

Evidentiary Issues and Big Mistakes

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1. Hearsay

- Generally, hearsay is not admissible in SVP hearings and trials – *Commonwealth v. Wynn*, 277 Va. 92 (2009).
- Ways this comes up at trial: Experts testifying on direct examination to facts underlying the sex offenses as contained in police reports and information contained in other records such as prior mental health evaluations.
- Also, respondent’s expert can’t testify on direct examination to respondent’s statements.
- A few statutory exceptions where hearsay is admissible; Respondent’s perspective
 - Probable cause hearings: Va. Code § 37.2-906(E)
“The details underlying the commission of an offense or behavior that led to a prior conviction or charge may be shown by affidavits or documentary evidence, including but not limited to, hearing and/or trial transcripts, probation and parole and sentencing reports, police and sheriffs’ reports, and mental health evaluations.”
 - Annual review hearings: Va. Code § 37.2-910
Section 37.2-910(B) provides that any report submitted pursuant to this subsection shall be sent to the court, Attorney General and to any attorney appointed or retained for the respondent. Section 37.2-910(D) provides that “if the court finds, based upon the report and other evidence provided at the hearing. . . .”
 - Emergency custody hearings: Va. Code § 37.2-913 (B) provides that the evaluator appointed to conduct an emergency custody evaluation “shall report his findings and conclusions in writing to the Department, the Office of the Attorney General, counsel for the respondent, and the court in which the petition was filed. The evaluator’s report shall become part of the record in the case.”

- ❖ *Harvey v. Commonwealth*, 297 Va. 403 (2019) – the Virginia Supreme Court held that the General Assembly intended for the report of the expert to be admissible and for it to be considered by the trial court.

2. **Refusal of respondent to participate with initial SVP evaluation:** Understanding the consequences of your client’s refusal to cooperate with the DBHDS expert.

a. If respondent refused to cooperate with the initial SVP evaluation done by the evaluator for DBHDS and required by Virginia Code § 37.2-904:

- i. The Commonwealth will not include a copy of the evaluation with the initial petition
- ii. Virginia Code § 37.2-906 (D)

1. The respondent has 21 days from retention or appointment of counsel to rescind his refusal

2. Written notice of the rescission must be provided to the court and OAG within 30 days of the retention or appointment of counsel

3. PC hearing is stayed until 30 days after the re-evaluation report is received

4. Consequences of refusal:

- **Probable cause hearings:** If respondent persists in his refusal, the court shall admit evidence of the refusal and shall bar the respondent from introducing his own psychiatric or psychological evidence at the probable cause hearing -- *see* Virginia Code § 37.2-906(D); *Ferrara v. Commonwealth*, 299 Va. 438 (2021)

- **Trials:** Respondent’s *court appointed expert* may not testify at trial if the Respondent refused to cooperate with the Commonwealth’s evaluator. Va. Code § 37.2-907(A). Even though Section 907(A) doesn’t bar testimony of respondent’s *retained* expert at trial in refusal cases, the court, in the exercise of its discretion, may still bar such testimony and the admission of the expert’s report.

- When a respondent in a SVP commitment proceeding refuses to cooperate with the Commonwealth’s expert and no valid reason exists to excuse or justify this lack of cooperation, a court has the inherent authority to address this failure to cooperate. This authority includes the exclusion of the respondent’s expert testimony and report.

Excluding such evidence doesn't violate respondent's Due Process rights. *Ferrara v. Commonwealth*, 299 Va. 438 (2021)

- b. If you have a case where the respondent refused, important to find out early on whether respondent wishes to cooperate, or potentially lose the ability to present expert testimony

3. Disclosure of Respondent's Expert's Report

- a. In order for respondent's expert to testify at trial on respondent's behalf, the expert must have prepared a written report detailing his findings and conclusions and have submitted his report, along with all supporting data, to the court, the Attorney General and counsel for the respondent no less than 45 days prior to trial unless a different time period is agreed to by the parties. Va. Code § 37.2-907(A).
- b. Unless a different time period is agreed to by the parties, the failure of respondent to timely disclose his expert's report will necessitate a continuance or foregoing expert's testimony.
- c. Consulting Expert: If the respondent's expert's opinions/conclusions are not favorable to the respondent and the respondent does not plan to call him to testify at trial, respondent is not required to disclose his report to the Commonwealth.
 - o Contrast disclosure of respondent's expert's evaluation at trial (Va. Code § 37.2-907(A)) (Respondent doesn't have to disclose his expert's report unless he plans to call the expert to testify at trial) with disclosure of 2nd opinion annual review evaluation (Va. Code 37.2-910(B) (a copy of any 2nd expert opinion shall be sent to the court, the Commissioner of DBHDS, the Attorney General and to respondent's counsel regardless of whether respondent plans to call the expert to testify)
- d. Bifurcated trial: SVP and Disposition Phases are 2 phases of one trial. *See Wheeler v. Commonwealth*, 11 Va. S. Ct. UNP 101123 (2011). However, if you don't plan to call the expert at the SVP phase but want to call him to testify at the disposition phase, must disclose the expert's report prior to the start of SVP phase of trial.

4. **Can the Commonwealth call the Respondent's expert to testify at trial? Two perspectives.**