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

In re the Detention of:

DARREN PERKINS,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 1

III. ISSUE PRESENTED 8

IV. ARGUMENT 8

A. THE TRIAL COURT PROPERLY ADMITTED PERKINS' PERCENTILE RANKINGS ON THE ACTUARIAL INSTRUMENTS USED TO ASSESS HIS RISK 9

B. RELATIVE RISK INFORMATION IS GENERALLY ACCEPTED IN THE FIELD OF SEX OFFENDER RISK ASSESSMENT. 12

C. PERKINS' COMPARISON TO *IN RE POST* IS MISPLACED 16

V. CONCLUSION 17

TABLE OF AUTHORITIES

Cases

In re Detention of Post,
170 Wn.2d 302, 241 P.3d 1234 (2010) 16, 17

In re Detention of Turay,
139 Wn. 2d 379, 986 P.2d 790 (1999) 16

In re Pers. Restraint of Duncan,
167 Wn. 2d 398, 219 P.3d 666, 669 (2009) 8

In re the Detention of Thorell,
149 Wn.2d 724, 72 P.3d 708, 725 (2003) 12, 13

In re Young,
122 Wn. 2d 1, 857 P.2d 989, 1017 (1993) 8

State v. Bourgeois,
133 Wn. 2d 389, 945 P.2d 1120, (1997) 9

State v. Ortiz,
119 Wash.2d 294, 831 P.2d 1060 (1992) 8

Statutes

RCW 71.09 ..... 1, 2, 3

RCW 71.09.020 ..... 2, 4

RCW 71.09.020(15); .060(1) 12

Rules

ER 401 9

ER 402 6

ER 402 and 403 12

ER 403 6

ER 702 12

ER 703 12

I. INTRODUCTION

In October 2018, a unanimous jury found that Darren Perkins met the statutory criteria for civil commitment as a "sexually violent predator" pursuant to RCW 71.09. His trial included expert risk assessment testimony concerning the use of actuarial tools designed to statistically estimate the likelihood of Perkins committing a new sex offense if released. One piece of data returned by the actuarial instruments was the percentile associated with Perkins' score on each of the tests. In addition, Perkins' scores on some of the tests were associated with a risk level (e.g. "High Risk", "Average Risk", "Low Risk", etc.). This information was referred to during the trial as "relative risk" data.

On appeal, Perkins argues the trial court abused its discretion by admitting the relative risk testimony. Specifically, he argues the relative risk testimony was not relevant. Perkins is incorrect because the State's expert testified the information assisted him in forming an opinion about Perkins' risk. Also, the trial court properly held Perkins' arguments about the shortcomings of relative risk information involve its weight, not its admissibility. For these reasons, this Court should deny Perkins' appeal.

II. STATEMENT OF THE CASE

On January 13, 2014, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of

Darren Perkins pursuant to RCW 71.09 *et seq.* CP at 1-2. Perkins began acting on his longstanding sexual arousal to rape during his adolescence, and continued to do so as an adult. CP 46. Perkins committed crimes continuously starting at around age fifteen. RP (9/24/18) 798. Many of the crimes were motivated by his attraction to rape, and prominently involved violent forced coercion. When acting on these urges, Perkins does not discriminate among young girls, adolescents or adult women. *Id.* In all, Perkins has seven documented victims of forced sexual conduct. *Id.* at 812-818.

One of Perkins' earliest offenses involved tying up and blindfolding a three-year-old and four-year-old girl, and forcing them to orally copulate him. CP 47. Perkins was approximately eighteen years old at the time of the offense. CP 2-3. For these acts, he was charged with two counts of Statutory Rape in the First Degree, and ultimately pleaded guilty to one count. First-degree statutory rape is a "sexually violent offense" as defined by RCW 71.09.020. Perkins most recent offense was committed in 2004, when he was 37 years old. CP 5. Under the guise of taking her photograph, Perkins lured a sixteen-year-old acquaintance into his workplace where he tied her hands to a pipe, put a bag over her head, and raped her while she cried and screamed. CP 437, 447-451, 453-458.

In between the commission of the above offenses, Perkins participated in sex offender treatment programs on multiple occasions. RP (9/24/18) 756. In 2000, while serving a sentence for using a knife to assault a woman he had previously dated, Perkins completed the Department of Corrections (DOC) sex offender treatment program. CP 4-5, 50; RP (9/24/18) 742; RP (9/26/18) 929-930. The records relating to Perkins' time in the program indicate that he actively participated during treatment sessions and finished all the required assignments. RP (9/24/18) 756, 823. Upon his release from prison later in 2000, Perkins was not cited for any behavioral violations while on probationary status in the community. RP (9/26/18) 930-932. Despite this apparent behavioral turnaround, Perkins committed the above rape of his sixteen-year-old victim just a few months later. RP (9/24/18) 824-825.

At Perkins' SVP civil commitment trial, the State called Dr. Harry Goldberg, Ph.D., a psychologist with considerable experience in the evaluation, diagnosis, and treatment of sex offenders, who conducted a psychological evaluation of Perkins to determine whether he met the SVP statutory criteria. RP (9/24/18) 759. Dr. Goldberg is familiar with RCW 71.09 and has assessed sex offenders under consideration for civil commitment pursuant to that statute since 2004. *Id.* at 765. In conducting his assessment of Perkins, Dr. Goldberg reviewed police reports, witness

statements, court documents, DOC records, treatment records, and previous psychological evaluations. *Id.* at 768-769. He also conducted an in-person interview with Perkins in the spring of 2018 that lasted approximately three hours. *Id.* at 772, 809; RP (9/26/18) 1035.

Dr. Goldberg testified that it is his opinion, to a reasonable degree of psychological certainty that Perkins suffers from three mental disorders: Sexual Sadism, Alcohol Use Disorder, and Antisocial Personality Disorder. RP (9/24/18) 788-789. Dr. Goldberg testified that Perkins' Sexual Sadism disorder constituted a "mental abnormality" as defined by RCW 71.09.020, and the other two disorders were "aggravating factors." *Id.* Perkins' Sexual Sadism Disorder causes him to experience recurrent sexual arousal towards the physical or psychological suffering of others that is manifested by fantasies, urges, or behaviors. *Id.* at 790. Dr. Goldberg noted that Perkins' sexually sadistic offending continued despite multiple lengthy incarcerations during which he typically maintained good behavior. *Id.* at 821-826. In addition, Dr. Goldberg concluded that Perkins appears to have very little understanding of his own psychology, stating,

> In my opinion, his understanding of his sexual sadism disorder is quite limited. He does not believe he has a sexual sadism disorder. He does not believe that he has any disorder. He just believes that he had an anger problem. That's his understanding of why he did all of these things.

> That's kind of a superficial way to understand why you do all of these things just because you have an anger problem. When I was asking him, he said that he could not really identify any triggers, causes that could have happened that would cause him to get involved in these types of behaviors again even though it has been happening and over and over and over again.

RP (9/24/28) 823.

Dr. Goldberg also conducted a risk assessment to determine whether Perkins is likely to engage in predatory acts of sexual violence if not confined in a secure facility. Dr. Goldberg used actuarial instruments called the Static-99R, the Static-2002R, the Sex Offender Risk Appraisal Guide (SORAG) and the Violence Risk Appraisal Guide (VRAG). All of the actuarial tools placed Perkins in the highest risk category. RP (9/26/18) 934. Thirty five percent of offenders who scored the same as Perkins on the Static-99R committed a new sex offense within five years of release, as did 43.7 percent of the offenders with Perkins' score on the Static-2002R. RP (9/26/18) 911, 915. Perkins' score on the SORAG corresponds with an 84 percent likelihood of re-offense within twelve years of release. *Id.* at 922. His VRAG score corresponded with a 78 percent re-offense likelihood over twelve years. *Id.* at 925.

In addition to relaying the above risk percentages, Dr. Goldberg testified about the "relative risk" statistics associated with Perkins' actuarial scores. Relative risk numbers give Dr. Goldberg information

about "how [the person being evaluated] compares with other sexual offenders." RP (9/26/18) 912. The relative risk associated with Perkins' Static-99R score placed him in the 99th percentile and in the 98th percentile for the Static-2002R score.[1] *Id.* at 912, 916. The relative risk figures were published by the creators of those actuarials in the Static-99R and Static-2002R Evaluators' Handbook. RP (10/2/18) 1465-1466. Dr. Goldberg explicitly told the jury that number "doesn't mean that [Perkins] has a 99 percent chance of reoffending." RP (9/26/18) 912. Rather, it means he scored in the 99th percentile on that test and that is a higher score than the vast majority of sex offenders who are scored on the Static-99R. *Id.* at 911-912. As such, the relative risk figure is an indicator that he may present a higher risk of re-offense than most sex offenders. *Id.*

Perkins moved *in limine* to exclude testimony regarding the relative risk figures "pursuant to ER 402 and ER 403." CP 250. The trial court determined that Perkins' relevancy arguments went to weight, not admissibility. RP (9/17/18) 97. The court noted that Perkins was, in effect, asking it to hold that "a methodology that is used by the experts, [and] is generally accepted by the experts" should be excluded regardless. *Id.* at 101. The court denied the motion. *Id.* at 102.

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[1] D. Goldberg also reported relative risk figures for the PCL-R, SORAG and VRAG. *See e.g.* RP (9/26/18) 918. For brevity, those figures are omitted here.

In addition to the actuarial tools, Dr. Goldberg used a psychological test called the PCL-R that measures psychopathic personality characteristics, and reviewed Perkins' history for various other researched risk factors not considered by the actuarials. RP (9/26/18) 915-918. Dr. Goldberg also used the Structured Risk Assessment – Forensic Version to consider changeable dynamic risk factors and other psychological vulnerabilities not captured by the other instruments. *Id.* at 919. Dr. Goldberg then assessed research-based "protective" factors to determine whether there were extraneous circumstances that would mitigate the recidivism risk predicted by the actuarial tests. *Id.* at 926-927.

Based on his interview of Perkins, the available records and other data, and the various testing results, Dr. Goldberg testified that Perkins' mental abnormality makes him more likely than not to commit predatory acts of sexual violence if not committed. *Id.* at 935-836.

The jury heard from several other witnesses during the trial, including Perkins and one of his victims via videotaped deposition testimony. During his case, Perkins presented the testimony of forensic psychologist Paul Spizman, PhD. Dr. Spizman worked for DSHS performing annual review evaluations of committed SVPs for 11 years before going into private practice. RP (10/1/18) 1309. He did not assign a sexual sadism diagnosis to Perkins because, given Perkins' current age, he

"would need something particularly compelling as recent evidence." *Id.* at 1349. In addition, he referred to the relative risk statistics associated with Perkins' actuarial scores as "noise." RP (10/2/18) 1551.

At the conclusion of the trial, the jury found that Perkins did meet the SVP definition. CP 796-797. Perkins appeals. CP 809-811.

III. ISSUE PRESENTED

Did the trial court abuse its discretion by permitting expert testimony regarding how Perkins scores on certain risk assessment instruments compared the scores of other assessed sex offenders?

IV. ARGUMENT

Perkins argues that the trial court erred in permitting the State's expert to testify about the percentile rankings associated with Perkins' scores on various actuarial risk assessment tools. "The determination of whether expert testimony is admissible is within the discretion of the trial court." *In re Young*, 122 Wn. 2d 1, 57, 857 P.2d 989, 1017 (1993) (citing *State v. Ortiz,* 119 Wash.2d 294, 310, 831 P.2d 1060 (1992)). "A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds, or for untenable reasons." *In re Pers. Restraint of Duncan*, 167 Wn. 2d 398, 402, 219 P.3d 666, 669 (2009) (internal citations omitted). "A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take." *Id.*

at 402-403. Unless there has been an abuse of discretion, an appellate court will not disturb the trial court's decision. *State v. Bourgeois*, 133 Wn. 2d 389, 399, 945 P.2d 1120, (1997).

Here, the trial court correctly held that Perkins' arguments related to the weight to be given to the percentile information, not its admissibility. In turn, Perkins challenged the significance of the percentile figures through cross examination of the State's expert, the testimony of his own testifying expert, and closing argument. For these reasons, this Court should affirm the trial court.

A. THE TRIAL COURT PROPERLY ADMITTED PERKINS' PERCENTILE RANKINGS ON THE ACTUARIAL INSTRUMENTS USED TO ASSESS HIS RISK

Perkins claims that the relative risk information reported by Dr. Goldberg is not relevant to the assessment of his likelihood of re-offense. Evidence is relevant if it has "any tendency" to prove or disprove a fact of consequence to the action. ER 401. Both Perkins' appellate counsel and trial counsel employ a "certain minimum height" analogy in support of their argument that relativity does not bear on risk assessment. Specifically, counsel argue "that if the question for the jury were whether someone was a certain minimum height, then a person's height relative to others in a group would be meaningless." Brief of Appellant at 9 (citing 9/17/18 RP at 85). This argument misunderstands the nature of risk

assessment opinion testimony and how it differs from answering calculable questions definitively. Such information does tend to shed light on whether the person assessed may be atypical, and providing that information to the jury is not unduly prejudicial.

Perkins' minimum height argument does not address the reasons why relative risk was relevant at trial. For example, riding on a roller coaster at an amusement park can be dangerous for children under a certain height. If, for that reason, the coaster operator wants to eliminate the risk of injury due to height, she is easily and definitively able to do so by measuring the children in line. In this example, no other information is needed because the ultimate question can be quantitatively answered with a tape measure.

On the other hand, risk *assessment* presumes consideration of a variety of available factors in order to estimate the likelihood of a given outcome. These assessments are made in countless contexts. When a student applies for admission to a university, the university conducts a risk assessment before deciding whether to admit the student applicant. When a recent law school graduate applies for a job with a law firm, the firm conducts a risk assessment before deciding whether to hire the new attorney. Notably, both the university and law firm staff are often interested in the class rank or percentile of the applicant.

The reviewing staff consider these rankings knowing that they by no means provide a conclusive picture of the value the applicant will bring to the school or firm. However, they do provide some information about the level of effort or interest the applicant devoted to previous endeavors. They provide some information about whether the applicant is atypical in relation to others, albeit in an imperfect way that must be investigated further via reference checks, in person interviews, review of writing samples, etc.

Similarly, a high number percentile ranking (such as the 97.8 and 99.1 percentile figures Dr. Goldberg referenced at trial) in the context of the Static-99R or Static-2002R provides some information about whether the assessed offender is atypical. Again, that information is imperfect and deeper analysis is required. Nonetheless, Dr. Goldberg testified the figures did tell him how Perkins' scores on the applied risk assessment tools compared to the scores of other assessed sex offenders. RP (9/26/18) 912. Dr. Goldberg testified that, in his opinion, a high percentile figure is an indication that the recidivism risk posed by the assessed person is uncommonly high. *Id.* at 912-913. The information was relevant to his evaluation and helped the jury understand how he came to his conclusions. This the court properly admitted Dr. Goldberg's relative risk testimony.

B. RELATIVE RISK INFORMATION IS GENERALLY ACCEPTED IN THE FIELD OF SEX OFFENDER RISK ASSESSMENT.

Although Perkins challenges admission of expert testimony, he notably limits his argument to ER 402 and 403. By omission, he concedes that relative risk testimony complies with ER 702 and is the kind of "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Likewise, by refraining from making an ER 703 challenge, it should be presumed relative risk is information "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

Here, one of the central issues at trial was whether or not Perkins is likely to commit a sexually violent offense if not confined to a secure facility. RCW 71.09.020(15); .060(1). Thus, Dr. Goldberg was properly permitted to testify regarding all of the statistical information he utilized when conducting his risk assessment of Perkins. 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). As such, Dr. Goldberg testified about two ways of quantifying the results of actuarial analysis – by "absolute" recidivism rate and by "relative" risk. RP (9/26/18) 910-913. With regard to Perkins, he discussed each of those two results for all of the

tests he used. He described the percentile ranking as being similar to the type of result used in tests that students take in school that can identify the students who significantly outperform the rest of the class. *Id.*

The use of this information is not unique to Dr. Goldberg. Rather, the developers of the actuarial instruments he 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) ("An alternative method of reporting Static-99 scores that avoids the ambiguities associated with absolute recidivism rates is to report relative risk.").[2]

In addition, it is notable that Perkins does not challenge the same type of information when used to explain the score Dr. Goldberg gave him on the Psychopathy Checklist-Revised (PCL-R), a test of psychopathic personality characteristics. Without objection, Dr. Goldberg explained Perkins' score on that test as follows:

> Let me just say you can get a 0 to a 40 on this scale. The next column is -- it is divided into what they -- sometimes what they do in tests is they look at -- a test can be made up

[2] Complete copy attached as Appendix A to this Response.

> of factors. In other words, one factor for -- we are talking about antisocial personality -- might be associated with some type of traits like impulsivity and things like that. Another factor might be other types of traits, such as narcissism, such as superficial charm, grandiosity.
>
> As you see [on a published trial exhibit], it says "factor one." That is the more narcissistic-type traits. He obtained this score of 11. That is a percentile. Again, percentile comparisons to other offenders. 74.7. He also obtained an 11 on the second factor, which was a -- that's a 43.3.

RP (9/26/18) 916-918.

During pretrial argument on the admissibility of relative risk information, the PCL-R was not a focus of the discussion. At one point, Perkins' trial counsel acknowledged, "I'm not asking the court to suppress any testimony about how Dr. Goldberg may consider PCL-R scores." RP (9/17/18) 98. Since the analysis is identical to that used with the actuarial instruments, one can only assume Perkins does not focus his challenge on PCL-R percentile ranking testimony because it suited his case better than the other percentile information heard by the jury.

Likewise, Perkins is satisfied with the "absolute risk" percentages associated with his actuarial scores, despite their similar mathematical caveats and shortcomings. As trial counsel for the State aptly argued, an absolute risk percentage may actually have *less* utility than relative risk

when it comes to predicting an individual outcome. Counsel analogized to flipping a coin:

> When I look at the coin, okay, and I'm going to flip this coin, right, and I can tell you the probability that it's going to be heads or tails is 50 percent, assuming it is a true coin, right?
>
> What that means is if I take enough samples, essentially the more samples, the more flips that I do, the closer and closer that number is going to get to 50.
>
> On any given flip, I essentially have no idea what is going to happen. It doesn't provided (sic) me any useful information. The recidivism rate of the coin in the long run doesn't provide me any useful information about the recidivism rate of the coin on that given flip. That actually is the statistical problem, reliability.

RP (9/17/19) 158-159.

For all of these reasons, Perkins cannot pick and choose for the jury what portions of Dr. Goldberg's risk assessment should be considered. Rather, and as noted by the trial court, "[i]f Dr. Goldberg is going to testify that this was relevant and this is part of what made his opinion, then it seems to me that makes it relevant." *Id.* at 97. Dr. Goldberg's testimony regarding the various percentile rankings produced by Perkins's testing was relevant to his opinions, and properly admitted at trial. Consequently, this Court should affirm Perkins' civil commitment.

C. PERKINS' COMPARISON TO *IN RE POST* IS MISPLACED

On appeal, Perkins analogizes relative risk data to the evidence that was declared inadmissible in *In re Detention of Post*, 170 Wn.2d 302, 241 P.3d 1234 (2010). In *Post*, the Court held "the trial court abused its discretion in allowing testimony about the treatment that would be available to *Post* if he were committed and the possibility of release to a less restrictive alternative following commitment." *Post* at 314. In other words, the Court rejected evidence that *if* the jury committed *Post* and *if* he then participated in treatment at the Special Commitment Center, then his risk might be reduced. The Court followed established precedent excluding the potential conditions of confinement from discussion during an SVP commitment trial. *Id.* (citing *In re Detention of Turay*, 139 Wn. 2d 379, 403-404, 986 P.2d 790 (1999)).

Perkins claims the *Post* holding should also render relative risk statistics inadmissible in an SVP proceeding; he argues evidence concerning "the *relative* degree of risk associated with the two scenarios" in *Post* (release without treatment vs. commitment and potential future treatment) is similar to evidence of relative risk statistics. Brief at 18. While this characterization of the *Post* holding may be technically correct, it does not apply to relative risk statistics because the information they provide is not hypothetical or based on events that may occur in the future.

Post involved evidence of a possible future where *Post* could potentially reduce his level of risk through prolonged treatment participation. The Court concluded this was irrelevant to the issue of whether *Post* currently posed a risk of re-offense. By contrast, here, the relative risk data was derived from assessment of his criminal and personal history. That historical information was used to score an actuarial instrument, and the score in turn provided the evaluator with various items of information about the assessed person's risk. Here, the relative risk percentiles mentioned by Dr. Goldberg were one piece of information that he used to assess Perkins' current risk. *Post* does not operate to preclude the kind of expert testimony on current risk offered below. Perkins' argument is misplaced.

V. CONCLUSION

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

RESPECTFULLY SUBMITTED this 6th day of November, 2019.

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Appendix A

This article appeared in the newsletter for the Association for the Treatment of Sexual Abusers, *The Forum, 21* (1), Winter 2009, p. 38-45.

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.

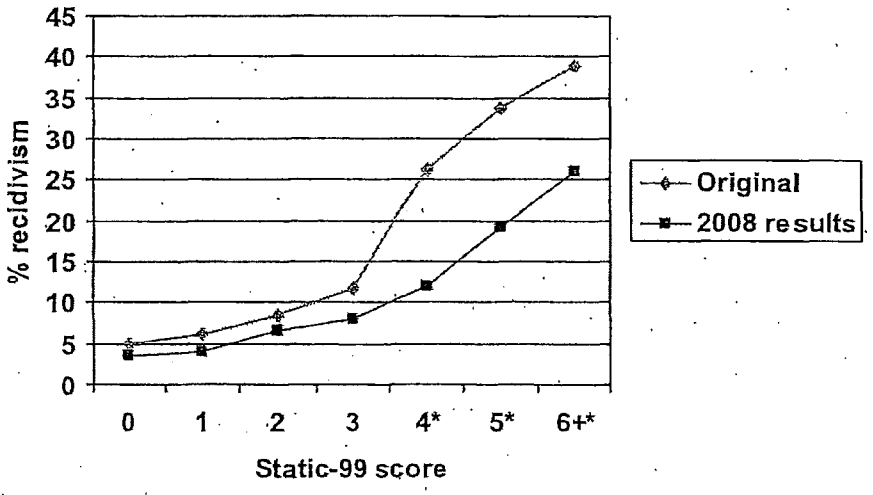
Experts have yet to come to a consensus concerning the reasons for the decline; although, it is unlikely that a single factor is responsible. Possible explanations that have been proposed include demographic factors (e.g., aging population, increased obesity, reliance on medications such as Prozac or 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 crimes 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

	5 Year Sexual Recidivism (%)		10 Year Sexual Recidivism (%)	
Static-99 Score	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

	5 Year Violent Recidivism (%)		10 Year Violent Recidivism (%)	
Static-99 Score	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.

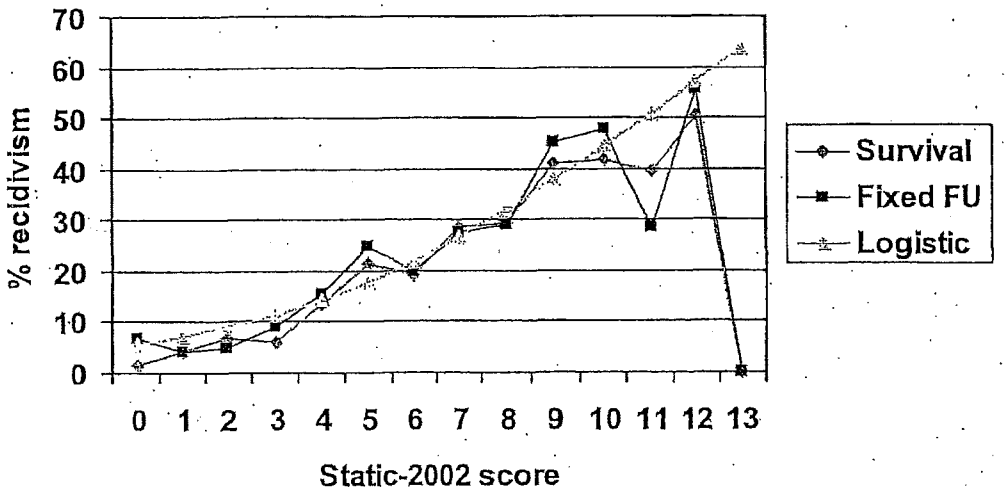
To overcome these limitations, we used logistic regression analysis to calculate recidivism estimates. In simplest terms, regression produces a "line of best fit" that models the relationship between an independent variable (Static-99 scores) and a dependent variable (the probability of recidivism). 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 (*n*)	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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NO. 52814-2 II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: DARREN THOMAS PERKINS, Respondent	DECLARATION OF SERVICE

I, Malia Anfinson, declare as follows:

On November 6, 2019, I sent via electronic mail, per service agreement, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

Kate Benward
Washington Appellate Project
wapofficemail@washapp.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of November, 2019, at Seattle, Washington.

MALIA ANFINSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

November 06, 2019 - 10:35 AM

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