

Sexually Violent Predator A Not So Civil Commitment

Sex crimes are perhaps the most difficult cases to defend at trial. Often, with charges stacked, your client may face a life sentence in the absence of a plea. So you go to the negotiation table and structure a great deal. There will be some prison time, but it could have been much worse. Your client will be out before he knows it. Or will he?

Defendants convicted of a “sexually violent” crime or any sex crime involving a victim under the age of fourteen are subject to “Sexually Violent Predator,” or “SVP,” evaluation prior to release, with potentially dire consequences: an SVP designation can result in civil commitment for an indeterminate amount of time.

SVP Defined

The Welfare & Institutions Code defines a sexually violent predator as a person who (1) has been convicted of a sexually violent offense against one or more victims (the “predicate offense”) and (2) has a currently diagnosed mental disorder that (3) makes that person likely to commit future violent sex offenses.¹

Welfare & Institutions Code 6601(b) requires that the Department of Corrections review a convicted sex offender’s case six months prior to release, to examine the predicate offense and “the person’s social, criminal, and institutional history.” If the assessment indicates that the defendant is likely to be a sexually violent predator, the person will be referred to the Department of State Hospitals (DSH) for a full evaluation.²

Predicate Offenses

What constitutes a predicate offense that triggers SVP evaluation? Any sex crime that is considered “sexually violent in nature,” such that it is committed by force, violence, duress, menace, or fear of immediate bodily injury to the victim or another person or by threatening to retaliate against the victim or another person. All subdivisions of Penal Code §§ 261, 262, 264.1, 269, 286, 288, 288(a), 288.5, and 289 qualify as predicate offenses. Kidnapping (P.C. §§ 207 and 209) and assault with intent to commit a designated sex offense (P.C. § 220) are considered predicate offenses if committed with the intent to violate any of the previously-listed sections.³

In addition to the above, all offenses committed against a child under the age of fourteen, qualify as predicate offenses triggering SVP evaluation, whether or not force or violence were used.⁴

Diagnosed Mental Disorder

¹ Welf. & Inst. Code, 6600(a.)

² The Department of Corrections (CDCR) need only take into account that the predicate offense was sexually violent in nature or was committed against a minor under the age of fourteen for a referral for full evaluation. 15 CDCR 2600.1(d)(1)-(2)

³ Welf. & Inst. Code, 6600(b).

⁴ Welf. & Inst. Code 6600.1; *see also People v. Torres* (2001) 25 CAL.4th 680, 684-687 (predicate offense need not be “predatory,” meaning with a stranger, a casual acquaintance, or where the relationship was created for the purpose of victimization).

The two most common mental disorders looked for in SVP evaluations are antisocial personality disorder and paraphilia.⁵ Both disorders are quite broad and encompass many specific disorders.

In Antisocial Personality Disorders, evaluators look for pervasive patterns of disregard for and violation of the rights of others occurring since childhood and continuing on into adulthood. The diagnostic criteria include conduct that demonstrates (1) failure to conform to social norms associated with lawful behaviors; (2) deceitfulness such as compulsive lying or conning others; (3) lack of impulse control; (4) irritability and aggressiveness such as fighting or assaulting; (5) reckless disregard for safety of self or others; (6) irresponsibility like the inability to sustain employment; and (7) lack of remorse.⁶

Paraphilia involves “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors over a period of at least six months.”⁷ These behaviors can involve nonhuman objects, suffering or humiliation of oneself, one’s partner, children, and/or other non-consenting persons.⁸

Paraphilia comes in many different forms. The most common is Pedophilia, where the individual is sexually attracted to prepubescent children. Other forms of paraphilia include Sexual Sadism, Fetishism, Frotteurism, Sexual Masochism, Transvestic Fetishism, Voyeurism, and a generic form classified as Paraphilia Not Otherwise Specified (“N.O.S.”).⁹

Steps of the SVP Evaluation

A few months, weeks, or even days before your client’s scheduled release, he will be called to appear for the evaluation. He will receive a nondescript ducat one day with the place and time to appear, but no notice of the subject of the meeting. Your client is not required to be given advance notice of the evaluation and has no right to the assistance of counsel during the interview.¹⁰

The Department of State Hospitals will send two licensed psychologists or psychiatrists to conduct the evaluation on separate days. Both evaluations, each approximately three hours in duration, consists of a series of highly invasive and personal questions. For SVP proceedings to commence, both clinicians must conclude that the defendant has a current mental condition such that if released, he is likely to commit acts of sexual violence.

If both clinicians conclude the defendant does not meet the standards of SVP, then he will be released on his scheduled release date. If the evaluators cannot agree on a determination, two independent evaluators will be sent out and the process will start over again. If the second set of

⁵Shoba Sreenivasan, PhD, Linda E. Weinberger, PhD, and Thomas Garrick, MD, *Expert Testimony in Sexually Violent Predator Commitments: Conceptualizing Legal Standards of “Mental Disorder” and “Likely to Reoffend”* J AM ACAD PSYCHIATRY LAW 31:471–85, 2003, available at www.jaapl.org/content/31/4/471.full.pdf (last visited Aug. 4, 2016).

⁶ DSM-5 301.7 (F60.2)

⁷*Diagnostic and Statistical Manual of Mental Disorders-IV (Text Revision)*, American Psychiatric Association (June 2000), Arlington, VA, USA: American Psychiatric Publishing, Inc. at 566–76. doi:10.1176/appi.books.9780890423349. ISBN 978-0-89042-024-9.

⁸*Id.*

⁹American Psychiatric Association, ed. (2013). *“Paraphilic Disorders”*. *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*. American Psychiatric Publishing. pp. 685–686.

¹⁰*People v. Carmony* (2002) 99 Cal.App.4th 317, 327.

evaluators also fails to reach a unanimous determination, your client should be released. Your client can be held in custody up to 45 days after his scheduled release date to complete the interviews.¹¹

The Interview

The interview begins with the evaluators presenting a consent form that explains the purpose of the interview. If the interviewee declines the interview, the clinicians must base their conclusions on the case files, including arrest records, Probation report, FBI file, disciplinary infractions during incarceration, mental health reports, medications taken, and any other evidence at the evaluator's disposal.

Refusal precludes a future challenge to the sufficiency of evidence finding that he lacks the ability to control his behavior later on during proceedings.¹²

Common SVP question topics include:

- past acts of aggression towards people or animals, destruction of property, deceitfulness or theft, or serious violations of rules.¹³
- Personal and family medical history, including mental health, medications taken currently and during childhood, etc.
- Age of first sexual encounter.
- Age of puberty and frequency of masturbation during adolescence.
- Length and nature of past relationships.
- Masturbation habits while in prison, including questions about what the interviewee thinks about while masturbating.

At the conclusion of the interview, the evaluator will ask if the interviewee thinks he needs and is amenable to treatment.¹⁴

Predicting Recidivism

How exactly does a mental health evaluator determine that a defendant, because of his mental disorder, is likely to engage in sexually violent criminal behavior? And when, exactly, will the defendant engage in this criminal behavior? The People do not need to prove that a violent sex offense will be committed at any particular time or that the defendant will commit such a crime immediately after release. All they need to prove is that the defendant presents a "serious and well-founded risk" of re-offense, which the California Supreme Court has held does not even need to exceed a 50% chance.¹⁵

How can an evaluator make such a determination that the defendant, due to his mental illness, is likely to reoffend? The answer is that it is a crapshoot; an educated guess at best. The

¹¹ Welf. & Inst. Code 6601.3(a).

¹² *People v. Sumahit* (2005) 128 Cal.App.4th 347,349.

¹³ Clinical Evaluator Handbook and Standardized Assessment Protocol February 2003, Appendix D, California Department of Mental Health, Sacramento, CA

¹⁴ Clinical Evaluator Handbook and Standardized Assessment Protocol February 2003, Appendix D, California Department of Mental Health, Sacramento, CA

¹⁵ *People v. Superior Court* (Ghilotti) (2002) 27 Cal.4th 888-922

evaluators are required to follow a “Standardized Assessment Protocol” which forms the basis of the evaluation.¹⁶ However, this protocol is no more than a guideline, simply outlining the definitions, requirements in statute, and court decisions that must be followed while conducting the evaluation.¹⁷ The protocol is not a precise, step-by-step procedure, so the clinicians themselves determine the actual evaluation process and form their own opinions and conclusions.¹⁸

There is a standard diagnostic tool the clinicians will use during the course of the evaluation to predict future violent sexual behavior. The STATIC -99 test, an instrument that even its creators admitted to be flawed and wildly unstable in predicting future recidivism rates, is the most widely accepted sex offender risk assessment tool in the world.¹⁹

The STATIC-99 is a score sheet of 10 risk factors scored 0 or 1, all based on the person’s criminal history. Such risk factors include past convictions for non-sexual violence, prior sex offenses, stranger victims, male victims, and the defendant’s age at the time of the conviction. A score from 0 to 3 is considered low risk, 4 and 5 moderate risk, and 6 and above high risk.

A defendant going to prison for the first time on a sex case will typically have a low to moderate risk score. However, factor number five for any prior sex offenses, can greatly inflate the score, because the factor includes both convictions and charges. Further, whereas all of the other factors rank either 0 or 1, a person can score as high as 3 on this risk factor. Thus, a client charged with three counts against a single victim, but only pled to 1, will receive 3 points on this item alone.

A defendant who is mentally sharp and has been prepared for the evaluation questions may do well to participate in the interviews, especially in cases involving multiple counts or victims, where the client’s participation will be necessary to mitigate the higher risk STATIC-99 risk score. However, if your client has a learning disability, mental impairment, or a documented case of lying or deception, answering the evaluator’s questions may not be advisable. A client with a low STATIC-99 score and thin criminal history may also consider not cooperating in the evaluation. Further, during commitment proceedings, it may be more difficult to establish that a defendant has a “currently diagnosed mental disorder” if he has not participated in the evaluations.

But it is roulette either way. The competence of the randomly-assigned evaluators can have a substantial impact. The absence of clearly-defined methods, proper training, and consistency in the system may result in the evaluators’ conclusions to be biased if your client can not present himself as honest and “normal,” thus having catastrophic consequences for your client, such that the clinicians find him to meet the SVP criteria.

¹⁶Welf. & Inst. Code 6601(c).

¹⁷Standardized Assessment Protocol For Sexually Violent Predator Evaluations. California Department of Mental Health, February 11, 2009.

¹⁸*Id.*

¹⁹ Criminal Justice & Behavior, September 2012, vol. 39, no.9, 1148-1171

The STATIC-99, bases this prediction almost entirely on past criminal indicators. According to experts, the tool has a 70% accuracy rate, meaning that 30% of the time, their conclusions are inaccurate!²⁰

The Petition

If two evaluators concur that the defendant meets the criteria of SVP, the DSH director will forward a petition commitment request to the district attorney of the county of origin. If the district attorney finds that the defendant comes within the SVP Act, the district attorney will then file a petition with the court for civil commitment. At which time, your client will be confined to county jail, awaiting trial.¹⁸

Your client is entitled to a probable cause hearing, with the right of counsel, to determine whether there is sufficient evidence to believe he is likely to engage in sexually violent predatory behavior if released.¹⁹

Conclusion

The SVP designation, like so many classifications in the criminal justice system, is deeply flawed. In March 2015, the California State Auditor released a report finding that SVP evaluations were inconsistent and lacked a standard protocol for determining whether someone meets the criteria for civil commitment. The report determined that many of the evaluators are not properly trained or supervised to make such a highly specialized determination.²¹ As a result of these deficiencies, many sex offenders are compelled to fight erroneous SVP determinations in full-blown civil trials, which carry great risk of flawed indeterminate civil commitments.

Though the SVP statute is a civil rather than criminal procedure, there is nothing civil about the methods, tools, and laws utilized in the process. Confining one to an indeterminate sentence to a mental institution, potentially for life, should require stricter policies and procedures, especially in the earliest phases of the procedure. The state Auditor's 2015 report indicates that evaluator training and guidelines need to be overhauled. Until this comes to pass, be sure to advise any client convicted of a sex crime about the SVP process at least six months prior to his release.

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²⁰ Larry Oakes, 'They're all close calls now', STAR TRIB. (Minneapolis), June 9, 2008, at A1 (quoting John Austin, a psychologist in St. Paul, who has testified in commitment cases since 1979).

¹⁸Pen. Code 1610, Subd. (b).

¹⁹Welf. & Inst. Code 6602, subd. (a).

²¹ Romney, Lee, "State audit faults evaluations of sexually violent predators," *Los Angeles Times* (Mar. 12, 2015), available at <http://www.latimes.com/local/lanow/la-me-ln-state-audit-svp-evaluations-20150312-story.html> (last visited June 28, 2016).

