

GUILTY BUT MENTALLY ILL: THE ETHICAL DILEMMA OF MENTAL ILLNESS AS A TOOL OF THE PROSECUTION

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ABSTRACT

While other jurisdictions use guilty but mentally ill as a compromise verdict to fill the gap between guilty by reason of insanity and a guilty verdict after an unsuccessful insanity defense, Alaska has transformed the status into a prosecutorial tool to keep mentally ill defendants incarcerated for longer than their mentally sane counterparts through denial of “good time” credit. Although Blakely was used – correctly – to prevent the denial of the mentally ill their Sixth Amendment right to a trial by jury and proof beyond a reasonable doubt in December 2013’s State v. Clifton, the court of appeals eliminated any utility from this middle ground, rendering serious mental illness short of M’Naghten insanity a per se aggravating circumstance.

INTRODUCTION

This Article will discuss the current state of the guilty but mentally ill (GBMI) verdict in Alaska, the 2012 “*Blakely* fix,” and the Alaska Court of Appeals’ decision in *State v. Clifton*. This Article will argue that prosecution-initiated GBMI is unethical and if not repealed will be increasingly used, post-*Clifton*, by prosecutors to deny mentally ill defendants their entitlement to good-time credit and will further disincentivize defense investigation and defense presentation of a defendant’s mental illness.

Part I will provide the reader with an overview of the affirmative defense of insanity, the use of evidence of diminished capacity to undercut proof of intent, guilty but mentally ill, and civil commitment.

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Part II will discuss the legal developments that provide a backdrop to Ms. Clifton's appeal, including a discussion of the *Apprendi* line of United States Supreme Court decisions and *Forster* in Alaska. Part III will discuss *Clifton* and the post-2012 version of section 12.47.030 of the Alaska Statutes. Part IV will highlight the GBMI verdict as a tool of the prosecution with special emphasis on evidentiary and ethical considerations.

I. INSANITY AND RELATED ADJUDICATIONS IN ALASKA, A CRIMINAL AND CIVIL OVERVIEW

This Part seeks to introduce the social, legal, and medical history of the insanity defense and related alternative dispositions in Alaska as well as to highlight key movements in Alaska's political and social landscape related to the mentally ill criminal defendant.

The law has long recognized that a person who suffers from a serious mental illness is "not to be regarded as a moral agent, or punishable by the law for his acts."¹ Insanity is, at its core, a legal fiction created to enhance the predictive value of what is otherwise an imprecise or complicated medical standard.² This Article will not discuss the various insanity defense standards that other jurisdictions use.³

A slim majority of United States jurisdictions use the *M'Naghten* test to determine whether a criminal defendant qualifies for an insanity acquittal.⁴ The *M'Naghten* test arose from public backlash following an 1843 assassination attempt on British Prime Minister Robert Peel.⁵ Daniel M'Naghten was acquitted of murder for fatally shooting one of P.M. Peel's secretaries.⁶ Following the judgment of acquittal on the basis of Mr. M'Naghten's insanity, a panel of judges was asked a series of hypothetical questions about the common law insanity defense as it existed at that time.⁷ The answers to these questions resulted in the *M'Naghten* test of legal insanity.⁸ Under *M'Naghten*, an accused may not be held criminally responsible if at the time of the criminal conduct she

1. *Bovard v. State*, 30 Miss. 600, 613 (Miss. Err. & App. 1856).

2. WAYNE R. LAFAYE, CRIMINAL LAW § 7.5(a) (5th ed. 2010) (describing the American Law Institute's insanity test).

3. For further reading, see *Insanity Defense*, 41 AM. JUR. 2D *Proof of Facts* 615 (2014); see also Andrew March, Note, *Insanity in Alaska*, 98 GEO. L.J. 1481 (2010).

4. WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 7.2, 7.2(a) (2d ed. 2003).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

was suffering from a mental disease or defect which rendered them unknowing of either, (a) the nature and quality of the act, or (b) that the act was wrong.⁹

Alaska currently uses only the first prong of the *M'Naghten* test: a defendant is to be found not guilty if at the time of the offense she was “unable, as a result of a mental disease or defect, to appreciate the nature and quality of her conduct.”¹⁰ *M'Naghten* has been widely criticized in the United States since the 1960's as inapplicable to mental illnesses that result in unlawful actions committed during, and in obedience to, prolonged and sustained hallucinatory directives.¹¹ For example, a person who experiences auditory hallucinations that direct her to kill her children to save them from “Evil” may be able to resist such a thought for a time, but eventually, over a period of years, may come to believe that it is, indeed, necessary to kill her children in order to save them. This person is excluded from a not guilty by reason of insanity (NGI) defense in Alaska because she knows that she is killing a person, but she cannot resist the directives of her hallucinations.

Defense counsel must provide written notice to the court of their intent to rely on the NGI defense within ten days of entering a plea or at another pre-trial juncture if there is good cause for later notice.¹² Insanity is a complete affirmative defense and negates all criminal culpability for the alleged crime.¹³ However, as Subsection A of this Part, *infra*, shall discuss, the successful insanity defendant will very likely be civilly committed for a long, indefinite period following an NGI acquittal, which partially explains the rarity of insanity pleas except in extremely serious felonies akin to aggravated murder.

Alaska has both an NGI verdict, which negates culpability, and an alternate GBMI verdict, after which the defendant will be exposed to the same potential punishment as a sane offender.¹⁴ The punishment for a GBMI defendant will be the same as a similarly situated “sane” person except that the Alaska Department of Corrections (DoC) is required to provide mental health treatment during incarceration and the defendant is not entitled to parole or furlough during continuing treatment with the DoC.¹⁵

9. *Id.*

10. ALASKA STAT. § 12.47.010(a) (2013). *See, e.g.,* State v. Patterson, 740 P.2d 944, 949 (Alaska 1987) (holding that Alaska's Insanity statutes only incorporate the first *M'Naghten* prong, and not the second).

11. *Insanity Defense*, *supra* note 3, at 615.

12. § 12.47.010(b).

13. § 12.47.010(d).

14. § 12.47.050.

15. § 12.47.030; § 12.47.050.

In Alaska, the GBMI verdict has a different, and more broadly applicable, standard for determining mental illness at the time of the offense than NGI's *M'Naghten* standard. For a defendant to be found GBMI, the prosecution or defense must show that, at the time the conduct occurred, the defendant lacked as a result of a mental disease or defect the substantial capacity either to appreciate the wrongfulness of their conduct or to conform that conduct to the requirements of law.¹⁶ This is a formulation of the American Law Institute Model Penal Code definition of legal insanity (ALI).¹⁷

The ALI test is broader than *M'Naghten*, using the term "substantial capacity" to describe the mentally ill person's volitional ability. The drafters of the ALI test noted that the "substantial capacity" part of the test accommodates an outsider's inability to identify a defendant's degree of impairment precisely.¹⁸ "Inability to conform conduct to the law" solves the deficiency of my previous example, wherein a person is ground down over a period of years by auditory hallucinations or other mental health symptoms to commit a crime they believe is necessary as a result of their disordered thought process.¹⁹ Also, the ALI test substitutes *M'Naghten's* "know" with the ALI's "appreciate."²⁰ The "appreciate" standard allows an expert witness to enter the defendant's realm of past experiences more easily and also to discuss the affect on emotional states of being and the effect on the defendant therein at the time of the offense.²¹ To prevent jurisdictions that may adopt this standard from exonerating those persons with nondelusional mental disorders—such as psychopathy or personality disorders, which are not chemically-treatable mental illnesses but involve diminished empathy, remorse, and self-control—the ALI added a definitional, exclusive, second paragraph to the test, which reads: "As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."²² Alaska includes this language in its GBMI statute,²³ but one can also find this language in section 12.47.010(c) of the Alaska Statutes.²⁴

Alaska also allows the defense to present evidence of diminished

16. § 12.47.030.

17. See LAFAVE, *supra* note 2.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*; MODEL PENAL CODE § 4.01 (1962).

23. ALASKA STAT. § 12.47.030(b) (2013).

24. *Id.*

capacity.²⁵ The diminished capacity doctrine allows the defendant to introduce evidence that creates a reasonable doubt as to whether she formed the requisite mens rea for the crime charged as a result of a mental disease or defect. The state has the burden of proving every element of the charged crime, including mens rea, beyond a reasonable doubt.²⁶ Evidence of diminished capacity is not an affirmative defense, but rather a failure-of-proof defense.²⁷ The defendant may still be convicted of lesser-included offenses with lesser or no mens rea elements (e.g., negligence or strict-liability crimes).²⁸ Alaska requires timely notice to the court that the defense will rely on evidence of diminished capacity.²⁹ Successful use of the diminished capacity defense (either as a complete defense or lesser-included conviction) can *only* result in a verdict of NGI to the charged offense,³⁰ in contrast to a verdict of not guilty. The successful diminished capacity defendant is still subject to automatic civil commitment, as discussed in Subsection A of this Part.

Following the entry of an NGI verdict, a defendant will be involuntarily committed to a mental health treatment facility.³¹ We now turn to a discussion of involuntary civil commitment to illustrate the rarity of the NGI defense due to the resulting loss of liberty.

A. Involuntary Civil Commitment

When John Hinkley was found not guilty by reason of insanity (NGI) following his attempted assassination of Ronald Reagan, the public outcry was deafening. Multiple jurisdictions re-wrote statutory insanity defenses that had been carefully crafted over years using the emerging bio-medical understanding of mental illnesses.³² But even before John Hinkley's Jodie Foster-fueled assassination attempt, Alaska had already been especially zealous as a result of the infamous Robert Meach murders.³³ A discussion of civil commitment, usually of

25. § 12.47.020(a).

26. *Patterson v. New York*, 432 U.S. 197, 210 (1977).

27. *Barrett v. State*, 772 P.2d 559, 564 (Alaska Ct. App. 1989). Diminished capacity is not an element of the prosecution's case-in-chief that must be proven beyond a reasonable doubt. *Id.* at 571.

28. § 12.47.020.

29. *Id.*

30. *Id.*

31. § 12.47.090(b).

32. Lincoln Caplan, *The Insanity Defense, Post-Hinkley*, N.Y. TIMES, Jan. 17, 2011, available at <http://www.nytimes.com/2011/01/18/opinion/18tue4.html> (last visited March 31, 2015).

33. Robert Meach presented a successful MPC insanity defense to murder in

extensive duration, following a defendant's successful insanity defense, was absent from the public discourse during statutory overhaul in many jurisdictions including Alaska.³⁴

Outside of the context of an NGI verdict, civil commitment (or *parens patriae* commitment) is generally authorized when a person is found to be (a) under the influence of a mental illness, and (b) as a result of her mental illness, a danger to herself or others.³⁵ Both prongs (mental illness *and* dangerousness) must be satisfied to comport with due process.³⁶ A mental illness for purposes of civil commitment in Alaska is defined by statute:

[A]n organic, mental, or emotional impairment that has substantive adverse effects on an individual's ability to exercise conscious control of the individual's actions or ability to perceive reality or to reason or understand; intellectual disability, developmental disability, or both, epilepsy, drug addiction, and alcoholism do not per se constitute mental illness, although persons suffering from these conditions may also be suffering from mental illness.³⁷

In a commitment hearing for a person who is alleged to be a danger

1973. Then, on May 3, 1981, while out on a day pass from the Alaska Psychiatric Institute (API), he killed four teenagers. This crime spurred the Alaska State Legislature to repeal the ten-year-old MPC insanity defense, and institute the restrictive statutory language that incorporates only the first *M'Naghten* prong and GBMI. Wallace Turner, *New Law on Insanity Plea Stirs Dispute in Alaska*, N.Y. TIMES, June 22, 1982, available at <http://www.nytimes.com/1982/06/22/us/new-law-on-insanity-plea-stirs-dispute-in-alaska.html> (last visited March 31, 2015).

34. John Hinkley has spent almost thirty-two years in civil confinement at St. Elizabeth's Hospital in D.C. He has only recently been allowed to go on seventeen-day unsupervised trips to stay with family in Williamsburg, VA. These trips are transitional to permanent release and began in December 2013, following a U.S. District Court ruling for his release. Hospital officials claimed his mental illness has been in remission for several years. *Ronald Reagan Shooter Free, 'Released and Unsupervised'*, INT'L BUS. TIMES AUSTL., March 7, 2014, available at <http://au.ibtimes.com/ronald-reagan-shooter-john-hinckley-free-released-unsupervised-photo-1334176> (last visited March 31, 2015); Matt Zapotosky, *Federal judge grants more freedom to John Hinkley Jr., Reagan's would-be assassin*, WASH. POST, Dec. 20, 2013, available at http://www.washingtonpost.com/local/crime/federal-judge-grants-more-freedom-to-reagans-would-be-assassin/2013/12/20/efdd2c60-68e9-11e3-8b5b-a77187b716a3_story.html (last visited March 31, 2015).

35. § 47.30.730(a)(1). *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (noting that involuntary confinement is generally justified by preventing harm to the individual and others).

36. *See* Addington v. Texas, 441 U.S. 418, 433 (1979) (holding that the state must prove these two elements by at least clear and convincing evidence).

37. § 47.30.915(14).

to themselves or others, the state need not allege that treatment will improve the mentally ill person's condition.³⁸ Rather, the purpose of commitment is to protect either the public or the mentally ill person, who may harm herself through some volitional act.³⁹

The state can also seek to commit those persons who are gravely disabled by their mental illness. The gravely disabled option allows the state to commit those persons who cannot, as a result of a mental illness, "live safely in freedom"⁴⁰ and who "risk[] harm from passive failure to secure their own basic needs."⁴¹ Under this portion of the statute, the state must allege that treatment will improve the gravely disabled person's condition. Even if the person is so disabled they cannot care for themselves, they still retain important liberty considerations protected in the absence of volitional self-harm or harm to others.⁴²

The time periods in which a person may be involuntarily civilly committed are finite and increase in duration. Typically, a person will enter the civil commitment track when local police or family member take her to a treatment facility following an incident where the peace officer has probable cause to believe that the person is mentally ill and may be a harm to herself or others and/or gravely disabled.⁴³ A mental health professional must evaluate the person within twenty-four hours after her arrival at the treatment facility.⁴⁴ If the evaluator believes the person has a mental illness that causes a likelihood of future harm to herself or others, or that the person is gravely disabled as a result of mental illness, the mental health professional may detain that person on an emergency basis and apply for an ex parte order.⁴⁵ Once a judge grants the ex parte order for evaluation, the facility has seventy-two hours to evaluate the person for evidence of a mental illness. Before that period expires, a judge will make a determination of probable cause for

38. *E.P. v. Alaska Psychiatric Inst.*, 205 P.3d 1101, 1108 (Alaska 2009) ("We conclude that the state is not required to show a likelihood that, in the case of a mentally ill person who poses a danger to himself, treatment will improve his condition.").

39. *Id.* at 1110.

40. *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 377 (Alaska 2007) (citing *O'Connor*, 422 U.S. at 575 n.9). *See also* § 47.30.915(9)(B) (defining "gravely disabled," in part, as a condition associated with the deterioration of a person's ability to function independently).

41. *E.P.*, 205 P.3d at 1110.

42. *See id.* (distinguishing between the gravely disabled, who risk harm from passive failure to secure basic needs, and those who are likely to harm themselves or others, who risk harm by acting affirmatively).

43. *Id.*

44. ALASKA STAT. § 47.30.710 (2013).

45. *Id.* The mentally ill person is also appointed counsel for the thirty-day commitment period hearing. *Id.*

commitment for thirty days, then for a period of ninety days, and finally for a period of 180 days, which will subsequently repeat on 180-day intervals until the person can live safely in freedom.⁴⁶

B. Committing NGI Acquittes

A defendant who is acquitted via a not guilty by reason of insanity verdict is almost always committed to a mental health treatment facility. The NGI acquittee is entitled to a hearing before the trier of fact at the same trial as to whether the defendant presently poses a danger to themselves or others as a result of a mental illness.⁴⁷ At this hearing, the defendant must show by clear and convincing evidence that she no longer suffers from “any mental illness that causes the defendant to be dangerous to the public” to avoid automatic civil commitment.⁴⁸ If the defendant fails to meet this burden, the court shall order the defendant committed.⁴⁹

The state has the power to commit NGI acquittes for periods longer than the statutory maximum sentence following *Jones v. United States*.⁵⁰ In this case, Mr. Jones, a paranoid schizophrenic, was acquitted NGI for petit larceny, a misdemeanor crime.⁵¹ Mr. Jones was held involuntarily at St. Elizabeth’s Hospital in D.C. for over one year (thus, placing him beyond the maximum period of incarceration for a misdemeanor).⁵² Mr. Jones argued that an NGI acquittal did not constitute a finding of present mental illness and dangerousness as *Addington v. Texas* required, and that a past criminal conviction had little to no predictive value of future dangerousness.⁵³ The court disagreed:

The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. Indeed, this concrete evidence generally may be at least as persuasive as any predictions about dangerousness that might be made in a civil commitment proceeding. We do not agree... that the requisite dangerousness is not established by proof that a person committed a non-violent crime against property.⁵⁴

46. §§ 47.30.715–755.

47. § 12.47.090.

48. §§ 12.47.090(a)–(c).

49. § 12.47.090(c).

50. 463 U.S. 354 (1983).

51. *Id.* at 360.

52. *Id.*

53. *Id.* at 362.

54. *Id.* at 364–65.

Jones also requires periodic review hearings to comport with due process,⁵⁵ and requires the release of NGI acquittees no longer suffering from mental illness.⁵⁶ Despite the overlap between NGI, civil commitment, incarceration, and indefinite commitment of NGI acquittees, civil commitment of NGI acquittees does not violate the prohibition on double jeopardy.⁵⁷

An extended NGI commitment is reviewed annually by the committing court, and is subject to the standards previously discussed for a thirty-day involuntary civil commitment.⁵⁸ Evidence of the underlying crime, in conjunction with evidence of the defendant's inability to appreciate her actions, will be compelling evidence of danger to the community in an annual commitment hearing. Evidence of the risk of danger extends the commitment indefinitely, depending on the severity of the mental illness. The DoC can petition for civil commitment of GBMI defendants at the conclusion of their sentence if they continue to receive treatment and the DoC has good cause to believe the person is still mentally ill and poses a threat to themselves or public safety.⁵⁹

A commitment's temporal uncertainty for the mentally ill defendant partially explains defense counsel's reluctance to recommend their clients pursue an insanity defense, present evidence of diminished capacity, or seek a GBMI verdict. Troublingly, these verdicts expose a mentally ill defendant to a longer period of incarceration than a similarly situated "sane" person.

II. THE PLAGUE: PRE-2012 GBMI IN ALASKA

Alaska revised its insanity defense statute to include only the first prong of the *M'Naghten* test following the outcry over Robert Meach's second murder. To be found not guilty by reason of insanity (NGI), a defendant must show that at the time of the offense he was unable to appreciate the nature and quality of his conduct as a result of a mental disease or defect.⁶⁰ Practically, this first prong will only apply to a defendant who, when firing a gun at another person, did not

55. *Id.* at 368. However, the state has no burden of showing the two prongs of civil commitment—continuing mental illness and dangerousness—under the automatic commitment model. *Id.*

56. *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992). The NGI acquittee with no remaining *treatable mental illness* must be released. Therefore, an NGI acquittee, like *Foucha*, cannot be held on the basis of a remaining *personality disorder*. *Id.*

57. *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997).

58. ALASKA STAT. § 47.30.735 (2013).

59. § 12.47.050(e).

60. § 12.47.010.

understand that the bullet could potentially kill that person. The *M'Naghten* test in NGI would not apply to the person who believes that shooting a person is not illegal or is not morally wrong as a result of their mental illness. Given the extremely limited availability of an insanity defense in Alaska following this statutory revision, the legislature adopted an alternative verdict: guilty but mentally ill (GBMI).⁶¹ In the NGI scenario, after the defense presents an insanity defense, the jury will also be instructed that if they do not find an NGI verdict, they must consider a possible GBMI verdict.⁶² Then, if the prosecution has proven all elements of the offense beyond a reasonable doubt and the defense has not successfully presented an insanity defense, the jury must reject an NGI verdict and consider a verdict of GBMI.⁶³ To find the defendant GBMI in the NGI/GBMI context, the jury applies the ALI test of insanity.⁶⁴

Before the 2012 *Blakely* fix of Alaska's GBMI statutes, a trial judge determined GBMI based on a preponderance of the evidence standard in a post-conviction hearing.⁶⁵ A post-conviction GBMI hearing could be requested by the defense, prosecution, or on the court's own motion.⁶⁶ During the GBMI hearing, the court would determine whether the defendant met the ALI definition of insanity as previously described in Part I, *supra*.⁶⁷ The ALI test of insanity is less stringent than the *M'Naghten* NGI analysis. If the defendant was found GBMI under the ALI test, the court would enter a verdict of GBMI and thereby the DoC would deny any good time credit or furlough for the duration of the incarcerated person's treatment.⁶⁸ Pre-2012, there was no DoC policy to allow the defendant to review the necessity of continued treatment following a GBMI finding.⁶⁹ No such provision exists today.⁷⁰

Following entry of a GBMI verdict the court will sentence the

61. § 12.47.040.

62. *Id.*

63. § 12.47.040(c).

64. § 12.47.050.

65. § 12.47.060, amended by §§ 6-7, 2012 Alaska Sess. Laws ch. 70.

66. *Id.*

67. § 12.47.030.

68. *See* § 12.47.050 (“[A] defendant receiving treatment under . . . this section may not be released . . . on furlough . . . or . . . on parole.”).

69. Crimes Against Children, S. 210, 27th Leg., 2nd Sess. (Alaska 2012), http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=S&beg_line=00250&end_line=00804&session=27&comm=JUD&date=20120210&time=1333.

70. The Department of Corrections does provide for review of the defendant's continuing mental illness under § 12.47.050(e), but this review is only pursuant to determining whether the commissioner is required to file a petition for involuntary civil commitment under § 47.30.070, and occurs thirty days before the end of the defendant's sentence.

defendant the same way as a similarly situated sane person and the DoC will provide mental health treatment to the defendant for a length of time depending on the severity of her mental illness.⁷¹ As long as the mentally ill defendant is in treatment during her sentence, she is neither eligible for release on furlough (except for treatment in a “secure facility”) nor eligible for parole.⁷² The computation for awarding credit for “good time,” set forth by statute,⁷³ is not available for the GBMI defendant who is still in treatment with the DOC.⁷⁴

In 2000, the U.S. Supreme Court decided *Apprendi v. New Jersey*,⁷⁵ which held that due process and the Sixth Amendment required any fact (other than a prior conviction) that increases punishment beyond a statutory maximum sentence be submitted and proved to a jury beyond a reasonable doubt.⁷⁶ The Court went on in a 2004 decision, *Blakely v. Washington*,⁷⁷ to hold that the Sixth Amendment required a jury finding beyond a reasonable doubt of any fact that would increase a mandatory guideline sentence within a statutory sentencing range (not merely the maximum sentence allowed by law).⁷⁸

Alaska applied the *Apprendi* and *Blakely* holdings to section 33.020.010 of the Alaska Statutes’ good time computation in a 2010 court of appeals decision, *Forster v. State*.⁷⁹ At trial, Mr. Forster was convicted of first-degree murder for killing Kenai Police Officer John Watson.⁸⁰ Typically, a first-degree murder conviction has a sentencing range of 20-99 years to serve.⁸¹ However, a 99-year mandatory sentence without the possibility of parole applies if the defendant is convicted of first-degree murder of “a uniformed or otherwise clearly identified peace officer . . . who was engaged in the performance of official duties at the time of the murder.”⁸² Although there was no dispute that Officer Watson was uniformed and engaging in official duties at the time of his death, the jury did not make that finding at trial.⁸³ Following *Blakely*, the superior

71. § 12.47.050(b).

72. § 12.47.050.

73. See § 33.20.010(a) (“[Defendants are] entitled to a deduction of one-third of the term of imprisonment rounded off to the nearest day if the prisoner follows the rules of the correctional facility in which the prisoner is confined.”).

74. § 12.47.050.

75. 530 U.S. 466 (2000).

76. *Id.* at 490.

77. 542 U.S. 296 (2004).

78. *Id.* at 303–04.

79. 236 P.3d 1157 (Alaska Ct. App. 2010).

80. *Id.* at 1160.

81. ALASKA STAT. § 12.55.125(a) (2013).

82. § 12.55.125(a)(1).

83. *Forster*, 236 P.3d at 1169.

court declined to impose the mandatory 99-year sentence without parole because the jury did not make a required finding of fact.⁸⁴ The superior court entered the maximum sentence of ninety-nine years.⁸⁵ The court of appeals then determined whether “a defendant is entitled to have a jury find the facts that result in [an] elimination of the good-time deduction” by restricting the defendant’s right to parole.⁸⁶ The court of appeals affirmed the lower court and held that “a sentencing court may not restrict or eliminate a defendant’s good-time credit and mandatory parole without holding a jury trial on the aggravating circumstance.”⁸⁷ This decision brought the denial of good-time credit under the auspices of *Blakely* in Alaska.

In 2009, while presiding over *State v. Clifton*,⁸⁸ Judge Volland of the Alaska Superior Court in Anchorage saw that the GBMI statute, as written, violated *Blakely* by denying GBMI defendants good-time credit on facts not determined by a jury.⁸⁹ Around that same time, the State of Alaska went about crafting a “*Blakely* Fix” of the GBMI statutes to require a jury finding of GBMI.⁹⁰

However, a finding of GBMI by jury was not enough to cure the defense community’s unease regarding defense-initiated presentation of mental illness. During a presentation before the House Judiciary on GBMI in 2012, the Deputy Director for the Public Defender Agency, Criminal Division, stated that:

GBMI provisions currently doesn’t [sic] effect a great many clients, because defense counsel will do everything possible to avoid a GBMI verdict because it results in greater punishment for the client because they don’t get parole, they’re not eligible

84. *Id.*

85. *Id.*

86. *Id.* at 1170.

87. *Id.* at 1172. However, the court also found that the superior court was required to impose the restriction on discretionary parole that is mandated in § 12.55.125(a) – the offense for which the defendant was convicted at trial. This is because in a previous Alaska Supreme Court case – *State v. Malloy* – the court held that a sentencing court has the statutory authority to impose a 99-year sentence with no eligibility for parole even without the finding of an aggravating circumstance in a first-degree murder sentencing. *See id.* at 1170 (discussing *State v. Malloy*, 46 P.3d 949, 954 (Alaska 2002)).

88. 315 P.3d 694 (Alaska Ct. App. 2013).

89. *Id.* at 702–03.

90. Act of July 1, 2012, §§ 6–7, 2012 Alaska Sess. Laws ch. 70; *see also* *Hearing on S. 210 Before the H. Finance Comm.*, ALASKA S. FIN. COMM. MINUTES, 27th Leg., 2nd Sess. (April 13, 2012) (statement of Anne Carpeneti, Assistant Att’y Gen. of the Alaska Department of Law), *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&9beg_line=01083&end_line=01465&session=27&comm=FIN&date=20120413&time=0912.

for early release to a halfway house, or anything like that. So, we try and avoid it like the plague.⁹¹

III. *CITO, LONGE, TARDE*: POST-2012 GBMI IN ALASKA AND *STATE V. CLIFTON*

A. 2012 GBMI Amendments

In response to the *Blakely* decision, the Alaska Legislature amended section 12.47.060 of the Alaska Statutes to require that guilty but mentally ill (GBMI), if raised by the prosecution, must be proven to the jury beyond a reasonable doubt unless waived by the defense.⁹² The bill was originally introduced as SB 186, sponsored by the Senate Judiciary Committee and was intended to reconcile Alaska GBMI to the U.S. Supreme Court decisions in *Blakely* and *Apprendi*.⁹³

The statutory changes would apply “to [all] proceedings occurring on or after the effective date of this Act.”⁹⁴ These changes apply regardless of whether the defendant committed an offense “before, on or after the effective date of this Act.”⁹⁵ Therefore, the GBMI statutory revisions retroactively applied to Ms. Clifton’s 2006 offense and the 2009 superior court trial.

Meanwhile, the State had already appealed the superior court’s decision in *State v. Clifton*. We now turn to a detailed look at Ms. Clifton’s trial and the result of the State’s appeal.

B. *State v. Clifton*: The Superior Court Case

On August 2, 2006, Ms. Clifton pressed a loaded handgun into her

91. Statement of Douglas Moody, *Hearing on S. 186 Before the S. Judiciary Comm.*, ALASKA S. JUDICIARY COMM, Minutes, 27th Leg., 2nd Sess. (Feb. 10, 2012) (statement of Douglas Moody, Deputy Director for the Public Defender Agency, Criminal Division), available at http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=S&beg_line=00250&end_line=00804&session=27&comm=JUD&date=20120210&time=1333.

92. Act of July 1, 2012, §§ 6-7, 2012 Alaska Sess. Laws ch. 70; see also *Hearing on S. 210 Before the H. Finance Comm.*, ALASKA S. FIN. COMM. MINUTES, 27th Leg., 2nd Sess. (April 13, 2012) (statement of Anne Carpeneti, Assistant Att’y Gen. of the Alaska Department of Law), available at http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&9beg_line=01083&end_line=01465&session=27&comm=FIN&date=20120413&time=0912.

93. *Hearing on S. 186 Before the S. Judiciary Comm.*, supra note 90.

94. Crimes/Sentencing/Parole/Victims, § 17, 2012 Alaska Sess. Laws ch. 70, 7, available at http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=SB0210Z&session=27.

95. *Id.*

supervisor's ribcage. Ms. Clifton believed the government conspired to ruin her life and harm her physically.⁹⁶ She claimed she had been raped in Saudi Arabia by a high-ranking military officer who now lives in Anchorage.⁹⁷ Ms. Clifton told co-workers about the government conspiracy against her, prompting her supervisor, Steven Mayer, to decide she needed to undergo a psychiatric evaluation before returning to work.⁹⁸ During a meeting on this issue, Ms. Clifton became agitated, pushed a loaded gun into Mr. Mayer's ribs, and pulled the trigger.⁹⁹ Ms. Clifton used a semi-automatic handgun that required the user to "rack" the top slide; she failed to do this. No round entered the chamber and no bullet fired.¹⁰⁰ Officers responding to the incident found five rounds inside the gun, a loaded magazine in her purse, and six loose rounds of ammunition in her bag.¹⁰¹ Ms. Clifton was indicted on one count of attempted first-degree murder and one count of third-degree assault for placing her supervisor in fear of serious physical injury.¹⁰²

Ms. Clifton sent Judge Volland a handwritten pro se letter from jail in May 2007 reiterating her belief in a government conspiracy against her.¹⁰³ In this letter she complained of her treatment in prison and of her appointed counsel.¹⁰⁴ Ms. Clifton's counsel requested a competency evaluation.¹⁰⁵ Ms. Clifton was sent to API for evaluation by Dr. Lois Michauld, and based on Dr. Michauld's findings, Ms. Clifton was found not competent to stand trial.¹⁰⁶ Following the State's request for an additional evaluation from an alternate individual, Dr. David Sperbeck evaluated Ms. Clifton, and like Dr. Michauld, he concluded that Ms. Clifton was not competent to stand trial and that she suffered from a "Delusional Disorder, Persecutory Type."¹⁰⁷ Ms. Clifton was committed to API in August of 2008 for restoration of competency.¹⁰⁸ Ms. Clifton had three intervening competency evaluations and subsequent hearings in October, November, and December of 2008 before she was found

96. Brief for Petitioner at 3, *State v. Clifton*, 315 P.3d 694 (Alaska Ct. App. 2013) (No. A-10941).

97. *Id.*

98. *Clifton*, 315 P.3d at 698.

99. *Id.*

100. *Id.*

101. *Id.*

102. Brief for Petitioner, *supra* note 96, at 7.

103. *Id.*

104. *Id.*

105. *Id.* at 8.

106. *Id.*

107. *Id.*

108. *Id.*

competent to stand trial in January 2009 and a trial date was set.¹⁰⁹

The State filed Motion to Preclude Argument/Evidence of Insanity or Diminished Capacity at Trial on July 13, 2009, and indicated it would seek a GBMI finding following a guilty verdict using the pre-2012 GBMI statutes.¹¹⁰ The State changed this position in September and gave notice that if Ms. Clifton took the stand the State would seek a GBMI jury instruction, as well as call either of the competency evaluators to testify as to Ms. Clifton's mental health.¹¹¹ The defense objected to the use of competency evaluators as expert witnesses to Ms. Clifton's mental illness at the time of the offense and the superior court ordered Ms. Clifton to submit to a psychiatric evaluation for a possible State-initiated GBMI finding.¹¹² Ms. Clifton exercised her Fifth Amendment right against self-incrimination and refused to submit to a psychiatric evaluation.¹¹³

Ms. Clifton's trial occurred in late October 2009, during which her supervisors and responding officers only hinted at her mental illness and defense counsel presented no evidence of her mental illness. The state did not seek a jury instruction on GBMI. The jury returned a verdict of guilty of attempted murder and assault in the third degree on November 4, 2009. Following trial the prosecutor moved the court to find Ms. Clifton GBMI.¹¹⁴ The defense objected to the constitutionality of the post-trial GBMI on the following three grounds:

109. *Id.*

110. *Id.* at 9.

111. *Id.*

112. *Id.* at 13. These actions on behalf of the state begin to reveal the pressure placed on Ms. Clifton to bring her mental illness into the trial. The state, in its petition for review argued "that without a proper instruction on the possibility of a GBMI determination. . . [Ms.] Clifton might get the windfall of an undeserved outright acquittal if jurors concluded that she was mentally ill but did not know how to factor that into the traditional guilty/not guilty choice." *Id.* at 11. To which defense counsel "essentially confirmed that he was gambling on such an implicit insanity acquittal." *Id.* This statement about the defense counsel's "gamble" is the first in a series of implicit and unfair criticisms from the state, and the court of appeals, directed towards defense counsel's strategy at trial. As discussed in Part I, *supra*, and as confirmed by the holding of *Clifton*, the defense counsel had ample reasons to exclude evidence of mental illness at trial. These reasons included: limiting incarceration (including the possibility of civil commitment), providing the possibility of parole, protecting Ms. Clifton from the stigma of mental illness, and limiting the release of invasive psychiatric evaluations.

113. *Id.* at 13.

114. *Clifton*, 315 P.3d at 700.

1. A GBMI verdict violates due process and equal protection when the defense did not place her mental status at issue through an NGI or diminished capacity defense,
2. The GBMI's judicial determination violated Ms. Clifton's right to a jury trial post-*Blakely v. Washington*,
3. Post-trial determination of GBMI would violate the proscription of double jeopardy.

After a hearing on GBMI, Judge Volland found, based on a preponderance of the evidence, that Ms. Clifton met the definition of GBMI, but concluded the judicial determination of GBMI violated equal protection when Ms. Clifton did not place her mental illness at issue.¹¹⁵ The superior court reasoned that to enter a verdict of GBMI in a post-trial procedure such as the pre-2012, section 12.47.050(d) of the Alaska Statutes would violate Ms. Clifton's constitutional rights to equal protection and due process of law.¹¹⁶ In doing so, the superior court reached two legal conclusions. First, section 12.47.50(d) of the Alaska Statutes, by barring GBMI defendants from parole during treatment, violated equal protection of the law because it infringed upon a fundamental liberty interest in good time credits while similarly situated sane people would be released under the same circumstances.¹¹⁷ Second, post-*Blakely*, GBMI violated Ms. Clifton's Sixth Amendment right to a jury trial.¹¹⁸ The superior court determined that, because a GBMI verdict functionally increased Ms. Clifton's exposure to the maximum punishment, she was entitled to a jury trial on the issue of GBMI and that the government had to prove GBMI beyond a reasonable doubt.¹¹⁹

C. *State v. Clifton*: The Court of Appeals Decision

The State appealed the sentencing court's decision on GBMI.¹²⁰ Ms. Clifton argued that the court of appeals should uphold the decision on the ground that in proving GBMI, the prosecution violated her right against self-incrimination by presenting the results of her competency evaluation.¹²¹ In its December 27, 2013 opinion, the Alaska Court of Appeals discussed six legal issues: *Blakely v. Washington*, expert witnesses, equal protection, due process, issues related to fair play, and finally, double jeopardy. This Article will discuss these issues in the

115. *Id.*

116. *Id.* (summarizing the superior courts' reasoning).

117. *Id.*

118. *Id.*

119. *Id.* at 701.

120. *Id.* at 698.

121. *Id.*

order presented in the opinion.

1. *Blakely*

The Alaska Court of Appeals agreed with the superior court that *Blakely* precludes the superior court from finding Ms. Clifton GBMI without a jury determination.¹²²

The court of appeals stated:

This good time credit, and the accompanying right to mandatory parole, is not a discretionary aspect of Clifton's sentence. The superior court has no sentencing authority to diminish Clifton's good time credit, or to declare her ineligible for parole. Rather, Clifton's eligibility for mandatory parole can be restricted only if she is found guilty but mentally ill.¹²³

Relying on *Forster* and *Blakely*, the court of appeals found the pre-2012 GBMI statute, in allowing the judge to be the fact finder under a preponderance of the evidence standard, violated the defendant's Sixth Amendment right to jury trial.¹²⁴ However, the statutory revisions in 2012 cured this deficiency, *supra*, Part II. Therefore, Judge Volland correctly decided that the post-trial judicial determination was unconstitutional under *Blakely*.

2. *Equal Protection*

Ms. Clifton argued at trial and in her response brief that because the GBMI verdict infringed on her fundamental liberty interest to be released at the same time as other inmates convicted of the same crime, and because the distinction is made on the basis of mental illness, the GBMI verdict in Alaska cannot survive any level of equal protection scrutiny.¹²⁵ Ms. Clifton contended that section 12.47.050 of the Alaska Statutes equated mental illness with dangerousness without making dangerousness a separate showing at the trial court level, or at any level of DoC review.¹²⁶ As Ms. Clifton argued, equating mental illness with dangerousness is antithetical to civil commitment in Alaska and offensive to mental health professionals.¹²⁷ Clifton further suggested that

122. *Id.* at 702.

123. *Id.*

124. *Id.*

125. Brief for Respondent at 34, *State v. Clifton*, 315 P.3d 694 (Alaska Ct. App. 2013) (No. A-10941).

126. *Id.*

127. *Id.* at 36.

this creates a problem of underinclusion in that Alaska's GBMI statute presupposes that all mentally ill persons are more dangerous than mentally stable persons who commit the same crimes.¹²⁸

In rejecting the dangerousness argument, the court of appeals reasoned that "proof that a defendant suffered from a mental illness at the time of the offense is not enough to support a verdict" of GBMI.¹²⁹ Rather, to support a GBMI verdict, the State must prove both "that the defendant [suffers] from a mental illness and that, because of this mental illness, the defendant lacked the substantial capacity to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of law."¹³⁰ Thus, according to the court of appeals, the State must support both the *mental illness* and *dangerousness* of a defendant.¹³¹ The court of appeals went on to reject the respondent's underinclusion argument, reasoning that the Alaska State Legislature could reasonably conclude that the GBMI defendant "will be significantly less receptive to parole supervision and control."¹³² In this section, the court of appeals upheld the constitutionality of Alaska's GBMI statute on equal protection grounds.

3. *Due Process*

The court continued on to address the respondent's due process concerns. Here, the court once again faced a problem of DoC review in a GBMI case. In 1993's *Monroe v. State*, the defendant argued that Alaska's GBMI statute does not provide an opportunity to review the necessity of ongoing mental health treatment nor does it provide review of defendant's continuing mental illness while incarcerated.¹³³ As previously discussed in Parts I and II, *supra*, the DoC today has no mechanism to review a defendant's ongoing mental health diagnosis in the GBMI context. In footnote four of *Monroe*, the court of appeals stated that some type of review of the defendant's ongoing need for mental health treatment while the defendant could be eligible for good time

128. *Id.*

129. *Clifton*, 315 P.3d at 703.

130. *Id.* at 710 (citing ALASKA STAT. § 12.47.030(a)). The court went on to briefly discuss the requirement of a procedural mechanism to "seek eligibility for parole and furlough by demonstrating their lack of continued dangerousness." *Id.* at 704 (citing *Monroe v. State*, 847 P.2d 84, 90 n.4 (Alaska Ct. App. 1993)). However, the court did not make a decision on this issue because the issue was not yet ripe in Ms. Clifton's situation. *Id.* at 704.

131. *Id.* (affirming *Monroe*, 847 P.2d at 90 n.4).

132. *Id.*

133. *Monroe*, 847 P.2d at 90 n.4.

must be provided.¹³⁴ However, the court recognized the issue was not yet ripe for review.¹³⁵ As Mr. Monroe was sentenced to sixty years' incarceration, the issue in his case is unlikely to surface any time soon.¹³⁶ In *Clifton*, the court of appeals reiterated the necessity for review at the DoC level, but once again concluded the issue was not yet ripe for due process review.¹³⁷

4. *Fair Play*

An overarching theme of Ms. Clifton's argument on appeal and likely obvious to anyone encountering Alaska's GBMI scheme on first blush, is that it is fundamentally unfair to subject a mentally ill person who does not place their mental illness at issue during trial to a harsher sentence than one who successfully hides their mental illness.¹³⁸ Ms. Clifton framed this issue on the basis of equal protection, but the court of appeals separated the issue of fundamental fairness and framed it in terms of the punishment imposed.¹³⁹

The court of appeals separated Ms. Clifton's argument into two alleged consequences of a GBMI verdict to a defendant: first, she would be forced to undergo mental health treatment while in DoC custody; and second, she would be ineligible for parole or furlough while undergoing this treatment.¹⁴⁰ In rejecting Ms. Clifton's first alleged consequence, the court of appeals interpreted section 12.47.050(b) of the Alaska Statutes' treatment provision as non-compulsory.¹⁴¹ Therefore, Ms. Clifton could arguably *refuse* treatment by the DoC. However, the court noted: "this would seemingly mean that defendants who did not spontaneously get better would never be released on parole or furlough."¹⁴²

As to her second alleged consequence, the defendant argued that giving "disparate treatment to defendants who have not placed their

134. *Id.*

135. *Id.*

136. *See id.* ("Monroe would be ineligible for discretionary parole for an extended period of time.").

137. *Clifton*, 315 P.3d at 704-05.

138. Whether or not it is also fundamentally unfair to subject a mentally ill person to a harsher punishment as a result of a crime committed while mentally ill *at all* could be the subject of an entire article and will be left to a more capable mind.

139. *See* Brief for Respondent, *supra* note 125, at 16-20. *See also Clifton*, 315 P.3d at 705-07 (discussing the unfairness of lack of parole and different sentences).

140. *Clifton*, 315 P.3d at 699.

141. *Id.* at 705.

142. *Id.*

mental illness at issue” was fundamentally unfair.¹⁴³ She also argued that a GBMI verdict was the “‘price’ that a defendant risks if the she raises a defense based on mental disease or defect and is unsuccessful.”¹⁴⁴ However, the court of appeals pointed out that section 12.47.020(a) of the Alaska Statutes allows evidence of a defendant’s mental disease or defect if such evidence is “relevant to prove that the defendant did or did not have a culpable mental state which is an element of the crime.”¹⁴⁵ The court reasoned:

AS 12.47.020(a) limits the admissibility of this evidence only in the sense that if a defendant wishes to introduce evidence of their mental disease or defect to *negate* a culpable mental state, the defendant must give the State and the trial court advance notice. Thus, under AS 12.47.020(a), the State can introduce evidence of a defendant’s mental disease or defect if this evidence is relevant to *support* the state’s allegations concerning the defendant’s mental state.¹⁴⁶

This discussion of the admissibility of evidence regarding the defendant’s mental state leads us to the fifth argument of *Clifton*, the advisability of using a mental health professional who evaluated a mentally ill defendant for competency to testify as to the defendant’s mental state at a GBMI trial.

5. *Expert Witnesses*

There was an overarching disagreement whether Dr. Sperbeck should have been allowed to testify at Ms. Clifton’s post-trial hearing for GBMI.¹⁴⁷ Dr. Sperbeck only evaluated Ms. Clifton for competency and Ms. Clifton invoked her Fifth Amendment right against self-incrimination in response to a judicial order to submit a mental health evaluation to determine her mental state at the time of the crime. Dr. Sperbeck evaluated Ms. Clifton for competency several times.¹⁴⁸ At Ms. Clifton’s hearing on GBMI, the prosecution called Dr. Sperbeck to testify as to Ms. Clifton’s mental state at the time of the crime for the purpose

143. *Id.*

144. *Id.* at 706.

145. *Id.*

146. *Id.* (emphasis in original).

147. *See id.* at 701, 706 (concluding that the government’s use of Dr. Sperbeck as a witness was not a constitutional violation). *Compare* Brief for Respondent, *supra* note 125, at 16–20, *with* Petitioner’s Reply Brief at 1–12, *State v. Clifton*, 315 P.3d 694 (Alaska Ct. App. 2013) (No. A-10941).

148. *Clifton*, 315 P.3d at 699.

of a GBMI determination.¹⁴⁹ Ms. Clifton asked the court of appeals to affirm the superior court's decision on the grounds that including Dr. Sperbeck's testimony violated her right against self-incrimination.¹⁵⁰ Dr. Sperbeck stated that he could put aside his earlier examination of Ms. Clifton and objectively assess Ms. Clifton.¹⁵¹ Judge Volland accepted Dr. Sperbeck's statement and allowed him to testify as an expert witness, and the court of appeals allowed this assessment to stand.¹⁵²

The court of appeals went on to say that evidence of a mental illness was admissible for purposes of proving the defendant's mental state at the commission of the offense.¹⁵³ This includes evidence of mental illness for purposes of a GBMI determination.¹⁵⁴ This is because *Blakely* has placed the burden of proving all the elements of GBMI on the prosecution when the defendant has not raised this issue at trial.¹⁵⁵ The elements of GBMI are distinct from the elements of the underlying offense.¹⁵⁶ Therefore, "the State can introduce evidence of a defendant's mental disease or defect if this evidence is relevant to *support* the state's allegations concerning the defendant's mental state."¹⁵⁷

The court of appeals, in this portion of *Clifton*, allowed the possibility that a previous competency evaluator could be able to ignore several previous mental health evaluations and rely only on an objective determination. This portion of the court's decision will be discussed further in Part IV(A) of this Article, *infra*.

6. *Bifurcation*

In the event of a trial wherein neither the defense nor the prosecution makes mental illness an issue, the prosecution can still seek GBMI after a guilty verdict.¹⁵⁸ Here, the "evidence of the defendant's mental disease or defect will be relevant only if the defendant is convicted, because it is relevant to the type of disposition that the sentencing court should impose on the defendant"—i.e., eligibility for early release on parole.¹⁵⁹

The result is a bifurcated trial wherein the issue of guilt or

149. *Id.* at 701.

150. *Id.*

151. *Id.* at 701-02.

152. *Id.*

153. *Id.* at 706.

154. *Id.* at 701-02.

155. *Id.*

156. *Id.* at 710.

157. *Id.* at 706 (emphasis in original).

158. *Id.*

159. *Id.* at 707.

innocence is adjudicated and a guilty verdict is entered, followed by defense or prosecution's motion to have the issue of GBMI litigated in front of the same jury that decided guilt.¹⁶⁰ If the prosecution raises the issue, the defendant is entitled to a trial by jury on GBMI and a finding of GBMI beyond a reasonable doubt.¹⁶¹ This procedure, according to the court of appeals, complies with *Blakely*, as discussed earlier, *supra*.

In the second, GBMI portion of the trial, the prosecution must prove all elements of GBMI as separate and distinct from the underlying charged offense.¹⁶²

7. *Double Jeopardy*

The court of appeals briefly concluded that subjecting Ms. Clifton to a second trial to determine GBMI would not violate double jeopardy. The court reasoned the elements of GBMI are separate and distinct from the underlying offense.¹⁶³ Also, Ms. Clifton's counsel was insistent that all evidence of mental illness must be excluded from her trial.¹⁶⁴

8. *Final Points*

The court was unclear, however, about whether the potential GBMI defendant's right to a jury trial under a "beyond a reasonable doubt" standard would apply if the defense raised the GBMI issue following a guilty verdict. The court only stated: "Because . . . the defendant faces an increased maximum sentence if the jury decides in the government's favor on this issue, the defendant is entitled to trial by jury and to proof beyond a reasonable doubt."¹⁶⁵

Additionally, the court did not address the situation in which the defense attempted an unsuccessful NGI defense and then the GBMI verdict is presented as an alternative to the jury, as required by statute. The court of appeals upheld the superior court's determination that the pre-2012 version of section 12.47.060 of the Alaska Statutes was unconstitutional post-*Blakely*, but the court did not find the punishment enhancement of GBMI unconstitutional as the superior court previously determined.¹⁶⁶

160. *Id.*

161. *Id.* at 706; *Forster v. State*, 236 P.3d 1157, 1170-72 (Alaska Ct. App. 2010).

162. *Clifton*, 315 P.3d at 710.

163. *Id.*

164. *Id.*

165. *Id.* at 707.

166. *Id.* at 703-05.

IV. MENTAL ILLNESS AS A TOOL OF THE PROSECUTION

*But Talus sternely did upon them set,
And brusht and battred them without remorse,
That on the ground he left full many a corse;
Ne any able was him to withstand,
But he them overthrew both man and horse,
That they lay scattred over all the land,
As thicke as doth the seede after the sowers hand.*

-Edmund Spencer, *The Faerie Queen*
Book V, Canto XII

The court of appeals decision in *State v. Clifton* further complicates Alaska's already strained relationship between mental illness and criminal behavior. Now, a traditionally defense-oriented tool has been crowned by the appellate court as a per se sentencing aggravator for persons suffering from mental illness.

This Part addresses a potential broader use of guilty but mentally ill (GBMI) in Alaska post-*Clifton*, and will examine two practical issues the defense and prosecution will encounter during these proceedings, one evidentiary and one ethical. This Part concludes with a discussion of the Coordinated Resources Project (CRP or Mental Health Court) and will show that the prosecution will gain no benefit from participating in these elective programs post-*Clifton*.

A. Evidentiary Issues: Competency Evaluations and Expert Witnesses

Pre-*Clifton*, the use of competency evaluations in State criminal proceedings existed in a nebulous and unclear state. The U.S. Supreme Court in *Estelle v. Smith*¹⁶⁷ stated that competency evaluations are conducted for a limited, neutral purpose.¹⁶⁸ In Alaska, use of competency evaluations for evidence in an adversarial proceeding violates the defendant's right against self-incrimination.¹⁶⁹ However, *R.H. v. State's* prohibition on competency evaluations in criminal prosecutions is not as strong as one might view on first blush. In *Monroe v. State*, the court of appeals found that it was not plain error for a trial judge to allow a competency evaluator to testify as to GBMI if defense

167. 451 U.S. 454 (1981).

168. *Id.* at 465.

169. *R.H. v. State*, 777 P.2d 204, 210 (Alaska Ct. App. 1989).

counsel did not object in the proceeding for tactical reasons.¹⁷⁰ This means that a competency evaluator may also testify to a defendant's mental illness at the time of the offense, as long as they performed a separate evaluation.

Pre-*Clifton*, there was at least an arguable position the defense could take to exclude evidence of competency evaluations in a possible GBMI situation. Now, the prosecution can not only present lay witness testimony of the defendant's mental illness, but the prosecution can also bring in a former competency evaluator to testify about the defendant's mental state at the time of the offense as long as they say a few magic words about objectivity and the defense does not object.¹⁷¹

If the prosecution can bring a competency evaluator in the second half of a bifurcated GBMI trial to testify about the defendant's mental illness at the time of the commission of the crime, which can then be used to *aggravate* and *lengthen* a defendant's sentence, there is a huge tactical risk in bringing forth competency concerns at the preliminary stages of a client's case. Seeking a competency evaluation would, in practice, expose a client to a GBMI finding at a bifurcated GBMI trial, and, consequently, to a longer prison term if the prosecution is successful in establishing GBMI.

B. Ethical Issues: Defense and Prosecution

Defense counsel has a duty to zealously advocate their client's position, which in the criminal context includes limiting their exposure to incarceration.¹⁷² Attorneys also have a duty of confidentiality.¹⁷³ The duty of confidentiality can be overcome to a limited degree in the case of a client with diminished capacity.¹⁷⁴ If a lawyer reasonably believes their client has diminished capacity as a result of mental illness and cannot act reasonably to protect their own interests, the attorney may disclose information to a tribunal which would indicate the defendant may not be competent to stand trial and seek a competency evaluation.¹⁷⁵ This

170. *Monroe v. State*, 847 P.2d 84, 87 (Alaska Ct. App. 1993).

171. The competency evaluator who testified in Ms. Clifton's case is the same person who testified in Mr. Monroe's trial 20 years ago: David Sperbeck. *Clifton*, 315 P.3d at 699.

172. ALASKA RULES OF PROF'L CONDUCT pmbl. (2009). This duty applies to all lawyers, not just defense counsel. *Id.*

173. ALASKA RULES OF PROF'L CONDUCT R. 1.6 (2009).

174. See ALASKA RULES OF PROF'L CONDUCT R. 1.14 (2009) (when taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests).

175. *Id.*

decision is discretionary. The prosecution may then request a second competency evaluation (it is this second competency evaluation from which the prosecution can bring a competency evaluator as an expert witness post-*Clifton*).

The A.B.A. Criminal Justice Standards advise that the contents of a competency evaluation “be considered privileged information and should be used only in a proceeding to determine the defendant’s competence.”¹⁷⁶ The state’s use of the same competency *evaluator* as an expert witness at a bifurcated GBMI trial does not comply with the A.B.A. Criminal Justice Standards. It is unreasonable to believe that a competency evaluator who has seen a defendant several times, such as the evaluator in *Clifton*, could set aside both their observations and diagnosis and state to a jury completely objective opinions about the defendant’s mental state at the time of the offense as an expert witness.

The State’s pursuit of GBMI also creates a *Brady* problem. The government has special duties to disclose to the defense all evidence that tends to negate guilt or mitigate an offense.¹⁷⁷ In *Brady v. Maryland*,¹⁷⁸ the Supreme Court of the United States held that withholding exculpatory evidence violates due process when the evidence is material to either “guilt or . . . punishment.”¹⁷⁹ As the *Clifton* court of appeals stated, mental disease or defect in a GBMI determination will be relevant “to the type of disposition that the sentencing court should impose on the defendant,”¹⁸⁰ any evidence of mental illness in order to mitigate a culpable mental state must be disclosed to the defense before trial. This places the government in an odd ontological position in the context of prosecution-initiated GBMI. On one hand, the government must view the evidence of mental illness as mitigating, material evidence that must be disclosed to the defense because it has the ability to defeat the mens rea element of the crime charged.¹⁸¹ On the other hand, the government may pull an about-face and use this evidence in a bifurcated GBMI proceeding to deny the defendant good-time parole.¹⁸² Therefore, in the second half of a bifurcated GBMI trial, the prosecution must disclose all evidence to the defense tending to negate a mental illness or risk violating their duties under ARPC 3.8(d) and *Brady*. While in trial, the

176. A.B.A. CRIMINAL JUSTICE STANDARDS Mental Health Standard 7-4.6.

177. ALASKA RULES OF PROF’L CONDUCT R. 3.8(d) (2009).

178. 373 U.S. 83 (1963).

179. *Id.* at 87 (emphasis added).

180. State v. Clifton, 315 P.3d 694, 707 (Alaska Ct. App. 2013) (dicta).

181. A.B.A. CRIMINAL JUSTICE STANDARDS Mental Health Standard 7-9. See also, ALASKA RULES OF PROF’L CONDUCT R. 3.8(d) (2009) (demonstrating the government’s duty to disclose evidence that mitigates guilt).

182. *Clifton*, 315 P.3d at 707.

prosecution has a duty to disclose evidence tending to negate that very fact.

This *Brady* problem reveals the prosecution's unprincipled stance in the bifurcated GBMI context, and on its face shows a lack of good faith argument. In a situation where the defense presents evidence of mental illness at trial, this problem is easily solved: the prosecution in this scenario will almost invariably oppose the defense's assertion of mental illness throughout each prong of the bifurcated trial in an unsuccessful NGI attempt, or throughout the trial in a defense-initiated GBMI trial. The consistency of argument when mental illness is brought forth by the defense does not implicate ethical issues regarding the special duties of prosecutors. However, the prosecution's switch in a bifurcated GBMI trial shows that the conflicting use of evidence of mental illness by the prosecution cannot align with their responsibility as ministers of justice.

Finally, it is likely post-*Clifton* that a prosecutor cannot try to bifurcate a trial for GBMI unless she has probable cause to believe that the defendant is mentally ill. A prosecutor cannot charge a crime unless she believes the charge is supported by probable cause.¹⁸³ As *Blakely* has been applied to GBMI through *Clifton* and the 2012 statutory revisions, the prosecution must prove all elements of GBMI beyond a reasonable doubt, making the GBMI analogous to a sentencing aggravator. Additionally, because the A.B.A. Criminal Justice Standards advise attorneys to refrain from using competency evaluations in any proceeding other than a competency proceeding and *Estelle* distinguishes the use of a competency evaluation for only limited, neutral purposes, the prosecution should not use competency evaluations to support the probable cause for GBMI, and must rely on police reports, separate expert witnesses, and lay witness evidence alone.

C. CRP Courts

Post-*Clifton*, the prosecution will have little incentive to participate in the Coordinated Resource Projects (CRP) currently in effect in Alaska State District Courts. A CRP is a multi-dimensional, therapeutic court that emphasizes treatment and stability as a cornerstone to solving recidivism, desperation, and homelessness in Alaska's mentally ill community.¹⁸⁴ Anchorage's CRP functions as a diversionary program designed to allow mentally ill misdemeanor defendants the opportunity

183. ALASKA RULES OF PROF'L CONDUCT R. 3.8(a) (2009).

184. ALASKA JUDICIAL COUNCIL, TRANSFERABILITY OF THE ANCHORAGE WELLNESS COURT MODEL (2008).

to have their misdemeanor charges dismissed or significantly reduced in exchange for following a court-ordered treatment plan.¹⁸⁵

The CRP program involves a team of psychologists interviewing the defendant, determining eligibility – i.e., that the person suffers from a mental illness – and setting up a treatment plan which may include medication, release to an assisted living facility, mandatory and frequent drug testing, and therapy with an appropriate treatment provider. Participation in the court usually takes a full year, and upon a successful completion the participant gets their bargained-for lesser sentence, a certificate of graduation, and a small gift. The defendant will come to several “check in” type hearings throughout their time in CRP court to ensure they remain compliant with the terms of a Rule 11 Agreement.¹⁸⁶ The hearings are adversarial.

CRP court benefits the prosecution in that the defendant will hopefully solve the underlying mental illness that contributes to their criminal conduct, thus theoretically reducing recidivism. However, CRP court requires a certain level of specialized knowledge that prosecution typical prosecution does not present. A familiarity with the community’s mental health treatment options, health insurance and Medicaid, and a working knowledge of civil commitment and competency evaluations is necessary to properly represent and prosecute in CRP court. CRP court also requires a fair amount of attorney time.

Prosecutorial use of GBMI risks the end of CRP court. Practically, prosecutors will reject CRP court if they could get the same benefit (mental health treatment) from a GBMI verdict. However, this is problematic because DoC mental health treatment offered, whether appropriate or not, would merely be a Band-Aid for larger collateral consequences of the mental illness including homelessness – a widely recognized problem in Alaska. CRP Courts work to provide a support system while the mentally ill person is receiving treatment outside of prison. To avoid CRP courts in favor of GBMI would deny the community the benefit of seeing its neighbors properly housed, stable, and able to receive much-needed mental health intervention.

185. *Alaska Coordinated Resources Project: Alaska Mental Health Court*, ALASKA COURT SYSTEM 2 (September 2006), <http://www.uaa.alaska.edu/centerforhumandevlopment/fulllives/pastconferences/upload/judge-rhoadesPub-100-Anchorage-Coordinated-Resources-Project-9-06.pdf>.

186. A Rule 11 Agreement is a plea bargain in Alaska. ALASKA R. CRIM. P. 11.

D. GBMI: Will Its Use Expand Post-Clifton?

The *Clifton* decision unequivocally allows the prosecution to present mental illness as a potential aggravating factor into criminal prosecutions through GBMI. This creates a risk that the State of Alaska may try to extend more sentences, and open up the possibility of post-incarceration civil commitment, for the mentally ill in non-traditionally NGI or GBMI charges (rather than functionally limiting NGI/GBMI use to high-exposure crimes like murder). For example, GBMI may infringe on the State's willingness to participate in the Coordinated Resources Project Courts (CRP or Mental Health Court) for misdemeanors and low-level felonies, *supra*. GBMI is a powerful tool for prosecutors to limit parole and/or furlough to the mentally ill.

It seems very likely that after the court of appeals has given its blessing to prosecution-initiated GBMI that its use will expand into lower-level felonies and perhaps even misdemeanor crimes. The relative ease of proving what is a lower standard than *M'Naghten* insanity in a GBMI trial will encourage prosecutors to impose GBMI on defendants.

Prosecutors may think they are serving justice by helping the mentally ill receive treatment in prison or jail. However, this could not be further from the truth. In pursuing a GBMI verdict, they are actually subjecting the mentally ill offender to longer prison sentences, branding defendants with the stigma of mental illness, limiting their access to mental health care of their own choosing, and possibly creating the opportunity for abuse and maltreatment from other inmates. It is, as Artegall's squire Talus (the "iron man") from Spencer's *The Faerie Queene*, the allegorical equivalent to justice without mercy.

CONCLUSION

A year and a half after the Alaska Court of Appeal's decision in *Clifton*, Ms. Karan Clifton's case continues in the superior court. Now that the issue of guilt has been decided, it only remains to present the GBMI determination to a jury. A trial on this matter is currently scheduled for July 2015.

This article argues that both prosecution and defense counsel should avoid the GBMI verdict. GBMI offends justice and when raised by the State implicates ethical questions on the part of the prosecution.

We are measured by how we treat the most vulnerable members of our community. Although Ms. Clifton does not lend herself to deep sympathy, she is an extremely disabled woman. Because of her illness she behaves in a way that necessitates her confinement from the public and results in a significant loss of freedom. She did not choose to be a

mentally ill person and yet her illness has confined her both psychologically and physically.

This Article should not be read to minimize or excuse Ms. Clifton's actions. The victim in this case, and indeed all Alaskans, are entitled to live their lives in safety. However, we should endeavor to punish people only for their choices. Not, as in prosecution-initiated GBMI, for their disabilities.