medicated with antipsychotic medications, no matter what the justification for administering the drugs). A governmental approval on the medication will not abate side effects such as muscle spasms, "mask-like face," sedation, or agitation. See *supra* note 19.

¹⁵² See *supra* notes 15-26 and accompanying text (discussing the various potential side effects and the probability of their occurrence). The medications used do not cure the underlying mental illness, but only control the symptoms so that the patient can be treated with other approaches, such as psychotherapy. Ziegelmuller, *supra* note 1, at 836-37.

¹⁵³ See *supra* notes 70-72 and accompanying text.

¹⁵⁴ See *supra* notes 83-88 and accompanying text. Various courts have recognized the inadequacy of a curative instruction in remedying the effect of the defendant's altered demeanor on the jury. *Id.*

¹⁵⁵ See *supra* Part II.C.

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defendant appear nervous or fidgety.¹⁵⁶ Another possible side effect is one that will dull the senses of the defendant, making her appear disinterested or unaffected by the testimony.¹⁵⁷ These conditions may alter the jury's perception of the defendant, thus influencing its deliberations and ultimate decision as to her guilt or innocence.¹⁵⁸ It is evident that the current standard does not provide for a remedy to this problem, since no measures are in place that allow for a trier of fact to view the defendant prior to her being medicated with behavior-altering drugs.¹⁵⁹

Another way in which the side effects negatively impacts the defendant as to her demeanor relates to the possible defense that she may raise.¹⁶⁰ For example, obviously the defense of insanity may be raised in cases where the defendant has been forcibly medicated with antipsychotic medication when she has been found to have a mental illness that requires medication.¹⁶¹ The defendant arguing an insanity defense will have a tough hurdle to overcome when the medication dulls her senses so that her demeanor is different from her demeanor at the time of the alleged crime.¹⁶² When the jury is considering whether to find the defendant not guilty by reason of insanity, their perception of

¹⁵⁶ See *supra* note 69-70 and accompanying text. Tardive dyskinesia commonly manifests with involuntary muscle spasms and rigidity in the limbs. Stone, *supra* note 17, at 306.

¹⁵⁷ See *supra* note 69 and accompanying text. The side effect termed akinesia can alter a defendant's demeanor so that he, in mild cases, will appear to lack the ability to have spontaneous expression, and in extreme cases, will manifest a wooden, "mask-like" face." Page, *supra* note 16, at 1068.

¹⁵⁸ See *supra* note 69 and accompanying text. Justice Kennedy stated, "The drugs can prejudice the accused . . . by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom." *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring). See also *Peterson's Stoicism*, *supra* note 71. The jury in the *Peterson* trial indicated that the demeanor of the defendant was "unsettling." *Id.*

¹⁵⁹ See *supra* notes 117-19 and accompanying text. The current *Sell* four-part standard allows for the forcible medication of pre-trial detainees, but does not implement any measures to safeguard any rights that are compromised by allowing the medication to take place. In the standard itself, there is no mention of any method to combat the negative impression that the medicated demeanor of the defendant will have on the trier of fact.

¹⁶⁰ See *supra* note 79 and accompanying text. In addition to possibly affecting the type of defense that the defendant will be willing to proffer, the medication may render the defendant less willing or able to actually take part in any part of the defense. *Riggins*, 504 U.S. at 144 (Kennedy, J., concurring).

¹⁶¹ See *supra* note 91. Justice Kennedy stated that "The drugs can prejudice the accused . . . by rendering him unable or unwilling to assist counsel." *Riggins*, 504 U.S. at 142 (Kennedy, J., concurring).

¹⁶² See *supra* note 75 and accompanying text. The court recognized that the demeanor of the defendant not only influenced the guilt-innocence phase, but also sentencing.

the defendant during the trial proceedings may also affect their verdict.¹⁶³

Finally, when the outward demeanor of the defendant is affected, the sentencing phase of a trial can be impacted as well.¹⁶⁴ For example, in *Riggins*, the Supreme Court found that the potential negative side effects of the drug Mellaril with which the defendant was forcibly injected were likely to have impacted his right to a fair trial.¹⁶⁵ In particular, Justice Kennedy noted that the demeanor of the defendant is crucial during the sentencing phase where the trier of fact is making a determination between life and death for the defendant.¹⁶⁶ Further, in *Cockrell*, a court in the Western District of Texas reversed a murder conviction and death sentence due in part to the effect that the defendant's medicated demeanor had on the jury.¹⁶⁷ The current standard fails to address a method to solve the problems of negative perception of the defendant by the jury.¹⁶⁸ However, the outward appearance of the defendant is not the only concern caused by forcibly medicating the defendant with antipsychotic medications.¹⁶⁹

2. Forcible Administration of Antipsychotic Medications Interferes with Communications with Counsel

In addition, the current standard fails to address the problem created by impaired communications between the defendant and her counsel.¹⁷⁰

¹⁶³ See *supra* note 74 and accompanying text. In one case, a Texas court vacated a death penalty sentence based in part on the prejudicial effect of the defendant's demeanor on the jury. *Willis v. Cockrell*, No. P-01-CA-20, 2004 U.S. Dist. LEXIS 15950, at *148 (W.D. Tex. July 21, 2004).

¹⁶⁴ See *supra* note 76 and accompanying text.

¹⁶⁵ See *supra* note 68 and accompanying text. If a jury has convicted a defendant in part based on his medicated demeanor, it is reasonable to infer that the same demeanor will also impact the sentencing phase of the trial.

¹⁶⁶ See *supra* note 71 and accompanying text. Justice Kennedy stressed the impact of the demeanor during the sentencing phase. *Riggins*, 504 U.S. at 141 (Kennedy, J., concurring).

¹⁶⁷ See *supra* notes 74-76 and accompanying text.

¹⁶⁸ See *supra* notes 73-76. Justice Kennedy foresaw this problem as he noted that demeanor of the defendant can influence the jury. *Riggins*, 504 U.S. at 145 (Kennedy, J., concurring).

¹⁶⁹ See *supra* Part III.A.1 (listing the varied outward manifestations that can be caused by antipsychotic medications).

¹⁷⁰ See *supra* notes 78-80 and accompanying text. The current standard fails to provide any remedy for correcting the negative impact on communications ability. By the very nature of the medication itself, and by forcibly medicating a defendant with this medication, the communications are hampered. The only true way to remedy this situation

Along with impacting the perception of the defendant by the trier of fact, the side effects of antipsychotic medications also impact the manner in which a defendant can interact with counsel.¹⁷¹ In order for a defendant to mount an effective defense, she must be able to communicate with her attorney.¹⁷² When antipsychotic medications are introduced into a defendant's body, the drugs, by their very nature, alter the thought processes of the defendant.¹⁷³ When a defendant's state of mind is altered, communications with her counsel may be impaired.¹⁷⁴

Some experts assert that the introduction of these antipsychotic medications can actually improve communications between the medicated client and her counsel.¹⁷⁵ However, for the most part, these medications are thought to hamper rather than assist the ability to communicate.¹⁷⁶ Once a defendant is unable to effectively communicate, or when her communication is in fact controlled by medication, she will not have assistance of counsel, her Sixth Amendment rights will be violated, and her subsequent trial will be rendered unfair.¹⁷⁷

Additionally, the introduction of antipsychotic medications, in altering the thinking of the pre-trial detainee, may also alter the defense strategy that she would have normally pursued if not medicated.¹⁷⁸ If

would be to not forcibly medicate the defendant, a proposition the Supreme Court does not seem willing to consider at this time.

¹⁷¹ See *supra* note 80 and accompanying text. The Court recognized that the possible side effects of the medications can hamper a person's ability to communicate. *Riggins*, 504 U.S. at 145 (Kennedy, J., concurring).

¹⁷² See *supra* note 79 and accompanying text. Additionally, Justice Kennedy asserted, "[i]n my view medication of the type here prescribed may be for the very purpose of imposing constraints on the defendant's own will, and for that reason its legitimacy is put in grave doubt." *Riggins*, 504 U.S. at 145 (Kennedy, J., concurring).

¹⁷³ See *supra* note 22 and accompanying text. Some of the benefits of the medication include altering the thinking patterns of the patient so that disjointed thoughts and hallucinations are abated. Ziegelmueller, *supra* note 1, at 667.

¹⁷⁴ See *supra* note 19 and accompanying text. One possible effect of the medication is adverse effect on the thinking process. Cichon, *supra* note 19, at 322.

¹⁷⁵ See *supra* note 25 and accompanying text. While these antipsychotic medications may rid the detainee of delusions and hallucinations, the negative side effects of tardive dyskinesia, restlessness, drowsiness, involuntary facial movements, and involuntary limb movements are still possible. Ziegelmueller, *supra* note 1, at 667.

¹⁷⁶ See *supra* note 19 and accompanying text. Psychotropic medications can dull the senses so that the person seems and feels emotionless. It follows that when a person is in such a state, she may not consider the implications of not pursuing or pursuing various lines of defenses. She may not fully understand and comprehend the ramifications of strategies or defenses proposed to her by her counsel.

¹⁷⁷ See *supra* note 78 and accompanying text.

¹⁷⁸ See *supra* note 72 and accompanying text.

the defendant in the medicated state now feels “normal,” she may not wish to pursue an insanity defense that she would have considered pursuing if she was not medicated.¹⁷⁹ In addition, a medicated defendant, with emotions dulled, might not pursue the most vigorous options in a defense strategy.¹⁸⁰ For these reasons, the forcible medication of pre-trial detainees with antipsychotic medications infringes on Sixth Amendment rights.

B. The Current Remedies To Cure Sixth Amendment Problems with Forcible Medication Are Inadequate

Though no remedies specifically appear within *Sell*, courts have utilized different approaches to attempt to remedy the Sixth Amendment concerns implicated by forcibly medicating pre-trial detainees.¹⁸¹ However, those approaches are wholly inadequate.¹⁸² First, as to the issue of altered demeanor, the jury is told how the defendant acted and appeared before medication, and the jury does not get to see for itself the defendant in her unmedicated state.¹⁸³ Instead, jurors hear a recitation of the defendant’s mental state prior to medication.¹⁸⁴ Because these medications have so many side effects that can impact the demeanor and appearance of the defendant, the jury may focus on the current mental state of the defendant, ignoring that the mental state at the time of the crime was completely different.¹⁸⁵ The jury may in fact ignore that the defendant ever was in a different mental state, based on her current conduct.¹⁸⁶ Though appearances can be deceiving, and a person can deliberately act as if she is mentally ill, presenting the defendant in an unmedicated state would provide powerful evidence to the jury to

¹⁷⁹ See *supra* note 71 and accompanying text.

¹⁸⁰ See *supra* note 79 and accompanying text.

¹⁸¹ See *supra* notes 83-85 and accompanying text. Courts have utilized both jury instructions regarding medication as well as the use of expert testimony in explaining the medicated demeanor of criminal defendants.

¹⁸² See *supra* notes 84, 88 and accompanying text. Both solutions are perceived as being practically unworkable towards solving the problems presented by the side effects of the medications.

¹⁸³ See *supra* note 83 and accompanying text. A jury instruction is given orally and does not erase the visual image that the trier of fact has seen during the trial.

¹⁸⁴ See *supra* note 85 and accompanying text.

¹⁸⁵ See *supra* note 83 and accompanying text; see also *Willis v. Cockrell*, No. P-01-CA-20, 2004 U.S. Dist. LEXIS 15950, at *1 (W.D. Tex. Aug. 9, 2004) (acknowledging the impact of the defendant’s medicated demeanor on a defendant in both the guilt-innocence phase and the sentencing phase of the trial).

¹⁸⁶ See *supra* note 84 and accompanying text.

decide if that state was only a deliberate effect or was representative of the defendant's true mental state.¹⁸⁷

In appearing cold and emotionless, the defendant's ability to garner a fair sentence if convicted is also hampered.¹⁸⁸ If the jury has already determined guilt while the defendant is in a medicated state, it could be influenced by those same observations while considering a sentence.¹⁸⁹ A jury may even consider the reaction of the defendant to the conviction itself and impose the sentence based in part on that reaction.¹⁹⁰

Additionally, the other main remedy utilized, a jury instruction, is ineffective in curing the negative impact that medication can have on the communications between client and counsel and problems with altered demeanors.¹⁹¹ Simply informing the jury that the defendant is in a medicated state, and that the jury may not consider the demeanor of the defendant when determining guilt or innocence, is clearly not an adequate solution.¹⁹² Finally, even if a curative instruction could solve the problem, in considering that the government has an interest in maintaining the integrity of the trial process by conducting fair trials, the government cannot be said to have an interest in conducting a trial with such a high risk of jury prejudice known prior to the trial commencing.¹⁹³

Consequently, the forcible medication of criminal defendants with psychotropic medications impacts fair trial rights in many ways.¹⁹⁴ The courts' recognition of the constitutional problems is evidenced by courts' incorporation of different remedies, such as jury instructions and expert

¹⁸⁷ See *supra* notes 83-85. Allowing a defendant to present himself in an unmedicated state displays his demeanor when he is not subject to drugs that by their nature alter the chemistry of the brain. See *supra* note 84 and accompanying text. Whether the defendant's behavior while in this unmedicated state is representative of his true mental state is a matter for the finder of fact to determine. Not allowing the defendant to communicate his mental state without being under the influence of thought altering drugs deprives him of the right to raise an adequate defense.

¹⁸⁸ See *supra* note 72 and accompanying text.

¹⁸⁹ See *supra* note 75 and accompanying text.

¹⁹⁰ See *supra* note 74 and accompanying text. If a defendant continues to show little to no reaction to his surroundings at the time the conviction is read, the jury may interpret that as a sign of indifference or lack of remorse and impose a harsher sentence as a result.

¹⁹¹ See *supra* note 87 (discussing the inadequacy of jury instructions as they relate to the demeanor of the defendant).

¹⁹² See *supra* note 88 and accompanying text. Relying on jury instructions to cure evidentiary problems of this nature is neither realistic nor practical.

¹⁹³ See *supra* note 93 and accompanying text.

¹⁹⁴ See *supra* Part II.C.

testimony, to combat the effects of psychotropic medications.¹⁹⁵ These clearly inadequate remedies could easily be supplemented by new evidentiary and procedural rules to safeguard the fundamental rights of criminal defendants.¹⁹⁶

IV. CONTRIBUTION

Forcible medication of criminal detainees for the purpose of rendering them competent to stand trial implicates many constitutional rights, especially the Sixth Amendment's guarantee to a fair trial. In this section, two "fixes" to the current problem are presented.¹⁹⁷ First, this section will discuss the use of videotape and how the use of videotape will assist in alleviating the prejudicial effect on a criminal defendant who has been forcibly medicated with psychotropic drugs so that she can be deemed competent for trial. Second, this section will propose a new rule of evidence, creating a rebuttable presumption of "not guilty by reason of mental disease or defect" in cases where the defendant has been forcibly medicated with psychotropic drugs. Finally, this section will discuss how these two proposals, used in tandem, will effectively reduce the dangers of a criminal defendant's Sixth Amendment rights violation.

A. Using Videotape Evidence of the Defendant's Behavior Before Forcible Medication

No detailed procedure for videotaping a pretrial detainee prior to forcible medication has been proposed or implemented. The following section will describe a new rule of criminal procedure, detailing methods regarding the videotaping of a criminal defendant prior to forcible medication with psychotropic medications, to ensure that the evidence is an accurate representation of the demeanor of the defendant.

¹⁹⁵ See *supra* notes 84-87 and accompanying text.

¹⁹⁶ See *infra* Part IV.

¹⁹⁷ Note, the problem of ineffective communication with counsel is much more problematic to solve than the issue of the defendant's demeanor. By the very nature of the act of medicating the defendant, the communications are compromised and the Sixth Amendment rights of the defendant are implicated. The only viable solution to the communications aspect would be to halt the practice of forcibly medicating pre-trial detainees, a solution that the Supreme Court seems unwilling to consider at this point. See *Sell v. United States*, 538 U.S. 166 (2003) (detailing a four-part standard for permitting forcible medication of pre-trial detainees). The Contribution in this Note provides a mechanism for lessening the impact of the altered demeanor of the defendant, for which a possible and realistic solution exists.

1. A New Rule of Criminal Procedure

Once a court has ordered the forcible medication of a criminal defendant for the purpose of rendering him competent to stand trial, the defendant will have the option to be videotaped such that his unmedicated demeanor and behavior can be presented to the jury during the trial. In order to ensure that the tape presented to the jury is an accurate representation of the demeanor of the defendant, the following procedural safeguards must be followed:

- 1. The tape shall be recorded by a court appointed person who is capable of swearing in witnesses. The session shall be treated as if it were a formal deposition.*
- 2. Both the prosecution and the defense counsel shall be present at the videotaping.*
- 3. The videotaping shall consist of two parts.*
 - (a) A question and answer session with a neutral psychiatrist. The question and answer period duration shall be at the discretion of the psychiatrist; and*
 - (b) A taping the defendant's behavior and demeanor while the defendant is alone for a duration of at least fifteen minutes but no longer than thirty minutes.*
- 4. After the taping is completed, two copies will be made from the source tape, with one copy being distributed to each counsel, and the source tape being retained by the court.*
- 5. When the time for presenting the tape arrives at trial, it will be viewed in its entirety and from the source tape only. Neither party will have the option to present an edited version of the tape for the trier of fact.*

2. Commentary

One of the most significant problems with forcibly medicating a criminal detainee with psychotropic medications is that the side effects of the medication alter not only the thinking patterns of the defendant, but also produce detrimental physical reactions.¹⁹⁸ If a jury is explicitly told of the medication that the defendant is taking and the side effects that it may produce, it is possible that the jury will understand that the defendant is not in her normal state. However, by producing videotape

¹⁹⁸ See *supra* Part II.C.

that can show the trier of fact the unmedicated state of the defendant, the jury will see for themselves how the defendant appeared not only before medication, but also at the time of the alleged crime. Since the prosecution has already been able to forcibly take away the "in-person" evidence by medicating the defendant, the next best alternative would be videotape.

With videotape, there is always a concern that it will be altered so that the true depictions of the events on the tape are not presented. By implementing the aforementioned procedures, the opportunities to alter crucial evidence are reduced. First, by requiring a court officer to be present, the court itself oversees the process. This court officer will witness the entire event, and if alterations are made, the officer should testify to such alteration. Second, with the court retaining the source tape and the source tape being the only tape allowed for viewing at the trial, the parties will not have a chance to edit the tape to eliminate any damaging statements that the defendant may have made during the examination. Finally, with the tape being shown in its entirety, or not at all, the jury will get a full picture of the defendant's demeanor without any editing.

Videotape alone will not provide a solution to the problem of jury bias that is presented by forcible medication of criminal detainees with psychotropic medications. The jury will indeed see a visual representation of the true demeanor of the defendant, but this alone is not enough to cure the defect in the entire process. Expert testimony corroborating not only what is on the videotape, but also other observations of the defendant would aid in presenting to the jury an accurate representation of the defendant's unmedicated mental state. Along with the expert testimony and videotape, additional safeguards are needed from the court itself, to ensure that the trier of fact is fully aware of the defendant's true demeanor and mental state.

B. Proposed Federal Rule of Evidence: An Inference of Incompetence

Because videotape alone will provide an inadequate solution to the problems created by forcibly medicating criminal detainees with psychotropic medications, an additional component is necessary to further remedy the Sixth Amendment concerns raised by forcible medication. Jury instructions alone are not adequate; something with more force is necessary to stress to the trier of fact that a medicated defendant is competent to stand trial only because of this medication. To do this, a new rule of evidence is called for.

The new rule, with text set out below, creates an inference that the defendant lacked the adequate *mens rea* to commit the crime because the government has met the requirements to forcibly medicate that person to stand trial. Though this rule is proposed as a Federal Rule of Evidence, states would have the option of adopting this rule as written, with modifications, or not at all. Below, this Note sets out the text of the proposed new rule, followed by a proposed comment by the Advisory Committee and an explanation of how this rule, in tandem with videotape and other remedies, will further assist in resolving the Sixth Amendment concerns raised by forcibly medicating a criminal detainee with psychotropic medications.

1. Proposed Rule

Rule XXX. Inferences in Criminal Proceedings Wherein the Defendant Has Been Forcibly Medicated with Antipsychotic or Psychotropic Medications.

In all criminal actions where the defendant has been forcibly medicated with psychotropic or antipsychotic medications, an inference will be established that the defendant, incompetent to stand trial without medication, also lacked competence at the time the crime was committed, only if the defendant was also in an unmedicated state at the time the alleged crime was committed. The prosecution will be afforded the opportunity to rebut this inference by producing clear and convincing evidence that despite the fact that the defendant is now in a state that requires medication to establish competency, the defendant had the requisite mens rea at the time of the crime.

In the case of a jury trial, the jury will be instructed that the defendant has been medicated against her will to establish trial competence, and will be informed of the medical diagnosis of the defendant. The jury will be told that they may infer that because of the forcible medication of the defendant, that she was not legally responsible for her actions at the time the crime was committed, if the prosecution is unable to rebut the inference at trial.

2. Proposed Comment

The purpose of this Rule is to protect the Sixth Amendment fair trial rights of a criminal defendant in the particular circumstance where the defendant has been

medicated against her will with psychotropic drugs for the purpose of rendering the defendant competent to stand trial. The medical and legal communities, including the Supreme Court, have acknowledged the side effects of psychotropic drugs. See Riggins v. Nevada, 504 U.S. 127 (1992). By affording the defendant this inference, the disadvantages that are imposed on her by this medication, though not completely eradicated, will be substantially reduced and it will be more likely that the defendant will receive a fair trial.

Rule XXX is to be applied in very narrow circumstances. This rule is to be applied only when the defendant has been forcibly medicated against her will with psychotropic or antipsychotic medications for the purpose of rendering the accused competent to stand trial. Upon request of the defendant who has been so medicated, the judge must give instruction to the jury as to the inference as well as inform the jury of the defendant's medical diagnosis and that the defendant would not be able to stand trial without the medication.

This rule creates a permissive inference, not a presumption, therefore not interfering with the guarantee to a trial by jury found in the Sixth Amendment. This Rule is seen as a balancing factor to counteract the disadvantages, such as altered demeanor and impairment of communications with counsel, that the defendant will be under when forcibly medicated.

3. Commentary

Creating a presumption in a criminal trial can be problematic as the Sixth Amendment guarantees a criminal defendant the right to a jury trial.¹⁹⁹ However, this rule creates a permissive inference that the jury *may* find that the defendant was not competent by the fact that the prosecution has forcibly medicated her. Ultimately, it is for the jury to determine whether the defendant was culpable for the offense with which she is charged. Further, this inference is protective of the defendant's Sixth Amendment rights by creating an inference in the defendant's favor as opposed to providing a presumption in the government's favor.

¹⁹⁹ See *supra* note 65 and accompanying text.

Showing a videotape of the defendant in an unmedicated state, along with expert testimony, can only go so far in allaying the concerns caused by forcible medication. By creating this rule of evidence, the jury will be informed before deliberation that the defendant's current state is not representative of her unmedicated state. This instruction further bolsters the idea that the medications alter the demeanor of the defendant. The judge instructing the jury on this very matter will further allow the jury to consider the implications of the medication and how it has impacted the defendant's demeanor. When the videotaped evidence is coupled with the inference, the defendant has a much better chance of receiving a fair trial.

Additionally, this inference contains many caveats: the defendant must not have been medicated at the time the alleged crime was committed and the prosecution may rebut the inference. If the defendant was similarly medicated at the time the crime was allegedly committed, the jury will not be instructed on the inference, as it is not necessary. The demeanor and mental state of the defendant at the time of trial would then be representative of the mental state of the defendant at the time the crime was allegedly committed. Further, the prosecution will have the opportunity to show the mental state of the defendant at the time of the alleged crime. If the jury finds that the defendant had the requisite *mens rea* at the time of the crime despite this inference, then the defendant has received as fair of a trial as possible while being forcibly medicated.

Some solutions have already been implemented to correct the inherent Sixth Amendment violations in forcibly medicating pre-trial detainees for the purpose of trial competence, and these solutions are a good start.²⁰⁰ However, with the addition of both videotaping the defendant in an unmedicated state and a rebuttable inference of incompetence, the defendant will be afforded more protection of her fundamental rights. Though these two new protections do not completely remedy the problem, they assist in the recovery of the defendant's guaranteed Sixth Amendment protections.

V. CONCLUSION

Flashback to jury deliberations in the trial on which you serve as the foreperson. Instead of simply hearing a doctor tell you and your fellow

²⁰⁰ See *supra* notes 99-101 and accompanying text.

jurors about the defendant's mental state before his medication, the defense presents a videotape of the defendant before he was medicated. The person in the courtroom seems to be a totally different person than the one on the tape. His incoherent answers to the psychiatrist's questions, his pacing and inability to stay still, and his seemingly wild tale of how his wife and children were out to get him made a substantial impression on the jury. After the judge gives the instructions, deliberations begin, taking an entirely different direction. This time, the jury is unanimous once again, but the defendant instead will be getting the mental treatment he needs at a psychiatric facility, instead of prison confinement.

Forcibly medicating a criminal detainee for the purposes of rendering her competent to stand trial presents many constitutional issues. Most notably, the Sixth Amendment guarantee to a fair trial has been trampled. Not only is the ability to communicate with counsel damaged, but the very demeanor of the defendant is altered, causing the jury to potentially view the defendant in an exceedingly negative manner.

The ultimate remedy to this problem would be for the Supreme Court to recognize that forcibly medicating a criminal defendant violates that defendant's constitutional rights. However, the Court has seemingly decided otherwise by providing criteria allowing this process to occur. To combat the negative effects of this process, two bandages can be applied to patch the problems caused by forcible medication. First, videotaping a defendant under controlled conditions prior to forcibly medicating the defendant can provide the trier of fact with a visual representation of the true demeanor of the defendant. Second, by instituting a presumption that a forcibly medicated defendant did not have the requisite *mens rea* at the time of the alleged crime, the trier of fact will be forced to examine more closely not only the side effects of the medication but also the state of mind of the defendant. These two solutions, used alone or in tandem, would improve the current standards in place under *Sell*.

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