

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 06-2175 MV

ELBERT BARBER,

Defendant.

ORDER

THIS MATTER is before the Court on the government's Motion for an Order to Request the Forced Medication of Defendant, filed July 14, 2008 [Doc. 35]. At a hearing on July 15, 2008, the Court ruled that Defendant was presently incompetent to stand trial and that the government had not at that time satisfied its heavy burden under *Sell v. United States*, 539 U.S. 166 (2003) of showing that Defendant's forcible medication with antipsychotic drugs for the sole purpose of rendering him competent to stand trial was constitutionally permissible. The Court ordered that Dr. Robert Sarrazin, Defendant's treating psychiatrist at the United States Medical Center for Federal Prisoners, Springfield, Missouri (hereinafter "USMCFPS"), submit an individualized treatment plan for the Court's consideration. On August 25, 2008, in response to the Court's Order, Dr. Sarrazin, submitted an eighteen-page report, including an individualized treatment plan. The Court held a hearing on November 13, 2008. At the hearing, Dr. Sarrazin testified telephonically with regard to his report as it relates to the relevant *Sell* factors. At the conclusion of the hearing, the Court took the matter under advisement. Having reviewed Dr. Sarrazin's testimony, having considered the parties' arguments, and being otherwise fully advised, the Court finds that the government's motion is well-taken and will be **granted**. The Court's ruling is based on the following findings as required by *Sell*.

1. Applying the clear and convincing test articulated by the Tenth Circuit in *United States v. Valenzuela-Puentes*, 479 F.3d 1220 (10th Cir. 2007), I find that the government's important interest in forcibly medicating Defendant for the sole purpose of rendering him competent to stand trial outweighs Defendant's "significant liberty interest" under the Due Process Clause "in avoiding the unwanted administration of antipsychotic drugs." *Washington v. Harper*, 494 U.S. 210, 221 (1990).

2. The government's interest in bringing Defendant to trial on the very serious charges against him is an important, if not compelling, interest. Defendant is charged with two counts of robbery, in violation of 18 U.S.C. § 2111, and two counts of using a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Robbery carries a maximum statutory penalty of 15 years and using a firearm in relation to a crime of violence carries a maximum statutory penalty of 7 years. No facts have been presented that mitigate the government's important interest in bringing Defendant to trial on these very serious charges.

3. The government has established that Defendant's forcible medication will significantly further its important interest in bringing Defendant to trial. Dr. Sarrazin, as an expert in forensic psychiatry, testified that the administration of antipsychotic drugs was substantially likely to render Defendant competent to stand trial. He based his expert opinion on the scientific literature, his day-to-day experience treating incompetent, mentally ill criminal defendants to competency with antipsychotic drugs, and his individualized assessment of Defendant. Dr. Sarrazin also opined that the administration of antipsychotic drugs was substantially unlikely to have side effects that would interfere significantly with Defendant's ability to assist counsel. He explained that side-effects of antipsychotic drugs such as akathisia (inner sense of restlessness) and muscle stiffness can be effectively managed by administering adjunctive medication or by changing the dosage. According

to Dr. Sarrazin, the side effect of sedation can be managed by adjusting the dosage or by changing the medication. Dr. Sarrazin acknowledged that these side-effects are more likely to occur with first generation antipsychotic medication, such as *Haloperidol*, rather than second-generation antipsychotic medication. Dr. Sarrazin clarified that if Defendant is forcibly medicated, he will be administered *Haloperidol*. Crediting Dr. Sarrazin's expert testimony, the Court finds that the government has demonstrated by clear and convincing evidence that forcible administration of antipsychotic drugs is substantially likely to render Defendant competent to stand trial and substantially unlikely to have side-effects that will interfere significantly with Defendant's ability to assist his counsel or otherwise undermine his right to a fair trial.

4. The government has shown that involuntary medication is *necessary* to further the government's important interest in bringing Defendant to trial *if* Defendant does not voluntarily agree to treatment. The government established by clear and convincing evidence that alternative less intrusive treatments such as psychotherapy are unlikely to achieve substantially the same results as antipsychotic medications. Although it is clear from Dr. Sarrazin's testimony that psychotherapy may be helpful as an adjunct to treatment with antipsychotic medication, it is equally clear that it will not, by itself, render Defendant competent to stand trial. Dr. Sarrazin explained in his report that Defendant "cannot be engaged in any type of therapeutic task to reduce the intensity of his psychotic symptoms because he does not believe that his symptoms are the result of a mental illness." Report at 12. Pursuant to *Sell*, the Court has considered less intrusive means for administering antipsychotic medication, and for this reason, the Court will authorize Defendant's forcible medication only if Defendant is first afforded an opportunity to submit voluntarily to treatment with *Geodon*, a second generation antipsychotic medication specifically proposed by Dr. Sarrazin because of its generally more favorable side-effect profile.

5. The government has established by clear and convincing evidence that forcible medication with antipsychotic drugs is “medically appropriate,” i.e. that it is in Defendant’s best medical interest in light of his medical condition. It is uncontested that Defendant suffers from schizophrenia, undifferentiated type. Dr. Sarrazin testified that administration of antipsychotic drugs is the “treatment of choice” for Defendant’s condition. He explained that although antipsychotic drugs do not cure schizophrenia, they can be effective in reducing delusions, thereby enabling patients to think more clearly and in a more organized way. He stated in his report that the effectiveness of antipsychotic medication in treating schizophrenia has been demonstrated in the literature for nearly fifty years and that the current literature indicates that with one exception (not relevant here) first and second generation antipsychotic drugs have approximately equal efficacy. *See* Report at 12. Defendant is a healthy young adult male. He has no health conditions that might caution against treatment with antipsychotic medication. He is not currently taking medication for any health conditions and therefore, no risk of potential drug interactions exists. As a young adult male, his risk of developing certain side-effects such as tardive dyskinesia is lower than if he were an elderly patient (over 65), as is his risk of developing side-effects from taking adjunctive anticholinergic medication. *See* Report at 9, 13.

6. At the hearing, defense counsel stated that Defendant appeared to be willing to agree to treatment with the second generation antipsychotic drug, *Geodon*--a drug that would be administered to Defendant orally. Defense counsel stated that Defendant was fearful of being forcibly injected with antipsychotic medication because he previously witnessed an inmate being physically restrained and forcibly medicated and this experience left a visceral impression on him. In light of Defendant’s apparent willingness to agree to treatment with *Geodon*, the Court authorizes Defendant’s forcible medication only if he refuses to submit voluntarily to treatment with *Geodon*,

as proposed by Dr. Sarrazin. It should be noted that forcible medication would involve intramuscular injections of the first generation anti-psychotic drug *Haloperidol*, which appears to have a significantly less favorable side-effect profile than *Geodon* and other second generation antipsychotic drugs.

WHEREFORE, IT IS ORDERED that the government's Motion for an Order to Request the Forced Medication of Defendant, filed July 14, 2008 [Doc. 35] is **GRANTED** as set forth in this Order;

IT IS FURTHER ORDERED that Defendant shall be committed to the custody of the Attorney General for hospitalization pursuant to 18 U.S.C. § 4241 (d) (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a reasonable probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward;

IT IS FURTHER ORDERED that Defendant shall consult with his attorney, Mr. Winterbottom, Dr. Sarrazin and Dr. Lea Ann Preston (the clinical psychologist who previously evaluated Defendant for competency) with a view to voluntarily agreeing to treatment with *Geodon*, as proposed by Dr. Sarrazin, with the understanding that he would also be required to cooperate with nursing staff in accepting the oral medication, permitting mouth checks, and submitting to periodic laboratory tests and assessments;

IT IS FURTHER ORDERED that if, within 3 days of his consultation with Dr. Sarrazin and Dr. Preston, Defendant refuses to agree to treatment with *Geodon*, the government is authorized to forcibly medicate Defendant with *Haloperidol*, by injection, as proposed by Dr. Sarrazin;

IT IS FURTHER ORDERED that if Defendant is forcibly medicated and he refuses to voluntarily submit to testing and assessments for the purpose of monitoring side-effects, the


government shall be authorized to forcibly undertake these procedures, as set forth in Dr. Sarrazin's individualized plan;

IT IS FURTHER ORDERED that in light of Defendant's lack of history regarding any significant course of treatment with antipsychotic medications, Defendant shall be closely monitored in accordance with the individualized plan, including but not limited to weight and glucose checks at least once a month and cholesterol testing every three months and, in addition, a psychiatrist shall meet with Defendant by appointment once a week and shall document these visits;

IT IS FURTHER ORDERED that Dr. Sarrazin shall provide the Court with monthly written reports documenting: (1) Defendant's progress towards competency; (2) any negative side effects that Defendant has reported or that have been observed by hospital staff; (3) results of all tests and assessments conducted for the purpose of monitoring side-effects; (4) any adjunctive medication that is being administered to Defendant; and (5) if Defendant's antipsychotic medication has been changed, a full explanation as to why the change was necessary;

IT IS FURTHER ORDERED that pursuant to 18 U.S.C. §3161 (h)(1), the period of delay resulting from Defendant's treatment for the purpose of restoring his competency and any related evaluations and proceedings, is excluded for purposes of the Speedy Trial Act.

Dated this 18th day of December, 2008



MARTHA VALQUEZ
CHIEF UNITED STATES DISTRICT JUDGE

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Richard Winterbottom