[Cite as *State v. Ellison*, 2002-Ohio-4024.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 78256

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
MARK ELLISON,	:	
	:	
Defendant-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 8, 2002
CHARACTER OF PROCEEDING:	:	Civil appeal from
	:	Common Pleas Court
	:	Case No. CR-167954
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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[Cite as *State v. Ellison*, 2002-Ohio-4024.]
MICHAEL J. CORRIGAN, P.J.:

{¶1} The court classified defendant Mark Ellison as a sexual predator based on 1981 convictions for sexual battery and gross sexual imposition against two young boys. Ellison's sole assignment of error contests the classification.

{¶2} The court may classify an offender as a sexual predator when it finds by clear and convincing evidence that the offender is likely to engage in the future in one or more sexually oriented offenses. See R.C. 2950.01(E). The classification should be based on consideration of the factors set forth in R.C. 2950.09(B)(2), although the court has "discretion to determine what weight, if any, he or she will assign to each guideline." *State v. Thompson* (2001), 92 Ohio St.3d 585, paragraph two of the syllabus. Moreover, the court has discretion to consider any other evidence that the court deems relevant to its classification determination. Id.

{¶3} The discretion given to the court necessarily means that our review is deferential. For that reason, we employ a manifest weight of the evidence standard on appeal. See *State v. Cook* (1998), 83 Ohio St.3d 404; *State v. Childs* (2001), 142 Ohio App.3d 389, 395. Judgments supported by competent, credible evidence will not be overturned on appeal. See *State v. DeHass* (1967), 10 Ohio St.2d 320; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. It should go

without saying that we are not permitted to substitute our judgment for that of the trial court, no matter how much we might disagree with the court's fact finding. See *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 277, 280 ("The choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its judgment for that of the trier of fact.").

{¶4} At the age of twenty-one, Ellison enticed two boys, ages six and ten, into his house by promising them a bicycle. Once alone, he removed their trousers, kissed and fondled them, and forced the ten-year-old to give him oral sex. The boys escaped when someone knocked on the door. The boys told their parents, and the police were called. Ellison was arrested that same day. He claimed that he had been under the influence of drugs and alcohol at the time, but did not specifically disavow the sexual conduct.

{¶5} Ellison pleaded guilty to sexual battery and gross sexual imposition. The court suspended his sentence and placed him on probation. Ellison violated that probation in 1982 by moving to West Virginia without first notifying his probation officer. When he applied for a state of West Virginia driver's license, the West Virginia State Patrol discovered that he had an outstanding capias from Cuyahoga

County. He was arrested, returned to Ohio and ordered to serve his original sentence.

{¶6} The sexual predator hearing provided evidence of several factors listed in R.C. 2950.09(B)(2). The court could find the age of the victims relevant, and could also find significant that Ellison lured or enticed the boys. The court could rationally find that the boys, because of tender years, lacked the ability to resist Ellison's offer of a bicycle in return for sex. The evidence also showed that Ellison himself had been sexually abused as a child, and he believed this might explain his sexual attraction to young boys. Finally, Ellison refused to accept treatment while incarcerated, suggesting that he failed to accept responsibility for his actions.

{¶7} In support of his argument against the sexual predator classification, Ellison claims that he has maintained stable family relationships over the years, has been sober since 1988, and has not reoffended in any way. He also cites to a psychological report which listed him as a low to moderate risk of reoffending.

{¶8} Evidence that Ellison has been sober since 1988 is potentially promising, but is not particularly significant because for the last seven years he has been incarcerated. This is an involuntary sobriety, and it remains to be seen

whether he has the fortitude to abstain from intoxicating substances upon release. But in any event, an offender is necessarily sober in prison, where alcohol is generally unavailable. The court could validly discount evidence concerning Ellison's absention from drugs or afford that factor very little, if any weight. For the same reasons, the stability of Ellison's personal relationships is likewise irrelevant.

{¶9} The court was not obligated to give the psychological report any great weight. The utility of the STATIC-99 evaluation as a diagnostic tool for individual risk assessment is open to question. The evaluation merely performs an actuarial assessment of an offender's chances of reoffending. See *State v. Colpetzer* (Mar. 7, 2002), Cuyahoga App. No. 79983. While actuarial risk assessments are said to outperform clinical risk assessments, actuarial assessments do not, and cannot, purport to make a prediction of a *particular* offender's future conduct. In fact, the use of an actuarial assessment could arguably be at odds with Ohio's statutory scheme. R.C. 2950.01(E) and R.C. 2950.09(B) require a determination that the offender is likely to engage in the future in one or more sexually oriented offenses. This is an individualized determination for a particular offender. The STATIC-99 cannot purport to make an individualized assessment of future conduct any more than a life expectancy table can

provide a accurate prediction of a particular individual's longevity.

{¶10} That Ellison tested within normal limits on an MMPI-2 evaluation is likewise not particularly noteworthy. Studies suggest that many sexual offenders test within "normal" limits. See, e.g., Baker, Once A Rapist? Motivational Evidence and Relevancy In Rape Law (1997), 110 Harv.L.Rev. 563, 576-578 (reviewing data regarding the "normality" of rapists). If pedophiles can be classified as "normal" it might be time to question just what term "normal" means.

{¶11} The MMPI result finding Ellison within the "normal" range appears to be undercut in large part by various data relating to the recidivism rate among sexual offenders. When considering the Jacob Wetterling Crimes Against Children Registration Act, Section 14701, Title 42, U.S.Code, the House Report prepared for the Act stated that:

{¶12} "Evidence suggests that child sex offenders are generally serial offenders. Indeed, one recent study concluded the "behavior is highly repetitive, to the point of compulsion," and found that 74% of imprisoned child sex offenders had one or more prior convictions for a sexual offense against a child." See H.R. Rep. No. 392, 103^{d} Congress (1993).

{¶13} In *State v. Eppinger* (2001), 91 Ohio St.3d 158, 159-162, the Supreme Court also recognized the increased risk of recidivism for pedophiles:

{¶14} "Although Ohio's version, R.C. Chapter 2950, does not differentiate between crimes against children and crimes against adults, recidivism among pedophile offenders is highest. Some studies have estimated the rate of recidivism as being as high as fifty-two percent for rapists and *seventy-two percent for child molesters*. Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator* (2000), 37 San Diego L.Rev. 1057, 1071, citing Prentky, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis* (1997), 21 Law & Human Behavior 635, 651.

{¶15} "***

{¶16} "In some instances, offenders will have several sexually oriented convictions, or will clearly fit a variety of the factors listed in R.C. 2950.09(B)(2)(a) through (j). *An offender who preys on children, for example, may fit the pedophile profile, a class of sex offenders known for their especially high rate of recidivism.*" (Emphasis added.)

{¶17} The sobering statistical evidence cited by the United States Congress and reviewed in *Eppinger* cannot be ignored. The high risk of recidivism with child sex offenders

would tend to dispel any notion that they could be considered "normal" in a sense understood by the public.

{¶18} It has been suggested that the court overstepped its authority by injecting its own personal knowledge garnered during years of social work, but otherwise not in evidence, into the proceedings. We disagree. The court stated:

{¶19} "*** I can say almost certainly that the time he was molested by the second person was also the time he had been a reasonably good student, he was going to school, doing all the things, didn't give the teachers any problem. He indicates that he was molested a second time and after the second time he literally sort of washed out, stopped going to school, stopped participating. He just gave up."

{¶20} It may never be known exactly why Ellison's life took a turn for the worse, but the reason for that turn is not as critical to the court's classification as has been suggested. The fact remains that Ellison went from the abused to abuser. The court had every right, as the trier of fact, to draw conclusions from this fact. And the court's finding takes on a greater significance in light of Ellison's pointed refusal to undergo treatment while incarcerated. Ellison's reason for refusing treatment — that the program was a "joke" — spoke poorly of his ability to grasp the extent of his problem. The court validly considered this cavalier attitude

toward treatment as suggesting that Ellison had not taken the necessary steps to control his problems.

{¶21} The Ohio Supreme Court's decision in *Thompson* has removed all doubt as to the trial court's expansive fact-finding function in sexual predator classifications. The Supreme Court stated:

{¶22} "The guidelines also do not provide an exclusive list of factors to consider when determining whether an offender is a sexual predator. This is evidenced by the General Assembly's use of the phrase directing courts to 'consider all relevant factors, *including, but not limited to,* all of the following [factors].' R.C. 2950.09(B)(2). *** The phrase 'including, but not limited to' indicates that what follows is a nonexhaustive list of examples. Thus, the 'factors' enumerated in R.C. 2950.09(B)(2) are merely a nonexhaustive list of examples that a court must consider in a sexual predator hearing. Accordingly, a judge may consider evidence other than those factors listed in R.C. 2950.09(B)(2) that he or she believes is relevant to determining recidivism. (Emphasis *sic*.)(Citations omitted). 92 Ohio St.3d at 281."

{¶23} At this point, it is appropriate to comment that a panel decision in *State v. Krueger* (Dec. 19, 2000), Cuyahoga App. No. 76624, is not controlling. Krueger had been diagnosed as a pedophile after committing dozens of acts of

sexual abuse against two different children, one of whom was only six years of age. The evidence showed that at the time, Krueger used the girls as surrogates because lack of sex from a girlfriend "weakened his resolve." He steadfastly denied that he forced the girls to do anything improper, apparently maintaining that the sex acts he performed were truly consensual. When considering a sexual predator classification, the trial judge noted that literature in the field of pedophilia indicated that it was an incurable condition that could only be controlled through environmental factors.

{¶24} The *Krueger* majority took issue with the trial judge's reference to pedophilia literature, suggesting that the literature had to be introduced into evidence. The *Krueger* majority went on to question the validity of many judicial statements concerning the high recidivism rate among child molesters, claiming that the courts had accepted such factual assertions without first making a critical assessment of the veracity of such statements.

{¶25} *Krueger* cannot be considered as authority for the proposition that a trial court cannot rely on obvious statistical data relating to recidivism of child molestors. At least one other judge of this court has cogently described *Krueger* as being "unnecessary" and "inappropriate" and, in any

event, "doubtful precedent upon which to rely." See *State v. Smith* (Nov. 21, 2001), Cuyahoga App. No. 78823 (Rocco, J., concurring).

{¶26} At any rate, the Ohio Supreme Court's citation to recidivism rates among child molestors in *Eppinger*, a decision released after the panel decision in *Krueger*, should dispel any argument that the trial courts cannot give weight to recidivism factors as they are commonly known. Moreover, the General Assembly has likewise stated that it passed the sexual predator laws in part because sexual predators "pose a high risk of engaging in further offenses even after being released from imprisonment ***." See R.C. 2950.02(A)(2). These statements from the legislature and the highest court of this state should end any notion that the courts are not permitted to consider recidivism rates as they might impact on a sexual predator classification for a particular offender. Hence, the court could validly consider general data of recidivism rates for sexual offenders along with Ellison's own history of abuse and his refusal to seek any treatment for his past pedophilia as factors that would indicate a likelihood of reoffending. This conclusion fell within the statutory framework of another factor "relevant to determining recidivism."

{¶27} Because the court engaged in fact finding, we must be extremely reluctant to reverse this sexual predator

determination, particularly where the offender is an admitted child molester. Ellison's sexual predator classification was supported by competent credible evidence showing clearly and convincingly that he was likely to commit a sexually oriented offense in the future. The assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN, PRESIDING JUDGE

TERRENCE O'DONNELL, J., CONCURS.

ANNE L. KILBANE, J., DISSENTS WITH SEPARATE OPINION

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and

order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

ANNE L. KILBANE, J., DISSENTING:

{¶28} On this is an appeal from an order of Judge Shirley Strickland Saffold, I dissent. The majority's result-oriented opinion calls to mind Thomas Jefferson's thoughts on how they are drafted.[1]

{¶29} The majority first suggests that in reviewing a sexual predator determination, the judges of this court are suddenly emasculated[2] and must be fawningly differential to whatever a trial judge finds to be a fact or the weight given

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[1]"An opinion is huddled up in conference, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge..." Andrew A. Lipscomb, The Writing of Thomas Jefferson, 1903.

[2]Five of the twelve judges on the Eighth District Court are females.

to guidelines or other evidence. A reviewing court is bound to accept findings of fact if supported by competent credible evidence;[3] however, without deference to the trial judge's conclusion, it must be determined independently whether, as a matter of law, the facts meet the appropriate legal standard.[4] The reader will note that the majority carefully avoids ever stating Ellison's assignment or error by baldly claiming he merely "contests the classification." This was done to disguise the fact that Ellison should have prevailed.

{¶30} Ellison's sole assignment of error states:

{¶31} "The Evidence Was Insufficient as a Matter of Law to Prove by 'Clear and Convincing Evidence' That Appellant Is Likely to Engage in Future Sexually Oriented Offenses."

{¶32} "With respect to sufficiency of the evidence, 'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the *** verdict as a matter of law. *** In essence, sufficiency is a test of adequacy."[5] Whether the evidence is

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[3]*State v. Schiebel* (1990), 55 Ohio St.3d 71, 298 N.E.2d 137.

[4]*State v. Curry* (1994), 95 Ohio App.3d 93, *State v. Fellows* (May 22, 1997), Cuyahoga App. No. 70900.

[5]*State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541 (Internal cites omitted).

legally sufficient to sustain a verdict is a question of law,[6] subject to a de novo review.[7] The majority, however, have thumbed their noses at the Ohio Supreme Court and decided that this court now reviews a sufficiency of the evidence challenge using a manifest weight analysis.[8]

{¶33} The judges of this court should simply admit that one does not employ a manifest weight standard to address a sufficiency challenge,[9] and cease blindly accepting this misstatement. To do otherwise reflects a conscious intent by members of this court to decide that an accused sexual predator does not have the right to make a sufficiency challenge, and thus provide some members of this court with a rationale for denying preclusive effect to sexual predator

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[6]*State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148.

[7]Goodyear Tire and Rubber Co. V. Aetna Cas. & Sur. Co. (2002), 95 Ohio St.3d 512, 769 N.E2d. 835.

[8]*State v. Childs* (2001), 142 Ohio App.3d 389, 395, 755 N.E.2d 958, 962, written by Judge O'Donnell, citing as his authority *State v. Perry* (Nov. 16, 2000), Cuyahoga App. No. 77724, unreported, also written by Judge O'Donnell, citing *State v. Cook* (1998), 83 Ohio St.3d 404 where, based upon the underlying appellate opinion, the relevant challenge appears to be a general assignment that the judge erred in determining the defendant to be a sexual predator, a challenge in part relating to the credibility, to the "manifest weight," of evidence in a presentence report that was not part of the record. *State v. Cook* (Aug. 7, 1997), Allen App. No. 1-97-21, unreported.

[9]See, *e.g.*, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541, 546-547 (discussing difference between weight and sufficiency).

determinations reversed for insufficient evidence, since a reversal on weight of the evidence does not have preclusive effect, but is instead grounds for a new trial.[10] The majority declines to explain why one cannot attack legal sufficiency in a civil case, but simply cites *State v. Cook*, *supra*, for the proposition that the manifest weight standard applies in all sexual predator proceedings.

{¶34} In *Cook*, the Ohio Supreme Court reversed an appellate judgment in favor of the offender, and made a manifest weight finding as a means of affirming the trial judgment, in the apparent absence of any assignment of error from the offender and in response to a general assignment of error made in the appellate court. As will be shown below, manifest weight review includes sufficiency review and, therefore, manifest weight analysis was appropriate in this circumstance because Cook had no specific evidentiary challenge before the court, and had made a general assignment in the court below that arguably attacked the weight of the evidence. In an exercise of prudence, then, the Ohio Supreme Court addressed manifest weight in *Cook* to ensure proper resolution.

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[10]Civ.R. 59(A)(6).

{¶35} Indeed, in *State v. Eppinger,*[11] in a portion of its opinion titled **"***Sufficiency of the Evidence***"** the Supreme Court stated: "[I]n order for the offender to be designated a sexual predator, the state must prove by clear and convincing evidence that the offender has been convicted of a sexually oriented offense *and* that the offender is likely to engage in the future in one or more sexually oriented offenses. (Emphasis *sic*.)"[12] The court made clear that the State must prove each element to justify the classification, and concluded that the State had failed to provide sufficient evidence of the defendant's likelihood of re-offending.[13]

{¶36} Similarly, the majority's reliance on *C.E. Morris Co. v. Foley Constr. Co.*[14] is misplaced. *C.E. Morris Co.* does not posit that sufficiency review is unavailable, but holds only that a sufficiency review is implicitly included in a manifest weight review.[15]

{¶37} In December of 1981, Ellison pleaded guilty to an amended charge of sexual battery and one count of gross sexual imposition. He was sentenced by Judge Ralph McAllister to

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[11](2001), 91 Ohio St.3d 158, 743 N.E.2d 881.

[12]Id. at 163, 743 N.E.2d at 886-887.

[13]Id. at 164-165, 743 N.E.2d at 887-888.

[14](1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578.

[15]Id.

concurrent terms of one to ten years in prison, with the prison time suspended, and he was placed on three years of probation, 120 days in the county workhouse and ordered to become employed and observe an early curfew. Clearly, given the suspended prison terms imposed, Judge McAllister did not consider Ellison to present a serious threat of re-offending at that time.

{¶38} He violated his probation in 1982 and a capias warrant was issued. West Virginia State Police arrested him in March of 1994 on that outstanding warrant and then released him. He drove to Cleveland, turned himself in and his original sentence was imposed.

{¶39} Sometime before November 9, 1999, the Ohio Department of Rehabilitation and Corrections requested that Ellison be adjudicated a sexual predator.[16] He was returned from Madison Correctional Institution for a hearing held on April 20, 2000.[17] During that hearing the judge granted Ellison's request for a psychological examination and the hearing reconvened on June 15, 2000. Ellison's attorney

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[16]On November 29, 1999, the Ohio Parole Board subjected Ellison to a Pre-Parole Clinical Risk Assessment which reviewed high-risk factors associated with violent or sexual re-offending, and he was found to display a low to a low-moderate degree of risk to re-offend.

[17]The State entered the Pre-Parole Clinical Risk Assessment into evidence.

presented, and both he and the prosecutor discussed, parts of the Court Psychiatric Clinic Sexual Predator Evaluation. Based upon the results of various tests and interviews, the evidence indicated that Ellison was in the medium-low risk category for sexual recidivism. Ellison was then designated a sexual predator.

{¶40} A "sexual predator" is a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses.[18] A judge shall make the determination that a sex offender is a sexual predator only if the conclusion is supported by clear and convincing evidence.[19] "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to facts sought to be established.[20]

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[18]R.C. 2950.01(E).

[19]*State v. Williams,* (2000) 88 Ohio St.3d 513, 519, 728 N.E.2d 342, 351.

[20]*Cross v. Ledford* (1954), 161 Ohio St.469, 120 N.E.2d 118, paragraph three of the syllabus; *State v. Eppinger*, (2001) 91 Ohio St.3d 158, 743 N.E.2d 881.

{¶41} A judge is to base a sexual predator determination upon all relevant factors, including ten specifically identified in R.C. 2950.09(B)(2); i.e., from age and number of victims to display and threat of cruelty, and should discuss on the record the evidence and factors relied upon in determining the likelihood of a defendant's recidivism.[21]

{¶42} The following R.C. 2950.09(B)(2) factors were in the record: (1) Ellison's victims were two boys molested on one occasion; (2) he declined to participate in a prison sex offender program because, in his own words, "[a]t my prison, the program is a big joke. If I'm going to do something like that I want to be serious about it. If the parole board wants me to do something on the outside I would have no problem with that;" (3) the nature of the sexual contact itself; and (4) as a child, Ellison was molested on three occasions by two adult males.

{¶43} The record also reflected: (1) Ellison is forty years old; (2) as a juvenile, he had a limited non-sexual criminal history and the 1981 crimes were his only sexual offenses as an adult; (3) while he did have a problem with drug use and alcohol abuse, he has been completely sober since 1988; (4) in 1999 he participated in the prison 90-day substance abuse program with the 12-week aftercare program;

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[21]State v. Eppinger, *supra* at 159.

(5) his post-offense social environment and relationships with family and women have been consistently stable and normal; (6) Ellison was married in 1984, remains married to a supportive spouse, and has goal-oriented career aspirations; (7) he professes to have found new religious faith in 1994 and retains it; (8) as part of his court-ordered clinical assessment, Ellison underwent a STATIC-99 evaluation designed to rate his statistical probability of re-offending, and he registered as a low-to-medium risk; (9) an MMPI 2 revealed Ellison had evaluations within normal limits and that he typically functions in an adequate manner in most aspects of his life situation; (10) the report further revealed Ellison displayed seven factors which were not indicative of risk for sexual recidivism and only two that were; and (11) there was no indication that Ellison committed any sexual offense from 1981 until his imprisonment in 1994 and his prison record reflects nothing of that nature.

{¶44} In rendering her decision, the judge noted testimony at the hearings and the psychological evaluation as the evidence she considered in reaching her decision to declare Ellison a sexual predator. She specifically indicated that Ellison's refusal to participate in a prison treatment program, combined with his own history of being molested as a child, weighed heavily in her decision because of her own personal knowledge.

{¶45} The 2000 psychological evaluation had revealed that at the age of seven or eight years, Ellison, on two occasions, was fondled by his nineteen-year-old uncle and on a later but unspecified age or date was fondled by an unidentified man. The judge stated that, because Ellison had been molested on two different occasions, probably dropped out of school at age thirteen years "[S]o probably the molestation started about that time," refused to identify the second molester and declined to participate in a prison sex offender program, she found that "chances are very likely that he will, in fact, do it again." It was her contention that in sexual molestation cases, one starts as a victim and without counseling the victim starts to molest, "then you don't stop until you get that treatment." She based this conclusion upon her background as a social worker and then further stated:

{¶46} "I can say almost certainly that the time he was molested by the second person was also the time he had been a reasonably good student, he was going to school, doing all the things, didn't give the teachers any problem. He indicates that he was molested a second time and after the second time he literally sort of washed out, stopped going to school, stopped participating. He just gave up."

{¶47} To the extent the determination was based on personal knowledge not otherwise in evidence, the decision was

contrary to law.[22] There was no evidence, other than the circumstances surrounding the 1981 molestations and Ellison's own childhood encounters, to support a conclusion that an offender's own prior history of being a victim of abuse contributed to a determination that the offender would likely commit another sexual offense. While other courts have acknowledged an offender's own history of abuse in making a sexual predator determination, I note that even such offenders have not been designated as sexual predators in the absence of a multitude of other compelling factors.[23] Moreover, there is nothing in the record to support the conclusion that Ellison was molested at age thirteen, or that because he was molested, he dropped out of school. Indeed, he claims that at age thirteen to have briefly joined a gang and began using marijuana two to three times a week with friends; this could just as easily be the likely reason that he began to avoid school.

{¶48} In light of Ellison's clean post-conviction criminal record and history until his discovery in 1994, and his sobriety, stability, and current psychological evaluations as

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[22]*See State v. Krueger*, (Dec. 19, 2000), Cuyahoga App. No. 76624.

[23]*See State v. McCoy,* (Dec. 14, 2000), Cuyahoga App. No. 76669, unreported; *See State v. Schroer,* (Mar. 31, 2000), Auglaize App. No. 2-99-44, unreported.

a "low to low moderate" and "medium to low risk", I cannot find that Ellison's own history of abuse and failure to seek treatment in prison, so long after the sexual offenses, could have provided the judge with a firm belief or conviction that he would be likely to commit another sexual offense in the future.

{¶49} I do not excuse Ellison's past conduct, for which he remains incarcerated, but Ohio's sexual predator law exists not to punish Ellison for his past sexually deviant conduct, but rather, to protect society from individuals likely to commit sexual offenses in the future and to warn those geographically near to the offender that he presents such a risk. Viewing the evidence in favor of Ellison, there was insufficient clear and convincing evidence that he is likely to commit another sexual offense in the future. The State failed in its burden of proof.[24]

{¶50} The majority's preachy, holier-than-thou attitude about the value of the results of tests given to Ellison is at odds with one of its own purported authorities, *State v. Eppinger*,[25] which held "Admittedly, predicting future

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[24]App.R. 12(B); *Moncol v. Bd. of Edn. of N. Royalton School Dist.* (1978), 55 Ohio St.2d 72, 378 N.E. 2d 155; *Leighton v. Hower Corp.* (1948), 149 Ohio St. 72, 77 N.E.2d 72, paragraphs two and three of the syllabus.

[25](2001), 91 Ohio St.3d 158 at 163.

behavior of a sex offender, or anyone else, for that matter, is an imperfect science. Nevertheless, R.C. Chapter 2950 requires it and the evidence presented by a psychologist, psychiatrist, or other expert in the field of predicting future behavior may be the best tool available to the court to assist in making these determinations."

{¶51} What is even more amazing is the majority's contention that, from a silent record, the judge actually considered the evidence light of her express reasons for finding him to be a predator.[26]

{¶52} Interestingly, the majority author gratuitously attacks *State v. Krueger*,[27] in which he was the dissenter. In that case, the alleged "overwhelming statistical evidence referred to in discussions of recidivism rates of sexual offenders who commit crimes against children," both by the legislature and various cases is dissected. I would refer the reader to that case and again state: "[It] is improper to cite phantom statistical evidence, no matter how 'overwhelming' the apparition."[28]

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[26]See dissent pages 11, 12.

[27]*Krueger*, (Dec. 19, 2000), Cuyahoga App. NO. 76624.

[28]*Krueger*, at pg. 10.

{¶53} The Ohio Supreme Court has specifically recognized the "profound impact"[29] and "grave consequences"[30] flowing from a sexual predator finding, and has liberally interpreted the statutory scheme, which already grants rights ordinarily reserved to criminal defendants.[31] Where was the clear and convincing evidence that Ellison was likely to sexually re-offend in the future? As in the Hans Christian Anderson story,[32] a manifest weight analysis will not disguise the Emperor's nakedness.

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[29]Id.

[30]*Eppinger*, 91 Ohio St.3d at 162, 743 N.E.2d at 885.

[31]Id., at syllabus; R.C. 2950.09(B)(1).

[32]The Emperor's New Clothes.