

Lawyers battle over medicating man for sane trial

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SPRINGDALE, Ark. (AP) — A Springdale man diagnosed with paranoid schizophrenia has spent more than three years in federal custody while his attorneys fight the government's effort to forcibly medicate him.

David Eugene Nicklas, 57, is charged with making interstate communications involving threats against persons in violation of U.S. Code Title18, Section 875(c), court records show.

A Nov. 19, 2008, indictment states that Nicklas faxed a threatening letter from his home to the U.S. Department of Justice in September 2008. His history of harassing communications dates back at least 10 years and includes two convictions in Springdale District Court.

In the federal case at hand, the U.S. Attorney's Office in Fayetteville wants to restore Nicklas to competency through medication so he can assist in his defense during trial. Federal public defenders oppose forced medication because the case likely will end with a hearing to determine whether Nicklas should be committed to a facility for psychiatric treatment.

Assistant federal defender Angela Pitts of Fayetteville said that even if medication restores Nicklas to competency by legal standards, there's no guarantee he'll remain that way long enough to stand trial in the case.

"The question is would he remain competent while we prepare for trial," Pitts said. "If he doesn't, (the debate over forced medication would) start over."

Pitts said both sides in the case agree that Nicklas is mentally ill and was so at the time of the crime.

"One of the unique things about this case is it's the government's experts who have found him to be incompetent or insane at the time of offense," Pitts said. "It's not a battle of experts, and our expert is saying he was insane at the time of the offense."

The case highlights the dilemma of how to best deal with the mentally ill once they land in the criminal justice system, said Dr. Brian Rush Simpson, section chief of forensic services at the Arkansas State Hospital.

"I think untreated mental illness is one of those areas where the needs of the state and liberal needs of medicine start banging up against each other," Simpson said.

Cases such as Nicklas' force attorneys to base decisions on more than just the law, Simpson said.



"It's a conflict that runs through the veins of American paternalism - the need for the state to take care of citizens balances out the basic Libertarian yearnings of America to be left alone as long as we're not hurting each other," he said.

"Who's to say what's better for a person. I don't know."

On Oct. 1, 2008, agents at the FBI's Fayetteville field office interviewed Nicklas about threatening letters he faxed to various federal agencies that day warning of nuclear devices hidden in 14 major cities, court records show.

Nicklas admitted to sending the faxes, but told agents "he was psychic and only reported what his 'visions' told him," court records show.

Through the course of the investigation, agents connected Nicklas to the September 2008 letter faxed to the Department of Justice inspector general in Washington, D.C., which read:

"I understand the FBI is under attack nationwide. Agents are being killed in a number of cities and a major task force in (sic) trying to figure out why.

"Remember what I told you last week. Tom Duvall, Gambino crime boss gave you a message. For each day I do not receive the deed to my property which you are illegally holding, an FBI agent will die. The deadline is noon of each day.

"The FBI satellite office in Fayetteville, AR has the deed."

At the time, Nicklas was on probation for a 2007 misdemeanor harassment conviction in Springdale, City Attorney Jeff Harper said. Nicklas mailed a letter to a person he wrongly thought was an FBI agent. The letter threatened the man's life if he failed to sign the deed to his house over to Nicklas, Harper said. Nicklas was convicted and given a six-month suspended sentence.

In 2004, Nicklas was convicted in Springdale court of communicating a false alarm, a misdemeanor, and sentenced to one year in jail.

The FBI obtained a federal arrest warrant for Nicklas on Oct. 27, 2008, over the letter sent to the Department of Justice a month earlier.

Nicklas was arrested Oct. 27, 2008, and has remained in federal custody since.

In February 2009, Robert Johnson, a forensic psychologist with Federal Bureau of Prisons, diagnosed Nicklas with paranoid schizophrenia, after an exam requested by the government.

Johnson found that Nicklas was legally insane at the time of crime but nonetheless was fit to stand trial, according to court records.

The court ordered Nicklas to undergo a supplementary competency test in March 2009 at the request of the government and defense attorneys, who were concerned he was no longer fit to stand trial. The request came after Nicklas asked his attorney at the time to withdraw from the case because he learned

through his "psychic powers," that mobsters had paid his attorney \$10,000 to "throw the case," records show.

After a second examination, Johnson found Nicklas was no longer fit to stand trial.

Nicklas was transferred to the Federal Medical Center in Butner, N.C., in July 2009, where he was evaluated by staff psychiatrist Ralph Newman, whom the court charged with developing a plan to restore Nicklas to competency. Newman recommended Nicklas be treated with anti-psychotic medication, given by force if necessary.

In a Nov. 18, 2009, order, U.S. District Judge Jimm L. Hendren approved the recommendation of a magistrate judge and ordered that Nicklas be forcibly medicated. Hendren's approval gave doctors four months to restore Nicklas' competency.

Nicklas' attorneys appealed, but the order was affirmed by the 8th Circuit Court of Appeals on Jan. 18. The defense again appealed, but the U.S. Supreme Court in October declined to hear the case.

In his ruling, Hendren referred to a 2009 medication plan created by Newman. The plan was reviewed and again recommended by Newman on Nov. 9, 2011.

In the plan, Newman wrote he preferred treating Nicklas with the medication Abilify. Newman said if Nicklas refused to take the medication orally, then an injection of Haldol Decanoate or Prolixin Decanoate would be used, court records show.

Chris Burke, a Federal Bureau of Prisons spokesman, declined to specifically discuss Nicklas' case with the Arkansas Democrat-Gazette, but said that generally medication is administered orally to prison inmates. He said that each year only a small number of federal inmates are forcibly medicated in order to restore them to competency for trial.

Simpson of the Arkansas State Hospital told the Arkansas Democrat-Gazette (<http://is.gd/ikCmDK>) that often a patient who is ordered to take medication will acquiesce once presented with a court order.

"It's not ever a pleasant experience to potentially hold someone and give them an injection against their will," Simpson said. "It goes against the basic principles of humanism in you."

Simpson said that fewer than 25 percent of patients at the State Hospital have to be forcibly medicated, most of those are for psychiatric emergencies.

"Be it ... because they now have medicine in them that is decreasing their symptoms, or sedating them, is making them more cooperative, or they just decided it's not worth fighting over and take pills," Simpson said. "If I have to forcibly medicate, it's rare that it's more than once or twice."

While states have different legal requirements for forced medication, federal law states it typically justified when the issue is competency in a criminal case.

Pitts said the methods of forcible medication vary but often involve a group of medical personnel "in full battle gear" restraining an inmate. The inmate is then either injected or fed a pill via a tube "put" down

his throat, she said.

Pitts said that neither Nicklas nor federal medical personnel have confirmed to her that forced medication has begun, so she can only assume it began shortly after the court's Nov. 14 order.

Pitts said she has received e-mail from Nicklas since the order, but she cannot tell that his mental state has improved.

Brian Gallini, an assistant professor at the University of Arkansas School of Law in Fayetteville, said the U.S. Supreme Court has addressed the issue of forced medication in order to restore a defendant's competency.

A 2003 ruling in *Sell v. United States*, 539 U.S. 166., establishes criteria that must be met before forcibly medicating a criminal defendant for the purpose of standing trial, he said.

"There are very limited circumstances to forcibly medicate, but the fight is (over) what the factors actually mean," Gallini said.

In her 2009 recommendation, U.S. Magistrate Erin Setser found that the government had met four criteria necessary to forcibly medicate Nicklas.

Setser found that:

there is an important government interest in bringing Nicklas to trial because he is charged with a serious crime;

- That forced medication likely would render him competent with limited possible side effects;
- That less intrusive means of treatment would be less likely to achieve substantially the same results;
- and that the administration of the medication is medically appropriate.

Gallini said that if doctors can't restore Nicklas to competency by the four-month deadline in March, the government may try to prove Nicklas poses a danger and have him civilly committed to a treatment facility.

The argument would have to be made under a different section of law, which carries a higher burden of proof than if Nicklas is found innocent by reason of insanity, but it would be a lower burden than proving guilt at trial, he said.

"It sounds to me (like) the feds are going to do everything (they) can," Gallini said. "This is how serious they take threats in a post-9/11 world, and they will do everything they can to keep this guy away from a fax machine."

Conner Eldridge, U.S. attorney for the Western District of Arkansas in Fort Smith, said if Nicklas is restored to competency, they will proceed to trial.

"I can't comment on those future proceedings, until we finish this process," Eldridge said.

An irony of Nicklas' case is that even if he is convicted, the maximum prison sentence he likely would receive is less than the three years he's already spent behind bars, defender Pitts said.

Although the charge carries a maximum sentence of five years in prison, sentencing guidelines are determined by weighing factors such as criminal history and cooperation.

Nicklas likely would fall in a sentencing range of 12-18 months, in which case "he's done triple what the guideline range would have been," Pitts said.

Pitts said if Nicklas remains incompetent to stand trial, the government will have to decide whether to dismiss the case and seek a civil commitment or to seek another round of treatment.

Pitts said before Nicklas could be committed, the government would have to prove he is a danger to himself or others at a special hearing.

Nicklas still could be committed even if the case goes to trial and he's found innocent by reason of insanity, Pitts said. She said if Nicklas were found innocent by reason of insanity, a "dangerousness" hearing would be held, but the burden would be on him to prove he's not a danger to anyone.

The potential for a civil commitment was a source of concern for one of the three appellate judges who heard Nicklas' case.

U.S. Circuit Judge Michael J. Melloy of Cedar Rapids, Iowa, wrote that he concurred with Hendren's ruling, except with respect to Nicklas' mental state at the time of offense, which precludes the government's interest in forced medication.

"Despite some variability between the burden of proof in the two statutes, Nicklas essentially would face the same result: a civil-commitment hearing in which his release would hinge on the outcome of a dangerousness assessment," Melloy wrote in the opinion.

For the time being, U.S. attorney Eldridge said prosecutors are applying the law to the case and looking to the medical experts to render a sound decision.

"This is serious to us," Eldridge said, "to make the best decision and just decision that is appropriate." To contact this reporter:

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