Getting individuals committed to the MT State Hospital out of county jails

By Anna Conley

A disturbing trend is occurring in our state that negatively impacts individuals with mental illness. The following hypothetical example illustrates the problem: Imagine John Doe is an individual with a significant history of mental illness who requires regular medication to function, but does not receive adequate treatment in his community, and occasionally stops taking his medications. John Doe is transient and subsists on a very limited income.

John Doe is arrested for theft, and charged accordingly. Unable to post bond, John Doe is held as a pre-trial detainee in a county detention center and appointed a public defender. After meeting with John Doe, the public defender determines there are likely mental health issues impacting him, and requests a court ordered mental fitness evaluation. The court orders the mental fitness evaluation and commits John Doe to the Montana State Hospital ("MSH") for evaluation. While awaiting transfer to the MSH, John Doe sits in the county detention center for over a month. The county detention center has very limited mental health treatment, and John Doe does not receive the medications he needs and does not get evaluated by a mental health professional. His mental condition deteriorates rapidly, and he is put into isolation for the duration of his incarceration because he is not appropriate for general population, which further exacerbates his condition.

Lack of funding or resources is not a justification for the prolonged detention in county detention centers of individuals court ordered to the state hospital.

This scenario is occurring with regularity throughout Montana. Extended stays in county detention centers by individuals in need of mental health treatment are a result of an underfunded and overwhelmed Montana Department of Health and Human Services. In 2012, Montana District Judge David Ortley addressed this issue in *State v. Brown,* DC-03-438(A) (Mont. 11th Dist. 2012). A defendant was committed to MSH for evaluation, but remained in a Flathead County Detention Center for over a month. Although the defendant ultimately received the treatment and medication he needed from mental health staff in Flathead County and his commitment was eventually rescinded, Judge Ortley made the following comment regarding the lag time in sending the defendant to the state hospital: "Mental health providers are not free to ignore the orders of the courts charged by the legislature with ensuring the mentally ill are provided with fundamentally fair proceedings... [I]t is incumbent on those duty bound to obey the order to seek legal redress and not simply ignore the order to the potential detriment of the mentally ill." *Id* at 2, ¶3.

Incarcerating pre-trial detainees with mental illness in county detention centers despite court orders that they be transferred to MSH amounts to punishment in violation of their Fourteenth Amendment rights to medical and psychiatric care. *Oregon Advocacy Center v. Mink,* 322 F.3d 1101, 1120, 1122 (9th Cir. 2003). *See Terry v. Hill*, 232 F.Supp.2d 934 (2002) (the due process clause prohibits pre-trial detainees from being punished prior to conviction, and "delay in transferring court ordered pretrial detainees to the [state hospital] for evaluation or treatment, amounts to punishment of the detainees").

Pre-trial detainees court ordered to MSH who are subject to prolonged incarceration in county detention centers retain a liberty interest in both freedom from incarceration absent criminal conviction and restorative treatment. *Id.* This interest cannot be infringed unless outweighed by a legitimate state interest. Courts have held that states have no legitimate state interest justifying prolonged detention in county detention centers of individuals who are court ordered to a state hospital. *See e.g., Mink*, 322 F.3d at 1121; *Advocacy Center for Elderly and Disabled v. Louisiana Dept. of Health and Hospital*, 731 F.Supp.2d 603, 610 (E.D. La. 2010) ("defendants' policy of subjecting Incompetent Detainees to extended delays in jail before their transfer to Feliciana [state hospital] bears no rational relationship to the restoration of their competency or a determination that they will never become competent").

While in county detention centers, such pre-trial detainees are often provided inadequate mental health treatment, and in some cases no mental health treatment whatsoever, and suffer from exacerbated mental illness symptoms as a result. *See Advocacy Center for Elderly and Disabled*, 731 F.SUpp.2d at 610 ("[t]he mental health treatment that the Incompetent Detainees are receiving in local jails is minimal, and defendants provide them with virtually the same level of mental-health treatment that is available to the average inmate who has not been deemed incompetent to stand trial"). Put simply by the U.S. Supreme Court: "confinement in prison is punitive and hence more onerous than confinement in a mental hospital." *Heller v. Doe by Doe*, 509 U.S. 312, 325 (1993). As such, prolonged incarceration in county detention centers after being court ordered to MSH

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Supreme Court gets it right in difficult gene case

By Toni Tease

In June of this year, the U.S. Supreme Court decided a case involving the patentability of human genes. According to the Court, human genes in and of themselves are not patentable, but synthetic replications of them are. The issue before the Court was whether the patent holder had the exclusive right to isolate certain genes and to synthetically replicate those genes. The Court decided that the answer to the former question was no, and the answer to the latter question was yes (with the caveat that the synthetic replications are not the same as the naturally occurring genes).

In *Association for Molecular Pathology v. Myriad Genetics, Inc.,* 133 S. Ct. 2107 (2013), three of Myriad's patents were at issue. These patents covered not only the actual DNA sequences themselves but also nucleotide sequences for complementary DNA (cDNA), which is synthetically created DNA that omits portions of the DNA segment that do not code for proteins. In other words, the patents covered not only DNA as it exists in nature but also a man-made, synthetic form of DNA that does not exist in nature and that was created for diagnostic purposes. Specifically, the cDNA contains only the exons and omits the introns that are normally present in DNA.

The specific genes that Myriad patented are the genes that govern susceptibility to breast and ovarian cancer. Myriad discovered the location and sequence of these genes and used this information to develop diagnostic tests that inform women as to their risk of developing these types of cancers. When other companies developed similar tests (and typically charged less money for them), Myriad sued for infringement of its patents, and the accused companies challenged the validity of those patents.

In reaching its conclusion, the Court reasoned that products of nature are not eligible for patent protection, but something that is not naturally occurring is. (For example, you cannot find a plant in the woods and patent it, but you could patent the use of that plant for medicinal purposes.) Even brilliant discoveries--such as Myriad's discovery that mutations of the BRCA1 and BRCA2 genes increase the risk of certain cancers--are not patentable if they involve simply discovering a fact of nature. The same is true of extensive effort--no matter how great the investment in time and personnel, extensive effort alone is irrelevant to the patentability analysis.

The controversial issue--and one that has been the subject of many debates in intellectual property forums across the country--was whether the isolation of certain genes from the rest of the DNA strand should be patentable. The issue of the patentability of the cDNA was less controversial because cDNA does not occur in nature. According to the Court, the mere act of isolating a gene, by severing the covalent bonds that bind it to the rest of the chromosome, is not an act of invention. (My analogy is that this would be like picking a leaf off of a tree and attempting to patent the leaf.) In the latter instance, the Court reasoned, Myriad did not create anything. On the other hand, cDNA is not the same as a naturally occurring DNA segment because it is an exons-only molecule. Because it is "distinct from the DNA from which it is derived," the Court held that it is patentable.

Finally, the Court noted that if Myriad had attempted to patent novel methods of isolating the DNA strands, those claims may have been upheld--but the methods Myriad used were well-known in the industry. The Myriad patents also included claims for applications of its knowledge concerning the BRCA1 and BRCA2 genes (as in the above analogy regarding patenting the use of a plant for medicinal purposes), but those claims were not challenged. In patent parlance, the challenged claims were "composition" claims that went to the gene sequences themselves.

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violates pre-trial detainees' right to restorative treatment. *Mink*, 322 F.3d at 1122; *Terry*, 232 F.Supp.2d at 943 ("the lack of inpatient mental health treatment [in jails], combined with the prolonged wait in confinement, transgresses the constitution"). Even a few weeks in a detention center without proper medication and treatment for a prisoner with mental illness can lead to significant suffering and deterioration.

Lack of funding or resources is not a justification for the prolonged detention in county detention centers of individuals court ordered to the state hospital. *See Advocacy Center for Elderly and Disabled,* 731 F.Supp. at 624 ("Defendants' limited resources are a concern, but lack of funding cannot justify the continued detention of defendants who have not been convicted of any crime, who are not awaiting trial, and who are receiving next to no mental-health services").

We at the ACLU of Montana encourage attorneys representing individuals detained in county detention centers after being court ordered to MSH to raise this constitutional violation with district court judges, and stop county detention centers from serving as the holding ground for individuals in need of mental health treatment.

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