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Testimony in SVP Cases

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Amid the furor regarding sex offenders over the past decade or so, the popular press has given less attention to sexually violent predator (SVP) civil commitment laws than to community notification laws or residency restriction laws. The latter two deal with sex offenders in the community, so perhaps these laws have more saliency to the public than SVP commitment cases, which are “out of sight, out of mind.”

SVP Controversy

Nonetheless, SVP cases are controversial among forensic psychology and psychiatry professionals, who tend to be polarized regarding the appropriateness of civilly committing sex offenders. Some find the process highly offensive and perhaps even unethical, believing that SVP commitments are a form of preventative detention. Similarly, some believe that the diagnoses used to classify SVP cases and the risk assessment instruments used to assess potential of future offenses are insufficiently scientific to be used in such an important context, in which an individual's liberty may be severely restricted. For example, Franklin states:

The legal requirement that these civil commitments be predicated on a mental disorder or mental abnormality has spawned a booming cottage industry in the mental health field. Because many sex offenders do not suffer from traditional mental disorders, forensic evaluators have developed a highly contested—some

would say pretextual—diagnostic nosology centered around the triad of Antisocial Personality Disorder, Pedophilia, and Paraphilia Not Otherwise Specified. [citation omitted] (K. Franklin, “The Public Policy Implications of ‘Hebephilia’: A Response to Blanchard et al.,” *Arch. of Sexual Behav.* (Oct. 2008); available at <http://www.springerlink.com/content/g33406g6t2k8717>.)

Or consider Campbell's position: “When legal standards of evidentiary reliability are carefully applied to SVP evaluation procedures, they cannot survive the ensuing scrutiny.” (T. Campbell, *Assessing Sex Offenders: Problems and Pitfalls* 306 (2d. Charles Thomas 2008).)

Use Best Available Instruments. Others take the opposite view, suggesting that one must use the best instruments and procedures available, even if imperfect. For example, Monahan states:

Finally, in the commitment of sexually violent predators, I have argued that courts should keep jurisprudential considerations about the use of specific violence risk factors apart from substantive questions about the constitutionality of the underlying statutes that trigger risk assessment. If commitment as a sexually violent predator is properly categorized as civil commitment, the admissibility of violence risk factors in implementing

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such commitments should parallel the admissibility of violence risk factors in traditional civil commitment. Disagreement with the substantive merits of sexually violent predator statutes does not justify depriving decision-makers of the only kind of scientific evidence—empirically validated actuarial violence risk assessment—that can effectuate their statutory goals. (J. Monahan, “A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patents,” 92 Virginia L. Rev. 435 (2006).)

Overcome Prejudgment. Our point here is that SVP evaluations raise strong emotions and opinions among professionals. The forensic evaluator should bear this in mind when testifying in such cases. When testifying, the evaluator needs to present himself or herself with a high degree of credibility to overcome what may be prejudice of both the SVP case itself and of the expert. It is frequently difficult enough for forensic experts to impress triers-of-fact as credible. For instance, Ivkovic and Hans noted that only one in 10 jurors *disagreed* with the statement that “lawyers can always find an expert who will back up their client’s point of view no matter what it is” [italics in original]. (S.K. Ivkovic and V.P. Hans, “Jurors’ Evaluations of Expert Testimony: Judging the Messenger and the Message,” 28 L. & Social Inquiry 452 (2003).) They

note that the best expert witness is one who comes across as a good teacher, “someone who knows how to make a presentation.” (Ivkovic and Hans, 2003, *supra*, at 470.) The expert in SVP cases should bear in mind Ivkovic and Hans’ advice.

First Things First

The foundation of testimony in SVP cases is knowledge of the three interlocked constructs of mental abnormality, volitional impairment, and risk. In SVP cases, some form of mental abnormality must result in volitional impairment, which in turn must result in increased risk of future sex offending, as established by two leading U.S. Supreme Court cases, both from Kansas. (*Kansas v. Hendricks*, 521 U.S. 346 (1997); *Kansas v. Crane*, 534 U.S. 407 (2002).) These decisions have led to almost uniformity among the wording of statutes on these issues. For instance, of the 18 states that have SVP commitment laws, 13 use the following wording regarding the required mental abnormality and its relationship to the constructs of volitional impairment and risk:

A congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts to a degree constituting the person a menace to the health and safety of others. (S. Sreenivasan, L.E. Weinberger, and T. Garrick, “Expert Testimony in Sexually Violent Predator Commitments: Conceptualizing Legal Standards of ‘Mental Disorder’

and ‘likely to Reoffend.’” 31 J. of the Amer. Academy of Psychiatry & the L. 473 (2003).)

Tailor Testimony. These three issues are the ones that concern the court. The forensic evaluator should tailor their testimony to ensure that these issues (and only these issues) are clearly addressed. Along these lines, Witt and Conroy suggest the following recommendations:

1. Identify the relevant legal construct by reviewing relevant statutory and case law, as well as legal scholarship on the subject.
2. Operationalize the constructs. That is, determine how these constructs can be measured and what methods could be used to measure them.
3. Gather information in the relevant domains to measure these constructs.
4. Use the information gathered to form and test hypotheses on the fit of the facts to the legal constructs. (P.H. Witt and M.A. Conroy, *Evaluation of Sexually Violent Predators* 132 (Oxford 2008), modifying K. Heilbrun, G.R. Marczyk, and D. DeMatteo, *Forensic Mental Health Assessment: A Casebook* (Oxford 2002).)

Fit Between Data, Hypothesis. Although perhaps simple in principle, the above recommendations sometimes prove difficult in practice. Two circumstances

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present particular problems in formulating an opinion and providing testimony. (For a more extended discussion, see Witt and Conroy, 2008, *supra*, at 129-133.) First, the facts (broadly construed, consisting of information from all sources, such as interviews, records review, structured risk assessment scales) may be clear, but the pattern of facts may not neatly fit a specific hypothesis. For instance, the available information may indicate some signs of deviant sexual interest, but these signs are not so pervasive or chronic as to lead to a diagnosis of a paraphilia. Second, the facts themselves may be unclear. That is, available information may be in part contradictory or incomplete. There may be unproven allegations in the frequently voluminous records, and it is unclear how much weight to give these allegations.

In such circumstances, when the fit between the data and a hypothesis (or hypotheses) is unclear, the forensic evaluator has a few options, each with advantages and disadvantages. First, the evaluator can reach a conditional conclusion, depending on what findings are made by the finder-of-fact on the underlying factual issues. The evaluator could then allow the judge (if a bench trial) or jury (if a jury trial) to reach its own conclusion about the underlying facts, allowing the appropriate expert inference to follow upon the finding of fact. This approach has the advantage of avoiding placing the evaluator in the role of a trier-of-fact, something many authorities recommend against. (E.g., G.B. Melton, J. Petrila, N.G. Poythress, and C.

Slobogin, *Psychological Evaluations for the Courts* (3d, Guilford 2007).) However, some courts, rightly or wrongly, expect an evaluator to offer an ultimate opinion on the issue before the court, thereby requiring the evaluator to take a position on the underlying facts, at least implicitly. In such cases, the evaluator can offer an opinion on which hypothesis is best explained by the available facts, making it clear the extent to which he or she is relying on disputed facts. One could place less weight on facts that are in dispute, or one could simply assume that such facts are established, leaving it to the court to reach any final finding on the underlying assumed facts. (Witt and Conroy, 2008, *supra*, at 131.)

a Multidimensional Model for Sexual Recidivism Risk," 19 J. of Interpersonal Violence 835-856 (2004); Witt and Conroy, 2008, *supra*.)

This approach has the advantage of clarity of one's opinion, but the potential disadvantage of at least giving the impression of stepping into the role of finder-of-fact.

Mental Abnormality

As noted above, there is commonality among many of the states regarding a definition of mental abnormality. However, each state then articulates a jurisdiction-specific interpretation through case law or local wording changes or additions, so the evaluator should be aware of any issues related to his or her jurisdiction. Certain elements are common, those being (see discussion in Witt and Conroy, 2008, *supra*, at 21-29):

1. Mental disorder or abnormality is typically broadly defined, not requiring a specific DSM diagnosis (or even, by statute at least, any DSM diagnosis). Nonetheless, a DSM diagnosis is the de facto standard, commonly used and generally expected. (D. Doren, "Toward

her reasoning to the court.

Axis I Diagnoses. The Axis I diagnoses most commonly found among civilly committed SVP cases are paraphilias, especially pedophilia and paraphilia not otherwise specified (NOS). There is controversy as to whether such diagnoses are reliable (see R.L. Packard and J.S. Levenson,

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"Revisiting the Reliability of Diagnostic Decisions in Sex Offender Civil Commitment," 1 *Sex Offender Treatment* 3 (2006); Campbell, 2008, supra, especially paraphilia NOS (which is frequently used to diagnose rapists who do not meet the criteria for sexual sadism), and, again, the evaluator should be aware of the issues regarding this controversy so as to be prepared for cross examination. An articulate explanation to the court of how one is making a given diagnosis, and upon what facts one is relying in determining how the diagnostic criteria are met, is helpful in establishing credibility. However, the evaluator should realize that the DSM was not written with court testimony in mind, and that no specific DSM diagnosis provides an exact mapping onto SVP statutes.

Psychopathy. Finally, there is the issue of psychopathy. Although not a DSM diagnosis, psychopathy has a long history as a diagnosis (R.D. Hare, "Psychopaths and Their Nature: Implications for the Mental Health and Criminal Justice Systems," in T. Millon, E. Simonsen, M. Birker-Smith, and R.D. Davis, eds., *Psychopathy: Antisocial, Criminal, and Violent Behavior* 188-212 (Guilford Press 1998)), as well as a structured scale for its assessment, the Psychopathy Checklist-Revised (PCL-R). (R.D. Hare, *Hare Psychopathy Checklist-Revised* (2d) (PCL-R) (Multi-Health Systems, Inc., 2003).) The PCL-R has two broad factors—a callous, egocentric personality style (Factor 1) and an impulsive, antisocial lifestyle (Factor 2)—and high levels of psychopathy have been found to be associated with both violent and sexual offense recidivism. (See review in H.E. Barbaree, "Psychopathy, Treatment Behavior, and Recidivism: An Extended Follow-Up to Seto and Barbaree," 20 *J. of Interpersonal Violence* 1115-131 (2005).) In fact, one state, Texas, by statute requires consideration of psychopathy; another, California, requires such consideration by written policy. In others, such as New Jersey, consideration of psychopathy is customary, but not required by statute or policy.

Volitional Impairment

Forming an opinion on and testifying about volitional impairment is perhaps the most controversial aspect of SVP evaluations. For example, LaFond notes, "There is virtually unanimous consensus that MHPs [mental health professionals] cannot

determine when an individual has significant difficulty controlling his behavior." (J.Q. LaFond, *Preventing Sexual Violence: How Society Should Cope With Sex Offenders* 140 (Am. Psych. Ass'n 2005).) Perhaps the most widely quoted criticism of forming opinions regarding volitional impairment is that by the American Psychiatric Association: "[T]he line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk." (Am. Psych. Ass'n, "Statement on the Insanity Defense," 140 *Amer. J. of Psychiatry* 685 (1983).) However, as Witt and Conroy note, "If an SVP evaluator is to offer an opinion on the issue of commitment, then it seems necessary that the evaluator assess the components of commitment, one of which is volitional impairment." (Witt and Conroy, 2008, supra, at 31.)

Guiding Principles. Despite the controversy on this issue, we believe there are some guiding principles the evaluator can follow. First, as we suggest earlier, the evaluator should be familiar with case law, especially in the evaluator's jurisdiction, that delineates the factors considered important in reaching a conclusion regarding volitional impairment. Mercado et al. reviewed a series of such decisions from Minnesota and found, at least in that jurisdiction, some consistency in the court decisions. (C.C. Mercado, R.F. Schopp, and B.H. Bornstein, "Evaluating Sex Offenders Under Sexually Violent Predator Laws: How Might Mental Health Professionals Conceptualize the Issue of Volitional Impairment?" 10 *Aggression & Violent Behav.* 289-309 (2005).) To summarize a few of their more salient points:

- No psychosis or mental retardation is required;
- Planning or grooming does not preclude a finding of volitional impairment;
- Lack of insight into one's behavior may indicate volitional impairment;
- Loss of control need not be present all the time, but may be specific to the offending situation;
- Repeated illegal conduct despite legal consequences is relevant; and
- Lack of control may be present even when the offender has entrenched beliefs that justify such behavior.

Along the same lines, Rogers and Shuman suggest the following dimensions to consider, showing some overlap with Mercado, Schopp, and Bornstein's recommendations:

- Lack of capacity for meaningful choice;
- Disregard for personal consequences;
- Incapacity for delay; and
- Chronicity. (R. Rogers and D.W. Shuman, *Fundamentals of Forensic Practice* (Springer 2005).)

Local Norms. As always, we recommend that the evaluator determine what local norms and expectations exist for opinions and testimony on this issue. Although we certainly do not recommend blindly adhering to local norms if one considers these norms inappropriate or unethical, with regard to volitional impairment, the area is so contentious that knowledge of local norms can be useful in guiding one's thinking. One must realize that offering an opinion on volitional impairment depends more on rational analysis of the legal and psychological literature than upon empirical studies.

Risk

The final area in which the evaluator may form an opinion and testify is regarding risk; that is, that the offender is likely to engage in acts of repeat sexual violence. (E.g., Kansas Stat. Ann. § 59-29a01, 2003 and Supp. 2004.) On the surface, this issue seems straightforward. But even here there are subtleties. For example, just how high does an SVP candidate's risk need to be to trigger a recommendation of commitment? How likely is likely? Does the likelihood need to be, say, greater than 50%? Greater than the general or local base rate for recidivism, if that is known? There is considerable variation among the states as to what level of likelihood meets the threshold, and although some jurisdictions have "clarifying phrases" in their statutes (which may or may not actually help clarify the issue), the evaluator is well advised to get a sense of local case law and norms on this issue.

Risk Assessment Instruments. As a practical matter, most SVP evaluators rely on some form of structured risk assessment scale in reaching a conclusion on likelihood. (H.A. Miller, A.E. Armenta, and M.A. Conroy, "Sexually Violent Predator Evaluations: Empirical Limitations, Strategies for Professionals, and Research Directions," 29 *L. & Human Behav.* 29-54 (2005).) In recent years, evaluators have relied almost exclusively on empirically guided risk assessment scales, such as actuarial instruments or structured professional judgment methods. (See review in Witt and Conroy, 2008, supra, at 38-42.)

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Rarely will an evaluator come into court having formed an opinion based on an unstructured clinical interview and a purely clinical formulation of risk. Although perhaps 20 years ago evaluators would routinely answer cross examination questions concerning risk with the conclusory, "It's my clinical opinion," today, that answer no longer suffices. Although there is still debate over the relative merits of structured professional judgment methods versus actuarial methods, there is consensus that some form of structured, empirically validated or research-guided method is necessary. That is not to say that even empirically guided methods are without criticism, as noted in our introduction, but these methods at least have an empirical foundation on which to rely, as opposed to purely clinical, unstructured assessments of risk, which almost invariably fall short. (E.g., J. Monahan, "A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients," 92 Virginia L. Rev. 391-435 (2006).)

Structure Findings to Court. One additional benefit of using a structured risk assessment instrument is that it helps structure and communicate one's findings to the court, both in the written report and during testimony. By using a structured instrument or instruments, one can systematically review and communicate the areas found in the professional literature to be associated with increased likelihood of reoffending. Bear in mind that, as we noted earlier, a good expert is one who presents as a good teacher, and clear, well organized communication in the report and in testimony is a step in this direction. Witt and Conroy note:

[E]valuators must, to some degree, assume the role of educators. Respectfully and without being condescending or overly technical, reports [and testimony] should communicate not only the relevant data but also the rationale behind the procedures used. (Witt and Conroy, 2008, supra, at 163.)

Broadly, the evaluator is looking for evidence of two overarching factors that contribute to risk: those being antisociality and sexual deviance (D. Doren, 2004, supra; Witt and Conroy, 2008, supra, these being paralleled by the primary diagnoses given (i.e., APD or a paraphilia).

Relevant Ideographic Factors. The evaluator should include not only nomothetic factors relevant to risk—and these are

typically well covered by actuarial scales—but also any relevant ideographic factors that may be present. The operative word regarding ideographic factors is "relevant." All too often we have seen evaluators testify as to some salacious or sensationalistic detail in the offender's life history, perhaps the offender's own early sexual history or perhaps the offender's denial of guilt, despite the fact that this detail has no bearing (or an illusory bearing) on the individual's likelihood of reoffending. Such details are best omitted from both the report and testimony, otherwise the evaluator could convey the mistaken impression that this detail is somehow probative, or at least important.

Proverbal Bottom Line

In a sense, testifying in court in SVP cases requires two orthogonal skills: mastering the technical aspects of the case and handling stylistic aspects of testimony. Mastering the technical aspects of the case involves knowing the scientific literature and legal context regarding the three interrelated constructs of interest to the court—those being mental abnormality, volitional impairment, and risk of future sex offending. And, of course, the evaluator should know in detail the file in the specific case at hand.

Handling stylistic aspects of testimony involves organizing one's thoughts coherently, testifying clearly during direct, and reacting calmly and nondefensively during cross. The stylistic aspects of the evaluator's testimony are what will (or will not) convince the court that the evaluator's opinion is worth considering.

In addition, the evaluator should have what we call local knowledge—awareness of what the court in one's jurisdiction expects and knowledge of relevant local statutes and case law. Local knowledge can make the difference between testimony that is persuasive and testimony that is dismissed out of hand.

Testifying in court is the proverbial bottom line. Without clear, coherent testimony, all the evaluator's work may come to little. As Melton et al. put it:

Forensic knowledge... will be virtually useless unless it is organized and presented in a manner that will be helpful to legal consumers (lawyers, judges, jurors), and if its purveyors are not prepared to endure the sometimes harsh scrutiny that the adversary process demands. (Melton et al., 2007, supra, at 577.)

As mental health practitioners, most of us are unaccustomed to and uncomfortable with adversarial proceedings. Our patients and colleagues are, for the most part at least, respectful and deferential. Not so in court. Attorneys are zealous advocates for their point of view, and any expert with a contrary opinion is fair game. Again, as Melton et al. note:

[A]ttorneys are more interested in *credibility* than in truth per se; many of the questions posed in court by attorneys are aimed at enhancing (through direct questioning) or undermining (through cross-examination) a witness' credibility. (Melton et al., 2007, supra, at 587.)

Hence, anxiety management and maintaining composure under duress are valuable skills for any expert witness. Perhaps the key is to be an assertive expert; that is, for the expert to calmly assert his or her opinion in the face of sometimes stressful challenges to his or her credibility. Of course, this is easier said than done and perhaps comes more easily with multiple repetitions.

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