

1 Offender Treatment Program. That is one of  
2 the things that we talk about during the class  
3 is that at some point in time there has to be  
4 a minimum of five years after they're off  
5 supervision before we'll even consider looking  
6 at their risk, reducing their risk. That is  
7 communicated. But for people who either  
8 haven't gone through treatment or are already  
9 out in the community, that's on a request  
10 basis.

11 Q Besides a polygraph exam, what  
12 else is required?

13 A We'll do a risk assessment again.  
14 Basically, a risk assessment, a polygraph, an  
15 interview with the offender. We want to hear  
16 from Department of Corrections what the person  
17 did while they were on supervision. We want  
18 corroborating evidence from people in the  
19 community who know of this person's behavior  
20 in the community.

21 Q With respect to a risk assessment,  
22 the risk assessment is based on the WASOST?

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1 A Yes.

2 Q And that's not going to change, is  
3 it?

4 A That's probably not going to  
5 change. What we have looked at doing is using  
6 the Static-99 because there is a, Dr. Hansen  
7 has a table in there as one of his appendixes  
8 that talks about time in the community.

9 Q And time in the community is an  
10 important aspect of, time in the community  
11 without re-offense is an important aspect in  
12 terms of assessing the risk for re-offense,  
13 correct?

14 A Yes.

15 Q In fact, let me read to you a  
16 statement by Dr. Epperson and see if you agree  
17 with it. "Consequently, actuarial tools are  
18 not appropriate for assessing decreases in  
19 risk of re-offense following an extended  
20 period, ten years or more, of successful  
21 integration into the community marked by the  
22 absence of offending behavior and absence of

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1 behaviors associated with prior sex offenses,  
2 for example substance abuse, inappropriate  
3 associations, notwithstanding how such an  
4 individual may score on an actuarial risk  
5 assessment tool." Now, my question is do you  
6 agree with that?

7 MR. KNOWLES-KELLETT: I have an  
8 objection.

9 JUDGE SIPPEL: What's the  
10 objection?

11 MR. KNOWLES-KELLETT: The  
12 objection is he's reading statements without  
13 sources. This is one of his proposed rebuttal  
14 witnesses. We indicated we wanted the witness  
15 for cross examination, and he's trying to back  
16 door this guy's statements into the record  
17 without presenting them for cross examination.  
18 And if he had a one-line statement, that's  
19 fine, and I was going to give him some leeway.  
20 But to read a page is, I'd ask that that be  
21 struck from the record. If he wants the  
22 witness, put it on for cross.

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1 MR. LYON: Your Honor --

2 JUDGE SIPPEL: I'm sorry. Maybe  
3 I'm confused here. This witness is being  
4 examined with respect to his direct testimony,  
5 among other things. And I understand that --

6 MR. KNOWLES-KELLETT: Not Dr.  
7 Epperson. Dr. Epperson is --

8 JUDGE SIPPEL: I'm talking about -

9  
10 MR. KNOWLES-KELLETT: -- witness.  
11 He's reading the proposed testimony into the  
12 record.

13 JUDGE SIPPEL: When you say this  
14 witness, you've got me confused --

15 MR. KNOWLES-KELLETT: I'm sorry.

16 JUDGE SIPPEL: -- because I  
17 thought that you were, well, the witness is  
18 Detective Shilling. All right. He's asking  
19 him about Doctor --

20 MR. LYON: Epperson.

21 JUDGE SIPPEL: -- Epperson and  
22 statements, reading things that Dr. Epperson

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1 has apparently written?

2 MR. LYON: Yes.

3 MR. KNOWLES-KELLETT: He's reading  
4 his proposed written testimony in this case,  
5 your Honor, and we ask to put it on cross --

6 JUDGE SIPPEL: All right.

7 MR. KNOWLES-KELLETT: -- rebuttal.

8 JUDGE SIPPEL: If you let me, I'm  
9 going to require counsel to identify the  
10 source of what he's reading to the witness  
11 from, and the witness should be asked whether  
12 or not he understands this or whether he feels  
13 qualified to respond to it. But other than  
14 that, you're going to be able to redirect.  
15 There's nothing going to come in here --

16 MR. KNOWLES-KELLETT: Can I state  
17 my objection for the record?

18 JUDGE SIPPEL: Yes, yes, yes.

19 MR. KNOWLES-KELLETT: He has  
20 proposed two rebuttal witnesses, actually  
21 three: Mr. Allmon, Dr. Epperson, and Dr.  
22 Novick-Brown. We have serious problems with

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1 the credibility and reliability of Dr. Novick-  
2 Brown's testimony. I don't want their  
3 testimony coming into the record because he's  
4 allowed to read from proposed testimony. You  
5 know, that's an inappropriate fact or approach  
6 because he doesn't want to produce the  
7 witnesses themselves for cross examination.  
8 If he wants to say some brief statement, okay.  
9 But if he starts to, you know, go five times  
10 and read their whole testimony into the record  
11 and, say, you agree with this, I think that's  
12 totally inappropriate to get this into  
13 evidence.

14 MR. LYON: Your Honor, may I  
15 respond?

16 JUDGE SIPPEL: Yes, go ahead.

17 MR. LYON: It is a standard cross  
18 examination technique to read from a learned  
19 treatise to an expert witness, and I would  
20 point out that Detective Shilling has been  
21 proffered as an expert witness. He has given  
22 his opinion. I have agreed to allow his

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1 opinion, and it is a standard technique to  
2 read a statement by another learned person, an  
3 expert, and ask if the witness agrees with it.  
4 If the witness doesn't agree with it then the  
5 witness doesn't agree with it. But it doesn't  
6 mean that it's evidence unless the witness  
7 himself adopts it and agrees. And I'm  
8 entitled to know whether this witness agrees  
9 with it.

10 MR. KNOWLES-KELLETT: My  
11 understanding is we re-wrote Dr. Shilling's  
12 testimony because he wouldn't accept him as an  
13 expert. Because he's agreeing he's an expert,  
14 that's a big step forward. However, I  
15 misunderstood. Is that a learned treatise, or  
16 is that Dr. Epperson's testimony? I'm asking  
17 Mr. Lyon. Is that treatise, as you just  
18 represented to the Judge; or is that his  
19 testimony?

20 MR. LYON: Well, it is a statement  
21 that --

22 MR. KNOWLES-KELLETT: Is it a

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1           treatise or is it testimony?

2                   MR. LYON: Do I get to answer --

3                   MR. KNOWLES-KELLETT: Yes, well,  
4           you just represented it as a treatise, your  
5           Honor. And --

6                   MR. LYON: Excuse me. Either let  
7           me talk, or you talk. I'm not going to talk  
8           over you.

9                   JUDGE SIPPEL: We're going into  
10          recess for ten minutes. Go off the record.  
11          We're in recess.

12                   (Whereupon, the foregoing matter  
13          went off the record at 10:29 a.m. and went  
14          back on the record at 10:57 a.m.)

15                   JUDGE SIPPEL: Here's what I'm  
16          going to do. I don't want to hear anything  
17          more. I'm going to limit the cross  
18          examination to the testimony of Robert  
19          Shilling. He was tendered to you as a witness  
20          for cross examination after his Exhibit 2 came  
21          in, which is his direct testimony. You want  
22          to develop evidence through other experts.

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1 You had anticipated, perhaps, rebuttal. We'll  
2 reschedule that rebuttal, but I don't want  
3 this thing to be, I don't want the witness to  
4 be put in a position where he hasn't had a  
5 chance to see up-front what it is that he's  
6 being asked to agree with, you know, seeing  
7 that he's not having any difficulty with that.  
8 But I want this witness to, I want the witness  
9 to review his testimony up to this point, not  
10 today, of course, but when the transcript  
11 comes out and see if there's anything in here  
12 that either he didn't understand or that was,  
13 that he's not familiar with or that he doesn't  
14 feel qualified to answer.

15 And then that's the extent. If  
16 you're going to ask him a question and you're  
17 going to go into another area, identify, you  
18 got questions that you're going to ask, if  
19 it's coming from another source, identify the  
20 source.

21 MR. LYON: Your Honor, I don't  
22 have a problem with that. What I am trying to

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1 do is to elicit the witness' understanding of  
2 the limitations of the tool that he was  
3 required to use by the State of Washington.  
4 And I'm trying to show that this witness  
5 himself understands that, if he does  
6 understand it, that long time in the community  
7 without re-offense is an important  
8 consideration in determining whether or not  
9 someone is likely to re-offend and maybe an  
10 even more important factor than the score on  
11 a test that was meant to be given at the time  
12 someone was released from confinement. That's  
13 all I'm trying to do.

14 JUDGE SIPPEL: But that question  
15 can be asked at the conclusion of the cross  
16 examination. I'm not telling you how to do  
17 it, but you can go through the direct  
18 testimony. When you're finished with that,  
19 you can ask that question. If there's a  
20 question I, myself, would like to ask then, if  
21 it's been touched upon, I don't know that it's  
22 been actually asked and answered --

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1 MR. LYON: I can do that without  
2 referring to Dr. Epperson or Ms. Brown. I  
3 would like to know the witness' view of the  
4 professional standing of these individuals  
5 because I think it's relevant to whether this  
6 future testimony may be credible, and I won't  
7 have the opportunity to have this witness  
8 back.

9 JUDGE SIPPEL: Any objection to  
10 that? Do you know what he's saying?

11 MR. KNOWLES-KELLETT: Yes. Your  
12 Honor, going back to my previous objection,  
13 I'd like to withdraw the objection. Mr. Lyon  
14 explained that he contends that I interrupted  
15 him, and I believe that could very well be the  
16 case. And if he wants to treat Detective  
17 Shilling as an expert witness and read to him,  
18 I have no problem with that. And I'd just ask  
19 him if he identify the source. So if he wants  
20 limited parts and find out Detective  
21 Shilling's expert opinion about various  
22 passages, I'm fine with that. But we'd like

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1 to recognize that he's asking Detective  
2 Shilling expert opinion.

3 MS. LANCASTER: We'd like the  
4 Court to recognize Detective Shilling as an  
5 expert under that situation. I think Mr. Lyon  
6 has already referred to Detective Shilling as  
7 an expert, but it has not been acknowledged by  
8 the Court at this point. As a matter of fact,  
9 Detective Shilling's testimony was originally  
10 edited because --

11 JUDGE SIPPEL: There was too much  
12 opinion in it.

13 MS. LANCASTER: -- because Mr.  
14 Lyon objected to his opinion. But since he's  
15 now asking his opinion on all these things and  
16 he's discussed him being an expert, we'd like  
17 that recognized by the Court.

18 JUDGE SIPPEL: Okay. There's two  
19 things going on. I want to get back to the  
20 most important thing. Just a minute, though.  
21 If he's asking for Detective Shilling's  
22 opinion, the record will reflect Detective

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1 Shilling's opinion. Whether he's qualified to  
2 give that opinion even as a lay witness, but  
3 he has certain qualifications, he's not just  
4 a lay person that you're picking up off the  
5 street. But I don't know. I'm not convinced  
6 that he's qualified as a matter of record as  
7 an expert opinion.

8 MS. LANCASTER: Your Honor, I  
9 think Mr. Lyon's argument to the Court in  
10 response to our objection earlier was that he  
11 referred to Detective Shilling as an expert.

12 JUDGE SIPPEL: Well, let me try it  
13 this way then. Are both sides willing to  
14 stipulate that this man is an expert or do you  
15 feel --

16 MR. LYON: I will stipulate that  
17 he has a degree of expertise in the study of  
18 sexual offenders. I'm not sure the extent to  
19 which it goes, but I think it's clear from the  
20 testimony that's been offered by the Bureau  
21 that they are seeking his opinion. And  
22 implicit in his rating of Mr. Titus is an

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1 exercise in opinion and expertness, which you  
2 have admitted. So I think at that point I'm  
3 entitled to ask his agreement or disagreement  
4 with other experts in the field.

5 MS. LANCASTER: Your Honor --

6 JUDGE SIPPEL: Well, you're almost  
7 there.

8 MS. LANCASTER: If we could  
9 respond to that. He's asking his expert  
10 opinion with regards to psychological and what  
11 he determines learned treatises is what he's  
12 referred them to his documents for. And you  
13 don't ask a layman, there's no value in asking  
14 someone who's a layman their opinion about  
15 those sorts of things. He's only asking his  
16 opinion about those sorts of things because,  
17 in fact, he considers him an expert, a general  
18 expert in this area.

19 JUDGE SIPPEL: Well, boy, you're  
20 so close to getting what you want. There's a  
21 procedure for establishing somebody to be an  
22 expert and it requires voir dire and is

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1 generally, you know, you do have a lot of, he  
2 certainly does have an outstanding resume.  
3 I'm not trying to downplay this witness'  
4 qualifications. And he's going to have an  
5 opinion that's going to be listened to.

6 MS. LANCASTER: Would you allow us  
7 to voir dire him on redirect?

8 JUDGE SIPPEL: Yes.

9 MS. LANCASTER: Okay.

10 JUDGE SIPPEL: I would determine  
11 him to be a, you know, under the Federal Rules  
12 of Evidence, I can determine him to be an  
13 expert any time if the record supports that.  
14 I'm not convinced it does at this point  
15 because of how he's been handled. I'm sorry,  
16 sir. I don't mean to impute anything that  
17 you're testifying to or your ability to --

18 THE WITNESS: Oh, I understand.

19 JUDGE SIPPEL: -- tell us what we  
20 want. It's a very technical issue. As I say,  
21 it's not going to affect my reliability on  
22 this witness to whether or not he's officially

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1 declared to be an expert or whether he's  
2 testifying in a technical sense as a lay  
3 expert with a background and experience that  
4 this witness has. Plus, I've observed him for  
5 a couple of hours, and I have no reason to  
6 question his credibility or his ability to  
7 articulate opinions. So, I mean, I think  
8 we're just flagging a dead horse. We will  
9 address it before we close. We'll come back  
10 to that.

11 The main thing that I'm concerned  
12 about is I appreciate very much what you have  
13 proposed as the procedure, and what I'm asking  
14 of you is that you retract your statement on  
15 the record that your opposing counsel is a  
16 liar --

17 MR. KNOWLES-KELLETT: I accept  
18 that I was interrupted and he was going to  
19 clarify it. I believe that he was misleading  
20 the Court, but I told you I jumped in before  
21 he had a chance to clarify. What Mr. Lyon's  
22 explained to me, he started to say it's

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1 standard practice to read from his learned  
2 treatise and get an expert's agreement or  
3 disagreement, and this is no different is what  
4 he was going to say before I jumped in with my  
5 objection. At the point where I thought he  
6 was misleading the Court about what he was  
7 reading I jumped in, and I was mistaken.

8 JUDGE SIPPEL: So you are  
9 retracting your conclusion that he is a liar?

10 MR. KNOWLES-KELLETT: Right.  
11 Correct, your Honor.

12 JUDGE SIPPEL: Do you want any  
13 further clarification on that?

14 MR. LYON: No. Counsel adequately  
15 summarized what I would have said had I had  
16 the chance to finish.

17 JUDGE SIPPEL: All right. That's  
18 good. Well, then let's go forward. Let's go  
19 forward as we're doing it. This witness is  
20 certainly, he's testified as a qualified  
21 witness to testify in the area that he's  
22 testifying to. And he's also qualified to

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1 render an opinion as to the credibility or  
2 qualifications or quality of the testimony,  
3 the conclusions, of these other possible  
4 expert witnesses, these other people in the  
5 field that we're referring to here who have  
6 written, I guess they have written treatises  
7 and they have published on this; am I correct?

8 MR. LYON: Dr. Epperson has  
9 published extensively. Whether he's published  
10 an article that says specifically what he's  
11 told me, I don't know.

12 JUDGE SIPPEL: All right. Do you  
13 want the treatise identified --

14 MS. LANCASTER: . . . for the  
15 expertise in the treatise, your Honor.  
16 Otherwise, how can it be recognized as a  
17 learned treatise?

18 MR. LYON: Well, your Honor, I'm  
19 not attempting to do that.

20 JUDGE SIPPEL: He's not attempting  
21 to do that. He's not attempting to do that.  
22 All I'm saying, look, let me come at this

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1 again. He's asking the witness whether or not  
2 the witness, whether this Epperson person is  
3 a reliable person on the areas that he's being  
4 questioned about. That's all.

5 MR. LYON: Actually, I'm not even  
6 doing that, your Honor, although I think I  
7 asked a witness earlier if Dr. Epperson was a  
8 noted sex researcher. If I didn't, I  
9 certainly can. Dr. Epperson, of course,  
10 formulated the MSOST and the MSOST-R. I  
11 haven't gotten to the MSOST-R, and I may not.  
12 But I don't know that I even need, I don't  
13 intend to put any learned treatise into  
14 evidence. I don't intend to put Dr.  
15 Epperson's statement that he gave me into  
16 evidence, but I wanted to know if this witness  
17 agrees with what I think Dr. Epperson believes  
18 him. And that's all I want to do.

19 MR. KNOWLES-KELLETT: We'd like to  
20 know the source of whatever he reads from. No  
21 problem with what he's doing.

22 JUDGE SIPPEL: Well, how specific?

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1 Can he say that it's something that Epperson  
2 wrote or something that's in his testimony?  
3 You're entitled to what you're asking but --

4 MR. LYON: I will show you what  
5 I'm quoting from.

6 MR. KNOWLES-KELLETT: Identify it  
7 for the record.

8 MR. LYON: Let the record reflect  
9 that I'm quoting from a document called  
10 "Testimony of Douglas L. Epperson, Ph.D."  
11 dated 3/26/08. I will represent Mr. Epperson  
12 provided me this statement. I will also  
13 represent that it has been previously  
14 exchanged with the Bureau. At this time, I am  
15 not offering it into evidence, but I do intend  
16 to quote from it to question the witness.

17 MS. LANCASTER: This was the  
18 rebuttal testimony that you proffered in the  
19 exchange of direct written --

20 MR. LYON: This is possible  
21 rebuttal testimony that I previously supplied  
22 to the Enforcement Bureau.

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1 MR. KNOWLES-KELLETT: Thank you.

2 JUDGE SIPPEL: I'm sorry. Just  
3 for your edification, an expert who is  
4 qualified after voir dire and whatnot that  
5 testifies as an expert can say things like, "I  
6 read the materials in this area, and here's my  
7 opinion, here's what I think." He doesn't  
8 have to line up every piece of material that  
9 he's reading. He can just say I'm satisfied  
10 with what I've read. We're basically treating  
11 this witness as an expert, and so I don't want  
12 to be tripping over myself or ourselves simply  
13 because we want a technical determination as  
14 to whether -- never mind. I'm not going to  
15 say anything more. You all handled this very  
16 well. I appreciate that. Let's go forward.

17 BY MR. LYON:

18 Q All right. Let me try again. And  
19 for the record, I am going to quote to you a  
20 statement given to me by Dr. Epperson of the  
21 University of Iowa. And you know Dr.  
22 Epperson?

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1 A I do.

2 Q Okay. And you respect him as an  
3 expert in the field of sexual deviance  
4 research?

5 A I do.

6 Q Okay. The quote is,  
7 "Consequently, actuarial tools are not  
8 appropriate for assessing decreases in risk of  
9 re-offense following an extended period, ten  
10 years or more, of successful integration into  
11 the community marked by the absence of  
12 offending behavior and an absence of behaviors  
13 associated with prior sex offenses, for  
14 example substance abuse, inappropriate  
15 associations, notwithstanding how such an  
16 individual may score on an actuarial risk  
17 assessment tool." Now, my question is do you  
18 agree with that statement?

19 A Well, I would respectfully  
20 disagree with Dr. Epperson because Dr. Hansen,  
21 who you mentioned yesterday, actually in his  
22 Static-99, which is a static risk tool, has an

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1 appendix in there which actually decreases  
2 risk over time in the community.

3 Q Okay. If we are looking only at  
4 actuarial tools which do not take into account  
5 that factor that you mentioned, that Static-  
6 99, would you agree with Dr. Epperson to that  
7 extent?

8 A Well, the Static-99 is an  
9 actuarial tool.

10 Q I understand. But let's take the  
11 MSOST, which does not account for time in the  
12 community. You would agree that the MSOST is  
13 not an appropriate tool for assessing  
14 decreases in risk of re-offense following an  
15 extended period in the community?

16 A I would agree with that, yes.

17 Q Okay. And would it be true that  
18 someone who has been in the community for more  
19 than 15 years without any evidence of  
20 additional sex offenses or behaviors  
21 associated with prior sex offenses and with a  
22 record of relatively stable employment and

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1 appropriate relationships would be at a low  
2 risk of re-offending, despite how that person  
3 may score on an actuarial risk assessment tool  
4 that does not take into account time in the  
5 community?

6 A I'm not sure I understand that  
7 question.

8 Q Sure. Let me see if I can  
9 rephrase it. Assume someone has been in the  
10 community for 15 years without any evidence of  
11 additional sex offenses, and assume that there  
12 hasn't been behavior associated with prior sex  
13 offenses and that this person has a relatively  
14 stable employment history and appropriate  
15 relationships. Would you think that it would  
16 be likely that that person would be at a low  
17 risk of re-offending, despite how he might  
18 score on the MSOST?

19 A Well, I would say you have to take  
20 a look at the totality of the circumstances,  
21 not just one actuarial, like the MSOST. For  
22 example, part of the WASOST, the Washington

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1 State Sex Offender Screening Tool that we are  
2 mandated to use is the RRASOR. There is ample  
3 evidence that persons who score five on the  
4 RRASOR, after ten years there is a 73-percent  
5 change of recidivism. That's not part of the  
6 MSOST. This is strictly the RRASOR done by  
7 Dr. Karl Hansen, another very well-respected  
8 researcher, and it increases over time.

9 Q. There is an increased risk of  
10 recidivism over time?

11 A. For those who score a five on the  
12 RRASOR, which Mr. Titus scored.

13 Q. Okay. We'll address the RRASOR  
14 shortly. You know Natalie Novick-Brown?

15 A. I do.

16 Q. Have you worked with her before?

17 A. Yes.

18 Q. Is she a well-respected researcher  
19 into sexual offenses?

20 A. No.

21 Q. Would you explain?

22 A. Unfortunately, Ms. Novick-Brown

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