C.A. No. 11-10432

D. Ct. No. CR 11-0187-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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III. STATEMENT OF JURISDICTION

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 July 18, 2011, to involuntarily medicate the defendant based on his danger to himself, pursuant to the emergency provision, 28 C.F.R. § 549.43 (b).[1] (CR 297, 306; ER 1.) The government relies on its briefs filed in CA No. 11-10339 and CA No. 11-10504 with regard to the district court's jurisdiction to resolve this question below. (CA No. 11-10339, Ans. Br. at 1; CA No. 11-10504, Ans Br. at 1.)

B. Appellate Court Jurisdiction

The government has filed a motion to dismiss the defendant's appeal of the district court's denial to his emergency medication challenge as moot, which the government incorporates here. This Court lacks jurisdiction to hear this appeal.

C. Timeliness of Appeal

Following the district court's oral denial of the defendant's motion on August 26, 2011, the defendant filed a notice of appeal on August 30, 2011. (CR 297.) The

[1] "CR" refers to the Clerk's Record, followed by the document number. "RT" refers to the transcript from August 26, 2011, unless otherwise noted, followed by the page number. "ER" and "SER" refer to the Excerpts of Record and Supplemental Excerpts of Record, respectively, followed by the page number. Some references will refer to excerpts filed in the related appeals, No. 11-10504 and No. 11-10339.

district court also issued its written order that same day. (CR 306; ER1.) The notice was timely pursuant to Fed. R. App. P. 4(b).

D. Bail Status

The defendant is currently in BOP custody at the Federal Medical Center in Springfield, Missouri.

IV. ISSUES PRESENTED

A. WHETHER THIS APPEAL SHOULD BE DISMISSED AS MOOT.

B. IF NOT DISMISSED, WHETHER THE DISTRICT COURT ERRED WHEN IT DENIED THE DEFENDANT'S CHALLENGE TO BOP'S JULY 18, 2011 DECISION TO INVOLUNTARILY MEDICATE HIM UNDER THE EMERGENCY REGULATION BASED ON HIS DANGER TO HIMSELF.

V. STATEMENT OF THE CASE

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

B. Procedural History – Defendant's Dangerousness Prompting Involuntary Medication

As this Court is aware, and as set forth more fully in the government's answering brief in CA No. 11-10504 (*see* Ans. Br. at 5-15), there are three pending interlocutory appeals concerning medication decisions involving the above defendant. Two of those appeals (CA No. 11-10339 and CA No. 11-10504) have been briefed and argued before a panel of this Court (J. Wallace, J. Berzon, and J. Bybee) and are pending a decision. The defendant's remaining appeal (CA No. 11-10432), which is the subject of this brief, concerns BOP's emergency medication decision of July 18,

2011. On November 22, 2011, the government moved to dismiss this appeal based on mootness, which this Court has deferred pending further briefing.

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

The defendant's first appeal (CA No. 11-10339) concerns his challenge to FMC-Springfield's June 14, 2011 administrative determination under 28 C.F.R. § 549.43(a)(5) and *Washington v. Harper*, 494 U.S. 210 (1990), that he should be involuntarily medicated as a danger to others ("*Harper* I"). 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.) On the same date, this Court granted a stay of medication. (CA No. 11-10339, Dkt # 10.) The defendant's appeal of the district court's order (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 (Subject of This Appeal)

The defendant's condition deteriorated after the medication was stopped in compliance with this Court's July 1, 2011 stay order, and on July 18, 2011, FMC-Springfield doctors determined that the defendant was a danger to himself and needed to be medicated under the emergency provision, 28 C.F.R. § 549.43(b). (SER 23-29; *see also* CA No. 11-10504, ER 619.) The Emergency Medication Justification

("Justification") provides further details, which are discussed later in this brief, including the conclusions of Dr. Robert Sarrazin, the defendant's treating psychiatrist, and that of a reviewing psychiatrist, Dr. James Wolfson, who concurred that medication was appropriate based on the defendant's danger to himself. (Justification at 1-5; SER 25-29.) Therefore, emergency medication began that day.

Three days later, on July 21, 2011, the defendant filed an "Emergency Motion to Enforce Injunction and Compel Daily Production of BOP Records" in this Court, attaching affidavits and exhibits. (CA No 11-10339, Dkt # 19.) On July 22, 2011, the government filed a response, also attaching affidavits. (CA No. 11-10339, Dkt # 20-21.) Later that day, this Court denied the defendant's emergency motion seeking to enforce the medication injunction, without prejudice to renewing his arguments in the district court. (CA No. 11-10339, Dkt # 23.)

On August 11, 2011, the defense filed an "Emergency Motion for Prompt Post-Deprivation Hearing on Forced Medication" in the district court, seeking enjoinment of BOP's emergency medication determination, making arguments similar to those raised in his other medication challenges. (CR 278) (SER 1-21.)[2] Specifically, the

[2] The government is attaching the defendant's motion filed in the district court (SER 1-21), as well as BOP's July 18, 2011 emergency medication decision (SER 22-29). The government is also enclosing its district court response to the defendant's motion, as well as Exhibits 1, 2, and 3 to that response. (CR 284, 287, 292, 305; SER (continued...)

defendant contended that he was entitled to a "prompt, post-deprivation hearing" consisting of a judicial adversarial hearing with witnesses and evidence, and a subsequent judicial order approving BOP's administrative decision to medicate the defendant under the emergency regulation. The government opposed that motion. (CR 284, 287; SER 30-47.) After argument on August 26, 2011, the district court denied the defendant's motion from the bench and in a written order. (RT 8/26/11 77-86; CR 306; ER 1, 53-62.) The July 18, 2011 medication decision is the subject of this appeal in CA No. 11-10432.

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"). (CA No. 11-10504, ER 641-646.) After

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[2](...continued)
30-90.) Two of those exhibits contain material provided to this Court in July 2011. This Court ordered the parties' exhibits sealed in its July 22nd order (CA No. 11-10339, Dkt # 23), so they were submitted under seal in the district court with the government's response and are being submitted under seal to this Court.

the defendant's staff representative filed an administrative appeal, the Associate Warden determined on September 6, 2011 that another *Harper* due process hearing should be conducted. (CA No. 11-10504, 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"). BOP doctors concluded that involuntary medication was justified based on the defendant's danger to himself. (CA No. 11-10504-ER 654-56.) After the Associate Warden affirmed that decision on administrative appeal (CA No. 11-10504, ER 666), the defendant, on September 23, 2011, filed an emergency motion to enjoin involuntary medication based on the September 15, 2011 determination. (CR 321; CA No. 11-10504, ER 497.) After a hearing on September 28, 2011, the district court denied that motion and granted an extension of the defendant's commitment to FMC-Springfield. (CR 343.) The defendant has appealed that decision (CA No. 11-10504), and on October 7, 2011, this Court denied his motion to stay his transportation to FMC-Springfield. The defendant's appeal was briefed under an expedited schedule, oral argument was conducted in this Court on November 1, 2011, and the matter has been submitted.

VI. SUMMARY OF ARGUMENTS

The defendant's appeal should be dismissed for lack of jurisdiction because it is moot. He is appealing the district court's order denying his request for a "post-deprivation" adversarial judicial hearing challenging BOP's July 18, 2011 emergency medication decision, but the defendant is no longer being medicated under the emergency regulation. For the reasons set forth in the government's pending motion to dismiss, this appeal should be dismissed.

In any event, if the merits are reached, the district court's order should be affirmed. The defendant challenged BOP's administrative decision to medicate him, asserting a right to an adversarial judicial hearing with evidence and witnesses, under standards derived from *Riggins* and *Sell*. However, as explained in the other pending appeals involving the defendant, he was not legally entitled to such a judicial hearing and finding, and consequently, he was not entitled to a "prompt" hearing for that purpose, as he argues in this appeal. The district court correctly rejected the defendant's argument. It also judicially reviewed BOP's decision to medicate the defendant and correctly concluded that BOP did not act arbitrarily. This Court should dismiss the defendant's appeal for lack of jurisdiction, or in the alternative, affirm.

VII. ARGUMENTS

A. THE DEFENDANT'S APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE IT IS MOOT.

On November 22, 2011, the government filed a motion to dismiss the defendant's appeal for lack of jurisdiction based on mootness. On January 6, 2012, this Court deferred resolution of that motion pending briefing. The government renews its argument here. In short, the defendant is no longer being medicated under the emergency regulation and is currently being medicated based on BOP's "*Harper* III" medication decision from September 15, 2011. There is no longer a "case or controversy" in this appeal, which the defendant does not dispute. (Gov's Motion to Dismiss, pp. 4-6; Gov's Reply, pp. 1-2.) Nor does the defendant's appeal meet the "capable of repetition, yet evading review" exception to mootness. (Gov's Motion to Dismiss, pp. 6-8; Gov's Reply, pp. 2-10.) This appeal should be dismissed.

B. THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION CHALLENGING BOP'S JULY 18, 2011 EMERGENCY MEDICATION DECISION AND SEEKING A JUDICIAL HEARING AND ORDER BASED ON STANDARDS IN *RIGGINS* AND *SELL*.

1. Standard of Review

As the government noted in its answering brief in CA No. 11-10504, the following standards of review apply. (CA No. 11-10504, pp. 27-28.) 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," *United States v. Morgan*, 193 F.3d 252, 261 (4th Cir. 1999), the defendant shoulders a heavy burden to successfully challenge BOP's administrative *Harper* determination. The 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. The District Court Did Not Err When It Denied The Defendant's Request For A "Post-Deprivation" Judicial Adversarial Hearing And Order Under The Standard In *Riggins* and *Sell*.

In its motion seeking to enjoin medication below, the defense argued that "any administrative procedures by the prisons" do not provide "adequate procedural protections" and that "any decision to forcibly medicate on dangerousness grounds be reviewed by a court upon presentation of evidence by both parties." (CR 278, p. 5; SER 5; citing *Sell v. United States*, 539 U.S. 166 (2003), and *United States v. Hernandez-Vasquez*, 513 F.3d 908 (9th Cir. 2008)). When it denied the defendant's motion, the district court noted that the "post-deprivation hearing the defense is requesting is a *judicial* hearing at which the Government must demonstrate 'that the drugs are essential to mitigating safety concerns after consideration of less intrusive alternatives.'" (CR 306; ER 2) (emphasis added) (repeating the defendant's argument based on *Riggins v. Nevada*, 504 U.S. 127 (1992)). The district court set forth a paragraph of considerations the defendant was requesting as part such a judicial hearing (ER 2), which the defendant re-urges on appeal verbatim (Op. Br. at 11).

Thus, the defendant's request for a "prompt post-deprivation hearing" regarding the July 18, 2011 emergency medication decision was a request for the

same kind of judicial adversarial hearing and judicial finding that he has repeatedly sought with every medication challenge, but which is not legally required. The district court properly rejected the defendant's motion, noting that it was continuing to find that the rule of *Harper* applied, so the decision to medicate was up to "doctors, not lawyers or judges." (CR 306; ER 2-3) (quoting *Harper*, 494 U.S. at 231.) The district court reviewed FMC-Springfield's medication decision for arbitrariness and determined that BOP had not acted arbitrarily. (CR 306; ER 3-4) (citing *Morgan*, 193 F.3d at 262-63).[3]

On appeal, the defendant renews his claim that he was entitled to a "prompt, judicial post-deprivation hearing," and that the "appropriate substantive standard to apply" in such a hearing "is the one set forth in *Riggins v. Nevada* and urged by the defense in appeals in Case Nos 11-10339 and 11-10504." (Op. Br. at 11.) Thus, the defendant's "judicial hearing" argument is currently being reviewed in his other pending appeals in CA No. 11-10339 and CA No. 11-10504. Rather than re-stating the reasons why the defendant's position is incorrect, the government incorporates

[3] After noting that he continues to be medicated, the defendant states that "No court has authorized the prison's actions." (Op. Br. at 4, n. 1.) This statement is incorrect. Although the district court denied the defendant's request for an adversarial judicial hearing with witnesses and presentation of evidence, the court did judicially review and approve BOP's medication determinations from June 14, July 18, and September 15, 2011, finding that those decisions were not arbitrary. This Court also denied the defendant's request to stay the emergency medication.

the arguments it has made on appeal in CA No. 11-10339 and CA No. 11-10504. In short, the district court correctly found that *Harper* applied and that BOP was entitled to medicate the defendant (ER 2-3), and it properly rejected the defendant's argument that it needed to conduct a judicial adversarial hearing "upon presentation of evidence by both parties" and determine that medication "was 'essential' to the government's objectives following consideration of 'less intrusive' alternatives." (CR 278, pp. 4-5; SER 4-5) (citing *Riggins* and *Sell*).

In addition to what the government has already argued on appeal in CA No. 11-10339 and CA No. 11-10504, it would note that the defendant failed to cite pertinent authority below supporting his request for a "post-deprivation" judicial hearing. (CR 278, pp. 5-8; SER 5-8.) Rather, most of the cases he cited were civil cases that did not involve emergency medication of a detained inmate, but administrative decisions that children should be taken into emergency custody because of official concerns about their well-being. *See Brokow v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000); *Campbell v. Burt*, 141 F.3d 927 (9th Cir. 1998); *Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994); *Weller v. Dep't of Social Svcs for Baltimore*, 901 F.2d 387 (4th Cir. 1990). Those decisions, which the defendant also cites on appeal (Op. Br. at 12, 13, 17, 18), are simply inapposite and the interests at issue are not the same as in this case.

Moreover, rather than supporting the defendant's position, the decision in *Brandt v. Monte*, 626 F.Supp.2d 469 (D.N.J. 2009), which he cited below (CR 278, pp 5, 8) and cites again on appeal (Op. Br. at 12), actually undercuts his position. Far from mandating judicial review of emergency medication orders, *Brandt* holds that due process is satisfied by use of an "intra-administrative review committee" as a "post-deprivation" "check" on the treating physician's decision to administer emergency medication. *Id.* at 486-88. Such an administrative "check" occurred in this case, because a non-treating psychiatrist (here, Dr. Wolfson) determined, independently of the treating physician (here, Dr. Sarrazin), that emergency medication is necessary and appropriate, even *before* the medication was administered. Thus, the review that the defendant argued he was entitled to under *Brandt*, in order to ensure due process, had already occurred.[4] The defendant failed to provide pertinent authority supporting that a judicial hearing and approval was required for an emergency medication decision rather than, or in addition to, the administrative process BOP employed.

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[4] Indeed, the regulation provides greater due process protection than even *Brandt* says is appropriate, and the court in *Brandt* reached its conclusion after weighing the interests set forth in *Matthews v. Eldridge*, 424 U.S. 319, 324 (1976), which the defense erroneously contends mandates an adversarial court hearing and judicial approval. (Op. Br. at 10, 12; *see also* CR 278, pp. 8, 9-20; SER 8, 9-20.)

As the government noted below, emergency medication decisions do not even require ordinary *Harper* procedures, much less judicial approval. Title 28, Code of Federal Regulations, Section 549.43 sets forth an emergency exception to the ordinary *Harper* procedures: "*Except as provided for in paragraph (b) of this section*, the procedures outlined herein [in subsection (a)] must be followed after a person is committed for hospitalization and prior to administering involuntary treatment, including medication." At the time of the July 18, 2011 medication decision, subsection (b) provided:

> (b) Emergencies. For purposes of this subpart, a psychiatric emergency is defined as one in which a person is suffering from a mental illness which creates an immediate threat of bodily harm to self or others, or extreme deterioration of functioning secondary to psychiatric illness. During a psychiatric emergency, psychotropic medication may be administered when the medication constitutes an appropriate treatment for the mental illness and less restrictive alternatives (e.g., seclusion or physical restraint) are not available or indicated, or would not be effective.

28 C.F.R. § 549.43(b).[5] The defendant failed to demonstrate that due process demanded procedures different than those utilized by BOP under § 549.43 (b) here,

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[5] On August 11, 2011, the regulation was amended. *See* 76 Fed. Reg. 40229-02, 2011 WL 2648228 (eff. 8/12/11) (emergency involuntary medication section is renumbered to § 549.46 (b)). The defendant has attached the amended version of the regulation to his brief (Op. Br. App. A), but the government is citing and attaching the prior version of the regulation that applied at the time of BOP's July 18, 2011 emergency medication decision (Appendix 1).

and in fact, it did not. *See, e.g., Dancy v. Simms*, 116 F.Supp.2d 652, 655 (D. Md. 2000) ("Quite simply, the decision to administer antipsychotic medication over an inmate's objection comports with due process if the decision was made in the exercise of professional medical judgment and arose in the context of an emergency situation where the inmate posed a danger to himself or others."); *Chapman v. Haney*, 2004 WL 936682, at *27 (D. Neb 2004) (unpublished) (in civil action brought pursuant to 42 U.S.C. § 1983, district court noted that "no court has concluded that the emergency involuntary medication procedures in [28 C.F.R.] § 549.43 . . . violate inmates' procedural due process rights").

Indeed, cases that address emergency medication situations find them exempt from even *Harper* administrative requirements, much less from full-blown judicial review. *See Hogan v. Carter*, 85 F.3d 1113, 1117 (4th Cir. 1996) (en banc) (noting that *Harper* administrative review does not apply to emergencies, and rejecting the notion that a court must "convene full-scale adversary proceedings at any hour of the night, appoint and retain counsel, subpoena witnesses, and allow for cross-examination – all while the very inmates for whose protection the state is constitutionally responsible remain in danger of injury at their own hands"). This Court has effectively reached the same conclusion, finding *Hogan* factually distinguishable only because in the case before it there was "no evidence that [the

detainee] posed such an imminent and serious danger to himself or others that the minimal procedural requirements of *Harper* . . . could not be met." *Kulas v. Valdez*, 159 F.3d 453, 456 (9th Cir. 1998). Even Justice Stevens' dissent in *Harper* appears to recognize that an inmate can be medicated on an emergency basis without a due process hearing, based on a responsible physician's medical judgment that such medication was in the inmate's best interest, because of the distinct interests present in such a situation. 494 U.S. at 246-47 (contrasting the situation in *Harper* with the "imminent danger of injury that triggers the emergency medication provisions").

Other circuits have also held that inmates can be medicated in emergencies without *Harper* administrative hearings or adversarial judicial procedures. In *Leeks v. Cunningham*, 997 F.2d 1330, 1335 (11th Cir. 1993), the Eleventh Circuit noted that even courts which had concluded that involuntary administration of antipsychotic drugs could violate due process under certain circumstances still provided for an "emergency exception." *Leeks* cites three decisions: *United States v. Charters*, 829 F.2d 479, 484 (4th Cir. 1987) (noting that the case did "not present an emergency situation in which violence or the imminent deterioration of a patient will occur in the absence of forcible medication"); *Ronnie v. Klein*, 720 F.2d 266, 269 (3rd Cir. 1983) ("antipsychotic drugs may be constitutionally administered to an involuntarily committed mentally ill patient whenever, in the exercise of professional judgment,

such an action is deemed necessary to prevent the patient from endangering himself or others."); and *Sherman v. Four County Counseling Center*, 987 F.2d 397, 409-10 (7th Cir. 1993) (plaintiff was involuntarily medicated, solely on doctor's orders, because he was "hostile and dangerous"; in light of *Harper*, Seventh Circuit concluded that, "[i]n the context in which it acted – medicating an apparently schizophrenic patient in emergency detention – we cannot say that Four County's actions were unconstitutional . . ."). *See also Bee v. Greaves*, 744 F.2d 1387, 1395-96 (10th Cir. 1984) (forcible medication with antipsychotic drugs "may be required in an emergency" because it is "reasonably related to the concededly legitimate goals of jail safety and security"; the decision to do so "must be the product of professional judgment by appropriate medical authorities, applying accepted medical standards"). The district court properly determined that the defendant was not legally entitled to the kind of "post-deprivation hearing" he sought.[6]

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[6] The defendant faults the district court for allegedly failing to state what "substantive standard" applied. (Op. Br. at 9.) However, the district court's order stated that it was relying on *Harper* for the proposition that doctors, not judges, make these kinds of medication decisions. (ER 2-3.) It also rejected the defendant's argument that a judicial hearing with witnesses was required along with a judicial finding under the *Riggins* standard that the defendant was advocating. (ER 2-3) (rejecting defendant's argument for a judicial hearing at which the government would be required to prove that "the drugs are essential to mitigating safety concerns after consideration of less intrusive alternatives"). It reviewed BOP's decision for arbitrariness and found that the decision was not arbitrary. The court's written order, (continued...)

The defendant never alleged below – nor does he allege on appeal – that due process would have been satisfied with additional *administrative* protections after the emergency medication decision, such as a *Harper* hearing. Rather, his argument was (and continues to be) that he was entitled to an adversarial *judicial* hearing with presentation of evidence under the standard of "*Riggins*." (Op. Br. at 11) (*see also* CR 278 at 8-20; SER 8-20) (arguing that the "post-deprivation hearing" needs to be "conducted before the court in an adversarial hearing" under the standards in *Matthews* and *Riggins*, reiterating his "pretrial detainee" argument). However, because the defendant was not entitled to that type of adversarial "post-deprivation" judicial hearing in the first place, his complaint that such a hearing needed to be "prompt" is necessarily meritless. (Op. Br. at 13-19.) If someone is not entitled to a particular hearing at all, the hypothetical timing of such a hearing is irrelevant. Thus, the defendant's entire "promptness" argument – including his discussion of the emergency provisions of various state commitment statutes and cases (Op. Br. at 14-17) – is inapposite.

As noted earlier in the facts section, BOP conducted a *Harper* hearing on August 25, 2011, which was conducted again on September 15, 2011, continuing to

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[6](...continued)
along with its comments from the hearing on August 26, 2011, provided sufficient explanation that it was rejecting the argument the defendant advanced in his motion.

find that the defendant needed to be medicated as a danger to himself. Thus, the defendant has now been afforded even more procedural protections than existed when he was medicated under the emergency regulation on July 18, 2011. The district court also made this observation. (ER 3-4.) As the government noted in its motion to dismiss this appeal, BOP's September 15, 2011 "*Harper* III" medication decision moots the defendant's challenge to the emergency medication decision from July 18, 2011. Because the most due process the defendant was entitled to receive in this medication context was the due process specified by the Supreme Court in *Harper* (which the defendant has now received under the regulation promulgated in the wake of *Harper*), the government noted below that the defendant's challenge to the emergency medication decision was no longer germane, and the district court "agree[d] with that observation." (RT 8/26/11 58-59, 69-70, 86; ER 34-35, 45-46, 62.) This also means that the defendant could not (and still cannot) show prejudice from any procedural error in BOP's decision to medicate him in the past under the emergency regulation. Thus, any error would be harmless.

On appeal, the defendant states: "[T]he prison continued to forcibly medicate Mr. Loughner with anti-psychotic drugs for over five weeks before conducting any sort of review." (Op. Br. at 18.) At first blush, the phrase "any sort of review" might be read as raising a new argument on appeal that the prison needed to conduct an

administrative *Harper* hearing earlier than it did. However, as noted earlier, the defendant has never contended that administrative compliance with *Harper* would be sufficient to justify involuntary medication (indeed, all of his pleadings and appeals argue the opposite), and directly after the above-quoted sentence, he states that the "prison's failure to implement its own limited hearing procedures once any immediate threat has passed demonstrates the need for *judicial* intervention." (Op. Br. at 18) (emphasis added). His next argument is that "post-deprivation review must be conducted *by a court in an adversarial hearing*." (Op. Br. at 19) (emphasis added). Thus, the defendant is not arguing on appeal that BOP should have conducted its administrative *Harper* hearing more quickly after emergency medication began, but instead continues to argue that the court needed to conduct an adversarial judicial hearing with witnesses and presentation of evidence under the standard in *Riggins*. The district court properly rejected this argument and its order should be affirmed.[7]

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[7] Although the defendant does not argue that a *Harper* hearing should have been conducted more quickly, the government would note that the defendant's commitment statutes and cases are not on-point to this question. (Op. Br. at 14-19.) The decision in *Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981) (Op. Br. at 16-17), which dealt with a challenge to a California involuntary commitment statute, is inapposite to this involuntary medication case and the defendant here already was properly incarcerated and committed to the custody of FMC-Springfield. The emergency regulation does not set forth a specific time limit for conducting a *Harper* hearing after an emergency medication decision, nor is one required. *Chapman v. Haney*, 2004 WL 936682, at *28 (D. Neb 2004) (unpublished) ("it would be a (continued...)

3. The District Court Correctly Determined That BOP's Emergency Medication Determination Was Not Arbitrary.

The district court properly determined that BOP's decision to medicate the defendant under the emergency regulation was not arbitrary, stating at the hearing: "I don't see anything arbitrary about it. The factual circumstances and background that led the doctors to take action seems entirely appropriate and reasonable to me." (RT 8/26/11 85-86; ER 61-62.) In its written order, the district court reiterated this conclusion:

> The prison's decision to medicate the defendant after the Ninth Circuit stayed his involuntary medication was not arbitrary. Two psychiatrists intimately familiar with his medical history and behavior while in custody submitted written findings detailing his deterioration and concluding that emergency medication was necessary. Consistent with § 549.43, they found that seclusion, restraints, and minor tranquilizers would be ineffective. The defense may disagree with those conclusions, but that does not establish that they are arbitrary.

(ER 3-4.)

On appeal, the defendant does not appear to meaningfully dispute that BOP's decision to medicate him under the emergency regulation was not arbitrary, but claims that the court had a "duty" to "review whether the decision is consistent with the appropriate substantive due process standard." He states: "The substantive

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[7](...continued)
mistake to define the contours of an emergency so narrowly that only the most dire situations qualify as emergencies.")

standard here is whether forcible medication with specific drugs and dosages anticipated is 'essential' considering less intrusive alternatives to mitigating Mr. Loughner's danger to himself," which he states is the "standard set forth in *Riggins*" and due process. (Op. Br. at 20.)

First, the district court was not required to conduct an adversarial hearing, as explained earlier. Second, BOP followed its emergency regulation, which afforded adequate due process. Finally, in any event, BOP's emergency medication decision set forth "specific drugs and dosages" and the doctors found what the defendant contends is required – that involuntary medication was "essential considering less instrusive alternatives to mitigating Mr. Loughner's danger to himself." (Op. Br. at 20.) Thus, even though BOP was not required to comply with the "*Riggins* standard" the defendant is advancing, his appellate argument is particularly meritless here because BOP's emergency medication determination met that standard anyway.

In *Harper*, 494 U.S. at 228, the Supreme Court stated: "Having determined that state law recognizes a liberty interest, also protected by the Due Process Clause, which permits refusal of antipsychotic drugs unless certain preconditions are met, we address next what procedural protections are necessary to ensure that the decision to medicate an inmate against his will is neither arbitrary nor erroneous under the standards we have discussed above." The Court then rejected the argument that a

judicial hearing was required, and stated that, notwithstanding the risk of potential side effects from medication, a hearing conducted by doctors, rather than judges, would adequately, and "perhaps better" protect the inmate's due process rights. *Id*. at 231. It then found that "adequate procedures existed" in *Harper* under the Washington policy. Thus, it seems clear from *Harper* that no "arbitrariness" exists if BOP conducts an administrative hearing according to a regulation that complies with due process. As noted above, the emergency provision, then-numbered § 549.43(b), provided adequate due process in that context, so *Harper* supports that BOP's compliance with that regulation demonstrates that its administrative decision was not arbitrary.

The propriety of BOP's decision is evident here, as the district court found. (ER 3.) As noted earlier, BOP could medicate an inmate under its then-numbered emergency regulation, 28 C.F.R. § 549.43(b), if: 1) a psychiatric emergency exists, in which "a person is suffering from a mental illness which creates an immediate threat of bodily harm to self or others, or extreme deterioration of functioning secondary to psychiatric illness"; 2) the psychotropic medication "constitutes an appropriate treatment for the mental illness"; and 3) "less restrictive alternatives (e.g., seclusion or physical restraint) are not available or indicated, or would not be

effective." 28 C.F.R. § 549.43(b). BOP complied with its regulation and its decision to medicate was not arbitrary, but appropriate.

First, Dr. Sarrazin determined

Sealed Materials Deleted

Dr. Sarrazin wrote

Sealed Materials Deleted

Dr. Sarrazin also noted

Dr. Wolfson, an independent psychiatrist not involved in the treatment of the defendant, concurred with these determinations

Sealed Materials Deleted

Dr.

Wolfson then wrote:

Thus, BOP determined that there was a "psychiatric emergency" under 28 C.F.R. § 549.43(b) and this decision was not arbitrary.

Second, the doctors determined that psychotropic medication "constitutes an appropriate treatment for the mental illness." 28 C.F.R. § 549.43(b).

Dr. Wolfson concurred with Dr. Sarrazin's medication decision. The defendant did not allege below, nor does he argue on appeal, that the medication prescribed was an arbitrary treatment. Rather, the choice of medication was appropriate for the defendant. Although the emergency order speaks for itself in terms of establishing the propriety of the BOP finding, the

affidavits that were submitted to this Court when the defendant filed his emergency motion to enforce the medication injunction further amplified this point.[8]

Third, Dr. Sarrazin and Dr. Wolfson found that "less restrictive alternatives (e.g., seclusion or physical restraint) are not available or indicated, or would not be effective." 28 C.F.R. § 549.43(b).

[8] In its response to the emergency medication challenge below, the government noted that a newer generation drug with less potential for serious side effects than the drugs at issue in cases like *Riggins* and *Harper* –

In addition, since the time of the emergency medication litigation, and as this Court is aware from the appeal in CA No. 11-10504, further evidence about the propriety of the defendant's medication was obtained during the hearing on September 28, 2011, in which the defendant challenged his extension of commitment at FMC-Springfield and BOP's "*Harper* III" medication determination of September 15, 2011. For example, Dr. Ballenger testified about the reduced potential for serious side effects with newer generation medications like risperidone and stated that the medication regimen Dr. Serrazin was prescribing to the defendant was "highly appropriate." (CA No. 11-10504, Ans. Br. at 22-24.)

Dr. Wolfson concurred that "less restrictive alternatives (e.g., seclusion or physical restraint) . . . would not be effective." 28 C.F.R. § 549.43(b).

Thus, BOP did not act arbitrarily – but rather, quite appropriately, as the district court found – when the medical doctors determined that medication of the defendant was warranted under the emergency provision set forth in 28 C.F.R. § 549.43(b).

As noted earlier, the defendant argues on appeal that "[t]he substantive standard here is whether forcible medication with specific drugs and dosages anticipated is 'essential' considering less intrusive alternatives to mitigating Mr. Loughner's danger to himself," which he states is the "standard set forth in *Riggins*" and due process. (Op. Br. at 20; *see also* CR 278, p. 4 – defendant argued below that due process clause protects a pretrial detainee's desire to be free of unwanted medication "absent a showing that they are 'essential' to the government's objectives following consideration of 'less intrusive' alternatives"; SER 4.) *Riggins* is inapposite as explained in the other appeals, but in any event, BOP's emergency medication decision met the standard the defendant argues was required here. The drugs and dosages were identified; the doctors determined that the emergency medication was "essential" (i.e., warranted based on the defendant's danger to himself in the BOP medical facility); and the doctors considered "less intrusive alternatives," as specifically required under the emergency regulation, but found them to be "unavailable or ineffective."

The district court correctly found that BOP acted appropriately, not arbitrarily. *See, e.g., Morgan*, 193 F.3d at 258 (determination of whether to forcibly medicate a pretrial detainee "was best left to the professional judgment of institutional medical personnel and subject to judicial review only for arbitrariness").

The defense contended below that its request for a full-blown hearing and judicial approval "do[es] not impact the government's interests because what Mr. Loughner is seeking – a post-deprivation hearing – does not require the prison to suspend its forcible medication regimen" and "requires only that a timely and adequate hearing be held after the emergency decision is made and implemented." (CR 278, p. 16; SER 16.) Yet, not only did the defense fail to show it was legally entitled to such a judicial hearing and order as explained earlier, but the defense was, in fact, asking the district court "suspend [the] forcible medication regimen." The defense asked the district court to substitute its own judgment for that of the medical doctors and issue an "emergency stay" of medication and "enjoin" BOP from "enforcing the administrative medication." (CR 278, p. 21; SER 21.)

Halting the defendant's medication, however, was not in his medical interest, as the government demonstrated. The district court properly declined the defense's invitation to order the defendant's medication stopped against the BOP psychiatrists' sound medical judgment.

The district court also declined to grant the stay of medication

that this Court had previously declined to grant when the defense filed its emergency motion in this Court on July 21, 2011, a fact the court noted in its order. (ER 3.)

In sum, the district court properly deferred to the emergency treatment decision made by the BOP doctors, who possessed the expertise to make such decisions and were legally and ethically bound to act in the defendant's medical best interests. As the Supreme Court also noted in *Harper*:

> We confront here [BOP's] obligations, not just its interests. [It] has undertaken the obligation to provide prisoners with medical treatment consistent not only with their own medical interests, but also with the needs of the institution. Prison administrators have not only an interest in ensuring the safety of prison staffs and administrative personnel, but also the duty to take reasonable measures for the prisoners' own safety. These concerns have added weight when a penal institution, like [FMC-Springfield] is restricted to inmates with mental illnesses [and] an inmate's mental disability is the root cause of the threat he poses . . .

Harper, 494 U.S. at 225-26 (internal citations omitted).

The defendant's argument that his fair trial rights will be affected by medication (Op. Br. at 17; CR 278, pp. 12-13, 20-21) is both premature and unfounded. (*See also* CA No. 11-10339, Ans. Br. at 54-56; CA No. 11-10504, Ans. Br. at 54-55.)

VIII. CONCLUSION

For the foregoing reasons, the defendant's appeal should be dismissed as moot, or in the alternative, the district court's order denying the defendant's challenge to BOP's July 18, 2011 emergency medication decision should be affirmed.

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Acting United States Attorney
District of Arizona

s/ Christina M. Cabanillas

CHRISTINA M. CABANILLAS
Appellate Chief

IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, this appeal is related to: 1) the defendant's appeal in CA No.11-10339, which challenges BOP's June 14th *Harper* medication decision ("*Harper* I"); and 2) the defendant's appeal in CA No. 11-10504, which challenges BOP's September 15, 2011 *Harper* medication decision ("*Harper* III"). Both of the above appeals have been argued and submitted to this Court.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 11-10432

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 8473 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

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words, or is

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January 20, 2012
Date

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

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2012, 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 mailed hard copies of the sealed Brief of Appellee and the Supplemental Excerpts of Record to this Court and defense counsel, by overnight delivery.

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

BMF/sr