ITINERARY FOR THE FEBRUARY 15, 2012 MEETING OF THE GEORGE MASON AMERICAN INN OF COURT

Program Title: Civil Commitment of Sex Offenders and Correspondent Expert Issues

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A. **Introductions**:
(7:30 p.m. – 7:35 p.m.)

Stephen Foster, Student Member
Brittany Burke, Student Member
Christine Park, Student Member

B. **Sex Offender Risk Assessment and Virginia's Sexually Violent Predator Statute: A Dialogue With a Leading Forensic Expert**
(7:35 p.m. – 8:30 p.m.)

Edward S. Rosenthal, Esq.,
of Rich Rosenthal Brincefield Manitta Dzubin & Kroeger, LLP

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Clinical and Forensic Psychologist, Falls Church, VA

w/PowerPoint Presentation and reference materials prepared by Lana M. Manitta, Esq. of Rich Rosenthal Brincefield Manitta Dzubin & Kroeger, LLP and the Student Members

C. **Open Discussion/Q&A** (8:30 p.m.)

Civil Commitment of Sex Offenders and Correspondent Expert Issues
George Mason American Inn of Court
February 15, 2012

I. Forensic Uses of Risk Assessment - "Preventive Detention?"

A. Sex Offense Sentencing Guidelines
B. Sexually Violent Predator (SVP) Petitions
C. Death Penalty – Future Dangerousness Evidence
D. Other Criminal Sentencing Proceedings
E. Civil Commitment Proceedings

II. Risk Assessment Instruments and Forensic Predictions of Dangerousness

A. Purpose and Uses.
B. Forensic approaches to risk assessment
    1. Risk assessment vs. prediction vs. risk management.
    2. Actuarial instruments – definitions and examples.
    3. Clinical judgment – definitions and examples.
    4. Clinical vs. Actuarial Debate
    5. Structurally guided clinical assessment instruments
C. Specific instruments for assessment of recidivism.
    1. Sexual offense recidivism
        i. PCL:R2
        ii. RRASOR
        iii. Static-99R
        iv. Static-2002R
        v. MnSOST-R
        vi. SVR-20
        vii. Others
        viii. Instruments examining dynamic variables-the cutting edge
    2. Violent offense recidivism
        i. VRAG
        ii. SORAG

III. Sexual Offense Recidivism Risk Assessment In SVP Proceedings.

A. Purpose and Effect of SVP Statutory Scheme.
B. The Virginia SVP Act: Va. Code § 37.2-900, et seq.
C. Definition of Sexually Violent Predator:

1. *"Sexually violent predator"* means any person who (i) has been convicted of a sexually violent offense or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial pursuant to *§ 19.2-169.3* and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.

2. *"Mental abnormality"* or *"personality disorder"* means a congenital or acquired condition that affects a person's emotional or volitional capacity

and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others.

D. Evaluations of Potential SVPs. Section 37.2-904 sets out the procedure for identifying potential SVAP defendants as they approach the completion of their criminal incarceration:

1. CRC assessments of eligible prisoners or defendants shall include a mental health examination, including a personal interview, of the prisoner or defendant by a licensed psychiatrist or a licensed clinical psychologist who is designated by the Commissioner, skilled in the diagnosis, treatment, and risk assessment of sex offenders, and not a member of the CRC. If the prisoner's or defendant's name was forwarded to the CRC based upon an evaluation by a licensed psychiatrist or licensed clinical psychologist, a different licensed psychiatrist or licensed clinical psychologist shall perform the examination for the CRC. The licensed psychiatrist or licensed clinical psychologist shall determine whether the prisoner or defendant is a sexually violent predator, as defined in *§ 37.2-900*, and forward the results of this evaluation and any supporting documents to the CRC for its review.
2. The CRC assessment may be based on "[a]n actuarial evaluation, clinical evaluation, or any other information or evaluation determined by the CRC to be relevant, including but not limited to, a review of (i) the prisoner's or defendant's institutional history and treatment record, if any; (ii) his criminal background; and (iii) any other factor that is relevant to the determination of whether he is a sexually violent predator."

E. Following the examination and review conducted pursuant to subsection B, the CRC shall recommend that the prisoner or defendant (i) be committed as a sexually violent predator pursuant to this chapter; (ii) not be committed, but be placed in a conditional release program as a less restrictive alternative; or (iii) not be committed because he does not meet the definition of a sexually violent predator.

F. Expert Testimony Under the SVPA (Code § 37.2-910):

1. If he meets the qualifications set forth in subsection B of *§ 37.2-904*, the expert witness may be permitted to testify at the probable cause hearing as to his diagnosis, his opinion as to whether the respondent meets the definition of a sexually violent predator, his recommendations as to treatment, and the basis for his opinions. Such opinions shall not be dispositive of whether the respondent is a sexually violent predator.
2. See also Va. Code § 37.2-906 (expert testimony at SVPA preliminary hearing).

G. The Ultimate Question for Judge or Jury:

1. If the court or jury finds the respondent to be a sexually violent predator, the court shall then determine that the respondent shall be fully committed or [placed on conditional release.] If after considering the factors listed in § 37.2-912, the court finds that there is no suitable less restrictive alternative to involuntary secure inpatient treatment, the judge shall . . . order that the respondent be committed to the custody of the Department for appropriate inpatient treatment in a secure facility. . . .

IV. Due Process Limits on SVP Civil Commitments?

A. Kansas v. Hendricks, 521 U.S. 346, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997) (Kansas SVP Act satisfies substantive due process and, as a civil commitment statute, does not violate the ex post facto or double jeopardy clauses).

B. Seling v. Young, 531 U.S. 250, 148 L. Ed. 2d 734, 121 S. Ct. 727 (2001) (SVP Act, found to be a valid civil commitment mechanism, cannot be deemed punitive 'as applied' to a single individual).

C. Kansas v. Crane, 534 U.S. 407, 151 L. Ed. 2d 856, 122 S. Ct. 867 (2002) (SVP commitment must be attended by procedural safeguards and must require a finding of dangerousness to one's self or others that is closely linked to a mental abnormality or illness that makes it difficult for the person to control his dangerous behavior. The burden of proof 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.)

D. *Shivaee v. Commonwealth, 270 Va. 112, 613 S.E.2d 570 (2005)* (Upholding Virginia SVP Act under *Hendricks*, *Seling*, and *Crane*, and rejecting claim that Act is void for vagueness).

V. Scientific and Ethical Limits on Risk Assessment Evidence?

A. Determination of mental illness
   1. Paraphilias
   2. Personality disorders
   3. Other disorders

B. Risk assessment

C. Particular Instruments
   1. General sexual offending vs. sexually violent offending as defined in VA
   2. Reliability/Relevance of various instruments
      i. PCL:R2
      ii. RRASOR
      iii. Static-99R and Static-2002R
      iv. MnSOST-R

VI. Legal Limits on Risk Assessment Evidence?

A. *Billings* standard for admissibility of scientific or expert testimony applies in Virginia.
   1. Compare to *Daubert* standard in federal courts.
   2. Compare to *Frye* standard in some other states.

B. But SVPA (Code § 37.2-910) trumps common law:
   1. If he meets the qualifications set forth in subsection B of § 37.2-904, the expert witness may be permitted to testify at the probable cause hearing as to his diagnosis, his opinion as to whether the respondent meets the definition of a sexually violent predator, his recommendations as to treatment, and the basis for his opinions. Such opinions shall not be dispositive of whether the respondent is a sexually violent predator.
   2. See also Va. Code § 37.2-906 (expert testimony at SVPA preliminary hearing).

C. Is Clinical/Actuarial Evidence of Future Dangerousness So Unreliable That Its Admission Violates Due Process?
   1. But see *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) (majority refused to find violation of constitutional magnitude in admission of clinical psychiatric testimony supporting element of "future dangerousness" in death penalty proceeding, despite undisputed record and warning from American Psychiatric Association that such predictions are wrong in approximately two of every three instances).

VII. What SVP Issues Remain After *Hendricks, Seling, Crane*, and *Shivaee*?

A. Anything left of Substantive Due Process?

B. Procedural Due Process. *See Jenkins v. Director, VCBR*, 271 Va. 4, 624 S.E.2d 453 (2006).
   1. Right to Counsel.
   2. Court Appointment and Fee Issues
   3. Self-Representation?
   4. Self-Incrimination.
   5. Right to Testify.
   6. Allocution?
   7. Vagueness.
   8. Challenges to Actuarial Risk Assessment Evidence.
   9. Challenges to Clinical Risk Assessment Evidence.

C. Other Issues.
   1. Bench vs. Jury trial?
   2. Is the second evaluator a defense or a neutral expert?
   3. Use of Polygraph Evidence. *White v. Commonwealth*, 41 Va. App. 191, 194 (2003).
   4. Treatment vs. Punishment Issues ("as applied" analysis):
   5. Hearsay in Reports.
   6. Conditional Release Issues
   7. Section 1983 Claims re Conditions of Confinement?

Va. Rule of Evidence 2:704 Opinion on Ultimate Issue

(a) Civil cases. In civil cases, no expert or lay witness shall be prohibited from expressing an otherwise admissible opinion or conclusion as to any matter of fact solely because that fact is the ultimate issue or critical to the resolution of the case. But in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law. Any other exceptions to the "ultimate fact in issue" rule recognized in the Commonwealth remain in full force.

(b) Criminal cases. In criminal proceedings, opinion testimony on the ultimate issues of fact is not admissible. This Rule does not require exclusion of otherwise proper expert testimony concerning a witness' or the defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness' or the defendant's situation.

Fed. R. Evid. 704

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

THE ULTIMATE QUESTION

FOR THE EXPERTS:

The Commonwealth's expert "shall determine whether the prisoner is a sexually violent predator . . . .") .

Va. Code § 37.2-904(B)

For the experts (cont.)

Any qualified expert "shall be permitted to testify at the probable cause hearing and at the trial as to . . . whether the prisoner or defendant meets the definition of a sexually violent predator. . . .").

Va. Code § 37.2-904(G)

THE ULTIMATE QUESTION

FOR THE COURT:

"The court or jury shall determine whether, by clear and convincing evidence, the person who is subject to the petition is a sexually violent predator."

Va. Code 37.2-908(C)

Sexually Violent Predator
Va. Code §37.2-900

. . . any person who (i) has been convicted of a sexually violent offense . . . and (ii) because of a **mental abnormality** or **personality disorder, finds it difficult to control his predatory behavior**, which makes him **likely to engage in sexually violent acts.**

Va. Code §37.2-900 (2005)

"Mental Abnormality" and "Personality Disorder"

. . . a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person **so likely to commit** sexually violent offenses that he **constitutes a menace** to the health and safety of others.

Va. Code §37.2-900 (2005)

An SVP has . . .

1. a **congenital** or **acquired** condition
2. that "affects a person's **emotional or volitional capacity;"**
3. so that he **"finds it difficult to control;"**
4. his **"predatory behavior;"**
5. which makes him "**likely to engage"**
6. in "**sexually violent acts**;"
7. and is "**so likely to commit;"**
8. **"sexually violent offenses;"**
9. that he "constitutes a **menace to the health and safety** of others."

Assessing the Probability of Re-offense

- Actuarial tools are most effective
- Generic actuarial tools are not effective with sex offenders
- Tools specifically designed for sex offenses are most effective

Source: Center for Sex Offender Management, U.S. Dept. of Justice. Long Version, Section 3: Lecture Content and Teaching Notes - Supervision of Sex Offenders in the Community: A Training Curriculum ("CSOM")

Variables in Definitions of Sex Offender Recidivism - "Fit"

CATEGORY OF NEW OFFENSE

- Sex offenses
- All offenses
- Violent offenses
- Offenses against the person
- Felonies
- "Sexually violent offenses" as defined by SVP Act (never studied)

Variables in Definitions of Sex Offender Recidivism - "Fit"

QUANTUM OF EVIDENCE

- Arrest
- Conviction
- Return to Custody
- Re-admission to psychiatric institution
- Violation of release conditions
- Self-report
- Other

Variables in Definitions of Sex Offender Recidivism - "Fit"

FOLLOW-UP PERIOD

- One year or less
- Three years or less
- Five years
- Ten years
- Fifteen years or more

Variables in Definitions of Sex Offender Recidivism - "Fit"

INDEX OFFENSE

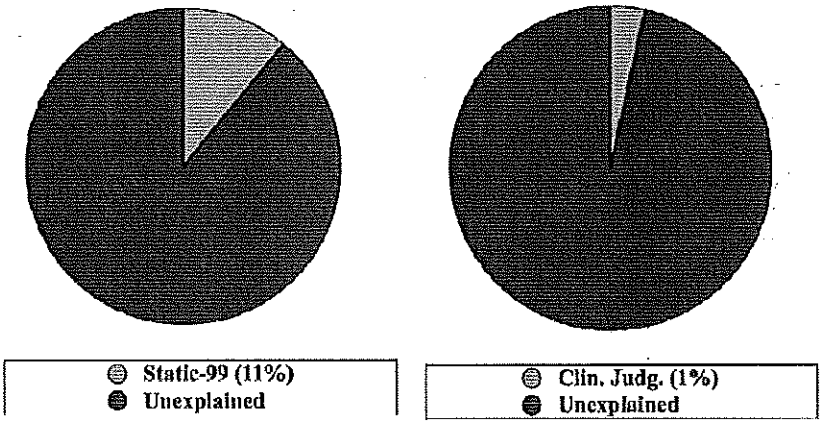
- Rape
- Child molestation
- Incest
- Any sex offense
- "Sexually violent offense" as defined by SVP Act (never studied)

Prediction

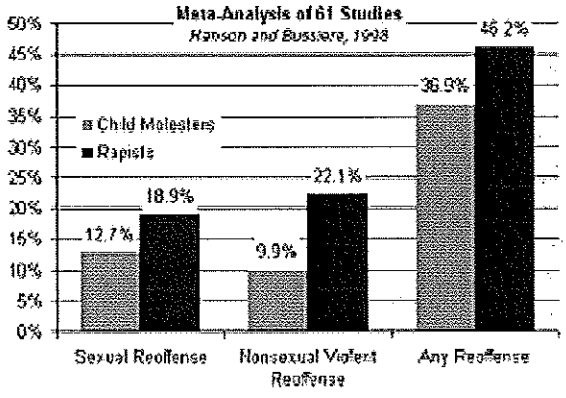
Actual		*Offender does not recidivate*	*Offender recidivates*
	Offender does not recidivate	**Correct prediction** (true negative)	**False positive**
	Offender recidivates	**False negative**	**Correct prediction** (true positive)

Source: VA Sent. Commission, Offender Risk Assessment in VA, A Three Stage Evaluation

Predictive Power



Base Rates & Their Effect on Predictive Power

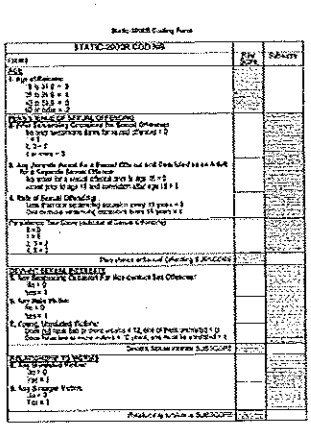


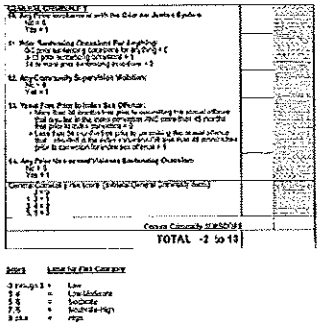
Source: CSOM

Identification of Static Risk Factors

- Deviant sexual interest, esp. children
- Prior offenses, esp. sexual offenses
- Not completing treatment
- Sadistic arousal/high level of psychopathy
- Young, never married
- Unrelated or male child victims
- Genital to genital contact w/children

Static-2002R





METHOD	TYPE OF RECIDIVISM			PURPOSE	DESCRIPTION	PREDICTIVE VALIDITY	
						r	r^2
	sex	viol.	any	Assess re-offense risk among sex offenders.	Meta-analysis of 61 follow-up studies that examined factors related to recidivism among sex offenders.	.10	.01
Clinical	.10	.06	.14				
Past Sex Offense	.19	.02	.12	Assess re-offense risk among sex offenders.			
RRASOR	.27			Assess sexual re-offense risk among adult sex offenders at 5 and 10-year follow-up periods.	4 items (static) scored by clinical staff or case managers using a weighted scale scoring key.	.27	.07
Static-99	.33	.32		Assess sexual re-offense risk among prison adult sex offenders at 5, 10, and 15-year follow-up periods.	10 items (static) scored by clinical staff or case managers using a weighted scoring key.	.33	.11

Correlation Coefficient, r:

Quantity *r*
measures the strength of and
the direction of a linear relationship
between two variables and ranges
between –1 and +1

Source: Wikipedia

"Positive Correlation"

As one variable (x) increases, so does the other (y).

This is a positive correlation.

If x and y have a strong positive linear correlation, r is close to +1.

When $r = +1$ this is a perfect positive fit.

Source: Wikipedia

"Strong" vs. "Weak" Correlation

A correlation of greater than .08 is generally considered "strong"

&

A correlation of less than .05 is generally considered "weak"

Source: Wikipedia

The Coefficient of Determination, r^2:

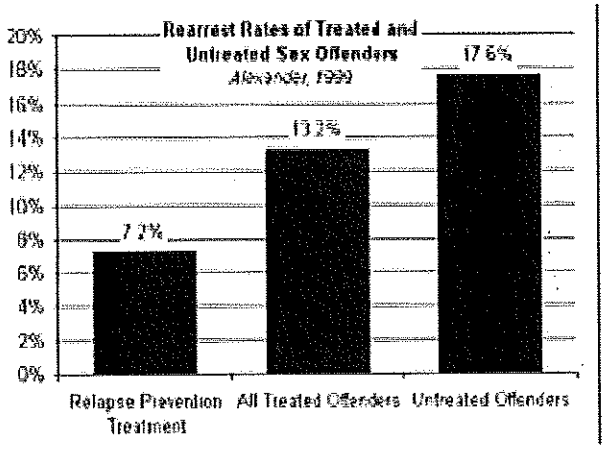
R^2 is the proportion of variance of one variable that is predictable from the other variable.

It is therefore a measure that allows us to determine how certain one can be in making predictions using a particular instrument or model.

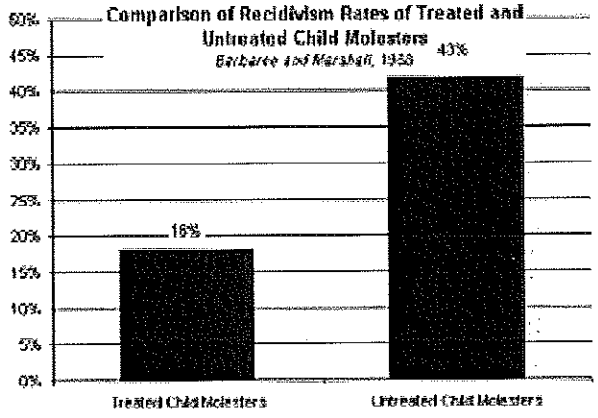
Identification of Dynamic Risk Factors

- Acute
  - Substance abuse
  - Negative mood
  - Anger/hostility
  - Victim Access
- Stable
  - Intimacy Deficits
  - Negative social influences
  - Attitudes
  - Sexual/emotional self-regulation
  - General self-regulation

Source: CSOM



Source: "Recidivism of Sex Offenders," Center for Sex Offender Management
U.S. Dept. Of Justice, May 2001



Source: "Recidivism of Sex Offenders," Center for Sex Offender Management
U.S. Dept. Of Justice, May 2001

Barefoot v. Estelle, 463 U.S. 880 (1983)

Majority refused to find violation of constitutional magnitude in admission of clinical psychiatric testimony supporting element of "future dangerousness" in death penalty proceeding, despite undisputed record and warning from American Psychiatric Association that such predictions are wrong in approximately *two of every three* instances.

Kansas v. Hendricks, 521 U.S. 346 (1997)

Kansas' SVP Statute Constitutionally Sound:

substantive due process -- statutory definition of SVP requires dangerousness coupled with volitional impairment

double jeopardy -- statute not intended as punitive, does not establish criminal proceedings and the commitment itself is not punitive

***ex post facto* prohibition** -- not punitive or criminal, doesn't criminalize once legal conduct, nor deprive person of defenses available at time of crime

Seling v. Young, 531 U.S. 250 (2001)

State's Sexually Violent Predator Act -- found to be a valid civil commitment mechanism -- cannot be deemed punitive, i.e., violative of the double jeopardy and *ex post facto* clauses "as applied" to a single individual.

Kansas v. Crane, 534 U.S. 407 (2002)

SVP commitment must be attended by procedural safeguards and require a finding of dangerousness to one's self or others that is closely linked to a mental abnormality or illness that makes it difficult for the person to control his dangerous behavior.

The burden of proof 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.

***Shivaee v. Commonwealth*, 270 Va. 112 (2005)**

Upholding Virginia SVP Act under *Hendricks*, *Seling*, and *Crane*, and rejecting claim that Act is void for vagueness.

***Jenkins v. Dir. of the Va. Ctr. for Behavioral Rehab.*, 271 Va. 4 (2006).**

"[I]n view of the substantial liberty interest at stake in an involuntary civil commitment [under SVP Act] . . due process . . . mandate[s] that the subject of the involuntary civil commitment process has the right to counsel at all significant stages of the judicial proceedings, including the appellate process."

Daubert Rule in Virginia?

***John v. Im*, 263 Va. 315 (2002)**

Finding expert's testimony inadmissible as speculative and lacking in sufficient factual foundation, the Supreme Court leaves "open for future consideration" the question of whether the *Daubert* rule, applied in federal courts, should be applied in Virginia.

Spencer v. Commonwealth
240 Va. 78 (1990)

[T]he trial court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, or unless it is so unreliable that the considerations requiring its exclusion have ripened into rules of law, or unless its admission is regulated by statute.

Billips v. Commonwealth, 274 Va. 805 (2007)

"Advancements in the sciences continually outpace the education of laymen [including] judges, jurors and lawyers not schooled in the particular field . . . . [T]here is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be "scientific," and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism . . . . To guard against that risk, the Supreme Court of Virginia continues to require a threshold finding of fact with respect to the reliability of the scientific method offered subject only to the exceptions in Spencer."

White v. Commonwealth 41 Va. App. 191 (2003)

"[P]olygraph examinations are so thoroughly unreliable as to be of no proper evidentiary use whether they favor the accused, implicate the accused, or are agreed to by both parties." Thus, the results of such an examination are inadmissible in proceedings to revoke probation or suspended sentences.

West's Annotated Code of Virginia

Title 37.2. Behavioral Health and Developmental Services (Refs & Annos)

Subtitle III. Admissions and Dispositions

Chapter 9. Civil Commitment of Sexually Violent Predators (Refs & Annos)

VA Code Ann. § 37.2-900
Formerly cited as VA ST § 37.1-70.1

§ 37.2-900. Definitions

Currentness

As used in this chapter, unless the context requires a different meaning:

"Commissioner" means the Commissioner of Behavioral Health and Developmental Services.

"Defendant" means any person charged with a sexually violent offense who is deemed to be an unrestorably incompetent defendant pursuant to § 19.2-169.3 and is referred for commitment review pursuant to this chapter.

"Department" means the Department of Behavioral Health and Developmental Services.

"Director" means the Director of the Department of Corrections.

"Mental abnormality" or "personality disorder" means a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others.

"Respondent" means the person who is subject of a petition filed under this chapter.

"Sexually violent offense" means a felony under (i) former § 18-54, former § 18.1-44, subdivision 5 of § 18.2-31, § 18.2-61, 18.2-67.1, or 18.2-67.2; (ii) § 18.2-48 (ii), 18.2-48 (iii), 18.2-63, 18.2-64.1, or 18.2-67.3; (iii) subdivision 1 of § 18.2-31 where the abduction was committed with intent to defile the victim; (iv) § 18.2-32 when the killing was in the commission of, or attempt to commit rape, forcible sodomy, or inanimate or animate object sexual penetration; (v) the laws of the Commonwealth for a forcible sexual offense committed prior to July 1, 1981, where the criminal behavior is set forth in § 18.2-67.1 or 18.2-67.2, or is set forth in § 18.2-67.3; or (vi) conspiracy to commit or attempt to commit any of the above offenses.

"Sexually violent predator" means any person who (i) has been convicted of a sexually violent offense, or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial pursuant to § 19.2-169.3; and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.

Credits

Acts 2005, c. 716, eff. Oct. 1, 2005; Acts 2005, c. 914, eff. April 6, 2005. Amended by Acts 2006, c. 863, eff. Jan. 1, 2007; Acts 2006, c. 914, eff. Jan. 1, 2007; Acts 2007, c. 876; Acts 2009, c. 740; Acts 2009, c. 813; Acts 2009, c. 840.

Notes of Decisions (19)

West's Annotated Code of Virginia

Title 37.2. Behavioral Health and Developmental Services (Refs & Annos)

Subtitle III. Admissions and Dispositions

Chapter 9. Civil Commitment of Sexually Violent Predators (Refs & Annos)

VA Code Ann. § 37.2-903
Formerly cited as VA ST §37.1-70.4

§ 37.2-903. Database of prisoners convicted of sexually violent offenses; maintained by Department of Corrections; notice of pending release to CRC

Currentness

A. The Director shall establish and maintain a database of each prisoner in his custody who is (i) incarcerated for a sexually violent offense or (ii) serving or will serve concurrent or consecutive time for another offense in addition to time for a sexually violent offense. The database shall include the following information regarding each prisoner: (a) the prisoner's criminal record and (b) the prisoner's sentences and scheduled date of release. A prisoner who is serving or will serve concurrent or consecutive time for other offenses in addition to his time for a sexually violent offense, shall remain in the database until such time as he is released from the custody or supervision of the Department of Corrections or Virginia Parole Board for all of his charges. Prior to the initial assessment of a prisoner under subsection C, the Director shall order a national criminal history records check to be conducted on the prisoner.

B. Each month, the Director shall review the database and identify all such prisoners who are scheduled for release from prison within 10 months from the date of such review who receive a score of five or more on the Static-99 or a similar score on a comparable, scientifically validated instrument designated by the Commissioner, or a score of four on the Static-99 or a similar score on a comparable, scientifically validated instrument if the sexually violent offense mandating the prisoner's evaluation under this section was a violation of § 18.2-67.3 where the victim was under the age of 13 and suffered physical bodily injury and any of the following where the victim was under the age of 13: § 18.2-61, 18.2-67.1, or 18.2-67.2.

C. If the Director and the Commissioner agree that no specific scientifically validated instrument exists to measure the risk assessment of a prisoner, the prisoner may instead be screened by a licensed psychiatrist, licensed clinical psychologist, or a licensed mental health professional certified by the Board of Psychology as a sex offender treatment provider pursuant to § 54.1-3600 for an initial determination of whether or not the prisoner may meet the definition of a sexually violent predator.

D. Upon the identification of such prisoners, the Director shall forward their names, their scheduled dates of release, and copies of their files to the CRC for assessment.

Credits

Acts 2005, c. 716, eff. Oct. 1, 2005; Acts 2005, c. 914, eff. April 6, 2005. Amended by Acts 2006, c. 863; Acts 2006, c. 914; Acts 2007, c. 876; Acts 2009, c. 740; Acts 2010, c. 389.

Notes of Decisions (2)

Current through End of 2011 Regular Session and includes 2011 Sp. S. I, c. 1.

West's Annotated Code of Virginia

Title 37.2. Behavioral Health and Developmental Services (Refs & Annos)

Subtitle III. Admissions and Dispositions

Chapter 9. Civil Commitment of Sexually Violent Predators (Refs & Annos)

VA Code Ann. § 37.2-904
Formerly cited as VA ST § 37.1-70.5

§ 37.2-904. CRC assessment of prisoners or defendants eligible for commitment as sexually violent predators; mental health examination; recommendation

Currentness

A. Within 120 days of receiving notice from the Director pursuant to § 37. 2-903 regarding a prisoner who is in the database, or from a court referring a defendant pursuant to § 19.2-169.3, the CRC shall (i) complete its assessment of the prisoner or defendant for possible commitment pursuant to subsection B and (ii) forward its written recommendation regarding the prisoner or defendant to the Attorney General pursuant to subsection C.

B. CRC assessments of eligible prisoners or defendants shall include a mental health examination, including a personal interview, of the prisoner or defendant by a licensed psychiatrist or a licensed clinical psychologist who is designated by the Commissioner, skilled in the diagnosis and risk assessment of sex offenders, knowledgeable about the treatment of sex offenders, and not a member of the CRC. If the prisoner's or defendant's name was forwarded to the CRC based upon an evaluation by a licensed psychiatrist or licensed clinical psychologist, a different licensed psychiatrist or licensed clinical psychologist shall perform the examination for the CRC. The licensed psychiatrist or licensed clinical psychologist shall determine whether the prisoner or defendant is a sexually violent predator, as defined in § 37.2-900, and forward the results of this evaluation and any supporting documents to the CRC for its review.

The CRC assessment may be based on:

An actuarial evaluation, clinical evaluation, or any other information or evaluation determined by the CRC to be relevant, including but not limited to a review of (i) the prisoner's or defendant's institutional history and treatment record, if any; (ii) his criminal background; and (iii) any other factor that is relevant to the determination of whether he is a sexually violent predator.

C. Following the examination and review conducted pursuant to subsection B, the CRC shall recommend that the prisoner or defendant (i) be committed as a sexually violent predator pursuant to this chapter; (ii) not be committed, but be placed in a conditional release program as a less restrictive alternative; or (iii) not be committed because he does not meet the definition of a sexually violent predator. To assist the Attorney General in his review, the Department of Corrections, the CRC, and the psychiatrist or psychologist who conducts the mental health examination pursuant to this section shall provide the Attorney General with all evaluation reports, prisoner records, criminal records, medical files, and any other documentation relevant to determining whether a prisoner or defendant is a sexually violent predator.

D. Pursuant to clause (ii) of subsection C, the CRC may recommend that a prisoner or defendant enter a conditional release program if it finds that (i) he does not need inpatient treatment, but needs outpatient treatment and monitoring to prevent his condition from deteriorating to a degree that he would need inpatient treatment; (ii) appropriate outpatient supervision and

treatment are reasonably available; (iii) there is significant reason to believe that, if conditionally released, he would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety.

E. Notwithstanding any other provision of law, any mental health professional employed or appointed pursuant to subsection B or § 37.2-907 shall be permitted to copy and possess any presentence or postsentence reports and victim impact statements. The mental health professional shall not disseminate the contents of the reports or the actual reports to any person or entity and shall only utilize the reports for use in examinations, creating reports, and testifying in any proceedings pursuant to this article.

F. If the CRC deems it necessary to have the services of additional experts in order to complete its review of the prisoner or defendant, the Commissioner shall appoint such qualified experts as are needed.

Credits

Acts 2005, c. 716, eff. Oct. 1, 2005; Acts 2005, c. 914, eff. April 6, 2005. Amended by Acts 2006, c. 863; Acts 2006, c. 914; Acts 2007, c. 876; Acts 2009, c. 740; Acts 2011, c. 42.

Notes of Decisions (7)

Current through End of 2011 Regular Session and includes 2011 Sp. S. I, c. 1.

End of Document

West's Annotated Code of Virginia

Title 37.2. Behavioral Health and Developmental Services (Refs & Annos)

Subtitle III. Admissions and Dispositions

Chapter 9. Civil Commitment of Sexually Violent Predators (Refs & Annos)

VA Code Ann. § 37.2-907
Formerly cited as VA ST § 37.1-70.8

§ 37.2-907. Right to assistance of experts; compensation

Currentness

A. Upon a finding of probable cause the judge shall ascertain if the respondent is requesting expert assistance. If the respondent requests expert assistance and has not employed an expert at his own expense, the judge shall appoint such experts as he deems necessary. However, if the respondent refused to cooperate with the mental health examination required pursuant to § 37.2-904 or failed or refused to cooperate with a mental health examination following rescission of a refusal pursuant to § 37.2-906, any expert appointed to assist the respondent shall not be permitted to testify at trial nor shall any report of any such expert be admissible. Any expert employed or appointed pursuant to this section shall be a licensed psychiatrist or licensed clinical psychologist who is skilled in the diagnosis and risk assessment of sex offenders and knowledgeable about the treatment of sex offenders, and who is not a member of the CRC. Any expert employed or appointed pursuant to this section shall have reasonable access to all relevant medical and psychological records and reports pertaining to the respondent. No such expert shall be permitted to testify as a witness on behalf of the respondent unless that expert has prepared a written report detailing his findings and conclusions and has submitted his report, along with all supporting data, to the court, the Attorney General, and counsel for the respondent. Such report shall be submitted no less than 45 days prior to the trial of the matter unless a different time period is agreed to by the parties.

B. Each psychiatrist, psychologist, or other expert appointed by the court to render professional service pursuant to this chapter who is not regularly employed by the Commonwealth, except by the University of Virginia School of Medicine and the Virginia Commonwealth University School of Medicine, shall receive a reasonable fee for such service. The fee shall be determined in each instance by the court that appointed the expert, in accordance with guidelines established by the Supreme Court after consultation with the Department. The fee shall not exceed $5,000. However, in addition, if any such expert is required to appear as a witness in any hearing held pursuant to this chapter, he shall receive mileage and a fee of $750 for each day during which he is required to serve. An itemized account of expenses, duly sworn to, shall be presented to the court, and, when allowed, shall be certified to the Supreme Court for payment out of the state treasury, and shall be charged against the appropriations made to pay criminal charges. Allowance for the fee and for the per diem authorized shall also be made by order of the court, duly certified to the Supreme Court, for payment out of the appropriation to pay criminal charges.

Credits

Acts 2005, c. 716, eff. Oct. 1, 2005. Amended by Acts 2006, c. 863; Acts 2006, c. 914; Acts 2007, c. 876; Acts 2009, c. 740; Acts 2011, c. 42; Acts 2011, c. 446; Acts 2011, c. 448.

Notes of Decisions (3)

Current through End of 2011 Regular Session and includes 2011 Sp. S. I, c. 1.

Static-2002R Coding Form

STATIC-2002R CODING		
ITEMS	Raw Score	Subscore
AGE **1. Age at Release** 18 to 34.9 = 2 35 to 39.9 = 1 40 to 59.9 = 0 60 or older = -2		
PERSISTENCE OF SEXUAL OFFENDING **2. Prior Sentencing Occasions for Sexual Offences:** No prior sentencing dates for sexual offences = 0 1 = 1 2, 3 = 2 4 or more = 3		
3. Any Juvenile Arrest for a Sexual Offence and Convicted as an Adult for a Separate Sexual Offence: No arrest for a sexual offence prior to age 18 = 0 Arrest prior to age 18 and conviction after age 18 = 1		
4. Rate of Sexual Offending: Less than one sentencing occasion every 15 years = 0 One or more sentencing occasions every 15 years = 1		
Persistence Raw Score (subtotal of Sexual Offending) 0 = 0 1 = 1 2, 3 = 2 4, 5 = 3		
Persistence of Sexual Offending SUBSCORE		
DEVIANT SEXUAL INTERESTS **5. Any Sentencing Occasion For Non-contact Sex Offences:** No = 0 Yes = 1		
6. Any Male Victim: No = 0 Yes = 1		
7. Young, Unrelated Victims: Does not have two or more victims < 12, one of them unrelated = 0 Does have two or more victims < 12 years, one must be unrelated = 1		
Deviant Sexual Interest SUBSCORE		
RELATIONSHIP TO VICTIMS **8. Any Unrelated Victim:** No = 0 Yes = 1		
9. Any Stranger Victim: No = 0 Yes = 1		
Relationship to Victims SUBSCORE		

GENERAL CRIMINALITY **10. Any Prior Involvement with the Criminal Justice System** No = 0 Yes = 1		
11. Prior Sentencing Occasions For Anything: 0-2 prior sentencing occasions for anything = 0 3-13 prior sentencing occasions = 1 14 or more prior sentencing occasions = 2		
12. Any Community Supervision Violation: No = 0 Yes = 1		
13. Years Free Prior to Index Sex Offence: • More than 36 months free prior to committing the sexual offence that resulted in the index conviction AND more than 48 months free prior to index conviction = 0 • Less than 36 months free prior to committing the sexual offence that resulted in the index conviction OR less than 48 months free prior to conviction for index sex offence = 1		
14. Any Prior Non-sexual Violence Sentencing Occasion: No = 0 Yes = 1		
General Criminality raw score (subtotal General Criminality items) 0 = 0 1, 2 = 1 3, 4 = 2 5, 6 = 3		
General Criminality SUBSCORE		
TOTAL -2 to 13		

Score		Label for Risk Category
-2 through 2	=	Low
3, 4	=	Low-Moderate
5, 6	=	Moderate
7, 8	=	Moderate-High
9 plus	=	High

In The

Supreme Court of Virginia

RECORD NO. XXXXX

NAME CLIENT,

Petitioner – Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Respondent – Appellee.

AMENDED PETITION FOR APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF MATERIAL PROCEEDINGS BELOW

Prior to his trial under the Sexually Violent Predator Act, Va. Code § 37.2-900, *et seq.*, ("SVPA" or "Act"), Timothy CLIENT ("CLIENT") moved to dismiss on vagueness, due process, equal protection, double jeopardy, and *ex post facto* grounds. He also moved to exclude all evidence of scientific "risk assessment" and polygraph examinations. Except for explicit polygraph results, such evidence was admitted over CLIENT's objections. The court denied CLIENT's motion to strike, found him to be an SVP, and directed the Commissioner of Mental Health to prepare a report "suggesting possible alternatives to full commitment," pursuant to Va. Code § 37.2-908(C) (2005). The report of Dr. Steven Wolf was later admitted over CLIENT's objections. CLIENT sought to allocute in the form of a letter, which was excluded. *Respondent's Exhibit* (hereinafter *"RE"*) DDD. When technical problems with GPS monitoring at CLIENT's conditional release residence were raised, both experts testified that an on-site test would be material to the feasibility of conditional release. CLIENT unsuccessfully moved to reopen to allow for such a test. Full SVP commitment was ordered on October 5, 2006.

ASSIGNMENTS OF ERROR

1. The court erred in denying CLIENT's pretrial motions to dismiss because the Act violates due process and equal protection.

2. The court erred in denying CLIENT's motions to dismiss because the Act violates the constitutional prohibitions against double jeopardy and *ex post facto* laws.

3. The admission of expert and scientific risk assessment evidence was erroneous.

4. The court erred in admitting evidence relating to polygraph examinations.

5. The court erred in finding that CLIENT is an SVP.

6. The court erred in refusing to permit CLIENT to allocute personally.

7. The court erred in accepting the report of Dr. Wolf.

8. The court erred in directing full custodial commitment rather than conditional release.

9. The court erred in denying CLIENT's motion to reopen.

QUESTIONS PRESENTED

1. Is the Act impermissibly vague? (Assignment 1)

2. Does the Act deny due process and equal protection of the law? (Assignment 1)

3. Does the Act violate double jeopardy and the *Ex Post Facto* Clause? (Assignment 2)

4. Did admission of expert and scientific evidence to predict CLIENT's likelihood of re-offending violate due process and equal protection? (Assignment 3)

5. Should all polygraph evidence have been excluded? (Assignment 4)

6. Was the evidence sufficient to prove that CLIENT is an SVP? (Assignment 5)

7. Did the court err by refusing to permit CLIENT to allocute? (Assignment 6)

8. Did the court err in accepting the report of Dr. Wolf? (Assignment 7)

9. Was the evidence sufficient to support the court's determination that full custodial commitment, rather than conditional release, was necessary? (Assignment 8)

10. Did the court err in denying CLIENT's motion to reopen? (Assignment 9)

STATEMENT OF FACTS

I. Offense History

CLIENT, 34, is a pedophile whose sexual interest is in young boys. Until his incarceration in 1997, CLIENT "repeatedly place[d] himself in situations where he [would] have access to" young boys. *Petitioner's Exhibit* (hereinafter "*PE*") 22 at 2. (*e.g.*, working at Chuck E. Cheese; offering rides on his moped). He often isolated his victims, away from other adults. According to a "non-deceptive," "full disclosure" polygraph, CLIENT acknowledged touching sixteen children and "grooming" (*i.e.*, developing a relationship that may lead to sexual activity) another ten. *See RE* F. He

admitted stealing items of clothing for masturbation from approximately five victims and "peeping" on one occasion. *See id.* Seven of these acts have resulted in convictions.[1]

In 1992, while at a party, CLIENT asked a six-year-old boy to join him to watch a movie, covered himself and the boy with a blanket, and fondled the boy's genitals through his clothing. In 1996, the boy's family reported the incident, and CLIENT was convicted of aggravated sexual battery. He received 6 ½ years in prison, with 5 suspended. Also in 1992, CLIENT was convicted in Prince William County of misdemeanor sexual battery and sentenced to 12 months probation for pulling down the pants of a six-year-old boy (whom he had previously molested) and fondling his penis. He violated probation with new charges and technical violations. After the Prince William victim moved to CLIENT's neighborhood, CLIENT spoke with him and another boy, whom he later revealed he had also previously molested. CLIENT was convicted of two counts of stalking and sentenced to 5 years probation, which he violated three times due to home electronic monitoring violations and prohibited communications with young boys. In 1997, CLIENT was convicted of breaking and entering with intent to defile in Arlington after he snuck into his counselor's home and was found kneeling over an eight-year old boy who was sleeping on the couch. He received 15 years, 10 suspended, and has served 5. The 5 suspended years in Warren County were then also executed.

II. Response to Supervision

CLIENT repeatedly violated probation, through technical violations and grooming behavior. Each time, CLIENT was incarcerated briefly and new conditions were imposed, including treatment. When accused, CLIENT would frequently offer

[1] As a juvenile (ages 14 and 15), CLIENT was convicted of unlawful entry on three occasions for entering the homes of friends in the middle of the night. *See PE* 11 at 6. At the time, no sexual component was suspected. *See id.*

innocent explanations for his behavior. He has acknowledged that he was in denial about his sexual preference and the nature of his offenses, which resulted in repeated supervision failures.

III. Treatment History

At six, CLIENT was diagnosed with learning disabilities. He received psychological treatment as a teen after his convictions for unlawful entry, but sexual issues were not suspected or addressed. During college, CLIENT began treatment with Dr. Chapman who diagnosed ADHD and prescribed Cylert and then Adderal. While incarcerated, he was switched to Ritalin, and in 2004 began taking Paxil, an anti-depressant. In 1993, CLIENT was ordered into treatment at The Augustus Institute, which consisted of group and individual therapy focused on his offense behaviors and the underlying cause(s).

In prison, CLIENT received more intensive treatment in the Sex Offender Residential Treatment (SORT) program. At first, he did not complete all assignments nor attend all meetings. He once engaged in what authorities viewed as inchoate grooming behavior by writing to "Child Rescue International" to sponsor a child in Romania, using a return address of "CLIENT Enterprises" at his father's home. As a result, CLIENT was terminated from SORT after staff determined that his behavioral pattern was to

> act in some inappropriate manner . . . attempt to justify his actions . . . debate often over minute details . . . appeal until he exhaust [sic] all avenues . . . [and then] apologize specifically for his wrongdoing because he sees this as his only way to keep himself out of more trouble while not clearly understanding how his choices earned him such sanctions.

Transcript ("*TR*") 5/9/06 at 164. CLIENT was then sent to Buckingham, where he volunteered for the Sex Offender Awareness Program (SOAP), and eventually earned a recommendation for re-admission to SORT. "SORT staff found CLIENT to

have significantly improved in his level of commitment . . . and participation. . . . " *RE* K at 12. Dr. Lisa Magazine reported that as of May, 2005, CLIENT had not finished a Relapse Prevention Plan, was still in the process of completing the four-stage "Cycle of Offending Recognition" portion of the program,[2] and had not fully disclosed his offense history.[3] She noted that "historically" CLIENT had not turned in assignments on time, for which he received a final warning in March, 2006. In group sessions, CLIENT rejected the labels "pedophile" and "sex offender" and offered conflicting information regarding his sexual orientation and offense behavior, but he did admit an attraction to pre-pubescent males, and he articulated a commitment to refrain from further offenses.[4] Overall, Dr. Magazine characterized CLIENT's participation in SORT as "good." *TR* 5/9/06 at 190. CLIENT had seven rules-related infractions in nearly nine years in custody (*e.g.*, he was fired from his job in the kitchen for failing to wear plastic gloves). As the trial judge concluded, "none of these were of a serious nature." *Order*, 10/5/06 at 7.

IV. Evaluation and Risk Assessment

In July, 2005, Dr. Evan Nelson diagnosed CLIENT with "pedophilia, which makes him likely to engage in sexually violent acts." *PE* 9 at 17. Dr. Ronald Boggio, the defense expert, agreed, adding that CLIENT is "less able than others who meet the clinical criteria for pedophilia to refrain from acting on his sexual impulses." *RE* K at 15.

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[2] CLIENT did complete a "Relapse Prevention Group," scoring a 92 on the final exam on March 24, 2005. *See RE* G.

[3] SORT records indicate that CLIENT passed a "full disclosure" polygraph in March, 2006.

[4] In one SORT assignment, CLIENT wrote, "I think my God, what was I thinking, what was I doing? After completing this [assignment] in retrospect I was and am glad to do this. Looking upon it and foretold it was like a cancer and old festering inside of me." *RE* F.

The court found that CLIENT's pedophilia was a "mental abnormality" within the meaning of Va. Code § 37.2-900 (2005), causing him to find "it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts."

Both experts evaluated CLIENT using the RRASOR and Static-99 risk assessment tools, which are scored using "static" (unchanging) factors. Both gave CLIENT a four on the RRASOR, assigning points for previous sex offenses and for unrelated, male victims. In an oft-cited meta-analysis of 28,972 sex offenders, 32.7% of those released with RRASOR scores of 4 were rearrested or reconvicted for a sexual offense within 5 years.[5] Both experts agreed that CLIENT posed a risk of re-offense, but that supervised release under strict conditions would be appropriate. *See PE* 9 at 17; *RE* K at 15. They differed mainly in their willingness to render opinions conforming to the Act's definitions.

At the pretrial motions hearing, Dr. Boggio analyzed the question the experts *and* the trier-of-fact are called upon to answer: whether or not the respondent "meets the criteria" of being an SVP under the Code. *See TR* 5/3/06 at 37. He pointed out that the term "mental abnormality" does not exist in the Diagnostic and Statistic Manual (DSM-IV). The phrase "difficult to control," he explained, can "obviously mean different things in different circumstances," because "[t]here is not a universally agreed upon definition." *TR* 5/3/06 at 40. The vagueness of the term, he testified, means that one is left to "determine it[s] meaning for [one]self," *id.* at 41—the antithesis of the scientific method.

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[5] The outcomes of the "arrests" used in the studies are unknown, and the "sexual offense" category includes many crimes that would not be a "sexually violent offense" under the SVPA. *See* Hanson & Bussiere, *Predicting Relapse: A meta-analysis of Sexual Offender Recidivism Studies*, 66 J. CONS. CLIN. PSYCH. 2, 348-362 (1998) ("*Preventing Relapse*").

Without operational definitions,[6] there is no way to know if two experts' understandings of "difficult" would represent "the same test or threshold." *Id.* at 43-44.

The "difficult[y]" referred to in the Act is in controlling "predatory behavior," which also lacks operational meaning. *See TR* 5/3/06 at 45. Thus, Dr. Boggio testified, "an opinion that [he] might have would be in a sense no different than anyone else's," *i.e.*, "a non-expert opinion." *Id.* at 47. He also addressed the term "likely" which appears in the statutory phrases "likely to engage in sexually violent acts" and "so likely to commit sexually violent offenses." Neither of these phrases is operationalized. Dr. Boggio explained that, to a scientist, "likely" is "vague because no thresholds are established for what that means." *Id.* at 50. The construct "'so likely to commit,'" he cautioned, "calls for a lot of variation in judgment about what point do you draw the line and say this is so likely versus less likely." *Id.* at 52. He identified an even graver ambiguity in the phrase "menace to the health and safety of others": there is simply no definition of the term "menace" upon which experts can agree. *See id.* at 56-57.

Dr. Boggio also pointed to the Act's failure to identify the context in which a subject's likelihood to re-offend should be evaluated. *See TR* 5/10/06 560-67:

> It is important . . . to determine *specific risk factors under specific conditions/ environments.* A continuum . . . exists under which his risk might be either mitigated or enhanced . . . . [from] continued confinement . . . with absolutely no contact with children. . . . [to] unsupervised release without treatment into a community densely populated with children.

RE K at 16. Dr. Boggio concluded that the SVP definition is so "vague in terms of any . . . attempt that one would make to quantify it," that he could not offer an expert opinion on the ultimate question whether CLIENT is an SVP. *TR 5/3/06* at 53, 209.

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[6] An "operational definition" is a process by which the thing being defined can be reliably measured and classified using concrete, specific, and agreed-upon criteria.

V. SVP Determination

At trial, Dr. Boggio did offer a risk assessment of CLIENT consistent with his views regarding the limitations of psychological science. Dr. Boggio opined that CLIENT's risk of re-offense could be minimized by

> . . . a program of outpatient supervision and treatment including a specific combination of services and safeguards designed to significantly mitigate the risk of re-offense. . . . [which] is available . . . through the Virginia Serious and Violent Offender Re-Entry (VASAVOR) Initiative. There is good reason to believe that such a program could substantially reduce the risk of re-offense for CLIENT.

RE K at 16. Dr. Boggio testified that for each risk factor, "there are safeguards and treatments that can be offered in a programmatic and safe way within the community." *TR* 5/10/06 at 566.[7] Dr. Nelson offered a similar view of the importance of context in assessing risk: "relapse prevention techniques within the community could help to reduce his risk of recidivism" *id.* at 343; data from studies "indicates that the more often people are supervised the less likely they are to be rearrested." *Id.* at 350.

Dr. Nelson also acknowledged that his opinions were not based upon any quantitative assessment of "likelihood." When asked to assume that the statutory term "likely" means "more likely than not," he testified that making such a quantified prediction "wouldn't be a reasonable thing from the science for [me] to do." *Id.* at 378. He acknowledged that he could not "defend a number" (*i.e.*, a particular percentage or range of percentages applicable to the risk that CLIENT might re-offend), and that relying on data he *could* quantify, "in that instance this individual would not meet [the]

[7] The Commonwealth offered no evidence to rebut Dr. Boggio' testimony regarding the issues raised in CLIENT's pretrial motions. Nor did Dr. Nelson's testimony at trial materially differ, on these points, from Dr. Boggio's in regard to the limitations of expert testimony under the SVPA. *See TR* 5/3/06 at 235; *TR* 5/9/06 at 378-82.

criteria because at this point in time, while his risk . . . at some point in the indefinite future would cross that fifty percent rate, perhaps, I am not able to tell you that for a fact." *Id.* at 387.

VI. Conditional Release

The experts agreed that a program of intensive community supervision and treatment could be appropriately fashioned to allow conditional release under Va. Code §§ 37.2-908 (2006) and 37.2-912 (2006). Before the Petition was filed, CLIENT had already been slated to enter VASAVOR, a unique public-private partnership offering intensive and multi-faceted supervision and treatment. *See TR* 5/9/06 at 76; *RE* B. Upon release, CLIENT would be placed in this program regardless of his classification as an SVP. *TR* 5/9/06 at 81-82. He would be subject to the constraints of VASAVOR and the Sex Offender Containment Model, which include, among other restrictions, curfew, treatment, close supervision, and GPS monitoring. He would also be subject to standard probation and parole conditions dictated by Va. Code § 53.1-136, *RE* A, as well as special conditions pertaining to his post-release/mandatory release orders and his split sentences from Arlington and Warren counties. Those conditions include (a) no use of illegal substances, (b) participation in mental health counseling and vocational rehabilitation as required by his probation officer, (c) drug screening through urinalysis, as directed; (d) completion of sex offender treatment as directed by his probation officer; (e) no contact with victims; and (f) no unsupervised contact with anyone under 18. *See RE* A.

Dr. Boggio provided a condition-by-condition analysis of a conditional release plan rooted in VASAVOR, which he believes would provide a "menu" of "effective" tools and methods to address those re-offense issues that CLIENT would be expected to

face if released. *TR* 8/4/06 at 232-302. According to Dr. Boggio, "this Conditional Release Plan, if it is able to be fully implemented as has been discussed with all the VASAVOR elements and the Sex Offender Containment Model, will substantially reduce CLIENT's risk of . . . committing another sexual offense." *Id.* at 300-01. Dr. Nelson's report also suggested that a rigorous conditional release plan would be appropriate:

> In theory, he is an excellent candidate for community supervision because one would expect him to have the psychological wherewithal to comply with the restrictions and requirements . . . . [T]echnical advances and savvy about sex offender supervision have increased markedly since CLIENT was last in the community. In my opinion, outpatient commitment should be considered but the plan will need to be extremely intensive for monitoring his movements and contacts with children, and absent almost total control over this variable he would need inpatient commitment.

PE 11 at 17.

Dr. Steven Wolf prepared a report containing standardized terms for conditional release. When asked if conditional release was appropriate in this case, Dr. Wolf stated that if the objective of conditional release is to maximize the opportunity for the offender to remain offense-free, then "a good plan is appropriate." *TR* 8/4/06 at 76. Despite reservations, Dr. Wolf stated:

> The information I have at this time suggests that this may be the window of opportunity. In talking with Dr. Nelson and Dr. Boggio, it is their opinion that he has made some progress and that they believe that . . . if there is a time in his life when he can be successful, this may be the window. This may be it.

Id. at 77.

Four witnesses testified about the VASAVOR program generally and as it would be applied to CLIENT. Mario Woodard, the Special Programs Director for Virginia DOC, provided the following testimony, *see TR* 5/9/06 306-27, regarding VASAVOR:

- The program calls for early identification, assessment, treatment, and supervision planning by a number of collaborative local and state agencies including the local community services boards, the Northern Virginia Work Force Investment Board, the Probation and Parole Office, OAR, the Sheriff, and private vendors to fill in any gaps in supervision, substance abuse treatment, and ancillary services.

- Offenders come under intensive supervision until they either exhibit appropriate pro-social behavior, or return to the courts on a new offense or violation.

- The program has contracts with sex offender treatment providers to perform treatment, assessment, education, and polygraphy, which are also parts of the Sex Offender Containment Model. Group treatment is utilized, imposing external controls and helping develop internal controls as well.

- Of a group of similar offenders released from DOC in 1998 and 1999 approximately 15% have been re-incarcerated for a new offense, compared to only 1.9% of VASAVOR participants returned to DOC for a new felony offense.

- In 9 years, in 9 sites, and more than 1000 participants, only 1% of those in the Sex Offender Containment Model have been re-arrested for a new sexual offense.

Don Needels of Fairfax Probation and Parole testified, *see TR* 6/29/06 at 224-60, that

- Upon his "release," CLIENT would be held at the Fairfax ADC for 45 days where (during the first 72 hours) he would be evaluated for post-release mental health and sex offender treatment and would participate in "Thinking Straight."

- The conditions placed upon CLIENT by the program are in addition to any conditions imposed by the court or other competent authority.

- CLIENT would be subject to both active and passive GPS Monitoring (minute-by-minute, as well as a once-daily review of all movements)[8] which provides notification if the subject approaches problem areas such as schools, playgrounds, or other locations where children are known to gather.

- CLIENT would be seen at least once a week, probably twice a week, for the first several months. He would meet with the various program coordinators on a more frequent basis until it is decided that he is stable and compliant.

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[8] Just prior to and at the final hearing on conditional release, it was suggested by another probation officer, Thomas Quinn, that the GPS system would not work at the Kennedy Shelter where CLIENT was to be housed if released. On cross-examination, however, Mr. Quinn admitted that no test had been performed and that he did not, in fact, know whether it would work or not. CLIENT sought to arrange an "on-site" diagnostic test of the technology—and filed a motion to reopen the hearing in order to do so—but the court sustained the Commonwealth's opposition to such an experiment, without explanation. *See* Motion for Consideration of Reopening Record.

- Within 72 hours of his release from the ADC, CLIENT would meet with a certified sex offender treatment provider, for preparation of an individual treatment plan, and would immediately begin mandatory participation in a weekly, one-and-one-half hour sex offender group therapy session, which continue for 12-18 months.

- CLIENT would be required to meet with the VASAVOR job coordinator, for skills assessment within the first 2-3 days of his release from the ADC.

- CLIENT has already been accepted for residency at the Kennedy Shelter, located on the property of Ft. Belvoir. This would be a *bed-to-bed* transfer, so he would remain at the detention center until a bed became available. However, the shelter "bends over backward" to accommodate VASAVOR participants.

- At the shelter, CLIENT would have "24/7" access to Mike Stein, the program therapist and, if an immediate need arises, to Dr. Faisal Awadelkarim, the program psychiatrist, as well a case manager to address emergent issues.

- There is "constant supervision" at the shelter, monitoring all resident movements.

- The general curfew at the shelter is 9:30 p.m., CLIENT's curfew would be 7:30 p.m.

- There would be virtually no tolerance even for "technical" violations – CLIENT would be arrested immediately for any rule violation.

- Mr. Needels (or another officer supervising CLIENT) would see to it that Probation could arrest CLIENT on a violation without first seeking judicial approval.

Heather Venner, Program Coordinator, and Mouly Aloumouati, Job Coordinator, stated:

- The Kennedy Shelter, at Ft. Belvoir, houses sex offenders and bars children.

- If CLIENT is not there when he should be, someone is notified immediately. A violation of shelter rules (including curfew) is also a violation of the conditions of release, subjecting the subject to immediate arrest.

- When CLIENT is given a "lead," that job is available to him immediately, and he would be expected to obtain work within 30 days. If not, then Mr. Aloumouati attends the interviews as well. The employment rate for the program is 95%.

- Employment placements must be approved by Probation and are in locations appropriate to the specific offense (*i.e.*, with no access whatsoever to children)

See id. at 260-97.

Dr. Nelson testified that "if all these pieces are in . . . this sounds like a plan that could be reasonably expected to control his risk and protect the public safety at this level of risk for the first stage of conditional release," and that CLIENT would have "a likelihood of success on an initial release plan with the level of structure that we are discussing." *Id.* at 213. He also expressed some remaining concerns, *see TR* 8/4/06 at 167:

> [T]here is still ambiguity about whether he is truly accepted at the shelter and whether or not the shelter can work appropriately with the GPS system and I still haven't heard clear evidence yet about how we are going to handle CLIENT's mobility to get to work and to other appointments. If those details are not nailed down then in my opinion conditional release right now would not be appropriate.

At the conclusion of the hearing, Judge Hupp voiced great ambivalence, noting the need to weigh the "vital, vital" concern for public safety with the evidence that there are "devices out there now that we didn't have even just a few years ago that perhaps could justify conditional release." *Id.* at 364. Ultimately, he ordered full commitment because he had "little confidence that CLIENT will be able to comply with the conditions of that program at this time," thus he "presents an undue risk to public safety."

ARGUMENT

I. THE SVPA IS UNCONSTITUTIONALLY VAGUE AND VIOLATES DUE PROCESS AND EQUAL PROTECTION.

The legal and forensic methods employed to classify an offender like CLIENT as an SVP are insufficiently specific, accurate, scientific, and reliable to distinguish CLIENT from the "ordinary" sex offender and to justify confining him indefinitely.

A. The Statutory Definition of an SVP Is Impermissibly Vague.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Due

process requires laws with sufficient standards to prevent arbitrary or discriminatory enforcement by the executive or unjustly disparate application by judges and juries. *Chicago v. Morales*, 527 U.S. 41, 56-56 (1991); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (legislative guidelines required to prevent "arbitrary and discriminatory enforcement"). The most important aspect of vagueness doctrine is "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 358. *See Papachristou v. Jacksonville*, 405 U.S. 156, 167-71 (1972) (vagrancy law permitted unfettered discretion in enforcement). The Act defines a "sexually violent predator" as:

> any person who (i) has been convicted of a sexually violent offense . . . and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.
>
> "Mental abnormality" or "personality disorder" means a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others.

Va. Code § 37.2-900 (2005). Viewed in combination, these provisions produce an compound definition: an SVP has (1) a **mental abnormality** or **personality disorder** (2) that affects his **emotional or volitional capacity** (3) so that the person **"finds it difficult to control"** (4) his "**predatory behavior**" (5) which makes him "**likely to engage**" (6) in "**sexually violent acts**" (7) and "**so likely to commit**" (8) "sexually violent offenses" (9) that he "**constitutes a menace** to the health and safety of others."

In view of the weakness and inaccuracy of contemporary forensic methods for predicting recidivism, the lack of a more precise and measurable definition of an SVP must inevitably lead to unreliable, widely disparate, and arbitrary applications of the SVP determination and, consequently, the indefinite confinement of many offenders who pose no greater threat of recidivism than similarly-situated offenders not committed. As Dr.

Boggio testified, the highlighted terms are largely devoid of specific, definite, or agreed-upon psychological meaning; they require sensitive value-judgments about which experts, judges, and jurors are likely to have widely differing personal views.

For example, just how "difficult" must the offender find it to control his "predatory behavior?" What constitutes "predatory behavior?" What is "emotional or volitional capacity?" As one commentator (a strong supporter of SVP statutes) has written,

> [T]he question of how much volition warrants civil confinement is impossible to answer. Legal and psychiatric commentators generally agree that whether a person is able to control his impulses is almost impossible to know. One legal commentator has stated: "There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred ... Whatever the precise terms of the volitional test, the question is unanswerable--or can be answered only by 'moral guesses.'" [quoting H.R. NO. 98-1030, 98th Cong., 1st Sess. (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3408-09 (quoting Professor Richard Bonnie)]. Additionally, the volitional test for criminal insanity has proved to be impossible to implement and has been abandoned in criminal cases. A coalition of state attorneys general has argued that implementation of a similar standard in the context of civil confinement laws would be similarly futile.[9]

How *likely* does the threat of re-offense have to be for it to be sufficiently "likely?" Does "likely" mean *more likely than not*? May different jurors, judges, or experts choose their own preferred level of *likelihood*? In what context is the likelihood of further crimes to be considered? In prison, where the SVP resides with no access to children? At large, without any supervision, treatment, or job or housing assistance? Under parole or probation supervision? Or under even tighter controls, treatment programs, and work and housing assistance, as in VASAVOR? Over what period of time is the *likelihood* to be measured? One year? Five years? Ten years? A lifetime? What

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[9] Lee, *How Little Control? Volition and the Civil Confinement of Sexually Violent Predators (Case Note)*, HARVARD J. OF LAW & PUB. POLICY (Winter 2003) (citations omitted).

level of risk is required to constitute "a **menace** to the health and safety of others"? Is a low probability of a very serious offense menacing enough? A high probability of a less egregious crime? One expert, juror, or judge may find that someone with *any* difficulty controlling his impulses, and therefore presenting *the remotest* likelihood of re-offending, would be such a "menace," whereas another expert, juror, or judge might feel that only one who finds it *impossible* to resist such impulses constitutes a "menace." The imponderable quality of the SVP definition would permit a jury verdict that the accused *is* or *is not* an SVP on the basis of seven materially different understandings of what an SVP *is*.

Balancing the impulse to incapacitate every sex offender against the injustice of incarcerating some sex offenders who would not recidivate calls for the delicate weighing of competing values and public policies, a task within the sole province of the legislative branch. "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *Morales*, 527 U.S. at 60. The defect in the SVPA is similar to that in the provision before the court in *Connally v. General Constr. Co.*, 269 U.S. 385 (1926), where the terms "neighborhood" and "locality" were deemed too ambiguous. "[B]oth terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Id.* at 395. Just as the indefinite meaning of the word "annoy" fatally infected the ordinance in *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971), which prohibited people from "conducting themselves in a manner annoying to persons passing by," the amorphous quality of the

terms comprising Virginia's SVP definition render the Act unconstitutionally vague.[10]

B. The Lack of a Valid and Reliable Basis for Predicting Future Sexually Violent Offenses Violates Due Process and Equal Protection.

Although this Court rejected a constitutional challenge against Virginia's SVPA in *Shivaee v. Commonwealth*, *supra*, it has not yet considered the implications of the weaknesses of scientific methods for predicting which individuals will re-offend. The Act runs afoul of due process and equal protection because the means for predicting whether a particular sex offender will commit future sex crimes are neither suited to the class of "sexually violent offenses" used in the Act, nor sufficiently reliable to justify an indefinite deprivation of liberty.

1. The SVPA is Subject to Strict Judicial Scrutiny.

Because it impinges upon an offender's fundamental liberty interest, the SVPA is subject to strict scrutiny under both the Due Process and Equal Protection Clauses. Because involuntary commitment for any purpose "entails 'a massive curtailment of liberty,'" *Jenkins v. Director*, 271 Va. 4, 15, 624 S.E.2d 453, 459 (2006) (quoting *Vitek v. Jones*, 445 U.S. 480, 491-492 (1980)), "an individual who is the subject of a proceeding under [the SVPA] has a substantial liberty interest in avoiding confinement," which requires due process protection. *Ibid.* The SVPA targets only sex offenders—only those suffering from "a mental abnormality or personality disorder" in particular—for involuntary commitment. Because psychologically-impaired sex offenders are such an insular and powerless minority,

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[10] Neither *Kansas v. Hendricks*, 521 U.S. 346 (1997) nor *Kansas v. Crane*, 534 U.S. 407 (2002) addressed claims of vagueness, equal protection, or the reliability of predictions of recidivism. In *Shivaee v. Commonwealth*, 270 Va. 112, 613 S.E.2d 570 (2005), this Court rejected a "strained attempt" to assert the vagueness of a "portion" of the SVP definition, which the appellant attacked out of "context" and only "hypothetically." ("Significantly, even under the multiple and strained interpretations Butler tries to give the statute, he does not argue that his conduct fails to be reached.") 270 Va. at 124-25.

and the indefinite detention imposed on offenders under the Act implicates such a fundamental right, the Act is also subject to strict scrutiny under the Equal Protection Clause. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).[11]

State laws cannot satisfy strict scrutiny "unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). A law is narrowly tailored if it employs the least restrictive means to achieve its goal, *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) and a clear evidentiary nexus between the government's compelling interest and the classification. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

2. Current Measures Lack Fit, Accuracy, and Reliability in Predicting Who Will Commit Sexually Violent Offenses in the Future.

The SVPA cannot withstand strict scrutiny, nor can it satisfy the test laid down in *Kansas v. Crane*, 534 U.S. 407 (2002), and *Kansas v. Hendricks*, 521 U.S. 346 (1997), that (1) "the confinement takes place pursuant to proper procedures and evidentiary standards" and (2) there is a strong evidentiary nexus between a compelling state interest and the statutory mechanism. *Id.* at 358. The Act falls short of achieving the "constitutional[ly] important[t] [goal] of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'" *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 360). The record demonstrates that the SVP definition—and the legal, scientific, and forensic methods employed under the Act—are neither

[11] The Commonwealth conceded below that the "restraint on the Respondent's liberty is a fundamental right and therefore justifies the use of the strict scrutiny" standard of review, so that the Act cannot be upheld "unless the infringement is narrowly tailored to serve a compelling state interest." *Petitioner's Response to Respondent's Motion to Dismiss*, at 2.

specific, accurate, nor reliable enough to assure that mental health experts, judges, and jurors can dependably identify and isolate those particular offenders who will re-offend unless deprived of their liberty indefinitely. "That distinction is necessary," *Crane* teaches, "lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment." *Ibid.*

In order to survive strict scrutiny, the Commonwealth's chosen mechanism must be truly capable of making that *necessary distinction* with a high degree of accuracy and reliability. To make that distinction requires, in turn, a demonstration of four very questionable propositions: "(a) the probability of **dangerousness is susceptible of measure** (*i.e.*, can be operationally defined), (b) there is a way to **discriminate between predictions of higher and lower probability**, (c) there are **standards** that allow commitments based on the former while excluding confinement based on the latter, and (d) these **standards are, in fact, enforced.**"[12] The Act relies upon the unproven assumption that mental health consultants, judges, and juries are each capable of fulfilling these propositions and reaching an accurate and dependable conclusion about whether a given offender will commit new sexual offenses.

Predictions of recidivism are typically derived from one of three distinct methods: (1) clinical judgment; (2) actuarial, sometimes called "statistical" or "mechanistic" ("ARA"); and "adjusted" or "guided" clinical risk assessment ("GCRA"). "In the clinical method the decision-maker combines or processes information in his or her head. In the actuarial or statistical method the human judge is eliminated and conclusions rest solely on empirically established relations between data and the condition or event of

[12] Janus & Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, AMERICAN CRIMINAL LAW REVIEW, Vol. 40, p. 12 (2003) ("*Forensic Use*") (emphasis added).

interest."[13] ARA "is empirical and quantitative. To be truly actuarial, interpretations must be both automatic (that is, pre-specified, standardized, or routinized) and based on empirically established relations." *Id.* In the GCRA approach, the investigator "adjusts" ARA scales in her head, using traditional clinical judgment.

The evidence of scientific research, commentary, and studies introduced by CLIENT in support of his motions shows that none of these methods—no currently available tools for the prediction of sexual recidivism—is capable of providing an accurate and reliable measure of the chances that a given individual will actually commit an act of sexual violence in the future.[14] Following a lengthy survey pertaining to recidivism assessment, the Virginia Criminal Sentencing Commission has concluded that "there are no standards or universal criteria for conducting recidivism research."[15]

> Investigation of recidivism has occurred in a variety of settings on a wide array of sex offender populations. Researchers in the field have not adopted a uniform measure for differentiating recidivists and non-recidivists. . . . [T]he extent of sex offender recidivism detected across research studies varies considerably.

Ibid. Of the diverse definitions of "sexual recidivism" in the literature, *none of them* matches Virginia's class of "sexually violent offenses." *See TR* 5/3/06 at 64-68, 72; TR 5/9/06 at 336-37; *see also Assessing Risk*, at 17. "Because there are no standards or uniform practices for studying recidivism among sex offenders, it is difficult to directly compare studies in this field to one another." *Assessing Risk* at 16. Due to the

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[13] Dawes *et al.*, *Clinical Versus Actuarial Judgment*, 243 SCIENCE 1668, 1668 (1989). The SVPA process is, itself, essentially a form of "clinical assessment": judges or jurors hear evidence (often competing analyses by opposing experts) and argument by attorneys in an adversarial context; then through an opaque and largely unconstrained deliberative process, they reach "clinical judgments" of their own.

[14] *See, e.g., TR* 3/9/06 at 400 (testimony of Dr. Nelson).

[15] *Assessing Risk Among Sex Offenders in Virginia*, Virginia Sentencing Commission (Jan. 2001) (*"Assessing Risk"*) at 15.

unoperationalized nature of the Act's definitions, there is no way to assure that one expert's or judge's or juror's understanding of the definition will "fit" with another's.

Furthermore, study after study has demonstrated that, when relying on clinical judgment (as Dr. Nelson largely did), expert clinicians correctly predict sexual recidivism only slightly better than chance."[16] At least one study found that laypersons actually *outperformed* experts in predicting future crimes.[17]

> When relying on unaided clinical judgment (UCJ)—making predictions of future violence based on idiosyncratic impressions obtained from interview and test data—the performance of psychologists and psychiatrists is abysmal. Monahan's (1978) review of the accumulated literature reported the rate of error associated with attempts at predicting future violence ranged from 54 to 94%. In this same review, Monahan indicated that the majority of studies reported an error rate of 80% or more when attempting to predict future violence. A subsequent review by Monahan (1981b) concluded that mental health professionals are: "accurate in no more than one out of three predictions of violent behavior over a several year period among institutionalized populations that have both committed violence in the past (and thus had high base rates for it) and who were diagnosed as mentally ill" (p. 14). In 1984, Scopp and Quattrochi further reviewed the accuracy of UCJ in predicting violence. They emphasized:

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[16] *Predicting Relapse, supra.* Hanson and Bussiere (1998) found an average correlation of only .10 for predictions of sex offender recidivism using clinical judgment. *See also* Barbaree *et al., Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders*, 28.CRIM JUST. AND BEHAV. 490, 492 (2000); Monahan *et al.*, Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence (2001); Grove *et al., Clinical Versus Mechanical Prediction: A Meta-Analysis*, 12 PSYCHOL. ASSESSMENT 19, 19 (2000); Dawes, House of Cards: Psychology and Psychotherapy Built on Myth, (1994); Grove & Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y. & L. 293-323 (1996); Janus & Meehl, *Assessing the Legal Standard, supra*; Swets, *et al., Psychological Science Can Improve Diagnostic Decisions*, 1 PSYCHOL. SCI. 1-26 (2000); Faust & Ziskin, *The Expert Witness in Psychology and Psychiatry*, 241 SCIENCE 501-511 (1988); Dawes, *et al., A Handbook for Data Analysis, supra*; Ziskin & Faust, Coping with Psychiatric and Psychological Testimony, (4th ed. 1988); Meehl, Clinical Versus Statistical Prediction: A Theoretical Analysis and a Review of the Evidence (1954).

[17] *See Offender Risk Assessment*, John Howard Society of Alberta (2000), citing Menzies, *et al., The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence*, LAW AND HUMAN BEHAVIOR, 18(1), 1-28 (1994).

> A rather large and consistent body of empirical evidence indicates that the standards of the profession include no ability to accurately predict dangerous behavior. Not only have psychologists and psychiatrists been unable to predict dangerousness to a degree of accuracy which would justify infringing on a client's rights, they have been unable to predict any more accurately than nonprofessionals.[18]

As both expert witnesses testified, there are simply *no studies* that demonstrate a high degree of accuracy for sex offender recidivism predictions on the basis of clinical judgment, even when "adjusted." *See TR* 5/9/06 at 401-402; *TR* 5/10/06 at 559. Even if there were, we would still not know the reliability of the predictions of individual clinicians. *See TR* 5/9/06 at 397-403; *TR* 5/10/06 at 558-59.

> The clinician's brain is functioning as merely a poor substitute for an explicit regression equation or actuarial table. Humans simply cannot assign optimal weights to variables, and they are not consistent in applying their own weights.[19]

Errors can include but are not limited to "confirmatory bias," or seeking evidence that supports one's hypothesis while ignoring or avoiding inconsistent evidence.[20] Because the critical steps in a clinical assessment reside in the clinician's head, such errors may be difficult to expose through the normal tools of cross-examination. When there is a dispute between clinicians, the fact-finder is left with a simple credibility judgment.

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[18] Campbell, *Sexual Predator Evaluations and Phrenology: Considering Issues of Evidentiary Reliability*, Behav. Sciences and the Law 18: 111-130 (2000).

[19] *Forensic Use* at 24. *See also*, Garb, Studying the Clinician, Judgment, Research and Psychological Assessment (1998).

[20] *See* Janus & Prentky, *supra* at 80; Campbell, *supra* at 63. ("The elasticity of clinical judgment allows stretching it to conform with the *a priori* expectations of an evaluator. If predisposed to 'rule in,' or 'rule out,' future sexual dangerousness, evaluators will seek information consistent with their expectations. When people respond to strong expectations, they selectively pay attention to the information available to them. They remember expectancy-consistent information better because it confirms what they expected to find. They also discount inconsistencies as random variation, further regarding them as insignificant exceptions to what they expected (Rothbart, Evans, & Fulero, 1979)." *Ibid.*)

Beyond the inability to choose optimal variables and assign appropriate weight to each, clinicians often ignore or use incorrect base rates and fail to take regression-toward-the-mean and covariation into account. Janus & Prentky, *supra* at 80. They have frequently relied upon intuitive, but illusory, correlations between variables and criteria.[21] Forensic examiners often exhibit a bias toward "conservative" judgments,[22] so false positives are far more likely, and there is little feedback sought or received on judgment errors.[23]

On the other hand, ARA scales such as the RRASOR also fail to provide a reliable basis for predicting re-offense by a given individual. As a leading scholar has written:

> This evaluation of the RRASOR results in rather grim conclusions for those who would rely on it in a sexual predator hearing. Hanson himself acknowledges that the RRASOR is not a comprehensive method for assessing recidivism risk in cases of previously convicted sexual offenders. Except for the estimates of Janus and Meehl, there are no other data identifying the levels of sensitivity, levels of specificity, frequencies of false positives and frequencies of false negatives associated with the RRASOR. The necessary study in accordance with Testing Standard 1.1 has not been done for the RRASOR. Despite Testing Standard 5.1, there is no generally available manual for the RRASOR detailing its proper use. Regarding Testing Standard 6.1, and Ethical Standard 2.04(a), there are no reliability or validity data reported in a peer-reviewed journal for the RRASOR. These considerations lead to the conclusion that the RRASOR is also an experimental procedure that cannot support expert testimony in a legal proceeding.

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[21] For example, statistical studies have recently debunked the long-held clinical belief that abuse as a child correlates to offending as an adult.

[22] Campbell, *supra* at 62. ("For a practicing psychologist undertaking a predator evaluation, the costs of false positive and false negative errors are far from equal. In the instance of a false positive error, that outcome rarely if ever receives public attention. An offender mistakenly classified as a predator may protest his fate. His protests, however, typically fall upon deaf ears as he lingers in the obscurity of indefinite confinement. In cases of false negative errors, however, the psychologist involved can endure the harsh spotlight of public criticism." *Ibid.*) The same pressures exist for judges and jurors.

[23] *See* Grove *et al.*, *Clinical Versus Mechanical*, *supra*; Campbell, *supra* at 62-63.

Id. at 123. Much the same can be said of the Static-99 and other ARA tools. The predictive ability of the most commonly used actuarial measures is only "moderate," with "no one measure showing consistent superiority across samples."[24]

ARA techniques generally have relied upon a few large meta-analyses (retrospective assessments of the results of many different studies). These meta-analyses tabulate how many among large, diverse, and often undifferentiated populations of convicted sex offenders (*e.g.*, violent and non-violent, mentally-ill and healthy, old and young, convicted of non-sexual crimes and not) have committed some kind of new crime (violent and non-violent, sexual and non-sexual, felony and misdemeanor, by arrest and conviction), over varying periods of observation (from 1 to 20 or more years). The base rate for sex offenders (including rapists, child molesters, exhibitionists, etc.) committing any new sex crimes (however defined) was approximately 13 percent, *Predicting Relapse* at 348-362, which is no greater than reported rates of recidivism by non-sexual offenders.

ARA investigators have discerned from these meta-analyses that a subset of offenders who exhibit several identifiable, static characteristics (*e.g.*, age, victim's gender, number of sexual offenses, relationship with victim) have recidivated (as variously defined) at a higher rate. On the RRASOR scale, for example, both Drs. Nelson and Boggio computed a score of four of six for CLIENT. Of offenders in the meta-analysis with this score, 32.7% were charged (but possibly not convicted) with some sort of new sexual offense (not necessarily a sexually violent offense) within some follow-on period. This means that almost a third of the subjects in the meta-analysis with a RRASOR score of 4 or higher committed new crimes. Conversely, it means that over

[24] Hanson & Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis 2004-2* at 8. Pub. Safety & Emergency Preparedness Canada (2004).

two-thirds (67.3%) of those with such a score *did not* commit any new sex offense. In other words, using a RRASOR score of four or more as evidence of an individual's likelihood of sexual recidivism would produce a true positive rate of 32.7%, but a *false positive* rate of 67.3%. Even these figures are misleading, however. The 32.7% re-offense rate associated with a RRASOR score of 4 is merely an average.[25] As Dr. Nelson emphasized, "What also needs to be understood is that the actuarial data don't give a number specifically for [an individual]. They say for a group of people with that score, this is what they got." *TR* 3/9/06 at 400.

ARA scales are even less specific and reliable over greater follow-on periods. Dr. Nelson testified that "the numbers for ten years and out are largely statistical hocus-pocus. Very few of the subjects in the original sample actually had follow up data at ten years out." *TR* 11/29/05 at 73. The ten-year post-release statistics are "strictly a numerical extrapolation of a line on a tiny bit of data." *TR* 3/9/06 at 366. *See also*, *TR* 5/3/06 at 79-80 (Dr. Boggio). Furthermore, ARA instruments do not account for a host of dynamic factors that may significantly affect the likelihood of recidivism.[26] "ARA is not yet very sensitive to the changes in risk status that might be accomplished through

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[25] It *does not* follow that *any* particular sex offender has a 32.7% probability of committing a new sex crime (however defined). That would be rather like saying that each of a group of six people (including Bill Gates) in an elevator probably has a net worth of ten billion dollars.

[26] *See* Hanson & Harris, *A Structured Approach to Evaluating Change Among Sexual Offenders*; 13 SEXUAL ABUSE: J. RES. & TREATMENT 105 (2001); Thornton, *Constructing and Testing a Framework for Dynamic Risk Assessment*, 14 SEXUAL ABUSE: J. RES. & TREATMENT 139 (2002).

effective treatment or well-designed community supervision."[27] "[T]he most effective known technique for reducing risk of relapse is intensive supervision" in the community; community "aftercare can be made sufficiently 'tight' to reduce risk to a minimum for many offenders." *Ibid.* Thus, ARA results must be interpreted as reporting long-term risk without consideration of state-of-the-art supervision and treatment. *Ibid.* As Dr. Nelson observed, CLIENT exhibits a number of favorable dynamic factors that are not captured by ARA instruments:

> Mr. CLIENT has many assets. He is a "nice guy" who, while a pedophile, is not malicious of violence in any of his known sexual behaviors or other areas of his life. There were no indications that he has antisocial attitudes, is a psychopath, or has a concurrent substance abuse problem or mental illness to complicate the picture. His is intelligent, verbal, and willing to engage in treatment. In theory, he is an excellent candidate for community supervision because one would expect him to have the psychological wherewithal to comply with the restrictions and requirements. . . . [T]echnical advances and savvy about sex offender supervision have increased markedly since Mr. CLIENT was last in the community.

PE 11 at 17.

There is no proof that "adjusted" or GCRA approaches are substantially more trustworthy than either clinical or actuarial risk assessment alone. GCRA shares most of the shortcomings of unaided clinical judgment: the results are ultimately subjective and cannot be effectively tested, error-rated, or peer-reviewed. Moreover, any "adjustment" of the statistical algorithms of actuarial prediction will "lose the mathematical precision," Dr. Boggio explained. *TR* 5/10/06 at 558. Dr. Nelson concurred: "once you violate the parameters of actuarial data, you are moving away

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[27] *Assessing Risk*, at 26-27. *See Forensic Use*, *supra*; Hanson *et al.*, *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sexual Offenders*, 14 SEXUAL ABUSE J. RES. & TREATMENT169 (2002) (meta-analysis showing that "relative" reduction in recidivism associated with treatment completion was 40%); Prentky & Burgess, Forensic Management of Sexual Offenders, 236, 243 (2000).

from that data." *TR* 5/9/06 at 400. So, we have no way of knowing if GCRAs are more or less accurate than the pure actuarial or pure clinical predictions that they attempt to "adjust."

> For assessing the recidivism risk of previously convicted sexual offenders, UCJ and GCRAs do not possess sufficient evidentiary reliability to support expert testimony. Ongoing research related to developing actuarial instruments for risk assessment appears promising. Nonetheless, there still remains considerable work to be done before psychologists can use these instruments to support their testimony in a legal proceeding.

Campbell, *supra* at 72.

The evidence clearly establishes that SVPA risk assessment methods fail to provide a relevant, accurate, or reliable process for predicting the probability that a particular sex offender will commit new offenses. If experts and scholars cannot accurately predict the likelihood of recidivism for a particular offender, the idea that a judge or jurors can do so, either on the basis of expert testimony or their own "common sense," requires a gigantic leap of faith. The shortcomings of forensic risk assessment, combined with the undue elasticity of the VSP definition, fall well short of a process "narrowly tailored to serve a compelling state interest" that due process and equal protection require to justify the "massive curtailment of liberty" that CLIENT's adjudication as an SVP portends.

Furthermore, because there is no evidence that sex offenders in general—and psychologically-impaired sex offenders in particular—pose an inordinate risk of re-offense, the imprecision of the Act's SVP classification and the lack of clear standards for distinguishing those presenting the gravest risk in the future virtually ensure arbitrary

and unpredictable disparities in the application of the Act. For these reasons, the SVPA does not afford a valid basis for CLIENT's indefinite detainment under either the Virginia or federal constitutions.

II. THE SVPA VIOLATES THE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY AND *EX POST FACTO* LAWS.

Although we recognize that this Court and the U.S. Supreme Court have previously rejected challenges to SVP statutes on these grounds, we urge the Court to take another look at the punitive character of the process and the minimal emphasis on treatment, which render Virginia's SVPA so punitive in both purpose and effect that it violates CLIENT's constitutional rights to be protected from *ex post facto* laws and double jeopardy.

III. IRRELEVANT, INACCURATE, AND UNRELIABLE RISK ASSESSMENT EVIDENCE SHOULD HAVE BEEN EXCLUDED.

The trial court should not have admitted expert or scientific testimony regarding the predicted probability that CLIENT would commit a sexually violent offense. "Relevant scientific evidence is admissible if the expert is qualified to give testimony and the science upon which he testifies is reliable." *Farley v. Commonwealth*, 20 Va. App. 495, 498 (1995). Scientific or expert testimony is relevant if it assists the trier of fact in understanding the evidence. *See Utz v. Commonwealth*, 28 Va. App. 411, 423 (1998).

> When scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis; or unless it is so unreliable that the considerations requiring its exclusion have ripened into rules of law, such as 'lie-detector' tests; or unless its admission is regulated by statute, such as blood-alcohol test results.

Spencer v. Commonwealth, 240 Va. 78, 97-98, 393 S.E.2d 609, 621 (1990). We acknowledge that Va. Code § 37.2-904(G) (2005), authorizes the admission of a

qualified expert's opinion "whether the prisoner or defendant meets the definition of a sexually violent predator," but fundamental fairness and judicial integrity still require that a court reject scientific or expert testimony that is not (1) relevant to an issue in dispute, (2) accurate, and (3) reliable. "Expert testimony is inadmissible if it is speculative or founded on assumptions that have an insufficient factual basis" or "when an expert has failed to consider all variables bearing on the inferences to be drawn from the facts observed." *John v. Im*, 263 Va. 315, 319-20, 559 S.E.2d 694 (2002),

For the same reasons stated in Section I above, and on the record of the uncontradicted evidence regarding the demonstrated shortcomings of risk assessment measures, as well as the vague and unoperationalized elements of the SVP definition, Dr. Nelson's report and testimony regarding CLIENT's risk of committing a new sexually violent offense should not have been received into evidence.

IV. THE COURT ERRED IN ADMITTING POLYGRAPH EVIDENCE.

CLIENT objected to the introduction of all evidence directly or indirectly related to polygraph examinations. The court held that all direct references to such results were inadmissible, but nevertheless admitted a considerable amount of evidence regarding such examinations, including the testimony of the polygrapher who administered several "full disclosure" tests to CLIENT, as well as references in Dr. Nelson's report and in his and Dr. Magazine's testimony. CLIENT had to keep taking these tests until he "passed" them by "truthfully" (*i.e.*, as demonstrated by the polygraph "results") disclosing all unadjudicated sex offenses. All such references should have been excluded because (1) they carried the implicit message that CLIENT had either "passed" or "failed" those tests; (2) the experts, Dr. Magazine, the Commonwealth, and even the court effectively treated those tacit "results" as evidence of the truth or falsity of CLIENT's admissions or denials

of various bad acts; and (3) any admissions by CLIENT to fulfill the SORT program's requirement of a "clean" polygraph report demonstrating "full truthful disclosure" were tainted because that process motivated CLIENT to admit more sexual offenses after each time he failed to pass the test.

This Court has made clear that polygraph examinations are so thoroughly unreliable as to be of no legitimate evidentiary use. *White v. Commonwealth*, 41 Va. App. 191, 194 (2003). The same rule should apply in SVP cases. *In re Foster*, 127 P.3d 277 (Kan. Sup. Ct. 2006); *cf. White*, 41 Va. App. at 191 (inadmissible in probation revocation hearing). The plentiful references to those polygraph examinations were no less prejudicial just because the results were conveyed implicitly. *See Foster, supra* (excluding "admission into evidence, directly and indirectly" of evidence of polygraph examinations).[28]

V. THE EVIDENCE DID NOT SUPPORT A FINDING THAT CLIENT IS A SEXUALLY VIOLENT PREDATOR, AS DEFINED IN THE SVPA.

The evidence was insufficient to support a finding, by clear and convincing evidence, that CLIENT meets the definition of an SVP. Our analysis of the evidence for that position is set forth above in Section I of this petition, so it will not be repeated here.

VI. THE COURT SHOULD HAVE PERMITTED CLIENT TO ALLOCUTE PERSONALLY BEFORE IMPOSING CUSTODIAL COMMITMENT.

Prior to the court's decision to impose full commitment or conditional release, CLIENT requested the opportunity to allocute, in the form of a letter. *RE* DDD. The court sustained the Commonwealth's objection that the letter was hearsay and its

[28] *See also, Barber v. Commonwealth*, 206 Va. 241, 251, 142 S.E.2d 484, 492 (1965) (willingness to take polygraph inadmissible); *Estate of Neumann v. Neumann*, 242 Wis. 2d 205, 238 (Wis. App. 2001) (rejecting testimony that defense experts relied on his polygraph results because testimony "would inform the jury that a polygraph had been taken and allow the jury to infer that those results were favorable to defendant").

admission would be unfair because not subject to cross-examination by the Commonwealth. The right of allocution is personal and fundamental and has been protected since the time of English common law. *See, e.g., Ball v. United States*, 140 U.S. 118, 129 (1891); *Green v. United States*, 365 U.S. 301, 304 (1961) (plurality opinion) (criminal defendant should be "issued a personal invitation to speak prior to sentencing"). This personal right to speak is "ancient in the law," *United States v. Behrens*, 375 U.S. 162, 165 (1963) (opinion of Black, J.), an "elementary right," *id.* (Harlan, J., concurring), of "immemorial origin," *McGautha v. California*, 402 U.S. 183, 217, 218-19 (1971) (assuming, without deciding, "that the Constitution does require such an opportunity"). In a criminal case—even one involving the risk of no more than a fine or a brief period in a local jail—imposition of sentence upon a prisoner without affording him the opportunity to address the court personally, would be unthinkable. *Ashe v. North Carolina*, 586 F.2d 334, 336 (4th Cir. 1978) (rejection of defendant's request to allocute to state sentencing court was denial of due process). The same rule should apply in an SVPA proceeding where respondent faces "a massive curtailment of liberty" that may last a lifetime. *See Jenkins*, 271 Va. at 14.[29] *Jenkins* teaches that the "chance to be heard" is one of

> certain minimal standards that federal due process guarantees to a respondent in an involuntary civil commitment proceeding: a hearing at which evidence is presented and the respondent is provided *a chance to be heard* and to present documentary evidence as well as witnesses; the right to confront and to cross-examine government witnesses at the hearing except upon a showing of good

[29] *Cf. Groppi v. Leslie*, 404 U.S. 496 (U.S. 1972) (right to be heard, "resembl[ing] the traditional right of a criminal defendant to allocution prior to the imposition of sentence," *id.* at 501, was requirement of due process in legislative contempt proceedings). *See also, In re Foster*, 127 P.3d 277 (Kan. Sup. Ct. 2006) (rejecting argument that claims of prosecutorial misconduct, prejudicial opening statements, references to polygraph examinations, *etc.* inapplicable to SVPA proceedings).

cause; an independent decision maker; a written, reasoned opinion; and effective and timely notice of the pendency of the hearing and of these rights.

271 Va. at 15 (emphasis added). It is no accident that *Jenkins* mentions "a chance to be heard" *in addition to* other due process rights such as presenting evidence, confronting witnesses, and receiving the assistance of counsel. That "chance to be heard" necessarily includes an opportunity to personally address the court prior to the court's decision whether to impose indefinite commitment. The trial court erred in denying CLIENT this fundamental right to speak for himself.

VII. THE CIRCUIT COURT ERRED IN ACCEPTING DR. WOLF'S REPORT.

On June 29, 2006, a hearing was held regarding alternatives to involuntary, secure, inpatient commitment. The Commonwealth presented the testimony of Mario Dennis, Ph.D., Clinical Director of the Virginia Center for Behavioral Rehabilitation, the facility currently housing Virginia's SVPs. At the conclusion of the evidence, CLIENT moved to strike because the Commonwealth had not met its burden to prove "that alternatives to involuntary secure inpatient treatment have been investigated and deemed unsuitable and there is no less restrictive alternative to involuntary secure inpatient treatment." Va. Code § 37.2-908(C) (2005). The motion was granted. *See TR* 6/29/06 at 106.[30]

The court then ordered the Commissioner to prepare the report called for under § 37.2-908(C) (2005), "suggesting possible alternatives to full commitment." CLIENT objected to the report prepared by Dr. Steven Wolf, contending that it was a mere rehash, in the light least favorable to CLIENT, of the reports of Drs. Nelson and Boggio; that it

[30] In granting the motion to strike, the court stated that it did not intend to foreclose a future determination that CLIENT should be fully committed. *Ibid.*

disregarded all of the evidence—provided to Dr. Wolf by CLIENT's counsel—of the supervision and treatment available in the VASAVOR program; and that it failed to satisfy the requirements of the statute "to suggest possible alternatives to full commitment" and to recommend "a specific course of treatment and programs for provision of such treatment." Va. Code § 37.2-908(F) (2006).[31]

There is virtually nothing in the report, *PE* 22, specific to CLIENT or resembling an *individualized* conditional release plan.[32] In the short time he had to complete his report, Dr. Wolf did not speak to any of ten recommended witnesses identified for him by defense counsel, including staff of VASAVOR, DOC, the Kennedy Shelter, and Fairfax Probation, all of whom were familiar with CLIENT and the specific arrangements in place for his release. *See TR* 8/4/06 at 85. As of August 4, 2006, Dr. Wolf was still unfamiliar with CLIENT's housing plan or the Kennedy Shelter itself. *See id.* at 67. Similar uncertain testimony was offered regarding available transportation options, *see id.* at 69, diagnostic tools, *see id.* at 70, 109-10, employment opportunities *see id.* at 114, and so on. Dr. Wolf admitted that he had not even spoken to Drs. Nelson and Boggio until that very morning, *see id.* at 89, when he was surprised to learn that they both felt that conditional release was a viable option for CLIENT. His preparation for the report consisted mainly of a few hours at the Attorney General's office reviewing treatment and

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[31] The 2006 amendment to the SVPA, effective July 1, 2006, also required that DMHMRSAS "shall recommend a specific course of treatment and programs for provision of such treatment." Va. Code § 37.2-908(F) (2006).

[32] The closest the report came to "suggesting possible alternatives" or recommending "a specific course of treatment and programs" were a half dozen standard provisions likely to be found in virtually any community supervision plan: CLIENT would need to 1) live where he would not have access to children; 2) have his movements closely monitored by people who take his situation seriously and would not ignore minor infractions; 3) show motivation to comply with sex offender specific treatment; 4) be monitored by GPS; and 5) undergo plethysmograph or ABEL testing to monitor his arousal patterns.

DOC records, *all* of which dealt with *past* events and did not address "alternatives to commitment." *Id.* at 86.

The Act unambiguously assigns to the Commonwealth the duty to conduct a substantive, meaningful, comprehensive, and individualized investigation, and to provide the court and counsel, in advance of the hearing, a thorough and particularized report "suggesting possible alternatives to full commitment," Va. Code § 37.2-908(E) (2006), and "recommend[ing] a specific course of treatment and programs for provision of such treatment," Va. Code § 37.2-908(F) (2006). No such investigation was conducted by the Commonwealth, and the court erred in accepting Dr. Wolf's deficient simulacrum.

VIII. THE COURT ERRED IN DENYING CLIENT CONDITIONAL RELEASE AND DENYING HIS MOTION TO REOPEN.

Of crucial importance to an evaluation of a conditional release plan was whether and how CLIENT could be subject to mandatory GPS monitoring, as now required under Code § 37.2-908(E) (2006). In a note added to his report, Dr. Wolf suggested that "the [Kennedy] shelter's construction makes it impossible to use the GPS equipment." His testimony revealed that he had relied for that assertion on a fleeting conversation with a DOC official in Richmond, who may himself have had no personal knowledge regarding any GPS problem there. *See TR* 8/4/06 at 103. Dr. Wolf conceded that his informant "was not specifically familiar with the Kennedy Shelter," *id.* at 96, "didn't say anything specifically about the Kennedy Shelter" *ibid.*, may not have had "any personal knowledge with respect to" any GPS issue, *id.* at 103, and may not have "ever been to the shelter." *Ibid.* Dr. Wolf was aware of no testing of the equipment performed at the shelter and had not spoken with any of the shelter's staff until the morning of the hearing, at court, *id.* at 97, when he learned, "I think they may have resolved that now." *Id.* at 94.

Through the testimony of Needels, Venner, Aloumouati, Woodward, Dr. Boggio, and others, CLIENT established that a VASAVOR-based plan—including appropriate housing compatible with GPS monitoring—was a realistic alternative to custodial detention. If there was a legitimate concern about the feasibility of GPS monitoring at the Kennedy Shelter, then a site test of the Commonwealth's GPS equipment, as requested by CLIENT and endorsed by both experts, should have been performed. Because of the speculative concerns raised at the 11th hour by Dr. Wolf and Mr. Quinn, uncertainty about GPS monitoring at the Kennedy Shelter led Dr. Nelson—who testified that, were such appropriate conditions in place, conditional release would be warranted, *TR* 8/4/06 at 213—to refrain from giving his full blessing to CLIENT's conditional release plan.[33] The trial court erred in ordering full commitment and in depriving CLIENT of a fair determination of the feasibility of a less restrictive alternative, compatible with CLIENT's treatment needs and public safety. Alternatively, CLIENT's motion to reopen the record and to direct the Commonwealth to cooperate in such a GPS site test should have been granted to afford CLIENT a fair opportunity to demonstrate the appropriateness of his conditional release plan.

CONCLUSION

CLIENT respectfully prays that this Court grant his petition for appeal, reverse the judgment of the circuit court, and dismiss the SVP petition or grant him a new trial.

[33] Dr. Boggio's recommendation of a VASAVOR-based conditional release plan was similarly conditioned upon the availability of GPS monitoring.

Respectfully submitted,

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RULE 5:17(e) CERTIFICATE

I hereby certify in accordance with the provisions of Rule 5:17(e) as follows:

The name of the appellant is NAME CLIENT, who is represented by court-appointed counsel:

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The name of the appellee is the Commonwealth of Virginia, which is re

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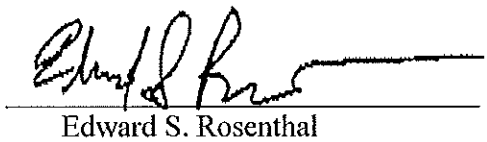
Counsel for appellant desire to state orally and in person the reasons wh appeal should be granted.

A true copy of the foregoing Petition for Appeal was served by first cla prepaid, this 1st day of February, 2007, on the above-identified counsel



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