

01-002

CRIMINAL PROCEDURE: TRIAL AND ITS INCIDENTS.

Risk assessment instrument developed by Virginia Criminal Sentencing Commission for integration into state's sentencing guidelines for sex offenses does not violate federal or state constitution.

The Honorable Kenneth W. Stolle
Member, Senate of Virginia
April 24, 2001

You ask whether a risk assessment instrument developed by the Virginia Criminal Sentencing Commission for integration into the state's sentencing guidelines for sex offenses violates either the Constitution of the United States or the Constitution of Virginia.

You advise that risk assessments occur both formally and informally throughout the various stages of the criminal justice system. Judges, for instance, make sentencing decisions based on the perceived risk an offender poses to public safety in terms of new offense behavior. You advise further that the 1999 session of the General Assembly requested "the Virginia Criminal Sentencing Commission to develop a risk assessment instrument for utilization in the sentencing guidelines for sex offenses."¹ You explain that such a risk assessment instrument is designed to identify those offenders who, as a group, represent the greatest risk for repeat offenses once released back into the community.

You relate further that the Sentencing Commission responded to the legislative mandate by designing and executing a research methodology to study a sample of felony sex offenders convicted in the Commonwealth. The objective of the Commission was to develop a reliable and valid predictive instrument, specific to the population of sex offenders in the Commonwealth, that would be helpful to the judiciary when sentencing sex offenders.

You explain that criminal risk assessment is a means of developing profiles or composites of offenders likely to repeat criminal behavior, based on overall group results. Typically, risk assessment is practiced informally throughout the criminal justice system (e.g., prosecutors in bringing charges, judges in sentencing offenders, and probation officers in developing supervision plans). Groups have several factors in common that are statistically relevant to predicting the likelihood of repeat offenses. Those groups exhibiting a high degree of repeat offenses are labeled high risk. Empirically based risk assessment, however, is a formal process of

gaining knowledge by observing the actual behavior of individual offenders within groups.

The Virginia Criminal Sentencing Commission has devised a risk assessment instrument for sex offenders to enhance the underlying structure of the sentencing guidelines. The Commission studied the recidivist rate for sex offenders, and found that forty percent committed repeat offenses while others committed felony offenses. The Commission, therefore, developed a risk assessment instrument for use in determining which offenders are at risk of recidivism. The instrument contains a checklist of the following factors, with points assigned to each factor to indicate its importance in predicting recidivism:

1. The offender's age at the time the offense was committed;
2. Whether the offender has less than a ninth grade education;
3. Whether the offender was regularly unemployed;
4. The offender's relationship to the victim;
5. Whether the primary offense is an aggravated sexual battery;
6. The location of the offense;
7. Whether the offender had prior felony/misdemeanor arrests for crimes against the person;
8. Whether the offender had prior incarcerations/commitments; and
9. Whether the offender received prior treatment.

Decisions of the Supreme Court of the United States indicate that, from a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions,² and the Court has specifically rejected the contention "that it is impossible to predict future behavior and that the question is so vague as to be meaningless."³ A prediction of future criminal conduct formed the basis for an enhanced sentence under the now-repealed "dangerous special offender" statute.⁴ The federal statute defined a defendant as dangerous "'if a period of confinement longer than that provided for [the instant] felony is required for the protection of the public from further criminal conduct by the defendant.'⁵ The statute was challenged numerous times on the grounds that the standard of proving dangerousness was unconstitutionally vague. Courts have upheld the statute as not unconstitutionally vague on the basis that dangerousness is a

concept familiar to judges involved in sentencing decisions.⁶ It, therefore, appears to be well-established that there is no impediment under the United States Constitution to using predictions of dangerousness in legal proceedings, up to and including those that may result in loss of liberty or death.⁷

The Supreme Court of Virginia has also had opportunity to consider the constitutionality of predictions of future dangerousness under § 19.2-264.4 of the *Code of Virginia* in the context of death penalty cases. The Court rejected the assertion that § 19.2-264.4(C) violates a defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution, because a jury may find future dangerousness based upon unadjudicated crimes.⁸ The Virginia Supreme Court has determined that a death sentence in the Commonwealth may be based on the assessment by a jury of such matters as lay testimony and the circumstances of the capital crime. Accordingly, I must conclude that sentencing guidelines that are voluntary and may be dispensed with by a trial judge may take into account a defendant's prior history of sexual offenses in determining the likelihood of his recidivism.

It is, therefore, my opinion that a risk assessment instrument developed for integration into the state's sentencing guidelines for sex offenses does not violate either the United States or the Virginia Constitution.

¹1999 Va. Acts S.J. Res. 333, at 3077.

²See *Jurek v. Texas*, 428 U.S. 262, 274-75 (1976) (imposition of death sentence by jury); see also *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 9-10 (1979) (grant of parole); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (revocation of parole).

³*Jurek v. Texas*, 428 U.S. at 274 (op. of Stewart, Powell, Stevens, JJ.); *id.* at 279 (White, J., concurring).

⁴The "dangerous special offender" statute, previously codified at 18 U.S.C. §§ 3575, was repealed by act of October 12, 1984. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, § 212(a)(2), 98 Stat. 1837, 1987.

⁵*United States v. Williamson*, 567 F.2d 610, 613 n.6 (4th Cir. 1977) (quoting now-repealed § 3575(f)).

⁶See *United States v. Schell*, 692 F.2d 672, 675-76 (10th Cir. 1982); *United States v. Williamson*, 567 F.2d at 613; *United States v. Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977); *United States v. Neary*, 552 F.2d 1184, 1194 (7th Cir. 1977); *United States v. Stewart*, 531 F.2d 326, 336-37 (6th Cir. 1976).

⁷See *Schall v. Martin*, 467 U.S. 253, 268, 269 n.18 (1984) (citing *Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (stating that presence or absence of violence does not always affect strength of society's interest in deterring particular crime));

Barefoot v. Estelle, 463 U.S. 880, 897 (1983) (noting that, though difficult, predictions of dangerousness are essential part of judicial process); Jurek v. Texas, 428 U.S. at 272-74 (holding that medical testimony on future dangerousness is admissible at penalty phase of capital prosecution); State v. Prior, 799 P.2d 244, 249 (Wash. 1990) (holding that exceptional sentences are warranted when offender has significant criminal history and is not amenable to treatment); *In re Harris*, 98 Wash. 2d 276, 287, 654 P.2d 109, 114 (1982) (requiring judicial finding of probable dangerousness to self before issuing summons for 72-hour evaluation and treatment).

⁸See *Evans v. Commonwealth*, 222 Va. 766, 770, 284 S.E.2d 816, 817-18 (1981); see also *Watkins v. Commonwealth*, 238 Va.

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