

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, Petitioner

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

**Application For Leave to File Amicus Curiae Brief,
and Amicus Curiae Brief on Behalf of the
Center for Cognitive Liberty & Ethics**

**Filed in Support of Appellant
Charles Thomas Sell
Supporting Petition for Rehearing And/Or Rehearing en banc**

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**In The United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

UNITED STATES OF AMERICA,)	
)	
Appellee,)	
)	
v.)	Crim. No. 01-1862EMSL
)	
DR. CHARLES THOMAS SELL, D.D.S.)	
)	
Appellant.)	
)	

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

COMES NOW the Center for Cognitive Liberty & Ethics (CCLE) and, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, files this Application for Leave to File Amicus Curiae Brief on behalf of the CCLE.

The CCLE is an independent nonprofit law and policy center working in the public interest to foster cognitive liberty – the right of each individual to think independently and to use the full spectrum of his or her mind. The CCLE encourages social policies that respect and protect the full potential and autonomy of the human intellect. As an organization charged with defending freedom of thought and mental autonomy, CCLE has a vital interest in this case because the forcible injection of a citizen with a mind-

altering drug directly infringes on the right to cognitive liberty and mental autonomy.

The CCLE seeks to explain to the Court how the right to cognitive liberty and autonomy is a fundamental right of the highest order. If the Court accepts our premise, then the Panel erred by failing to fully consider the nature and importance of the right that is at issue in this case, and by failing to apply the correct standard of review when judging a governmental infringement of this right.

For this reason, the CCLE requests permission of this Court to be heard as *amicus curiae* in support of petitioner, Dr. Charles Thomas Sell.

Dated: March 29, 2002

Richard Glen Boire, Esq.
Counsel for CCLE

NO. 01-1862EMSL

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v.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel of record certifies that the Center for Cognitive Liberty & Ethics (CCLE) is an independent nonprofit, nonpartisan law and policy center operated by the Alchemind Society: The International Association for Cognitive Liberty. The Alchemind Society is a public education organization under Section 501(c)(3) of the Internal Revenue Code.

Dated March 29, 2002

Richard Glen Boire, Esq.
Counsel for CCLE

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

The Center for Cognitive Liberty & Ethics is nonprofit law and policy center working in the public interest to foster cognitive liberty – the right of each individual to think independently, and to use the full spectrum of his or her mind. The CCLE encourages social policies that respect and protect the full potential and autonomy of the human intellect.

The CCLE learned of the profound issue in this case on March 21, 2002, when it received a press release from the Association of American Physicians & Surgeons, which discussed the Eighth Circuit’s opinion in the case delivered on March 7, 2002.

As an organization charged with defending freedom of thought and mental autonomy, the CCLE has a direct and vital interest in this case. The fundamental right to control one’s own intellect and mental processes is eviscerated if courts permit the government to forcibly drug citizens. If state officials, with the concurrence of the courts, can constitutionally order the forcible alteration of Dr. Sell’s mind in order that he may stand trial, then every other accused defendant, who poses no danger to himself or others, is also at jeopardy of losing his or her right to freedom of thought.

To be sure that our argument is correctly understood, we do 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 propose that the state cannot, consistent with the Constitution, regulate or manipulate the *mental states* of individuals.

The CCLE submits that because the Panel misunderstood the vital liberty interest at stake in this case, it consequently applied an incorrect standard of review. Accordingly, the CCLE respectfully submits this amicus curiae brief in support of Dr. Sell’s petition for rehearing and/or rehearing en banc.

Argument

I. THE PANEL APPLIED THE INCORRECT STANDARD OF REVIEW TO JUDGE THE GOVERNMENT’S INFRINGEMENT ON DR. SELL’S RIGHT TO COGNITIVE LIBERTY AND AUTONOMY

1. Introduction

This case presents an issue of “exceptional importance” and ought to be accepted for rehearing en banc (See, Fed. R. App. P. 35(a)). The proper adjudication of this case requires the application of the correct standard of review. The CCLE submits that the Panel mischaracterized the fundamental right at issue in this case, and as a result, erred by applying an incorrect standard of review.

2. The Right to Cognitive Liberty and Autonomy is a Fundamental Right of The Highest Order

While the Panel acknowledged that Dr. Sell has a “significant liberty interest in refusing anti-psychotic medication” (opinion, p. 12), the Panel grossly undervalued the liberty interest at stake in this case. The right to self-determination over one’s own intellect and mental processes is 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 of the highest order.

Essential to the most elementary concepts of human freedom, dignity, and self-determination, a person has a fundamental right to cognitive liberty – a right to freedom of thought, to independent thinking, to autonomy over his or her own mind and brain chemistry, and the right to experience the full spectrum of possible thought and consciousness.

While a right to cognitive liberty is not expressly enumerated in the Constitution, it is one of “those liberties of the individual which history has attested as the indispensable condition...of an open as against a closed society.” (*Kovacs v. Cooper* 336 U.S. 77, 95 (1949) (J. Frankfurter, concurring opinion).) Indeed, cognitive liberty is something so fundamental to the integrity of free human beings, that it forms the necessary substrate for, and is the common principle underlying, some of our most well-established and cherished constitutional rights. As Justice Benjamin Cardozo extolled, “...freedom of

thought...one may say...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, 326-327 (1937).)

The First Amendment, which Prof. Laurence Tribe has called “the Constitution’s most majestic guarantee”¹ protects freedom of speech and, thus, necessarily protects cognitive liberty. Speech is the expression of a person’s ideas. A government that is permitted to manipulate a citizen’s consciousness at its very roots—by forcing a person to take a mind-altering drug—need not censor speech, because it could prevent the ideas from ever occurring in the mind of the speaker. Chemical manipulation of the mind is, therefore, the ultimate prior restraint on speech.

By altering a person’s mind with the forced administration of drugs, the government commits an act of *cognitive* censorship and mental manipulation, an action even more offensive to democratic principles than the censorship of speech. Such an action by the government violates the First Amendment, because, as noted by the Tenth Circuit “[t]he First Amendment protects communication of ideas, which itself implies protection of the capacity to produce ideas.” (*Bee v. Greaves*, 744 F.2d 1387, 1393-1394 (10th Cir. 1984).)

¹ Tribe, Laurence, *American Constitutional Law*, Sec. 12-1 (2nd ed. 1988) p. 785.

By forcing Dr. Sell to take psychoactive drugs against his will, the government is commandeering Dr. Sell's mind, and forcibly changing his very ability to formulate particular thoughts. By manipulating the manner in which Dr. Sell's mind processes information and formulates ideas, the government *ipso facto* manipulates and alters both the form and content of Dr. Sell's subsequent expression and thus renders the First Amendment's free speech guarantee meaningless.²

² Professor Michael H. Shapiro, has outlined the logic of this proposition as follows:

(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. (Shapiro, Michael H., "Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies," 47 Southern Cal.L.Rev 237, 256 (1974).)

The First Amendment is, indeed, infused with the principle that each citizen—not the government—ought to have control over his or her own mind, to think what he or she wants to think, and to freely form and express opinions and beliefs based on all the information at his or her disposal, even if these beliefs conflict with the government’s position on a given matter or are contrary to those held by society-at-large. As succinctly expressed by the Supreme Court, “In a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.” (*Abouod v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977).)

The violation of Dr. Sell’s mental autonomy is particularly egregious here, where his Sixth Amendment right to a fair trial is at stake. Forcibly manipulating a defendant’s mental state with drugs, affects his ability to express himself, as well as the manner of his expression and his demeanor. As noted by Justice Kennedy in his concurring opinion in *Riggins v. Nevada*, 504 U.S. 127 (1992), “By administering medication, the State may be creating a prejudicial negative demeanor in the defendant—making him look nervous and restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive... .” (*Id.* at 143 (Kennedy, J., concurring).) Because Dr. Sell’s demeanor can be considered by the jury, the government’s manipulation of his demeanor by forcibly administering drugs raises the same concerns as if the government had manipulated material evidence.

3. The Panel Erred By Failing To Apply The Correct Standard Of Review

In reaching its holding that Dr. Sell may be forcibly injected with mind-altering drugs, the Panel applied a balancing test under which it “weigh[ed] the government’s interest in rendering Sell competent against Sell’s interest in refusing unwanted medication.” (Opinion, p. 11-12.) The CCLE submits that the Panel applied the incorrect standard of review.

The Panel’s reliance on *Riggins, supra*, for the proposition that strict scrutiny is not demanded in the instant case, is misplaced. In *Riggins*, the Court expressly refused to determine the standard of review to be applied when a peaceful pre-trial detainee is force-drugged by the government. “We have no occasion,” explained the Court, “to prescribe such substantive standards...since the District Court allowed administration of Mellaril to continue without making any determination of the need for this course or any reasonable alternatives.” (*Riggins, supra*, 504 U.S. at p. 136.)

Given that the forced-drugging of Dr. Sell is a direct effort to alter the content and form of his thoughts—the essential substrate for free speech and expression—the Panel should have applied, *at the very least*, 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”]; *United States v. Brandon*, 158 F.3d 947 (6th Cir. 1998) [“to medicate a non-dangerous pretrial detainee in order to render him competent to stand trial...the government must satisfy strict scrutiny review...”].)

Applying a lesser standard, as did the Panel, was erroneous and substantially jeopardizes the fundamental right of all Americans to cognitive liberty and mental autonomy. Rehearing should be granted in order to apply the appropriate standard of review given the nature and importance of the fundamental right that is at issue in this case.

CONCLUSION

For the foregoing reasons, amicus curiae the Center for Cognitive Liberty & Ethics respectfully requests rehearing of this matter, and/or rehearing en banc, as appropriate.

Dated: March 29, 2002

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It is written in a proportionately spaced typeface of 14 points, and has a total of 1723 words. Pursuant to Eighth Circuit Rule 28A(c), I further certify that the word processing software used to prepare the brief was Microsoft Word 2000. I hereby certify that the computer diskette has been scanned for viruses and is virus-free in compliance with Eighth Circuit Rule 28A(d).

Dated: March 29, 2002

Richard Glen Boire, Esq.
Counsel for CCLE

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing document and one 3 ½ inch diskette that has been scanned for viruses and is virus free, were sent, by first-class postage-prepaid mail, this 29th day of March, 2002, to the following parties:

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