NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Johnathan Dewayne Mitchell - Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Court should resolve an issue of first impression and decide if district courts have the authority to order the forcible medication of competent defendants in order to maintain their competency.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

United States v. Mitchell, 1:16-cr-00029-001 (N.D. Iowa) (criminal proceedings), Memorandum Opinion and Order entered January 21, 2021.

United States v. Mitchell, 21-1174 (8th Cir.) (interlocutory appeal), Judgment entered August 25, 2021.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Other

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The petitioner, Johnathan Mitchell, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 21-1174, entered on August 25, 2021.

OPINION BELOW

On August 25, 2021, the court of appeals entered its opinion and judgment affirming the judgment of the United States District Court for the Northern District of Iowa. The opinion of the district court is unpublished, and the opinion of the court of appeals is available at 11 F.4th 668.

JURISDICTION

The Court of Appeals entered its judgment on August 25, 2021. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 4241(d)

> (d) Determination and disposition.--If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his dense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--
>
> > (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and
> >
> > (2) for an additional reasonable period of time until--
> >
> > > (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or
> > >
> > > (B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of section 4246 and 4248.

INTRODUCTION

This case presents the Court with an opportunity to resolve an issue of first impression and avoid confusion and conflict among the lower courts over a significant deprivation of liberty question: whether a competent defendant may be forcibly medicated against their wishes. The Court previously reserved this question under its decision in *Riggins v. Nevada*, 504 U.S. 127, 136 (1992), and no decision since has reached or resolved the question of forcible medication to maintain the competency of an already competent defendant. The district court and court of appeals mistakenly relied on the Court's opinion in *Sell v. United States*, 539 U.S. 166 (2003), which only authorizes forcible medication to restore rather than maintain defendants' competency.

The question whether district courts may order the forcible medication of an already competent defendant is important for the Court to resolve because it concerns such a significant deprivation of liberty. Additionally, allowing the forcible medication of a competent defendant is incompatible with the concept of a competent defendant, who is able to contribute to decisions affecting his physical liberty by definition. Uniformity among lower courts on such a significant deprivation of liberty issue is essential, and the Court has an opportunity to set the standard for this issue of first impression.

STATEMENT OF THE CASE

Appellant Johnathan Mitchell was indicted in the Northern District of Iowa with interference with commerce by robbery under the 18 U.S.C. § 1951. DCD 2.[1] The case has been pending against him since April 2016. *Id.* While Mr. Mitchell has not yet been tried—diagnosed with schizophrenia and antisocial personality disorder, he has cycled between competency and incompetency—he is presently competent to stand trial.

Mr. Mitchell has been found incompetent to stand trial three times. DCD 45, 89, 193. Each time Mr. Mitchell was declared not competent, he subsequently regained competency without resort to forcible medication. DCD 69, 171, 211; *see also* DCD 153 (in which the Honorable Chief United States District Court Judge Leonard T. Strand adopted the magistrate court's recommendation to deny the Government's motion for involuntary medication based on lack of necessity under the third *Sell* requirement). Despite the Government's first motion for involuntary medication having been denied, the Government filed a second motion for the involuntary administration of antipsychotic medication in order to maintain Mr. Mitchell's competency. DCD 226. The Government did so despite the fact that involuntary medication is unnecessary to bring Mr. Mitchell to trial because he is already competent to stand trial. The district court granted the Government's motion

[1] In this brief, "DCD" will be used to refer to district court clerk's records, followed by docket entry and page number, where noted.

pursuant to *United States v. Sell*, 539 U.S. 166 (2003), and the court of appeals affirmed.

Mr. Mitchell appeals the district court's determination, and the court of appeals' subsequent affirmation, that it has the authority to order the forcible medication of a competent defendant simply to maintain their competency.

REASONS FOR GRANTING THE WRIT

This Court has held that involuntary medication of incompetent defendants is permissible where such medication is necessary to further a sufficiently important governmental interest. *Sell v. United States*, 539 U.S. 166 (2003). However, this Court has specifically reserved, and never subsequently addressed, the issue of involuntarily medicating competent defendants so that they may remain competent to stand trial. *Riggins*, 504 U.S. 127. In Petitioner's case, the United States District Court for the Northern District of Iowa and the United States Court of Appeals for the Eighth Circuit decided to extend this Court's decision in *Sell* to allow forcible medication of competent defendants to maintain their competency.

The Government, the district court, and the court of appeals all relied on *Sell v. United States*, 539 U.S. 166 (2003). However, the issue presented in *Sell*, the Court's holding, and its purpose are limited to authorizing the administration of forcible medication against a defendant to *restore* their competency, not to *maintain* the competency of an already competent defendant.

The district court's order and court of appeals' affirmance of authorizing involuntary administration of antipsychotic medication to Mr. Mitchell should be reversed because the district court erred in finding that it has the authority to order the forcible medication of antipsychotics against a competent defendant.

I. BECAUSE *SELL* ONLY AUTHORIZES FORCIBLE MEDICATION OF ANTIPSYCHOTICS TO RESTORE THE COMPETENCE OF AN INCOMPETENT DEFENDANT, THE COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S FINDING THAT IT HAS

THE AUTHORITY TO ORDER THE FORCIBLE MEDICATION OF A COMPETENT DEFENDANT TO MAINTAIN COMPETENCY.

The question presented in *Sell* was whether the Constitution permits a court to order the involuntary administration of antipsychotic drugs to a defendant to "render that defendant competent to stand trial . . . ." *Sell v. United States*, 539 U.S. at 169. Nowhere in *Sell* did the Court discuss preserving or maintaining competency. Indeed, the Court consistently used the word "render" when discussing courts' power to order forcible medication. *Id.* at 177–86. The word "render" is defined as "to cause to be or become: make." *Render*, Merriam-Webster, https://www.merriam-webster.com/dictionary/render (last visited Oct. 6, 2021). The Court's deliberate use of the word "render," and its refusal to use words like "maintain" or "preserve," strongly evidences that the Court did not contemplate the use of forcible medication against competent defendants to maintain their competency—particularly given that the Court had previously reserved that very question in *Riggins v. Nevada*, 504 U.S. 127, 136 (1992) (observing that the "question whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us").

The Court's discussion in *Sell* confirms that forcible medication is limited to the restoration of incompetent defendants. First, the Court noted that the "defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." 539 U.S. at 180. This observation clearly refers to the consequences

faced by an incompetent defendant in the event they are not restored to competency. *See* 18 U.S.C. § 4241(d). Inherent in the discussion of this factor is the likelihood that the defendant will regain competence at some point. Second, the Court wrote that "it may be difficult or impossible to try a defendant who *regains* competence after years of commitment during which memories may fade and evidence may be lost." *Sell*, 539 U.S. at 180 (emphasis added). The most reasonable interpretation of the word "regains" is that the Court intended *Sell*'s factors to be used to determine whether to restore defendants to competency. Third, the Court found that the "failure to focus upon trial competence could well have mattered. Whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to *restore* competence." *Id.* at 185–86 (emphasis added). The most reasonable interpretation of the Court's second use of a word that has little meaning to a competent defendant (*i.e.*, "regain" and "restore") is that *Sell* is directed to and only authorizes forcible *restoration* of competency. Additionally, since defendants are presumed to be competent to stand trial, the Court's italicization of "competent to stand trial" reflects the Court's intent to limit forcible medication to restoration of incompetent defendants, not maintenance of competent defendants. *See id.* at 181.

The *Sell* Court concluded by holding that the "Government may pursue its request for forced medication on the grounds discussed in this opinion, including grounds related to the danger Sell poses to himself or others. Since Sell's medical

condition may have changed over time, the Government should do so on the basis of current circumstances." *Id.* at 186. The *Sell* Court is clearly signaling that Sell may have been restored to competency during the pendency of his interlocutory appeal, and that the Government may only seek involuntary medication in the event that Sell had not been rendered competent in the interim. In fact, on remand, after finding Sell competent, the district court held, "In light of the competency determination, the government's pending motion to involuntarily medicate defendant, and a related supplemental motion, will be denied." *United States v. Sell*, 2004 U.S. Dist. LEXIS 32624, at *10 (E.D. Mo. July 12, 2004). Supporting Mr. Mitchell's position here, the most natural and logical reading of this order is that the district court interpreted *Sell* to apply only to incompetent defendants.

In reaching a contrary conclusion, the district court's order in this case is at odds not only with *Sell* and the *Sell* remand order just discussed, but also with the statutory scheme surrounding incompetent defendants. 18 U.S.C. § 4241 only authorizes the commitment of incompetent defendants to the Attorney General for competency restoration. But, under the Government's position (adopted by the district court and the court of appeals), courts could commit a competent defendant to the custody of the Attorney General in order to maintain their competency. This is counter-intuitive, at best, with Congress having only authorized courts to commit incompetent defendants to the custody of the Attorney General. *See* 18 U.S.C. § 4241(d). The Court should not permit *Sell* to empower lower courts to subject competent defendants to dramatically more intrusive governmental action.

Moreover, neither the Government, the district court, nor the court of appeals identified a single case in which a court ordered the involuntary administration of antipsychotics against a presently competent defendant in the first instance to maintain their competence.[2] DCD 226, 230, App. pp. 1-22, DCD 235, 236, App. pp. 23-44; *United States v. Mitchell*, 11 F.4th 668, 673–74. Mr. Mitchell respectfully suggests that the lack of support in the case law is consistent with the testimony of the BOP doctor at the second *Sell* hearing. There, the BOP doctor testified that he has testified in approximately 35 to 40 *Sell* hearings, and that Mr. Mitchell was the first defendant against whom the Government sought an order for involuntary administration of antipsychotic medication only to maintain their competency. DCD 222, at p. 30, ll. 10–20. The BOP doctor also testified that the only reason that he prepared a treatment plan was because he was ordered to do so. DCD 222, at p. 42, ll. 18–20.

While not citing to any cases in which a court ordered involuntary medication of a presently competent defendant, the district court did cite two cases for the proposition that a court may order the forcible medication of an incompetent defendant and subsequently continue the order to maintain that defendant's competency. DCD 236, at p. 9. However, the one-sentence order in first case, *United States v. Gomes*, No. CRIM 3:98CR195 CFD, 2006 WL 2988962, at *4 (D. Conn. Oct. 19, 2006), is far less instructive to this issue than the order on remand from *Sell*.

[2] Mr. Mitchell acknowledges that he has not cited a case in which a court has denied a request for involuntary medication of antipsychotics against a presently competent defendant to maintain competency. But, it is the Government's burden to prove that the district court has this power.

Upon finding Sell competent on remand, the district court held, "In light of the competency determination, the government's pending motion to involuntarily medicate defendant, and a related supplemental motion, will be denied." *United States v. Sell*, 2004 U.S. Dist. LEXIS 32624, at *10 (E.D. Mo. July 12, 2004). The second case cited by the district court, *United States v. Diaz*, 630 F.3d 1314, 1324–25, 1335–36 (11th Cir. 2011), is also not instructive. In *Diaz*, the Eleventh Circuit began its analysis by observing that the "Supreme Court instructed that, before considering whether a defendant may be involuntarily medicated to *attain* competency to stand trial . . . if the defendant cannot be medicated for an alternative purpose, a court may order under *Sell* that he can be involuntarily medicated to *attain* competency to stand trial . . . ." *Id.* Mr. Mitchell respectfully submits that the framing of the issue in *Diaz* demonstrates that incompetency is a necessary precondition to a *Sell* order.

The district court cited *Washington v. Harper*, 494 U.S. 210 (1990) as well. DCD 236, at p. 10. However, *Harper* involved the forcible medication of a defendant who either "suffers" from a "mental disorder," "is gravely disabled," or "poses" a "likelihood of serious harm" to himself, others, or their property. *Harper*, 494 U.S. at 215. The use of "suffers," "is," and "poses" strongly suggests that the *Harper* Court only authorized forcible medication of defendants whose mental illnesses were actively presenting issues that compromised legitimate interests. Analogously, courts may only forcibly medicate defendants whose mental illnesses are actively rendering them incompetent such that their issues actually and fully implicate

governmental interests.[3] The *Harper* Court's framing of the issue, stating that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty," requires that its holding not be extended any further.

The district court then cited *Riggins v. Nevada*, 504 U.S. 127 (1992) to show that a district court may employ *Sell*'s "balancing" or four-factor test to forcibly medicate a competent defendant. DCD 236, at pp. 10–11, App. pp. 32–33. Respectfully, however, this is a plain misreading of *Riggins*. First, because the district court in *Riggins* did not find that cessation of medication would render the defendant incompetent to stand trial, *Riggins*' holding does not extend to competent defendants who may become incompetent at some unknown point in the future. 504 U.S. at 131. Second, although the *Riggins* Court did not express concern with the lower court's failure to employ a balancing test, the more significant threshold question is whether the defendant is incompetent in the first instance. Third—and most importantly—the *Riggins* Court specifically observed that the "question whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us." *Id.* at 136. *Riggins* can hardly be read to authorize forcible medication in this situation, by balancing test or otherwise, when this situation is *precisely* what the Court declined to address. Further, if *Sell* were a simple four-factor test for courts to determine when administration of forcible antipsychotics may be used, including

[3] Similarly, 18 U.S.C. § 4247 only permits commitment where the prisoner "*is* insane or mentally incompetent." (emphasis added).

against competent defendants, Mitchell respectfully submits that the *Sell* Court would have provided some (or any) indication that it intended to resolve *Riggins*' unanswered question.

To be sure, the "greater power typically includes the grant of a lesser power." *United States v. Herman*, 971 F.3d 784, 786 (8th Cir. 2020). However, Mr. Mitchell would argue that the authority to forcibly medicate a competent defendant in the first instance is not a lesser-included power of continuing to forcibly medicate an incompetent defendant after they have regained competency. It does not follow that, just because a court may order forcible medication of an incompetent defendant to continue after they regain competency, a court may also order forcible medication to maintain the competency of a competent defendant. This is because, as discussed above, *Sell* does not authorize courts to forcibly medicate a competent defendant. This Court should withhold that authorization because, where forcible medication is not medically necessary or less intrusive methods (voluntary medication) have restored competency (as *voluntary* medication did here), the Government could never satisfy *Sell*'s third factor. *See Sell*, 539 U.S. at 181 (requiring, as a third prong of the balancing test for forcibly medicating incompetent defendants, that the Government prove by clear and convincing evidence that "involuntary medication is necessary to further those interests," and that "any alternative, less intrusive treatments are unlikely to achieve substantially the same results."); DCD 222, at p. 31, ll. 14–19 (BOP doctor testifying that forcible medication is not presently medically necessary).

Incompetence as a condition precedent also properly weighs the competing interests of defendants, courts, and the Government. Permitting forcible medication to continue against a defendant after the restoration of their competency imposes a (relatively) small marginal cost to that defendant's liberty, compared to the cost to liberty in forcibly medicating a competent defendant in the first instance. In other words, the deprivation of liberty in forcibly medicating a now-competent defendant after forcibly medicating that same defendant to restore their competency is much less than forcibly medicating a competent defendant who has not yet been subjected to forcible medication.

Protecting this liberty interest by bright-line rule, as Mr. Mitchell advocates, and treating incompetence as a condition precedent to forcible administration of antipsychotics, does not unduly prevent the Government or courts from bringing defendants to trial. Rather, it properly focuses the inquiry. The Government, the district court, and the court of appeals believe that administration of forcible medication is appropriate and necessary to maintain competency. But, at the most recent *Sell* hearing, Mr. Mitchell's treating psychiatrist testified regarding the difficulty confronted by courts with such prospective orders. The psychiatrist was asked:

> Q. I think this has been fairly well established. But just to be clear, you can't predict whether one missed dose or two missed doses will render him incompetent; right?
>
> A. I don't think they would. But it's hard to know. You know, it's hypothetical in the future. I think that's part of why I recommend ongoing psychiatric care. I think that will need to be assessed in realtime.

> Q. Right. And that's because, you know, you can always pick X number of days where he is Y percentage compliant or Z percentage compliant, but just a raw number or percentage of compliance, that by itself is not going to tell lawyers whether he's competent; right? This is why you've reiterated time and again that there needs to be an actual psychiatrist involved; right?

DCD 222 at 72–73. The psychiatrist then agreed with the question. *Id.*

Undoubtedly, competence is a legal determination, but the notion that courts may predict that some future compliance percentage will endanger competence (and thus the Government's interest in taking a defendant to trial) divorces the focus from the most obviously relevant time period: when the defendant is actually incompetent. And, because the Government may always renew its *Sell* motion if and when a defendant decompensates into incompetency, such arguing is unnecessary.

The court of appeals reasoned that "mere competency, standing alone, is not the governmental interest at stake. Competency *to stand trial* is." *Mitchell*, 11 F.4th at 673 (emphasis in original). Mr. Mitchell asserts that the governmental interest in maintaining the competence of a defendant so that they may stand trial is not insufficiently implicated in the case of a presently competent defendant to justify the administration of forcible medication. Holding that "involuntary administration of drugs solely for trial competence is appropriate" where a defendant cycles in and out of competency, even where a defendant has without exception been restored to competence without resort to involuntary administration of antipsychotic medication, the court of appeals ignored the essential framework of the factor test set by *Sell*. *Id.* at 673–74. By its reasoning, the lower courts' holding implicitly creates an additional *Sell* factor: it imposes the burden on the defendant to establish that they will

maintain their competence. Because defendants are presumed to be competent in the absence of a judicial determination to the contrary, the court of appeals' analysis is incompatible with precedent, and the district court's order is erroneous. *See United States v. Denton*, 434 F.3d 1104, 1112 (8th Cir. 2006).

The most obvious reason to treat a competent defendant differently from an incompetent one with respect to their exposure to involuntary medication is that a judicial determination of incompetence has not been entered against the former. While a defendant who has been restored to competency by forcible medication may continue to be subjected to involuntary medication, a competent defendant may not be involuntarily medicated because there has not been the necessary finding of incompetency.

Just as a convicted defendant may be treated differently from a defendant pending adjudication, an incompetent defendant may be treated differently from a competent one. Forcible medication of a competent defendant is a greater infringement than forcible medication of an incompetent defendant. The lower courts' holdings to the contrary does not fully account for this important distinction.[4] Without a judicial determination of incompetence, there is an insufficient basis for forcible medication.

For all of the above reasons, Mr. Mitchell respectfully submits that the district court erred in holding that it has the authority to involuntarily medicate a competent

[4] This Court does not have to look far to find a context in which a finding of incompetency is a condition precedent to court action. Defendants may only be remanded to the BOP for restoration proceedings after a finding of incompetency. 18 U.S.C. § 4241. Similarly, the ordering court may only then schedule that defendant's trial after finding them to be competent.

Mr. Mitchell to maintain his competence, and the court of appeals erred in affirming such order.

CONCLUSION

For the foregoing reasons, Mr. Mitchell respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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