

# **PROTECTING YOUR SEXUAL ASSAULT CLIENT FROM FUTURE CHAPTER 980 COMMITMENT**

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## **Overview of Chapter 980 Trials**

1. DOC inmates approaching release from prison sentences being served for a 980-qualifying offense (after Act 434 this is virtually every sex-related felony) are referred to the End of Confinement Review Board (ECRB). The ECRB reviews these offenders and recommends 980 action on approximately 1/3 of them (approximately 180). They are referred to the DOC Evaluation Team (a group of DOC psychologists), which generates a Special Purpose Evaluation and recommendation for commitment on approximately 1/3 of that group (approximately 45 p/yr statewide). Either the Attorney General or the District Attorney in the county of residence, county of confinement, or county of conviction for a sexually violent offense then files the 980 petition.
2. Petition requirements:
  - A. Client has been convicted of a 980-qualifying offense;
  - B. Client is within 90 days of release from prison for that offense;
  - C. Client is suffering from a mental disorder that is congenital or acquired and which affects his emotional or volitional capacity, predisposing him to engage in acts of sexual violence;
  - D. Client is more likely than not to commit such acts of sexual violence.
3. Probable Cause Hearing:
  - A. Held within ten days of prison release date unless client waives time limits;
  - B. Similar to a felony probable cause hearing in that State introduces evidence demonstrating reason to believe the client fits the criteria for 980 commitment (usually through testimony of the DOC evaluator).
4. Trial:
  - A. Must be held within 90 days of probable cause finding unless time limits waived;
  - B. Twelve person jury with unanimous verdict;
  - C. Client has right to remain silent (although State may comment if client does not interview with evaluators);
  - D. Psychological evaluations:
    - i. DHFS examination ordered by court prior to trial; examination performed by Sand Ridge Secure Treatment Center Evaluation Team;

- ii. Client selects examiner to be appointed by court; client need not disclose this evaluation if it is unfavorable;
  - iii. Both parties may retain other examiners.
- E. If committed, client must be placed in secure institution (SRSTC).

5. Annual Reevaluation (following commitment):

- A. Addresses client's appropriateness for supervised release or discharge, and is prepared by the SRSTC Evaluation team;
  - i. Includes a recent evaluation by a 980-qualified psychologist and the SRSTC treatment team;
- B. Supervised Release requirements:
  - i. Significant progress in treatment which can be sustained in the community;
  - ii. Substantially probable (much more likely than not) that client will not engage in acts of sexual violence;
  - iii. Treatment for client's needs is reasonably available within the community;
  - iv. Client can comply with treatment and rules of supervision;
  - v. Reasonable level of resources exists in the community for the safe management of client.
- C. Discharge:
  - i. State must prove by clear and convincing evidence that client still meets commitment criteria;
  - ii. Jury trial allowed if requested by any party; six-person jury with five of six required for verdict.

## **Problem Areas for the Sexual Assault Client**

### **Overview:**

In forming their psychological opinions, the examiners review the client's criminal and social history. This almost exclusively involves a review of his DOC file, which includes all of his prison records (parole reviews, work history, educational and vocational programming, disciplinary reports, psychiatric history, PSIs on prior convictions, criminal complaints, police reports, etc). This DOC file often contains incorrect information or lacks critical and pertinent information. Almost always something of significance is wrong or missing, and this misinformation is perpetuated throughout the client's prison term. It affects programming, parole eligibility, and, significantly, the doctors' opinions on the ultimate issue of commitment. Since 980 commitment is indefinite, and therefore potentially a life sentence, this is an area of extreme importance.

1. Incorrect information in the PSI will be replicated throughout the client's prison term unless corrected at the time of sentencing:

- A. Counsel must compel the court to not only note corrections on the record but also to provide written corrections which will be attached to the PSI and the JOC;
  - B. Any court report (including supporting data such as psychological evaluation) should be requested to be made part of the record forwarded to DOC with the PSI and JOC;
2. Examiners look at the original charges and convictions but do not look behind the convictions.
  - A. Eg., a client is charged with 1<sup>st</sup> Deg. SA but negotiates a reduction to Physical Abuse of a Child. The examiner will nevertheless treat this as a sex offense for scoring purposes on the actuarial instruments and ultimately in forming his opinion on commitment.
    - i. If, in fact, there is no sexual component to the charge, counsel must get that fact into the written record and into the DOC file;
  - B. Eg., client is charged with 2d Deg. SA. At the preliminary hearing the victim testifies and following the bindover the State, without negotiation, decides to issue Attempted False Imprisonment based on lack of evidence of sexual assault, to which the client pleads. The examiner will view this as a sex offense unless the record is absolutely clear that there was no sexual component to the offense.
3. Chapter 980 psychologists make diagnoses at the end of a client's prison sentence based on behavior and information which occurred prior to the beginning of his prison sentence. Therefore, you should consider a psychological evaluation of the client prior to sentencing to rule out those diagnoses commonly used to support 980 commitment.
  - A. For instance, if you have a 980-qualified psychologist opining at the time of the pending sexual assault that the client is not a pedophile or does not suffer from Paraphilia NOS and is not predisposed to future acts of sexual violence, that would be very compelling evidence on the client's behalf when he is faced with a 980 petition years later when approaching release from prison;
4. Consider attempting to negotiate a promise from the State not to commence a 980 action in the future which would use the pending sexual assault as the 980-qualifying offense.
  - A. Prior to Act 434, cases were routinely negotiated down from First or Second Degree Sexual Assault to Third Degree Sexual Assault or Physical Abuse of a Child to avoid Chapt. 980 exposure. Both the State and the defense understood this factor as an element of the plea negotiation. However, some of those clients are now facing 980 petitions.
  - B. After Act 434 there is no negotiable sex-related felony which will insulate the client from a future 980 petition.
  - C. Decent facts and a favorable psychological evaluation could help persuade the State to agree that, if the client is not now an appropriate 980 candidate

he will continue to be an inappropriate 980 candidate unless he commits sexual misconduct in prison. In other words, absent sex offending in prison the client's psychological diagnosis will remain fixed in the future.

5. Treatment:

- A. Entering or declining treatment is a critical issue for the client which must be discussed with complete seriousness and candor.
- B. Completing treatment has obvious benefits, such as transfer to a less secure facility, a reduction (but not necessarily elimination) of the likelihood of 980 commitment, and the probable reduction of recidivism.
- C. Not completing treatment or refusing treatment has a significant downside:
  - i. Increased likelihood of 980 commitment;
  - ii. Deniers are not allowed in sex offender treatment;
  - iii. Failing or quitting treatment is considered a risk elevator;
  - iv. If released from prison without sex offender treatment, it will be mandated as a condition of parole/ES and client will be revoked if he continues to deny offense or refuse treatment;
  - v. If transferred to another facility without sex offender treatment, client will be viewed as failing/not completing treatment, even if he sought to continue in treatment.
- D. Treatment will require full disclosure of sex offending history and will be verified by lie detector and PPG (penile plethysmograph testing). Disclosures in treatment may contribute to the bases for 980 commitment, even if previously unknown and uncharged.

**Actuarial Instruments:**

- 1. Similar in concept to actual instruments used by insurance companies to gauge risk and set premium rates and coverage. In 980 World, they are used by the psychologists to assess risk of sexual recidivism and to help frame their opinions as to whether or not the client is more likely than not to reoffend.
- 2. Instruments itemize risk factors shown to be most accurate in predicting sexual recidivism. Those factors carry a numerical score; the total score is reduced to a percentage likelihood of recidivism over a certain number of years.
- 3. Actuarials for a "static" profile of the client which does not change with the passage of time or other mitigating factors (as opposed to "dynamic" factors, which do change with time, such as treatment completion, advancing age, declining health).
- 4. Static factors include (but not limited to):
  - A. Prior convictions and charges;
  - B. Violence during offense;
  - C. Stranger victim;
  - D. Related victim;
  - E. Male victim;
  - F. Age of offender;
  - G. Marital status;

5. Information used to score the actuarials is taken from the client's DOC file.

### **Common Diagnoses in Chapt. 980 Cases**

1. Paraphilia
  - A. Over a period of at least six months, recurrent intense sexual fantasies, sexual urges, or behaviors involving;
    - i. nonhuman objects;
    - ii. the suffering or humiliation of oneself or another;
    - iii. children or other nonconsenting persons.
  - B. And the person acts on those urges, or the urges cause marked distress or interpersonal difficulty.
2. Pedophilia
  - A. Over a period of at least six months recurrent, intense sexually arousing fantasies, sexual urges, or behavior involving sexual activity with prepubescent (under age 13) children;
  - B. The person is at least 16yrs old and at least five years older than the child;
  - C. The urges cause marked distress or interpersonal difficulty.
3. Antisocial Personality Disorder
  - A. A pervasive pattern of disregard for and violation of the rights of other occurring since age 15; recurrent criminal behavior, impulsivity, irresponsibility, and deceitfulness which persists throughout life.