No._____

IN THE SUPREME COURT OF THE UNITED STATES

DR. CHARLES THOMAS SELL, D.D.S.
Petitioner,

v.

THE UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government can violate an innocent individual's fundamental right to bodily integrity by injecting him with permanently mind-altering psychotropic drugs against his will solely because it believes there is a chance to medicate the individual into drug-induced "competence" for trial?

2. Whether the government's effort to forcibly medicate an innocent person, solely for the purpose of attempting to make him "competent" to stand trial, is reviewed under a strict scrutiny standard or under one of the lower standards, which standards are both recited in the conflicting lower court and appellate court decisions on this issue?

3. Whether the government should at least be required to prove, by clear and convincing evidence, each element of the strict scrutiny test before it violates an individual's right to be free from the forced injection of mind-altering medication?

4. Whether the district court must consider the effects of forcible medication on a defendant's Sixth Amendment trial rights before the government is allowed to permanently alter an individual's psychological chemistry?

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The court of appeals' opinion is reported at United States v. Sell, 282 F.3d 560 (8th Cir. 2002) and is reproduced in the appendix hereto at pages 1 through 12. The magistrate judge's opinion, which was not published, is reproduced in the appendix hereto at pages 13 through 28. The district court's opinion is not reported and is reproduced in the appendix hereto at pages 29 through 46. The court of appeals' denial of the petition for rehearing is provided herewith on page 47 of the appendix.

JURISDICTION

A divided panel of the court of appeals entered its judgment on March 7, 2002. By a vote of 5-4, the petition for rehearing and petition for rehearing en banc were denied on May 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions.

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense.

U.S. Const. amend. IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Statutory Provisions.

18 U.S.C. § 4241(d):

> (d) Determination and Disposition. - If . . . the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his own defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility --
>
> > (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and
> >
> > (2) for an additional reasonable period of time until --

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

STATEMENT OF THE CASE

On May 7, 2002, in a five-to-four split vote, the United States Court of Appeals denied Dr. Charles Thomas Sell's ("Dr. Sell") petition for rehearing en banc. On March 7, 2002, two judges on the three-judge panel affirmed the District Court's opinion, over the vigorous dissent of the Honorable Judge Bye. The District Court opinion, issued on April 4, 2001, allowed the forcible medication of Dr. Sell solely based upon the government's desire to drug Dr. Sell into "competence" to stand trial. The District Court denied Dr. Sell's motion to reconsider the Magistrate Judge's August 9, 2000 Report and Recommendation, also condoning Dr. Sell's forced medication.

Dr. Sell is an intelligent, educated individual with advanced medical and dental training who opposes being involuntarily medicated with ineffective and potentially life-threatening medications. (Record on Appeal ("ROA") at 1099, 1108, 1137, 1120, 1121, 1136, 589, 617). At 53, Dr. Sell is a non-dangerous, unconvicted, pretrial detainee confined in the United States Medical Center for Federal Prisoners (the "Center") in Springfield, Missouri. (ROA at 1108). He has been held at the Center without treatment or trial for more than three and one half years, often under particularly difficult circumstances, and has been held in other facilities, including the Center, for more than four years without trial. (ROA at 551, 547, 559, 730-746, 1001-09). He is accused of insurance fraud.[1]

Prior to being indicted, Dr. Sell maintained a dental practice in St. Louis County, Missouri. (ROA 1108, 1099). He was married and has four children. (ROA at 1087, 1091, 1114). In addition, Dr. Sell served for almost two decades, with distinction, as an

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[1]While there are other charges pending, the charges of insurance fraud were the sole basis for the Eighth Circuit's decision regarding involuntary medication. See Appendix at 7, n.8.

officer in the United States Army Dental Reserve, ultimately attaining the rank of Major. (ROA at 1085, 1142-59, 1161-74, 1177).

On July 30, 1997, after an undercover investigation involving government witnesses (with very questionable pasts and motives), Dr. Sell was indicted for Medicaid and insurance fraud for allegedly submitting false invoices to insurers for the purpose of obtaining payment for dental services that were not covered by the policies and program in violation of 18 U.S.C. § 1341, 42 U.S.C. § 1320a-7b(a)(1)(i), and 18 U.S.C. § 1957(a). (Cause No. 4:97CR00290-DJS). Dr. Sell denies the charges.

On October 14, 1998, after exploration of Dr. Sell's history of mental illness, counsel for Dr. Sell filed a notice of intent to introduce evidence of a mental disease or defect, which resulted in the Magistrate Judge ordering a psychological assessment of Dr. Sell. (ROA at 285-86, 293-317).

Ultimately, as a result of the psychological assessment, the District Court found Dr. Sell incompetent to stand trial because Dr. Sell "suffer[ed] from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him and to assist properly in his defense." (ROA at 341-43). Pursuant to 18 U.S.C. §4241(c), the court committed Dr. Sell to the custody of the United States Attorney General for a reasonable period of time "not to exceed four months." (ROA at 341). The Department of Justice then committed Dr. Sell to the custody of the Center, where he has been confined for over three and one half years, without treatment, often without a valid order of commitment. (See, e.g., ROA at 730-46, 1001-09, 551, 547, 559).

In 1999, only two weeks after Dr. Sell was committed, the Center sought to forcibly drug Dr. Sell with antipsychotic medications to restore him to competency for the sole purpose of bringing him to trial. (See, e.g., ROA at 347-50) (motion for appointed counsel to attend administrative proceeding). Dr. Sell opposes the medication because he has previously been treated with an antipsychotic drug and found the side effects to be intolerable. (ROA at 589, 617). In addition, because of his medical and dental training, Dr. Sell understands that antipsychotic medications are potent, mind-altering drugs with the potential for severe, irreversible side effects. (ROA at 556).

On April 4, 2001, two and one half years after Dr. Sell filed his notice of intent to introduce evidence of mental disease or defect, and after protracted delays in proceedings before the Magistrate Judge and the District Court, the District Court held that Dr. Sell was not dangerous, but that the Government's interest in restoring Dr. Sell to competency to stand trial was alone sufficient to warrant forcible medication. (April 4, 2001 Order at App. 37-46).

Dr. Sell appealed to the United States Court of Appeals for the Eighth Circuit and, on March 7, 2002, a divided Panel affirmed the decision of the District Court and held that, although not dangerous, Dr. Sell may be involuntarily medicated with antipsychotic drugs for the sole purpose of rendering him competent to stand trial. Dr. Sell's petition for rehearing by the Eighth Circuit en banc was denied 5-4.

REASONS FOR GRANTING THE PETITION

Dr. Sell remains an innocent man - he has never been convicted of any crime - and the government has wrongfully imprisoned him for over four years without a trial. Even though Dr. Sell poses no demonstrated risk of harm to himself or others, the government seeks to violate his First, Fifth, Sixth, and Ninth Amendment rights by injecting him with permanently mind-altering psychotropic drugs against his will. The government wants to medicate Dr. Sell into an artificially induced, drug-dependent competence so that the government can bring him to trial on charges involving alleged economic crimes of fraud and money laundering. If the Eighth Circuit Court of Appeals' decision is allowed to stand, a mentally incompetent individual will lose his right to refuse medication based solely on the government's unproven assertion that the individual is guilty of a non-violent crime.

The petition should be granted to determine whether an individual has a fundamental right to refuse the government's attempts to forcibly medicate him. Although this Court has ruled that the right to resist forced administration of psychotropic drugs is substantial, it has never considered whether this right is fundamental as a matter of substantive Constitutional law. This Court has repeatedly reiterated, however, that an individual has fundamental rights in the self-determination over one's body. Dr. Sell's interest in avoiding the permanent alteration of his brain chemistry and muscular control is as least as important as the rights previously recognized as fundamental.

In addition, the petition should be granted to ensure that the decision of the Eighth Circuit to narrow the fundamental liberty interest in self-determination of medical issues does not adversely affect or overrule, sub silentio, existing law relating to the control of

medical decisions about pregnant women and those opposing certain medical treatment on religious grounds.

The petition should also be granted to determine whether the government can violate a person's Constitutional rights for a purely prosecutorial motive. In the past, the Court has refused to allow the government to violate an individual's right to bodily integrity when its only motive was a prosecutorial one. In fact, the Constitution only sanctions intrusion upon the right to bodily integrity when the life or health of the individual or others is at risk. A citizen does not lose a fundamental, Constitutional right simply based on the fact that he is charged with a crime.

Importantly, unlike the Court's prior decisions regarding forcible medication, this case does not involve questions of prison administration or prison safety. Rather, this case presents the narrow question of whether an innocent individual loses his right to refuse psychiatric medication simply because the government has chosen to charge that individual with a crime. Constitutionally, the answer to this question must be no.

The petition should also be granted, and a decision by this Court is necessary, to resolve the divergent opinions in the lower federal courts and state courts regarding the standard of scrutiny and burden of proof to be applied to the government's efforts to forcibly medicate an individual solely for the purpose of making the individual competent to stand trial. About ten years ago, in Riggins v. Nevada, 504 U.S. 127 (1992), this Court specifically declined to prescribe the substantive standards concerning forced medication of a pretrial detainee, based on the insufficient record before it. Id. at 136. The Riggins Court also did not determine the government's burden of proof to establish that forcible

medication is proper. This case presents an opportunity to address the important Constitutional issues left open by Riggins.

In addressing the issues presented herein, this Court should also confirm a detainee's right to a Sixth Amendment pretrial inquiry to determine whether the forced medication would affect the detainee's jury trial rights.

APPENDIX

1. United States v. Sell, 282 F.3d 560 (8th Cir. 2002)
2. August 9, 2000 Memorandum and Order of United States Magistrate Judge
3. April 4, 2001 Order of United States District Court
4. May 7, 2002 Order Denying Petition for Rehearing and for Rehearing En Banc

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THE UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Charles Thomas Sell, D.D.S., ("Dr. Sell") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

I. The Petition Should Be Granted To Determine Whether The Government Can Violate An Innocent Individual's Fundamental Right To Bodily Integrity By Injecting Him With Permanently Mind-Altering Psychotropic Drugs Against His Will Solely Because It Believes That There Is A Chance To Medicate The Individual Into Drug-Induced "Competence" For Trial.

This is a case of first impression, inasmuch as it involves a non-dangerous pretrial detainee. Until now, Supreme Court jurisprudence regarding medication of pretrial detainees has only considered the quantum of due process required when the government seeks to medicate a pretrial detainee for the penological interest of maintaining prison safety. See Riggins, 504 U.S. at 127. This Court has never determined whether, consistent with substantive due process, the government can take away an individual's Constitutional right to bodily integrity by forcibly medicating that person, based solely upon the government's assertion that the individual is guilty of a non-violent crime. This

Court's prior jurisprudence in Winston v. Lee, 470 U.S. 753, 767 (1985) and Rochin v. California, 342 U.S. 165, 171-74 (1952), confirms that forced medication of Dr. Sell will violate his Constitutional rights. Under the stark circumstances of this case, this Court should confirm that the right to bodily integrity is a fundamental right, which should not be overridden absent a demonstration of a compelling interest from the government.

Dr. Sell's case presents a unique opportunity to consider these issues for two reasons. First, as determined by the lower courts, Dr. Sell has not demonstrated any violence against himself or others while confined. The sole motive for the government's actions, as noted above, is its desire to prosecute Dr. Sell. Second, because the decision to medicate Dr. Sell was based upon non-violent charges, the government's interest in bringing him to trial cannot be deemed compelling. In a nutshell, this Court needs to address the issues of when an individual's right to be free from unwanted medication ends, and when the government's ability to medicate a non-violent person against their will begins. That line has been unconstitutionally transgressed in the courts below. Also, lower state and federal courts across the nation need guidance on this critical question.

A. The petition should be granted because the right to bodily integrity is a fundamental right.

Any analysis of an individual's substantive rights under the Constitution begins with the threshold question of whether the challenged state action implicates a fundamental right. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997); Mills v. Rogers, 457 U.S. 291, 299 (1982) (recognizing that forcible medication of an individual implicates both procedural and substantive rights). Failure to address this question results, necessarily, in a Constitutionally standardless exercise.

Petitioner notes that this Court has never specifically ruled that the right to be free from unwanted medical treatment is a fundamental right. See Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 304-05 (1990) (Brennan , J., dissenting) (stating that majority failed to consider whether right to bodily integrity was fundamental); Riggins, 504 U.S. at 136 (stating Court could not reach question of substantive rights); Washington v. Harper, 494 U.S. 210, 229 (1990) (assuming, without deciding, that right to refuse medication is at least substantial). The determination of whether a fundamental right is implicated, however, remains critical. It is critical because the nature of the right affected by the government's proposed actions is a prerequisite to determining the applicable standard by which the government's actions are judicially reviewed. The District Court and the Court of Appeals in the instant case failed to determine whether Dr. Sell's right to resist forcible medication was fundamental. See App. 6, 44-45. By doing so, their analyses are without the necessary Constitutional bedrock.

In determining whether a fundamental right exists, it is necessary to examine "our Nation's history, legal traditions, and practices." Glucksberg, 521 U.S. at 710. Even before the Constitution's ratification, the common law recognized that the touching of a person without consent or legal justification constituted a battery. See Cruzan, 497 U.S. at 269. The common law and this Court's ruling in other cases demonstrate quite plainly that forcibly medicating a non-violent detainee involves a fundamental right.

This Court has previously ruled that the right to bodily integrity is fundamental. See Glucksberg, 521 U.S. at 720; Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) (finding fundamental right for woman to have abortion); Griswold v. Connecticut, 381 U.S. 479, 521 (1965) (recognizing right to use contraceptives is fundamental); Rochin,

342 U.S. at 171-74 (finding government cannot force individual to take an emetic based on suspicion that individual swallowed morphine capsules). A right is fundamental when it involves "the most intimate personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." See Casey, 505 U.S. at 851. Making a determination about one's own psychology - one's own mental state - and about one's own muscular control are the most important personal decisions an individual can make. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Id.

Acceptance of the Eighth Circuit's decision to narrow the fundamental liberty interest in self-determination of medical issues will adversely affect and overrule, sub silentio, existing law relating to the control of medical decisions concerning pregnant women and by those opposing certain medical treatment on religious and other grounds. Ferguson v. Charleston, 532 U.S. 67, 68 (2001) (refusing to allow drug testing of pregnant women for prosecutorial purpose); Cruzan v. Harmon, 760 S.W.2d 408, 412 n.4 (Mo. 1988) (collecting cases regarding right to refuse medical treatment).

Indeed, in Cruzan, this Court previously acknowledged that the right of an individual to refuse unwanted medical treatment is protected by the Fourteenth Amendment. Cruzan, 497 U.S. at 78-79. Speaking through Chief Justice Rehnquist, this Court reiterated:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Id. at 269 (citations omitted). Because "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination," state incursions into the body are deemed repugnant to the interests protected by the Constitution. Id. at 287 (O'Connor, J., concurring); Chandler v. Miller, 520 U.S. 305 (1997) (finding state's requirement that candidates for public office take drug tests is unconstitutional). Not surprisingly, therefore, the trend of modern authority recognizes that an individual has a fundamental right to avoid forced medication. See United States v. Brandon, 158 F.3d 947, 957 (6th Cir. 1998) (recognizing fundamental right in avoiding forcible medication); Bee v. Greaves, 744 F.2d 1387, 1395 (10th Cir. 1984) (applying analysis similar to strict scrutiny); Doe v. Dyett, No. 84 Civ. 6251-KMW, 1993 WL 378867, *2 (S.D.N.Y. Sept. 24, 1993) (recognizing right to refuse administration of drugs as fundamental); Conservatorship of Wendland, 28 P.3d 151, 154 (Cal. 2001) (determining incompetent adult has fundamental right to refuse treatment); Steele v. Hamilton County Community Mental Health Bd., 736 N.E.2d 10, 15 (Ohio 2000) (finding right to refuse medical treatment is a fundamental right in our country); Steinkruger v. Miller, 612 N.W.2d 591, 596 (S.D. 2000) (holding persons involuntarily committed have a federal Constitutionally protected liberty interest to refuse the administration of psychotropic drugs); In re Conservatorship of Foster, 547 N.W.2d 81, 85 (Minn. 1996) (finding the right to be free from intrusive medical treatment is a fundamental right); In re C.E., 641 N.E.2d 345, 351-52 (Ill. 1994) (same); Rasmussen by Mitchell v. Fleming, 741 P.2d 674, 682 (Ariz. 1987) (same); In re Schuoler, 723 P.2d 1103, 1107-08 (Wash. 1986) (same); Andrews v. Ballard, 498 F. Supp. 1038, 1045-48 (S.D. Tex. 1980) (stating right to refuse treatment encompassed in right to privacy). Accordingly, this Court's jurisprudence suggests the

Constitutional answer to the question of whether the government can forcibly medicate a non-violent detainee against his will: No.

Significantly, the forced administration of psychotropic drugs is more serious than other intrusions into the body. As this Court has previously recognized, "[t]he forcible injection of medication into a nonconsenting person's body . . . represents a substantial interference with that person's liberty and [i]n the case of antipsychotic drugs . . . that interference is particularly severe." Riggins, 504 U.S. at 134 (citations omitted). The forcible medication of Dr. Sell will permanently alter his mind and identity and will substantially infringe his First, Fifth, Sixth and Ninth Amendment rights.[2] "The purpose of the drugs is to alter the chemical balance in a patient's brain. . . . While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects." Harper, 494 U.S. at 229. Once such an interest is infringed by the government, it cannot be restored. The right to bodily integrity is a fundamental right.

Moreover, the efficacy of antipsychotic drugs in cases of delusional disorder is uncertain at best. (See, e.g., Transcript of September 29, 1999 Involuntary Medication Hearing at ROA at 526, et seq.) (Judge Stohr acknowledging the disagreement among experts); (ROA at 589). There were three sources of evidence on the question of the medical appropriateness of psychotropic medication for individuals suffering from delusional disorder presented at the hearing before the magistrate judge: the testimony of the Bureau of Prisons witnesses, Drs. DeMier and Wolfson; the affidavit of Dr. Robert

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[2] See Bee, 744 F.2d at 1394 and cases cited therein (recognizing decision whether to accept treatment with antipsychotic drugs also falls within privacy interests protected by First Amendment).

Cloninger; and a report from Dr. Daniel Greenstein from the Federal Bureau of Prisons Institution of Metropolitan Correctional Center, a forensic psychologist. While Drs. DeMier and Wolfson, who were advocating medicating Dr. Sell, testified that the use of antipsychotic medication was medically appropriate, Dr. Cloninger's affidavit was clear that "there is no evidence that [antipsychotic medications] are beneficial for patients with delusional disorder." (ROA at 414). The report of Dr. Greenstein stated that delusional disorders do not typically respond to medication or psychotherapy. In fact, the very text relied upon by Drs. DeMier and Wolfson as authoritative, the Comprehensive Textbook of Psychiatry, states that there are no controlled studies reported to support the practice of treating delusional disorder with antipsychotic medication. COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, 1048 (4th ed.). Ordering involuntary medical treatment presupposes that the treatment is medically appropriate, Riggins, 504 U.S. at 127-28, which is not the case here.

Because Dr. Sell's right to bodily integrity is fundamental, this petition should be granted.

B. The government must establish a compelling or "extraordinary" interest in trying an individual for a non-violent crime in order to override his fundamental right.

The government wishes to override Dr. Sell's fundamental right to be free from bodily intrusion under the First, Fifth, and Ninth Amendments and his Sixth Amendment trial rights, so that it can try him for defrauding an insurance company. In United States v. Brandon, the Sixth Circuit determined that the charges brought against the defendant were insufficient for the government to prove it had a compelling interest. 158 F.3d at 961 (discussing charge of sending threatening letter in the mail); see also Bee, 744 F.2d

at 1395 (stating "needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotic drugs is concerned"); Winston, 470 U.S. at 766-67 (holding government's desire to prosecute defendant did not outweigh defendant's Fourth Amendment rights); see also United States v. Gomes, 289 F.3d 71 (2d Cir. 2002) (labeling government's interest as fundamental). In the instant case, the lower courts labeled the government's interest as "essential," without ever deciding whether the interest was compelling. See United States v. Sell, 282 F.3d 560, 567 (8th Cir. 2002). Because a fundamental right is at stake, the government must demonstrate a compelling interest.

While this Court has never considered whether the government can violate a pretrial detainee's Constitutional right of bodily integrity without asserting any penological objectives, this Court's prior rulings mandate the Constitutional answer.[3] It is undisputed that the government may detain a person suspected of committing a crime prior to an adjudication of guilt. See Gerstein v. Pugh, 420 U.S. 103, 111-14 (1975). However, prior to conviction, an individual committed to pretrial detention has not been adjudged guilty of any crime. While incarcerated, therefore, a pretrial detainee must be presumed to be innocent of alleged, prior criminal conduct. See Bell v. Wolfish, 441 U.S. 520, 582 (1979) (Stevens, J., dissenting). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and

[3] The district court opinion and the panel opinion afford Dr. Sell, a pretrial non-dangerous detainee, less due process rights than those afforded convicted felons in established case law. A convicted felon cannot be involuntarily medicated unless he is a danger to himself or others within the prison setting and the medication is deemed medically appropriate. Harper, 494 U.S. at 227. By permitting the involuntary medication of a non-dangerous pretrial detainee, the court is fashioning a test that affords an individual presumed innocent with less rights and protections than those of a convicted individual who can only be medicated if dangerous.

its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

In Riggins, this Court states:

> [A]bsent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial.

504 U.S. at 139 (Kennedy, J., concurring) (expressing doubt that the government will be able to make such a showing in most cases).

Petitioner respectfully submits that because the effects of psychotropic drugs on an individual may cause permanent changes in brain chemistry and muscular control, forcibly medicating that individual for the sole purpose of inducing "competence," when the individual has not been found guilty of a crime and still enjoys the presumption of innocence, can only be justified by a government interest of the highest order.

Here, the government's only basis for medicating Dr. Sell is the government's belief that Dr. Sell is guilty of non-violent crimes, involving only economic losses. This interest cannot be compelling enough to overcome Dr. Sell's Constitutional rights.[4] See Brandon, 158 F.3d at 947, 960-61. As noted by the Nevada Supreme Court after remand: "[W]hen I balance the need to bring insane persons to justice against the ignominy of forcing mind-altering drugs down the throats of persons who are presumed to be innocent, I opt in favor of the rights of the individual as against the rights of the State." Riggins v. Nevada, 860 P.2d at 706 (Springer, J., dissenting).

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[4] This is especially so, considering the statute specifically contemplated civil commitment as an alternative remedy. See 18 U.S.C. § 4246. "I should think that any alternative would be less intrusive than toying with an accused's brain chemistry." Riggins v. Nevada, 860 P.2d 705, 707 (Nev. 1993) (Springer, J., dissenting).

Dr. Sell's rights under the common law and under the Constitution were not extinguished after the government charged him with a crime. This Court has recognized the significant Constitutional rights retained by pretrial detainees and has previously only limited those rights when the safety of the pretrial detainee, fellow prisoners or the prison staff was at issue. Riggins, 504 U.S. at 134-35. Indeed, this Court has previously held that prosecutorial motive alone is not enough to violate an individual's Constitutional rights. Winston, 470 U.S. at 766-67 (holding government's desire to prosecute defendant did not outweigh defendant's Fourth Amendment rights); Rochin, 342 U.S. at 171-74 (finding that requiring an individual to ingest an emetic so that police could obtain drugs is unconstitutional).

Although the government possesses an interest in bringing a defendant to trial, not "every charge is sufficient to justify forcible medication of a defendant." See Sell, 282 F.3d at 572 (Bye, J., dissenting) (finding charges against Dr. Sell insufficient to justify forcible medication). While the Eighth Circuit panel also recognized that "[n]ot all charges . . . are sufficient to justify forcible medication of a defendant," it cursorily determined that the charges against Dr. Sell are "serious" and outweighed by the government's essential interest. Sell, 282 F.3d at 568. The Eighth Circuit's one-sentence examination of the nature of the crimes for which Dr. Sell was indicted does not pass Constitutional muster. It does, however, strongly illustrate the need for this Court to explain that the government is required to provide a compelling reason before drugging an individual into "competence." Petitioner also submits that the government cannot present a compelling interest when the defendant is charged with a non-violent crime.

Like the Eighth Circuit, many of the lower courts that have considered forcible medication issues have not analyzed whether the right to bodily integrity is a fundamental right or whether the government's interest in trying the accused is compelling. Failure to conduct this analysis has resulted in a wide range of opinions regarding the types of crimes that justify forcible medication. See Brandon, 158 F.3d at 961 (finding government's interest in prosecuting individual for sending threatening mail is not compelling enough); Bee, 744 F.2d at 1395 (questioning whether the state's interest in trying suspects could ever outweigh the individual's interest in avoiding forcible treatment with antipsychotic drugs); but see Gomes, 289 F.3d at 86 (finding possession of firearm by felon serious enough to warrant forcible medication); Sell, 282 F.3d at 572-73 (stating money laundering and fraud charges justify forcible medication).[5]

The petition must be granted to confirm that the government must establish a compelling interest in trying an individual before forcibly medicating a non-violent detainee.

C. Even absent a finding of a fundamental right, the forced medication of an accused solely for prosecutorial purposes violates minimum standards of due process.

Even if this Court determines that the right to bodily integrity is not fundamental, due process still prohibits the conduct advocated by the government here. Due process requires that this Court ascertain whether the government's conduct "offend[s] those

[5] The state cases relating to forcible medication deal primarily with cases involving murder, and thus do not distinguish the state's less compelling interest in prosecuting non-violent crimes. See, e.g., Rickman v. State, 972 S.W.2d 687 (Tenn.Crim.App. 1997); Harrison v. State, 635 So.2d 894 (Miss. 1994); State v. Odiaga, 871 P.2d 801 (Idaho 1994).

canons of decency and fairness which express the notions of justice of English-speaking peoples, even those charged with [criminal] offenses." Rochin, 342 U.S. at 169.

In Rochin, police detectives required the accused to take an emetic because the police suspected that the accused had swallowed two capsules of morphine. 342 U.S. at 166. In finding that this practice violates due process, this Court stated:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents -- this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172. The government here wants to permanently alter an accused's psychology and possibly alter his muscular control so that it may bring him to trial. This conduct is far more violative than the conduct found unconstitutional in Rochin. Allowing the government's prosecutorial might to extend into physical intrusions into an individual's mind violates the minimum standards of due process. Such a violation cannot be condoned in a free society.

II. The Petition Should Be Granted To Resolve The Widely Divergent Splits In Opinion Among Federal And State Courts Concerning The Standards To Be Applied When The Government Desires To Forcibly Medicate An Individual Solely For The Purpose Of Attempting To Make Him "Competent" To Stand Trial.

A. The petition should be granted to resolve a split in the lower federal courts and state courts regarding the proper standard of scrutiny.

In Riggins v. Nevada, this Court expressly recognized it has "not had occasion to develop substantive standards for judging forced administration of [antipsychotic] drugs," due to deficiencies in the Riggins record. 504 U.S. at 135. In the wake of Riggins are lower federal court and state court decisions proclaiming widely divergent standards of

scrutiny in forced medication cases.[6] This divergence means that pretrial detainees have more Constitutional protection if they are facing trial in the Sixth Circuit than if they are facing trial in the Fourth or Eighth Circuits. See Gomes, 289 F.3d at 82 (adopting heightened scrutiny standard); Sell, 282 F.3d at 567 (adopting essential state interest standard); Brandon, 158 F.3d at 957 (adopting a strict scrutiny-type standard); see also Khiem v. United States, 612 A.2d 160, 166 (D.C. 1992) (requiring overriding justification and medical appropriateness); Bee, 744 F.2d at 1395 (doubting government should ever be able to forcibly medicate individual for prosecutorial purposes alone). Given the recognized importance of an individual's right to be free from forced medication, it is imperative that the Court re-visit the issues that were left unaddressed in Riggins.

The opinions of the federal district courts and state courts also reflect a myriad of opinions regarding the standard to be applied in the forcible medication context. The federal district courts have used standards varying from strict scrutiny, to heightened scrutiny, to a hybrid balancing test requiring a compelling government interest. See United States v. Santonio, 2001 WL 670932, *5 (D. Utah May 3, 2001) (applying strict scrutiny approach), United States v. Sanchez-Hurtado, 90 F.Supp.2d 1049, 1055 (S.D. Cal. 1999) (declining to apply strict scrutiny); Woodland v. Angus, 820 F.Supp. 1497, 1505 (D. Utah 1993) (applying balancing test and finding government's interest in prosecuting a second-degree murder charge not compelling enough to overcome right to be free from forcible medication).

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[6] In its Brief to the Eighth Circuit, the government stated that either a strict scrutiny or rational basis test could be applied and noted that "[t]he case law does not supply a clear answer as to which of these standards applies." See Brief of Appellee, page 20.

State court opinions provide an even more divergent view of the Constitutional standard to be applied in these cases. Although several state courts apply a heightened form of scrutiny in determining whether an individual may be forcibly medicated into competence and require that no less intrusive means exist to induce competency, other states only require a minimal showing that the medication will not affect the individual's ability to understand the proceedings against him. See State v. Garcia, 658 A.2d 947, 966-67 (Conn. 1995) (applying balancing test similar to strict scrutiny); Odiaga, 871 P.2d at 805 (using heightened scrutiny); Riggins, 860 P.2d at 705-06 (allowing forcible medication if medically appropriate, necessary to maintain competence and no less intrusive means available); State v. Lover, 707 P.2d 1351, 1353 (Wash. Ct. App. 1985) (requiring compelling state interest and finding such an interest when medication without consent of the pretrial detainee is required to make the individual competent to stand trial); State v. Law, 244 S.E.2d 302, 307 (S.C. 1978) (same); People v. Hardesty, 362 N.W.2d 787, 797 (Mich. Ct. App. 1984) (balancing state's interest in safety and trial continuity with Defendant's interest in presenting probative evidence of insanity through his manner and demeanor on witness stand). At least one state has declared that, under certain conditions, an incompetent individual may waive the right to be tried while competent. State v. Hayes, 389 A.2d 1379, 1381-82 (N.H. 1978) (finding defendant may be forcibly medicated if there are no less intrusive means to maintain competence and holding that defendant may waive his right to be tried while competent if he refuses to take medication).

The lower courts' opinions and the government's briefing in this case highlight the confusion regarding the standard to be applied in forcible medication cases. Contrary

to the express language in Riggins that the majority was not adopting a substantive standard, the Eighth Circuit erroneously concluded that the Riggins Court rejected a strict scrutiny standard of review. See Riggins, 504 U.S. at 136 (stating Court has "no occasion" to adopt a standard of strict scrutiny because of failure of district court to make findings of fact).

After improperly rejecting the strict scrutiny standard adopted by the Sixth Circuit, the District Court below appeared to outline the following test: (1) administration of antipsychotic medication is necessary to serve government's compelling interest in obtaining adjudication; (2) treatment with antipsychotic drugs is medically appropriate; and (3) drugs represent only "hope" of rendering individual competent. See United States v. Sell, No. 4:97CR290-DJS, pg. 17, App. hereto at 45 (E.D. Mo. Apr. 4, 2001) (unpublished decision). In affirming, the Eighth Circuit panel invented a new three-part test in which the government is required to (1) present an essential state interest that outweighs the individual's interest in remaining free from medication; (2) prove that there is no less intrusive way of fulfilling its interest; and (3) prove by clear and convincing evidence that medication is medically appropriate. See Sell, 282 F.3d at 567. The multiple tests applied by the lower courts and apparent confusion about this Court's holding in Riggins result in different treatment of the accused, depending on the jurisdiction in which he happens to be charged. The Court should grant the petition to clarify the applicable standard of scrutiny.

B. The petition should be granted to resolve a split in the lower federal courts and state courts regarding the proper burden of proof.

This Court has not decided the issue of the government's burden of proof when it seeks involuntary medication of a pretrial detainee. Lower court and state court decisions

on this issue require various burdens of proof, and many courts do not discuss the government's burden of proof when addressing forced medication issues. See Gomes, 289 F.3d 71, 88 (failing to discuss burden of proof); Brandon, 158 F.3d at 960-61 (requiring proof by clear and convincing evidence); Garcia, 658 A.2d at 967 (requiring proof by clear and convincing evidence); Kheim, 612 A.2d at 172 (adopting medical judgment standard).

Dr. Sell's case illustrates the confusion in the courts regarding the burden of proof to be applied. While the District Court affirmed the magistrate judge's use of a "substantial and very strong showing" standard, the Eighth Circuit required the government to prove, by clear and convincing evidence, that the medication is appropriate. See App. at 24, 45; Sell, 282 F.3d at 567-68. It is unclear what burden of proof the government is required to meet for the remaining two factors in the Eighth Circuit's three-part test.

This Court has mandated that the government prove its case by clear and convincing evidence when "the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money." Cruzan, 497 U.S. at 282 (citations omitted). Thus, the Court has required proof by clear and convincing evidence in deportation proceedings, Woodby v. INS, 385 U.S. 276 (1966), in denaturalization proceedings, Schnedierman v. United States, 320 U.S. 118 (1943), and in civil commitment proceedings, Addington v. Texas, 441 U.S. 418 (1979). A defendant's Constitutional right of bodily integrity should be granted equal protection with these important rights. The Court should grant the petition to determine whether the government is required to prove its case by clear and convincing evidence.

C. The facts presented do not support medication of Dr. Sell under any standard or burden of proof.

Before injecting a person with antipsychotic drugs, the government must establish, at a minimum, that the medication is necessary and appropriate. See Washington v. Harper, 494 U.S. at 222 n.8. In this case, the government was not even required to inform Dr. Sell or the district court which type of drugs or dosage it planned on injecting into him. Certainly, a showing of medical appropriateness requires that the government provide the Court and the defendant with the name of the antipsychotic drug to be administered, so that the defendant can rebut any assertions made by the government. The standardless drugging of pretrial detainees cannot comport with due process.

III. The Petition Must Be Granted To Resolve The Split Of Authority Regarding Whether The Trial Court Must Consider The Effects The Medication Will Have On Dr. Sell's Trial Rights Before Medication Is Administered.

Trial courts must be required to conduct a Sixth Amendment inquiry regarding the effects of any medication on a detainee's trial rights, prior to ordering that the detainee be involuntarily medicated. See United States v. Weston, 206 F.3d 9, 14 (D.C. Cir. 2000). Under current authority, trial courts in the District of Columbia are required to conduct a premedication review of the effects medication will have on the detainee's Sixth Amendment rights, while trial courts in the Eighth Circuit are not. See id.; Sell, 282 F.3d at 572. This dichotomy in the law results in unequal treatment of individuals entitled to equal treatment under the Constitution.

A criminal defendant's right to present his own defense is guaranteed by the compulsory process clause of the Sixth Amendment and the Fifth Amendment's guarantee that no person in a criminal case can be compelled to be a witness against

himself. See Rock v. Arkansas, 483 U.S. 44 (1987). This right is "one of the rights that are essential to due process of law in a fair adversary process." Id. at 51.

Antipsychotic medication affects the defendant's ability to assist in his defense and, in essence, forces the accused to provide the jury with a coerced confession of his mental state. See Riggins, 504 U.S. at 137, 143 (Kennedy, J., concurring); Rochin, 342 U.S. at 175 (Black, J., concurring) (finding person is compelled to be witness against himself when "incriminating evidence is forcibly taken from him by contrivance of modern science"). In a case where diminished capacity is raised as a defense, the jury must assess their belief about defendant's mental state at the time the crime occurred. "If the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime, substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." Hardesty, 362 N.W.2d at 796 . The accused, sitting in the courtroom drugged and listless, becomes an instrument of his own conviction, with his calm and controlled demeanor rebutting his own case without a single word being uttered.

Further, compulsory medication of a defendant makes it easier for the government to rebut the accused's defense of diminished capacity by suppressing the most persuasive evidence of the individual's demeanor at the time the crime occurred. Due process does not allow the government to suppress "evidence favorable to an accused . . . where the evidence is material to either guilt or punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963).

After antipsychotic drugs are administered, defendant is deprived of the best evidence of his mental state at the time of the alleged crime – his own demeanor in an

unmedicated state. Postmedication review of an individual's Sixth Amendment rights may come too late to prevent impairment of that right. See Weston, 206 F.3d at 14. "[B]oth the defendant, whose right to present a defense may be infringed by involuntary medication, and the government, whose eventual prosecution of the defendant may be foreclosed because of the infringement, are entitled to premedication resolution of the Sixth Amendment issue." Id.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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