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Assumed Sane

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INTRODUCTION

In 2014, the Board of Immigration Appeals (BIA) held in *Matter of G-G-S-* that a noncitizen's mental health status at the time of an offense is irrelevant to determining whether the offense is a "particularly serious crime" for immigration purposes.[1] Since a "particularly serious crime" is a bar to asylum and withholding of removal, it can result in a noncitizen's deportation to a country where he or she faces a serious risk of persecution. In deciding that immigration judges "are constrained by how mental health issues were addressed as part of the criminal proceedings," the BIA failed to recognize the many reasons why criminal proceedings often do not actually take into account the role of mental illness.[2] This Essay explicitly examines those reasons in arguing that evidence of mental illness should be permitted

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1 26 I. & N. Dec. 339, 339 (BIA 2014).

2 *Id.*

as part of the "particularly serious crime" determination.

I
THE BIA'S RECENT DECISION IN *MATTER OF G-G-S-*

Under the Immigration and Nationality Act (INA), an individual becomes ineligible for asylum and withholding of removal if the immigration judge determines that "the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States."[3] Neither the INA nor its regulations define the term "particularly serious crime."[4] Accordingly, its meaning has been developed through case law. The BIA generally applies a multifactor test to determine whether a conviction constitutes a "particularly serious crime."[5] These factors include "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly whether the type and circumstances of the crime indicate that the alien will be a danger to the community."[6] The BIA does not require a separate determination of dangerousness after the noncitizen is found to have committed a particularly serious crime.[7] Rather, the "essential key" to the particularly serious crime determination is "whether the nature of the crime is one which indicates that the alien poses a danger to the community."[8]

Before *Matter of G-G-S-*, an immigration judge could have considered an individual's mental health status at the time of an offense as part of the circumstances and underlying facts of the conviction, as well as in considering dangerousness. Taking the noncitizen's mental health into consideration could have potentially helped mitigate the seriousness of an offense by explaining the context in which it occurred. For example, if a noncitizen with schizophrenia was convicted for making threats while suffering from paranoid delusions, an immigration judge could have previously decided that the circumstances were an extenuating factor. Even if this individual pleaded guilty and never raised the issue of mental

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3 Immigration and Nationality Act § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (2012).

4 *Id.*; *see also* 8 C.F.R. § 1208.16(d)(2) (2015).

5 Matter of Frentescu, 18 I. & N. Dec. 244, 246–47 (BIA 1982).

6 *Id.* at 247.

7 *In re* N-A-M-, 24 I. & N. Dec. 336, 342 (BIA 2007).

8 Matter of Carballe, 19 I. & N. Dec. 357, 360 (BIA 1986); *see also* Alphonsus v. Holder, 705 F.3d 1031, 1041 (9th Cir. 2013) (describing dangerousness as "the pivotal standard by which particularly serious crimes are judged").

health during the criminal proceedings, the immigration judge still could have considered evidence regarding mental health at the time of the offense, as the BIA had specifically held that "*all reliable information* may be considered in making a particularly serious crime determination, including . . . information outside the confines of a record of conviction."[9]

While purporting to rely on such precedents, *Matter of G-G-S-* effectively carved out an exception from the general rule that all reliable information may be considered in the "particularly serious crime" determination. The BIA singled out a noncitizen's mental health at the time of the offense as a fact that the immigration judge cannot consider. The BIA's rationale for prohibiting immigration judges from taking mental health into account was that doing so would "go behind the decisions of the criminal judge and reassess any ruling on criminal culpability."[10] The BIA reasoned that the fact finders in criminal proceedings "have expertise in the applicable State and Federal criminal law, are informed by the evidence presented by the defendant and the prosecution, and have the benefit of weighing all the factors firsthand."[11]

In addition, the BIA observed that there are several ways during criminal proceedings to raise the issue of a defendant's mental condition. These include challenging competency to stand trial; raising the affirmative defense of not guilty by reason of insanity; showing the absence of the mens rea required for a conviction; and arguing that mental health should be a mitigating factor for sentencing.[12] In addition, the BIA noted that mental health issues may be raised in post-conviction motions, appeals, and petitions.[13] Since the respondent in *Matter of G-G-S-* had not presented any evidence of "a plea of guilty by reason of insanity," and no findings regarding insanity were made during his criminal proceedings, the BIA concluded that his mental illness should not be considered as part of the "particularly serious crime" analysis.[14] This reasoning is deeply flawed for the reasons discussed below.

II

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9 *In re* N-A-M-, 24 I. & N. Dec. 336, 342 (BIA 2007) (emphasis added).

10 Matter of G-G-S-, 26 I. & N. Dec. 339, 345 (BIA 2014).

11 *Id.*

12 *Id.* (internal footnotes omitted).

13 *Id.* (internal footnotes omitted).

14 *Id.* at 346.

In prohibiting immigration judges from considering a noncitizen's mental health status at the time of an offense, the BIA assumes that any issues related to mental health have already been handled by the criminal court, so there is no need for the immigration judge to stir this pot again. The reality, however, is that defendants often do not raise the issue of mental health in criminal proceedings because of the risks involved in doing so, or they are constrained in how and when they can raise the issue by various state laws.

A. Competence Not Relevant to Mental State at Time of Offense

As an initial matter, insofar as the BIA mentions competence determinations as an opportunity to introduce evidence about a defendant's mental state at the time of an offense, it fails to recognize that such determinations focus on a defendant's mental state *during the criminal proceeding*, not at the time of the offense. A defendant may become incompetent after committing an offense, or, conversely, a defendant who was incompetent at the time of the offense may be restored to competence before the criminal proceedings begin. The mere fact that competence was not raised during the criminal proceedings therefore provides no information about the defendant's mental condition at the time of the offense, and the BIA has made it quite clear that the "particularly serious crime" determination is not concerned with events that occur after the crime.[15]

In addition, even where the competence inquiry somehow sheds light on the defendant's mental state at the time of the offense, defense attorneys often do not raise concerns about incompetence for strategic reasons. Empirical evidence shows that defense attorneys harbor doubts about the mental capacity of their clients in about 8% to 15% of felony cases, but mental health assessments are sought in less than half of these.[16] Defense attorneys are wary of findings of incompetence because they can result in lengthy civil

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15 *In re* N-A-M-, 24 I. & N. Dec. 336, 343 (BIA 2007) (finding that the particularly serious crime determination does not focus on facts that occurred after the crime was committed).

16 Steven K. Hoge et al., *Attorney-Client Decision-Making in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 BEHAV. SCI. & L. 385, 389 (1992); Norman G. Poythress et al., *Client Abilities to Assist Counsel and Make Decisions in Criminal Cases; Findings from Three Studies*, 18 L. & HUM. BEHAV. 437, 441–43, 446 (1994).

commitment.[17] If a defendant is found incompetent, efforts are made to restore that person to competence, which can include the involuntary administration of medications.[18] Defendants who cannot be restored to competence and are considered a danger to self or others are subjected to civil commitment, which, in many states, can last for an indefinite period of time.[19]

B. The Insanity Defense

Unlike mental competence, which is a prerequisite for a defendant to stand trial, insanity is an affirmative defense that may be raised during the trial. By making an insanity defense, the defendant admits to committing the offense but argues lack of culpability due to his or her mental state at the time. While the test used to determine "insanity" varies from state to state, there are two dominant approaches.[20] Under the *M'Naughten* rule, the trier of fact must determine whether the defendant could understand the difference between right and wrong and, if not, whether this was due to a mental disease or defect. A less restrictive approach requires showing that the defendant lacked sufficient capacity to appreciate the criminality of his acts, *or to conform his actions to the requirements of law*, due to mental disease or defect. Within each of these general approaches, variations exist among states. The burden of proof also varies, with some states placing the burden on the government to show that the defendant was sane at the time of the offense and others requiring the defendant to show insanity at the time of the offense.[21]

1. *Risks Involved in Making an Insanity Defense*

While *Matter of G-G-S-* suggests that a defendant who was mentally ill at the time of the offense would be expected to make an insanity defense, thereby allowing the trier of fact to take mental health into consideration in determining culpability, empirical data clearly indicate otherwise. Studies

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17 *See* Robert D. Miller, *Criminal Responsibility*, *in* PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY 200 (R. Rosner, ed., 1994)

18 *See* Dora W. Klein, *When Coercion Lacks Care: Competency to Make Medical Treatment Decisions and Parens Patriae Civil Commitments*, 45 U. MICH. J.L. REFORM 561, 571–72 (2012).

19 *See* Miller, *supra* note 17, at 200.

20 *See* Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 Law & Hum. Behav. 375, 377 (1999).

21 *See id.* at 381–82.

show that the insanity defense is raised in only 1% of felony cases, and, when raised, it is rarely successful.[22] Some studies have found that the insanity defense succeeds in one out of four cases, while others have found a success rate as low as one in a thousand.[23] The overall low success rate may itself be a deterrent to making the defense, but there are other reasons to avoid it as well. Defendants whose insanity defenses are unsuccessful—which represents the vast majority of those who raise it—receive significantly longer sentences than those who are convicted without having argued insanity.[24] In other words, defendants pay a penalty for arguing insanity and losing.

Furthermore, in many states, defendants acquitted based on insanity often experience longer periods of civil commitment than the maximum length of time in prison that a defendant could have served for the crime. This creates an incentive for defendants to plead guilty even if they have a strong insanity defense. For example, studies have found that in California, New York, Connecticut, Colorado, and the District of Columbia, defendants acquitted through an insanity defense are confined for longer periods of time than convicted individuals.[25] Some studies show that individuals who succeed with an insanity defense spend nearly twice as long in civil commitment as defendants convicted of similar crimes spend in prison; additionally, they often face post-

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22 *Id.* at 378; Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULLETIN AM. ACAD. PSYCHIATRY & L. 331, 334–35 (1991).

23 *See* HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM, 58–61 (1993); Borum & Fulero, 20 note 20, at 378; *see also* Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-*Clark *Era*, 18 U. FLA. J. L. & PUB. POL. 7, 11–12 (2007) (citing a success rate of under 25%); Heather Leigh Stangle, *Murderous Madonna: Femininity, Violence, and the Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide*, 50 WM. & MARY L. REV. 699, 728 (2008) (citing a success rate of 1 in 1000 criminal trials); Stephen G. Valdes, Comment, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1723 (2005) (citing success rates ranging from 0.87% to 26%).

24 Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULLETIN AM. ACAD. PSYCHIATRY & L. 5, 12 (1996) [hereinafter Perlin, *Myths*]; Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 650 (1990); Joseph Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 401–02 (1983).

25 Miller, *supra* note 17, at 198–215; Eric Silver, *Punishment or Treatment? Comparing the Lengths of Confinement of Successful and Unsuccessful Insanity Defendants*, 19 L. &. HUM. BEHAV. 375, 384–87 (1995).

release judicial oversight for the rest of their lives.[26] One study found that in California, individuals acquitted based on insanity for nonviolent crimes were confined for *nine times* as long as those convicted.[27]

The chance of being promptly released is also much higher in some states for those who are convicted than for those who are acquitted based on insanity. For example, in Georgia, less than 1% of defendants found not guilty by reason of insanity were released upon acquittal, compared to 30% of those found guilty; in California, 5.5% of defendants acquitted based on insanity were released, compared to 29% of those convicted; and in Ohio, 7% of defendants acquitted based on insanity were released, compared to 32% of those convicted.[28] Consequently, critics of the insanity defense contend that "post-acquittal hospitalization is used to punish insanity acquittees."[29]

Defense attorneys must take all of this into consideration in advising their clients about whether or not to make an insanity defense. In many states, civil commitment can be indefinite, and that possibility may be more frightening to defendants than a finite period of incarceration. The National Alliance on Mental Illness has acknowledged that deciding whether or not to use the insanity defense is a complex, strategic decision that often turns on nuanced and localized factors, such as "the attitude of the court and the community to mental illness . . . ."[30] The risks involved in making an insanity defense in criminal proceedings, however, do not exist in immigration proceedings, where neither the immigration judge nor the Department of Homeland Security has the authority to initiate civil commitment or order incarceration.[31]

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26 STEADMAN ET AL., *supra* note 23, at 58–61; Perlin, *Myths*, *supra* note 24, at 12; Mark Pogrebin et al., *Not Guilty By Reason of Insanity: A Research Note*, 8 INT'L J. L. PSYCHIATRY 237, 240 (1986); Rodriguez, *supra* note 24, at 401–02.

27 STEADMAN ET AL., *supra* note 23, at 58–61; Pogrebin et al., *supra* note 26, at 240; Rodriguez, *supra* note 24, at 401–02.

28 Silver, *supra* note 25, at Table 4.

29 Donald M. Linhorst & P. Ann Dirks-Linhorst, *A Critical Assessment of Disposition Options for Mentally Ill Offenders*, 73 SOC. SERV. REV. 65, 73 (1999).

30 NAT'L ALLIANCE ON MENTAL ILLNESS, DEP'T OF POL'Y AND LEGAL AFFAIRS, A GUIDE TO MENTAL ILLNESS AND THE CRIMINAL JUSTICE SYSTEM 25–26, http://www.pacenterofexcellence.pitt.edu/documents/Guide_to_Mental_Illness_and_the_Criminal_Justice_System_NAMI.pdf [http://perma.cc/6Q5Q-CXLM].

31 *See generally* Fatma E. Marouf, *Incompetent but Deportable: The Case For a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929 (2014).

2. *Defendants with Mental Illness May Resist Arguing Insanity*

Another problem is that some mentally ill defendants refuse to invoke the insanity defense. While attorneys can raise the issue of incompetence even if the client insists she is competent, an attorney is supposed to adhere to the client's decision about whether or not to use an insanity defense.[32] One study found that among 139 cases where there was clinical support for an insanity defense, 10% of the defendants resisted making the defense and another 15% were not receptive to attributing the offense to mental illness.[33] Thus, one-quarter of the defendants resisted arguing insanity even when it was a pivotal issue in the case.

Such resistance may reflect some defendants' lack of insight into their own mental health conditions, or it may result from a desire to avoid "the prospect of psychiatric labeling, stigmatization, and indeterminate hospitalization . . . ."[34] If the latter, those fears may not carry as much weight in a situation where deportation and possible persecution are on the table, rather than just imprisonment. In other words, the balance an individual strikes between the potential risks and benefits of acknowledging the role of a mental illness in the commission of a crime may well be different in a criminal case and an immigration case. Binding a noncitizen facing removal to a decision about mental illness made in a criminal case ignores the different stakes involved in these two types of proceedings.

3. *Several States Do Not Recognize an Insanity Defense*

Finally, several states simply do not recognize an insanity defense. Specifically, Montana, Idaho, Utah, and Kansas do not recognize the insanity defense.[35] Since the U.S. Supreme Court has never addressed whether an insanity defense is constitutionally required, several state courts have upheld its abolishment.[36] Nevada's legislature abolished the insanity

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32 *See* STANDARDS FOR CRIM. JUST. PROSECUTION FUNCTION AND DEF. FUNCTION § 4-5.2 & cmt. at 199-202 (AM. BAR ASS'N 1993).

33 Richard J. Bonnie et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubted Client Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48, 54–55 (1996).

34 *Id.* at 58.

35 *See* IDAHO CODE § 18-207 (1997); KAN. STAT. ANN. § 22-3220 (1995); MONT. CODE. ANN. § 46-14-214 (1999); UTAH CODE ANN. § 76-2-305 (1999).

36 *See* Leland v. Oregon, 343 U.S. 790, 791–802 (1952) (declining to specify a particular insanity test required by due process); *see also* Foucha v. Louisiana, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting) ("States are free to

defense in 1995, but the Nevada Supreme Court held that it was constitutionally required in 2001.[37] The U.S. Supreme Court declined certiorari in this case, despite the conflict with the rulings of other state courts. The absence of Supreme Court authority on this issue makes it possible for additional states to abolish the insanity defense in the future.

Prohibiting immigration judges from considering mental health status at the time of an offense under the theory that its role in culpability has already been addressed by the criminal court ignores the fact that not all defendants are allowed to argue not guilty by reason of insanity. Under *G-G-S-*, these individuals are subjected to the double penalty of not being able to argue insanity in either criminal or immigration proceedings.

C. Limitations of Mens Rea Defenses Based on Mental Illness

Even if a defendant does not or cannot make an insanity defense, she may be able to introduce evidence of mental illness to try to prove the absence of the requisite mens rea.[38] Mens rea defenses are not, however, available to all defendants. First, many crimes are strict liability offenses. Since no specific mental state is required as an element of these offenses, evidence of mental illness may never be introduced during the criminal proceedings. Similarly, mental illness is not a defense to crimes that require only negligence.[39]

Second, when people with mental illness commit crimes that do require intent, lack of mens rea "is extremely rare."[40] Daniel M'Naghten, for example, had delusions of a Tory plot to kill him and therefore formed a preemptive plan to kill the Prime Minister.[41] When he mistakenly killed the Prime Minister's Secretary, he intended to kill a person, and

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recognize and define the insanity defense as they see fit.").

37 *See* NEV. REV. STAT. § 174.035 (1997); Finger v. State, 27 P.3d 66, 86 (Nev. 2001) (holding that the abolition of the insanity defense violated due process), *cert denied*, 534 U.S. 1127 (2002).

38 *See* MODEL PENAL CODE § 4.02(1) (AM. LAW INST. 1985) ("Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense."); Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, n. 2 (2000).

39 Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond* Clark v. Arizona, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1090 (2007); Slobogin, *supra* note 38, at 1239.

40 Slobogin, *supra* note 38, at 1205.

41 Morse & Hoffman, *supra* note 39, at 1089.

therefore would not be able to negate the mens rea for the crime.[42] Likewise, when Andrea Yates drowned her five children because she believed Satan would otherwise torment them, she had the intent to kill, despite the delusional circumstances surrounding the murder.[43] As Christopher Slobogin has observed, "most people with mental disorder who cause harm mean to do so, albeit sometimes for reasons that seem irrational."[44] Similarly, Morse and Hoffman conclude that only on "rare occasions" is mental illness inconsistent with the formation of mens rea.[45]

Third, states may prohibit evidence of mental illness from being used to show that the defendant did not possess the requisite mens rea. In *Clark v. Arizona*, the Supreme Court examined the constitutionality of an Arizona rule that prohibited the admission of expert psychiatric evidence and other evidence of mental disorder, short of legal insanity, to negate mens rea.[46] The Court found it permissible for Arizona to exclude "mental disease evidence" and "capacity evidence," although it found that "observation evidence" must be admitted.[47] Under *Clark*, states may exclude testimony, usually provided by experts, about the defendant's mental disorder and capacity for cognition and moral judgment, which bear directly on the ability to form the requisite mens rea. But even where evidence of a mental disorder is admitted into evidence to help show the defendant's capacity to form a mental state, such evidence "will almost never help resolve whether that state was formed in fact."[48]

D. Drawbacks of "Guilty But Mentally Ill" Verdict

The BIA's decision in *G-G-S-* mentions that the respondent had not presented any evidence of "a plea of guilty by reason of insanity."[49] This phrase appears to conflate the affirmative defense of *not guilty* by reason of

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42 *Id.*

43 *Id.* at 1089–90.

44 Slobogin, *supra* note 38, at 1205 (describing four situations where mens rea is absent—involuntary action, mistake as to results, mistake as to circumstances, and ignorance of the law—and arguing that mental illness is most likely to play a role in the third scenario).

45 Morse & Hoffman, *supra* note 39, at 1090.

46 548 U.S. 735 (2006) (examining, inter alia, the constitutionality of the Arizona Supreme Court's decision in *State v. Mott*, 931 P.2d 1046, 1051 (Ariz. 1997) (en banc), *cert. denied*, 520 U.S. 1234 (1997)).

47 Scholars have criticized the lack of clarity in this tripartite formulation. *See, e.g.*, Morse & Hoffman, *supra* note 39, at 1104–11.

48 *Id.* at 1089.

49 Matter of G-G-S-, 26 I. & N. Dec. 339, 346 (BIA 2014).

insanity with the verdict of "guilty but mentally ill" (GBMI). In many states, GBMI requires proof, beyond a reasonable doubt, that the defendant committed the act and was aware of its wrongfulness but had a mental disorder that substantially impaired his ability to conform his conduct to the law.[50] Defendants who plead GBMI are still guilty and therefore criminally culpable. They are subject to incarceration and may even receive the death penalty. A GBMI verdict does not even provide additional treatment opportunities. The GBMI verdict differs from a regular guilty verdict only by recognizing that the defendant had a mental disorder at the time of the offense. Some defendants mistakenly perceive GBMI as reducing culpability. In reality, GBMI requires the defendant to admit to an additional stigmatizing fact while receiving nothing in return.[51] Consequently, GBMI has been described as "a politically expedient 'third-way' fraud."[52]

Pleas are the most common way that GBMI verdicts occur.[53] Commentators have recognized that "these pleas appear to reflect civil commitment concerns for the best interests of the client."[54] In other words, as discussed above, defendants may decline to use an insanity defense and instead plead GBMI in order to avoid a lengthy or indefinite civil commitment. But there is also an advantage to pleading guilty instead of GBMI, since GBMI verdicts tend to result in longer sentences than mentally ill defendants receive with typical guilty pleas.[55] In the aftermath of *G-G-S-*, noncitizen defendants may now have to choose whether to plead to GBMI in order to make it clear for the removal proceedings that mental illness played a role in the offense or to simply plead guilty to get a shorter sentence.

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50 Borum & Fulero, *supra* note 20, at 382–83.

51 Linda C. Fentiman, *"Guilty but Mentally Ill": The Real Verdict is Guilty*, 26 B.C. L. REV. 601, 605 (1985); Mark A. Woodmansee, *The Guilty but Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 341, 361–77 (1996).

52 Morse & Hoffman, *supra* note 39, at 1122.

53 John Klofas & Ralph Weisheit, *Pleading Guilty but Mentally Ill: Adversarial Justice and Mental Health*, 9 INT'L J. L. & PSYCHIATRY 491, 493–94 (1986).

54 *Id.* at 491.

55 INSTITUTE ON MENTAL DISABILITY AND THE LAW, THE GUILTY BUT MENTALLY ILL VERDICT: AN EMPIRICAL STUDY, 1–78 (1985); *see also* Lisa A. Callahan et al., *Measuring the Effects of the Guilty but Mentally Ill (GBMI) Verdict: Georgia's 1982 GBMI Reform*, 16 L. & HUM. BEHAV. 447, 449 (1992).

E. Constraints and Discretion in Sentencing

The BIA indicates in *Matter of G-G-S-* that sentencing is another phase of the criminal proceeding where mental health issues are taken into consideration.[56] The defendant's probation officer typically includes a mental health history in the presentencing report. Yet judges may be constrained in their ability to consider mental illness by sentencing guidelines, or, on the other end of the spectrum, they may decline to exercise the discretion they are given to consider mental illness during sentencing.

Under the U.S. Sentencing Guidelines, mental and emotional conditions may be considered in sentencing if "present to an unusual degree."[57] A downward departure may be justified if "(1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense."[58] The Guidelines further explain that the extent of the departure "should reflect the extent to which the reduced mental capacity contributed to the commission of the offense."[59] Downward departure is prohibited, however, if voluntary use of drugs or intoxicants caused the reduced mental capacity, if the facts indicate a need to protect the public, or if the defendant was convicted of certain enumerated offenses.[60]

Some state sentencing guidelines track the U.S. Guidelines' language about downward departures for diminished mental capacity.[61] Others give judges broad discretion to consider any mitigating factors without specifically mentioning mental condition.[62] Johnston notes that "a state's failure to enumerate vulnerability due to a mental condition as a mitigating factor might suggest an inability to depart on this basis."[63] But even in situations

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56 Matter of G-G-S-, 26 I. & N. Dec. 339, 345 (BIA 2014).

57 U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (U.S. SENTENCING COMM'N 2015). Federal courts have also at times relied on Guidelines §§ 5K2.0, 5H1.4, and 5K2.13 provisions for downward departure based on suspected or demonstrated hardship in prison. *See* E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 153 n.21 (2013).

58 GUIDELINES § 5K2.13.

59 *Id.*

60 *Id.*

61 *See, e.g.*, ALASKA STAT. § 12.55.155(d)(18) (2012); CAL. RULES OF COURT § 4.423(b)(2) (2012).

62 *See, e.g.*, KAN. STAT. ANN. § 21-6815(c)(1) (2007 & Supp. 2011).

63 Johnston, *supra* note 57, at 153.

where judges recognize that sentencing is discretionary, "there is no guarantee that the appropriate role of mental abnormality will be considered or that individual sentencing judges will calibrate punishment properly even if they do take mental abnormality into account."[64]

Perhaps most importantly, the empirical evidence discussed above indicates that in cases where defendants are convicted after having raised mental health issues, the sentences actually turn out to be longer than if they had not raised the issue at all.[65] This evidence undercuts the notion in *G-G-S-* that sentences take into consideration the role of mental illness so there is no need for immigration judges to consider the issue. Furthermore, in prior decisions, the BIA has indicated that the sentence imposed is the least important factor in the "particularly serious crime" determination, because it is "not the most accurate or salient factor to consider in determining the seriousness of an offense."[66] If the length of the sentence is not that important, then it makes little sense to suggest that mental illness need not be considered because any role it played is already reflected in the sentence.

CONCLUSION

In foreclosing the opportunity for immigration judges to consider evidence of mental illness in determining whether an offense constitutes a "particularly serious crime," the BIA assumes that the conviction and sentence already incorporate the role that mental illness played in the offense. But that assumption is flawed. Strong incentives exist for defendants not to raise the issue of mental illness in criminal proceedings, such as avoiding indefinite civil commitment if acquitted or a longer sentence if convicted. Furthermore, not all states allow defendants to make an insanity defense or to use evidence of mental illness to negate mens rea. Finally, when it comes to sentencing, judges may be constrained by sentencing guidelines or may simply decide, in the exercise of discretion, not to use mental illness as a mitigating factor.

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64 Morse & Hoffman, *supra* note 39, at 1122.

65 *See supra* text accompanying note 28.

66 *In re* N-A-M-, 24 I. & N. Dec. 336, 343 (BIA 2007). In this case, the BIA found that "the sentence imposed is not a dominant factor in determining whether a conviction is for a particularly serious crime." *Id.* The BIA also minimized the importance of factors that occur subsequent to the offense, such as cooperation with law enforcement, explaining that they "bear only on sentencing." *Id.*

The sentence therefore does not necessarily take into account the role of mental illness in the offense. Given these facts, immigration judges should be allowed to consider the role of mental illness in determining whether an offense constitutes a "particularly serious crime."

Depriving immigration judges of this power places individuals with mental illness in danger of being deported to countries where they face a serious risk of persecution. Even someone who demonstrates a greater than fifty percent chance of persecution may be deported based on a "particularly serious crime." *Matter of G-G-S-* also places unreasonable demands on criminal defense attorneys, who must advise defendants about the immigration consequences of a plea in order to provide effective assistance of counsel.[67] Such consequences include preserving relief from removal, which means avoiding bars like a conviction for a "particularly serious crime." By limiting immigration judges to the findings of the criminal court regarding the role that mental illness played in a crime, *Matter of G-G-S-* places defense attorneys in the extremely difficult, if not impossible, position of having to navigate the conflicting consequences of raising mental health issues in two totally different proceedings. In some cases, this means choosing between an indefinite amount of time in an institution and persecution.

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67 Padilla v. Kentucky, 559 U.S. 356, 373–74 (2009).