

IN THE SUPREME COURT OF IOWA

IN RE THE DETENTION OF ROBERT SWANSON, Respondent-Appellant.	SUPREME COURT NO. 18-0715
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APPEAL FROM

THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY

THE HONORABLE KELLYANN M. LEKAR, JUDGE

APPELLANT'S FINAL BRIEF AND ARGUMENT

AND

REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE AND FILING

On the 12th day of October, 2018, the undersigned did serve the within Appellant's Final Brief And Request for Oral Argument on all other parties to this appeal through EDMS and by electronic transmission to CAmail@ag.state.ia.us, and upon the Respondent-Appellant by Regular United States Mail.

I further certify that on October 12, 2018, I will electronically file this document through EDMS with the Clerk of the Iowa Supreme Court, Iowa Judicial Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

IS THERE SUFFICIENT EVIDENCE TO FIND THAT A 68-YEAR-OLD MAN REMAINS A SEXUALLY VIOLENT PREDATOR WHEN HIS LAST SEXUAL MISCONDUCT WAS A RAPE 38 YEARS PRIOR, WHEN HE HAS NOT HAD SEXUAL AROUSAL IN DECADES, WHEN HE IS DIAGNOSED WITH CONTRIVED MENTAL CONDITIONS, AND WHEN HE HAS AN ESTIMATED SEXUAL RECIDIVISM RATE OF NO MORE THAN 7.8% USING THE BEST RISK ASSESSMENT METHOD AVAILABLE?

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ROUTING STATEMENT

This case involves the application of existing law and principles to the facts. As such, retention by the Court of Appeals would be appropriate.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal filed by Respondent-Appellant Robert Swanson (hereafter “Swanson”) from the April 12, 2018 Order for Continuing Commitment filed by the district court following a final hearing held pursuant to Iowa Code section 229A.8(6).

Course of Proceedings and Disposition in District

Court: On November 2, 2017, the State filed a Notice of Annual Report and a Chapter 229A Annual Report. On said date, Swanson filed a Motion for Hearing. The case came to trial (final hearing) before the district court on February 21, 2018. On April 12, 2018, the district court entered an Order for Continuing Commitment, which provided that Swanson

should remain confined under chapter 229A. (Order Continuing Commitment)(App. p. 28). Swanson then filed notice of appeal on April 24, 2018. (Notice of Appeal)(App. p. 38).

Statement of Facts: Swanson was born on December 29, 1949, and was 68 years old at the time of trial. (Trial Transcript p. 5, ln. 1-2). In 1964 at the age of fourteen, Swanson was charged with his first sexual offense. *In Re the Detention of Swanson*, 668 N.W.2d 570, 573 (Iowa 2003). In 1973, he was convicted of raping a fourteen-year-old girl; and after being released from prison in 1979, was sentenced to prison in 1980 for a conviction of third degree sexual abuse. *Id.* It was determined that Swanson randomly contacted single women with whom he had little to no prior connection in an attempt to befriend them. Some of these women became victims of sexual assault by Swanson. *Id.*

In November, 2001, Swanson was living in a halfway house in Des Moines. *Id.* at 571. Swanson telephoned and wrote letters to a Christine Eiselstein, attempting to befriend her. *Id.* When Eiselstein reported these concerning events,

Swanson's sexual offending history was discovered. *Id.* The State then filed a petition under Iowa Code chapter 229A and alleged that the letter and telephone contacts constituted "recent overt acts". *Id.* at 574.

The district court determined that Swanson had in fact committed "recent overt acts" towards Eiselstein, and the jury found Swanson to be a sexually violent predator. Swanson was committed to the Civil Commitment Unit for Sexual Offenders (CCUSO). The Iowa Supreme Court affirmed the commitment in 2003. Swanson was determined to suffer from the mental abnormalities of Paraphilia Not Otherwise Specified, and Personality Disorder Not Otherwise Specified with Antisocial, Narcissistic, and Schizoid Traits. (Trial Transcript, p. 64, ln. 12-16).

On November 2, 2017, the State filed its annual report pursuant to Iowa Code section 229A.8(2) and (3). Swanson requested an annual review hearing. At the hearing the district court determined that Swanson was entitled to a final hearing pursuant to Iowa Code section 229A.8(5)(e) and 229A.8(6). The final hearing was held on February 21, 2018.

At trial, the State called Swanson to testify. Swanson gave the details of his previous sexual offenses. On his first offense in 1973, he described how he and his fiancé had had a fight, and she decided that they should separate, which didn't work well for him. He went out on a date with "Cathy", and raped her later that evening. (Trial Transcript, p. 8, ln. 22-p. 11, ln. 21).

Later that month in October, Swanson raped "Barbara". Swanson described how it was a rough time for him. His marriage was "shot", but he felt compelled to try to keep it together even though he wasn't happy. He didn't love his wife. He wanted a normal life but he didn't have that. He was angry at his marital situation. (Trial Transcript, p. 11, ln. 22-p. 15, ln. 8).

On January 27, 1980, Swanson raped "Elizabeth". At trial in the present matter he described how she came to his home to look at a bedspread after they had met at a laundromat and had a conversation about crocheting or knitting. They sat on Swanson's bed because he didn't have another place to sit. He did not know how this situation went

from a normal social interaction to a rape. (Trial Transcript, p. p. 17, ln. 23). He was, however, very angry at his life situation. His ex-wife was interfering with him and his fiancé, she was calling his fiancé's family, and she was taking him to court for child support. He was paying an attorney \$100 per hour to represent him in the child support case. (Trial Transcript, p. 15, ln. 9-21).

While Swanson has been in CCUSO, he remains in Phase I of the program. He is eligible for Phase II, however, he stubbornly refuses to ask for it. (Trial Transcript, p. 32, ln. 15-p. 33, ln. 25). He attained Phase III, but was demoted after he refused to go to Iowa City for medical treatment because he would have to wear a "black box", an extra security measure placed over his handcuffs that caused him pain due to injuries. (Trial Transcript, p. 34, ln. 4-p. 35, ln. 9). Also during his confinement at CCUSO, Swanson wrote a threatening letter to Federal District Court Judge Linda Reade. As a result, he was placed in federal prison. He wrote a threatening letter to a former Assistant Attorney General. In the letter, Swanson makes the statement, "there will surely

come a time when your karma runs out and I hope I can somehow be there on that day to look you directly in your eyes because I would like to be the one holding and playing with the gun upside your head.” (Order for Continuing Commitment, page 4)(App. p. 31), (Trial Transcript p. 62, ln. 9-p. 63, ln. 1).

When he committed his sexual offense in 1973, Swanson was 22 years old. When he committed his sexual offenses in 1979-1980, he was 30 years old. At the time of trial, he was 68 years old. In the 38 years from his last sexual offense to the present, Swanson has matured and lost his sex drive. The last time he had sexual relations was 1983. The last time he had an orgasm was approximately 1989. Swanson could not remember the last time he masturbated , and estimated it had been decades. He also could not remember when he had his last erection, but thought possibly 20 years prior. (Trial Transcript, p. 40, ln. 16-p. 42, ln. 8.)

Swanson admitted that he still harbors anger and resentment, but states that it is a different kind of anger. His last act of violence was when he punched someone in federal

prison in approximately 1990. (Trial Transcript, p. 42, ln. 23-p. 43, ln. 16). Swanson admits to violating rules at CCUSO, but did not receive a single behavior violation in seven and one-half years in federal prison. (Trial Transcript, p. 38, ln. 10-p. 39, ln. 18).

At the time of trial, Swanson suffered from a compression fracture in his lower back which requires that he use a cane, and inhibits his mobility. He's had two strokes, suffers from high blood pressure and neuropathy. (Trial Transcript, p. 43, ln. 19-p. 45, ln. 18). He doubts that he is physically capable of committing a rape, and states that he would "probably get the hell beat out of me if I tried." (Trial Transcript, p. 50, ln. 18-21).

As its second witness, the State called Dr. Stacey Hoem, Ph.D.. Dr. Hoem received her doctorate degree in clinical psychology in 2007. Trial Transcript, p. 79, ln. 12-14), (State's Exhibit 11)(App. p. 24). She works for the Wisconsin Department of Corrections doing risk assessments and evaluation, and also does evaluations with CCUSO. Trial Transcript, p. 79, ln. 19-24), (State's Exhibit 11)(App. p. 24).

Dr. Hoem has approximately one year of experience treating sexual offenders. (Trial Transcript, p. 80, ln. 5-15), (State's Exhibit 11)(App. p. 24).

As will be described in greater detail hereafter, Dr. Hoem opined that Swanson suffers from a "mental abnormality", and that he remains "more likely than not to commit a sexually violent offense if discharged.

Swanson called Dr. Richard Wollert, Ph.D. as his expert witness. Dr. Wollert is a clinical and forensic psychologist. Dr. Wollert earned his doctorate in 1977. His specialty is sexual offender evaluation and treatment. He created a State certified outpatient mental health clinic specializing in the treatment of sexual offenders where he personally has treated 3,000 sexual offenders since 1978 in Portland, Oregon and Canada, and where he supervised a staff that treated an additional four to five thousand sexual offenders. He has evaluated over a thousand sexual offenders for treatment purposes, and conducted multiple evaluations for 250 sexually violent predator cases. Dr. Wollert has published multiple works on the evaluation and treatment of sexual offenders in

peer-reviewed journals, and conducted extensive research in that area. Trial Transcript, p. 103, ln. 15-p. 105, ln. 25), (Respondent's Exhibit AA)(App. p. 6).

Dr. Wollert first met Swanson in 2004 or 2005 at the request of Swanson's counsel. He has conducted several interviews and evaluations of Swanson since that time. (Trial Transcript, p. 106, ln. 1-p. 107, ln. 9).

As will be fully set forth hereafter, it is Dr. Wollert's opinion that Swanson does not suffer from a mental abnormality, nor is Swanson "more likely than not to commit a sexually violent offense if discharged.

ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO FIND THAT SWANSON CONTINUES TO SUFFER FROM A MENTAL ABNORMALITY AND THAT HE REMAINS LIKELY TO COMMIT A SEXUALLY VIOLENT OFFENSE IF DISCHARGED.

Standard of Review. The Court's review of a challenge to the sufficiency of the evidence is for the correction of errors of law. *In Re the Detention of Betsworth*, 711 N.W.2d 280, 286

(Iowa 2006)(quoting *In Re the Detention of Swanson*, 668 N.W.2d 570, 574 (Iowa 2003). “If there is substantial evidence upon which a rational trier of fact could find the respondent to be a sexually violent predator beyond a reasonable doubt, we are bound by the jury's finding.” *Id.* “To determine whether the evidence was substantial, we consider the entirety of the evidence presented in a ‘light most favorable to the State, including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the record.’ Evidence is not substantial if it raises only suspicion, speculation, or conjecture.” *Id.*

Preservation of Error: The issue of the sufficiency of the State’s evidence to continue to confine Swanson was challenged throughout the trial to the district court, and specifically argued in closing arguments. Following trial to the district court and its Order Continuing Commitment, Swanson filed a timely notice of appeal. (Notice of Appeal)(App. p. 38).

Discussion. As stated briefly, the district court heard testimony from Swanson, from the State’s expert witness Dr. Stacey Hoem, Ph.D., and from Swanson’s expert, Dr. Richard

Wollert, Ph.D. The district court gave greater weight to the opinions and conclusions of the State's expert, Dr. Stacey Hoem, Ph.D., than it did to those of Swanson's expert:

The Court gives greater weight to the Annual Report prepared by Dr. Hoem at the Civil Commitment Unit for Sexual Offenders and the impact of dynamic factors on risk to reoffend. The Respondent has yet to complete a treatment program and remains in Phase 1. The Court finds that the state has proven beyond a reasonable doubt, as required by Code of Iowa Section 229A.8(6)(d), that the Respondent's mental abnormality remains such that he is likely to engage in predatory acts that constitute sexually violent offenses if discharged and/or that the Respondent is not suitable for placement in a transitional release program pursuant to Section 229A.8A.

With regard to suitability for a transitional release program, pursuant to Code of Iowa Section 229A.8A, the Court finds that the evidence before it does not allow the Court to find that the Respondent's mental abnormality is no longer such that he is not at a high risk to reoffend, that the Respondent has achieved and demonstrated significant insights into his sex-offending cycle, that the Respondent has accepted responsibility for past behavior and understands the impact sexually violent crimes have upon a victim, that the Respondent has a detailed relapse prevention plan which has been developed and accepted by the treatment provider which is appropriate for his mental abnormality and sex-offending history, or that the Respondent is not likely to engage in predatory acts constituting sexually violent offenses while in the program. As previously found by other

reviewing judges, this Court continues to find that the Respondent remains a legitimate public safety concern and must maintain full meaningful participation in the treatment program for sexually violent predators before his placement in a less restrictive setting is appropriate.

(Order Continuing Commitment, p. 8)(App. p. 28).

Swanson recognizes that his case before the district court amounted to “the proverbial battle of the experts.” *In Re the Detention of Hollins*, 856 N.W.2d 1, 2, (Table) 2014WL 3931485 (IowaCt.App. 2014). As such, the weight to be assigned the testimony of each witness is within the province of the fact-finder. *City of Forest City v. Holland Contracting Corp.*, 810 N.W.2d 532 (Table), 2012 WL 170195)(Citing *In re the Estate of Hagedorn*, 690 N.W.2d 84, 88 (Iowa 2004).

Swanson asserts, however, that the State’s evidence was insufficient to reach the level of beyond a reasonable doubt, and that the district court’s decision is not based on substantial evidence.

To begin with, the State’s expert, Dr. Hoem, had little to no expertise when compared to that of Swanson’s expert, Dr. Wollert. Dr. Hoem received her doctorate approximately ten

(10) years prior to trial. (State's Exhibit 11)(App. p. 24). She has one year of experience treating sexual offenders, and has evaluated sexual offenders for the States of Wisconsin and Iowa for a combined twelve (12) years. *Id.* The bulk of her experience with sexual offenders involves reporting the results of her evaluations in court. *Id.*

Dr. Wollert, on the other hand, has beginning in 1978, treated sexual offenders, evaluated sexual offenders, and conducted research and published about sexual offenders. He created a State certified outpatient mental health clinic specializing in the treatment of sexual offenders where he personally has treated 3,000 sexual offenders in Portland, Oregon and Canada, and where he supervised a staff that treated an additional four to five thousand sexual offenders. He has evaluated over a thousand sexual offenders for treatment purposes, and conducted multiple evaluations for 250 sexually violent predator evaluations. Dr. Wollert has published multiple works on the evaluation and treatment of sexual offenders in peer-reviewed journals, and conducted research in that area. (Trial Transcript, p. 103, ln. 15-p. 105,

ln. 25), (Respondent's Exhibit AA)(App. p. 6). The disparity in the experts' credentials is evident in the methodology undertaken by each expert, and the opinions resulting therefrom.

ARGUMENT A

THE STATE'S EVIDENCE THAT SWANSON CONTINUES TO SUFFER FROM A MENTAL ABNORMALITY IS INSUFFICIENT

Dr. Hoem, while not making an independent diagnosis of Swanson, confirmed the diagnosis made by a prior State evaluator in 2002--Paraphilia Not Otherwise Specified (Nonconsent), and Personality Disorder Not Otherwise Specified--since she did not feel that Swanson had dealt with and talked about why he committed the rapes. (Trial Transcript, p. 80, ln. 22-p. 81, ln. 23). Dr. Hoem acknowledged that Paraphilia Not Otherwise Specified (Nonconsent) is considered a "rape paraphilia" where the person is sexually aroused to the physical act of forcing sex. (Trial Transcript, p. 81, ln. 24-p. 82, ln. 7). There is no evidence in the record to demonstrate that Swanson became sexually aroused to coerced or forced sexual contact. In

addition, such a paraphilia, or a disorder describing nonconsensual sexual contact is not contained in the Diagnostic and Statistical Manual of Mental Disorders, (DSM), the diagnostic manual most commonly used by mental health practitioners in North America. Despite the decades-long efforts of some psychiatrists and psychologists to have this condition included in the DSM as a mental disorder, its inclusion has been rejected each time. (Trial Transcript, p. 82, ln. 11-p. 83, ln. 20).

Based on her reading of the criteria listed in the DSM, Dr. Hoem also holds the opinion that Swanson suffers from a personality disorder with antisocial aspects. (Trial Transcript, p. 80, ln. 22-p. 81, ln. 15).

Dr. Wollert began his evaluation of Swanson with consideration of the diagnoses given Swanson by State evaluators. With regard to the diagnosis of Paraphilia Not Otherwise Specified (Nonconsent), Dr. Wollert indicated that it was a diagnosis that has a great deal of controversy surrounding it. It has been rejected for inclusion in the Diagnostic and Statistical Manual of the American Psychiatric

Associations on four occasions. (Trial Transcript, p. 107, ln. 16-p. 108, ln. 21.). This diagnosis, which is sometimes referred to as paraphilic rapism, is a disorder involving arousal to coerced or forced sexual contact. According to research in the field, this diagnosis cannot be made reliably or with any degree of certainty beyond chance. (Trial Transcript, p. 108, ln. 22-p. 109, ln. 6). In other words, assigning this diagnosis to any given individual would be as accurate as flipping a coin to assign the diagnosis. Aside from the rejection of this diagnosis for inclusion in the Diagnostic and Statistical Manual, and the evidence showing that clinicians cannot reliably attach it to some, Dr. Wollert testified that Swanson's record and Dr. Hoem's report demonstrates that Swanson is not suffering from any sort of paraphilic rape disorder or any disorder of sexual arousal involving coercion or force. Since his last sexual offense 38 years ago, Swanson has had no problem, behavioral report, sanction, or mention of sexual conduct in the many pages of records generated about him by corrections and treatment staff. While Dr. Wollert's criticisms of dynamic risk factors will be addressed herein, he pointed

out that Swanson had an absence of sexually-related dynamic risk factors. (Trial Transcript, p. 109, ln. 7-p. 111, ln. 1).

Dr. Wollert next addressed the diagnosis of Personality Disorder Not Otherwise Specified. Dr. Wollert is of the opinion that Swanson does not currently suffer from the condition specifically labeled Personality Disorder Not Otherwise Specified, since that diagnosis is the most unreliable of all the diagnosis sometimes applied in civil commitment cases. The reliability is worse than chance, and virtually any offender could be diagnosed with it. Further, there is no personality disorder with some sort of sexual features. (Trial Transcript, p. 111, ln. 2-21). While Swanson does get into arguments, gets off topic, focuses on things, writes letters that he shouldn't and in general makes problems for himself, that is not a mental disorder according to the American Psychiatric Association. A mental disorder is an internal mental dysfunction, not merely bad behavior. Again, since the diagnostic criteria are so broad, virtually anyone could be diagnosed with it. (Trial Transcript, p. 111, ln. 22-p. 112, ln. 19).

In its Order, the district court correctly identified that “Iowa law does not require a recognized medical diagnosis of an underlying condition that causes one to commit sexually violent offenses in order to commit an individual under Chapter 229A.2(11). In re Det. of Barnes, 689 N.W.2d 455, 460 (Iowa 2004). ‘Due process is satisfied as long as the condition or disorder predisposes the particular person, under his or her circumstances, to commit sexually violent offenses.’ Id.” However, Justice Kennedy cautioned that “if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.” *Kansas v. Hendricks*, 521 U.S. 346, 373, 117 S.Ct. 2072, 2087 (1997)(Justice Kennedy Concurring). See also, *In Re the Detention of Wygle*, 910 N.W.2d 599, 602 (Iowa 2018)(“First, many critics found the concepts of mental abnormality or mental disorder to be ‘so vague and broad that it excludes almost no one.’ Eric S. Janus, *Closing Pandora’s Box: Sexual Predators and the Politics of Sexual Violence*, 34 Seton Hall L. Rev. 1233, 1237 (2004) [hereinafter Janus]; see, e.g., Grant H.

Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. Ill. L. Rev. 1199, 1206–07 (2000); Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 Psychol. Pub. Pol’y & L. 250, 265 (1998)).”

Dr. Wollert echoes these concerns that, in the context of a sexual predator civil commitment case, diagnoses are often made that are not made in other facets of psychiatry and psychology. Such diagnoses are not based on a formal, organized, rule-based diagnostic system that is validated by research and accepted by experts in the area, but rather are often vague, “not specified” diagnoses or combinations of parts of diagnoses. When the diagnostic process is not governed by the safeguards such as employed by the Diagnostic and Statistical Manual, diagnostic opinions become fluid, idiosyncratic, and unreliable, and can be made to fit anyone and exclude no one. While Iowa law does not require a medical diagnosis to serve as a mental abnormality, having an organized, rule-based diagnostic system that is validated by research and accepted by experts in the area protects against idiosyncratic opinions and fluid, exaggerated, and made up

conditions which can be molded to fit anyone and exclude no one.

Secondly, of all the dynamic factors set forth by Dr. Hoem, Swanson is not affected by any that affect or concern sexual conduct. (Trial Transcript, p. 109, ln. 7-p. 110, ln. 18). Swanson had no sexually-deviant diagnosis. (Trial Transcript, p. 110, ln. 19-p. 111, ln. 1).

Dr. Wollert also questioned Dr. Hoem's concern with Swanson's current anger issues, and her attempt to link that to the anger he experienced 38 years prior when he last committed a sexual crime. Dr. Wollert testified that asserting that what was a motivator for behavior 38 years ago is now a motivator for a 68 year old man stretches credulity. (Trial Transcript, p. 112, ln. 20-p. 113, ln. 10).

Ultimately, Dr. Wollert gave the opinion that Swanson does not suffer from any condition that qualifies as a mental abnormality or that predisposes him to commit sexually violent offenses. (Trial Transcript, p. 114, ln. 16-21). Unlike Dr. Hoem, his reasoning reflected a lengthy history with the subject matter, and specific and precise reasons for his

opinions. Moreover, Dr. Wollert's opinions were grounded in common sense. It is not a stretch to say that a multitude of facets of Swanson's life have changed in the 38 years since he last committed a sexual offense. It is more likely, and more sensical, that what motivated Swanson 38 years ago at age 30, is no longer the case after the passage of that 38 years and at his current age of 68.

ARGUMENT B

THE STATE'S EVIDENCE THAT SWANSON REMAINS LIKELY TO COMMIT A SEXUALLY VIOLENT OFFENSE IF DISCHARGED IS INSUFFICIENT

With respect to Swanson's risk of committing a sexually violent offense in the future, Dr. Hoem used the Static-99R or the Static 99 Revised. The Revised version has been updated two to three times since it was used on Swanson in 2002. (Trial Transcript, p. 84, ln. 9-p. 85, ln. 4). The version of the Static-99 and the other actuarials used to assess Swanson's risk in 2002 have been abandoned, are no longer used, or are used rarely in Canada because they do not have the scientific

research supporting them. (Trial Transcript, p. 85, ln. 5-p. 86, ln. 9).

The Static-99R has only a moderate predictive accuracy for sexual recidivism. See *Wygle*, 910 N.W.2d at 600 (Iowa 2018)(citing Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 Temp. L. Rev. 697, 726–31 (2011) (describing the scientific problems with several actuarial assessment models, noting that a meta-analysis of studies at best show actuarial models to be less than “moderately predictive”); see also Hanson, Babchishin, Helmus, Thornton, and Phenix, *Communicating the Results of Criterion Referenced Prediction Measures: Risk Categories for the Static-99R and Static-99R and Static 202R Sexual Offender Risk Assessment Tools*, Journal of Psychological Assessment (2016), (A meta-analysis found that Static-99R has moderate predictive accuracy for sexual recidivism (mean AUC=.70, k=22, N=8,055; Helmus, Hanson, et al., 2012), available at static99.org). With this being said, the Static-99R is considered the “gold standard” with respect to assessing the

risk for sexual offender recidivism. (Trial Transcript, p. 87, ln. 3-7).

Dr. Hoem scored Swanson a “1” on the Static-99R, which she described as a “very low” and “extremely low” score with very few recidivists in the sample at that score. Trial Transcript, p. 86, ln. 10-p. 87, ln. 24). 3.9% - 7.8% of the sexual offenders scoring a “1” on the Static-99R sexually reoffended within a five year follow up period. (95% confidence interval 3.3%-12.5%). Phenix, Helmus, and Hanson, *Static 99R and Static 2002R Evaluators’ Workbook* (2016), static99.org. Accordingly, Dr. Hoem agreed that Swanson’s risk of sexually reoffending according to the Static-99R was “very much lower than more likely than not.” (Trial Transcript, p. 87, ln. 8-10).

Dr. Hoem attributed this low risk to the fact that Swanson’s score decreased by 3 points because of his age. (Trial Transcript, p. 83, ln. 23-p. 84, ln. 8). This information was conveyed in a manner as if age was not a valid risk consideration, despite research findings indicating that it is one of the most robust factors in sexual as well as criminal

recidivism. (Trial Transcript, p. 69, ln. 2-21). See, Hanson, Recidivism and Age: Follow-Up Data From 4,673 Sexual Offenders, *Journal of Interpersonal Violence* (2002)(“As with other criminal behavior, the rate of sexual offending decreased with age. The rate of decline was rather gradual, however, and there were significant differences between types of sexual offenders. Rapists were younger than other sexual offenders (45% were younger than 30), and their recidivism risk steadily decreased with age.”); Hanson, Does Static-99 Predict Recidivism Among Older Sexual Offenders, *Sex Abuse* (2006)(“Static-99 (Hanson & Thornton) is the most commonly used actuarial risk tool for estimating sexual offender recidivism risk. Recent research has suggested that its methods of accounting for the offenders’ age may be insufficient to capture declines in recidivism risk associated with advanced age. . . Older offenders, however, had lower sexual recidivism rates than would be expected based on their Static-99 risk categories. Consequently, evaluators should consider advanced age in their overall estimate of risk.”); Helmus, Thornton, Hanson, and Babchishin, Improving the

Predictive Accuracy of Static-99 and Static 2002 With Older Sex Offenders: Revised Age Weights, *Sexual Abuse: A Journal of Research and Treatment* (2012)(“Actuarial risk assessment scales and their associated recidivism estimates are generally developed on samples of offenders whose average age is well below 50 years. Criminal behavior of all types declines with age; consequently actuarial scales tend to overestimate recidivism for older offenders. . . Using data from 8,390 sex offenders derived from 24 separate samples, age was found to add incremental predictive validity to both Static-99 and Static 2002. After creating new age weights, the resulting instruments (Static-99R and Static 2002R) had only slightly higher relative predictive accuracy. The absolute recidivism estimates, however, provided a substantially better fit for older offenders than the recidivism estimates from the original scales.”).

Dr. Hoem also examined dynamic or changeable risk factors to assess Swanson’s risk of sexually reoffending. (Trial Transcript, p. 69, ln. 22-p. 70, ln. 9). Dr. Hoem believes that the following dynamic risk factors apply to Swanson:

Resistance to Rules and Supervision, Poor Problem Solving, Dysfunctional Coping (not sexualized coping), Impulsivity, and Grievance Thinking. (Trial Transcript, p. 70, ln. 10-p. 78, ln. 18). Dr. Hoem concedes however, that at present there are no sexual risk factors that apply to Swanson. (Trial Transcript, p. 88, ln. 11-p. 89, ln. 20).

Dr. Hoem also concedes that there is no research that provides rules or guidance as to how to use dynamic factors in an assessment, or what the presence or absence of a factor means. Essentially, Dr. Hoem believes that an evaluator must use their judgment and the evaluator's educated guess. According to Dr. Hoem's educated guess, the dynamic risk factors show Swanson is more likely than not to sexually reoffend. (Trial Transcript, p. 94, ln. 16-20).

Dr. Hoem describes her guesswork as "clinical judgment". (Trial Transcript, p. 95, ln. 3-8). As stated previously, Dr. Hoem's clinical judgment amounts to approximately one year of experience treating sexual offenders, and approximately 12 years giving her opinions, using in part, her clinical judgment.

Clinical Judgment in the prediction of risk for violence, and specifically sexual recidivism, has been studied by the field of psychology. Such research determined that such clinical judgment is not as good as chance, and that psychologists do a better job at predicting sexual re-offense by flipping a coin than they do by using clinical judgment. (Trial Transcript, p. 97, ln. 18-p. 98, ln. 8). See, *Wygle*, 910 N.W.2d at 603 (quoting Smith, 67 Okla. L. Rev. at 675 (“Psychiatrists have long rejected the notion that they have a special ability to predict future behavior, particularly dangerous conduct.”)). “It has been claimed, for instance, that the predictions of experts are little better than chance. See Smith, 67 Okla. L. Rev. at 700 (citing Rebecca L. Jackson et al., *The Adequacy and Accuracy of Sexually Violent Predator Evaluations: Contextualized Risk Assessment in Clinical Practice*, 3 Int’l J. Forensic Mental Health 115, 124 (2004)); see also Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 Cardozo L. Rev. 1845, 1860 (2003)”.

With respect to risk, Dr. Wollert testified that as a general rule, rape is a crime committed by young persons. As a person ages, his risk of re-offense, either criminal or sexual, declines. This is particularly true for rapists. Research shows that at age 60, rapists have a re-offense rate that does not differ from zero. (Trial Transcript, p. 113, ln. 14-p. 114, ln. 15).

Dr. Wollert testified that the most accurate way to assess a person's risk of sexual recidivism is the use of an actuarial test, specifically the Static-99R. The Static-99R is the most widely used and is held in the highest regard among actuarial tests. (Trial Transcript, p. 114, ln. 24-p. 115, ln. 115).

Actuarials, including the Static-99 have changed, evolved, or been abandoned since Swanson was evaluated in 2002. (Trial Transcript, p. 115, ln. 7-p. 116, ln. 2).

Like Dr. Hoem, Dr. Wollert used the Static-99R to evaluate Swanson's risk. While Dr. Hoem scored Swanson as a "1", Dr. Wollert scored him a "0". At a score of "0", the range of possible scores is "-3" to "12". 3% of people in the development sample of the Static-99R who scored "0"

recidivated over a five year period. If a person is in the community over that five year period without recidivating, research shows that the person's risk drops in half, or to 1.5% for those scoring a "0" on the Static-99R. (Trial Transcript, p. 116, ln. 3-p. 117, ln. 14), (see also Harris and Hanson, *Sex Offender Recidivism: A Simple Question*, Public Safety and Preparedness Canada (2004)(<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/sx-ffndr-rcdvsm/index-en.aspx>), and Hanson, Harris, Helmus, and Thornton, *High Risk Sex Offenders May Not Be High Risk Forever*, Journal of Interpersonal Violence (2014)(https://www.researchgate.net/publication/261069441_High-Risk_Sex_Offenders_May_Not_Be_High_Risk_Forever).

Dr. Wollert criticized the dynamic risk factors used by Dr. Hoem to assess Swanson's risk. In Dr. Wollert's opinion, dynamic risk factors are poorly defined, if at all, and do not have rules for weighing the importance of each factor. There are also no rules as to the weight or effect of combining factors. Dr. Wollert opined that the dynamic risk factors would have to be enormously persuasive to overcome the

Static-99R score of zero or “1” given to Swanson, and research shows that the dynamic risk factors are not that persuasive. To reach a level of 50% probability, as “likely”/”more likely than not” would be greater than 50% probability, Dr. Wollert stated that a psychological test must have a likelihood ratio of 33 to 1, which is enormous. Dr. Wollert stated that psychological tests do not reach that level for the prediction of sexual recidivism, adding that some medical tests that do, but not very many. (Trial Transcript, p. 117, ln. 21-p. 120, ln. 18). See van den Berg, Smid, Schepers, Wever, van Beek, Janssen, and Gijs, *The Predictive Properties of Dynamic Sex Offender Risk Assessment Instruments: A Meta-Analysis*, *Psychological Assessment* (2017), <http://dx.doi.org/10.1037/pas0000454>, (This study attempted to determine how well dynamic risk factors (1) predict sexual recidivism, and (2) if dynamic risk factors improved upon static risk assessments such as the Static-99R.

The researchers determined that dynamic risk factors predicted sexual recidivism about as well as static risk prediction instruments like the Static-99R--effect sizes

(Cohen's d) of .71 and .67 respectively. As far as whether dynamic risk factors improved upon static risk assessments such as Static-99R, the researchers found only a slight improvement. Effect sizes were small, with a hazard ratio of 1.08 for sexual recidivism. In other words, a hazard ratio of "1" means that dynamic risk factors identify sexual recidivists as well as static risk assessments such as Static-99R. A hazard ratio of 1.08 means that dynamic risk factors identify sexual recidivists only slightly better than a static risk assessment such as Static-99R when the two methods are combined. This is far from the "enormous" persuasive power described by Dr. Wollert when he testified that the dynamic risk facts would have to be "enormously persuasive" to raise a Static-99R risk estimate with a score of "0" or "1" to the level of "more likely than" not to warrant civil commitment. (Trial Transcript, p. 117, ln. 21-p. 120, ln. 18).

Dr. Wollert also examined Swanson from a clinical standpoint. According to Wollert, older offenders generally do not commit violent crimes, and do not commit rape. This effect of aging is something that has been shown by research

for 150 years. (Trial Transcript, p. 120, ln. 19-p. 121, ln. 9).

Further, research demonstrates that persons of Swanson's age do not have competent erectile functioning. This effect is measured by the penile plethysmograph, an instrument which measures tumescence in a man's penis in response to sexual stimuli. Plethysmograph studies show a curvilinear decline with age to the extent that it may be relatively high at age 28 to 30, but essentially zero for someone that is 68. This finding agrees with Swanson's assessment of his own sexual functioning, and with the lack of sexual misbehavior and physical violence in his record. (Trial Transcript, p. 121, ln. 10-p. 122, ln. 9). Dr. Wollert reported the result of a penile plethysmograph (PPG) test taken by Swanson on October 15, 2013. This test showed that Swanson did not have a significant penile response. This is consistent with Swanson's reports on his own sexual functioning, is consistent with the research plethysmography, and consistent with the fact that Swanson had been released from his arousal management group by staff at CCUSO. (Trial Transcript, p. 122, ln. 10-p. 123, ln. 10).

Dr. Wollert indicated that he believed that Swanson had made progress in the attitudes that lead to his sexual offending. The attitudes he possesses regarding whether he will or will not comply with the sexual offender registry have nothing to do with sexual offending, and Dr. Wollert surmised that Swanson would be punished for any such non-sexual violations by the criminal court system. (Trial Transcript, p. 123, ln. 12-p. 125, ln. 9). This is consistent with the mandate of the United States Supreme Court that SVP statutes must distinguish between “the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment, and the dangerous but typical recidivist convicted in an ordinary criminal case.” *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 870 (2002).

CONCLUSION

As the Iowa Supreme Court has stated, “SVP statutes threaten to deprive individuals of what from time immemorial has been the weightiest of interests-the interest in individual liberty. Yet the vague and flexible standards of SVP statutes

allows, if not encourages, a better-safe-than-sorry approach that tolerates false positives but abhors false negatives.”

Wygle, 910 N.W.2d at 607. It is for this very reason that the Court found the requirement of a recent overt act to be so critical—it is a reinforcing mechanism or a spine for the spongy concept of “mental abnormality” and the speculative nature of causation in any particular case; it contributes to distinguishing a sexual predator from an ordinary recidivist. *Wygle*, 910 N.W.2d at 606.

Because of the dangers of erroneous deprivation of liberty, the imperfection with which SVP opinions and predictions are made, and the desire to narrowly apply the statute, the Court must also ensure that substantial evidence exists, not mere guesswork and speculation, to justify a civil commitment. The State’s case in this matter amounts to nothing more than speculation and conjecture, which is not substantial evidence.

The State’s case against Swanson begins with the diagnosis of the two “mental abnormalities” of Paraphilia Not Otherwise Specified (Nonconsent), and Personality Disorder

Not Otherwise Specified. The evidence is undisputed that these conditions are not mental disorders as set forth in the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. This manual was created to improve the accuracy of mental health diagnoses and is used virtually universally for the diagnosis of mental disorders in North America. One of these diagnoses, Paraphilia Not Otherwise Specified (Nonconsent) was specifically considered for inclusion in the DSM but was rejected four times over several decades. The reason is that such a diagnosis cannot be made with any degree of certainty beyond chance. The second diagnosis, Personality Disorder Not Otherwise Specified, is the most unreliable diagnosis often seen in SVP cases. Again, such a diagnosis has a level of certainty less than chance.

It is true, as noted by the district court, that Iowa law does not require that a mental abnormality be a recognized medical condition. However, it cannot be a vague, amorphous, and conjured-up condition that does not have the support of

the best science we have to date. That is clearly not the status of the mental abnormalities ascribed to Swanson.

The inadequacy of the State's case against Swanson continues with the risk of sexual recidivism ascribed to him by the State's expert. While both parties acknowledge that the Static-99R has only "moderate" predictive accuracy, both also agree that it is the "gold standard" for evaluating the risk of recidivism by sexual offenders. Both parties agree that Swanson's risk according to the Static-99R is low or extremely low. 2.8% - 7.2% of those persons in the developmental sample that scored a "0" as scored by Dr. Wollert sexually reoffended in five years; 3.9% - 7.8% of those persons in the developmental sample that scored a "1" as scored by Dr. Hoem sexually reoffended in five years. These recidivism estimates are admittedly far less than the "likely"/"more likely than not" standard required for commitment. Further, the evidence is undisputed that an offender who remains in the community for five years without sexually reoffending has a risk that is roughly half what it was when first released.

Dr. Hoem supplemented her evaluation of Swanson's risk of recidivism by considering dynamic risk factors. Of all the factors considered, none of them are sexual factors. Swanson has none of the dynamic factors that are sexual factors. Moreover, the dynamic factors considered by Dr. Hoem have no rules which define the individual factors, no rules for scoring the factors, no rules for the weight or significance to be attributed to the factors, and no rules about combinations or factors, or consideration of them in conjunction with the Static-99R. The absence of a formal, rule-driven methodology leads to the same vague, amorphous, and speculative situation that is to be avoided when a person's liberty is at stake. In fact, Dr. Hoem admits that she gives weight to the dynamic factors based on her "educated guess". Guesswork is not a proper subject of expert testimony, and is certainly not the kind of speculation and conjecture that can be substantial evidence in a case where a person's liberty is at stake.

On the same lines, clinical judgment of psychologists predicting the likelihood of sexual recidivism has been found to be worse than chance. Research examining the utility of

using dynamic factors in conjunction with a static assessment like the Static-99R has found such practice to be only a slight improvement over using a static assessment alone. Again, the speculative, educated-guess approach underlying the State's evidence cannot be said to be substantial evidence in such an important case.

Last, the expertise of the respective experts reflects on the quality of the evidence presented in this case, and is informative as to whether such evidence is substantial. When Dr. Hoem gives opinions about the applicability of a diagnosis to a given individual, whether that diagnosis predisposes that individual to commit sexually violent offenses, and whether the person is "likely"/"more likely than not" to commit a sexually violent offense, those opinions must be considered in light of her limited experience working with sexual offenders and her limited knowledge of the research concerning sexual offenders. Because of this limited expertise, Dr. Hoem's opinions do not carry the same level of evidentiary value as those given by a much more experienced witness. This is especially true when comparing such opinions to the

criticisms of the same by Dr. Wollert, and the research contradicting those opinions. The State's evidence consisting of the opinions given by Dr. Hoem regarding the mental abnormalities and risk ascribed to Swanson are not substantial evidence.

For these reasons, Swanson prays the Court to remand this case with instructions to discharge him from commitment under chapter 229A.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Counsel for the Respondent-Appellant respectfully requests to be heard in oral argument upon the submission of this case.

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ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$0, and that amount has been paid in full by the Office of the State Public Defender.



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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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