UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JARED LEE LOUGHNER, Defendant-Appellant	C.A. No. 11-10504 D. Ct. No. 11-00187-LAB District of Arizona, Tucson **RESPONSE TO DEFENDANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL OF EXTENSION OF COMMITMENT**

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 opposes the defendant's emergency motion for a stay of his transportation from Tucson to FMC-Springfield pending his appeal.

I. Introduction

The defendant's emergency motion should be denied because he has failed to meet his burden of showing he warrants a preliminary injunction preventing his transportation back to FMC-Springfield. The defendant has not shown he is likely to succeed with his appeal of the district court's order extending his commitment under 18 U.S.C. § 4241(d)(2), particularly considering the very deferential standards of review that apply to the district court's ruling and credibility determinations. The

district court did not err, much less clearly err, by granting the extension. Nor has the defendant shown the likelihood of irreparable injury if he is transported to FMC-Springfield. While his appeal of the four-month extension may become moot before it is resolved under the current briefing schedule, he will not suffer irreparable injury because his appeal is without merit. Moreover, unlike USP-Tucson where the defendant is currently being held, FMC Springfield is a medical facility where he receives constant medical care, including by Dr. Pietz, the BOP psychologist who sees him on an almost daily basis, and BOP psychiatrists who monitor his medication and treatment. The defendant's continued progress towards competency restoration at FMC-Springfield should not be disrupted to have him remain in a Tucson maximum security prison while his appeal is resolved, particularly where his appeal is not likely to succeed.[1]

II. Facts & Procedural History[2]

A. Preliminary Proceedings and Competency Evaluations

The defendant was arrested in the above-captioned case on January 8, 2011. On March 3, 2011, a federal grand jury in Tucson, Arizona filed a superseding

[1] This Court ordered the government to provide the defendant's likely date of transportation in this response. Due to USMS policy forbidding public disclosure of this information, the government has provided it directly to the Court.

[2] "CR" refers to the Clerk's Record, followed by the docket number.

indictment charging him 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 participants at a federally provided activity.

On March 9, 2011, the district court granted the government's motion for a competency examination and committed the defendant to the custody of the Attorney General for purposes of a psychiatric or psychological examination and report pursuant to 18 U.S.C. § 4241(a) and (b). In addition, the court ordered a separate examination and report by a psychologist of the court's choosing.

Pursuant to the commitment order, the defendant was transported to the Federal Medical Center in Springfield, Missouri (FMC-Springfield) on March 23, 2011, where he was subsequently examined by BOP psychologist Christina Pietz and the court's psychologist, Matthew Carroll. During the examination period, the doctors each produced independent reports, finding the defendant was suffering from a mental disease or defect that presently rendered him incompetent for trial. On April 28, 2011, the U.S. Marshals Service returned the defendant to USP-Tucson.

The parties stipulated to the doctors' expertise and their reports that concluded the defendant was presently suffering from a mental disease or defect rendering him

incompetent. On May 25, 2011, the district court found the defendant incompetent pursuant to 18 U.S.C. § 4241(d). It ordered the defendant committed to the custody of the Attorney General for hospitalization and treatment for a period of four months, to determine whether defendant could obtain competency in the foreseeable future. 18 U.S.C. § 4241(d). The U.S. Marshals Service returned the defendant to FMC-Springfield on May 27, 2011.

B. Defendant's Dangerousness Prompting Involuntary Medication

On June 14, 2011, after the defendant declined medication at FMC-Springfield, the prison facility conducted an administrative hearing pursuant to 28 C.F.R. § 549.43 (a)(5) and *Washington v. Harper*, 494 U.S. 210 (1990), and determined that he should be involuntarily medicated as a danger to others ("*Harper* I"). The district court denied the defendant's motion to enjoin the involuntary medication and found that FMC-Springfield's medication decision was not arbitrary. (CR 252.) The defendant appealed that decision to this Court (CA No. 11-10339), and on July 1, 2011, a motions panel of this Court stayed the defendant's medication based on that June 14th *Harper* determination pending resolution of the defendant's appeal and reiterated the stay in a written order on July 12, 2011. The appeal was briefed by the parties under an expedited schedule and oral argument was conducted on August 30, 2011. The matter has been submitted and is pending a decision.

After the medication was stopped in compliance with this Court's stay order, the defendant's condition deteriorated, and on July 18, 2011, FMC-Springfield doctors determined that the defendant was a severe danger to himself and needed to be medicated under the emergency provision, 28 C.F.R. § 549.43(b) ("emergency medication"). On July 22, 2011, this Court denied the defendant's emergency motion seeking to enforce the medication injunction, without prejudice to renewing his arguments before the district court. On August 11, 2011, the defense filed an "Emergency Motion for Prompt Post-Deprivation Hearing on Forced Medication" before the district court, seeking enjoinment of BOP's emergency medication determination, which the government opposed. After hearing argument on August 26, 2011, the court denied the defendant's motion. (RT 8/26/11 89-91; CR 294.) On August 29, 2011, the defendant filed a notice of appeal from that decision and his Ninth Circuit appeal (CA No. 11-10432) is pending. The defendant's opening brief is due on November 28, 2011.

On August 25, 2011, FMC-Springfield conducted a *Harper* hearing pursuant to 28 C.F.R. § 549.46(a), and continued to find medication justified based on the defendant's danger to himself ("*Harper* II").[3] After the defendant's staff

[3] The regulation was amended effective August 12, 2011 (*see* 76 Fed. Reg. 40229-02, 2011 WL 2648228), so former § 549.43 is now contained in § 549.46.

representative, Mr. Getchell, filed an appeal for the defendant, the Associate Warden administratively determined on September 6, 2011 that a witness statement should have been obtained prior to the hearing, so he ordered another *Harper* due process hearing to be completed. (Exhibit 8.)[4]

On September 15, 2011, FMC-Springfield conducted another *Harper* hearing as the Associate Warden had ordered ("*Harper* III"). Dr. Tomelleri concluded that the defendant remained a danger to himself, setting forth facts showing how the defendant is a danger to himself when unmedicated, the specific medication being prescribed, and other information. Dr. Tomelleri also noted that the medication was having a favorable effect on the defendant. Mr. Getchell, the defendant's staff representative, filed an administrative appeal on the defendant's behalf, and on September 21, the Associate Warden found that the *Harper* hearing and determination complied with due process. (Exhibit 9.)

C. Request For Extension of Commitment Pursuant to 18 U.S.C. § 4241(d)(2)

On August 22 and September 7, 2011, Dr. Pietz provided the court with reports summarizing the defendant's hospital course at FMC-Springfield between May 27 and August 22, 2011, his current mental status and psychiatric treatment, and her opinion as to restoration probability and length of time restoration will probably take.

[4] This exhibit and some other exhibits have been submitted under seal.

(Exhibits 2 and 3.) Dr. Pietz reported that while the defendant presently remains incompetent to stand trial, it is likely that he will be competent in the near future. (Exh 3, pp. 3-4.) She pointed to improvement in the defendant's condition, expressed the opinion that "historically most defendants reach competency within 8 months of their commitment," and recommended a four month extension for purposes of restoring him to competency. (*Id.* at p. 3.) Dr. Pietz explained at the September 28th hearing that she limited her extension request to four months initially because she was under the impression that the law restricted extensions to four month increments. She expected she would have to request another four month extension in the defendant's case. The government therefore asked the district court to extend the defendant's commitment for the full eight months Dr. Pietz anticipated that it would take for the defendant to attain competency. (CR 324; Exhibit 5.)

On , the defendant filed a motion objecting to the extension of time under § 4241(d)(2) and asking the court for a *Sell* hearing and medication order. (CR 311.) At a teleconference on September 19, 2011, after speaking with Dr. Pietz on the record and learning that the defendant wanted to attend the Tucson hearing concerning whether his commitment would be extended, the district court ordered the defendant to be present. Among the issues discussed, the district court also asked the parties to address whether a *Sell* medication order was required if it ordered the defendant's

commitment extended under § 4241(d)(2). On September 26, the government filed a response to the defendant's objection to the § 4241(d)(2) extension, arguing that the extension was justified and arguing that no *Sell* medication order was required because the defendant is already being medicated on *Harper* grounds. (CR 324; Exhibit 5.)[5] The hearing was set for September 28, 2011.

On Friday, September 23, 2011, the defendant filed an emergency motion to enjoin involuntary medication based on the September 15, 2011 "*Harper* III" medication determination. (CR 331.) He reiterated arguments he had made in other medication challenges and claimed with regard to this particular hearing that BOP failed to find that the medication was necessary and that his staff representative was inadequate. The government filed a response on September 27, 2011, opposing this motion. (CR 335; Exhibit 6.)

D. September 28th Evidentiary Hearing and District Court's Rulings

On September 26, 2011, the U.S. Marshals Service returned the defendant to USP-Tucson. On September 28, 2011, a hearing was conducted pursuant to 18 U.S.C.

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[5] At the teleconference, the district court also recognized: "*Sell* indicates that the first step among the considerations is to determine whether involuntary medication is justified on some other basis, for example *Harper*. I found that it is. So the question is do we go any farther than that if we reiterate my finding that he can be . . . involuntarily medicated because of dangerousness, either to himself or others." (RT 9/19/11 6-7.) The government advised the district court that the answer to this question is no, based on *Sell* and other decisions. (CR 324; Exhibit 5.)

§ 4241(d)(2) to determine whether an extension of his commitment to FMC-Springfield is supported by a substantial probability he can be restored to competency in a reasonable period of time.[6] The government submitted exhibits and presented testimony from Dr. Pietz and Dr. James Ballenger, M.D., to support its request for an extension of time.[7]

Dr. Pietz, the BOP psychologist evaluating the defendant, is very experienced, having been a psychologist at FMC-Springfield for approximately 21 years and having qualified as an expert in federal court approximately 200 times. Dr. Pietz conducted the initial competency evaluation of the defendant and concluded that he suffered from schizophrenia, undifferentiated type, and was incompetent to stand trial. At the hearing, Dr. Pietz's testimony described numerous observations about the defendant and discussed the differences in his behavior and abilities before medication and since being medicated.

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[6] The defendant's initial four month commitment pursuant to 18 U.S.C. § 4241(d)(1) expired Monday, September 26, 2011. As correctly noted by the district court, its decision-making authority pursuant to Section 4241(d)(2) was not constrained to the initial four month period. *See United States v. Magassouba*, 544 F.3d 387, 408 (2nd Cir. 2008). (CR 315.)

[7] Because the transcript of the September 28, 2011 hearing is not yet available, the facts concerning the hearing have been prepared from notes taken by government attorneys at the hearing.

For example, before being medicated, the defendant refused to believe that Congresswoman Giffords, one of the victims he had shot on January 8, 2011, was alive. He persisted in the belief that she was dead and asked questions about her status, believing that his attorneys and the media who reported that she was alive were lying and conspiring against him. The defendant also had apparently seen the video of the shooting from the surveillance camera at the Safeway and believed the video was staged and a re-enactment. In addition, the defendant would refuse to meet or talk to his attorneys. During one attorney visit, he reportedly spat on his attorney and lunged at her. Dr. Pietz also noted that the defendant's thinking before being medicated was irrational and disorganized, and he struggled to maintain concentration for any length of time and often digressed to unrelated topics. He would mumble his responses and his speech was often tangential and difficult to redirect. He appeared to attend to internal stimuli (i.e. hearing voices) and would display an inappropriate affect by smiling or laughing at inappropriate times. He was agitated and paced incessantly. He had poor eye contact and typically looked away or looked at Dr. Pietz while his head was tilted to the side. At his first *Harper* hearing in his cell on June 14th, for example, he hid behind his bed.

Dr. Pietz saw improvement in the defendant after he was medicated. She discussed how the defendant's medication had begun on June 21, 2011, after the first

Harper hearing, and it had been stopped in the wake of this Court's stay order of July 1, 2011. The defendant's medication began again on July 18, 2011, when FMC-Springfield psychiatrists determined that the defendant needed to be medicated on an emergency basis as a danger to himself. Dr. Pietz discussed the course of events concerning his different *Harper* hearings and set forth the medication the defendant was currently taking as prescribed by Dr. Serrazin. She also stated that she had not witnessed any serious side effects from the medication and that she consults with Dr. Serrazin often and his opinion is that the defendant is not suffering serious side effects from the medication. The minor side effects have been addressed and controlled.

Dr. Pietz testified that she is the staff member that has interacted the most with the defendant and that she has seen him almost daily, sometimes twice a day. Dr. Pietz testified the defendant was clearly improving and although he remains psychotic and currently incompetent in her opinion, his psychotic symptoms have diminished, which she attributed to the medication. She testified that he no longer appears to be attending to internal stimuli, or hearing voices. His thoughts are more rational and organized. He is able to hold conversations with her for longer periods of time and he appears more engaged in reality. The defendant more readily establishes and maintains eye contact for extended periods of time, his sleep has improved, and he no longer paces incessantly as he did before. Dr. Pietz also testified that the defendant

now accepts that Congresswoman Giffords is alive, which indicates to Dr. Pietz that he is more in touch with reality. He is also willing to meet with his attorneys and looks forward to his meetings with them, and he has not missed a visit since being medicated. Dr. Pietz also described that, before being medicated, the defendant would disrobe in front of staff members, including females, without any regard for modesty. However, he now declines to do so and seems to be more appropriately modest, another indicator of his improvement. Before being medicated, he also asked for a TV, but it was removed almost immediately at his request because he said he was hearing voices from it. Since the time he was medicated, his TV was returned to his room at his request.

She also described that it is significant that he is able to engage in a conversation and is more capable of connecting with her, when he was not able to do so before being medicated. For example, he could not express empathy before being medicated, but when she recently had a cast on her hand, the defendant asked her how she was injured, which was a significant event because he was displaying empathy and connecting with her. She testified that the defendant's his memory has improved and he is more able to track the days, and he has a calendar in his cell that helps him do this. For example, he was able to recall that the hearing in Tucson was scheduled for a particular date and expressed interest in attending. Dr. Pietz stated that the

defendant is still depressed, but he is oriented, less delusional, less obsessed, and his cognitive abilities and functioning has improved.

Based on her experience, Dr. Pietz testified that she believed that the defendant can be restored to competency, likely within eight months, although it could take less time. In her experience, individuals with this defendant's mental issues can still become competent to stand trial and that she has found delusional defendants competent and that courts have concurred with that assessment. She also noted that federal judges before whom she has appeared have granted extensions in four-month increments, with extensions as needed, so that is why she initially requested a four month extension.

Dr. James Ballenger, M.D., a psychiatrist who has treated thousands of patients with schizophrenia and other psychoses since he began his practice in 1971, also testified about the rates and likelihood of restoration generally and history and side effects of first generation and second generation antipsychotics. In his experience, a very high percentage of people in the defendant's condition are restored to competency within one year, indicated by the fact that they are no longer as delusional, are more organized in thought, can focus and concentrate, and they show improvement in taking care of themselves. Much improvement usually occurs between months three and twelve. His affidavit admitted at the hearing also describes

the general rates of improvement with Risperidone, and that restoration of competency to stand trial generally requires longer periods because it involves resolution of psychotic symptoms and paranoia, and technical aspects of the court process may need to be learned. Thus, "many restoration to competency programs involve 8 to 15 months." (Hearing Exh. 6; Exhibit 4, p. 4.)

Like this defendant, the typical schizophrenic individual is prescribed four different drugs (an antipsychotic, an antidepressant, an anti-anxiety drug, and a drug for side effects). Dr. Ballenger said he reviewed the defendant's history and medication and opined that the medication the defendant is taking as prescribed by Dr. Serrazin is very appropriate. He also noted that some individuals can be "treatment resistent," which is defined as when a patient does not respond to certain medications within four months. Dr. Ballenger said that the record shows that the defendant is not treatment resistant and had responded well to the medication.

Because Dr. Ballenger has practiced for approximately 40 years, he was around when the first generation and second generation medications were created and used, so he has significant experience with those medications as a psychiatrist. He testified about the strides that have been made and the significant benefits of, and lack of potential side effects from, second-generation medication like Risperadone, which the defendant is taking. His affidavit also detailed some of this information. (Exhibit 4.)

Dr. Ballenger testified to the marked decrease in the frequency of serious side effects. For example, where the risk of tardive dyskenesia (TD) was present in first generation medications like Haldol approximately 4% to 5% of the time, the risk significantly decreased to 1/10th of that rate with second generation medication. He testified that neuroleptic malignant syndrome (NPS) is "vanishingly rare" under second generation medication, and that the severely reduced risks of extra-pyramidal side effects (EPS) is one of the greatest aspects of the second generation medication. The doctor also testified that side effects are now able to be controlled with medication. He testified that, rather than negatively impacting the brain, anti-psychotics have a positive effect on the brain of a schizophrenic, reducing delusions and in some cases eliminating them, and improving cognitive thinking and organization to allow the individual to participate in a more rational way.[8]

After hearing testimony and argument, the district court determined that the defendant's commitment should be extended under § 4241(d)(2) by four months. It also noted that Dr. Pietz could apply for an additional extension if she believed one was warranted, and ordered her to provide a report to the court two weeks before the expiration of the four-month extension. In addition, the district court denied the

[8] The defense called no witnesses. Before the hearing, it submitted some graphs with affidavits from its defense attorneys who reviewed BOP records. (CR 336, 337.)

defendant's challenge to the September 15th "*Harper* III" medication decision, finding that the proceeding complied with due process and rejecting the defendant's arguments.[9]

On September 30, 2011, the district court issued a written order reiterating its rulings regarding both the extension and *Harper* medication. (Def's Exh. A) ("Order"). It concluded that "Mr. Loughner may be recommitted to FMC Springfield for competency restoration for an additional four months," which "shall begin at the time he arrives at the prison."[10] (Order, p. 7.)

The defense filed a notice of appeal on same day and later that evening, it filed simultaneous motions for stay in this Court and the district court. On today's date, the

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[9] The defendant's motion does not seek a stay of medication. He instead argues that the fact that he continues to receive medication in Tucson supports that there is no need to send him back to FMC-Springfield. (Motion, p. 13.) However, it is unclear if he will be appealing the medication determination. His notice of appeal states that he is appealing the "court's order issued September 30, 2011" (CR 348), which encompasses the denial of his motion challenging BOP's September 15th *Harper* medication determination. The defendant's motion to stay states that his "appeal concerns the legal propriety of the district court's decision to send [him] back to . . . Springfield," although he also states: "Nothing in this motion is meant to limit the arguments to be raised in the opening brief." (Motion, p. 3 "Facts Showing Claimed Emergency" & Motion, p. 5 n. 4.)

[10] The order mistakenly states in one spot that the time would begin on September 29. (Order, p. 2.) However, it is clear that the court found that the four months would begin on the day he returns to FMC-Springfield. (Order, pp. 4, 7.)

district court denied the motion for stay, noting that the defendant had failed to show a likelihood of success on the merits. (CR 345; Exhibit 1.)

III. The Defendant's Emergency Motion To Stay His Transportation To FMC-Springfield Should Be Denied Because He Fails To Make A "Clear Showing" Warranting The "Extraordinary Remedy" Of An Injunction.

A. Standard of Review

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 376 (2008). Thus, it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* *See also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (party seeking a preliminary injunction must provide "substantial proof" in support of its position, because injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.") (emphasis in original).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an injunction is in the public interest." *Winter*, 129 S.Ct. at 374 (emphasis added); *see also Nken v. Holder*, 129 S.Ct. 1749, 1761 (2009) (noting that the first two factors of the injunction standard – strong likelihood of success on the merits and whether the

applicant will be irreparably damaged – "are the most critical"). The district court's factual findings are reviewed for clear error. *The Lands Council v. McNair*, 537 F.3d 981, 986-87 (9th Cir. 2008) (en banc) (citations omitted), *abrogated in part on other grounds* by *Winter*.

B. Argument

Because the defendant has failed to make a "clear showing" of all necessary prongs of the preliminary injunction test, this Court should deny his motion to prevent his transportation back to FMC-Springfield while his appeal is pending. *Winter*, 129 S.Ct. at 376; *Nken*, 129 S.Ct. at 1761.

1. **The Defendant Has Failed To Make a "Clear Showing" That He Is Likely To Succeed on Appeal.**

The defendant has failed to show that he is likely to succeed on appeal with his challenge to the district court's determination that there is a substantial probability under § 4241(d)(2) that he is likely to be restored to competency within a reasonable time. This heavily fact-intensive determination is reviewed for clear error. *See United States v. Beavers*, 2007 WL 2301565 (9th Cir. 2007) (unpublished) (reviewing for clear error the district court's determination under § 4241(d) that the defendant was incompetent and that "there was no substantial probability in the foreseeable future that Beavers would be restored to competency to permit the proceedings to go forward"). A district court's competency determination is reviewed for clear error.

Id., citing *United States v. Friedman*, 366 F.3d 975, 980 (9th Cir. 2004); *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1171 (9th Cir. 2002).

"Clear error is not demonstrated by pointing to conflicting evidence in the record." *United States v. Frank*, 956 F.2d 872, 875 (9th Cir. 1992). "We review factual findings for clear error and give great deference to district court findings relating to credibility." *United States v. Jordan*, 291 F.3d 1091, 1100 (9th Cir. 2002). In performing its fact-finding and credibility functions, a district court is free to assign greater weight to the findings of experts produced by the government than to the opposing opinions of the medical witnesses produced by the defendant. *See United States v. Lindley*, 774 F.2d 993 (9th Cir. 1985) ("The district court did not clearly err in assigning more weight to the findings of [the government's] psychiatrists than to the contrary conclusion of a psychiatrist retained by the defense.")

"Review under the clearly erroneous standard is significantly deferential, requiring for reversal a definite and firm conviction that a mistake has been made. The standard does not entitle a reviewing court to reverse the findings of the trial court simply because the reviewing court might have decided differently." *United States v. Asagba*, 77 F.3d 324, 325 (9th Cir. 1996), *citing Concrete Pipe & Prod. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623-25 (1993). "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it

must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Fisher v. Roe,* 263 F.3d 906, 912 (9th Cir. 2001) (internal quotations omitted).

The defendant has failed to show he is likely to prevail on appeal. *See also Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011) (likelihood of success is "a substantial case for relief on the merits"). In fact, his appeal is *unlikely* to succeed considering his high burden of demonstrating clear error on the part of the district court. The district court's order was not erroneous, much less clearly erroneous. The district court's order denying the motion for stay (CR 347), also supports that the defendant has failed to show a likelihood of success on the merits.

First, the district court followed the statute and this Court's precedent when applying the legal standard. The defendant had argued that the court should employ a clear and convincing burden of proof. The government noted that the standard under § 4241(d)(2) was whether there was a "substantial probability." (CR 324; Exhibit 5.) The district court correctly determined that the "substantial probability" standard applied, and it declined to layer an additional standard on top of it, whether preponderance of the evidence or clear and convincing evidence. (Order, pp. 2-4.) The court analyzed the definition of "substantial probability" and concluded that this Court had already spoken on this issue in *United States v. Rivera-Guerrero*, 426 F.3d 1130 (9th Cir. 2005). This Court stated that "[c]ourts have generally construed

[§ 4241(d)(2)] to allow extensions for a reasonable period of time only when 'the individual is likely to attain competency within a reasonable period of time.'" *Id*. at 1143 (quoting *United States v. Baker*, 807 F.3d 1315, 1320 (6th Cir. 1986). (Order, p. 4.) The district court stated: "That, then, is the definition of "a substantial probability": likely." (*Id*.)[11] This determination was not erroneous.

Second, the district court's conclusion that an extension was justified was not clearly erroneous. The district court stated:

> Considering that the question under § 4241(d)(2) is whether Mr. Loughner can be restored to competency to stand trial in a reasonable amount of time, and that the burden of proof is substantial probability, or likelihood, the Court found good cause for granting FMC Springfield a four-month extension to treat Mr. Loughner. The reports submitted by Dr. Pietz in advance of the hearing, along with the testimony of Dr. Pietz and Dr. Ballenger at the hearing, establish that it is likely Mr. Loughner can become competent to stand trial in this case.

(Order, p. 4.) The district court ordered that the defendant's four month commitment would begin when he returned to FMC Springfield from Tucson. (*Id*. at 4 and 7.)

At the hearing, the district court found Dr. Pietz to be a qualified and credible witness, and particularly credited her day-to-day contact with the defendant; it noted

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[11] The court stated that if it was mistaken that the correct burden was "substantial probability," it "[held] alternatively that the appropriate burden of proof to import into § 4241(d)(2) is preponderance of the evidence," and it found that "the government has shown by a preponderance of the evidence that there is a substantial probability that Mr. Loughner will be restored to competency." (Order, p. 4 n. 4.)

in its order that Dr. Pietz "is most familiar with Mr. Loughner." (Order, p. 1.) Indeed, Dr. Pietz's knowledge, skills, experience, training, education, and her particular experience with this defendant – with whom she has had nearly continuous interaction from March 23, 2011, through the present[12] – supports that the district court did not clearly err when it credited her opinion that the defendant has shown improvement and can be restored to competency. In addition, the district court found that Dr. Pietz's opinion was supported by the testimony of Dr. Ballenger, a very experienced psychiatrist and expert.

The district court's determination, which relied on Dr. Pietz's reports and her testimony, Dr. Ballenger's testimony, and its own observations of the defendant at the hearing,[13] was not clearly erroneous. *See also United States v. Diaz*, 630 F.3d 1314 (11th Cir. 2011) (affirming district court's crediting of BOP psychologist's and psychiatrist's expert opinions on the probability of restoration, stating their testimony "strongly demonstrates a substantial likelihood [of restoration]"); *United States v.*

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[12] The only significant gap in Dr. Pietz's contact with the defendant was April 28, 2011, through May 27, 2011, when the defendant was at USP-Tucson for the May 25, 2011 competency hearing. He was similarly returned to Tucson on September 27th so he could attend the hearing regarding the extension request.

[13] Indeed, the defendant calmly sat through the lengthy hearing that lasted from 11:00 a.m. until close to 7:00 p.m., without incident. This was in marked contrast to his competency hearing on May 25, when he had not yet been medicated, where he had an outburst and shouted at the judge and had to be removed from the courtroom.

Weston, 211 F.Supp.2d 182 (D.C. Cir. 2002) (relying on the government's expert witness, BOP progress notes, and the court's observations of the defendant, including in open court, the district court credited the doctor's opinion "that there is a substantial probability that the defendant will attain the capacity to permit the trial to proceed within the foreseeable future," which in that case "could be a year or two" from the time medication commenced); *United States v. Kokoski*, 1996 WL 181482, at *3 (4th Cir. 1996) (unpublished) (affirming district court's commitment order where it relied on forensic and BOP reports stating that there was a substantial probability of future competency).

The district court extended the time of commitment for only four months, with leave for Dr. Pietz to seek another extension if needed. Contrary to the defendant's argument, the district court did not need to specifically state that the defendant could likely be restored within four months. In any event, the district court has done so here. (CR 347, p. 2) (stating that the testimony of the experts and other information "established the likelihood and substantial probability that the defendant will continue to get better and can be restored to competency to *stand trial in four months*") (emphasis added). The district court also noted in its order denying the stay that "the hearing transcript speaks for itself" in terms of why the "Court settled on a four-month extension," including that it believed four months was consistent with the statute and

that the evidenced showed a substantial probability the defendant will attain the capacity to permit the proceedings to go forward within 120 days.[14] (CR 347, p. 6.) As noted earlier, Dr. Pietz testified that in her opinion the defendant could be restored to competency and she expected it to occur within eight months. Dr. Ballenger stated that it is highly likely that the defendant will become competent and noted that there is ordinarily much improvement of similarly-situated individuals between months three and twelve. The district court's order was not erroneous, much less clearly erroneous.

The defendant also argues that when § 4241 discusses the defendant's "capacity," it means something other than competency to stand trial. (Motion, pp. 17-22.) This is incorrect. As the district court noted: "The defense insists that 'competency' is not the same thing as 'the capacity to permit the proceedings to go forward' because only the latter takes into account the potential side effects of anti-psychotic drugs that may 'interfere with [Mr. Loughner's] ability to obtain a fair trial."

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[14] In considering what length of time is "reasonable" under Section 4241(d)(2), there is no set period that is *per se* reasonable. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("we do not think it is appropriate for us to attempt to prescribe arbitrary time limits"); *United States v. Ecker*, 30 F.3d 966, 969 (8th Cir. 1994) (finding a total four year commitment reasonable – "[a]s we read [Section 4241], the overall determination of ultimate competency to stand trial can extend over a reasonable period"); *Magassouba*, 544 F.3d at 408 (declining to place outer limit on the extension period under Section 3241(d)(2)); *United States v. Weston*, 260 F. Supp.2d 147 (granting 12 month extension pursuant to Section 4241(d)(2)).

(Order, p. 2 n. 1.) The district court disagreed and noted that it had stated at the hearing that its finding "in no way forecloses the defense from later arguing that Mr. Loughner lacks the capacity to stand trial because [of] the side effects of his anti-psychotic medications . . ." (*Id*.) In its denial of the motion to stay, it also stated: "To be perfectly clear, the Court would not have found that the defendant can be restored to competency if it entertained any serious concern that the medication prescribed to restore him would be debilitating at trial." (CR 347 at p. 2.) It also noted: "Contrary to the defense's claims that the potential side effects of the defendant's medication antipsychotic drugs were not considered, a fair reading of the record of the September 28 hearing demonstrates that the Court evaluated the concerns and found no basis for them on the testimony and evidence presented." (*Id*. at 3.)

The defendant's arguments relying on involuntary medication decisions like *Sell* and *Riggins* and complaining about the alleged lack of a treatment plan (Motion, pp. 10, 22-27) are without merit. First, a treatment plan is not a requirement of the § 4241(d)(2) inquiry, so his reliance on *Sell* and other medication decisions is inapposite. Indeed, as the government noted in its response below, even if the district court ordered an extension of commitment under § 4241(d)(2) for the purpose of restoring the defendant to competency, no *Sell* medication order was required because the defendant is already being lawfully medicated on *Harper* dangerousness grounds,

and a *Sell* order is only required if the *sole* reason for medication is competency restoration. (CR 335; Exhibit 6) (citing *Sell*, 539 U.S. at 181-83; *United States v. Hernandez-Vasquez*, 513 F.3d 908, 913 (9th Cir. 2008) ("Because *Sell* orders are "disfavored," the district court, in an ordinary case, should refrain from proceeding with the *Sell* inquiry before examining dangerousness and other bases to administer medication forcibly."); *United States v. Rivera-Guerrero,* 426 F.3d 1130, 1137, 1138 & n.4 (9th Cir. 2005) ("The record strongly suggests that in the case before us the district court should have conducted a *Harper* dangerousness hearing instead of proceeding under *Sell*."). The defense's criticism of the district court for not holding a *Sell* hearing is without merit. (Motion, pp. 6-8, 25.) The district court also found that BOP's most recent September 15th *Harper* medication determination was lawful. (Order, pp. 4-7.)

Second, in any event, the defendant's medication regimen was discussed at the hearing and is known by the defense, and the district court did consider it. As the district court noted in its order denying the motion for stay:

> But regardless of whether the Court can simply rely on the *Harper* determinations that have been previously made by prison medical personnel and administrators, or must conduct a more robust *Sell* hearing to approve the defendant's ongoing involuntary medication, the Court *did* make a restorability determination on September 28 with reference to a particular treatment plan. The hearing testimony established what medications the defendant receiving, what *dosages* of those medications he is receiving, and *when* during the day is receiving those dosages.

(CR 347, pp. 4-5) (emphasis in original). It noted that "implicit in the testimony and evidence the Court considered is that the defendant's present medication regimen will continue with only minor modifications, and that the medical experts believe this regimen will succeed in restoring him to competency." (*Id*. at 5.) Indeed, Dr. Ballenger testified about the beneficial effects of anti-psychotic medication on schitzophrenic individuals and the extremely low risk of serious side effects with second-generation medication like Respiridone (which the defendant is taking), when compared to the risk of serious side effects of the first-generation drugs at issue in *Harper*, *Riggins*, and *Ruiz-Gaxiola*. Dr. Pietz also testified that the defendant has not exhibited any of those serious side effects.

The defendant has failed to make a "clear showing" that he is likely to succeed on appeal.[15]

[15] The defendant claims the district court's order granting an extension of commitment under § 4241(d)(2) is appealable before trial. (Motion, pp. 9-10.) He does not cite a decision from this Court holding that a § 4241(d)(2) extension of commitment is immediately appealable, but even if it is, the defendant has failed to show he is likely to succeed on appeal, as demonstrated above.

2. **The Defendant Has Failed To Show That Irreparable Injury Is "The More Probable or Likely Outcome" and The Remaining Factors Also Militate Against An Injunction.**

The defendant has failed to show the likelihood of irreparable injury which – like the strong likelihood of success on appeal – is a "critical" factor in the injunction calculus. "*Nken* held that if the petitioner has not made a certain threshold showing regarding irreparable harm . . . then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Leiva-Perez*, 640 F.3d at 965, citing *Nken*, 129 S.Ct. at 1760-61. "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 129 S.Ct. at 375 (emphasis in original). The defendant "must demonstrate that "irreparable harm is probable if the stay is not granted," i.e., that "an irreparable injury is the *more probable or likely outcome*." *Leiva-Perez*, 640 F.3d at 968 (emphasis added). Even a showing of irreparable injury will not ensure a stay. "A proper showing regarding irreparable harm was, and remains, a necessary but not sufficient condition for the exercise of judicial discretion to issue a stay." *Id*. at 965.

The defendant claims that irreparable harm will occur because he is being committed for an additional period and because a stay "may also have the effect of rendering the appeal moot." (Motion, p. 4.) First, even if he was not sent to Springfield, he would still remain in custody in Tucson, so there does not appear to

be a meaningful "deprivation of liberty" that his transportation would invoke. Second, although the defendant is correct that his appeal may be rendered moot if he is restored to competency before his appeal is resolved, that will not constitute irreparable harm because his appeal is meritless, as demonstrated above.

Moreover, there are good reasons why the defendant should be returned to the medical facility at FMC Springfield rather than continuing to be detained in a maximum security prison in Tucson. FMC Springfield is a medical facility where he receives constant medical care, including by Dr. Pietz, the psychologist who sees him almost daily, and Dr. Serrazin and other BOP psychiatrists, who monitor his medication and treatment. USP-Tucson is not an in-patient mental health facility. Dr. Pietz also testified that the defendant has been progressively improving and can be restored to competency, an opinion the district court found credible. BOP has submitted an affidavit further supporting why it believes the defendant should be returned to FMC-Springfield rather than remain in USP-Tucson, in light of the defendant's mental condition and other factors. (Exhibit 7) (affidavit with attachments.) The defendant's continued progress at FMC-Springfield should not be disrupted while his appeal is resolved, particularly where that appeal is without merit as demonstrated above, and in light of the opinions of Dr. Pietz and others reflected in the BOP affidavit.

The defendant's failure to meet the "critical" factors of likelihood of success on the merits and irreparable harm is enough to warrant denial of the defendant's motion, but the other two factors – whether the stay is supported by equities and whether it is in the public interest – also do not militate in favor of an injunction. The victims in this case have a right to a prompt resolution of this case. Delaying the defendant's return to FMC-Springfield and potentially disrupting the defendant's progress toward competency restoration is not in the public interest or equitable, particularly when his pending appeal is unlikely to succeed.

C. **Conclusion**

Because the defendant has failed to make a "clear showing" that he warrants the "extraordinary remedy" of a preliminary injunction pending appeal, this Court should deny his motion to stay his transportation back to FMC Springfield.

Respectfully submitted this 3rd day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2011, I electronically filed the following response 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