

Judy Clarke
Clarke and Rice, APC
1010 2nd Avenue, Suite 1800
San Diego, CA 92101
(619) 308-8484

Mark Fleming
Law Office of Mark Fleming
1350 Columbia Street, #600
San Diego, CA 92101
(619) 794-0220

Reuben Camper Cahn
Ellis M. Johnston III
Janet Tung
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467

Attorneys for Defendant Jared Lee Loughner

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JARED LEE LOUGHNER,

Defendant.

Case No. CR 11-0187-TUC LAB

**DEFENDANT'S EMERGENCY
MOTION TO IMMEDIATELY ENJOIN
FORCIBLE MEDICATION**

MOTION

Defendant Jared Loughner, by and through his counsel, hereby seeks to immediately enjoin the involuntary administration of unspecified psychiatric medications by the Bureau of Prisons pending a hearing and judicial determination of the appropriateness of forcibly medication in this case. This motion is based on the Due Process Clause of the United States Constitution, 28 C.F.R. § 549.43, any and all applicable provisions of the federal constitution and statutes, all files and records in this case, and any further evidence as may be adduced at the hearing on this motion.

I.**INTRODUCTION**

The Attorney General, acting through the Bureau of Prisons, and without the approval of the court, has decided to involuntarily and forcibly medicate Jared Loughner on the grounds that he is a danger to others.¹ Records produced by the Bureau of Prisons indicate that an internal administrative proceeding was held on June 14, 2011 at which Mr. Loughner was denied his request for his attorney to be present. Springfield FMC staff made a finding that Mr. Loughner should be involuntarily and forcibly medicated with unspecified, powerful anti-psychotic medications in unspecified dosages. The Warden upheld this determination on June 20, 2011. Undersigned counsel have no idea whether or not the forcible medication regime has begun.

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

II.**BACKGROUND**

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

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

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

11 For nearly six months since his arrest on January 8, 2011, Mr. Loughner has remained in
12 isolation because of the nature of the case. Until his recent arrival at Springfield in late May
13 2011, the Bureau of Prisons made no claim that Mr. Loughner should be forcibly medicated
14 because of danger to himself or others. Yet, almost immediately upon his arrival at Springfield
15 for purposes of competency restoration and only after he declined to take psychotropic
16 medications voluntarily for purposes of restoration, Mr. Loughner was notified of the prison's
17 intent to forcibly medicate him on the grounds that he was a danger to others. At the June 14th
18 hearing, Dr. Tomelleri concluded that Mr. Loughner would be forcibly medicated with
19 psychotropic medications "on the basis of a diagnosis of mental illness and of actions on his part
20 [sic] dangerousness to others within the correctional setting" Exhibit C at 558. Specifically,
21 Dr. Tomelleri cited three isolated instances of conduct during Mr. Loughner's five-plus months
22 in custody as justification for his conclusion. *Id.* at 557. Two of these involved throwing a
23 plastic chair inside the isolated confines of his closed and locked cell, one of which occurred
24 three months ago; the third involved spitting at counsel, also more than two months ago.

25 The forced medication report concludes that "psychotropic medication is universally
26 accepted as the choice for conditions such as Mr. Loughner's." *Id.* at 558. It does not clarify
27 whether the "conditions" it is referring to is Mr. Loughner's mental illness or his perceived
28

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

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

21 Defense counsel became aware of the unilateral decision to involuntarily and forcibly
22 medicate Mr. Loughner on June 21, 2011, upon receipt of BOP records. Counsel have sought
23 since that time, but to no avail, to obtain information about Mr. Loughner’s condition, to visit
24 with him cell side, and to have a medical expert visit with him cell side. At this time, counsel
25
26
27
28

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

3 II.

4 **THE FORCIBLE MEDICATION ORDER SIDE-STEPS THE PROTECTIONS** 5 **AFFORDED TO PRETRIAL DETAINEES BY *SELL* AND VIOLATES *HARPER*** 6 **AND *RIGGINS***

7 Mr. Loughner has a due process right to bodily integrity free of unwanted, forcible
8 administration of psychiatric medication. *Washington v. Harper*, 494 U.S. 210, 221 (1990).
9 That right has both a substantive and procedural component. *Id.* at 220. Both were violated
10 here.

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

21 Moreover, unlike the case of a convicted felon serving a lengthy prison term, *see Harper*,
22 494 U.S. at 213-17, additional concerns about the administration of psychotropic medication
23 are raised in the pretrial context because potential side effects of the medication have “an
24 impact upon not just [the detainee’s] outward appearance, but also the content of his testimony
25 on direct or cross examination, his ability to follow the proceedings, or the substance of his
26 communication with counsel.” *Riggins*, 504 U.S. at 137; *see id.* at 139 (Kennedy, J.,

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

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

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

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

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

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

22 By contrast, in the pre-trial dangerousness context, the prison's sole prerogative is to
23 neutralize any danger. Yet, here the prison engaged instead in the error-prone, multi-faceted
24 decision to *treat mental illness* and did so in a truncated, non-adversarial setting when it decided
25 to forcibly medicate Mr. Loughner on the ostensible grounds of addressing dangerousness.
26 Certainly there are cases where alternative measures to address dangerousness are unavailable,
27 too costly, or ineffective in dealing with dangerousness, and in those cases the decision to
28

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

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

19 It is critical that any dangerousness determination by the prison be decoupled from
20 overarching desires to treat a mental disease. This is why “medical necessity” in the *Harper*
21 context is defined differently from treatment. Medical necessity for purposes of dangerousness
22 means “essential for the sake of [the detainee’s] own safety or the safety of others.” *See*
23 *Riggins*, 504 U.S. at 135. And, by definition, it can only be essential if and only if “less
24 intrusive alternatives” have been considered and deemed ineffective or unavailable, which they
25 were not in this case. More far-reaching and error-prone treatment concerns are the province
26 of this Court, and must be considered in full and fair judicial proceedings with the guidance of
27 *Sell*. By importing these concerns into the dangerousness context, the prison has usurped the
28

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

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

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

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

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

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

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

26 Focused on the long-term treatment of Mr. Loughner’s mental illness rather than the
27 immediacy of dealing with any dangerousness concerns, the report quickly rejects other less
28

1 intrusive remedies without considering their effectiveness for the short duration of his
2 commitment to the prison. The report concedes that minor tranquilizers--which do not have the
3 same potential as psychotropics for debilitating, and even fatal, side effects and the permanent
4 changing of Mr. Loughner's mental faculties, *see Harper*, 494 U.S. at 229-30--"are useful in
5 reducing agitation," but rejects their use because they "have no direct effect on the core
6 manifestations of the mental disease." Exhibit C at 558. It nowhere explains why this
7 alternative is not effective to lessen dangerousness. *Accord Jones v. Caruso*, 569 F.3d 258,
8 273-74 (6th Cir. 2009) (prison regulation was likely an "exaggerated response" where other
9 rules already in place appeared to fully address the stated concerns).

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

24 Quite simply, the prison has failed to demonstrate how the use of psychotropic drugs are
25 "essential for [Mr. Loughner's] safety or the safety of others." *Riggins*, 504 U.S. at 135. For
26 nearly six months, Mr. Loughner has been detained using less intrusive alternatives without
27 serious harm to Mr. Loughner or anyone else. *See Harper*, 494 U.S. at 215 (upholding a
28

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

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

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

22 Absent a judicial determination following upon an adversary hearing at which a pre-trial
 23 detainee is represented by counsel, *Harper* does not authorize the forcible medication of such
 24 an individual who has been committed for restoration of competency. *Harper* considered and
 25 approved a decision by medical professionals to medicate a imprisoned convicted felon in order
 26 to mitigate his dangerousness in the prison setting. Applying the traditional balancing test of
 27
 28

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

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

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

20 III.

21 **THE PRISON FAILED TO ADHERE TO THE MINIMAL CONSTITUTIONAL** 22 **PROTECTIONS DELINEATED BY *HARPER* AND THE BOP'S OWN** 23 **REGULATIONS BY REFUSING TO CALL A WITNESS REQUESTED BY** 24 **MR. LOUGHNER**

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

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

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

15 Although Mr. Loughner was given notice on June 2, 2011, that a hearing would be held
16 at some unspecified date in the future, *see* Exhibit A, his staff representative did not meet with
17 Mr. Loughner, introduce himself, and discuss Mr. Loughner’s hearing rights until Monday, June
18 13th, *see* Exhibit B. The representative told Mr. Loughner that he thought the hearing “was
19 going to take place most likely” the next day. *Id.* The next day, June 14th, the representative
20 again met with Mr. Loughner and “asked him again if he desired any witnesses to be present at
21 the hearing.” Exhibit B. In response to this question, Mr. Loughner said, “Just my attorney.” *Id.*
22 Despite asking this and receiving an affirmative answer, the representative apparently made no
23 attempts contact Mr. Loughner’s attorney, so that Mr. Loughner could avail himself of the one
24 and only witness he specifically requested be present at the proceeding. Mr. Loughner’s attorney
25 could have been reasonably available as a witness, *see* 28 C.F.R. § 549.43(a)(2). The
26 representative even informed the hearing doctors that Mr. Loughner made this request. But the
27 proceeding went forward without a witness, a key witness to the alleged spitting incident and
28

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

6 IV.

7 **"MEDICAL APPROPRIATENESS" MUST BE DETERMINED BY REFERENCE TO** 8 **A SPECIFIC DRUG AND DOSAGE, AND BECAUSE NONE WAS SPECIFIED, THE** **PRISON'S ORDER VIOLATED DUE PROCESS**

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

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

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

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

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

23 *Hernandez-Vasquez*'s specificity holding is binding on this Court. In other words, on the
24 issue of medical appropriateness, *Sell* is no more or less stringent than *Harper* and *Riggins*. This
25 is because the specificity holding emerges directly from a *Sell* requirement that is equally
26 necessary to satisfy the *Harper/Riggins* test—the government's burden of establishing "medical
27 appropriate[ness]." *See id.* (citing *Sell*, 539 U.S. at 181). The specificity discussion in *Sell* that
28

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

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

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

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

V.

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

The emergency motion should be granted because administration of forcible medication is either imminent or has already begun and Mr. Loughner will suffer **irreparable harm** unless the government is enjoined from proceeding on the constitutionally deficient record present here. Psychotropic drugs “alter the chemical balance in a patient’s brain,” and “can have serious, even fatal, side effects” including “acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes,” “akathisia (motor restlessness, often characterized by an inability to sit

³The 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”).

1 still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from
 2 cardiac dysfunction); and tardive dyskinesia, a neurological disorder . . . that is
 3 characterized by involuntary, uncontrollable movements of various muscles, especially around
 4 the face.” *Harper*, 494 U.S. at 230. Tardive dyskinesia is “irreversible in some cases.” *Id.*

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

10 Finally, the public interest will be served by issuance of a stay and preservation of the
 11 status quo. Permitting the government to go forward on the woefully deficient showing here
 12 poses not just the risk of irreversible physical harm to Mr. Loughner, but the prospect of
 13 depriving the Court of the ability to fashion an appropriate remedy.

14 CONCLUSION

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

17
 18 Respectfully submitted,

19 /s/ *Judy Clarke*

20 DATED: June 24, 2011

21 JUDY CLARKE
 22 MARK FLEMING
 23 REUBEN CAMPER CAHN
 24 Attorneys for Jared Lee Loughner
 25

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