

NO. 11-10339

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

v.

JARED LEE LOUGHNER,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona

Honorable Larry A. Burns, District Judge Presiding by Designation

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 & FRAP 8(a)

**EMERGENCY MOTION TO ENFORCE INJUNCTION AND COMPEL DAILY
PRODUCTION OF BOP RECORDS**

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES,)	U.S.C.A. No. 11-10339
)	U.S.D.C. No. 11CR187-TUC (LAB)
Plaintiff-Appellee,)	
)	(Appeal, Emergency Motion)
v.)	
)	
JARED LEE LOUGHNER,)	
)	
Defendant-Appellant.)	
_____)	

CIRCUIT RULE 27-3 CERTIFICATE OF COUNSEL

(i) The Telephone Numbers and Office Addresses of the Attorneys for the Parties:

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(ii) Facts Showing the Existence and Nature of the Claimed Emergency

On July 12, 2011, this Court issued an order continuing the enforcement of a stay it previously issued on July 1st enjoining the Bureau of Prisons from forcibly medicating the appellant, Jared Lee Loughner, with psychotropic drugs until this appeal is resolved on the merits and the mandate issues, or until the Court issues a superceding order. The Court's order expressly permitted the use of less intrusive means including minor tranquilizers to address concerns of dangerousness. *See* 7/12/11 Order at 4-5, DE 10 (attached as Exhibit A).

On the afternoon of July 19, 2011, the district court provided defense counsel with a letter and documentation from prison officials at the Medical Center for Federal Prisons, Springfield, Missouri, indicating that the prison made a decision on July 18th to forcibly medicate Mr. Loughner with psychotropic drugs "on an

emergency basis” in apparent violation of this Court’s order. *See* Exhibit B, filed under seal. Because of the purported emergency nature of the prison’s decision, counsel requested that the prison provide daily production of records concerning Mr. Loughner’s condition and all relevant materials to his ongoing forced medication. This request was denied.

(iii) When and How Counsel for the Other Parties Were Notified and Whether They Have Been Served with the Motion; Or, If Not Notified and Served, Why That Was Not Done:

Counsel for Mr. Loughner have notified counsel for the government via email that the instant emergency motion would be filed. Counsel for the government will be presented with this motion by electronic mail.

(iv) **Relief Requested:**

Because a serious question exists as to whether the BOP has willfully violated the Court's order, Mr. Loughner requests that this Court compel daily production of all relevant records to the parties for the duration of the forced medication regime in order that they may determine whether further emergency action should be taken by this Court.

Respectfully submitted,

/s/ Judy Clarke

DATED: July 21, 2011

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**STATEMENT OF FACTS AND MEMORANDUM OF LAW AND POINTS
AND AUTHORITIES IN SUPPORT OF
EMERGENCY MOTION TO ENFORCE INJUNCTION AND COMPEL
DAILY PRODUCTION OF BOP RECORDS**

I.

STATEMENT OF FACTS

On June 21, 2011, asserting that he was a danger to others or to property, the Bureau of Prisons began forcibly administering anti-psychotic medications to Mr. Loughner. Though Mr. Loughner is a pre-trial detainee committed by the district court to the Attorney General for restoration of competency, the prison acted without notice to the parties. *See* Emergency Mtn at 6, DE 2-1. Mr. Loughner promptly sought injunctive relief which the district court denied. Thereupon, Mr. Loughner filed an emergency motion with this Court for immediate cessation of involuntary medication and temporary injunction pending appeal. The Court granted the temporary injunction that same day on July 1st. *See* 7/1/11 Order (attached as Exhibit C).

On July 8th, the day after oral argument on the emergency motion during which counsel argued that there was an insufficient basis for the prison to forcibly medicate Mr. Loughner on grounds that he was a danger to others, the prison placed Mr. Loughner on suicide watch. Though detailed records of the Bureau of Prisons reflect that Mr. Loughner remained depressed, as he had been for much of his

incarceration, they do not reflect that he had exhibited suicidal gestures, suicidal ideation, or an unwillingness to assure doctors that he would not engage in self-harm. These are normal criteria considered in determining whether a mentally ill patient is at risk of harming himself. *See* Sealed Declaration at ¶¶ 10-11 (attached as Exhibit D). Mr. Loughner continued to deny suicidal ideation, yet he remained on suicide watch and despite the fact that such conditions, including constant monitoring and other precautions, can increase anxiety and insomnia in a person with his diagnosis of schizophrenia. *See id.*

On July 12th, this Court held that there is “a serious question” as to whether a prison can decide to forcibly medicate a pretrial detainee with psychotropic drugs absent a court order. *See* Ex. A at 1. And it enjoined the prison from forcibly medicating Mr. Loughner with psychotropic drugs pending resolution of this appeal or a superceding court order. *See id.* at 4-5. The order expressly permitted taking other actions to ensure the safety of Mr. Loughner or others, including forcible administration of tranquilizers. *Id.*

Despite the clear order of this Court, six days later, the prison decided to forcibly medicate Mr. Loughner with powerful psychotropic drugs asserting that he had become “an immediate threat to himself.” *See* Ex. B. It did so without notice to the parties. Among other measures, the prison considered and rejected the

administration of minor tranquilizers because they “would not impact the underlying etiology of his dangerousness.” *Id.* at 3 (attached Emergency Medication Justification). The prison further noted that tranquilizers “may decrease [Mr. Loughner’s] agitation and induce rest, but this would be short lived *and, again, not impact the underlying psychotic illness.*” *Id.* (emphasis added). The prison decided to forcibly administer oral Risperidone solution in doses of 1 milligram twice daily with the threat of haloperidol injections if Mr. Loughner refused the oral Risperidone. *Id.* In addition to administering psychotropic medication in violation of this Court’s injunction, the prison also decided to administer the very tranquilizer it rejected as inadequate “[d]ue to Mr. Loughner’s agitation, lack of sleep, and incessant pacing . . . as needed for agitation.” *Id.* at 4. The prison’s report nowhere states how long the psychotropic medication will be administered or how it will ascertain when and if the emergency nature of its justification has abated.

As the attached sealed declarations attest, the prison’s prescription of 1 mg Risperidone twice daily falls far short of the appropriate dosage of psychotropic medication that should be administered in a true emergency. *See* Ex. D ¶15; Sealed Declaration ¶ ¶7-8 (attached as Exhibit E). In a true psychiatric emergency, particularly one in which prominent symptoms include agitation and insomnia, the preferred course of clinical treatment is to give a large dose of an anti-psychotic drug

to permit sleep and reduce the symptoms. Ex. E ¶¶7, 9; Ex. D ¶15. The prison's current actions, administering a small dose in twice daily increments is more typical of a long-term treatment approach where medication dosages are slowly adjusted upward until control of psychotic symptoms is achieved. Ex. E ¶8. In fact, the twice daily dosage given is exactly what the prison had prescribed Mr. Loughner when it embarked on its previous course of long-term treatment.

II.

THE COURT SHOULD COMPEL DAILY PRODUCTION OF MEDICAL RECORDS TO DETERMINE WHETHER THE PRISON'S ACTIONS REPRESENT A WILLFUL VIOLATION OF THE COURT'S ORDER

The records received to date indicate that the prison has directly contravened this Court's injunction less than a week after it was entered. Its actions under these circumstances cause concern as to whether further action is warranted by this Court to effectuate its injunction. The language of the Court's injunctive order is clear: it prohibited the forced administration of psychotropic drugs absent further Court order, and it expressly laid out the means to protect the safety of Mr. Loughner and others, including the use of tranquilizers, that were not covered by the injunction. The prison did not abide by the order's plain language. But because the prison has proffered an emergency basis for its decision to forcibly medicate Mr. Loughner, and because the circumstances potentially justifying any form of emergency medication can so quickly

change, this Court should compel immediate daily production of BOP records to assist the Court and parties in determining whether further action is necessary.

A. The Evidence Raises a Serious Question as to Whether the Prison is Willfully Violating the Court's Order and Attempting an End Run Around *Sell*.

There is no doubt that Mr. Loughner suffers from a serious and debilitating mental illness, and proper precautions must be taken to assure his safety and the safety of others during his detention. But the timing of the BOP's actions through the course of this litigation, the course of treatment it has chosen to address the current purported emergency, and its express reasons for rejecting less intrusive means of doing so, suggest a willful disregard for both the courts' authority to oversee the criminal process and Mr. Loughner's constitutional right to be free from forcible medication with powerful mind-altering drugs.

Almost immediately after Mr. Loughner was returned to Springfield for purposes of being restored to competency, prison employees asked that he take psychotropic medication. When Mr. Loughner refused this request, the prison, without notice to the parties, commenced an administrative hearing and ordered that Mr. Loughner be forcibly medicated.

Of course, this Court halted that forcible medication. But shortly thereafter, prison officials placed Mr. Loughner under unrelenting twenty four hour observation.

They took this action based upon supposed deterioration of Mr. Loughner's psychological condition. Following this change in his conditions of confinement, Mr. Loughner began to show increased agitation and sleeplessness.

Less than a week after this Court confirmed its injunction barring the prison from forcibly medicating Mr. Loughner, prison officials determined that Mr. Loughner is a danger to himself and that this danger constitutes an emergency. Upon making these determinations, prison officials began forcibly medicating Mr. Loughner with the same drug that this Court had halted the previous week.

Equally problematic, and suggestive of a willful attempt to circumvent judicial supervision of the competency restoration process, is the prison's chosen course of treatment. In a psychiatric emergency, the medically appropriate course of treatment seeks immediate control of symptoms. In a clinical setting, this typically involves the use of a high dose of psychotropic medication. The one milligram of risperidone given twice daily is less likely to reduce agitation and induce sleep. Instead, this relatively low dosage spread out over the course of the day is typical of long-term therapeutic regimes in which medication dosage is gradually increased until control of symptoms is achieved. Moreover, because the dosage is low and because the prison has provided no timeline for the duration of this medication regime, it

presumably intends to provide this medication over a significant time period that is also inconsistent with the short-term need to abate symptoms on an emergency basis.

Indeed, this one milligram, twice daily dosage is precisely the medication regime halted by this Court's injunction. Apparently aware that this lower dose was less likely to have the sedating effect that would reduce agitation and induce sleep, the prison has chosen to also administer lorazepam, an anti-anxiety medication which the prison rejected as a primary means of treating the symptoms that are the major contributing factor to Mr. Loughner's current debilitation. See Ex. D, Dec. ¶ 13; Ex. E, Dec. ¶¶ 4 & 7.

Finally, the prison's express reasons for rejecting less intrusive means (anti-anxiety medication and sleep aids) to address the claimed emergency suggests an intent to treat long-term rather than control emergent symptoms. See Ex. E ¶ 8. Though Mr. Loughner's primary symptoms are agitation and sleeplessness, and though both can be addressed by the use of minor tranquilizers, *see* Ex. E ¶ 9, the prison rejected this course. In the prison's view, although such tranquilizers will control Mr. Loughner's "agitation, lack of sleep, and incessant pacing," they are inappropriate because they will not "impact the underlying psychotic illness." Ex. B at 3. This is, of course, the reason the prison previously gave for ignoring alternatives

when it previously ordered forced medication to address the danger Mr. Loughner purportedly poses to others in the prison setting.

This entire line of reasoning is troubling because, while anti-psychotics may be a clinically appropriate response to the emergency conditions described by the prison staff, the far less intrusive administration of anti-anxiety medication (also prescribed by the prison) along with a sleep aid, both allowed by this Court's order staying forced medication, are also medically appropriate. Ex. E ¶ 9 & Ex. D ¶ 17. Of course, any decision to treat mental illness with psychotropic drugs, a decision that necessarily represents an effort to restore competency, is a decision that falls squarely within the province of the Court's jurisdiction; it is not a unilateral decision that the prison may make alone. *See Sell v. United States*, 539 U.S. 166 (2003).

B. Daily Production of Prison Records is Essential to Determining the Extent of the Emergency and Whether Ongoing Administration of Psychotropic Medications is Warranted.

At most, in a truly acute emergency situation, the proper use of psychotropic drugs should be limited by the duration of the emergency. Once the patient is rested and the emergency symptoms abated, the emergency has ended. The exact duration of such a regime is extremely fact dependent. There must be daily assessments of several factors: (1) the medications and dosages; (2) amount of sleep; (3) fluid and food intake and urine/feces output; (4) suicidal ideation and behavior; (5) the

patient's ability to contract for safety; and (6) vital signs. Ex. D ¶18; *see also* Ex. E ¶7 (daily assessments must be made). The BOP is under court order to provide the defense with all records pertaining to Mr. Loughner. Currently, however, BOP is only providing these records on a weekly basis. Upon learning about the emergency medication regime, counsel asked prison officials at Springfield to provide these records on a daily basis. This request has been denied, although the prison has indicated that it will determine whether it is willing to produce records every two to three days.

Any assessment of whether the prison's decision to force antipsychotic medication on Mr. Loughner is a willful violation of the Court's order depends on (1) whether an emergency exists; (2) the duration of the emergency circumstances; (3) how the prison addresses the perceived emergency; and (4) whether the prison continues forcible medication beyond the end of any emergency. The standard of care for emergencies in circumstances such as these requires daily assessment of the above described factors. And because the perceived emergency may abate at any time, counsel requests this Court to order daily production of records concerning the outlined factors in this motion. Such production will aid both the Court and the parties in assessing the prison's conduct in this case and whether it has, or begins to,

willfully violate the Court's order enjoining the prison from forcibly administering psychotropic medications to Mr. Loughner.

III.

CONCLUSION

For the reasons stated above, the Court should compel immediate daily production of relevant records to assist the Court and parties in determining the proper course of action in enforcing its injunction.

Respectfully submitted,

/s/ Judy Clarke

DATED: July 21, 2011

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