No. 02-5664

IN THE

Supreme Court of the United States

Dr. Charles Thomas Sell, D.D.S.
Petitioner,

v.

United States of America,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR COGNITIVE LIBERTY & ETHICS IN SUPPORT OF THE PETITION

RICHARD GLEN BOIRE
(*Counsel of Record)*
Center for Cognitive
Liberty & Ethics
Court & Cedar Building
231 G. Street, Suite 7
Davis, CA 95616
(530) 750-7912

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Page

Cited Authorities

Page

Statutes:

Constitutional Provisions:

International Authorities:

Page

Other Authorities:

Miscellaneous:

Cited Authorities

Page

Cited Authorities

Page

Cited Authorities

Page

Page

I.
INTEREST OF AMICUS CURIAE

With the written consent of the parties reflected in letters lodged with the Clerk, undersigned counsel for the Center for Cognitive Liberty & Ethics (CCLE), submits this brief as *amicus curiae* in support of petitioner pursuant to Rule 37 of the Rules of Court.[1]

The CCLE is a nonprofit education, law, and policy center working in the public interest to foster cognitive liberty—the right of each individual to think independently, to use the full spectrum of his or her mind, and to have autonomy over his or her own brain chemistry. The CCLE encourages social policies that respect and protect the full potential and dignity of the human intellect. The CCLE was an *amicus curiae* party to this case, in support of petitioner Dr. Sell at the petition stage, and before the Eighth Circuit when Petition for Rehearing/Rehearing en banc was filed in this case.

As an organization charged with defending freedom of thought, the CCLE has a vital interest in this case because the forcible injection of a citizen with a mind-altering drug directly infringes on cognitive liberty and mental autonomy.

The CCLE is deeply concerned that the decision below seriously compromises the core of the freedoms guaranteed by the First Amendment and, if permitted to stand, will undermine the fundamental right of all citizens to have autonomy over their own minds and mental processes.

In particular, the CCLE seeks to assist the Court by demonstrating that the right at stake in this case is a fundamental First Amendment right; the infringement of

[1] No counsel for a party authored this brief in whole or part, and no person or entity other than the *amicus curiae,* its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

which must withstand strict scrutiny. The CCLE seeks to show that more is at issue in this case than what courts have commonly termed "bodily integrity." At stake is a fundamental right: the right to freedom of thought.

SUMMARY OF ARGUMENT

The CCLE submits that the court of appeals mischaracterized the fundamental right at issue in this case, and as a result, erred by applying an inappropriately low standard of review.

The fundamental right to control one's own intellect and mental processes is protected by the First Amendment, and is eviscerated if courts permit the government to forcibly drug citizens. If government agents, with the concurrence of the courts, can constitutionally order the forcible manipulation of Dr. Sell's mind in order that he may stand trial, then any accused defendant, who poses no danger to self or others, is also at jeopardy of losing his or her First Amendment right to freedom of thought. This is particularly true in light of ongoing pharmacological and technological developments, which provide unprecedented tools for forcibly altering the inner workings of the mind.

To clarify, the CCLE does not propose that the state cannot regulate the *behavior* of individuals, including the acts of individuals who are incoherent or who spit on or otherwise assault judges. We maintain that the state cannot, consistent with the First Amendment of the Constitution, forcibly manipulate the *thought processes* of individuals who do not pose a clear and present danger to others. The government may, of course, use words and other expression to advocate and persuade with the intent to alter thoughts, but the First Amendment must be read to strictly forbid the government from directly and forcibly manipulating a person's brain with the intent of changing what, or how, the person thinks.

ARGUMENT

I.

FORCIBLY ADMINISTERING MIND-ALTERING DRUGS TO A NONDANGEROUS PRETRIAL DETAINEE, SOLELY TO RENDER HIM COMPETENT TO STAND TRIAL FOR NONVIOLENT OFFENSES, IS UNCONSTITUTIONAL

In a 2-1 ruling issued on March 7, 2002, the United States Court of Appeals for the Eighth Circuit upheld a District Court order allowing the government to forcibly medicate Dr. Charles Thomas Sell with antipsychotic drugs for the sole purpose of making him competent to stand trial for a nonviolent crime. While the Eighth Circuit acknowledged that Dr. Sell has a "significant liberty interest in refusing anti-psychotic medication" *United States v. Sell*, 282 F.3d 560, 568 (2002), the court grossly undervalued the individual interest at stake in this case. The right to freedom of thought is far more than "significant;" it is situated at the very core of what it means to be a free person in a civilized society, and is a fundamental right protected by the First Amendment.

A. The First Amendment Guarantees Freedom of Thought

The First Amendment, which Professor Tribe terms "the Constitution's most majestic guarantee,"[2] provides:

> 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 the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. AMEND. I.

[2] Laurence Tribe, AMERICAN CONSTITUTIONAL LAW, § 12-1, 785 (2nd ed. 1988).

While "[t]he First Amendment literally forbids the abridgment only of 'speech,'" this Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson,* 491 U.S. 397, 404 (1989); *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("[W]e have long eschewed any 'narrow, literal conception' of the [First] Amendment's terms, …for the Framers were concerned with broad principles….").

This Court has repeatedly observed that there are derivative and corollary rights that are essential to effectuate the purposes of the First Amendment, or which are inherent in the rights expressly enumerated in the Amendment. For example, in *Lamont v. Postmaster Gen*., 381 U.S. 301, 308 (1965), Justice Brennan, in his concurring opinion explained:

> It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful.

Likewise, in *Globe* this Court observed that "[t]he First Amendment is…broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe,* 457 U.S. at 604. Thus, in 1982, this Court recognized a "right to receive information and ideas," locating the right as "an inherent corollary of the right of free speech and press" guaranteed by the First Amendment. *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion).

Freedom of thought, while not expressly guaranteed by the First Amendment, is one of those fundamental rights necessary to make the express guarantees meaningful. As Justice Benjamin Cardozo extolled, "freedom of thought…is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive

recognition of that truth can be traced in our history, political and legal." *Palko v. Connecticut,* 302 U.S. 319, 326-27 (1937).

As this Court noted as recently as 2002, "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coalition* 533 U.S. 234 (2002). "The guarantee of free expression," notes Professor Tribe, "is inextricably linked to the protection and preservation of open and unfettered mental activity… ." L. Tribe, *supra,* § 15-7, at 1322 (2nd ed. 1988).[3]

Repeatedly, this Court has recognized that freedom of thought is one of the most elementary and important rights inherent in the First Amendment.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court, in an 8-1 decision, invalidated a school requirement that compelled a flag salute on the ground that it was an unconstitutional invasion of "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from official control." *Id*. at 642. The First Amendment, declared this Court, gives a constitutional preference for "individual freedom of mind" over "officially disciplined uniformity for which history indicates a disappointing and disastrous end."

---

[3] Professor Emerson makes the same point. Situating freedom of thought as the foundation of the First Amendment, he explains:

> Forming or holding a belief occurs prior to expression. But it is the first stage in the processes of expression, and it tends to progress into expression. Hence safeguarding the right to form and hold beliefs is essential in maintaining a system of freedom of expression. Freedom of belief, therefore, must be held included within the protection of the First Amendment. Thomas Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 21-22 (1970).

Id. at 637. At the center of our American freedom, is the "freedom to be intellectually and spiritually diverse." *Id*. at 641. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds," this Court explained, "only at the price of occasional eccentricity and abnormal attitudes." *Id*. at 641-42.

This principle, that freedom of thought is central to the First Amendment and protected thereby, has guided other important decisions of this Court. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court invalidated a New Hampshire statute that required all noncommercial vehicle license plates to bear the state motto "Live Free or Die," finding the requirement inconsistent with "the right of freedom of thought protected by the First Amendment." *Id*. at 714.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court struck down a Georgia law that banned the private possession of obscene material, finding the law "wholly inconsistent with the philosophy of the First Amendment." *Id*. at 565-66. "Our whole constitutional heritage," explained this Court, "rebels at the thought of giving government the power to control men's minds." *Id*. at 565.

Justice Harlan, concurring in *United States v. Reidel*, 402 U.S. 351 (1971), characterized the Constitutional right protected in *Stanley* as "the First Amendment right of the individual to be free from governmental programs of thought control, however such programs might be justified in terms of permissible state objectives," and as the "freedom from governmental manipulation of the content of a man's mind…." *Id*. at 359 (Harlan J., concurring).

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court invalidated a statute forcing public school teachers to contribute money to a union that advanced partisan political views. This Court characterized the case as one concerning "freedom of belief" and emphasized "freedom of belief is no incidental or secondary aspect of the First Amendment's protections… [A]t the heart of the First

Amendment," noted this Court, "is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id*. at 234-35.

B. The Government's Forcible and Direct Manipulation of a Person's Mental Processes Violates the First Amendment

The government is seeking to directly modify Dr. Sell's thoughts and thought processes by forcibly administering antipsychotic drugs designed to manipulate the chemistry of his brain and thereby change the way he thinks. The forcible administration of antipsychotic medication is not an effort to control Dr. Sell's behavior, with merely an incidental effect on his thinking. It is an effort aimed *directly* at changing his *mind* and *mental processes* by forcibly manipulating his brain chemistry. As such, this Court should recognize it as a serious affront to the First Amendment's protection of freedom of thought.

1. This Court's Rulings in *Harper* and *Riggins* Did Not Address A First Amendment Claim

In 1990, and again in 1992, this Court reviewed decisions in which defendants were medicated with psychiatric drugs against their will. However, in neither of those cases did the defendant raise a First Amendment freedom of thought claim.

In *Washington v. Harper* 494 U.S. 210 (1990), this Court (6-3) held that a state prisoner's "significant liberty interest" in refusing unwanted psychiatric drug treatment was constitutionally protected, but was outweighed by the state's interest in prison security. *Harper*, 494 U.S. at 221, 236. Harper was a post-conviction prisoner forced to take antipsychotic drugs on order of the prison psychiatrist. *Id* at 213-18. This Court acknowledged that "[t]he forcible injection of medication into a nonconsenting person's body

represents a substantial interference with that person's liberty." *Id*. at 229. This Court held, however, that when an inmate is dangerous to others and the treatment is in his best interest, the Due Process Clause permits the state to treat the inmate with antipsychotic drugs against his will. *Id*. at 227.

Harper is distinct from the instant case in two important ways. First, Harper was a post-conviction prison inmate, whereas Dr. Sell is a pretrial detainee. Harper's status as a prisoner, led this Court to apply the deferential "standard of reasonableness," which this Court has traditionally employed to decide constitutional claims in prisons. *Id*. At 223-24.[4] Second, unlike Dr. Sell, Harper was found to present "a danger to others," an important fact underscored by this Court:

> [w]here an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness. *Id.* 494 U.S. at 225-26.

In *Harper*, this Court did not examine the possible First Amendment implications of forced psychiatric drug treatment. *Id*. at 258, n. 32 (Stevens J., concurring in part and dissenting in part). Additionally, because the case involved a dangerous post-conviction prisoner, rather than a nondangerous pretrial detainee deemed incompetent to stand trial, *Harper* provides background, but little guidance, for evaluating the claim in the instant case.

In *Riggins v. Nevada,* 504 U.S. 127 (1992), this Court suggested that *Harper* was to be read narrowly, noting that *Harper* turned on "the unique circumstances of penal confinement." *Id*. at 134-135. Riggins sought to raise an

---

[4] "[P]rison regulations…are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987).

insanity defense to murder charges. During his trial he was medicated against his will with the antipsychotic drug Mellaril® (thioridazine HCl). His defense failed and he appealed his death sentence on the ground that the forced drugging violated his right to due process by manipulating his demeanor during trial and by hindering his ability to communicate with his attorney. In a 7-2 ruling, this Court reversed Riggins' conviction, finding that the trial court erred by failing to acknowledge Riggins' liberty interest in resisting the drugs, and by failing to examine whether any less intrusive alternatives to forced drugging existed. *Id*. at 133-37.

While both *Harper* and *Riggins* declared that a person has a "significant liberty interest" in resisting unwanted administration of antipsychotic drugs, neither case discussed: 1) the nature of that liberty interest; 2) whether it is a "fundamental" interest deserving of strict scrutiny; or 3) whether it could be overcome simply on a finding that the defendant was incompetent to stand trial. Most specifically, in neither case was a First Amendment freedom of thought claim presented or evaluated. As discussed in the following section, First Amendment principles are at the nexus of this case, and are clearly implicated when the state forcibly administers drugs intended and designed to alter the way a person thinks.

2. The First Amendment Right to Freedom of Thought Is Violated when the Government Forcibly Subjects a Person to Drugs or Other Technology for the Purpose of Directly Altering the Person's Thought Processes

a) Antipsychotic Drugs Manipulate the Brain With the Intent and Effect of Manipulating Thought

In the instant case, the Eighth Circuit has held that the state may forcibly inject a nondangerous citizen with mind-altering antipsychotic drugs for the sole purpose of making him competent to stand trial on fraud charges. *United States*

v. Sell, 282 F.3d 560 (2002). The Eighth Circuit's decision goes far beyond *Harper* or *Riggins*, or any other holding of this Court, concerning the power of the state to directly intrude into the innermost workings of a person's mind. The sweeping breadth of the Eighth Circuit's decision places freedom of thought in jeopardy, threatening the very foundation of the First Amendment as well as basic notions of individual freedom upon which this country was founded.

Sixty years ago this Court opined "[f]reedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind." *Jones v. Opelika*, 316 U.S. 584, 618 (1942). Since the advent of powerful antipsychotic drugs in the 1950s (as well as other technologies discussed in Section C2, *infra*), the government now *does have* the capability to "control the inward workings of the mind." The critical question, which the instant case frames for this Court, is whether or not the Constitution grants the government the power to alter a person's thinking processes against his or her will solely in an effort to render that person competent to stand trial. Here, the state seeks to forcibly change the way Dr. Sell *thinks*, by directly manipulating his brain chemistry.[5] Antipsychotic drugs, this

[5] The order granting the petition in this case limited the issue to whether petitioner's rights under the First, Fifth, and Sixth Amendments are violated by allowing the government to administer antipsychotic drugs to him against his will in order to make him competent to stand trial for nonviolent offenses. While the CCLE's brief is limited to articulating the First Amendment right to freedom of thought, the CCLE observes that government authorized forced drugging of a person with mind-altering drugs implicates other constitutional guarantees (federal and state) including the right to privacy, the rights guaranteed by the Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments, as well as International resolutions, laws, and treaties such as the UNIVERSAL DECLARATION OF HUMAN RIGHTS, adopted by the United Nations General Assembly. *See, e.g.,* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L.

Court has noted, are "mind altering," and "[t]heir effectiveness resides in their capacity to achieve such effects." *Mills v. Rogers*, 457 U.S. 291, 293 n.1 (1982). These drugs "alter the chemical balance in a patient's brain, leading to changes…in his or her cognitive processes." *Harper*, 494 U.S. at 229.[6]

REV. 389 (1977); Michael Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A. L. REV. 1249, 1250-51 (1987); Bruce Winnick, *The Right to Refuse Mental Health Treatment*, AM. PSYCHOL. ASS'N, WASH., D.C. (1997); G.A. Res. 217, U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948); *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, G.A. Res. 119, U.N. GAOR, 46th Sess., Supp. No. 49, Annex, at 188-92, U.N.Doc. A/46/49 (1991).

> It is obligatory that Helsinki signatory states not manipulate the minds of their citizens; that they not step between a man and his conscience or his God; and that they not prevent his thoughts from finding expression through peaceful action. *Hearings on Abuse of Psychiatry in the Soviet Union before the Subcomm. on Human Rights and Int'l Orgs. of the House Comm. on Foreign Affairs*, 98th Cong., 106 (1983) (remarks by Max Kampelman, Chair of the U.S. Delegation, to the Plenary Session of the Comm. on Security and Cooperation in Europe), quoted in *Harper,* 494 U.S. at 238, n3 (Stevens, J., dissenting).

[6] For many people, antipsychotic drugs may provide life-enhancing benefits. For others, the physical and mental side effects of the drugs may be unacceptable, even dangerous. *See, e.g., Harper,* 494 U.S. at 229 ("While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects"). The *medical efficacy* of anti-psychotic drugs, however, is *not* the issue in this case. Even in the absence of physical and mental "side effects," the fact remains that antipsychotic drugs strongly affect thought processes. The First Amendment should be read to allocate to the individual, as opposed to the government, the final say about whether to

Given that alteration of thinking is both the design and effect of antipsychotic drugs, permitting the government to *force* a citizen to take such drugs outside of the narrow context of *Harper*, cannot be squared with the supremely fundamental nature of the right to freedom of thought.

By forcing a person to take a mind-altering drug against his or her will, the government is commandeering that person's mind, and forcibly changing his or her very ability to formulate particular thoughts. *In re guardianship of Roe,* 421 N.E.2d 40, 52-3 (1981), ("the impact of the chemicals upon the brain is sufficient to undermine the foundations of personality.") By directly manipulating the manner in which a person's brain processes information and formulates ideas, the government *ipso facto* manipulates and alters both the form and content of that person's subsequent expression and thereby completely undermines the First Amendment's free speech guarantee.

Thus, a government action that directly and intentionally alters the way a person thinks by forcibly modifying that person's brain, directly violates the First Amendment right to freedom of thought. By manipulating the way that Dr. Sell thinks, through the forcible act of administering mind-altering drugs to him, the state commits a type of *cognitive* censorship—suppressing Dr. Sell's own thoughts in favor of state-approved, drug-induced, "normal," "acceptable," or "competent" thoughts.[7] Such state action is surely no less disfavored under the First Amendment than the censorship of speech.[8] A government that is permitted to

---

manipulate his or her own brain for the purpose of occasioning or suppressing thoughts.

[7] It should be noted that antipsychotic drugs do not cure mental illness; rather they suppress the symptoms of the illness. *See* Gerald Davison & John Neale, ABNORMAL PSYCHOLOGY 305 (8th ed. 2001).

[8] Professor Shapiro has outlined the core logic of this proposition as follows:

manipulate a citizen's consciousness at its very roots does not need to censor speech, because it can prevent the ideas from ever occurring in the mind of the speaker.[9] Chemical or technological manipulation of the brain, therefore, has the potential to become the ultimate prior restraint on speech.[10]

If "at the heart of the First Amendment is the notion that…in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State" (*Abood,* 431 U.S. at 234-235), then there can be no doubt that the government infringes on the First Amendment when

---

(1) The First Amendment protects communication of virtually all kinds, whether in written, verbal, pictorial, or any symbolic form, and whether cognitive or emotive in nature.

(2) Communication entails the transmission and reception of whatever is communicated.

(3) Transmission and reception necessarily involves mentation on the part of both the person transmitting and the person receiving.

(4) It is in fact impossible to distinguish in advance mentation that will be involved in or necessary to transmission and reception from mentation that will not.

(5) If communication is to be protected, *all* mentation (regardless of its potential involvement in transmission or reception) must therefore be protected. Michael Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237, 256 (1974).

[9] "If they can get you asking the wrong questions, they don't have to worry about the answers." Thomas Pynchon, GRAVITY'S RAINBOW 293 (Bantam Books 1974).

[10] "Any prior restraint on expression comes to…[the] Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

outside the narrow context of *Harper* it acts to alter what, or how, a person thinks by forcibly and directly manipulating a person's brain.

b) Federal Courts Have Recognized a First Amendment Violation When the Government Forces a Person to Take Mind-Altering Drugs

Federal courts have recognized the First Amendment freedom of thought implications of government-ordered forced drugging with psychiatric drugs.

In *Mackey v. Procunier*, 477 F.2d 877 (9th Cir. 1973) a prisoner complained that he was being forced to take the drug succinylcholine, which he characterized as a "breath-stopping and paralyzing 'fright drug,'" (*id*. at 877) used at the time in aversive therapy. The Ninth Circuit reversed and remanded the case for a hearing on the prisoner's allegations, noting that "[p]roof of such matters could, in our judgment, raise serious constitutional questions respecting…impermissible tinkering with the mental processes." *Id*. at 878**.**

In *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984), the Tenth Circuit found that the First Amendment is implicated when the government forcibly administers antipsychotic drugs to pretrial detainees. In *Bee*, a pretrial detainee brought suit after employees of the Salt Lake City Jail forcibly injected him with the antipsychotic drug thorazine.

Quoting this Court, the Tenth Circuit in *Bee* recognized that "liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action,"[11] and reasoned that "[i]f incarcerated individuals retain a liberty interest in freedom from *bodily* restraints…then a fortiori they have a liberty

[11] *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982), (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18, (1979) (Powell, J., concurring in part and dissenting in part)).

interest in freedom from physical and mental restraint of the kind potentially imposed by antipsychotic drugs." *Bee,* 744 F.2d at 1393 (emph. in orig).

Most specifically, the Tenth Circuit found that the First Amendment is implicated when the government forcibly administers antipsychotic drugs to a person, explaining:

> The First Amendment protects the communication of ideas, which itself implies protection of the capacity to produce ideas. [Citations omitted] Antipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate. *Id.* at 1393-94.

Continuing, the Tenth Circuit in *Bee* observed:

> "In a society whose 'whole constitutional heritage rebels at the thought of giving government the power to control men's minds,' the governing institutions, and especially the courts, must not only reject direct attempts to exercise forbidden domination over mental processes; they must strictly examine as well oblique intrusions likely to produce, or designed to produce, the same result." L. Tribe, [*supra*] at 899 (1978) (quoting *Stanley,* [*supra*] 394 U.S. 557, 565…). *Bee,* 744 F.2d at 1394.

The Tenth Circuit's reasoning in *Bee* was followed by the Sixth Circuit in a case involving a pretrial detainee whom the government sought to forcibly drug in an effort to make him competent to stand trial. In *United States v. Brandon*, 158 F.3d 947 (6th Cir. 1998) the Sixth Circuit agreed with the *Bee* court that a pretrial detainee has, among other interests, "a First Amendment interest in avoiding forced medication, which may interfere with his ability to communicate ideas." *Brandon,* 158 F.3d at 953.

C. The Fundamental Right to Freedom of Thought Must Be Jealously Guarded By A Clear Bright-Line Rule

In light of the importance that this Court and federal

courts have placed upon the constitutional right of an individual to freedom of thought and integrity over his or her thought processes, it is imperative that this Court strictly circumscribe, and make unequivocally clear, the limits on the government's power to forcibly and directly alter the thoughts of citizens. The absence of such an unambiguous bright-line rule at the jurisprudential crossroads of psychiatry and technology, exposes the very foundation of the First Amendment to erosion, and grants "government the power to control men's minds." *Stanley,* 394 U.S. at 565.

1. Abuse and Misapplication of Mental Diagnosis Threatens to Undermine Freedom of Thought In the Absence of an Unequivocal and Narrow Rule

The former Soviet Union had a First Amendment equivalent, but it was merely an unenforced "paper" right. It was not uncommon for Soviet psychiatrists to forcibly drug political dissidents after labeling them "mentally ill." *See* Sidney Bloch & Peter Reddaway, PSYCHIATRIC TERROR: HOW SOVIET PSYCHIATRY IS USED TO SUPPRESS DISSENT (1977); *See also* James F. Clarity, *A Freed Dissident Says Soviet Doctors Sought to Break His Political Beliefs*, N. Y. TIMES, Feb. 4, 1976, at A1, 8. Similar political misuse of psychiatry reportedly continues today in the People's Republic of China. *See* Robin Munro, *Judicial Psychiatry in China and its Political Abuses*, Vol. 14, no.1 COLUM. J. ASIAN L. 1-128 (2000); Munro, *Political Psychiatry in Post Mao China and its Origins in the Cultural Revolution*, Vol. 30, n. 1 J. AM. ACAD. PSYCHIATRY & L. 97-106 (2002).

Even in the absence of overt political abuse, this Court has acknowledged that distinguishing "normal" thoughts from "abnormal" or "disordered" thoughts is fraught with peril: "the inquiry itself is elusive, for it presupposes some baseline of normality that experts may have some difficulty in establishing for a particular defendant, if they can establish it at all." *Riggins,* 504 U.S. at 141 (Kennedy, J.,

concurring).[12] Indeed, this Court has previously recognized that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations," because "[p]sychiatric diagnosis . . . is to a large extent based on medical impressions drawn from subjective analysis and filtered through the experience of the diagnostician." *Medina v. California*, 504 U.S. 437, 451 (1992), quoting *Addington v. Texas*, 441 U.S. 418, 430 (1979). "Psychiatry," this Court has observed, "is not…an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given

---

[12] Dr. Robert Spitzer, chair of the American Psychiatric Association committees that developed two earlier versions of the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM) (DSM—III and DSM-III-R) and special advisor to the committee that developed the latest DSM (DSM-IV, 1994), has acknowledged that "[t]he concept of 'disorder' always involves a value judgment." Spitzer, *The Diagnostic Status of Homosexuality in DSM-III: A Reformulation of the Issues*, 138 AM. J. PSYCHIATRY 210, 214 (1981). For example, until 1972 the DSM defined homosexuality as a mental disorder. "Treatment," in addition to counseling, included penile plethysmograph shocks (electronic shock triggered by penile erection), drugging, and hypnosis. *See* N. McConaghy, *Subjective and Penile Plethysmograph Responses Following Aversion-Relief and Apomorphine Aversion Therapy for Homosexual Impulses*, 115 BRIT. J. PSYCHIATRY 723-730 (1969); B. James & D. Early, *Aversion Therapy for Homosexuality*, 1 BRIT. MED. J. 538 (1963); M. Feldman & M. MacCulloch, *A Systematic Approach to the Treatment of Homosexuality by Conditioned Aversion: Preliminary Report*, 121 AM. J. PSYCHIATRY 167-171 (1964); E. Callahan & H. Leitenberg, *Aversion Therapy for Sexual Deviation: Contingent Shock and Covert Sensitization*, 81 J. ABNORMAL PSYCHOL. 60-73 (1973).

In 1973, following intense debate within the American Psychiatric Association, the diagnostic disorder category of "homosexual" was removed from the DSM. *Spitzer, supra*, at 214.

behavior and symptoms, on cure and treatment…." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985); *See also* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 697-708, 729-32 (1974).

In light of the difficulties inherent in categorizing and diagnosing "disordered" thought, the government's power to "correct a person's thinking by manipulating the person's brain against his or her will, must be strictly and unambiguously limited.

2. Technological Developments Threaten to Undermine Freedom of Thought in the Absence of an Unequivocal and Narrow Rule

Vigorous protection of freedom of thought is particularly important today, given major advances in technology and pharmacology. Pharmaceutical companies are increasingly interested in the development and marketing of new drugs aimed at modulating consciousness by modifying brain chemistry. The sale of Prozac® and similar antidepressant drugs is currently one of the most profitable segments of the pharmaceutical drug industry.[13] Sales of "antipsychotic" drugs are currently the eighth largest therapy class of drugs with worldwide sales of $6 billion in the year 2000, a 22 percent increase in sales over the previous year.[14]

---

[13] According to IMS Health, a fifty-year-old company specializing in pharmaceutical market intelligence and analyses, "antidepressants, the #3-ranked therapy class worldwide, experienced 18 percent sales growth in 2000, to $13.4 billion or 4.2 percent of all audited global pharmaceutical sales." IMS Health, *Antidepressants* (summary online <http://www.imshealth.com/public/structure/navcontent/1,3272,1034-1034-0,00.html>).

[14] *See* IMS Health, *Antipsychotics* (summary online <http://www.imshealth.com/public/structure/navcontent/1,3272,1035-1035-0,00.html>). A report published by the Lewin Group in

Machines such as brain imagers, brain monitors, and new biological interventions are rapidly increasing our knowledge of how the brain works, while simultaneously increasing the ability to monitor and/or alter its workings in both gross and subtle ways.[15] The development of such drugs and

---

January 2000, found that within the Medicaid program alone, "Antidepressant prescriptions totaled 19 million in 1998…[and] [a]ntipsychotic prescriptions totaled 11 million in 1998." Lewin Group, *Access and Utilization of New Antidepressant and Antipsychotic Medications* (Jan. 2000).

[15] Aside from growing applications of available brain scan devices including: functional magnetic resonance imaging f(MRI), positron emission tomography (PET), electroencephalographic monitoring (EEG); developments in fields related to nanotechnology point to possibilities for minute-scaled (physical, chemical, thermodynamic, mechanical, and biological) devices deployed in the body that would be capable of closer monitoring, intervention and manipulation. *See* Robert Freitas. NANOMEDICINE VOLUME 1: BASIC CAPABILITIES (1999), which methodically describes the capabilities of molecular machine systems that may be required by many, if not most, medical nanorobotic devices. These include: the abilities to recognize, sort, and transport important molecules; sense the environment; alter shape or surface texture; generate onboard energy to power effective robotic functions; communicate with doctors, patients, and other nanorobots; navigate throughout the human body; manipulate microscopic objects and move about inside a human body; timekeep, perform computations, and disable living cells and viruses. In Chapter One, Freitas writes "… most of us suppose that we are endowed with free will. But if choices by free will are simply the resolution of conflicts of neurological subsystems, and we become consciously aware of those subsystems and are able to intervene in their processes, do we run the risk of runaway instabilities at the deepest levels of what we presently call our 'minds'? Will we find that these instabilities are profound counterparts to the maladies we currently designate as epilepsy, or psychosomatic illnesses? In any redesigns of our brains which would involve opening doors to, quite literally, the ultrastructure of our thoughts, we could become 'naked to ourselves' in ways that we can only vaguely speculate about at

technologies is to be applauded for their potential to aid millions of suffering Americans who *voluntarily* use them. But the instant case raises the dark prospect of the government *forcibly* employing existing and new technologies to overtly or covertly alter the way that the populace, or individual citizens, think.[16]

As cautioned by Professor Winnick, "…a vast array of treatment technologies now exist that enable government for the first time to intrude directly and powerfully into an individual's mental processes and therefore pose a potential for abuse that cannot be ignored." *Winnick, supra*, at 8.

"Advances in the psychic and related sciences," conjectured Justice Brandies 75 years ago, "may bring means of exploring unexpressed beliefs, thoughts and emotions." *Olmstead* v. *United States*, 277 U. S. 438, 474 (1928) (Brandeis, J., dissenting opinion). Technological progress is indeed turning "mind control" fiction into fact, with the possibility that neurochemical drugs or other technology

---

present. Along with any other dangers we might encounter, this will raise entirely new issues of the proper role of psychotherapy and the sanctity of personal privacy." NANOMEDICINE, *supra,* Volume 1: Chapter 1.2 Current Medical Practice, § 1.2.5 "Changing View of the Human Body."

[16] Already, for example, at least one public school has reportedly mandated drugging a student with Dextrostat, (a version of Ritalin®) and Paxil,® in order to attend school. *See* Douglas Montero, *I Was Told To Dope My Kid,* N. Y. POST, Aug. 7, 2002; Karen Thomas, *Parents pressured to put kids on Ritalin: N.Y. court orders use of medicine*, USA TODAY, Aug. 8, 2000 ("An Albany, N.Y. couple put their 7-year-old son back on Ritalin after a family court ruled that they must continue medicating him for ADD."). *See also* Lehtinen, *Technological Incapacitation: A Neglected Alternative*, 2 Q. J. CORRECTIONS 31, 35-36 (1978) (Suggesting sub-dermal implanting of long-acting tranquilizers as an alternative to incarceration).

could be deployed as tools of individual and social control.[17] Already in use, and undergoing further development, is a "brain fingerprinting" machine, a brainwave-measuring device intended for law enforcement use. *See* United States General Accounting Office, *Investigative Techniques:*

[17] The 20th century imagination is peppered with ruminations on the coercive potential of electronic and chemical technologies. Variations on theme form the basis for countless dystopian novels, most notably NINETEEN EIGHTY-FOUR. ("Don't you see that the whole aim of Newspeak is to narrow the range of thought?…Every year fewer and fewer words, and the range of consciousness always a little smaller"). George Orwell, NINETEEN EIGHTY-FOUR 46 (Harcourt, Brace 1949); *see also*, *id*., Appendix "The Principles of Newspeak;" A psychoactive drug named "Soma" controls citizens' behavior in the novel BRAVE NEW WORLD. Aldous Huxley, BRAVE NEW WORLD, (Doubleday 1932); In A CLOCKWORK ORANGE, the protagonist, Alex, is conditioned into a docile model citizen through aversion therapy. Anthony Burgess, A CLOCKWORK ORANGE, (W. W. Norton 1963); In THE TERMINAL MAN, a man's violent tendencies are controlled by implanting electrodes into his brain. Michael Crichton, THE TERMINAL MAN, (Knopf 1972); In THIS PERFECT DAY inhabitants are genetically engineered and drugged daily into a calm state of mind. Ira Levin, THIS PERFECT DAY, (Random House 1970); In WOMAN ON THE EDGE OF TIME, the heroine is incarcerated in a mental hospital and subjected to a panoply of forced-drugs and is subjected to electrode implantation in the brain. Marge Piercy, (Knopf 1976); In SYNNERS, socket nanotechnology allows imperceptibly small brain implants to directly interface with a readily available cybernetic information network. Pat Cadigan, SYNNERS, (Bantam Spectra 1991); In MINDPLAYERS, mind-to-mind technology works by infusing a chemical bath of sedatives to the brain, then engaging skull caps connected directly to neurons. For the central character, this experience has the effect of "producing a change in brain chemistry that felt as natural as changing your mind" Pat Cadigan, MINDPLAYERS 4, (Bantam Books 1987); *See generally* Kenneth Melvin, Stanley Brodsky and Raymond Fowler, Jr., eds. PSY-FI ONE: AN ANTHOLOGY OF PSYCHOLOGY IN SCIENCE FICTION (1st ed.: Random House, 1977).

Federal Agency Views on the Potential Application of "Brain Fingerprinting." REPORT GAO-02-22, (Oct. 2001).

Dr. John D. Norseen, systems scientist for Lockheed Martin, has been quoted as saying "[w]e are at the point where… we can use a single electrode or something like an airport security system where there is a dome above your head to get enough information that we can know the number you're thinking." Sharon Berry, *Decoding Minds, Foiling Adversaries*, SIGNAL MAG., (Oct. 2001).[18]

The Department of Defense's Joint Non-Lethal Weapons Directorate (JNLWD) is exploring the use of various pharmaceutical psychoactive "calmative" agents in a number of contexts, including civilian crowd control by blanket sedation.[19] An October 2000 JNLWD report, notes that potential "use environments" for calmative drugs include "a group of hungry refugees that are excited over the distribution of food and unwilling to wait patiently," an "agitated population" and "riot and/or hostage situations." *Id*. at 3, 10. Examples of more tailored means of calmative drug distribution described in the report include "application to

---

[18] *Signal Magazine* is the Armed Forces Communications and Electronics Association's "Journal for Communications, Electronics, Intelligence, and Information Systems Professionals."

[19] *See* Joan Lakoski, W. Murray, John Kenny, *The Advantages and Limitations of Calmatives for Use as a Non-Lethal Technique*, U. PA, (Oct. 3, 2000) (report obtained by the Sunshine Project <http://www.sunshine-project.org> under a FOIA Request,) ("There are numerous pharmaceutical agents with a profile of producing a calm-like behavioral state currently available in clinical practice. Moreover, wide arrays of new compounds with unique cellular and molecular mechanisms are under development by the pharmaceutical industry for their ability to produce calm and tranquil-like states of behavior. Therefore, this report serves as an essential first step in identification of calmative pharmaceutical agents with potential utility as non-lethal techniques"). *Id*. at 6.

drinking water, topical administration to the skin, an aerosol spray inhalation route, or a drug-filled rubber bullet." *Id*. at 10.

As this Court noted in 1985, the U.S. government has, in the past, crossed ethical and legal lines by administering psychoactive drugs on unwitting civilians. *See CIA v. Sims*, 471 U.S. 159 (1985) ("Several MKULTRA subprojects involved experiments where researchers surreptitiously administered dangerous drugs, such as LSD, to unwitting human subjects. At least two persons died as a result of MKULTRA experiments, and others may have suffered impaired health because of the testing.").[20]

Recently, this Court observed with respect to the Fourth Amendment, that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology…. The question…is what limits there are upon this power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States* 533 U.S. 27, 34 (2001). When that same question is asked about technological developments like those discussed in this section, the First Amendment guarantee of freedom of thought demands an answer by this Court that establishes unequivocal limits on the government's power to invade the inner workings of a

---

[20] *See also Final Report of the Select Comm. to Study Gov't Operations with Respect to Intelligence Activities*, S. Rep. No. 94-755, Book I, (1976); *Report to the President by the Comm'n on CIA Activities Within the United States* 226-228 (June 1975); *Project MKULTRA, the CIA's Program of Research in Behavioral Modification: Joint Hearings before the Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977); *Human Drug Testing by the CIA, 1977: Hearings on S. 1893 before the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977).

person's mind.

D. Violating a Person's Fundamental Right to Freedom of Thought Solely to Advance the Government's Interest in Adjudicating Crimes Does Not Withstand Strict Scrutiny

To infringe on a fundamental right such as the First Amendment right to freedom of thought, the government must justify its action by no less a standard than strict scrutiny. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest…can justify limiting First Amendment freedoms."); *Brandon,* 158 F.3d at 957 ("[T]o forcibly medicate [a non-dangerous pretrial detainee] the government must satisfy strict scrutiny review and demonstrate that its proposed approach is narrowly tailored to a compelling interest.").

1. The Government's Interest in Adjudicating Crimes Is, Standing Alone, Insufficiently Compelling to Justify Forcible Alteration of a Defendant's Thought Processes

To survive strict scrutiny, the governmental interest advanced "must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Here, the sole interest asserted by the state is its "interest in bringing a defendant to trial." *Sell,* 283 F.3d at 568. While this is undeniably a *legitimate* governmental interest, the CCLE submits that it is insufficiently *compelling, by itself,* to override a person's First Amendment right to freedom of thought.

This Court should reject the Eighth Circuit's assertion that some charges are sufficiently "serious" to justify forced drugging with antipsychotics. *Sell*, 282 F.3d at 568. The CCLE submits that a bare determination of a defendant's incompetence to stand trial, regardless of the "seriousness" of the offense, may not, standing alone, serve as the overriding

justification for the state directly intruding into a person's brain and manipulating how he or she thinks. To permit such an important First Amendment right to turn on how various courts characterize the "seriousness" of offenses would invite confusion and inconsistent application of the law. One need only look at the Eighth Circuit's perfunctory conclusion that fraud and money laundering (nonviolent economic crimes), are "serious" enough to justify drugging Dr. Sell, to clearly glimpse how important it is for this Court to unequivocally state that a finding of incompetence to stand trial is, alone, insufficient to justify the government in forcibly administering mind-altering drugs to a defendant.

In the instant case, the Eighth Circuit affirmed that Dr. Sell is not a danger to himself or others. *Sell,* 283 F.3d at 565. ("Upon review, we agree that the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center"). Dr. Sell has merely been found incompetent to stand trial. The test for determining competence to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). Professor Winnick has suggested that the test for competency to stand trial should not be conflated with the test of competency to make medical treatment decisions, explaining: "at least some and perhaps many defendants found incompetent to stand trial are competent to make medical treatment decisions, it would [therefore] seem unconstitutional conclusively to presume that all defendants found incompetent to stand trial are also incompetent [to make their own medical decisions]." *Winnick, supra*, at 294, n.165.

Indeed this Court has recognized, "commitment and competency proceedings address entirely different substantive issues." *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996). Dr. Sell has *not* been found to be incompetent to

make his own *medical decisions*. In order to civilly commit a person, and thereby substitute the state's authority in treatment decisions for the person's own authority, this Court previously emphasized:

> …due process requires at a minimum a showing that the person is mentally ill and either poses a danger to himself or others or is incapable of "surviving safely in freedom," *id.,* at 573-576. The test for competence to stand trial, by contrast, is whether the defendant has the present ability to understand the charges against him and communicate effectively with defense counsel. *Cooper*, 517 U.S. at 368.

Accordingly, simply because Dr. Sell has been declared incompetent to stand trial, the state must not, *ipso facto,* be handed the enormous power of reworking his brain and "correcting" his thoughts. A clear rule that the First Amendment prohibits the government from altering the way a person thinks merely because that person has been declared incompetent to stand trial, also comports with principles of fundamental fairness and other constitutional guarantees. As Justice Kennedy noted in his concurring opinion in *Riggins*:

> [c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. *Riggins* 504 U.S. at 139-140.

Justice Kennedy's comments underscore that the government's interest is not merely to bring defendants to trial, but to conduct a fair and just trial. *See Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) ("[T]he central goal of the criminal justice system…[is the] accurate determination of guilt and innocence"); *Estes v. Texas*, 381 U.S. 532, 542-43 (1965)

("The criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated.") "The Constitution," this Court has explained, "recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 24, 36 (1965).

It is precisely because our criminal justice system is *adversarial*, and because the Constitution demands a *fair trial*, that the government's "legitimate interest in seeing that cases…are tried," must not be found to encompass the power to forcibly drug its adversaries into "competence." Indeed, the Eighth Circuit's ruling turns "competence to stand trial" into a weapon against the defendant, by transforming it into a gruesome test that the defendant must pass in order to escape having his mental processes forcibly manipulated by the state. This turns the principles underlying the rule on their head. What pretrial detainee will feel safe raising the issue of trial competence when the result could well be a forced injection of mind-altering drugs?

Further, drugging a defendant with antipsychotics or other psychoactive drugs will likely affect the person's demeanor at trial and/or his or her testimony. As Justice Kennedy noted in his concurring opinion in *Riggins*:

> The avowed purpose of [antipsychotic] medication is not functional competence, but competence to stand trial. In my view, elementary protections against state intrusion require the State, in every case, to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel. Based on my understanding of the medical literature, I have substantial reservations that the State can

> make that showing. *Riggins,* 504 U.S. at 140 (Kennedy, J., concurring).

This position was earlier expressed by the Tenth Circuit in *Bee*. There, the Tenth Circuit applied strict scrutiny after finding that a pretrial detainee has a constitutionally protected liberty interest in avoiding antipsychotic drugs. *Bee,* 744 Fd.3. at 1394. While remanding the case for further proceedings because the trial court granted the government's motion for summary judgment without a sufficient hearing, the Tenth Circuit expressed extreme skepticism that the government's interest in bringing a defendant to trial could *ever* be a sufficiently compelling reason to drug a detainee against his will:

> …although the state undoubtedly has an interest in bringing to trial those accused of a crime, we question whether this interest could *ever* be deemed sufficiently compelling to outweigh a criminal defendant's interest in not being forcibly medicated with antipsychotic drugs. With their potentially dangerous side effects, such drugs may not be administered lightly. Generally speaking, a decision to administer antipsychotics should be based on the legitimate treatment needs of the individual, in accordance with accepted medical practice. A state interest unrelated to the well-being of the individual or those around him simply has no relevance to such a determination. The needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotic drugs is concerned. *Id.* at 1395 (emph. added).

2. There Are Less Intrusive Means To Advance the Government's Interest

Under strict scrutiny analysis, the government's infringement on a fundamental right must be "narrowly tailored"[21] or "no greater than necessary or essential"[22] to

[21] *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989); *Miller v.*

protect the governmental interest at stake.

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. Shelton v. Tucker, 364 U.S. 479, 488 (1960).

As the CCLE reads the record, far less intrusive therapies, such as psychotherapy, psychoanalysis, counseling, group therapy, and a panoply of behavior therapies have yet to be tried in the instant case. *Sell,* 282 F.3d at 563-64. Psychoanalytical treatments are non-invasive, and do not directly alter the electro-chemical status of the brain. They have virtually no side effects, nor do they run the risk of chemically altering Dr. Sell's demeanor at trial or of hindering his ability to communicate with counsel or the jury. Thus, they present a far less intrusive means of advancing the state's interest than does the forcible administration of mind-altering drugs.

Finally, if this Court upholds Dr. Sell's fundamental right to freedom of thought against government efforts to forcibly drug him into competence, the result will not be to grant him his freedom. Rather, both federal and state laws provide long-standing and comprehensive procedures for dealing with defendants who are found incompetent to stand trial. *See* R. Roesch & S. Golding, *Competency To Stand Trial* (1980) 48-49; 18 U.S.C. §§ 4241-4248; *Greenwood v. United States*, 350 U.S. 366, 373 (1956) ("[T]he bill [enacting 18 U.S.C. 4241 *et seq*.] was proposed by the Judicial Conference of the United States after long study by a conspicuously able committee, followed by consultation with

---

Johnson, 515 U.S. 900, 920 (1995) ("To satisfy strict scrutiny, the State must demonstrate that its…legislation is narrowly tailored to serving a compelling governmental interest").

[22] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)).

federal district and circuit judges…[and] deals comprehensively with those persons charged with federal crime who are insane or mentally incompetent to stand trial"); *Riggins*, 504 U.S. at 145 (Kennedy, J., concurring) ("If the State cannot render the defendant competent without involuntary medicine, then it must resort to civil commitment, if appropriate, unless the defendant becomes competent through other means"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (noting that if a detainee is not competent to stand trial, the government may "institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen"). These existing systems protect society while also protecting the best medical interest of the individual. Following these established procedures protects the right to freedom of thought as well as the state's interest in adjudicating crimes.

As this Court observed nearly 100 years ago:

> There is…a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

A person's intellect is surely within that protected sphere. The right of a person to liberty, autonomy and privacy over his or her own thought processes is situated at the core of what it means to be a free person. It is essential to the most elementary concepts of human freedom, dignity, and self-expression, and demands this Court's steadfast protection. The right to sovereignty over one's own thought processes is the quintessence of freedom, and is protected by the First Amendment.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to reverse the decision of the Eighth Circuit.

Respectfully submitted,

RICHARD GLEN BOIRE
(*Counsel of Record)*
Center for Cognitive
Liberty & Ethics
Court & Cedar Building
231 G. Street, Suite 7
Davis, CA 95616
(530) 750-7912