No. 02-5664

In The
Supreme Court of the United States

CHARLES THOMAS SELL, D.D.S.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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ARGUMENT

I. DR. SELL'S INTEREST IN AVOIDING FORCED MEDICATION IS FUNDAMENTAL.

Whether articulated as freedom of thought, right to bodily integrity, right to refuse unwanted medical treatment or right to privacy, the right to be free from unwanted physical and mental intrusions has long been recognized as an integral part of an individual's constitutional freedom. In his opening brief Dr. Sell articulates the constitutional and historic bases for recognizing that the right to remain free from forced medication is fundamental.

The government recognizes that, at minimum, the right that Dr. Sell asserts is significant. Indeed, the government does not argue that the right to refuse unwanted medical treatment is not fundamental or try to distinguish the right to refuse unwanted medical treatment from other fundamental rights that this Court has recognized. This Court recently acknowledged that "[t]he right to think is the beginning of freedom." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1403 (2002). Dr. Sell's rights to form thoughts, to speak, and to remain free from unwanted bodily intrusion are fundamental.

A. Dr. Sell Has A Fundamental Fifth Amendment Right In Refusing Forced Medication With Antipsychotic Drugs.

This Court has repeatedly recognized an individual's fundamental right to "bodily integrity" and to make "choices central to personal dignity and autonomy." *See Planned Parenthood v. Casey*, 505 U.S. 833, 851, 857 (1992); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing right to use contraceptives is fundamental);

Rochin v. California, 342 U.S. 165, 171-74 (1952) (finding government cannot force individual to take an emetic based on suspicion that individual swallowed morphine capsules); *see also Washington v. Harper*, 494 U.S. 210, 241 (1990) (dissent) (three Justices viewed the right to refuse antipsychotics as fundamental). This right has been deemed so important, that the Court has protected the right, even when a state government has asserted as an interest the protection of life. *Planned Parenthood*, 505 U.S. at 857. Making a determination about one's own psychology and about one's own physical integrity are among the most important personal decisions an individual can make. Dr. Sell's interest in making these decisions is even more important when the government's intrusion may cause serious, long-lasting side effects and the medical establishment cannot even agree on the treatment for his psychiatric condition. *See generally* Amicus Briefs of American Psychiatric Association and American Psychological Association (expressing contrary views on treatment of delusional disorder, persecutory type). In light of "our Nation's history, legal traditions, and practices," Dr. Sell has a fundamental Fifth Amendment right in avoiding forced medication with antipsychotic drugs. *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

B. Dr. Sell Has A Fundamental First Amendment Interest In Not Having His Speech And Thought Manipulated By The Government.

The involuntary drugging of Dr. Sell implicates First Amendment rights separate and distinct from his substantive due process rights. "Where, as here, medication which is potentially mind altering is concerned, the threat to individual rights goes beyond a threat of physical intrusion

and threatens an intrusion into the mind." *United States v. Charters*, 829 F.2d 479, 492 (4th Cir. 1987). The makers of our Constitution recognized the significance of man's "spiritual nature, of his feelings and of his intellect. [They] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Thus, the protection of an individual's right to believe and think as he or she sees fit has long been viewed as within the protection of the First Amendment by this Court. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943); *Wooley v. Maynard*, 430 U.S. 705, 713 (1977); *United States v. Reidel*, 402 U.S. 351, 359 (1971) (Harlan, J., concurring). Here, the government seeks to alter Dr. Sell's mind and the manner in which he forms thought solely for prosecutorial purposes.[1]

The government concedes in its Brief that the First Amendment protects "expressive and freedom-of-thought interests" and that Dr. Sell may have a residual First Amendment interest that is distinct from a liberty interest.

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[1] "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." *United States v. Charters*, 829 F.2d 479, 492 (4th Cir. 1987) "[T]he power to control men's minds is 'wholly inconsistent' not only with the 'philosophy of the first amendment but with virtually any concept of liberty.'" *Davis v. Hubbard*, 506 F. Supp. 915, 933 (N.D. Ohio 1980) (quoting *Stanley v. Georgia*, 394 U.S. at 565-66).

Government's Brief at 13, 37. The government then argues, however, that forced medication of Dr. Sell is "content-neutral" and, therefore, application of intermediate scrutiny is appropriate. Contrary to the government's assertion, the involuntary drugging sought in this case is not content-neutral. The content of Dr. Sell's thoughts is precisely the reason the government seeks to medicate him. The very purpose of the government's efforts is to change Dr. Sell's thought and speech so that he does not evidence persecutory delusions. *Harper*, 494 U.S. at 229 (recognizing that the purpose of antipsychotic drugs is to alter the chemical balance in the patient's brain).

Dr. Sell believes that the FBI is plotting to discredit and/or kill him. (Record 807, 809; 1999 FPR at 6). He believes the Branch Davidian Compound at Waco, Texas was intentionally burned by government agents. (Record 376-77). He believes that his statements about witnessing these events were forwarded to the FBI and that in an effort to conceal the truth about Waco, the FBI has arranged for criminal charges to be brought against him and might seek to kill him. (Record 377-78). While Dr. Sell's view of the world and political beliefs may seem unusual in these respects, until Dr. Sell is adjudged incompetent to make medical decisions, he must be permitted to think his thoughts, and speak his mind, even if the government does not like what he thinks or says. It is these thoughts the government wishes to suppress and alter, to change the way he thinks, so that he will appear to be competent.

An individual's freedom of thought must not be infringed, even if the individual is regarded as "mentally ill." Many noted world leaders, authors, and artists have suffered from mental illness. Abraham Lincoln suffered from severe and incapacitating depressions that occasionally lead

to thoughts of suicide. *See* National Alliance for the Mentally Ill, http://www.nami.org/helpline/peoplew.htm (identifying famous individuals who suffered from mental illness). Ludwig van Beethoven experienced bipolar disorder. *See id.* Isaac Newton and Ernest Hemingway both suffered from mental illnesses. *See id.* Dr. Sell does not ask that the Court accept his views and thoughts or even that it acknowledge any positive aspects of these thoughts. What should be noted, however, is that society has benefited through diverse thinking.[2]

Even assuming for the sake of argument that the government's efforts were content-neutral, strict scrutiny still must apply. The primary case upon which the government relies, *Ward v. Rock Against Racism*, deals with the government's ability to impose content-neutral time, place, or manner restrictions on speech.[3] 491 U.S. 781, 792 (1989). The forced medication of Dr. Sell with its potentially serious and life-threatening side effects cannot be characterized simply as a time, place, or manner restriction. *See Reno v. ACLU*, 521 U.S. 844, 868 (1997) (recognizing that blanket restrictions on speech cannot be considered as a time, place, or manner regulation). Further, this Court has

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[2] As Emily Dickinson eloquently stated: "Much madness is divinest sense/To a discerning eye; much sense the starkest madness. 'T is the majority/In this, as all, prevails. Assent, and you are sane; Demur, – you're straightway dangerous/And handled with a chain." Emily Dickinson, *The Complete Poems of Emily Dickinson*, Part I: Life (1924).

[3] The remaining cases cited by the government concern restrictions on conduct that incidentally affect speech, and are thus inapposite. Even the government does not suggest that the drugging of Dr. Sell is aimed primarily at his conduct and would only incidentally affect his speech. *United States v. Albertini*, 472 U.S. 675, 689 (1985); *United States v. O'Brien*, 391 U.S. 367, 375 (1968).

recognized on several occasions that government efforts that appear to be content-neutral can nonetheless be unconstitutional if they prohibit too much speech. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (finding content-neutral regulation of yard signs unconstitutional because it "foreclose[s] an entire medium of expression"); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (finding ordinance unconstitutional that prohibited distribution of all magazines and pamphlets).

Here, and most importantly, Dr. Sell has an interest in his own thought process that is separate and distinct from his right to communicate those thoughts to others. The government's efforts are directed to changing the manner in which Dr. Sell thinks. The restriction is pre-content. As this Court has found: "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that permissible end." *Ashcroft*, 122 S. Ct. at 1403. None of the cases cited by the government allow it to limit what and how an individual thinks. Rather, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley*, 394 U.S. at 565. Dr. Sell has a fundamental, First Amendment right to avoid forced medication aimed at changing the way he thinks.

II. THE GOVERNMENT'S INTEREST IN BRINGING DR. SELL TO TRIAL FOR NON-VIOLENT CRIMES DOES NOT OVERRIDE DR. SELL'S FUNDAMENTAL RIGHT.

Once the Court determines that Dr. Sell's right to refuse unwanted drugs is fundamental, the government must prove by clear and convincing evidence that its interest is compelling enough to overcome the fundamental right and

that it is using reasonable and the least restrictive means to accomplish its goal. Application of a strict scrutiny approach ensures that the government will only attempt to drug individuals in extraordinary cases. Under strict scrutiny, the prosecution of an individual for a non-violent crime, involving only economic loss, must never be adjudged compelling enough to overcome the individual's right to refuse unwanted drugging. Even in advocating for its own interest, the only harm alleged and articulated by the government in the instant case is "draining an important federal assistance program of its limited resources." Government's Brief at 24.

This justification for forced drugging of Dr. Sell is unavailing. First, only six of the 63 counts of the indictment regard allegations that Dr. Sell submitted improper invoices to a federal program. *Id.* at 23. The remainder govern transactions involving private insurance companies. *Id.* Second, to the extent that the government wants to obtain a monetary award to reimburse the federal government, it can pursue this interest by seeking a civil monetary award. *See* 42 U.S.C. § 1320a-7a(a)(1)(A); FED. R. CIV. P. 17(c). Likewise, the private insurers would presumably have civil remedies at their disposal. Although the government certainly has an interest in protecting the financial integrity of its institutions, this interest is not compelling enough to justify the forced drugging of Dr. Sell.

Further, our constitutional heritage recognizes that an individual's liberty or other interests are often protected to the detriment of the government's prosecutorial interests. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (recognizing that government cannot bring an incompetent individual to trial); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (finding that exclusionary rule applies even if its application results in an inability to prosecute); *Greenwood v. United States*, 350

U.S. 366, 375 (1956) (recognizing that "federal authority to prosecute" is not frustrated by use of treatment and commitment statute). This Court has likewise repeatedly recognized that the government's prosecutorial motives are insufficient to justify significant intrusions into an individual's body. *See Ferguson v. Charleston*, 532 U.S. 67, 86 (2001); *Winston v. Lee*, 470 U.S. 753, 767 (1985); *Rochin*, 342 U.S. at 171-74. The government interest is even less important in the instant case, where Dr. Sell has already served more time on the insurance fraud charges than if he had been convicted, where there are doubts about whether Dr. Sell will ever be restored to competency, and when there are concerns that Dr. Sell will not receive a fair trial if drugged into some type of synthetic competency.

The government's suggestion that being charged with any felony creates an interest sufficient to drug an individual highlights why individual liberty interests need the highest level of protection against government intrusion. Thus, under the government approach, its interest in prosecuting an individual for the first-time theft of a single letter would be enough to overcome a person's fundamental interest. *See* 18 U.S.C. § 1708 (establishing a felony for theft of mail).

Further, the government's assertion that every felony constitutes a crime serious enough to justify altering an individual's brain chemistry can be dispelled simply by reviewing some of the felonies with which individuals can be charged. *See* 18 U.S.C. § 2342 (shipment of contraband cigarettes is a felony); § 152 (concealment of item from bankruptcy estate assets is a felony); § 248 (second offense of blocking entrance to abortion clinic is a felony); § 541 (misrepresenting the weight of an imported item is a felony); § 1231 (transportation of strike breakers is a

felony); § 1302 (mailing of a lottery ticket is a felony); § 1368 (causing serious bodily injury to a police dog or horse is a felony); § 1706 (injuring a mail pouch is a felony). Drugging for every crime must not be sanctioned.

Importantly, the government's interest is lessened even further because the record establishes that Dr. Sell is not dangerous. In supporting its argument regarding the importance of its interest, the government has relied almost exclusively on cases in which an individual has been determined to be a danger or potential danger to himself or others. *See Harper*, 494 U.S. at 227; *United States v. Salerno*, 481 U.S. 739, 751-52 (1987). Both the District Court and Court of Appeals below have determined that Dr. Sell does not pose such a danger. (App. 349, 363). Any attempt to imply that Dr. Sell poses a danger to himself or others is simply unsupported by the record and is not a valid consideration when determining the government's interest in forcibly medicating Dr. Sell. (App. 349, 363). Indeed, the question posed by this Court acknowledges that the government wants to medicate Dr. Sell "solely to render him competent."

Further, because the record indicates a strong disagreement about the side effects of antipsychotic medication and whether medication is even an appropriate treatment for delusional disorder, persecutory type, the government's interest should not supersede Dr. Sell's individual rights. As this Court has recognized: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Addington v. Texas*, 441 U.S. 418, 427 (1979). The government has not shown that its interest is compelling enough to override Dr. Sell's fundamental right.

III. THE GOVERNMENT HAS NOT SHOWN THAT THE FORCED MEDICATION OF DR. SELL IS A REASONABLE AND LEAST RESTRICTIVE MEANS OF ACCOMPLISHING ITS INTEREST.

Involuntarily drugging Dr. Sell is not the least restrictive means of accomplishing the government's interest.[4] The government admits that, even though Dr. Sell has been confined for five years, it has not attempted any other method to restore Dr. Sell's competency. At the hearing, DeMeir testified that Dr. Sell was not receiving any treatment for his condition and that he was being kept in solitary confinement, which may be exacerbating his illness. (App. 180, 188). The government's refusal to consider any less restrictive means is highlighted by the anonymous, uncited authority presented in its Response Brief, which claims that in a recent twelve-month period 285 pretrial detainees, who were deemed incompetent to stand trial, were evaluated and treated by the Bureau of Prisons. Government's Brief at 27. Of these 285 individuals, 226 were voluntarily drugged and 59 were involuntarily drugged. Thus, the government drugged 100% of the people it evaluated. It has not tried to treat Dr. Sell as suggested by Dr. Sell's expert physician/psychiatrist Dr. Cloninger. (App. 32).

The government argues that medication is the least restrictive means because Dr. Sell will only be medicated for a short period of time. *See*, *e.g.*, Government's Brief at

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[4] Even if the Court finds that drugging Dr. Sell is the only means of accomplishing the government's interest, this Court has recognized that in some circumstances, even use of the least restrictive means is not constitutionally permissible. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

33. It must be noted that once Dr. Sell is drugged, his right to avoid the drugging has been infringed. Moreover, the articles cited by the government recognize that severe dyskinesia sometimes results from the withdrawal of antipsychotic drugs. Stanley N. Caroff, et al., *Movement Disorder Associated with Atypical Antipsychotic Drugs*, 63 J. CLIN. PSYCHIATRY 12, 15 (2002). Studies have also shown that short treatments with antipsychotic drugs may not be sufficient to effectuate changes in patients with delusional disorders. Alan R. Felthous, et al., *Are Persecutory Delusions Amenable to Treatment*, 29 J. AM. ACAD. PSYCHIATRY LAW 461, 465 (2001). Ironically, the government's proposed "least restrictive alternative" contemplates that if the drugs given to make Dr. Sell competent create prejudicial side effects, then he should be subjected to further unwanted medication to counteract those side effects. *See, e.g.*, Government's Brief at 33. This never-ending cycle of medication is not reasonable. Here, the "least restrictive" method is also the most restrictive; Dr. Sell's rights and the government's stated interest cannot co-exist.

The inquiry is whether the government's proposed action is the least restrictive means *of accomplishing the government's interest*. *Playboy Entm't Group*, 529 U.S. at 813. The government's interests can be met in several, other less restrictive ways. As Justice Kennedy recognized in *Riggins*, the government can attempt to civilly commit Dr. Sell until he is competent to stand trial. *Riggins v. Nevada*, 504 U.S. 127, 145 (1992). Given the economic nature of the crimes, the government may also seek civil penalties and damages for any claimed monetary losses. *See* 42 U.S.C. § 1320a-7a(a)(1)(A).

The government must prove by clear and convincing evidence that its proposed solution will accomplish the

government's goals. Even if the government's statistics are to be believed, there is a 24% chance that Dr. Sell will not be restored to competency. As discussed in section IV(B), *infra*, even if Dr. Sell were made competent, the government has not shown that the side effects of the drugs will not impermissibly interfere with Dr. Sell's constitutional, fair trial rights. The government has not shown that medicating Dr. Sell is the least restrictive means of accomplishing its objective or that the medication of Dr. Sell will accomplish the government's goal of bringing him to trial.

IV. THE GOVERNMENT CANNOT SATISFY ITS OWN FOUR-PART TEST.

The four-part test proposed by the government does not pass constitutional muster because it does not comport with the dictates of strict scrutiny. However, even if it were constitutionally appropriate to adopt the four-part test proposed by the government, it has failed to meet the elements of its own test. From the outset, the government cannot establish that drugging Dr. Sell is an essential state interest. In any case, the government suggests that forced medication of a pretrial detainee is appropriate when the government can demonstrate that (1) the medication has a substantial probability of restoring competence; (2) the medication is medically appropriate; (3) there is no reasonable and less intrusive alternative;[5] and (4) it is reasonable to expect that the defendant, if restored

[5] As discussed in section III, *supra*, the government is unable to establish that its decision to drug Dr. Sell is reasonable and that it is the least intrusive way to accomplish its objectives.

to competency, will receive a fair trial. Government's Brief at 15. These factors are not met in this case.

A. The Government Has Not Shown That Any Medication Will Restore Dr. Sell To Competence Or That It Is Medically Appropriate.

The government has not shown by clear and convincing evidence that "the medication" or any medication has a substantial probability of restoring Dr. Sell to competence or that such medication is medically appropriate. As a matter of fairness, such findings require, at a minimum, that the government provide Dr. Sell and the court with the medications with which it plans to medicate him. Without this information, Dr. Sell is left to rebut the government's vague and generalized assertions about the effects of dozens if not hundreds of antipsychotic drugs on a myriad of different psychiatric conditions, which are unlike Dr. Sell's rare psychiatric condition.

Recognizing that the government's evidence regarding the efficacy and medical appropriateness of non-specific medication was tentative at best, the government now floods the Court with facts, statistics, and non-legal authorities not found in the Record. *See, e.g.*, Government's Brief at 27, 28 n.8, 29-34, 34 n.9, 35, 39-41, 45-46. At times, the government relies upon facts and statistics without citation. *See, e.g.*, Government's Brief at 27, 39. For example, while arguing that antipsychotic medication will restore Dr. Sell's competency, the government relies upon statistics emanating from "the experience of the Bureau of Prisons" without citation. Government's Brief at 27. Moreover, many of the authorities the government cites *did not even exist* at the time of the involuntary medication hearing. *See, e.g.*, Government's Brief at 27, 30,

32, 34, 34 n.9, 35, 39, 41, 45 (relying upon authorities dated 2000, 2001, or 2002). This Court should not entertain such material, as Dr. Sell had no opportunity to rebut any of this material and none of this information was presented to any lower court for consideration.[6]

Instead of allowing the government to submit to this Court information outside the Record, "the lawfulness of [the lower court's actions regarding] the defendant is to be determined *by the formal record. . . .* " *Hoyt v. People*, 114 U.S. 488, 491 (1885) (emphasis added) (rejecting affidavit). It has been this Court's practice to reject information which is unaccounted-for and to which the opposing party has not been able to respond. *See Adickes v. S.H. Kress & Co.*, 398 U.S. at 157-58 n.16 (1970); *see also Russell v. Southard*, 53 U.S. (12 How.) 139, 158-59 (1851) (Taney, C.J.) (rejecting motion to receive affidavits of newly-discovered evidence). This Court must rule "upon the case as it appears in the record . . . [and] cannot look out of it. . . . " *Id.* at 159; *see also Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 n.3 (1986) (noting importance of "factual development in earlier proceedings"); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."). In *Adickes*, the respondent lodged with this Court an unsworn statement, but this Court recognized the impropriety of such a maneuver, since "the statement itself is not in the record of the proceedings below and

[6] The government's uncited reference to such statistics is additionally deficient due to the otherwise vague manner in which the government refers to them, since the government has provided no identifying information which would allow Petitioner to rebut such statistics. *See* Government's Brief at 27 ("Over a recent twelve month period").

therefore could not have been considered by the trial court." 398 U.S. at 157-58 n.16. The government's reliance upon non-legal authorities not before the lower courts is likewise improper.

Importantly, the bulk of the new sources the government attempts to interject are not helpful to the consideration of the case because these sources deal with the appropriateness of medication for schizophrenia.[7] Schizophrenia is a separate and distinct condition from delusional disorder, the affliction from which Dr. Sell's suffers. (App. 257; Record 766). At points in its Brief, the government weaves into its discussion of Dr. Sell's condition, delusional disorder, (App. 226), specific references to schizophrenia and suitable treatment therefor. Government's Brief at 30 ("[s]chizophrenia is characterized by profound disruption in cognition and emotion") (citation omitted). At other points in its Brief, the government's efforts are more subtle, such as where it indicates Geodon – a drug the FDA approved only for schizophrenia, *see* Federal Drug Administration, FY 2001 User Fee NME Approvals as of September 30, 2001, http://fda.gov/cder/rdmt/FYUFNME2001Rel.htm. – would be suitable for treating Dr. Sell's delusional disorder. Further, the government's own sources recognize that it is improper to assume that

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[7] Stanley N. Caroff, et al., *Movement Disorder Associated with Atypical Antipsychotic Drugs*, 63 J. CLIN. PSYCHIATRY 12, 12 (2002) (stating atypical drugs are a significant advance in treatment of schizophrenia); Linda Pendleton, Ph.D., *Treatment of Persons Found Incompetent to Stand Trial*, 137 AM. J. PSYCHIATRY 1098-99 (1980) (noting 90% of patients in 1978 study group had schizophrenia); National Institute of Mental Health, Mental Health: A Report of the Surgeon General 279-80 (1999) (pages cited in Government's Response concern schizophrenia).

patients with delusional disorder will respond to medications in the same way as those with schizophrenia. Felthous, *supra*, at 463 (2001) (recognizing "paranoid patients are usually very sensitive to all side effects of drugs" (citation omitted)).

The government's repeated references to and heavy reliance upon facts, statistics, and authorities not in the Record attempt to indicate a well-developed body of literature regarding antipsychotic drugs' appropriateness in treating delusional disorder.[8] As demonstrated by the amicus briefs, there remains medical debate between the nation's largest organization of psychiatrists and the largest organization of psychologists about whether medication is appropriate treatment for delusional disorder, persecutory type. In its amicus brief, the American Psychological Association stated: "At present, there is no consensus among researchers that delusional disorder, persecutory type will respond favorably to antipsychotic drugs. . . . " American Psychological Association Brief at 17 (citing sources). Likewise, the District Court recognized

[8] Even were the alleged developments upon which the government relies certain to occur following the involuntary medication hearing, this Court cannot lend serious weight to the claim that the lower courts should have predicted such changes and acted according to events not on the record. *See Ramdass v. Angelone*, 530 U.S. 156, 178 (2000) (denying habeas relief due to record before court at time of sentencing and rejecting argument that subsequent developments that might have altered jury verdict were "inevitable" at time of sentencing). This Court has previously evaluated the status of science from the time the case was before the district court, *see Reno*, 521 U.S. at 876-77 (evaluating technology from time of trial), and has relied upon scientific and technological developments only once those developments actually occurred, *see Ashcroft v. ACLU*, 122 S. Ct. 1700, 1704 (2002).

the current debate among experts about whether medication is effective to treat delusional disorder, persecutory type.[9] Even the sources cited by the government recognize "[t]here have been no controlled studies of specific agents in the treatment of delusional disorder." Felthous, *supra*, at 461. Given this debate and the government's refusal to name the medications and dosages it plans to use, the government cannot establish by clear and convincing evidence that Dr. Sell will be restored to competence or that medication is medically appropriate.

B. It Is Not Reasonable To Expect That Dr. Sell, If Restored To Competency, Will Receive A Fair Trial.

The government argues that, before medicating Dr. Sell, it should be required to prove that it is reasonable to expect that the defendant, if restored to competency, will receive a fair trial. The government ignores that it was not required to make this showing before either the District Court or the Court of Appeals. The District Court found that consideration of the issue was premature. (App. 352). Further, the Court of Appeals did not ask whether Dr. Sell would receive a fair trial. Rather, the Court of Appeals

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[9] In a recent *en banc* opinion, four members of the Eighth Circuit Court of Appeals, two of whom were on the three judge panel in *United States v. Sell*, found that drugging with antipsychotic drugs produces a synthetic sanity, which is temporary and unpredictable and that "receiving treatment is not synonymous with being cured." *Singleton v. Norris*, No. 00-1492, 2003 WL 261795, at *14 (8th Cir. Feb. 10, 2003) (Heaney, J., dissenting). These judges also recognized that "[a]ntipsychotic drugs merely calm and mask the psychotic symptoms which usually return to debilitate the patient when the medication is discontinued." *Id.* (citation omitted).

considered only whether Dr. Sell would be able to participate in a trial, given the effects of the medication. The Court of Appeals, therefore, did not consider whether the medication would effect Dr. Sell's trial rights, including the right to present a diminished capacity defense, *see* FED. R. CRIM. P. 12.2(b), the right to not have the government manipulate his appearance in a way that prejudices him before the jury, and the right to testify and "present his own version of events in his own words." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *see also Illinois v. Allen*, 397 U.S. 377, 345 (1970); FED. R. CRIM. P. 12.2(b).

Further, the lower courts could not have made a determination that there is a substantial probability that Dr. Sell will receive a fair trial. The government has not provided Dr. Sell or the lower courts with the medications or dosages it intends to use with Dr. Sell. A general review of the effects of non-specific medications on individuals who suffer from a wide-range of psychological conditions is not sufficient to protect Dr. Sell's rights.

Importantly, our nation's constitutional heritage does not countenance the drug first, hold a hearing second approach advocated by the government. Rather this Court has made clear that due process requires at a minimum that, when possible, an individual be given notice and the right to a hearing before the deprivation of a right. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 57 (1993). If the forced medication of a non-dangerous individual is even constitutionally permissible, due process requires that the Court consider the full effects of a deprivation on the defendant's trial rights before the right is taken away, not afterward.

Given the numerous effects medication will have on Dr. Sell's trial rights, the government cannot show that

forced medication would constitute harmless error. Contrary to the government's suggestion, Dr. Sell has never argued that he has a right to appear incompetent at trial. Rather, Dr. Sell has a right to appear at trial in a state that is unmanipulated by the government. Defendants may not be required to appear before the jury in prison garb, in shackles, or in an unkempt state, absent the most compelling interest. *Allen*, 397 U.S. at 344 . Likewise, the government may not inject Dr. Sell with antipsychotic drugs, then inject him with another round of drugs to counteract the antipsychotic drugs, and then place him before the jury in a state of synthetic sanity.

Further, Dr. Sell is the best witness regarding the effects of the drugs on his thinking and demeanor. Once the government manipulates Dr. Sell's brain, Dr. Sell loses his best witness regarding the effects of the medication on his ability to think and communicate. Dr. Sell has no way of preserving his pre-medication demeanor or beliefs in a manner that would be accepted as evidence by the court without waiving his right to take the Fifth Amendment. Dr. Sell will be faced with a Hobson's choice: waive his Fifth Amendment right to attempt to explain to the jury the effects of the forced medication or refuse to testify and risk that the jury is still improperly affected by these same considerations.

Importantly, a predeprivation review of Dr. Sell's Fifth and Sixth Amendment trial rights is vital to the consideration of whether the government's interest in overriding Dr. Sell's First and Fifth Amendment rights is compelling. Since it is unlikely that Dr. Sell will both regain competence and then have a fair trial after being medicated, the government's interest in drugging Dr. Sell is severely diminished and cannot be deemed compelling.

CONCLUSION

For the foregoing reasons, Dr. Sell respectfully requests that the Court rule that forced administration of antipsychotic drugs for the sole purpose of prosecuting him for a non-violent crime violates his First, Fifth, and Sixth Amendment rights.

Respectfully submitted,

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