

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

MS 1997-000001

10/31/2013

HON. ANDREW G. KLEIN

CLERK OF THE COURT  
M. Nash  
Deputy

IN THE MATTER OF

DERICK JOSEPH MARTIN  
DOB: 07/09/1965

MARY BETH MITCHELL

AUBREY J CORCORAN  
RENA P GLITSOS  
KAREN B SCIARROTTA

AZ STATE HOSPITAL-ACPTC

UNDER ADVISEMENT RULING

This matter having been taken under advisement,

Respondent Derick Joseph Martin (“Respondent”) seeks to preclude the 4/26/12 Annual Progress Review (“Report”) from being admitted into evidence and the Arizona Community Protection and Treatment Center (“ACPTC”) psychologist who prepared the Report, Dr. Ryan T. Goldenstein, Psy.D. (“Dr. Goldenstein”), from testifying at Respondent’s annual review hearing. The basis for Respondent’s challenge is that when Dr. Goldenstein evaluated Respondent and prepared his Report, the principles and methods that were utilized were not reliable because they did not comply with a methodology that has been generally accepted in the scientific community. This challenge under Arizona Rule of Evidence 702, as amended, is commonly known as a Daubert challenge. To understand the basis for such a challenge, it is necessary to review Rule 702 and the Daubert decision.

Rule 702 of the Arizona Rules of Evidence provides that a witness who is qualified as an expert may testify in the form of opinion if:

- A. The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- B. The testimony is based on sufficient facts or data;
- C. The testimony is the product of reliable principles and methods; and
- D. The expert has reliably applied the principles and methods to the facts of the case.

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In Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the U.S. Supreme Court in interpreting identical Rule 702 of the Federal Rules of Evidence found that a trial judge must ensure that the expert testimony rests on a reliable foundation. To that end, it must make a preliminary assessment of whether the reasoning or methodology underlining the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. Daubert provides a non-exclusive checklist for a judge to assess the reliability of the expert's principle or methods, which includes:

1. Whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot be assessed for reliability;
2. Whether the technique or theory has been subject to peer review in publication;
3. The known or potential rate of error of the technique or theory when applied;
4. The existence and maintenance of standards and controls; and
5. Whether the technique or theory has been generally accepted in the scientific community.

In Arizona State Hospital v. Klein, 296 P.3d 1003 (App. 2013), the Arizona Court of Appeals recently indicated that they will construe Arizona Rule of Evidence 702 in accordance with Federal Rule of Evidence 702. In that regard, the Committee Notes on amendments to Federal Rule 702 give the following guidance to trial courts: the rejection of expert testimony is the exception, not the rule, and the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system. Likewise, Rule 702 is not intended to provide an excuse for an automatic challenge to the testimony of every expert. Rather, the Rule is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise.

Under Daubert, judges are entitled to broad discretion when discharging their gatekeeping function. Whether Daubert's suggested indicia of reliability applies to any given testimony depends on the nature of the issue at hand, the witness's particular expertise, and the subject of the testimony. It is a fact specific inquiry, and Rule 702 is intended to be construed liberally. Regardless of who the expert is or the subject matter involved, the crux of the inquiry is always the same: has the expert employed the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Put another way, the expert must demonstrate in some objectively verifiable way that he/she has chosen a reliable method and followed it. This means describing how the method utilized complies with industry standards.

With the aforementioned as a preface, the Court concludes under all of the prongs of Arizona Rule of Evidence 702 that Dr. Goldenstein may testify as an expert at Respondent's

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annual review hearing. Pursuant to Rule 702(A), Respondent has not challenged Dr. Goldenstein's qualifications for purposes of this evidentiary hearing so there is no contention that he lacks scientific, technical, or other specialized knowledge to assist the trier of fact in understanding the evidence or determining a fact in issue.<sup>1</sup>

Pursuant to Rule 702(B), Dr. Goldenstein's Report is based on sufficient facts and data. It appears that he spoke with Respondent's primary therapist, reviewed ACPTC's treatment records and previous psychological, psychiatric, and neuropsychological evaluations, reviewed Respondent's status screening as a sexually violent person, his Department of Corrections records, Superior Court filings, and police reports. Dr. Goldenstein also interviewed Respondent Martin and considered both his historical data and current data in forming his conclusions and recommendations. In so doing, it is the Court's conclusion that Dr. Goldenstein did the kind of preparation for his Report that is typical of other experts in the field who routinely do these types of annual reviews.

The third and fourth prongs of Rule 702—whether the testimony is the product of reliable principles and methods and whether the expert has reliably applied the principles and methods to the facts of the case—are the main focus of Respondent's challenge. In the Court's view, although the methodology used by Dr. Goldenstein (structured professional judgment)<sup>2</sup> may not be the most widely used approach to sexual offender assessment, it nonetheless is the product of reliable principles and methods and has found general acceptance in the scientific community.

According to one of ACPTC's experts—Dr. David Thornton, Ph.D. (who together with Karl Hanson and Ruth Mann developed the Static 99 test<sup>3</sup>, which is the most widely used actuarial risk assessment for sex offenders in the world)—about 25% of Canadian and 10% of American sex offender programs report using techniques similar to that utilized by Dr.

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<sup>1</sup> Although Dr. Goldenstein's qualifications were not challenged for purposes of this hearing, the State's expert—Dr. Amy Phenix, Ph.D.—testified that all of the ACPTC's evaluators whose annual reports she reviewed were competent and they were all well trained to do these types of evaluations. Dr. Phenix further testified that in her judgment, these evaluators received appropriate supervision and had the requisite experience to meet the standards required by A.R.S. § 36-3701(2) for a "competent professional."

<sup>2</sup> Structured professional judgment combines the use of research-based risk factors with clinical judgment as opposed to unguided clinical judgment, which is an evaluation of an individual based simply on the evaluator's instincts or intuition. Unlike an actuarial assessment, which adds up the number of risk factors to develop a score, in structured professional judgment the evaluator uses his professional judgment to determine the relevance and significance of the various factors in combination to assess the individual's risk.

<sup>3</sup> The Static-99 measures long term risk potential by using fixed facts from a person's history to assign risk points and then mechanically accumulate those points into a score. However, because the Static-99 focuses largely on aspects of risk that are not expected to change once someone is committed, this instrument does not measure whether an offender has benefited from treatment. This is why Dr. Goldenstein's methodology was reliable in considering Respondent's static factors as the first step in assessing overall risk and then determining whether that risk had changed through treatment and a reduction in dynamic factors.

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Goldenstein. That number, though, may be misleading because those percentages resulted from a survey mainly for DOC treatment programs. As Dr. Thornton testified, Corrections Departments use actuarial assessments as their primary methodology whereas forensic hospitals such as ACPTC more commonly use structured professional judgment. In fact, some states, such as Massachusetts, use structured professional judgment as the dominant methodology in forensic hospitals. Dr. Thornton stated that it also is the dominant methodology used in Europe.

Yet even if the percentage is only 10%, Dr. Thornton testified that structured professional judgment is clearly recognized in the scientific community as an alternative approach to static actuarial assessment and is properly utilized as part of a professional's repertoire. This would be consistent with the Daubert standard for admissibility, which holds that the methodology does not have to be the most widely used or even the most reliable. It just has to be an acceptable practice.

Both sides presented two experts who had divergent opinions about the reliability, validity, and predictive accuracy of the methodology used by Dr. Goldenstein and the other ACPTC evaluators, and the methodology's acceptance in the relevant scientific community. The Court found all four witnesses to be well credentialed and aptly able to support the positions they have taken. On balance, though, this Court finds the State's position more credible because it allows for reasonable alternative approaches whereas the Respondent stridently maintains that there is only one best practice to the exclusion of everything else. Again, Daubert does not focus on the dominant methodology as long as the methodology used meets the minimum standards. In the Court's opinion, based on the testimony of the State's experts, the ACTPC methodology for conducting annual reviews of SVPs meets this requirement.

To the extent there are weaknesses in Dr. Goldenstein's approach, this should go to the weight of the evidence, not its admissibility. As the Committee Notes on amendment to Federal Rule 702 provide, cross-examination and presentation of contrary evidence are still the traditional and appropriate means of attacking "shaky but admissible evidence." Moreover, Rule 702 is to be construed liberally and should not be used to prohibit testimony based on competing methodologies within a field of expertise.

Both of the State's experts wrote reports and testified at the evidentiary hearing. Consistent with the Daubert checklist to assess the reliability of Dr. Goldenstein's methods or principles, both stated that the methodology used by ACPTC evaluators, including Dr. Goldenstein, in conducting their annual reviews of SVPs was reliable and the conclusions and recommendations reached were valid; that the structured professional judgment used to evaluate SVPs is supported by research; that this methodology has been tested and subject to peer review and publication; that the known or potential rate of error of the technique used by Dr. Goldenstein and other ACPTC evaluators has acceptable predictive accuracy; that the methodology used by ACPTC to conduct annual evaluations is substantially similar to those

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conducted in forensic hospitals in other states; and that this type of structured professional judgment is generally accepted in the scientific community in both the United States and Canada. While Respondent maintains that the methodology Dr. Goldenstein used has been rejected in favor of objective actuarial instruments to assess risk, the Court disagrees that Dr. Goldenstein's methods have been "rejected." For reasons previously stated, competing methodologies may both be admissible even where one is more commonly utilized than the other.

The methodology utilized by Dr. Goldenstein logically can be applied to the facts of this case. In conducting an annual review of Respondent, Dr. Goldenstein considered both "static" and "dynamic" risk factors in assessing whether Respondent's status has changed, which is the primary objective of the absolute discharge hearing pursuant to A.R.S. § 36-3714(A). At such a hearing, the Court's focus is to determine whether the SVP's mental disorder has "so changed that the person is not likely to engage in acts of sexual violence if discharged."

"Static" factors are defined as fixed or historical characteristics (such as offender age, offense history, and sexual deviance) whereas "dynamic" factors are identified as characteristics that can change over time (such as anger control methods, lifestyle impulsivity, cooperation with supervision, attitude toward others, and sexual preferences). Because an offender's static risk factors cannot generally be reduced, it is the purpose of sex offender treatment to reduce the dynamic risk factors that might someday allow the offender to be released to a less restrictive alternative or be absolutely discharged.

Respondent believes that actuarial assessments are much better predictors of an individual's risk of committing future acts of sexual violence. That is definitely true at the time of commitment, but as the ACPTC experts indicated, these types of instruments, such as the Static-99 or its successor the Static-99R, generally only consider static variables that do not change as opposed to making a determination whether a person's mental condition has changed. This is why the Static-99R is such a vital tool in pre-commitment evaluations but may not be as critical in post-commitment evaluations where the evaluator must assess dynamic factors such as treatment progress and readiness for release.

In Respondent's case, Dr. Goldenstein considered numerous dynamic risk factors that have been empirically supported in research and applied them in a systematic way to structure the judgment in his Report.<sup>4</sup> He then applied those dynamic risk factors to assess whether Respondent's mental condition had changed so that he could be safely managed in a less

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<sup>4</sup> The dynamic risk factors considered by Dr. Goldenstein include deviant sexual interests, sexual preoccupation, ability to control sexual impulses, self regulation and impulsivity, emotional identification with children, social rejection, lack of relationships with adults, lack of empathy, remorse, poor cooperation with supervision, attitudes supportive of sexual offending, and other factors that were case specific to Respondent.

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restrictive alternative or be unconditionally discharged while also considering the relevant static factors that were important to the original SVP evaluation and subsequent commitment.

The static factors Dr. Goldenstein considered included an evaluation of many of the same factors that are used in a Static-99R assessment (sexual contact with unrelated victims, male victims, convictions for prior sex offenses, and limited appropriate relationship experience). There was no Static-99 or Static-99R to review for Respondent because he was evaluated for screening status as an SVP before these tests were developed.

According to Dr. Phenix, there was nothing inappropriate in the failure to actuarially score Respondent when Dr. Goldenstein conducted his annual review because actuaries cannot tell whether a person's mental disorder has changed from the time his static risk was first measured. Moreover, in this particular case, Dr. Phenix said there was overwhelming empirical evidence based on dynamic and individual risk factors to suggest that Respondent would not be safe to release into the community. Nonetheless, Dr. Phenix testified that in the 13 other annual reports of SVPs that she reviewed there were Static 99 or Static 99R scores available, and they were appropriately considered by the evaluator. However, she said that the failure to re-score the actuarial instrument does not render the SVP evaluation invalid or unreliable.

In reviewing all of Respondent's records and reports, consulting with Respondent's therapist, conducting a clinical interview with Respondent, and considering both static and dynamic risk factors in assessing Respondent's risk, Dr. Goldenstein's annual review applied reliable and valid techniques and principles. In so doing, Dr. Goldenstein utilized a method that has found acceptance in the relevant scientific community.

Based upon the foregoing, the methodology employed by Dr. Goldenstein in conducting Respondent's evaluation meets the Daubert standard for reliability. Accordingly, his annual evaluation should be admitted, he should be allowed to testify, and the ACPTC should be allowed to present this evidence at Respondent's annual review hearing.

To the extent other SVPs have joined in the Daubert motion filed by Respondent in this case and to the extent their cases have been consolidated for purposes of this evidentiary hearing only, the court's ruling applies to them as well. There was testimony that the methodology used by ACPTC evaluators in conducting their annual reviews of those other SVPs was the same as that utilized with Respondent.