UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JARED LEE LOUGHNER, Defendant-Appellant	C.A. No. 11-10339 D. Ct. No. 11-00187-LAB District of Arizona, Tucson **RESPONSE TO DEFENDANT'S EMERGENCY MOTION FOR IMMEDIATE CESSATION OF INVOLUNTARY MEDICATION AND TEMPORARY INJUNCTION PENDING APPEAL**

The United States of America, Plaintiff-Appellee, by and through its attorneys, Dennis K. Burke, United States Attorney, and Christina M. Cabanillas, Assistant United States Attorney, and pursuant to this Court's order issued on July 1, 2011, hereby opposes the defendant's emergency motion and request for preliminary injunction of involuntary medication pending his appeal.

I. Introduction

The defendant's emergency motion should be denied because the defendant has failed to make a "clear showing" that he warrants the "extraordinary remedy" of a preliminary injunction pending appeal. He fails to meet all necessary prongs of this Court's multi-factor test, and has particularly failed to show a strong likelihood of

success on appeal, nor the likelihood of irreparable injury, which are the most "critical" injunction factors.

As explained more below, the Supreme Court has determined that a prison facility may involuntarily medicate a mentally ill inmate who poses a danger, without judicial approval and without an attorney present, noting that this decision is made by doctors, not judges. *Washington v. Harper*, 494 U.S. 210 (1990). The federal Bureau of Prisons (BOP) properly conducted such an administrative "*Harper*" determination here and found that involuntary medication was appropriate based on the defendant's dangerousness. As the district court correctly found, the defendant was *not* ordered by BOP to be involuntarily medicated to restore competency, so the requirements in *Sell v. United States*, 539 U.S. 166 (2003) – which apply only to involuntary medication orders to restore competency ("*Sell* orders") – are inapplicable.[1] This Court has recognized that a *Harper* hearing must precede any *Sell* inquiry, and that *Harper* provides an independent and separate reason to involuntarily medicate an inmate. The district court did not abuse its discretion in affording necessary deference to BOP's administrative finding and ruling that it complied with *Harper* and due process and was not arbitrary.

[1] For this same reason, the decision in *United States v. Ruiz-Gaxiola*, 623 F.3d 684 (9th Cir. 2010), which also concerns *Sell* orders, is inapplicable.

The defendant's motion (and his appeal) are without merit because: 1) he seeks to impermissibly graft the requirements of *Sell* onto *Harper*, which would require this Court to disregard or overrule *Harper*; 2) he asks this Court to substitute its judgment for the medical doctors at the prison, which would also be inappropriate under Supreme Court law; and 3) he challenges the district court's factual findings, which he cannot show were clearly erroneous. This Court should lift the temporary stay and, like the district court, deny the defendant's motion to enjoin medication. The medical personnel at the prison facility need to be able to interact with the defendant *safely* in order to assess him for purposes of 18 U.S.C. § 4241(d), and the involuntary medication of the defendant – clearly authorized under *Harper* – should be allowed to continue while the defendant's appeal, which is without merit, is pending.

II. Facts & Procedural History[2]

A. Preliminary Proceedings

On March 3, 2011, a federal grand jury in Tucson, Arizona filed a superseding indictment charging the defendant, Jared Lee Loughner ("the defendant") with multiple criminal offenses committed on or about January 8, 2011, including attempted assassination of a member of Congress, Gabrielle Giffords, murder of a federal judge, John M. Roll, murder and attempted murder of other federal employees,

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

various weapons offenses, and injuring and causing death to participants at a federally provided activity. (CR 129.)

On March 21, 2011, after the government filed a motion for a competency hearing and competency evaluation under 18 U.S.C. § 4241(a) (CR 141), the district court ordered that the defendant be evaluated by BOP medical personnel at the Medical Referral Center (MRC) in Springfield, Missouri. (CR 165.) BOP completed its court-ordered evaluation of the defendant, and psychologist Dr. Pietz submitted a report to the district court, concluding that the defendant was suffering from a mental illness, schizophrenia, and was presently incompetent to stand trial. A psychiatrist appointed by the district court to evaluate the defendant, Dr. Carroll, reached a similar conclusion. On May 25, 2011, after receiving the competency reports of Dr. Pietz and Dr. Carroll, and after conducting a hearing pursuant to 18 U.S.C. § 4241, which the defendant attended, the district court concluded that the defendant was presently incompetent to stand trial.[3] Pursuant to 18 U.S.C. § 4241(d), the district court ordered the defendant committed to FMC-Springfield. (CR 221.)

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[3] The defendant was present, but at one point while the court was speaking, he suddenly stood up and had an outburst, shouting at the court, whereupon he was removed by U.S. Marshals. The district court called a short recess, and then gave the defendant another opportunity to remain. The defendant instead chose to watch the proceedings on a closed circuit television that had been set up for him, a request the district court accommodated without objection. (RT 5/25/11 36-37.)

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

After the defendant returned to FMC-Springfield on May 27, 2011, he declined to take medication. On June 14, 2011, BOP conducted an administrative hearing pursuant to 28 C.F.R. § 549.43 and *Harper*, to determine whether the defendant should be involuntarily medicated as a danger to himself or others. 28 C.F.R. § 549.43 (a)(5). (Def's Exh. C; Govt's Exh. 1; discussed in Govt's Exh. 2 at pp. 2-4.)[4] The defendant was given notice of this hearing on June 2, 2011, and was advised he could call witnesses. (Govt's Exh. 2, p. 2.; RT 6/29/11 at 53-54.) On June 13, 2011, the defendant's staff representative, Mr. Getchell, a licensed social worker, met with him and explained the reason for the involuntary medication review hearing, explained his rights, and stated he would answer questions the defendant may have about the process. (Govt's Exh. 2, p. 2.)

On June 14, 2011, an independent psychiatrist, not involved in the defendant's diagnosis or treatment, Dr. Tomelleri, presided over the *Harper* hearing. In the Involuntary Medication Report, Dr. Tomelleri discussed the defendant's behavior exhibiting that he was a danger. Dr. Tomelleri wrote that on March 28, 2011, while

[4]The government has submitted its Exhibit 1 under seal with this Court, as in the district court. The district court discussed facts from the government's and defendant's public and sealed exhibits at the hearing it conducted and in its written order. (RT 6/29/11 34, 49, 55-56; Def's Exh 2; CR 252, at 2, 7-8; Govt's Exh. 2.)

being interviewed by Dr. Pietz, the defendant suddenly became enraged. He said "Fuck you," threw a plastic chair twice towards Dr. Pietz, wet a roll of toilet paper attempting to throw it at the camera, and again threw the chair twice. The chair hit the grill between the defendant and Dr. Pietz. In addition, on April 4, 2011, the defendant spat on his attorney, lunged at her, and had to be restrained by staff. (Govt's Exh. 2, p. 2-3; CR 252 at 2.) He also threw chairs in his cell after being readmitted on May 28, 2011. (Govt's Exh. 1, p. 10.)[5]

The report also noted that the defendant had been diagnosed as a schizophrenic by Dr. Pietz and Dr. Carroll, and he had declined to take medication, even after being advised that it would be expected to produce a significant improvement in his condition. He was afforded the opportunity to be present at his hearing. When he would not participate in the hearing and instead barricaded himself, lying down behind his bed, Dr. Pietz, Dr. Serrazin and Mr. Getchell, his staff representative, repeatedly encouraged him to participate in the hearing. (Govt's Exh. 2, p 3.)

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[5] The defendant was speaking with Dr. Brandt on June 6, 2011, when the defendant "quickly appeared angry," stood up and "threw his chair full force against the back wall." On June 8, 2011, Dr. Pietz stated that the defendant threw his chair when they were speaking, and correctional staff reported to her that his conduct had been "escalating." (Govt's Exh. 2, p. 3 n. 2.) Since the time of the *Harper* hearing, the defendant was witnessed throwing his chair around his cell the weekend of June 24, 25, and 26, 2011 (Govt's Exh. 2, p. 3 n. 2.), and threw items again on June 29, 2011 (RT 6/29/11 at 48-49; Def's Exh. 2.)

Dr. Tomelleri's findings at the hearing included that treatment with psychotropic medication is universally accepted as the choice of treatment for people with the defendant's mental illness. He noted that other measures, such as psychotherapy, are not practicable and do not address the defendant's fundamental problem. He also noted that minor tranquilizers are useful in reducing agitation, but have no direct effect on the mental disease, and seclusion and restraints are merely temporary protective measures with no direct effect on mental disease. (Govt's Exh. 2, p. 3.)

The doctor determined that "involuntary medication is approved as in the patient's best medical interest" and "as a result of a mental disease or defect, and within the correctional setting, . . . [t]he patient is dangerous to others by actively engaging, or is likely to engage, in conduct which is either intended or reasonably likely to cause physical harm to another. . . ." (Govt's Exh. 2, pp. 3-4.) The defendant was informed that "on the basis of a diagnosis of mental illness and of actions on his part [showing] dangerousness to others within the correctional setting," the psychiatrist would "authorize treatment with psychotropic medication on an involuntary basis." (Govt's Exh. 2, p. 4.)

The defendant was also advised that if he disagreed with this decision, he could appeal to the Associate Warden of Health Services within 24 hours of the decision.

(Govt's Exh. 2, p. 4.) The defendant submitted a written appeal, which contained some profanities. (Govt's Exh. 2, p. 4.) The Associate Warden of Health Services addressed the appeal, restating evidence of the defendant's dangerousness and his mental condition. In his "Due Process Hearing Response," the Associate Warden found that, based on independent evidence and examination, involuntary medication was justified because it is in the defendant's "medical interest" and because "[w]ithout psychiatric medication, [he is] dangerous to others. . . ." The Associate Warden upheld the hearing psychiatrist's findings. (Def's Exh. E; Govt's Exh. 2, p. 4.) As the district court found, the defendant was afforded all of his procedural rights under 28 C.F.R. § 549.43. (CR 252.)

C. District Court Denies Defendant's Emergency Motion to Enjoin Medication

On June 24, 2011, the defendant filed an emergency motion with the district court, asking it to enjoin FMC-Springfield from involuntarily medicating the defendant in the wake of BOP's administrative determination under *Harper* that the defendant is dangerous. (CR 239; Def's Exh. 1.) The defendant argued that: 1) involuntary medication under *Harper* must first be approved by a court, notwithstanding the Supreme Court's contrary determination in *Harper*; 2) FMC-Springfield's decision to medicate for *Harper* reasons should be vacated because it was unjustified, citing *United States v. Morgan*, 193 F.3d 252 (4th Cir. 1999); and 3)

the requirements of *Sell* and *Riggins v. Nevada*, 504 U.S. 127 (1992) should be imported into *Harper* determinations. On June 28, 2011, the government filed a response, opposing the request. (CR 241; Govt's Exh. 2.)

On June 29, 2011, the district court conducted a hearing and listened to arguments of counsel. (RT 6/29/11; Def's Exh. 2.) The district court denied the defendant's motion (RT 6/29/11 at 50-64), and issued a written order, finding that: 1) this matter was controlled by *Harper*, not *Riggins* or *Sell*; 2) BOP had the authority under *Harper* to medicate the defendant without judicial approval; 3) BOP was not medicating the defendant for the purpose of restoring the defendant to competency or to assist the government at trial; 4) BOP's administrative hearing complied with due process and the defendant received all of the rights and protections that *Harper* mandates; 5) BOP's *Harper* determination was not arbitrary; and 6) the defendant's "lawyer as witness" argument was without merit, factually finding that BOP interpreted the defendant's request as a request for legal representation at the hearing, to which he is not entitled under *Harper*, and rejecting the defense's contrary factual assertion. (CR 252; Govt's Exh. 3).

The defendant filed a notice of appeal on Friday, July 1, 2011, and filed a motion seeking an injunction of medication. Late that same night, this Court granted

a temporary stay of involuntary medication until briefing and resolution of the defendant's motion. The government now files its response as ordered.

III. The Defendant's Emergency Motion Should Be Denied Because He Fails to Make A "Clear Showing" Warranting The "Extraordinary and Drastic Remedy" of A Preliminary Injunction.

A. Standard of Review

"A district court's decision regarding preliminary injunctive relief is subject to limited and deferential review. Thus, we review the denial of a preliminary injunction for abuse of discretion." *The Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc) (citations omitted), *abrogated in part on other grounds*, *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 375-76 (2008).

> A district court abuses its discretion in denying a request for a preliminary injunction if it "base[s] its decision on an erroneous legal standard or clearly erroneous findings of fact." We review conclusions of law de novo and findings of fact for clear error. Under this standard, "[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case."

Lands Council, 537 F.3d at 986-87 (citations omitted).

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 129 S.Ct. at 376. 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).

In *Winter*, the Supreme Court restated the test for obtaining an injunction: "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." 129 S.Ct. at 374. Thus, "a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Id.* *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"). *Id*.[6]

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[6] The defendant asserts that a "sliding scale approach" applies in this Circuit, asserting that he can still merit an injunction even if he does not show a likelihood of success on the merits. (Motion, pp. 8-9, citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011).) To the extent the defendant is suggesting that he no longer needs to meet all four injunction factors, he is incorrect. The *Wild Rockies* decision describes the "sliding scale approach" to mean that "a stronger showing of irreparable harm to a plaintiff might offset a lesser showing of likelihood of success on the merits." *Id.* at 1131. This Court made it absolutely clear, however, that a showing of all four elements of the standard is still necessary. *Id*. at 1131-32, 1135. Moreover, although the defendant accurately cites to *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011), which defines the minimum amount of "likelihood of success" as "a substantial case for relief" (Motion, p. 9), he overlooks the parts of the case that undermine his minimalist approach to the requirements.

The district court's factual findings, as noted above, are reviewed for clear error. "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).

B. Argument

In light of the defendant's failure to make a "clear showing" of all prongs of the preliminary injunction test – particularly his failure to demonstrate the "critical factors" of a strong likelihood of success on the merits on appeal and the likelihood of irreparable injury – this Court should deny his motion to enjoin medication and lift the temporary stay. *Winter*, 129 S.Ct. at 376; *Nken*, 129 S.Ct. at 1761.

1. **The Defendant Has Failed To Make a "Clear Showing" That He Has A Strong Likelihood of Success on Appeal Because He Cannot Show The District Court Abused Its Discretion When It Denied The Motion To Enjoin Medication.**

a. *The District Court Correctly Found That Harper Controls And That Judicial Approval Was Not Required Before BOP Could Involuntarily Medicate The Defendant Under Harper.*

The defendant's motion below asked the district court to enjoin BOP from involuntarily medicating him based on BOP's administrative determination under *Harper* that he is dangerous, claiming that judicial approval is required before a prison can medicate an inmate for this reason. (Def's Exh. 1, pp. 12-13.) The defendant repeats this argument to this Court and strains to evade the dispositive effects of *Harper*. (Motion, pp. 13-17.) However, the district court properly found "that *Harper*, not *Riggins* or *Sell*, applies here." (CR 252 at 3; Gov's Exh. 3.) It correctly rejected the defendant's attempts to "import into the *Harper* analysis the substantive due process rights identified in *Sell* and *Riggins*," noting that such a determination would be for the Supreme Court alone to make. (CR 252 at 3-4.) The defendant fails to make a "clear showing" that he would succeed on appeal when challenging these determinations, particularly because the court was correct.[7]

[7] As a preliminary matter, the defendant claims the district court's order is appealable (Motion, p. 9-10), but this Court has never held that a district court's denial of a motion to enjoin medication, based on BOP's issuance of an administrative *Harper* order, is appealable before trial. The only court to do so is the Fourth

The district court properly observed that the order at issue is an administrative *Harper* order, and that this is *not* a situation where the defendant was ordered to be forcibly medicated to restore competency under *Sell*, notwithstanding the defendant's persistent attempts to graft *Sell* requirements onto separate and distinct *Harper* administrative requirements. (*See, e.g.*, Def's Exh. 1, pp. 5-9, 12-13.)

If a defendant refuses medication but is determined by BOP to be dangerous under *Harper*, he can be involuntarily medicated for that separate administrative reason. This Court has noted:

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

United States v. Hernandez-Vasquez, 513 F.3d 908, 912 (9th Cir. 2008) (emphasis added). It also noted that "the Supreme Court stressed that a *Sell* inquiry is

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Circuit in *Morgan*, but the defendant now appears to be disavowing that decision. (Motion, p. 16.) Any debate about whether the order is appealable weighs against the request for injunctive relief, because by failing to clearly show his claim will be reviewed, the defendant consequently has not made a "clear showing" he will succeed on appeal.

independent of the procedure that allows involuntary medication of dangerous inmates under *Harper*" and "an involuntary medication order based on dangerousness is preferable to consideration of an order intended to render a defendant competent for trial." *Id*. at 913 ("A court need not consider whether to allow forced medication [to render a defendant competent for trial], if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* related to the individual's dangerousness . . ."). *See also United States v. Rivera-Guerrero*, 426 F.3d 1130, 1137 (9th Cir. 2005) (defendant may be involuntarily medicated for *Harper* dangerousness, a separate determination than medication under *Sell*). This Court noted that these "*Harper*-type grounds," are typically treated "as a civil matter." *Hernandez-Vasquez*, 513 F.3d at 913-14, quoting *Sell*, 539 U.S. at 181-83. Thus, *Sell* forced medication orders by a judge to restore competency are different from *Harper* administrative orders, and a defendant may be medicated for *Harper* dangerousness reasons, completely independent of *Sell*'s requirements, even if he is incidentally restored to competency from medication administered on *Harper* grounds.[8]

The defendant wrongly claimed below that he could not be forcibly medicated under *Harper* "[a]bsent a judicial determination" and "hearing" at which he would

[8]As the district court noted, a case providing a practical illustration of this principle is *United States v. Grape*, 549 F.3d 591, 594, 597 (3rd Cir. 2008). (CR 252 at n.2.)

be "represented by counsel." (Def's Exh. 1, p. 12.) Indeed, *Harper* itself rejects this argument. In particular, the Supreme Court held that it was permissible for prison officials to order involuntary medication under the regulations without judicial involvement and found that the Washington Supreme Court had erred in requiring a judicial hearing as a prerequisite. *Id*. It stated:

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

Harper, 494 U.S. at 231 (internal citations and quotations omitted) (emphasis added). (*See* also Govt's Exh. 2, pp 5-7.) *See also Parham v. J.R.*, 442 U.S. 584, 607 (1979) ("[D]ue process is not violated by use of informal, traditional medical investigative techniques . . .. The mode and procedure of medical diagnostic procedures is not the business of judges . . .."), cited in *Harper*. As the district court correctly found, the "procedural mechanisms" set forth by the Bureau of Prisons in 28 C.F.R. § 549.43 are consistent with *Harper*. (CR 252 at 7 & n. 3.)

The defendant argued below that *Harper* was inapplicable because he was returned to FMC-Springfield to determine whether he can be restored to competency,

suggesting that BOP medical personnel are not impartial by claiming that their "task is to protect the government's weighty interest in obtaining a verdict on the charges against" the defendant. (Def's Exh. 1, p. 13.) Yet, the district court soundly rejected this assertion.[9] The district court's factual finding is reviewed for clear error on appeal and the defendant cannot show a strong likelihood of success under this very deferential standard. The defendant's other attempts to distinguish his case from *Harper* rely on *Sell*, and are without merit because this is not a *Sell* order. (Def's Exh. 1, p. 13.)[10]

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[9] The district court found "no evidence that the FMC staff is in any way an ally of the government prosecution team (it was the FMC staff, after all, who recommended the defendant be found incompetent) and contrary to the argument of [defense] counsel, the FMC has not been charged with the obligation to *restore* the defendant to competency. They remain free to find that he cannot be, or has not been, restored." (CR 252 at 5; Gov's Exh. 3) (emphasis in original).

[10] Because the order was a *Harper* order and not a *Sell* order, then, as noted earlier, *Ruiz-Gaxiola*, which dealt with *Sell* orders, is inapplicable. *See supra* n. 1. The defendant also cited *Hernandez-Vasquez* below to support that a judge must approve a *Harper* order (Def's Exh.1 at 12), but that case does not support his position. It holds merely that a district court must consider whether there are other grounds to forcibly medicate, such as for *Harper* dangerousness, *before* assessing whether a defendant can be forcibly medicated to restore competency under *Sell*. It does not hold that a district court must judicially approve a *Harper* dangerousness finding by BOP before BOP may forcibly medicate for that reason. Indeed, such a ruling would have been contrary to *Harper*. Nor has this Court been asked to order forced medication to restore the defendant's competency under *Sell* in any event.

Contrary to the defendant's claim before this Court (Motion, pp. 13-17), the Supreme Court in *Harper* never limited its ruling only to inmates who had been convicted, nor did the Supreme Court so rule in *Sell* or *Riggins*. Indeed, the district court noted Justice Kennedy's concurrence in *Riggins* specifically stated that *Riggins* was "not a case like *Washington v. Harper*," where involuntary medication could be authorized based dangerousness. (CR 252 at 3-4; Gov's Exh. 3.) The district court properly applied *Harper* and properly declined to "stitch" the requirements of *Sell* and *Riggins* into the "fabric" of *Harper*. (CR 252 at 4.) It also properly noted that "a dangerous individual is dangerous, whether he is a pretrial detainee or has been convicted and sentenced." (CR 252 at 4.) The defendant cannot make a "clear showing" that he would prevail on appeal with any challenge to these determinations.

b. *The Defendant Cannot Make a "Clear Showing" That The District Court Abused Its Discretion When It Found That BOP's Administrative Hearing Complied With Harper and Due Process and That BOP's Decision to Medicate Was Not Arbitrary.*

"There can be little doubt as to both the legitimacy and the importance of the governmental interest presented here," and there are few cases where the "interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, by definition, is made up of persons with a

demonstrated proclivity for antisocial criminal, and often violent, conduct."[11] *Harper*, 494 U.S. at 225. The Supreme Court has recognized that prison officials have a "duty" to ensure the safety of their medical staff and may medicate mentally ill inmates who pose a danger. *Harper*, 494 U.S. at 225-226 ("[W]e conclude that an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge."). (*See also* Gov's Exh. 2, pp. 8-11.) Because of the high government interest in ensuring the safety of staff and inmates in a prison environment, and because "prison officials are best equipped to make difficult decisions regarding prison administration," *id*. at 223-24, the district court did not abuse its discretion when it rejected the defendant's challenge to BOP's administrative *Harper* determination and denied the motion to enjoin medication.

The defendant relied below on a Fourth Circuit decision in *United States v. Morgan*, 193 F.3d 252 (4th Cir. 1999), to support his effort to enjoin and seek judicial review of BOP's administrative *Harper* determination. (Def's Exh. 1, p. 14.) The district court here adopted *Morgan* and did not abuse its discretion when it

[11] This is an apt description of the defendant, who is charged with killing six people and shooting 13 others, a fact of which BOP was aware. (CR 129.)

determined that BOP's decision was not arbitrary.[12] (CR 252 at 6-7.) The government provided a detailed description of *Morgan*'s facts and holding in its response in the district court (Govt's Exh. 2), noting that the district court in *Morgan* found that "the determination of whether to forcibly medicate a pretrial detainee found to be incompetent to stand trial and dangerous to himself and to others *was best left to the professional judgment of institutional medical personnel and subject to judicial review only for arbitrariness*." *Morgan*, 193 F.3d at 258 (emphasis added). The Fourth Circuit also noted that, "although § 549.43 does not affirmatively grant the right to obtain judicial review of an administrative determination," the Fourth Circuit found that BOP's *Harper* determination was subject to judicial review for arbitrariness. *Id*. *See also Youngberg v. Romeo*, 457 U.S. 307, 323-24 (1982) ("[c]ourts must show deference to the judgment exercised by a qualified professional" and "interference by the federal judiciary with the internal operations of these institutions should be minimized," so that "the decision, if made by a professional, is presumptively valid").

The defendant argued below that the "administrative forced medication order is invalid on the additional ground of procedural inadequacy." (Def's Exh. 1, pp. 13-

[12] On appeal before this Court, the defendant now faults the district court for relying on *Morgan*. (Motion, p. 16.) Yet, the defense cited that decision to the district court to support their motion to enjoin. (CR 239; Def's Exh. 1, p. 14.)

14.) Yet, the defendant received the procedural protections set forth in 28 C.F.R. § 549.43, crafted in the wake of *Harper*, and as the Fourth Circuit noted in *Morgan*, that regulation complies with due process. *Morgan*, 193 F.3d at 262 ("Springfield medical personnel, in determining that Morgan should be forcibly medicated, not only exercised professional judgment in making the decision, but also afforded Morgan an administrative hearing subject to the procedural safeguards mandated by the BOP under 28 C.F.R. § 549.43," which was "virtually identical to the state framework at issue in *Harper*.") The district court found that the regulation was followed:

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

(CR 252 at 7; Govt's Exh. 3; providing explanation of 28 C.F.R. § 549.43 and relating details of compliance with rights at hearing).

Although the defendant requested an attorney, he was not entitled to have an attorney present at the administrative *Harper* hearing, as the Supreme Court determined in *Harper*. 494 U.S. at 236. The defense claimed that, when the defendant stated that he wanted an attorney, he made this request after the staff representative had asked him whether he wanted witnesses, so he was actually asking

that his attorney be called as his "witness." (Def's Exh. 1 at 14-15.) However, the district court resolved this factual dispute against the defendant. (CR 252, at 7-8 & n. 4; Govt's Exh. 3) (finding that BOP interpreted the defendant's request as a request for legal representation at the hearing, to which he is not entitled under *Harper*, and rejecting the defense's different factual "take on the situation"). The defendant cannot show that this factual finding was clearly erroneous. Nor has the defense demonstrated prejudice. Even if Ms. Clarke had tried to "downplay the significance of the incident," as the district court wrote (CR 252 at n.4), this would not have altered BOP's conclusion under *Harper* that the defendant was dangerous. *See Morgan*, 193 F.3d at 267 (discussing failure to show prejudice).[13]

The defendant also argues that FMC-Springfield's substantive decision to medicate the defendant should not be upheld, but again, the defendant is asking this Court to impermissibly substitute its judgment for the judgment of the medical professionals and officials at the prison facility, to whom great deference must be given.

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[13] Moreover, 28 C.F.R. § 549.43 (a)(2) provides that witnesses need not be called if they possess repetitive information. BOP was already aware of the defendant's mental condition and his conduct in the facility, without his attorney's input. In addition, the defense creates the impression that BOP has somehow prevented the defendant from receiving visits from his attorney. However, FMC-Springfield reported that this is incorrect and the defendant continues to be able to have access to his attorney. (Gov's Exh. 2, n. 8.)

As noted earlier, the Supreme Court permits prison institutions "to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Harper*, 494 U.S. at 227; *see also* 28 C.F.R. § 549.43(a)(5) (psychiatrist conducting the hearing determines whether "treatment or psychotropic medication is necessary . . . because the inmate is dangerous to self or others . . ."). The psychiatrist at the hearing informed the defendant that "on the basis of a diagnosis of mental illness and of actions on his part [showing] dangerousness to others within the correctional setting, [the psychiatrist] would authorize treatment with involuntary medication on an involuntary basis." (Govt's Exh. 2, p. 4.)

The defendant argues that his conduct – throwing chairs with doctors present, throwing chairs in his cell, spitting at his attorney, and lunging toward her to where he had to be restrained – is insufficient to show he is dangerous under *Harper*. (Motion, p. 3-4; Def's Exh 1, p. 9-10.) Yet, this is precisely the kind of determination that the district court in *Morgan* noted was "best left to the professional judgment of institutional medical personnel and subject to judicial review only for arbitrariness." *Morgan*, 193 F.3d at 258 (emphasis added). It was not "arbitrary" for the Bureau of Prisons to have determined that the defendant's actions show he is "dangerous" to others. *Harper*, 494 U.S. at 227. Indeed, the staff noted on June 8, 2011, only six

days before the *Harper* hearing, that the defendant had been throwing his chair again and that his conduct had been "escalating." (Govt's Exh. 2, p. 3 n. 2.) After seeing the defendant's aggressive conduct, and knowing that he has been charged with murder and violent offenses, prison officials had a "duty to ensure the safety of prison staff and administrative personnel" who are interacting with the defendant, *Harper*, 494 U.S. at 225-26, like Dr. Pietz and other staff, and properly determined that the defendant could be medicated involuntarily under *Harper*.

When "an inmate's mental disability is the root cause of the threat he poses," the government's "interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness." *Id.* at 225-26. For this reason, prison officials may "treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.* at 227. Such is the case at bar. The *Morgan* case also supports that FMC-Springfield's dangerousness decision was not arbitrary in this case, because FMC-Springfield's decision was not found to be arbitrary in *Morgan*, based on facts arguably less serious than exist here. *See Morgan*, 193 F.3d at 257 (FMC-Springfield determined that the defendant should be involuntarily medicated because his thoughts "make him a potential danger to

himself and others because of misunderstandings and impulsive responses"; the Fourth Circuit did not disturb this dangerousness finding).[14]

The defendant also contended that BOP's decision whether to medicate was based primarily or solely on a determination that the medication could treat his mental illness. (*See, e.g.*, Def's Exh. 1, pp. 6-12.) This claim overlooks the record, which shows that the defendant was involuntarily medicated because it was in his medical interest *and he was a danger*. (Govt's Exhibit 1.) Moreover, BOP's discussion of the defendant's mental condition and why it believed medication was the best method of treating the defendant's illness was important to address the *Harper* determination concerning whether the "treatment is in the inmate's medical interest." *Harper*, 494

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[14] The defendant also asserted that BOP's decision to medicate him as a danger under *Harper* is undermined by the fact that some of the conduct justifying the order preceded his return to Springfield. (Def's Exh. 1, p. 21; Motion, p. 3.) However, not only was the defendant's conduct "escalating," as noted above, but he overlooks that when he was at FMC-Springfield originally, he had not yet been committed for hospitalization under 18 U.S.C. § 4241(d); he had been sent to Springfield only for a competency evaluation. As the first paragraph of 28 C.F.R. § 549.43 notes: "Except as provided in paragraph (b) of this section [which governs emergencies], the procedures outlined herein must be followed *after a person is committed for hospitalization and prior to administering involuntary treatment, including medication."* Thus, once the defendant arrived back to Springfield after being committed pursuant to 18 U.S.C. § 4241(d), and once he declined medication, then BOP appropriately convened an administrative *Harper* hearing to determine whether the defendant could be involuntarily medicated pursuant to 28 C.F.R. § 549.43. As this Court has noted, this *Harper* inquiry must precede any determination by the district court that the defendant could be medicated under *Sell*, so BOP properly conducted that *Harper* inquiry. *Hernandez-Vasquez*, 513 F.3d at 913.

U.S. at 227. The defendant failed to show that the *Harper* determination was "arbitrary" and cannot show the district court abused its discretion.

The defendant faults BOP for deciding to medicate the defendant instead of employing what the defendant contends were "less restrictive means." (Motion, pp. 9-12.) This argument is unpersuasive, as the district court found. First, the defendant again tries to import language from *Riggins* and *Sell*, which do not apply to *Harper* orders. Second, the claim that BOP overlooked less intrusive means is factually incorrect. Although the defense disagrees with the outcome, the hearing report, reviewed by the administrator, considered and excluded such measures as isolation, restraint, and other kinds of drugs. Thus, less intrusive means were considered. As the district court found, "Harper approved the abatement of an inmate's dangerousness by the administration of antipsychotic drugs that treat his underlying mental illness" and "the medical staff's authority is not limited to simply rearranging the furniture in the defendant's cell, or physically restraining him when he is in the company of others so that he is unable to hurt them." (CR 252 at 6.)[15] The defendant's contrary argument again asks this Court to substitute its judicial judgment

[15] Indeed, not only did the district court properly gave great deference in terms of assessing the safety needs of the prison, but even isolation and seclusion does not mean an individual cannot be dangerous to others. For example, BOP reported that the food slot can be a very dangerous area, where inmates can easily throw items at staff, or otherwise assault staff through the slot. (Govt's Exh. 2 n. 10.)

for expert medical judgment, a course that the Supreme Court has expressly repudiated in *Harper*, 494 U.S. at 230-33, and the Fourth Circuit rejected in *Morgan*.

The district court here properly "declined the defendant's invitation to conduct what would amount to a de novo review of the *Harper* hearing that was conducted in this case" (CR 252 at 6), and properly declined to re-weigh FMC-Springfield's medical *Harper* determination and substitute its judgment about whether the defendant is dangerous or whether the medication was in the defendant's medical interest. It also did not abuse its discretion in determining that "the procedures followed by the FMC staff at the § 549.43 hearing, and the finding of the independent psychiatrist, were not arbitrary." (CR 252 at 7.)[16]

Finally, the defendant claimed below that the documentation from BOP does not contain the actual medication or the maximum "dosage," which he contends was required. Yet, this is another effort to import a *Sell* requirement into *Harper*. First, as noted earlier, BOP properly determined that treatment by medication was "is in the inmate's medical interest." *Harper*, 494 U.S. at 227. Second, the defendant's more stringent "medical appropriateness" argument overlooks that neither *Harper* nor any

[16] The defendant attached a report from another case where *Harper* medication was apparently not ordered, ostensibly to claim that FMC-Springfield's decision here was arbitrary. (Motion, p. 12-13.) However, that other case does not affect or undercut the agency's determination in this specific case, based on this record, that the defendant's conduct demonstrated that he was a danger.

of the cases upholding the due process sufficiency of the BOP regulations in the context of *Harper* have found that specification of drug or dosage is required before a *Harper* order can issue, as the government explained in its response. (*See* Govt's Exh. 2, pp. 17-18.) In any event, the record shows that an initial medication regimen was provided in writing by Dr. Serrazin, as his administrative note from June 21, 2011, reflects. (Govt's Exh. 2, p. 19.)

In short, the defendant has failed to make a "clear showing" that he has a strong likelihood of success on appeal.

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. Indeed, the Supreme Court in *Winter* ruled that this Court had erroneously applied the "irreparable harm" prong in a series of cases which had held that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable

harm." *Winter*, 129 S.Ct. at 375. Holding this standard "too lenient," the Supreme Court emphasized: "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* (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 argues here that he will suffer irreparable harm if a stay is not granted, claiming that if being medicated with anti-psychotropic drugs may result in side effects. (Motion, pp. 20-21.) However, as Dr. Tomelleri noted in the *Harper* hearing report, treatment with psychotropic medication is universally accepted as the choice of treatment for people with the defendant's mental illness. (Govt's Exh. 2, p. 3.) The defendant's claim of "possible" serious side effects is also speculative, and rebutted by the fact that FMC Springfield reported that the defendant was taking medication orally in lieu of injections and tolerating the medication well. (Govt's Exh. 2 at n. 12.) The defendant's claim that "no thought appears to have given to the risk of drug interactions between the medication the prison has chosen to administer"

is patently incorrect. (Motion, pp. 20-21.) FMC-Springfield medical personnel have been continuously monitoring the defendant and his treatment regimen (Govt's Exh. 2, at n. 12; RT 6/29/11 48), although they have now ceased involuntary medication in light of this Court's temporary stay. The defendant's listing of "possible" side effects is insufficient on this record to show that "an irreparable injury is the more probable or likely outcome" if a stay is not granted. *Leiva-Perez*, 640 F.3d at 968. And contrary to the defendant's assertion, the interests of justice will be affected if medication is halted pending appeal. Pursuant to 18 U.S.C. § 4241(d), FMC-Springfield needs to promptly assess whether the defendant can be restored to competency, and it cannot conduct that assessment *safely* unless the defendant is medicated, as the facility determined under *Harper*.

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 FMC-Springfield's ability to safely assess whether the defendant can be restored to competency (and therefore stand trial) is not in the public interest, particularly when his pending appeal is meritless. The equities weigh in favor of allowing BOP to

continue to medicate the defendant based on *Harper* and safely conduct its job of assessing whether the defendant can be restored to competency.

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 the defendant's emergency motion to enjoin medication and lift the temporary stay.

Respectfully submitted this 5th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 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