dition had improved since the prior decision based on the facts that he received minimal, conservative treatment; had normal diagnostic test results; and had recovered from his injuries. The court also held that his mental condition had improved, as evidenced by treatment notes reflecting an improvement in mental status, less depression, and anxiety; no depressive symptoms; and an improved GAF score of 60. Thus, the prior RFC was not binding.

Mr. Rudd contended that his new mental evaluation established greater mental impairment and limitations and that the ALJ's reliance on Dr. Wagner's testimony was improper, since Dr. Wagner never examined him. The court held that substantial evidence supported the opposite conclusion that his condition had improved, including treatment records reflecting moderate mental limitations; opinions of two state agency physicians that Mr. Rudd could perform simple work, interact with superiors and peers, and adapt to work changes based on their reviews of the evidence; and Dr. Wagner's review of the entire mental health evidence before his testimony. Since the evidence supported his testimony, the court held that the ALJ was not precluded from relying on the opinion of a nonexamining physician.

The court held that the ALJ did not err in failing to give Dr. Butler's opinion controlling weight, recognizing that the nature and extent of a treatment relationship is relevant to the weight given to a physician's opinion. The court found Mr. Rudd's treatment sparse, not well supported by medically acceptable clinical and laboratory diagnostic techniques, and inconsistent with the other substantial evidence.

Discussion

Traditionally in disability law, the treating physician's opinion holds the controlling weight for the determination of symptoms in the adjudication of claims for disability benefits. In this case, however, the judge gave more weight to a nonexamining physician than to the treating physician because of the limited treatment provided by the treating physician, the inconsistency between his opinion and those of other experts, the lack of basis for his opinion, and the power of a nonexamining physician who reviewed the entire record and supported his opinion with evidence. This physician's report was more persuasive to the court because of its thoroughness and well-documented substantiation of opinions, as is desired in forensic practice. Moreover, the latter very likely improved the court's awareness of the dual role of the treating physician and a reminder of the required sensitivity to the differences between clinical and legal obligations of those who find themselves in a dual-agency situation, such as in disability evaluations, guardianships, civil commitments, and Workers' Compensation hearings.

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The Diagnosis of Mental Illness and the Determination of a Sex Offender's Eligibility for Civil Commitment

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Fourth Circuit Court Affirms Ruling That Repeat Sex Offender Does Not Suffer From a Serious Mental Illness and Is Not Eligible for Civil Commitment

In January 2012, Frederick Springer, who had already been incarcerated for failing to comply with the federal Sex Offender Registration and Notification Act, was certified as "sexually dangerous" in seeking to have him civilly committed under the Adam Walsh Child Protection and Safety Act of July 27, 2006 (Pub. L. No. 109-248, 120 Stat. 587 (2006)) (the Walsh Act). In *United States v. Springer*, 715 F.3d 535 (4th Cir. 2013), the Fourth Circuit Court of Appeals affirmed the decision of the U.S. District Court of the Eastern District of North Carolina, finding that it is within the court's discretion not to rely on the Diagnostic and Statistical Manual

of Mental Disorders (DSM-IV-TR, APA, 2000) in determining whether the serious mental illness that is requisite under the Walsh Act is present.

Facts of the Case

Frederick Springer was 34 years old at the time of the Fourth Circuit ruling, and had a history of six prior sexual offenses. He allegedly forcibly performed oral sex and other sexual acts on a seven-year-old boy over a nine-month period in 1996 and 1997. In 1997, when Mr. Springer was about 19 years old, he was convicted of abusing an 11-year-old girl, and stated that he liked the girl "because she was flat-chested; she wasn't developed." Later that year he pled guilty to third-degree sexual abuse after performing oral sex on a 13-year-old boy. Soon after his release from prison for those charges, he pleaded guilty to third-degree sexual abuse for molesting a 19-year-old while she was sleeping. Months later, he was charged for allegedly offering a 13-year-old boy money in exchange for posing nude for photographs. In 2004, when he was 26-years-old, he pleaded guilty to charges relating to nonconsensual oral and anal sex with a 16-year-old.

In 2010, Mr. Springer was imprisoned for violating the federal Sex Offender Registration and Notification Act of July 27, 2006 (Pub. L. No. 109-248, 120 Stat. 590 (2006)) (the Registration Act) when he moved from New York to North Carolina. He was still serving that sentence when the district court ruled that he was ineligible for civil commitment in September 2012. Until that time, he had spent nearly four years outside of prison without committing any other known illegal sex acts.

In January 2012, when Mr. Springer was scheduled to be released in six months, he was certified as "sexually dangerous," to initiate the civil commitment process under the Walsh Act. An evidentiary hearing was held in August 2012 at the district court to determine whether he satisfied the Walsh Act commitment criteria. Three expert witnesses testified on this matter: one court-appointed (Dr. Hastings), one hired by the prosecution (Dr. Graney), and one hired by the defense (Dr. Plaud). Both Dr. Hastings and Dr. Graney agreed that Mr. Springer met diagnostic criteria for pedophilia and that he would have serious difficulty controlling his sexual urges if released. Dr. Plaud, however, felt that there was insufficient evidence to diagnose pedophilia. Dr. Plaud opined that Mr. Springer's previous pedophilic acts were caused by delayed sexual maturation as a result of physical and sexual abuse during Mr. Springer's childhood. Dr. Plaud further opined that Mr. Springer was no longer sexually attracted to prepubescent children and no longer had difficulty in controlling his sexual impulses.

In September 2012 the court ruled that the prosecution had failed to prove that Mr. Springer met criteria for civil commitment under the Walsh Act. The prosecution appealed the case to the Fourth Circuit Court of Appeals. Mr. Springer was released from prison in October 2012, after the Fourth Circuit refused to stay his release. In December 2012, before the case was argued before the Fourth Circuit, Mr. Springer was charged with a violation of his supervised release by allegedly spending five nights away from his group residence and by engaging in a consensual intimate relationship with another convicted sex offender. He was sentenced to 13 months in prison. The case was argued before the Fourth Circuit in January 2013. In February 2013, before the case was decided by the Fourth Circuit, the Bureau of Prisons certified Mr. Springer as meeting criteria for civil commitment under the Walsh Act for a second time. The Fourth Circuit issued its ruling in April 2013.

Ruling and Reasoning

The Fourth Circuit Court of Appeals, before deciding on whether the district court had erred in finding that Mr. Springer did not meet the Walsh Act criteria for civil commitment, had to determine whether the case was now moot, given the filing of the second certification for civil commitment and Mr. Springer's new charges. The court found that the case was not moot, reasoning that if they did not decide on the case after the second certification, it might set a precedent whereby the Bureau of Prisons could file repeated certifications to continue a case until a favorable decision is achieved, raising due process concerns.

The court went on to address the finding of the district court that Mr. Springer did not have a serious mental illness under the Walsh Act. To commit an individual under the Walsh Act, three prongs must be established by clear and convincing evidence. The first prong of the Walsh Act states that, for an individual to be committed, he must have previously "engaged in or attempted to engage in sexually violent conduct or child molestation." Both the prose-

cution and defense agreed from the start that Mr. Springer met the criteria for this first prong.

The second prong requires that the individual currently "suffers from a mental illness, abnormality, or disorder" (18 U.S.C. § 4247(a)(6) (2006)). The Fourth Circuit majority opinion noted that the district court "did not clearly err in concluding that Springer did not have a serious mental illness" (*Springer*, p 538). It reasoned that although pedophilia would qualify as a "serious mental illness" for purposes of the Walsh Act and that Mr. Springer may have met DSM criteria for pedophilia, "courts are not bound by medical definitions in determining whether an individual suffers from a mental illness" (*Springer*, p 546). The Fourth Circuit found that Dr. Plaud considered all the relevant evidence in making his determination that Mr. Springer did not have pedophilia, and thus testimony offered by Dr. Plaud, which was deemed persuasive by the district court, was not invalid. Thus, "the district court did not clearly err in finding that Springer currently does not suffer from a qualifying mental illness" (*Springer*, p 547),

The third prong of the Walsh Act requires that the individual "would have serious difficulty in refraining from sexually violent conduct or child molestation if released" (18 U.S.C. § 4247(a)(6) (2006)), as a consequence of a mental condition. The district court had found that Mr. Springer did not meet criteria for the third prong, based on Dr. Plaud's testimony. The Fourth Circuit court did not consider whether Mr. Springer met the third prong, noting that such determination was irrelevant, in that the second prong had not been met, and that precedent set in *United States v. Hall*, 664 F.3d 456 (4th Cir. 2012), p 463, necessitates that all three prongs be met for civil commitment.

Discussion

The U.S. Supreme Court established the constitutionality of civil confinement of certain sex offenders after criminal confinement for sex offenses in *Kansas v. Hendricks*, 521 U.S. 346 (1997), in which Mr. Hendricks was found to have a "mental abnormality" as a result of a diagnosis of pedophilia. The Court again considered a case of civil commitment of a sex offender in *Kansas v. Crane*, 534 U.S. 407 (2002), and agreed with the state of Kansas that it is not necessary, or even possible, "always to prove that a dangerous individual is completely unable to control his behavior" (*Crane*, p 411). The effect of *Hendricks* and *Crane* was essentially to balance what was perceived as an overemphasis on individual liberty protections with the state's interests in civil confinement of dangerous sex offenders.

Both *Hendricks* and *Crane* also spoke to the distinction between legal definitions of mental illness and psychiatric definitions, including DSM criteria. *Hendricks* established that legal definitions of mental illness "need not mirror those advanced by the medical community" (*Hendricks*, p 359), whereas *Crane* qualified that "psychiatry. . .informs but does not control ultimate legal determinations" (*Crane*, p 413). Although physicians typically apply well-defined diagnoses (such as those offered in the DSM) to their patients, courts are at liberty to consider mental illness diagnoses partially or fully. In addition, courts may use different criteria than those in the DSM, while using similar terminology for a mental illness determination.

The distinction between legal determinations of mental illness and medical definitions is readily apparent when the legal language describing a mental illness (i.e., "serious mental illness" in the case of the Walsh Act) does not equate with a specific medical diagnosis (*i.e.*, a psychiatric diagnosis as defined in the DSM). This difference in jargon will at times necessitate clarification, such as in *United States v. Hall*, in which the diagnosis of pedophilia was considered to be a "serious mental illness" under the Walsh Act, although the specific criteria for the determination of pedophilia in its legal context (including how the legal requirements differ from the DSM criteria) were not articulated.

In both *Hendricks* and *Crane*, the defendants' backgrounds of repeated sexual offenses against prepubescent children (similar to the background of Mr. Springer) were found to be consistent with a diagnosis of pedophilia, and in support of civil commitment. However, unlike Mr. Springer, Mr. Hendricks, and Mr. Crane had both agreed with the diagnosis of pedophilia and acknowledged ongoing symptoms via testimony. In the case of *United States v. Springer*, it was already established by *Hall* that a diagnosis of pedophilia met the definition of "serious mental illness" under the Walsh Act, and it was implied that Mr. Springer did meet DSM criteria for pedophilia. Still, the Fourth Circuit affirmed the district court's decision, finding no clear error in the determination that Mr. Springer did not have a se-

vere mental illness. Thus, the Fourth Circuit found no clear error in the district court's apparent departure from DSM criteria for the diagnosis of pedophilia and its finding Dr. Plaud's diagnoses and testimony more persuasive. The Fourth Circuit did not find any clear error to support overturning the district court's decision, affirming the rather wide latitude that courts have in making legal determinations of mental illness and in departing from medical criteria for psychiatric illness.

Finally, as to the questions of due process raised in this case, the Supreme Court noted in *Jackson v. Indiana*, 406 U.S. 715 (1972), that the right to due process applies to individuals litigating their confinement under federal civil commitment statutes, and individuals confined under the Walsh Act are now explicitly provided the same protections in *Springer*.

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Expanded Responsibility of the Court to Order Competency Evaluations at Time of Sentencing

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The Ninth Circuit Rules That a California District Court's Failure to Order an Evidentiary Hearing to Evaluate Competency Was Plain Error When Reasonable Doubt of Competency Existed at Sentencing

In *United States v. Dreyer*, 693 F.3d 803 (9th Cir. 2012), the Ninth Circuit Court of Appeals ruled that the District Court had committed a plain error in failing to order a competency hearing at the time of sentencing for Dr. Dreyer who had pleaded guilty to conspiracy to distribute controlled substances. It was asserted that Dr. Dreyer's well-established diagnosis of frontotemporal dementia (FTD) and consequent inability to regulate his behavior and speech, raised substantial doubt about his ability to assist his defense counsel at time of sentencing. Although Dr. Dreyer's defense attorney asked only for leniency in sentencing, the court erred in failing to order an evidentiary hearing to evaluate competency.

Facts of the Case

In 2007, Joel Dreyer , MD, was indicted on 30 counts related to conspiracy to possess and distribute controlled substances. At the time, he was a licensed psychiatrist and was allegedly writing prescriptions for oxycodone and hydrocodone in exchange for cash payments of $100 to $200. These incidences occurred between 2004 and 2007 and involved the illicit dispensation of tens of thousands of pills. Dr. Dreyer accepted a plea agreement in 2009, in which he pleaded guilty to two counts related to conspiracy to distribute and unlawful distribution of oxycodone.

Dr. Dreyer had no criminal history before this incident, and he had been diagnosed with FTD in 2001. Family members described dramatic personality and behavioral changes that had been observed over the previous years. These included a divorce from his wife of 17 years, withdrawal from his family, the use of profane and explicitly sexual language, and inappropriate behavior, such as walking around a hotel lobby without a shirt. Considering this, the defense procured medical and psychological evaluations before sentencing. Two reports from experts retained by the defense and one from an evaluator appointed by the state were submitted to the court.

Of the clinicians who evaluated Dr. Dreyer, all agreed on a diagnosis of FTD. Several experts opined on Dr. Dreyer's cognitive dysfunction in the realms of judgment, memory, language, and executive function. As a result, he had markedly impaired insight into his deficits as well as the consequences of his impulsive actions. Magnetic resonance imaging of his brain was consistent with FTD as well. Although the purpose of the evaluations was not specifically to assess competence, opinions of whether Dr. Dreyer was competent to plead guilty were offered. The defense's expert opined that Dr. Dreyer may not have fully understood the consequences of agreements that he had entered into, whereas the state's expert opined that, although he was competent to plead guilty, his diagnosis might mitigate some culpability.