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Criminal Law - The Consequences of Involuntary Medication: Misunderstanding Mental Illness and Misapplying Legal Precedent; United States v. Breedlove, 756 F.3d 1036 (7th Circ. 2014)

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Case Note

CRIMINAL LAW—The Consequences of Involuntary Medication: Misunderstanding Mental Illness and Misapplying Legal Precedent; *United States v. Breedlove*, 756 F.3d 1036 (7th Cir. 2014)

*Jasmine M. Fathalla**

I. Introduction

In 2003, the United States Supreme Court articulated a four-factor test in *Sell v. United States* to determine when antipsychotic medications can be forced upon a defendant to restore mental competency to stand trial.[1] The *Sell* test enables courts to balance governmental interests and individual liberty interests when States seek to medicate mentally ill defendants.[2] However, lack of proper knowledge regarding issues related to mental illness has resulted in differing interpretations of the *Sell* test.[3] For instance, some courts have shown great deference to governmental interests over individual liberty interests, which is contrary to the intent of the *Sell* opinion.[4]

United States v. Breedlove exemplifies how the *Sell* test has been misapplied.[5] Although the court correctly stated each prong of the *Sell* test, it failed to understand the intent behind the test as a whole, resulting in an incomplete analysis and improper authorization to involuntarily medicate the defendant. This note begins in Section II by discussing mental illness as it relates to the criminal justice system.[6] Then, this note explains the development of the *Sell* test

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[1] *See* Sell v. United States, 539 U.S. 166 (2003).

[2] *Id.*

[3] For example, some courts have shown deference to the governmental interests over the individual liberty interests and vice versa. These inconsistencies have led to differing dispositions. *See, e.g.*, United States v. Evans, 404 F.3d 227 (4th Cir. 2005); United States v. Bradley, 417 F.3d 1107 (10th Cir. 2005); United States v. Green, 532 F.3d 538 (6th Cir. 2008); United States v. Hernandez-Vasquez, 513 F.3d 908 (9th Cir. 2008); United States v. Bush, 585 F.3d 806 (4th Cir. 2009); United States v. White, 620 F.3d 401 (4th Cir. 2010); United States v. Chatmon, 718 F.3d 369 (4th Cir. 2013); United States v. Debenedetto, 744 F.3d 465 (7th Cir. 2013); United States v. Chavez, 734 F.3d 1247 (10th Cir. 2013); United States v. Breedlove, 756 F.3d 1036 (7th Cir. 2014).

[4] *See supra* note 3 and accompanying text.

[5] *See* United States v. Breedlove, 756 F.3d 1036 (7th Cir. 2014)

[6] *See infra* notes 10–31 and accompanying text.

and the *Sell* opinion.[7] Section III examines the factual background of the principal case, and Section IV concludes by explaining how the court misapplied the *Sell* test.[8] Specifically, *Breedlove* misinterpreted the *Sell* test because it failed to consider special circumstances lessening the governmental interest, the potential for side effects of administered medication, less intrusive alternatives to that medication, and the medical appropriateness of the medication.[9]

II. BACKGROUND

A. Mental Illness

A mental illness is "a disease that causes mild to severe disturbances in thought and/or behavior, resulting in an inability to cope with life's ordinary demands and routines."[10] Mental illnesses may affect people of any age, race, religion, or socioeconomic status.[11] In the United States, approximately one in four adults, or 61.5 million Americans experience a mental illness in a given year.[12] Keeping this statistic in mind, it is important for society to understand that mental illnesses are nondiscriminatory medical conditions that disrupt an individual's mood, cognition, ability to communicate with others, and daily functioning.[13] Of those who experience a mental illness, an estimated 13.6 million Americans endure the consequences of a *serious mental illness*.[14] Serious mental illnesses include major depression disorder, schizophrenia, bipolar disorder, obsessive compulsive disorder, panic disorder, posttraumatic stress disorder, as well as, borderline personality disorder.[15] Based on the prevalence of mental illness in society, it is unsurprising that in the United States correctional facilities, roughly twenty percent of state inmates and twenty-one percent of local jail inmates have histories of mental health impairments.[16]

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[7] *See infra* notes 32–112 and accompanying text.

[8] *See infra* notes 113–205 and accompanying text.

[9] *See infra* notes 136–198 and accompanying text.

[10] *Mental Illness and the Family: Recognizing Warning Signs and How to Cope*, MENTAL HEALTH AMERICA, http://www.mentalhealthamerica.net/recognizing-warning-signs (last visited Jan. 2, 2015).

[11] *See infra* note 13 and accompanying text.

[12] Ken Duckworth M.D., *Mental Illness Facts and Numbers*, NATIONAL ALLIANCE ON MENTAL ILLNESS (2013) [hereinafter *Facts and Numbers*], *available at* http://www.nami.org/factsheets/mentalillness_factsheet.pdf (emphasis added) (stating that an estimated 9.2 million Americans suffer from co-occurring mental health and addiction disorders).

[13] *Mental Illnesses*, NATIONAL ALLIANCE ON MENTAL ILLNESS, http://www.nami.org (last visited Jan. 2, 2015) [hereinafter *Mental Illnesses*] (explaining mental illnesses are nondiscriminatory because individuals of any age, race, religion, or income may be affected).

[14] *Facts and Numbers*, *supra* note 12.

[15] *Mental Illnesses*, *supra* note 13. "Approximately 1.1 percent of American adults—about 2.4 million people—live with schizophrenia." *Facts and Numbers*, *supra* note 12. "Approximately 2.6 percent of American adults—6.1 million people—live with bipolar disorder." *Facts and Numbers*, *supra* note 12.

[16] *Facts and Numbers*, *supra* note 12.

Although mental illnesses affect many individuals each year, there is continually a lack of societal knowledge regarding these medical conditions.[17] Because many people do not understand mental illnesses, perceptions of the mentally ill are often skewed; sometimes these perceptions are generated from fear.[18] To explain why fear contributes to forming skewed perceptions of the mentally ill, the words of H.P. Lovecraft echo loudly: "The oldest and strongest emotion of mankind is fear, and the oldest and strongest kind of fear is fear of the unknown."[19] Linking mental illness with the unknown illuminates why skewed perceptions of the mentally ill exist. These perceptions affect peoples' beliefs and attitudes toward the mentally ill, which then shapes the interactions, opportunities, and support systems provided to those with mental illnesses.[20] Fear of the mentally ill is perpetuated in society through cultural stereotypes, media influences, institutional practices, and past restrictions.[21] For example, a common cultural stereotype is that "individuals with mental illness are significantly more likely to commit violent crimes."[22] Although some people with mental illnesses do commit crimes, public perceptions of the mentally ill as criminally dangerous are exaggerated.[23] This exaggeration is enhanced when random, senseless, or unpredictable violent acts occur in society.[24]

One way to counterbalance the stigmas associated with mental illness is through spreading awareness.[25] Awareness is especially important in the legal

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[17] *See generally* Rene Scheffer, *Addressing Stigma Increasing: Public Understanding of Mental Illness*, CENTER FOR ADDICTION AND MENTAL HEALTH (2003) [hereinafter *Addressing Stigma*], *available at* https://knowledgex.camh.net/policy_health/diversity_hr/Documents/addressing_stigma_senatepres03.pdf.

[18] *See* Heather Stuart, *Violence and Mental Illness: An Overview*, WORLD PSYCHIATRY 121–22 (2003) [hereinafter *Violence and Mental Illness*], *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525086/pdf/wpa020121.pdf.

[19] H.P. LOVECRAFT, SUPERNATURAL HORROR IN LITERATURE (E.F. Bleiler ed., Dover Publications 1973).

[20] Rosemarie Kobau et al., *Attitudes Toward Mental Illness: Results From the Behavioral Risk Factor Surveillance System*, BRFSS MENTAL ILLNESS STIGMA REPORT 3 (Centers for Disease Control and Prevention et al. eds., 2012) [hereinafter *Attitudes Toward Mental Illness*], *available at* http://www.cdc.gov/hrqol/Mental_Health_Reports/pdf/BRFSS_Report_InsidePages.pdf (discussing that society's attitudes and beliefs towards mental illness can "influence how policymakers allocate resources to mental health services, pose challenges for staff retention in mental health settings, result in poorer quality of medical care administered to people with mental illness, and create fundraising challenges for organizations who serve people with mental illness and their families.").

[21] *Attitudes Toward Mental Illness*, *supra* note 20.

[22] *Addressing Stigma*, *supra* note 17. *See also Attitudes Toward Mental Illness*, *supra* note 20.

[23] *Addressing Stigma*, *supra* note 17 ("In fact, 80 to 90 percent of people with mental illness never commit violent acts. They are more likely to have acts of violence committed against them, particularly homeless individuals who may also have a mental illness.").

[24] *Violence and Mental Illness*, *supra* note 18; *see also Attitudes Toward Mental Illness*, *supra* note 20; *Addressing Stigma*, *supra* note 17.

[25] *See generally Attitudes Toward Mental Illness*, *supra* note 20; *Addressing Stigma*, *supra* note 17; and *Violence and Mental Illness*, *supra* note 18.

sphere because stigmas pose particular problems for legal practitioners and their clients, predominantly when issues of mental competency come forth.[26] Given "mental illnesses are medical conditions that often result in a diminished capacity for coping with the ordinary demands of life," problems arise when treatment is unavailable or unwanted.[27] Because the United States Constitution provides that no person "be deprived of life, liberty, or property, without due process of law," an individual must be deemed competent to stand trial.[28] Mental competency is defined as "the intellectual and emotional capacity of the accused to perform the functions which are essential to the fairness and accuracy of a criminal proceeding."[29] Brilliantly, the United States District Court for the District of Columbia stated: "However strong and pervasive the public policy to bring the morally responsible to bar, it cannot subvert the constitutional right to a fair trial which is not afforded to an accused who is prosecuted while legally incompetent."[30] Thus, competency problems arise if a mentally ill defendant is accused of a crime and refuses medication. To resolve this conflict, courts engage in a balancing test.[31]

B. Development of Sell

For courts to adequately balance both governmental interests and individual liberty interests, they need to address the following question: Can the government forcibly provide treatment to a mentally incompetent defendant in order to restore competency to stand trial? Under, 18 U.S.C. § 4241, Congress responded to this question in the affirmative.[32] However, Congress failed to delineate the type of treatment constitutionally permissible.[33] Instead, Title 18 provides procedures for courts to follow when issues of mental competency appear.[34] Because Congress did

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[26] *See* Sell v. United States, 539 U.S. 166 (2003).

[27] *Mental Illnesses*, *supra* note 13. Because mental illnesses do not have a cure, continuous treatment is required. *Mental Illnesses*, *supra* note 13. However, even when an illness is adequately managed through treatment, potential side effects could arise, therefore treatment should also be continuously monitored. *Mental Illnesses*, *supra* note 13.

[28] U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV. *See* 18 U.S.C.A. § 4241(a) (2014) (providing procedural safeguards for mentally incompetent criminal defendants).

[29] United States v. Wilson, 263 F. Supp. 528, 532 (D.D.C. 1966).

[30] *Id.*

[31] *See* Sell v. United States, 539 U.S. 166 (2003).

[32] *See* 18 U.S.C. § 4241. Section 4241(a) states that both the defendant and the government have the opportunity to file a motion for a hearing to determine mental competency. *Id.* Section 4241(b) permits the court to order a psychiatric or psychological examination of the defendant. *Id.* Then in Section 4241(d) if the defendant is deemed incompetent at the hearing, the Attorney General is able to hospitalize the defendant for treatment according to specific procedures. *Id.*

[33] *Id.*

[34] *See* 18 U.S.C. §§ 4241–4248 (2014). See 18 U.S.C § 4244, for the procedures for hospitalizing a convicted person suffering from a mental disease or defect. See 18 U.S.C. § 4245,

not explicitly define the type of treatment the government is able to administer to a defendant, in 1990 and then again in 1992, the United States Supreme Court set the foundation for determining when involuntary medication can be used to restore competency.[35] Specifically, the Court addressed the issue of when the government is able to forcibly administer antipsychotic medications to a mentally incompetent defendant.[36] The theory for seeking to administer antipsychotic drugs is to alter the chemical balance in the defendant's brain, resulting in the ability for the defendant to regain an organized, rational state of mind.[37]

In 1990, in *Washington v. Harper*, the Court held "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] In *Harper*, the defendant was diagnosed with manic-depressive disorder after violating his parole and returning to prison.[39] Manic-depressive disorder, also known as bipolar disorder, is a brain disorder that causes changes in an individual's mood, energy, and abilities to carry out daily tasks.[40] People with bipolar disorder experience "unusually intense emotional states that occur in distinct periods called 'mood episodes.'"[41] Mood episodes are drastic changes from a person's usual mood and behavior.[42] In *Harper*, the Court emphasized the importance of the individual's interest in refusing medication against the State's interest.[43] Moreover, the Court

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for the procedures for hospitalizing an imprisoned person suffering from a mental disease or defect. See 18 U.S.C. § 4246, for the procedures for hospitalizing a person due for release, but suffering from a mental disease or defect.

[35] *See* Washington v. Harper, 494 U.S. 210 (1990); Riggins v. Nevada, 504 U.S. 127 (1992). Note however, in *Harper* the court examined the issue of involuntary medication in a post-trial context. In comparison, in *Riggins*, the court examined the issue of involuntary medication in a pre-trial context.

[36] *See Washington*, 494 U.S. 210; *Riggins*, 504 U.S. 127. "Antipsychotic drugs are used to treat symptoms of psychiatric disorders such as schizophrenia and bipolar disorder, and have been shown to improve daily functioning in individuals with these disorders." UNITED STATES FOOD AND DRUG ADMINISTRATION, DRUGS (2011), *available at* http://www.fda.gov/drugs/drugsafety/ucm243903.htm.

[37] *See Harper*, 494 U.S. at 215.

[38] *Id.* at 277.

[39] *Id.* at 213–14. Initially, the defendant voluntarily consented to the administration of antipsychotic medication. *Id.*

[40] *Mental Health Information: Bipolar Disorder*, NATIONAL INSTITUTE OF MENTAL HEALTH (last visited Jan. 2, 2015) [hereinafter *Bipolar Disorder*], available at http://www.nimh.nih.gov/health/topics/bipolar-disorder/index.shtml.

[41] *Bipolar Disorder*, *supra* note 40 (citations omitted).

[42] *Bipolar Disorder*, *supra* note 40 ("An overly joyful or excited state is called a manic episode, and an extremely sad or hopeless state is called a depressive episode. Sometimes, a mood episode includes symptoms of both mania and depression. This is called a mixed state. People with bipolar disorder also may be explosive and irritable during a mood episode.").

[43] *See Harper*, 494 U.S. at 221.

acknowledged that the individual has a significant liberty interest "in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."[44]

Two years after deciding *Harper*, the Court held in *Riggins v. Nevada* that the Due Process Clause allows states to administer antipsychotic medication to an involuntary defendant if the medication is medically appropriate, less intrusive alternatives were considered, and if the medication is essential for the defendant's safety or the safety of others.[45] In *Riggins*, the defendant was taken into custody for murder and shortly thereafter, informed a private psychiatrist he was hearing voices and having difficulties sleeping.[46] The defendant initially consented to antipsychotic medication, but once the Court deemed the defendant competent, the medication was refused.[47] In analyzing whether the defendant's constitutional rights were violated, the Court emphasized the importance of the individual liberty interests at stake.[48] Specifically, the Court acknowledged that forced medication "represents a substantial interference with that person's liberty."[49] Furthermore, the Court stressed that the individual interest may be overcome only by an essential or overriding state interest.[50]

After *Riggins*, the test for involuntary medication was generally considered by courts to be a balancing test, weighing the state's interest against the defendant's liberty interest.[51] However, because neither the *Riggins* balancing test nor the *Harper* test provided a bright-line rule, courts were able to invoke discretion in deciding which test to follow; undoubtedly inconsistencies began to emerge.[52] These inconsistencies led the United States Supreme Court to craft a definitive test in *Sell v. United States*.[53]

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[44] *Id.*

[45] Riggins v. Nevada, 504 U.S. 127, 135 (1992). The Court relied on *Harper* to reach the holding. *Id.* The Court stated: "Under *Harper*, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness." *Id.*

[46] *Id.* at 129.

[47] *Id.* at 129–30 ("Riggins argued that continued administration of these drugs infringed upon his freedom that the drugs' effect on his demeanor and mental state during trial would deny him due process. Riggins also asserted that, because he would offer an insanity defense at trial, he had a right to show jurors his 'true mental state.'" (citations omitted)).

[48] *See id.* at 133–36.

[49] *Id.* at 134 (citations omitted).

[50] *Id.*; *see also* Sell v. United States, 539 U.S. 166, 178–79 (2003).

[51] *See* Riggins v. Nevada, 504 U.S. 127 (1992).

[52] *See supra* note 3.

[53] *See* Sell v. United States, 539 U.S. 166 (2003).

C. *The Facts of* Sell *and Mental Illness*

The defendant, Charles Sell, a once practicing dentist, had a long history of mental illness.[54] Sell began displaying mental abnormalities in September 1982, and was subsequently hospitalized, treated, and discharged.[55] From 1982 until 1997, Sell's mental health slowly deteriorated.[56] Then, in May 1997, Sell was charged with submitting false insurance claims for payment.[57] Although numerous records indicated Sell suffered from a mental illness, he was nevertheless deemed competent and was released on bail.[58] One year later, Sell's bail was revoked for intimidating a witness.[59] During that year, he was charged with attempting to murder the arresting FBI agent and a testifying witness.[60]

These events led the court to reconsider Sell's mental competency in 1999.[61] Sell was sent to the United States Medical Center for Federal Prisoners ("Center") for a mental health evaluation.[62] Based upon the examination results, Sell was

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[54] *Id.* at 169.

[55] *Id.* ("In September 1982, after telling doctors that the gold he used for fillings had been contaminated by communists, Sell was hospitalized, treated with antipsychotic medication, and subsequently discharged.").

[56] *Id.* The Court found:

> In June 1984, Sell called the police to say that a leopard was outside his office boarding a bus, and then asked the police to shoot him. Sell was again hospitalized and subsequently released. On various occasions, he complained that public officials, for example, a State Governor and a police chief, were trying to kill him. In April 1997, he told law enforcement personnel that he "spoke to God last night," and that "God told me every [Federal Bureau of Investigation] person I kill, a soul will be saved."

Id. (citations omitted).

[57] *Id.* at 169–70 ("A grand jury later produced a superseding indictment charging Sell and his wife with 56 counts of mail fraud, 6 counts of Medicaid fraud, and 1 count of money laundering.").

[58] *Id.* "A Federal Magistrate Judge (Magistrate), after ordering a psychiatric examination, found Sell 'currently competent,' but noted that Sell might experience 'a psychotic episode' in the future." *Id.* (citations omitted).

[59] *Sell*, 539 U.S. at 170. The Court found:

> The Magistrate held a bail revocation hearing. Sell's behavior at his initial appearance was, in the judge's words, "totally out of control," involving "screaming and shouting," the use of "personal insults" and "racial epithets," and spitting "in the judge's face." A psychiatrist reported that Sell could not sleep because he expected the Federal Bureau of Investigation (FBI) to "come busting through the door," and concluded that Sell's condition had worsened. After considering that report and other testimony, the Magistrate revoked Sell's bail.

Id. (citations omitted).

[60] *Id.* ("The attempted murder and fraud cases were joined for trial.").

[61] *Id.* at 170–71.

[62] *Id.*

deemed mentally incompetent and subsequently ordered to be hospitalized at the Center for up to four months.[63] The hospitalization was meant to determine if there was a significant likelihood Sell would regain competency to stand trial.[64] After two months at the Center, medical staff recommended antipsychotic medication.[65] However, because Sell refused the medication, medical staff then requested to administer the drugs forceably.[66] The request led to a hearing held by the reviewing psychiatrist, which resulted in the authorization to forego Sell's refusal.[67] This decision was premised on the determination that Sell was mentally ill and dangerous, and antipsychotic medication was necessary to treat Sell's mental illness and restore his competency for trial.[68] This rationale was supported by evidence presented during the hearing that Sell had a type of delusional disorder or schizophrenia.[69]

A delusional disorder affects a person's ability to decipher reality from fiction.[70] Delusions are false beliefs held to be true, contrary to reality.[71] There are five types of delusional disorders distinguishable from one another based on the type of delusion experienced.[72] People who have a delusional disorder do no not usually experience hallucinations.[73] Rather, these individuals maintain persistent, fixed beliefs based on false realities.[74] Additionally, delusional disorders are quite rare,

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[63] *Id.*

[64] *Id.*

[65] *Sell*, 539 U.S. at 171.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 171–72. The evidence at the hearing included: "Sell's current prosecutorial beliefs . . . staff medical opinions . . . staff medical concerns . . . an outside medical expert's opinion . . . and Sell's own views, as well as those of other laypersons who know him." *Id.* (citations omitted).

[69] *Id.*

[70] *Delusional Disorder*, HARVARD HEALTH PUBLICATIONS (2014) [hereinafter *Delusional Disorder*], *available at* http://www.drugs.com/health-guide/delusional-disorder.html ("Delusional Disorder is classified as a psychotic disorder.").

[71] *Delusional Disorder*, *supra* note 70 ("Delusions, like all psychotic symptoms, can occur as part of many different psychiatric disorders. But the term delusional disorder is used when delusions are the most prominent symptom.").

[72] *Delusional Disorder*, *supra* note 70 (The five types of delusional disorders include: (1) Erotomanic, which occurs when a person has a "delusion of a special, loving relationship with another person, usually someone famous or of higher standing"; (2) Grandiose, which occurs when a person has a "delusion that the person has a special power or ability, or a special relationship with a powerful person or figure, such as the president, a celebrity or the Pope"; (3) Jealous, which occurs when a person has a "delusion that a sexual partner is being unfaithful"; (4) Persecutory, which occurs when a person has a "delusion that the person is being threatened or maltreated"; and (5) Somatic, which occurs when a person has a "delusion of having a physical illness or defect.").

[73] *Delusional Disorder*, *supra* note 70.

[74] *Delusional Disorder*, *supra* note 70.

and less frequently diagnosed than other illnesses.[75] Because delusional disorder is a rarity, doctors need to evaluate alternative illnesses, such as schizophrenia, for a correct diagnosis.[76] Schizophrenia is a chronic and severe brain disorder.[77] To diagnose someone with schizophrenia, doctors look to three broad categories of symptoms: positive, negative, and cognitive.[78] Some of these symptoms include hearing voices, having delusions, or becoming withdrawn from society.[79]

After the reviewing psychiatrist determined Sell's mental state and required antipsychotic medication be administered, Sell moved to contest the State's ability to medicate him involuntarily.[80] The lower courts agreed with the state that involuntary medication of Sell was appropriate.[81]

D. The Sell *Four-Factor Test*

The Court granted certiorari to clarify the standard that must be applied in order to resolve issues of whether a defendant can be subjected to involuntary medication.[82] In clarifying the test to be used, the Court acknowledged that both

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[75] *See Delusional Disorder*, *supra* note 70.

[76] *See Delusional Disorder*, *supra* note 70.

[77] *Schizophrenia*, NATIONAL INSTITUTE OF MENTAL HEALTH (last visited Jan. 2, 2015) [hereinafter *Schizophrenia*], *available at* http://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml#part1.

[78] *Schizophrenia*, *supra* note 77. "Positive symptoms are psychotic behaviors not seen in healthy people." *Id.* Positive symptoms can include, hallucinations, delusions, thought disorders, and movement disorders. *Id.* "Negative symptoms are associated with disruptions to normal emotions and behaviors." *Id.* Cognitive symptoms include an inability to understand information, problems focusing, and an inability to apply information that was learned. *Id.* Both, negative and cognitive symptoms are not easily detected when diagnosing a person with schizophrenia. *Id.*

[79] *Id.*

[80] *See* Sell v. United States, 539 U.S. 166, 172 (2003).

[81] *Id.* at 172–75. The Court noted that:

> The District Court *affirmed* the Magistrate's order permitting Sell's involuntary medication. The court wrote that "anti-psychotic drugs are medically appropriate," that "they represent the only viable hope of rendering defendant competent to stand trial," and that "administration of such drugs appears necessary to serve the government's compelling interest in obtaining an adjudication of defendant's guilt or innocence of numerous and serious charges" (including fraud and attempted murder). The court added that it was "premature" to consider whether "the effects of medication might prejudice [Sell's] defense at trial."

Id. (citations omitted).

[82] *Id.* at 169 (stating the issue as "whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes.").

Washington v. Harper and *Riggins v. Nevada* set the foundation for the Court to build upon.[83] Relying on precedent, the Court announced a four-factor test.[84]

First, for a court to find involuntary medication is necessary, it must find that there is an *important* governmental interest at stake.[85] To determine if the first prong is met, the reviewing court must consider the individual facts of the case.[86] Under this prong, the Court acknowledged that the Government has an important interest to bring an accused to stand trial.[87] However, if special circumstances are present, the government's interest is lessened.[88] In *Sell*, the first prong was not satisfied because "the lower courts did not consider that Sell [had] already been confined at the Medical Center for a long period of time, and that his refusal to take antipsychotic drugs might result in further lengthy confinement."[89] Further, in *United States v. White*, the Fourth Circuit Court of Appeals considered the length of time the defendant spent confined prior to trial, the nature of the crime, the district court's order to hospitalize the defendant, the defendant's medical condition, and the need to medicate the defendant involuntarily.[90]

Second, the involuntary medication must *significantly* further the Government's interest.[91] To fulfill this requirement, the reviewing court must determine if the medication is substantially likely to restore the defendant's competency for trial.[92] However, the court must also determine if the medication is substantially unlikely to cause side effects that would significantly interfere with the defendant's

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[83] *Id.* at 169, 177–79 ("*Harper* and *Riggins*, 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 the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests."). *See supra* notes 38, 45 and accompanying text.

[84] *Sell*, 539 U.S. at 169. Note how the Court describes the *Sell* test as a factor-type test, not elemental. *Id.* Interestingly, throughout the opinion, the Court referred to these factors as requirements. *Id.*

[85] *Id.* at 180.

[86] *Id.*

[87] *Id.*

[88] *See Sell*, 539 U.S. at 180. For example, a "defendant's failure to take drugs voluntarily . . . may mean lengthy confinement in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Id.* Also, "it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost. The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution." *Id.*

[89] *Id.* at 186.

[90] United States v. White, 620 F.3d 401, 413 (4th Cir. 2010).

[91] *Sell*, 539 U.S. at 181.

[92] *Id.*

ability to participate in the trial.[93] If the court finds that the side effects would prevent the defendant from actively assisting in the defense, the request for involuntary medication must be denied because it would render the trial unfair.[94] In *Sell*, the lower courts failed to satisfy this prong because the potential for side effects were not adequately analyzed.[95] 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 . . . ."[96] Additionally, in *United States v. Evans* the court stated the second prong of the *Sell* test must be examined with "sufficient particularity" to be satisfied.[97]

Third, the medication must be *necessary* to further the Government's interest.[98] For the Government to prove involuntary medication is necessary, the court must find that no other, less intrusive, alternative would be likely to achieve the same result.[99] In *Sell*, the Court remanded the case to the lower courts to determine this prong, acknowledging that nondrug therapies may be effective in restoring competency, but noted alternative methods are sometimes not as effective as medication.[100] Additionally, in *United States v. Chatmon*, the Fourth Circuit Court of Appeals reversed the district court's order to involuntarily medicate the defendant because "the court did not mention or analyze any of the less intrusive alternatives suggested by the Supreme Court in *Sell* or by [the defendant] himself."[101] In *Chatmon*, the court stated: "The question of when the government may involuntarily administer psychotropic drugs to a defendant for the purposes of rendering him competent to stand trial entails a difficult balance between the defendant's interest in refusing mind-altering medication and society's

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[93] *Id.*

[94] *Id.* For examples of side effects that would interfere with the defendant's ability to assist in a defense, see *infra* note 125 and accompanying text.

[95] *Id.* at 185.

[96] *Id.*

[97] *See* United States v. Evans, 404 F.3d 227, 232 (4th Cir. 2005).

[98] *Sell*, 539 U.S. at 181.

[99] *See id.* (explaining that "the Court must consider less intrusive means for administering the drugs, *e.g.*, a court order to the defendant backed by the contempt power, before considering more intrusive methods.").

[100] *Id.*

[101] *See* United States v. Chatmon, 718 F.3d 369, 371 (4th Cir. 2013) (discussing forcible medication "should be carefully scrutinized due to their impact on personal liberty").

interest in bringing the accused to trial."[102] Further, *Chatmon* characterized the ability to involuntarily medicate a mentally ill defendant as a "drastic resort."[103] This framework emphasizes the importance of the individual interests in refusing antipsychotic medications.[104]

Fourth, the medication must be *medically appropriate*.[105] To determine if the medication is medically appropriate, the reviewing court must decide if the medication sought is in the defendant's medical interest in light of his or her medical condition.[106] The Court in *Sell* remanded the case to the lower courts to decide this prong.[107] However, in *Evans* the court stated the analysis of the fourth factor of the *Sell* test requires consideration of the defendant's "particular mental and physical condition."[108]

Based on the four factors, the Court in *Sell* stated, "the present orders authorizing forced administration of antipsychotic drugs cannot stand."[109] Because the lower courts did not consider all of the prongs in the test, the Court remanded the case to the lower courts for further factual inquiry.[110] The Court also stated that because "Sell's medical condition may have changed over time, the Government should do so on the basis of current circumstance."[111]

To illustrate the significance of *Sell*, the Court posited the following question to future reviewing courts: "Has the Government, in light of the efficiency, the side effects, the possible alternatives, and the medical appropriateness of a

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[102] *Id.* at 373. In *Chatmon*, the defendant was indicted for "conspiracy to distribute crack cocaine and heroin" and was subsequently "diagnosed with paranoid schizophrenia and deemed incompetent to stand trial." *Id.* at 371. The issue arose when the district court permitted the government to involuntarily medicate the defendant. *Id.* On appeal, the court held, "Because careful findings concerning the availability of less intrusive means are necessary to vindicate the Supreme Court's admonition that forcible medication motions should be carefully scrutinized due to their impact on personal liberty, we vacate the district court's order and remand for further proceedings." *Id. See also supra*, notes 77–78 and accompanying text.

[103] *Chatmon*, 718 F.3d at 373 (characterizing the "recourse to forced medication as a 'drastic resort' that, if allowed to become 'routine,' could threaten an elementary 'imperative of individual liberty.'" (citations omitted)).

[104] *See id.* This framework comports with *Washington v. Harper* and *Riggins v. Nevada* because of the emphasis on the individual liberty interests rather than the governmental interests. *See supra* notes 43–44, 48–50 and accompanying text.

[105] *Sell*, 539 U.S. at 181.

[106] *Id.* ("Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.").

[107] *Id.* at 186.

[108] United States v. Evans, 404 F.3d 227, 240 (4th Cir. 2005).

[109] *Sell*, 539 U.S. at 186.

[110] *Id.*

[111] *Id.*

particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?"[112]

III. PRINCIPAL CASE

United States v. Breedlove is an example of the *Sell* test misapplied. In *Breedlove* the United States Court of Appeals for the Seventh Circuit attempted to abide by the precedent set forth in *Sell* to determine "whether a presentence detainee may be involuntarily medicated in order to restore competency for sentencing."[113] Although the court correctly stated each prong of the *Sell* test, it failed to understand the intent behind the test as a whole. This failure resulted in an incomplete analysis and the improper authorization to involuntarily medicate the defendant.

The defendant, Norman Breedlove, agreed to testify against four co-conspirators in a variety of drug trafficking and firearm offenses in exchange for a sentence reduction.[114] Prior to sentencing, Breedlove filed a Notice of Ineffective Counsel on the premise that his counsel, the co-defendants, and the court system were conspiring against him.[115] After Breedlove was provided new counsel, a mental health examination was requested.[116] The attorney believed Breedlove exhibited signs of "paranoid delusion."[117] Initially, the examination resulted in a paranoid schizophrenia diagnosis.[118] Because of this diagnosis, Breedlove was hospitalized and the administration of antipsychotic medication was subsequently requested pursuant to *Sell*.[119] A *Sell* hearing was conducted to determine the appropriateness of involuntary medication.[120] At the hearing, the psychologist and psychiatrist explained their recommendation to involuntarily medicate

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[112] *Id.* at 183.

[113] United States v. Breedlove, 756 F.3d 1036, 1038 (7th Cir. 2014).

[114] *Id.* at 1038–41 (reducing Breedlove's sentence from life to ten years in prison).

[115] *Id.*

[116] *Id.*

[117] *See Breedlove*, 756 F.3d at 1038–41. *See also supra* notes 70–76 and accompanying text (explaining that delusional disorders are a rarity, and are difficult to properly diagnose). Regardless of whether Breedlove was actually suffering from a delusional disorder, the delusion described is consistent with persecutory delusion. *See Delusional Disorder*, *supra* note 70; *see supra* notes 70–76 and accompanying text.

[118] *Breedlove*, 756 F.3d at 1038. *See supra* notes 76–79 and accompanying text (explaining that schizophrenia is a serious brain disorder in which three primary symptoms are generally found).

[119] *Breedlove*, 756 F.3d at 1038.

[120] A *Sell* hearing is a hearing in which evidence is presented to determine the medical appropriateness of the medication sought to be administered. *Id.*

Breedlove was premised on hours of face-to-face interviews and observations.[121] The psychologist also admitted the recommendation was aimed more at restoring competency than at individual therapy.[122] Additionally, the psychiatrist testified that the antipsychotic medication, called Haloperidol, was substantially likely to restore the defendant's competency.[123] Haloperidol is a conventional antipsychotic drug that decreases abnormal excitement in the brain.[124] Although the psychiatrist testified that Haloperidol could cause severe side effects, she remained confident in her recommendation.[125] The psychiatrist stated she was comfortable with the

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[121] *Id.* at 1039 ("Their testimony was also, at least in part, influenced by a study that Dr. Reardon authored with two other colleagues (the Butner study), which examined all federal detainees treated under *Sell* between 2003 and 2009 and determined that 79% of all treatment resulted in restored competency, and that the success rate rose to 93% for individuals with the same disorder as Breedlove."). It is important to note the difference between psychologists and psychiatrists. "Practicing psychologists have the professional training and clinical skills to help people learn to cope more effectively with life issues and mental health problems. After years of graduate school and supervised training, they become licensed by their states to provide a number of services, including evaluations and psychotherapy." *What do Practicing Psychologists do?*, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/helpcenter/about-psychologists.aspx (last visited Jan. 2, 2015). In contrast, a psychiatrist is a doctor,

> who specializes in the diagnosis, treatment, and prevention of mental health and emotional problems. Because of extensive medical training, the psychiatrist understands the body's functions and the complex relationship between emotional illness and other medical illness. The psychiatrist is thus the mental health professional and physician best qualified to distinguish between physical and psychological causes of both mental and physical distress.

What is a Psychiatrist, AMERICAN PSYCHIATRIC ASSOCIATION, http://www.psychiatry.org/medical-students/what-is-a-psychiatrist (last visited Jan. 2, 2015).

[122] *Breedlove*, 756 F.3d at 1039.

[123] *Id.* "Haloperidol is used to treat psychotic disorders (conditions that cause difficulty telling the difference between things or ideas that are real and things or ideas that are not real)." *Haloperidol*, MEDLINEPLUS [hereinafter *Haloperidol*], http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682180.html (last visited Oct. 25, 2014).

[124] *Haloperidol*, *supra* note 123 ("Haloperidol may help control [a] condition, but it will not cure it."). Haloperidol comes in the form of a tablet or a concentrated liquid to be taken by mouth every day at around the same time. *Haloperidol*, *supra* note 123. It is generally understood that when starting to take Haloperidol, a doctor will initially prescribe a low dose and then gradually increase the dose as needed, however, once the condition is deemed controlled, the doctor may decrease the dose as well. *Haloperidol*, *supra* note 123.

[125] *Breedlove*, 756 F.3d at 1039. Some side effects that can result from taking Haloperidol include, but are not limited to the following:

> Drowsiness, dry mouth, increased saliva, blurred vision, loss of appetite, constipation, diarrhea, heartburn, nausea, vomiting, difficulty falling asleep or staying asleep, blank facial expression, uncontrollable eye movements, unusual, slowed, or uncontrollable movements of any part of the body, restlessness, agitation, nervousness, mood changes, dizziness, headache, breast enlargement or pain, breast milk production, missed menstrual periods, decreased sexual ability in men, increased sexual desire, difficulty urinating, fever, muscle stiffness, confusion, fast or irregular heartbeat, sweating, decreased thirst, neck cramps, tongue that sticks out of the mouth, tightness in the throat, difficulty breathing or swallowing, fine, worm-like tongue movements,

treatment plan because Breedlove would be monitored to detect any side effects and to adjust treatment accordingly.[126]

Shortly after the *Sell* hearing, Breedlove's counsel moved to have his client reevaluated.[127] The motion was based solely on the attorney's observations and conclusions.[128] After the District Court reviewed the evidence, the court denied the request for reevaluation and granted the request to involuntarily medicate Breedlove.[129] The court stated the motion for reevaluation was denied because "the counsel's expertise was in the law, not psychology" and preferred to rely on the testifying doctors instead.[130]

On appeal, the circuit court examined the district court's findings and concluded the *Sell* test satisfied.[131] The court affirmed the first factor of the *Sell* test because Breedlove's crimes were sufficiently serious.[132] The second factor was satisfied because the court relied on the recommendation of the psychologist and psychiatrist that the medication would likely restore the defendant's competency.[133] The court also agreed that the third factor of the *Sell* test was satisfied based on the testimony of the psychologist and psychiatrist that alternative treatments would be substantially unlikely to restore the defendant's competency.[134] Finally, the appellate court found the fourth *Sell* factor was satisfied because "the district court's instructions and reference to the government's detailed treatment plan satisfied its burden under *Sell*, even if a maximum dosage was not explicitly included in the district court's order."[135]

IV. ANALYSIS

In *Breedlove*, the court correctly stated each prong of the *Sell* test, but failed to understand the intent behind the test as a whole, resulting in an incomplete analysis and the improper authorization to involuntarily medicate the defendant.

> uncontrollable, rhythmic face, mouth, or jaw movements, seizures, eye pain or discoloration, decreased vision, especially at night, seeing everything with a brown tint, rash, yellowing of the skin or eyes, and erection that lasts for hours.

Haloperidol, supra note 123.

[126] *Breedlove*, 756 F.3d at 1039.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 1039–40.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 1041.

[133] *Id.* at 1041–42.

[134] *Id.* at 1042–43.

[135] *Id.* at 1043.

Additionally, *Breedlove* was wrongly decided because the court failed to consider special circumstances lessening the governmental interest, the potential for side effects of administered medication, less intrusive alternatives to that medication, and its medical appropriateness.[136] Further, the court showed great deference to the governmental interests over the individual liberty interests throughout the application of the *Sell* test. Because the court did not give adequate weight to the individual liberty interests, as required by *Harper* and *Riggins*, the court failed to understand the intent behind the *Sell* opinion.[137] Moreover, in *United States v. White*, the court stated, "we think the Supreme Court intended to pay more than lip service to the imperative of the individual liberty in the admonishment that forced medication is constitutionally permissible in "limited circumstances."[138]

A. The Government Must have an Important Interest

In *Breedlove*, the reviewing court claimed the first factor of the *Sell* test to be the most "contentious", but did not explain why.[139] The first factor requires the court to determine if an important governmental interest is at stake.[140] In *Sell*, the Court was not distressed over this first factor; it merely requires the reviewing court to look to the specific facts of a case to determine if any special circumstances exist.[141] In application, it was clear that the governmental interest in forcefully medicating Breedlove was to restore his competency to proceed with the sentencing hearing.[142] Similarly, in *Sell* it was recognized that the government will always have an important interest in bringing the accused to stand trial, but if special circumstances are present the government's interest is lessened.[143]

To illustrate how special circumstances may lessen the government's interest, *Sell* provided the example that a defendant's failure to voluntarily take medication "may mean lengthy confinement in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime."[144] Based on this example, *Sell* indicated that the reviewing court must identify the severity of the crime to properly apply the first prong in the test.[145] However, *Sell* did not provide courts a clear

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[136] *See infra* notes 139–205 and accompanying text.

[137] *See* Washington v. Harper, 494 U.S. 210, 221 (1990); Riggins v. Nevada, 504 U.S. 127, 133–136 (1992); *see also supra* notes 43–44, 48–50 and accompanying text.

[138] United States v. White, 620 F.3d 401, 422 (4th Cir. 2010).

[139] *Breedlove*, 756 F.3d at 1040.

[140] *Id.*

[141] *See* Sell v. United States, 539 U.S. 166, 180 (2003); *supra* notes 85–89 and accompanying text.

[142] *See Breedlove*, 756 F.3d at 1040.

[143] *See Sell*, 539 U.S. at 180.

[144] *Id.* at 180; *see supra* notes 87–88 and accompanying text.

[145] *Sell*, 539 U.S. at 180.

standard to follow. This silence caused inconsistent results.[146] Because of these inconsistencies, two years after *Sell*, in *United States v. Evans*, the United States Court of Appeals for the Fourth Circuit developed a standard for seriousness.[147] The standard requires courts to look to the maximum penalty authorized by Congress to determine the severity of the crime.[148]

In *Breedlove,* the court adopted this standard, concluding that, because Breedlove's crime carried the maximum statutory penalty of life imprisonment, the crime was serious.[149] However, the court failed to consider a special circumstance in this case: Breedlove's sentence was only ten years as a result of a plea bargain, not life imprisonment.[150] The reduced sentence and plea bargain are evidence of a reduced governmental interest. Because the court did not consider this circumstance, it failed to comply with the intent of the first prong in the *Sell* test.[151]

Even though *Breedlove* recognized both aspects of the first prong, including the government's desire to sentence the defendant and to scrutinize the seriousness of the crime, the court skipped the analysis of the former and instead focused on the latter.[152] The intent behind the first *Sell* factor was to require courts to examine all relevant factual circumstances of a case, including the government's interest and any special circumstances that might lessen the government's interest.[153] Failing to accurately frame the *Sell* test in the first prong created difficulties throughout the entire analysis. Because the court did not fully examine both competing interests, the analysis favored the governmental interests.[154]

B. The Medication Must Significantly Further the Governmental Interest

The second prong of the *Sell* test requires the reviewing court to find that the medication significantly furthers the government's interest.[155] Moreover, the court must find the medication substantially likely to render the defendant competent,

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[146] *See supra* note 3.

[147] *See* United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005) (explaining "it is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is 'serious' for involuntary medication purposes. Such an approach respects legislative judgments regarding the severity of the crime . . . while at the same time giving courts an objective standard to apply . . . .").

[148] *Id.*

[149] *Breedlove*, 756 F.3d at 1041.

[150] *See id.* at 1038; *see supra* note 114 and accompanying text.

[151] *See supra* notes 88–89 and accompanying text.

[152] *See Breedlove*, 756 F.3d at 1040.

[153] *See* Sell v. United States, 539 U.S. 166, 180 (2003).

[154] *See* United States v. Breedlove, 756 F.3d 1036 (7th Cir. 2014).

[155] *See Sell*, 539 U.S. at 181.

and substantially unlikely to have adverse side effects.[156] In *Breedlove*, the court relied heavily on the testimony of the psychiatrist and psychologist to find the second prong satisfied.[157] However, the court failed to delve into the reliability of the experts' recommendations. Instead, the court accepted the experts' testimony, which favored involuntary medication.[158]

The court's analysis of this prong poses specific problems. For example, there was not a determinative diagnosis of Breedlove.[159] It is difficult to understand how the court, without a specific diagnosis, could have declared the medication substantially likely to restore competency. In fact, the psychologist disputed the initial diagnosis of paranoid schizophrenia.[160] Further, the inquiry of Breedlove's mental state was premised solely on Breedlove's accusations that his previous counsel, co-defendants, and the court system were conspiring against him.[161] This evidence was not the product of a mental health evaluation.[162] Rather, Breedlove's counsel requested the mental health evaluation based upon these accusations.[163] The experts' recommendation to involuntarily medicate Breedlove was derived from only hours of face-to-face interviews, observations, and a contested study.[164] In contrast, the defendant in *Sell* underwent two months of constant supervision prior to the medical staff recommending antipsychotic drugs.[165]

In *Breedlove*, the court also failed to fully analyze the potential for the medication to cause severe side effects.[166] Failing to examine this aspect of the second prong defies the intent of the *Sell* test. The *Sell* opinion relied on both *Washington v. Harper* and *Riggins v. Nevada*, which emphasized the individual liberty interests.[167] Courts are required to examine the potential side effects in order to weigh the individual liberty interests fairly against the governmental

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[156] *Id.*

[157] *Breedlove*, 756 F.3d at 1041.

[158] *See id.* at 1039–40.

[159] *See id.* at 1038–39.

[160] *See id.*

[161] *See id.* at 1038.

[162] *See id.* at 1038–41; *see supra* notes 115–118 and accompanying text.

[163] *See Breedlove*, 756 F.3d at 1038–41; *see supra* notes 115–118 and accompanying text.

[164] *See Breedlove*, 756 F.3d at 1039 (noting the study "examined all federal detainees treated under *Sell* between 2003 and 2009 and determined that 79% of all treatment resulted in restored competency, and that the success rate rose to 93% for individuals with the same disorder as Breedlove.").

[165] *See supra* notes 61–69 and accompanying text.

[166] *See Breedlove*, 756 F.3d at 1041–42.

[167] *See* Sell v. United States, 539 U.S. 166 (2003); Washington v. Harper, 494 U.S. 210, 221 (1990); Riggins v. Nevada, 504 U.S. 127, 133–36 (1992). *See also supra* notes 43–44, 48–50 and accompanying text.

interests.[168] The only evidence for potential side effects from the medication was the psychiatrist's testimony that despite the side effects, Haloperidol was substantially likely to restore Breedlove's competency.[169] The psychiatrist testified that some of the potential side effects are "severe and irreversible in their most serious manifestations."[170] Nevertheless, the court disregarded these statements because the psychiatrist claimed to be comfortable with the treatment plan.[171] Additionally, the psychologist testified that the medication might cause several benefits, such as a reduced stress level.[172] Although the court specifically noted the potential benefit for a reduced stress level, the court did not discuss or disclose the negative side effects that could occur.[173] Some side effects of Haloperidol include drowsiness, vomiting, uncontrollable eye movements, unusual, slowed, or uncontrollable movements of any part of the body, confusion, difficulty breathing or swallowing and seizures.[174] In *Breedlove*, the court did not mention any of these side effects, nor did the court discuss the possibility the side effects could interfere with Breedlove's ability to assist in the defense.[175]

The analysis of the second prong, in *Breedlove*, strayed from the intent of the *Sell* test because the court failed to discuss the potential for side effects.[176] The analysis of the second prong also lessened the importance of the individual liberty interests at stake, contrary to the intent of both *Harper* and *Riggins*, upon which the Court in *Sell* relied.[177] Additionally, in *Breedlove*, the defense attorney exemplified why legal practitioners need to understand issues related to mental illnesses in order to avoid unfavorable dispositions. A basic foundation of knowl edge will lead to sounder arguments, credibility, and beneficial communications between attorneys and clients.[178]

C. The Medication Must be Necessary to Further the Governmental Interest

The third prong of the *Sell* test requires the reviewing court to find the medication necessary to further the government's interest.[179] In order to fulfill

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[168] S*ee Sell*, 539 U.S. at 181.

[169] *See Breedlove*, 756 F.3d at 1039.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.* at 1038–40.

[174] *Haloperidol*, *supra* note 123; *see supra* notes 124–125 and accompanying text.

[175] *See Breedlove*, 756 F.3d at 1039.

[176] *Compare id.* at 1041–42, *with* Sell v. United States, 539 U.S. 166, 181 (2003).

[177] *See Sell*, 539 U.S. 166 (2003); Washington v. Harper, 494 U.S. 210, 221 (1990); Riggins v. Nevada, 504 U.S. 127, 133–36 (1992). *See also supra* notes 43–44, 48–50 and accompanying text.

[178] *See supra* notes 10–31 and accompanying text.

[179] *See Breedlove*, 756 F.3d at 1042.

this requirement, there must be no other, less intrusive, alternative likely to obtain the same results.[180] In *Breedlove*, to satisfy this prong, the court relied on the opinions of the psychologist and psychiatrist "that therapy or other non-medication based treatments would be substantially unlikely to restore Breedlove's competency. . . ."[181] However, at no point in the opinion did the court mention, nor inquire into, any *alternative* to forced medication.[182] Because the court failed to adequately analyze other possible treatments, *Breedlove* strayed from the intent of the *Sell* test.[183]

The court attempted to satisfy the third prong by stating forced injections would occur only if Breedlove first refused the medication orally.[184] This *alternative method* is no alternative at all because the method still required Breedlove to be involuntarily medicated. Additionally, Breedlove argued that the government failed to prove that he would "not regain competency on his own, rendering non-treatment a viable, less intrusive alternative."[185] The court rejected this argument stating "there was clear and convincing evidence that administration of Haloperidol was necessary to restore Breedlove's competence and that his competence was unlikely to be restored with alternative treatments, much less no treatment."[186] This conclusion was based upon the testimony of the psychologist and psychiatrist.[187] The court also refused to credit the defense's claim that Breedlove's condition had improved based on the defense attorney's observations.[188] Because the defendant's request for a second mental health evaluation was premised on the defense attorney's observations, and not medical expertise, the court denied the request.[189]

The court failed to comply with the third prong of the *Sell* test because alternative methods to forced medication were not examined. By demanding that no other, less intrusive, alternative be available to achieve the same results as forced medication, this prong encourages courts to emphasize the individual

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[180] *Id.*

[181] *Id.*

[182] *See Breedlove*, 756 F.3d 1036.

[183] *See* Sell v. United States, 539 U.S. 166 (2003); Washington v. Harper, 494 U.S. 210, 221 (1990); Riggins v. Nevada, 504 U.S. 127, 133–36 (1992). *See also supra* notes 43–44, 48–50 and accompanying text.

[184] *See Breedlove*, 756 F.3d at 1042.

[185] *Id.*

[186] *Id.* at 1043 (stating that Breedlove's argument failed because "according to the district court, the government's experts convincingly testified to the opposite" and "the court did not credit Breedlove's assertion, through his counsel, that his condition was improving.").

[187] *Id.*

[188] *Id.*

[189] *Id.*; *compare supra* notes 115–117 and accompanying text, *with supra* notes 129–130 and accompanying text.

liberty interests involved.[190] For a court to satisfy the third prong in the *Sell* test, the court must identify alternatives, and then decide involuntary medication is the best choice.[191]

D. The Medication Must be Medically Appropriate

Finally, to satisfy the *Sell* test the reviewing court must find the medication medically appropriate.[192] To determine if the medication is medically appropriate, the court must decide if the medication is in the defendant's best interest, in light of his or her medical condition.[193] This prong requires courts to take into consideration the diagnosis and personal medical history of the defendant.[194] In *Breedlove*, the court applied the fourth prong inconsistently with the purpose of the *Sell* test because the court did not emphasize the individual liberty interests of the defendant. Further, the court did not consider the diagnosis or the defendant's medical history. For instance, the court rejected the defendant's argument that the medication was inappropriate because the purpose was to restore competency, not individual therapy.[195] Because the psychologist testified the medication was aimed solely at restoring competency, the governmental interest outweighed Breedlove's personal medical interests.[196] However, to satisfy the fourth prong, the court must decide that the medication is medically appropriate for the specific defendant.[197] This inquiry requires the court to evaluate the defendant's individual needs. Additionally, because the experts disagreed on the diagnosis ascribed to Breedlove, and because the court failed to adequately examine the potential for side effects, the medication was not medically appropriate.[198]

E. Mental Illness Education

The *Sell* test was designed to enable courts to "make the ultimate constitutionally required judgment."[199] Specifically, *Sell* established the test courts must follow when issues of involuntary medication arise.[200] This test is significant because the Court drew lines, defining the government's interests against the

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[190] *See Breedlove*, 756 F.3d at 1042.

[191] *Id.*

[192] *Id.* at 1043; *see* Sell v. United States, 539 U.S. 166, 181 (2003).

[193] *See Breedlove*, 756 F.3d at 1043; *see Sell*, 539 U.S. at 181.

[194] *See Breedlove*, 756 F.3d at 1043; *see Sell*, 539 U.S. at 181.

[195] *Breedlove*, 756 F.3d at 1039, 1043; *see supra* note 122 and accompanying text.

[196] *See Breedlove*, 756 F.3d at 1039; *see supra* note 122 and accompanying text.

[197] *See Breedlove*, 756 F.3d at 1043; *see Sell*, 539 U.S. at 181.

[198] *See supra* notes 155–178 and accompanying text.

[199] *Sell*, 539 U.S. at 183.

[200] *See* United States v. Breedlove, 756 F.3d 1036 (7th Cir. 2014).

individual liberty interests in a medical context.[201] By creating these distinctions, psychiatry merged into the law, shining light on mental illness. *Sell* exemplifies why legal practitioners need to be versed on matters related to mental illnesses, especially when dealing with issues of involuntary medication.[202] The fourth prong in the *Sell* test requires courts to examine not only the medical diagnosis of the defendant's mental illness, but also the appropriateness of treatment.[203] As a result, legal practitioners are compelled to educate themselves on mental illnesses.[204] Simply relying on an expert is inadequate. In order to ethically and professionally represent a mentally ill client, and properly apply the *Sell* test, an attorney must understand his or her client's mental condition.[205]

V. CONCLUSION

United States v. Breedlove is an example of how one court misapplied the *Sell* test.[206] Misapplications of the *Sell* test stem from not understanding the purpose of the test.[207] The Court developed the *Sell* test to enhance the ideals from *Washington v. Harper* and *Riggins v. Nevada*.[208] In both *Harper* and *Riggins*, the Court acknowledged the important governmental interest in bringing an accused to stand trial, yet sought to limit a state's ability to medicate an involuntary defendant.[209] The *Sell* test adopted these ideals because each factor requires courts to analyze, in-depth, the individual liberty interests at stake.[210] Because each prong is aimed at protecting individual liberty interests, *Sell* exemplifies the need for legal practitioners to become aware of the issues related to mental illnesses in order to comply with the four factors. For example, in *Breedlove*, although the defense attorney vigilantly attempted to provide insight to the court regarding the defendant's mental state, the attempts were unsuccessful because the court refused to credit the attorney's observations.[211] Additionally, *Breedlove* is an example of

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[201] *See* Sell v. United States, 539 U.S. 166 (2003).

[202] *See supra* notes 139–205 and accompanying text.

[203] *See supra* notes 192–198 and accompanying text.

[204] *See Sell*, 539 U.S. at 181.

[205] For example, in *Breedlove*, the defendant's attorney did not understand the defendant's mental illness, which resulted in various diagnoses and an unfavorable verdict. *See* 756 F.3d 1036 (7th Cir. 2014).

[206] *See supra* notes 136–198 and accompanying text.

[207] *See supra* notes 136–138 and accompanying text.

[208] *See Sell*, 539 U.S. at 178–79; Washington v. Harper, 494 U.S. 210, 221(1990); Riggins v. Nevada, 504 U.S. 127, 133–136 (1992). *See supra* notes 43–44, 48–50, 83–84 and accompanying text.

[209] *See Sell*, 539 U.S. at 169, 177–79; *Harper*, 494 U.S. at 221; *Riggins*, 504 U.S. at 133–36. *See supra* note 83 and accompanying text.

[210] *See supra* note 83 and accompanying text.

[211] *See supra* notes 115–117, 129–130 and accompanying text.

how a court has interpreted *Sell* to show great deference to the governmental interests over the individual liberty interests.[212] However, because courts, like *Breedlove*, have misapplied the *Sell* test, inconsistencies have blossomed.[213] To resolve these inconsistencies, legal practitioners must become educated on mental illness to adequately represent mentally ill clients.

[212] *See supra* notes 136–138 and accompanying text.

[213] For examples of how courts have applied the *Sell* test, *see* United States v. Evans, 404 F.3d 227 (4th Cir. 2005); United States v. Bradley, 417 F.3d 1107 (10th Cir. 2005); United States v. Green, 532 F.3d 538 (6th Cir. 2008); United States v. Hernandez-Vasquez, 513 F.3d 908 (9th Cir. 2008); United States v. Bush, 585 F.3d 806 (4th Cir. 2009); United States v. White, 620 F.3d 401 (4th Cir. 2010); United States v. Chatmon, 718 F.3d 369 (4th Cir. 2013); United States v. Debenedetto, 744 F.3d 465 (7th Cir. 2013); United States v. Chavez, 734 F.3d 1247 (10th Cir. 2013); United States v. Breedlove, 756 F.3d 1036 (7th Cir. 2014).