likely length of civil commitment, should she be found NGRI. Significantly, though not addressed by the court, the introduction of details about length of civil commitment during the culpability phase is a threat to fact-finder neutrality. (In addition, the prosecutor's use of Ms. Dalton's invocation of her rights to remain silent and request counsel, as evidence of her sanity, also raises important points related to mental illness and due process rights).

Courts typically separate fact finding from sentencing, out of concern for biasing the jury with information about legal consequences of the verdict (*Shannon v. U.S.* 512 U.S. 573 (1994); *Pope v. U.S.*, 298 F.2d. 507 (5th Cir. 1962)). As seen in the present case, however, length of civil commitment is sometimes addressed during the fact-finding phase in NGRI cases. Discussion of civil commitment time frames before resolution of the ultimate question, whether the evidence supports an NGRI finding, increases the probability of fact-finder bias by conflating the decision regarding culpability or NGRI with concerns related to time spent in civil commitment (*Lyles v. U.S.*, 254 F.2d 725 (D.C. Cir. 1957), *en banc, cert. denied*, 356 U.S. 961 (1957)). The outcome of an NGRI finding, civil commitment, is not considered a punishment; rather, it involves treatment. Nonetheless, or perhaps because of this outcome, the stigma surrounding mental illness, as well as concerns that someone found NGRI is "getting away with not serving appropriate time" (Hans VP: An analysis of public attitudes toward the insanity defense. *Criminology* 24(2):393, 1986), or is a danger to the community, can lead to fact-finder bias. The court in *Shannon* held that instructions on the consequence of an NGRI verdict should only be provided when statements made during trial suggest an outcome of the NGRI verdict that is erroneous.

An important step toward reducing the impact of stigma related to mental illness in NGRI cases involves protecting defendants from stigma-related bias in the culpability phase of trials, through the separation of fact-finding from details about duration of civil commitment. The duration of civil commitment, as well as future risk assessment processes, should not be addressed in any way during the fact-finding phase, when the ultimate question at hand is merely whether the evidence supports an NGRI finding. A clean separation can serve to protect defendants not only from fact-finder bias related to stigma surrounding mental illness, but also from the elicitation of confounding views about adequate punishment. At the same time, it might be worthwhile for jury instructions to include the outcome of an NGRI finding, without details about length or processes (Piel J: In the aftermath of State v. Becker: a review of state and federal jury instructions on insanity acquittal disposition. *J Am Acad Psychiatry Law* 40:537–46, 2012). Although the Supreme Court has said such instruction is not necessary in federal cases (in *Shannon*), such an instruction can allay jurors' concerns about a rapid return to the community. This approach parallels non-NGRI cases, providing jurors with information comparable with what they know about guilty verdicts typically involving jail time.

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Suitable Treatment Facility for Federal Defendants Found Incompetent and Not Restorable

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Commitment to the Custody of the Bureau of Prisons for Competence Restoration Is Constitutional Regardless of Medical Evidence of Nonrestorability

In *U.S. v. Dalasta*, 856 F.3d 549 (8th Cir. 2017), the defendant, Kevin Dalasta, appealed the Iowa district court's order for commitment to the custody of the U.S. Bureau of Prisons (BOP) to determine whether he could be restored to competency to stand trial. Mr. Dalasta argued that the court's order for commitment was unconstitutional because of medical evidence supporting the unlikelihood of restoration and that the court failed to consider more suitable alternatives available to the BOP to meet the duty to commit. The Court of Appeals for the Eighth Circuit affirmed the order of the district court to commit Mr. Dalasta to the custody of the BOP, pur-

suant to 18 U.S.C. § 4241(d) (2015), requiring the commitment of a defendant found incompetent to stand trial. The attorney general assumes responsibility for committing the defendant to a suitable treatment facility.

Facts of the Case

Mr. Dalasta had a temporal lobectomy to address a worsening seizure condition in March 2012. During this time, he was facing charges from 2010 for vehicular homicide. The case was delayed due to Mr. Dalasta's medical procedures. Based on an evaluation by Dr. Michael Taylor, the court suspended the proceedings, pursuant to Iowa Code § 812.5 (2012), and requested a further examination to determine whether competency could be restored. In July 2012, Dr. Taylor, opined that Mr. Dalasta was not competent and not restorable. That August, a second examiner, Dr. Eric Barlow, reported that restoration was not possible because of cognitive deficits resulting from the lobectomy. In March 2013, a third evaluator, Dr. Robert Jones, also opined that Mr. Dalasta was not competent to stand trial, with no possibility of restoration. In May 2013, a hearing was held, and the vehicular homicide case was dismissed because of a lack of substantial evidence of competence restorability within a reasonable amount of time.

In October 2015, it was alleged that, after an argument with his father, Mr. Dalasta placed a gun to his own chin. Police arrived at his parents' home, where he resided, and removed four firearms. Mr. Dalasta was arrested and charged with unlawful possession of a firearm as a prohibited person (18 U.S.C. § 922 (2015)). The district court moved for a competency evaluation, and once again, an evaluator opined that Mr. Dalasta was incompetent and not restorable. Despite the defense counsel's argument against mandatory commitment for competency restoration because of medical records indicating cognitive deficits resulting from his seizure condition, he was committed to the custody of the BOP to determine whether competency could be restored.

Mr. Dalasta appealed the order of commitment to the BOP, arguing that the district court erred in mandating commitment, given undisputed evidence from his previous criminal case of inability to restore his competency to stand trial; the strict application of this order of commitment is unconstitutional and violates his liberty interest under the Due Process Clause; and the district court neglected to consider other disposition options for determining nonrestorability.

Ruling and Reasoning

The Eighth Circuit affirmed the district court's decision to commit Mr. Dalasta to the custody of the BOP. It agreed that the language in 18 U.S.C.S. § 4241(d) (2015) imposes mandatory commitment to the custody of the attorney general, therefore placing the duty to commit and select a suitable treatment facility on the attorney general rather than the district court.

The court referenced the provisions of 28 C.F.R. § 96 (2015) under which the BOP is authorized to perform the functions of the attorney general and make decisions about appropriate placement. The court disagreed with Mr. Dalasta that commitment to the custody of the attorney general is "absurd," even in the face of extensive evidence showing nonrestorability, because the question of dangerousness upon release from custody would still have to be considered, and the assessment by the BOP would accomplish that. Finally, the court disagreed with Mr. Dalasta's argument that such commitment is a violation of his constitutional right to liberty. The steps outlined in the determination of the competency to stand trial statute include a limited deprivation of liberty if a defendant is found not competent, and this complies with due process.

Although the court affirmed the district court's commitment to the BOP, the court expressed concern that the BOP, by its guideline that requires forensic evaluations be done on a BOP Psychiatric Referral Center inpatient unit, may unduly restrict the statutory discretion of the attorney general in selecting a suitable facility when warranted. This point was not raised by Mr. Dalasta.

Discussion

Although the circuit court affirmed the decision of the district court, Mr. Dalasta's appeal raised an important question about the options available to the federal courts when defendants are found not competent and not restorable. The procedure after such a finding is limited and vague.

When a defendant is found not competent, 18 U.S.C. § 4241(d) (2015) specifies that the court shall commit the defendant to the custody of the attorney general, who shall hospitalize the defendant in a suitable treatment facility for a reasonable period of time to determine restorability. At present, there are no

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.