

1           IN THE SUPREME COURT OF THE UNITED STATE  
2   CHARLES THOMAS SELL,                                 :  
3                   Petitioner                                 :  
4           v.   :   No. 02- 5664  
5   UNITED STATES   :  
6   - - - - -X  
7   Washington, D. C.  
8   Monday, March 3, 2003  
9           The above-entitled matter came on for oral  
10 argument before the Supreme Court of the United States at  
11 10: 03 a. m  
12 APPEARANCES:  
13 BARRY A. SHORT, ESQ., St. Louis, Missouri; on behalf of  
14                   the Petitioner.  
15 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,  
16                   Department of Justice, Washington, D. C. ; on  
17                   behalf of the Respondent.  
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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.

1                   QUESTION: No trial has taken place?

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

4                   I -- I believe that this Court, of course, has  
5 jurisdiction pursuant to section 1254 because it granted a  
6 writ of certiorari to the Eighth Circuit Court of Appeals.  
7 The court of appeals had jurisdiction pursuant to section  
8 1291, providing for appeal of final decisions of the  
9 district courts. I believe this was a final decision  
10 pursuant to the Cohen collateral final order doctrine.

11                  Now, while this Court has not addressed the  
12 collateral order doctrine under these set of facts, the  
13 courts of appeals that have, have unanimously concluded  
14 that an order approving the involuntary medication of a  
15 pretrial detainee constitutes an appealable order under  
16 Cohen, and these cases are set forth in footnote 5, page  
17 10 of the Government's brief.

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

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

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

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

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

11 QUESTION: We held that in Riggins.

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

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

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

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

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

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

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

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

24 MR. SHORT: Yes, sir.

25 QUESTION: It has no rooting in the text. The

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

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

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

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

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

6                   MR. SHORT: Once --

7                   QUESTION: -- restored?

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

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

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

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



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

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

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

16 MR. SHORT: Justice Stevens, that is correct.

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

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

25 QUESTION: But to pursue Justice Stevens'

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

3 MR. SHORT: Yes, it was.

4 QUESTION: Yes.

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

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

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

16 MR. SHORT: Very well.

17 QUESTION: -- case.

18 MR. SHORT: Very well.

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

25 QUESTION: Is that a finding we have from the

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

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

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

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

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

1                   MR. SHORT: Justice Souter, that's absolutely  
2 true.  
3                   QUESTION: Yes.  
4                   MR. SHORT: That's part of -- that's part of the  
5 delusion.  
6                   But another feature of this disorder is that  
7 apart from the direct impact of the delusions,  
8 psychosocial functioning is not markedly, markedly  
9 impaired, nor is the behavior odd, which means that his  
10 disorder only affects him in a narrow, a very narrow band,  
11 but the rest -- most of his life he can perform as a  
12 normal person would, function in a normal manner, and as a  
13 matter of fact --  
14                  QUESTION: Then he should be able to stand  
15 trial.  
16                  MR. SHORT: The problem --  
17                  QUESTION: If he's so normal.  
18                  MR. SHORT: The problem, Justice Scalia, is,  
19 because of his delusion he can't focus on the trial --  
20                  QUESTION: I see.  
21                  MR. SHORT: -- on anything else other than the  
22 FBI.  
23                  QUESTION: Well, what is your solution for this  
24 dilemma? We cannot try him for the crime that he's  
25 accused of, because his mind is not working properly. He

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

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

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

15 MR. SHORT: He's legally incompetent --

16 QUESTION: -- to stand trial.

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

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

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

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

1 competence?

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

3 QUESTION: And that the medication is medically

4 appropriate?

5 MR. SHORT: Yes, there was --

6 QUESTION: Yes.

7 MR. SHORT: There was --

8 QUESTION: And even under those circumstances,

9 you assert that there can be no medication?

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

11 position.

12 QUESTION: And what is your general principle of

13 law that justifies your position?

14 MR. SHORT: First of all, since he is medically

15 competent, he can make decisions about his own person and

16 body.

17 QUESTION: I thought that you might have gone

18 further in your case, and to say the Government just has

19 no right to put needles into pretrial detainees?

20 MR. SHORT: Well, on a -- at a basic level that

21 is, that is what -- we have a -- we have a nondangerous --

22 QUESTION: I mean, they can make the defendant

23 wear a hat, put on clothes, give a voice exempt bar. This

24 is somehow different. It seems to me at least that

25 ought --

1           MR. SHORT: This is --

2           QUESTION: You don't exactly argue that.

3           MR. SHORT: This is very different, Your Honor.

4   We are dealing with a person who has been merely accused

5   of a crime. He is medically competent. He is

6   nondangerous.

7           QUESTION: Well, you say he's nondangerous. He

8   was later charged with attempted murder, wasn't he?

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

10   yes.

11          QUESTION: He doesn't sound nondangerous.

12          (Laughter.)

13          QUESTION: So what are we supposed to do, just

14   do this on the hypothetical basis that he isn't, although

15   maybe he is?

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

17   nondangerousness --

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

19          MR. SHORT: The only -- the only times -- as I

20   read the cases, pretrial detainees -- these are civilly

21   committed people -- can be medically administered

22   antipsychotic drugs is if they are in the prison setting

23   and they are dangerous to themselves --

24          QUESTION: So a person who's in a mental

25   hospital, civilly committed, and he's dangerous, going to

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

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

5 QUESTION: -- what you're saying?

6 MR. SHORT: Maybe I misstated --

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

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

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

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

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



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

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

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

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

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

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

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

23 MR. SHORT: Oh, I have.

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

1                   MR. SHORT: Yes.

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

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

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

8                   MR. SHORT: Yes.

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

16                  MR. SHORT: Essentially --

17                  QUESTION: I'm just trying to clarify --

18                  MR. SHORT: Essentially that's it.

19                  QUESTION: That's it.

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

1 trial?

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

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

9 MR. SHORT: I --

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

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

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

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

1                   QUESTION: Page 26 of your brief. So you  
2 don't -- you don't go along with any other standards.  
3 You're saying there is an absolute right to be free from  
4 compelled medication.  
5                   MR. SHORT: That is our position.  
6                   QUESTION: How about -- how about -- how about  
7 vaccinating little children with a needle against  
8 smallpox? I guess there's no right to do that by the  
9 Government?  
10                  MR. SHORT: Yes, there is a right to do that.  
11                  QUESTION: Oh.  
12                  MR. SHORT: The intrusion there is very minimal,  
13 and I think the Government -- the governmental interest is  
14 obviously to protect it against the spread of whatever  
15 dis --  
16                  QUESTION: And I take it that's pursuant to the  
17 statute, not because some prosecutor thinks it's a good  
18 idea.  
19                  MR. SHORT: That's --  
20                  QUESTION: Then you don't even agree with the  
21 dissenting judge in the court below who said there could  
22 be forcible medication for a violent crime?  
23                  MR. SHORT: I do not -- that's correct, Mr.  
24 Chief Justice. I do not --  
25                  QUESTION: Well, the -- --

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

7                   MR. SHORT: That's correct.

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

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

16                  QUESTION: Is we let him go.

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

19                  QUESTION: Why not?

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

25                  MR. SHORT: That's correct.

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

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

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

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

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

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

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

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

4 MR. SHORT: Yes, Your Honor.

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

6 MR. SHORT: He would. He would --

7 QUESTION: He would be subject to commitment?

8 MR. SHORT: He is subject to commitment under  
9 4246.

10 QUESTION: He satisfies the criteria for  
11 commitment?

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

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

22 MR. SHORT: No, that -- that's not what will  
23 happen to Dr. Sell. He will then go from the 4241 to  
24 4246, at which time the director of that facility will  
25 have to make a determination whether he is a substantial

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

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

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

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

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

17 QUESTION: No, but you --

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

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



1   whom these drugs do help a lot.

2                   MR. SHORT: That's correct.

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

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

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

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

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

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

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

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

11 QUESTION: Very well.

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

13 ORAL ARGUMENT OF MICHAEL R. DREEBEN

14 ON BEHALF OF THE RESPONDENT

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

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

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

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

18           MR. DREEBEN: Correct, and --

19           QUESTION: Not to be tried at all.

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

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

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

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

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

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

1    thing before us here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

8 MR. DREEBEN: Well, I think maybe it's important  
9 to back up and look at how this case came to be before the  
10 Court. Dr. Sell was found to be incompetent to stand  
11 trial, and pursuant to statute section 4241(d) of title  
12 18, he was committed to the Bureau of Prisons for  
13 treatment to determine whether his competency could be  
14 restored.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. DREEBEN: And --

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

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

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

21 MR. DREEBEN: Correct.

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

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

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

5                   MR. DREEBEN: Well --

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

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

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

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

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

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

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

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

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

23                  MR. DREEBEN: Yes to both.

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

1 Now --

2 MR. DREEBEN: I -- I --

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

4 MR. DREEBEN: Justice Breyer --

5 QUESTION: Yes.

6 MR. DREEBEN: -- the question that you're asking

7 is, how serious need the offense be in order to justify an

8 intrusion on substantive due process interests, whether

9 they be through psychiatric medication or through blood

10 pressure --

11 QUESTION: Oh, that's exactly right, that is my

12 question, because I thought that's what was at issue in

13 this case.

14 MR. DREEBEN: And I entirely agree that it needs

15 to be a sufficiently serious offense to outweigh --

16 QUESTION: What is -- what is the basis for the

17 Government ordering medication in the case of high blood

18 pressure, where -- where I would think it doesn't

19 necessarily interfere with your ability to make trial

20 decisions?

21 MR. DREEBEN: Well, to the extent that a person

22 was making a claim that, I'm not medically competent to go

23 to trial because I have high blood pressure, and if I go

24 to trial, I may have a heart attack and die. This

25 actually happens. People will come into court and say,

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

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

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

15 QUESTION: And is that not true in this case?

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

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

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



1 in --

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

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

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

12 MR. DREEBEN: Well, to be --

13 QUESTION: It relied entirely on the financial  
14 crimes.

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

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

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

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

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

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

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

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

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

25 QUESTION: In other words, not getting

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

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

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

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

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

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

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

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

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

25 QUESTION: Mr. Dreeben, isn't there something

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

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

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

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

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

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

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

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

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

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

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

16 MR. DREEBEN: There is legislation that  
17 authorizes and requires the Bureau of Prisons to treat an  
18 individual to attempt to restore him to competency once he  
19 has been determined incompetent. That's what section  
20 4241(d) says. Now, it does not --

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

23 MR. DREEBEN: Correct, and it does not  
24 specifically refer to antipsychotic medication, but in  
25 1984, when this legislation was enacted, it was well known

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

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

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

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

25 MR. DREEBEN: Well, as a matter of the



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

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

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

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

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

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

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

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

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

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

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

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

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

12 QUESTION: It would, okay.

13 QUESTION: Thank you, Mr. Dreeben.

14 Mr. Short, you have 4 minutes remaining.

15 REBUTTAL ARGUMENT OF BARRY A. SHORT

16 ON BEHALF OF THE PETITIONER

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

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

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

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

14 Thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Short.

16 The case is submitted.

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