

**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*

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

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

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

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**MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF FOR  
REHEARING EN BANC**

The Association of American Physicians & Surgeons, Inc. (“AAPS”) and the Eagle Forum Education and Legal Defense Fund (“EFELDF”) hereby move, pursuant to Federal Rule of Appellate Procedure 29(e), to file the accompanying *amici curiae* brief for rehearing *en banc*.

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 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.

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. <sup>1</sup>

### **Reasons for Moving for Rehearing *En Banc***

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 stunning breadth of the Decision leaves few, if any, defendants free from the threat of being medicated against their will. The panel majority even rejected any limits on the type or quantity of the drugs injected, and implicitly allows drugs that have not been fully tested and approved for the given 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 maximum sentence under the Sentencing Guidelines for the fraud charges underlying the Decision. The State’s

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<sup>1</sup> *Amici* sought consent by the government for this motion, but it declined.

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. *United States v. Sell*, No. 01-1862, 2002 U.S. App. LEXIS 3582, \*33 - \*34 (8<sup>th</sup> Cir. Mar. 7, 2002) (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 errs in permitting government to exercise mind control over a peaceful prisoner presumed to be innocent, which here amounts to punishment without satisfaction of the applicable burden of proof. 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 of this grave matter is necessary.

For these reasons, discussed in detail below, *Amici* request leave to file the accompanying brief for rehearing *en banc*.

**A. The Decision is Inconsistent with Supreme Court Precedents, and Adherence to Rule of Law Requires Rehearing *En Banc*.**

“Needless to say, only this [Supreme] Court may overrule one of its precedents.” *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S.

533, 535 (1983) (per curiam) (criticizing a Court of Appeals for departing from a Supreme Court precedent). Justices have subsequently emphasized this point further, describing departure from Supreme Court precedent as an “indefensible brand of judicial activism.” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 486 (1989) (Stevens, Brennan, Marshall and Blackmun, JJ., dissenting). Rule of Law should apply even though the precedent may appear to be plainly wrong and a unanimous Supreme Court may subsequently overrule it. *See Khan v. State Oil Co.*, 522 U.S. 3, 20 (1997) (“Court of Appeals was correct in applying th[e] principle despite disagreement with [the precedent], **for it is this Court's prerogative alone to overrule one of its precedents.**”) (emphasis added).

The Supreme Court has emphasized that 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). A court may override this liberty interest 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. Nor does the Decision cite any “compelling concern” to support the mandatory medication. Therefore, under the *Riggins* test, no medication should be ordered.

The Decision imposes the drugging by effectively 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. In addition, the Decision 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” in its entire opinion. 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.”); *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

The dissent to the panel majority was exactly right in urging this Circuit to remain consistent with the Supreme Court and another Circuit which addressed the same issue:

The Sixth Circuit stated ‘we find it difficult to imagine . . . that the government’s interest in prosecuting the charge of sending a threatening letter through the mail could be considered a compelling justification to forcibly medicate Brandon.’ [ *United States v. Brandon*, 158 F.3d 947, 961 (6<sup>th</sup> Cir. 1998)]; cf. *Bee v. Greaves*, 744 F.2d 1387, 1395 (10<sup>th</sup> Cir. 1984) (questioning whether the state’s interest in trying suspects could ever outweigh a criminal defendant's interest in avoiding forcible medication with antipsychotic drugs).

2002 U.S. App. LEXIS 3582, \*31 - \*32 (Bye, J., dissenting). The maximum penalty for Dr. Sell on the relevant charges going forward is actually zero years imprisonment, as discussed in Part II below, making this case far less suitable for drugging than even *Brandon*. Nor is Dr. Sell remotely comparable to the defendant in *United States v. Weston*, 255 F.3d 873 (D.C.

2001), for whom “the government’s interest ... reaches its zenith when the crime is the murder of federal police officers in a place crowded with bystanders where a branch of government conducts its business.” *Id.* at 881.

The panel majority relies on pure dictum in *Riggins*, commenting that “the state might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins’ guilt or innocence by using less intrusive means.” 2002 U.S. App. LEXIS 3582, \*13 (quoting *Riggins*, 504 U.S. at 135). But that comment was based only on the compelling need to punish defendant Riggins, who was condemned to death for “stabbing [another] 32 times with a knife ... [and then taking] cash, drugs, and other items from [the victim’s] home.” 504 U.S. at 146 (Thomas, J., dissenting). That dictum is hardly applicable to defendant Dr. Sell, whom the panel majority orders to be drugged based on a mere dispute over billings under the Medicaid program.

The Decision, in essence, allows the State to circumvent its heavy burden of proof and implement widespread pretrial drugging without a showing of guilt. Dr. Sell, upon reading AAPS’s *amicus curiae* brief filed before the panel, sent this unsolicited note to its counsel demonstrating both his cogency and the widespread fear of forced drugging among detainees:

Thank you very much for the excellent amicus curiae brief that you filed in support of me on behalf of the Association of American

Physicians and Surgeons to the US 8<sup>th</sup> Circuit Court of Appeals. I just yesterday received a copy of the brief, and the other inmates that have read it so far are raving about it. You have given us prisoners here at Springfield new hope in our efforts against the terrible practice of forced medication. Also I would like to assure you that I am not the despicable monster the government portrays me.

Thank you for your time and consideration in this matter.

(Handwritten copy attached.)

Dr. Sell, a practicing dentist before he was charged with Medicaid fraud, plainly is not so deranged that he needs mind-altering drugs over his objections. Tragically, the drugging here looks like a form of punishment -- exactly what several Supreme Court Justices warned against in *Harper*:

Forced administration of antipsychotic medication may not be used as a form of punishment. This conclusion follows inexorably from our holding in *Vitek v. Jones*, 445 U.S. 480 (1980), that the Constitution provides a convicted felon the protection of due process against an involuntary transfer from the prison population to a mental hospital for psychiatric treatment.

494 U.S. at 242 (Stevens, Brennan, Marshall, JJ ., concurring and dissenting in part).

The Decision departs further from Supreme Court precedents by putting unlimited power in the hands of the prison psychiatrist to inject any quantity or type of drugs into Dr. Sell. In *Riggins*, the Court reversed the drugging of the defendant, while noting that “Riggins received a very high dose of the drug.” 504 U.S. at 133; *see also id.* at 143 (Kennedy, J., concurring) (noting expert testimony that “the dose he had been taking,

which is very, very high [and] I mean you can tranquilize an elephant with” such dose). The Court held that defense counsel had not objected to the dose in a timely manner, implying that such an objection would have been proper. 504 U.S. at 133 (holding that “at no point did [defense counsel] suggest to the Nevada courts that administration of Mellaril was medically improper treatment for his client”). Yet the Decision deprives Dr. Sell of his right to object to the dosage or the type of drug to be administered, instead giving the prison psychiatrist *carte blanche* to inject him with whatever he chooses.

**B. The Government Lacks *Any* Interest in Drugging Dr. Sell for Trial, Now that He Has Served More than His Maximum Sentence.**

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 provide a legitimate basis for this forced drugging.

The panel majority emphasizes the government's tale about an unfortunate incident for which charges were never filed. The episode, in which Dr. Sell ultimately spat in the face of a magistrate, was regrettable but is not accurately described in the government's brief or in the Decision. As reflected by Dr. Sell's comments on an investigatory wiretap, he was struck on the head and repeatedly provoked while being led, handcuffed, to a holding cell. In a highly agitated state, and contrary to ordinary procedure, Dr. Sell was then met face-to-face by the magistrate, without the presence of

his attorney as he had been repeatedly requesting. Dr. Sell has the right to defend against charges concerning the incident, rather than have it used as a surrogate for punishment by drugging here. But no charges have been filed, and thus it should not have been a basis for the Decision.

**C. The State May Not Manipulate a Peaceful Citizen's Mind Against His Will.**

In the classic novel *1984*, George Orwell's hero is an Englishman named Winston Smith who faces a government attempt to root out his mental independence and spiritual dignity:

O'Brien was standing at his side, looking down at him intently. At the other side of him stood a man in a white coat, holding a hypodermic syringe. ... Did I not tell you just now that we are different from the persecutors of the past? We are not content with negative obedience, nor even with the most abject submission. When finally you surrender to us, it must be of your own free will. We do not destroy the heretic because he resists us; so long as he resists us we never destroy him. We convert him, we capture his inner mind, we reshape him. We burn all evil and all illusion out of him; we bring him over to our side, not in appearance, but genuinely, heart and soul. We make him one of ourselves before we kill him. It is intolerable to us that an erroneous thought should exist anywhere in the world, however secret and powerless it may be.

George Orwell, *1984* at 243, 258 (Harcourt, Brace & World: 1949). Here, the government claims that Dr. Sell is delusional about it being out to get him. As in *1984*, it seeks to drug Dr. Sell in order to change his allegedly delusional hostility toward the government.

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, “in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.” 319 U.S. at 637. Forced drugging may 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 is even more compelling with respect to injecting mind-altering drugs in defendants presumed to be innocent.

The Decision’s permissiveness towards legal, but possibly untested, treatments for Dr. Sell without his consent is particularly troubling. The failure of American courts to enforce the Nuremberg Code, which expressly prohibits the use of untested drugs without informed consent, is tragically continued here. The Supreme Court of Maryland recently deplored this unfortunate chapter of American jurisprudence: “[O]ur own use of prisoners, the institutionalized retarded, and the mentally ill to test malaria treatments during World War II was generally hailed as positive, making the

war ‘everyone’s war.’ Likewise, in the late 1940’s and early 1950’s, the testing of new polio vaccines on institutionalized mentally retarded children was considered appropriate. Utilitarianism was the ethic of the day.’” *Grimes v. Kennedy Krieger Inst., Inc.*, 366 Md. 29, 77, 782 A.2d 807, 836 (2001) (quoting Dr. George J. Annas, *Mengel’s Birthmark: The Nuremberg Code in United States Courts*, 7 *Journal of Contemporary Health Law & Policy* 17, 24 (Spring 1991)).

The Supreme Court of Montana also recently rejected this utilitarian approach to forced medical treatment. *See In re Mental Health of K.G.F.*, 306 Mont. 1, 29 P.3d 485 (2001). The Court held that counsel would be presumed to be ineffective if he acquiesces in involuntary commitment for a mental disorder. The Court held that:

Nevertheless, our concept of due process regarding state action involuntarily imposed on individuals with mental disorders has surely progressed since the U.S. Supreme Court's decision in *Buck v. Bell*. In that case, Justice Holmes described a ‘feeble-minded white woman,’ who was the daughter of a ‘feeble-minded mother’ and the mother of an ‘illegitimate feeble-minded child.’ The Court declared that the woman, who was committed to the ‘State Colony for Epileptics and Feeble Minded,’ could be involuntarily sterilized in the ‘best interest of the patients and of society’ because: ‘It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough.’

306 Mont. at 13-14, 29 P.3d at 496 (quoting *Buck v. Bell*, 274 U.S. 200, 205-07 (1927)). See also *In re W.*, 637 P.2d 366, 368-69 (Colo. 1981) (agreeing with scholars who “have concluded that compulsory sterilization laws, no matter what their rationale, are unconstitutional in the absence of evidence that compulsory sterilization is the only remedy available to further a compelling governmental interest”) (citing, *inter alia*, Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977)).

Demonstrating the enormous potential for abuse of power, historians later discovered that neither the subject of the *Buck v. Bell* mandatory sterilization, Carrie Buck, nor her daughter, was mentally defective by today’s standards. The daughter, in fact, was reportedly “very bright” and was listed on her school’s honor roll. Albert W. Alschuler, *Law Without Values: The Life, Work, Legacy of Justice Holmes* 65 (Univ. Chicago: 2000) (quoting Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 Colum. L. Rev. 1418, 1458 (1981)). There, as here, the factual claims were based on testimony by a government witness. And despite assurances of protections against abusive sterilizations, Carrie Buck’s sister was subsequently sterilized without her knowledge, under the ruse that she was having an appendectomy. Alschuler, *supra*, at 66 (citing Sheldon M.

Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 478 n. 65 (Little, Brown: 1989)). University of Chicago Law School Professor Alschuler observes that the *Buck v. Bell* decision imposing treatment without patient consent “merits its reputation for brutality.” *Id.*

The same inhumane utilitarianism underlies the Decision here. The testimony by Dr. Wolfson suggests eagerness to use novel drugs on Dr. Sell, without his consent:

Q: Now, let me ask you this, what medications would you propose for Dr. Sell if you were to treat him?

A: ... There is another [drug] that they are hoping to have in a few months, that on paper looks very promising as well called Ziprazodone, Z-I-P-R-A-Z-O-D-O-N-E. As usual, there’s experiment in Europe well before [its] introduction here. So that can be considered [too], if [it] shows up in time ....

Medication Hearing Transcript, September 29, 1999, at 90.

The testimony that a new drug would be used on prisoner Sell “if [it] shows up in time” is disconcerting. *Id.* The Court neither required general FDA approval for the drugs to be used by Dr. Wolfson, nor authorization for their specific use. Drugs approved for one use by the FDA can be legally prescribed for unapproved and untested, “off-label” use. *See, e.g., “Off-*

*Label” and Investigational Use of Marketed Drugs, Biologics, and Medical Devices*, FDA Guidance for Institutional Review Boards and Clinical Investigators (1998).<sup>2</sup> But such “off-label” use is based on patient consent, which is lacking here. The Decision authorizes the prison medical staff to drug Dr. Sell with “off-label”, experimental uses, without the patient’s consent.

Finally, it is worth observing that the medical testimony in favor of drugging Dr. Sell here 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.

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<sup>2</sup> Available online at <http://www.fda.gov/oc/ohrt/irbs/offlabel.html> (viewed 4/2/02).

The Decision defers to the district court, under the clearly erroneous standard, to allow this abysmal track record. But this evidence falls far short of the “clear and convincing” standard that the Decision itself recites. 2002 U.S. App. LEXIS 3582, \*14. It is clear that the injection of mind-altering drugs into Dr. Sell will, indeed, alter his mind. But it is quite doubtful whether this change will be for the better, and even the government expert conceded the substantial probability of “significant side effects.” *Id.* at \*19 (quoting Dr. DeMier’s testimony). The State has not justified its attempt to alter Dr. Sell’s mind against his will.

### **Conclusion**

For the reasons stated herein, *Amici* request leave to file the accompanying brief in support of rehearing *en banc*.

Respectfully submitted,

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

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