

ily resolved: for example, a time conflict between employment and a therapeutic group. Distinguishing avoidance and deflection from adaptive occupational initiatives can be an important part of the therapeutic process for both the treatment team and the patient. Forensic evaluators must strive to protect civil liberties of civilly committed patients while considering whether these activities impede treatment. The court's rationale in *Oliver* helps to set a framework to make this distinction.

In *Oliver*, the circuit court did not ultimately resolve the complicated question of First Amendment rights as they pertain to people with mental illness. The presence of a mental illness itself does not diminish a person's First Amendment rights, but in some instances behavior associated with mental illness can be at odds with a perceived right. When a mentally ill person files suit regarding breach of a First Amendment right, forensic providers, evaluators, or courts are tasked with addressing this discrepancy. Had the circuit court ruled in favor of Mr. Oliver, it could have set a precedent for the exclusion of aspects of a patient's behavior or speech from forensic evaluations. This ruling could substantially impede the tasks of risk assessment and risk management. On the other hand, ensuring that protected behaviors and expression, however provocative, are managed in a therapeutic, rather than punitive way, is an important duty of forensic evaluators and teams and is something that should be actively considered in any forensic treatment context.

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Propriety of Closing Statements Regarding Release of Acquittes in Insanity Defense Case

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Prosecutor's Statements During Closing Arguments, Related to Likely Duration of Civil Commitment if the Defendant Were Found NGRI, Were Prejudicial

In *State v. Dalton*, 794 S.E.2d 485 (N.C. 2016), the Supreme Court of North Carolina agreed that statements made by the prosecutor during closing arguments exaggerated the likelihood that the defendant, Melissa Amber Dalton, would be quickly released from civil commitment if found not guilty by reason of insanity (NGRI). Specifically, the court found that the prosecutor's statements were not supported by the evidence presented at trial. The court upheld the decision of the state court of appeals, affirming that prejudicial error had occurred and granting a new trial.

Facts of the Case

Ms. Dalton has a long history of mental illness, including bipolar disorder, borderline personality disorder, and substance abuse. In July 2009, Ms. Dalton was admitted to a crisis treatment facility and was prescribed escitalopram, a selective serotonin reuptake inhibitor (SSRI) antidepressant. Her treaters at the facility were unaware that Ms. Dalton had reacted negatively when prescribed a different SSRI, fluoxetine. During her inpatient stay, Ms. Dalton received multiple diagnoses, including cocaine dependence, cannabis abuse, substance-induced mood disorder, and borderline personality disorder. She was discharged after approximately three days and continued to take escitalopram. On August 20, 2009, approximately three weeks after her discharge, Ms. Dalton's boyfriend contacted her mother and asked her to check on Ms. Dalton, who appeared depressed. Ms. Dalton's mother also observed Ms. Dalton's "strange behavior" and went to the local magistrate's office, in an effort to have Ms. Dalton involuntarily committed. She was instead told to speak with a social worker and return to the magistrate's office the next day. That night, Ms. Dalton bartered electronics for a gram of crack cocaine. In the early morning of August 21, 2009, Ms. Dalton knocked on her neighbors' door claiming to have money that she owed the neighbor. When the door was opened, Ms. Dalton forced her way in and repeatedly stabbed her two neighbors, calling one by the wrong name. One neighbor died and the other sustained serious injuries. Ms. Dalton was soon located, still wearing bloodied clothing and attempting to get a ride. She was brought to the police station,

where she refused to speak with law enforcement agents after being read her *Miranda* rights.

Ms. Dalton was indicted on October 5, 2009, for “first-degree murder, first-degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury” (*Dalton*, p 487). She notified the court of her intent to plead not guilty by reason of insanity (NGRI) and was thereafter evaluated by a psychiatrist to determine her competency to proceed, as well as to evaluate her mental state at the time of the offense. During the trial, the defense offered a neuropharmacology expert, who testified to the negative impact SSRIs can have on patients with bipolar disorder, as well as the effects of illicit drugs on Ms. Dalton’s behavior at the time of the crime. A second defense expert, a psychiatrist, offered further testimony regarding Ms. Dalton’s state of mind at the time of the crime, including the impact of her history of mental illness, her drug use, and her negative reaction to SSRIs, on her mental state. No experts were offered by the prosecution.

During a trial conference, the prosecutor requested permission to comment on civil commitment procedures during his closing argument. Permission was granted, though he was instructed not to exaggerate Ms. Dalton’s likelihood of release after 50 days. The prosecutor did, however, make statements to that effect: “. . . and it is very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself she will be back home . . . [defense objects and is overruled] . . . she very well could be back home in less than two months . . .” (*Dalton*, p 488).

The prosecutor also asserted that Ms. Dalton’s request for counsel and refusal to speak further in the absence of counsel while being questioned at the police station, after being informed of her right to do so, was an indication of her sanity at the time of the crime. On April 14, 2014, Ms. Dalton was found guilty of all charges.

Ms. Dalton appealed her convictions based on two procedural errors: the trial court erred in overruling her objection to the prosecutor’s statements regarding her likely length of civil commitment upon a finding of NGRI; and the trial court failed to intervene of its own accord when the state argued that Ms. Dalton’s request for counsel was evidence of sanity. The court of appeals unanimously found prejudicial error in the prosecutor’s assertion that it was “very possible” Ms. Dalton would be released in 50 days,

and she was granted a new trial. The court of appeals did not address Ms. Dalton’s claim regarding the trial court’s failure to intervene when the prosecutor argued that her request for counsel during police interrogation weighed against an NGRI finding.

The Supreme Court of North Carolina granted the state’s petition for discretionary review on March 17, 2016, to determine whether the appellate court “[e]rred in distorting the transcript, applying the incorrect standard of review, and finding prejudicial error” (*Dalton*, p 488), based on the prosecutor’s closing argument statements.

Ruling and Reasoning

The Supreme Court of North Carolina upheld the court of appeal’s decision and granted a new trial, ruling that the abuse-of-discretion standard was correctly applied to the prosecutor’s closing argument. The supreme court found prejudicial error, relying on *State v. Millsaps*, 610 S.E.2d 437 (N.C. Ct. App. 2005), on the basis that the trial evidence did not support the prosecutor’s assertions during closing arguments, and on *State v. Jones*, 558 S.E.2d 97, 108 (N.C. Ct. App. 2002): “Improper remarks may be prejudicial, either because of their individual stigma or because of the general tenor of the argument as a whole.” Justice Jackson concurred, agreeing with the outcome of the majority decision, but writing “to emphasize the impropriety of the prosecutor’s jury argument” (*Dalton*, p 491), citing *State v. Hammonds*, 224 S.E.2d 595 (N.C. 1976), and asserting that the prosecutor inappropriately inflamed the jury, invoking stigma and fear for community safety. Chief Justice Martin dissented, raising a literal interpretation of “very possible,” suggesting that this meant something merely had the potential to occur rather than being probable or likely to occur: [The prosecutor] “merely said that she would win her hearing *if she proved her case*” (*Dalton*, p 495, emphasis in original). This concrete argument focused on the literal definition of wording rather than the question of stigma and prejudicing the jury.

Discussion

Ms. Dalton’s case raises important questions related to reducing stigma in NGRI cases. The question to be addressed involves the basis of the North Carolina Supreme Court’s finding of prejudicial error. The court’s ruling was based solely on the prosecutor’s failure to present evidence at trial to support closing argument statements regarding Ms. Dalton’s

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-