Diagnostic and Statistical Manual of Mental Diseases (DSM) for it to be problematic or to warrant treatment. Although Gerald Kivland did not have a DSM diagnosis of note, he was in marked mental and physical anguish associated with hopelessness, resulting from (or worsened by) his surgery, which ultimately caused him to commit suicide. To suggest that there is no connection between Mr. Kivland's suicide and the life-changing consequences of his surgery just because there was no diagnosable mental illness responsible for his suicide is unfortunate. It is heartening, however, that the Missouri Supreme Court opened the door for expert witness testimony in cases (hopefully rare), for which there is no clear DSM diagnosis, despite obvious severe psychological distress.

In this case, we encounter the vexing question of what factors ultimately cause an individual to commit suicide. Suicide has traditionally been considered (nearly always) a consequence of mental illness. However, the scientific literature has identified other suicide risk factors, including demographic data and medical conditions. For example, in the *Practice Guideline for the Assessment and Treatment of Patients with Suicidal Behaviors* (American Psychiatric Publishing, 2003), physical illness is a risk factor for future suicidal behavior. Likewise, recent literature shows that physical illness is a significant risk factor for suicide, independent of psychiatric diagnosis. An important point is that, even with identified risk factors, can we say with confidence what ultimately causes an individual to commit suicide?

The court also highlighted the importance of the jury in inconclusive situations "when the legal rules have been exhausted and have yielded no answer" (Scalia A: The rule of law. . . . *U Chi L Rev* 56:1175–81, 1989). In such cases, the jury should use their life experiences to arrive at an answer. In a case involving suicide, it is difficult to determine what life experiences the jury would use to make a final decision.

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Sexually Violent Predators Have a Right to Competent Counsel

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Inaction of Court-Appointed Counsel Is a Due Process Violation

In *In re Ontiberos*, 287 P.3d 855 (Kan. 2012), the Supreme Court of Kansas reviewed the case of Robert Ontiberos, who appealed his commitment under the Kansas Sexually Violent Predator Act (KSVPA). The court considered whether individuals facing sexually violent predator (SVP) commitment proceedings have a right to effective and competent representation by counsel, whether the KSVPA provides an adequate mechanism to contest the competence of counsel, and whether prosecutorial misconduct and the incompetence of Mr. Ontiberos' counsel resulted in an unfair trial.

Facts of the Case

In 1983, Mr. Ontiberos was convicted of the attempted rape of a casual acquaintance, and in 2001, he was convicted of the aggravated sexual battery of his mother-in-law. He received sex offender treatment in prison after both of these offenses. In 2007, just before his scheduled release on parole, the state filed a petition for civil commitment for treatment under the Kansas Sexually Violent Predator Act (KSVPA) (Kan. Stat. Ann. § 59-29a01 (2007)).

At the civil commitment trial, a jury heard evidence from two experts: Dr. Deborah McCoy for the state and Dr. Robert Barnett for the defense. Dr. McCoy was a clinical psychologist who evaluated Mr. Ontiberos by reviewing his prison records and prior psychological evaluations, conducting a personal interview, and administering two actuarial risk assessments: the Static-99 and the MnSOST. Dr. McCoy diagnosed Mr. Ontiberos with "paraphilia not otherwise specified, with themes of exhibitionism and non-consent" (*Ontiberos*, p 859), as well as a personality disorder not otherwise specified and polysubstance dependence. Dr. McCoy testified that, based in part on his Static-99 result, Mr. Ontiberos had a high risk of recidivism and could be deemed an SVP. In contrast, Dr. Barnett, also a clinical psychologist, stated that Mr. Ontiberos was at high risk only when intoxicated. He based this con-

clusion on an interview of Mr. Ontiberos, a review of his clinical history, and a mental status examination. Dr. Barnett diagnosed polysubstance abuse and dependence and a mild cognitive disorder. He stated that he did not consider the Static-99 or the MnSOST to be valid risk assessment tools, saying instead that penile plethysmography was the most accurate predictor of risk (although, to his knowledge, the test had not been performed on Mr. Ontiberos).

In reaching their conclusions, both experts had reviewed approximately 3,500 pages of documents about Mr. Ontiberos, identified during the trial as Exhibit 1. Both attorneys stipulated that Exhibit 1 could be used to cross-examine the experts but would not be given to the jury or entered into evidence. However, the prosecutor asked Dr. Barnett about an alleged knife incident in 2003 for which Mr. Ontiberos was disciplined in prison, despite there being no documentation of the incident in Exhibit 1. Mr. Ontiberos was also cross-examined using information in the exhibit, including police reports of additional sex offenses for which he was never charged. His attorney did not object to these questions.

At the conclusion of the trial, the jury found that Mr. Ontiberos was an SVP, and he was committed to state custody for treatment until determined to be safe for release. He then appealed his commitment to the Kansas Court of Appeals, arguing prosecutorial misconduct and ineffective assistance of counsel. The court of appeals held (among other things) that his counsel had been ineffective and that he therefore did not receive a fair trial. The court further held that the state's attorney had committed misconduct, as the knife incident had been seriously mischaracterized and had prejudiced the outcome of the trial. The case was remanded to the trial court for rehearing.

Both parties then appealed to the Supreme Court of Kansas. In his appeal, Mr. Ontiberos made three claims: first, that the KSVPA was unconstitutional, because it did not provide a specific mechanism for challenging the effectiveness of trial counsel; second, that he received ineffective counsel; and third, that the state's attorney committed egregious misconduct.

Ruling and Reasoning

The court held that Mr. Ontiberos had a constitutional and statutory right to effective counsel, that his counsel was ineffective, and that the prosecutor had committed misconduct. The court affirmed the judgment of the court of appeals and remanded the matter to the district court for a new trial.

Regarding Mr. Ontiberos' first claim, the supreme court noted that, although SVP trials are civil rather than criminal, Mr. Ontiberos had a statutory right to counsel made explicit by the KSVPA. The court held that the right to counsel is necessarily a right to effective counsel, as otherwise the provision of an attorney would be a meaningless formality. Although the KSVPA itself does not articulate a specific procedure to contest the competence of counsel, the court identified several methods by which one could do so and concluded that these mechanisms are constitutionally adequate. The court further reasoned that SVP hearings are similar enough to criminal proceedings that the same standard for ineffective assistance of counsel can be applied: counsel's performance must be deficient and the resulting harm sufficiently serious to deprive the respondent of a fair trial.

The court then addressed Mr. Ontiberos' second claim, that his counsel had been ineffective. He argued that his counsel was incompetent in four ways: failure to object when the state used Exhibit 1 documents; failure to object when the state referenced a nonexistent disciplinary report involving a knife; failure to introduce evidence that a Static-99 assessment in 2006 yielded a low-risk result that directly contradicted Dr. McCoy's Static-99 findings; and failure to provide the defense expert (Dr. Barnett) with data from a penile plethysmograph test performed in 2005. The court agreed with Mr. Ontiberos' arguments, stating that the attorney should have been more familiar with elements of Mr. Ontiberos' history and previous testing, as well as evidentiary rules governing expert testimony.

Finally, Mr. Ontiberos argued that the state's attorney committed misconduct by improperly using portions of Exhibit 1 to cross-examine him. The court agreed, stating that documents not in evidence can be used only for the limited purpose agreed on by the attorneys—in this case, to examine the expert witnesses. In addition, the court held that the prosecutor committed misconduct by mischaracterizing evidence of the 2003 knife incident, which was later determined to have occurred in 1991 and involved only a pen covered in duct tape. The court reasoned that, as a result, the jury was deprived of the chance to decide the facts and properly assess credibility.

Discussion

Although this case establishes a right to competent counsel in SVP commitment hearings, a more interesting aspect to forensic mental health professionals is the court's handling of discrepant risk assessment results and the expectation that counsel will competently interpret this divergence. In this case, for example, the court held that counsel was incompetent for failing to introduce discrepant Static-99 results: a 2006 assessment yielding a 9 percent chance of reconviction in 16 years, and a 2007 assessment yielding a 52 percent chance in 15 years. This difference is obviously sufficiently large to undermine the reliability of the Static-99 and justify the court's finding of incompetence. However, there are several factors that affect the reliability of test results, and it is important to consider their role when evaluating whether the attorney should have brought the problem to the court's attention.

Any two measures yield less consistent results as the method and measurement differences between them grow. The same examiner administering the same measure to the same examinee on the same day will, practice effects aside, get two different results because of the eccentricities of administration, the mental state of the examinee, and random factors. This difference between scores will be larger with greater time between administrations, different examiners, different measures (e.g., two different actuarial measures), and different methods (e.g., actuarial versus physiological). If it is reasonable to get different results between two identical administrations on the same day because of the standard error of measurement, then it is also reasonable to get larger divergences over longer periods and with different raters and methods.

Although, by any standard, a 43 percent difference in Static-99 risk results that were obtained one year apart is probably too large to be ignored by competent counsel, one might ask whether counsel would still be incompetent for not arguing that a smaller difference—say, 30 or 20 percent—undermines the reliability of the measure. In other words, is there a threshold difference between risk results that can be used to evaluate the competence of counsel's use of those results? When is the difference between test results sufficient that the attorney is obligated to highlight it, perhaps at the expense of other trial strategies?

Realistically, most attorneys know very little about psychological testing or actuarial instruments, and they rely on experts to guide them in this area. As this case illustrates, detailed knowledge of risk assessment tools—their indications, proper administration, and limitations—is an essential part of forensic psychological and psychiatric practice. Courts routinely ask experts to explain discrepant results, and counsel can be held accountable for not bringing these results to the attention of the fact finder. Lack of preparation or familiarity with the tools, by either the attorney or the expert, is unacceptable.

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Tort Reform Legislation: Connecticut Supreme Court Clarifies Standard for Negligence Action Against a Health Care Provider

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In a Case of First Impression, the Connecticut Supreme Court Held That, When a Medical Malpractice Action Has Been Dismissed for Failure to Meet a Statutory Suit Requirement, a Plaintiff May Bring an Otherwise Time-barred New Action Only if the Failure Was Caused by a Simple Mistake or Omission, Rather Than Egregious Conduct or Gross Negligence

In *Plante v. Charlotte Hungerford Hospital* 12 A.3d 885 (Conn. 2011), the Connecticut Supreme Court affirmed the dismissal of a medical malpractice complaint because of failure to attach a letter of opinion by a similar health care provider.

Facts of the Case

The estate of Joanne Plante sued a psychiatrist and clinical social worker employed by Charlotte Hungerford Hospital and two emergency room physicians practicing at the hospital on the grounds that Ms. Plan-