error," given that she was the state's primary witness, the only mental health professional who testified, and the person whose testimony the district court primarily relied upon to commit N.A. Additionally, the court was unpersuaded by the state's argument that N.A. should have requested a continuance to allow time for Ms. Post to testify in person, countering that N.A. was under no obligation to request a continuance, especially given that the hearing was being held on the last possible day of the statutorily-mandated timeline for civil commitment proceedings. Strict adherence to the involuntary commitment statute was applied because of the liberties at stake, and the Supreme Court of Montana found that the statute was clear and unambiguous regarding the legislative intent.

Dissent

Justices Sandefur, McGrath, and Rice voiced the dissenting opinion. They suggested that the majority followed the statute too simplistically; the statute was implemented before modern technological advancements; and transportation over long-distances while being handcuffed would be inhumane and costly.

Discussion

The increased use of videoconferencing has brought about its own unique challenges. The Montana Code regarding the use of two-way-electronic audio-video communication allowed this method of testimony, but only if all parties were in agreement. This case illustrates that when a statute's legislative intent is clear, unambiguous, and unmistakable, then that statute is not open to alternate interpretation.

Over the past few decades, both the fields of medicine and the law have debated how extensively videoconferencing technology should be used. Both fields have recognized potential benefits of videoconferencing, including reductions in costs of transportation, convenience, and avoidance of delays. The use of videoconferencing in psychiatry has not been without its critics. Psychiatrists have been skeptical regarding the inability to perform physical examinations and detect nonverbal cues using videoconferencing, and clinicians and patients alike have been skeptical about the effect of telemedicine on rapport and the loss of direct patient-doctor contact (Cowan KE, McKean AJ, Gentry MT, *et al.* Barriers to use of telepsychiatry: Clinicians as gatekeepers. Mayo Clin Proc. 2019; 94 (12):2510-2523). The use of teleconferencing in medicine also brings up questions of equality for patients who do not have access to the required technology, as well as concerns about security.

Courts have also considered the question of the use of videoconferencing over the past decades, particularly in relation to the Confrontation Clause of the Sixth Amendment that guarantees defendants the right to confront witnesses against them in criminal proceedings. The Confrontation Clause has traditionally been interpreted as guaranteeing that these confrontations must occur in-person. For example, in *Coy v. Iowa*, 487 U.S. 1012 (1988), Justice Scalia delivered the Supreme Court decision that the use of a one-way screen designed to protect a child witness from having to see the defendant in a sex crime case was a violation of the constitutional right to "face-to-face" confrontation. The use of videoconferencing in the courtroom has generally been considered inferior to in-person testimony; criticisms include that remote testimony may impede the ability to assess witness credibility, and also may affect the way the witness is perceived (Izzo NC: How litigators are confronting COVID in the courtroom [Internet]; August 31, 2020. Available from: https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2020/covid-19-video-testimony-courtrooms/. Accessed April 1, 2022).

The onset of the COVID-19 pandemic placed increasing pressure on both the medical and legal fields to utilize videoconferencing technology. Physicians began to use videoconferencing so that they could provide care to their patients without increasing the risk of spreading disease. These platforms became an everyday necessity and now are part of daily routine for many in health care. Courtrooms have been under similar pressure to use videoconferencing to limit COVID transmission and protect the public and people in the courtroom, but as this case illustrates, courts also must balance the right of defendants to confront witnesses, and states may have laws that clearly delimit the use of teleconferencing. States with such explicit instruction in their statutes may find it difficult to quickly adjust practice to meet the needs of society in changing times, such as during a pandemic.

Weight of Expert Testimony

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Pointing out Weaknesses in Defendant's Expert Opinion Does Not Shift Burden of Proof to Defendant

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Key words: burden of proof; dangerousness; indefinite hospitalization; neurocognitive disorder; non-restorable

In *United States v. Dalasta,* 3 F. 4th. 1121 (8th Cir. 2021), the U.S. Court of Appeals for the Eighth Circuit considered whether the district court committed an error in discounting the findings of the defendant's expert regarding risk of future dangerousness. The court ruled that there was no clear error and the court's assessment of expert testimony did not improperly shift the burden of proof to the defendant.

Facts of the Case

In 2012, while facing charges for vehicular homicide, Kevin Allen Dalasta underwent a left temporal lobectomy to treat refractory seizures. He received a diagnosis of a major neurocognitive disorder incurred from that lobectomy and the vehicular homicide charges were dismissed because he was found nonrestorable (*United States v. Dalasta,* 856 F.3d 549 (8th Cir. 2017)).

In 2015, Mr. Dalasta's parents confronted him about purchases of cellphone games he had made. The confrontation intensified when Mr. Dalasta responded by packing his belongings (including firearms), threatening to leave, and holding a gun to his own chin. Police intervened, and the confrontation ended without injury. The responding officers discovered that Mr. Dalasta possessed his firearms illegally. He was charged by the federal government in Iowa district court with being a prohibited person in possession of a firearm. The district court did not try Mr. Dalasta because he was again found incompetent to proceed. Instead, he was committed to the custody of the Attorney General and evaluated for competency at the United States Medical Center for Federal Prisoners (USMCFP) in Springfield, Missouri. After the evaluation, the court determined that he was unlikely to be restored. He was ordered to remain in the USMCFP for an evaluation of dangerousness under 18 U.S.C. § 4246 (2013).

The government then requested that Mr. Dalasta be committed by petitioning the U.S. District Court for the Western District of Missouri for a hearing on his present mental condition. The government had the burden to prove dangerousness by clear and convincing evidence. At that August 2018 hearing, the government presented a dangerousness report from a Risk Assessment Panel made up of USMCFP clinicians. Two clinicians testified at the hearing for USMCFP, Drs. Robert Sarrazin, Chief of Psychiatry, and Ashley Christiansen, a treating psychologist. Psychologist Richard DeMier, whom Mr. Dalasta requested independently evaluate him, also testified. Dr. Sarrazin, Dr. Christiansen, and the USMCFP panel opined that Mr. Dalasta would be dangerous. In contrast, Dr. DeMier opined that there was insufficient evidence to conclude that Mr. Dalasta was dangerous under 18 U.S.C. § 4246.

Subsequently, the magistrate judge issued a report and recommendation (R&R) that Mr. Dalasta be committed; but, the district court declined to make a ruling given that greater than a year had passed since the panel's report was submitted. Therefore, an updated risk assessment report was filed by the government. The panel reached the same conclusion of dangerousness while Dr. DeMier again opined that there was insufficient evidence of dangerousness. The panel identified specific concerns about Mr. Dalasta's intent to possess firearms because of his emotional reactivity, failure to understand that he was legally barred from possessing weapons, limitations in his ability to "perceive situations," statements that he would use deadly force if threatened, and his imaginary beliefs of being in the U.S. military.

Ruling and Reasoning

Mr. Dalasta, proceeding *pro se*, appealed the commitment order, arguing that the district court clearly erred by rejecting the opinion of Dr. DeMier. Mr. Dalasta articulated that, in doing so, they rejected his expert's views for lacking certainty, shifted the burden of proof, and discredited Dr. DeMier's opinion on the grounds that the government's experts had spent more time with him. The Eighth Circuit disagreed with Mr. Dalasta.

The Eighth Circuit reviewed the district court's findings for clear error. The court summarized that

all of the examining experts agreed on Mr. Dalasta's major neurocognitive disorder. What differed was the experts' opinions on Mr. Dalasta's risk of future dangerousness. The court specifically reviewed Dr. DeMier's opinion and the district court's finding that the expert conveyed "uncertainty or change over time" in rendering opinions about Mr. Dalasta (*Dalasta*, p 1125), as evidenced by assuming that he would live with his parents and not have access to firearms. The court noted that the district court has "discretion to weigh the credibility of expert opinions" (*Dalasta*, p 1126).

The Eighth Circuit found that the lower court was entitled to weigh Dr. DeMier's testimony and compare it to other experts' opinions. The court disagreed with Mr. Dalasta's contention that the lower court improperly shifted the burden of proof. Their contrasting analysis of Dr. DeMier's opinion did not amount to shifting the burden of proof to the defendant, and the lower court did not require him to prove, through his expert, that he would not be dangerous.

The court also reviewed that the magistrate judge had found the panel's opinion of dangerousness more compelling, in part, because the government's medical experts spent more time evaluating Mr. Dalasta. The court concluded that, although the government's experts' "home-field advantage" of additional time with the evaluee could disadvantage the defendant, this did not rise to the level of an error in this case. As a result, the court affirmed the prior ruling.

Discussion

Involuntary hospitalization of United States citizens is fraught with difficulty and conflicting interests. The balancing of the state's *parens patriae* power to civilly commit persons with mental illness against the individual rights enshrined in the Fourteenth Amendment is at times a challenging task. Indeed, indefinite ongoing incarceration of unrestorable defendants deemed dangerous provides tension between protecting public safety and the constitutional rights of the defendant. Some have argued that state jurisdiction should be limited to the length of the original charge (Bloom JD, Kirkorsky SE. Arizona's insanity defense, *Clark*, and the 2007 legislature. J Am Acad Psychiatry Law. 2021; 49: 618–622).

In *Jackson v. Indiana*, 406 U.S. 715 (1972), there was an underlying legal protection of those found incompetent to stand trial; that is, they could not be held beyond a reasonable time to restore them. The caveat that can alter the nonrestorable defendant's due process protection is dangerousness. Individual states have assembled means to maintain public safety with this select group deemed both dangerous and nonrestorable (e.g., in Or. Rev. Stat § 426.701 (2021) on Commitment of Extremely Dangerous Persons with Qualifying Mental Disorder). Such statutes allow for essentially indefinite detention. When dangerousness affects public safety, the legal system may be less sensitive to individual rights, such as in *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976).

The burden of proof in *Dalasta* was on the state, with a clear and convincing standard. The Eighth Circuit found that the burden was not shifted to Mr. Dalasta.

Arguably, a panel of government experts at an expert facility that houses the evaluee have an advantage over one plaintiff's expert. Forensic testimony is based on evaluations which should rely on equal access to records, but again one can argue that multiple government experts concurring is more persuasive than one opposing. In this case, the idea that a group of government experts at one facility would not have more than a "homefield advantage" seems somewhat naive. But a credible expert can certainly attest that more time with a defendant does not always heighten or sharpen one's objectivity. In fact, this could have the reverse effect. In this case, the government's calling government expert witnesses does raise the concern that the burden to prove a lack of dangerousness was made more difficult for Mr. Dalasta. The court's finding that expert opinion was more "compelling" based on the time spent with an evaluee raises the question of what constitutes an adequate evaluation in terms of the number of evaluators and time spent with an evaluee. It also raises the question of whether internal facility evaluators will have an advantage over outside evaluators conducting point in time interviews. As the number of competency cases increases, it is likely that similar challenges will arise. That federal and state statutes permit indefinitely incarcerating nonrestorable defendants deemed dangerous will no doubt invite further scrutiny. Given these considerations, one can argue that the system has, to some extent, shifted the burden to such detained persons to demonstrate they are not dangerous.