C.A. No. 11-10504

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JARED LEE LOUGHNER,

Defendant-Appellant.

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

BRIEF OF APPELLEE
(REDACTED FOR PUBLIC FILING)

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A. District Court Jurisdiction

The defendant appeals the district court's denial of his motion challenging the Bureau of Prisons' (BOP's) administrative decision on September 15, 2011, finding involuntarily medication justified under *Washington v. Harper*, 494 U.S. 210 (1990).[1] (CR 343; ER 6.) The government relies on its statement of jurisdiction from its answering brief filed in CA No. 11-10339 with regard to the district court's jurisdiction to resolve this question below. (Ans. Br. at 1.) The defendant also appeals the district court's order extending his commitment to the Federal Medical Center in Springfield ("FMC-Springfield"), which the district court possessed jurisdiction to issue pursuant to 18 U.S.C. § 4241(d)(2). (CR 343; ER 6.)

B. Appellate Court Jurisdiction

The government incorporates its jurisdictional statement in CA No. 11-10339 regarding whether the district court's order denying the defendant's challenge to

[1] "CR" refers to the Clerk's Record, followed by the document number. "RT" refers to the transcript from September 28, 2011, unless otherwise noted, followed by a date and page number. "ER" refers to the Excerpts of Record, followed by the page number. "SER" refers to the Supplemental Excerpts of Record, followed by the page number. "Ans. Br." refers to the government's answering brief filed in CA No. 11-10339. (In orders issued on October 2 and 7, 2011, this Court stated that the relevant facts and issues presented in this appeal and the appeal in CA No. 11-10339 are similar, and advised the parties not to repeat prior legal arguments or reiterate factual background already briefed, but to incorporate such material as necessary.)

BOP's *Harper* medication decision is appealable. (Ans. Br. at 1-2.) This Court's authority supports that such an order is appealable under the collateral order exception. *United States v. Godinez Ortiz*, 563 F.3d 1022, 1026-28 (9th Cir. 2009) (order committing defendant under 18 U.S.C. § 4246 is appealable before final judgment), citing *United States v. Friedman*, 366 F.3d 975, 979-80 (9th Cir. 2004) (order temporarily committing the defendant under § 4241(d) is appealable before final judgment) (collecting cases).

C. Timeliness of Appeal

On September 30, 2011, the district court issued its written order denying the defendant's challenge to BOP's September 15th *Harper* medication decision and granting an extension of the defendant's commitment pursuant to 18 U.S.C. § 4241(d)(2). (CR 343; ER 6.) The defendant filed a notice of appeal of that order the same day. (CR 344; ER 1.) The notice was timely pursuant to Fed. R. App. P. 4(b).

D. Bail Status

The defendant is currently in BOP custody at the FMC-Springfield, Missouri. After this Court denied the defendant's motion to stay transportation, he was returned to FMC-Springfield on October 12, 2011.

IV. ISSUES PRESENTED

A. WHETHER THE DISTRICT COURT ERRED WHEN IT DENIED THE DEFENDANT'S CHALLENGE TO BOP'S SEPTEMBER 15TH *HARPER* FINDING THAT INVOLUNTARY MEDICATION OF THE DEFENDANT WAS JUSTIFIED BASED ON HIS DANGER TO HIMSELF.

B. WHETHER THE DISTRICT COURT CLEARLY OR OTHERWISE ERRED WHEN IT EXTENDED THE DEFENDANT'S COMMITMENT TO FMC-SPRINGFIELD, PURSUANT TO 18 U.S.C. § 4241(d)(2).

V. STATEMENT OF THE CASE

A. Preliminary Proceedings and Competency Evaluations

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

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 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 (schizophrenia) 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

The defendants appeal challenges BOP's September 15th medication decision ("*Harper* III"). The chronology of the different medication orders are listed below.

1. BOP's Medication Decision on June 14, 2011 ("*Harper* I")

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"). (ER 609.)[2] The defendant's motion to enjoin medication based on this administrative decision was denied by the district court on July 1, 2011, after briefing and argument. (CR 252.) The defendant's appeal of that order to this Court (CA No. 11-10339), was briefed under an expedited schedule and was argued and submitted on August 30, 2011.

2. BOP's Emergency Medication Decision on July 18, 2011

After the defendant's medication was stopped in compliance with this Court's stay order of July 1, 2011, 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"). (ER 619.) 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 (CR 381), which the government opposed. (CR 284, 287; SER 115.) After argument on August 26, 2011,

[2] The defendant's copy omits the June 21st prescription by Dr. Sarrazin, which was provided to this Court in CA No. 11-10339. (CA No. 11-10339 - SER 22.)

the court denied the defendant's motion. (CR 294.) On August 29, 2011, the defendant filed a notice of appeal from that decision and his appeal (CA No. 11-10432) is pending. The defendant's opening brief is due on November 28, 2011.

3. BOP's Medication Decision on August 25, 2011 ("*Harper* II")

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] (ER 641-646.) The defendant's staff representative, Mr. Getchell, filed an administrative appeal on the defendant's behalf after he declined to complete the form. (ER 652.) As a result of this appeal, the Associate Warden determined on September 6, 2011 that a witness statement from defense attorney Ms. Chapman should have been obtained before rather than after the hearing, so he ordered another *Harper* due process hearing. (ER 650.)

4. **BOP's Medication Decision on September 15, 2011 ("*Harper* III")**

On September 15, 2011, FMC-Springfield conducted another *Harper* hearing as the Associate Warden had ordered ("*Harper* III"). (ER 654.). This medication determination is the subject of the current appeal.

[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.

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The defendant had requested Ms. Chapman, one of this defense attorneys, to be a witness. She was contacted by BOP and provided a statement before the hearing, which Dr. Tomelleri considered.

After reviewing all of the evidence, Dr. Tomelleri concluded that medication was justified

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Dr. Tomelleri detailed the facts justifying his determination.

Dr. Tomelleri listed the regimen of anti-psychotic and other medications the defendant was currently taking, including the medication dosages and frequency.

[4] One of the defendant's arguments on appeal is that there was no "treatment plan" (Op. Br. at 25), but his brief fails to mention that the defendant's medication and dosages were specifically set forth in the *Harper* III justification.

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Mr. Getchell, the defendant's staff representative, explained the process to the defendant and continued to assist him before, during, and after the hearing.

On September 21, the Associate Warden found

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The Associate Warden advised the defendant that

On September 23, 2011, the defendant filed an emergency motion to enjoin involuntary medication based on the September 15, 2011 "*Harper* III" medication determination. (CR 321; ER 497.) 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 had

provided inadequate assistance. (*Id.*) The government filed a response on September 27, 2011, opposing this motion. (CR 335; SER 17.)

The district court denied the defendant's motion at the hearing on September 28, 2011. It noted that BOP's medication determination was "predicated on the ground of dangerousness and really has nothing to do with his competency to stand trial." (RT 295; ER 36.) The court found that the medication is "an issue [for] the Bureau of Prisons and the physicians there, and for good reason," noting that the hearing that day had "strengthened" its view that medical personnel at FMC-Springfield are in the "best position to assess whether [the defendant is] a danger to himself and to assess his institutional needs." (*Id.*) The court noted that "whether he's dangerous in the institution to himself is peculiarly a decision for the jailers and medical professionals here, not me. There's nothing in my portfolio that qualifies me to make that kind of determination." (ER 37.) "I believe under *Harper*, irrespective of his station in the criminal justice process, whether convicted or a pretrial detainee, that the Supreme Court has committed that determination to the Bureau of Prisons and its doctors." (ER 36-37.) The court also noted that caselaw supported that "*Harper* [medication] is more objective because it deals with dangerousness rather

than all of the other considerations under *Sell*."[5] (ER 37.) The court found that BOP's determination was not arbitrary. (ER 37-38.) It rejected the defendant's argument concerning the adequacy of his staff representative. (ER 38.)

The court also found that a stay of medication was not warranted. It distinguished the current situation from that which existed when this Court issued its July stay order, particularly that the defendant is now a danger to himself when unmedicated. The district court stated it "fear[ed] what would happen to Mr. Loughner if he [were] to be taken off the medication again." (RT 300; ER 41.)

In its written order on September 30, 2011, the district court reiterated this ruling, stating that: 1) it had considered the issue again based on the briefings and continued to find that "[t]he decision to medicate Mr. Loughner to prevent him from harming himself and others is best made by prison doctors following *administrative* procedures" (emphasis in original), citing *Harper*; 2) the only question for the court was whether that decision has some factual basis and was made pursuant to the procedures set forth in 28 U.S.C. § 549.46, citing *United States v. Morgan*, 193 F.3d 252, 262-63 (4th Cir. 1999); 3) BOP's "*Harper* III" decision finding involuntary medication warranted based on the defendant's danger to himself was factually supported; 4) the defendant's "staff representative" argument was without merit,

[5] *Sell v. United States*, 539 U.S. 166 (2003).

distinguishing the District of South Dakota decision upon which the defendant relied; and 5) a stay of medication was not justified. (CR 343 at 4-6; ER 9-11.)

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 likely take. (ER 629, 636.) Dr. Pietz reported that while the defendant presently remains incompetent to stand trial, he was improving and she believed he would become competent within the additional period of time requested. (ER 638-39.) 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. (ER 638-39.) Dr. Pietz explained at the September 28th hearing that she had limited her extension request to four months initially because, in her experience, judges ordinarily grant extensions in four month increments. (RT 165, 181-82; ER 214, 230-31.) The government asked the district court to extend the defendant's commitment for the full eight months Dr. Pietz anticipated that it was likely to take for the defendant to attain competency. (CR 324; SER 31; RT 54-55; ER 103-04.)

On September 16, 2011, 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; ER 411.) 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. (CR 316.) 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. It also argued, in response to an inquiry by the district court, that no *Sell* medication order was required because the defendant is already being medicated on *Harper* grounds. (CR 324; SER 39-43.) The hearing was set for September 28, 2011. On September 26, 2011, the U.S. Marshals Service returned the defendant to USP-Tucson.

D. <u>September 28th Evidentiary Hearing and District Court's Rulings</u>

On September 28, 2011, a hearing was conducted pursuant to 18 U.S.C. § 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

[6] The defendant's initial four month commitment pursuant to 18 U.S.C. § 4241(d)(1) expired on September 26, 2011. As correctly noted by the district court, (continued...)

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, state and military court approximately 200 times. (RT 11-13; ER 60-62.) 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. (SER 49.) At the hearing, Dr. Pietz described numerous observations about the defendant and discussed the differences in his behavior and abilities before medication was administered and since being medicated.

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

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[6](...continued)
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] The resumes of both Dr. Pietz and Dr. Ballenger were admitted at the hearing. (Hrg Exh's 1 & 5.) The government has not placed the resumes in its SER – Dr. Ballenger's is over 90 pages long – but can provide them to this Court upon request.

status, believing that his attorneys and others 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 a staged re-enactment. (RT 19-20, 109; ER 68-69, 158.) 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. (RT 20-24; ER 69-73.)

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, angry, and paced incessantly. He had trouble maintaining eye contact. (RT 19-22; ER 68-71.) 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 medication began on June 21, 2011, after the June 14th *Harper* hearing, and had then 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. (RT 26-37; ER 75-86.) She also listed the medication the defendant was currently taking as prescribed by Dr. Sarrazin. (RT 36-37; ER 85-86.) She also stated that she had not witnessed any serious side effects from the medication. Dr. Pietz discussed a time when they thought he had thickening of the tongue, but it turned out to be a blood blister on the tongue, which was caused by dehydration and resolved with medication. She also stated that the akathisia, or pacing, was not a side effect of the medication in Dr. Sarrazin's opinion. When asked whether, "basically, then, would it be safe to say that Mr. Loughner as not exhibited any side effects from the medication?", Dr. Pietz stated: "In my opinion, based on my consultation with Dr. Sarrazin, he has not." (RT 37-39; ER 86-88.)

Dr. Pietz testified that she is the staff member who has interacted the most with the defendant and that she has seen him almost daily, sometimes twice a day. (RT 14, 25, 181, 182; ER 63, 74, 230, 231.) She 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 more able to concentrate and hold conversations with her for longer periods of time and he appears more

engaged in reality. (RT 43-49; ER 92-98.) His sleep has improved, he maintains eye contact, and he no longer paces incessantly. (RT 149, 161-62; ER 198, 210-11.)

Although he is still delusional and suicidal, 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 also is willing to meet with his attorneys and looks forward to his meetings with them, and he has not missed a visit since being medicated. (RT 41-42, 52-54; ER 90-91, 101-03.) 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. (RT 50-51; ER 99-100.) 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. Dr. Pietz stated that the defendant has improved with the medication. (RT 31-32, 45, 51, 56; ER 80-81, 94, 100, 105.)

Dr. Pietz 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, 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. He also spoke to her about his birthday and his family pets. (RT 43, 45-47; ER 92, 94-96.) The defendant's memory has improved. 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. (RT 43-44, 49; ER 92-93, 98.) Overall, Dr. Pietz stated that the defendant is still depressed, but he is more oriented, less delusional, less obsessed, and his cognitive abilities and functioning have 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 might take less time. (RT 54-55; ER 103-04; RT 181-82; ER 230-31.) In her experience, individuals with the defendant's mental issues can become competent to stand trial, and she has found delusional defendants competent and courts have concurred with that assessment. (RT 104-05; ER 153-54.) She also noted that federal judges before whom she has appeared have granted extensions in four-month increments, with extensions as needed, which is why she initially requested a four month extension even though she believed it would take eight months. (RT 165, 181-82; ER 214, 230-31.)

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 antipsychotic drugs. In his experience, a very high percentage of people in the defendant's condition are restored to competency within one year of being medicated, indicated by the fact that they are no longer as delusional, are more organized in thought, can focus and concentrate, and show improvement in taking care of themselves. Much improvement usually occurs between months three and twelve. (RT 212-15; ER 263-66.) His affidavit admitted at the hearing also described the general rates of improvement with risperidone, and stated 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." (Exh. 6 at 4; SER 10.)

Dr. Ballenger testified that, 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). (RT 221; ER 270.) Dr. Ballenger said he reviewed the defendant's history and medication and opined that the medication the defendant is taking as prescribed by Dr. Sarrazin is "highly appropriate." (RT

218-21; ER 267-70.) He also noted that some people can be "treatment resistant," which is 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. (RT 222-24; ER 271-73.)

Because Dr. Ballenger has practiced for 40 years, he has significant experience as a psychiatrist with both first and second generation medications, including when they were first created and used. (RT 189-205; ER 238-54.) He noted that 85% of people taking antipsychotics like risperidone, which the defendant is taking, become competent after one year. (RT 214; ER 263.) He testified about the strides that have been made and the significant benefits of, and lack of potential side effects from, the newer, second-generation medication like risperidone, in comparison to older, first-generation medication.

For example, although the risk of tardive dyskenesia (TD) was present in first generation medications like Haldol approximately 4% to 5% of the time, the risk decreased to 1/10th of that rate with second generation medication. Neuroleptic malignant syndrome (NPS) is "vanishingly rare" under second generation medication and the extremely reduced risk of extra-pyramidal side effects (EPS) is one of the outstanding changes with second generation medications. The doctor also testified that side effects are now able to be controlled with medication. 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. (RT 189-205; ER 238-54.)

When asked about the likelihood that the defendant will become competent, Dr. Ballenger testified: "I think it's highly likely that he will." He thought this would occur in "two to six, eight more months." The doctor also noted that once the defendant's mental illness is addressed, "he's of average intelligence and should be able to understand these roles . . . [a]nd actually even psychotic, he understands a lot of the kind of issues that are involved in understanding how the court works. . . . It's the psychosis that's making him incompetent, not a lack of knowledge of how the court system works." (RT 223-224; ER 272-73.)

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.)

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 ordered Dr. Pietz to provide a report to the court two weeks before the expiration of the four-month extension, regarding whether the defendant's competency had been restored or if not, whether there would be a likelihood of restoration. The district

court also denied the defendant's challenge to the September 15th "*Harper* III" medication decision. (RT 283-84, 297; ER 24-25, 38.) On September 30, 2011, the court issued a written order reiterating its oral rulings. (CR 343; ER 6.) It found that "Mr. Loughner may be recommitted to FMC Springfield for competency restoration for an additional four months," to "begin at the time he arrives at the prison." (CR 343 at 7; ER 12.)

The defense filed a notice of appeal that same day, and filed simultaneous motions for stay in this Court and the district court, seeking a stay of his transportation to FMC-Springfield. On October 3, 2011, the district court denied the motion for stay. (CR 345; SER 1.) On October 7, 2011, after briefing and oral argument, this Court denied the defendant's motion for stay. It then expedited briefing in this appeal and scheduled oral argument for November 1, 2011.

VI. SUMMARY OF ARGUMENTS

A. The district court did not err when it denied the defendant's motion challenging BOP's September 15th "*Harper* III" medication determination. It correctly reiterated that BOP was entitled under *Harper* to medicate a mentally ill inmate who poses a danger, and rejected the defense's *Sell* based argument that a judicial order based upon clear and convincing evidence after an adversarial hearing with witnesses was required. The government addressed those arguments in CA No 11-10339 and incorporates that argument here. The district court also correctly found that BOP had not acted arbitrarily in finding that medication was justified, based on the defendant's danger to himself, and that the defendant received the required due process.

B. The district court's four-month extension of the defendant's commitment under § 4241(d)(2) should also be affirmed. The court employed the correct legal standard, made appropriate findings, and did not clearly err when it determined that there was a substantial probability the defendant could be restored to competency within a reasonable period of time. The district court's credibility and fact findings are entitled to deference and the defendant's various arguments seeking to alter applicable legal standards and unfairly criticizing the district court should be rejected.

VII. ARGUMENTS

A. THE DISTRICT COURT CORRECTLY DENIED THE DEFENDANT'S CHALLENGE TO BOP'S SEPTEMBER 15TH *HARPER* MEDICATION DETERMINATION.

1. Standard of Review

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

Because of the high government interest in ensuring the safety of staff and inmates in a prison environment, and because "prison officials are best equipped to make difficult decisions regarding prison administration," *Morgan*, 193 F.3d at 223-24, the defendant shoulders a heavy burden to successfully challenge BOP's administrative *Harper* determination. The *Harper* decision to medicate is "best left to the professional judgment of institutional medical personnel and subject to judicial review only for arbitrariness." *Morgan*, 193 F.3d at 258. *See also Youngberg v. Romeo*, 457 U.S. 307, 323-24 (1982) ("[c]ourts must show deference to the judgment

exercised by a qualified professional" and "interference by the federal judiciary with the internal operations of these institutions should be minimized," so that "the decision, if made by a professional, is presumptively valid"); *Bull v. City and County of San Francisco*, 595 F.3d 964, 972, 975 (9th Cir. 2010) (en banc) (determinations made by institutional officials must be given great deference by the courts).

2. Argument

The defendant reiterates many arguments already made to this Court and impermissibly attempts to import the legal requirements for *Sell* medication orders into situations where *Sell* does not apply. Separate legal standards exist for *Harper* medication based on dangerousness – as well as for an extension of commitment under 18 U.S.C. § 4241(d)(2) – and this Court should decline the defendant's invitation to re-write those legal standards using *Sell* as the template.

The defendant appeals the district court's denial of his challenge to the September 15th *Harper* III medication determination on several grounds. He argues that: 1) a judicial order is required to medicate the defendant (incorporating his due process arguments in CA No. 11-10339); 2) BOP did not "apply the *Riggins* standard" and failed to find that medication was "medically appropriate and considering less instrusive alternatives . . . essential for the sake of [the defendant's] safety or the safety of others" (Op. Br. at 21-25) (citing *Riggins v. Nevada*, 504 U.S.

127, 135 (1992)); 3) BOP failed to set forth a "treatment plan," including specifying drug identity and dosages, an argument based on *Sell* medication cases; and 4) his staff representative "failed to provide any representation" (Op. Br. at 19-20). The district court properly denied the defendant's motion.

a. The Defendant's Due Process Argument is Still Without Merit

The defense's challenge to the *Harper* III medication decision renews his argument made in prior pleadings that "due process permits forcible medication of psychiatric medications to a pretrial detainee only upon a showing, by clear and convincing evidence, that such medication is 'essential' to the government's objectives following consideration of 'less intrusive' alternatives and is medically appropriate." (CR 321 at 13; ER 509.) He claims: "Such a finding may only be made by a court of law following an adversarial hearing at which a defendant is entitled to representation by counsel." (*Id*.) The defendant's brief incorporates his due process arguments from CA No. 11-10339. (Op. Br. at 19.)

The defendant's arguments continue to be incorrect and the government incorporates all arguments it made in CA No. 11-10339. (Ans. Br. at 15-56.) In short, *Harper* applies to pretrial detainees like the defendant and no adversarial judicial hearing and judicial finding based on clear and convincing evidence is required before BOP may administratively medicate a defendant based on a finding

of *Harper* dangerousness. *See also Harper*, 494 U.S. at 235 (rejecting clear and convincing standard, which "is neither required nor helpful when medical personnel are making the judgment," also noting that inmate's ability to contest prison's position at *Harper* hearing provide sufficient due process).

In addition to the authority the government already cited in its brief in CA No. 11-10339, the applicable regulations also support that BOP's authority to medicate mentally ill inmates under its *Harper* regulation, 28 C.F.R. § 549.46(a), applies equally to pretrial detainees. *See* 28 C.F.R. § 549.40 (noting that this subpart "applies to inmates in Bureau custody, as defined in 28 C.F.R. § 500"); 28 C.F.R. § 500.1 ("Definitions") ("Inmate means all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the United States . . . and persons held as . . . detainees . . .").[8]

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[8] The defendant below continued to rely on *Matthews v. Eldridge*, 424 U.S. 319 (1976), to support his request for a judicial adversarial hearing and order. (CR 321 at 13-25; ER 497.) The Court in *Harper* has already concluded that the prison's right to medicate a mentally ill, dangerous inmate outweighs the individual's right to be free from unwanted medication, and this conclusion is still correct even if this Court were to re-weigh the *Matthews* factors anew, as the defendant invites. The government's interest in medicating such inmates is significant because prisons have a duty to maintain safety and security of the prison and inmates. *Harper*, 494 U.S. at 225-226. (*See also* ER 667) (Associate Warden wrote: "Staff at this prison must ensure [the defendant's] safety.") With regard to the "probable value, if any," of requiring a judicial hearing, *Matthews*, 424 U.S. at 335 (CR 321 at 21-22; ER 497), the administrative procedures are sufficient to ensure due process without judicial (continued...)

Moreover, no *Sell* medication order is required if a defendant is being medicated administratively for *Harper* dangerousness reasons, as in this case. (*See* Ans. Br. at 16-18; CR 324, 357, 335; SER 39-42, 45-48, 21.)

b. *The Defendant Received Substantive Due Process*

The *Harper* substantive due process standard controls, which allows a prison "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. The Court also held that no judicial hearing is required. *Id.* at 228-36. Dr. Tomelleri found that the defendant

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[8](...continued)
approval. Not only did the Court determine that an inmate's due process interests are adequately protected by leaving medication decisions to "medical professionals rather than a judge," *Harper*, 494 U.S. at 231, but the decision is made by an independent psychiatrist – here, Dr. Tomelleri, who certainly is no "rubber stamp" (CR 321 at 21-22; ER 497), as evidenced by his disapproval of involuntary *Harper* medication decisions in the past. *See, e.g., United States v. Diaz*, 630 F.3d 1314, 1319 (11th Cir. 2011) ("After the hearing, Dr. Tomelleri concluded that he could not approve involuntary medication because the defendant was not likely to cause harm to himself or others."); *United States v. Grape*, 549 F.3d 591, 594 (3d Cir. 2008) (Dr. Tomelleri concluded that "Grape's inappropriate behavior could be adequately managed by the conditions of his confinement," so "Grape therefore could not be involuntarily medicated on the grounds that he was a danger to himself or others under *Harper*"). Moreover, the fact that the Associate Warden granted the defendant's appeal of the August 25th *Harper* medication determination and ordered a new *Harper* hearing illustrates the effectiveness of existing administrative review procedures without the need for a judicial hearing. (CR 321 at 22; ER 497.) In short, *Matthews* supports that no judicial hearing is required before BOP can medicate for *Harper* reasons.

had a mental illness (schizophrenia), he was a danger to himself as a result, and medication was in the defendant's "best medical interest." (ER 656, 659.) Thus, the September 15th medication decision provided substantive due process. *Harper*, 494 U.S. at 227.

The defendant repeats his argument that the "wrong standard" was applied and that the government must meet standards set forth in various cases other than *Harper*, including *Riggins*. (Op. Br. at 20-23.) As the government observed in its prior pleadings, *Riggins* did not concern an involuntary medication decision based on *Harper* dangerousness, but rather the propriety of medicating a defendant during trial, a different issue. In any event, the language the defense has continually cited is the following:

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

Riggins, 504 U.S. at 135 (emphasis added). Although BOP only needed to comply with *Harper*, the September 15th medication decision also meets the *Riggins* standard

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quoted above.[9] Dr. Tomelleri set forth the specific medication that the defendant was being prescribed, including dosages and frequency,

The Associate Warden made similar findings.

Thus, consistent with *Riggins*, the record shows that BOP concluded that "treatment with antipsychotic

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[9] In his reply brief filed in CA No. 11-10339, the defendant stated that if the *Riggins* standard was met, "there would be no conflict between the government and appellant." (Rep. Br. at 14.)

[10] As this Court may recall, one of the defendant's complaints about the June 14th *Harper* determination is that the justification section did not contain the defendant's specific medication and dosage. [However, this information was contained in Dr. Sarrazin's June 21st prescription issued after the Warden affirmed the decision on June 20th, and the prescription refers to the June 14th due process hearing. (CA No. 11-10339 - SER 22.)] In any event, the September 15th *Harper* justification section does contain the defendant's medication information. (ER 657-59.)

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medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of [the] defendant's own safety . . .." 504 U.S. at 135. The district court also reviewed the evidence and affirmed BOP's decision, placing its stamp of judicial approval. The defendant is wrong when he says that "[n]o court has authorized the prison's actions." (Op. Br. at 5.)

The defendant argues that "the prison never determined that medication was necessary to mitigate any danger he posed to himself." (Op. Br. at 21-22.) However, when Dr. Tomelleri wrote that

The defendant's claim that "no scientific basis" justifies the conclusion that he would become a danger to self if medication is stopped (Op. Br. at 23), overlooks that he *did*, in fact, become a danger to himself when his medication was stopped. (ER 657-59; RT 33-34; ER 82-83.) The defendant's parsing of Dr Pietz's testimony is also unavailing (Op. Br. at 24-25), because her testimony as a whole established that medication was helping the defendant and reducing his danger to himself.

The defendant incorrectly alleges that the "prison failed to appropriately consider less intrusive means because it examined whether they would treat the mental illness rather than whether they would abate the danger." (Op. Br. at 22.)

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Again, the record shows that Dr. Tomelleri, as well as the Associate Warden, made findings concerning less intrusive means, noting that

Moreover, the defendant seems to suggest that the purpose of medication is not supposed to include treatment of the mental illness. This is wrong. *Harper* itself required that the medication be in the mentally ill inmate's "medical interest," a finding made by BOP here. (ER 656.) The Supreme Court also specifically recognized: "Where an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness." *Harper*, 494 U.S. at 225-26 (internal citations and quotations omitted). Dr. Tomelleri found that "*as a result of* a mental disease or defect" the defendant was a danger to himself. (ER 656) (emphasis added). BOP is properly treating his mental illness to help abate that danger in accordance with *Harper*, so the defendant's complaint that risperidone was improperly used to "treat his mental illness" (Op. Br. at 24), which the government "has no right to pursue" (Op. Br. at 25), is without merit.

c. *The Defendant's "Treatment Plan" and "Side Effects" Arguments Are Meritless*.[11]

The defendant contends that a determination of medical appropriateness "requires consideration of the proposed treatment plan as well as limitations on the future course of that treatment." (Op. Br. at 25.) He alleges that the September 15th *"Harper* III" medication decision "violated due process" like the June 14th *"Harper* I" decision, by "fail[ing] to specify the identity and maximum dosage of the permitted medications and making its 'medical appropriateness' finding without reference to any specific, proposed course of treatment." (Op. Br. at 26-27.) These arguments are without merit.

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[11] The defendant unfairly criticizes the district court for allegedly limiting his cross-examination at the hearing on these issues. (Op. Br. at 12, 35-36, 44.) The district court had broad discretion to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence," Fed. R. Evid. 611(a), and did not abuse that discretion here. *United States v. Claiborne*, 765 F.2d 784, 804 (9th Cir. 1985). The court was very patient during the lengthy hearing, speaking up only after defense counsel had consumed 2 ½ hours cross-examining Dr. Pietz. (RT 177; ER 226.) After defense counsel had cross-examined Dr. Ballenger for 24 pages and the subject turned to "cures" for schizophrenia and whether it is like a "bacterial infection," the district court stated that it believed the examination was "off-track," but made clear: "I'm not trying to constrain you at all on your cross-examination of what is relevant here." (RT 248-49; ER 297-98.) Defense counsel then cross-examined the doctor for over 15 more pages, discussing potential effects of drugs and other matters. He then checked his notes, and said "I think I'm done. Nothing further." (RT 265; ER 314.) He did not claim below that his cross-examination had been unfairly limited (so any complaint is not preserved), nor does he state what more he would have elicited that would have resulted in the granting of his motion.

First, this "treatment plan" requirement is not part of the *Harper* standard, but this Court's application of *Sell* in *United States v. Hernandez Vasquez*, 513 F.3d 908 (9th Cir. 2008), so it was not required here. The defendant's reliance on *Sell* medication order decisions like *Hernandez Vasquez* and *United States v. Evans*, 404 F.3d 227 (4th Cir. 2005), is completely misplaced. (Op. Br. at 25-26, 28-30.) Nor do those decisions assist the defendant, because they recognize that *Harper* medication decisions and *Sell* medication orders rely on different tests and that no *Sell* medication order is required if *Harper* grounds exist to medicate. *See Hernandez Vasquez*, 513 F.3d at 913 (*Sell* orders are "disfavored" and medication under *Harper* obviates need for any *Sell* order); *Evans*, 404 F.3d at 235-236 (district court ordered medication under *Sell* and defendant argued that the government had failed to meet *Sell* factors); *see also* n. 3 ("The Supreme Court has outlined *different tests* for" for involuntary medication under *Harper* and involuntary medication under *Sell*, noting that a *Sell* order is unnecessary if "forced medication is warranted for a different purpose, such as the purposes set out in *Harper*"; because Evans "neither posed a danger to himself or others in the prison community, nor was he gravely ill," . . . "[w]e must therefore consider whether the involuntary medication . . . was constitutional under *Sell*'s framework") (emphasis added).

The defendant also cites *United States v. Williams*, 356 F.3d 1045, 1056 (9th Cir. 2004), for the proposition that a "medically informed record [must] be developed." (Op. Br. at 26, 30.) That case concerned the judicial imposition of involuntary medication as a condition of supervised release under 18 U.S.C. § 3583, and this Court found that the district court erred when it did so without appropriate findings. *Id*. at 1057 ("before a mandatory condition can be imposed at sentencing, the district court must make on-the-record, medically-grounded findings that court-ordered medication is necessary to accomplish one or more of the factors listed in § 3583(d)(1)" and "involves no greater deprivation of liberty than is reasonably necessary" under § 3583(d)(2)). That court-ordered involuntary medication condition of supervised release understandably required the judge to obtain medical information and make findings because judges are not doctors. Here, BOP doctors provided a "medically informed record" justifying involuntary medication based on dangerousness under *Harper*, and the district court properly affirmed that decision, deferring to that medical opinion.

Moreover, the defendant's arguments fail on this record in any event because, as noted earlier, the specific medication, dosages, and frequency were set forth in the September 15th justification by Dr. Tomelleri, who also found that the anti-psychotic medication was the appropriate treatment for the defendant's mental condition and

that there was a documented treatment plan in the chart. (ER 657-58, 659.)[12] Defense counsel's suggestion that there are "no bounds on the type of medication that prison staff may prescribe" overlooks that BOP doctors have an ethical duty to do what is in the best interest of the patient. (ER 667.) *See also Harper*, 494 U.S. at 223 n. 8 ("Unlike Justice Stevens, we will not assume that physicians will prescribe these drugs for reasons unrelated to the medical needs of the patient; indeed the ethics of the medical profession are to the contrary"). Nor did the defense allege that the doctors have chosen a course that is not medically appropriate; the district court noted the "absence of any evidence suggesting the medication regimen is improper." (CR 347 at 5; SER 5.) Rather, expert psychiatrist Dr. Ballenger testified that the course of medication being prescribed by BOP doctors is "highly appropriate." (RT 218-21; ER 267-70.)

With regard to side effects (Op. Br. at 28), the testimony at the hearing demonstrated that the defendant is taking newer, second-generation anti-psychotic medication (riperidone) and Dr. Pietz testified that he has not suffered any of the side

[12] The defendant's medication was also discussed in Dr. Pietz's reports (ER 633, 637) ("Psychiatric Treatment"), and at the September 28th hearing (RT 36-37; ER 85-86), so the district court was well aware of the course of treatment. Moreover, as noted in the next argument section, the district court considered the defendant's treatment and the potential for side effects from the medication when determining whether to extend the defendant's commitment.

effects that were a feature of the older, first-generation antipsychotics at issue in *Harper* and *Riggins*. (RT 37-39; ER 86-88.) Dr. Ballenger also explained the evolution of anti-psychotic medication over the years and detailed risperidone's effectiveness in treating schizophrenia with a very low risk of serious side effects. (RT 189-205; ER 238-54.) The record rebuts the defendant's suggestion that risperidone "exacerbated" his dangerousness. (Op. Br. at 29.) Indeed, Dr. Pietz also testified about the defendant's improved condition since taking risperidone. (RT 43-49; ER 92-98.) The defendant's claim that antidepressants alone are sufficient to reduce his dangerousness and treat his mental illness (Op. Br. at 29) is meritless in light of the *Harper* III findings of Dr. Tomelleri, as well as the opinions of Dr. Pietz and Dr. Ballenger – medical opinions that the district court properly credited.

d. *The Defendant's Staff Representative Provided Sufficient Assistance.*

The district court properly rejected the defendant's argument concerning his staff representative. The defendant appears to criticize Mr. Getchell for not providing the kind of representation that a lawyer might have afforded. (Op. Br. at 19-20.) However, this level of representation was not required because the Supreme Court in *Harper* determined that an inmate is not entitled to an attorney (*see* Ans. Br. at 50 in CA No. 10339), and that a non-attorney staff representative provides sufficient due

process in this context. Mr. Getchell provided assistance to the defendant before, during, and after the *Harper* III hearing, and advised the doctors that the defendant did not want to take medication. He appealed on his behalf multiple times, an effort that was successful with regard to the August 25th hearing. (ER 652, 650.) The defendant also fails to show prejudice. Indeed, one of his attorneys, Ms. Chapman, provided a statement to Dr. Tomelleri as a "witness" on the defendant's behalf, pointing out reasons the medication was allegedly unjustified, both factually and legally. (ER 665.) This supports that whatever argument the defense wanted to convey to Dr. Tomelleri was imparted. *See Morgan*, 193 F.3d at 267 (discussing failure to show prejudice).

In short, the district court correctly determined that BOP's September 15th "*Harper* III" medication decision complied with substantive and procedural due process and was not arbitrary. This Court should affirm that decision.

B. THE DISTRICT COURT DID NOT CLEARLY OR OTHERWISE ERR WHEN IT EXTENDED THE DEFENDANT'S PERIOD OF COMMITMENT FOR ANOTHER FOUR MONTHS PURSUANT TO 18 U.S.C. § 4241(d)(2)(A).

1. Standard of Review

A district court's determination under § 4241(d)(2) that there is a substantial probability that a defendant can be restored to competency is a heavily fact-intensive

finding 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).

"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).

2. Argument

The district court's order granting an extension of commitment (CR 343; ER 6) was not legally erroneous, nor did the court err, much less clearly err, when it determined on this record that an extension of commitment was justified. The court's order denying the motion for stay (CR 347; SER 1) further supports this conclusion.

a. *The District Court Applied The Correct Legal Standard*

In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Supreme Court prescribed parameters for commitment of non-dangerous, incompetent, pretrial defendants. The Court held the initial commitment must only be for a "reasonable period of time necessary to determine" restorability, and extensions of the commitment "must be justified by progress toward" competency. *Id.* at 738. The Court deliberately left the definition of "reasonable period" to be determined on a case by case basis, holding "we do not think it is appropriate for us to attempt to prescribe arbitrary time limits."

Id. at 738. In response to *Jackson*, Congress in 1984 repealed the previous federal mental health statutes, and passed 18 U.S.C. § 4241, *et. seq.* *See United States v. Donofrio*, 896 F.2d 1301, 1302 (11th Cir. 1990).

Pursuant to 18 U.S.C. § 4241(d)(2), a court may order additional commitment beyond the first four months prescribed in § 4241(d)(1) if it finds there is "substantial probability that within such additional period of time [the defendant] will attain the capacity to permit the proceedings to go forward." 18 U.S.C. § 4241(d)(2)(A). It is further required by both *Jackson* and § 4241(d)(2) that the additional period of time be "reasonable." *Jackson*, 406 U.S. at 738; 18 U.S.C § 4241(d)(2).

As he argued below, the defendant claims that the district court needed to find that an extension under § 4241(d)(2) is justified by clear and convincing evidence. (Op. Br. at 49 n. 13; CR 311; ER 419.) The government argued that the standard for extension of commitment under § 4241(d)(2)(A) was "substantial probability," as set forth in the statute. (CR 324 at 5-8; SER 33-36.) The district court followed the statute and this Court's precedent when it 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. (CR

343 at 2-4; ER 7-9.)[13] When determining what "substantial probability" required, it concluded that this Court had already spoken on this issue in *United States v. Rivera Guerrero*, 426 F.3d 1130 (9th Cir. 2005), which 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). (CR 343 at 4; ER 9.) The district court therefore stated the "definition of "a substantial probability" is likely." (CR 343 at 4; ER 9.) This determination was not erroneous.

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[13] 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." (CR 343 at. 4 n. 4.) The defendant's argument that a clear and convincing burden of proof applies should be rejected. (Op. Br. at 49 n. 13.) The district court correctly declined to follow *United States v. Weston*, 211 F.Supp.2d 182, 183 (D.D.C. 2002) on this point. (RT 276; ER 17.) (*See also* CR 324 at 7-8; SER 35-36.) The defendant below also relied on *Riggins* and *United States v. Ruiz Gaxiola*, 623 F.3d 684 (9th Cir. 2010) (CR 311; ER 418-19), but those are involuntary medication cases that are inapplicable to § 4241(d)(2) extensions of commitment. (*See also* CR 324 at 7; SER 35.) In any event, even if a clear and convincing standard is applied, the evidence is still sufficient. A district court's ruling will be affirmed for any reason supported in the record. *McLain v. Calderon*, 134 F.3d 1383, 1384 n. 3 (9th Cir. 1998).

b. The District Court's Did Not Clearly Err In Finding The Extension Appropriate On This Record.

The defendant wrongly contends that the evidence was insufficient to support the district court's extension of commitment and that it engaged in flawed reasoning. (Op. Br. at 49-57.) After listening to all of the testimony and considering all of the evidence submitted, the district court ruled at the hearing that an extension was justified. Its subsequent written order reiterated its ruling:

> 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.

(CR 343 at 4; ER 9.) The district court's finding was not clearly erroneous.

The district court found Dr. Pietz to be a qualified and credible witness, particularly considering her day-to-day contact with the defendant (RT 275; ER 16), noting in its written order that Dr. Pietz "is most familiar with Mr. Loughner." (CR 343 at 1; ER 6.) Dr. Pietz's knowledge, skills, experience, training, education, and her particular experience with this defendant supports that the district court did not clearly err when it credited her opinion that the defendant has shown improvement and is likely to be restored to competency within a reasonable period of time. In

addition, the district court found that Dr. Pietz's opinion was supported by the testimony of Dr. Ballenger, an "experienced and well-credentialed psychiatrist." (RT 275-76; ER 16-17; CR 343 at 4; ER 4; CR 347 at 2; SER 2.)[14]

The defendant's contrary arguments concerning the sufficiency of the record (Op. Br. at 49-57) unfairly parse the testimony and, as the district court observed, "ignore[] the import of the medical opinion testimony that was presented" and other evidence. (CR 347 at 2; SER 2.) 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,[15] was not clearly erroneous. *See also United States v. Diaz*, 630 F.3d 1314 (11th Cir. 2011) (affirming district court's

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[14] The defendant faults the district court for relying on Dr. Ballenger's testimony and finding that clinical restoration provides a "parallel" to the competency restoration here. (Op. Br. at 56-57.) Yet, the selected portion he quotes (Op. Br. at 56) shows that the district court was simply finding in its discretion that the doctor possessed sufficient experience to offer his opinion concerning the likelihood of competency restoration. The district court did not clearly err in finding that Dr. Ballenger's testimony supported the extension request.

[15] The district court noted that the defendant looked better and seemed to pay attention better than he did in the hearings before his commitment. (RT 276; ER 17; CR 347 at 2; SER 2.) 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 the defendant had not yet been medicated, where he had an outburst and shouted at the judge and was removed from the courtroom. The court also noted that the defendant seemed tired from the time to time, and that it would continue to consider the effects of medication in future proceedings. (RT 282-83; ER 23-24.)

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. Weston*, 211 F. Supp. 2d 182 (D.D.C. 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 defendant's claim that Dr. Pietz's testimony is unsupported by sufficient "data" and that she failed to show an "improvement trajectory" (Op. Br. at 51-52; 53-55), is insufficient to show that the district court clearly erred in crediting her testimony, which was sufficiently reliable based on her knowledge, experience, and extensive interaction with the defendant. When she testified that she expected the defendant would be restored to competency based on his progress thus far and her knowledge and experience (RT 54-55, ER 103-04), the district court was entitled to credit that opinion. The defense's contrary argument, relying on scientific evidence

principles in Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993), is misplaced. (Op. Br. at 54-55.) Ultimately, the defendant's various factual arguments relying on defense graphs or other points (Op. Br. at 49-55) either unfairly parse the record or boil down to a claim that there was conflicting evidence or different inferences to be drawn, which is insufficient to show that the district court clearly erred. *Frank*, 956 F.2d at 875 ("Clear error is not demonstrated by pointing to conflicting evidence in the record.")

The district court extended the time of commitment for four months. The defendant in his recent motion for stay faulted the district court for "failing to make a finding" and "arbitrarily choosing" a four month period without finding that he can be restored within four months in particular. (CA 11-10504, Dkt # 2, pp. 27-28.) The transcript reflects that the district court did find that four months was appropriate based on the evidence (ER 279; ER 20), but in any event, the district court's denial of the motion for stay resolved any question about its finding. (CR 347 at 1; SER 1) (after noting that it had granted an extension of four months, the court stated that it "believes the defendant is likely to become competent to stand trial in that time"); (CR 347 at 2; SER 2) (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") (CR 347 at 5-6;

SER 5-6) ("there is a 'substantial probability' that the defendant will 'attain the capacity' to permit the proceedings to go forward within an additional 120-day commitment").

The defendant now claims that the record does not support the district court's determination that he is likely to be restored to competency within this four-month period. (Op. Br. at 50-55.) However, Dr. Pietz provided detailed testimony about the defendant's improvement since being medicated and that she believed he could be restored to competency, likely within eight months, although it could take less time. (*See, e.g.*, RT 54-55; ER 103-04; RT 181-82; ER 230-31.) The defendant criticizes Dr. Pietz for not knowing for sure when the defendant would be restored (Op. Br. at 52, 55-56), but § 4241(d)(2) does not require such level of certainty. As Dr. Pietz noted, she did not have a "magic wand" enabling her to say for certain how long it will take for any person's competency to be restored, but that she was relying on her knowledge and experience when predicting the length of time it is likely to take for this defendant. (RT 152, 54-55; ER 201, 103-04.) Dr. Ballenger also stated that it is "highly likely" that the defendant will become competent in "two to six, eight more months," and noted that there is ordinarily much improvement of similarly-situated individuals between months three and twelve. (RT 223-224; ER 272-73.)

The district court did not clearly err when it determined that the extension should be for four months. Indeed, considering that the record would have supported an even *lengthier* extension, including the eight months the government requested, the defendant can hardly show prejudice by the district court's more conservative decision to extend commitment for *less* time, which requires the government to justify any future extension request.

c. *The Defendant's Arguments Seeking To Alter The Legal Standards Are Without Merit Because Commitment Extension Orders Under § 4241(d)(2) Are Not Sell Medication Orders.* (Op. Br. at 30-39, 56-57.)

The defense incorrectly attempts to graft additional requirements onto the extension of commitment standards in § 4241(d)(2). He argues that the phrase "attain the capacity to permit the proceedings to go forward" has a special meaning beyond restoration to competency. (Op. Br. at 42; CR 311 at 7-8; ER 417-18.) He cites the concurrence in *Riggins* (Op. Br. at 56-57) and the side-effect weighing test in *Sell* as cited in a Fourth Circuit case (Op. Br. at 30), and argues that not only was the district court required to find substantial probability of restoration to competency (understanding the proceedings and assisting counsel), but it also needed to find as part of that determination that the medications the defendant is taking will not interfere with his ability to obtain a fair trial. (Op Br at 39-49, 56-57.)

First, these arguments are incorrect. Indeed, § 4241(d)(2) refers to competency, and accepting the defendant's invitation to alter the appropriate standard would also require overlooking *Rivera Guerrero*, 426 F.3d at 1143, in which this Court found that extensions are appropriate "only when the individual *is likely to attain competency within a reasonable time*." (CR 343; ER 9.) (emphasis added). This Court therefore has already determined that whether a defendant "will attain the capacity to permit the proceedings to go forward" under § 4241(d)(2) means whether he is "likely to attain competency" to stand trial. *Id*.

The defendant's "treatment plan" and "side effects" arguments are extrapolations of *Sell*; he even goes so far as to say that a "district court's commitment order is . . . *indistinguishable* from a [*Sell*] mandatory forcible medication order for competency" (emphasis added), and that the court's commitment extension order needed to "undertake *Sell*'s medical appropriateness inquiry and substantial likelihood analyses in order to pass constitutional muster." (Op. Br. at 33) (emphasis added). However, § 4142 is not an involuntary medication statute and does not require the extra elements and judicial findings that the defendant seeks to import from inapplicable involuntary medication cases like *Sell*. Nor was the district court

required to "place meaningful limitations on the prison's medication decisions." (Op. Br. at 36-38.)[16]

The district court at one point asked the parties whether, if it ordered an extension of commitment under § 4241(d)(2) for the purpose of restoring the defendant to competency, a *Sell* hearing is now required. (CR 309; ER 5.) The court recognized, however, that "*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 responded that the answer to this question is no. A *Sell* medication order is not required because the defendant is already being lawfully medicated on *Harper* dangerousness grounds and a *Sell* order is only required if the

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[16] The defendant's discussion about possible future medication (Op. Br. at 37) again fails to credit that the BOP doctors have a medical duty to administer medication that is in the defendant's best medical interest, as noted earlier. Dr. Ballenger also testified that the defendant's medication regimen was "highly appropriate." (RT 218-222; ER 267-271.) The defendant's argument that the government "created" the defendant's dangerousness (Op. Br. at 38) is wholly without merit. BOP medicated the defendant under *Harper* after he posed a danger to others in the facility. After BOP was ordered to stop his medication, he then became a danger to himself. BOP reacted appropriately in medicating him to help abate that danger; as the Associate Warden noted, BOP "must ensure [his] safety." (ER 667.)

sole reason for medication is competency restoration. The government explained this more fully in pleadings below, which it incorporates here. (CR 324, 357; SER 39-43, 45-48) (citing *Sell*, 539 U.S. at 181-86, and other decisions). Indeed, the Court in *Sell* noted that the defendant had been determined *not* to be a danger under *Harper*, and thus, a *Sell* medication order was required because competency restoration was the sole purpose of the medication. *Sell*, 539 U.S. at 183-186 ("[w]e must assume that Sell was not dangerous . . . [and] we find that the Court of Appeals was wrong to approve forced medication solely to render Sell competent to stand trial"). However, the defendant here is being medicated by BOP based on dangerousness under *Harper*, as the district court found. (CR 343 at 4-6; ER 9-11; RT 295; ER 36) (BOP's September 15th medication finding was "predicated on the ground of dangerousness and really has nothing to do with his competency to stand trial"). An extension of commitment for purposes of competency restoration does not alter that the defendant's medication is being properly administered for *Harper* reasons and that no *Sell* medication order is therefore necessary. (CR 324 at 11-14; SER 39-42.)[17]

[17] The recently-amended BOP regulations also recognize that a judicial order is required when the sole purpose of involuntary medication is to restore the inmate to competency. *See* 28 C.F.R. § 549.46 (b)(2) (Eff. 8/12/11) (noting that, absent a psychiatric emergency, the *Harper* procedure in subpart (a) "does not apply to the involuntary administration of medication for the *sole purpose* of restoring a person's competency to stand trial. Only a Federal court of competent jurisdiction may order (continued...)

Second, although it disagreed with the defendant's "treatment plan" and "side effects" arguments and considered the "fair trial" argument to be premature, the district court did, in any event, consider these points. It observed: "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." (CR 343 at 2 n. 1; ER 7.) 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.*; RT 283; ER 24.)

In its denial of the motion to stay, the district court also settled any dispute about whether it had considered the treatment plan, potential for side effects, and the right to a fair trial. (*See* CR 347 at 2; SER 2) ("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 3; SER 3.) ("Contrary to the defense's claims that the potential side effects of the defendant's medication antipsychotic drugs were not considered,

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[17](...continued)
the involuntary medication of psychiatric medication for the *sole purpose* of restoring a person's competency to stand trial.") (emphasis added).

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."); (CR 347 at 4-5; SER 4-5) ("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") (emphasis in original); (CR 347 at 5; SER 5) (when rejecting the defendant's argument that it had not considered whether future treatment will achieve restoration, the court noted that "implicit in the testimony and evidence [it] 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.") The court also referenced the "ongoing treatment" at FMC-Springfield, as the defendant notes. (Op. Br. at 36-37.) As the district court correctly noted: "Neither *Sell* nor § 4241(d) requires more at this stage in the defendant's commitment – especially in the absence of any evidence suggesting the medication regimen is improper." (CR 347 at 5; SER 5.)

Thus, contrary to the defendant's claim that the district court "altogether failed to consider the medical appropriateness" of the medication (Op. Br. at 36), the court *did* consider the arguments the defendant had advanced about the medication,

treatment plan, and potential for side effects, but nevertheless found an extension warranted based on the information and testimony presented. This Court should credit the district court's statement about what it considered and concluded. *See United States v. Gonzales*, 765 F.2d 1393, 1397 (9th Cir. 1985) (doing otherwise would require abandoning reliance on the "good faith of our district court judges"). The district court's determination was not error, much less clear error, based on the evidence presented.

VIII. CONCLUSION

For the foregoing reasons, the district court's September 30th order denying the defendant's challenge to BOP's September 15th "*Harper* III" medication decision, and extending the defendant's commitment for four months pursuant to § 4241(d)(2), should be affirmed.[18]

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Appellate Chief

[18] In the defendant's recent motion for stay before this Court, he did not seek cessation of anti-psychotic medication and instead argued to this Court that his continued medication in Tucson was a reason not to transport him to FMC-Springfield. (9/30/11 Motion, p. 13.) He now seeks immediate cessation of medication in his request for relief. (Op. Br. at 58.) Based on the record, however, the district court properly denied the defendant's motion to enjoin the medication, stating that it "fear[ed] what would happen to Mr. Loughner if he [were] to be taken off the medication again." (RT 300; ER 41.)

IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, this appeal is related to the defendant's appeal in CA No.11-10339, which challenges BOP's June 14th medication decision. That appeal was argued and submitted on August 30, 2011. The defendant's appeal in CA No. 11-10432, which challenges BOP's July 18, 2011 emergency medication decision, is also a related appeal.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 11-10504

I certify that: (check appropriate option(s))

X 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 13,537 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

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

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

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

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October 24, 2011
Date

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

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2011, I submitted the following Brief of Appellee under seal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit. I electronically filed a copy of the Brief of Appellee that was redacted for public filing with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. In addition, on this date, I have submitted hard copies of the sealed Brief of Appellee to this Court and defense counsel, by overnight delivery, as ordered by the Court on October 7, 2011.

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

BMF/sr