

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA)	
)	
)	
v.)	Case No. 1:13cr00046
)	<u>REPORT AND</u>
JEFFREY LEON BANKS,)	<u>RECOMMENDATION</u>
Defendant)	

This matter is before the court on the United States’ Motion For Involuntary Medication And Treatment, (Docket Item No. 37) (“Motion”), to allow the forcible medication of the defendant, Jeffrey Leon Banks, in an attempt to restore him to competency to stand trial in this matter. This case is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

I.

By Indictment returned November 18, 2013, Banks was charged in this court with five counts of threatening to kill or harm the President of the United States, in violation of 18 U.S.C. § 871, and five counts of mailing a threat to injure another, in violation of 18 U.S.C. § 876(c). At the time of the alleged offenses, Banks was an inmate at Keen Mountain Correctional Center, (“Keen Mountain”), in Oakwood serving a 15-year Virginia state court sentence for the second-degree murder of his wife. At his initial appearance in this court, the Government moved for a

psychological evaluation to determine the defendant's competency. Also at this initial appearance, the defendant announced to the court that he was not requesting court-appointed counsel and intended to represent himself on the charges. Based on the Government's representations that Banks had suffered from serious mental health issues in the past, the court took the motions under advisement, set them over for hearing on December 10 and appointed an Assistant Federal Public Defender to represent Banks.

By the December 10 hearing, the court had received and reviewed the defendant's mental health records from Keen Mountain. The records, which were filed with the court under seal, (Docket Item No. 21), showed that the defendant had been treated with antipsychotic medications in the past for a delusional disorder and a psychotic disorder. These records also showed that the defendant had been committed for psychiatric treatment on two prior occasions in an attempt to restore competency for trial. Based on this information, the court ordered the defendant detained for a psychological or psychiatric examination to determine his competency. (Docket Item No. 22.)

Banks was subsequently transported to Metropolitan Correctional Center in New York City, where an evaluation was conducted. According to the report of this evaluation, (Docket Item No. 28), Banks suffered from other specified schizophrenic spectrum and other psychotic disorder/delusional with disorganized thought content. The evaluators opined that, as a result, Banks was not competent. In particular, the evaluators stated that Banks's paranoid delusional thought content and disorganized thought process would interfere with his ability to adequately assist in the defense of his case. These same evaluators also opined that Banks was

not sane at the time of the alleged offenses, in that his mental illness impaired his ability to appreciate the wrongfulness of his conduct. This report also stated:

Given the chronicity of ... Banks'[s] symptoms, it is unlikely he will experience any spontaneous remission or reduction in impairment without appropriate interventions and a period of stabilization.

Upon the completion of this evaluation, the defendant appeared before the undersigned on April 14, 2014, for a competency hearing. Based on the evidence before the court at that time, the undersigned found Banks not competent to stand trial and, pursuant to 18 U.S.C. § 4241(d)(1), ordered that Banks be committed to the custody of the Attorney General to be hospitalized for treatment in a suitable mental health facility to determine whether there was a substantial probability that the defendant would attain the capacity to permit his trial to proceed. (Docket Item No. 32.)

Banks was subsequently transferred to FMC Butner, ("Butner"), for treatment in an effort to restore him to competency. By letter dated November 7, 2014, the Warden of Butner notified the court that Banks's evaluators had opined that Banks needed to be involuntarily treated with psychotropic medications to be restored to competency. The Warden's letter was accompanied by a report of Forensic Evaluation completed on October 27, 2014, and signed by Dr. Bryon Herbel, M.D., Staff Psychiatrist, and Adeirdre Stribling Riley, Ph.D., Staff Psychologist. According to the report, the staff at FMC Butner had determined that, while Banks "demonstrated minimal impairment on factual understanding of the [criminal] proceedings," he presented "substantial impairment in rational understanding of the courtroom proceedings." (Docket Item No. 35 at 10-11.) The evaluators also stated

that “Banks’[s] symptoms of psychosis ... substantially interfere with his ... rational ability to consult with counsel.” (Docket Item No. 35 at 13.)

The evaluators diagnosed Banks with schizophrenia and alcohol use disorder, mild, in sustained remission in a controlled environment. According to the report: “...Banks’[s] most prominent symptoms are grandiose and paranoid delusional ideation, along with some fluctuating levels of low level thought disorganization.” (Docket Item No. 35 at 14.) The report suggested that auditory hallucinations also might be present based on his current and past behaviors. The report also stated that Banks’s “mental health impairments prevent him from having a rational understanding of his case, as he does not appear to have the capacity to weigh evidence in a rational and reality-based [manner]. ... [Banks] appears to lack the capacity to work in a collaborative manner with his defense counsel due to his untreated mental disorder.” (Docket Item No. 35 at 15.)

According to Dr. Herbel, Banks suffers from a mental disease or defect rendering him mentally incompetent to the extent he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. Based on Banks’s history of being restored to competency in 2006 and, again, in 2007 following treatment with antipsychotic medication, Dr. Herbel opined that “a substantial probability exists that ... Banks’[s] competency to stand trial can be restored with appropriate treatment with antipsychotic medicine.” (Docket Item No. 35 at 15.) In particular, the report noted that the fact that Banks had been restored to competency in the past “indicates he has a treatment responsive mental disorder and would likely improve again if he received the appropriate treatment

with antipsychotic medication.” (Docket Item No. 35 at 26.) The report stated that Banks refused to accept this treatment on a voluntary basis. The report also stated:

...[T]he available empirical data indicate[] the majority of incompetent defendants suffering from schizophrenia and related psychotic disorders who refuse the recommended treatment with antipsychotic medication can be restored to competency to stand trial following a period of involuntary treatment....

(Docket Item No. 35 at 19.) Also with regard to forced treatment, the report stated that there is no “strong quantitative evidence that the experience of coercion is negatively or positively associated with psychopathology or general well-being.” (Docket Item No. 35 at 21.)

To restore Banks to competency, the evaluators suggested that he receive a trial of oral antipsychotic medication. If Banks refuses oral medication, or if he fails to cooperate with the procedures to monitor and enforce compliance with oral medication, the evaluators recommended that Banks be treated with long-acting injections of the antipsychotic medications on the Federal Bureau of Prisons formulary -- haloperidol, fluphenazine or risperidone.

The report recognized a number of side effects which may be caused by antipsychotic medications. One of the known side effects of these medications is sedation. The report noted that this effect is usually temporary and could be managed with dosage adjustments. The report further stated that it is more likely that forced treatment with antipsychotic medication would enhance Banks’s cognitive abilities than adversely affect them. The report also noted that neuromuscular side

effects, such as acute dystonia reactions (sustained contraction of various muscle groups), drug-induced parkinsonism, akathisia (an uncomfortable inner sense of restlessness) and tardive dyskinesia (the delayed onset of prolonged contractions of various muscle groups), have been associated with all antipsychotic medications. According to the report, the risks of these neuromuscular side effects are much higher on first-generation antipsychotics, such as haloperidol. Acute dystonic reactions occur in 2 to 10 percent of persons treated with first-generation antipsychotic medications. While the report notes that dystonic reactions can be frightening and painful to the person experiencing them, these reactions can be easily, effectively and quickly treated with anticholinergic medication, such as benztropine. Drug-induced parkinsonism, with muscle rigidity, resting tremor and decreased spontaneous facial expression, can occur in 15 to 50 percent of persons treated with first-generation antipsychotic medications. Drug-induced parkinsonism also is easily treated by reducing the dosage of the antipsychotic medication or adding an anticholinergic medication. Akathisia can occur in 20 to 30 percent of persons treated with first-generation antipsychotic medication. This side effect is treated by reducing the dosage of the antipsychotic medication or adding a beta-blocker such as propranolol or a benzodiazepine such as lorazepam. Tardive dystonia occurs in 1 to 2 percent of persons receiving long-term treatment with first-generation antipsychotic medications. This side effect would be treated by lowering the dosage of antipsychotic medications.

The report also noted that treatment with antipsychotic medications can cause metabolic side effects such as weight gain, diabetes and elevated serum lipids. These side effects can be treated with lifestyle modifications of increased exercise and improved dietary choices or, if necessary, by referral for medical intervention. The

report also noted that Banks does not take any oral medication, so there is no chance of any potential drug interactions.

The report noted that Banks was restored to competency status in 2006 and 2007 at Central State Hospital after he was involuntarily treated with risperidone, an antipsychotic. Based on this history, along with data showing that the majority of individuals with chronic psychotic disorders manifest some degree of clinical improvement in their mental status following adequate treatment with antipsychotic medication, Dr. Herbel opined that the “involuntary treatment of ... Banks with antipsychotic medication will be substantially likely to render him competent to stand trial and substantially unlikely to have side effects that will interfere significantly with his ability to assist counsel in conducting a defense.” (Docket Item No. 35 at 27.)

The evaluators also stated that the involuntary treatment with antipsychotic medications was necessary to restore Banks to competency because alternative, less intrusive treatments are unlikely to restore Banks to competency. The report stated that there is some recent evidence that psychotherapy, in general, and cognitive-behavioral therapy, in particular, is a valuable treatment intervention for persons with schizophrenia and related psychotic disorders, in that it improves their adherence to recommended treatment with antipsychotic medication. The report stated that there is no convincing evidence that patients with chronic schizophrenia or related psychotic disorders respond as well or better to treatment with psychotherapy alone. The report noted that the “effectiveness of antipsychotic medication in treating schizophrenia and related psychotic disorders has been

repeatedly demonstrated in published professional literature for nearly 50 years, and is considered an essential element in the treatment of these conditions.”

The evaluators proposed that, if the court orders Banks involuntarily medicated, the treating psychiatrist, again, would discuss treatment options and attempt to enlist Banks’s cooperation. If Banks would cooperate with oral medication, the recommended medications would include risperidone (Risperdal); olanzapine (Zyprexa); perphenazine (Trilafon); fluphenazine (Prolixin); or haloperidol (Haldol). According to the report, an adequate trial of antipsychotic medication would be at least eight weeks at the therapeutic dosage. If oral medication were administered, Banks would be required to undergo routine blood draws for periodic laboratory tests to confirm compliance and to assist with future dosing adjustments. The evaluators stated that the goal would be to achieve clinical improvement at the lowest effective dosage. If Banks developed intolerable side effects to any one of the medications, his treatment could be switched to another of the medications.

If Banks refuses to accept oral antipsychotic medication, the evaluators recommended that he be treated with long-acting injections of haloperidol decanoate. If restraints were necessary, standard correctional policies would be followed. If Banks became agitated during the process of receiving an injection, he may be given an injection of lorazepam to assist with calming him down so he could safely be released from restraints. If Banks did not suffer any side effects to a test dose, Banks would receive 100 milligrams of haloperidol decanoate the following day. A similar dosage would be repeated in two weeks, with subsequent dose adjustments as clinically indicated. The typical target dosage for adults would be

200 milligrams every four weeks. The evaluators also stated that injections of fluphenazine decanoate or risperidone could be used. The evaluators noted that Banks had tolerated treatment with risperidone injections in the past, but also stated that it would require at least three to four months of continuous treatment at an adequate dosage to achieve a therapeutic effect.

If Banks experienced neuromuscular side effects from treatment with any of these medications, Banks would be offered the lowest effective dosage of an adjunctive medication such as benztropine, propranolol or lorazepam, as necessary, to manage the side effects. If neuromuscular side effects persisted despite adjunctive medication, Banks would be offered treatment with an alternative antipsychotic medication.

According to the report, Banks was able to “function adequately” in the locked mental health unit at Butner for approximately three months “without engaging in behavior which would pose a high risk of being dangerous to himself or others.” (Docket Item No. 35 at 16.)

Based on the evaluators’ report, the Government moved to forcibly medicate Banks. An evidentiary hearing was held before the undersigned on January 15, 2015. At this hearing, the Government stated that it wished to rely on the evaluators’ report filed with the court. Defense counsel submitted additional exhibits into evidence at this hearing, including records regarding Banks’s state court convictions, copies of the letters that the Government alleges are the basis of Banks’s current federal charges, information regarding the drug Cogentin or benztropine mesylate injections and copies of some of Banks’s VDOC mental health records. (Docket Item Nos.

42-1, -2, -3, 43.) The VDOC mental health records submitted by counsel show that Banks has been treated in the past with Risperdal and Haldol, along with Cogentin. These records also show that Banks, while housed at Greensville Correctional Center and Keen Mountain, denied suffering from any side effects of his treatment with antipsychotic medication, other than on one occasion when he complained of constipation and erectile dysfunction. (Docket Item No. 43 at 9.) There are numerous notes contained in these records stating that Banks denied any neuromuscular side effects or any involuntary movements.

The mental health records received earlier from the VDOC show that antipsychotic medications have been used to restore Banks to competency to stand trial on two prior occasions. The records show that Banks was treated at Central State Hospital in Petersburg, Virginia, from September 29, 2006, to November 2, 2006. (Docket Item No. 21 at 99-101.) Upon his admission to Central State Hospital, Banks was diagnosed with the need to rule out a psychotic disorder. Banks was initially treated with 0.5 milligram of Risperdal by mouth daily. When Banks refused to continue taking this medication, a court order was obtained for treatment. The records show that Banks's condition improved on this low dosage and that his treatment team opined that he was restored to competency.

These records also show that Banks was admitted to Central State Hospital again on May 14, 2007, for restoration to competency. (Docket Item No. 21 at 97-98.) It was reported that, after his previous restoration and discharge, he had been sporadically nonadherent to his medication. He was diagnosed with a psychotic disorder. On this admission, Banks was treated with injections of 25 milligrams of

Risperdal Consta given intramuscularly every two weeks. It was noted that Banks's condition was stable at the time of his discharge on September 13, 2007.

Banks was involuntarily admitted to Marion Correctional Treatment Center from Green Rock Correctional Center on November 10, 2009. (Docket Item No. 21 at 75-79.) It was noted that, at the time of his commitment, Banks was having bizarre thoughts and was paranoid. During this admission, Banks complained that the medication given to him at Central State Hospital had made him "vomit." Banks was diagnosed with a psychotic disorder, not otherwise specified.

Banks was discharged from the acute care unit into the residential treatment program at Marion Correctional Treatment Center on April 19, 2010. (Docket Item No. 21 at 80.) On May 12, 2010, it was noted that Banks was diagnosed with a delusional disorder, persecutory type, and an adult antisocial behavior personality disorder. At the time of his discharge into the residential treatment program it was noted that Banks was receiving injections of 12.5 milligrams of Risperdal Consta every two weeks. It was noted that Banks was compliant with his medication from May 12 to October 13, 2010, but the medication he was taking was not listed.

Banks was discharged from the residential treatment program at Marion Correctional Treatment Center some time after November 4, 2010. (Docket Item No. 21 at 64-66.) The Discharge Summary stated that, while in the program, Banks was treated with Risperdal Consta and was compliant. It was noted that Banks had some complaints of knee stiffness after receiving injections, but he refused to take Cogentin. The Discharge Summary noted that Banks would "most likely be switched to the oral preparation of Risperdal."

Banks was received on the Mental Health Unit at Greensville Correctional Center on December 14, 2010. (Docket Item No. 21 at 57-63.) A Psychosocial Assessment completed on March 31, 2011, noted that Banks had a history of persecutory delusions since 1999. It also noted that Banks's delusions and paranoia had been constant since onset. It was noted, "Offender maintains previous delusions and often develops new delusions after he has been residing at any place for an extended period of time." (Docket Item No. 21 at 57.) This assessment noted that Banks had taken antipsychotic medications Risperdal Consta, Risperdal and Haldol in the past, with each being effective for at least some period of time. It was noted that he was currently receiving Haldol and Cogentin. On March 10, 2011, it was noted that Banks was medication compliant "with no verbalized or observed delusions or delusional behaviors." (Docket Item No. 21 at 48.) On April 12, 2011, Banks requested a transfer to Keen Mountain to be placed in protective custody. (Docket Item No. 21 at 44-46.) It was noted that Banks was suffering from delusional disorder, persecutory type, and that he had been compliant taking Haldol and Cogentin for the past 30 days with no apparent physical problems. According to the transfer request, Banks had expressed increased paranoia recently.

On a Mental Health Discharge Summary dated April 12, 2011, it was noted that Banks had been compliant with his antipsychotic medication while at Greensville Correctional Center until his paranoia had increased. After that, Banks refused his medications, but stated he wanted to be compliant with treatment. (Docket Item No. 21 at 42-43.) Banks was switched from Risperdal to Haldol and Cogentin. It was noted that Banks required continued mental health treatment due to his history of developing delusions related to his current situation. According to the summary, "... Banks continues to hold onto his delusions as they accrue from

institution to institution and becomes withdrawn and isolated when delusions become confronted or challenged.” (Docket Item No. 21 at 43.)

The note of Banks’s initial psychiatric evaluation upon his transfer to Keen Mountain stated that Banks was being treated with Haldol and Cogentin and that Banks denied any involuntary movements. (Docket Item No. 21 at 5.) A note dated November 30, 2011, stated that Banks wished to discontinue taking Haldol and Cogentin. (Docket Item No. 21 at 4.) It also stated that Banks blamed these medications as being responsible for his “misbehavior.” On December 13, 2011, the treating psychiatrist agreed to decrease Banks’s medication dosages. (Docket Item No. 21 at 3.) Banks denied any involuntary movement or sexual dysfunction since being on the medication. Medication review notes state that Banks’s medications continued to be reduced through June 12, 2012. A Mental Health Monitoring Report from Keen Mountain dated October 31, 2012, stated that Banks reported no mental health issues since discontinuing his medication in June. Banks denied any mental health issues again on March 1, April 18, June 17, July 8, August 6, August 23, and November 7, 2013.

II.

The United States Supreme Court in *Sell v. United States*, 539 U.S. 166, 180 (2003), held that a defendant who has been found incompetent to stand trial may be involuntarily medicated in an effort to restore competency only in "rare" circumstances. The Court in *Sell* recognized that it previously had held that a defendant has a constitutionally protected liberty interest in avoiding the involuntary administration of antipsychotic drugs. *See* 539 U.S. at 178-79 (citing *Riggins v.*

Nevada, 504 U.S. 127, 134 (1992)). The Court noted that only an "essential" or "overriding" state interest could overcome this liberty interest. *Sell*, 539 U.S. at 178-79 (quoting *Riggins*, 504 U.S. at 135.) The Court held that

the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

Sell, 539 U.S. at 179.

The Court in *Sell* set out four factors that must be established before a court can order that a defendant be involuntarily medicated to restore competency. *See* 539 U.S. at 180-81. First, the court must find that *important* governmental interests are at stake. *See Sell*, 539 U.S. at 180. Second, the court must find that involuntary medication will *significantly further* those important governmental interests, in that the medication must be substantially likely to render the defendant competent and must be substantially unlikely to cause side effects that will interfere significantly with the defendant's ability to assist in his trial defense. *See Sell*, 539 U.S. at 181. Third, the court must find that involuntary medication is *necessary* to further those governmental interests, in that alternative, less intrusive treatments are unlikely to restore competency. *See Sell*, 539 U.S. at 181. Fourth, the court must find that the administration of the medication is medically appropriate. *See Sell*, 539 U.S. at 181. Furthermore, the Government must satisfy the *Sell* factors by clear and convincing evidence. *See United States v. Bush*, 585 F.3d 806, 814 (4th Cir. 2009).

The Court in *Sell* also held that before considering whether the Government should be allowed to involuntarily medicate a defendant to restore competency, the court should consider whether involuntary medication was warranted for another purpose, such as when the defendant poses a danger to himself or others or when medication is necessary to treat a defendant who is gravely ill. *See* 539 U.S. at 181-82. In this case, the Government's own experts opined that Banks does not pose a danger to himself or others while incarcerated, and there is no evidence that Banks is gravely ill. Therefore, I find that, at this time, no other grounds exist to support the involuntary medication of Banks, other than for the sole purpose of establishing competency. That being the case, I must analyze the facts and circumstances of this case to determine whether each of the four factors set forth in *Sell* has been established.

Because the expert psychiatric and psychological evidence before the court is in large part uncontradicted, I first turn my attention to the medical issues, or prongs two through four, of the *Sell* test. The second prong of the *Sell* test requires the court to determine whether involuntary medication will significantly *further* important governmental interests, in that the medication would be substantially likely to render the defendant competent and would be substantially unlikely to cause side effects that will interfere significantly with the defendant's ability to assist in his trial defense. *See Sell*, 539 U.S. at 181. The uncontradicted expert evidence before the court is that the treatment of Banks with antipsychotic medication would be substantially likely to render him competent to stand trial and substantially unlikely to have side effects that would interfere significantly with his ability to assist counsel in conducting a defense. Based on the evidence before the court, the side effect most likely to have any impact on Banks's ability to assist in his defense

would be sedation, and the experts have stated that this side effect would be controlled by administering the lowest effective dosage of the antipsychotic medication.

Under the third prong of the *Sell* test, the court must find that involuntary medication is *necessary* to further important governmental interests, in that alternative, less intrusive treatments are unlikely to restore competency. *See* 539 U.S. at 181. Again, the uncontradicted expert evidence before the court is that there is no alternative, less intrusive treatment available that would likely restore Banks to competency. Banks's counsel has argued that the court should order an attempt to restore Banks to competency through cognitive-behavioral therapy before ordering forced medication. The problem with this argument is that there is no evidence before the court to show that that cognitive-behavioral therapy would likely restore Banks to competency.

The fourth prong of the *Sell* test requires the court to determine whether the administration of the medication is medically appropriate. *See* 539 U.S. at 181. The expert evidence in this case recognizes that the antipsychotic medications likely to be administered to Banks may result in serious side effects, including sedation and metabolic and neuromuscular side effects. The evidence before the court shows that Banks has taken injections of two of these medication, haloperidol decanoate and risperidone, in the past without any complaints of significant side effects. As stated above, if Banks experiences sedation, the experts stated that would be addressed by a decrease to the lowest effective dosage. The experts also have stated that any metabolic changes could be addressed through changes in diet and exercise or through medical management. The experts further have stated that, should Banks

experience neuromuscular side effects, he would be offered the lowest effective dosage of an adjunctive medication such as benztropine, propranolol or lorazepam, as necessary, to manage the side effects. The evidence before the court also shows that Banks has taken benztropine or Cogentin, in the past. It appears from the evidence before the court that Cogentin was administered prophylactically, in that there is no evidence that Banks suffered from any neuromuscular side effects from the antipsychotic medication. Also, there is no evidence that Banks suffered any side effects from the Cogentin. Furthermore, according to the experts, if neuromuscular side effects persisted despite adjunctive medication, Banks would be offered treatment with an alternative antipsychotic medication.

Based on the above, I find that the Government has met its burden, by the clear and convincing standard, that the involuntary medication of Banks would significantly further the governmental interests in prosecuting Banks, in that the medication would be substantially likely to render Banks competent and substantially unlikely to cause side effects that will interfere significantly with Banks's ability to assist in his trial defense; that involuntary medication is necessary to further the governmental interests, in that alternative, less intrusive treatments are unlikely to restore Banks to competency; and the forced administration of antipsychotic medication to Banks is medically appropriate.

That being found, I turn my attention to the more difficult issue of whether the Government has met its burden under the first prong of the *Sell* test. The Supreme Court in *Sell* recognized that the “Government's interest in bringing to trial an individual accused of a *serious* crime is important ... whether the offense is a serious crime against the person or a serious crime against property.” 539 U.S. at 180

(emphasis added). In this case, Banks is charged with multiple counts of mailing threats to kill the President, in violation of 18 U.S.C. §§ 871, 876(c). The maximum punishment for each count against Banks is five years' imprisonment. In *United States v. Evans*, 404 F.3d 227, 238 (4th Cir. 2005), the Fourth Circuit held that threatening to murder a federal judge, in violation of 18 U.S.C. § 115(a)(1)(B), a felony whose maximum term of imprisonment is 10 years, was considered a serious crime under the *Sell* test. In a footnote, however, the Fourth Circuit in *Evans* also stated: "To resolve the case before us, it is enough to say that the Government has an important interest based on the felony charge alone[.]" thus implying that any felony charge would be sufficiently serious under *Sell*. 404 F.3d 238 n.8. Therefore, I find that Banks is charged with a serious crime.

This finding, in and of itself, however, does not necessitate a finding that an important governmental interest is at stake. The Court in *Sell* listed factors other than the seriousness of the offense for a court to consider in determining if an important government interest was a stake. In fact, the Court recognized that "[s]pecial circumstances" might lessen the importance of the government's interest in prosecution. *Sell*, 539 U.S. at 180. In particular, the Court noted that the potential for future confinement would argue against the need for prosecution. *See Sell*, 539 U.S. at 180. More specifically, the Court recognized that a defendant's refusal to take medication voluntarily could lead to a lengthy confinement in a mental health institution, thereby diminishing the risks of releasing without punishment a person who has committed a serious crime. *See Sell*, 539 U.S. at 180. The Court also noted that the government's interest in prosecution would be lessened if a defendant already had been confined for a significant amount of time for which the defendant would receive credit toward any sentence ultimately imposed. *See Sell*, 539 U.S. at

180. Another district court also has suggested that the court may consider whether a delay in the prosecution of a defendant would prejudice the government, in that the memories of its witnesses were likely to fade or that its witnesses might become unavailable. *See United States v. Miller*, 292 F. Supp. 2d 163, 165, (D. Me. 2003). In this case, the Government has argued that it has an important governmental interest in protecting public safety, in addition to its interest in bringing an accused to trial on a serious crime.

To date, Banks has been confined pretrial for more than one year on charges that carry a maximum sentence of five years' imprisonment. Nonetheless, Banks faces 10 separate counts. Therefore, he faces a maximum term of imprisonment of up to 50 years. The court has no way of knowing at this point what range the Sentencing Guidelines would prescribe, if Banks is convicted of the charges he faces. Neither the Government, nor Banks, has offered any evidence from which the court could calculate Banks's offense level or criminal history category under the Sentencing Guidelines. Nonetheless, it does not appear too much of a stretch to assume that a person previously convicted of murder may be sentenced at the higher end of the Guidelines range or, perhaps, even outside of and above the Guidelines range, if convicted on charges of threatening to take the life of another. Thus, I find that this fact does not lessen the Government's interests at stake.

On the other hand, it does not appear that a delay in the prosecution of Banks would prejudice the Government's ability to proceed in the future. The threats which are the bases for the charges against Banks were written down on paper and mailed. (Docket Item No. 42-2.) Thus, the evidence against Banks is primarily documentary and does not depend on witnesses whose memories are likely to fade or who may

become unavailable. Thus, I find that this fact neither strengthens nor lessens the governmental interests at issue.

There are, however, four separate facts that do lessen the Government's interest in restoring Banks to competency to prosecute him in this case. First, Banks's release date on his murder conviction is not until July 30, 2021. (Docket Item No. 42-1.) Therefore, he will not be released from custody until this date, regardless of whether he is restored to competency or not. Second, based on Banks's criminal history, it appears likely that, even if Banks were not restored to competency, the Government would move to hospitalize Banks indefinitely, arguing that his release would create a substantial risk of bodily injury to another under 18 U.S.C. § 4246 if released. Third, and perhaps the most damning fact against the Government's position, is that it appears unlikely that the prosecution would end in a conviction, in that the original psychological evaluation conducted on Banks found that he was not sane at the time of the offense. Were Banks restored to competency and, then, found not guilty by reason of insanity, he would be committed pursuant to 18 U.S.C. § 4243 until such time as he proved that his release would not create a substantial risk of bodily injury to another person, a task that likely would be difficult for a person who has killed in the past and who, by refusing antipsychotic medication, likely would remain delusional. Fourth, should the defendant ever be released from custody, his prior involuntary commitments, as well as his murder conviction, prevent him from legally acquiring or possessing a firearm.

Based on these factors, I find that the special circumstances of this case lessen the Government's interests in pursuing the prosecution of Banks on these charges. That being the case, the court next must determine whether the Government's

interests remain great enough to overcome the defendant's constitutionally protected liberty interest in avoiding the involuntary administration of antipsychotic drugs. Such a decision is a difficult one, as is illustrated by the Sixth Circuit's opinion in *United States v. Grigsby*, 712 F.3d 964, 976 (6th Cir. 2013):

Each involuntary medication case presents a court with the challenging task of balancing the defendant's fundamental constitutional right to liberty against the government's important interest in prosecution. A fact-intensive inquiry into the circumstances of each defendant is necessary to determine where to strike that balance. That inquiry entails recognition of the difficulties inherent in dealing with mentally disabled defendants and the problems likely to be encountered when the balance favors medication – and when it does not. It cannot be ignored that when either side wins its position, that success is at best a mixed blessing. For a defendant, success in avoiding forced medication means he does not receive potentially harmful – but also potentially beneficial – medication and the cost of that avoidance may be lengthy or even lifetime involuntary commitment to an institution for the mentally ill. For the [G]overnment, obtaining medication by force does not guarantee: return to competency for trial; or if competency is obtained, that prosecution will be successful; or if prosecution is successful, that post-incarceration problems will not result in risks to society that civil commitment might have avoided. It is not an exaggeration to suggest that there is no adequate solution to the difficulties presented by these cases.

In determining where to strike the balance in the competing interests in this case, the court is mindful of the Supreme Court's admonitions that the instances in which the involuntary administration of medication solely to restore competency for trial should be "rare," *see Sell*, 539 U.S. at 180, and may be ordered only when the individual's liberty interest is outweighed by an "essential" or "overriding" governmental interest, *see Riggins*, 504 U.S. at 134, 135. When viewing the facts

of this case against these standards, I find that the special circumstances here undermine the Government's interests to the point that they do not outweigh Banks's constitutionally protected liberty interest.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. The Government has met its burden, by the clear and convincing standard, that the involuntary medication of Banks would significantly further the governmental interests in prosecuting Banks, in that the medication would be substantially likely to render Banks competent and substantially unlikely to cause side effects that will interfere significantly with Banks's ability to assist in his trial defense;
2. The Government has met its burden, by the clear and convincing standard, that involuntary medication is necessary to further the governmental interests, in that alternative, less intrusive treatments are unlikely to restore Banks to competency;
3. The Government has met its burden, by the clear and convincing standard, that the forced administration of antipsychotic medication to Banks is medically appropriate;
4. Banks is charged with a serious crime;
5. The Government has important governmental interests at stake in protecting public safety and in prosecuting a person accused of a serious crime; and

6. The special circumstances here undermine the government's interests to the point that they do not outweigh Banks's constitutionally protected liberty interest against forcible medication.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny the Motion.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(C) (West 2006 & Supp. 2014):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, United States District Judge.

The Clerk is directed to send certified copies of this Report and

Recommendation to all counsel of record at this time.

DATED: March 3, 2015.

/s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE