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 REPLY BRIEF

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FOR THE NINTH CIRCUIT

UNITED STATES, Plaintiff-Appellee, v. JARED LEE LOUGHNER, Defendant-Appellant.	)	U.S.C.A. No. 11-10432 U.S.D.C. No. 11CR187-TUC (LAB) **APPELLANT'S REPLY BRIEF**

INTRODUCTION

The opening brief raised three arguments: (1) even when an apparent emergency seems to require immediate action, procedural due process requires prompt post-deprivation review of a decision to forcibly medicate a detainee with antipsychotic drugs where the deprivation is ongoing; (2) in the pretrial context, any such post-deprivation review must be conducted by a court of law in an adversarial proceeding; and (3) substantive due process permits such emergency medication only when it is essential to mitigating danger and less restrictive alternatives have been adequately considered.

Because issues (2) and (3) have been adequately briefed and argued in his other appeals, Appellant's opening brief addressed the first issue, that due process requires

a prompt post-deprivation hearing when the government intends to continue the forcible medication it undertook in response to a claimed emergency. Rather than address the claim actually made by Appellant, the bulk of the government's brief is devoted to arguing that because an emergency was claimed, Mr. Loughner was entitled to no hearing before the prison acted. From this, the government somehow concludes that he was entitled to no process at all, before or after his forced drugging commenced. In a last ditch effort to defend the result, the government claims that the prison has actually provided Mr. Loughner with the process he requested.

In fact, the prison forcibly medicated Mr. Loughner on an ostensible emergency basis pursuant to a regulation that provides absolutely no procedural protections, temporal limitations, or review process, and continued its medication regimen for over five weeks without attempting to provide even the most rudimentary hearing. Neither the district court nor the prison conducted a prompt post-deprivation hearing. When the court finally held a hearing over five weeks after the forced medication regimen began, and only after the defense filed a motion challenging the prison's actions, it rejected application of the appropriate substantive legal standard, provided no standard of its own, and simply found that the prison had not acted arbitrarily in its decision.

ARGUMENT

DUE PROCESS REQUIRES A PROMPT POST-DEPRIVATION HEARING

Claiming an emergency, the prison began forcibly medicating Mr. Loughner on July 18, 2011 despite an order from this Court staying medication, and the prison continued to forcibly medicate him for over five weeks without ever seeking judicial review or even conducting an administrative hearing. On August 25, 2011, the prison conducted an administrative hearing that was ultimately reversed on administrative appeal. Meanwhile, it continued to forcibly medicate Mr. Loughner, without interruption, until it conducted another administrative proceeding on September 15, 2011, almost two months after beginning medication. This appeal concerns the prison's failure to provide prompt post-deprivation review, not, as the government would lead this Court to believe, the initial decision to medicate on July 18. It presents this question: Whether, having decided that emergency circumstances justified ongoing forcible medication as opposed to a one-time action to prevent harm, the prison was obligated to provide such a hearing as soon as circumstances permitted.[1]

[1] The government misses the point when it claims defense experts endorsed BOP's actions as appropriate. *See* GRB at 30-31 and n.8. They did not. Instead, they advised that if BOP truly intended to respond to an emergency in order to prevent harm, it should use either a different medication or a larger dose to achieve sleep rather than the more limited dose appropriate for long-term therapeutic use. That

A. BOTH THIS COURT AND THE SUPREME COURT REQUIRE SOME FORM OF POST-DEPRIVATION REVIEW, AND THE PRISON'S REGULATION PROVIDES FOR NONE.

The government argues that "[t]he district court properly rejected the defendant's motion, noting that it was continuing to find that the rule of *Harper* applied, so the decision to medicate was up to 'doctors, not lawyers or judges.'" GRB at 13 (citations omitted). Putting aside for the moment whether a court or prison doctors review emergency medication decisions, *see* AOB at 19, the "rule of *Harper*" is that a decision to forcibly drug even a convicted felon "cannot withstand challenge if there are no procedural safeguards to ensure the prisoner's interests are taken into account." *Harper*, 494 U.S. 210, 233 (1990). And those safeguards include, at a minimum, "notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses." *Id.* at 235. *Harper* does not address emergencies, let alone hold that they eviscerate these protections.

What the Supreme Court has held is that where an immediate, compelling need requires the government to act without delay, it must promptly provide appropriate review so that a wrongful deprivation will not continue indefinitely. That pre-deprivation process is impracticable in some circumstances "does not mean, of course, that the State can take property without providing a meaningful

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dosage betrayed a motive not to prevent immediate harm, but to treat mental illness.

postdeprivation hearing." *Parratt v. Taylor*, 451 U.S. 527, 541, overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986). *A fortiori*, if the taking of mere property requires adequate post-deprivation process, the invasion of a person's body with unwanted antipsychotic medications requires the same protections. This Court has said as much: In the emergency context, "the requirements of process may be delayed where emergency action is necessary to avert harm," but the delay can only be justified if "adequate post-deprivation process to ratify the emergency action is promptly accorded." *Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998) (quoting *Jordan by Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994)).

Contrary to the government's claim, GRB at 14, that cases like *Campbell* are civil in nature or involve child custody issues does not make them "inapposite." Rather, deprivations of a constitutional right require timely and meaningful procedural protections, and *Harper* has established that the baseline, minimum protections in the forced medication context are an adversarial hearing that did not occur in this case. *See* 494 U.S. at 235.

Seeking support for its position that no procedures are required, the government looks to cases with no relevance to this issue. It cites to a number of opinions in § 1983 civil damage suits concerned not with what procedures are

required following the emergency administration of antipsychotic medication but whether, at the time of the claimed deprivation, the civil defendants' actions so clearly violated established law as to deny qualified immunity.[2]

Fundamentally misunderstanding either the defense's argument or the holdings of these cases, the government cites *Hogan v. Carter*, a case in which the "sole question" was whether a doctor "violated clearly established law when, in response to the nurse's call during the early morning hours of September 21 informing him that Hogan was in jeopardy of injuring himself, he ordered that Hogan be administered the single emergency dose of Thorazine." 85 F.3d 1113, 1115 (4th Cir. 1996) (en banc), for the proposition that a court need not "convene full-scale adversary proceedings at any hour of the night, appoint and retain counsel, subpoena witnesses, and allow for cross-examination–all while the very inmates for whose protection the state is constitutionally responsible remain in danger of injury at their own hands." *Id*. at 1117. The defense is asking for no such thing. To be clear, it asks for a prompt *post*-deprivation hearing, and *Hogan* doesn't address, let alone undermine, this claim.

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[2] The government's reliance on these 1983 cases is unsupportable for another reason. Each considered constitutional limitations on isolated instances of emergency administration of drugs, not continuing courses of treatment. The deprivation of liberty inherent in those actions was not continuing. Here, the opposite is true. The government did not simply act to prevent immediate harm. It continued to forcibly drug Mr. Loughner for five weeks without providing any process at all.

Nor does this Court's decision in *Kulas v. Valdez*, 159 F.3d 453 (9th Cir. 1998), another § 1983 case cited by the government. In fact, *Kulas* reinforces the necessity of procedural protections. *Id.* at 456 (holding that the doctor's actions could not be justified where there were "no procedures in place" and the district court did not acknowledge *Harper*'s procedural protections).

The government claims that "[o]ther circuits have also held that inmates can be medicated in emergencies without *Harper* administrative hearings or adversarial judicial procedures." GRB at 18. In fact, the cases it cites have held no such thing. Stunningly, the government begins by citing *Leeks v. Cunningham*. But *Leeks* is another § 1983 case addressing whether qualified immunity was properly denied a physician who, prior to *Harper* and *Riggins*, administered antipsychotic drugs to a pretrial detainee. It held explicitly that "[a]s a threshold matter, *Harper* and the Court's revisiting of the question of forced administration of antipsychotic drugs in *Riggins v. Nevada*, are not controlling as both cases were decided well after the allegedly improper Thorazine injections involved in this appeal." 997 F.2d 1330, 1333 (11th Cir. 1993). In fact, *Leeks* never considered or addressed the question of post-deprivation process.

Nor was post-deprivation process addressed in another pre-*Harper* case cited by the government, *United States v. Charters*, which held that a pre-trial detainee may

not be forcibly medicated *without a judicial order* and explicitly held that it did "not resolve whether [an emergency] situation might call for a different result." 829 F.2d 479, 484 (4th Cir. 1987). The government's reliance on *Rennie v. Klein*, is equally unavailing insofar as that case only articulated a pre-*Harper* substantive standard for forced medication, 720 F.2d 266, 269 (3rd Cir. 1983) (allowing forced medication when decision is made "in the exercise of professional judgment" and "is deemed necessary to prevent the patient from endangering himself or others"). Any interpretation of that case for the proposition that no procedural protections are otherwise required "is untenable, particularly in the aftermath of *Harper, Riggins*, and *Sell*." *Brandt v. Monte*, 626 F. Supp.2d 469, 476 n.10 (D.N.J. 2009).

The government further strains credulity when it claims that "in light of *Harper*," the Seventh Circuit upheld as constitutional the forced medication of a committed individual on a doctor's order alone. GRB at 19 (citing *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397 (7th Cir. 1993)). That claim is flatly wrong. The doctor in *Sherman* was actually administering the medications under a judicial order to "give whatever treatment is deemed necessary and appropriate with or without the consent of Respondent." 987 F.2d at 402. Moreover, *Sherman*'s holding was not informed by *Harper*. *Sherman* was a § 1983 case concerned solely with whether there was "a clear consensus of opinion about what the Due Process Clause

required in 1989," specifically recognizing that *Harper* post-dated the incident in question. *Id.* at 409. Quite simply, post-deprivation review was not argued or decided in any of these decisions, and *Harper* played no role in their analysis.

Nor do any of the other cases cited by the government support its position. Indeed, one of them, *Chapman v. Haney*, a case involving a convicted felon, explicitly stated *twice* that "the full procedural protections afforded in non-emergency situations as set forth in *Harper* must follow ***as soon as circumstances permit***." 2004 WL 936682 at *26 (D. Neb. 2004) (unpublished) (emphasis added); *see id.* at *28. *Dancy v. Simms*, is equally unavailing insofar as the court never addressed post-deprivation procedures and explicitly distinguished "isolated administrations of [ ] antipsychotics" at issue in that case from "general long-term use of these drugs in the treatment of [a convicted felon's] schizophrenia," noting that the latter approach required the full protections of *Harper*. *See* 116 F. Supp. 2d 652, 657, 655 (D. Md. 2000). Likewise, while *Bee v. Greaves* may stand for the unremarkable proposition that forced drugging "may be required in an emergency," 744 F.2d 1387, 1395, it nowhere addresses what procedures must follow. *Bee* does, however, note that even though there may be a "medical nature to the inquiry," it "does not justify dispensing with due process requirements. *It is precisely 'the subtleties and nuances of*

psychiatric diagnoses' that justify the requirement of adversary hearings." *Id.* at 1393 (emphasis added) (quoting *Vitek v. Jones*, 445 U.S. 480, 495 (1980)).

The government claims that *Brandt v. Monte* undercuts the defense's position. GRB at 15. It does not. As discussed in the Opening Brief at p.17, *Brandt* gives numerous reasons why there should be procedural protections for forced medication decisions, especially in emergencies. *See* 626 F.Supp.2d at 486-87. The government does not dispute any of these reasons for having procedural protections. Rather, it seems to suggest that the relief granted in *Brandt* somehow limits the protections sought in this case, and presumably even those announced in *Harper*, because the court in *Brandt* approved a remedy of an "intra-administrative review committee," which provides even less procedural protections than a traditional *Harper* hearing.

In making this argument, the government ignores that an "intra-administrative post-deprivation hearing" along with periodic reviews is the only relief that the plaintiff in that case requested. *See id.* at 486. Why the involuntarily committed patient in that case asked for no more is unclear. What is clear is that *Brandt* nowhere suggests that such a remedy constitutes the constitutional ceiling, nor could it for a pretrial detainee facing the specter of capital prosecution.

Nevertheless, the government argues that "the regulation [in this case, § 549.43] provides greater due process protection than even *Brandt* says is

appropriate." GRB at 15 n.4. Not true. Neither 28 C.F.R. § 549.43[3] nor 28 C.F.R. § 549.46[4] provide any procedural protections for the emergency administration of antipsychotic drugs. The doctors in this case could have conducted a full-blown *Harper* hearing prior to medicating Mr. Loughner or even sought judicial approval, but the regulations require them to do nothing, not even to consult an independent doctor before, during, or after the decision is made. The regulation doesn't even require them to periodically review their decision, *see e.g.*, *Brandt*, 626 F. Supp.2d at 487 (holding that the failure to hold periodic reviews is unconstitutional), no matter how long the proclaimed emergency continues. As the Supreme Court has held, the absence of procedural safeguards in the regulations is unconstitutional, whatever the doctors' best intentions:

> A State's attempt to set a high standard for determining when involuntary medication with antipsychotic drugs is permitted cannot withstand challenge if there are no procedural safeguards to ensure the prisoner's interests are taken into account.

Harper, 494 U.S. at 233.

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[3] The now inoperative regulation governing BOP forced medication for the first three-plus weeks of Mr. Loughner's forced emergency regimen.

[4] The currently operative regulation as of August 12, 2011, in place for several days before the prison's first botched *Harper* hearing and for three more weeks thereafter before the next *Harper* hearing on September 15, 2011.

Nothing in § 549.43(b) or § 549.46(b) provides such procedural safeguards. The government admits as much by acknowledging that "549.43 sets forth an emergency *exception* to the ordinary *Harper* procedures." GRB at 16 (emphasis added). Yet, in the most tortured of reasoning, it goes on to claim the following:

> It seems clear from *Harper* that no 'arbitrariness' exists if BOP conducts an administrative hearing according to a regulation that complies with due process. [T]he emergency provision, then-numbered § 549.43(b), provided adequate due process in that context, so *Harper* supports that BOP's compliance with that regulation demonstrates that its administrative decision was not arbitrary.

GRB at 25. The government's position makes no sense. It seems to argue: One portion of BOP's regulation complies with *Harper* by providing an administrative hearing; therefore, the entire regulation complies with *Harper*, even though it exempts emergency actions from *Harper*'s requirements. It is difficult to know what to say about this argument, but it is clear that regulations do not determine the meaning of the Constitution. And that one portion of a Bureau of Prison's regulation complies with the Constitution has no relevance to whether another does.

The government also attempts to morph its mootness argument into some sort of harmless error analysis for the merits of this case. *See* GRB at 21. The government claims that "the most due process that the defendant was entitled to receive in this medication context was the due process specified by the Supreme

Court in *Harper*," and because he ultimately had a *Harper* hearing (that was not administratively overturned) nearly two months after the emergency medication regimen began, he can show no prejudice. GRB at 21. There are several problems with this argument. First, the defense has argued that Mr. Loughner is entitled to a *prompt* post-deprivation hearing. Not even the government has seriously argued that the September 15 hearing was prompt. Second, one of the issues on appeal is whether Mr. Loughner was entitled to a judicial adversarial hearing, which never occurred in this case. And finally, this appeal is not subject to any sort of harmless error analysis. If the Court is reaching the merits, it is not because it can reverse what has already happened, it is because the issue is capable of repetition, yet evading review. Appellant seeks a declaratory judgment, and the Court should address the merits of post-deprivation review question, no matter whether Mr. Loughner would have been entitled to judicial or mere administrative relief.

B. POST-DEPRIVATION REVIEW MUST BE PROMPT.

The government nowhere argues that either the August 25 or the September 15 *Harper* hearing was prompt. As for what constitutes a prompt hearing, the government makes no effort to establish its parameters other than to argue that the very regulations that the defense has challenged as unconstitutional provide no "specific time limit." GRB at 22 n.7. And, in concluding that a prompt hearing is not

required, the government seeks authority by citing a case that explicitly states–in the very page quoted by the government–that *even in emergency situations* "the full procedural protections afforded in non-emergencies as set forth in *Harper* must follow ***as soon as circumstances permit***." *Chapman*, 2004 WL 936682 at *26, *28.

Instead of seriously addressing the parameters of promptness, the government tries to hedge its bets by conflating arguments. It claims that "the defendant is not arguing on appeal that BOP should have conducted its administrative *Harper* hearing more quickly after emergency medication began," apparently because he is arguing that post-deprivation review must be conducted by a court of law. GRB at 22. Thus, without explicitly stating it, the government seems to be claiming that the defense has waived relief for any constitutional protections less than he has requested. But there is no basis for this conclusion; a prayer for relief is not the floor of any remedy the Court can grant. And to be clear, what the defense is arguing in this case is that Mr. Loughner is being unconstitutionally forced to take powerful mind-altering antipsychotic drugs against his will, and the regulations followed by the prison provide absolutely no procedural protections. AOB at 13-14.[5] Whatever process is

[5] The dosage of risperidone being administered to Mr. Loughner continues to increase from 2 mg a day at the time of the initial emergency medication decision to 8 mg a day at the time of this writing.

On July 18, 2011, it began at 2 mg a day; on July 21, it increased to 4 mg a day; on July 25, it increased to 5 mg a day; and on August 8, it increased to 6 mg a day.

due must be accorded by a prompt hearing. That was not done in this case, and the government essentially has conceded this point.

See Dist. Ct. Case No. 11-cr-187 LAB, DE 337-1. According to prison records, the risperidone was then increased to 7 mg a day on November 10, 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)). And on January 18, 2012, his dosage was increased to 8 mg a day.

CONCLUSION

The district court's orders should be reversed, and this Court should 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: January 27, 2012

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