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 statue, 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

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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

testimony on "dangerousness," including that portion that relied on an actuarial instrument.

Facts of the Case

Near the end of Mr. Elliott's 15-year prison sentence for rape, the state, spurred by concern that he would commit another sexually violent act once released from prison, filed a petition to commit him to the custody of the Missouri Department of Mental Health, just nine days before his scheduled release. The petition was filed pursuant to the state's Sexually Violent Predator statute, Mo. Ann. Stat. §§ 632.480–632.513 (2005).

This concern was not unfounded. Mr. Elliott had a history of multiple violent sexual assaults. He had admitted to raping at least eight women and young girls between 1975 and 1989, when he was convicted in the rape of Sandra Talbott. His history of sexual crimes included multiple violent and sadistic acts.

A forensic evaluation of Mr. Elliott was ordered before the SVP trial date and was performed by forensic psychologist Dr. Jeanette Dunkin. Although Mr. Elliott refused to be interviewed, Dr. Dunkin testified that he had a "mental abnormality" (sadism) that caused him "serious difficulty controlling his behavior." This opinion was formulated after the review of various records and reports pertaining to Mr. Elliott's offense and psychiatric history.

As well, Dr. Dunkin utilized an actuarial instrument, the Static-99, to assess Mr. Elliott's potential for future dangerousness and his risk of reoffense. She testified that, because of his high score on this test, coupled with information she gleaned from the records and evidence of additional "aggravating factors," Mr. Elliott was indeed more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility. Before and during the SVP hearing, the defense objected to the admissibility of expert testimony concerning his alleged "serious difficulty in controlling his behavior" on the grounds that such testimony lacked a recognized scientific basis. These objections were overruled by the trial judge.

Based on this testimony, the jury unanimously found Mr. Elliott to be a sexually violent predator, and the court ordered him to be placed in the custody of the Missouri Department of Mental Health for control, care, and treatment until deemed "safe to be at large." Mr. Elliott appealed the ruling on the grounds of violation of due process and objection to the admissibility of expert testimony that Mr. Elliott demonstrated a "serious difficulty controlling behavior," as well as the admissibility of the results of the Static-99 actuarial instrument, as applied to him.

Ruling and Reasoning

The Supreme Court of Missouri held that the state's SVP law did not violate due process, citing as its authority the decision *Murrell v. State*, 215 S.W.3d 96 (Mo. 2007). The court also held that expert testimony, including results of actuarial instruments, was admissible under the state's expert evidence admissibility rule (Mo. Ann. Stat. § 490.065 (2000)).

In *Murell*, the argument was made that Missouri's SVP statute was unconstitutional because it "does not require the State to prove that the individual poses an immediate risk of harm," and thus violated Mr. Murell's right to due process. The *Murell* opinion stated: "the language of section 632.480 is written in the present tense and necessarily requires the jury to find an individual presently poses a danger to society if released" (*Murrell*, p 104). Thus, the court ruled that the statute did not violate due process protections, because it required the jury to find that Mr. Murell presently posed a danger to society if released, and the statute required an annual certification of Mr. Murell's commitment. Because the issue of violation of due process in *Elliott* was deemed to be identical to that in *Murell*, the holding in *Murell* controls.

As for the question of admissibility of expert testimony, the court held that the Missouri SVP statute is civil, and thus, the admissibility of expert testimony is governed by its rules of evidence, §§ 490.065.1 and 490.065.3. The statute reads, in relevant part:

> 1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise . . .
>
> 3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

In upholding the admissibility of Dr. Dunkin's testimony, the court determined that she possessed the requisite knowledge, skill, experience, training, and education in the area of forensic psychology to

provide expert testimony in this field. The court also held that expert testimony, including evidence of actuarial instruments such as the Static-99 actuarial instrument, constitutes "data . . . of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject" and thus ruled this actuarial data admissible.

The court again referred to *Murell* in this regard: "[T]estimony incorporating the results of actuarial instruments is admissible in cases involving the civil commitment of an SVP when the instruments are used in conjunction with a full clinical evaluation" (*Murrell*, p 112). Because the evidentiary issue in *Elliott* was deemed identical with that presented in *Murell*, the holding in *Murell* controls.

Mr. Elliott argued against the admission of testimony regarding "serious difficulty controlling behavior," and cited *In re Coffel*, 117 S.W.3d 116 (Mo. Ct. App. 2003), in support of this contention. In *Coffel*, the court of appeals reversed an earlier ruling that found a woman, Ms. Coffel, to be an SVP, resulting in her civil commitment. The court of appeals ruled that there was insufficient evidence to support a finding that she is more likely than not to reoffend if not committed, because no reliable evidence was presented at her trial concerning female sex offender recidivism.

The *Elliott* court held that, when absolutely no evidence is presented as to whether the scientific principles or facts or data relied on by the expert are of the type reasonably relied on in the relevant scientific community, expert testimony is not admissible. In the instant case, the court distinguished the absence of recidivism data concerning female offenders as against the modicum of evidence that relates to male offenders. The holding did not speak to the sufficiency of the foundation of the expert testimony, only to its applicability to the defendant.

Discussion

Civil commitment of sexually violent predators gained support in the 1990s following several high-profile cases involving sexual assaults on children. The first sexually violent predator law in the United States was the Community Protection Act of 1990, passed in the state of Washington in 1990. The Act utilized civil commitment as a way of ensuring that sexually violent predators could not pose a danger to the public once prison terms expired.

The Act circumvented the Constitution's double jeopardy prohibition by construing predator statues as civil rather than criminal adjudications. This determination is supported by the precedent that "an individual's constitutionally protected liberty interest in avoiding physical restraint may be overridden even in the civil context" (*Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26 (1905)).

In 1997, the United States Supreme Court upheld the constitutionality of SVP commitments in *Kansas v. Hendricks*, 521 U.S. 346 (1997). The Court rejected arguments directed against opaque language in the statute such as "mental abnormality," and established that "there must be proof of serious difficulty in controlling behavior." The Sexually Violent Predator Act in Kansas has served as a template for other SVP statutes throughout the United States and is referenced by the Honorable William Price, Jr., in his opinion in the *Elliott* case.

One interesting point worthy of discussion is the matter of the admissibility of Dr. Dunkin's expert opinion regarding Mr. Elliott's purported "serious difficulty controlling behavior." Although Judge Price wrote in his opinion that Dr. Dunkin's testimony was based on a "full clinical evaluation," he was not entirely correct. Mr. Elliott refused to be interviewed by Dr. Dunkin, and although we do not know the circumstances surrounding this refusal, the fact remains that Dr. Dunkin did not interview Mr. Elliott, and thus her evaluation cannot be considered a "full clinical evaluation." Judge Price seems to make an attempt at addressing these apparent inconsistencies by including the following quote in his opinion: "Any weakness in the factual underpinnings of the expert's opinion . . . goes to the weight that testimony should be given and not its admissibility" (*Elliot*, p 95).

Dr. Dunkin's opinion was, instead, incompletely (although apparently necessarily) based on records and other collateral information (including the application of the Static-99) that, together, formed her opinion of Mr. Elliott's "serious difficulty controlling behavior." Judge Price concluded that the information Dr. Dunkin utilized in her evaluation of Mr. Elliott was "the type of information generally relied upon in her profession to form opinions in SVP cases." Typically, information that is "generally relied upon" in a profession falls in line with a *Frye*-style interpretation of expert testimony admissibility, rather than the *Daubert* test, upon which Missouri's testimony rules are based.

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).