court cases have set the precedent that noncompliance in the treatment of psychiatric disorders should not be used to deny disability claims (*Brashears*; *Mendez v. Chater*, 943 F. Supp. 503 (E.D. Pa. 1996); *Sharp v. Bowen*, 705 F. Supp. 1111 (W.D. Pa. 1989)). In fact, her medical record consistently suggested that noncompliance was a result of poor insight and judgment because of her psychiatric disorder. Noncompliance with psychiatric medication for severe psychiatric disorders is high and can be attributed to the belief that one is not disordered, to unpleasant side effects, and to difficulty in achieving the degree of organization required to take medications and keep appointments.

The ALJ also viewed Ms. Pate-Fires' substance use as evidence of her lack of credibility. If the ALJ is unable to determine whether a substance use disorder contributed substantially to the psychiatric disorder, it cannot be used to deny disability (*Brueggemann v. Barnhart*, 348 F.3d 689 (8th Cir. 2003)). High comorbidity of substance use disorders and psychiatric disorders may lead to inappropriate denial of disability to those who would otherwise qualify.

Determination of a disability in cases in which the individual has an episodic, psychiatric condition must include consideration of the chronicity of the disorder and the full history of the individual's functioning. In Ms. Pate-Fires' case, the ALJ determined that she was not permanently disabled, because her medical record showed periods of improvement in which symptoms of paranoia and mania abated, and her global assessment of functioning increased. Given the episodic nature of her difficulties and the severity of impairment associated with her low GAF scores, the few reports of higher GAF scores are not suggestive of an ability to function in the workplace.

The ALJ used the evidence of Ms. Pate-Fires' noncompliance and her substance abuse history to discredit the treating physician's opinion, on the basis that these two concerns were not adequately addressed in the medical record. Previous disability determination cases have shown that an ALJ must give controlling weight to the treating physician and define the weight given (*Robinson*). The ALJ must not use speculation to make interpretations of disability or credibility from the client's medical record; these interpretations are reserved for mental health practitioners (*Rohan*). The decision that the treating physician's report has controlling weight brings to light the importance of explicit documentation of a patient's ability for work and daily activities and also the factors contributing to noncompliance. The provider's controlling weight brings with it the challenge of maintaining a therapeutic alliance while trying to make impartial judgments of disability, judgments for which treatment providers have limited training.

In conclusion, mental health providers have a substantial role in the determination of disability for their clients, and in most circumstances, the treating provider's opinion is given weight over that of an independent psychiatric evaluator who has spent less time with the client. In addition, it is the role of mental health providers and not the ALJ to determine whether noncompliance with medication is a direct result of the psychiatric disorder and whether brief periods of lessened symptoms suggest an impermanence of the disorder and the disability.

Disclosures of financial or other conflicts of interest: None.

The Burden of Proof on Psychiatric Experts With Regard to Imminent Injury in Civil Commitment Proceedings in Montana

Maya Prabhu, MSc, MD, LLB
Fellow in Forensic Psychiatry

Charles C. Dike, MD, MRCPsych, MPH
Assistant Clinical Professor

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, CT

Civil Commitment Criteria Clarified: Substance Abuse and Antisocial Personality Disorder Excluded

In re D.M.S, 203 P.3d 776 (Mont. 2009), decided by the Montana Supreme Court on February 18, 2009, was an appeal from an order of the District Court of the Twenty-First Judicial District, Ravalli County, committing D.M.S. to the Montana State Hospital (MSH). The supreme court concluded that the evidence must clearly demonstrate a connection between imminent threat of injury and a recognized

mental disorder, "as opposed to alcoholism or antisocial behavior" (*D.M.S.*, p 780).

Facts of the Case

In 2007, D.M.S. was arrested and "charged with two felony counts of driving under the influence of alcohol (DUI) on two occasions in 2007" (*D.M.S.*, p 777). He was also a prime suspect in five cases of vehicular arson. The issue of his fitness to stand trial was raised by the court, as he was known to have sustained a significant head trauma two years prior. In the competency evaluation that followed, he was found to have a cognitive disorder not otherwise specified, as a result of the brain injury, combined with antisocial personality disorder, alcohol abuse, and borderline intellectual functioning. He was adjudicated unfit to stand trial and committed to MSH for 90 days for restoration.

At the end of that period, MSH concluded that D.M.S. had not regained fitness and was unlikely to do so in the foreseeable future; as required by Montana law, the district court subsequently dismissed the two DUI cases. Immediately thereafter, however, the state filed a petition for civil commitment and, over his objections, he was detained at MSH on order of the court pending the evaluation. Ultimately, the court-appointed psychiatric expert concurred with the treating psychiatrists that D.M.S. did not meet the criteria for civil commitment.

Faced again with D.M.S.'s impending release into the community, the state requested a "second opinion" examination. However, he refused to meet for the second evaluation, invoking an explicit statutory right to remain silent for a professional examination (Mont. Code Ann. § 53-21-115 (6) (2005)). With only one report available to the court, he filed a motion to dismiss the petition for commitment. The denial of the petition set the stage for a trial on the matter of civil commitment.

D.M.S.'s case was tried before a jury in December 2007. The fact that he had a cognitive disorder secondary to the head trauma was not contested; the only question was whether there were grounds for civil commitment.

In the state's case-in-chief, law enforcement witnesses testified as to D.M.S.'s arrests for the DUIs; they reported that he smelled of alcohol, failed a nystagmus test, and was profane. The state also introduced evidence with regard to his involvement in the vehicular fires. Most significant was the testimony of the second expert, Dr. Michael Mozer, whom D.M.S. had refused to meet for evaluation. Dr. Mozer described D.M.S.'s longstanding history of violence and profanity aggravated by his drinking. He opined that D.M.S.'s mental disorder would deteriorate "because everyone in this room knows that alcohol greatly deteriorates a person's behavior and demeanor" (*D.M.S.*, p 780).

At the close of the state's case, D.M.S. moved to dismiss on the grounds that Dr. Mozer's evaluation was statutorily insufficient to support commitment, a motion that was denied. The court then ordered him once again to be examined by Dr. Mozer; as before, he refused to participate and his refusal was conveyed to the jury.

Ultimately, the jury found that D.M.S.'s mental disorder posed an imminent threat of injury to himself or others, and the court committed him for a period of 90 days. Following his commitment, the district court readjudicated his fitness to stand trial, reversed its prior determination of incompetence, and reinstated the DUI charges. At the expiration of his civil commitment, he was transported back to the county jail where he awaited trial on the two DUIs.

Ruling and Reasoning

The Supreme Court of Montana reversed the decision of the trial court for the civil commitment of D.M.S. and remanded the case to that court.

Though D.M.S. had already served his commitment term, the court first determined that the hearing on civil commitment should proceed, given the "stigma" associated with commitment and the "potential for damage to reputation" (*D.M.S.*, p 778) that would extend well beyond the duration of any commitment. The court then addressed the standard of review for civil commitment proceedings where a jury is the trier of fact, a situation for which the court had not previously articulated a standard. The court analogized to criminal hearings, concluding that the state must prove its case beyond a reasonable doubt. Specifically, the court considered whether there was sufficient evidence that a rational trier of fact could have found, beyond a reasonable doubt, that a direct connection existed between D.M.S.'s mental illness and his risk of causing danger to himself or others (Mont. Code Ann. § 53-21-126 (2) (2005)).

The majority concluded that such a nexus between imminent threat of injury and mental disorder had not been met. It noted that the state's case rested heavily on testimony that emphasized D.M.S.'s history of alcohol use and decompensation in the context of intoxication, but not a connection between his cognitive disorder and imminent threat of harm to self or others. Since the Montana statute did not recognize either substance use or personality disorder as a mental disorder, the link therefore must be specifically made to the cognitive disorder, NOS. A concurring opinion offered that had the case not been remanded secondary to the reasoning described above, it would have been remanded for the violation of D.M.S.'s right to remain silent; the jury had been informed of his refusal to participate in the second evaluation. Only one justice dissented, citing deference to the jury's observations of D.M.S.'s disruptive behavior during trial.

Discussion

Montana is not the only state that excludes alcohol, illicit substances, or personality disorders in the definition of mental disorder within its civil commitment statutes. *In re D.M.S.* illustrates the perils for testifying experts in these states who fail to make explicit the links (when they exist) between the relevant commitment criteria and the recognized mental illness. While such precise pronouncements about cause and effect may be artificial in a clinical milieu, such specificity may be necessary in legal proceedings where the statute limits grounds for commitment. As the majority opinion emphasized, inference or proximity to a mental disorder is not sufficient; criteria for commitment must be met "because of" the illness.

While the primary topic of interest to forensic psychiatrists in *In re D.M.S.* is causation, that aspect is only a subplot in this case; rather, the major story is the complex set of interactions between the criminal and civil procedures and standards. What began as a criminal matter became a civil one to remedy a deficiency in the criminal process—namely, the inability of the state to find criminal grounds on which to detain an individual who the state believed to be a menace. That the state offered to drop civil commitment proceedings if the court were willing to readjudicate competency and pursue the original DUI cases suggests strongly that the civil commitment petition was pursued solely to effect detention. This strategy ran aground at the point at which D.M.S. invoked the right to remain silent, a right more commonly associated with protections in a criminal proceeding. Because he availed himself of this right, the state could not meet the major elements of the civil procedure, causation. Ironically, this burden of proof was particularly high, since the standard of review in Montana for civil commitment proceedings is the same as in a criminal trial and could not be met without expert testimony as a matter of law rather than fact.

While the use of civil commitment statutes to engage in preventative detention is, of course, not unheard of in practice, as most civil commitment statutes are broadly drawn, this case demonstrates why it is preferable to use the criminal sanction to deal with dangerousness, where possible. Here, the overwhelming flavor is that the state had multiple bites of the apple to detain D.M.S. This seriously raises questions of due process as applied to him and potentially to others like him.

Disclosures of financial or other conflicts of interest: None.

Duty to Control a Community Mental Health Outpatient via Emergency Civil Commitment

Warren Stanley Adamson, MA
Predoctoral Fellow in Psychology

Caroline J. Easton, PhD
Associate Professor of Psychiatry

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, CT

Rhode Island Supreme Court Declines to Impose on a Community Mental Health Center a Duty to Control a Voluntary Outpatient by Emergency Civil Commitment to Prevent a Violent Assault on a Coworker

In *Santana v. Rainbow Cleaners, Inc.*, 969 A.2d 653 (R.I. 2009), the Rhode Island Supreme Court considered an appeal of a summary judgment issued by the Providence County Superior Court in a case in which Zaida Santana, an assault victim, filed suit against a community mental health center for negligent supervision and failure to control a patient with