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ANTIPSYCHOTIC DRUGS AND THE INCOMPETENT DEFENDANT: A PERSPECTIVE ON THE TREATMENT AND PROSECUTION OF INCOMPETENT DEFENDANTS

Nationwide, state and federal courts order competency evaluations for approximately 25,000 criminal defendants each year.¹ Courts, however, find that only ten to twenty-five percent of the defendants are incompetent.² After finding that a defendant is incompetent, a court will commit the defendant to the care of a mental hospital.³ If the defendant is suffering from psychotic symptoms, the hospital will attempt to restore the defendant's competence by medicating the defendant with antipsychotic drugs, with or without the defendant's consent.⁴ Antipsychotic drugs may relieve the more severe symptoms of mental illness, but often cause side effects that impair the defendant's mental abilities and that make the defendant passive and detached from others.⁵ Once the defendant no longer is displaying the acute symptoms of mental illness, hospital officials release the defendant to the prosecution for trial.⁶

Forcible medication raises two issues: first, whether a state may treat a defendant with antipsychotic drugs without the defendant's consent, and second, whether a state may try a medicated defendant. Forcible medication of a criminal defendant implicates the constitutionally protected right to privacy.⁷ Although the United States Constitution does not explicitly mention a right to privacy, the United States Supreme Court has determined that

1. See Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243, 245 (1987) (giving statistics regarding number of competency evaluations ordered each year); STEDMAN'S MEDICAL DICTIONARY 32 (5th ed. 1982). STEDMAN'S MEDICAL DICTIONARY defines antipsychotics as a type of major tranquilizer that is helpful in the treatment of psychosis and that has the potential to reduce thought disorder. *Id.*

2. Winick, *supra* note 1, at 247.

3. See *id.* at 248 (discussing procedure court follows after court finds defendant incompetent).

4. *Id.*

5. See PHYSICIAN'S DESK REFERENCE 2071 (B. Huff 42d ed. 1989) (describing side effects of antipsychotics); *infra* notes 19-42 (discussing side effects of antipsychotics).

6. See Winick, *supra* note 1, at 248-58 (discussing mental hospitals' treatment of incompetent defendants).

7. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding that right to privacy draws on first amendment's protection of freedom of thought, fourth amendment's prohibition of unreasonable searches and seizures, ninth amendment's penumbra of rights, and fourteenth amendment's due process protection of liberty and autonomy); *United States v. Charters*, 829 F.2d 479, 493 (4th Cir. 1979) (holding that forcible medication of defendant violates defendant's right to privacy), *rev'd on other grounds*, 863 F.2d 302 (4th Cir. 1988) *cert. denied*, 110 S. Ct. 1317 (1990); *Bee v. Greaves*, 744 F.2d 1387, 1892-93 (10th Cir. 1984) (same); *Rogers v. Okin*, 738 F.2d 1, 9 (1st Cir. 1984) (same).

individuals have a right to make personal decisions about their bodies.⁸ Moreover, the Court has found that the right to privacy is a fundamental right.⁹ The Court, however, has determined that the right to privacy is not absolute, but instead, that the state's interest in safeguarding the health, welfare, and safety of state citizens circumscribes the right to privacy.¹⁰ Accordingly, the Supreme Court has held that to override the right to privacy, a state must show a compelling countervailing interest.¹¹ Courts have employed a balancing test when considering whether a state's interest is sufficiently compelling to outweigh a defendant's constitutional right to privacy.¹² For example, in balancing the interests of a state and a criminal defendant with regard to antipsychotic drug treatment, courts consider the risks and the intrusiveness of antipsychotic drugs on the defendant's mental and bodily integrity as opposed to the interest of the state in restoring the defendant's competence with antipsychotic drugs.¹³

Although antipsychotic drugs potentially are dangerous, psychiatrists frequently prescribe antipsychotic drugs for patients who are experiencing psychotic symptoms.¹⁴ Some of the common psychotic symptoms are ab-

8. See *Griswold*, 381 U.S. at 484-86 (determining that right to privacy includes right to make personal decisions about one's body such as whether or not to use contraceptives); *Rogers v. Okin*, 738 F.2d 1, 9 (1st Cir. 1984) (holding that right to privacy includes right to make decisions regarding medical treatment).

9. See generally *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (discussing fundamental right of association); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (discussing fundamental right to travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (discussing fundamental right to privacy); *NAACP v. Alabama*, 357 U.S. 449 (1958) (discussing fundamental right to association); R. ROTUNDA, J. NOWAK, & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE*, 222-23 (1986) (defining what constitutes fundamental right). Fundamental rights are defined as rights that the United States Constitution expressly states in the Constitution's text or which the Constitution implies because the values are fundamental to freedom in American society. *Id.* The most significant fundamental rights that the Constitution implies are the freedom of association, the right to interstate travel, the right to privacy, and the right to vote. *Id.*

10. See *Winston v. Lee*, 470 U.S. 753, 765-67 (1985) (determining that only compelling state interest can override right to privacy); *Carey v. Population Services Int'l*, 431 U.S. 678, 686 (1977) (same); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (same).

11. See *Winston*, 470 U.S. at 756-67 (stating that only compelling government interest can outweigh person's fundamental right); *Carey*, 431 U.S. at 686 (same); *Roe*, 410 U.S. at 154 (same).

12. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (indicating that court employs balancing test in cases involving privacy right); *Roe v. Wade*, 410 U.S. 113 (1973) (same); *Winston v. Lee*, 470 U.S. 753 (1985) (same); *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984) (same); *People v. Medina*, 705 P.2d 961 (Colo. 1985) (same).

13. See *Bee v. Greaves*, 744 F.2d 1387, 1892-95 (10th Cir. 1984) (noting that court considers risks and benefits of procedure in deciding whether to allow state to perform medical procedure without defendant's consent); *Winston v. Lee*, 470 U.S. 753, 760-63 (1985) (same).

14. See J. DAVIS & J. COLE, *Antipsychotic Drugs* in *AMERICAN HANDBOOK OF PSYCHIATRY* 441, 442-43 (2d ed. 1975) (stating that physicians widely prescribe antipsychotic drugs); Brief for the American Psychological Association at 5, *United States v. Charters*, 863 F.2d 302 (4th Cir. 1988) (No. 86-5568) (hereinafter Brief for American Psychological Association) (stating that physicians frequently prescribe antipsychotic drugs).

normal perceptions, disordered thinking, hallucinations, and delusions.¹⁵ The outward manifestations of psychotic symptoms include bizarre behavior, distorted speech, extreme anxiety or panic, and inappropriate responses to people.¹⁶ The primary benefit of antipsychotic drug treatment is a potential reduction of a patient's acute symptoms.¹⁷ Studies, however, indicate that the patient still will exhibit some symptoms of mental illness.¹⁸

Although antipsychotic drugs can be an effective form of treatment, considerable evidence suggests that treatment with antipsychotic drugs may not be therapeutic for every patient.¹⁹ The majority of health practitioners maintain that predicting whether antipsychotic drugs will be effective for any given patient is impossible.²⁰ Additionally, health practitioners agree that antipsychotic drugs do not cure mental illness, but instead provide only temporary relief.²¹ The most serious concern that critics of antipsychotic drug treatment cite is that antipsychotic drugs may cause many harmful side effects to a significant number of patients.²² For example, antipsychotic drugs can impair mental functions and cause abnormal motor activity.²³ One side effect that impairs motor activity is called akinesia.²⁴ Akinesia

15. See K. BERNHEIM & R. LEWINE, *SCHIZOPHRENIA* 127 (1979) (discussing common psychotic symptoms associated with mental illness); E. MCNEIL, *THE PSYCHOSIS* 27-34 (1970) (same).

16. See K. BERNHEIM & R. LEWINE, *supra* note 15, at 127 (discussing outward manifestation of psychotic symptoms associated with mental illness).

17. See J. DAVIS & J. COLE, *supra* note 14, at 442 (discussing effectiveness of antipsychotic drug treatment). Several recent studies indicate that treatment with antipsychotic drugs is responsible for the reduction in hospitalized schizophrenic patients. *Id.*

18. See *id.* (indicating that even after antipsychotic drug treatment, patient probably will exhibit symptoms of mental illness).

19. See *A Review of California's Programs for the Mentally Disabled: Public Hearing on H.R. 106 Before the Permanent Subcommittee on Mental Health and Developmental Disability*, 12-14 (Nov. 3, 1977) (hereinafter *California's Programs*) (statement of Dr. Theodore Van Putten) (indicating that antipsychotics may not be effective for all patients); 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, 1128-29 (1986) (same).

20. See *California's Programs*, *supra* note 19, at 12 (stating that it is impossible to predict whether or not antipsychotics will work); Fentiman, *supra* note 19, at 1128-29 (same).

21. See *California's Programs*, *supra* note 19, at 12 (stating that antipsychotics provide only temporary relief from symptoms of mental illness); Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461 (1977) (same); Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 WIS. L. REV. 497, 539-42 (hereinafter *Madness and Medicine*) (same).

22. See generally PHYSICIAN'S DESK REFERENCE 2071 (B. Huff 42d ed. 1989) (stating that antipsychotic drugs may cause dangerous effects); *California's Programs*, *supra* note 19 (same); Fentiman, *supra* note 19 (same); *Madness and Medicine*, *supra* note 21 (same).

23. See Brief For American Psychological Association, *supra* note 14, at 6 (discussing side effects of antipsychotic drugs). In a brief for *United States v. Charters*, 863 F.2d 302 (4th Cir. 1988), the American Psychological Association noted that physicians characterize antipsychotic drug treatment as a high risk treatment because the side effects associated with antipsychotic drugs occur in a significant number of patients. *Id.*

24. See J. DAVIS & J. COLE, *supra* note 14, at 449-50, 460-63 (discussing akinesia, one side effect of antipsychotic drugs that impairs patient's motor abilities); PHYSICIAN'S DESK

causes lethargy, drooling, lessening of spontaneity, apathy, and a disinclination to initiate activity.²⁵ Patients suffering from akinesia often have rigid facial expressions.²⁶ Another side effect that impairs motor activity is called akathisia.²⁷ Akathisia causes a pronounced inner restlessness or jumpiness.²⁸ Patients experiencing akathisia often will not be able to sit still and may be overcome by panic.²⁹ Furthermore, some patients suffering from akathisia will experience an increase in psychotic symptoms.³⁰

A third and more serious side effect that patients taking antipsychotic drugs frequently experience is tardive dyskinesia (TD).³¹ TD is characterized by rhythmic and involuntary muscular movements that often occur around the mouth.³² The muscular contractions also may affect the limbs and the trunk and may be so severe that the movements permanently cripple the patient.³³ TD also may cause involuntary movement of the fingers, hands, legs, and pelvic areas, hindering the patient's ability to maintain balance.³⁴ In the more advanced stages, TD can interfere with all of a patient's motor

REFERENCE 2071 (B. Huff 42d ed. 1989) (same); *Madness and Medicine*, *supra* note 21, at 530-31 (same).

25. See *California's Programs*, *supra* note 19, at 12 (discussing akinesia, one side effect of antipsychotic drugs that causes patient to feel apathetic).

26. See Fentiman, *supra* note 19, at 1129 (discussing akinesia, one side effect of antipsychotic drugs that causes patient to feel lethargic); *Madness and Medicine*, *supra* note 21, at 531 (same).

27. See *California's Programs*, *supra* note 19, at 12 (describing akathisia, one side effect of antipsychotic drugs that causes patient to feel agitated); Brief for American Psychological Association, *supra* note 14, at 460-61 (same).

28. See *California's Programs*, *supra* note 19, at 14 (stating that akathisia, one side effect of antipsychotic drugs that causes patient to feel restless); J. DAVIS & J. COLE, *supra* note 14, at 460 (same); Note, *Antipsychotic Drugs and Fitness to Stand Trial: The Right of the Unfit Accused to Refuse Treatment*, 52 U. CHI. L. REV. 773, 785-86 (1985) (hereinafter *Antipsychotic Drugs*) (same). Akathisia is a frequent side effect of antipsychotics that causes the patient to become extremely agitated and hinders the patient's ability to concentrate. *Id.*

29. See *California's Programs*, *supra* note 19, at 14 (stating that akathisia, one side effect of antipsychotic drugs may cause patient to be overcome with panic).

30. See *id.* (noting that akathisia, one side effect of antipsychotic drugs may cause symptoms of mental illness to worsen).

31. See J. DAVIS & J. COLE, *supra* note 14, at 462-63 (discussing tardive dyskinesia, one side effect resulting from antipsychotic drug use); PHYSICIAN'S DESK REFERENCE 2071 (B. Huff. 42d ed. 1989) (same).

32. See Brief for American Psychological Association, *supra* note 14 at 462 (describing characteristics of tardive dyskinesia, one side effect associated with antipsychotic drugs use); J. DAVIS & J. COLE, *supra* note 14, at 462 (same); PHYSICIAN'S DESK REFERENCE 1071 (B. Huff. 42d ed. 1989) (same).

33. See Brief for American Psychological Association, *supra* note 14 at 11 (stating that tardive dyskinesia, one side effect of antipsychotic drugs, can cripple patient); Note, *Judicial Schizophrenia: An Involuntarily Confined Mental Patient's Right to Refuse Antipsychotic Drugs*, 51 U.M.K.C. L. REV. at 74, 79 (1982) (hereinafter *Judicial Schizophrenia*) (same); *Madness and Medicine*, *supra* note 21, at 532 (same).

34. See *Madness and Medicine*, *supra* note 21, at 532 (stating that tardive dyskinesia, one side effect of antipsychotic drugs, may cause patient to lose sense of balance). Tardive dyskinesia may impair a patient's balance, making it difficult for the patient to walk normally. *Id.*

activity, thus affecting the patient's speaking ability, swallowing and breathing.³⁵ Studies have estimated that approximately one-half of all chronically ill schizophrenics suffer from TD.³⁶ Furthermore, TD can afflict patients who have been taking antipsychotics for only a short period of time.³⁷ There is no known cure for TD.³⁸

Another serious side effect associated with antipsychotic drug treatment is impaired mental functioning.³⁹ Studies have noted that antipsychotic drugs can decrease a patient's abilities to learn, to remember, and to reason.⁴⁰ Other effects of antipsychotic drugs include sedation, dry mouth and throat, stuffy nose, blurred vision, urinary retention, constipation, and light-headedness.⁴¹ Furthermore, health practitioners believe that antipsychotic drug treatment is responsible for several deaths.⁴²

Numerous courts have recognized that the severe side effects associated with antipsychotic drugs heighten an individual's privacy interest.⁴³ Many

35. See Brief for American Psychological Association, *supra* note 14 at 11 (discussing more severe aspects of tardive dyskinesia, one side effect associated with antipsychotic drugs). In an amicus curiae brief for United States v. Charters, 863 F.2d 302 (4th Cir. 1988), the American Psychological Association noted that clinical studies have reported that tardive dyskinesia may impair a patient's abilities to drink, eat, read, and drive. *Id.*

36. See *Madness and Medicine*, *supra* note 21, at 533 (noting that studies show that tardive dyskinesia affects one-half of all chronically ill schizophrenics); Brief for American Psychological Association, *supra* note 14, at 12-15 (estimating that tardive dyskinesia affects from 20%-60% of all patients treated with antipsychotic drugs).

37. See *Madness and Medicine*, *supra* note 21, at 532 (stating that tardive dyskinesia, one side effect of antipsychotic drugs, can affect patient shortly after treatment begins). *But see* J. DAVIS & J. COLE, *supra* note 14, at 462 (suggesting that tardive dyskinesia only affects patients who are treated with antipsychotics for long period of time).

38. See Brief for American Psychological Association, *supra* note 14, at 15 (stating that there is no known cure for tardive dyskinesia, one side effect of antipsychotic drugs); *Judicial Schizophrenia*, *supra* note 33, at 79 (same); Note, *Protecting the Inmate's Right to Refuse Antipsychotic Drugs*, 64 WASH. L. REV. 459, 463 (1989) (same).

39. See Brief for American Psychological Association, *supra* note 14 at 16-17 (stating that side effects of antipsychotic drugs may impair patient's ability to relate with others). In an amicus curiae brief for United States v. Charters, 863 F.2d 302 (4th Cir. 1988), the American Psychological Association stated that antipsychotic drugs can impair the patient's mental abilities and can make the patient passive and disinclined to interact with people. *Id.* at 17; *see also* Fentiman, *supra* note 19, at 1132-33 (discussing effect of antipsychotic drugs on patient's ability to communication with people); *Antipsychotic Drugs*, *supra* note 28, at 782-86 (same).

40. See Brief for American Psychological Association, *supra* note 14 at 16-17 (stating that antipsychotics can impair patient's memory, reasoning ability, and ability to function on normal basis); Fentiman, *supra* note 19, at 1132 (same); *Madness and Medicine*, *supra* note 21, at 512, 534 (same).

41. See J. DAVIS & J. COLE, *supra* note 14, at 459-60 (discussing side effects of antipsychotic drugs); Gaughan & LaRue, *The Right of a Mental Patient to Refuse Antipsychotic Drugs in an Institution*, 4 LAW & PSYCHOLOGY REV. 43 at 51-52 (1978) (same).

42. See *Madness and Medicine*, *supra* note 21, at 536-39 (discussing fatal side effects caused by antipsychotic drugs).

43. See generally *Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984) (noting that severe side effects associated with antipsychotic drugs heighten individual's privacy interest); *Rennie v.*

courts considering the issue of forcible medication have concluded that institutionalized patients have a constitutional right to refuse treatment with antipsychotic drugs.⁴⁴ For example, in *Rogers v. Okin*⁴⁵ the United States Court of Appeals for the First Circuit considered whether the Commonwealth of Massachusetts could administer antipsychotic drugs to an institutionalized patient without the patient's consent.⁴⁶ In *Rogers* patients who were institutionalized at a Commonwealth mental hospital brought suit in federal district court seeking to enjoin hospital staff from forcibly medicating the patients.⁴⁷ The patients argued that forcible medication violated the patients' constitutional rights to liberty and privacy.⁴⁸ The defendants, hospital staff members, argued that patients who are committed at mental institution have no right to refuse medication because committed patients are incompetent to make treatment decisions.⁴⁹ The district court granted the patients injunctive relief finding that, if the Commonwealth forcibly medicated a patient, the Commonwealth would violate the patient's liberty and privacy rights under the first and fourteenth amendments to the United States Constitution.⁵⁰ The defendants appealed the district court's decision to the United States Court of Appeals for the First Circuit.⁵¹

On appeal, the First Circuit rejected the district court's conclusion that forcible medication violated the patients' rights under the United States Constitution.⁵² In so holding, the First Circuit reasoned that, because Massachusetts law creates a substantive liberty interest that gives institutionalized patients the right to refuse antipsychotic drugs, the district court unnecessarily considered the constitutional issue.⁵³ The *Rogers* court observed

Klein, 720 F.2d 266 (3d Cir. 1983) (same); *United States v. Charters*, 829 F.2d 479, 493 (4th Cir. 1979) (same), *rev'd on other grounds*, 863 F.2d 302 (4th Cir. 1988) *cert. denied*, 110 S. Ct. 1317 (1990); *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984) (same); *People v. Medina*, 705 F.2d 961 (Colo. 1985) (same); *In re Guardianship of Roe*, 383 Mass. 415, 421 N.E.2d 40 (1981) (same).

44. *See Rogers v. Okin*, 738 F.2d 1, 6 (1st Cir. 1984) (holding that institutionalized mental patient has constitutionally protected liberty right to refuse antipsychotic drugs); *Rennie v. Klein*, 720 F.2d 266, 270 (3d Cir. 1983) (same); *People v. Medina*, 705 P.2d 961, 969-71 (Colo. 1985) (same); *In re Guardianship of Roe*, 383 Mass. 415, 421 N.E.2d 40, 51-53 (1981) (same).

45. 738 F.2d 1 (1st Cir. 1984).

46. *Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984).

47. *Id.* at 2.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 3.

53. *See id.* at 6 (finding that Massachusetts law grants committed mental patients a substantive right to refuse unwanted medication) (quoting MASS. GEN. LAWS ANN. ch. 123 § 25 (West 1982)). The *Rogers* court noted that the liberty interests of committed patients, created by Massachusetts law are protected under the fourteenth amendment due process clause, *e.g.*, *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (holding that state law may create substantive liberty interests that due process clause of fourteenth amendment guarantees from state infringement); *Greenholz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979) (same); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (same).

that Massachusetts law pertaining to institutionalized patients mandates that hospital staff follow certain procedures prior to medicating a committed patient.⁵⁴ For instance, Massachusetts law requires hospital officials to allow a patient to make treatment decisions unless a court determines that the patient is incompetent to make treatment decisions.⁵⁵ Additionally, Massachusetts law mandates that, if a patient is incompetent to make medical decisions, a court must make a substitute judgment for the patient.⁵⁶ In *Rogers* the First Circuit observed that Massachusetts law requires that a court consider six factors in making a substitute judgment for the patient including the patient's expressed preference regarding treatment; the patient's religious beliefs; the impact of the treatment decision on the patient's family; the probability of adverse side effects; and the prognosis with treatment; and the prognosis without treatment.⁵⁷ After discussing the substantive liberty interests created by Massachusetts law, the *Rogers* court noted that the fourteenth amendment due process clause protects state-created liberty interests.⁵⁸ In concluding that the process required under Massachusetts law exceeds the fourteenth amendment's requirements, the First Circuit remanded the case to the district court to terminate the injunction governing the forcibly medication of committed mental patients.⁵⁹

Not only have courts recognized that involuntarily committed patients have a right to refuse antipsychotic drugs, but in *Bee v. Greaves*⁶⁰ the United States Court of Appeals for the Tenth Circuit held that a defendant in pretrial custody also has the right to refuse antipsychotic drugs.⁶¹ In *Bee* the Tenth Circuit considered whether the State of Utah constitutionally

54. See *Rogers v. Okin*, 738 F.2d 1, 6-7 (1st Cir. 1984) (discussing procedures provided by Massachusetts law that hospital must follow prior to medicating committed mental patient) (quoting MASS. GEN. LAWS ANN. ch. 123 § 21-25 (West 1982)); *Rogers v. Commissioner*, 458 N.E.2d 308, 313016 (Mass. 1983) (holding that court must determine whether patient is competent to make treatment decisions if hospital seeks to medicate patient without patient's consent).

55. See *Rogers*, 738 F.2d at 6-7 (observing that Massachusetts law allows committed patient to make treatment decisions unless court finds patient incompetent to make treatment decisions) (quoting MASS. GEN. LAWS ANN. ch. 123 § 21-25 (West 1982)); *In re Guardianship of Roe*, 421 N.E.2d 40, 56-59 (Mass. 1981) (holding that court must determine that patient is incompetent to make treatment decisions to allow state to medicate patient without patient's consent).

56. See *Rogers*, 738 F.2d at 6-7 (observing that court's substitute judgment determination should approximate as much as possible subjective wants and needs of patient) (quoting *Rogers v. Commissioner*, 458 N.E.2d 308, 318 (Mass. 1983)).

57. See *Rogers*, 738 F.2d at 6 (enumerating six factors to be considered by court in making substitute judgment determination) (quoting *In re Guardianship of Roe*, 421 N.E.2d 40, 56-59 (Mass. 1981)).

58. See *Rogers*, 738 F.2d at 8-9 (finding that MASS. GEN. LAWS ANN. ch. 123 § 21-25 (West 1982) provides greater protection of patient's state-created liberty interests than fourteenth amendment due process clause requires).

59. *Rogers v. Okin*, 738 F.2d 1, 8-9 (1st Cir. 1984).

60. 744 F.2d 1387 (10th Cir. 1984).

61. *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984).

could medicate Bee with antipsychotic drugs without Bee's consent.⁶² The *Bee* court noted that the State detained Bee prior to trial and forcibly medicated Bee with antipsychotic drugs after learning that Bee was incompetent to stand trial.⁶³ Bee brought suit under 42 U.S.C. section 1983 against State officials in federal district court claiming that the forcible administration of antipsychotic drugs violated Bee's fourteenth amendment due process rights and the right to privacy under the United States Constitution.⁶⁴ The State argued that the State should be able to medicate Bee without Bee's consent for three reasons: the State has a right and duty to treat a mentally ill detainee; the State has a legitimate interest in maintaining the defendant's competence to stand trial; and the State has a duty to prevent a violent defendant from injuring himself or others.⁶⁵ The district court granted summary judgment for the State on the grounds that pretrial detainees do not have a constitutional right to refuse medication.⁶⁶ Bee appealed the district court's decision to the United States Court of Appeals for the Tenth Circuit.⁶⁷

On appeal, the Tenth Circuit in *Bee* determined that forcible medication implicates the right to privacy, the substantive liberty interests of the fourteenth amendment, and the first amendment right to think and communicate.⁶⁸ Moreover, the Tenth Circuit observed that the many dangerous side effects associated with antipsychotic drug use heighten a defendant's interest in avoiding antipsychotic drug treatment.⁶⁹ The *Bee* court, therefore, required that the State of Utah show a compelling interest to medicate Bee without Bee's consent.⁷⁰

In considering the State's first reason for medicating Bee, the Tenth Circuit observed that a state has a duty to provide adequate medical assistance to a defendant in custody so that the conditions of detention do

62. *Id.* at 1391-96.

63. *Id.* at 1389-90.

64. *Id.*

65. *Id.* at 1394.

66. *Id.* at 1389.

67. *Id.*

68. *Id.* at 1391-94. In *Bee* the Tenth Circuit reviewed the United States Supreme Court decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982), to determine that forcible medication with antipsychotic drugs implicates the fourteenth amendment liberty interest. In *Youngberg* the Supreme Court determined that the fourteenth amendment liberty includes a right to freedom from bodily restraint and that the right survives both civil and criminal incarceration. Accordingly, the *Bee* court determined that the fourteenth amendment liberty interest also includes the right to be free from the mental restraint imposed by antipsychotic drugs. *Id.* Additionally, the Tenth Circuit determined that forcible treatment with antipsychotic drugs implicates the first amendment right to think and communicate because studies have shown that antipsychotic drugs interfere with a person's mental and verbal processes. *Id.*

69. *Bee*, 744 F.2d at 1392-93.

70. *Id.* at 1394-95. The *Bee* court reviewed the United States Supreme Court decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982), to determine that a state may overcome an individual's fundamental liberty interest by showing a compelling interest. *Id.*

not amount to unconstitutional punishment under the due process clause.⁷¹ The *Bee* court, however, determined that the state cannot use the duty to provide necessary medical assistance to justify medicating an unconsenting defendant unless the defendant is incompetent to make medical decisions.⁷² In *Bee* the court noted that, because a court had not adjudicated Bee incompetent to make medical decisions, the State did not have a duty to provide medical assistance to the defendant.⁷³ The *Bee* court next considered the State's desire to maintain Bee's competence for trial.⁷⁴ Finding that the decision to take antipsychotic drugs is a medical and personal decision, the *Bee* court held that the court would not consider factors that did not relate to the well-being of Bee, such as the State's interest in maintaining Bee's competence for trial.⁷⁵ The *Bee* court, therefore, determined that the State's interest in maintaining Bee's competence to stand trial was not a compelling reason to forcibly medicate Bee.⁷⁶ In considering the State's third reason for medicating Bee, the Tenth Circuit determined that a state's interest in protecting a defendant from hurting himself or others is legitimate, but can justify forcible medication only if the state has no less drastic means available.⁷⁷ The *Bee* court thus concluded that the State's interest in medicating Bee was not compelling unless an emergency existed at the time that the State medicated Bee and no other less dangerous alternatives were available to the State.⁷⁸ Accordingly, the *Bee* court reversed and remanded the case for the district court to determine whether an emergency existed when the State medicated Bee.⁷⁹

Several United States Supreme Court cases that discuss the rights of defendants in pretrial custody support the *Bee* court's decision.⁸⁰ The

71. *Bee v. Greaves*, 744 F.2d 1387, 1895 (10th Cir. 1984). In *Bee* the Tenth Circuit observed that under *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), the due process clause of the fourteenth amendment requires that a state not punish a defendant until after conviction. *Id.*

72. *Bee*, 744 F.2d at 1395. In *Bee* the Tenth Circuit determined that without a compelling state interest, forcible medication might amount to an unconstitutional punishment of a defendant. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* In *Bee* the Tenth Circuit noted that when a compelling state interest conflicts with an individual's fundamental right, the state's chosen means should be carefully drafted to limit the infringement of the individual's rights. *Id.*; see, e.g., *Griswold v. Connecticut* 381 U.S. 479, 485 (1965) (determining that means chosen by government to effect compelling state interest should be narrowly tailored; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (same).

78. *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984).

79. *Id.* at 1396-97.

80. See *Bell v. Wolfish*, 441 U.S. 520 (1979) (finding that defendants in custody have diminished expectation of privacy); *Winston v. Lee*, 470 U.S. 753, 756-57 (1985) (determining that defendants in custody have right to privacy regarding unwanted medical procedures); *Washington v. Harper*, 58 U.S.L.W. 4249, 4252 (1990) (finding that convicted prisoners have fourteenth amendment due process interest in avoiding unwanted administration of antipsychotic drugs).

Supreme Court first considered the rights of a defendant in pretrial custody in *Bell v. Wolfish*.⁸¹ In *Bell* the Supreme Court considered whether the conditions of pretrial detention in New York implicated the eighth amendment prohibition against cruel and unusual punishment.⁸² The *Bell* Court observed that the State of New York held Bell and other defendants awaiting trial in a corrections facility and subjected the defendants to the same restrictions placed on convicted prisoners.⁸³ For example, the State searched the defendants' rooms, the defendants' persons, and placed restrictions on mail the defendants could receive.⁸⁴ The defendants in *Bell* brought suit in federal district court alleging that State restrictions placed on defendants in pretrial custody violated the defendants' eighth amendment right against cruel and unusual punishment.⁸⁵ In *Bell* the district court determined that the court could uphold the State's restrictions under the eighth amendment only if the State could show a compelling necessity for the restrictions.⁸⁶ Consequently, the district court in *Bell* enjoined many of the State's restrictions, finding that no compelling necessity existed for the restrictions.⁸⁷ The State appealed the district court decision to the United States Court of Appeals for the Second Circuit.⁸⁸ In *Bell* the Second Circuit upheld the district court's ruling but, rejected the district court's reasoning, finding that the eighth amendment prohibition against cruel and unusual punishment does not apply to defendants in pretrial custody.⁸⁹ Accordingly, the Second Circuit remanded the case for the district court to consider whether the conditions of custody were constitutionally adequate and not whether the conditions amounted to cruel and unusual punishment under the eighth amendment.⁹⁰ The State appealed the Second Circuit's decision in *Bell* to the United States Supreme Court.⁹¹

On appeal, the Supreme Court in *Bell* observed that under the fourteenth amendment due process clause a state cannot punish a defendant until after

81. 441 U.S. 520 (1979).

82. *Bell v. Wolfish*, 441 U.S. 520 (1979).

83. *Id.* at 527.

84. *Id.*

85. *Id.* at 523.

86. *Id.* In *Bell* the district court observed that a defendant is innocent until proven guilty and, therefore, if a state holds a defendant in custody prior to trial, the restrictions placed on a defendant must be related to the purpose of assuring the defendant's presence at trial. *Id.* Moreover, the district court determined that any restrictions unrelated to the need to assure a defendant's presence at trial will be upheld only if a state has a compelling reason for employing the restrictions. *Id.*

87. *Id.* at 528.

88. *Id.* at 529. The United States Court of Appeals for the Second Circuit in *Bell* upheld the district court's rulings, finding that the parameters for judicial intervention into a state's restrictions on pretrial detainees are greater than in cases involving convicted prisoners. *Id.*

89. *Id.* In *Bell* the Second Circuit determined that pretrial detainees retain all of the rights held by unincarcerated individuals and, therefore, that it is not sufficient for restrictions on pretrial detainees to comport with the eighth amendment's standards of decency. *Id.*

90. *Id.*

91. *Id.*

trial and conviction.⁹² The Supreme Court, therefore, determined that the proper test for assessing the conditions of pretrial detention is whether the conditions amount to an unconstitutional punishment of a defendant.⁹³ In considering whether the conditions of the New York State prison amounted to a punishment of Bell and the other detainees, the *Bell* Court observed that a state has a legitimate interest in maintaining security at the institution where the state is holding a defendant.⁹⁴ The Supreme Court, therefore, concluded that as long as the restrictions a state places on a defendant reasonably are related to maintaining security and are not imposed for purposes of punishment, the restrictions do not amount to unconstitutional punishment.⁹⁵ Moreover, the *Bell* Court noted that, although restrictions may invade a defendant's privacy in the defendant's room and person, as long as the restrictions reasonably are related to a state's interest in maintaining security, a court should uphold the state's restrictions.⁹⁶ Accordingly, the Supreme Court in *Bell* reversed the Second Circuit's decision and remanded the case for the district court to determine whether the State's restrictions reasonably were related to maintaining security at the institution.⁹⁷

Although *Bell* primarily relates to the due process prohibition of punishment prior to conviction, an issue that does not arise often with regard to forcible medication,⁹⁸ *Bell* also has implications for the right to privacy of a defendant in custody.⁹⁹ The Supreme Court in *Bell* determined that a defendant in custody has a diminished privacy interest that does not prohibit a state from searching a defendant's person and cell because the state has

92. *Id.* at 528-29. In *Bell* the Supreme Court determined that, under the fifth and fourteenth amendment due process clauses, a state may not punish a defendant until after trial and conviction. *Id.*; see also *Wong Wing v. United States*, 163 U.S. 238, 237 (1896) (holding that a state may not subject a defendant to hard labor until after trial and conviction).

93. *Bell v. Wolfish*, 441 U.S. 520, 528-29 (1970).

94. *Id.* at 540. The *Bell* Court observed that a court ordinarily should defer to the judgment of corrections officials in cases involving a challenge to conditions of imprisonment because corrections officials have a lot of experience in handling prisons. *Id.*

95. *Id.*; see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (holding that if defendant does not show state intent to punish, court should consider whether restriction at issue is related to non punitive, legitimate governmental objective).

96. *Bell*, 441 U.S. at 556-57. In *Bell* the Supreme court found that if a search is related to a legitimate governmental interest, as long as the search is not unreasonable under the fourth amendment, the Court will uphold the search. *Id.*; see also *Carroll v. United States*, 267 U.S. 132, 147 (1925) (holding that only unreasonable searches are prohibited under the fourth amendment). The *Bell* Court also noted that to determine whether a search is reasonable a court must balance a state's need for the search against an individual's interest in privacy. *Bell*, 441 U.S. at 559.

97. *Id.* at 563.

98. *Id.* at 528-29. A state's main reason for forcibly medicating a defendant is not to punish a defendant but rather, to restore the defendant's competence to stand trial. See, e.g., *Bee v. Greaves*, 744 F.2d 1387, 1894 (10th Cir. 1984) (discussing state's reasons for medicating defendant such as to restore competence and to protect defendant's health).

99. See *Bell v. Wolfish*, 441 U.S. 520, 556-67 (1979) (finding that defendant retains diminished right to privacy while in state custody).

a legitimate interest in searching these areas for security purposes.¹⁰⁰ A state, however, generally administers antipsychotic drugs to a defendant for security purposes only in an emergency, such as when the defendant poses a threat to himself or others.¹⁰¹ If a state administers antipsychotic drugs to a defendant for reasons other than security, *Bell* indicates that a defendant may have a protected privacy right to refuse the medication.¹⁰²

The Supreme Court's decision in *Winston v. Lee*¹⁰³ illustrates the interest that a state must show to overcome a defendant's privacy right with regard to an intrusive medical procedure.¹⁰⁴ In *Winston* the Commonwealth of Virginia arrested the defendant in connection with an attempted robbery.¹⁰⁵ The alleged victim in *Winston* shot the defendant during the attempted robbery.¹⁰⁶ Subsequently, the Commonwealth sought to remove the bullet surgically from the defendant for evidentiary purposes, but the defendant resisted.¹⁰⁷ The Commonwealth petitioned the trial court for permission to compel surgical removal of the bullet from the defendant.¹⁰⁸ The proposed surgery in *Winston* involved minimal risk and, therefore, the trial court granted the Commonwealth's motion to compel surgery.¹⁰⁹ The defendant petitioned the federal district court for a preliminary injunction, alleging that the proposed surgery violated the defendant's fourth amendment right to be secure in his person.¹¹⁰ The district court initially refused to grant an injunction, finding that because the proposed surgery involved minimal risk, the surgery was not overly intrusive.¹¹¹ On reconsideration, however, after finding that the proposed surgery involved more risk than originally was determined, the district court granted the defendant an injunction.¹¹² The Commonwealth appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.¹¹³ Finding that the proposed

100. *Id.*

101. *See Bee v. Greaves*, 744 F.2d 1874, 1894 (10th Cir. 1984) (stating that state forcibly can medicate defendant in emergency if no less drastic alternatives are available to state); *Washington v. Harper*, 58 U.S.L.W. 4149, 4256 (1990) (holding that state forcibly can medicate convicted prisoner, incarcerated in psychiatric unit of prison, with antipsychotic drugs without a judicial hearing if state determines in administrative hearing that antipsychotic drug treatment is necessary for security purposes or for prisoner's mental well-being).

102. *See Bell*, 441 U.S. at 556-67 (finding that state can impose restrictions on pretrial detainee's that invade detainee's privacy if restrictions reasonably are related to security purposes).

103. 470 U.S. 753 (1985).

104. *See Winston v. Lee*, 470 U.S. 753, 765-67 (1985) (determining that state must show compelling interest to compel surgical removal of bullet).

105. *Id.*

106. *Id.* at 758.

107. *Id.* at 755-56.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

surgery was risky and overly intrusive, and that the Commonwealth lacked a compelling reason for requesting the surgery, the Fourth Circuit affirmed the district court's decision.¹¹⁴ The Commonwealth appealed the Fourth Circuit decision to the United States Supreme Court.¹¹⁵

On appeal, the Supreme Court affirmed the Fourth Circuit's decision.¹¹⁶ The Supreme Court concluded that, because the proposed surgery in *Winston* would be risky and potentially harmful to the defendant, the Court would require the Commonwealth to show a compelling interest to overcome the defendant's fourth amendment right to privacy.¹¹⁷ The *Winston* Court determined that the Commonwealth lacked a compelling reason for the proposed surgery because the Commonwealth did not need the bullet to successfully try the defendant.¹¹⁸ The Supreme Court in *Winston*, therefore, held that the Commonwealth could not compel the surgery.¹¹⁹

Although *Winston* involved an overly intrusive surgical procedure, *Winston* also has implications for a defendant's right to refuse medication.¹²⁰ *Winston* suggests that whenever a state seeks to impose a dangerous medical procedure on a defendant, the defendant's right to privacy is implicated.¹²¹ As the dangerous side effects associated with antipsychotic drug treatment indicate, forcible medication is invasive and involves significant risks to a defendant's health and well-being, much like the proposed surgery in *Winston*.¹²² *Winston*, therefore, indicates that courts should require states to show a compelling reason to medicate a defendant without the defendant's consent.¹²³

114. *Id.*

115. *Id.*

116. *Id.* at 767.

117. *Id.* at 765-67. In *Winston* the Supreme Court applied the *Schmerber v. California*, 384 U.S. 757 (1966), test to determine whether the proposed surgery was reasonable under the fourth amendment. *Id.* The *Schmerber* test requires that a court consider the reasonableness of a search on a case-by-case basis by balancing an individual's interest in privacy and security against a state's interest in conducting the procedure. *Id.* In *Winston* the Supreme Court determined that the proposed surgery was highly intrusive because surgical removal of the bullet involved general anesthesia and deep incisions into the defendant's shoulder. *Id.*

118. *See id.* at 765-67 (holding that proposed surgical removal of bullet implicates defendant's right to privacy).

119. *See id.* (finding that surgical removal of bullet was risky and overly intrusive); *supra* notes 22-42 and accompanying text (discussing side effects of antipsychotics).

120. *See Winston v. Lee*, 470 U.S. 753, 765-67 (1985) (finding that proposed surgical procedure implicates defendant's right to privacy).

121. *See id.* (holding that state must show compelling reason to overcome defendant's fourth amendment right to privacy); *Bee v. Greaves*, 744 F.2d 1387, 1894-95 (10th Cir. 1984) (holding that state must show compelling reason forcibly to medicate defendant).

122. *See Bee v. Greaves*, 744 F.2d 1387, 1394 (10th Cir. 1985) (discussing state's interest in security and in health and welfare of defendant as justification for forcibly medicating defendant); *United States v. Charters*, 829 F.2d 479, 492-94 (4th Cir. 1979) (same), *rev'd on other grounds*, 863 F.2d 302 (4th Cir. 1988), *cert. denied*, 110 S.Ct. 1317 (1990).

123. *See Winston v. Lee*, 470 U.S. 753, 762 (1985) (discussing state's interest in trying defendant); *Bell v. Wolfish*, 441 U.S. 520, 536-40 (1979) (discussing state's interest in holding defendant prior to trial); *State v. Law*, 270 S.C. 664, 674, 244 S.E.2d 302, 307 (1978) (holding that state's interest in trying defendant is compelling); *infra* note 205 (discussing *State v. Law*).

When deciding if a defendant can refuse antipsychotic drug treatment, courts weigh the defendant's interest in refusing the medication against the state's interest in medicating the defendant.¹²⁴ Courts recognize that states have a strong interest in bringing a defendant to trial because states are responsible for the safety of the public.¹²⁵ If a defendant is incompetent, however, the fourteenth amendment due process clause of the United States Constitution bars state prosecution of the defendant.¹²⁶ Because antipsychotic drugs potentially may restore a defendant's competence to stand trial, a state has a strong interest in medicating a defendant to be able to try the defendant.¹²⁷ In weighing the opposing interests with regard to forcible medication, a court will consider the benefits and the risks associated with antipsychotic drugs as well as the state's interest in being able to try the defendant.¹²⁸ In *Bee v. Greaves*, however, the Tenth Circuit determined that

124. See *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (discussing fourteenth amendment right to fair trial with regard to defendant's competence to stand trial); *Pate v. Robinson*, 383 U.S. 375, 376-77 (1966) (same); *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) (same); *infra* notes 140-61 and accompanying text (same).

125. See *Bee*, 744 F.2d at 1395 (noting that state's interest in trying defendant conflicts with defendant's interest in refusing medication); *State v. Hayes*, 389 A.2d 1379, 1381-82 (N.H. 1978) (finding that state has interest in medicating defendant to restore defendant's competence). In *State v. Hayes* the New Hampshire Supreme Court considered whether a defendant may waive the right to be competent at trial. *Id.* at 1380. In *Hayes* the State of New Hampshire indicted the defendant for murder. *Id.* The defendant voluntarily had taken antipsychotic medication prior to allegedly committing the crime and while he was in pretrial custody to alleviate the psychotic symptoms that the defendant was experiencing. *Id.* The defendant moved that the trial court allow the defendant to stop taking the medication seven days prior to trial so that the jury could see the defendant in an unmedicated state. *Id.* In *Hayes* the trial court initially granted the defendant's motion, but upon reconsideration, the trial court determined that the defendant would be incompetent to stand trial if the defendant stopped taking the medication and, therefore, the trial court reversed the previous ruling. *Id.* The defendant appealed the trial court ruling to the New Hampshire Supreme Court, alleging that the defendant's right to a fair trial prohibited the trial court from requiring the defendant to take medication during the trial. *Id.*

In deciding *Hayes* the New Hampshire Supreme Court determined that if a defendant was not taking medication at the time the defendant committed the alleged crime, the defendant would not have a right to be tried in an unmedicated condition. *Id.* at 1381-82. Consequently, a court could compel the defendant to take antipsychotic medication prior to and during the trial. *Id.* The *Hayes* court thus found that a defendant who was not taking medication at the time of the alleged crime has a right to appear in the same unmedicated condition before the jury. *Id.* The court in *Hayes*, however, held that a competent defendant who is taking antipsychotic medication may decide to stop taking the medication prior to trial. *Id.* at 1382. The *Hayes* court reasoned that if a defendant voluntarily refuses to continue taking antipsychotic drugs, the court will consider the defendant as having waived his right to be tried while competent. *Id.* Accordingly, the *Hayes* court remanded the case for the lower court to try the defendant. *Id.*

126. See *Bee v. Greaves*, 744 F.2d 1387, 1395-96 (10th Cir. 1984) (noting that court will consider benefits and risks when deciding whether court should permit state to medicate defendant).

127. See *id.* (holding that court may not consider state's interest in trying defendant when deciding whether court should permit state to medicate defendant).

128. See *id.* (holding that state forcibly can medicate defendant only if emergency exists and no less intrusive alternative is available).

a court may not consider a state's interest in trying a defendant when deciding whether to allow forcible medication.¹²⁹ Under *Bee* a state would be able forcibly to medicate a defendant only if the defendant is incompetent to make medical decisions or in an emergency if no other alternative measures are available to a state.¹³⁰ Consequently, courts following *Bee* permissibly can consider only the risks and benefits of antipsychotic drug treatment when determining whether a state should be able to medicate an unconsenting defendant.¹³¹

Even if a court does not follow *Bee* and considers a state's interest in trying a defendant when deciding whether or not a state can medicate a defendant, the court probably will determine that the state's interest is not compelling given the alternatives to medicating the defendant that are available to the state.¹³² If a state does not get the opportunity to try a defendant, in most cases, the state will be able to commit the defendant under civil commitment procedures.¹³³ The possibility of civil commitment partially fulfills the state's interest in trying the defendant because civil commitment of a defendant protects the public from harm.¹³⁴ If a state

129. *See Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984) (finding that court will not consider state's interest in trying defendant in determining if state can forcibly medicate defendant).

130. *Id.*

131. *See id.* at 1396 (holding that state may medicate defendant only if emergency exists and state has no less drastic alternative measures available).

132. *See infra* note 205 (discussing *State v. Law*). Compare *Bee*, 744 F.2d at 1395 (finding that state interest in restoring defendant's competence is not compelling) with *State v. Law*, 270 S.C. 664, 674, 244 S.E. 302, 307 (1978) (determining that state has strong interest in restoring defendant's competence).

133. *See* 18 U.S.C. § 4247(i)(B) (West 1985) (giving United States Attorney General authority to apply for civil commitment under relevant state law for defendant committed to custody of Attorney General). In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Supreme Court held that a state cannot hold a defendant indefinitely if no chance exists that the defendant will regain competency. *Id.* at 730. The Court reasoned that if a state holds an incompetent defendant indefinitely, but does not accord the defendant the usual procedures granted to individuals who are civilly committed, the state denies the defendant due process and equal protection of the law under the fourteenth amendment. *Id.* at 730. Accordingly, the *Jackson* Court held that the state either must release the defendant or institute civil commitment procedures against the defendant if it is unlikely that the defendant will regain competence in the near future. *Id.* at 738.

As a result of the Supreme Court's holding in *Jackson*, many states have enacted provisions similar to 18 U.S.C. § 4247(i)(B) (West 1985). *See, e.g.,* CAL. PENAL CODE § 1370(a)(2) (West 1982) (stating that if no substantial likelihood exists that defendant will regain competence, state can apply for civil commitment); N.C. GEN. STAT. § 15a-1003 (1983) (giving court power to hold hearing to determine if court should commit defendant to mental institution if defendant is unlikely to regain competence in near future); N.J. STAT. ANN. § 2C:4-6(c)-(e) (West 1982) (stating that court has power to institute civil commitment procedures if no probability exists that defendant will become competent within reasonable period of time); VA. CODE ANN. § 19.2-169.3 (Supp. 1986) (giving court power to institute civil commitment procedures if defendant is likely to remain incompetent for foreseeable future).

134. *See generally* *United States v. Hensley*, 469 U.S. 221 (1985) (state has strong interest in trying criminals); *State v. Jojola*, 553 P.2d 1296 (N.M. Ct. App. 1976) (same); *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978) (same).

civilly commits a defendant, the court generally dismisses the charges against the defendant without prejudice.¹³⁵ Consequently, once the hospital releases the defendant, the state may reinstitute proceedings against the defendant.¹³⁶ It is unnecessary, therefore, for a state to forcibly medicate a defendant to preserve the state's opportunity to try the defendant.¹³⁷ Accordingly, courts weighing a state's interest in trying a defendant against a defendant's right to privacy probably will determine that the state's interest is not sufficiently compelling to override the defendant's rights.¹³⁸

If a defendant is under the influence of antipsychotic drugs, the consideration becomes whether the state should be able to try the defendant.¹³⁹ This issue arises regardless of whether the defendant voluntarily or involuntarily has taken antipsychotic drugs. Two main issues arise if a state tries a medicated defendant. The first issue is whether the defendant in fact is competent. The second issue is whether a medicated defendant can receive a fair trial.

The United States Supreme Court has determined that, if a state tries an incompetent defendant, the state violates the defendant's right to fair trial under the fourteenth amendment of the United States Constitution.¹⁴⁰

135. See Winick, *supra* note 1, at 246-49 (discussing procedures court follows if court finds defendant incompetent to stand trial).

136. See *id.* (stating that state can try defendant once hospital releases defendant).

137. See *id.* (stating that court often dismisses charges against defendant without prejudice when state civilly commits defendant).

138. See *Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984) (determining that state's interest in trying defendant is not relevant to court's determination of whether state should be able to medicate defendant); *United States v. Charters*, 829 F.2d 479, 492-94 (4th Cir. 1979) (same), *rev'd on other grounds*, 863 F.2d 302 (4th Cir. 1988), *cert. denied*, 110 S.Ct. 1317 (1990).

139. Cf. *In re Pray*, 336 A.2d 174, 177 (Vt. 1975) (determining that state violates defendant's right to fundamental fairness under the fourteenth amendment if state tries defendant in medicated state); *State v. Murphy*, 355 P.2d 323, 326 (Wash. 1960) (*en banc*) (holding that state violates defendant's right to fair trial if state tries defendant while defendant is taking medication).

140. U.S. CONST. amend. XIV. The fourteenth amendment to the United States Constitution provides that "... nor shall any State deprive any person of life, liberty, or property without due process of law . . ." *Id.* See generally *Drope v. Missouri*, 420 U.S. 162 (1975) (determining that trying incompetent defendant violates defendant's right to fair trial); *Pate v. Robinson*, 383 U.S. 375 (1966) (finding that trying incompetent defendant violates defendant's fourteenth amendment right to a fair trial); 4 W. BLACKSTONE, COMMENTARIES *24 (discussing rationale for common law prohibition on trying an incompetent defendant). In *Pate* the United States Supreme Court considered, *inter alia*, whether the trial court denied the defendant a fair trial by failing to conduct a hearing regarding the defendant's competence to stand trial. *Id.* at 376-77. In *Pate* the defendant was convicted of murder. *Id.* The defendant appealed the decision to the Illinois Supreme Court claiming that the trial court denied the defendant a fair trial by failing to hold a competency hearing. *Id.* at 376. The Illinois Supreme Court in *Pate* upheld the trial court decision finding that the evidence failed to raise a doubt as to the defendant's competence to stand trial, and that the defendant, in failing to request a competency hearing waived the right to a hearing. *Id.* at 376-77. The defendant in *Pate* petitioned the federal district court for habeas corpus which the district court denied without a hearing. *Id.* at 377. The United States Court of Appeals for the Seventh Circuit, however,

In *Drope v. Missouri*¹⁴¹ the Supreme Court suggested that the fourteenth amendment prohibition against trying an incompetent defendant rests on the assumption that an incompetent defendant will be unable effectively to present a defense.¹⁴² If a state tries a defendant who is unable to present an effective defense, the state will be violating the defendant's fourteenth amendment right to a fair trial.¹⁴³ A second concern with trying an incompetent defendant is that requiring an incompetent defendant to stand trial undermines the deterrence rationale of criminal punishment.¹⁴⁴ One of the goals of punishment in the American system of justice is to deter the offender from future criminal activities.¹⁴⁵ The defendant, therefore, must understand why the state is punishing the defendant for punishment to be effective.¹⁴⁶ A medicated defendant may not understand why the state is prosecuting the defendant and the defendant may have difficulties in effectively presenting a defense.¹⁴⁷ Accordingly, a defendant's competence is vital to his ability to present a defense and to the effectiveness of the deterrence function.¹⁴⁸

The United States Supreme Court in *Dusky v. United States*¹⁴⁹ clarified 18 U.S.C. section 4244, the federal statutory standard for determining whether a defendant is competent to stand trial.¹⁵⁰ In *Dusky* a federal district

granted habeas corpus and reversed the trial court, finding that the trial court had failed to conduct a competency hearing. *Id.* After the Seventh Circuit granted the defendant a new trial, the State appealed the Seventh Circuit's decision to the United States Supreme Court. *Id.*

On appeal, the Supreme Court in *Pate* noted that trying an incompetent defendant violates the defendant's fourteenth amendment right to a fair trial. *Id.* at 378. The *Pate* Court determined that because the defendant had a history of insanity, the trial court should have ordered a competency hearing. *Id.* at 379-84. Moreover, the Supreme Court in *Pate* noted that an incompetent defendant effectively cannot waive the right to a competency hearing because the waiver cannot be knowing or intelligent if a defendant is incompetent. *Id.* at 384. Accordingly, finding that the trial court denied the defendant a fair trial in failing to hold a competency hearing and that the defendant had not waived the right to a hearing, the *Pate* Court affirmed the appeals court decision. *Id.* at 387.

141. 420 U.S. 162, 171 (1975).

142. *Drope v. Missouri*, 420 U.S. 162, 171 (1975); see also STANDARDS OF CRIMINAL JUSTICE § 7-4.1 (1982) (establishing rules and definitions regarding competence to stand trial).

143. *Drope*, 420 U.S. at 171.

144. See Fentiman, *supra* note 19, at 1117 (stating that trying incompetent defendant undermines deterrent rationale).

145. See *id.* (stating that one goal of American system of justice is to deter offender from future crime).

146. See *id.* (stating that offender must understand why state is punishing offender for punishment to be effective).

147. See *infra* notes 162-76 and accompanying text (discussing effect of antipsychotic drugs on defendant's ability to present defense).

148. See *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (noting that defendant must be competent for defendant to present effective defense); Fentiman, *supra* note 18, at 1117 (observing that if state tries incompetent defendant, state frustrates deterrent rationale).

149. 362 U.S. 402 (1960) (per curiam).

150. *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam); 18 U.S.C. § 4241(a) (1987).

court in Missouri convicted the defendant for kidnapping.¹⁵¹ The defendant appealed the conviction to the United States Court of Appeals for the Eighth Circuit alleging that the district court erroneously had found the defendant competent to stand trial.¹⁵² The Eighth Circuit noted that the district court determined that although the defendant was suffering from a schizophrenic reaction, because the defendant was oriented as to time, place, and person, he was competent to stand trial.¹⁵³ Accordingly, the Eighth Circuit in *Dusky* agreed with the district court's decision and affirmed the defendant's conviction.¹⁵⁴ *Dusky* appealed the Eighth Circuit's decision to the United States Supreme Court.¹⁵⁵

On appeal, the Supreme Court in *Dusky* found that the district court erroneously determined that *Dusky* was competent to stand trial because the district court considered only whether *Dusky* was oriented as to time, place, and person.¹⁵⁶ The Supreme Court reasoned that the proper test for competency under 18 U.S.C. section 4244 is first, whether a defendant is able to consult with counsel with a reasonable amount of understanding,¹⁵⁷ and second, whether a defendant is able to comprehend the proceedings.¹⁵⁸ The *Dusky* Court also determined that a defendant must be able to appreciate his situation and the possible consequences of conviction for a court to conclude that the defendant is competent.¹⁵⁹ Accordingly, because the district court failed to consider these factors, the Supreme Court overturned *Dusky's* conviction.¹⁶⁰

Both state courts and legislatures generally have followed the standards the Supreme Court established in *Dusky* when considering whether a defendant is competent and, therefore, have focused on the defendant's ability to understand the proceedings, to comprehend the possible consequences of conviction, and to aid counsel in presenting a defense.¹⁶¹ Moreover, in cases

151. 271 F.2d 385, 387 (8th Cir. 1959).

152. *Dusky v. United States*, 271 F.2d 385, 387 (8th Cir. 1959).

153. *Id.* at 388.

154. *Id.* at 402.

155. 363 U.S. 402 (1960) (per curiam).

156. *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam).

157. *Id.*

158. *Id.*; see also 18 U.S.C. § 4241(a) (1987) (establishing federal statutory standard for determining whether defendant is competent to stand trial).

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

160. *Id.*

161. See 18 U.S.C. § 4241(a) (1987) (stating that defendant is incompetent if defendant is unable to understand nature and consequences of proceedings against defendant, or is unable to assist in preparing defense); CAL. PENAL CODE § 1367 (West 1982) (stating that defendant is incompetent if as result of mental or developmental disorder defendant is unable to understand nature of proceedings or is unable to assist in defense in rational manner); N.J. STAT. ANN. § 2C:4-4 (West 1982) (stating that defendant is incompetent if defendant lacks capacity to understand nature and object of the proceedings or is unable to assist in defense); N.C. GEN. STAT. § 15A-1001(a) (1983) (stating that defendant is incompetent if defendant is unable to understand nature and object of proceedings against defendant, to comprehend his own position with regard to proceedings, or is unable to assist in defense in rational and

subsequent to *Dusky* the Supreme Court has suggested that statutes which follow the *Dusky* standard adequately protect a defendant's fourteenth amendment right to a fair trial.¹⁶²

When determining whether a medicated defendant is competent to stand trial, a court should consider the extent to which a defendant is suffering from side effects of antipsychotic drugs.¹⁶³ Although studies have found that antipsychotic drugs are helpful in relieving psychotic symptoms,¹⁶⁴ studies also indicate that the numerous side effects which may impair the defendant's ability to relate with people regularly are associated with antipsychotic drugs.¹⁶⁵ Specifically, antipsychotic drugs can impair a defendant's ability to remember, reason, and function effectively.¹⁶⁶ The side effects associated with antipsychotic drugs, therefore, can have a profound effect on the defendant's ability to assist counsel in preparing a defense.¹⁶⁷ Ac-

reasonable manner); VA. CODE ANN. § 19.2-169.1(a) (Supp. 1986) (stating that defendant is incompetent if defendant lacks substantial capacity to understand proceedings against defendant or is unable to assist in defense); STANDARDS OF CRIMINAL JUSTICE § 7-4.1 (1982) (stating that defendant is incompetent if defendant lacks sufficient present ability to consult with his attorney with reasonable degree of rational understanding, and/or defendant lacks rational and factual understanding of proceedings against defendant); *infra* note 167 (discussing sixth amendment right to counsel).

162. See *Drope v. Missouri*, 420 U.S. 162, 173 (1975) (determining that statutes following *Dusky* standard are adequate to protect defendant's right not to be tried while incompetent); *Dusky v. United States*, 363 U.S. 402 (1960) (per curiam) (clarifying federal statutory standard for determining whether defendant is competent to stand trial).

163. See *In re Pray*, 336 A.2d 174, 177 (Vt. 1975) (stating that prior to trial, court should consider whether medication adversely is affecting defendant); *State v. Murphy*, 355 P.2d 323, 326 (Wash. 1960) (en banc) (same).

164. See *supra* note 14-18 and accompanying text (discussing therapeutic effects of antipsychotics).

165. See *supra* notes 39-40 (discussing side effects of antipsychotics that cause mental impairment).

166. See *supra* note 39-40 (discussing side effects of antipsychotics that impair mental abilities).

167. U.S. CONST. amend. VI. The sixth amendment to the United States Constitution provides that "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *Id.*; see also *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that sixth amendment right to counsel applies to state criminal proceedings). In *Gideon* the Supreme Court considered whether the fourteenth amendment right to a fair trial requires that a State provide counsel for indigent defendants in all criminal trials. *Id.* at 335. In *Gideon* the Supreme Court determined that the right to counsel is fundamental and essential to guarantee the right to a fair trial under the fourteenth amendment. *Id.* at 342. The *Gideon* Court reasoned that the right to be heard is of little use to a defendant who does not understand the law and cannot afford to hire an attorney to assist the defendant in presenting a defense. *Id.* at 345. The Supreme Court in *Gideon* therefore determined that a state must provide an indigent defendant with counsel in all criminal proceedings to protect the defendant's right to a fair trial. *Id.* Accordingly, the *Gideon* Court reversed the defendant's conviction. *Id.*

In cases subsequent to *Gideon* the Supreme Court has determined that under the sixth amendment, a defendant has the right to the effective assistance of counsel. Effective assistance of counsel requires that there be no restrictions on the functions of counsel in defending a criminal prosecution. See *United States v. Cronin*, 466 U.S. 648, 650 (1984) (finding that right

cordingly, if a state tries a defendant who is suffering from the side effects of antipsychotic drugs that impair mental ability, the state may be denying the defendant the right to a fair trial in violation of the fourteenth amendment.¹⁶⁸

In addition to causing side effects that impair a defendant's mental abilities, antipsychotic drugs may cause akinesia, a side effect that makes a defendant feel lethargic and indifferent.¹⁶⁹ If a defendant is suffering from akinesia, the defendant may comprehend the proceedings, but may be too apathetic to care about the outcome of the proceedings.¹⁷⁰ Akinesia, therefore, significantly can impair a defendant's ability to assist defense counsel in deciding what strategies to pursue at trial.¹⁷¹

In light of these considerations, if a state tries a defendant who is taking antipsychotics, the state actually may be trying an incompetent defendant. If the defendant cannot aid his attorney because his mental abilities are impaired, or because the defendant is lethargic or sedated, then the defendant cannot exercise fully his sixth amendment rights.¹⁷² Consequently, in determining whether a state should be allowed to try a medicated defendant, courts should determine whether a medicated defendant is suffering from any side effects.¹⁷³ Moreover, courts should consider the extent to which adverse side effects may impair a defendant's ability to present an effective defense.¹⁷⁴ If a court determines that a defendant's ability to present a defense will be lessened because of the side effects that the

to effective assistance of counsel is right of defendant to have defendant's counsel put prosecution's case to meaningful adversarial test); *Flanagan v. United States*, 465 U.S. 259, 268 (1984) (holding that courts should presume that counsel is ineffective if counsel has conflict of interest); *Geders v. United States*, 425 U.S. 80, 88-89 (1970) (finding that defendant did not have effective assistance of counsel when trial court refused defendant access to counsel during overnight recess).

168. Fentiman, *supra* note 19, at 1133 (arguing that state violates defendant's sixth amendment right to counsel if state tries defendant who is suffering from side effects of antipsychotics); *supra* note 167 (discussing sixth amendment right to counsel).

169. See *California's Programs*, *supra* note 19, at 12-13 (stating that side effects of antipsychotic drug treatment can give the patient a zombie-like appearance); *Antipsychotic Drugs*, *supra* note 28, at 787 (same).

170. See *supra* notes 162-76 and accompanying text (discussing inability of medicated defendant to assist in defense); *supra* note 167 (discussing sixth amendment right to counsel).

171. See *supra* notes 162-76 and accompanying text (stating that side effects of antipsychotic drugs may impair defendant's ability to assist in defense).

172. See *United States v. Charters*, 829 F.2d 479, 493 (4th Cir. 1979), *rev'd on other grounds*, F.2d 302 (4th Cir. 1988), *cert. denied*, 110 S.Ct. 1317 (1990) (questioning whether defendant who is taking antipsychotics is competent to stand trial); Fentiman, *supra* note 19, at 1132 (same); *Antipsychotic Drugs*, *supra* note 28, at 783-83 (same).

173. See *Pate v. Robinson*, 383 U.S. 375, 376-77 (1966) (holding that court should hold hearing to determine defendant's competence to stand trial if any facts or circumstances indicate that defendant may be incompetent); Fentiman, *supra* note 19, at 1132 (stating that court should determine whether medicated defendant is suffering adverse side effects); *Antipsychotic Drugs*, *supra* note 28, at 782-83 (same).

174. See Fentiman, *supra* note 19, at 1132 (suggesting that court should determine impact of adverse side effects on defendant's ability to present defense).

defendant is experiencing, the court should not allow the state to try the defendant until the side effects diminish.¹⁷⁵ If a court fails to consider whether a medicated defendant is suffering from side effects, the court may be denying the defendant a fair trial.¹⁷⁶

A second concern with trying a medicated defendant is that the defendant's appearance may prejudice the jury.¹⁷⁷ The United States Supreme Court has determined that a defendant's appearance may prejudice a jury so greatly that the impartiality of the verdict is questionable.¹⁷⁸ A defendant suffering from akinesia will seem apathetic, indifferent, and detached from reality.¹⁷⁹ To a jury a medicated defendant may appear unemotional and unconcerned about the proceedings at hand.¹⁸⁰ The appearance of a defendant suffering from akathisia also may prejudice the jury because akathisia causes the defendant to act overly jumpy and anxious.¹⁸¹ If a defendant is behaving in an excessively nervous manner, the jury might believe that the defendant has a guilty mind and, therefore, the jury may not be objective.¹⁸² Consequently, if a defendant is required to appear before the jury while suffering from side effects of antipsychotic drugs, the defendant may not receive a fair trial.¹⁸³

175. See *Pate*, 383 U.S. at 376-77 (noting that state cannot try incompetent defendant); *Drope v. Missouri*, 420 U.S. 162, 171 (same).

176. See *Pate*, 383 U.S. at 376-77 (determining that if state tries incompetent defendant state, violates defendant's right to fair trial); *Drope*, 420 U.S. at 171 (same); Fentiman, *supra* note 19, at 1117 (same).

177. See *Ake v. Oklahoma*, 470 U.S. 68, 78-79 (1985) (noting that fourteenth amendment guarantees right to fair trial); *Estelle v. Williams*, 96 S.Ct. 1691, 1692 (1976) (stating that right to fair trial is fundamental liberty secured by fourteenth amendment); Fentiman, *supra* note 19, at 1125-35 (stating that defendant may not get fair trial if state is allowed to try defendant in medicated condition); *Antipsychotic Drugs*, *supra* note 28, at 787-89 (same). But see Note, *Mind Control, Synthetic Sanity, Artificial Competence, and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 *HOFSTRA L. REV.* 77, 90-98 (1983) (arguing that fair trial concerns not implicated if court notifies jury that defendant is taking antipsychotics).

178. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (noting that impartiality of tribunal is essential to fair trial); *Estelle v. Williams*, 96 S.Ct. 1691, 1697 (1976) (holding that court cannot require defendant to wear prison garb during trial under fourteenth amendment right to fair trial); *Illinois v. Allen*, 90 S.Ct. 1057, 1061 (1970) (noting that sight of defendant bound and gagged in court is likely to prejudice jury).

179. See *supra* notes 23-26 and accompanying text (stating that side effects of antipsychotic drugs can make defendant appear apathetic).

180. See *Commonwealth v. Louraine*, 453 N.E. 437, 444 (Mass. 1983) (stating that side effects of antipsychotics can make defendant appear unemotional); Fentiman, *supra* note 19, at 1128-31 (same); *Antipsychotic Drugs*, *supra* note 28, at 878-89 (same).

181. See *supra* notes 27-30 and accompanying text (describing akathisia, one side effect of antipsychotic drugs that causes patient to feel agitated).

182. See Fentiman, *supra* note 19, at 1130 (arguing that defendant's medicated appearance may prejudice jury); *Antipsychotic Drugs*, *supra* note 28, at 787-88 (same); *infra* notes 184-207 and accompanying text (discussing side effects of antipsychotic drugs and defendant's right to fair trial).

183. See Fentiman, *supra* note 19, at 1130 (arguing that if state tries medicated defendant, state may violate defendant's right to fair trial); *Antipsychotic Drugs*, *supra* note 28, at 787-

In *In re Pray*¹⁸⁴ the Vermont Supreme Court considered whether the defendant's medicated appearance prejudiced the jury.¹⁸⁵ In *Pray* the State of Vermont charged the defendant with first degree murder and placed the defendant in pretrial custody.¹⁸⁶ Jail officials medicated the defendant with tranquilizers prior to and during the trial to prevent the defendant from becoming violent.¹⁸⁷ In *Pray* the jury rejected the defendant's insanity defense and found the defendant guilty of first degree murder.¹⁸⁸ The defendant appealed the conviction to the Vermont Supreme Court claiming, *inter alia*, that the lower court denied the defendant a fair trial because the court did not allow the defendant to appear before the jury in an unmedicated state.¹⁸⁹

On appeal the Vermont Supreme Court in *Pray* observed that a jury inevitably will use its perceptions of the defendant's courtroom appearance to judge the defendant's prior mental state in every criminal case, and particularly in insanity cases.¹⁹⁰ Moreover, the *Pray* court found that because the defendant was suffering from the side effects of tranquilizers that made the defendant appear emotionless during the trial, the jury might have thought that the defendant did not care about the outcome of the trial.¹⁹¹ The *Pray* court held that the trial court's failure to allow the defendant to appear at trial in an unmedicated condition violated the defendant's fourteenth amendment right to a fair trial.¹⁹² Accordingly, the Vermont Supreme Court granted the defendant a new trial.¹⁹³

The Washington Supreme Court in *State v. Murphy*¹⁹⁴ also considered whether the defendant's medicated appearance prejudiced the jury.¹⁹⁵ In *Murphy* the State of Washington arrested the defendant for first degree murder.¹⁹⁶ Prior to the defendant's testimony, jail personnel gave the defendant tranquilizers because the defendant complained of a severe cold.¹⁹⁷ The trial court withdrew the defendant's plea of insanity after the defendant testified that the defendant knew right from wrong when he committed the murder.¹⁹⁸ The jury subsequently found the defendant guilty of first degree

88 (same); *infra* notes 184-207 and accompanying text (stating that state violates defendant's right to fair trial if state tries defendant who is suffering from adverse side effects of antipsychotics).

184. 336 A.2d 174 (Vt. 1975).

185. *In re Pray*, 336 A.2d 174 (Vt. 1975).

186. *Id.*

187. *Id.* at 174-75.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 176.

192. *Id.*

193. *Id.*

194. 355 P.2d 323 (Wash. 1960) (en banc).

195. *State v. Murphy*, 355 P.2d 323, 325 (Wash. 1960) (en banc).

196. *Id.* at 324.

197. *Id.*

198. *Id.*

murder and sentenced the defendant to death.¹⁹⁹ The defendant appealed the conviction to the Washington Supreme Court.²⁰⁰ The defendant in *Murphy* alleged, *inter alia*, that the trial court erroneously had allowed the jury to see the defendant in a medicated condition.²⁰¹

On appeal, the Washington Supreme Court determined that the tranquilizers made the defendant appear lackadaisical and uncaring to the jury and thus influenced the jury in the decision to convict the defendant.²⁰² The *Murphy* court, therefore, determined that in trying a medicated defendant, the State violated the defendant's right to present a defense under the Washington State Constitution.²⁰³ Accordingly, the Washington Supreme Court found that the trial court erroneously allowed the jury to see the defendant in a medicated state and, therefore, granted the defendant a new trial.²⁰⁴

Both *Murphy* and *In re Pray* indicate that if a state tries a medicated defendant, the medicated defendant's appearance may prejudice the jury and result in the jury's failure to render an impartial verdict.²⁰⁵ Conse-

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 326. In *Murphy* the Washington Supreme Court noted that the defendant's attorney testified that after the State medicated the defendant, the defendant appeared to be extremely nervous and taut. *Id.* at 325. Moreover, the defendant's attorney testified that when the defendant took the stand, the defendant hesitated over every word and acted very guilty. *Id.*

203. *Id.* at 327. The *Murphy* court determined that the State violated the defendant's rights under Art. I § 22 of the Washington Constitution by trying the defendant while the defendant was taking tranquilizers. *Id.* The Washington Constitution provides that, "In all criminal prosecutions, the accused shall have the right to appear and defend in person," WASH. CONST. Art. I § 22. In *Murphy* the Washington Supreme Court noted that in an earlier case, *State v. Williams*, 50 P. 580 (Wash. 1897), the Washington Supreme Court determined that Art. I § 22 of the Washington Constitution encompasses the right of a defendant to have the unfettered use of his mental and physical faculties when appearing at trial. *State v. Murphy*, 355 P.2d at 323, 327 (Wash. 1960) (en banc).

204. *State v. Murphy*, 355 P.2d 323, 327 (Wash. 1960) (en banc).

205. See *id.* (determining that state denies defendant fair trial if state tries medicated defendant); *In re Pray*, 336 A.2d 174, 177 (Vt. 1975) (same). But see *State v. Hayes*, 389 A.2d 1379, 1381-82 (N.H. 1978) (finding that defendant who is taking antipsychotic drugs does not have absolute right to appear before jury in unmedicated state); *State v. Jojola*, 553 P.2d 1296, 1300 (N.M. Ct. App. 1976) (same); *State v. Law*, 270 S.C. 664, 675, 244 S.E.2d 302, 307 (1978) (same). In *State v. Law* the State of South Carolina arrested the defendant for a murder committed during armed robbery. *Id.* at 303. In *Law* the defendant had a history of schizophrenia and had been taking antipsychotic medication to reduce the psychotic symptoms associated with schizophrenia. *Id.* at 307. Jail officials withheld the defendant's medication until defendant's attorney requested that the defendant be given a psychiatric examination and treatment. *Id.* After a psychiatrist determined that the defendant was suffering from psychotic symptoms, the defendant resumed taking medication. *Id.* Subsequently, the trial court held a hearing to determine whether the defendant was competent to stand trial while medicated. *Id.* After the trial court found the defendant competent to stand trial, the State tried and convicted the defendant for murder. *Id.* The defendant in *Law* appealed the conviction to the South Carolina Supreme Court, alleging first, that the State violated the

quently, courts should not allow states to try a defendant who is suffering from adverse side effects of antipsychotic drugs.²⁰⁶ If a court permits a state to try a defendant who is taking antipsychotic drugs, the court should take cautionary steps to insure that the state does not circumscribe the defendant's right to a fair trial.²⁰⁷ To alleviate the problems presented in *In re Pray* and in *Murphy*, several courts have suggested that the court could inform the jury that the defendant is taking medication and explain the effects of the medication.²⁰⁸ However, no matter how a court instructs a jury, the verbal information will not have the same effect as a defendant's actual undrugged appearance.²⁰⁹ Consequently, instructing the jury may be inadequate to protect the defendant's right to a fair trial.²¹⁰

A second measure a court could employ to protect a defendant's right to a fair trial is to hold a hearing whenever a defendant is taking antipsychotic drugs.²¹¹ The court, in determining whether a state should be able to try a medicated defendant, should consider whether the defendant is suf-

defendant's right to privacy by medicating the defendant without the defendant's consent and second, that the State had denied the defendant a fair trial by trying the defendant while the defendant was in a medicated condition. *Id.*

On appeal, the South Carolina Supreme Court observed that the defendant's counsel had given the State permission to medicate the defendant. *Id.* at 307. Accordingly, the *Law* court determined that the State did not violate the defendant's right to privacy. *Id.* Moreover, the *Law* court noted in dicta that a defendant does not have an absolute right to refuse antipsychotics. *Id.* Instead, a compelling state interest, such as the interest in restoring a defendant's competence to stand trial, circumscribes a defendant's right to privacy. *Id.* After determining that the State did not violate the defendant's right to privacy, the *Law* court held that the State did not deny the defendant a fair trial. *Id.* The court reasoned that the trial court adequately protected the defendant's right to a fair trial by holding a hearing to determine if the defendant was competent to stand trial while taking the medication. *Id.* Moreover, the *Law* court noted that the trial court safeguarded the defendant from prejudice regarding the defendant's medicated appearance by informing the jury that the defendant was taking antipsychotic drugs. *Id.* Accordingly, the South Carolina Supreme Court in *Law* upheld the defendant's conviction.

206. See *Murphy*, 355 P.2d at 327 (holding that state should not try defendant suffering from side effects of medication that alter defendant's appearance and behavior); *Pray*, 336 A.2d at 174-75 (same).

207. See *Murphy*, 355 P.2d at 327 (finding that court must protect defendant's right to fair trial if defendant is taking medication by not allowing state to try defendant or by informing jury that defendant is taking medication).

208. See *State v. Law*, 270 S.C. 664, 671-72, 244 S.E.2d 302, 307 (1978) (determining that court may tell jury that defendant is taking medication rather than allowing defendant to appear in unmedicated state).

209. See *Antipsychotic Drugs*, *supra* note 28, at 788-89 (stating that court informing jury that defendant is taking medication is not as effective as court allowing defendant to appear in unmedicated state).

210. See *id.* (arguing that instructing jury that defendant is medicated may not be effective measure to protect defendant's right to fair trial).

211. See *supra* notes 171-76 and accompanying text (suggesting that court should hold hearing to determine if medicated defendant is suffering from adverse side effects of antipsychotic drugs).

fering from any side effects that may prejudice the jury.²¹² If the court determines that a defendant is suffering from side effects which may prejudice the jury, the court should prohibit the state from trying the defendant until the side effects subside.²¹³ If a court fails to consider whether a defendant's appearance may prejudice the jury, the court may be abridging the defendant's right to a fair trial.²¹⁴ In light of the foregoing analysis, a state should not be allowed to administer antipsychotics to a defendant without the defendant's consent.²¹⁵ Forcible medication significantly interferes with a defendant's constitutional right to privacy by denying the defendant the right to make decisions regarding the defendant's body.²¹⁶ The likelihood that a defendant will suffer from the severe side effects associated with antipsychotic drugs strengthens the defendant's privacy interest.²¹⁷ Moreover, a state's interest in trying a defendant is not compelling because the state probably will not lose the opportunity to try the defendant if the state temporarily drops the charges against the defendant.²¹⁸ If a defendant is not going to regain competency in the near future, the state may be able to commit the defendant pursuant to state law.²¹⁹ This procedure would prevent a state from forcing a defendant to take a potentially dangerous drug simply to restore the defendant's competence for trial.²²⁰

Furthermore, the state should be able to try a defendant who is taking antipsychotic medication only if the defendant is not suffering from any side effects that alter the defendant's cognition or demeanor.²²¹ If a state

212. See *id.* (discussing competency hearing that court should hold if defendant is taking antipsychotics).

213. See *Commonwealth v. Louraine*, 453 N.E.2d 437, 444 (Mass. 1983) (determining that court should not allow state to try defendant if defendant is suffering from side effects that alter defendant's appearance and behavior); *In re Pray*, 336 A.2d 174, 176 (Vt. 1975) (same); *State v. Murphy*, 355 P.2d 323, 327 (Wash. 1960) (en banc) (same); *supra* notes 177-207 and accompanying text (discussing prejudice and defendant's right to fair trial).

214. See *Fentiman*, *supra* note 19, at 1130 (arguing that defendant who is suffering from side effects associated with antipsychotics may not get fair trial); *Antipsychotic Drugs*, *supra* note 28, at 787-88 (same); *supra* notes 177-207 and accompanying text (discussing prejudice and right to fair trial).

215. See *supra* notes 71-77 and accompanying text (arguing that court should not allow state forcibly to medicate defendant unless medication is in defendant's best interest).

216. See *Bee v. Greaves*, 744 F.2d 1387, 1391-94 (10th Cir. 1984) (finding that forcible medication violates defendant's right to privacy); *supra* notes 45-122 and accompanying text (stating that if state forcibly medicates defendant, state violates defendant's right to privacy).

217. See *supra* notes 31-42 and accompanying text (describing dangerous side effects associated with antipsychotic drug treatment).

218. See *supra* note 135 and accompanying text (stating that if court finds defendant incompetent to stand trial, court often dismisses charges without prejudice).

219. See *supra* notes 133-34 and accompanying text (stating that state may be able to commit defendant to mental institution if it is unlikely that defendant will regain competency in near future).

220. See *supra* notes 132-38 and accompanying text (describing alternatives available to state if court finds defendant incompetent).

221. See *supra* notes 162-214 and accompanying text (stating that state should not be able to try a medicated defendant if defendant is suffering from side effects which alter defendant's cognition or demeanor).

tries a defendant who is suffering from any side effects, the state significantly will circumscribe the defendant's rights to a fair trial and to assist in a defense.²²² If a defendant is taking antipsychotic drugs, the court should hold a hearing to determine how the drugs are affecting the defendant to properly safeguard the defendant's constitutional rights.²²³

MICHELLE K. BACHAND

222. *See supra* notes 162-214 and accompanying text (stating that if state tries medicated defendant who is experiencing side effects of antipsychotic drugs that alter defendant's cognition or demeanor, state violates defendant's sixth amendment right to counsel and right to fair trial).

223. *See supra* notes 162-214 and accompanying text (suggesting that court should hold hearing to determine if medicated defendant is suffering from side effects of antipsychotic drugs that alter defendant's cognition or demeanor).