Another point of discussion concerns the admissibility of the actuarial instrument itself. The Court held that actuarial instruments, such as the Static-99, constitute "data . . . of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject." According to R. Karl Hanson, PhD, Solicitor General of Canada, and designer of the Static-99: The Static-99 is intended to be a measure of long-term risk potential. Given its lack of dynamic factors, it cannot be used to select treatment targets, measure change, evaluate whether offenders have benefited from treatment, or predict when (or under what circumstances) sex offenders are likely to recidivate. The Static-99 is administered in an interview setting by probation/parole officers, correctional case managers, as well as mental health professionals (http://www.assessments.com/catalog/STATIC_99.htm).

Judge Price's opinion states: "Mr. Elliott's score of 7 on the test puts him in the 'high risk' category of reoffense, and therefore, tends to make more probable the likelihood that Elliott is a risk to reoffend once released from prison." Dr. Hanson clearly states that the Static-99 is not intended to predict "when (or under what circumstances) sex offenders are likely to recidivate." This appears to include the qualifier referred to by Judge Price when he writes the phrase "once released from prison."

It is apparent that the factor of control of SVPs is the most pertinent prong of the trident of "control, treatment, and care," set out in the Missouri SVP statute. It seems as though this position is supported by the variability between nonapplication of a *Daubert* test of reliability in *Elliott v. Missouri* and its application in *In re Coffel*, a case in which a female offender was involved. In *Coffel*, the court of appeals exercised a gate-keeping function and disallowed expert testimony that had a weak foundation. In *Elliott*, the Missouri Supreme Court "cured" any reliability issues by saying they went to the weight of the expert evidence, not its admissibility.

The opinion in *Elliott* raises many questions regarding civil commitments in sexually violent predator cases. Until efficacious treatment can be consistently and safely provided on an outpatient basis, indefinite civil commitment of SVPs is likely to be the mainstay of treatment and care of such offenders.

Ethics-related concerns, specifically with regard to the civil liberties of offenders, are legitimate. These concerns must be balanced, however, with those for the safety of the public at large. It is for this reason that a consistent application of the admissibility of expert testimony must be adhered to in these cases. More research is warranted to study the reliability and reproducibility of sex offender reoffense risk assessment tools so that evidence-based opinions of recidivism can be more accurately formed.

Not Guilty by Reason of Insanity Defense

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Insanity Defense Precludes Defendant's Eligibility for Reduced Sentence Under "Acceptance of Responsibility" Sentencing Provisions

In *United States v. Sam*, 467 F.3d 857 (5th Cir. 2006), the United States Court of Appeals for the Fifth Circuit ruled that ". . . generally, an insanity defense precludes an acceptance-of-responsibility reduction" in sentence according to the United States Sentencing Commission's Guidelines Manual (Nov. 2006; USSG). The USSG are an arcane set of rules for determining a sentence range for a particular defendant convicted of a particular crime. The USSG specify conditions permitting upward and downward departures from the guidelines—that is, sentences above and below the guideline range—in certain situations. However, as shown in the *Sam* case, caution is suggested when considering how the USSG affect defendants who unsuccessfully mount a defense of not guilty by reason of insanity (NGRI).

Facts of the Case

Brian Leron Sam, a man in his 30s with a well-established history of schizophrenia, entered a bank in Duncanville, Texas, on the morning of January 30, 2002, and handed the teller a note: "I HAVE A GUN! SILENTLY AND QUICKLY GIVE ME ALL YOUR MONEY." Before the teller had a chance to comply, Mr. Sam snatched some money that happened to be on the counter and fled, leaving his note behind. Unfortunately for Mr. Sam, he had composed the abortive note on the back of his disability paperwork containing detailed identifying information. He was quickly captured and confessed to the robbery (a 20-year felony).

In July of 2002, he was found incompetent to stand trial. Competency was restored with medication by September 2003, and Mr. Sam offered an insanity defense, conceding each factual element of the crime. He claimed that although his actions were wrong, his mental condition prevented him from understanding the seriousness of their consequences. Unswayed, the jury convicted Mr. Sam on October 21, 2004.

He was sentenced in February 2005, and the presentence investigation report recommended a sentence of 92 to 115 months in a federal penitentiary, based on the USSG. The guidelines allow for upward and downward departures, depending on specifics of the offender and the offense. For example, a defendant categorized as a "career offender" may incur an upward departure, whereas both diminished mental capacity and acceptance of responsibility may earn downward departures. Mr. Sam argued that downward departures from the USSG were warranted for both diminished mental capacity and acceptance of responsibility. In essence, Mr. Sam argued that pleading NGRI, an affirmative defense requiring that he concede the factual elements of the crime, was tantamount to accepting responsibility.

The district court refused Mr. Sam a downward departure on both grounds. First, the court ruled that bank robbery is, as a matter of law, a violent crime, and therefore a downward departure for diminished mental capacity is precluded under the USSG. Second, the court found that Mr. Sam's insanity defense challenged a basic factual element of his crime—*mens rea*, a culpable mental state—and therefore was inconsistent with a sentence reduction based on acceptance of responsibility. Mr. Sam appealed.

Ruling and Reasoning

The U.S. Sentencing Commission was created by an act of Congress in 1984 with a mandate to create sentencing guidelines that "provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity. . .while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors" (http://www.ussc.gov/general.htm). The United States Sentencing Guidelines

> . . . provide federal judges with fair and consistent sentencing ranges to consult at sentencing. The guidelines take into account both the seriousness of the criminal conduct and the defendant's criminal record. Based on the severity of the offense, the guidelines assign most federal crimes to one of 43 "offense levels." Each offender is also assigned to one of six "criminal history categories."

The USSG were initially mandatory, but the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that mandatory application violates the Sixth Amendment right to trial by jury in allowing judges to be the sole fact-finders during the sentencing phase of a trial. The Court converted the mandatory system into an advisory one. However, Congress made no change to the mandatory language of the sentencing statute, "the court *shall* impose a sentence of the kind, and within the range, referred to [in the guidelines]" (18 U.S.C.A. § 3553(b) (2005), emphasis added). An editorial note following this section tersely informs readers, "Unconstitutionality of Subsection (b): (1) Mandatory aspect of subsection (b) (1) of this section held unconstitutional by *United States v. Booker*, 125 S. Ct. 738 (2005)." Now legally advisory in nature, Congress enacted legislation requiring that judges explicitly state their reason for any sentence that deviates from the guidelines.

The Fifth Circuit affirmed Mr. Sam's conviction and upheld the district court's finding that an insanity defense is inconsistent with an acceptance-of-responsibility sentence reduction. It reasoned as follows: although an affirmative defense, such as not guilty by reason of insanity or self defense, requires the defendant to admit to the facts of the alleged crime, it nonetheless disputes the prosecution's claim that a crime has been committed. The government still must prove its case beyond a reasonable doubt. This is clearly different from a situation in which someone comes forward and admits to committing a crime unbeknownst to the government, aids the sub-

sequent investigation, and attempts to make restitution, an actual example in the USSG of a situation in which the acceptance-of-responsibility departure is warranted. The sentencing guidelines are explicit: "[An acceptance-of-responsibility reduction] is not intended to apply to a defendant who puts the government to its burden of proof at trial. . . ."

Mr. Sam also appealed the district court's denial of a downward departure for diminished mental capacity. According to the USSG, if an offense was committed while a defendant was suffering from diminished mental capacity, a downward departure may be warranted to the extent that the reduced capacity contributed to the offense. However, this departure is forbidden under some circumstances, including an offense that "involved actual violence or a serious threat of violence." The Fifth Circuit found that the district court erred in considering bank robbery a *de facto* violent crime. Instead, the court should have considered the particular circumstances of the robbery and made its own determination as to whether the crime was violent. By this ruling, Mr. Sam obtained minor (and temporary) relief from the Fifth Circuit: his conviction was affirmed but his sentence was vacated and the matter was remanded for resentencing. On February 15, 2005, Mr. Sam was resentenced to 92 months imprisonment, the bottom end of the guideline range of 92 to 115 months.

Discussion

Although their status changed from mandatory to advisory after the Supreme Court's *Booker* ruling, it appears that Congress, and therefore the Sentencing Commission, intends for judges to stay within the guidelines in most cases. Given the strictures of the federal Insanity Defense Reform Act of 1984 (enacted in response to John Hinckley, Jr.'s successful use of the insanity defense after he attempted to kill President Reagan), a federal insanity defense requires that the defendant prove that he did not know the wrongfulness of his conduct, a high burden for the defense. Diminished capacity, which has a standard two-prong test, is the only sentencing allowance made for situations in which mental illness contributed to an offense. But as we see in *Sam*, this allowance applies only to nonviolent offenses.

Adolescents and the Insanity Defense

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Roper Decision Not a Sufficient Basis for Challenging Constitutionality of the M'Naughten Rule

In *State v. McLaughlin*, 725 N.W.2d 703 (Minn. 2007), the Supreme Court of Minnesota reviewed the district court's conviction of a 15-year-old defendant for the murders of two fellow high school students. The appellant, who had asserted an insanity defense, argued that the M'Naughten rule is unconstitutional as applied to adolescents and cited *Roper v. Simmons*, 543 U.S. 551 (2005), in support of this claim.

Facts of the Case

John Jason McLaughlin was a 15-year-old high school freshman when he shot and killed two fellow students, Seth Bartell and Aaron Rollins, on September 24, 2003. According to facts established at trial, Mr. McLaughlin took his father's semiautomatic .22-caliber pistol to school that day with the intent to "shoot some people." He waited for Mr. Bartell in physical education class, followed him down the hallway, and shot at him. When this shot only grazed the intended victim, Mr. McLaughlin fired again and hit a bystander, Aaron Rollins. Mr. McLaughlin then followed Mr. Bartell into the gymnasium, where he fired a third shot from point-blank range that hit his victim in the forehead. He surrendered to school officials, who immediately called the police. Mr. Rollins was pronounced dead on arrival at the local hospital, and Mr. Bartell remained unconscious until his death 16 days later.

During the initial interrogation by police, Mr. McLaughlin admitted shooting one victim, though he claimed not to know that he had shot Mr. Rollins. When asked whether he had done anything wrong that day, Mr. McLaughlin responded, "Yeah." He reported that he had planned the attack for several days in advance, and he had checked the school for