IN THE IOWA DISTRICT COURT FOR POLK COUNTY

In Re The Detention of	)	
	)	NO. CL 86949
STEVEN HOWELL,	)	
	)	TRANSCRIPT OF TESTIMONY
Defendant.	)	OF DR. DENNIS DOREN

Trial in the above matter came on before the Honorable Glenn E. Pille, Judge of the Fifth Judicial District of Iowa, commencing on the 29th day of October, 2001. The testimony of Dr. Doren was heard commencing at 9:10 a.m. on the 30th day of October, 2001, at the Polk County Courthouse, Des Moines, Polk County, Iowa.

APPEARANCES

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PROCEEDINGS

(The following record was made commencing at 9:10 a.m. on the 30th day of October, 2001.)

MR. PROSSER: I would like to call Dr. Dennis Doren.

MR. BAL: Your Honor, if I may, yesterday we mentioned we had sequestered all witnesses. Today we do have Dr. Rogers who is sitting in the courtroom, and my understanding is Mr. Prosser does have no objection to him being present.

MR. PROSSER: I do not, with the condition that Dr. Doren may also sit in the courtroom during Dr. Rogers' testimony.

THE COURT: Certainly.

DR. DENNIS DOREN,

called as a witness, being first duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PROSSER:

Q. Could you please state your full name and spell your last name for the record.

A. Yes. My name is Dennis Doren, D-o-r-e-n.

Q. How are you employed, sir?

A. I'm employed on a part-time basis for the State of Wisconsin in a forensic hospital. Basically the title I

have is evaluation director, meaning that I supervise the precommitment and postcommitment reexaminations in Wisconsin for sex offenders facing a civil commitment or who are already committed. I'm also in private practice as a psychologist licensed in Wisconsin with a permit to practice psychology in Iowa and Washington.

Q. Sir, in advance of today, have you provided me with copies of your curriculum vitae as well as copies of a document which you have entitled Credential Information Concerning Sex Offender Civil Commitment Evaluations?

A. Yes, I have.

MR. PROSSER: Your Honor, I previously provided copies to counsel of what I previously marked as Petitioner's Exhibits 4 and 7, which I'm now handing to the witness.

Q. Dr. Doren, what is Exhibit No. 4?

A. No. 4 is actually two documents. The first part of it, the first 16 pages, are -- constitute my general vitae, my general credentials as a psychologist and what practice I have done, training, et cetera. The second part of that document, the remaining 14 pages, is an update of what I just referred to as my credential information. It's basically specific to my work with sex offenders or involving sex offending.

The document for the update that is attached

was -- is listed as updated from July 31 of 2001. I just moments ago gave you the update that's now Petitioner's Exhibit No. 7. That's the same type of -- second part of that document, the credential information specific to sex offender work. This update was from October 10, 2001.

Q. Do these documents fairly and accurately reflect both your professional qualifications, educational background, research, writing and professional involvement?

A. Yes. The general vitae, the first part of Exhibit 4, is inclusive of work that I've done involving sex offenders, but also a lot of other work that I've done which the Court may not consider as relevant to the hearing today.

The second part of document 4 or the whole part of Exhibit 7 is more specific and inclusive of my work involving sex offenders and their assessments.

MR. PROSSER: Your Honor, at this time we would offer Petitioner's Exhibits 4 and 7.

MR. BAL: No objections.

THE COURT: The Court receives Exhibits 4 and 7.

Q. Doctor, I just want to go over, even though your vitae and the other document have been admitted, I would like to go over just briefly some of your professional background and qualifications. What exactly is your educational background?

A. I received a doctorate of philosophy in

psychology, specifically clinical psychology, that occurring in 1983 from Florida State University. Previous to that I had a master's in psychology from Bucknell University. That was in 1978. And previous to that was a bachelor's in psychology from State University of New York at Buffalo. That was in 1975.

Q. What specific training, if any, do you have in the area of evaluating persons who are being considered for potential commitment and sexually violent persons or predators?

A. What training have I received?

Q. Yes, sir.

A. Well, quite a bit. Let me summarize some of the highlights. And then if you wish more, I can answer that.

Mainly the set of trainings that I received was from an organization called Wisconsin Sex Offender Treatment Network. The details of all of that is in Exhibit 7 as well as the second part of Exhibit 4.

But briefly, starting in July of 1994, I attended two full days of training each month from July through December of 1994 from that organization. The people doing those trainings were, besides the training director from that organization, were people who were in my view internationally known for their work in assessment or treatment with sex offenders, people who had been well-

published and won awards. These were, from my view, the names in the field.

Additionally, beyond December of 1994, I received more training from that organization that would approximate about twice a year through maybe two years ago; two, maybe three. I don't recall exactly in that regard. Again, the people doing the trainings were people who were doing work in the field, the people doing the research or doing the treatment in the field.

I have also, besides that, attended national, international conferences where people have presented concerning clinical and assessment -- clinical practice treatment, as I'm referring to, treatment and assessment findings relative to sex offenders. That's the bulk of it.

Q. I see in Exhibit 7 under Roman V, a category called training given specific to and relevant to sex offender. Are those trainings that you actually gave or those that you received?

A. In Roman Numeral V starting on page 3 of that document, those are what I have given. What I was summarizing in answer to your previous question comes from Roman Numeral III earlier in the document.

Q. So you have been a speaker or a lecturer on the subject of or subject related to sex offender civil commitment actions on more than 50 occasions, is that

correct? It's A through ZZ?

A. Right.

Q. All right.

A. Yes, I've done presentations either at conferences, or more typically invited to do a training specifically for certain individuals, those trainings being anywhere from an hour and a half through a full day or more.

Q. I also see in section Roman VII of Exhibit 7 a number of publications of which you've been an author or co-author relevant to civil commitment in sex offender cases.

A. I think you mean Roman Numeral VI on page 7.

Q. Excuse me. I do mean that. Are all those relevant to sex offender recidivism assessment or sex offender civil commitment?

A. Those listed in Exhibit 7, yes, those are ones that are specific to work with sex offenders, their assessment, in some way.

Q. Have you been the author of a book or any portions of a book relevant to civil commitment of sexually violent predators?

A. I have a book chapter that is currently in press in a volume to be entitled Sex Offender, Volume 4, edited by Barbara Schwartz. And I also have a book that I've completed that is also currently in press at the publisher.

That book is -- the chapter is specific to risk assessment. The book that I've completed is on the process of doing -- basically a manual for doing sex offender civil commitment evaluations. I've also completed a booklet at the request of the Board of the Association for the Treatment of Sexual Abusers, ATSA, A-T-S-A, specific to the risk assessment portion of sex offender civil commitment work.

Q. What has your role been with the state of Iowa in its application of Chapter 229A?

A. Since the summer of three years ago, so 1998, I believe, I have been hired by the attorney general's office from Iowa to do assessments of people who are referred to me relative to Chapter 229A specifically.

Q. Have you been consulted by any other states or prosecution offices of other states for the same purpose, namely assessment of persons under consideration for civil commitment as sexually violent persons or predators?

A. Yes, quite a few.

Q. How many other states have you done such consultation work with?

A. By consultation you mean specifically doing an evaluation? Because consultation to me is more inclusive.

Q. Well, let's break it down, then. How many have you done specific assessments of persons being considered for commitment?

A. I believe that would be seven states of the fifteen that currently have active sex offender civil commitment laws that I've done one or more assessments in that state.

Q. Have you ever attempted to or actually calculated on a percentage basis the number of persons who you've reviewed who you ultimately conclude do meet criteria or don't meet criteria just on a statistical or numbers basis?

A. Yes. I've done that both within Wisconsin and for all of my work outside of Wisconsin, breaking that down actually into multiple subcategories.

Q. Could you summarize those for us, please.

A. Yes. Basically what I'm going to be summarizing is on page 9 of Exhibit 7, Roman Numeral VII and VIII. Since my work began in Wisconsin, that's where I still am doing a good portion of my work, that I separated out Wisconsin first. Wisconsin's law that's very similar to Iowa's Chapter 229A is Chapter 980. So that's what Roman Numeral VII summarizes.

And I break into three categories. Those cases that I assess that were pre-petition, potentially to make a referral to a prosecutor or not; cases that were already referred by somebody else and probable cause had already been found, so petition had already been filed, probable cause had been found before I ever knew of the case; and

then cases of people who had been committed and then were reexamined about whether or not they still met criteria or potentially were eligible for supervised release.

And the percentages I have at the end of each of those lines are the percentage of people that I assessed that I was recommending commitment, in other words, found met criteria, in my opinion.

The Roman Numeral VIII summarizes for the other states in which I have done one or more assessments. The breakdown into three categories is similar to but not exactly the same as the breakdown for Wisconsin in that in no state am I part of the process at this point in time in doing a pre-petition evaluation that has never been screened before. So in all the cases that I've seen pre-petition outside of Wisconsin, there's at least been a recommendation by some individual or group. Iowa would have a multidisciplinary team that has recommended the petition. But this would still be pre-petition.

Q. All right.

A. And again, percentages are listed for each of those three categories.

Q. So by no means do you end up with the opinion that pretty much everybody who you see you recommend for commitment. I mean, I just want --

A. I certainly don't believe everyone I see, even

those who have gone through probable cause, in my opinion, meet criteria. That's not true. On average, those have already gone through probable cause, putting all of this together, would be one out of three I agree with. One out of four I don't.

Q. In how many instances have you testified as an expert in any court proceeding, and I'm excluding depositions in this question, on the issue of potential commitment as a sexually violent predator, in any court?

A. Somewhere around 80, depending on which things you count. That would not include depositions or motion hearings.

Q. Well, then let's talk about what process you generally follow in reaching an opinion about whether a person meets the standards set forth in the statute for civil commitment. What general process do you follow in Iowa when you engage in such an assessment?

A. The first step in Iowa and anywhere else for me is to obtain a copy of records concerning the individual. Quite typically these include records that are developed by the Department of Corrections, whether it's Iowa or elsewhere. But from now on, to answer the question, I'll just stick to Iowa. The Department of Corrections.

But it also includes potentially transcripts from hearings, whether it be sentencing hearings or actual trial

proceedings. It would also often include -- in fact, Iowa quite typically includes information from prosecutors' files. Typically that does overlap the Department of Corrections records. But typically there's other pieces of information in those files as well.

On a regular basis I don't know if there's other sources of paper reviewed, until eventually there could be a review of the deposition of the individual, in this case respondent. But that would not necessarily -- the review of the deposition would not necessarily be a part of my initial process. Usually that has not yet occurred.

In addition to reviewing paper, then, I will typically have telephone contact and sometimes face-to-face contact with other individuals. Telephone contact would involve other people who are familiar with the individual in some capacity, whether it be because they had a significant relationship with the individual, and sometimes it would involve persons who were victims or alleged victims of the individual. And sometimes I will have either phone or face-to-face contact with other professionals for a professional consultation.

In addition to that process of gathering information separate from the individual, I always offer an interview of a nonconfidential nature to the individual whom I'm evaluating, and in Iowa quite regularly do have such an

interview with the individual.

Then with all of that information, I apply what I consider to be standard procedures for the diagnosis of the individual, as well as scoring the individual on certain instruments and one psychological test.

I think I answered your question.

Q. Okay. And this is all a part of an initial opinion or is that the process in its entirety?

A. I was answering the question in its entirety.

Q. Okay. And then you reach what opinions? Or let me ask that differently. What question or questions are you seeking to answer in Iowa when you do one of these evaluations?

A. There are two considerations relevant, as I understand Chapter 229A, for the evaluator, knowing that there's also other issues for someone to meet criteria for commitment, but two that the evaluator can add information about. One of those is the concept that the law caused mental abnormality. Putting it in the language I would use more generally, I would need to come to a diagnosis. And I would have to examine whatever diagnoses I came to to the issue brought into the law -- or stated in the law about whether or not any of those diagnosed conditions specifically predisposes the individual to commit certain sexual acts in the future if not in a secure environment.

The second thing that I need to look at is the degree of risk that the individual represents for doing certain types of sexual offenses. Specifically, as I understand Chapter 229A, it is a standard of risk that is defined as more likely than not, with no specified time period that the person will do one or more of certain acts.

Q. So in even briefer summary, then, you were looking for whether the person has a mental abnormality and also whether they're likely to re-offend, commit another sexually violent offense if not confined in a secure facility?

A. Yes, more likely than not.

Q. Well, let's turn our attention even more specifically to Mr. Howell. Did you, in fact, receive and review documents concerning Mr. Howell?

A. Yes.

Q. Did you receive the kinds of documents which you generally described a moment ago in your testimony?

A. Yes. I received documents that were similar in type and content that I've seen before from the Department of Corrections here and elsewhere. In addition, there was some information of the other types I mentioned.

Q. Court records?

A. Yes.

Q. Trial transcripts?

A. Yes.

Q. Were there also included in the Department of Corrections things like psychological evaluations?

A. Yes.

Q. All right. Presentence investigation reports?

A. Yes.

Q. Any disciplinary reports, that sort of thing? I don't know whether Mr. Howell had any, but would those be the kinds of things that might exist?

A. That's correct.

Q. Are those the kinds of documents which experts in your field reasonably and regularly rely upon in reaching opinions of this nature?

A. In my opinion, yes, it's quite standard.

Q. Why are they necessary? Why do you look at them? What are you looking for?

A. Both for the issue of addressing the diagnosis of the individual as well as looking at his risk, one needs to look at his life history, basically.

Q. Even outside the area of sexually violent predator commitment, is it normal or routine for psychologists to go back through documentary history when diagnosing and/or treating patients?

A. Under most circumstances, the answer would be yes. There's some circumstances where just the most current information is relevant.

Q. All right. So after reviewing Mr. Howell's documents, what did you do?

A. The specific procedures?

Q. Yes, sir.

A. I had a series of telephone conversations with people who were victims or alleged victims of Mr. Howell, as well as his ex-wife. I had initially, anyway, I had four different telephone conversations each with a different individual. One individual was Michelle Dickson. One individual was Carrie Fatino. One individual was Jamie Kiefer. And then Mr. Howell's ex-wife, maiden name Deanna Carlson.

Q. More recently did you make another contact following a telephone call that you and I had?

A. Yes, I had one other contact with a person I guess would be best described as an alleged victim, a person by the name of Teresa Stratton or Teresa Ryan, R-y-a-n.

Q. Why did you make these in-person contacts?

A. Quite specifically, I was looking for certain information relative to a diagnosis that in my initial review of the records was left open as a distinct possibility but not clear enough for me that it applied to Mr. Howell, a condition that generically is a sexual disorder, technically is called paraphilia, not otherwise specified, nonconsent. Basically it's a sexual disorder

where the person is sexually aroused by the nonconsenting in directions by others. And what I wanted to find out from the victims or alleged victims was specifically types of things that Mr. Howell said or did during the attacks or alleged attacks that would help me differentiate whether or not he had that diagnosis. I also spoke with his ex-wife, both for that reason as well as other reasons.

Q. All right. Based upon these contacts, your review of the records, as well as your training and experience, were you able to formulate an opinion to a reasonable degree of professional certainty as to the diagnosis of any mental abnormality as that term is defined under Chapter 229A of the Code?

A. In my opinion, yes, I did.

Q. What diagnosis did you make?

A. The diagnosis that I made was -- it's called antisocial personality disorder.

Q. What is antisocial personality disorder?

A. Basically any personality disorder that is a longstanding, chronic, mal-adaptive pattern of behavior and/or inner experience that interferes with the person's social functioning. Specifically antisocial personality disorder involves a pattern that for that type of personality disorder is described as disregard for and violation of the rights of others.

Q. How is it that we could see in some real world examples this disorder which, in your opinion, Mr. Howell has? In other words, are there -- how would we be able to see it as nonpsychologists? What would we look for in his past?

A. Well, the kinds of things one would note is a legal infraction history of a variety of types of legal infractions. It would be going back into adolescence, at least in some earlier forms, not necessarily something that brought him in face with the law, but things that were still illegal actions in a technical sense.

In addition, one could also look at the type of relationships that the individual has had over his lifetime and look at the way in which he treated those individuals. Did he show disregard for their welfare in some important ways?

Q. And did Mr. Howell? I guess that's my question, is what specifically did you see in Mr. Howell's past that enabled you to reach the opinion that you did about antisocial personality?

A. Well, there are a number of different characteristics. One of those, as I mentioned, is legal history. He has been involved in legal infractions that made it to the level of being recorded somewhere since age 19, when that was just a possession of drugs offense.

But he's had numerous different offenses since then, for which he was at least arrested, some of which for which he was convicted, some not, going from age 19, age 20, age 22, age 23, some things at age 24, age 30, age 32, age 33, another at age 33, another age 40. So it's been a relatively consistent pattern. Some of those years he was incarcerated at the end of that.

These were of a variety of different types of offenses ranging from property crimes to personal crimes.

Q. Yesterday Mr. Howell testified -- and this is not verbatim, so you shouldn't take it this way, but basically he testified that some of his actions in the past were as a result of selfishness, lack of concern over how his actions might affect the victims or others. Is that consistent or inconsistent with the diagnosis, in your opinion, of antisocial personality disorder?

A. That would sound like a pretty consistent statement, an accurate reflection of what I did assess.

Q. All right. There's been -- this is not covered in your report, but there's been some suggestion so far in this trial that alcoholism or alcohol abuse may have at least, in Mr. Howell's opinion, played a role in some of his offending. Do you have any opinion about that?

A. The formal diagnostic conclusion I came to is listed in my report as rule out, R slash O, alcohol abuse.

What that means is that in my opinion there was significant information to indicate that he does or has exhibited the symptoms of that disorder, but I was not certain to a sufficient degree to diagnose it in a more formal way. So officially I did not diagnose it. But I basically made note that it may very well be an accurate representation of his symptoms.

Q. And how, if you have an opinion, would alcohol abuse relate to his sex offending as opposed to the antisocial personality disorder?

A. Do you mean historically or potentially in the future?

Q. Well, either, if there's a distinction.

A. I have slightly different answers.

Q. Okay. Let's hear them both.

A. Historically, the record indicates as well as Mr. Howell has indicated that he was drinking -- had been drinking before each of the offenses or alleged offenses. And alcohol in general, including by again his own statements to me during an interview would agree with this, it serves as what he referred to and I would agree with as a disinhibitor. It's something that makes it easier for someone to do something that they might otherwise not be doing, or at least would find it more anxiety-provoking to do it. In that sense, it was potentially -- his alcohol use

was potentially a facilitator, allowing him to do those actions.

From a risk perspective, assessment into the future, however, a history of alcohol abuse, even if diagnosed, does not necessarily mean higher risk. However, the process of then going back to drinking then becomes the risk factor.

Q. All right. But do you see alcohol abuse or alcoholism as a, quote, mental abnormality as that phrase is defined under 229A?

A. Even if I were to fully diagnose the condition for Mr. Howell, I would not see it meeting the full set of definition that's offered in the statute, as I understand it, for mental abnormality. It clearly is a diagnosed condition and would meet the first part, in my opinion, of mental abnormality as an acquired or congenital condition affecting the emotional or volitional capacity.

On the other hand, the second part of that phrase, that predisposes the individual to commit sexually violent acts if not confined in a secure facility, I don't see that alcohol abuse by itself specifically predisposes him to commit sexually violent acts. It may very well, and I have little doubt, served for him as a facilitator or disinhibitor. But to say in my opinion that it predisposes him would be to say that in effect it is what drives him and

the idea would not even be in his head, in other words, and would certainly not be in his actions if he were not drinking. I do not find that to be accurate, in my opinion.

Q. Then let's turn to antisocial personality disorder. Is that condition, in your opinion, acquired or congenital?

A. Yes.

Q. What do acquired or congenital mean?

A. Congenital basically is inborn. Acquired is something that developed after that time.

Q. So in your opinion, either he was born antisocial or he picked it up somewhere along the way?

A. Or a mixture of both.

Q. Or a mixture. All right. Does that condition affect his emotional or volitional capacity or control?

A. Emotional or volitional capacity, you said, or control?

Q. Well, let me get the words right.

A. Yeah, "or control" is not part of the statute.

Q. Emotional or volitional capacity. Strike control.

A. In my opinion, yes.

Q. How does Mr. Howell's antisocial personality disorder affect his emotional or volitional capacity, in your opinion?

A. The issue is that he has a personality that

we're -- that I'm calling antisocial personality, but he has a personality style or way of interacting with the world that shows disregard for and violation of the rights of others. His description of being selfish is a meaningful concept that fits within that. The concept of antisocial personality disorder does not, in my opinion, always constitute a mental disorder. But in his case I believe it does affect his emotional and volitional capacity.

Q. Volitional capacity being what?

A. Important question. The statute, as I read it, offers no definition. My working definition as an evaluator of volitional capacity is the process by which somebody makes decisions.

Q. All right. And how would then his antisocial personality disorder affect his process of making decisions, in your opinion?

A. There are two different possible ways. One of those is that it affects the choices which he would consider at any given point. The options at any given situation could be limited in a way that reflects his own desires and not reflects potential consequences to himself or others.

A different one which I consider to be more accurate relative to Mr. Howell is that the way in which he experiences fear or experiences the -- I'm trying to figure out how to say this. In a decision process we consider

different options based on their meaning to us. And sometimes something can be very meaningful because it's very positive and it outweighs the other things, including for its consequences, weighed just fine -- just in a positive way. Sometimes we do a process that is inaccurate or unrealistic in weighing because we don't take things into consideration that most of the rest of us would experience as involving fear or involving a negative consequence. It is that that I consider to be the impairment for Mr. Howell's volitional capacity.

Q. And is Mr. Howell's antisocial personality disorder -- or I should say, does it predispose him, in your opinion, to commit sexually violent offenses to a degree which would constitute a menace to the health and safety of others?

A. In my opinion, yes.

Q. And how would that be so in his case?

A. Again, the issue of a personality disorder in general or specifically antisocial personality disorder does not, in my opinion, necessarily predispose someone to commit sexually violent acts. In fact, there are numerous people with antisocial personality disorder who to my knowledge never commit a sexual criminal act of any type, violent or otherwise.

In Mr. Howell's case, however, his sexual

offending was apparently repetitive and within a far larger pattern of antisocial acts. So for him, his pattern of repetitive, different criminal acts includes sexual violent acts and therefore, in my opinion, predisposes him.

Q. Let's turn our attention now to the second question, then, of the risk assessment. Based upon your record review, your interview with the respondent, your training and experience, were you able to reach an opinion to a reasonable degree of professional certainty as to whether the respondent is likely to engage in sexually violent acts if not confined in a secure facility?

A. I do have such an opinion. May I just have some more water, please?

Q. Sure. Sure. I'm sorry.

A. I have a cold, so I'm going to dry out quickly. Thank you.

My answer to that question was yes, in my opinion.

Q. What is your opinion on that subject?

A. That the risk that Mr. Howell represents for committing a new sexually violent act is defined by Chapter 229A --

MR. BAL: I'm going to object to this opinion by the expert. He's giving a legal conclusion, his interpretation of the statute. That is completely in the purview of the fact finder. He can certainly give facts

which he, the fact finder, may consider in making a legal conclusion; but to conclude that the facts that he is giving meet the requirement of Chapter 229A is clearly inappropriate.

THE COURT: The Court acknowledges the objection, and the Court will be the ultimate determiner and fact finder in this case as to both what the statute means and whether or not and what the facts are in this particular case. To that extent, the Court acknowledges the objection and sustains the objection. The Court will allow, nonetheless, the witness to render his opinions in his own words.

MR. PROSSER: Thank you.

Q. Go ahead, Doctor.

A. In my opinion, the risks that Mr. Howell represents to commit a new sexually violent act is at least at the level of more likely than not.

Q. You mentioned briefly how you went about that. Let's talk specifically in this case about what you did to arrive at that particular opinion. What did you do?

A. There are basically three different steps to risk assessment. The first part is using various research-based information to assess this individual relative to other sex offenders. Specifically, I use in that category multiple sex offender risk assessment instruments of an actuarial

nature, just sometimes nicknamed actuarial risk assessment. It's been sort of the actuarials. I happened to use three in this case, which is what I do in all cases currently if the instruments that I use are applicable to the individual.

Additionally, I also look at other groups of known risk factors, known characteristics, in other words, of the individual indicating risk, and to see if those groups of -- basically if all of the types of risk factors in any group is found to be applicable to the individual, in this case Mr. Howell, or not.

The second step in the process that -- and after I use that first step basically to anchor the rest of what I do, the second step is to look at what's changed about the individual since the last time he committed a sexual offense, what are often called protective factors. The usual characteristic one looks for here is treatment, specifically sex offender treatment, and in some cases such as this one, treatment related to alcohol use. I could also be looking at other protective factors as well.

The third category are characteristics that are probably best described as they make common sense to be applicable either to show lower risk or higher risk compared to the other information. The research may not have studied them. The most extreme examples to clarify what I'm talking about is if the individual during the interview tells me

he's going to do it again and knows he can't control himself from that, that would clearly weigh heavily in my assessment relative to the first two categories.

Likewise, again an extreme example, if the individual were to be on his death bed and not have access to victims, all the prior risk information probably would not be very relevant either.

So I look at those three categories of things that are basically risk assessment considerations, what's changed about the individual, and then things unique to the individual that have little -- a little bit of research support or simply commonsensical.

Q. All right. Let's go through those. But before we do, the statute refers to a risk of committing predatory acts constituting sexually violent offenses. Do you have an opinion about whether the risk that you've just testified to has to do with predatory acts constituting sexually violent offenses?

MR. BAL: Objection again. The witness is being asked to apply facts that he may testify about and to conclude whether or not it meets the statutory definition of predatory. If he wants to talk about specific acts, he may do so, but the final conclusion is reserved for the fact finder.

THE COURT: The Court appreciates that and will

issue the same ruling as before, which is the Court will ultimately determine the issues to be submitted to the Court and what the law says in Iowa. This witness is allowed to express his opinion based upon his education, experience, and knowledge, and the Court will give it what weight the Court deems appropriate. But he may respond to the question.

A. I do have such an opinion.

Q. What is your opinion, sir?

A. That for Mr. Howell, his risk is of a predatory nature.

Q. All right.

A. As I understand the statute.

Q. What do you mean --

MR. BAL: Objection, Your Honor. The conclusion -- he just couched it in terms of the statute once again. I move that his response in its entirety be stricken and that he be instructed to give facts or scenarios pertaining to Mr. Howell which he thinks may pertain to acts of a predatory nature.

THE COURT: The objection is noted, and the Court's ruling is still the same. He may express his opinions. The Court will ultimately determine whether or not the facts fit the statute and the meaning of the statute and whether or not the opinions expressed here merit the

weight each side suggests.

Mr. Prosser.

MR. PROSSER: Thank you, Your Honor.

Q. What is your understanding of predatory and how that relates to Mr. Howell's likelihood to commit predatory offenses?

A. When I'm doing the assessment, the understanding that I use of the concept of predatory is that the degree of relationship or type of relationship the individual -- the offender had with his victims was basically established or promoted based on his desire for victimizing that individual. That can come down to the most simple case where the individual, where the victim, was basically a stranger, so there was no, in that sense, prior relationship. It could also be where there was some degree of acquaintance relationship, but that Mr. Howell's actions were basically to promote the process of victimization.

Q. And do you have examples from the past, in Mr. Howell's past, that make you think that his acts have been predatory?

A. Yes.

Q. What examples are those?

A. By both the victim's statement and Mr. Howell's statement, Michelle Dickson was a stranger and complete stranger until earlier in the evening when he met her and

victimized her later. And that would constitute in my view the process of someone being a stranger.

Q. Do you mean by that that he was sort of grooming her to be his victim?

MR. BAL: Objection. Leading.

THE COURT: Sustained.

Q. I'm sorry. What other examples do you have, Doctor, of potential predatory history on Mr. Howell's part?

A. The degree to which he had a prior relationship with Jamie Kiefer has differed to some degree in his own reports, Mr. Howell's reports. But at least on occasion he has stated that he had no prior relationship with her outside of being aware of her. But they had no ongoing contact. That to me again would be an example of a process of victimizing her later, would be of a predatory nature.

Q. Is she the strip dancer at the bar?

A. She was a dancer there, yes.

Q. Okay.

A. The report from Carrie Fatino significantly differs from Mr. Howell's report of the relationship between the two. Ms. Fatino has stated in the records as well as to me that the relationship with him, with Mr. Howell, was basically that of a stranger. And she was only aware of him by what he was ordering at a bar on a repetitive basis, so she knew of him in the context of what he was ordering in a

bar, knew of him as a customer where she worked, but otherwise was not aware of him in any relationship.

That is not the information related by Mr. Howell. Mr. Howell has said that they had gone out a few times. So he denies sexual contact with her and at one point stated that they had not been dating but they had gone out. I'm not exactly sure what that was, but that he at least had been aware of her on multiple occasions previously to her report of what allegedly occurred. And both of those people testified to that, those differences.

Q. Now, we've been speaking about these incidences in the context of whether you had an opinion about whether his past acts were predatory. How does that relate to your other opinion that his future acts are likely to be predatory?

A. Basically what is commonly found in general for people and certainly applicable to sex offenders is people tend to follow the same patterns. People only tend to make changes through an active process, if general aging doesn't tend to do that process for them. And so the -- my opinion about his risk in the future being of a predatory nature is based on the pattern he demonstrated earlier as well. I should point out that the same type of report was made as an allegation by Ms. Ryan that there was no prior relationship.

MR. BAL: Objection, Your Honor. I'm going to

object to any statements regarding a Ms. Ryan as hearsay. It is a witness of which we were not given formal notice by the prosecution; in fact, we were just given notice yesterday.

If Dr. Doren is allowed to testify as an expert to all hearsay statements, then the State wouldn't have to give respondent notice of any witnesses. Dr. Doren could just testify about people he talked to and get it in that way. If he wants to give a conclusion based on his conversations with witnesses, as he has already done, we certainly have no objection to that under the rules of evidence, but certainly have objection to him talking about some hearsay statements from a witness about which respondent was not given notice.

THE COURT: Mr. Prosser, do you have a response?

MR. PROSSER: I do, Your Honor. Under the Rule -- the 700 series rules on experts, of course experts are allowed to rely upon expert -- upon hearsay to the extent that experts in their field reasonably do so in reaching the conclusions that they reach. That's the case here, and I think the -- his testimony is entirely permissible. And it's irrelevant to the discovery issue that's been raised that I think we're going to get into later today, Your Honor.

MR. BAL: Your Honor, we also object on the grounds that in 229A cases respondent is given the right to

confront witnesses. Therefore, it violates that express right given to respondent under the statute.

THE COURT: The Court acknowledges the objection to the hearsay statement attributed by this witness to Ms. Ryan. The Court also acknowledges too that experts, to the extent that they rely upon such statements, may render opinions if those sorts of opinions are normally expressed as a result and in the formulation of their expert opinions.

The Court will not allow this witness to testify as to specific statements made by Ms. Ryan to him, but he's clearly allowed to testify as to his opinions based on the result of statements that may have been made to him.

MR. PROSSER: Thank you, Judge.

Q. Okay. Well, let's now shift back to what you actually did to arrive at the -- your opinion on the risk that you feel that Mr. Howell poses. I think you first mentioned that you applied actuarial instruments?

A. Yes.

Q. What instruments did you apply and with what results?

A. There were three. One is the Rapid Risk Assessment for Sex Offender Recidivism. It's abbreviated by the first letters of those six words, R-R-A-S-O-R, just pronounced RRASOR. The second instrument is called the Static-99, with a hyphen in between. And the third is

called the Minnesota Sex Offenders Screening Tool, Revised. I'll just call it the Minnesota instrument.

The first one, the RRASOR, the first one I mentioned, is the shortest of the four instruments. It -- excuse me, of the three instruments. It has only four items. Possible scores from that when you add up the scores per item go from zero to six, with six being at the high risk end. Mr. Howell's score on that was a two. Basically, this is a relatively low risk finding. Specifically looking at that -- at that instrument looks at reconviction likelihood within a five- to ten-year period post-incarceration. From that instrument alone, his risk would not be viewed as more likely than not, in my opinion.

From the Static-99, he -- this is a ten-item scale that includes the four items from the RRASOR as well as six other items. It is sometimes thought of as a second generation instrument, because it built upon two prior instruments, the RRASOR being one of those two. On that instrument, he scored six in a range that goes from zero to twelve, twelve being at the high risk end. The highest risk category for that instrument is six or higher, which is usually called six plus. So he fell into the highest risk category that that instrument measures.

From the third instrument, the Minnesota instrument, there are 16 items on that scale, slightly

overlapping the other two, but not directly. That scale has a far wider range of scores, theoretically something like minus 16 to plus 31. The vast majority of people who even are incarcerated for sex offenses fall in the range from minus 5 to plus 17. The highest risk category is a plus 13 or higher.

Mr. Howell's score was either a plus 8 or plus 10, depending on how one item was scored. I was not able to clarify that. The category that the scores fall into of a plus 8 or plus 10 is the same, so that difference in the scoring doesn't -- really does not matter, in my interpretation. And that falls into what is referred to by the developers of the instrument as the high risk category but not the highest risk category.

Q. All right. And what general conclusion did you draw from this phase of your assessment?

A. Putting this information together with other information at this phase, my conclusion was that if I stopped the assessment at this point, then I would conclude that in my opinion, his risk is beyond more likely than not to commit a sexually violent act over his lifetime.

Q. Okay. And how do you reach that if in light of, for example, the RRASOR score of two, which is in the low risk, in other words, one of these obviously says he's in the low risk category, how do you explain that conclusion

given that score?

A. There are various pieces of research -- I should say there are various pieces of research that indicate to me that there are different pathways, different avenues by which someone who is previously convicted of a sex offense becomes a sexual re-offender. The metaphor that I use to describe that is when I go for a checkup for my physical health, if I want to know what risk there is to my health, the doctor is going to check out risk factors for instance related to my heart, you know, from cholesterol and blood pressure, et cetera. But even if the doctor assesses my risk to my heart to be very low, in other words, my heart's doing well, the doctor needs to check other systems, other parts of me relative to my health. And if I have -- if it's found I have a malignant brain tumor, it doesn't matter there's low risk to my heart. I'm still at very high risk to my health. So there's different pathways to showing high risk to, in my metaphor, my health; in this situation, to recidivism.

The research that I'm aware of would indicate that there are at least two different pathways or dimensions for sex offenders. One of those is related to the concept of being driven by sexual interests that are illegal. The classic case of those is the child molester who's diagnosed as a pedophile. They are driven to have sex with kids.

They may be fine, upstanding citizens who never break the law outside of that; stable lifestyles, et cetera. But they are driven by their sexual problem. That is one avenue. And the RRASOR tends to measure that avenue better than the other instruments.

The other avenue that is, in my view, demonstrated by research is more of the type of individual who is criminal in a variety of ways, including sexual but not specifically sexual. They do not necessarily have a sexual disorder at all. Their sexual offending is similar to other offending in that it's basically -- they take what they want when they want it, irrelevant of the effect on anybody else or consequences to themselves. So people with long criminal histories in a variety of types, including sexual, could fall into this category.

The instruments that are most associated with this dimension are the Static-99, the Minnesota instrument, the psychological test called the Psychopathy Checklist-Revised, abbreviated PCL-R in capitals, and other instruments that are measures of violence potential.

Q. Now, I didn't ask you about the PCL-R or the Psychopathy Checklist-Revised.

A. If I may, I didn't quite finish.

Q. I'm sorry. Go ahead.

A. Just pulling that together again, the question was

why I could see him as having a more likely than not risk with a RRASOR that was low. The bottom line then is that the RRASOR being low goes along with the fact I did not diagnose a sexual disorder. He does not have any known child victims. Basically, he does not seem to be driven to sexually offend through a sexual disorder. And that's what the RRASOR is telling me.

The other instruments, the Static-99 and Minnesota instrument, were in the high to very high area. And that goes along with a diagnosed personality disorder, along with having adult victims, having a relatively high score on the PCL-R.

Q. Which is what I was just about to ask you about, and I don't think you testified to before. That's the one psychological test, I think you referred to it as, that you did perform?

A. Yes.

Q. Tell us what that test is and what Mr. Howell's score was on that instrument.

A. The Psychopathy Checklist-Revised, or let me just abbreviate, PCL-R, was designed not for the purpose specifically to which I've used. It was designed for research purposes to define the category of people that we call psychopaths. The developer, Robert Hare, H-a-r-e, was looking to define the relatively homogenous group of people

who were high in these characteristics in order to do other research on them. And the scale has -- or the test has since been tested and even researched with a variety of -- a large variety of populations of criminals and other individuals and found to have a statistical relationship with certain kinds of risks or certain kinds of violence.

And the scale is -- that's why I used it. The scale is something that goes from zero to 40 in its numerical system. It involves 20 items, each scored zero, one or two. That's how you get up to the zero to 40 range. The higher the number, the more the person is like the prototypical psychopath, the classic case that would be described in professional literature.

I should make real clear that I'm not referring to psychopath in the way that the media does. It has nothing to do with serial murder or something like that. This is a personality type.

The score that he had from my scoring of the PCL-R was a 30.

Q. And what significance does that score have on your assessment?

A. Basically all that it meant to my assessment is that he was in the category of people who were 25 or higher, which is a research relevant finding for me. The -- I did not use the finding ultimately of the PCL-R for Mr. Howell

in a strong way in my assessment. I basically found it to be consistent with the other types of signs of risk that I've already described in my list of what that second pathway was about. It was consistent with the other findings there, but otherwise I really didn't use it very much.

Q. So you left, as I understand it, this phase of your assessment with the general opinion that he would meet the criteria, in other words, more likely than not to re-offend if not confined. Do I have that right?

A. In my opinion, through this portion of the assessment, he would be found to be more likely than not to commit another sexual offense.

Q. What was the next phase of your assessment of risk question? I think you referred to it previously as protective factor?

A. Maybe I need to clarify something first.

Q. All right.

A. There was one other part to that first part as well. I don't know if you meant to skip that or not.

Q. No, I didn't. But if I've missed something, please tell me what else you did in the first phase.

A. As I mentioned earlier, the second part of the -- or another portion of that first segment is that I look at groups of risk factors that research has indicated would

show potential sign of risk. There were two such clusters or groupings of risk factors that I found of potential applicability to Mr. Howell, ultimately only finding only one of those two actually applying. One that did not apply is the one that's better researched. That is the combination of the high degree of psychopathy as I already described from the PCL-R with a certain type of sexual disorder. I did not ultimately diagnose any sexual disorder for Mr. Howell. And therefore, he did not have that combination, which would have been a very high risk combination, but I found not to be applicable to him.

The second category I looked at or second grouping has only been researched once. So I don't make a lot out of it. Again, it just tells me a little piece of information. No one has tried to replicate those results, so I have to take it with some degree of grain of salt, whether or not it has some meaning. The way I describe it in my report is that the results of being found applicable to him I have not viewed as strong but just more suggestive or indicative of some potential risk. It's a cluster of five different things that go into the category called lifestyle impulsivity.

Q. Could you describe those characteristics?

A. Yes. They basically involve changing jobs frequently. There's a definition of what frequently means.

I don't have those in my memory. I have to look at my notes. Something called reckless behavior without regard for consequences. For him, for instance, that would be numerous violations of speeding, as well as the potential attacks, the sexual attacks. Repeated incidences of aggressive or destructive behavior in response to frustration. Something I found not known to apply to him, disruptiveness at school or work, including verbal or physical assaults on teachers or supervisors. And the last one is a history of fighting. You don't need to have all five of those for the concept to apply.

Q. So in your opinion, he did have or show that constellation of factors?

A. Yes.

Q. All right.

A. And again, I don't make a lot out of it. I just wanted to be thorough in what I described, that this is something I looked at.

Q. Now let's move on to the second part of your risk assessment analysis.

A. Yes.

Q. Which you previously described as protective factors. What did you look at in Mr. Howell's case?

A. Basically the most common thing to look at, because research has been supportive of this, is the

participation and completion of treatment programming specific to sex offenders. That is the most research supportive type of protective factor which I'm aware of which Mr. Howell would have some degree of control.

Q. All right. What findings did you make in this category with respect to Mr. Howell?

A. He had participated in certain groups, six sessions of one, a similar number of another, but basically has not participated in a full sex offender treatment program while he was incarcerated during this last offense -- from his last offense.

Q. Despite the fact that, at least according to your review, he has not participated in a full-blown sex offender treatment program, did you nevertheless attempt to determine whether he had control of or awareness of any of the concepts which one might learn at a sex offender treatment program?

A. If I understand your question correctly, the answer is yes. I'll explain my answer. During the interview of Mr. Howell, I asked him certain questions related to his understanding of his sexual offending and how he would avoid re-offending in the future.

Q. Okay. And what were his responses to those questions?

A. The specific answers?

Q. Well, give me the general conclusions that you reached, and then maybe we'll talk about a few of the answers.

A. Bottom line was that he had been denying that he ever committed a sexual offense; and therefore, most of the things he was describing in answers to questions about how he would go about preventing things were described as relatively hypothetical. He described himself as having no risk for sexual re-offending, which I view as actually a sign of potential risk in that there's a suggestive piece of research that shows that people who are seeing themselves as no risk actually re-offend more. And my understanding of that is that people who see themselves as no risk are either just lying in that regard or potentially seeing themselves that way but then therefore not watching the risk that they are developing over time. So they put themselves into higher risk situations where they're more likely to re-offend.

Q. Did you ask Mr. Howell about whether he had a relapse prevention plan or some sort of plan about how to avoid sex offending if he is not confined?

A. The set of questions that are specific to his potential benefit from treatment or what he's learned about how to avoid re-offending go into detail about aspects of what is called a relapse prevention plan. I did not ask him

the overall question of do you have a relapse prevention plan, because his answer wouldn't be meaningful to me. I asked specific components.

Q. Did he articulate specific components of what you referred to as a relapse prevention program?

A. He answered my questions, but I would say that he basically does not have a meaningful relapse prevention plan.

Q. What did he say, I mean, specifically about that? And I guess the next question is, why isn't that meaningful to you?

A. I'm not sure which question to answer first to make the most sense. I'll answer them the way in which you asked them. The kinds of things that he was describing that would put him -- feelings or moods, for instance, that would put him at risk of sex offending, again I asked him to describe just two of those. He did come up with two.

He described roller coaster of ups and downs, meaning his moods, or just maybe what he referred to as a flat line depression. Then the issue in terms of relapse prevention planning is, so how will you deal with those moods? And the specific question is, how will you cope with such feelings or moods in the future? Describe at least two ways.

And his answer was, "Recognizing the behavior

patterns and those initiators and being aware of actually knowing those and being able to counteract those, whether through medication or treatment or just knowledge." This is a general statement. It doesn't state what he's going to do to address his own issues.

Second type of question along those lines, I asked a question having to do with what thoughts, including sexual thoughts or fantasies, would put him at risk of sexual offending. Describe at least two different thoughts. His answer, "I think any kind of sexual thought has an influence on where your thinking is at. If you are just sitting around thinking about sexual fantasies instead of a job, I'm sure those would put you at risk more so than going out to a softball game with your two boys or something like that."

Basically what he's describing is what thoughts would put him at risk. If I even understand the general statement, he's talking just general sexual thoughts. So I asked the follow-up question, "How would you cope with such thoughts in the future?" Again, describe at least two different ways.

"Well, with our society now, it is more than an average medium that we are bombarded with sexual imagery, sexually influencing or form. You just have to lessen that to a degree, I think."

Again, my understanding of what we are saying here

is he will just try to avoid the media bombardment, to use his words, of sexual images. I don't see that as a relapse prevention plan in that that doesn't say what he's going to do or how he's going to cope with a sexual feeling. He doesn't say he doesn't have sexual feelings, and I would have found that difficult to believe if he did. He doesn't say, "I was going to address those issues." Therefore, there's no real relapse prevention plan.

A third category, "What events might make you more likely to have feelings or thoughts that put you at risk of offending?" So we're asking about events. He mentioned anxiety, depression, a bad temper. I asked for clarification on that. "Okay. Maybe sitting drunk, being in a bar, anything that will lower -- that would lower your inhibitions, drugs or alcohol." Didn't really describe events there.

But I again asked, feeling that this could be a follow-up to the mood issues, "How would you cope with such events in the future?" Again, describe at least two different ways.

"I think you have to have a plan, agenda. You just can't go through not planning for tomorrow. You have to plan out your life and make sure that a lot of those things are coincidentally coming into your life."

Again, this is a general descriptor, but it

doesn't say what he's going to do. This is the nature of the question and answers I got along the way.

And his bottom line, the end when I asked him to explain what risk he saw himself at, he saw these -- the events earlier as -- when explaining why he gave himself a no risk rating, "Because these were extraordinary circumstances and I don't think I will be able to allow myself to be put into those circumstances again." I asked the clarification of that. "I don't think that the conditions I put on myself back then are what I would do today. I would not have those same priorities. Back then it was having a good time, so to speak. Right now I just want to have my freedom, having experience with my family." Then he goes on explaining that a bit. Again, to my view, this doesn't explain a relapse prevention plan. It states a desire.

Q. Were there any other factors or things that you looked at in the protective factors phase of your risk assessment other than the nontreatment benefit, as I understand your testimony so far?

A. Yes. It had to do as well with his potential alcohol use. Whether he met a diagnostic set of criteria or not wasn't so much the issue to me as he has acknowledged and it seemed accurate to me that alcohol has served to facilitate his offending in the past, to use his words,

disinhibiting him.

And so the potential for his going back to drinking in the future is of interest to me in the risk assessment, not so much the history of abuse but will he go back to drinking in the future.

And the information I obtained on that suggested to me that he -- I want to be accurate in how I phrase this -- has not made a plan to totally avoid drinking. And I'm basing that on a number of things. But the main one was during that same set of questions, one of the questions that I asked was, "How would you cope if you were in these situations or places in the future?" Let me make sense out of that. First question, "In what situations are you most likely to offend? What situations or places should you avoid? Describe at least two." His answer was, "Maybe a bar. I really can't say." So the one he came up with was a bar.

So I asked a question about that. "How would you cope if you were in these situations or places in the future?" Again, "Describe at least two different ways."

His answer was, "First of all, you have to understand what the indications are and what that cycle of behavior does. If you can catch on what those indicators are, you can avoid more so, if you can avoid putting yourself -- if going to a bar and meeting people, I would

stop going to that bar again." That indicates to me that he's not saying he would avoid going to bars. He just won't go to that bar again. That was the most poignant statement about whether or not he would be looking to avoid drinking in the future.

Q. Any other factors under this general area of your risk assessment?

A. I don't think so.

Q. What effect, if any, did looking at these protective factors have on the first part of your assessment of risk?

A. The concept of protective factors is that they are used as assessing a lowered degree of risk. Since he did not demonstrate the potential benefit from relevant treatment in either sex offender treatment or alcohol-related treatment, then therefore it was not -- the assessment of risk from the first section is not lowered by the second section assessment.

Q. As I understand it, then, the fact that you didn't view him as having benefitted from treatment didn't increase his risk. It just didn't decrease the risk?

A. That is correct. It did not increase the risk. It just did not decrease it.

MR. PROSSER: Judge, maybe this would be a good time for a break this morning?

THE COURT: Sure. We'll take about 15 minutes or so. You may step down. Thank you, sir.

(Trial recessed at 10:35 a.m.)

(Trial resumed at 11:00 a.m.)

THE COURT: Mr. Prosser?

MR. PROSSER: Thank you, Your Honor.

Q. Dr. Doren, I think when we left off we completed the second of three parts, as I understood it, of your risk assessment in Mr. Howell's case. Is your memory consistent with mine?

A. Yes.

Q. What was the third part of your risk assessment? I think you referred to it as a commonsense or perhaps situational factors portion of your risk assessment?

A. Yes. There are a number of different ways to describe it, situational or other unique character distribution, things that are more commonsense relation and are also by research.

Q. What factors did you look at under that category in Mr. Howell's case?

A. There's one in my report and another that I did not write there, but I did look at it. The first one is whether or not the individual, in this case Mr. Howell, has any scheduled community supervision if no longer detained under Chapter 229A. In his case he does not.

This is not a sign of extra risk. It does not increase his risk in my assessment. But if he had a significant period of mandated community supervision scheduled for him, that would be reason to at least temporarily, if not on a more permanent basis, to lower the assessed risk. So he does not have that characteristic that would potentially lower his risk.

The other characteristic that I note, I didn't put in the report but is part of my assessment, is just looking at his age. There's reason to believe that people who commit sexual assaults against adult women, sexual assaults in general but I'll be more specific in his case against adults, adult women, that the likelihood for recommitting another offense once convicted lessens as the person gets older. And so I needed to look at both his current age and the last time that he was known to have offended sexually.

Q. All right. And what conclusions did you draw from that age factor?

A. On the one hand, his age of currently 47 puts him into a category or into a general age range of the forties that would suggest on average a lowering of recidivism likelihood compared to people in their thirties or twenties. For Mr. Howell, however, his last known sexual offense by conviction occurred when he was already age 40, so he was already in that age bracket. So I did not decrease the

assessed risk based on his age, separate from other considerations. It did have some effect on how I would look at the interpretation of the actuarial instruments, but it had no effect by itself.

Q. So overall, what effect, if any, did your look at these unique factors have on the opinion that you had arrived at or been working on through the first two phases of your assessment?

A. It served not to change it. There was the issue of the age or community supervision could have potentially lowered the assessed risks, and I did not lower the assessed risk based on either of those considerations.

Q. Are there any other parts of your risk assessment that I have not covered with you?

A. Not in any formal sense.

Q. All right. Based upon that assessment, once again, what was your opinion to a reasonable degree of professional certainty as to whether or not the respondent in this case, Steven Howell, is likely to commit predatory acts of a sexually violent nature if he is not confined in a secure facility?

A. My opinion, again to a reasonable degree of professional certainty, is that the risk that he represents for committing a sexually violent act if no longer confined is much more likely than not -- excuse me, is more likely

than not. Excuse me. Is more likely than not.

Q. Thank you.

MR. PROSSER: I have no further questions now.

THE COURT: Mr. Bal?

MR. BAL: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BAL:

Q. Good morning, Dr. Doren.

A. Good morning.

Q. Good to see you again.

A. Thank you. Same to you.

Q. In the case of Mr. Howell, you have done approximately three reports, correct?

A. I had a total of three reports, that's correct.

Q. And each one of those you have some sort of diagnosis as far as mental abnormality, correct?

A. Yes.

Q. For example, in the preliminary report dated November 18, 2000, do you have that in front of you, sir?

A. Yes, I do.

Q. You indicated that Mr. Howell may suffer from personality disorder, NOS, with antisocial features? I believe that's on page 1.

A. Yes, that's correct. I thought you were continuing. I'm sorry.

Q. And you also stated there may be indications of paraphilia NOS, nonconsent, and alcohol abuse?

A. That's both correct.

Q. Now, the diagnoses of personality disorder NOS, paraphilia NOS, nonconsent and alcohol abuse, did you get those diagnoses from any type of reference or guide book?

A. The concepts you are talking about are from the --

Q. Those terms as well as the standards which you applied to reach those tentative conclusions?

A. Yes.

Q. And what did you use?

A. The Diagnostic and Statistical Manual of Mental Disorders, Volume IV.

Q. And there is a more current version of that, is there not, called DSM-IV TR?

A. There is in one sense. It's certainly a newer publication. TR standards for text revision. None of the criteria for defining a diagnosis changes from one volume to the next. But there's some additional text.

Q. Then on April 17 of 2001, you updated your preliminary report?

A. That is correct.

Q. And you stated that to a reasonable degree of scientific certainty, Mr. Howell suffers from personality disorder, NOS or not otherwise specified, with antisocial

features?

A. Yes, I did.

Q. And but you did not diagnose him as being paraphiliac or having paraphilia?

A. That's correct. At that point I had ruled that out.

Q. And the diagnosis of paraphilia, that is also from the DSM-IV?

A. That's correct.

Q. And your most recent evaluation of September 17, 2001, your diagnosis is antisocial personality disorder?

A. That is correct.

Q. And that is also taken from the DSM-IV?

A. That is correct.

Q. And the criteria for reaching these diagnoses are all contained in the DSM-IV, correct?

A. To the extent criteria are listed, yes.

Q. The DSM-IV does have criteria which must be met in order to reach these diagnoses, correct?

A. I think "must" overstates the case. They are considered as clinical guidelines, but there can be exceptions to criteria absolutely having to be met in order to diagnose a condition.

Q. And if the DSM-IV uses the word "must," that this criteria must be met, that's pretty much mandatory, isn't

it?

A. Interesting question. In the beginning of the manual it talks about how each of these are to be considered guidelines and not strict criteria. And it may be -- I can't think of a specific for instance -- it may be that under any of the sets of criteria for the different diagnoses that the word "must" is used, I would go with the general descriptor that they serve as clinical guidelines but not an absolute mandatory set of criteria. And that's an interesting question.

Q. So your interpretation of the DSM-IV is that "must" doesn't necessarily mean mandatory?

A. As a general concept, I would agree. There may be a circumstance where I would agree that the -- or I would state that "must" is mandatory. But none come to mind at the moment.

Q. Can the diagnosis that I just mentioned, the very diagnosis that you've given to Mr. Howell, were there any criteria under the DSM-IV that you did not follow?

A. I don't believe so.

Q. Okay. So for the diagnosis that you've given, the criteria on the DSM-IV are the ones you followed?

A. Yes.

Q. You did not go outside those requirements of DSM-IV, these diagnoses?

A. To the extent that there's anything listed there, that's correct.

Q. Now, your final diagnosis for Mr. Howell was antisocial personality disorder?

A. That's correct.

Q. I'm going to show you first of all the Diagnostic and Statistical Manual of mental disorders, DSM-IV TR, and refer you to page 701 of this publication. Now, on page 701 at the bottom under Section 301.7 it states antisocial personality disorder, correct?

A. That's correct.

Q. And I would like you to flip forward to page 706.

A. Yes.

Q. And 706 is the very last portion of the criteria for antisocial personality disorder?

A. That is correct again.

Q. I'm going to show you what I have marked as Respondent's Exhibit F. Would you please compare that to the DSM-IV TR, indicate whether that is a fair and accurate copy of that volume?

A. Exhibit F has some underlining on page 702. Besides that, it is accurate.

Q. Thank you. Let me show you Respondent's Exhibit F which is not underlined. Would you please indicate that to the Court.

A. Yes, this appears to have the same set of pages.
Q. And that is a fair and accurate copy of what is contained in the DSM-IV TR?
A. It certainly looked that way to me in the quick review.
Q. In writing your preliminary report of November 18, 2000, what were the sources you relied on?
A. That report was based purely on paper review.
Q. And by paper review are you referring to Mr. Howell's record from the Department of Corrections?
A. Essentially that was what was there, plus I don't remember exactly what, but it would be some other -- potentially some prosecutor's file or two. But it would not have been the complete set I eventually looked at. That's correct.
Q. And what is the difference between the initial set and the complete set you eventually looked at?
A. The complete set included some trial transcripts, I believe it included another prosecutor's file, and I don't recall if there was another transcript or not. I have a vague recollection, but I'm not certain of that.
Q. And the transcript of trial you're talking about was the trial of Mr. Howell in 1994?
A. The one that I'm thinking of is the one involving Carrie Fatino, so no, that would have been from 1987.

Q. Did you review any other transcripts of trial?

A. I know that I reviewed Minutes of Testimony and was checking my notes to see if I had a transcript from the 1994 trial. I do have some memory of viewing it. I don't have it in my notes that I did, however, so I'm not certain.

Q. Do you recall reviewing testimony of a Rita Gall at a trial involving Mr. Howell?

A. Yes.

Q. And in her testimony do you recall reviewing the statement that Mr. Howell and Ms. Fatino had come to her establishment after a date?

A. I don't recall.

Q. Or that Ms. Fatino and Mr. Howell had come to her apartment and that Ms. Fatino had taken out some cocaine --

A. I'm sorry. I may have mixed up the questions. You were just asking me about Ms. Fatino.

Q. I was asking about testimony of Ms. Gall regarding Ms. Fatino.

A. Oh, I'm sorry. Could you repeat that question, please? I have the wrong case in mind.

Q. Let me go back to the previous question. Do you recall Rita Gall testifying that Mr. Howell and Ms. Fatino had come into a bowling establishment where Ms. Gall worked?

A. I believe so.

Q. And that that was after a date?

A. I don't remember how it was characterized, but along those lines, was the impression I had.

Q. And that they had come into the establishment together?

A. I cannot say I recall. I don't know.

Q. How about Mr. Howell and Ms. Fatino coming to Ms. Gall's apartment and Ms. Fatino ingesting cocaine?

A. I remember somebody giving testimony along those lines.

Q. Now, you've been hired by the State to do a number of civil commitment cases, correct?

A. To do assessments under Chapter 229A, yes.

Q. And in the past you have recommended that the case not be referred to civil commitment, correct?

A. Yes, some of the time.

Q. Or you have stated that you cannot be certain whether a person will or will not offend in the future? Unclear?

A. I -- in using the words that you're using, I would always say that. If you're talking about not clear whether or not someone is meeting a threshold of risk of more likely than not, yes, I've done that on occasion as well.

Q. In fact, you did so in the Willis case, did you not, a case involving --

A. At one point I had, yes.

Q. Okay. That point was prior to trial, correct?
A. Yes.
Q. That is, after you had done an evaluation of Mr. Willis?
A. Yes.
Q. And that was after he faced court, faced an interview with Mr. Willis?
A. Yes.
Q. And your conclusion was that it was unclear to you whether Mr. Willis was more likely than not to re-offend.
A. At that point in time, yes. That's correct.
Q. And then in that case the State went out and got a Dr. Hoberman from Minnesota, correct?
A. To do an assessment. That's my understanding, yes.
Q. And his assessment was that Mr. Howell -- or Mr. Willis was more likely than not to re-offend?
A. That is my understanding of what Dr. Hoberman came to the opinion of.
Q. Well you, you read Dr. Hoberman's report, didn't you?
A. Eventually, yes.
Q. And, in fact, you ended up changing your opinion and testified at trial for the State in that case, correct?
A. All of that is accurate.

Q. Now, the preliminary report of Mr. Howell done on November 18, your recommendation to the State was that Mr. Howell should not be thought of as meeting criteria for commitment?

A. My statement more exactly is he probably should not be thought of as meeting the criteria based on what -- the information I had at that time.

Q. And you did not see the degree of risk as clearly beyond the threshold of more likely than not?

A. At that point in time, that's correct.

Q. But the State initiated commitment proceedings against Mr. Howell after that preliminary report, correct?

A. Chronologically, that's an accurate statement. There was some intervening information. But chronologically, that's correct.

Q. And then you gave an updated preliminary report on April 17, 2001?

A. That's correct.

Q. And in that report you said to a reasonable degree of professional certainly that Mr. Howell suffered from personality disorder NOS with antisocial features?

A. Yes, I did.

Q. You ruled that out at this point, correct?

A. It's subsumed within the category of antisocial personality disorder. I wouldn't make a separate diagnosis

of personality disorder not otherwise specified at this point. I am basically addressing the same issue. The diagnosis at that point was personality disorder NOS, not otherwise specified, with antisocial features. And the diagnosis that I finalized was antisocial personality disorder. These are very much overlapping conditions.

Q. So your final diagnosis is antisocial personality disorder?

A. That's correct.

Q. And that is to a reasonable degree of professional certainty?

A. Yes.

Q. Now, you talked about a number of actuarial instruments that you used in reaching your conclusions. One of them is the RRASOR?

A. Correct.

Q. And you also scored the RRASOR when you did the preliminary report, correct?

A. Yes.

Q. And did the score on the RRASOR for Mr. Howell change from the time you did the preliminary report to your final evaluation?

A. No.

Q. That was a score of two?

A. That's correct.

Q. And is there a percentage associated with that score given by the developers of the instrument?

A. There are percentages, yes.

Q. And what is the percentage given for that score, score of two on the RRASOR?

A. Basically there are two percentages, both having to do with the reconviction likelihood within a certain time period. For a five-year post-incarceration time period, a two on average is associated with 14 percent reconviction likelihood for a new sexual offense after five years. And after ten years post-incarceration, it's 21 percent for the same type of recidivism.

Q. And that is based on reconviction rates, correct?

A. Basically, yes.

Q. And the other instrument you used was a Static-99?

A. One of the two others, yes.

Q. Now, the Static-99 in part is developed by a Karl Hanson, correct?

A. Correct.

Q. And the RRASOR is entirely developed by Dr. Karl Hanson?

A. That's correct again.

Q. Same Dr. Karl Hanson?

A. Correct.

Q. In fact, Dr. Hanson is one of the leading

researchers and developers of these risk assessment instruments?

A. He's certainly one of that group, yes.

Q. Would you consider him to be an expert in the field?

A. What field?

Q. In the field we're talking about, sex offender recidivism prediction?

A. I consider him highly knowledgeable and respected.

Q. You certainly use the instruments he either developed or helped develop, don't you?

A. I certainly use these, that's correct. I don't use everything that he has developed.

Q. But you certainly rely on them in reaching your opinion?

A. For these instruments, that is correct. Not other ones that he has developed.

Q. And what was your score on the Static-99 in your preliminary report in November 18 of 2000?

A. That was a score of five.

Q. And that score has changed --

A. Yes.

Q. -- at this point? And the score now is six?

A. That's correct.

Q. And then what was the basis for the change from

five to six?

A. One specific item. It is an item that -- the short title of which is called single, but the actual coding -- as in not married or never married. But the actual coding rules indicate that the definition has to do with whether or not the individual has lived for at least two years consecutively with a lover.

Q. And did you talk to Mr. Howell about whether he had done that?

A. Yes, I did.

Q. It's your opinion that Mr. Howell did not live with a lover for two or more years?

A. That's correct, not consecutive years.

Q. Well, you took notes when you scored these items, did you not?

A. Certainly.

Q. And you have the sheet where you scored the Static-99?

A. Yes.

Q. And I believe there's a chart and states Appendix I right above that?

A. Yes.

Q. And does the sheet -- or the -- do the documents that you have contain the basis numbers?

A. For my notes? No.

Q. They do not. Okay.

A. I may have a page 22 at the top if I printed them out before.

Q. 22, okay. Mine is page 20.

A. Oh, okay.

Q. Let's just make sure we're talking about the same thing here. At the bottom, the very last column, states total score and states five slash six?

A. That's correct.

Q. Five slash six?

A. That's correct.

Q. Not six?

A. That's what it says, five slash six.

Q. Now, you stated that the actual coding sheet for the Static-99 contains the term married, is that right?

A. I don't think I stated that. What I was stating is that it's usually described as the risk factor is just called single, but the coding rules, that basically has the person ever lived with a lover for at least two consecutive years? In other words, things like prison marriages don't count as lowering risk. Things like that.

Q. You also have an item in there which is entitled index of nonsexual violence?

A. Correct.

Q. And you gave Mr. Howell a score of one for that?

A. No, I did not. I gave him a zero, which is a lower risk side.

Q. Is that where you have in brackets "bod" for habitual offender?

A. Yes, "bod" is my abbreviation for benefit of the doubt. In other words, the information in this case, the interpretation of what a conviction of habitual offender would mean relative to the actuarial item having to do with nonsexual violence was not actually clear to me, but I did give Mr. Howell the benefit of the doubt and scored him in the nonrisk direction. The issue is the applicability of that conviction to the coding rules, and that wasn't so clear to me.

Q. Under the item single, which you had written down five slash six?

A. Under single I have zero slash one and the total score I have five slash six.

Q. Which means five or six.

A. That would be one interpretation. I can tell you what I meant by it.

Q. I want you to tell us what you meant by that.

A. The issue is ultimately how that item applied for Mr. Howell. I came to the conclusion that a one was a proper scoring, but I reminded myself that there was a difference in information relative to that item by scoring

it a zero slash one, and a further reminder of that of five slash six.

Q. And what was the difference in information regarding that point?

A. The information directly from Mr. Howell during the interview was consistent with the idea that he lived with his now ex-wife but lived with his wife for a period of beyond two years consecutively. That was not consistent with what she reported to me on two separate occasions.

She was more specific about when they were separated. He did not acknowledge to me or state to me or -- when asked directly about separations, he did not talk about separations having occurred to me that would interfere with the scoring on this item.

Q. So you have two different sources of information regarding --

A. Well, actually three, if I include a presentence investigation summary. But that was just a summary of when he was married and when he was divorced. It didn't describe when they lived together.

Q. And what was the length of time period in the summary in the PSI?

A. That they married in June of 1973 and divorced in June -- on June 10, 1976. To be clear, however, both Mr. Howell and his wife, ex-wife, talked about having lived

together on two separate occasions, one starting before they were married going into when they were married, and one some years after they divorced, getting back together, living together for a period of time.

Q. What was the longest period of time Mr. Howell and his wife lived together?

A. My understanding would be about a year and a half, would be the longest without a separation.

Q. And how about the total time that they lived together?

A. I did not compute that. I would approximate it to be maybe four years, three and a half, four.

Q. And this change from a score of five to a six based on this information from different sources, that increased, in your opinion, Mr. Howell's likelihood of re-offense?

A. It affected my assessment in that direction, if that's what you're asking me, yes.

Q. That's one change in the risk assessment instruments from your preliminary report. How about the MnSOST-R?

A. Minnesota instrument. Okay. It essentially didn't change. It became a little less clear on the scoring of one item that is still not clear to me on the scoring of it, potentially that if I were clear in a way that is in the

risk direction, his score would be slightly higher. But essentially I'm still, no matter how you look at it, I'm still looking at the same risk category across all the reports.

Q. But the score in the MnSOST-R in your preliminary report was eight, correct?

A. Correct.

Q. And the score in the final report is also eight, correct?

A. Well, I should clarify. Okay. That's correct, yes.

Q. And in your preliminary report, you stated that the MnSOST-R has the smallest degree of scientific research to support it?

A. Compared to the other two instruments, that's correct.

Q. Now, that was as of November of the year 2000, correct?

A. That's the date of the report, yes.

Q. But there has been research since that time on the MnSOST-R as well as the other two instruments that you used?

A. Correct.

Q. And that research was encompassed in a publication by Howard Barbaree, B-a-r-b-a-r-e-e, and a couple of other authors?

A. Barbaree, Seto, Langton and Peacock.
Q. And that was on criminal justice and behavior?
A. Yes, came out this past August.
Q. August of 2000?
A. 2001.
Q. 2001. So you have reviewed that piece of research?
A. Yes, I'm well familiar with it.
Q. Isn't it true that in that article the authors state that the MnSOST-R failed to meet conventional levels of statistical significance in the prediction of serious and sexual recidivism?
A. I know that statement is true relative to sexual recidivism. I'm not sure that's true relative to serious recidivism as they defined it. But concerning of most relevance to 229A, specifically sexual recidivism, that statement is accurate.
Q. And they also indicated that the inclusion in the MnSOST-R of institutional items, institutional treatment items may reduce the instrument's predicted ability?
A. The authors of that article make that statement in the discussion section as a way of trying to make sense of their results. So it's an accurate statement of one hypothesis they raise in their discussion section.
Q. At least it's an explanation of why the MnSOST-R

didn't do well in this study, right?

A. It was one explanation that was not supported by some other analysis they ran afterwards.

Q. I can certainly talk about that. But I'm talking about this study right now. So the statement I said is correct as far as the study goes?

A. It is one interpretation.

Q. It also goes on to say that the one explanation for this failure of the MnSOST-R could be that it was defined to predict arrest and not charge or conviction, isn't that correct?

A. I don't recall them saying that. It may be true. I don't recall that.

Q. Well, let me show you what I've marked as Respondent's Exhibit A. Is that the study by Barbaree we've been talking about?

A. Yes, assuming you have all the pages here, that's the study, yes.

Q. Let me refer you to page 514 of that study. The second photograph there, it states, "A specific explanation for the MnSOST-R's failure to predict sexual recidivism is that the instrument was designed to predict arrest for a new sexual offense, whereas the outcome evaluated in this study was a new charge or conviction for a sexual offense." That's what it says, isn't it?

A. That's what it says.

Q. And the RRASOR on which you relied looks at convictions, not arrest, correct?

A. Basically, yes.

Q. And the same is true for the Static-99?

A. That's very clear there, yes.

Q. Now, one of the assumptions that the authors of the MnSOST-R used is that everyone who is arrested is guilty or will be convicted of that charge, or not even charged, after the arrest. They will be convicted of sexual offense, correct?

A. I would not fully agree with that statement.

Q. They're assuming that everyone who's arrested recidivated, isn't that right?

A. In a technical sense, they are. By counting arrest as the outcome measure for recidivism, then they are stating that as their substitute measure for true re-offending, and we don't know what those acts are, that in the process of using rearrest, that people who are arrested for a new, in that case, hands-on sexual offense, at least at some point since release committed such an offense; not necessarily for the one they were arrested for, just that at some point they did so.

Q. Well, that was their assumption.

A. In counting arrest, that would be accurate.

Q. Now, are you familiar with a study by the United States Department of Justice which did an analysis of people who were convicted of sexual offenses?

A. I don't believe so.

Q. The State has not provided you with that study?

A. This does not sound familiar to me.

MR. PROSSER: Maybe if you show it to him, Mr. Bal, you will recognize it.

MR. BAL: I don't have it with me.

Q. Do you have any knowledge of any study done by the FBI of DNA analysis that indicated over one-third of people convicted of sexual offenses, in fact, were not guilty?

A. I'm not aware of any such study.

Q. Now, the three instruments that you used, the RRASOR relied on a population sample from England, is that correct, in part?

A. Six samples from Canada, one from the U.S., and then a replication study out of England -- out of the United Kingdom, more accurately.

Q. Was that Wales?

A. Wales and England.

Q. And what year were those samples taken?

A. They varied greatly. The oldest was -- testing my memory here. It's either the late sixties or early seventies. The most recent was early nineties, I believe.

I'm not positive of those things. But it was a span of a good 20-plus years.

Q. What about the Static-99?

A. Static-99 was developed on the United Kingdom sample, and then replicated using three Canadian samples, in its development.

Q. And the MnSOST-R was developed in a population in Minnesota, correct?

A. Correct. Minnesota Department of Corrections.

Q. And none of these instruments has been replicated or normed from the state of Iowa, correct?

A. I don't know any test specific to Iowa for any of the instruments.

Q. Now, we already talked about the MnSOST-R of using rearrest in defining recidivism. Are you familiar with the specific statute or statutory requirements of the sexual offense in the state of Iowa?

A. I'm sorry, am I familiar with?

Q. Yes, the specific statutory sexual offenses which are defined by the Iowa Code in Section 229A?

A. I couldn't quote to you the names of all those, but I am familiar in general terms, yes. I have read through that before. I just don't recall all the names.

Q. Have you compared Iowa's definition of a sex offense with the sexual offenses that were used in

developing the MnSOST-R?

A. In effect, I have.

Q. Each and every offense?

A. My purpose for that comparison wasn't for the specific Iowa-to-Minnesota comparison. I was doing a chapter of my book and I was looking at what all of the states defined as sexually violent crimes in their different statutes for commitment and finding degrees of similarity and degrees of difference. Are you asking are Iowa's and Minnesota's exactly the same? No, they are not exactly the same. They overlap.

Q. They are not exactly the same?

A. They are not exactly the same.

Q. So the arrest in Minnesota for sex offense may be for behaviors that are not considered sex offenses under Iowa Code, correct?

A. In thinking about the answer, I mixed up which state you were asking me was not similar to which. I'm sorry.

Q. Minnesota and Iowa. We're talking about the MnSOST-R, and I'm talking about how they measure recidivism as compared to the definition of the Iowa Code.

A. Yeah, in Iowa, the main difference is that basically any sexual contact with a child is included in both. Certain types of sexual attacks on adults are

included in both. The Iowa Code includes exposing oneself under various circumstances to strangers, for instance. That is not included in Minnesota's code. And Minnesota lists some very unusual ones that Iowa doesn't, such as sex with a corpse.

Q. And the publishers of the MnSOST-R did not break down different types of offenses they considered recidivism and compare it to the offenses in the Iowa Code, did they?

A. They did in effect describe within their code what offenses they were including. They did no comparison to anybody else anywhere, including Iowa, of which I'm aware.

Q. So there could be behaviors in Minnesota which the developers of the MnSOST-R considered recidivism which may not be sexual offenses in Iowa, isn't that correct?

A. There could be a small number of those, as I was describing. The Iowa Code is actually more inclusive, by various hands-off offenses that are in the category of exposing genitals. But yes, there are at least a handful -- wrong. There are -- there is at least the possibility that there were some number of cases in Minnesota that would not be included in Iowa's law.

Q. Really don't know the number, do you?

A. I do not know a number.

Q. Okay. Thank you. Now, the RRASOR and Static-99, did the authors compare the different jurisdictions from

which samples were taken and look at what constituted recidivism in those jurisdictions and compare that to Iowa?

A. There were no comparisons to Iowa involving any of these pieces of research, to my knowledge.

Q. Have you compared the laws in Wales and Canada and England and try to determine that they would find recidivism the same way as the Iowa Code does?

A. In a general sense, but not a specific case-by-case sense.

Q. So you really don't have a specific number or percentage of how many of the samples the authors considered as recidivism versus whether they would consider recidivism in Iowa. You really don't know, do you?

A. Although I would not have a specific number, the proportion of --

Q. That was my question. Do you have a specific number or do you know a specific number?

A. I would have a reasonable perspective on proportion. I have no number.

Q. Now, would you agree that any instrument such as the risk assessment instruments that you're attempting to apply, to get the most accurate result, that should be normed in the particular population to which you're attempting to apply it?

A. That's a difficult question to answer. I don't

know that your question has an answer as asked. If you were to do a test, for instance, in Iowa with any of these instruments, when you finished that test and then applied it to somebody else, the time period has changed, in which case things could have changed along the way in terms of prosecutorial practices or ability to detect recidivism, and so there is no way in any applied science to directly test to the population you're going to apply it. There's always some degree of applying results from elsewhere to the current situation.

Q. So because of a time gap, because things change during a period of time, whatever attempts you have to try to apply to a particular population may be invalid or not as accurate, would that be correct?

A. It is correct to say that it is possible that that is true. At the same time, one -- if you take that argument to its extreme, that would mean that we never know anything through science. So obviously there's -- taking it to extreme is not sensical either.

Q. But it certainly is possible, or a consideration, true?

A. Applying results from any other group, whether it be from the same state in the example you're talking about or a different location, et cetera, it's always an issue about how directly it applies to the case you're using it

with.

Q. I was talking about this time delay that you're talking about. That certainly could be a factor in the accuracy, correct?

A. Are you asking could it be? Yes, it's a theoretical possibility it could be addressed.

Q. It's a possibility you raised?

A. Yes. Yes.

Q. And the study you talked about as far as the RRASOR and Static-99?

A. Those were for a long time period, like 20-some years, correct. The different follow-up -- the different times at which people were released spanned a period of at least 20 years for the RRASOR. So it had numerous samples coming from different time periods.

Q. And the laws of those countries and jurisdictions could also have changed, just as you indicated the laws in Iowa could change, right?

A. That's certainly a possibility.

Q. So that certainly should be a consideration when you're looking at these instruments, right?

A. I do consider that. One of the major conclusions I draw is that the fact that it seemed to work across time periods and across jurisdictions.

Q. Now, these instruments, in coming up with

percentages, don't give you a precise percentage, do they? Isn't there a margin of error, plus or minus, around those percentages?

A. I'm sorry?

Q. Isn't there a plus or minus? I think that's the term you used in one of your evaluations. You said it's important to keep in mind there is a plus or minus around these percentages.

A. Yes. If you look at what is written in the original write-up of the developmental research, they do not talk about plus and minus in that way. On the other hand, I am well aware that there are potentially different sources of error that I'm calling plus and minus, in the same way we think about a Gallup Poll adding plus or minus figures to whatever percentages they come up with, that's something based on what they call error and sampling.

Q. One of the ways they build in error is the confidence interval?

A. Yes, that's a formal term, what I was getting at, when the Gallup Poll, they talk about plus or minus three percent or four percent when they're saying how many people are going to vote for which presidential candidate. That's a confidence interval, yes.

THE COURT: Counsel, I think we're going to break at this time for a noon break. The Court has a commitment.

I know we would like to get through this witness, but I don't see that it's going to be done shortly. So we'll take a noon recess at this time and reconvene at 1:30.

You may step down.

(Trial recessed at 11:50 a.m.)

(Trial resumed at 1:29 p.m.)

THE COURT: Mr. Bal?

MR. BAL: Thank you, Your Honor.

Q. Dr. Doren, I'll try to remember where I left off. I think I was talking about standard error of measurement and confidence interval before I left.

A. You had mentioned confidence interval. I don't think you mentioned standard error yet.

Q. I'm headed there. Before we start that, let me clarify a couple of your scores. On the MnSOST-R, I believe it's page 21 of your scoring sheet, I had a question about Item No. 10, which is, "Is there evidence of adolescent antisocial behavior in the file?"

A. Yes.

Q. And it looks like you give it a minus one, which is no -- minus one, which means there's no indication of that, is that right?

A. That is the score I gave, yes.

Q. Did you score it as minus one? Is there something in the bracket that says "bod"?

A. Again, that's my own note to myself, my abbreviation for benefit of doubt.

Q. Okay. All right. I wasn't sure you actually scored it, because it seems to indicate there's no indication of adolescent antisocial behavior. So, okay, "bod." Did you score that differently in the PCL-R scoring sheet, that item?

A. I'm not sure which item you're referring to. If you're referring to item 12, early behavior problems?

Q. What is it called?

A. Early behavior problems. It's No. 12. That would be specifically before age twelve, not adolescent.

Q. Okay. How about item 18 of the PCL-R, juvenile delinquency?

A. Juvenile -- no, I still scored that as a zero, which means there was not an indication of major or serious offense before age 18 resulting in formal contact with the law.

Q. Okay. How about adolescent antisocial behavior? How is that defined? What is adolescence?

A. In the Minnesota, you mean? Approximate ages 13 to 17 inclusive.

Q. Okay. All right. Thanks for clarifying that. Now I'm going to go back to the statistics.

A. Okay.

Q. I believe I had asked you a question about confidence interval and whether that introduced error into the instruments.

A. It doesn't introduce error. It's a description of an assessment of the degree of error, of one type of error. Like I mentioned the Gallup Poll, the plus or minus around a percentage that you hear about the number of people who are going to vote for a certain candidate.

Q. Okay. So is it your statement that the confidence interval is the same as the plus or minus percentage?

A. In the way that I'm talking about it around a percentage outcome, yes. I mean, there are other types of errors that use a plus or minus.

Q. How would you refer to the plus or minus, that terminology? Is there a more scientific term for that?

A. There are different kinds of error. And the one that pertains to confidence interval, in which case the term is confidence interval, is the interpretive percentage for any given score on the actuarial instruments. So, for example, Mr. Howell's score of two on the RRASOR had a 21 percent reconviction likelihood within ten years. That would be plus or minus a certain percentage.

Q. What is that percentage?

A. My understanding, that's approximately about two and a half percent either direction.

Q. Plus or minus two and a half percent --

A. Well, we can round it to three percent. That's an approximate number.

Q. Around 21 percent?

A. 21, give or take 3. That give or take is a confidence interval.

Q. And the give or take, that represents a range in which Mr. Howell could fall, correct?

A. That would be one interpretation of the range. It's not an exact interpretation of it. An exact interpretation, what's called a 95 percent confidence interval, just what I'm using, has to do with the process of sampling, of testing with different samples of people, different groups of people, and there's going to be some variability in what you find. So if you sample over here and then over there and then over here, the people with the score of two, as my example goes, and the RRASOR over here will have a certain percentage of them will recidivate in the way described over ten years. This percentage won't be exactly the same as that, and this one won't be exactly the same as either of them, but they vary in a predictable way. The confidence interval is most directly interpreted as 95 percent of the time you sample, the sample will fall in that range for a score of two.

Q. So it's saying that 95 percent of the time it'll

fall in this range, not 100 percent, correct?

A. That's correct, yes, 95 percent.

Q. So there's error in just the interval itself, correct, just the interval we're talking about, plus or minus, that range?

A. Well, in the way we're describing it, yes. You can figure confidence intervals at any percentage you want, at 70 or 99 or whatever you want.

Q. I understand that. But it's not 100 percent, so there's some error just by virtue of the fact it's a 95 percent confidence interval?

A. Okay. Yes.

Q. Now, there's another type of error which is based on the sample size, correct?

A. I need for you to explain further what you mean.

Q. Okay. Generally speaking, would you agree that the smaller the sample, the larger the plus or minus around any score?

A. Around the score or around the percentage attached --

Q. Around the percentage.

A. That's true, but that's included in the figuring of the confidence interval. It's the same error. The way the confidence interval is computed takes into consideration the number of people that you've sampled. And the smaller

your sample, the larger the range of possibilities.

Q. So the smaller the sample, the larger the range around any particular percentage?

A. That's correct, uh-huh.

Q. And that is what I was trying to say. Maybe I didn't say it clearly enough.

A. Okay.

Q. And the larger the sample size, the smaller the range around a particular score.

A. In general, that's correct, yes.

Q. So that's talking about the range around a particular percentage?

A. That's correct.

Q. And the confidence interval you're talking about talks about how certain you can be it is actually within this range, whether small or large, right?

A. In a manner of speaking. It's not a direct translation to how certain I can be. It is a statistical assessment, estimation of, the example I was giving, that 95 percent of the time, no matter where you sample from, the score will be associated with something in that range.

Q. In that range. But the range itself can also vary depending upon the size of population, the sample size?

A. In terms of how it's computed, yes.

Q. Now, the sample size for the RRASOR, Static-99

exceeded 1,000, did it not?

A. Yes.

Q. And I believe you indicated the plus or minus for the RRASOR is approximately two and a half to three percent?

A. I indicated that for a score of two. Actually, it varies per score.

Q. Okay.

A. It's not -- there is no such thing as a confidence interval for the whole instrument. It's per score that you have to figure it.

Q. Okay. What's the average for the RRASOR, the confidence interval?

A. For the ten-year figures, zero, one and two are all in the two to two-and-a-half range, give or take two, two-and-a-half percent. Three, if I remember correctly, is somewhere around a four percent range. Four goes up to about eight and a half, and a five goes up to about twelve. And there are just too few cases that are ever found with a six. We don't know what that is.

Q. Because there's too few cases, the info around any percentage score is probably going to be larger than in the smaller scores.

A. Absolutely correct. And one reason why the lower numbers have smaller confidence intervals is more people fall into them so we have more people to test.

Q. Per the Static-99, what would be the plus or minus for the score that you gave to Mr. Howell?

A. A score of six on the Static-99 for the 15-year figure, which is the farthest out, is approximately eight and a half, approximately eight, eight and a half.

Q. How about a score of five?

A. If I remember correctly, that one showed a slight peculiarity again because of the sample size issue, but it's actually larger than for the six. It was somewhere closer to ten or eleven. I'm not certain.

Q. And both of those instruments, the RRASOR and the Static-99, had samples in excess of a thousand?

A. Original developmental samples, yes.

Q. What was the sample size for the MnSOST-R?

A. Original development? 256.

Q. Now, Dr. Karl Hanson, who developed the RRASOR and Static-99, actually recommends that in developing instruments of this type you have samples of at least a thousand, right?

A. I think you're referring to something he wrote in 1988. That's probably what he said.

Q. He has made that statement in the past, correct?

A. I think that's true. I would certainly not be surprised if he said that.

Q. I deposed you on a number of occasions previously,

Doctor, correct?

A. Yes. I think what you're referring to is a publication from 1988, I think is what you're asking me about.

Q. Okay. So the MnSOST-R is approximately 256?

A. The original developmental sample, yes.

Q. And what is the plus or minus for the MnSOST-R?

A. That again depends on the score category. There's no one confidence interval for a whole instrument.

Q. Okay. How about for the score he gave to Mr. Howell, a score of eight?

A. I believe that's approximately 11 percent, give or take.

Q. Now, you indicated --

A. Again, that's because of smaller numbers.

Q. And you gave an opinion earlier that more likely than not based on whatever score Mr. Howell got on that that he will re-offend, correct, based on a score of eight?

A. I don't think I stated that purely based on the one actuarial score that I would say that Mr. Howell's risk is more likely than not or is not more likely than not. I don't believe I made such a statement.

Q. Is there a percentage likelihood associated with a score of eight on the MnSOST-R?

A. Yes.

Q. What is that percentage?

A. There are actually three different ones, but I believe the one to be most accurate is 54 percent likelihood for rearrest, for a new hands-on sexual offense, within six years after incarceration.

Q. And that's rearrest, right?

A. That is correct.

Q. And the margin for that once again is what? Eleven?

A. I believe it's plus or minus eleven.

Q. Okay. And the -- that percentage is actually not just for a score of eight. It's for scores between eight and ten, correct?

A. Eight to twelve actually is the score category.

Q. Eight to twelve?

A. Yes.

Q. So there's people in that range who got scores higher than eight. Some got nine, some got ten, some got eleven, some got twelve, correct?

A. In the research that would compute the percentage, that's correct.

Q. And for each of the ones that score higher than eight, nine, ten, eleven, twelve, there are different percentages associated with that, correct?

A. Not technically.

Q. Well, is the person who gets a twelve versus a person who gets an eight on the MnSOST-R more likely to recidivate?

A. I have different answers to the question. I'm not sure I can answer it directly.

Q. Based on the data from Dr. Hanson when he developed this instrument --

A. Dr. Epperson, you mean.

Q. I'm sorry. That was Dr. Epperson. Was there a difference between the recidivism rates of people who got 12 versus scores down to 8?

A. Not a statistically significant one, so that's one reason that Dr. Epperson was recommending collapsing those scores into one category.

Q. And the reason he collapsed them was because his sample was too small to be statistically significant for each and every score, correct?

A. That would be one interpretation.

Q. Well, isn't that his interpretation? Isn't --

A. No, I don't think that's true. The way in which I saw him present these data included a graph, which I will describe for you if you wish, which basically showed that there didn't seem to be much difference among those scores and recidivism rates, as different from less than that or more than that. It wasn't --

Q. Not much difference. Was there any difference, if you recall?

A. Oh, I'm not certain I recall. I would guess that it was not exactly the same. Things are rarely exactly the same in this kind of work, but not statistically different.

Q. Now, the development of all these instruments, the developers use something like base rate, correct?

A. That's included in the process of doing the research.

Q. Right. But there is a thing called base rate which is factored in?

A. Yes.

Q. And generally speaking, the higher the base rate, the higher the percentage scores you're going to have for each instrument, correct?

A. The higher the percentages attached to each score?

Q. Yes.

A. On average, that would be true. It's not necessarily the case in all cases. On average it is true.

Q. Now, Dr. Epperson recommends a certain base rate when interpreting the MnSOST-R, correct?

A. That's fair enough, yes. Not exactly, but I'll go with that, yes.

Q. And you, yourself, don't use that base rate. You actually use a lower base rate, correct?

A. See, Dr. Epperson has developed data relative to three different base rates, and I use a second one that he provided.

Q. And of each of the three different base rates, the percentage likelihood of recidivism changes?

A. For each of the score categories, that is correct.

Q. And the base rate that you use is in the middle.

A. Compared to the other two, that is correct.

Q. And the percentage likelihood using your base rate is lower than the highest base rate Dr. Epperson recommends?

A. The number based on the highest base rate, that's correct, the one Dr. Epperson talks about.

Q. It is higher than the lower base rate, correct?

A. That is correct.

Q. What is the lowest base rate in the MnSOST-R?

A. For the data I provided, based on a 15 percent base rate, that would again be for six-year rearrest for new sexual offense, hands-on sexual offense.

Q. And using that base rate, what is the percentage likelihood of recidivism? Lower than the 54 percent you talked about?

A. It's lower. I don't recall what it is.

Q. And if it is lower, then you still have the margin of error of around 11 percent, correct?

A. It would not be exactly the same 11 percent. It

would still be a range around it, but statistically what would be occurring would make it smaller even with the same sample sizes.

Q. Okay. And the RRASOR and Static-99 also have a base rate associated with them, correct?

A. That were part of the developmental research, yes.

Q. What was the base rate used for the RRASOR, do you know?

A. Approximately -- I'm trying to recall. Just a moment. I did know this. Two different figures are sticking in my mind. I'm not certain about either one. The figures sticking in my mind are either 19 or 23 percent, but I don't remember which.

Q. Okay. Somewhere in between there?

A. It would be in that range.

Q. How about for the Static-99? The same?

A. It would be very close to the same, whatever that was.

Q. And these are base rates for a particular population, correct, the developmental sample?

A. A set of samples, more accurately, eight samples for the RRASOR, it's across eight samples, and across four samples for the Static-99.

Q. But base rate for the samples you're talking about, these are samples, for example, Wales and England and

Canada and, you know, from which the statistics were taken, right?

A. Yes. Yes.

Q. Same for the MnSOST-R?

A. For its own population.

Q. Its baseline is based on the population of Minnesota, correct?

A. Yes.

Q. Do you know what the base rate for recidivism for sex offenses is in Iowa?

A. I'm aware of one study in that regard.

Q. Okay. And what is that study, first of all?

A. It was a study that's been posted on the internet, done by the Department of Corrections, I believe.

Q. Okay. Is that entitled the Iowa Sex Offender Registry and Recidivism, per chance?

A. I believe that's it.

Q. Well, actually, why don't I just show it to you. Let me show you what I have marked as Respondent's Exhibit B. Please look at that and tell me if that's the study to which you're referring.

A. Yes. Without checking that all pages are here, this is the right study.

Q. And do you recall what the base rate for recidivism is in Iowa according to that particular study you

referred to?

A. I know what the statistics are for that study, yes, and that sample.

Q. And what is the -- let me strike that. That study looked at recidivism rates between people who are required to register as sex offenders and ones that are not required to register, correct?

A. That was part of the purpose of the study, yes.

Q. And the people who were required to register had a slightly lower recidivism rate than the people who were not required to register. Would you agree with that?

A. I don't remember that that was statistically significant. It was the difference between three percent and three-and-a-half percent.

Q. Three and three-and-a-half percent being the recidivism rate for sex offenses?

A. By those two groups, within the time frame that they were following up using the measure that they were using.

Q. Let me just backtrack a little bit and make sure I'm covering everything before I wind up here. In your preliminary report of November 18, 2000, you talked about diagnosis of personality disorder and the antisocial features, paraphilia, NOS, nonconsent and alcohol abuse?

A. I did talk about all three of those.

Q. As possible diagnoses at that point?
A. That is correct.
Q. And you also indicated that only the paraphilia NOS out of all these three would potentially show a predisposition for recommitting sex offense?
A. No, I don't believe that's what I said.
Q. Isn't that what you stated on page 2?
A. On page 1 I had already concluded that personality disorder NOS did predispose him to commit sexually violent acts.
Q. Right.
A. Then of the other two, paraphilia disorder and the alcohol abuse, of those two the only one that would potentially predispose as well is the paraphilia.
Q. Okay.
A. The original question included all three.
Q. I must have misstated it. But the alcohol abuse does not predispose Mr. Howell to re-offend?
A. In my opinion, it does not specifically predispose him to commit sexually violent acts.
Q. When reviewing the offenses for which Mr. Howell has been convicted, there were none in which alcohol was not involved, is that correct?
A. Are you referring to sexual offenses or any offense?

Q. Well, let's talk about sexual offenses.

A. To my knowledge, that's accurate, in terms of his having used beforehand.

Q. So when Mr. Howell was not drinking, he's not -- he did not commit a sex offense?

A. I do not have record of him having or any allegation of him having committed a sexual offense where it is clear he did not drink.

Q. Per the Static-99, what is the percentage for reconviction associated with a score of six?

A. Do you want five- and ten- and fifteen-year figures or just the fifteen?

Q. Well, let's talk about five years. Is that about 39 percent?

A. It's approximately 39 percent over a five-year period for being reconvicted of a new sexual offense after incarceration.

Q. And that's the plus or minus whatever percentage you talked about?

A. Right.

Q. And 54 percent for 16 years, correct?

A. Would be approximately accurate, yes.

Q. Also the plus or minus whatever percent you're talking about?

A. That's correct.

Q. And MnSOST-R, 54 percent, plus or minus 11 percent?

A. That would be approximately accurate, yes.

Q. Each of these instruments look at the age of the respondent, do they not?

A. All three of those instruments have age in their consideration and part of the scoring, yes.

Q. And depending on the age, he may or may not get a point.

A. Yes, that's correct. A point being a risk sign, yes.

Q. And generally speaking, the higher the points, the higher the percentage of the rate of recidivism?

A. That's the way the scales work. The more points you accumulate, the higher the risk is assessed. The lower, the lower the risk is assessed.

Q. Now, Dr. Karl Hanson, the developer of the RRASOR and co-developer of the Static-99, has done additional research on the correlation between age and sexual recidivism, correct?

A. Yes, he has.

Q. And Dr. Karl Hanson is with the Department of the Solicitor General of Canada, correct?

A. That's correct. He's a research psychologist for the solicitor general.

Q. Let me show you what I've marked as Respondent's Exhibit C. Is that the report by Dr. Hanson published sometime in 2001 where he looks at correlation between age and sexual recidivism?

A. That is what he has done and posted on the solicitor general web site earlier this year, that's correct.

Q. Is this one of the most recent pieces of research on that correlation that you're aware of?

A. It very well could be. I don't recall anything else newer. It is clearly the newest that combines data from a set of samples, not just one sample, looking at that issue.

Q. And combined data from several samples, that would increase the validity or reliability of the results, would it not, because you can apply it to more populations?

A. It does not affect the reliability in a statistical sense. It is related to validity and the concept of generalizing it to other people.

Q. Now, Dr. Hanson in this study breaks down sex offenders in different categories, does he not?

A. Yes, he does.

Q. For example, one group is rapists?

A. Yes.

Q. One group are incest offenders?

A. Correct.

Q. And one group deals with extra-familial, meaning outside-the-family, child molesters?

A. Correct again.

Q. And Mr. Howell is not an incest offender, correct?

A. Not to my knowledge.

Q. And he's not an extra-familial child molester?

A. Not to my knowledge.

Q. So out of those three categories, the only one that applies to him would be rapist?

A. That is correct. My understanding of Mr. Howell's history is he would fit into the definition that Dr. Hanson was using for that category.

Q. I refer you once again to Respondent's Exhibit C. Unfortunately, these do not have page numbers because this was downloaded from the internet. But let me refer you to what is referred to as figure 1. And I would ask you to relate that to Respondent's Exhibit E.

A. They certainly are very close if not exactly the same.

Q. Is Respondent's Exhibit E a fair and accurate representation of figure 1?

A. It appears to be, yes.

Q. Let me also refer you to Respondent's Exhibit D, ask you to compare that to Table 2 of Respondent's

Exhibit C.

A. These would again appear to be the same except that Exhibit D has a couple extra lines on it.

Q. And I was going to ask you about those couple extra lines.

A. Okay.

Q. Let me refer you to Exhibit D once again. Mr. Howell is in the age range 45 to 49?

A. He is currently, that's correct.

Q. And Dr. Hanson has actually broken down age groups into categories smaller than, for example, 40 to 50, has he not?

A. In this diagram he has, yes.

Q. And one of the lines that you're talking about goes directly up from the 45 to 49 age range?

A. Yes.

Q. And it connects to the graph line associated with rapists, correct?

A. That is correct.

Q. And then it goes perpendicularly to the left to -- which would be the Y axis, which is entitled recidivism rate, correct?

A. Yes.

Q. And intersects that line at approximately 11, say 12 percent. Would you agree with that?

A. That's a fair interpretation, yes.

Q. Now, you testified in your direct examination that because one of the offenses -- or the last offense of which Mr. Howell was convicted was at age 40, you did not consider his subsequent age as a factor.

A. It was not a factor for which I would lower the risk, that's correct.

Q. But you essentially grouped Mr. Howell into age range 40 and over, correct, 40 to 50?

A. I did in what I was describing. The difference in the two subcategories is very minor. 40 to 44, 45 to 50 is very minor.

Q. The different ranges as far as years you give for the various instruments, percentages for five years, six years, so on, one of them is for 16 years, correct?

A. The farthest out that you can take data from any of the instruments is 16 years for the Static-99.

Q. And for Mr. Howell's score, that was associated with a 54 percent reconviction rate?

A. Correct.

Q. In 16 years Mr. Howell would be in his fifties?

A. No, he would be 63.

Q. He would be 63. Okay. Now, let me show you Respondent's Exhibit D once more. Is there an age range there which encompasses age 63?

A. Yes, indeed.

Q. And if you take where that age range intersects with the graph line for rapists and go over to the recidivism rate, it essentially is zero, correct?

A. That's correct.

Q. You indicated earlier that the first thing you do is score Mr. Howell on these actuarial instruments?

A. Once I've gathered all the data I'm going to, yes, given -- that's what I did in his case. It is not invariable that I do that. I first have to decide that the instruments are appropriate to the case. In this case I did, and that's what I did with him, yes.

Q. So all these percentage scores we've been talking about, when you say they anchored your subsequent decision, that essentially means you decide whether the subsequent findings are consistent with these scores?

A. Not exactly, no. As we described in the testimony already, there's basically -- these represent a range, and so it helps me eliminate things that are above that range and eliminate things below that range as my starting place. Then I look at things that are potentially signs of increased risk and signs of decreased risk and take those into consideration in the overall risk assessment. I don't necessarily look for a consistency with these results. I look for things that would make me believe I need to adjust

from those actuarial results either up or down, or in some situations some of both.

Q. Well, would you say that these initial scores on these risk assessment instruments predispose you towards a particular finding?

A. Well, yes and no. The -- I'm not sure how to interpret predispose. Maybe I need that clarified.

Q. Sure. Let's say that you scored Mr. Howell on these instruments and the percentages came up with associated with 20 percent risk of recidivism.

A. Across the board?

Q. Across the board. Well, maybe some differences, maybe a little less, but say on average across the board.

A. Okay.

Q. Then if you found additional information, would your final conclusions vary from that 20 percent estimate or would they be anchored in that initial finding?

A. It would be anchored in that initial information the same way it would be no matter where it fell. But I would still be looking at all the other information. In a case like you're describing, if I found that the actuarial information indicated 20 percent or less across the board, then I understand my task, to comparing against a standard of more likely than not. Unless I found some particular reason to say the risk is much higher than the actuarials, I

would stay anchored with the actuarials.

Q. For example, if Mr. Howell kept telling you, "As soon as I get out I'm going to rape as many people as I can"?

A. That would be something I would have to strongly take into consideration. The fact is I've had three people say that to me. Two people I believed and I had one person I had reason to not believe his statement and had to check it out further.

Q. But Mr. Howell did not make any such statements?

A. No, he did not.

Q. You indicated based on some research there are essentially two pathways for re-offense?

A. At least two.

Q. At least two. Well, you talked about two.

A. Yes, and those are the better researched ones. They're indications of others.

Q. Let's talk about the ones that are better researched. The first one did not apply to Mr. Howell, and that dealt with whether he's driven by sexual interests, correct?

A. Sexual interests that are illegal.

Q. Right.

A. Correct. Well, not just --

Q. Such as sex offenses?

A. That he's not driven internally for desires that are illegal. So that would include he does not have interests, that I'm aware of, interests with sexual contact with children. I ended up ruling out a sexual disorder where he would be interested specifically in the nonconsenting interaction. He doesn't have -- show sexual sadism. He's not interested sexually in hurting people. That's not what turns him on. Those would be examples of that type of dimension.

Q. When you say he's not interested in these, these are not motivating factors or driving factors?

A. As I understand it, that is correct.

Q. Now, the second pathway you said involved a person being criminal in a variety of ways?

A. That's a typical pattern these people show that are high risk in that dimension, yes.

Q. But Mr. Howell does not suffer from a sex disorder, right?

A. I diagnosed no sexual disorder for him. I initially left that open, as we already talked about. That was the paraphilia NOS, but I since ruled that out.

Q. You also administered what is called a PCL-R to Mr. Howell?

A. Yes, I did, though I need to clarify. Administer does not mean I gave him something to fill out. It's

something that by design the person using it fills out himself or herself.

Q. And is there a recommended cutoff score after which a person is considered psychopath or considered psychopathic?

A. Research definition that Robert Hare uses and has in the manual for that instrument is 30 or higher.

Q. And Dr. Hare is the developer of this instrument, correct?

A. Yes.

Q. Initially when you administered this instrument to Mr. Howell, he got a score of 28, correct?

A. Actually, there were three steps in the process. The first one is I did not consider myself having enough information. That's in the first report. In the second report I had a score of 28, and my final report I had a score of 30.

Q. In your preliminary report, the update off the preliminary report on April 17 of 2001, PCL score for Mr. Howell was 28?

A. Yes, that was the middle one, yes.

Q. And according to recommendation by Dr. Hare, the developer of this instrument, that would not have classified Mr. Howell as psychopath or psychopathic?

A. Technically he did not meet the threshold of 30

plus, if that's what you're asking me.

Q. That is what I'm asking. Thank you. Now, psychopathy is defined by the PCL-R as not a diagnosis contained in the DSM-IV, is it?

A. Not in that form, that's correct.

Q. And it is not a diagnosis you're making of mental abnormality in this court, are you?

A. I'm not making a diagnosis of psychopathy, that's correct.

Q. The only diagnosis you made is the antisocial personality disorder?

A. That's correct.

Q. Now, Mr. Prosser asked you about how you arrived at your conclusions on the RRASOR, Static-99, MnSOST-R, I believe PCL-R, as well as your diagnosis of the mental abnormality of antisocial personality disorder, and you went through a number of factors which were the basis for your conclusions. Do you recall that?

A. I recall a number of statements. I'm not sure to which you're referring. The general discussion, yes.

Q. The general discussion. But you indicated certain facts or certain things which supported your conclusions, which were the basis for your conclusions.

A. I did that at various times, yes.

Q. Is there anything in addition to what you've

already testified to which you would like to state at this point was the basis for, let's say, the antisocial personality disorder? Have you indicated to the Court all the facts which were the basis for that diagnosis?

A. No.

Q. What additional facts do you consider when making the diagnosis of antisocial personality disorder for Mr. Howell?

A. In making that diagnosis, I follow the -- basically the outline of criteria in the diagnostic manual. The first -- there are four basic segments to that. The first of those is that he -- the individual needs to have shown at least three out of seven different categories of characteristics. In Mr. Howell's case, in my view we met four, not the minimal three, of those seven.

One of those is called failure to conform to social norms, as demonstrated by grounds for arrest. A second has to do with what's called irritability or aggressiveness. The third has to do with reckless disregard for others and his own welfare. And the fourth is entitled lack of remorse.

There are three other characteristics that are listed there that I did not find to apply to Mr. Howell.

A second category is that the individual is at least 18 years old. That's clearly true in this situation.

A third category is that the person demonstrates evidence of a conduct disorder, which is a formal concept, another diagnosis, before age 15. In that case what I had from Mr. Howell's own report was that he was involved in bullying and some fighting during grade school.

And then the last category is that the antisocial behavior does not occur specifically during periods of, let me say, certain classic mental illnesses, schizophrenia and a certain mood disorder. And that clearly is the case for Mr. Howell, is that he's never been diagnosed with any of those types of disorders.

Q. Let's talk about this bullying during grade school.

A. Yes.

Q. Do you have a specific instant or instances to which you're referring?

A. Specific instances, no. I have Mr. Howell's report to that effect.

Q. How many instances did he talk to you about?

A. I wouldn't have a count on that. The question was, "Looking back on childhood, were you considered a bully?" And the answer, "Probably." And then he added a little bit afterwards, "I don't know, in grade school."

Q. So he may have been a bully in grade school?

A. Yes. And that's listed under conduct disorder as

one of the characteristics in the diagnostic manual, as is fighting.

Q. And did you ask Mr. Howell which specific behaviors he considered as being a bully?

A. No, I did not.

Q. Or which incidents he considered being a bully?

A. I did not ask that.

Q. A bully is a term that's defined in the DSM-IV, correct?

A. It is simply used as a descriptor. I would not say it's defined.

Q. You didn't clarify what Mr. Howell meant as a bully?

A. I don't recall clarifying it, that's correct. I did not.

Q. You don't know that what he meant by bully was that he just stared at people for lengthy periods of time until they looked away? You don't know if that's what he meant, do you?

A. What I know is that he described himself as probably being a bully. That's what I know.

Q. I understand that. That's not my question.

A. I do not know the details beyond that statement.

Q. You have no idea what Mr. Howell is referring to when he thought of himself as a bully, do you?

A. The only other context I have is that he was involved in some fights.

Q. When did these fights occur?

A. What I know is it was in grade school.

Q. Grade school. We're talking about fifth grade or something?

A. The issue for meeting the criteria is below 15. In grade school would count. I didn't care what age.

Q. I don't care what you're talking about. I'm asking, up to fifth grade?

A. I don't.

Q. You don't recall asking that?

A. I don't recall asking that.

Q. It doesn't matter if it was kindergarten, does it? Did you ask him if it was in kindergarten?

A. No, I did not ask him that question. In answer to the other question, I don't know if it matters or not. The issue is evidence of that type of behavior. Obviously there's a difference between the fighting that would occur at five years old and the fighting that would occur at, let's say, twelve years old. I did not ask him that clarification.

Q. Did you ask about how many instances?

A. No.

Q. You didn't consider it important how many times he

may have gotten into fights?

A. I'm trying to recall the exact discussion. His general descriptor about fights was about twice a year. But I don't think that related to issues of being a bully. But I don't have numbers beyond that.

Q. Twice a year for how many years, do you know? Or was it just two instances you're talking about?

A. It was more than two instances within the context of the way in which he was describing it, but I don't have a number of occasions.

Q. And this is also -- you're not sure what grades?

A. Grade school.

Q. Grade school.

A. The only other thing I have relative to -- now, grade school for bullying, relative to fighting was -- the words were "typical early teenager" was his description. So it would be early teenage years for fighting.

Q. Have you ever gotten in a fight when you were in grade school or early teenager?

A. I don't recall any physical fights.

Q. Are you familiar with the definition of conduct disorder in the DSM-IV?

A. Yes.

Q. And in order to diagnose a person with antisocial personality disorder, it must be conduct disorder before the

age of 15, correct?

A. No, that's not correct. The wording is that there must be evidence of a conduct disorder, which the writers of the diagnostic manual have communicated upon questioning that you do not need to have at least three characteristics. You need to have at least one.

Q. And that wasn't my question. And let me rephrase that.

A. Okay.

Q. Does the DSM-IV state that you must have a history of some symptoms of chronic disorder before age 15 years? I'll just show it to you. That would be faster. Page 702. What's marked as 702 of Respondent's Exhibit F, which is DSM-IV TR. It's the second paragraph there.

A. When looking at the criteria, the place I would go would be page 706.

Q. Well, I'll get you there in a second. Let me just ask you specifically about this page and that second paragraph. Now, isn't that true that that particular page, it states what I just stated earlier?

A. What it states here is, "For this diagnosis to be given, the individual must be at least 18 years and must have had a history of some symptoms of conduct disorder before age 15 years."

Q. Is it also true that conduct disorder must be a

repetitive and persistent pattern of behavior?

A. If one's diagnosing a conduct disorder, yes.

Q. Well, you have to diagnose a conduct disorder or make a diagnosis of personality disorder, don't you?

A. No, that's not accurate.

Q. It has some symptoms of conduct disorder, right?

A. Which the writers of the diagnostic manual have defined as one.

Q. You have to have some symptoms of conduct disorder in order to have a diagnosis of personality disorder, correct? That's what this says here?

A. The words that you are reading are accurately read.

Q. Do you agree with the words that I have read?

A. Not as listed in the diagnostic criteria in that same manual.

Q. I'm asking you what you just read a few seconds ago. Would you like me to bring it to you again? Does it not say, "must have had a history of some symptoms of conduct disorder before age 15"?

A. In that segment in the book it says that.

Q. Thank you. And that conduct disorder involves a repetitive and persistent pattern of behavior. That's what it said in here, isn't it, "repetitive and persistent pattern of behavior"?

A. It uses those words, yes.
Q. Do you agree with the words DSM-IV used?
MR. PROSSER: What page are you referring to, counsel?
MR. BAL: It's the second page of Exhibit F. It's labeled page 702, second paragraph.
MR. PROSSER: Thank you.
A. The words you're reading are accurately read.
Q. And my question is, do you agree with the words that are contained in the DSM-IV, those I just read?
A. When using the diagnostic manual, the process of using the manual is to use the criteria listed and not just the general descriptors. The --
MR. BAL: I object to that as nonresponsive.
MR. PROSSER: Your Honor, may I object? Could I have the ability of the expert to answer the question that's asked and not the one that counsel wants to put in his mouth?
THE COURT: Let's ask a question.
Q. This particular statement on page 702, all right, "conduct disorder involves a repetitive and persistent pattern of behavior," that's the question I've been asking for the last five questions, okay? Is that understood? You understand that, Dr. Doren?
A. I understand that I've said many times that's what

it said there.

Q. And that particular statement as it is stated at this point in the manual, do you agree or disagree with the fact that conduct disorder requires a repetitive and a persistent pattern of behavior?

A. When diagnosing conduct disorder, that is true. When diagnosing antisocial personality disorder, that is not necessarily the case.

Q. Conduct disorder they're talking about here is in terms of diagnosing personality disorders, right? That's where it's taken from?

A. Where you're reading is in the section for antisocial personality disorder.

Q. Which is what you claim Mr. Howell suffers from?

A. Yes.

Q. And it goes on to say that -- after we talk about repetitive and persistent pattern of behavior it says, "in which the basic rights of others or major age-appropriate societal norms or rules are violated."

A. Yes.

Q. It goes on to say that. Do you agree or disagree with that? Yes or no.

A. The concept of the latter part of that, I agree with that.

Q. Now, these definitions of bullying, perhaps in

elementary school, that you talked about, as well as the -- some fights he may have had in early adolescence, is that a repetitive and persistent pattern of behavior, in your opinion?

A. Of one type or two types of behavior, it is sufficient, yes.

Q. So two incidents are sufficient?

A. I didn't say two incidents.

Q. How many incidents of fighting do you have?

A. Two per year for some small number of years.

Q. And did that involve basic rights of others?

A. In my opinion, yes.

Q. Well, do you know if Mr. Howell himself was assaulted?

A. He gave me an example of one such thing when he was an older adolescent, so that occurred I presume on more than one occasion.

Q. So you know of at least one occasion that that might be the case?

A. When he was an older adolescent.

Q. During which Mr. Howell was assaulted?

A. Excuse me. By his description, that was the way it occurred.

Q. Well, that's what you're basing this whole diagnosis on, right, based on his description of what

happened in adolescence before age 15, correct?

A. I'm basing the issue of conduct disorder based on what he said. The rest of the diagnosis of personality disorder, no, I'm not basing that on what he said.

Q. Right now I'm just talking about the conduct disorder and what happened prior to 15.

A. Okay.

Q. So which behavior by Mr. Howell do you think involved his violation of basic rights of others?

A. Bullying and fighting.

Q. And you don't really know what the bullying was about at this point?

A. That's correct.

Q. And the fighting may have been self-defense, somebody picking on him?

A. There may have been occasions of that.

Q. Well, how about violation of major age-appropriate societal norms or rules?

A. My understanding is that typically falls more into examples of conduct disorder that are related to things like sexual behaviors and the like, and so this would not directly apply in that regard.

Q. Dr. Doren, do you have a degree in mathematics?

A. No.

Q. In reaching your conclusions, you spoke with the

victims or alleged victims and Mr. Howell's former wife, correct?

A. I had conversations with all five of those people, yes.

Q. In determining whether a person will recidivate sexually upon release from the Department of Corrections, do you consider environmental factors at all?

A. In effect, yes, in some of them. I mean, I can't possibly -- I don't know that I could possibly include everything, but certainly some of them.

Q. Well, how about support from the family?

A. I'm trying to describe how that does and does not apply. That is an issue that is more often part of a reexamination or determination when someone can go for supervised release. It is something that is part of risk management of an individual, not necessarily the risk assessment of an individual. I don't know if I'm making myself clear.

Q. Well, would support from family, either emotional, lodging, financial support to attend counseling, other classes, are those all factors which could diminish a person's risk of re-offending?

A. To the extent that they are consistent or ongoing, that would be of potential importance.

Q. You did not speak with any of Mr. Howell's family

members in reaching your conclusions, did you?

A. That's correct.

Q. You stated on direct examination that in your opinion, Mr. Howell is selfish or suffers from selfishness?

A. I'm not sure I said it quite like that. The question, if I remember correctly, posed to me was that -- and I think Mr. Prosser was specifically saying he was paraphrasing Mr. Howell's testimony -- something to the effect that Mr. Howell described himself as having been selfish. And what I believe I stated in response is that would be consistent with what I diagnosed.

Q. Is that similar to a person being narcissistic?

A. It certainly can overlap a significant degree. People may even use the words interchangeably.

Q. Now, you ruled out diagnosis of alcohol abuse for Mr. Howell, correct?

A. Ruled out isn't exactly correct. The terminology is an unfortunate terminology that's listed as rule-out, the real meaning is yet to be ruled out. Because I didn't rule it out. I didn't rule it in. I didn't diagnosis it. But I didn't totally say it does not apply.

Q. So you did not diagnose him as suffering from alcohol abuse?

A. That is correct.

Q. How about alcoholism?

A. That's a layperson's term. If what you're referring to is alcohol dependence, I did not diagnose that.

Q. Are you familiar with the symptoms of alcohol dependence?

A. Certainly to some degree, yes.

Q. For example, increased tolerance is a symptom, correct?

A. It can be a symptom, yes. People can be alcohol dependent and not show that, but showing that is often a sign of alcohol dependence.

Q. There can also be decreased tolerance, correct?

A. Changes in the effect of the alcohol or drug on the individual through continued use matters, yes.

Q. You indicated that alcohol can work as a disinhibitor in a person?

A. Yes.

Q. So in other words, things people normally wouldn't do or be inclined to do, they might do because of the disinhibiting effects of alcohol?

A. That's the general concept.

Q. One of the things that you looked at was whether or not Mr. Howell had attended sex offender treatment.

A. Yes.

Q. You don't consider whatever classes or groups he participated in in Anamosa as qualifying?

A. Not as a complete program, no. They were on target in that they were things that I would consider to be a component of a larger program that would be a sex offender treatment program, but they were simply a component and relatively short term at that.

Q. Did Mr. Alcohol -- oh, Mr. Alcohol. Sorry. Was Mr. Howell offered alcoholic treatment during his last term in prison?

A. I do not believe so.

Q. Would not completing sex offender treatment at Mount Pleasant, in your opinion, would that increase the likelihood of re-offense or would it just not matter? Would it just not decrease it?

A. If he had completed the sex offender treatment program? Is what you're asking me?

Q. Right.

A. At Mount Pleasant.

Q. At Mount Pleasant. In your opinion, does that just not reduce his risk or does it in fact increase his risk?

A. In general, the process of completing a sex offender treatment program brings the estimate of risk down.

Q. You're not saying that because he didn't complete it, that makes him more likely to recidivate?

A. That's correct. I'm not saying that the

nonparticipation or noncompletion of such a program, given he never basically started a program, does not increase someone's risk based compared to, for instance, what the actuarials are already showing. But the completion, based on other research, the completion of the program lowers the risk even compared to what the actuarials will show.

Q. When you're talking about lowering the risk, you're talking about in terms of the results you got on the actuarials?

A. Ultimately the assessment of the individual including that, yes, compared to what the actuarials are saying, yes.

Q. So the fact that he didn't complete sex offender treatment at Mount Pleasant is not going to raise whatever estimates you had based on the actuarials?

A. That's correct. It does not raise it. Completion would lower it, but not participating does not raise it.

Q. Now, you asked Mr. Howell about any benefits he got from the group sessions at Anamosa, correct?

A. I asked him about benefit from anything, including those, yes.

Q. Such as whether he recognized certain things in himself which may be contributing factors?

A. That kind of process, yes.

Q. He did indicate to you that mood swings and

depression were a contributing factor, correct?

A. The question was what feelings or moods would put you at risk of sexual offending again. Describe at least two. And his answer was "a roller coaster of ups or downs or just maybe a flat line depression."

Q. So depression in his opinion could be a contributing factor?

A. Could be a mood or feeling that would put him at risk, yes.

Q. And he also indicated that perhaps medication and treatment could help him to control these.

A. In answer to the second part of that same question, "How will you cope with such feelings or moods?" his answer included being able to counteract those whether through medication or treatment or just knowledge.

Q. But medication and treatment is not specific enough for you. It's only a general descriptor?

A. All he was saying is one could do this. He was not saying that this is what he would do. The question was, "How will you cope with such feelings?" And he gave a generic answer.

Q. So he said perhaps medication and treatment to control depression. Because he didn't say, "I will actually do this," that's not a responsive answer to your question?

A. His answer was in full, recognizing the behavior

patterns and those initiators, and being aware of actually knowing those, and being able to counteract those, whether through medication or treatment or just knowledge. My assessment of that, including through -- well, my assessment of that, it does not constitute any plan. It's just a descriptor of options.

Q. Let me refer you to your PCL-R score sheet one last time, then I think I'm almost done. Is there an arrow by Item No. 2 on there?

A. Yes.

Q. And the arrow is downward from the score of one?

A. That's correct.

Q. So it could be zero?

A. What an arrow means after -- either direction after a number is a -- basically a statement to myself that the score as I gave it is my best scoring of the individual, but there's reason to see some degree of ambiguity in the direction the arrow is pointing. So for that item, my best score for him is a one. But it leans in the direction of a zero.

Q. And the same for Item No. 14, then, which has a downward arrow about two. It could lean in the direction of a one?

A. It could lean in a direction down, and upper arrow would lean in the direction higher.

Q. So there's some room for interpretation on these various factors perhaps depending on the score?

A. The scoring of the PCL-R does involve a great deal of training. And even after being trained, people do not -- trained individuals do not come up with exactly accurate -- excuse me, exactly the same scores per item.

Q. And that is true for all instruments, including the RRASOR, Static-99 and MnSOST-R?

A. To a lesser degree by some of those instruments that you were describing, but you would not expect in all cases that all raters would even -- while trained, would score all cases the same between them.

Q. In fact, that's called interrater reliability, the extent to which multiple raters score almost the same score or are consistent, correct?

A. That's quite correct. The interrater reliability is consistency of cross-raters with the same cases.

Q. It's an important enough factor that the developers of these tests actually test their instrument to determine what the interrater reliability is.

A. Yes.

Q. So that is also another error factor in addition to the previous ones we talked about.

A. It is one potential source of error.

MR. BAL: Nothing further at this point, Your

Honor.

THE COURT: Mr. Prosser, do you have many questions?

MR. PROSSER: Maybe 15 minutes.

THE COURT: Why don't you go ahead, then.

MR. PROSSER: I'll take a break if you want.

THE COURT: That's all right.

MR. PROSSER: First of all, Your Honor, I would like to move for the admission of Respondent's Exhibit F, which is the diagnostic criteria for antisocial personality disorder.

Do you have that?

MR. BAL: I have it. I was going to do it.

(Respondent's Exhibit F was marked for identification by the court reporter.)

THE COURT: Any objection to F?

MR. BAL: No objections.

THE COURT: F is received.

MR. PROSSER: Thank you, Judge.

REDIRECT EXAMINATION

BY MR. PROSSER:

Q. I guess I have a general question. In your opinion, Dr. Doren, is having a conduct disorder the same as having a symptom of a conduct disorder?

A. No. The terminology in the diagnostic criteria

here, section C on page 706, is, "There is evidence of conduct disorder with onset before age 15." And in clarifying with the writers of the diagnostic manual, they simply are referring to at least one of the type of behaviors that constitutes a conduct disorder as described earlier in the manual. The idea is to look at a pattern that began in the early age and continues into adulthood.

Q. And then referring back to page 702 of Exhibit F that you were asked some questions about, am I correct that essentially it says in order to diagnose antisocial personality disorder, you have to have what it describes as some symptoms of conduct disorder, am I right so far?

A. Those are the words that are there.

Q. All right. And then it goes on in a different sentence to explain what conduct disorder is, right? It says "conduct disorder involves," and then it tells us what conduct disorder involves?

A. It gives a general description, yes.

Q. Do you read that as being anything other than the very distinction that I asked you the question about initially? In other words, do you read that as saying you have to have a diagnosed conduct disorder in order to be antisocial --

MR. BAL: Objection, leading.

MR. PROSSER: I didn't get the question out.

THE COURT: I'll let him finish the question, then I'll let you make your objection.

Q. Do you read that as being -- the question that I asked, in other words, do you read that as saying that you have to have a diagnosed conduct disorder in order to have an antisocial personality diagnosis?

MR. BAL: Objection, leading.

THE COURT: Overruled. He may respond.

A. I don't read it as having to have a complete conduct disorder for the diagnostic part of the antisocial personality disorder.

Q. All right. Let's then back up on a related subject to your three reports. And you remember the questions you were asked about the preliminary report, your April report, and your September of 2001 report?

A. I remember at least some of them.

Q. Okay. Could you please explain to the Court why it was that your opinions changed from each of those reports to the next?

A. Okay. Let me start with the diagnostic process. In the November 2000 report I had done just a paper review. At that point what I had was a pattern of a personality disorder. I did not have evidence of conduct disorder. Putting that together, I had a personality disorder not otherwise specified with antisocial features. There was

also a question in my mind about whether or not Mr. Howell had a sexual disorder called a paraphilia and whether he exhibited this full syndrome called alcohol abuse. I simply believe that I did not have enough clear information in regards to either of those -- there was some degree of indications of both, but not enough for me to feel confident making either diagnosis.

Let me follow the diagnostic process firsthand.

Then the April 2001 report, I had updated information both from a taped interview of Mr. Howell by an investigator from the attorney general's office by the name of Michael Ferjak, F-e-r-j-a-k, as well as my own telephone conversations with Mr. Howell's ex-wife and three of his victims or alleged victims.

Through the process of those telephone contacts, I ended up ruling out the sexual disorder diagnosis. In other words, based on new information, I asked the same kinds of things of all of the different victims or alleged victims and some questions to his ex-wife concerning what he was saying and doing during different sexual interactions with each. And I concluded that he did not have the syndrome of paraphilia, and I ruled that out.

When it came to the issue of alcohol abuse, at that point it looked to me like he did have that condition.

Going to the final diagnosis, my final report from

September 17, 2001, at that point I had obtained the information that I've already described in my testimony relative to evidence of conduct disorder, so that made the personality disorder, not otherwise specified, into the more individually labeled antisocial personality disorder. That's --

Q. What specific information are you referring to that you acquired, you know, that enabled you to make that diagnosis?

A. That was interview information relative to the bullying and fighting that we've already discussed.

Q. All right.

A. The only difference between the diagnosed personality disorder, not otherwise specified, with antisocial features from my April 2001 report and the final diagnosis of antisocial personality disorder is that issue of evidence of conduct disorder. Otherwise, it's the same disorder.

Q. Let me ask you this question. Hypothetically, had you not found evidence of a conduct disorder during adolescence or whatever the magical phrase is from DSM that we've been talking about, what would your diagnosis have been, if anything?

A. Personality disorder, not otherwise specified, with antisocial features.

Q. And would that have changed your opinion -- let me strike that. In your opinion, would that have been a mental abnormality as we've been talking about that term in the context of Iowa Code Chapter 229A?

A. In my opinion, concerning Mr. Howell, the answer would be yes.

Q. Okay. So this business about conduct disorder really has more to do with the label of the condition as opposed to the -- one of the ultimate opinions that you reach in this case?

A. I guess that's true, yes.

Q. All right.

A. Then you asked --

Q. Go ahead. Now I think you're about to discuss how and why, if it did, your opinion progressed from your preliminary report to your final report about risk.

A. Correct.

Q. All right.

A. In the November 18, 2000, report, the information I had available to me at that point did not include the -- a clear picture of the Psychopathy Checklist-Revised. It was still unclear to me based on the records I had alone. Additionally, at that point I had the Static-99 score at a five and not a six. I believe --

Q. Because of what? Is that because of the

conversation you had with the wife about living together for two years?

A. That's correct.

Q. Okay.

A. That had not yet occurred.

Q. All right.

A. And so what I had in this early picture was that I was not clear whether or not he had a sexual disorder. A risk assessment instrument, specifically the RRASOR, that looks at that risk was not showing high risk in that dimension or that pathway.

In the other pathway, I had a high Minnesota instrument, a moderately high but not highest category Static-99, an unclear psychopathy checklist score, and I did have a diagnosis of personality disorder. So it was not clear to me that it was consistent results in that second pathway of the different ways of measuring the intensity of that pathway for the individual. I did not have a clear picture that he met criteria.

And my conclusion at that point, based on this information, was that specifically this examiner does not see that degree of risk as clearly beyond the threshold of more likely than not.

Going on to the October [sic] 17 report, based on different information, then, the Static-99 score moved from

a five to a six, and I was able to score the PCL-R at a score that was beyond twenty-four. Twenty-five or higher is the threshold that was of relevance to me based on some research.

Q. And based on -- both of those changes are based on your interview with Mr. Howell, is that right, or on other information?

A. It was based on information from Mr. Ferjak's interview of Mr. Howell and based on the information from my telephone interviewing of the four women.

Q. Okay. We're talking about the intermediate report at this point?

A. Yes.

Q. All right. I've been saying April. Is it in fact dated --

A. It's April 2001.

Q. Okay. I thought you said October.

A. If I did, I said the wrong thing. It's April 2001.

Q. All right. All right. So you're --

A. So therefore, then, my opinion became that his personality disorder makes him likely to engage in predatory acts, et cetera.

In my final report, I had the interview of Mr. Howell and another conversation by phone with his

ex-wife. And I was -- I finalized a PCL-R score. It moved slightly. A two-point change is not a major change. It's within the standard error of measurement, one of those error ranges. But the other characteristics all stayed the same, except the personality disorder, as I mentioned, became a more specific type of personality disorder as opposed to one that's described as not otherwise specified. But basically the transition went from lack of clarity in that second pathway to a very consistent picture in that pathway.

MR. PROSSER: I would also like to offer Respondent's Exhibit A, which is the Barbaree -- Barbaree, Seto, et cetera, article. Do you have it?

MR. BAL: I have no objections.

MR. PROSSER: Exhibit A. It hasn't been initialed.

(Respondent's Exhibit A was marked for identification by the court reporter.)

THE COURT: Exhibit A is received.

MR. PROSSER: Thank you.

Q. Doctor, you were asked some questions about this. Generally, isn't it true that this article supports the proposition of the utility of using actuarial instruments in assessing risk of sex offenders?

A. In my opinion, it's strong evidence in that regard.

Q. Well, we don't even need your opinion. Look at the front page, the very last line of the summary. What does it say?

A. In the abstract on the front page it states, "The results support the utility of an actuarial approach to risk assessment of sex offenders."

Q. All right. Is it or isn't it true that this is a study that found at least the RRASOR, the Static-99, the VRAG and the PCL-R all to be accurate ways of assessing what those instruments purport to assess?

A. That's correct.

Q. Namely certain kinds of risks of re-offending?

A. Yes.

Q. This is not the only such article that's published in the world, is it, about basically making the same kind of findings at least with respect to the RRASOR and the Static-99, is it?

A. There's another one that's published, and there are some others that have been accepted for publication that are currently in press.

Q. You were asked a great many questions about specific what I perceive to be problems with the methodology used for development of these instruments. Generally, what is a replication study?

A. The term is used in different ways. The general

concept is that somebody different from the original researchers basically try to show -- test whether or not that finding is going to be repeated in their sample under their circumstances.

Q. Okay. Which are, I guess, by definition not the same circumstances as those that the developer of a particular instrument uses.

A. The idea is not to do an exact process. You're using a different sample. But following the same basic parameters, same rules.

Q. If you get a successful replication study, what does that tell a person?

A. Most simplistically, that the original findings were not unique, were not what we call in the field spurious, by chance; that there is reason to believe that -- the more that happens that there's a replication finding, then the more there is reason to believe that you can take the results and apply them to people who have not yet been studied.

Q. Okay. And so what conclusion might be able to be drawn from, say, multiple replication studies as opposed to, say, one with respect to a particular instrument?

A. In general, the more something is replicated, the more its validity is demonstrated and the more you can have confidence generalizing it or applying it to people or

situations beyond the original test sample.

Q. Well, what if there were some particulars that might have been subject to criticism about the -- about the original instrument but, hey, it keeps replicating and replicating? What does that tell us?

A. Bottom line, if anything, any piece of research, keeps replicating, then there's something about it that works. The faults with the original design become an intellectual argument of little consequence, in my opinion, if the results keep replicating elsewhere.

Q. Have the results of the RRASOR and Static-99 been replicated in more instances than just this Barbaree study, Exhibit A?

A. Yes, quite a few.

Q. How many?

A. I'm aware of I believe it's now 17 studies involving the RRASOR beyond the developmental study. And these come from North America, both Canada and the U.S., as well as various places in Europe, as well as New Zealand. I think it's seven countries in all. I think there are studies in five or six different U.S. states. Of those 17 studies, at least 16 have been fully supportive to the instrument's validity. The 17th is a debatable one. It's a technical point. One could debate it demonstrated validity or it didn't.

Q. Is what you've just said, does that mean that regardless of how they were developed, they seem to be working? They seem to be doing what they purport to do?

MR. BAL: Objection. That's a leading question.

THE COURT: Sustained.

MR. PROSSER: All right. I'll withdraw the question, Your Honor.

Q. Let's look at what counsel marked as Exhibits D and E. I just want -- you weren't asked this question. I want to have you tell us what you think can be drawn, what are those charts telling us, about age and sexual recidivism?

A. Can I ask that you get a little bit more specific? I could go on about an hour about that question. I think you want something more specific.

Q. Well, one thing that confused me is that even at the very top of any of those charts, we have --

MR. BAL: Objection, Your Honor. The counselor is testifying. Is he going to ask a specific question or his impressions --

THE COURT: I think we're going to take our afternoon break in any event, counsel. We're going to take about a 15-minute recess. Thank you. We are in recess.

(Trial recessed at 3:04 p.m.)

(Trial resumed at 3:30 p.m.)

THE COURT: Mr. Prosser.

MR. PROSSER: Thank you, Your Honor.

Q. You have Exhibit D in front of you?

A. Yes.

Q. That is one of the charts out of the article by Dr. Hanson that was referred to?

A. Yes.

Q. What does that exhibit tell us, if anything, about Mr. Howell?

A. What it states basically is that if I knew nothing else about Mr. Howell except his current age and the type of victims he had, so in his case adult women, that he would fall into a category of people who showed a 12 percent recidivism risk measured in various ways, if I knew nothing besides the adult victims and his age.

The other thing that it would tell me is that given that he fell into the category of rapist, that that 12 percent is the same degree of risk that would be shown since age 35.

Q. All right. Did you in your prior testimony take into account this very study that we're referring to?

A. Yes, that's what I was referring to when I talked about taking age into consideration.

Q. And just to refresh my recollection, what was your testimony on that subject?

A. That in general, that people classified as rapists falling into the forties would expect a lower recidivism rate than people in their thirties or twenties, but that in his case I did not lower the estimated risk because he already demonstrated himself to be a sexual recidivist at age 40. That was within the range of the 35 to 49 that is saying basically shows no difference in risk.

Q. Are you aware of any evidence, Dr. Doren, that indicates that Mr. Howell's family will be or is any more supportive of him now than they were after his first conviction and prior to his second offense for which he was convicted back in 1994?

A. I don't have any information to suggest there is a difference one way or the other.

Q. Thank you.

MR. PROSSER: I don't have any other questions.

THE COURT: Mr. Bal?

MR. BAL: Thank you, Your Honor.

RECROSS-EXAMINATION

BY MR. BAL:

Q. Dr. Doren, Mr. Prosser on redirect just asked you about the Barbaree study. I believe that's Defendant's Exhibit A, or Respondent's Exhibit A.

A. Yes.

Q. Do you have that in front of you?

A. Yes. I put it up here, but I have it, yes.
Q. We're talking about in that study the RRASOR and Static-99 being validated by Dr. Hanson? That's what you talked about.
A. Validated in the study by Dr. Barbaree, you mean.
Q. I'm sorry, Dr. Barbaree that validated the RRASOR and Static-99?
A. Yes.
Q. The Static-99 and RRASOR were developed at least entirely or in part on Canadian population, correct?
A. That's correct.
Q. Barbaree study was also Canadian population?
A. That's correct again.
Q. The MnSOST-R which the study did not support is a Minnesota population?
A. That is correct.
Q. And the study was not replicated or duplicated using an Iowa population, was it?
A. That's correct.
Q. Or using the base rate in Iowa, right?
A. That I don't know to be true.
Q. Did it change the base rate on any of these, any of the replication studies?
A. The sexual recidivism base rate in the Barbaree study was overall approximately 9 percent, if I remember

correctly. The Iowa sex offender recidivism rate, when you're specifically looking at people who have been incarcerated for sexual offense, is not known to me. The study to which you're referring earlier, more than half the population where people have been put on probation, who may never have been incarcerated, probationers in every study I'm aware of show lower recidivism rates than people who have been incarcerated. Basically, the judges got it right in terms of who they're willing to put in the community. So I don't know the Iowa rate relative to the same part of population that Barbaree studies.

Q. Those people you say were on probation in Iowa, they were people with prior sex offenses?

A. They were convicted of sex offense, but they may have never been incarcerated for it.

Q. Now, do you have your notes from the interview with Mr. Howell in front of you?

A. Yes.

Q. I'll refer you to page 3 of your notes. Now, the top couple of paragraphs are italicized. Do you have the same copy that I have?

A. I printed this out with some other stuff on top for me, so if you could just tell me where you're reading from, I'll find it.

Q. Let's see. The heading is "legal"?

A. Yes.
Q. And number one in parentheses?
A. Yes.
Q. States "juvenile record."
A. Yes.
Q. And then the next two paragraphs are italicized, correct?
A. Yes.
Q. And those are italicized portions based on quotations from Mr. Howell?
A. As close as I could get during the interview. I don't claim they're so exact. It's the closest I could get while typing.
Q. The first line of the second paragraph there --
A. Okay.
Q. -- if you go down, it states "fights"?
A. Yes.
Q. Okay. Then it says, "no, not necessarily." Do you see that part, right after fights, first sentence?
A. Yes.
Q. Okay. Is that a statement Mr. Howell made to you regarding fights?
A. Yes.
Q. The statement goes on to say, "a few later on, HS years"?

A. High school years.
Q. High school years?
A. Yes.
Q. Okay. And do you know if the high school in Ankeny started from grades tenth through twelfth?
A. I don't have specific knowledge whether it was tenth or ninth that it started.
Q. So you don't know what age Mr. Howell started high school, do you?
A. Specifically, no.
Q. And your testimony earlier regarding Mr. Howell getting in scuffles, those are based on the notes you're talking about right now?
A. No.
Q. Do you have additional notes which are not contained in the documents here?
A. They are contained in here. The notes I was referring to are from the interview by Mr. Ferjak, and the relevant area is in the section that in your printout I think may have been page -- it's 9, 10, or 11, just before the section entitled treatment effectiveness. There's another part in italics that starts, "fights as a kid," et cetera. That was from the interview by Mike Ferjak of Mr. Howell.
Q. And says, "as far as fights, twice a year, maybe."

It says "maybe" right after that, doesn't it?

A. Yes, it does.

Q. You didn't say that in your earlier testimony, did you?

A. I said approximately twice a year, or about twice a year. That's what I said.

Q. Then it goes on to say, "not even say quite two times a year." That's what it says right after, is that right?

A. Yes, it does.

Q. Now, Exhibit D, Respondent's Exhibit D, do you have that in front of you, sir?

A. Yes, I'm sorry. I was just making sure I didn't mix these up.

Q. First, I'll lay a small basis for my question regarding this exhibit. I believe the Static-99, you gave different percentage estimates for recidivism, based on different years follow-up?

A. Yes.

Q. Based on different years follow-up?

A. Yes.

Q. And the first time period was five years?

A. Yes.

Q. And the second time period was 16 years?

A. In my report, yes.

Q. And in the 15-year estimate was based on -- the 16-year estimate was associated with a 54 percent risk of recidivism?

A. Yes.

Q. Well, according to Respondent's Exhibit D, do you think you should extend risk of recidivism 16 years beyond Mr. Howell's current age?

A. One of the things I stated in my earlier testimony was that there were two issues related to age. One of those was a general decreasing process. The other affected how I interpreted the actuarials. I think that's all I got to say. And the issue that you're raising is the point I was referring to. As we talked about earlier, at 16 years from now he would be age 63. It is unusual to find a new recidivist rapist at that age or beyond. So I certainly wouldn't go beyond those age interpretation figures. And ten years may be considered more appropriate.

Q. Well, do we have an exact figure for ten-year?

A. Ten-year for the Static-99 six-plus category, I believe is 45 percent.

Q. Okay. And even that figure is based on a combination of sex offenders regardless of age, correct, that had --

A. Regardless of age is an accurate portrayal, yes.

Q. So people at a younger age who may have been high

risk to re-offend, their risks were averaged with people at a much older age whose risk might be less?

A. There was some averaging of that type, yes.

Q. That estimate was not based by separating each age category, then looking at the risk per age category?

A. No. In fact, I asked Dr. Hanson after he made this study available that Exhibit D is from if he in fact could break it down by scores on the RRASOR or the Static. Unfortunately, he was not able to do so.

Q. At least not at this point.

A. Correct.

Q. And one of the criticisms or comments Dr. Hanson has consistently made about risk assessment instruments is that you need to look at dynamic factors more, correct?

A. He's made that statement various times.

Q. And one of the dynamic factors is age, something that changes.

A. Well, technically, your statement is accurate. And Dr. Hanson's statements, I believe he's referring to things that are far beyond the control of the individual.

Q. Would one of those dynamic factors be support of the family?

A. That kind of issue would be closer, yes.

Q. But age is one of the factors in all of the instruments that you're talking about which is dynamic,

which does change?

A. Technically, your statement is accurate.

Q. And almost all of the other factors are based on historical record, correct?

A. Basically, if you're talking about the RRASOR, that's absolutely the case. If you're talking about the Static-99, that's basically the case. If you're talking about the Minnesota instrument, then that would be true except for three other items relative to the person's most recent institutional behavior.

Q. And three items out of how many total?

A. Sixteen.

Q. So most of the items are static?

A. That's correct. That's correct.

Q. And once a person has those items in their history, scores regarding those static items is never going to change.

A. Except potentially to go up if the person continues to do a sexual criminal behavior or something along those lines.

Q. Okay. But they'll never decrease.

A. On the Minnesota instrument they have the potential to decrease. On the RRASOR or the Static, they will not, except with minor exceptions like the person first has a two-year relationship or something like that.

Q. You were also asked a question by Mr. Prosser regarding whether Mr. Howell's family is more supportive now than in the past. You don't know, because you never talked to any of the family members, right?

A. I don't know, and that would be one of the reasons that I don't.

MR. BAL: Nothing further, Your Honor.

MR. PROSSER: No further questions.

THE COURT: You may step down, sir.

(The testimony of Dr. Doren was concluded on the 30th day of October, 2001.)

CERTIFICATE OF REPORTER

I, Teresa A. Kordick, Certified Shorthand Reporter and Official Court Reporter for the Fifth Judicial District of Iowa, do hereby certify that I was present during the foregoing proceedings and took down in shorthand the testimony and other proceedings held; that said shorthand notes were transcribed by me by way of computer-aided transcription; and that the foregoing pages of transcript contain a true, complete and correct transcript of said shorthand notes so taken.

DATED this 15th day of January, 2002.

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