C.A. No. 11-10339

D. Ct. No. CR 11-00187-TUC-LAB

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JARED LEE LOUGHNER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE
(REDACTED FOR PUBLIC FILING)

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Date Electronically Filed: August 10, 2011

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III. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant/appellant, Jared Lee Loughner ("the defendant"), was charged with a federal crime. (CR 129; ER 100.)[1] Although this Court has not stated whether a defendant may seek judicial review in the district court of a Bureau of Prison (BOP) administrative decision to involuntarily administer medication under *Washington v. Harper*, 494 U.S. 210 (1990), both parties agreed that the district court could resolve the defendant's emergency motion raising this issue. (RT 5, 24-25; ER 15, 34-35.) *See also United States v. Morgan*, 193 F.3d 252, 258-59 (4th Cir. 1999) (district court in pending criminal case reviewed defendant's challenge to FMC-Springfield's *Harper* determination).

B. Appellate Court Jurisdiction

This Court has not determined whether a district court order denying the defendant's motion to enjoin involuntary medication under *Harper* is appealable before trial under the collateral order doctrine. As the defendant notes, the Supreme

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[1] "CR" refers to the Clerk's Record, followed by the document number. "RT" refers to the Reporter's Transcript of June 29, 2011, followed by a page number. "ER" refers to the Excerpts of Record, followed by the page number. "SER" refers to the Supplemental Excerpts of Record, followed by the page number.

Court in *Sell v. United States*, 539 U.S. 166, 175-77 (2003), determined that the Eighth Circuit possessed jurisdiction under the collateral order doctrine to resolve Sell's pretrial interlocutory appeal challenging the district court's order authorizing involuntary medication to restore his competency. (Op. Br. at 2.) The involuntary medication decision being challenged on appeal in this case is an administrative *Harper* dangerousness order, and not a *Sell* order, as explained in this brief. However, based on the Supreme Court's analysis of the collateral order doctrine and its jurisdictional conclusion in *Sell*, the district court's order denying the defendant's challenge to BOP's *Harper* order appears similarly reviewable by the defendant on appeal before conviction. *See also Morgan*, 193 F.3d at 258-59 (Fourth Circuit analyzed collateral order doctrine in context of *Harper* order and found appellate jurisdiction existed to review the order before trial).[2]

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[2] Having said the above, there is a potential mootness issue. As this Court is aware, after the defendant filed a notice of appeal on July 1, 2011, challenging BOP's June 14th *Harper* order finding him to be a danger to others, this Court granted a temporary stay of medication that same night, requiring BOP doctors to stop medicating the defendant. (Ninth Circuit Order, July 1, 2011; Docket # 3.) This Court continued the stay on July 11, 2011, pending briefing and resolution of this appeal. (Ninth Circuit Order, July 11, 2011, Docket # 10.)

on July 18, 2011, BOP doctors determined that he needed to be medicated on an emergency basis. Documents concerning that emergency order were submitted to this Court under seal with the government's July 22, 2011 "Response to Defendant's Emergency Motion to Enforce Injunction and Compel Daily Production of BOP Records." (Ninth Circuit (continued...)

C. Timeliness of Appeal

Following the district court's denial of the defendant's emergency motion on June 29, 2011, the defendant filed a notice of appeal on July 1, 2011. (CR 251; ER 1.) The notice was timely pursuant to Fed. R. App. P. 4(b).

D. Bail Status

The defendant is currently in BOP custody at the Federal Medical Center (FMC) in Springfield, Missouri, after having been committed by the district court under 18 U.S.C. § 4241(d). (CR 252; ER 1.)

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[2](...continued)
Docket # 20-21). Exhibits 2 and 5 from that response –

– have been placed in the SER. (SER 40, 49.) On July 22, 2011, this Court denied the defendant's request to enjoin BOP's emergency medication of the defendant. (Ninth Circuit Order, July 22, 2011, Dkt # 23.) Thus, the defendant is currently being medicated with antipsychotic drugs based on a different BOP administrative order than the June 14th *Harper* order he challenges on appeal, which may raise a mootness issue. If not resolved in this appeal, the due process arguments the defendant advances, such as whether *Harper* determinations must be made by a judge rather than BOP doctors in a pretrial detainee context, may recur if he were to challenge any other BOP involuntary medication order in the future, including the emergency order. *See Murphy v. Hunt,* 455 U.S. 478, 482 (1982) (per curiam) (a case is not moot if there is a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party").

IV. ISSUES PRESENTED

I. WHETHER THE DISTRICT COURT PROPERLY DETERMINED THAT *WASHINGTON v. HARPER* – WHICH AUTHORIZES PRISON DOCTORS TO INVOLUNTARILY MEDICATE A DANGEROUS, MENTALLY ILL INMATE WITHOUT JUDICIAL APPROVAL – APPLIES TO PRETRIAL DETAINEES.

II. WHETHER THE DISTRICT COURT CORRECTLY FOUND THAT THE BUREAU OF PRISONS DID NOT ACT ARBITRARILY WHEN IT DETERMINED THAT INVOLUNTARY MEDICATION OF THE DEFENDANT WAS WARRANTED UNDER *HARPER*.

V. STATEMENT OF THE CASE

A. Superseding Indictment

On March 3, 2011, a federal grand jury in Tucson, Arizona filed a superseding indictment charging the defendant, Jared Lee Loughner ("the defendant") with multiple criminal offenses committed on or about January 8, 2011, including attempted assassination of a member of Congress, Gabrielle Giffords, murder of a federal judge, John M. Roll, murder and attempted murder of other federal employees, various weapons offenses, and injuring and causing death to multiple participants at a federally provided activity. (CR 129.)

B. Competency Hearing

On March 21, 2011, after the government filed a motion for a competency hearing and competency evaluation under 18 U.S.C. § 4241(a) (CR 141), the district court ordered that the defendant be evaluated by BOP medical personnel at FMC-Springfield. (CR 165.) BOP completed its court-ordered evaluation of the defendant, and, as the district court noted at the competency hearing, psychologist Dr. Pietz submitted a report to the district court, concluding that the defendant was suffering from a mental illness, schizophrenia, and was presently incompetent to stand trial. The district court also noted that a psychiatrist it appointed to evaluate the defendant, Dr. Carroll, reached a similar conclusion. (CR 221, 233; RT 5/25/11 39-49; *see also*

SER 30-31.) On May 25, 2011, after receiving the competency reports of Dr. Pietz and Dr. Carroll, and after conducting the competency hearing pursuant to 18 U.S.C. § 4241, which the defendant attended, the district court concluded that the defendant was presently incompetent to stand trial. Pursuant to 18 U.S.C. § 4241(d), the district court ordered the defendant committed to FMC-Springfield. (CR 221, 233; RT 5/25/11 50-52.)

C. FMC-Springfield Conducts *Harper* Hearing Pursuant to Regulation

After the defendant returned to FMC-Springfield on May 27, 2011, he declined to take medication. On June 14, 2011, BOP conducted an administrative hearing pursuant to 28 C.F.R. § 549.43 and *Washington v. Harper*, to determine whether the defendant should be involuntarily medicated as a danger to himself or others. 28 C.F.R. § 549.43 (a)(5) ("*Harper* order"). (CR 241, Exh. 1; SER 27; RT 4; ER 14.)[3] The defendant was given notice of this hearing and was advised he could call witnesses. He did not want to call witnesses. (CR 241, Exh. 1; SER 27, 29, 34; RT 53-54; ER 63-64.)

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[3] Exhibit 1 contains information relevant to the *Harper* hearing and was submitted under seal with the government's response to the defendant's motion to enjoin the *Harper* order. (CR 241; SER 21-38.) Exhibit 1 was subsequently ordered sealed by the district court, as were three exhibits that the defense submitted under seal with its motion to enjoin. (CR 244; ER 150, 151-176.)

Material Under Seal Deleted

(CR 241,

Exh. 1; SER 29.)

(SER 29.)

(CR 241, Exh.

Material Under Seal Deleted

1; SER 31.)

(CR 241, Exh. 1; SER 31.)[4]

(CR 241, Exh. 1; SER 30-32.)

(CR 241, Exh.

1; SER 32.)

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[4]

(CR 241, Exh. 1; SER 36-37.) Since the time of the *Harper* hearing, the defendant

threw items again on June 29, 2011 (RT 48-49; ER 58-59.)

Material Under Seal Deleted

(CR 241, Exh. 1; SER 30.)

(CR 241, Exh. 1; SER 32.)

(CR 241, Exh. 1; SER 32.)

(CR 241, Exh. 1; SER 29, 32, 33.)

(CR 241, Exh. 1; SER 26.)

(CR 241, Exh. 1; SER 24-25.) The district court found that the defendant was afforded all of his procedural rights under 28 C.F.R. § 549.43. (CR 252.)

On June 21, 2011, BOP began medicating the defendant

(CR 241, Exh. 1; SER 32.) The defendant took the medication orally and was tolerating the medication well. (CR 241 n.12; SER 19.)[5]

D. <u>District Court's Denial of Defendant's Emergency Motion to Enjoin Medication</u>

On June 24, 2011, the defense filed an emergency motion with the district court, asking it to enjoin FMC-Springfield from involuntarily medicating the defendant in the wake of BOP's administrative determination under *Harper* that the defendant is a danger to others. (CR 239; ER 76.) The defense argued that: 1) an involuntary

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[5] Dr. Serrazin's July 22, 2011 affidavit concerning BOP's July 18, 2011 emergency medication order amplifies this point.

medication order for *Harper* reasons must first be made by a court, notwithstanding the Supreme Court's contrary determination in *Harper*; 2) FMC-Springfield's decision to medicate for *Harper* reasons should be vacated because it was unjustified, citing *United States v. Morgan*, 193 F.3d 252 (4th Cir. 1999); and 3) the requirements of *Sell v. United States*, 539 U.S. 166 (2003), and *Riggins v. Nevada*, 504 U.S. 127 (1992), should govern this case. (ER 80-93.) On June 28, 2011, the government filed a response, opposing the request. (CR 241; SER 1.)

On June 29, 2011, the district court conducted a hearing and listened to arguments of counsel. (RT 6/29/11; ER11.) The district court subsequently denied the defendant's motion at the hearing (RT 50-64; ER 60-74) and in a subsequent written order (CR 252; ER 3-10). In that order, the district court made the following factual findings:

> When [the defendant] was at FMC previously for his competency evaluation during March and April, 2011, the defendant threw a chair on multiple occasions, sometimes while screaming expletives. On a separate occasion, he lunged and spat at his attorney. During his current stay at the FMC, he has been observed hallucinating, yelling for no apparent reason, and again throwing the chair in his cell. This conduct has come on suddenly and with no apparent provocation. On June 14, the FMC staff held a *Harper* hearing, pursuant to [28 C.F.R.] § 549.43, and determined that the defendant poses a danger to others. The staff was aware not only of his conduct at the FMC, but also that he has a history of mental illness. The defendant began receiving antipsychotic medications approximately one week after the June 14th *Harper* hearing.

Material Under Seal Deleted

(CR 252; ER 4.) In response to the defendant's argument that he had requested his attorney to be his witness, and that such a request was wrongly denied, the district court stated that it "agree[d] with the apparent interpretation of the statement by the defendant's staff representative who, in light of the defendant's initial response [stating he did not want to present witnesses], construed the statement as a request for legal representation at the hearing, to which he is not entitled." (CR 252; ER 10 & n.4.) The district court denied the defendant's emergency motion to enjoin medication. (CR 252; ER 10.)

The defendant filed a notice of appeal on July 1, 2011, and filed a motion in this Court seeking an injunction of involuntary medication. (CR 251; ER 1; Ninth Circuit Docket # 2.) After granting a temporary stay that same evening (Ninth Circuit Docket # 3), this Court, on July 12, 2011, issued an order staying involuntary medication until briefing and resolution of the defendant's appeal (Ninth Circuit Docket # 10). As noted earlier, *see supra* n. 2, after this Court stayed the involuntary medication of the defendant, BOP doctors ceased providing anti-psychotic medication to the defendant. On July 18, 2011, BOP determined that medication was warranted on an emergency basis (SER 41-47.)

The defendant appeals the district court's denial of his motion to enjoin medication based on BOP's June 14th *Harper* determination.

VI. SUMMARY OF ARGUMENT

A. The district court properly denied the defendant's motion to enjoin BOP from medicating the defendant based on its June 14th *Harper* determination. First, the district court correctly determined that the defendant received substantive due process based on the Supreme Court's decision in *Harper*, which held that prison doctors may involuntarily administer antipsychotic medication to a mentally ill inmate who poses a danger, and that doctors, not judges, make that administrative decision. The district court correctly found that the BOP determination being challenged was a *Harper* order based on dangerousness, and not a *Sell* order, which is issued by a judge authorizing involuntary medication to restore a defendant to competency. Nor was this matter controlled by *Riggins*, which did not involve a *Harper* administrative order, but a judicial order involuntarily medicating a defendant during trial. The district court correctly concluded that the standards in *Harper*, not *Sell* or *Riggins*, controlled this matter.

Contrary to the defendant's argument, *Harper* applies to pretrial detainees like him, as the district court noted, a conclusion fully supported by authority from the Supreme Court, this Court, and other circuits. The legitimate interest of a prison to maintain safety and security is the same whether the inmate is a pretrial detainee or a convicted prisoner, and, as the district court observed, a dangerous inmate is a

danger regardless of the stage of his criminal case. Consequently, the defendant's various arguments throughout his brief advocating for a more rigorous inquiry than what is required in *Harper*, and that judges, not doctors, must make *Harper* decisions in a pretrial context, stumble out of the gate because they rest on the legally incorrect premise that *Harper* does not apply to him as a pretrial detainee.

B. Second, the district court correctly found that the defendant received procedural due process and that BOP's administrative decision to medicate him under *Harper* and 28 C.F.R. § 549.43 was not arbitrary. The district court found that the defendant received all of the protections required by *Harper* and § 549.43, a regulation specifically crafted in the wake of *Harper*. The defendant's various arguments to the contrary are unfounded. He was afforded a right to present witnesses, and although he requested his attorney, he had no right to counsel at the administrative hearing. His complaints about specific dosage and least restrictive alternatives are unavailing because they are not features of *Harper*, but of *Riggins* and *Sell*, which do not apply. Moreover, BOP did consider lesser alternatives and the defendant was prescribed specific medication before being medicated. Finally, the district court did not plainly err when it found that BOP medicated the defendant based on his danger to others, not danger to property, an argument the defendant raises for the first time on appeal.

VII. ARGUMENTS

I. THE DEFENDANT WAS NOT DENIED SUBSTANTIVE DUE PROCESS BECAUSE, AS THE DISTRICT COURT CORRECTLY DETERMINED, PRISON DOCTORS COULD INVOLUNTARILY MEDICATE THE DEFENDANT BASED ON *WASHINGTON V. HARPER*.

A. Standard of Review

The determination of the appropriate constitutional standard that governs a particular inquiry is a question of law subject to de novo review. *Pierce v. Multnomah County*, 76 F.3d 1032, 1042 (9th Cir. 1996). However, unpreserved due process claims are reviewed only for plain error. *United States v. Diaz-Ramirez*, 2011 WL 1947226 at *2 (9th Cir. 2011). A district court's factual findings are reviewed for clear error, requiring a "definite and firm conviction" that a mistake has been committed. *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009) (en banc).

B. Argument

The defendant first claims that he was denied substantive due process, claiming that: 1) the rule in *Harper* does not apply to pretrial detainees and that judges, not doctors, must make *Harper* medication determinations; and 2) different legal standards apply, such as those in *Sell* and *Riggins*, instead of the standards in *Harper*. (Op. Br. at 14-46.) The district court properly rejected these arguments and the defendant has failed to cite a single decision where a reviewing court has adopted

them. This Court should decline the defendant's invitation to be the first court to do so; such a ruling not only would be legally incorrect, but would be contrary to authority from the Supreme Court, this Court, and other circuits.

1. **The District Court Correctly Determined That *Washington v. Harper* Controlled This Case, Not *Sell* or *Riggins*, And That Prison Doctors, Not Judges, Make *Harper* Determinations.**

The Supreme Court in *Washington v. Harper* determined that involuntary administration of antipsychotic medication is permissible based on a prison's administrative finding that a mentally ill inmate is a danger and the treatment is in his medical interest:

> In *Harper,* the Supreme Court recognized that an individual has a significant liberty interest under the Due Process Clause of the Fourteenth Amendment in avoiding the unwanted administration of antipsychotic drugs. *Harper,* 494 U.S. at 221-22, 110 S.Ct. 1028. The Court concluded, however, that a state's interest in administering medication to a dangerous inmate is legitimate and important, *id.* at 225-26, 110 S.Ct. 1028, and held that the Due Process Clause allows a state *"to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."* *Id*. at 227, 110 S.Ct. 1028.

United States v. Hernandez-Vasquez, 513 F.3d 908, 912 (9th Cir. 2008) (emphasis added).

By contrast, the Supreme Court's later decision in *Sell* involved the judicial determination whether to "administer antipsychotic drugs to a mentally ill defendant

facing serious criminal charges *in order to render that defendant competent to stand trial*." *Sell*, 539 U.S. at 179-80 (emphasis added).[6]

The Court in *Sell* specifically found that *Harper* orders were different from *Sell* orders, and that *Harper* orders are "preferable" because "inquiry into whether medication is permissible, say, to render an individual non-dangerous is usually more objective and manageable than the inquiry into whether medication is permissible to render a defendant competent." *Sell*, 539 U.S. at 181-83; *see also Hernandez-Vasquez*, 513 F.3d at 913 ("The Supreme Court stressed that a *Sell* inquiry is independent of the procedure that allows involuntary medication of dangerous inmates under *Harper*" and "an involuntary medication order based on dangerousness is preferable to consideration of an order intended to render a defendant competent for trial.").

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[6] Unlike a *Harper* order, a *Sell* order requires the government to present clear and convincing evidence of the following: 1) the existence of an "important" government interest; 2) that involuntary medication will "significantly further" the government interest; 3) that involuntary medication is "necessary" to further those interests; and 4) that administration of the drugs must be "medically appropriate." *Sell*, 539 U.S. at 180-81. *See also Harper*, 494 U.S. at 235 (*Harper* did not employ the same standards used in *Sell*, and the *Harper* majority rejected the dissent's argument that the clear and convincing evidence standard should apply to *Harper* administrative hearings). The defendant's reliance on *Sell* and other decisions that concerned *Sell* orders, such as *United States v. Ruiz-Gaxiola*, 623 F.3d 684 (9th Cir. 2004), is misplaced.

Sell expressly limits applicability of its more rigorous standards to situations where the defendant was being involuntarily medicated to restore competency, and stated that a court need not consider a *Sell* order if *Harper* grounds exist to medicate:

> We emphasize that the court applying [the *Sell*] standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a government interest, namely the interest in rendering the defendant *competent to stand trial*. A court need not consider whether to allow forced medication for that kind of purpose, if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* related to the individual's dangerousness...

Sell, 539 U.S. at 181-82 (emphasis in original). *See Sell*, 539 U.S. at 183; *Hernandez-Vasquez*, 513 F.3d at 913 (*Sell* orders are "disfavored" and *Harper* inquiry must come first; medication for *Harper* reasons obviates need for any *Sell* order); *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1137 (9th Cir. 2005). These "*Harper*-type grounds," are typically treated "as a civil matter." *Sell*, 539 U.S. at 181-83.

In short, *Sell* involuntary medication orders by a judge to restore competency are different from *Harper* administrative orders based on dangerousness, and the defendant may be medicated for *Harper* reasons, completely independent of *Sell*'s requirements, even if he is incidentally restored to competency from medication administered on *Harper* grounds.[7] In this case, the district court specifically found

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[7]As the district court noted, a case providing a practical illustration of this principle is *United States v. Grape*, 549 F.3d 591, 594, 597 (3rd Cir. 2008). (CR 252 (continued...)

that BOP medicated the defendant based on his danger to others under *Harper*, and not to restore his competency. (CR 252; ER 5.)

The decision in *Riggins*, cited by the defendant, did not concern a *Harper* order. As the district court noted, Justice Kennedy's concurrence stated that *Riggins* was "not a case like *Washington v. Harper*," where involuntary medication could be authorized based on dangerousness. (CR 252; ER 5-6). Rather, after taking medication (Mellaril) voluntarily, and having been found competent to stand trial, Riggins moved to suspend the administration of Mellaril until after his trial. *Riggins*, 504 U.S. at 130-31. The district court conducted an evidentiary hearing and denied the motion in a one-page order that gave no indication of the court's rationale. *Id.* at 131. The defendant was convicted at trial and argued that the forced administration of the medication denied him the ability to assist in his defense and prejudicially altered his attitude, appearance and demeanor at trial. *Id.* Thus, the Court's discussion in *Riggins* about medication and side effects arose in this trial-medication context, and did not concern a *Harper* order. *See Riggins*, 504 U.S. at 140 (J. Kennedy, concurring) (after noting that *Riggins* did not concern *Harper*, where the "purpose of the

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[7](...continued)
n.2; ER 6.) *See also Morgan*, 193 F.3d at 264 (although *Harper*-based medication may have incidental effect of restoring defendant to competency, this did not alter that the administrative involuntary medication decision was justified under *Harper*).

involuntary medication was to ensure that the incarcerated person ceased to be a physical danger to himself or others," and was both "objective and manageable," Justice Kennedy observed that the medication purpose in *Riggins* included, "rather, to render the person competent to stand trial").

The district court properly found "that *Harper*, not *Riggins* or *Sell*, applies here." (CR 252 at 3; ER 5.) It rejected the defendant's attempts to "import into the *Harper* analysis the substantive due process rights identified in *Sell* and *Riggins*," noting that such a determination would be for the Supreme Court to make. (*Id.*)

The defendant claimed below that he could not be forcibly medicated under *Harper* "[a]bsent a judicial determination" and "hearing" at which he would be "represented by counsel." (Def's Exh. 1, p. 12.) He reiterates this argument on appeal. (Op. Br. at 12-13, 35-46.) However, *Harper* itself rejects this argument. In addition to holding that, as a matter of substantive due process, the prison may "treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest," 494 U.S. at 227, the Court also held that, as a matter of procedural due process, the procedural protections afforded by the Washington regulations satisfied the requirements of the Due Process Clause. *Id.* at 228-36.

In particular, the Court held that it was permissible for prison officials to order involuntary medication under the regulations without judicial involvement. Like the defendant here argues, the Washington Supreme Court held that "a full judicial hearing, with the inmate being represented by counsel, was required by the Due Process Clause before the State could administer antipsychotic drugs to him against his will." *Harper*, 494 U.S. at 228. The Supreme Court disagreed, holding that "the Washington Supreme Court erred in requiring a judicial hearing as a prerequisite for the involuntary treatment of prison inmates." *Id*. The Court found that an inmate's due process rights are protected by having doctors, not judges, make the *Harper* determination:

> Notwithstanding the [medication] risks that are involved, *we conclude that an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge*. The Due Process Clause has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer. Though it cannot be doubted that the decision to medicate has societal and legal implications, the Constitution does not prohibit the State from permitting medical personnel to make the decision under fair procedural mechanisms.

Harper, 494 U.S. at 231 (internal citations and quotations omitted) (emphasis added). (*See* also Govt's Exh. 2, pp 5-7.)[8] *See also Parham v. J.R.*, 442 U.S. 584, 607 (1979)

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[8] As the district court correctly found, the "procedural mechanisms" set forth by the Bureau of Prisons in 28 C.F.R. § 549.43 are consistent with *Harper*. (CR 252 (continued...)

("[D]ue process is not violated by use of informal, traditional medical investigative techniques . . .. The mode and procedure of medical diagnostic procedures is not the business of judges . . .."), cited in *Harper*. The district court correctly found that "*Harper* is clear that doctors, not lawyers or judges, should answer the question whether an inmate should be involuntarily medicated to abate his dangerousness and maintain prison safety." (CR 252; ER 5.) *See also* RT 56, 58; ER 66, 68 ("I'm not presupposing that my judgment is better than the doctors.' In fact, I think just the opposite. . . I didn't go to medical school.").

Thus, the Supreme Court decision in *Harper* controls this case, and prison doctors, not judges, are responsible for making the administrative *Harper* decision. The district court correctly so found.

2. **The District Court Correctly Determined That *Washington v. Harper* Applies To Pretrial Detainees**

a. Supreme Court Authority Establishes This Point

The defendant attempts to evade the dispositive effects of *Harper* by asserting throughout his brief that *Harper* does not apply to pretrial detainees. (*See, e.g.*, Op.

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[8](...continued)
at 7 & n. 3.) Indeed, BOP enacted that regulation in light of *Harper*, establishing procedures allowing prison officials to order the involuntary medication of a federal inmate. *See* Administrative Safeguards for Psychiatric Treatment and Medication, 57 Fed. Reg. 53820-01 (Nov. 12, 1992) (codified at 28 C.F.R. § 549.43). The regulation recently was amended. *See* 76 Fed. Reg. 40229-02, 2011 WL 2648228 (eff. 8/12/11).

Br. at 16-20, 26-33.) Not only does he fail to cite any case so holding, but the Supreme Court has already resolved that a prison's legitimate interest and duty to maintain security and safety of the facility is the same, regardless of whether the inmate is a pretrial detainee or a convicted prisoner.

"There can be little doubt as to both the legitimacy and the importance of the governmental interest presented here," and there are few cases where the "interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, by definition, is made up of persons with a demonstrated proclivity for antisocial criminal, and often violent, conduct."[9] *Harper*, 494 U.S. at 225. The Supreme Court has recognized that prison officials have a "duty" to ensure the safety of their medical staff and may medicate mentally ill inmates who pose a danger:

> Prison administrators have not only an interest in ensuring the safety of prison staffs and administrative personnel, but also the duty to take reasonable measures for the prisoners' own safety. These concerns have added weight when a penal institution . . . is restricted to inmates with mental illnesses. Where an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness.

Harper, 494 U.S. at 225-226 (internal citations and quotations omitted).

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[9] This is an apt description of the defendant, who is charged with killing six people and shooting 13 others.

The Court also observed that the "extent of a prisoner's right under the [Due Process] Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement." *Id.* at 222-23. Although the defendant argues the "context of confinement" language means that there is a legal difference between the pretrial and post-conviction detention context for *Harper* medication purposes (Op. Br. at 15-16), he is incorrect.

First, when the Court in *Harper* discussed the "inmate's confinement," it drew no distinction between pretrial and post-conviction confinement, and the references in its decision are to "prisoner" or "inmate" without differentiation, and not, for example, to "convict" as opposed to "accused." Second, as the district court correctly noted, "a dangerous individual is dangerous, whether he is a pretrial detainee or has been convicted and sentenced." (CR 252 at 4; ER 6.) *See also* RT 51-52; ER 61-62 ("The nature of the danger doesn't turn on whether a person is serving time after conviction pending trial. . . [I]f the purpose is to abate the danger, . . . then . . .whether he's serving time after a conviction or pending trial[] doesn't make any difference at all. [The dangerousness inquiry] is an abiding concern regardless of the [stage] in the criminal justice process . . .").

The district court's conclusion is correct both as a matter of common sense and based on the Supreme Court cases relied upon by the Court in *Harper*, which

demonstrate that *Harper* applies with equal force to pretrial detainees because of the prison facility's interest in maintaining security and safety, regardless of the stage of the inmate's criminal case. "The legitimacy, and the necessity, of considering the [government's] interest in prison safety and security are all well-established by our cases." *Harper*, 494 U.S. at 223. The Court stated that it had previously held that the "proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is reasonably related to legitimate penological interests." *Id*., quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987). Further, "[w]e made quite clear that the standard of review we adopted in *Turner* applies to *all circumstances* in which the needs of prison administration implicate constitutional rights." *Id.* at 223 (emphasis added).

In support of this statement, the *Harper* Court quoted portions of *Turner* that relied not only on cases involving convicted inmates, but also on the pretrial detainee decisions in *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Block v. Rutherford*, 468 U.S. 576 (1984). Thus, the Court in *Harper* clearly intended that the standard it adopted would apply regardless of whether individuals were being detained before trial or after conviction – it was the institutional confinement itself that determined the extent of their right against unwanted medication.

The lack of distinction between pretrial detainees and convicted prisoners when institutional security and management is at issue is at the heart of the *Bell* decision. *Bell* concerned a federal facility in New York City that housed people pending trial as well as those awaiting sentencing or serving short sentences. The Supreme Court stated that, "reasoning from the 'premise that an individual is to be treated as innocent until proven guilty,' the court [of appeals] concluded that pretrial detainees retain the 'rights afforded unincarcerated individuals,'" so that they could only be subjected to conditions that were justified by "compelling necessities of jail administration." 441 U.S. at 531. The defendant in this case similarly argues that he was entitled to greater due process protections than those set forth in *Harper* because he is a pretrial detainee who is presumed innocent. (Op. Br. at 19-20, 26-29.)

In *Bell*, however, the Supreme Court stated that, "the presumption of innocence provides no support for such a [compelling necessity] rule" because, while the presumption has great importance in the *trial* context, "it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has ever begun." *Id.* at 532-33. "The fact of confinement as well as the legitimate goals and policies of the penal institution limits . . . retained constitutional rights. . . . *This principle applies equally to pretrial detainees and convicted prisoners*." *Id.* at 546 (emphasis added). Therefore, the appropriate inquiry "[i]n evaluating the

constitutionality of conditions . . . of pretrial detention that implicate only the protection against deprivation of liberty without due process of law . . . is whether those conditions amount to punishment of the detainee." *Id.* at 535-36. The Court found that not every unpleasant aspect of institutional confinement is "punishment" that may not be inflicted on pretrial detainees:

> Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment."

Id. at 535-36.

To determine what would constitute impermissible "punishment" of a pretrial detainee, the Court determined that if "a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment'" and that courts "must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Id.* at 538 (internal citations omitted). "[T]reatment with psychotropic drugs is not punishment." *Jurasek v. Utah State Hospital*, 158 F.3d 506, 511 (10th Cir. 1998) ("[t]he lack of punishment in the context of forced medication . . . removes any

need to provide involuntarily-committed patients with greater due process protection than prisoners"). Because treatment with psychotropic drugs is not "punishment," the defendant incorrectly relies on the notion that he is or will be subjected to punishment to conclude that "the pretrial detainee's liberty interest in avoiding unwanted medication is greater than that of a convicted inmate." (Op. Br. at 19-20).[10]

The defendant also incorrectly argues that a government interest greater than that found by the Court in *Harper* is necessary in a pretrial context. (Op. Br. at 20.) That argument overlooks *Harper* itself, which held that the liberty interest of an inmate to avoid unwanted medication is subordinate to a prison's legitimate interest in medicating a dangerously mentally ill inmate to maintain the security and safety of the facility. *Harper,* 494 U.S. at 221-22, 225-27. As noted earlier, the *Harper* Court's conclusion finds its roots in the pretrial detainee case of *Bell*, in which it stated that "the Government must be able to take steps to maintain security and order at the

[10] The defendant's discussion of the potential punishment in his criminal case, including the death penalty, is without merit because it is not the potential punishment in a criminal case that determines whether a prison facility may involuntarily medicate the defendant as a danger under *Harper*. (Op. Br. at 25.) Nor has the defendant cited any authority holding that the possible criminal sentence triggers different standards for *Harper*-based administrative medication decisions other than those set forth in *Harper*. The defendant also cites *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004) (Op. Br. at 20, 26-27), which is inapplicable because it concerned a finding that use of jail video cameras to televise images of pretrial detainees over the internet was punishment. As noted above, treatment with psychotropic drugs is not "punishment."

institution." *Bell*, 441 U.S. at 540. In *Bell*, the Court noted that "the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention," *id.*, even when constitutional rights are at issue:

> [M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of *both convicted prisoners and pretrial detainees. "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."* . . . Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel . . . Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.

Id. at 546-47 (emphasis added; internal citations omitted). The Court stated: "Neither the Court of Appeals nor the District Court distinguished between pretrial detainees and convicted inmates in reviewing the challenged security practices, and we see no reason to do so. *There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates*." *Id.* at 546 n.28 (emphasis added).[11]

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[11] Yet again emphasizing that there is no legitimate distinction to be drawn between pretrial detainees and convicted prison inmates, the Court rejected the very argument now made by the defendant that "this Court's cases holding that substantial deference should be accorded prison officials are not applicable to this case because those decisions concerned convicted inmates, not pretrial detainees." *Bell*, 441 U.S. at 547 n.29 ("Those decisions held that courts should defer to the informed discretion (continued...)

In short, the Supreme Court has already determined that in assessing the extent of the rights possessed by detained persons, no valid distinction exists between pretrial detainees and convicts. Prisons possess the same legitimate interest in maintaining the safety and security of the facility in both situations. *See also* 18 U.S.C. § 4042(a) (BOP is obligated to "provide suitable quarters and provide for the safekeeping, care, and subsistence *of all persons charged with or convicted of offenses* against the United States") (emphasis added).

The Court's decision in *Sell* also demonstrates that *Harper* applies to pretrial detainees. Whether to issue a *Sell* order – which involves involuntarily medicating a defendant to try to restore his competency to stand trial – is an inquiry that necessarily occurs before trial. As discussed earlier, the Court in *Sell* stated that a trial court should not issue a *Sell* order if "forced medication is warranted for a different purpose, such as the purposes set out in *Harper* related to the individual's dangerousness or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk." *Sell*, 539 U.S. at 181-82. If *Harper* must be considered before

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[11](...continued)
of prison administrators because the realities of running a corrections institution are complex and difficult, courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch. *While those cases each concerned restrictions governing convicted inmates, the principle of deference enunciated in them is not dependent on that happenstance*.") (Emphasis added.)

Sell – and *Sell* is a pretrial inquiry – then *Harper* necessarily applies to pretrial detainees. Although it certainly had the opportunity, the Court in *Sell* also never stated that the *Harper* determination must be made by a judge in a pretrial detainee scenario.

Nor did the Court so hold in *Riggins*. Instead, it quoted the legal standard from *Harper* – that due process permits involuntary medication of a mentally ill inmate who is a danger and the treatment is in his medical interest. 504 U.S. at 134-35. Pertinent to the argument the defendant makes on appeal, the Court also stated:

> Although we have not had occasion to develop substantive standards for judging forced administration of such drugs in the trial or pretrial setting, Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others.

Id. at 135. The defendant latches onto this language and contends that the Court was enunciating a new and heightened *Harper* test for pretrial detainees. (Op. Br. at 17.) However, the defendant misreads the case. As the quote above reflects, the Court merely commented that *if* Nevada had shown that "treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others," due process would have been satisfied. 504 U.S. at 135. It does not say that this is the *only* way

that due process can be satisfied. Thus, the defense turns a mere passing comment into a holding that the Court did not make.

Moreover, as noted earlier, *Riggins* did not concern a *Harper* medication order; that decision analyzed involuntary medication of the defendant during the course of the trial. *See Riggins*, 504 U.S. at 135 (Court discussed situations where the state wants to treat the defendant in order to obtain an adjudication of guilt or innocence); *see also Morgan*, 193 F.3d at 264-65 (*Riggins* standard applies for involuntary medication during trial); *Milne v. Burns*, 2005 WL 2044912 at *7 (D.N.J. 2005) (unpublished) ("*Riggins* and *Sell* do not apply here because Milne was not administered Mellaril for the purposes of making him competent to stand trial"). *See also* RT 51; ER 61 (district court observed that neither *Riggins* nor *Sell* expressly modified *Harper* or restricted its application to convicted persons in the way that the defense contended). In short, Supreme Court authority demonstrates that *Harper* is applicable to pretrial detainees like the defendant.

b. Authority From This Court And Other Circuits Further Supports That *Harper* Applies To Pretrial Detainees And That Doctors, Not Judges, Make *Harper* Determinations.

In *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc), a case dealing with a jail policy of strip-searching pretrial detainees, this Court drew heavily on *Turner* and *Bell* and explicitly rejected the pretrial/post-trial

distinction the defense attempts to draw in this case. This Court held that, because the goal of the policy "was to further institutional security goals within a detention facility," its decision was governed by *Turner* and *Bell*. 595 F.3d at 971. It specifically cited *Harper* as "explaining that *Turner* made quite clear that the standard of review [the Supreme Court] adopted ... applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Id.* at 974 (internal quotations omitted). This Court also noted that safeguarding institutional security is "the central objective of prison administration." *Id.* at 975.

The defendant here contends that a detention facility's interests differ at the pretrial and post-conviction stages in a penological sense, and that this distinction mandates heightened standards in the pretrial *Harper* context. (Op. Br. at 26-33.) Such a distinction was rejected in *Bull*:

> The dissent attempts to distinguish [prior cases] on the ground that they involved "claims brought by prisoners already serving sentences," and thus "involve[d] legitimate penological interests," while such "penological interests" do not apply to pre-trial detainees. This distinction is unavailing. *We have never distinguished between pretrial detainees and prisoners in applying the Turner test, but have identified the interests of correction facility officials responsible for pretrial detainees as being "penological" in nature. . . .* While penological interests in punishment or rehabilitation may not be applicable outside of a prison setting, the penological interest in security and safety is applicable in all correction facilities. *Indeed, Bell declined to "distinguish[ ] between pretrial detainees and convicted inmates in reviewing the challenged security practices," noting that "[t]here is no*

> *basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates."* . . . *Bell,* 441 U.S. at 547 n. 28.

Id. at 974 n.11 (emphasis added). Thus, both the Supreme Court and this Court en banc have rejected the purported distinction that is foundational to the defendant's argument.

As explained earlier, this Court has also noted in *Hernandez-Vasquez* and *Rivera-Guerrero* that *Sell* requires courts to consider whether *Harper* dangerousness grounds exist to medicate a defendant before considering whether to issue a *Sell* order. Both cases involved pretrial detainees. Contrary to the defendant's argument, this Court in *Hernandez-Vasquez* did not rule that judges must make *Harper* determinations in a pretrial context. (Op. Br. at 44-46.) It simply faulted the district court for not considering whether *Harper* grounds existed to medicate and remanded for this purpose. *Hernandez-Vasquez*, 513 F.3d at 919. *Harper* itself states that a *Harper* determination is made by the prison doctors, not by judges, and *Hernandez-Vasquez* did not hold to the contrary. *See also Ruiz-Gaxiola*, 623 F.3d at 689 (before considering whether *Sell* applied, magistrate ordered the *government* to conduct an administrative *Harper* hearing to determine whether *Harper*-based medication of pretrial detainee was warranted; after FMC-Butner determined defendant was not a danger, magistrate proceeded to *Sell* analysis).

Indeed, other circuit decisions support that *Harper* applies to pretrial detainees and that the decision to medicate is made by prison doctors, not judges, even in this pretrial detainee context. In *United States v. White*, 431 F.3d 431, 433-35 (5th Cir. 2005), the Fifth Circuit rejected the argument that the defendant makes here, namely, that a judge should have made the *Harper* determination instead of BOP, and that BOP was making an "end run" around *Sell* by medicating the pretrial detainee defendant under *Harper*. (CR 239; ER 77; Op. Br. at 12, 33.) In *White*, the government asked the district court directly for an order authorizing involuntary medication of pretrial detainee based on both *Harper* and *Sell* grounds. The district court found that medication was justified on both grounds. *Id*. at 432. The Fifth Circuit reversed, finding that the "government made an end run around the regulatory scheme in [28 C.F.R.] § 549.43" by going directly to the judge for a *Harper* order instead of following the procedure in § 549.43. *Id*. at 434. It also declined to consider the separate *Sell*-based justification for the medication in the district court's order, in light of "the Supreme Court's admonition in *Sell* to consider whether involuntary medication is appropriate on grounds of dangerousness *before* considering whether doing so would be appropriate to restore an inmate's competence to stand trial." *Id*. at 435 (emphasis in original).

The defendant here claims that the *Sell* procedure and standards apply instead of the *Harper*-based procedure and standards in § 549.43 (Op. Br. at 37-46), but the Fifth Circuit disagreed: "Nothing in *Sell* casts doubt on § 549.43's applicability to the dangerousness inquiry." *Id.* The Fifth Circuit found that "it was error for the district court to make the initial determination to medicate White involuntarily," and remanded "to the district court with instructions to order a due process hearing in accordance with § 549.43." *Id.* at 434. This Court should decline the defendant's invitation to create a circuit split by ruling to the contrary. The defendant is wrong that a judge should have made the *Harper* decision instead of BOP doctors, and under standards not found in *Harper*.[12]

Adopting the defendant's arguments would also create a conflict with the Fourth Circuit, which also applied *Harper* to pretrial detainees. *See Morgan*, 193 F.3d

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[12] The defendant's argument that having judges make these decisions would not meaningfully or adversely interfere with custodial facilities (Op. Br. at 37-39) is without merit. As the amici note: "Such a requirement [of judicial review] . . .would create serious risks and burdens for custodial officials, medical personnel, and other inmates, while doing little, if anything to protect the legitimate due process interests at stake." (Amicus Br at 20-21.) *See also id.* at 24-26 (discussing administrative burdens that would ensue, as well as delay between diagnosis and treatment, particularly where "the choice to medicate is not a one-time decision; it involves a process of monitoring and, for many patients, adjustments in medication and dosage").

at 261-63.[13] Other circuits are in accord. *See United States v. Green*, 532 F.3d 538, 545 n.5 (6th Cir. 2008) ("The *Sell* standard applies when the forced medication is requested to restore competency to a pretrial detainee and the pretrial detainee is not a danger to himself or others. *When the pretrial detainee is a danger to himself or others, the Harper standard is used*.") (emphasis added); *Grape*, 549 F.3d 591, 599 (3rd Cir. 2008) ("We do not reach consideration of the four-factor *Sell* test unless an inmate does not qualify for forcible medication under *Harper,* as determined at a *Harper* hearing generally held within the inmate's medical center." After FMC-Springfield conducted a *Harper* hearing and found the pretrial defendant to be a danger, "staff began forcibly medicating Grape immediately," and he was incidentally restored to competency before oral argument on the *Sell* appeal); *United States v. Morrison*, 415 F.3d 1180, 1185-87 (10th Cir. 2005) (Tenth Circuit determined that *Harper* inquiry should have preceded *Sell* inquiry, and remanded to the district court

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[13] In response to the defendant's argument that *Harper* did not apply to pretrial detainees, the district court stated: "[D]o you have a case that supports that slant? Because there are cases now, including a Fourth Circuit case in *Morgan*, that recognized no such distinction between pre-trial detainees and convicted prisoners. *Morgan* himself was a pretrial detainee." The defendant did not cite any such cases, and continued to argue based on *Riggins* and *Sell*. (RT 19-20; ER 29-30.)

so it could "require the *Government* to proceed first under *Harper,* or explain why it chooses not to") (emphasis added).[14]

3. The Defendant's Various Other Arguments Are Without Merit

In his brief, the defendant claims that he had "weighty interests" as a pretrial detainee that allowed him to avoid unwanted medication, listing several such interests. (Op. Br. at 17-33.) He also cites *Matthews v. Eldridge*, 424 U.S. 319 (1976), and argues that a judicial hearing was necessary before medicating the defendant, again advocating standards that he contends govern in this "different" pretrial "context." (Op. Br. at 35-46.) However, almost all of the arguments are dependent on this Court's acceptance of his premise that *Harper* is inapplicable to pretrial detainees. Because that premise has been shown to be unfounded, the defendant's various arguments fail at the outset. In any event, they are without merit.

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[14] *See also Jurasek v. Utah State Hospital*, 158 F.3d 506, 511 (10th Cir. 1998) (Tenth Circuit balanced the interest of a civilly-committed violent schizophrenic in not being involuntarily medicated with the hospital's need to insure the safety of staff and other patients, finding that *Harper* provides sufficient due process in this context and that medication is not punishment. "One could argue that because a pretrial detainee has not been convicted of a crime, he deserves greater due process protections than a prisoner. The Court, however, implicitly rejected this argument in *Riggins* by applying the *Harper* standards to an incompetent pretrial detainee.") Thus, the Tenth Circuit interpreted *Riggins* as *not* as setting forth a different standard than *Harper* for pretrial detainees medicated for dangerousness.

Material Under Seal Deleted

a. *That Antipsychotic Medication Has The Potential For Side Effects Does Not Make Harper Orders Unjustified; Rather, Such Medication Is The Well-Accepted Treatment For The Defendant's Diagnosed Mental Illness.*

The defendant contends that *Harper* is inapplicable in part because, as a pretrial detainee, he has the right to be free from unwanted "brain altering chemicals" (Op. Br. at 18) that could have "harmful side effects" (Op. Br. at 21). However, the risk of side effects does not invalidate *Harper* medication orders; the defendant's side effect discussion overlooks key points; and the defendant was, in fact, tolerating the prescribed medication well

First, as explained earlier, the defendant has no increased liberty interest as a pretrial detainee in the *Harper* context, so he cannot evade *Harper*. The *Harper* Court specifically held that, notwithstanding the potential for side effects with antipsychotic medication, doctors may nevertheless medicate inmates who pose a danger. *Harper*, 494 U.S. at 229-31 (after discussing the potential side effects at length, the Court immediately concluded: "Notwithstanding the risks that are involved, we conclude that an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be medical professionals rather than a judge.") Thus, the defendant's discussion of potential side effects does not undermine BOP's decision here, because *Harper* authorized the use of antipsychotic medication, even though it carries the potential for side effects.

Second, the defendant's discussion of the potential for negative side effects overlooks the nature of the drugs at issue and the positive effects of those drugs in treating mental illness. The American Psychiatric Association and American Academy of Psychiatry and the Law state that "[a]ntipsychotic medications are an accepted and often irreplaceable treatment for acute psychotic illnesses, as most firmly established for schizophrenia, because the benefits of antipsychotic medications, compared to any other available means of treatment, outweigh their acknowledged side effects." (Amicus Br. at 12.) These benefits are present in both first-generation antipsychotics (such as Haldol) and second-generation antipsychotics (such as risperidone). (Amicus Br. at 12-13, 17-19).

The older, first-generation antipsychotic medications were at issue in *Harper* (Haldol), *Riggins* (Mellaril), and *Ruiz-Gaxiola* (Haldol), all cases on whose discussion of side effects the defendant relies. As the amici note, however, most of the side effects can be controlled by lowering dosages or by adding another medication, and the side effects ordinarily cease when the medication is discontinued. The amicus brief also supports that the risk of serious side effects from first-generation medication (such as tardive dyskenesia, or TD) is less than the defendant suggests, because doctors monitor a patient for side effects and alter medication as needed. (Amicus Br

at 14-16.) FMC-Springfield medical personnel are continuously monitoring the defendant and his treatment regimen. (CR 241 n.12; SER 19.)

[15] Medical literature notes that risperidone is the most frequently prescribed of the several second generation antipsychotic drugs used to treat schizophrenia, and the FDA approved its use in 1994. Risperidone's potential for serious physical side effects are significantly lower than first generation drugs such as Haldol and Mellaril. Risperidone is generally quite well tolerated, producing only moderate weight gain and mild sedation, and when administered by competent medical professionals who follow their patients with routine monitoring, does not pose a serious risk of physical harm. Rather than negatively altering the individual's brain and changing his or her cognitive process in a hurtful manner as the defendant alleges, studies have shown that risperidone may enhance cognitive functioning, particularly verbal working memory. *See* Donald C. Goff, M.D, *Risperidone and Paliperidone,* TEXTBOOK OF PSYCHOPHARMACOLOGY, Chapter 32 (American Psychiatric Publishing, 4th Ed. 2009). (*See also* Amicus Br. at 14-18.)

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[15]

Material Under Seal Deleted

Finally, the defendant, in fact, tolerated the prescribed medication well,

(CR 241; SER 19 n.12; SER 45, 51.) Thus, his discussion of side effects that *may* be experienced is undermined by the record showing he tolerated the medication well. In any event, as noted earlier, the potential for side effects does not eliminate the authority of doctors under *Harper* to medicate a mentally ill inmate with antipsychotic medication who poses a danger. *Harper*, 494 U.S. at 229-31.

b. *The Defendant's "Least Restrictive Alternative" Argument Based On Riggins Is Inapplicable, But In Any Event, BOP Did Consider Less Intrusive Measures.*

The defendant faults BOP for deciding to medicate the defendant without employing "less restrictive means." (CR 239; ER 84-87; Op. Br. at 41.) First, that is not a requirement set forth in *Harper*, and the defendant again relies on *Riggins*, which is not controlling, as explained earlier. Moreover, the claim that BOP overlooked less intrusive means is factually incorrect. Although the defense disagrees with the outcome, the hearing report, reviewed by the administrator, considered and excluded such measures as isolation, restraint, and other kinds of drugs. (CR 241, Exh. 1; SER 32.) Thus, less intrusive means *were* considered.

The defendant's suggestion that sedation with tranquilizers would be an effective alternative to antipsychotic medication (Op. Br. at 41) "is not supported by

literature or sound clinical practice." (Amicus Br at 19-20) ("Sedatives do nothing to address the symptoms that may drive the patient to harm himself and others; even when sedated, a patient therefore may still be dangerous, and there is no reason to expect that the danger will be diminished after the sedative wears off. Use of sedatives alone . . . not only carries its own risks of side effects but also fails to address the patient's underlying illness, and is thus more akin to physical restraint than to the use of appropriate medication.")

Moreover, the Court in *Harper* noted that physical restraints and seclusion often are not acceptable substitutes for medication. *Harper*, 494 U.S. at 227, and n. 10. *See also* CR 252 at 5-6; ER 7-8 (the district court stated: "Contrary to the defendant's suggestion that the FMC should attempt only to control his dangerousness, *Harper* approved the abatement of an inmate's dangerousness by the administration of antipsychotic drugs that treat his underlying mental illness. Accordingly, the medical staff's authority is not limited to simply rearranging the furniture in the defendant's cell, or physically restraining him when he is in the company of others so that he is unable to hurt them."). For example, BOP reported that the food slot can be a very dangerous area, where inmates can easily throw items at staff, or otherwise assault staff through the slot. (CR 241 n.10; SER 16; RT 26; ER 36.) Moreover, medical personnel need to draw blood from the defendant and interact with him at close range

(RT 26; ER 36), so BOP needs to be able to ensure that medical personnel can do their job safely.

c. *The District Court's Factual Findings Concerning BOP's Impartiality And The Reason For BOP's Medication Order Were Not Erroneous, Much Less Clearly Erroneous.*

The defendant claimed below that *Harper* was inapplicable because he was returned to FMC-Springfield to determine whether he can be restored to competency, suggesting that BOP medical personnel are not impartial because their supposed "task is to protect the government's weighty interest in obtaining a verdict on the charges against" the defendant. (CR 239; ER 13.) He renews this argument on appeal. (Op. Br. at 40-41.) This argument is without merit. As the Supreme Court has observed:

> [W]e will not assume that physicians will prescribe these drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to the contrary. *See* Hippocratic Oath; American Psychiatric Association, Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry, in Codes of Professional Responsibility 129-135 (R. Gorlin ed. 1986).

Harper, 494 U.S. at 222 n.8. (*See also* Amicus Br at 23.)

Moreover, the district court expressly rejected the defendant's suggestion that the BOP staff "has conflated its obligation to provide a safe environment for its staff and inmates with its charge to restore the defendant to competency." It stated: "The Court finds no evidence that the FMC staff is in any way an ally of the Government

prosecution team (it was the FMC staff, after all, who recommended the defendant be found incompetent) and contrary to the argument of counsel, the FMC staff has not been charged with the *obligation* to restore the defendant to competency. They remain free to find that he cannot be, or has not been, restored." (CR 252; ER 7) (emphasis in original.) *See also* RT 21; ER 31 ("I don't see any evidence in this record whatsoever that the prison officials had in mind what [the defendant's] papers characterize as an end-run around *Sell*."). *See also Morgan*, 193 F.3d at 252 (rejecting defendant's argument that, notwithstanding BOP's *Harper* order, BOP was medicating the defendant "mainly" to render him competent; court applied *Harper* standard and rejected the defendant's "dual motives" argument).[16]

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[16] The objectivity of the *Harper* medication decision is also enhanced by the regulatory requirement that the hearing be "conducted by a psychiatrist who is not currently involved in the diagnosis and treatment of the inmate." 28 C.F.R. § 549.43 (a)(3). That requirement was met here. (CR 252; ER 9.) The defendant also asserts that BOP's decision to medicate him as a danger under *Harper* is undermined by the fact that some of the conduct justifying the order preceded his return to Springfield. (Op. Br. at 5-9, 38-39.) However, the defendant overlooks that when he was at FMC-Springfield originally, he had not yet been committed for hospitalization under 18 U.S.C. § 4241(d); he had been sent to Springfield only for a competency evaluation. (CR 165.) As the first paragraph of 28 C.F.R. § 549.43 notes: "Except as provided in paragraph (b) of this section [which governs emergencies], the procedures outlined herein must be followed *after a person is committed for hospitalization and prior to administering involuntary treatment, including medication."* (Emphasis added.) Thus, once the defendant arrived back to Springfield after being committed pursuant to 18 U.S.C. § 4241(d), and once the defendant declined medication, then BOP appropriately convened an administrative *Harper* hearing to determine whether the (continued...)

d. *The Defendant's Reliance on Matthews v. Eldridge is Misplaced.*

In addition to the many other tests based on *Riggins* and *Sell* that the defendant encourages this Court to employ instead of *Harper*, he asserts that "the correct test is the one set forth in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)," and proceeds to analyze that case. (Op. Br. at 36-44.) The defendant contends the district court did not apply this "correct test." (Op. Br. at 36.)

First, although the defendant cited *Matthews* once at the top of a page in his motion to enjoin, it was never analyzed or cited again. (CR 239; ER 88.) *Matthews* was then mentioned briefly by the defense at the oral argument on the motion. (RT 17, 23, 41.) Even if the brief mention of *Matthews* is sufficient to elude plain error review of the defendant's argument, he can hardly fault the district court for not divining the alleged significance of a case that was only cited in passing, but never addressed, in his written motion.

In any event, the defendant's reliance on *Matthews* is misplaced. In *Matthews*, the petitioner, whose social security benefits had been terminated, challenged the constitutionality of the administrative procedures. 424 U.S. at 333-36. The Court analyzed the "government and private interests that are affected," *id*. at 334-45, and

[16](...continued)
defendant should be involuntarily medicated pursuant to 28 C.F.R. § 549.43.

the defendant now asks this Court to write on a blank slate and re-weigh the purported interests at issue that he articulates. (Op. Br. at 36-44.) However, the Supreme Court in *Harper* already resolved this question, finding that a prison's interest in maintaining the safety and security of a prison is superior to a mentally ill, dangerous inmate's right to be free from unwanted medication. The defendant's contrary argument is dependent on the premise that *Harper* is inapplicable to him as a pretrial detainee – a premise already shown to be incorrect – so his attempt to use *Matthews* to craft a new "interest" calculation should be rejected.

II. BOP'S ADMINISTRATIVE HEARING CONDUCTED PURSUANT TO 28 C.F.R. § 549.43 PROVIDED PROCEDURAL DUE PROCESS UNDER *HARPER* AND THE DISTRICT COURT PROPERLY DETERMINED THAT BOP'S DECISION TO MEDICATE THE DEFENDANT WAS NOT ARBITRARY.

1. Standard of Review

Because of the high government interest in ensuring the safety of staff and inmates in a prison environment, and because "prison officials are best equipped to make difficult decisions regarding prison administration," *Morgan*, 193 F.3d at 223-24, the defendant must shoulder a heavy burden to successfully challenge BOP's administrative *Harper* determination. The district court here adopted *Morgan* (CR 252; ER 6), in which the Fourth Circuit found that the *Harper* decision to medicate "was best left to the professional judgment of institutional medical personnel and

subject to judicial review only for arbitrariness." *Morgan*, 193 F.3d at 258 (emphasis added). *See also Youngberg v. Romeo*, 457 U.S. 307, 323-24 (1982) ("[c]ourts must show deference to the judgment exercised by a qualified professional" and "interference by the federal judiciary with the internal operations of these institutions should be minimized," so that "the decision, if made by a professional, is presumptively valid"); *Bull*, 595 F.3d at 972, 975 (determinations made by institutional officials must be given great deference by the courts).

A denial of a motion to enjoin is reviewed for abuse of discretion. *Montana v. BNSF Ry. Co.*, 623 F.3d 1312, 1317 n. 3 (9th Cir. 2010) (no abuse of discretion in refusing to enjoin state proceedings). Claims of procedural error in *Harper* dangerousness hearings not presented to the district court are reviewed for plain error. *Walton v. Norris*, 59 F.3d 67, 68 (8th Cir. 1995).

2. The Defendant Was Afforded The Procedural Protections of 28 C.F.R. § 549.43 And BOP's Decision To Medicate Was Not Arbitrary

Contrary to the defendant's arguments, he received procedural due process. (Op. Br. at 46.) He received an administrative hearing and procedural protections set forth in 28 C.F.R. § 549.43, crafted in the wake of *Harper*, and as the Fourth Circuit noted in *Morgan*, that regulation complies with due process. *Morgan*, 193 F.3d at 262 ("Springfield medical personnel, in determining that Morgan should be forcibly

medicated, not only exercised professional judgment in making the decision, but also afforded Morgan an administrative hearing subject to the procedural safeguards mandated by the BOP under 28 C.F.R. § 549.43," which was "virtually identical to the state framework at issue in *Harper*.")

The district court found that the BOP regulation was followed:

> The defendant was given advance notice of the administrative hearing. He was appointed a staff representative who advised him of his rights at the hearing. The hearing was conducted by an independent psychiatrist who is not involved in diagnosing or treating the defendant. The defendant appealed these findings to the FMC's Associate Warden for Health Services. . . All of these procedures precisely track the requirements of § 549.43, which, in turn, precisely follow the minimum due process interests spelled out in *Harper*.

(CR 252; ER 9.)

The defendant makes three challenges to his administrative hearing: 1) that he was denied his right to present witnesses because he asked for his attorney as his "witness"; 2) that the *Harper* order needed to detail specific medication and dosage, pursuant to *Riggins* and *Sell*; and 3) in an argument raised for the first time on appeal, that the *Harper* order was not based on danger to others, but danger to property. The defendant's arguments are unavailing.

First, although the defendant requested an attorney, the regulation does not confer a right to have an attorney present at the administrative *Harper* hearing.

Harper, 494 U.S. at 236.[17] The defense claims that, when the defendant stated that he wanted an attorney, he made this request after the staff representative had asked him whether he wanted witnesses, so he was actually asking that his attorney be called as his "witness." (CR 239; ER 89-90; Op. Br. at 47.) However, it was not unreasonable for BOP personnel to interpret the defendant's request for his attorney as a request to be represented by his attorney at the hearing, which the regulation and Supreme Court law do not require. Indeed, as the district court noted, the defendant had been informed of his right to present witnesses on earlier occasions and had stated he did *not* wish to call witnesses. (CR 252; ER 9; SER 29, 34.) This Court, like the district court, should decline the defendant's invitation to insert its judgment for the judgment of the personnel who actually communicated with the defendant at FMC-Springfield and were in the best position to determine factually what the defendant was requesting.

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[17] When the Supreme Court in *Harper* determined that there was no right to counsel at the administrative hearing, it noted: "[I]t is less than crystal clear why *lawyers* must be available to identify any errors in *medical* judgment. . . . Given the nature of the decision to be made, we conclude that the provision of an independent lay adviser who understands the psychiatric issues involved is sufficient protection." *Harper*, 494 U.S. at 236 (emphasis in original) (internal citations omitted). As the administrative regulation reflects, the inmate is provided "procedural safeguards"at the hearing, including a staff representative, 28 C.F.R. § 549.43(a), which the defendant received in this case. (CR 252; ER 9; SER 29.)

The district court rejected the defense's suggestion that the defendant was asking to call his attorney as a witness, a conclusion that was not clearly or otherwise erroneous. (CR 252 at 7-8 & n. 4; ER 9-10) (finding that BOP interpreted the defendant's request as a request for legal representation at the hearing, to which he is not entitled under *Harper*, and rejecting the defense's different factual "take on the situation").

Nor has the defendant demonstrated prejudice. Even if his defense attorney had tried to "downplay the significance of the [spitting] incident," as the district court wrote (CR 252 n.4; ER 10), the defendant failed to demonstrate that this information would have altered BOP's conclusion at the *Harper* hearing that the defendant was dangerous, particularly where BOP would not have been required to credit defense counsel's interpretation of the spitting event witnessed by others, and other undisputed facts showed defendant's dangerousness, such as his throwing of chairs and objects. *See Morgan*, 193 F.3d at 267 (discussing failure to show prejudice).

Second, the defendant states that the documentation from the BOP *Harper* hearing did not contain the actual medication or the maximum dosage, and that such a "blanket authorization plainly violates [his] rights." (CR 239; ER 90-92; *see* Op. Br. at 49-53.) The defendant's arguments about medical appropriateness and dosage are based on *Sell* and *Riggins* (and on *Hernandez-Vasquez*, a *Sell* case), which do not

control a situation like this. BOP determined that treatment by using antipsychotic drugs was in the defendant's medical interest (ER 170), which is all that *Harper* required. *See Harper*, 494 U.S. at 227 (involuntary medication permissible "if the inmate is dangerous to himself or others *and the treatment is in the inmate's medical interest*") (emphasis added).

The defendant's argument about specific "dosage" overlooks that none of the cases upholding the due process sufficiency of the prison regulations in the context of *Harper* have found that specification of drug type or dosage is required before a *Harper* order can issue. Although a committee's review of the staff's choice of medication was a feature of the Washington scheme in *Harper,* the Court did not include such review as part of the due process protections it listed as necessary for a valid medication regulation. *Id.* at 233-36. (Op. Br. at 40-41.) "Unlike Justice Stevens, we will not assume that physicians will prescribe these drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to the contrary." *Harper*, 494 U.S. at 222 n.8. The defense's reliance on *Riggins*, which did not concern a *Harper* order, is misplaced as explained earlier.

In any event, a medication regimen was provided

before the defendant was medicated, so the defendant's

complaint that there was no "dosage" prescribed is without merit. Nor has he shown that dosage information must be mentioned in a *Harper* order to make it valid.

The defendant also contends that BOP's decision whether to medicate was based primarily or solely on a determination that the medication could treat his mental illness, blending the *Harper* and *Sell* concepts, and that *Sell* consequently applies. (Op. Br. at 31-32.) Yet, the record shows the defendant was involuntarily medicated because it was in his medical interest *and he was a danger*. (SER 30, 32.) BOP's discussion of why it believed medication was the best method of treating the defendant's illness (SER 25, 32) was relevant to address the "medical interest" part of the *Harper* requirement. *Harper*, 494 U.S. at 227. It did not trigger *Sell*.

Third, the defendant contends for the first time on appeal that BOP determined that the defendant posed a danger to property instead of danger to others. This argument is reviewed for plain error and there was none. The *Harper* order reflects that BOP found that the defendant was a danger to others under *Harper*. First, BOP checked the box on its form stating: "The patient is *dangerous to others* by actively engaging, or is likely to engage, in conduct which is either intended or reasonably likely to cause physical harm to another or cause significant property damage." (ER 170) (emphasis added). The defendant incorrectly asserts that BOP was finding he was a danger to "property," rather than a danger to others, which overlooks the

italicized finding above, reflecting BOP's ultimate conclusion that he was a danger to others. The destruction of property was cited as a *reason* he was a danger to others. *See also* ER 163 (

"); ER 169 (

The *Harper* record shows that the defendant was medicated because he was a danger to others.

In short, the defendant has failed to show that BOP's *Harper* determination was "arbitrary" and this Court should decline the defendant's invitation to substitute its judgment for that of the prison officials and doctors to whom deference is given.

3. The District Court Will Determine Whether The Defendant Is Competent To Stand Trial

Finally, the defendant's brief relies on the notion that involuntary medication under *Harper* could affect his right to a fair trial if he is restored to competency and that judicial approval of a *Harper* order is therefore required to protect that right. (Op. Br. at 22-24.) The defendant overlooks that, even if the *Harper*-based medication of

the defendant has the incidental effect of restoring him to competency in BOP's opinion, he would not be tried until the *district court* first determined he was competent. The defendant in *Morgan* made a similar challenge to his *Harper* order, and the Fourth Circuit rejected it, noting that the defendant would receive judicial protections before he could stand trial:

> Although Morgan provides us with no psychiatric evidence supporting a conclusion that the "dangerousness" finding was made arbitrarily, he essentially requests that we disregard that finding so that we may evaluate the constitutionality of permitting Springfield medical personnel to make the determination of whether to forcibly medicate him solely for the purpose of rendering him competent to stand trial. This we are unwilling to do.
>
> We realize that forcibly medicating a pretrial detainee on the basis that such treatment is necessary because he is dangerous to himself or to others in the institutional setting might have the incidental effect of rendering him competent to stand trial. However, if such an occurrence should come to pass in the present matter, Morgan would not simply be thrust into the courtroom for trial without additional procedural protections. Rather, he would be statutorily entitled to have a district judge conduct a pretrial examination of his competency to stand trial in the context of an evidentiary hearing, at which time he would be represented by counsel and permitted "to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." 18 U.S.C. § 4247(d) . . . Morgan could be brought to trial only if the government proved to the district judge by a preponderance of the evidence that Morgan was able to understand the nature and consequences of the proceedings against him and to assist properly in his defense. *See id.* § 4241(e).

Morgan, 193 F.3d at 263-65. Such is the case at bar. *See also* RT 23; ER 33 (When the defendant argued that it needed to consider the "impact of medication on fair trial rights," the district court stated: "It seems to me. . . that argument is premature. . . If this *Harper* procedure takes place, you waive no claims whatsoever that by administering these drugs to him, they've rendered him in such a state that he cannot be tried at this point.") Thus, the district court will ultimately decide whether the defendant is competent to stand trial and any suggestion by the defendant that his right to a fair trial will be violated is both unfounded and premature.[18]

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[18] *See also Morgan*, 193 F.3d at 264-65 (even if medication were to render a pretrial detainee competent, he may be entitled to further protection under *Riggins* if government intends to involuntarily medicate him during trial).

VIII. CONCLUSION

For the foregoing reasons, the district court's order denying the defendant's emergency motion to enjoin should be affirmed.

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IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 11-10339

I certify that: (check appropriate option(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 13,646 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, has 10.5 or fewer characters per inch and contains ______ words or _____ lines of text (opening, answering, and the 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).

___ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

☐ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _________ words, or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _______ pages or _____ words or _____ lines of text.

August 10, 2011 — *s/ Christina M. Cabanillas*
Date — Assistant U.S. Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2011, I submitted the unredacted Brief of Appellee under seal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, pursuant to this Court's order of August 9, 2011. Also pursuant to that order, I electronically filed this copy of the Brief of Appellee that was redacted for public filing with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. In addition, on this date, I have mailed a copy of the sealed Brief of Appellee to defense counsel, by overnight delivery, as ordered by the Court on July 28, 2011.

s/ *Christina M. Cabanillas*
CHRISTINA M. CABANILLAS
Assistant U.S. Attorney

BMF/sr