



Basics of Direct & Cross Examination of Mental Health Experts

Presented By:

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Direct & Cross Examination of Mental Health Experts

- **Direct Examination**
 - To get FACTS into evidence
- **Cross Examination**
 - Where the battle is won

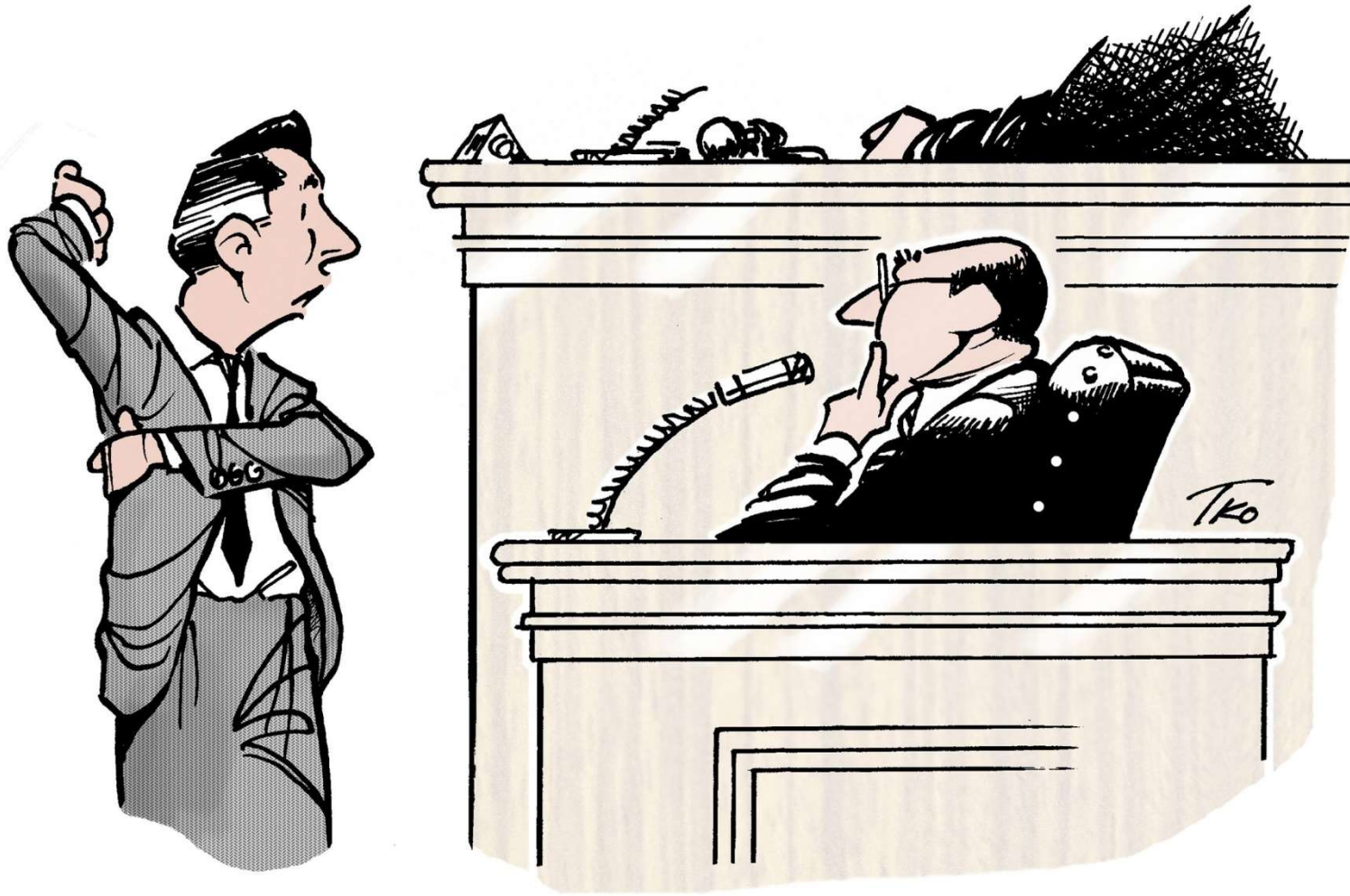
DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

- ☐ Preparation
- ☐ Lay Foundation For Expert
- ☐ Prove Your Elements

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

PREPARATION - is the single most important aspect of the direct of a mental health expert

- **Know facts of your case cold**
- **Speak with your mental health expert before they testify**
- **Remember why your mental health expert is testifying and question accordingly**



“And finally, Doctor, in your expert medical opinion, is this lump in my armpit anything to be concerned about?”

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

- **EC § 801 – Expert witnesses; Opinion Testimony**
 - **Don't be surprised by an issue with your mental health expert's bona fides!**
 - **Ask your colleagues about the expert ahead of time**
 - **Ask for colleagues input and experience with expert, transcripts, opinions of the expert**
 - **Prepare for any foreseeable issues and have a game plan as to how you will handle it**
 - ***People v. Landau* (2016) 246 Cal.App.4th 850**
 - ***People v. Sanchez* (2016) 63 Cal.App.4th 665**

... WE NOW TURN TO AN EXPERT ON
THIS SUBJECT, WHO DOESN'T ACTUALLY
KNOW ANY MORE THAN WE DO. BUT
HE LOOKS SINCERE, SOUNDS CONVINCING
AND HAS 'DR.' IN FRONT OF HIS NAME.



THEY-BOUNTY

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

- **EC § 802 – Statement of Basis of Opinion**
 - **An Expert may testify about evidence consisting of out-of-court statements which form the basis of the Expert's opinion**
 - **HOWEVER, an Expert's on the record recitation of sources relied on for an Expert opinion does not transform inadmissible matter into independent proof of any fact**
 - **Court's discretion to exclude hearsay applies to the defense, as well as the prosecution, expert evidence**
 - ***People v. Miller* (2014) 231 Cal.App.4th 1301**

ALL I SAID WAS



PSYCHOLOGY ISN'T A SCIENCE

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

- **Voir dire on your anticipated mental health expert testimony**
- **Address expert issues in jury selection**
- **DO NOT bad mouth Psychiatry or Psychology!**
 - **Many potential jurors or their friends or family have successfully gone to mental health professionals, don't ostracize them**
 - **Distinguish between forensic and clinical psychology**

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

- **Sample voir dire questions:**
- **Have you or any close friend or family ever been treated or examined by a psychologist or psychiatrist?**
- **What is your opinion about psychologists or psychiatrists in general?**
- **Do you think people sometimes lie about or fake mental problems for their own advantage? (malingering?)**
- **Do you think mental health experts are always right or never wrong?**
- **Even if a defendant has mental problems, unless they prevent him from actually forming the necessary criminal intent, he is still responsible for his criminal actions. Do you agree with this principle and agree to follow it?**

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

- **Sample voir dire questions:**
- Do you agree that mental health experts, just like any other witness, can be biased?
- Do you agree that expert witnesses, just like any other witness, can be wrong for a variety of reasons?
- Do you agree that expert opinions are only as good as the facts or reasoning upon which they are based? (Garbage in, garbage out?)
- Would you believe an expert's opinion simply because of the expert's title or position?
- If a psychologist's or psychiatrist's opinion did not make rational sense to you, would you have any difficulty rejecting it?
- Do you think the side with the most experts should automatically win?

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

✓ Preparation

□ Lay Foundation For Expert

□ Prove Your Elements

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

LAY FOUNDATION FOR MENTAL HEALTH EXPERT

- **EC § 720 – Qualification as an expert witness**
- **Have your expert's CV & DISCOVER IT!!!**
- **Go thru foundation ahead of time, including:**
 - **Expert's schooling and experience?**
 - **Expert's compensation for testifying?**
 - **How many times have they testified before?**
 - **Testify for both the People and Defense?**
 - **When/how they created their expert report?**
 - **Spoke with the Prosecutor before testifying?**

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

- ✓ Preparation
- ✓ Lay Foundation For Expert
- Prove Your Elements

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

PROVE YOUR ELEMENTS

- **Mental Health Experts live in the land of Psychiatry and/or Psychology**
- **Prosecutors live in the land of FACTS (and the LAW)**
- **Make sure your mental health expert's OPINION discusses all the FACTS necessary for you to argue each of the elements (mental/intent) you need in your closing**
- **Bring out any negatives on direct and take the air out of any defense cross**

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

PROVE YOUR ELEMENTS – EXAMPLE (CRIMINAL)

- **Child Sexual Abuse Accommodation Syndrome (CSAAS)**
 - Describes what commonly occurs when a child has been sexually abused
 - Helps dispel myths, prejudices and distorted opinions regarding the actions of an abused child and the child's responses to their victimization
 - HOWEVER – NOT in DSM-5
 - Different studies have said it is not a “syndrome”
 - Author of CSAAS has written an article referencing justice system abuse of CSAAS (both Prosecution and Defense)
 - Doesn't account for false allegations

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

PROVE YOUR ELEMENTS – EXAMPLE (SVP)

- Other Specified/Unspecified Paraphilic Disorder (302.89/302.9)
- Antisocial Personality Disorder (301.7)
 - Both in DSM-5 – HOWEVER...
 - Disagreement within the Psychological community about the appropriateness of their use for Civil Commitments such as the California SVP Act
 - Some experts argue end run around DSM-5 for Paraphilic Rape (which was excluded)
 - *People v. Wright* – LA Sup. Ct. No. ZM011387 (10/24/16)

DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT

- ✓ **Preparation**
- ✓ **Lay Foundation For Expert**
- ✓ **Prove Your Elements**

**CROSS EXAMINATION OF A
MENTAL HEALTH EXPERT
CAN FEEL INTIMIDATING...**



CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- ☐ Preparation**
- ☐ Work Your Plan**
- ☐ Make Defense Expert Yours**

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **PREPARATION – Is the single most important aspect of cross of mental health expert**
- **Know the expert you are going to cross**
 - **Ask for colleagues input and experience with expert, gather transcripts**
 - **Read Experts articles, books, etc.**
 - **Gain knowledge in the field**
 - **THINK LIKE A BOYSCOUT, BE PREPARED!!!**

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

“There may be people that have more talent than you, but there’s no excuse for anyone to work harder than you do.”

– Derek Jeter

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **Know the facts of your case cold**
 - **No one should know the case better than you**
 - **Prepare exhibits, transcripts and witness testimony that undermine the expert's position – PC § 1054.3 – gather everything**
 - **Have all your materials tabbed and organized**
 - **Look more expert than the expert**
 - **You should know your case facts better than the expert and use that fact to your advantage at every opportunity**

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

✓ Preparation

☐ Work Your Plan

☐ Make Defense Expert Yours

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **Work Your Plan – Don't cross examine expert without a goal in mind**
 - **Set the jury up for your approach during voir dire**
 - **Bad Expert**
 - **Erroneous Opinion**
 - **Poor credentials**
 - **Insufficient preparation – failure to review or defense withholding evidence from their expert**
 - **Unreliable information – defendant interviews or third party sources related to defendant**
 - **Bad science**
 - **Bias**

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- ✓ Preparation
- ✓ Work Your Plan
- ❑ Make Defense Expert Yours

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **Make Defense Expert Yours**
 - **Expert Report – Is there one?**
 - **Was it peer reviewed?**
 - **Read it with a critical eye, what did the expert review and what is missing?**
 - **Be specific when crossing an expert and don't let them get away with vague answers or expert's re-phrased questions**
 - **Confront expert with your case, your facts, your evidence using hypothetical questions – “Isn't this inconsistent with your opinion?”**

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **Expert Report**
- **EC § 721 – Scope of cross-examination of expert**
 - **It's permissible to cross on anything expert relied on**
- **Ask the expert if they are sure they have reviewed all of the relevant material**
 - **Who gave it to them?**
 - **Did they contact third party sources?**
 - **Did they contact the police?**
 - **Did they reach out to you, the prosecutor?**
 - **(Remember – Garbage in, garbage out!)**



"I'll answer the question provided you listen without interrupting, commenting or passing judgment."

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **Don't let the expert set the tone of cross**
- **Understand the field of psychology, but do NOT challenge a mental health expert head on**
 - **They will talk circles around you if you let them focus on the psychology**
 - **Focus instead on the facts, law and evidence**
 - **Challenge the expert on the sources for the expert's opinion, not the "science" behind it**

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- Find common ground between defense expert and your own – make defense expert yours
 - Often commonality agreed upon in the field
 - This is where your preparation really pays off!
 - Having the defense expert validate your expert's opinion and defuse D/C's attempt to undermine it in closing
 - You may often trip up D/C who was not prepared for your line of questioning, watch them object repeatedly and be overruled

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **Challenge the expert's bias**
 - **Only a defense expert? Hammer that point.**
 - **EC § 722 – Credibility of Expert Witness**
 - **Allows cross on compensation for testimony of expert witness**
 - **How much are they being paid?**
 - **What is their annual earnings from defense retainers, expert reports and testimony as opposed to other sources? – All goes to bias**

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **You define your terms, not expert**
 - **The expert's definition is often not the legal definition – don't let them get away with it**
 - **The only definition that matters is the legal definition – make sure that the jury knows that YOU know the legal definition and that the expert does not**
 - **If the expert does know and use the legal definition, explore expert's conclusions**



“Objection, leading the witness.”

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **Listen to the expert's answers on direct and you will find openings to use their words against them on cross**
- **Set them up to hit them with their own quotes**
- **Use their own quotes against them**
- **Then in closing, you can finish with a Reasonable vs. Unreasonable analysis**
- **You start with the law, you finish with the law**



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“Will you please answer the question, and this time, without the smoke and mirrors?”

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **Expert's are often professional witnesses**
- **They know who is paying their fee and will work hard on cross to insure that they are re-hired in the future**
- **YOU must control the flow of cross – never let the expert reiterate their direct testimony***
- **Object as non-responsive, motion to strike, ask for the expert to be admonished, ask that the jury be admonished to disregard**

*** Sometimes Judge lets them get away with it, let them drone on and then hammer them in closing – do not let them get away with it unscathed!**



"We find the defense and prosecution arguments
totally confusing without a doubt."

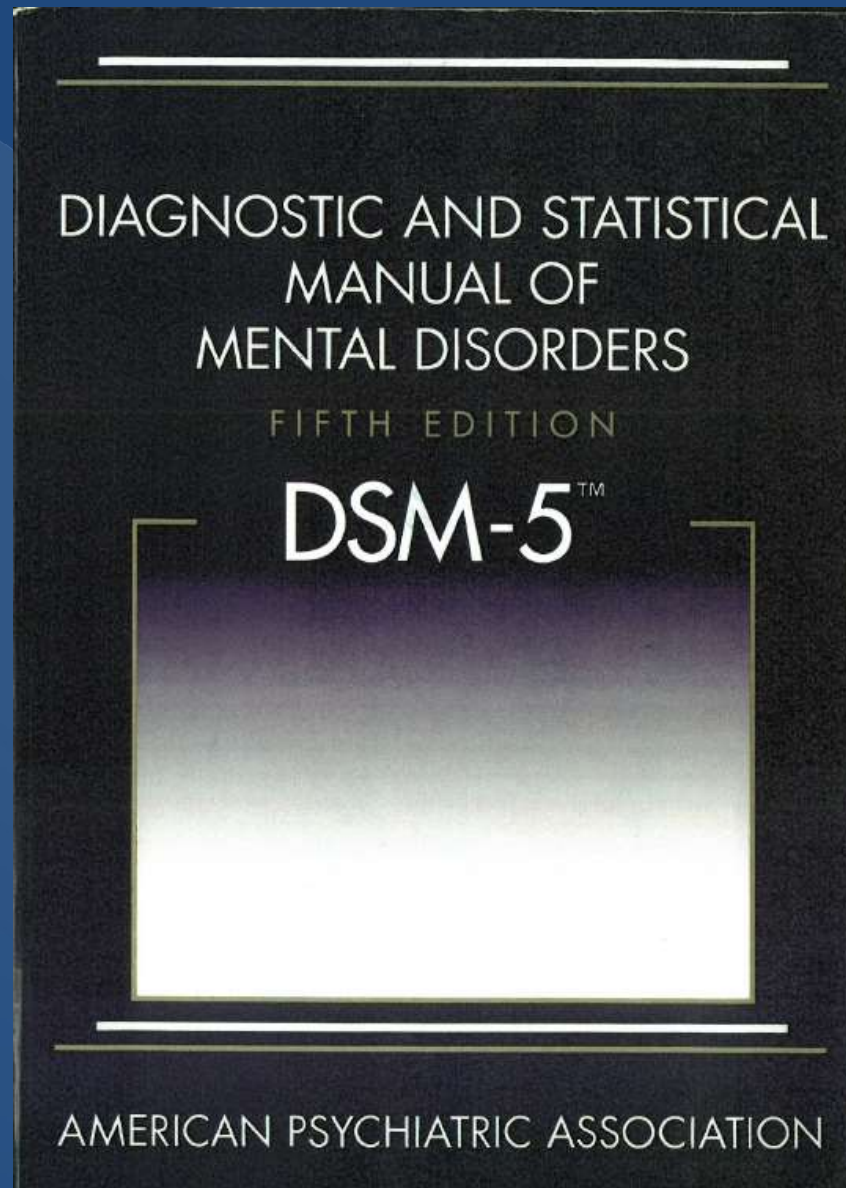
CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- **Know when to quit**
 - **Length of cross can be an important strategic consideration of an effective cross**
 - **Don't lose the impact of cross on minutiae**
 - **End on a high note**
 - **Never end on a sustained objection**
 - **Leave the argument for closing, don't ask that one question too many**

CROSS EXAMINATION OF A MENTAL HEALTH EXPERT

- ✓ **Preparation**
- ✓ **Work Your Plan**
- ✓ **Make Defense Expert Yours**

MENTAL HEALTH EXPERT TOOLS



MENTAL HEALTH EXPERT TOOLS

DSM 5 – Diagnostic and Statistical Manual of Mental Disorders – 5th Edition

- **Published by American Psychiatric Association**
- **Guide for the diagnosis of mental disorders
used by most Psychiatrists and Psychologists**
- **If you have a mental health expert as a witness,
you should review the section of the DSM they
are going to reference regarding their diagnosis**

MENTAL HEALTH EXPERT TOOLS

Pedophilic Disorder, sexually attracted to males and females, non-exclusive type

“Pedophilic Disorder” – DSM-V (302.2)

Over a Period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children (generally 13 years or younger).

The individual has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.

The individual is at least 16 years and at least 5 years older than the child or children

It is *lifelong* and *chronic* (it never goes away)

MENTAL HEALTH EXPERT TOOLS

Static-99R

- **Most used psychological static actuarial assessment tool regarding sex offender recidivism**
- **It has 10 questions and if you are going to have any sex offender recidivism evidence, you need to know what those questions are**
- **Depending on the type of case you are prosecuting, you are going to want to embrace or distance yourself from the result**

Static-99R Coding Form

Question Number	Risk Factor	Codes		Score
1	Age at release	Aged 18 to 34.9 Aged 35 to 39.9 Aged 40 to 59.9 Aged 60 or older		1 0 -1 -3
2	Ever Lived With	Ever lived with lover for at least two years? Yes No		0 1
3	Index non-sexual violence - Any Convictions	No Yes		0 1
4	Prior non-sexual violence - Any Convictions	No Yes		0 1
5	Prior Sex Offences	<u>Charges</u> 0 1,2 3-5 6+	<u>Convictions</u> 0 1 2,3 4+	0 1 2 3
6	Prior sentencing dates (excluding index)	3 or less 4 or more		0 1
7	Any convictions for non-contact sex offences	No Yes		0 1
8	Any Unrelated Victims	No Yes		0 1
9	Any Stranger Victims	No Yes		0 1
10	Any Male Victims	No Yes		0 1
	Total Score	Add up scores from individual risk factors		

Translating Static-99R scores into risk categories

Score Label for Risk Category

-3 through 1 = Low
 2, 3 = Low-Moderate
 4, 5 = Moderate-High
 6 plus = High

MENTAL HEALTH EXPERT TOOLS

PCL-R

Hare Psychopathy Check List - Revised

- **Psychological static actuarial assessment tool regarding whether defendant is a Psychopath**
- **It has 20 questions scored as either a 0,1 or 2**
- **If defendant has a high enough score (generally a score of 30 or higher) defendant may be considered a Psychopath and that can have a huge impact on a mental health professionals opinion**

MENTAL HEALTH EXPERT TOOLS

VRAG-R

Violence Risk Appraisal Guide - Revised

- **An actuarial instrument that assesses the risk of further violence among men or women who have already committed criminal violence**
- **It is a 12 item actuarial instrument**
- **Used to help determine the offender's future likelihood of engaging in subsequent criminal violence**

DIRECT & CROSS EXAMINATION **OF MENTAL HEALTH EXPERTS**

EXAMPLE:

**Sexually Violent Predator
Petition**

Sexually Violent Predator

- 1) Convicted of sexually violent offense
- 2) Diagnosed mental disorder
- 3) Likely (serious, substantial, well founded risk) will do it again
- 4) It is necessary to keep him in custody in a secure facility to ensure the health and safety of others



TRUE OR NOT TRUE

Sexually Violent Predator

- Two separate experts for Petitioner
 1. Dr. Kathleen Longwell
 2. Dr. George Grosso
- Both doctors are experienced veteran SVP evaluators for the Department of State Hospitals
- Both doctors independently diagnosed Respondent with a Qualifying Mental Diagnosis under the SVPA
- Both doctors referenced DSM-5 – Diagnostic and Statistical Manual of Mental Disorders in determining their diagnosis

Sexually Violent Predator

Static 99-R

Doctor Longwell gives Gordon a score of 2

Doctor Grosso gives Gordon a score of 2

(But also thinks its reasonable to give a 3, 4 or 5)

Both doctors place Gordon in the High Risk High Needs Group

5 year recidivism rate of 11.3%

10 year recidivism rate of 19.1%

The Static 99-R rates are an underestimate of actual recidivism as only charged or convicted sex crimes

Sexually Violent Predator

Doctor Longwell also used additional actuarials:

Static 2002-R

Gives Respondent a score of 5
5 year recidivism rate of 19.1%

VRAG-R

Gives Respondent a score of 9
5 year recidivism rate of 34%
12 year recidivism rate of 60%

Respondent's Expert Witnesses

- Doctor Barbaree – Retained by Respondent
 - Testified as to his opinion on age and re-offending
- Doctor Musacco – State Evaluator
- Doctor Owen – State Evaluator
 - Respondent has Qualifying Offenses
 - Respondent has Qualifying Mental Disorder
- Pedophilic Disorder
 - Respondent's Pedophilia is “entrenched” and “severe”
 - Respondent's Pedophilia is “lifelong” and “chronic”

Respondent's Expert Witnesses

- Doctor Owen
- Only 3% of sex offenders reoffend even once
 - So Respondent is in that 3%... In 1982
- In fact, Respondent has reoffended over and over again for decades...
 - So Respondent is really in that 3% over and over again
- Respondent in the tiny subset of sex offenders who continue to reoffend regardless of sex offender treatment, probation, prison, parole, outpatient treatment or age, they are called

SEXUALLY VIOLENT PREDATORS

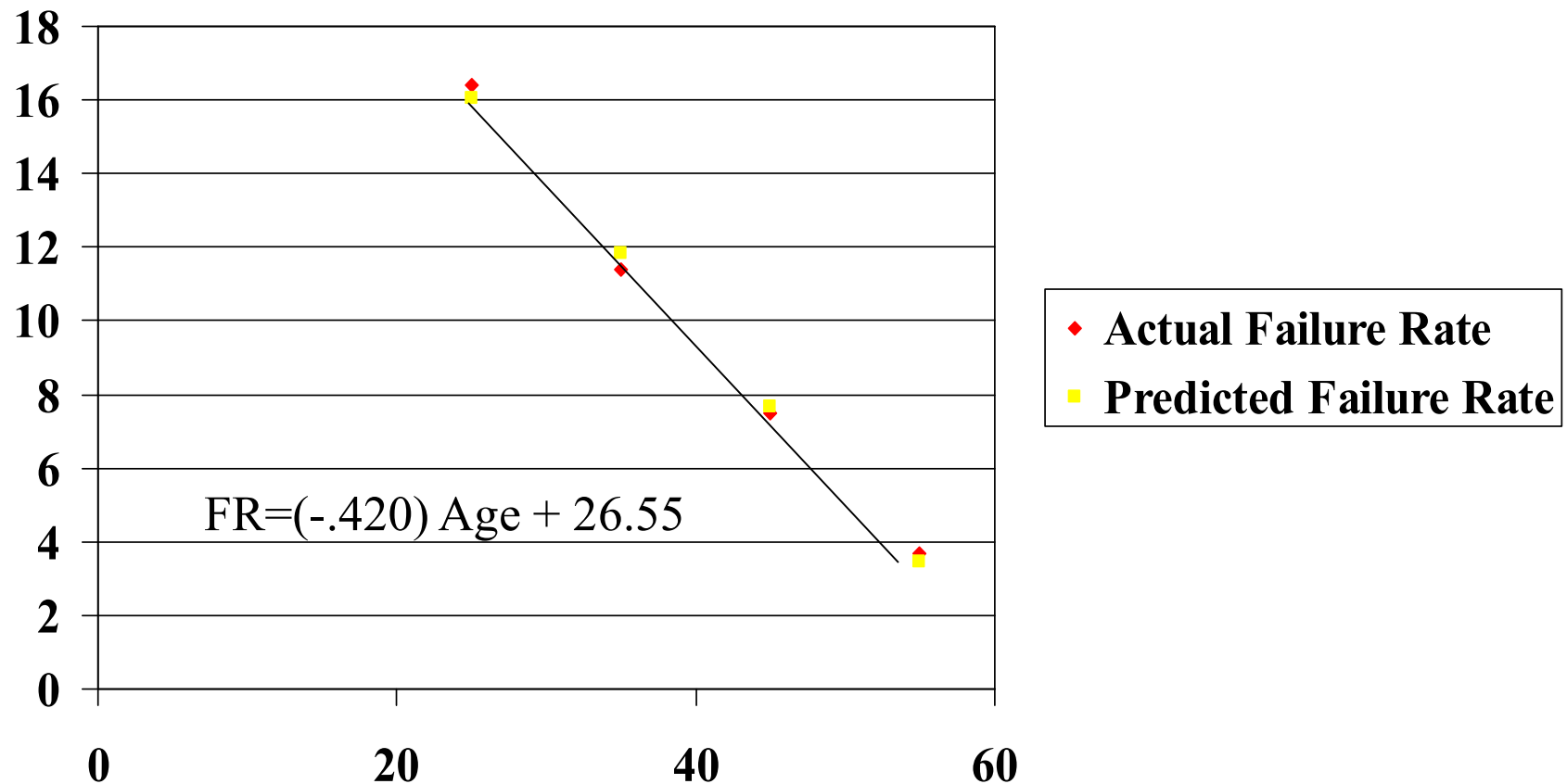
Respondent's Expert Witnesses

- Doctor Musacco
- It is a bad idea for sex offenders to get together in the community
- If Respondent were to do so, it would be “a huge red flag”
 - Respondent did just that when he got out of PSH
 - Respondent did it again with his 4th wife Jody
- Believes that Respondent IS a risk to reoffend, just not “likely” to do so

Respondent's Expert Witnesses

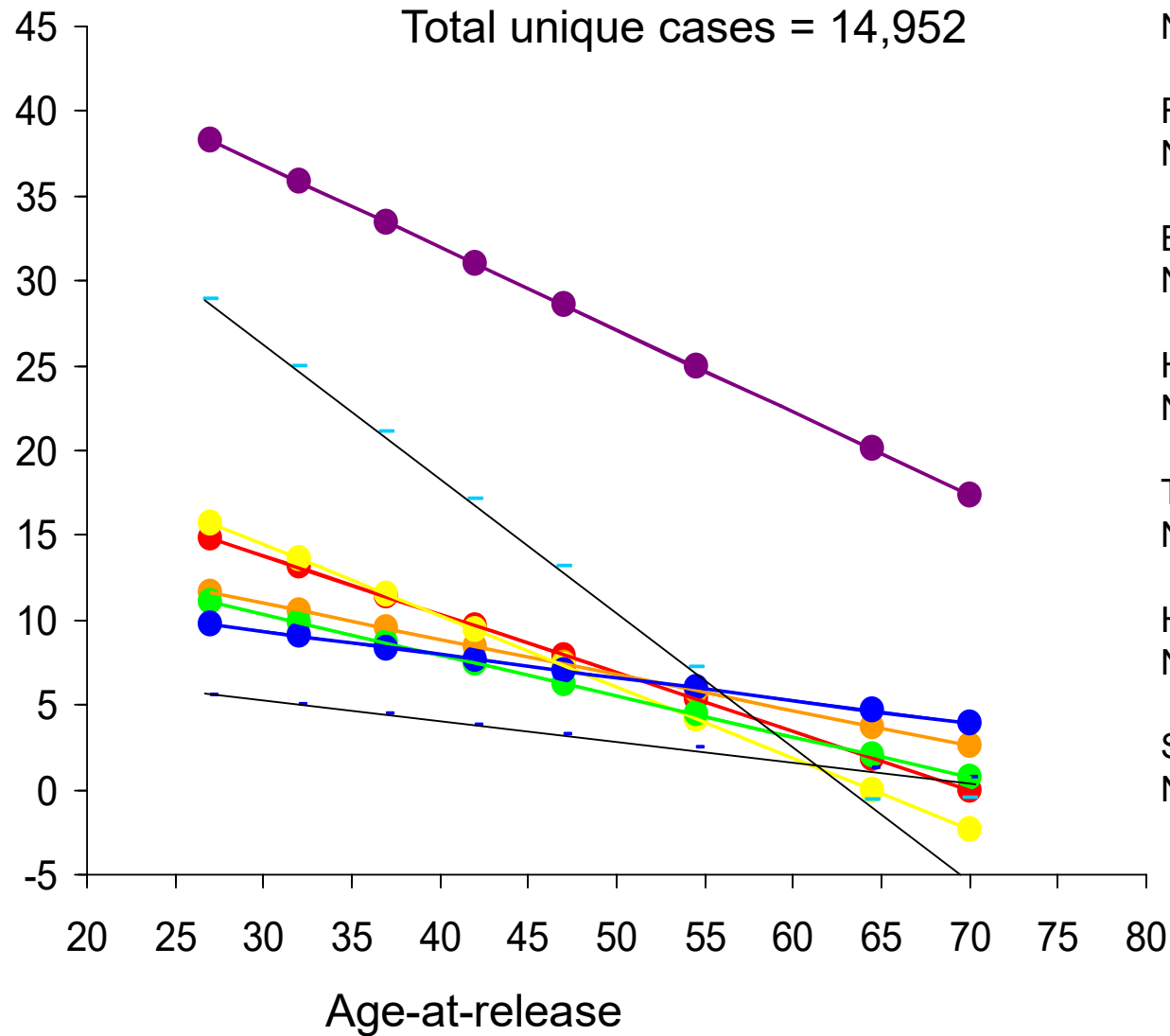
- Doctor Barbaree
 - Has NEVER testified for the People/Petitioner
- Has a vested interest in age being considered a big factor in recidivism as he has staked his professional reputation on that concept
- Manipulates his “statistics” to get the results he wants
- For Example – Doesn't include any reoffending within 5 years, but by that rationale...
- RESPONDENT HAS NEVER REOFFENDED!!!!
- Doctor Barbaree's bias infects his testimony

Five-year failure rate as a function of age-at-release

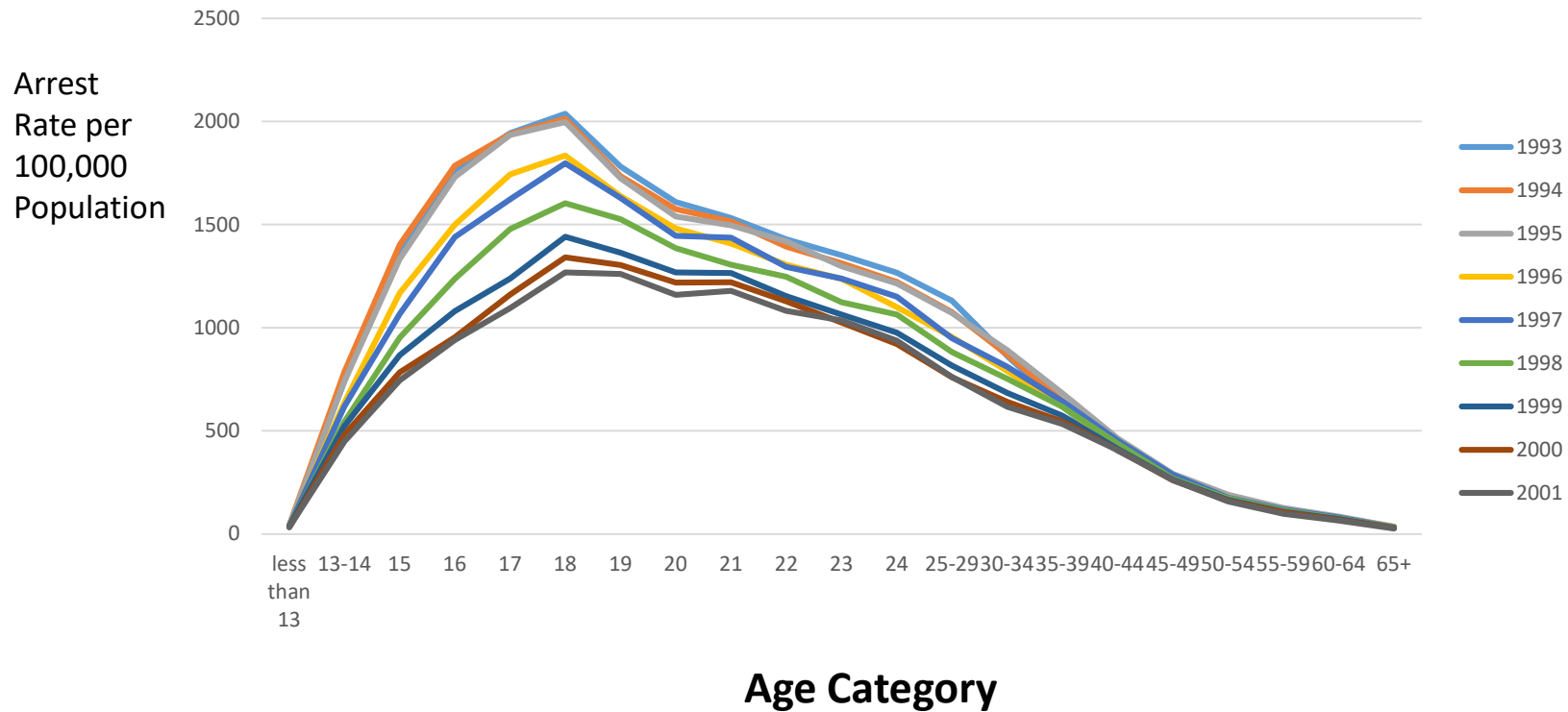


Eight studies on age and recidivism:

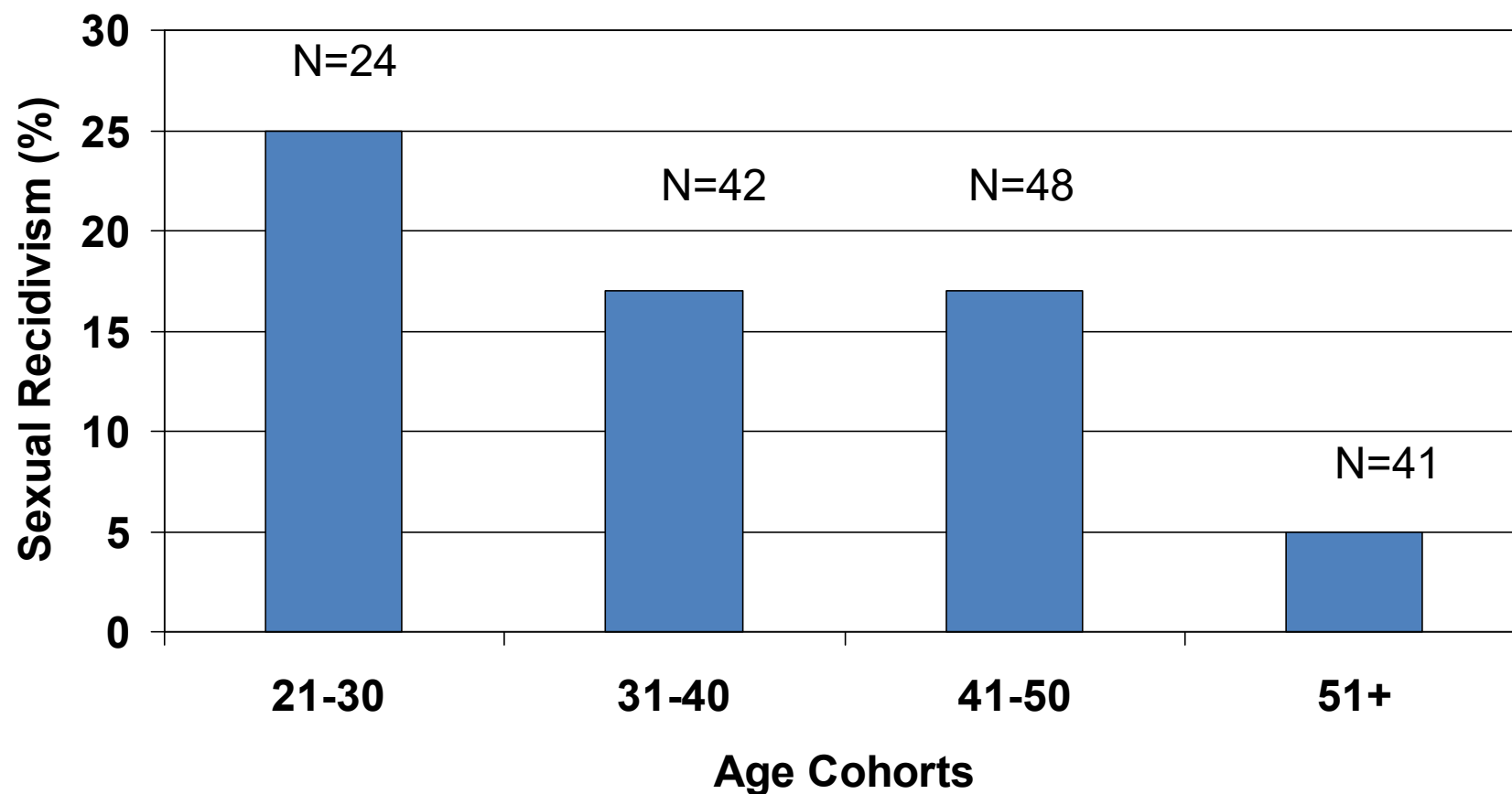
Recidivism%



FBI Uniform Crime Report 2015: Violent Crime by Men

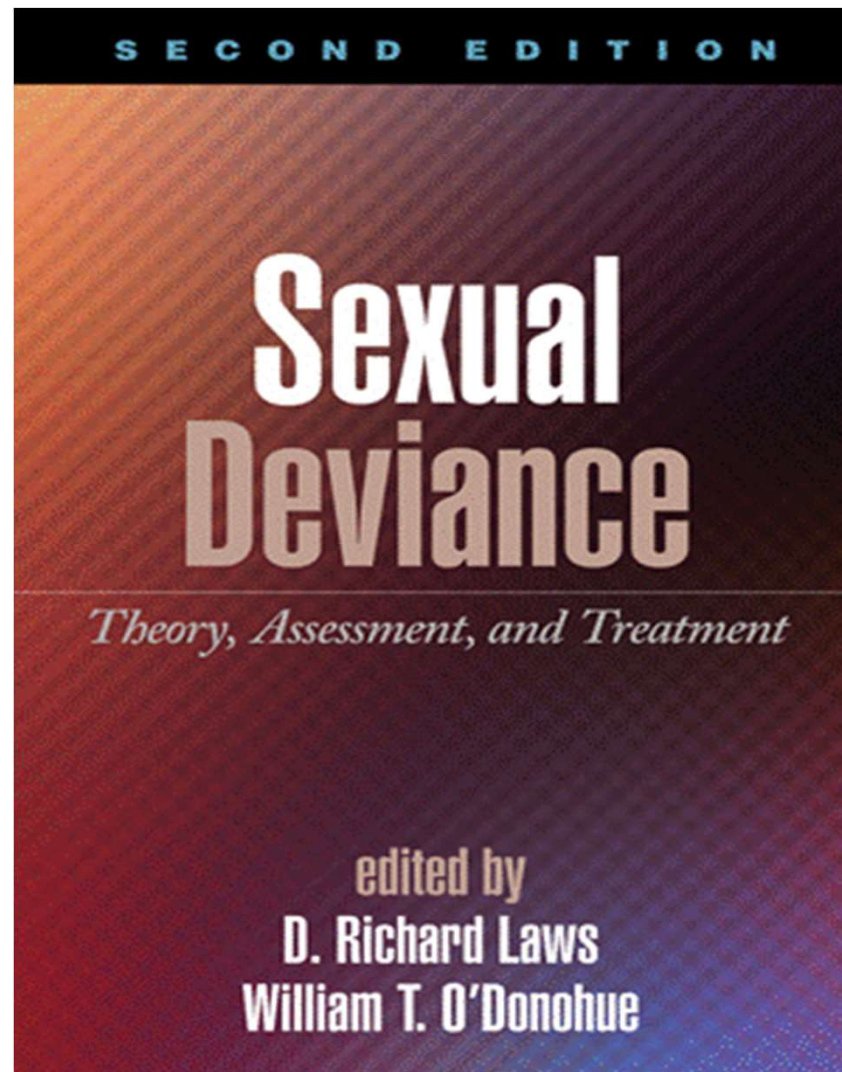


Sexual Recidivism in Non-Familial Child Molesters (N=155) Over Age-at-release



Barbaree, H.E., & Blanchard, R. (2008) Sexual deviance over the lifespan: Reductions in deviant sexual behavior in the aging sex offender

Chapter 3

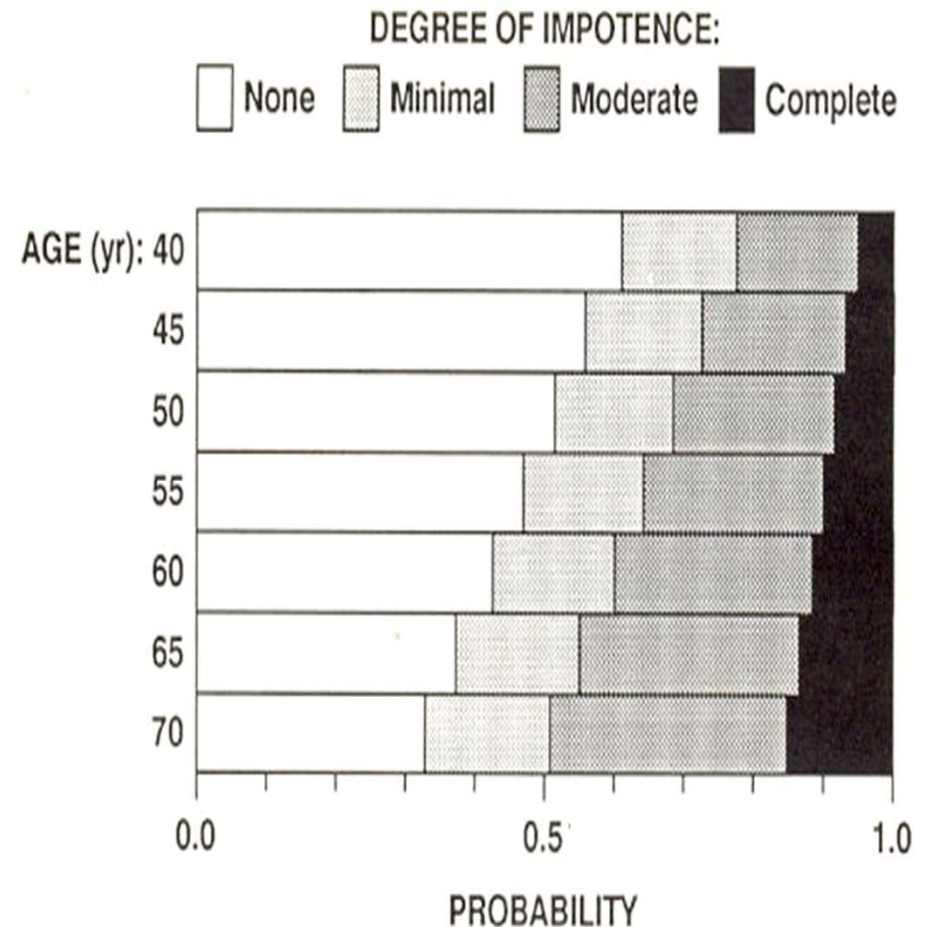


The likely role of testosterone in maintaining recidivism risk

- European studies on the effects of castration as a treatment for sex offenders (Freund, 1980)
 - Outcome data indicate large decreases in recidivism among castrated sex offenders (from 50% to <10%)
- Medical treatments (anti-androgens, etc.) of sex offenders designed to reduce bio-available testosterone, thereby reducing recidivism risk

Prevalence of erectile dysfunction increases with age

- Feldman et al.(1994)
- Prevalence of minimal erectile dysfunction constant at about 20% over all age groups
- Prevalence of moderate and complete dysfunction increases in linear fashion with age



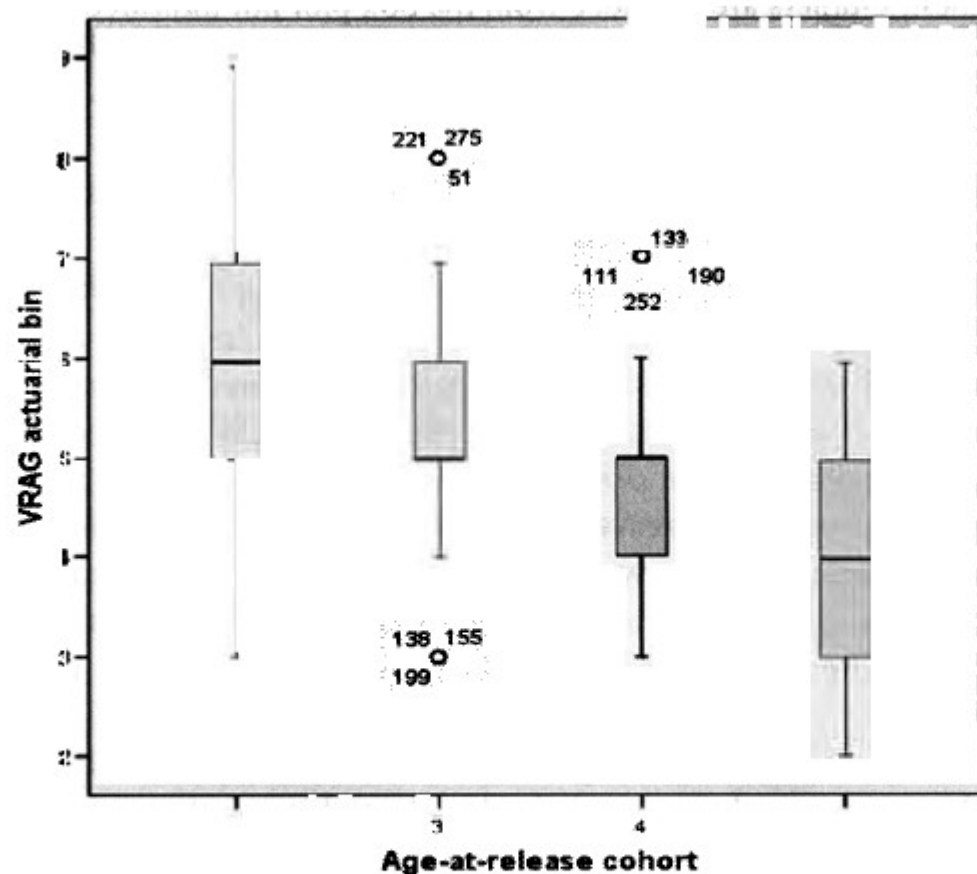


FIGURE 3.10. Box plots of the mean VRAG bin scores plotted as a function of age-at-release cohort. The box depicts scores from the 25th to the 75th percentiles, and the horizontal line through the box represents the median score. The “whiskers” represent the range of values in the sample from lowest to highest. Outliers are excluded from the box plot but indicated on the figure. Age-at-release cohorts 2 through 5 were released from custody at 21–30, 31–40, 41–50, and 51+ years of age, respectively.

Professional standards guiding the use of psychological tests warn against the use of tests if such use may be discriminatory on the basis of age, race, culture, or other factors. If the person being tested is substantially different from the individuals who made up the standardization sample for the test, the test should be applied with extreme caution. The current chapter makes the point that direct application of current actuarial instruments to elderly sex offenders is potentially discriminatory.

The implications of the aging effects reviewed in this chapter are profound. Current policy and legislation in most Western jurisdictions target sex offenders for civil commitment or long-term incapacitation when the offenders are in their middle years. Current practice is to continue the detention of many of these offenders on into old age. Incarceration of these offenders is grossly expensive and seems unjustified if risk is generally

lower in the aged sex offender. One solution is the revamping of the current risk assessment methodologies to accommodate reductions in the performance of sexually deviant behavior in the older sex offender.

NOTES

1. The Swedish data showed exceptionally low rates of sexual recidivism, much lower than those reported for the U.K. and North American data here or in previous reports. Allowing for possible differences between Sweden and other jurisdictions in the way sexual crimes are charged, prosecuted, and tried, including possible differences in plea bargaining, we chose to use the Swedish data reflecting “any violent” reconviction—a statistic that included all sexual offenses. These percentages were very similar to those reported in the U.K. and North American data for sexual recidivism.

Sexually Violent Predator

- 1) Convicted of sexually violent offense
- 2) Diagnosed mental disorder
- 3) Likely (serious, substantial, well founded risk) will do it again
- 4) It is necessary to keep him in custody in a secure facility to ensure the health and safety of others



TRUE



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SANITY



NGI STATUTES

PC §25

(a)The defense of diminished capacity is hereby abolished, ...

(b)In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

M'Naghten rule

EC § 522

The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.

MENTAL HEALTH STATUTES

- PC §1368 – Inquiry into defendant's mental competence when doubt arises prior to judgment or during probation, supervision, or parole revocation proceedings
- PC § 1026.2 – Application for Release after commitment (“restoration of sanity”)

BIFURCATED TRIAL

- **GUILT PHASE**
 - Admission or trial
- **SANITY PHASE**

JURY INSTRUCTION

1) When defendant committed the crimes, defendant had a **mental disease or defect**; and

2) Because of that disease or defect

defendant was incapable of understanding the nature of the act

OR

defendant was incapable of understanding that the act was morally or legally wrong.

SANITY

What constitutes a **mental disease or defect**?

- Schizophrenia, schizoaffective disorder, bipolar with psychotic features, post-partum psychosis, persons suffering from delusions, and/or hallucinations
- Not psychopaths/sociopaths who commit crimes because of a lack of empathy. Not depression. Not kleptomania

PEOPLE v. CARTER



Charges:

- PC 187(a)
- PC 12022(b)(1)

JURY INSTRUCTION

1) When D committed the crimes, D had a **mental disease or defect**; and

2) Because of that disease or defect
D was incapable of understanding the nature
of the act

OR

D was incapable of understanding that his act
was morally or legally wrong.

PEOPLE v. CORONADO



Charges:

3 counts – PC 187(a)

1 count – PC 664/187

PC 12022(b)(1) – use of knife

PC 190.2(a)(3) – LWOP multiple victims

JURY INSTRUCTION

1) When defendant committed the crimes, defendant had a **mental disease or defect**; and

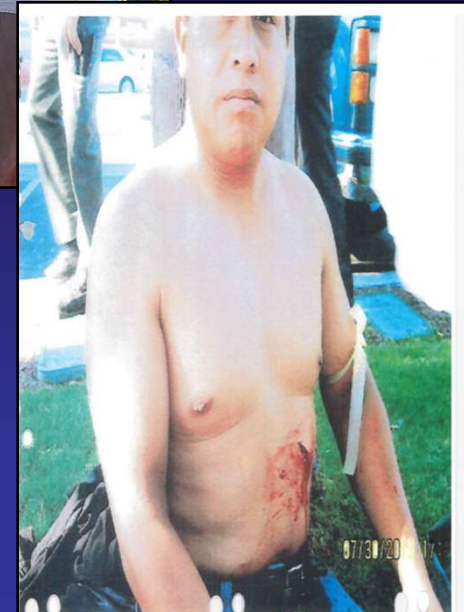
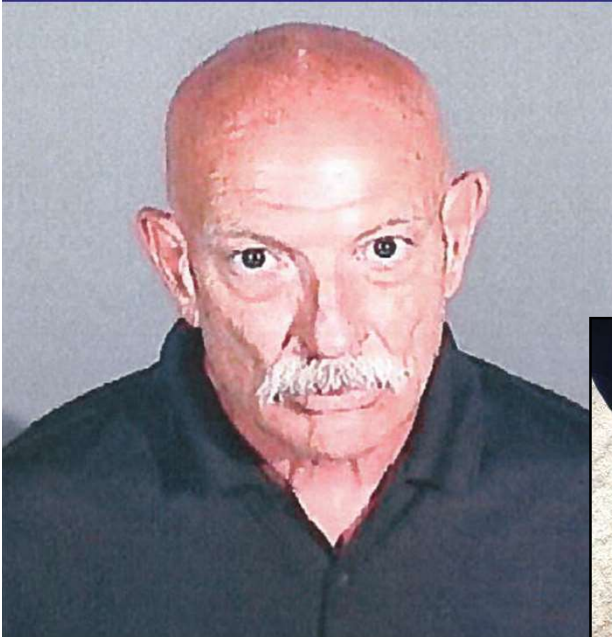
2) Because of that disease or defect

defendant was incapable of understanding the nature of the act

OR

defendant was incapable of understanding that the act was morally or legally wrong.

PEOPLE v. LAMMERS



Charges:
3 counts - PC 664/187(a)
PC 12022(b)(1) allegations

JURY INSTRUCTION

1) When defendant committed the crimes, defendant had a **mental disease or defect**; and

2) Because of that disease or defect

defendant was incapable of understanding the nature of the act

OR

defendant was incapable of understanding that the act was morally or legally wrong.

WHEN DOES NGI APPLY?

NGI applies to ALL crimes

Voluntary Intoxication & Mental Impairment

- **Specific Intent Crimes only**
- **Not General intent Crimes**
 - **P v Lara (1996) 44 Cal.App.4th 102**
 - **P v Gutierrez (1986) 180 Cal.App.3d 1076.**

HOW DO DRUGS/ALCOHOL FIT IN?

Addiction itself does not qualify as legal insanity

Even if the intoxicants cause brain damage or a mental disease after the effect have worn off.

HOW DO DRUGS/ALCOHOL FIT IN?

However . . .

If the intoxicants cause a mental disease or defect after the intoxicants wear off AND

there is another mental disease or defect,

then the defendant **may** be NGI

WHEN DOES NGI APPLY?

People v. Lammers

- Defendant claimed a mental disease due to drug use
- Defendant claimed that as a result, he didn't understand that his act was morally or legally wrong

HOW DOES IT WORK?

- Defendant must tell the court by entering a plea of “not guilty by reason of insanity.”
- Defendant must also enter a plea of “not guilty” to the underlying crime.
- If the defendant fails to plead “not guilty” as well as NGI, then it is an admission to the underlying guilt.
 - Chances are the court would allow the defendant to correct the plea.

APPOINTMENT OF EXPERTS

PC § 1027

- Upon a plea of NGI, the court will appoint at least 2 (possibly 3) to evaluate the defendant and his/her mental health.
 - Statements made to the doctors are not confidential
 - Expert must prepare a report and testify if called.
 - Different than an EC § 1017 appointment for defense counsel to advise re NGI plea
 - Best practice: Do not have your PC 1368 expert appointed as your NGI expert

APPOINTMENT OF EXPERTS

- What if you decide you want more experts?? You can have more and we frequently do, however we pay for their services.
- Where do you find an expert?
 - <http://www.lacourt.org/division/criminal/pdf/psychiatrist.pdf> (or Google LA County Psychologist Expert Panel)

APPOINTMENT OF EXPERTS

- **No expert??**
 - Some DA's think its better to just cross examine the defense's expert because it's the defendant's burden of proof.
 - Alternatively, you could appoint an expert and decide in trial.

WHAT HAPPENS IF Δ IS NGI?

- If the experts (and you and your head deputy) agree that the defendant is NGI, then you take a plea and he gets sent to Patton (see attached plea script)
- MUST advise defendant of possible lifetime confinement in the state hospital
- *P v. Lomboy* (1981) 116 Cal.App.3rd 68

WHAT HAPPENS IF Δ IS NGI?

- Sent to a state hospital or **outpatient treatment** program up to max sentence
- If we want to keep them in, he is entitled to another jury trial
 - Per PC 1026.2, this can happen as soon as 180 days later!!

DISCOVERY

- **Case by Case Evaluation**

- Prison Records
- County Jail Records
- DMH records including any 5150 holds
- Medical records
- Hospitalization records
- Intake and classification records
- CDCR “C” File – disciplinary and housing records
- ITMS
- Monitored visits
- Work/Employment Records
- School Records
- Military records
- Regional Center Records
- IEP or other Juvie Documents
- Patton Records
- Interview friends, relatives and co-workers

DISCOVERY

People v. Coronado

- Defendant claimed both post-partum depression and claimed to have been hearing voices since the age of 5
 - School, military and employment records were relevant
 - Records from her OBGYN and hospital records were relevant.
 - Had OBGYN testify that he does screenings for post-partum depression

PRETRIAL ISSUES

Bifurcated trial

- Defendant can ask for two separate juries for each phase (court's discretion).

Voir Dire as to Sanity

- Can inform the jurors about the dual plea. *People v. Phillips* (1979) 90 Cal.App.3rd 356, *People v. Guillebeau* (1980) 10 Cal.App.3rd 531
- Strongly recommend voire dire on Sanity. Some thoughts:
 - Explain the shifted burden and ask if jurors willing to follow the law.
 - Comfortable holding the defense to that burden?
 - Explain that you don't have to prove anything in the sanity phase.
 - Listen to all of the evidence from all of the experts.
 - Talk about motive not being an element of the crime or sanity verdict.
 - Legal Sanity versus Sanity in medical/psychological or common knowledge
 - Promise NOT TO USE SANITY in guilt phase.

TRIAL ISSUES

Guilt Phase

- Normal guilt phase trial.
- However, some mental health information may be discussed to negate specific intent
 - Defense should provide you with notice.
 - If the defendant does put his mental state at issue, a court appointed psychiatrist can testify as to the defendant's statements to him under a PC 1027 evaluation. *In re Spencer* 63 Cal.2nd 412
 - Could also use statements to impeach testifying defendant. *People v. Combes* (1961) 56 Cal.2nd 135

SANITY TRIAL

- No requirement that the People or Defense go first. Up to the trial judge. *People v. Letourneau* (1949) 34 Cal.2nd 478
- Realistically, if no guilt phase, it may be easier for you to present most of the evidence.
- If both guilt and sanity, best practice to have a stipulation that all evidence from guilt phase applies to sanity phase.
- Waive or choose to give your opening at the close of defense's case.
- Move for a directed verdict at the close of defense's case.

TYPES OF EVIDENCE TO CONSIDER PRESENTING

- Expert testimony
- Documents reflecting no mental health problems.
- Friends/Family/Co-workers *Evid. Code § 870*
- Physical evidence collected and where it was found.
- Defendant's statements to police or on ITMS
- Defendant's flight or evidence that he attempted to cover up his crimes.

TYPES OF EVIDENCE TO CONSIDER PRESENTING

- **People v. Carter**
 - **Nature and Quality of Act**
 - **Told Dr. Kojian:**
 - **Had the knife in his room from earlier in the day when he was eating some food.**
 - **Was angry with his sister.**
 - **Grabbed his niece in the hallway**
 - **Got the knife from the dresser**
 - **Cut her neck**
 - **Put the knife in a drawer by the bed**

TYPES OF EVIDENCE TO CONSIDER PRESENTING

- **People v. Carter**
 - **Understanding that act Morally or Legally Wrong**
 - Hid Mireya's body in trash bag
 - Hid the bag in his closet
 - Hid the knife
 - Changed from his bloody clothes and hid them.
 - Dressed appropriately for going out.
 - Left the crime scene
 - Jumped out of Richard's truck
 - Ran from his sister when she confronted him
 - Ran from police in custody
 - Told jailers that he ran from the cops

CLOSING ARGUMENTS

Burden on the defense

Preponderance of the Evidence

Defense argues first and last . . . BUT,

We get to argue

- **“Defense has the burden”**
- **“People didn’t have to do anything”**
- **“Defense has FAILED to meet its burden”**
- **“Where is the (any missing potential evidence)?”**
- **“If you’re not sure, you’re 50/50, you MUST find the defendant to be sane.”**

SANITY



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