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Sell v. United States 123 S. Ct. 2174 (2003)

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I. Facts

In May 1997 the Government charged Charles Sell ("Sell") with submitting fictitious insurance claims.[1] A federal magistrate judge ordered a psychiatric examination of Sell that found him competent to stand trial, but noted that Sell may experience another psychotic episode in the future.[2] The judge granted Sell bail.[3] Subsequently, a grand jury produced a "superceding indictment charging Sell and his wife with 56 counts of mail fraud, 6 counts of Medicaid fraud, and 1 count of money laundering."[4]

In 1998 the magistrate held a bail revocation hearing because the Government claimed that Sell sought to intimidate a witness. At the hearing, the judge described Sell's behavior as out of control, involving screaming insults and spitting on the judge. A psychiatrist reported that Sell's condition had worsened. After considering the report and other testimony, the magistrate revoked Sell's bail.[5]

In April 1998 the grand jury issued another indictment. This indictment charged Sell with the attempted murder of the Federal Bureau of Investigation ("FBI") agent who arrested Sell and an individual who planned to testify against him in the fraud case. The court joined the fraud and attempted murder cases for trial.[6]

In 1999 Sell asked the magistrate to reconsider his competency. The magistrate sent Sell to the United States Medical Center for Federal Prisoners. Doctors examined Sell and determined that he was not competent to stand trial. The magistrate ordered Sell to remain at the Medical Center for treatment and a determination of the probability that Sell would attain a mental capacity that would allow him to proceed to trial.[7]

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1. Sell v. United States, 123 S. Ct. 2174, 2179 (2003); *see* 18 U.S.C. § 1035(a)(2) (2003) (describing the offense of making false statements relating to health care).

2. *Sell*, 123 S. Ct. at 2179. Sell had a long history of mental illness accompanied by "episodes" that preceded this charge. *Id.* The Court noted several episodes between 1982 and 1997 when Sell's mental illness required hospitalization and treatment. *Id.* Additionally, the Court noted that Sell had been treated with antipsychotic medication on at least one prior occasion. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

Two months after Sell's arrival, the Medical Center staff recommended that Sell be medicated with antipsychotic drugs, but Sell refused to take them.[8] The staff sought permission from institutional authorities to medicate Sell against his will.[9] A reviewing psychiatrist held a hearing and authorized the forced medication of Sell.[10] He determined that medication was necessary because Sell was mentally ill and dangerous and because it would make Sell competent to stand trial.[11] The reviewing psychiatrist noted that the determination of Sell's dangerousness was based on threats outside the prison.[12] He asserted that Sell would be able to function in an open prison population.[13]

Next, the Medical Center reviewed the determination of its reviewing psychiatrist.[14] A Bureau of Prisons official upheld the decision that Sell would benefit from the antipsychotic medication.[15] The official "concluded that antipsychotic medication represents the medical intervention 'most likely' to 'ameliorate' Sell's symptoms" and "that other 'less restrictive interventions' [were] 'unlikely to work.' "[16]

In July 1999 Sell filed a motion contesting the Medical Center's right to medicate him against his will.[17] In September 1999 the federal magistrate judge who ordered Sell to the Medical Center held a hearing.[18] Sell introduced much of the same evidence that he had introduced in the first two administrative hearings.[19] He added two bodies of evidence.[20] First, a witness explored the question of the medication's effectiveness.[21] Second, doctors testified about events that had occurred in the Medical Center after the administrative procedures concluded.[22]

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8. *Sell*, 123 S. Ct. at 2179.

9. *Id.*

10. *Id.* at 2179–80. At the hearing, the reviewing psychiatrist considered Sell's past history of mental illness, Sell's current beliefs, the staff's medical opinions and concerns, an outside medical expert's opinion, Sell's own views, and the views of laypersons who knew him. *Id.* at 2180.

11. *Id.* at 2180.

12. *Id.*

13. *Id.*

14. *Sell*, 123 S. Ct. at 2180.

15. *Id.* The Bureau of Prisons official considered the evidence at the initial hearing, Sell's delusions, and the different professional opinions as to the proper treatment and medication. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Sell*, 123 S. Ct. at 2180.

21. *Id.*

22. *Id.* Sell's doctors testified that Sell repeatedly approached nurses at the Medical Center and had various "boundary-breaching" incidents. *Id.* The doctors testified that, given Sell's prior behavior, diagnosis and current beliefs, these incidents were not harmless and, when combined with

In August 2000 the magistrate found that forcibly medicating Sell was the only way to render him not dangerous and competent to stand trial.[23] The magistrate issued an order authorizing the involuntary administration of antipsychotic drugs but stayed the order to allow Sell to appeal to the federal district court.[24]

In April 2001 the district court reviewed Sell's record and found that the magistrate's conclusion that Sell was sufficiently dangerous to warrant involuntary administration of antipsychotic drugs was "clearly erroneous."[25] "The court limited its determination to Sell's 'dangerousness *at this time* to himself and to those around him *in his institutional context*.' "[26] Nonetheless, the district court affirmed the decision of the magistrate that permitted the forced medication of Sell, concluding that forced medication was the only way to render Sell competent to stand trial.[27] Both the Government and Sell appealed.[28]

In March 2002 a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision.[29] The Eighth Circuit held that " 'the evidence [did] not support a finding that Sell posed a danger to himself or others at the Medical Center.' "[30] The Eighth Circuit also affirmed the district court's order requiring medication of Sell in order to render him competent to stand trial.[31] The majority of the panel found that because of the seriousness of the fraud allegations against Sell, the government had an " 'essential interest in bringing [Sell] to trial.' "[32] The Eighth Circuit agreed with the district court's

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Sell's inability and unwillingness to stop this inappropriate conduct, indicated that he was a safety risk inside the institution. *Id.* The doctors noted that Sell had been moved to a locked unit. *Id.*

23. *Id.* at 2180–81. The magistrate specifically found that the government had shown that "anti-psychotic medication [was] the only way to render [Sell] less dangerous"; that newer drugs would reduce the risk of serious side effects; that the benefits of medication outweighed the risks; and that there was a "substantial probability" that medication would restore Sell to competency. *Id.*

24. *Id.* at 2181.

25. *Id.* The magistrate noted that Sell had "been returned to an open ward." *Id.*

26. *Sell*, 123 S. Ct. at 2181.

27. *Id.* The district court noted that antipsychotic drugs were necessary and medically appropriate and that the drugs represented the only hope for rendering Sell competent to stand trial. *Id.* Additionally, the court stated that the administration of the antipsychotic drugs was necessary to serve the government's compelling interest of adjudicating Sell's case. *Id.* The district court further related that it would be "premature" to consider whether "the effects of medication might prejudice [Sell's] defense at trial." *Id.*

28. *Id.* at 2181.

29. *Id.*; *see* United States v. Sell, 282 F.3d 560, 572 (8th Cir. 2002) (affirming the district court decision that Sell "may be involuntarily medicated for the purpose of rendering him competent to stand trial").

30. *Sell*, 123 S. Ct. at 2181 (quoting *Sell*, 282 F.3d at 565).

31. *Id.*

32. *Id.* (quoting *Sell*, 282 F.3d at 568).

finding that there was no less intrusive means of accomplishing the trial objective.[33] Sell appealed this decision on the ground that " 'allowing the government to administer antipsychotic medication against his will solely to render him competent to stand trial for non-violent offenses,' " violated his Fifth Amendment right to liberty.[34]

II. Holding

The United States Supreme Court reaffirmed the holdings of *Riggins v Nevada*[35] and *Washington v Harper*[36] that, in limited circumstances, the Constitution allows the government to administer antipsychotic drugs involuntarily.[37] Specifically, the Court held that the Constitution permits the government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges for the sole purpose of rendering that defendant competent to stand trial only if the following conditions are met: (1) the court finds an important governmental interest; (2) the court concludes that antipsychotic medication will significantly further the state's interest in seeing justice served; (3) the court determines that involuntary medication is necessary to further the state's interests; and (4) the "administration of the drugs is medically appropriate" and in the patient's best interest.[38] The Court ordered the judgment of the Eighth Circuit vacated and remanded the case for further proceedings not inconsistent with its decision.[39]

III. Analysis

A. Collateral Order

Initially, the Supreme Court considered whether the Eighth Circuit had jurisdiction to decide Sell's appeal.[40] The district court's judgment, from which Sell appealed, was a pre-trial order by a magistrate judge that required Sell to

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33. *Id.* (citing *Sell*, 282 F.3d at 571).

34. *Id.* (quoting Brief for Petitioner at i, Sell v. United States, 123 S. Ct. 2174 (2003) (No. 02-5664)).

35. 504 U.S. 127 (1992).

36. 494 U.S. 210 (1990).

37. *Sell*, 123 S. Ct. at 2178, 2183; Riggins v. Nevada, 504 U.S. 127, 138 (1992) (reversing Riggins's conviction and remanding the case because the trial court allowed forced medication "without finding a substantial state interest for doing so"); Washington v. Harper, 494 U.S. 210, 227 (1990) (holding that "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest").

38. *Sell*, 123 S. Ct. at 2184–85.

39. *Id.* at 2187.

40. *Id.* at 2181–82.

receive medication involuntarily.[41] "The order embodied legal conclusions related to the Medical Center's administrative efforts to medicate Sell"; these efforts resulted from Sell's commitment pursuant to the magistrate's order seeking to determine Sell's competency to stand trial.[42]

The law generally requires a defendant to wait until the end of trial to obtain review of a pre-trial order.[43] However, the Court noted that the law makes exceptions to this rule.[44] The Court found that the district court's order in this case fell within the "collateral order" exception.[45]

In *Stack v Boyle*,[46] the Court held that a defendant can appeal a pre-trial order setting bail excessively high as a "collateral order."[47] This appeal is now statutory in the federal system.[48] The collateral order issue only arises in the absence of a statutory right to appeal. The Court has held that a preliminary or interim decision is appealable under the collateral order doctrine when it: (1) "conclusively determine[s] the disputed question"; (2) "resolve[s] an important issue" that is "completely separate from the merits of the action"; and (3) "is effectively unreviewable on appeal from a final judgment."[49]

The order in *Sell* " 'conclusively . . . determin[ed] the disputed question' " whether Sell had a legal right to avoid forced medication.[50] The order " 'resolv[ed] an important issue' " because involuntary medication raises important constitutional questions.[51] Additionally, whether Sell should have been forced to undergo medical treatment against his will was a matter that was " 'completely separate from the merits of the action,' " namely, whether Sell was guilty or innocent of the crimes with which he was charged.[52] Finally, the issue of whether

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41. *Id.* The magistrate judge received his authority to enter a pre-trial order from a delegation of the district court. *Id.*; *see* 28 U.S.C. § 636(b)(1)(A) (2000) (allowing a judge to designate a magistrate judge to hear and determine certain pretrial matters).

42. *Sell*, 123 S. Ct. at 2182.

43. *Id.*

44. *Id.*; *see also* United States v. Ferebe, 332 F.3d 722, 726 (4th Cir. 2003) (holding that a refusal to strike a death notice is appealable as a collateral order); Jessie A. Seiden, Case Note, 16 CAP. DEF. J. 207 (2003) (analyzing United States v. Ferebe, 332 F.3d 722 (4th Cir. 2003)).

45. *Sell*, 123 S. Ct. at 2182.; *see* 28 U.S.C. § 1291 (2000) (authorizing federal courts of appeals to review only "final decisions of the district courts"). A final judgment has been interpreted to mean a judgment that terminates a criminal proceeding. *Sell*, 123 S. Ct. at 2182.

46. 342 U.S. 1 (1951).

47. Stack v. Boyle, 342 U.S. 1, 6–7 (1951).

48. *See* 18 U.S.C. § 3145(c) (2000) (allowing appeal from a release or detention order).

49. *Sell*, 123 S. Ct. at 2182 (quoting Coopers & Lybrand v. Livesay, 43 U.S. 463, 468 (1978)) (internal quotation marks omitted).

50. *Id.* (quoting *Coopers & Lybrand*, 43 U.S. at 468).

51. *Id.* (quoting *Coopers & Lybrand*, 43 U.S. at 468).

52. *Id.* (quoting *Coopers & Lybrand*, 43 U.S. at 468). The Court noted that this question is distinct from questions concerning trial procedures. *Id.*

Sell should have been involuntarily medicated was " 'effectively unreviewable on appeal from a final judgment.' "[53] If Sell was forced to take medication before trial, the harm which he sought to avoid would already have occurred.[54]

The Supreme Court concluded that the district court order from which Sell appealed was appealable as a "collateral order," thus the Eighth Circuit had jurisdiction to hear it.[55] Consequently, the Court concluded it had jurisdiction to review Sell's claim that involuntary medication would violate his constitutional rights.[56]

B. Forced Administration of Antipsychotic Drugs

1. The Standard for Forced Administration

In *Riggins* and *Harper*, the Court set forth the framework for determining when the Constitution permits the forced medication of defendants.[57] Read together, these cases indicate that the Constitution "permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if" it is: (1) a medically appropriate treatment; (2) "substantially unlikely to have side effects that may undermine the fairness of a trial"; and (3) "taking account of less invasive alternatives, [ ] necessary significantly to further important governmental trial-related interests."[58] The Court noted that this standard only permits involuntary administration of drugs for trial competency purposes in limited instances.[59]

Before turning to the competency question, the Court emphasized that there are often strong reasons for a court to determine whether forced administration of drugs can be justified on grounds other than competency to stand trial.[60] First, an inquiry into whether medication will render an individual less

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53. *Id.* (quoting *Coopers & Lybrand*, 43 U.S. at 468).

54. *Id.* (quoting *Coopers & Lybrand*, 43 U.S. 468). The Court noted that Sell's argument that forced medication may make his trial unfair is fundamentally different than an argument that forced medication did make his trial unfair. In Sell's case, what may happen at trial is irrelevant and a "final decision" appeal would come too late for Sell to have a ruling on his rights. *Id.* at 2183.

55. *Sell*, 123 S. Ct. at 2183.

56. *Id.* A three Justice dissent argued that the Court lacked jurisdiction in this case because the district court never entered a final judgment, nor did the question appealed fall under 28 U.S.C. § 1291 or § 1292. *Id.* at 2187–88 (Scalia, J., dissenting).

57. *Id.*; *see Riggins*, 504 U.S. at 138 (reversing and remanding Riggins's conviction because the trial court permitted the forced medication of Riggins without taking into account his liberty interests, thus causing a consequent possibility of trial prejudice); *Harper*, 494 U.S. at 221 (allowing the state to treat a mentally ill inmate, who is dangerous to himself or others, with antipsychotic medication so long as the treatment is in the inmate's medical interest).

58. *Sell*, 123 S. Ct. at 2184.

59. *Id.* The Court noted that such instances "may be rare." *Id.*

60. *Id.* at 2185.

dangerous is more "objective and manageable" than an inquiry into whether medication is permissible to render a defendant competent.[61] The Court suggested that medical experts might find it easier to determine whether medication is appropriate and necessary to control a defendant's dangerous behavior than to weigh the potential harms and benefits of medication and apply them to questions of fairness and competency to stand trial.[62] Additionally, the Court noted that in civil proceedings where a patient is dangerous or lacks competency to make decisions regarding his health, involuntary medication is often justified on these grounds.[63] Every state provides ways in which caretakers or guardians can make decisions authorizing medication when it is in the best interest of the patient if the patient lacks the capacity to make such a decision.[64] "If a court authorizes medication on an alternative ground [e.g., health or dangerousness], the need to consider authorization on trial competence grounds will likely disappear."[65] The Court noted that, in most instances, a court, when asked to render a decision regarding involuntary medication for trial competence, should determine if the Government has first sought permission for forced administration of drugs on alternative grounds, such as dangerousness or health.[66] If the Government has not sought to pursue this alternate avenue, the Supreme Court urged the lower courts to ask "why not."[67] The findings underlying a determination that medication cannot be forcefully administered because the defendant is not a danger and his health is not in jeopardy can still be relevant and useful to aid a judicial decisionmaker when ruling on forced medication for trial competency.[68]

The Supreme Court in *Sell* broke the standard from *Harper* and *Riggins* into four considerations that a court must explore before ordering forced medication solely for trial competency.[69] First, the court must find an *important* governmental interest at stake.[70] The government has an important interest in bringing an offender accused of serious personal or property crimes to trial for security reasons.[71] However, the Court noted that courts must consider the facts of the

61. *Id.* (citing *Riggins*, 504 U.S. at 140 (Kennedy, J., concurring in judgment)).

62. *Id.*

63. *Id.*

64. *Sell*, 123 S. Ct. at 2185 (citing ALA. CODE §§ 26-2A-102(a), 26-2A-105, 26-A2-10 (1992); ALASKA STAT. §§ 13.26.105(a), 13.26.116(b) (Michie 2002); ARIZ. REV. STAT. ANN. §§ 14-5303, 14-5312 (West 1995); ARK. CODE ANN. §§ 28-65-205, 28-65-301 (Michie 1987)).

65. *Id.* at 2185–86.

66. *Id.* at 2186.

67. *Id.*

68. *Id.*

69. *Id.* at 2184–85.

70. *Sell*, 123 S. Ct. at 2184.

71. *Id.*

individual offender's case when evaluating the government's interest in prosecution.[72] Special circumstances, such as the lengthy confinement that may result when a defendant refuses to take medication voluntarily, may lessen the importance of the government's interest.[73] These factors should be balanced against both the defendant's and the government's interest in a fair and timely trial. The government has an important interest in assuring that a defendant has a fair trial, as a trial delay may result in lost evidence, faded memories, and other occurrences that may affect a trial's outcome.[74]

Second, forced medication must *significantly further* state interests.[75] The court must find that administering the drugs will render the defendant competent to stand trial, while at the same time determine that the administration of the drugs is substantially unlikely to have side effects that would interfere with the defendant's ability to aid his counsel in preparation of trial.[76] The court noted that such interference would render the trial unfair.[77]

Third, the court must conclude that involuntary medication is *necessary* to further the government's interests and that there are no less intrusive treatments likely to achieve substantially the same result.[78] The court must also consider less intrusive means of administering the drugs.[79] The Court proffered the example of utilizing a court order backed by contempt sanctions as a less intrusive means of accomplishing the medication goal.[80] Finally, the court must conclude, before administration, that the drugs are *medically appropriate*.[81] The defendant's medical interests, as well as the interests of the state, must be considered when administering a drug that could produce different levels of success and side effects.[82]

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72. *Id.*

73. *Id.* The Court noted that if a defendant is mentally ill and refuses drug treatment, often the defendant will have a lengthy confinement in a mental institution. *Id.* This confinement reduces the risk that results from freeing a serious offender without punishment. *Id.*

74. *Id.*

75. *Id.*

76. *Sell*, 123 S. Ct. at 2184; *see Riggins*, 504 U.S. at 142–45 (listing reasons why forced administration of psychiatric drugs can cause trial prejudice).

77. *Sell*, 123 S. Ct. at 2184–85.

78. *Id.* at 2185. The Court noted that alternative non-drug therapies may be effective for the treatment of psychotic defendants for trial competency. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* The Court defined "medically appropriate" as "in the patient's best medical interest in light of his medical condition." *Id.*

82. *Id.*

2. *Application to Sell*

The Supreme Court assumed that the Eighth Circuit was correct in finding that the magistrate's conclusion that Sell was dangerous was "clearly erroneous."[83] Both the district court and the Eighth Circuit approved forced medication of Sell solely in order to render him competent to stand trial.[84] The Supreme Court noted that it made the assumption that the district court and the Eighth Circuit correctly approved forced medication for competency reasons alone because the Government did not argue, nor did the parties contest that matter.[85] However, the Court related that the record before it suggested the contrary.[86]

The Court ruled that, on the assumption that Sell was not dangerous, the Eighth Circuit erred by approving forced medication solely to restore competency.[87] The Court noted that the magistrate found that forced medication was not ordered on trial competency grounds alone, but rather because Sell was dangerous and forced medication was "the only way to render the defendant *not dangerous and* competent to stand trial."[88] Moreover, the Court noted that the record from the hearing before the magistrate showed that the experts testified primarily regarding Sell's dangerousness.[89] Consequently, questions concerning the side effects of the medication and whether medication was warranted on trial competency grounds alone were not asked or answered.[90] Failure to focus on trial competence could have caused the lower courts' and administrative hearings' judges to articulate the wrong result.[91] The Court stated:

> Whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence, but not necessarily relevant when dangerousness is primarily at issue.[92]

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83. *Sell*, 123 S. Ct. at 2186.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 2187.
88. *Id.*
89. *Sell*, 123 S. Ct. at 2187.
90. *Id.*
91. *Id.*
92. *Id.* (citing *Riggins*, 504 U.S. at 142–45 (Kennedy, J., concurring)).

Finally, the Court noted that the lower courts did not consider that Sell had been confined at the Medical Center for a long time and his refusal to take medication could result in a lengthier confinement.[93]

IV. Application in Virginia

The United States Supreme Court's standard for forcible medication for trial competency consists of several factors. Under *Riggins* and *Harper*, the government's burden to prove an overriding state interest in order to medicate a defendant involuntarily is eased by the fact that a defendant is dangerous to himself or to others.[94] Such a situation is constitutional because the involuntary treatment is an " 'accommodation between an inmate's liberty interest in avoiding the forced administration of antipsychotic drugs and the State's interest in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others.' "[95] The *Riggins* Court went further and suggested that involuntary medication could be constitutional if the state could not adjudicate guilt or innocence because the defendant was incompetent and less intrusive means were unavailable.[96] Using both *Harper* and *Riggins*, the Court in *Sell* articulated a set of factors that must be met in order to justify such an invasion of the defendant's liberty. In *Sell*, the Court did not specifically limit the application of such an analysis to any particular set of defendants, such as non-violent or non-capital. However, due to the nature of capital cases, courts will likely find that the government has a significant interest in prosecution.

In Virginia, there is no forced medication statute that speaks directly to trial competency. Under Virginia Code section 19.2-169.2, the court, upon finding that the defendant is incompetent, must order that the defendant receive treatment to restore his competency.[97] "Treatment" under the Virginia statute is not defined.

Assume a case in Virginia where a defendant is found incompetent and ordered to undergo treatment to restore his competency.[98] The defendant's

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93. *Id.* The Court reasoned that Sell's confinement at the Medical Center reduced the likelihood that he would commit future crimes, and although this does not eliminate the Government's interest in prosecution, it does reduce it. *Id.*

94. *Id.* at 2185.

95. *Sell*, 123 S. Ct. at 2183 (quoting *Harper*, 494 U.S. at 236).

96. *Id.* (citing *Riggins*, 504 U.S. at 135).

97. VA. CODE ANN. § 19.2-169.2 (Michie Supp. 2003). Virginia Code section 37.1-134.21 addresses involuntary medical treatment as a civil matter. VA. CODE ANN. § 37.1-134.21 (Michie Supp. 2003). It provides avenues by which the court can authorize involuntary medication when it can be shown by clear and convincing evidence that the patient is incapable of making an informed decision and that the proposed action is in the best interest of the patient. *Id.*

98. *See* VA. CODE ANN. §§ 19.2-169.1–169.3 (Michie Supp. 2003) (outlining procedures for

doctors decide that psychotropic drugs should be administered to restore his competency, but the defendant refuses voluntarily to take the medication. The defendant is not dangerous. The Commonwealth must take several steps to obtain a court order to medicate forcibly the defendant.[99]

First, the Commonwealth must file a motion asking the court to order involuntary administration of the antipsychotic drugs to the defendant.[100] In a hearing on the issue, the Commonwealth would seek to present witnesses, presumably from the hospital where the defendant is located, and other experts to testify as to the defendant's mental state, prospect of competency without medication, and other relevant data regarding the defendant's mental capacity. Under *Sell*, if the Commonwealth seeks to have antipsychotic drugs administered to a defendant facing serious criminal charges in order to render the defendant competent to stand trial, the Constitution permits forced medication only when there are important governmental interests that involuntary medication will significantly further and the involuntary medication is necessary and medically appropriate to further those interests.[101] The Commonwealth must demonstrate these factors, as well as that the antipsychotic drugs are necessary and do not have side effects that would hurt the defendant in trial preparation.[102]

The next question that logically arises is whether the defendant has a right to his own expert witnesses to challenge the testimony of the Government's witnesses. In *Commonwealth v Husske*,[103] the Supreme Court of Virginia held that when *Ake v Oklahoma*[104] and *Caldwell v Mississippi*[105] are read together, the Commonwealth is required to provide indigent defendants "the basic tools of an adequate defense."[106] After *Husske*, the indigent defendant seeking an expert

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defendants who allege incompetency and are found to be incompetent).

99. The Court in *Sell* stated that "[w]e consequently believe that a court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced medication" on dangerousness grounds. *Sell*, 123 S. Ct. at 2186. This statement implies that an inquiry into the need for forced administration of medication for trial competency could occur without a prior inquiry into dangerousness although the Court instructs lower courts to question why such a dangerousness inquiry was not made. *Id.*

100. Note that Virginia Code sections 19.2-169.1–169.7, dealing with trial competency, do not refer to a defendant's dangerousness. VA. CODE ANN. § 19.2-169.1–169.7 (Michie Supp. 2003).

101. *Sell*, 123 S. Ct. at 2184–85.

102. *Id.*

103. 476 S.E.2d 920 (Va. 1996).

104. 470 U.S. 68 (1985).

105. 472 U.S. 320 (1985).

106. *See* Commonwealth v. Husske, 476 S.E.2d 920, 925 (Va. 1996) (extending *Ake* to allow a defendant to request any kind of expert needed for the defendant to have the "basic tools of an adequate defense" so long as the defendant can show a particularized need); *see also* Ake v. Oklahoma, 470 U.S. 68, 82–83 (1985) (discussing the showing that would entitle a defendant to psychiatric assistance as a matter of federal constitutional law); Caldwell v. Mississippi, 472 U.S. 320,

must show a particularized need for the expert.[107] One could argue that a defendant who does not want to be forcibly medicated in order to become competent to stand trial could show the *Husske* particularized need because this defendant could demonstrate to the court that his liberty interests would be compromised if forcibly medicated. A defendant in this position deserves the opportunity to rebut the testimony of the Commonwealth's expert. Once forcibly medicated, a defendant would have no redress post-trial because his liberty right to be free from medication would have already been violated. In addition, one would assume that because the question here is the administration of medication to the incompetent defendant, through the application of the *Sell* factors, the burden is placed on the Commonwealth to prove by a preponderance of the evidence that forced medication is essential.

If the court orders that the defendant be forcibly medicated, the next question that arises is whether the Commonwealth or the defendant can immediately appeal an adverse decision. In *Sell*, an order by the district court judge was appealable to the Eighth Circuit as a collateral order because the harm complained of could not be corrected after final judgment. In Virginia Code section 37.1-134.21, addressing cases involving civil competency, the Virginia legislature provided for the de novo appeal of a magistrate's or judge's opinion to the circuit court for the jurisdiction where the order was entered within ten days; any decision of the circuit court could be appealed within ten days to the court of appeals.[108] A court of appeals would likely use an abuse of discretion standard because the circuit court's review was de novo.

A defendant can also raise the forced medication issue on appeal post-trial or in a habeas petition. The defendant may argue that his constitutionally protected liberty interest was violated and that, due to side effects of the medication forcefully administered, he was unable to provide his counsel with the assistance needed to be effective at trial. An action in habeas would allow the court to address the defendant's unconstitutional deprivation of his liberty interest.

V. Conclusion

Due to the absence of statutory guidance on involuntary medication of defendants for trial competency, there is a need for the Commonwealth to codify legislation with respect to forced medication in the criminal context. In such a statute, the legislature should include provisions for experts, appeals, proper procedures, burdens of proof, and timing. Lacking statutory guidance, practitio-

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323 n.1 (1985) (finding that without more than a generalized statement of the need for an expert, due process is not violated by a judge's determination not to grant the requested expert).

107. *Husske*, 476 S.E.2d at 925.

108. VA. CODE ANN. § 37.1-134.21(K) (Michie Supp. 2003).

ners are urged to argue that the timing, standard of proof, and provisions for appeal that appear in the Virginia civil competency statute should serve as guideposts, as they place the burden on the government to overcome the defendant's liberty interest and provide for immediate appeal of an adverse decision.

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