bivalent parent is not an optimal solution. Although the mother had a previous child fatality and had not followed the conditions for return of her children for several years, in this case the Supreme Court remanded the case to allow the respondent's expert witness to proffer testimony regarding the mother's future ability to meet the conditions.

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Sexually Violent Predators Laws

Sexually Violent Predator Testimony Is Not Novel Science Subject to a Frye *Hearing*

In *Commonwealth v. Dengler*, 890 A.2d 372 (Pa. 2005), Harry Dengler appealed the trial court's finding that he was a sexually violent predator (SVP). He argued that the court should not have admitted the opinion testimony of an expert witness psychologist before subjecting her testimony to the Pennsylvania test of admissibility for novel scientific testimony derived from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The Supreme Court of Pennsylvania affirmed the trial court and superior court and held that SVP expert opinion testimony was not novel science and therefore not subject to a *Frye* hearing.

Facts of the Case

As part of a plea bargain, 34-year-old Harry Dengler pleaded guilty to aggravated indecent assault and corruption of minors after an incident with his 12-year-old niece in which he fondled and kissed her breasts through her clothing, fondled and inserted his finger into her vagina, and performed oral sex on her against her protests. The trial judge ordered the State Sexual Offenders Assessment Board to perform a Sexually Violent Predator (SVP) assessment under Megan's Law II. The Act defines the term "sexually violent predator" as a person convicted of a sexual offense and likely to engage in predatory sexually violent offenses due to a "mental abnormality" or "personality disorder" (42 Pa. Cons. Stat. § 9791 et seq. (2000)). The Act further outlines specific factors to be considered in the determination of a defendant's SVP designation; however, the Act does not limit the analysis to these factors.

The State Sexual Offenders Assessment Board issued a report prepared by Board member Veronique Valliere, a licensed psychologist. Mr. Dengler declined to be interviewed by a board investigator. Dr. Valliere completed her assessment by relying on available records, including court records in the case: the probable cause affidavit and court records relating to two prior sexual offenses. Dr. Valliere opined that Mr. Dengler met the criteria for classification as an SVP based on her experience and a review of the factors listed in the Act, such as "the research, his behavior, his past records, [and] his previous diagnoses."

Under extensive cross-examination, Dr. Valliere conceded that statutory terms, including "mental abnormality" and "sexually violent predator" were not diagnostic terms in psychiatry or psychology. Further, she conceded that there was no specific test to determine SVP status. Based on Dr. Valliere's testimony, the court found Mr. Dengler to be an SVP and sentenced him to prison and probation. In addition, on his release from prison, he was to comply with the registration provisions of Megan's Law II.

Ruling and Reasoning

Mr. Dengler appealed. The superior court unanimously affirmed the trial court, stating that it would defy logic to ask an expert witness to apply Megan's Law II in conducting an assessment and then exclude the expert's testimony merely because she employed Megan's Law II language in her assessment. Further, they said that psychological or psychiatric testimony offered at an SVP hearing was not novel scientific evidence subject to *Frye*.

The Supreme Court of Pennsylvania granted further discretionary review to provide guidance on this issue of first impression. Mr. Dengler argued that Dr. Valliere had based her testimony on statutory terms not generally accepted or having clinical meaning in

the field of psychology. As such, he argued that the trial court erred in not subjecting Dr. Valliere's testimony to the Pennsylvania test of admissibility for novel scientific testimony derived from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The Supreme Court of Pennsylvania affirmed the Superior Court and held that the trial court did not abuse its discretion in admitting the expert testimony without a *Frye* hearing.

As background, the court noted that experts could give testimony in the form of an opinion under Rule 702 of the Pennsylvania Rules of Evidence. Further, the court clarified that in Pennsylvania, *Frye* was the standard and not *Daubert v. Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579 (1993). The *Frye* standard requires that the scientific principle on which the opinion is based "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." In discussing its decision, the court dismissed the objection to Dr. Valliere's use of the terms "mental abnormality" and "sexually violent predator," stating they were defined in detail in Megan's Law II, making them terms of art. Thus, criticizing Dr. Valliere's testimony based on acceptance within the psychological or psychiatric community "simply misses the mark."

The court then pointed out that *Frye* does not apply every time science comes into the courtroom; rather, it applies only to proffered expert testimony involving novel science. They reasoned that because the legislature provided the framework for assessing whether an offender is an SVP, it should be deemed generally accepted in the community of professionals who conduct SVP assessments. Further, because it is from the legislature, it cannot be deemed "novel science" and therefore no *Frye* hearing is necessary. Because Dr. Valliere followed the statutory factors, it was not novel science and no *Frye* test was required.

The court remarked that other jurisdictions have held, under a traditional *Frye* analysis, that *Frye* does not apply to expert psychological or psychiatric testimony regarding a sexual offender's likelihood of recidivism, because such evidence is not novel. Although the appellant pointed out numerous cases in which such testimony was held to a *Frye* standard, the court argued that each of these cases involved actuarial assessments. Because Dr. Valliere did not employ actuarial methods to predict recidivism, these cases were not relevant.

In his concurring opinion, Justice Baer wrote that he agreed that the evidence was not subject to a *Frye* analysis because the theory and methodology underlying the SVP assessment was not novel. However, he argued that statutorily defined factors do not relieve a court from conducting an independent analysis under *Frye* of the novelty of a given theory or method used to address those factors. For example, if the legislature based SVP designation on phrenology (head contours) to categorize defendants, the fact that the legislature made the policy would not eliminate the requirement of a *Frye* hearing.

Discussion

The primary issue for the forensic practitioner is that the court said that it no longer considers SVP assessments to be novel science and therefore such assessments are not subject to a *Frye* hearing. It explained that the legislature had defined the factors the psychiatrist or psychologist should consider, essentially removing part of the scientific argument behind the case. This analysis raises concern, considering the nature of science. As noted in Justice Baer's concurring opinion, statutorily defined factors do not necessarily relieve a court from conducting an independent analysis under *Frye* of the novelty of a given theory or method used to address those factors. Although it is true that several of the factors listed in Megan's Law II are currently scientifically validated risk factors for recidivism, science is a constantly evolving field, molded by ongoing research and expertise. As such, it is naïve to suggest that the legislature could keep up with the current scientific body of research to forego the need for an evaluation by the court. For example, the court specifically distinguished Dr. Valliere's approach from examiners using actuarial instruments. However, many experts in the sex offender field routinely use such actuarial instruments, which have a large body of scientific evidence supporting their use. What if the expert, based on her experience and understanding of the scientific evidence disagreed with the legislatively defined factors? For example, Megan's Law II lists the age of the victim as a factor, which has little support for recidivism in the literature.

Although we agree that the theory underlying SVP evaluations as described in the case are well validated to the extent that it is reasonable to say they no longer qualify as novel science, this conclusion is independent of the legislation.

One issue not discussed by the court that this case raises is the role of experts when testifying to what have traditionally been fact-finder issues. In this case, the psychologist was encouraged to testify on whether a defendant qualified for legal terms of art, such as "mental abnormality" and "sexually violent predator." The appellant correctly argued that the terms were not validated within the field of psychiatry or psychology. The traditional role of the expert has been to educate the court, not to make legal decisions about who qualifies under a legal definition. Much of the difficulty could have been avoided had the expert limited her testimony to the diagnoses that the defendant had met, the risk factors for recidivism (from the Act and otherwise), and how these relate to his risk.

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Release of Insanity Acquittees

Polysubstance Dependence and Personality Disorder, Not Otherwise Specified, Were Held to Be Mental Diseases for Purposes of Continued Civil Commitment of an Insanity Acquittee

In *State v. Klein*, 124 P.3d 644 (Wash. 2005), the Washington State Supreme Court held that polysubstance dependence and personality disorder, not otherwise specified (NOS), constituted mental disease for the purpose of continued commitment of an insanity acquittee. The court also held that the presence of the same mental disease that formed the basis for the NGRI acquittal was not necessary for ongoing commitment.

Facts of the Case

The petitioner, Tina Klein, stabbed her 20-month old nephew with a butcher knife while in a cocaine-induced psychosis. The victim's parents successfully intervened to save his life. Ms. Klein was found not guilty by reason of insanity and granted conditional release. She repeatedly violated the terms of her conditional release by abusing methamphetamine and marijuana and failing to report to her probation officer.

The trial court revoked Ms. Klein's conditional release and ordered her admitted to Western State Hospital on November 27, 2001 (eight years after her acquittal). Ms. Klein received diagnoses of polysubstance dependence, in full sustained remission, in a controlled environment and personality disorder, NOS, with borderline, antisocial, and passive-aggressive features.

After unsuccessfully petitioning for transfer to a residential substance abuse treatment program, Ms. Klein petitioned the trial court for full release on the basis that she no longer had a mental disease or defect because her polysubstance dependence was "in remission." At a hearing on the petition, the experts for the state and defense both reached similar diagnoses but disagreed as to whether Ms. Klein's diagnoses legally constituted mental diseases. The state's expert testified that Ms. Klein had a "moderate" risk of reoffending, and the defense expert testified that she had a "low to moderate" risk of reoffending. The state's expert testified that Ms. Klein had a "rather high" risk of experiencing another psychotic episode if she returned to using drugs and that her risk of reoffending would be "much higher than the average individual" if she returned to using drugs.

The trial court denied Ms. Klein's petition for full release and held that Ms. Klein "continues to suffer from a mental disease or defect" and "remains a substantial danger to others and presents a substantial likelihood of committing criminal acts jeopardizing public safety, as a consequence of her mental disorder." Ms. Klein appealed both findings to the court of appeals, which affirmed the trial court's findings.

Ms. Klein appealed to the Supreme Court of Washington. There were three issues before the court. First, whether there was substantial evidence in the record to support the finding that Ms. Klein continued to have a mental disease or defect; second, whether insanity acquittees with a mental disease other than the one that formed the basis for their acquittal must be unconditionally released; and third, whether there was substantial evidence in the record to support the finding of ongoing dangerousness.