SUPREME COURT OF THE UNITED STATES

No. 02–5664

CHARLES THOMAS SELL, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 16, 2003]

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

The District Court never entered a final judgment in this case, which should have led the Court of Appeals to wonder whether it had any business entertaining petitioner's appeal. Instead, without so much as acknowledging that Congress has limited court-of-appeals jurisdiction to "appeals from all *final decisions* of the district courts of the United States," 28 U. S. C. §1291 (emphasis added), and appeals from certain specified interlocutory orders, see §1292, the Court of Appeals proceeded to the merits of Sell's interlocutory appeal. 282 F. 3d 560 (2002). Perhaps this failure to discuss jurisdiction was attributable to the United States' refusal to contest the point there (as it has refused here, see Brief for United States 10, n. 5), or to the panel's unexpressed agreement with the conclusion reached by other Courts of Appeals, that pretrial forced-medication orders are appealable under the "collateral order doctrine," see, *e.g.*, *United States* v. *Morgan*, 193 F. 3d 252, 258–259 (CA4 1999); *United States* v. *Brandon*, 158 F. 3d 947, 950–951 (CA6 1998). But *this* Court's cases do not authorize appeal from the District Court's April 4, 2001, order, which was neither a "final decision" under §1291 nor part of the class of specified interlocutory orders in §1292. We therefore lack jurisdic-

tion, and I would vacate the Court of Appeals' decision and remand with instructions to dismiss.

I

After petitioner's indictment, a Magistrate Judge found that petitioner was incompetent to stand trial because he was unable to understand the nature and consequences of the proceedings against him and to assist in his defense. As required by 18 U. S. C. §4241(d), the Magistrate Judge committed petitioner to the custody of the Attorney General, and petitioner was hospitalized to determine whether there was a substantial probability that in the foreseeable future he would attain the capacity to stand trial. On June 9, 1999, a reviewing psychiatrist determined, after a §549.43 administrative hearing[1], that petitioner should be required to take antipsychotic medication, finding the medication necessary to render petitioner competent for trial and medically appropriate to treat his mental illness. Petitioner's administrative appeal from that decision[2] was denied with a written statement of reasons.

At that point the Government possessed the requisite authority to administer forced medication. Petitioner responded, not by appealing to the courts the §549.43 administrative determination, see 5 U. S. C. §702, but by

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[1] 28 CFR §549.43 (2002) provides the standards and procedures used to determine whether a person in the custody of the Attorney General may be involuntarily medicated. Before that can be done, a reviewing psychiatrist must determine that it is "necessary in order to attempt to make the inmate competent for trial or is necessary because the inmate is dangerous to self or others, is gravely disabled, or is unable to function in the open population of a mental health referral center or a regular prison," §549.43(a)(5).

[2] §549.43(a)(6) provides: "The inmate . . . may submit an appeal to the institution mental health division administrator regarding the decision within 24 hours of the decision and . . . the administrator shall review the decision within 24 hours of the inmate's appeal."

moving in the District Court overseeing his criminal prosecution for a *hearing* regarding the appropriateness of his medication. A Magistrate Judge granted the motion and held a hearing. The Government then requested from the Magistrate Judge an order authorizing the involuntary medication of petitioner, which the Magistrate Judge entered.[3] On April 4, 2001, the District Court affirmed this Magistrate Judge's order, and it is from *this* order that petitioner appealed to the Eighth Circuit.

II

A

Petitioner and the United States maintain that 28 U. S. C. §1291, which permits the courts of appeals to review "all *final decisions* of the district courts of the United States" (emphasis added), allowed the Court of Appeals to review the District Court's April 4, 2001 order. We have described §1291, however, as a "final judgment rule," *Flanagan* v. *United States*, 465 U. S. 259, 263 (1984), which "[i]n a criminal case . . . prohibits appellate review *until conviction and imposition of sentence*," *ibid.* (emphasis added). See also *Abney* v. *United States*, 431 U. S. 651, 656–657 (1977). We have invented[4] a narrow

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[3] It is not apparent why this order was necessary, since the Government had *already* received authorization to medicate petitioner pursuant to §549.43. If the Magistrate Judge had denied the Government's motion (or if this Court were to reverse the Magistrate Judge's order) the Bureau of Prisons' administrative decision ordering petitioner's forcible medication would remain in place. Which is to suggest that, in addition to the jurisdictional defect of interlocutoriness to which my opinion is addressed, there may be no jurisdiction because, at the time this suit was filed, petitioner failed to meet the "remediability" requirement of Article III standing. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83 (1998). The Court of Appeals should address this jurisdictional issue on remand.

[4] I use the term "invented" advisedly. The statutory text provides no basis.

exception to this statutory command: the so-called "collateral order" doctrine, which permits appeal of district court orders that (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," *and* (3) are "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978). But the District Court's April 4, 2001, order fails to satisfy the third requirement of this test.

Our decision in *Riggins* v. *Nevada*, 504 U. S. 127 (1992), demonstrates that the District Court's April 4, 2001, order *is* reviewable on appeal from conviction and sentence. The defendant in *Riggins* had been involuntarily medicated while a pretrial detainee, and he argued, *on appeal from his murder conviction*, that the State of Nevada had contravened the substantive-due-process standards set forth in *Washington* v. *Harper*, 494 U. S. 210 (1990). Rather than holding that review of this claim was not possible on appeal from a criminal conviction, the *Riggins* Court held that forced medication of a criminal defendant that fails to comply with *Harper* creates an unacceptable risk of trial error and entitles the defendant to automatic vacatur of his conviction. 504 U. S., at 135–138. The Court is therefore wrong to say that "[a]n ordinary appeal comes too late for a defendant to enforce" this right, *ante*, at 9, and appellate review of any substantive-due-process challenge to the District Court's April 4, 2001, order must wait until after conviction and sentence have been imposed.[5]

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[5] To be sure, the order here is unreviewable after final judgment *if the defendant is acquitted*. But the "unreviewability" leg of our collateral-order doctrine—which, as it is framed, requires that the interlocutory order be "effectively unreviewable *on appeal from a final judgment,*" *Coopers & Lybrand* v. *Livesay,* 437 U. S. 463, 468 (1978) (emphasis added)—is not satisfied by the possibility that the aggrieved party will have no occasion to appeal.

It is true that, if petitioner must wait until final judgment to appeal, he will not receive the *type* of remedy he would prefer—a predeprivation injunction rather than the postdeprivation vacatur of conviction provided by *Riggins*. But *that* ground for interlocutory appeal is emphatically rejected by our cases. See, *e.g.*, *Flanagan, supra* (disallowing interlocutory appeal of an order disqualifying defense counsel); *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263 (1982) *(per curiam)* (disallowing interlocutory appeal of an order denying motion to dismiss indictment on grounds of prosecutorial vindictiveness); *Carroll* v. *United States*, 354 U. S. 394 (1957) (disallowing interlocutory appeal of an order denying motion to suppress evidence).

We have until today interpreted the collateral-order exception to §1291 "'with the *utmost strictness'*" in criminal cases. *Midland Asphalt Corp.* v. *United States*, 489 U. S. 794, 799 (1989) (emphasis added). In the 54 years since we invented the exception, see *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), we have found only three types of prejudgment orders in criminal cases appealable: denials of motions to reduce bail, *Stack* v. *Boyle*, 342 U. S. 1 (1951), denials of motions to dismiss on double-jeopardy grounds, *Abney*, *supra,* and denials of motions to dismiss under the Speech or Debate Clause, *Helstoski* v. *Meanor*, 442 U. S. 500 (1979). The first of these exceptions was justified on the ground that the denial of a motion to reduce bail becomes moot (and thus effectively unreviewable) on appeal from conviction. See *Flanagan*, *supra,* at 266. As *Riggins* demonstrates, that is not the case here. The interlocutory appeals in *Abney* and *Helstoski* were justified on the ground that it was appropriate to interrupt the trial when the precise right asserted was the *right not to be tried*. See *Abney*, *supra,* at 660–661; *Helstonski*, *supra,* at 507–508. Petitioner does not assert a right not to be tried, but a right not to be

medicated.

B

Today's narrow holding will allow criminal defendants in petitioner's position to engage in opportunistic behavior. They can, for example, voluntarily take their medication until halfway through trial, then abruptly refuse and demand an interlocutory appeal from the order that medication continue on a compulsory basis. This sort of concern for the disruption of criminal proceedings—strangely missing from the Court's discussion today—is what has led us to state many times that we interpret the collateral-order exception narrowly in criminal cases. See *Midland Asphalt Corp., supra,* at 799; *Flanagan,* 465 U. S., at 264.

But the adverse effects of today's narrow holding are as nothing compared to the adverse effects of the new rule of law that underlies the holding. The Court's opinion announces that appellate jurisdiction is proper because review after conviction and sentence will come only after "Sell will have undergone forced medication—the very harm that he seeks to avoid." *Ante*, at 9. This analysis effects a breathtaking expansion of appellate jurisdiction over interlocutory orders. If it is applied faithfully (and some appellate panels will be eager to apply it faithfully), any criminal defendant who asserts that a trial court order will, if implemented, cause an immediate violation of his constitutional (or perhaps even statutory?) rights may immediately appeal. He is empowered to hold up the trial for months by claiming that review after final judgment "would come too late" to prevent the violation. A trial-court order requiring the defendant to wear an electronic bracelet could be attacked as an immediate infringement of the constitutional right to "bodily integrity"; an order refusing to allow the defendant to wear a T-shirt that says "Black Power" in front of the jury could be attacked as an

immediate violation of First Amendment rights; and an order compelling testimony could be attacked as an immediate denial Fifth Amendment rights. All these orders would be immediately appealable. *Flanagan* and *Carroll*, which held that appellate review of orders that might infringe a defendant's constitutionally protected rights *still* had to wait until final judgment, are seemingly overruled. The narrow gate of entry to the collateral-order doctrine—hitherto traversable by only (1) orders unreviewable on appeal from judgment and (2) orders denying an asserted right not to be tried—has been generously widened.

The Court dismisses these concerns in a single sentence immediately following its assertion that the order here meets the three *Cohen*-exception requirements of (1) conclusively determining the disputed question (correct); (2) resolving an important issue separate from the merits of the action (correct); and (3) being unreviewable on appeal (quite plainly incorrect). That sentence reads as follows: "These considerations, particularly those involving the severity of the intrusion and corresponding importance of the constitutional issue, readily distinguish Sell's case from the examples raised by the dissent." *Ante*, at 9. That is a brand new consideration put forward in rebuttal, not at all discussed in the body of the Court's analysis, which relies on the ground that (contrary to my contention) this order *is not reviewable on appeal*. The Court's last-minute addition must mean that it is revising the *Cohen* test, to dispense with the third requirement (unreviewable on appeal) *only when the important separate issue in question involves a "severe intrusion" and hence an "important constitutional issue."* Of course I welcome this narrowing of a misguided revision—but I still would not favor the revision, not only because it is a novelty with no basis in our prior opinions, but also because of the uncertainty, and the obvious opportunity for gamesmanship, that the

revision-as-narrowed produces. If, however, I did make this more limited addition to the textually unsupported *Cohen* doctrine, I would at least do so in an undisguised fashion.

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Petitioner could have obtained pre-trial review of the §549.43 medication order by filing suit under the Administrative Procedure Act, 5 U. S. C. §551 *et. seq.,* or even by filing a *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), action, which is available to federal pretrial detainees challenging the conditions of their confinement, see, *e.g.*, *Lyons* v. *U. S. Marshals*, 840 F. 2d 202 (CA3 1987). In such a suit, he could have obtained immediate appellate review of denial of relief.[6] But if he chooses to challenge his forced medication in the context of a criminal trial, he must abide by the limitations attached to such a challenge—which prevent him from stopping the proceedings in their tracks. Petitioner's mistaken litigation strategy, and this Court's desire to decide an interesting constitutional issue, do not justify a disregard of the limits that Congress has imposed on courts of appeals' (and our own) jurisdiction. We should vacate the judgment here, and remand the case to the Court of Appeals with instructions to dismiss.

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[6] Petitioner points out that there are disadvantages to such an approach—for example, lack of constitutional entitlement to appointed counsel in a *Bivens* action. That does not entitle him or us to disregard the limits on appellate jurisdiction.