California Department of Mental Health

Sexually Violent Predator Evaluations

An Introduction – A reintroduction

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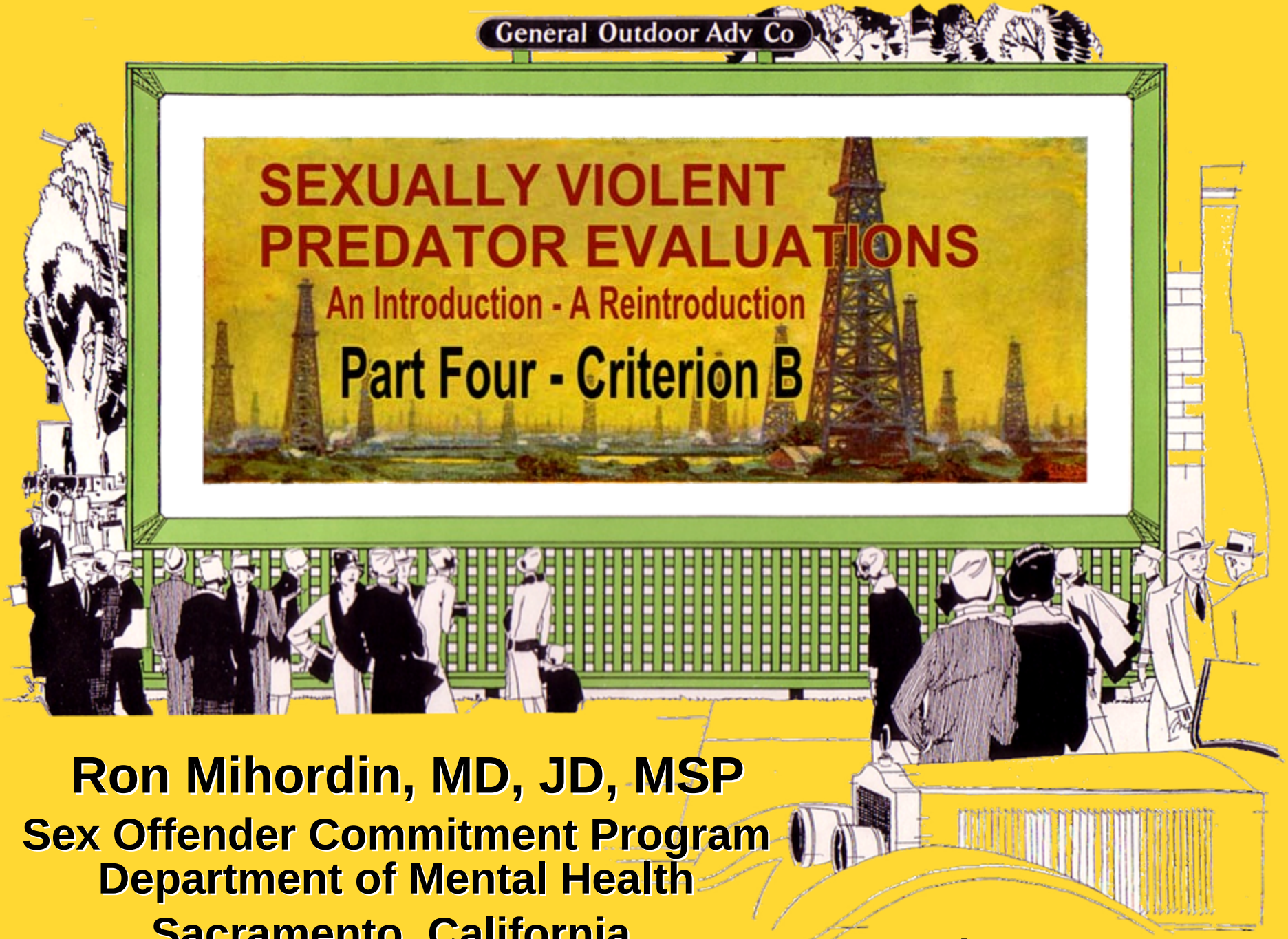

SEXUALLY VIOLENT PREDATOR EVALUATIONS

An Introduction - A Reintroduction

Part Four - Criterion B

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Criterion B – The Question

Does the person have a “diagnosed mental disorder?”

or

Does the person have a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others?

Criterion B – The Question

- "Diagnosed mental disorder" is defined in WIC 6600 (b).
- "Diagnosable mental disorder" appears elsewhere in the statute but is not defined.
- Misstatement: "A diagnosed mental disorder" that predisposes the person to commission . . ."
- ATM (Automatic Teller Machine) machine.

Diagnosed Mental Disorder

Welfare and Institutions Code Section 6600 (c)

A congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

Congenital or Acquired Condition

+

Requisite Predisposition

+

Emotional-Volitional Impairment

=

“Diagnosed Mental Disorder”

Congenital or Acquired Condition

Congenital or Acquired Condition?

- Any DSM-IV-TR disorder?
- Only DSM-IV-TR paraphilias?
- Not DSM-IV-TR personality disorders?
- Any condition characterized by the word *disorder* preceded by two adjectives?

Diagnosed Mental Disorder

The Boilerplate

A “diagnosed mental disorder” is defined in the statute as a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual act in a degree constituting the person a menace to the health and safety of others.

While “diagnosed mental disorder” is statutorily defined, clinicians utilize the diagnostic categories of DSM-IV-TR *to describe the mental disorder*.

The Question

1. Ambiguous language – Correct application of law?
2. Code for “Only-Paraphilia”- Material legal error?

DSM-IV-TR Disorders

1. Disorders First Diagnosed in Infancy, Childhood, or Adolescence.
2. Delirium, Dementia, and Amnestic and Other Cognitive Disorders.
3. Mental Disorders Due to General Medical Conditions.
4. Substance-Related Disorders.
5. Schizophrenia and Other Psychotic Disorders.
6. Mood Disorders.
7. Anxiety Disorders.
8. Somatoform Disorders.
9. Factitious Disorders.
10. Dissociative Disorders.
11. Sexual and Gender Identity Disorders.
12. Eating Disorders.
13. Sleep Disorders.
14. Impulse-Control Disorders.
15. Adjustment Disorders.
16. Personality Disorders.
17. Other Conditions that are Focus of Clinical Attention.

Paraphilias - Essential Features

- Occurring over a period of at least six months:
- Recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving:
  - Nonhuman objects,
  - The suffering or humiliation of oneself or others,
  - Children or other nonconsenting persons.

Paraphilias – Controversies?

1. “Garage” diagnoses – Paraphilic Coercive Disorder, Hebephilia, or Gerontophilia.

2. An expression of whose volitional impairment?

3. “Red flag” diagnoses for DMH reviewers.

4. General rule: If it’s outside the contemporary DSM, it is out-of-bounds for DMH SVP reports.

5. DSM is where we “draw the line.”

Paraphilias – Controversies?

6. Sexual Sadism is a DSM-listed disorder.
7. Paraphilia (Not Otherwise Specified) is a DSM-listed disorder.
8. A test of intellectual discipline and integrity.
9. NOS applied to “all but one criterion met” cases, not the “one or no criterion met” cases.
10. Mental state not behavior is key to supportable diagnoses of Sexual Sadism or Paraphilia NOS (nonconsent).
11. Proof of mental state is hard to come by.

Paraphilias – Controversies?

9.01 Use of Appropriate Methods

When performing examinations, treatment, consultation . . . forensic practitioners seek to maintain integrity by examining the issue or problem at hand from all reasonable perspectives and seek information that will differentially test plausible rival hypotheses.

Specialty Guidelines for Forensic Psychology,
APA Council of Representatives,
Adopted August 3, 2011

Paraphilias – Controversies?

12. Diagnostic zeal can dull intellectual sharpness.

13. “Evidence of something” becomes evidence of mental state.

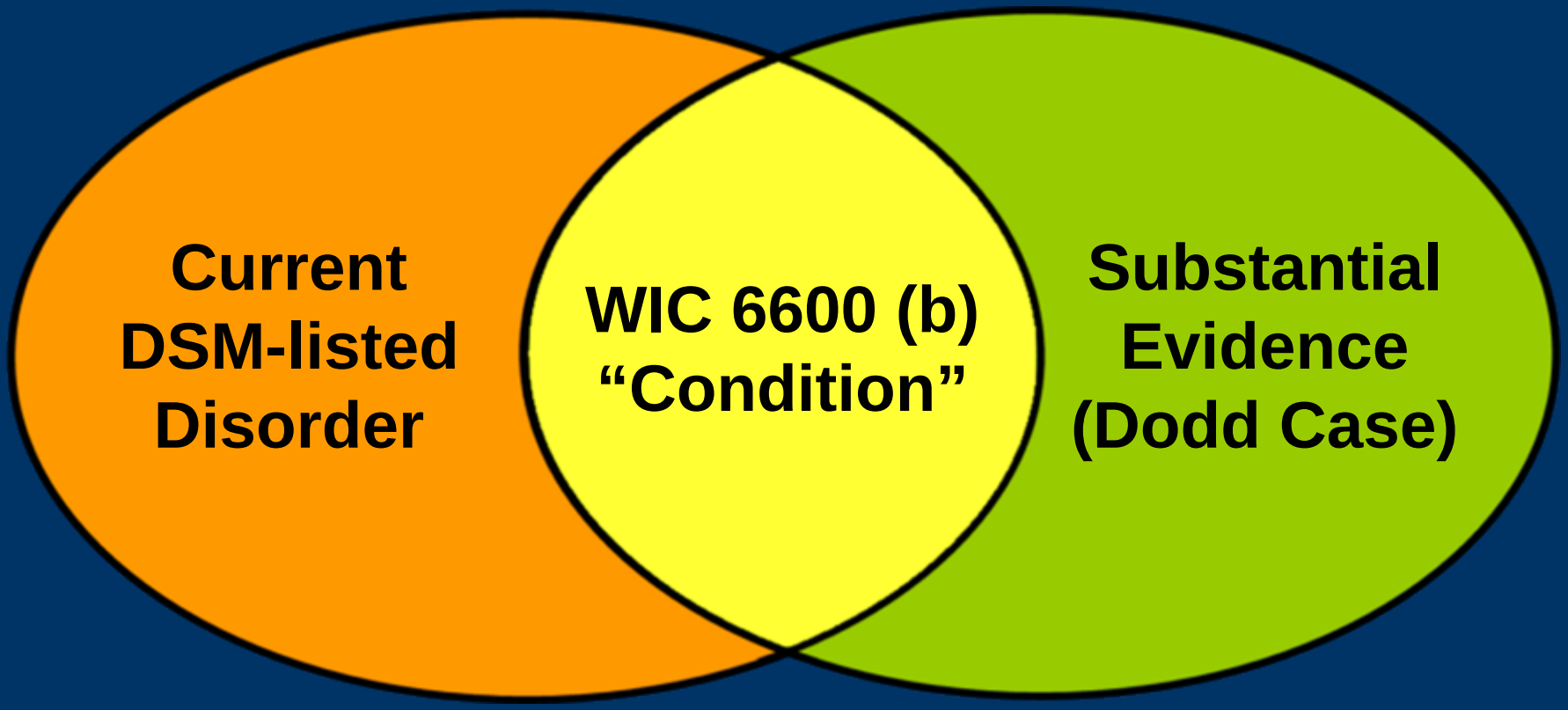
14. Sadistic behavior does not prove sexual sadism.

15. Violence associated with sexual crimes does not prove sexual sadism.

16. Violence toward women does not prove sexual sadism.

17. Planning and preparation does not prove sexual sadism.

Congenital or Acquired Conditions
WIC Section 6600 (b)



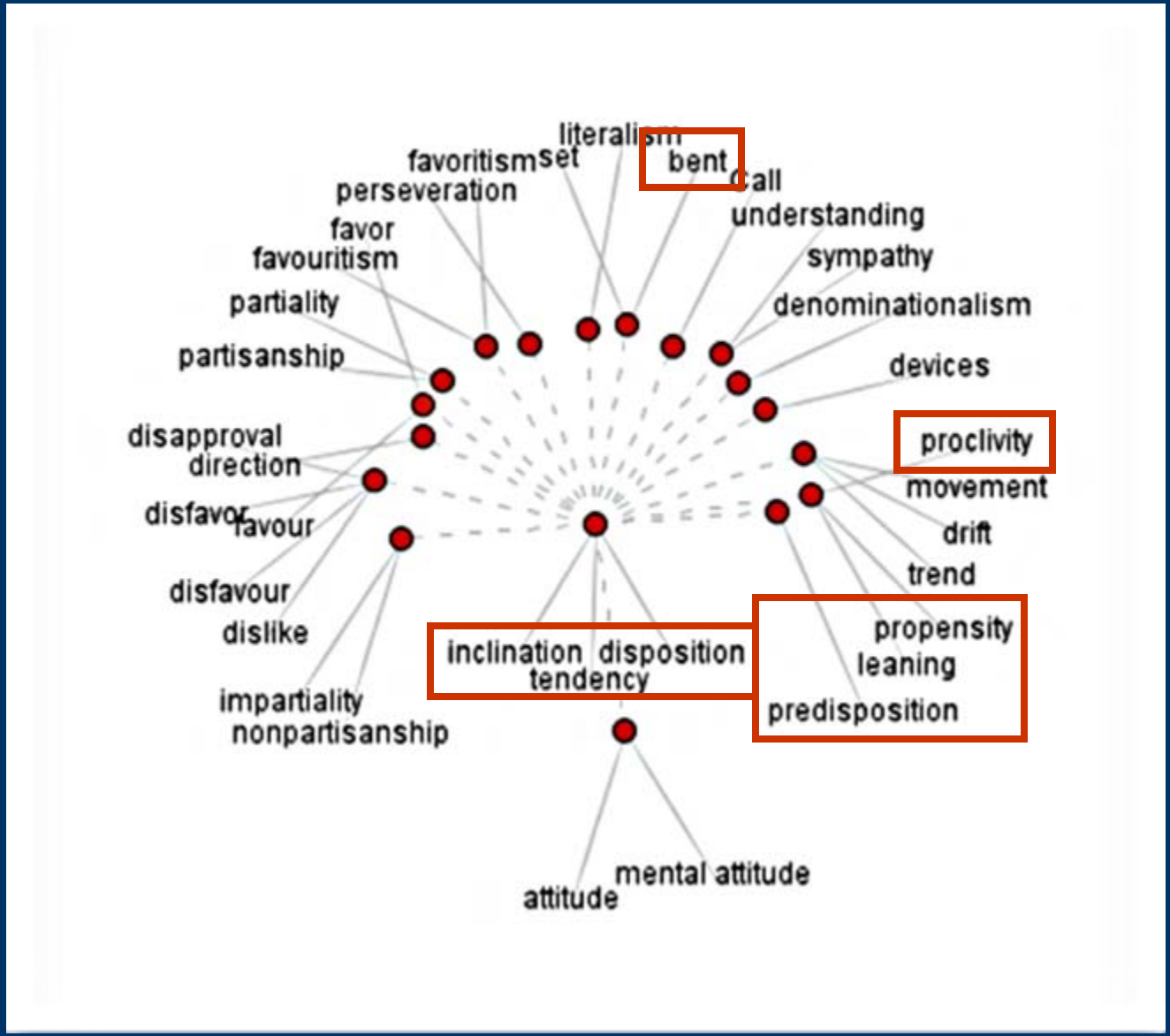
Out-of-Bounds

Congenital or Acquired Condition

+

Requisite Predisposition

Predispose? Predisposition?



www.visualthesaurus.com

Diagnosed Mental Disorder

Welfare and Institutions Code Section 6600(c)

A paraphilic condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

Diagnosed Mental Disorder

Welfare and Institutions Code Section 6600(c)

A congenital or acquired condition affecting the emotional or volitional capacity that paraphilically predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

Congenital or Acquired Condition

+

Requisite Predisposition

+

Emotional-Volitional Impairment

Emotional-Volitional Impairment

1. Objective Psychological Analysis.

   a. Behavior persists notwithstanding emotional distress/ego-dystonia.

   b. Behavior persists notwithstanding self-sought voluntary treatment for behavior or emotional sequelae.

   c. Behavior persists notwithstanding self-motivated/initiated attempts to control/avoid.

Emotional-Volitional Impairment

Case Law - Based Analysis

1. A recidivist violent sexual offender who, due to a mental disorder, is unlikely to be deterred by the risk of criminal punishment lacks control in the requisite sense. [102 Cal.App.4th 1107]

People v. Burris (2002)
102 Cal.App.4th 1096

Emotional-Volitional Impairment

Case Law - Based Analysis

2. A person who does not want to rape, feels remorse after raping, yet continues to rape anyway, "lacks control."

3. A person who *does* want to rape, feels *no* remorse after raping, and continues to rape despite having been criminally punished for prior rapes, *also* "lacks control."

People v. Burris (2002)

Emotional-Volitional Impairment

Case Law - Based Analysis

4. An offender who chooses to reoffend because, emotionally or cognitively, he has a "defective understanding or appreciation" of the consequences also "lacks control" in the requisite sense.

5. An offender can lack control even if he has an antisocial personality disorder and lacks remorse.

People v. Burris (2002)

Congenital or Acquired Condition

+

Requisite Predisposition

+

Emotional-Volitional Impairment

=

“Diagnosed Mental Disorder”

People v. Superior Court (Ghilotti) (2002)

In the Ghilotti case, the Supreme Court noted that the SVP evaluator's recommendations were conclusive [not subject to judicial review] "insofar as the evaluator's recommendations represent the application of their professional judgment within statutory requirements."

"On the other hand, the statute does not allow the evaluators utter free rein . . . The evaluators' professional judgment is therefore to be exercised within a specified legal framework, and their accurate understanding of the statutory criteria is crucial to the Act's proper operation."

Material Legal Error

People v. Superior Court (Ghilotti) (2002)

1. "The requirement that SVPA evaluators apply criteria set forth in the statute invokes the inherent judicial power to determine whether an evaluator's recommendation stems, on its face, from an inaccurate understanding of those criteria, and thus constitutes legal error."

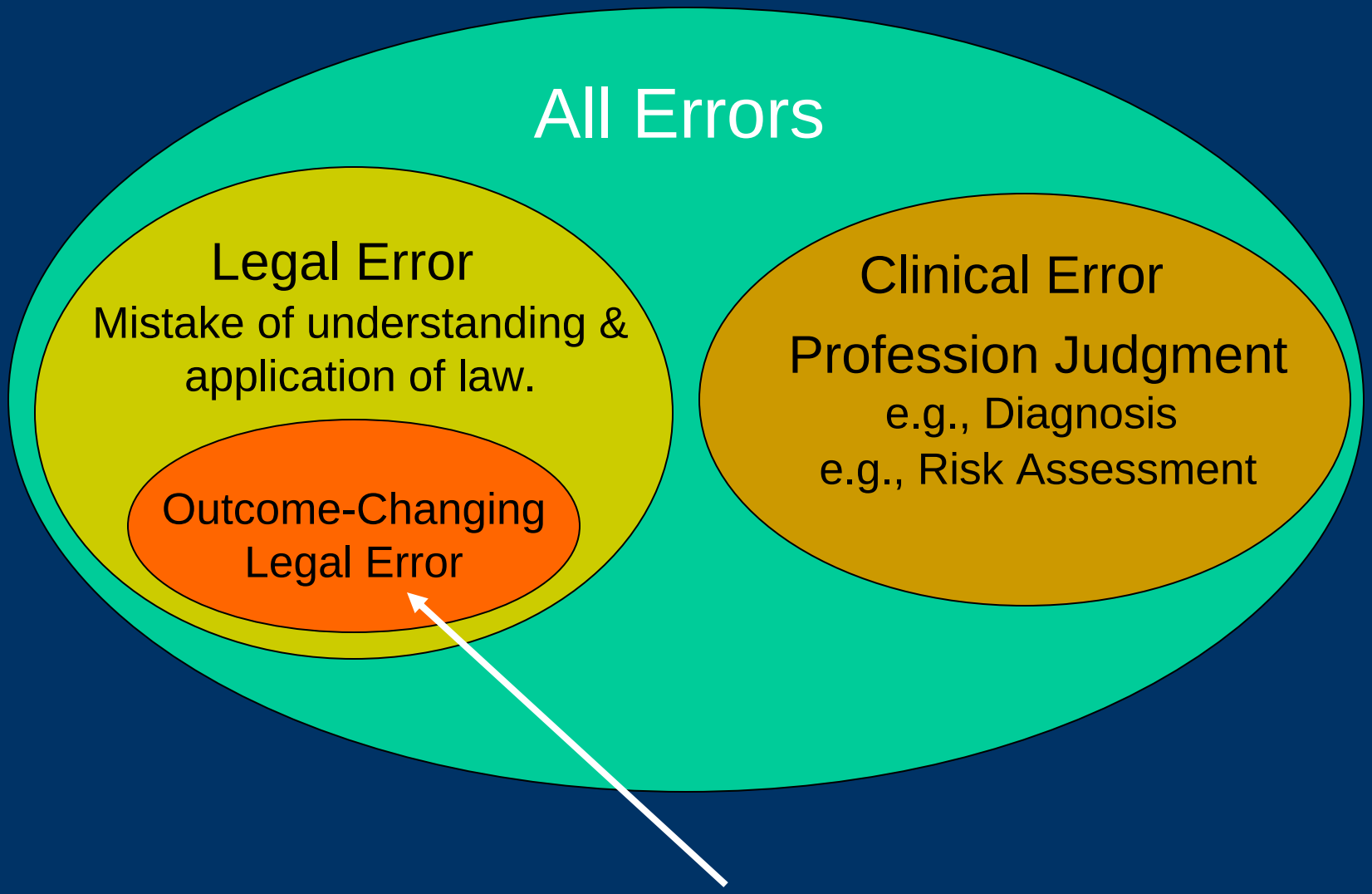
2. "An evaluator's report is infected with legal error if, on its face, it reflects an inaccurate understanding of the statutory criteria governing the evaluation."

Material Legal Error

People v. Superior Court (Ghilotti) (2002)

3. "An evaluator's legal error shall be deemed material if, and only if, (1) there appears a reasonable probability, sufficient to undermine confidence in the outcome, that the error affected the evaluator's ultimate conclusion, and (2) a change in the evaluator's conclusion would either supply or dissolve, the necessary concurrence of two designated evaluators."

Material legal error can be found anywhere, but . . .



Material Legal Error

Congenital or Acquired Condition

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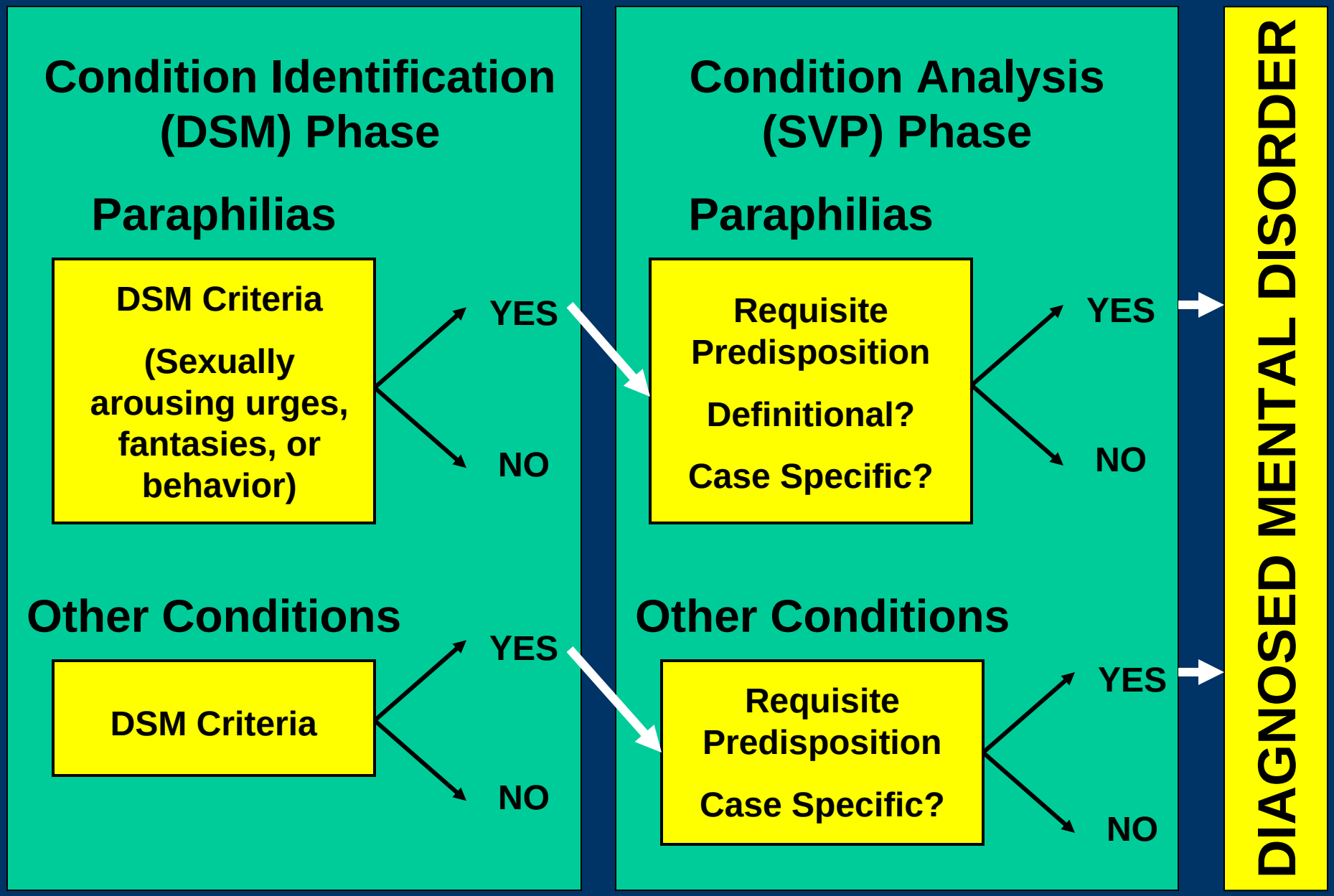
“Diagnosed Mental Disorder”


Condition Identification (DSM) Phase
Paraphilias
DSM Criteria
(Sexually arousing urges, fantasies, or behavior)
YES
NO
Other Conditions
DSM Criteria
YES
NO
Condition Analysis (SVP) Phase
Paraphilias
Requisite Predisposition
Definitional?
Case Specific?
YES
NO
Other Conditions
Requisite Predisposition
Case Specific?
YES
NO
DIAGNOSED MENTAL DISORDER

Criterion B – Material Legal Error (Type I)

Condition Identification (DSM) Phase

Paraphilias

DSM Criteria

(sexually arousing urges, fantasies, or behavior)

YES

NO

Other Conditions

DSM Criteria

YES

NO

Condition Analysis (SVP) Phase

Paraphilias

Requisite Predisposition

Definitional?

Case Specific?

YES

NO

Other Conditions

Requisite Predisposition

Case Specific?

YES

NO

DIAGNOSED MENTAL DISORDER

Criterion B – Material Legal Error (Type II)

Condition Identification (DSM) Phase

Paraphilias

DSM Criteria

(sexually arousing urges, fantasies, or behavior)

YES

NO

Other Conditions

DSM Criteria

YES

NO

Condition Analysis (SVP) Phase

Paraphilias

~~Requisite~~ Paraphilic Predisposition?

Definitional?

Case Specific?

YES

NO

Other Conditions

~~Requisite~~ Paraphilic Predisposition?

Case Specific?

YES

NO

DIAGNOSED MENTAL DISORDER

Material Legal Error

Case No. 00130

1. Criterion A - Positive

- ✓ SVP-Qualifying: Forcible Rape and Oral Copulation, 7 yo female victim, subject age 24.
- ✓ SVP-Qualifying: Oral Copulation, 17 yo female victim, subject age 36.
- ✓ Parole Violation: Rape, “adult” female victim, subject age 50.
- ✓ Subject current age: 52.

Material Legal Error

Case No. 00130

2. Criterion B - Negative

   a. R/O Paraphilia, NOS, Non-consenting Females.

   ✓ "[Subject] is simply a very antisocial man who takes what he wants when he wants it and has no concern for others."

   ✓ "I do not believe the evidence indicates he is specifically attracted to sex with non-consenting victims."

Material Legal Error

Case No. 00130

2. Criterion B - Negative

   b. Antisocial Personality Disorder, Severe

   - ✓ Conduct disorder prior to age 15.
   - ✓ "Very large number" of offenses against property and persons, sexual and non-sexual.
   - ✓ Serious rules violations in prison and violations of "conditions of release."
   - ✓ A psychopath.

Material Legal Error

Case No. 00130

3. Criterion C - Negative

- ✓ SVR-20: High risk.
- ✓ Static-99R: High risk.
- ✓ MnSOST-R: Very high risk.
- ✓ Protective factors: None.
- ✓ Future offense likely predatory: Yes.
- ✓ Can be safely or effectively treated as OP: No.

Material Legal Error

Case No. 00130

3. Criterion C - Summary

In summary, it is not likely that [subject] will reoffend in a sexually violent predatory manner if he is released . . . .

This follows only from the fact that [subject] cannot be clearly diagnosed as having a severe mental disorder which predisposes him to such offending.

Material Legal Error

Case No. 00130

3. Criterion C - Summary

It may well be that [subject] will go on to reoffend in a sexual manner as indicated by the several risk estimation instruments utilized here.

However, any such reoffending would be the result of his general antisocial and substance abuse disorders and not due to a disorder which specifically drives him toward sexual offending.

Material Legal Error

Case No. 00131

1. Criterion A - Positive
2. Criterion B - Negative
   - ✓ Diagnosis: Antisocial Personality Disorder
   - ✓ Irritability and aggressiveness are evidenced in incidents of domestic and sexual violence.
   - ✓ His arrests involving sexually violent acts demonstrate a reckless disregard for the safety of others.

Material Legal Error

Case No. 00131

2. Criterion B - Negative

- ✓ There is an absence of compelling evidence of expected behavior correlates and victim characteristics . . . associated with a paraphilic coercive disorder.

- ✓ Antisocial Personality Disorder . . . better accounts for this individual's known sex offense history.

Material Legal Error

Case No. 00131

2. Criterion B - Negative

- ✓ His sexual acts involving three victims are . . . an expression of his [need] for immediate gratification, callousnesss, and . . . disregard for safety and welfare of others. [ASPD symptoms]
- ✓ [Foregoing are not a] manifestation of a discrete paraphilic disorder.
- ✓ Does not meet the . . .diagnostic criteria for paraphilia.

Material Legal Error

Case No. 00131

2. Criterion B - Negative

- ✓ [Cannot] proffer a diagnosis of paraphilia . . . .
- ✓ The ASPD does not affect [subject's] emotional or volitional capacity. [Cf. *People v. Burris*]
- ✓ [Subject] was not diagnosed with a statutory required qualifying disorder.
- ✓ [Subject does not have] a statutorily required sexual disorder . . . .

Material Legal Error

Case No. 00131

3. Criterion C - Negative

- ✓ Since [subject] does not meet diagnostic criteria for statutory necessary mental disorder, Criterion C, cannot be satisfied.
- ✓ Static-99R: High risk.
- ✓ Static-2002R: Moderate-high risk.
- ✓ MnSOST-R: Highest risk.

Material Legal Error

Case No. 00131

3. Criterion C - Negative

- ✓ [Subject] evidenced sexual deviancy by his actions against [his] three victims.
- ✓ Actions during . . . his sexual crimes do not appear to rise to the threshold of a specific diagnosable paraphilic disorder.
- ✓ ASPD . . . explains this individual's sexual offenses.
- ✓ [Subject] does not suffer from a qualifying Axis I condition.

CRITERION B

Paraphilia Diagnosis?	Predisposition?	DMD?
NO	NO	NO
Other Diagnosis?	Predisposition?	DMD?
YES	YES	YES

CRITERION C

DMD:	NO
Likely:	Y/N
Criterion C:	NO
DMD:	YES
Likely:	YES
Criterion C:	YES

DMD = Diagnosed Mental Disorder

= Material Legal Error Elements

Material Legal Error

On the face? The keys:

Their diagnosis.

Their own words.