

Competence in Context

The Rift Between the Legal Obligation and Ethical Burden of Establishing Offender Competence in California's Sexually Violent Predator Evaluations.

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Introduction

A legal situation exists in the State of California in which there is no obligation that an individual be mentally competent prior to, or during, any phase of evaluation as a Sexually Violent Predator. As recently as 2011, courtrooms under the jurisdiction of the 9th Circuit Court of Appeals have made decisions affecting the rights of individuals being evaluated as Sexually Violent Predators, specifically by supporting the lack of a legal obligation of competency to be evaluated as a SVP. These decisions have a direct impact on the ethical burden of psychologists performing the second stage of these evaluations, submitting reports used during the third stage of the evaluations, and giving testimony during the fourth.

This presentation provides an overview of the legal and psychological tenants of competence in SVP evaluations conducted in California. Included are some explanations of current statutory law, case law, and state mandates, as well as the current APA Ethical Guidelines for Forensic Psychologists. Special scrutiny of all legal mandates and ethical aspirational guidelines, as well as consideration of what the future ramifications of today's professional judgment, are warranted when compliance with the judicial law may conflict with professional standards of ethical practice.

Legal Statutes and Case Law

In the state of California, an individual found to be a SVP under California's Sexually Violent Predator Act (Cal. Welf. & Inst. Code §6600 et seq. (2011)), is subject to involuntary civil commitment for an indefinite time.

Definition: The state of California defines Sexually Violent Predators as those individuals who have been: "convicted of a sexually violent offense against one or more victims and who [have] a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior" (Welf. & Inst. Code ("WIC") §6600, subd. (a)(1).)

Historic Context of Civil Commitment Laws:

- **Hubbart v. Superior Court of Santa Clara County (People)**, S052136, 1999 (19 Cal.4th 1138): *SVPA does not violate the federal or state constitutions.*
- **People v. Torres**, S079575, 2001 (25 Cal. 4th 680): *No requirement that the defendant's prior crimes are "predatory acts."*
- **People v. Superior Court of Marin County (Ghilotti)**, S102527, 2002 (27Cal.4th888): *SVPs may be committed, or recommitted if there is a substantial public danger.*
- **Moore v. Superior Court**, 2010 (50 Cal. 4th 802): *Due process does not require competence for a defendant to be evaluated as a SVP.*

Stages of the SVP Evaluation

Stage 1: Determination of Eligibility - "Based on whether the person has committed a sexually violent predatory offense (SVPO) and on a review of the person's social, criminal, and institutional history." (WIC §6601, subds. (a)(1) & (b).) SVPOs are felony offenses covered by 12 sections of the Cal. Penal Code (PC).

Stage 2: Standardized Evaluation - Two Mental Health Providers (MHPs) designated by WIC §6601. subd. (d) and certified pursuant to PC §9003. subd. (a) conduct independent evaluations. During the evaluation, these professionals: "shall inform the person that the purpose of their examination is not treatment but to determine if the person meets certain criteria to be involuntarily committed [under the SVPA]. It is not required that the person appreciate or understand that information." (WIC § 6601. subd. (f).) If both evaluators concur that the individual meets the criteria, the Director of Mental Health must petition to have the individual committed as a SVP. (WIC § 6601, subds. (d), (h) &(i).)

Stage 3: Probable Cause Ruling - A judge of the superior court will rule on probable cause outlined in the petition and based on the submitted MHPs reports. (WIC § 6602, subd. (a).) If probable cause is found, the individual will be remanded to trial.

Stage 4: Jury Trial - The individual retains the rights to the assistance of counsel, to an examination on his or her behalf by outside experts or professional persons, and to have access to all relevant medical and psychological records and reports. If the individual is indigent, they are entitled to court appointed counsel and assistance in obtaining an "expert or professional person to perform an examination or participate in the trial on the person's behalf." (WIC § 6603, subd. (a).) "The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." (WIC § 6604.) Any jury verdict must be unanimous. (WIC § 6603, subd. (f).)

Moore v Superior Court

The issue of a defendant's right to be competent for the Jury Trial portion of an SVP jury trial was taken up in Moore v. Superior Court (2010) 50 Cal.4th 802. In this 5–2 decision the supreme court of California: "held that due process does not require mental competence on the part of someone undergoing a commitment or recommitment trial under the California Sexually Violent Predators Act, WIC, § 6600 et seq."

The court outlined four factors considered in the discussion leading to this conclusion (Moore, supra, 50 Cal.4th at p. 819; see also People v. Allen (2008) 44 Cal.4th 843, 862-863.):

1. The private interest that will be affected by the official action;
2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;

3. The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail;
4. The dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official.

In addressing the first and fourth factors the court found that:

- The delay of an individual's evaluation as an SVP "because his mental problems make him incompetent to stand trial" would "substantially impede the governmental interest in protecting the public." (Moore, supra, 50 Cal.4th at pp. 819-820.)

In addressing the second factor the court found:

- The nature of the SVP proceeding prevents any defendant from "playing much more than a supporting role." (Moore, supra, 50 Cal.4th at p. 824.)
- The procedural safeguards available are enough to prevent erroneous commitments. (Id. at pp. 824-825.)

In addressing the third factor, the majority ruling of the court stated:

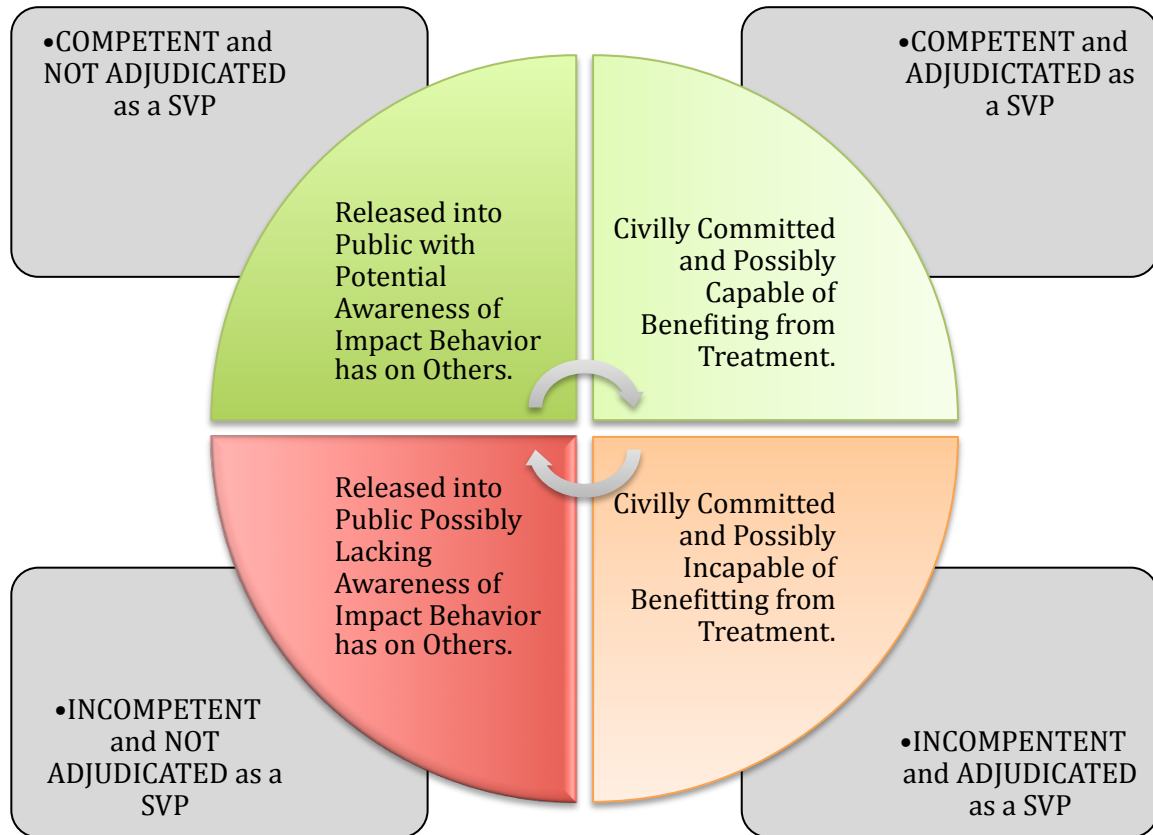
- The government has a strong interest in protecting the public from sexually violent predators and in providing treatment to them. (Moore, supra, 50 Cal.4th at p. 825.)
- Unknown, and possibly large, numbers of proceedings would be stayed, unless and until competence was restored. (Id. at p. 826.)
- Such a requirement would cause a substantial fiscal and resource-based burden on the state in the housing and treatment of such individuals during the indeterminate period of competency restoration. (Id. at p. 828.)

Possible Outcomes of a SVP Evaluation

This chart describes four potential outcomes of the interaction between two dichotomous variables. These variables necessarily exist in every case set for SVP evaluation without regard to legal recognition of their importance.

1. Is the individual being evaluated likely to engage in future sexually violent, criminal behavior?
 - This is the question answered by the evaluation.
2. Is the individual being evaluated competent, therefore aware of the difference between right and wrong?
 - This question has been declared judicially irrelevant.

This chart seeks to describe, in generalities, the four potential outcomes of the interaction of these two variables.



APA Ethics and Forensic Specialty Guidelines

In August of 2011 the APA Council of Representatives adopted an updated version of the Specialty Guidelines for Forensic Psychology. Amongst the many goals of these guidelines designed to promote best practice, is the implicitly stated goal to “encourage forensic practitioners to acknowledge and respect the rights of those they serve.” Those they serve may include both the public and the individuals being evaluated.

It is important to keep these guidelines in mind when they may conflict, in whole or in part, with the judicial regulation of the assessments facilitated by Mental Health Practitioners in SVP evaluations.

Some Highlights:

1.02 Impartiality and Fairness: When conducting forensic examinations, forensic practitioners strive to be unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact.

2.04 Knowledge of the Legal System and the Legal Rights of Individuals: Forensic practitioners aspire to manage their professional conduct in a manner that does not threaten or impair the rights of affected individuals.

2.05 Knowledge of the Scientific Foundation for Opinions and Testimony: Forensic practitioners seek to provide opinions and testimony that are sufficiently based upon adequate scientific foundation, and reliable and valid principles and methods that have been applied appropriately to the facts of the case.

6.03.03 Persons Lacking Capacity to Provide Informed Consent: For examinees adjudicated or presumed by law to lack the capacity to provide informed consent for the anticipated forensic service, the forensic practitioner nevertheless provides an appropriate explanation, seeks the examinee's assent, and obtain appropriate permission from a legally authorized person, as permitted or required by law (EPPCC Standards 3.10, 9.03).

7.01 Conflicts with Legal Authority: When their responsibilities conflict with law, regulations, or other governing legal authority, forensic practitioners make known their commitment to the EPPCC, and take steps to resolve the conflict. In situations in which the EPPCC or Guidelines are in conflict with the law, attempts to resolve the conflict are made in accordance with the EPPCC (EPPCC Standard 1.02). When the conflict cannot be resolved by such means, forensic practitioners may adhere to the requirements of the law, regulations, or other governing legal authority, but only to the extent required and not in any way that violates a person's human rights (EPPCC Standard 1.03).

References

CA Codes (wic:6600-6609.3). (n.d.). Retrieved February 28, 2012, from <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=wic&group=06001-07000&file=6600-6609.3>

No. S174633. - MOORE v. SUPERIOR COURT - CA Supreme Court. (n.d.). Retrieved February 28, 2012, from <http://caselaw.findlaw.com/ca-supreme-court/1535660.html>

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In order to obtain a copy of the Specialty Guidelines for Forensic Psychology on your smart phone in .pdf format, you can scan this barcode for a direct download from the AP-LS website.

