UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES, Plaintiff-Appellee, v. JARED LEE LOUGHNER, Defendant-Appellant.	)	U.S.C.A. No. 11-10504 U.S.D.C. No. 11CR187-TUC (LAB) DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO EMERGENCY MOTION FOR STAY PENDING APPEAL

I.

INTRODUCTION

In his emergency motion for a stay pending appeal, Mr. Loughner asked this Court to stay his commitment and transfer to MCFP Springfield pending his appeal from the district court's commitment order. In his pleadings before the district court, and in his initial motion before this court, Appellant raised three arguments: First, the district failed to consider the likely impact of the restoration commitment on Mr. Loughner's capacity to go forward to trial; second, the district court failed to make its restorability finding in reference to an ongoing plan of treatment; and third, the district court's determination of a four-month time period for additional commitment

was untethered to a determination that Mr. Loughner was substantially likely to be restored within that specific time period.

Rather than address the distinct legal arguments appellant raises and discuss whether these present "a serious legal question" on which he has a "fair prospect" of success, the government has chosen to mischaracterize the record below and adopts "findings" from the district court's order denying the same relief requested here. These "findings" do not address the legal issues presented, and cannot be considered complete or accurate because the district court precluded inquiry into underlying facts at the September 28 hearing. The failure of the government, and the district court below, to take seriously the actual arguments raised by appellant elucidates the error committed below.

II.

LEGAL STANDARD APPLICABLE TO THE MOTION FOR PRELIMINARY INJUNCTION

As a threshold matter, the government misunderstands the legal standard applicable to this stage of the case. That standard is the four-pronged test set forth in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-25 (9th Cir. 2011). As that case and others make clear, the substantive question (Prong 1 of the test) at this stage is not whether the legal arguments on appeal *will necessarily* triumph, but

simply whether there exists some likelihood of success—which this Court has defined as a "fair prospect" of success or "substantial case for relief." *See Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011); *see also Alliance for the Wild Rockies*, 632 F.3d at 1131-35 (explaining that "a serious question" on the merits plus the balance of hardships is enough). Appellant easily satisfies this standard.

The government, however, simply ignores this Court's decisions. Instead of acknowledging the "fair prospect"/ "serious legal question" standard—which is unequivocally the law of this Circuit—the government asserts that Mr. Loughner must make "a 'clear showing' that he is likely to succeed on appeal," *see* Gov Resp. at 18. The government's position is not only incorrect, it has been squarely rejected by this Court. *See Leiva-Perez*, 640 F.3d at 967 (a more stringent requirement than "serious questions going to the merits" would "put every case in which a stay is requested on an expedited schedule" or would require the court "to predict with accuracy the resolution of often-thorny legal issues without adequate briefing and argument"). To paraphrase *Leiva-Perez*, the "whole idea" at this stage is to hold the matter under review in abeyance to give the appellate court sufficient time to decide the merits—*after* full briefing on the appeal. *See id.*

III.

LIKELIHOOD OF SUCCESS ON THE MERITS

Appellant argued in his motion that he has shown a "likelihood of success" on appeal and/or raises "serious questions" on the merits with respect to at least three arguments presented to the district court. *See* Mtn at 16-30 (summarizing the arguments and pointing out flaws in the district court's analysis). The government's response is unpersuasive. As an initial matter, it relies heavily on the notion that the legal arguments raised by the defense will be reviewed for "clear error." Gov Resp. at 18. This is obviously wrong. Whether the district court misinterpreted § 4241(d)(2) and failed to perform necessary legal analyses prior to ordering Mr. Loughner committed are pure legal issues (or mixed questions of law and fact) subject to *de novo* review. *See, e.g.*, *United States v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc). The government's remaining contentions are addressed in turn below.

A. Capacity to go forward to trial

A serious question is posed in this case as to whether the district court erred when it refused to consider whether the medication administered during the commitment *was substantially likely to* infringe on Mr. Loughner's fair trial rights by changing his demeanor, rendering him unable to participate meaningfully in his

defense, and prevent counsel from accessing and presenting to a jury information relevant to the defense of this potential capital case. Neither the district court nor the government address the legal arguments presented here and below concerning the meaning of "capacity" in 18 U.S.C. § 4241(d)(2)(A) or why finding a substantial likelihood of capacity to proceed must be understood to encompass more than just trial competency.

The government latches onto the court's assurance that it would allow the defense to "later argu[e] that Mr. Loughner lacks the capacity to stand trial because [of] the side effects of his anti-psychotic medications . . . ." Govt Resp., DE 4 at 25 (quoting the district court's 10/3/11 order (attached to the govt's response as Exhibit A). But allowing argument on this at some later point ignores the requirement that the court make a *predictive* determination of the medication's effects before Mr. Loughner is deprived of his liberty interest to be free of unwanted treatment. *See Vitek v. Jones*, 445 U.S. 480, 491-92 (1980) (holding that "involuntary commitment is more than a loss of freedom from confinement").

At no point during the hearing did the district court make this finding. Yet in its order denying a stay pending appeal, the court claims that "a fair reading of the record of the September 28 hearing demonstrates that the Court evaluated the [capacity] concerns and found no basis for them on the testimony and evidence

presented." 10/3/11 Order at 3. This simply is not true. What a fair reading of the record will demonstrate[1] is that the court precluded the defense from inquiring into medication side effects despite having permitted the government to elicit testimony about them in its direct examination of Dr. Ballenger. The government fails to address this point, one made in the current motion for a stay. *See* Mtn. at 22. The record will also demonstrate that if Dr. Ballenger's claims about the "miraculous" ability of second generation anti-psychotics are true, then, as Dr. Ballenger's testimony confirms, Mr. Loughner's outward demeanor and appearance will be so changed as to make him appear normal, not psychotic, to a jury: This is a serious concern, particularly in a case presenting mental health issues and a potential mental health defense. *See Riggins v. Nevada*, 504 U.S. 127, 137 (1992) (reversing conviction where it was assumed that the defendant was competent but it was also "clearly possible that [ ] side effects had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination"). Quite simply, the district court did not adequately address these concerns at the hearing, permit sufficient examination by the defense on them, and certainly did not make a predictive finding about the potential effects of medications on Mr.

[1] As noted in the original motion for a stay, the transcript of the September 28 hearing is still not available. The court reporter has indicated as of today that she is unable to complete it until the end of the week.

Loughner's fair trial rights. A stay should be issued pending resolution of this appeal on this ground alone.

B. Lack of treatment plan

The government's contentions are equally unpersuasive on the second argument. First, it claims that a treatment plan is not required by the statute. But how is a court to determine whether a defendant is substantially likely to be restored if it doesn't even have to consider how the prison intends to restore him? It can't. Perhaps recognizing the problem such a position creates, the government latches onto the district court's post-hoc claim in its October 3 order that it "did make a restorability determination on September 28 with reference to a particular treatment plan ." Govt Resp. at 26 (quoting order at 4-5). This claim is belied by a fair reading of the record.

While it is true that the court and the parties were aware of Mr. Loughner's medication regimen at the time of the hearing, Dr. Pietz repeatedly disavowed responsibility for Mr. Loughner's medication decisions, and at most she "assumed" that he would be continued on the same medications.[2] But when she was questioned

[2] In his testimony, Dr. Ballenger suggested that the doses of medication might be increased to levels of 10 to 12 milligrams a day, levels highly likely to cause severe side effects. *See* BOP Publication, *Pharmacological Management of Schizophrenia*, at bates 24-25 (documenting that doses of risperidone higher than 6 mg per day are "well known" to create serious side effects) (attached as Exhibit C to Mtn to Deny

further about future treatment, the government objected that inquiry into Mr. Loughner's expected treatment plan was beyond the scope of the hearing, and the district court sustained the objection.[3] Defense counsel noted this problem in its motion before this Court, *see* Mtn. at 23, and the government's silence on this point in its response confirms the error.

The district court also claimed in its October 3 order that "implicit in the testimony and evidence the Court considered is that the defendant's present medication regimen will continue with only minor modifications, and that the medical experts believe this regimen will succeed in restoring him to competency." 10/3/11 Order at 5. As noted above, it is hard to credit that anything was implicit in the testimony presented concerning what the plan was going forward since the district court cut off inquiry into the subject. This Court should not credit the government's attempts now in its response to claim that the very thing it successfully objected to was adequately considered by the district court at the time of the hearing. Relief should be granted.

Extension, Dist Ct DE 311). Dr. Ballenger also testified that the medications could be changed entirely.

[3] The government did not call the treating psychiatrist who is actually prescribing the medication, instead relying on a psychiatrist who only reviewed selected records.

C. The temporal limitation on restoration commitment

Mr. Loughner's third argument was that the district court erred by arbitrarily choosing a four-month time period for additional commitment without finding that such time period was sufficient to permit Mr. Loughner's restoration. The government correctly characterizes the district court's finding in this regard: "The district court extended the time of commitment for only four months, with leave for Dr. Pietz to seek another extension if needed." Govt Resp. at 23. In other words, the court gave the prison four months for restoration, and offered the possibly of more time without finding that the four months was substantially likely to result in restoration. But without even responding to the argument that the plain language of section 4241(d)(2)(A) requires the court to find that the specified extension granted is the specific time substantially likely to result in restoration, the government simply says the court didn't have to, Govt. Resp. at 23, thus endorsing a piecemeal approach to restoration commitment that the statute did not contemplate.

The district court now claims that it found that four months was, indeed, the period it believes is necessary for Mr. Loughner to be restored. *See* 10/3/11 Order at 2. It makes this new finding despite the fact that Dr. Pietz claimed that it would take eight more months, and Dr. Pietz is the very expert whom the court repeatedly credited on every other point as having the most intimate knowledge of Mr. Loughner

and his potential for restoration. In justifying this new conclusion, the court points to the fact that it picked four months because it was "consistent with the language and structure of § 4241(d)." *Id.* at 5-6. In contrast to subsection (d)(1), subsection (d)(2)(A) explicitly provides no specific period of time for restoration. Regardless, the district court's additional October 3 finding on this point only serves to underscore the importance of this Court issuing a stay until important questions about the implementation of extension orders under section 4241 can be fully briefed and decided by the Court.

IV.

IRREPARABLE HARM AND OTHER FACTORS

In the motion, Mr. Loughner explained that absent a stay, he will suffer the irreparable harm to his constitutional right to be free from unwanted hospitalization and psychiatric treatment. Mtn at 18 (citing *Vitek v. Jones*); *see also id.* at 30-31. In response, the government misses the point of protecting this additional liberty interest by focusing myopically on the fact that Mr. Loughner will remain in custody regardless of whether he is detained at USP Tucson or MCFP Springfield. *See* Govt Resp. at 29. Indeed, in relying on the BOP's declaration about USP Tucson's limitations in providing the sort of treatment Mr. Loughner seeks to avoid, it is asking

this Court to permit the very commitment and procedures that were employed in extending the commitment that Mr. Loughner is challenging.

Moreover, as the BOP declaration makes clear, USP Tucson has continued to consult with Mr. Loughner's treating psychiatrist, Dr. Sarrazin, during Mr. Loughner's time at USP Tucson, and it has the capacity to permit Dr. Sarrazin to continue monitoring Mr. Loughner via tele-psychiatry. See Exhibit 7 at ¶ 8. Certainly these are the veryprocedures that the BOP will have to utilize if and when Mr. Loughner becomes competent to stand trial and returns to Tucson for the duration of the trial and pretrial proceedings.

Finally, to the extent that Dr. Pietz, the psychologist charged with restoring Mr. Loughner to competency is concerned about any stay's effect on her continued attempts to restore him to competency, *see id.*, such concerns are necessarily subsumed by the propriety of the extension order that is the subject of this appeal. In sum, the BOP continues to medicate Mr. Loughner at USP Tucson; it has the capacity to maintain suicide watch protocols; and a denial of the stay on these important questions infringes on the very rights that Mr. Loughner seeks to protect in this appeal.

V.

CONCLUSION

For the reasons set forth here and in the motion, the Court should grant the stay pending appeal.

Respectfully submitted,

/s/ Judy Clarke

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