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Important is Not Important Enough: Forcibly Medicating Defendants for Sentencing Using the Important Interest Standard

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IMPORTANT IS NOT IMPORTANT ENOUGH: FORCIBLY MEDICATING DEFENDANTS FOR SENTENCING USING THE IMPORTANT INTEREST STANDARD

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INTRODUCTION

Consider the following hypothetical. Jack is convicted of a felony in federal court. Jack suffers from a mental illness. Shortly after his conviction, Jack starts hearing voices in his head. Jack begins acting and feeling strange. Jack does not want to take medication, and of course he has the right to refuse to do so. Jack's sentencing hearing is scheduled for next month, but the court worries that Jack may not be fit to continue with sentencing based on his recent behavior. As a result, the court orders a hearing pursuant to 18 U.S.C. § 4241 to determine if Jack is presently suffering from a mental disease or defect rendering him incompetent to proceed with sentencing.

At the hearing, the court finds by a preponderance of the evidence that Jack is presently suffering from a mental disease or defect and is incompetent to proceed with sentencing.[1] Once deemed incompetent, Jack is hospitalized in a suitable facility pursuant to 18 U.S.C. § 4241(d).[2] After several months, it appears unlikely that Jack will regain competency for

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[1] Competency requires that the defendant "understand the nature and consequences of the proceedings against him" and be able to participate in them. 18 U.S.C. § 4241 (2012); *see also* United States v. Dreyer, 705 F.3d 951, 961 (9th Cir. 2013); Chavez v. United States, 656 F.2d 512, 518 (9th Cir. 1981). The competency statute was initially enacted in 1948 and was substantially revised in 1984 as part of an attempt to afford more protection to mentally ill defendants within the criminal law. 18 U.S.C. § 4241 (2012); H.R. REP. NO. 81-1319, at 1 (1949).

[2] This statute allows a court to hospitalize a defendant for treatment following a determination that the defendant is presently suffering a mental disease or defect rendering him incompetent to proceed with the proceedings against him.

sentencing. The court is ready to provisionally sentence Jack under 18 U.S.C. § 4244(d) to a suitable facility for care or treatment until he regains competency or serves out the maximum term authorized for his crime.[3] But the Government steps in, arguing that it has an important interest in sentencing Jack, and thus it should be permitted to forcibly medicate him in order to restore his competency. Jack objects. He does not want to be medicated, and he believes he has the right not to be medicated.

There are several invaluable rights at stake for Jack. First, he has a right to be free from unwarranted bodily intrusion.[4] Forcible medication would violate this right with no repercussions to the wrongdoer. Second, through the Fifth and Fourteenth Amendments to the United States Constitution, Jack has a protected liberty interest in avoiding forcible medication of antipsychotic drugs.[5] Third, he has a constitutional right under the First Amendment to freedom of speech and thought.[6] Fourth, Jack has a fundamental right to privacy, and forcible medication would interfere with this right.[7]

Nevertheless, the Government argues that its important interest in sentencing Jack outweighs these significant individual rights. The court agrees. Jack is held down, sedated, and injected with antipsychotic medication. The court proceeds to sentence him.

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[3] This provision provides the court with a sentencing alternative for a defendant suffering from a mental disease or defect.

[4] Greater N.Y. Health Care Facilities Ass'n, Inc. v. Axelrod, 770 F. Supp. 183, 187 (S.D.N.Y. 1991) ("The Constitution does provide protection against unwanted bodily intrusion."); United States v. Charters, 829 F.2d 479, 490 (4th Cir. 1987) ("Forcible medication with antipsychotic drugs implicates individual rights to freedom from physical invasion . . . as well as the right to privacy protected by the Constitution and the common law.").

[5] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. This right is recognized in all Supreme Court cases dealing with the issue of forcible medication. Sell v. United States, 539 U.S. 166, 183 (2003); Riggins v. Nevada, 504 U.S. 127, 133–34 (1992); Washington v. Harper, 494 U.S. 210, 221–22 (1990).

[6] *Charters*, 829 F.2d at 492 ("Such mind altering medication has the potential to allow the government to alter or control thinking and thereby to destroy the independence of thought and speech so crucial to a free society.").

[7] Bee v. Greaves, 744 F.2d 1387, 1393 (10th Cir. 1984) ("[T]he decision whether to accept treatment with antipsychotic drugs is of sufficient importance to fall within this category of privacy interests protected by the Constitution.").

The Government is able to step in and forcibly medicate Jack because of the United States Supreme Court's decision in *Sell v. United States*.[8] In *Sell*, the Court created a four-part factors test, which, if established by the Government, allows the Government to forcibly medicate a defendant for the sole purpose of regaining competency for trial.[9] Recently, the *Sell* factors test has been extended to apply in situations where the Government is seeking to forcibly medicate a defendant for sentencing as opposed to trial.[10] This Note specifically focuses on the first factor of the *Sell* test, which requires that the Government demonstrate an important interest in forcibly medicating the defendant in order to proceed.[11] This is the only factor that is purely a matter of law to be decided by the court.[12] The other three factors include: (1) that the involuntary medication will significantly further the Government's interests, (2) that the medication is necessary to further those interests, and (3) that administration of the drugs is medically appropriate.[13] These three factors are largely dependent on the factual circumstances of individual cases.[14] While it is well established that the Government may have an important interest in forcibly medicating a defendant for trial,[15] only two lower courts have addressed the Government's interest in forcibly medicating a defendant for sentencing.[16]

This Note analyzes whether the Government's interest in sentencing is the same as its interest in trial, and whether the "important interest" standard is a high enough threshold for the Government when it seeks to forcibly medicate a defendant for sentencing.[17] This Note will conclude that because of the

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[8] 539 U.S. 166.

[9] *Id.* at 180–81.

[10] United States v. Baldovinos, 434 F.3d 233, 240–41 (4th Cir. 2006).

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

[12] United States v. Grape, 549 F.3d 591, 598 (3rd Cir. 2008).

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

[14] *Grape*, 549 F.3d at 598 (applying a clear error standard of review to factors two through four because of their factual nature).

[15] *See* United States v. Mikulich, 732 F.3d 692, 696 (6th Cir. 2013); United States v. Fazio, 599 F.3d 835, 839 (8th Cir. 2010); United States v. Renshaw, No. 4:06CR-31-M., 2007 WL 2746675, at *1 (W.D. Ky. Sept. 18, 2007).

[16] United States v. Cruz, 757 F.3d 372, 383 (3rd Cir. 2014); United States v. Wood, 459 F. Supp. 2d 451, 457–58 (E.D. Va. 2006).

[17] This Note does not specifically explore the extension of the other three factors to the sentencing phase, but rather discusses how they help or harm the argument that the important interest standard is the appropriate threshold for the Government when it seeks to forcibly medicate a defendant for sentencing.

procedural alternatives to forcible medication at sentencing, the functional differences between trial and sentencing, and the spirit of the Supreme Court's decision in *Sell*, the Government should be required to demonstrate a compelling, rather than an important, interest when it seeks to forcibly medicate a defendant for sentencing.

Part I discusses the evolution of allowing a defendant to be forcibly medicated in order to withstand trial. Part II discusses how this concept was extended to apply in situations where the Government seeks to forcibly medicate a defendant for sentencing. Part III analyzes the arguments supporting the proposition that the Government's interest in forcibly medicating a defendant for trial is essentially the same as its interest in sentencing. Part IV presents the arguments as to why the Government's interest in forcibly medicating a defendant for sentencing is different than its interest in forcibly medicating a defendant for trial. Finally, Part V discusses why these differences call for a heightened standard when the Government seeks to forcibly medicate a defendant for sentencing as opposed to trial, and the practical effect of that heightened standard.

I. BACKGROUND

A. The Initial Allowance of Forcible Medication to Dangerous Defendants

The conflict between individual rights and the state's interest in forcible medication first arose in a case involving a mentally ill prisoner who was a danger to himself and to others. In *Washington v. Harper*,[18] the United States Supreme Court addressed the issue of "whether a judicial hearing is required before the State may treat a mentally ill prisoner with antipsychotic drugs against his will."[19] At the time of this decision, Washington state policy allowed inmates to be forcibly medicated pursuant to prison policy if certain conditions were met.[20] Defendant Harper had been sentenced to prison for

[18] 494 U.S. 210 (1990).

[19] *Id.* at 213.

[20] *Id.* at 215–16. In order to be forcibly medicated the inmate must first "suffer[] from a 'mental disorder' and . . . [be] 'gravely disabled' or pose[] a 'likelihood of serious harm' to himself, others, or their property." *Id.* at 215 (footnote omitted). The inmate is entitled to a hearing before a committee who determines if those

robbery and spent most of his incarceration housed in a mental health unit where, at first, he consented to administration of antipsychotic medication.[21] Harper was eventually paroled on the condition that he continue to receive treatment.[22] One year later, Harper assaulted two nurses, and his parole was revoked.[23] Upon his return to prison, he was diagnosed with manic-depressive disorder but refused treatment.[24] As a result, the treating physician sought to medicate Harper over his objections pursuant to prison policy.[25] An administrative hearing was conducted, and the committee found that involuntary medication was appropriate.[26]

Harper eventually filed suit under 42 U.S.C § 1983, claiming that the failure to provide a judicial hearing before involuntary administration of antipsychotic medication violated both Substantive and Procedural Due Process, Equal Protection, and the Free Speech Clauses of both state and federal constitutions.[27] The lower court held that even considering Harper's liberty interest, the procedures governing involuntary administration of antipsychotic medication met the requirements of due process.[28] The Washington Supreme Court reversed and remanded the case, holding that the "highly intrusive nature" of the treatment in this case required the state to prove by clear and convincing evidence that the "medication was both necessary and effective for furthering a compelling state interest."[29] The Supreme Court granted certiorari and reversed, holding that, "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[30] Thus, the Supreme Court held

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requirements are met. *Id.* The inmate also has "certain procedural rights before, during, and after the hearing." *Id.* at 216. This "involuntary medication can continue only with periodic review." *Id.*

[21] *Id.* at 213.
[22] *Id.* at 214.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 217.
[27] *Id.*
[28] *Id.* at 217–18.
[29] *Id.* at 218.
[30] *Id.* at 227.

that the state's policy was permissible under the Constitution because it balanced the inmate's liberty interest in being free from forced administration of antipsychotic drugs and the state's interest in providing treatment to an inmate who is a danger to himself and others.[31]

The Supreme Court revisited the balancing of these interests two years later in *Riggins v. Nevada*,[32] this time finding that the state's interests were not essential enough to allow forcible medication of a pre-trial detainee.[33] In *Riggins*, defendant Riggins was awaiting his trial for murder and robbery charges when a psychiatrist prescribed him medication to help with the voices he was hearing and his sleeping problems.[34] The lower court conducted a hearing and determined that Riggins was competent to withstand trial.[35] Shortly thereafter, Riggins sought to suspend his medication until after his trial, arguing that the medication would alter the way the jury saw him and thus might negatively impact his insanity defense.[36] After an evidentiary hearing, the trial court denied Riggins's motion.[37] He pursued the insanity defense but was convicted and sentenced to death.[38] Riggins then challenged his conviction, arguing that his

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[31] *Id.* at 236.

[32] 504 U.S. 127 (1992).

[33] *Id.* at 138.

[34] *Id.* at 129.

[35] *Id.* at 129–30. Three court-appointed psychiatrists performed examinations of Riggins while he was taking daily antipsychotic medication. *Id.* Two out of the three doctors found Riggins competent to withstand trial. *Id.* at 130.

[36] *Id.*

[37] *Id.* at 130–31. The district court heard testimony from the treating physicians. *Id.* One doctor "guess[ed]" that taking Riggins off medication would not render him incompetent to withstand trial and would not lead to a noticeable change in his behavior. *Id.* at 130 (alteration in original). Another doctor opined that Riggins would be competent without the medication, but that the jurors would not notice the effects of the medication. *Id.* A third doctor was unable to predict what would happen if Riggins went off his medication, but questioned if Riggins really needed the high dose he was receiving. *Id.* at 131. The doctor who previously found Riggins incompetent also submitted a written report, holding to his earlier opinion and expressing concern about what would happen if Riggins was taken off medication. *Id.* The decision to deny the motion was one page long and did not indicate the court's rationale. *Id.*

[38] *Id.*

constitutional rights were violated when he was forced to take drugs, and that these drugs "denied him the ability to assist in his own defense and prejudicially affected his attitude, appearance, and demeanor at trial."[39]

The Nevada Supreme Court affirmed Riggins's convictions, holding that the forcible medication did not violate his trial rights.[40] The Supreme Court granted certiorari to decide whether Riggins's trial rights under the Sixth and Fourteenth Amendments were violated.[41] The Court held that "[b]ecause the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy . . . we have no basis for saying that the substantial probability of trial prejudice in this case was justified."[42] In other words, the Court was not convinced that the state had met its burden in showing that the treatment was medically appropriate and essential for the sake of Riggins's own safety or the safety of others.[43] The *Riggins* Court reiterated that an individual has an important liberty interest in remaining free from unwanted administration of antipsychotic drugs, and that only an essential state interest could override this liberty interest.[44]

B. The Sell *Test: Forcibly Medicating Defendants for Trial Purposes*

The concept of balancing the liberty interests of the defendant against an important state interest set the stage for the Court's opinion in *Sell v. United States*.[45] Charles Sell was a practicing dentist and had a long history of mental illness.[46] On multiple occasions, Sell was hospitalized and treated with antipsychotic medications for reasons not involving criminal

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[39] *Id.* Riggins argued that this prejudice was not justified because the state did not demonstrate a need to administer the drugs, and it did not explore alternatives to the medication. *Id.*

[40] *Id.* at 132. The court held that the expert testimony sufficiently informed the jurors about the effects of the medication, and thus the lower court did not abuse its discretion or violate Riggins's trial rights. *Id.*

[41] *Id.* at 132–33.

[42] *Id.* at 138.

[43] *Id.* at 135.

[44] *Id.* at 136.

[45] 539 U.S. 166, 167 (2003).

[46] *Id.* at 169.

activity.[47] Sell was charged with fifty-six counts of mail fraud, six counts of Medicaid fraud, and one count of money laundering.[48] A Magistrate Judge, aware of Sell's psychotic breaks, found Sell "currently competent," and released him on bail.[49] However, the Magistrate Judge later held a bail revocation hearing as a result of the Government's claim that Sell had sought to intimidate a witness.[50] Sell's outlandish behavior, a psychiatrist's report, and other testimony at the hearing led the Magistrate Judge to revoke Sell's bail.[51] Later that year, a new indictment was issued charging Sell with attempting to murder the FBI agent who arrested him and a former employee who planned to be a witness in the fraud case.[52] These charges were combined with the fraud charges for trial purposes.[53]

Thereafter, Sell sought reconsideration of his competency to stand trial.[54] After an examination at the United States Medical Center for Federal Prisoners ("Medical Center"), the Magistrate Judge determined Sell was incompetent to stand trial and ordered that he be hospitalized for treatment for up to four months in order to determine the probability that Sell would ever regain competency for trial.[55] Two months into his stay, Sell began refusing the staff's recommendation that he take antipsychotic medication.[56] The center then "sought permission to administer the medication against Sell's will."[57]

The decision to forcibly medicate Sell was first made by a reviewing physician who considered, among other things, Sell's prior history, his current state, and additional medical opinions.[58]

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[47] *Id.* at 169–70.
[48] *Id.* at 170.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 171.
[56] *Id.*
[57] *Id.*
[58] *Id.* Some examples of the type of information the physician took into account include: Sell's belief that the Government was trying to suppress his knowledge about certain events and silence him, medical opinions that pointed to a diagnosis of a Delusional Disorder with underlying Schizophrenic Process, medical concerns about the persistence of his government conspiracy belief, and Sell's own view that he did not suffer from mental illness. *Id.*

The physician authorized the administration of the medication because Sell was mentally ill and dangerous, and the medication would help render him competent to stand trial.[59] Next, the Medical Center administratively reviewed this decision, reviewed the evidence, and upheld the physician's decision.[60] Soon after, Sell challenged the Medical Center's right to forcibly medicate him.[61] The Magistrate Judge reviewed the evidence, agreed with the Medical Center's opinion, and issued an order authorizing the center to administer the medication to Sell against his will.[62] The district court reviewed the Magistrate Judge's decision and held that the finding that Sell was a danger to himself and others was "clearly erroneous."[63] Nevertheless, the district court upheld the Magistrate's Order allowing involuntary administration of the drugs for the sole purpose of rendering the defendant competent for trial.[64] Both parties appealed, and the United States Court of Appeals for the Eighth Circuit affirmed the district court's judgment.[65] The Supreme Court granted

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[59] *Id.* at 171–72.

[60] *Id.* at 172.

[61] *Id.*

[62] *Id.* at 172–73. The Magistrate Judge based his finding of dangerousness on the defendant's belief that everyone is out to get him—arguing it increases the likelihood that he will try to protect himself by being violent towards others—the violent nature of Sell's offenses, the defendant's alleged infatuation with a nurse, and his animosity towards the prison psychologist. United States v. Sell, No. 4:97 CR 290 DJS, 4:98 CR 177 DJS, 2001 WL 35838455, at *4 (E.D. Mo. Apr. 4, 2001), *aff'd*, 282 F.3d 560 (8th Cir. 2002), *vacated*, 539 U.S. 166 (2003).

[63] *Sell*, 539 U.S. at 173–74. A district court judge can reconsider any pretrial matter decided by a Magistrate Judge where that order has been shown to be completely erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A) (2012). Here, the district court held the finding of dangerousness to be clearly erroneous because the record did not indicate the defendant "posed a danger to himself or others during the period of his institutionalization at the USMC, and the statements and conduct relied upon for a finding of dangerousness do not suggest a threat of violence to the staff." *Sell*, 2001 WL 35838455, at *5.

[64] *Sell*, 2001 WL 35838455, at *8. The court based its decision on three findings. *Id.* These findings were that the drugs were medically appropriate for the defendant, that they were the only viable hope of rendering the defendant competent for trial, and that the drugs appeared to be necessary to serve the Government's compelling interest in bringing the defendant to trial. *Id.*

[65] *Sell*, 539 U.S. at 174. Sell asked the Eighth Circuit to decide whether the lower court erred in holding that he could be forcibly medicated for the sole purpose of restoring his competency for trial. United States v. Sell, 282 F.3d 560, 565 (8th Cir. 2002). He also asked whether the lower court applied the correct standard of review, whether it properly considered his Sixth Amendment right to a fair trial,

certiorari to determine whether the Government can forcibly medicate a defendant solely to render him competent to stand trial for nonviolent offenses.[66]

Unlike *Harper* and *Riggins*, the *Sell* Court was forced to address the issue of involuntary medication solely for trial competence purposes, leaving aside the dangerousness of the defendant, and the violent nature of the defendant's crime.[67] The *Sell* Court discussed the tensions at play, reiterating the defendant's liberty interest in remaining free from unwanted medications and the state's possible interest in rendering the defendant competent.[68] Considering these competing interests, the *Sell* Court dictated a factors test to be used in order to determine whether drugs may be administered involuntarily solely for the purpose of trial: (1) there must be an important Government interest at stake; (2) the court must conclude that involuntary medication will significantly further those interests; (3) the involuntary administration of medication must be necessary to further the important interest at stake; and (4) administration of the drugs must be medically appropriate.[69] The rationale behind this test was to confine forcible medication for trial competence to very rare circumstances in order to preserve the important liberty interest an individual has in remaining free from unwanted medication.[70]

Ultimately, the *Sell* Court determined that the court of appeals erred in its decision to allow forcible medication of Sell solely to render him competent to stand trial because the four factors were not met.[71] First, the Court stated that the lower courts, as well as the expert witnesses, focused on the dangerousness issue rather than trial competence.[72] As a result, important questions about trial-related side effects and risks were not asked or answered.[73] Thus, the Court was unable to

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and whether the Government proved by clear and convincing evidence that the medication was appropriate and would likely restore his competency. *Id.* The Government argued that the lower court did not err on those grounds, and that the district court's finding that Sell was not dangerous was erroneous. *Id.*

[66] *Sell*, 539 U.S. at 175.

[67] *Id.*

[68] *Id.* at 177.

[69] *Id.* at 180–81.

[70] *Id.* at 180.

[71] *Id.* at 186.

[72] *Id.* at 185.

[73] *Id.*

conclude whether Sell would be prejudiced and whether his trial rights would be violated by the forcible medication.[74] Additionally, the lower courts did not consider the amount of time Sell had already spent confined, and that his refusal to take the medication "might result in further lengthy confinement."[75] Those two factors could possibly mitigate the importance of the governmental interest in prosecution.[76] Consequently, the Supreme Court held that Sell's forcible medication could not stand.[77] Despite this particular outcome, the *Sell* test has become the standard for determining the constitutionality of forcibly medicating a defendant for trial.[78]

II. FORCIBLY MEDICATING DEFENDANTS FOR SENTENCING

A. An Issue of First Impression: Extending the Sell *Factors to Sentencing*

While the *Sell* test is consistently used to determine whether a nondangerous defendant can be forcibly medicated for trial, there remains an unanswered question: whether the same analysis governs a situation in which the Government seeks to forcibly medicate a defendant for sentencing. Recently, several lower courts have been faced with this issue of first impression and have attempted to answer it.

In 2006, the Court of Appeals for the Fourth Circuit extended the *Sell* test to apply to situations where the Government seeks to forcibly medicate the defendant for sentencing.[79] In *United States v. Baldovinos*,[80] the court used the *Sell* test to determine whether the defendant's sentence should be vacated because he was involuntarily medicated with antipsychotic drugs in order to regain competency for sentencing.[81] Baldovinos's mental health problems began after he had already been convicted at trial and before his sentencing hearing.[82] Due to his troubling behavior on several occasions,

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[74] *Id.* at 185–86.
[75] *Id.* at 186.
[76] *Id.*
[77] *Id.*
[78] United States v. Grape, 549 F.3d 591, 598 (3rd Cir. 2008).
[79] United States v. Baldovinos, 434 F.3d 233, 238–39 (4th Cir. 2006).
[80] 434 F.3d 233.
[81] *Id.* at 240–41.
[82] *Id.* at 235–36.

Baldovinos was treated with short-acting antipsychotic medication.[83] The treating physicians ultimately determined that Baldovinos was not competent to be sentenced, but they believed that they could render him competent with medication.[84] The district court agreed with the treating physicians' report and thus extended his commitment period for continued treatment.[85] Sixteen months later, the physicians determined Baldovinos was competent to be sentenced.[86] In those sixteen months, the physicians changed his diagnoses twice and altered the type and amount of his medication several times.[87] Based on the physicians' recommendation, the court proceeded to sentence Baldovinos to a total term of 120 months in prison.[88] Baldovinos appealed, arguing that his sentence should be vacated due to the fact that he was medicated against his will.[89]

The court used the *Sell* principles in its analysis as opposed to weighing the defendant's liberty interests against the state's interest in protecting the defendant and others from danger, like in *Harper*. The court's rationale was that "the Government's overriding purpose in medicating Baldovinos was to render him mentally competent to be sentenced," not to address his dangerousness.[90] The court acknowledged that it was unresolved whether the *Sell* principles allow the Government to forcibly medicate the defendant for sentencing, but did not address this issue directly.[91] The Government conceded that, under the *Sell* principles, the district court plainly erred[92] by allowing Baldovinos to be forcibly medicated, but urged the court not to recognize the error because those involved medicated him in good faith, believing medication was in his best interest.[93] The court

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[83] *Id.* at 236. Specifically, Baldovinos was seen in the fetal position on the floor under the bed, and would alternatively remain crouched for several hours in a corner of his room or in the shower. *Id.* He would not respond to the staff, and when he was touched by the staff, he would become upset and appeared frightened. *Id.* He ate little food and he soiled himself, but "resisted staff members' efforts to move and clean him." *Id.*

[84] *Id.* at 236.

[85] *Id.* at 237.

[86] *Id.* at 238.

[87] *Id.* at 237–38.

[88] *Id.* at 238.

[89] *Id.* at 238–39.

[90] *Id.* at 241.

[91] *Id.* at 243 n.7.

[92] *Id.* at 239.

[93] *Id.* at 242.

declined to recognize any plain error that occurred, but not based on the Government's good faith argument.[94] It reasoned that Baldovinos had already been medicated and it could not undo that.[95] Moreover, since Baldovinos had received the minimum sentence for his crimes, the court was unable to conclude "any error in medicating Baldovinos against his will seriously affected the 'fairness, integrity or public reputation of judicial proceedings.' "[96] Thus, the court did not engage in a full analysis of the *Sell* factors test as applied to Baldovinos.

Similarly, later that same year, a Virginia district court followed the *Baldovinos* court's determination that the *Sell* factors apply in the sentencing context.[97] In *United States v. Wood*,[98] defendant John Wood had a long history of mental illness and was often going on and off his medication.[99] Wood pled guilty to making false bomb threats by telephone.[100] The court found that his guilty plea was knowing and voluntary, but grappled with the issue of whether Mr. Wood could be involuntarily medicated for sentencing.[101] Both parties agreed that the defendant should be forcibly medicated, but disagreed as to whether he should be sentenced or provisionally sentenced once the medicating took place.[102]

For the first time, a court considered each of the factors laid out by the *Sell* Court in the sentencing context.[103] First, the court held that the Government had an important interest in forcibly medicating the defendant for sentencing "because doing so furthers Congress' goal that the sentence a defendant receives should accurately reflect the real nature of his offense, and should be tailored to the defendant's circumstances."[104] In

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[94] *Id.* at 243.

[95] *Id.* at 242.

[96] *Id.* at 243 (quoting United States v. Olano, 507 U.S. 725, 736 (1993)).

[97] United States v. Wood, 459 F. Supp. 2d 451, 456–57 (E.D. Va. 2006).

[98] 459 F. Supp. 2d 451.

[99] *Id.* at 453–55.

[100] *Id.* at 454.

[101] *Id.* at 454–55.

[102] *Id.* at 455. The defendant asserted that forcible medication should be ordered to restore the defendant to competence and proceed with sentencing. *Id.* The Government argued that the defendant should be provisionally sentenced under 18 U.S.C. § 4244(d) with a view towards restoring competency, and the sentencing could be revisited once competency is restored. *Id.*

[103] *Id.* at 456–57.

[104] *Id.* at 458.

support of this holding, the court discussed Congress's enactment of the Federal Sentencing Act and the Federal Sentencing Guidelines, which were aimed at achieving "similar relationships between sentences and real conduct."[105] Stressing Congress's intention, the court held that sentencing a defendant is a critical step in achieving these goals, and thus the Government had an important interest.[106]

Second, the court found by clear and convincing evidence that the medication was substantially likely to render the defendant competent, and that it was substantially likely that the medication's side effects would not substantially interfere with his ability to assist counsel in the proceeding.[107] Third, the court found involuntary administration of medication to be necessary, and that there were no less intrusive alternatives due to Mr. Wood's reluctance to comply with treatment plans and inability to recognize his mental disease.[108] Fourth and finally, the court found the administration of medication to be medically appropriate based on Mr. Wood's medical history, and the treatment of his mental illness in general.[109] Following this analysis, the court granted the Government's request that Mr. Wood be forcibly medicated in order to render him competent for sentencing, but denied the Government's request that Mr. Wood be provisionally sentenced.[110]

B. Finding a Governmental Interest in Forcibly Medicating for Sentencing

The above line of cases influenced the recent decision in *United States v. Cruz*,[111] where the United States Court of Appeals for the Third Circuit confronted a matter of first

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[105] *Id.* (quoting United States v. Booker, 543 U.S. 220, 253–54 (2005)).

[106] *Id.* at 458–59. The court also concluded that there were no special circumstances in this case that made the Government's interest "less exigent." *Id.* at 459.

[107] *Id.* at 460.

[108] *Id.* at 461.

[109] *Id.* The court stated that the proposed medical regimen appeared unlikely to harm Mr. Wood since he does not have any underlying medical conditions that would caution the use of antipsychotic medication. *Id.* Additionally, the court used evidence that early treatment of schizophrenia improves chances of recovery, and that the disease worsens if untreated. *Id.*

[110] *Id.* at 462.

[111] 757 F.3d 372 (3d Cir. 2014).

impression.[112] The issue was "whether the Government . . . can have a sufficiently important interest in forcibly medicating a defendant to restore his mental competency and render him fit to proceed with sentencing."[113] Defendant Cruz was found guilty of two counts of threatening a federal law enforcement officer, but before the sentencing hearing could take place, the Government expressed concerns about his competency.[114] The district court found Cruz to be incompetent and thus did not proceed with sentencing.[115] Cruz continued to refuse medication, and the Government sought approval to have Cruz medicated against his will.[116] Using the *Sell* criteria as a basis for its analysis, the district court found that the four *Sell* factors were sufficiently satisfied and ordered defendant's forcible medication.[117]

Cruz moved for a stay of the district court's order, specifically challenging the court's finding in regard to the first factor of the *Sell* test: the finding of an important interest.[118] The district court cited *Wood* and argued that the Government had an important interest in making sure the defendant's sentence adequately reflects his crime and the circumstances.[119] In addition, the district court found that there were no special circumstances that would lessen the Government's interest.[120] On appeal, Cruz raised several arguments to demonstrate that this first factor of the *Sell* test was not adequately met.[121] He argued that the Government's interest is lessened because the intent is to restore his competency for sentencing, as opposed to a trial.[122] Cruz further argued that the likelihood of him being civilly committed constitutes a special circumstance that lessens the Government's interest.[123]

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[112] *Id.* at 374.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 375.
[117] *Id.* at 376.
[118] *Id.* at 377.
[119] *Id.* at 376.
[120] *Id.*
[121] *Id.* at 377–78.
[122] *Id.* at 378.
[123] *Id.* Cruz also argued that his crimes are less violent than precedent cases, and that the court's dependence on the presentence report was misplaced. *Id.* Those arguments are not relevant to this analysis. Civil commitment is authorized for persons whose sentence is about to expire, or who have been committed to the custody of the Attorney General pursuant to 18 U.S.C. § 4241(d), or for persons

The court of appeals reviewed for plain error and found that the district court did not plainly err in finding an important Government interest.[124] The court found the *Wood* court's rationale highly persuasive and reiterated the idea that the Government has an important interest in formal sentencing procedures in order to achieve uniformity.[125] Additionally, the *Cruz* court addressed the argument that sentencing proceedings should be differentiated from the trial phase because of the *Sell* court's emphasis on the "pre-trial nature of the proceedings."[126] The court responded that the sentencing phase of prosecution has similar procedural concerns[127] to those at the trial phase, and thus the Government's interest is just as important at sentencing as it is at trial.[128] Further, the *Cruz* court rejected the argument that the court's ability to provisionally sentence undermines the Government's interest, arguing that provisional sentences cannot bring finality to a criminal case the same way sentencing proceedings can.[129] Finally, the court reasoned that Cruz's crimes were serious enough to create a governmental interest in preserving "human security."[130] For these reasons, the court of appeals affirmed the order of the district court.[131]

III. THE GOVERNMENT'S IMPORTANT INTEREST IN SENTENCING A DEFENDANT

In *Sell*, the United States Supreme Court held that the Government may have an important interest in forcibly medicating a defendant for trial.[132] The reasoning of the *Sell* Court rested on the procedural aspects of a trial, such as presentation of evidence and witness testimony, as well as the

against whom criminal charges have been dismissed as a result of a mental condition if the release of such person would create a substantial risk of bodily injury to another person or serious damage to property. 18 U.S.C. § 4241 (2006). Cruz argued that his dangerous behavior was likely to result in civil commitment, but the court of appeals did not agree. *Cruz*, 757 F.3d at 378.

[124] *Id.* at 389.

[125] *Id.* at 384.

[126] *Id.* at 384–85.

[127] These concerns include memories fading and evidence lost. *Id.* at 385–86.

[128] *Id.* at 385.

[129] *Id.*

[130] *Id.* at 387.

[131] *Id.* at 389.

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

purposes behind having a trial.[133] There are several arguments to be made that the procedural and substantive aspects of sentencing proceedings are no less important to the Government. These arguments provide some support for the use of the important interest standard as the first factor for seeking to forcibly medicate defendants for sentencing, but are unconvincing.

First, similar to the Government's interest in timely prosecution, the Government has an interest in a timely sentencing procedure.[134] There are two main reasons why the Government has an interest in speedy sentencing. The first reason is concern about memories fading and losing evidence.[135] As expressed by the *Cruz* court, this concern "applies with equal force to both the jury's determination of a defendant's guilt and the court's sentencing determinations."[136] This is because, like in trial, it may be hard to conduct a fair sentencing hearing without prejudice to the defendant if memories have faded and evidence is lost, since the court largely depends on a presentence report.[137] There are many fact-finding procedures in a sentencing, and it is beneficial to the court and to the defendant if memories of these facts are fresh since they will greatly influence the defendant's sentence.[138]

The second reason rests on the idea of judicial efficiency.[139] One can never be certain if or when an incompetent person is suddenly going to be competent again.[140] As a result, it may be

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[133] *Id.*

[134] *Cruz*, 757 F.3d at 384–86.

[135] Barker v. Wingo, 407 U.S. 514, 532 (1972). Prejudice to the defendant is the fourth and most serious factor in determining whether a defendant's right to a speedy trial has been violated because a defendant must be able to adequately prepare his or her case. *Id.* ("If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past."). This factor remains a consideration when the court seeks to determine whether a defendant's right to a speedy sentencing has been violated. *See* Perez v. Sullivan, 793 F.2d 249, 253–54 (10th Cir. 1986) (citing cases).

[136] *Cruz*, 757 F.3d at 385.

[137] *Id.* at 385–86.

[138] *See* FED. R. CRIM. P. 32 (discussing the factual circumstances that receive consideration in sentencing).

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

[140] *See* 18 U.S.C. § 4241(d) (2012) (allowing periodic review of a person's competency). The individual remains in treatment until the court finds that there is a "substantial probability" he or she will regain competency in an additional amount of time. *Id.*

many years before a guilty person actually receives his or her sentence.[141] In the interim between conviction and sentencing, the court does not sit idly by until the defendant is suddenly ready to be sentenced.[142] Instead, the court must actively use judicial resources in order to monitor the defendant's progress and competency.[143] Thus, the extra time between the close of trial and sentencing proceeding requires the expenditure of extra judicial resources. In addition, allowing too many years to go by between a guilty conviction and a sentencing procedure might result in courts being flooded with cases which may never come to a close. These cases remain on the court's docket, causing congestion. Accordingly, the Government has an interest in making sure judicial resources are used efficiently, and that sentencing is completed within a reasonable time.

Second, the Government has an interest in completing the criminal justice process and ensuring that the purposes of the criminal justice system are being furthered.[144] The criminal law serves many purposes, and sentencing a defendant plays a crucial role in furthering these purposes.[145] For the Government, the trial phase is only one part of the adjudicative process, and determination of the defendant's punishment is a critical part of the criminal process.[146] "Both the deterrent and retributive purposes of the criminal law are better served . . . by quicker resolutions, as expressed by the aphorism 'justice delayed is justice denied.' "[147] The *Wood* court utilized this argument, stating that the "sentencing phase of a criminal prosecution is . . . a critical step in the criminal justice process that Congress

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[141] *Id.*

[142] § 4241(d)–(e) (describing the role of the court following a finding that the defendant is incompetent to stand trial); FED. R. CRIM. P. 32 (describing the ordinary role of the court after trial and before sentencing).

[143] § 4241(d).

[144] 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 15.01 (4th ed. 2006).

[145] *Id.*

[146] *Id.*

[147] *Id.* § 8.01; *see also* United States v. Petty, 982 F.2d 1365, 1371 (9th Cir. 1993) (Noonan, J., dissenting) ("To deny that the sentencing process is part of a criminal prosecution is to cut out the guts of criminal prosecution as it is conducted in our courts.").

designed."[148] Thus, if the Government is unable to complete the criminal justice process by punishing the criminal defendant, then the purposes of the criminal justice system are not being served.[149]

Third, the Government has a responsibility to conclude the criminal justice process in order to protect the public.[150] One of the driving forces behind criminal punishment is to ensure that the community feels safe, and sentencing defendants to the proper punishment is one way of achieving this goal.[151] The Government "seeks to protect through application of the criminal law the basic human need for security."[152] The *Cruz* court highlighted this argument by suggesting that the Government's interest in securing the community does not end after the trial phase of the criminal process, but instead carries over to the sentencing phase of the process.[153] Accordingly, the Government has an interest in incapacitating the individual in order to prevent further harm to society.[154] Further, it may be argued that incapacitation in a medical facility does not sufficiently punish the individual or put the community at ease. Thus, if an incompetent defendant is not forcibly medicated, and as a result never receives his or her sentence, the community will experience a sense of unrest that the criminal justice system is designed to eliminate.

Fourth, the Government has an interest in enforcing the Sentencing Reform Act of 1984[155] and the United States Federal Sentencing Guidelines[156] in order to ensure fairness and

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[148] United States v. Wood, 459 F. Supp. 2d 451, 459 (E.D. Va. 2006).

[149] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.01 (6th ed. 2012).

[150] DRESSLER & MICHAELS, *supra* note 144, § 15.01.

[151] *Id.*

[152] Sell v. United States, 539 U.S. 166, 180 (2003); *see also* DRESSLER, *supra* note 149, § 2.03 (defining incapacitation as a goal of the criminal justice system).

[153] United States v. Cruz, 757 F.3d 372, 384–85 (3rd Cir. 2014).

[154] DRESSLER, *supra* note 149, § 2.03.

[155] Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (2012).

[156] 28 U.S.C. §§ 991–998 (2012). The Guidelines were not implemented until 1987 and were not fully operational until 1989. John S. Martin, Jr., *The Role of the Departure Power in Reducing Injustice and Unwarranted Disparity Under the Sentencing Guidelines*, 66 BROOK. L. REV. 259, 259 (2000). The Guidelines established an independent commission in the judicial branch. § 991(b). The purpose of this commission is to ensure the purposes of the Sentencing Act are being fulfilled. *Id.* This includes, providing certainty, fairness, and flexibility in sentencing. *Id.*

uniformity in sentencing.[157] As the *Wood* court observed, forcibly medicating a defendant for sentencing is an important governmental interest because "there is a very important, legislatively articulated, governmental interest in achieving fair, reasonable and non-disparate sentences for similarly situated defendants who have engaged in similar conduct."[158] If the court decides to provisionally sentence the defendant, then there is no consideration for other similarly situated defendants who have engaged in similar conduct because the statute requires the defendant to serve out the maximum term authorized by the statute as a default. [159] Thus, if the defendant is provisionally sentenced, the presentence fact-finding procedures are eliminated.[160] Consequently, a formal sentencing would be more effective in furthering the goals of the Sentencing Reform Act and Sentencing Guidelines.

Fifth, the Government arguably has an important interest in forcibly medicating a defendant for sentencing because the person is no longer a pretrial detainee, but rather a convicted criminal.[161] In the trial context, the individual is innocent until proven guilty and forcibly medicating this "innocent" person could be less justified if it turns out that the defendant did not actually commit the crime he or she is charged with.[162] In such a situation, the Government may have violated the defendant's due

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[157] S. REP. NO. 98-225, at 38 (1984) ("These provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing.").

[158] United States v. Wood, 459 F. Supp. 2d 451, 459 (E.D. Va. 2006); *see also Cruz*, 757 F.3d at 383.

[159] 18 U.S.C. § 4244(d) (2012).

[160] *See* FED. R. CRIM. P. 32 (describing the pre-sentence investigations and findings of fact that typically take place before a sentencing). These procedures are designed to contribute to a fair, reasonable, and nondisparate sentence. United States v. Trevino, 556 F.2d 1265, 1270 (5th Cir. 1977) ("[A] presentence report serves not as a prosecutorial tool but as an informative document for the guidance of the court."); United States v. Hogan, 489 F. Supp. 1035, 1037 (W.D. Wash. 1980) ("[T]he primary function of the probation department in the preparation of a presentence investigation report is to provide the sentencing judge with objective and accurate information relating to the defendant.").

[161] Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1856 (2003) ("The notion would be that, once convicted of the crime, the defendant is not entitled to special protection from the punishment for which that conviction makes him eligible.").

[162] *Id.* at 1855–56.

process rights without any benefits to society.[163] By contrast, an individual being sentenced has already been found guilty, so the risk of violating an innocent person's rights does not exist.[164] Instead, the Government's guaranteed purpose is to sentence a convicted person rather than to bring a potentially innocent person to trial.[165]

Overall, the Government undoubtedly has interests in forcibly medicating a defendant for sentencing. As explored supra, many of the Government's interests in sentencing are similar to those interests that the Government has in bringing a defendant to trial.[166] The *Wood* and *Cruz* courts held that the Government's interests in sentencing are of the same importance as the Government's interests in proceeding to trial.[167] As a result, those courts did not hesitate to hold that the first factor of the *Sell* test was an appropriate burden for the Government to have to meet when seeking to forcibly medicate a defendant for sentencing. Those courts, however, did not engage in a complete analysis of the differences between trial proceedings and sentencing proceedings that might make the Government's interests less compelling.

IV. WHY FORCIBLY MEDICATING DEFENDANTS FOR TRIAL IS DIFFERENT THAN SENTENCING

The function of a trial and the function of sentencing have always been, and still are, distinct in the law. A trial is "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding."[168] In contrast, sentencing is "[t]he judicial determination of the penalty for a crime."[169] As described by William Blackstone in the 1800s, "the imposition of punishment was not considered part of the criminal trial; rather, it constituted a separate phase of criminal

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[163] *Id.* at 1856–57.

[164] *Id.* ("The convicted individual facing sentencing is, by definition, not innocent. Retributive and utilitarian concerns about the high cost of punishing the innocent (or risking doing so) might be deemed inapplicable.").

[165] *Id.*

[166] *See supra* Part III.

[167] United States v. Cruz, 757 F.3d 372, 384 (3rd Cir. 2014); United States v. Wood, 459 F. Supp. 2d 451, 458 (E.D. Va. 2006).

[168] BLACK'S LAW DICTIONARY 1735 (10th ed. 2014).

[169] *Id.* at 1570.

proceedings that followed the conclusion of the trial."[170] Additionally, early decisions of American courts support the notion that trials are separate and distinct from sentencing.[171] Even today, trial and sentencing are defined differently by the Federal Rules of Criminal Procedure.[172] Each process is governed by different rules and procedures, and the defendant is afforded different rights at each stage.[173] These two stages are treated differently because they are distinct processes with different goals in mind.[174] This long history of distinction supports the conclusion that the governmental interest in bringing a defendant to trial is different than its interest in sentencing by nature of the two processes and the goals achieved by each.

A. The Government's Interest in Sentencing Is Less than in Trial

There are many reasons why the Government's interest in forcibly medicating a defendant is lessened in a sentencing. The first reason is that the Government's interest is lessened by its ability to provisionally sentence a defendant under 18 U.S.C. § 4244(d).[175] The statute provides that a defendant who is presently suffering from a mental disease or defect be committed to a suitable facility for care or treatment instead of being sentenced.[176] The commitment constitutes a provisional sentence to the maximum term authorized for the specific offense.[177] This provision was part of the Insanity Defense Reform Act, which was enacted to provide uniform procedure for delinquents suffering from mental disease or defect at the time of trial, at sentencing or when he or she is set to be released.[178] Specifically, the fact-finding procedures found in § 4244—psychiatric exam, report to the court, hearing and judicial finding—are aimed at formalizing the court procedures for such

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[170] United States v. Ray, 578 F.3d 184, 195 (2d Cir. 2009) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *368).

[171] *See id.* at 195–96 (collecting cases).

[172] *Compare* FED. R. CRIM. P. 23–31 (pertaining to trials), *with* FED. R. CRIM. P. 32 (governing post-trial procedures).

[173] Michaels, *supra* note 161, at 1778; Williams v. New York, 337 U.S. 241, 246 (1949).

[174] *See* Michaels, *supra* note 161, at 1773 (citing *Williams*, 337 U.S. at 246).

[175] 18 U.S.C. § 4244(d) (2012); *see supra* note 3.

[176] *Id.*

[177] *Id.*

[178] H.R. REP. NO. 81-1319, at 1 (1949).

similarly situated accused persons.[179] Consequently, a provisional sentence under § 4244 can be a suitable alternative to a formal sentence since it contains its own fact-finding procedures,[180] and aims to achieve the goal of uniformity stressed by the Sentencing Reform Act and Sentencing Guidelines.[181]

In the past, courts have been reluctant to accept the provisional sentencing statute as an acceptable alternative to sentencing.[182] Courts hesitate because the statute requires commitment for the maximum term authorized for the offense, and often this would result in the individual serving more time in a facility than he or she would have had he or she received an actual sentence.[183] However, this Note does not argue that provisional sentencing is always the best alternative for defendants who refuse to take medication, but rather that as an available option, it undermines the Government's interest in forcibly medicating a defendant purely to proceed with a formal sentencing procedure.

In fact, the possibility of lengthy confinement in a facility through a provisional sentence has, on occasion, led the Government to concede that its interest was not great enough to forcibly medicate the defendant.[184] In *United States v. Perez-Rubalcava*,[185] the defendant was found guilty of reentry following deportation, but was found incompetent to withstand sentencing.[186] The defendant was then provisionally sentenced under 18 U.S.C. § 4244(d) to twenty years in a suitable facility.[187]

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[179] *Id.*

[180] The *Wood* court argued that a provisional sentence "shortcuts the factfinding procedure . . . and arrives at an accurate sentence only by coincidence." United States v. Wood, 459 F. Supp. 2d 451, 459 (E.D. Va. 2006). While the fact-finding procedures required under 18 U.S.C. § 4244 are different than the fact-finding procedures that take place at a traditional sentencing, they still serve the purpose of informing the judge of the best sentence for that defendant. H.R. REP. NO. 81-1319, at 1.

[181] S. REP. NO. 98-225, at 38 (1984).

[182] United States v. Baldovinos, 434 F.3d 233, 242–43 (4th Cir. 2006); *Wood*, 459 F. Supp. 2d at 459.

[183] *Baldovinos*, 434 F.3d at 242–43. There, the statutory maximum for the crime defendant committed totaled forty years, which was four times more than the sentence defendant had already received. *Id.*

[184] United States v. Perez-Rubalcava, No. CR-03-20018-RMW, 2008 WL 4601024, at *1 (N.D. Cal. Oct. 15, 2008).

[185] 2008 WL 4601024.

[186] *Id.*

[187] *Id.* This was the maximum authorized sentence by law for the defendant's offense. *Id.*

At that time, the Government did not seek to provisionally sentence the defendant, reasoning that the defendant's refusal to take drugs voluntarily would result in lengthy confinement in a suitable facility, and that this would "diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime."[188] The Government conceded that the purposes of criminal punishment would be met without violating the defendant's rights through forcible medication.[189] Based on the Government's position, the court declined to involuntarily medicate the defendant, stating that the Government's interest did not seem to justify it.[190] Four years later, the Government sought to forcibly medicate the defendant to restore his competency for sentencing.[191] However, the court denied the motion, finding that the first factor of the *Sell* test was not met, and that the Government had already "in large part obtained the deterrence and other goals of a criminal conviction and sentence."[192]

The court's holding in *Perez-Rubalcava* suggests that the ability of the court to provisionally sentence mentally ill defendants seriously undermines the Government's interest in forcibly medicating defendants for sentencing. Once the Government has achieved the goals of criminal punishment through a provisional sentence, it is hard to justify violating a defendant's rights just to formally sentence him or her. Furthermore, courts should not hesitate to provisionally sentence defendants because it might result in a lengthy confinement. The provisional sentence statute requires the defendant be committed for the maximum term authorized by the statute for the crime.[193] This is a legislatively approved sentence, which furthers rehabilitative and incapacitation principles of criminal punishment.

The second reason why the Government's interest in forcibly medicating a defendant is lessened in a sentencing is due to the differences between purposes of criminal punishment achieved at the trial stage and at the sentencing stage. Such differences

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[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.* at *2.
[193] 18 U.S.C. § 4244(d) (2012).

support the conclusion that the Government's interest in sentencing is not the same as in trial. One of the main purposes of convicting and sentencing defendants is to create a sense of security for the community.[194] The community wants to know that those who have committed crimes are punished for their crimes and that society does not have to fear that person.[195] Arguably, once the guilty conviction has been determined, the criminal justice system has already worked to put the community at ease. The community is now aware that this is someone who will be punished for his or her crimes. Additionally, if the convicted person is refusing medication and the court finds him or her incompetent to proceed, then this person is going to be placed in a suitable facility, again maintaining the safety of the community.[196] Accordingly, the guilty conviction, coupled with the fact that anyone the Government is seeking to forcibly medicate will be placed in a facility, is all the assurance that the community needs to feel safe.[197] Consequently, the Government has already done its part in protecting the community by getting the guilty verdict, and its actual interest in formally sentencing the defendant has decreased.

Third, forcibly medicating a convicted individual is not fulfilling the rehabilitative purpose of criminal punishment. By forcibly medicating a defendant for sentencing, the Government is only temporarily restoring competency and is not truly seeking to "rehabilitate" the individual.[198] Instead, the Government's goal in seeking to forcibly medicate the defendant is solely for the

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[194] 18 U.S.C. § 3553(a)(2)(C) (2012).

[195] S. REP. NO. 98-225, at 36 (1984).

[196] 18 U.S.C. § 4244(d) (2012). The distinction between a forensic psychiatric facility and a prison is insignificant for punishment purposes. The defendant is still being punished by being involuntarily held in a secure environment.

[197] The forensic psychiatric facilities where incompetent defendants go when they are provisionally sentenced are maximum security facilities. *See Kirby Forensic Psychiatric Center*, OFF. MENTAL HEALTH, https://www.omh.ny.gov/omhweb/facilities/krpc/ (last visited Mar. 8, 2016); Donna Riemer, *Creating Sanctuary: Reducing Violence in a Maximum Security Forensic Psychiatric Hospital Unit*, INT'L ASS'N FORENSIC NURSES, http://www.forensicnurses.org/?page=302 (last visited Mar. 8, 2016) (discussing the setting of a maximum security psychiatric facility).

[198] This proposition is analogous to that discussed in cases which deal with whether an inmate sentenced to death can be forcibly medicated in order to render him or her competent to be executed. *See* Singleton v. Norris, 319 F.3d 1018, 1036 (8th Cir. 2003) (Heaney, J., dissenting); Singleton v. State, 437 S.E.2d 53, 61 (S.C. 1993); State v. Perry, 610 So. 2d 746, 755 (La. 1992).

purpose of restoring mental competency to proceed with sentencing and punish the defendant.[199] There is no guarantee that after one instance of forcible medication, he or she will continue to take medication. Rehabilitation would be better served if the defendant were provisionally sentenced to a treatment facility where the staff is well equipped to deal with mentally ill individuals.[200] Accordingly, if most of the goals of criminal punishment can be met through the provisional sentence, the governmental interest in sentencing the defendant by violating important individual rights is reduced.

Fourth, the side effects of antipsychotic medication can have a significant impact on a defendant's right to be reasonably heard at sentencing, also known as allocution.[201] While not a constitutionally protected right, "[t]he right to allocution is an integral part of the sentencing process which if not fully afforded to the defendant requires a reversal of the sentence imposed."[202] The purpose of allocution is to allow the defendant to be heard by the judge when he or she makes the ultimate decision in regards to sentencing.[203] If a defendant does not want to be medicated for sentencing, then forcibly medicating this person for the purpose of sentencing interferes with his or her right to speak honestly and openly to the judge at sentencing. In other words, the person who appears before the judge filled with antipsychotic medication is not the same person that committed the crime, and that person has a right to be heard by the judge.

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[199] *Singleton*, 319 F.3d at 1036 (Heaney, J., dissenting) ("At the very least, the setting of an execution date calls into question the State's true motivation for administering the medication in the first instance."); *Perry*, 610 So. 2d at 755 (concluding that *Washington v. Harper* "sets forth a due process standard . . . [which] strongly implies that antipsychotic drugs absolutely may not be used as a tool for punishment").

[200] *See* Riemer, *supra* note 197.

[201] *See generally* FED. R. CRIM. P. 32(i)(4)(A)(i) (stating the defendant must be afforded the opportunity to be heard through his attorney before a sentence is imposed).

[202] United States v. Muniz, 1 F.3d 1018, 1025 (10th Cir. 1993).

[203] FED. R. CRIM. P. 32(i)(4)(A)(i); *see also* Kimberly A. Thomas, *Beyond Mitigation: Towards A Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2655 (2007) (discussing the theory of mitigation as the purpose behind allocution).

B. Extending Sell *Is Contrary to the Spirit of the Opinion*

Finally, the spirit of the United States Supreme Court decision, in *Sell v. United States*,[204] suggests that it was not meant to be extended to apply in the sentencing context. The *Sell* Court was careful to emphasize that forcible medication should be used in very rare circumstances.[205] The question presented before the *Sell* Court was whether a defendant can be forcibly medicated to be rendered competent for trial.[206] With much consideration for the defendant's rights, the Court developed a four-part factors test to ensure that forcible medication would only be used when it was absolutely necessary and effective.[207] To extend this holding to include situations where the Government is seeking to forcibly medicate defendants for sentencing without extra consideration of the defendant's rights and the interests at stake is a misapplication of *Sell*.[208]

In *Baldovinos*, the Fourth Circuit decided for the first time that it would use the *Sell* principles to govern its analysis of whether the defendant could be forcibly medicated for sentencing.[209] The court's only consideration was whether *Harper* or *Sell* should apply, and it ultimately decided to apply the *Sell* test since the defendant was not dangerous.[210] The *Baldovinos* court failed to discuss the substantial difference between the present case and *Sell*, which was that the Government was not seeking to medicate the defendant for trial, but for sentencing.[211] As a result, the very first application of the *Sell* test to the sentencing context was done without any consideration for the differences between trial and sentencing.[212] Thus, the *Baldovinos* court completely ignored the *Sell* Court's prudence in creating the factors test as a balancing mechanism for the defendant's rights and the Government's interest in proceeding with trial. It was not long before both the *Wood* and *Cruz* courts used the *Baldovinos* extension of the *Sell* holding,

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[204] 539 U.S. 166 (2003).
[205] Sell, 539 U.S. at 180.
[206] *Id.* at 169.
[207] *Id.* at 180–81.
[208] Pet. Reh'g En Banc and Panel Reh'g at 3, United States v. Cruz, 757 F.3d 372 (3rd Cir. 2014) (No. 13-4378).
[209] United States v. Baldovinos, 434 F.3d 233, 241 (4th Cir. 2006).
[210] *Id.* at 239–41.
[211] *See id.* at 240–41.
[212] *See id.*

again without consideration of the implied narrowness of the decision.[213] Accordingly, the extension of the *Sell* holding without careful consideration of the Supreme Court's warning that forcible medication should be used in "rare circumstances" was a misapplication of the decision.

Furthermore, the *Sell* Court's emphasis on the pre-trial nature of the proceedings suggests that the Government's interest in forcibly medicating a defendant for sentencing should be treated differently.[214] While there are still concerns about memories fading and lost evidence, the need for immediacy at sentencing is not as great as in trial.[215] This is because before trial there is a significant risk of prejudice to the defendant while he awaits trial.[216] This prejudice includes, "public scorn, deprivation of employment, disruption of family life, and the detrimental impact on the individual when jailed awaiting trial."[217] However, many of these interests disappear after a conviction, since the individual is now a convicted person and not a potentially innocent pretrial detainee.[218] Similarly, the stated interest of minimizing anxiety and concern before trial[219] is less compelling since the anxiety that an accused person experiences "is not to be equated for constitutional purposes with anxiety suffered by one who is convicted, in jail, unquestionably going to serve a sentence, and only waiting to learn how long that sentence will be."[220] These different concerns suggest that there are reasons to treat the two processes differently.

Finally, while there is still concern for memories fading and lost evidence, there are other important evidentiary concerns for the incompetent defendant at sentencing. Formal sentencing procedures heavily rely on a collection of all relevant facts about the defendant, which contribute to a fair sentence.[221] The defendant who is deemed incompetent to be sentenced is not

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[213] United States v. Wood, 459 F. Supp. 2d 451, 456–61 (E.D. Va. 2006); United States v. Cruz, 757 F.3d 372, 381–89 (3rd Cir. 2014).

[214] Sell v. United States. 539 U.S. 166, 180 (2003) ("[I]t may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost.").

[215] Perez v. Sullivan, 793 F.2d 249, 256 (10th Cir. 1986).

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] Barker v. Wingo, 407 U.S. 514, 532 (1972).

[220] *Perez*, 793 F.2d at 257.

[221] FED. R. CRIM. P. 32(c)–(d).

ready to be sentenced, and as a result, the evidence needed to sentence this defendant is not ready yet either.[222] Thus, instead of being concerned about the fading memories and lost evidence, the court should be concerned with undeveloped evidence when it seeks to sentence an incompetent defendant.

V. A CALL FOR A HEIGHTENED STANDARD FOR THE GOVERNMENT

The differences between trial and sentencing, along with the spirit of the *Sell* decision, should have resulted in a more in-depth analysis by the *Wood* and *Cruz* courts when they held that the Government may have an important interest in forcibly medicating a defendant for sentencing. While the *Cruz* and *Wood* courts did consider some of the implications, they did not reach the proper conclusion.

The differences between trial and sentencing and the nature of the *Sell* holding lead to the conclusion that the Government should have to meet a higher burden when seeking to forcibly medicate a defendant for sentencing. Thus, in the sentencing context, the first *Sell* factor should be changed to require that the Government demonstrate a compelling interest in forcibly medicating the defendant for sentencing. A compelling interest standard would acknowledge that there are differences between trial and sentencing, and thus would more appropriately balance the interests of the Government and those of the defendant. Furthermore, raising the standard based on these differences would help to maintain the spirit of the *Sell* decision. With the compelling interest standard, there is still the possibility that defendants can be forcibly medicated for sentencing, but it will only occur in the rarest and most appropriate circumstances. For these reasons, the first factor of the *Sell* test should be changed from requiring an important interest to requiring a compelling interest when the Government seeks to forcibly administer medication to a defendant for the purpose of rendering him or her competent to withstand sentencing.

As a practical matter, there is no exact formula for what constitutes a compelling government interest. Some factors that might contribute to a finding of a compelling interest include

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[222] United States v. Booker, 543 U.S. 220, 264–65 (2005) (arguing that the features of the remaining Sentencing Guideline "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary").

exceptionally complex factual findings at trial, the nature and extent of the defendant's crimes and the defendant's effect on society, whether a provisional sentence, as opposed to a formal sentence, would result in an extremely disparate sentence for the defendant, and where the defendant is likely to serve time if formally sentenced.

Take, for example, the hypothetical defendant Jack. Imagine Jack was involved in an ongoing conspiracy scheme to defraud the Government. The trial went on for many months because the testimony was endless, and the court's opinion spent twenty pages discussing the findings of fact. Also, imagine that the maximum term authorized by the statute is twenty years in prison, but that Jack's co-conspirators are each receiving five years. Additionally, if formally sentenced, Jack is likely to be placed in a secure and suitable medical facility where he can continue to receive treatment. The Government may have a compelling interest in forcibly medicating Jack since there are compelling concerns about keeping the complex factual evidence fresh. There is a big difference between the provisional sentence Jack would receive and the actual sentence he would receive, and Jack is likely to get the rehabilitative help he needs if formally sentenced.

Now imagine, instead, Jack conspires to commit an armed robbery. The facts of the case are not that complicated, and the trial takes two days to complete. Imagine the maximum term authorized by the statute is eight years, and that Jack's co-conspirators each receive six years in prison. If Jack is formally sentenced, he is likely to serve out his sentence in a federal prison. Here, the Government's interest is not compelling because there are no significant evidentiary concerns, the sentence Jack would receive provisionally is not so disparate as to justify violating individual rights, and Jack would receive better rehabilitative care through treatment in a suitable facility than in a federal prison.

CONCLUSION

Though the *Sell* test is an appropriate test to balance the interests of the defendant and the Government when seeking to forcibly medicate a defendant for trial, it is not appropriate in the sentencing context. Trials and sentencing have always been distinct from one another and there are reasons for the

distinction. As this Note argues, there are more important interests at stake for the Government in the trial phase than in sentencing, which involve both the principles and procedures of criminal punishment. Furthermore, an extension of the important interest standard to the sentencing context without extra consideration of individual liberties and governmental interests is contrary to the spirit of the United States Supreme Court decision in *Sell*. Accordingly, the first factor of the *Sell* test as applied in the sentencing context should require the Government to prove a compelling interest in order to account for the differences between trial and sentencing and to preserve the essence of *Sell*.