No. 11-10432

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JARED LEE LOUGHNER,

Defendant-Appellant.

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

APPELLANT'S OPENING BRIEF

JUDY CLARKE
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UNITED STATES OF AMERICA,	)	C.A. No. 11-10432
	)	D.C. No. 11CR0187-TUC LAB
Plaintiff-Appellee,	)	
	)	
v.	)	**APPELLANT'S OPENING BRIEF**
	)	
JARED LEE LOUGHNER,	)	
	)	
	)	
Defendant-Appellant.	)	
_____	)	

JURISDICTIONAL STATEMENT

Jared Loughner appeals the district court's order denying a prompt post-deprivation hearing on the emergency forced medication of Mr. Loughner. The district court issued an oral ruling on August 26, 2011, and entered a written order on August 30, 2011.

A. District Court Jurisdiction

The order appealed from was entered in a criminal prosecution against Mr. Loughner for offenses arising out of a shooting incident in Tucson, Arizona. The United States District Court of the District of Arizona has original jurisdiction over the prosecution. 18 U.S.C. §3231.

B. Appellate Jurisdiction

Mr. Loughner filed a timely notice of appeal on August 29, 2011. Fed. R. App. P. 4(b). This Court has jurisdiction over a timely appeal from an appealable interlocutory order within its geographical jurisdiction, 28 U.S.C. §§1292 & 1294(1); *United States v. Godinez-Ortiz*, 563 F.3d 1022, 1026, 1027-28 (9th Cir. 2009). The question of the right to a prompt post-deprivation hearing is capable of repetition, of evading review, and, therefore, is not moot.

C. Bail Status

Mr. Loughner is in pretrial detention. No trial date has been set. He is currently in the custody of the Attorney General, pursuant to 18 U.S.C. §4241(d)(2)(A).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. On July 18, following a claimed emergency, prison officials began forcibly medicating Jared Loughner with antipsychotic drugs. No hearing of any kind was held until August 25, over five weeks later, when the prison held an administrative proceeding purporting to justify continued medication. Did the prison deprive Mr. Loughner of liberty without due process by failing to seek a prompt hearing to determine whether continued forcible medication was justified?

II. Have the prison's actions denied Mr. Loughner due process by forcibly medicating him without an adversarial hearing and a judicial determination that antipsychotic medication is medically appropriate, and, considering less intrusive means, essential to the safety of Mr. Loughner or others?

STATUTORY PROVISIONS

A copy of 28 C.F.R. §549.46 appears in the attached Addendum.

STATEMENT OF THE CASE

Mr. Loughner is a pretrial detainee charged with federal offenses arising out of shootings in Tucson, Arizona, on January 8, 2011, where six people were killed and thirteen injured. The district court has committed Mr. Loughner to the custody of the Attorney General for an additional four months for competency restoration. He continues to be involuntarily medicated though no court has ever determined that these drugs are medically appropriate, that they are, considering less intrusive means essential to Mr. Loughner's safety, or that they are substantially unlikely to deprive Mr. Loughner of a fair trial.

This Court has pending before it two appeals of involuntary medication orders in this case, both of which have been fully briefed and argued. *See* Case Nos. 11-10339 and 11-10504. This appeal arises from the prison's July 18 decision to forcibly medicate Mr. Loughner on an emergency basis, and to continue that forcible medication for five weeks, without any hearing to determine whether this deprivation of liberty was justified. In addition to raising procedural and substantive due process challenges identical to those which have been briefed and argued, this appeal raises the serious question of whether, having been forcibly medicated on grounds of danger

to self, without any prior proceeding, Mr. Loughner had the right to a prompt post-deprivation judicial hearing so as to ensure that a wrongful deprivation of his liberty would not continue indefinitely.

STATEMENT OF FACTS

On July 18, 2011, the prison began forcibly medicating Mr. Loughner on the basis of a claimed emergency. The district court denied the defense request for the court to conduct a prompt post-deprivation hearing to determine whether continued forced medication was justified.

A. The Prison's Forced Medication Decisions.

The government has now been forcibly administering antipsychotic medications to Mr. Loughner since June 22, 2011, with a seventeen-day break starting on July 1, when this Court issued a temporary stay of medication. The medication regimen began with a small dose of just one drug—0.5 mg of risperidone (an antipsychotic) twice a day—and has since increased, with various changes along the way, to the four-to-five drug cocktail currently forced on him. No court has authorized the prison's actions.[1]

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[1]At the time of this writing, Mr. Loughner's dosage of risperidone has been increased to 7 mg a day, a dosage that the Bureau of Prison's own practice guidelines indicate as having "a side effect profile much more like [first generation anti-psychotics] than other [second generation anti-psychotics] have." *See* Case No. 11-10339, DE 20-1, Ex. 5, attachment 2 at 10-11 (*Federal Bureau of Prisons Clinical Practice Guidelines: Pharmacological Management of Schizophrenia* (June 2010)).

The emergency medication decision that is the subject of this appeal arises from a decision made by two prison psychiatrists, Dr. Robert Sarrazin and Dr. James Wolfson. *See* Case No. 11-10504, ER 619-26 ('Emergency Medication Justification" dated July 18, 2011).[2] Their report set out the prison's purported justification for forcibly medicating Mr. Loughner. *See id.*

According to the report, Mr. Loughner required emergency medication because he posed "an immediate threat to self." *Id.* at ER 622. The report contained various observations of Mr. Loughner's mental and physical state, including difficulty sleeping (resulting in his staying awake for up to 50 hours at a time), inability to stop pacing (causing swelling in his leg), and weight loss. *Id.* at ER 622-23; *see also id.* at ER 625-26 ("He is at risk from existing infection, malnutrition, and exhaustion" and "ongoing serious risk of suicide"). The report concluded that "Mr. Loughner has deterioration of his status and grave disability with an extreme deterioration in his personal functioning, secondary to his mental illness. Emergency medication is justified." *Id.* at ER 624.

Mr. Loughner's dosage of the anti-depressant, buproprione XL (Welbutrin), has also been increased to 450 mg daily.

[2] Counsel has referenced this earlier excerpt of record, which was filed under seal, for the convenience of the Court. To the extent that the Court would prefer that it, or any other excerpt referenced from another related appeal, be re-filed separately under this case number, counsel will do so promptly.

More than five weeks passed. On August 25, the day before the district court held a hearing on the issue, the prison conducted an administrative proceeding which approved the ongoing forcible medication of Mr. Loughner. *See id.* at ER 641-46. Approximately two weeks later, the decision to continue forcible medication was overturned by an associate warden for failing to comply with the administrative procedures set forth in the governing regulation, 28 C.F.R. §549.46, *see id.* at ER 650, but the prison continued to forcibly medicate Mr. Loughner. On September 15, the prison conducted another administrative hearing that was ultimately upheld on appeal to the warden. *See id.* at ER 654-60; 666-67. Forced medication continues to this day.

B. The District Court's Denial of the Motion to Conduct a Prompt Post-deprivation Hearing.

Upon learning of the July 18 emergency medication decision and the prison's failure to hold a post-medication administrative hearing, the defense moved the district court to conduct a prompt post-deprivation hearing. The court scheduled a hearing on this motion for August 26. At that hearing, the court advised the parties it had been contacted by the prison just before the hearing about an administrative proceeding conducted at the prison the day before. ER 6. But "because [Mr. Loughner's] period for appeal of that decision has not expired," ER 12, the court concluded that the prison had not presumed to medicate Mr. Loughner on the basis

of that decision. The government, too, agreed that the August 26 hearing concerned only the July 18 decision to medicate and not any subsequent administrative action. *See* ER 22 ("I think the July 18th decision is the one that defendant has filed a motion challenging, and that's the one that we're facing today."); *see* ER 25 ("Whatever happened yesterday, if the defendant wants to challenge that, we think he needs to file another motion. The only thing that's before this court today is the emergency one.").

At the September 26 hearing, the defense made clear that it was asking the court to hold a post-deprivation hearing:

> Our view is that due process does at times allow the government to engage in behavior which deprives an individual of substantive and/or procedural due process of property and/or liberty without providing the process that would normally be required. When there's an overwhelming need, when there's an emergency, they can do that.

ER 28-29; *see* ER 42-43 ("What is before the court is not whether or not the original emergency determination was correct, but whether or not we're entitled to a post-deprivation hearing and what standards should apply.").

The government responded at the hearing, as it claimed in its written response, *see* Government Response to Motion for Prompt Hearing at 4 (Doc. No. 287), that because the July 18 decision to medicate was made on an emergency basis, Mr. Loughner was entitled to no more process than provided in the prison's regulations. ER 24. It also argued, as a fallback, that if any post-deprivation hearing

was necessary, the administrative procedure held over five weeks later, on August 25 (which was later reversed on administrative appeal), was adequate to satisfy due process. ER 34-35.

The district court agreed with the government's primary argument. Applying the regulation applicable at the time of the August 26 hearing, specifically 28 C.F.R. §549.46,[3] the court ruled that §549.46(b) and case law "justif[y] the conclusion that the Bureau of Prisons and its medical experts should have that discretion [to forcibly medicate on an emergency basis] in the first instance." ER 54. It further concluded that "there is some limited judicial review of those determinations, and that's for arbitrariness. That's to ensure, for example, that the CFR is complied with." *Id.* The court then considered the alleged reasons for the July 18 decision, ER 60-61, and found, "applying an arbitrariness standard to this emergency decision, I don't see anything arbitrary about it. The factual circumstances and background that led the doctors to take action seems entirely appropriate and reasonable to me." ER 61-62. To conclude, the court denied the motion for a judicial post-deprivation hearing, stating it would "adhere to its view that the determination of dangerousness and whether to involuntarily medicate that is a determination left to the Bureau of Prisons,

[3] Section 549.46 became effective on August 12, 2011. Prior to that time, and at the time of the original emergency medication decision, the operative regulation was 28 C.F.R. §549.43.

that the only involvement this court has at this point is to review whether the CFR and other procedures were complied with and whether there was any arbitrariness." ER 65. The court never addressed what substantive standard is required by due process to forcibly medicate on an emergency basis.

C. The District Court's Written Order.

On August 30, four days after the hearing, the court confirmed its oral ruling in a written order. It specifically rejected the defense request for a judicial hearing "at which the Government must demonstrate 'that the drugs are essential to mitigating safety concerns after consideration of less intrusive alternatives.'" ER 2. Without ever addressing the correct substantive standard to be applied, the court claimed to apply the "*Harper*" standard, which it articulated by citing to one of its previous orders:

> *Harper* is clear that doctors, not lawyers and judges, should answer the question whether an inmate should be involuntarily medicated to abate his dangerousness and maintain prison safety.

ER 2-3 (citing *Washington v. Harper*, 494 U.S. 210, 231 (1990)). The court never explained how *Harper* resolved the question of Appellant's entitlement to a prompt post-deprivation hearing. Nor did it address how this aspect of *Harper*'s procedural due process analysis applied to the substantive standard that the defense argued is

applicable to pretrial detainees. Rather, the court simply found that the defense did not establish that the prison's actions were arbitrary. ER 3.

SUMMARY OF ARGUMENT

The district court's ruling was erroneous on two grounds. First, it erred in rejecting the argument that due process requires any emergency decision to deprive Mr. Loughner of his liberty interest in remaining free of involuntarily administered psychotropic medication be followed by a *prompt* post-deprivation hearing. According to the district court, no post-deprivation hearing was required at all—let alone a prompt one—because the prison regulations do not require such a hearing. This position does not square with well-established principles of due process. The regulation in question, 28 C.F.R. §549.46, fails to comply with basic requirements of due process.

Second, the district court erred in ruling that the post-deprivation procedures need not include a hearing before a court of law and a judicial determination in the first instance. A proper balancing of interests under *Mathews v. Eldridge* establishes that a judicial proceeding is necessary in light of the weighty interests of a pretrial detainee like Mr. Loughner and the substantial risks of erroneous deprivation of liberty, which in this context greatly outweigh governmental claims of inconvenience.

The appropriate substantive standard to apply in such a prompt, judicial, post-deprivation hearing is the one set forth in *Riggins v. Nevada* and urged by the defense in appeals in Case Nos. 11-10339 and 11-10504. This standard applies even if an apparent emergency situation seems to preclude sufficient pre-deprivation review of the decision. Whether such action lies outside the mainstream of psychiatric care; whether less restrictive alternatives of seclusion, restraints, and/or minor tranquilizers or anti-depressants were available and could be used with fewer long-term consequences and better short term efficacy; and whether a neuro-developmental disease such as schizophrenia can give rise to an emergency which might justify forced medication for indefinite periods of time, are questions which should be determined at a hearing before the district court.

These questions must be answered promptly by a court to ensure meaningful protection of important constitutional rights. The district court failed to conduct any meaningful review in this case, and that failure continues today. Its denial of the motion for such review should be reversed.

ARGUMENT

EVEN IF THE PRISON ASSERTS THAT FORCED MEDICATION WITH ANTI-PSYCHOTIC DRUGS IS WARRANTED ON AN EMERGENCY BASIS, MR. LOUGHNER IS ENTITLED, AT A MINIMUM, TO A PROMPT POST-DEPRIVATION REVIEW OF THIS DETERMINATION BY THE COURT.

Mr. Loughner has a due process right to bodily integrity free of unwanted, forcible administration of psychiatric medication. *Washington v. Harper*, 494 U.S. 210, 221 (1990). The Due Process Clause protects a pretrial detainee's desire to be free of unwanted brain-altering chemicals absent a showing they are "essential" to the government's objectives following consideration of "less intrusive" alternatives. *See, e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 135 (1992). This is true even in an emergency context. *See Brandt v. Monte*, 626 F. Supp. 2d 469, 488 (D.N.J. 2009) (citing *Sell v. United States*, 539 U.S. 166, 179, 181 (2003), and *Riggins*, 504 U.S. at 135). And even when emergency action is required to avert imminent harm, due process guarantees, at a minimum, a "prompt and fair" post-deprivation review of the state action. *Brokow v. Mercer Co.*, 235 F.3d 1000, 1021 (7th Cir. 2000) (citing *Campell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998)).

Additionally, in the case of a pretrial detainee being forcibly medicated with powerful anti-psychotic drugs, the proper balancing of interests under *Mathews v. Eldridge*, 424 U.S. 319 (1976), reveals that any administrative procedures by the

prison do not provide adequate procedural protections to vindicate Mr. Loughner's strong liberty interests in a fair trial and avoiding the effects of unwanted psychotropic drugs. Rather, due process requires that any decision to forcibly medicate be reviewed by a court upon presentation of evidence by both parties. *See Sell*, 539 U.S. at 182-83; *United States v. Hernandez-Vasquez*, 513 F.3d 908, 914, 919 (9th Cir. 2008). Because the prison began forcibly medicating Mr. Loughner on emergency grounds of danger to self, the district court was required to hold a prompt hearing to review the propriety of such action.

A. Procedural Due Process Requires a Prompt Post-deprivation Review.

The prison continues to violate Mr. Loughner's bodily integrity, to deprive him of his right to be free of unwanted psychiatric medication. Due process requires review of that conduct to ensure that the prison's actions are justified by sufficiently compelling interests. And while "the requirements of process may be delayed where emergency action is necessary to avert imminent harm," this delay can only be justified if "adequate post-deprivation process to ratify the emergency action is promptly accorded." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) (quoted in *Campbell*, 141 F.3d at 929). The governing prison regulation here, 28 C.F.R. §549.46, utterly fails to provide for such post-deprivation process. It provides simply that the BOP may forcibly medicate "[d]uring a psychiatric emergency"

without any procedural protections. Section 549.46 places no limits on the maximum duration of such procedure-free forced medication, nor does it require a post-deprivation hearing within any set period of time. For these reasons, the regulation and the prison's actions towards Mr. Loughner violate the Constitution.

In the psychiatric emergency context, the need for prompt post-deprivation review is recognized by state emergency commitment statutes, which typically require a post-emergency hearing within 24 to 72 hours. *See, e.g.*, Conn. Gen. Stat. Ann. §17a-502 (d) (committed person or representative may demand court hearing within 72 hours; total emergency commitment may not exceed 15 days); D.C. Stat. §21-523 (court order required for hospitalization over 48 hours; maximum detention not to exceed seven days from issuance of court order); Idaho Code Ann. §66-326 (court hearing required within 24 hours of emergency commitment); Wash. Rev. Code §71.05.210 (emergency involuntary commitment terminates after 72 hours unless court orders further detention); Wisc. Stat. Ann. §51.15 (emergency commitment expires after 72 hours, not weekends and holidays; court petition required for extended commitment); *see also* N.C. Gen. Stat. §§122C-262, 122C-264 (hospital certification required within 24 hours and court review of certificate within 24 hours of receipt). *But see* Ariz. Rev. Stat. Ann. §36-535 (court hearing to be held "within six business days"; extension of three additional business days authorized upon

finding of good cause); N.Y. Mental Hygiene Law §9.39 (hospital review within 24 hours of emergency commitment and court hearing must be held within 5 days of request; emergency detention expires after 15 days).

State laws also typically place limits on the maximum duration of emergency commitment, generally for a period of three to five days. *Cf.* Ca. Welfare & Inst. Code §5150 (authorizing 72-hour emergency hold); Colo. Rev. Stat. Ann. §27-65-105 (emergency hold expires after 72 hours); La. Rev. Stat. Ann. §28:53D. (individual subjected to emergency detention may demand judicial hearing to be held within five days); Mass. Gen. Laws Ann. ch. 123 §12 (emergency hospitalization authorized "for a 3-day period"); Ohio Rev. Code §5122.10 (hospital review mandated within 24 hours of emergency commitment, and detention may extend beyond three more court days only if a court issues a temporary detention order). *But see* Conn. Gen. Stat. Ann. §17a-502 (d) (total emergency commitment may not exceed 15 days). Indeed, at least one state expressly limits the duration of emergency forcible medication to forty-eight hours. *See* La. Rev. Stat. Ann. §28:53K.(b) (permitting "emergency administration of medication" until "the emergency subsides, but in no event shall it exceed forty-eight hours, except on weekends or holidays when it may be extended for an additional twenty-four hours").

What these state legislatures recognize—and what the prison's regulation improperly fails to comprehend—is that while swift action without process may be appropriate at the time of the emergency, due process requires that the deprivation of liberty be justified through adequate proceedings soon thereafter. *Cf. Doe v. Gallinot*, 657 F.2d 1017, 1022 (9th Cir. 1981) (describing the first 72 hours of an emergency hospitalization as "justified as an emergency treatment" but finding that the "emergency commitment should continue . . . only for the length of time necessary to arrange for a hearing before a neutral party so that the existence of probable cause for detention may be determined") (quoting district court opinion). This Court has recognized the constitutional necessity for prompt post-deprivation review in *Doe v. Gallinot*, a pre-*Sell* decision. There, the Court affirmed the district court's finding that California's involuntary commitment procedures were unconstitutional because they failed to adequately protect the "substantial private [liberty] interest" in avoiding psychiatric commitment. *Id.* at 1023. Specifically, *Doe* rejected the notion that optional, collateral review (filing a petition for writ of habeas corpus) was enough to protect that liberty interest, and rejected the state's claim that mandatory, 72-hour probable cause hearings would prove too burdensome upon hospital staff. *Id.* at 1023-24; *see id.* at 1025 ("We affirm the ruling of the district court that 'due process requires a probable cause hearing after the 72-hour emergency detention period for

persons alleged to be gravely disabled. A slight delay due to intervening weekends or holidays is permissible but in no event should the hearing occur later than the seventh day of confinement.'").

The need for prompt post-deprivation review is no less warranted under the instant circumstances than it is in the psychiatric commitment or the child custody contexts addressed in *Jackson* and *Campbell*. Indeed, considering the potentially devastating effects on bodily integrity, fair trial rights, and even what Justice Kennedy has described as the potential manipulation of material evidence in a capital prosecution, *see Riggins*, 504 U.S. at 139 (Kennedy, J., concurring), such review is critically important. Moreover, post-deprivation review in the forced medication context is further warranted by numerous other concerns laid out in *Brandt*:

> Without any procedural check on the decision for the administering doctor, there is substantial opportunity for errors of fact and law: Doctors may perceive an emergency where none exists, and doctors may believe that certain circumstances constitute an emergency, which, under the law, do not. . . . A treating physician might also declare an emergency in bad faith to quiet a bothersome patient. Finally, a patient presenting a momentary emergency who would be pacified by a single administration of medication may be medicated [for a longer duration]; *in other words, the state may continue to sacrifice the patient's liberty interest long after the emergency has subsided.*

626 F. Supp. 2d at 486-87 (emphasis added). This last point is particularly crucial. In *Brandt*, the court was concerned with continuing forced medication for 72 hours. *See id.* Here, Mr. Loughner has been medicated since July 18, 2011, more than four

months, and *more than five weeks* before the prison ever conducted an administrative hearing.

The prison's own regulations permit forced medication with psychotropic drugs only for the duration of an emergency, defined as lasting only as long as there is "an immediate threat of . . . bodily harm to self or others . . . or . . . extreme deterioration of functioning secondary to psychiatric illness." 28 C.F.R. §549.46(b)(1)(ii). However, the prison regulations provide no avenue for review of the emergency nature of the situation, much less independent judicial review.[4] So the prison continued to forcibly medicate Mr. Loughner with anti-psychotic drugs for over five weeks before conducting any sort of review. The prison's failure to implement even its own limited hearing procedures once any immediate threat had passed demonstrates the need for judicial intervention.

In the pretrial context, a court must conduct a prompt hearing in which the government has the burden of demonstrating that the need for forcible medication continues to exist. *See, e.g., Weller v. Dep't of Soc. Servs. for Baltimore*, 901 F.2d

[4] It should be noted that the regulation appears to require an administrative proceeding if "psychiatric medication is still recommended *after* the psychiatric emergency." 28 C.F.R. §549.46(b)(1)(i) (emphasis added). But this provision provides no review, much less the constitutionally mandated review required in this pretrial context, to promptly determine whether an emergency exists in the first instance or whether the particular forced medication regimen is necessary to abate danger.

387, 396 (4th Cir. 1990) ("the state has the burden to initiate prompt judicial proceedings to ratify its emergency action"). The district court in this case conducted no such review, and its order must be reversed. Likewise, §549.46 cannot withstand constitutional scrutiny because it authorizes emergency forcible medication without any of the post-deprivation protections required by the Due Process Clause.

As for what would constitute a "prompt" hearing, the five weeks the prison took before conducting any sort of review is not prompt. "Prompt" means "to act immediately, responding on the instant." Black's Law Dictionary 6th ed. at 1214. Thus, in the context of an emergency medication decision such as the one in this case, the hearing should occur immediately upon the opportunity to conduct such hearing. Whatever the outer time limit for such a hearing, the critical inquiry is whether the hearing is held upon the first opportunity to do so. The five-plus week delay in this case did not satisfy this requirement.

B. Post-deprivation Review must Be Conducted by the Court in an Adversarial Hearing.

In the pretrial context of a death-eligible prosecution, due process requires that the post-deprivation hearing here be conducted by a court for all the reasons previously stated in the briefing from the appeals in Case Nos. 11-10339 and 11-10504.

C. Substantive Due Process Permits Emergency Medication Only When it Is Essential to Mitigating Danger and less Restrictive Alternatives Have Been Adequately Considered.

Whether a decision to forcibly medicate on dangerousness grounds is made administratively, judicially, or on an emergency basis, it is both a court's prerogative and duty to review whether the decision is consistent with the appropriate substantive due process standard. The substantive standard applicable here is whether forcible medication with the specific drugs and dosages anticipated is "essential" considering less intrusive alternatives to mitigating Mr. Loughner's danger to himself. This is the standard set forth in *Riggins* and the one generated by an independent weighing of interests under the Due Process Clause. *See* AOB, Case No. 11-10339, at 14-33.

In this case, the district court nowhere considered the applicable substantive standard in either its oral or written ruling. Instead, it merely cited that part of *Harper* which addresses what *procedures* are due to a convicted felon for whom the state has attained the right to treat for mental illness. *See* ER 2-3. No review, not even for arbitrariness, can be conducted without first establishing the correct substantive standard.

CONCLUSION

For the reasons set forth above, the Court should reverse the district court and issue a judgment declaring that, following an emergency decision to forcibly

administer psychotropic medications to a pretrial detainee, due process requires a prompt, judicial post-deprivation hearing at which the court presiding over the hearing must determine whether continued medication is essential, considering less intrusive alternatives, to accomplish the stated goal.

Respectfully submitted,

DATED: November 21, 2011

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CERTIFICATE OF RELATED CASES

Counsel for the Appellant is aware of these related cases in United States v. Jared Lee Loughner, pending before this Court.

1. USCA No. 11-10339 (case was argued on 8-30-11)

2. USCA No. 11-10504 (case was argued on 11-1-11)

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 11-10432

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

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

× Proportionately spaced, has a typeface of 14 points or more and contains 4,456 words (opening, ~~answering, and the second and third briefs~~ filed in cross-appeals must NOT exceed 14,000 words; reply briefs must NOT exceed 7,000 words),

or is

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

DATED: November 21, 2011

s/ Judy Clarke
JUDY CLARKE
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CERTIFICATE OF SERVICE WHEN ALL CASE PARTICIPANTS ARE CM/ECF PARTICIPANTS

I hereby certify that on November 21, 2011 , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/ Judy Clarke
JUDY CLARKE