statutorily permitted alternatives. For individuals who are unable to regain competency within the limited time constraints for restoration, 18 U.S.C. § 4246(d) (2015), states that such persons should be held in a suitable treatment facility until the state assumes responsibility, or he is eligible for conditional release and no longer a risk to the public. In both statutes, the phrase "suitable treatment facility" indicates discretionary placements without procedures for determining how the decisions about placements will be made. Despite the statute allowing the discretion of a "suitable treatment facility," the regulations of the attorney general authorize the BOP to fulfill the functions under the statute and determine placement. As the Eight Circuit Court of Appeals observed in this case, the inflexibility of the BOP may restrict reasonable discretion for placement. The BOP knows about federal prisons and their capacity to assess, treat, and manage prisoners with psychiatric needs; however, they are not familiar with alternative facilities across states and communities.

Although inpatient commitment affords the opportunity for consistent and sustained observation of psychiatric symptoms and cognitive limitations and creates an immersion in competency-related education, assessment of dangerousness requires more. Risk of dangerousness assessments rely on collateral information; record reviews; community, residential, and relationship considerations; substance use assessments; and functional analyses across situations. Because the BOP inpatient placements are often in a different state from a defendant's family and community, communication between the BOP evaluators/treaters and family may not occur, and knowledge about the community agencies and support systems are hard to assess from afar. Moreover, the BOP assessment and treatment units are designed to serve prisoners for whom questions of risk are related to prison safety and management, and release to the community is determined by courts.

The limited flexibility in placement for defendants with deficits significant enough to render them nonrestorable also raises the prospect of harm. In some cases, placements away from support and treatment networks may cause psychiatric exacerbations and setbacks in rehabilitation and recovery. A useful public policy consideration might be a change in regulations whereby the attorney general may order an independent forensic evaluation, addressing the best placement for determining both restorability and risk, thereby maximizing the opportunity for suitability on a case-by-case basis.

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Ineffective Assistance of Counsel After Forgoing a Mental Health Defense

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A Competent Defendant Who Chooses To Forgo a Mental Health Defense Cannot Later Claim Ineffective Assistance of Counsel

In *Breton v. Comm'r of Corr.*, 159 A.3d 1112 (Conn. 2017), the Connecticut Supreme Court ruled that a competent defendant who had chosen to forgo a mental health defense cannot later claim ineffective assistance of counsel. In this case, the defendant had knowingly and voluntarily refused the presentation of mental health evidence in his murder trial, even though his counsel advised that presenting this evidence would be the best course of action.

Facts of the Case

In December 1987, Robert Breton was arrested and charged with murdering his former wife and son in Waterbury, CT. Around the time of the homicides, Mr. Breton was unemployed, had been prescribed methamphetamine hydrochloride for weight loss, and was consuming alcohol. Approximately 40 hours after the crime, a blood sample was drawn, but it was not tested until 2005.

Despite strong physical and eyewitness evidence against him, Mr. Breton persistently denied committing the homicides. In preparation for trial, defense counsel retained a forensic psychiatrist, Dr. Walter Borden, who interviewed Mr. Breton in 1988. His counsel repeatedly advised Mr. Breton against proceeding on a theory of reasonable doubt, urging instead the use of an extreme emotional disturbance (EED) defense.

Mr. Breton persistently disallowed his counsel to present any evidence that could have suggested that he had committed the homicides. He also threatened to testify that he did not commit the offenses if counsel used an affirmative defense against his wishes. Furthermore, he rejected a plea offer of life in prison, as well as the Alford plea.

Concerned about Mr. Breton's persistent refusal to follow their advice, defense counsel requested a competency to stand trial evaluation. A court-appointed team of evaluators found Mr. Breton competent to proceed. The trial court judge conducted two additional inquiries into Mr. Breton's ability to waive an EED defense. The judge found him competent to refuse the presentation of any psychiatric evidence. The judge nevertheless instructed the jury that if they found that Mr. Breton had acted under the influence of an EED, he would be guilty of manslaughter in the first degree instead of murder.

In 1989, the jury convicted Mr. Breton on all counts, and the trial court imposed the death penalty. Mr. Breton appealed. In 1995, the Connecticut Supreme Court affirmed the conviction but reversed the death penalty judgment on technical grounds. In 1997, a three-judge panel heard testimony from Dr. Borden. In his testimony, Dr. Borden relied, *inter alia*, on his 1988 interviews with Mr. Breton, and two 1966 transcripts related to an earlier homicide charge. After killing his father in 1966, Mr. Breton had pleaded guilty to manslaughter and received a suspended sentence. Based on Mr. Breton's accounts of the homicides in 1966 and 1987, Dr. Borden opined that Mr. Breton was susceptible to dissociative states, and he diagnosed a mixed personality disorder with borderline, paranoid, and depressive features. He and another expert testified that at the time of the 1987 murders, Mr. Breton's mental state was significantly impaired by his personality disorder and an extreme emotional disturbance. He also testified that these conditions could have been aggravated by Mr. Breton's use of methamphetamine and alcohol. The three-judge panel nonetheless imposed the death penalty after finding that the homicides had been committed in an especially cruel manner and that Mr. Breton did not prove the affirmative EED defense, although he did prove other mitigating factors related to childhood experiences.

In 2003, Mr. Breton filed a petition for a writ of *habeas corpus*. Among numerous claims, he argued that the trial counsel had provided ineffective assistance by: failing to discover the two 1966 transcripts, which would have established that he had stabbed his father while experiencing dissociative symptoms stemming from post-traumatic stress disorder (PTSD), related to childhood traumatization, which would have supported an affirmative defense of an EED for the 1987 murders; failing to test the blood sample, which could have supported an amphetamine intoxication defense or a mitigation; and presenting a marginal reasonable doubt defense at the exclusion of a meritorious EED defense.

Habeas hearings took place in 2011. The *habeas* court determined that although defense counsel rendered deficient performance in failing to discover the 1966 transcripts and test the blood sample, Mr. Breton was not prejudiced, because there was no reasonable probability that the trial outcome would have been different had this evidence been available, as he would not have permitted the presentation of psychiatric or intoxication evidence. He appealed.

Ruling and Reasoning

The Connecticut Supreme Court denied Mr. Breton's appeal. In light of the intervening abolition of the death penalty in Connecticut, Mr. Breton's death penalty challenge had been rendered moot. In addressing his other claims, the court relied on *Strickland v. Washington*, 466 U.S. 668 (1984). According to *Strickland*, a claim of ineffective counsel can succeed only when representation falls below an objective standard of reasonableness, and this deficiency also has a reasonable probability to change the ultimate outcome of the proceedings. The court found that even if counsel had failed to discover the transcripts and to test the blood sample, Mr. Breton was not prejudiced, as ample evidence demonstrated his persistent refusal of presentation of any mitigating evidence that was tantamount to an admission that he had committed the crimes. Mr. Breton's repeated instructions not to present mitigating evidence were made knowingly and voluntarily. Further, the court ruled that the *habeas* court's finding that Mr. Breton would not allow counsel to present intoxication evidence was not erroneous. The record demonstrated that counsel investigated Mr. Breton's use of prescribed medications, recognizing that it could be used to raise a question of his ability to form the necessary specific intent, but Mr. Breton would not allow counsel to proceed in that direction. No evidence established that he had actually been intoxi-

cated during the commission of the homicides. Finally, the court opined that counsel had an ethics-based obligation to comply with an informed defendant's refusal to present an affirmative defense.

Discussion

Defendants who are mentally ill, but competent to stand trial, sometimes do not allow their defense attorneys to present any mental health evidence in court, even if this appears prudent and could substantially reduce the resulting sentence. In such cases, the question arises what obligations defense attorneys and other actors involved in the legal proceedings have if a defendant with mental illness appears to act against his own self-interest. In extreme cases, some states allow the defense attorney, judge, or prosecutor, or combination thereof, to impose an insanity defense on a defendant against his expressed will, in some states even if the defendant has been found competent to stand trial (Miller RD: *Hendricks v. People:* forcing the insanity defense on an unwilling defendant. *J Am Acad Psychiatry Law* 30: 295–7, 2002).

Aside from the question of what mechanisms are used to force unwilling but competent-to-stand-trial defendants to pursue a defense strategy based on a mental health claim, one may ask whether such mechanisms should exist at all. If a defendant is deemed competent to stand trial, what does this competency really mean if the defendant is then not free to determine the defense strategy that he wishes to pursue? Miller (p 297) argued that this seeming contradiction mainly stems from the artificial separation, applied by most courts, between competency to proceed and competency to enter a plea. He further argued that the latter should be subsumed under the former, and that in such a system, a competent defendant should not have an insanity defense imposed on him. It appears to follow directly from Miller's argument that this should also hold true in cases where the action that is to be compelled is not an insanity defense, *per se*, but involves the presentation of mental health evidence to reduce a sentence or charges (for example, from murder to manslaughter, as in *Breton*). Such an understanding of competency would naturally entail defendants' choosing the defense strategy and presumably resolving the question as to the obligations of defense attorneys. If the capacity to decide on a trial strategy is seen as an integral part of the ability of defendants to aid in their defense, psychiatrists would not recommend a finding of competence to stand trial if that ability were lacking.

Whereas psychiatrists could identify cases where this ability is grossly lacking, there would presumably be many cases where it would be difficult to discriminate between a defendant making a competent but unwise decision, and a defendant making an incompetent decision. Psychiatrists who lack formal legal training are not necessarily in the best position to judge which legal strategy is best in which specific context. This lack of training would make it very difficult indeed for psychiatrists to be the arbiters of such legally nuanced questions.

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The Limits of Solitary Confinement on Death Row

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Holding Inmates in Solitary Confinement Is Unconstitutional After Death Sentences Have Been Vacated

In *Williams v. Sec'y Pa. Dep't of Corrections*, 848 F.3d 549 (3d Cir. 2017), the U.S. Court of Appeals for the Third Circuit considered Pennsylvania's practice of housing inmates in solitary confinement on death row after they have been granted resentencing hearings. The court held that this practice violates the inmates' Fourteenth Amendment rights because the extreme deprivations of death row are no longer justified once the death sentences have been vacated. In arriving at its decision, the court relied heavily upon scientific literature delineating the psychological harms of solitary confinement.

Facts of the Case

In 1988, Craig Williams was convicted of first-degree murder and sentenced to death in the Philadelphia Court of Common Pleas. Upon entry into the Pennsylvania Department of Corrections