

his purported nondangerousness made his prosecution a lesser governmental interest. Yet the court of appeals, even while recognizing his outpatient commitment as evidence that mental health clinicians had not deemed him to be a significant risk to the public, ultimately decided that, “the necessary implications of the indictment in this case preclude a finding that Dillon is harmless” (*Dillon*, p 297). As forensic psychiatrists, we are quite familiar with performing risk assessments to determine an individual’s risk of self-harm or violence, but for the purpose of a *Sell* hearing, how is dangerousness determined? Is it the function of a mental health evaluation and risk assessment or merely based on the designation of the individual’s present charges? The court’s ruling in *Dillon* seems to indicate it is the latter, as Mr. Dillon was deemed to be a low risk by mental health providers, yet still dangerous by the court as a function of his charges. This possibility subsequently raises questions as to whether the opposite would be true: could an individual deemed psychiatrically to be at high risk for violence (and perhaps requiring involuntary medication under *Harper*) be found to be nondangerous in a *Sell* hearing if his charges were nonviolent? Clarifying how the court will define dangerousness for the purpose of *Sell* seems prudent, given these potential problems.

Another question raised by *Dillon* is what consideration, if any, should outpatient civil commitment be given as a special circumstance under the first *Sell* factor? *Sell*, by essentially equating inpatient psychiatric commitment to a form of social control, outlines that lengthy confinement in an institution would constitute such a special circumstance, as it would “diminish the risks of freeing without punishment one who has committed a serious crime” (*Sell*, p 180). Outpatient commitment, while not equivalent to confinement in an institution, does provide a degree of oversight and infringement on an individual’s civil liberties, as well as the opportunity to initiate psychotropic medications. Thus, it may warrant consideration as a special circumstance under *Sell*, though certainly less so than inpatient confinement and perhaps only in cases where there is already some question as to the government’s important interest in prosecuting the defendant.

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Sentencing Adjustment Following an Unsuccessful Insanity Defense

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Downward Adjustment in Sentence Is Not Granted for Confessing to a Crime Before Raising an Insanity Defense

In *United States v. Herriman*, 739 F.3d 1250 (10th Cir. 2014), the Court of Appeals for the Tenth Circuit affirmed a lower court holding that Daniel Herriman was not eligible for a sentence reduction after asserting a failed insanity defense. This case brings attention to the precarious position insanity defendants can find themselves in when not claiming innocence but not admitting guilt.

Facts of the Case

On August 10, 2011, Mr. Herriman planted a bomb near a gas pipeline in Okemah, Oklahoma. Without prompting, he later contacted the police and reported his involvement. He provided police with specific information relating to the bomb’s components and manufacture. The government charged him with attempting to destroy or damage property by means of an explosive and with illegally making a destructive device.

Mr. Herriman had an extensive history of psychiatric illness and treatment that reached back to his youth. He was raised within a complicated family environment with a significant family history of mental illness. He experienced symptoms related to trauma, psychosis, and mood instability. During certain periods of his life, he required psychiatric hospitalization. Around the time of the offense, he was taking antipsychotic medication prescribed by a psychiatrist in an outpatient setting.

Mr. Herriman was reportedly experiencing worsening social and emotional stressors leading up to the period when he planted the bomb. The anniversary of his mother’s death by suicide was approaching and

he had been having intensifying psychotic hallucinations of menacing figures threatening to turn him over to his abusers from childhood.

A competency evaluation was ordered during the preliminary hearings due to concerns about Mr. Herriman's ability to understand his legal proceedings and to participate in his defense. At the subsequent hearing, he was deemed to be competent to face his charges. Despite previously taking responsibility for planting the bomb, he proceeded to trial, asserting an insanity defense. It was the defense's position that due to his psychotic thinking, he was unable to understand and differentiate the wrongfulness of his behavior.

During the trial, the government presented evidence that Mr. Herriman had engaged in manufacturing and planting the bomb. The defense did little to contest these assertions. It acknowledged his role in contacting the authorities and admitting his involvement in the offense. The defense, instead, detailed Mr. Herriman's extensive history of psychiatric disturbance and treatment.

The government and the defense factually disagreed about Mr. Herriman's mental state and its effects on him at the time of the offense. The government argued that he was not influenced by psychotic thinking during the commission of the offense. They asserted that he understood the nature of his actions as demonstrated by his carefully crafting and placing the explosive near the gas pipeline. The government also argued that he understood the wrongfulness of his act by detailing his involvement to police soon after planting the bomb. The defense countered that he had experienced command hallucinations ordering him to manufacture and plant the bomb. The defense contended that his delusional mental state undermined his ability to understand the nature and wrongfulness of his actions. The jury, however, agreed with the government's interpretation of the facts.

Mr. Herriman acknowledged that he confessed to the offense but simultaneously contended that he could not be held responsible due to mental illness. His insanity defense was rejected by the jury, and he was convicted of the charges against him.

Mr. Herriman requested a downward adjustment in his sentence. The defense argued that he was eligible for downward departure because he initially accepted responsibility by contacting the police after planting the bomb, relieving the government of expending the effort to investigate the crime. The presentence investigation

report, however, maintained that he did not accept responsibility for the crime, because he asserted innocence through an insanity defense. The defense posited that he was being held to an impossible standard, as he could not plead guilty when his psychiatric disturbance cast doubt regarding his intent.

Mr. Herriman's objection was overruled by the trial court, and he was sentenced to a prison term of 63 months. He appealed.

Ruling and Reasoning

The court of appeals clarified that

in rare situations, a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct) [*Herriman*, pp 1255–6].

Mr. Herriman contended that his case was one of these rare situations. The appeals court disagreed.

The court acknowledged that it had previously upheld a trial court's decision to impose a lesser sentence in an acceptance-of-responsibility case that was taken to trial (*United States v. Gauvin*, 173 F.3d 798 (10th Cir. 1999)). In that case, Mr. Gauvin had become assaultive while intoxicated. He admitted to the assaultive act but challenged whether his "state of mind met the legal criteria for intent" (*Herriman*, p 1256). The appeals court differentiated Mr. Gauvin's case from Mr. Herriman's in that Mr. Herriman challenged "the factual element of intent" (*Herriman*, p 1257) because the matter was contested by both sides during the trial.

Discussion

A successful insanity defense demonstrates that a defendant, due to mental impairment during the alleged crime, could not appreciate the nature or wrongfulness of his act. Closely related is the principle of *mens rea*, the guilty mind, in which through reasonable doubt, a defendant demonstrates that he did not possess the intent or knowledge of the act that resulted in the offense. The insanity defense and *mens rea* represented critical lenses through which the government and the defense saw factual disagreement during *Herriman*. The lack of legal recourse that many mentally ill individuals have as they try to seek legal remedy for their accused crimes casts a wider scope on Mr. Herriman's particular legal bind.

Contrary to public perception, the insanity defense is rarely utilized and is rarely successful (Circinione C, Steadman HJ, McGreevy MS *et al*: Rates of insanity acquittals. . . . *J Am Acad Psychiatry Law* 23:399–409, 1995). Mentally ill offenders have few available options for finding a successful resolution for their alleged crimes and for diversion into treatment instead of lengthy prison sentences (Mentally Ill Offenders in the Criminal Justice System. . . . Washington DC: The Sentencing Project, 2002). Mr. Herriman found himself in an increasing group of people in the United States who paradoxically have fewer legal remedies as a result of mental illness.

Given, his circumstances, Mr. Herriman's legal options were particularly challenging as he approached sentencing. His mental illness and his right to present an affirmative defense obstructed his access to sentence reduction in a way that does not occur for defendants who do not have a serious mental illness. The defense articulated that Mr. Herriman's active psychiatric disturbance during the accused crime and his confession to the police shortly after called into question his sanity. The defense also viewed it inappropriate to permit him to plead guilty given their impressions of his psychiatric state and irrational behavior. The government would not recognize his attempts at cooperation through his confession because he took his case to trial. His counsel believed that an insanity defense represented Mr. Herriman's best opportunity for legal recourse. Given its low likelihood for success, this particular legal defense could not have held out much optimism for him.

The government did not present other opportunities for Mr. Herriman to seek legal relief through mental health diversion. His mental illness appeared to situate him unfairly in a tight legal bind: either pursue what appeared to be a viable insanity defense and hope for treatment rather than punishment or plead guilty despite counsel's assessment of his lack of guilt due to psychiatric impairment and hope to be imprisoned for a shorter period of time because of his cooperation in doing so. The act of trying to accept responsibility and concurrently assert an insanity defense may not seem to mental health professionals as inconsistent as argued by the government and affirmed by the court. Had a prosecution expert agreed with the defense's position, for example,

there may have been no factual contest in court and the case would have resembled *Gauwin* more clearly, but the government did not retain an expert to conduct such an evaluation. One could just as easily argue, therefore, that it was the government's decision to take the case to trial that blocked Mr. Herriman from obtaining a downward departure.

Requesting a downward adjustment in sentence following his failed insanity defense may have represented Mr. Herriman's most reasonable remaining legal option. It was denied because of the adversarial process in deciding legal insanity, despite his acknowledgment of the criminal act. The rules about downward departure were clearly not designed with insanity defense situations in mind. Defendants experiencing serious mental illness at the time of their crimes thus seem to be disadvantaged relative to defendants who do not, when both defense and prosecution acknowledge the facts of the criminal act.

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Retrospective Assessment of Testamentary Capacity: A Gray Zone

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Review of Trial Court's Decision Regarding Testatrix's Second Will and Grounds for Testamentary Incapacity and Undue Influence

In *Estate of Nalaschi*, 90 A.3d 8 (Pa. Super. Ct. 2014), the Superior Court of Pennsylvania affirmed the trial court's decision to allow probate of the decedent's second will. While conceding that the beneficiary under the second will would receive substantial benefit, the court held that the testator had testamentary capacity when he executed his second