No. 96773

THE SUPREME COURT OF ILLINOIS

In Re: Robert S., Alleged to be a Person in Need of Involuntary Medication	)	Appeal from the Appellate Court of Illinois Second Judicial District Case No. 2-02-0262
The People of the State Of Illinois, Respondent-Appellee.	)	Original Appeal from the Circuit Court Sixteenth Judicial Circuit Kane County, Illinois No. 01-MH-261 Honorable Franklin D. Brewe presiding

BRIEF AND ARGUMENT FOR *AMICI CURIAE*

Mental Health Association in Illinois
and
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POINTS AND AUTHORITIES

INTRODUCTION

Amici curia, the Mental Health Association in Illinois and the Mental Health Project of the Edwin F. Mandel Legal Aid Clinic, are both organizations committed to insuring that persons with mental illnesses in Illinois receive adequate and humane mental health services and that the rights of persons to make their own mental health decisions, so long as they are competent to do so, be scrupulously protected. The present case implicates important and conflicting rights established under the United States and Illinois Constitutions and the Mental Health and Developmental Disabilities Code.

Those rights include:

(a) The right of persons with mental illnesses to refuse psychotropic medications except as authorized by Sections 2-107 and 2-107.1 of the Mental Health and Developmental Disabilities Code;

(b) The right of the State of Illinois, acting as *parens patriae* under Section 2-107.1, to ensure that persons with serious mental illnesses, who lack capacity to make decisions about psychotropic medication, receive medication if it is needed;

(c) The right of the State of Illinois, consistent with the decision of the United States Supreme Court in Sell v. U. S., to ensure that unfit criminal defendants receive the treatment they need to become fit.

(d) The right of criminal defendants, set forth by the United States Supreme Court in Riggins v. Nevada, to discontinue psychotropic medications that may interfere with their right to a fair criminal trial.

Fortunately, in Sell v. U. S., the United States Supreme Court spelled out standards and procedures for medicating unfit criminal defendants which balance all of these important issues. Since the decisions of the trial court and the Illinois Appellate Court on review in this case are in complete harmony with the decision in Sell and protect all four interest set forth above, *amici* urge this Court to affirm those decisions.

SUMMARY OF ARGUMENT

In Part I, we argue that Illinois should use the procedures for authorizing involuntary medication set forth in the Mental Health and Developmental Disabilities Code (specifically, §2-107.1) to medicate unfit criminal defendants. In section (A), we explain that in Sell v U.S., 123 S. Ct. 2174 (2003), the United States Supreme Court held that states trying to medicate unfit criminal defendants should begin by using existing mechanisms for determining when a court can order a person with mental illness to take medication. In section (B), we argue that using §2-107.1 as provided in Sell simplifies what might otherwise be an unnecessarily difficult inquiry. In section (C), we point out that Illinois courts have consistently supported use of §2-107.1 to medicate unfit defendants.

In Part II, we argue that using §2-107.1 to medicate unfit criminal defendants will not interfere with their fair trial rights under the 6th Amendment. It is extremely unlikely that an unfit criminal defendant will go to trial at all. Even if a formerly unfit defendant does go to trial, and he and his lawyer decide that his medication may interfere with his fair trial rights, he can simply wait for the medication order to expire. Alternatively, he can ask the court for permission to discontinue his medication. According to Riggins v. Nevada, 504 U.S. 127 (1992), the court would have to grant his request unless the state could make an affirmative showing that antipsychotic medication was necessary to accomplish an essential state policy.

In Part III, we argue that Robert S.'s position, set forth in part I of his argument, that unfit criminal defendants can never be medicated under the state's *parens patriae* power, does not comport with the equal protection clause of the 14th Amendment. There is no

rational justification for treating unfit criminal defendants differently from other people with mental illness when the state exercises its *parens patriae* power by holding an involuntary medication hearing. Whether or not a person has been adjudicated unfit has no bearing at all on any of the qualities that subject a person to the State's *parens patriae* power. Furthermore, Robert S.'s inchoate concern that the state might use §2-107.1 as a pretext for violating unfit criminal defendants constitutional rights does not justify the establishment of a discriminatory regime.

In Part IV, we argue that in In Re Robert S., 341 Ill. App. 3d 238 (2003), the Illinois trial court properly conducted an involuntary medication hearing pursuant to §2-107.1. The trial court reviewed each of the factors listed in section 2-107.1(a-5)(4), and did not consider any evidence related to Robert S.'s criminal case.[1]

In Part IV, we argue that the state had no obligation to notify Robert S.'s criminal defense attorney that a 2-107.1 petition has been filed. The state had no constitutional obligation to give notice to Robert S.'s criminal defense attorney because the only reason a defender would need that information would be to prepare for a Riggins hearing (discussed above in part II, section (B)). But a Riggins hearing could not possibly be held until much later on in the process, at which point the defense attorney would have notice of the §2-107.1 petition pursuant to 725 ILCS 5/104-18. The state had no statutory obligation to give notice, either. Section 2-107.1 requires the state to notify the patients' the attorney appointed to represent the patient at his involuntary medication hearing, not his criminal defense attorney.

[1] *Amici* do not take a position on the question of whether or not the state violated Robert S.'s Due Process rights by appointing a psychologist (rather than a psychiatrist) to perform an independent examination (discussed in Part II of Robert S's argument)

ARGUMENT

I ILLINOIS SHOULD USE THE ORDINARY PROCEDURES FOR AUTHORIZING INVOLUNTARY MEDICATION SET FORTH IN THE MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CODE TO MEDICATE UNFIT CRIMINAL DEFENDANTS.

(A) THE UNITED STATES SUPREME COURT HELD THAT STATES TRYING TO MEDICATE UNFIT DEFENDANTS SHOULD BEGIN BY USING EXISTING CIVIL MECHANISMS LIKE §2-107.1 OF THE MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CODE.

In Sell v U.S., 123 S. Ct. 2174 (2003), the United States Supreme Court held that states trying to medicate unfit criminal defendants should begin by using existing civil mechanisms for determining when a court can order a person with mental illness to take medication. If, and only if, an unfit defendant does not meet the ordinary civil criteria for involuntary medication, *then* the state should proceed to the second stage of the Sell process and hold a hearing to determine whether or not the unfit defendant may be medicated for the sole purpose of making him fit to stand trial.[2]

(1) Section 2-107.1 of the Mental Health and Developmental Disabilities Code closely corresponds to one of the two statutory mechanisms explicitly authorized by Sell v. U.S. for medicating unfit defendants.

The Sell court gives two examples of civil mechanisms that states who are trying to medicate an unfit defendant should turn to first, before they ever consider any issues related to criminal justice. According to Sell, "a court need not consider whether to allow forced medication for [the]... purpose [of rendering the defendant competent to stand trial if forced medication is warranted for a *different* purpose, such as the purposes set out in Harper related to the individual's dangerousness, or purposes related to the individual's

[2] An Illinois court could not actually hold such a hearing because the Mental Health and Disabilities Code explicitly grants patients a right to refuse medication unless they meet the criteria in §§2-107 and 2-107.1.

own interests where refusal to take drugs puts his health gravely at risk." Sell v U.S., 123 S. Ct. 2174, 2185 (2003). In this sentence, the Sell court gives two examples of reasons that forced medication might be warranted, aside from rendering a defendant competent to stand trial. The first reason is to stop a dangerous person from harming himself or others, what the court refers to in shorthand as "the purposes set out in Harper"[3]. The second reason is "for purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk." If a person is being medicated for either of these two reasons, the Sell court states, the court should "determine whether forced administration of drugs can be justified [solely] on these alternative grounds..." Id.

The first example corresponds to §2-107, which authorizes involuntary medication in emergency situations, to "prevent the recipient from causing serious and imminent physical harm to the recipient or others." 405 ILCS 5/2-107. The second example corresponds to §2-107.1 of the Mental Health and Developmental Disabilities Code, which was used by the trial court to authorize involuntary medication in the present case. Section 2-107.1 authorizes involuntary medication in situations where a person lacks the capacity to make a reasoned decision about treatment and where medication is medically necessary. Specifically, it authorizes involuntary treatment in cases where all of the following factors are present:

> (A) That the recipient has a serious mental illness or developmental disability.
> (B) That because of said mental illness or developmental disability, the recipient currently exhibits any one of the following: (i) deterioration of his or her ability to function, as compared to the recipient's ability to function prior to the current onset of symptoms of the mental illness or

[3] In Washington v. Harper, the court considered a state law authorizing forced administration of anti-psychotic drugs to inmates who "were gravely disabled or represented a significant danger to themselves or others." 494 U.S. 210, 226 (1990).

> disability for which treatment is presently sought, (ii) suffering, or (iii) threatening behavior.
> (C) That the illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in item (B) of this subdivision (4) or the repeated episodic occurrence of these symptoms.
> (D) That the benefits of the treatment outweigh the harm.
> (E) That the recipient lacks the capacity to make a reasoned decision about the treatment.
> (F) That other less restrictive services have been explored and found inappropriate.
> (G) If the petition seeks authorization for testing and other procedures, that such testing and procedures are essential for the safe and effective administration of the treatment.
> 405 ILCS 5/2-107.1

Section 2-107.1 is substantially similar to the second example of a civil mechanism for medicating people with mental illness identified by the Sell court: a statute enacted "for purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk."

(2) Even if §2-107.1 were not substantial identical to the Sell court's example, Sell makes it clear that states should try to use whatever mechanisms may exist for authorizing involuntary medication before taking on trial competency related issues.

The Sell court holds that "the purposes set out in Harper" and the "purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk" are not the only grounds for involuntary medication that warrant separate consideration. These are merely two examples of "alternative grounds", i.e. statutory grounds for involuntary medication that have nothing to do with a person's criminal case. First of all, the examples are preceded by the words "such as". Second, the court notes that "[e]very state provides avenues through which, for example, a doctor or institution can seek appointment of a guardian with the power to make a decision authorizing medication—when in the best interest of a patient who lacks the mental competence to make such a

decision." Id. The Court's position in Sell is that every state has developed different criteria for determining when involuntary medication is warranted, usually *but not necessarily* related to dangerousness or/or lack of competency, that have nothing to do with a persons status as a criminal defendant. These separate criteria, or "alternative grounds" need to be considered at the outset, prior to the consideration of issues related to a person's criminal case or his status as an unfit.

Section 107.1 is an instance of an "avenue" whereby a state can order a person to take psychotropic medication. Therefore, under Sell, an Illinois court deciding whether or not an unfit criminal defendant can be ordered to take antipsychotic drugs should begin by asking whether involuntary medication is warranted under §2-107.1 before delving into issues related to the mentally-ill person's status as an unfit defendant.

Therefore, this Court should affirm the decision in In Re Robert S., 792 N.E.2d 421 (App. Ct. 2d Dist. 2003) because the Appellate Court correctly upheld the trial court's order to medicate Robert. S., an unfit criminal defendant, pursuant to §2-107.1 of the Mental Health and Developmental Disabilities Code.

(B) TREATING UNFIT DEFENDANTS LIKE ORDINARY CIVIL PATIENTS SIMPLIFIES WHAT MIGHT OTHERWISE BE AN UNMANAGEABLE INQUIRY.

The Sell court holds that there are "strong reasons for a court to determine whether forced administration of drugs can be justified on... grounds [unrelated to a defendant's criminal case] *before* turning to the trial competence question." Sell v. U.S. at 2185.

(1) Using existing mechanisms for authorizing involuntary medication first is likely to simplify the inquiry.

If courts use existing mechanisms for authorizing involuntary medication, the court may never need to consider various difficult questions (such as the government's interest in bringing a specific case to trial, or the possible effects of medication on the defendant's future testimony). As the Court in Sell points out, "if a court authorizes medication on [ordinary civil] grounds, the need to consider authorization on trial competence grounds will likely disappear." Id. at 2186. This is because many people, if not most of the people, who are incompetent to stand trial are also going to be incompetent to make their own treatment decisions.

Furthermore, if a court does reach the second stage of the Sell process, that stage will be more straightforward because the only issue remaining before the court will be placed in stark relief. According to Sell, the Constitution permits states to forcibly administer antipsychotic drugs to mentally ill criminal defendants for the sole purpose of rendering them fit to stand trial "only if the treatment is (1) medically appropriate, (2) is substantially unlikely to have side-effects that may undermine the fairness of the trial, and, (3) taking into account of less intrusive alternatives, (4) is necessary... to further important government trial-related interests." Id. at 2184. All of these factors will be easier to weigh after a court has determined that the defendant does not meet the ordinary

criteria for involuntary medication. "If a court decides medication cannot be authorized on the alternative grounds," the Sell court explains, "the findings underlying such a decision will help to inform expert opinion and judicial decision-making in respect to a request to administer drugs for trial competence purposes." Id. at 2186. Splitting the process up into two stages "will facilitate direct medical and legal focus upon such questions as: Why is it medically appropriate forcibly to administer drugs to an individual who (1) is not dangerous and (2) is competent to make up his mind about treatment? Can bringing such an individual to trial *alone* justify... administration of a drug that may have adverse side effects, including side effects that may to some extent impair a defense at trial?" Id.

In Part II, below, we discuss the possibility that a criminal defendant who has been medicated involuntarily may decide, *after* he regains fitness, that his medication is going to interfere with the fairness of his trial. Such a defendant could move for a hearing on that issue in criminal court pursuant to Riggins. At that point, deciding whether or not the medication might interfere with the fairness of a defendant's trial would require little speculation on the part of the court. Instead, it would require the court to weigh and interpret existing, known facts, such as actual side-effects.

(2) A single inquiry into the ordinary involuntary medication issues and criminal justice issues would be unnecessarily difficult.

If courts had to consider all the questions that need to be decided during an ordinary involuntary medication hearing and all the questions that need to be decided during a Sell hearing, they would have to balance a great number of contingencies and unknowns, which would make it unnecessarily difficult for the court to reach a sensible decision.

According to Sell "[t]he inquiry into whether medication is permissible, say, to render an individual nondangerous is more "objective and manageable" than the inquiry into whether medication is permissible to render a defendant competent...." because it is easier for medical experts to "provide an informed opinion about whether, given the risk of side effects, particular drugs are medically appropriate and necessary to control a patient's potentially dangerous behavior... than to try to balance the harms and benefits related to the more quintessentially legal questions of trial fairness and competence." Id. In order to "balance the harms and benefits related to the more quintessentially legal questions of trial fairness and competence," a trial court would have to take many complex contingencies into account.

For example, the court would have to estimate the probability that the case would actually go to trial. What if the defendant fails to regain fitness as a result of taking the medication? What if the case never goes to trial? Over 90% of state criminal defendants plead guilty.[4]

If the case does go to trial, how can the court know whether the costs of the medication will outweigh the benefits? In most cases, psychotropic medication enhances a defendant's ability to think clearly and rationally about his case and makes it easier for him to communicate with his lawyer. It also tends to reduce the occurrence of potentially stigmatizing symptoms. On the other hand, it is possible to imagine a situation where the benefits *would* be outweighed by the costs. For example, the medication might cause the

[4] See Brady v. United States, 397 U.S. 742, 752 n.10 (1970) (relying on estimates "that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty"); Alschuler, Plea Bargaining and Its History, supra note 13, at 1 ("[R]oughly ninety percent of the criminal defendants convicted in state and federal courts plead guilty."); Douglas D. Guidorizzi, Comment, Should We Really "Ban" Plea Bargaining? The Core Concerns of Plea Bargaining Critics, 47 Emory L.J. 753, 753 (1998) (reporting on a 1992 survey of the seventy-five most populous counties in the United States which showed that guilty pleas accounted for 92% of all convictions in state courts).

defendant to appear apathetic and bored. This type of demeanor could be highly prejudicial, particularly if the defendant planned on taking the stand (another unknown). Alternately, the defendant's lawyer might decide to pursue a defense of not-guilty-by-reason-of-insanity (NGRI). Then there might be a strong incentive for the defendant to appear as disturbed as possible-- a placid, alert countenance could actually undermine a defendant's chances of a favorable (NGRI) verdict. A civil court is in no position to predict a criminal lawyer's trial strategy, in a trial that may or may not occur, and then try to weigh the potential pros and cons of a future course of treatment.

(C) ILLINOIS COURTS HAVE CONSISTENTLY HELD THAT §2-107.1 SHOULD BE USED TO MEDICATE UNFIT DEFENDANTS.

Illinois courts have consistently held that the State should rely on the Mental Health Code. In re Evelyn S., 337 Ill. App. 3d 1096 (2003), the State argued that because Evelyn S. had come before the court system pursuant to the Code of Criminal Procedure, and had been committed to a mental hospital pursuant to the Code of Criminal Procedure, proceedings to administer psychotropic medication against Evelyn S's wishes should be governed by the Code of Criminal Procedures as well. Id. at 1105. The court held that "the Mental Health Code governs the procedures," however, pointing out that the Code of Criminal Procedure contained no provisions related to the administration of psychotropic medication. "Involuntary mental health services involve a massive curtailment of liberty... thus... the courts of this state have repeatedly recognized the importance of the procedures enacted by our legislature to ensure that Illinois citizens are not subjected to such services improperly." Id. at 1105 (quoting in re Barbara H., 183 Ill. 2d 482, 496 (1998)) "These protections are no less important to a criminal defendant found unfit to

stand trial than they are to a mental health patient subject to involuntary civil commitment." Id. at 1105.

Ten years earlier, in People v DeJesus, 263 Ill. App. 3d 487 (1994), the appellate court implicitly approved the application of §2-107.1 to unfit criminal defendants. In that case, De Jesus, who had been found unfit to stand trial, was challenging a §2-107.1 order. The court reversed the order because DeJesus never got a jury trial: "We... hold that [DeJesus] ha[s] the right to a jury trial under section 2-107.1 on the issue of whether he should be involuntarily administered psychotropic medication." Id. at 489. Neither DeJesus nor anyone else questioned whether §2-107.1 was in fact applicable in his situation.

II USING EXISTING MECHANISMS (LIKE 2-107.1) TO MEDICATE UNFIT CRIMINAL DEFENDANTS WILL NOT INTERFERE WITH THEIR RIGHT TO A FAIR TRIAL.

Robert S. argues that it is unconstitutional to apply section 2-107.1 to unfit criminal defendants (such as himself) because the State's *parens patriae* power is far outweighed by unfit criminal defendants interest in preserving his right to a fair trial. "Side effects may make it difficult for a defendant to focus on testimony of the witness, or assist counsel in his defense... They may adversely effect juror's perceptions of a defendant character, especially with demonstrations of remorse or compassion." Robert S's brief at 23. Therefore, he argues, the state has "has no authority to utilize the *parens patriae* power to potentially infringe [Robert S's] trial rights." Id. at 24. This argument has no merit. First, it is extremely unlikely that an unfit criminal defendant will ever go to trial at all. Even if a formerly unfit defendant does decide to go to trial, and does decide that his medication may interfere with his fair trial rights, he can either (1) wait for the medication order to expire, or (2) ask the court for permission to discontinue his medication. According to Riggins v. Nevada, 504 U.S. 127 (1992), the court would have to grant his request unless the state could make an affirmative showing that antipsychotic medication was necessary to accomplish an essential state policy.

(A) IT IS EXTREMELY UNLIKELY THAT ANY UNFIT CRIMINAL DEFENDANT WILL EVER STAND TRIAL.

Being ordered to take psychotropic medications cannot possibly affect the fairness of a criminal trial that never occurs, and most unfit defendants will never actually stand trial. First of all, even if a defendant is ordered to take psychotropic medication pursuant to §2-107.1, there is no guarantee that he will ever become fit. Antipsychotic medication may

seem like a panacea, but the effectiveness and the side effect profiles vary significantly among people who seem to have common characteristics. Even the celebrated "atypical" antipsychotics, which have been shown to improve all types of symptoms of schizophrenia, do not work for everyone.[5] Second, even if the defendant is rendered fit, it is almost certain that his criminal charges will resolved without a trial. People are often confined as unfits for months at a time. Evidence becomes stale and witnesses memories fog over. Moreover, if the defendant was accused of committing a relatively minor crime, his period of confinement as an unfit is likely to exceed whatever sentence he would have gotten in criminal court. Prosecutors will have little incentive to take these types of cases to trial. Therefore, these cases are *even more likely* to plea out than regular cases, which *already* plea out over 90% of the time.[6]

(B) IF A DEFENDANT DOES DECIDE TO GO TO TRIAL, AND DOES DECIDE THAT HIS MEDICATION MAY INTERFERE WITH HIS FAIR TRIAL RIGHTS, HE CAN TAKE STEPS TO DISCONTINUE HIS MEDICATION THEN.

In the unlikely event that the defendant does decide to take his case to trial and does decide that his medication might interfere with his fair trial rights, he can he can either (1) wait for the medication order to expire, or (2) ask the court for permission to discontinue his medication.

(1) The Defendant can wait for the medication order to expire.

An involuntary medication order issued pursuant to §2-107.1 only last three months: "In no event shall an order issued under this Section be effective for more than 90 days..." 405 ILCS 5/2-107.1(a-5)(5). By the time an unfit defendant being medicated

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[5] See Nelson, M. (December 2002). Individualizing Treatment with Atypical Antipsychotics: Factors to Consider in Decision Making. *Drug Benefit Trends Supplement*

[6] See footnote 4, supra.

under this section actually gets to trial, the original order will almost certainly expire. After all, the medication would need time to take effect. Then the state (or the defendant himself) would have to move for a new fitness hearing. After a defendant's fitness has been established, it could be months before the trial date. Even if the defendant decided to invoke his speedy trial rights, the Code of Criminal Procedure of 1963 gives the State plenty of time. According to Illinois' speedy trial statute, Illinois would have 120 more days, after the fitness adjudication, before it had to bring the defendant to trial. 725 ILCS 5/103-5.

(2) The Defendant can ask the criminal court for permission to discontinue his medication pursuant to Riggins v. Nevada.

If, for whatever reason, a criminal defendant is still being medicated involuntarily as his trial date draws near, he can always move for a Riggins hearing. In Riggins v. Nevada, 112 S.Ct. 1810 (1992), the Supreme Court held that criminal defendants have a 6th Amendment right to discontinue antipsychotic medication in cases where the medication is likely to create a prejudicial demeanor or otherwise interfere with the presentation of the defense. The risk of prejudice can only be justified by a showing that administration of antipsychotic medication is necessary to accomplish an essential state interest. "Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy... we have no basis for saying that the substantial probability of trial prejudice... was justified." Id. at 1817.

III ROBERT S'S POSITION THAT UNFIT CRIMINAL DEFENDANTS CANNOT BE MEDICATED UNDER THE *PARENS PATRIAE* POWER DOES NOT COMPORT WITH THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT.

According to Robert S.'s reading of Sell, unfit criminal defendants can be only be ordered to take psychotropic medication in emergency situations. They cannot be medicated under the State's *pzarens patriae* power. "[Because R. S. was] a criminal defendant refusing ... medication, the State's *parens patriae* power was either non-existent, or so minimal, relative to his right to refuse, that application of §2-107.1 to him was unconstitutional." Robert S's brief at 15. If adopted by this court, Robert S.'s argument would violate the Equal Protection clause of the 14th Amendment.

The Equal Protection clause prohibits states from discriminating between two classes of people without any rational justification. In this case, there is no rational reason for treating unfit criminal defendants differently from other people with mental illness when the state exercises its *parens patriae* power by holding an involuntary medication hearing.

(A) WHETHER OR NOT A PERSON HAS BEEN ADJUDICATED UNFIT HAS NO BEARING AT ALL ON ANY OF THE QUALITIES THAT SUBJECT A PERSON TO THE STATE'S *PARENS PATRIAE* POWER.

There is no reasonable justification for denying medically necessary treatment to incompetent patients simply because they have been accused of committing a crime. The state has a *parens patriae* interest in providing medical treatment to "such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves." In re C.E., 641 N.E.2d 345 (Ill. 1994). This interest specifically extends to people with mental illness who are incompetent to make treatment decisions: the state "has significant *parens patriae* interest in providing for persons who,

while suffering from serious mental illness or developmental disability, lack capacity to make reasoned decisions concerning their need for medication." See also In re Branning, 674 N.E.2d 463 (Ill. App. Ct. 4 Dist. 1996) (overturned on unrelated grounds). Whether or not a person has been accused of committing a crime has no bearing on any of the qualities that subject a person to the state's *parens patriae* power, such as illness, permanent disability, severely defective understanding, or lack of capacity to make decisions concerning their need for medical treatment. People suffer from mental illnesses and disabilities, have defects in their understanding and lose the capacity to make decisions about medical treatment whether or not they are facing criminal charges.

This case is analogous to Jackson v Indiana, 406 U.S. 715 (1972), in which the Supreme Court has held that Equal Protection requires patients to be subject to the same standards of release regardless of whether or not they have been held as an unfit. Subjecting a defendant who has been held as an unfit to a "more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses" stated the court "...deprived [him] of equal protection of the laws under the Fourteenth Amendment." Id. at 730. According to the logic of Jackson, there is no reason to subject a mental patient to a different standard of release simply because he had been held as unfit because the original purpose of confinement has no bearing on the characteristics (such as present dangerousness) that justify involuntary commitment. Likewise, there is no reason to subject a patient to a different standard for involuntary medication just because he has been found unfit-- the purely legal determination that a person is unfit to stand trial has no bearing on the various factors that justify involuntary medication.

(B) ROBERT S.'S INCHAOTE CONCERN THAT ILLINOIS MIGHT USE §2-107.1 AS A PRETEXT FOR VIOLATING DEFENDANTS CONSTITUTIONAL RIGHTS DOES NOT JUSTIFY THE ESTABLISHMENT OF A DISCRIMINATORY REGIME.

Lurking amorphously in Robert S.'s brief is the notion that given the chance, states would likely use their *parens patriae* power as a pretext for violating the constitutional rights of unfit criminal defendants. "The term "*parens patriae*" means "parent of the country," Robert S. writes. Robert S.'s brief at 19. "The State's duties under the *parens patriae* doctrine are humanitarian and benevolent in nature." Id. at 19. But states cannot possibly have a benevolent attitude toward criminal defendants, Robert S. suggests: "a defendant finds himself faced with the prosecutorial forces of organized society... the state [is] his opponent, not his supportive parent." Id. at 20. Therefore, the implication seems to be, if Illinois were allowed to use its *parens patriae* power to medicate unfit criminal defendants, it would use §2-107.1 as a pretext for medicating unfits whenever it wanted, with no concern at all for their welfare.[7]

In fact, a §2-107.1 order authorizing involuntary medication cannot be based, even in part, on the fact that a patients happens to be an unfit criminal defendant. As discussed in Part I, sections (A) and (B), Sell does not permit courts to take any criteria pertaining to someone's fitness into account during the first stage of the proceedings. Additionally, §2-107.1 itself does not permit courts to hear any evidence pertaining to a patient's criminal status. The statute explicitly states that "... authorized involuntary treatment shall not be administered to the recipient unless it has been determined by clear and convincing evidence that all of the following factors are present..." The statute then lists

[7] Robert S. cites exactly one case in support of his misguided view: Woodland v. Angus, 820 F. Supp. 1497 (D Utah 1993) a federal decision which sets forth elaborate standards and procedures for medicating unfit criminal defendants to make them fit for trial. Woodland's holding that the *parens patriae* power can never be used *in and of itself* to medicate unfit criminal defendants has been over-ruled by Sell v. U.S.

seven factors that may be considered, none of which have anything to do with patients' legal problems. As a result, judges presiding over involuntary medication hearings under §2-107.1 have no way of knowing whether or not a particular person with mental illness has been determined to be an unfit.

Consider Robert S.'s case: the Illinois trial court reviewed each of the factors listed in section 2-107.1(a-5)(4), and did not consider any evidence related to his criminal charges. The appellate court observed that

> The trial court reviewed each of the factors listed in section 2-107.1(a-5)(4) of the code... And found that the state proved each factor by clear and convincing evidence. The court found that respondent suffered a mental illness, the result of which resulted in a deterioration of his ability to function, suffering, and threatening behavior. Moreover, the court found that the benefits of the proposed treatment outweighed the harm and that less restrictive alternatives were inappropriate. It is evident that the trial court granted the state's petition because it found the involuntary administration of psychotropic medication to be medically appropriate. In re Robert S., 341 App. 3rd 238, 258 (2003).

Meanwhile, the record is barren of any evidence that the petition to administer psychotropic medication was filed solely for the purpose of fitness for trial. Moreover, respondent never argues that the purpose of the state's petition was to render him fit for trial." Id. at 429. "In rendering its decision the trial court never mentioned respondent's fitness to stand trial." Id. at 429.

This court should therefore affirm the ruling in In re Robert S., 341 App. 3rd 238, 258 (2003), and explicitly hold that the state can never refer to a patients unfitness to stand trial in a §2-107.1 petition, that the state cannot introduce any evidence of unfitness in a §2-107.1 hearing, and that a trial court cannot rely upon a patients unfitness as a basis for involuntary medication under §2-107.1.

IV THE STATE HAD NO OBLIGATION TO NOTIFY ROBERT S.'S CRIMINAL DEFENSE ATTORNEY THAT A 2-107.1 PETITION HAS BEEN FILED.

Petitioner contends that the state violated both the Due Process clause and 405 ILCS 5/2-107.1 by failing to notify Robert S.'s criminal defense attorney that a 2-107.1 petition had been filed. Both of these arguments are without merit.

(A) DUE PROCESS DID NOT REQUIRE THE STATE TO NOTIFY ROBERT S.'S CRIMINAL DEFENSE ATTORNEY THAT A §2-107.1 PETITION HAS BEEN FILED.

The state had no constitutional obligation to give notice to Robert S.'s criminal defense attorney because the only reason a defender would need that information would be to prepare for a Riggins hearing (discussed above in part II, section (B)). But a Riggins hearing could not possibly be held until much later on in the process, when the defendant and his defense attorney decide that they case might actually go to trial. That wouldn't happen until after the defendant had regained his fitness, at which point the defense attorney would already have notice of the §2-107.1 petition pursuant to 725 ILCS 5/104-18. (The Illinois Criminal Code reasonably requires an unfit defendant's treatment supervisor to submit a written progress report to the defense attorney containing information regarding "the type, the dosage and the effect of the medication on the defendant's appearance, actions and demeanor... (1) At least 7 days prior to the date for any hearing on the issue of the defendant's fitness; (2) Whenever he believes that the defendant has attained fitness; [or] (3) Whenever he believes that there is not a substantial probability that the defendant will attain fitness, with treatment, within one year from the date of the original finding of unfitness." 725 ILCS 5/104-18.)

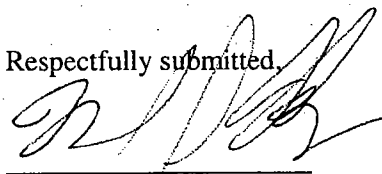
(B) THE STATE HAD NO STATUTORY OBLIGATION TO NOTIFY ROBERT S.'S CRIMINAL DEFENSE ATTORNEY THAT A §2-107.1 PETITION HAS BEEN FILED.

Robert S. argues that §2-107.1 "requires that the attorney representing the defendant in the criminal case should be served." Robert S.'s brief at 50. In fact, §2-107.1 requires that "the petitioner [i.e. the State] shall deliver a copy of the petition, and notice of the time and place of the hearing, to the respondent [i.e. the patient], his or her attorney, any known agent or attorney-in-fact, if any, and the guardian, if any, no later than 3 days prior to the date of the hearing." 405 ILCS 5/2-107.1 (a-5)(1). The purpose of this provision is to ensure that the attorney that has been appointed to represent the patient receives the information that is necessary to prepare for a §2-107.1 hearing. The provision is in keeping with the over-all purpose of §2-107.1: to ensure that people with mental illness receive the treatment they need even if they lack capacity to make decisions about psychotropic medication. There is no reason to think that the word "attorney" refers to a patient's criminal defense attorney, as Robert S. argues, or to any other attorney that the patient may have retained for an entirely unrelated, matter. Such a provision would not comport in the least with the purpose of the statute.

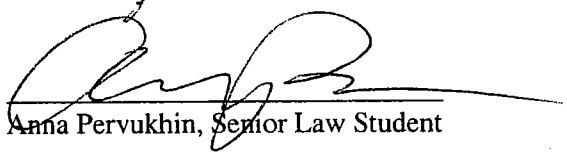
CONCLUSION

For these reasons, we urge this court to affirm the Appellate Court's holding in In re Robert S., 792 N.E.2d 421 (App. Ct. 2d Dist. 2003) that an unfit defendant can be medicated pursuant to section 2-107.1 of the Illinois Mental Health and Developmental Disabilities Code.

Respectfully submitted,



Mark J. Heyrman



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