

NO. 38187-7-II

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION TWO

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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In re Commitment of:

TOMMIE COLEMAN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Thomas J. Felnagle, Judge

BRIEF OF APPELLANT

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STATE OF WASHINGTON
BY *[Signature]*
APPELLANT
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DIVISION TWO

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to effective assistance of counsel.

Issue Related to Assignment of Error

Defense counsel failed to object to the state's expert's improper scoring of an actuarial risk measure. Counsel also failed to object to the state's expert's opinion that appellant had raped two other inmates, despite a contrary prison disciplinary finding that the sex was consensual. Where the state's burden is high and where the defense presented persuasive expert testimony rebutting the state's case, did counsel's deficient performance prejudice appellant?

B. STATEMENT OF THE CASE

1. Procedural Facts

On January 10, 2005, the state filed a petition seeking appellant Tommie Coleman's detention under RCW 71.09. CP 1-29. The state alleged Coleman met the criteria for commitment based on his history of criminal offenses and the opinion of Dr. Brian Judd. CP 3-49.

After Coleman stipulated there was probable cause, the case was tried to a Pierce County jury in July and August, 2008. See RP

covers. Coleman was 55 years old at the time of trial. RP 278, 460.¹

On August 12, 2008, the jury returned a verdict answering “yes” to the question whether the state had proved beyond a reasonable doubt that Coleman “is a sexually violent predator.” CP 386.

2. Trial Testimony – Expert Disagreement

The two main disputed trial issues were: (1) whether Coleman suffered from a “mental abnormality,” and (2) how to quantify Coleman’s risk of reoffense. The “mental abnormality” issue focused on whether Coleman could be diagnosed with the disorder of “paraphilia not otherwise specified (NOS), nonconsent.”

The reference book for both experts was the DSM-IV-TR.² The DSM generally defines a paraphilia by its essential features:

[t]he essential features of a Paraphilia are recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one’s partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months (Criterion A). . . . For the remaining Paraphilias, the diagnosis is made if the behavior, sexual urges, or fantasies cause clinically significant distress or impairment in social,

¹ This brief refers to the 8-volume sequentially-paginated trial transcripts as “RP.” The separately numbered pretrial transcripts are referenced as RP (7/25/08).

² Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders DSM-IV-TR (4th ed.2000), hereafter referenced as “DSM.”

occupational, or other important areas of functioning (Criterion B).

DSM, at 586; Ex. 20; RP 100-01, 107-08, 195, 343-44, 379-80, 414-15, 417, 452.

The defense expert, Dr. Theodore Donaldson, testified there was not sufficient evidence to diagnose Coleman as a paraphilic rapist. RP 345-46.

Donaldson had received his Ph.D in clinical psychology in 1962. He had a part-time clinical practice from 1963-1980. Since 1980 he had a forensic psychology practice and had done nothing but sex offender forensic work since 1996. He had conducted more than 450 evaluations in California and 80 in Washington, and had testified 257 times in California and 23 times in Washington. He had written numerous papers and made numerous presentations for public defender groups. RP 322-30, 391-94.

Dr. Donaldson showed why the “paraphilia NOS (nonconsent)” diagnosis conflicted with the DSM. He explained the DSM had excluded “paraphilic coercive disorder” from earlier versions of the manual, and it had excluded “paraphilia NOS nonconsent” from current versions of the manual. The DSM committee excluded the diagnosis for two reasons: (1) it did not want to create a mental

defense for rapists, and (2) the data needed for the diagnosis is too improbable and difficult. RP 343-44, 379-80, 414-15, 417, 449-52; Ex. 47.

Donaldson described the paraphilia diagnosis as requiring the person to have a deviant sexual arousal to the target of the paraphilia. For a paraphilic rapist the evidence would have to show "specific arousal to rape or to nonconsent." RP 339. It can be very difficult to differentiate between the rapist who is specifically aroused by nonconsent as opposed to the rapist who doesn't care if there is consent. Simple fantasies about rape are not enough. The fantasies about the nonconsensual aspect must be intense and persistent. RP 340-41, 346, 375, 400.

Donaldson also described the different types of rapists that had been described by psychologists: the power reassurance rapist, the sadistic rapist, the exploitive rapist, and the anger rapist. Of those, only the power reassurance and sadistic rapists might be considered paraphilic. RP 337. Coleman's offenses were a combination of anger and impulse, not paraphilia. RP 458.

Donaldson testified there was insufficient evidence to show Coleman had the type of recurrent intense sexually arousing fantasies necessary to establish the rapes were paraphilic – i.e. the product of a

mental disorder – rather than simply criminal acts. RP 377, 399-400, 418-36. A paraphilia NOS diagnosis is not justified to describe repetitive rape. The record must instead show considerable evidence that the rapes reflected paraphilic urges and fantasies linking the coercion to the arousal. RP 451-52.

In contrast, the state's expert, Dr. Brian Judd, opined Coleman could be diagnosed with paraphilia NOS (nonconsent), and that diagnosis constituted the "mental abnormality" required by RCW 71.09. RP 95-96, 99, 195. He claimed the DSM allowed the diagnosis even though it was not specifically included in the DSM. RP 129-30, 205. Judd admitted the DSM committee had rejected a paraphilic coercive disorder diagnosis. RP 205. Judd admitted he was not board certified as a forensic psychologist, RP 193, and he admitted the NOS diagnosis relied a lot on his clinical judgment. RP 203-04. Judd also admitted Coleman had not been diagnosed with a paraphilic disorder during a 15-day evaluation at Western State Hospital in 1986. RP 245-49, 270.

Judd reached this diagnosis based on his review of Coleman's criminal history and various records from Coleman's incarcerations. He believed Coleman had admitted persistent fantasies about rape to

various evaluators. He believed Coleman was aroused by rape. RP 112-18, 126-28, 206-10, 229-30.

Judd believed Coleman's periods of incarceration constituted the kind of "impairment" of social and volitional functioning necessary to make the diagnosis. RP 121.

Donaldson and Judd agreed Coleman was properly diagnosed with a personality disorder NOS, with antisocial tendencies. Neither of them believed this diagnosis was sufficient to constitute the mental abnormality necessary for a 71.09 commitment. RP 96, 99, 134-36, 258, 366-67, 400-01; Ex. 19.

Donaldson and Judd also offered different opinions on the risk prediction element, i.e. whether Coleman was "likely to engage in predatory acts of sexual violence if not confined to a secure facility." CP 374; RCW 71.09.020(15).

Donaldson used the Static-99 and scored Coleman as a 4. That would suggest Coleman shared characteristics with a group of offenders who had been reconvicted of sexually violent offenses at rates of 26% over 5 years, 31% over 10 years, and 36% over 15 years. RP 152, 408-10; Ex. 48.

Donaldson started with Coleman's 1986 convictions as the "index offense." These were the last convictions and the proper

offense under the Static-99 scoring rules. RP 351-55, 411-12. Coleman received one point for the other current index offense of non-sexual violence, one point for a 1976 sex offense, one point for unrelated victims, and one point for stranger victims. RP 355-58.

Donaldson said there was no way to get close to the 50% threshold in Coleman's situation with a Static-99 score of 4 or 5. Furthermore, recent research had shown the assumptions underlying the Static-99's base rates of recidivism had been undermined and the base rates were now lower. Added to that was the fact that Coleman was over 50 and the risk for older offenders goes down considerably. Very few offenders offend after 70. RP 360-65. The offenders in the Static-99 sample averaged 34 years old. It is not reasonable to assume there is a 45% chance Coleman would be convicted in the next 10 years. RP 365, 383-85.

In the state's case, Judd testified the actuarial instruments had proven more accurate than clinical judgment in predicting risk. RP 139-40, 184. Judd used the Static-99 and the Sex Offender Risk Appraisal Guide (SORAG). RP 141-42. He asserted the scoring for these two instruments was primarily based on the available documentation of Coleman's history, but admitted there were obvious errors in some of the records. RP 143, 186-87, 227.

Judd nonetheless scored Coleman differently than Donaldson, reaching a score of 7. RP 151. He used either a 1993 or 2002 prison infraction as the “index offense.”³ This allowed Judd to add a point to Coleman’s score for his 1986 rape conviction. Judd also added a point to Coleman’s score based on Judd’s belief that Coleman had not sustained a two-year cohabiting relationship in the community. Judd added another point for “male victims.” As discussed in more detail infra, he discounted prison infractions that found Coleman had been involved in consensual sexual relations in prison, and instead believed the incidents were nonconsensual. RP 146-47, 262-64, 356-58; Ex. 48.

According to Judd, the score of 7 meant Coleman shared traits with a group of offenders, 52% of whom had been reconvicted of sexually violent offenses within 15 years of release from confinement. RP 152. Judd claimed this was a “very conservative” estimate of the risk of future sexual violence because the Static-99 measured reconviction, not just reoffense. RP 151, 262. On cross examination, Judd admitted the five and ten-year Static-99 estimates for recidivism

³ As discussed in section 4, infra, it was unclear which infraction Judd harnessed for use as his “index offense.”

were less than 50% -- 43% in five years and 43% in 10 years. RP 261.⁴

Judd also used the SORAG, arriving at a score of 27. According to Judd, this placed Coleman in a group of offenders who had reoffended at a rate of 75% over 7 years and 89% over 10 years. RP 154-56. Judd admitted, however, that a 2002 Airway Heights risk assessment had scored Coleman at 19 on the SORAG, far less than Judd's 27. RP 255-56, 274.

Donaldson criticized Judd's use of the SORAG. An article by Michael Seto published in 2008, "Is More Better?," criticized the use of multiple actuarial instruments to pad risk predictions. RP 413. Judd admitted such peer-reviewed articles are persuasive guides in this arena. RP 182-83.

Judd admitted there was substantial recent research on the use of actuarial instruments suggesting a lesser risk for offenders over age 50. Judd nonetheless felt secure in his estimates because he believed the actuarial instruments tended to underpredict the real risk of reoffense. He felt no need to adjust his risk assessment even

⁴ The Static-99 scoring worksheet states different numbers: 39% for five years, and 45% for 10 years. Ex. 48.

though Coleman was 55 years old and the population on which the Static-99 base rates had been established averaged 34 years of age. RP 157-58, 169-72, 259-60. He admitted Coleman would be 70 in 15 years, and that the Static-99 did not account for age at release. RP 261-62. He admitted that recent research showed a decline in base rates for sexual recidivism, but he still did not factor that into his risk analysis. RP 265-66.

Judd also opined Coleman had difficulty controlling his sexually violent behavior, based on several statements Coleman had made in the past. RP 163-65. Donaldson disagreed, stating the evidence was not sufficient to show that Coleman had difficulty controlling his behavior, as defined by the statute, case law, and science. RP 367, 383, 395, 403-04, 437-43.

3. Coleman's Life and Conviction History

Coleman was born December 14, 1952. At the time of trial in 2008, he was 55 years old. RP 278. He has three children and five grandchildren. RP 541.

Coleman grew up in a small town in Louisiana. He was raised by his grandmother after his mother and father divorced. His grandmother was domineering. RP 481, 540. His uncles were

Southern Baptists, men who acted very macho and in control. RP 462, 544.

When he was 17 he graduated high school and came to Seattle to live with an uncle. He had a scholarship lined up at Seattle University, but he had no money so he started working instead. He bought a car and drifted away from his family. RP 461-62.

He went to welding school and got a job in the shipyards. His girlfriend Sharon became pregnant and had a child. In 1971 he married another woman, Diane, who was easier to get along with than Sharon. They had two children at a young age. They lived together until 1975. They eventually broke up because of his infidelity. RP 297, 463-65, 526.

In an 18-month period in 1975 and 1976, Coleman started drinking more and smoking marijuana. He was angry at the separation from Diane and angry at women in general. At one point while they were separated he went back to see Diane and had sex with her.⁵ In early November, 1976, he went to see a pornographic movie and passed out drunk in the theater. RP 471-78.

⁵ There were different descriptions as to whether this was forced or whether Diane submitted to his desires. RP 114-15, 468.

Coleman was twice convicted for sexually violent offenses. He pled guilty to first degree rape with a deadly weapon of J.B. on February 8, 1977, for an act committed November 3, 1976. CP 375; Ex 2, 3, 4; RP 285, 478. He pled guilty to second degree rape of M.D. on May 21, 1986, for an act committed March 16, 1986. Ex. 7, 8; RP 296.

The state offered video depositions from J.B. and M.D., the rape victims. They described the facts of the rapes and were played for the jury. RP 222-25, 275-77; CP 87-115, 148-81. The state also called Coleman as a witness during the state's case to admit the rapes. RP 279-297.

J.B. testified Coleman came to her apartment and asked whether the upstairs apartment was for rent. She did not think any of the units were for rent and she referred him to the management company. He came back about five minute later and asked to use the phone for a cab. He was carrying a satchel and looked tired. She let him in and he used the phone. CP 93-99.

When she walked him to the door he slammed it shut and displayed a knife. Her two-year-old daughter came out and he grabbed her by the ponytail and put a knife at her throat. J.B. said

she would do whatever he wanted as long as he didn't hurt her daughter. J.B. put her daughter in another room. CP 99-103.

Coleman wanted oral sex but she said she was pregnant and would vomit. She got a rag and washed his penis. He talked constantly and traced her body with the knife. He had intercourse with her for 20-30 minutes and ejaculated. He smelled of alcohol. CP 103-09.

Coleman left her apartment and walked in a daze about two blocks to a police officer. RP 477; CP 110.

Following his 1977 guilty plea, Coleman entered the sexual psychopathy program at Western State Hospital. He participated in the group therapy and inpatient treatment program there for about two and a half years. He was released to an outpatient program for about eight months. He was then terminated from the program; the described reasons ranged from his use of alcohol and being in a bar, to dishonesty and concerns about his knocking on doors at a nearby apartment complex. RP 230-31, 286-87, 479-87. From the program he learned why he was feeling the way that he felt, but he admitted he really did not internalize all the knowledge. RP 525-26.

His deferred sentence was revoked on February 4, 1980. At that time he was living with Cheryl. They married when he was in jail. They were still married at the time of trial. RP 484, 527, 541.⁶

He was paroled June 29, 1984. Ex. 4, 5; RP 231-32, 288. While on parole he worked as a driver for a roofing company in Tacoma. RP 287-88, 516. E.W. was one of his friends and coworkers. They would go to E.W.'s apartment for lunch on occasion. E.W.'s girlfriend, M.D., made them sandwiches. CP 156-57, 170-72. He started drinking and using drugs again. RP 287-89, 517-18.

On the night of March 16, 1986, Coleman, E.W., and another friend went out to drink at the Ram. They also were using cocaine. CP 158, 172, 175.

Later that evening Coleman committed three violent offenses. He first assaulted D.T. in her apartment, hitting her on the head with a beer stein. He had gone there because her husband had sold him some "bunk" drugs and he wanted his money back. D.T. argued with him, but he was drunk and high. He denied he was thinking of sex. He left her there, bloody and unconscious. He went to his apartment to change clothes. RP 289-93, 516, 518-19; Ex. 45.

⁶ Diane had died in 1978. RP 464, 515, 527.

After the assault on D.T., he went to E.W. and M.D.'s studio apartment. M.D. thought he arrived about 3:30. CP 178. E.W. was drunk and sleepy and his head was in M.D.'s lap. He had inadvertently taken home a beer stein from the bar and it was near the television. CP 161-63.

Coleman testified they sold cocaine together and E.W. owed him money. He went to collect because he planned to leave town to avoid conviction for the D.T. assault. According to Coleman, E.W. called him the "N" word and came at Coleman first. RP 520-21.

Coleman fought back and hit him multiple times in the head with the beer stein. When M.D. tried to stop him, he hit her too. He raped M.D. after he knocked E.W. unconscious. Coleman said it was not the first time they had sex. RP 294-95, 522-23.

In contrast, M.D. said there was no fighting or argument, but rather that Coleman suddenly grabbed the beer stein and hit E.W. in the head with it. M.D. tried to block a few blows, but there was a lot of blood. E.W.'s eyes rolled back and he fell to the floor. CP 163-65.

M.D. said Coleman told her to take her clothes off and when she said no, he took the beer stein over toward the crib where M.D.'s six-month-old daughter was sleeping. She then complied and was

raped orally and vaginally. He tied her loosely with shoelaces before he left. She ran to her neighbor's to call the police. CP 166-69.

Coleman pled guilty to the three new offenses on May 21, 1986. EX 7; RP 109-11, 296, 524. His parole on the 1977 offense was revoked. Ex. 5; RP 272. After he served the remainder of his sentence for the 1977 offense, he served the 212-month consecutive sentence for the 1986 offenses. Ex. 8; RP 527.

At the time of trial Coleman had blood pressure problems and difficulty becoming sexually aroused. His physical health was a mixed bag – he had been in decent shape due to weightlifting, but the SCC had limited the weight he could lift due to other health problems like osteoporosis and a degenerating hip. RP 170-71, 538, 549, 551, 553; Ex. 35.

If released, Coleman planned to move back to Louisiana and go to work on the family farm. He has many relatives in Louisiana. He also had three children in the Seattle area, and five grandchildren. RP 173-74, 541-44, 551.

4. Prior Infractions and the Static-99 Dispute

On the risk prediction dispute, the expert testimony diverged most clearly on how to score the Static-99 scoresheet.

Prior to trial the state moved in limine to prohibit Coleman from relitigating the validity of his convictions. The state asserted Coleman should not be allowed to argue he did not commit offenses where he had pled guilty. RP (7/25/08) 18-20.

The state, however, sought to relitigate two prior prison infraction findings. While Coleman was in prison, he received an infraction in 1993 and 2002 for having consensual sexual intercourse with another inmate.⁷ The 1993 infraction involved Robert Growcock (also referred to as Robert Lynch) and the 2002 infraction involved David Weinert. RP 109-111, 132-33, Ex. 49.

The state was not satisfied with the prison's findings. It offered Dr. Judd's opinion that the history showed these "victims" were nonconsenting.⁸ RP 109. He believed the evidence showed the incidents were paraphilic, rather than consensual, and that they

⁷ During Coleman's roughly 22 years in custody, he received 11 infractions, but few were identified as relevant to any issue in this proceeding. RP 99, 171, 242-43.

⁸ The trial court granted a defense pretrial motion to prevent the state's witnesses from referring to Growcock or Weinert as "victims" because Coleman had not been convicted of any offense relating to those allegations. RP (7/25/08) 25-26. Judd still called them "victims" when he testified.

supported his belief in a persistent paraphilic arousal. RP 172, 212-13, 239.

The state played the video deposition of David Weinert.⁹ Weinert said he and Coleman developed a friendship when they both worked in the food factory at Airway Heights. They shared a cell. Weinert had to move out after he broke an ankle playing basketball, but moved back in a few days later. According to Weinert, Coleman said he had sexual desires for Weinert. CP 123-26.

Although Weinert said he initially said no and tried to resist, he admitted he gave up trying to say no. He claimed Coleman anally raped him seven times. Weinert said Coleman threatened to have Weinert or one of his family members dealt with if Coleman got in trouble. CP 126-132, 137-39; RP 239-40.

Weinert said the situation was reported after 2-3 weeks, when another friend reported it to the Chaplain. He was found guilty of a major infraction for being a willing participant. CP 132-33; RP 240.

⁹ Although the transcript does not note Weinert's deposition was played (RP 275-77), the clerk's minutes state the deposition was played to the jury at 2:39 pm on August 6, 2008. Supp. CP ___ (Memorandum of Journal Entry, 8/6/08). See also, RP 222-23 (publishing the deposition), and 297-98 (prosecutor's question to Coleman noting the deposition was played "here today").

The state did not offer testimony from Growcock/Lynch. The only state's evidence about that situation came from Judd's hearsay assertion that Coleman received an infraction, was placed in isolation, and lost good conduct time. RP 88, 109-10. On cross, Judd admitted the record also showed statements where Growcock admitted he had been selling himself for cigarettes. RP 234-35, 238. Growcock received an infraction for consensual sex. RP 240.

It was unclear which of the infractions Judd relied on to reach his index offense result. Initially Judd said he relied on the Growcock/Lynch infraction. RP 147. Later he suggested it was the Weinert infraction. RP 172.

Coleman, however, described the two situations as consensual. RP 132-33, 299-302, 529. Infractions may result for consensual sexual conduct in prison. RP 215-16, 533. A prison report from the investigating lieutenant confirmed Growcock admitted he was selling himself in exchange for cigarettes. RP 234-35, 238. Judd said Growcock admitted Coleman initially provided him with cigarettes without asking for anything in return. RP 271.

Coleman also discussed his friendship with David Weinert. Weinert was intelligent and they could "kick it." When Coleman's previous cellmate moved out, he suggested Weinert could move in,

and said they probably would have a physical relationship. Weinert agreed. Coleman said he tried homosexual sex with Weinert, but was unable to complete any act. He had trouble getting aroused and did not penetrate or ejaculate. He was sanctioned for having consensual sex with Weinert. RP 299-302, 533-38.

Despite the prison's findings that the sex was consensual, Judd testified to his belief that Coleman forced both men to engage in sex. He interviewed both of them and came away with his own opinion of what happened. Defense counsel did not object to the state's use of a consensual sex infraction as the index offense, nor to Dr. Judd's opinion the sex was not consensual. RP 88, 147, 150-51, 172, 212-13, 238-39, 270-71.

The failure ultimately proved devastating to the defense. Dr. Judd was allowed to use an infraction as the "index offense" for Judd's Static-99 scoresheet.¹⁰ He also added a point for "male victims." As a result of these manipulations, he added two points to the Static-99 score, which placed Coleman in the high risk category. Had he properly scored the index offense as the 1986 conviction, the

¹⁰ He did not make it clear which infraction he used in his scoring. Cf. RP 147, 172.

score would have been 4 or 5 points and the corresponding recidivism rates well under the 50% threshold. RP 147-50, 357-59, 361-65, 383-85, 408-12; EX 48.¹¹

Donaldson said Judd misused the prison infraction write-up as the index offense because that was prohibited by the Static-99 scoring rules. RP 351, 411-12. Prison sexual misbehavior could only be used as an index offense if it could be prosecuted by the state. The prison wrote Coleman up for consensual sex, and that is not a prosecutable offense. RP 351-55; Ex. 36, 49.

In closing, the prosecutor emphasized Weinert's situation and the fact that Judd, unlike Donaldson, had "interviewed" Growcock and Weinert. RP 563, 565, 585-87; Ex. 51-52. The prosecutor emphasized Judd's Static-99 calculations in closing. RP 568.

¹¹ The other disputed point involved Judd's belief that Coleman had not cohabited with his wife Diane for at least two years when they had their two children. RP 145-46, 357, 466-67.

C. ARGUMENT

COUNSEL'S FAILURE TO OBJECT TO JUDD'S STATIC-99 CALCULATION, AND TO HIS EXPERT OPINION THAT GROWCOCK AND WEINERT WERE RAPED, WAS INEFFECTIVE ASSISTANCE.

When the state seeks to commit a person under RCW 71.09, the person has the right to counsel. RCW 71.09.050(1). The due process clause requires counsel to provide effective assistance. Washington courts have adopted the familiar Strickland test in this context. U.S. Const. amend. 14; Const. art. 1, § 3; In re Detention of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). Under Strickland, ineffective assistance is established when an accused shows counsel's performance was deficient and the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

Defense counsel's failure to object to Dr. Judd's use of a prison infraction for consensual sex as the "index offense" was deficient performance that prejudiced Coleman. Counsel also failed to object to Judd's opinion that Weinert and Growcock had been raped, contrary to the prior prison disciplinary finding the sex was

consensual. The commitment order should be reversed and the case remanded for a new trial.

Expert opinion is admissible under ER 702 only if the witness qualifies as an expert and the testimony would be helpful to the trier of fact. State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). Expert testimony or opinion that lacks a proper foundation is inadmissible. State v. Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006).

The Static-99 specifically excludes consensual sexual activity in prison from consideration as a sexual offense. Static-99 Coding Rules, Revised 2003, at 13 (“The following offences would not normally be considered sexual offences . . . Consensual sexual activity in prison (except if sufficiently indiscreet to meet criteria for gross indecency”).¹² The Static-99 does not permit an institutional rule violation to be considered an index offense unless the violation is serious enough that individuals could be charged with a sexual offense if not already in prison. Id., at 15. The evaluator must be sure the sexual assaults occurred. Id., at 16. If the information is

¹² A copy of relevant pages is attached as appendix A. The information is from http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf (last accessed 5/31/09), and also can be located at http://www.publicsafety.gc.ca/res/cor/rep/_fl/2003-03-stc-cde-eng.pdf.

insufficient to support the conclusion that the offender would have been charged for the alleged offense if committed outside of prison, the offender should be given the benefit of the doubt. Id., at 16-17. “Institutional Disciplinary Reports for sexual misbehaviours that would likely result in a charge were the offender not already in custody count as charges.” Id., at 16.

This summary of the coding rules is consistent with Dr. Donaldson’s testimony. RP 352-55; Ex. 36.

The 1993 infraction does not meet this standard by any objective measure. Although the state did not clearly identify which infraction Judd relied on, no reasonable Washington prosecutor would charge either alleged offense. See RCW 9.94A.411(2) (discussing charging standards for crimes against persons; there is no exception for offenses alleged to have occurred in prison). In fact no prosecutor did file a charge, even though the matters had been referred to the the prison disciplinary authorities. This is the best evidence that the state cannot meet this standard, because the state did not, and cannot, prove that prosecutors will not file charges for offenses

occurring in prison.¹³ Coleman was not serving a sentence of life without parole, but instead was nearing his release date when the 2002 infraction occurred.

Assuming arguendo the Static-99 represents a legitimate use of science in deciding legal questions about future risk predictions,¹⁴ the point of objecting to allegedly “scientific” evidence without proper foundation is to filter junk science from legitimate theories accepted in the scientific community. This ostensibly prevents jurors from being misled by experts who expound theories not accepted in the scientific community. State v. Copeland, 130 Wn.2d 244, 258, 922 P.2d 1304

¹³ The limited evidence regarding the allegations showed that Growcock admitted selling himself for cigarettes. Growcock did not testify, nor was any deposition taken. He was not shown to be unavailable; the only suggestion in the record regarding his current whereabouts was Coleman’s undisputed statement that he had, on the advice of counsel, declined to participate in AA meetings at the Special Offender Center because Growcock was there and participating in those meetings. RP 547-48.

Although it is not clear that Judd relied on the Weinert allegation, the state’s theory fares no better there. Weinert admitted he consented. The prison investigation found consensual sex. Although Weinert later changed his story, no reasonable prosecutor would have filed this charge.

¹⁴ This assumption is by no means universally accepted. See e.g., J. Fennel, Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments, 35 New Eng. J. on Crim. & Civ. Confinement 37 (Winter 2009).

(1996) (discussing Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C.Cir.1923)).

The problem with counsel's failure is that it left this key question to be resolved by the jury's view of the battle of experts, rather than by the court, where it belonged. The state argued it was Donaldson who manipulated the Static-99 scoring below what it should have been. The state made every effort to undermine Donaldson's credibility with the jury. RP 561-66; Ex. 51, 52. It would be odd for the state to now claim in this Court its efforts did not succeed.

Judd's manipulation of the Static-99 scoring should have been obvious to defense counsel before trial. Judd's initial report essentially admitted the manipulation. The report justified adding a point for "male victims" based on the less rigorous standard for scoring that risk factor, CP 45-46, because that standard permits the evaluator to determine which version of events is more likely to be true. Coding Rules, at 49. Even so, the standard does not permit the evaluator to disregard an affirmative prison disciplinary finding that the sexual contact was consensual. The standard instead allows the evaluator to independently determine whether an offense occurred if a prior prosecution resulted in an acquittal. Id., at 49. The difference is

important, because an acquittal is not an affirmative finding of consent; it instead represents a prior factfinder's determination the state did not prove its case beyond a reasonable doubt.

In response, the state may assert this case is like Detention of Stout, where the state was allowed to admit evidence of a prior incident even though Stout had been acquitted of attempted rape. Stout, 159 Wn.2d at 378-79. Stout is quickly distinguished. First, an acquittal is not an affirmative finding of consent. The prison infraction is. Second, the Stout court did not permit the state's expert to conduct a separate investigation, then add the weight of his expert opinion to seek a result contrary to the prior finding. The Stout court instead merely held it was not error to allow the state to admit evidence regarding the prior incident and then let the jury decide how to interpret those facts. Stout, 159 Wn.2d at 377-78.

Counsel's failure to object was deficient performance. It also prejudiced Coleman.

The state bore the burden to prove its case beyond a reasonable doubt. CP 374. This standard of proof is the highest in our legal system.

This case involved two closely disputed questions. First, was Coleman a paraphilic rapist, or was he simply a recidivist criminal.

The expert testimony on that question was close and controverted, and Donaldson's wealth of experience exceeded Judd's.

The second disputed issue was whether the state proved Coleman was likely to reoffend if not confined in a secure facility. The state's effort was undermined by these uncontroverted facts: (1) Coleman's advancing age, which was not fully accounted for by the Static-99, (2) the decline in recidivism base rates since the Static-99's inception. Judd's improper manipulation of the Static-99 score could well have been the final weight that tipped the scale for the state.

In response, the state may offer several potential assertions in an effort to show the error was not prejudicial. But the prosecutor emphasized Weinert's testimony and Judd's Static-99 calculations in closing, as well as Judd's allegedly superior ability to determine that Growcock and Weinert were the "victims" of rape via his personal interviews. RP 563, 565, 568-70, 585-87; Ex. 51, 52. Courts will closely scrutinize a state's harmless error claim on appeal where the state intentionally sought admission of prejudicial evidence and clearly benefitted from the error at trial. State v. Aaron, 57 Wn. App. 277, 282, 787 P.2d 949 (1990).

Counsel's timely objection also would have undermined one of the state's repeated assertions – that the actuarial evidence was more

reliable than clinical judgment. But as this manipulation of the Static-99 showed, Dr. Judd's clinical judgment pervaded his actuarial opinions. The state also repeatedly argued the Static-99 underpredicted the true risk of reoffense because it measured conviction, rather than reoffense. RP 568-69; Ex. 51. This, however, failed to account for declining base rates or Coleman's advancing age.

The state may assert the SORAG evidence still showed a substantial risk of reoffense. But the state cannot show a reasonable juror would rely on the SORAG instead of the Static-99. Judd admitted a prior SORAG assessment from Airway Heights scored Coleman as 19, far less than Judd's inflated 27. Donaldson also testified Judd's use of the SORAG was not supported by the literature. Donaldson admitted the Static-99, by comparison, was recognized as the more widely-used and accurate actuarial instrument. RP 360, 406, 574.

Although defense counsel recognized in closing that Judd had manipulated the index offense, RP 580-81, by then it was too late. The damage had been done. In a battle of the experts, there is no legitimate reason to permit the state's expert to unfairly skew the facts

to bolster a risk prediction unwarranted by the science on which it allegedly is based.

The state also may claim the evidence against Coleman was "overwhelming." See RP 561-62 (repeating in closing the evidence was "overwhelming"). That claim would be transparent hyperbole. The state's proof was closely contested by experienced expert testimony and a strong defense case.

In the final analysis there was no legitimate reason for defense counsel not to object to Judd's error in scoring the Static-99. Because the deficient performance prejudiced the result, this Court should vacate the commitment order and remand for a new trial.

D. CONCLUSION

The commitment order should be reversed and the case remanded for a new trial.

DATED this 1st day of June, 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

Today I deposited in the mails of the United States of America
properly stamped and addressed envelope directed to citizens of
republic of Washington, containing a copy of the
document to which this declaration is attached.
AAG James Bieder
I declare under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.
6/1/09
Name _____ Date

Done in Seattle, WA Date

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APPENDIX A
No. 38187-7-II

STATIC-99 Coding Rules

Revised - 2003

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STATIQUE-99 Règles de codage révisées – 2003**

Definitions

Sexual Offence

For the purposes of a STATIC-99 assessment a sexual offence is an officially recorded sexual misbehaviour or criminal behaviour with sexual intent. To be considered a sexual offence the sexual misbehaviour must result in some form of criminal justice intervention or official sanction. For people already engaged in the criminal justice system the sexual misbehaviour must be serious enough that individuals could be charged with a sexual offence if they were not already under legal sanction. **Do not count offences such as failure to register as a sexual offender or consenting sex in prison.**

Criminal justice interventions may include the following:

- Alternative resolutions agreements (Restorative Justice)
- Arrests
- Charges
- Community-based Justice Committee Agreements
- Criminal convictions
- Institutional rule violations for sexual offences (Do not count consenting sexual activity in prison)
- Parole and probation violations

Sanctions may include the following:

- Alternative resolution agreements
- Community supervision
- Conditional discharges
- Fines
- Imprisonment
- Loss of institutional time credits due to sexual offending (“worktime credits”)

Generally, “worktime credit” or “institutional time credits” means credit towards (time off) a prisoner’s sentence for satisfactory performance in work, training or education programs. Any prisoner who accumulates “worktime credit” may be denied or may forfeit the credit for failure or refusal to perform assigned, ordered, or directed work or for receiving a serious disciplinary offense.

Sexual offences are scored only from official records and both juvenile and adult offences count. You may not count self-reported offences except under certain limited circumstances, please refer to the Introduction section – sub-section “Self-report and the STATIC-99”.

An offence need not be called “sexual” in its legal title or definition for a charge or conviction to be considered a sexual offence. Charges or convictions that are explicitly for sexual assaults, or for the sexual abuse of children, are counted as sexual offenses on the STATIC-99, regardless of the offender’s motive. Offenses that directly involve illegal sexual behaviour are counted as sex offenses even when the legal process has led to a “non-sexual” charge or conviction. An example of this would be where an offender is charged with or pleads guilty to a Break and Enter when he was really going in to steal dirty underwear to use for fetishistic purposes.

In addition, offenses that involve non-sexual behavior are counted as sexual offenses if they had a sexual motive. For example, consider the case of a man who strangles a woman to death as part of a sexual act but only gets charged with manslaughter. In this case the manslaughter charge would still be considered a sexual offence. Similarly, a man who strangles a woman to gain sexual compliance but only gets charged

with Assault; this Assault charge would still be considered a sexual offence. Further examples of this kind include convictions for murder where there was a sexual component to the crime (perhaps a rape preceding the killing), kidnapping where the kidnapping took place but the planned sexual assault was interrupted before it could occur, and assaults “pled down” from sexual assaults.

Physical assaults, threats, and stalking motivated by sexual jealousy do not count as sexual offenses when scoring the STATIC-99.

Additional Charges

Offences that may not be specifically sexual in nature, occurring at the same time as the sexual offence, and under certain conditions, may be considered part of the sexual misbehaviour. Examples of this would include an offender being charged with/convicted of:

- Sexual assault (rape) and false imprisonment
- Sexual assault (rape) and kidnapping
- Sexual assault (rape) and battery

In instances such as these, depending upon when in the court process the risk assessment was completed, the offender would be coded as having been convicted of two sexual offences plus scoring in another item (Index or Prior Non-sexual Violence). For example if an offender were convicted of any of the three examples above prior to the current “Index” offence, the offender would score 2 “prior” sex offence charges and 2 “prior” sex offence convictions (On Item #5 – Prior Sexual Offences) and a point for Prior Non-sexual Violence (Please see “Prior Non-sexual Violence” or “Index Non-sexual Violence” for a further explanation).

Category “A” and Category “B” Offences

For the purposes of the STATIC-99, sexual misbehaviours are divided into two categories. Category “A” involves most criminal charges that we generally consider “sexual offences” and that involve an identifiable child or non-consenting adult victim. This category includes all contact offences, exhibitionism, voyeurism, sex with animals and dead bodies.

Category “B” offences include sexual behaviour that is illegal but the parties are consenting or no specific victim is involved. Category “B” offences include prostitution related offences, consenting sex in public places, and possession of pornography. Behaviours such as urinating in public or public nudity associated with mental impairment are also considered Category “B” offences.

Rule: if the offender has **any** category “A” offences on their record - all category “B” offences should be counted as sex offences for the purpose of scoring sexual priors or identifying the Index offense. They do not count for the purpose of scoring victim type items. The STATIC-99 is not recommended for use with offenders who have only category “B” offences.

Offence names and legalities differ from jurisdiction to jurisdiction and a given sexual behaviour may be associated with a different charge in a different jurisdiction. The following is a list of offences that would typically be considered sexual. Other offence names may qualify when they denote sexual intent or sexual misbehaviour.

Category “A” Offences

- Aggravated Sexual Assault
- Attempted sexual offences (Attempted Rape, Attempted Sexual Assault)
- Contributing to the delinquency of a minor (where the offence had a sexual element)
- Exhibitionism

- Incest
- Indecent exposure
- Invitation to sexual touching
- Lewd or lascivious acts with a child under 14
- Manufacturing/Creating child pornography where an identifiable child victim was used in the process (The offender had to be present or participate in the creation of the child pornography with a human child present)
- Molest children
- Oral copulation
- Penetration with a foreign object
- Rape (includes in concert) (Rape in concert is rape with one or more co-offenders. The co-offender can actually perpetrate a sexual crime or be involved to hold the victim down)
- Sexual Assault
- Sexual Assault Causing Bodily Harm
- Sexual battery
- Sexual homicide
- Sexual offences against animals (Bestiality)
- Sexual offences involving dead bodies (Offering an indignity to a dead body)
- Sodomy (includes in concert and with a person under 14 years of age)
- Unlawful sexual intercourse with a minor
- Voyeuristic activity (Trespass by night)

Category “B” Offences

- Consenting sex with other adults in public places
- Crimes relating to child pornography (possession, selling, transporting, creating where only pre-existing images are used, digital creation of)
- Indecent behaviour without a sexual motive (e.g., urinating in public)
- Offering prostitution services
- Pimping/Pandering
- Seeking/hiring prostitutes
- Solicitation of a prostitute

Certain sexual behaviours may be illegal in some jurisdictions and legal in others (e.g., prostitution). Count only those sexual misbehaviours that are illegal in the jurisdiction in which the risk assessment takes place and in the jurisdiction where the acts took place.

Exclusions

The following offences would not normally be considered sexual offences

- Annoying children
- Consensual sexual activity in prison (except if sufficiently indiscreet to meet criteria for gross indecency).
- Failure to register as a sex offender
- Being in the presence of children, loitering at schools
- Possession of children’s clothing, pictures, toys
- Stalking (unless sexual offence appears imminent, please see definition of “Truly Imminent” below)
- Reports to child protection services (without charges)

Rule: Simple questioning by police not leading to an arrest or charge is insufficient to count as a sexual offence.

Probation, Parole or Conditional Release Violations as Sexual Offences

Rule: Probation, parole or conditional release violations resulting in arrest or revocation/breach are considered sexual offences when the behaviour could have resulted in a charge/conviction for a sexual offence if the offender were not already under legal sanction.

Sometimes the violations are not clearly defined as a sexual arrest or conviction. The determination of whether to count probation, parole, or conditional release violations as sexual offences is dependent upon the nature of the sexual misbehaviour. Some probation, parole and conditional release violations are clearly of a sexual nature, such as when a rape or a child molestation has taken place or when behaviours such as exhibitionism or possession of child pornography have occurred. These violations would count as the Index offence if they were the offender's most recent criminal justice intervention.

Generally, violations due to "high-risk" behaviour would not be considered sex offences. The most common of these occurs when the offender has a condition not to be in the presence of children but is nevertheless charged with a breach - being in the presence of children. A breach of this nature would not be considered a sexual offence. This is a technical violation. The issue that determines if a violation of conditional release is a new sex offence or not is whether a person who has never been convicted of a sex offence could be charged and convicted of the breach behaviour. A person who has never faced criminal sanction could not be charged with being in the presence of minors; hence, because a non-criminal could not be charged with this offence, it is a technical violation. Non-sexual probation, parole and conditional release violations, and charges and convictions such as property offences or drug offences are not counted as sexual offences, even when they occur at the same time as sexual offences.

Taking the above into consideration, some high-risk behaviour may count as a sexual offence if the risk for sexual offence recidivism was truly imminent and an offence failed to occur only due to chance factors, such as detection by the supervision officer or resistance of the victim.

Definition of "Truly Imminent"

Examples of this nature would include an individual with a history of child molesting being discovered alone with a child and about to engage in a "wrestling game." Another example would be an individual with a long history of abducting teenage girls for sexual assault being apprehended while attempting to lure teenage girls into his car.

Institutional Rule Violations

Institutional rule violations resulting in institutional punishment can be counted as sex offences if certain conditions exist. The first condition is that the sexual behaviour would have to be sufficiently intrusive that a charge for a sexual offence would be possible were the offender not already under legal sanction. In other words, "if he did it on the outside would he get charged for it?" Institutional Disciplinary Reports for sexual misbehaviours that would likely result in a charge were the offender not already in custody count as charges. Poorly timed or insensitive homosexual advances would not count even though this type of behaviour might attract institutional sanctions. The second condition is that the evaluator must be sure that the sexual assaults actually occurred and the institutional punishment was for the sexual behaviour.

In a prison environment it is important to distinguish between targeted activity and non-targeted activity. Institutional disciplinary reports that result from an offender who specifically chooses a female officer and masturbates in front of her, where she is the obvious and intended target of the act, would count as a

“charge” and hence, could stand as an Index offence. The alternative situation is where an offender who is masturbating in his cell is discovered by a female officer and she is not an obvious and intended target. In some jurisdictions this would lead to a Disciplinary Report. Violations of this “non-targeted” nature do not count as a “charge” and could not stand as an Index offence. If the evaluator has insufficient information to distinguish between these two types of occurrences the offender gets the benefit of the doubt and the evaluator would not score these occurrences. A further important distinction is whether the masturbation takes place covered or uncovered. Masturbating under a sheet would not be regarded as an attempt at indecent exposure.

Consider these two examples:

- (1) A prisoner is masturbating under a sheet at a time when staff would not normally look in his cell. Unexpectedly a female member of staff opens the observation window, looks through the door, and observes him masturbating. This would not count as a sex offence for the purposes of STATIC-99, even if a disciplinary charge resulted.
- (2) In the alternate example, a prisoner masturbates uncovered so that his erect penis is visible to anyone who looks in his cell. Prison staff have reason to believe that he listens for the lighter footsteps of a female guard approaching his cell. He times himself so that he is exposed in this fashion at the point that a female guard is looking into the cell. This would count as a sexual offence for the purposes of scoring STATIC-99 if it resulted in an institutional punishment.

Rule: Prison Misconducts and Institutional Rule Violations for Sexual Misbehaviours count as one charge per sentence

Prison misconducts for sexual misbehaviours count as one charge per sentence, even when there are multiple incidents. The reason for this is that in some jurisdictions the threshold for misconducts is very low. Often, as previously described, misconduct will involve a female guard simply looking into a cell and observing an inmate masturbating. Even in prison, serious sexual offences, rape and attempted rape will generally attract official criminal charges.

Mentally Disordered and Developmentally Delayed Offenders

Some offenders suffer from sufficient mental impairment (major mental illness, developmental delays) that criminal justice intervention is unlikely. For these offenders, informal hearings and sanctions such as placement in treatment facilities and residential moves would be counted as both a charge and a conviction for a sexual offence.

Clergy and the Military

For members of the military or religious groups (clergy) (and similar professions) some movements within their own organizations can count as charges and convictions and hence, Index offences. The offender has to receive some form of official sanction in order for it to count as a conviction. An example of this would be the “de-frocking” of a priest or minister or being publicly denounced. Another example would be where an offender is transferred within the organization and the receiving institution knows they are receiving a sex offender. If this institution considers it part of their mandate to address the offender’s problem or attempt to help him with his problem then this would function as equivalent to being sent to a correctional institution, and would count as a conviction and could be used as an Index Offence.

For members of the military, a religious group (clergy) or teachers (and similar professions) being transferred to a new parish/school/post or being sent to graduate school for re-training does not count as a conviction and cannot be used as an Index Offence.

Juveniles

Instances in which juveniles (ages 12–15) are placed into residential care for sexual aggression would count as a charge and conviction for a sexual offence. In jurisdictions where 16 and 17 year old sexual offenders remain in a juvenile justice system (not charged, tried, and sent to jail as adults are), where it is possible to be sent to a “home” or “placement”, this would count as a charge and a conviction for a sexual offence. In jurisdictions where juveniles aged 16 and 17 are charged, convicted, sentenced, and jailed much like adults, juvenile charges and convictions (between ages 16 & 17) would be counted the same as adult charges and convictions.

Sexual misbehaviour of children 11 or under would not count as a sex offence unless it resulted in official charges.

Official Cautions – United Kingdom

In the United Kingdom, an official caution should be treated as equivalent to a charge and a conviction.

Similar Fact Crimes

An Offender assaults three different women on three different occasions. On the first two occasions he grabs the woman as she is walking past a wooded area, drags her into the bushes and rapes her. For this he is convicted twice of Sexual Assault (rape). In the third case he grabs the woman, starts to drag her into the bushes but she is so resistant that he beats her severely and leaves her. In this case he is convicted of Aggravated Assault. In order for the conviction to be counted as a sexual offence, it must have a sexual motivation. In a case like this it is reasonable to assume that the Aggravated Assault had a sexual motivation because it resembles the other sexual offences so closely. In the absence of any other indication to the contrary this Aggravated Assault would also be counted as a sexual offence. Note: This crime could also count as Non-sexual Violence.

Please also read subsection “Coding Crime Sprees” in section “Item #5 – Prior Sex Offences”.

Index offence

The Index offence is generally the most recent sexual offence. It could be a charge, arrest, conviction, or rule violation (see definition of a sexual offence, earlier in this section). Sometimes Index offences include multiple counts, multiple victims, and numerous crimes perpetrated at different times because the offender may not have been detected and apprehended. Some offenders are apprehended after a spree of offending. If this results in a single conviction regardless of the number of counts, all counts are considered part of the Index offence. Convictions for sexual offences that are subsequently overturned on appeal can count as the Index offence. Charges for sexual offences can count as the Index Offence, even if the offender is later acquitted.

Most of the STATIC-99 sample (about 70%) had no prior sexual offences on their record; their Index offence was their first recorded sexual misbehaviour. As a result, the STATIC-99 is valid with offenders facing their first sexual charges.

Acquittals

Acquittals count as charges and can be used as the Index Offence.

Convictions Overturned on Appeal

Convictions that are subsequently overturned on appeal can count as an Index Offence.

“Detected” by Child Protection Services

Being “detected” by the Children’s Aid Society or other Child Protection Services does not count as an official sanction; it may not stand as a charge or a conviction. This is insufficient to create a new Index Offence.

Revocation of Conditional Release for “Lifers”, Dangerous Offenders, and Others with Indeterminate Sentences – As an Index Offence

Occasionally, offenders on conditional release in the community who have a life sentence, who have been designated as Dangerous Offenders (Canada C.C.C. Sec. 753) or other offenders with indeterminate sentences either commit a new offence or breach their release conditions while in the community. Sometimes, when this happens the offenders have their conditional releases revoked and are simply returned to prison rather than being charged with a new offence or violation. Generally, this is done to save time and court resources as these offenders are already under sentence.

If a “lifer”, Dangerous Offender, or other offender with an already imposed indeterminate sentence is simply revoked (returned to prison from conditional release in the community without trial) for a sexual behaviour this can serve as the Index Sexual Offence if the behaviour is of such gravity that a person not already involved with the criminal justice system would most likely be charged with a sexual criminal offence given the same behaviour. Note: the evaluator should be sure that were this offender not already under sanction that it is highly likely that a sexual offence charge would be laid by police.

Historical Offences

The evaluator may face a situation where an offender is brought before the court on a series of sexual offences, all of which happened several years in the past. This most often occurs when an offender has offended against children in the past and as these children mature they come forward and charge the perpetrator. After the first charge is laid it is not unusual for other victims to appear and lay subsequent charges. The evaluator may be faced with an offender with multiple charges, multiple court dates, and possibly multiple convictions who has never before been to court – or who has never before been sanctioned for sexual misbehaviour. In a case like this, where the offender is before the court for the first time, all of the charges, court appearances and convictions become what is known as an “Index Cluster” and they are all counted as part of the Index Offence.

Index Cluster

An offender may commit a number of sexual offences in different jurisdictions, over a protracted period, in a spree of offending prior to being detected or arrested. Even though the offender may have a number of sentencing dates in different jurisdictions, the subsequent charges and convictions would constitute an “Index Cluster”. These “spree” offences would group together – the early ones would not be considered “priors” and the last, the “Index”, they all become the “Index Cluster”. This is because the offender has not been “caught” and sanctioned for the earlier offences and then “chosen” to re-offend in spite of the sanction. Furthermore, historical offences that are detected after the offender is convicted of a more recent sexual offence would be considered part of the Index offence (pseudo-recidivism) and become part of the Index Cluster (See subsequent section).

For two offences to be considered separate offences, the second offence must have been committed after the offender was detected and detained and/or sanctioned for the previous offence. For example, an offence committed while an offender was released on bail for a previous sexual offence would supersede

the previous charge and become the Index offence. This is because the offender knew he/she had been detected for their previous crimes but chose to re-offend anyway.

An Index cluster can occur in three ways.

The first occurs when an offender commits multiple offences at the same time and these offences are then subsequently dealt with as a group by the police and the courts.

The second occurs when an Index offence has been identified for an offender and following this the evaluator becomes aware of previous historical offences for which the offender has never previously been charged or convicted. These previous offences come forward and become part of the “Index Cluster”. This is also known as “Pseudo-recidivism”. It is important to remember, these historical charges do not count as “priors” because the offending behaviour was not consequenced before the offender committed the Index offence. The issue being, the offender has not been previously sanctioned for his behaviour and then made the choice to re-offend.

The third situation arises when an offender is charged with several offences that come to trial within a short period of time (a month or so). When the criminal record is reviewed it appears that a cluster of charges were laid at the end of an investigation and that the court could not attend to all of these charges in one sitting day. When the evaluator sees groups of charges where it appears that a lot of offending has finally “caught up” with an offender – these can be considered a “cluster”. If these charges happen to be the last charges they become an Index Cluster. The evaluator would not count the last court day as the “Index” and the earlier ones as “priors”. A second example of this occurs when an offender goes on a crime “spree” – the offender repeatedly offends over time, but is not detected or caught. Eventually, after two or more crimes, the offender is detected, charged, and goes to court. But he has not been independently sanctioned between the multiple offences.

For Example: An offender commits a rape, is apprehended, charged, and released on bail. Very shortly after his release, he commits another rape, is apprehended and charged. Because the offender was apprehended and charged between crimes this does not qualify as a crime “spree” – these charges and possible eventual convictions would be considered separate crimes. If these charges were the last sexual offences on the offender’s record – the second charge would become the Index and the first charge would become a “Prior”.

However, if an offender commits a rape in January, another in March, another in May, and another in July and is finally caught and charged for all four in August this constitutes a crime “spree” because he was not detected or consequenced between these crimes. As such, this spree of sexual offences, were they the most recent sexual offences on the offenders record, would be considered an “Index Cluster” and all four rape offences would count as “Index” not just the last one.

Pseudo-recidivism

Pseudo-recidivism occurs when an offender currently involved in the criminal justice process is charged with old offences for which they have never before been charged. This occurs most commonly with sexual offenders when public notoriety or media publicity surrounding their trial or release leads other victims of past offences to come forward and lay new charges. Because the offender has not been charged or consequenced for these misbehaviours previously, they have not experienced a legal consequence and then chosen to re-offend.

For Example: Mr. Jones was convicted in 1998 of three sexual assaults of children. These sexual assaults took place in the 1970’s. As a result of the publicity surrounding Mr. Jones’ possible release in 2002, two more victims, now adults, come forward and lay new charges in 2002. These offences also took place in the 1970’s but these victims did not come forward until 2002. Because Mr. Jones

had never been sanctioned for these offences they were not on his record when he was convicted in 1998. Offences for which the offender has never been sanctioned that come to light once the offender is in the judicial process are considered “pseudo-recidivism” and are counted as part of the “Index Cluster”. Historical charges of this nature are not counted as “priors”.

The basic concept is that the offender has to be sanctioned for previous mis-behaviours and then “chose” to ignore that sanction and re-offend anyway. If he chooses to re-offend after a sanction then he creates a new offence and this offence is considered part of the record, usually a new Index offence. If historical offences come to light, for which the offender has never been sanctioned, once the offender is in the system for another sexual offence, these offences “come forward” and join the Index Offence to form an “Index Cluster”.

Post-Index Offences

Offences that occur after the Index offence do not count for STATIC-99 purposes. Post-Index sexual offences create a new Index offence. Post-Index violent offences should be considered “external” risk factors and would be included separately in any report about the offender’s behaviour.

For Example, Post-Index Sexual Offences: Consider a case where an offender commits a sexual offence, is apprehended, charged, and released on bail. You are assigned to evaluate this offender but before you can complete your evaluation he commits another sexual offence, is apprehended and charged. Because the offender was apprehended, charged, and released this does not qualify as a crime “spree”. He chose to re-offend in spite of knowing that he was under legal sanction. These new charges and possible eventual convictions would be considered a separate crime. In a situation of this nature the new charges would create a new sexual offence and become the new Index offence. If these charges happened to be the last sexual offences on the offender’s record – the most recent charges would become the Index and the charge on which he was first released on bail would become a “Prior” Sexual Offence.

For Example, Post-Index Violent Offences: Consider a case where an offender in prison on a sexual offence commits and is convicted of a serious violent offence. This violent offence would not be scored on either Item #3 (Index Non-sexual Violence convictions) or Item #4 (Prior Non-sexual Violence convictions) but would be referred to separately, as an “external risk factor”, outside the context of the STATIC-99 assessment, in any subsequent report on the offender.

Prior Offence(s)

A prior offence is any sexual or non-sexual crime, institutional rule violation, probation, parole or conditional release violation(s) and/or arrest charge(s) or, conviction(s), that was legally dealt with PRIOR to the Index offence. This includes both juvenile and adult offences. In general, to count as a prior, the sanction imposed for the prior offense must have occurred before the Index offense was committed. However, if the offender was aware that they were under some form of legal restraint and then goes out and re-offends in spite of this restriction, the new offence(s) would create a new Index offence. An example of this could be where an offender is charged with “Sexual Communication with a Person Under the Age of 14 Years” and is then released on his own recognizance with a promise to appear or where they are charged and released on bail. In both of these cases if the offender then committed an “Invitation to Sexual Touching” after being charged and released the “Invitation to Sexual Touching” would become the new Index offence and the “Sexual Communication with a Person Under the Age of 14 Years” would automatically become a “Prior” sexual offence.

In order to count violations of conditional release as “Priors” they must be “real crimes”, something that someone not already engaged in the criminal justice system could be charged with. Technical violations such as Being in the Presence of Minors or Drinking Prohibitions do not count.

stumbling upon a crime scene does not make the observer a victim regardless of how repugnant the observer finds the behaviour.

Acquitted or Found Not Guilty

The criteria for coding victim information is “all credible information”. In this type of situation it is important to distinguish between the court’s stringent standard of determining guilt (Beyond a reasonable doubt) and “What is most likely to be true” – a balance of probabilities. When the court sticks to the “Beyond a reasonable doubt” criteria they are not concluding that someone did not do the crime, just that the evidence was insufficient to be certain that they did it. The risk assessment perspective is guided by: “On the balance of probabilities, what is most likely to be true?” If the assessor, “On the balance of probabilities” feels that the offence more likely than not took place the victims may be counted.

For the assessment, therefore, it may be necessary to review the cases in which the offender was acquitted or found “Not Guilty” and make an independent determination of whether it is more likely than not that there were actual victims. If, in the evaluators opinion, it were more likely that there was no sexual offence the evaluator would not count the victim information. In the resulting report the evaluator would generally include a score with the contentious victim information included and a score without this victim information included, showing how it effects the risk assessment both ways.

This decision to score acquittals and not guilty in this manner is buttressed by a research study in England that found that men acquitted of rape are more likely to be convicted of sexual offences in the follow-up period than men who had been found guilty {with equal times at risk} (Soothill et al., 1980).

Child Pornography

Victims portrayed in child pornography are not scored as victims for the purposes of the STATIC-99. They do not count as non-familial, stranger, nor male victims. Only real, live, human victims count. If your offender is a child pornography maker and a real live child was used to create pornography by your offender or your offender was present when pornography was created with a real live child, this child is a victim and should be scored as such on the STATIC-99 victim questions. (Note: manipulating pre-existing images to make child pornography [either digitally or photographically] is not sufficient – a real child must be present) Making child pornography with a real child victim counts as a “Category A” offence and, hence, with even a single charge of this nature, the STATIC-99 is appropriate to use.

The evaluator may, of course, in another section of the report make reference to the apparent preferences demonstrated in the pornography belonging to the offender.

Conviction, But No Victim

For the purposes of the STATIC-99, consensual sexual behaviour that is prohibited by statute does not create victims. This is the thinking behind Category “B” offences. Examples of this are prostitution offences and public toileting (Please see “Category “A” and Category “B” offences” in the Introduction section for a further discussion of this issue). Under some circumstances it is possible that in spite of a conviction for a sexual offence the evaluator may conclude that there are no real victims. An example of this could be where a boy (age 16 years) is convicted of Statutory Rape of his 15-year-old boyfriend (Assume age of consent in this jurisdiction to be 16 years of age). The younger boy tells the police that the sexual contact was consensual and the police report informs the evaluator that outraged parents were the complainants in the case. In a scenario like this, the younger boy would not be scored as a victim, the conviction notwithstanding.

Credible Information

Credible sources of information would include, but are not limited to, police reports, child welfare reports, victim impact statements or discussions with victims, collateral contacts and offender self-report.

If the information is credible (Children's Protective Association, victim impact statements, police reports) you may use this information to code the three victim questions, even if the offender has never been arrested or charged for those offences.

Exhibitionism

In cases of exhibitionism, the three victim items may be scored if there was a targeted victim, and the evaluator is confident that they know before whom the offender was trying to exhibit. If the offender exhibits before a mixed group, males and females, do not score "Male Victim" unless there is reason to believe that the offender was exhibiting specifically for the males in the group. Assume only female victims unless you have evidence to suggest that the offender was targeting males.

Example: If a man exposed to a school bus of children he had never seen before (both genders), the evaluator would score this offender one risk point for Unrelated Victim, one risk point for Stranger Victim, but would not score a risk point for Male Victim unless there was evidence the offender was specifically targeting the boys on the bus.

In cases where there is no sexual context (i.e., the psychotic street person who takes a shower in the town fountain) there are no victims regardless of how offended they might be or how many people witnessed the event.

Internet Victims and Intention

If an offender provides pornographic material over the Internet, the intent of the communication is important. In reality a policeman may be on the other end of the net in a "sting" operation. If the offender thought he was providing pornography to a child, even though he sent it to a police officer, the victim information is counted as if a child received it. In addition, when offenders attempt, over the Internet, to contact face-to-face a "boy or girl" they have contacted over the Internet the victim information counts as the intended victim, even if they only "met" a policeman.

Intention is important. In a case where a child was pretending to be an adult and an adult "shared" pornography with that person in the honest belief that they were (legally) sharing it with another adult there would not be a victim.

Polygraph Information

Victim information derived solely from polygraph examinations is not used to score the STATIC-99 unless it can be corroborated by outside sources or the offender provides sufficient information to support a new criminal investigation.

Prowl by Night - Voyeurism

For these types of offences the evaluator should score specific identifiable victims. However, assume only female victims unless you have evidence to suggest that the offender was targeting males.

Sexual Offences Against Animals

While the sexual assault of animals counts as a sexual offence, animals do not count as victims. This category is restricted to human victims. It makes no difference whether the animal was a member of the family or whether it was a male animal or a stranger animal.

Sex with Dead Bodies

If an offender has sexual contact with dead bodies these people do count as victims. The evaluator should score the three victim questions based upon the degree of pre-death relationship between the perpetrator and the victim.

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