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RIGGINS v. NEVADA FAILS TO RESOLVE THE CONFLICT OVER FORCIBLY MEDICATING THE INCOMPETENT CRIMINAL DEFENDANT

INTRODUCTION

"JUSTICE . . . is a kind of compact not to harm or be harmed."¹ The harm often inflicted on persons whom the state chooses to forcibly medicate with antipsychotic drugs² represents a severe intrusion into the personal liberties guaranteed by the United States Constitution.³ The case of *Riggins v. Nevada*⁴ examines the boundaries of this issue. The question raised is whether a criminal defendant may refuse to take antipsychotic drugs given to him to ensure his competence to stand trial.⁵ The *Riggins* Court decided that, under the due process clause of the fourteenth amendment, a criminal defendant possesses a significant liberty interest in remaining free of unwanted medication.⁶ Because the Court acknowledged the potential prejudice antipsychotic drugs may have on the defendant's trial,⁷ this decision appears to seriously limit the state's power to forcibly medicate individuals. But upon examining the Court's discussion of the state's compelling interest in bringing an accused to trial,⁸ the amount of protection a criminal defendant may actually expect seems to be seriously jeopardized.

The purpose of this casenote is to assess the propriety of the *Riggins* Court's decision and highlight some problems with the Court's reasoning. This note

¹ GEORGE K. STRODACH, *THE PHILOSOPHY OF EPICURUS* 83 (Northwestern University Press 1963) (quoting *LEADING DOCTRINE* 33).

² Antipsychotic drugs include such medications as Mellaril, Thorazine, Haldol, and Prolixin. John M. Davis & Johnathan O. Cole, *Antipsychotic Drugs* in 5 *AM. HANDBOOK OF PSYCHIATRY* 441, 445 (2d ed. 1975); These drugs are commonly used in the treatment of schizophrenic patients. *Id.* at 442; More recently these drugs have been used to control violent tendencies and make mentally ill persons accused of crimes competent to stand trial. See *infra* notes 23-27.

³ The forcible medication of antipsychotic drugs into a nonconsenting person's body represents a substantial interference with that person's fundamental constitutional liberties. *Washington v. Harper*, 494 U.S. 210, 230 (1990); The freedom from bodily restraint is at the very core of the liberty interests protected by the due process clause of the fourteenth amendment. *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). The right to be let alone is the most comprehensive of rights and the right most valued by civilized men. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); No right is more sacred or more carefully guarded than the right of every person to the possession and control of his own person, free from all restraint or interference of others. *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1890).

⁴ 112 S. Ct. 1810 (1992).

⁵ *Id.* at 1813.

⁶ *Id.* at 1815. The fourteenth amendment to the United States Constitution provides in pertinent part that ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ." U.S. CONST. amend. XIV, §1.

⁷ *Riggins*, 112 S. Ct. at 1816. (stating that it is very possible that the drugs affected Riggins ability to follow the trial proceedings, to communicate with counsel and to answer questions on direct and cross-examination).

⁸ See *Id.* at 1815-1817.

begins by discussing antipsychotic drugs and their side effects. Next, this note explores the ways in which courts have responded to the state's power to compel such medication, followed by an explanation of the types of objections raised to prevent this intrusion. Then, this casenote analyzes the Court's discussion of Riggins' eighth amendment claim, his liberty interest in avoiding forced medication, and the trial prejudice which antipsychotic drugs can cause. Finally, this note analyzes the discussion of the state's compelling interest in bringing defendants to trial.

BACKGROUND

Effects of Antipsychotic Drugs

Antipsychotic drugs⁹ were first introduced in the 1950's in the treatment of psychosis and other mental disorders.¹⁰ The primary benefit of these drugs is their effectiveness in the treatment of acute symptoms of the mentally ill.¹¹ However, there has been great concern over the harmful, disabling and irreversible side effects which these drugs commonly produce.¹² One such effect, akinesia, causes lethargy, apathy and drooling.¹³ Another common side effect, akathisia, causes constant restlessness or jumpiness.¹⁴ Tardive dyskinesia, an irreversible neurological disorder which patients taking antipsychotics frequently experience, causes involuntary muscular movements which can permanently cripple the patient.¹⁵ In some cases, patients taking this medication suffer an effect called neuroleptic malignant syndrome, which can cause death by cardiac arrest.¹⁶

⁹ These drugs are also sometimes called "neuroleptics" or "psychotropic drugs." *Washington v. Harper*, 494 U.S. 210, 214 (1990).

¹⁰ Thomas G. Guthrie M.D. & Paul S. Appelbaum M.D., "Mind Control," "Synthetic Sanity," "Artificial Competence," And Genuine Confusion: Legally Relevant Effects Of Antipsychotic Medication, 12 HOFSTRA L. REV. 77, 117-19 (1983).

¹¹ See Davis & Cole, *supra* note 2, at 442.

¹² See generally A REVIEW OF CALIFORNIA'S PROGRAMS FOR THE MENTALLY DISABLED: PUBLIC HEARING ON H.R. 106 BEFORE THE PERMANENT SUBCOMMITTEE ON MENTAL HEALTH AND DEVELOPMENTAL DISABILITY, 12-14 (Nov. 3, 1977) (hereinafter CALIFORNIA'S PROGRAMS) (stating that antipsychotic drugs may have dangerous side effects); Linda C. Fentiman, *Whose Right Is It Anyway?: Rethinking Competency To Stand Trial In Light Of The Synthetically Sane Insanity Defendant*, 40 U. MIAMI L. REV. 1109 (1986) (same); Stephen Bauer, Comment, *Madness And Medicine: The Forcible Administration Of Psychotropic Drugs*, 1980 WIS. L. REV. 497 (same).

¹³ See CALIFORNIA'S PROGRAMS, *supra* note 12 at 12-13 (discussing the effects of akinesia, which include a sense of apathy).

¹⁴ *Id.* at 14 (stating that akathisia causes the patient to feel restless and may even cause panic).

¹⁵ Bauer, *supra* note 12, at 532 (stating that tardive dyskinesia can cripple the patient);

¹⁶ *Riggins*, 112 S. Ct. at 1815. See also 3 INTERNATIONAL DICTIONARY OF MEDICINE AND BIOLOGY 2809 (1986) (stating that continued use of the drugs may cause permanent impairment of brain function or even death); The drugs may also cause liver damage, convulsions, involuntary rigidity, and changes in heart rate that can lead to cardiac arrest. *Id.*

Limits of the State's Power to Compel Antipsychotic Drugs

It is a fundamental concept that the state may not bring a person to trial who is incompetent.¹⁷ States have used antipsychotic drugs to render incompetent defendants fit to stand trial.¹⁸ Antipsychotic medication in general is relatively new to the courts. The first case to address the use of such drugs to make a criminal defendant competent for trial was not decided until 1969 in *State v. Hampton*.¹⁹ In *Hampton*, the defendant was charged with attempted murder.²⁰ While awaiting trial, she began taking antipsychotic medication to become legally competent.²¹ The *Hampton* court held that if a defendant chooses to be medicated with antipsychotic drugs in order to become competent to stand trial, the state may not prevent it.²²

Many early courts extended the *Hampton* decision to justify permitting the state to force defendants to take this medication to guarantee their competence or safety at trial.²³ Beside trial competency, states have forcibly administered antipsychotic medication to civilly committed mental patients²⁴ and pre-trial detainees.²⁵ In *Washington v. Harper*,²⁶ the Supreme Court recently addressed the issue of forcibly medicating a convicted prisoner.²⁷ The *Washington* Court held

¹⁷ See *Riggins*, 112 S. Ct. at 1817 (Kennedy, J., concurring) (stating that it is rudimentary that the state may not try someone who is incompetent); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (stating that a person who does not have the capacity to understand the proceedings against him may not be subjected to a trial); *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

¹⁸ See *State v. Hayes*, 389 A.2d 1379 (N.H. 1978); *State v. Jojola*, 553 P.2d 1296 (N.M. Ct. App. 1976); *State v. Law*, 244 S.E.2d 302 (S.C. 1978).

¹⁹ 218 So. 2d 311 (La. 1969).

²⁰ *Id.*

²¹ *Id.* at 311-312.

²² *Id.* at 312.

²³ See *State v. Hayes*, 389 A.2d 1379 (N.H. 1978) (holding that the state may medicate the defendant to maintain his competence for trial); *State v. Jojola*, 553 P.2d 1296 (N.M. Ct. App. 1976); (same); *State v. Law*, 244 S.E. 2d 302 (S.C. 1978) (same); *But See State v. Maryott*, 422 P.2d 239 (Wash. Ct. App. 1971) (holding that state may not compel medication to make defendant competent for trial).

²⁴ See *Davis v. Hubbard*, 506 F. Supp. 915, 929-30 (N.D. Ohio 1980) (recognizing that even an institutionalized patient retains a fundamental right to privacy and the forced administration of antipsychotic medication represents a significant invasion of that privacy); accord *Rogers v. Okin*, 634 F.2d 650, 653-54 (1st Cir. 1980), *cert. granted*, 451 U.S. 906 (1981), *appeal dismissed sub. nom.*, *Mills v. Rogers*, 454 U.S. 936 (1981), later proceeding *Mills v. Rogers*, 454 U.S. 1136 (1982), *vacated*, *Mills v. Rogers*, 457 U.S. 294 (1980), *vacated and remanded on other grounds sub nom.* *Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1989).

²⁵ See *Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984), *cert denied*, 469 U.S. 1214 (1985) (holding that a state may only forcibly medicate a defendant if it shows a compelling interest and no less intrusive means are available); *United States v. Charters*, 829 F.2d 479, 484 (4th Cir. 1982) (stating that a mentally ill pre-trial detainee has a constitutionally protected interest in deciding whether to accept or refuse medication).

²⁶ 494 U.S. 210 (1990).

²⁷ The prisoner in *Harper* was forcibly medicated with antipsychotic drugs by the prison officials after they determined that the prisoner's mental state presented a danger to himself and others in the prison. *Id.* at 214. A special committee, consisting of a psychiatrist, a psychologist and the Associate Superintendent of the facility held a hearing to determine if the medication was necessary, at which Harper was present and had the assistance of a nurse practitioner for his defense. *Id.* at 217. The prisoner, Harper challenged the decision to medicate him and on appeal, the Washington State Supreme Court held that the highly

that the due process clause of the fourteenth amendment confers a significant liberty interest on a state prisoner in avoiding unwanted medication.²⁸

In *Pate v. Robinson*,²⁹ the Supreme Court established that due process prohibits the trial of a criminal defendant who is incompetent.³⁰ The current standard for determining competence to stand trial was set out by the Court in *Dusky v. United States*.³¹ This standard requires that the defendant have a present ability to consult with his lawyer with a reasonable degree of understanding, and a rational, factual understanding of the proceedings against him.³² There have been several constitutional bases put forth to justify a "right to refuse" when the state attempts to forcibly medicate a defendant to make him competent to stand trial under *Dusky*. In *Winston v. Lee*,³³ which has been frequently cited in support of a right to refuse medication at trial, the Supreme Court decided that when a state attempts to compel a medical procedure, it has intruded on a defendant's fourth amendment right to privacy.³⁴

*Youngberg v. Romeo*³⁵ also lends support to a right to refuse medication necessary to attain competence for trial. The Supreme Court in *Youngberg* recognized that a person has a liberty interest protected by the fourteenth amendment in being free from bodily restraint.³⁶ Courts have also found that a right to refuse antipsychotic medication at trial exists under the first amendment protection of freedom of thought.³⁷ In *Illinois v. Allen*,³⁸ the Supreme Court acknowledged that the defendant's physical appearance before the jury may

intrusive nature of the medication required the state to show a compelling interest before medicating a prisoner. *Harper v. State*, 759 P.2d 358, 364-65 (Wash. 1988), *motion granted, cert. granted*, *Washington v. Harper*, 489 U.S. 1064 (1989) *rev'd*, 494 U.S. 210 (1990).

²⁸ *Harper*, 494 U.S. at 221.

²⁹ 383 U.S. 375 (1966).

³⁰ *Id.* at 386. This principle was reaffirmed by the Court in *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975).

³¹ 362 U.S. 402 (1960).

³² *Id.* at 402.

³³ 470 U.S. 753 (1985).

³⁴ *Id.* at 765-67. The Court determined that the compelled surgical removal of a bullet, which involved serious medical risks to the defendant, interfered with his fourth amendment privacy rights to be secure in his person. *Id.* The Court then held that the state must show a compelling interest before it could subject a criminal defendant to such a dangerous medical procedure. *Id.* at 762.

³⁵ 457 U.S. 307 (1982).

³⁶ *Id.* at 320. While *Youngberg* was concerned with a mental patient's right to be free from physical restraints, *id.* at 316, the principle has been applied by several courts in finding that this interest justifies a criminal defendant's right to refuse medication necessary to make him competent for trial. *See, e.g.* *United States v. Charters*, 829 F.2d 479, 488-90 (4th Cir. 1987) (stating that just as the Supreme Court in *Youngberg* balanced the patients liberty interests against the state's interests, a defendant's liberty interests must be weighed against the state's interest in bringing him to trial); *Bee v. Greaves*, 744 F.2d 1387, 1394-95 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) (stating that under *Youngberg*, a state may only overcome a defendant's liberty interest by showing a compelling interest).

³⁷ *See Bee*, 744 F.2d at 1395 (holding that the liberty and first amendment interests outweigh the state's interest in medicating a defendant to attain competence for trial).

³⁸ 397 U.S. 337 (1970).

prejudice his fourteenth amendment right to a fair trial.³⁹ Another justification supporting a defendant's right to refuse medication is that the drugs deny the defendant a fair trial by interfering with his fundamental sixth amendment right to present a full defense.⁴⁰

STATEMENT OF THE CASE

In November 1987, David Riggins was arrested for the murder of a man found knifed to death.⁴¹ Shortly after his arrest, Riggins complained to a psychiatrist treating him in jail that he was hearing voices in his head and having trouble sleeping.⁴² The psychiatrist then prescribed Mellaril, an antipsychotic drug, to Riggins.⁴³ While awaiting trial, three court-appointed psychiatrists examined Riggins while he was taking the medication to determine his competence to stand trial.⁴⁴ Two of the three psychiatrists concluded that Riggins was competent to stand trial while taking the medication.⁴⁵ The trial court then ruled Riggins competent and ordered the trial to proceed.⁴⁶

Before the trial began, Riggins' defense counsel moved for a court order suspending the forced medication to Riggins until after the trial.⁴⁷ The court held a hearing on the issue at which medical testimony showed that there was only a small possibility that Riggins could become incompetent if taken off the medication, but that it was not likely.⁴⁸ Nonetheless, the trial court issued an order denying Riggins' motion to suspend.⁴⁹ The trial then proceeded with Riggins subjected to the medication for the duration.⁵⁰ Riggins presented an insanity

³⁹ See *id.* at 344 (stating that a defendant's appearance before the jury bound and gagged was such a severe intrusion that it could only be justified in the most extreme cases). *Ake v. Oklahoma*, 470 U.S. 68, 78-79 (1985) (noting that the right to a fair trial is guaranteed by the fourteenth amendment); *Estelle v. Williams*, 425 U.S. 501, 502 (1976) (stating that the right to a fair trial is a fundamental right under the fourteenth amendment). But see *State v. Law*, 244 S.E.2d 302, 307 (S.C. 1978) (deciding that any prejudice which defendant may suffer from being medicated with antipsychotic drugs may be cured by informing the jury that the defendant is taking the drugs and of the effects the drugs).

⁴⁰ See *Faretta v. California*, 422 U.S. 806, 818 (1975) (holding that the sixth amendment provides the rights essential to having a fair defense, rights which are a basic part of the due process of the fourteenth amendment). Antipsychotic drugs can significantly impair this right by causing the defendant difficulty in remembering and reasoning, which will have a serious effect on his ability to assist his counsel in his own defense. Michele K. Bachand, Note, *Antipsychotic Drugs And The Incompetent Defendant: A Perspective On The Treatment And Prosecution Of Incompetent Defendants*, 47 WASH. & LEE L. REV. 1059, 1077 (1990).

⁴¹ *Riggins*, 112 S. Ct. at 1812.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* The third psychiatrist concluded that Riggins was incompetent to stand trial even while taking the medication. *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Petitioners Brief at 7, *Riggins*, 112 S. Ct. 1810 (1992) (No. 90-8466) available on LEXIS, Genfed ILbrary, Briefs File).

⁴⁹ *Riggins*, 112 S. Ct. at 1813.

⁵⁰ *Id.*

defense and testified on his own behalf.⁵¹ But the jury still convicted him of first degree murder, and in a separate sentence hearing sentenced Riggins to death.⁵²

Riggins appealed directly to the Nevada Supreme Court, claiming that the forced administration of Mellaril denied him his constitutional right to assist in his own defense and prejudiced him in the eyes of the jurors.⁵³ But the Nevada Supreme Court affirmed the conviction.⁵⁴ The court held that any prejudice Riggins suffered was corrected by the admission of expert testimony informing the jury of the effect antipsychotic medication has on a person's demeanor.⁵⁵ The United States Supreme Court granted certiorari to determine whether forced administration of antipsychotic medication during trial violated rights guaranteed by the sixth and fourteenth amendments.⁵⁶

ANALYSIS

Eighth Amendment Claim

The Court began its analysis by dismissing out of hand Riggins' claim that his eighth amendment rights were violated at trial.⁵⁷ Riggins alleged that the state's administration of antipsychotic drugs to him unfairly prejudiced him in the eyes of the jurors during his sentencing hearing.⁵⁸ Riggins argued that the effects of these drugs made him appear apathetic, uncaring, zombie-like and without remorse in the eyes of the jurors.⁵⁹ Despite this possible prejudice, the Court properly decided that since Riggins had not raised this argument at a lower court or in his petition for certiorari, the Court would not address it.⁶⁰

Liberty Interest

The Court then moved directly into what it considered Riggins' core argument, that the forced administration of medication to Riggins violated his

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Riggins v. State*, 808 P.2d 535 (Nev. 1991).

⁵⁵ *Id.* at 538.

⁵⁶ *Riggins*, 112 S. Ct. at 1814.

⁵⁷ *Id.*

⁵⁸ *Id.* To a jury, a defendant medicated with antipsychotic drugs may appear unemotional and unconcerned about the proceedings at hand. Fentiman, *supra* note 12, at 1128-31. The defendant may also suffer side effects causing him to act restless and overly nervous, which could cause the jury to believe he has a guilty mind and be prejudiced against him. *Id.* at 1130. See also, Bachand, *supra* note 40, at 1080. (stating that a jury will invariably use its perceptions of the defendant's courtroom appearance to judge the defendant's prior mental state in every criminal case, and particularly in insanity cases).

⁵⁹ See Petitioners Brief at 6-7, *Riggins*, 112 S. Ct. 1810 (1992) No. 90-8466) available on LEXIS, Genfed Library, Briefs File.

⁶⁰ *Riggins*, 112 S. Ct. at 1814.

fourteenth amendment due process rights.⁶¹ The Court started its discussion by reviewing its recent decision in *Washington v. Harper*.⁶² The *Washington* Court held that a convicted state prisoner still retains a liberty interest in not being medicated against his will.⁶³ The *Riggins* Court stated that the forcible administration of antipsychotic drugs represents a particularly severe interference with a person's liberty because the drugs can have serious and even fatal side effects.⁶⁴ The Court acknowledged that the fourteenth amendment provides at least the same amount of protection to a criminal defendant, who is presumed innocent, as it does to a convicted prisoner.⁶⁵ The Court then decided that it was error for the trial court to refuse to discontinue Riggins' medication without recognizing his liberty interest and weighing it against the relevant state interests.⁶⁶

The Court's decision to extend the holding in *Washington* finally sets a firm standard for all courts to apply in considering whether a defendant may refuse antipsychotic medication at trial. This standard puts an end to the sharp split of authority among the courts over whether a defendant has a constitutionally protected right in avoiding such medication.⁶⁷ This decision logically follows from the Supreme Court's prior holdings suggesting that any time a state forcibly administers medication to an individual, it has intruded on that person's protected liberty interest.⁶⁸

⁶¹ *Id.*

⁶² 494 U.S. 210 (1990).

⁶³ *Id.* at 221.

⁶⁴ *Riggins*, 112 S. Ct. at 1814. The drugs alter the chemical balance of a person's brain. In addition, neuroleptic malignant syndrome can cause death by cardiac arrest. *Id.* at 1815.

⁶⁵ *Id.* "Pre-trial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." (*quoting Bell v. Wolfish*, 441 U.S. 520, 545 (1979)).

⁶⁶ *Riggins*, 112 S. Ct. at 1816.

⁶⁷ See, e.g., Brian Domb, Note, *A New Twist in the War on Drugs: The Constitutional Right of a Mentally Ill Criminal Defendant to Refuse Antipsychotic Medication That Would Make Him Competent to Stand Trial*, 4 J.L. & HEALTH 273 (1990) (There has been clear disagreement within the judicial system on the issue of forcibly medicating a person with antipsychotic drugs); *Id.* at 273 (Both civil and criminal arenas would benefit greatly from direct and clear Supreme Court guidance on the issue of forced medication); *Jarvis v. Levine*, 418 N.W. 2d 139 (Minn. 1988) (placing very tight restrictions on when a mental patient may be forcibly medicated); *State v. Maryott*, 492 P.2d 239, 240 (Wash. Ct. App. 1971) (holding that no state interest could justify the intrusive control over an accused which such drugs represent). *But See Also*, *State v. Hayes*, 389 A.2d 1379, 1381-1382 (N.H. 1978) (stating that a criminal defendant does not have an absolute right to refuse medication at trial); *State v. Jojola*, 553 P.2d 1296, 1300 (N.M. Ct. App. 1976) (same); *State v. Law*, 244 S.E. 2d 302 (S.C. 1978) (same).

⁶⁸ "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990). Freedom from bodily restraint is at the core of liberty interests protected by the Fourteenth Amendment. *Youngberg v. Romeo*, 457 U.S. 307, 316 (1980). The right to be free from unjustified intrusions on personal security is one of the historic liberty interests protected by the due process clause. *Vitek v. Jones*, 445 U.S. 480, 492 (1980). "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). The right to be let alone is the most comprehensive of rights, and the right most valued by civilized men. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Trial Prejudice

The Court next went on to consider whether Riggins' due process right to a fair trial was prejudiced by the forced administration of the antipsychotic drugs.⁶⁹ Ultimately, the Court balks at answering this question. But the Court does state that it is clearly possible that the side effects of the drugs impacted Riggins' outward appearance, his testimony on direct and cross-examination, his ability to follow the proceedings, or his communication with counsel.⁷⁰ But the Court chose not to decide this issue.⁷¹ The Court stated that because the trial judge gave no reasoning for his refusal to order the discontinuation of the medication, it was impossible to tell whether Riggins had been prejudiced.⁷²

As Justice Kennedy points out in his concurring opinion, there are serious problems involved in forcibly medicating a defendant during trial.⁷³ When the state forcibly medicates a defendant during his trial for the stated purpose of changing his behavior, the state has acted much the same as if it had manipulated material evidence.⁷⁴ Justice Kennedy points out that the side effects of antipsychotics can alter a defendant's demeanor and make him unable or at least unwilling to assist his own defense counsel.⁷⁵ This is a particularly serious concern because the principal value served by the defendant's presence at trial is his ability to give advice and suggestions to his counsel during the course of the trial.⁷⁶ Although several commentators have seriously questioned whether a defendant medicated with antipsychotic drugs can ever truly receive a fair trial,⁷⁷ the Supreme

⁶⁹ *Riggins*, 112 S. Ct. at 1816.

⁷⁰ *Id.* at 1816. See generally Fentiman, *supra* note 12 (discussing the mind altering effects of antipsychotic drugs); Alexander D. Brooks, *The Constitutional Right To Refuse Antipsychotic Medications*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 179 (1980) (same); Bauer, *supra* note 12 (same).

⁷¹ *Riggins*, 112 S. Ct. at 1816.

⁷² *Id.*

⁷³ *Id.* at 1817 ("Involuntary medication with antipsychotic drugs poses a serious threat to a defendant's right to a fair trial") (Kennedy, J., concurring).

⁷⁴ *Id.* (Kennedy, J., concurring).

⁷⁵ *Id.* at 1818 (Kennedy, J., concurring). See also Steve Tomashefsky, Comment, *Antipsychotic Drugs and Fitness to Stand Trial: The Right of The Unfit Accused to Refuse Treatment*, 52 U. CHI. L. REV. 773, 782 (1985). (Stating that drugs which affect the emotions may inhibit the defendant's ability to function properly as a defendant by diminishing his motivation to advise his lawyer about such things as the cross-examination of witnesses); Domb *supra* note 67, at 302. (Stating that the effects of these drugs may well give the defendant such diminished anxiety, and unnatural apathy that he feels an increased level of trust for his adversaries).

⁷⁶ Tomashefsky, *supra* note 75, at 782. One common side effect of antipsychotic medication, Akinesia, makes a defendant feel lethargic and indifferent. *California's Programs*, *supra* note 12, at 12-13; This effect may make a defendant too apathetic to care about the outcome, even though he does in fact comprehend what is happening. Bachand, *supra* note 40, at 1078; The emotional apathy and lack of initiative symptomatic of Akinesia, combined with the physical restlessness symptomatic of Akathisia, produces a defendant who, even though he may be competent to be on trial, is not likely to help himself or his attorney during his trial. Tomashefsky, *supra* note 75, at 786.

⁷⁷ See Fentiman, *supra* note 12, at 1125-35 (arguing that if a defendant is tried in a medicated state, he may not even have a chance for a fair trial). The right to have a fair trial is so fundamental to society that the state should not be permitted to coerce the defendant into a position of even potential prejudice. Tomashefsky, *supra* note 75, at 789.

Court failed to settle this issue.⁷⁸ The reason the Court stopped short of deciding the trial prejudice issue could be its desire to wait for a more suitable case to come before it, before announcing a rule of law expanding the amount of trial prejudice that the state may compel a defendant to undergo.⁷⁹

Justice Thomas, in his dissent, acknowledged that the fourteenth amendment confers a fundamental right to a fair trial on every criminal defendant.⁸⁰ But Thomas asserted that Riggins did receive a fair trial.⁸¹ Thomas argued that before Riggins' conviction is reversed, he should be required to show how he was actually prejudiced by the medication.⁸² But Thomas fails to fully realize the limited extent of the Court's holding and the constitutional interests at stake. First of all, the Court did not reverse Riggins' conviction because it found his trial rights had been prejudiced. In fact, the Court specifically found that it was impossible to tell from the record if Riggins had been prejudiced.⁸³ The Court reversed the conviction because the trial judge had failed to recognize Riggins' liberty interest in avoiding unwanted medication when he decided to refuse to order that the drug be discontinued.⁸⁴

Secondly, in contrast to Justice Thomas' assertion, the burden does not fall on Riggins to show how he was prejudiced from taking the medication. Once the state medicated Riggins against his will, it took on the obligation to show that the drug was necessary to further an essential state policy.⁸⁵ There is an important reason why a defendant medicated with these drugs should not bear the burden of showing how his trial was prejudiced. Another very common symptom of antipsychotic drugs is an impaired ability to remember.⁸⁶ Because of this, it would

⁷⁸ *Riggins*, 112 S. Ct. at 1816. Instead, the Court remanded to the trial court for a determination of whether Riggins would be prejudiced. *Id.* at 1816-1817.

⁷⁹ One point that the Court might have had difficulty with, is the fact that it would be setting forth a rule for determining whether the state may forcibly medicate a defendant to make him competent for trial, but in this case, Riggins was never actually found to be incompetent while not under the influence of the medication. The trial court never ordered Riggins to be examined while not taking the drugs. The psychiatrists who found Riggins to be competent, had examined him only while he was being given daily doses of the antipsychotic medication. *Id.* at 1812; Another point that may have been troublesome to the court is that the psychiatrist who prescribed the drugs for Riggins did not do so because he believed it was necessary to make Riggins competent to stand trial. The psychiatrist prescribed the drugs only because Riggins told him he was hearing voices in his head and could not sleep. *Id.*; There is also the problem of finding alternatives to the drugs to make a defendant competent to stand trial. As discussed *infra* notes 101-104, there has not been any research done to determine whether antipsychotic drugs are the least intrusive means of attaining trial competence. The Court may, therefore, want to see a case addressing this issue, and one where the defendant's incompetence is properly determined.

⁸⁰ *Id.* at 1822. ("The due process clause guarantees the fundamental elements of fairness in a criminal trial") (quoting *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967)).

⁸¹ *Riggins*, 112 S. Ct. at 1822.

⁸² *Id.* at 1822-23.

⁸³ *Id.* at 1816. ("Efforts to prove or disprove actual prejudice from the record before use would be futile").

⁸⁴ *See id.*

⁸⁵ *Id.* at 1815. (Stating that once Riggins objected to the state forcibly medicating him, the state became obligated to establish the need for Mellaril and the medical appropriateness of the drug).

⁸⁶ *See Fentiman*, *supra* note 12, at 1132 (Stating that antipsychotics can impair a person's memory, reasoning ability and ability to function on a normal basis); *Bauer*, *supra* note 12, at 512, 534 (same).

be fundamentally unfair to forcibly medicate a defendant, and then, after he is convicted, to require him to demonstrate what he might have done differently if he had not been medicated. Such tactics would truly give life to Orwell's picture of life in Oceania.⁸⁷

Compelling Interest

The Court stated that the reason it agreed to hear this case was to decide whether the forced administration of antipsychotic medication during trial violated rights guaranteed by the sixth and fourteenth amendments.⁸⁸ In the end, the Court fails to decide this question and leaves much confusion about exactly what it expects from the trial court on remand.⁸⁹ But the Court does give strong indications about how it would decide a case brought to it where the lower court did recognize the defendant's liberty interest in deciding to permit forcible medication.

The Court focused on the state's strong interest in bringing an accused to trial.⁹⁰ The Court went on to state that it is not yet adopting a strict scrutiny standard in these forced medication cases, because the trial court made no findings of fact that would show a compelling state interest that outweighed Riggins' liberty interest.⁹¹ However, the Court did point out that the state of Nevada would have satisfied strict scrutiny if it had shown that the medication was medically appropriate, necessary to bring Riggins to trial, and there were no less intrusive alternatives available.⁹² The Court then flatly stated that trial prejudice can be justified by showing a compelling state interest.⁹³ It would, therefore, appear that the Court is prepared to permit forcible medication of a criminal defendant, even where it prejudices his ability to assist in his own defense, because of the state's strong interest in bringing the accused to trial.⁹⁴

⁸⁷ GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Harcourt Brace Jovanovich, Inc. 1949).

⁸⁸ *Riggins*, 112 S. Ct. at 1814.

⁸⁹ *See id.* at 1818 (Kennedy, J., concurring) (Stating that the Court gives little guidance about what the trial judge is to consider on remand).

⁹⁰ *Id.* at 1815. ("The constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace") (*quoting* *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring)).

⁹¹ *Id.* at 1815-1816.

⁹² *Id.* at 1815. The Court also states that forced medication at trial would be permissible if it were necessary for Riggins own safety or the safety of others and the least intrusive means. *Id.* The Court even goes so far as to compare forcible medication to binding and gagging a defendant, which is permissible where it is the "fairest and most reasonable way" to control a disruptive defendant. *Id.* at 1816 (*quoting* *Allen*, 397 U.S. at 344).

⁹³ *Id.*

⁹⁴ Exactly how much prejudice the court would be willing to compel the defendant to suffer for the sake of being brought to trial remains to be seen, because the Court failed to address it. But given the Court's acknowledgement that even the prejudice suffered from binding and gagging a defendant at trial is acceptable where it is the most reasonable way to control a disruptive defendant, *id.* at 1816-17, it would seem that the Court is willing to permit the defendant to endure a great deal of trial prejudice.

The Court's rationale that forced medication may be justified by a compelling state interest is consistent with prior Supreme Court decisions, as well as lower federal and state court decisions.⁹⁵ It has been firmly established that the state has a compelling interest in bringing an accused to trial.⁹⁶ However, it must be remembered that the state also has a compelling interest in ensuring that criminal trials are fair.⁹⁷ Because of the adverse effects of antipsychotic drugs on a defendant's ability to assist in his own defense, it is highly questionable whether such a defendant can ever receive a fair trial.⁹⁸ Therefore, this medication should not be used to make a defendant competent to stand trial. Because the state's compelling interest in having fair trials is jeopardized by the use of antipsychotic drugs, other means of handling mentally incompetent persons who commit crimes should be explored.⁹⁹

Least Intrusive Means

It is important to note that in addressing the state's compelling interest in bringing defendants to trial, the Court failed to consider the second part of the analysis, that the means of achieving the state's goal be the least intrusive available.¹⁰⁰ This failure is understandable because the only occasions which courts and the medical community have had to consider alternatives to the use of antipsychotic drugs have been limited to situations involving mental patients,¹⁰¹

⁹⁵ See, e.g., *Winston v. Lee*, 470 U.S. 753, 765-67 (1985) (holding that the state may compel removal of a bullet from a defendant only upon a showing of a compelling interest); *Bee v. Greaves*, 744 F.2d 1387, 1392-93 (10th cir. 1984), cert. denied, 469 U.S. 1214 (1985) (holding that the state may forcibly medicate a defendant at trial only if there exists a compelling state interest); *State v. Law*, 244 S.E.2d 302, 307 (1978) (same). But see *Rogers v. Commissioner of Dept. of Mental Health*, 458 N.E.2d 308 (Mass. 1983) (holding that absent an emergency situation, no state interest is sufficiently compelling to overcome a patient's decision to refuse medication).

⁹⁶ See *supra* note 90 and accompanying text.

⁹⁷ The state has a powerful interest in a trial's accuracy in order to preserve respect for the trial system, especially where the accused may be sentenced to death. *Domb*, *supra* note 67, at 280. The interest in the accuracy of a criminal trial that places a defendant's life or liberty at risk is almost uniquely compelling. *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985).

⁹⁸ *United States v. Charters*, 829 F.2d 479, 493 (4th Cir. 1987). The state's interest in bringing an accused to trial does not permit the draconian invasion the defendant's liberty and the risk of permanent injury that antipsychotic drugs represent. *Id.* at 494.

⁹⁹ In most cases, the state may choose civil commitment of an incompetent defendant in place of a criminal trial. See *Bachand*, *supra* note 40, at 1073. Civil commitment also partially fulfills the state's interest in trying the defendant because civil commitment of a defendant protects the public from harm. *Id.* Further, civil commitment may, in many cases, meet the punishment aspect of the criminal system because often commitment is considerably more difficult and stigmatizing than prison. Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 456 (1967).

¹⁰⁰ Whenever a state intrudes on a fundamental constitutional right, not only must it show a compelling interest for doing so, but the means for accomplishing the state's goal must be the least drastic available. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); If there are other reasonable ways to achieve those goals with a lesser burden on the constitutional right, the state may not choose the way of greater interference. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); The means of achieving the state's interest must be carefully selected so as to result in the minimum possible infringement of the protected right. *United States v. Charters*, 829 F.2d 479 (4th Cir. 1987).

¹⁰¹ See *Youngberg v. Romeo*, 457 U.S. 307 (1982) (permitting soft physical restraints to be used on a civilly committed mental patient); In the civil commitment environment, valid alternatives have also

prisoners¹⁰² and pre-trial detainees.¹⁰³ But the alternatives employed in those situations, such as physical restraints and tranquilizers, were simply used to ensure the safety of others or the person medicated.¹⁰⁴ None of these alternatives address the problem of making a person competent to stand trial. Given the lack of research on alternatives, it may well be that antipsychotic drugs are the least intrusive means of bringing an incompetent defendant to trial. But in the future, courts should remain aware that advances in medical technology may produce other methods that are less intrusive than antipsychotic medication.

Possible Extensions

The Court implied in dicta that forcible medication of an incompetent defendant would be permissible if it were the least intrusive means of bringing him to trial.¹⁰⁵ Because of this, the next logical step would seem to be for the Court to specifically rule that a defendant may not refuse such medication if there is no other way to bring him to trial.¹⁰⁶ Given the adverse effects antipsychotics have on a defendant's ability to assist in his defense and show his true demeanor to the jury,¹⁰⁷ such a decision will significantly increase the amount of trial prejudice a defendant can be forced to suffer.

CONCLUSION

The *Riggins* Court's recognition of a defendant's liberty interest in remaining free of unwanted medication at trial offers some hope to the incompetent criminal defendant who does not want to endure the disabling effects of antipsychotic drugs for the sole purpose of being brought to trial. However, the Court's reasoning suggests that regardless of this liberty interest, or the trial prejudice, the state may

included seclusion or less intrusive medication like tranquilizers or sedatives. Brooks, *supra* note 70, at 193.

¹⁰² See *Washington v. Harper*, 494 U.S. 210, 226-27 (1990). The *Washington* Court stated that neither physical restraints nor seclusion would be as effective as antipsychotic drugs in meeting the state's legitimate interests in controlling a convicted prisoner, because of the costs and dangers to prison staff; PAUL H. SOLOFF, *Physical Controls: The Use of Seclusion and Restraint in Modern Psychiatric Practice*, in CLINICAL TREATMENT OF THE VIOLENT PERSON 119 (L. Roth ed. 1987) (discussing the costs and dangers of using physical restraints and seclusion on violent patients).

¹⁰³ See *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1980) (holding that a pre-trial detainee could be forced to take antipsychotic drugs only where an emergency exists that cannot be met by less intrusive means such as tranquilizers, sedatives, or segregation).

¹⁰⁴ In *Youngberg*, the mental patient was put in soft arm restraints to keep him from harming himself or other patients in the hospital. 457 U.S. at 310-311; Similarly, in *Harper*, the Court justified the use of antipsychotic drugs on the convicted prisoner by the need to protect the prison staff and administrators. 494 U.S. at 225.

¹⁰⁵ *Riggins*, 112 S. Ct. at 1816.

¹⁰⁶ In fact, such a decision may be very close at hand, because *Riggins* is currently sitting in jail awaiting re-trial, and he is still being subjected to daily doses of the antipsychotic medication. Telephone interview with the law office of Mace Yampolsky, Counsel for David E. Riggins (Sept. 25, 1992); No trial date has yet been set, but *Riggins'* case status is listed as "ongoing". Telephone interview with Clark County, Nevada, Clerk of Courts (Sept. 25, 1992).

¹⁰⁷ See *supra* notes 39-40 and accompanying text.

forcibly medicate defendants because of its compelling interest in bringing an accused to trial. This raises serious doubt about whether incompetent defendants have any true protection from the drugs. Because *Riggins* does not consider whether antipsychotic medication is the least intrusive means of attaining trial competency, it remains to be seen whether other methods may satisfy that test.

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