Case Law Considerations in the Use of ASPD in SVP/SDP Evaluations

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The use of antisocial personality disorder (ASPD) as a qualifying mental disorder for a sexually violent predator (SVP) or a sexually dangerous person (SDP) commitment continues to arouse controversy. Two common questions arise. Is ASPD considered a qualifying mental disorder in statutory or case law definitions? Can ASPD be the sole qualifying mental disorder? We review case law for guidance as to when ASPD may serve as a sole qualifying diagnosis in SVP/SDP evaluations. Other than the federal government and New York, all other jurisdictions with SVP/SDP commitments permit the use of ASPD as a stand-alone diagnosis when it can be linked to sexually violent behavior. ASPD is a viable qualifying disorder when the pattern of offending is atypical, severe, and can be linked to the risk for further sexual offending. ASPD is less viable as a qualifying diagnosis when it is manifested primarily by criminal behavior, the sex crimes are situational in context (e.g., substance abuse, negative peer affiliation), or the disorder cannot be linked to future sexual offending. Case law can provide guidelines, but the forensic clinician as the diagnostic expert bears the responsibility of providing a cogent and sound rationale as to why ASPD drives the risk for sexual reoffense.

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Laws governing the civil commitment of dangerous sexual offenders, collectively known as sexually violent predator (SVP) or sexually dangerous person (SDP) statutes, exist currently in 21 jurisdictions (20 states and the federal government).[1] Certain incarcerated individuals with sex crime convictions pending release into the community undergo evaluations to determine whether they meet criteria under these statutes. Typically, one or two psychologists or psychiatrists conduct the evaluations. Three components typically characterize the SVP/SDP laws: the presence of a qualifying sex crime; a mental disorder considered to predispose the individual to commit sexual crimes; and a likelihood of risk for committing sexual offenses, stemming from the mental disorder, if released to the community. The most common SVP/SDP statutory definition of a mental condition is one that affects the emotional or volitional capacity of the person in a manner that predisposes the person to committing criminal sexual acts.

SVP/SDP laws have existed for more than 20 years in most jurisdictions and approaching 30 years in one state (Washington). Despite such longevity and having withstood constitutional challenges,[2,3] these laws continue to provoke controversy and debate.[4-7] Prominent criticisms of the SVP/SDP laws center on two concerns: that their true intent is to continue the detention of dangerous but not mentally ill individuals; and, that the broad statutory definitions of mental abnormality permit the misuse of psychiatric terminology and methods.[7-11]

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ASPD as a Qualifying Disorder

Perhaps no diagnosis engenders as much dispute as antisocial personality disorder (ASPD)[12-14] as a qualifying mental disorder for SVP/SDP commitment.[15-18] Some object that the use of ASPD to civilly commit an individual is tantamount to rendering criminal behavior a mental disorder and suggest that psychiatric commitment is to be reserved for those with traditionally defined serious mental illness.[4,7,19] Others argue that the SVP/SDP laws are intended for those with primary sexual (paraphilic) disorders and not ASPD.[16] Others suggest that ASPD is a serious personality disorder and in some cases may be what predisposes the individual to sexually deviant behavior.[4,15] Such controversy is frequently witnessed in the courtroom setting, where the trier-of-fact has to sift through contrasting expert opinions.[20-22]

The courts have provided guidance for forensic clinicians in determining whether ASPD does or does not qualify as an SVP/SDP mental disorder.[4] The U.S. Supreme Court's decision in *Kansas v. Crane*[3] bears specific relevance to the question of ASPD as an SVP mental abnormality. Michael Crane was given a diagnosis of exhibitionism and ASPD supporting his SVP classification by the trial court. The Kansas Supreme Court interpreted an earlier U.S. Supreme Court holding, *Kansas v. Hendricks*,[2] as a requirement to find complete lack of control of dangerous behavior stemming from the mental abnormality and reversed the lower court's finding. The U.S. Supreme Court disagreed with this interpretation and held that there need only be proof of serious difficulty in controlling behavior. The Court emphasized the link between the mental disorder and lack of control, not a specific type of mental disorder, as the essential element. The Court wrote that states should have "considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment" (Ref. 3, p 413), leaving the definition of mental abnormality for each state to construct.[4] The U.S. Supreme Court also underscored that

> the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case (Ref. 3, p 413).

The *Crane* Court, however, did not offer guidance on how to use mental abnormality to distinguish the dangerous sexual offender from the typical criminal recidivist. Consequently, when considering ASPD as a viable SVP/SDP diagnosis, forensic clinicians continue to grapple with when and how to draw the line between the typical criminal recidivist and the dangerous sexual offender.

With close to 30 years of history with SVP/SDP laws in 20 states and the federal government, both the statutes themselves and case decisions may offer some guidance. To that end, we examined the statutes and reviewed case law where ASPD was and was not a viable qualifying mental disorder to address three questions.

> Is ASPD permitted or prohibited as a qualifying mental disorder by SVP/SDP statutory definitions?
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> Can ASPD be the sole qualifying mental disorder?
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> What parameters may be established from case law rulings for the use of ASPD in SVP/SDP evaluations?

ASPD and Statutory Definitions

In examining the SVP/SDP mental disorder and mental abnormality definitions applied by the states, no statutory definition specifically proscribes the use of ASPD in SVP/SDP commitment, yet psychiatric and psychological evaluators continue to disagree as to whether ASPD can be a qualifying mental disorder within these statutory definitions.[1,6,15-18] Why is this? Clinicians make two broad objections to including ASPD as a qualifying mental disorder. The first is that those with ASPD are not amenable to treatment. The SVP/SDP statutory schemes do not require treatment amenability, and the Supreme Court in *Hendricks* explicitly noted that a mental disorder need not be treatable for hospitalization to be warranted. Nonetheless, some psychiatrists and psychologists may continue to conceptualize qualifying mental disorders in this manner. This view may reflect, in part, the conceptual remnants of the earlier sexual psychopath laws first enacted in the 1930s, in which amenability to treatment was a necessary component.[4,7] Although these laws were largely repealed by the 1980s, beliefs by psychiatrists and psychologists that civil commitment should be based on a treatable mental condition remain. Given that ASPD is generally viewed as unamenable to treatment, the

SVP/SDP examining clinicians may base their opinions on the premise that including ASPD as a viable diagnosis qualifying for such commitment would be inappropriate.

A second possible reason for rejecting ASPD as a qualifying mental condition may be that some clinicians believe that it does not comport with the statutory definition of a diagnosed mental disorder; i.e., one reflecting impairments in emotional or volitional control. In this view, the ASPD sex offender's behavior reflects criminal inclinations, not psychiatric impairments.[7] In other words, they are "bad but not mad." That is, ASPD is not a paraphilic disorder that impairs emotional or volitional regulation and predisposes to deviant sexuality, but a condition defined by chronic criminality. As a result, sex offenders with ASPD may return to sexual crimes after criminal sanctions; they are no different than the ordinary criminal recidivist whose recurrent nonsexual crimes are similarly undeterred by punishment. Consequently, such individuals are criminals and are not psychiatrically impaired. Therefore, these persons should be managed within the criminal justice system and differentiated from those with mental disorders warranting psychiatric civil commitment.

A closely related reason for rejecting ASPD as a legitimate SVP/SDP mental disorder is that it uses civil commitment as the mechanism to confine dangerous but not mentally ill individuals. This objection is supported by the ruling of the U.S. Supreme Court in *Foucha v. Louisiana*[23] that both dangerousness and mental illness, and not dangerousness alone, are required before depriving individuals of their liberty through involuntary psychiatric commitment. Although *Foucha* pertains to an insanity acquittee's continued commitment, the reasoning can be applied to SVP/SDP commitments. For some, disregarding this precept by involuntary commitment of the "bad but not mad" goes against the basic tenets of the medical model of psychiatric commitment.[7,9,24] Indeed, the 1999 APA Task Force[7] characterized SVP/SDP commitment laws as bending civil commitment to serve nonmedical purposes.

These objections notwithstanding, all statutory definitions are arguably broad enough to permit the use of ASPD as a qualifying mental disorder, if it can be demonstrated as being linked to sexual offending.[4] Recently, Weinberger *et al.*,[1] in their review of the 21 jurisdictions with SVP/SDP laws, noted that the terms for a mental condition vary. They included mental abnormality (Florida, Iowa, Kansas, Massachusetts, Missouri, New Hampshire, New Jersey, New York, South Carolina, Virginia, and Washington); mental disorder (Arizona, Illinois, Minnesota, North Dakota, and Wisconsin); diagnosed mental disorder (California); behavioral abnormality (Texas); mental illness (Nebraska and Tennessee); and mental illness, abnormality, or disorder (federal government). All of the statutory definitions are descriptive. For example, in California, a mental disorder includes "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others."[25] As noted by Weinberger *et al.*,[1] a similar description is used by 14 additional jurisdictions (Florida, Illinois, Iowa, Kansas, Massachusetts, Missouri, New Hampshire, New Jersey, New York, South Carolina, Texas, Virginia, Washington, and Wisconsin).

Some statutes are more explicit and specifically include personality disorder in the definition of a qualifying mental disorder (i.e., Arizona, Florida, Kansas, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, North Dakota, South Carolina, Virginia, and Washington). Some specifically include paraphilia or a sexual disorder in their definition of a mental disorder (i.e., Minnesota, North Dakota, and Arizona). Arizona includes conduct disorder in its statutory definition of a mental disorder. (See online Appendix for list of SVP statutes and definitions of mental disorders.)

ASPD as a Stand-Alone Diagnosis

The supreme and appellate courts of most states as well as the federal government have acknowledged that any mental condition, and not necessarily a sex-related disorder, can be used as the basis for an SVP commitment.[1] As long as the condition relates to the individual's inability to control sexual impulses, and thus supports the person's predisposition to commit sexually dangerous acts, a disorder such as ASPD may be used.

Several courts have upheld SVP/SDP civil commitment on the basis of ASPD as a stand-alone diagnosis.[26-28] Table 1 provides a sample of state cases related to ASPD. Case law in California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, North Dakota, and Wisconsin have affirmed the use of ASPD alone as a qualifying

Table 1 ASPD and Case Law

State	Case Law Supports ASPD	Case Law Rejects ASPD
California	*People v. Burris*[31] *People v. Gudino*[33]	
Florida	*Hale v. State*[53]	
Illinois	*People v. White (In re White)*[54]	
Iowa	*State v. Goodwin (In re Goodwin)*[55] *In re Detention of Barnes*[27]	
Kansas	*In re Care & Treatment of Colt*[56]	
Massachusetts	*Young v. Murphy*[42] *Commonwealth v. Mazzarino*[26]	
Minnesota	*In re Civ. Commitment of Spicer*[44] *In re Civ. Commitment of Wagner*[43]	
Missouri	*Murrell v. State (In re Murrell)*[39] *Holtcamp v. State*[41] *In re Care & Treatment of Shafer*[57]	
New Jersey	*In the Matter of the Commitment of W.Z.*[32]	
New York		*Matter of State of New York v Donald DD*[29]
North Dakota	*In the Interest of Kelly Tanner*[40] *State v. Anderson (In re Anderson)*[45] *Gaddie v. Barrera (In re Barrera)*[58]	
Texas	*In re Commitment of Barrientos*[59]	
Wisconsin	*State v. Allison*[34] *Adams v. Bartow*[35] *State v. Farmer (In re Farmer)*[36] *State v. Gladney (In re Gladney)*[37] *State v. Bergemann*[38] *State v. McCain*[60]	
Federal legislation		*United States v Wilkinson*[30]

ASPD, antisocial personality disorder.

disorder. Other states, such as Texas, Virginia, and Washington, have not addressed ASPD as the sole qualifying mental disorder; rather, the rulings in these states address the cumulative impact of multiple disorders, such as ASPD and paraphilic disorder in combination. Arizona, Nebraska, New Hampshire, South Carolina, and Tennessee have thus far been silent on the matter. The federal government and New York have ruled that ASPD alone is not a justifiable diagnosis for civil commitment as a sexually dangerous person. In sum, most states permit the use of ASPD as a stand-alone qualifying SVP/SDP mental disorder, either by statutory definition of a mental disorder or by case law.

Case Law Parameters

Guidance for when a diagnosis of ASPD can be used as a diagnosed mental disorder for SVP/SDP may be found within case law; the reasoning offered by the courts can be instructive to experts across states.

ASPD Rejected

New York and federal case decisions have rejected the application of ASPD as a stand-alone diagnosis. In 2014, the New York State Court of Appeals in *Matter of State of New York v. Donald DD*[29] addressed whether civil commitment under the New York SVP law could be based solely on the diagnosis of ASPD together with evidence of sexual crimes. The case facts in *Donald DD* are instructive. In 2002, Donald DD was 18 years old when he committed the first sex offense, which involved sexual contact with a 14-year-old and a 12-year-old. The second offense occurred at age 20 in 2004, when he was found guilty for

nonconsensual sexual intercourse with his wife's close friend. At age 24, he was again incarcerated after encouraging his four-year-old son and three-year-old daughter to touch their privates and to touch his. His wife alleged that he engaged in forced sexual contact. SVP proceedings were initiated in 2009. The experts opined that Donald DD had six to seven ASPD traits that predisposed him to sexual offenses.[22]

The New York Court of Appeals held that the diagnosis of ASPD alone was an insufficient basis for a finding of a mental abnormality for the purposes of civil commitment when there is no other condition represented. The court's decision that ASPD alone was insufficient to support an SVP civil commitment appeared to be driven by two factors. The first was a generic objection: an overwhelming majority of criminal offenders in prison would meet the criteria for ASPD, implying that ASPD alone does not differentiate a sex offender with a mental abnormality from the ordinary criminal recidivist. The second was that ASPD is not a sexual disorder, so it cannot be relied upon to demonstrate mental abnormality, and that it is a characteristic of those who tended to commit crimes in general.

A federal district court held in 2009 in *United States v Wilkinson*[30] that ASPD was not a serious mental disorder within the federal SDP definition. Steven Wilkinson's last sexual criminal conviction occurred 18 years earlier in 1991; his prior convictions were for statutory rape in 1976 and rape of an acquaintance in 1982. In all instances, he and the victim were using substances. While on parole in 1991, he pled guilty to indecent assault of a female friend who was staying in his motel room; because he had a gun, he was charged federally with felony in possession of a firearm and sentenced as a career offender to 210 months in prison. He was scheduled to be released on February 14, 2008, and was certified as a sexually dangerous person. The federal court held that the government did not prove that he would have serious difficulty in refraining from sexually violent conduct or child molestation if he were released.

The court reasoned that Mr. Wilkinson's ASPD was not severe. The court supported this by citing the following: his good behavior during his long federal prison sentence with no disciplinary incidents in 16 years of confinement; his prosocial work in federal prison in caring for inmates with dementia or blindness; his statements that the work he performed in prison was his best job because it allowed him to give back to others; the lack of credible expert testimony that he exhibited psychopathy; and the government's failure to prove that psychopathy was a distinct mental illness or abnormality. Moreover, the federal court noted that no expert identified Mr. Wilkinson as having a paraphilic disorder.

ASPD Affirmed

In states where ASPD has been affirmed as a standalone disorder, the decision centers on the extent to which ASPD reflects a lack of volitional impairment, ASPD's credible link to sexual violence, and whether ASPD is a mental abnormality.

ASPD and Volitional Impairment

The California Appellate Court in *People v. Burris*[31] addressed ASPD and the volitional prong. The state's experts diagnosed a paraphilic disorder and ASPD; the defense expert diagnosed only ASPD. The experts offered conflicting opinions regarding how ASPD impaired James Clenzo Burris' capacity to control impulses to rape. Mr. Burris had a juvenile adjudication, at age 10 or 11, for sexual assault on an eight- or nine-year-old girl. His adult qualifying offenses, occurring at age 18, included three sexual assaults in 1981: rape of a woman at gunpoint, attempted rape of another woman that was thwarted by the arrival of her husband, and rape at knifepoint of a woman in a parking lot, which was committed while he was awaiting sentencing in the other cases. His prison behavior reflected a constant pattern of rules violation, many for violent or gang-related behavior. In addition, he exposed and massaged his genitals in front of a female correctional officer. He was paroled in 1991, but it was revoked after he stole a car and failed to register as a sex offender. In 1993, he was again paroled; however, seven months later he lured a seven-year-old girl to his house, took off his clothes, and tried to engage in sexual intercourse. He pled to possession of a firearm by an ex-felon and child molestation. In 1997, two state SVP evaluators found Mr. Burris to meet SVP criteria with the mental abnormalities of ASPD and paraphilia.

The state's experts argued that Mr. Burris' diagnosis of ASPD enhanced the risk for sexual recidivism because it involved both a disregard for the law as well as a tendency to act impulsively. The defense

expert opined that Mr. Burris was not unable to control his behavior; rather, he chose not to control himself, and that his ASPD was the antithesis of a volitional impairment. The defense expert argued that Mr. Burris' ASPD did not impair his volitional capacity as he chose to rape and thereby did not lack control. His repeated criminal behavior after being punished did not demonstrate volitional impairment; instead, it showed purposeful risk-taking behavior. The court rejected the defense's arguments and concluded that if an individual with ASPD wanted to rape, felt no remorse, and continued to do so despite criminal sanctions, that individual lacked control because he was not deterred by the risk of criminal punishment.

Similar reasoning was articulated by the New Jersey Appellate Court in the case of *In the Matter of the Commitment of W.Z.*[32] W.Z. had an extensive criminal history that commenced at age twelve and spanned a wide array of offenses including drug possession, theft, assault, burglary, and criminal sexual assault. His first sexual offense occurred at age 16, for which he served a juvenile term. His second sexual offense occurred when he was approximately 23 years old and involved the physical and attempted sexual assault of a woman he met at a bar. He choked the woman and dragged her into the woods, repeatedly punching her face and choking her until she was unconscious. He began to remove her clothing but was frightened away by the police before he could complete the sexual assault. His last conviction was for criminal sexual assault of a woman on a train; he lifted her skirt above her head and grabbed her buttocks. W.Z. claimed that all his sexual offenses were accompanied by either drug or alcohol use. His in-custody behavior was notable for fights, threats of others, lying to officers, refusing to obey, and one attempted suicide.

In the SVP proceedings, the state's experts diagnosed ASPD in W.Z. and testified that he could not control his antisocial condition. The defense expert also rendered the diagnosis of ASPD but opined that W.Z. made a conscious choice to hurt his victims sexually and that the disorder was not a mental incapacity. Moreover, the defense expert drew a distinction between a person with a compulsion to commit sex offenses versus the individual whose sex offending was opportunistic and situational. The expert testified that the "latter type of person does not perform sexually violent acts any more frequently than any other antisocial act in his regimen." (Ref. 32, p 104). Nevertheless, the trial court found that W.Z. "has a mental abnormality that does affect his emotional capacity so as to predispose him to commit acts of sexual violence." (Ref. 32, p 104), which was upheld by the appellate court.

ASPD and Link to Sexual Violence

People v. Gudino,[33] an unpublished California SVP case, is instructive regarding the need to explicitly link ASPD to a propensity for sexual violence. The court did not reject the use of ASPD *per se*; rather, ASPD was rejected as a qualifying diagnosis because the state failed to prove a lack of impulse control (volitional prong) that predisposed the person to commit sexual criminal acts due to ASPD. Marco Gudino's first sexual offenses occurred when he was 16 years old and involved forced oral copulation with a six-year-old and a nine-year-old. In 1993, at age 19, he sexually assaulted an 83-year-old woman. During the next 12 years while he was in prison, he incurred no rule violations. He was on parole for 18 months but violated parole for failing to register as a sexual offender, and he was then reincarcerated and found to meet SVP criteria. At the time of the SVP court trial, Mr. Gudino was contesting the sufficiency of the evidence to identify him as an SVP after he had been in the state hospital for eight years pending a commitment trial. The experts focused on Mr. Gudino's angry and belligerent behavior in the state hospital to support his current diagnosis of ASPD. The judge asked the experts pointedly as to how these antisocial personality traits predisposed Mr. Gudino to commit criminal sexual acts. The judge was struck by the lack of integration by the state's experts of the long periods (12 years in prison, 18 months in the community, and 8 years in the state hospital) when Mr. Gudino had not acted out sexually. The court noted his behavior while on parole in the community as well as how he complied with the parole officer, held down a job, and was in a normal, age-appropriate sexual relationship with a female. In addition, the judge considered the situational context of Mr. Gudino's aggression (due to frustration) in the state hospital and the lack of evidence for sexually acting out, even though a witness from the hospital testified that such acting out occurs frequently in that setting. The court found that the state did not meet its burden of proof and ordered Mr. Gudino released.

The *Gudino* case and others underscore the need for experts to establish clearly the nexus between ASPD and sexually violent behavior.[34-37] The nexus between ASPD and sexual violence is best illustrated by the chronicity of sexual offending and failures to be contained by custody or the experience of prior sanctions. This link is notable in the *Burris* case.[31] Mr. Burris' sexual criminality emerged when he was a juvenile and endured into adulthood. His ASPD reflected impulsivity in the indiscriminate sexual targets (i.e, women, a seven-year-old girl), behaviors (i.e., rape, child molestation, indecent exposure, public masturbation), and his inability to learn from sanctions (i.e., committing sexual crimes while on parole), and Mr. Burriss expressed no remorse for this behavior. While in custody, Mr. Burris demonstrated a pattern of defiance of authority that included violence toward others and sexual aggression toward staff.[31]

By contrast, in the *Gudino* case the court found a weak nexus between ASPD and sexual violence. In that case, despite egregious sexual criminality occurring at ages 16 and 19, the court considered the more than 21-year period where there was no evidence of sexual impulsivity or aggression. Mr. Gudino had a 12-year period in prison with no rule violations and 18 months in the community with no criminal behavior, and he had an age-appropriate sexual relationship. During an eight-year period in the state hospital, he violated the hospital rules but with no evidence of sexual aggression.

Ordinary Criminal and Sexual Recidivists

In the Iowa case of Alan Albert Barnes,[27] his history of sexual misconduct dated to age 13, when he sexually molested his nephew. Thereafter, his criminal history consisted of raping three women at knifepoint and attempting to rape a fourth woman. These offenses resulted in his incarceration until 1990, when he was released. Six years later, he forced his way into a woman's house and raped her. While incarcerated for this offense, Mr. Barnes was terminated from sex offender treatment for inappropriate behavior toward female staff. In 2001 the state filed an SVP petition. The state's expert delivered a diagnosis of ASPD and psychopathy for Mr. Barnes. The defense expert argued that ASPD does not affect "emotional or volitional capacity in any kind of significant way" and "does not cause a serious difficulty in controlling behavior" (Ref. 27, p 457). The defense expert's reasoning for this opinion was that ASPD was common among general criminals and that forensic psychiatrists did not consider it a disorder that predisposed an individual to commit sexually violent crimes. Rather, those with ASPD made bad choices and were punished in the criminal justice system.

The Iowa Supreme Court rejected the defense's argument. The court found a link between the disorder and his offending in Mr. Barnes' testimony that "the rape 'was just a spur of the moment thing'" (Ref. 27, p 459), that the victims smiling at him was interpreted as wanting to engage in sexual intercourse, and that he felt forced to rape them because they did not comply voluntarily. The court highlighted that an individualized inquiry was needed to determine the specific link between that person's mental disorder and the effect of the mental disorder on that person. Such an individualized inquiry would protect from civil commitment those with ASPD who are not predisposed to commit sexual crimes. Moreover, the court noted that the link between ASPD and sexual dangerousness could be evident in a person with a broad array of crimes, general and sexual. Mirroring the Iowa Supreme Court's rationale, the Wisconsin Appellate Court noted in *State v. Bergemann*[38] that the mental disorder does not have to predispose the individual to commit sexually violent crimes exclusively.

Evidence of the link between ASPD and sexual violence may be apparent based on a number of factors. In *Murrell v. State (In re Murrell)*,[39] the link between Mark Murrell's diagnosis of ASPD and his sexually violent behavior was evidenced by his multiple sexual acts upon a victim, multiple sexual victims, the impulsiveness of his sexual crimes, and his lack of remorse or regret for the crimes. The case of *In the Interest of Kelly Tanner*[40] indicated that ASPD can be characterized by both opportunistic and predatory offending, a disregard for others' wishes, acting out sexually after being warned and reprimanded, and not being able to control sexual behavior in a highly restrictive environment where the individual knows he is being observed.

Other Elements

Several additional elements characterize the rationale offered by state courts in Massachusetts, Missouri, Minnesota, and North Dakota for accepting the use of ASPD. Criminal history does not have to

be the sole basis for linking ASPD to the predisposition for sexual violence. Data from the offender's treatment history and sexual history could also provide the link between the diagnosis of ASPD and sexual violence.[26,27,41] In addition, the rationale provided should demonstrate how ASPD results in a general lack of ability to control sexual impulses.[42] Risk assessment scores and dynamic variables, such as continuing lack of remorse, can also be the basis for supporting ASPD as a qualifying mental disorder for SVP/SDP commitment.[43] Although advancing age is associated typically with waning symptoms of ASPD, this is not always the case if an offender has engaged in sexual offenses at an age when his risk should have been greatly reduced.[44] A causative link between ASPD and sexual violence may also be established by the severity of ASPD as demonstrated by criminal history and continued impulse control problems while incarcerated.[45]

Summary

ASPD is not sufficient for SVP/SDP commitment when it does not distinguish a sexual offender with a mental disorder from the ordinary criminal recidivist. In addition, courts have cited case specifics (e.g., severity of ASPD, decreased risk associated with advancing age, and prosocial behavior in custody) when they have rejected ASPD as an SVP/SDP mental abnormality. When case law supports the use of ASPD, the diagnosis is characterized by disinhibition related to a lack of victim empathy, excessive impulsivity and lack of control, and a severe expression of the disorder (e.g., lengthy criminal history, custodial infraction, and absence of deterrence following criminal sanction).

The case law directives reviewed have congruence with the ASPD clinical literature. That is, there is heterogeneity in the expression of ASPD as marked by a wide range of dysfunction and different subgroups of individuals with the disorder.[46,47] In some individuals, ASPD may be manifested as protracted criminal careers characterized by externalizing aggressive motivations; in others, however, the criminality reflects externalizing sexual motivations.[48] Substance intoxication may be a potentially disinhibiting condition impairing volitional capacity; substance use disorder has a high level of frequency as a comorbid disorder in ASPD.[49] ASPD diminishes with advancing age, and older offenders show low base rates of sexual recidivism.[50]

Whereas ASPD does not always predispose those with the disorder to commit sexual crimes, in certain cases the traits of the disorder as expressed in a specific individual are highly relevant to sexual impulse control. This concept was highlighted in 2010 by the U.S. Court of Appeals in *Brown v. Watters.*[51] The court differentiated between how the mental disorder manifested itself in that individual and his ability to control behavior and the diagnosis in the abstract. The dissenting opinion in the *Matter of State of New York v. Donald DD*[29] also highlighted the importance of an individualized inquiry. Contrasting the bright-line reasoning by the majority who rejected ASPD as a qualifying mental disorder, the dissenting judge argued that ASPD may be manifested uniquely in an individual so the condition causes serious difficulty in controlling sexual impulses. Finally, as the Minnesota Supreme Court opined 20 years ago in the case of *In re Linehan*,[52] if ASPD is linked with sexually violent behavior, it can be the basis for civil commitment.

Conclusion

ASPD in SVP/SDP proceedings will continue to raise debate among forensic clinicians and the legalists who interpret the law. This is so because ASPD has a complex relationship with the law: ASPD occurs at a high rate among criminal recidivists; the maladaptive behavior often appears to be under the control of the individual; and ASPD is aligned closely with how the legal system conceptualizes criminality.[61] It is also inherently difficult to draw a bright line between where "bad" behavior becomes "mad" behavior.[4] SVP/SDP commitments raise a critical balancing of public safety against the protection of civil liberties. The SVP/SDP laws were established to protect society by treating and confining dangerous sex offenders. On the other hand, the term of an SVP/SDP commitment is, in effect, indefinite; this reality underscores the serious consequences for the individual who is found to meet the criteria. The balance of public safety against civil liberties bears serious consideration when assessing sex offenders with ASPD.

Case law directs SVP/SDP evaluators to establish a clear nexus between ASPD and sexually violent behavior. It is the unique expression of ASPD in an individual that determines its viability as a qualifying SVP/SDP mental disorder. ASPD is viable when there is chronic disregard for the rights of others as

evidenced by extensive sexual and nonsexual criminality as well as a lack of remorse for sexual violent behavior. It is viable when the behavior is severe and there are antisocial externalizing sexual motivations, such as sexual aggression in custody or proportionately more sexual than nonsexual criminal behaviors reflecting an increasingly sexual criminal trajectory. Finally, ASPD is viable when characterized by sexual impulsivity and indiscriminate sexual aggression in a broad range of sexual crimes and victims (e.g., across age groups, both male and female victims). Consequently, SVP/SDP evaluators should be particularly focused on the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5),[12] criteria for ASPD: impulsivity and aggressiveness, reckless disregard for the safety of others, and lack of remorse.

ASPD may not be a viable disorder when it is characterized largely by externalizing aggressive motivations and an increasingly nonsexual criminal trajectory. It may not be viable when the traits are mitigated by maturity (e.g., prosocial behaviors during lengthy incarcerations). ASPD may not be viable when impulsive and custodial aggressive behaviors are not meaningfully linked to sexual aggression (e.g., nonsexual rules violations, verbal or physical aggression sparked by situation frustration to confinement). Finally, ASPD may not be viable when there is evidence that it is limited to a developmental stage (e.g., juvenile sexual offending). Thus, SVP/SDP evaluators should not exclusively focus on DSM-5 ASPD traits that relate to general rather than to sexual criminality, such as irresponsibility, deceitfulness, and nonsexual crimes reflecting a failure to conform behavior to the law.

SVP/SDP laws have been controversial from their onset, particularly regarding what constitutes a mental abnormality.[7,62-67] The forensic clinician as a diagnostic expert ultimately bears the responsibility of providing to the courts a cogent and sound rationale as to why ASPD in the specific case is related to the risk for sexual reoffense. How is this accomplished? ASPD is a polythetic diagnosis with no specific combination of criteria to establish it; two individuals can have the same disorder but may not share diagnostic features.[1] ASPD criteria do not include terms such as "predisposition" to deviant sexual behavior or "volitional" or "emotional" impairment, which are central elements in the SVP/SDP statutory definitions of a diagnosed mental disorder.

Forensic clinicians will have to move beyond a mere recitation of ASPD criteria and support their arguments linking ASPD to criminal sexual behavior via specific clinical considerations that may include examination of offending patterns, trajectories, risk, and paraphilia-like behavior. Moreover, forensic experts should examine for other nuanced clinical factors that are not fully described by DSM-5 ASPD criteria but are included within the broader construct of psychopathy. Psychopathy is a complex concept that some may argue may be characterized better as a continuum than a category, as described in the Psychopathy Checklist–Revised (PCL-R).[68,69] The PCL-R measures antisocial impulsivity (under factor 2, facet 4), which could serve as a proxy indicator of volitional impairment. In addition, these elements tap criminogenic drives, converge the most with DSM-5 ASPD, and are the strongest predictors of sexual recidivism.[70,71] Forensic clinicians also need to address sexualized manifestations of ASPD. Examples include hypersexuality or compulsive sexual behavior (e.g., daily and frequent masturbation, a large number of sexual partners, polymorphous sexual targets, or subthreshold criteria for a paraphilic disorder) that may be liked to sexual offending but not addressed specifically thus far by the courts.

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