

NO. 01-1862EMSL
Criminal

**In The United States Court of Appeals
For The Eighth Circuit**

UNITED STATES OF AMERICA,

Appellee

v.

DR. CHARLES THOMAS SELL, D.D.S

Appellant

**Appeal from the United States District Court
for the Eastern District of Missouri**

Amici Curiae Brief
**Association of American Physicians & Surgeons, Inc. (AAPS)
Eagle Forum Education and Legal Defense Fund (EFELDF)**

**Filed in Support of Appellant
Charles Thomas Sell
In Favor of Rehearing *En Banc***

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

The Association of American Physicians & Surgeons, Inc. (“AAPS”) is a nonprofit organization dedicated to defending ethical medicine. Founded in 1943, AAPS has thousands of physician members in all specialties. Members of AAPS object to the violation of the ethical medicine entailed in the forced drugging of a peaceful prisoner with antipsychotic medication. It is a fundamental principle of medical ethics, and human rights generally, that individuals have the right to decline treatment when they pose no threat to others or themselves. AAPS has a strong interest in protesting the misuse of medicine in violation of this basic principle.

Eagle Forum Education and Legal Defense Fund (“EFELDF”) is a nonprofit organization founded in 1981. For over twenty years it has defended principles of limited government and individual liberty which, at a minimum, preclude the State from forcibly medicating peaceful individuals against their will. EFELDF has a strong interest in restraining government from seizing the power to inject its adversaries with mind-altering drugs.

Amici have a direct and vital interest in the issues presented to this Court based on their representation of physicians and individuals.

Argument

The decision of the panel majority (the “Decision”) is inconsistent with Supreme Court precedents, which limit forced drugging of prisoners to circumstances that are compelling. The Decision holds that merely by alleging fraud, the State may inject mind-altering drugs into a prisoner against his will, based on government testimony. The panel majority even rejected any limits on the type or quantity of the drugs injected, and implicitly allowed drugs that have not been fully tested and approved for the specific purpose. Because the Decision is at odds with Supreme Court holdings, adherence to Rule of Law requires a rehearing *en banc*.

In addition, the Decision relies on a factually erroneous premise – that the State has an interest in punishing Dr. Sell further. He has already spent about 4.5 years in prison (and 1.5 years of it in solitary confinement), which is more than a year *longer* than his severest sentence under the Sentencing Guidelines for the fraud charges underlying the Decision. The State’s interest in subjecting Dr. Sell to a trial can be no greater than its interest in sentencing him. The dissenting opinion recognizes the limit of 41 months on Dr. Sell’s maximum sentence if convicted on the relevant charges, but the Court apparently did not realize that he has already served far more than that period. 2002 U.S. App. LEXIS 3582, *33 - *34 (Bye, J., dissenting). On

this ground alone the order to require medication of Dr. Sell must be reheard and reversed. In addition, the Court erred in thinking the government provided testimony by two psychiatrists; in fact, one of those witnesses (Dr. DeMier) is a psychologist lacking authorization even to prescribe medicine. *Compare* 2002 U.S. App. LEXIS 3582, *5, *with* Medication Hearing Transcript, September 29, 1999, at 20.

More generally, the Decision allows the State to inject defendants with mind-altering drugs, against their will, without demonstrating beyond reasonable doubt the need for such treatment. The Decision effectively allows the government to drug defendants simply by claiming it beneficial to do so, an approach Justice Brandeis expressly warned against: “experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent.” *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). The government may not, through mandatory treatment, manipulate a peaceful citizen’s mind against his will. The Decision regrettably gives the State a new, and unethical, tool for bypassing its burden to prove guilt beyond a reasonable doubt before meting out punishment.

Advances in medical technology made this case inevitable. Over 50 years ago, George Orwell predicted the misuse of mind-control technology

in his famous novel *1984*. The persecutor O'Brien confronts the prisoner with the tool of a hypodermic syringe, and abject inhumanity follows. It is unprecedented in America to authorize a prison doctor to administer, in his sole discretion, any quantity and type of antipsychotic medication over the objections of a peaceful prisoner. Rehearing here is essential.

I. Rehearing *En Banc* is Necessary Because the Decision is Inconsistent with Supreme Court Precedents.

There is “no doubt that ... [an inmate] possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.” *Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *see also Riggins v. Nevada*, 504 U.S. 127, 134 (1992) (“The forcible injection of medication into a nonconsenting person’s body ... represents a substantial interference with that person’s liberty.’ In the case of antipsychotic drugs ... that interference is particularly severe”) (quoting *Harper*, 494 U.S. at 229). This liberty interest may be infringed based only on “a finding that safety considerations or other **compelling** concerns outweighed [defendant’s] interest in freedom from unwanted antipsychotic drugs.” *Riggins*, 504 U.S. at 136 (emphasis added). The Decision concedes that there is no safety consideration that justifies mandatory medication of Dr. Sell, and fails to cite any “compelling

concern” to support the mandatory medication. Under the *Riggins* test, no medication should be ordered.

The Decision imposes the drugging by implicitly lowering the high threshold for forced medication established in *Harper* and *Riggins*. The Decision allows the State to alter defendants’ minds based merely on (1) unproven charges of non-violent crimes and (2) disputed testimony by government-hired witnesses. This unprecedented test eviscerates the Supreme Court requirement of a “compelling concern” with respect to a peaceful defendant presumed by law to be innocent of the charges. The Decision even allows the State to infringe on a defendant’s right to pursue the treatment recommended by his own physician. 2002 U.S. App. LEXIS 3582, *23.

The panel majority does not even once address the term “compelling”. Accordingly, the Decision drastically alters the applicable Supreme Court rule, and thereby allows the State to drug defendants presumed to be innocent without any meaningful showing of governmental need. Only the Supreme Court itself can relax the high standard it established in *Riggins* and *Harper*. See, e.g., *Hohn v. United States*, 524 U.S. 236, 252-253 (1998) (Supreme Court decisions “remain binding precedent until we see fit to

reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.”).

II. The Government Lacks *Any* Interest in Punishing Dr. Sell With Further Imprisonment, the Basis for Drugging Him.

Dr. Sell has already served more than a year *longer* than his most severe sentence under the Sentencing Guidelines on the relevant charges. The dissent noted that Dr. Sell’s maximum imprisonment, even under a very generous view of the government’s relevant charges, is 41 months. 2002 U.S. App. LEXIS 3582, *34 (Bye, J., dissenting) (“his sentencing range would be 33-41 months”). Dr. Sell has already served about 53 months in jail, with about 1.5 years of that in solitary confinement. So even if he were found guilty on the relevant charges, he would be freed immediately from jail. The State lacks any interest in punishing him further on the relevant charges, and therefore lacks any compelling reason to drug him.

In *Riggins*, the State’s interest in drugging the defendant was to try him for the very purpose of inflicting additional punishment: the death penalty. 504 U.S. at 131. The Supreme Court reversed an order of forced drugging with antipsychotic medication, even though the State did have a compelling interest in attempting to impose this punishment. *Id.* at 134-38. Here, the State attempts to inject similar drugs into a defendant on whom it can impose no further punishment, let alone the death penalty. The State’s

purported rationale for drugging Dr. Sell – to try him for a crime entailing no further imprisonment – simply cannot justify this coerced drugging.

III. The State May Not Forcibly Alter the Mind of a Peaceful Citizen.

The Supreme Court has emphatically rejected attempts by the State to engage in mind control, such as mandatory incantation. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)). The *Barnette* Court emphasized the “individual freedom of mind” as the strength of our country, and its “preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.” *Id.* at 637. Forced drugging may tend to promote uniformity, but the *Barnette* Court cautioned against the “uniformity of the graveyard.” *Id.* at 641. Later, the Supreme Court extended that principle to protect against compelled speech in *Wooley v. Maynard*, 430 U.S. 705 (1977). This doctrine applies with even greater force here.

The medical testimony in favor of drugging Dr. Sell is extremely weak. It is based only on two witnesses, a government psychologist and psychiatrist, both of whom had inadequate success rates. While the Decision states that “the government must prove by clear and convincing evidence that the medication is medically appropriate,” the cited evidence is anything

but. 2002 U.S. App. LEXIS 3582, *14. The government made no effort to obtain the testimony of independent, qualified psychiatrists to justify its attempt to drug Dr. Sell. Dr. DeMier, the government psychologist who even lacked authority to prescribe medication, said he had experience with a grand total of only two patients similar to Dr. Sell – and the drugging failed for one of them. *Id.* at *19. Dr. Wolfson’s experience was not much better, amounting to a grand total of only four patients with only a 75% success rate. *Id.* at *20.

Conclusion

Amici respectfully request a rehearing *en banc* in this action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Federal Rule of Civil Procedure 32(a)(7)(B). It has a total of 1,739 words. Pursuant to Eighth Circuit Rule 28A(c), I further certify that the word processing software used to prepare the brief was Microsoft Word 97.

Karen Tripp, Esq.

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 overnight delivery, this 3rd day of April, 2002, to the following attorneys of record:

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