Riggins v. Nevada: Are "Synthetically Sane" Criminal Defendants Competent to Stand Trial?

I. INTRODUCTION

Imagine the following scenario:

Stage One: An obviously mentally disturbed person commits a crime. Police necessarily refer the person to "mental health professionals."

Stage Two: Psychiatrists or psychologists see the arrestee and, seeing that the person is confused, out of contact with reality and suffering from delusions and vivid auditory or visual hallucinations, conclude that the person is suffering from psychosis and should be institutionalized for treatment. (At this time the doctors frequently are in agreement that the arrested person was psychotic at the time of the commission of the crime.)

Stage Three: The psychotic person is placed in confinement where "treatment" is instituted by administering the mentioned "major tranquilizers." Pretty soon the "patient" is "zombified" to the extent that he or she is no longer ranting or raving and, although a little sleepy most of the time, looks to be sane.

Stage Four: The then psychotic but synthetically sane person is sent back to the criminal justice system with a doctor's certificate saying that the psychotic person is now sane and fit to stand trial.

Stage Five: The synthetically sane zombie sits smilingly through the trial, listening indifferently to "experts" testify that
he is presently mentally competent and was mentally competent at the time of committing the crime. The tranquilized defendant obligingly nods assent to whatever is being said.

Stage Six: The jury understandably assumes that the defendant was as sane at the time of the crimes as he appears to be in court. The defendant is convicted. The drugs are withdrawn, and the psychotic state resumes.¹

When a defendant's competency is achieved through the administration of antipsychotic drugs, as illustrated above, he or she is denied the right to present a defense to a criminal charge, and consequently is denied the right to a fair trial. The severe side effects of antipsychotic drugs preclude the jury from seeing the defendant as he or she was at the time of the crime. The very mode in which the defendant attained competency may remove all credibility from the primary defense—that he or she was insane at the time of the crime.² The side effects of antipsychotic drugs may also interfere with the defendant's ability to assist counsel in preparing a defense. Due to the accused's impaired cognitive functioning and the reduction of natural anxiety produced at trial, the defendant loses the initiative to battle the criminal charges which are levied.³

The Supreme Court in Riggins v. Nevada⁴ addressed the issue of whether petitioner David Riggins, who was forcibly administered 800 milligrams of Mellaril⁵ each day of his trial, was denied his constitutionally protected trial rights.⁶ The Court held in favor of Riggins and concluded that there was a strong possibility that Riggins' defense was impaired due to the administration of Mellaril.⁷

The majority, however, failed to address the issue of whether competency to stand trial can ever be achieved through the administration of antipsychotic drugs, considering the severe side effects of the drugs and the way in which they impair an accused's right to defend. The Court ignored the purpose of the competency standard

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² Fentiman, supra note 1, at 1111.
³ Id.
⁵ See infra note 15.
⁶ Riggins, 112 S. Ct. at 1816.
⁷ Id.
announced in *Dusky v. United States*, which is to subject to the criminal process only those who have the capacity to function as defendants.

This Comment begins by explaining that the historical purpose for not trying mentally incompetent individuals was premised on their inability to assume the role of a defendant. By permitting the use of antipsychotic drugs to restore competency, courts have lost sight of this goal. Antipsychotic drugs may induce some sort of functional competence to a certain extent, but not to the level of competency necessary to stand trial. This Comment will then analyze Justice Kennedy's concurrence, and explain his reservations regarding the propriety of involuntarily medicating mentally ill defendants for the purpose of rendering them competent. Finally, the Comment will demonstrate how the severe side effects of antipsychotic drugs alter the defendant's demeanor and impact on his or her cognitive functioning, which results in a denial of the defendant's constitutional right to a fair trial.

II. FACTS

Paul Wade was found dead on November 20, 1987 in his Las Vegas apartment. According to the autopsy, multiple stab wounds to Wade's back, head, and chest caused his death. The following evening David Riggins was arrested and charged with robbery and first degree murder with a deadly weapon.

Shortly after police apprehended Riggins, he told Dr. R. Edward Quass, a private psychiatrist who treated patients at the Clark County Jail, that he heard voices in his head and had difficulty sleeping. Riggins is a paranoid schizophrenic, a psychosis characterized by "a disorder in the thinking processes, such as delusions and hallucinations," particularly delusions of persecution. Dr. Quass learned

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9. *Riggins*, 112 S. Ct. at 1815 (citing *Washington v. Harper*, 494 U.S. 210, 227 (1990)). For example, the antipsychotic drugs may enable a defendant to function and behave in a way that is not dangerous to himself or others. *Id.* (citing *Harper*, 494 U.S. at 227).
11. *Id.*
from Riggins that he had been successfully treated with Mellaril in the past. After this consultation, Dr. Quass prescribed 100 milligrams of Mellaril per day. Riggins continued to complain of voices and sleep problems throughout the following months. Consequently, Dr. Quass gradually increased the Mellaril prescription to 800 milligrams per day.

III. PROCEDURAL HISTORY

A. Pretrial Proceedings

1. Pretrial Motions

On January 13, 1988, Riggins made a motion to suspend the trial, pending determination of his competency to stand trial. Subsequently, Riggins was examined by three court-appointed psychiatrists. Dr. William O’Gorman, a psychiatrist who had treated Riggins for anxiety in 1982, and Dr. Franklin Master found Riggins competent to stand trial while medicated. Dr. Jack Jurasky, the third psychiatrist, found the medicated Riggins incompetent to stand trial. The Clark County District Court did not hold a competency hearing and found Riggins competent to stand trial based solely on the psychiatrists’ reports.

On June 10, 1988, Riggins filed notice of his insanity defense and moved the district court for an order suspending the administration of Mellaril until the end of his trial. Riggins argued that forci-
ible administration of this drug infringed upon his freedom and that the drug's effect on his demeanor and mental state during trial would deny him due process under the Fourteenth Amendment.\textsuperscript{24} Riggins argued he had a right to show jurors his "true mental state" since he was going to present the insanity defense at trial.\textsuperscript{25} The State opposed Riggins' motion and argued that medication was "essential . . . in order for him to maintain his competence."\textsuperscript{26}

2. The Evidentiary Hearing

On July 14, 1988, the district court held an evidentiary hearing on Riggins' motion.\textsuperscript{27} "At the hearing, Dr. Master 'guess[ed]' that taking Riggins off medication would not noticeably alter his behavior or render him incompetent to stand trial."\textsuperscript{28} Dr. Quass testified that Riggins would be competent to stand trial.\textsuperscript{29} Dr. O'Gorman testified that he had examined Riggins without medication in 1982 and believed that he had been competent at that time.\textsuperscript{30} Dr. O'Gorman also testified that he could not, however, render an opinion on whether Riggins would become incompetent without medication because he had not recently evaluated Riggins in an unmedicated state.\textsuperscript{31} The court also had before it a written report by Dr. Jurasky.\textsuperscript{32} He held to his earlier view that Riggins was incompetent to stand trial even while medicated and predicted that, if taken off Mellaril, the defendant "would most likely regress to a manifest psychosis and become extremely difficult to manage."\textsuperscript{33}

The district court judge rejected defense counsel's request to stop Riggins' medication in order to have him reevaluated for competency while unmedicated.\textsuperscript{34} The judge issued a one-page order that gave

\textsuperscript{24} Id. The Fourteenth Amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.
\textsuperscript{25} Riggins, 112 S. Ct. at 1812.
\textsuperscript{26} Petitioner's Brief at 7, Riggins (No. 90-8466).
\textsuperscript{27} Riggins, 112 S. Ct. at 1813.
\textsuperscript{28} Id.
\textsuperscript{29} Petitioner's Brief at 7, Riggins (No. 90-8466).
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Riggins, 112 S. Ct. at 1813.
\textsuperscript{33} Id.
\textsuperscript{34} Petitioner's Brief at 7, Riggins (No. 90-8466).
no indication of the court's rationale. Accordingly, Riggins was forced to ingest during each day of his trial the 800 milligrams of Mellaril prescribed by Dr. Quass, the psychiatrist treating detainees at Clark County Jail. This was a dosage all three psychiatrists considered excessive. Dr. Jurasky, who testified at the trial but not at the hearing, described that the dosage was sufficient to "tranquilize an elephant." Dr. Master considered it "just about the maximum amount of Mellaril before you get into the toxic range" and Dr. O'Gorman stated that even 450 milligrams of Mellaril per day was "an extremely high dose" for Riggins. It was not a surprise, therefore, that Riggins was seen closing his eyes during the hearing on his motion to terminate the medication and "had a zombie-like appearance throughout his trial."

B. Trial: The Clark County District Court

During the trial, Riggins testified on his own behalf to prove an insanity defense. Riggins stated that on the night of Wade's death he used cocaine before going to Wade's apartment. Riggins conceded that he fought with Wade, "but claimed that Wade was trying to kill him and that voices in his head said that killing Wade would

35. Riggins, 112 S. Ct. at 1813.
36. Petitioner's Brief at 7, Riggins (No. 90-8466).
37. Id.
38. Id.
39. Id.
40. Riggins, 112 S. Ct. at 1813. Riggins testified that:
   [he] hear[ed] the voices of "Satan and his assistant" who would order him to
do certain things such as hurt or kill people; he described how, ten months
before his arrest, he had been hospitalized after wandering on the streets in his
underwear declaring that he was the son of John F. Kennedy and Marilyn
Monroe and was sought by the Mafia.

Petitioner's Brief at 8, Riggins (No. 90-8466). Riggins also testified:
   Wade [the decedent] had once told him that he had killed two girls and wanted
   to kill Riggins before Riggins told the police; he said that Wade had tried
to kill him by putting fiberglass in his water and by squirting AIDS-infected
blood on his cocaine; he explained that he killed Wade only after Wade at-
tacked him with a knife.

Id. Counsel for Petitioner stated in his brief that, "[R]ather than presenting this bizarre testi-
mony in the unmedicated condition he was in at the time of the offense, the ‘synthetically
sane’ Riggins appeared rational, cool and unemotional. His testimony, therefore, did not
sound truthful and obviously had no impact." Id.
41. Riggins, 112 S. Ct. at 1813.
be justifiable homicide." At his jury trial in November 1988, Riggins was found guilty of murder and robbery, both with the use of a deadly weapon. Following a penalty hearing, Riggins was sentenced to death by the same jury. He then appealed his conviction and sentence to the Supreme Court of Nevada.

C. The Nevada Supreme Court

Riggins presented the Nevada Supreme Court with a variety of claims. Riggins contended that "forced administration of Mellaril denied him the ability to assist in his own defense and prejudicially affected his attitude, appearance, and demeanor at trial." In his brief, Riggins stated that this prejudice was not justified because the State "neither demonstrated a need to administer Mellaril nor explored alternatives to giving him 800 milligrams of the drug each day." More specifically, Riggins, in his reply brief, objected that "the State intruded upon his constitutionally protected liberty interest in freedom from antipsychotic drugs without considering less intrusive options." Riggins presented the following argument:

In United States v. Bryant, the court, in reference to medicating prisoners against their will, stated that "courts have recognized a protectable liberty interest . . . in the freedom to avoid unwanted medication with such drugs." The court in so stating cited Bee v. Greaves, which addressed the issue of medicating pre-trial detainees and stated that "less restrictive alternatives, such as segregation or the use of less controversial drugs like tranquilizers or sedatives, should be ruled out before resorting to antipsychotic drugs." In the case at bar, no less restrictive alternatives were utilized, considered or even proposed.

The Nevada Supreme Court specifically rejected Riggins' argu-

42. Id.
43. Id.
44. Id.
45. Id.
46. Riggins, 112 S. Ct. at 1813.
47. Id.
48. Id.
49. Id.
50. Id. (quoting United States v. Bryant, 670 F. Supp. 840, 843 (Minn. 1987)).
51. Id. (quoting Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984)).
52. Id. (quoting Record 1070-71) (citations omitted).
ment that involuntary medication during trial deprived him of his right to present his insanity defense, and therefore affirmed Riggins' convictions and death sentence. With respect to the administration of Mellaril, the court held "that expert testimony presented at trial was sufficient to inform the jury of the effect of... Mellaril on Riggins' demeanor and testimony." While acknowledging the relevance of demeanor to his insanity defense, the court held that denial of the defense motion to terminate was neither an abuse of discretion nor a violation of Riggins' trial rights. Justice Rose, in a concurring opinion, suggested that the district court should have determined whether Riggins actually needed to be on the prescribed drug and whether he could not adequately function if the drug was terminated. Justice Springer dissented, arguing that these drugs should never be forced upon defendants "just so the state can bring them to justice."

D. The Supreme Court Decision

The Supreme Court granted certiorari "to decide whether forced administration of antipsychotic medication during trial violated rights guaranteed by the Sixth and Fourteenth Amendments." In an opinion written by Justice O'Connor, the Supreme Court reversed the ruling of the Nevada Supreme Court. The Court held that there was "a strong possibility that Riggins' defense was impaired due to the administration of Mellaril." The case was remanded for further pro-

53. Id.
54. Id. (quoting Riggins v. State, 808 P.2d 535, 538 (Nev. 1991)).
55. Id.
57. Id. at 541 (Springer, J., dissenting).
58. Riggins, 112 S. Ct. at 1814. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." U.S. Const. amend. VI.
59. Riggins, 112 S. Ct. at 1814. The Fourteenth Amendment protects a defendant's right to due process before being deprived of life, liberty or property. U.S. Const. amend XIV; for direct quote, see supra note 24. The record is dispositive with respect to Riggins' Eighth Amendment claim that the administration of Mellaril denied him an opportunity to show jurors his true mental condition at the sentencing hearing. Riggins, 112 S. Ct. at 1814. Because this argument was presented neither to the Nevada Supreme Court nor in Riggins' petition for certiorari, the Supreme Court does not address the issue. Id.
60. Riggins, 112 S. Ct. at 1816.
ceedings not inconsistent with the Court's opinion.61

1. Denial of a Full and Fair Trial

The Court first considered Riggins' core contention that involuntary administration of Mellaril prevented a "full and fair trial" by denying him the liberty to be free from mind altering drugs during trial.62 The Court drew upon its recent discussion in Washington v. Harper63 to evaluate this claim.64 In Harper, a prison inmate alleged that the State of Washington violated his right to due process by giving him antipsychotic drugs against his will.65 The Supreme Court agreed that the inmate's interest in avoiding involuntary administration of antipsychotic drugs was protected under the Fourteenth Amendment's Due Process Clause.66 Justice O'Connor, writing for the majority, declared: ""The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty.""67 Taking into account the unique circumstances of penal confinement, the Court determined that due process allows the State to involuntarily treat an inmate with antipsychotic drugs where there is a determination that ""the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.""68 The Supreme Court then pronounced the rule established

61. Id. at 1817.
62. Id.
64. Riggins, 112 S. Ct. at 1814.
65. Id. (citing Washington v. Harper, 494 U.S. 210 (1990)).
66. Id.
67. Id. (quoting Harper, 494 U.S. at 229). Justice O'Connor explained the particular severity of antipsychotic drugs:

The purpose of the drugs is to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes. While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects. One such side effect identified by the trial court is acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes . . . . Other side effects include akathesia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs. Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face.

Id. at 1814-15 (quoting Harper, 494 U.S. at 229-30).
68. Riggins, 112 S. Ct. at 1815 (quoting Harper, 494 U.S. at 227). The inmate in
in *Harper*: "[F]orcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness." According to the Court's holding in *Bell v. Wolfish*, "the Fourteenth Amendment affords at least as much protection to persons the State detains for trial." In light of the holdings in *Harper* and *Bell*, the Supreme Court determined that "[o]nce Riggins moved to terminate administration of antipsychotic medication, the State became obligated to establish the need for Mellaril and the medical appropriateness of the drug."

Using its ruling in *Harper*, the Supreme Court explained that "Nevada certainly would have satisfied due process if the prosecution had demonstrated and the District Court had found that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others." Similarly, the Court deter-

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*Harper* was forced to take antipsychotic drugs under the Special Offender Policy in Washington. *Harper*, 494 U.S. at 214. The Supreme Court held that the Special Offender Policy comports with the due process requirements set out in the text. *Id.* at 236. The components of the policy are:

First, if a psychiatrist determines that an inmate should be treated with antipsychotic drugs but the inmate does not consent, the inmate may be subjected to involuntary treatment with the drugs only if he (1) suffers from a "mental disorder" and (2) is "gravely disabled" or poses a "likelihood of serious harm" to himself, others, or their property . . . . Second, an inmate who refuses to take the medication voluntarily is entitled to a hearing before a special committee consisting of a psychiatrist, a psychologist, and the Associate Superintendent of the Center, none of whom may be, at the time of the hearing, involved in the inmate's treatment or diagnosis. If the committee determines by a majority vote that the inmate suffers from a mental disorder and is gravely disabled or dangerous, the inmate may be medicated against his will, provided the psychiatrist is in the majority. *Id.* at 215-16. The third component of the policy is that the inmate must be given 24 hours notice of the Center's intent to convene an involuntary medication hearing, during which time he may not be medicated. *Id.* at 216. He also must receive notice of the tentative diagnosis and the reasons the staff believes medication is necessary. *Id.* The inmate also has a right to attend and present evidence at the hearing. *Id.* The fourth and last component of the policy provides that after the initial hearing, involuntary medication can continue only with periodic review by the special committee. *Id.*

70. 441 U.S. 520, 525 (1979).
71. *Riggins*, 112 S. Ct. at 1815 (quoting *Bell v. Wolfish*, 441 U.S. 520, 545 (1979)). In *Bell*, the Supreme Court held: "[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Bell*, 441 U.S. at 545.
73. *Id.* The *Riggins* Court reinforced its determination by citing *Addington v. Texas*,
minded that "[t]he State might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means." The Nevada Supreme Court's order neither found that continued administration of Mellaril was required to ensure that the defendant could be tried nor found that safety considerations or other compelling concerns outweighed Riggins' interest in freedom from unwanted antipsychotic drugs.

The Supreme Court concluded from the district court's logic and the transcript "that the court simply weighed the risk that the defense would be prejudiced by changes in Riggins' outward appearance against the chance that Riggins would become incompetent if taken off Mellaril, and struck the balance in favor of involuntary medication." In doing so, the Court determined that the district court erred in not acknowledging the defendant's liberty interest in freedom from unwanted antipsychotic drugs.

2. Constitutionally Protected Trial Rights

Riggins' second contention was that his constitutionally protected trial rights were denied because the court failed to acknowledge his liberty interest in freedom from unwanted antipsychotic drugs. The Supreme Court determined that "[t]his error may well have impaired the constitutionally protected trial rights that Riggins invokes." The Supreme Court returned to the evidentiary hearing held by the district court to consider whether the medication should have been terminated. "Dr. O'Gorman suggested that the dosage administered to Riggins was within the toxic range, and could make him 'up-"
tight." 81 Dr. Master testified that a patient taking 800 milligrams of Mellaril each day might suffer from drowsiness or confusion. 82 The Court compared the opinions of the three psychiatrists with a brief submitted by the American Psychiatric Association as amicus curiae which indicated "in extreme cases, the sedation-like effect may be severe enough to affect thought processes." 83 The Supreme Court, therefore, concluded that "[i]t is clearly possible that such side effects impacted not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication[s] with counsel." 84

The dissent suggested that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. 85 The Court, however, believed that "[e]fforts to prove or disprove actual prejudice from the record before [them] would be futile, and guesses [as to] whether the outcome of the trial might have been different if Riggins' motion had been granted would [be] purely speculative." 86 The Court explained that "[l]ike the consequences of compelling a defendant to wear prison clothing, 87 or of binding and gagging an accused during trial, the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript." 88 The Court concluded that "[w]hat the testimony of doctors who examined Riggins establishes, and what we will not ignore, is a strong possibility that Riggins' defense was impaired due to the administration of Mellaril." 89

The Court next considered whether Riggins' presentation of expert testimony about the effect of Mellaril on his demeanor cured the possibility that the substance of his own testimony, interaction with counsel, or comprehension at trial were compromised by forced ad-

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81. Id. (quoting Record at 483-84).
82. Id. (quoting Record at 416).
83. Id. (quoting Brief Amicus Curiae of the American Psychiatric Association Supporting Petitioner at 10-11, Riggins (No. 90-8466)).
84. Id.
85. Id. at 1823-24 (Thomas, J., dissenting).
86. Id. at 1816.
88. Id. Illinois v. Allen, 397 U.S. 337, 344 (1979) ("[T]he precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.").
89. Riggins, 112 S. Ct. at 1816.
ministration of Mellaril. The Court concluded that the expert testimony did nothing to cure the possibility that Riggins' testimony was compromised, and explained that even if the Nevada Supreme Court was correct in ruling that expert testimony allowed jurors to assess Riggins' demeanor fairly, an "unacceptable risk of prejudice remained."

The Court concluded by considering under what circumstances trial prejudice can be tolerated. The Court concluded that "trial prejudice can sometimes be justified by an essential state interest." The Court explained that the substantial probability of trial prejudice in this case was not justified "because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy." The Supreme Court reversed the judgment of the Nevada Supreme Court, and the case was remanded for further proceedings not inconsistent with the majority opinion.

3. The Concurrence

Justice Kennedy filed a concurring opinion in which he broadly pronounced that "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." Justice Kennedy explained that "since 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[,]" the Court could not give full consideration to the issue. Kennedy's opinion expressed the
view that the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent to stand 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. 97

Justice Kennedy agreed with the Court's conclusion that one who was medicated against his will in order to achieve the requisite competence to stand trial may challenge his conviction. 98 "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." 99 Justice Kennedy specifically rejected Justice Thomas' dissenting argument "that the involuntary medication order compromis[ed] some separate procedure, unrelated to the trial . . . ." 100 To the contrary, Justice Kennedy asserted that the allegations pertained to the State's appropriate interference with the trial and review of criminal proceedings. 101

Justice Kennedy "also agree[d] with the majority that the State has a legitimate interest in attempting to restore the competence of otherwise incompetent defendants." 102 The interest is based both on the State's right to bring an accused to trial and from the Court's holding in Pate v. Robinson, 103 that the conviction of an incompetent defendant violates due process. 104 He explained that unless a defendant is competent, the State cannot put him on trial. 105 Justice Kennedy went beyond the majority opinion and focused upon the importance of competence, the root of a fair trial:

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, includ-
ing 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.\textsuperscript{106}

In defining the issue before the Court, Justice Kennedy concentrated on whether the State’s interest in conducting the trial allows it to ensure the defendant’s competence through involuntary medication.\textsuperscript{107} Justice Kennedy recognized that the case will require further proceedings on remand and also acknowledged that the majority gave little guidance about what is to be considered in these further proceedings.\textsuperscript{108} Kennedy recognized that the Court failed to address these issues because they were not the subject of briefing or argument. He believed, however, that some discussion on this point was required to “underscore [his] reservations about the propriety of involuntary medication for the purpose of rendering the defendant competent, and to explain what [he] thinks ought to be express qualifications of the Court’s opinion . . . .”\textsuperscript{109}

Justice Kennedy began by distinguishing the case at bar from \textit{Washington v. Harper},\textsuperscript{110} which addressed a similar issue in a different context. In \textit{Harper}, the involuntary medication was given to an incarcerated person to ensure that he ceased to be a physical danger to himself or others.\textsuperscript{111} Justice Kennedy distinguished the two cases stating “[h]ere 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.”\textsuperscript{112} Justice Kennedy was concerned with “the last part of the State’s objective, medicating the person for the purpose of bringing him to trial . . . .”\textsuperscript{113} He asserted that the avowed purpose of the medication is not to achieve some bare level of functional competence, but competence to stand trial.\textsuperscript{114} The elementary protections against state intrusion re-

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108. \textit{Id.} at 1818 (Kennedy, J., concurring).
109. \textit{Id.} (Kennedy, J., concurring).
111. \textit{Riggins}, 112 S. Ct. at 1818 (Kennedy, J., concurring).
112. \textit{Id.} (Kennedy, J., concurring).
113. \textit{Id.} (Kennedy, J., concurring).
114. \textit{Id.} (Kennedy, J., concurring).
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quire "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."115 Based on Justice Kennedy's understanding of recent literature concerning the side effects of antipsychotic medication, he had substantial reservations that the State could have made that showing.

Although Justice Kennedy acknowledged that antipsychotic drugs have changed the lives of psychiatric patients, he explained that they can have unwanted side effects.116 The side effects are relevant to this case because they can compromise the right of a medicated criminal defendant to receive a fair trial.117 Justice Kennedy defined the two principle ways that drugs can prejudice the accused: "(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."118

Justice Kennedy proceeded to explain that the defendant's behavior, manner, expressions and emotional responses are crucial in making an impression on the jury.119 Demeanor can have a great bearing on a defendant who takes the stand.120 He asserted that the side effects such as inability to sit still, Parkinsonism (characterized by tremor of the limbs, diminished range of facial expression, or slowed movements and speech), the "sedation-like" effect, drowsiness and lack of alertness may alter demeanor in a way that will prejudice all facets of the defense. Justice Kennedy stated:

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.121

115. Id. (Kennedy, J., concurring).
117. Riggins, 112 S. Ct. at 1818 (Kennedy, J., concurring).
118. Id.
119. Id. at 1819 (Kennedy, J., concurring).
120. Id. (Kennedy, J., concurring).
121. Id. (Kennedy, J., concurring).
Justice Kennedy was also concerned about the medication interfering with a defendant's ability to cooperate with counsel.\textsuperscript{122} The Court held in \textit{Massiah v. United States}\textsuperscript{123} and \textit{Geders v. United States}\textsuperscript{124} that a defendant's right to the effective assistance of counsel is interfered with when the defendant cannot actively cooperate with his or her lawyer.\textsuperscript{125} The cognition-dulling side effects of antipsychotic drugs can hinder the attorney-client relationship, preventing effective communication and rendering the defendant less able or willing to take part in the defense.\textsuperscript{126} In Justice Kennedy's view, "[i]f the State cannot render the defendant competent without involuntary medication, then it must resort to civil commitment . . . ."\textsuperscript{127} He concluded, "the Constitution requires that society bear this cost in order to preserve the integrity of the trial process."\textsuperscript{128}

IV. ANALYSIS

A. \textit{What Does Competency to Stand Trial Mean?}

1. Historical Purpose for Competence

The historical prohibition against trying and convicting an incompetent defendant is premised on a number of related factors, most of which stem from the Anglo-American model of the adversarial trial system, in which competing parties, aided by their counsel, strive to establish and ascertain the truth.\textsuperscript{129} The proposition "that a defendant who was not mentally or physically present at trial was unable to carry on the role of the defendant is predicated on the adversarial model."\textsuperscript{130}

A defendant who did not understand the nature and purpose of the proceedings against him, who could not recall or otherwise provide his attorney with facts that might exonerate him, who could not interact with counsel, who could not comprehend or

\textsuperscript{122} \textit{Id.} at 1820 (Kennedy, J., concurring).
\textsuperscript{123} 377 U.S. 201 (1964).
\textsuperscript{124} 425 U.S. 80 (1976).
\textsuperscript{125} \textit{Riggins}, 112 S. Ct. at 1820 (Kennedy, J., concurring).
\textsuperscript{126} \textit{Id.} (Kennedy, J., concurring).
\textsuperscript{127} \textit{Id.} (Kennedy, J., concurring).
\textsuperscript{128} \textit{Id.} (Kennedy, J., concurring).
\textsuperscript{129} Fentiman, \textit{supra} note 1, at 1114.
\textsuperscript{130} \textit{Id.}
comment upon the testimony of adverse witnesses, and who could not intelligently make strategic trial decisions, was not only a defendant who might be unfairly found guilty, but was also simply not the type of defendant whom our system of adjudication of guilt seeks to convict. Such a defendant was thus deemed incompetent to stand trial.\textsuperscript{131}

This historical emphasis on the accused's ability to function as a defendant is reflected in the two-pronged test for competency which the Supreme Court articulated in \textit{Dusky v. United States}.\textsuperscript{132} The \textit{Dusky} test addresses two issues: "(1) whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and (2) whether [the accused] has a rational as well as factual understanding of the proceedings against him."\textsuperscript{133} The incompetency defense was seen as a vehicle to increase social cohesion and respect for the criminal justice system, ensuring that criminal punishment would only be imposed on those who were aware of and could participate in the criminal process.\textsuperscript{134} Also, "it was believed that if court-room observers perceived that the defendant was incapable of understanding and making fundamental trial decisions or that he was engaging in bizarre and inappropriate behavior, public confidence in, and support for, the justice system would be undermined."\textsuperscript{135} If a court were to properly follow the theory behind the \textit{Dusky} competence standard, any impairment of a defendant's ability to function as a defendant, such as altered demeanor or impaired cognitive functioning, would cause him or her to be viewed as incompetent.

\textbf{B. The Use Of Drugs to Restore Competency}

\textit{State v. Hampton}\textsuperscript{136} was the first common law decision to address the use of antipsychotic drugs in making a criminal defendant fit to stand trial. In \textit{Hampton}, an unfit defendant was voluntarily administered Thorazine during her trial.\textsuperscript{137} A state sanity commission found that Hampton, while under the influence of drugs, had a

\begin{itemize}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} 362 U.S. 402 (1960) (per curiam).
\item \textsuperscript{133} \textit{Id.} at 402.
\item \textsuperscript{134} \textit{Fentiman, supra} note 1, at 1116-17.
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} 218 So. 2d 311 (La. 1969).
\item \textsuperscript{137} \textit{Id.} at 312.
\end{itemize}
present capacity to understand the nature of the proceedings and assist in her defense.\textsuperscript{138} As a result, the court held that the fact that this capacity was produced by antipsychotic medication was of "no legal consequence."\textsuperscript{139} The Court in \textit{Hampton} "established the proposition that the state had no interest in preventing the trial of a defendant who could, by taking drugs, meet the fitness test: the court \text{[would]} not look beyond existing competency and erase improvement produced by medical science."\textsuperscript{140} The holding in \textit{Hampton} simply "affirmed that the fitness standard is a test of current ability to function \text{[as a defendant]} and held that the fact that Hampton was 'only "synthetically sane"' constituted no fraud upon the court."\textsuperscript{141}

Since \textit{Hampton}, the majority of courts that have considered the issue whether competency of a mentally ill criminal defendant can be restored through the use of antipsychotic medication have lost sight of the proper focus. The focus should be on whether the accused has the ability to function as a defendant. Instead, courts have concentrated on the categorization of whether the drug affected "cognition" or merely affected "emotion."\textsuperscript{142} If only "emotion" rather than "cognition" has been affected by the drugs, it is of no consequence to the competency determination of the defendant.

In \textit{State v. Hayes},\textsuperscript{143} for example, the defendant, "whose competence to stand trial was dependent upon treatment with antipsychotic drugs, claimed a right to be tried in his unmedicated state."\textsuperscript{144} The New Hampshire Supreme Court held that Hayes lacked the right to be tried without being under the influence of drugs.\textsuperscript{145} The court in \textit{Hayes} emphasized that antipsychotic drugs did not affect the "process or content"\textsuperscript{146} of his thoughts but "allow[ed] the cognitive part of the defendant's brain . . . to come back into play."\textsuperscript{147}

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\textsuperscript{138} Id.
\textsuperscript{139} Steve Tomashefsky, \textit{Antipsychotic Drugs and Fitness to Stand Trial: The Right of the Unfit Accused to Refuse Treatment}, 52 U. CHI. L. REV. 773, 776 (1985) (quoting State v. Hampton, 218 So. 2d 311 (La. 1969)).
\textsuperscript{140} Id. (quoting \textit{Hampton}, 218 So. 2d at 312).
\textsuperscript{141} Id. (quoting \textit{Hampton}, 218 So. 2d at 312 (quoting the trial judge)).
\textsuperscript{142} Id. at 777.
\textsuperscript{143} 389 A.2d 1379 (N.H. 1978).
\textsuperscript{144} Brian Domb, \textit{A New Twist on 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, 286 (1990).
\textsuperscript{145} \textit{Hayes}, 389 A.2d at 1381.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\end{flushleft}
Similarly, the defendant in *State v. Jojola*,148 who had a long history of mental illness, suffered from paranoid schizophrenia which caused him to feel persecuted by almost everyone with whom he came into contact.149 The evidence showed that Jojola was competent to stand trial under the *Dusky* competency standard, provided he was forcibly administered antipsychotic drugs.150 The court endorsed such forcible administration because the drugs allow "the mind to operate as it might were there not some organic or other type of illness [a]ffecting the mind."151

These courts have divided mental activity into two separate functions: (1) cognition and (2) emotion, determining that "any effect that antipsychotic drugs might have on the latter is all to the benefit of a criminal defendant."152 According to these courts, emotion is not really a part of the defendant's mind153 and, therefore, can be controlled.154 "Courts adopting this view assume that [their interpretation of the] competency standard covers all of the mental activity with which the Constitution is concerned under a due process analysis."155 Since the competency standard has been interpreted by courts to be restricted to cognition, they hold that forced administration of the drugs will violate the defendant's constitutional rights only if it interferes with cognitive functioning.156 This reasoning, however, ignores the aim of the *Dusky* competency standard, which enables a defendant to function fully in court.

149. *Id.* at 1298.
151. *Jojola*, 553 P.2d at 1299.
152. Tomashefsky, *supra* note 139, at 777.
153. *See id.* at 777-78 n.25 (quoting Stanley v. Georgia, 394 U.S. 557, 565 (1969)) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").
154. *Id.* at 778. "[T]he courts have posed the constitutional issue as one of mind control by the government, and they have defined the action of antipsychotic drugs in such a way that the conclusion must be that the mind is not controlled." *Id.*

But, either the mind is "continuous and inchoate," or it consists of the cognitive function alone, upon which emotion is, during psychosis, an unwelcome burden. When the question is framed as a choice between considering the mind as an integrated whole from which no mental function is separable or, on the contrary broken down into such compartments as cognition, memory, and emotion, most courts have chosen the latter view.

*Id.*

155. *Id.* at 779.
156. *Id.*
C. Competency: The Ability to Function as a Defendant

The purpose of a competency standard is to ensure that an accused has the ability to function as a defendant. This purpose is reflected in the Dusky two pronged test. The Dusky standard is significant because “a defendant need[s] to be able to do more than identify facts; he must have some capacity to reason from a simple premise to a simple conclusion.” As Hampton points out, the courts began defining competency consistent with Dusky in focusing on whether the accused could function as a defendant. In determining that the State has a right to forcibly administer drugs to a criminal defendant, the courts have lost sight of the Hampton and Dusky focus, and have instead defined competency solely as cognitive functioning without regard to whether the defendant’s altered emotions and appearance will affect the jury’s findings.

The courts that have focused solely on cognition as the one criterion in establishing competency have ignored the probative value of the accused’s demeanor which is directly impaired due to the side effects of antipsychotic drugs. They have also failed to realize that cognition truly is impaired when one is administered antipsychotic drugs. This alteration of demeanor and effect on cognition by the administration of antipsychotic drugs has great significance in impairing an accused’s ability to function as a defendant.

The majority in Riggins v. Nevada, acknowledged the possibility that the side effects of the antipsychotic drugs could impact “not just Riggins’ outward appearance [or demeanor], but also the content of his testimony on direct or cross examination, his ability to follow proceedings, or the substance of his communication with counsel.” The Court explained that the side effects may have impaired

157. Fentiman, supra note 1, at 1114.
158. See supra notes 132-33 and accompanying text.
159. Domb, supra note 144, at 279.
160. See State v. Hayes, 389 A.2d 1379 (N.H. 1978). The Hayes court emphasized that antipsychotic drugs did not affect the “process or content” of the defendant’s thoughts but “allow[ed] the cognitive part of the defendant’s brain . . . to come back into play.” Id. at 1380. See also State v. Jojola, 553 P.2d 1296 (N.M. Ct. App. 1976). The court in Jojola endorsed forcible administration of antipsychotic drugs because the drugs allow “the mind to operate as it might were there not some organic or other type of illness affecting the mind.” Id. at 1299 (quoting expert witness).
161. Riggins v. Nevada, 112 S. Ct. 1810, 1816 (1992). At the hearing to consider terminating medication, Dr. O’Gorman suggested that the antipsychotic drugs administered to
Riggins’ constitutionally protected trial rights. The majority did not, however, consider whether the side effects of the drugs rendered him unable to function as a defendant, and therefore unable to meet the Dusky competency standard.

Justice Kennedy, in his concurrence, agreed with the majority that the side effects of antipsychotic drugs can prejudice the accused. Justice Kennedy, however, addressed the issue of whether the state can ever ensure a defendant’s competence to stand trial when involuntarily medicated.

In analyzing whether these drugs should be used as a means of inducing competence to stand trial, Justice Kennedy contrasted Riggins’ case with Washington v. Harper, where the Court upheld the forcible administration of antipsychotic medication to a prison inmate. In its reasoning, the Harper Court stressed the importance of maintaining safety in the prison setting. Justice Kennedy distinguished the case at bar with Harper:

This is not a case like Washington v. Harper 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, [as in Harper,] but rather to render the person competent to

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Riggins could make him “uptight” and Dr. Master testified that a patient taking 800 milligrams of Mellaril each day might suffer from drowsiness or confusion. Id. The Brief for American Psychiatric Association as Amicus Curiae states, “in extreme cases, the sedation-like effect [of antipsychotic medication] may be severe enough to affect the thought processes.” Id. (quoting Brief Amicus Curiae of the American Psychiatric Association Supporting Petitioner at 10-11, Riggins (No. 90-8466)).

162. Id.

163. Id.

164. Riggins, 112 S. Ct. at 1818 (Kennedy, J., concurring). Justice Kennedy explained that competence to stand trial is the root of our justice system because:

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.

Id. at 1817 (Kennedy, J., concurring) (citing Drope v. Missouri, 420 U.S. 162, 171-72 (1975)).


166. Id. at 1818 (Kennedy, J., concurring).
Justice Kennedy concerned himself with the latter objective—medicating for the purpose of bringing Riggins to trial. He explained that, "[i]f the only question were whether some bare level of functional competence can be induced [as in Harper], that would be a grave matter in itself, but here there are even more far reaching concerns." In Justice Kennedy's eyes, one of the far reaching concerns was whether competence can ever be restored to an accused through the administration of antipsychotic drugs. He explained that the avowed purpose of the medication is not functional competence, as it was in Harper, but competence to stand trial. Justice Kennedy implied that Riggins did not meet the Dusky competency standard while being administered high dosages of Mellaril.

The majority never considered whether the method by which Riggins attained his requisite competency (through the administration of antipsychotic drugs) affected the finding of present competency. Because the majority did not consider what competency to stand trial entails, they failed to address the issue of whether a "synthetically sane" defendant can ever really be competent to stand trial. The majority failed to consider the extent to which the side effects of the medication deny a defendant the right to defend by (1) altering his or her demeanor in a manner that will prejudice their reactions and presentation in the courtroom, and (2) rendering him or her unable or unwilling to assist counsel.

D. The Right To Defend

The Sixth Amendment includes a concise statement of the rights necessary to a full defense: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." In Faretta v.

167. Id. (Kennedy, J., concurring) (emphasis added).
168. Id.
169. Id.
170. Id.
171. For a definition of "synthetically sane," see Fentiman, supra note 1, at 1111.
172. Riggins, 112 S. Ct. at 1818-19 (Kennedy, J., concurring).
173. U.S. CONST. amend. VI.
California, the Supreme Court announced that "[b]ecause these rights are basic to our adversary system of criminal justice, they are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States." The Court explained that "[t]he rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." "The Supreme Court has rendered numerous decisions premised on the importance of the right to be heard in one's own defense as an essential element of the fundamental fairness and due process requirements which are central to our adversarial system." In a criminal contempt case, In re Oliver, the Supreme Court held "that the failure to provide the defendant with 'a reasonable opportunity to defend himself' constituted a denial of due process." The Court held that a person's right to be heard in their own defense is basic to our system of jurisprudence.

"[T]he Supreme Court has recognized that even a partial deprivation of a defendant's right to present a defense can constitute a denial of his constitutional right to a fair trial." In Washington v. Texas, the Supreme Court struck down two Texas statutes which provided that a person charged with or convicted of the same offense as the defendant could not testify on his behalf, unless called by the prosecution. The Supreme Court reversed Washington's conviction, declaring:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the

176. Id.
177. Fentiman, supra note 1, at 1121.
179. Fentiman, supra note 1, at 1121-22 (quoting In re Oliver, 333 U.S. 257, 273 (1948)).
181. Fentiman, supra note 1, at 1122.
182. 388 U.S. 14 (1967).
183. Fentiman, supra note 1, at 1122 (citing Washington v. Texas, 388 U.S. 14, 16 (1967)).
facts as well as the prosecution's to the jury so it may decide where the truth lies. 184

"Synthetically sane" defendants are denied the right to defend if they are tried after their competency has been determined without considering the impairment that the side effects of the drugs had on their demeanor and cognitive functioning. The majority acknowledged that "[i]t is clearly possible that such side effects impacted not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." 185 The majority did not, however, present a plan to guard against denying a "synthetically sane" defendant the right to defend as Justice Kennedy did in his concurring opinion. 186 Justice Kennedy listed factors which he believed should be express qualifications of the Court's opinion in order to ensure that a medicated defendant is guaranteed a fair trial: "[E]lementary 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." 187 The majority did state that the demeanor of the accused and his ability to assist his counsel are concerns in determining whether a medicated defendant's defense has been impaired. Justice Kennedy in the concurrence, however, took a more realistic approach by formulating a systematic plan to determine whether a defendant's right to defend has been impaired. He realized that both demeanor evidence and the ability of a defendant to assist his counsel are paramount where a defendant is said to be "competent" to stand trial through the administration of antipsychotic drugs. 188 In order to completely understand how the side effects of antipsychotic drugs affect an accused's right to defend, the actual side effects of the antipsychotic drugs must be addressed. 189

184. Id. (quoting Washington v. Texas, 388 U.S. 14, 19 (1967) (emphasis added)).
185. See supra note 1 for definition of "synthetically sane."
186. Riggins, 112 S. Ct. at 1816.
187. Id. at 1817 (Kennedy, J., concurring).
188. Id. at 1818-19 (Kennedy, J., concurring).
189. Id. at 1818-20 (Kennedy, J., concurring).
190. Id. at 1818 (Kennedy, J., concurring).
E. Side Effects of Antipsychotic Drugs

First introduced in the 1950s, antipsychotic drugs such as Mellaril have been widely accepted as a treatment for psychotic thought disorders. The effects of antipsychotic medication on an insane defendant's ability to present a defense are most clearly seen in the case of schizophrenic patients (such as Riggins) who are forcibly medicated with antipsychotic drugs such as Thioridazine. Physicians have theorized that the disease is caused by inappropriate amounts of two chemical neurotransmitters in the brain, dopamine and norepinephrine. The abnormal levels of these two chemical neurotransmitters cause a "situation where brain activity is highly stimulated, but not focused, which results in thought disorders, hallucinations, delusions, and paranoid ideation." The antipsychotic drugs work to "alter the relative proportions of dopamine and norepinephrine to reduce or eliminate the overt symptoms of schizophrenia, thus diminishing the defendant's violent and disruptive behavior."

A variety of unwanted side effects accompany the use of the medication. The psychiatric profession reluctantly recognizes that many of the side effects are significant, capable of causing serious physical, emotional, and cognitive distress. "It is critical to keep in mind that side effects occur even where medication is responsibly and competently administered . . . ." The more serious side effects include:

Akinesia: "[A]kinesia, causes the defendant to feel a lack of energy and to complain of being dead inside, to feel that everything is dull and boring, and that nothing matters." Patients discuss being "in a stupor," and walking around with a "shuffle, head hung down,

192. Fentiman, supra note 1, at 1128.
193. Id. at 1128-29.
194. Id.
195. Id. at 1129.
197. Id.
198. Fentiman, supra note 1, at 1129 (quoting Theodore Van Putten, Why do Schizophrenic Patients Refuse to Take Their Drugs?, 31 ARCHIVES GEN. PSYCHIATRY 67, 69 (1974)).
looking... like [you're] not seeing anything."\textsuperscript{199} "Externally, akinesia may alter the defendant's facial expression, ... and in severe cases have a wooden, mask-like face."\textsuperscript{200} Persons with akinesia "display 'few gestures, unsponsive speech, and particularly, apathy and difficulty initiating usual activities.'"\textsuperscript{201}

\textit{Akathisia:} Akathisia is another common side effect of antipsychotic drugs. It is an emotional state of inner restlessness and agitation, in which defendants feel "all nerved up," or "squirmy inside," so that they are never comfortable, and, in severe cases, will suffer from inner feelings of panic.\textsuperscript{202} These internal symptoms are externally manifested by fidgetiness, the inability to sit still, constant crossing and uncrossing of the legs, and continuous alterations in posture.\textsuperscript{203} "With subtle akathisia the defendant may not pace or use the word 'restless' and complain instead of 'nervousness,' 'irritability,' 'impatience,' 'feeling keyed up,' or of an 'inability to feel comfortable.'"\textsuperscript{204}

\textit{Tardive Dyskinesia:} This is an irreversible condition, which results from lengthy and high dosages of antipsychotic drugs.\textsuperscript{205} In recent years this side effect has aroused the most legal interest and medical concern because of its irreversible nature.\textsuperscript{206} "A defendant suffering from tardive dyskinesia exhibits grotesque involuntary movements of the tongue, lips, and jaws, which may in some cases extend to the trunk and bodily extremities."\textsuperscript{207} "In severe cases, the involuntary movements impede walking and even digestion. Health can be endangered, and often the defendant's appearance becomes gro-

\begin{itemize}
\item \textsuperscript{199} Sheldon Gelman, \textit{Mental Hospital Drugs, Professionalism, and the Constitution}, 72 GEO. L.J. 1725, 1744 (1984).
\item \textsuperscript{200} Fentiman, supra note 1, at 1129 (quoting Van Putten, \textit{supra} note 198, at 69). "Such a rigid, 'mask-like' face may also be a result of one of the other side effects of antipsychotic drugs, parkinsonism, which is also characterized by 'drooling, muscle stiffness and rigidity, a shuffling gait [often referred to colloquially as the Stellazine Shuffle], and tremors.'" \textit{Id.} (quoting Kemna, \textit{Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs}, 6 J. LEGAL MED. 107, 110 (1985)).
\item \textsuperscript{201} Gelman, \textit{supra} note 199, at 1744 (quoting Rifkin et. al., \textit{Akinesia: A Poorly Recognized Drug-Induced Extrapyramidal Behavioral Disorder}, 32 ARCHIVES GEN. PSYCHIATRY 672, 672 (1975)).
\item \textsuperscript{202} Fentiman, \textit{supra} note 1, at 1129.
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} Gelman, \textit{supra} note 199, at 1743 (quoting Theodore Van Putten & Louis R. Mutalipassi, \textit{Fluphenazine Enanthate Induced Decompositions}, 16 PSYCHOMATICS 37, 39 (1975)).
\item \textsuperscript{205} Fentiman, \textit{supra} note 1, at 1129.
\item \textsuperscript{206} Gelman, \textit{supra} note 199, at 1742.
\item \textsuperscript{207} Fentiman, \textit{supra} note 1, at 1129.
\end{itemize}
This side effect is common: estimates of the prevalence of the disorder in patients who take antipsychotics range as high as sixty-five percent. The medication unfortunately masks the symptoms of tardive dyskinesia and becomes apparent only after the user has discontinued use. The condition persists throughout life without any cure.

The severe emotional, physical, and cognitive side effects are apparent from the above discussion. Emotionally, the side effects include listlessness and apathy. "Zombiism" is a widely used term for the condition. Individuals on these drugs feel that life is not worth living, and characterize their lives as "empty," and "aimless."

Physically, a defendant cannot control their movements. Cognitively, the drugs impair the defendant’s ability to concentrate or think straight. "Reading or talking becomes impossible, and the [defendant] retreats into an intellectual vacuum. For a [defendant] who has even modest intellectual interests, cognitive side effects can be extremely distressing."

It is evident from the documented effects of antipsychotic medication that the demeanor and cognitive functioning of medicated individuals are impaired. The side effects of antipsychotic drugs alter the defendant’s demeanor in a manner that prejudice their reactions and presentation in the courtroom and which impair the defendant’s cognition by rendering them unable or unwilling to assist counsel. This alteration of demeanor and impairment of cognitive functioning compromise the defendant’s right to receive a fair trial. The way in which impaired demeanor and cognitive functioning effects an accused’s right to defend and right to a fair trial will be explored next.

F. Importance of Demeanor Evidence and the Right to Defend

The majority held that Riggins’ “outward appearance” at trial, while under the influence of Mellaril, may have prejudiced him in the
eyes of the jury. Justice Kennedy realized how powerfully these drugs affect demeanor and asserted that whether demeanor has been altered should be looked into in every case where competency is said to be achieved through antipsychotic medication.

“When insanity is at issue, a defendant’s right to be heard in his own defense involves more than testimony from the witness stand; the defendant’s courtroom demeanor will necessarily have a significant probative value to the jury.” A defendant’s “own demeanor is perhaps the most persuasive evidence an insanity defendant can offer about his mental state at the time of the crime.” The appearance and demeanor of a defendant in the courtroom are a crucial part of any case. According to Justice Kennedy, the state should be required in every case to make a showing that demeanor is not impaired or altered by the medication.

Justice Kennedy stated that “[i]t 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.” In all stages of the proceedings, the defendant’s responses, or lack thereof, manner, behavior and facial expressions combine to make an impression on the jury that can have a powerful influence on the outcome of the trial. Justice Kennedy wrote, “[i]f 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.” Even when a defendant does not testify, jurors will watch how the accused reacts to testimony and other courtroom happenings. These reactions influence their judgment of the defendant’s guilt, or appropriate sentence in a capital case.

Antipsychotic drugs may produce a markedly passive, apathetic or

218. Id. at 1818 (Kennedy, J., concurring).
220. Id.
222. Riggins, 112 S. Ct. at 1818 (Kennedy, J., concurring).
223. Id. at 1819 (Kennedy, J., concurring).
224. Id. (Kennedy, J., concurring).
225. Id. (Kennedy, J., concurring).
227. Id.
"zombie-like" appearance as a result of the suppression of emotions. The defense is especially concerned with the side effects of the medication because altered appearance, idiosyncratic movements, drowsiness, and unnatural rigidity may have a distracting or misleading effect on the trier of fact. The American Psychiatric Association, in their Brief Amicus Curiae Supporting Petitioner, explained that antipsychotic drugs may have sedative effects, cause restlessness, and influence the defendant's demeanor at all stages of the trial. Furthermore, they asserted that "by administering medication, the State may be creating a prejudicial negative demeanor in the defendant—making him look nervous and restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive." In a case involving the insanity defense, the significance of these effects may be enhanced because the jury might be especially sensitive to the defendant's demeanor for what it may reflect about his or her future conduct if acquitted. Similarly, demeanor may be especially significant in capital sentencing, in which the jury is called upon to make a prospective moral judgment about the defendant as a person rather than engaging in purely retrospective factfinding.

Compelling the use of medication denies a defendant the right to present relevant evidence, specifically themselves in their true mental state. "Few rights are so fundamental in our jurisprudence than that of an accused to present . . . [their] own version of the facts." This right is necessary to ensure that the defendant is not deprived of a fair trial. Due process does not permit a state to suppress "evidence favorable to the accused . . . where the evidence is material either to guilt or to punishment . . . ." The forcible treatment of Riggins or

228. Tomashefsky, supra note 139, at 784.
229. Id.
231. Id.
232. Id. at 11.
234. See Riggins v. State, 808 P.2d 535, 542 (Nev. 1991). The Nevada Supreme Court explained that "[w]here . . . the sole issue at trial is the defendant's mental state, the most compelling evidence available is the defendant himself." Id.
any other criminal defendant creates such a deprivation. By distorting Riggins' natural mental condition, the state masked evidence critical to the sole issue at trial. "The courtroom demeanor of a defendant is the most reliable evidence of mental condition." An expert's verbal picture of a defendant's unmedicated condition cannot match the reliability of the jury's observation of a defendant when unmedicated.

In Riggins' case, the trial court instructed the jury to consider his "manner upon the stand" while assessing the credibility of his insanity defense. It was likely, therefore, that the jury discounted evidence which suggested he was insane at the time of the crime after witnessing Riggins' calm and controlled demeanor during the trial.

G. Impairment of Cognition and The Right to Defend

Although the majority does acknowledge that Riggins' cognitive functioning may have been impaired due to the administration of antipsychotic drugs, its opinion does not contain an express qualification that the possibility of cognitive impairment should be examined in every case where competency is purported to be achieved through antipsychotic drugs. The better view is that when a criminal defendant is medicated in order to meet the Dusky competency standard, it should be mandatory that the state make a showing that the defendant has not been cognitively impaired by the drugs. This showing would ensure

238. Brief for the Petitioner at 10, Riggins (No. 90-8466).
240. Id.
241. Id. The court in State v. Lewis discussed the limitations of verbal description as opposed to direct observation:

As a general rule it is undoubtedly true that it is the facts which a witness gives of the conduct, acts, manner, and conversations of the defendant which constitute the greatest value of his testimony, and that the testimony of a witness having but a limited knowledge upon these matters ordinarily has but little if any, weight with the jury; but it is not true that a witness is bound to give, or that he can in all cases give, the glare of the eye, the wild look, the peculiar expressions, or strange demeanor of the defendant. There are many cases where the mental condition of a person depends as much or more, upon his looks and gestures, connected with his acts, conduct, or conversation, as upon the words and actions themselves; and it would be difficult, and sometimes impossible, for the witness to intelligently give all of the details upon which his opinion is based.

State v. Lewis, 22 P. 241, 345-46 (Nev. 1889).
242. Brief for the Petitioner at 10, Riggins (No. 90-8466).
that the accused has the ability to function as a defendant, and thus meet the goal of the *Dusky* competency standard.

As stated previously, the majority of the courts that have considered the issue whether an accused’s right to defend has been impaired through the forcible administration of antipsychotic drugs have concluded that antipsychotic drugs do not affect the cognitive component of the brain. These courts have decided that defendants who are forced to take antipsychotic drugs are competent to stand trial because their cognition has not been affected. Contrary to these decisions, the side effects of antipsychotic drugs demonstrate that cognition is indeed impaired when they are administered. This impairment of cognition renders an accused unable and unwilling to assist counsel. This inability to assist counsel compromises the right of a medicated criminal defendant to receive a fair trial.

Justice Kennedy, in his concurrence, stated that the majority opinion should have included an express qualification that when an accused is administered antipsychotic drugs for the purpose of achieving competence to stand trial, the state must make a showing that there is no significant risk that the medication will impair the defendant’s capacity or willingness to assist his counsel. He pointed out that a defendant’s right to the effective assistance of counsel is impaired when the defendant cannot cooperate in an active manner with the lawyer. He explained that “[t]he 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 the defense.” The state interferes with this relationship when it forcibly administers a drug which impairs cognition. The National Association of Criminal Defense Lawyers in its Brief Amicus

243. *See* State v. Jojola, 553 P.2d 1296 (N.M. Ct. App. 1976). The Jojola court found that “Thorazine ‘an antipsychotic drug’ allows the cognitive part of the brain to come back into play.” *Id.* at 1299. The court reasoned that “a person being dosed with Thorazine is sedated emotionally more than cognitively.” *Id.* at 1298-99, quoted in Fentiman, supra note 1, at 1132 n.121.


245. For a discussion of the side effects of antipsychotic drugs see *supra* notes 191-216 and accompanying text.


247. *Id.* at 1820 (Kennedy, J., concurring).

248. *Id.* (Kennedy, J., concurring).

249. *Id.* (Kennedy, J., concurring).
Curiae determined that "[a]nti-psychotic medication . . . generates a cognitive dulling that impairs the defendant’s ability to remember, reason, or function effectively in a complex learning situation. This effect of the medication can have a devastating impact on the defendant’s ability to assist his attorney in preparing a defense." They asserted that "the 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 their own defense in preparation for trial." In its Amicus Curiae Brief, the National Association of Criminal Defense Lawyers used Riggins’ sentencing hearing as an example of the way in which administering antipsychotic drugs at trial can impair cognition, and ultimately impact on one’s right to a fair trial. For the sentencing hearing, Riggins had prepared a statement to present to the jury in order to persuade them to allow him to live. The National Association of Criminal Defense Lawyers pointed out that because of the cognitive dulling effect of Mellaril, Riggins did not have the inner strength to make this critical presentation on his own. His lawyer had to read this statement to the jury for him.

Although antipsychotic drugs remove the most violent aspects of the defendant’s behavior, which makes it possible for to communications to appear more rational, "they also generate some ‘cognitive dampening,’ [and] an impairment of the defendant’s ‘ability to remember, reason, or function effectively.’" The antipsychotic drugs may also cause the defendant to have a decreased appreciation for their situation, "including a reduction in normal healthy anxiety, producing a ‘don’t care’ mental status rather than responses based on self-protection.” It is likely that a medicated defendant would "agree to less effective measures in the preparation of his trial defense than

251. Id.
252. Id.
253. Id.
254. See State v. Jojola, 553 P.2d 1296 (N.M. Ct. App. 1976). In Jojola, the court rejected the defendant’s claim that his forcible restoration to competency through the use of thorazine (an antipsychotic drug) violated due process, focusing on how the drug restored rationality in the defendant and ignoring the drug’s cognitive dampening effects. Id. at 1299.
255. Fentiman, supra note 1, at 1132-33.
256. Fentiman, supra note 1, at 1133 (quoting Clifford R. Mynatt, Artificial Competence, 22 Hosp. & Community Psychiatry 96, 96 (1971)).
would a truly competent and anxious person charged with a crime." 257

The Sixth Amendment guarantees the defendant the right "to be confronted with witnesses against him." 258 This has been interpreted "to secure his right to be present at those stages of his trial 'where fundamental fairness might be thwarted by his absence.'" 259 "The principal value served by the defendant's presence is his ability to give advice and suggestions to his counsel during the course of the trial." 260 The Court has announced that "'[i]t 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.'" 261

In order for an accused to be effectively present at trial, he or she must be alert, concerned and ready to assist the defense counsel. 262 Defendants must, therefore, not only have the cognitive capacity to assist counsel, but also the will and desire to do so. 263 An apathetic and distracted defendant, "whose defensive instincts are not keen, and who unquestionably accepts the statements of the prosecution and the witnesses against him will not be able to exercise his right of presence and cross-examination in an effective manner." 264 These precise types of attitudes which are produced by antipsychotic drugs are a concomi-

257. Id.
258. U.S. CONST. amend. VI.
259. Tomashefsky, supra note 139, at 782 (quoting Faretta v. California, 422 U.S. 806, 816 (1975)). See Illinois v. Allen, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.") (citing Lewis v. United States, 146 U.S. 370 (1892)); see also United States v. Hayman, 342 U.S. 205, 222 (1952) (where the Court stated in dicta that in a "criminal trial where the guilt of the defendant is in issue . . . his presence is required by the Sixth Amendment . . . ").
260. Tomashefsky, supra note 139, at 782. See Faretta v. California, 422 U.S. 806, 816 (1975), where the Court based the right of presence on the premise that the defendant is enabled to "give advice or suggestion" to his attorney. See also Illinois v. Allen, 397 U.S. 337, 344 (1970), where the Court noted that "one of the defendant's primary advantages of being present at trial [is] his ability to communicate with his counsel."
262. Tomashefsky, supra note 139, at 783.
263. Id. at 783-84.
264. Id. at 784. See Sheldon Gelman, Mental Hospital Drugs, Professionalism, and the Constitution, 72 Geo. L.J. 1725, 1751 (1984) (Antipsychotic drugs "possess a remarkable potential for undermining individual will and self-direction, thereby producing a psychological state of unusual receptiveness to the directions of custodians.").
tant of their beneficial effects on controlling the defendant's deviant behavior. For example, one of the side effects of antipsychotic drugs, Akinesia, produces feelings of apathy and indifference. The medicated defendant develops a disinclination to speak and an indifference to stimuli which are a "definite liability to an effective criminal defense." Akathisia, another side effect, causes a medicated defendant to be "so beset by motor restlessness that he cannot concentrate, but is driven about restlessly." It is clear that both of these side effects impact on a medicated defendant's ability to be meaningfully present at trial and assist counsel in his or her defense.

Thus, while forcible administration of antipsychotic drugs apparently benefit the accused by lessening the symptoms caused by the mental illness and by making the defendant sound more rational and better able to cooperate with counsel, "the reality may be that as a result of these drugs the defendant can neither recall nor understand facts which are crucial to his defense nor appreciate the seriousness of his predicament." Because the accused can neither be meaningfully present at trial, nor effectively assist counsel in preparing a defense, "he is simply not in a position to function as a defendant."

V. CONCLUSION

The historical purpose of the competency standard is based on the notion that only those with the ability to carry out the role of the defendant should be subject to the criminal process. When defendants, like Riggins, are forcibly administered antipsychotic drugs they lose the ability to function as a defendant. Due to the severe side effects of antipsychotic drugs, the medicated defendant's demeanor and cognitive functioning become impaired. Medicated defendants lose the right to defend because their ability to assist counsel is impaired, and they are denied the ability to present to the jury the most persuasive evi-
The majority did acknowledge that Riggins' demeanor and cognitive functioning may have been affected by the drugs. From what is understood about the severe side effects of antipsychotic drugs, however, the majority opinion should have included a broad qualification similar to the one Justice Kennedy included in his concurring opinion. Justice Kennedy proposed that, in every case where competency is said to be achieved through the administration of antipsychotic drugs, the state should be required to make a showing that there is no risk that the medication will impair or alter the defendant's demeanor or cognitive functioning. Mandating this qualification would more effectively ensure that a medicated defendant is indeed competent to stand trial than would the majority's approach, which merely acknowledged the possibility of impairment of demeanor and cognitive functioning. Considering the documented scientific evidence regarding the side effects of antipsychotic drugs, it is doubtful that this showing can be made. This proposed qualification to the majority opinion poses serious questions as to whether competency can ever be achieved through the administration of antipsychotic drugs.

M. CATHERINE HEALY