

exhibiting symptoms of mental illness to the degree that safety is threatened, and may also help prevent unnecessary or unlawful detention and injury.

Initiating Federal Civil Commitment Proceedings Following Competency Evaluation

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Determination of Dangerousness for Civil Commitment Proceeding Does Not Need to Be Filed During the Time Period Allotted for Competency Evaluation

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Key words: dangerousness; civil commitment; competency evaluation

In *Sealed v. Sealed*, 802 Fed. Appx. 138 (5th Cir. 2020), the U.S. Court of Appeals for the Fifth Circuit in an unpublished opinion ruled that a certificate of dangerousness to initiate civil commitment procedures under federal statute 18 U.S.C. § 4246 (1997) need not be filed during the time period established in 18 U.S.C. § 4241 (2006). The provisions of § 4241 establish procedures for determination of mental competence and provide that if a defendant is found mentally incompetent, the court shall commit him to the Attorney General for hospitalization. If the defendant is unlikely to regain competency, the defendant is subject to civil commitment for dangerousness under § 4246.

Facts of the Case

“Appellant” (unnamed in the opinion) was arrested for criminal trespass in April 2017 at a

field office for the Secret Service in Nashville, Tennessee. She returned in October 2017 and was seen spraypainting signs. When asked to stop, she punched an employee in the face. When she entered the building, two Secret Service agents followed her, and she accused the Secret Service of “holding her captive, shooting her in the head, and raping her over 12 years ago” (*Sealed*, p 139). She subsequently punched one of the agents in the face and resisted the other. A federal grand jury in Nashville charged Appellant with one count of assaulting a Special Agent and one count of resisting another Special Agent when he was engaged in the performance of his official duties. She was detained in federal custody.

In January 2018, the district court in Nashville issued a commitment order to determine competency, pursuant to 18 U.S.C. § 4241(a). In February 2018, Appellant was moved to the Federal Medical Center-Carswell (FMC Carswell) in Fort Worth, Texas for determination of competency, the time period of which was later extended with expiration set for September 2018.

In August 2018, prior to the expiration of the order, the district court was notified that, in the opinion of FMC Carswell clinical staff, Appellant displayed symptoms of mental illness that would impair her ability to be competent to stand trial. Furthermore, staff found that Appellant would likely remain incompetent to stand trial without receiving psychotropic medication, which she was unwilling to accept on a regular basis. They felt that medication was an appropriate treatment, but that she could not be forcibly medicated as staff did not consider her a present danger to herself or others. The staff requested the district court determine whether Appellant could be “forcibly medicated for the sole purpose of rendering her competent” under *Sell* criteria (*Sealed*, p 140, citing *Sell v. United States*, 539 U.S. 166 (2003)).

On October 1, 2018, the district court in Nashville denied the government’s motion for involuntary medication to restore Appellant to competency. On October 5, the government filed a notice with the Nashville court that Appellant was subject to civil commitment procedures for dangerousness under 18 U.S.C. § 4246 and that clinical staff at FMC Carswell planned to conduct a risk panel review to determine whether a full dangerousness evaluation was warranted. The government did not

dismiss the indictment in the Nashville case “to ensure Appellant remained in custody pending completion of the commitment procedures” (*Sealed*, p 140).

The risk panel review recommended a full dangerousness evaluation, so this evaluation was performed by a forensic examiner. On January 28, 2019, the government filed a petition, accompanied by the evaluation and a certificate of dangerousness signed by the warden at FMC Carswell, which initiated civil commitment proceedings. A hearing was ultimately held on March 26, 2019, at which the forensic examiner testified to Appellant’s dangerousness. The district court found by clear and convincing evidence that Appellant met criteria and ordered that she be committed for hospitalization under 18 U.S.C. § 4246(d).

Appellant filed a notice of appeal, contending that the district court plainly erred when it held the commitment proceeding after the four-month deadline set forth in 18 U.S.C. § 4241(d)(1) had expired in September 2018.

Ruling and Reasoning

The U.S. Court of Appeals for the Fifth Circuit found that the district court did not plainly err. Federal law, 18 U.S.C. § 4241(d)(1), provides that if a defendant is found to have a mental disease or defect rendering him incompetent to stand trial, the defendant shall be committed to the custody of the Attorney General who shall hospitalize the defendant “for a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward.” 18 U.S.C. § 4241(d)(2) specifies that a defendant may be hospitalized “for an additional reasonable period of time” until the defendant is restored to competency or the pending charges are disposed of, whichever comes first. The district court did not find substantial probability that Appellant’s mental condition would improve to permit the trial proceedings to move forward, and her criminal charges were not resolved. While it was undisputed that Appellant was hospitalized beyond the four-month period that expired in September 2018, the court noted that 18 U.S.C. § 4241(d) further provides that “if, at the end of the time period specified, it is determined that the defendant’s mental

condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.”

While Appellant claimed that the government did not take action to initiate a civil proceeding between the expiration of the commitment order in September 2018 and the initiation of the civil commitment proceedings on January 28, 2019, the court noted that the government had been taking action during this time frame, first by pursuing involuntary medication and then pursuing a certificate of dangerousness, which is “a necessary prerequisite” to initiation of commitment proceedings (*Sealed*, p 142, quoting *United States v. Bonin*, 541 F.3d 399 (5th Cir. 2008)). The court determined, in accordance with the Ninth Circuit opinion in *United States v. Godinez-Ortiz*, 563 F.3d 1022 (9th Cir. 2009), that “§ 4246 does not require the dangerousness certificate to be filed during the time period in § 4241(d)” or before the § 4241(d) evaluation period ends (*Sealed*, p 143). The judgment of the district court was affirmed.

Discussion

Sealed v. Sealed addresses whether an individual can be committed on the grounds of dangerousness after a period of time beyond that of a competency restoration. The court here agreed that the language of § 4246(a) does not require that a dangerousness certificate be filed during the time period for competency evaluation established in § 4241(d).

Importantly for forensic psychiatrists, the court did not establish a maximum time frame in which the certificate of dangerousness under § 4246(a) must be filed. Thus, the time period between the expiration of the order for competency evaluation and the petition for civil commitment remains unspecified. The court did specifically note the steps the government took in the interim, such as pursuing involuntary medication or pursuing a certificate of dangerousness. This comment may suggest that, when statutes do not directly address time frames, delays in proceedings may be viewed as reasonable by courts if it can be demonstrated that other appropriate actions are being taken in a timely manner. The case reinforces the need for psychiatrists to be familiar with specific procedures and protocols in both competency and civil commitment statutes, and to document steps taken to address delays in proceedings.

Sealed also highlights differing standards for dangerousness, depending on what clinicians are seeking for the patient. Initially, Appellant's treating clinicians felt that she could not be forcibly medicated because she was not a present danger to herself or others, which is why they sought in-voluntary medication under *Sell* criteria for the sole purpose of rendering her competent to stand trial. Although Appellant was not considered dangerous enough to require involuntary medication at that time, she was later found to be dangerous enough to meet criteria for civil commitment. Providers of care in psychiatric settings should be aware of dynamic factors in risk assessments and dangerousness standards for various procedures and should understand there can be differences between the risk of dangerousness in an institutional setting versus in the community.

Guilty but Mentally Ill, Ineffective Assistance of Counsel, and Habeas Corpus

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Counsel's Failure to Object to Improper Statutory Procedure for Entering a Guilty but Mentally Ill Plea Constitutes Ineffective Assistance of Counsel in Violation of the Sixth Amendment

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In *Velazquez v. Superintendent Fayette SCI*, 937 F.3d 151 (3rd Cir. 2019), the U.S. Court of Appeals

for the Third Circuit considered whether a criminal defendant may petition for *habeas corpus* relief when counsel is ineffective for failing to object to a defective plea process during a plea of guilty but mentally ill (GBMI). The district court's order rejecting the defendant's claim was vacated. The case was remanded to grant the petition for the writ and to vacate the judgment of conviction.

Facts of the Case

In 2008, Mr. Anthony Velazquez was charged with multiple counts arising from two separate incidents. The first incident involved three events. First, he entered a home, where he had a physical altercation with his lover and another person living in the home. Second, during his preliminary hearing, he threatened that lover to prevent her from testifying against him. Third, he wrote that lover several threatening letters from prison. The second incident arose from scratches incurred by a corrections officer while seeking to restrain and place Mr. Velazquez into a cell. Because of these incidents, Mr. Velazquez was charged with burglary, witness intimidation, terroristic threats, and harassment for the circumstances pertaining to his lover, and aggravated assault for injuring the corrections officer.

Mr. Velazquez's defense counsel advised him to plead GBMI, considering that Mr. Velazquez had experienced mental illness. Under 18 Pa. Cons. Stat. § 314(b) (2008), there are three requirements for a GBMI plea to be accepted in Pennsylvania: the judge must examine "all reports prepared pursuant to the Rules of Criminal Procedure," the judge must hold a hearing solely on the topic "of the defendant's mental illness at which either party may present evidence," and the judge must be "satisfied that the defendant was mentally ill at the time of the offense" (*Velazquez*, p 154).

If the GBMI plea is accepted, then the defendant may be sentenced in accordance with the offense as would occur with other general offenders. A second hearing must then be held to determine whether the defendant is severely mentally disabled. If so, then the defendant must also be provided mental health treatment pursuant to 42 Pa. Cons. Stat. § 9727(b) (2008). If the plea is not accepted, then the defendant may withdraw it and demand a jury trial.

Against this statutory context, Mr. Velazquez pled GBMI, forfeiting his right to trial. Instead of following the statutory framework, however, the judge