

NO. 63268-0-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In re the Detention of:

JAMES R. TAYLOR,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

On November 13, 2006, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of James R. Taylor pursuant to RCW 71.09 *et seq.* CP at 145-6. Taylor spent much of his childhood and adolescence molesting nine of his younger siblings and cousins. Taylor molested these children on many hundreds of occasions over the years. 2RP at 208-10¹; Ex. 28. The sexual abuse was extensive, and included sexual penetration unless the victim was so young and small that Taylor's penis "didn't fit." 3RP at 138-39. The victims were males and females, as young as four years old, and all were between four and ten years younger than Taylor at the time of the offending. Ex. 12 at 5-14. Taylor was eventually convicted of one count of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree for which he received an alternative sentence ("SSODA") that allowed him to remain in the community on probation rather than be incarcerated. Ex. 3; 4. Both first degree rape of a child and

¹ Because there were multiple court reporters used during Taylor's trial, the volumes were received, and are cited, as follows:

1RP = March 9, 2009 and March 16, 2009

2RP = March 19, 2009

3RP = March 20, 2009 and the morning session on March 23, 2009

4RP = March 25, 2009 and March 26, 2009

5RP = March 23, 2009 afternoon session

6RP = March 24, 2009

first degree child molestation are “sexually violent offenses” as defined by RCW 71.09.020.

As a result of his convictions, fifteen year old Taylor was removed from his family home and attended therapy sessions with Dr. Gary Smith, a certified sex offender treatment provider. Ex. 4. Some of this counseling fulfilled a requirement of Taylor’s SSODA sentence. Having since relocated to New Zealand, Dr. Smith testified via videotaped deposition. Ex. 15. In the course of the therapy sessions with Taylor, Dr. Smith noted that Taylor was blaming his sister and mother for his offending, and seemed to still “have a crush” on his eleven year old sister. Ex. 15 at 22. Taylor was noted to be spending a lot of time in his own fantasy world, and for Taylor, this was often sexual fantasy. Ex 15 at 23. Taylor also appeared to Dr. Smith to be minimizing his potential for future offenses. *Id.* Near the end of his time in counseling with Dr. Smith, Taylor went to a local library and used the account number from a stolen check to access pornography on the library computer. Ex. 15 at 33-4.

The incident at the library, and Taylor’s “halfhearted” efforts in treatment resulted in revocation of the SSODA, and Taylor’s incarceration at the Naselle Youth Camp for the remainder of his sentence. Ex. 15 at 4-5. Pauline Bartley was Taylor’s primary counselor at Naselle, and she formed a fairly productive working relationship with Taylor. Ex. 18 at 3-

5.² However, Ms. Bartley noted Taylor engaging in problematic sexual behavior by exposing his genitals to Naselle staff on multiple occasions despite being told to stop. Ex. 18 at 12-13. For the first time, despite already having been in treatment with Mr. Smith, Taylor disclosed molesting two younger male cousins; each cousin was five years old at the time. Ex. 18 at 18-20. Ms Bartley was also concerned when Taylor informed her that he had a peer aged girlfriend during part of the time he was victimizing younger siblings. Taylor told Ms. Bartley that he was choosing sex with his young siblings over sex with his peer aged girlfriend because, according to Taylor, he respected the girlfriend too much. Ex. 18 at 24. Finally, Mr. Bartley noted that at age seventeen, Taylor was continuing to sexually fantasize about one of his sisters whom he had not seen since she was twelve. Ex. 18 at 25-26.

After Taylor was released from Nasselle, he was on probation and living in the Everett area. As a condition of his probation Taylor, was attending out-patient sex offender treatment sessions provided by Scott Zankman. Mr. Zankman was also the individual who conducted Taylor's SSODA psychological evaluation years earlier. In his testimony, Mr. Zankman noted that Taylor appeared to have made some progress in

² Ms. Bartley also testified via videotaped deposition which was edited for presentation. Ex. 18 is the edited version of her deposition testimony.

treatment, but he not always open with Mr. Zankman about things such as his whereabouts, who he was spending his time with, what he was doing. 2RP at 156. According to Mr. Zankman, it was “a pattern” for Taylor to lie. 2RP at 182. Mr. Zankman testified that Taylor often spent time with friends at a nearby bus station which was a concern because some of the kids in the group were twelve or thirteen years old. 2RP at 188. In addition, while in treatment, Taylor was caught hanging out in the children’s section of the public library despite previously being told that he was not allowed to be there. 2RP at 157. Taylor was unable to finish treatment with Mr. Zankman because he was arrested for Child Molestation in the Third Degree. 2RP at 190.

The third degree child molestation involved Taylor, age nineteen, having a sexual relationship with a fifteen year old girl that he met on the street. Taylor and the victim first met when the victim was fourteen years old. 3RP at 218. During the course of the offense, Taylor lied to the victim’s mother about his age and his level of interest in the victim, and asked the victim to lie about her age if their sexual relationship was revealed. 3RP at 219-20; 5RP at 106.

Once convicted of this offense, Taylor served a prison sentence at the Monroe Correctional Center. There, he participated in the prison’s sex offender treatment program. Robert Alvord, MSW, a counselor with a

strong history of working well with younger offenders, was assigned to be Taylor's treatment provider. 6RP at 79-80. Nonetheless, Taylor's time in the program was characterized by his failure to take responsibility for his offending, deceitfulness, and apathy. 2RP at 247-48. Ultimately, Taylor did not complete the treatment program because he "decided he was not interested." 6RP at 84-85. Prior to the end of Taylor's sentence, this Sexually Violent Predator civil commitment case was filed. CP at 158.

Dr. Kathleen Longwell, Ph.D., a psychologist with considerable experience in the evaluation, diagnosis, and treatment of sex offenders, conducted a psychological evaluation of Taylor for the purpose of determining whether he met the "sexually violent predator" definition. Dr. Longwell is familiar with RCW 71.09 and had previously conducted assessments of sex offenders under consideration for civil commitment pursuant to that statute. 2RP at 205-06. In conducting her assessment, Dr. Longwell reviewed numerous records involving Mr. Taylor which included police reports, witness statements, court documents, DOC records, medical records, and previous psychological evaluations. 2RP at 206-07. She also conducted an in-person interview with Taylor on August 3, 2005 which lasted approximately 3 hours. *Id.*

Dr. Longwell reports that it is her opinion, to a reasonable degree of psychological certainty that Taylor suffers from two mental disorders:

Pedophilia, sexually attracted to boys and girls, nonexclusive type, and Personality Disorder Not Otherwise Specified (NOS) with Antisocial and Borderline features. 2RP at 252-53. Dr. Longwell testified that Taylor's Pedophilia constituted a "mental abnormality" as defined by RCW 71.09.020. 2 RP at 265. She noted that Taylor's impulsive sexuality and pedophilic urges persisted despite his removal from his family, criminal convictions, incarceration, participation in sex offender treatment, as well as while under community supervision. 2RP at 266-79; The persistence of his pedophilic urges despite all of these changes in circumstance suggested to Dr. Longwell that Taylor has very little, if any, control over his deviant sexual urges. 2RP at 279.

Dr. Longwell also conducted a risk assessment to determine whether Mr. Taylor is likely to engage in predatory acts of sexual violence if not confined in a secure facility. Dr. Longwell used four actuarial instruments: the Static-99, the Static-2002, the Minnesota Sex Offender Screening Tool – Revised (MnSOST-R), and the Sex Offender Risk Appraisal Guide (SORAG). 2RP at 284. All of the actuarial tools placed Taylor in the highest risk category. 3RP at 339.

In addition to these actuarial tools, Dr. Longwell used a psychological test called the PCL-R that measures psychopathic personality characteristics, and reviewed Taylor's history for various other

researched risk factors not considered by the actuarials. 3RP at 334; 353-59. Dr. Longwell used these factors to determine whether there were extraneous factors that would mitigate the recidivism risk predicted by the actuarial tests. Dr. Longwell found that Taylor's failure to complete sex offender treatment, lifestyle instability, his demonstrated lack of concern for others and poor cooperation with supervision all point to the "high risk" results being accurate for Taylor. 3RP at 359. After considering all of these instruments and factors, Dr. Longwell's opined Taylor is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. 2RP at 279-80.

In his defense, Taylor presented the testimony of Theodore Donaldson, PhD and Diane Lytton, PhD. Dr. Donaldson worked briefly for the State of California conducting SVP psychological evaluations until he was fired. 3RP at 478-79. Since 1996, he has been working as a self-described "defense expert" in SVP cases. 5RP at 44. He opined that Taylor was not a pedophile because, once Taylor turned sixteen, none of his victims were five years younger than Taylor. 5RP at 3-10.

Taylor's second expert, Dr. Lytton, testified that Taylor was an honest, humble, polite young man whose offending was the product of a brain that was not fully developed at the time. 6RP at 149-51; 153; 161.

II. ISSUES PRESENTED

- A. Did the trial court correctly determine as a matter of law that Taylor's conviction for Child Molestation in the Third Degree constituted a recent overt act where Taylor was incarcerated for that conviction when the State filed the SVP petition?
- B. Was sufficient evidence presented to the jury to sustain their determination that Taylor suffers from pedophilia?
- C. Did the trial court abuse its discretion in permitting expert testimony regarding how Taylor's scores on certain risk assessment instruments compared to the scores of the offenders used to create those instruments?
- D. Did the trial court abuse its discretion in permitting cross-examination of expert witnesses that included disclosure of portions of the records they reviewed in order to form their opinions?
- E. Was the jury properly instructed as to the definition of "reasonable doubt?"
- F. Whether the above circumstances amount to cumulative error requiring reversal of the jury's verdict in this case.

III. ARGUMENT

A. The Trial Court Properly Determined That Taylor's 2004 Conviction For Child Molestation in the Third Degree Is A Recent Overt Act

Taylor argues that the trial court erred in determining that his 2004 conviction for third degree child molestation constituted a recent overt act. His argument confuses the standard of proof applicable to the ultimate factual issue for the jury - whether Taylor is currently dangerous and a sexually violent predator - with the preliminary legal issue of whether

current dangerousness must be proven at trial by a particular type of evidence; a recent overt act. The trial court properly determined that Taylor's conviction for third degree child molestation constitutes a recent overt act.

1. The State Was Not Required To Plead And Prove A Recent Overt Act Because Taylor Was Incarcerated For An Offense That Constituted A Recent Overt Act When The SVP Petition Was Filed

At an SVP civil commitment trial, the State must prove beyond a reasonable doubt that the individual is a sexually violent predator.³ RCW 71.09.060(1); *In re Young*, 122 Wn.2d 1, 13, 857 P.2d 989 (1993). "The Washington sexually violent predator statute is premised on a finding of the present dangerousness of those subject to commitment." *Detention of Henrickson v. State*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000). The statute's definition of "mental abnormality" is tied directly to present dangerousness. *Id.*⁴

In order to civilly commit an individual as a sexually violent predator, due process requires that the individual be both mentally ill and

³ A sexually violent predator is "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(16).

⁴ A mental abnormality is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

dangerous. *In re the Detention of Marshall*, 156 Wn.2d 150, 157, 125 P.3d 111 (2005). In some circumstances, such as when a person is not incarcerated when the SVP petition is filed, due process requires the State to prove dangerousness at trial through evidence of a recent overt act. *Id.* A recent overt act is “any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.” RCW 71.09.020(10).

The State is not required to prove a recent overt act in every case. If the person is living in the community on the day the State files the SVP petition, the State must prove at trial beyond a reasonable doubt that the person had committed a recent overt act. RCW 71.09.060(1); *In re Young*, 122 Wn.2d at 31. However, if on the day the State files the SVP petition, the person is incarcerated for a sexually violent offense or for an act that would itself qualify as a recent overt act, the State is not constitutionally or statutorily required to prove a recent overt act at the commitment trial. *Marshall*, 156 Wn.2d at 157, citing *Henrickson*, 140 Wn.2d at 695.

The rationale for this rule is that for incarcerated individuals, a requirement of a recent overt act under the SVP statute would create a standard which would be impossible to meet. *Young*, 122 Wn.2d at 41.

“[D]ue process does not require that the absurd be done before a compelling state interest can be vindicated.” *Id.*

Rather, when an individual is incarcerated on the day the State files the SVP petition, the question is whether the confinement is for a sexually violent act or an act that itself qualifies as a recent overt act. *Marshall*, 156 Wn.2d at 158. The inquiry as to whether an individual is incarcerated for an act that qualifies as a recent overt act is a question for the court, not a jury. *Id.* The *Marshall* court, relying on a decision by this Court, described the analysis that must be done:

[F]irst, an inquiry must be made into the factual circumstances of the individual’s history and mental condition; second, a legal inquiry must be made as to whether an objective person knowing the factual circumstances of the individual’s history and mental condition would have a reasonable apprehension that the individual’s act would cause harm of a sexually violent nature.

Id., citing *State v. McNutt*, 124 Wn. App. 344, 350, 101 P.3d 422 (2004).

Marshall and *McNutt* “make clear that whether the act resulting in confinement constitutes a recent overt act is a mixed question of fact and law decided by first looking into the factual circumstances of the offender’s history and mental condition.” *In re the Detention of Brown*, Slip Op. No. 62383-4-I at 8 (Wash. Ct. App., January 11, 2010). “Next, the trial court assesses whether an objective person with knowledge of

those factual circumstances could reasonably apprehend harm of a sexually violent nature from the act resulting in confinement.” *Id.* Here, Taylor’s act of child molestation resulted in incarceration, and the issue of whether that act constituted a recent overt act was properly submitted to the trial judge.

2. Taylor Misstates The Standard To Be Applied When By A Trial Court That Is Making A Recent Overt Act Determination

Taylor argues that the acts which led to his third degree child molestation conviction fails to satisfy the *Marshall/McNutt* standard because “none of these [factual] circumstances [relied upon by the court] demonstrate that Taylor’s crime was functionally the equivalent of a sexually violent offense, nor does it show that Taylor was essentially “interrupted” while attempting to commit a sexually violent offense.” App. Brief at 39 (emphasis added). Taylor’s argument fundamentally misstates what must be established in order for a trial court to conclude that a certain act, or set of acts, constitutes a recent overt act.

“On the contrary, the question is whether an objective person familiar with the person’s mental health and offense history would reasonably fear harm. The act or threat itself need not be dangerous.” *Id.* (citing *In re the Detention of Hovinga*, 132 Wn. App. 16, 130 P.3d 830 (2006); *In re the Detention of Broten*, 130 Wn. App. 326, 122 P.3d 942

(2005); *In re the Detention of Albrecht*, 129 Wn. App. 243, 252, 118 P.3d 909 (2005), *review denied*, 157 Wn.2d 1003, 136 P.3d 758 (2006)).

Here, the evidence considered by the trial court at the ROA hearing included the August 28, 2005 “Sexually Violent Predator Evaluation” of Taylor that was authored by Dr. Longwell. CP at 164-203. That evaluation included a comprehensive review of Taylor’s life history. Dr. Longwell also conducted a three hour interview of Taylor. CP at 164. During the interview, Taylor offered the following explanation of the acts constituting his third degree child molestation:

About a year and a half out of prison, Mr. Taylor said that he was with a girl he had been with before for sex. They resumed their relationship after she was away a few months. In November of 2001, they resumed dating. He had known her since 2000. (The reader might note that Brittani was 13-years-old in 2000.) Her name is Brittani. She was 14 the first time they had sex and he was 19. There were 4 ½ years difference between them. He knew her age but that he could “slide by” because she would soon be 15 even though he knew it was illegal.

CP at 185 (parenthetical information in original).

In her report, Dr. Longwell also discussed Taylor’s participation in a sex offender treatment program while he was incarcerated for his third degree child molestation offense. She noted the following passage from his treatment records:

Mr. Taylor does not appear to have much of a conscience claiming never to have experienced shame. He sees

himself as an innocent victim of injustice. Mr. Taylor shows no sense of responsibility and lacks self-control and insight. He was noted to “present with a great deal of entitlement in seeking instant gratification” for his sexual needs. He is sexually promiscuous and preoccupied with sensuous pleasures. He appears to have no regret, remorse or guilt. On the contrary, Mr. Taylor appeared to take pride in rule breaking.

CP at 193.

Dr. Longwell compared that statement to Taylor’s statements to her during her interview. The question of whether this behavior constituted a recent overt act was answered by Taylor’s own statements during Dr. Longwell’s evaluation. Although it appears that Taylor gained some understanding of his potential risk factors, it is clear from his statements to Dr. Longwell that his victimization of children is likely to continue. Regarding a sexual interest in children, Taylor stated:

Mr. Taylor said that he does not think he will molest children again. He cannot say he never will. He said that severe depression or feeling afraid would be risk factors to his re-offending. ... He said he could “possibly” molest children if under a lot of stress.

CP at 187.

The appropriate test of the trial court’s ruling in this case is whether Taylor’s behavior would instill reasonable apprehension in an objective person aware of his history and condition. This testimony easily passes that test. Here, the court received evidence that Taylor committed a

sex offense against someone significantly younger than he was, and that he did so while knowing that he would be in serious trouble if caught. Taylor engaged in this conduct knowing it violated conditions of release, and that indicates his continued inability to control his pedophilic urges, making it likely that he would reoffend. Taylor had also been diagnosed as suffering from Pedophilia and Antisocial Personality Disorder and a Personality Disorder with Antisocial and Borderline Features. CP at 194.

Within approximately two years of his release, he was arrested for third degree child molestation. While in the community, he lied to his CCO and treatment provider about his sexual deviancy and hid the fact that he had been having sex with underage girls. Because Taylor was lying to his CCO and therapist about his escalating sexual deviance, there were no external barriers to stop him from reoffending. In light of Taylor's offense history, his diagnosed pedophilia, and his lack of remorse or insight about his offenses against children, his conduct creates a reasonable apprehension in the mind of an objective person familiar with his mental condition and offense history that he is likely to commit future harm of a sexually violent nature. The trial court properly considered the circumstances of the crime together with other factual circumstances of Taylor's history and mental condition in order to conclude that his

possession of child pornography constitutes a recent overt act. Therefore, Taylor's claim is without merit.

B. SUFFICIENT EVIDENCE THAT TAYLOR SUFFERS FROM PEDOPHILIA WAS PRESENTED TO THE JURY

Taylor argues that Dr. Longwell's trial testimony that he suffers from pedophilia was not supported by "substantial evidence." His argument employs the wrong legal standard, and is also belied by the record. For those reasons, Taylor's civil commitment should be affirmed.

1. Taylor's Claim Should Be Judged According To A Sufficiency Of Evidence Standard, Not The "Substantial Evidence" Standard He Proposes

Citing *In re the Detention of Halgren*, 156 Wn.2d 795, 132 P.2d 714 (2006), Taylor argues that the pedophilia diagnosis must be supported by "substantial evidence." Appellant's Brief at 41. However, as Taylor points out in his briefing, this was not an alternative means case. *Id.* Although the jury instructions refer to both "mental abnormality, specifically pedophilia" and "personality disorder," all of the evidence and argument presented at trial described Taylor's pedophilia at the basis for his civil commitment. Thus, Taylor is misapplying the *Halgren* "substantial evidence" standard, and his claim should instead be reviewed as a challenge to the *sufficiency* of the pedophilia evidence received by the jury.

When sufficiency of the evidence is challenged, the evidence is viewed in the light most favorable to the State to determine if it could permit a rational trier of fact to find the essential elements beyond a reasonable doubt. *In re the Detention of Broten*, 130 Wn. App. at 334 (citing *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003)). A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom. *Id.* at 334-335 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Circumstantial evidence is as reliable as direct evidence. *Id.* (citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). The appellate court defers to the trier of fact regarding witness credibility, conflicting testimony, and the persuasiveness of the evidence. *Id.* (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

2. The Record Contains Sufficient Evidence To Support Dr. Longwell's Pedophilia Diagnosis

a. The DSM IV-TR Pedophilia criteria are not meant to be used rigidly as Taylor suggests

Regardless of the standard employed, the record is replete with evidence that Taylor suffers from pedophilia. Throughout Taylor's trial, reference was made to the pedophilia criteria found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition – Text Revision

(DSM IV-TR). In his briefing, Taylor correctly states those criteria as follows:

- Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
- The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.
- The person is at least age 16 years and at least 5 years older than the child or children referenced in the first criterion.

Ex. 31.

However, what Taylor neglects to mention while arguing that these criteria are not met, are the numerous cautionary instructions regarding the use application of DSM IV-TR diagnoses. Nearly all of these cautions allude to the obvious difficulties that clinicians necessarily face when attempting the complicated task of classifying a person's mental make up.

For example,

The specific diagnostic criteria included in the DSM-IV are meant to serve as guidelines to be informed by clinical judgment and are not meant to be used in a cookbook fashion. For example, the exercise of clinical judgment may justify giving a certain diagnosis to an individual even though the clinical presentation falls just short of meeting the full criteria for the diagnosis as long as the symptoms that are present are persistent and severe.

DSM IV-TR at xxxii.

The specified diagnostic criteria for each mental disorder are offered as guidelines for making diagnoses, because it has been demonstrated that the use of such criteria enhances agreement among clinicians and investigators.

The proper use of these criteria requires specialized clinical training that provides both a body of knowledge and clinical skills.

Id. at xxxvii.

Regarding sexual disorders such as pedophilia, which are broadly categorized as “paraphilias,” specific information outside the diagnostic criteria is provided that specifically implicates Taylor’s circumstance.

Certain of the fantasies and behaviors associated with Paraphilias may begin in childhood or early-adolescence but become better defined and elaborated during adolescence and early adulthood. ... The disorders tend to be chronic and lifelong, but both the fantasies and behaviors often diminish with advancing age in adults. The behaviors may increase in response to psychological stressors, in relation to other mental disorders, or with increased opportunity to engage in the Paraphilia.

Id. at 568.

Finally, the DSM IV-TR also provides specific information about pedophilia. Again, the description tends to identify many attributes of Taylor’s case.

The disorder *usually begins in adolescence*, although some individuals with Pedophilia report that they did not become aroused by children until middle age. The frequency of pedophilic behavior often fluctuates with psychosocial stress. The *course is usually chronic, especially in those attracted to males.*⁵

⁵ It should be noted that Taylor has a history of molesting male relatives that as young as three years old when the molestation occurred. Consequently, Dr. Longwell’s pedophilia diagnosis included the qualifying language “sexually attracted to males and females.” 2RP at 253.

DSM IV-TR at 571.

For individuals in late adolescence with Pedophilia, *no precise age range is specified*, and clinical judgment must be used; both the sexual maturity of the child and the age difference must be taken into account.

Id. (emphasis added).

In his argument, Taylor does precisely what the DSM IV-TR instructs not be done. He is using the diagnostic criteria for pedophilia in a “cookbook” fashion, and refusing to look at the evidence as a whole. Dr. Longwell made it clear during her testimony that she was following accepted DSM diagnostic procedures. *See e.g.* 3RP at 433 (“[J]ust to be very clear, that the authors of this section of the Diagnostic and Statistical Manual of Mental Diseases state that these are guidelines. These are not hard and fast rules.”). Dr. Longwell’s approach to diagnostic procedure is also in accord with the courts’ view of such matters. *See e.g. In re the Detention of Young*, 122 Wn.2d at 56 (“The sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable cause and effect relation petitioners seek, the level of acceptance is sufficient to merit consideration at [an SVP] trial.”)

In contrast, because Taylor refuses to acknowledge these details as well as the realities of dealing with the human condition, his argument fails.

b. When the record is viewed in its entirety, Dr. Longwell's pedophilia diagnosis is well and obviously supported

It is undisputed that Taylor's childhood and early adolescence are defined by his sexual abuse of six of his younger siblings and three younger cousins on hundreds of occasions. The age difference between Taylor and his victims ranged between three and ten years. Ex. 12. All told, he molested four female and five male child relatives. *Id.* With one exception, the sexual abuse of these family members occurred before Taylor turned sixteen years old. However, once sixteen, Taylor did continue to molest his twelve year old sister when he had the opportunity despite having been removed from the family home by that time. 3RP at 232. Taylor now asks that this information be ignored, and the analysis only include events that occurred after he turned sixteen, and involved children five or more years younger than he is. Appellant's Brief at 43. To so ignore the unbelievable events of Taylor's developmental years is unsound, and this Court should not accept Taylor's invitation to do so.

With Taylor's adolescence as background information, and with the DSM IV-TR instructions in mind, Dr. Longwell applied the pedophilia

diagnostic criteria to Mr. Taylor's case. She noted a detailed description of a sexual encounter with a thirteen year old girl that Taylor wrote while in a prison sex offender treatment program at age 22.⁶ 2RP at 257. In addition, a physiological test result that showed Taylor was sexually aroused to a picture of a young child was considered. *Id.* Also, immediately after undergoing the test, Taylor stated that he wasn't surprised by the results, and that the photo of the young child sexually aroused him. 3RP at 459-460. In the end, Dr. Longwell determined that it was his behavior in the community after turning sixteen that was most reflective of Taylor's sexual disorder, stating,

In addition, while he is out in the community, he is gravitating towards younger and younger persons. Even though he is involved throughout the time he is out in the community with a large range of people, he likes looking younger. It allows him to be able to gain contact with younger people. He really is gravitating towards the younger ones. And there are indications that that is really where his primary interest is gravitating towards. Not his only interest but he's gravitating toward it.

3RP at 459-460.

In this regard, Taylor told Dr. Longwell that he was having sexual contact with people as young as 14 years old. 2RP at 256. Taylor's

⁶ Although Taylor claims the sexual encounter did not actually happen, the level of detail provided in the description he wrote suggests that a significant amount of time was spent thinking about this sexual encounter, whether it occurred or not. 3RP at 408-409. At the very least, the incident can be described as an example of Taylor fantasizing about pedophilic sex.

inability to refrain from associating with children persisted despite the detachment from his own family, the violations of probation, and the incarceration that it had caused him. 2RP at 259. This inability to pursue an age appropriate lifestyle is strong evidence of pedophilia, and exemplifies the strength of Dr. Longwell's analysis.

Dr. Longwell's diagnosis was also consistent with the factual testimony of the other witnesses at trial. Scott Zankman, who had previously evaluated and treated Taylor, noted that even after being caught by his parents, Taylor would continue to molest his younger siblings once supervision was relaxed because, in Taylor's words, "he craved it." 2RP at 142. Using a psychological test, Mr. Zankman determined Taylor was minimizing the impact that his sex offending had on his siblings. 2RP at 148. Although Taylor was noted to have made some progress in treatment, Taylor was not always open with Mr. Zankman about things such as his whereabouts, who he was spending his time with, what he was doing. 2RP at 156. It was "a pattern" for Taylor to lie to Mr. Zankman during treatment. 2RP at 182. Mr. Zankman testified that Taylor often spent time with friends at a nearby bus station which was a concern because some of the kids in the group were twelve or thirteen years old. 2RP at 188. In addition, while in treatment, Taylor was caught hanging out in the children's section of the public library despite previously being

told that he was not allowed to be there. 2RP at 157. Taylor was unable to finish treatment with Mr. Zankman because he was arrested for Child Molestation in the Third Degree. 2RP at 190.

Gary Smith treated Taylor after he had been removed from his family home due to his molestation of his siblings. During that time, Mr. Smith noted that Taylor was blaming his sister and mother for his offending, and seemed to still “have a crush” on his sister Deborah. Ex. 15 at 22. He spent a lot of time in his own fantasy world, and for Taylor, this was often sexual fantasy. Ex. 15 at 23. Taylor also appeared to Mr. Smith to be minimizing his potential for future offenses. *Id.* Finally, while in treatment with Mr. Smith, Taylor to a local library and used the account number from a stolen check to access pornography on the library computer. Ex. 15 at 33-34.

The jury also viewed the videotaped deposition testimony of Pauline Bartley, Taylor’s counselor at the Naselle Youth Camp. Ms. Bartley reported that Taylor exposed his genitals to Naselle staff on multiple occasions despite being told to stop. Ex. 18 at 12-3. For the first time, and after being in treatment with Mr. Smith and evaluated by Mr. Zankman, Taylor disclosed molesting two younger male cousins, each cousin was five years old at the time. Ex. 18 at 18-20. Ms Bartley was also concerned when Taylor informed her that he

had a peer aged girlfriend during part of the time he was victimizing younger siblings. Taylor told Ms. Bartley that he was choosing sex with his young siblings over sex with his peer aged girlfriend because, according to Taylor, he respected the girlfriend too much. Ex. 18 at 24. Finally, Mr. Bartley noted that at age seventeen, Taylor was continuing to fantasize about one of his sisters whom he had not seen since she was twelve. Ex. 18 at 25-6.

Dr. Longwell's diagnosis was strongly supported by the overwhelming evidence that Taylor is an extremely sexually disordered individual with pedophilic interests. Those interests have persisted his entire life, and he has consistently failed to intervene or deal with them. For all of these reasons, Taylor's civil commitment should be affirmed.

C. THE ADMISSION OF TAYLOR'S PERCENTILE RANKING ON VARIOUS RISK ASSESSMENT INSTRUMENTS WAS NOT AN ABUSE OF DISCRETION

Taylor argues that the trial court erred in permitting Dr. Longwell to testify about how Taylor's scores on the actuarial instruments she used in her risk assessment compared to the scores of the hundreds of sex offenders that were used to develop and test those instruments. Put another way, Taylor argues that the trial court abused its discretion when it allowed his percentile ranking on the actuarial instruments into evidence. One of the central issues at trial was whether or not Taylor is likely to

commit a sexually violent offense if not confined to a secure facility. RCW 71.09.020(15); .060(1). Thus, Dr. Longwell was properly permitted to testify regarding all of the statistical information she utilized when conducting her risk assessment of Mr. Taylor.

The results of actuarial analyses have long been discussed in SVP trials, and their use at trial assessed under ER 702 and ER 703. *In re the Detention of Thorell*, 149 Wn.2d 724, 756, 72 P.3d 708, 725 (2003). ER 702 provides: “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Admissibility of expert testimony under ER 702 is within the trial court’s discretion. *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003) (citation omitted).

Here, Dr. Longwell testified that there are two ways of quantifying the results of actuarial analysis – by “percentile rank,” and by “risk range.” 2RP at 291, 294-5.⁷ With regard to Taylor, she relayed each of the two results to the jury. She described the percentile ranking as being similar to the type of result seen in standardized tests that students take in school.

⁷ Taylor does not challenge the admissibility of “risk range” information on appeal.

Dr. Longwell described the ranking as a way to quantify the result by looking at “how many people scored lower than [Taylor], [and] how many scored above him.” 2RP at 291. The use of this ranking is not unique to Dr. Longwell. Rather, the developers of the actuarial instruments she used provide the percentile ranking information, and recommend that it be used to assist in explaining the test results. *See Helmus, Hanson & Thornton, Reporting Static-99 in Light of New Research on Recidivism Norms, Association for the Treatment of Sexual Abusers: The Forum, Vol. 21, 38, 43-44 (Winter 2009).*⁸

Interestingly, Taylor does not challenge the same type of information when used to explain the score Dr. Longwell gave him on the Psychopathy Checklist-Revised (PCL-R), a test of psychopathic personality characteristics. Consider Dr. Longwell’s explanation of Taylor’s score of 25 on that test:

Well, a score of 25, if we compare Mr. Taylor to other people in prison, other inmates, in North America, his -- a score of 25 would fall in the 62.1 percentile. So again, this means that if you consider the 50th percentile average, he would have more much psychopathy than the average prison inmate, but then there is some 38 percent who scored higher than him. So he is certainly not -- would not be considered in the very high risk range or a full-blown, very dangerous psychopath.

⁸ Complete copy attached as Appendix A to this Response.

3RP at 350.

Since the analysis is identical to that used with the actuarial instruments, one can only assume does not challenge this PCL-R percentile ranking testimony because it suited his case better than the other percentile information heard by the jury. Nonetheless, Taylor cannot pick and choose for the jury what portions of Dr. Longwell's risk assessment should be considered. Rather, and as noted by the trial court in its ruling, "The doctor is clearly entitled to rely on any information that an expert in her field would normally rely on in reaching the opinion that she has reached. And she is also able to tell the jury what information it is that she relied on in reaching that opinion." Dr. Longwell's testimony regarding the various percentile rankings produced by Taylor's testing falls in to this category of information, and was properly admitted at trial. For these reasons, Taylor's appeal should be denied.

D. WHETHER EVIDENCE PROVIDED TO EXPERT WITNESS WAS RELIED UPON MAY BE DETERMINED DURING CROSS-EXAMINATION

Taylor argues that the trial court erred in permitting the use of records received and reviewed by his experts during their cross examination. Specifically, he argues that certain records used during cross examination were inadmissible hearsay. The scope of redirect or cross-

examination lies within the trial court's discretion and will not be disturbed absent a manifest abuse of discretion. See *State v. Descoteaux*, 94 Wn.2d 31, 39, 614 P.2d 179 (1980), overruled on other grounds by *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982).

Further, ER 705 provides that an expert who offers an opinion may be required to disclose the underlying facts or data upon which that opinion is based during cross-examination. Otherwise inadmissible evidence may be admissible to explain the expert's opinion or to permit the jury to determine what weight it should be given. *Group Health Coop. of Puget Sound, Inc. v. Department of Rev.*, 106 Wn.2d 391, 400, 722 P.2d 787 (1986). "The evidence rules clearly envision experts' reliance on hearsay ... and leave to the other party 'the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness....'" *Cornejo v. State*, 57 Wn. App. 314, 325-26, 788 P.2d 554 (1990) (quoting 5A Karl B. Tegland, *Washington Practice* § 313, at 488 (1989)). These concepts have been applied in previous SVP cases. See e.g. *In re the Detention of Marshall*, 156 Wn.2d at 162-3.

Here, Taylor offered the testimony of two expert witnesses at trial – Dr. Theodore Donaldson and Dr. Diane Lytton. Both experts testified that they read and utilized the all of the records and reports produced concerning Taylor before formulating their respective opinions. For

example, when asked about his SVP evaluation procedures, Dr. Donaldson stated,

Well, the first thing I do is read the record. I'm usually in a fortunate position of doing the evaluation after the State has already had at least one evaluation. So they have had a psychologist who has already interviewed the person, reviewed the file, and I have all their notes. I have all their discussion with the clients. Usually a case history is at least two reports in the file. I don't have to do a case history.

3RP at 484-5.

Similarly, Dr. Lytton testified that she received all the "typical kind of documents," and read all of what she estimated was 900 to 1,000 pages. 3/24/09 RP at 134. She said that doing so was "a standard part of [her] evaluation." *Id.* at 134-5. Now, Taylor claims that the trial court abused its discretion in permitting the use of some of those records during cross-examination. With regard to Dr. Donaldson's cross-examination, the specific portions of the record that Taylor appears to be objecting to on appeal are as follows:

- Documents related to Taylor's time in treatment while serving his SSODA sentence for molesting his siblings; authored by Gary Smith. Via videotaped deposition, Dr. Smith testified and was subject to cross-examination at Taylors SVP trial.

- The presentence investigation report pertaining to Taylor's 2002 conviction for Child Molestation in the Third Degree; authored by Department of Corrections Personnel.
- Records from the sex offender treatment program (SOTP) Taylor attended while serving the sentence for his 2002 conviction; authored by Robert Alvord who passed away prior to Taylor's SVP trial. 6RP at 79.

On direct examination, Dr. Donaldson testified at length about Taylor's time in SOTP, and what he perceived to be a problematic relationship between Taylor and Robert Alvord, Taylor's primary treatment provider. He called their relationship "terrible," and opined that from "reading the treatment notes and the treatment summary, his relationship was totally different than it was with either Smith or Zankman or Bartley." 2/23/09 RP at 20-21. Obviously, Dr. Donaldson was relying upon the notes, reports and records generated by all of those various treatment providers when forming his opinions about Taylor. Thus, the content of those records were certainly appropriate for discussion during cross-examination.

Regarding the presentence investigation report, Dr. Donaldson testified at length about Taylor's third degree child molestation, and why, in his opinion, the act did not constitute pedophilic behavior. 5RP

at 5, 18. Also, Dr. Donaldson was unconvinced that Taylor had a personality disorder; instead describing Taylor as well behaved and considerate of his victims' feelings. 5RP at 29-30; 6RP at 51-52. As seen in the portions of the presentence investigation Taylor excerpts in his briefing, the records Dr. Donaldson reviewed are in direct conflict with those opinions. Specifically, the report noted that Taylor was routinely violating the conditions of his parole by associating with minors and using drugs. Because Dr. Donaldson reviewed the presentence investigation report, and that report contradicted his opinions, it was not an abuse of discretion to permit the use of that document during cross-examination.

Taylor also claims that the cross-examination of Dr. Lytton was improper. He specifically notes three portions of the record:

- Questioning regarding a quarterly treatment evaluation authored by Dr. Gary Smith.
- Documents related to Taylor's time in treatment with Scott Zankman while on probation after serving his SSODA sentence for molesting his siblings; authored by Mr. Zankman. Mr. Zankman testified and was subject to cross-examination at Taylor's SVP trial
- Records from SOTP authored by Robert Alvord.

A primary focus of Dr. Lytton's testimony was to challenge the score that Dr. Longwell gave Taylor on a psychological test called the

PCL-R. 6RP at 135; 155-161; 187-91. As previously noted, the PCL-R measures the degree to which an individual's personality exhibits psychopathic qualities. The test requires its administrator to determine whether the person meets such criteria as being glib or superficially charming, sexually promiscuous, or a pathological liar. During her testimony, Dr. Lytton stated that Taylor did not meet the PCL-R's pathological liar requirement, and went as far as to describe Taylor as "honest." 6RP at 153.

Dr. Lytton's characterization of Taylor has particular significance here as the cross-examination he complains of was solely related to a discussion of records reviewed by Dr. Lytton that were completely contrary to her opinion of Taylor's veracity. Rather, time and again, the records described Taylor as "thinking he could fool everyone," a "skilled" liar, or "deceitful, showing little concern when caught in a lie." 6RP at 194-197. Clearly, permitting discussion of those records was not an abuse of discretion given the stark contrast between those documents and Dr. Lytton's trial testimony.

Both experts stated that they reviewed the documents that were used during cross-examination, as well as the rest of the documents in the record, for the purpose of formulating their opinions about Mr. Taylor. Those opinions ranged from such matters as Taylor being an "honest,"

“humble,” “well-behaved” young man, to general belief that young, unsupervised children being prone to sexually “fooling around,” to Taylor not suffering from any mental disorder. “An opposing party has the right to attack the credibility of an expert witness by exposing weaknesses in the expert’s credentials or in the information upon which the expert’s opinion is based. An expert may likewise be impeached by a showing of bias, prior inconsistent statements, reputation for untruthfulness, contradiction, or any of the other methods available to impeach a lay witness.” 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence* § 705.10, at 386-87 (2009). Given the breadth of subject matter covered by Drs. Donaldson and Lytton, and their professed familiarity with Taylor’s recorded history, it was not an abuse of discretion for the trial court to permit records-based cross-examination where the information reviewed was not offered as substantive evidence. Thus, Taylor’s civil commitment should be affirmed.

E. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE DEFINITION OF “REASONABLE DOUBT”

Taylor claims that the trial court erroneously instructed the jury as to the definition of reasonable doubt by referring to the SVP case against him as “the charge” in that instruction. In this case, the trial court’s reasonable doubt instruction read:

The State has the burden of proving beyond a reasonable doubt **that James Taylor is a sexually violent predator**. James Taylor has no burden of establishing that a reasonable doubt exists.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth **of the charge**, you are satisfied beyond a reasonable doubt.

CP at 17 (emphasis added).

The above instruction is a verbatim rendition of one of the alternatives proposed in WPI 365.11. It also immediately follows the instructions that define the term “sexually violent predator,” and sets forth the elements of that definition that the State must prove in order to establish that Taylor is a sexually violent predator. CP at 15-16. Nonetheless, Taylor claims that “the charge,” as stated in the above instruction invites the jury to speculate that all the state needed to prove in this case was that Taylor had been committed of some criminal offense at some time in the past.

On appeal, alleged errors of law in jury instructions are reviewed de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions are proper when, as a whole, they accurately state the law, do not mislead the jury, and permit both parties to argue their respective theories of the case. *State v. Reed*, 150 Wn. App. 761, 770, 208 P.3d 1274

(2009) (citing *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004)). A reviewing court looks to the cumulative legal accuracy and sufficiency of all the instructions given. *State v. Peterson*, 35 Wn. App. 481, 486, 667 P.2d 645 (1983) (approving jury instruction based on a subsequently clarified pattern instruction because “the instructions, when read as a whole, accurately informed the jury” of the applicable law). Even if an instruction is erroneous, we will not reverse unless the party asserting error meets its burden of establishing consequential prejudice. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994). Only errors prejudicial to the outcome of the trial warrant reversal. *Peterson* at 486.

To that end, so long as the court instructs the jury on the necessity that the State’s case be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof. *Taylor v. Kentucky*, 436 U.S. 478, 485-86, 98 S.Ct. 1930, 1934-35, 56 L.Ed.2d 468 (1978). Rather, “taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.” *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954).

Here, Taylor’s reading of jury instruction number six is strained, and without context. Not only does the first sentence of that very instruction plainly tell the jury that the State must prove beyond a

reasonable doubt that Taylor “*is a sexually violent predator,*” but the immediately preceding instruction does likewise. *See* CP at 15-17. In addition, the verdict form asked the jury whether they believed Taylor had been proven to meet the sexually violent predator definition, not whether he had committed a crime. CP at 9. For all of these reasons, Taylor’s argument is without merit and should be rejected.

F. THE CIRCUMSTANCES DISCUSSED ABOVE DO NOT AMOUNT TO CUMMULATIVE ERROR REQUIRING REVERSAL

Mr. Taylor contends that the cumulative error doctrine mandates reversal in this case. Under this doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a fundamentally unfair trial. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). The cumulative error doctrine only applies when there are numerous prejudicial and egregious errors during trial. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). Where the claims of error are “largely meritless,” reversal is not warranted. *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13, 33 (2006). Given these standards, and the above discussion of Mr. Taylor’s claimed errors, the cumulative error doctrine does not apply to this case. Therefore, reversal is not required.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Taylor's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 22nd day of January, 2010.



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APPENDIX A

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Reporting Static-99 in Light of New Research on Recidivism Norms

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Static-99 (Hanson & Thornton, 2000) is a 10-item actuarial risk assessment scale designed to predict sexual and violent recidivism in male adult sexual offenders. It is the most widely used risk assessment tool for sexual offenders (Archer et al., 2006; Jackson & Hess, 2007; McGrath, Cumming, & Burchard, 2003) and also the most widely researched, with 63 replications demonstrating, on average, moderate predictive accuracy (ROC = .68, Hanson & Morton-Bourgon, in press).

Total scores on Static-99 can be translated to relative risk categories (low, moderate-low, moderate-high, and high) and each score is associated with an estimated probability of recidivism, developed based on survival analysis from three samples ($n = 1,086$). Although the ability of Static-99 to rank relative risk has received considerable support, there has been much less research examining the stability of the absolute recidivism rates. The vast majority of offenders used to derive the original Static-99 recidivism estimates were released in the 1960s, 1970s, and 1980s. Given the broad cultural changes during the past 40 years, it is important to consider whether the recidivism rates of sexual offenders have remained the same during that time.

Crimes rates peaked in the early 1990s and have been generally declining since then. This trend has been found for both violent and property offences in Canada (Public Safety Canada, 2007) and the United States (Federal Bureau of Investigation, 2007), using both official crime data as well as victimization surveys (Bureau of Justice Statistics, 2006). Sexual offences appear to be no exception. Declines have been observed in the rates of forcible rape (Federal Bureau of Investigation, 2007), clergy sexual abuse (Terry, 2008), and child sexual abuse measured both by substantiated cases as well as victimization surveys (for a summary, see Finkelhor & Jones, 2006; Jones & Finkelhor, 2006). Recent data from Minnesota ($n = 1,782$; Minnesota Department of Corrections, 2007) show a dramatic decline in three-year rates of sexual rearrest, reconviction, and reincarceration.

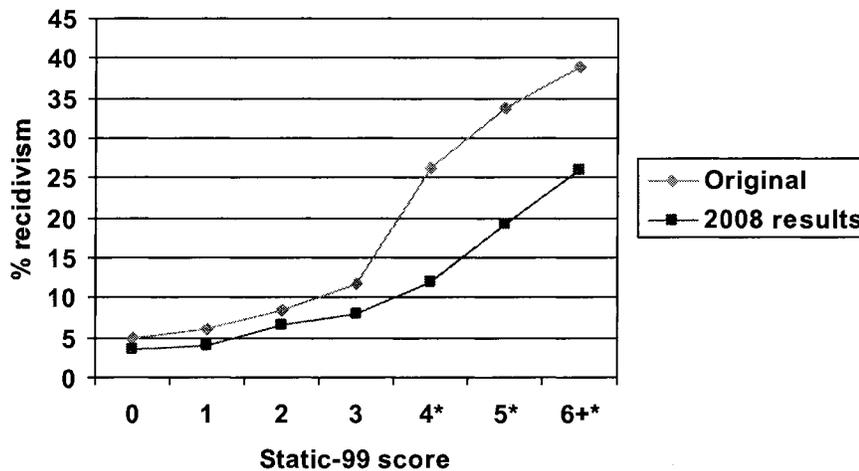
Experts have yet to come to a consensus concerning the reasons for the decline; although, it is unlikely that a single factor is responsible. Possible explanations that have been proposed include demographic factors (e.g., aging population, increased obesity, reliance on medications such as Prozac or other serotonin-affecting agents), cultural factors (e.g., changing mores regarding sexuality, increased awareness about sexual assault leading to greater vigilance and supervision of children), and criminal justice system factors (e.g., offender treatment, increased supervision, deterrent/incapacitation effects of longer sentences—for a summary, see Finkelhor & Jones, 2006).

Evidence of declining crime rates leads to two important, but distinct areas of research: one examining the causes of changing crime rates, and the other examining how changes affect best practices in offender assessment, management, and supervision. Even without understanding the reasons for the change, the evidence of change forces evaluators to adjust their practice.

Currently, we are in the process of examining the extent to which the original norms apply to recent samples. So far, we have collected datasets from 28 Static-99 replications, of which 18 have been cleaned and merged ($n = 6,774$). Of the 18 samples, 8 are Canadian ($n = 2,271$), 4 are from continental Europe ($n = 2,416$), 4 are from the United States ($n = 1,028$), and one each are from New Zealand ($n = 493$) and the U.K. ($n = 198$). Of 16 datasets with information on year of release ($n = 6,114$), 90% of offenders were released in 1990 or later, representing much more current samples than those used in the original Static-99 norms.

Figure 1 displays five-year sexual recidivism rates (generated through survival analysis) of the new samples ($n = 6,406$) and the original Static-99 samples ($n = 1,086$). For each Static-99 score, recidivism rates are lower in the new sample, and the difference is particularly meaningful for scores of 4+. Cox regression analyses found that, in the new samples, sexual recidivism was two-thirds (66%) the rate of the original samples. When we controlled for Static-99 scores, the difference increased, with offenders in the current samples showing 59% the rate of sexual recidivism as compared to offenders in the original samples. In both analyses, the difference was significant.

Figure 1: Five-year sexual recidivism rates for Static-99 based on survival analysis



For violent (including sexual) recidivism, after controlling for Static-99 scores and offender type (rapist versus child molester), Cox regression found that violent recidivism rates were significantly lower in the current samples as compared to the original samples, with offenders in the newer samples showing approximately 73% the violent recidivism rate of offenders in the original samples ($n = 5,192$).

Our basic conclusions and recommendations

Sexual and violent recidivism rates per Static-99 score are significantly lower in our data than they were in the samples used to develop the original Static-99 norms (reported in Harris, Phenix, Hanson, & Thornton, 2003). Even though we have yet to finish our analyses, the evidence is sufficiently strong that we believe the new norms should replace the original norms. Compared to the original norms, the new norms are based on more offenders, more complete data, and more recent, representative samples.

How to use the new norms

Unfortunately, updating the Static-99 norms is not as simple as substituting new numbers into the recidivism tables. In our samples, we found significant differences in recidivism rates within the same Static-99 score. Controlling for Static-99 scores, the sexual recidivism rate from five samples of “routine” prison cases from the Correctional Service of Canada (CSC) was approximately 41% of the sexual recidivism rate observed in five samples “preselected” to be high risk ($n = 2,522$; see below for an explanation). A similar effect was found for violent recidivism, with routine CSC offenders showing approximately 54% of the violent recidivism rate of offenders from the preselected high-risk samples ($n = 2,490$). Additionally, child molesters showed approximately 62% of the violent recidivism rate compared to rapists, when controlling for Static-99 scores ($n = 4,256$).

The finding of substantial differences in recidivism within each Static-99 score necessitates further discussion of the two sample types we examined. CSC administers Canadian prison sentences of two or more years, while offenders receiving sentences of less than two years are managed by the respective provincial correctional system. During the 1990s, when the offenders in the CSC samples were incarcerated, CSC offered numerous treatment programs based on principles that are known to be effective in reducing criminal recidivism (Risk-Need-Responsivity—Andrews & Bonta, 2006), and the typical offender would have participated in multiple programs (both general and sexual offender programs). Most CSC offenders would also have been supported through a gradual re-integration into the community by parole supervision and human service programming.

The “preselected” high risk samples typically consisted of offenders who had been judged by some administrative or decision-making body or tribunal to be of sufficiently high risk to warrant exceptional measures (e.g., treatment order, preventive or indefinite detention, denial of statutory release). The factors considered in making these determinations are not fully known and would vary across samples; however, it would be expected that factors external to Static-99 were considered (e.g., recent antisocial behaviour, self-reported sexual deviancy, resistance to treatment, increased presence of salient dynamic risk factors) along with factors already included in Static-99 (e.g., number of prior sexual offence convictions).

Differences in recidivism within each Static-99 score on the basis of sample type and offender type suggest that evaluators can no longer, in an unqualified way, associate a single Static-99 score with a single recidivism estimate. Instead, each Static-99 score is associated with a range of recidivism estimates, and evaluators must make a separate judgment as to where a particular offender lies within that range. This new conceptualization of recidivism norms forces evaluators to consider factors external to the risk scale. Although the best method of considering these external factors is as yet unknown, there are several factors worth considering in this decision. These factors include the risk-relevant characteristics of the population from which the

offender is selected (as described above), as well as risk-relevant characteristics of individual offenders.

Currently, our recommendation is to report recidivism estimates with the new norms in two stages. The first stage involves reporting an empirically-derived range of recidivism risk. The recidivism estimates from the CSC samples represent the lower bound of the range and the preselected high-risk samples are the upper bound of the range. Tables 1 and 2 provide the five and ten-year sexual and violent recidivism estimates for both sample types. The second stage involves making a professional judgment as to where a particular offender is likely to fall within that range. This judgment represents a separate task from reporting the empirical recidivism rates; currently, there is no research to assess how well evaluators are able to make this judgment. Until further research is conducted, however, this professional judgment is unavoidable. It is also important to note that regardless of the evaluator's opinion of which sample the offender most closely resembles, recidivism rates of both samples should be reported in all cases. Although reporting absolute recidivism rates as a range may appear less precise, it is likely more realistic given that predicting behavior was likely never as simple as associating a single number with a single Static-99 score.

Table 1: Static-99 sexual recidivism table

Static-99 Score	5 Year Sexual Recidivism (%)		10 Year Sexual Recidivism (%)	
	Routine CSC Samples	Preselected High Risk Samples	Routine CSC Samples	Preselected High Risk Samples
0	2.3	8.3	1.8	13.0
1	3.2	10.3	2.6	15.8
2	4.3	12.8	3.9	19.1
3	5.7	15.7	5.7	23.0
4	7.7	19.1	8.2	27.3
5	10.2	23.1	11.8	32.1
6	13.4	27.7	16.7	37.3
7	17.4	32.7	23.0	42.8
8	22.3	38.2	30.8	48.5
9	28.2	44.0	39.8	54.3
10+	34.9	50.0	49.7	59.9
Total N*	752	1,163	342	735

**N is the total sample size used in the logistic regression analysis to generate predicted recidivism values. It is not the sample size with a particular Static-99 score. This is because logistic regression uses information on the relationship between Static-99 and recidivism in the complete dataset to generate predicted values.*

Note: Some of the 10-year CSC rates are lower than the 5-year rates due to sampling error (not all of the offenders in the 5-year sample were followed for the full 10 years).

Table 2: Static-99 violent recidivism table

Static-99 Score	5 Year Violent Recidivism (%)		10 Year Violent Recidivism (%)	
	Routine CSC Samples	Preselected High Risk Samples	Routine CSC Samples	Preselected High Risk Samples
0	8.5	16.5	8.5	25.5
1	10.8	20.0	11.4	29.5
2	13.6	24.1	15.1	33.8
3	17.0	28.6	19.7	38.4
4	21.1	33.7	25.3	43.2
5	25.8	39.1	31.8	48.2
6	31.2	44.9	39.2	53.2
7	37.1	50.8	47.0	58.1
8	43.4	56.6	55.1	62.9
9	50.0	62.3	62.8	67.4
10+	56.6	67.6	70.0	71.7
Total N*	752	1,110	342	790

**N is the total sample size used in the logistic regression analysis to generate predicted recidivism values. It is not the sample size with a particular Static-99 score. This is because logistic regression uses information on the relationship between Static-99 and recidivism in the complete dataset to generate predicted values.*

Recidivism estimates generated from logistic regression

A slightly tangential, but important note pertains to the methods used to generate recidivism estimates. The original Static-99 recidivism norms were calculated using survival analysis, which is a statistical technique that tracks reoffending over time and uses that information to correct for varying follow-up periods. An important limitation of survival analysis, however, is that it only uses information from offenders with a particular score. In other words, estimating recidivism for scores of 3 is independent from estimating recidivism for scores of 4. This can lead to random fluctuations, particularly with small sample sizes for certain scores. This fluctuation is evident in the original Static-99 norms, where the 10 and 15-year sexual recidivism rates were slightly higher for a score of 0 than for a score of 1. These fluctuations also necessitated collapsing all offenders with scores of 6+. Another approach to generating recidivism estimates is to report observed rates from fixed follow-up periods. This method has the same problems as survival analysis, but these problems are magnified because using fixed follow-up periods typically reduces the available sample size.

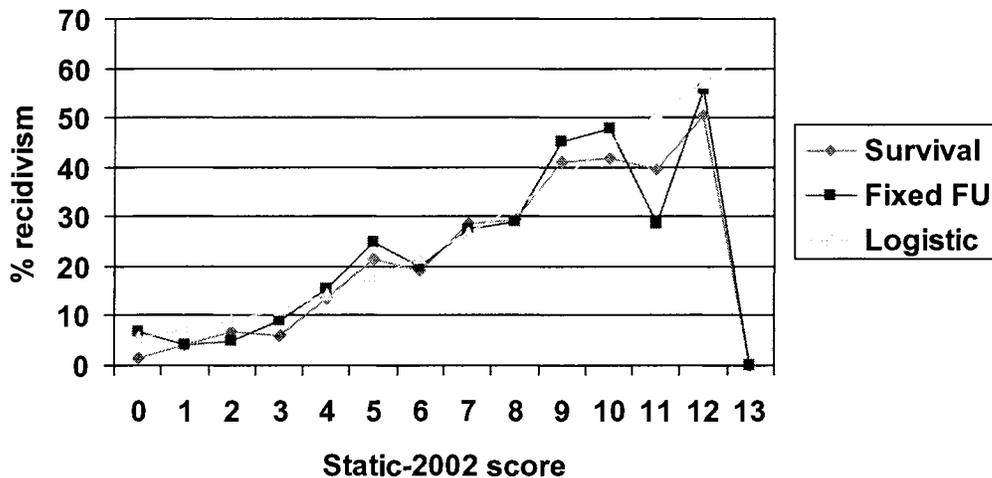
To overcome these limitations, we used logistic regression analysis to calculate recidivism estimates. In simplest terms, regression produces a “line of best fit” that models the relationship between an independent variable (Static-99 scores) and a dependent variable (the probability of recidivism). The slope of the line tells us the average increase in the probability of recidivism associated with each one-score increase on Static-99. The intercept of the line (where the line intersects with the y-axis) tells us the predicted recidivism rate for a Static-99 score of 0. Using both the intercept and the slope, regression allows us to predict recidivism rates for any

score on Static-99. Logistic regression is a specific form of regression that transforms the dependent variable (i.e., the odds of recidivism) into its natural logarithm and is more appropriate for use with dichotomous outcome variables (i.e., recidivism).

An advantage of logistic regression is that it uses information on the relationship between Static-99 and recidivism in the full dataset to make predictions for a given score. This eliminates the logical anomaly whereby offenders with a certain score can have slightly higher estimated recidivism rates than offenders with a higher score. In other words, it smoothes out the random fluctuations inherent in survival analysis and likely provides better estimates of the “true” relationship between the variables. Logistic regression is appropriate to use for generating recidivism estimates as long as the data approximate a logistic distribution (this assumption is satisfied in the tables reported here). A disadvantage of logistic regression is that fixed follow-up periods are required, which reduces the overall sample size.

Figure 2, taken from our research on Static-2002 with 8 samples (Hanson, Helmus, & Thornton, 2008) demonstrates the advantages of using logistic regression as opposed to survival analysis or fixed follow-up periods. The figure shows that survival analysis and fixed follow-up periods produce similar recidivism estimates, with slightly more fluctuations in the fixed follow-up estimates (due to reduced sample size). The logistic regression produces estimates similar to the other two methods, but cleans up the random fluctuations, particularly in the higher risk scores.

Figure 2: Ten-year sexual recidivism rates for Static-2002 estimated by survival analysis, fixed follow-up, and logistic regression.



Other ways of reporting Static-99

An alternative method of reporting Static-99 scores that avoids the ambiguities associated with absolute recidivism rates is to report relative risk. Relative risk answers questions regarding how this offender’s risk compares to the risk posed by other sexual offenders. We believe that for most decisions informed by risk assessment—particularly, decisions involving the allocation of treatment and/or supervision resources—reporting relative risk is sufficient and is more informative than absolute risk estimates. Relative risk has the additional advantage that it is fairly consistent across time and samples, which is not true for absolute risk.

Relative risk can be reported in different ways, and we are currently exploring some of these options. Relative risk can be reported as percentiles (e.g., 15% of adjudicated sexual offenders score at or above this score) and can also be reported as relative risk ratios. Relative risk ratios allow us to make statements about a particular offender's recidivism rate relative to the "typical" sexual offender, which we have defined as a score of 2 because it was the median score in a sample re-weighted to approximate the population of adjudicated Canadian sexual offenders (Hanson, Lloyd, Helmus, & Thornton, 2008). Using Table 3 as an example, we could say that an offender with a Static-99 score of 0 shows approximately half (.44) the recidivism rate of the typical sexual offender. Alternately, an offender with a score of 6 shows three times the recidivism rate of the typical sexual offender. Further research on relative risk ratios is needed, but it appears to be a promising method of reporting actuarial scores in way that is useful for decisions regarding offender management and resource allocation.

Table 3: Static-99 relative risk ratios for sexual recidivism based on Cox regression

Static-99 Score	Frequency (<i>n</i>)	Relative Risk
0	294	0.44
1	382	0.68
2	488	1.00
3	490	1.41
4	487	1.89
5	337	2.42
6	270	2.96
7	159	3.44
8	91	3.81
9+	36	4.04

Summary and resources for reporting Static-99

For those reporting absolute recidivism rates, we recommend using the tables reported here. Although these tables will be updated as our research progresses, we believe these new norms are better than the original because they are based on larger and more current samples, are derived from better statistical estimation procedures (logistic regression), and more accurately reflect variation in recidivism base rates.

As noted, this research project is ongoing and the absolute recidivism rates presented here will be updated. Given changes in recidivism over time, norms for Static-99 (and likely for other actuarial risk assessment scales as well) should be continually monitored and updated as needed (i.e., when changes are large enough to be meaningful). We are currently adding more datasets and plan to do further analyses to explore other factors that may influence recidivism norms, such as age, treatment, and jurisdiction.

To stay abreast of further developments in this area, we encourage you to periodically check the new Static-99 official website, www.static99.org. This website contains a wide variety of resources for Static-99 users, including copies of presentations related to this research project, the newest Static-99 recidivism tables, percentiles tables, relative risk ratio tables, new templates for reporting Static-99 scores, and information regarding educational/training opportunities.

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