

NO. 01-1862EMSL  
*Criminal*

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In The United States Court of Appeals  
For the Eighth Circuit

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**UNITED STATES OF AMERICA,**

*Appellee,*

v.

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

*Appellant, Petitioner*

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**Appeal From the United States District Court  
For The Eastern District of Missouri**

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**Amicus Curiae Brief on Behalf of  
National Association of Criminal Defense Lawyers**

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**Filed in Support of Appellant  
Dr. Charles Thomas Sell, D.D.S.  
Supporting Petition for Rehearing and/or Rehearing en banc**

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**In the United States Court of Appeals  
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**UNITED STATES OF AMERICA,**

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**v.**

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

**Appellant.**

**Crim. No. 01-1862EMSL**

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel of record certifies that the National Association of Criminal Defense Lawyers (NACDL) is an independent nonprofit, national bar association devoted exclusively to the interests of criminal defense lawyers, organized under the laws of the District of Columbia with no parent companies. No publicly held companies own ten percent or more of NACDL.

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**Concise Statement of Identity of Amicus Curiae,  
Interest in the Case, and Source of Authority to File**

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a membership comprised of over 10,500 lawyers including representatives of every state. NACDL was founded over 40 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers. Among NACDL's stated objectives is the promotion of proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of criminal law in its practices and procedures. A cornerstone of this organization's objectives and of the criminal justice system is the fundamental constitutional protection of an accused's right to a fair trial. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee, as would adoption of the position taken by the United States in the instant case. The Amicus Curiae Committee of the NACDL has discussed this case and has decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court. NACDL submits that because a panel of this Court did not conduct a pre-medication Sixth Amendment analysis in this case, it erroneously found that Petitioner's right to a fair trial was not violated.

Accordingly, the NACDL respectfully submits this Amicus Curiae Brief in support of Dr. Sell's Petition for Rehearing and/or Rehearing en banc.

## ARGUMENT

THE PANEL FAILED TO CONDUCT A PRE-MEDICATION SIXTH AMENDMENT ANALYSIS AND THEREFORE DEPRIVED DR. SELL HIS RIGHT TO A FAIR TRIAL.

A panel of this Court held that the United States could administer anti-psychotic drugs to Dr. Sell, a non-violent pretrial detainee, against his will in order to render him competent to stand trial. This Court further found that Dr. Sell's right to a fair trial was not jeopardized and that Dr. Sell could raise any claims regarding any alleged violations of his right to a fair trial after having received the medication. In so holding, this Court has seriously underestimated the effect of its decision and has incorrectly framed the issue as one of "ripeness".

The right to a fair trial is the basis of this country's legal system. Administering involuntary anti-psychotic drugs impinges upon a defendant's right to fair trial by altering his demeanor and by interfering with his ability to assist his attorney in presenting his defense. *Riggins vs. Nevada*, 504 U.S. 127, 142 (1992). These violations are caused from the side effects commonly produced by anti-psychotic medication. *Id.* at 141-42. In this case, both doctors who testified in favor of medicating Dr. Sell admitted that there are harmful and unpleasant side effects associated with using anti-psychotic drugs. Dr. Wolfson testified that these harmful and unpleasant side effects include sedation, neuroleptic malignant syndrome, which is rare but fatal, and tardive dyskinesia and/or dystonic reaction,

which causes a person to have involuntary movements of various parts of the body. (Op. 14).

The purpose of a criminal trial is the fair determination of the guilt or innocence of the defendant. *Rose vs. Clark*, 478 U.S. 570, 577-78 (1986). The administration of anti-psychotic medication will likely prevent Dr. Sell from meaningfully and purposefully participating in his defense and deny him a fair trial.

It has been argued that the medication may actually enhance Dr. Sell's trial rights, allowing him to be more aware of the proceedings against him and permitting him to more effectively consult with his counsel and to assist in his defense. This argument overlooks the fact that while some symptoms of Dr. Sell's mental illness may be alleviated, and thereby render him competent to stand trial, the medication at the same time will cause a number of side effects, and thereby diminish his ability to participate in his trial.

It is hornbook law that in assessing a witnesses' credibility, jurors may base their decision on the manner and demeanor of the witness. In addition, our legal system is one in which the trier of fact observes the defendant throughout the trial, whether he is testifying or sitting at counsel table. *Riggins*, 504 U.S. at 142. The focal point of any criminal trial is the defendant. The defendant will be visually examined by the trier of fact in determining guilt or innocence, whether or not the

defendant takes the stand. F. Lee Bailey and Henry R. Rothblatt, *Successful Techniques for Criminal Trials*. § 8.8 at 230 (2d ed. 1985). A defendant generally cannot be forced to appear before a jury in shackles or a prison uniform because of the resulting prejudice. See *McKaskle v. Wiggins*, 465 U.S. 168 (1984). Compelling a defendant to take psychotropic medication likewise prejudices the defendant and falsifies the jury's impression of the defendant because the defendant may appear emotionally unresponsive, bored, nervous or restless. See *Riggins*, 504 U.S. at 143.

In the District Court Dr. Sell argued that involuntary medication was inappropriate because he intended to interpose a diminished capacity defense to the specific intent crimes for which he was charged. The administration of psychotropic drugs may alleviate Dr. Sell's delusions while at the same time alter the evidence of diminished capacity. See *Riggins*, 504 U.S. at 139. Involuntary medication of Dr. Sell would alleviate the symptoms which most likely would convince a jury of his diminished capacity at the time of the offense. His appearance under medication at the time of trial will make his defense of diminished capacity more unbelievable to a jury. Because Dr. Sell's mental state at the time of the offenses charged will be at issue, a jury's decision will be guided by its observations of Dr. Sell during the trial.

A Panel of this Court based its holding that Dr. Sell's right to a fair trial was not violated because of the District Court's willingness to reexamine Dr. Sell's Sixth Amendment claims after the medication regimen has begun. (Op.18). By that time, however, it may be too late. The Sixth Circuit held in *United States v. Brandon*, that:

The decision to be made here is whether the detainee may be forcibly medicated so as to render him competent to stand trial...This decision will require the court to consider whether the medication will have a prejudicial effect on Brandon's physical appearance at trial, as well as whether it will interfere with his ability to aid in the preparation of his own defense.

158 F.3d 947, 955 (6th Cir. 1998). See also *Lawrence v. State*, 454 S.E. 2d 446, 451 (Ga. 1995). (“We find merit in the argument that a State’s compliance with the requirement in *Riggins* fails to address adequately an accused’s interest in the impact his medicated demeanor may have upon the jury’s evaluation of his sanity.”).

Here, the District Court and this Court failed to analyze and appreciate the effect the medication would have on Dr. Sell's physical appearance as well as whether it would interfere with his ability to receive a fair trial and hold that the administration of the medication would be harmful in both respects.

## **CONCLUSION**

For the foregoing reasons, Amicus Curiae National Association of Criminal Defense Lawyers requests this Court grant a rehearing of this matter.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It is written in a proportionately spaced typeface of 14 points, and has a total of 1,228 words. Pursuant to Eighth Circuit Court Rule 28A(c), I further certify that the word processing software used to prepare the brief was Microsoft Word 2000. I hereby certify that the computer diskette has been scanned for viruses and is virus-free in compliance with Eighth Circuit Rule 28A(d).

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## CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing document and one 3 ½ inch diskette that has been scanned for viruses and is virus free, were sent, by first-class postage prepaid mail, faxed and/or hand delivered on this the 4th day of April, 2002 to the following:

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