No. 11-10339

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JARED LEE LOUGHNER,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
Honorable Larry Alan Burns, District Judge

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	C.A. No. 11-10339
	)	D.C. No. 11CR187-TUC
Plaintiff-Appellee,	)	
	)	
v.	)	APPELLANT'S OPENING BRIEF
	)	
JARED LEE LOUGHNER,	)	
	)	
	)	
Defendant-Appellant.	)	
	)	

JURISDICTIONAL STATEMENT

Jared Lee Loughner appeals from the district court's order denying his motion to enjoin the government from forcibly medicating him. The district court issued an oral ruling from the bench at a hearing held on June 29, 2011, and entered a substantively identical written order on July 1, 2011.

A. District court jurisdiction

The order appealed from was entered in a criminal prosecution against Mr. Loughner for offenses arising out of a shooting incident in Tucson, Arizona, that occurred at an event sponsored by United States Congresswoman Gabrielle Giffords. The United States District Court of the District of Arizona has original jurisdiction over the prosecution. 18 U.S.C. § 3231.

B. Appellate Jurisdiction

Mr. Loughner filed his notice of appeal on July 1, 2011, within the applicable time limit. Fed. R. App. P. 4(b). This Court has jurisdiction over a timely appeal from an appealable interlocutory order entered in the District of Arizona, within the Ninth Circuit's geographical jurisdiction, 28 U.S.C. §§ 1292 & 1294(1).

Jurisdiction is proper under the collateral order doctrine, which permits appeal from non-final orders which conclusively determine the disputed question, resolve an important issue separate from the merits of the action, and are effectively unreviewable on appeal. *United States v. Godinez-Ortiz*, 563 F.3d 1022, 1026 (9th Cir. 2009). The Supreme Court has resolved the question in favor of appellate jurisdiction in the context presented here, where appeal is taken from a district court order refusing to enjoin involuntary medication. *See Sell v. United States*, 539 U.S. 166, 175-77 (2003). *Sell* held that such an order is "an appealable collateral order." *Id.* at 177 (quotation marks omitted).

C. Bail Status

Mr. Loughner is in pretrial detention. No trial date has been set. He is currently in the custody of the Attorney General, pursuant to 18 U.S.C. § 4241(d), for a determination of whether he can be restored to competence.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Is forcible administration of psychotropic drugs "essential" to mitigate dangerousness under *Riggins v. Nevada* where less intrusive means (minor tranquilizers) are admittedly available but rejected by the prison on the ground that they do not provide "treatment" for the underlying mental illness?

II. Does due process permit a pretrial detainee to be forced to take psychotropic medications solely on the basis of an administrative finding of potential dangerousness?

III. May the Bureau of Prisons proceed with forcible medication where its administrative hearing (1) denied Mr. Loughner the right to present witnesses; (2) considered and authorized forcible medication without specifying the identity and maximum dosage to be administered; and (3) based its decision on the potential for "significant property damage"?

STATUTORY PROVISIONS

Pursuant to Ninth Circuit Rule 28-2.7, copies of 18 U.S.C. § 4241 and 28 C.F.R. § 549.43 appear in the attached Addendum.

STATEMENT OF THE CASE

This case arose from the January 8, 2011, shooting incident in Tucson, Arizona, when six people were killed and thirteen injured. Mr. Loughner was charged with federal offenses arising from the shootings. The matter is in the pretrial phase. On May 25, 2011, the district court found that Mr. Loughner was suffering from schizophrenia and was incompetent to stand trial because he was unable to understand the nature of the proceedings or to assist counsel. It ordered

Mr. Loughner to be committed to the custody of the Attorney General under 18 U.S.C. § 4241(d) for a four-month period to determine whether he can be restored to competence.

Shortly after Mr. Loughner arrived at the United States Medical Center for Federal Prisoners, Springfield, Missouri, he was notified of the prison's intent to conduct an administrative hearing to determine whether to forcibly medicate him on dangerousness grounds. The prison conducted a cell-side administrative proceeding on June 14 and decided to forcibly administer psychotropic drugs. Mr. Loughner's administrative appeal was denied on June 20, and the prison began forcibly administering psychotropic drugs on June 21.

After learning of these events, defense counsel filed an emergency motion with the district court on June 24 to enjoin the involuntary medication of Mr. Loughner. The district court held a hearing on June 29 and denied the motion in an oral ruling from the bench. On July 1, the district court issued a written order substantively identical to its oral ruling.

Mr. Loughner filed his notice of appeal on July 1. He also sought an emergency stay of the forced medication from this Court, which was temporarily granted on July 1. Oral argument on the emergency motion was held on July 7. On

July 12, this Court issued an order enjoining the Bureau of Prisons from forcibly medicating Mr. Loughner pending resolution of this appeal.

STATEMENT OF FACTS

A. Background

Mr. Loughner arrived at MCFP Springfield on May 27, 2011, two days after the district court ordered him there for purposes of restoring competency. Less than a week after his arrival, Mr. Loughner was notified that the prison intended to conduct a proceeding not to determine whether he could be restored to competency but instead whether to forcibly medicate him with psychotropic drugs on dangerousness grounds. ER 96.

B. The Administrative Proceedings

Mr. Loughner was assigned a prison social worker as his "staff representative" to assist him in this involuntary medication review proceeding. ER 152. When asked if he wanted any witnesses present, Mr. Loughner told his staff representative that he wanted his attorney present. *Id.* 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 at the hearing. *Id.* The hearing was conducted five minutes later on the same day, June 14. ER 154. Mr. Loughner's

attorneys were not given notice of the hearing. Mr. Loughner's representative did not offer any evidence or testimony on Mr. Loughner's behalf.

For nearly seven months since his arrest on January 8, 2011, Mr. Loughner has remained in isolation because of the nature of the case. It was not until his *second* commitment at Springfield in late May 2011, that the Bureau of Prisons made any 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 "on the basis of a diagnosis of mental illness and of actions on his part [sic] dangerousness to others within the correctional setting . . . ." ER 159. Dr. Tomelleri cited three isolated instances of conduct during Mr. Loughner's five-plus months in custody as justification for his conclusion. ER 158.

The first incident concerned an interview of Mr. Loughner by Dr. Christina Pietz on March 28. The forced medication report indicates that during the interview, Mr. Loughner "said 'Fuck you,' threw a plastic chair twice towards Dr. Pietz, wet a roll of toilet paper attempting to throw it at the camera, and threw the chair on two

subsequent occasions." ER 158. It then notes that the chair "hit the grill between Mr. Loughner and Dr. Pietz." *Id.* The report fails to indicate that this incident lasted less than a minute or that Mr. Loughner then, in Dr. Pietz's own words, "calmly sat down and resumed answering questions" for nearly an hour. *See* Pietz's Competency Report at 36.[1] Nor does the report clarify that Mr. Loughner directed his speech and the chair throwing at the video camera which was beside Dr. Pietz, who sat safely on the other side of the cell door, a point that Dr. Pietz confirmed with Mr. Loughner when she asked him if his comments were directed at his attorneys. *Id.* As Dr. Pietz made clear in her competency report, this incident was the only time during her evaluation of Mr. Loughner that he acted in such a manner. *Id.* And at no point did Dr. Pietz or any guards seek any restraints for Mr. Loughner. Instead, she calmly continued the interview without any indication of fear or concern for her safety.

The second incident concerned a meeting with Mr. Loughner and his attorneys on April 4. According to the forced medication report, Mr. Loughner "spat on his attorney, lunged at her, and had to be restrained by staff." ER 158. This characterization that Mr. Loughner "lunged at" his attorney is inconsistent with the official incident report, *see* ER 149 (describing Mr. Loughner as "lean[ing] across the table and spit[ting] in the face of one of the two females directly in front of him").

---

[1] Lodged with the district court.

It is also inconsistent with the proffer made by the defense in support of its request for an evidentiary hearing that Mr. Loughner's attorney would deny that he lunged at her and would says that she never felt any fear or at risk in any way. ER 71.

The third incident occurred when Mr. Loughner threw his plastic chair, "this time against the back wall of his cell." ER 158. No other details are provided except that Mr. Loughner was "also observed yelling 'No!' repeatedly and covering his ears." *Id.*

Presumably referring to his mental illness, the report concludes that "psychotropic medication is universally accepted as the choice for conditions such as Mr. Loughner's." ER 172. It further 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 was no evidence that, before seeking to forcibly medicate him with psychotropic drugs, any efforts were made to educate Mr. Loughner about the consequences of his behavior. The report briefly rules out the use of minor tranquilizers such as benzodiazepines although conceding they "are useful in reducing agitation, [because they] have no direct effect on the core manifestations of the mental disease." *Id.* It does not not state why such tranquilizers or other *non*-mind altering drugs would not be sufficient to address any concerns of 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, or if, these measures would be insufficient 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.*, ER 96b (explaining why Mr. Loughner has been isolated in administration segregation upon his arrival at Springfield for competency evaluation).

Finally, Mr. Loughner appealed Dr. Tomelleri's decision to the warden. *See* ER 175. 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." ER 176.

C. The Motion to Enjoin Forcible Medication

Defense counsel became aware of the unilateral decision to involuntarily and forcibly medicate Mr. Loughner on June 21, 2011, when they received BOP records. Counsel had sought 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 since his return to Springfield on May 27, 2011. At that time, counsel did not know whether the prison had already begun to forcibly medicate Mr. Loughner. Still in the

dark about Mr. Loughner's medication status, defense counsel filed with the district court a motion to enjoin forcible medication on June 24. ER 76-99. It was not until four days later, on June 28, that defense counsel learned (again through a regularly scheduled records production) that the BOP had already begun forcing antipsychotic medications on Mr. Loughner—and, in fact, that it had been doing so since June 21.

In its motion to enjoin forcible medication, the defense argued that the prison's decision to forcibly medicate Mr. Loughner solely on the basis of an administrative proceeding violated both his substantive and procedural due process rights. The motion raised four arguments: (1) the prison's decision to treat mental illness when less intrusive methods would have ameliorated concerns of danger denied Mr. Loughner substantive due process; (2) the fair trial concerns implicated by Mr. Loughner's pretrial status and the dual motivations of prison doctors charged with both restoring competency and maintaining safety and security of the facility required a judicial determination as a prerequisite to forcible medication; (3) the administrative proceeding was procedurally defective because the prison denied Mr. Loughner's request for a witness in violation of its own rules and (4) because it failed to specify the medication(s) and maximum dosages under consideration.

On June 29, the district court held a hearing on the motion. Defense counsel requested an evidentiary hearing and proffered the testimony of both a forensic

psychiatrist experienced in prison administration and forced medication decisions and a former BOP official, and requested an opportunity to present evidence at a full hearing. ER 51-52, 73. These witnesses would have testified that the forced medication decision was inappropriate and excessive in light of the circumstances, based on their experience in prison administration. They would have also testified that the Bureau of Prisons has more than adequate means to restrain and mitigate any danger arising out of exactly the sort of behavior exhibited by Mr. Loughner and that such behavior is a commonplace, daily occurrence in prisons.

The district court denied both the motion and the request for an evidentiary hearing in an oral ruling from the bench. ER 70. On July 1, it issued a written order substantively identical to its oral ruling. ER 3-10.

D. The Ninth Circuit Proceedings and Stay

Mr. Loughner filed his notice of appeal on July 1. He also sought an emergency stay of the forced medication from this Court, which was temporarily granted on July 1. Oral argument on the emergency motion was held on July 7. On July 12, this Court issued an order enjoining the Bureau of Prisons from forcibly medicating Mr. Loughner pending resolution of this appeal.

SUMMARY OF ARGUMENT

The district court's order approving forcible medication of Mr. Loughner was legally erroneous. It should be reversed for three reasons.

First, the prison's decision to forcibly medicate Mr. Loughner in order to treat his mental illness when less intrusive means would have mitigated any danger denied Mr. Loughner substantive due process. 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). Here, "less intrusive" means of mitigating danger—use of minor tranquilizers, isolation, or, if necessary, restraints—were available. The prison ignored these means because it wished to treat the underlying mental illness. In the pretrial context, when seeking to mitigate danger, the government cannot justify forcible medication to treat mental illness if less intrusive means are available because the treatment is not "essential" to the aim. To allow a claimed "treatment" interest to override *Riggins*'s substantive requirement would allow the government to evade the requirements of *Sell v. United States* by outwardly asserting that its interest is in mitigating danger.

Second, in the pretrial detention context, the Due Process Clause requires that any decision to forcibly medicate on dangerousness grounds be made by a court of

law upon presentation of evidence by both sides. Application of the *Mathews v. Eldridge* balancing test establishes that an administrative hearing held by the Bureau of Prisons does not provide adequate procedural protections to vindicate Mr. Loughner's strong liberty interests in avoiding the effects of unwanted psychotropic medications. The government's interests are lesser in the pretrial context than in the post-conviction, correctional setting, and the added procedural protections denied to Mr. Loughner would greatly enhance the reliability and accuracy of the process while adding only minimal additional administrative burden.

Third, even if the Court rejects Mr. Loughner's first two arguments, reversal is nonetheless necessary because the prison's decision is unjustifiable on its own terms. This is true for three reasons: (1) the administrative hearing arbitrarily violated Mr. Loughner's right to present witnesses by denying his requested witness; (2) the forced medication decision, purportedly made after a determination of "medical appropriateness," was made without even knowing what drug or dosage was under consideration; and (3) the final administrative decision by the warden authorized forcible medication to prevent "significant property damage," an insufficient basis for such a drastic subjugation of Mr. Loughner's liberty.

ARGUMENT

I.

THE DISTRICT COURT MUST BE REVERSED BECAUSE IT FAILED TO DETERMINE OR APPLY THE APPROPRIATE SUBSTANTIVE DUE PROCESS STANDARD, A STANDARD THAT WAS NOT SATISFIED BY THE PRISON'S ALLEGED JUSTIFICATION FOR FORCIBLE MEDICATION

The prison decided to forcibly administer psychotropic drugs to Mr. Loughner on dangerousness grounds despite acknowledging that other less intrusive means were available to mitigate any perceived dangerousness. The district court denied Mr. Loughner's motion for injunctive relief without ever once addressing the appropriate substantive standard for when such powerful, mind-altering drugs may be forcibly administered in the pretrial context. Because such drugs cannot be forcibly administered without consideration of less intrusive means and a determination that such drugs are essential to mitigating dangerousness, the district court should be reversed.

A. STANDARD OF REVIEW

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. Constitutional issues are reviewed *de novo*, whether viewed as a due

process challenge to the district court's denial of an injunction, *see Krug v. Lutz*, 329 F.3d 692, 695 (9th Cir. 2003), or as a due process challenge to the Bureau of Prison's decision to forcibly administer psychotropic drugs under 28 C.F.R. § 549.43, *see Gonzalez v. Metropolitan Transp. Authority*, 174 F.3d 1016, 1018 (9th Cir. 1999).

B. THE DEFINITION OF THE SUBSTANTIVE DUE PROCESS STANDARD IS CONTEXT DRIVEN, AND IN THE PRETRIAL CONTEXT, FORCED MEDICATION MUST BE ESSENTIAL TO MITIGATING DANGER AFTER CONSIDERING LESS INTRUSIVE MEANS.

"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. *Washington v. Harper*, 494 U.S. 210, 220 (1990). 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 v. United States,* 539 U.S. at 178. 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). 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. 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 pretrial 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.

An analysis of the respective interests at stake show that a pretrial detainee has weighty interests which weigh against forced medication. Moreover, these interests are substantially different from, and greater than, those of the convicted inmate whose case was explored in *Harper*. On the other hand, the interests of the state are, in the case a pretrial detainee, both fewer and less weighty than they are when considering its interests in the case of a convicted inmate whom it must house for prolonged periods and rehabilitated. It is because of these substantial differences in the interests weighed that *Riggins* arrived at a very different substantive due process standard from that applied in *Harper*.

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).

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 (Doc. No. 2) ("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 this Court 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 this Court 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 point was apparently lost on the district court, which simply considered the matter "controlled by *Harper* exclusively." ER:8. This interest, however, is an 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.

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").

The government may contend that it is premature for Mr. Loughner to assert an interest in his right to a fair trial because trial has not yet commenced. The case law, however, is to the contrary. In both *Riggins* and *Sell*, the Supreme Court held that consideration of fair trial concerns was a necessary part of the inquiry into whether pyschotropic drugs should be administered in the first instance. And both of those cases—as here—concerned a prediction of the effect on fair trial rights *before* commencement of the trial itself. Indeed, *Sell* expressly rejected the notion that the interest in fair-trial rights is cognizable only after it has been violated. *See* 539 U.S. at 177 ("whether Sell has a legal right to avoid forced medication, perhaps in part because medication *may make a trial unfair*, differs from the question whether forced medication did make a trial unfair," and that legal right may be enforced pretrial). Moreover, the government has never disclaimed the intent to continue forced medication under its purported "dangerousness" rationale until Mr. Loughner is restored and through the conclusion of trial. Its actions, especially the failure to specify any end date or termination criteria for forced medication under the "dangerousness" rationale, indicate the opposite.

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 "dangerousness" is the same it would apply in an effort to restore Mr. Loughner to trial competency. The prison has admitted as much. *See* ER 172 (authorizing forced medication for purpose of "treatment" of Mr. Loughner's mental 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

Under *Mills v. Rogers*, the governmental interests at stake are to be weighed against those of the individual in calculating the proper substantive standard. *See* 457 U.S. at 299 (as cited in *Harper*, 494 U.S. at 220). The governmental interests involved are 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, Doc. No. 10 (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 this Court's law 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; it is not, and the government does not claim it be, necessary to prevent escape.

Only the government's interest in general maintenance of security is at play here. This interest, while significant, is not overwhelming. Moreover, in the pretrial context, the government has available to it multiple other means available to it to address safety concerns, means which would not be suitable or practical in the context of longer-term incarceration. For example, in this case, Mr. Loughner has been housed in a secure facility for a temporary duration, *see* 18 U.S.C. § 4241(d)(1), segregated from others because of the high-profile nature of the case, and housed in a facility well-equipped to deal with dangerousness by means less intrusive than forced medication. *See, e.g.*, ER 99 (Declaration of BOP psychologist opining that the psychiatric seclusion unit available at federal medical referral centers has sufficient means to protect safety without resort to forced medication even in the case of a detainee who has repeatedly assaulted inmates and officers).

3. The balancing of interests results in the narrow standard for pretrial medication on dangerousness grounds articulated in *Riggins* and confirmed by *Sell*.

The differences in the context of the convicted inmate in *Harper* and that of Mr. Loughner alters the various interests to be weighed, and this alters the substantive

due process standard to be applied. *Riggins* recognized these differences and articulated the correct standard in requiring that "the prosecution . . . demonstrate[], and the District Court [find], that the treatment with antipsychotic medication [is] medically appropriate and, considering less intrusive alternatives, essential for the sake [the detainee's] own safety or the safety of others." 504 U.S. at 135.

Yet despite these obvious differences, and the clear command of the Supreme Court in *Riggin*s, the government has insisted throughout this litigation that *Harper*, and only *Harper*, is relevant. This position is based upon a misreading of *Sell's* command that courts first consider whatever medication is appropriate for the purposes addressed in *Harper* before considering competency restoration. The government's reading is mistaken. Its argument wrong. Neither *Sell* nor this Circuit's caselaw supports this position.

What *Sell* actually states is:

> A court need not consider whether to allow forced medication for that kind of purpose, if forced medication is warranted for a different purpose, *such as the purposes set out in Harper* related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk. 494 U.S. at 225-26. There are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds before turning to the trial competence question.

Id., 539 U.S. at 181-82 (emphasis added). The Supreme Court has not instructed courts to abdicate to prisons judicial responsibility for deciding these issues. Instead,

it has advised courts to first inquire whether medication is justified because a detainee is a danger to himself or others. Because the inquiry concerns a detainee, the question will necessarily be determined by the standard in *Riggins*. Indeed, *Sell* restates the *Riggins* standard as the appropriate standard to be applied in the pretrial context. *See Sell*, 539 U.S. at 179.

The Court goes on to explain that application of *Riggins*' narrow standard is appropriate because an inquiry under it is "more 'objective and manageable' than the inquiry into whether medication is permissible to render a defendant competent." *Id.* at 182 (quoting *Riggins*, 504 U.S. at 140 (Kennedy, J., concurring)). Explaining why this is so, the Court held that

> The medical experts may find it easier to provide an informed opinion about whether, given the risk of side effects, particular drugs are medically appropriate ***and necessary*** to control a patient's potentially dangerous behavior (or to avoid serious harm to the patient himself) than to try to balance harms and benefits related to the more quintessentially legal questions of trial fairness and competence.

Sell, 539 U.S. at 182 (emphasis added). The *Riggins* standard is more objective and manageable because it is limited to (1) mitigating danger, as opposed to more far-reaching treatment goals for mental illness; and (2) determining whether psychotropic medicatons are, "considering less intrusive means, essential" to that aim. *Riggins*, 504 U.S. at 135. Were courts to allow the *Riggins* inquiry to expand to questions about treating "the core manifestations of the mental disease," ER 172, the purpose

of first examining dangerousness would be defeated. Determining how to best treat mental illness throws doctors and courts back into the thicket of issues that are normally addressed in a *Sell* hearing. This path would also impermissibly muddle the dangerousness rationale with the attempt to administer psychotropic medications for purposes of treatment and restoration of competency. *See United States v. Hernandez-Vasquez*, 513 U.S. 908, 919 (9th Cir. 2008) (courts should "not allow the inquires to collapse into each other"); *cf. Harper*, 494 U.S. at 249-50 (Stevens, J., dissenting) (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).

For a mentally ill, incompetent defendant to be restored to competency, the underlying mental illness must be addressed. And any decision of how to treat mental illness with medication 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 framework for protecting a defendant's

rights when medication is forced on him as a means of treatment. To permit the prison to make these treatment decisions in the pretrial context without *Sell*'s guidance and protections not only jeopardizes a significant liberty interest, it also jeopardizes a fair trial, an interest held not just by the defendant but by the government.

For all of these reasons, the standard applied to the dangerousness inquiry in the pretrial context must be the one announced in *Riggins* and confirmed by *Sell*. To otherwise mix the desire for treatment with concerns about dangerousness into the dangerousness inquiry would impermissibly side-step the significant concerns and procedural protections established in *Sell* and its progeny.

C. BECAUSE THE PRISON JUSTIFIED THE USE OF PSYCHOTROPIC MEDICATION AS A MEANS OF TREATING MENTAL ILLNESS RATHER THAN CONSIDERING LESS INTRUSIVE MEANS OF CONTROLLING PERCEIVED DANGEROUSNESS, IT HAS VIOLATED THE *RIGGINS* STANDARD.

The prison's decision to forcibly medicate Mr. Loughner because less intrusive means of mitigating danger would not treat his mental illness violates the substantive due process standard set out in *Riggins*. There, the Supreme Court was clear that forcibly medicating a pretrial detainee is permissible only when it is *essential* to his safety or the safety of others. *Riggins*, 504 U.S. at 135. Certainly there are cases where alternative measures for addressing dangerousness are unavailable, too costly,

or ineffective, 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 this is precisely what the prison did not do in this case when it decided to import a treatment rationale into its decision. The prison rejected less intrusive means of managing Mr. Loughner's purported dangerousness, not because they would be ineffective, but because they would not address his mental illness. *See supra* at 8-9.

Under these circumstances, the prison did not find, nor could it, that the forcible administration of antipsychotic drugs was "essential for [Loughner's] own safety or the safety of others." *Riggins*, 504 U.S. at 135. In focusing its efforts on treating mental illness rather than mitigating danger, the prison ignored this Court's admonition in *Ruiz-Gaxiola* that efforts to mitigate danger and efforts to restore competency are two separate matters, and that "[t]he two inquiries should not be allowed to 'collapse into each other.'" *Id.* at 694, n.6 (quoting *Hernandez-Vasquez*, 513 F.3d at 919). The prison did allow the two inquiries to "collapse into each other" resulting in the non-essential and therefore improper medication of Mr. Loughner.

II.

DUE PROCESS REQUIRES THAT THE DECISION TO FORCIBLY MEDICATE A PRETRIAL DETAINEE BE MADE BY A COURT, NOT PRISON ADMINISTRATORS

A. STANDARD OF REVIEW

Whether a particular procedure is required by the Due Process Clause is a question of law. *Soffer v. City of Costa Mesa*, 798 F.2d 361, 362 (9th Cir. 1986). Questions of law arising out of forced medication orders are reviewed *de novo*. *Hernandez-Vasquez*, 513 F.3d at 915-16. Factual questions are reviewed for clear error. *Id.*

B. A PRETRIAL DETAINEE MAY NOT BE FORCED TO TAKE PSYCHOTROPIC DRUGS ON THE BASIS OF AN ADMINISTRATIVE DETERMINATION BY THE DETENTION FACILITY.

The district court erred when approving the forcible administration of psychotropic drugs to Mr. Loughner on the basis of a decision made solely by prison administrators. When the subject is a pretrial detainee, rather than a convicted prisoner, the Due Process Clause requires heightened procedural protections, namely: (1) a judicial determination (2) with representation of counsel (3) made by clear and convincing evidence after (4) an opportunity to present evidence and witnesses at a judicial hearing. This is because the applicable balance of interests under *Mathews v. Eldridge* sharply favors the interests of the detainee—unlike the *Mathews* balance

when the subject is a convicted prisoner, where the prisoner's interests are lesser and the government's more substantial. *See Harper*, 494 U.S. at 228-36 (applying *Mathews* to hold that an administrative determination is enough to forcibly medicate a convicted prisoner).

Reaching the correct result requires applying the correct test—something the district court failed to do. *See generally* ER 3-10. The correct test is the one set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which must be conducted "with reference to the rights and interests at stake in the particular case." *Harper*, 494 U.S. at 229 (emphasis added). Under *Mathews*, this Court weighs:

> 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.

These concerns are, of course, different in this "particular case"—involving forced medication in the pretrial context—than they were in *Harper*, which addressed the issue in the post-conviction, correctional setting. This is something that both this Court 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 Order (Doc. No. 10) ("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*, 378 F.3d at 1032). Correctly balancing the competing *pretrial* interests establishes the inadequacy of the purely administrative procedures used to justify forcibly medicating Mr. Loughner.

C. BALANCING THESE INTERESTS NECESSITATES AN ADVERSARIAL JUDICIAL HEARING BEFORE A PRETRIAL DETAINEE MAY BE FORCIBLY MEDICATED ON DANGEROUSNESS GROUNDS.

The private interests to be balanced are those "that will be affected by the official action." *Mathews*, 424 U.S. at 335. These are those same interests that a court considers in determining the substantive due process standard. They remain weighty and include the right to be free of the intended brain-altering effects of antipsychotic drugs, the right to be free of the grievous unintended effects of the drugs and the right to a fair trial. These interests weigh as heavily in determining what procedures are constitutionally required as they do in determining the appropriate substantive standard. *See supra* at 17-25.

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. In the context of the *Mathews* test, the governmental interest differs from that weighed in determining the substantive standard. 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").

The government function involved, maintaining the detainee's, and the institution's, security is an important one. But, again, the *Mathews* calculus looks not at the strength of that interest but at the way in which additional procedural protections would negatively affect it. *Id.* Assuming the danger presented by a detainee is real, additional procedural protections would still cause only minimal harm to the government's interest. The judicial process is already in place. A judge

and lawyers are already involved, and there is no reason judicial proceedings should unduly delay action. Indeed, here, from the time of the incidents the prison claims show dangerousness to the time it made its administrative determination to forcibly medicate Mr. Loughner, some two months passed. Surely, an adversarial judicial proceeding could have convened and reached a reliable result in less time.

Moreover, although "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)), where a true emergency exists, a prompt post-deprivation hearing may satisfy due process. *Parrat v. Taylor*, 451 U.S. 527, 539-39 (1981). Under these circumstances, additional procedural protections will have only a minimal impact on the governmental interest, an impact that is greatly outweighed by the detainee's interest in avoiding the intended and unintended effects of forced medication with antipsychotic drugs and in obtaining a fair trial.

The last element addressed in the *Mathews* calculus is the value of additional procedural protections in avoiding a wrongful deprivation. The added value of judicial proceedings is substantial here. Again, this is in marked contrast to the value of additional procedures in the post-conviction context. There, 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 the administrative hearing are supposed to render an independent decision about whether the medicate on different grounds— dangerousness. 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, as explained in greater detail *supra* at 5-9, the record here establishes that the administrative proceedings were not very "probing" at all, unlike in *Harper*. Specifically, the decision to administer psychotropic drugs was made despite the admitted effectiveness of less intrusive alternatives (minor tranquilizers), *see* ER 172, and the prison's demonstrated ability to contain any potential risk using security measures such as the special housing applicable to Mr. Loughner anyway due to the publicity of his case. *See* July 12 Order, Doc. No. 10, at 3-4 (noting that the government "has managed to keep Loughner in custody for over six months without injury to anyone"). Additionally, the administrators here ordered involuntary

medication without even knowing in advance what that medication would be, or how much of it would be forced on Mr. Loughner—again in stark contrast to the proceedings in *Harper*. *Compare Harper*, 494 U.S. at 222 & n.8 (state policy required one physician to prescribe medication and second to approve it "before the hearing committee [makes any] determin[ation]"), *with* ER 172 (hearing report fails to specify what drug is under contemplation). *Accord infra* at 50-54 (failure to specify identity and maximum quantity of the medication violated *Hernandez-Vasquez*). Finally, the government has all but admitted in the course of this litigation that the outcome of the administrative proceedings were predetermined, notwithstanding any evidence Mr. Loughner might have presented on his own behalf. *See* Gov Response to Emergency Stay Mtn at 22 (Doc. No. 4-1) (admitting that eyewitness testimony that Mr. Loughner did not "lunge," contrary to the administrative finding that he did, "would not have altered BOP's conclusion" of dangerousness to others). A proceeding whose outcome is immune to the evidence cannot possibly be characterized as "probing."

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). In sum, 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.

D. THE ADDITIONAL PROCEDURAL PROTECTIONS ARE CONSTITUTIONALLY NECESSARY

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 this Court 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; nor has it gone unnoticed by this Court. In *Hernandez-Vasquez*, this Court stated that a judicial determination of involuntary medication of a pretrial detainee is the law of this Circuit:

> 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).

In sum, Mr. Loughner's due process rights were plainly violated by the government's forcible administration of psychotropic drugs against his will on the basis of an administrative determination without any opportunity to present evidence at a judicial hearing while represented by counsel. *See* ER 8 (district court denial of evidentiary hearing). The district court's order should be reversed.

III.

THE PRISON VIOLATED DUE PROCESS IN THREE ADDITIONAL WAYS IN THE COURSE OF THE ADMINISTRATIVE PROCEEDINGS

Even assuming *arguendo* that the law permits forcible medication of pretrial detainees on the basis of an administrative decision, Mr. Loughner's due process rights were violated here in three additional ways. These are: (1) the prison's violation of its own rule guaranteeing Mr. Loughner the right to call witnesses; (2) its failure to specify the identity and maximum dosage of the medication under consideration in the administrative proceeding; and (3) basing its forced medication rationale in part on the risk of "significant property damage." Mr. Loughner is

entitled to relief on each of these separate grounds even if the Court agrees with the government that only the most minimal "arbitrariness" review applies.

A. VIOLATION OF THE RIGHT TO CALL WITNESSES

The record plainly establishes that the prison denied Mr. Loughner his request that his attorney appear as a witness at the administrative proceeding. A detainee's right to call witnesses of his choice to testify at his proceeding is one guaranteed by the regulation governing the proceedings, 28 C.F.R. § 549.43(a)(2). It is, moreover, undisputed that an "agency's failure to afford an individual procedural safeguards required by its own regulations" requires reversal so long as the regulation is designed for the benefit of the complaining individual and the violation prejudiced his interests. *United States v. Morgan*, 193 F.3d 252, 266-67 (4th Cir. 1999).

This was the case here. The regulation granting Mr. Loughner the right to call witnesses is clearly intended for his benefit. Its violation prejudiced him because he was denied the opportunity to present direct, eyewitness evidence of the inaccuracy of one of the accusations against him.

The district court relied on a finding that Mr. Loughner did not, in fact, request his attorney—a percipient witness and alleged victim of one of the three incidents forming the basis of Mr. Loughner's purported dangerousness to others in the custodial setting. *See* ER 72 (district court concluding: "I didn't read the 'just my

attorney' as a request for an attorney as a witness. I read [his request] as an assertion of the right to have an attorney representing him at the *Harper* hearing."). This finding was clearly erroneous because the district court's reading of the paper record was plainly mistaken. *See Ruiz-Gaxiola*, 623 F.3d at 693 ("A trial court's factual finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

The record plainly demonstrates that Mr. Loughner requested his attorney *as a witness*, not just as an advocate. Specifically, the prison staff member assigned to assist Mr. Loughner in the administrative hearing reported that:

> I met again with Mr. Loughner on Tuesday, June 14 on Unit 10-D, just prior to the involuntary medication review proceeding. I asked him again if he desired any witnesses to be present for the hearing. He told me "Just my attorney."

ER 169. As this clearly shows, Mr. Loughner's response to being asked whether he wanted "any witnesses"—not whether he wanted an attorney to represent him—was to request his "attorney."

It is, moreover, quite obvious why Mr. Loughner might request his attorney to be a witness, rather than just a representative, at the hearing. His attorney was a percipient witness to one of the three incidents allegedly demonstrating "dangerousness" that Mr. Loughner was accused at the hearing of engaging in. *Id.*

at 171 (finding that "Mr. Loughner spat at his attorney, lunged at her, and had to be restrained by staff"). And had Mr. Loughner been allowed to present his attorney's testimony, which he was not, she would have testified that the she was never lunged at and never felt that she was at risk in any way. *See* ER 73. The district court's reading simply does not withstand examination of the record. Its erroneous reading is entitled to no deference because the usual reasons for deferring to factual findings below do not apply. All the district court did was read the documents in the cold record, something this Court is equally well positioned to do.

B. FAILURE TO SPECIFY THE IDENTITY AND MAXIMUM DOSAGE OF THE MEDICATION

Mr. Loughner's procedural and substantive due process rights were also violated by the administrative proceeding's blanket authorization of treatment with "psychotropic medication" without limitation as to the specific type of medication or the maximum dosages authorized. This failure made it impossible to render a proper determination about the "medical appropriateness" of the forcible medication. *See Harper*, 494 U.S. at 227; *Sell*, 539 U.S. at 179 (medication of pretrial detainee must be "medically appropriate"). It also violated the rule set forth in *Hernandez-Vasquez*, which requires authorization for forcible medication to specify "the specific medication or range of medications" and "maximum dosages" authorized in order to

satisfy the medical-appropriateness requirement applicable to involuntary medication. *Hernandez-Vasquez*, 513 F.3d at 916.

The administrative proceeding here commenced and concluded without ever specifying what drug the prison wished to force on Mr. Loughner and how much of it was contemplated. Nowhere is the *actual medication* or *its maximum dosage* specified in the hearing materials. *See* ER 172. The administrative materials simply authorize "treatment with psychotropic medication on an involuntary basis." *See id*. There appear to be no limits on the type, quantity, or duration 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 *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.

This Circuit has held in an analogous 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*, for competency restoration, not the dangerousness rationale asserted here. *Hernandez-Vasquez*'s specificity holding is nonetheless binding because, on the issue of medical appropriateness, the *Sell* standard is identical to the one employed in *Harper* and *Riggins*. This is because the specificity holding emerges directly from a *Sell* requirement that is equally necessary to satisfy the *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*],[2] 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

[2]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").

> 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 *Hernandez-Vasquez* 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, this 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.*

In sum, the cases make plain that the identity of the drug and maximum allowable dosages must be specified *before* the conclusion of any hearing on forced medication. Otherwise, the "medical appropriateness" of the regimen simply cannot be assessed. This rule was violated here. The district court was wrong to reject this point without analysis and its decision should be reversed.

C. APPROVAL OF FORCIBLE MEDICATION TO PROTECT THE "PROPERTY" OF OTHERS

No authority supports the notion that the government may force psychiatric medication on a person in order to prevent damage to mere property. *See Harper*, 494 U.S. at 227 (permitting forced medication only "if the inmate is dangerous to himself or others"). Such action would plainly violate the Constitution. Yet that is exactly what happened here.

After the initial administrative hearing authorized medication, Mr. Loughner appealed to the warden. The warden denied the appeal and found forced medication justified on the following basis:

> Without 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*.

ER 176 (emphasis added). This is consistent with the findings at the initial hearing. *See* ER 170 (checking box indicating that "The patient is dangerous to others by actively engaging . . . in conduct which is either intended or reasonably likely to cause physical harm to another *or cause significant property damage*.") (emphasis added). The prison's reliance on the harm-to-property justification plainly violated Mr. Loughner's rights.

The government may argue that this Court should ignore the warden's findings and look instead to the hearing officer's statement that medication was ordered due to "actions on his part dangerousness [*sic*] to others within the correctional setting." ER 172. This argument is unavailing because it is the administrative body's final decision—the warden's—that this Court reviews. *See Yepes-Prado v. INS*, 10 F.3d 1363, 1366 (9th Cir. 1993).

CONCLUSION

For the reasons set forth above, the district court's order should be reversed, and the prison should be permanently enjoined from forcibly medicating Mr. Loughner on the basis of *Washington v. Harper* without a judicial hearing applying the standard set forth in *Riggins v. Nevada*.

Respectfully submitted,

/s/ Judy Clarke

DATED: July 27, 2011

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CERTIFICATE OF RELATED CASES

Counsel for the Appellant is unaware of any other related cases pending before this Court which should be considered in this appeal.

Respectfully submitted,

/s/ Judy Clarke

DATED: July 27, 2011

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 11-10339

I certify that: (check appropriate options(s))

X 1. Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached opening/~~answering/reply/cross~~ appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 12,043 words (opening, answering, and the second and third briefs filed in cross-appeals must NOT exceed 14,000 words; reply briefs must NOT exceed 7,000 words),

or is

❑ Monospaced, have 10.5 or fewer characters per inch and contain ______ words or _____ lines of text (opening, answering, and second and third briefs filed in cross-appeals must NOT exceed 14,000 words, or 1,300 lines of text; reply briefs must NOT exceed 7,000 words or 650 lines of text).

/s/ Judy Clarke

July 27, 2011
Date

JUDY CLARKE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on July 27, 2011 , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. As ordered by the Ninth Circuit, I am also sending 7 copies of the appellant's opening brief and 4 copies of the excerpt of record via federal express.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Judy Clarke

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ADDENDUM

INDEX TO ADDENDUM

UNITED STATES v. LOUGHNER
U.S.C.A. No. 11-10339

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APPENDIX A

C

Effective: July 27, 2006

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part III. Prisons and Prisoners
Chapter 313. Offenders with Mental Disease or Defect
→ **§ 4241. Determination of mental competency to stand trial to undergo postrelease proceedings**

(a) Motion to determine competency of defendant.--At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.--Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) Hearing.--The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.--If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until--

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to

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go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) Discharge.--When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) Admissibility of finding of competency.--A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 855; Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2057; July 27, 2006, Pub.L. 109-248, Title III, § 302(2), 120 Stat. 619.)

Current through P.L. 112-23 approved 6-29-11

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APPENDIX B

C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 28. Judicial Administration
Chapter V. Bureau of Prisons, Department of Justice
Subchapter C. Institutional Management
Part 549. Medical Services (Refs & Annos)
Subpart C. Administrative Safeguards for Psychiatric Treatment and Medication (Refs & Annos)

§ 549.43 Involuntary psychiatric treatment and medication.

Title 18 U.S.C. 4241–4247 and federal court decisions require that certain procedures be followed prior to the involuntary administration of psychiatric treatment and medication to persons in the custody of the Attorney General. Court commitment for hospitalization provides the judicial due process hearing, and no further judicial authorization is needed for the admission decision. However, in order to administer treatment or psychotropic medication on an involuntary basis, further administrative due process procedures, as specified in this section, must be provided to the inmate. Except as provided for in paragraph (b) of this section, the procedures outlined herein must be followed after a person is committed for hospitalization and prior to administering involuntary treatment, including medication.

(a) Procedures. When an inmate will not or cannot provide voluntary written informed consent for psychotropic medication, the inmate will be scheduled for an administrative hearing. Absent an emergency situation, the inmate will not be medicated prior to the hearing. In regard to the hearing, the inmate will be given the following procedural safeguards:

(1) Staff shall provide 24–hour advance written notice of the date, time, place, and purpose of the hearing, including the reasons for the medication proposal.

(2) Staff shall inform the inmate of the right to appear at the hearing, to present evidence, to have a staff representative, to request witnesses, and to request that witnesses be questioned by the staff representative or by the person conducting the hearing. If the inmate does not request a staff representative, or requests a staff representative with insufficient experience or education, the institution mental health division administrator shall appoint a staff representative. Witnesses 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. Witnesses who only have repetitive information need not be called.

(3) The hearing is to be conducted by a psychiatrist who is not currently involved in the diagnosis or treatment of the inmate.

(4) The treating/evaluating psychiatrist/clinician must be present at the hearing and must present clinical data and background information relative to the need for medication. Members of the treating/evaluating team may also attend the hearing.

(5) The psychiatrist conducting the hearing shall determine whether treatment or psychotropic medication is necessary in order to attempt to make the inmate competent for trial or is necessary because the inmate is dangerous to self or others, is gravely disabled, or is unable to function in the open population of a mental health referral center or a regular prison. The

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psychiatrist shall prepare a written report regarding the decision.

(6) The inmate shall be given a copy of the report and shall be advised that he or she may submit an appeal to the institution mental health division administrator regarding the decision within 24 hours of the decision and that the administrator shall review the decision within 24 hours of the inmate's appeal. The administrator shall ensure that the inmate received all necessary procedural protections and that the justification for involuntary treatment or medication is appropriate. Upon request of the inmate, the staff representative shall assist the inmate in preparing and submitting the appeal.

(7) If the inmate appeals, absent a psychiatric emergency, medication will not be administered before the administrator's decision. The inmate's appeal, which may be handwritten, must be filed within 24 hours of the inmate's receipt of the decision.

(8) A psychiatrist, other than the attending psychiatrist, shall provide follow-up monitoring of the patient's treatment or medication at least once every 30 days after the hearing. The follow-up shall be documented in the medical record.

(b) Emergencies. For purpose 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.

(c) Exceptions. Title 18 United States Code, sections 4241 through 4247 do not apply to military prisoners, unsentenced Immigration and Naturalization Service (INS) detainees, unsentenced prisoners in Bureau custody as a result of a court order (e.g. a civil contemnor), state or territorial prisoners, and District of Columbia Code offenders. For those persons not covered by sections 4241–4247, the decision to involuntarily admit the person to the hospital must be made at an administrative hearing meeting the requirements of Vitek v. Jones. The decision to provide involuntary treatment, including medication, shall nonetheless be made at an administrative hearing in compliance with § 549.43.

[60 FR 49444, Sept. 25, 1995]

<Subpart effective until Aug. 12, 2011.>

SOURCE: 52 FR 48068, Dec. 17, 1987; 55 FR 17355, April 24, 1990; 57 FR 53820, Nov. 12, 1992; 68 FR 47849, Aug. 12, 2003; 70 FR 29193, May 20, 2005; 70 FR 43050, July 26, 2005; 73 FR 70280, Nov. 20, 2008; 76 FR 40231, July 8, 2011, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 876b; 18 U.S.C. 3621, 3622, 3524, 4001, 4005, 4042, 4045, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), Chapter 313, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

28 C. F. R. § 549.43, 28 CFR § 549.43

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