IN THE SUPREME COURT OF THE UNITED STATE

CHARLES THOMAS SELL, :

Petitioner :

v. : No. 02-5664

UNITED STATES :

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Washington, D.C.

Monday, March 3, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

BARRY A. SHORT, ESQ., St. Louis, Missouri; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 02-5664, Charles Thomas Sell v. The United States.

Mr. Short.

ORAL ARGUMENT OF BARRY A. SHORT

ON BEHALF OF THE PETITIONER

MR. SHORT: Mr. Chief Justice, and may it please the Court:

On Friday, this Court entered its order stating that counsel should be prepared to discuss the jurisdiction of this Court and of the court of appeals, and cited the Cohen v. Beneficial case, and they --

QUESTION: Mr. Short, did that subject jurisdiction come up when you were in the court of appeals?

MR. SHORT: It did not come up in the court of appeals, Justice O'Connor.

In the first --

QUESTION: It is interlocutory?

MR. SHORT: It's a decision from -- it's a final decision under the collateral order doctrine.

QUESTION: Well, that's the issue. Is it?

MR. SHORT: That's the issue, I believe, yes.

QUESTION: No trial has taken place?

MR. SHORT: No trial has taken place, not at all.

I -- I believe that this Court, of course, has jurisdiction pursuant to section 1254 because it granted a writ of certiorari to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to section 1291, providing for appeal of final decisions of the district courts. I believe this was a final decision pursuant to the Cohen collateral final order doctrine.

Now, while this Court has not addressed the collateral order doctrine under these set of facts, the courts of appeals that have, have unanimously concluded that an order approving the involuntary medication of a pretrial detainee constitutes an appealable order under Cohen, and these cases are set forth in footnote 5, page 10 of the Government's brief.

In order to fall within the collateral order doctrine, the order must satisfy several requirements. It must conclusively determine the dispute question, it must resolve an important issue completely and separate from the merits of the underlying action, and it must be effectively unreviewable on appeal from the final judgment.

QUESTION: Well, that's the question. Would --

if it -- if we did not think there were jurisdiction, then at the end of the day, if the defendant were tried, I suppose that issue could be raised then.

MR. SHORT: Except by that time, Justice O'Connor, his rights will have already been infringed. He will not be able to become unmedicated.

QUESTION: Well, but that's not the point. The point is whether the third requirement has been met, that it is effectively nonreviewable unless it's reviewed this way. It seems to me it is reviewable.

QUESTION: We held that in Riggins.

MR. SHORT: Riggins -- Riggins was looking at a post conviction case, however, and looking only to see if his trial rights had been violated.

QUESTION: Perhaps it depends on whether we're talking about the right to avoid medication, as opposed to the right to avoid medication for purposes of trial, and the latter would give you maybe somewhat more difficulty under prong 3, whereas the former, the right can only be vindicated by treating this as a final order. Would you accept that, or would you say that it's final even if what you're talking about is the right to avoid medication for purposes of standing trial?

MR. SHORT: I would say on all three it would. Certainly under -- under the First and the Fifth

Amendments, whatever rights he would have would have been infringed irreparably once he's medicated.

QUESTION: Well, are there -- are there no ways to challenge that, except in the context of the criminal prosecution? I mean, if -- if you had objections to being medicated, whether for purposes of, of making your client capable of standing trial or not, if you had objections to being medicated, why couldn't those objections be brought under section 1983 or in some civil action?

MR. SHORT: My reflections on that, Justice Scalia, is, it would probably be too late. By the time we brought any type of other action, I believe the Government would have proceeded in the criminal case and gone ahead with the order and had him medicated.

I also see filing such an action with another district court, for example, having it defer to the court in which the criminal action was pending, I think there's some -- I think there's some procedural problems with, by the time that was done, Dr. Sell may have already been medicated, and of course -- we will address these issues hopefully in our briefs that are due, that are due Friday.

QUESTION: What concerns me is, you know, the Cohen doctrine is over half a century old.

MR. SHORT: Yes, sir.

QUESTION: It has no rooting in the text. The

text of Congress' statute is quite absolute. We have made in that half a century only three exceptions under the, under the Cohen doctrine, and I'm truly concerned about, about the extent to which this new exception would, would be available to disrupt criminal trials considerably. For example, a defendant, instead of challenging the, the order initially can, can half-way through trial decide he does not want any medication, and then the trial has to be postponed so that, so that the order to continue the medication can be appealed. I just see real difficulties in running a criminal justice system when, when this kind of an order is immediately appealable, rather than reviewable at the end of the criminal case.

MR. SHORT: Again, Justice Scalia, all I can say is, I think by the time that would be reviewed, filed, and considered, I'm afraid Dr. Sell will have been medicated, and again we've already, of course --

QUESTION: Well, that's perfectly true, but I think the hypothesis offered by Justice Scalia, at least as I understand it, is that even if that's the case, perhaps he has to wait till the end of the criminal trial in order to appeal it because our policy against piecemeal appeals in criminal cases has been so strict.

MR. SHORT: I do -- I do understand that, but -- and again, I think this is unreviewable.

QUESTION: Do you -- do you equate it to bail, bail pending trial? If it's denied, and the trial goes on, you can't get it back again once the trial is over. Is -- is that your point, with respect to once -- once he's drugged he can't be --

MR. SHORT: Once --

QUESTION: -- restored?

MR. SHORT: It's a simple statement, but once he's medicated he can't be unmedicated.

QUESTION: I think you're confusing unreviewable with irreversible. To be sure, it can't be reversed, but can it be reviewed? In the case of bail, it can't be reviewed, because once the trial is over, it's a moot question. It cannot be reviewed. It's not just that it can't be reversed, it cannot be reviewed.

But you're here asserting that this issue cannot be reviewed. It seems to me that's just patently false. It can be reviewed. Your complaint is that it can't be reversed, but that has never been the, the Cohen criterion.

MR. SHORT: My view, Justice Scalia, is it can't be effectively reviewed. Once he's medicated with these drugs, whatever changes take place, these drugs are meant to cause changes to take place. That's the purpose of giving him these drugs. In effect, the decision will

have been made, his mind will have been altered, in whatever segment that is altered, and that cannot be undone.

QUESTION: That is his -- if that is his objection, and if his objection is not that my criminal trial will be distorted, he should bring a separate civil action and perhaps the court would stay the criminal action until that one is, until that civil action is determined, but it's an entirely different procedure to come in in the criminal case and seek an interlocutory appeal from that order, and I just don't --

QUESTION: May I ask a question about the back -- about the background order? Isn't it correct that in this case the Bureau of Prisons got an order authorizing them to medicate your, your client?

MR. SHORT: Justice Stevens, that is correct.

QUESTION: And then you got a stay of that order?

MR. SHORT: Yeah. There was appeal -- there was an appeal of that order, and then we filed a motion with the magistrate judge to have a hearing as to whether or not, as to the propriety of whether or not he should be medicated, yes. That's -- that's the procedural standpoint --

QUESTION: But to pursue Justice Stevens'

question, that order was in the context of this criminal case.

MR. SHORT: Yes, it was.

QUESTION: Yes.

QUESTION: The Bureau of Prisons order was in the context of this criminal case? I -- I thought that they ordered him to be medicated before -- before the trial was -- was on the horizon. Is that --

MR. SHORT: He was -- he was sent to the Springfield Medical Center after being found incompetent under section 4241, in order to be treated to see if he could be restored to competency.

QUESTION: You're going to brief this issue, so perhaps we ought to, since your time is running out, hear something on the merits of your --

MR. SHORT: Very well.

QUESTION: -- case.

MR. SHORT: Very well.

The individual, of course, we are talking about today is Charles Thomas Sell. He's a dentist. He is a pretrial detainee. He has not been convicted of any crime. In his present setting, he is neither dangerous to himself, nor is he dangerous to others. The Government wishes to medicate Dr. Sell.

QUESTION: Is that a finding we have from the

lower courts, that he is not dangerous to himself or others?

MR. SHORT: Yes, it is, Justice O'Connor. The district court made that finding, and -- and -- essentially reversing the magistrate court, and the appellate court affirmed the district court's finding that he was not dangerous.

The Government wants to forcibly administer to Dr. Sell antipsychotic drugs solely on the chance that it can, that it can bring him to trial on insurance fraud charges, nonviolent crimes. Dr. Sell does not want to be forcibly medicated. In his own words, he said, I do not want my chemistry altered. My brain is working fine.

Now, Dr. Sell is legally incompetent. He suffers from a rare mental disorder called delusional disorder, persecutory type. This is not schizophrenia. The main feature of this disorder is nonbizarre delusions. In other words, thoughts that are plausible, thoughts that can conceivably come true, probably won't. In Dr. Sell's case, he believes the FBI is out to discredit or harm him. Excuse me.

QUESTION: As I take it, that's try -- that is tied into the competence to stand trial because he thinks that's why he is being prosecuted, is that it, that the FBI is behind this?

MR. SHORT: Justice Souter, that's absolutely true.

QUESTION: Yes.

MR. SHORT: That's part of -- that's part of the delusion.

But another feature of this disorder is that apart from the direct impact of the delusions, psychosocial functioning is not markedly, markedly impaired, nor is the behavior odd, which means that his disorder only affects him in a narrow, a very narrow band, but the rest -- most of his life he can perform as a normal person would, function in a normal manner, and as a matter of fact --

QUESTION: Then he should be able to stand trial.

MR. SHORT: The problem --

QUESTION: If he's so normal.

MR. SHORT: The problem, Justice Scalia, is, because of his delusion he can't focus on the trial --

QUESTION: I see.

MR. SHORT: -- on anything else other than the FBI.

QUESTION: Well, what is your solution for this dilemma? We cannot try him for the crime that he's accused of, because his mind is not working properly. He

is entitled to refuse, you say, drugs that would cause his mind to work properly. It's a vicious -- what -- what do we do with him? Do we continue to hold him with the inability to stand trial, not treat him, because he refuses treatment? I -- it's just a crazy situation. What can be done about it?

MR. SHORT: Your Honor, our -- because we feel that he is a) medically competent -- no one has ever contended that Dr. Sell is not medically competent. Dr. Sell is perfectly able to make his own health care decisions, and make his own decisions about his mind and his body, and he has made the decision --

QUESTION: But he's legally incompetent, you say --

MR. SHORT: He's legally incompetent --

QUESTION: -- to stand trial.

MR. SHORT: Yes, but he's not mentally incompetent.

QUESTION: And is there a finding below that medication will -- there's a substantial probability he would be restored to competence if there were medication?

MR. SHORT: The standard's changed somewhat, but the answer is essentially yes.

QUESTION: And is there a finding that no less intrusive alternative is available to restore him to

competence?

MR. SHORT: Yes, there was such a finding.

QUESTION: And that the medication is medically appropriate?

MR. SHORT: Yes, there was --

QUESTION: Yes.

MR. SHORT: There was --

QUESTION: And even under those circumstances, you assert that there can be no medication?

MR. SHORT: Yes. That is -- that is my position.

QUESTION: And what is your general principle of law that justifies your position?

MR. SHORT: First of all, since he is medically competent, he can make decisions about his own person and body.

QUESTION: I thought that you might have gone further in your case, and to say the Government just has no right to put needles into pretrial detainees?

MR. SHORT: Well, on a -- at a basic level that is, that is what -- we have a -- we have a nondangerous --

QUESTION: I mean, they can make the defendant wear a hat, put on clothes, give a voice exempt bar. This is somehow different. It seems to me at least that ought --

MR. SHORT: This is --

QUESTION: You don't exactly argue that.

MR. SHORT: This is very different, Your Honor. We are dealing with a person who has been merely accused of a crime. He is medically competent. He is nondangerous.

QUESTION: Well, you say he's nondangerous. He was later charged with attempted murder, wasn't he?

MR. SHORT: He was charged with that offense, yes.

QUESTION: He doesn't sound nondangerous.

(Laughter.)

QUESTION: So what are we supposed to do, just do this on the hypothetical basis that he isn't, although maybe he is?

MR. SHORT: No, Justice Breyer, not at all. The nondangerousness --

QUESTION: He didn't -- he did --

MR. SHORT: The only -- the only times -- as I read the cases, pretrial detainees -- these are civilly committed people -- can be medically administered antipsychotic drugs is if they are in the prison setting and they are dangerous to themselves --

QUESTION: So a person who's in a mental hospital, civilly committed, and he's dangerous, going to

commit suicide or possibly kill someone, that the doctors in that civil setting are forbidden to administer psychotic drugs? That's not my understanding. Is that --

MR. SHORT: Maybe I -- maybe I --

QUESTION: -- what you're saying?

MR. SHORT: Maybe I misstated --

QUESTION: All right, but -- so -- but my question on this case is the following. I take it you say, to follow the psychological association's standards, one, the court did consider whether any nondrug therapy could restore him to competence, and it answered the question, no.

The court did consider whether there was a substantial likelihood of success in restoring the defendant to competence, and they answered, yes.

The court did consider whether the effectiveness of the drugs clearly outweighed the risk from side effects, and it said yes.

It also considered the effects of the Fifth and Sixth Amendment rights to fair trial, and decided they weren't enough to change the question, so it seems to me that once you concede all that, they're following the right standards.

So is your claim that we should go and review because they, although they purported to follow the right

standards they didn't really do it, in other words, going to the facts of this case, or is your claim that those standards that your side's amicus says are the right ones, are not the right ones and, if so, what are?

MR. SHORT: Our view is that, first of all we have fundamental rights at stake here, and the Government must show then, of course, a compelling interest in overriding those fundamental interests.

QUESTION: But I would appreciate a direct answer to my question.

MR. SHORT: I'm sorry. Maybe I misunderstood --

QUESTION: It seems to me, either you have to say that the psychological association standards are wrong, or you have to say they're right, and if you say they're right, then you have to ask us to say they weren't applied correctly here, but I want to know if you think they're the wrong ones, or if you think they're the right ones.

MR. SHORT: I'm not sure I understand the requirements of --

QUESTION: Well, if you read -- if you'd simply read the table of contents, as I'm certain you have --

MR. SHORT: Oh, I have.

QUESTION: -- of the APA, the psychological association's brief, filed on your side --

MR. SHORT: Yes.

QUESTION: -- they have four standards, so I'm asking you if you think those are the right standards.

MR. SHORT: I think essentially those are the right standards.

QUESTION: Okay. If you think those are there right standards, do you think they were applied here?

MR. SHORT: Yes.

QUESTION: Yes, all right. Then is what you're asking us to do, since you think they were applied, and you don't like the answer the court came to, is what you're asking us to do today is take those standards, look to see how the court applied them, and come to the conclusion that they applied them incorrectly, or are you asking us to do something else?

MR. SHORT: Essentially --

QUESTION: I'm just trying to clarify --

MR. SHORT: Essentially that's it.

QUESTION: That's it.

QUESTION: And I -- I don't know why you concede that the Government has this right at all. What gives the Government the authority to medicate a pretrial detainee or someone pretrial -- supposing they're not even in, in custody. Can they essentially, out with a needle the day before the trial and say, we're going to get you ready for

trial?

MR. SHORT: Well, it's very possible then, of course, I'm not understanding Justice Breyer's contention, and it's my fault. I don't concede that they can do this at all.

QUESTION: Well then, you think these standards are wrong. The standards -- can you come up in your mind --

MR. SHORT: I --

QUESTION: I won't pursue this, but I'm just trying to clarify what it is you want us to do. Now, call into your own mind the standards of the American Psychological Association. I read that amicus with some care, I'm very interested, and it seemed to me similar in principle to the Government's point of view, and I want to know, in -- though they may not think they're applied correctly here, but what -- what -- tell me about it.

MR. SHORT: I'm sorry, I can't recall their standards with such preciseness that I can answer that question.

QUESTION: Well, I thought, looking at your brief, that you were asserting that the petitioner has a right to be free from compelled medication by the Government, period, per se. That's the rule.

MR. SHORT: That is my under -- that is my --

QUESTION: Page 26 of your brief. So you don't -- you don't go along with any other standards. You're saying there is an absolute right to be free from compelled medication.

MR. SHORT: That is our position.

QUESTION: How about -- how about -- how about vaccinating little children with a needle against smallpox? I guess there's no right to do that by the Government?

MR. SHORT: Yes, there is a right to do that.

QUESTION: Oh.

MR. SHORT: The intrusion there is very minimal, and I think the Government -- the governmental interest is obviously to protect it against the spread of whatever dis --

QUESTION: And I take it that's pursuant to the statute, not because some prosecutor thinks it's a good idea.

MR. SHORT: That's --

QUESTION: Then you don't even agree with the dissenting judge in the court below who said there could be forcible medication for a violent crime?

MR. SHORT: I do not -- that's correct, Mr. Chief Justice. I do not --

QUESTION: Well, the -- --

QUESTION: Then I wish you'd go back to a question I asked earlier that I don't think I got an answer to. What do you propose that we do with this man? He's been accused of a serious crime. For purposes of this case you're willing to assume it to be the same if he had been accused of a violent crime.

MR. SHORT: That's correct.

QUESTION: He is -- his mental ability is such that he cannot be tried. The means are available to straighten his mind out so that he is competent to stand trial, but you say no, if he refuses that, we must respect his wishes. Then what do we do with him? Do we let him go?

MR. SHORT: The direct answer to your question, Justice Scalia, is --

QUESTION: Is we let him go.

MR. SHORT: -- is that you do not -- he will not be let go.

QUESTION: Why not?

QUESTION: What happens to him? You can't keep him in prison indefinitely. I had very much the same question in mind. As I understand it, and correct me if I'm wrong, he could not be civilly committed, since he's been found nondangerous.

MR. SHORT: That's correct.

QUESTION: If he were found dangerous, he could be civilly committed. So here he is, nondangerous, but incompetent to stand trial. You -- you agree that civil commitment was -- isn't -- isn't available under those circumstances?

MR. SHORT: No, I -- civil commitment is what's going to happen to this individual under 4241.

QUESTION: How? How is he going to be committed if he's not dangerous?

MR. SHORT: Because 4241 provides that a person who can't stand trial because they are legally incompetent are referred to the sections of 4246. The director at that facility, under section 4246, will then have to make a determination as to whether or not Dr. Sell is a substantial risk to persons or property of others if --

QUESTION: And -- and you are telling us -- and you are telling us, are you not, that he is not a substantial risk? That -- that that may not be something we accept in view of the murder charge, but I mean, on your theory, you are saying he's not dangerous.

MR. SHORT: Justice Souter, I'm saying there are two different standards at --

QUESTION: No, I realize there are two different standards, but there's -- if I understand the representations you have been making to the Court about

your client, under the standard for commitment, if he cannot be tried, he would not be subject to commitment. Am I wrong?

MR. SHORT: Yes, Your Honor.

QUESTION: He would -- so are you -- are you --

MR. SHORT: He would. He would --

QUESTION: He would be subject to commitment?

MR. SHORT: He is subject to commitment under 4246.

QUESTION: He satisfies the criteria for commitment?

MR. SHORT: Yes, he does. He does, and --

QUESTION: And I thought that the whole reason why we're -- how you got to this stage is that a district court made a finding that this man is not a danger to himself or others, and now you want to say for purposes of the -- your being here on that question, could he be medicated, because he's not a danger to himself or others, that finding holds, but once he avoids the trial, then he can say, ah, but for purposes of civil commitment I am dangerous to myself or others?

MR. SHORT: No, that -- that's not what will happen to Dr. Sell. He will then go from the 4241 to 4246, at which time the director of that facility will have to make a determination whether he is a substantial

risk to others, or property to others, if he is released. He then has to make that certification. It goes to the district court. They have to prove that by clear and convincing evidence, and if they so show, he does remain committed.

QUESTION: Yes, but you keep saying, if they show. Are you conceding that, in fact, the evidence is there to show it and that he will be in fact subject to -- that he will, in fact, be lawfully committed?

MR. SHORT: No, I am not -- I am not --

QUESTION: Then I don't see how you've answered Justice Scalia's question.

MR. SHORT: No, I will tell you, from my experience in this case, I suspect that's precisely what's going to happen, because of what the Government's view is of this individual.

QUESTION: No, but you --

QUESTION: Well, I -- I hope that's what's going to happen, but I -- but I don't know how it -- how it comes about with the law as you've described it to us. That's -- that's my problem.

QUESTION: I have a different problem. Let me explain to you what -- I imagine that the slogan, mind-altering drugs, is not a very good slogan for present purposes, because there are a lot of seriously ill people

whom these drugs do help a lot.

MR. SHORT: That's correct.

QUESTION: Now, if we're thinking of that class of people, how are they any different from the class of people with very, very high blood pressure whose lives are at risk, and could be perhaps medicated with blood pressure medicine. These people could be medicated with antidelusional medicine. Now, is there a difference between those two circumstances?

That doesn't answer the question, because what I'm looking for are the right standards to use to separate those genuinely ill people from others who may be more borderline, or may be less obviously helped.

Now, you don't -- I realize now you don't have much time, but I'm -- that's what I'm struggling with in this case.

MR. SHORT: The standard, the standard, Your Honor, is whether or not -- and this is very basic, whether the person has the right to make the choice. Our position is that Dr. Sell has the right to make the choice over his medical decisions.

He has had experience with antipsychotic drugs. He took Haldol in the 1980's. He had an attack of acute dystonia, which this Court has recognized as being a serious side effect in at least three cases, Harper,

Riggins, and Mills. He also has a psychiatrist that has told him that antipsychotic drugs will not work on delusional disorders, and Dr. Sell, with all due respect to what he's charged with, is not a stupid person. He does not want to undergo the effects of antipsychotic medication. He is making that a free choice, and with all due respect, I think he has a right to make that choice.

QUESTION: Do you wish to reserve your remaining time, Mr. Short?

MR. SHORT: Thank you, Your Honor, I do.

QUESTION: Very well.

Now, Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to address the question of jurisdiction first. Dr. Sell's claim should be analyzed as having two related but distinct components. One component of his claim is a Harper-style objection to forcible medication by the Government in order to render him competent to stand trial. The second component of his claim is a Riggins-style objection to the fairness of his trial if, in fact, he is medicated and restored to competence and tried.

The Riggins-style claim is clearly not amenable to review under the collateral order doctrine. Dr. Sell has not even been tried. There is clearly no determination yet whether he can be given a fair trial, whether he will receive one, and he may raise an objection to the fairness of his trial at the conclusion of the criminal case and obtain reversal of his conviction at that time, but the Harper-style claim is amenable to review under the collateral order doctrine. It deals with a right that is effectively unreviewable if not reviewed now, just as this Court's cases addressing double jeopardy claims and qualified immunity claims are effectively unreviewable if not reviewed --

QUESTION: Well, it's not just they're unreviewable, Mr. Dreeben, but it would -- I think we said in those cases there the claim was a right not to be tried.

MR. DREEBEN: Correct, and --

QUESTION: Not to be tried at all.

MR. DREEBEN: -- that right would be lost if the trial occurs. Here, one of his claims is a right not to be medicated. That right will be lost if, in fact, he is medicated.

QUESTION: Well, what if -- what if -- what if someone says, I claim a right to be tried without this

evidence that I want suppressed but the court has ruled otherwise?

MR. DREEBEN: Well, that's right and that's because the court has concluded that there is no right not to be tried in the relevant sense without particular evidence that will be suppressed. What that reflects is a right whose remedy would be a right not to have the evidence used against them, which could include reversal of a conviction, so that kind of a claim is reviewable at the end of the case.

But taking Dr. Sell's claims at face value, he's saying it will violate my First Amendment rights and my substantive due process rights to be medicated, and those claims are, in a sense, independent of the main criminal action. Justice Scalia is correct that in a sense they could be viewed as claims that could be brought independently, but I think under the statutory scheme that exists they are better brought in the context of the criminal case, rather than through an independent APA action or some other form of action.

QUESTION: Well, I -- I'd be less worried if, if all that was before us here is the up or down question whether you have an absolute right to refuse medication, and once that is disposed of, the issue goes away, but that's not what's before us here. That is not the only

thing before us here.

The -- there is also the question, assuming that you can be medicated, what are the criteria, and I assume that any prisoner can make the claim, I have a right not to be medicated unless these criteria are fulfilled, so in every criminal case you're going to have a pre -- with someone who has psychological difficulties, or who is found to be not triable because of his mental state, you have to have this preliminary appeal all the way up before the trial can even start. It -- it's not a one-time thing.

MR. DREEBEN: Justice Scalia, I'm a little bit less concerned about the practical consequences, although I share the view that the delay of the criminal case and, more importantly, concretely here, the delay in starting the medication is a critical problem that results from collateral order review, but there are two things that I think reduce any of the costs associated with permitting collateral order review.

First, if this Court does settle the fundamental question in favor of the Government and determines that, on an appropriate showing that this court defines, medication for the purpose of restoring competence is permissible, in the future, criminal defendants will not be able to assert that broad, unsettled, and important

legal issue and obtain a stay of the medication order in order to litigate it.

What they would have to show is that the actual application of those standards to the particular facts of the case is incorrect. That will most likely be reviewed under a more deferential standard. Courts of appeals can establish expedited calendars to dispose of frivolous claims, and can weed out those claims that don't --

QUESTION: But it would certainly be a new exception to the collateral order doctrine, would it not?

MR. DREEBEN: It would be a new exception as applied to the particular facts of this case, but the standards of the collateral order doctrine I think are met, and there is --

QUESTION: Let me ask you, if we reach the question of what standards to apply, it doesn't fit comfortably in any setting with which we're familiar, strict scrutiny, rational basis test. Do you see this as somewhere in between some kind of heightened review, and if so, what case do you think is closest?

MR. DREEBEN: Justice O'Connor, I do think that a heightened form of review is appropriate. I don't have any case that has precisely articulated the correct standard of review, but in all of this Court's substantive due process cases, what the Court has done is balanced the

interests of the individual in his liberty, or in this case in the First Amendment concerns, against the Government's interest in achieving the objectives that it has.

QUESTION: How -- how do you describe the authority of the Government to make this order at all? Suppose this defendant were under a voluntary commitment in a private institution. Could you send your guy out there with a needle the day before the trial?

MR. DREEBEN: In order to render the defendant competent to stand trial, Your Honor, the Government would have to have some sort of a finding that would justify --

QUESTION: Well, you have -- you have this -- this -- this case, let's assume it's this person, and only with the hypothetical alteration that I've given. It's this person, he's in a private facility, voluntary commitment --

MR. DREEBEN: Well, I don't think that that makes any difference at all, Justice Kennedy.

QUESTION: All right, so what is the authority of the Government to go out and force him to be medicated so that he behaves the way the Government wants him to at trial?

MR. DREEBEN: Well, the Government's authority here is the -- derives from the fact that Dr. Sell has

been indicted on serious criminal charges, and he has been -- been found incompetent to stand trial on those charges. The Government will be completely unable to achieve what this Court has recognized to be the compelling interest in adjudicating serious criminal charges.

QUESTION: Could you inoculate a material witness? You have to have a prosecution witness. He's the key witness, but he's incompetent. Could you force him to be inoculated the day before the trial?

MR. DREEBEN: It's the same due process question as presented here, Justice Kennedy, with the possible difference that our interests may be greater with respect to a person who has been charged than with respect to a person who has not. Material witnesses are held all the time without bail.

QUESTION: I fully understand that, and I want to know if they can be medicated and what your authority is for doing it.

MR. DREEBEN: Well, the authority would be an application of any principle that this Court adopts in this case to permit us to medicate the defendant. As I indicated, there is a distinction between a witness and a defendant, but here we deal with someone who has already been placed under indictment, which is to an -- a certain

extent a significant restriction on liberty as well as an indication of a paramount Government interest in adjudicating the charges.

QUESTION: Well, at -- at the very least it seems to me that you should have statutory authority for doing this. Just the court thinks it's a good idea that the witnesses behave a certain way and order medication --

MR. DREEBEN: Well, I think maybe it's important to back up and look at how this case came to be before the Court. Dr. Sell was found to be incompetent to stand trial, and pursuant to statute section 4241(d) of title 18, he was committed to the Bureau of Prisons for treatment to determine whether his competency could be restored.

In the context of that confinement at a medical facility, pursuant to regulations of the Bureau of Prisons, the Bureau of Prisons determined that antipsychotic medication and nothing else was the means by which the Government could restore him to competency.

QUESTION: But that, that was competency for trial. That's -- that's -- that's the -- that's not the standard in the regulations, as I understand them.

MR. DREEBEN: No, the regulations do indeed address the potential of medication for the purpose of rendering competence to stand trial. That's one of the

criteria that is given to the Bureau of Prisons when it accepts a patient for treatment under section 4241(d), and the bureau in fact made the finding that this was a medically appropriate treatment for a person who has the illness, the serious delusional disorder that Dr. Sell has, and that this treatment had a substantial probability of restoring him to competence. The --

QUESTION: Mr. Dreeben, can you back up just for a minute, because there's a piece of this that I'm not clear on. I thought that before the issue of competence to stand trial came up, the Bureau of Prisons had determined this man to be dangerous to himself or others without medication, and that the Bureau of Prisons was going to medicate him under the danger standard.

MR. DREEBEN: The administrative order, and it's the same administrative order that I referred to in answering Justice Kennedy's question, Justice Ginsburg, does rest on both restoration of competency and to a certain extent on concerns about danger.

What happened after the Bureau of Prisons entered that order is not that it immediately implemented it and began to medicate Dr. Sell. Rather, it stayed the order, and Dr. Sell then sought judicial review in the very court that had ordered his commitment, which is why I think that it was appropriate for the district court to

hear this in the criminal action rather than under some separate APA action. This is the district court that had ordered Dr. Sell confined.

The magistrate judge determined that the Government had not made a showing of dangerousness, which would have permitted medication under Washington v. Harper, but that it had adequately shown that medication was necessary in order to restore Dr. Sell to be competent for trial.

Dr. Sell then appealed that determination to the district court, which entered its final decision saying that the Bureau of Prisons could medicate, there was a substantial probability of restoring competence, the antipsychotic medication was medically appropriate treatment for the psychotic illness that Dr. Sell had, and that there was a reasonable likelihood of a fair trial, and any particularized fair trial concerns that Dr. Sell was raising, involving effects on his demeanor, or his effects to relate to counsel, should be determined after the medication has been administered and it's been determined whether, in fact, he was restored to competence.

QUESTION: Can we get your answer to the question that Justice Scalia asked Mr. Short? That is, suppose it is determined that he can't be medicated for

the purpose of making him competent, what happens to him?

MR. DREEBEN: Well, at that point, Mr. Short is correct that under 4241 he would then be referred over to the director of a medical facility where he would be held for confinement to determine, pursuant to section 4246, whether, if released, he would be dangerous to himself or others.

QUESTION: Well, all right, suppose he's not. Then he goes free.

MR. DREEBEN: And --

QUESTION: And the question I would like to know is, suppose that you have a person who has very high blood pressure, a defendant. Is it permissible, or clearly permissible under the law, to force him to take blood pressure medication so that he can go to trial?

MR. DREEBEN: It is not something that courts of appeals that I have seen have had to deal with, and this Court --

QUESTION: All right, so we have exactly the same question.

MR. DREEBEN: Correct.

QUESTION: And so the question is not necessarily about psychiatry. It's about whether or not you can force a person to take medicine that makes him competent to stand trial.

MR. DREEBEN: I think it's a very particularized inquiry under the sub --

QUESTION: I don't know why it would be -- it may or may not be --

MR. DREEBEN: Well --

QUESTION: -- different with psychiatry, but then the question comes back to, assuming we have the right standards, which are, I think you and the APA agree, the psychological people, I don't see much of a difference there between you, the lower courts, and the -- as to the standards if you can medicate a comp -- if you can medicate such a person at all, and so what we know is that you can go to the person with high blood pressure or the person who is seriously mentally ill, and you can medicate him, because the Government has a good reason, where he is going to be tried for murder, assault, et cetera, all right.

Here we have a property crime. Is this still a good reason? Suppose it were a traffic ticket? I mean, I take it this is a person whom, in the absence of a criminal proceeding, the Government could not compel to take medication. Am I right?

Now, I've given you a number of things. I'm trying to elicit your views on things that are of concern to me.

MR. DREEBEN: Justice Breyer, the question of what would happen if Dr. Sell were living safely in free society is obviously distinct from this case. There's no authority --

QUESTION: No, it's not obviously distinct, because I am assuming a person who is not a danger to himself or others is, in fact, in that position.

QUESTION: And it's not distinct because you say the Government has an interest in having him medicated for trial. I don't see the difference in somebody who is at liberty and in custody.

MR. DREEBEN: I had taken Justice Breyer's question to involve somebody who's at liberty but not charged with a criminal offense.

QUESTION: All right, now, if you want to make a difference, fine, do it. I start out with the proposition that a person who is wandering around a free person now suddenly is charged. Now he says, I have very high blood pressure and I won't take my medicine, or he says, I'm delusional and I won't take my medicine.

If -- can the Government compel person 1 or person 2 to do it?

MR. DREEBEN: Yes to both.

QUESTION: Yes. Where it's murder and assault, if they're about to -- a traffic ticket? No, all right.

Now --

MR. DREEBEN: I -- I --

QUESTION: If that's -- if that's your --

MR. DREEBEN: Justice Breyer --

QUESTION: Yes.

MR. DREEBEN: -- the question that you're asking is, how serious need the offense be in order to justify an intrusion on substantive due process interests, whether they be through psychiatric medication or through blood pressure --

QUESTION: Oh, that's exactly right, that is my question, because I thought that's what was at issue in this case.

MR. DREEBEN: And I entirely agree that it needs to be a sufficiently serious offense to outweigh --

QUESTION: What is -- what is the basis for the Government ordering medication in the case of high blood pressure, where -- where I would think it doesn't necessarily interfere with your ability to make trial decisions?

MR. DREEBEN: Well, to the extent that a person was making a claim that, I'm not medically competent to go to trial because I have high blood pressure, and if I go to trial, I may have a heart attack and die. This actually happens. People will come into court and say,

you can't try me now because I'm too fragile, I have a serious health condition, and courts then have to balance. It's essentially the same balancing test that's at issue in this case. They have to balance --

QUESTION: Mr. Dreeben, can I ask you a question that I've been trying to -- thinking about for quite a while? Is the amount of time he's already been in custody, as compared to the potential sentence he might receive, relevant to the analysis?

MR. DREEBEN: It may be, Justice Stevens, relevant to the analysis to the extent that courts have held that the amount of time that a person can be held for treatment under 4241(d) cannot exceed the ultimate sentence that they would receive.

QUESTION: And is that not true in this case?

MR. DREEBEN: No, it's not true in this case for a number of reasons. First of all, even limiting consideration to the medicaid fraud and money laundering charges, the test is the maximum sentence that the defendant could receive as a matter of statutory law, and he could receive a sentence --

QUESTION: It's the maximum sentence, rather than what the sentencing guidelines would provide?

MR. DREEBEN: Well, this Court obviously hasn't addressed the question, and it would be free to weigh

in --

QUESTION: But if you assumed it was the sentencing guidelines rather than the maximum statutory sentence, is it not true that his period of confinement has already approached that, that time?

MR. DREEBEN: Yes, it probably is. Of course, he's also charged with attempted murder and conspiracy to murder charges.

QUESTION: Yes, but that was not -- that was not part of the analysis, as I understood it, in the court of appeals decision.

MR. DREEBEN: Well, to be --

QUESTION: It relied entirely on the financial crimes.

MR. DREEBEN: You're right, Justice Stevens, but to the extent that the question is, how long can the Government hold him for treatment, he's clearly indicted for attempted murder and conspiracy to murder charges, and the length that the Government can hold --

QUESTION: Well, is it critical to your position in this case that we take into account the indictment for -- for -- for attempted murder?

MR. DREEBEN: No, because the Government's position here is that any felony case is serious enough --

QUESTION: Even if the time he's already been in

custody exceeds the time he would get under the sentencing guidelines?

MR. DREEBEN: Well, again, if-- if a court were to hold -- it's not critical to my position, because my position is, it's statutory maximum. If the Court were to hold that we're not going to look at the attempted murder and conspiracy murder charges, we are only going to look at the sentencing guidelines sentence, and we are going to hold that he cannot be held for treatment longer than his ultimate potential sentence, then the Court would have no choice but to remand for treatment of Dr. Sell under 4246 to determine whether he should be civilly committed.

Those are questions that were never litigated in any court, and are certainly not raised in the petition for certiorari. What is raised in the petition for certiorari is whether treatment to render a defendant competent to stand trial on a nonviolent offense is a sufficient Government interest.

QUESTION: May I ask this other question, just to be sure I have your understanding on it? Has he or has he not been getting civil -- getting treatment during the period of his detention?

MR. DREEBEN: He has not been getting antipsychotic medication. He gets --

QUESTION: In other words, not getting

medicine -- I know he's not getting medical, medicine, but has he been getting any other kind of treatment for his ailment?

MR. DREEBEN: Essentially, no, and the reason is that there is no other form of treatment, standing alone, that would have any likelihood of success with a person with delusional disorder, persecutory type. This is a serious thought disorder, interfering with Dr. Sell's ability to rationally understand what is going on in the world, and it's well-established in the medical literature that antipsychotic medication and nothing else is the only thing that may hold promise of treating the -- the ailment that he has. Now, the -- the --

QUESTION: Mr. Dreeben, may I ask you to comment on this, on the question of medication? One of the arguments is that if you accept, for example, essentially your standard or the psychological association's standard, in applying it, you cannot apply it, as it were, in gross. You've got to apply it with reference to the specific medication which is proposed, and that was not done in this case. I think the argument is, it's important because the effects of the various possible antipsychotic medications may vary tremendously.

Would you comment on that argument, that even if we accept the standards, they -- they were not adequately

met here because the -- the order was not drug-specific?

MR. DREEBEN: I -- Justice Souter, if a court were to attempt to make an order drug-specific for a patient it would be essentially ignoring the medical reality of what this treatment will entail.

Now, Dr. Wolfson, the treating psychiatrist, or consulting psychiatrist at the hearing, testified that in his view there were two particular medications, quetiapine and olanzapine, which were likely to be the most suitable ones for Dr. Sell's case because of their very minimal side effect profile, that they would have a much better chance of not inducing sedation or other side effects that he might claim would interfere with the fairness of his trial.

But he explained that he did not want to be locked into a particular medication because one of his hopes, as the psychiatrist on the case, is that Dr. Sell would participate in choosing, if he had been told, he's ordered to take medication, which medication he wanted to take.

This is the kind of interactive process that doctors and patients have all the time, and for a court to superimpose some rigid rule up front that establishes this and only this medication can be administered is --

QUESTION: Mr. Dreeben, isn't there something

short of that, though? I mean, we -- we are told that there are the old kind of drugs that could be injected, and the new drugs, which originally had to be taken orally. Isn't -- that distinction between the category of drugs, not the particular drug within that category, or even a decision between something that's injectable and something that we'd have to force him to swallow, isn't -- isn't that kind of determination something that the -- shouldn't -- shouldn't there be some control over the Government's discretion?

MR. DREEBEN: Well, I -- I think the Court should be very cautious about superimposing a judicial decision making process on a --

QUESTION: But just asking the Government to identify that general class of drugs, not the court making the decision in the first instance.

MR. DREEBEN: The -- the problem with that, Justice Ginsburg, is that the response that an individual patient has to a drug is individual-specific. Side effects can be described in general categories, but nobody knows what side effects will actually occur, or whether the drugs will be effective until they've been administered, and it is not uncommon for the treating psychiatrist to discover that a drug that may have a wildly, you know, significant side effect in one

individual has none in another, and a drug that's anticipated to be entirely successful turns out not to be successful.

One of the newer, new generation of drugs, the atypical drugs that have the more favorable side effect profiles in general may not turn out to be suitable for a particular patient.

QUESTION: But of course, one answer to that is, this is sufficiently serious so that you ought to have to come back. In other words, in -- in -- in -- the -- the premise of your argument is that there's kind of an either-or choice that is made here, medicate or don't medicate, but if the -- if the substan -- if a substantive due process right is recognized, one question here is, how serious is it, and maybe it ought to be regarded as so serious that the Government would have to come back.

MR. DREEBEN: That would -- might be true, Justice Souter, if the Government's alternatives were antipsychotic medication and psychosurgery, so that the difference was dramatic between the two forms of treatment that are being proposed, but even looking at the, at the classes of drugs that are at issue here, the atypical drugs and the older generation of typical antipsychotic drugs, there are very important and dramatic differences between them, but they belong to a family of medications

that are used for treatment all the time, and the psychiatrist's understanding of the various range of effects that might be achieved is not likely to be enhanced by subjecting that to judicial review, nor are the potential side effects so dramatically different that it calls for an entirely different substantive due process analysis.

QUESTION: May I ask you a different question about seriousness, and I think it was raised originally by a question from Justice Kennedy, and I'm not -- I'm not sure of the facts or of your answer.

Should we treat this, assuming we are going to recognize it, as sufficiently serious that the Government should have no power in the absence of legislation, and if that is so, is there any legislation that authorizes this?

MR. DREEBEN: There is legislation that authorizes and requires the Bureau of Prisons to treat an individual to attempt to restore him to competency once he has been determined incompetent. That's what section 4241(d) says. Now, it does not --

QUESTION: So it's treat for purposes of competency?

MR. DREEBEN: Correct, and it does not specifically refer to antipsychotic medication, but in 1984, when this legislation was enacted, it was well known

that, for the kind of psychotic conditions that render a defendant incompetent to stand trial, it's antipsychotic medication or --

QUESTION: But you say the Government can do this even if the defendant is, is not in custody, and just to follow this same point, suppose a defendant not in custody, at home, is undergoing a hunger strike and he's going to die before the trial. Can the Government come out and force feed him?

MR. DREEBEN: You know, Justice Kennedy, I'll answer that question yes, but I recognize that it involves a very different set of considerations, because the intrusion through force feeding of somebody who wants to die might be considered to be a very different decision than treating an ill person's illness with medication that is the norm that's used to treat people with these kinds of disorders.

QUESTION: But if -- but if your -- but if your interest is in making the defendant stand trial, it would -- it would seem to me that you could per -- suppose it was for -- I don't -- I -- we could play with the hypothetical, and your time has about run out. I still just don't understand your basic authority to do this at all.

MR. DREEBEN: Well, as a matter of the

organization of Government, this Court has recognized that the ability to resolve criminal charges through the mechanism of a trial is a compelling interest in maintaining social order and peace, and in order to try these criminal charges, the Government has no option but to attempt to restore competency.

QUESTION: What's the most intrusive thing that it's clear the Government can do to get the defendant inside the courthouse door?

MR. DREEBEN: Well, it -- it's quite clear that the Government may seize the person and hold them in pretrial detention, which is a --

QUESTION: All right, physically seizing him, shackling him, I guess. Anything else?

MR. DREEBEN: Not that this Court has considered, but this -- this kind of medication has to be judged against the backdrop of the nature of the intrusion and the efficacy of the treatment for those people who have this kind of disorder. Virtually everyone who is committed to the Bureau of Prisons' care for incompetency determinations has some form of psychotic disorder that can be treated.

There are, of course, organic problems that cannot be treatable at all, and there are other kinds of mental illness that can create this, but the statistics

that the Bureau of Prisons furnished to us in considering this case shows that 80 percent of the individuals who are committed take these drugs voluntarily.

Of the remaining 20 percent who did not, there's very little indication that any sort of judicial relief has been sought through appellate review, and I think that's because these drugs enable someone who has serious psychotic orders to be restored to a point of rationality where they can make decisions about what they want to do with their life.

So instead of remaining incompetent and perhaps being committed indefinitely to a Bureau of Prisons facility, where they may be warehoused without any treatment, or being released if they are not subject to civil commitment, so that they don't stand trial on criminal charges and suffer essentially no consequences, most individuals accept the fact, particularly after an initial round of treatment has rendered them competent so that thy can understand the benefits of this, that the medication is the appropriate, medically sanctioned way to deal with the disease that they have.

And when the Government has no mechanism to achieve its essential interest in adjudicating criminal charges but for using these medically appropriate means, and it can show the, the items that have been laid out in

our brief of medical appropriateness, no less-restrictive alternative, and that there's a reason to expect that a fair trial will not be precluded, the Government should appropriately have the authority to override the substantive due process interest that the defendant has asserted and medicate him.

QUESTION: May I ask one last question before your light goes off? Under the statute that provides credit for prior custody, would this defendant's custody in the -- count?

MR. DREEBEN: Yes, it would, Justice Stevens.

QUESTION: It would, okay.

QUESTION: Thank you, Mr. Dreeben.

Mr. Short, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF BARRY A. SHORT

ON BEHALF OF THE PETITIONER

MR. SHORT: I only have 2 minutes I need to use, Your Honor. I am going to essentially combine one of the comments made by Mr. Dreeben with questions posed by Justice Stevens.

Mr. Dreeben says there is a -- we are talking, of course by a -- about an individual -- although I understand there's an overall concern about what the results of this case, case are, we are talking about Dr. Sell specifically, and the Government's interest --

the Government states that they have a compelling interest in prosecuting Dr. Sell.

Now, I do not believe the statutory maximum is what -- is what guides here on the thought of how long has Dr. Sell been in custody. Dr. Sell has been in custody, except for a 5-month period of time when he was out on bond, since May of 1997. Under any way you calculate the guidelines, and I submit the guidelines is the only way you can calculate it, he has served much more time than he would have served had he been convicted and sentenced on this crime, and under these circumstances, I do not see any compelling interest whatsoever on the part of the Government in prosecuting this defendant, Dr. Sell.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Short.

The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)