

# Sex Offender Testimony: Junk Science or Unethical Testimony?

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Sexual predator statutes require that an offender be evaluated for civil commitment, after completing his penal sentence, by psychiatrists, psychologists, and other mental health professionals. These professionals are usually asked to determine whether the offender: (1) has been convicted of sexually violent predatory offenses against two or more victims; (2) has a "mental or behavioral abnormality" that predisposes the person to the commission of criminal sexual acts; (3) is likely to engage in sexually violent criminal behavior as a result of his mental or behavioral abnormality.

Despite the fact that the American Psychiatric Association believes that these statutes represent a misuse of psychiatry and are primarily aimed at preventive detention, the U.S. Supreme Court upheld their constitutionality in *Kansas v. Hendricks*.<sup>1</sup> Similar statutes have been passed in about 16 states. The Supreme Court catalogued constitutionally permissible instances in which "[s]tates have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety."<sup>2</sup> In the aftermath, state departments of mental health have rushed to set up mechanisms to evaluate sex offenders who are completing their sentences. These officials have turned to mental health professionals to design and then perform these evaluations. Many professionals, like good soldiers, have charged into the breach and are attempting to do the best possible job. In their efforts to bolster

clinical assessments, they are using a variety of new questionnaires and actuarial formulae. They are interviewing offenders who agree to the interviews. Many offenders, understandably, refuse to be cooperative with these assessments. The profession and the courts are learning a whole new list of acronyms for these tests, which include the following: Sexual Violence Risk-20 (SRV-20); Rapid Risk Assessment for Sexual Offender Recidivism (RRASOR); Minnesota Sex Offender Screening Tool (MnSOST); Sexual Offender Risk Appraisal Guide (SORAG); Violence Risk Appraisal Guide (VRAG); Abel Screening Tool (AST).

Is the "best possible" job ethically and scientifically good enough? The courts have been increasingly concerned with the introduction of "junk science." Since 1923, *Frye v. U.S.* has served as a standard for determining whether expert testimony would "assist the trier of fact."<sup>3</sup> *Frye* requires that expert testimony be supported by scientific principles or evidence that are "generally accepted" by the relevant scientific or professional communities. In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court rejected the *Frye* test and construed Rule 702 of the Federal Rules of Evidence to create a "gatekeeper" function for federal judges.<sup>4</sup> *Daubert* defined a four-prong test for judges to use in determining the evidentiary reliability of the scientific theory or technique: (1) whether it can be (and has been) tested; (2) whether it had been subjected to peer review and publication; (3) what is the known or potential rate of the error; (4) the existence of standards controlling the operation of the technique; and (5) the degree to which the theory has been generally

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accepted by the scientific community. Some states have followed the federal rules and have adopted the Daubert guidelines while other states have retained the Frye rule.

In 1999, the United States Supreme Court in *Kumho Tire Inc. v. Carmichael*<sup>5</sup> further extended the reach of Daubert. In the Court's majority opinion, Justice Breyer wrote that a trial judge must determine whether proposed expert testimony that "reflects scientific, technical or other specialized knowledge" has a reliable basis in the knowledge and experience of (the relevant) discipline. Since courts had previously ruled that *Daubert* was applicable only to the procedures of laboratory science, and therefore not applicable to clinical opinion, *Kumho* extended *Daubert* to encompass opinion testimony.

How this holding will be applied remains to be seen. If an expert states that he bases his opinion upon his clinical experience, which includes the examination of 1000 sex offenders, will this alone be sufficient for admissibility?<sup>6</sup> Research data regarding the use of unaided clinical judgment are quite poor in examining the predictive accuracy of unguided clinical judgment regarding sex offender recidivism risk. Hanson and Bussiere<sup>7</sup> found an average correlation of .10. Campbell<sup>8</sup> has provided a recent review of the assessment instruments noted above and has considered if they meet the necessary requirements for sensitivity, specificity, false positives, false negatives, interrater reliability, and peer review, thus meeting the various ethics guidelines for psychologists. He noted that the American Psychological Association's Ethics Standard, § 7.04(b), states: "Whenever necessary to avoid misleading, psychologists acknowledge the limits of their data or conclusions."<sup>9</sup> "This standard [according to Campbell] obligates psychologists to acknowledge that, given the current level of knowledge regarding risk assessments, the instruments typically used in sexual predator evaluations cannot claim general acceptance by the relevant scientific or professional community. General acceptance of these instruments necessitates that they comply with appropriate ethical and practice standards. Quite clearly, however, those instruments failed to comply with the relevant standards by margin of 9 to 1."<sup>10</sup>

In 1996, Grisso and Tompkins<sup>11</sup> expressed guarded optimism regarding the progress being made in predicting future dangerousness:

When properly translated, the results of the new generation of violence risk studies might soon provide mental health professionals with a more reliable scientific foundation for describing

a person's violence risk, thereby assisting society and deciding when these risks are sufficient to take action to protect the person and others. We have not yet achieved this capacity.

Campbell agreed that this verdict remained as appropriate in 2000 as it was in 1996. He concluded that: "For assessing the recidivism risk of previously convicted sex offenders UCJ (unguided clinical judgment) and GCRA (guided clinical risk assessments using various empirical validated risk factors) do not possess sufficient evidentiary reliability to support expert testimony. Ongoing research related to developing actuarial instruments for risk assessment appears promising. Nonetheless, there still remains considerable work to be done before psychologists can use these instruments to support their testimony in a legal proceeding."<sup>12</sup> Campbell argued that the rate of error associated with their use remains unknown and therefore they will fail to satisfy the Daubert criteria. In addition, since they do not meet the relevant ethical and practice standards for psychologists, they cannot claim general acceptance under Frye.

The assessment of those "unable to control their behavior" adds an additional dimension to the questions that experts may be asked. The Kansas Supreme Court has noted that this ability must be assessed to sustain the constitutionality of the statute.<sup>13</sup> The American Psychiatric Association's position statement on the insanity defense notes the difficulty of distinguishing an inability to control from a failure to control, analogizing it to distinguishing twilight from dusk.

Psychiatrists have been criticized for making similar predictions regarding long-term future dangerousness in capital sentencing hearings. The death penalty raises a number of profound ethical dilemmas for psychiatrists in particular and physicians in general. Psychiatrists were first challenged when Dr. James Grigson began testifying that defendants he never personally examined would kill again. The fact that he testified to this with 100% or greater certainty eventually raised questions for the Supreme Court and the American Psychiatric Association. Prior to the *Daubert* decision, the Supreme Court was asked to consider whether such testimony should be admissible.<sup>14</sup> The Court was reluctant to exclude only psychiatric testimony when many others were permitted to testify as to future dangerousness and such inquiry had been previously upheld. While the current data showed that psychiatrists were more often wrong than right in their predictions, the Court felt that the adversary system should be adequate to

provide the appropriate checks and balances. After Dr. Grigson testified in hundreds of capital sentencing hearings, the Texas Psychiatric Society and the American Psychiatric Association expelled him from their organizations on ethics grounds for "arriving at a psychiatric diagnosis without examining the individuals in question and for indicating, while testifying as an expert witness, that he could predict with 100% certainty that the individuals would engage in future violent acts."<sup>15</sup>

More recently, another psychiatrist, Dr. Clay Griffith, has picked up Dr. Grigson's baton. Dr. Griffith bases his predictions on the fact that he has examined over 8,000 individuals facing criminal charges. He has testified in 146 capital murder cases. In published cases reaching the appellate level, he testified "yes" on 22 occasions and "no" on 0 occasions that the defendant would be dangerous in the future. In the case of *Flores v. Johnson*,<sup>16</sup> Dr. Griffith never examined Flores before testifying unequivocally that Flores would be a "future danger," nor did he make his evaluation based on psychological records or psychological testimony. Rather, he sat at trial and based his opinion on the facts of the offense and Flores' conduct during the trial (Flores did not testify). In this case, not only did Griffith testify that he could accurately predict a defendant's future dangerousness from a hypothetical, but he also told the jury that actually examining the defendant is "a hindrance to a hypothetical question."

Although not immediately germane to the particular case, Judge Emilio Garza, in a concurring opinion, took great pains to express his concerns regarding the admissibility of such testimony on *Daubert/Kumho* grounds, suggesting that these decisions provide a possible basis to exclude such testimony.<sup>16</sup> He stated:

Such testimony, lacking objective scientific testing or personal examination, defies scientific rigor and cannot be described as expert testimony. It is simply subjective testimony without any scientific validity by one who holds a medical degree. Given the paucity, indeed the complete lack of mitigating evidence presented in this case, Dr. Griffith's testimony virtually compelled the jury's answer to the second special issue. In short, the truly troubling facet of this case is the sole evidence upon which the jury found Flores to be a future danger: the testimony of a doctor who had never met the defendant.<sup>17</sup>

The Supreme Court has made it clear that the constitutionality of the state's capital sentencing scheme is dependent on the individualized basis by which defendants are considered. It is difficult to see how individuality is being addressed when expert tes-

timony is admitted under circumstances where there is no personal examination, no review of medical records, no psychological testing, and no scientific data showing that professionals are capable of making the particular prediction of future dangerousness.

This raises profound questions for the professional who agrees to be an expert witness under such circumstances, not only in death penalty cases but also in sex offender cases involving long-term, potentially lifetime, civil commitment. I believe this type of testimony is qualitatively different from the usual civil commitment and standard of care testimony, but it may be a slippery slope. Courts that admit sexual predator and death penalty testimony need to develop appropriate guidelines for admission or rejection of such testimony. Professional organizations need to develop or enforce current applicable ethics guidelines. Attorneys should be prepared to raise *Daubert/Kumho* and *Frye* objections. Professionals must be aware of the limitations of the data and be scrupulous in their testimony about their significant limitations. This is a rapidly evolving field and important research data constantly appear. The fact that a few articles appear in the literature does not mean that the data have reached a scientific threshold that makes them valid in the courtroom setting.

## References

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2. *Ibid.* at 357
3. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923)
4. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)
5. *Kumho Tire Inc. v. Carmichael*, 526 U.S. 137 (1999)
6. *Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000) (The Arizona Supreme Court recently found this type of testimony admissible in a repressed memory case and outside of both the *Frye* and *Daubert* tests.)
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9. American Psychological Association: Ethical principles of psychologists and code of conduct. *Am Psychol* 47:1597-1611, 1992
10. *Supra* Ref. 8, p 128
11. Grisso T, Tompkins AJ: Communicating violence risk assessments. *Am Psychol* 51:928-30, 1996
12. *Supra* Ref. 8, p 128
13. *In re Crane*, 7 P.3d 285 (Kan. 2000)
14. *Barefoot v. Estelle*, 463 U.S. 880 (1983)
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16. *Flores v. Johnson*, 210 F.3d 456 (5th Cir. 2000)
17. *Ibid.* at 458