UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JARED LEE LOUGHNER, Defendant-Appellant	C.A. No. 11-10432 D. Ct. No. 11-00187-LAB District of Arizona, Tucson **MOTION TO DISMISS DEFENDANT'S APPEAL BASED ON MOOTNESS**

The United States of America, Plaintiff-Appellee, by and through its attorneys, Ann Birmingham Scheel, Acting United States Attorney, and Christina M. Cabanillas, Assistant United States Attorney, and pursuant to Ninth Circuit Rule 27-9.2, hereby moves to dismiss the defendant's appeal in CA No. 11-10432 – which concerns BOP's July 18, 2011 decision to medicate the defendant under the emergency regulation – because it is moot. Pursuant to Ninth Circuit Rule 27-11, the filing of this motion to dismiss stays the briefing schedule pending this Court's ruling.

I. Facts

As this Court is aware, and as set forth more fully in the government's answering brief in CA No. 11-10504 (Ans. Br. at 5-15), there are three pending interlocutory appeals concerning medication decisions involving the above defendant. Two of those appeals (CA No. 11-10339 and CA No. 11-10504) have been briefed and argued before

a panel of this Court (J. Wallace, J. Berzon, and J. Bybee) and are pending a decision. This motion to dismiss concerns the defendant's remaining appeal (CA No. 11-10432).

To provide some brief procedural background, the defendant's first appeal (CA No. 11-10339) concerns his challenge to FMC-Springfield's administrative determination under 28 C.F.R. § 549.43 (a)(5) and *Washington v. Harper*, 494 U.S. 210 (1990), that he should be involuntarily medicated as a danger to others ("*Harper* I"). The defendant's motion to enjoin medication based on this administrative decision was denied by the district court on July 1, 2011, after briefing and argument. (CR 252.) The defendant's appeal of that order (CA No. 11-10339) was briefed under an expedited schedule and was argued and submitted in this Court on August 30, 2011.

The defendant's second appeal – and the subject of this motion to dismiss – concerns BOP's emergency medication decision. After the defendant's medication was stopped in compliance with this Court's stay order of July 1, 2011, the defendant's condition deteriorated, and on July 18, 2011, FMC-Springfield doctors determined that the defendant was a severe danger to himself and needed to be medicated under the emergency provision, 28 C.F.R. § 549.43(b) ("emergency medication"). (*See* CA No. 11-10504, ER 619.) On July 22, 2011, this Court denied the defendant's emergency motion seeking to enforce the medication injunction, without prejudice to renewing his arguments in the district court. On August 11, 2011, the defense filed an "Emergency

Motion for Prompt Post-Deprivation Hearing on Forced Medication" before the district court, seeking enjoinment of BOP's emergency medication determination, making similar arguments to those raised in his other medication challenges. (CR 381) (Exhibit 1).[1] The government opposed that motion. (CR 284, 287) (Exhibit 2). After argument on August 26, 2011, the district court denied the defendant's motion from the bench and in a written order. (RT 8/26/11 77-86; CR 306) (Exhibits 3 and 4). On August 29, 2011, the defendant filed an appeal from that decision (CA No. 11-10432), and has now filed his opening brief (Ninth Circuit Dkt Entry 2-1, dated Nov. 21, 2011).

On August 25, 2011, FMC-Springfield conducted a *Harper* hearing pursuant to 28 C.F.R. § 549.46(a), and continued to find medication justified based on the defendant's danger to himself ("*Harper* II").[2] (CA No. 11-10504, ER 641-646.) After the defendant's staff representative filed an administrative appeal, the Associate Warden determined on September 6, 2011 that another *Harper* due process hearing should be conducted. (CA No. 11-10504, ER 650.)

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[1] For ease of reference, the government is attaching certain portions of the record as exhibits to this motion to dismiss: Exhibit 1 (defendant's motion in the district court dated August 11, 2011) (without exhibits); Exhibit 2 (government's response dated August 2, 2011– unredacted version submitted under seal) (without exhibits); Exhibit 3 (portions of transcript of August 26, 2011 hearing); and Exhibit 4 (district court's written order dated August 30, 2011).

[2] The regulation was amended effective August 12, 2011 (*see* 76 Fed. Reg. 40229-02, 2011 WL 2648228), so former § 549.43 is now contained in § 549.46.

On September 15, 2011, FMC-Springfield conducted another *Harper* hearing as the Associate Warden had ordered ("*Harper* III"). BOP doctors concluded that involuntary medication was justified based on the defendant's danger to himself. (CA No. 11-10504, ER 654-56.) After the Associate Warden affirmed that decision on administrative appeal (CA No. 11-10504, ER 666), the defendant, on September 23, 2011, filed an emergency motion in the district court to enjoin involuntary medication based on the September 15, 2011 determination. (CR 321; CA No. 11-10504, ER 497.) After conducting a hearing on September 28, 2011, the district court denied that motion and also granted an extension of the defendant's commitment to FMC-Springfield. (CR 343.) The defendant filed an appeal from that decision (CA No. 11-10504) and filed simultaneous motions in the district court and this Court to stay his transportation to FMC-Springfield. On October 7, 2011, after expedited briefing and argument, this Court denied the defendant's motion to stay. The defendant's appeal was briefed under an expedited schedule and oral argument was conducted in this Court on November 1, 2011. The matter has been submitted.

II. The Defendant's Appeal of BOP's July 18, 2011 Emergency Medication Decision Is Moot.

A federal court lacks jurisdiction unless there is a "case or controversy" under Article III of the Constitution. *See Public Utilities Comm'n v. Federal Energy Regulatory Comm'n,* 100 F.3d 1451, 1458 (9th Cir. 1996). This controversy must exist

at all stages, including appellate review, and not simply at the date the action is initiated. *See id.* "In general a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt,* 455 U.S. 478, 481 (1982) (per curiam) (finding that appellate challenge to pretrial bail was moot after conviction) (internal citations and quotations omitted). If a court is unable to render effective relief, it lacks jurisdiction and must dismiss the appeal. *Public Utilities Comm'n*, 100 F.3d at 1458; *see also Tyler v. Cuomo*, 236 F.3d 1124, 1137 (9th Cir. 2000) (applying *Murphy v. Hunt* standard and analyzing whether the court could grant "effective relief").

In his appeal in CA No. 11-10432, the defendant is appealing the district court's denial of his challenge to BOP's July 18, 2011 decision to medicate him on an emergency basis under then-numbered emergency regulation, 28 C.F.R. § 549.43(b). However, the defendant is no longer being medicated under the emergency regulation. Rather, he is now being medicated pursuant to 28 C.F.R. § 549.46(a), based on BOP's *Harper* determination from September 15, 2011, that he remains a danger to himself when unmedicated. The defendant has himself acknowledged that BOP's September 15, 2011 *Harper* medication decision is the "presently operative" decision. (*See* CA No. 11-10504, Op. Br. at 7.) Thus, although the district court correctly denied the defendant's motion challenging the July 18, 2011 determination and seeking a de novo

adversarial hearing with witnesses, *see* CR 278 at 8-20 (def's motion) (Exh. 1); CR 306 (court's order) (Exh. 4), even if the defendant's challenge to that appeal had merit, there is no "effective relief" that this Court could grant because he is no longer being medicated under the emergency regulation and is being medicated based on the September 15, 2011 *Harper* medication decision.[3]

The Supreme Court has "recognized an exception to the general [mootness] rule in cases that are capable of repetition, yet evading review." *Murphy*, 455 U.S. at 482. In his opening brief, the only comment the defendant makes about mootness is the following: "The question of a right to a prompt, post-deprivation hearing is capable of repetition, of evading review, and, therefore, is not moot." (Op. Br. at 2.) However, the "capable of repetition, yet evading review" exception to mootness applies only in

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[3] The district court heard the defendant's challenge to the July 18th emergency medication decision on August 26, 2011, the day after BOP conducted its August 25, 2011 *Harper* hearing and made its determination pursuant to 28 C.F.R. § 549.46(a). The government noted at the August 26th hearing that the defendant's challenge to the July 18 emergency medication decision was not germane anymore because he had since received a *Harper* hearing under § 549.46(a), which would be the only remedy even if the district court were to find that he should no longer be medicated under the emergency regulation (then-numbered § 549.43 (b)). (RT 8/26/11 58-59, 69-70; *see also* CR 287) (Exh. 2). In denying the defendant's motion, the district court also noted: "[The government has] said that the [BOP] hearing yesterday is implicated to the extent that it might moot [the] present motion. I agree with that observation." (RT 8/26/11 86) (Exh. 3). After the August 25, 2011 medication determination was set aside by the Associate Warden, BOP conducted the subsequent *Harper* hearing and determination on September 15, 2011.

"exceptional circumstances," *Public Utilities Comm'n,* 100 F.3d at 1459, and only when two requirements are met: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy*, 455 U.S. at 482 (noting that a "mere physical or theoretical possibility" that the issue will recur is insufficient).

The defendant does not meet this exception, mainly because his primary argument will not "evade review." *Murphy*, 455 U.S. at 482. The defendant's district court motion challenging BOP's medication under the emergency regulation raised the same general argument that he has raised in his other appeals in CA No. 11-10339 and CA No. 11-10504, namely, that BOP cannot administratively medicate the defendant as a danger under *Harper* without a judicial determination, after an adversarial hearing with witnesses and evidence, that medication is warranted. [*See* CR 278 at 4-22, relying on *Riggins*, *Sell*, and other authority cited in prior filings) (Exh. 1); RT 8/26/11 42-44 (arguing that whenever a person is medicated by BOP on an emergency basis, "there's a requirement for a prompt, post-deprivation hearing . . . apply[ing] standards set out in *Riggins* . . . before a court of law, . . . [which] is the issue that's up in front of the Ninth Circuit at this time.") (Exh. 3)]. The defendant's recently-filed opening brief renews the same arguments, cross-referencing arguments already made in his

other appeals. (CA No. 11-10432, Op. Br. at 12-20.) Thus, if the defendant's appeal of the July 18th emergency medication determination is dismissed as moot, the question of whether BOP may medicate a dangerous pre-trial detainee without a judicial adversarial evidentiary hearing and judicial approval will not evade review, but rather, is presently being considered by this Court.

To obviate the need for unnecessary briefing, the government is filing its motion to dismiss appeal at this time, which stays the briefing schedule pending resolution of the motion, pursuant to Ninth Circuit Rule 27-11. The government understands that this Court may wish to defer acting on this motion to dismiss until it resolves the defendant's other pending appeals in CA No. 11-10339 and CA No. 11-10504.

For the foregoing reasons, the government respectfully asks this Court to dismiss the defendant's appeal in CA No. 11-10432 as moot.

Respectfully submitted this 22nd day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2011, I electronically filed the following motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Christina M. Cabanillas
Christina M. Cabanillas
Assistant U.S. Attorney

INDEX OF EXHIBITS

Government's Motion to Dismiss Defendant's
Appeal Based on Mootness
United States v. Jared Lee Loughner, 11-CR-0187-TUC-LAB

Exhibit 1 — Defendant's Emergency Motion for Prompt Post-Deprevation Hearing on Forced Medication filed August 11, 2011

Exhibit 2 — (Submitted to this Court separately under seal) Government's Response to "Defendant's Emergency Motion for Prompt Post-Deprivation Hearing on Forced Medication" filed August 22, 2011 (unredacted version submitted under seal in district court)

Exhibit 3 — Portions of Reporter's Transcript - Motion Hearing dated August 26, 2011

Exhibit 4 — District Court Order Following August 26, 2011 Hearing

EXHIBIT 1

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. JARED LEE LOUGHNER, Defendant.	Case No. CR 11-0187-TUC LAB **DEFENDANT'S EMERGENCY MOTION FOR PROMPT POST-DEPRIVATION HEARING ON FORCED MEDICATION**

MOTION

Defendant Jared Loughner, by and through his counsel, hereby seeks a prompt hearing to review the ongoing forced administration of pyschotropic drugs to Mr. Loughner by prison officials. This motion is based on the Due Process Clause of the United States Constitution, 28 C.F.R. § 549.43, any and all applicable provisions of the federal constitution and statutes, all files and records in this case, and any further evidence as may be adduced at the hearing on this motion.

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I.

INTRODUCTION

The Attorney General, acting through the Bureau of Prisons, and without the approval of the Court, has decided to involuntarily and forcibly medicate Jared Loughner on the grounds that he is a danger to himself and gravely disabled as a result of his mental illness. The prison claims that this danger is an emergency, despite a medication regime that currently forces anti-psychotic drugs on Mr. Loughner for several more months.

The decision, made solely by the Bureau of Prisons, to involuntarily and forcibly medicate Mr. Loughner on emergency grounds for a prolonged, indefinite period cannot continue absent a prompt determination by this Court that the government has met its burden of demonstrating that the drugs are essential to mitigating safety concerns after consideration of less intrusive alternatives.

II.

STATEMENT OF FACTS

This motion arises from the BOP's latest effort to administer psychotropic drugs to Mr. Loughner against his will. This time, the stated reasons are found in an "Emergency Medication Justification" report issued on July 18, 2011. Forcible medication commenced then and has continued on that "emergency" basis for the past three weeks. Nothing in the report suggests that there was any sort of hearing or judicial authorization for the prison's actions.

A. Procedural Background

Mr. Loughner was found incompetent to stand trial on May 25, 2011, and ordered into the Attorney General's custody for a determination of restorability pursuant to 18 U.S.C. § 4241(d). *See* May 25, 2011 Order (DE 221). On May 27, he was transferred to the BOP facility in Springfield, Missouri ("MCFP Springfield") for the restorability determination.

Six days after he arrived at Springfield, the prison initiated its first attempt to involuntarily medicate Mr. Loughner. On June 2, prison officials notified Mr. Loughner of their intent to hold an administrative hearing to authorize forcible administration of psychiatric medications. The prison held the hearing on June 14 and authorized involuntary medication.

Mr. Loughner's administrative appeal was denied June 20, 2011, and the prison started administering medication involuntarily on June 21.

After learning of these events through discovery (the prison did not notify defense counsel), defense counsel sought immediately to enjoin the forcible medication due to the unlawfulness of the prison's actions. On July 1, the Ninth Circuit ordered the prison to stop forcibly medication Mr. Loughner. *See* Exhibit A (July 1, 2011 temporary injunction order). On July 12, after considering further briefing and holding oral argument, the Ninth Circuit renewed its initial injunction and extended the prohibition on forcible medication until resolution of Mr. Loughner's interlocutory appeal in Case No. 11-10339. *See* Exhibit B (July 12, 2011 Order). The appeal is currently pending; the July 12 stay order thus remains in effect.

B. The Prison's July 18 Decision to Resume Forcible Medication

The prison abided by the Ninth Circuit's order and refrained from forcing medication on Mr. Loughner for only six days after the July 12 order. And on July 18, it resumed forcibly administering psychiatric medication to Mr. Loughner. *See* Exhibit C ('Emergency Medication Justification" dated July 18, 2011).[1] The report, consisting of the opinion of BOP Psychiatrist Robert Sarrazin, along with the concurring opinion of BOP psychiatrist James Wolfson, stated the prison's purported justification for forcibly medicating Mr. Loughner. *See id.*

According to the report, Mr. Loughner required emergency medication because he posed "an immediate threat to self." *Id.* (Report at at 870). The report contained various observations of Mr. Loughner's mental and physical state, including difficulty sleeping (resulting in his staying awake for up to 50 hours at a time), inability to stop pacing (causing swelling in his leg), and weight loss. *Id.* (Report at 870-71); *see also* Report at 873-74 ("He is at risk from existing infection, malnutrition, and exhaustion" and "ongoing serious risk of suicide"). The report concluded that "Mr. Loughner has deterioration of his status and grave disability with an extreme deterioration in his personal functioning, secondary to his mental illness. Emergency medication is justified." *Id.* (Report at 872).

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[1] Exhibit C is being filed under seal.

Whether such justification lies outside the mainstream of psychiatric care, whether less restrictive alternatives of seclusion, restraints, and/and minor tranquilizers were available and could be used with fewer long-term consequences and better short term efficacy, and whether a neuro-developmental disease such as Schizophrenia can be used to justify an emergency condition such that forced medication is justified for indefinite periods of time, are questions which should be determined at a hearing before the District Court. The fundamental question posed to this Court is whether an administrative agency can undertake an unreviewable end-run around the Constitutional protections against government coercion and violation of the bodily integrity of an individual facing trial on potential federal capital charges.

C. The Prison's Continuing Forcible Medication Under the "Emergency" Justification

More than three weeks have elapsed since the July 18 "Emergency Medication Justification" report. The prison has continued to forcibly administer medication under the "emergency" justification, with no apparent end date.

The prison's approach to emergency medication, rather than being limited to mitigating the emergency, is fundamentally geared towards competency restoration as its ultimate goal. The dosages, the types of medications, the on-going efforts to "educate" Mr. Loughner about the benefits of voluntarily taking medication, and the failure to seek a faster progression to safety all speak to the prison's goal as one of competence restoration and not emergence intervention.

III.

EVEN IF THE PRISON ASSERTS THAT FORCED MEDICATION WITH PSYCHOTROPIC DRUGS IS WARRANTED ON AN EMERGENCY BASIS, MR. LOUGHNER IS ENTITLED, AT A MINIMUM, TO A PROMPT POST-DEPRIVATION REVIEW OF THIS DETERMINATION BY THE COURT.

Mr. Loughner has a due process right to bodily integrity free of unwanted, forcible administration of psychiatric medication. *Washington v. Harper*, 494 U.S. 210, 221 (1990). The Due Process Clause protects a pretrial detainee's desire to be free of unwanted brain-altering chemicals absent a showing they are "essential" to the government's objectives following consideration of "less intrusive" alternatives. See, e.g., *Riggins v. Nevada*, 504 U.S.

127, 135 (1992). This is true even in an emergency context. *See Brandt v. Monte*, 626 F.Supp.2d 469, 488 (D.N.J. 2009) (citing *Sell v. United States*, 539 U.S. 166, 179, 181 (2003) and *Riggins*, 504 U.S. at 135). And even when emergency action is required to avert imminent harm, due process guarantees, at a minimum, a "prompt and fair" post-deprivation review of the state action. *Brokow v. Mercer Co.*, 235 F.3d 1000, 1021 (7th Cir. 2000) (citing *Campell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998)). Finally, in the case of a pretrial detainee being forcibly medicated with powerful psychotropic drugs, the proper balancing of interests under *Mathews v. Eldridge*, 424 U.S. 319 (1976), reveals that any administrative procedures by the prison don't provide adequate procedural protections to vindicate Mr. Loughner's strong liberty interests in a fair trial and avoiding the effects of unwanted psychotropic drugs. Rather, due process requires that any decision to forcibly medicate on dangerousness grounds be reviewed by a court upon presentation of evidence by both parties. *See Sell*, 539 U.S. at 182-83; *United States v. Hernandez-Vasquez*, 513 F.3d 908, 914, 919 (9th Cir. 2008). Because the prison has begun forcibly medicating Mr. Loughner on emergency grounds for dangerousness, and continues to do so, this Court must hold a prompt hearing to review the propriety of such action.

A. Substantive Due Process Permits Emergency Medication Only When it is Essential to Mitigating Danger and Less Restrictive Alternatives Have Been Adequately Considered.

Whether a decision to forcibly medicate on dangerousness grounds is made administratively or judicially, it is both a court's prerogative and duty to review whether the decision is consistent with the appropriate substantive due process standard. "What factual circumstances must exist before the State may administer antipsychotic drugs to a[n individual] against his will" is a question of substantive due process. *Harper*, 494 U.S. at 220. The proper substantive due process standard must balance both the interests of the individual and those of the state: "It is an accommodation between an inmate's liberty interest in avoiding the forced administration of antipsychotic drugs and the State's interest in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others." *Id.* at 236. *See also Sell,* 539 U.S. at 178. The interests to be balanced vary with context: "The extent of a prisoner's rights under the [Due Process] Clause

to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement." *Harper*, 494 U.S. at 222. Thus, identifying the appropriate substantive due process standard "involves a definition of th[e] protected constitutional interest, *as well as identification of the conditions under which competing state interests might outweigh it.*" *Harper,* 494 U.S. at 220 (quoting *Mills v. Rogers*, 457 U.S. 291, 299 (1982)) (emphasis added). When the context of confinement changes, the confined person's liberty interest changes, and "the conditions under which competing state interests might outweigh" that liberty interest also change.

Because the context of the inmate's confinement in *Harper* differs from that of Mr. Loughner, a pre-trial detainee committed for restoration of competency, the rights at stake differ. So while the Supreme Court in *Harper* held that "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest," *id.* at 227, the Court recognized in *Riggins* that the *Harper* standard did not govern the case of a pre-trial detainee. There, the Court stated that "we have not had the occasion to develop substantive standards for judging forced administration of such drugs in the trial or pretrial setting." *Riggins*, 504 U.S. at 135.

In *Riggins*, the Court went on to articulate the standard governing forced medication of pre-trial detainees: "if the prosecution had demonstrated, and the District Court had found, that the 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," the Due Process Clause would be satisfied. *Id.* Because Mr. Loughner is, like the defendant in *Riggins*, a pretrial detainee facing capital charges, the *Riggins* standard governs his case.

The fact that the prison's most recent justification for forced medication is made on an ostensible emergency basis does not change the standard. Even in an emergency, a detainee retains his substantive right to be free from forced medication, and the state may only forcibly administer psychotropic drugs if: (1) it is necessary to prevent the detainee from endangering himself or others; (2) it is otherwise consistent with accepted professional standards, and; (3)

sufficient consideration has been taken of available alternatives. *Brandt*, 626 F.Supp.2d at 478 (citing *Rennie v. Klein*, 720 F.3d 266, 269-70 (3rd Cir. 1983)); *see id.*, 626 F.Supp.2d at 488 (citing *Sell* and *Riggins* for the proposition that less restrictive alternatives must be considered). Critical to this standard is the fact that it "decline[s] to give carte-blanche deference to doctors acting in the exercise of professional judgment." *Brandt*, 626 F.Supp.2d at 489. This is because even if psychotropics drugs may be medically appropriate for a person suffering from psychosis, the doctors must *first* "deem involuntary medication *necessary* to avert an emergency." *Id.* (emphasis added). Moreover, for the involuntary administration of powerful psychotropic drugs to be "necessary to avert an emergency," medical authorities must have considered alternatives. *Id.* Even the prison's own regulations require it in an emergency to adequately consider whether less restrictive alternatives "are not available, or indicated, or would not be effective." 28 C.F.R. § 549.43(b).

Quite simply, whether an emergency or not, the substantive standard for when a pretrial detainee may be forcibly administered psychotropic drugs is governed by the *Riggins* standard, specifically whether the drugs they are "essential" to the government's objectives following consideration of "less intrusive" alternatives. 504 U.S. at 135.

B. Procedural Due Process Requires a Prompt Post-Deprivation Review.

Because Mr. Loughner's significant due process right to be free from unwanted medication has been, and continues to be, violated, he is entitled to procedural protections to ensure that the prison's decision to infringe this right is sufficiently compelling. And while "the requirements of process may be delayed where emergency action is necessary to avert imminent harm," this delay can only be justified if "adequate post-deprivation process to ratify the emergency action is promptly accorded." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) (quoted in *Campbell*, 141 F.3d at 929).

The need for prompt post-deprivation review is no less warranted under the instant circumstances than it is in the child custody context addressed in *Jackson* and *Campbell*. Indeed, considering the potentially devastating effects on bodily integrity, fair trial rights, and even what Justice Kennedy has described as the potential manipulation of material evidence in

a capital prosecution, *see Riggins*, 504 U.S. at 139 (Kennedy, J., concurring), such review is paramount. Moreover, post-deprivation review in the forced medication context is further warranted by numerous other concerns laid out in *Brandt*:

> Without any procedural check on the decision for the administering doctor, there is substantial opportunity for errors of fact and law: Doctors may perceive an emergency where none exists, and doctors may believe that certain circumstances constitute an emergency, which, under the law, do not. . . . A treating physician might also declare an emergency in bad faith to quiet a bothersome patient. Finally, a patient presenting a momentary emergency who would be pacified by a single administration of medication may be medicated [for a longer duration]; *in other words, the state may continue to sacrifice the patient's liberty interest long after the emergency has subsided.*

626 F.Supp.2d at 486-87 (emphasis added). This last point is particularly crucial. In *Brandt*, the court was concerned with continuing forced medication for 72 hours. *See id.* Here, Mr. Loughner has been medicated on an emergency basis since July 18, 2011, approximately three weeks. And his current prescription for psychotropic drugs continues until at least September 29, a two-plus month period of administering these drugs.

Even the prison's own regulations only permit forced medication of psychotropic drugs for the duration of an emergency, which is defining as lasting only as long as there is "an immediate threat of bodily harm to self or others . . . or extreme deterioration of functioning secondary to psychiatric illness." 28 C.F.R. § 549.43. Yet the prison continues to forcibly medicate him with psychotropic drugs. Moreover, the prison regulations provide no avenue for review of the emergency nature of the situation, much less independent judicial review.

This Court must conduct a prompt hearing in which the government has the burden of demonstrating whether an emergency continues to exist. *See, e.g., Weller v. Dep't of Soc. Servs. for Baltimore*, 901 F.2d 387, 396 (4th Cir. 1990) ("the state has the burden to initiate prompt judicial proceedings to ratify its emergency action").

C. Post-Deprivation Review Must Be Conducted Before the Court in an Adversarial Hearing.

Due process requires that the post-deprivation hearing here be conducted by a court. Procedural adequacy is weighed under the *Mathews* test, which balances the following:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

In this case—involving ongoing forced medication justified on "emergency" grounds in the pretrial context—the interests at stake are different the than they were in *Harper*, which addressed the issue in the post-conviction, correctional setting. This is something that both the Ninth Circuit and the Supreme Court have recognized. *See Riggins*, 504U.S. at 135 (specifying that *Harper*'s holding addressed forcibly medicating "a *convicted* prisoner" and explaining that its analysis concerned "the unique circumstances of *penal* confinement") (emphases added); *see also* July 12 Ninth Circuit Order (Exhibit B) ("Because Loughner has not been convicted of a crime, he is presumptively innocent and is therefore entitled to greater constitutional protections than a convicted inmate, as in *Harper*.") (citing *Riggins* and *Demery v. Arpaio*, 378 F.3d 1020, 1032 (9th Cir. 2004)). Correctly balancing the competing *pretrial* interests establishes that judicial consideration, not just administrative procedures, are necessary to justify the prolonged administration of "emergency"-based forcible medication.

1. The private liberty interests at stake

Mr. Loughner's interests in avoiding undesired administration of psychotropic medications are substantial and differ in marked ways from those of the inmate in *Harper*. These interests fall into four categories: the fundamental liberty interests in avoiding (1) the undesired brain-altering effects psychotropic drugs are designed to induce; (2) side effects of the drugs that are universally recognized as harmful; (3) other effects of the drugs that pose a threat to Mr. Loughner's right to a fair trial; and (4) the even more fundamental interest in avoiding the death penalty, the government's potential ultimate objective in this case (an interest it might advance through administration of the medications).

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a. Freedom from unwanted brain-altering chemicals

Only the first two of these interests were addressed in *Harper*, and *Harper* found these interests to be "substantial" even for convicted prisoners. Addressing the first interest, *Harper* recognized that:

> The forcible injection of medication into a nonconsenting person's body represents a *substantial interference* with that person's liberty. . . . The purpose of the drugs is to alter the chemical balance in a person's brain, leading to changes . . . in his or her cognitive processes.

See 494 U.S. at 229 (citations omitted; emphasis added); *see also United States v. Ruiz-Gaxiola*, 623 F.3d 684, 691 (9th Cir. 2010) ("Antipsychotic medications are designed to cause a personality change that, if unwanted, interferes with a person's self-autonomy, and can impair his or her ability to function in particular contexts.") (quotation marks omitted).

Here the interest is even stronger. After *Harper*, the Supreme Court twice considered the strength of that interest when the subject of the forced medication is a pretrial detainee like Mr. Loughner, rather than a convicted prisoner. In *Riggins* and *Sell*—both cases involving medication of pretrial detainees—the Supreme Court concluded the interest is so significant in the pretrial context that it can only be substantively overcome by an "'essential' or 'overriding' state interest." *Sell*, 539 U.S. at 179 (citing *Riggins*, 504 U.S. at 134).

Harper, addressing the case of a convicted inmate, did not require a showing that medication was "essential" or that the state's interest in medication was "overriding." It required only a lesser showing of a "legitimate" governmental interest and a "valid, rational connection" to that interest. 494 U.S. at 224-25. Moreover, *Riggins* makes clear that it is the *pretrial* setting—not some other factor—that places a thumb on the due process scale in favor of the individual's interest. In discussing *Harper*, *Riggins* takes care to distinguish the "unique circumstances of *penal* confinement" at issue there from "the trial or pretrial settings." 504 U.S. at 134-35 (emphasis added). Indeed, *Riggins* makes clear that the due process question "in the trial or pretrial settings" was not answered by *Harper*. *Id.* at 135.

Thus, the heightened due process liberty interest articulated by *Riggins* and *Sell* necessarily emerges from the Supreme Court's recognition that a pretrial detainee has a stronger

liberty interest in being free from unwanted medication than a convicted inmate. This distinction derives from either one of two important differences between the convicted inmate and the pretrial detainee. The first is that the pre-trial detainee is, in fact, awaiting trial and has fair trial rights (discussed below) that may be adversely affected by, and thus weigh against, forcible medication. The second is that the state, in convicting an individual, has extinguished his liberty interest in avoiding correction or treatment. These are legitimate aims of a criminal sentence that may be imposed as punishment upon conviction of a crime. *See* 18 U.S.C. §§ 3553(a)(2)(D) & 3563(b)(9). But "[t]he Fourteenth Amendment prohibits punishment of pretrial detainees." *Demery v. Arpaio*, 378 F.3d 1020, 1023 (2004) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)); *see also* July 12 Order at 2 (Exhibit B) ("Because Loughner has not been convicted of a crime, he is presumptively innocent and is therefore entitled to greater constitutional protections than a convicted inmate, as in *Harper*.") (citing *Riggins*, 504 U.S. at 137, and *Demery*, 378 F.3d at 1032). Regardless of which distinction is more important, *Riggins* and *Sell* establish that an "essential" or "overriding" government purpose is needed to forcibly medicate a pretrial detainee, though *Harper* required less to subject a convicted inmate to this same deprivation. This demonstrates that the pretrial detainee's liberty interest in avoiding unwanted medication is greater than that of the convicted inmate.

b. Freedom from harmful side effects.

The second interest that must be considered, freedom from side effects, has also been expressly recognized by both the Ninth Circuit and the Supreme Court, which have found this to be a serious matter:

> [A]ntipsychotic drugs . . . can have serious, even fatal, side effects. One such side effect . . . 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. . . . Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by muscles, involuntary, uncontrollable movements of various muscles, especially around the face. . . . [T]he proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%.

Harper, 494 U.S. at 229-30; *see also Riggins*, 504 U.S. at 134 (characterizing risk of the same side effects as a "particularly severe" interference with personal liberty).

The risk of enduring such side effects—particularly when the possibility looms of developing an *irreversible* neurological disorder—has led the Ninth Circuit to characterize forcible psychotropic medication in the pretrial context as an "especially grave infringement of liberty" which the Court "has refused to permit . . . except in highly-specific factual and medical circumstances." *Ruiz-Gaxiola*, 623 F.3d at 691-92; *see also id.* at 692 (the importance of the defendant's liberty interest is colored by the "powerful and permanent effects" of antipsychotics and the their adverse "side-effects"). Like Mr. Loughner's interest in freedom from the unwanted *intended* effects of the medication, his interest in avoiding their serious side effects is heightened by his status as a pretrial detainee. Both weigh heavily in his favor.

c. Right to a fair trial

The third interest, the right to a fair trial, is one that was not considered in *Harper* because the convicted inmate there no longer had a fair trial right to assert. This interest is a crucial part of the inquiry that it is "error" to ignore. *See Riggins*, 504 U.S. at 137 ("The court did not acknowledge the defendant's liberty interest in freedom from unwanted antipsychotic drugs. . . . This error may well have impaired the constitutionally protected trial rights Riggins invokes."); *see also Sell*, 539 U.S. at 177 (holding that the defendant's legal right to avoid medication "because medication may make a trial unfair" is cognizable pretrial and before actual administration of the drugs).

Being forced to take psychotropic drugs poses a severe threat to Mr. Loughner's ability to receive a fair trial should he ever be restored to competency. Specifically, antipsychotics can "sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, . . . diminish the ability to express emotions," *Sell*, 539 U.S. at 185, cause "drowsiness," "confusion," as well as "affect thought processes," "outward appearance," "the content of . . . testimony . . . [and the] ability to follow the proceedings or the substance of his communication with counsel," *Riggins*, 504 U.S. at 137. This is a particularly important concern in light of the long-term nature of the prescription authorized by prison—which extends

through September 28—and the lack of any indication that the BOP foresees a termination point to the emergency.

The "powerful and permanent effects" of antipsychotics also pose a threat of permanently depriving Mr. Loughner of an opportunity to communicate with his attorneys and develop potential mental-state defenses because, as the Supreme Court has acknowledged, their very purpose is to "alter the chemical balance in a person's brain" and change "his or her cognitive processes." *Harper*, 494 U.S. at 229; *Ruiz-Gaxiola*, 623 F.3d at 692. This is, in essence, not only a fair-trial issue but also an evidence-tampering problem. Justice Kennedy put it most succinctly in his concurrence in *Riggins*:

> 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.

504 U.S. at 139 (Kennedy, J., concurring); *see also id.* at 144 ("The side effects of antipsychotic drugs can hamper the attorney-client relationship, preventing effective communication and rendering the defendant less able or willing to take part in his defense."). In short, "involuntary medication with antipsychotic drugs poses a serious threat to a defendant's right to a fair trial." *Id.* at 138 (Kennedy, J., concurring). *Accord Ruiz-Gaxiola*, 623 F.3d at 692 (noting "the strong possibility that a defendant's trial will be adversely affected by a drugs's side-effects").

d. The interest in not being sentenced to death

Finally, on the "individual interests" side of the scale, Mr. Loughner has an exceptionally strong interest in not being executed. The government's ultimate objective in this case is to obtain a conviction and sentence against Mr. Loughner, and it is no secret that the government may seek the death penalty. This interest is implicated now because the medication regime the government has applied here in the name of mitigating an emergency is the same it would apply in an effort to restore Mr. Loughner to trial competency. The prison has admitted as much. *See* Exhibit A at 3 (ruling out less intrusive alternatives such as minor tranquilizers because they would not "impact the underlying psychotic illness").

In short, the forced-medication road taken by the government here is one that potentially leads to Mr. Loughner's death. To paraphrase lay commentators, the government's position here raises the specter of "medicating him to execute him." And obviously, individuals have a strong interest—the paramount interest recognized by the Due Process Clause—in remaining alive. Thus, so long as the death penalty remains on the table, it is clear that this interest sharply tips the balance in favor of the individual.

2. The governmental interests involved

Weighed against these private interests is the government's interest "including the function involved and the fiscal and administrative burdens the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Insofar as the governmental interest is considered, *Mathews* is concerned only with procedures, so what is weighed is the damage to governmental interests resulting from increased procedural protections. Here, the administrative and fiscal burden of additional procedural protections in the pretrial context is minimal in comparison with the private interests at stake. Requiring judicial proceedings to authorize forced medication poses a much lesser administrative burden in the pretrial context because the detention staff is already necessarily charged with participation in judicial proceedings—the competency proceedings conducted under 18 U.S.C. § 4241(d). *See Harper*, 494 U.S. at 232 (by contrast, importing judicial proceedings into the post-conviction context poses a new burden on the prison's "money and the staff's time").

In contrast to *Harper*, the governmental interests involved here are much weaker than those it holds when addressing a convicted inmate who poses a danger. And they are particularly weak in comparison to the exceptionally weighty interests asserted by Mr. Loughner. To begin, it is important to recognize that the governmental interests at stake in the pretrial, temporary-detention setting are quite different from its long-term *correctional* interests after a conviction is obtained. As discussed above, treatment and correction are legitimate aims of a criminal sentence imposed as punishment for a crime. *See, e.g., Harper*, 494 U.S. at 225 (state's interests "encompass[] an interest in providing him with medical treatment for his illness"). But such punishment may not be imposed at all on a pre-trial

detainee. *Bell*, 441 U.S. at 530; *accord Demery*, 378 F.3d at 1032 (holding that an "otherwise valid" governmental interest did not justify violating the rights of pretrial detainees); July 12 Order at 3 (Exhibit C) (same; citing *Demery*).

Unlike post-conviction incarceration, the government has only two legitimate interests in pretrial detention: (1) "assur[ing] the detainees' presence at trial" and (2) "maintain[ing] the security and order of the detention facility and otherwise manag[ing] the detention facility." *Demery*, 378 F.3d at 1031 (citing *Halvorsen v. Baird*, 146 F.3d 680, 689 (9th Cir. 1998)). This is a comprehensive list; it is limited by binding caselaw and "[a]ncient principles." *Halvorsen*, 146 F.3d at 689 ("Ancient principles limit conditions of detention without conviction of a crime. Blackstone explained that detention prior to conviction 'is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such are absolutely requisite for the purpose of confinement only. . . .'") (quoting IV William Blackstone, Commentaries on the Laws of England 297 (1769)).

Though substantial, the governmental interests are limited. They stand in marked contrast to the broad range of interests it has in penal confinement. After a defendant has been convicted and sentenced, the state may assert not only general administrative and security interests, but also interests that are "correctional" in nature. *See Harper*, 494 U.S. at 235. These "correctional" interests include punishment, deterrence, promoting respect for the law, protecting the public from future crimes by the defendant, and providing "needed educational or vocational training, medical care, or other correctional treatment." *See* 18 U.S.C. § 3553(a)(2) (listing federal sentencing goals). Moreover, prisons (as opposed to pretrial detention facilities) are charged with providing long-term care, treatment, and rehabilitation. *See, e.g.*, 18 U.S.C. § 3621 (providing for substance-abuse and sex-offender treatment programs in federal prisons for convicted inmates). A prison therefore has a legitimate interest in maintaining resources for such long-term care—an interest that weighed heavily in the Supreme Court's decision in *Harper*. *See* 494 U.S. at 232 (expressing concern that added procedural

protections would "divert scarce prison resources . . . from the care and treatment of mentally ill inmates").

This interest is absent in the pretrial context. A detention facility has no responsibility to provide long-term "care and treatment" to mentally ill inmates. Indeed, to the extent the government has *any* direct interest in involuntary "treatment" of a pretrial detainee's mental illness, it is limited to the *competency restoration* context. *See* 18 U.S.C. § 4241(d) (authorizing hospitalization "for treatment" during the period permitted for a restorability determination). And taking this interest into account moves the inquiry into the purview of *Sell*.

In sum, the governmental interests in the pretrial setting are much narrower than in the post-conviction, correctional setting. *Accord Riggins*, 504 U.S. at 135 (recognizing that *Harper* addressed the "unique circumstances of penal confinement" and observing that "Fourteenth Amendment affords *at least* as much protection to persons the State detains for trial") (emphasis added). Moreover, a primary pretrial detention interest—assuring the detainee's physical presence at trial—is irrelevant here. Forced medication is entirely unrelated to trial-presence. Moreover, the procedural protections at issue here do not impact the government's interests because what Mr. Loughner is seeking—a post-deprivation hearing—does not require the prison to suspend its forcible medication regimen. It requires only that a timely and adequate hearing be held *after* the emergency decision is made and implemented.

3. The added value of procedural safeguards

A judicial post-deprivation hearing would significantly protect the individual interests at stake without unduly increasing the administrative burden. Involvement of a court is not nearly as burdensome as it was in the post-conviction context in *Harper* because here, the judicial process is already in place. A judge and lawyers are already involved, and *post-deprivation* judicial proceedings would not prevent the prison from acting immediately in response to an emergency.

In *Harper*, it was possible to conclude that "a judicial hearing will not be as effective, as continuous, or as probing as administrative review using medical decisionmakers." *Harper*, 494 U.S. at 233. But due to the different circumstances here, the same cannot be said. This is

true for four reasons: (1) the prison doctors are charged with conflicting goals; (2) experience demonstrates that administrative review is not very "probing" at all; (3) there exists no continuity problem because judicial proceedings are ongoing; and (4) medical expertise is actually advanced by permitting the defense to present additional scientific evidence in the form of its own experts' opinions.

First, the prison doctors here are, by necessity, burdened by competing responsibilities. Mr. Loughner is committed for a competency restorability determination under § 4241(d). That statute requires the prison not only to determine the likelihood that he will be restored to competency, but also to actually "provide treatment" to that end. 18 U.S.C. § 4241(d)(2)(A) (defendant to be hospitalized "for treatment" until "his mental condition is so improved that trial may proceed"). In other words, in this context, the prison's medical staff is *statutorily charged* with trying to restore Mr. Loughner to competency. This responsibility poses an objective source of structural conflict for the prison staff where the detainee refuses to take psychotropic medications. On the one hand, the medical staff desires to restore Mr. Loughner to competency—not necessarily because of any nefarious desire, but simply because it is what Congress says they should do. On the other hand, the "medical decisionmakers" at an administrative hearing are supposed to render an independent decision about whether the medicate on different grounds—an emergency due to dangerousness to oneself. This poses a distinct conflict of interest such that it cannot be said that the administrative decisionmakers possess the necessary "independence" to make an unbiased decision. *Cf. Harper*, 494 U.S. at 233 (in the penal context, which lacks the statutory duty of restoration, there was no evidence of lack of "independence of the decisionmaker"). Independence of the decisionmaker is an absolutely essential element of procedural due process. *Cf. Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2259 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process" (quotations and citation omitted)).

Second, it appears on the record here that whatever post-deprivation administrative review exists at all, it certainly is not very "probing," unlike in *Harper*. It is not clear that *any*

review occurred after the first 7-day emergency prescription for Risperidone expired and the prison decided to renew the prescription for two more months."

Third, the continuity problem identified in *Harper* is absent here. For convicted inmates like Harper, judicial proceedings have ended. Harper had long ago been sentenced and his criminal case was closed by the time the forced medication issue arose. Circumstances are the opposite for pretrial detainees like Mr. Loughner. By definition, a pretrial detainee is in the midst of pending judicial proceedings—that is, the criminal proceedings he is in detention for. Thus, a court of law is necessarily already convened and all relevant parties are engaged in active litigation. Moreover, the involvement of the MCFP Springfield detention facility staff here is a direct result of the pending judicial proceedings. Springfield's authority over Mr. Loughner arises solely out of his court-ordered temporary commitment there pursuant to § 4241(d). The added administrative burden and delay inherent to starting *new* judicial litigation—as would be necessary for inmates such as Harper—is absent in the pretrial context.

Fourth, also absent here is *Harper*'s concern that a judicial decisionmaker would actually be at a disadvantage to medical doctors in terms of access to information and expertise. *See* 494 U.S. at 233. Again, it is the pretrial context that makes all the difference. A pretrial detainee, unlike a convicted inmate, is constitutionally entitled to counsel and access to his own medical experts to assist in his defense. This distinction dramatically changes the contours of a judicial proceeding. Such a proceeding for a pretrial detainee would actually present the presiding judge with *more* medical information and expertise—the opinions and testimony of defense experts in addition to the government's experts. By contrast, a judge presiding over a proceeding convened for a convicted prisoner would likely face a one-sided presentation of expert information from the government and would have little beyond what an administrative officer could offer.

4. Under *Mathews*, due process requires a judicial hearing

It is thus clear that, applying the *Mathews* balancing test, the additional procedural protections for pretrial detainees like Mr. Loughner add substantial value to the reliability of the proceedings, are necessary to vindicate the heightened individual interests at stake, and come at

minimal additional cost or administrative burden because a pretrial detainee already has a lawyer, a judge, and access to medical expertise. A judicial determination (and accompanying procedures) is necessary to authorize forcible administration of psychotropic medications to Mr. Loughner on dangerousness grounds.

This is not a surprising result. Both the Ninth Circuit and the Supreme Court have, in published opinions, contemplated that a court, not a prison administrator, would be the decisionmaker in the pretrial context. *See Sell*, 539 U.S. at 182-83 (discussing forced medication of a pretrial detainee); *Hernandez-Vasquez*, 513 F.3d at 914, 919 (same). Specifically, in the course of discussing the advantages of starting with a dangerousness evaluation, *Sell* refers to "a court" as the decision maker in this context no less than four times. *See id.* at 182 ("There are often strong reasons for *a court* to determine whether forced administration of drugs can be justified on these alternative grounds [of dangerousness] before turning to the trial competence question.") (emphasis altered); *id.* (discussing how "courts" frequently consider dangerousness-based forced medication issues in civil proceedings); *id.* at 183 ("If *a court* authorizes medication on these alternative grounds. . . .") (emphasis added); *id.* ("Even if *a court* decides medication not to be authorized on the alternative [dangerousness] grounds . . . .") (emphasis added).

Sell's express invocation of a "court" was not accidental. Likewise, in *Hernandez-Vasquez*, the Ninth Circuit stated that a judicial determination of involuntary medication of a pretrial detainee is the law:

> As we have held previously, the Supreme Court clearly intends *courts* to explore other procedures, such as *Harper* hearings (which are to be employed in the case of dangerousness) before considering involuntary medication orders under *Sell*.

513 F.3d at 914 (emphasis added; quotation marks omitted). Indeed, *Hernandez-Vasquez* urged "*the district court*" to "examin[e] dangerouness" as a basis for medication as a precursor to deciding whether restoration for competency alone justifies forced medication. *Id.* (emphasis added). Under *Hernandez-Vasquez*, it is clear that the district court, not a prison administrator, must decide the question. If it were otherwise, there would be no explaining that decision's command that "*a district court* should make a specific determination on the record" regarding

medication for dangerousness. *Id.* (emphasis added); *see also id.* at 919 (admonishing district courts to "take care to separate the *Sell* inquiry from the *Harper* dangerousness inquiry and not allow the inquiries to collapse into each other," a precaution that would be superfluous unless the district court is the decisionmaker for both issues).

V.

MR. LOUGHNER WILL BE IRREPARABLY HARMED UNLESS THE PRISON'S ACTION IS ENJOINED

The emergency motion should be granted because administration of forcible medication has begun and Mr. Loughner will suffer irreparable harm unless the government is required to justify its forced medication regime. Psychotropic drugs "alter the chemical balance in a patient's brain," and "can have serious, even fatal, side effects" including "acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes," "akathsia (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, ... a neurological disorder . . . that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face." *Harper*, 494 U.S. at 230. Tardive dyskinesia is "irreversible in some cases." *Id.*

Moreover, the fact that antipsychotic medications are currently being administered to Mr. Loughner creates an evidence-preservation issue. The "powerful and permanent effects" of anti-psychotics pose a threat of permanently depriving Mr. Loughner and his counsel of access to mental-state evidence necessary to evaluate and develop potential mental-state defenses to the charged crimes. As the Supreme Court has acknowledged, the very purpose of anti-psychotics is to "alter the chemical balance in a person's brain" and change "his or her cognitive processes." *Washington v. Harper*, 494 U.S. 210, 229 (1990); *Ruiz-Gaxiola*, 623 F.3d at 692. This is both a fair-trial issue and an evidence-tampering problem. Justice Kennedy put it most succinctly in his concurrence in *Riggins v. Nevada*:

> 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.

504 U.S. 127, 139 (1992) (Kennedy, J., concurring); *see also id.* at 144 ("The side effects of antipsychotic drugs can hamper the attorney-client relationship, preventing effective communication and rendering the defendant less able or willing to take part in his defense."). In short, "involuntary medication with antipsychotic drugs poses a serious threat to a defendant's right to a fair trial." *Id.* at 138 (Kennedy, J., concurring). *Accord Ruiz-Gaxiola*, 623 F.3d at 692 (noting "the strong possibility that a defendant's trial will be adversely affected by a drugs's side-effects").

The government will not be prejudiced by the issuance of an emergency stay. If forcible medication turns out to be appropriate, it will undoubtedly continue to administer psychotropic drugs to Mr. Loughner. The balance of hardships thus tilts sharply in Mr. Loughner's favor.

Finally, the public interest will be served by prompt judicial review of the prison's actions. Permitting the government to go forward without sufficient review poses not just the risk of irreversible physical harm to Mr. Loughner, but the prospect of depriving the Court of the ability to fashion an appropriate remedy.

CONCLUSION

For reasons set forth above, the government should be enjoined from enforcing the administrative medication order.

Respectfully submitted,

/s/ Judy Clarke

DATED: August 11, 2011

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EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
HONORABLE LARRY ALAN BURNS, JUDGE PRESIDING

UNITED STATES OF AMERICA, PLAINTIFF, VS. JARED LEE LOUGHNER, DEFENDANT.	CASE NO.: 4:11-CR-00187-LAB SAN DIEGO, CALIFORNIA AUGUST 26, 2011 2:00 P.M.

REPORTER'S TRANSCRIPT

MOTION HEARING

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FOR THE COURT TO ORDER THE BUREAU OF PRISON TO GIVE YOU CONTEMPORANEOUS INFORMATION ON ANY ACTION THEY TAKE RELATIVE TO INVOLUNTARY MEDICATION?

MR. CAHN: WE WOULD LOVE THAT. WE BELIEVE THAT THE INFORMATION WE'RE GETTING AT THE MOMENT IS IN COMPLIANCE WITH WHAT'S POSSIBLE. IT'S THE BEST THAT'S POSSIBLE UNDER THE CIRCUMSTANCES, AND WE'RE SATISFIED WITH THAT.

THE COURT: WHAT'S THE TIMETABLE ON THAT? ARE YOU GETTING IT THE NEXT DAY OR TWO DAYS LATER OR WHAT?

MR. CAHN: WE'RE GETTING IT MORE OR LESS ON A WEEKLY BASIS, BUT WITH SOME NOTIFICATION OF MATTERS THAT ARE PARTICULARLY CRITICAL AND SOME ADDITIONAL -- THERE WAS A POINT IN TIME WHEN THE BUREAU OF PRISONS WAS REFUSING TO TALK TO US. IT HAD BECOME A BLACK HOLE, ESSENTIALLY, AND OUR CLIENT HAD DISAPPEARED. THAT NO LONGER SEEMS TO BE CASE. SO AT LEAST WE'RE, IF NOT COMFORTABLE, SATISFIED THAT UNDER THE CIRCUMSTANCES, WE'RE DOING AS WELL AS WE CAN.

SO THE MOTION TODAY WAS REALLY BASED ON THE FACT THAT THIS DEPRIVATION HAD OCCURRED. THE DECISION HAD BEEN MADE TO AGAIN MEDICATE MR. LOUGHNER, THAT NO PROCESS HAD OCCURRED. IT WAS OUR UNDERSTANDING UNDER FUNDAMENTAL PRECEPTS OF DUE PROCESS LAW THAT WHENEVER THE GOVERNMENT DEPRIVES AND INDIVIDUAL OF LIBERTY OR PROPERTY AND DOES SO ON AN EMERGENCY BASIS BECAUSE CIRCUMSTANCES DON'T ALLOW THAT PROCESS TO TAKE PLACE, THAT THERE'S A REQUIREMENT FOR A PROMPT

POST-DEPRIVATION HEARING.

AND CONSISTENT WITH THE VIEW WE HAD PUT FORWARD BEFORE, WE INSIST THAT THAT HEARING MUST APPLY TO STANDARDS SET OUT IN RIGGINS, THAT MEDICATION IS CONSIDERING LESS-INTRUSIVE MEANS ESSENTIAL TO THE SAFETY OF THE INDIVIDUAL OR TO OTHERS AND THAT IT BE MEDICALLY APPROPRIATE.

NOW, WE ALSO INSISTED, AS WE HAD WITH THE COURT -- WITH OUR PRIOR POSITION BEFORE THIS COURT, THAT IT TAKE PLACE BEFORE COURT OF LAW. OF COURSE, THAT IS THE ISSUE THAT'S UP IN FRONT OF THE NINTH CIRCUIT AT THIS TIME.

AND WE AGREE THAT WHETHER THE ISSUE IS DANGER TO SELF OR DANGER TO OTHERS, IT IS CONCEPTUALLY AND LEGALLY IDENTICAL FOR THESE PURPOSES. BUT THIS IS A NEW MEDICATION ORDER, AND WE'RE REQUIRED TO COME TO THIS COURT AND MAKE SURE THE COURT'S AWARE OF OUR POSITION ON THIS MATTER AND ASK FOR RELIEF.

BEYOND THAT IS --

THE COURT: LET ME STOP UP THERE.

PART OF THE HEARING TODAY, THEN, IS TO REQUEST A NEW -- A JUDICIAL HEARING BEFORE ME BEFORE HE GETS MEDICATED ON THE BASIS THAT'S HE'S A DANGER TO HIMSELF?

MR. CAHN: YES, A HEARING APPLYING THE STANDARD OF RIGGINS BEFORE YOU DETERMINING THAT HE'S APPROPRIATELY MEDICATED AS A DANGER TO HIMSELF AND THAT THE MEDICATION IS MEDICALLY APPROPRIATE. AND THAT INCLUDES, OF COURSE, THE

HERNANDEZ-VASQUEZ REQUIREMENT THAT THE MEDICATION BE SPECIFIED, THE DOSE BE SPECIFIED, THE DURATION BE SPECIFIED.

BECAUSE ONE OF THE THINGS WE'RE PARTICULARLY CONCERNED WITH IS WHAT APPEARS TO BE ALMOST AN EXPERIMENTAL APPROACH TO MEDICATING MR. LOUGHNER WHERE THERE'S NO DOSAGES, THERE'S NO MEDICATIONS SPECIFIED. AND THERE'S SORT OF A PRESCRIPTION -- AD HOC PRESCRIBING. AND WE'RE QUITE CONCERNED ABOUT THE WAY THAT'S OCCURRING AND WHETHER OR NOT HE'S BEING APPROPRIATELY TREATED.

THE COURT: I SAW THAT. I SAW THAT IN THE ADVOCACY, AND THE MOTIONS PANEL APPARENTLY ACCEPTED THAT. BUT THAT IS CONTRADICTED BY THE BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION, WHICH SAYS, NO, THE MEDICATIONS HERE ARE VENERABLE, APPROPRIATE MEDICATIONS THAT HAVE BEEN USED FOR MANY, MANY YEARS TO TREAT SCHIZOPHRENIA. AND THERE ARE SOME SIDE EFFECTS, BUT THEY CAN ALSO BE MANAGED VERY, VERY WELL. SO THE DOCTORS APPARENTLY ARE IN DISAGREEMENT WITH THAT CONTENTION.

MR. CAHN: WE AGREE, AND WE BELIEVE THAT'S A REASON AN EVIDENTIARY HEARING SHOULD BE HELD TO DETERMINE WHETHER OR NOT THE TREATMENT IS APPROPRIATE. THESE ARE FACTUAL MATTERS.

THE COURT: YOU AGREE.

MR. CAHN: I AGREE THERE'S A DISPUTE. CERTAINLY, THE GOVERNMENT DISPUTES OUR VIEW WITH THE MEDICATION BEING OFFERED. APPARENTLY AT LEAST THE BOARD OF DIRECTORS OF THE

ALL RELEVANT INFORMATION SHOULD BE BEFORE THE COURT TO CONSIDER WHETHER OR NOT THE MEDICATION SHOULD CONTINUE.

THE COURT: MS. CABANILLAS, I'M HAPPY TO HEAR FROM YOU. I WANT TO MAKE SURE WHAT IS IN AGREEMENT, WHAT'S NOT AGREED TO.

DO YOU AGREE THAT THE MOTIONS PANEL HAS REFERRED BACK TO THIS COURT THE ISSUE OF WHAT OUGHT TO BE DONE, IF ANYTHING, REGARDING THE EMERGENCY PROCEDURE THAT WAS TAKEN ON JULY 18TH?

MS. CABANILLAS: YES. AND I WOULD ALSO ADD AGAIN MR. CAHN SAID THAT THEY DID NOT SEEK TO ENJOIN THAT MEDICATION. THEY DID SEEK TO ENJOIN IT. AGAIN, IT WAS A COMBINED REQUEST. YOU JUST LOOK AT THE PRAYER FOR RELIEF AT THE NINTH CIRCUIT DOCKET, NO. 20 TO 21, AND I THINK THAT WOULD RESOLVE THE QUESTION THERE.

ALTHOUGH THIS COURT CAN CONSIDER THE EMERGENCY MEDICATION CHALLENGE, THERE IS A CERTAIN QUESTION ABOUT GERMANENESS. THE DEFENDANT IS ARGUING IN HIS MOTION THAT IS BEFORE THIS COURT NOW THAT THERE WERE NOT PROCEDURES THAT WERE GIVEN TO HIM THAT WERE ADEQUATE. HE CONTENDS THAT THE EMERGENCY MEDICATION PROVISION WAS NOT ADEQUATE, AND HE ALSO CONTENDS THAT ADDITIONAL PROCEDURES WERE REQUIRED.

I JUST WANTED TO BE REAL CLEAR THAT IF THE DEFENDANT IS CONTENDING THAT ADDITIONAL PROCEDURES ARE REQUIRED IN ADDITION TO THE EMERGENCY REGULATION, THOSE PROCEDURES

THEORETICALLY WERE GIVEN YESTERDAY, AT LEAST THE MOST THAN AN INMATE IS ENTITLED TO UNDER HARPER IN A HARPER DUE PROCESS HEARING.

SO WE WOULD SUBMIT THAT THERE'S A QUESTION ABOUT WHETHER THERE'S A REMEDY TO BE APPLIED EVEN IF THIS COURT WERE TO FIND THERE WAS SOMETHING WRONG WITH THE ORIGINAL EMERGENCY DECISION. BUT I WOULD JUST LIKE TO GO AHEAD AND ADDRESS SUBSTANTIVELY, IF THE COURT PERMITS, JUST A FEW POINTS FOR WHY IT IS THE DEFENSE MOTION THAT'S BEFORE THIS COURT SHOULD BE DENIED.

WOULD THAT BE ALL RIGHT?

THE COURT: OF COURSE.

MS. CABANILLAS: SUBSTANTIVELY, AGAIN, THE DEFENDANT SEEKS TO HAVE THIS COURT STOP THE MEDICATION AGAIN. IN THE MOTION TO -- IT'S CALLED A MOTION TO ENJOIN THE EMERGENCY MEDICATION, THERE'S A SUGGESTION THAT THEY WEREN'T ACTUALLY SEEKING TO STOP THE EMERGENCY MEDICATION AND THEY'RE NOT SEEKING IT NOW.

AGAIN, THE LAST PAGE OF THE DEFENDANT'S MOTION THAT HE FILED BEFORE THIS COURT ASK THIS COURT TO STOP THE MEDICATION. I JUST WANT TO, AGAIN, BE REAL CLEAR THAT STOPPING THE MEDICATION WOULD NOT BE IN THE DEFENDANT'S MEDICAL INTEREST, SOMETHING THAT SEEMS TO BE SOMEWHAT OVERLOOKED IN THE DEFENDANT'S MOTION.

AFTER THE MEDICATION WAS STOPPED BEFORE, AS THIS

BEFORE WE CAN GO FORWARD TO AN ACTUAL HEARING BEFORE YOUR HONOR ON THAT, BUT I DO THINK IT'S BEFORE YOU.

THE COURT: I UNDERSTAND.

MS. CABANILLAS, YOU DON'T DISAGREE WITH -- IN FACT, IF I UNDERSTAND YOU CORRECTLY, YOU SAID THAT THE FOLLOW-ON HEARING YESTERDAY WAS REALLY PREDICATED ON THE EMERGENCY DETERMINATION, AND THEN THE HARPER HEARING FOR DANGER TO SELF OCCURRED AS AN EXTENSION OF THAT FIRST DECISION.

IS THAT THE GOVERNMENT'S POSITION?

MS. CABANILLAS: LET ME CLARIFY.

WHAT I MEAN IS I IMAGINE THERE'S GOING TO BE SOME BLEED-OVER IN TERMS OF JUSTIFICATION BECAUSE THE JULY 18TH DETERMINATION ALSO DEALT WITH DANGER TO HIMSELF AND SO DID YESTERDAY A DANGER TO HIMSELF. SO THERE MAY BE SOME BLEED-OVER IN TERMS OF THE JUSTIFICATION.

BUT THE FACT OF THE MATTER IS THE ONLY PROCEDURE THAT WE THINK THE DEFENDANT COULD EVEN CLAIM THAT HE WOULD BE ENTITLED TO IN ADDITION TO THE EMERGENCY ONE THAT HE RECEIVED WOULD BE THE HARPER PROCEDURES, AND THAT HAPPENED YESTERDAY.

SO WE THINK THAT THAT DOES MAKE A LOT OF WHAT HE'S SAYING NOT GERMANE ANYMORE, AT LEAST WOULD BE THE REMEDY FOR THIS COURT. IF THIS COURT WERE TO FIND THAT -- ASSUMING THIS COURT STILL BELIEVES THAT IT'S NOT ENTITLED TO -- THE DEFENSE IS NOT ENTITLED TO A FULL-BLOWN JUDICIAL HEARING, THEN THE ONLY THING LEFT IS DID HE GET A HARPER HEARING? AND THE

ANSWER IS HE DID.

NOW, THE COURT MAY WANT TO WAIT AND SEE WHAT THE PAPERWORK WAS, BUT I JUST WANTED TO MAKE THE POINT THAT THE ONLY PROCEDURE UNDER HARPER OR THAT THE BUREAU OF PRISONS WOULD NEED TO COMPLY WITH TO MEDICATE AN INDIVIDUAL IN THE PRISON AS A DANGER TO HIMSELF, THE MOST THE DEFENDANT CAN SEEK HERE IS A HARPER DUE PROCESS BECAUSE THAT'S ALL THE LAW REQUIRES.

THE COURT: I HAVE THE GOVERNMENT'S POSITION.

MR. CAHN, ANYTHING ELSE?

MR. CAHN: THERE IS ONE OTHER POINT I NEED TO MAKE, AND I NEED TO RESPOND TO THIS BECAUSE THE GOVERNMENT HAS RAISED THIS CONSISTENTLY. AND I THINK A FACTUAL RESPONSE IS APPROPRIATE.

THE GOVERNMENT SAID FOR THE FIRST TIME TODAY, WHERE THEY ACTUALLY CAME OUT AND SAID IT AS OPPOSED TO MERELY IMPLYING IT, THAT IT WAS THE WITHDRAWAL OF MEDICATION PURSUANT TO THE ORDER OF THE COURT OF APPEALS THAT LED TO A DETERIORATION IN MR. LOUGHNER'S CONDITION.

WE DISPUTE THAT AND WE DISPUTE IT VIGOROUSLY. WE THINK WHAT THE GOVERNMENT IS ASKING IS FOR THIS COURT TO INDULGE IN THE LOGICAL FALLACY THAT BECAUSE SOMETHING HAPPENED AFTER SOMETHING ELSE, IT HAPPENED BECAUSE OF IT.

LET ME MAKE CLEAR WE DON'T BELIEVE THAT. WE BELIEVE THERE'S SUBSTANTIVE REASONS TO BELIEVE OPPOSITE. WE THINK THE

UNDER THE CFR." BUT IF THAT'S NOT THE RECORD, MAYBE I'M MISRECOLLECTING.

MS. CABANILLAS, YOU DON'T REMEMBER ANYTHING LIKE THAT, ANY STATISTICS CITED?

MS. CABANILLAS: I DON'T OFF THE TOP OF MY HEAD, BUT I GUESS I WOULD JUST SUBMIT TO YOU THAT THERE'S AN INDEPENDENT PSYCHIATRIST THAT'S THERE. THAT INDEPENDENT PSYCHIATRIST HAS BEEN INDEPENDENT. AND THE DEFENDANT'S EFFORTS TO CONTINUALLY SORT OF COMPLAIN THAT THE B.O.P. -- OR ACCUSE THE B.O.P. OF BIAS IS JUST SO UNFOUNDED. WE RESPECTFULLY DISAGREE WITH THAT SUGGESTION.

MR. CAHN: WE'D LOVE TO HAVE THE INFORMATION, YOUR HONOR. IT WOULD CERTAINLY ILLUMINATE THIS MATTER.

THE COURT: WELL, WE'LL SEE.

I THINK BOTH SIDES HAVE BEEN FULLY HEARD ON THIS. LET ME RULE.

THE COURT CONCEIVES THAT THE ISSUE BEFORE IT IS THE PROPRIETY OF CONTINUED MEDICATION ON AN EMERGENCY BASIS UNDER THE PROVISION SMALL B OF THE CODE OF FEDERAL REGULATIONS. 549.46 STARTS OFF WITH SMALL A, AND THEN SUBPARTS, AND THEN SMALL B.

SMALL B APPLIES AN EXCEPTION TO THE USUAL PROTOCOL THAT THE BUREAU OF PRISONS MUST FOLLOW. EVEN IN SITUATIONS WHERE THE MEDICATION IS FOR THE PURPOSE OF EVADING DANGEROUSNESS, THEY SAY IF AN EMERGENCY ARISES, A TRUE

EMERGENCY, THEN EVEN THESE PROCEDURES CAN BE BYPASSED AND WITH MORE MINIMAL PROCEDURES A PERSON CAN BE MEDICATED.

THE DEFENSE POSITION IN THIS CASE IS NOT SO MUCH THAT THEY DISAGREE WITH THAT THRESHOLD DECISION, BUT THAT AT THE TIME THAT WAS MADE ON OR ABOUT JULY 18TH, THAT IT MIGHT HAVE BEEN AN APPROPRIATE DECISION.

THE DEFENSE POSITION IS THAT TO CONTINUE TO MEDICATE THE DEFENDANT ON THAT BASIS JUSTIFIES A POST-MEDICATION HEARING AND JUSTIFICATION THAT THE NEED AND SMALL B CONTINUES TO APPLY.

THE COURT HAS NOT FOUND ANY CASE ON THIS PARTICULAR NARROW ISSUE. I DON'T THINK THERE IS ANY PARTICULAR CASE ON THIS NARROW ISSUE. I INSTEAD RULE BY ANALOGY AND HYPOTHESIZING TO THE HARPER PROCEDURES.

LET ME GO BACK AND RESTATE HOW I READ THE CASE LAW.

I THINK ON MATTERS OTHER THAN RESTORATION OF COMPETENCY, OTHER THAN MEDICATING FOR THE PURPOSE OF RESTORING COMPETENCY, THAT THE CASE LAW JUSTIFIES THE CONCLUSION THAT THE BUREAU OF PRISONS AND ITS MEDICAL EXPERTS SHOULD HAVE THAT DISCRETION IN THE FIRST INSTANCE.

I DO BELIEVE, AS I SAID IN THE FIRST HEARING AND I REITERATE HERE, THAT THERE IS SOME LIMITED JUDICIAL REVIEW OF THOSE DETERMINATIONS, AND THAT'S FOR ARBITRARINESS. THAT'S TO ENSURE, FOR EXAMPLE, THAT THE CFR IS COMPLIED WITH.

THE CFR PROVIDES IN THE CASE OF A HARPER HEARING,

FOR EXAMPLE, FOR NOTICE TO THE DEFENDANT, AN EXPLANATION TO HIM OF WHAT THE PROCEEDING IS GOING TO BE ABOUT, REPRESENTATION BY SOMEONE WHO IS KNOWLEDGEABLE IN THE PROCEEDING, NOT JUST ANY JAIL GUARD THAT -- IN THIS CASE, I THINK THE DEFENDANT HAD A SOCIOLOGIST OR SOMEBODY THAT WAS A LITTLE MORE SKILLED AND EDUCATED AS HIS REPRESENTATIVE.

IT PROVIDES FOR THE OPPORTUNITY FOR THE DEFENDANT TO REQUEST WITNESSES TO APPEAR AT THE HEARING. AND IT PROVIDES FOR THE DETERMINATION TO BE MADE BY AN INDEPENDENT PSYCHIATRIST; THAT IS, ONE WHO'S NOT INVOLVED IN THE CARE AND TREATMENT OF THE DEFENDANT, SOMEONE WHO DOESN'T HAVE A HISTORICAL CONNECTION TO THE DEFENDANT'S CARE AND TREATMENT.

THOSE REALLY ARE THE MAIN POINTS OF THE HARPER CASE. THE CFR, BOTH SIDES AGREE, WAS PROMULGATED IN RESPONSE TO HARPER AND TRACKED THE REQUIREMENTS THAT HARPER SPELLED OUT.

IT'S SIGNIFICANT TO ME, MR. CAHN, WHEN I CONSIDER THE ARGUMENT FOR JUDICIAL REVIEW OF THIS AND JUDICIAL INTERVENTION IN THE DECISION THAT THE STATE OF WASHINGTON IN STATE VERSUS HARPER, THE WASHINGTON SUPREME COURT HAD ESSENTIALLY ADOPTED THE POSITION THAT YOU ADVOCATE.

THE POSITION THAT THE WASHINGTON BUREAU OF PRISONS OR DEPARTMENT OF CORRECTIONS FOLLOWED BEFORE STATE VERSUS HARPER WAS THAT THIS IS A DECISION -- THESE DECISIONS ON INVOLUNTARY MEDICATION FOR DANGEROUSNESS ARE TO BE MADE BY PRISON AUTHORITIES.

THAT DECISION WAS CHALLENGED. THE WASHINGTON SUPREME COURT ESSENTIALLY ADOPTED THE POSITION THAT YOU'VE TAKEN HERE, THAT IT'S TOO IMPORTANT A DECISION TO GRANT A DEPRIVATION OF LIBERTY TO LEAVE IT TO PRISONS WITHOUT JUDICIAL INTERVENTION.

SO THE WASHINGTON SUPREME COURT ESTABLISHED THAT AS A MATTER OF DUE PROCESS UNDER A FEDERAL CONSTITUTION, THAT PRECEDING INVOLUNTARY MEDICATION OF A DEFENDANT, THERE HAD TO BE A COURT HEARING PRESIDED OVER BY A JUDGE WHO CONSIDERED MANY OF THE FACTORS THAT YOU'VE ADVOCATED OUGHT TO BE CONSIDERED HERE.

WHAT'S SIGNIFICANT TO ME IS THAT THAT HOLDING WAS REPUDIATED BY THE SUPREME COURT, BY THE U.S. SUPREME COURT, IN HARPER VERSUS WASHINGTON. AND THE LAST PART OF THE HARPER OPINION HAS OCCUPIED MY ATTENTION.

THAT'S THE PART THAT SAYS, "IN PARTICULAR, WITH THE NEED FOR A JUDICIAL HEARING AND WITH LAWYERS INVOLVED IN THESE PRELIMINARY DETERMINATIONS OF INVOLUNTARY MEDICATION." THE COURT WAS VERY CLEAR, AND I QUOTED THAT LANGUAGE IN MY PRIOR ORDERS ON THIS MATTER, SAYING THAT WE REALLY DON'T SEE HOW IT WOULD BE A BENEFIT TO HAVE LAWYERS INVOLVED IN THIS RATHER THAN DOCTORS.

AND I HAVE TO TELL YOU, THAT ADMONITION CAME TO MIND. YOU'RE OBVIOUSLY WAY BETTER EQUIPPED, WAY BETTER SEEPED IN MEDICAL KNOWLEDGE THAN EVEN I AM. YOU RATTLED OFF THE

TYPES OF MEDICATIONS AND THE EFFECTS THEY HAVE. OTHER THAN A COUPLE OF THOSE WHERE I'VE HEARD OF THEM BEFORE, I HAD NO KNOWLEDGE OF THAT.

BUT I SUSPECT DOCTORS WOULD FOLLOW AND ENGAGE YOU IN THAT BECAUSE THEY WELL KNOW WHAT MEDICATIONS ARE APPROPRIATE FOR TREATMENT OF SCHIZOPHRENIA, WHICH I KNOW THE SUPREME COURT HAD IN MIND THEN THEY SAID, "LOOK, IN THE FIRST INSTANCE, WE'RE GOING TO LEAVE THIS DECISION TO DOCTORS."

TURNING TO THE LEGAL ISSUE OF DUE PROCESS, THE SUPREME COURT IN HARPER FOUND THAT WHEN A PERSON IS DANGEROUS, THAT INVOKES NOT ONLY CONCERNS FOR DEPRIVATION OF LIBERTY BECAUSE OF THE PROPOSAL THAT THE PERSON BE INVOLUNTARILY MEDICATED TO ABATE THE DANGEROUSNESS, BUT IT ALSO IMPLICATED CONCERNS FOR THE PRISON INSTITUTION THAT, AFTER ALL, IS CHARGED WITH SAFEKEEPING AND CARE OF ALL PEOPLE IN THE PRISON, ALL INMATES, CERTAINLY, AND THE PRISON STAFF.

AND I THINK AS I READ THE HARPER CASE, THEY BALANCED THOSE CONCERNS AND DETERMINED THAT THE LEVEL OF DUE PROCESS REQUIRED WHEN THE CONCERN IS DANGEROUSNESS IS SATISFIED BY ALLOWING PRISON STAFF, SUBJECT TO THE PROCEDURES LAID OUT IN THE CFR AND IDENTIFIED FIRST IN HARPER, TO MAKE THAT DETERMINATION.

I FULLY UNDERSTAND WHY SELL HAS A DIFFERENT SET OF CONSIDERATIONS THAT IMPLICATES JUDICIAL SCRUTINY OF THE DECISION. I CAN WELL IMAGINE AN OVERMEDICATED FELLOW COMING

IN AND LOOKING LETHARGIC IN FRONT OF A JURY AND INDIFFERENT, AND INDEED THAT INVOKES THE COURT'S DISCRETION. AND UNABLE COMPLETELY TO COMMUNICATE WITH YOU IN A TIMELY FASHION OR BE SPONTANEOUS, THOSE THINGS ARE ALL NECESSITIES WHEN A PERSON IS FACED WITH A JURY TRIAL AND APPEARING IN FRONT OF A JURY TRIAL.

SO THE DISTINCTION BETWEEN RESTORING A PERSON FOR COMPETENCY AND RESTORING THEM BECAUSE HE'S DANGEROUS OR TRYING TO ABATE THE DANGEROUSNESS, MEDICATING HIM BECAUSE HE'S DANGEROUS, IS REALLY QUITE CLEAR TO ME, THE FORMER BEING ONE THAT I FULLY AGREE WITH YOU.

AND I AGREE WITH THE SELL DECISION. IT IMPLICATES JUDICIAL DECISION-MAKING, JUDICIAL IMPRIMATUR THAT THE PERSON'S APPEARANCE AND DEMEANOR WOULD BE APPROPRIATE AND BE EFFECTIVE IN ASSISTING COUNSEL IN DEFENDING HIM VERSUS A SITUATION THAT REALLY DOESN'T COME UP MUCH IN COURT, WHICH IS DANGEROUSNESS. THAT IS A DETERMINATION THAT'S VERY PECULIAR TO INSTITUTIONS.

AND AS MS. CABANILLAS POINTS OUT REITERATING WHAT I'VE SAID, A DANGEROUS PERSON IS DANGEROUS REGARDLESS OF WHAT STATION HIS CASE IS AT IN THE CRIMINAL JUSTICE PROCESS. IT MAKES SENSE TO ME THAT THE SUPREME COURT WOULD LEAVE THAT DETERMINATION WITH PRISON OFFICIALS FOR THOSE REASONS AND A LOT OF OTHERS.

I WONDER ABOUT THE LOGISTICS AND EFFICACY OF

REQUIRING A HEARING IN FRONT OF A JUDGE WHEN THE BUREAU OF PRISONS THINKS SOMEBODY IS SO DANGEROUS THAT THEY HAVE TO BE MEDICATED TO ABATE THAT DANGEROUSNESS.

WHAT WOULD WE DO IN THE CASE OF SOMEBODY CONFINED AT SPRINGFIELD, PUT THEM ON A FLIGHT WITH U.S. MARSHALS TO COME TO SAN DIEGO AND TRY TO DEAL WITH THAT? WOULD A COURT HAVE TO DROP EVERYTHING IT'S DOING AND CONDUCT AN EMERGENCY HEARING? BECAUSE THE DANGEROUSNESS IS PERSISTING.

THE OTHER PROBLEM I HAVE, OF COURSE, IS THAT THE CIRCUITS THAT HAVE LOOKED AT THIS HAVE ALL GONE THE OTHER WAY ON THE ARGUMENT. THEY HAVE RECOGNIZED THE DISTINCTION BETWEEN HARPER AND SELL HEARINGS AND HAVE DETERMINED THAT THE BUREAU OF PRISONS IS AUTHORIZED TO INVOLUNTARILY MEDICATE WHEN THE GROUND IS DANGEROUSNESS AND NOT RESTORATION OF COMPETENCY.

A CIRCUIT SPLIT AT THIS POINT WOULD CREATE AN AWFUL MESS. IT WOULD. IN THE WESTERN UNITED STATES, PEOPLE WOULD HAVE TO BE FLOWN OUT FOR DANGEROUSNESS HEARINGS IN ALL OTHER PARTS OF THE COUNTRY. THOSE HEARINGS WOULD CONTINUE TO BE CONDUCTED AT THE BUREAU OF PRISONS, AND THIS WOULD JUST BE AN AWFUL MESS. I THINK IT WOULD SURELY BE A CASE THAT THE SUPREME COURT WOULD QUICKLY LOOK AT AND TRY TO RESOLVE ONE WAY OR THE OTHER TO TRY AND GET UNIFORMITY IN THE LAW.

LET ME SPEAK NOW TO WHAT'S BEFORE ME.

~~I RULED ON THAT. IT INFORMS THE DECISION THAT I~~ MAKE ON THE APPLICATION TODAY.

I AGREE WITH BOTH COUNSEL THAT WHAT'S BACK IN FRONT OF ME IS THE JULY 18TH DECISION TO MEDICATE ON AN INVOLUNTARILY BASIS. WHAT I SAID WAS PREDICATE TO THIS RULING BECAUSE IT REALLY INFORMS THE DECISION.

THE B GROUNDS, I THINK, ARE ALSO COMMITTED TO THE BUREAU OF PRISONS, AND I THINK FOR THE SAME REASONS. AT THE HEART OF THIS PARTICULAR CASE -- I WON'T TALK ABOUT HYPOTHETICAL CASES -- A FEAR THAT THE DEFENDANT WAS A DANGER TO HIMSELF, WHICH WAS THE IMPETUS FOR THE EMERGENCY MEDICATION.

AND I HAVE TO THINK THAT THE BUREAU OF PRISONS TOOK VERY SERIOUSLY ITS OBLIGATIONS TO THE DEFENDANT AND TO HIS WELL-BEING BECAUSE THEY KNEW THEY WERE UNDER AN INJUNCTION AT THAT POINT TO STOP MEDICATING. I THINK IT TOOK ON THEIR PART A RECOGNITION THAT THERE WERE CHANGED CIRCUMSTANCES AND A NEED TO PROTECT MR. LOUGHNER THAT JUSTIFIED THEIR RENEWAL OF THE MEDICATION.

YOU'VE POINTED OUT HIS CONDITION IN YOUR BRIEF TO THE NINTH CIRCUIT, WHICH I HAVE IN FRONT OF ME. YOU'VE ALSO TAKEN THE POSITION THAT I SHOULD HAVE ALL INFORMATION.

WHEN I LOOK AT HIS CONDITION BETWEEN THE TIME THE MEDICATION STOPPED AND THE TIME THEY REMEDICATED HIM ON JULY 18TH, IT'S APPARENT TO ME -- AND I DON'T THINK I HAVE TO GET TO WHY IT HAPPENED, WHETHER IT HAPPENED AS A RESULT OF STOPPING THE MEDICATION OR JUST A CONTINUED DETERIORATION OF

MENTAL STATE. BUT WHAT'S CLEAR TO ME IS THAT HIS MENTAL CONDITION AND HIS PHYSICAL CONDITION DID CLEARLY DETERIORATE BETWEEN THE TIME OF THE FIRST HEARING AND THE JULY 18TH DECISION TO MEDICATE HIM ON AN EMERGENCY BASIS.

HIS CONDITION WORSENED IN MANIFEST WAYS. HE WAS UP FOR MANY, MANY HOURS AT A TIME, 50 HOURS AT A TIME, PACING, WALKING IN CIRCLES FOR HOURS, YELLING, SCREAMING, CRYING, ROCKING BACK AND FORTH IN THE SHOWER. IT GOT TO THE POINT WHERE HE DEVELOPED SORES ON HIS FEET FROM BEING CONTINUALLY ON HIS FEET. THE MEDICAL STAFF EVALUATED HIM AND DETERMINED THAT HIS FOOT WAS INFECTED, HIS LEG WAS INFECTED, URGED HIM TO LAY DOWN, TAKE A BREAK, OFFER HIM ANTIBIOTIC MEDICATION, BUT HE REFUSED TO TAKE THAT MEDICATION.

DURING THIS SAME PERIOD OF TIME WHILE HE WAS NOT SLEEPING, HE WAS ALSO NOT EATING. THE DOCUMENTATION SUGGESTS THAT HE LOST NINE POUNDS IN A FAIRLY SHORT PERIOD OF TIME. I REMEMBER SEEING MR. LOUGHNER LAST TIME. HE'S NOT A STOUT FELLOW. HE WAS THIN AND TRIM WHEN I SAW HIM IN COURT. SO I CAN IMAGINE NINE POUNDS -- LOSING NINE POUNDS WITH HIS STATURE WOULD HAVE BEEN A CONCERN TO DOCTORS THERE.

BUT ALL OF THESE THINGS, I THINK, CONVINCED MEDICAL STAFF THAT IF THEY DIDN'T INTERVENE, HE WAS CERTAINLY IN DANGER OF BEING IRREPARABLY HARMED AND WAS HEADED DOWN A SELF-DESTRUCTIVE PATH THAT WOULD TAKE INTERVENTION TO STOP.

AGAIN, APPLYING AN ARBITRARINESS STANDARD TO THIS

EMERGENCY DECISION, I DON'T SEE ANYTHING ARBITRARY ABOUT IT. THE FACTUAL CIRCUMSTANCES AND BACKGROUND THAT LED THE DOCTORS TO TAKE ACTION SEEMS ENTIRELY APPROPRIATE AND REASONABLE TO ME.

AND SO WITH ALL RESPECT, MR. CAHN, I DON'T BELIEVE MORE IS REQUIRED AT THIS POINT. I DON'T BELIEVE THAT JUDGES AND LAWYERS SHOULD BE INVOLVED IN THIS EMERGENCY DETERMINATION OF DANGEROUSNESS. I CONTINUE TO BELIEVE, I ADHERE TO MY BELIEF THAT THE DANGEROUSNESS DETERMINATION IS FOR THE BUREAU OF PRISONS AND FOR ITS MEDICAL STAFF, WHO ARE TRAINED AND WHO HAVE A BROADER PERSPECTIVE ON HOW DANGER IMPLICATES THE ENTIRE PRISON ENVIRONMENT AS WELL AS THE DEFENDANT.

YOU HAVE SAID THAT THE HEARING YESTERDAY IS IMPLICATED TO THE EXTENT THAT IT MIGHT MOOT A PRESENT MOTION. I AGREE WITH THAT OBSERVATION. I ALSO AGREE WITH YOUR STATEMENT THAT THE RECORD IS NOT DEVELOPED ENOUGH AT THIS POINT.

IF INDEED MR. LOUGHNER ASKED FOR WITNESSES, WHICH HE WAS ENTITLED TO DO UNDER THE CFR -- IT'S NOT SMALL B PROVISION ANYMORE -- AND THAT REQUEST WAS DENIED, THEN THERE'S A PROBLEM WITH THAT. I'LL SAY THAT RIGHT UP FRONT. CALL IT ARBITRARY OR CALL IT FAILURE TO COMPLY WITH MINIMAL DUE PROCESS PROCEDURES, THERE'S A PROBLEM WITH THAT. THE BUREAU OF PRISONS NEEDS TO FOLLOW ITS OWN PROCEDURES.

MS. CABANILLOS, I'M NOT MAKING ANY FINDING ON THAT.

EXHIBIT 4

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Jared Lee Loughner, Defendant.	CASE NO. 11cr0187 TUC LAB **ORDER FOLLOWING HEARING**

This Order confirms the Court's oral rulings at the hearing held on August 26, 2011.

The Government's motion for reciprocal discovery (Dkt. No. 217) is granted, although the defense obligation to produce reciprocal discovery is tolled until such time the defendant is competent to assist in his defense. The Government's motion to compel compliance with Fed. R. Crim. P. 17(c) (Dkt. No. 277) is denied without prejudice, for the reasons given during the hearing. The defense's motion for reconsideration of the Court's order denying videotaping of restoration procedures (Dkt. No. 279) is also denied without prejudice; the Court will reconsider if Dr. Pietz or some other member of the FMC staff represents that the defendant's mental state has so improved that the presence of a video camera will not impede efforts to diagnose and treat him.

The defense's motion for a post-deprivation hearing (Dkt. No. 278) is denied. The defendant was initially medicated by prison staff, on the ground that he was dangerous to others, following an administrative *Harper* hearing conducted on June 14, 2011. (Dkt. No. 245.) On June 29, the Court declined the defense's request for a *judicial* hearing on the

matter (Dkt. Nos. 250, 252), but a motions panel of the Ninth Circuit subsequently stayed the medication, finding "[t]here is a serious question whether the decision to involuntarily medicate a pre-trial detainee with psychotropic drugs may be made by prison authorities pursuant to *Washington v. Harper*, 494 U.S. 210, 227 (1990), or by the district court applying the *Harper* substantive standard." (Case No. 11-10339, Dkt. No. 10.) That question is now before a merits panel of the Ninth Circuit, and argument is scheduled for August 30. In the meantime, the defendant's condition deteriorated, and on July 18 prison staff began medicating him again, this time on the emergency basis that he was dangerous to himself. Under 28 C.F.R. § 549.43(b), no administrative hearing was required, and none was held.[1] Rather, because of the emergency situation, the decision was justified solely by the written findings of the Chief of Psychiatry and a staff psychiatrist at the FMC. (Dkt. No. 290.)

The post-deprivation hearing the defense requests is a *judicial* hearing at which the Government must demonstrate "that the drugs are essential to mitigating safety concerns after consideration of less intrusive alternatives." (Dkt. No. 278 at 2.) The defense maintains that "[w]hether such justification lies outside the mainstream of psychiatric care, whether less restrictive alternatives of seclusion, restraints, and/and [sic] minor tranquilizers were available and could be used with fewer long-term consequences and better short term efficacy, and whether a neuro-developmental disease such as Schizophrenia can be used to justify an emergency condition such that forced medication is justified for indefinite periods of time, are questions which should be determined at a hearing before the District Court." (*Id.* at 4.)

The Court perceives that judicial review of the FMC's decision to medicate the defendant on the ground that he now poses a danger to himself should be guided by the same standard the Court applied when it considered the defense's request for a judicial

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[1] The regulation — which was replaced by 28 C.F.R. § 549.46 on August 12, 2011 — read, "Emergencies. For purposes of this subpart, a psychiatric emergency is defined as one in which a person is suffering from a mental illness which creates an immediate threat of bodily harm to self or others, serious destruction of property, or extreme deterioration of functioning secondary to psychiatric illness. During a psychiatric emergency, psychotropic medication may be administered when the medication constitutes an appropriate treatment for the mental illness and less restrictive alternatives (e.g., seclusion or physical restraint) are not available or indicated, or would not be effective."

review of the original round of involuntary medication, to wit, the standard articulated in *Harper*:

> *Harper* is clear that doctors, not lawyers and judges, should answer the question whether an inmate should be involuntarily medicated to abate his dangerousness and maintain prison safety. *Harper*, 494 U.S. at 231 ("[W]e conclude that an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge.").

(Dkt. No. 252 at 3.) Accordingly, the Court will only review the administrative medical decisions of the FMC staff for arbitrariness, meaning that the decisions must have some factual basis and must have been made pursuant to procedures outlined in § 549.43 (now § 549.46). *See, e.g.*, *United States v. Morgan*, 193 F.3d 252, 262–263 (4th Cir. 1999) ("[U]nder *Harper*, the administrative safeguards contained in 28 C.F.R. § 549.43 and the availability of judicial review for arbitrariness adequately protect the due process rights of a pretrial detainee for whom treatment with antipsychotic medication is necessary because he poses a danger to himself or to others in the institutional setting.").

The prison's decision to medicate the defendant after the Ninth Circuit stayed his involuntary medication was not arbitrary. Two psychiatrists intimately familiar with his medical history and behavior while in custody submitted written findings detailing his deterioration and concluding emergency medication was necessary. (Dkt. No. 290.) Consistent with § 549.43, they found that seclusion, restraints, and minor tranquilizers would be ineffective. The defense may disagree with those conclusions, but that does not establish that they are arbitrary. Two more points are important: First, the defense asked the motions panel of the Ninth Circuit to intervene when the involuntary medication of the defendant re-commenced — it even labeled the re-commencement of the medication an "apparent violation" of the motions panel's injunction — and the motions panel declined to do so. (Case No. 11-10339, Dkt. Nos. 19-1, 23.) Second, the Court received notice just before the August 26 hearing that the prison conducted a second *Harper*-like hearing pursuant to § 549.43(a), and that the defendant was found to remain a danger to himself. Thus, the defendant has now received additional process on the latest stage of his involuntary medication: first, the

medication was initiated on an emergency basis pursuant to § 549.43(b), and now (or soon) he is being medicated following an administrative hearing conducted pursuant to § 549.46(a). Because this latest *Harper* hearing just took place, a paper record is still forthcoming, and the defendant still has the opportunity to file an administrative appeal. *See* 28 C.F.R. § 549.46(a)(8). If the FMC lacked a valid basis for initiating the latest round of involuntary medication, or failed to follow the proper procedures set forth in § 549.46, the defendant is free to refile a challenge to the medication with the Court.

This summary confirms the Court's rulings at the August 26 hearing.

There is one more matter. On August 26, the Court received a letter from the Warden of the FMC requesting "an additional reasonable period of time to complete the mental health treatment to determine if there is a substantial probability that the defendant will become competent for trial to proceed." Attached to the letter was a progress report from Dr. Pietz, finding that the defendant "remains not competent to stand trial" and requesting an extension of his commitment. This progress report was requested by the Court when it found the defendant incompetent to stand trial on May 25, 2011. (Dkt. No. 221.) The Warden's request — which the Court construes as a request for more time to actually restore the defendant to competency, rather than to determine whether he can be restored, *see* 18 U.S.C. § 4241(d) — is taken under submission.[2] The parties should communicate their positions regarding whether the Warden's request for additional time should be granted to the Court telephonically, either jointly or separately, by no later than August 31, 2011.

IT IS SO ORDERED.

DATED: August 30, 2011

Larry A. Burns

HONORABLE LARRY ALAN BURNS
United States District Judge

[2] The Warden's letter is also somewhat early. Pursuant to § 4241(d), the Attorney General has up to four months to determine "whether there is a substantial probability that in the foreseeable future [the defendant] will attain the capacity to permit the proceedings to go forward." Here, those four months will expire on Monday, September 26, which is almost a month away.