

**Avoiding Garbage 3:
Fairness and Accuracy in Reporting Criminal Histories in Sexually Violent
Predator Evaluations**

Abstract

At probable cause hearings in cases involving the civil commitment of a person as a sexually violent predator (SVP), judges consider evidence, likely including one or more reports from an evaluating psychologist or psychiatrist. At least in Florida, judges rely on the evaluators' reports as accurate sources for the person's criminal history, including his history of sex-offense convictions. But the evaluators' reports are not consistently accurate regarding criminal history, and no one in the process is demanding accuracy or questioning the "facts" included in the reports. Recommendations are made for evaluators, state programs, attorneys for respondents, state attorneys, and judges.

This is the third in a series of articles about sexual offender re-offense risk assessment. The article titles refer to the expression common in computer lingo, "Garbage in, garbage out." That is, no matter how elegant the design of a computer program, if the input data are garbage, then the output of the computer program is doomed to be garbage.

The first article (DeClue, 2002) used a case study to illustrate misuse of instruments designed to aid in the assessment of risk for sexual re-offense. The second article (DeClue, 2005) used a case study to illustrate problems and pitfalls¹ in risk assessments of people who have been in long-term sex-offender treatment. The

¹ The phrase is from Campbell (2004).

present article addresses the importance of the criminal history section of evaluation reports in cases involving the civil commitment of sexually violent predators.

Statement of the Problem

Please see Deming (this issue) for a general introduction to issues related to the civil commitment of sexually violent predators (SVPs).

When psychologists and psychiatrists conduct evaluations of people being considered for civil commitment as an SVP, they often write reports of the results of the evaluations. The report lays out facts and describes the evaluator's opinion. In Florida,² where I practice, the evaluation report is considered by the Sexually Violent Predator Program (SVPP; a subdivision within the Florida Department of Children and Families) as they decide whether or not to recommend that the state attorney in a particular judicial circuit file a petition seeking civil commitment. If the state attorney files such a petition, a judge considers the evaluation report in deciding whether there is sufficient probable cause to warrant a trial and to justify confining the person (called a "respondent") while he³ awaits trial.

Evaluators working under contract with Florida's Sexually Violent Predator Program are required to write reports and are encouraged to use a model evaluation format that includes a table showing, for each charged sex offense, the dates of the offense and the arrest, a description of the charge(s), and the disposition of the case:

DATE	OFFENSE	DISPOSITION

² I will continue to focus on Florida's laws and procedures in this article, with the expectation that there will be some similarities and some differences in other states with SVP procedures.

³ Most respondents are males, and the masculine pronoun will be used herein.

Although there are some guidelines about how to organize data within the cells of these tables in the SVP evaluation reports in Florida, guidelines regarding the “Disposition” column have been lax. This has resulted in dissemination of misleading or inaccurate information. For example, in one recent report an evaluator simply typed “Guilty” for the disposition of a particular case. In fact, careful review of the records reveals that the person was never found guilty of the sex offense described in the “Date” and “Offense” columns of that row in the table. He was found guilty of a misdemeanor charge of resisting arrest without violence – that conviction was related to his behavior at the time of the *arrest* for a sex offense a day or two after the alleged sex offense, but he was certainly not convicted of that sex offense.

A similar and more common deficiency in the “Disposition” column of the evaluation reports in Florida is for the evaluator to list a sentence (for example, seven years in prison) without specifying what crime(s) the person was found to have committed. In one recent case, a person was charged with seven sex-offense felonies, but was found guilty of one felony and six misdemeanors. All six misdemeanor convictions were for simple battery. A reader of the evaluator’s report might have guessed that he was found guilty of seven sex-offense felonies.⁴

In another recent case, a sentence listed in the “Disposition” column was not meted out for *any* sex offense, but for a violation of probation on a prior criminal offense. In fact, the person was not found guilty of the sex offense described in that row of the table. Readers of the report would likely misinterpret the presentation and believe that the person was convicted of the sex offense described in that column of the table.

⁴ One evaluator scored item 7 of the Static-99 incorrectly due to misunderstanding of the facts regarding the conviction in that case.

Is it important for evaluators to clearly and accurately report the person's history of convictions for sex offenses? Yes, it is very important. Although misleading or erroneous information might eventually be corrected at trial, not every case goes to trial, and some cases do not go to trial for several years. Important decisions are made on the basis of these evaluation reports, first by the Sexually Violent Predator Program (whether to recommend that the state attorney file a petition for civil commitment), then by the state attorney (whether to file the petition), and then by the judge (whether to find probable cause to hold a trial and to confine the respondent in the meantime).

For several years I have been aware of the more than occasional lack of precision in Florida evaluators' reports, specifically regarding the dispositions of prior criminal sex-offense cases. Recently I learned from some attorneys for respondents that at probable cause hearings they typically do not question or challenge the "facts" in the evaluators' reports. The accuracy of evaluators' reports is not being questioned, challenged, or verified in the course of the probable cause hearings, and judges simply treat the evaluation report as being entirely accurate. So every time that an evaluator prepares a report with misleading or inaccurate information about the disposition of one of the person's prior sex-offense criminal cases, it is almost guaranteed that the judge will make a determination about probable cause on the basis of a misunderstanding of the person's criminal history.

Upon learning that, I contacted Florida's Sexually Violent Predator Program to encourage them to require that evaluators include enough detail in the "Disposition" column of the reports that the reports would be clear and unambiguous as to the number and type of sex-offense convictions. Surely it is of fundamental importance in

an SVP case to know whether the person has been convicted of one or two or five sex offenses, and of which particular offenses he has been convicted.

But the response from Florida's Sexually Violent Predator Program (SVPP) did not show the level of concern or the commitment to fairness and accuracy I had anticipated. They wrote that they understood my concern about possible inaccuracies, but saw that as something the attorneys could address as the case progresses. At the time of this writing, neither SVPP nor the attorneys are taking any actions that will alert the judge to possible inaccurate or misleading "facts" in reports.

In sum, the problem is that, if evaluators are not scrupulously fair and accurate in our SVP reports, decisions are likely to be made on the basis of a misunderstanding of the facts of the case. In current practice, at least in Florida, misleading or inaccurate reporting by evaluators almost guarantees that a judge will make these very important decisions on the basis of a misunderstanding of key facts about the respondent in SVP cases.

Proposed Solutions

Prior to Probable Cause Hearings

Evaluators

1. For each sex-offense arrest or charge, evaluators should carefully report which led to convictions and which did not. In Florida, evaluators can carefully present these details in the "Disposition" column of the standard report.
2. Evaluators should also specify which document(s) show that the person was convicted. If the evaluator viewed a copy of the Judgment in the case, the evaluator should specify that. If, instead, the evaluator gleaned the information from a secondary

source, such as a Presentence Investigation, that should be specified, and that might serve as a “red flag” to a reader that a particular conviction should be questioned, challenged, or verified.

3. When the disposition of a case is (even somewhat) unclear, ambiguous, or unknown to an evaluator based on records available at the time of the report, the evaluator should clearly report that the disposition of the case is not known.

State Programs

1. State programs responsible for implementation of states’ SVP laws (such as Florida’s Sexually Violent Predator Program) should require evaluators to precisely and accurately report which sex offenses led to a conviction and which did not. Programs should require evaluators to clearly state that records are unclear about whether or not a person was convicted of a particular sex offense, when that is the case.

2. In advising state attorneys whether or not to file a petition for civil commitment in an SVP case, state programs should draw attention to any important gaps in knowledge about the disposition of sex-offense arrests and charges.

Probable Cause Hearings

Attorneys for Respondents

1. Attorneys for Respondents should not assume that “factual” information in SVP evaluation reports is accurate and precise.

2. Attorneys for Respondents should demand that the state prove every conviction stated or implied in SVP reports considered by the judge.

3. Attorneys for Respondents should demand that, in any case in which the state cannot prove that the person was convicted, the judge should assume that the person was not convicted.

4. Attorneys for Respondents should seek a reasonable compromise for cases in which it is clear that the respondent was found guilty of some crime, but surviving records do not show which crime the person was found to have committed.

State Attorneys

1. State Attorneys should not assume that “factual” information in SVP evaluation reports is accurate and precise.

2. State Attorneys should prove every conviction stated or implied in SVP reports considered by the judge. If there are any convictions stated or implied in SVP reports that the state attorney cannot prove, the state attorney should make sure that is clear to the judge.

3. State Attorneys should accept that, in any case in which the state cannot prove that the person was convicted, the judge should assume that the person was not convicted.

4. State Attorneys should seek a reasonable compromise for cases in which it is clear that the respondent was found guilty of some crime, but surviving records do not show which crime the person was found to have committed.

Judges

1. Judges should not assume that “factual” information in SVP evaluation reports is accurate and precise.

2. Judges should require proof of every conviction stated or implied in SVP reports considered.

3. In any case in which the state cannot prove that the person was convicted, the judge should assume that the person was not convicted.

4. Judges should entertain efforts toward a reasonable compromise for cases in which it is clear that the respondent was found guilty of some crime, but surviving records do not show which crime the person was found to have committed.

Summary

Decisions about civil commitment of people as sexually violent predators are very important decisions. Determination of probable cause in such cases deserves very careful scrutiny, and should be made on the basis of precise and accurate information. Everyone involved in preparing materials for and conducting probable cause hearings should be scrupulously fair and accurate in reporting all information, including the person's criminal history of sex-offense convictions. That includes evaluators, state programs, attorneys for respondents, state attorneys, and judges. No one in this process should produce or accept inaccurate, imprecise, or misleading reports, and no one should rely on someone else in the process to find and correct mistakes. No one should assume that evaluators' reports are accurate, especially about criminal convictions.

In SVP probable cause hearings, a person's record of prior convictions should be established by presentation of official records of convictions, not by evaluators' reports, which are not consistently accurate enough for that purpose. If, due to time constraints, it is not possible or practical to obtain official records of convictions prior to a determination regarding probable cause, then any records introduced should be as accurate as possible. SVP evaluators' reports should be as accurate as possible,

particularly about the person's record of criminal conviction. Every party involved in the process should demand accuracy, and should demand that evaluators show precisely how they determined that a person was convicted of a particular sex offense. This is essential for getting the right outcome in each case, and it is essential for us to have confidence and trust in the entire process.

References

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