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Notes

UNITED STATES v. WHITE: FURTHER UNBALANCING THE JUDICIAL ANALYSIS OF FORCIBLE MEDICATION OF DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL

CYNTHIA POLASKO*

In *United States v. White*,[1] the United States Court of Appeals for the Fourth Circuit considered whether the federal government could force defendant Kimberly White to take antipsychotic medication against her will for the sole purpose of rendering her competent to stand trial.[2] The court held that the government could not forcibly medicate White because its interest in forcible medication was not important enough to override White's constitutional liberty interest in avoiding such medication.[3] In making its decision, the court considered four factors,[4] as set out by the Supreme Court of the United States in *Sell v. United States*.[5] In its opinion, however, the Fourth Circuit overcomplicated the *Sell* analysis by engaging in a conjectural sentencing calculation while at the same time deemphasizing its focus on White as an individual.[6] The court should have taken this opportunity to apply the four *Sell* factors in the form of a constitutional balancing test, which would have identified and weighed White's specific

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1. 620 F.3d 401 (4th Cir. 2010).

2. *Id.* at 404–06.

3. *Id.* at 404–05.

4. *Id.* at 409–10.

5. 539 U.S. 166 (2003); *see also infra* Part II.B.2. This Note uses the following phrases interchangeably: the four *Sell* factors, the *Sell* analysis, and the four-factor *Sell* test.

6. *See infra* Part IV.D.1.

liberty interest in avoiding unwanted medication against the government's interest in prosecuting White for her crimes.[7]

I. THE CASE

On March 19, 2008, a grand jury in the Eastern District of North Carolina indicted Kimberly White on one count of conspiracy to commit credit card fraud, two counts of aggravated identity theft, and three counts of credit card fraud and aiding and abetting.[8] White was detained pursuant to a court order and psychiatrically evaluated to determine whether she was competent to stand trial.[9] On July 22, 2008, the district court found that White suffered from a mental disease or defect that rendered her incompetent to stand trial, as she was unable to understand the nature of the proceedings against her and to assist counsel in her own defense.[10]

White was taken to the Federal Medical Center in Carswell, Texas ("FMC-Carswell") for evaluation of whether she would be competent to stand trial in the foreseeable future.[11] Based on her behavior at FMC-Carswell, doctors diagnosed White with Delusional Disorder, Grandiose Type.[12] While doctors did not believe that White was dangerous to herself or others if she remained unmedicated, White refused to take any medication, and clinical staff exhausted all possible nonmedicinal treatments to render White competent.[13]

On May 21, 2009, the district court held a hearing pursuant to *Sell v. United States*[14] to determine whether the government could forcibly medicate White to render her competent to stand trial.[15] The

7. *See infra* Part IV.D.2.

8. United States v. White, No. 5:08-CR-81-D-1, 2009 WL 3296096, at *1 (E.D.N.C. Oct. 9, 2009), *rev'd*, 620 F.3d 401 (4th Cir. 2010).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at *2. Specifically, White believed that she could create cures for AIDS and breast cancer out of her food, and as a result hoarded her food in her cell. *Id.* Because she was afraid that someone would steal her cures, White refused to allow FMC-Carswell staff to clean her cell and would not leave her cell to bathe. *White*, 620 F.3d at 406.

13. *White*, 2009 WL 3296096, at *2. Because White was nonviolent, and her disorder did not put her health at risk, doctors did not consider White a candidate for civil commitment. *Id.*

14. 539 U.S. 166 (2003).

15. *White*, 2009 WL 3296096, at *2.

court heard testimony from Dr. Leslie Powers, who testified as to White's disorder and her behavior while at FMC-Carswell, and from Dr. Camille Kempke, who testified as to the possible treatments available to render White competent.[16] In particular, Dr. Kempke provided testimony as to the drugs available to treat White's condition, the recommended dosage of each drug, the process for forcibly administering those drugs, and the possible side effects of the suggested medications.[17]

After hearing Dr. White's and Dr. Kempke's testimony, the district court applied the four-factor *Sell* test to determine whether the government could forcibly medicate White.[18] First, the district court concluded that the government had an important interest in prosecuting White for her serious crimes and that no special circumstances

16. *Id.* The court recognized Dr. Powers as an expert in clinical and forensic psychology and recognized Dr. Kempke as an expert in psychiatry. *Id.*

17. *Id.* at *3. Dr. Kempke identified three drugs she could administer to White that would treat her disorder: Haldol Decanoate, Prolixin Decanoate or Enanthate, and Risperdal Consta. *Id.* She also described the method she would use to forcibly medicate White: A FMC-Carswell team would enter White's cell and restrain her before injecting her with a fifty milligram dose of Haldol Decanoate. *Id.* This process would repeat every two to four weeks, and White would always be given the opportunity to take the medication voluntarily before being restrained. *Id.* Possible side effects of the recommended drugs included tardive dyskinesia, extrapyramidal symptoms, agranulocytosis, and increased risk of diabetes and hyperlipidemia; Dr. Kempke, however, considered these side effects rare and stated that they could be addressed with other medications. *Id.* at *3–4. Drs. Powers and Kempke based their testimony that White could likely be restored to competence with antipsychotic medication in part on a 2007 study conducted by Dr. Herbel. *See White*, 620 F.3d at 420 (stating that the only medical research discussed by the doctors during the *Sell* hearing was the Herbel study). In the Herbel study, twenty-two men with delusional disorders were forcibly medicated for their disorders, and seventeen of them, or seventy-seven percent, were restored to competency as a result. *Id.* at 420–21.

18. *White*, 2009 WL 3296096, at *5. Pursuant to *Sell*, the government must prove by clear and convincing evidence that: (1) there is an important governmental interest at stake that is not mitigated by special circumstances; (2) forcibly medicating the defendant will render him competent to stand trial, but that the effect of the medication will not interfere with the defendant's ability to assist in his own defense; (3) involuntary medication is necessary to further the government's interest; and (4) involuntary medication is medically appropriate and in the defendant's best medical interests in light of his condition. *Sell*, 539 U.S. at 180–81. For an in-depth discussion of the Supreme Court's decision in *Sell*, see *infra* Part II.B.2.

existed to undermine this interest.[19] The court reached its determination that White was accused of serious crimes because she faced a statutory maximum of thirty-nine years in prison if convicted.[20] Second, based on Dr. Kempke's testimony, the district court found that antipsychotic medication was substantially likely to render White competent to stand trial without causing serious side effects or impeding White's ability to assist in her own defense.[21] Third, the district court determined that White was unlikely to gain competence without medication, and that less intrusive means of treatment were not viable.[22] Finally, Dr. Kempke's testimony persuaded the district court that the proposed medication regimen was medically appropriate for White based on her particular condition.[23]

Because the district court found that the government satisfied the four-factor *Sell* test, it granted the government permission to forcibly medicate White so she would regain competence to stand trial.[24] The district court anticipated, however, that White would appeal to the Fourth Circuit and accordingly stayed the order permitting forcible medication.[25] The Fourth Circuit heard White's timely interlocutory appeal to determine whether the government demonstrated an important interest in prosecuting White that would overcome any showing of special circumstances.[26]

II. LEGAL BACKGROUND

Balancing tests are commonly utilized in constitutional decisions, especially when federal courts weigh individual constitutional interests against governmental interests.[27] The individual right to be free from unwanted medical treatments, including unwanted medication with antipsychotic drugs, is derived from the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitu-

19. *Id.* at *5–6.

20. *White*, 2009 WL 3296096, at *5.

21. *Id.* at *6.

22. *Id.*

23. *Id.*

24. *Id.* at *5–7. In particular, the district court found that the government satisfied the test by clear and convincing evidence. *Id.*

25. *Id.* at *7.

26. United States v. White, 620 F.3d 401, 404 (4th Cir. 2010).

27. *See infra* Part II.A.

tion.[28] When the government wishes to forcibly medicate an individual solely to render him competent to stand trial, the Supreme Court requires that a court consider four distinct factors, set out in *Sell v. United States*.[29] After *Sell*, lower federal courts, including the Fourth Circuit, developed their own ways of reviewing and applying the four factors.[30]

A. *The Supreme Court Has Successfully Utilized Balancing Tests in Situations Where an Individual's Personal Liberty Is Pitted Against the Government's Interests*

When referring to a balancing opinion, this Note looks to the definition provided by Professor T. Alexander Aleinikoff: "By a 'balancing opinion,' I mean a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests."[31] Specifically, the constitutional balancing test advocated in this Note is an "ad hoc" balancing test, where "the process that the Constitution requires is determined by balancing the governmental and private interests at stake in the particular case."[32] Such an ad hoc balancing test cannot be satisfied merely through the application of a multi-factor test, because the two kinds of tests are inherently different: Multi-factor tests "ask questions about how one ought to characterize particular

28. *See infra* Part II.A–B.

29. *See infra* Part II.B.2.

30. *See infra* Part II.C.

31. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987).

32. *Id.* at 948. Professor Aleinikoff contrasted this ad hoc balancing with the concept of "definitional" balancing. *Id.* In ad hoc balancing, the act of balancing itself is the constitutional principle, whereas definitional balancing "establishes a substantive constitutional principle of general application . . . ." *Id.* Because of these conceptual differences, a definitional balancing opinion produces a holding that can be applied in later, factually similar cases, without the need to perform the balancing test again; by contrast, an ad hoc balancing opinion is factually specific, and the balancing must be performed separately each time the issue arises. *Id.* Professor Aleinikoff considered the holding in *New York v. Ferber*, 458 U.S. 747 (1982), an example of a definitional balancing test, because the holding "that the distribution of child pornography is not protected by the First Amendment . . . may be applied in subsequent cases without additional balancing." *Id.* For an example of an ad hoc balancing test, see *infra* note 37.

events," but balancing tests "focus . . . directly on the interests or factors themselves. Each interest seeks recognition on its own and forces a head-to-head comparison with competing interests."[33]

The Supreme Court has frequently applied ad hoc balancing tests in cases that raised a governmental interest on one side and one of myriad individual constitutional rights on the other.[34] A comprehensive overview of the different kinds of cases in which balancing has been employed to weigh competing interests is beyond the scope of this Note. Briefly, however, the Court has employed balancing tests in cases implicating various individual rights, from the First Amendment right of free association[35] to the Fourth Amendment protection against unreasonable searches and seizures.[36] The Court has also evaluated the Sixth Amendment right to a speedy trial through balancing.[37] Similarly, balancing tests have been used in procedural due process[38] and substantive due process[39] cases.

33. Aleinikoff, *supra* note 31, at 945. Although Professor Aleinikoff's definitions provide guidance for the kind of balancing test called for in this Note, he recognized that balancing tests are not without their pitfalls. For example, he noted the difficulties in developing "the scale needed to translate the value of interests into a common currency for comparison" and recognized that the Supreme Court "spent surprisingly little time exploring the difficult analytic and operational problems the method presents." *Id.* at 972–73.

34. *See id.* at 965–72 (providing examples and analysis of how balancing tests were applied in cases arising from the Bill of Rights). As Professor Aleinikoff noted, while the traditional conception of balancing tests weighs governmental interests against individual interests, balancing was used in other situations as well, including conflicts between two governmental interests and conflicts where the government is not involved at all. *Id.* at 947.

35. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 126 (1959) (balancing the individual's right to not disclose his membership in the Communist Party with the government's interest in investigating communist activities within the United States).

36. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (calling for a balancing test in specific types of search situations, where the government can articulate specific facts that warrant an intrusion into individual privacy); *see also* Dunaway v. New York, 442 U.S. 200, 209–10 (1979) (characterizing *Terry* as setting out a balancing test within a special area of Fourth Amendment seizures).

37. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 530–33 (1972) (setting out an ad hoc balancing test by looking to the conduct of both the prosecution and the defendant to determine whether the right to a speedy trial was violated).

38. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976) (setting forth a balancing test, which requires consideration of three factors, to determine whether the govern-

The Court has applied a balancing test when an individual's liberty and interest in bodily integrity were at stake. In *Cruzan v. Director, Missouri Department of Health*,[40] for example, the Supreme Court addressed the conflict between the right to refuse life-sustaining medical treatments and the state's asserted interests in preserving life.[41] The right to refuse medical treatment was grounded both in common law and in the Constitution, specifically in the Due Process Clause of the Fourteenth Amendment.[42] Forced medical treatment violated the Fourteenth Amendment by impinging upon the individual's liberty interest in his own body.[43] The Court then endorsed a balancing test in the context of refusing life-saving medical treatment when it stated: "[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'"[44] To overcome the individual's interest in not being forcibly subjected to medical treatment, the state needed to prove its interest by clear and convincing evidence.[45] This particular standard of proof was adopted

ment was required to provide a hearing pursuant to the Fifth Amendment's Due Process Clause before terminating Social Security benefits).

39. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 319–21 (1982) (finding that the Court must balance individual liberty against "'the demands of an organized society'" in determining whether the Due Process Clause of the Fourteenth Amendment was violated (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

40. 497 U.S. 261 (1990).

41. *Id.* at 270.

42. *Id.* at 271, 278; *see also* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."). This constitutional interest in refusing unwanted medical treatment was inferred in part from the Court's decision in the same term in Washington v. Harper, 494 U.S. 210 (1990). *Cruzan*, 497 U.S. at 278. For a discussion of the importance of *Harper*, see *infra* Part II.B.

43. *Cruzan*, 497 U.S. at 287–88 (O'Connor, J., concurring).

44. *Id.* at 279 (majority opinion) (citation omitted) (quoting *Youngberg*, 457 U.S. at 321). The Court identified the state interest in this case as the interest in protecting and preserving human life. *Id.* at 280.

45. *See id.* at 282 (approving Missouri's use of the clear and convincing evidence standard by noting that "[t]his Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money" (citations omitted) (internal quotation marks omitted)).

because the individual and the state interests were seen as "particularly important" and "substantial."[46]

B. *The Supreme Court Has Recognized an Individual's Constitutionally Protected Liberty Interest in Not Being Forcibly Medicated and Extended That Right to Defendants Who Were Found Incompetent to Stand Trial*

The Supreme Court has considered state-sanctioned forcible medication in the context of criminal prosecution in a series of cases, each of which focused on a narrowly tailored group of individuals.[47] These decisions recognized an individual liberty interest on the one hand and a governmental interest on the other, but the Court never explicitly weighed these interests against each other.[48] In its most recent decision on the issue of forcible medication, the Court set out four factors that lower federal courts must consider when faced with a government request to forcibly medicate defendants who would otherwise be incompetent to stand trial.[49]

1. *The Supreme Court Has Provided Constitutional Protections for Individuals Who Do Not Wish to Take Antipsychotic Medications*

In *Washington v. Harper*,[50] the Supreme Court addressed whether Walter Harper, a mentally ill prisoner serving a sentence in a state prison, could be forcibly treated with antipsychotic medication against his will.[51] The Court analyzed Harper's desire to refuse medication in the context of the Due Process Clause of the Fourteenth Amend-

46. *Id.* at 282–83. In *Cruzan*, the majority determined that Cruzan's parents did not prove by clear and convincing evidence that their daughter wished to have hydration and nutrition withdrawn in the event that she entered a persistent vegetative state. *Id.* at 284–85. Due to that lack of evidence, Missouri was not required to defer to the parents' wishes and was allowed to continue Cruzan's life support. *Id.* at 286–87.

47. *See infra* Part II.B.1–2.

48. *See infra* Part II.B.1–2.

49. *See infra* Part II.B.2.

50. 494 U.S. 210 (1990).

51. *Id.* at 213. Harper was originally convicted of robbery and eventually had his parole revoked after he assaulted two nurses in a Seattle hospital. *Id.* at 213–14. Although Harper had voluntarily taken antipsychotic medication during his original incarceration, upon his return to prison he refused to continue taking medication for manic-depressive disorder. *Id.* A prison physician sought to forcibly medicate Harper pursuant to the state of Washington's special offender policy. *Id.* at 214.

ment.[52] Specifically, the majority articulated the individual's "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs."[53] The Due Process Clause was implicated in such situations because "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty" under the Fourteenth Amendment.[54] With this articulation of the individual's interest, the Court found that Harper could be forcibly medicated because Washington's policy satisfied the procedural and substantive demands imposed by the Fourteenth Amendment.[55]

The Supreme Court again addressed the forcible medication of criminal defendants in *Riggins v. Nevada*,[56] this time in the context of a defendant, David Riggins, who claimed he was forcibly medicated with an antipsychotic drug during the course of his trial.[57] The Court reaffirmed its finding in *Harper* that the Fourteenth Amendment's

52. *Id.* at 213.

53. *Id.* at 221.

54. *Id.* at 229.

55. *Id.* at 220, 222–23. The Court articulated that the substantive due process issue concerned "what factual circumstances must exist before the State [of Washington] may administer antipsychotic drugs to [Harper] against his will," and the procedural due process aspect concerned whether "the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient." *Id.* at 220. Stated more generally, "'[t]he substantive issue involves a definition of th[e] protected Constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance.'" *Id.* (second alteration in original) (quoting Mills v. Rogers, 457 U.S. 291, 299 (1982)). The Court also recognized that the prison environment presented its own unique set of concerns that affected the substantive due process requirements the State of Washington had to satisfy before medication would be allowed. *Id.* at 227.

56. 504 U.S. 127 (1992).

57. *Id.* at 129. A jury convicted Riggins of murder and robbery, both with the use of a deadly weapon. *Id.* at 131. During his trial, Riggins moved the Clark County District Court for an order suspending the forced administration of two antipsychotic medications, but his motion was denied. *Id.* at 130–31. Although the district court did not offer any rationale for its decision, it presumably relied in part on oral testimony from three psychiatrists. *See id.* (describing the testimony of Drs. Master, Quass, and O'Gorman). Riggins appealed his convictions, arguing in part that the forced administration of medication during his trial deprived him of his constitutional rights under the Sixth and Fourteenth Amendments. *Id.* at 132–33.

Due Process Clause granted an individual a protected liberty interest in refusing forcible medication, and reiterated that that liberty interest is particularly pronounced when the drugs are of the antipsychotic variety.[58] The *Riggins* Court also recognized that individuals whom the state detains for trial retain constitutional rights[59] and, as a result, the State of Nevada was required under the Fourteenth Amendment "to establish the need for [a particular antipsychotic] and the medical appropriateness of the drug" before forcing Riggins to continue taking antipsychotics during his trial.[60] Although the Court declined to lay out specific substantive standards for the Nevada court to consider on remand, it reasoned that the state would have satisfied due process had it demonstrated both the medical appropriateness of forced medication and the need, in the absence of alternative treatments, for medication to ensure the safety of Riggins and others around him.[61]

2. *The Supreme Court Extended Constitutional Protections Against Forcibly Medicating Defendants Who Would Otherwise Be Incompetent to Stand Trial by Establishing a Four-Factor Test*

In *Sell v. United States*,[62] defendant Charles Sell, who had been found mentally incompetent to stand trial, opposed the government's motion to involuntarily medicate him on the grounds that forcible

58. *Id.* at 133–34. The Court took particular notice of the effect of antipsychotic drugs on an individual's liberty interest because "[t]he purpose of the drugs is to alter the chemical balance in a patient's brain, leading to changes . . . in his or her cognitive processes. While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects." *Harper*, 494 U.S. at 229.

59. *Riggins*, 504 U.S. at 135. Justice Kennedy, in his concurring opinion, explicitly noted that this case was different from *Harper*, where medication was ordered to render Harper not dangerous to himself or those around him, because it focused on forcible medication simply for the purposes of rendering Riggins competent to stand trial. *Id.* at 140 (Kennedy, J., concurring).

60. *Id.* at 135 (majority opinion). In the absence of such findings, the Court found that Riggins' constitutional trial rights were impaired, and ordered that the judgment of the Nevada Supreme Court be reversed. *Id.* at 137–38.

61. *Id.* at 135. The Court noted that the ultimate problem in *Riggins* was that the district court allowed forcible medication in the absence of any sort of findings regarding medical appropriateness, reasonable alternatives, safety, or other compelling considerations. *Id.* at 136.

62. 539 U.S. 166 (2003).

medication deprived him of his constitutional liberty guaranties.[63] The Supreme Court granted certiorari to determine whether the forcible administration of antipsychotic medication for the sole purpose of rendering Sell competent to stand trial deprived him of the constitutional liberty to reject unwanted medical treatment.[64] According to the Court, the government could forcibly medicate Sell for the sole purpose of rendering him competent to stand trial, but only in limited circumstances and "upon [the] satisfaction of [certain] conditions."[65]

Looking to its previous decisions in *Harper* and *Riggins*, the Court found that the Constitution's liberty protections logically extended to defendants whom the government wished to medicate in order to render them competent to stand trial.[66] The government could, however, override that constitutional liberty interest "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."[67] The Court intended this standard to provide guidance for forcible medication in competency cases, but still noted that forcible medication may be allowed only in rare cases.[68]

63. *Id.* at 171, 175. Sell, described as a man with "a long and unfortunate history of mental illness," was charged with attempted murder and several nonviolent offenses, including insurance fraud, mail fraud, Medicaid fraud, and money laundering. *Id.* at 169–70. Sell was found incompetent to stand trial after hospitalization and treatment at the United States Medical Center for Federal Prisoners. *Id.* at 170–71. He refused to take the prescribed antipsychotic medications that would allegedly render him competent. *Id.* at 171. A federal magistrate judge and the reviewing district court both ruled in favor of the government's motion for forcible medication, although the district court disagreed with the magistrate's finding that Sell was dangerous and needed to be medicated for his own safety and the safety of others. *Id.* at 173–74.

64. *Id.* at 177. The Court in *Sell* framed Sell's liberty in terms of the Fifth Amendment's protections of due process, and did not frame the issue in Fourteenth Amendment terms. *Id.* The Court explicitly noted, however, that its earlier decisions in *Harper* and *Riggins* guided its inquiry into the individual liberty issue. *Id.* at 178–79. As discussed above, *Harper* and *Riggins* framed the individual liberty interest in Fourteenth Amendment terms. *See supra* Part II.B.1.

65. *Sell*, 539 U.S. at 169.

66. *Id.* at 179.

67. *Id.*

68. *Id.* at 180.

The *Sell* Court broke down the required showing for forcible medication into four individual factors.[69] First, a court "must find that *important* governmental interests are at stake," which can be satisfied by a showing that the defendant was accused of a "serious" crime.[70] Those important governmental interests, however, may be lessened by certain "[s]pecial circumstances."[71] Such special circumstances include the possibility that the defendant might be confined to an institution or the possibility that the defendant might receive credit toward his sentence for time already served in confinement.[72] Second, a court must consider whether "involuntary medication will *significantly further* those concomitant state interests."[73] To make this finding, the court must determine whether the antipsychotic drugs are "substantially likely to render the defendant competent," while at the same time finding that the drugs chosen are "substantially unlikely to have side effects" that would prevent the defendant from receiving a fair trial.[74] Third, a court must consider whether "involuntary medication is *necessary* to further those [governmental] interests."[75] Under this factor, the court must determine "that any alternative, less intrusive treatments are unlikely to achieve substantially the same results" that could be achieved through medication.[76] Finally, the court must find that the "administration of the drugs [would be] *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition."[77]

These four factors were designed to help lower federal courts determine whether the government had an interest important enough to override the individual's interest in not being forcibly medicated for competency purposes.[78] The Court believed these four factors

69. *Id.* at 180–81.

70. *Id.* at 180. The Court noted that for purposes of the forcible medication analysis, such a "serious" crime could be committed against either a person or property. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 181.

74. *Id.* A defendant suffering from significant side effects might be unable to assist counsel in his own defense, resulting in a trial that is constitutionally unfair. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.* ("[T]he court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular govern-

"should help [a court] make the ultimate constitutionally required judgment."[79] Specifically, the applying court should ask: Has "the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?"[80]

C. *The Supreme Court Has Provided Lower Federal Courts with Little Guidance as to How the Four* Sell *Factors Should Be Applied and Analyzed in Practice*

Although the *Sell* decision defined the four factors explicitly,[81] the Supreme Court did not take the opportunity to apply those factors to Sell's particular case, choosing instead to remand the case for further consideration in light of the new holding.[82] In remanding, the Court did not address either the evidentiary standard or the standard of appellate review that should be applied in *Sell*-type cases.[83] Lower federal courts were therefore left to their own judgment in making such determinations and often looked to sister circuit courts for guidance.[84] The Fourth Circuit became a leading force in clarifying the *Sell* analysis.[85]

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mental interest, namely, the interest in rendering the defendant *competent to stand trial*."). The Court remarked that lower courts should not engage in an analysis of whether forcible medication for competency purposes would be appropriate if forcible medication could be warranted for a different reason; for example, if an individual could be forcibly medicated under *Harper*'s dangerousness analysis, the court would not have to reach the competency inquiry. *Id.* at 181–82.

79. *Id.* at 183.

80. *Id.*

81. *Id.* at 180–81.

82. *See id.* at 185–86 (providing a brief overview of how the district court touched upon the four *Sell* factors, but not applying the factors, and remanding the case).

83. *See, e.g.*, United States v. Bradley, 417 F.3d 1107, 1113 (10th Cir. 2005) (noting that "[t]he Supreme Court in *Sell* articulated neither a standard of proof for the *Sell* factors nor a standard of appellate review").

84. *See infra* Part II.C.1.

85. *See infra* Part II.C.2.

1. The United States Circuit Courts of Appeals Generally Agree on the Evidentiary and Appellate Review Standards for Sell-*Type Cases*

Because the Supreme Court did not provide evidentiary or appellate review standards, the lower federal courts were compelled to make their own choices; still, the federal circuits are now, by and large, in agreement about the appropriate standards. The Second Circuit was the first circuit court to hear a *Sell*-type case when it heard *United States v. Gomes*,[86] and it developed the standards that most circuits later adopted. In *Gomes*, the Second Circuit adopted the clear and convincing standard of proof for all the *Sell* factors, based in part on the Supreme Court's language in *Riggins*.[87] Turning to the standards of appellate review, the Second Circuit reasoned that the government's asserted interest in prosecution was a legal finding and reviewed it *de novo*, while the court considered the other three *Sell* factors "factual in nature" and therefore reviewed them for clear error.[88]

When addressing the standards of proof and appellate review, other courts looked initially to *Gomes*, and nearly all adopted the same standards.[89] To this point, a number of circuits have adopted the

86. 387 F.3d 157 (2d Cir. 2004).

87. *Id.* at 160. In making this evidentiary determination, the *Gomes* court likely focused on the language in *Riggins v. Nevada* that characterized the "administration of antipsychotic medication [as] necessary to accomplish an essential state policy . . . ." 504 U.S. 127, 138 (1992). The Supreme Court in *Washington v. Harper* also called for "clear, cogent, and convincing evidence" before allowing forcible medication. 494 U.S. 210, 228 (1990) (internal quotation marks omitted).

88. *Gomes*, 387 F.3d at 160.

89. *See, e.g.*, *United States v. Evans*, 404 F.3d 227, 236, 240 (4th Cir. 2005) (looking to *Gomes* in developing its review standards); United States v. Fazio, 599 F.3d 835, 839–40 & n.2 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 901 (2011) (suggesting the use of the clear and convincing standard of proof at a *Sell* hearing and adopting explicitly *de novo* review of the governmental interest factor and clear error review of the other three factors); United States v. Green, 532 F.3d 538, 545–46, 551–52, 559 (6th Cir. 2008) (employing *de novo* review of the governmental interest factor, adopting clear error review of at least two other *Sell* factors, and endorsing the clear and convincing standard of proof for all the *Sell* factors); United States v. Grape, 549 F.3d 591, 598–99 (3d Cir. 2008) (adopting *de novo* review of the first *Sell* factor, clear error review of the second *Sell* factor, and the clear and convincing standard of proof for the second, third, and fourth *Sell* factors); United States v. Hernandez-Vasquez, 513 F.3d 908, 915–16 (9th Cir. 2007) (using *de novo* review of the first

clear and convincing evidence standard.[90] There is, however, a slight discrepancy in the appellate standard of review; the Tenth Circuit reviews the first and second *Sell* factors *de novo* and reviews only the third and fourth factors for clear error.[91] The Tenth Circuit is thus far the only circuit to review the *Sell* factors this way, and all other circuits that have addressed the issue generally follow *Gomes*.

2. *The Fourth Circuit Has Emerged as a Leading Force as Lower Federal Courts Attempted to Further Define How the Government Should Satisfy Each* Sell *Factor*

The Fourth Circuit was one of several circuit courts to address the application of the *Sell* factors multiple times.[92] The court first applied the four *Sell* factors in *United States v. Evans*.[93] It remanded the case to the district court for further proceedings after finding that the government did not adequately show that its proposed medication regime was "medically appropriate" for Evans or would "significantly

Sell factor and clear error review of the remaining *Sell* factors); United States v. Palmer, 507 F.3d 300, 303 (5th Cir. 2007) (adopting the appellate standard of review set out in *Gomes*).

90. The First Circuit and the Seventh Circuit have yet to address the application of the *Sell* factors.

91. *See* United States v. Bradley, 417 F.3d 1107, 1113–14 (10th Cir. 2005) (agreeing with the *Gomes* court that the governmental interest factor should be viewed as a question of law, but "expand[ing] the parameters of the legal question" to include the second factor as well).

92. The Ninth Circuit addressed the issue three times. *See* United States v. Ruiz-Gaxiola, 623 F.3d 684 (9th Cir. 2010); United States v. Hernandez-Vasquez, 513 F.3d 908 (9th Cir. 2008); United States v. Rivera-Guerrero, 426 F.3d 1130 (9th Cir. 2005). The Tenth Circuit also addressed the *Sell* issue repeatedly. *See* United States v. Valenzuela-Puentes, 479 F.3d 1220 (10th Cir. 2007); United States v. Bradley, 417 F.3d 1107 (10th Cir. 2005); United States v. Morrison, 415 F.3d 1180 (10th Cir. 2005). Other circuits, however, only addressed the issue once. *See, e.g.*, United States v. Diaz, 630 F.3d 1314 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 128 (2011); United States v. Gomes, 387 F.3d 157 (2d Cir. 2004).

93. 404 F.3d 227 (4th Cir. 2005). Defendant Herbert Evans was accused of assault on a federal employee and of threatening to murder a federal judge but was found mentally incompetent to stand trial because he was diagnosed as a paranoid schizophrenic. *Id.* at 232. After Evans refused treatment, the government moved, pursuant to *Sell*, to forcibly medicate him to render him competent for trial. *Id.* The United States District Court for the Western District of Virginia granted the motion after applying *Sell*'s four-part test, and Evans appealed. *Id.* at 227, 232, 235.

further" its interest in prosecuting.[94] The *Evans* court characterized the *Sell* holding overall as "a four-part showing" that the government must make to ensure it complied with the Constitution in seeking the forcible medication of an incompetent defendant.[95] This four-part showing allowed the government to constitutionally "outweigh the defendant's liberty interest" in refusing medication.[96] The Fourth Circuit then examined three of the four *Sell* factors and articulated the standards the government would be held to in a *Sell*-style case.[97]

In applying the first *Sell* factor—whether the government had an important interest—the Fourth Circuit reviewed the district court's conclusion *de novo*.[98] Specifically, to determine whether Evans was facing prosecution for a "serious" offense, the Fourth Circuit "focus[ed] on the maximum penalty authorized by statute," and argued that such a focus "respects legislative judgments regarding the severity of the crime."[99] While it declined to specify a rule as to what statutory maximum would constitute a "serious" crime, the Fourth Circuit conceded that an important governmental interest exists when the defendant faces a maximum punishment of ten years or more.[100] This important governmental interest was not mitigated by any of the special circumstances discussed in *Sell*.[101]

94. *Id.* at 232.

95. *Id.* at 235.

96. *Id.*

97. The Fourth Circuit only addressed the first, second, and fourth *Sell* factors because Evans did not challenge the question of whether the government satisfied the third factor. *Id.* at 236 & n.4.

98. *Id.* at 236. In choosing to review this factor as a matter of law, the Fourth Circuit followed the majority of other circuits. *See supra* Part II.C.1.

99. *Evans*, 404 F.3d at 237. Notably, the Fourth Circuit explicitly *rejected* Evans's argument that the "proper focus" in determining whether he was facing prosecution for a serious crime "should be on the sentence he was most likely to receive under the Sentencing Guidelines." *Id.* While the Fourth Circuit admitted that a probable sentencing guideline range would show respect to legislative judgment about serious crimes, it rejected Evans's argument on the grounds that looking to the guidelines "would simply be unworkable because at this stage in the proceedings, there is no way of accurately predicting what that range will be." *Id.* at 237–38.

100. *Id.* at 238.

101. *Id.* at 239. Specifically, the Fourth Circuit recognized that Evans was unlikely to be civilly committed. *Id.* Additionally, although Evans was incarcerated for over two years while awaiting trial, the court noted that "while the length of Evans's confinement for evaluation may lessen the importance of the state's interest, it does not defeat it." *Id.*

Considering them findings of fact, the Fourth Circuit reviewed the district court's findings on the second and fourth *Sell* factors for clear error.[102] The court held that the government did not supply adequate information to satisfy the factors in question.[103] The primary failing, as related to the "significantly further" and "medically appropriate" factors, was that the involuntarily medicated report ("IM report") filed in the lower court proceedings failed to identify which antipsychotic drugs doctors planned to use to restore Evans to competency.[104] The Fourth Circuit specifically stated that to establish the medical appropriateness of its forcible medication request, "[t]he government must propose a course of treatment in which it specifies the particular drug to be administered."[105] The IM report's failure to address the possible side effects of any specific drugs contributed to the government's failure to satisfy the "medically appropriate" *Sell* factor.[106] In short, "[w]ithout at least describing the proposed course of treatment, it is tautological that the Government cannot satisfy its burden of showing anything with regards to that treatment, much less that it will 'significantly further' the Government's trial-related interests and be 'medically appropriate' for Evans."[107]

The government's second major stumbling block regarding the second and fourth factors was the IM report's failure to analyze Evans as an individual.[108] Nothing in the IM report explained how antipsychotic medication would be appropriate for Evans' specific physiology.[109] Instead, the IM report "simply set[] up syllogisms to explain its

102. *Id.* at 240.

103. *Id.*

104. *Id.* at 233, 240.

105. *Id.* at 240. The IM report filed in support of the government's motion only referenced second-generation, or atypical, antipsychotic medications but mentioned none by name. *Id.* at 233. The report filed in support of forcible medication also did not discuss the rationale behind the doctors' conclusions that medication would render Evans competent. *Id.* at 233–34.

106. *Id.* at 240.

107. *Id.* For a discussion of how the Fourth Circuit analyzed the second and fourth *Sell* factors as parts of a single unit, as opposed to individual factors to be established independently, see *infra* Part IV.C.

108. *Evans*, 404 F.3d at 240–41.

109. *Id.* at 240. For example, the IM report "nowhere addressed [a psychiatrist's] concern that Evans's delusions of governmental conspiracies that have persisted longer than 40 years will resist involuntary medication precisely because the government administers the medication." *Id.* at 241. The IM report also did not address how Evans, "an elderly

conclusions" that, if accepted in this case, would have allowed the government to satisfy the second and fourth *Sell* factors by asserting that antipsychotics were generally effective and medically appropriate for most people.[110] Thus, to satisfy the second and fourth *Sell* factors in the Fourth Circuit, the government must describe its proposed treatment plan and all other relevant circumstances as they relate to the specific facts of an individual case.[111]

The Fourth Circuit once again addressed the *Sell* factors in *United States v. Bush*.[112] In that case, the court explicitly adopted the clear and convincing evidence standard when considering cases under *Sell*, and remanded the case to the district court on the grounds that the government did not provide enough evidence to satisfy the demanding second and fourth factors.[113] The court also revisited the first factor and any potentially undermining special circumstances but upheld the district court's finding that the government had an

man with diabetes, hypertension, and asthma," might experience any potential side effects of antipsychotic medication. *Id.*

110. *Id.* at 241.

111. *Id.* at 242. Any report filed in support of the second and fourth *Sell* factors in the Fourth Circuit must therefore discuss any potential side effects as they relate to a particular defendant, describe a plan to deal with those potential side effects, and explain why those side effects are "substantially unlikely" to interfere with the defendant's ability to assist counsel in preparing his defense. *Id.* The report must also "provide the estimated time the proposed treatment plan will take to restore the defendant's competence and the criteria it will apply when deciding when to discontinue the treatment," and explain why medication is overall more beneficial to the defendant than refusing the medication would be. *Id.* This is a more stringent standard than that adopted in other circuits. *See, e.g.*, United States v. Bradley, 417 F.3d 1107, 1114–15 (10th Cir. 2005) (finding that the government met its burden by clear and convincing evidence that its proposed treatment was medically appropriate, even though the testifying doctor spoke in general about antipsychotic medications).

112. 585 F.3d 806 (4th Cir. 2009). Defendant Barbara Bush, who suffered from Delusional Disorder, Persecutory Type, was charged with threatening a federal judge but was found mentally incompetent to stand trial. *Id.* at 809. Because psychiatrists believed she could be restored to competence with antipsychotics, the government sought to forcibly medicate Bush after she refused treatment. *Id.* The United States District Court for the District of Maryland granted the government's motion. *Id.* at 806, 809.

113. *Id.* at 809, 814, 817–18.

important interest that was not mitigated.[114] In affirming the district court's finding that no special circumstances existed, the court stated that "[e]ven though Bush can make a serious argument that the time she has already served in prison is sufficiently long to cover, or almost cover, any sentence that reasonably could be anticipated, this fact alone does not defeat [the government's interest]."[115]

The Fourth Circuit, however, found that the government failed to meet the evidentiary burden to show that forcible medication would be substantially likely to render Bush competent while also being in her best medical interest.[116] The court again emphasized that the government must demonstrate how a specific medication is likely to work on a specific defendant.[117] Because the *Evans* decision, which set out this individualized analysis, failed to establish a corresponding evidentiary standard, the *Bush* district court allowed medication under the second *Sell* factor without the appropriate amount of evidence needed to satisfy the newly adopted clear and convincing evidence standard.[118] The district court also failed to address whether medication would be in Bush's best medical interest, even though reports filed in support of Bush's forcible medication did not specify a specific drug, a specific dosage, or a specific plan to deal with side effects.[119] In so deciding, the district court contravened both the holding in *Evans* and the new evidentiary standard adopted by the Fourth Circuit.[120]

114. *Id.* at 814–15. Bush acknowledged that her charged crimes carried a ten-year maximum. *Id.* at 814. Yet, based on the Sentencing Guidelines and governmental concessions, she argued she would only be sentenced to time served. *Id.*

115. *Id.* at 815 (alteration in original) (internal quotation marks omitted).

116. *Id.* at 815–18.

117. *Id.* at 816. In this case, Bush's particular psychotic disorder presented some uncertainty as to whether medication could reverse her condition. *Id.* This uncertainty was included in the record through the testimony of two different doctors, each with a different opinion as to the potential success of antipsychotics on Bush. *Id.*

118. *Id.* at 816–17.

119. *Id.* at 817.

120. *Id.* at 817–18. Admittedly, the report in *Bush* was more specific than the report in *Evans*. The government identified three specific medications that were being considered, even indicating a preference for one drug above the other two, and they provided a plan for forcible injection every two weeks. *Id.* at 817. No dosages, however, were provided in the reports, and the district court "did not guide or limit the medical staff's discretion" as to dosages. *Id.* The proposed forcible medication plan also failed to account for Bush's

The Fourth Circuit's application of the *Sell* factors influenced the forcible medication analysis in other circuits. For example, the Eleventh Circuit implicitly adopted the finding in *Evans* that the government should submit a personalized treatment plan with dosages and possible side effects when arguing that its medication regime is substantially likely to render the defendant competent.[121] The Ninth Circuit also explicitly adopted the reasoning in *Evans* when it found that a *Sell* analysis would not be satisfied if the government simply drew "direct inference[s]" that forcible medication would render a specific defendant competent from "general proposition[s]" that antipsychotic medications were usually effective.[122] In that same decision, the Ninth Circuit also cited *Bush* when noting "the weakness of evidence that antipsychotic medication is successful in treating Delusional Disorder."[123] Similarly, both the Ninth and the Tenth Circuits looked to *Evans* when determining what constituted a "serious crime" in the *Sell* analysis, although only one of those circuits agreed with the Fourth Circuit's analysis.[124] These cases suggest that the Fourth Circuit's application and understanding of the *Sell* factors significantly influenced other appellate courts and that the court is a leader in this area of the law.

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diabetes and for how any side effects might affect that condition, an omission that went against the holding in *Evans*. *Id.* at 817–18.

121. *See* United States v. Diaz, 630 F.3d 1314, 1334 (11th Cir. 2011), *cert denied*, 132 S. Ct. 128 (2011) (noting with approval the testifying doctor's personalized medication plan and contrasting that plan to *Evans*, where no specific dosage plan was submitted).

122. United States v. Ruiz-Gaxiola, 623 F.3d 684, 700 (9th Cir. 2010). The Ninth Circuit cited extensively to *Evans* and noted that, "[l]ike the Fourth Circuit, '[w]e do not believe that *Sell*'s analysis permits such deference.'" *Id.* (quoting United States v. Evans, 404 F.3d 227, 241 (4th Cir. 2005)).

123. *Id.* at 701 n.11.

124. *Compare* United States v. Hernandez-Vasquez, 513 F.3d 908, 918–19 (9th Cir. 2007) (discussing the Fourth Circuit's analysis in *Evans*, but ultimately "disagree[ing] with the Fourth Circuit and conclud[ing] that the likely guideline range is the appropriate starting point for the analysis of a crime's seriousness"), *with* United States v. Valenzuela-Puentes, 479 F.3d 1220, 1226 (10th Cir. 2007) (agreeing with the *Evans* court that the seriousness of a crime "relates to the possible penalty the defendant faces if convicted, as well as the nature or effect of the underlying conduct for which he was charged"). Other circuits have cited *Evans* when determining the seriousness of an offense. *See, e.g.*, United States v. Green, 532 F.3d 538, 547 (6th Cir. 2008) (citing *Evans* and considering "both the potential statutory penalty and the potential Guideline range" to determine the seriousness of a crime).

III. THE COURT'S REASONING

In *United States v. White*, the Fourth Circuit held that the government could not forcibly medicate Kimberly White for the sole purpose of rendering her competent to stand trial.[125] Writing for the majority, Judge Davis reasoned that the government did not show a sufficiently important interest in prosecuting White that would override her constitutionally protected liberty interest in not being forcibly medicated.[126]

Judge Davis reiterated that the four-factor *Sell* test governed the conflict between the government's interest in prosecuting crime and the defendant's liberty interest in not being forcibly medicated for the purpose of being made competent to stand trial.[127] Considering the first *Sell* factor, Judge Davis weighed the government's interest in prosecuting White against any special circumstances that might mitigate that interest.[128] He deemed this factor dispositive and found that the government's interest did not overcome the special circumstances present in White's case.[129] In determining whether special circumstances undermined the government's interest in prosecuting White, Judge Davis considered: the amount of time White spent, and would likely spend, in confinement before her trial could begin; the nature of her crime; the fact that her confinement would preclude her from certain activities that would threaten public safety; her unique medical condition; and whether the case against White was sufficiently exceptional to allow the government to forcibly medicate her.[130]

After considering how much time White spent in confinement, and determining what her sentence might be if convicted, Judge Da-

125. 620 F.3d 401, 410, 422 (4th Cir. 2010).

126. *Id.* at 404, 410.

127. *Id.* at 409–10; *see also supra* note 18 (discussing the four-factor *Sell* test).

128. *White*, 620 F.3d at 410.

129. *Id.* Although Judge Davis recognized that White's charged crimes were serious, he noted that the government's interest in prosecuting even serious crimes can be mitigated when special circumstances are present. *Id.* at 411. The Fourth Circuit considers crimes serious when the defendant faces a maximum sentence of ten years in prison. *Id.* at 410.

130. *Id.* at 413. When the Fourth Circuit previously considered the issue of special circumstances in involuntary medication cases, it examined: "(1) the possibility that the defendant might be confined to an institution for the mentally ill . . . ; (2) the potential for future confinement should the defendant regain competence; and (3) the fact that the defendant . . . [might] receive credit toward any sentence imposed [for time served]." *Id.* at 411 n.8 (internal quotation marks omitted).

vis found that White's time in pretrial detention would "have extended *considerably longer* than her likely sentence," a fact that substantially weakened the government's interest in prosecuting White.[131] In making this determination, Judge Davis estimated that White's likely prison sentence would range between forty-two and fifty-one months, based in part on the sentence imposed on White's codefendant and the median and mean sentences that local and national courts had imposed on other defendants charged with similar crimes.[132] Although the estimation that White already served a significant portion of her likely sentence substantially weakened the government's interest in prosecuting her, Judge Davis indicated that White needed to show additional special circumstances to completely mitigate the government's interest.[133] Noting that "[n]ot every serious crime is equally serious," the majority emphasized that White's crimes were nonviolent and committed against property, not people.[134] This

131. *Id.* at 418–19. Judge Davis noted that from the time of her arrest in March 2007 to the time her appeal was heard in August 2010, White was already confined for forty-one months. *Id.* at 414. He estimated that if White was forcibly medicated, she would spend an additional four months in detention before regaining competence to stand trial, resulting in forty-five months in confinement before her trial could begin. *Id.* If White chose to appeal an unfavorable decision to the Supreme Court, she would spend at least another six months in confinement while waiting for her petition for certiorari to be granted or denied, resulting in fifty-one months of confinement before her trial could begin. *Id.* If White was brought to trial and found guilty, she would be awarded approximately 6.7 months of good conduct credits, resulting in 57.7 months of confinement. *Id.* at 415.

132. *Id.* at 415–18. Judge Davis noted that the court also could have calculated White's likely sentence based on the federal advisory sentencing guidelines, but that the court could look to codefendants and national average sentences if it could not find the appropriate sentencing guidelines. *Id.* at 415. In coming to his anticipated sentence of forty-two to fifty-one months, Judge Davis noted that White's codefendant, Vonda Machelle Baker, received a thirty-six-month sentence "for substantially the same relevant conduct in which White [was] alleged to have engaged." *Id.* at 416, 418. He also considered that, nationally, defendants convicted of fraud tended to serve no prison time and that the Fourth Circuit tended to issue nonprison sentences for fraud. *Id.* at 416–17. Finally, Judge Davis referred to data from the United States Sentencing Commission and noted that the median sentence for fraud charges was eighteen months. *Id.* at 417.

133. *Id.* at 419.

134. *Id.*

distinguished White's case from *Evans* and *Bush*.[135] Judge Davis reasoned that White's confinement in a mental hospital would prevent her from ever owning a handgun, thus addressing the concern that White could be a danger to the public without prosecution.[136] He also noted that White's medical condition made it difficult to predict with certainty whether she could be restored to competence and what, if any, side effects she would experience as a result of involuntary medication.[137] Finally, Judge Davis concluded that White's crimes were "not sufficiently exceptional" and that allowing forcible medication in her case would risk making forcible medication to restore competency a "routine" practice.[138]

Judge Keenan wrote a concurring opinion, emphasizing that the government must show an "overriding" or "essential" interest in prosecuting a defendant before forcible medication can be allowed.[139] She reasoned that the government failed to meet that burden in White's case.[140] Although Judge Keenan did not estimate what White's likely prison sentence might be if she was convicted, she recognized that White had been in custody for forty-one months, a "significant period of time."[141] She also noted that White's crimes were "entirely nonviolent" and that, although they were serious, the charges were not exceptional enough to justify forcible medication.[142]

135. *Id.*; *see also supra* Part II.C.2 (discussing *United States v. Evans* and *United States v. Bush*). The majority also noted that prosecuting White would not provide her victims with any tangible benefit. *White*, 620 F.3d at 419.

136. *Id.* at 420.

137. *Id.* at 420–21. The majority distinguished between White's diagnosis of Delusional Disorder, Grandiose Type and the diagnoses of patients in the Herbel study cited by Drs. Kempke and Powers. *Id.* In the Herbel study, only one of the twenty-two subjects had Delusional Disorder, Grandiose Type, and none of the subjects were female. *Id.* at 421. The majority therefore reasoned that the Herbel study outcome did not accurately predict how White would respond to similar medication. *Id.* at 420–21. Judge Davis also gave less weight to Dr. Kempke's testimony regarding how White might respond to the recommended medication because her expertise was in schizophrenia, not delusional disorders, and she never personally examined White. *Id.* at 421.

138. *Id.* at 421–22.

139. *Id.* at 422 (Keenan, J., concurring).

140. *Id.* at 422.

141. *Id.* at 423.

142. *Id.*

In dissent, Judge Niemeyer asserted that the district court "careful[ly]" and "thorough[ly]" reviewed and applied the four-factor *Sell* test in allowing White to be forcibly medicated.[143] He believed that the Fourth Circuit should have deferred to the district court's findings.[144] Judge Niemeyer characterized the majority's assessment of White's likely sentence as "rank speculation" and stated that the court had conducted an "unprecedented and unsupportable" sentencing hearing without the benefit of a presentence report or the necessary facts.[145] Taking issue with the majority's conclusion that the nonviolent nature of White's offenses reduced the seriousness of her crimes, Judge Niemeyer argued that the Supreme Court in *Sell* did not distinguish between crimes committed against a person and those against property.[146] Judge Niemeyer finally noted that a trial would have permitted the government to publicly confront White with the allegations against her, which could serve as a deterrent to others who might commit similar crimes, and that a criminal conviction would have allowed the government to fully punish White for her crimes by subjecting her to a period of supervised release and requiring her to pay restitution to her victims.[147]

IV. ANALYSIS

In *United States v. White*, the Fourth Circuit missed an opportunity to apply the four *Sell* factors as elements of a constitutional balancing test, choosing instead to complicate the *Sell* inquiry by performing a conjectural sentencing analysis. A balancing test would have support-

143. *Id.* at 424 (Niemeyer, J., dissenting).

144. *Id.*

145. *Id.* at 424, 428. A sentencing judge would ordinarily consider a presentence report that includes White's criminal history and definitions of the relevant conduct of the charged crimes. *Id.* In a sentencing hearing, the government would be permitted to introduce evidence of White's criminal conduct that was not included in the indictment and other evidence that might justify enhancing White's sentence. *Id.* Judge Niemeyer disapproved of the majority's failure to address the Federal Sentencing Guidelines in estimating White's probable sentence and noted that White's coconspirator had been cooperative and had only faced two counts in contrast to White's six. *Id.* Judge Niemeyer also stressed that courts of appeals cannot conduct sentencing proceedings and criminal sentences cannot be based on national averages for a broad class of fraud charges. *Id.* at 429.

146. *Id.* at 430.

147. *Id.*

ed an individually focused analysis[148] and should have been applied in a situation such as White's, where individual liberty rights conflicted with governmental interests.[149] Earlier Supreme Court decisions, including *Sell*, set out the importance of individual interests in forcible medication cases and suggested that a balancing-style test could be appropriately applied.[150] Other lower federal courts conducted *Sell* analyses in ways that suggested a balancing test could be easily adopted in the future.[151] Instead of taking the opportunity to develop such a test, the Fourth Circuit in *White* overcomplicated the *Sell* analysis and seemingly contradicted its earlier decisions.[152]

A. *Balancing Tests Are Well-Suited to Cases Where Individual and Governmental Interests Collide Because Such Tests Recognize the Importance of Both Interests*

Ad hoc balancing tests, as opposed to definitional balancing or categorical-style tests, are more appropriate for situations in which courts must take notice of an individual's particular situation and characteristics when making their decisions.[153] Courts can still successfully apply a series of particular factors, like those outlined in *Sell*, in a balancing-style test if the factors are treated as elements to be considered rather than as sufficient conditions.[154] To apply the *Sell* factors, however, most courts have employed a categorical-style test that cannot sufficiently account for the individual's interests.[155] Forcible medication cases in particular are well-suited to balancing tests because of the extreme individual concerns involved.[156]

148. *See infra* Part IV.A.1.

149. *See infra* Part IV.A.2.

150. *See infra* Part IV.B.

151. *See infra* Part IV.C.

152. *See infra* Part IV.D.

153. *See infra* Part IV.A.1.

154. *See infra* notes 176–179 and accompanying text.

155. *See infra* Part IV.A.1.

156. *See infra* Part IV.A.2.

1. Balancing Tests May Not Produce Consistent, Predictable Results, but Their Fact-Intensive Analysis Is Appropriate When Individual Rights and Governmental Interests Are Concerned

This Note advocates for an ad hoc balancing test[157] that focuses on the interests at stake in a particular case, with attention to the facts involved, and weighs those competing interests against each other to reach a final decision.[158] It is necessary to acknowledge that courts might be reluctant to employ ad hoc balancing tests because of their labor-intensive nature, especially when multi-factor tests, or even definitional balancing tests, provide possible alternatives.[159] Beyond the initial effort of applying a balancing test each time a particular issue comes before the court, this kind of analysis also requires courts to develop ways to weigh and measure disparate, conceptual interests against each other.[160] In addition, because the balancing test requires that a fact-specific analysis occur each time the interests compete,[161] the balancing test is unlikely to yield predictable results.

Balancing tests, which outline general standards that must be set against each other, are commonly contrasted against "categorical" type tests, which focus more on setting down rules.[162] As Professor Kathleen M. Sullivan explains:

157. *See supra* note 32 and accompanying text.

158. *See supra* Part II.A.

159. *See supra* Part II.A.

160. *See* Aleinikoff, *supra* note 31, at 945–46 (explaining the balancing analysis).

161. *See id.* at 946 (illustrating how the balancing test applies to a particular case).

162. *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293–94 (1992) [hereinafter Sullivan, *Post-Liberal Judging*] (explaining the difference between balancing rhetoric and categorization rhetoric); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381–82 (2009) (explaining the difference between categoricalism and balancing in constitutional jurisprudence). Sullivan also noted that there is a subtle difference between categorization and the establishment of a judicial rule: "A legal directive is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts," while a categorization method creates standards instead of rules, "allow[s] the decisionmaker to take into account all relevant factors or the totality of the circumstances," and permits the decision-maker to reach different results when different facts are presented. Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–59 (1992) [hereinafter Sullivan, *Rules and Standards*]. "The recurring distinction in constitutional law between 'categorization' and 'balancing' [therefore] is a

> Categorization and balancing each employ quite different rhetoric. Categorization is the taxonomist's style—a job of classification and labeling. When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's justification for the infringement. Balancing is more like grocer's work (or Justice's)—the judge's job is to place competing rights and interests on a scale and weigh them against each other. Here the outcome is not determined at the outset, but depends on the relative strength of a multitude of factors. These two styles have competed endlessly in contemporary constitutional law; neither has ever entirely eclipsed the other.[163]

Each style of decision-making has advantages and disadvantages. Those who advocate for rules and categorizations argue that such tests promote judicial consistency, uniformity, and predictability in decision-making.[164] Categorization also prevents the effect of a judge's own biases from influencing his decision by structuring the decision around clearly identified constraints.[165] By contrast, balancing tests "spare individuals from being sacrificed on the altar of rules" by highlighting the relevant similarities and differences between parties and cases.[166] Judges are permitted to apply flexible standards to changing circumstances and can reach different decisions over time.[167] Balancing tests also make judges more accountable for their decisions; by requiring judges to explain the reasons behind their substantive decisions, these tests help develop legal principles.[168]

The differences between balancing tests and categorizations "mark a continuum, not a divide,"[169] which suggests that a transition

version of the rules/standards distinction," where balancing reflects standards and categorization reflects rules. *Id.* at 59–60.

163. Sullivan, *Post-Liberal Judging*, *supra* note 162, at 293–94.

164. Sullivan, *Rules and Standards*, *supra* note 162, at 65.

165. Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 283 (1995).

166. Sullivan, *Rules and Standards*, *supra* note 162, at 66.

167. *Id.*

168. Chen, *supra* note 165, at 283.

169. Sullivan, *Rules and Standards*, *supra* note 162, at 61.

from a categorization test to a balancing test is not jurisprudentially impossible. Arguably, most of the courts to address the *Sell* factors did so in a categorical style, where the government's ability to satisfy each factor was considered enough to allow forcible medication without any further inquiry into the individual's interest.[170] Comparing the benefits and problems equated with both methods, however, suggests that categorization does not work as effectively as a balancing test would in the realm of forcible medication. Categorization "prohibits the reweighing of interests" once the rules are developed[171] and prevents judges from considering the particular qualities of each party in making their decisions.[172] By definition, categorization demands that judges treat all cases of the same type exactly alike;[173] however, forcible medication analyses have required courts to focus on the individual to be medicated and the specific course of treatment for that specific purpose.[174] Because the forcible medication analysis will conconstantly change depending on the individual's specific diagnosis and susceptibility to side effects, categorization's inability to adapt to changing circumstances is ill-suited to the task. The increased accountability of a standards-based balancing test is also necessary when judges are charged with making decisions that affect an individual's mental processes and physical health.[175] In short, what would be sacrificed in terms of consistency and predictability by treating the *Sell* factors as standards in an overall balancing test—instead of parts of a categorical rule—would be countered by an increased ability to focus on individual characteristics of the defendants and clearer judicial explanations for why medication was permitted or denied.

The right to avoid forcible medication is an individual right important enough that courts should be compelled to undertake a balancing test, despite its difficult and nuanced application. In the past, the Supreme Court actually rejected a bright-line rule for determining whether the government's interests can override an individual's

170. *See, e.g.*, United States v. Green, 532 F.3d 538, 545 (6th Cir. 2008) (describing the *Sell* factors as "a four-part analysis to be conducted by the district court when determining whether involuntary medication may be utilized to render a defendant competent to stand trial").

171. Blocher, *supra* note 162, at 382.

172. Sullivan, *Rules and Standards*, *supra* note 162, at 62.

173. *Id.*

174. *See, e.g.*, United States v. Evans, 404 F.3d 227, 241 (4th Cir. 2005) (requiring courts to consider defendants facing forcible medication on an individualized basis).

175. *See infra* Part IV.A.2.

constitutional rights in favor of a more flexible balancing test.[176] In *Barker v. Wingo*,[177] the Court developed an ad hoc balancing test that applied in situations where the individual right to a speedy trial under the Sixth Amendment was allegedly violated, and in doing so, outlined four factors for a court to consider in determining whether the individual had been deprived of his right.[178] The Court noted:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.[179]

The same analysis and reasoning could easily be applied to the four *Sell* factors and to the individual right to be free from forcible medication with antipsychotic drugs. Such an interpretation of the *Sell* factors would help courts compare the individual and governmental interests at stake in a forcible medication case without reducing the inquiry to a mere checklist of steps the government must fulfill before medication will be allowed.

2. *A Balancing Test is Particularly Appropriate in the Context of Forcible Medication*

It is well-settled law that the individual's interest in liberty, including the liberty to treat his body how he wishes in the medical context, is protected by the Due Process Clause of the Fourteenth Amendment.[180] The right to choose medical treatment, or to avoid treatment altogether, is so critical because it can affect an individual's very existence.[181] This liberty interest becomes especially important in

176. Barker v. Wingo, 407 U.S. 514, 529–30 (1972).

177. 407 U.S. 514 (1972).

178. *Id.* at 530. The four factors identified by the Court were the length of the delay before the trial began, the government's reasons for the delay, the defendant's personal responsibility to assert his Sixth Amendment right, and any prejudice to the defendant resulting from delay. *Id.* at 530–32.

179. *Id.* at 533 (citation omitted).

180. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (affirming the Fourteenth Amendment right to refuse unwanted medical treatment).

181. *See In re* Quinlan, 355 A.2d 647, 663–64 (N.J. 1976), *overruled by In re* Conroy, 486 A.2d 1209 (N.J. 1985) (recognizing that an individual might knowingly choose to discon-

the forcible medication context, because unwanted treatment with antipsychotic drugs is designed to have a profound effect on the individual's physiology without affording the individual the right to choose that effect on his own.[182] The purpose of antipsychotic medication is "to alter the chemical balance in a patient's brain, leading to changes . . . in his or her cognitive processes."[183] Besides fundamentally altering an individual's brain chemistry, these drugs can also cause a variety of side effects, ranging from the (comparatively benign) risks of elevated body weight and cholesterol levels[184] to the risks of irreversible muscle twitches (tardive dyskinesia) and possible death from cardiac malfunction (as a result of neuroleptic malignant syndrome).[185]

These are severe effects, intended and potential, for any individual to face, but the individual who wishes to take these medications voluntarily has at least made his own choice in the context of his own liberty interest in his own body. Before imposing these effects on an individual who did not wish to take antipsychotic medication at all, the law should require the government to make an extremely strong case demonstrating why it could not yield to the individual's liberty interest in keeping his own body and mind free from such fundamental changes.[186] An ad hoc balancing test that places the government's specific interest in trying a specific defendant against that defendant's interest in being free from a specific antipsychotic medical regimen, including an analysis of the potential side effects that individual might face, would give the necessary respect and deference to the individu-

tinue medication, even if that choice meant hastening her own death, and finding that the right to privacy would protect such an informed choice).

182. *See* Washington v. Harper, 494 U.S. 210, 229–30 (1990) (describing the potential effects of antipsychotic medication).

183. *Id.* at 229.

184. *See* United States v. White, 620 F.3d 401, 408 (4th Cir. 2010) (describing some potential effects of second-generation antipsychotics).

185. *See Harper*, 494 U.S. at 230 (describing potential, although rare, side effects of antipsychotic medications in general).

186. *See* Riggins v. Nevada, 504 U.S. 127, 134–35 (1992) (describing some of the possible serious side effects of antipsychotics and emphasizing that forcing such drugs onto an individual absent "overriding justification" is unconstitutional).

al's compelling interest, while allowing the government to prevail in certain rare cases.[187]

B. Sell *and its Predecessors Never Explicitly Ruled Out a Balancing Test, and the Structure of the* Sell *Factors Could Lend Itself to a Balancing Format with Little Difficulty*

The Supreme Court cases before *Sell* that addressed forcible medication suggested that a balancing-style test could be appropriately applied to contrast individual rights against government interests.[188] Furthermore, nothing in the language of *Sell* indicated that the Court would have disapproved of a balancing test to implement its four factors.[189] The *Sell* factors as they stand now could be modified to fit a balancing-style test, which would more effectively consider the government's interest in prosecuting crime and the individual's liberty interest in avoiding forcible medication.[190]

1. Harper *and* Riggins *Established the Importance of the Individual and Government Interests, and Required That Courts Consider Both in the Forcible Medication Analysis*

The Supreme Court in *Sell* explicitly looked to *Harper* and *Riggins* as "set[ting] forth the framework for determining the legal answer" to whether an individual awaiting trial could be forcibly medicated.[191] Both cases characterized the individual's interest in avoiding forced administration of medication as a constitutionally protected liberty interest.[192] Specifically, the Court in *Harper* classified that liberty in-

187. Such a test would also respect the mandate in *Sell* that forcible medication for the purposes of rendering a defendant competent to stand trial ought to be allowed only in "rare" instances. Sell v. United States, 539 U.S. 166, 180 (2003).

188. *See infra* Part IV.B.1.

189. *See infra* Part IV.B.2.

190. *See infra* Part IV.B.3.

191. *Sell*, 539 U.S. at 178–79.

192. Riggins v. Nevada, 504 U.S. 127, 134 (1992); Washington v. Harper, 494 U.S. 210, 221–22 (1990). The *Sell* Court accepted this constitutional liberty interest without specifying which amendment was implicated in the forcible medication analysis. *Sell*, 539 U.S. at 179. In contrast, both *Harper* and *Riggins* grounded that right in the Fourteenth Amendment. *Riggins*, 504 U.S. at 134; *Harper*, 494 U.S. at 221–22. The liberty protections offered to an individual under the Fifth and Fourteenth Amendments' Due Process Clauses, however, are equivalent, suggesting that the *Sell* Court could discuss the individual's constitutional liberty right in avoiding forcible medication without grounding it specifically in ei-

terest as "significant," and it had to be evaluated against "both the legitimacy and the importance of the governmental interest presented . . . ."[193] The *Riggins* Court instead required a finding of an "essential state policy" or an "overriding justification" before forcible medication could be considered; without such a finding, forcible medication would be an "impermissible" infringement on individual liberty.[194] Although neither *Harper* nor *Riggins* explicitly called for balancing the individual and governmental interests, the characterization of the individual's liberty interest as "significant" and as standing in opposition to the government's interest set out the issue in a balancing-appropriate format. Furthermore, the Court in *Riggins* found that the state courts had committed reversible error because they "did not acknowledge the defendant's liberty interest in freedom from unwanted antipsychotic drugs" before allowing forcible medication, implying that both the individual's interest *and* the government's interests must be evaluated concurrently in such situations.[195]

2. Sell *Suggested That Individual Liberty Must Remain an Important Consideration in Forcible Medication Cases, and Further Indicated That Courts Could Use the Four Factors in a Balancing-Style Test*

The *Sell* Court, before setting out the standard for forcible medication of a defendant who has yet to stand trial, explicitly reiterated both the individual liberty interest set forth in *Harper* and *Riggins* and the need for the government to show a very significant interest of its own before being allowed to medicate.[196] Thus, the Court made clear at the outset that both sets of interests would need to be considered in

ther the state or the federal realm. *See* John F. Basiak, Jr., *The Roberts Court and the Future of Substantive Due Process: The Demise of "Split-the-Difference" Jurisprudence?*, 28 WHITTIER L. REV. 861, 866 & n.34 (2007) (explaining that the Fifth and Fourteenth Amendments' Due Process Clauses offer identical liberty protections).

193. *Harper*, 494 U.S. at 221, 225.

194. *Riggins*, 504 U.S. at 135, 138.

195. *Id.* at 135–37. Indeed, the *Riggins* Court reversed because the lower state courts did not make sufficient findings, including the finding that the state interest overrode Riggins's liberty interest, to justify forced medication. *Id.* at 129, 138.

196. *Sell*, 539 U.S. at 178–79. In its recapitulation of *Harper* and *Riggins*, the Court variously characterized the government's level of interest as "legitimate," "important," "essential," and "overriding." *Id.*

the forcible medication analysis it was about to undertake.[197] Additionally, although the Court introduced the *Sell* factors by stating that the Constitution permits forcible medication "*only if* the treatment is medically appropriate, is substantially unlikely to have side effects . . . and . . . is necessary significantly to further important governmental trial-related interests,"[198] it never suggested that the satisfaction of those four factors was *all* that was required before forcible medication would be allowed. On the contrary, viewing the satisfaction of the four *Sell* factors as the only roadblock to forcible medication works against the Court's statement that "those instances [when medication is ordered] may be *rare*."[199]

Instead, the four *Sell* factors outlined by the Court were designed to *help* lower courts decide whether "the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, [has] shown a need for that treatment sufficiently important to *overcome* the individual's protected interest in refusing it[.]"[200] Based on this description of the purpose of the four factors, it appears that they were designed to help a court determine whether the government had satisfied its side of the constitutional balance and had demonstrated a significant interest in forcible medication.[201] As the factors were designed to "help" this determination, and not to prove it, the *Sell* Court never indicated that the four factors were *all* that had to be shown to allow forcible medication.[202] Because the Court did not choose to set out the four *Sell* factors as a standard to be met and overcome, therefore allowing medication once all four factors were

197. *Id.* at 179. The Court made a point to discuss the failure of the state courts in *Riggins* to consider the individual's liberty interest before ordering Riggins's forced medication, indicating that such an omission in an analysis of forcible medication to regain competence to stand trial was a very serious error. *Id.*

198. *Id.* (emphasis added).

199. *Id.* at 180 (emphasis added).

200. *Id.* at 183 (emphasis added).

201. *Cf. id.* at 181 ("We emphasize that the court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant competent to stand trial.") (emphasis omitted).

202. *See id.* at 183 ("[T]he factors . . . should *help* [a court] make the ultimate constitutionally required judgment.") (emphasis added).

shown,[203] the possibility remains that the four factors could instead be applied as a part of a balancing test.

3. *Courts Could Apply the* Sell *Factors in a Balancing Format Without Changing the Factors or the Rationale Behind the Decision*

The structure and content of the four *Sell* factors, as originally set out by the Supreme Court, actually forces courts to consider the governmental and individual interests side by side;[204] thus, shifting the factors into a balancing test would require very little in the way of substantive change. The first *Sell* factor, in fact, explicitly addresses the government's need to have "important" interests at stake in prosecuting the charged individual.[205] This important governmental interest represents one half of the proposed ad hoc balancing test, and would be bolstered by individualized findings in support of the effectiveness of the proposed treatment. The other half of the test would call for a detailed analysis of the individual's interests in not being forcibly medicated and would consider, in part, other treatments that might be available, the possibility for civil commitment, and the side effects that antipsychotic drugs might cause. These concerns already exist in the remaining *Sell* factors.[206] A balancing-style test would subsume the second, third, and fourth *Sell* factors into the overall interests at stake on each side, perhaps giving weight to either the individual or the government, but not by themselves sufficient to allow forcible medication.

For example, courts performing a *Sell* analysis already require the government to identify specific drugs in specific dosages and to plan for possible side effects the individual might experience.[207] The government must also tailor its arguments in favor of prosecution to the

203. *See id.* at 180 (stating that the instances where medication is allowed will be "rare").

204. *See id.* (noting that the four-factor analysis requires courts to "consider the facts of the individual case in evaluating the Government's interest in prosecution").

205. *Id.*

206. *Id.* at 180–81 (explaining the possible special circumstances that may lessen the government's interest, the necessity of medication, and the medical appropriateness of medication).

207. *See supra* Part II.C.2.

crimes for which the individual has been charged.[208] A balancing test would still require courts to consider the same factors, but would consider them standards rather than "necessary or sufficient condition[s]" for depriving an individual of his liberty interest.[209] The balancing test format would also allow those individualized findings to support either side of the scale: If the government, for example, has not identified which antipsychotic medications it plans to use to treat the defendant, the absence of that finding would bolster the individual's assertion that the government does not have a strong enough argument to outweigh his interest in remaining free from forcible medication. If the treatment plan is highly individualized, however, the individual could still introduce evidence of special circumstances that argue against his medication. The last three *Sell* factors could therefore be considered a kind of safeguard: without them the government cannot demonstrate an interest strong enough to overcome the individual's liberty right, but the existence of those factors does not guarantee that the government's argument will prevail.[210]

The standards of review the lower courts have given this particular factor also support transforming the first *Sell* factor into one half of a constitutional balancing test. The first *Sell* factor is unique in that it is reviewed *de novo*, as a legal finding, in every circuit that has addressed *Sell*-type cases.[211] The other three factors are considered factual in nature, except in the Tenth Circuit where only the third and fourth factors are reviewed as factual.[212] Because the last three factors

208. *Cf. Sell*, 539 U.S. at 180 (discussing how the government has an important interest in prosecuting serious crimes, but the facts of the individual case will affect that prosecutorial interest).

209. *See* Barker v. Wingo, 407 U.S. 514, 533 (1972) (stating that the four factors for determining whether the right to a speedy trial was violated were not "necessary or sufficient condition[s]").

210. *Cf. id.* (noting that the four factors outlined in the Court's decision were merely related, not "talismanic," and "must be considered together with such other circumstances as may be relevant").

211. *See supra* Part II.C.1. The Tenth Circuit is unique in treating both the first and second factors *de novo*. United States v. Bradley, 417 F.3d 1107, 1113–14 & n.12 (10th Cir. 2005). The other eight circuits to address *Sell* have not followed the Tenth Circuit's lead, even when some of them addressed the *Sell* factors as a matter of first impression and had the Tenth Circuit's approach available for guidance. *See, e.g.*, United States v. Diaz, 630 F.3d 1314, 1331 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 128 (2011) (citing *Bradley* but disagreeing with it and choosing to follow the other circuits to address the *Sell* factors).

212. *See supra* Part II.C.1.

are reviewed as factual, courts could conceivably resolve them differently in every forcible medication case, where different facts would present each time. The consistent review of the governmental interest factor as a legal conclusion, however, suggests that this interest is either present or absent in every case. The willingness of the appellate courts to consider the first *Sell* factor legally and the last three factors factually provides further support for the contention that the forcible medication analysis should be applied in an individualized balancing test, where the ultimate goal is to prove that the government has an interest sufficiently strong to overcome the individual's constitutional liberty interest in avoiding forced medication.

C. Circuit Courts of Appeals, Including the Fourth Circuit,Have Taken Steps Toward a Balancing Test, Suggesting That a Balancing Approach Would Not Be Difficult to Implement

Although courts that performed *Sell* analyses did not explicitly adopt a balancing test format, they considered the four factors in such a way that balancing was either referenced outright[213] or was implicitly supported by the way the factors were discussed.[214] Other courts compared their current cases to other forcible medication decisions from other circuits and drew distinctions between the cases, another indication that balancing-style methods were implicitly adopted.[215] These practices suggest that courts could easily convert the *Sell* analysis into a balancing test without adversely affecting the way decisions are made.

The Ninth Circuit is the only circuit that has explicitly refused to apply the *Sell* analysis as a balancing test. In *United States v. Ruiz-Gaxiola*, the Ninth Circuit found that "[t]he *Sell* factors do not represent a balancing test, but a set of independent requirements, each of which must be found to be true before the forcible administration of psychotropic drugs may be considered constitutionally permissible."[216] The court, however, did not have an independent, precedential basis for this statement and instead reached its conclusion that the four factors act as mere barriers to overcome based on a textual reading of

213. *See infra* notes 219–223 and accompanying text.

214. *See infra* notes 227–228 and accompanying text.

215. *See infra* notes 224–228 and accompanying text.

216. 623 F.3d 684, 691 (9th Cir. 2010).

Sell.[217] No other circuit court has reached this conclusion, making the Ninth Circuit an outlier court in this respect in the same way the Tenth Circuit is an outlier court in its standard of review of the second *Sell* factor.[218]

On the other end of the spectrum, the Third Circuit arguably attempted to apply the *Sell* factors in a balancing test format in *United States v. Grape*.[219] *Grape* involved a challenge to the government's satisfaction of the first and second *Sell* factors: whether the government had demonstrated a sufficiently important interest to justify medication and whether that medication was substantially likely to restore Grape to competence.[220] Although the Third Circuit recognized that

217. *See* United States v. Hernandez-Vasquez, 513 F.3d 908, 913 (9th Cir. 2008) (phrasing the *Sell* factors as findings the trial court must make before allowing medication); *see also Ruiz-Gaxiola*, 623 F.3d at, 691 (citing the *Hernandez-Vasquez* Court's listing of the *Sell* factors for the proposition that the factors should not be applied as a balancing test but should instead be seen as "a set of independent requirements").

218. *See supra* note 211 and accompanying text.

219. 549 F.3d 591 (3d Cir. 2008). John Douglas Grape, diagnosed with paranoid schizophrenia, was charged with the receipt and possession of child pornography. *Id.* at 592–93. The Third Circuit affirmed the order from the United States District Court for the Western District of Pennsylvania granting the government's motion to allow forcible medication. *Id.* The Third Circuit also reviewed one other district court decision relating to the *Sell* factors, *United States v. Muhammad*, 398 F. App'x 848 (3d Cir. 2010). *Muhammad*, however, yielded no additional discussion as to how the Third Circuit would apply the *Sell* factors, and the court simply stated that its analysis was limited "to the narrow question of whether the [district court] properly applied the four *Sell* factors. We have reviewed the record and we are satisfied that the Court's opinion responded to the contentions Muhammad has made before us. We will affirm its judgment without further discussion." *Id.* at 849–50.

220. *Grape*, 549 F.3d at 592. The Third Circuit dismissed Grape's arguments as to the second *Sell* factor on factual grounds. *Id.* at 604. Grape had actually been forcibly medicated by the time of his appeal for the safety reasons set out in *Harper*. *Id.* at 592–93. Because that forcible medication restored Grape to competency in the past, the Third Circuit disposed of the issue of whether forcible medication was substantially likely to restore Grape to competence. *Id.* at 604. The court, however, did take note of "the research and scientific and empirical evidence the parties debated regarding the likelihood that antipsychotic medications would restore Grape to competency." *Id.* at 605 (citation omitted). That evidence included the identification of a specific drug, an outline of a dosage regimen, and contingencies for dealing with identified potential side effects—all of which would have appeared to satisfy the criteria set out in *Evans*, although the Third Circuit did not expressly mention *Evans* in its analysis. *Id.* at 595–96.

Grape made a convincing argument about the possibility of his civil commitment that might work against the government's interest in bringing him to trial, it stated that "we must *balance* Grape's strong argument against the Government's interests."[221] As a result of this balancing, the court found that "Grape's arguments do not *outweigh* the Government's. Therefore, the Government's interest is sufficiently strong to *outweigh* Grape's liberty interest and to meet [the first factor] of the *Sell* test."[222] The use of balancing test language and the court's explicit recognition of the defendant's individualized arguments—in particular, the possibility that Grape could be committed as opposed to tried in court—indicate that the restructuring of the *Sell* test as a balancing analysis would not be fundamentally different from some of the analyses in which lower courts have already engaged.[223]

The Eighth Circuit undertook a balancing-style analysis in the *Sell* arena as well, although it did not use balancing language explicitly. One of the benefits of a balancing test is that it allows courts to compare the "relevant similarities and differences" between cases that are substantively alike.[224] In *United States v. Nicklas*,[225] the Eighth Circuit spent a portion of its forcible medication analysis drawing comparisons and distinctions between Nicklas's case and the Fourth Circuit's decision in *White*.[226] The fact that both cases raised the same substan-

221. *Id.* at 600, 602 (emphasis added).

222. *Id.* at 603 (emphasis added). The Third Circuit found that governmental interests outweighed Grape's individual liberty interest based specifically on Grape's status as a repeat offender, the opportunity for supervised release that would come with a potential conviction, and the fact that Grape would still be required to serve the majority of any sentence imposed on him. *Id.* at 602.

223. Perhaps taking notice of the fact that *Sell* was not explicitly set out as a balancing test, the Third Circuit also noted that the four factors as a whole made up "a standard that the government must meet in order to overcome the inmate's liberty interest." *Id.* at 599. The crux of the Third Circuit's opinion, however, was that the government's interest—the first *Sell* factor—could overcome Grape's arguments against medication, suggesting that the court tacitly adopted a balancing format. *Id.* at 603.

224. Sullivan, *Rules and Standards*, *supra* note 162, at 66.

225. 623 F.3d 1175 (8th Cir. 2010) *cert. denied*, 132 S. Ct. 124 (2011).

226. *Id.* at 1179–80. In affirming the government's motion to forcibly medicate Nicklas, the Eighth Circuit compared the time Nicklas spent in pretrial custody to the time White served, Nicklas' propensity to be a repeat offender to the lack of evidence that White would commit similar crimes, and the violent nature of Nicklas's crime to the nonviolent nature of White's. *Id.*

tive issue of whether the defendant could be forcibly medicated to render him competent, and that the court relied on factual distinctions between its own case and earlier cases to help make its decision, provides support for the argument that a balancing test that takes note of individualized distinctions could be applied effectively in a *Sell* analysis.

The Fourth Circuit itself discussed the application of the *Sell* factors in a way that would lend itself to a balancing test. *Evans* and *Bush* discussed the second and fourth *Sell* factors as one single unit, not as two separate elements that exist independently of one another.[227] The *Evans* court, in particular, made no effort to separate the second "significantly further" factor from the fourth "medically appropriate" factor and required the government to provide individualized findings before satisfying either.[228] If the court had considered each factor as an element to be proven individually before medication would be allowed, it would not have combined two of those four factors into one determination. Because the Fourth Circuit already adopted a forcible medication analysis that addresses two of the three factual factors as one unit, it would be a simple and logical step to consider the last three factors together, as part of the overall determination of whether the government has expressed an interest important enough to overcome the individual's constitutional rights.

D. *Instead of Adopting a Conjectural Approach That Rendered the* Sell *Factors Increasingly Unwieldy, the Fourth Circuit in* White *Should Have Taken the Opportunity to Apply the* Sell *Factors in a Constitutionally Appropriate Balancing Test*

In *White*, the Fourth Circuit went beyond further defining the four *Sell* factors and entered the realm of conjecture when it conducted its own sentencing analysis for White before she ever stood trial.[229] This sentencing calculation confused the court's analysis and led it to focus on issues that were not relevant to the individualized focus ad-

227. *See* United States v. Bush, 585 F.3d 806, 815–17 (4th Cir. 2009) (discussing the second and fourth *Sell* factors under their own headings, but citing to the *Evans* requirement that the second and fourth factors be shown by an individualized plan); United States v. Evans, 404 F.3d 227, 240–42 (4th Cir. 2005) (discussing the second and fourth *Sell* factors under the same heading and repeatedly referring to both factors together).

228. *Evans*, 404 F.3d at 240–41.

229. *See supra* Part III; *see also* United States v. White, 620 F.3d 401, 424 (4th Cir. 2010) (Niemeyer, J., dissenting) (noting that the majority's sentencing calculation was based on "rank speculation").

vocated in its earlier decisions.[230] Instead of creating this complicated calculation, the Fourth Circuit should have used *White* as an opportunity to develop, and explicitly adopt, a balancing test that would have properly weighed White's constitutional liberty interests against the government's interest in prosecution.[231]

1. *The Majority's Decision in* White *Renders the Application of the* Sell *Factors Increasingly Unwieldy and Overly Conjectural*

As a result of the majority's decision in *White*, courts in the Fourth Circuit may face the daunting and unwieldy task of calculating a defendant's potential sentence when deciding whether to grant the government's motion for forcible medication of mentally incompetent defendants. The Supreme Court did not contemplate this kind of analysis in *Sell*, and, until *White*, it had not been undertaken by the Fourth Circuit or the other circuit courts. Admittedly, the *Sell* analysis is fact-intensive by design, and therefore the results cannot be entirely predictable.[232] The Fourth Circuit's analysis of the first *Sell* factor, and its attendant special circumstances, however, went beyond an individualized analysis. By attempting to calculate both White's time served and her potential sentence if convicted,[233] the court turned an analysis that in the past had focused on a defendant's possible individual reactions to antipsychotic medications into highly conjectural guesswork not conceived by the Supreme Court.[234]

The court's decision to "calculate White's time served, her likely sentence, and then ask whether the former is significant in light of the latter"[235] is directly contrary to the Fourth Circuit's prior decisions in *Evans* and *Bush*, where sentencing guidelines were not analyzed

230. *See infra* Part IV.D.1.

231. *See infra* Part IV.D.2.

232. *Cf. Evans*, 404 F.3d at 241 (criticizing the lower court for accepting a report that did not analyze Evans as an individual and did not take note of his particular physiology before approving the government's forcible medication plan, and noting that to accept generic plans "would be to find the government necessarily meets its burden in every case [in which] it wishes to use . . . antipsychotic medication").

233. *White*, 620 F.3d at 414–17 (majority opinion).

234. *See id.* at 424, 429 (Niemeyer, J., dissenting) (arguing that the majority's focus on sentencing "create[d] new standards and a new process without legal support and relie[d] on gross speculation" and that a faithful application of the *Sell* factors would have supported forcible medication).

235. *Id.* at 414 (majority opinion).

and the maximum statutory penalty was sufficient to establish that a serious crime was committed.[236] Indeed, the *Evans* court specifically considered such a focus on potential sentence calculation as both "unworkable" and "uniquely inappropriate" in the context of a *Sell* analysis.[237] The *Bush* court was equally clear about the potential effect of time served as a special circumstance, stating that time served in an amount long enough to cover a potential sentence did not, by itself, defeat the government's interest.[238] In addition to circumventing earlier Fourth Circuit decisions, this focus on calculating White's potential sentence created a new step in the *Sell* analysis that no other circuit had adopted: The Fourth Circuit appears to be the only circuit court that has attempted such a sentencing calculation in determining whether the government established an important interest in prosecuting.[239]

The majority in *White* also moved the *Sell* analysis further away from the fact-specific and individually focused analysis recommended by *Sell*[240] and by other courts[241] by considering both the sentence of White's co-defendant and the median and mean sentences imposed

236. *See* United States v. Bush, 585 F.3d 806, 814–15 (4th Cir. 2009) (noting Bush's possible sentence under the Sentencing Guidelines but not relying on that figure for any sort of analysis); *Evans*, 404 F.3d at 237 (disagreeing with Evans's claim that the Sentencing Guidelines were the appropriate focus in determining the seriousness of the charges against him).

237. *Evans*, 404 F.3d at 237–38. The *Evans* court considered a sentencing guideline range unworkable because it would require an appellate court to calculate a probable sentencing range in the absence of the factual findings contained in a presentence report ("PSR"), which was typically prepared:

> pursuant to testimony presented at trial or the plea and a detailed investigation of the defendant. A focus on the probable guideline range as the barometer of seriousness would shift this fact-finding to a time before the defendant's trial or plea, before the Probation Office prepares its report, and at a time when the district court has already ruled that the defendant himself is incompetent.

Id. at 238.

238. *Bush*, 585 F.3d at 815. Bush argued that the Sentencing Guidelines called for a sentence ranging from twenty-four to thirty months, and that she had been in confinement for eighteen months at the time of her appeal. *Id.* at 814.

239. *See White*, 620 F.3d at 428 (Niemeyer, J., dissenting) (noting that the attempt to calculate White's possible sentence was "unprecedented and unsupportable").

240. Sell v. United States, 539 U.S. 166, 180 (2003).

241. *See, e.g.*, *Evans*, 404 F.3d at 240–41 (stating multiple times that the government should have analyzed Evans "as an individual").

nationally for similar crimes.[242] The majority even admitted that this sentencing analogy between White and her codefendant, Baker, was "imperfect; Baker pled guilty to only three counts (White [wa]s charged in six) and, unlike White, Baker provided substantial assistance to law enforcement."[243] Indeed, this approach of looking to median sentences and sentences imposed on other defendants removed the element of individuality from the *Sell* analysis calculus because these sentencing considerations were an attempt to force White into compliance with preexisting sentences as opposed to focusing on her individual characteristics and considerations.[244] Most distressing of all, perhaps, is the fact that the *White* majority's attempt to calculate White's possible sentence before a trial had even taken place led the Fourth Circuit into an area of law where it was "totally without legal support," given that courts of appeals "cannot conduct sentencings."[245] Introducing this sentencing analysis into the examination of the governmental interest factor convoluted the Fourth Circuit's existing *Sell* analysis, which had been fairly well defined.[246]

2. *The Fourth Circuit in* White *Missed an Opportunity to Apply the* Sell *Factors as a Constitutionally Appropriate Balancing-Test*

By the time *White* was decided, the Fourth Circuit had defined nearly all the other elements of the *Sell* factors that had proved confusing: what constituted a serious crime,[247] whether medication was medically appropriate,[248] how to measure whether medication would

242. *White*, 620 F.3d at 415–16 (majority opinion).

243. *Id.* at 416 n.16.

244. *See id.* at 415 (noting that the majority was attempting to calculate a sentence for White that would fit into a scheme of "uniformity [of] sentencing" among "similarly situated defendants"). As the dissent in *White* and the majority in *Evans* note, however, sentencing is inherently an individualized calculation, and any attempt to base a hypothetical sentence solely off the Sentencing Guidelines or on sentences of "dissimilar" co-offenders destroys that individuality. *See White*, 620 F.3d at 428 (Niemeyer, J., dissenting) (discussing the individual analysis of White that would be required in sentencing); *see also Evans*, 404 F.3d at 238 (noting that sentencing requires a Presentence Report that includes a detailed investigation of the individual defendant).

245. *White*, 620 F.3d at 429.

246. *See supra* Part II.C.2.

247. *Evans*, 404 F.3d at 238.

248. *Id.* at 240.

significantly further the government's interest in prosecution[249] and what standard of proof and standard of review an appellate court should apply.[250] In short, the court—and the government—were aware of what needed to be shown to overcome the individual's interest in not being forcibly medicated. In using the opportunity to apply the *Sell* factors in a balancing format, the Fourth Circuit could have given the appropriate respect to the individual's strong interest in not being forcibly medicated and continued to set itself apart as a leader in forcible medication cases. Instead, the court shied away from this individualized analysis and turned the *Sell* inquiry into a conjectural, unwieldy, and speculative exercise. Not only would a balancing test have been the more appropriate choice, it would have been a more consistent choice given the Fourth Circuit's earlier decisions.[251] In fact, the Fourth Circuit had already laid the foundations for applying *Sell* as a balancing test. *Evans* and *Bush* considered the second and fourth factors as a unit, indicating that the appropriateness of the medication regime could not logically be separated from the requirement that the medication significantly further the government's interest in prosecution.[252]

Not only had the Fourth Circuit set itself up for applying a balancing test based on its earlier decisions, it also suggested in parts of its *White* opinion that a balancing test could have reached the same conclusion without having to enter the conjectural realm through its sentencing analysis. Indeed, the Fourth Circuit outlined a list of considerations, some of which were individualized to this specific case, supported White's side of the balance, and undermined the government's arguments in favor of medication.[253] These factors included "the amount of time that [White] ha[d] spent . . . in confinement before her trial," "the nature of the crime" White was charged with, the list of activities White would be precluded from as a result of her admission to a mental hospital, White's "unique medical condition," and whether this specific case was "exceptional."[254] After setting out this list of factors supporting the individual's side of the balance, however,

249. *Id.* at 240–41.

250. *Id.* at 236, 240; United States v. Bush, 585 F.3d 806, 814 (4th Cir. 2009).

251. *See supra* Part IV.C.

252. *See supra* notes 227–228 and accompanying text.

253. United States v. White, 620 F.3d 401, 413 (4th Cir. 2010) (majority opinion).

254. *Id.*

the Fourth Circuit entered into its ill-advised sentencing proceeding and detracted all attention from any sort of balancing it employed.[255]

The court's venture into sentencing could have been avoided had the court focused on how the four *Sell* factors weighed against the government. The majority remarked that "White's unique medical condition lessen[ed] the government's interest in prosecution because the proposed medical treatment has rarely, if ever, been tested on individuals with White's condition and thus may not rehabilitate White . . . ."[256] This concern is reminiscent of the second and fourth *Sell* factors, which *Evans* and *Bush* discussed as a unit, and is individually tailored in such a way that it would have bolstered White's interests in not being medicated. Additionally, the Fourth Circuit spent time addressing how White's case was not "sufficiently exceptional to warrant forcible medication,"[257] a consideration independent from the four factors identified in *Sell* that nonetheless would have countered any government argument in favor of medication. Although the Fourth Circuit had all the tools necessary to apply *Sell* as a balancing test, and although it introduced in *White* a new set of factors that could be considered on the individual's side of the balance, it failed to actually adopting a balancing test. Instead, it complicated the *Sell* analysis when it chose the sentencing path. As a result, this decision promises to complicate future forcible medication decisions, while moving further away from the constitutional balancing that this individual liberty interest requires.

V. CONCLUSION

In *United States v. White*, the United States Court of Appeals for the Fourth Circuit missed an opportunity to apply the four *Sell* factors in a constitutionally appropriate, balancing-style test.[258] Instead, the court made the forcible medication inquiry overly conjectural and complicated by performing a sentencing analysis before the defendant stood trial.[259] The court's decision in *White* moved the Fourth Circuit's forcible medication jurisprudence further away from the understandings of the individual's liberty interest in avoiding unwanted

255. *See id.* at 414–17 (analyzing White's likely sentence).

256. *Id.* at 420; *see also supra* note 137 (discussing the difficulties in predicting the effect of antipsychotic medication on White based on existing studies).

257. *White*, 620 F.3d at 421.

258. *See supra* Parts IV.B.3, D.2.

259. *See supra* Part IV.D.1.

medical treatment articulated in *Washington v. Harper*, *Riggins v. Nevada*, and *Sell v. United States*,[260] and ignored the individualized focus it called for in its own decisions in *United States v. Evans* and *United States v. Bush*.[261] The Fourth Circuit would have been more faithful to the individual and governmental interests at stake in forcible medication cases if it had taken the opportunity to balance them against each other.[262] Had the Fourth Circuit used a balancing test, its decision would have comported with other circuit court decisions, including its own,[263] and would have endorsed a style of analysis appropriate for such an individually focused area of the law.[264] The court's failure to do so downplays the interests on both sides, but especially discounts the individual's constitutional liberty interest in being free from forcible medication.[265]

260. *See supra* Part IV.B.1–2.

261. *See supra* Parts II.C.2, IV.C.

262. *See supra* Part IV.A.1.

263. *See supra* Part IV.C.

264. *See supra* Part IV.A.

265. *See supra* Part IV.A.2.