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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America,

vs.

Jared Lee Loughner,

Plaintiff,

Defendant.

CASE NO. 11cr0187 TUC LAB
ORDER ON SELL HEARING

I. Introduction

Following a hearing in Tucson on September 28, 2011, the Court extended the defendant’s commitment to FMC Springfield for a period of four months. (Dkt. No. 343.) Before that date, the formal purpose of his commitment to FMC Springfield was *evaluative*. Specifically, the purpose was “to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward.” 18 U.S.C. § 4241(d)(1). Now, however, the purpose of the defendant’s commitment is officially *restorative*. Rather than just *evaluate* the defendant’s mental condition, the FMC Springfield staff has been directed by the Court to treat the defendant with the aim of restoring him to competency to stand trial. 18 U.S.C. § 4241(d)(2)(A).

Because the FMC Springfield medical staff has decided that the defendant’s mental illness poses a danger to himself and others, they have been medicating him involuntarily with antipsychotic drugs in compliance with *Washington v. Harper*, 494 U.S. 210 (1990). The decisions to medicate the defendant — there have been three *Harper* hearings so far, and

1 one emergency hearing — were made administratively pursuant to 28 C.F.R. § 549.46.
2 Consistent with *Harper* and the federal regulations implementing that decision, the Court was
3 neither consulted nor asked to approve the staff's decisions to medicate the defendant.
4 Nevertheless, the defense has repeatedly requested that the Court conduct a hearing on the
5 merits of the medication decisions pursuant to *Sell v. United States*, 539 U.S. 166 (2003).
6 The defense has argued that the Government must establish that the medication regimen
7 complies with the *Sell* requirements: (1) that important governmental interests are at stake;
8 (2) that involuntary medication is substantially likely to render a defendant competent without
9 having side effects that will interfere significantly with his ability to assist his counsel; (3) that
10 involuntary medication is necessary to restore the defendant to competency, and that
11 alternative, less intrusive treatments are inadequate; and (4) that the drugs administered are
12 medically appropriate. *Id.* at 180–181.

13 This Court has previously determined that *Sell* does not apply when, as here, the
14 decision to involuntarily medicate a defendant is made by prison doctors to abate that
15 defendant's dangerousness. Instead, the Court has relied on *Harper* and *United States v.*
16 *Morgan*, 193 F.3d 252 (4th Cir. 1999), both of which suggest a clear distinction between
17 involuntarily medicating a defendant because he is dangerous on the one hand, and
18 involuntarily medicating him to restore his competency to stand trial on the other. Following
19 *Morgan*, the Court has reviewed the FMC staff's decision to medicate the defendant for
20 arbitrariness. (See Dkt. Nos. 252, 306 at 2–3, 343 at 4–5). With respect to the latest
21 decision to medicate the defendant, which was made by FMC doctors on September 15,
22 2011 and upheld by the Associate Warden on September 21, 2011, the Court found that
23 FMC personnel complied with the proper procedural protocol and that their decision had
24 some basis in fact. It was therefore not arbitrary.

25 However, having extended the defendant's commitment to FMC Springfield for the
26 express purpose of restoring him to trial competency, the Court has reconsidered whether
27 the defendant is now entitled to some form of a *Sell* hearing. More specifically, the Court has
28 considered whether shifting the aim of the defendant's commitment from evaluation to

1 restoration also justifies shifting the procedural protocol for involuntarily medicating him with
 2 antipsychotic drugs. The Court explained its concerns at the conclusion of the September
 3 28 hearing in Tucson:

4 This is a significant change, I think, in at least the legal status of
 5 the defendant.

6 I'm now committing him for the purpose of restoration. No more
 7 evaluation. It changes today with this ruling. He's being
 8 committed for another four months for the purpose of restoration.

9 I'm committing him at a time that I know that they're continuing
 10 to treat him with medication that he declines to take. He's
 11 passively resisting, which means they tell him "Either you have
 12 to do this or we'll give you a shot and forcibly inject you." In the
 13 face of that, he comes and takes the medicine.

14 I think this is a very different situation from what has existed to
 15 this point. I'm now telling them to continue to restore him. I think
 16 we're right up against *Sell*. And the reason I asked the parties
 17 to be ready to speak to this is I think some form of a *Sell* hearing
 18 or an acknowledgment needs to take place here.

19 What the parameters of that hearing are I'm less clear about. As
 20 I read *Sell*, you look first at whether he'd be medicated on
 21 another basis. If the answer is yes, perhaps, that's the end of
 22 the inquiry. Maybe not. Maybe the Court is also to be concerned
 23 with the other factors under *Sell*.

24 (Dkt. No. 354 at 281.) The Court asked the parties on September 28 to brief the issue, which
 25 they have now done.¹ (Dkt. Nos. 355, 357.)

26 ¹ In its motion to stay the defendant's return to Springfield, the defense implied that
 27 the Court initially favored a prompt *Sell* hearing before extending the defendant's
 28 commitment, and subsequently "took a different turn" and "suggested that it could simply
 authorize the extension first and address the legal problems later (by holding what it termed
 a "*Sell*" hearing)." (Dkt. No. 345 at 3–7.) This misrepresents what the Court said and what
 the Court wrote in its orders.

In its September 1 order, the Court set a hearing on the question of whether to extend
 the defendant's commitment to FMC Springfield. In the order, the Court said, "The parties
 should be prepared at the hearing to state their positions regarding the necessity of
 scheduling a *Sell* hearing if the BOP contemplates accomplishing restoration of the
 defendant's competency by involuntarily medicating him." (Dkt. No. 309 at 3.) The order
 further suggested the Court would "reset a future date for a *Sell* hearing, *if necessary*, and
 for determining whether the defendant has been restored to competency." (*Id.* (emphasis
 added).) In context, the clear implication of the Court's statement was that a *Sell* hearing
 may be unnecessary in the first place, or very limited in scope, considering that the
 defendant is now being medicated, legitimately in the Court's view, pursuant to *Harper*.

The defense claims that in the September 19 order "the Court again expressed its
 concerns about extending commitment without addressing the concerns required under *Sell*

1 **II. Discussion**

2 The Government's position is that no *Sell* hearing is required because the defendant
3 is now being medicated pursuant to *Harper* and its implementing regulation, 28 C.F.R.
4 § 549.46, on the ground that he is dangerous to himself and gravely disabled. (See Dkt. No.
5 324.) *Sell*, itself, appears to support the Government's argument. That decision, which
6 imposes a heightened, four-part standard for involuntary medication orders, is limited to
7 medication *solely* intended to render an incompetent defendant competent. *Sell*, 539 U.S.
8 at 185.² Indeed, *Sell* explicitly instructs courts to first determine whether the involuntary
9 medication of an incompetent defendant may be warranted on other grounds, such as
10 dangerousness under *Harper*.

11 _____
12 *v. United States*—which would include consideration of . . . fair trial rights and medication for
13 competency purposes pursuant to a treatment plan" (Dkt. No. 345 at 5.) That's
14 inaccurate, and in fact the defense supports such a misleading synopsis of the Court's
15 September 19 order only by omitting the following critical paragraphs from the excerpt it
16 quoted:

17 The next question is what's the nature of the *Sell* hearing.
18 And this is where I need some additional guidance, I think, from
19 the parties. *Sell* indicates that the first step among the
20 considerations is to determine whether involuntary medication is
21 justified on some other basis, for example, *Harper*. I found that
22 it is.

23 So the question is do we go any farther than that if we
24 reiterate my finding that . . . he can be involuntarily medicated
25 because of dangerousness, either to himself or others.

26 (Dkt. No. 320 at 6–7.) In contemplating a *Sell*-type hearing, then, the Court in no way
27 suggested that it would require the Government to actually satisfy the *Sell* factors to justify
28 the defendant's ongoing involuntary medication. Nor did the Court say that it would take
those factors into account in any way in extending the defendant's commitment to FMC
Springfield. The Court reiterated its uncertainty about the actual relevance of *Sell* during the
September 28 hearing. (See Dkt. No. 354 at 281.)

The defense also wrongly ascribes to the Court the view "that it could postpone
undertaking *Sell*-type considerations until *after* authorizing such a commitment." (Dkt. No.
345 at 6.) The Court never suggested that "*Sell*-type considerations" would necessarily be
addressed going forward. Rather, as the full, undistorted passages from the record
demonstrate, the Court's question for the parties was whether there needed to be a *Sell*
hearing at all, and if so, what the scope of that hearing should be considering that the
defendant is being medicated on dangerousness grounds under *Harper*.

² BOP regulations also reflect the view that a *Sell* hearing is appropriate only when the
sole justification for medicating an incompetent defendant is to restore him to competency
to stand trial. See 28 C.F.R. § 549.46(b)(2) ("Only a Federal court of competency jurisdiction
may order the involuntary administration of psychiatric medication for the sole purpose of
restoring a person's competency to stand trial.").

1 We emphasize that the court applying these standards is
2 seeking to determine whether involuntary administration of drugs
3 is necessary significantly to further a particular government
4 interest, namely, the interest in rendering the defendant
5 *competent to stand trial*. A court need not consider whether to
6 allow forced medication for that kind of purpose, if forced
7 medication is warranted for a different purpose, such as the
8 purpose set out in *Harper* related to the individual's
9 dangerousness, or purposes related to the individual's own
10 interests where refusal to take drugs puts his health gravely at
11 risk. There are often strong reasons for a court to determine
12 whether forced administration of drugs can be justified on these
13 alternative grounds *before* turning to the trial competence
14 question

15 *If a court authorizes medication on these alternative grounds, the*
16 *need to consider authorization on trial competence grounds will*
17 *likely disappear* We consequently believe that a court,
18 asked to approve forced medication of drugs for purposes of
19 rendering a defendant competent to stand trial, should ordinarily
20 determine whether the Government seeks, or has first sought,
21 permission for forced administration of drugs on these other
22 *Harper*-type grounds; and if not, why not.

23 *Id.* at 181–83 (emphasis added). The Ninth Circuit has acknowledged the distinction that *Sell*
24 draws between involuntary medicating a defendant on grounds of dangerousness and
25 medicating a defendant for the purpose of restoring competency, and it has emphasized that
26 “*Sell* orders are disfavored” and that the Supreme Court “clearly intends courts to explore
27 other procedures, such as *Harper* hearings (which are to be employed in the case of
28 dangerousness) before considering involuntary medication orders under *Sell*.” *United States*
v. Rivera-Guerrero, 426 F.3d 1130, 1137 (9th Cir. 2005); *see also United States v.*
Hernandez-Vasquez, 513 F.3d 908, 914 (9th Cir. 2008) (“Accordingly, prior to undertaking
the *Sell* inquiry, a district court should make a specific determination on the record that no
other basis for forcibly administering medication is reasonably available.”).

Here, the defense concedes it “never requested a *Sell* hearing as such—that is, a
hearing seeking permission for the government to forcibly medicate Mr. Loughner for the
purpose of competency restoration.” (Dkt. No. 345 at 6 n.8.). But it has repeatedly advanced
the argument that, because the defendant is a pretrial detainee, the four *Sell* factors must
be applied as a matter of due process. It argues, now, that the factors must be grafted onto
the question of the legitimacy of the defendant’s ongoing medication pursuant to *Harper*, and

1 even onto the decision whether to extend his commitment to FMC Springfield: To be clear,
2 the defense position is that to justify the twin invasions of Mr. Loughner's liberty — forcible
3 medication and recommitment for purposes of restoration of competency — the court must
4 make several findings: First, the court must find that there exists a substantial probability that
5 Mr. Loughner will be restored to competency within a reasonable period of time; second, that
6 it is substantially unlikely that the means employed will deprive him of a fair trial; third, that
7 the means employed will either advance a substantial government interest or, considering
8 less intrusive means, are essential to the safety of Mr. Loughner or others; and fourth, that
9 the means employed are medically appropriate.

10 (Dkt. No. 355 at 2.) However, no case directly supports the defense's contentions, and in
11 fact *Harper* and *Sell* require different levels of due process protection because they deal with
12 very different interests on the part of the government in involuntary medicating an inmate.

13 In *Harper*, the Supreme Court recognized that individuals have a constitutionally
14 protected liberty interest in "avoiding the unwanted administration of antipsychotic drugs."
15 494 U.S. at 221. It also recognized, at the same time, a prison's significant interest "in
16 providing appropriate medical treatment to reduce the danger that an inmate suffering from
17 a serious mental disorder represents to himself or others." *Id.* at 236. The *administrative*
18 process the Supreme Court found a dangerous inmate is due in *Harper* — and that is now
19 codified in 28 C.F.R. § 549.46 — is best viewed as an accommodation of these interests.
20 Moreover, nowhere in the *Harper* decision is it suggested that this accommodation turns on
21 where in the criminal justice process a defendant finds himself, *i.e.*, whether he is a pretrial
22 detainee, or is awaiting sentencing, or is serving a sentence. And sensibly so: a mentally ill
23 inmate can pose a danger to himself, to others, and to the prison environment regardless of
24 the stage of his case. The inmate's interest in avoiding involuntary medication and the
25 prison's interest in inmate health and safety are constants.³

26 In contrast to *Harper*, the inmate in *Sell* was assumed not to be dangerous. *Sell*, 539
27 U.S. at 185. When that is the case, the prison's interest in maintaining inmate health and

28 ³ The defense's rebuttal to this point has always been that the FMC's staff's
dangerousness determinations under *Harper* are compromised by its concomitant directive
to restore the defendant to competency under 18 U.S.C. § 4241(d). The Court has never
found any evidence that the FMC staff is medicating the defendant under *Harper* just to avoid
a more stringent *Sell* hearing, and it rejects the defense's unsupported accusation that this
is going on. The FMC staff has no *obligation* to restore the defendant to competency, and
indeed, the staff is free to report to the Court that the defendant cannot be restored or has
not been restored within the time allowed.

1 safety drops out, leaving only the state’s generic interest “in bringing to trial an individual
2 accused of a serious crime.” *Id.* at 180. That changes the due process calculus significantly.
3 When the state’s only interest in medicating a mentally ill inmate is to restore him to trial
4 competency, the inmate’s liberty interest in not being involuntary medicated dominates, and
5 the four *Sell* factors must be considered. *Id.* at 179. But *Sell* didn’t undercut the *Harper*
6 formula for dealing with dangerous inmates in any way, and in fact, the Supreme Court held
7 explicitly that the four factors needn’t be considered “if forced medication is warranted for a
8 *different* purpose, such as the purposes set out in *Harper* related to the individual’s
9 dangerousness, or purposes related to the individual’s own interests where refusal to take
10 drugs puts his own health gravely at risk.” *Id.* at 181–82.

11 The defense has ignored this critical point in its repeated attempts to graft *Sell* onto
12 the circumstances of this case, and to infuse the *Sell* factors into every intermediate stage
13 of the competency restoration process. If the defense is right, and *Harper* has no application
14 to pretrial detainees, then what is to be made of the explicit instruction in *Sell* that courts
15 must first consider whether an inmate is being medicated pursuant to *Harper* before
16 proceeding to consider the *Sell* factors? The clear implication of that directive is that the
17 Supreme Court, in *Sell*, contemplated that a pretrial detainee could be incidentally be
18 restored to trial competency by being medicated on dangerousness grounds under *Harper*.

19 This Court has reconsidered *Harper*, *Sell*, *Rivera-Guerrero*, and *Hernandez-Vasquez*,
20 and finds that this case fits into the category of cases in which there is no need for a full-
21 blown *Sell* hearing because the defendant is already being medicated for other legitimate
22 reasons. He is now being medicated, and indeed, was originally medicated, following a
23 *Harper* hearing on the ground of dangerousness. The most recent *Harper* hearing, which
24 took place on September 15, and which is now the operative justification for his medication,
25 found him to be dangerous to himself on the related grounds that he is gravely disabled, i.e.,
26 unable to attend to his own basic needs, *and* actively engaging or likely to engage in conduct
27 that may result in physical harm to himself. The Court reviewed that determination for
28 arbitrariness and found none. (Dkt. No. 343 at 4–7.)

1 While the Court has reconsidered the arguments advanced by the defense, the Court
2 finds that the protocol for involuntarily medicating a dangerous inmate set out in *Harper* is
3 operative here. Because doctors have made a *medical* determination in this case justifying
4 the need for medicating Mr. Loughner under *Harper*, which the Court has reviewed and has
5 concluded was not arbitrary, the defendant has received all of the process that he is due at
6 this point. He is not entitled to have the Court give fuller consideration to other *Sell* factors,
7 or make additional findings pursuant to *Sell*, at this time. Moreover, as the Court has already
8 pointed out, there is, in all respects, an overlap between the findings the defense would have
9 the Court make and the factors *Sell* requires courts to consider before ordering a non-
10 dangerous defendant be involuntarily medicated to restore his competency to stand trial.
11 Regardless, *Sell* is clear that if the Court finds that involuntary medication is currently justified
12 on *Harper* grounds, it is not required to make further findings that take into account the
13 additional *Sell* factors.

14 Although not required by *Harper*, the Court has nonetheless twice addressed the
15 defense's concern that the antipsychotic medications the defendant is receiving will deny him
16 a fair trial by compromising his awareness at trial and his ability to assist his lawyers. (See
17 Dkt. Nos. 343 at 2 n.1, 347 at 2.) A defendant who "is unable to understand the nature and
18 consequences of the proceedings against him," or cannot "assist properly in his defense,"
19 is not competent to stand trial. 18 U.S.C. § 4241(d). The Court has assured defense
20 counsel that any lingering concerns about the defendant's appearance at trial or capacity to
21 stand trial will be fully addressed if there is a future competency hearing.⁴ The Court

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23 ⁴ The Court has previously noted that *Sell* itself folds the side effects of medication into
24 the competency analysis. See *Sell*, 539 U.S. at 185 ("Whether a particular drug will tend to
25 sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial
26 developments, or diminish the ability to express emotions are matters important in
determining the permissibility of medication to restore competence."); see also *id.* at 181
(blending question of whether drugs will render a defendant competent to stand trial with the
question whether drugs will have side effects that interfere with defendant's ability to assist
in his defense).

27 Now, it may be that there are side effects of medication that, while they don't render
28 a defendant technically incompetent, nonetheless disadvantage him at trial and implicate his
fair trial rights as well as the integrity of the trial process. See *Riggins v. Nevada*, 504 U.S.
127, 141–45 (1992) (Kennedy, J., concurring) (distinguishing between "some bare level of
functional competence" and "competence to stand trial"). In his *Riggins* concurrence, Justice

1 explained as much when it denied the defense's motion to stay the defendant's return to
2 FMC Springfield:

3 To be perfectly clear, the Court would not have found that the
4 defendant can be restored to competency if it entertained any
5 serious concern that the medication prescribed to restore him
6 would be debilitating at trial. Implicit in the Court's oral recital of
7 its finding that the defendant can be restored to competency was
8 the recognition that the defendant must be — *and must appear*
9 *to be* — able to grasp the proceedings and to assist his counsel
10 in his defense.

11 (Dkt. No. 347 at 2–3.) The Court reiterates that it will consider the defense's concerns anew
12 if and when there is an adversarial competency hearing in this case. (See *also* Dkt. No. 354
13 at 282–83.) Contrary to the defense's argument, 18 U.S.C. § 4241(d)(2)(A) does not require
14 the Court to make a determinative, predictive finding *now* about what, if any, the *future* side
15 effects of the defendant's medication will be. It is enough that the Court finds no clear cause
16 for concern at the present time about deleterious side effects of the defendant's medication⁵,

17 Kennedy expressed concern about antipsychotic drugs prejudicing a defendant “(1) by
18 altering his demeanor in a manner that will prejudice his reactions and presentation in the
19 courtroom, and (2) by rendering him unable or unwilling to assist counsel.” *Id.* at 142. He
20 reasoned that “the documented probability of side effects seems . . . to render involuntary
21 administration of the drugs . . . unacceptable absent a showing by the State that the side
22 effects will not alter the defendant's reactions or diminish his capacity to assist counsel.” *Id.*
23 at 143.

24 The Court takes these concerns seriously — and notwithstanding the fact that *Riggins*
25 was decided almost two decades ago, and that Justice Kennedy tempered his concerns with
26 the acknowledgment that “[t]he state of our knowledge of antipsychotic drugs and their side
27 effects is evolving and may one day produce effective drugs that have only minimal side
28 effects.” *Id.* at 145. But even then, the defense fails to explain why they shouldn't simply be
folded into the prevailing competency standard and addressed at the time there is an
adversarial competency hearing in this case. Its only argument is that the language of 18
U.S.C. § 4241(d)(2)(A) — particularly the words “the capacity to permit the proceedings to
go forward” — requires that the Court make a predictive determination of what, if any, the
side effects of the defendant's medication will be. (Dkt. No. 345 at 14.) That argument,
however, can only succeed by reading *Sell* into § 4241(d) and the ongoing battle over the
defendant's medication, which the Court has consistently and emphatically refused to do.

⁵ In its motion to stay the defendant's return to FMC Springfield, the defense alleged
that its cross examination of the Government's witnesses on the subject of side effects was
blocked by the Court. (Dkt. No. 345 at 7 n.10, 15.) This is, at best, overstatement.

Dr. Pietz testified on direct examination that the defendant's daily dosage of
Risperidone is timed to reduce the sedative side effects of the drug, that he is receiving
Cogentin to reduce the side effects of the Risperidone, and that he is not exhibiting any side
effects from his medication. (Dkt. No. 354 at 36–38.) On cross examination, Dr. Pietz
testified that in the view of the defendant's treating psychiatrist a bout of abdominal pain and

1 and that the Court will give fresh and full consideration to the defense's concerns before it
 2 makes any definitive finding that the defendant has been restored to competency. To the
 3 extent the defense argues that *Sell* requires the Court to engage in a predictive analysis of
 4 side effects, the Court reiterates its position that *Harper*, not *Sell*, is the operative case here.⁶

5 III. Conclusion

6 Accepting the legitimacy of the doctors' conclusion that the defendant must be
 7 medicated to control his dangerousness, the Court asked the parties for guidance on whether
 8 it must nevertheless conduct a *Sell* hearing at this stage in the case, and if so, what the

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 10 vomiting the defendant suffered was not a side effect of his medication. (*Id.* at 145.) Dr.
 11 Pietz said the same of the defendant's constant pacing, or akathisia, which the psychiatrist
 12 attributed to agitation and the defendant's underlying mental illness. (*Id.* at 146–48.) Finally,
 13 Dr. Pietz speculated that the defendant's flat affect was not a side effect of his medication,
 14 but rather is attributable to his depression, itself an indication of improved cognitive
 15 functioning. (*Id.* at 146.)

16 The Government's second witness, Dr. Ballenger, testified extensively on direct
 17 examination about the reduced side effects of second versus first generation anti-psychotic
 18 drugs. (*Id.* at 190–201.) The only adverse side effect he identified in the defendant's
 19 medical records was "some sedation." (*Id.* at 222.) The Court suggested the defense's
 20 cross examination of Dr. Ballenger was "off track" not when it focused on side effects, but
 21 when it focused on whether schizophrenia can be cured or merely managed over time. (Dkt.
 22 No. 354 at 248.) The Court did say, at the time, "I didn't, frankly, understand it when Mr.
 23 Kleindienst got into side effects, which is not the subject of this hearing." But the fact is that
 24 the Court allowed testimony on side effects and did not prevent the defense from asking the
 25 Government's witnesses, in particular, about any side effects suffered by the defendant.
 26 After the Court interrupted the defense's cross examination of Dr. Ballenger, cross
 27 examination went on to address the sedative and cognitive side effects of the drugs being
 28 administered to the defendant. (*Id.* at 254–56.) The defense also asked Dr. Ballenger about
 the role of side effects in the subjects of a clinical study discontinuing their treatment with
 antipsychotic drugs, and the Court allowed the questioning. (*Id.* at 262.)

21 ⁶ Moreover, the second *Sell* factor, which requires consideration of side effects,
 22 requires courts to "find that administration of the drugs is substantially unlikely to have side
 23 effects that will interfere with the defendant's ability to assist counsel in conducting a trial
 24 defense, thereby rendering the trial unfair." *Sell*, 539 U.S. at 181. Notably, *Sell* does not
 25 require courts to consider *other* side effects, such as those contemplated by Justice Kennedy
 26 in *Riggins* that may not render a defendant incompetent but may nonetheless disadvantage
 27 him at trial. It requires consideration of side effects only insofar as they may inform the
 28 competency issue.

25 This makes sense. The defendant is presently incompetent to stand trial. There is
 26 no guarantee that he will become competent in the future. By asking the Court, now, to
 27 make a predictive — and potentially case-dispositive — finding about the manner in which
 28 the defendant's medication will impact his demeanor at some future time, the defense is
 seeking, prematurely, to terminate this case and extinguish the Government's interest in
 having the charges against the defendant resolved by a trial. While the Court takes seriously
 the defense's concerns about the defendant's appearance and capacity at trial, the time to
 address those concerns will come if and when the Government contends that the defendant's
 competency has been restored and he is fit to stand trial.

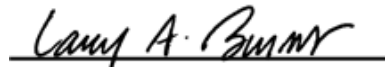
1 nature or extent of that hearing should be. The Court sought this guidance based on the
2 changed directive it had given to FMC Springfield to attempt to restore the defendant to
3 competency. Having now fully considered the matter, the Court concludes that there is no
4 need for a full-blown *Sell* hearing to consider the merits of the medication decision.
5 Involuntary medication of the defendant in this case is justified under *Harper*, and *Sell* itself
6 recognizes that this finding obviates the need for further inquiry.

7 The defense hasn't asked for a *Sell* hearing in the formal sense. Instead, it again
8 advances the argument that *Sell* principles must be grafted onto the pending issues in this
9 case, namely the legitimacy of the defendant's ongoing medication pursuant to *Harper* and
10 the bases for extending his commitment to FMC Springfield. The Court declines to blend *Sell*
11 requirements into what, in the first instance, was, and continues to be a *Harper*-based
12 determination. The defense has cited no case, and the Court conceives of no persuasive
13 argument, in support of the proposition that *Sell* factors control the determination of whether
14 to extend the defendant's commitment to FMC Springfield.

15 To the contrary, the Court finds the case law clear that no *Sell* order is required if a
16 defendant is being legitimately medicated on dangerousness grounds pursuant to *Harper*.
17 These are the defendant's circumstances. Accordingly, no additional *Sell* hearing need be
18 held at this time.

19 **IT IS SO ORDERED.**

20 DATED: October 25, 2011

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22 **HONORABLE LARRY ALAN BURNS**
23 United States District Judge

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