

IN THE UNITED STATES DISTRICT COURT FOR THE
 EASTERN DISTRICT OF VIRGINIA
 NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA)	
)	
v.)	CRIMINAL NO. 4:11CR112
)	
KEITH BRENT DUNCAN)	

GOVERNMENT’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS AND MOTION FOR DANGEROUSNESS ASSESSMENT PURSUANT TO 18 U.S.C.§4246

Comes now the United States, by and through its attorney, Dee Mullarkey Sterling, Assistant United States Attorney for the Eastern District of Virginia, Newport News Division, on opposition to defendant’s motion to dismiss the indictment, and moves the court to deny the motion and to grant the government’s motion to return the defendant to FMC Butner for a dangerousness assessment pursuant to 18 U.S.C.§4246.

FACTUAL AND PROCEDURAL HISTORY

Defendant is charged by criminal indictment with possession of a firearm in violation of a protective order, 18 U.S.C.§922(g)(8), and was arrested on this charge on February 22, 2012. On March 19, 2012, Magistrate Judge Douglas E. Miller ordered the defendant to undergo a psychiatric evaluation to determine whether he was suffering from a mental disease or defect rendering him incompetent to stand trial. On June 11, 2012, this court found that the defendant was not competent to stand trial, adopting the findings of a report filed by the Federal Bureau of Prisons, Metropolitan Correctional Center, wherein the defendant was diagnosed with Bipolar I Disorder, Severe with Psychotic Features, and that this mental illness impaired the defendant’s ability to understand the legal proceedings against him and to assist his counsel at trial. Pursuant to 18

U.S.C. §4241(d), the court ordered the defendant to be placed in the custody of the Attorney General for further evaluation to determine the probability that defendant could be restored to competency.

On Sept. 17, 2012, the psychiatric staff at FMC Butner, North Carolina, filed a report with the court where in they diagnosed the defendant with Schizoaffective Disorder, Bipolar Type. They noted that the defendant refused to take medication for this condition and opined that the defendant would have to be involuntarily medicated in order for his competence to stand trial to be restored. The government filed a motion to involuntarily medicate the defendant based upon the findings in the Butner report. On Dec. 12, 2012, the Butner staff filed a treatment plan or the defendant again recommending involuntarily medicating him.

A hearing on the government's motion was held on February 4, 2013. However, because the defendant agreed to voluntarily submit to medication, he was returned to Butner for this purpose, and the court did not rule on the government's motion. The defendant failed to comply with the medical treatment plan at Butner, and the parties returned to court on May 21, 2013 for argument on the government's motion to involuntarily medicate. By order dated July 22, 2013, the court denied the government's motion and directed the government to file a motion for further proceedings within 45 days. On August 15, 2013, counsel for the defendant filed a motion to dismiss the indictment. The government now responds to this motion, respectfully requesting that it be denied, and further moves the court for an order directing that the defendant be returned to Butner for further proceedings pursuant to 18 U.S.C. §4246.

ARGUMENT

In support of its motion, counsel for defendant argues that the indictment charging the defendant with illegal possession of a firearm should be dismissed because the defendant is currently incompetent to stand trial. The government agrees that an incompetent defendant cannot

be tried for a criminal offense. However, granting the defendant's motion would contravene the clear intent of Congress of enacting the statutory scheme of 18 U.S.C. §§4241-4248 for handling criminal offenders suffering from a mental disease or defect, and should therefore be denied.

In accordance with statutory requirements, counsel for the defendant initially made a motion pursuant to §4241(a) for an evaluation to determine the mental competence of the defendant. Pursuant to §4241(d), this court found that the defendant was suffering from a mental disease or defect that rendered him incompetent to stand trial, and remanded the defendant to the custody of the Attorney General to "determine whether there is a substantial probability in the foreseeable future that he will attain the capacity to permit the proceeding to go forward." The psychiatric staff at FMC Butner determined that there was not a substantial probability that defendant's competence could be restored without medication, which the defendant refused to take, and the court has denied the government's motion to involuntarily medicate the defendant. Because the defendant remains incompetent and it is not substantially probable in the foreseeable future that he will obtain the capacity to permit the proceedings to go forward, §4241(d) states that the defendant is therefore subject to 18 U.S.C. §4246. 18 U.S.C. §4246(a) provides that the defendant should be returned to Butner for a certification by the director of the facility as to whether the defendant "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another." The statute provides for the certificate to be filed with the court, and a hearing to be subsequently conducted by the court to determine whether, based upon the dangerousness assessment, the defendant should be turned over to the state for "custody, care and treatment" or released from custody.

The statutory scheme makes clear that a federal medical center treating an incompetent

defendant is to have an opportunity to re-evaluate the defendant for potential commitment proceedings once it has been determined that the defendant's mental condition prohibits proceeding to trial. United States v. Ecker, 78 F.3d 726, 728 n.1 (1st Cir. 1996); United States v. Ohnick, 803 F.2d 1485, 1486 (9th Cir. 1986); United States v. Rivera-Morales, 365 F.Supp.2d 1139, 1142 (S.D.Cal. 2005); United States v. Trillo-Cerda, 244 F.Supp.2d 1065, 1067 (S.D. Cal. 2002). As the court in Trillo-Cerda stated:

Underlying §§4241-4248 “is the concept of some protection to society as well as the preservation of the rights of an accused person.” United States v. Barnes, 175 F.Supp 60, 65 (S.D.Cal. 1959); see also, United States v. Sahhar, 56 F.2d 1026 (9th Cir. 1995) (nothing that §4246 implicates “important federal concerns of protecting society from dangerous criminal defendants and controlling and treating dangerous persons within the federal criminal justice system who are incompetent to stand trial.”). It would undermine that concept to allow the release of defendant into society without a dangerousness determination being made as contemplated by the statute...

Id. at 1068.

In United States v. Ecker, 78 F.3d 726 (1st Cir, 1996), the court ruled that a defendant committed to the custody of the Attorney General for hospitalization under 18 U.S.C.§4246 was not entitled to a dismissal of the indictment charging him as a felon in possession. The court found that neither §4241 or §4246 addressed what happened to a pending indictment when a defendant is determined under §4241 to be incompetent to stand trial and subject to indefinite civil commitment under §4246, and opined that “The statutory silence is not surprising. Congress, we have little doubt, intended to leave the decision about the disposition of pending charges to the case by case discretion of prosecutors.” Id. at 728. Accord, Greenwood v. United States, 350 U.S. 366. 76 S.Ct. 410, 100 L.Ed. 492 (1956) (holding that the “indictment persists” even after the defendant has been found unlikely to recover competency and has been committed as dangerous).

If the defendant in the present case is civilly committed pursuant to §4246, he could decide

to begin taking prescribed medications, become competent, and be able to appear in court to answer to the charges against him. On the other hand, if the defendant is not found to meet the criteria for commitment under §4246, the government would have a substantially lessened interest in maintaining the charges in the indictment. See, United States v. Baker, 2010 WL 174222 (W.D. Ark.) (when certificate of dangerousness not issued, government to show cause why defendant should not be released and charges against him be dismissed). In either even, the government should be permitted to make an informed decision in exercising its discretion with regard to the indictment after the evaluation under §4246 has been conducted in accordance with statutory requirements.

For the foregoing reasons, the government respectfully requests that the defendant's motion to dismiss be denied and that the defendant be remanded to Butner for an assessment of dangerousness pursuant to 18 U.S.C. §4246.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I do hereby certify that on August 21, 2013, I electrically filed the foregoing Response with the Clerk of Court using the CM/ECF system, with notification of such filing to:

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