IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re JARED LEE LOUGHNER _____	)	U.S.C.A. No. U.S.D.C. No. 11CR187-TUC (LAB)
Jared Lee Loughner, Petitioner;	)	
U.S. District Court for the District of Arizona, Respondent;	)	**EMERGENCY PETITION FOR WRIT OF MANDAMUS FOR RETURN OF PETITIONER TO TUCSON, SUSPENSION OF THE DISTRICT COURT ORDER, AND RESTORATION OF THE STATUS QUO**
United States of America, Real Party in Interest.	)	

Petitioner Jared Lee Loughner, the defendant in the criminal case United States v. Jared Lee Loughner, No. No. 11CR187-TUC (LAB), in the United States District Court for the District of Arizona, hereby respectfully requests this Court to issue an emergency writ of mandamus to remedy the implementation of unlawful provisions of the district court's order concerning the competency examination under 18 U.S.C. §§ 4241 & 4247(b). Petitioner seeks an order granting the following relief: (1) that he be returned forthwith to Tucson, where he was in pretrial detention at the USP Tucson until his transfer earlier today to Springfield, Missouri, pursuant to an unlawful provision of the district court's commitment order; (2) that all further execution of the district court's March 21, 2011 Order Re: Competency Exam be

stayed pending review of that order by this Court, from which Petitioner will lodge a Notice of Appeal.

Issuance of the writ is of exceptional importance here because execution of the district court's order will result and is currently resulting in irreparable harm to Mr. Loughner. The matter is of the utmost urgency. As explained in greater detail herein, the partial execution of the order—Mr. Loughner's commitment and transfer earlier this morning to the Medical Referral Center (MRC) in Springfield, Missouri—occurred despite the fact that an emergency motion to stay the order was pending before the district court and despite ample notice to the government of the defense's intent to seek an emergency stay in this Court. Moreover, issuance of the writ is essential and authorized under the All Writs Act, 28 U.S.C. § 1651, because it is "necessary [and] appropriate in aid of [this Court's] jurisdiction" over the issues appealed. Failure to issue the writ is likely to moot the issues and thus deprive the Court of jurisdiction.

Respectfully submitted,

DATED: March 23, 2011

/s/Judy Clarke

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
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467
Attorneys for Defendant-Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re JARED LEE LOUGHNER _____	)	U.S.C.A. No. U.S.D.C. No. 11CR187-TUC (LAB)
Jared Lee Loughner, Petitioner;	)	
U.S. District Court for the District of Arizona, Respondent;	)	**EMERGENCY PETITION FOR WRIT OF MANDAMUS FOR R E T U R N OF PETITIONER TO TUCSON, SUSPENSION OF THE DISTRICT COURT ORDER, AND RESTORATION OF THE STATUS QUO**
United States of America, Real Party in Interest.	)	

CIRCUIT RULE 27-3 CERTIFICATE OF COUNSEL

(i) <u>The Telephone Numbers and Office Addresses of the Attorneys for the Parties</u>:

<u>Counsel for Plaintiff-Appellee, United States of America</u>:

Dennis K. Burke, United States Attorney
Wallace H. Kleindienst, Beverly K. Anderson, Christina M. Cabanillas, Mary Sue Feldmeier, Assistant United States Attorneys
405 W. Congress St., Suite 4800
Tucson, AZ 85701
Telephone: (520) 620-7300

<u>Counsel for Defendant-Appellant, Jared Lee Loughner</u>
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
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467

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

On March 9, 2011, the district court granted the government's motion for a competency hearing under 18 U.S.C. § 4241, over defense objections to the competency proceedings as premature and as potentially unduly interfering with the development of the attorney-client relationship. The district court indicated that, prior to the competency hearing, it would exercise its authority under §§ 4241(b) and 4247(b) to order a psychiatric or psychological examination of Mr. Loughner. The district court acknowledged the defense interest in maintaining ready access to the defendant but did not resolve the logistics of the competency examination on March 9.

The parties subsequently met, but ultimately submitted separate proposals for the logistics and procedures to apply to the § 4241(b) examination. The defense vigorously argued that Mr. Loughner should be allowed to remain at USP Tucson, and urged appointment of an independent competency examiner by the district court. The government, in an about-face from its position on March 9, when it had advocated commitment to the federal pretrial facility in San Diego, urged that Mr. Loughner be transferred to Springfield, Missouri. The government's reason for picking a location in Missouri was its view that the Medical Referral Center there was the "most suitable facility" for BOP examiners to conduct an evaluation.

The defense also requested:

- Fifth Amendment protection of any statements obtained during the examination, pursuant to Estelle v. Smith, 451 U.S. 454 (1981);
- advance notice of any proposed testing instruments;
- the presence of defense counsel via live video feed at the court-compelled examination; and
- a videotape recording of court-appointed experts that would be provided only to defense counsel. (Doc. 159 at 4-6.)

These requests were made in order to safeguard Mr. Loughner's constitutional rights—which could otherwise be irretrievably lost were this case to proceed beyond competency proceedings.

On March 21, the district court rejected the defense requests and issued an order providing the government with much more than even it had asked for.[1] In an unprecedented infringement on the Fifth and Sixth Amendment rights of an individual charged with capital crimes, the district court ordered that (1) videotaped recordings of the compelled psychiatric examination of Jared Loughner *be provided to government counsel*; (2) any defense psychiatric examination conducted to determine competency to stand trial be conducted at the Springfield BOP facility, be videotaped and that those *videotapes be provided to government counsel*; and (3) that Mr. Loughner be committed to Medical Referral Center (MRC) Springfield, Missouri,

[1]A copy of the order is attached hereto as Exhibit A.

so that the Department of Justice (DOJ), through its Bureau of Prisons, would conduct the examination, rather than an independent, court-appointed examiner—and thus granting the DOJ unlimited access to the defendant. *See* Order Re: Competency Exam, filed March 21, 2001, pp. 5-6, ¶4, and 6.[2] The district court rejected the defense request for an order protecting the use of the examination, and limiting access to video recordings to defense counsel. *See* Order at p. 5 ("The numerous other requests made on behalf of the defendant concerning the manner and protocol for conducting the competency examination have been considered by the Court and found wanting, and are DENIED.") The district court's order, providing unlimited prosecutorial access to the examinations by the defense as well as by the BOP of this seriously mentally ill young man and imposing unprecedented limitations on the work of the defense, violates the Fifth and Sixth Amendments.

On March 22, 2011, the defense filed with the district court an emergency motion to stay the March 21 order and to reconsider its rulings, and also provided notice of its intent to seek appellate review.[3] Defense counsel contacted the district court and was informed by the district court's clerk that the government advised it would take three to four days to arrange the transfer. Counsel also contacted the

---

[2] The district court also apparently directed the defense evaluator to provide a written report, lodged with the district court by May 11, 2011.

[3]The emergency motion is attached hereto as Exhibit B.

government, notified the government of its intent on March 22, and was informed by government counsel that there would be sufficient time for the court to consider the motion prior to Mr. Loughner's physical transfer to Springfield, Missouri.

In the morning of March 23, defense counsel attempted to contact government counsel via telephone concerning scheduling matters, but was unable to reach government counsel. Defense counsel left a voicemail message and sent an email to government counsel, and continued in their efforts to prepare an emergency motion for stay pending appeal to this Court. At approximately 11:40 A.M., defense counsel received an email from government counsel stating that Mr. Loughner "left Tucson about two hours ago on a plane to Springfield."

Having no other remedy, the defense now files this emergency petition for writ of mandamus to restore the status quo and prevent irreparable harm.

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

On March 23, defense counsel has notified counsel for the government via email that the instant emergency petition would be filed. Counsel for Mr. Loughner has also notified the Ninth Circuit and the chambers of Judge Burns that the instant emergency petition for writ of mandamus would be filed. Counsel for the government will be presented with this motion, by electronic mail and by U.S. mail.

(iv) Relief Requested:

The defense requests that this Court issue a writ of mandamus directed to the United States District Court for the District of Arizona, and to the Honorable Larry A. Burns, presiding by designation, directing them order Mr. Loughner's return to Tucson forthwith and to stay any further implementation of the district court's March 21 Order pending the resolution of full review by this Court.

(v) Whether All Grounds of Relief Were Submitted to the District Court:

The substantive issues have been submitted to the district court. On March 22, 2011, the defense filed with the district court an emergency motion for stay of the order and motion for reconsideration. The legal arguments and relief sought by the motion were substantially the same as those in the instant petition. As of the writing of this petition on March 23, the district court has not yet acted on the motion for reconsideration and stay, but the district court anticipates it will issue an order by the end of today. As the provisions of the challenged Order are already being carried out—the government has taken custody of Mr. Loughner and physically transferred him to the MRC in Springfield, Missouri, and the district court has not yet acted on the emergency stay motion—the district court has "failed to afford the relief requested," necessitating the instant request. See Fed. R. App. 8(a)(2)(ii).

(vi) Bail Status

Mr. Loughner, to defense counsel's best knowledge, is presently en route from UCP Tucson to MRC Springfield, located at 1900 W. Sunshine St, Springfield, Missouri 65807 (Tel.: 417-837-1717).

Respectfully submitted,

DATED: March 23, 2011

/s/ Judy Clarke

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
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467
Attorneys for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re JARED LEE LOUGHNER	)	U.S.C.A. No.
_____	)	U.S.D.C. No. 11CR187-TUC (LAB)
	)	
Jared Lee Loughner,	)	
Petitioner;	)	
	)	**EMERGENCY**
U.S. District Court for the	)	**PETITION FOR WRIT**
District of Arizona,	)	**OF MANDAMUS FOR R E T U R N**
Respondent;	)	**OF PETITIONER TO TUCSON,**
	)	**SUSPENSION OF THE**
United States of America,	)	**DISTRICT COURT ORDER,**
Real Party in Interest.	)	**AND RESTORATION OF**
	)	**THE STATUS QUO**
	)	
_____	)	

PRAYER FOR RELIEF

Wherefore, petitioner prays that a writ of mandamus issue in this Court directed to the United States District Court for the District of Arizona, and to the Honorable Larry A. Burns, presiding by designation, directing them order Mr. Loughner's return to Tucson forthwith and to stay any further implementation of the district court's March 21 Order pending the resolution of full review by this Court.

II.

STATEMENT OF FACTS

The issue here concerns the district court's March 21, 2011, commitment order and procedures for holding a competency examination. On March 9 2011, the district

court ordered a competency evaluation, granting the government's motion for a competency hearing under 18 U.S.C. § 4241, over defense objections to the competency proceedings as premature and as potentially unduly interfering with the development of the attorney-client relationship. The district court indicated that, prior to the competency hearing, it would exercise its authority under §§ 4241(b) and 4247(b) to order a psychiatric or psychological examination of Mr. Loughner. The logistics of the examination, however, were not resolved on March 9.

There was some discussion at the March 9 hearing about the location for the examination. The district court indicated its concern that the disruption to Mr. Loughner and his ability to consult with counsel be kept to a minimum. The government indicated that a psychiatric visit likely could be conducted at USP Tucson:

THE COURT:	Can it be done here?
MR. KLEINDIENST:	In Tucson?
THE COURT:	Can it be done here so that he is not disrupted from his cell and that counsel can continue to see him?
MR. KLEINDIENST:	B.O.P. here doesn't have that capacity, but I suspect we can get a psychiatrist to examine him, judge.
THE COURT:	I don't know what the practice is here, but in the district where I am from, we frequently bring in an outside psychiatrist on competency issues who go to the jail where the defendant is and do a clinical

> examination, and then do a report and report back to the Court. I think that would be less disruptive than pulling him away.

Transcript of March 9, 2011 hearing at 34-35.[4] The government also conceded that the examination could be conducted in San Diego, which "would be more conducive where his lawyers reside than even Tucson and doing it through a local doctor." Transcript at 35; see also Transcript at 42 ("Mr. Kleindienst: . . . . San Diego has told us that they are more than happy to do it. We are not talking about Minnesota or North Carolina. We are talking about San Diego.").

Subsequently, following the district court's direction, the parties met to discuss the procedures, but ultimately submitted separate proposals for the logistics and procedures to apply to the § 4241(b) examination. The defense urged that Mr. Loughner be allowed to remain at USP Tucson, and that an independent examiner be appointed by the district court to conduct the evaluation. (Doc. 159 at 2-4.) The government, in an about-face, urged that Mr. Loughner be transferred to Springfield, Missouri, because in its view the Medical Referral Center there is the "most suitable facility" for BOP examiners to conduct an evaluation. (Doc. 156 at 2.)

The defense also requested:

- Fifth Amendment protection of any statements obtained during the examination, pursuant to Estelle v. Smith, 451 U.S. 454 (1981);

---

[4]The transcript of the March 9 hearing is contained in Exhibit C.

- advance notice of any proposed testing instruments;
- the presence of defense counsel via live video feed at the court-compelled examination; and
- a videotape recording of court-appointed experts that would be provided only to defense counsel. (Doc. 159 at 4-6.)

These requests were made in order to safeguard Mr. Loughner's constitutional rights—which could otherwise be irretrievably lost were this case to proceed beyond competency proceedings.

On March 21, the district court rejected the defense requests and issued an order providing the government with much more than even it had asked for. In an unprecedented infringement on the Fifth and Sixth Amendment rights of an individual charged with capital crimes, the district court ordered that (1) videotaped recordings of the compelled psychiatric examination of Jared Loughner be provided to government counsel; (2) any defense psychiatric examination conducted to determine competency to stand trial be conducted at the Springfield BOP facility, be videotaped and that those videotapes be provided to government counsel; and (3) that Mr. Loughner be committed to MRC Springfield, Missouri, so that the Department of Justice, through its Bureau of Prisons, rather than an independent, court-appointed examiner. See Order Re: Competency Exam, filed March 21, 2001, pp. 5-6, ¶4, and 6. The district court rejected the defense request for an order protecting the use of the

examination, and limiting access to video recordings to defense counsel. See Order at p. 5 ("The numerous other requests made on behalf of the defendant concerning the manner and protocol for conducting the competency examination have been considered by the Court and found wanting, and are DENIED.") The district court's order, providing unlimited prosecutorial access to the examinations by the defense as well as by the BOP of this seriously mentally ill young man and imposing unprecedented limitations on the work of the defense, violates the Fifth and Sixth Amendments.

IV.

THE REASONS WHY THIS WRIT SHOULD ISSUE

This Court should issue the writ under its authority to issue extraordinary Writs pursuant to the All Writs statute, 28 U.S.C. § 1651. Because implementation of the order the defense is appealing from is already underway, issuance of the writ is necessary to protect this Court's jurisdiction. See id. ("[A]ll acourts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

The writ power is used sparingly and will be issued only pursuant to the guidelines set forth in *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977). The five factors as discussed in *Bauman* are:

1. Does the Petitioner have adequate other means, such as direct appeal, to attain the relief he desires;
2. Does the District Court's detention of the Petitioner damage the Petitioner in a way not correctable on appeal;
3. Is the District Court's order clearly erroneous as a matter of law;
4. Is the District Court's order an oft repeated error and does it manifest a persistent disregard of Federal Rules;
5. Does the District Court's order raise issues of first impression and create new and important problems.

An examination of each factor demonstrates that the writ should issue here.

A. THE *BAUMAN* FACTORS

1. Does Petitioner have adequate other means, such as direct appeal, to attain the relief he desires?

As of this writing, Petitioner has been put on an airplane to Springfield, Missouri, pursuant to an unlawful commitment order to begin the evaluation directe by the district court's order. The relief sought here—immediate restoration of the status quo and stay of the district court's order—can only be attained through the instant petition for writ of mandamus.

2. Unless the writ is issued, will the Petitioner be damaged in a way not correctable on appeal?

The present injury suffered by Petitioner is not correctable on appeal. Unless the status quo is restored the district court's order is stayed, this Court will not be able to review the substantive issues on direct appeal. Like the defendant in United States v. Godinez-Ortiz, 563 F.3d 1022, 1026 (9th Cir. 2009), Mr. Loughner "can never

regain the time he will be forced to travel to and from [MRC Springfield]" and, if the competency examination is performed under the conditions he is challenging as unconstitutional, "it cannot be unperformed." Id. at 1027-28 ("[A] commitment order is analogous to an order denying bail and requiring pretrial detention, which the Supreme Court has found to be effectively unreviewable upon final judgment, and therefore immediately appealable as a collateral order.") (citing United States v. Friedman, 366 F.3d 975, 979 (9th Cir. 2004)); see also United States v. Weissberger, 951 F.2d 392, 396 (D.C. Cir. 1992) (holding that a commitment order under §§ 4241 and 4247, like the one here, "would be complete and effectively unreviewable by the time of final judgment"). Thus, unless the writ issues, Petitioner will suffer irreparable injury to his statutory and constitutional rights.

3. Is the District Court's order clearly erroneous as a matter of law?

As set forth more particularly below, *infra* at pp. ___, the District Court's commitment order and the requirements therein are clearly erroneous as a matter of law.

4. Is the District Court's order an oft repeated error and does it manifest a persistent disregard of Federal Rules?

It may be the case that the commitment to a facility other than the suitable one "closest to the court," 18 U.S.C. § 4247(b), is an oft-repeated error. However, there does not seem to be any indication that the remaining provisions of the district court's

order—in particular, the restrictions placed on an independent defense examiner, preclusion of defense counsel, and disclosure to the government without use-limitations of the recording of the court-compelled examination—are oft-repeated. This seems to be an indication of how truly extraordinary and unlawful these terms are. No source of authority supports the imposition of these terms, and, indeed, the constitution and the federal discovery rules prohibit them. Thus, although it is unclear whether the problem is "persistent," the district court's order without doubt manifests a disregard of the Federal Rules.

In any event, even if this *Bauman* factor is not apparent, "rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable. The considerations are cumulative and proper disposition will often require a balancing of conflicting indicators." *Bauman,* 557 F.2d at 655.

5. Does the District Court's order raise issues of first impression and create new and important problems?

The order, to the best of defense counsel's knowledge, raises questions of first impression and creates new and important problems. The nature of this case, moreover, is extraordinary. The underlying criminal case involved the shooting of a congresswoman, the death of a federal judge, and injury and/or death of seventeen others. The case has been the subject of intense media interest, as has the mental

health and competency of Mr. Loughner. The matter deserves this Court's attention.

B. THE *BAUMAN* FACTORS SUPPORT GRANTING THE PETITION.

A review of the facts set forth previously in support of this petition make it clear that the first, second, third and fifth requirements of the *Bauman* test are met. "[R]arely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is applicable. The considerations are cumulative and proper disposition will often require a balancing of conflicting indicators." *Bauman*, 557 F.2d at 655. However, although all five factors need not be satisfied in order for mandamus to issue, "it is clear that the third factor, the existence of clear error as a matter of law, is dispositive. "*Calderon v. U.S. District Court for the Northern District of California*, 134 F.3d 981, 983-84 (9th Cir.1998).

As explained below, the third factor—clear error as a matter of law—weighs heavily in favor of issuing the writ. Three aspects are particularly inappropriate and contrary to law: (1) the directions that any defense psychiatric examination be conducted at MRC Springfield, be videotaped, and that *videotapes of the defense examination be provided to government counsel*; (2) that videotaped recordings of the compelled court-ordered psychiatric examination of Jared Loughner *be provided to government counsel* without limitation on its use or any opportunity by defense counsel to seek redactions or otherwise avoid unfair prejudice; and (3) that

Mr. Loughner be committed to MRC Springfield and that he be examined by individuals employed by the Bureau of Prisons rather than an independent, court-appointed evaluator.

1. Restrictions on the Work of the Defense

First, the order's imposition of unprecedented limitations on defense investigation and work product amounts to an egregious violation of the Fifth and Sixth Amendment rights to counsel, to present a defense, to be free of compelled self-incrimination, and the guarantee of due process of law. The district court directed that any defense evaluation for current competency take place under the same conditions as the court-compelled evaluation, and directed that any such evaluation be videotaped, and the recording provided to government counsel. The order provides:

> Defense counsel may retain an independent medical expert to conduct a separate mental competency examination of the defendant. If an independent examination of the defendant is performed, it shall be conducted and completed at the Springfield MRC by no later than April 29, 2011. Any independent competency examination of the defendant shall be conducted in full compliance with the required protocols set forth in sections (3) [limiting the scope of the examination to competency to stand trial] and (4) of this order [requiring all formal clinical interviews to be video recorded and "copies of the video recordings shall be provided promptly to both counsel"] . . . .

Order at 5-6. The order also requires the defense examiner to produce "[a] formal written report of [his] opinions and conclusions . . . including the reasons for the

opinions and conclusions," to be "lodged with [the district court] and provided to counsel for *both parties*." Order at 6 (emphasis added). In other words, the independent defense-retained expert would be forced to (1) videorecord his examination, (2) turn the recording over to the prosecution, (3) write a formal report, and (4) turn that report over to the government.

The defense is unaware of any precedent for such an extraordinary intrusion into defense work product. The conditions imposed plainly violate the Fifth and Sixth Amendments, and also impermissibly intrude into the most basic interaction between defense counsel and their client. There exists no source of authority for the district court to direct when and how the defense conducts its investigation or to force upon it any particular strategy—let alone coerce defense counsel to record their investigation and to provide an exact record of that investigation to the prosecution. Yet the district court's order does just that. It forces the defense to make an impossible and unconstitutional choice: either relinquish the Sixth Amendment right to conduct an independent, unfettered examination into the question of the defendant's competency to stand trial, or choose to conduct the examination knowing that it would automatically be provided to the government and likely used in an effort to secure a sentence of death.[5]

---

[5] Counsel realizes, of course, that the Government may not directly use the defendant's statements from a competency evaluation to prove his guilt, or in its

As the D.C. Circuit stated in a related context:

> Ordering a defense investigator to turn over a copy of his investigative report to the Government is such an unprecedented procedure that most of the legal questions it raises are as uncharted as they are fundamental. Among the issues we find lurking in use of the procedure in the instant case are: (1) the Fifth Amendment privilege against self-incrimination; (2) the permissible scope of discovery by the Government under Rule 16(c) of the Federal Rules of Criminal Procedure and application of the exceptions in that rule to discovery during trial; (3) the scope of the attorney-client privilege and its relation to investigators employed by defense counsel; (4) the scope of the 'work product' doctrine in criminal procedure and its relation to investigators employed by the defense counsel; (5) the relationship between the attorney-client privilege, the work product doctrine, and the Sixth Amendment's guarantee of effective assistance of counsel . . . .

United States v. Wright, 489 F.2d 1181, 1188 (D.C. Cir. 1973). The district court's production order, Wright held, was plainly erroneous even after the defense investigator testified at trial because "defense counsel is under no obligation to reveal evidence which would aid the prosecution." Id. at 1192. "Quite the contrary, the Fifth Amendment provides that *the defense cannot be required to turn over evidence* favorable to the prosecution." Id. (emphasis added). Just as in Wright, the district

---

sentencing case in chief. However, given the very high likelihood that Mr. Loughner's mental condition will be a central issue in any trial (or in any capital sentencing hearing that might follow) it is highly likely that statements and conclusions derived from his competency determination will find their way into the process by which his guilt or innocence and his punishment are determined. *See Buchanan v. Kentucky*, 483 U.S. 402 (1987). For this reason, it is essential that the district court not require this gravely mentally ill man to become "the deluded instrument" of his own conviction and execution. *Estelle v. Smith*, *supra*, 451 U.S. at 463 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961)).

court's order here plainly violates the Fifth Amendment. "It is abhorrent to the instincts of an American," and while "it may suit the purposes of a despotic power[,] . . . it cannot abide the pure atmosphere of political liberty and personal freedom." Id. at 1193 (quoting Boyd v. United States, 116 U.S. 616, 631-32 (1886)).

Counsel are unaware of any other case in which a federal, or state, court has ordered the defense to videotape its own evaluation of a capital defendant or any court-imposed requirement that the work product of the defense be so openly provided to those who seek to prosecute, convict, and sentence an individual to death. That the government did not itself ask for such restrictions demonstrates how beyond the pale they are. The appeal of these provisions is likely to succeed on the merits. Specifically, the law requires certain protections precluded by the district court's order, including: reasonable access to Mr. Loughner by counsel; the ability of experts retained by the defense to proceed without the onerous conditions imposed by the district court; and the right to keep under seal the identity of defense experts who have contact with the defendant, as well as other logistical facts related to the evaluation process, such as dates, times, location, and nature of the assessment.

2. Protection of Statements and Materials

Second, the order's requirement that videotapes of the court-ordered examination be automatically disclosed to the government without any use

restrictions is clearly contrary to law.

As noted in the defendant's Request Re: Competency Procedures, *see* DE 159, filed March 16, 2011, the competency evaluation and hearing have been ordered over defense objection and are thus compelled. Thus, adverse use of statements made by Mr. Loughner during that examination in his prosecution – including his responses to test questions – would violate the Fifth Amendment. *See Estelle v. Smith*, 451 U.S. 454 (1981) (prosecution use at capital sentencing hearing of statements obtained during compelled competency examination violates Fifth Amendment.). However, to be clear on the limitations of the use of the evaluation, the defense requested that the district court enter an order directing that any and all statements, and fruits of statements, made by Mr. Loughner during this court ordered competency evaluation be protected from use during any proceedings against Mr. Loughner. *See Estelle*, at 469 ("If, upon being adequately warned, respondent had indicated that he would not answer [the doctor's] questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose.").

Furthermore, because of the potential significance of information gathered to date by defense counsel, we sought protection of the use of that information or materials before providing it to a court-appointed evaluator. The district court has

denied this request as well. Defense counsel cannot be put in the position of assisting in an evaluation in which communications and other work product are not protected from access by the government. These provisions of the order are thus equally unlikely to withstand constitutional scrutiny.

Accordingly, the district court should have granted the defense request that (1) all statements and fruits of statements made by Mr. Loughner during the course of the competency evaluation procedures be protected from future use against Mr. Loughner; and (2) all information and materials provided by defense counsel to the evaluator remain privileged and confidential and that the examiner's report be disclosed first to the defense and court only, so that counsel may propose those redactions necessary to protect Mr. Loughner's Fifth and Sixth Amendment rights and matters of attorney client privilege.[6]

Similarly, the district court's rejection of Mr. Loughner's requests that provision be made for observation by defense counsel of the examination by live video feed,[7] that the examination be videotaped, that the videotape be secured, and

---

[6] The district court's order did not address the use of FCI Phoenix and USP Tucson records (which are at issue in a motion currently pending before the district court). For much the same reasons, these materials also should be protected from further use in proceedings against Mr. Loughner.

[7] Live video feed strikes the right balance between protecting the right to counsel's presence at the evaluation while permitting the evaluation to proceed without undue interference. See ABA Standards for Criminal Justice: Mental Health,

be disclosed only to defense counsel impermissibly infringes on his Sixth Amendment rights to counsel. Videotaping is for the protection of the defendant faced with a compelled psychiatric evaluation in a criminal case. It is not a tool for use by the government in seeking a capital conviction and sentence of death. The ABA Standards governing mental health issues in criminal cases make this clear:

> All court-ordered evaluations of defendant initiated by the prosecution should be recorded . . . if possible, on videotape, and a copy of the recording should be provided promptly *to the defense attorney. The defense may use* the recording for any evidentiary purpose permitted by the jurisdiction. If the defense intends to use the recording at trial, it should notify the court. Upon receiving notice, the court should promptly provide to the prosecution a copy of the recording. Upon defense motion, the court may enter a protective order redacting portions of the recording before it is forwarded to the prosecution.

ABA Standards for Criminal Justice: Mental Health, Standard 7-3.6(d), at 100 (1986). What the ABA standards recognize is that the competency proceedings exist for the protection of the defendant—not for the prosecution to gather information out of the defendant's own mouth, deposition-style, to use in advocating for a conviction or sentence of death. As the standards provide, only the defense should receive a copy of the examination videotape; the government should receive a redacted version *only* "[i]f the defense intends to use the recording at trial" and when the defense provides

---

Standard 7-3.6(c)(i) (1986) ("When the scope of the evaluation is limited to defendant's present mental competency, the defense attorney is entitled to be present at the evaluation but may actively participate only if requested to do so by the evaluator."); see also id. at 106 (commentary to paragraph (c)).

such notice to the court. See also id. at Standard 7-3.6(c)(iii) ("The prosecutor may not be present at any mental evaluation of the defendant."). The commentary explains that:

> The sixth amendment right to adequate representation by an attorney is protected under the standard by the requirement that all court-ordered evaluations initiated by the prosecution be recorded, preferably through videotaping, and by the further requirement that a copy of the recording be supplied to defense counsel.

Id. at 107 (commentary to paragraph (c)).

3. Location of the Examination

Finally, the district court's decision to order Mr. Loughner's commitment to Springfield, Missouri for the § 4241(b) examination violates the plain text of § 4247(b), and also unduly infringes on the right of a capital defendant to access to counsel under 18 U.S.C. § 3005.

A district court's discretion to order Mr. Loughner's transfer for a competency examination is controlled by the plain language of 18 U.S.C. § 4247(b). That section permits placement in government custody, but requires the following location:

> Unless impracticable, the psychiatric or psychological examination shall be conducted in *the suitable facility closest to the court*.

18 U.S.C. § 4247(b) (emphasis added). In other words, the district court must designate *the* suitable facility *closest* to it—which, in this case, is USP Tucson. The statutory language is mandatory; the examination "*shall* be conducted" in that facility.

The only way the district court can reject the closest facility, USP Tucson, is by finding it to be unsuitable or impracticable. It has done neither here, nor would such findings be justified. The government has never argued either point; it has claimed only that MRC Springfield is the "most" suitable facility—not that USP Tucson is *un*suitable. Indeed, the government conceded at the March 9 hearing that USP Tucson likely is "suitable" and that an exam there is likely "practicable": " . . . . I suspect we can get a psychiatrist to examine him, Judge." Transcript at 35. The government has also conceded that MCC San Diego is a suitable facility and that evaluation there is practicable. *Id.*

Neither do the declarations submitted by the government alter the analysis. The Lewis declaration states that USP Tucson, "as a high security facility, presents an extraordinary, atypical, and inappropriate location for a competency study." The reason for this, according to Lewis, is because the "mission" of USP Tucson is "inconsistent with a competency study, when another BOP facility is more suited." Lewis also states that the USP's restrictions "*could* prove disruptive" and that its "resources would be strained." Doc . 156-1 at 1 (emphasis added). These concerns, however, say only that there exist more convenient places for the examination—not that USP Tuscon is not suitable.

The Faerstein declaration is no different. It "recommend[s]" another facility

on the ground that a Federal Medical Center would be "more experienced and better equipped"—not because it cannot be done at USP Tucson. Faerstein certainly does not assert that competency examinations may *only* be validly conducted at FMCs; as he admits, he has himself conducted examinations at the Los Angeles pretrial detention facility. Doc. 156-2 at 1-2. In fact, as Faerstein explains it, there is no reason to believe that USP Tucson would be inadequate in this case:

> The evaluation of competency usually consists of a forensic psychiatric interview to assess whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him. *In most cases, the interview alone is sufficient to reach a credible opinion.*

Doc. 156-2 at 2 (emphasis added). Although Faerstein goes on to describe a minority of cases where more might be needed, there is no indication that this case falls within that small subset where "the defendant may be uncooperative" or feign "mutism." Faerstein concedes: "I do not know whether this is such a case." *Id.* Neither Faerstein nor the government has provided any evidence to show any such impediments to an evaluation are likely to arise.

Additionally, although both the Lewis and Faerstein declarations opine that the "conditions" of the FMC are optimal for evaluation, they fail to explain how an evaluation in a hospital-like setting—with its significantly increased psychiatric and other support features—is apt to give a more accurate assessment of Mr. Loughner's

competency to stand trial than one conducted under the exact circumstances he would endure during trial—confinement at USP Tucson, the FCI Tucson (which houses pretrial inmates, or another pretrial facility in Tucson or elsewhere in the Southwest region.

This simply does not meet the statutory standard. Without an "unsuitability" finding, the district court lacks the authority to designate anything other than the "closest" facility, USP Tucson. See 18 U.S.C. § 4247(b). Moreover, even if Tucson is deemed unsuitable, the district court would have to make a finding that other closer facilities are unsuitable, or evaluation there is impracticable, before it could lawfully designate a facility located in Missouri. Because it has not made this requisite finding, the commitment to MRC Springfield is *ultra vires* and improper.

Additionally, the district court's order infringes on Mr. Loughner's right under 18 U.S.C. § 3005, which requires that counsel appointed in a capital case "shall have free access to the accused at all reasonable hours." This entitlement to "free access" in capital cases is as old as the nation, having been enacted in 1790 by the First Congress--the body that also framed the Bill of Rights--and may fairly be regarded as a fundamental attribute of the right to counsel in the federal courts. Confinement in Tucson satisfies that venerable standard; confinement in Springfield, Missouri, does not. Counsel, though located in San Diego rather than Tucson, are within an

easy one-and-a-half hour flight from Tucson, and can visit Mr. Loughner within the course of a day. Springfield, Missouri, by contrast, is 1,500 miles and two time zones away. Counsel contacted MRC Springfield and was informed that visiting hours are limited to Friday through Monday, between 8 A.M. to 3 P.M. Moreover, defense counsel have been advised by counsel in another federal capital case where the defendant is housed at MRC Springfield of additional extraordinary visiting limitations.[8] Title 18 U.S.C. § 3005, enacted by our very first Congress, ensures that, in a capital case, counsel "shall have free access to the accused at all reasonable hours." Conditions at MRC Springfield do not meet § 3005's standard, which applies "*at all reasonable hours*"—not just during periods of time when no competency hearing is pending.

4. The Writ of Mandamus should issue

In sum, it is clear that consideration of the Bauman factors weighs strongly in favor of granting the writ. At least four of the five Bauman factors are easily met (factors 1, 2, 3, and 5). Most importantly, the existence of the third factor is clear.

---

[8] Counsel were advised that, at the Springfield facility, face-to-face, contact visits are denied, and counsel must meet, interview, and observe the defendant behind a glass window with a limited field of vision. All verbal communication is through a wall telephone that operates poorly and impedes group discussions and spontaneous conversation. Partitioned visiting rooms do not allow counsel to interact with the client during their review of video and audio tapes, written reports, photographs, and demonstrative evidence.

The provisions of the district court's order are clearly illegal.

CONCLUSION

For all of the foregoing reasons, the Court should issue a writ of mandamus Court directed to the United States District Court for the District of Arizona, and to the Honorable Larry A. Burns, presiding by designation, directing them order Mr. Loughner's return to Tucson forthwith and to stay any further implementation of the district court's March 21 Order pending the resolution of full review by this Court.

Respectfully submitted,

DATED: March 23, 2011

/s/Judy Clarke

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
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467

Attorneys for Defendant-Petitioner

CERTIFICATE OF RELATED CASES

Pursuant to 9th Cir. R. 21-3, counsel for the petitioner is unaware of any related cases.

DATED: March 23, 2011

/s/Judy Clarke

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
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467
Attorneys for Defendant-Petitioner