“Far From the Turbulent Space”: Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators

Michael L Perlin, New York Law School
Heather Ellis Cucolo, New York Law School

Available at: https://works.bepress.com/michael_perlin/9/
“Far From the Turbulent Space”: Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators

Adjunct Prof. Heather Cucolo
New York Law School
185 West Broadway
New York, NY 10013
201 937 4570
Heather.cucolo@nyls.edu

Prof. Michael L. Perlin
Director, International Mental Disability Law Reform Project
Director, Online Mental Disability Law Program
New York Law School
185 West Broadway
New York, NY 10013
212-431-2183
mperlin@nyls.edu
The authors wish to thank Katherine Davies and Paul Metcalf for their excellent research assistance.

Portions of this paper were presented at the American Society of Criminology annual meeting (November 2013), and at a faculty workshop at New York Law School (January 2014).
Introduction

For the past thirty years, the US Supreme Court’s standard of *Strickland v. Washington* has governed the question of adequacy of counsel in criminal trials. There, in a Sixth Amendment analysis, the Supreme Court acknowledged that simply having a lawyer assigned to a defendant was not constitutionally adequate, but that that lawyer must provide "effective assistance of counsel," effectiveness being defined, pallidly, as requiring simply that counsel’s efforts be “reasonable” under the circumstances. The benchmark for judging an ineffectiveness claim is simply “whether counsel’s conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result.”

Although the Court has subsequently extended the *Strickland* standard in cases involving plea bargaining, bail hearings, the sentencing and appellate

---

2 See id. at 689: “A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.’” (citation omitted).
5 Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012). On why these cases augur a “seismic shift” in *Strickland* jurisprudence, see Justin F. Marceau,
stages\(^7\) (as well as to the mitigation stage of death penalty cases)\(^8\), over the years, this standard has proven to fall far short of insuring that counsel is truly adequate\(^9\) that she investigates the case, provides the defendant with all the information necessary for the defendant to make informed choices, and to mount a vigorous defense at trial.\(^10\) “Little evidence disputes the failure of *Strickland*” to insure that capital defendants truly receive adequate assistance of counsel.\(^11\)

Examples of cases in which counsel fell clearly short of the mark -- yet were affirmed on appeal, the *Strickland* arguments being rejected -- are, in some cases, jaw dropping. In one case, counsel was found to be effective even though he had failed to introduce ballistics evidence showing that the gun taken from the defendant was not the murder weapon.\(^12\) In another case, an attorney was found

---


10 On the question of whether *Strickland* is the appropriate standard in cases involving a defendant’s right to testify, see Donald Capra & Joseph Tartakovsky, *Why Strickland is the Wrong Test for Violations of the Right to Testify*, 70 WASH. & LEE L. REV. 95 (2013).


constitutionally adequate to provide representation to a death-eligible defendant notwithstanding the fact that he had been admitted to the bar for only six months and had never tried a jury case. Another lawyer was found constitutionally adequate even where during the middle of the trial he appeared in court intoxicated and spent a night in jail.

There is also a significant array of post-Strickland cases involving ineffectiveness of counsel in cases involving defendants with potentially viable insanity or incompetency claims, and it is clear from a reading of these cases and others like them -- cases involving mental status issues outside the ken of most lawyers -- that counsel in these cases all too often are little more than what Judge David Bazelon characterized some 40 years ago as "walking violations of the Sixth Amendment." There is little evidence to contradict Welsh White’s conclusion that

---

13 See Paradis v. Arave, 954 F.2d 1483, 1490-92 (9th Cir. 1992).
“[L]ower courts’ application of *Strickland* has produced appalling results.”\(^{19}\)

When *Strickland* was decided, the Court had before it a felony case, involving a death penalty conviction in multiple homicides.\(^{20}\) And certainly, there is nothing more final than a death sentence; the Court has said many times that "death is different"\(^{21}\) as a reflection of this and of the obligation on the part of courts to insure that due process has not been violated in such a trial. But there was no hint, at all, in


\(^{20}\) See 466 U.S. at 671-72: “During a 10-day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft.” *Strickland* was argued in tandem with another effectiveness-of-counsel case, United States v. Cronic, 466 U.S. 648 (1984), a white-collar criminal case involving a complex check-kiting scheme.

\(^{21}\) See Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (noting that “the penalty of death is different in kind from any other punishment”). This concept has recently been characterized as the “foundational” basis of death penalty jurisprudence. See Sara Breslow, *Pleading Guilty to Death: Protecting the Capital Defendant’s Sixth Amendment Right to a Jury Sentencing after Entering a Guilty Plea*, 98 Cornell L. Rev. 1245, 1249 (2013).
Strickland as to what its impact might be on other cases that were not criminal prosecutions, but that potentially involved lengthy periods of institutionalization.

Over a decade ago, in In re the Mental Health of K.G.F., the Montana Supreme Court acknowledged that the Strickland standard might not be a sufficient test of adequacy in cases involving involuntary civil commitment, relying on state statutory and constitutional sources to find that “the right to counsel . . . provides an individual subject to an involuntary commitment proceeding the right to effective assistance of counsel. In turn, this right affords the individual with the right to raise the allegation of ineffective assistance of counsel in challenging a commitment order." In assessing what constitutes “effectiveness,” the court--startlingly, to our minds--eschewed the Strickland standard as insufficiently protective of the “liberty interests of individuals such as K.G.F., who may or may not have broken any law, but who, upon the expiration of a ninety-day commitment, must indefinitely bear the badge of inferiority of a once ‘involuntarily committed’ person with a proven mental disorder.” Importantly, one of the key reasons why Strickland was seen as lacking was the court's conclusion that “reasonable professional assistance” --the linchpin of the Strickland decision-- “cannot be presumed in a proceeding that routinely

---

22 29 P.3d 485 (Mont. 2001).
23 Id. at 491.
24 Id.
accepts--and even requires--an unreasonably low standard of legal assistance and generally disdains zealous, adversarial confrontation."  

While no other jurisdiction has yet followed the lead of the *K.G.F.* case, the case remains a powerful statement of how at least one court could "unpack" the proceedings in question and articulate why a more rigorous standard was required. Writing about *K.G.F.* some five years ago, one of the authors (MLP) characterized it as “without doubt the most comprehensive decision on the scope and meaning of the right to counsel in this context from any jurisdiction in the world.” And this was largely because of its willingness to “get” the fact that the *Strickland* standard might not be sufficient in all cases involving subsequent institutionalization.

In this paper, we are turning our attention to another aspect of the justice system that does not involve a pending criminal prosecution but which may potentially lead to lengthy --indeed, lifetime -- periods of institutionalization: proceedings that follow the invocation of Sexually Violent Predator Acts (SVPA). Under such Acts:

---

25 *Id.* at 492, quoting Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases, 16 LAW & HUM. BEHAV. 39, 53-54 (1992)* ("identifying the *Strickland* standard as ‘sterile and perfunctory’ where ‘reasonably effective assistance’ is objectively measured by the ‘prevailing professional norms’").


[A]ny person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.  

Such individuals can be committed indefinitely as sexually violent predators; in a significant percentage of these cases, such commitments are, basically, life sentences. The Minnesota appellate courts have reversed judgments on the merits, in only six civil commitment cases, since the adoption of their Sexually Dangerous Predator statute in 1994. Such cases are, following the Supreme Court's decision in Kansas v. Hendricks, classified as “civil” rather than

---

28 Kan. Stat. Ann. § 59-29a02(a). On the question of what the risk of recidivism must be in such a case, see Frederick Vars, *Delineating Sexual Dangerousness*, 50 Houston L. Rev. 855 897 (2013) (risk must be at least 75%).


“criminal”, because they involve “involuntary civil confinement of a limited subclass of dangerous persons.”

The question that we seek to address here is this: Does, at the least, the Strickland standard apply to such cases, or should a more rigorous standard -- à la K.G.F. - be employed? The answer to this question is, we believe, of great importance to the entire criminal justice system (and, of course, to the SVPA system), for multiple reasons: As we discuss below, the entire SVPA process is cloaked in confusion and infused with fear. Are these cases "criminal"? Are they "civil"? Are they a hybrid? Are the people before the court -- the most despised individuals in the nation -- "worthy" of the assignment of counsel? With resources problems plaguing both the criminal and the civil justice systems, does it make logical sense to "burn" money to appoint counsel in cases such as these, on behalf of a population whose loathsomeness is seen as a nearly-universal "given."

Interestingly, there have been multiple cases decided on the question of whether the failure of counsel to inform a client that a guilty plea in a criminal trial might make the client eligible for SVPA proceedings. Courts have split, finding, on


33 For a recent powerful article, arguing that the right to counsel should be robustly expanded in all criminal cases, see John D. King, Beyond "Life and Liberty": The Evolving Right to Counsel, 48 Harv. C.R.-C.L. L. Rev. 1 (2013).
one hand, that – because of, among other reasons, "the severity of [the]
consequences" of potential SVPA commitment 34 – this failure rose to the level of
ineffectiveness of counsel,35 while others have rejected these claims, noting that the
SVPA proceeding is merely "civil and regulatory in nature."36 Those cases that have
found Strickland violations have mostly drawn on the Supreme Court’s decision in
Padilla v. Kentucky,37 holding that counsel’s failure to advise his client about the

34 See Roberts, supra note 29, at 720-21, discussing State v. Bellamy, 835 A.2d 1231, 1238
(N.J. 2003) (holding that "when the consequence of a plea may be so severe that a defendant
may be confined for the remainder of his or her life [under New Jersey's Sexually Violent
Predator Act], fundamental fairness demands that the trial court inform defendant of that
possible consequence").
June 11, 2010); Taylor v. State, 698 S.E.2d 384 (Ga. Ct. App. 2010); People v. Fonville, 804
N.W.2d 878, 892 (Mich. Ct. App. 2011); Calvert v. State, 342 S.W.3d 477 (Tenn. 2011) as
discussed in Colleen Shanahan, Significant Entanglements: A Framework for the Civil
Consequences of Criminal Convictions, 49 AM. CRIM. L. REV. 1387, 1424 (2012); see also,
Colleen Connolly, Sliding Down the Slippery Slope of the Sixth Amendment: Arguments for
Interpreting Padilla v. Kentucky Narrowly and Limiting the Burden It Places on the Criminal
Justice System, 77 BROOK. L. REV. 745, 777 (2012). In Taylor, the Georgia Court of Appeals
relied on an American Bar Association Criminal Justice Standard in support of its position
that professional standards requiring informing defendants of the consequences of guilty
pleas in such cases. See 698 S.E. 2d at 388.
36 See e.g., Shanahan, supra note 35, at 1424, discussing Maxwell v. Larkins, No. 4:08 CV
37 130 S. Ct. 1473 (2010). In Padilla, although deportation was characterized as “not, in a
strict sense, a criminal sanction” and although “removal proceedings are civil in nature,” the
Court granted that deportation is an especially “severe ‘penalty,’” “intimately related to the
potential immigration/deportation consequences of a guilty plea were to be assessed by the *Strickland* standard, whereas those that rejected application of *Strickland* have, by and large, limited *Padilla* to the context of deportation, and

---


thus inapplicable to SVPA commitments. Those cases that have applied Strickland, following Padilla, have generally recognized that “lack of knowledge about serious consequences undermines the basic fairness and legitimacy of a guilty plea but few cases have extended this concept to notification of the consequence of the SVPA.

State v. Myers specifically demonstrates the general approach to due process and knowledge of an SVPA during the guilty plea process. After pleading guilty to sexual assault of a child, Robert Myers moved to withdraw his plea on the grounds that it was not knowing, voluntary, and intelligent because the trial court had failed to inform him about Wisconsin’s Sexually Violent Persons Commitment law. The court noted that because commitment is not an automatic result of the conviction,


41 Roberts, supra note 29, at 721. Notes Professor Roberts further: “It is difficult to maintain that a plea without such knowledge is truly a voluntary, knowing, and intelligent act.” Id.

42 State v. Bellamy, 835 A.2d 1231, 1246 (N.J. 2003) (prior to accepting a guilty plea to a predicate offense, trial courts must inform defendants of possible consequences under the Act)

43 State v. Myers, 544 N.W.2d 609 (Wis. Ct. App. 1996)

44 Id. at 610
Myers had no due process right to be informed prior to entering his plea.\textsuperscript{45} Myers arguments have received “a cool reception by the courts”\textsuperscript{46}, but the case has encouraged prosecutors to “include the discussion of these topics as part of the plea colloquy” in order to avoid potential litigation on this issue.\textsuperscript{47}

As Professor Roberts notes:

> Involuntary commitment under an SVPA is a clear-cut case in which due process would require a pre-plea warning under this Article’s proposed reasonableness test. Due to its highly severe nature, any reasonable

\textsuperscript{45} \textit{Id.} at 611. See also, Thomas v. State, 365 S.W. 3d 537 (Tex. Ct. App. 2012); Blaise v. State, 801 N.W. 2d 627 (Iowa Ct. App. 2011); Roberts, \textit{supra} note 29, at 710 (“The court noted that involuntary commitment would not automatically flow from the fact of Myers's conviction. Instead, ‘Myers will have the full benefit of the [commitment law’s] procedures, due process, and an independent trial.’ Since commitment was thus only a potential future consequence of his plea, Myers had no due process right to know about it prior to entering his plea.”).

The contrast between decisions such as this and cases mandating counsel in misdemeanor criminal cases, see e.g., Argersinger v. Hamlin, 407 U.S. 25, 33 (1972) (that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”) and Rodriguez v. Rosenblatt, 277 A.2d 216, 223 (N.J. 1971) (state statutory case, mandating counsel if, in misdemeanor prosecution, defendant faces “consequence of magnitude,” such as loss of driver’s license) – is stark. On how failure to comply with the \textit{Argersinger} mandate regularly leaves “\textit{Gideon’s} promise...unfulfilled,” see Erica Hashimoto, \textit{The Problem with Misdemeanor Representation}, 70 WASH. & LEE L. REV. 1019, 1047 (2013).

\textsuperscript{46} Brian K. Holmgren, \textit{Sexually Violent Predator Statutes Implications for Prosecutors and Their Communities}, 32-JUN PROSECUTOR 20, 32 (1998)

\textsuperscript{47} \textit{Id.}
defendant would place significant weight on the possibility of lifelong involuntary commitment as a sexually violent predator in the decision-making process leading up to a guilty plea. Not every defendant will ultimately decide, due to the potential for commitment, to reject all plea offers. However, this is information that reasonable defendants will rely upon in making knowledgeable, voluntary decisions about whether to plead guilty to a qualifying offense in the states with SVPAs.48 But these cases consider Strickland only within the context of the initial criminal proceeding.49 Our focus here, rather, is on the SVPA proceeding itself. And here there is least some case authority that holds that there is no constitutional right to counsel at all in such a proceeding.50 Of those cases that have considered Strickland challenges (thus assuming a right to representation), virtually all have rejected Strickland-based arguments.51

We assert that there is such a right to counsel, but that Strickland -- especially given the pallid interpretations of Strickland that have passed constitutional muster

48 Id. at 726.
49 See Shanahan, supra note 35, at 1434: “Courts can ask: is the consequence significant as an objective matter and to the particular defendant, and is the consequence entangled with the criminal process?”
51 See infra text accompanying notes 75-77.
in felony cases\textsuperscript{52} -- is an insufficient predicate for a finding of constitutionality in such proceedings and that, again, in the wake of \textit{K.G.F.}, a more searching standard (albeit a different one from \textit{K.G.F.}) must be employed.\textsuperscript{53}

We say this for three main reasons:

1. SVPA proceedings normally turn on the interpretation of several controversial psychometric tests,\textsuperscript{54} and there is no evidence whatsoever that the

\textsuperscript{52} See e.g., \textsc{Perlin. supra} note 3, at 123-38 (discussing cases).

\textsuperscript{53} For perhaps the most comprehensive analysis of why \textit{Strickland} should apply to SVPA cases, see In the Matter of Ontiberos, 287 P. 3d 855, 867 (Kan. 2012), applying \textit{Strickland} “because Ontiberos' right to counsel arises from a constitutional right similar to the rights attendant to a criminal trial”.

\textsuperscript{54} Future risk assessment includes the use of actuarial instruments. Many of these experts, in turn, base their predictions heavily on “actuarial tests” that are referred to by such names as the Violence Risk Appraisal Guide (VRAG)\textsuperscript{(for the best description of the VRAG and pertinent research see \textsc{Vernon L. Quinsey, Violent Offenders: Appraising and Managing Risk} (2d ed. 2006)); for more information, see Grant T. Harris et al., \textsc{Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument}, 20 \textsc{Crim. Just. & Behav.} 315 (1993); the Sex Offender Risk Appraisal Guide (SORAG) (see \textsc{Vernon L. Quinsey et al., Violent Offenders: Appraising and Managing Risk} 143 (1998)); the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR) (see \textsc{R. Karl Hanson, The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism} 14 (1997)); and the Minnesota Sex Offender Screening Tool – Revised Form (MnSOST-R) (see David L. Epperson et al., \textsc{Minnesota Sex Offender Screening Tool-- Revised (MnSOST-R): Development, Validation, and Recommended Risk Level Cut Scores}, (Dec. 2003), http:// www.psychology.iastate.edu/faculty/epperson/TechUpdatePaper12-03.pdf); see also Richard Hamill, \textsc{Recidivism of Sex Offenders: What You Need to Know}, 15 \textsc{Crim. Just.} 24, 30 (2001).
bulk of lawyers doing such cases has any familiarity with these instruments and with the literature about their validity and reliability.

The Static-99, R. Karl Hanson & David Thornton, STATIC-99 Tally Sheet, STATIC-99 CLEARINGHOUSE, http://www.static99.org/pdfdocs/static-99-coding-rules_e71.pdf (last visited Jan. 1, 2014), which is most readily utilized, is a ten item actuarial assessment instrument created by Drs. R. Karl Hanson and David Thornton for use with adult male sexual offenders who are at least 18 year of age at time of release to the community. It is the most widely used sex offender risk assessment instrument in the world, and is extensively used in the United States, Canada, the United Kingdom, Australia, and many European nations. According to Hanson, the RRASOR and STATIC-99 developmental samples were derived from a limited number of small, nonrandom samples from mostly Canadian and English institutions, with one U.S. sample included in RRASOR. R. KARL HANSON, THE DEVELOPMENT OF A BRIEF ACTUARIAL RISK SCALE FOR SEXUAL OFFENSE RECIDIVISM 14, (1997), available at http://www.sgc.gc.ca/publications/corrections/199704_e.pdf.; See also, R. Karl Hanson & David Thornton, Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales, 24 L. & HUM. BEHAV. 119 (Feb. 2000), available at http://www.static99.org/pdfdocs/hansonandthornton2000staticvalidation.pd. ; R. Karl Hanson & Andrew J.R. Harris, Dynamic Predictors of Sexual Recidivism, 27 CRIM. JUST. BEHAV. 6 (1998); The samples used in the Static-99 tool were revised a handful of times, R. KARL HANSON & KELLEY MORTON-BOURGON, PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS 32 (2004), yet there were still problems in determining risk accurately. The sampled majority was released from maximum-security prisons or mental health institutions, and thus may represent higher risk groups than typical sex offenders. While intending the tools to be applicable on an international scale, there is no sign the developers made any attempt to conduct truly representative sampling to satisfy scientific principles for a more global application. Another issue is the fact that the developmental samples included inconsistent definitions of the outcome variable of recidivism, including charges, readmissions, and/or reconvictions, and used widely varying time frames for follow-up.
2. Although the Supreme Court has held in *Ake v. Oklahoma*55 that a defendant has a right to an independent expert in a felony trial, there is scant analogous case or statutory law with regard to SVPA matters.56 This makes it even less likely that counsel will be able to ably launch a defense in such cases.

3. There is no question that the population in question is the most despised group of individuals in the nation.57 Society's general revulsion towards this population is shared by judges, jurors and lawyers.58 Although the bar pays lip service to the bromide that counsel is available for all, no matter how unpopular the cause, the reality is that there are few volunteers for the job of representing these individuals, and that the public's enmity has a chilling effect on the vigorous of representation in this area.

---

56 But see, Commonwealth v. Curnute, 871 A.2d 839, 842-44 (Pa. Super. Ct. 2005) (holding that an indigent defendant with private counsel was entitled to a state-funded expert for his sexually violent predator hearing).
57 See Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMPLE POLITICAL & CIVIL RTS. L. REV. 1, 2 (2012) (“Currently, no other population is more despised, more vilified, more subject to media misrepresentation, and more likely to be denied basic human rights.”).
58 Id.; Kevin J. Breer, *Beyond Hendricks: The United States Supreme Court Decision in Kansas v. Crane and Other Issues Concerning Kansas’ Sexually Violent Predator Act*, 71-APR J. KAN. B.A. 13 (2002) (“Sex offenders are the scourge of modern America, the “irredeemable monsters” who prey on the innocent. Although this revulsion is perhaps now more widespread and more acute, it is not unprecedented in the annals of American justice.”).
For all of these reasons, we propose a new standard for such cases: We believe that, in order to be effective at an SVPA hearing, counsel must demonstrate a familiarity with the psychometric tests regularly employed at such hearings, and with relevant expert witnesses who could assist in the representation of the client, experts who would be appointed by the court at no cost to the person facing sex offender adjudication in the same manner envisioned by the Ake Court in insanity cases. Further, we believe that the use of such a standard would also best comport with the principles of therapeutic jurisprudence.59

This paper will proceed in this manner. First, we will look more completely at the relevant issues that surround the question of the scope of the right to counsel in such cases. Then, we will examine the three issues listed above supporting a more stringent effectiveness standard in these cases. After that, we will consider the meaning of therapeutic jurisprudence and its application to these cases. We will then offer some modest conclusions.

The title of this article comes, in part, from Bob Dylan’s complex song Jokerman- a song that some critics see as “a mediation on the duality between good

59 For discussions of the role of therapeutic jurisprudence in the representation of persons alleged to be sexually violent predators, see Cucolo & Perlin, supra note 57, at 31-42; Heather Ellis Cucolo & Michael L. Perlin, “They're Planting Stories In the Press”: The Impact of Media Distortions on Sex Offender Law and Policy 3 U. DENV. CRIM. L. REV. 185, 240-45 (2013). On therapeutic jurisprudence (TJ) in general in this context, see infra text accompanying notes 271-94.
and evil.”

In the most elaborate discussion of the song’s meaning, the critic Michael Gray points out that it “insist[s] that ‘evil’ is not ‘out there,’ ‘among the others,’ but is inside us all”

Our refusal to acknowledge this reality – and to, rather, see sex offenders as a less-than-human subgroup of “The Other” enables us (encourages us) to ignore the issues that we seek to address in this paper. We believe that these words are crucial to understanding the legal issues we are about to discuss.

I. A Right to Counsel

An individual facing sex offender civil commitment may be assigned counsel but is not necessarily afforded the absolute right to have an appointed attorney. Jurisdictions vary on the availability and constitutionality of the 6th amendment right to counsel. If a person is indigent, Kansas has required the State to provide,

63 This section is generally adapted from 2 MICHAEL L. PERLIN & HEATHER E. CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (3d ed., to be published 2015). For a comprehensive consideration of state-by-state practices, see http://www.ndaa.org/pdf/Sex%20Offender%20Civil%20Commitment-April%202012.pdf.
65 Commitment of Dodge, 989 N.E.2d 1159 (Ill. App. 2013)(although proceedings governing a petition alleging that a defendant is a “sexually violent person” under the Sexually Violent Persons Commitment Act are civil in nature, the Act provides a defendant with the right to effective assistance of counsel as provided in Strickland).
at public expense, the assistance of counsel and an examination by mental health care professionals.\textsuperscript{66} The individual also receives the right to present and cross-examine witnesses, and the opportunity to review documentary evidence presented by the State.\textsuperscript{67} Yet the right to counsel at each stage in the commitment process is not automatically granted and that right has been denied during pre-commitment evaluations\textsuperscript{68} as well as during the psychological evaluation for the annual review

\begin{footnotesize}
\textsuperscript{66} KAN. STAT. ANN. § 59-29a06; see also as to self-representation, Detention of Turay, 986 P.2d 790 (Wash. 1999), \textit{cert. den.}, 531 U.S. 1125 (2001) (defendant did not unequivocally request the right to represent himself).

\textsuperscript{67} KAN. STAT. ANN. § 59-29a07.

\textsuperscript{68} See e.g., Greenfield v. New Jersey Department of Corrections, 888 A.2d 507 (N.J. App. Div. 2006) (sex offender had no due process right to review materials or meet with a committee addressing his possible referral to the state's attorney general for commitment as a sexually violent predator (SVP)); Notably, New York considers civil management to be a collateral rather than a direct consequence of a conviction. People v. Harnett, 920 N.Y.S.2d 246 (2011) (Failure to inform a defendant who pleads guilty to a sex offense of the possibility of being civilly committed under SOMTA does not result in an automatic invalidation of the plea); Project Release v. Prevost, 722 F.2d 960, 976 (2nd Cir.1983) (legal counsel not required at pre-hearing psychiatric interviews); see also, Hollis v. Smith, 571 F.2d 685 (2d Cir. 1978); compare, Ughetto v. Acrish, 518 N.Y.S.2d 398, 405 (N.Y. A.D. 1987) (in the absence of a showing that counsel would interfere, he or she should be permitted to observe the psychiatric examination either directly or indirectly). Admittedly, a number of courts have concluded that a civil commitment proceeding should not be equated with a criminal prosecution. E.g., \textit{Project Release} 722 F.2d at 974-75; see also, Goetz v. Crosson, 967 F.2d 29, 34-35 (2d Cir. 1992). However, the rationale for this conclusion is not that the deprivations suffered by an individual subject to the civil commitment process are less severe than those suffered by a convicted criminal defendant but that civil commitment proceedings are less adversarial in nature because one of the purposes of commitment is to provide mental
\end{footnotesize}
The Kansas Court of Appeals has mandated that if appointed counsel for a committed person under the SVPA is not engaged, not responsive or otherwise not active, the court is obligated to investigate or to appoint new counsel declaring that there is a clear statutory requirement that counsel be provided “at all stages of the proceedings. K.S.A. 59-29a06(b).” Other jurisdictions have found that the Sixth Amendment attaches once the individual has been screened for civil commitment and detained post conviction, thus implicating a right to effective assistance of counsel in the underlying criminal proceeding. New Jersey and New York are two

---

69 Detention of Peterson, 980 P.2d 1204 (Wash. 1999).

70 In the matter of the Care and Treatment of Jimmy W. Miles, 213 P.3d 1077, 1083 (Kan. App. 2009) Citing to petitioners' pro se response:

   “the problem Petitioners are experiencing is with the attorneys appointed by the Court of Wyandotte County. These attorneys of record rarely, if ever, consult with their clients during the annual review period and almost never send any documentation as to any judgment or action taken in their case. Hence the patient has no alternative but to file his own petition without the assistance of counsel”.

71 See Seibert v. Macht, 627 N.W.2d (Wis. 2001) (constitutional right attaches to first appeal from denial of release petition); State ex rel Romley v. Sheldon, 7 P.3d 118 (Ariz. Ct. App. 2000) (individual detained prior to probable cause hearing could be deposed on question of need for commitment for treatment). Conversely see, Collie v. State, 710 So.2d 1000 (FlaDist.App.1998), rev. den., 722 So.2d 192 (Fla. 1998), cert. den., 525 U.S. 1058 (1998) (Florida has found that there is no constitutional right to counsel under that state's SVPA); Matter of Care and Treatment of McCracken, 551 S.E.2d 235 (2001)(Committee's only right to counsel in proceedings under Sexually Violent Predator (SVP) Act was his right to
states that, in the SVPA process, statutorily mandate that counsel be assigned once an individual is temporarily committed and awaiting his initial civil commitment hearing or trial.\textsuperscript{72}

Questions regarding the quality of counsel and the threshold of constitutional rights have been considered in cases where defendants have sought withdraw a plea bargain where they were not informed of the potential consequences of a sex offender conviction. The Supreme Court has yet to address this issue, and there is lack of uniformity in the state courts. New Jersey appears to be one of the only states that require counsel to inform the defendant that pleading guilty might qualify them for sexual offender civil commitment.\textsuperscript{73} Other state courts have mandated a duty to

\textsuperscript{72} N.J. STAT. ANN. §30:4-27.29 (c) (West 1998) (A person subject to involuntary commitment shall have counsel present at the hearing and shall not be permitted to appear at the hearing without counsel); N.Y. MENTAL HYG. LAW §10.06 (c) (d) (McKinney 2010) (Upon the filing of the petition to civilly commit or upon an order to undergo a mental examination, the court shall appoint counsel in any case where the respondent is financially unable to obtain counsel. The court shall appoint the mental hygiene legal service if possible).

\textsuperscript{73} State v. Bellamy, 835 A.2d 1231,1246 (N.J. 2003) (prior to accepting a guilty plea to a predicate offense, trial courts must inform defendants of possible consequences under the Act).
inform when the plea would result in sexual offender registration while on parole\textsuperscript{74}. Most state courts have determined that civil commitment is merely a collateral consequence and not a direct result of the plea and therefore no duty to inform is required.\textsuperscript{75} A South Carolina court ruled that although the criminal conviction is the triggering event for the SVPA, the attorney had no duty to inform the offender about the SVPA before he pleaded guilty.\textsuperscript{76} The Kansas court of appeals reasoned that even if the defendant was informed of the SVPA, the chance of losing at trial and facing a

\begin{flushleft}
\textsuperscript{74} See generally, Taylor v. State, 698 S.E.2d 384 (Ga. Ct. App. 2010) (counsel is constitutionally deficient if they did not advise their client that pleading guilty will subject the client to the sex offender registration requirements).

\textsuperscript{75} See generally, In re Detention of Bailey, 740 N.E.2d 1146 (Ill. App.Ct.2000) (present commitment proceedings were civil in nature and thus were not improperly used by state to subject offender to greater punishment than was imposed pursuant to plea bargain). In re Detention of Campbell, 986 P.2d 771 (Wash. App. 1999) (en banc), cert. denied, 531 U.S. 1125 (2001) (explaining that because civil commitment is not criminal punishment, it was not a foregone conclusion that respondent would be civilly committed, thus commitment, like sex offender registration, is a collateral consequence of pleading guilty and does not violate the plea agreement); Matter of Hay, 953 P.2d 666 (Kan. App. 1998) (finding the “plea agreement is immaterial as far as proceedings under the Act are concerned” where the commitment is based on a defendant’s mental ailment and present dangerousness); People v. Moore, 81 Cal.Rptr.2d 658, 661 (1998) (holding any commitment defendant might suffer under the sexual violent predator act would not be a direct consequence of his plea); In re Kunshier, 521 N.W.2d 880 (Minn.Ct.App.1994) (finding that county did not violate plea agreement by invoking civil commitment statute against patient because it is not criminal punishment but civil treatment).

\textsuperscript{76} Page v. State, 615 S.E.2d 740, 742 (S.C. 2005); For an insightful look into collateral consequences discussing the \textit{Page} case see Roberts \textit{supra} note 29 at 693-700.
\end{flushleft}
longer prison sentence would deter a guilty plea retraction. The question remains whether the defendant’s decision to plead guilty took into account the fact that a potential life sentence attached to civil commitment.

Although securing a constitutional right to counsel in civil commitment is an initial step, it is crucial that we not merely consider the right to counsel but discuss that right in combination with the quality of counsel and counsel’s resources and knowledge in this area of the law. In the following subsections, we will explore the unique circumstances associated with representation of this population and why a defense attorney needs to have a working knowledge of all of the collateral consequences that might result from committing a sexually motivated offense and/or being labeled a sexual predator.

a. **Psychometric tests**

Expert predictions of future violence “central to the ultimate question...whether petitioners suffer from a mental abnormality or personality disorder” are necessary in the civil commitment of sexual offenders. The concept

---


78 In re Young, 857 P.2d 989, 1018 (Wash. 1993).
that humans can accurately predict the criminal or aberrant behavior of other humans in the long-term future has created the need for the development of actuarial instruments that allegedly remove the “human” element of error when predicting future risk.\textsuperscript{80}

In greatly simplified terms, there are two broad approaches to conducting risk assessments in order to predict future dangerous sexual behavior: clinical judgment or actuarial assessment\textsuperscript{81}. The clinical approach requires evaluators to consider a wide range of risk factors and then form an overall opinion concerning future dangerousness. The actuarial approach evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of re-offense which may be adjusted (or not) by expert evaluators considering potentially important factors not included in the actuarial measure.\textsuperscript{82}

Courts have grappled with the correct standard that balances the potential for unfair prejudice against the evidence’s probative value. With the understanding

\textsuperscript{79} In re Detention of Thorell, 72 P.3d 708, 758 (Wash. 2003) \textit{en banc}; In re Detention of Holtz, 653 N.W.2d 613, 615 (Iowa 2002) (If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise).

\textsuperscript{80} In re Commitment of Burton, 884 So.2d 1112, 1119 (Fla. App. 2004).

\textsuperscript{81} See generally Dennis M. Doren, Using Risk Assessment Instrumentation, in Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond 103 (2002).

\textsuperscript{82} \textit{Id.}
that testimony regarding the future dangerousness of sexually violent predators is undoubtedly prejudicial, most courts have deemed actuarial assessments as appropriate tools to help the professional draw inferences from historical data or the collective experience of other professionals who have assessed sex offenders for potential recidivism.\textsuperscript{83} The purpose of actuarial assessment testimony is to assist the fact finder in determining whether a sexually violent predator is likely to commit future violent acts. The consensus in the case law is that the probative value of this testimony is significant and directly relevant to whether an individual should be committed as a sexually violent predator.\textsuperscript{84} But questions as to the ethical usage and accuracy of these instruments remain unanswered\textsuperscript{85} notwithstanding the fact that the vast majority of judges who credit testimony that includes results from these tools.\textsuperscript{86}

\textsuperscript{83} State ex rel. Romley v. Fields, 35 P.3d 82, 89 (Ariz. App. 2001) \textit{review denied}, (May 21, 2002) ("Unlike DNA and other types of ‘scientific’ evidence, these risk assessment tools do not have an aura of scientific infallibility").

\textsuperscript{84} In re Girard, 257 P.3d 1256 (Kan. App. 2011).

\textsuperscript{85} Burton, 884 So.2d at 1120 ("I, for one, do not yet have faith that it is wise for the judiciary or for society as a whole to rush down this new path before we are confident that both the science of jurisprudence and the sciences of psychology and psychiatry are up to this awesome task.").

\textsuperscript{86} The Washington Association for the Treatment of Sexual Abusers declared in an amicus brief prepared in Thorell, 72 P.3d at 738, that “the proof of the scientific community’s
The introduction of actuarial tools in the risk assessment of sexual offenders has significantly compromised the validity of the forensic psychological testimony presented in such cases, and has pitted experts against one another in a battle to determine which method of prediction is superior. As noted in a thorough opinion by a Florida appellate judge, the relevant scientific community that must generally accept these tests and the interpretation of their results should include a broader group of clinical and experimental psychologists and psychiatrists, and not merely the group of licensed professionals who are making a living by testifying in court, urging jurors and fact-finding judges to rely upon these tests. Actuarial approaches use statistical analysis to identify a number of risk factors that assist in the prediction of future dangerousness. Because actuarial models are based on acceptance of actuarial instruments is that the failure to use such instruments constitutes an ethical violation for its members.” Br. of Amicus Curiae, 16.

87 In the Matter of the Commitment of R.S., 773 A.2d 72 (N.J. Super. App. Div, 2001), aff’d, 801 A.2d 219, 220 (N.J. 2002) (many of the same people who created the assessment tools did the reliability and validation studies, but only because most of the instruments have not been in use long enough for peer review or replication studies) see also Id at 82(expert for the defense: “I think it’s a real concern here that these instruments promise something they don’t deliver. And they have an incredible aura of scientific certainty and preciseness that’s just not there if you peel away the second layer of the onion. Therefore, I think psychologists do a disservice to the profession and psychiatrists, too, for that matter, when they use them and act as if there’s this precision and with a scientific basis that’s not really there.”); Burton, 884 So.2d at 1116 (psychologists and psychiatrists must decide whether the members of their profession have a professional capacity to perform this function, and the legal community must decide whether ordinary citizens serving as jurors have this capacity).
statistical analysis of small sample sizes, they have a variety of potential predictive shortcomings.\textsuperscript{88} However, despite their potential statistical limitations, some experts have called for the complete rejection of clinical assessment in favor of purely actuarial assessment. \textsuperscript{89}

The use of actuarial tools raises multiple issues. In a thorough and probing analysis of these tests, Professors Eric Janus and Robert Prentky have concluded that, “to a greater or lesser extent, all ARA [actuarial risk assessment] instruments have shortcomings, and these shortcomings detract from the reliability of the instruments,”\textsuperscript{90} noting that there are three potential sources of prejudice from ARA testimony: concern that the scientific and statistical nature of actuarial assessments will unduly influence the fact-finder into giving it more weight and credibility than it deserves, and that the principle of “actuarial superiority” will exacerbate this

\textsuperscript{88} See generally, Harry M. Hoberman, Dangerousness and Sex Offenders-Assessing Risk for Future Sex Offenses, in 2 The Sexual Predator (Anita Schlank ed., 2001).

\textsuperscript{89} See Vernon L. Quinsey et al., Fifteen Arguments Against Actuarial Risk Appraisal, in Violent Offenders: Appraising and Managing Risk 171 (1998); Conversely see Campbell, 986 P.2d at 778 (Campbell sought to exclude the State’s expert’s testimony because the opinion was based on clinical assessment instead of the superiority of actuarial assessment; defendant’s argument rejected on the basis of Barefoot v. Estelle, 463 U.S. 880, 896–903 (1983), holding predictions of future dangerousness should be admitted and evaluated by the fact finder. The New Jersey Supreme Court has found as fact that actuarial instruments are at least as reliable, if not more so, than clinical interviews. In the Matter of the Registrant, C.A., 679 A.2d 1153 (N.J. 1996). For universal criticisms of Barefoot, see PERLIN, supra note 3, at 19-28.

\textsuperscript{90} Eric Janus & Robert Prentky, Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability, 40 AM. CRIM. L. REV. 1443, 1472 (2003).
tendency; that juries will ignore the lack of “fit” between the actuarially derived risk and the legally relevant risk, thus giving ARA too much weight, and the reality that the “incriminating significance” of statistical probabilities is “obscure.”

Discussed below are four of the most common issues that have been debated regarding the usage of actuarial instruments: (1) admissibility under evidentiary review standards; (2) lawyers and judges familiarity with these tests; (3) concern over confusion and misinterpretation of the results by juries; and (4) the expert’s lack of training to administer these tests;

i. Admissibility

Generally, the standard of review for admitting evidence must satisfy the tests articulated in either Frye v. United States or Daubert v. Dow Merrill. Under the Frye test, novel scientific evidence is admissible when the relevant scientific community has generally accepted the reliability of the underlying theory or principle. A Frye issue involves a mixed question of law and fact. If the evidence

---

91 Id. at 1487.

92 Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923) (designating general acceptance by the scientific community as the standard for admissibility of expert testimony); see also K.R. Foster & P.W. Huber, Judging Science: Scientific Knowledge and the Federal Courts 225 (1999) (Noting “[t]he ‘Frye rule’ was applied by federal courts for more than 50 years and is still enforced by many state courts”).


94 Id. at 586:
does not involve new scientific principles or methods of proof, a Frye inquiry is unnecessary. In reviewing a ruling based on Frye, an appellate court may look beyond the record to scientific literature and secondary legal authority. In Daubert, the argument that Frye’s general acceptance test remained the central inquiry in the admissibility of scientific testimony, was rejected by the Supreme Court and instead, the trial judge’s independent “gatekeeping” function was emphasized. The Daubert test instructs the trier of fact to consider the following factors: (1) whether the theory or technique is scientific knowledge that can and has been tested, (2) whether the theory or technique has been subjected to peer review or publication, (3) the known or potential rate of error, or (4) whether it is generally

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*See generally, In re Detention of Thorell, 72 P.3d 708 (Wash. App. 2004) (en banc) (on the specific question of whether actuarial instruments should be viewed as novel scientific evidence).*


97 Janus & Prentky, *supra* note 90 at 1460-61 (“determining at the threshold whether the ‘reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can be applied to the facts in issue.’”).
accepted within the relevant scientific community. However, if “a trial court considers these factors, the court should focus solely on the principles and methodology, not on the conclusions that they generate.” In short, Daubert places the reliability assessment on trial judges while Frye delegates to the scientific community the duty to determine whether the evidence in question has gained general acceptance. Daubert has been considered by some as potentially more generous than the Frye standard, thus substantively minimizing the role of the general acceptability standard in federal court.

---

98 Daubert, supra.

99 Id. at 596 (“[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”); See Janus & Prenky, supra note 90 at 1462-63 (“A strong argument could be made for requiring a rather high level of reliability for risk assessment testimony. After all, the consequences resting on the assessments are momentous--long-term loss of liberty, on the one hand, and prevention of potential sexual violence on the other. Under such a rigorous standard, it is likely that no risk assessment testimony--clinical or actuarial--would pass muster.”).

100 See James Aaron George, Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?, 61 Vand. L. Rev. 221, 233-35 (2008) (discussing how Daubert is broader than Frye, but that courts have applied it strictly); See Melissa Hamilton, Public Safety, Individual Liberty and Suspect Science: Future Dangerous Assessments and Sex Offender Laws, 83 Temp. L. Rev. 697, 715-16 (2011), using the example of astrology to demonstrate how Daubert can also be more limiting; there may be general acceptance in the field of astrology about the methods and tools with which to predict future events based on planetary movement, but a Daubert-led court likely would exclude the evidence as specious (i.e., unreliable), and thus inadmissible.

On how courts generally “lower the bar” in criminal cases involving Daubert challenges to the state’s case, see Michael L. Perlin, “And I See Through Your Brain”: Access To Experts,
Actuarial tools used in sex offender civil commitment cases have faced a number of challenges\textsuperscript{101} under both \textit{Frye}\textsuperscript{102} and \textit{Daubert}\textsuperscript{103} and courts under both standards have generally held the actuarial tools- most notably used -the Static\textsuperscript{99}.


\textsuperscript{101} Challenges have suggested that such actuarial instruments are inadmissible profiling tools because they do nothing more than assign values to characteristics in an effort to fit an individual within a profile thus purely identifying a person as a member of a group likely to commit a crime. See e.g. Thorell, 72 P.3d at 710; Burton, 884 So.2d at, 1119 (expert criticized the tests at issue provided evidence that might be helpful in rejecting the tests under the \textit{Daubert} standard even though Florida has adopted the \textit{Frye} standard).


\textsuperscript{103} See Hamilton, supra note 100 at 737 ("\textit{Daubert} analyses have been virtually absent in the SVP case law to date. The few courts to analyze actuarial risk assessments under \textit{Daubert} have found them admissible."). \textit{See Alice B. Lustre, Annotation, Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts}, 90 A.L.R.5th 453 (2001)(five states have adopted \textit{Daubert} (South Carolina, Texas, Iowa) or the \textit{Daubert} factors (Massachusetts, New Jersey), and two (Wisconsin and Virginia) have developed their own tests).
and MnSOST-R-admissible. A majority of these courts found the tests to be reliable on the asserted basis that they are generally accepted by the scientific community and thereby require no further validation.

---

104 See e.g., In re Detention of Ashlock, 2002 WL 31309497 (Iowa Ct. App.); In re Detention of Taylor, 134 P. 3d 254 (Wash. Ct. App. 2006); State v. Shaddon, 235 P.3d 436, 450-51(Kan. App. 2010)(a district court must use the Frye test if an opinion is based on scientific methods or procedures and is offered for admission); Roeling v. State 880 So.2d 1234 (Fla. Dist. Ct. App. 2004), see also Burton, 884 So.2d at 1118 where the judge cautioned that even if the tests passed the Frye test, the current margin of error in these tests suggests that they may be more unduly prejudicial than probative; See generally, Ortega-Mantilla v. State, 898 So. 2d 1164 (Fla. Dist. Ct. App. 2005), (actuarial instruments that purportedly predict the propensity to commit future sexual offenses constituted scientific evidence and thus were required to pass the Frye test to be admissible in a proceeding under the Jimmy Ryce Act); Jackson v. State, 833 So. 2d 243 (Fla. Dist. Ct. App. 4th Dist. 2002) (implicitly recognized that actuarial instruments were scientific evidence subject to the Frye test for admissibility); In re Detention of Hargett, 786 N.E.2d 557 (Ill. App. 2003), as modified on denial of reh'g, (Apr. 18, 2003) (the court held that testimony from a psychologist, which is based on actuarial instruments, constitutes "scientific evidence" subject to the Frye test of admissibility) See generally, People v. Taylor, 782 N.E.2d 920 (Ill. App. 2002) (abrogated by 821 N.E.2d 1184 (2004)) and appeal denied, judgment vacated, 824 N.E.2d 277 (2005) and judgment vacated, 830 N.E.2d 855 (.2005), where the court concluded that the MNSOST-R and Static-99 tests constitute scientific evidence.); In re Goddard, 144 S.W.3d 848, 853 (Mo. Ct. App. 2004) (the court summarily ruled the STATIC-99 to be scientific evidence based upon the state expert's assertions that the tool satisfied Daubert).

105 R.S., 773 A.2d at 73; In re Detention of Rudolph, 121 Wash.App. 1078, 2004 WL 1328673, *2; see also Holtz, 653 N.W.2d at 619.

Beyond the scope of this paper is a discussion of the stark reality that in Daubert cases the prosecutor’s position is sustained (either in support of questioned expertise or in
In the case of *In the Matter of the Commitment of R.S.*\(^{106}\) the trial judge decided that the actuarial instruments were admissible in their own right and as the basis of an expert opinion. On review, the appellate court reasoned that even though other appellate courts had not specifically and articulately approved such actuarials under *Frye*,\(^ {107}\) the fact that they accepted these instruments as reliable and helpful sanctioned the New Jersey court's usage. By summarizing the influence of *Barefoot*\(^ {108}\) on future dangerousness, the *R.S.* court evaded the reliability question\(^ {109}\) Other courts, after ruling that neither *Daubert* nor *Frye* applied, have repeated that, “where the trier of fact is required by statute to determine whether a person is dangerous or likely to be dangerous, expert prediction may be the only evidence available.”\(^ {110}\)

---


\(^{107}\) *Id.* at 97.

\(^{108}\) *Barefoot*, *supra*.

\(^{109}\) See, e.g., *R.S.*, 773 A.2d at 90 (concluding that since *Barefoot* accepted reliability of clinical judgment as to future dangerousness, then actuarial evidence must also be admissible).

In *State ex rel. Romley v. Fields*¹¹¹, the court held that the use of actuarial models by mental health experts to help predict a person’s likelihood of recidivism is not the kind of novel scientific evidence or process to which the *Frye* test applies. The State argued that actuarials were concerned with general characteristics of sex offenders and were not "scientific" evidence subject to the *Frye* test of admissibility. The court found that unlike DNA and other types of "scientific" evidence, these risk assessment tools do not have an aura of scientific infallibility, but are subject to interpretation and their predictive value is far less than 100%.¹¹² The inconsistency between *Daubert* and *Barefoot* on the issue of future dangerousness testimony was acknowledged by the court, but ultimately dismissed.¹¹³

A majority of courts have denied SVP committees the opportunity to have a Frye or Daubert hearing, employing the same reasoning as upheld in *R.S.*,¹¹⁴ finding

---

¹¹¹ *State ex rel. Romley v. Fields*, supra.

¹¹² *Id.* at 89.

¹¹³ *Id.* at 87-89 (observing inconsistency between *Barefoot* and *Daubert/Kumho*, but finding actuarial evidence admissible on other grounds).

¹¹⁴ *R.S.*, 801 A.2d at 221 (relying upon the thorough analysis of the New Jersey Court of Appeals, the New Jersey Supreme Court affirmed that “actuarial risk assessment instruments may be admissible in evidence in a civil commitment proceeding under the SVPA when such tools are used in the formation of the basis for a testifying expert’s opinion concerning the future dangerousness of a sex offender.”) See also, *Thorell*, 72 P.3d at 725 (court noted that its conclusion is similar to that of other jurisdictions, which have upheld the use of actuarial assessments.); *C.A*, supra (holding *Frye* inapplicable to actuarial device unique to New Jersey SVPA); *accord* *State ex rel. Romley v. Fields*, 35 P.3d 82 (agreeing with the supreme courts of New Jersey and Arizona and thus holding *Frye* inapplicable to predictions of future dangerousness based upon actuarial instruments).
that the accuracy of these tests goes to the weight of the evidence rather than admissibility—especially when such tools are used in the formation of the basis for a testifying expert’s opinion concerning the future dangerousness of a sex offender.\textsuperscript{115} 

\textit{Daubert} courts have pointed to \textit{Barefoot} as holding that the question of reliability in actuarial-assessment testimony goes to the weight of the evidence, not its admissibility\textsuperscript{116} and courts have relied on precedent that future dangerousness—regarded as medical testimony—does not constitute scientific evidence for purposes of \textit{Frye}.\textsuperscript{117} Only where recidivism risk was not at issue, was the Static 99 “not

\textsuperscript{115} See Hamilton, supra note 100 at 735 ("relatively few courts considering the admissibility of RRASOR or STATIC-99 have conducted any type of reliability analysis, whether \textit{Daubert}, \textit{Frye}, or a variant thereof"); Holtz, 653 N.W.2d at 619 relied on \textit{R.S.} to hold that the trial court properly admitted evidence regarding certain actuarial instruments, including the Static-99 and the Minnesota Screening Tool–Revised).


\textsuperscript{117} The courts in the following cases held that the use of actuarial instruments by expert witnesses to help predict a sex offender’s likelihood of recidivism in a civil commitment proceeding is not the kind of novel scientific evidence or process to which the \textit{Frye} test applies: Wilson v. Phillips, 86 Cal. Rptr. 2d 204, 207-08 (Ct. App. 1999); State ex rel. Romley v. Fields, 35 P.3d at 88; People v. Therrian, 6 Cal. Rptr. 3d 415 (3d Dist. 2003), \textit{review denied}, (Feb. 18, 2004); In re Detention of Hauge, 812 N.E.2d 571 (Ill. App. 2004); In re Girard 257 P.3d 1256 (Kan. App. 2011); In re Detention of Strauss, 20 P.3d 1022, 1023–24 (Wash. App. 2001); In re Commitment of Lalor, 661 N.W.2d 898, 903 (Wis. App.2003) (actuarial instruments used to assess the likelihood of re-offending were admissible in sexually-violent-person commitment proceeding, as instruments were commonly and reasonably relied upon by experts in the field of sex-offender risk assessment); Jackson v. State, 833
scientifically accepted” for the purpose of determining the requisite “mental abnormality” under the state’s civil commitment statute.\(^{118}\)

A California court explained how *Frye* is inapplicable to medical testimony:

We have never applied the *Kelly*/*Frye* rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association\(^{119}\).

A defendant facing civil commitment in the state of Washington moved to exclude evidence regarding the results of certain actuarial risk-assessment instruments, including the Violence Risk Appraisal Guide and the Minnesota Screening Tool–Revised.\(^{120}\) The Washington appellate court concluded that the

So.2d 243, 246 (Fla.App.2002) (concluding that the trial court did not err by determining that the actuarial instruments used in that case were “generally accepted in the relevant scientific community as part of the overall risk assessment for sexual predators”); *Garcetti v. Superior Court*, 102 Cal.Rptr.2d 214, 238 (2000), *rev’d on other grounds sub nom. Cooley v. Superior Court*, 127 Cal.Rptr.2d 177 (2002) (psychiatrist’s prediction of future dangerousness is not subject to *Frye*, regardless of whether the psychiatrist used clinical or actuarial models).


\(^{119}\) *Therrian*, 6 Cal. Rptr. 3d at 419.

\(^{120}\) *Strauss*, 20 P.3d at 1023–24.
actuarial instruments were generally accepted within the relevant scientific community, based on (1) the expert testimony of both the State and the defendant; (2) the scientific literature; and (3) secondary legal authority.\textsuperscript{121} The same appellate court confirmed in a subsequent sexual predator commitment review that the use of these instruments - as an aid to expert opinion testimony - go to the weight of the evidence rather than its admissibility.\textsuperscript{122} In rendering its decision to admit such testimony, the court agreed with the authors of an amicus brief that such tools further legitimize the assessment of future risk, by “anchor[ing] their risk assessments, thus not requiring an additional Frye hearing.”\textsuperscript{123}

The Illinois appellate court has repeatedly maintained that “the Frye standard does not demand unanimity, consensus, or even a majority to satisfy the general acceptance test” and that no error occurred by denying the defendant’s motion for a Frye hearing in a sex offender civil commitment case.\textsuperscript{124} A Florida court declined to resolve the issues of whether the actuarial instruments used in sexually violent predator commitment evaluations are subject to a Frye analysis and whether they meet the Frye test because any error in the admission of the actuarial evidence was deemed harmless since the experts relied on Appellant’s admissions and performed clinical reviews in addition to using actuarial instruments. Significant

\textsuperscript{121} Id. at 1025.

\textsuperscript{122} Thorell, 72 P.3d at 725; See also, State v. Baity, 991 P.2d 1151 (Wash. App. 2000).

\textsuperscript{123} Thorell, 72 P.3d at 725 citing the Br. of Amicus Curiae, by the Washington Association for the Treatment of Sexual Abusers (WATSA) at p. 16.

\textsuperscript{124} In re Detention of Erbe, 800 N.E.2d 137, 152 (Ill. App. 2003).
also in the court’s decision was that the appellant, rather than the State, emphasized the results of the actuarial instruments in closing arguments.\textsuperscript{125}

Only when a new or relatively unknown actuarial tool is introduced is an evidentiary hearing request granted.\textsuperscript{126} An Illinois appellate court remanded a case and directed the trial court to conduct a \textit{Frye} hearing to determine the admissibility of the actuarial instruments used to measure the likelihood of re-offense.\textsuperscript{127} The court stated that if the Static 99, the MnSost-R, and the RRASOR satisfied the standard set forth in \textit{Frye}, then the judgment of the trial court would be affirmed but if they had not gained general acceptance from the psychological and psychiatric communities, the respondent would be entitled to a new trial.\textsuperscript{128} Before the \textit{Frye} hearing was conducted, the state Supreme Court issued an opinion in \textit{In re Commitment of Simons}\textsuperscript{129}, and noted, “In several jurisdictions actuarial risk assessment is mandated by either statute or regulation.”\textsuperscript{130} Thus the appellate court’s prior order was vacated based off of the criteria laid out in \textit{Simons}: “(1) experts in at least 19 other states rely upon actuarial risk assessment in forming

\begin{flushleft}
\textsuperscript{125} McQueen v. State 848 So.2d 1220, 1220 n. 1 (Fla. App. 2003).

\textsuperscript{126} \textit{See} \textit{In Re Detention of Ritter}, 312 P.3d 723, 726 (Wash. App. 2013)\textit{(the Court of Appeals remanded the case back to the trial court with directions to conduct a \textit{Frye} hearing and issue factual findings on the SRA-FV)}.


\textsuperscript{128} \textit{In re Detention of Traynoff}, 831 N.E.2d 709, 723 (Ill. App. 2005).

\textsuperscript{129} \textit{In re Commitment of Simons}, 821 N.E.2d 1184 (Ill. App. 2004).

\textsuperscript{130} \textit{Id. at 1194}.
\end{flushleft}
their opinions on sex offenders’ risks of recidivism; (2) no state outside of Illinois has deemed inadmissible expert testimony based upon such instruments; (3) several jurisdictions actually mandate actuarial risk assessment; and (4) academic literature contains many articles confirming the general acceptance of actuarial risk assessment by professionals who assess sexually violent offenders for risk of recidivism.”

The conclusion that actuarial risk assessment has gained general acceptance in the psychological and psychiatric communities was believed to be thoroughly supported by the case law, the statutory law, and the academic literature.

A Massachusetts district court premised its decision solely upon the precedent of In re Simons and summarily admitted actuarial-based predictions, concluding the standards of general acceptance and peer review had been met. An Iowa appellate court affirmed the notion that trial courts may, in their discretion, consider the Daubert factors - if deemed helpful in a particular case - because determinations of admissibility of such evidence must necessarily be made on an ad hoc basis since it would be impossible to establish rules binding in every

131 Traynoff, 831 N.E.2d at 724.
132 Id.
135 Shields, 597 F. Supp 2d at 236 (“As is the commonly accepted practice in the field, all three experts in this case used an actuarial tool as part of his evaluation process.”).
Citing the Iowa Supreme Court, the appellate court echoed the concerning yet realistic point that “there is no requirement that the expert be able to express an opinion with absolute certainty.\textsuperscript{137}

It is our contention that the summarily determined reliability on actuarial tools is in error because such tools are still premised on questionable and unconfirmed scientific methods.\textsuperscript{138} The severe consequence resulting from these courts’ decisions—blindly allowing for testimony based on actuarial findings— is the potential lifetime deprivation of an individual’s liberty, thus making the acceptance of a lack of “absolute certainty” difficult to accept.

\textbf{ii. Legal and judicial unfamiliarity}

Another factor and concern is the potential for judges (and lawyers) to blindly accept testimony regarding the accuracy of actuarial instruments.\textsuperscript{139} “We

\begin{quote}
\textsuperscript{136} Holtz, 653 N.W.2d at 615.

\textsuperscript{137} Id.


\textsuperscript{139} People v. Poe, 88 Cal.Rptr.2d 437, 440–41 (Ct. App. 1999) (concluding that a Rapid Risk Assessment score in the high-risk category, adjusted with appropriate clinical factors,
have embarked on the first steps into a new world, arguably a science fiction world, in which judges and juries are asked to prevent crimes years before they occur.”

For a judge to make a ruling on the potential future risk of an individual, his or her ultimate decision is purely based off of the subjective opinion of an expert witness devoid of concrete answers and verifiable scientific conclusions. The initial promise of actuarial instruments that would remove the fallibility of the human element and offer quantifiable answers regarding risk to reoffend is understandably enticing.

An opinion responding to a challenge to admitted STATIC-99 evidence stated that courts must “respect [the] policy of [the] legislature with respect to the trustworthiness of psychiatric opinion evidence in cases involving sexually dangerous persons.”

In a sex-offender registration case, the Static 99 score of 5 – designating medium to high risk- was used in conjunction with other factors, to classify the
generated

---

140 Burton, 884 So.2d at 1120.
141 See e.g. People v. Santos, 901 N.Y.S.2d 909, *5 (Sup. Ct. 2009) (use of ARAs in predicting sex offender recidivism was an outgrowth of what were seen as the predictive deficiencies of using subjective clinical judgment alone).
defendant. The defendant’s expert was qualified to testify but did not utilize the Static 99 in his assessment. The issued opinion upheld the state’s classification level and found that the defense expert’s testimony was not credible without the inclusion of “factors in the so-called Static 99 which provides for a total score”\(^{143}\) in determining risk to reoffend. The court dismissed the question of whether psychiatrists and psychologists can predict future behavior and evidenced the legislature’s provision of reports and testimony in SVP hearings as proof of such ability.\(^{144}\)

Courts have held that the adversarial protections of cross-examination and rebuttal witnesses, would sufficiently allow the defendant the opportunity to challenge the instruments’ validity.\(^{145}\) This of course is only effective if the defendant is afforded an opportunity for a rebuttal witness and has been assigned effective counsel who is knowledgeable and able to dispute opposing expert witness testimony.\(^{146}\)

\(^{143}\) \textit{Id.}\n
\(^{144}\) \textit{Id.} (“Judgment must be respected absent a showing that it is utterly without a reasonable foundation or specifically contravenes a Constitutional provision.”)\n
\(^{145}\) See generally, \textit{In re Detention of Erbe}, 800 N.E.2d 137 (Ill. App. 2003); See also \textit{Halleck v. Coastal Building Maintenance Co.,}, 647 N.E.2d 618, 627 (Ill. App. 1995) (on cross-examination, counsel may probe the weaknesses in the bases of an expert’s opinion as well as the general soundness of his opinion).

\(^{146}\) An early case involving an individual committed under Minnesota’s SVP law challenged his commitment because the State’s expert \textit{had failed to use} actuarial methods in his risk assessment and that by failing to perform actuarial analysis, the State had ignored "state of
An order issued by Florida trial court judge declared that the tests were “accepted by a clear majority of the professional community in assessing the risks of recidivism for sexually violent offenders,” without a thorough discussion of the various tests or a basis for her opinion. It is important to note that neither party objected to the judge’s description of the relevant scientific community even though none of the State’s experts could testify about acceptance within the psychiatric community. On appeal from this case, Chief Judge Altenbernd, wrote a remarkably thoughtful concurring opinion, specifically discussing the issues related to reliance on unfamiliar actuarial instruments:

I am inclined to believe, however, that the lawyers and trial judges involved in these cases have not yet identified the issues that need to be examined to determine whether these actuarial tests pass the Frye test and whether evidence regarding the tests is more probative than prejudicial. It is not entirely clear to me that the diagnostic method utilized by these experts is generally accepted within the psychiatric and psychological professions, or that the courts should permit opinion testimony based on these methodologies.  

the art” evidence and the “best available scientific knowledge and methodology”, Linehan, 557 N.W.2d at 189.

147 See generally, Burton, supra.

148 Burton, 884 So. 2d at 1115.
Subsequently, he highlighted the difficulties in assessing future risk and questioned whether “humans have the ability to accurately select those people who, by clear and convincing evidence, are likely to engage in future acts of sexual violence if not confined.” He carefully cautioned that the creation of certain testing instruments were fueled by outside pressures placed on psychiatrists and psychologists to develop a scientific method to uniformly identify dangerous sexual offenders, and clearly noted that although he did not profess to have the expertise to even phrase all of the questions, the judiciary needs to obtain the help of those who can ask and answer the necessary questions before testimony is admitted based on these actuarials.

The opinion rendered by the trial judge in the New Jersey case of R.S. lacked the well-reasoned and insightful position offered above, and instead argued that since expert testimony concerning future dangerousness based on clinical judgment alone has been found sufficiently reliable for admission into evidence at criminal trials, “it is logical that testimony based upon a combination of clinical

149 Burton, 884 So.2d at 1117 (“I find it very hard to believe that the membership of the American Psychiatric Association and the membership of the American Psychological Association have reached a consensus that their professions can achieve these predictions with a level of accuracy sufficient to permit the indefinite confinement of an individual”); see Roeling v. State, 880 So.2d 1234 (Fla. 1st DCA 2004) (defining the relevant scientific community that generally accepts these actuarial tests as licensed clinical psychologists specializing in forensic psychology and the evaluation of sexually violent predators).

150 Burton, 884 So.2d at 1119.

151 R.S., supra.
judgment and actuarial instruments is also reliable. Not only does actuarial evidence provide the court with additional relevant information, in the view of some, it may even provide a more reliable prediction of recidivism.”

An Illinois appellate court also concluded that there existed no logical reason why a professional could not at least consider actuarial instruments, which the profession widely uses and which are less subjective than unaided clinical judgment.

The problem with this reasoning lies in the understanding of what is “logical”. Although logical reasoning is based on earlier or otherwise known statements, events, or conditions, in law, if those “known” statements, events or conditions are incorrect or false, the logical deduction stemming from those basis’ is also false. Philosophically speaking, logic is characterized by clear or valid reasoning and that cannot be accomplished without investigation into what constitutes the basic truths that premise the resulting conclusions. This point is strengthened in the New Jersey case, In re J.P., that illustrates a prime example of the failure of the...

152 ld. at 220-21.:  

Although there are critics who challenge the validity and predictability of actuarial instruments in sex offender assessments, the record expert testimony and scientific literature demonstrates that clinicians specializing in sex offender assessments generally support the use of actuarial instruments in the overall assessment process even though they do not support reliance on the actuarial instruments alone....

judiciary to accurately investigate and understand the complexities and uncertainties of these instruments. J.P. joined in the R.S. appeal but dealt exclusively with the appropriateness of using actuarial instruments to assess the future risk of juveniles.\textsuperscript{155} In R.S., the New Jersey appellate court reaffirmed its confidence in the judicial ability to interpret the value and validity of actuarial instruments, noting that “an experienced judge who is well-informed as to the character of the actuarial instruments and who is accustomed to dealing with them is much less likely to be prejudiced by their admission …[and] accord the appropriate weight to actuarial assessments in any given case, or reject them.”\textsuperscript{156} However, in J.P., the appellate division reversed the trial judge’s decision and remanded the case for an evidentiary hearing on the applicability of actuarial instruments to juvenile offenders.\textsuperscript{157} In J.P., the trial judge, admitted and relied upon expert testimony utilizing actuarials without hearing any evidence on the valid use of such tools on individuals who committed their offenses while under age eighteen.\textsuperscript{158} The trial judge adopted, by reference, the prior opinion of the trial judge in R.S. -admitting actuarial instruments as clinical tools in SVPA commitment hearings - and added her own clarification:

\textsuperscript{155} Id. at 54.

\textsuperscript{156} R.S., 773 A.2d at 91.

\textsuperscript{157} J.P., 772 A.2d at 65 (The appellate court states in their opinion that they doubt any studies or information exists supporting the usage of these tools for juvenile offenders.)

\textsuperscript{158} Id. at 64 (The appellate court issues some concern that “the only testimony concerning the application of the instruments to juveniles elicited from the State’s expert at the R.S. evidentiary hearing calls their reliability into question.”).
They are tools, which are used by clinicians in this area of their expertise.

There is nothing that I have ever said nor have I seen anything said by any legal writer that these are anything more than what they purport to be: Actuarial, placing people in groups, matters for consideration by clinicians, not binding. I mean, it's not like an X ray, and I don't think anybody ever said it was. I think it's admissible for what it is. And I'll cast my vote with Judge Freedman on that.... [a]nd I'm not going to repeat this exhaustive multi-page-I think he's got 60 pages or more in which he exhaustively goes into the background of these various tests. And I believe that these two are included.

Okay.159

Clearly, confidence in judicial ability cannot be blindly accepted, and even those judges who "have seen it all" must support their decisions with clear and valid reasoning and be held accountable for failing to do proper investigation of the basis underlying their decisions. It is up to effective counsel to ask the necessary questions and require the heightened judicial standards.

In In the Matter of the Care and Treatment of Darwin C. Williams160, the Kansas Supreme Court reviewed the decision of the Kansas Court of Appeals in overturning a district court finding that Mr. Williams was a sexually violent predator. The appeals court gave considerable weight to the fact that Mr. Williams’

159 Id. at 59.

160 253 P.3d 327 (Kan. 2011).
scores on actuarial testing did not exceed a 50 percent risk of sexual reoffending. Justice Luckert pointed out that there is no authority supporting a particular method of proof, test, or percentage or category of risk. Ultimately, the court decided that evidence beyond the test scores based on the evaluating clinician’s conclusions of risk, could convince a rational fact finder that the State had met their burden.

Unfortunately to date, most court opinions still rely on controversial science\textsuperscript{161} and reveal that the judiciary has failed to ask the necessary questions or demand the necessary answers from the clinical community that would justify civil

\begin{flushleft}
\footnotesize
\textsuperscript{161} For an overview of the discrepancies in risk assessment, see Robin J. Wilson et al., \textit{Comparing Sexual Offenders at the Regional Treatment Centre (Ontario) and the Florida Civil Commitment Center}\textit{ Int’l J. Offender Ther. & Compar. Criminol.} (2012) (in press), accessible at http://ijo.sagepub.com/content/early/2012/01/17/0306624X11434918 (discussed in Karen Franklin’s online blog, In the News: Treatment and Risk Among the Most Dangerous Sexual Offenders (February, 21, 2012), retrieved from http://forensicpsychologist.blogspot.com/2012/02/treatment-and-risk-among-most-dangerous.html); see also, Shoba Sreenivasan et al., \textit{Alice In Actuarial-Land: Through the Looking Glass of Changing Static-99 Norms}, 38 J. AM. ACAD. PSYCHIATRY & L. 406 (2010); R. Karl Hanson, \textit{Who is Dangerous and When are They Safe? Risk Assessment with Sexual Offenders}, in \textit{PROTECTING SOCIETY}, supra note 6, at 63-72; See also, Matter of Registrant G.B., 685 A.2d 1252 (N.J.1996); C.A., supra.
\end{flushleft}
commitment and the grave deprivation of freedom and liberty based on future risk predictions.\(^{162}\)

iii. Scientific Reliability- error rate and inherent false positives

Actuarial tests are designed to establish or define a small group or sub-population of people in which the risk that a member of the group will commit a violent sexual offense is higher than in the population as a whole. They look at whether the likelihood of a particular condition is higher than in the population as a whole but the pool always contains some people who do not have the particular condition and thus false identification is inevitable. A false positive occurs when a scientist errs by incorrectly placing a person into a group or category based off of a scientific test.\(^{163}\) When these tests are utilized in sex offender civil commitment, the

\(^{162}\) In People v. Poe, 88 Cal.Rptr.2d 437, 440-41 (Ct. App. 1999), the court found that a RRASOR score in the high risk category adjusted with appropriate clinical factors supported a finding that the defendant was likely to engage in sexually violent behavior if released. See also People v. Otto, 95 Cal.Rptr.2d 236, 241-42 (Ct.App.), aff’d on other gds., 109 Cal.Rptr.2d 327 (2001) (results of RRASOR admitted into evidence at SVP trial). In Garcetti v. Superior Court, 102 Cal.Rptr.2d at 239, rev’d on other grounds sub nom. Cooley v. Superior Court, 127 Cal.Rptr.2d 177 (2002) the court held that the Static 99, “a psychological instrument that uses an actuarial method to produce a profile of a person’s likelihood of re-offense with an accuracy rate of over 70 percent, and that is supplemented or adjusted by use of clinical factors, can form the basis for an expert opinion on future dangerousness.”.

\(^{163}\) Hamilton, supra note 100 at 749 (a common problem is “improper interpretation that group-based scores provide risk-assessment estimates that are individualized to specific defendants.”), see e.g. State v. Rosado, 889 N.Y.S.2d at 379 (actuarial instruments do not
result of a false positive is indefinite confinement in a facility that looks very similar to a prison.\textsuperscript{164}

“For many purposes, an error rate of 30\% or more is quite acceptable. Life insurance companies, for example, usually charge higher premiums or refuse to insure the pool of obese, cigarette smokers because the probability of a premature death is higher among the members of this pool, even though many members of the pool live to an average age. It is one thing to price insurance based on actuarial device with an error rate of 20\% or higher; it is quite another to deprive citizens of their constitutional liberty based on actuarial devices with such high error rates.”\textsuperscript{165}

One court opinion incorrectly interpreted the results of the Static 99 and noted that it “calculated defendant’s risk of re-offense”.\textsuperscript{166} In another case, an expert testified that the defendant's score of seven on STATIC-99 “means that the likelihood of [the defendant] being convicted of a new sex offense is 39\% within 5 years.\textsuperscript{167} Experts have also mis-characterized the use of multiple actuarial tools measure psychological constructs such as personality or intelligence. In fact, they do not measure any personal attributes of the particular sex offender at all. Rather, they are simply actuarial tables—methods of organizing and interpreting historical data).  

\textsuperscript{164} Burton, 884 So.2d at 1120.  
\textsuperscript{165} Id. at 1119.  
\textsuperscript{166} People v. Hubbart, 106 Cal. Rptr. 2d 490, 498 (Ct. App. 2001) (emphasis added).  
\textsuperscript{167} State v. P.H., 874 N.Y.S.2d 733, 740 (Sup. Ct. 2008).
when such tools are relatively consistent in the direction of their risk predictions, presuming that results from numerous tools strengthen the reliability of each individual tool.\textsuperscript{168} The Static 99 has even been relied upon to rehabilitate an expert’s mis-diagnose of the defendant.\textsuperscript{169}

The New Jersey case of \textit{R.S} reflects the dissension amongst experts in the reliability and accuracy of actuarial assessment tools.\textsuperscript{170} The State’s experts testified in favor of the use of actuarial instruments alluding to an “overwhelmingly” large number of research studies that support the use of static factors over the use of dynamic factors for making sex offender risk determinations.\textsuperscript{171} Even though all the experts admitted that none of the studies had been peer reviewed. The experts for the defense found the instruments to be generally unreliable in assessing risk and

\textsuperscript{168} People v. Lopez, 53 Cal. Rptr. 3d 549, 553 (Ct. App. 2006); People v. Edmonton, 126 Cal. Rptr. 2d 836, 838-39 (Ct. App. 2002).

\textsuperscript{169} See People v. Mckee, 73 Cal. Rptr. 3d 661, 688 n.23, 689 (Ct. App. 2008) (the court relied on expert’s belief that defendant would reoffend even though it concluded that the defendant was not diagnosed properly).

\textsuperscript{170} Hamilton, \textit{supra} note 100, at 752 (noting that discrepancies in the scoring of defendants, both between experts on competing sides and between the two or more experts on the same side – illustrating the problems inherent in the instruments and their scoring rules has not impacted the courts’ reliance on these instruments.)

\textsuperscript{171} \textit{Id.} (The argument as to interpretation of risk fell upon semantics with one of the State’s experts acknowledging that it “is a misuse of the instruments to say that a person with a certain score has a specific risk of recidivism. Rather, it is proper to say that a person with a certain score is in a group that has been shown through research to have a specific risk of recidivism.”).
one expert noted that psychologists have a history of utilizing invalid instruments and that actuarial tools are lacking in psychometric reliability (If the test is administered to the same person on more than one occasion, are the results consistent?), inter-rater reliability (If two different individuals administer the test, are the same results achieved?) and scale consistency (Are the items on the same scale internally consistent? Do they measure the same thing?). 172

The New Jersey appellate court concluded that authoritative scientific and legal writings, along with the existence of numerous workshops held nationwide on the subject of risk assessment, established that actuarial instruments were “an accepted and advancing method of helping to assess the risk of recidivism among sex offenders.” 173 As the Appellate Division summarized:

The extensive expert testimony in this matter concerning validation studies, cross-validation studies, reliability studies, correlation coefficients, and clinically-derived factors attests to reliability in this context, where the actuarials are not used as the sole or free-standing determinants for civil commitment. They are not litmus tests. There is no requirement that the actuarial instruments be the best methods which could ever be devised to

172 Id. at 524.
173 R.S., 773 A.2d at 95.
determine risk of recidivism. What is required is that they produce results which are reasonably reliable for their intended purpose.¹⁷⁴

The results from these actuarial tests tend to bolster the opinion that the individual is dangerous and should be indefinitely committed¹⁷⁵ and begs the crucial question not often asked or answered: what is their intended purpose?

iv. Jury Taint

Concern over jury confusion has elicited a number of objections in the usage of actuarial instruments to determine risk sexual offender civil commitment cases—although most of these objections have been struck down by the courts.¹⁷⁶ In two cases, however, courts have excluded expert testimony based on the STATIC-99,

¹⁷⁴ Id, 773 A.2d at 91[citation omitted].

¹⁷⁵ Hamilton, supra note 100, at 750 (“While courts have tended to accept the individualized statistic when the actuarial-based risk estimate is high, they have tended to highlight the group-based nature of actuarial scores when the results are low”), citing In re Civil Commitment of K.S., 2008 N.J. Super. LEXIS 627, at **6-9 (N.J. App. Div. 2008) (noting “high risk” score on STATIC-99 as part of determination that commitment was proper); State v. Vanek, No. 89125, 2007 Ohio App. LEXIS 5433, at *6-7 (Ohio Ct. App. 2007) (finding for state despite low score while noting that “the utility of the Static-99 evaluation as a diagnostic tool for individual risk assessment is open to question” [internal quotation marks omitted]); State v. Ellison 2002 Ohio App. LEXIS 4216, at *5-6, 24 (Ohio Ct. App. 2002) (court need not give much weight to STATIC-99 evidence showing defendant to be “low-to-medium risk,” since actuarial-based risk estimates could “be at odds with Ohio’s statutory scheme” requiring individualized determinations).

¹⁷⁶ Ward, supra.
finding that it could not distinguish between, or explain, the reasons why a person might reoffend, and such testimony based on the SVR-20 test, finding that it was inadmissible under Frye. In People v. Santos, a New York court opined that risk assessment “is a dynamic and ever changing discipline, where new research findings continually modify the understanding of risk”. The court focused on the recent revision of the Static 99 - “the most common ARA in use throughout the world today” in order to exemplify the changing opinions on risk, notably the fact that recidivism rates for sex offenders are significantly lower from when the original norms were compiled in 2003.

In 2002, Iowa faced its first appellate challenge to the admissibility of expert testimony regarding actuarial risk assessment instruments. The appellate court admitted and found reliable, testimony based off of the scoring of actuarial instruments (the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR), the Static-99, the Minnesota Sex Offender Screening Tools (MnSOST), and the Minnesota Sex Offender Screening Tools-Revised (MnSOST-R)) that have only been in existence  

177 Rosado, 889 N.Y.S.2d at 391-92.


179 People v. Santos, 901 N.Y.S.2d 909 (Sup. Ct. 2009).

180 Id. at *9.

181 Id.

182 Id.
for two to three years.\textsuperscript{183} The expert’s reliance on these instruments was appropriate since the expert had also conducted a full clinical evaluation through a thorough review of a comprehensive file of materials and documents relating to his past criminal history. The defendant’s expert instructed the district court that although it is acceptable to perform the tests:

What’s not accepted at this point in time is adding up those numbers to get some kind of a score that you can then change into a prediction of the future. That’s where the science doesn’t support things. So having a list of bad signs, that’s perfectly acceptable. Changing them into a number to predict the future, there’s no basis for that. And if one wants to use the tests, one has to acknowledge that there is no foundation for that.\textsuperscript{184}

Regardless of the cautionary testimony as to the usage of these instruments, the district court found the instruments to be reliable and was confident that “the jury would not be left with a mistaken assumption that that’s what they need to look at and that’s all they need to look at.” \textsuperscript{185}

\textsuperscript{183} Holtz, 653 N.W.2d at 617.
\textsuperscript{184} Id. at 618.

\textsuperscript{185} Id. at 619; see also, In re Van Orden, 271 S.W.3d 579, 584 en banc (a psychologist at a jury trial based his assessment on the results of the Static–99 actuarial test and diagnosed Van Orden with pedophilia and anti-social personality disorder and found that he was more likely than not to reoffend if not committed).
The appellate court rejected the argument that cross-examination on the statistical and methodological problems associated with these instruments would “confuse and mislead the jury,” without offering any substantive explanation for its ruling. In affirming the district court’s decision, the appellate court found solace and cited to the then recent conclusion of the New Jersey Superior Court\textsuperscript{186} that “[o]ur research has revealed no state appellate court decision which has found actuarial instruments inadmissible at SVP proceedings.”\textsuperscript{187}

\textsuperscript{186} R.S. supra.

\textsuperscript{187} Holtz, 653 N.W.2d at 619 quoting R.S., 773 A.2d at 96.

For cases cited affirming admission, see, e.g., People v. Ward, 83 Cal.Rptr.2d at 832 (“In civil commitment cases where the trier of fact is required by statute to determine whether a person is dangerous or likely to be dangerous, expert prediction may be the only evidence available.”); People v. Poe, 88 Cal.Rptr.2d 437, 440 (Ct. App. 1999) (use of RRASOR upheld); Garcetti v. Superior Court, 102 Cal.Rptr.2d at 241 rev’d on other grounds sub nom. Cooley v. Superior Court, 127 Cal.Rptr.2d 177 (2002) (use of PCL-R, RRASOR and Static 99 upheld); In re Detention of Walker, 731 N.E.2d 994, 998 (Ill. App. 2000) (use of RRASOR upheld); In re Detention of Strauss, 20 P.3d 1022, 1024 (Wash. App. 2001) (use of MnSOST, RRASOR and VRAG upheld); In re Detention of Campbell, 1986 P.2d at 779 (Wash. 1999) (reliance on actuarial and clinical assessment proper and weight to be given evidence is question for the jury). See also State, ex rel. Romley v. Fields, 35 P.3d 82, 89 (Ariz. 2001) (“use of actuarial models by mental health experts to help predict person’s likelihood of recidivism is not the kind of novel scientific evidence or process to which Frye applies”); Commonwealth v. Reese, 2001 WL 359954 at *9 (Mass. Super. 2001) (“statistics, in general, are better predictors of future sexual dangerousness than clinical judgments”).
A committee facing civil commitment argued that the Static–99 actuarial instrument\textsuperscript{188} only predicts group risk, not individual risk, and will thus confuse the jury.\textsuperscript{189} The court found that results of the Static 99 was admissible in testimony in cases involving the civil commitment of a sexually violent predator so long as the instrument is used in conjunction with a full clinical evaluation.\textsuperscript{190}

As explained in \textit{People v. McDonald}\textsuperscript{191}:

When a witness gives his personal opinion on the stand—even if he qualifies as an expert—the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible. But the opposite may be true when the evidence is produced by a machine: like many laypersons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently ‘scientific’ mechanism, instrument, or procedure. Yet the aura of infallibility that often surrounds such evidence may well conceal the fact that it remains experimental and tentative. For this reason, courts have invoked the Kelly–

\begin{flushleft}
\end{flushleft}

\begin{flushleft}
\textsuperscript{189} In re Van Orden, 271 S.W.3d 579, 588 (Mis. 2008) \textit{en banc}.
\end{flushleft}

\begin{flushleft}
\textsuperscript{190} See In the Matter of the Care and Treatment of Murrell, 215 S.W. 3d 96, 112 (Mo. 2007) (, on the question of whether actuarial instruments should be rejected as “irrelevant” because “they are a product of the recidivism of the test group, not the individual being evaluated.”)
\end{flushleft}

\begin{flushleft}
\textsuperscript{191} People v. McDonald, 690 P.2d 709 (Cal. 1984), \textit{overruled on other grounds} in People v. Mendoza, 98 Cal.Rptr.2d 431 (2000) .
\end{flushleft}
Frye rule primarily in cases involving novel devices or processes such as lie detectors, ‘truth serum,’ Nalline testing, experimental systems of blood typing, ‘voiceprints,’ identification by human bite marks, microscopic analysis of gunshot residue, and hypnosis and, most recently, proof of guilt by ‘rape trauma syndrome’. In some instances the evidence passed the Kelly–Frye test, in others it failed; but in all such cases ‘the rule serves its salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods.” 192

How competent is a jury to accurately discern testimony about the results of the Static 99 test? 193 In a 2003 case, the State presented the testimony two psychologists who scored the Static–99 test during their evaluations. The first expert found that the Static–99 test indicated a 52 percent chance that defendant will reoffend within 15 years. The second psychologist testified that she used the Static–99 test to get a “general thumbnail estimate of where [she] thought [defendant] would fall,” 194 but did not rely on the test. It was admitted that the developer of the Static–99 continually revises the instrument thus it was not perfect and that no known study had shown that adjusting the actuarial was an accurate measure of risk. Also explained was that psychologists do not have actuarial instruments that encompass all the known risk factors obtained from research on

192 Id. at 724.

193 Therrian, supra.

194 Id., 6 Cal. Rptr. 3d at 418.
sexual reoffenders. The defendant’s psychologist testified that the Static–99 test is a work-in-progress and its reliability is unknown. He opined that the factors considered in the Static–99 test are important and must be considered, but objected to using the assessment as an “arithmetic personality profile.” He pronounced that defendant's behavior was opportunistic, not predatory, and that defendant had control over his behavior.¹⁹⁵ Both state experts found that the defendant posed a substantial risk to reoffend. The appellate court upheld the commitment based on the information that the state’s experts relied on other factors outside of the actuarial instruments to make their assessment and adequately informed the jury that the procedures used in the Static 99 were objective and fallible.¹⁹⁶ The court felt confident in their assumption that no reasonable juror would mistake either expert’s use of the Static–99 test as a source of infallible truth on the issue of defendant's risk of reoffending.¹⁹⁷ Of course, where there is a dispute between clinicians, the fact-finder is left with a simple credibility judgment, in which the fears

¹⁹⁵ Id.
¹⁹⁶ Id. at 419:

“No precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior.” Psychological evaluation is “a learned professional art, rather than the purported exact ‘science’ with which Kelly/Frye is concerned....” (People v. Stoll, supra, 49 Cal.3d at p. 1159, 265 Cal.Rptr. 111, 783 P.2d 698).

¹⁹⁷ Id. at 418 (no reasonable juror would mistake expert’s reliance on standardized tests such as MMPI as source of infallible truth on personality, predisposition or criminal guilt).
of sexual violence create a strong bias in favor of assessments that are more protective of public safety.198 This becomes especially problematical in light of valid and reliable evidence that juries are “more likely to undervalue, rather than overvalue, statistical evidence.”199

In the New Jersey case of R.S., the trial judge acknowledged that unreliable psychological testimony might mislead a jury but concluded that where the court is the trier of fact the risk of confusion from expert testimony is greatly diminished.200 A Florida judge questioned whether jurors should be called upon to evaluate the validity of these tests when deciding issues of liberty. When presented to a jury, these tests, coupled with the testimony of the experts who rely on them, may “impl[y] an infallibility not found in pure opinion testimony.”201 In a recent experimental study, Professors Nicholas Scurich and Daniel Kraus concluded that adjusting actuarial risk with clinical judgment was taken into consideration by mock jurors only when it increased the risk estimate, not when it diminished it.202

198 Janus & Prentky, supra note 90, at 1488.
199 Id. at 1491, citing, inter alia, Brian C. Smith et al., Jurors’ Use of Probabilistic Evidence, 20 L. & HUM. BEHAV. 49, 51 (1996).
200 R.S., 773 A.2d at 84-85.
201 In re Commitment of Burton, 884 So.2d 1112, 1117 (Fla. App. 2004); See Flanagan v. State, 625 So.2d 827, 828 (Fla.1993).
Jury taint is most definitely compounded by a judge or lawyer’s blind acceptance or unfamiliarity with the tools and tests. A jury’s susceptibility to a judge’s confidence in actuarial tools or a heavily -weighted, one-sided interpretation of the tools’ reliability is a valid concern and sure-fire way to seal a defendant’s lifetime commitment.

v. Expert Qualifications

The debate over necessary expert qualifications required to testify in a sexual offender commitment case has been frequently argued. A Texas trial court found, after conducting a Daubert hearing, that the defendant’s expert lacked the requisite forensic training and experience to testify on his behalf. On appeal, the defendant argued that the trial court abused its discretion and denied him a fair trial when it excluded the testimony of his only expert - despite her documented extensive experience and training in providing sex offender treatment - and prevented him from presenting his side of the case to the jury. The State maintained that any error in excluding the defendant’s expert was harmless despite the fact that her

19 PSYCHOL. PUB. POL’Y & L. 259 ((2013) (jurors more likely to be influenced by testimony as to clinical judgment than by testimony based on risk-assessment instruments).

203 Ward, 83 Cal.Rptr.2d at 832 (Whether they used clinical or actuarial models and whether they specifically followed the DMH handbook are not reasons to exclude their testimony. Even if a difference of opinion exists among professionals on these matters, the experts were not restricted to one methodology or another).

204 Id. at 300
opinion stated that the defendant lacked a behavioral abnormality “at this time.”

The appellate court overturned the trial court’s ruling and concluded that the defendant’s expert was qualified to testify to the likelihood of re-offense, a critical issue disputed by the parties, and without her testimony, the jury had only the State’s experts to guide them in determining one of the critical issues in the case.

On subsequent appeal, the Texas Supreme Court issued the following findings regarding the issue of expert qualifications, in concluding that the trial court abused its discretion in excluding the defendant’s expert:

(1) the Texas SVP Act does not prescribe the qualifications for experts to testify whether a person has the behavioral abnormality required for an SVP and in the Legislature’s view, an expert used to assess whether a person is an SVP is not constitutionally required to be a physician;

(2) “credentials are important, but credentials alone do not qualify an expert to testify” and “a medical license does not automatically qualify the holder to testify as an expert on every medical question”;

(3) trial courts must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion. The test is whether the offering party has established that the expert has knowledge, skill, experience, training, or education regarding the specific issue.

---

205 Id.
206 Id. at 299.
207 Id. at 305.
208 Id.
before the court which would qualify the expert to give an opinion on that particular subject; 209

(4) opinions about behavior and psychology depend largely on the subjective interpretation of the expert, and opinions too dependent upon an expert’s subjective guesswork must be excluded. 210 The expert’s experience, knowledge, and training are crucial in determining whether the expert’s opinions are admissible, and;

(5) risk assessments are to a degree subjective, and in evaluating an expert’s qualifications to make them, it is important to know what training and experience an expert has in minimizing that subjectivity. 211

A final concern stems from the quality and extent of training sought and available to experts utilizing these tools. The authors of the STATIC-99 write in their coding rules that they “strongly recommend training in the use of the STATIC-99 before attempting risk assessments that may affect human lives.” 212

In the initial trials involving actuarial instruments, formal training manuals for the instruments did not exist. Only articles, technical instructions, varied workshops by the

209 Id.
210 Id. at 306, citing S.V. v. R.V., 933 S.W.2d 1, 42 (Tex.1996) (Cornyn, J., concurring).
211 Id. at 307.
instruments developers\textsuperscript{213} and materials on the Internet\textsuperscript{214} were available to aid the evaluators in scoring. An expert in Illinois, scored three actuarial risk-assessment instruments after receiving about 150 hours of specialized training geared to the proceedings under the SVP Act, including the administration of actuarial risk-assessment instruments and other evaluation tools. Based off of those scores, he placed the defendant in a “membership with a group of sex offenders who did sexually reoffend at a fairly high rate.”\textsuperscript{215}

The Kansas Supreme court upheld commitment even though the state’s expert had performed only 17 or 18 prior sexual predator evaluations.\textsuperscript{216} The court reinstated the order of commitment: “If we were weighing the evidence and assessing credibility, we might reach a different result from that of the district court. But that is not our role and should not have been the role of the Court of Appeals.\textsuperscript{217}

\textsuperscript{213} Hamilton, supra note 100, at 731 (“There are no criteria, however, for the scope, time, or regimen for training or otherwise certifying potential assessors on the actuarial instruments.”).

\textsuperscript{214} Id. at 733 (“Mostly, information is vicariously available on the internet and through occasional training classes.”).

\textsuperscript{215} In re Detention of Erbe, 800 N.E.2d 137, 144 (Ill. App. 2003).

\textsuperscript{216} In re Williams, 253 P.3d 327, 329 (Kan. 2011).

\textsuperscript{217} In re Williams, 2009 WL 2762455, at *6 (Kan. App. 2009), rev’d on other grounds, 253 P.3d 327 (2011) (State argued that Court of Appeals focused on the statistical data from the risk assessment tools finding that the percentages of risk, generated by the actuarial tests,
Rather, we look at all of the evidence in the light most favorable to the State to
determine if a reasonable fact finder would find the State had met its burden....As is
often true in cases such as this, the dispute became a battle of the experts.”

Conclusion

These complex issues and circumstances must be considered in evaluating
the quality of representation afforded to individuals who potentially deemed to be
sexual predator commitment cases. These cases are truly like no other in the justice
system, and require a heightened standard of representation. In order to meet this
heightened standard, counsel must use every resource and tool at his or her
disposal in order to be effective and offer ethical and rigorous representation.
Counsel must seek out and have access to expert instruction and opinion on the
psychiatric, social and political elements of each case – skills that are most likely
beyond most attorneys’ schooling and legal education. Without such access, counsel
has little hope of understanding the opinions and expertise that he or she will
confront throughout the development of the case likely provide inadequate
representation. Only through stricter standards of representation will we have the
ability, in the words of a Florida appellate court, still be able to “honor and trust the
heritage of freedom and liberty that has made this country strong”.218

were “rather low in comparison to other defendants who have been found to be sexually
violent predators.”).

218 In re Commitment of Burton, 884 So.2d 1112, 1121 (Fla. App. 2004).
b. Ake v. Oklahoma

Nearly thirty years ago, the U.S. Supreme Court addressed the question of a defendant’s right to an expert in a criminal trial.\textsuperscript{219} In \textit{Ake v. Oklahoma}, a death penalty case, the Supreme Court ruled that an indigent criminal defendant who makes a threshold showing that insanity is likely to be a significant factor at trial is constitutionally entitled to a psychiatrist’s assistance.\textsuperscript{220} The Court observed that it had “long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to insure that the defendant has a fair opportunity to present his defense.”\textsuperscript{221} This principle, grounded in the due process clause’s guarantee of “fundamental fairness,” derives from the belief “that justice cannot be equal when, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”\textsuperscript{222}

\begin{flushright}
\textsuperscript{219} See generally, Perlin, \textit{supra} note 100, at **14-22.
\textsuperscript{221} \textit{Ake}, 470 U.S. at 76.
\textsuperscript{222} \textit{Id.}
\end{flushright}
“Meaningful access to justice” is the theme of the relevant cases, the Court found,223 noting that “mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process.”224 A criminal trial is “fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.”225

The Court considered the “pivotal role” psychiatry has come to play in criminal proceedings,226 reflecting the “reality ... that when the State has made the defendant’s mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant’s ability to marshal his defense.”227 It set out what it perceived as the role of the psychiatrist in such cases:

[P]sychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant’s mental condition, and about the effects of any disorder

223 Id. at 77.
224 Id.
225 Id. While such a defendant does not have a right to all the assistance that a wealthier defendant might be able to purchase, he is nonetheless entitled to “an adequate opportunity to present [his] claims fairly within the adversary system.” Ross v. Moffitt, 417 U.S. 600, 612 (1974).
226 Ake, 470 U.S. at 79.
227 Id. at 80.
on behavior; and they offer opinions about the defendant’s mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party’s psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant’s mental state, psychiatrists can identify the “elusive and often deceptive” symptoms of insanity, Solesbee v. Balkcom, 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the medical condition of the defendant at the time of the offense.\textsuperscript{228}

Importantly, for the purposes of the question we are facing here, the courts have generally read \textit{Ake} narrowly, and have refused to require appointment of an expert unless it is “absolutely essential to the defense.”\textsuperscript{229} By way of examples,

\textsuperscript{228} \textit{Ake}, 470 U.S. at 80-81.

\textsuperscript{229} \textsc{Stephen A. Saltzburg \& Daniel J. Capra}, \textsc{American Criminal Procedure} 802 (6th ed. 2000); \textit{see also} David A. Harris, \textit{Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent}, 68 N.C. L. Rev. 763, 783 (1990) (“Lower courts often have interpreted \textit{Ake} less than generously, unduly constricting the availability of the right.”); Comment,
courts have split on whether there is a right to an expert *psychologist* to perform psychological testing under *Ake*, and have also, without citing *Ake*, rejected an application for the right to the appointment of a social psychologist to aid in jury selection. *Ake*, on the other hand, was relied on so as to require the appointment of a pathologist in a criminal case. On the perhaps-closer question of the requirement of the appointment of a DNA expert, after an intermediate appellate court in Virginia relied on *Ake* to require the appointment of such an expert, that decision was subsequently vacated, with no discussion of *Ake* in the subsequent opinion.

---

*Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-*

*Ake* *Criminal Justice System*, 37 EMORY L.J. 995 (1988) (arguing *Ake* should be read to encompass nonpsychiatric expert assistance).


The application of Ake to SVP proceedings remains an open question.234 As the Crane court noted, the “science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law.235” It would therefore seem necessary to provide individuals facing SVP civil commitment, an absolute right to the appointment to an expert witness. Perhaps, courts might follow the lead of the pre-Ake case of Little v. Streater,236 conferring a right to state-funded blood testing in paternity actions because of their “quasi-criminal status.237 A Texas appellate court, citing Little, ruled that because the SVP statute provides for assistance of counsel, due process requires a person to be able to enjoy that protected right.238 Without concluding whether the SVP is civil or quasi-criminal, liberty interests in a fair

---

234 JULES EPSTEIN, THE PROSECUTION AND DEFENSE OF SEX CRIMES § 41.05 (2013).
235 Crane, 534 U.S. at 413–14 (citing Ake 470 U.S. at 81 (psychiatry not “an exact science”)
237 Id. at 9.
proceeding, including the statutory right to counsel were guaranteed.\textsuperscript{239} The court distinguished \textit{Allen v. Illinois} because it involved “actual treatment in a psychiatric hospital.”\textsuperscript{240} However, the Texas Supreme Court reversed the ruling of the appellate court and reiterated that competency hearings are not required for civil proceedings,\textsuperscript{241} noting that by their very nature, civil commitments often involve individuals who would be incompetent to stand trial.\textsuperscript{242} Criminal due process rights – and the ability to be competent and assist in representation - would only apply if the individual were to violate the terms of his civil commitment and incur a felony charge.\textsuperscript{243} Although the Texas Supreme Court sidestepped the right to counsel issue, the court’s decision makes it that even more necessary to have legislative standards requiring the appointment of a qualified mental health expert.

Without mention of any right to an expert witness, a Florida court found that in order to meaningfully exercise due process rights, a Ryce Act respondent must be competent so that he or she may both testify on his or her own behalf and assist counsel in challenging the alleged facts. The court stressed that any inability to

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} (Defendant’s due process rights were violated because competent evidence indicated his incapacity both to participate in the proceeding in an effective way and his demonstrated inability to factually or rationally utilize his right to counsel.)
\item \textit{Id.} at 834-45 (comparing \textit{Allen v. Illinois}, 478 U.S. 364, 373 (1986).)
\item \textit{Fisher}, 164 S.W.3d at 654
\item \textit{Id.} at 653-64
\item \textit{Id.} at 654. In 2005, the Texas Legislature revised the SVP statute to allow the court to appoint outside counsel for alleged SVPs if no representative of the Office of the State Counsel for Offenders is available.
\end{enumerate}
\end{footnotesize}
assist counsel in challenging the facts presented at trial violates due process and the right is simply illusory. 244

Again, courts have been split. 245 Although there was a right to court-funded expert assistance found in Pennsylvania, 246 and while Florida has applied Ake in this context, 247 it appears that only four states statutorily provide access to experts in such cases, 248 in at least one of those states, the constitutional argument has been

244 In re Commitment of Branch, 890 So.2d 322 (Fla. Ct. App. 2004) (court emphasized that it is not the admission of hearsay that thwarts a Ryce Act respondent’s due process rights but the inability to combat that hearsay).

245 In the Matter of Williamson, 200 P.3d 38, 2009 WL 248229 (Kan. App. 2009) (resident committed to a state hospital, participating in a sexual predator treatment program, was not entitled to funds to obtain an independent psychiatric evaluation who would offer expert testimony on his mental status. The resident had no right to psychiatric services pursuant to the annual review provisions found under Kansas state statutes.).

246 See Curnutte, supra.


248 Arizona, California, Florida and Kansas and Illinois See Epstein, supra note 234, § 41.02. In In re Kortte, 738 N.E.2d 983 (Ill. App. 2000), the court determined that, if the sex offender who is the subject of proceedings under the Sexually Violent Persons Commitment Act is indigent, he is entitled as matter of due process to the appointment of an expert of the kind that he is permitted to call, and that, if a sex offender who is subject of proceedings under the Sexually Violent Persons Commitment Act does not submit to an evaluation by expert from the Department of Human Services (DHS), but the state still calls an examining expert, due process requires that the offender be permitted to call an examining expert of
rejected. California’s SVPA expressly authorizes the appointment of experts for indigent litigants but is not required to give an indigent defendant a confidential evaluation from a non-testifying expert. Citing Ake, the court reiterated that there is no right to more than one appointed mental health expert and no right to a favorable evaluation.

This is even more problematic when we recognize that valid and reliable research indicates that mental health clinicians may lack formal training in risk assessment, and thus may be unaware of risk assessment research findings.

A recent article has considered the application of Ake to cases involving children’s deaths – a cohort of cases that would certainly inspire some of the same enmity as is found in SVPA cases – and has argued that, given “courts’ ready

his own; likewise, if the state calls only nonexamining experts, the offender must be permitted to call one as well.

249 People v. Angulo, 30 Cal. Rptr.3d 189 (Ct. App.2005) (statutorily authorized expert reports may not be privileged).
250 Welfare and Institutions Code section 6603, subdivision (a) (Welfare and Institutions Code section 6603(a)) states in relevant part: “In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person’s request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person’s behalf.”.
251 Angulo, 30 Cal. Rptr. 3d at 197.
252 Id.
admission of prosecutorial forensic evidence that may be invalid, unreliable, or misleading and the defendant's lack of a fair opportunity to rebut such evidence," 254 Ake should apply in such cases. Certainly, identical arguments are on point in SVPA cases.

c. Despised population

Sex offenders 255 are in the media and legal spotlight and are considered to be the most despised segment of the American population. 256 Regularly reviled as

255 On the imprecision and over breadth of this category, ranging from the stranger pedophilic rapist to the teenager consensually sending “sexting” pictures of herself to her boyfriend, see Lucy Berliner, Sex Offenders: Policy and Practice, 92 NW. U. L. REV. 1203, 1208 (1998) (“sex offenders do not share a common set of psychological and behavioral characteristics”), or the driver who posts an allegedly-obscene bumper sticker, see e.g., ALA. CODE § 13A-12-131 (LexisNexis 2005) (including displaying such a bumper sticker as a sex offense). See generally, Cucolo & Perlin, supra note 59, at 207 n. 196 (current system “bundles statutory rape cases that deal with sexual interactions between teenagers -- interactions that would otherwise be consensual but for the age of one of the partners -- with cases of individuals who have committed violent pedophilic offenses”). On the incoherence of laws governing adolescent sexuality, see Michelle Oberman, Two Truths and a Lie: In re John Z. and Other Stories at the Juncture of Teen Sex and the Law, 38 LAW & SOC’L. INQ. 364 (2013). On juveniles and sex offenses generally, see Carissa Byrne Hessick & Judith M. Stimson, Juveniles, Sex Offenses, and the Scope of Substantive Law, 46 TEXAS TECH L. REV. – (2014) (in press).
“monsters” by district attorneys in jury summations, by judges at sentencing, by elected representatives at legislative hearings, and by the media, the

256 Perlin, supra note 32, at 1248:

If we are no longer focusing on insanity defendants as the most “despised” group in society, it is more likely because there is a new universe of “monsters” replacing them in our demonology: sex offenders, known variously, as mentally disordered sex offenders, or sexually violent predators, the ultimate “other.”


257 We have yet to find an appellate reversal of a case in which this inflammatory language was used. See e.g., State v. Henry, 102 So.3d 1016 (La.App. 2012); Comer v. Schriro, 463 F.3d 934, 960 (9th Cir. 2006), cert. den., 550 U.S. 966 (2007); Jackson v. Ludwick, 2011 WL 4374281 (E.D. Mich. 2011); People v. Bonner, 2010 WL 3503858 (Tex. App. 2010); Kellogg v. Skon, 176 F.3d 447, 452 (8th Cir. 1999).


demonization of this population has helped create a “moral panic”\textsuperscript{261} that has driven the passage of legislation.\textsuperscript{262} The “anger and hostility the public feels” about this population has been reflected in judicial decisions, at the trial, intermediate appellate and Supreme Court levels.\textsuperscript{263} The emerging laws and legislation have been more often than not found to be counter-productive and engendering a more dangerous set of conditions.\textsuperscript{264} As the authors have reiterated in prior articles,\textsuperscript{265}, as monsters.’ We tell our kids that. The truth is that monsters are real. . . . These monsters are called ‘Sex Offenders’).


\textsuperscript{263} On “judicial panic” in the context of same-sex marriage cases, see John Culhane, \textit{Uprooting the Arguments Against Same-Sex Marriage}, 20 \textsc{Carbozo L. Rev.} 1119, 1146 (1999).


\textsuperscript{265} Cucolo & Perlin, supra note 57; Cucolo & Perlin, supra note 59
the term “sexually violent predator” in itself is “an emotionally charged one that conjures up many misleading or inaccurate images.”

Categorizing this population as the most despised has no doubt had a direct effect on the quality and availability of counsel for these individuals. Regardless of an attorney’s principled intentions, the emotional response generated from these types of crimes can have a detrimental effect on the quality of representation. Once again, the emphasis on ability of counsel cannot be undermined when we are considering an absolute right to counsel.

d. **Conclusion**

In short, the simple assignment of counsel will not provide, by any metric, “adequate representation.” Judge David Bazelon’s characterization of many of the lawyers who appeared before him as “walking violations of the Sixth Amendment,” referred to in the Introduction to this paper, still – unfortunately – resonates after four decades. The special confounding issues presented in these cases – the pretextuality of the entire SVPA process, the fact that most lawyers are not familiar with the psychometric tests that are at the heart of these

---


267 On the additional problems raised by the “status quo bias” of the criminal justice system, see Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH L. REV 315 (2012).


269 See generally, Perlin, *supra* note 32.
proceedings, the failure of courts to extend the *Ake v. Oklahoma* ruling to such cases, and the level of hatred leveled at this cohort of individuals (as well as to their lawyers) – demand a standard more rigorous than the pallid one presented in *Strickland*. 270

**Therapeutic jurisprudence** 271

One of the most important legal theoretical developments of the past two decades has been the creation of therapeutic jurisprudence. 272 Initially employed in

270 A state court system, under the aegis of the Administrative Office of Courts, could certainly promulgate practice standards demanding an enhanced level of competency for attorneys doing such cases. (We wish to thank our colleague Prof. Rick Marsico for this helpful suggestion).


cases involving individuals with mental disabilities but subsequently expanded far beyond that narrow area, therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences. The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and the role of lawyers can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.

David  

273 See Perlin, supra note 105, at 912; Kate Diesfeld & Ian Freckelton, Mental Health Law and Therapeutic Jurisprudence, in Disputes and Dilemmas in Health Law 91 (Ian Freckelton & Kate Peterson eds., 2006) (for a transnational perspective).


Wexler identifies how the inherent tension in this inquiry must be resolved: “the law's use of mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.” As one of the authors of this article (MLP) has written elsewhere, “An inquiry into therapeutic outcomes does not mean that therapeutic concerns `trump' civil rights and civil liberties.”

Therapeutic jurisprudence “asks us to look at law as it actually impacts people's lives” and focuses on the law's influence on emotional life and psychological well-being. It suggests that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when

---


consistent with other values served by law should attempt to bring about healing and wellness.”

Therapeutic jurisprudence “is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications.” It is also part of a growing comprehensive movement towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully. In its aim to use the law to empower individuals, enhance rights, and promote well-being, therapeutic jurisprudence has been described as “…a sea-change in ethical thinking about the role of law…a movement towards a more distinctly relational approach to the practice of law…which emphasises psychological wellness over adversarial triumphalism.” Accordingly, therapeutic jurisprudence supports an ethic of care.

279 Bruce Winick, A Therapeutic Jurisprudence Model for Civil Commitment, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton, eds., 2003).

280 Diesfeld & Freckelton, supra note 273, at 582.


One of the central principles of therapeutic jurisprudence is a commitment to dignity. Professor Amy Ronner describes the “three Vs”: voice, validation and voluntariness, arguing:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as


less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions. 286

The question to be posed here is this: to what extent can therapeutic jurisprudence better inform legal practices to insure that adequate counsel is provided to persons at SVPA hearings in such a way that these principles written about by Professor Ronner -- the principles of voluntariness, voice and validation -- be honored?

Although there has been important scholarly inquiry into the question of the relationship between TJ and the sex offender process in general,287 virtually no


attention has been paid to the question before us here.\textsuperscript{288} What the substantive SVPA case law tells us, though, underscores the positive and essential relationship between adequate counsel and TJ in this context. Those very variables that make SVPA litigation \textit{different} – the need for lawyers to be able to understand, contextualize and effectively cross-examine about specific actuarial tests; the need for lawyers to be able to “get” when an expert witness is needed to rebut the state’s position, and the need for lawyers to understand the potential extent of jury bias (making the ideal of a fair trial even more difficult to accomplish) – all demand a TJ approach to representation and to litigation. Certainly, even a cursory examination of SVPA cases litigated on the right to counsel issue\textsuperscript{289} demonstrate – beyond any doubt – that the “voice” required in Professor Ronner’s TJ formulation is missing, and that we have no basis on which to make a reasoned conclusion as to whether


\textsuperscript{289} See \textit{supra} text accompanying notes 63-78.
the “validity” is present. This is all the more important since the notion of “voluntariness” is certainly absent.290

Looking at this question recently, Prof. Dale Dewhurst concluded that, from a TJ perspective, lawyers must be able to engage with other behavioral experts in SVPA cases so as to provide adequate representation for their clients so as to – optimally – share with the court treatment models that reject the current punitive measures that have not been found to reduce recidivism.291 If counsel were to be familiar with such approaches as the Risk-Needs-Responsibility Model or the Good Lives model292 --embodying approaches that go “beyond the legalistic skills of the

290 See Ronner, supra note 286.

291 Dewhurst, supra note 288, at 999-1000, citing, the research of Doris Layton MacKenzie, WHAT WORKS IN CORRECTIONS: REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS 333, 333-34 (2006). One recent state study (Minnesota) has concluded that just nine percent of civilly committed sex offenders would have been reconvicted of a sex offense had they been released to the community. See Grant Duwe, To What Extent Does Civil Commitment Reduce Sexual Recidivism? Estimating the Selective Incapacitation Effects in Minnesota, J. CRIM. JUSTICE (2013), available online at http://www.sciencedirect.com/science/article/pii/S0047235213000482.

lawyers”293 – she would best embody the TJ value of “zealous counseling” urged by Robert Ward.294.

In short, TJ is completely absent from these proceedings. We believe that adoption of our effectiveness-of-counsel remedy might be the most important way of remediating this absence.

Conclusion

When we presented a version of this paper at a faculty workshop, friends and colleagues – including ones whose careers have been devoted to representing marginalized populations --told us that they found some of what we reported on “almost unbelievable.” We were not surprised. What we have reported on here exists under the radar for almost all attorneys – even progressive attorneys – who do not focus on these cases. So it is no surprise that these issues have remained unconsidered by courts and by scholars alike.

What we have reported on is woeful. Again, perhaps more woeful is the fact that this entire issue is ignored in the public debate. We believe, however, that if the right to counsel were to be made mandatory in all SVPA cases, and if the standard of adequacy of counsel in such cases was to be enhanced (as the Montana Supreme

293 Dewhurst, supra note 288, at 1002.
Court did in “regular” civil commitment cases in *K.G.F.*), then that would make it more likely that counsel would be effective and that the underlying proceedings would have at least a patina of fairness.

Again, recall what Dylan critic Michael Gray had to say about *Jokerman*, the song from which the first part of the title of this article is derived: that “‘evil’ is not ‘out there,’ ‘among the others,’ but is inside us all,” By depicting sex offenders as “monsters” or “scum,” we ignore this, and that allows us to ignore the realities of the SVPA process and the need for effective counsel. It is time to stop ignoring these realities.

---


296 GRAY, *supra* note 61, at 264.