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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 TO IMMEDIATELY ENJOIN FORCIBLE MEDICATION**

MOTION

Defendant Jared Loughner, by and through his counsel, hereby seeks to immediately enjoin the involuntary administration of unspecified psychiatric medications by the Bureau of Prisons pending a hearing and judicial determination of the appropriateness of forcibly medication in this case. 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.

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 others.[1] Records produced by the Bureau of Prisons indicate that an internal administrative proceeding was held on June 14, 2011 at which Mr. Loughner was denied his request for his attorney to be present. Springfield FMC staff made a finding that Mr. Loughner should be involuntarily and forcibly medicated with unspecified, powerful anti-psychotic medications in unspecified dosages. The Warden upheld this determination on June 20, 2011. Undersigned counsel have no idea whether or not the forcible medication regime has begun.

The decision, made solely by the Bureau of Prisons, to involuntarily and forcibly medicate Mr. Loughner based on dangerousness is an end run around the right to a judicial determination of whether an incompetent defendant can be involuntarily and forcibly medicated to restore competency to stand trial. *See Sell v. United States*, 539 U.S. 166 (2003) (government bears a heavy burden of proving several independent factors by clear and convincing evidence before ordering the forcible medication of an individual to restore competency to stand trial).

II.

BACKGROUND

On May 25, 2011, this Court ordered Mr. Loughner into the custody of the Attorney General for the purpose of determining whether he could be restored to competency. He arrived at the United States Medical Center for Federal Prisoners, Springfield, Missouri, two days later. Six days after his arrival, Mr. Loughner was notified that the prison intended to conduct a proceeding to determine not whether he could be restored to competency but instead whether to forcibly medicate him with psychotropic drugs against his will on dangerousness grounds. Exhibit A [Notice of Medication Hearing and Advisement of Rights at 560].

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[1] The finding that Mr. Loughner should be involuntarily and forcibly medicated with anti-psychotics was based on his having thrown a plastic chair against the wall and screen of his cell door and spit on his attorney more than two months ago.

Mr. Loughner was assigned a staff representative to assist him in this involuntary medication review proceeding, a prison social worker named John Getchell. Exhibit B [Staff Representative Statement at 555]. When asked if he wanted any witnesses present, Mr. Loughner told his staff representative that he wanted his attorney present. The staff representative then advised the doctors conducting the proceeding, Doctors Christina Pietz and Carlos Tomelleri, that Mr. Loughner wished to have his attorney present. *Id.* The proceeding was conducted five minutes later on the same day, June 14th. Exhibit C [Involuntary Medication Report by Dr. Carlos Tomelleri at 553]. Mr. Loughner's attorneys were not given prior notice of the hearing. It does not appear that Mr. Loughner's representative offered any evidence or testimony on Mr. Loughner's behalf.

For nearly six months since his arrest on January 8, 2011, Mr. Loughner has remained in isolation because of the nature of the case. Until his recent arrival at Springfield in late May 2011, the Bureau of Prisons made no claim that Mr. Loughner should be forcibly medicated because of danger to himself or others. Yet, almost immediately upon his arrival at Springfield for purposes of competency restoration and only after he declined to take psychotropic medications voluntarily for purposes of restoration, Mr. Loughner was notified of the prison's intent to forcibly medicate him on the grounds that he was a danger to others. At the June 14th hearing, Dr. Tomelleri concluded that Mr. Loughner would be forcibly medicated with psychotropic medications "on the basis of a diagnosis of mental illness and of actions on his part [sic] dangerousness to others within the correctional setting . . . ." Exhibit C at 558. Specifically, Dr. Tomelleri cited three isolated instances of conduct during Mr. Loughner's five-plus months in custody as justification for his conclusion. *Id.* at 557. Two of these involved throwing a plastic chair inside the isolated confines of his closed and locked cell, one of which occurred three months ago; the third involved spitting at counsel, also more than two months ago.

The forced medication report concludes that "psychotropic medication is universally accepted as the choice for conditions such as Mr. Loughner's." *Id.* at 558. It does not clarify whether the "conditions" it is referring to is Mr. Loughner's mental illness or his perceived

dangerousness. But in the next sentence, it states that "[o]ther measures, such as psychotherapy, are not practicable and do not address the fundamental problem," *id.*, clearly in reference to his underlying mental illness. There is no evidence that any efforts were made to educate Mr. Loughner about the consequences of his behavior before seeking to forcibly medicate him with psychotropic drugs. The report briefly mentions that minor tranquilizers such as benzodiazepines "are useful in reducing agitation, but have no direct effect on the core manifestations of the mental disease." *Id.* But it does not state why such tranquilizers or other *non*-mind altering drugs would not be sufficient to address concerns of any perceived dangerousness. Likewise, the report states that "[s]eclusion and restraints are merely temporary protective measures with no direct effect on mental disease." *Id.* But it does not explain why these measures are not sufficient for the brief duration of Mr. Loughner's commitment to Springfield. Nor does the report mention that Mr. Loughner is, has been, and will remain in administrative segregation for reasons unrelated to dangerousness, specifically "because of the nature of this case." *See, e.g.*, Exhibit D [Report by Dr. Christina Pietz dated 3-30-2011] (explaining why Mr. Loughner has been isolated in administration segregation upon his arrival at Springfield for competency evaluation).

Finally, the Warden upheld the finding, specifically concluding "[w]ithout psychiatric medication, you are dangerous to others by engaging in conduct, like throwing chairs, that is either intended or reasonably likely to cause physical harm to another or cause significant property damage." *See* Exhibit E [Due Process Hearing Appeal Response dated 6-20-2011].

Defense counsel became aware of the unilateral decision to involuntarily and forcibly medicate Mr. Loughner on June 21, 2011, upon receipt of BOP records. Counsel have sought since that time, but to no avail, to obtain information about Mr. Loughner's condition, to visit with him cell side, and to have a medical expert visit with him cell side. At this time, counsel

does not know whether the prison has already begun to forcibly medicate Mr. Loughner.[2] This motion follows.

II.

THE FORCIBLE MEDICATION ORDER SIDE-STEPS THE PROTECTIONS AFFORDED TO PRETRIAL DETAINEES BY *SELL* AND VIOLATES *HARPER* AND *RIGGINS*

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). That right has both a substantive and procedural component. *Id.* at 220. Both were violated here.

Forcible medication on dangerousness grounds is governed by the standard set forth in *Harper* and *Riggins v. Nevada*, 504 U.S. 127, 135 (1992). The substantive question is "what factual circumstances must exist before the [government] may administer antipsychotic drugs to the prisoner against his will." *Harper*, 494 U.S. at 220. In the dangerousness context, the Supreme Court has held that the requisite "factual circumstances" are twofold: "[1] a finding of overriding justification and [2] a determination of medical appropriateness." *Riggins*, 504 U.S. at 135. A regime of forced pyschotropic medication is not medically appropriate unless "considering less intrusive alternatives, [the medication regime] is *essential* for the sake of [the inmate's] own safety or the safety of others." *Id.* (emphasis added). None of these circumstances have been satisfied here.

Moreover, unlike the case of a convicted felon serving a lengthy prison term, *see Harper*, 494 U.S. at 213-17, additional concerns about the administration of psychotropic medication are raised in the pretrial context because potential side effects of the medication have "an impact upon not just [the detainee's] outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Riggins*, 504 U.S. at 137; *see id.* at 139 (Kennedy, J.,

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[2] BOP has informed counsel, however, that the prison has been keeping the Court apprised of all steps in this case pertaining to this issue.

concurring) (comparing forced medication to the manipulation of material evidence). Thus, under these circumstances, the Supreme Court "has resolved the conflicting interests by establishing 'rare' circumstances under which the government will be permitted to administer antipsychotic drugs involuntarily." *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 707 (9th Cir. 2010) (citing *Sell v. United States*, 539 U.S. 166 (2003)). For *Sell* purposes, i.e., forced medication for purposes of restoring competency, the government bears a heavy burden of proving several independent factors by clear and convincing evidence. *Ruiz-Gaxiola*, 623 F.3d at 691-92. And while the Court has suggested there may be grounds such as those laid out in *Harper* that can justify forced medication in the pretrial context beyond the need for restoration of competency, *Sell*, 539 U.S. at 181-82, courts must remain mindful that the dangerousness rationale and its purported justifications don't become muddled with the attempt to administer psychotropic medications for purposes of treatment and restoration of competency. *Cf. Harper*, 494 U.S. at 249-50 (Blackmun, J., concurring) (raising the concern--even in the post-conviction context--that dual goals for treatment and institutional safety can lead to "exaggerated response[s]" that violate due process); *Hrdlicka v. Reniff*, 631 F.3d 1044, 1049-50, 1054 (9th Cir. 2011) ("An alternative that fully accommodates the [asserted] rights at *de minimis* cost to valid penological interests' suggests that the 'regulation does not satisfy the reasonable relationship standard'" but is instead an "exaggerated response") (citing *Turner v. Safley*, 482 U.S. 78, 90-91 (1987)). MCFP Springfield treated *Harper* as a threshold, which once crossed allowed it to forcibly medicate Mr. Loughner without reference to purposes justifying such a gross intrusion upon liberty. Especially in the pretrial context, mixing the desire for treatment with concerns about dangerousness impermissibly side-steps the significant concerns and procedural protections established in *Sell*.

A. ALLOWING THE PRISON TO PURSUE A TREATMENT RATIONALE IMPERMISSIBLY SIDE-STEPS THE PROTECTIONS AFFORDED A PRETRIAL DETAINEE BY *SELL*.

Harper, by its terms, allows a prison to forcibly medicate a prisoner only to insure his safety or the safety of others. Yet here, the prison staff repeatedly rejected measures other than

psychotropic drugs that would mitigate any danger but would not treat Mr. Loughner's underlying mental illness. This focus on treating mental illness rather than mitigating danger is impermissible. When an institution has decided to forcibly medicate a detainee by reference to considerations other than mitigating danger, it has traduced the ruling of *Harper*. Moreover, this focus on treatment invades the courts' province by usurping its role to protect the due process and fair trial rights developed specifically for the courts under the *Sell* rubric.

When forced medication is presented in the pretrial context for purposes of restoring a defendant to competency, i.e. to *treat* the mental illness sufficiently so that a criminal defendant can understand the nature of the charges and adequately assist counsel, "*Harper*, *Riggins*, and *Sell* demonstrate the Court's reluctance to permit involuntary medication except in rare circumstances." *United States v. Rivera-Guerrero*, 426 F.3d 1130,1138 (9th Cir. 2005). In the pretrial context, "[t]he importance of the defendant's liberty interest, the powerful and permanent effects of anti-psychotic medications, and the strong possibility that a defendant's trial will be adversely affected by the drug's side effects all counsel in favor of ensuring that an involuntary medication order is issued only after both sides have had a fair opportunity to present their case and develop a complete and reliable record." *Id.* For these very reasons, the government is held to a very high burden. *Ruiz-Gaxiola*, 623 F.3d at 692 (clear and convincing). It is also held to this high burden in an adversarial process because the decision to *treat* someone with psychotropic drugs *for mental illness*, as opposed to addressing more straight-forward concerns of dangerousness, is so multi-faceted and prone to error. *Id.*; *see also United States v. Hernandez-Vasquez*, 513 F.3d 908, 915 (9th Cir. 2008).

By contrast, in the pre-trial dangerousness context, the prison's sole prerogative is to neutralize any danger. Yet, here the prison engaged instead in the error-prone, multi-faceted decision *to treat mental illness* and did so in a truncated, non-adversarial setting when it decided to forcibly medicate Mr. Loughner on the ostensible grounds of addressing dangerousness. Certainly there are cases where alternative measures to address dangerousness are unavailable, too costly, or ineffective in dealing with dangerousness, and in those cases the decision to

administer psychotropic medications is indeed "more objective and manageable than the inquiry into whether medication is permissible to render a defendant competent." *See Sell*, 539 U.S. at 182. But, as discussed below in Part II.B, this is precisely what the prison did not do in this case. It simply chose psychotropic medications because the prison believes they effectively treat mental illness, without any consideration of the cost, burden, or effectiveness of other alternatives that the record and the doctor's own opinion show are, in fact, effective, existing, and available in Mr. Loughner's case to address dangerousness.

For a mentally ill defendant to become competent, his mental illness must be treated. And any decision of how to treat mental illness includes numerous multi-faceted and error-prone decisions such as whether to administer psychotropics, if so, how much, what kind, what duration; if done forcibly, whether that approach confounds the ultimate prognosis for success, as well as numerous other difficult considerations. When coupled with concerns about how medication will affect a pretrial defendant's fair trial rights and ability to assist counsel, these decisions are even further complicated. Thus, *Sell* and its progeny have developed a robust judicial procedure for protecting a defendant's rights when medication is forced on him as a means of treatment. But to permit the prison to make these treatment decisions without *Sell*'s guidance and protections not only jeopardizes a significant liberty interest, it jeopardizes a fair trial, an interest held not just by the defendant but by the government.

It is critical that any dangerousness determination by the prison be decoupled from overarching desires to treat a mental disease. This is why "medical necessity" in the *Harper* context is defined differently from treatment. Medical necessity for purposes of dangerousness means "*essential* for the sake of [the detainee's] own safety or the safety of others." *See Riggins*, 504 U.S. at 135. And, by definition, it can only be essential if and only if "less intrusive alternatives" have been considered and deemed ineffective or unavailable, which they were not in this case. More far-reaching and error-prone treatment concerns are the province of this Court, and must be considered in full and fair judicial proceedings with the guidance of *Sell*. By importing these concerns into the dangerousness context, the prison has usurped the

court's province and kept a critical pretrial decision behind closed doors that neither this Court nor the parties can address, flesh out, or consider.

Because the prison has violated the constitutional protections of *Harper* and *Riggins* and pursued the treatment concerns reserved for the courts by *Sell*, it must be enjoined from forcibly medicating Mr. Loughner with psychotropic medication on the basis of the treatment rationale it has adopted.

B. BECAUSE THE PRISON JUSTIFIED THE USE OF PSYCHOTROPIC MEDICATION AS A MEANS OF TREATING MENTAL ILLNESS RATHER THAN CONSIDER LESS INTRUSIVE MEANS OF CONTROLLING PERCEIVED DANGEROUSNESS, IT HAS VIOLATED THE STANDARD ESTABLISHED BY *HARPER* AND *RIGGINS*.

In the dangerousness context, forced medication must be not only justified by an "overriding concern" for safety, it must also be medically appropriate, specifically "considering less intrusive alternatives, essential for the sake of [the detainee's] own safety or the safety of others." *Riggins*, 504 U.S. at 135. Here, the prison's report provides a singular justification why BOP decided to address perceived concerns about dangerousness by forcibly medicating Mr. Loughner with psychotropic drugs. It states that "[t]reatment with psychotropic medication is universally accepted as the choice for conditions such as Mr. Loughner's." Exhibit C at 558. While the report doesn't clarify what these "conditions" are, it is clearly referring to Mr. Loughner's mental illness. It certainly isn't referring to the condition of spitting at people. Countless prisoners, detainees, and institutionalized people have spit or worse, including throwing feces or urine on other inmates and guards, physically assaulting and injuring other inmates and guards, without being subjected to forced medication, much less mind-altering psychotropic medications. Likewise, the report was not referring to any proclivity to throwing chairs while isolated in one's cell. On the two isolated occasions Mr. Loughner engaged in this conduct, BOP staff saw no need to even write up a report. All too common minor acts of insubordination by inmates such as these, even if violations of prison rules, haven't led to the forced medication for countless other prisoners who have engaged in such conduct.

Indeed, this Court is well aware that Medical Referral Centers have the ability to ensure the safety of inmates and staff without resort to psychotropic medication. Even where the detainee committed multiple assaults against both staff and other inmates, such Medical Centers are able to mitigate dangerousness without resort to forcible psychotropic medication. *See e.g.* Exhibit F at ¶6, Declaration of Trent H. Evans, PhD, June 20, 2007, filed in *United States v. Espinoza-Pareda*, No. 06CR472-LAB.

Perhaps aware of the effectiveness of alternatives, the report instead says that psychotropics are appropriate because they are used to treat mental illness; however this reason provides no justification for why these mind-altering drugs are necessary or essential to dealing with dangerousness. If psychotropic medications were the "universal" response to sporadic chair throwing and spitting, there would be no bounds to their forced use on detainees, and any "significant" constitutionally protected liberty interest in "avoiding the unwanted administration of antipsychotic drugs," *Harper*, 494 U.S. at 221, would be eviscerated.

Furthering its treatment rationale, the report continues by stating that "[o]ther measures, such as psychotherapy, are not practicable and do not address the fundamental problem." Exhibit C at 558. Again the report is focusing on the treatment of mental illness, disregarding the core issue of what it can do, beyond psychotropics, to address any concerns about dangerousness. These prison doctors may not believe in the efficacy of cognitive therapy for purposes of curing mental illness. But they never explain whether they have tried to talk to Mr. Loughner about his actions and how such actions might impair his right to be free from forced medication. Indeed, when Mr. Loughner threw his chair during the March 28th Pietz interview, she never once tried to talk to him about why he did it other than confirm that his outburst was directed at his attorneys. Rather, she simply asked him if he was okay and proceeded to ask questions about his family history--without interruption--for nearly another hour.

Focused on the long-term treatment of Mr. Loughner's mental illness rather than the immediacy of dealing with any dangerousness concerns, the report quickly rejects other less

intrusive remedies without considering their effectiveness for the short duration of his commitment to the prison. The report concedes that minor tranquilizers--which do not have the same potential as psychotropics for debilitating, and even fatal, side effects and the permanent changing of Mr. Loughner's mental faculties, *see Harper*, 494 U.S. at 229-30--"are useful in reducing agitation," but rejects their use because they "have no direct effect on the core manifestations of the mental disease." Exhibit C at 558. It nowhere explains why this alternative is not effective to lessen dangerousness. *Accord Jones v. Caruso*, 569 F.3d 258, 273-74 (6th Cir. 2009) (prison regulation was likely an "exaggerated response" where other rules already in place appeared to fully address the stated concerns).

Similarly, the report rejects other solutions such as seclusion and restraints because they "are merely temporary protective measures with no direct effect on mental disease." *Id.* Moreover, the report fails to acknowledge that Mr. Loughner is and will remain in seclusion because of the high-profile nature of his case. And nowhere does it say that seclusion is not effective means to ensure the safety of Mr. Loughner and others during the remainder of his brief stay at Springfield. Nor does the report allege that seclusion or the use of temporary restraints on Mr. Loughner has taken "a toll on limited prison resources." *Harper*, 494 U.S. at 227. Instead these less restrictive, but apparently effective, measures are discounted out of hand because they do not constitute treatment for mental illness. *Cf. Jones*, 569 F.3d at 273-74; *United States v. Mikhel*, 552 F.3d 961, 963 (9th Cir. 2009) (the existence of another regulation--requiring an interpreter to be FBI-cleared---supported the conclusion that a special rule forbidding public defender from using an interpreter to meet with pretrial detainee who had already once used an interpreter to plan a prison escape was an "exaggerated response" to legitimate prison concerns).

Quite simply, the prison has failed to demonstrate how the use of psychotropic drugs are "essential for [Mr. Loughner's] safety or the safety of others." *Riggins*, 504 U.S. at 135. For nearly six months, Mr. Loughner has been detained using less intrusive alternatives without serious harm to Mr. Loughner or anyone else. *See Harper*, 494 U.S. at 215 (upholding a

scheme that requires a showing of a "likelihood of serious harm" to self or others). The prison has also failed to show that less intrusive means are not effective. To the contrary, the report affirmatively states that mild tranquilizers are effective at reducing agitation. Exhibit C at 558. And even if these mild tranquilizers are administered forcefully, they don't carry any more risk or resources than the forced administration of psychotropics, *see Harper*, 494 U.S. at 248 (Blackmun, J., concurring), which, unlike the mild tranquilizers, carry the risk of physically harming Mr. Loughner as well as his fair trial rights, *see Riggins*, 504 U.S. at 145 (Kennedy, J., concurring).

C. THE PRISON MAY NOT FORCIBLY MEDICATE MR. LOUGHNER IN THIS PRETRIAL CONTEXT, EVEN ON DANGEROUSNESS GROUNDS, WITHOUT A JUDICIAL PROCEEDING.

Regardless of any administrative findings by the prison, or their validity, the prison may not forcibly medicate a pretrial inmate, committed for restoration of competency, without the Court making its own findings, after an adversarial hearing, and with the assistance of counsel. In *Sell*, the Court suggested that there may be instances where *Harper* grounds warrant forcible medication pretrial. 539 U.S. at 181-82. And these *Harper* grounds very well may present a more objective and manageable inquiry, but such "strong reasons" for addressing these alternative grounds are still only "for *a court* to determine" in the pretrial context, specifically to determine "whether forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competence question." *Id.* at 182 (*emphasis added*); *see also Hernandez-Vasquez*, 513 F.3d at 914 (holding that the district court should "conduct a dangerousness inquiry under *Harper*").

Absent a judicial determination following upon an adversary hearing at which a pre-trial detainee is represented by counsel, *Harper* does not authorize the forcible medication of such an individual who has been committed for restoration of competency. *Harper* considered and approved a decision by medical professionals to medicate a imprisoned convicted felon in order to mitigate his dangerousness in the prison setting. Applying the traditional balancing test of

Mathews v. Eldridge, 424 U.S. 319 (1976), the *Harper* Court found further procedural protections unnecessary for a post-trial convicted felon. 494 U.S. at 229-36.

Two critical circumstances differentiate this case from *Harper*. First, the medical professionals in Harper were unconflicted. They had no interests other than safely confining the prisoner. Here, the Springfield prison has been tasked by the court with restoring Mr. Loughner to competency. Their task is to protect the government's weighty interest in obtaining a verdict on the charges against Mr. Loughner. *See Sell*, 539 U.S. at 180. The effect of these conflicting duties is evident in the prison staff's repeated rejection of measures other than psychotropic drugs that would mitigate any danger but would not treat Mr. Loughner's underlying mental illness. In *Harper*, the Court could safely entrust the medication decision to medical professionals because their interests necessarily focused on the only permissible basis for medication. Here, that is not true, and additional procedural protections are warranted.

Second, because the decision to be made in *Harper* was solely medical in nature, the *Harper* Court believed a decision by a judge following an adversary hearing would not reduce the risk of error. Here, the decision cannot be solely medical. As recognized by the Court in *Riggins* and *Sell*, a decision to forcibly medicate a pre-trial detainee has grave implications for that individual's right to a fair trial. Those rights are legal in nature. And balancing the risk to those rights against the utility of medication is a legal endeavor appropriately undertaken by the judiciary, not doctors.

III.

THE PRISON FAILED TO ADHERE TO THE MINIMAL CONSTITUTIONAL PROTECTIONS DELINEATED BY *HARPER* AND THE BOP'S OWN REGULATIONS BY REFUSING TO CALL A WITNESS REQUESTED BY MR. LOUGHNER

The administrative forcible medication order is invalid on the additional ground of procedural inadequacy. At a minimum, "this court must examine the record to determine whether the personnel at [MCFP Springfield] complied with the procedural safeguards set out in 28 C.F.R. § 549.43 and whether the decision that defendant should be forcibly medicated was

reached arbitrarily." *United States v. Keeven*, 115 F. Supp. 2d 1132, 1136 (E.D. Mo. 2000 *Id.* at 1137. Failure to comply with the applicable procedural safeguards requires a forcible medication order to be set aside. *United States v. Morgan*. 193 F. 3d 292, 266 (4th Cir. 1999) ("[O]nce the BOP established the administrative framework set forth in § 549.43, Springfield medical personnel were bound to follow it.").

Here, the prison failed to even abide by its own limited regulations and *Harper*'s minimal procedural protections. Specifically, the hearing doctors refused to call a witness that Mr. Loughner requested for his hearing. Section 549.43(a)(2) provides the detainee with certain rights, including the right to call a witness. A witness "should be called if they have information relevant to the inmate's mental condition and/or need for medication, and if they are reasonably available." *Id.* This right to call witnesses is also constitutionally compelled by *Harper* insofar as it permits the inmate to confront the staff's position at a meaningful time and in a meaningful manner. *See* 494 U.S. at 235 (citing *Vitek v. Jones*, 445 U.S. 480, 494-96 (1980) and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Although Mr. Loughner was given notice on June 2, 2011, that a hearing would be held at some unspecified date in the future, *see* Exhibit A, his staff representative did not meet with Mr. Loughner, introduce himself, and discuss Mr. Loughner's hearing rights until Monday, June 13th, *see* Exhibit B. The representative told Mr. Loughner that he thought the hearing "was going to take place most likely" the next day. *Id.* The next day, June 14th, the representative again met with Mr. Loughner and "asked him again if he desired any witnesses to be present at the hearing." Exhibit B. In response to this question, Mr. Loughner said, "Just my attorney." *Id.* Despite asking this and receiving an affirmative answer, the representative apparently made no attempts contact Mr. Loughner's attorney, so that Mr. Loughner could avail himself of the one and only witness he specifically requested be present at the proceeding. Mr. Loughner's attorney could have been reasonably available as a witness, *see* 28 C.F.R. § 549.43(a)(2). The representative even informed the hearing doctors that Mr. Loughner made this request. But the proceeding went forward without a witness, a key witness to the alleged spitting incident and

someone with personal knowledge of Mr. Loughner's mental condition. Because the hearing violated BOP's own regulations and was not held at a meaningful time, i.e. when Mr. Loughner's witness could be reasonably available, and in a meaningful manner in which the attorney could answer questions about these issues, the prison must be enjoined from forcibly medicating Mr. Loughner.

IV.

"MEDICAL APPROPRIATENESS" MUST BE DETERMINED BY REFERENCE TO A SPECIFIC DRUG AND DOSAGE, AND BECAUSE NONE WAS SPECIFIED, THE PRISON'S ORDER VIOLATED DUE PROCESS

Finally, the government's administrative proceeding cannot possibly satisfy *Riggins*' medical appropriateness requirement for an independent reason. Nowhere is the *actual medication* or *its maximum dosage* even specified in the hearing materials. *See* Exhibit C. The administrative materials simply authorize "treatment with psychotropic medication on an involuntary basis." *See id*. There appear to be no limits on the type or quantity of such "psychotropic medication."

This blanket authorization plainly violates Mr. Loughner's constitutional rights. *Harper* and *Riggins* make clear that medical appropriateness must be determined by reference to the actual drug and dosage prescribed. In *Harper*, the Supreme Court upheld a due process challenge to a state prison's involuntary medication policy. In doing so, it expressly relied on the fact that the state policy required the proposed medication to "*first be prescribed* by a psychiatrist," reviewed by a second psychiatrist, and specifically refused by the inmate before the administrative process could even be invoked. *Harper*, 494 U.S. at 222 & n.8 (emphasis added). This point was central to the Supreme Court's approval of the "medical appropriateness" prong; it was the subject of extended debate between the majority and dissent in *Harper*. *See id.* at 222 n.8 (addressing the dissent's concern that treatment would be permitted without a medical appropriateness determination by reference to the state policy's initial-prescription provision).

Riggins, two terms later, reinforced *Harper*'s emphasis on the specific drug prescribed. Interpreting *Harper*'s medical appropriateness holding, *Riggins* made clear that satisfaction of that prong was dependent on the appropriateness of the *actual drug prescribed*; indeed, the *Riggins* opinion even identified the specific drug by name. The Supreme Court explained that once the prescribed medication was refused, "the State became obligated to establish the need for Mellaril and the medical appropriateness *of the drug*." *Riggins*, 504 U.S. at 135 (emphasis added).

Indeed, identification of the proposed drug of administration—not just a general class of drugs—is inherent in the *Harper*/*Riggins* requirement that the administrative decisionmaker "consider[] less intrusive alternatives" to determine whether the proposed medication is "essential" to ensure safety. *Riggins*, 504 U.S. at 135. Obviously, the identity of the proposed medication—not just the general class of pharmaceutical—must be known before "alternatives" can even be identified. Indeed, as the Supreme Court has recognized, "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." *Sell*, 539 U.S. at 181.

Finally, the Ninth Circuit has held in a somewhat different—but, for these narrow purposes, indistinguishable—context that an involuntary medication order must, at a minimum, identify "the specific medication or range of medications" authorized and "the maximum dosages that may be administered." *Hernandez-Vasquez*, 513 F.3d at 916 (vacating forced medication order and remanding). *Hernandez-Vasquez* was a case concerning involuntary medication under *Sell*, not *Harper*—and, in general, the *Sell* standard is admittedly more stringent and difficult for the government to meet.

Hernandez-Vasquez's specificity holding is binding on this Court. In other words, on the issue of medical appropriateness, *Sell* is no more or less stringent that *Harper* and *Riggins*. This is because the specificity holding emerges directly from a *Sell* requirement that is equally necessary to satisfy the *Harper*/*Riggins* test—the government's burden of establishing "medical appropriate[ness]." *See id.* (citing *Sell*, 539 U.S. at 181). The specificity discussion in *Sell* that

led the Ninth Circuit to require identification of the specific medication and maximum dosage concerned *exactly the same* "medical appropriateness" requirement applicable here. In the Supreme Court's words:

> [A]s we have said [in *Harper* and *Riggins*],[3] the court must conclude that administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

Sell, 539 U.S. at 181 (emphasis in original).

These concerns about the "specific kinds of drugs" as they pertain to medical appropriateness—an element that is equally applicable here as in the *Sell* context—led the Ninth Circuit to reason that the Supreme Court's "discussion of specificity would have little meaning if . . . the Bureau of Prisons [could exercise] unfettered discretion in its medication of a defendant." *Hernandez-Vasquez*, 513 F.3d at 916. Following this reasoning, the Ninth Circuit held that, in order to establish medical appropriateness, forced medication orders were invalid unless they contained certain limitations: as relevant here, the "specific medication or range of medications" and the "maximum dosages" permitted. *Id.*

V.

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

The emergency motion should be granted because administration of forcible medication is either imminent or has already begun and Mr. Loughner will suffer irreparable harm unless the government is enjoined from proceeding on the constitutionally deficient record present here. 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

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[3]The context makes clear that the Supreme Court was referencing its earlier holdings in *Harper* and *Riggins*. *See Sell*, 539 U.S. at 179 (noting that "*Harper* and *Riggins* indicate that the Constitution permits [involuntary medication] . . . only if the treatment is medically appropriate").

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.*

The government will not be prejudiced by the issuance of an emergency stay. If forcible medication turns out to be appropriate, it will not have lost to ability to do so. The government has no claim to urgency; the events it relies on for its findings under § 549.43 occurred months ago, yet it chose to wait until June 14th to initiate forcible medication proceedings. The balance of hardships thus tilts sharply in Mr. Loughner's favor.

Finally, the public interest will be served by issuance of a stay and preservation of the status quo. Permitting the government to go forward on the woefully deficient showing here 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: June 24, 2011

JUDY CLARKE
MARK FLEMING
REUBEN CAMPER CAHN
Attorneys for Jared Lee Loughner

Copies of the foregoing served electronically to:
Wallace H. Kleindienst, Beverly K. Anderson
Christina M. Cabanillas, Mary Sue Feldmeier

Index of Exhibits

Exhibit A

NOTICE OF MEDICATION HEARING AND ADVISEMENT OF RIGHTS

To: Jared Loughner Reg. No. 15213-196

Diagnosis: Undifferentiated Schizophrenia

Proposed Treatment: Anti-psychotic medication

Reason for Treatment: Mr. Loughner suffers from a mental illness and refused to take the medication prescribed to him. He was referred to this facility to restore competency.

In order to consider whether or not you should be given psychotropic medication, you are being referred for a hearing. The hearing will convene on 06-03-2011 (Date) at 1430 (Time)

at the following location: 10D

You are entitled to be present at the hearing and to present evidence at the hearing. You are also entitled to have a staff member represent you at the hearing and, if institutional security is not threatened, to call witnesses. You may also request that staff witnesses by cross examined.

The inmate desires to have witnesses. Yes ____ No XX

Name: ____

Name: ____

The inmate requests the following staff member to represent him:

Name: Mr. Loughner did not request anyone.

The Administrator of the Mental Health Division appointed the following staff member to represent the inmate:

Name: John Getchell, LCSW

6/2/2011 (Date) (Signature)

Notice of Hearing given to inmate on 06-02-2011 (Date) at 1430 (Time)

by (Staff Member Signature) Christina A. Pietz, Ph.D. (Printed Name)

SENSITIVE BUT UNCLASSIFIED

Exhibit D

SENSITIVE BUT UNCLASSIFIED

Federal Bureau of Prisons
Psychology Data System

Date-Title: 03-30-2011 - Clinical Intervention - Clinical Contact
Reg Number-Name: 15213-198 - LOUGHNER, JARED L. **Unit/Qtrs:** MHU-FOR, D01-019L
Author: CHRISTINA A. PIETZ, Ph.D., FORENSICS UNIT PSYCH
Institution: SPG - SPRINGFIELD USMCFP

Mr. Loughner was court ordered to this facility for a competency evaluation. He was placed on AD status because of the nature of this case. This note was prepared in lieu of a SHU review. A forensic report will follow.

SENSITIVE BUT UNCLASSIFIED

Exhibit F

DECLARATION OF TRENT H. EVANS, PH.D.

I, TRENT H. EVANS, PH.D., do hereby state as follows under penalty of perjury:

1. I am over the age of 18 and am competent to make this declaration. I have personal knowledge of the facts stated herein.

2. I am employed as a Forensic Psychologist with the Federal Bureau of Prisons at the Federal Medical Center (FMC) Carswell, in Fort Worth, Texas. I received a Ph.D. in Clinical Psychology from the University of Texas Southwestern Medical Center at Dallas in 1999. I am a licensed psychologist in Texas, License number 31525. I have eight years of experience performing forensic psychological evaluations.

3. I performed a psychological evaluation of Maria Espinoza-Pareda, Reg. No. 96693-198, and have submitted two prior reports to the Court, dated September 27, 2006, and October 18, 2006. Ms. Espinoza-Pareda continued to be housed at FMC Carswell until June 6, 2007. During the time between my last report to the Court and the date of Ms. Espinoza-Pareda's departure, she was housed in our psychiatric seclusion unit where she was observed on a daily basis. As Ms. Espinoza-Pareda was seen at our facility as recently as two weeks ago, I can offer the following opinions to the Court without need for further examination.

4. In my opinion, Ms. Espinoza-Pareda's clinical condition has remained largely unchanged, and in some ways it has worsened. She continues to suffer from delusions and a thought disorder which render her incompetent to proceed. She also has physically acted out on three occasions since my last report to the Court, as reported by the Assistant United States Attorney in his motion dated June 4, 2007. I continue to believe that with the administration of psychotropic medication, there is a substantial probability Ms. Espinoza-Pareda will be restored to competence. I also continue to believe that her release would create a substantial risk of bodily injury to another person or serious damage to property of another.

5. In my opinion, Ms. Espinoza-Pareda continues to suffer from a serious mental illness, specifically Schizoaffective Disorder, Bipolar Type. It is also my opinion that the administration of psychotropic medication, against her will if necessary, would be in Ms. Espinoza-Pareda's best medical interest. The state of paranoia and confusion which Ms. Espinoza-Pareda has suffered from continuously since her original arrival at FMC Carswell almost one year ago borders on inhumane in my opinion. This mental state can be frightening for the patient, and has led to her confinement in highly restrictive conditions for an extended period. Furthermore, the longer a psychotic patient goes without appropriate psychopharmacological treatment, the more refractory he or she becomes to treatment once it is initiated. In addition, she is at risk for committing perhaps much more serious offenses upon her release if she remains untreated, which would subject her to a potentially lengthy period of confinement that could be avoided if

her mental illness was under good control. Independent of her legal circumstances, Ms. Espinoza-Pareda is in desperate need of medication. This has been one of the most unfortunate, heartbreaking, and frustrating cases of my career in terms of observing another human being suffering for so long while being unable to provide any help due to legal processes.

6. In my opinion, Ms. Espinoza-Pareda is not a danger to herself or others in *this* setting. That is, in the highly structured environment of a medical referral center where a psychiatric seclusion unit is available to control severely mentally ill individuals who are prone to acting out, psychotropic medication is not a necessity to keep Ms. Espinoza-Pareda safe or to keep those around her safe. She has committed assaults against both staff and inmates since our last report to the Court. However, these assaults have been infrequent, short-lived, and have not caused serious bodily injury. The presence of staff who can respond quickly and the availability of a system of strict control neutralizes the danger Ms. Espinoza-Pareda represents while incarcerated. Therefore, we have not sought to medicate her because we did not consider it absolutely necessary for her safety or the safety of others within the confines of FMC Carswell. Hence, although she would represent a danger if released, she does not represent a danger while confined.

EXECUTED on June 20, 2007 in FORT WORTH, TEXAS.

TRENT H. EVANS, PH.D.