SUPREME COURT OF THE UNITED STATES

No. 90–8466

DAVID RIGGINS, PETITIONER *v.* NEVADA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

[May 18, 1992]

JUSTICE KENNEDY, concurring in the judgment.

The medical and pharmacological data in the *amicus* briefs and other sources indicate that involuntary medication with antipsychotic drugs poses a serious threat to a defendant's right to a fair trial. In the case before us, there was no hearing or well-developed record on the point, and the whole subject of treating incompetence to stand trial by drug medication is somewhat new to the law, if not to medicine. On the sparse record before us, we cannot give full consideration to the issue. I file this separate opinion, however, to express my view that the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial absent an extraordinary showing, and to express doubt that the showing can be made, given our present understanding of the properties of these drugs.

At the outset, I express full agreement with the Court's conclusion that one who was medicated against his will in order to stand trial may challenge his conviction. When the State commands medication during the pretrial and trial phases of the case for the avowed purpose of changing the defendant's behavior, the concerns are much the same as if it were alleged that the prosecution had manipulated material evidence. *See Brady* v. *Maryland*, 373 U. S. 83, 87 (1963) (suppression by the prosecution of material evidence favorable to the accused violates due process); *Arizona* v. *Youngblood*, 488 U.S. 51, 58 (1988) (bad faith failure to preserve potentially useful evidence constitutes a due process

violation). I cannot accept the premise of JUSTICE THOMAS' dissent that the involuntary medication order comprises some separate procedure, unrelated to the trial and foreclosed from inquiry or review in the criminal proceeding itself. To the contrary, the allegations pertain to the State's interference with the trial and review in the criminal proceeding is appropriate.

I also agree with the majority that the State has a legitimate interest in attempting to restore the competence of otherwise incompetent defendants. Its interest derives from the State's right to bring an accused to trial and from our holding in *Pate* v. *Robinson*, 383 U. S. 375, 378 (1966), that conviction of an incompetent defendant violates due process. Unless a defendant is competent, the State cannot put him on trial. Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. *Drope* v. *Missouri*, 420 U.S. 162, 171–172 (1975). Although the majority is correct that this case does not require us to address the question whether a defendant may waive his right to be tried while competent, in my view a general rule permitting waiver would not withstand scrutiny under the Due Process Clause, given our holdings in *Pate* and *Drope*. A defendant's waiver of the right to be tried while competent would cast doubt on his exercise or waiver of all subsequent rights and privileges through the whole course of the trial.

The question is whether the State's interest in conducting the trial allows it to insure the defendant's competence by involuntary medication, assuming of course there is a sound medical basis for the treatment. The Court's opinion will require further proceedings on remand, but there seems to be little discussion as to what must be considered in these further proceedings. The Court's failure to address these issues is understandable in some respects, for it was not the subject of briefing or argument; but to underscore my reservations about the propriety of involuntary medication for the purpose of rendering the defendant competent, and to explain what I think

ought to be express qualifications of the Court's opinion, some discussion of the point is required.

This is not a case like *Washington* v. *Harper*, 494 U.S. 210 (1990), in which the purpose of the involuntary medication was to insure that the incarcerated person ceased to be a physical danger to himself or others. The inquiry in that context is both objective and manageable. Here the purpose of the medication is not merely to treat a person with grave psychiatric disorders and enable that person to function and behave in a way not dangerous to himself or others, but rather to render the person competent to stand trial. It is the last part of the State's objective, medicating the person for the purpose of bringing him to trial, that causes most serious concern. If the only question were whether some bare level of functional competence can be induced, that would be a grave matter in itself, but here there are even more far reaching concerns. The avowed purpose of the medication is not functional competence, but competence to stand trial. In my view elementary protections against state intrusion require the State in every case to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel. Based on my understanding of the medical literature, I have substantial reservations that the State can make that showing. Indeed, the inquiry itself is elusive, for it assumes some baseline of normality that experts may have some difficulty in establishing for a particular defendant, if they can establish it at all. These uncertainties serve to underscore the difficult terrain the State must traverse when it enters this domain.

To make these concerns concrete, the effects of antipsychotic drugs must be addressed. First introduced in the 1950's, antipsychotic drugs such as Mellaril have wide acceptance in the psychiatric

community as an effective treatment for psychotic thought disorders. See American Psychiatric Press Textbook of Psychiatry 770–774 (J. Talbott, R. Hales & S. Yodofsky eds. 1988) (Textbook of Psychiatry); Brief for American Psychiatric Association as *Amicus Curiae* 6–7. The medications restore normal thought processes by clearing hallucinations and delusions. Textbook of Psychiatry, at 774. *See* also Brief for American Psychiatric Association, at 9 ("The mental health produced by antipsychotic medication is no different from, no more inauthentic or alien to the patient than, the physical health produced by other medications, such as penicillin for pneumonia"). For many patients, no effective alternative exists for treatment of their illnesses. *Id.*, at 7, and n.3.

Although these drugs have changed the lives of psychiatric patients, they can have unwanted side effects. We documented some of the more serious side effects in *Washington* v. *Harper*, *supra*, at 229–230, and they are mentioned again in the majority opinion. More relevant to this case are side effects that, it appears, can compromise the right of a medicated criminal defendant to receive a fair trial. The drugs can prejudice the accused in two principal ways: 1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and 2) by rendering him unable or unwilling to assist counsel.

It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, either while the accused is on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. *Taylor* v. *United States*, 414 U. S. 17, 19 (1973) (*per curiam*). At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an

overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, as Riggins did, his demeanor can have a great bearing on his credibility, persuasiveness, and on the degree to which he evokes sympathy. The defendant's demeanor may also be relevant to his confrontation rights. *See Coy* v. *Iowa*, 487 U. S. 1012, 1016–1020 (1988) (emphasizing the importance of the face-to-face encounter between the accused and the accuser).

The side effects of antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense. Serious due process concerns are implicated when the State manipulates the evidence in this way. The defendant may be restless and unable to sit still. Brief for American Psychiatric Association, at 10. The drugs can induce a condition called parkinsonism, which, like Parkinson's disease, is characterized by tremor of the limbs, diminished range of facial expression, or slowed movements and speech. *Ibid.* Some of the side effects are more subtle. Antipsychotic drugs such as Mellaril can have a "sedation-like effect" that in severe cases may affect thought processes. *Ibid.* At trial, Dr. Jurasky testified that Mellaril has "a tranquilizer effect." Record 752. See also *ibid.* ("If you are dealing with someone very sick then you may prescribe up to 800 milligrams which is the dose he had been taking which is very, very high. I mean you can tranquilize an elephant with 800 milligrams"). Dr. Jurasky listed the following side effects of large doses of Mellaril: "Drowsiness, constipation, perhaps lack of alertness, changes in blood pressure. . . . Depression of the psychomotor functions. If you take a lot of it you become stoned for all practical purposes and can barely function." *Id.*, at 753.

These potential side effects would be disturbing for any patient; but when the patient is a criminal

defendant who is going to stand trial, the documented probability of side effects seems to me to render involuntary administration of the drugs by prosecuting officials unacceptable absent a showing by the State that the side effects will not alter the defendant's reactions or diminish his capacity to assist counsel. As the American Psychiatric Association points out:

> "By administering medication, the State may be creating a prejudicial negative demeanor in the defendant—-making him look nervous or restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive. . . . That such effects may be subtle does not make them any less real or potentially influential."

Brief for American Psychiatric Association, at 13. As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. *See* Geimer & Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J. Crim. L. 1, 51–53 (1987–1988).

Concerns about medication extend also to the issue of cooperation with counsel. We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. *Massiah* v. *United States*, 377 U.S. 201 (1964); *Geders* v. *United States*, 425 U. S. 80 (1976) (trial court order directing defendant not to consult with his lawyer during an

overnight recess held to deprive him of the effective assistance of counsel). The defendant must be able to provide needed information to his lawyer, and to participate in the making of decisions on his own behalf. The side effects of antipsychotic drugs can hamper the attorney-client relation, preventing effective communication and rendering the defendant less able or willing to take part in his defense. The State interferes with this relation when it administers a drug to dull cognition. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 42 ("[T]he chemical flattening of a person's will can also lead to the defendant's loss of self-determination undermining the desire for self-preservation which is necessary to engage the defendant in his own defense in preparation for his trial").

It is well established that the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system, *In re Oliver*, 333 U.S. 257, 273 (1948). We have found the right implicit as well in the Compulsory Process Clause of the Sixth Amendment. *Rock* v. *Arkansas*, 483 U.S. 44 (1987). In *Rock*, we held that a state rule excluding all testimony aided or refreshed by hypnosis violated the defendant's constitutional right to take the stand in her own defense. We observed that barring the testimony would contradict not only the right of the accused to conduct her own defense, but also her right to make this defense in person: "`It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor."'" *Id.*, at 52, quoting *Faretta* v. *California*, 422 U.S. 806, 819 (1975). We gave further recognition to the right of the accused to testify in his or her own words, and noted that this in turn was related to the Fifth Amendment choice to speak "in

the unfettered exercise of his own will." *Rock*, *supra*, at 53. In my view medication of the type here prescribed may be for the very purpose of imposing constraints on the defendant's own will, and for that reason its legitimacy is put in grave doubt.

If the State cannot render the defendant competent without involuntary medication, then it must resort to civil commitment, if appropriate, unless the defendant becomes competent through other means. If the defendant cannot be tried without his behavior and demeanor being affected in this substantial way by involuntary treatment, in my view the Constitution requires that society bear this cost in order to preserve the integrity of the trial process. The state of our knowledge of antipsychotic drugs and their side effects is evolving and may one day produce effective drugs that have only minimal side effects. Until that day comes, we can permit their use only when the State can show that involuntary treatment does not cause alterations raising the concerns enumerated in this separate opinion.

With these observations, I concur in the judgment reversing the conviction.