

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2000

5 (Argued July 11, 2001 Decided: April 24, 2002)

6 Docket No. 01-1143

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8
9 UNITED STATES OF AMERICA,

10
11 Appellee,

12
13 -v.-

14
15 AARON GOMES,

16
17 Defendant-Appellant.

18
19 -----x
20 B e f o r e : WALKER, Chief Judge, CABRANES and STRAUB, Circuit
21 Judges.

22 Appeal from that part of an order issued by the United
23 States District Court for the District of Connecticut
24 (Christopher F. Droney, District Judge), authorizing the
25 involuntary medication of Aaron Gomes with antipsychotic drugs to
26 render him competent to stand trial.

27 Vacated and remanded.

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30 brief), Old Saybrook, CT, for
31 Defendant-Appellant.

32
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28 Curiae the Federal Bar Council.

29
30 WILLIAM J. ROLD, New York, NY, for
31 Amicus Curiae the National
32 Commission on Correctional Health
33 Care.

34 JOHN M. WALKER, JR., Chief Judge:

35 This appeal requires us to determine the appropriate
36 standard under which involuntary medication may be ordered to
37 render a non-dangerous criminal defendant competent to stand
38 trial. Defendant-appellant Aaron Gomes appeals from the February
39 6, 2001 order of the United States District Court for the
40 District of Connecticut (Christopher F. Droney, District Judge)

1 authorizing Gomes's involuntary medication with antipsychotic
2 drugs, subject to certain conditions, to render him competent to
3 stand trial for the charged criminal conduct, and extending his
4 commitment to the custody of the Attorney General. On appeal,
5 Gomes challenges only that part of the district court order
6 authorizing his involuntary medication. We vacate the order of
7 involuntary medication and remand for further proceedings in
8 light of the standard we have adopted.

9 BACKGROUND

10 On October 27, 1998, a federal grand jury indicted Gomes on
11 one count of possession of a firearm by a convicted felon, in
12 violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The
13 indictment followed Gomes's arrest by the Hartford Police on
14 September 30, 1998 for possession of a pistol without a permit,
15 possession of a controlled substance, and possession of narcotics
16 and theft of a firearm. On May 7, 1999, the government filed a
17 notice informing the district court that because Gomes had at
18 least three prior convictions for violent felonies or serious
19 drug offenses, he qualified for a sentence enhancement as an
20 Armed Career Offender under 18 U.S.C. § 924(e). With this
21 enhancement, Gomes faces a mandatory minimum sentence of fifteen
22 years' imprisonment.

23 Gomes has yet to stand trial for these charges. After the
24 district court denied Gomes's motion to suppress evidence in

1 April 1999, the proceedings in this case have centered on Gomes's
2 competency to stand trial. On May 27, 1999, Gomes's own attorney
3 first raised the issue. Citing "behavior of the defendant which
4 casts some doubts as to defendant's competency," Gomes's counsel
5 on June 1, 1999 sought authorization to have a psychiatrist
6 determine Gomes's present competency and whether he was
7 criminally insane at the time of the offense. However, Gomes
8 refused to participate and this examination did not take place.

9 On June 23, 1999, the district court, on its own motion and
10 without the benefit of expert testimony, found that there was
11 "reasonable cause to believe that [Gomes] may presently be
12 suffering from a mental disease or defect rendering him mentally
13 incompetent to the extent that he may be unable to understand the
14 nature and consequences of the proceedings against him and/or to
15 assist properly in his defense." The district court ordered a
16 competency hearing that was to be held after Gomes was examined
17 by a psychiatrist. Once again, Gomes refused to cooperate. On
18 October 25, 1999, the district court, absent objection, ordered
19 that Gomes be committed, pursuant to 18 U.S.C. § 4247(b), to the
20 custody of the Attorney General for placement in a suitable
21 psychiatric facility for thirty days for examination of his
22 mental health and competency to stand trial.

23 I. The Competency Hearings

24 After Gomes was examined at the U.S. Medical Center for

1 Federal Prisoners in Springfield, Missouri ("USMC-Springfield"),
2 the district court scheduled a competency hearing. At the
3 hearing, held on May 12, 2000, Gomes persisted in his refusal to
4 participate and angrily objected to, among other things, certain
5 witnesses who were to testify by teleconference. Gomes's efforts
6 to obstruct the proceedings led to his removal from the
7 courtroom. The district court proposed various measures that
8 would have allowed Gomes to participate in the hearing from
9 outside the courtroom, but none of these proposals were
10 technologically feasible. Ultimately, without objection from
11 counsel for either side, the district court held the hearing in
12 Gomes's absence.

13 The government offered the testimony and written report of
14 Dr. David Mrad, a Bureau of Prisons forensic psychologist. Dr.
15 Mrad, who had examined Gomes at USMC-Springfield, concluded that
16 Gomes was incompetent because, while he understood some aspects
17 of the proceedings against him, he lacked a "rational
18 understanding" of those proceedings and suffered from an
19 undefined "psychotic disorder." Dr. Mrad's report cited numerous
20 instances of Gomes's "persecutory ideas" and other delusions.
21 Among these delusions is Gomes's insistence that the instant
22 federal proceedings are part of a vast conspiracy against him
23 orchestrated by the judge in a prior state court proceeding.

24 In a June 7, 2000 ruling, the district court found that

1 Gomes was not competent to stand trial and ordered him committed
2 to the custody of the Attorney General for three months to
3 determine whether there was a substantial probability that Gomes
4 would attain the capacity to stand trial in the foreseeable
5 future. The district court agreed with Dr. Mrad that Gomes's
6 persecutory delusions rendered him unable to assist in his own
7 defense because his efforts would be directed toward uncovering
8 the supposed "conspiracy" rather than defending against the
9 actual charges. We affirmed the district court in an unpublished
10 summary order dated October 2, 2000.

11 II. The Administrative Involuntary Medication Proceedings

12 Upon his return to USMC-Springfield following the hearing,
13 Gomes was examined again and prescribed antipsychotic medication.
14 When Gomes refused to take the medication, two administrative
15 hearings were held at USMC-Springfield, in accordance with the
16 rules and procedures set forth at 28 C.F.R. § 549.43, to
17 determine whether Gomes could be involuntarily medicated. The
18 second hearing was necessary because it was unclear whether Gomes
19 was given a copy of the report of the first hearing as required.
20 The psychiatrists who presided at the hearings, Drs. Patrick C.
21 Gariety and Carlos Tomelleri, concluded that antipsychotic
22 medication was appropriate because it was the indicated treatment
23 for Gomes's illness and other forms of treatment would not be
24 likely to alleviate his symptoms. Gomes refused to take the

1 prescribed antipsychotic medication.

2 On October 13, 2000, the government sought to have the
3 district court supplement its earlier commitment order to extend
4 the time of Gomes's commitment and to expressly authorize the
5 Bureau of Prisons to medicate Gomes against his will. In a
6 November 11, 2000 ruling and order, the district court granted
7 the extension of time but denied authorization of involuntary
8 medication. Because the government's interest in medicating
9 Gomes was restoring him to competency so that he could be tried,
10 and not the weightier interest of pacifying a dangerous detainee,
11 the district court found that involuntary medication could not be
12 ordered without first holding a judicial hearing.

13 III. The District Court Involuntary Medication Proceedings

14 The district court held an involuntary medication hearing on
15 December 28, 2000. The government argued that, in determining
16 whether to order the involuntary medication of Gomes to render
17 him competent to stand trial, the district court should employ
18 the same standard that was used in the administrative hearings:
19 the government need only show by a preponderance of the evidence
20 that (1) weighing the benefits against the risks, the medication
21 was medically appropriate; and (2) there were no less intrusive
22 means that would enable the government to bring the defendant to
23 trial. In the alternative, the government argued that the
24 involuntary medication of Gomes was authorized under the strict

1 scrutiny standard announced by the Sixth Circuit in United States
2 v. Brandon, 158 F.3d 947, 957 (6th Cir. 1998). To prove the
3 necessity of forcibly medicating Gomes, the government offered
4 the testimony of Dr. James K. Wolfson, Gomes's treating
5 psychiatrist at USMC-Springfield.

6 In response, Gomes contended that such involuntary
7 medication was never warranted unless the defendant posed a
8 danger to himself or others. Because Gomes refused to submit to
9 a psychiatric examination, his defense was limited to his own
10 testimony and cross-examination of the government's psychiatrist.

11 The district court concluded that it could order the
12 involuntary medication of a non-dangerous defendant, but that the
13 government must first show that the involuntary medication is
14 "necessary to accomplish an essential government interest." The
15 district court then listed eight factors that the government must
16 establish by clear and convincing evidence:

- 17 1. Whether the government has an overriding
18 justification for involuntarily medicating the
19 defendant;
- 20 2. Whether psychotropic medication is medically
21 appropriate and necessary;
- 22 3. Whether there are any less intrusive means by
23 which to restore the defendant to competency;
- 24 4. Whether there is a sound medical basis for
25 administering psychotropic medication;
- 26 5. Whether there is any significant risk that the
27 medication will impair or alter in any material
28 way the defendant's capacity or willingness to
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1 react to the testimony at trial or to assist his
2 counsel;

3
4 6. Whether there are any apparent side-effects of the
5 psychotropic medication;

6
7 7. Whether there are any other indications that the
8 medication will in any way interfere with the
9 defendant's ability to provide information to his
10 attorney and to participate in the making of
11 decisions on his own behalf at trial; and

12
13 8. Whether the defendant's appearance will be
14 adversely [a]ffected or whether he will suffer
15 other prejudice at trial as a result of
16 involuntary medication.

17 Finally, the district court determined that it must weigh
18 five additional factors: (1) the competing interests of the
19 defendant and the government; (2) the dangerousness of the
20 defendant; (3) the seriousness of the charged crime; (4) the
21 possibility of the defendant's release in the event that he
22 cannot be made to stand trial; and (5) the availability of less
23 intrusive means by which the defendant could be restored to
24 competency.

25 In concluding that the government had met its burden, the
26 district court found that the government's interest in enforcing
27 the federal criminal laws constituted an "essential, overriding
28 justification for involuntary medicat[ion]." According to the
29 court, Dr. Wolfson's testimony sufficiently established that the
30 administration of the antipsychotic drugs was medically
31 appropriate and necessary to reduce Gomes's persecutory delusions
32 and restore his mental functioning; that there were no less

1 intrusive means to do so; and that there was a "high likelihood"
2 that the drugs would have the desired effect. The district court
3 also found that the risks posed by side effects were neither
4 sufficient to prohibit the use of the medication nor likely to
5 interfere with Gomes's ability to participate in and assist with
6 his trial. Based on these findings, the district court ordered
7 the involuntary medication of Gomes with antipsychotic drugs,
8 subject to certain conditions, and a two-month extension of his
9 commitment to the custody of the Attorney General, pursuant to 18
10 U.S.C. § 4241(d) (2) (A).

11 Gomes appealed from this order. The district court stayed,
12 during the pendency of the appeal, its order to medicate Gomes.

13 DISCUSSION

14 The question of under what circumstances medication may be
15 forcibly administered to a non-dangerous criminal defendant for
16 the purpose of rendering him competent to stand trial is one of
17 first impression in this circuit. Similarly, the Supreme Court
18 has had "no occasion to finally prescribe . . . substantive
19 standards" to govern this question. Riggins v. Nevada, 504 U.S.
20 127, 136 (1992). Before we turn to that issue, however, we will
21 address whether we have jurisdiction to decide this appeal.

22 I. Appellate Jurisdiction

23 The parties agree that we have appellate jurisdiction over
24 the district court's non-final order that, among other things,

1 authorizes the involuntary medication of Gomes, under the
2 collateral order doctrine set forth in Cohen v. Beneficial
3 Industrial Loan Corp., 337 U.S. 541, 546 (1949). Because
4 jurisdiction cannot be conferred by the parties, however, we must
5 independently decide the question.

6 Under Cohen and its progeny, non-final orders are
7 immediately appealable if they “conclusively determine the
8 disputed question, resolve an important issue completely separate
9 from the merits of the action, and [are] effectively unreviewable
10 on appeal from a final judgment.” Coopers & Lybrand v. Livesay,
11 437 U.S. 463, 468 (1978) (footnote omitted); see also Cohen, 337
12 U.S. at 546. Applying this standard, the Sixth and the Fourth
13 Circuits have determined that they had appellate jurisdiction to
14 review district court orders authorizing the involuntary
15 medication of criminal defendants. Brandon, 158 F.3d at 950-51;
16 United States v. Morgan, 193 F.3d 252, 258-59 (4th Cir. 1999);
17 see also United States v. Sell, 282 F.3d 560 (8th Cir. 2002)
18 (exercising, without expressly considering the issue, appellate
19 jurisdiction over a district court order authorizing the
20 involuntary medication of a criminal defendant to render him
21 competent to stand trial); United States v. Weston, 255 F.3d 873
22 (D.C. Cir.), cert. denied, 122 S. Ct. 670 (2001) (same).

23 We join our sister circuits in holding that the Cohen test
24 is satisfied here. The district court’s order conclusively

1 determined the question before it, namely whether Gomes may be
2 involuntarily medicated. Also, the issues involved in
3 determining whether to order involuntary medication are separate
4 from the merits of the underlying criminal charges. See Morgan,
5 193 F.3d at 259; Brandon, 158 F.3d at 951. Finally, the district
6 court's order is effectively unreviewable on appeal. If the
7 defendant should prevail after he has been forcibly medicated,
8 his right to refuse to be medicated would have been lost and his
9 victory would be a hollow one. See Morgan, 193 F.3d at 259.

10 Thus, we have jurisdiction.

11 II. Involuntary Medication

12 While the Supreme Court has yet to articulate a standard for
13 determining when a non-dangerous criminal defendant may be
14 involuntarily medicated to render him competent to stand trial,
15 it has framed the issue in general terms. "[T]he substantive
16 issue involves a definition of th[e] protected constitutional
17 interest, as well as identification of the conditions under which
18 competing state interests might outweigh it." Washington v.
19 Harper, 494 U.S. 210, 220 (1990) (quoting Mills v. Rogers, 457
20 U.S. 291, 299 (1982) (citations omitted)) (internal quotation
21 marks omitted, alterations in original). Our first task, then,
22 is to identify the competing interests of the defendant and the
23 government.

24 A. *The Defendant's Interest in Avoiding Unwanted* 25 *Medication*

1 There can be little doubt that the “forcible injection of
2 medication into a nonconsenting person’s body . . . represents a
3 substantial interference with that person’s liberty.” Riggins,
4 504 U.S. at 134 (quoting Harper, 494 U.S. at 229) (internal
5 quotation marks omitted). As the Supreme Court has noted, the
6 “purpose of the [antipsychotics] is to alter the chemical balance
7 in a patient’s brain, leading to changes, intended to be
8 beneficial, in his or her cognitive processes. . . . [I]t is
9 also true that the drugs can have serious, even fatal, side
10 effects.” Id. (quoting Harper, 494 U.S. at 229) (citation and
11 internal quotation marks omitted). Given this level of
12 invasiveness and the severity of the possible side effects of
13 antipsychotic medication, it follows that the non-consenting
14 criminal defendant’s liberty interest to be free from this sort
15 of bodily intrusion under the Due Process Clause of the
16 Fourteenth Amendment is a substantial one. See, e.g., Weston,
17 255 F.3d at 876; Brandon, 158 F.3d at 953.

18 When the drugs are being administered to render the
19 defendant competent to stand trial, the defendant has other
20 interests that come into play after the administration of the
21 medication. It is unconstitutional for the government to bring
22 an incompetent defendant to trial. See Pate v. Robinson, 383
23 U.S. 375, 378 (1966). Even when they restore competency, in
24 particular cases antipsychotic drugs can affect a defendant’s in-

1 court demeanor as well as his willingness and ability to assist
2 in his defense, thereby implicating Sixth Amendment rights to a
3 fair trial. Riggins, 504 U.S. at 142 (Kennedy, J., concurring);
4 Weston, 255 F.3d at 876, 883-86; Brandon, 158 F.3d at 954. In
5 addition, some courts have found--and Gomes presses the argument
6 in this appeal--that a criminal defendant "has a First Amendment
7 interest in avoiding forced medication, which may interfere with
8 his ability to communicate ideas." Brandon, 158 F.3d at 953; see
9 also Bee v. Greaves, 744 F.2d 1387, 1393-94 (10th Cir. 1984).

10 *B. The Government's Countervailing Interests in*
11 *Prosecution*

12 The government's countervailing interests are no less
13 substantial and, under certain circumstances, outweigh those of
14 the criminal defendant. The Supreme Court has on numerous
15 occasions recognized that the "individual's strong interest in
16 liberty," even though "importan[t] and fundamental . . . may, in
17 circumstances where the government's interest is sufficiently
18 weighty, be subordinated to the greater needs of society."
19 United States v. Salerno, 481 U.S. 739, 750-51 (1987); see also
20 Kansas v. Hendricks, 521 U.S. 346, 356 (1997); Youngberg v.
21 Romeo, 457 U.S. 307, 320 (1982). Moreover, "trial prejudice can
22 sometimes be justified by an essential state interest," Riggins,
23 504 U.S. at 138, and the Supreme Court has rejected the view that
24 the rights protected by the First Amendment are "absolutes."
25 Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961) (citation

1 and internal quotation marks omitted).

2 The government's interest in bringing a criminal defendant
3 to trial is a fundamental one. The "[c]onstitutional power to
4 bring an accused to trial is fundamental to a scheme of 'ordered
5 liberty' and prerequisite to social justice and peace." Illinois
6 v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J., concurring); see
7 also Winston v. Lee, 470 U.S. 753, 762 (1985). In the context of
8 forcibly administering antipsychotic medication to render a
9 criminal defendant competent to stand trial, the government's
10 interest in prosecution has been deemed "essential," Sell, 282
11 F.3d at 568, Weston, 255 F.3d at 880; "substantial," Brandon, 158
12 F.3d at 954; and "vital," State v. Garcia, 233 Conn. 44, 74, 658
13 A.2d 947, 962 (1995). As the District of Columbia Circuit noted
14 in Weston, even though civil commitment might reduce the danger
15 to the community posed by an individual, it cannot address a host
16 of other important societal concerns and values served by a
17 criminal trial: "the retributive, deterrent, communicative, and
18 investigative functions of the criminal justice system, . . .
19 serve to ensure that offenders receive their just deserts, to
20 make clear that offenses entail consequences, and to discover
21 what happened through the public mechanism of trial." 255 F.3d
22 at 882. The government's interest in the prosecution of crime
23 generally is a substantial and important interest, and it is
24 usually an essential one.

1 III. The Standard for Involuntary Medication

2 With these competing interests in mind, we turn to the
3 circumstances under which the government's interests are likely
4 to outweigh those of the defendant. Abjuring any definitive
5 pronouncements, the Supreme Court in Riggins has offered some
6 suggestions as to the baseline requirements that must be met
7 before antipsychotic drugs may be forcibly administered to a non-
8 dangerous criminal defendant to render him competent to stand
9 trial.

10 A. *The Substantive Standard*

11 In Riggins, the defendant, who was sentenced to death
12 following his conviction for murder and robbery, challenged a
13 state court's order denying his motion to halt the administration
14 of antipsychotic medication during his trial. 504 U.S. at 130-
15 32. The Court reversed, but concluded that it had "no occasion
16 to finally prescribe . . . substantive standards . . . [for
17 involuntary medication], since the [trial court] allowed
18 administration of [antipsychotic medication] to continue without
19 making any determination of the need for this course or any
20 findings about reasonable alternatives." Id. at 136 (emphasis in
21 original).

22 One of the lessons we draw from Riggins is that before the
23 government is permitted to forcibly medicate a criminal defendant
24 to bring him to trial, the trial court must make explicit

1 findings as to the factors that weigh in the balance and the
2 government's showing that these factors weigh in its favor. In
3 particular, the Court indicated that forced medication might be
4 allowable if, in addition to being medically appropriate, it were
5 necessary to bringing a non-dangerous criminal defendant to
6 trial. See id. at 135 ("[T]he State might have been able to
7 justify medically appropriate, involuntary treatment with the
8 drug by establishing that it could not obtain an adjudication of
9 Riggins' guilt or innocence by using less intrusive means."); id.
10 ("[O]nce Riggins moved to terminate administration of
11 antipsychotic medication, the State became obligated to establish
12 the need for Mellaril and the medical appropriateness of the
13 drug."). The Court also set forth a standard of heightened, but
14 not "strict," scrutiny for determining when the possible
15 prejudice to a defendant's fair trial rights might be outweighed
16 by the government's interest in prosecution: "administration of
17 antipsychotic medication [that is] necessary to accomplish an
18 essential state policy." Id. at 138; see also id. at 136
19 ("Contrary to the dissent's understanding, we do not 'adopt a
20 standard of strict scrutiny.'" (citation omitted)).

21 We agree with the observations of our sister circuits that
22 the Supreme Court in Riggins "suggest[ed] that the governmental
23 interest in restoring a pretrial detainee's competence to stand
24 trial could override his liberty interest," Weston, 255 F.3d at

1 879; see also Sell, 282 F.3d at 566, and that “the opinion’s
2 language suggests some form of heightened scrutiny,” Weston, 255
3 F.3d at 880; see also Sell, 282 F.3d at 567 & n.7. In accord
4 with Riggins, Sell, and Weston, we hold that heightened, but not
5 strict, scrutiny is the appropriate standard for determining when
6 a non-dangerous criminal defendant may be forcibly medicated with
7 antipsychotic drugs for the purpose of rendering him competent to
8 stand trial. We think that the government must show, and the
9 district court must explicitly find, by clear and convincing
10 evidence (1) that the proposed treatment is medically
11 appropriate, see Sell, 282 F.3d at 567; Weston, 255 F.3d at 876;
12 (2) that it is necessary to restore the defendant to trial
13 competence, see Sell, 282 F.3d at 567; Weston, 255 F.3d at 882;
14 (3) that the defendant can be fairly tried while under the
15 medication, see Sell, 282 F.3d at 571; Weston, 255 F.3d at 883;
16 and (4) that trying the defendant will serve an essential
17 government interest, see Sell, 282 F.3d at 567; Weston, 255 F.3d
18 at 880; see also United States v. Sanchez-Hurtado, 90 F. Supp. 2d
19 1049, 1055 (S.D. Cal. 1999) (following Riggins in prescribing a
20 heightened scrutiny standard and several other factors).

21 The process of medicating a defendant is a dynamic one. It
22 can be evaluated over the course of treatment to ascertain, with
23 expert assistance, both its effectiveness and the nature of any
24 side effects. Accordingly, we believe that a district court

1 ordering involuntary medication must closely monitor the process
2 to ensure that the dosage is properly individualized to the
3 defendant, that it continues to be medically appropriate, and
4 that it does not deprive him of a fair trial or the effective
5 assistance of counsel. See Sell, 282 F.3d at 572 (noting with
6 approval the district court's willingness to reconsider the
7 defendant's fair trial rights after the administration of the
8 medication). There are three principal reasons why we believe
9 the foregoing standard is the appropriate one.

10 *B. The Government's Overriding Interest in Prosecution*

11 First, we are convinced that, while an individualized
12 finding must be made in each case, in most although not
13 necessarily all of them, the district court will be considering a
14 government interest in prosecution that will be found to weigh
15 heavily in the balance. In our view, a strict scrutiny standard,
16 such as that adopted by the Sixth Circuit, is unduly restrictive
17 because strict scrutiny has come to be considered "fatal in
18 fact." See Brandon, 158 F.3d at 956. Although we are not
19 unmindful of Brandon's concerns about the important interests of
20 the defendant, we cannot accept the proposition that involuntary
21 medication should be limited to defendants who are prosecuted for
22 only the most heinous crimes. Cf. Sell, 282 F.3d at 572 (Bye,
23 J., dissenting) ("Weston [involving, among other things, two
24 counts of murder and one count of attempted murder of federal law

1 officers] typifies the case where the government's interest is
2 paramount because the charges include the most serious crimes
3 known to man."). As will be discussed in more detail below, we
4 believe that in most cases a flexible regime can accommodate both
5 the government's interest in prosecution and the defendant's
6 health interests and fair trial rights consistent with
7 constitutional requirements.

8 *C. Protection of the Defendant's Health Interests and Fair*
9 *Trial Rights*

10 Second, recent advances in antipsychotic medication reduce
11 our concerns that the defendant's health interests and fair trial
12 rights cannot be adequately protected when he is involuntarily
13 medicated to render him competent to stand trial. These
14 concerns, which Gomes forcefully presents, were carefully
15 articulated by Justice Kennedy in his concurrence in Riggins, 504
16 U.S. at 138-45, and have been repeated in subsequent decisions.
17 See Brandon, 158 F.3d at 961; United States v. Santonio, No.
18 2:00-CR-90C, 2001 WL 670932, at *3 (D. Utah May 3, 2001);
19 Woodland v. Angus, 820 F. Supp. 1497, 1510 n.15 (D. Utah 1993).
20 Justice Kennedy was particularly troubled that the side effects
21 of these drugs might, by making the defendant look bored or
22 unfeeling, prejudice the jury and affect the outcome of the
23 trial. Riggins, 504 U.S. at 142-43. In addition, he believed
24 that the drowsiness and mind-dulling effects of these drugs might
25 "hamper the attorney-client relation, preventing effective

1 communication and rendering the defendant less able or willing to
2 take part in his defense." Id. at 144.

3 These are important concerns. In responding to them, we
4 first note that significant improvements have been made in
5 antipsychotic medication in the decade since Justice Kennedy
6 expressed his misgivings in Riggins. Justice Kennedy himself
7 presciently acknowledged then that "[t]he state of our knowledge
8 of antipsychotic drugs and their side effects is evolving and may
9 one day produce effective drugs that have only minimal side
10 effects." Id. at 145. As the American Psychiatric Association
11 has pointed out, a new generation of antipsychotic drugs "largely
12 post-dating Riggins" and with a "more favorable side effect
13 profile" has appeared. Amicus Br. of the Am. Psychiatric Ass'n
14 at 3, 13-14 [hereinafter Am. Psychiatric Ass'n]. The American
15 Psychological Association agrees, stating that these new drugs,
16 called atypicals, "generally exhibit equal or improved
17 therapeutic efficacy in comparison to the traditional or
18 conventional agents, yet they have a more favorable side effect
19 profile." Amicus Br. of the Am. Psychological Ass'n at 8
20 (citation and internal quotation marks omitted) [hereinafter Am.
21 Psychological Ass'n]. Most of the atypicals present relatively
22 low risks of the serious side effects associated with
23 conventional drugs such as Mellaril, the drug at issue in
24 Riggins. See id. at 8-9.

1 Gomes's effort to discount the significance of the atypicals
2 is not convincing. Relying on the unavailability of atypicals in
3 an injectable form that could be forcibly administered, Gomes
4 argues that because he is likely to refuse medication, the more
5 severe side effects attributable to injectable conventional drugs
6 are also relevant. However, amicus American Psychological
7 Association points out that two injectable forms of atypicals
8 that could be forcibly administered have been recommended for
9 approval by the FDA, and are pending approval. Am. Psychological
10 Ass'n at 9 n.9; see also Am. Psychiatric Ass'n at 15 n.12 (noting
11 that at least one injectable atypical "has now moved most of the
12 way through the FDA approval process"). These atypicals could be
13 considered for use, with approval or substantial progress in the
14 FDA process of evaluation, upon an adequate scientific record.

15 Moreover, even if it were necessary to forcibly medicate
16 Gomes with conventional drugs, we believe that Gomes's interests
17 could be sufficiently accommodated. See Sell, 282 F.3d at 571
18 (rejecting claim that the district court erred by basing its
19 involuntary medication order in part on the availability of
20 atypicals that could not be forcibly administered). Dr. Wolfson
21 testified that in such cases the initially non-consenting
22 individual, after being restored somewhat and having become more
23 cooperative, could be switched to atypicals. Even if this were
24 not to occur, we note that the most harmful side effects

1 associated with conventional antipsychotic medications are rare,
2 result from years of usage, and, to the extent that they arise
3 shortly after administration of the medication, are manageable.
4 Furthermore, the involuntary administration of the medication
5 would be of limited duration because the government's interest in
6 involuntary medication ceases with the completion of the legal
7 proceedings.

8 Finally, whatever the risks of side effects may be, we
9 believe that they are best dealt with in the context of the
10 individual case rather than by blanket judicial pronouncements.
11 We agree with the American Psychological Association that
12 concerns about the medication's effect on the defendant's health
13 interests and fair trial rights need to be considered in light of
14 the individual defendant's response in the particular case and
15 thus are "best addressed at the time of trial, after the drugs
16 have already been administered and their effects in the given
17 case are understood." Am. Psychological Ass'n at 26. In
18 addition, the defendant always retains the ability to argue on
19 direct appeal from his conviction that the involuntary medication
20 order had the effect of denying him a fair trial.

21 *D. The Defendant's First Amendment Rights*

22 Third, we do not think that a consideration of the
23 defendant's First Amendment rights, at least insofar as they are
24 raised in this appeal, alters the analysis derived from Riggins,

1 Sell, and Weston, even though those cases did not explicitly
2 consider these rights. Gomes argues that the involuntary
3 administration of the antipsychotics would run afoul of the First
4 Amendment by affecting his ability "to produce and communicate
5 ideas," as well as his mood, attitude, and capacity to think.

6 As an initial matter, we note that because Gomes articulated
7 his First Amendment rights only in cursory and general terms, we
8 are not certain as to the exact nature of his First Amendment
9 claims. To the extent that Gomes's concerns about the drugs'
10 effect on his mental processes and personality are an expression
11 of fears that the antipsychotic medication will "alter the
12 chemical balance in [his] brain, leading to changes, intended to
13 be beneficial, in his . . . cognitive processes," Riggins, 504
14 U.S. at 134 (citation and internal quotation marks omitted),
15 Gomes's First Amendment rights are in large part co-extensive
16 with his due process liberty interest in avoiding unwanted
17 medication. We have considered this interest, as have Riggins,
18 Sell, and Weston.

19 To the extent that Gomes seeks to assert other First
20 Amendment rights, we do not think he has raised considerations
21 that would change our analysis by triggering the more exacting,
22 strict scrutiny standard that is applied to content-based
23 regulations. See, e.g., Simon & Schuster, Inc. v. Members of the
24 N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991). The sole

1 intention of the order of involuntary medication is to restore
2 Gomes to competence for trial, not to “proscribe speech or even
3 expressive conduct because of disapproval of the ideas
4 expressed.” R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)
5 (citations omitted). In doing so, the administration of
6 antipsychotics is intended to facilitate Gomes’s ability “to
7 produce and communicate ideas” and in this sense “positively
8 promote[s] First Amendment interests by enhancing [his] ability
9 to concentrate, read, learn, and communicate” and “clear[ing] the
10 hallucinations and delusions produced by psychosis.” Am.
11 Psychiatric Ass’n at 22 (emphasis in original). In any event,
12 under the circumstances of this case at least, a content-neutral
13 regulation such as the instant order of involuntary medication
14 would trigger only an intermediate scrutiny standard similar to
15 the heightened scrutiny standard adopted today. See, e.g., Ward
16 v. Rock Against Racism, 491 U.S. 781, 798 (1989) (applying an
17 intermediate scrutiny standard to content-neutral time, place,
18 and manner restrictions); United States v. O’Brien, 391 U.S. 367,
19 377 (1968) (applying a similar standard of intermediate scrutiny
20 to a regulation limiting expressive conduct where the government
21 interest was “unrelated to the suppression of free expression”).
22 Thus the standard we hold to be appropriate provides adequate
23 protection of Gomes’s First Amendment rights.

24 IV. Application of the Standard

1 We agree with Gomes that the district court's thirteen-
2 factor test was needlessly cumbersome. Although the district
3 court's analysis was thorough and thoughtful, it did not discuss
4 in sufficient depth the more limited number of factors identified
5 by the test we adopt. In particular, the district court did not
6 adequately consider Gomes's liberty interest, the possible limits
7 of the government's interest in prosecution, and the need for
8 monitoring of Gomes's condition. For this reason, and because of
9 the passage of time since the district court hearing, we vacate
10 that part of the district court's order that authorizes the
11 involuntary medication of Gomes and remand for an involuntary
12 medication hearing that is consistent with the standard we are
13 announcing.

14 To assist the district court, we will briefly discuss the
15 record facts of this case, understanding that they may be
16 modified or supplemented with additional evidence on remand, in
17 light of the applicable standard.

18 *A. The Government's Interest in Prosecuting Gomes*

19 With respect to the inquiry into the government's interest
20 in trying the defendant, we decline to set forth a bright-line
21 rule for all cases. While the governmental interest will
22 generally be essential, it is still case specific. The factors
23 that bear on this interest include whether the crime is one that
24 is broadly harmful, such as drug trafficking, see United States

1 v. Arena, No. 00 CR.398, 2001 WL 1335008, at *3 (S.D.N.Y. Oct.
2 30, 2001) (finding that there is a compelling governmental
3 interest in bringing to trial a defendant charged with conspiring
4 to import cocaine), or a scheme of health care fraud, see Sell,
5 282 F.3d at 568 & n.8 (deeming to be "paramount" the government's
6 interest in prosecuting criminal charges of health care fraud and
7 money laundering); whether it is classified as a felony and
8 carries a substantial penalty, see Weston, 255 F.3d at 881
9 (noting that the statutory sentences for crimes "reflect the
10 intensity of the government's interest in bringing those
11 suspected of such crimes to trial"); and whether the defendant
12 poses a danger to society, based on the charged conduct, his past
13 conduct, or both.

14 In this case, we believe that the government has an
15 essential interest in bringing Gomes to trial. Gomes faces trial
16 for a serious felony--possessing a firearm as a felon. Both the
17 seriousness of the crime and Gomes's perceived dangerousness to
18 society are evident from the substantial sentence Gomes faces if
19 convicted. Because he has committed at least three prior violent
20 felonies or serious drug offenses, Gomes faces a possible
21 statutory minimum of fifteen years' imprisonment. Of course,
22 statutory maxima and minima, while helpful indicators of the
23 general governmental interest in prosecuting such a crime, may
24 overstate or understate the severity of the actual charged

1 conduct and the particular risk to society posed by the
2 defendant. It is appropriate for the district court to consider
3 the sentence likely to be imposed in fact rather than the
4 statutory maximum alone.

5 Some other aspects of the district court's consideration of
6 the interests implicated in this case warrant further discussion.
7 First, to the extent that the district court considered the
8 enforcement of the federal criminal laws generally to be an
9 essential overriding justification for involuntary medication, we
10 think that it swept with too broad a brush. While the government
11 has a strong interest in prosecuting all crime, some prosecutions
12 are simply so minor that, in the absence of some unusual
13 compelling reason, they ordinarily will not outweigh a
14 defendant's interests in avoiding involuntary medication. We
15 will not provide a definitive list of such offenses, but we have
16 in mind such crimes as the first-time theft of a single letter or
17 unlawful possession of a small amount of drugs for personal use.
18 In appropriate circumstances--depending on the dangerousness of
19 the defendant--there might be exceptions even in these cases.

20 In addition, the defendant's liberty interest, a critical
21 factor in any proper analysis, is absent from the district
22 court's discussion. We are not satisfied by the government's
23 claim that the court implicitly considered Gomes's liberty
24 interest when it said it weighed the competing interests. The

1 analysis of whether to involuntarily medicate must consider--and
2 discuss explicitly--the defendant's liberty interest.

3 *B. The Medical Appropriateness of Gomes's Proposed*
4 *Treatment*

5 As part of its inquiry into the medical appropriateness of
6 administering antipsychotic medication in Gomes's case, the
7 district court appropriately considered the expert's diagnosis of
8 the defendant's mental illness. See Weston, 255 F.3d at 876
9 ("Whether a proposed course of action is 'medically appropriate'
10 obviously depends on the judgment of medical professionals.")
11 (collecting cases); Harper, 494 U.S. at 231. The government
12 offered the testimony of Gomes's treating psychiatrist at USMC-
13 Springfield, Dr. Wolfson, who testified extensively about the
14 likely effects and side effects of both the older and newer types
15 of antipsychotic medication. Weighing the benefits of this type
16 of medication against the possible harms, Dr. Wolfson concluded
17 that medication was appropriate for Gomes. Without faulting Dr.
18 Wolfson's comprehensive and competent testimony, we believe that,
19 given the passage of time, the district court on remand should
20 update the testimony, particularly to account for possible
21 developments in Gomes's condition and advances in appropriate
22 medications and their side effects.

23 *C. The Necessity of Medicating Gomes Because of the Absence*
24 *of Less Invasive Means of Restoring Him to Competency*

25 The required inquiry into the necessity of administering the

1 drugs addresses two important concerns. First, it accomplishes
2 narrow tailoring in that it requires the government to make a
3 showing that it "could not obtain an adjudication of
4 [defendant's] guilt or innocence by using less intrusive means."
5 Riggins, 504 U.S. at 135; see also Sell, 282 F.3d at 567; Weston,
6 255 F.3d at 882. Second, it ensures that, before medication is
7 ordered, the district court finds that the prescribed medicine is
8 likely to restore the defendant to competency. See Sell, 282
9 F.3d at 567.

10 The necessity requirement should not be applied myopically.
11 As the Weston court noted, "[e]ven narrow tailoring in strict
12 scrutiny analysis does not contemplate a perfect correspondence
13 between the means chosen to accomplish a compelling governmental
14 interest." 255 F.3d at 883. The district court need only find
15 that it is sufficiently likely, in light of the importance of the
16 government's interest in prosecution, that the medication will
17 restore the defendant to competence and will not produce undue
18 side effects; it need not find that the medication is absolutely
19 certain to have the desired effect. See Sell, 282 F.3d at 570.
20 In this connection, we do not foreclose the possibility that,
21 even though the alternative of psychiatric therapy might be
22 determined to be ineffective standing alone, such treatment in
23 conjunction with medication could possibly be effective and
24 appropriate in particular circumstances.

1 *D. The Continued Monitoring of Gomes*

2 Although the district court did order that Gomes be
3 monitored for side effects, we find that its order was
4 insufficiently specific with respect to the need for continued
5 monitoring of Gomes's ability to participate in and receive the
6 fair trial that we believe is both feasible and warranted. It is
7 essential that not only Gomes's health, but also his ability to
8 participate in his trial, be evaluated over the course of the
9 trial when the actual effects of the medication are known. See
10 id. at 572.

11 *E. The Insanity Defense*

12 Finally, because the medication is likely to enhance Gomes's
13 ability to rationally communicate, it would not, as Gomes's
14 counsel contends, unduly prevent him from raising an insanity
15 defense. "[A] defendant does not have an absolute right to
16 replicate on the witness stand his mental state at the time of
17 the crime." Weston, 255 F.3d at 884. The need for medication to
18 render Gomes competent continues to yield an argument of some
19 force that but for the medication, his illness would amount to
20 insanity and that he suffered from the same illness when the
21 crime was committed. In short, Gomes remains free to present an
22 insanity defense through the testimony and reports of the doctors
23 who have treated him or examined his file.

24 V. Gomes's Remaining Claims

