

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0715

IN RE THE DETENTION OF
ROBERT SWANSON,
Respondent–Appellant,

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE KELLYANN LEKAR, JUDGE

APPELLEE’S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

TYLER J. BULLER
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
tyler.buller@ag.iowa.gov

KEISHA F. CRETSINGER
Assistant Attorney General

ATTORNEYS FOR PETITIONER-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW	5
ROUTING STATEMENT.....	6
STATEMENT OF THE CASE.....	6
ARGUMENT.....	13
I. The SVP Court Correctly Found the Respondent’s Commitment as a Sexually Violent Predator Should Continue. The District Court Found the State’s Expert More Credible than the Respondent’s Expert.	13
A. The respondent suffers from a mental abnormality.....	17
B. The respondent remains likely to commit future sexually violent offenses if he is discharged.....	19
CONCLUSION	25
REQUEST FOR NONORAL SUBMISSION.....	25
CERTIFICATE OF COMPLIANCE	26

TABLE OF AUTHORITIES

State Cases

<i>Det. of Hollins v. State</i> , No. 13-1137, 2014 WL 3931485 (Iowa Ct. App. Aug. 13, 2014)	18
<i>In re Commitment of Williams</i> , 539 S.W.3d 429 (Tex. App. 2017) ..	22
<i>In re Cummings</i> , No. 14-1955, 2016 WL 1130284 (Iowa Ct. App. March 23, 2016).....	21
<i>In re Det. of Barnes</i> , 689 N.W.2d 455 (Iowa 2004)	18
<i>In re Det. of Blaise</i> , 2008 WL 4308312 (Iowa Ct. App. Sept. 17, 2008)	19
<i>In re Det. of Bugley</i> , No. 11-2092, 2013 WL 1223692 (Iowa Ct. App. March 27, 2013)	21
<i>In re Det. of Hennings</i> , 744 N.W.2d 333 (Iowa 2008).....	18
<i>In re Det. of Hodges</i> , 689 N.W.2d 467 (Iowa 2004)	18
<i>In Re Det. of Scott</i> , No. 15-0634, 2016 WL 3002892 (Iowa Ct. App. May 25, 2016)	20
<i>In re Det. of Sease</i> , 357 P.3d 1088 (Wash. App. 2015)	22
<i>In re Det. of Stenzel</i> , 827 N.W.2d 690 (Iowa 2013)	18, 21
<i>In re Detention of Altman</i> , 723 N.W.2d 181 (Iowa 2006)	14, 18, 19, 20
<i>In re Doyle</i> , 428 S.W.3d 755 (Mo. Ct. App. 2014)	22
<i>People v. Therrian</i> , 113 Cal. App. 4th 609, 6 Cal. Rptr. 3d 415 (2003)	22, 24
<i>State v. Abbas</i> , 561 N.W.2d 72 (Iowa 1997)	14
<i>State v. Hickman</i> , 576 N.W.2d 364 (Iowa 1998).....	14
<i>State v. Jacobs</i> , 607 N.W.2d 679 (Iowa 2000)	15, 16, 19

<i>State v. Lage</i> , No. 01-0496, 2002 WL 597419 (Iowa Ct. App. Mar. 13, 2002)	16
---	----

State Statutes

Iowa Code § 229A.2(6) (2017).....	17
Iowa Code § 229A.8 (2017).....	19

State Rule

Iowa R. App. P. 6.801	13
-----------------------------	----

Other Authorities

Richard Wollert, et al., <i>Recent Research (N=9,305) Underscores the Importance of Using Age-Stratified Actuarial Tables in Sex Offender Risk Assessments</i> , SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT, vol. 22, pp. 471–490 (2010).....	23
--	----

Leslie Helmus & David Thornton, <i>The MATS-1 Risk Assessment Scale: Summary of Methodological Concerns and an Empirical Validation</i> , SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT, vol. 28, issue 3, pp. 160–186.....	23
---	----

Dennis M. Doren & Jill S. Levenson, <i>Diagnostic Reliability and Sex Offender Civil Commitment Evaluations: A Reply to Wollert</i> , SEXUAL OFFENDER TREATMENT, vol. 4, issue 1 (2009).....	24
--	----

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. The SVP Court Correctly Found the Respondent's Commitment as a Sexually Violent Predator Should Continue. The District Court Found the State's Expert More Credible than the Respondent's Expert.

Det. of Hollins v. State, No. 13-1137, 2014 WL 3931485
(Iowa Ct. App. Aug. 13, 2014)
In re Commitment of Williams, 539 S.W.3d 429
(Tex. App. 2017)
In re Cummings, No. 14-1955, 2016 WL 1130284
(Iowa Ct. App. March 23, 2016)
In re Det. of Barnes, 689 N.W.2d 455 (Iowa 2004)
In re Det. of Blaise, 2008 WL 4308312
(Iowa Ct. App. Sept. 17, 2008)
In re Det. of Bugley, No. 11-2092, 2013 WL 1223692
(Iowa Ct. App. March 27, 2013)
In re Det. of Hennings, 744 N.W.2d 333 (Iowa 2008)
In re Det. of Hodges, 689 N.W.2d 467 (Iowa 2004)
In Re Det. of Scott, No. 15-0634, 2016 WL 3002892
(Iowa Ct. App. May 25, 2016)
In re Det. of Sease, 357 P.3d 1088 (Wash. App. 2015)
In re Det. of Stenzel, 827 N.W.2d 690 (Iowa 2013)
In re Detention of Altman, 723 N.W.2d 181 (Iowa 2006)
In re Doyle, 428 S.W.3d 755 (Mo. Ct. App. 2014)
People v. Therrian, 113 Cal. App. 4th 609, 6 Cal. Rptr. 3d 415
(2003)
State v. Abbas, 561 N.W.2d 72 (Iowa 1997)
State v. Hickman, 576 N.W.2d 364 (Iowa 1998)
State v. Jacobs, 607 N.W.2d 679 (Iowa 2000)
State v. Lage, No. 01-0496, 2002 WL 597419
(Iowa Ct. App. Mar. 13, 2002)
Iowa Code § 229A.2(6) (2017)
Iowa Code § 229A.8 (2017)
Iowa R. App. P. 6.801
Richard Wollert, et al., *Recent Research (N=9,305)
Underscores the Importance of Using Age-Stratified Actuarial
Tables in Sex Offender Risk Assessments*, SEXUAL ABUSE: A

JOURNAL OF RESEARCH AND TREATMENT, vol. 22, pp. 471–490 (2010)
Leslie Helmus & David Thornton, *The MATS-1 Risk Assessment Scale: Summary of Methodological Concerns and an Empirical Validation*, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT, vol. 28, issue 3, pp. 160–186
Dennis M. Doren & Jill S. Levenson, *Diagnostic Reliability and Sex Offender Civil Commitment Evaluations: A Reply to Wollert*, SEXUAL OFFENDER TREATMENT, vol. 4, issue 1 (2009)

ROUTING STATEMENT

This case can be decided based on existing legal principles.

Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The respondent, Robert Swanson, appeals a district court order continuing his commitment as a sexually violent predator (“SVP”) pursuant to Iowa Code Chapter 229A. His commitment was continued following a bench trial in the Black Hawk County District Court, the Hon. Kellyann Lekar presiding.

Course of Proceedings

The State accepts the defendant’s course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The respondent has been committed as a sexually violent predator since 2002. Trial tr. p. 5, lines 10–14. He was fifty-one or fifty-two then. Trial tr. p. 5, lines 15–16.

At the time of commitment, the respondent was not presently confined, so the legal basis of his commitment was a recent overt act. Trial tr. p. 5, lines 17–19. Specifically, the respondent called and harassed a woman by phone, leading her to call the police. Trial tr. p. 5, line 20 — p. 7, line 23.

Prior to this recent over act, the respondent had also been convicted of two different sexual assaults, in 1973 and 1980. Trial tr. p. 7, line 24 — p. 8, line 3; SVP Verdict, p. 2; App. 29. The respondent now admits that he “raped” three different women. Trial tr. p. 8, lines 7 — p. 9, line 1. One of the respondent’s victims was 14. Trial tr. p. 14, line 25 — p. 15, line 4.

The respondent said that he raped the women due to stressors in his life, including his relationship with his girlfriend, workplace issues, and problems with his then-marriage. *See* trial tr. p. 10, lines 16–24; tr. p. 11, line 23 — p. 15, line 21.

The respondent claims he does not quite remember how his interactions with these women went from a “normal social interaction to a rape.” Trial tr. p. 17, lines 21–23. He has learned in the years since, however, that he raped women because of “misunderstood anger and misplaced anger.” Trial tr. p. 18, lines 16–18. Despite this, the respondent maintains that his civil commitment is unfair and should not have been allowed. Trial tr. p. 19, lines 4–17. Today, he is still angry, but “[i]t’s very different anger.” Trial tr. p. 42, lines 23–24. In the SVP court’s words, the respondent “struggles to understand others’ perspectives and perceptions of his behavior and statements.” SVP Verdict, p. 4; App. 31.

During his various periods of incarceration, the respondent did not complete sex offender treatment. Trial tr. p. 19, line 24 — p. 20, line 18; p. 28, lines 15–24. Shortly after release from his sex-assault convictions, the respondent threatened Judge Linda Reade and was incarcerated in federal prison. Trial tr. p. 21, line 11 — p. 22, line 8; p. 37, lines 21–24. More recently, in February of 2017, the respondent wrote a letter to Virginia Barchman, one of the prosecutors from his original criminal cases, writing: “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.” SVP Verdict, p. 4; App. 31; trial tr. p. 62, lines 9–11.

The respondent is currently in the first of five phases in the Civil Commitment Unit for Sex Offenders (“CCUSO”) treatment. Trial tr. p. 32, lines 12–16. The first phase is essentially the “orientation” phase of the program. Trial tr. p. 32, lines 17–21. The respondent admits that he only follows CCUSO rules “[m]ost of the time.” Trial tr. p. 35, lines 17–18. He has not advanced to further stages because he refuses to comply with rules or complete required assignments. SVP Verdict, p. 4; App. 31. The respondent also testified that he is not willing to register as a sex offender upon his release. Trial tr. p. 36, line 14 — p. 37, line 4; SVP Verdict, p. 4; App. 31.

Dr. Stacey Hoem, a clinical psychologist, interviewed and assessed the respondent. SVP Verdict, p. 5; App. 32. Dr. Hoem agreed with previous psychologists’ diagnoses for the respondent: Paraphilia Not Otherwise Specific (Nonconsent) and Personality Disorder Not Otherwise Specified (with Antisocial, Narcissistic, and Schizoid traits). SVP Verdict, p. 5; App. 32.

When Dr. Hoem first attempted to interview him, the respondent refused, said “hell no,” and refused to sign the annual advisory of patient rights. *See* trial tr. p. 57, line 24 — p. 58, line 13. When Dr. Hoem tried to interview the respondent at a later date, he claimed that he had never refused her initial interview (even though Dr. Hoem heard him do so). Trial tr. p. 58, line 25 — p. 59, line 11. Although the respondent did eventually agree to an interview, he tended to not answer questions directly and “explained away” his past offenses. Trial tr. p. 59, lines 12–22. The respondent also denied writing the threatening letter to Judge Reade and then tried to claim “that’s not really what happened” when Dr. Hoem read the letter to him verbatim. Trial tr. p. 59, line 23 — p. 60, line 22. He similarly denied threatening Barchman in the letter that said he “would like to be the one holding and playing with the gun upside [her] head.” Trial tr. p. 62, line 13 — p. 63, line 1. Finally, the respondent also denied having any kind of mental abnormality. Trial tr. p. 65, lines 12–14.

In Dr. Hoem’s opinion, the respondent’s mental abnormality has not changed such that he is no longer more likely than not to commit future sexually violent offenses. *SVP Verdict*, p. 5; App. 32. In reviewing the CCUSO treatment notes, Dr. Hoem saw little to no

treatment progress related to the mental abnormality. Trial tr. p. 65, line 15 — p. 66, line 3. Instead, the notes indicated that the respondent spent much of his time in therapy complaining about his legal issues. Trial tr. p. 65, line 15 — p. 66, line 3.

Dr. Hoem opined that the respondent was more likely than not to commit future sexually violent offenses based on her assessment of actuarial data and dynamic risk factors. SVP Verdict, p. 5; App. 32. Due to the respondent's age, he scored relatively low on the Static-99 actuarial instrument. *See* trial tr. p. 68, line 15 — p. 69, line 7. However, his dynamic risk factors greatly increased his risk of re-offense.

Dr. Hoem testified regarding (and the district court credited) the following dynamic risk factors:

- **Resistance to rules and supervision.** The respondent has a significant number of behavior reports—approximately eight—for failure to comply with CCUSO rules and regulations. Trial tr. p. 70, line 14 — p. 71, line 4. This factor is relevant to the risk of re-offense because it corresponds to the respondent's likelihood of complying with laws and societal normal upon release. Trial tr. p. 71, lines 5–14.
- **Poor problem solving.** The respondent's offenses demonstrate that he lacks problem-solving skills and turns to violent rape when he is unable to otherwise resolve his anger and other emotions. *See* trial tr. p. 71, line 19 — p. 72, line 21. This risk factor is relevant to the risk of re-offense because, without better-developed

problem-solving skills, the respondent may rape again when confronted with a situation or emotions he cannot resolve. Trial tr. p. 72, line 22 —p. 73, line 17.

- **Problems with social boundaries.** The respondent has repeatedly sent inappropriate, harassing, or threatening letters to women—including a recent attempt to contact one of his prior victims. Trial tr. p. 73, line 18 — p. 74, line 25. This risk factor is relevant to recidivism because the respondent “holds onto grievances, to resentments for 30, 40 years, plus, and appears to sit and ruminate on them.” Trial tr. p. 75, lines 1–23. This could increase the risk of re-offense either because the respondent acts on one of those past grievances or is confronted with a new situation in which he cannot behave appropriately.
- **Dysfunctional coping and impulsivity.** The respondent threatens, disrespects, and argues with CCUSO staff “when things don’t go his way.” SVP Verdict, p. 6; App. 33. He also argues with other patients and lacks the ability to avoid the arguments or otherwise deal with interpersonal issues. SVP Verdict, p. 6; App. 33.

In Dr. Hoem’s opinion, the respondent has not reduced these dynamic risk factors to the point where he is no longer more likely than not to commit future sexually violent offenses. *See* trial tr. p. 78, line 22 — p. 79, line 3.

Richard Wollert testified as an expert for the defense. SVP Verdict, pp. 6–7; App. 33–34. He admitted that the failure to complete sex-offender treatment may increase the respondent’s risk of re-offense, but noted he “disagree[d]” with the diagnoses assigned to the respondent and dislikes assessments based on dynamic risk

factors. Verdict, p. 7; App. 34. The district court's written verdict expressly noted that the court gave less weight to Wollert's opinion than Dr. Hoem's. SVP Verdict, p. 8; App. 35.

ARGUMENT

I. The SVP Court Correctly Found the Respondent's Commitment as a Sexually Violent Predator Should Continue. The District Court Found the State's Expert More Credible than the Respondent's Expert.

Motion to Strike

In portions of his brief, the respondent attempts to inject empirical social-science research to support factual assertions. *See, e.g.*, Respondent's Proof Br. at 30, 31, 32, 33, 35, 37, 38 (citing various psychological and sociological studies). Because the sole issue presented by the respondent on appeal is the sufficiency of the evidence supporting his continued commitment as a sexually violent predator, review is necessarily limited to the record presented below. The studies cited by the respondent are outside the record and cannot be considered. *See* Iowa R. App. P. 6.801. References to outside-the-record materials should be stricken or otherwise not considered by this Court in reviewing sufficiency.

Preservation of Error

The State does not contest error preservation for the sufficiency of the evidence supporting the respondent's continued commitment as a sexually violent predator, given that this matter was tried to the bench. *Cf. State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997).

Standard of Review

Review of sufficiency is for correction of errors at law. *In re Detention of Altman*, 723 N.W.2d 181, 184 (Iowa 2006). This Court “views the evidence in a light most favorable to the [bench] verdict, disregarding all contrary evidence and inferences, and determines whether the evidence was sufficient for the [fact-finder] to have believed beyond a reasonable doubt” that the respondent is a sexually violent predator. *See id.* at 184.

Merits

What the respondent wants is for this Court to set aside the trial court's credibility findings and replace them with the respondent's self-serving view. This, the Court cannot do. Credibility findings are virtually unreviewable on appeal. *See State v. Hickman*, 576 N.W.2d 364, 367 (Iowa 1998) (collecting cases). Particular to cases that turn on conflicting expert testimony—as SVP cases do—the Supreme Court has been clear regarding an appellate court's limited role: “When a

case evolves into a battle of experts, we, as the reviewing court, readily defer to the district court's judgment as it is in a better position to weigh the credibility of the witnesses." *State v. Jacobs*, 607 N.W.2d 679, 685 (Iowa 2000). The respondent here has not provided the kind of extraordinary grounds that would even arguably permit jettisoning a trial judge's credibility findings based on this Court's review of a cold record.

The SVP court was upfront about its dilemma: "This Court is faced with a static measure that places Swanson at lower risk to reoffend, [but] is also confronted with multiple dynamic factors that suggest Swanson is at a higher risk to reoffend." SVP Verdict, p. 8; App. 35. The court found the respondent's testimony unbelievable, noting it "cannot rely upon the credibility of Swanson" due to his history of lying and refusal to participate in treatment where the veracity of his admissions could be tested. SVP Verdict, p. 8; App. 35. In the battle of experts, the Court expressly wrote that it "gives greater weight to the Annual Report prepared by Dr. Hoem at the Civil Commitment Unit for Sexual Offenders and the impact of dynamic actors on risk to reoffend." SVP Verdict, p. 8; App. 35.

Even the respondent candidly admits the district court resolved the credibility questions adversely to him: “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.” Respondent’s Proof Br. at 19. He further admits that “the weight to be assigned the testimony of each witness is within the province of the fact-finder.” Respondent’s Proof Br. at 20. This is fatal to his claim.

The claims advanced by the respondent on appeal are nothing more than an attempt to re-litigate credibility in a new arena. But the appellate courts are not the place for such a contest. *Jacobs*, 607 N.W.2d at 685; *see also State v. Lage*, No. 01-0496, 2002 WL 597419, at *1 (Iowa Ct. App. Mar. 13, 2002) (“It is the role of the [fact-finder], not the appellate courts, to determine credibility of witnesses and resolve any conflicts in evidence.”). For example, the respondent complains that he thinks his expert was more qualified than the State’s expert. Respondent’s Proof Br. at 20–22. This is plainly the kind of credibility question resolved by a fact-finder at trial, not an appellate court on substantial-evidence review.

The respondent goes on to make two more-specific challenges in his brief. First, he claims that the State’s evidence is insufficient to show that the respondent continues to suffer from a mental abnormality. Respondent’s Proof Br. at 22–29. This claim is without merit under controlling case law, which holds that a “mental abnormality” is not limited to specific diagnoses in specific psychological manuals. Second, the respondent claims that he is no longer likely to commit future sexually violent offenses. Respondent’s Proof Br. at 29–41. This claim is without merit in light of the dynamic risk factors proven at the annual-review trial, as well as the SVP court’s credibility findings that accepted Dr. Hoem’s testimony and rejected Wollert’s.

A. The respondent suffers from a mental abnormality.

In order to sustain an SVP commitment under Chapter 229A, a sexually violent predator must have a “mental abnormality,” which “means a congenital or acquired condition affecting the emotional or volitional capacity of a person and predisposing that person to commit sexually violent offenses to a degree which would constitute a menace to the health and safety of others.” Iowa Code § 229A.2(6) (2017). “[T]he types of conditions that can serve to establish a

‘mental abnormality’ are not limited to certain recognized diagnoses.” *In re Det. of Barnes*, 689 N.W.2d 455, 458 (Iowa 2004). Further, the mental abnormality need not be primarily or exclusively linked to sexual offenses, but may also predispose the person to commit other crimes. *In re Det. of Altman*, 723 N.W.2d 181, 184 (Iowa 2006).

The respondent here was diagnosed with (1) paraphilia not otherwise specified — nonconsent and (2) personality disorder not otherwise specified — antisocial and narcissistic with schizoid traits. SVP Verdict, p. 5; App. 32. While the respondent is of the view that these diagnoses should not be legally sufficient to support commitment, Iowa’s appellate courts disagree: they have repeatedly affirmed commitments based on the same or substantially similar diagnoses. *See, e.g., In re Det. of Stenzel*, 827 N.W.2d 690, 702 (Iowa 2013) (antisocial personality disorder and paraphilia not otherwise specified — nonconsent); *In re Det. of Hennings*, 744 N.W.2d 333, 336 (Iowa 2008) (diagnoses included, but not limited to, paraphilia not otherwise specific and antisocial personality disorder); *In re Det. of Barnes*, 689 N.W.2d 455, 458 (Iowa 2004) (antisocial personality disorder); *In re Det. of Hodges*, 689 N.W.2d 467, 470 (Iowa 2004) (antisocial personality disorder); *Det. of Hollins v. State*, No. 13-1137,

2014 WL 3931485, at *3 (Iowa Ct. App. Aug. 13, 2014) (antisocial personality disorder and paraphilia not otherwise specified); *In re Det. of Blaise*, 2008 WL 4308312, at *1–2 (Iowa Ct. App. Sept. 17, 2008) (paraphilia not otherwise specified and personality disorder not otherwise specified). These cases dispose of the respondent’s claim.

Some of the respondent’s complaints in this subdivision of his brief also amount to challenging the credibility findings of the SVP court. For example, he urges that Wollert disagrees with some of Dr. Hoem’s conclusions and believes one of the diagnoses “has a great deal of controversy surrounding it.” Respondent’s Proof Br. at 23. The SVP court was presented with these competing experts and expressly chose to credit the State’s expert over the respondent’s. SVP Verdict, p. 8; App. 35. This Court must defer to that credibility finding on appeal. *See Altman*, 723 N.W.2d at 184; *Jacobs*, 607 N.W.2d at 685.

B. The respondent remains likely to commit future sexually violent offenses if he is discharged.

A sexually violent predator must also remain likely to commit future sexually violent offenses if discharged, in order to support continued commitment under Chapter 229A. *See Iowa Code* §

229A.8 (2017). The district court, crediting Dr. Hoem’s opinion and rejecting Wollert’s, found that the dynamic risk factors identified by Dr. Hoem proved beyond a reasonable doubt that the respondent remained likely to commit future sexually violent offenses if discharged. SVP Verdict, p. 8; App. 35.

The gist of the respondent’s argument is that he does not like the use of dynamic risk factors, preferring an actuarial instrument that would show him at a lower risk of re-offense. *See* Respondent’s Proof Br. at 29–41. He does not challenge the admissibility of evidence regarding these dynamic risk factors (and certainly preserved no error regarding such a claim), but instead challenges the weight these factors should be given. *See* Respondent’s Proof Br. at 29–41. What weight a particular type of evidence should be given is the kind of fact-finding function that is entrusted to trial judges and juries, not appellate courts, and the respondent’s challenge can find no audience here. *See Altman*, 723 N.W.2d at 184.

To the extent this Court finds a viable challenge to the use of dynamic risk factors within the respondent’s brief, Iowa’s appellate courts have repeatedly upheld civil commitments based on dynamic risk factors. *See, e.g., In Re Det. of Scott*, No. 15-0634, 2016 WL

3002892, at *2–3 (Iowa Ct. App. May 25, 2016) (affirming commitment based in part on “several dynamic risk factors, such as a lack of insight into his actions and lack of the ability to manage his emotions and outbursts”); *In re Cummings*, No. 14-1955, 2016 WL 1130284, at *1 (Iowa Ct. App. March 23, 2016) (approving risk assessment for SVP based on static and “dynamic” risk factors); *In re Det. of Bugley*, No. 11-2092, 2013 WL 1223692, at *1 (Iowa Ct. App. March 27, 2013) (“While [the respondent] challenges [the expert’s] use of clinical judgment with respect to the empirically supported dynamic risk variables present in [the respondent’s] case, our courts have accepted the use of clinical judgment in these cases.”); *see also In re Det. of Stenzel*, 827 N.W.2d 690, 703 (Iowa 2013) (approving of

commitment based in part on psychologist’s “clinical judgment”).¹

To the extent this Court considers the literature cited by the respondent in his brief (contrary to the State’s belief that such literature has no place in a sufficiency-of-the-evidence review), it is important to have the full picture. While some experts, like Wollert, take the position that older persons should essentially be immune to commitment as sexually violent predators, better-regarded subject-matter experts disagree with the fundamentals of Wollert’s opinions.

¹ Although the Iowa cases are sufficient to summarily dispose of the defendant’s complaints regarding dynamic risk factors, the State notes that other state appellate courts routinely affirm SVP commitments based in part on dynamic factors. *See, e.g., In re Commitment of Williams*, 539 S.W.3d 429, 440 (Tex. App. 2017), *reh’g denied* (Jan. 4, 2018) (“Dr. Proctor also testified that he believed the Static-99R underestimated Williams’ risk of reoffending because that particular test did not take into consideration “dynamic” risk factors ...”); *In re Det. of Sease*, 357 P.3d 1088, 1098 (Wash. App. 2015) (“[T]he State presented static and dynamic risk factor analyses that showed Sease was likely to reoffend and presented Dr. Newring’s opinion that Sease could not be safely released.”); *In re Doyle*, 428 S.W.3d 755, 763 (Mo. Ct. App. 2014) (“Dr. Stanislaus also used accepted actuarial tools and dynamic risk factors to come to her conclusion that Appellant was more likely than not to reoffend if not confined to a secure facility.”); *People v. Therrian*, 113 Cal. App. 4th 609, 612, 6 Cal. Rptr. 3d 415, 417 (2003) (“Dr. Phenix testified that the Static–99 test was only the beginning of her analysis of the risk that defendant would reoffend. She explained that psychologists do not have actuarial instruments that encompass all the known risk factors obtained from research on sexual reoffenders. Consequently, she examined risk factors outside the Static–99 test that are both static and dynamic in nature.”).

For example, in 2010 Wollert created his own instrument for assessing sex offenders based on his views regarding offender age. See Richard Wollert, et al., *Recent Research (N=9,305) Underscores the Importance of Using Age-Stratified Actuarial Tables in Sex Offender Risk Assessments*, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT, vol. 22, pp. 471–490 (2010). Subsequent peer-reviewed research in the same journal revealed Wollert’s work was “substantially flawed,” contained “a fundamental data quality problem,” and used “inappropriate statistical techniques” that “have not been commonly accepted in the field.” Leslie Helmus & David Thornton, *The MATS-1 Risk Assessment Scale: Summary of Methodological Concerns and an Empirical Validation*, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT, vol. 28, issue 3, pp. 160–186. Most relevant to the kind of claims Wollert made in this case, the subsequent peer-reviewed article found that Wollert “significantly underestimated recidivism for some offenders”—in one sample, his estimates were off by more than half, which means the actual rate of recidivism was more than *twice* what Wollert predicted. See *id.* at 175. Ultimately, the authors opined that the tool Wollert

created and the methods he used were “not appropriate to use for applied risk assessment.” *Id.* at 179.

Another peer-reviewed article similarly discredits Wollert’s testimony, assailing his work as “seriously flawed” and containing “glaring methodological unorthodoxies in research procedures.”

Dennis M. Doren & Jill S. Levenson, *Diagnostic Reliability and Sex Offender Civil Commitment Evaluations: A Reply to Wollert*, SEXUAL OFFENDER TREATMENT, vol. 4, issue 1 (2009). Doren & Levenson’s peer-reviewed article most heavily critiqued Wollert for incorrectly conflating mental abnormalities with a diagnosis pursuant to psychological manuals and confusing the basic statistical concepts of reliability and validity. *Id.* They ultimately opined that Wollert’s errors and biases rendered his work “virtually meaningless,” such that “we can learn nothing of value from Wollert’s computations” and that “[a]ttempts to apply the Wollert findings within the sexual offender civil commitment realm would be seriously misguided and inappropriate.” *Id.*

If this Court accepts the defendant’s invitation to inject outside-the-record literature into this case, it only confirms that the SVP court

was correct to find Wollert unbelievable and the State's expert credible.

CONCLUSION


This Court should affirm the order continuing the respondent's commitment as a sexually violent predator.

REQUEST FOR NONORAL SUBMISSION

This case should be decided on the briefs.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



TYLER J. BULLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tyler.buller@ag.iowa.gov

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) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,945** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: October 23, 2018



TYLER J. BULLER

Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tyler.buller@ag.iowa.gov