NYS Static-99 Case Law Summary

Background discussion

Key to the discussion on the admissibility of actuarial risk assessment instruments in New York State in Mental Hygiene Law Article 10 proceedings is the fact that New York's "sex offender management and treatment act" is unique in the country. No other state has a bifurcated process between the jury and the judge as to dangerousness. The position put forth by the Office of the Attorney General is that the only question the jury determines is whether the respondent is a detained sex offender with a mental abnormality, that is, does the respondent have a condition/disease/disorder that predisposes him/her to committing a sex offense, and results in serious difficulty controlling such conduct (Mental Hygiene Law §10.03(e)).

If such a finding is made the court, that is the judge, then determines whether the respondent is a dangerous sex offender- is the respondent likely to reoffend if not confined to a secure facility (Mental Hygiene Law §10.03(i)). In every other state the jury, or the court if a jury is waived or not provided for by law, determines the combined issues of mental abnormality/disorder, and dangerousness. Thus in other states the admission of certain actuarial risk assessment instruments, i.e. the Static-99 and the MnSOST-R, before the jury is acceptable because it is generally accepted in the psychiatric/psychological professions that those instruments aid in the determination of dangerousness, that is liklihood of reoffending. To repeat, in New York the jury does not determine the issue of dangerousness, the judge does, at least as directed by the statute.

Thus the issue becomes should such actuarial instruments be admitted before a jury in the first phase. Put another way, do actuarial risk assessment instruments assist the jury in determining whether the respondent has a mental abnormality that predisposes respondent to committing a sex offense, and results in serious difficulty controlling such conduct?

Judges throughout the country are considered the "gatekeepers" as to the admission of new or novel scientific theories or evidence in court cases. When a party in a case attempts to introduce such evidence the court conducts a hearing to determine if such theories or are reliable. The two main federal cases that provide the court with guidance are Frye v United States, 293 F 1013 [1923], and Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)(as developed further by Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 [1999]). New York State is still a Frye state as the State's highest court, the Court of Appeals, in People v Wesley, 83 NY2d 417, 422 [1994], made explicit. The courts determine under the Frye standard requires standard requires a trial court to determine whether a scientific theory or principle "'has achieved **general acceptance** in the relevant scientific community'" before admitting it into evidence. Much of country has gone to the more liberal federal standard (or some portions of it) as expressed in Daubert v Merrell Dow Pharmaceuticals, Inc., 509 US 579, [requiring that scientific testimony be **relevant and reliable** in order to assist the trier of fact under Federal Rule of Evidence 702])((Parker v. Mobil Oil Corp., 7 NY3d 434 [2006]).

Regarding the admissibility of actuarial risk assessment instruments, such as the Static-99, several states have allowed the admission of such instruments under a Frye or Daubert standard. Others have allowed admission based on their individual state's rules of evidence, while the sexual offender statutes in a few states specifically provide for such admissibility. Note there is only one case (from Illinois, on appeal) which has rejected admissibility actuarial risk instruments.

Other states have allowed risk assessment instruments in the context of administrative determinations as to Sex Offender Risk Assessments (SORA) or post-release offender classification (see Rhode Island, Minnesota). For the purposes of this project I have not addressed those states in detail.

In New York court system, the trial courts, most often the supreme court, make the initial

evidentiary rulings, and interpretations of the law. Appeals from the supreme court or even county court, at least from Westchester north, go to one of the four appellate divisions, and ultimate decisions may be made by the highest court in the state the Court of Appeals.

I have started with summary of New York cases, and then listed other states alphabetically.

NEW YORK

- Jury hears evidence of mental abnormality. Judge hears evidence as to dangerousness, likely to be a danger to others and to commit sex offenses if not confined.
- Probable cause hearing; and if probable cause found, trial is scheduled.
- Mental Hygiene Law, Article 10.
- Approximately 8 decisions discussing MHL Article 10 and the use of actuarials, Static-99, and MnSOST-R in the context of the probable cause hearings.

NEW YORK

Matter of State of New York v. C.B., 2008 NY Slip Op 50488U, 1 (Sup Ct., Bronx Co. [Dawson, J.] 2008)

...this Court conducted a hearing, pursuant to Article 10 of the Mental Hygiene Law ("MHL"), to determine whether there is probable cause to believe that respondent: (1) "is a sex offender requiring civil management" within the meaning of Section 10.06(g) of the MHL; and (2) "is sufficiently dangerous to require confinement, and that lesser conditions of supervision will not suffice to protect the public during pendency of the proceedings."(citations omitted). n1 Both sides agree that it was the petitioner's burden during the hearing to show probable cause to believe that respondent is sufficiently dangerous to require continued confinement pending trial. (ICO).

Dr. Langer also reviewed the results of two tests that assist mental health professionals in determining whether a sex offender is likely to commit another sex offense in the future, the "Static 99" test and the "Minnesota Sex Offender Screening Test, Revised" ("MNSOST-R"). These tests help determine the likelihood that a subject may commit a sexual offense in the future based on actuarial, historical and other data. The results of these tests augmented, and were consistent with, Dr. Langer's opinion of respondent. Id. at pp. 24-25, 42-53.

In addition, respondent's score on the Static 99 test was 7 or 8, which means that respondent is in the high range of previous sex offenders who are likely to commit another sex offense in the future. Id. at pp. 42-53. Similarly, respondent's score on the MNSOST-R test was 12, which also places respondent in the high range of previous sex offenders who are likely to commit another sex offense in the future. Dr. Langer testified that scoring in the high range means that there is a 52% likelihood that respondent would commit another sexual offense within the next fifteen years. Id.

Indeed, the doctor's testimony, especially when considered with the reports of the other psychiatrists, demonstrates that there is ample probable cause to believe that respondent's mental abnormality gives rise to such a strong predisposition to commit sex offenses that he is unable to control his behavior. Respondent's criminal history, his history of mental illness, his high scores on both the Static 99 and MNSOST-R tests, and his alleged conduct while confined at MPC including his alleged masturbation in front of a nurse all show that respondent has lacked, and continues to lack, the ability to control himself. (ICO).

Finally, and even more significantly than those disputed events, both Dr. Langer and the other professionals who proffered opinions about respondent's risk of re-offending all agree: he falls on the high end of the scale for sexual recidivism. Dr. Langer also opined that respondent should be treated in a secure facility because he would pose a danger to the public if treated in an outpatient or community-based setting. (ICO).

(NOTE: *above the Court here referenced Matter of Davis, and claimed the Davis Court found the "... sex offender lacked impulse control based in part on criminal history, problems while*

incarcerated, and high scores on Static 99 and MNSOST-R tests". While the Davis Court did not make a specific finding on "impulse control" based on Static-99 or MnSOST-R, it is "respectfully submitted" that the Court misinterpreted the actuarials on the issue of mental abnormality. See Davis decision below.

ALSO: beware the alleged testimony of Dr. Langer as to "what" exactly the 52% represents (see 3rd paragraph above). It measures re-conviction, not re-offending!

NEW YORK

Matter of State of New York v. Davis, 2008 NY Slip Op 50323U, 3 (Sup Ct., Queens Co. [Knopf, J.] 2008)

It is the opinion of Dr. Frances, to a reasonable degree of professional certainty, that respondent's personality disorder does predispose him to engage in sexually offending behavior. Psychological testing of the respondent conducted by Dr. Frances, with two specifics testing tools, to wit: the Static -99 test and the MnSOST - R test were predictive that respondent has a high risk for sexually re-offending and recidivism. This Court concludes that there is probable cause to believe that respondent suffers from a "mental abnormality" and that he is accordingly, a sex offender requiring civil management.

Finally, this Court must determine whether there is probable cause to believe that the respondent is sufficiently dangerous to require confinement in a secure treatment facility during pendency of the proceedings herein. As noted herein, it is the expert opinion of Dr. Frances that respondent has a high risk for sexually re-offending and recidivism. It is her opinion that respondent is sufficiently dangerous to require treatment in a secure facility and that there is no less restrictive alternative that would protect the public sufficiently from the respondent. It should be noted that the respondent has done very poorly in the past while under parole and probation supervision, having failed repeatedly to comply with the conditions of his parole and probation. The respondent did not complete the sex offender program that he attended while incarcerated having been discharged from the program after receiving a severe disciplinary violation. It is this Court's considered opinion the respondent's failure to comply with parole and probation supervision in the past indicates that release of the respondent to the community while these proceedings are pending would not be appropriate. Based upon respondent's poor past performance, this Court concludes that respondent would not be compliant with less restrictive alternatives that would included attending a sexual offender program in the community while at liberty.

NEW YORK

NOTE: *Justice Mullen appeared to initially grasp that actuarials go to the issue of dangerousness, that is recidivism, not mental abnormality, at least at the probable cause stage in* Phillips, *but seemed to back away in* Brooks *finding dangerousness inherent in definition of detained sex offender with mental abnormality!*

People v. Phillip, 2008 NY Slip Op 28001, 3 (Sup. Ct., Kings Co. [Mullen, J.]. 2008)

Two actuarial assessments used by the scientific community to measure the risk of sexual recidivism were utilized to determine whether Mr. Phillip is presently dangerous. The first, the "Static 99" is designed to assist in the prediction of sexually violent recidivism. Mr. Phillip's score was a seven. Individuals with this score are likely to sexually re-offend 43% of the time over five

and ten year time spans.
The second assessment is the Minnesota Sex Offender Risk Assessment Tool, or MnSoST-R. This tool is designed to assist in the prediction of sexual recidivism in adult males. Mr. Phillip scored a 10 translating into a recidivism rate of 57% over a six year period. Further indicating Mr. Phillip's high potential for sexually violent behavior in the community are his failed attempts to participate in sex offender treatment programs. In 2004 while incarcerated, he completed a sex offender program. However, during this program the records indicate he admitted to limited culpability and placed blame on his victims. Moreover, the counseling notes indicate that his mental health issues made it difficult for him to fully participate in the program. While in St. Lawrence Psychiatric Center (subsequent to the initiation of this article 10 proceeding) Mr. Phillip refused to participate in a sex offender treatment program on the advice of counsel. With no evidence of progress in sex offender therapy and gave his current diagnosis and actuarial scores, the risk of re-offending remains significantly high.

People v. Brooks, 2008 NY Slip Op 28068, 7 (Sup Ct., Bronx Co., [Mullen, J.] 2008)

Only those who suffer a mental disorder, disease or condition which affects them in a manner that makes them predisposed to commit a sex offense and that results in that person having serious difficulty in controlling such conduct can be found to have a mental abnormality. To require an independent finding of dangerousness at the probable cause phase is to suggest that a person who is predisposed to commit a sex offense and has serious difficulty in controlling his conduct has the probability of not being dangerous.1 This is patently absurd.2 Therefore, "probability" of dangerousness must be inherent in the Legislature's definition of mental abnormality. This is distinguished from the dispositional phase of the proceeding. The degree of dangerousness required for confinement after a verdict against a respondent is raised as is the burden of proof. (MHL§10.07(g)). If there is a verdict against the respondent, the Legislature requires the court to make a separate finding of dangerousness by proof of clear and convincing evidence, not a "more probable than not standard." Moreover, the statutory requirement of dangerousness by the court after the jury has found a mental abnormality only relates to the level of dangerousness required for confinement versus strict and intense supervision not to whether the person is dangerous at all. As previously noted, an individual who is a person with a predisposition to commit sex offenses and has serious difficulty in controlling such conduct is per se dangerous to society. This is common sense and looking at the whole of Article 10 it is apparent in the sections governing the dispositional phase.3 Once the trier of fact finds a mental abnormality, the respondent is never free to live in the community without further intensive government intervention. (MHL §10.07(f)). Either he is confined because his mental abnormality involves "such a strong predisposition to commit sex offenses and such an inability to control behavior" or the court shall make a finding that the respondent is a sex offender requiring civil management and subject to strict and intense supervision (which may include GPS or other electronic monitoring, lie detector testing and severe housing restrictions). (MHL§10.11(a)(1), MHL§10.11(a)(2), MHL§10.11(b)(1), MHL§10.11 (b)(2), MHL§10.11(b)(2)(c), MHL §10.11(b)(2)(c)(1)). The statute requires one of the two findings above if respondent has a mental abnormality shown by clear and convincing evidence. It is hardly conceivable that the Legislature intended that those who are not considered dangerous on some common sense level, to be subject to supervision or confinement with no consideration of living unsupervised in the community, if the fact of his dangerousness was not contained in the meaning of mental abnormality.4 The same definition of mental abnormality applies at the probable cause phase. Accordingly, this court is of the opinion that a probability of dangerousness is contained in our initial finding of probable cause. The court further concludes that the Legislature intended that all those suffering from a mental abnormality have an inherent probability of dangerousness such as that term is used in the ordinary common sense way which justifies their pre-trial

detention. It must rise to a substantially higher degree by clear and convincing evidence to justify post-trial confinement.

Two actuarial assessment tools used to predict recidivism were used by Dr. Rackley to assist in assessing whether respondent is presently dangerous. First, the "Static 99" test demonstrated that respondent was in a group considered to be at high risk to sexually reoffend. The second test, the MnSOST-R, placed respondent at very high risk to reoffend. On average, people with a MnSOST-R score similar to respondent have a seventy-two percent sexual recidivism rate within a six year period.

NEW YORK

State of New York v. J.J., 2008 NY Slip Op 28031, 4 (Sup Ct., Nassau Co. [Calabrese, J.]. 2008)

Dr. Greif also used two actuarial instruments in his determination - the Static 99 and the MnSOST-R. The Static 99 looks at ten static factors, i.e., historical factual variables associated with the increased risk of recidivism. Each factor is scored either a "1" or a "0." Respondent's Static 99 score was 7 out of 10 which places Respondent in the top category of "high risk to reoffend." One of the static factors for which Respondent was scored was based on the fact that his victims were strangers. Dr. Greif testified that when the victim was unrelated or a stranger, statistical analysis of released sex offenders showed they reoffended at a higher rate than those whose victims were known to the sex offender.

The MnSOST-R is likewise an actuarial instrument and is used to predict the risk of adult male sex offender recidivism and looks at both historical (static) factors as well as institutional, i.e., dynamic risk factors. The test is comprised of multiple items, to wit, "the static or the historical factors are [the] number of sex or sex-related convictions, length of sexual offending history, was the offender under any form of supervision when they [ ] offended, did the offense occur in a public place, was force or a threat of force used to achieve compliance in any sex offense, has any [ ] sex offense involve[d] multiple acts on a victim, [the] number of different age groups victimized across all sex offenses, whether the offender ever offended against a 13 to 15-year-old victim, [was] the offender [ ] more than five years older than the victim, was the victim a stranger in any offense, was there evidence of adolescent antisocial behavior, was this a person of substantial drug or alcohol use 12 months prior to the arrest for the instant offense, employment history and then the Constitutional or dynamic factors consisted of four involving one's discipline history while incarcerated, chemical dependency treatments while incarcerated, sex offender treatment history while incarcerated and age of the offender at the time of release."

Respondent scored a 18 on this test putting him in the highest risk group to reoffend. Respondent's history of marijuana/alcohol abuse are considered disinhibitors, i.e., often sex offenders offend while under the influence of drugs or alcohol. Accordingly, individuals with a history of substance abuse are more predisposed to reoffend insofar as the drug/alcohol has disinhibited him. Respondent's 27 year institutional history, the incidents of disciplinary infractions and his refusal to submit to urine tests gives an appearance that a historically known substance abuser is continuing to do so. Dr. Greif also determined that Respondent's lifestyle plans if he is released into the community to be unrealistic - he would first live in a shelter; get some clothes from a thrift shop; try to work at a gym teaching body building; work with children at the gym; and attend sex offense treatment if he has to. Dr. Greif found that Respondent's plans lack the specificity requisite to a relapse prevention plan.
Based upon the totality of his examination and evaluation of Respondent and review of the records, Dr. Greif concluded that Respondent suffers from a mental abnormality which affects his ability to control his sexual impulses and which predisposes him to the likelihood of committing a sexual offense and that in his current mental state Respondent poses a danger to the community

if he released.

NEW YORK

Matter of State of New York v. O.V., 2008 NY Slip Op 28016, 6 (Sup. Ct., N.Y. Co., [Bransten, J.]. 2008)

NOTE: *Justice Bransten appears to grasp that actuarials go to the issue of dangerousness, that is recidivism, not mental abnormality, again, at least at the probable cause stage.*

Mental Abnormality

The State presented substantially unrefuted evidence--Dr. Hicks' testimony--that O.V., a sex offender, suffers from paraphilia. Dr. Hicks further concluded that O.V. manifests polysubtance [*6] dependence and antisocial personality traits, possessing seven of the seven [**13] criteria for antisocial personality disorder. Based on the evidence, there is reasonable cause to believe that O.V. suffers from a congenital or acquired disorder that affects his emotional, cognitive or volitional capacity.

Dangerousness and Confinement

Additionally, the State has established that there is reasonable cause to believe that O.V. "is sufficiently dangerous to require confinement" and that "lesser conditions of supervision will not suffice to protect the public during the pendency of the proceedings." Based on either his score of seven or his score of nine on the Static 99, Dr. Hicks opined that O.V. clearly falls into the category of "high risk" and "does pose a danger to society." Tr., at 90. Dr. Hicks testified that O.V. poses a risk of repeating the dangerous actions of his past. Based on this evidence, in the interests of protection of the public, O.V. must be confined pending a trial. Releasing O.V. now would undermine the whole purpose underlying MHL Article 10. Accordingly, it is ORDERED that there is probable cause to believe that O.V. is a sex offender requiring civil management and that he shall not be released pending his trial.

NEW YORK

Matter of State of New York v. K.A., 2008 NY Slip Op 50103U, 6-7 (Sup. Ct., N.Y. Co., [Bransten, J.]. 2008))

Dr. Hicks further testified that he confirmed the State's results for the STATIC 99 test, which is "an actuarial risk assessment instrument that is used for sex offenders." Tr., at 111. Dr. Hicks pointed out that the STATIC 99: "[is] a scale that has ten questions and each item is scored with reference to a manual. * * * You add up a total score which is then divided among different risk categories, low risk, medium risk and high risk.* * * So, for example, a score of 6 on the STATIC 99 falls in the category of high risk * * * offenders who have demonstrated a recidivism rate of * * * 39 percent * * * in other words being rearrested for another sex offense within five years."Tr., at 111-112.

Dr. Hicks concluded that K. A.'s score of six on the STATIC 99 was an indicator of his high risk and dangerousness to society. Tr., at 110-111. He further opined that K.A. "continues to manifest signs of Pedophelia and antisocial personality traits * * * and that the conditions that led [K.A.] to [commit those crimes] have not changed." Tr., at 110. Dr. Hicks also testified that K.A. "has not benefitted from treatment, has not developed an internal sense of control that his actions are wrong" and that he continues] to pose a risk "as he's demonstrated himself to be

dangerous in the past." Tr., at 110-111.

On cross examination, Dr. Hicks agreed that K.A. was neither psychotic nor on psychotropic drugs, which he did not need. Tr., at 142. Dr. Hicks acknowledged that if K.A. were to be released from Manhattan Psychiatric he would remain on parole until 2012, and that K.A. is registered under the Sex Offender Registration Act ("SORA"). He explained that the restrictions while on parole and the demands imposed on registered sex offenders pursuant to SORA were quite strict, including living in approved residences, adhering to reporting requirements and enlisting in sex-offender treatment programs.

Dr. Hicks also stated that he knew K.A. had participated in the sex-offense treatment program at Kirby, and later at Manhattan Psychiatric, but that when K.A. was ready to progress to Stage 2 of the program, under the advice of counsel, he refused to sign the required contract. Recently, however, K.A. signed the contract and is now partaking in Stage 2.

NOTE: Look at Dr. Hick's testimony in first paragraph. Is the number measuring re-arrests, or convictions? Do the applicable fields differentiate between the two because the courts, and juries will.

NEW YORK

People v. S.S., 2007 NY Slip Op 52178U, 3 (Sup. Ct., Schuyler Co. [Garry, J.] 2007)

Court found state's expert not properly qualified to use actuarials.

While Dr. Berryman's report and her testimony on direct examination also referenced the use of actuarial instruments in rendering her risk assessment, in particular the STATIC-99, this testimony was discredited upon cross examination, as she lacked significant understanding of the instrument, and she failed to consider the results of a prior analysis based upon this same test which were markedly different, establishing that Respondent posed a low rather than moderate level risk.

Court-appointed expert Dr. Charles Ewing had a significantly stronger background in the field of forensic psychology. He is Board certified in that field, as well as dually licensed as an attorney and psychologist. (See vita, Exhibit B). Dr. Ewing also reviewed the various available documents, including both of the STATIC-99 assessments, and conducted a lengthier and more thorough personal interview with Respondent. Dr. Ewing concluded that Respondent does NOT meet the diagnostic criteria for pedophilia, as defined by the DSM-IV. Thus, without evidence of a "mental abnormality" as statutorily defined, and based upon proof of only the single sexual offense committed by Respondent at age 17, Dr. Ewing opined that he could not be considered a detained "sex offender requiring civil management". (See MHL §10.03 [i] and [q]). Dr. Ewing was qualified to opine regarding the STATIC-99 actuarial instrument, and concluded that both tests properly viewed and analyzed would result in a recidivism risk in the "moderate low" or "low" category. He testified that this risk assessment was consistent with other actuarial instruments that he utilized in his review, specifically including the Vermont Assessment of Sex-Offender Risk, the Bays & Freeman-Longo Evaluation of Dangerousness for Sexual Offenders, and the Carich-Adkerson Victim Empathy Inventory.

ARIZONA

- No bifurcation, court or jury makes determination of mental disorder and risk of re-offending, whether respondent is a dangerous sex offender.
- Court then makes determination as to confinement or less restrictive conditions.
- Risk assessment instruments such as Static-99, and MnSOST-R, admissible based on statute interpretation of evidence. No Frye hearing required.
- Sexually Violent Persons Act ("SVPA") commitment proceedings. See Ariz. Rev. Stat. ("A.R.S.") §§ 36-3701 to -3717

State ex rel. Romley v. Fields, 201 Ariz. 321, 323 (Ariz. Ct. App. 2001)

The state seeks special action relief from the trial court's decision to conduct a Frye hearing to determine the admissibility of actuarial data relied upon by experts in rendering opinions on recidivism in Sexually Violent Persons Act ("SVPA") commitment proceedings. We conclude that the admissibility of the actuarial data and the expert opinion relying on such data is controlled by the Arizona Rules of Evidence and not Frye. In its petition for special action, the state contends that a Frye hearing is unnecessary because the actuarials are concerned with general characteristics of sex offenders and are not "scientific" evidence subject to the Frye test of admissibility. In response, real parties in interest ("respondents") contend that Frye applies because the use of risk assessment tools based upon actuarial data to predict future acts of sexual violence is not generally accepted within the mental health community and because its use as a predictive tool is highly experimental.

We now consider the applicability to this case of the Frye rule, as clarified in Logerquist. The trial court correctly observed that the experts testifying in most SVPA cases do not base their testimony on actuarial data created from their personal experience or knowledge, but that they instead rely on data generated by the work of others. Then, relying on the distinction in Logerquist between experts who reach conclusions by inductive reasoning based on their own experience (Frye not applicable) and those whose conclusions are deduced from the application of novel scientific principles or techniques developed by others (Frye applicable), [internal cites omitted], the trial court implicitly concluded that the use of risk assessment tools to predict behavior constitutes a novel scientific principle or technique that must pass the Frye general acceptance test before it may be relied upon by experts.

Barefoot v. Estelle, 463 U.S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983), a capital case in which the Court upheld against constitutional claims the admission of psychiatric opinion evidence predicting the probability of the defendant's future dangerousness despite evidence that such claims were unreliable.

Based upon our understanding of Frye as interpreted by Logerquist, we conclude that the use of actuarial models by mental health experts to help predict a person's likelihood of recidivism is not the kind of novel scientific evidence or process to which Frye applies. We hasten to add, lest our holding be misinterpreted, that we are not determining whether the proffered expert testimony is or is not admissible. Applying Logerquist, we simply hold that Frye's general acceptance test is inapplicable to the expert testimony here.
State ex rel. Romley v. Fields, 201 Ariz. 321, 323 (Ariz. Ct. App. 2001)

CALIFORNIA

- Risk assessment instruments such as Static-99, and MnSOST-R, admissible based on statute interpretation of protocols.
- Instruments admissible without the necessity of a Frye (Frye v United States (293 F 1013 [1923]) Daubert (Daubert v Merrell Dow Pharmaceuticals, Inc. (509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 [1993]) hearing (California Kelly hearing- People v. Kelly (1976) 17 Cal.3d 24, 130 Cal. Rptr. 144), unless the instrument is the sole basis unless it is the sole measure of evaluation being used by the designated evaluators.
- No bifurcation, court or jury makes determination of mental disorder and risk of reoffending.
- Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.) permits the involuntary civil commitment or recommitment, for two-year terms of confinement and treatment, of persons who are found, in jury trials (§ 6604), and beyond a reasonable doubt (§ 6603, subd. (a)), to be 'sexually violent predators' (§ 6604). The Act defines a sexually violent predator as one 'who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.' (§ 6600, subd. (a)(1).)" ([internal cites omitted].)

Admissibility of the Evidence

The Sexually Violent Predators Act (SVPA) is aimed at "a select group of criminal offenders who are extremely dangerous as the result of mental impairment, and who are likely to continue committing acts of sexual violence even after they have been punished for such crimes." ([internal cites omitted]) To be classified as a sexually violent predator, a person must have been "convicted of a sexually violent offense against two or more victims," and suffer from a "diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).)

"We have never applied the Kelly/Frye rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association..." ([internal cites omitted]). The concern addressed by Kelly is not present here. Both Drs. Phenix and Paladino testified that, in their opinion, defendant was likely to reoffend in a sexually violent manner and both experts did utilize the Static-99 test during the course of their evaluation. However, Dr. Phenix testified the Static-99 test does not include all the known risk factors and that the process of determining the likelihood of defendant reoffending requires adjusting the risk assessment of the test. The Static-99 test is merely the starting point in the expert's analysis.

Similarly, Dr. Paladino testified that the Static-99 test only takes static factors into consideration and that many other risk factors are considered in forming an expert opinion of likelihood to reoffend. Dr. Paladino's opinion that defendant was likely to reoffend was independent of defendant's Static-99 test score. Thus, both experts testified that use of the Static-99 test was not definitive and that other factors were considered in reaching an opinion. Moreover, Dr. Phenix testified that the instrument was continuing to be revised and Dr. Paladino testified she was not aware of any study indicating that the approach of adjusting actuarial risk assessment has been tested and found to be accurate. Thus, the jury was not told that the procedures were objective and infallible. n7

"No precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior." ([internal cites omitted] Psychological evaluation is "a learned professional art, rather than the purported exact 'science' with which Kelly/Frye is concerned...." ([internal cites omitted]. We are satisfied that no reasonable juror would mistake either expert's use of the Static-99 test as a source of infallible truth on the issue of defendant's risk of reoffending. ([internal cites omitted] [no reasonable juror would mistake expert's reliance on standardized tests such as MMPI as source of infallible truth on personality, predisposition or criminal guilt].)

People v. Therrian, 113 Cal. App. 4th 609, 616 (Cal. Ct. App. 2003) review denied, ftlinerequest denied 2004 Cal. LEXIS 1277 (Cal. Feb. 18, 2004)

CONNECTICUT

- Static-99 used in family court proceeding.

In view of the allegations of sexual abuse of Rachel by Francis, a sex offender evaluation was conducted by Scott J. Stevens of Northeast Clinical Specialists, LLC. (Exhibit 6). Using a risk assessment protocol called the STATIC-99, Stevens concluded in April 2004 that Francis would pose at least a moderate risk to commit a sexual offense. Stevens testified that he conducted the evaluation of Francis assuming Rachel's allegations to be true even though Francis continued to deny them. He stated that the credibility of Rachel's allegations was an important part of his evaluation and that the trauma evaluation by Cohen-Freylikhman raised questions for him. He testified that if Rachel's allegations against Francis turned out to be false, the STATIC-99 risk assessment would be meaningless. He testified that it was not common for a victim to recant, and uncommon for a victim to recant and name their own mother as the perpetrator

In re Rachel J., 2005 Conn. Super. LEXIS 1759 (Conn. Super. Ct. 2005) affirmed 97 Conn. App. 748 appeal denied280 Conn. 941

FLORIDA

- RRASOR, Static-99 and MnSOST-R risk-assessment instruments satisfies the Frye test and are admissible.
- No bifurcation. Jury makes determination as to sexually violent offender, that is (a) Has been convicted of a sexually violent offense; and (b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. Fla. Stat.§ 394.912**.**
- Florida Statues§394.910 et al., 'Sexually Violent Predator Act' commonly referred to as the "Jimmy Ryce Act"
- If finding then committed. No less restrictive alternative.

Roeling v. State, 880 So. 2d 1234, 1239-1241 (Florida Court of Appeal, First District 2004)

IV.

The testimony presented to the trial court provides substantial support for the proposition that the risk-assessment instruments used by the experts who testified regarding appellant's

propensity to reoffend are a generally accepted diagnostic tool in the relevant scientific community (licensed clinical psychologists specializing in forensic psychology and the evaluation of sexually violent predators), and are based on scientific principles that are sufficiently established to have gained general acceptance in the relevant field. All of the experts except the one offered by appellant testified that they use such instruments on a regular basis; that they are generally accepted among forensic clinical psychologists who evaluate persons alleged to be sexually violent predators, provided they are used in conjunction with a clinical assessment (as those testifying in appellant's case did); and that the use of risk-assessment instruments in conjunction with a clinical assessment was a superior method of evaluating an individual to reliance on a clinical assessment alone. Even appellant's expert conceded that such instruments were being used "with great frequency by people doing these evaluations"; and that an evaluation based on only a clinical assessment would at best be equal to (but no better than) a pure actuarial approach.

The opinions relied upon by the trial court are, moreover, consistent with conclusions reached by a number of other psychologists, including those who have developed the actuarial tools and conducted cross-validation and meta-analyses to confirm their reliability. See, e.g., Judith V. Becker & Wm. D. Murphy, What We Know and Do Not Know About Assessing and Treating Sex Offenders, 4 Psychol., Pub. Pol'y & L. 116 (1998); Douglas L. Epperson et al., Cross-Validation of the Minnesota Sex Offender Screening Tool-Revised, ATSA Presentation, San Diego, CA (Nov. 3, 2000); Martin Grann et al., Actuarial Assessment of Risk for Violence: Predictive Validity of the VRAG and the Historical Part of the HCR-20, 27 Crim. Just. & Behavior 97 (2000); Wm. M. Grove & Paul E. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy, 2 Psychol., Pub. Pol'y & L. 293 (1996); R. Karl Hanson, What Do We Know About Sex Offender Risk Assessment?, 4 Psychol., Pub. Pol'y & L. 50 (1998); R. Karl Hanson & David Thornton, Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales, 24 L. & Human Behavior 119 (2000); R. Karl Hanson & Monique T. Bussiere, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies, 66 J. of Consulting & Clinical Psychol. 348 (1998); R. Karl Hanson & Andrew J. R. Harris, Where Should We Intervene?: Dynamic Predictors of Sexual Offense Recidivism, 27 Crim. Just. & Behavior 6 (2000); Robert D. Hare et al., Psychopathy and the Predictive Validity of the PCL-R: An International Perspective, 18 Behavioral Sci. & L. 623 (2000); Grant T. Harris et al., Appraisal and Management of Risk in Sexual Aggressors: Implications for Criminal Justice Policy, 4 Psychol., Pub. Pol'y & L. 73 (1998); Marnie E. Rice & Grant T. Harris, Cross-Validation and Extension of the Violence Risk Appraisal Guide for Child Molesters and Rapists, 21 L. & Human Behavior 231 (1997).

Finally, HN5courts in Florida and other jurisdictions have also considered the admissibility of expert opinion testimony regarding propensity to commit acts of sexual violence in the future which is based in part on use of risk-assessment instruments. Not one court has held such testimony inadmissible as a matter of law. Rather, the debate has been over whether the testimony must pass the Frye test. See, e.g., In the Matter of the Commitment of R.S., 173 N.J. 134, 801 A.2d 219, 220 (N.J. 2002) ("a testifying psychologist or psychiatrist may refer to actuarial risk assessment instruments used in the formation of the expert's opinion" because such instruments have [**14] gained sufficient acceptance to satisfy Frye); In re Detention of Thorell, 149 Wn.2d 724, 72 P. 3d 708, 724-25 (Wash. 2003) (such testimony is not subject to the Frye test because it does not involve "novel scientific evidence"); State v. Fields, 201 Ariz. 321, 35 P. 3d 82, 89 (Ariz. Ct. App. 2001) ("the use of actuarial models by mental health experts to help predict a person's likelihood of recidivism is not the kind of novel scientific evidence or process to which Frye applies"); Garcetti v. Superior Court, 85 Cal. App. 4th 508, 102 Cal.Rptr.2d 214, 238 (Ct. App. 2000) ("a psychiatrist's prediction of future dangerousness is not subject to a Kelly-Frye analysis and . . . it does not matter if the psychiatrist used clinical or actuarial models"), rev'd on other grounds sub nom. Cooley v. Superior Court, 29 Cal. 4th 228,

127 Cal. Rptr. 2d 177, 57 P. 3d 654 (Cal. 2003); Lee v. State, 854 So. 2d 709, 712 (Fla. 2d DCA) (testimony based in part on RRASOR, MnSOST-R, VRAG and SORAG was properly admitted because the state's evidence satisfied the Frye test; even if permitting the testimony was error, it was harmless), review pending, Case No. SC03-1608 (Fla. filed Sept. 8, 2003); Collier v. State, 857 So. 2d 943, 945-46 (Fla. 4th DCA 2003) (testimony based in part on SVR-20 must pass the Frye test; testimony should not have been admitted because the state's evidence did not satisfy Frye); In re Commitment of Stevens, 345 Ill. App. 3d 1050, 803 N.E.2d 1036, 1044, 281 Ill. Dec. 415 (Ill. App. Ct. 2004) ("actuarial risk-assessment instruments of the sort used in this case--namely, the Minnesota Screening Tool-Revised, the Static-99, and the Violence Risk Assessment Guide--do not purport to involve a scientific principle, method, or test to which Frye applies"); In re Commitment of Lourash, 347 Ill. App. 3d 680, 807 N.E.2d 1269, 1274-75, 283 Ill. Dec. 428 (Ill. App. Ct. 2004) (respondent was entitled to a Frye hearing where he could contest the admissibility of the evidence based on actuarial instruments used to measure his risk of recidivism, including the MnSOST-R and the Static-99); In re Detention of Holtz, 653 N.W.2d 613, 619 (Iowa Ct. App. 2002) ("the district court ably summed up the issues and was correct in determining the evidence concerning actuarial risk assessment instruments [**16] went to the weight the evidence should receive as opposed to the issue of admissibility"); Commonwealth v. Dengler, 2004 PA Super 38, 843 A.2d 1241, 1245 (Pa. Super. Ct. 2004) (such testimony is not subject to the Frye test because it does not involve "novel scientific evidence").

Having carefully considered the testimony presented to the trial court, scientific and legal writings and judicial opinions, we conclude that the state has carried its burden to demonstrate by the greater weight of the evidence that expert opinion testimony regarding propensity to commit acts of sexual violence in the future which is based in part on use of the RRASOR, Static-99 and MnSOST-R risk-assessment instruments satisfies the Frye test. Accordingly, we conclude, further, that the trial court correctly denied appellant's "Motion to Exclude Testimony Regarding Risk Prediction" and permitted the state's experts to testify regarding appellant's propensity to commit acts of sexual violence in the future. V.

Roeling v. State, 880 So. 2d 1234, 1239-1241 (Fla. 1st DCA 2004)

Jackson v. State, 833 So. 2d 243, 246 (Fla. App. 2002) (concluding that the trial court did not err by determining that the actuarial instruments used in that case were "generally accepted in the relevant scientific community as part of the overall risk assessment for sexual predators")

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- Risk assessment instruments such as Static-99, and MnSOST-R, admissible without necessity of Frye as generally accepted in profession.

- No bifurcation, court or jury makes determination of mental disorder and risk of reoffending.

- Key case on actuarial admissibility. People v. Erbe (In re Erbe), 344 Ill. App. 3d 350, 372 (Ill. App. Ct. 2003)

- Illinois 'Sexually Violent Persons Commitment Act' §725 ILCS 207/01 et al.

- Only one reported decision in the United States that has barred the use of actuarial instruments to predict recidivism. See Taylor, 335 Ill. App. 3d at 979-80, 782 N.E.2d at 932 (in which the Second District recently held that certain actuarial instruments did not satisfy the Frye standard), pet. for leave to appeal pending, No. 95657. The Taylor court based its conclusion, in large part, on the following: (1) the lack of significant peer review

of the instruments; (2) the existence of "significant controversy" surrounding the instruments; and (3) the existence of "frequent scoring inconsistencies by different evaluators." Taylor, 335 Ill. App. 3d at 978, 782 N.E.2d at 931.

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People v. Erbe (In re Erbe), 344 Ill. App. 3d 350, 372 (Ill. App. Ct. 2003) appeal denied 214 Ill. 2d 533, 830 N.E.2d 3, 2005 Ill. LEXIS 338, 294 Ill. Dec. 3 (2005)

Initially, we hold that the actuarial risk-assessment instruments used in this case do not purport to involve a scientific principle, method, or test to which Frye applies. One can then calculate the relative frequency with which sex offenders with those risk factors have reoffended and thus assess the probability that other sex offenders with the same risk factors will re-offend. The actuarial instruments merely help the professional draw inferences from historical data or the collective experience of other professionals who have assessed sex offenders for risks of reoffending. In this regard, the instruments are akin to actuarial tables for life expectancy admitted as evidence to a jury for the determination of the gross amount awarded for future pain and suffering or used by an economic expert to determine the present cash value of a pension. Such instruments simply do not constitute a special scientific principle, method, or test to which Frye applies. Even assuming that the Frye standard applies, we agree with the trial court that the use of actuarial risk-assessment instruments is generally accepted by professionals who assess sex offenders for risk of reoffending.First, 'general acceptance' does not concern the ultimate conclusion. Rather, the proper focus of the general acceptance test is on the underlying methodology used to generate the conclusion. If the underlying methods used to generate an expert's opinion are reasonably relied upon by the experts in the field, the fact finder may consider the opinion--despite the novelty of the conclusion rendered by the expert. [Citations.] Second, general acceptance of methodologies does not mean 'universal' acceptance of methodologies. *** 'In determining whether a novel scientific procedure is "generally accepted" in the scientific community, the issue is consensus versus controversy over a particular [***36] technique. *** Moreover, the mere existence of a dispute does not preclude a finding that the procedure is generally accepted.' [Citations; see] Frye, 293 F. at 1014 ('Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized'). Simply stated, general acceptance does not require that the methodology be accepted by unanimity, consensus, or even a majority of experts. A technique, however, is not 'generally accepted' if it is experimental or of dubious validity."

Nor should the mere fact that the actuarial instruments are controversial render them inadmissible under Frye. Any approach to predicting human behavior will be controversial--and frequently criticized--because the task is so complex and daunting. Yet, the law requires such predictions. If a psychiatrist or psychologist can predict a sex offender's likelihood of re-offending on the basis of a clinical examination, no logical reason exists why such a professional cannot at least consider actuarial instruments, which the profession widely uses and which are less subjective than unaided clinical judgment. Last, the Taylor court's concern with "frequent scoring inconsistencies by different evaluators" goes to the expert's application of the actuarial instruments, not to their general acceptance. Questions concerning an expert's application of a technique go to the weight of the evidence rather than its admissibility. As a final matter, we note that traditional methods, such as cross-examination and rebuttal witnesses, offered defendant the opportunity to challenge Buck's and Leavitt's opinions in the proper forum--that is, during trial in front of the trier of fact."vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

People v. Erbe (In re Erbe), 344 Ill. App. 3d 350, 372 (Ill. App. Ct. 2003) appeal denied 214 Ill. 2d 533, 830 N.E.2d 3, 2005 Ill. LEXIS 338, 294 Ill. Dec. 3 (2005)

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Turning now to the case at hand, we are asked to decide whether actuarial risk assessment, as utilized by Dr. Buck and Dr. Heaton, is admissible under Frye. The appellate court is sharply divided on this question. One view is represented by People v. Taylor, 335 Ill. App. 3d 965, 782 N.E.2d 920, 270 Ill. Dec. 361 (2002). In Taylor, as in the present case, the trial court held that the actuarial instruments at issue, including the MnSOST-R and the Static-99, were not scientific methodologies subject to Frye. Taylor, 335 Ill. App. 3d at 972. In reversing, the Second District of the appellate court first stated:

"Whether these tools are viewed as psychological tests or actuarial instruments, they certainly constitute a scientific methodology for predicting sexual offender recidivism. As such a methodology has yet to be adopted in a court proceeding in Illinois, the State was obligated to show that these instruments have gained acceptance in the relevant scientific community as required under Frye." [citations]

The next question became whether the State had met its burden of proving that actuarial risk assessment has gained general acceptance in the psychological and psychiatric communities. [citations]. The court held that it had not. Although the court conceded that "many psychologists and psychiatrists utilize these instruments to predict whether a sexual offender is likely to reoffend," the court remained convinced that "the instruments are still in the experimental stages and that the validity of these instruments has not been established." [citations]. The court was most concerned about the absence of published peer-reviewed studies concerning the validity of these instruments, as such studies "are important steps in the acceptance of a new methodology by the psychological community." [citations].

The opposite view is represented by [citations] in which the Fourth District held that (1) actuarial risk assessment is not a novel scientific method subject to Frye, and (2) even if it is, it meets the general acceptance test. In Erbe, the court methodically examined each step of the Frye inquiry, concluding at each step that testimony based upon actuarial risk assessment is admissible. First, the court held that actuarial instruments such as the MnSOST-R, the Static-99, and the VRAG "do not purport to involve a scientific principle, method, or test to which Frye applies." [citations]. Rather, these instruments " 'are simply actuarial tables-methods of organizing and interpreting a collection of historical data.' " [citations]. The court then explained that, even if actuarial risk assessment does constitute a scientific methodology, it still is not subject to Frye because actuarial science is not the least bit "new" or "novel." According to the court, "our society uses actuarial methods to predict human behavior all the time," particularly in relation to liability insurance and economics. Moreover, the court cited a study showing that, as early as 1928, the State of Illinois was using actuarial data to predict recidivism. Erbe, 344 Ill. App. 3d at 366, citing W. Grove & P. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy, 2 Psychol. Pub. Pol'y & L. 293, 293 (1996). Finally, the court held that, even assuming that Frye applies, actuarial risk assessment is generally accepted by professionals who assess sex offenders for risk of reoffending. The court emphasized that, of the numerous appellate decisions nationwide addressing the admissibility of actuarial instruments such as the MnSOST-R and the Static-99, only Taylor found them inadmissible. Erbe, 344 Ill. App. 3d at 368-72.

After careful consideration, we emphatically agree with Erbe's conclusion that, HN3whether or not actuarial risk assessment is subject to Frye, there is no question that it is generally accepted by professionals who assess sexually violent offenders and therefore is perfectly admissible in a court of law. As of this writing, experts in at least 19 other states rely upon actuarial risk assessment in forming their opinions on sex offenders' risks of recidivism. See State ex rel. Romley v. Fields, 201 Ariz. 321, 328, 35 P.3d 82, 89 (2001); People v. Therrian, 113 Cal. App. 4th 609, 614-16, 6 Cal.Rptr. 3d 415, 419-20 (2003); Roeling v. State, 880 So. 2d 1234, 1238-40 (Fla. App. 2004); In re Detention of Holtz, 653 N.W.2d 613, 619 (Iowa App. 2002); In re Care & Treatment of Teer, No. 89,652, slip op. at 3-4 (Kan. App. 2004) (unpublished order); Commonwealth v. Wright, 2004 Mass. Super. LEXIS 265, at *1, No. 032449A, (Mass. Super. 2004); In re Risk Level Determination of R.B.P., 640 N.W.2d 351, 353-56 (Minn. App. 2002); Goddard v. State, No. 25779, slip op. at 5 (Mo. App. 2004); State v. Legg, 2004 MT 26, 319 Mont. 362, 366, 84 P.3d 648, 651 (2004); Slansky v. Nebraska State Patrol, 268 Neb. 360, 370-75, 685 N.W.2d 335, 345-49 (2004); In re Commitment of R.S., 173 N.J. 134, 136-37, 801 A.2d 219, 220-21 (2002); People v. Girup, 9 A.D.3d 913, 780 N.Y.S.2d 698 (2004) (mem. op.); In re D.V.A., 2004 ND 57, 676 N.W.2d 776, 778-80 (N.D. 2004); State v. McKinniss, 153 Ohio App. 3d 654, 661-62, 2003 Ohio 4239, 795 N.E.2d 160, 165-66 (2003); State v. Gibson, 187 Or. App. 207, 214, [*536] 66 P.3d 560, 564-65 (2003); In re Care & Treatment of Tucker, 353 S.C. 466, 469, 578 S.E.2d 719, 721 (2003); In re Commitment of Morales, 98 S.W.3d 288, 291 (Tex. Ct. App. 2003); In re Detention of Thorell, 149 Wn. 2d 724, 753-56, 72 P.3d 708, 724-25 (2003); In re Commitment of Tainter, 2002 WI App 296, 259 Wis. 2d 387, 399, 655 N.W.2d 538, 544 (2002).

Significantly, eight of these states have directly addressed the Frye question and concluded either that Frye is inapplicable to actuarial risk assessment or that actuarial risk assessment satisfies the general acceptance standard. See Romley, 201 Ariz. at 328, 35 P.3d at 89 (Frye not applicable); Therrian, 113 Cal. App. 4th at 614-16, 6 Cal.Rptr. 3d at 419-20 (Frye not applicable); Roeling, 880 So. 2d at 1238-40 (general acceptance standard met); Holtz, 653 N.W.2d at 619 (general acceptance test met); Goddard, slip op. at 5 (general acceptance test met); R.S., 173 N.J. at 136-37, 801 A.2d at 220-21 (general acceptance test met); Thorell, 149 Wn. 2d at 753-56, 72 P.2d at 724-25 (general acceptance test met); Tainter, 259 Wis. 2d at 399, 655 N.W.2d at 544 (general acceptance test met). It is also worth noting that actuarial risk assessment is not exclusively an instrument of the State; experts for the offender rely upon it as well. See, e.g., People v. Calhoun, 118 Cal. App. 4th 519, 522-23, 13 Cal.Rptr. 3d 166, 168 (2004); In re Detention of Walker, 314 Ill. App. 3d 282, 290, 731 N.E.2d 994, 247 Ill. Dec. 221 (2000) (according to respondent's expert, "the research is very clear in stating that the most accurate predictions of the risk of future offenses are those based upon actuarial assessments of probability"); Legg, 319 Mont. at 366, 84 P.3d at 651; State v. Purser, 153 Ohio App. 3d 144, 150-53, 2003 Ohio 3523, 791 N.E.2d 1053, 1057-59 (2003); McKinnis, 153 Ohio App. 3d at 661-62, 795 N.E.2d at 165-66; Zimmer v. State, 2004 Tex. App. LEXIS 6180, at *6, No. 05-03-01253-CR (Tex. App. 2004) (unpublished order).

We recognize, of course, that "relying exclusively upon prior judicial decisions to establish general scientific acceptance can be a ' "hollow ritual" ' if the underlying issue of scientific acceptance has not been adequately litigated." [citations]. This is not a concern here, however, as the general acceptance of actuarial risk assessment has been thoroughly litigated in several states, as several of the above citations illustrate. In Roeling, for example, the court began by examining the testimony of the four expert psychologists who testified at trial: "All of the experts except the one offered by appellant testified that they use such instruments on a regular basis; that they are generally accepted among forensic clinical psychologists who evaluate persons alleged to be sexually violent predators, provided they are used in conjunction with a clinical assessment (as those testifying in appellant's case did); and that the use of risk-assessment instruments in conjunction with a clinical assessment was a superior method of

evaluating an individual to reliance on a clinical assessment alone. Even appellant's expert conceded that such instruments were being used 'with great frequency by people doing these evaluations'; and that an evaluation based on only a clinical assessment would at best be equal to (but no better than) a pure actuarial approach." Roeling, 880 So. 2d at 1239.Next, the court exhaustively examined the academic literature, which confirms that "the opinions relied upon by the trial court are *** consistent with conclusions reached by a number of other psychologists, including those who have developed the actuarial tools and conducted cross-validation and meta-analyses to confirm their reliability." Roeling, 880 So. 2d at 1239, citing J. Becker & W. Murphy, What We Know and Do Not Know About Assessing and Treating Sex Offenders, 4 Psychol. Pub. Pol'y & L. 116 (1998); D. Epperson, Cross-Validation of the Minnesota Sex Offender Screening Tool-Revised, ATSA Presentation, San Diego, CA (November 3, 2000); M. Grann, Actuarial Assessment of Risk for Violence: Predictive Validity of the VRAG and the Historical Part of the HCR-20, 27 Crim. Just. & Behav. 97 (2000); W. Grove & P. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy, 2 Psychol. Pub. Pol'y & L. 293 (1996); R. Hanson, What Do We Know About Sex Offender Risk Assessment?, 4 Psychol. Pub. Pol'y & L. 50 (1998); R. Hanson & D. Thornton, Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales, 24 L. & Hum. Behav. 119 (2000); R. Hanson & M. Bussiere, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies, 66 J. of Consulting & Clinical Psychol. 348 (1998); R. Hanson & A. Harris, Where Should We Intervene?: Dynamic Predictors of Sexual Offense Recidivism, 27 Crim. Just. & Behav. 6 (2000); R. Hare, Psychopathy and the Predictive Validity of the PCL-R: An International Perspective, 18 Behav. Sci. & L. 623 (2000); G. Harris, Appraisal and Management of Risk in Sexual Aggressors: Implications for Criminal Justice Policy, 4 Psychol. Pub. Pol'y & L. 73 (1998); M. Rice & G. Harris, Cross-Validation and Extension of the Violence Risk Appraisal Guide for Child Molesters and Rapists, 21 L. & Hum. Behav. 231 (1997). Lastly, the court surveyed the nationwide jurisprudence concerning the admissibility of expert testimony based in part upon the use of actuarial risk assessment. According to the court: "Not one court has held such testimony inadmissible as a matter of law. Rather, the debate has been over whether the testimony must pass the Frye test." Roeling, 880 So. 2d at 1239.Based on all of this information, the court ultimately concluded that HN4"expert opinion testimony regarding [*539] propensity to commit acts of sexual violence in the future which is based in part on use of the [RRASOR, Static-99 and MnSOST-R] risk-assessment instruments" satisfies the Frye test. Roeling, 880 So. 2d at 1239. n1

FOOTNOTES n1 Similarly thorough analyses can be found in the following decisions, all of which rely upon some combination of expert testimony, academic literature, and the nationwide jurisprudential consensus that clearly exists on this question: [citations]

As importantly, we were unable to identify any state outside of Illinois in which expert testimony based upon actuarial risk assessment was deemed inadmissible on the question of sex offender recidivism. In fact, in several jurisdictions actuarial risk assessment is mandated by either statute or regulation. In New York, for example, the Sex Offender Registration Act creates the Board of Examiners of Sex Offenders (the Board), which is charged with developing "guidelines and procedures to assess the risk of a repeat offense by [sex offenders] and the threat posed to the public safety." N.Y. Correct. Law§168-l(1), (5) (McKinney 2003). Such guidelines must be based upon certain risk factors specifically defined by the legislature. N.Y. Correct. Law§168-l(5) (McKinney 2003). In response to this mandate, the Board created an objective risk assessment instrument, which considers 15 risk factors and assigns a numerical value to the existence of certain circumstances regarding each specified factor. See People v. Salaam, 174 Misc. 2d 726, 729-30, 666 N.Y.S.2d 881, 883-84 (N.Y. Sup. Ct. 1997) (discussing history of the risk assessment instrument). These values are then totaled to arrive at the offender's presumptive risk level. Salaam, 174 Misc. 2d at 729-30, 666 N.Y.S.2d at 883-84.

Where the total score is 70 points or less, the offender is presumptively level one (low risk); more than 70 points but less than 110 points, he is presumptively level two (moderate risk); and if 110 points or more, he is presumptively level three (high risk). Salaam, 174 Misc. 2d at 729-30, 666 N.Y.S.2d at 883-84. Prior to the release of a convicted sex offender, a member of the Board calculates the offender's presumptive risk level and makes a recommendation to the original sentencing court. N.Y. Correct. Law§168-l (6) (McKinney 2003). The court then holds a risk assessment hearing to determine the offender's actual risk level, taking into the account the Board's recommendation as well as any additional evidence or testimony submitted by the parties. N.Y. Correct. Law§168-n (McKinney 2003).

A similar scheme exists in Minnesota, where the Sex Offender Community Notification Act (the Notification Act) directs the commissioner of corrections to create "end-of-confinement review committees" at each state facility where predatory offenders are confined. Minn. Stat.§ 244.052(3) (2004). The purpose of these committees is to "assess on a case-by-case basis the public risk posed by predatory offenders who are about to be released from confinement."Minn. Stat.§244.052(3) (2004). To assist the committees in discharging this mandate, the Notification Act also directed the commissioner of corrections to develop, by January 1, 1997, "a risk assessment scale which assigns weights to *** various risk factors *** and specifies the risk level to which offenders with various risk assessment scores shall be assigned." Minn. Stat.§ 244.052(2) (2004). The commissioner did so, and the result is the MnSOST-R. In re Risk Level Determination of R.B.P., 640 N.W.2d at 354. Using the MnSOST-R, the end-of-confinement review committees are statutorily required to assess predatory offenders who are about to be released from confinement and "determine the offender's risk assessment score and risk level." Minn. Stat.§244.052(3)(d)(i) [***30] (2004). An offender's risk level, which is subject to administrative review, ultimately determines the level of community notification that is required under the Notification Act. Minn. Stat.§§244.052(4)(b), (6) (2004). n2

FOOTNOTES n2 Other states that mandate the use of actuarial risk assessment include Alabama (Ala. Code§12-25-33(6) (2004) (directing sentencing commission to develop risk assessment instrument based on a study of Alabama felons)); Colorado (Colo. Rev. Stat.§18-3-414.5(1)(a)(IV) (2004) (defining "sexually violent predator" in terms of offender's results on risk assessment screening instrument)); Florida (Fla. Admin. Code R. 65E-25.001(2)(b) (2004) (mandating use of Static-99 in sexually violent predator evaluations)); Nebraska (Neb. Admin. Rs. & Regs. tit. 272, ch. 19,§§013.02, 013.07 (2004) (creating sex offender risk assessment instrument)); Nevada (Nev. Rev. Stat. Ann.§§179D.720(1), (2) (Lexis 2001) (directing attorney general to establish factor-based guidelines for assessing risk of sex offender recidivism); New Jersey (N.J. Rev. Stat.§2C:7-8(a) (2004) (directing attorney general to develop factor-based procedures for assessing risk of sex offender recidivism)); New Mexico (N.M. Stat. Ann.§9-3-13(D)(4) (Michie 2004) (directing sex offender management board to create a risk assessment screening tool); Oregon (Or. Admin. R. 255-060-0011(2004) (mandating use of Static-99 in predatory sex offender evaluations)); Rhode Island (R.I. Gen. Laws§11-37.1-6(1)(b) (Supp. 2003) (directing sex offender board of review to use a "validated risk assessment instrument" in sexually violent predator evaluations)); Texas (Tex. Crim. Proc. Code Ann. art. 62.035 (West Supp. 2004) (directing risk assessment review committee to "develop or select from among existing tools a sex offender screening tool")); and Virginia (Va. Code Ann.§37.1-70.4(C) (Lexis Supp. 2004) (directing department of corrections to evaluate sexually violent offenders using either the Rapid Risk Assessment for Sexual Offender Recidivism or "a comparable, scientifically validated instrument")).

Finally, we note that the academic literature contains many articles confirming the general acceptance of actuarial risk assessment by professionals who assess sexually violent offenders for risk of recidivism. In one article, the authors maintain that actuarial risk assessment "is a state-of-the-art technique, and courts should insist that it be employed as a major instrument of

risk [*542] assessment." E. Janus & R. Prentky, Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability, 40 Am. Crim. L. Rev. 1443, 1445 (2003). This same article notes that "respected researchers urge the 'complete replacement of existing practice with actuarial methods,' and suggest that the use of clinical methods, where actuarial ones are available, would be 'unethical.' " 40 Am. Crim. L. Rev. at 1485, quoting V. Quinsey, Violent Offenders: Appraising and Managing Risk 171 (1998); W. Grove & P. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy, 2 Psychol. Pub. Pol'y & L. 293, 320 (1996). The authors go on to explain: "The principle of actuarial superiority is not novel. *** It has been tested extensively, and has broad acceptance in the literature, both in general, and in the specific literature concerning sexual offending. Similarly, the science underlying ARA is not new. Statistical decision theory and its application to human judgment have been around for fifty years. The same methodology has been applied in numerous, diverse contexts, including weather forecasting, law school admissions, disability determinations, predicting the quality of the vintage for red Bordeaux wines, and predicting the quality of sound in opera houses." 40 Am. Crim. L. Rev. at 1486.Ultimately, the authors conclude that HN5"[risk] assessments should be conducted in the most scientifically credible and reliable fashion possible" and that "the weight of the evidence points to the superiority of actuarial assessment of risk over clinical assessment of risk." 40 Am. Crim. L. Rev. at 1498.

In another article, a board certified forensic and clinical psychologist describes actuarial risk assessment as "a quantum leap" in the science of violence risk analysis, noting [***33] that a combination of actuarial and clinical methods "is commonly advocated by leading forensic [*543] practitioners who routinely predict violence in the course of their forensic work." C. Mee & H. Hall, Risky Business: Assessing Dangerousness in Hawaii, 24 U. of Haw. L. Rev. 63, 92 (2001). Another forensic psychologist writes that "overall research has increasingly revealed that actuarial risk instruments*** exhibit more predictive reliability and validity than the clinical judgment of psychologists and psychiatrists alone" and that "in a wide variety of medical and social science studies, actuarial assessments consistently meet or surpass the accuracy of clinical assessments." J. Fabian, Kansas v. Hendricks, Crane and Beyond: "Mental Abnormality," and "Sexual Dangerousness": Volitional vs. Emotional Abnormality and the Debate Between Community Safety and Civil Liberties, 29 Wm. Mitchell L. Rev. 1367, 1434 (2003), citing N. Hilton & J. Simmons, The Influence of Actuarial Risk Assessment in Clinical Judgments in Tribunal Decisions about Mentally Disordered Offenders in Maximum Security, 25 L. & Hum. Behav. 394 (2001). More recently, the Static-99's creators, R. Karl [***34] Hanson & David Thornton, wrote that "Static-99 *** has been widely adopted as a measure of sex offense recidivism risk, with routine applications in jurisdictions as diverse as Sweden, Texas, and Taiwan." R. Hanson & D. Thornton, Notes on the Development of Static-2002, User Report No. 2003-01, Department of the Solicitor General of Canada (2003).

Taking all of this together-the case law, the statutory law, and the academic literature-we are more than convinced that HN6actuarial risk assessment has gained general acceptance in the psychological and psychiatric communities. We therefore hold that the trial court properly admitted the expert testimony of Dr. Buck and Dr. Heaton, which relied in part upon actuarial risk assessment.

CONCLUSION. Fore the foregoing reasons, the judgment of the appellate court is reversed, and the judgment of the circuit court is affirmed. Appellate court judgment reversed; circuit court judgment affirmed.

People v. Simons (In re Simons), 213 Ill. 2d 523, 543-544 (Ill. 2004)

ILLINOIS

In 1994, the State petitioned the trial court to find the respondent, Brian A. Vercolio, to be a sexually dangerous person (SDP) (725 ILCS 205/0.01 (West 1994)). The court adjudged the respondent to be an SDP and ordered him to be civilly committed.

In 2002, the respondent filed an application asking the trial court to find that he was recovered (725 ILCS 205/9 (West 2002)). At an evidentiary hearing, the court ruled that the proposed testimony of the State's expert witness met the standard for admissibility in Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923). At trial, a jury found that the respondent appeared no longer to be dangerous, but that it was impossible to determine with certainty under conditions of institutional care that he was fully recovered (725 ILCS 205/9 (West 2002)). Accordingly, the court ordered the respondent to be released under 53 enumerated conditions (725 ILCS 205/9 (West 2002)).

On appeal, the respondent argues that the trial court erred by ruling that the expert's proposed testimony met the Frye standard for admissibility because the expert relied on (1) the Minnesota7 Sex Offenders Screening Tool Revised (MnSOST-R) and the Static-99 actuarial risk assessment tools; and (2) 25 variables that the expert had developed for assessing the risk of recidivism among sex offenders. The respondent also contends that seven of the conditions imposed by the court for his release are excessive. We affirm in part and remand with directions.

BACKGROUND

The record shows that the respondent was found to be an SDP because of numerous acts of exhibitionism. On March 27, 2002, the respondent filed his application asking the trial court to find that he was recovered. On that date, the respondent also filed a demand that a sociopsychiatric report be prepared by the Department of Corrections (DOC) ([citations]).

FOOTNOTES n1 Neither Leavitt's evaluation nor Campbell's evaluation is included in the record.

Campbell testified that Carich had used 25 variables concerning treatment effectiveness to assess the respondent's risk of sex offense recidivism. Carich also had employed the MnSOST-R and the Static-99 actuarial risk assessment tools.

Campbell said that he used a 1998 study published by R. Karl Hanson and Monique T. Bussiere to assess Carich's 25 variables. Hanson and Bussiere had "identified different risk factors and the extent to which those factors are correlated with previously convicted sexual offenders committing new sexual offenses after they are released from confinement." Campbell criticized Carich's use of the 1996 version of the Hanson and Bussiere study because it was not subjected to peer review in the literature, but the 1998 version was peer reviewed.

Campbell testified about each of Carich's 25 variables. Concerning most of the variables, Campbell said that there was not a statistically significant correlation between the variables and a risk of recidivism, according to the 1998 Hanson and Bussiere study. Regarding other variables, Campbell stated that there was no support in peer-reviewed journals for using those variables to assess the risk of recidivism. Campbell said that one of Carich's variables combined four of Hanson and Bussiere's risk factors. Campbell asserted that Hanson and Bussiere had advised against combining their risk factors because "the correlations are too small" and "we don't know about the intercorrelations."

Campbell acknowledged that Leavitt's report stated that the Association for the Treatment of Sexual Abuse (ATSA) recognizes the variables used by Carich. Campbell asserted, however, that the ATSA recognized Carich's variables out of self-interest in promoting its professional agenda

rather than on the basis of scientific data.

Campbell testified that there were "major shortcomings" with Carich's reliance on the MnSOST-R. Campbell said that the only peer-reviewed article that assessed the MnSOST-R had reported that the MnSOST-R did not realize an acceptable level of predictive accuracy.

Campbell stated that the most comprehensive study of the Static-99 found that it moderately predicted recidivism risk. The study concluded that the Static-99 should not be used by itself to predict the risk of recidivism.

On cross-examination, Campbell said that he specializes in forensic psychology with several subspecialties within that specialty. He treated sex offenders in the past, but does not currently treat sex offenders. Campbell stated that he also does not assess the risk of sex offender recidivism because he does not believe that such assessments are accurate at this time.

Leavitt testified that he was familiar with Campbell's report concerning Carich's report. Leavitt disagreed with Campbell's reliance on the 1998 Hanson and Bussiere study to assess each of Carich's 25 variables individually. Leavitt then discussed each of Carich's 25 variables. He stated that the variables were supported by research in the professional literature and by the use of similar variables in recidivism risk assessment programs in other states.

Leavitt disagreed with Campbell's characterization of the ATSA as a biased, self-interest group. He submitted that the ATSA was a group of specialists who are knowledgeable about the field of sex offender recidivism assessment.

Leavitt said that the MnSOST-R and the Static-99 are actuarial risk assessment tools used by professionals in his field. He asserted that the debate about their use did not concern whether to use them but, rather, how they should be used. In summary, Leavitt stated that Carich's 25 variables, as well as the MnSOST-R and the Static-99, were accepted within the psychological community.

At the conclusion of the hearing, the trial court ruled that Carich's report met the standard for admissibility under Frye. The matter proceeded to a jury trial. The jury found that the respondent appeared no longer to be sexually dangerous, but that it was impossible to determine with certainty under conditions of institutional care that he was fully recovered.

The trial court then ordered the respondent to be released subject to 53 enumerated conditions. The respondent's motion for a new trial was denied, and he appealed.

ANALYSIS
I. Frye
A. MnSOST-R and Static-99
The respondent submits that the trial court erred by ruling that Carich's use of the MnSOST-R and the Static-99 met the standard for admissibility under Frye.
In In re Commitment of Simons, 213 Ill. 2d 523, 821 N.E.2d 1184, 290 Ill. Dec. 610 (2004), the Illinois Supreme Court ruled that HN1the MnSOST-R and the Static-99 meet the standard for admissibility under Frye. Therefore, we need not consider this argument further.

B. Carich's 25 Variables

The respondent contends that the trial court erred by ruling that Carich's reliance on 25 variables met the standard for admissibility under Frye.
HN2In Illinois, expert testimony is subject to admissibility under the standard first articulated in

Frye. [citations]. Under the Frye standard, scientific evidence is ftlineadmissible only if the methodology or scientific principle upon which the expert's opinion is based has gained general acceptance in that particular scientific field. [citations]. General acceptance, in this context, does not mean universal acceptance, acceptance by consensus, or acceptance by a majority of experts in the field. [citations]. Instead, general acceptance means that the underlying methodology used to generate the expert's opinion is reasonably relied upon by experts in the field. [citations]. HN3A trial court's ruling concerning whether testimony is admissible under the Frye standard is subject to de novo review. [citations].

In this case, Campbell concluded that Carich's 25 variables were not reliable for a variety of reasons. However, he testified that the ATSA recognizes the use of Carich's variables in assessing the risk of sex offender recidivism, even though he disagreed with the ATSA for doing so.
Leavitt also stated that Carich's variables were accepted by the ATSA. He said that similar variables were used by other states in sex offender recidivism risk assessments. Leavitt concluded, therefore, that Carich's variables are generally accepted within the field. Because the trial court heard testimony that Carich's variables are generally accepted within the field, we cannot say that the trial court erred as a matter of law by ruling that Carich's proposed testimony, based on his report, met the Frye standard for admissibility.

People v. Vercolio, 363 Ill. App. 3d 232, 236-237 (Ill. App. Ct. 2006) rehearing denied 2006App. LEXIS 205 (Ill. App. Ct. 3d Dist. Feb. 15, 2006)

ILLINOIS
Prior to Simons, the appellate courts had taken one of two approaches in dealing with actuarial risk assessments. See People v. Taylor, 335 Ill. App. 3d 965, 782 N.E.2d 920, 270 Ill. Dec. 361 (2002) (actuarial risk assessment was a scientific methodology which the State was required to prove had gained acceptance in the relevant scientific community); but see In re Detention of Erbe, 344 Ill. App. 3d 350, 800 N.E.2d 137, 279 Ill. Dec. 295 (2003) (actuarial risk assessment was not a novel scientific method subject to Frye and even if it was, it was generally accepted). In Simons, our supreme court agreed with the conclusion in Erbe and held that, HN8whether or not an actuarial risk assessment is subject to Frye, there was no question that it is generally accepted by professionals who assess sexually violent offenders and therefore is perfectly admissible in a court of law. Simons, 213 Ill. 2d at 535. As the court noted, "experts in at least 19 other states rely upon actuarial risk assessment in forming their opinions on sex offenders' [***26] risks of recidivism." Simons, 213 Ill. 2d at 535.

The State argues that the J-SOAP-II is an actuarial scale and therefore not subject to Frye. However, according to the 2003 J-SOAP-II manual, the J-SOAP-II "is a checklist" to aid in the review of risk factors identified in the professional literature as associated with sexual and criminal offending. The manual further provides: "Although our goal is to provide the user with probabilistic estimates of risk for sexual recidivism, we still do not have adequate data on a sufficiently large number of juvenile sexual reoffenders to provide such estimates. Thus, at the present time, J-SOAP-II is not an actuarial scale. J-SOAP is an empirically informed guide for the systematic review and assessment of a uniform set of items that may reflect increased risk to reoffend." (Emphasis in original.) R. Prentky & S. Righthand, Juvenile Sex Offender Assessement Protocol-II (J-SOAP-II) Manual, at 8 (2003).

Nonetheless, even if the trial court erred in failing to hold a Frye hearing, any error was harmless. [citations](any error in failing to conduct a Frye hearing harmless where the evidence established that the actuarial assessment-risk instruments were generally accepted by professionals who assess sex offenders). In Stevens, the court noted that HN9"' [v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of

proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" Stevens, 345 Ill. App. 3d at 1061, quoting Daubert, 509 U.S. at 596, 125 L. Ed. 2d at 484, 113 S. Ct. at 2798.

According to Ms. Vitale, her methods of evaluation, which included but were not limited to the J-SOAP-II, were generally accepted in the community of trained clinicians, including psychologists and psychiatrists, who evaluate juvenile sex offenders. The respondent conducted a vigorous cross-examination of Ms. Vitale in which she acknowledged that the J-SOAP II had not been validated yet.
Finally, even if the respondent had prevailed at a Frye hearing and barred the admission of the J-SOAP-II, we are satisfied that the result in this case would have been the same.

[citations] (erroneous admission of actuarial instruments was harmless error where evidence unrelated to those instruments supported the opinions of the State's experts).

People v. Darren M. (In re Darren M.), 368 Ill. App. 3d 24, 37 (Ill. App. Ct. 2006)

IOWA

- Iowa Code chapter 229A.1-.16 (2003) Commitment of Sexually Violent Predators
- In re Det. of Reinlasoder, 2007 Iowa App. LEXIS 1339, 2-3 (Iowa Ct. App. 2007)[Static-99 admissible]
- State v. Palmer (In re Palmer), 691 N.W.2d 413, 423 (Iowa 2005)[admission of Dr. Anna Salter's testimony]

- Probable cause hearings
- Right to jury trial which determines both mental abnormality/disorder and dangerousness
- State not required to demonstrate when in the future respondent is likely to re-offend

Iowa Code§229A

4. "Likely to engage in predatory acts of sexual violence" means that the person more likely than not will engage in acts of a sexually violent nature. If a person is not confined at the time that a petition is filed, a person is "likely to engage in predatory acts of sexual violence" only if the person commits a recent overt act.

5. "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity of a person and predisposing that person to commit sexually violent offenses to a degree which would constitute a menace to the health and safety of others.

Iowa Code§229A

5. At trial, the court or jury shall determine whether, beyond a reasonable doubt, the respondent is a sexually violent predator. If the case is before a jury, the verdict shall be unanimous that the respondent is a sexually violent predator.

If the court or jury determines that the respondent is a sexually violent predator, the respondent shall be committed to the custody of the director of the department of human services for control, care, and treatment until such time as the person's mental abnormality has so changed that the person is safe to be placed in a transitional release program or discharged. The determination may be appealed.

IOWA

Dr. Raymond Quackenbush, a psychologist, assessed whether Reinlasoder met the criteria for

commitment as a sexually violent predator under Iowa Code chapter 229A (2005). Dr. Quackenbush diagnosed Reinlasoder with pedophilia, paraphilia (not otherwise specified), and a personality disorder. Dr. Quackenbush applied the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR), the Static-99, and the Minnesota Sex Offender Screening Tool, Revised (MnSOST-R). He also performed a clinical interview. Dr. Quackenbush gave the opinion Reinlasoder was likely to commit future acts of a sexually violent nature.

The State filed a petition seeking to have Reinlasoder committed as a sexually violent predator. During the trial, Dr. Quackenbush testified: In my opinion based on the actuarial risk assessments, based also on my clinical interview and his history, I think that he is very likely to commit future acts of sexual violence. He has in the past, over a 22-year period, sexually molested children. He most recently offended three years ago so it's not-it's not behavior that is far in his past, and he has been incarcerated during that period, say, as he had access to children. He has had some sex offender treatment and this did not stop him from continuing his behavior. He continued with it after [*3] he had the treatment. In my opinion, he is very likely to continue this behavior.

The defense presented the testimony of Dr. Richard Wollert, who testified Reinlasoder was not likely to reoffend during the next five years. A jury found Reinlasoder was a sexually violent predator. He now appeals.

III. Sufficiency of the Evidence

A. HN3Section 229A.2(11) defines a "sexually violent predator" as a person "who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility." The phrase "likely to engage in predatory acts of sexual violence" means a person "more [*4] likely than not will engage in acts of a sexually violent nature." Iowa Code§229A.2(4).

Reinlasoder contends there is not sufficient evidence in the record to show he is more likely than not to reoffend. Dr. Quackenbush testified he used guided clinical judgment, which was a clinical interview plus consideration of actuarial instruments, to reach the conclusion Reinlasoder was very likely to reoffend. On cross-examination, Dr. Quackenbush testified: Q. And when I asked you how reliable guided clinical judgment was you testified that you would assume that guided clinical judgment was better than chance. Do you recall giving that testimony? A. Well, yes. Unaided clinical judgment has been shown to be slightly better than chance, and adding actuarials to that has been shown to be even better. Reinlasoder asserts Dr. Quackenbush's opinion is not entitled to any weight because his method of assessment was only "slightly better than chance."

Contrary to Reinlasoder's assertion, Dr. Quackenbush did not state his method was only "slightly better than chance." He stated unaided clinical judgment alone was slightly better than chance, and by adding actuarial instruments, his assessment was even [*5] better. Dr. Quackenbush also stated that his method was the best method available. We determine Dr. Quackenbush's opinion provides substantial evidence to show Reinlasoder was more likely than not to reoffend.

B. Reinlasoder also contends the State did not present sufficient evidence to show he was likely to engage in sexually violent predatory acts at the time of commitment. Reinlasoder relies on this statement: The language of chapter 229A clearly indicates by its use of the present tense that an individual must be both dangerous and possess a mental abnormality that makes the individual likely to engage in sexually violent predatory acts at the time of commitment. In re Detention of Selby, 710 N.W.2d 249, 253 (Iowa Ct. App. 2005). He asserts the State was required to show he was likely to reoffend at the time of commitment.

In Selby, the respondent complained that his lifetime risk to reoffend should not be presented at trial, and the court of appeals specifically stated it would not address that issue. Selby, 710 N.W.2d at 253-54. We conclude Selby does not support Reinlasoder's claim the State is required to present evidence he was likely to reoffend at the time of commitment.

HN4The [*6] Iowa Supreme Court has stated that section 229A.2(4) does not include a time frame as to when future acts of a sexually violent nature should be expected to occur. In re Detention of Ewoldt, 634 N.W.2d 622, 624 (Iowa 2001). The court stated, "we are convinced that the legislature did not intend to impose a burden upon the State to prove that alleged sexual predators are expected to reoffend within a specific time period, particularly a relatively short, one-year time period." Id. We conclude the State was not required to show Reinlasoder was more likely than not to engage in acts of a sexually violent nature at the time of commitment. The State sufficiently showed Reinlasoder was likely to engage in such acts in the future.

We affirm the determination Reinlasoder was a sexually violent predator. AFFIRMED.

In re Det. of Reinlasoder, 2007 Iowa App. LEXIS 1339, 2-3 (Iowa Ct. App. 2007)

IOWA

In re Det. of Wilson, 2007 Iowa App. LEXIS 1333 (Iowa Ct. App. 2007)

On June 7, 2006, the State filed a petition under Iowa Code section 229A.4(1) (2005) seeking the commitment of Mark Wilson as a sexually violent predator. At Wilson's civil commitment trial, the State introduced the videotaped testimony of psychologist Dennis Doren, who opined that Wilson suffers from a mental condition that predisposes him to commit sexually violent acts and is more likely than not to reoffend if not confined in a secured facility. Over Wilson's relevancy objection, see Iowa R. Evid. 5.401, Doren testified that in classifying Wilson's risk of reoffending he considered, among other things, three actuarial risk assessments.

Specifically, Doren testified that according to the RRASOR test Wilson shared [*2] characteristics with others who had a five-year reconviction rate of fifty percent and a ten-year reconviction rate of seventy-three percent. He further noted that according to the Static-99 risk assessment, Wilson's score correlated to a five-year reconviction rate of thirty-seven percent, a ten-year rate of forty-five percent, and a fifteen year rate of fifty-two percent. Finally, he testified that pursuant to the MnSOST-R tool, Wilson's score associated with a six-year rearrest rate of twenty-one percent.

On appeal, Wilson claims these risk assessments were irrelevant and unfairly prejudicial. n1 HN1We review rulings on the admissibility of opinion evidence for an abuse of discretion. In re Detention of Palmer, 691 N.W.2d 413, 416 (Iowa 2005). The decision of a trial court concerning the admissibility of evidence will only be overturned upon a showing that discretion was exercised "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Rodriquez, 636 N.W.2d 234, 245 (Iowa 2001).

FOOTNOTES n1 The State asserts error was not preserved as the relevancy objection was not ruled upon by the district court. The objections were made during the deposition and the court [*3] was alerted to them at trial. While not directly ruled upon by the district court, it is apparent in the court's finding of facts that the testimony was admitted.

In a previous case, we rejected reliability and trustworthiness challenges in finding no abuse of discretion in the admission of these very same risk assessment tools. In In re Detention of Holtz,

653 N.W.2d 613, 619 (Iowa Ct. App. 2002), this court determined the evidence concerning these actuarial risk assessment instruments went to the weight the evidence should receive as opposed to the issue of admissibility. However, Wilson's specific challenge to the assessments in this case is not that they are unreliable or not actuarially valid, but rather that they impermissibly measure reoffense rates far into the future. He argues [r]isk assessment rates for sex offenders for periods of time five years and longer have no bearing on dangerousness at the time of the commitment. They do not make the existence of any fact that is of consequence to the determination of whether Wilson is a sexually violent predator more or less probable.

We conclude the risk assessments in question were relevant to the essential question of whether [*4] Wilson is more likely than not to commit a sexually violent offense if he is not confined in a secured facility. As an initial matter, here, like in Holtz, the assessments were merely part of a larger clinical analysis that took into account a variety of other factors. See Holtz, 653 N.W.2d at 619 ("The instruments were used in conjunction with a full clinical evaluation and their limitations were clearly made known to the jury."). Doren testified that because the actuarial risk assessments are not "fully comprehensive . . . he looked beyond them with a combination of risk factors . . ., protective factors, and . . . other clinical considerations."

Furthermore, in In re Detention of Ewoldt, 634 N.W.2d 622, 624 (Iowa 2001), the supreme court held that the legislature did not impose a burden upon the State to prove that alleged sexual predators are expected to reoffend within a specific time period, particularly a relatively short, one-year time period. It rejected requests that the court place a temporal restriction on the question of when the future acts should be expected to occur. Ewoldt, 634 N.W.2d at 624. Also, in In re Detention of Selby, 710 N.W.2d 249, 253 (Iowa Ct. App. 2005), [*5] this court rejected a claim that chapter 229A is unconstitutional simply because it does not provide an explicit time frame for the adjudication of dangerousness.

We acknowledge that HN2in order to support a civil commitment, an individual "must be both dangerous and possess a mental abnormality that makes the individual likely to engage in sexually violent predatory acts at the time of commitment." Id. (emphasis added). However, we believe the actuarial instruments, while measuring future reconviction rates, assisted in understanding this essential question. Doren's expert testimony made clear that the instruments assisted his understanding of this issue, in conjunction with many other factors, including Wilson's current high degree of psychopathy and sexual deviance. n2

FOOTNOTES n2 Doren testified Wilson suffers from, among other things, pedophilia, exhibitionism, and antisocial personality disorder.

The evidence of future reconviction rates measured in the challenged instruments compared Wilson to a group of people with shared characteristics or who have been rearrested within a specified time period. According to Doren, they informed him of "characteristics that related to risk of the individual" [*6] and to his risk of reoffense if not confined in a secured facility. The Code requires the State to prove he "is more likely than not to reoffend . . . ." It would be impossible for the State to present evidence, as Wilson would like, that would assess his risk of reoffending immediately upon release. However, as the State's expert testified, these forward-looking predictors were relevant to his current risk to reoffend. We thus agree their relevancy was established. The court did not abuse its discretion in allowing their admission. AFFIRMED.

In re Det. of Wilson, 2007 Iowa App. LEXIS 1333 (Iowa Ct. App. 2007)

IOWA

A person is "likely to engage in predatory acts of sexual violence" if "the person more likely than not will engage in acts of a sexually violent nature." Id.§229A.2(4).

At trial, [*3] this case could be described as a simple battle of the experts. On behalf of the State, Dr. Caton Roberts testified generally that Triplett was more likely than not to reoffend if not confined and that he meets the statutory definition of a sexually violent predator. On the other hand, Triplett's expert, psychologist Robert Prenky, opined that Triplett was not likely to reoffend. In light of this directly contradictory testimony, we would generally defer to the jury's assessment of those two experts. See In re Detention of Barnes, 689 N.W.2d 455, 461 (Iowa 2004) ("Because the issue essentially turned on a judgment of credibility of two experts with different opinions, we give weight to the district court's judgment."); State v. Fetters, 562 N.W.2d 770, 775 (Iowa Ct. App. 1997) ("When the psychiatric testimony is conflicting, the reviewing court will not determine anew the weight to be given trial testimony.").

However, Triplett argues that Dr. Roberts' conclusion is based on "speculation or conjecture" and not even supported by the studies cited by him. It is true that two of the actuarial instruments employed by Dr. Roberts to assess Triplett's likelihood to reoffend, the Static-99 [*4] and the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR), indicated he was a low risk to reoffend. Roberts testified that these tools have predictive validity and are widely used. However, he further testified Triplett possesses additional conditions "that aren't accounted for by the actuarial" tests, and which caused him to elevate Triplett's risk potential beyond that indicated by the two tests. He opined that Triplett exhibits a sexual deviance along with a psychopathy, and that an individual with both of these personality traits has a high probability of reoffending.

Considered in a light most favorable to the State, we find substantial evidence supports the jury's determination that Triplett is more likely than not to commit a predatory offense if not confined to a secured facility. While the evidence was in conflict and a reasonable juror certainly could have accepted Triplett's evidence, it chose not to. We do not interfere with such decisions.

Triplett also asserts the court erred in admitting evidence that he "failed to [*6] complete a sex offender treatment and would be unsupervised if not committed . . . ." He claims the fact he did not complete such treatment has no effect on his risk of reoffending. We find the court's ruling on this evidentiary question was well within its discretion. When asked about Triplett's lack of treatment, Dr. Roberts testified that the completion and integration of treatment are factors he uses in assessing the risk of reoffense. Specifically, he testified that research has shown that those individuals who have completed treatment "are at a lower risk than they would be otherwise." In addition, because Triplett had not completed the treatment, Dr. Roberts "could not reduce [Triplett's] risk in [his] mind." Moreover, Dr. Roberts testified that in his risk assessment he looks to "what level of supervision by correctional persons" an individual will have in the future. Because both of these lines of questioning were relevant, the court did not abuse its discretion in allowing them.

In re Det. of Triplett, 2007 Iowa App. LEXIS 1197 (Iowa Ct. App. 2007)

IOWA

B. Discussion. Scott first contends the jury's [*7] finding that he is predisposed to commit sexually violent offenses is not supported by substantial evidence. HN2Pursuant to Iowa Code section 229A.2(11), a sexually violent predator is a person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility. HN3In order to prove that Scott had a "mental abnormality," the State had to prove that his condition "predispos[es] [him] to commit sexually violent offenses to

a degree which would constitute a menace to the health and safety of others." Iowa Code§ 229A.2(5). Antisocial personality disorder can be a mental disorder that predisposes an individual to commit sexually violent offenses to a degree that would constitute a menace to the health and safety of others, and thus may serve as the basis for civil commitment under chapter 229A. In re Det. of Barnes, 689 N.W.2d 455, 458 (Iowa 2004).

Scott asserts that because his disorder causes him to commit crimes "predominantly non-sexual in nature," he is not predisposed to commit sexual offenses in particular and [*8] his sexual offending was the exception rather than the rule. While it is true that Scott has committed many more non-sexual than sexual crimes during his lifetime, the Iowa Supreme Court in State v. Altman, 723 N.W.2d 181, 185 (Iowa 2006), concluded that HN4the mental abnormality required under section 229A.2(5) does not require a person's "risk to be primarily sexual in nature." Rather, the definition of "mental abnormality" is focused on the likelihood that the respondent will commit a sexual offense. Altman, 723 N.W.2d at 185. Based primarily on the results of three tests n3 Dr. Doren administered on Scott, he concluded that Scott was likely to commit another sex offense within five years. n4 We conclude that the jury's finding that Scott is predisposed to commit another sexually violent offense is supported by substantial evidence.

FOOTNOTESn3 The RRASOR (Rapid Risk Assessment for Sex Offense Recidivism), the MnSOST-R (Minnesota Sex Offender Screening Tool-Revised), and the Static-99.

n4 The Static-99 test showed a 39 percent chance that Scott would be convicted of a sex crime within the next five years. Dr. Doren testified that risk of arrest, compared to the risk of reconviction, was 1.25 to 1.5 [*9] higher than the risk of reconviction. He then testified that the risk of rearrest underestimates the risk of committing an offense. Based on these statistics, he concluded that even a conservative viewpoint makes it more likely than not Scott will commit another sex offense within five years.

Scott also contends sufficient evidence did not support the jury's finding that he was likely to engage in predatory acts if not confined, especially due to his poor physical condition. Scott suffers from a number of health ailments. He has type II diabetes, is morbidly obese, and has hypertension and an enlarged heart. Additionally, he lost his left leg in a motorcycle accident in 1992. n5 Despite these conditions, however, Dr. Doren testified that Scott's likelihood of committing another sexual offense was not sufficiently diminished. Although Dr. Rypma reached a contrary conclusion, HN5"it was for the jury to decide which of the experts was more credible . . . and whose opinion . . . the jury would accept." Altman, 723 N.W.2d at 185 (quoting Mercy Hosp. v. Hansen, Lind & Meyer, P.C., 456 N.W.2d 666, 672 (Iowa 1990)). We conclude Dr. Doren's opinion that Scott would likely reoffend sexually in the [*10] future was sufficient to distinguish the respondent from the typical criminal recidivist. Therefore, the district court did not err in denying Scott's request for judgment notwithstanding the verdict.

In re Det. of Scott, 2007 Iowa App. LEXIS 1124, 7-10 (Iowa Ct. App. 2007)

IOWA

Some of the evidence presented by Dr. Roberts showed that Harless's lifetime risk to reoffend is 52%. Our HN3courts have rejected the argument that Chapter 229A is unconstitutional because it [*9] permits commitment based on an estimation of lifetime risk, rather than a temporal risk, of reoffending. In re Detention of Selby, 710 N.W.2d 249, 253 (Iowa Ct. App. 2005). Thus, it was reasonable for the jury to consider Harless's likelihood to reoffend over the remainder of his life.

Some factors presented to the jury might suggest the 52% likelihood of lifetime reoffending was high. These include Harless's age at the time of trial (fifty-four), and the symptoms and

prognosis of his systemic scleroderma. However, there were also several factors which would suggest the 52% was low. These include the fact that since his first conviction for a sexual offense there has not been a period of time of more than a few months where he has been free and he did not reoffend, as well as his failure to complete a structured sexual offender program.

Perhaps the most compelling evidence presented that the 52% likelihood to reoffend was low was that the actuarial instruments used by Dr. Roberts actually measure recidivism by using rates of reconviction for sexual offenses rather than using rates of reoffending. As Dr. Roberts pointed out, the percent of sex offenders who [*10] reoffend is no doubt higher than the percent who are reconvicted, and thus the figures generated by use of the actuarial instruments no doubt underestimate the likelihood of reoffense. It would seem intuitive, although unfortunate, that there are sex offenses committed which do not result in a conviction, a charge, or even a report, including sex offenses committed by prior offenders. Thus, based on the evidence presented it was reasonable for the jury to determine a 52% likelihood of Harless to reoffend over his lifetime was a reasonable, or perhaps even low estimate.

Furthermore, despite Harless's assertion to the contrary, Dr. Roberts did consider many factors in forming his opinion of Harless's risk to reoffend. While it is true Roberts did take into account the results of the actuarial instruments, he testified he also considered Harless's criminal history and the fact Harless had never completed a structured treatment program for sex offenders. He further stated he considered other situational or circumstantial factors, including Harless's scleroderma, but opined that condition would not prevent him from reoffending, particularly because Harless had used weapons in some of his [*11] past offenses and would still be able to do so, although with more difficulty

In re Det. of Harless, 2007 Iowa App. LEXIS 66, 10-11 (Iowa Ct. App. 2007)

IOWA

Iowa has abandoned the test found in Frye v. United States, 54 App. D.C. 46, 293 F. 1013, 1014 (D.C. Cir. 1923), that requires a scientific test to be generally accepted as reliable within the scientific community to be admissible. We have, however, retained the rationale of the Frye test that evidence, scientific or otherwise, must be reliable to be admitted. Williams, 561 N.W.2d at 823. A threshold finding of reliability is necessary because unreliable evidence [*9] cannot assist a trier of fact. Williams, 561 N.W.2d at 822; State v. Klindt, 389 N.W.2d 670, 672 (Iowa 1986).

In Holtz we affirmed the district court in admitting actuarial risk assessment instruments, including the RRASOR and Static-99. Holtz, 653 N.W.2d at 616. The Holtz decision holds that these types of instruments are admissible when certain conditions are met. Id. at 619. In order to be admissible it must be made clear to the jury that the instruments have limitations and are not an end-all in evaluating offenders. Id. Additionally, the use of the instruments should be accompanied by a full clinical evaluation. Id. Under those conditions, we held it was not an abuse of discretion for the district court to admit the evidence of the instruments. It was also noted in Holtz that no state appellate court has found actuarial risk assessment instruments inadmissible in sexually violent predator civil commitment proceedings. Id. at 619. In the present case the instruments were not used as the "end-all" in evaluating Shearer and use of the instruments was accompanied by a full clinical [*10] evaluation. We cannot say the district court abused its discretion; we affirm on this issue.

Evidence of Underestimation by Actuarial Risk Assessment Instruments.

Shearer's next allegation of error is that evidence concerning undetected recidivism due to sex offenses going unreported and lifetime risk of recidivism was not reliable and, thus, the district

court erred in admitting such evidence over defense objections. The assumption used by the experts at trial was that in order for it to be more likely than not Shearer would engage in acts of a sexually violent nature, the likelihood must have been greater than fifty percent. The RRASOR placed Shearer's recidivism rate at 48.6% over a ten-year period following his release from custody, and the Static-99 placed Shearer's recidivism rate at forty percent over a fifteen-year period following his release from custody. The State's expert testified that in reaching his conclusion that it was more likely than not that Shearer would reoffend, he believed the actuarial instruments underestimate the likelihood of reoffense because they are based only on convictions and there are more sex offenses than there are convictions and because [*11] the instruments only measure a limited time period and not lifetime risk.
Shearer argues the State expert's opinions as to actual recidivism and lifetime risk are based solely on speculation and conjecture and there is no scientific foundation for such opinions. As support for this position, Shearer points out that the State expert could not give a specific figure as to how much he believed Shearer's likelihood of recidivism suggested by the actuarial instruments was raised by these factors. The State expert indicated that "there isn't a good way of evaluating [how much undetected recidivism should raise the overall likelihood of recidivism] at this point in time." The State expert stated that one prominent researcher in the field suggests the likelihood of underestimation by the instruments should only raise the rate a "small amount," while another prominent researcher suggests the instruments so underestimate recidivism that "he would triple" the rates. Additionally, in pretrial hearings an expert retained by Shearer indicated that there is no empirical authority for bridging that gap from forty percent to more likely than not by virtue of underestimation of sex offense recidivism [*12] by the instruments. The defense expert stated that in such a case the evaluator "would be using clinical judgment, and ultimately that evaluator under those circumstances would be resorting to wholesale guesswork and speculation disguised with a nice term called 'clinical judgment.'" The defense expert further testified that there are too many unknown factors to successfully predict recidivism after the fifteen-year window. Therefore, Shearer argues evidence that the actuarial instruments underestimate recidivism was unreliable and should not have been admitted.

In re Det. of Shearer, 2006 Iowa App. LEXIS 34, 9-12 (Iowa Ct. App. 2006)

KANSAS

- Right to jury but not bifurcated.
- Indirect reference in appellate court to use of actuarial instruments, affirmed.
- Leading United States Supreme Court cases on civil confinement came out of the Kansas cases; Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (5-4 decision); Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867, **;151 L. Ed. 2d 856, ***; 2002 U.S. LEXIS 493 (U.S. 2002).
- Kansas Sexually Violent Predator Act (KSVPA), K.S.A. 59-29a01 *et seq.*
- (a) "Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.

  (b) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

  (c) "Likely to engage in repeat acts of sexual violence" means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others. K.S.A.§59-29a02
- The court or jury shall determine whether, beyond a reasonable doubt, the person is a

sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury. Such determination may be appealed. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services. K.S.A.§59-29a07

KANSAS

There are four elements of proof necessary to establish that an individual is a sexually violent predator as provided by K.S.A. 59-29a02(a): (1) The respondent has been convicted of or charged with a sexually violent offense, (2) the respondent suffers from a mental abnormality or personality disorder, (3) the mental abnormality or [*7] personality disorder makes the respondent likely to commit repeat acts of sexual violence, and (4) the respondent has serious difficulty controlling his or her dangerous or sexually deviant behavior. See PIK Civ. 3d 130.20.

In the present case, Dahl stipulated to the first element--that he had been convicted of two counts of indecent liberties with a child between the ages of 14 and 16.

With regard to the second and third elements, Dr. Kinlen diagnosed Dahl with paraphilia NOS, more specifically described as hebephilia, and opined that combined with other factors, this mental abnormality made it likely that Dahl would reoffend. Dr. Kinlen testified that Dahl had demonstrated a life-long pattern as an adult of episodes of sexual behavior with minors, including at least five underage male victims and a "victim template" for males between the ages of 12 to 16. Although Dahl scored a moderate to low likelihood of reoffending on two actuarial assessments, Dr. Kinlen noted his opinion was partly based on other factors, including Dahl's alcoholism, prior sexual episodes with siblings and other underage boys, his cross-dressing fetish, and zooaphilia. In a high-risk situation of being alone [*8] with someone that fit Dahl's victim template and engaging in sexual conversation, Dr. Kinlen believed these behaviors would result in a likelihood that Dahl would repeat acts of sexual violence.

Dahl's defense psychologist, Dr. Robert W. Barnett, countered the State's assessment. Dr. Barnett attacked Dr. Kinlen's testing methods and conclusions, specifically pointing out that hebephilia is a "made up diagnosis." Dr. Barnett conceded, however, that paraphilia NOS was a recognized mental abnormality and that hebephilia was a descriptor, even though he reiterated that it was not in the DSM-IV. In essence, Dahl attacks the sufficiency of this evidence by arguing that Dr. Kinlen's expert opinions were not as credible as Dr. Barnett's opinions. This is a credibility determination or an attempt to have the appellate court reweigh evidence, which is beyond the purview of this court. State v. Corbett, 281 Kan. 294, 310, 130 P.3d 1179 (2006). Finally, Dahl challenges the fourth element of K.S.A. 59-29a02, that he has serious difficulty controlling his dangerous or sexually deviant behavior. Dahl argues that because the experts classified him as an opportunistic offender rather than a stalking predator, [*9] there was no evidence that he was a danger to society. Dahl further asserts that because he could manage his situation, evidence demonstrated he could nullify the opportunity to reoffend. To the contrary, Dr. Kinlen opined that based on Dahl's sexual history and troubling behaviors, it was his opinion that Dahl had serious difficulty controlling his sexually deviant behavior which was dangerous to others. Records from the sex offender treatment program also indicated that Dahl's prognosis was "poor."

In re Dahl, 2007 Kan. App. Unpub. LEXIS 72, 8-9 (Kan. App. Unpub. 2007)

MASSACHUSETTS

- Actuarials, Static-99 and MnSOST-R, admissible at probable cause hearing
- Note Abel Assessment for Sexual Interest (AASI) not admissible as not meet Frye/Daubert, and not relevant.
- No bifurcation. If jury finds the jury finds unanimously and beyond a reasonable doubt that the person named in the petition is a sexually dangerous person, such person shall be committed to the treatment center.

At the probable cause hearing, the Commonwealth has the burden to prove, using the aforementioned standard, three elements in order for Mr. Wright to be found a sexually dangerous person: (1) that he has been convicted of a "sexual offense," as that term is defined under the statute; (2) that he suffers from a mental abnormality or personality disorder; and (3) that the mental abnormality or personality disorder makes him likely to engage in further sexual offenses if not confined [*3] to a secure facility. There can be no serious dispute that the Respondent has previously been convicted of more than one "sexual offense" so that the Commonwealth has clearly established beyond a reasonable doubt the first element necessary for the SDP determination.

I accept the testimony of the expert, Doctor Kelso, that Mr. Wright suffers from pedophilia, a mental abnormality. The statute defines a mental abnormality as HN4"a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons." G.L.c. 123A,§1.

I also accept Dr. Kelso's testimony that Mr. Wright's scores on the MnSOST-R and Static 99 tests (which are used to predict sexual recidivism), his additional experiences of paraphilia, his number of prior sex offenses, and the inability to control his sexually deviant behavior while incarcerated make Mr. Wright a high risk of reoffending.

This court finds that the Commonwealth has met the directed verdict standard in establishing that Wright is a sexually dangerous person. The Commonwealth has satisfied its burden of convincing this court that he is likely to commit another sexual offense if not confined and he should, therefore, be committed to a secure facility.

Commonwealth v. Wright, 2004 Mass. Super. LEXIS 265, 3-4 (Mass. Super. Ct. 2004)

MASSACHUSETTS

Abel Assessment for Sexual Interest (AASI) during the trial. The appellate court held that the trial court properly found that the AASI test failed to satisfy the Frye or Daubert tests for reliability and general acceptance by the scientific community. Furthermore, the trial court did not abuse his discretion in finding that the test was not relevant.

Ready, 63 Mass. App. Ct. 171 (Mass. App. Ct. 2005)

MINNESOTA

- No right to jury trial, judge only.
- Static-99 admissible
- Minnesota Commitment and Treatment Act, Minn. Stat.§253B.01 et al.
- the State must prove the need for commitment with clear and convincing evidence

Subd. 17. Person who is mentally ill and dangerous to the public.

A "person who is mentally ill and dangerous to the public" is a person (a) who is mentally ill; and (b) who as a result of that mental illness presents a clear danger to the safety of others as demonstrated by the facts that (i) the person has engaged in an overt act causing or attempting to cause serious physical harm to another and (ii) there is a substantial likelihood that the person will engage in acts capable of inflicting serious physical harm on another. A person committed as a sexual psychopathic personality or sexually dangerous person as defined in subdivisions 18a and 18b is subject to the provisions of this chapter that apply to persons who are mentally ill and dangerous to the public. Minn. Stat.§253B.02

Subd. 18c. Sexually dangerous person.
(a) A "sexually dangerous person" means a person who:
(1) has engaged in a course of harmful sexual conduct as defined in subdivision 7a;
(2) has manifested a sexual, personality, or other mental disorder or dysfunction; and
(3) as a result, is likely to engage in acts of harmful sexual conduct as defined in subdivision 7a.
(b) For purposes of this provision, it is not necessary to prove that the person has an inability to control the person's sexual impulses. Minn. Stat.§253B.02

MINNESOTA

In In re Linehan, 557 N.W.2d 171, 189 (Minn.1996), vacated on other grounds, 522 U.S. 1011, 118 S.Ct. 596, 139 L.Ed.2d 486 (1997), an individual committed under Minnesota's SVP law challenged his commitment because the State's expert had failed to use actuarial methods in his risk assessment. The civilly-committed appellant argued that by failing to perform actuarial analysis, the State had ignored "state of the art" evidence and the "best available scientific knowledge and methodology." Ibid. The court rejected this argument, noting that the state's expert in fact did rely on base rate statistics in arriving at his [***65] recommendations. Ibid. The Minnesota court also found that enhanced accuracy can be achieved by combining actuarial methods with clinical judgment. Ibid.(In re Commitment of R.S., 339 N.J. Super. 507, 546 (App. Div. 2001))

MINNESOTA

The results of four different psychological tests confirm their observations. The first [**22] two tests, the MnSOST-R and the Static-99, which the expert witnesses viewed as characteristically underestimating the likelihood of reoffense, show, respectively, that Stone had a fifty-nine-percent chance of reoffending within six years and a forty-percent chance of reoffending in five years. On these tests, the two expert witnesses assigned Stone a score that indicates he is highly likely to reoffend. On the third test, the Hare PCL-R, Dr. Marshall assigned Stone a score of twenty-two, which corresponds to a moderate level of psychopathy, and Dr. Meyers assigned Stone a score of thirty-five. On the fourth test, the SVR-20, Dr. Marshall assigned him a score of fourteen, which represents a moderate-to-high risk of reoffending. After observing Stone testify and after reexamining her scoring on direct and cross-examination, Dr. Marshall stated that she had scored Stone conservatively and would likely rate him at a high risk of reoffending. Dr. Meyers and the doctor who conducted the initial psychological examination of Stone both classified him as a high risk under this test.

In re Civil Commitment of Stone, 711 N.W.2d 831, 841 (Minn. Ct. App. 2006) review denied 2006 Minn. LEXIS 371

MINNESOTA

Following the conviction, the Renville county attorney moved for a court-ordered sex-offender evaluation. Drs. Erickson and Farnsworth diagnosed appellant as having Axis I "Paraphilia NOS"

and Axis II "Antisocial Personality Disorder." The report indicated that appellant was a poor treatment candidate, but appellant's scores [*6] on the Static-99 sex offender screening tool and on the Minnesota Sex Offender Screening Tool-Revised (MNSOST-R) indicated that appellant was a high risk to reoffend.
In December 2002, Department of Corrections (DOC) psychologist Huot completed a civil-commitment screening on appellant, based on file review only. Huot opined that appellant should not be referred for civil commitment, noting that appellant's most recent convictions had not involved sexual penetration or physically assaultive behavior. Huot gave appellant a score of 8 on the MNSOST-R, reflecting a high likelihood of sexual reoffense. The end-of-confinement-review committee assigned appellant a risk level of three. Appellant was released from prison in March 2003, but was apprehended again in May and October 2003 after searches of appellant's residence produced sexually explicit materials in violation of a supervised release agent's order.

In September 2003, appellant underwent a diagnostic assessment to determine whether he was a candidate for outpatient treatment. Dr. Lee conducted the assessment. Dr. Lee opined that appellant was highly disinclined to take personal responsibility for his situation and that appellant [*7] genuinely believed that he did not need sex-offender treatment. Dr. Lee opined that appellant was both a high-risk offender and a poor candidate for treatment and denied appellant's admission to Woodland Center's sex-offender treatment program. Appellant was thereafter terminated from outpatient sex-offender treatment at CORE Professional Services after disrupting a group-therapy session.

In re Civil Commitment of Foley, 2005 Minn. App. LEXIS 534, 6-7 (Minn. Ct. App. 2005)

MINNESOTA

To commit an individual as a sexually dangerous person, the petitioning party must prove the statutory requirements by clear and convincing evidence. Minn. Stat.§253B.18, subd. 1(a) (2006). Whether the record contains clear and convincing evidence for commitment [*2] is a question of law, which this court reviews de novo. In re Linehan, 518 N.W.2d 609, 613 (Minn. 1994) (Linehan I). The clear-and-convincing-evidence standard "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978).

HN2This court defers to the district court's role as factfinder and its ability to judge the credibility of witnesses. In re Ramey, 648 N.W.2d 260, 269 (Minn. App. 2002), review denied (Minn. Sept. 17, 2002). HN3A trial court's findings of fact will not be reversed unless clearly erroneous. See In re Monson, 478 N.W.2d 785, 788 (Minn. App. 1991).

Appellant argues that "[g]iven the failure of the actuarials to yield a clear and convincing risk assessment supporting commitment, the court's consideration of the six [Linehan] factors . . . should have resulted in an order denying the petition." Appellant argues that the examiners relied primarily on the static base rate statistics and "did not satisfactorily address dynamic factors [under Linehan]." In short, appellant contends that he is not psychopathic and is not highly likely to reoffend.
This court examines whether clear and convincing [*3] evidence supports the district court's determination that appellant was highly likely to engage in further harmful sexual conduct. HN4The Minnesota Supreme Court has set out six factors to be considered in examining the likelihood of reoffense: (1) the offender's demographic characteristics; (2) the offender's history of violent behavior; (3) base-rate statistics for violent behavior among persons with the offender's background; (4) sources of stress in the offender's environment; (5) the similarity of present or future environment to the environment in which the offender used violence in the past; and (6) the offender's record of treatment in sex-therapy programs. Linehan I, 518 N.W.2d at 614.

The district court made findings on the court-appointed examiners' opinions that reflect their detailed reports. Contrary to appellant's argument, the examiners did not rely primarily on statistics; their reports indicate that all Linehan factors were addressed and were part of their analyses.

One actuarial tool, the Sex Offense Risk Assessment Guide (SORAG) indicated an 80% reoffense rate for appellant. Appellant argues that a second tool, the Static-99 is "the only genuine recidivism actuarial [*4] employed" and that, on it, two of his three scores were under 50% and the third was 52% over a 15-year period. One examiner explained that this test does "not directly measure deviant sexual practices/preferences, which has been previously shown . . . to be the strongest recidivism predictor." Neither examiner agreed with appellant's claim that the STATIC-99 was the only "genuine recidivism actuarial" and both agreed that it significantly underreports actual recidivism.

On assessment tools, appellant scored 34 and 35 on the Psychopathic Checklist-Revised (PCL-R:II) and 14 and 17 on the Sexual Violence Risk-20. One examiner stated that appellant's score on the PCL-R:II was "clear evidence" that appellant is a psychopath. The other examiner elaborated that this level of psychopathy "reflects a condition noted to be at a higher risk for re-offense, that is associated with increased treatment resistance and, where violence has been characteristic of their offense style, a continuing risk of violent acts even in spite of advancing age." Both scores placed appellant in the "high" category of risk of further sexual violence. One examiner noted that two items present, sexual deviance and psychopathy [*5] "can stand alone as items, which, if strongly present, would in and of themselves serve as strong predictors of future recidivism." Both examiners determined that these items were present.

The examiners viewed all of the psychological testing and risk assessments and concluded that appellant poses a high risk to reoffend. In addition to the actuarials and tests, the examiners considered appellant's demographic factors, extensive history of sexual misconduct, diagnoses, and lack of successful treatment. Although appellant's history of sexual misconduct is not directly reflected in his convictions, he admitted to five sexual assaults involving manipulation and violence. The assaults, some under the influence of drugs, some not, were characterized by gratuitous violence and humiliation of the victims. One examiner noted that appellant's "entrenched pattern of sexual deviance . . . most likely continues to date." Appellant continues to be an untreated sex offender; he has progressed in treatment at "a fairly delayed rate," "has limited insight into his sexual pathology," and his age does not mitigate the high likelihood that he will reoffend due to his history and psychopathy.

In re Civ. Commitment of Mosby, 2007 Minn. App. Unpub. LEXIS 1007, 4-5 (Minn. Ct. App. Unpub. 2007)

MINNESOTA

Dr. Kenning also testified that Carner's psychological and psychiatric testing reveal that he is a pedophile with an antisocial personality disorder, and that the actuarial tests indicate that Carner is likely to reoffend. Dr. Kenning explained that Carner scored a 30 on the Hare Psychopathy Checklist, which classifies him as a psychopath and more likely to reoffend. Additionally, Carner scored an [*8] 11 on the MN-SOST test, which according to Dr. Kenning, places him at a high-risk to reoffend. Carner scored an 8 on the Static-99, a test that assesses recidivism. Dr. Kenning testified that those people who score over a 6 on the Static-99 recidivate at a rate of over 52% in a fifteen-year-post-release period. Finally, Carner scored a 34 on the Sex Offender Risk Appraisal Guide (SORAG). Under this test, people are placed into one of nine categories. Carner's score fell within the highest category. Dr. Kenning testified that 100% of offenders in Carner's category reoffend within ten years of release.

In re Civil Commitment of Carner, 2003 Minn. App. LEXIS 1334, 7-8 (Minn. Ct. App. 2003)

MISSOURI

- Right to jury trial, but no bifurcation. If finding of sexually violent predator then committed.
- Static-99 admissible.
- Probable cause hearing
- Missouri 'sexually violent predator, civil commitment statute' § 632.480 R.S.Mo

(5) "Sexually violent predator", any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who:

(a) Has pled guilty or been found guilty, or been found not guilty by reason of mental disease or defect pursuant to section 552.030, RSMo, of a sexually violent offense; or
(b) Has been committed as a criminal sexual psychopath pursuant to section 632.475 and statutes in effect before August 13, 1980. § 632.480 R.S.Mo.

MISSOURI

Prior to trial, Dr. Deborah Gunnin, a licensed forensic psychologist with the department of mental health, was assigned to conduct an SVP evaluation of Murrell and diagnosed Murrell with recurrent depressive disorder, polysubstance dependence, and ASPD. In Dr. Gunnin's opinion, the existence of ASPD, as well as Murrell's scores on the Static-99 and MnSOST-R n4 actuarials, made Murrell more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

Following the change in the law, Dr. Gunnin reevaluated Murrell in October 2002. Although she again diagnosed him with ASPD and again took his scores on the Static-99 and MnSOST-R into account, she believed that there was inconclusive evidence to indicate whether Murrell has control of his behavior and chooses to act unlawfully, or whether he has serious difficulty controlling his behavior.

Consequently, the State hired Dr. Harry Hoberman, also a licensed psychologist, to conduct an evaluation of Mark Murrell. At trial, Dr. Hoberman testified n5 that Murrell suffers from the mental abnormality of ASPD. He instructed that Murrell's ASPD was a congenital or acquired condition that affects his emotional or volitional capacity such that it predisposes him to commit sexually violent offenses. Finally, Dr. Hoberman testified that, in his opinion, Murrell's ASPD causes him serious difficulty controlling his behavior and makes him more likely than not to engage in future acts of predatory sexual violence. He explained that he measured Murrell's risk of reoffense by reviewing and relying upon Murrell's extensive record, looking to base rates, and using actuarial tools.

Murrell v. State (In re Murrell), 215 S.W.3d 96, 101 (Mo. 2007)

MISSOURI

D. Admissibility of the Actuarial Instruments

Although relatively new in the judicial context, the actuarial method of risk assessment has been used rather extensively in other settings. E. Janus & R. Prenky, Forensic Use of Actuarial Risk

Assessment with Sex Offenders: Accuracy, Admissibility, and Accountability, 40 Am. Crim. L. Rev. 1443, 1454 (2003). Dr. Hoberman explained the methodology of both actuarial instruments in this case. He testified that the Static-99 is a ten-item measure developed by looking at the characteristics of approximately 4,000 sex offenders to see which characteristics they possessed were associated with the likelihood of reoffense within 15 years, as defined by reconviction. n12 The items that make up the Static-99 include prior sex offenses as measured by arrest or conviction, history of general violence, the number of prior sentencing occasions, marital status, and characteristics of the victim such as sex and whether the victim was a stranger.
FOOTNOTES n12 More specifically, "actuarial scales are developed using statistical analyses of groups of individuals (in the present case, released sex offenders) with known outcomes during a 'follow-up' period (either arrested for or convicted of a new sexual offense, or not identified as having committed a new sexual offense). These analyses tell us which items ('predictor variables') do the best job of differentiating between those who reoffended and those who did not reoffend within a specified time period. Since some of these variables inevitably do a better job than others, these analyses also help us to determine how much weight should be assigned to each item. The variables are then combined to form a scale, which is tested on many other groups of offenders (cross-validation). When the scale has been used on many samples with a sufficiently large number of offenders, the scores derived from the scale may be expressed as estimates of the probability that individuals with that score will reoffend within a specified time frame." E. Janus & R. Prenky, Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility, and Accountability, 40 Am. Crim. L. Rev. 1443, 1454 (2003).

Dr. Hoberman explained that the MnSOST-R is a sixteen-item measure developed by looking at the characteristics of approximately 1,000 individuals to see what characteristics were highly correlated to rearrest for sexual offenses within six years of release. The items include whether the victim was a stranger, the age of the victims, whether force was used, employment history of the offender, the offender's drug use at or around the time of offense, age of the offender, whether the offender has completed chemical dependency or sex offender treatment, and whether the offender had any disciplinary offenses during his or her most recent incarceration.

When Dr. Hoberman applied the Static-99 to Murrell he found that, according to the instrument, a person with Murrell's characteristics falls into the high risk category for reoffense. The score Murrell received is associated with a 52 percent chance of reconviction within fifteen years. Dr. Hoberman stated that the MnSOST-R, as applied by him to Murrell, placed Murrell in the high risk category for reoffense. According to Dr. Hoberman, the most recent research indicates that individuals in the high risk category of the MnSOST-R have a [**31] 72 percent chance of being rearrested for a sex offense within six years.

Murrell argues that the trial court abused its discretion in admitting Dr. Hoberman's testimony as to the results of the Static-99 and MnSOST-R actuarial instruments. Specifically, he argues that the instruments reflect only the results of a group analysis and, therefore, are irrelevant and not helpful to the jury in that they do not address the issue of whether Murrell is likely to reoffend.

2. The Static-99-99 and MnSOST-R

Murrell couches his relevance argument in a way that attacks Dr. Hoberman's utilization of the actuarial instruments in this case as not helpful to the trier of fact under 490.065.1. His focus on that section is misguided. 490.065.1 involves only the questions of whether expert testimony will assist the jury in understanding the evidence or determining a fact in issue and, if so, if the particular expert is qualified to testify. Murrell does not contest those two issues in this case.

The admissibility of the actuarial instruments, and Murrell's relevance argument, is controlled by section 490.065.3. HN24Under the statute, if expert testimony is needed and if the expert is

qualified to testify under subsection 1, the expert is entitled to base his opinion upon facts or data 1) "of a type reasonably relied upon by experts in the field," and 2) which "must otherwise be reasonably reliable." If facts or data are both reasonably reliable and reasonably relied on by experts in the field when forming an opinion on the matter at issue, they will necessarily be relevant to the case, and testimony as to the facts and data will be admissible.

Dr. Hoberman was asked if the data in this case, the actuarial instruments, were "the type of instruments or data reasonably relied upon by experts in the field in forming opinions about a person's risk of future sexual violence." He answered affirmatively. The State presented evidence of the frequent use of actuarial instruments and their general acceptance in the scientific community. Dr. Hoberman stated that in almost every SVP case he had participated in, "one of the [department of mental health] evaluators has used at least one actuarial measure and typically two, the Static-99 and the MnSOST-R." Dr. Hoberman testified that the Static-99 is used in fifteen of the seventeen states with SVP statutes.

In the past two years, reported cases in at least twelve states have recognized experts' reliance on the Static-99 as a risk-assessment tool in cases involving sexually violent predators. n13 At least five Missouri cases in the past three years reference the admission of the Static-99. n14 HN25Actuarial instruments are not only relied upon by the states in their cases against alleged SVPs, but also by experts for sexual offenders as well. See In re Commitment of Simons, 213 Ill. 2d 523, 821 N.E.2d 1184, 1192, 290 Ill. Dec. 610 (Ill. 2004) (citing People v. Calhoun, 118 Cal. App. 4th 519, 13 Cal.Rptr.3d 166, 168 (Cal App. 2004)). It is clear that actuarial instruments are reasonably relied upon by experts in evaluating a sexually violent predator's risk of reoffense.

FOOTNOTES n13 See People v. Vercolio, 363 Ill. App. 3d 232, 843 N.E.2d 417, 300 Ill. Dec. 159 (Ill. App. 2006); Harris v. State, 836 N.E.2d 267 (Ind. App. 2005); In re Detention of Shearer, 711 N.W.2d 733 (Iowa App. 2006); Sweet v. State, 163 Md. App. 676, 882 A.2d 296 (Md. App. 2005); Com. V. Chapman, 444 Mass. 15, 825 N.E.2d 508 (Mass. 2005); In re Commitment of Stone, 711 N.W.2d 831 (Minn. App. 2006); In re Civil Commitment of A.H.B., 386 N.J. Super. 16, 898 A.2d 1027 (N.J. Super A.D. 2006); In re J.M., 2006 ND 96, 713 N.W.2d 518 (N.D. 2006); In re Commitment of Barbee, 192 S.W.3d 835 (Tex. App. 2006); Com. v. Allen, 269 Va. 262, 609 S.E.2d 4 (Va. 2005); In re Detention of Elmore v. State, 134 Wn. App. 402, 139 P.3d 1140, 1142-43 (Wash. App. 2006); In re Commitment v. Combs, 2006 WI App 137, 295 Wis. 2d 457, 720 N.W.2d 684 (Wis. App 2006). n14 In re Care and Treatment of Kapprelian, 168 S.W.3d 708 (Mo. App. 2005); Smith v. State, 148 S.W.3d 330 (Mo. App 2004); Goddard v. State, 144 S.W.3d 848 (Mo. App. 2004); Care & Treatment of Wadleigh v. State, 145 S.W.3d 434 (Mo. App. 2004); Care and Treatment of Scates v. State, 134 S.W.3d 738 (Mo. App. 2004).

The second issue under 490.065.3 is whether the data is reasonably reliable. Dr. Hoberman testified that it was his belief that the MnSOST-R has been validated and is widely accepted. He cited an authoritative text entitled Evaluating Sex Offenders, by Dr. Dennis Doren, that advocates the use of the Static-99 and MnSOST-R instruments. He testified that another authoritative text, Forensic Management of Sexual Offenders, lists the MnSOST-R as one of the risk assessment tools used in the evaluation of sexual offenders. Dr. Hoberman instructed that the Static-99 has been subject to at least twenty-two cross-validation studies bolstering its reliability. He stated that the MnSOST-R has also been subject to cross-validation. Indeed, "many scholars have concluded that the predictive efficacy of actuarial methods of risk assessment is superior to clinically derived assessments of risk." E. Janus & R. Prenky, Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility, and Accountability, 40 Am. Crim. L. Rev. 1443, 1457 (2003).
There was testimony that, contrary to the contention of Murrell, the Static-99 is relevant to the risk of recidivism for the individual as well as the test group. Dr. Hoberman stated that the

instrument provides experts with an indicator of the factors that sex offenders who recidivate have in common. He instructed that the expert then looks at the individual being evaluated to determine whether he possesses the characteristics shown by the Static-99 to be indicative of recidivism. The person being evaluated is then given a score based on the characteristics he or she possesses, which indicates the percentage of likelihood of reoffense for a person with those characteristics; in this case Murrell.

Finally, any concern about the accuracy of the actuarial instruments was made known to the jury and goes to the weight the evidence should receive. Dr. Hoberman illuminated the issues surrounding the accuracy of these instruments and their limitations. He agreed that there is [*112] no way to know what personality disorders the individuals making up the Static-99 suffered from. He instructed that at least two experts in the field have criticized the MnSOST-R as over-predicting the risk of reoffense. On cross-examination Dr. Hoberman admitted that there is no way to determine for certain that Murrell will commit a sexually violent offense if released. He agreed that he could offer nothing more than probabilities and there was no way to tell whether Murrell would be in the class of the 52 percent of people who were reconvicted, as guided by the Static-99, or the 48 percent who were not. The trial court was correct in finding that the actuarial instruments were reasonably reliable.

This holding does not ignore Murrell's argument that the actuarial instruments are irrelevant because they are a product of the recidivism rate of the test group, not the individual being evaluated. HN26Under the statute, determination of whether the facts and data relied upon are relevant is made relative to the testimony [**39] of the expert. If the facts and data are shown to be reasonably relied upon by experts in the field, they are necessarily relevant to the issue the expert is addressing. The only way to attack the admissibility of that information is to show that the facts and data are not the type experts in the field are relying on or are not reliable. Murrell has simply failed to show that actuarial instruments are not reasonably relied upon or that they are not reliable in evaluating an SVP's risk of reoffense.

Additionally, it is essential to note that Dr. Hoberman's testimony indicated actuarial instruments are merely one of many tools considered in the evaluation and that he does not conclude his analysis of a person's future risk on the instruments alone. Dr. Hoberman stated that characteristics unique to the individual are omitted from the instruments and must be considered. He reviewed approximately 7,000 to 10,000 pages of Murrell's records during his assessment. He considered Murrell's offense history and personal characteristics, such as his mental abnormality, his past substance abuse, and his periodic refusal to take his medication. In other words, the evidence indicates Dr. Hoberman [**40] made his own clinical assessment in coming to a conclusion regarding Murrell's risk of reoffense and the actuarial instruments were used to corroborate his assessment; they were not the sole basis for it.

Admissibility should not be confused with submissibility. The holding today does not suggest that testimony as to the results of an actuarial instrument as applied to an individual standing alone, without the accompanying independent clinical assessment, would be a sufficiently reliable basis to commit an individual as an SVP. As courts in other states have recognized, HN27testimony incorporating the results of actuarial instruments is admissible in cases involving the civil commitment of an SVP when the instruments are used in conjunction with a full clinical evaluation. See In re Commitment of Simons, 213 Ill. 2d 523, 821 N.E.2d 1184, 1192, 290 Ill. Dec. 610 (Ill. 2004) (actuarial instruments are generally accepted by professionals who assess sexually violent offenders and therefore are perfectly admissible in a court of law); In re Detention of Holtz, 653 N.W.2d 613, 619-20 (Iowa 2004) (actuarial instruments admissible when used in conjunction with clinical evaluation). In this case, [**41] there was ample evidence that Dr. Hoberman conducted an independent clinical evaluation.

Moreover, the sole issue before the Court is whether an expert in a civil commitment trial may testify as to the results of actuarial instruments. The [*113] Court does not hold that an expert can argue based on the Static-99 that the particular offender has a 52% chance of reoffending. Rather, the Court holds the expert may base his or her opinion on actuarials because they constitute facts or data of a type reasonably relied upon and are otherwise reasonably reliable. The expert may testify that according to actuarials a certain percentage of people with characteristics like Murrell's do reoffend; that data can be part of the assessment as to whether Murrell is more likely than not to reoffend because although actuarials are not determinative, they are relevant to that determination.

At trial, the jury heard the following:

[Prosecutor]: "So does it (Static-99) give you any percentages or produce a result that comes out in percentages?"
[Dr. Hoberman]: "The score Mr. Murrell received is associated with a 52 percent chance of being reconvicted for a sex offense over a 15 year period of time."
To the extent this exchange was meant to convey to the jury that Murrell himself has a 52 percent chance of reoffending within the next 15 years, it was a misapplication of the actuarial results. However, the specific question and answer were not objected to by the defense and have not been challenged in Murrell's points relied on. Even had Murrell raised the issue here, the Court would not find plain error. On cross-examination of Dr. Hoberman, the jury heard the following testimony:
[Defense Counsel]: "You don't know if Mr. Murrell would fall in that 52 percent (of individuals who reoffended) or in that 48 percent (of individuals who did not), do you?"
[Dr. Hoberman]: "I do not."
[Defense Counsel]: "There's no way to tell?"
[Dr. Hoberman]: "No way to tell."
[Defense Counsel]: "Wouldn't you agree with me that it's kind of hard to talk specifics regarding Mr. Murrell and the Static-99 if you don't know exactly which side of this he fits in?"
[Dr. Hoberman]: "I think what you can say is what I said, which is that he has characteristics. You don't know which side he fits in, which is why you look at other actuarial measures, to use as many of them as possible to see to what degree they converge."
[Defense Counsel]: "Okay. But looking at the Static-99, you can't say whether Mr. Murrell was in the 52 percent number or the 48 percent number who don't reoffend?"
[Dr. Hoberman]: "Correct."
Any improper characterization conveyed to the jury was cured by Dr. Hoberman's testimony on cross-examination. In sum, the trial court correctly held that the actuarial instruments utilized by Dr. Hoberman in assessing Murrell's risk of recidivism constituted facts or data of a type reasonably relied upon by experts in the field and which were otherwise reasonably reliable. The testimony regarding Dr. Hoberman's utilization of those instruments was, therefore, admissible under 490.065.

III. Conclusion. The judgment is affirmed.
Murrell v. State (In re Murrell), 215 S.W.3d 96, 113 (Mo. 2007)

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Dr. Suire identified "a number of things" indicating Dunivan's serious difficulty controlling his behavior. He started with Dunivan's sheer number of offenses -- at least four convictions and eight charges for sexual offending behavior. Dunivan has offended after repeated legal interventions, including significant prison terms, and has continued to act out sexually and make sexualized threats in secure settings. He has not significantly benefited from treatment. In fact, he was terminated from the MOSOP program for sexual behavior and lack of progress. Dunivan

scored in the highest risk ranges on both the Static-99 and MnSOST-R, two commonly-used risk assessment tests. His paraphilia NOS is chronic and will not go away with time.

Most psychologists, according to Dr. Suire, think past behavior is the best predictor of future behavior. n5 This court will not reiterate Dunivan's repeated, vile threats of sexual violence against [*5] various staff members, and even a female superintendent, at his recent places of confinement. Suffice it to say such evidence was uncontradicted, as was Dunivan's "very large" number of conduct violations at every facility, totaling 546 violations through July 2006, plus further threats and conduct violations into early 2007 after Dunivan's transfer to the Missouri Sex Offender Treatment Center.

FOOTNOTES n5 Kapprelian, 168 S.W.3d at 711, cites similar testimony by another psychologist.

We need not further recount or detail the record. The trial court could reasonably infer, from the testimony we have cited and other evidence, that Dunivan has serious difficulty controlling his behavior. Dunivan's self-characterization as a mere victim of social intolerance is unsupported by the record and rebutted by Dr. Suire's testimony.

Dunivan v. State, 2008 Mo. App. LEXIS 305, 4-5 (Mo. Ct. App. 2008)

MISSOURI

sexual sadist

Dr. Hoberman indicated that he believed Barlow was more likely than not to commit future acts of sexual violence. He indicated that past behavior is the best predictor of future behavior. Dr. Hoberman looked at three different actuarial tools to assess the likelihood that Barlow would reoffend, the Static 99, the Minnesota Sex Offenders Screening Tool (MnSOST-R), and the Sex Offender Appraisal Guide (SORAG). The Static 99 indicated that Barlow had a 52% likelihood of being reconvicted of a sex offense over a fifteen-year time period. The MnSOST-R indicated that Barlow had a 57% likelihood of being rearrested for a sex offense over a six-year time period. The SORAG indicated that Barlow had a 58% probability of violently reoffending over a seven-year time [*10] period, an 88% likelihood in ten years, and a 63% chance in just five years. These were not the only studies that Dr. Hoberman examined; other studies also indicated a high-risk factor for Barlow.

Dr. Hoberman indicated that his lack of offenses while in the community on a work release was not an indication of a lower risk, because he was closely monitored during that time and because, even while he was monitored, he pushed the limits by doing things such as eating at a restaurant outside his ten-block radius, giving women's underwear to waitresses, buying vehicles without informing the hospital, and riding in cars with females in violation of his restrictions. He indicated that Barlow's tendency to test the limits of his release and see how much he can get away with indicates that Barlow has trouble controlling his behavior and complying with rules set for him. He also indicated that it was a concern for him that Barlow rarely, if ever, expressed any guilt or remorse for the acts of violence he had committed in the past.

Dr. Hoberman also indicated that Barlow's treatment over the years did not make his risk lower, because the treatment he had received over the years was not targeted [*11] specifically toward preventing recidivism in sex offenders. Moreover, there was no evidence indicating that Barlow was improving. He also indicated that Barlow's high IQ makes it more likely that Barlow is able to fool or manipulate people, including therapists, which increases the risk that he could be perceived as having improved when, really, he has not improved and is merely saying what he knows the evaluators want to hear.

Barlow v. State, 2008 Mo. App. LEXIS 215, 10-11 (Mo. Ct. App. 2008)

MISSOURI

Dr. Jackson testified that Kapprelian's mental abnormality of pedophilia, coupled with the additional diagnosis of sexual masochism, makes him more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility. This conclusion was based upon two independent considerations: (1) the results of Kapprelian's score on the Static-99 assessment; and (2) a review of other relevant factors drawn from the relevant professional literature on the subject.

Dr. Jackson first explained his assessment of Kapprelian using the Static-99. This assessment tool is an actuarial instrument that is widely used and accepted in the field of psychology to make statistical predictions about the likelihood of a sex offender being reconvicted of another sexual offense within five, ten and fifteen year periods after being released [**10] from confinement. It measures 10 risk factors for reconviction. Kapprelian scored an 8 on the Static-99 assessment, which predicted his risk of reconviction as 33% within five years, 52% within ten years, and 57% within fifteen years. The Static-99 is generally accepted as a reliable instrument for predicting future sexually violent behaviors by professionals who evaluate sexually violent predators. It has been validated and cross-validated approximately 15 times, and it has been tested for inter-rater reliability approximately five times. n3

FOOTNOTESn3 Validation means the instrument is actually able to measure what it purports to measure in a test population. Cross-validation means the instrument measures what it is supposed to measure when applied to a different population of test subjects. Inter-rater reliability means different psychologists using the instrument would arrive at the same score when evaluating the same test population.

Because a prudent evaluator would not base his or her SVP assessment solely upon the results of the Static-99, Dr. Jackson also considered other risk factors identified as significant by professional research on the subject. Dr. Jackson described the additional factors as "aggravators." He identified the following aggravators in his risk assessment of Kapprelian:

1. he suffers from the deviant sexual preference of pedophilia;
2. he has engaged in sexual masochism with children;
3. he has had a consistently high number of offenses against children over a long period of time;4. he suffers from multiple deviant sexual preferences in the form of pedophilia and sexual masochism; n4
5. he suffers from an intimacy defect which causes him to identify romantically with children more than he does with adults;
6. while on parole for one sex offense against a child, Kapprelian absconded and molested another child;
7. Kapprelian suffers from a lack of self-regulation, as demonstrated by his past history of extensive drug and alcohol abuse and homosexual prostitution as a young man; and
8. he did not complete MOSOP while in prison.Dr. Jackson concluded that each aggravator increased Kapprelian's risk of reoffending.

FOOTNOTES n4 This factor is significant because research indicates that a person who suffers from more than one deviant sexual interest is at a greater risk of reoffending. In other words, Kapprelian is more at risk to reoffend because he suffers from pedophilia and sexual masochism than he would be if he suffered from pedophilia alone.

[**12] At the conclusion of Dr. Jackson's direct examination, he testified that Kapprelian's mental abnormality makes him more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility. Kapprelian's behavior is predatory because he places himself in a position to meet children for the primary purpose of victimizing them.

The trial court found the evidence to be "one-sided and overwhelming" and made a specific factual finding that "[Kapprelian's] mental abnormality makes him more inelikely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility." This appeal followed.
Kapprelian's argument fails because it is based on an unsound premise: that Dr. Jackson's opinion was based solely on his clinical judgment. That is simply not the case. Dr. Jackson's assessment of Kapprelian's risk of reoffending was based upon the factors listed in the Static-99 and other empirical risk factors drawn from professional research literature on the subject. The Static-99 is an actuarial instrument which is accepted by professionals in the field as a reliable and [**19] valid instrument by which to assess the risk of reconviction of a sexually violent offense. Dr. Jackson scored Kapprelian based on the 10 risk factors utilized by the Static-99. In addition, Dr. Jackson testified that a prudent evaluator would not limit his or her assessment to just those static factors because other dynamic factors affecting the risk of reoffending have been identified by the relevant professional research on the subject. This research supported the use of each of the additional dynamic factors that Dr. Jackson utilized in evaluating Kapprelian. In sum, Dr. Jackson's opinion was based on scientifically-derived empirical factors, rather than naked clinical judgment. That distinguishes the case at bar from Coffel, which involved a female individual for whom there was "no data or research as to the accuracy of clinical judgment as a means of risk assessment[.]" Coffel, 117 S.W.3d at 123. Therefore, Dr. Jackson's testimony provided sufficient evidentiary support to sustain the trial court's finding. See Whitnell v. State, 129 S.W.3d 409, 415-16 (Mo. App. 2004) (a single psychiatrist's expert testimony provided [**20] sufficient competent and substantial evidence to submit the case to the jury in a SVP case). Kapprelian's second argument has no merit.

In re Kapprelian, 168 S.W.3d 708, 713 (Mo. Ct. App. 2005)

MISSOURI

After a review of [**6] Appellant's records, however, two psychologists and one psychiatrist were unable to agree that Appellant would more likely than not re-offend. Each of the doctors used the same actuarial risk assessment instrument, the Static-99, to determine the likelihood of Appellant re-offending. This assessment cites the primary risk factors, based upon research, that help predict whether someone will re-offend or not. Static-99 specifically offers ten established risk factors, each weighted statistically, which are associated with sexual reconviction. Appellant scored a 2 on the Static-99 instrument, which translated into the medium to low range risk of sexual re-offense. This converts into a nine percent probability of sexual-reconviction in 5 years. One of the psychologists, Dr. Phenix, and the psychiatrist, Dr. Lacoursiere, elevated Appellant's score to a higher range risk of sexual re-offense based upon actuarial risk factors not contained in the Static-99. It is from the elevation of Appellant's score on the [*334] Static-99 that Appellant bases his first point on appeal.

Dr. Phenix testified that the Static-99 has limitations in its ability to predict re- offenders; she believed the instrument [**7] underestimates the actual number of likely re- offenses because it only considers those offenders that would be caught and not those that would re-offend. She found this to be an important distinction because most sexual offenses are not reported. The number of sexual offenders who are reconvicted, therefore, is significantly lower than the number who re-offend and the Static-99 significantly underestimates the actual number of re-offenses. Dr. Phenix also testified that Static-99 does not include all of the known risk factors

because it only lists the static factors, those factors that are historically based such as how many prior sex offenses they have and whether an offender has unrelated victims. The test does not include any dynamic factors or changeable factors, such as understanding emotional identification with children and learning to develop relationships with adults. She claimed that because Static-99 is not a thorough indicator of predicting re-offenders, it is necessary to consider other factors.

Dr. Phenix testified the most important factor to consider, which is not included in the Static-99 instrument, is whether Appellant had successfully completed a credible sex [**8] offender treatment program. She maintained when such treatment is completed, it significantly reduces the risk of sexual re-offense because the treatment program helps offenders identify their individual re-offending cycle and develop plans to prevent re- offending. Dr. Phenix noted that Appellant did not do well in MOSOP, was rated poorly, felt he did not need treatment, and declined to finish his treatment program even though he was given an opportunity to do so.

Dr. Phenix also identified other risk factors which she considered and are not included in the Static-99 instrument. These included the fact that Appellant did not see himself as a risk and this, in turn, affected any possibility of treatment gains and increased his risk of re-offending. Appellant also demonstrated a lack of cooperation with supervision, thus increasing the risk of sexual re-offense since it made it more likely than not that Appellant would place himself in high risk situations in the future. Dr. Phenix testified that her diagnosis of Appellant's pedophilia constituted a mental abnormality because of his inability to control his behavior. She noted he received a diversion in 1994 and yet continued to place [**9] himself in situations where he knew young girls would be.

Dr. Lacoursiere, while utilizing the same instrument, Static-99, to determine a score of 2 for Appellant's likelihood of re-offense, also found that Appellant is more likely than not to sexually re-offend. Dr. Lacousiere, also, testified Appellant was more likely than not to re-offend because of the dynamic factors specified by Dr. Phenix. Additionally, Dr. Lacoursiere used another test known as the MnSOST-R. This test, unlike the Static-99, assesses dynamic factors. Dr. Lacoursiere scored Appellant at a 9, which correlates to a 63% re-arrest rate over six years; he testified that even this instrument underestimates the chance of re-offense because it fails to consider the strongest factor connected with re-offending, which is a diagnosis of an untreated sexual deviance, such as pedophilia.

Appellant cites to his expert to support his contention that he was not more likely than not to engage in predatory acts of sexual violence if not confined, however, the state presented two experts to contradict Appellant's position. Dr. Phenix and Dr. Lacoursiere diagnosed Appellant with pedophilia and testified this diagnosis constituted a mental abnormality by which defendant could not control his behavior. They pointed to other factors which needed to be taken into consideration to determine whether Appellant was more likely than not to re-offend. Although Dr. Jackson, Appellant's expert, diagnosed Appellant with pedophilia and claimed it did not rise to the level of a mental abnormality, we cannot choose his testimony as more credible than Dr. Phenix or Dr. Lacoursiere's testimony. Dr. Jackson further testified that Appellant was rated low on the Static-99 instrument and that outside factors should be construed narrowly and in keeping with the initial score on the Static-99. HN2We are not permitted to second-guess [**14] whom the jury chooses to believe, as this court leaves both the issue of credibility and the weight to be afforded conflicting evidence to the jury. Davolt v. Highland, 119 S.W.3d 118, 127 (Mo. App. W.D. 2003).
Smith v. State, 148 S.W.3d 330, 334 (Mo. Ct. App. 2004)

MISSOURI

While explaining why he believed Appellant was more likely than not to re-offend, Dr. Khan

mentioned "actuarial instruments" that he considered, specifically one called "Static 99" and another denominated "MnSOST-R." Thereon, Appellant renewed his pre-trial objection to testimony about these instruments. As before, the trial judge overruled the objection and allowed Dr. Khan to continue. Dr. Khan then explained that the Static-99 and MnSOST-R are "actuarial instruments" derived from cross-sectional studies of sex offenders made throughout the country. These studies examined the characteristics of repeat sexual offenders and assigned them a score. By using this statistical study and comparing it with the characteristics of the person being tested, an evaluator can get a "rough estimate" of whether the test subject will re-offend. n2

FOOTNOTES n2 As another explanation: "The STATIC-99 is a risk assessment instrument that combines ten factors. An individual's scores on these factors are summed, and the total score is compared to a table that shows the reoffense frequencies associated with each score. The table indicates, for example, that a score of 5 is associated with a frequency of sexual recidivism (over a five year follow-up period) of 33%. The highest risk category shown on the table--scores of 6 or above--is associated with a measured frequency of sexual recidivism (over a 5 year period) of 39%." Eric S. Janus, Examining Our Approaches to Sex Offenders & the Law: Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy be More Effective, 29 WM. MITCHEL L. REV 1083, 1095-96 (2003).

When asked if the Static-99 and MnSOST-R tests were "well accepted, widely used and generally accepted in your field for helping predict a person's future risk[]" potential, Dr. Khan replied: "In our field these are the two that are widely used. But then again, I think the [*851] majority of the clinicians base their evaluations on their opinion and just use the actuarials in a way to support them and not the other way around.

"Q. [To Dr. Khan] So you would have the same opinion whether or not you used any actuarials?
"A. That is correct."
Dr. Khan also testified that these instruments are only used after a diagnosis is completed as a way to "support" that evaluation, and in his opinion, these instruments actually underestimated the risk of re-offending. Moreover, Dr. Khan unequivocally testified that his opinion (that Appellant was more likely than not to re-offend if left unconfined) would not change regardless of the score on the instruments...

Here, Dr. Khan testified as to scientific evidence, namely, the actuarial instruments. Although Appellant presented contrary evidence, [**15] there was an abundance of evidence showing that the actuarial instruments met the requirements of scientific validity. First, there was testimony and exhibits presented that demonstrated the wide use of the instruments in the relevant scientific community and their general acceptance. Daubert, 509 U.S. at 594, 113 S. Ct. at 2797. Second, the State offered as exhibits two textbooks demonstrating the scientific validity of actuarial instruments. Id. at 593, 113 S. Ct. at 2796-97. Third, there was testimony that the actuarial instruments were the subject of peer review and publication. Id. Finally, there was other evidence tending to show the scientific validity of the instruments via a peer-reviewed research article. Id. at 593-94, 113 S. Ct. at 2796-97. Consequently, testimony relating to the actuarial instruments was admissible under section 490.065.1 as there was sufficient evidence for the trial judge to determine that "the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" Kumho Tire, 526 U.S. at 149, 119 S. Ct. at 1175 [**16] (quoting Daubert, 509 U.S. at 592, 113 S. Ct. at 2786).

In so concluding, we have not ignored Appellant's assertion that section 490.065.3 sets forth the applicable standard for admissibility of expert opinion testimony based on scientific knowledge. We believe Appellant is simply wrong when he makes this argument.

HN8By its explicit language, section 490.065.3 applies to "facts or data" that an expert relies

upon in rendering an opinion. The purpose of subsection (3) was to bring the legal practice in line with the standard practice exercised by experts in their respective fields. Wulfing v. Kansas City Southern Indus., Inc., 842 S.W.2d 133, 152 (Mo.App. 1992).

For instance, in life and death situations, doctors routinely rely on numerous sources, including statements from third parties, in rendering an opinion or diagnosis. See Glidewell v. S.C. Management, Inc., 923 S.W.2d 940, 951 (Mo.App. 1996). Prior to the adoption of section 490.065.3, a doctor could not come into court and testify as to these facts; he or she could only state the ultimate opinion or diagnosis. Stallings v. Washington University, 794 S.W.2d 264, 270 (Mo.App. 1990). Prior to the enactment of section 490.065, "when the reasons for the expert's opinion '[were] based in part on hearsay, as far as the witness [was] concerned, the accepted and proper way to present in evidence [the] opinion of [the] expert witness [was] to present competent evidence of those facts from some proper source, and then submit them to the expert witness in a hypothetical question along with other relevant matter.'" Id. (quoting Davies v. Carter Carburetor, Inc., 429 S.W.2d 738, 751 (Mo. 1968)).

As such, if a doctor based his or her diagnosis on statements from nurses, family members, or other doctors, then those individuals would be required to come to court to testify before the doctor could testify as to the reasons for the diagnosis. Glidewell, 923 S.W.2d at 951. The legislature recognized that it was inconsistent to allow experts to rely on hearsay while practicing their profession, but not let them rely on hearsay when rendering their opinion [**18] in court, unless substantial time and money were expended to bring those facts forth and put in evidence. It remedied this inconsistency by enacting section 490.065.3.

Under this subsection, "the questions are . . . whether the hearsay [or lack of firsthand knowledge] as tested by professional acceptance standards in the field is reasonably reliable, and whether it is otherwise reasonably reliable as a matter of general evidentiary principle." Wulfing, 842 S.W.2d at 152[18]. HN9The first mandate under subsection (3) requires a court to determine whether the facts and data are reasonably relied upon by experts in the particular field.

The practice of allowing an expert to testify as to facts and data of a type reasonably relied upon by experts in the field "as a juridical principle, is justified by the premise that a witness with specialized knowledge is as competent to evaluate the reliability of the statements presented by other investigators or technicians" as a fact-finder is to pass upon the credibility of an ordinary witness on the stand. Id. at 152. Generally, the trial judge is expected to defer to [**19] the expert's assessment of what data is reasonably reliable. Keyser v. Keyser, 81 S.W.3d 164, 169 (Mo.App. 2002); Glidewell, 923 S.W.2d at 951[9]. For instance, "medical records are the quintessential example of the type of facts or data reasonably relied upon by experts in the field of medicine." Id. at 951.

The second mandate under section 490.065.3 requires the trial judge to look beyond the expert's testimony that his or her reliance on certain facts and data are reasonable due to the general standard of the expert's field. The trial judge must then ensure that the facts and data are otherwise reasonably reliable. "It is only in those cases where the source upon which the expert relies for opinion is so slight as to be fundamentally unsupported, that the finder of fact may not receive the opinion." n6 Keyser, 81 S.W.3d at 169.

FOOTNOTES n6 As an example of this latter requirement, the reader may consult Edgell v. Leighty, 825 S.W.2d 325 (Mo.App. 1992). There, a police officer, called as an expert to reconstruct the accident, was not allowed to "express an opinion that plaintiff made an improper turn when that opinion was based upon the hearsay statements of witnesses." Id. at 328-29[2].

This is not to say that section 490.065.3 does not apply to this case. HN10Both subsection (1) and subsection (3) apply in all civil cases wherein an expert testifies. However, when a litigant wishes to challenge the underlying scientific principles of an expert's opinion, i.e., his or her "scientific knowledge," section 490.065.1 is the applicable standard. Daubert, 509 U.S. at 589-93, 113 S. Ct. at 2795-97. When a litigant wishes to challenge what an expert relies upon in rendering an opinion, i.e., certain "facts or data," an objection based on section 490.065.3 is appropriate. In some cases, the line distinguishing the two can be difficult to ascertain and may involve similar questions. See, KAYE, THE NEW WIGMORE, EXPERT EVIDENCE§3.1, at 76 n.8.

In this case, if Appellant wanted to challenge the validity of the actuarial instruments themselves (and opinions based thereon), he should have objected on the basis of section 490.065.1 and presented that point and argument on appeal. n7 An at-trial objection to this evidence based on subsection (3) [**21] and an appellate argument on that subsection could only be used to challenge the facts and data used by Dr. Khan in calculating Appellant's risk of re-offending. Thus, Dr. Kahn's use of prior conviction information would be subject to objection for not meeting the section 490.065.3 standard if the source of his information was not of a type reasonably relied upon by experts in the field and was not otherwise reasonably reliable. As an example, if Dr. Khan had testified that he gained this knowledge from a third party on the street, this might not be viewed as reasonably reliable information. Dr. Khan, however, stated that he gained this information from official arrest records, from Appellant, and from reports of probation and parole. These are the types of facts and data reasonably relied upon by experts in the fields of psychology and psychiatry. Moreover, these facts and data are otherwise reasonably reliable.

Goddard v. State, 144 S.W.3d 848, 855 (Mo. Ct. App. 2004)

NEBRASKA

No civil confinement statute. Sex Offender Registration Act applicability.

Furthermore, it is important that we recognize that no instrument will perfectly predict future conduct. As stated elsewhere: HN12"The non-existence of a perfect predictor of recidivism should not preclude legislative resort to a rationally based instrument of risk assessment, developed and validated by mental health professionals." E.B. v. Verniero, 119 F.3d 1077, 1098 (3d Cir. 1997). In this regard, Black's testimony concerning the instrument establishes that it was carefully and rationally crafted. While acknowledging some of the instrument's shortcomings, Black testified that the instrument (1) is based on a significant [*375] amount of empirical data, (2) utilizes factors [***27] that correlate with a registrant's [**349] risk of recidivism, (3) is valid and appropriate for its purpose, and (4) is consistent with other instruments that have been developed. Consequently, we conclude that the instrument is a rationally based risk assessment tool and that the grounds Slansky asserted to challenge the instrument are without merit.

Slansky v. Neb. State Patrol, 268 Neb. 360, 375 (Neb. 2004)

NEW JERSEY

- Actuarials admissible.
- No bifurcation between jury and judge.
- good decision at appellate division [In re Commitment of R.S., 339 N.J. Super. 507, 548-549 (App. Div. 2001)
- The use of actuarial instruments such as the Static 99 and the MnSOST-R was approved in In re Commitment of R.S., 339 N.J.Super. 507, 773 A.2d 72 (App.Div.2001), aff'd, 173

N.J. 134, 801 A.2d 219 (2002), and they are routinely employed in SVPA cases. See, e.g., In re Commitment of G.G.N., 372 N.J.Super. 42, 51-52, 855 A.2d 569(App.Div.2004).(In re Civil Commitment of A.E.F., 377 N.J. Super. 473, 480 (App. Div. 2005))

- "New Jersey Sexually Violent Predator Act.", N.J. Stat.§30:4-27.24 et al.
  §30:4-27.26. Definitions relative to sexually violent predators

(b) any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the person's offense should be considered a sexually violent offense.

"Sexually violent predator" means a person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sexually violent offense, or has been charged with a sexually violent offense but found to be incompetent to stand trial, and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment.

The New Jersey appellate court's decision in R.S., 339 N.J. Super. 507, 773 A.2d 72, aff'd, 173 N.J. 134, 801 A.2d 219, represents one of the well-researched and well-reasoned decisions on the issue. The defendant in R.S. had been convicted of sex crimes against prepubescent boys. R.S., 339 N.J. Super. at 513, 773 A.2d at 75. The State sought his commitment under the New Jersey Sexually Violent Predator Act (N.J. Stat. Ann.§30:4-27.24 through 30:4-27.38 (West 2002)). R.S., 339 N.J. Super. at 512, 773 A.2d at 74-75. At a five-day evidentiary hearing on the admissibility of actuarial instrument results, a State expert testified that she had administered four actuarial risk-assessment instruments, including the Minnesota Screening Tool-Revised and the Rapid Risk Assessment of Sex Offender Recidivism (Rapid Risk Assessment). R.S., 339 N.J. Super. at 516, 773 A.2d at 77. Another State expert testified that a large number of research studies supported the use of actuarial instruments for determining the likelihood of recidivism. That psychologist explained that the original Minnesota Sex Offender Screening Tool was a clinically derived measure in which researchers took factors that research had shown as significant indicators for sexual recidivism and scored them, based on clinical judgment, to determine which were most significant. The researchers then refined the scale through factor analysis and validity studies to derive a more statistically valid approach, the Minnesota Screening Tool-Revised. The Minnesota Screening Tool-Revised had been validated and cross-validated with good results. The State's expert further explained that the Rapid Risk Assessment was an empirically based instrument designed after a meta-analysis study by two prominent researchers in the field. (A meta-analysis study is one in which researchers look at several different studies at the same time and come up with a set of variables that are significant in all of them.) The Rapid Risk Assessment had been validated. The Static-99, which was the updated version of the Rapid Risk Assessment, was developed by a British researcher who combined the Rapid Risk Assessment with certain statistical instruments used in Britain and Canada. The Static-99 had been validated. The inter-rater reliability for the Minnesota Screening Tool-Revised, the Rapid Risk Assessment, and the Static-99 were all "fairly high," with the Static-99 the best. R.S., 339 N.J. Super. at 520, 773 A.2d at 79.

The defendant's experts testified that the reliability of the instruments administered to the defendant was unknown. They also testified that (1) the Rapid Risk Assessment and the Minnesota Screening Tool-Revised had little to modest predictive value; and (2) the inter-rater reliability scores for the Minnesota Screening Tool-Revised were relatively acceptable. R.S., 339 N.J. Super. at 524-28, 773 A.2d at 81-84.

On this evidence, the trial court in R.S. determined that evidence regarding the actuarial

instruments was admissible under Frye (R.S., 339 N.J. Super. at 530, 773 A.2d at 85), and the New Jersey appellate court affirmed the trial court's decision (R.S., 173 N.J. 134, 801 A.2d 219). In so holding, the appellate court concluded that the State had met its burden of proving that the use of actuarial instruments was generally accepted by professionals who assess sex offenders for risks of reoffending. R.S., 339 N.J. Super. at 540-41, 773 A.2d at 92. The appellate court also concluded that authoritative scientific and legal writings, along with the existence of numerous workshops held nationwide on the subject of risk assessment, established that actuarial instruments were "an accepted and advancing method of helping to assess the risk of recidivism among sex offenders." R.S., 339 N.J. Super. at 545, 773 A.2d at 95.

III

At the SVPA commitment hearing, the State presented testimony from two experts, Dr. Stanley Kern, a psychiatrist employed by the NRU, and Dr. Jennifer Kelly, [**77] a staff psychologist at the NRU. R.S. did not present any witnesses at this final commitment hearing; however, he did present three expert witnesses at the evidentiary hearing on use of the actuarial evidence.

Kern's diagnosis was pedophilia, alcohol abuse and borderline mental retardation. R.S. was currently taking Prozac, to control compulsive behavior; Lupron, to reduce sexual desire; and Thorazine, to relieve anxiety. While Kern acknowledged that R.S. had undergone eight years of therapy, he had only recently become more involved in treatment at the NRU. R.S. still had an [*516] "impulsive control" problem and "certainly" needed treatment and confinement.

Kelly testified that she prepared an evaluation of R.S. based upon a review of his treatment history, criminal record, and standardized testing, as well as her personal observations of R.S. in group sessions and a clinical interview. Kelly also administered the Minnesota Multi-Phasic Personality Inventory (MMPI-II) [***9] and scored four actuarial risk assessment tools--the Minnesota Sex Offender Screening Tool Revised (MnSOST-R), the California Actuarial Risk Assessment Tables (CARAT), the Registrant Risk Assessment Scale (RRAS), and the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR). Kelly said that the results of the MMPI-II were consistent with an individual who is impulsive, easily frustrated, angry, hostile and in some ways antisocial. On the actuarial instruments, R.S. fell into the high-risk range on the MnSOST-R, the CARAT, and the RRAS, and into the moderate-risk range on the RRASOR. Kelly stated that R.S. has acknowledged that he currently has deviant sexual fantasies involving children, but he claimed that he has tried to change his fantasies of children to fantasies of adult males. However, Kelly could not be sure of the truth of his statement because R.S. was not completely forthright on the psychometric testing. She concluded in her forensic psychosexual evaluation of March 27, 2000 that R.S. is at "high risk" to reoffend and should remain at the NRU for continued sex offender and substance abuse treatment.

Kelly testified at length about the actuarial risk assessment [***10] instruments she used in her evaluation. Research discloses, she explained, that clinical judgment alone has been considered inadequate to make a determination of which sex offender is going to recidivate and which is not. Individuals working in the field of sex offender risk assessment have developed actuarial tools to aid in making predictions of future dangerousness. This is done by studying those sex offenders who recidivate to see which risk factors they have in common. Through statistical tests, the [*517] factors which repeat most often are identified and used to create the actuarial instruments.

Actuarial instruments mainly measure static factors, which Kelly explained are historical facts about the offender which do not change. Once a subject's record is reviewed and an instrument is scored, the results are then adjusted based upon the evaluator's clinical judgment of the subject's dynamic factors. Dynamic factors are factors which change over time, such as an

individual's treatment progress, his attitude, and his arousal patterns. Kelly stated that dynamic factors are much more difficult to measure than static factors; they are subjective and they can vary from day to day. Kelly [***11] discussed the nature of each actuarial instrument she used, its validity and its reliability. Kelly's testimony in regard to actuarial instruments was entirely consistent with the testimony of the other State experts.

Dr. Glenn Ferguson, a psychologist employed as the clinical director at the NRU, was the first witness to testify on behalf of the State at the evidentiary admissibility hearing on the actuarial instruments relied upon by the three cases before us, R.S., W.Z., and J.P. He obtained a Ph.D. in 1997. His Ph.D. dissertation was "a validation study of the Registrant Risk Assessment Scale." Ferguson explained that the NRU uses an adjusted actuarial approach to evaluate a sexual offender's risk of recidivism. This consists of comparing actuarial instruments, psychological testing, clinical interviews and clinical observations to see when there is agreement to support a clinical diagnosis. Use of these different scales is "state-of-the-art" in the field of sex offender risk assessment because it minimizes the weaknesses inherent in any one single test.

Ferguson discussed each of the recently developed actuarial instruments used at the NRU, beginning with the CARAT. The CARAT is a purely actuarial measure developed by looking at the characteristics and personality traits of about 500 California sex offenders who had been released into the community after completing a treatment program. Comparing traits among those who [*518] recidivated, researchers derived a table very much like the actuarial tables insurance companies use to set rates. Because this is purely an actuarial measure, it does not consider dynamic factors which might contribute to an individual's recidivism. The California researchers who developed the CARAT did a validation study on the instrument which was favorable. A validation study looks at the ability of an instrument to measure what it purports to measure--in this case, to correctly classify individuals into different risk factors for recidivism.

Ferguson testified that the original MnSOST was a clinically-derived measure in which Minnesota researchers took factors which research had shown as significant indicators for sexual recidivism and scored them, based on clinical judgment, on which were most important. The researchers then refined the scale through factor analysis and validity studies to come up with a more statistically [***13] valid approach, the MnSOST-R. The MnSOST-R is empirically based but is one of the few actuarial instruments which attempts to capture dynamic factors, such as an individual's participation in treatment. The MnSOST-R has been validated and cross-validated with good results. Ferguson explained that the difference between a validation study and a cross-validation study is that a validation study is done using the same population that was used to develop the test while a cross-validation study looks at an entirely new set of individuals.

Ferguson described the RRASOR as an empirically-based instrument designed after a meta-analysis study by two prominent researchers in the field. A meta-analysis study is a study in which researchers look at several different studies at the same time--in the case of the RRASOR about 100 studies related to sex offender recidivism--and come up with a set of factors that are significant in all of them. The RRASOR consists of only four factors, all of which are static. He said that it has been validated and possibly cross-validated as well.

Concerning the Static 99, Ferguson stated that it is an improvement of the RRASOR, just as the MnSOST-R is an improvement of the MnSOST. The Static 99 was not scored for R.S., but it has been used in other sex offender commitment hearings. At the request of the Public Defender, the trial judge here considered the admissibility of the Static 99 along with the other actuarial instruments at R.S.'s evidentiary hearing. The Static 99 [**79] was developed by a British researcher who combined the RRASOR with statistical instruments used in Britain and Canada. A strength of this instrument is its utility in predicting violent recidivism as well as sexual recidivism. Although it does not capture many dynamic factors, it does consider substance

abuse. The Static 99 has been validated.

Finally, Ferguson discussed the RRAS, an instrument developed by clinicians and legal experts in New Jersey after the enactment of "Megan's Law," the Registration and Community Notification Law, N.J.S.A. 2C:7-1 to -11, as an objective way of assigning tier classifications to sex offenders prior to release into the community. Ferguson was a member of the group which did the validation study on the RRAS. The RRAS is a clinically-developed scale, based upon a 1995 review of the literature. One of its strengths is the inclusion of several dynamic factors such as progress in treatment, community support, employment, and substance-abuse treatment. However, Ferguson admitted that because the RRAS is not empirically derived it is "on the lower end of the preference scale" and is not in the same league as the MnSOST-R or Static 99.

Ferguson also testified that even though these actuarial tools were designed for specific regional populations (the CARAT was developed for use in California), they are equally applicable to any sex offender population. Evidence for that statement comes from the meta-analysis where studies from all over the world were considered.

Ferguson also stated that an "overwhelmingly" large number of research studies support the use of static facts over the use of dynamic factors for making sex offender risk determinations. One great advantage to using actuarial instruments is that by [*520] assigning specific weight to specific factors they standardize clinical assessments by ensuring that different clinicians arrive at basically the same result.

Ferguson explained that "inter-rater reliability" as applied to a risk assessment tool refers to its consistency--whether two different scorers will arrive at the same results for the same individual. Usually, the largest factors contributing to inconsistency are improper training and access to different information. The inter-rater reliability for the MnSOST-R, the RRASOR and the Static 99 are all fairly high with the Static 99 the best.

Ferguson admitted that many of the same people who created the assessment tools did the reliability and validation studies, but explained that this was because most of the instruments have not been in use long enough for peer review or replication studies. Although there are no formal testing manuals for the instruments, there are articles, technical instructions and materials on the Internet to aid the evaluators. And, there are numerous workshops around the country which offer training from the instrument developers themselves.

When asked about the correlation coefficients for the instruments, which represent the degree of agreement between the factors being considered and recidivism, Ferguson stated that they are generally in the 0.20 to 0.30 range, with the Static 99 being the best at around 0.40. While these coefficients may not seem high to the uninformed observer, he said that in the field of medicine anything over 0.15 is statistically significant. The range of .20 to .30 is much better than random chance or guesswork.

Ferguson explained it is important to understand that actuarial instruments are not predictive with regard to any particular individual; they can only indicate within [**80] what group the individual falls. In other words, an actuarial tool can say that a particular individual has characteristics similar to other individuals in a group that recidivates 70% of the time, but it cannot say that a particular individual has a 70% chance of recidivating. For this reason, actuarial instruments are not considered true psychological [*521] tests of the person. A psychological or "psychometric" test measures a personality or cognitive construct, such as I.Q., which is a unique characteristic of an individual and provides information specific to that individual. An actuarial instrument, on the other hand, measures impersonal historical factors to reach a result not predictive for a particular individual. Therefore, Ferguson said, test

development standards applicable to psychometric tests do not apply to actuarial instruments.

Dr. Dennis Doren also testified on behalf of the State. Doren is a psychologist who has been involved in sex offender treatment in Wisconsin since 1983 and in sex offender risk assessment there since 1994. He explained there are basically five types of sex offender assessment procedures. The first is unguided clinical judgment; this is simply the opinion of a psychiatrist or psychologist who has no preformed set of ideas of what factors contribute to risk. The second is guided clinical judgment where the clinician has some fixed or articulable ideas of what risk factors are important, perhaps based on experience or theory. These first two methods have been used in routine civil commitment proceedings in New Jersey. The third procedure is research-guided clinical judgment in which the clinician considers factors that research has shown as important. The fourth, which is the method used by the NRU, is the clinically-adjusted actuarial assessment in which the clinician starts with a statistically-based formula and makes clinical adjustments according to the specific details of each case. Finally, there is the pure actuarial method which uses statistical formulas without any clinical adjustment.

Of these methods, Doren said, research-guided clinical judgment and clinically-adjusted actuarial assessment are the most often used in the field of sexual offender risk assessment. The difference between the two approaches is the weighing of the risk factors. In research-guided clinical judgment the evaluator knows what factors are important but not how much weight to give one factor relative to the others. By using statistics, the actuarial approach standardizes how much weight is given to each factor.

Doren testified that there are currently about 150-175 experts nationwide in the field of sex offender risk assessment and most employ the clinically-adjusted actuarial assessment method. At the time of his testimony, June 16, 2000, fifteen states have sexually violent predator (SVP) laws, and only two, Texas and Massachusetts, do not use actuarial assessment tools. In July 1999, Doren surveyed the thirteen states which employ these instruments to determine which were most used for risk assessment. He discovered that the RRASOR was used by most of the evaluators in all thirteen states, the MnSOST-R was used in ten states, the CARAT was used only in California, and the RRAS was used only in New Jersey. Although the CARAT and the RRAS are not frequently used, the underlying principle of both is generally accepted.

Doren stated that the clinically-adjusted actuarial method is the most accurate method for risk assessments. Research has shown that actuarial analysis is at least as efficacious as clinical judgment and often better. This is because clinicians are often not systematic in their data [**81] gathering or in their memory. A study in Canada showed that clinicians tend to overestimate violence of all types, including sexual violence, so that unguided clinical judgment tends to come up with higher assessments of risk than does the actuarial process. By restricting and structuring clinical judgment, actuarial instruments produce more refined and accurate results.
In Doren's opinion, the order of the instruments from best researched to least researched is the Static 99, the RRASOR, the MnSOST-R, the CARAT and the RRAS. However, he also said that the instruments currently in use are not comprehensive enough in terms of the factors they consider and in terms of the type of outcome they measure. The greatest shortcoming of the instruments is that they do not adequately consider dynamic factors.

[*523] Doren also acknowledged it is a misuse of the instruments to say that a person with a certain score has a specific risk of recidivism. Rather, it is proper to say that a person with a certain score is in a group that has been shown through research to have a specific risk of recidivism. Misuse of the instruments can be avoided by reading the documents which describe how to interpret the results, receiving training from someone knowledgeable about the instruments, or consulting with another professional aware of the information. Finally, Doren

agreed with Ferguson that actuarial instruments are not psychological tests and are not designed specifically for psychologists. Hence, the rules applicable to psychological testing are not relevant to the development of the instruments.

Dr. Randy Kurt Otto, a psychologist and professor at the University of South Florida, testified on behalf of R.S. at the evidentiary hearing. Otto has been performing sex offender assessments in Florida since January 1999 and does not use actuarial tools, although he is familiar with how they are used and scored.

Otto stated that "a lot of people" in the field of sex offender assessment use actuarial [***22] tools, but added that the discipline of psychology has a history of psychologists using invalid instruments. He believes that the psychologists and psychiatrists who should be involved in validating these instruments are those with expertise in psychometrics and test development in general, not clinicians.

In Otto's opinion, in order for a test to be generally accepted it must be (1) published and made available for others to review, (2) proven to be reliable, (3) validated and cross-validated, (4) accompanied by a test manual, (5) critically reviewed by an independent group, and (6) associated with a known standard error of measurement. Psychologists are obligated under their code of ethics to use only those tests which meet these standards.

Otto discussed the concepts of psychometric reliability (If the test is administered to the same person on more than one occasion, [*524] are the results consistent?), inter-rater reliability (If two different individuals administer the test, are the same results achieved?) and scale consistency (Are the items on the same scale internally consistent? Do they measure the same thing?) and stated that the actuarial tools are lacking in all these areas. According to Otto, the inter-rater reliability is unknown for the RRASOR, the Static 99, the CARAT and the RRAS, and the inter-rater reliability for the MnSOST-R only holds true if all test administrators receive training.

Otto also discussed predictive validity (How well does the test predict what it purports to predict?), construct validity (How well does the test measure a particular construct, such as intelligence, as compared to other measures of the same construct?), sensitivity (How many individuals will the test identify who have the behavior for which you are testing?), and specificity (How many individuals will the test incorrectly classify who do not have the behavior for which you are testing?). Although the MnSOST-R has been validated and cross-validated, Otto thought the results of the validation questionable because the representative sample of offenders was very small. Also, the only validity data obtained to date is for the pure use of actuarials and there has never been a validity study done on the adjusted actuarial approach in general.

Otto further testified that the developers of the instruments have never reported standard error of measurement, although it can [***24] easily be calculated from the data. The informational materials available about the instruments over the Internet are not of comparable quality to a commercially-published testing manual. Articles about some of the instruments have been published in peer-reviewed journals, but in Otto's opinion none of the publications have been comprehensive.

Otto considers many of the same factors used by the instruments when he assesses a sex offender and acknowledges that the meta-analysis leading up to the RRASOR was "great work," a "wonderful" first, and a "valuable and worthwhile" attempt at developing a reliable instrument. Otto believes the data-based objectivity of the actuarial approach is "an absolute" strength. However, Otto concluded that I think it's a real concern here that these instruments promise

something they don't deliver. And they have an incredible aura of scientific certainty and preciseness that's just not there if you peel away the second layer of the onion.

Therefore, I think psychologists do a disservice to the profession and psychiatrists, too, for that matter, when they use them and act as if there's this precision and with a scientific basis that's not really there.

Dr. Kay Jackson, a psychologist and co-director of the Metropolitan Center, a treatment center for sex offenders in New York City, also testified on behalf of R.S. at the evidentiary hearing. She uses actuarial instruments as a way of assisting her interviews with clients and in assessing their dangerousness.

Jackson discussed the concepts of reliability and validity and applied them to the most common actuarial instruments. She said no one has reported any reliability statistics regarding the RRAS or the CARAT. Thus, we do not know if they are good instruments for predicting recidivism. The RRASOR has a modest predictive validity and reliability and the inter-rater reliability scores for the MnSOST-R are "pretty good." Jackson did not feel she could comment on the Static 99. All of the actuarial instruments are based upon archival records and so it would be a simple matter to do a predictive validity study on them, she thinks.

Jackson testified that actuarial tools are not generally accepted in the field of psychology because she has not seen any publications concerning them in general psychological journals. To her, meaningful peer review must encompass practitioners from outside the narrow specialty field of sex offender assessment.

However, Jackson acknowledged that actuarial instruments can be useful: I think that the actuarial tools provide important information for understanding what is going on with an offender and for making a clinician apprized of factors which he or she may have overlooked, [**83] and they're very important for understanding the probabilities of reoffense.

But I do not think that by themselves they can single out or offer a definitive understanding of the propensity and imminent risk of any specific individual at a given point in time.

Jackson found it important to employ as many diverse sources of information regarding a patient as possible. The problem with the clinically-adjusted actuarial approach is it might lead a clinician to assume that every factor determinative of reoffense has already been identified and assigned a probability, but that simply is not the case. Although the available research studies have been interesting and illuminating, they have not yet developed the degree of specificity which would allow a clinician to weigh absolutely essential dynamic factors, such as the effects of the passage of time, the development of a support system, realizing victim empathy, and the motivation underlying the offense.

Jackson testified that there is very persuasive research to suggest that clinical predictions for reoffense are no better than actuarial predictions and, in some circumstances, are even worse. Other research suggests that clinicians who use judgment informed by both research and actuarial instruments perform at least as well as the actuarial instruments and, in some circumstances, even better.

Jackson stated that the actuarial instruments can be meaningfully used by clinicians as long as they understand their limitations and do not rely upon them exclusively. The instruments are especially useful when used as a check list without employing the weights or probabilities their developers have assigned to them. Jackson agreed that some form of adjusted actuarial risk assessment can be expected to represent the highest standard of practice in the field in the

coming years.

The final expert for R.S. was Dr. Frederick Berlin, an M.D. psychiatrist and Ph.D. psychologist, who is a professor at the Johns Hopkins University School of Medicine and founder of the Johns Hopkins Sexual Disorders Clinic. Berlin clarified at the onset that the actuarial instruments under discussion are not psychological tests, but are simply statistical methods used to identify whether an individual belongs to a group with certain kinds of risk factors. Berlin echoed the admonitions of all the experts that actuarials are not helpful in making statements about [*527] individuals within a group and can only be used to make statements about the likely outcome for the group as a whole.

Berlin was very critical of the RRASOR, which consists of four simple questions regarding the subject's number of prior sexual offenses, the age of the offender, whether the offenses involved incest, and the gender of the victims. In practice, the method usually comes down to just two questions because most individuals being evaluated are over age twenty-five and incestuous offenders are rarely considered for civil commitment. All the RRASOR is really saying is that offenders who have had more prior offenses and who have had male victims are more likely to reoffend, and that "there's some consensus in the literature [which] suggests that if you've had a male as opposed to female victims you may be at heightened risk." Berlin said when the RRASOR was tested on 230 sex offenders in Minnesota, it did "abysmally" in predicting who would reoffend and who would not. Interpreting the RRASOR's correlation coefficient, Berlin explained that it indicated that only 2% of what determined whether or not someone would recidivate was being measured by the instrument. "Ninety-eight percent of what determined whether a given individual [**84] would or would not recidivate had nothing to do with anything that was being measured by the RRASOR." Berlin concluded that even though there is a statistical correlation between RRASOR scores and recidivism, in practical terms, to him, it means "virtually nothing."

Concerning the CARAT, Berlin testified that he had seen no studies concerning its predictive validity. He also questioned its accuracy with regard to R.S. Berlin compared Kelly's report that the CARAT placed R.S. within the group found to recidivate at a rate of 70% within five years with a study done of 600 men with similar backgrounds being treated at the Johns Hopkins Sexual Disorders Clinic that indicated the five-year recidivism rate was 10%. Berlin concluded that, based on his clinical experience, the CARAT prediction could not be accurate.

Berlin described the RRAS as not an actuarial method at all because it is without any basis in statistical analyses. It was designed as a common sense, reasonable approach that allows offenders to be classified into tiers for community notification purposes, but there is no statistical basis for its scoring. Berlin knew of no study which indicates that the RRAS can accurately predict recidivism.

The MnSOST-R was also strongly criticized by Berlin as misleading and having little predictive value. The studies which have been published make it appear promising mostly because of comparison with the earlier MnSOST which was "horrible," in his view. Berlin discussed the Static 99 and noted that it has a correlation coefficient of 0.33, corresponding to a predictive value of about 11%. This is better than any of the other instruments to date. Although some would call this a "moderate" correlation, in real life terms it means that 89% of the determinative factors are not addressed by the instrument.

Berlin summed up his objections to the use of actuarial instruments as follows: If people want to bring information in about prior offenses and say that there's some literature 'cause most people probably have figured out that the more offenses you have you're probably likely at recidivating. Fine. But don't bring in a test that only says something about a group as a whole, suggests that

it says more about an individual than it can possibly say, and give an impression.
And this is my worry that there's more of a science to this than there really is. There isn't that much of a science when it comes to individuals.Berlin did support the use of actuarial instruments as screening tools--to see who should be subject to a commitment hearing, for example. In fact, he acknowledged that actuarials are used generally in the psychological community as screening tools. But he does not believe that they should be accepted as accurate statements about the likelihood of a given individual to recidivate. The actuarial instruments simply cannot make distinctions among people within the group as a whole.

IV
Judge Freedman reviewed the applicable case law and observed that the final determination of dangerousness lies with the courts and not the expertise of psychiatrists and psychologists. He discussed the difference between "hard scientific evidence" [***32] and evidence of a psychological nature, noting that some scholars believe jurors do not view psychological evidence as very scientific or worthy of unquestioning acceptance. He also recognized many experts believe that "flexible, less stringent standards of reliability are appropriate [for psychological evidence] and that no one factor should be dispositive."

Although the judge acknowledged that unreliable psychological testimony might mislead a jury, he concluded that where the court is the trier of fact, as here, the risk of confusion from expert testimony is greatly diminished. He found that

[t]here is little question in the Court's mind that the use of the risk assessment instruments here would be sanctioned by the relaxed standards discussed in State versus Harvey [, 151 N.J. 117, 699 A.2d 596 (1997)].

It is also this Court's opinion that on the record here, HN4it is clearly established that these tests are admissible or can be used by an expert in creating expert testimony under the Frye [v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C.Cir.1923)] test as well.

Judge Freedman reviewed the expert testimony and found that it provided an empirical basis for the instruments and for the conclusion that they are to some degree predictive of future recidivism. He observed that both Jackson and Berlin, experts for R.S., indicated that the instruments can be useful if their limitations are understood and noted that even Otto used them for screening purposes. The judge concluded that the actuarial instruments can be relied upon in making decisions about future dangerousness. The judge also observed that Berlin had agreed with the State's experts that the actuarial instruments are not psychological tests and hence not subject to the standards for psychological testing.

The judge stated that the crucial question is to what extent the percentages that the actuarials assign with regard to recidivism can be applied to the individual sex offender. He concluded that the instruments have not yet reached the point where they can apply a particular percentage to a particular person. However, he found them nevertheless of evidential value and helpful to know that a person is within a group where 60% recidivate as opposed to a group where only 30% recidivate.

Judge Freedman concluded that the actuarial instruments meet the Frye test because they are based on valid scientific principles, there have been sufficient reliability and validity studies done to justify their use, and they are used for risk assessment purposes throughout this country.

Concerning R.S., the judge reviewed the evidence presented at the commitment hearing and found that he has a mental abnormality which predisposes him to commit acts of sexual violence. Although the judge said that in some cases it might be difficult to draw the line

between an individual who poses a threat to the community and one who does not, "in this case, I don't think it's close at all. I think that clearly R.S. clearly has the propensity to commit acts of sexual violence and it is to such a degree that he undoubtedly poses a threat."

V

R.S. first urges that in order to be used as evidence in SVPA commitment hearings, actuarial instruments must satisfy the test for admissibility established by Frye v. United States, 54 App.D.C. 46, 293 F. 1013 (D.C.Cir.1923). He contends that actuarial instruments do not satisfy the Frye standard because they are not generally accepted by the scientific community and their reliability has not been established by formalized scientific testing or peer review. R.S. also asserts that the prejudicial effect of the instruments far outweighs their probative value, even in this non-jury context. The State responds that these actuarial instruments are well accepted in forensic psychology as shown by the testimony [**86] of experts in the field, the widespread use of these tools in other [*531] jurisdictions, and the many professional publications concerning them.

HN5The standard of review which applies to a court's determination of the admissibility of scientific evidence at a SVPA commitment hearing is not settled. Generally, appellate courts apply an abuse of discretion standard to the evidentiary rulings of a trial court. State v. Conklin, 54 N.J. 540, 545, 258 A.2d 1 (1969). However, our Supreme Court has held that when the matter involves novel scientific evidence in a criminal proceeding, "an appellate court should scrutinize the record and independently review the relevant authorities, including judicial opinions and scientific literature." State v. Harvey, 151 N.J. 117, 167, 699 A.2d 596 (1997), cert. denied, 528 U.S. 1085, 120 S.Ct. 811, 145 L.Ed.2d 683 (2000) [***36] (DNA evidence). This review may even include post-hearing publications, since "general acceptance may change between the time of trial and the time of appellate review." Id. at 168, 699 A.2d 596.

In Harvey, the Court stated in dicta that [o]n this appeal, we do not decide whether a different standard of appellate review should apply to a trial court's decision to admit or exclude expert testimony in civil cases, where the focus is not on whether the scientific evidence is generally accepted, but rather whether it derives from a reliable methodology supported by some expert consensus.
[Ibid.]We question whether the Court has established a different standard of review for the admission of scientific evidence in all civil cases, including SVPA commitments. However, at a minimum, Harvey makes reasonably clear that HN6when a trial court applies the Frye test to admissibility determinations, an appellate court should employ a de novo standard of review, which we apply here.

VI

Two recent decisions of our Supreme Court, Matter of Registrant G.B., 147 N.J. 62, 685 A.2d 1252 (1996), and Matter of Registrant C.A., 146 N.J. 71, 679 A.2d 1153 (1996), [***37] address the use of RRAS assessments in the tier hearing process under Megan's [*532] Law. R.S. contends that the holdings in these cases should not be applicable to SVPA commitment proceedings because commitment threatens a much more substantial liberty interest than community notification, tier hearings are not governed by the rules of evidence, and the underlying statutory schemes are not comparable. The State disagrees.

In C.A., the Court held that the RRAS "is an appropriate and reliable tool" whose use is consistent with the requirements of the statutes and case law. Id. at 107, 679 A.2d 1153. Although C.A. involved a proceeding where the rules of evidence did not apply, the Court's reasoning in C.A. is instructive as to its view of actuarial instruments in general. After reviewing the development of the RRAS, the Court stated that [a]lthough the weights assigned to the categories in the [RRAS] Scale have not been scientifically proven to be valid, the State has

produced sufficient evidence to convince us that the factors used in the Scale are reliable predictors of recidivism and are weighted in the Scale according to their relative effectiveness as predictors. The greater [***38] weight attached to the static categories is in accord with expert opinion on criminal sexual behavior.

[Id. at 105, 679 A.2d 1153.]

Most important, the Court stated that HN7scientific literature has shown "that the use of actuarial concrete predictors is at least as good, if not in most cases better, in terms of reliability and predictability than clinical interviews." Id. at 106, 679 A.2d 1153. Although C.A. argued that the RRAS was unreliable, untested, and arbitrary in operation, and the Court agreed that the RRAS had not been empirically validated through scientific field studies, the Court nevertheless found that the factors which comprise the RRAS "have been shown to be the best indicators of risk of re-offense." Id. at 107, 679 A.2d 1153. The Court further observed that "one of the great strengths of the [RRAS] is that it can provide consistent measures of risk of re-offense." Id. at 108, 679 A.2d 1153. Finally, the Court observed that the RRAS "is not a scientific device. It is merely a useful tool to help prosecutors and courts determine whether a registrant's risk of reoffense is low, high, or moderate." Ibid.

[*533] In G.B., the Court again soundly endorsed the [***39] RRAS, holding that a registrant could not present evidence at a tier hearing to challenge its predictive validity. G.B., 147 N.J. at 85, 685 A.2d 1252. The Court fully realized that HN8community notification under Megan's Law implicates "significant" liberty and privacy interests that trigger the doctrines of procedural due process and fairness. Id. at 74, 685 A.2d 1252. Yet, the Court reasoned that the RRAS "is only a tool, albeit a useful one" that serves as "a guideline for the court to follow in conjunction with other relevant and reliable evidence in reaching an ultimate determination of the risk of reoffense. . . ." Id. at 80-81, 685 A.2d 1252d; see Matter of E.I., 300 N.J.Super. 519, 527-28, 693 A.2d 505 (App.Div.1997) (the court need not blindly follow the RRAS tier calculation but may place a registrant in a lower-risk tier based on the non-violent and consensual circumstances of the case--defendant age 21; victim age 15).

The Court in G.B. analyzed the role of experts at a tier hearing under the case law pertaining to civil commitments in general, implying that the same rules apply in both types of proceedings. G.B., 147 N.J. at 86-87, 685 A. 2d 1252. The Court cited In re D.C., 146 N.J. 31, 679 A.2d 634 (1996), [***40] which concerned the civil commitment of a convicted and paroled sex offender, as representing "how trial courts should view their role in the presentation of expert testimony when a liberty interest is at stake."147 N.J. at 86, 685 A.2d 1252. Contrary to R.S.'s position that C.A. and G.B. are not applicable to SVPA hearings because the liberty interests and the evidentiary standards differ, the Court appeared to say that the same evidentiary standards for admissibility apply whenever a liberty interest is at stake. Under this reasoning, if the RRAS is "presumptively reliable," id. at 82, 679 A.2d 1153, at a Megan's Law tier hearing, it is also presumptively reliable at an SVPA commitment hearing, especially when used only in conjunction with respectable clinical testimony, and indeed as merely ancillary thereto. The Court's reliance on the utility of RRAS was reiterated recently in Matter of Registrant J.M., 167 N.J. 490, 499-502, 2001 N.J. LEXIS 325, 772 A.2d 349 (2001) .

[*534] The approach taken by the Court in finding that the RRAS is simply one piece of the adjudicatory puzzle--a reliable tool which aids the court in reaching the ultimate determination of dangerousness--is [***41] directly applicable to questions of its admissibility at an SVPA commitment hearing. Indeed, HN9while the rules of evidence do not apply to Megan's Law tier hearings, the Court seems to be saying that due process and fundamental fairness [**88] requirements supercede those rules and require that the risk of reoffense be fairly evaluated by the trial court.147 N.J. at 74-75, 685 A.2d 1252. The Court specifically concluded that the RRAS

is a fair and reliable tool to aid in that evaluation. Since the RRAS satisfied the requirements of due process and fundamental fairness in G.B., we conclude it also satisfies these constitutional elements in the present matter. For us to find that the RRAS is not admissible at all in SVPA commitment hearings would disregard the Court's holdings in C.A. and G.B. Furthermore, because the testimony before Judge Freedman was uncontroverted that the RRAS is the least widely used and least experimentally supported of the relevant actuarial instruments, we conclude that the other risk assessment tools are admissible as well.

In C.A. and G.B., the Court took notice of the fact that HN10the use of actuarial predictors is at least as reliable, if not more [***42] so, than clinical interviews. C.A., 146 N.J. at 105, 679 A.2d 1153. Further, the Court held that allocating weight to risk factors in accordance with scientific literature and expertise is an acceptable method of predicting future criminal sexual behavior. Ibid. Also, the Court found it highly desirable to have a method which provides consistency in risk determinations. Id. at 108, 679 A.2d 1153. Finally, the Court specifically stated that the RRAS is presumptively reliable in measuring a sex offender's risk of reoffense. G.B., 147 N.J. at 81-82, 685 A.2d 1252. For these reasons, we uphold the admissibility and use of actuarial instruments at SVPA hearings as a factor in the overall prediction process under the precedent of C.A. and G.B.

VII

We next consider the question of admissibility of expert scientific evidence under the more general standard. The admission of expert testimony is governed by N.J.R.E. 702, which provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may [***43] testify theretHN11o in the form of an opinion or otherwise.This rule imposes three basic requirements on the admission of expert testimony: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror;

(2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and
(3) the witness must have sufficient expertise to offer the intended testimony.
[State v. Kelly, 97 N.J. 178, 208, 478 A.2d 364 (1984).]

Both parties agree that the experts presented at the hearings in this matter were properly qualified to offer testimony regarding sex offender risk assessment. Both parties also agree that the experts' specialized knowledge was beyond the ken of the average juror and helpful to the court in deciding the issue of admissibility of actuarial instruments. The sole question, then, is whether actuarial instruments as indicators of sex offender recidivism have achieved a state of the art so that an expert's testimony based in part upon them is sufficiently reliable.

Although the expert testimony at issue involves behavioral science, which is concededly subjective [***44] and less tangible than the techniques of physical science, our Court has applied the same test to its admissibility. See State v. Fortin, 162 N.J. 517, 525, [**89] 745 A.2d 509 (2000) (HN12expert testimony concerning an application of behavioral science must be evaluated under the test for admission of scientific evidence); State v. Cavallo, 88 N.J. 508, 518, 443 A.2d 1020 (1982) ("[T]he policies for applying the test to physical techniques such as radar apply as well to psychiatric testimony").

HN13 [*536] New Jersey has long recognized that in order to be admitted into evidence, a novel scientific test must meet the standard articulated in Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C.Cir.1923). State v. Doriguzzi, 334 N.J.Super. 530, 539, 760 A.2d 336 (App.Div.2000).

Although Frye has been replaced in the federal court system in favor of the more lenient standards of Federal Rule of Evidence 702 as set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), in New Jersey, with the exception of toxic tort litigation, Frye remains the standard. [***45]

[Ibid.]The test, which has been applied in criminal and civil cases alike, is whether the specific scientific community generally accepts the evidence. State v. Spann, 130 N.J. 484, 509, 617 A.2d 247 (1993); Windmere, Inc. v. International Ins. Co., 105 N.J. 373, 386, 522 A.2d 405 (1987). HN14

A proponent of a newly-devised scientific technology can prove its general acceptance in three ways:

(1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis;

(2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and

(3) by judicial opinions that indicate the expert's premises have gained general acceptance.

The burden to "clearly establish" each of these methods is on the proponent.

[State v. Harvey, 151 N.J. at 170, 699 A.2d 596 (citations omitted).]

HN15To establish that a technology is generally accepted in the profession, a party need not necessarily show there is a unanimous belief in the absolute infallibility of the techniques [***46] that underlie the scientific evidence. Windmere, 105 N.J. at 378, 522 A.2d 405. "The fact that a possibility of error exists does not preclude a conclusion that a scientific device is reliable." Ibid., citing, Romano v. Kimmelman, 96 N.J. 66, 474 A.2d 1 (1984). The burden on the proponent of the evidence is to prove that it is a "non-experimental, demonstrable technique[] that the relevant scientific community widely, but perhaps not unanimously, accepts as reliable." Harvey, 151 N.J. at 171, 699 A.2d 596.

HN16 [*537] Despite strong opposition from many mental health professionals, the United States Supreme Court has held that the testimony of psychiatrists and psychologists bearing on the future dangerousness of an individual is admissible. Barefoot v. Estelle, 463 U.S. 880, 896-99, 103 S.Ct. 3383, 3396-97, 77 L.Ed.2d 1090, 1106-08 (1983). In reaching that conclusion, the Court quoted the following passage from Jurek v. Texas, 428 U.S. 262, 274-76, 96 S.Ct. 2950, 2957-58, 49 L.Ed.2d 929, 940-41 (1976): It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does [***47] not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . What is essential is that the jury have before it all [**90] possible relevant information about the individual defendant whose fate it must determine.

[Barefoot, 463 U.S. at 897, 103 S.Ct. at 3396, 77 L.Ed.2d at 1106-07.]

This reasoning was followed by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1, 34, 662 A.2d 367 (1995), when it found that HN17there is nothing quintessentially inscrutable about a prediction of future criminal conduct. The Court held that an expert, with "a fair degree of experience with sex offenders and their characteristics, along with adequate knowledge of the research in this area," is qualified to testify concerning a sex offender's risk of reoffense at a

Megan's Law tier hearing. Id. at 35, 662 A.2d 367.

Barefoot allowed testimony concerning future dangerousness based upon the clinical judgment of qualified mental health professionals. In this matter now before us, the experts agreed that substantial research [***48] has shown that actuarial instruments may be better predictors of future violence than clinical predictions. The New Jersey Supreme Court has found as fact that actuarial instruments are at least as reliable, if not more so, than clinical interviews. C.A., 146 N.J. at 105, 679 A.2d 1153. .HN18 Since expert testimony concerning future dangerousness based on clinical judgment alone has been found sufficiently reliable for admission into evidence at criminal trials, we find it logical that testimony based upon a combination of clinical judgment and actuarial instruments is also reliable. Not only does actuarial evidence provide the [*538] court with additional relevant information, in the view of some, it may even provide a more reliable prediction of recidivism.

With regard to the Frye test standard, the State established that the use of actuarial instruments is generally accepted by professionals who assess sex offenders for risks of reoffense. All of the experts agreed that actuarial tools are in general use in the area of sex offender assessment. Doren's uncontradicted testimony indicated that actuarial instruments are commonly used in thirteen of the fifteen states with SVP laws. All of [***49] the experts agreed that the instruments can be useful, if properly understood and administered. They also agreed on the scientific validity of the principles underlying the instruments--that sex offenders who recidivate share certain common factors that can be evaluated and weighed to arrive at a statistical prediction of recidivism. The main area of disagreement is whether the instruments have been sufficiently peer-reviewed and validated to be considered inherently reliable predictors of future dangerousness. The State's experts expressed the belief that while there is certainly much more work to do in this developing science, the tests are sufficiently reliable to provide clinicians with useful information concerning a sex offender's risk of reoffense. Of the three witnesses who testified on behalf of R.S., only Berlin really disagreed with this statement, contending that the instruments meant "virtually nothing." However, Berlin later partially contradicted himself by admitting that the instruments can be useful for some purposes, such as screening tools to "see who gets to a civil commitment, for example."
Judge Freedman observed that there was a general consensus among [***50] the experts that actuarial instruments are, at least to some degree, reliable in predicting future dangerousness. Recognizing that questions concerning the instruments' overall utility and reliability are more properly questions of what weight to accord them than they are questions of admissibility, the judge found that the instruments cannot assign a specific risk to a particular individual. However, Judge [**91] Freedman concluded that knowing [*539] the risk group to which an offender belongs relative to other offenders is helpful in making a future dangerousness determination.

HN19There is no question that a substantial amount of reliability must be assured before scientific evidence may be admitted. State v. Cavallo, 88 N.J. at 518, 443 A.2d 1020. The extensive expert testimony in this matter concerning validation studies, cross-validation studies, reliability studies, correlation coefficients, and clinically-derived factors attests to such reliability in this context, where the actuarials are not used as the sole or freestanding determinants for civil commitment. They are not litmus tests. There is no requirement that the actuarial instruments be the best methods which could ever be devised [***51] to determine risk of recidivism. What is required is that they produce results which are reasonably reliable for their intended purpose. As observed, the Supreme Court, after reviewing the development of the RRAS, has concluded that it is a presumptively reliable instrument. G.B., 147 N.J. at 81-82, 685 A.2d 1252.

We are convinced that HN20"[w]hat constitutes reasonable reliability depends in part on the

context of the proceedings involved." Cavallo, 88 N.J. at 520, 443 A.2d 1020. Admissibility of the evidence

entails a weighing of reliability against prejudice in light of the context in which the evidence is offered. Expert evidence that poses too great a danger of prejudice in some situations, and for some purposes, may be admissible in other circumstances where it will be more helpful and less prejudicial.

[Ibid.]HN21SVPA commitment hearings are tried before a judge, not a jury. The court understands that it is the ultimate decision maker and must reach a conclusion based upon all of the relevant evidence "psychiatric or otherwise--according each type such weight as [it] see[s] fit." State v. Fields, 77 N.J. 282, 308, 390 A.2d 574 (1978). An experienced [***52] judge who is well-informed as to the character of the actuarial instruments and who is accustomed to dealing with them is much less likely to be prejudiced by their admission than a one-case, fact-finding jury would be. The judge can accord the [*540] appropriate weight to actuarial assessments in any given case, or reject them. This conclusion follows directly from the Court's reasoning in Cavallo: the HN22expert evidence in parole determinations is offered . . . to establish whether there is substantial likelihood that the inmate will commit future crimes. . . . Unlike a jury trial, in the parole context the evidence is heard by the Parole Board, which routinely makes predictions of the sort required and which has substantial experience evaluating psychiatric testimony. Therefore, such testing can be of reasonable assistance to the factfinder there without the concomitant risk of serious confusion, prejudice and diversion of attention that is likely to result from its admission in a jury trial.

[Cavallo, 88 N.J. at 525-26, 443 A.2d 1020.]We find R.S.'s N.J.R.E. 403 argument that the actuarials' prejudicial effect outweighs their probative value in this nonjury proceeding unconvincing.

[***53] Similarly unavailing is R.S.'s contention that the actuarial instruments cannot be accepted in the scientific community because they were not developed in accordance with the rules of ethics followed by psychologists. The fact that the development and use of the actuarial instruments does not conform with the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct and the American Educational Research Association's [**92] Standards for Educational and Psychological Testing was a main thrust of Otto's testimony. Judge Freedman considered this testimony, but rejected it, agreeing with the State's experts and Berlin that the actuarials are not psychological tests and hence not subject to the association's standards for psychological testing. This conclusion is amply supported by the evidence. HN23Actuarial instruments do not measure psychological constructs such as personality or intelligence. In fact, they do not measure any personal attributes of the particular sex offender at all. Rather, they are simply actuarial tables--methods of organizing and interpreting a collection of historical data. The standards governing the development and use of [***54] psychological tests are not applicable here.

While HN24"[p]roof of general acceptance within a scientific community can be elusive," Harvey, 151 N.J. at 171, 699 A.2d 596, [*541] the State has established that the actuarial instruments are reliable tools for help in predicting a sex offender's risk of reoffense. However, even if we had doubts that the instruments have "passe[d] from the experimental to the demonstrable stage", ibid., we think the State has demonstrated general acceptance through the other two prongs of the test set forth in Harvey.

HN25The second aspect of the Harvey test provides that a proponent can establish general acceptance "by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony." Id. at 170, 699 A.2d 596. At the

hearing and on this appeal, the State has presented numerous articles and pamphlets concerning the development and use of actuarial assessment instruments which have appeared in such journals as Psychology, Public Policy and Law, The Journal of Psychiatry and Law, Law and Human Behavior, and The Family Law Quarterly. Although many of the articles [***55] are by the same author, Dr. R. Karl Hanson, of the Department of the Solicitor General of Canada, others are written by academics and forensic psychologists from around this country.

In a very recent article, not available to Judge Freedman, researchers report the results of a meta-analytic study comparing three actuarial instruments: the RRASOR, the SACJ-Min (Structured Anchored Clinical Judgment Minimum), and the Static 99. R. Karl Hanson and David Thornton, Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales, 24 Law & Hum. Behav. 119 (2000). The researchers found that for prediction of sex offense recidivism, the Static 99 is more accurate than either the RRASOR or the SACJ-Min. Id. at 127. Further, the study showed that all three tests exhibit similar predictive accuracy both for rapists and for child molesters. Ibid. The correlation coefficient for the Static 99 was given as 0.33, which was reported to represent moderate predictive accuracy. Id. at 129. While admitting that the correlation coefficient of 0.33 accounts for only about 10% of the variance, the authors noted that [*542] [e]stimating absolute recidivism [***56] rates is a difficult task because many sex offenses go undetected. Observed recidivism rates (especially with short follow-up periods) are likely to substantially underestimate the actual recidivism rates. Nevertheless, Static 99 identified a substantial subsample of offenders (approximately 12%) whose observed sex offense recidivism rate was greater than 50%. At the other end, the scale identified another subsample whose observed recidivism rates was only 10% after 15 years. Differences of this magnitude [**93] should be of interest to many applied decision makers.

[Id. at 130.]Concerning the use of the Static 99 in sex offender risk assessments, the authors conclude that Static 99 does not claim to provide a comprehensive assessment for it neglects whole categories of potentially relevant variables (e.g., dynamic factors). Consequently, prudent evaluators would want to consider whether there are external factors that warrant adjusting the initial score or special features that limit the applicability of the scale (e.g., a debilitating disease or stated intentions to reoffend). Given the poor track record of clinical prediction, however, adjustments to actuarial [***57] predictions require strong justifications. In most cases, the optimal adjustment would be expected to be minor or none at all.

[Id. at 132.]

Of interest, Dr. Otto, who testified at the evidentiary hearing for R.S., co-authored an article which states, "[w]hile an actuarial approach to assessment may be distasteful to the judiciary, which displays a preference for focusing on the individual case rather than class membership, this approach is the most accurate approach to psychological assessment." Randy K. Otto & James N. Butcher, Computer-Assisted Psychological Assessment in Child Custody Evaluations, 29 Fam. L. Q. 79, 87 (1995). This statement seemingly conflicts with testimony given by Otto at the hearing. R.S. contends that the article is irrelevant to the question of sex offender risk assessment and only serves to illustrate that Otto "harbors no bias against the use of actuarials in general." However, Otto's endorsement of actuarial assessment in family law custody matters does show his acceptance of the scientific principles underlying actuarial methods and his recognition that they can be useful in judicial proceedings.

In an article reporting [***58] the results of a meta-analysis of the merits of actuarial methods, two researchers from the University of Minnesota conclude that to use clinical judgment in preference [*543] to actuarial data when predicting such things as risk of recidivism "is not only unscientific and irrational, it is unethical." William M. Grove & Paul E. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic)

Prediction Procedures: The Clinical-Statistical Controversy, 2 Psychol. Pub. Pol'y & L. 293, 320 (1996). These two researchers are ardent supporters of actuarial approaches in a wide variety of contexts. R.S. contends that Grove and Meehl provide no information concerning the reliability of the actuarial instruments challenged in this case. While it is true that the article does not discuss specific methods of sex offender risk assessment, it does strongly support the position that actuarial methods are superior to clinical judgment. In fact, it even implies that evaluations should be conducted based upon actuarial findings alone, unmodified by clinical adjustments.

Hanson, a leading authority in the field of sex offender assessment, compares [***59] the empirically-guided clinical approach to risk assessment with the pure actuarial approach and the adjusted actuarial approach and concludes: [a]s research progresses, actuarial approaches are expected to substantially outperform the guided clinical approaches, but currently each approach has demonstrated roughly equivalent (moderate) predictive accuracy. In particular, each of these approaches can be expected to reliably identify a small subgroup [**94] of offenders with an enduring propensity to sexually reoffend.

[R. Karl Hanson, What Do We Know About Sex Offender Risk Assessment? 4 Psychol. Pub. Pol'y & L. 50, 67 (1998).]R.S. stresses that Hanson admits that even the best actuarial instruments are far from perfect and it would be imprudent for a clinician to automatically defer to them. However, Hanson has never claimed in any of his articles that actuarials are perfect, only that they are a marked improvement over unaided clinical judgment. The main point of Hanson's What Do We Know About Sex Offender Risk Assessment? is that actuarial instruments can provide a court with useful information, particularly with regard to offenders falling at either extreme of the [***60] risk scale.

R.S. submitted two articles in support of his contention that actuarial instruments are still experimental methods that are [*544] unreliable predictors of future dangerousness. In the first, the author reviews currently used assessment procedures and criticizes both the RRASOR and the MnSOST-R as being experimental procedures "that cannot support expert testimony in a legal proceeding." Terence W. Campbell, Sexual Predator Evaluations and Phrenology: Considering Issues of Evidentiary Reliability, 18 Behav. Sci. & L. 111, 123 (2000). Although Campbell's article makes numerous assertions of a legal nature, he does not support his legal conclusions with citations to relevant case law or statutes. The impression one gets from reading the article is that while the author has extensive experience testifying as an expert witness in commitment hearings, he has little experience actually developing or testing risk assessment techniques.

The second article is a well-balanced and easily understood review of current sex offender risk assessment techniques. Judith V. Becker and William D. Murphy, What We Know and Do Not Know About Assessing and Treating Sex Offenders, 4 [***61] Psychol. Pub. Pol'y & L. 116 (1998). The authors observe that "improvements in prediction have been made using actuarial methods" and "actuarial prediction continues to outperform clinical prediction." Id. at 124. The authors do note, however, that even though actuarials significantly improve prediction over pure chance, they still produce a number of false positives and negatives. Id. at 126. For that reason, despite the "significant advance" their application to present individual offenders is still problematic. Ibid.

While the number of articles presented by both parties in this matter is not vast, HN26our Court has never required a specific number of articles to satisfy the test of general acceptance. Harvey, 151 N.J. at 1744, 699 A.2d 596. Rather, the focus should be on "whether existing literature reveals a consensus of acceptance regarding a technology." Ibid. "Further, 'under appropriate circumstances, speeches, addresses, and other similar sources may be used to demonstrate the acceptance of a premise by the scientific community.'" Ibid., quoting State v.

Kelly, 97 N.J. 178, 211 n.17, 478 A.2d 364 (1984). [***62]

[*545] Our Supreme Court observed, in its most recent Megan's Law registration case, HN27More recent studies continue to demonstrate that static factors, such as offense history, are better predictors of long-term recidivism. R. Karl Hanson & Andrew J.R. Harris, Where Should We Intervene? 27 Criminal Justice & Behavior 6 (2000) (citing R. Karl Hanson & Monique T. Bussiere, Predicting Relapse: A Meta Analysis of Sexual Recidivism Studies, 66 Journal of Consulting [**95] & Criminal Psychology, 348-362 (1998)).

[Matter of Registrant J.M., 167 N.J. 490, 501, 772 A.2d 349, 2001 N.J. LEXIS 325 (2001)].

In sum, the State has produced articles which endorse the use of actuarial instruments to predict the future dangerousness of sex offenders. All of these articles are serious, scientific efforts to tackle the elusive problem of looking inside the human mind and emotions to predict the future. In addition, uncontested evidence at the hearing indicates that numerous workshops are held throughout the country on the subject of risk assessment each year and that a great deal of material is available over the Internet concerning the use of actuarial instruments for sex offender evaluations. This evidence, [***63] taken together, establishes that actuarial instruments are an accepted and advancing method of helping to assess the risk of recidivism among sex offenders. Thus, we find the second prong of the Harvey test has been established.

Finally, HN28a proponent may prove the general acceptance of novel scientific technology "by judicial opinions that indicate the expert's premises have gained general acceptance." Harvey, 151 N.J. at 170, 699 A.2d 596. There are reported opinions from other jurisdictions in which courts have accepted the results of actuarial risk assessments into evidence. Actuarial assessments have been used at sexual predator commitment hearings in California, Washington, Wisconsin, Minnesota, Florida and Illinois.
In People v. Poe, 74 Cal.App.4th 826, 88 Cal.Rptr.2d 437, 440-41 (1999), the court found that a RRASOR score in the high risk category adjusted with appropriate clinical factors supported a finding that the defendant was likely to engage in sexually violent behavior if released. See also People v. Otto, 80 Cal.App.4th 75, 95 Cal.Rptr.2d 236, [*546] 241-42 (Ct.App.), review granted, 99 Cal. Rptr. 2d 484, 6 P.3d 149 (Cal.2000) [***64] (results of RRASOR admitted into evidence at SVP trial). In Garcetti v. Superior Court, 85 Cal. App. 4th 508, 102 Cal. Rptr. 2d 214, 239 (Ct.App.2000), review granted, 105 Cal.Rptr.2d 788, 20 P.3d 1084 (2001), the court held that the Static 99, "a psychological instrument that uses an actuarial method to produce a profile of a person's likelihood of reoffense with an accuracy rate of over 70 percent, and that is supplemented or adjusted by use of clinical factors, can form the basis for an expert opinion on future dangerousness."

In In re Linehan, 557 N.W.2d 171, 189 (Minn.1996), vacated on other grounds, 522 U.S. 1011, 118 S.Ct. 596, 139 L.Ed.2d 486 (1997), an individual committed under Minnesota's SVP law challenged his commitment because the State's expert had failed to use actuarial methods in his risk assessment. The civilly-committed appellant argued that by failing to perform actuarial analysis, the State had ignored "state of the art" evidence and the "best available scientific knowledge and methodology." Ibid. The court rejected this argument, noting that the state's expert in fact did rely on base rate statistics in arriving at his [***65] recommendations. Ibid. The Minnesota court also found that enhanced accuracy can be achieved by combining actuarial methods with clinical judgment. Ibid.

In In re Detention of Campbell, 139 Wn.2d 341, 986 P.2d 771, 779 (1999), cert. denied, U.S. , 121 S.Ct. 880, 148 L.Ed.2d 789 (2001), the court summarily rejected a challenge to expert actuarial testimony at a SVP commitment trial saying simply that predictions of future dangerousness are admissible and differences in opinion go to the weight of the evidence and

not its admissibility. The dissent took the majority to task, however, stating that the real issue in the case was "whether the psychiatric community has accepted the [**96] reliability of either the clinical or actuarial method to predict dangerousness." Campbell, 986 P.2d at 787 (Sanders, J., dissenting). After discussing the scientific literature concerning actuarial methods, Judge Sanders concluded that "[s]ince neither [*547] the clinical nor the actuarial method to predict the likelihood of reoffense has gained general acceptance in the psychiatric community, the Frye standard has not been met. To hold otherwise would be to allow preference for result [***66] to dictate the boundaries of science." Id. at 788. Actuarial instruments continue to be used at SVP hearings in Washington. See, e.g., In re Detention of Thorell, 99 Wn. App. 1041, 2000 Wash. App. LEXIS 2899, 2000 WL 222815 (Ct.App.2000) (published decision but unpublished opinion; this is an unpublished opinion despite citation as 99 Wn. App. 1041, because the state reporter lists the case only as an affirmance.) In Thorell, the state introduced several actuarial instruments, including the RRASOR, at an SVP hearing.

Cases which have accepted the use of actuarial instruments without comment include Pedroza v. Florida, 773 So. 2d 639 (Fla.Dist.Ct.App.2000) (RRASOR, MnSOST-R); In re Detention of Walker, 314 Ill. App. 3d 282, 731 N.E.2d 994, 247 Ill. Dec. 221 (2000) (RRASOR); and In re Commitment of Kienitz, 227 Wis. 2d 423, 597 N.W.2d 712 (1999) (five unnamed actuarial instruments); c.f., Westerheide v. State, 767 So. 2d 637, 657-60 (Fla.Dist.Ct.App.2000), review granted, (January 23, 2001). Our research has revealed no state appellate court decision which has found actuarial instruments inadmissible at SVP proceedings. [***67]

R.S. also submits two trial court orders refusing to admit the results of actuarial risk assessments into evidence. In Florida v. Klein, Case No. 05-1999-CF-08148 (Fla.Cir.Ct.2000), the Circuit (trial) Court held, noting in its order that it disagreed with other Circuit Court rulings on the point, that the RRASOR and the MnSOST-R are not reliable predictors of risk of reoffense. Id. at 3. Although the Klein court noted that actuarial methods, in general, are based upon sound scientific principles, it concluded that the RRASOR and the MnSOST-R have not been peer reviewed, do not have instruction manuals, and are not true psychological tests. It is clear from the decision that the testimony of Dr. Berlin, who testified for R.S. at the evidentiary hearing, had a major influence on the Klein court's decision. Ibid. In In re [*548] the Detention of Harold Johnson, No. LACV038974 (Iowa Dist.Co.Ct.2000), the court held that the RRASOR, the MnSOST, the MnSOST-R and the Static 99 are not sufficiently reliable to present to a jury. The court based this holding on the facts that actuarials are still experimental, there has been no peer review of the underlying data, the [***68] developers themselves express reservations about the accuracy of the instruments, and there is a lack of experimental data to support the instruments' predictions. Also, the Iowa trial court believed that the results of the assessments would have an exaggerated impact on the jury. In both Klein and Johnson, the trial courts evaluated the admissibility of the actuarial instruments under the Frye standard. (Our research has revealed no subsequent history for either of these cases.)

With the exception of Judge Sanders' dissent in Campbell, no appellate courts have considered articulately the Frye standard when upholding the introduction of actuarial instruments at SVP hearings. The reasons given for accepting actuarials have varied from none at all to analyses of the role of experts under Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090. Even though other appellate courts have not specifically and articulately approved actuarials under Frye, we [**97] find it more significant that they actually have accepted these instruments as reliable and helpful evidence in sexual predator proceedings. We conclude the third prong of the Harvey [***69] test has been met.

The State has established that actuarial instruments are generally accepted by mental health professionals who practice in the field of sex offender risk assessment; that there is support in scientific literature, at workshops and on the Internet for the use of these instruments; and that

actuarial instruments have been accepted by the courts of at least six other states. We affirm Judge Freedman's conclusion that actuarial instruments satisfy the Frye test and are admissible for consideration by the State's experts in this situation.
We affirm the judgment finding by clear and convincing evidence that R.S. suffers from a personality disorder with a propensity [*549] to engage in acts of sexual violence and poses a threat to the health and safety of the community within the meaning of N.J.S.A. 30:4-27.26. Affirmed.

In re Commitment of R.S., 339 N.J. Super. 507, 548-549 (App. Div. 2001) affirmed 173 N.J. 134, 801 A.2d 219, 2002 N.J. LEXIS 906 (2002)

This case, like its companion, IMO Commitment of W.Z., 173 N.J. 109, 801 A.2d 205, 2002 N.J. LEXIS 905, (2002), [***7] also decided today, involves application of the New Jersey Sexually Violent Predator Act (SVPA or Act), N.J.S.A. 30:4-27.24 to -27.38. In this case, R.S. challenges the State's use of actuarial risk assessment instruments by experts testifying in commitment proceedings under the Act. All arguments against the admissibility and use of such instruments were consolidated in this proceeding. We affirm the decision of [*136] the Appellate Division upholding "the admissibility and use of actuarial [risk assessment] instruments at SVPA hearings as a factor in the overall prediction process" substantially for the reasons expressed in the thorough and persuasive opinion by Judge King. IMO Commitment of R.S., 339 N.J. Super. 507, 534, 773 A.2d 72 (N.J.Super.A.D.2001) Commitment of R.S., 339 N.J. Super. 507, 534, 773 A.2d 72 (N.J.Super.A.D.2001). We add only the following.

We have no doubt that HN1a testifying psychologist or psychiatrist may refer to actuarial risk assessment instruments used in the formation of the expert's opinion. As the Appellate Division noted in applying the standard set forth in Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923), the use of actuarial instruments in the assessment process has gained general [***8] acceptance. IMO Commitment of R.S., supra, 339 N.J. Super. at 538, 773 A.2d 72 Commitment of R.S., supra, 339 N.J. Super. at 538, 773 A.2d 72. We resort here to the Frye standard because of the significant liberty interest at stake. HN2When seeking to satisfy that standard, however, a party need not show unanimous acceptance by the relevant community. State v. Harvey, 151 N.J. 117, 171, 699 A.2d 596 (1997). It is reliability that must be assured. IMO Commitment of R.S., supra, 339 N.J. Super. at 539, 773 A.2d 72 Commitment of R.S., supra, 339 N.J. Super. at 539, 773 A.2d 72 (citing State v. Cavallo, 88 N.J. 508, 518, 443 A.2d 1020 (1982), and noting that context of the proceedings determines whether reasonable reliability exists).

Although there are critics who challenge the validity and predictability of actuarial instruments in sex offender assessments, the record expert testimony and scientific literature demonstrates that clinicians specializing in sex offender assessments generally support the use of actuarial instruments [**221] in the overall assessment process even though they do not support reliance on the actuarial instruments alone. IMO Commitment of R.S., supra, 339 N.J. Super. at 538, 773 A.2d 72 Commitment of R.S., supra, 339 N.J. Super. at 538, 773 A.2d 72. As the Appellate Division summarized: The extensive expert testimony in this matter [***9] concerning validation studies, cross-validation studies, reliability studies, correlation coefficients, and clinically-derived factors attests to . . . reliability in this context, where the actuarials are not used as the sole or free-standing determinants for civil commitment. They are not litmus tests. HN3There is no requirement that the actuarial instruments be the best methods [*137] which could ever be devised to determine risk of recidivism. What is required is that they produce results which are reasonably reliable for their intended purpose. [Id. at 539, 773 A.2d 72 at 539, 773 A.2d 72 (citation omitted).]

We conclude, as did the courts below, that HN4actuarial risk assessment instruments may be

admissible in evidence in a civil commitment proceeding under the SVPA when such tools are used in the formation of the basis for a testifying expert's opinion concerning the future dangerousness of a sex offender. The testifying expert shall be permitted to refer to such instruments in explaining how he or she reached a conclusion concerning an individual's risk assessment. In so holding, we acknowledge that HN5a testifying expert now may rely on actuarial as well as clinical information when formulating an [***10] opinion concerning future dangerousness. We anticipate that the trial court will regard the actuarial assessment information, as did Judge Freedman below, as simply a factor to consider, weigh, or even reject, when engaging in the necessary factfinding under the SVPA. Id. at 538-40, 773 A.2d 72 at 538-40, 773 A.2d 72. The judgment of the Appellate Division is affirmed.

In re R.S., 173 N.J. 134, 137 (N.J. 2002)

NEW JERSEY

In conformity with standard procedures, M.L.V. was evaluated at the ADTC prior to his release. On March 27, 2003, Emili Rambus, Psy.D. (Rambus) issued a "termination report" which recommended that M.L.V. participate in certain ADTC treatment programs. Rambus noted that while M.L.V.'s score on the Static 99 suggested he is at a high risk of sexual re-offending, his score on the MnSOST-R suggested a moderate risk. n1 The doctor stated that M.L.V.'s scores on both tests were elevated due to historical variables, which remain static. Rambus added, "[M.L.V.'s] high score on the Static 99 is mitigated by [the] therapeutic progress and [the] strict requirements of parole supervision. As such, from a clinical viewpoint, [M.L.V.'s] continuation on parole is appropriate . . . ." On April 2, 2003, the Board placed an administrative hold on M.L.V.'s release pending further evaluation for commitment under the SVPA.

FOOTNOTES n1 The MnSOST-R is an actuarial instrument which measures sexual recidivism by taking into account certain static factors (historical facts that do not change over time) and attempts to capture certain dynamic factors (such as an individual's participation in treatment). The Static 99 is another actuarial instrument used to predict sexual recidivism. In re Commitment of R.S., 339 N.J. Super. 507, 517-19, 773 A.2d 72 (App.Div.2001), aff'd o.b., 173 N.J. 134, 801 A.2d 219 (2002).

Barone rendered a report in which she concluded that M.L.V. presents a significant risk to engage in future acts of deviant sexual behavior if released into the community. She testified that [***19] M.L.V.'s score on the Static 99 placed him in a high-risk category for sexual recidivism. Barone diagnosed M.L.V. as suffering from paraphilia NOS as well as anti-social personality disorder. Barone stated that the combination of paraphilia and anti-social personality disorder "has been shown through the research as being the most robust predictor of sexual recidivism."

In re Civil Commitment of M.L.V., 388 N.J. Super. 454, 460 (App. Div. 2006) certification denied In re Civil Commitment of M.L.V., 190 N.J. 255, 919 A.2d 848, 2007

On June 9, 2003, Heather Burnett, L.S.W., and Hilton Miller, Psy.D., prepared a termination report detailing A.H.B.'s treatment at Avenel. The report noted A.H.B.'s understanding of sex offender [*21] treatment was "superficial." According to the report, A.H.B. had "very limited understanding of his deviant arousal, [did] not understand the link between the deviant fantasy and the offensive cycle, [had] limited insight into the role of planning and grooming, and limited insight into internal and external high risk situations." According to the MnSOST-R test score of five, A.H.B. was a "moderate" risk to re-offend, [**1030] and his Static-99 score [***5] of six suggested he was a "high" risk to re-offend. n1

A.H.B. also presented testimony from Dr. Jeffrey [***9] Singer, a psychologist, who had interviewed A.H.B. on March 2 and March 9, 2004, n4 which was slightly over two weeks before the final hearing. Dr. Singer found that A.H.B. suffered from "a non-identifiable distinct paraphilic pattern of arousal," that he was not anti-social, was of borderline intelligence, and likely suffered from a personality disorder with dependent traits. According to Dr. Singer, the Static-9 should have been scored a four, which indicates "medium-high" risk of re-offending and the MnSOST-R should have been scored a three, indicating low risk. The doctor concluded that A.H.B. presented a low to moderate risk to re-offend and fell "below [the SVPA's] threshold" and that with a higher level of supervision than he had after his initial offense, A.H.B. could be maintained in the community with supervision for life.

In re Civil Commitment of A.H.B., 386 N.J. Super. 16, 20-21 (App. Div. 2006) certification denied 188 N.J. 492, 909 A.2d 726.

NEW JERSEY

Dr. Reeves interviewed A.E.F. at Midstate Correctional Facility for one hour on March 7, 2003, the same day he completed the certificate. He also reviewed the following: risk assessments of January 23, 2003 and February 4, 2002; psychological evaluations of August 31, 2002 and October 5, 2002; correspondence of [*480] February 19, 2003; evaluations [***8] of May 3, 1990 and November 20, 1998 from the Adult Diagnostic and Treatment Center (ADTC); a letter from the Prosecutor's office dated January 21, 2003; A.E.F.'s prison classification file, which included the items listed above as well as a criminal history. With respect to psychological testing or risk assessment tools, Dr. Reeves noted that A.E.F. had scored eight on the Static-99 n3, a score associated with a 39%, 45% and 52% probability of sexual reoffense within five, ten, or fifteen years, respectively, a score of fifteen on a psychopathy checklist screening version conducted at ADTC in 1998, and house-tree-person drawings that "show inadequacy and discomfort [with][A.E.F.'s] sexuality." Reviewing A.E.F.'s sexual history, Dr. Reeves noted that he either denied any sexual intent or behavior in his crimes or "minimizes its severity." Concerning his criminal history, Dr. Reeves stated that A.E.F. had "been convicted of crimes involving forced sex or attempts at forced sex on five separate occasions from 1973-1988." A.E.F. had received no extended sex-offender specific therapy while in prison, specifically having been offered none at ADTC.

FOOTNOTESn3 The use of actuarial instruments such as the Static 99 and the MnSOST-R was approved in In re Commitment of R.S., 339 N.J.Super. 507, 773 A.2d 72 (App.Div.2001), aff'd, 173 N.J. 134, 801 A.2d 219 (2002), and they are routinely employed in SVPA cases. See, e.g., In re Commitment of G.G.N., 372 N.J.Super. 42, 51-52, 855 A.2d 569 (App.Div.2004).

Dr. Reeves' diagnoses were: (1) polysubstance dependence; (2) personality disorder NOS [not otherwise specified] (with prominent antisocial traits beginning after age fifteen); (3) Hepatitis B carrier; chronic hepatitis C. His conclusion was that "[A.E.F.]'s Personality Disorder and Polysubstance Dependence, individually and together, result in A.E.F. having serious difficulty controlling his sexual behavior, such that it is likely he will not control his sexual behavior and will reoffend." As a result, A.E.F. qualified for SVPA commitment.

Dr. Makhija interviewed A.E.F. for one hour and twenty minutes immediately following the interview with Dr. Reeves. Dr. [*481] Makhija reviewed A.E.F.'s medical and classification records including the ADTC psychological evaluations by Dr. Catherine Blandford on May 3, 1990, and by Kenneth McNiel, Ph.D. on November 20, 1998, and the January 21, 2003 letter from the Prosecutor. A.E.F. denied receiving any in-patient or out-patient psychiatric treatment, including sex-offender specific therapy, other than several visits with Dr. Streete, a psychiatrist

at Midstate Correctional Facility. Dr. Makhija also noted A.E.F.'s score of eight on the Static-99 [***10] test, placing him in the high risk category, as well as a score of sixteen on the MnSOST-R, n4 also placing him in the high risk range. Both tests were completed that same day, March 7, 2003. Dr. Makhija diagnosed the following: (1) alcohol [**609] abuse, (2) polysubstance abuse, (3) Impulse Control Disorder, NOS, and (4) anti-social personality disorder. Without any additional comment or discussion, the doctor found A.E.F. subject to SVPA commitment, simply placing a check mark next to the appropriate preprinted language on the certificate which states that "[t]his person suffers from a mental abnormality (as defined by the Act) or personality disorder that makes the person likely to engage in acts of sexual violence if not confined to a secure facility for control, care and treatment."
FOOTNOTES n4 As we explained in E.S.T., 371 N.J.Super. at 569 n.3, 854 A.2d 936, a score of thirteen and above carries an 88% recidivism rate. See also In re Commitment of G.G.N., supra, 372 N.J.Super. at 52, 855 A.2d 569.

In re Civil Commitment of A.E.F., 377 N.J. Super. 473, 481 (App. Div. 2005) certification denied 185 N.J. 393, 886 A.2d 663, 2005 N.J. LEXIS 1592 (2005).

NEW JERSEY

The State's second witness was Dr. Robert S. Carlson, a psychologist employed at the STU. He interviewed E.S.T. for about one hour and reviewed correctional records from the state prison facility. He related that E.S.T. had participated in several "psychometric evaluations" that showed him to be in the "mildly mentally retarded range." Significantly, in his report and testimony, [*569] Dr. [***10] Carlson relied upon two actuarial instruments used for risk assessment, see In re Commitment of R.S. 339 N.J. Super. 507, 517, 773 A.2d 72 (App.Div.2001), aff'd, 173 N.J. 134, 801 A.2d 219 (2002), which had been administered to E.S.T. by Gregg Gambone, Ph.D. on December 29, 2001, a date on which Dr. Gambone interviewed E.S.T. as well. A copy of Dr. Gambone's report was also placed in evidence. Carlson's review of the tests showed that E.S.T. obtained a score of eight on the MnSOST-R, which placed him at a high-risk category for sexual reoffense. Gambone's report stated the test result as representing a 70% [**941] chance of recidivism. n3 On the Static 99, he received a score of four, suggesting that he belongs to a group that is at medium-high risk for sexual reoffense. Gambone referred to this as equating to a 45% chance of recidivism. n4 While these actuarial instruments are unique in that they "have been designed specifically for . . . and with the intention of predicting recidivism," they are "evaluated within the context of the overall evaluation." His conclusion that E.S.T. posed a "significant risk" of reoffense was based on: an overall pattern [***11] of impulsiveness, of lack of control, which he has manifested when in the community setting. And . . . it's just not necessarily only sexual behaviors that--that he has had difficulty with, but there is some criminal versatility that he has demonstrated over time. I don't--even though I did not [*570] score the Hare PCLR, I don't believe that he would probably meet the diagnostic threshold of--of psychopathy. But, certainly, there are traits that--that one could infer from, again, a careful review of the behavioral history.Dr. Carlson felt that E.S.T.'s offense denial made it unlikely for him to engage in any meaningful treatment.

FOOTNOTES n3 The MnSOST-R carries a possible total score of thirty-one, with a high score being the worst. Any score of eight or above denotes a 70% recidivism rate and a "possible" commitment. A score of thirteen and above carries an 88% recidivism rate and "probable" commitment. As noted, EST's score was eight, thus bringing him, albeit barely, within the 70% category. A score of seven would have denoted a 45% recidivism rate. Indeed, as noted, his score of four on the Static 99 test equated with a fifteen-year reoffense rate of 38%. [***12]

n4 In his report, Gambone concluded that E.S.T. presented a moderate to high risk "for sexual recidivism within the next ten years." He referred the matter to the Attorney General's office "for

further psychiatric evaluation to determine whether inmate meets the criteria for commitment as a sexually violent predator." Interestingly, Gambone also stated that as of the time of his evaluation, E.S.T. "does not meet the criteria for the appropriateness of a civil (psychiatric) commitment or forensic psychiatric commitment (i.e., A.K.F.)." There was no comment by the testifying experts on this aspect of Gambone's report or its significance.

The judge found, based on the history of the offenses and the opinions of the experts, that E.S.T. is a sexually violent predator, predisposed to commit sexually violent acts. "He has great difficulty controlling his sexual behavior." She went on to find that "[b]ecause of his denials, he cannot be treated. He cannot develop any insight into his problems. And, therefore, he cannot stop. He is exactly the same as he was when he was first taken into custody during [***13] that summer [of 1985]."

In re Commitment of E.S.T., 371 N.J. Super. 562, 570 (App. Div. 2004)

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- No jury, judge determines by 'clear and convincing' evidenceermine if sexually dangerous individual
- Static-99, MnSost-R, PLC-R2, RRASOR, admissible.
- Interesting use of "rebuttable presumption" in statute.
- North Dakota, 'Commitment of Sexually Dangerous Individuals' N.D. Cent. Code, § 25-03.3-01 et al.

8. "Sexually dangerous individual" means an individual who is shown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. It is a rebuttable presumption that sexually predatory conduct creates a danger to the physical or mental health or safety of the victim of the conduct. For these purposes, mental retardation is not a sexual disorder, personality disorder, or other mental disorder or dysfunction.

9. "Sexually predatory conduct" means: a. Engaging or attempting to engage in a sexual act or sexual contact with another individual, or causing or attempting to cause another individual to engage in a sexual act or sexual contact, if:

- Gaddie v. Barrera (In re Barrera), 2008 ND 25, P10-P13 (N.D. 2008)(discussion of Static-99 and MnSost-R)
- State v. Anderson (In re Anderson), 2007 ND 50, P41-P42 (N.D. 2007)(PCL-R)
- Feland v. P.F. (In the Interest of P.F.), 2006 ND 82, P22 (N.D. 2006)

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Dr. Sullivan also found a score of + 13 on [***6] the MnSost-R. Additionally, she scored Barrera at 2 on the Rrasor, indicating a twenty-one percent recidivism rate over ten years and a 5 on the Static-99, which is medium to high risk with a recidivism rate of forty percent over fifteen years. She also found a high risk level using the PCL-R2. Dr. Sullivan stated antisocial personality disorders predispose an individual to disregard and violate the rights of others to his own ends. She was concerned that Barrera viewed himself as posing "no risk whatsoever,"as that is a dynamic risk factor for re-offending. Dr. Sullivan stated Barrera did not complete [**747] sex

offender and alcohol treatment, even though treatment lessens the risk of alcohol contributing to future sexually violent offenses. She also noted Barrera had no plans to prevent himself from engaging in sexually offensive conduct in the future. Dr. Sullivan testified that Barrera possessed a number of psychopathic traits but did not possess any traits which would mitigate his high risk. She concluded to a reasonable degree of scientific certainty that Barrera is likely to engage in further acts of sexually predatory conduct by virtue of his personality disorder.

3.
[*P11] Using MnSost-R, [***7] Dr. Volk found a moderate level of risk with a forty-five percent recidivism rate, a moderate to high risk level using the Static-99 and a moderate level of risk on the Rrasor. He scored Barrera as 28 on the Hare PCLR test, indicating a strong propensity for psychopathic personality or behavior. Dr. Volk testified that Barrera's failure to complete sex offender treatment would increase these risk levels overall.

[*P12] In Dr. Volk's opinion, there is a risk that Barrera's mental disorder makes him likely to engage in further acts of sexually predatory conduct. Dr. Volk listed several high risk characteristics possessed by Barrera, including limited remorse for the victim, attempts to conceal facts from the examiner, limited awareness on how to prevent future assaults, resistance to treatment, and a history of physical aggression, substance abuse and suppression of emotions. It was Dr. Volk's opinion that Barrera should undergo sex offender treatment before being released.

[*P13] The testimony presented shows Barrera's antisocial personality disorder renders him more likely to disregard the rights of others to achieve his own ends. This is demonstrated by Barrera's extensive criminal history and [***8] previous sexual offense. Testimony also established that Barrera's failure to complete sex offender treatment and an alcohol treatment program increased his risk levels overall. We conclude the district court's commitment order is supported by clear and convincing evidence and therefore is not clearly erroneous.

Gaddie v. Barrera (In re Barrera), 2008 ND 25, P10-P13 (N.D. 2008)
NORTH DAKOTA

Psychometric "risk assessment inventories" or RAIs were also used to determine the probability or actuarial risk that Anderson will engage in future sexually predatory conduct: (1) the Rapid Risk Assessment for Sexual Offender Recidivism ("RRASOR"); (2) the Static-99; and (3) the Minnesota Sex Offender Screening Tool-Revised ("MnSOST-R"). A fourth test, the Psychopathy Checklist-Revised ("PCL-R 2nd"), is a tool "to measure the degree of psychopathy present." Dr. Etherington concluded that Anderson's PCL-R 2nd score indicated that his antisocial personality disorder was more severe than the general prison population's.

Dr. Belanger concluded: Mr. Anderson has a severe antisocial personality disorder. He has a conviction history that includes GSI [gross sexual imposition] and corruption of a minor. He has a high MnSOST-R and a high PCL-R 2nd score. These four items of data support the opinion to a reasonable degree of professional certainty that respondent has a personality disorder that renders him likely to engage in additional acts of sexually predatory conduct.(Emphasis added.) Dr. Etherington arrived at a similar conclusion and stressed Anderson's failure to [***30] complete sex offender treatment: Mr. Anderson meets the diagnostic criteria for Antisocial Personality Disorder. This disorder creates initial reason to believe he is likely to engage in further acts of sexually predatory conduct. The actuarial instruments lend additional support to further acts of sexually predatory conduct. He has not completed a treatment program that might be a protective factor. There is no idiosyncratic factor that might serve as a protective factor. This combination allows the undersigned to conclude to a reasonable degree of professional or scientific certainty that Mr. Anderson is an individual with a congenital or acquired condition that makes him likely to engage in future acts of sexually predatory

conduct.(Emphasis added.) Dr. Gulkin concurred: "One of the most potent factors which mediate against re-offense is the successful completion of a Sex Offender Treatment Program. Mr. Anderson has not completed such a program and had apparently been removed . . . due to failure to cooperate." With respect to the actuarial testing, Dr. Gulkin reviewed the results of the State Hospital's testing and found that "the administration/scoring of the RAI evaluations at the State Hospital supports the findings and conclusions."

1

Under the RRASOR, Anderson's score demonstrated "his lack of a specific paraphilic diagnosis." In other words, he does not have a sexual disorder according to all three experts. Consequently, his score of "2" on a scale of 0-6 indicates "about a 14.2% likelihood for being reconvicted for a new sexual offense within 5 years post-incarceration," and about 21% probability that Anderson would engage in recidivist acts in the next 10 years.

The diagnosis of a sexual disorder is not required under section 25-03.3-01(8), N.D.C.C. The individual satisfies a portion of this section, part (2) under In re G.R.H., 2006 ND 56, P6, 711 N.W.2d 587, by being diagnosed with "a personality disorder, or other mental disorder or dysfunction." See N.D.C.C.§25-03.3-01(8). Therefore, in this case the RRASOR assessment served only to eliminate one of [**582] the possible congenital or acquired conditions required under the statute.

2

Under the MnSOST-R, Anderson's score of 14 correlates to a 78% [***32] likelihood of committing another chargeable sexual offense in the next 6 years. Dr. Etherington characterized this score as "corresponding to the highest-risk range assessed by this scale."

3

Under the Static-99, Anderson scored a 5 on a scale of 11 or 12; however, Dr. Belanger testified that "the highest known score achieved in reality is about a seven." This test measures both paraphilia and antisocial personality disorder; therefore, "the strong loading on the antisocial factor is washed out to a degree by the low loading on the paraphilic factor," according to Dr. Belanger. According to Drs. Etherington and Belanger, even with this mitigation, Anderson's score translates to a 38 to 40 percent probability of recidivism over the next 15 years.

4

Under the PCL-R 2nd, Dr. Etherington concluded: His PCL-R score of 37-39 falls well above the threshold score of 25+ for a finding of a high degree of psychopathy, however, he was not diagnosed with a sexual disorder. It is therefore concluded that this high-risk combination does not affect Mr. Anderson's sexual recidivism risk. The high score on this measure, however, does support a belief [***33] that Mr. Anderson has a more severe antisocial personality than the general prison population.(Emphasis added.) Dr. Belanger explained the importance of the PCL-R 2nd assessment: The PCL-R 2nd scores are important in two different ways. First, it provides test corroboration to the clinical diagnosis of antisocial personality disorder. Second, the detail scores . . . are well within the range of scores that are associated with diminished response modulation. [footnote omitted] Thus the PCL-R 2nd scores also provide a basis for the opinion that Mr. Anderson is likely to engage because of a deficit in volitional capacity sufficient to create serious difficulty in the exercise of self-control.(Emphasis added.)

D

All three experts concluded that Anderson has engaged in sexually predatory conduct, each noting the significance of the 1998 gross sexual imposition charge and the 2000 conviction for corruption of a minor. All three experts found Anderson to have a "severe" or "significant" antisocial personality disorder. All three experts found the required nexis or "causative connection" between Anderson's personality disorder and his dangerousness by noting his impulse-control problems as evidenced by the 1998 and 2000 incidents as well as the many

fights and "write-ups" he has had while incarcerated. Drs. Etherington and Gulkin stressed the significance of Anderson's failure to complete sex offender treatment. All three experts concluded Anderson is a sexually dangerous individual and recommended involuntary civil commitment. All three experts relied on the combination of clinical interviews, actuarial testing, and a review of Anderson's record of conduct to arrive at their conclusions. In the expert opinion of three doctors, Anderson is not the typical recidivist in the ordinary criminal case.

State v. Anderson (In re Anderson), 2007 ND 50, P41-P42 (N.D. 2007)

NORTH DAKOTA

P.F. also raises an argument about the various diagnostic tools and assessment tests, such as the RRASOR and Static-99, used by the evaluating psychologists. He essentially asks the Court to examine the raw scores yielded by these tests to determine whether P.F. is "likely to re-offend." We decline the opportunity to second-guess the psychiatric experts used in these evaluations. The raw scores provided through diagnostic tools should not overshadow the ultimate diagnoses and opinions of the expert witnesses. The respondent should engage his or her own expert to attack the State's evidence, rather than asking this Court or the district court to conduct independent analyses of the raw test results.

Feland v. P.F. (In the Interest of P.F.), 2006 ND 82, P22 (N.D. 2006)

PENNSYLVANIA

- 42 PA. CONS. STAT. §§6401-6409
- Statute for commitment of sexually violent juveniles, State evaluates such juveniles before they "age" out of the system.
- If in need of involuntary treatment due to a mental abnormality or personality disorder which results in serious difficulty in controlling sexually violent behavior that makes the person likely to engage in an act of sexual violence.42 Pa.C.S.A.§6403(a). In the Interest of K.A.P., 2007 PA Super 22, P8 (Pa. Super. Ct. 2007)

- If the Court determines that the juvenile meets the criteria for commitment by clear and convincing evidence, it issues an order committing the juvenile for involuntary treatment at an inpatient facility designated for the purpose by the Department of Public Welfare. 42 Pa.C.S.§§6402, 6403(d). The term of the commitment is one year, unless the juvenile petitions the Court for release or the director of the facility determines the juvenile no longer has serious difficulty in controlling sexually violent behavior. 42 Pa.C.S.§6404(a), (c)(1), (4). If the director makes that determination, he must petition the Court for a hearing. 42 Pa.C.S.§6404(c)(1). The juvenile is entitled to have counsel at the hearing and if he cannot afford one, the Court will appoint counsel. 42 Pa.C.S.§6404(c)(1). If the Court determines by clear and convincing evidence that the juvenile "continues to have serious difficulty controlling sexually violent behavior due to a mental abnormality or personality disorder that makes the person likely to engage in an act of sexual violence," the Court continues the commitment. 42 Pa.C.S.§6404(c)(3). Otherwise, the Court must discharge the juvenile. In the Interest of K.A.P., 2007 PA Super 22, P8 (Pa. Super. Ct. 2007) appeal denied 943 A.2d 262, 2008 Pa. LEXIS 262 (Pa. 2008)

- Commonwealth v. Dengler, 2004 PA Super 38, 843 A.2d 1241, 1245 (Pa. Super. Ct. 2004) affirmed 586 Pa. 54, 890 A.2d 372, 2005 Pa. LEXIS 3208 (2005). (Pennsylvania's Megan's Law II, 42 Pa. Cons. Stat. Ann.§§9791-9799.7, of sex offender risk level, such testimony is not subject to the Frye test because it does not involve "novel scientific evidence").

TENNESSEE

- Static-99 admissibility on criminal sentencing.
- No separate sex offender civil commitment law

At the sentencing hearing, Donna Moore, the coordinator of sex [*50] offender services for Centerstone Mental Health Center, testified that she performed a psychosexual evaluation of Defendant which included a clinical interview and the administration of a series of psychological tests including the Minnesota Multiphasic Personality Inventory (MMPI-2); the Multiphasic Sex Inventory (MSI); the State Trait Anger Inventory Test-2 (STAXI-2); and the STATIC-99.

Dr. Moore said that Defendant's MMPI-2 test results were inconclusive because the validity scales were highly elevated. In other words, Defendant's responses to certain questions indicated that Defendant was not honest in his approach to taking the test. Dr. Moore said that the MSI examines the level of the participant's sexual functioning, including both deviant and normal behavior. Defendant's responses suggested an asexual profile, denying not only an interest in deviant sexual behavior but also normal sexual behavior. The STAXI-2 attempts to measure a participant's amenability to out-patient treatment and examines such factors as anger and denial. The test reflected that Defendant tended to monitor the outward expression of anger. The final test, STATIC-99, a risk assessment tool, measured Defendant's [*51] risk for recidivism as low moderate. The factors in the test are unchanging, and include the participant's age, number of prior convictions, the nature of the offense, and the victim's characteristics. State v. Fults, 2006 Tenn. Crim. App. LEXIS 520, 49-51 (Tenn. Crim. App. 2006) appeal denied 2006 Tenn. LEXIS 1078 (Tenn. Nov. 13, 2006)

SOUTH CAROLINA

- South Carolina Sexually Violent Predator Act, S.C. Code Ann. §§44-48-10 to -170 (2002).
- Static-99 admissible without comment. "Appellant was also evaluated according to the Static-99 test. The Static-99 is a brief actuarial instrument designed to estimate the probability of sexual and violent recidivism among adult males who have already been convicted of at least one sexual offense against a child or non-consenting adult. According to the Static-99, appellant received a score of 3, which is consistent with a medium-low risk category for re-offending."(In re Tucker, 353 S.C. 466 [S.C. 2003]).
- Right to jury, no bifurcation. If determine 'sexually violent predatory' beyond a reasonable doubt, then commitment.

§44-48-30. Definitions.
(1) "Sexually violent predator" means a person who:
(a) has been convicted of a sexually violent offense; and
(b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

(9) "Likely to engage in acts of sexual violence" means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.

TENNESSEE

- Static-99 admissibility on criminal sentencing.
- No separate sex offender civil commitment law

At the sentencing hearing, Donna Moore, the coordinator of sex offender services for

Centerstone Mental Health Center, testified that she performed a psychosexual evaluation of Defendant which included a clinical interview and the administration of a series of psychological tests including the Minnesota Multiphasic Personality Inventory (MMPI-2); the Multiphasic Sex Inventory (MSI); the State Trait Anger Inventory Test-2 (STAXI-2); and the STATIC-99. (State v. Fults, 2006 Tenn. Crim. App. LEXIS 520, 49-51 (Tenn. Crim. App. 2006) appeal denied 2006 Tenn. LEXIS 1078 (Tenn. Nov. 13, 2006)

TEXAS (*As with many things from Texas their statute is quite different*)

- Right to jury trial
- Determination must be unanimous, beyond a reasonable doubt
- No bifurcation on issue of dangerousness, if jury finds sexually violent predator then the Court shall commit the respondent to outpatient treatment with a strict conditions.
- If after such a finding respondent violates any of the conditions then it is a criminal offense and the defendant may be incarcerated. Texas Health & Safety Code§841.085
- Texas, Civil Commitment of Sexually Violent Predators , Texas Health & Safety Code§ 841.001 et al.
- Static-99 and MnSOST-R admissible. In re Commitment of Fisher, 164 S.W.3d 637, 642 (Tex. 2005) certiorari denied by Fisher v. Tex., 126 S. Ct. 428, 163 L. Ed. 2d 326, 2005 U.S. LEXIS 7362 (U.S., Oct. 11, 2005)

A sexually violent predator is defined as a person who both (1) is a repeat sexually violent offender and (2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. A repeat sexually violent offender is, in turn, defined as a person convicted, or found not guilty by reason of insanity, of more than one sexually violent offense. A behavioral abnormality is defined as "a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person." Id.§841.002(2). In re Browning, 113 S.W.3d 851, 855-856 (Tex. App. 2003)

No double jeopardy. Incarceration for violation of sexually violent predator statute is not violation of double jeopardy, it is punishment for new conduct. Adams v. State, 222 S.W.3d 37, 2005 Tex. App. LEXIS 9251 (Tex. App. Austin 2005) petition for review denied 2007 Tex. Crim. App. LEXIS 1327 (Tex. Crim. App. Oct. 3, 2007).

Other states with offender statutes do impose criminal penalties for escape from civil confinement. FLA. STAT.§394.927(1) (creating second-degree felony for escape or attempted escape from civil commitment confinement); IOWA CODE§229A.5B(2) (imposing criminal penalties on individuals who (1) leave or attempt to leave commitment facilities, (2) are absent "from a place where the person is required to be present," or (3) leave or attempt to leave the custody of civil-commitment personnel); MO. REV. STAT.§575.195 (criminalizing an escape from commitment or detention); VA. CODE§37.1-70.19 (imposing criminal penalties on committed individuals on conditional release who leave state without permission). (In re Commitment of Fisher, 164 S.W.3d 637, 642 (Tex. 2005))

VIRGINIA

- Static-99 admissible by statue.
- Right to jury trial, but not bifurcated. Jury determines if sexually violent predator.
- Virginia provides that the Court after such a finding may also hear evidence on less restrictive treatment than confinement.
- Virginia, 'Sexually Violent Predators Act', Va. Code Ann.§37.2-900 through 920

Va. Code Ann.§37.1-70.6(A), petitioner Commonwealth petitioned to civilly commit respondent inmate as a sexually violent predator. A jury rendered a unanimous verdict determining the inmate to be a sexually violent predator as defined in Va. Code Ann.§37.1-70.1. The Circuit Court of Prince William County (Virginia) ordered that the inmate be committed pursuant to Va. Code Ann.§37.1-70.9 (c).

Va. Code Ann.§37.1-70.1 defines a "sexually violent predator" as any person who (i) has been convicted of a sexually violent offense or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial pursuant to

Va. Code Ann.§19.2-169.3 and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior which makes him likely to engage in sexually violent acts

. If the court or jury finds the respondent to be a sexually violent predator, the court shall then determine that the respondent shall be fully committed or continue the trial for not less than 30 days nor more than 60 days pursuant to subsection E. In making its determination, the court may consider (i) the nature and circumstances of the sexually violent offense for which the respondent was charged or convicted, including the age and maturity of the victim; (ii) the results of any actuarial test, including the likelihood of recidivism; (iii) the results of any diagnostic tests previously administered to the respondent under this chapter; (iv) the respondent's mental history, including treatments for mental illness or mental disorders, participation in and response to therapy or treatment, and any history of previous hospitalizations; (v) the respondent's present mental condition; (vi) the respondent's disciplinary record and types of infractions he may have committed while incarcerated or hospitalized; (vii) the respondent's living arrangements and potential employment if he were to be placed on conditional release; (viii) the availability of transportation and appropriate supervision to ensure participation by the respondent in necessary treatment; and (ix) any other factors that the court deems relevant. If after considering the factors listed in§37.2-912, the court finds that there is no suitable less restrictive alternative to involuntary secure inpatient treatment, the judge shall by written order and specific findings so certify and order that the respondent be committed to the custody of the Department for appropriate inpatient treatment in a secure facility designated by the Commissioner. Respondents committed pursuant to this chapter are subject to the provisions of§19.2-174.1 and Chapter 11 (§37.2-1100 et seq.).

E. If the court determines to continue the trial to receive additional evidence on possible alternatives to full commitment, the court shall require the Commissioner to submit a report to the court, the Attorney General, and counsel for the respondent suggesting possible alternatives to full commitment. The court shall then reconvene the trial and receive testimony on the possible alternatives to full commitment. At the conclusion of the trial, if the court finds, in determining the treatment needs of a respondent found to be a sexually violent predator, that less restrictive alternatives to involuntary secure inpatient treatment have been investigated and are deemed suitable, and that any such alternatives will be able to accommodate needed and appropriate supervision and treatment plans for the respondent, including but not limited to, therapy or counseling, access to medications, availability of travel, location of residence, and regular psychological monitoring of the respondent if appropriate, including polygraph examinations, penile plethysmograph testing, or sexual interest testing, if necessary. Access to anti-androgen medications or other medication prescribed to lower blood serum testosterone shall not be used as a primary reason for determining that less restrictive alternatives are appropriate pursuant to this chapter. If the judge finds that the respondent meets the criteria for conditional release set forth in§37.2-912, the judge shall order that the respondent be returned to the custody of the Department of Corrections to be processed for conditional release as a sexually violent predator, pursuant to his conditional release plan. The court shall also order the respondent to be subject to electronic monitoring of his location by means of a GPS (Global Positioning System) tracking device, or other similar device, at all times while he is on

conditional release.

Va. Code Ann.§37.2-908

VIRGINIA

Dr. Boss administered to Miller a testing instrument known as the Static-99, [***8] which is used to predict sex offender recidivism. n2 Miller received a score of four on that test. In determining his score, Dr. Boss concluded that Miller did not have any victims who were "strangers" to him.

FOOTNOTES n2 Use of the Static-99 test is now specifically mandated by the Act. See Code§ 37.2-903(C).
Commonwealth v. Miller, 273 Va. 540, 546 (Va. 2007)

VIRGINIA [supreme court affirmed dismissal of petition. However, the trial court had allowed in actuarials on the issue of sexually violent predator.]

Dr. Foley administered a longer version of the Hare Psychopathy Checklist to Allen. Dr. Foley testified that Allen received a prorated score of 26.7, which is not indicative of a psychopathic classification. Dr. Foley testified that the most robust predictors of sexual offense recidivism are measured sexual deviance and evidence of psychopathy, and that Allen scored below the range of the psychopathy cutoff.

Dr. Foley testified that he also administered the Static-99 to Allen and that the results were comparable to those achieved when Dr. Boggio administered that test. While Dr. Foley agreed with Dr. Boggio's general assessment of the results of the Static-99 with regard to the likelihood that Allen would re-offend, he characterized that result as meaning "there is less than half a chance that Allen would be a recidivist [after] 15 years." Dr. Foley further qualified his assessment of the Static-99 results by stating [***15] that the base population for the test were adults who "had committed offenses as adults and had been on the street for a period of time," whereas Allen had been a juvenile at the time of his original offenses and "has never been on the street as an adult."

Dr. Foley agreed with Dr. Boggio's assessment that Allen suffers from APD. Dr. Foley testified that while Allen's antisocial personality traits "probably . . . will remain for the rest of [his] life," his "propensity to act them out will decrease with age." Moreover, it was Dr. Foley's opinion that

Allen "did not . . . suffer[] from an inability to control his sexual impulses." Dr. Foley testified that in his opinion Allen's personality disorder does not predispose him to commit sexually violent offenses.

On rebuttal, Dr. Boggio testified that he disagreed with Dr. Foley's opinion regarding Allen's propensity to re-offend. While Dr. Boggio agreed that Allen's propensity to act on his sexual impulses would decrease, he opined that Allen would remain at risk for re-offending throughout his life.

Commonwealth v. Allen, 269 Va. 262, 271 (Va. 2005)

WASHINGTON STATE

- Static-99 is admissible, as is the Screening Scale for Pedophilic Interests, SSPI.

- Any disagreements among the experts as to reliability goes to the "weight" or credibility the jury gives the instrument, not whether it should be admitted as evidence.
- No bifurcation. Jury determines mental abnormality and dangerousness.
- Rev. Code Wash. (ARCW) § 71.09.010, Sexually Violent Predators

7) "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(8) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(9) "Predatory" means acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.
Rev. Code Wash. (ARCW) § 71.09.020

Mr. Love contends that the trial court improperly admitted Dr. Phenix's testimony concerning the actuarial instruments she used to assess Mr. Love for future dangerousness. He asserts that because of new information in the scientific community concerning reduced risk of sexual recidivism, the evidence would not have withstood a Frye n1 challenge and the court erred by not holding a Frye hearing.

FOOTNOTES n1 Frye v. United States, 54 App. D.C. 46, 293 F. 1013, 1014 (D.C. Cir. 1923).HN1 "The Frye standard requires a trial court to determine whether a scientific theory or principle 'has achieved general acceptance in the relevant scientific community' before admitting it into evidence." In re Det. of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003) (internal quotation marks omitted) (quoting In re Pers. Restraint of Young, 122 Wn.2d 1, 56, 857 P.2d 989 (1993)). "'[T]he core concern . . . is only whether the evidence being offered is based on established scientific methodology.'" Id. (alterations in original) (internal quotation marks omitted) (quoting Young, 122 Wn.2d at 56).

HN2A reviewing court need not review a Frye challenge that is not raised before the trial court. In re Det. of Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006), review denied, 159 Wn.2d 1006 (2007); see In re Det. of Thorell, 149 Wn.2d 724, 754-55, 72 P.3d 708 (2003); State v. Jones, 71 Wn. App. 798, 821, 863 P.2d 85 (1993). Mr. Love did not seek a Frye hearing below. Nonetheless, the actuarial instruments satisfy the Frye standard. Thorell, 149 Wn.2d at 756. The reliability of the instruments is therefore tested under ER 702 and 703. Id. at 754-55. But Mr. Love did not object to Dr. Phenix's testimony. He has not, therefore, preserved the issue for appeal. See State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004) HN3(failure to raise an evidentiary objection at trial precludes the party from raising the issue on appeal).

Mr. Love presented rebuttal evidence from an expert, Dr. Wollert, who testified that recidivism for violent crime--including sex offenses, antisocial behavior, and even traffic offenses--peaks [*5] in males in their 20s and then drops off. Dr. Wollert cited two studies of sex offenders that showed such a trend.

Dr. Phenix recognized that there is new research concerning the connection between age and risk of recidivism. She believed, however, in light of evidence of "strong antisocial attitudes" held

by Mr. Love, that his age would not mitigate the risk. RP at 235. Mr. Love's clinical expert, Dr. Halon, testified that research has not progressed to the point that the potential for reduction in recidivism associated with aging can be quantified. This cast doubt on the 31 percent probability of reoffense that Dr. Wollert accorded to age. Significantly, Dr. Wollert conceded that he used the Static-99 to assess risk for future commission of sex offenses and that many experts rely on it for that purpose.

HN4The experts' disagreement as to the reliability of actuarial assessments goes to the weight of this evidence, not its admissibility. Thorell, 149 Wn.2d at 756 (citing In re Det. of Campbell, 139 Wn.2d 341, 358, 986 P.2d 771 (1999)). The court heard the evidence and weighed it. There is no error.

In re Det. of Love, 2007 Wash. App. LEXIS 680, 4-5 (Wash. Ct. App. 2007)

See also In re Det. of Robinson, 135 Wn. App. 772, 789-790 (Wash. Ct. App. 2006)

See also In re Det. of Taylor, 132 Wn. App. 827, 837 (Wash. Ct. App. 2006)

WISCONSIN

- Right to jury trial. No bifurcation jury to decide if sexually violent person, and if yes, Judte to issue commitment order.
- Static-99 and MnSOST-R admissible.
- Wisconsin, 'Sexually Violent Persons Commitment', Wis. Stat.§980.01 et al.

(7) "Sexually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.

WISCONSIN

Smalley's other claimed ground for a new trial is the testimony given by Dr. Jurek and another State expert about his scores on various actuarial instruments used to predict the likelihood of reoffense. These instruments consider several characteristics of a given sexual offender, and assign a score to the offender based on the offender's characteristics. The output of the instruments is the percentage of offenders with similar scores to the offender who were recharged with or reconvicted of a sexual offense in a given [**291] time span. n6 For example, Dr. Jurek used the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR) to determine that 37% of offenders with Smalley's score were again convicted of a sexual offense within ten years.

FOOTNOTES n6 The instruments used by the experts were the RRASOR, the Static 99 and the MnSOST-R.

Smalley is not the first committee to attack the use of actuarial instruments in our courts. Their admissibility was challenged in State v. Tainter, 2002 WI App 296, 259 Wis. 2d 387, 655 N.W.2d 538. There, we upheld the circuit court's admission of testimony on the actuarial instruments because they are "the type of information commonly and reasonably relied up[on] by experts in the field of sex offender risk assessment to draw conclusions about future risk." Id., P20. We noted that Wisconsin's test for the admissibility of scientific evidence is looser than that of the

federal courts, in that once the evidence is determined to be helpful to the jury and reliable enough to be probative, its ultimate reliability is a weight and credibility question [***13] for the jury. See id., P21.

Smalley stresses that his objection to the actuarial instruments is not to their reliability as tools for predicting reoffense. Rather, he argues, even if they are useful in predicting the likelihood that a particular offender will commit another sexual offense, this is not enough. This is because WIS. STAT . ch. 980 states that a sexually violent person is one who "is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." WIS. STAT.§980.01(7) (emphasis added). That is, a person is not a sexually violent person simply because he or she is dangerous, i.e. likely to engage in sexual violence. The person's propensity for sexual violence must be due to a mental disorder. This nexus between mental disorder and the likelihood of sexual violence is not only a statutory requirement, but a constitutional one. See, e.g., State v. Laxton, 2002 WI 82, P11, 254 Wis. 2d 185, 647 N.W.2d 784.

Smalley notes that the actuarial instruments fail to take an individual's mental disorder into account, and that they therefore predict dangerousness in general, rather than dangerousness due to mental disorder. He argues that because a jury in a WIS. STAT. ch. 980 trial is required to find dangerousness due to mental disorder, a general prediction of danger is completely irrelevant to the jury's task. n7 Irrelevant scientific evidence is, of course, not admissible, even given the "limited gatekeeper" role of the Wisconsin judge. See Green v. Smith & Nephew AHP, Inc., 2000 WI App 192, P21, 238 Wis. 2d 477, 617 N.W.2d 881, aff'd, 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727 ("expert testimony is admissible if relevant " (emphasis added)). n8

FOOTNOTES n7 Smalley is not the first committee to make this precise argument, either. See State v. Burgess, 2003 WI 71, P22, 262 Wis. 2d 354, 665 N.W.2d 124. However, the Burgess committee claimed that there was insufficient evidence to commit him, and the court found enough other evidence of dangerousness due to mental disorder that it did not consider the argument about the actuarial instruments. Id.

n8 Further, contrary to the State's claim, WIS. STAT.§907.03 does not serve to make otherwise inadmissible testimony admissible simply because an expert relies on it. That statute states only that the expert's opinion may be based on otherwise [***15] inadmissible evidence, not that the underlying evidence becomes itself admissible. See State v. Watson, 227 Wis. 2d 167, 198-99, 595 N.W.2d 403 (1999).

Again recognizing that there was no timely objection to any of the testimony he now complains of, Smalley again asks us to reverse in the interests of justice. He argues that the evidence of his dangerousness alone may have persuaded the jury to commit him, without regard to whether he was dangerous as a result of his mental disorder.

We reject Smalley's argument because we conclude that the actuarial instruments, though they measured dangerousness without regard to Smalley's mental illness, were nevertheless relevant. Relevant evidence is that evidence which tends to make any fact of consequence in the proceedings more or less likely. See Michael R. B. v. State, 175 Wis. 2d 713, 724, 499 N.W.2d 641 (1993). Smalley's dangerousness was a fact of consequence to the proceedings; it was not the only fact that needed to be shown, but evidence need not go to every facet of a party's case in order to be relevant. It is true that ultimately, the State needed to show that Smalley was dangerous due to a mental disorder. To that end, it adduced [***16] evidence of a mental disorder and evidence that Smalley was dangerous. It also adduced testimony from its experts as to the ways in which Smalley's alleged mental disorder made him dangerous. Evidence of dangerousness, while insufficient on its own to support a commitment, is clearly relevant to the

ultimate determination that the jury must make: dangerousness due to mental disorder.

As to Smalley's concern that the jury may have found him sexually violent solely based on his dangerousness without properly considering the required nexus between that dangerousness and his mental disorder, we note that the jury was properly instructed on this point. Juries are presumed to follow the court's instructions. State v. Delgado, 2002 WI App 38, P17, 250 Wis. 2d 689, 641 N.W.2d 490. We see no reason to think that this jury did anything other than what it was required to do. By the Court. -Order and judgment affirmed.

State v. Smalley (In re Commitment of Smalley), 2007 WI App 219, P20-P21 (Wis. Ct. App. 2007) review denied 2008 WI 6, 744 N.W.2d 296, 2007 Wisc. LEXIS 953 (2007)

WISCONSIN

In evaluating the likelihood of Kruse engaging in future acts of sexual violence, both Dr. Anderson and Dr. Coffey used actuarial instruments. These are statistics-based instruments created with data obtained [**137] by studying various factors associated with recidivism in groups of people who were convicted of sexual offenses, released, and followed over time. These instruments yield a score for an individual based on prior sex offenses and other historical facts; the scores are associated with a particular percentage of persons who are reconvicted of a sexually violent offense within a particular number of years. Both Dr. Anderson and Dr. Coffey used the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR) and the Static-99. In addition, Dr. Anderson used the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R). n6 Dr. Coffey testified she had stopped using the MnSOST-R because of concerns on the adequacy of cross-validation, while Dr. Anderson was of the view that this instrument had been adequately cross-validated.

FOOTNOTES n6 See State v. Combs, 2006 WI App 137, P4, ___ Wis. 2d ___, 295 Wis. 2d 457, 720 N.W.2d 684, for a description of the factors each of these actuarial instruments consider in arriving at a score for an individual.

Dr. Coffey used, in addition to actuarial instruments, the Hare Psychopathy Checklist Assessment (PCL-R), an instrument used to assess psychopathic personality traits. She concluded Kruse did not have a high degree of psychopathic personality traits and, thus, this instrument did not show an increased risk of reoffending.

Both Dr. Anderson and Dr. Coffey also considered whether and how incidents not considered by the actuarial instruments, as well as Kruse's attitudes, personality features, and behaviors, affected his risk of re-offending. Kruse was almost fifty-five years old at the time, and both experts testified they were aware that age had a potentially modifying effect on recidivism.

The scores Dr. Anderson and Dr. Coffey gave Kruse on the RRASOR and the Static-99 were substantially the same. n7 The difference in their conclusions on Kruse's dangerousness stemmed from their different diagnoses of Kruse's mental disorder, from Dr. Anderson's use of the MnSOST-R, and from Dr. Anderson's greater reliance on incidents, attitude, and behavior not taken into account by the actuarial instruments.

FOOTNOTESn7 Both gave Kruse a 5 on the Static-99; on the RRASOR, Dr. Anderson gave him a 3 and Dr. Coffey gave him a 4. However, Dr. Coffey noted that she was not confident that a 4 rather than a 3 accurately reflected his risk of reoffending, and she explained why an incident that she viewed as resulting in a 4 rather than a 3 might not actually contribute to increased risk.

Dr. Fields' diagnosis of Kruse as having "pedophilia, sexually attracted to females, non exclusive" is explained in her report as being based on conduct of Kruse that occurred prior to the commitment trial, and this conduct was considered by the experts testifying at the trial. In

assessing Kruse's risk of reoffending, she applied historical facts that existed at the time of the commitment trial to arrive at scores on the RRASOR and Static-99, as did the experts at the commitment hearing. She arrived at the same scores as Dr. Anderson and substantially the same scores as Dr. Coffey. Dr. Fields' report does not indicate that there is any new knowledge on how to score or interpret these instruments or that in scoring or interpreting them she is taking into account any facts not in existence at the commitment trial.

State v. Kruse (In re Kruse), 2006 WI App 179, P6 (Wis. Ct. App. 2006)

WISCONSIN

Wis. Stat.§980.01(7) "Sexually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.

At a trial on a petition under this chapter, the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person. Wis. Stat.§980.05

As already noted, the State agreed at oral argument that the opinions of Dr. Anderson [*37] and Dr. Coffey, including their testimony on the actuarial instruments, were a derivative use of Mark's compelled statements. We understand the State to be referring to their opinions that it was much more likely than not that Mark would reoffend, not their opinions that he suffers from pedophilia. The experts each explain in their testimony why they arrived at this diagnosis, and it is based on Mark's offenses and attitudes with respect to children and adults who are childlike; they do not mention the hotel incident in this context. n19 However, it is clear from the testimony of both experts that they took the hotel incident into account in deciding that Mark was much more likely than not to reoffend. Both experts testified that they arrived at this opinion by considering his scores on the actuarial instruments, his overall behavior patterns, and his progress in treatment; on each of these points they took into account the hotel incident, considering it significant to their evaluations that the incident was sexually motivated. With respect to the actuarial instruments, both testified that, without the hotel incident, Mark's score would have been lower, meaning he would have shown less [*38] of a risk without that. Dr. Coffey testified that his score might change by as much as three points on each of the two instruments she used if that conduct were not sexually motivated and Mark might not then be a candidate for WIS. STAT. ch. 980.

State v. Mark (In re Mark), 2008 Wisc. App. LEXIS 92 (Wis. Ct. App. 2008)

WISCONSIN

Marsh's risk assessment also relied upon actuarial instruments, which produce numerical scores with a corresponding risk of reoffending, based upon factors associated with the offender and historical data about other offenders. The three actuarial instruments she relied upon included the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR), the Static 99, and the Minnesota Sex Offender Screening Tool--Revised (MnSOST-R). Marsh explained the data each actuarial instrument is based upon, [*4] how the instruments are different, and what factors she used to obtain risk scores for Good. Considering the information available to her, including the actuarial instruments, Marsh opined that Good's mental disorders made it more likely than not that he would commit future acts of sexual violence.

Good called two experts at trial, Dr. Sheila Fields and Dr. Dianne Lytton. Fields agreed with Marsh's diagnosis of personality disorder NOS, but disagreed with Marsh's diagnoses of

paraphilia NOS. Fields concluded that Good's personality disorder NOS predisposed him to acts of sexual violence. However, Fields did not believe Good's risk to reoffend rose to the level of more likely than not. Fields relied upon [*6] two of the three actuarial instruments used by Marsh, the RRASOR and the Static 99. Using those instruments, she obtained lower risk percentages than Marsh because she did not score Good's stabbing incident as a sexual offense. Fields did not use the MnSOST-R because she "felt that the research wasn't keeping up."

We first address Good's challenge to Marsh's testimony about actuarial instruments. Good contends this testimony was irrelevant because actuarial instruments only measure general recidivism, not recidivism specific to any mental disorder. HN2In a WIS. STAT. ch. 980 proceeding, the respondent's propensity to reoffend must be due to a mental disorder. See WIS JI--CRIMINAL 2502 (2006).

P13 We conclude that the testimony regarding the actuarial instruments was relevant and admissible and therefore did not prevent the real controversy from being [*8] fully tried. We recently addressed the relevancy of actuarial instruments to WIS. STAT. ch. 980 proceedings in State v. Smalley, 2007 WI App 219, 741 N.W.2d 286. In Smalley, the appellant argued that expert testimony about actuarial instruments was irrelevant because those instruments predict dangerousness without regard to a particular person's mental disorder. Id., P2. We rejected this argument. Id., P20. Under Smalley, HN3even if actuarial instruments predict dangerousness regardless of mental disorder, they are still relevant to the specific issue of dangerousness. Id.

State v. Good (In re Mental Commitment of Good), 2008 WI App 17 (Wis. Ct. App. 2007)

WISCONSIN

In evaluating the likelihood of Combs engaging in future acts of sexual violence, all three experts used actuarial instruments. These are statistical research-based instruments that are created using data obtained by studying various factors associated with recidivism in groups of people who were convicted for sexual offenses, released, and followed over time. All three experts used: the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR), a four-item scale that considers prior sex offenses, current age, victim gender, and relationship to victim; the Static-99, which considers those factors as well as a broader category of criminal offenses and whether the individual is "single" as defined in the instrument; and the Minnesota Sex Offender Screening Tool Revised (MnSOST-R), which considers prior sex offenses and other factors based on the individual's life before the current offense as well as factors based on events occurring during institutionalization. n7

FOOTNOTES n7 In addition, Dr. Tyre used the unrevised version, the MnSOST. All three experts testified that they were aware that the MnSOST and the MnSOST-R were based on a small sample group, and Dr. Coffey and Dr. Roberts were aware that there were questions about the cross-validation of this instrument. Neither the MnSOST nor the MNSOST-R was used by either of the re-examination experts. Because Combs does not argue that it is significant that this instrument was not used in his re-examination, we do not further discuss it.

Dr. Tyre scored Combs as a four on the RRASOR and a "six slash seven slash eight" on the Static-99, depending on how he calculated certain events, while both Dr. Coffey and Dr. Roberts scored Combs as a three on the RRASOR and a five on the Static-99. The scores on these instruments are associated with a particular percentage of persons who are reconvicted of a sexually violent offense within a particular number of years, and each expert explained what those were, given the scores of each. The higher the score, the greater the risk.

The trial testimony explored some of the differences in the methods of scoring that led to the difference in scores. One of the differences was that Dr. Tyre counted as "convictions" incidents

that resulted in sanctions or consequences but not in convictions or adjudications, while Dr. Coffey and Dr. Roberts disagreed with this practice. Based on their understanding of how these instruments had been validated, these two experts counted only incidents that resulted in convictions and adjudications. n8
FOOTNOTES n8 Both the RRASOR and the Static-99 consider "charges" and "convictions" for prior sex offenses. We discuss in paragraph 6 only the testimony on how the witnesses interpreted "convictions."
In addition to their scores on the actuarial instruments, all three experts considered other events and other behavior of Combs in evaluating the risk that he would engage in acts of sexual violence. Furthermore, each considered their diagnoses of Combs in evaluating that risk. For example, Dr. Tyre testified that risk assessment research shows that people who [**464] have a combination of paraphilia and ASPD are the highest risk individual. In contrast, Dr. Coffey, besides disagreeing that Combs had paraphilia, did not agree that the combination of paraphilia and ASPD, by itself, meant a high risk. In her view, the degree of psychopathy, as measured by the Hare Psychopathy Checklist (PCL-R), was a critical factor, and she concluded Combs did not have a high degree of psychopathy according to this instrument.

Based on the testimony of these experts and the other evidence, the jury found Combs was a sexually violent person and the circuit court committed Combs to the custody of Department of Health and Family Services (DHFS).

State v. Combs (In re Combs), 2006 WI App 137, P6-P8 (Wis. Ct. App. 2006) review denied 2007 WI 16, 298 Wis. 2d 94, 727 N.W.2d 34, 2006 Wisc. LEXIS 920 (2006)

Testimony About Actuarial Instruments

P2 The State's expert psychologist, Dennis Doren, employed a series of actuarial instruments to assist him in assessing the probability that Brown would commit future acts of sexual violence. [*2] These included the Rapid Risk Assessment For Sex Offender's Recidivism (RRASOR), the Static-99, and the Minnesota Sex Offender Screening Tool Revised (MnSOST-R). Brown contends that Doren should not have been allowed to testify about the results of the actuarial instruments because: (1) the instruments were not the type of data reasonably relied upon by experts diagnosing mental disorders causing a substantial probability of sexual violence under WIS. STAT.§907.03 (2003-04) n1; (2) the actuarial evidence was insufficiently probative; (3) the instruments were insufficiently reliable to satisfy due process; and (4) the actuarial evidence unduly prejudiced Brown.

FOOTNOTES n1 All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

P3 We first note that Brown's argument regarding WIS. STAT.§907.03 is misplaced. That statute provides: HN1The facts or data in the particular case upon which an expert bases an opinion or inference [*3] may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.HN2Actuarial instruments are not themselves "facts or data." Rather, they are a method for evaluating data. While some of the historical information about Brown to which the actuarial instruments were applied might fall within this statute, Brown has not identified any specific fact used in the administration of the instruments to which he objected as otherwise inadmissible.

P4 Brown's challenge to the reliability of the actuarial instruments also misses the point. Brown contends that he has a due process right to have his commitment based upon reliable evidence,

HN3even though Wisconsin has elected not to follow the federal rule set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), which gives trial courts a broad gatekeeper role over the admission of scientific evidence. However, "Wisconsin, unlike the federal courts, considers the reliability of scientific [*4] evidence a question of weight and credibility for the trier of fact to decide." City of West Bend v. Wilkens, 2005 WI App 36, P23, 278 Wis. 2d 643, 693 N.W.2d 324. In other words, the Wisconsin rule is not that individuals may be committed based upon unreliable evidence, but that in this state it is the jury's function to determine what evidence is reliable. If the jury determines that evidence offered by an expert is reliable, there is no due process violation. The test for admissibility remains simply whether: the evidence is relevant; the witness offering it is qualified as an expert; and the evidence will assist the jury in determining an issue of fact. State v. Peters, 192 Wis. 2d 674, 687, 534 N.W.2d 867 (Ct. App 1995). n2

FOOTNOTES n2 We note that, in affirming the admission of Doren's testimony regarding the results of the actuarial instruments he employed, we do not thereby affirm the validity of his testimony or his methods.HN4 Under Wisconsin law governing the admissibility of expert testimony, that determination is to be made by the jury, not by this court or the circuit court.

[*5] P5 Finally, we also reject Brown's second and fourth contentions that the trial court should have barred Doren's testimony on the results of the actuarial instruments because it was not probative and was unduly prejudicial. The crux of both these arguments appears to be that, because the instruments only measure general recidivism rates, they are not probative as to the probability that an individual will commit a future sexually violent offense because of mental illness, and were thus likely to mislead the jury. We agree that,HN5 to be admissible, evidence must be relevant under WIS. STAT. §§ 904.01 and 904.02, in that it relates to a fact or proposition of consequence to the determination of the action, and its probative value must not be substantially outweighed by the danger of unfair prejudice or confusion of issues under WIS. STAT. § 904.03. We are satisfied, however, that the trial court reasonably exercised its discretion here in determining that the probative value of the actuarial testimony was not substantially outweighed by its prejudicial effect. HN6While the specific measure of recidivism [*6] used in the instruments is not precisely the same as the future risk which needs to be determined, the instruments could nonetheless help a jury draw a conclusion as to that future risk. See State v. Tainter, 2002 WI App 296, P20, 259 Wis. 2d 387, 655 N.W.2d 538 (holding that the trial court properly found actuarial instruments relevant because they assist in assessing an offender's future risk).

Reference to American Psychiatric Association

P6 Doren diagnosed Brown as suffering from "Paraphilia Not Otherwise Specified--Nonconsent." He admitted that he created the "nonconsent" portion of the diagnosis himself, because he believed there to be a gap in the DSM-IV-TR. When asked whether the "not otherwise specified category is a lesser category of diagnosis," Doren responded, over a sustained objection, "I'm quite sure it's not a lesser category. I checked with the American Psychiatric Association." Brown claims this reference to the American Psychiatric Association was hearsay which improperly buttressed the validity of Doren's diagnosis and therefore entitles him to a new trial.

State v. Brown (In re Brown), 2006 WI App 20 (Wis. Ct. App. 2005) certified 2006 WI 39, 290 Wis. 2d 21, 712 N.W.2d 895, 2006 Wisc. LEXIS 242 (2006)

Dr. Harasymiw set forth the sex offender risk assessment methods that he used in examining Fowler. He applied Hanson's Rapid Risk Assessment for Sex Offense Recidivism (RRASOR) from which he concluded Fowler was in a group that [***451] showed a 36.9% reconviction rate at ten years, a medium high level of risk for sexual recidivism.

He next used the Hare Psychopathy Checklist-Revised (PCL-R) to determine whether [**468] Fowler was psychopathic. Here, Harasymiw found Fowler's rating showed "significant psychopathy." He then concluded that "when a high degree of sexual deviance co-exists with a high degree of psychopathy, the risk of recidivism, both sexual and violent, is high."

He further used the Structured Risk Assessment (SRA), which is a three-step process that includes a Static Risk Factor Assessment, a Deviance Assessment and an Assessment of Treatment Progress. In applying step one, Fowler was found to be a High Risk for Re-offense; applying step two, he was found to have made little treatment gain and still represented a high risk for sexual re-offending. Step three is utilized to "demonstrate whether a sex offender has changed to such a degree that his risk category may be revised."

In applying the factors which comprise this assessment step including the PCL-R, RRASOR, Static 99 and SRA Steps One and Two, Dr. Harasymiw concluded that the "data indicated that he does not show a substantial decrease in the degree of risk he presents were he to be released from secure confinement at this time." He finally concluded that "Mr. Fowler continues to show substantial probability that he will commit another sexually violent offense."
Dr. Maskel's report reflected the following. She reviewed the same record and file material as did Dr. Harasymiw in addition to the latter's report. Her report consisted of two and one-half pages. Dr. Maskel essentially disagreed with the fundamental conclusions reached by Dr. Harasymiw. We set forth these differences of opinion.

First, Dr. Maskel disputed the assertion that Fowler was involved in three instances of sexual assault. She conceded that a second-degree sexual assault occurred, but challenged the assertion that two others [**469] took place. This dispute appeared to be a difference of interpretation, with other examiners agreeing with Dr. Harasymiw.

Second, Dr. Maskel agreed that Fowler had an Antisocial Personality Disorder with a long-standing pattern of maladaptive character traits, but did not conclude that this disorder constituted a mental disorder that affected his emotional or volitional capacity or that it predisposed him to future sexually violent acts. She concluded that the Antisocial Personality Disorder present in Fowler appeared to show some amount of improvement. She projected that due to age attrition, there would be some reduction in symptom severity.

Third, Dr. Maskel disagreed that Fowler's score of 26 on the PCL-R can be used to either show significant psychopathy or that it can be predictive of sexually violent recidivism.

Fourth, Dr. Maskel disputed that the RRASOR or Static 99 alone or as a basis for SRA can be utilized as a predictive instrument for sexually violent recidivism. Additionally, she maintained that the scores obtained on the testing are too high.

Lastly, Dr. Maskel complained that Fowler's programming has been frequently changed before completion making it difficult for him to fulfill program requirements for a proper assessment.

In summary, Dr. Maskel opined that the diagnosis of Antisocial Personality Disorder did not support the requisite [***452] mental disorder under chapter 980 and, as such, Fowler would qualify for a recommendation for discharge. n3

State v. Fowler, 2005 WI App 41, P25-P27 (Wis. Ct. App. 2005)

WISCONSIN

Brainard's challenge to the sufficiency of the evidence in this case rests primarily upon the

premise that, "at worst, the state's experts predicted that [*5] Brainard had a 48% to 52% likelihood of reoffending 10-15 years into the future," along with a corresponding assertion that "a risk of 50% or less is not 'much more likely than not.'" Brainard's premise is fundamentally flawed, however, because the actuarial instruments do not measure rates of reoffending; one measures rates of rearrest and reconviction and one measures only rates of reconviction. As Dr. Tyre pointed out, the instruments do not take into account individuals who reoffend but are not caught. HN3We think it is a matter of simple common sense and general knowledge that reoffense rates are significantly higher than the rates of rearrest and especially reconviction. We are, therefore, satisfied that a trier of fact could reasonably find that an individual's actual risk of reoffending is higher than the 48.6% rate predicted by the RRASOR instrument or the 52% rate predicted by the Static-99 instrument.

P8 Brainard further argues that additional testimony from the State's expert witnesses established that his actual risk of reoffending was lower than the actuarial instruments would predict because: (1) the recidivism rates predicted by the actuarial instruments include [*6] nonviolent sexual offenses; (2) Brainard was sixty-two years old by the time of the hearing, and recidivism rates decline with age; (3) recidivism rates for incest perpetrators, and particularly older incest perpetrators, are lower than for other types of sexual offenders; and (4) Brainard scored low on a test for psychopathy.

P9 While we agree that Brainard could fairly argue his theory to the trial court from the testimony he cites, we disagree that the only permissible inference to be drawn from that evidence was that Brainard's risk of reoffending was lower than the actuarial instruments would suggest. For instance, while the actuarial instruments do encompass both violent and nonviolent sexual offenses, Brainard himself had committed prior violent sexual offenses. Similarly, while recidivism rates for incest perpetrators might generally be low, Brainard had groped a complete stranger on the street, as well as molested both of his stepdaughters, and he had expressed his own concern about developing inappropriate feelings for his grandchildren. Furthermore, although there have been studies suggesting that recidivism rates decline with age, Dr. Roberts pointed out that it [*7] is unsettled whether those statistics apply to an offender who has already committed a sexually violent offense past the age of fifty, as Brainard had. And, finally, Dr. Roberts expressed his opinion that the psychopathy test relates more to general criminality, and that there was no strong evidence that it could, standing alone, predict sexual reoffense. Essentially, then, Brainard is simply asking this court to consider the evidence in the light most favorable to his position, rather than in the light most favorable to the verdict. We will not substitute our judgment for that of the fact finder in that manner.

State v. Brainard (In re Brainard), 2005 WI App 38 (Wis. Ct. App. 2005) review denied 2005 WI 60, 281 Wis. 2d 114, 697 N.W.2d 473, 2005 Wisc. LEXIS 254 (2005)

Here, Dal Cerro utilized a multi-step, research-based framework known as the Structured Risk Assessment ("SRA") method for assessing Seibert's risk for reoffending. HN2This assessment method begins with "Static 99"-an analysis of the static or unchangeable factors pertaining to Seibert that research has revealed may predispose sex offenders to reoffend. According to Dal Cerro's report, Seibert fell into a category of sex offenders who showed a 52% rate of sexual reconviction within fifteen years. Dal Cerro's report noted, however, that this figure tends to establish a lower limit on the likely reoffense rate because "it is known [**4] that the majority of sexual offenders are not apprehended for every offense they commit, and when they are apprehended, are not charged and convicted for every offense they are responsible for." n2

FOOTNOTES n2 The next step of the assessment refines the results of the first step by considering dynamic or changeable psychological or behavioral factors underlying sexual offending. Dal Cerro acknowledged five dynamic factors that have been identified as essential to

the determination of a sex offender's risk for reoffense and concluded that Seibert continues to show problems in three of the five areas.

Finally, the third step of the assessment considers whether a sex offender has made progress during intensive treatment to such a degree that his risk category may be revised. With respect to this third step, Dal Cerro noted that Seibert "has historically denied his need for treatment, and has been vocally depreciative of the value of treatment to the extent that he has been observed to exert a negative effect on fellow patients." Thus, Dal Cerro concluded Seibert failed to demonstrate that he "meaningfully lowered his risk of future sexual offending."

[**5] [*P6] Seibert argues that the trial court erred by allowing Dal Cerro to testify regarding his use of the "Static 99" actuarial instrument. Specifically, Seibert claims there was insufficient proof that "Static 99" is scientifically reliable. HN3Admissibility of scientific evidence in Wisconsin, however, is not conditioned upon its reliability. See State v. Peters, 192 Wis. 2d 674, 687, 534 N.W.2d 867 (Ct. App. 1995). With some exceptions that are inapplicable here, scientific evidence is admissible if it is relevant, the witness is qualified as an expert, and the evidence will assist the trier of fact in determining an issue of fact. See id. at 687-88.

[*P7] Seibert contends that Dal Cerro was not qualified as an expert in the use of statistical instruments. Dal Cerro, however, was not offered as an expert in the use of statistical instruments but, rather, as an expert psychologist. As our supreme court has recognized, HN4"an expert's opinion may be based in part on the results of scientific tests or studies that are not [his or] her own." State v. Williams, 2002 WI 58, P29, 253 Wis. 2d 99, 644 N.W.2d 919. [**6] The Williams court further noted: "It is rare indeed that an expert can give an opinion without relying to some extent upon information furnished by others." Id. Dal Cerro's reference to "Static 99" was relevant as part of the clinical assessment forming a basis for his opinion that Seibert was not qualified for supervised release. Qualified as an expert, Dal Cerro's testimony assisted the trier of fact in determining whether Seibert was a viable candidate for supervised release. Because the three tests were satisfied, the trial court properly admitted Dal Cerro's testimony regarding the assessment process he used as a basis for his expert opinion.

State v. Seibert (In re Seibert), 2003 WI App 89, P7 (Wis. Ct. App. 2003) 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 101, 2003 Wisc. LEXIS 253 (2003)

At trial, the State called Dr. Richard McKee, a psychologist, who testified that it was substantially probable that Tainter would commit a future act of sexual violence because of his mental disorder. He determined Tainter suffers from pedophilia, sexually attracted to females, nonexclusive type. In addition, he said Tainter had an antisocial personality disorder and substance abuse problems that made it more likely that Tainter would commit a future act of sexual violence. [**393] McKee said he assessed Tainter's likelihood of reoffense by using actuarial instruments, specifically the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR), Static-99, and the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R). McKee said these instruments showed Tainter has a high risk of reoffense and because of Tainter's mental disorders, McKee concluded Tainter was likely to commit a future act of sexual violence.

[*P5] In addition, the State presented the testimony of Dr. Sheila Fields, also a psychologist. She diagnosed Tainter with pedophilia. She also completed the RRSAOR, Static-99 and the MnSOST-R, and concluded that it was substantially probable that Tainter would commit a future act of sexual violence because of his mental disorder.

[*P6] The jury found Tainter to be a sexually violent person and the court ordered his

commitment. Tainter brought post-trial motions challenging the sufficiency of the evidence, the court's refusal to change venue and the admission of the results of the actuarial instruments. The court denied Tainter's motions and he now appeals.

State v. Tainter (In re Tainter), 2002 WI App 296, P6 (Wis. Ct. App. 2002) review denied 2003 WI 16, 259 Wis. 2d 101, 657 N.W.2d 707, 2003 Wisc. LEXIS 52 (2003)

CASE LIST FOR ADDENDUM TO STATIC-99 CASE SUMMARY (*For New York State only*)
James J. Williams, AAG SOMU, Utica Regional Office
April 2, 2009

- *Matter of Dove,* Sup. Ct., Bronx Co., Hunter, J., November 8, 2007. (*Court found probable cause hold R for trial*.)

- *Matter of Pedrazza,* Sup. Ct., Suffolk Co., Pines, J., November 9, 2007. (*Court found probable cause to hold R for trial.*)

- *Matter of Decker,* Sup. Ct., Monroe Co., VanStrydonck, J., February 4, 2008. *Released R on SIST*

- *Matter of David Stanfield,* Sup. Ct., Bronx Co., Dawson, J., May 7, 2008. (*Court found probable cause to hold R for trial.*).

- *Matter of Koval,* Sup. Ct., Otsego Co., Coccoma J., September 2, 2008. (*Found probable cause*.)

- *Mtr. Renee Lewis,* Sup Ct., King Co., Dowling J., November 21, 2008. (*Court found probable cause to hold R pending trial. Probable cause hearing done on paper submission only.*)

- *Mtr Silvester S.,* Sup Ct., Oneida Co., Tormey, J. January 9, 2009. Annual Review Decision. (*Found clear and convincing evidence R remained dangerous sex offender.*)

- *Matter of Michael Pierce,* Supreme Court, Lewis County. McGuire, J., January 12, 2009. (*Court found dangerous sex offender requiring confinement, after trial*.)

- *Matter of Dean Anderson,* Supreme Court, Oneida County, Romano, J., March 3, 2009. (*Court found dangerous sex offender requiring confinement, after R waived MA hearing*.)

- *Matter of Richard Holmes,* Sup. Ct., Albany Co., Devine J., March 9, 2009. (*Court found R dangerous sex offender requiring confinement, and that Static-99 was accurate and up to date*.)

- *Matter of P.H.*, Sup Ct., New York Co., 2008 NY Slip Op 28489; 22 Misc. 3d 689; 2008 N.Y. Misc.LEXIS 7074, December 9, 2008, Decided, Daniel P. Conviser, A.J.S.C. (Probable cause hearing the court disregarded Static-99, and wrote: "*unclear what actions respondent was at risk to do.*")

- *Matter Richard R.*, Supreme Court (Bronx Co., June 29, 2009) Order/Decision by Hon. Dineen A. Riviezzo, who opined in 45 pages that the Static-99 is not admissible in the first stage of the MHL Article 10 trials (relating to mental abnormality.)

CASES ALREADY CITED IN ORIGINAL STATIC-99 ANALYSIS

Matter of State of New York v. Davis, 2008 NY Slip Op 50323U, 3 (Sup Ct., Queens Co. [Knopf, J.] 2008)

Matter of C.B, Sup Ct. Bronx Co., Dawson, J., March 10, 2008. (*Court found probable cause to hold R for trial*.)

People v. Brooks, 2008 NY Slip Op 28068, 7 (Sup Ct., Bronx Co., [Mullen, J.] 2008.)

State of New York v. J.J., 2008 NY Slip Op 28031, 4 (Sup Ct., Nassau Co. [Calabrese, J.]. 2008)

Matter of State of New York v. O.V., 2008 NY Slip Op 28016, 6 (Sup. Ct., N.Y. Co., [Bransten, J.]. 2008)

Matter of State of New York v. K.A., 2008 NY Slip Op 50103U, 6-7 (Sup. Ct., N.Y. Co., [Bransten, J.]. 2008))

People v. Phillip, 2008 NY Slip Op 28001, 3 (Sup. Ct., Kings Co. [Mullen, J.]. 2008)

People v. S.S., 2007 NY Slip Op 52178U, 3 (Sup. Ct., Schuyler Co. [Garry, J.] 2007)