UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JARED LEE LOUGHNER, Defendant-Appellant	C.A. No. 11-10432 D. Ct. No. 11-00187-LAB District of Arizona, Tucson **REPLY TO RESPONSE TO MOTION TO DISMISS DEFENDANT'S APPEAL BASED ON MOOTNESS**

The United States of America, Plaintiff-Appellee, by and through its attorneys, Ann Birmingham Scheel, Acting United States Attorney, and Christina M. Cabanillas, Assistant United States Attorney, hereby files the following reply to the defendant's response to the government's motion to dismiss his appeal based on mootness.

The defendant does not dispute that BOP's September 15th *Harper* medication decision, which he is currently challenging on appeal in CA No. 11-10504, is the "presently operative" medication decision, as he acknowledged on appeal in that case. (*See* CA No. 11-10504, Op. Br. at 7.) Nor does he dispute that his present appeal of BOP's July 11, 2011 emergency medication decision (CA No. 11-10432) no longer raises a "case or controversy" necessary to invoke this Court's Article III jurisdiction. (*See* Motion to Dismiss, pp. 2-3, citing *Public Utilities Comm'n v. Federal Energy Regulatory Comm'n,* 100 F.3d 1451, 1458 (9th Cir. 1996) and *Murphy v. Hunt,* 455

U.S. 478, 481 (1982) (per curiam).) Rather, he asserts that his appeal challenging BOP's administration of emergency medication (even though he is no longer being medicated on an emergency basis) should be reviewed because an exception to mootness exists. He is incorrect.

As the government noted in its motion to dismiss, the Supreme Court has "recognized an exception to the general [mootness] rule in cases that are capable of repetition, yet evading review." *Murphy*, 455 U.S. at 482. Two requirements are necessary to invoke this exception: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy*, 455 U.S. at 482. (Motion, pp. 6-7.) *See also Demery v. Arpaio*, 378 F.3d 1020, 1026 (9th Cir. 2004) (citing same standard) (Response, p. 5.) This exception applies only in "exceptional circumstances," *Public Utilities Comm'n,* 100 F.3d at 1459, and those circumstances are absent here.

At the outset, the defendant does not meaningfully dispute that this Court is currently reviewing his central claim – repeated in all of his medication appeals, including this one – namely, whether BOP possesses the authority to administratively medicate him under *Harper* without judicial approval, or whether he is entitled to an adversarial judicial hearing and subsequent judicial order approving medication under

the legal standards set forth in *Riggins* and *Sell*. Instead, he claims his present appeal concerning the emergency medication (CA No. 11-10432) raises two issues: the "judicial hearing" question, and whether such a judicial hearing should be prompt. He contends that this second question is separate and distinct from the first question and is not being reviewed by this Court. (Response, pp. 1-2, 5-6.) The defendant's appellate argument, however, cannot be divorced from itself in this manner.

The record reflects that the defendant's motion challenging the emergency medication decision below requested a prompt post-deprivation hearing *for the purpose of* having the court judicially approve BOP's emergency medication decision after conducting a judicial hearing, under the standards in *Riggins* and *Sell*. *See* Exh. 1 to Motion to Dismiss – Defendant's Emergency Motion, pp. 4-20 ("The fundamental question posed to this Court is whether an administrative agency can undertake an unreviewable end-run around . . . Constitutional protections"; "Due process requires that the post-deprivation hearing here be conducted by a court"; "Quite simply, whether an emergency or not, the substantive standard for when a pretrial detainee may be forcibly administered psychotropic drugs is governed by the *Riggins* standard . . ."); *see also* Def's Op. Br. in CA 11-10432, pp. 10-11 (after claiming that the district court erred in not conducting a "prompt post-deprivation hearing," the defendant argues that "[t]he appropriate substantive standard to apply in such a prompt, judicial, post-

deprivation hearing is the one set forth in *Riggins v. Nevada* and urged by the defense [on] appeal[] in Case Nos. 11-10339 and 11-10504").

Thus, the defendant's request for a prompt hearing was entwined with his request for a judicial hearing and order under the legal standards he advocated. For example, he did not ask for a prompt hearing for any another purpose, such as to require more administrative review. (*See, e.g.*, Exh. 1 to Motion to Dismiss, p. 9) ("Correctly balancing the competing pretrial interests establishes that judicial consideration, not just administrative procedures, are necessary to justify the prolonged administration of emergency-based forcible medication"). In short, his request for a "prompt" hearing was indivisible from his request for a judicial hearing. This Court should decline the defendant's invitation to treat his appeal as raising two unrelated issues, rather than one core question that is currently being reviewed by this Court.[1]

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[1] The defendant states that the government is "wrong" that his core "judicial hearing" argument is being reviewed (Response, p. 1-2), but then he never explains how the government is wrong. Instead, he claims that "even if the government were right," his "promptness" argument is divisible and alone warrants review. (Response, p. 2, 4.) It would make little sense, however, for the Court to review whether a hearing should be quick when it does not also review whether the judicial hearing and order is even necessary. Indeed, if this Court determines in the defendant's other pending appeals that no judicial hearing and order was necessary, then it will be irrelevant whether such a judicial hearing needed to occur "promptly" after the July 18, 2011 emergency medication decision at issue in this appeal. The defendant's claim that his appeal will evade mootness no matter what this Court decides in his other appeals is incorrect. (Response, p. 7.)

Because the defendant's argument in this appeal is not "evading review" (but is, in fact, under review), the other arguments in his response – which rely on the notion that his "prompt judicial hearing" argument is divisible from his request for a judicial hearing and order – stumble out of the gate. The *Murphy* test has not been met and the defendant's contrary arguments are without merit.

The defendant contends that the months that this appeal will take to be briefed and resolved will result in a violation of his "right to a prompt hearing." (Response, p. 5-6.) However, as noted earlier, that argument presumes he had a right to the type of judicial hearing and order he requested under *Riggins* and *Sell* in the first place. Moreover, his overall complaint about whether the hearing was "prompt" misses the central point because he is being medicated based on the September 15, 2011 *Harper* medication decision, and not on an emergency basis under the July 18, 2011 medication decision. As a consequence, even if his allegedly "separate" argument prevailed, there is no relief which he could be accorded in appeal number 11-10432.[2]

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[2] The defendant's complaint about how long this appeal will take to be briefed and resolved (Response, p. 5) is misplaced, considering that he bears some fault for the passage of time. For example, after BOP began emergency medication on July 18, 2011, the defendant moved immediately to file an emergency motion seeking to enforce the medication injunction in this Court, which this Court denied on July 22, 2011, without prejudice to renewing his arguments in the district court. The defendant then waited almost three weeks to file his "Emergency Motion for Prompt Post-Deprivation Hearing on Forced Medication" before the district court on August 11, 2011. (CR 381) (Exhibit 1 to Motion to Dismiss). After the district court

The defendant relies on *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173-74 (9th Cir. 2002), but that decision does not assist him. (Response, p. 6.) It states: "In sum, an issue that 'evades review' is one which, in its regular course, resolves itself without allowing sufficient time for appellate review." *Id*. Again, because the defendant's core argument is being reviewed, there is clearly "sufficient time for appellate review." *Id*.

The defendant also claims that he meets the second prong of the *Murphy* test, requiring "a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy*, 455 U.S. at 482. (Response, pp. 7-9.) He claims that "this case satisfies the 'capable of repetition' prong because there exists a reasonable expectation of recurrence as to Mr. Loughner." (Response, p. 7.) However, the defendant misapprehends what is required under this prong.

The Supreme Court in *Murphy* noted:

> Because the Nebraska Supreme Court might overturn each of Hunt's three convictions, and because Hunt might then once again demand bail before trial, the Court of Appeals held that the matter fell within this class of cases "capable of repetition, yet evading review." We reach a different conclusion. The Court has never held that a mere physical or theoretical

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expeditiously heard the matter and denied his motion on August 26th, the defendant filed his appeal in CA No. 11-10432 on August 29th. However, he has never sought to expedite the briefing or resolution of this appeal, not even when this Court expedited the briefing and resolution of the defendant's subsequently-filed appeal in CA No. 11-10504.

> possibility was sufficient to satisfy the test . . .. If this were true, virtually any matter of short duration would be reviewable. Rather, we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. We detect no such level of probability in this case.

Murphy, 455 U.S. at 482-483 (internal citations omitted).

Such is the case at bar. Contrary to the defendant's argument, there is no "reasonable expectation" or "demonstrated probability" under *Murphy* that his medication would be stopped in the future by a court and that he would be medicated under the emergency regulation again. (Response, p. 8.) Although he contends that cessation of medication followed by emergency medication is "highly likely" in the future (Response, p. 9), that argument is belied by the record. The defense asked this Court to enforce its prior medication injunction to prevent BOP from medicating the defendant under the emergency regulation, a request this Court denied. The district court has denied the defendant's multiple requests to enjoin medication throughout this case. Although the defendant is correct that a court-ordered cessation of medication might trigger the need for BOP to administer medication on an emergency basis again if it believed such medication was warranted, there is no "demonstrated probability" that this scenario will occur; rather, the defendant raises no more than a "mere physical or theoretical possibility," which is insufficient to evade dismissal based on mootness. *Murphy*, 455 U.S. at 482-483.

The defendant also states that if he is found competent, he will be transferred to a "facility that, through the government's own admissions, lacks the ability to engage in long-term forced medication" (Response, p. 9), apparently suggesting that BOP will cease to medicate him if he is returned to Tucson for trial, thereby triggering the need for emergency medication. However, the defendant inaccurately characterizes an exhibit that the government provided when it opposed the defendant's motion seeking a stay of his transportation back to FMC-Springfield pending his appeal in CA No. 11-10504. (Response, p. 9.) The affidavit provided from BOP attorney Talplacido never stated that USP-Tucson could not medicate the defendant; it simply explained how FMC-Springfield, a medical facility, was better equipped to address his medication issues and restoration to competency than USP-Tucson. (*See* Exh. 7, pp. 4-5, attached to Govt's Response to Emergency Motion to Stay in CA No. 11-10504.)

The defendant's reliance on *United States v. Grape*, 549 F.3d 591, 597-98 (3d Cir. 2008), is misplaced. He contends that "[j]ust as in Grape, the government here is 'free to return to its old ways,' and the appeal is 'therefore not moot.'" (Response, p. 9, citing *Grape*, 549 F.3d at 598.) In *Grape*, the defendant was appealing the district court's *Sell* order authorizing involuntary medication to restore competency. Since the time he filed his *Sell* appeal, however, Grape had become competent after being medicated in the interim by FMC-Springfield based on a finding of *Harper*

dangerousness after Grape physically and verbally assaulted a guard while his *Sell* appeal was pending. *Id*. at 597.[3] The Third Circuit found that the defendant's *Sell* appeal was not moot because the government stated that it might use the original *Sell* order again should *Grape* become incompetent, and it had conceded that his appeal therefore was not moot. *Id*. (Grape had been discharged from Springfield and had stopped taking his medication.) That is not the situation here. Indeed, even if BOP had occasion to medicate the defendant under the emergency regulation again in the future, it would be BOP's decision at that time, not the decision from July 18, 2011, that the defendant would then need to challenge if he objected.

The defendant's appeal of the district court's order denying his challenge to BOP's July 18, 2011 emergency medication decision is moot and does not satisfy the *Murphy* exception to mootness. For the foregoing reasons and those set forth in the

[3] Before the *Sell* hearing, FMC-Springfield had already conducted a *Harper* hearing, but Dr. Tomelleri found that, although Grape showed signs of being dangerous, it could be managed by his conditions of confinement at the time. *Id*. at 595. However, after Grape assaulted a corrections officer, another *Harper* hearing was conducted and medication was "immediately" administered to Grape after that hearing, based on his dangerousness. *Id*. at 597. He subsequently was restored to competency before the oral argument on his *Sell* appeal. *Id*.

government's motion to dismiss, the government respectfully asks this Court to dismiss the defendant's appeal in CA No. 11-10432 as moot.

Respectfully submitted this 9th day of December, 2011.

ANN BIRMINGHAM SCHEEL
Acting United States Attorney
District of Arizona

/s/ Christina M. Cabanillas

CHRISTINA M. CABANILLAS
Appellate Chief
405 W. Congress, Suite 4800
Tucson, AZ 85701
(520) 620-7300
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2011, I electronically filed the following Reply to Response to Motion to Dismiss Appeal Based on Mootness with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit 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.

s/ Christina M. Cabanillas
Christina M. Cabanillas
Assistant U.S. Attorney