

not to have the “. . .required skill. . .” to qualify as an “expert concerning sexual offenders” (Va. Code Ann. § 37.2-904 (2007)). With this finding, the court excluded all of the defense expert’s testimony as well as the findings of the objective psychological tests that she had administered to the defendant.

Having stricken Mr. Miller’s expert defense and with only the state’s evidence admitted, the Virginia Supreme Court concluded: “We hold that the above evidence, as a matter of law, provided clear and convincing proof that Miller is a sexually violent predator as defined by the Act” (*Miller*, p 216).

Civil Commitment of Sexually Dangerous Persons: Statutory Interpretation of State’s SDP Law

Eric R. Neal, MD

Forensic Psychiatry Fellow

Michigan Center for Forensic Psychiatry

Melvin Guyer, PhD, JD

Professor of Psychology

Department of Psychiatry

University of Michigan

Ann Arbor, MI

Strict Judicial Interpretation of State’s Sexually Dangerous Person (SDP) Statute Bars SDP Proceedings Initiated After a Defendant’s Completion of Criminal Sentence

In the companion cases *Commonwealth v. Gillis*, and *Commonwealth v. Andrews*, 861 N.E.2d 422 (Mass. 2007), the defendant sex offenders served their criminal terms at a state hospital and were then civilly committed to the hospital after their sentences expired. While they were being civilly committed to the state hospital, the Commonwealth petitioned to have them committed as sexually dangerous persons (SDPs). The trial courts denied the petition and the Commonwealth appealed. The Massachusetts Supreme Judicial Court on its own initiative transferred the cases from the appeals court and affirmed the dismissal of the Commonwealth’s petition by the trial courts.

Facts of the Case

Richard Gillis, Jr., was convicted of sexual and nonsexual offenses and was sentenced to a term in prison. During that incarceration he was transferred to Bridgewater State Hospital (BSH). He remained there until his prison sentence ended in December 2001. He continued to be held at BSH under an involuntary civil commitment. Nearly three years after his prison sentence ended, but while he continued in his civil commitment at BSH, the Commonwealth petitioned to commit him as a sexually dangerous person instead of an involuntary civil commitment.

Mark Andrews was convicted of sexual and nonsexual offenses and sentenced to prison. During that incarceration he was transferred to Bridgewater State Hospital. Like Mr. Gillis, he served out his prison sentence in the state hospital and was held there under involuntary civil commitment after his prison sentence ended. A few weeks after his criminal sentence ended, the Commonwealth petitioned to commit him as a sexually dangerous person instead of an involuntary civil commitment.

The Essex and Worcester Superior Courts of Massachusetts dismissed both petitions to commit the defendants as SDPs. The respective superior courts based their decisions on the findings that the defendants were no longer prisoners serving a penal confinement at the time the SDP petitions were filed, and thus, pursuant to state law, were not subject to commitment as SDPs. The Commonwealth appealed. The Supreme Judicial Court of Massachusetts, on its own initiative, transferred the cases from the appeals court. The court found the cases of these two individuals factually identical in all respects material to their decision and affirmed the trial courts’ dismissal of the Commonwealth’s SDP petitions.

Ruling and Reasoning

The Supreme Judicial Court of Massachusetts reviewed the statute governing commitment of an SDP. That statute, Mass. Gen. Laws ch. 123A, § 12(b) (2004), authorizes the indefinite commitment to a treatment facility of persons who have been convicted of sexual offenses or charged with sexual offenses and determined to be incompetent to stand trial and who have a mental abnormality or personality disorder that makes the person likely to engage in sexual offenses if not confined to a secure facility. The procedure for seeking commitment of an SDP

begins with a report by an agency with jurisdiction. This report is usually triggered by the inmate's impending release from prison. The agency notifies the appropriate prosecutorial officials of the potential SDP candidate. The next step is filing a petition alleging that the prisoner is an SDP. The petition is then filed in the superior court in the jurisdiction where the prisoner is committed or where the sexual offense occurred.

The supreme court held that the issue in these cases came down to whether the SDP statute applies to individuals who, though having committed sexual offenses, have completed their prison terms with no pending criminal charges but are civilly committed to a state hospital at the time the State files its SDP petition.

In conducting its statutory interpretation, the supreme court applied the rule that "laws in derogation of the liberty and general rights of the citizen. . . are to be strictly construed . . ." citing *Commonwealth v. Beck*, 72 N.E. 357 (Mass. 1904). This rule is usually applied to criminal cases, not civil ones; however, it was applied in this case in recognition of the court's view that SDP commitments, though civil, nonetheless carry the risk of "the potential deprivation of liberty to those persons subjected to these proceedings," citing *Commonwealth v. Bruno*, 735 N.E.2d 1222 (Mass. 2000). The decision in *Bruno* held that the risk to the subject's liberty interest and due process considerations warrant a more stringent analysis in these civil cases than is usually applied in civil law statutory construction.

With strict interpretation as its guide, the court noted that the provision that authorizes prosecutors to petition for an SDP commitment repeatedly employs the term "prisoner." The court then held that mentally ill persons who have completed their prison terms and are civilly committed to Bridgewater State Hospital are not "prisoners" under stringent analysis. Hence, they fall outside the reach of the SDP statute. The key operative holding is that the SDP commitment is only available if the procedure is initiated before the end of the period of criminal confinement, while the person is still deemed a prisoner.

The Commonwealth contended that patients at Bridgewater State Hospital are prisoners because they are confined by a state facility owned by the Massachusetts Correctional Institution. The Supreme Judicial Court rejected that argument. That would make any patient at Bridgewater a prisoner,

but not patients at other hospitals, which are not affiliated with the Department of Corrections. The supreme court ruled that the legislature could not have intended SDP commitment to be influenced by random hospital placement.

The arguments offered by the Commonwealth in its appeal illustrate an inclination to read the SDP statute as broadly as possible, to expand its reach to more persons and wider circumstances. For example, the Commonwealth also argued that the defendants nonetheless fall under the SDP statute because the statute mentions the word "confined," and that should be taken to mean that they come under the statute's reach. The court rejected that argument and found that the use of the word "confined" in the SDP statute applies to people who are incompetent to stand trial. Such persons are not "incarcerated" or "committed." Because these people are charged with a crime and are awaiting trial they are "confined" and fall under the statute's reach.

In its argument, The Commonwealth cited *Commonwealth v. McLeod*, 771 N.E.2d 142 (Mass. 2002), and the subsequent legislative amendment to the SDP statute. The Supreme Judicial Court had affirmed the dismissal of an SDP petition for Mr. McLeod because the strict statute interpretation did not allow commitment based on a past sexual offense. Mr. McLeod was in a second term of incarceration for a nonsexual crime. He had committed a prior sexual offense and been released after he had served his sentence. The legislature amended the SDP statute after this ruling to apply to "a person who has ever been convicted . . . regardless of the reason for current incarceration, confinement or commitment." The court stated that this amendment did not apply to these cases because the defendants were not "prisoners" at the time of the petition.

The Commonwealth also cited *Commonwealth v. Shedlock*, 790 N.E.2d 722 (Mass. App. Ct. 2003), with its emphasis on time of release. Mr. Shedlock was a defendant who was serving two prison sentences: one for a sexual crime and one for a nonsexual crime. He was finishing his sexual crime sentence when the Commonwealth petitioned for an SDP designation. The petition was denied because Mr. Shedlock was not near "being reintegrated into the community." His nonsexual offense carried a longer sentence than his sexual offense. The Commonwealth argued in these cases that time of reintegration after a continuous incarceration applied to the

defendants. The Supreme Judicial Court disagreed based on the fact that Mr. Shedlock had a consecutive prison sentence and the petition only had to be filed later before his prison sentence ended. The court also argued that nothing prevented the Commonwealth from petitioning either defendant before the completion of their criminal sentences.

Discussion

There are several interesting implications to this case. It helps to place in context the function and application of a statute, such as the Sexually Dangerous Person Act where the court must weigh protecting society's interests against preserving individual liberty when interpreting statutes. There is an obvious back and forth between the Supreme Judicial Court of Massachusetts and its legislature. The *McLeod* case referenced in the instant case illustrates the tension in the judicial and legislative relationship. The Supreme Judicial Court has taken the view that strict analysis must be applied to the reach and application of the SDP statute, and thus it will not liberally read its terms nor add meaning to the statute. This view was affirmed in *McLeod* and was reaffirmed in this case. However, the legislative response to the *McLeod* holding was to amend the statute so that it could be applied in a more far-reaching manner. The amendment has allowed a person's history of sexual offense to be relevant in any future SDP proceedings, regardless of whether an incarceration during the SDP proceeding is based on a sexual offense and has at stake the possibility of an indefinite commitment for the individual. The legislature, concerned with public safety and law and order, seeks to expand the reach of SDP statutes, while the supreme court, perhaps more cognizant of individual liberties, has shown an inclination to balance public safety concerns with individual constitutional rights.

Just as significant as the role of the courts and the legislatures is the use of the mental health profession to "police" personality-disordered sex offenders, to commit them to a mental health hospital under an indefinite commitment when there is no realistic hope for treatment or improvement. From this implied role arises fundamental questions concerning the proper application and scope of clinical expertise in the service of the State. These cases illustrate the general perspective of the prosecutorial department, courts, and legislature toward mental illness and the place it occupies in the legal domain. In the two

individuals in these cases, the defendants could have been petitioned as SDPs if they had been identified during the period of their incarceration. Instead, when it was too late, the Commonwealth relied on a flawed argument that would have construed all the mentally ill patients in the state hospital to be prisoners. It is troubling that the practice of indefinite commitment, under the umbrella of protecting society, falls to the mental health profession because no legal recourse is available. The role of incarcerator seems a far cry from the concept of what our purpose as a forensic mental health profession ought to be. Others apparently see it as a way to confine dangerous but not mentally ill people when no other legal possibilities exist.

Expert Witness Testimony: Sexually Violent Predator Commitment

Vasilis K. Pozios, MD
Resident in Psychiatry

Melvin J. Guyer, PhD, JD
Professor of Psychology

Department of Psychiatry
University of Michigan
Ann Arbor, MI

Court Holds That Expert Testimony, Including Evidence of Actuarial Instruments, May Be Properly Admissible in Sexually Violent Predator Case

In the case *Elliott v. State*, 215 S.W.3d 88 (Mo. 2007), the Supreme Court of Missouri affirmed the judgment of the Seventh Judicial Circuit Court of Clay County. That court had found Stephen Elliott to be a sexually violent predator (SVP) and had ordered him to be placed in the custody of the Missouri Department of Mental Health under civil commitment for control, care, and treatment. Mr. Elliott appealed the trial court's admission of expert testimony concerning his dangerousness and the admission of evidence based on an actuarial instrument in circumstances in which the state's expert had not conducted a clinical interview with Mr. Elliott. He also challenged the constitutionality of the state's SVP statute. The Missouri Supreme Court affirmed the trial court's admission of the state's expert witness