

NO. 29920-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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In re Detention of Jason Muns,

STATE OF WASHINGTON,

Respondent,

v.

JASON MUNS

Appellant.

**FILED**  
**May 25, 2012**  
Court of Appeals  
Division III  
State of Washington

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Cameron Mitchell, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding expert testimony that appellant's risk of re-offense would be significantly reduced by participation in the Community Protection Program operated by the Division of Developmental Disabilities.

2. The provision of RCW 71.09.060 excluding evidence of the Community Protection Program violates appellant's constitutional right to equal protection of the law.

3. The provision of RCW 71.09.060 excluding evidence of the Community Protection Program violates appellant's constitutional right to procedural and substantive due process.

4. The trial court erred in denying appellant's motions to either exclude expert testimony on a new risk assessment guide for developmentally disabled persons or hold a Frye<sup>1</sup> hearing.

5. The risk assessment guide was inadmissible under ER 702 and ER 403.

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<sup>1</sup> Frye v. United States, 293 F. 1013, 54 App. D.C. 46 (D.C. Cir. 1923).

### Issues Pertaining to Assignments of Error

1. In a trial to determine whether a person meets commitment criteria under chapter 71.09 RCW, the factfinder may consider evidence that voluntary treatment on unconditional release is appropriate. However, RCW 71.09.060 precludes the factfinder from considering the Community Protection Program operated by the Division of Developmental Disabilities. Based on the statute, the trial court excluded appellant's proffered expert testimony that the Community Protection Program would be appropriate for him. Is the statute unconstitutional because it violates appellant's constitutional rights to equal protection and procedural and substantive due process?

2. When a theory or technique is not generally accepted in the relevant scientific community, evidence of that technique must be excluded. At a minimum, when there is evidence of a dispute, the court must hold a Frye hearing. Appellant moved for exclusion or a Frye hearing regarding a risk assessment guide that the State's expert recently developed and applied to appellant. In support of this motion, appellant presented an expert declaration that this type of guide is appropriate only for exploratory purposes, not for clinical or forensic use. Did the trial court err in admitting the State's expert's testimony regarding the risk assessment guide without first holding a Frye hearing?

B. STATEMENT OF THE CASE

1. Procedural Facts

In 2004, the State filed a petition alleging appellant Jason Muns met the criteria for indefinite civil commitment under chapter 71.09 RCW. CP 1-2. A jury found the State proved the allegations beyond a reasonable doubt and Muns was ordered committed to the Special Commitment Center (SCC). CP 179, 180. Notice of appeal was timely filed. CP 181.

2. Substantive Facts

a. Background

When Jason Muns was born in 1972, the dangers of Fetal Alcohol Syndrome (FAS) and its related effects were not widely known. 3RP 899-900, 916-17. Researchers were just beginning to make the link between maternal alcohol consumption, damage to fetal development and a host of developmental delays and persistent disabilities. 3RP 899-901, 979. Since then, research has shown that alcohol is far more damaging to a fetus than illegal drugs. 3RP<sup>2</sup> 900.

While pregnant with him, Muns' mother drank socially and, when doctors feared early labor, she was placed in the hospital for several weeks

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<sup>2</sup> There are 11 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 11, 2011; 2RP – Apr. 13, 2011; 3RP – Apr.18-22, 25-29 and May 5, 6, 9, 10, 2011 (9 consecutively paginated physical volumes).

on a drip of intravenous alcohol.<sup>3</sup> CP 466-67.<sup>4</sup> Muns was born healthy but underweight at just five and a half pounds. CP 468. Signs of developmental delay appeared almost immediately, but no one knew what was wrong. CP 468-71. He showed unusual delays in learning to crawl, walk, talk and use the toilet. 3RP 864-65. His mother took him to counseling and tried to help her son. 3RP 865-66.

By the time he was five, Muns had two younger sisters and no father. Muns' mother's marriage unraveled when he was very small. 3RP 862. The separation became hostile, and Muns' mother obtained a restraining order. 3RP 862. Muns' father went to prison shortly after the couple divorced and has had no contact with his son since. 3RP 862-63.

The commotion of two smaller children in the home exacerbated Muns' behavioral problems. 3RP 863. As a young single parent, it became clear Muns' mother could not care for all three children at once. At the recommendation of a counselor, Muns was placed in a foster home. 3RP 865-66.

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<sup>3</sup> Before the dangers of fetal alcohol exposure became known, intravenous alcohol was prescribed to prevent premature birth. Fuchs, F., et al., *Am. J. Obstet. Gynecol.*, 99:627 (1967).

<sup>4</sup> Depositions from Muns, his grandmother Mary Fortier, and Elizabeth Nelson were read for the jury but not transcribed. 3RP 142-43, 859, 871. Citation is therefore made to the relevant clerk's papers.

At that time, Mary Fortier, Muns' grandmother, and her husband came forward and offered to care for him. The grandparents continued the efforts to find the cause of and get appropriate help for Muns' developmental and behavioral problems. 3RP 867. At school, Muns was consistently in Special Education. 3RP 866; CP 472. He was involved in the Special Olympics and ARC.<sup>5</sup> 3RP 866; CP 472. He was disruptive at school and showed signs of severe auditory processing problems. CP 470-71. He obtained a certificate of achievement after completing the high school special education program but does not have a diploma. CP 472. Unable to live independently, he continued to live with his grandmother, who remains his legal guardian. 3RP 866; CP 461-62, 482, 503. The parties stipulated that in 2005, the Division of Developmental Disabilities found Muns eligible for benefits. 3RP 872; CP 147.

In his early 20s, Muns became enamored of Michelle, a young developmentally disabled woman he met through Special Olympics. CP 351-52. The two became romantically involved and planned to marry. Id. However, when Michelle became pregnant, her family intervened and cut off all contact between Muns and his fiancée and daughter. Id. Muns was devastated. Id. He was angry at being judged by her parents, so he clipped off the end of a catheter and pushed it into his penis. CP 371. He also got in

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<sup>5</sup> ARC provides support and advocacy for persons with developmental and intellectual disabilities. See <http://www.thearc.org/>.

trouble for stealing women's panties from clotheslines. CP 372. He masturbated with them because it made him feel closer to Michelle. CP 373. He explained he would rather masturbate with the panties than with the wet diapers he had been using. CP 375-76.

b. Events Leading Up To Petition for Commitment

In 1998, Muns' friend Bobby Wilson invited him to the apartment Wilson shared with his girlfriend. 3RP 389-90. Wilson was described as a bit slow but significantly higher functioning than Muns, as evidenced by the fact that he lived independently. 3RP 128-29. Wilson's girlfriend was babysitting four-year-old Destiny. 3RP 119. Knowing Muns had an obsessive fixation on urine and diapers, Wilson told him Destiny "tasted like pee." 3RP 125. When Destiny followed him into a bedroom, Muns removed her panties and licked her genital area. 3RP 119. Muns admitted that before this incident he had had thoughts of sucking on little boys' penises. 3RP 41. Muns pled guilty to first-degree child molestation regarding this incident. 3RP 137.

The same officer was assigned to investigate this and another incident in which Muns was invited to dinner at the home of his friend Annette's sister Elizabeth Nelson. 3RP 123-24; CP 443. Nelson asked Annette and Muns to take her two-year-old daughter Kyla into the next room. CP 441. She did not specifically ask Muns to pick up Kyla. CP 441.

However, she heard Kyla squeak, and when she looked, she saw Muns with his fingers inside Kyla's diaper. CP 444-45. Muns told the officer he was not trying to touch Kyla's genitals; he merely wanted to feel the urine in her diaper. 3RP 118. No charges arose from the incident with Kyla. 3RP 120.

During the course of the officer's investigation he also learned about two earlier incidents. In 1997, Muns pled guilty to fourth-degree assault after sucking on the breast of a 37-year-old developmentally disabled woman. 3RP 119-20. Muns admitted he touched the woman's breast with his hand but denied putting his mouth on her. CP 369.

A few years before that, a mother observed Muns put his hand inside her child's diaper. 3RP 120; CP 361-65. Again, Muns explained he was only trying to feel the wet diaper and no charges were filed. 3RP 120.

For the incident with Destiny, Muns received a Special Sex Offender Sentencing Alternative (SSOSA), in which his 68-month sentence was suspended on condition of treatment. Ex. 9. In November 1998, he moved into Rap House<sup>6</sup> and began sex offender treatment. CP 386. It was at Rap House that Muns' problems first were attributed to his in utero exposure to alcohol. 3RP 918.

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<sup>6</sup> Rap House is a Department of Corrections work release facility in Yakima for offenders with developmental disabilities or mental illness. See <http://www.doc.wa.gov/facilities/workrelease/raplincolnparkwr/default.asp>.

While at Rap House, Muns went out at night to get diapers from garbage cans and was caught masturbating with them. CP 386-87. He also stole a pair of panties from a female resident. CP 393. He felt his treatment provider unfairly jumped to the conclusion that he was not being cooperative with treatment. CP 392. Expert witnesses later relied on reports that Muns admitted to fantasies regarding Destiny while at the Rap House. 3RP 197-98. Roughly seven months after his arrival, Muns was terminated both from Rap House and from his sex offender treatment, and his SSOSA was revoked. CP 393.

Muns' 68-month sentence was reinstated and he was incarcerated. Ex. 9; CP 393. While in prison, he also participated in sex offender treatment. 3RP 199-200. Muns denied having sexual thoughts about children or diapers while in prison. CP 395-96. He testified that after he was revoked from Rap House, he stopped thinking about children and wet diapers. CP 389. However, he admitted being reprimanded for watching the children's television program "Rugrats" in which at least one of the characters wears a diaper. CP 399.

In prison, Muns wrote several apologetic letters to Destiny and continued to do so even after his treatment provider told him not to. CP 401. Experts relied on reports that he was found in 2003 with several pictures of children in diapers and approached staff wanting to sing them his diaper

song. 3RP 199-200. In September 2003, after roughly nine months of treatment, Muns was terminated from the sex offender treatment program. 3RP 199-200. Before he was due to be released, the State petitioned to have Muns civilly committed under chapter 71.09 RCW, and he was sent to the Special Commitment Center (SCC). CP 1-2.

Muns was angry at the accusations against him and required surgery after he inserted a pencil and two paper clips into his penis. CP 413. Early in his stay at the SCC in 2005, Muns admitted he had a minor relapse. CP 415. Experts relied on reports that he was caught masturbating into a diaper in August 2005 and in September admitted he was sexually aroused by a child in a diaper on television. 3RP 201. In October, he reportedly talked about how cute his daughter's diapers were and admitted masturbating five times per day. 3RP 202. In January 2006 he discussed his obsession with adult diapers in treatment. 3RP 202. In November 2006, he reportedly admitted fantasizing about Destiny and other children four to five times per month. 3RP 202. He reportedly told staff he cannot control his urges regarding diapers and urine. 3RP 203.

In his video deposition, Muns testified he avoids all negative sexual behaviors including pornography. CP 348. However, he has declined to take medication to reduce his sexual drive. CP 349-50. He explained he needs adult diapers because of a cyst and injury to his lower spine that

causes incontinence.<sup>7</sup> CP 350. However, he denied using the diapers to masturbate or being attracted to the smell. CP 350, 377.

At the SCC, Muns testified, he has an adult male partner called R.J. and a female partner on the outside who he wants to be with if he is released. CP 356. He now masturbates only to thoughts of her, and hopes to be married and possibly have children some day. CP 421. He testified he would do just fine if permitted to go back home to his family. CP 428. Unfortunately, Muns' grandparents are now elderly and unable to care for him. 461-62, 500, 502.

c. Psychological/Psychiatric Diagnoses

The State's forensic psychologist, Dr. Shoba Sreenivasan, diagnosed Muns with fetishism, paraphilia not otherwise specified (NOS) with pedophilic and urophilic traits. 3RP 174. She also diagnosed him with bipolar disorder, mood disorder NOS, learning disorder NOS, and borderline intellectual functioning. 3RP 174. She provided rule-out diagnoses of borderline personality disorder and cognitive disorder, but testified she would need more information. 3RP 174, 210. She testified that while some developmentally disabled people show inappropriate sexual behavior, the source of that behavior is poor social skills and poor intellectual functioning,

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<sup>7</sup> Dr. Natalie Novick Brown, an authority on fetal alcohol effects at the University of Washington, testified that in utero alcohol exposure can also result in neurological damage leading to incontinence. 3RP 975-76.

rather than a sexual disorder or paraphilia. 3RP 214-15. She rejected that theory in Muns' case, finding his history showed a preoccupation with deviant stimuli for arousal. 3RP 215.

She testified the paraphilia is an acquired condition that predisposes Muns to criminal sexual acts, and his other disorders such as bipolar disorder, cognitive disorder, and borderline personality disorder affect his ability to use good judgment and exert emotional and volitional control. 3RP 217-19. She concluded Muns has a mental abnormality as defined in RCW 71.09.020 and has serious difficulty controlling his behavior. 3RP 220-21.

Muns presented expert testimony challenging the validity of forensic use of the paraphilia NOS category. 3RP 663, 965. Dr. Robert Halon testified Muns' behavior could be caused either by paraphilia or FAS. 3RP 613. However, he rejected the paraphilia diagnosis because Muns' history showed no clear preference for deviant sexual activity given his peer relationships with adult women. 3RP 622, 694. He testified there was no need to diagnose Muns with paraphilia because fetal alcohol exposure explains all of his behavior. 3RP 725-26.

Dr. Natalie Novick Brown testified Muns' behavior is entirely consistent with the effects of fetal alcohol exposure. 3RP 985. Like Halon, she rejected the paraphilia diagnosis, particularly when used in a forensic

setting.<sup>8</sup> 3RP 965, 1004-06. She diagnosed Muns with a cognitive disorder NOS, mild mental retardation, fetishism, attention deficit disorder, and a communication disorder. 3RP 1002.

In rebuttal, the State called Dr. Douglas Tucker. He performed a much more limited review of Muns' medical records and reports of the previous experts. 3RP 1086. However, he performed the only comprehensive psychiatric evaluation of Muns by a medical doctor. 3RP 1085. Based on the records, he diagnosed Muns with fetishism, paraphilia NOS urophilia, borderline intellectual function, and borderline personality disorder. 3RP 1099-1100, 1106-07. He also testified he suspected pedophilia but could not say to a reasonable degree of medical certainty. 3RP 1100. He opined these disorders met the statutory definition of mental abnormality. 3RP 1122.

d. Risk Assessment

Sreenivasan scored Muns on the Static-99, an actuarial statistical instrument for predicting recidivism. 3RP 233-39. Muns' score of 6 indicates his risk of re-offense is between 14 and 42%. 3RP 238-39. However, because there are questions as to the efficacy of the Static-99 in predicting recidivism of persons with developmental disabilities,

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<sup>8</sup> Novick Brown had previously diagnosed Muns with paraphilia – urolagnia, but changed her mind when she learned the extent of the dispute regarding forensic use of the paraphilia NOS diagnosis. 3RP 1004-06.

Sreenivasan and a colleague created and published an assessment guide that considers other factors as well. 3RP 229.

She first considered that Muns' score on the Static-99, although it indicates a risk of only 14-42%, places him in the category labeled high risk. 3RP 239. Following her assessment guide, Sreenivasan concluded Muns had global risk factors, mental disorders, social skills deficits, behavioral tendencies, poor treatment progress, a need for secure placement, and acute dynamic factors such as conflicts with others and negative emotional states, all of which aggravate his risk. 3RP 240-52. She concluded that this corroborates and adds to the Static-99 result. 3RP 252. Although his risk on the Static-99 was only 42%, she testified that this was considered a high risk and that, without the protective factors and with the aggravating factors from her guide, his risk rose to the level of more likely than not. 3RP 488-91.

Because his offenses involved children who were strangers or casual acquaintances, she concluded he was likely to commit predatory acts if not committed to a secure facility. 3RP 258-60. She concluded Muns was not evil, antisocial, or criminal. 3RP 210, 534. On the contrary, in her opinion he does things he knows are wrong because he is unable to control his impulses and then feels remorseful. 3RP 210, 534.

Before trial, Muns repeatedly moved to either exclude Sreenivasan's new assessment guide or at a minimum hold a hearing to determine whether

it was generally accepted in the relevant scientific community as required under Frye. First, on September 16, 2009, Muns moved to exclude the as yet unpublished framework because admission was not established under Frye and, at a minimum, additional time would be needed to address the lack of cross-validation. CP 183-86. In support of that motion, he presented a declaration by Halon describing it as appropriate only for an exploratory research process toward developing a useful instrument, but unacceptable for either clinical or forensic use. CP 188-89. Halon criticized the guide because the factors used in it were not shown to correlate with recidivism and the guide was not cross-validated or shown to be reliable when used by different testers. CP 188-90.

On September 29, 2009, Muns filed a second motion to exclude or limit Sreenivasan's testimony and a request for a Frye hearing. CP 204-221. He argued the risk assessment guide was not based on any scientifically accepted theory or technique for assessing risk in developmentally disabled offenders. CP 206-07. He also argued it was unhelpful to the trier of fact as required by ER 702 and was unfairly prejudicial under ER 403. 216-20.

The trial was continued, and, more than a year later, on October 13, 2010, Muns filed a third motion challenging Sreenivasan's risk assessment guide. CP 222-238. By this time, the article presenting the guide had been published. CP 223. Muns reiterated his challenges based on Frye, ER 702

and ER 403. CP 224-38. He argued again that there are no studies cross-validating the framework and no studies showing any correlation between the items in the framework and actual recidivism by developmentally disabled sex offenders. CP 237. The trial was then continued several more months. On April 13, 2011, when the court heard pre-trial motions, Muns brought up this issue a fourth time. 1RP 143. The court concluded the assessment guide was not novel science and declined to hold a Frye hearing. 3RP 70.

At trial, Sreenivasan testified her assessment guide was neither an actuarial nor a psychological test, and, therefore, questions such as cross-validation and inter-rater reliability did not apply. 3RP 472, 480. She characterized it as merely an attempt to summarize factors from the research to structure a clinician's thinking about recidivism. 3RP 473-74. She explained that not every factor in her guide may be salient in every case, and on the other hand, some clinicians may add factors she had not included. 3RP 482.

Halon challenged the validity of Sreenivasan's assessment guide. 3RP 682-94. Halon testified that some of the factors used in the guide were taken from an article in which the author cautioned the factors were not ready for use in the courtroom and explained he was unsure they could actually predict recidivism in developmentally disabled persons. 3RP 683-

84. Halon testified the risk assessment guide is a test because it purports to measure or predict based on input of personal information. 3RP 682. Because it is a test, he explained, it must be validated to ensure that it actually can predict recidivism in developmentally disabled people. 3RP 557, 682-84.

Halon further testified that, although the Static-99 is the best-researched instrument available, the statistical results for a specific group cannot predict an individual's risk of re-offense with any degree of accuracy. 3RP 577-58, 841. He testified even structured clinical judgment does no better in predicting recidivism. 3RP 596.

Novick Brown rejected the Static-99 as obsolete. 3RP 1042. She testified that, based on her clinical judgment and the low base rates of re-offense for persons with developmental disabilities, in her opinion, Muns is a low risk to re-offend. 3RP 1042. She testified that, in her experience, people with developmental disabilities who have support from family and the Division of Developmental Disabilities do not re-offend. 3RP 1059-60. With this network of support, she testified, Muns is "safe to be in the community." 3RP 1060.

Tucker rejected this opinion and testified the effects of fetal alcohol exposure increase the risk of recidivism because they damage the part of the brain that controls impulses. 3RP 1124-25. He concluded Muns was

predisposed to sexually violent acts and would, more likely than not, reoffend. 3RP 1130.

C. ARGUMENT

1. THE PROVISION OF RCW 71.09.060 EXCLUDING EVIDENCE OF THE COMMUNITY PROTECTION PROGRAM IS UNCONSTITUTIONAL.

To commit a person indefinitely under chapter 71.09 RCW, the State must prove that the person will, more likely than not, commit predatory acts of sexual violence if not confined to a secure facility. RCW 71.09.060; RCW 71.09.020(18). To rebut this assertion, the person is generally entitled to present evidence of conditions that would exist if he were released into the community and that would reduce his risk of re-offending. RCW 71.09.060(1); In re Detention of Post, 170 Wn.2d 302, 316-17, 241 P.3d 1234 (2010); In re Detention of Thorell, 149 Wn.2d 724, 751, 72 P.3d 708 (2003). For example, a person facing commitment may argue he is deterred from re-offense because he knows an overt act could trigger a new commitment petition. Post, 170 Wn.2d at 316-17. Additionally, a person facing commitment may present “evidence that voluntary treatment on unconditional release is appropriate” and argue that treatment would reduce his risk. Thorell, 149 Wn.2d at 751. Despite the relevance and probative value of this evidence, the Legislature has singled out one type of voluntary treatment as inadmissible in a commitment trial: the Division of

Developmental Disabilities' Community Protection Program (CPP). RCW 71.09.060(1).<sup>9</sup>

The Community Protection Program provides both treatment tailored to the needs of developmentally disabled sex offenders and 24-hour-per-day supervision. Final Bill Report, E2SSB 6630, 59<sup>th</sup> Leg., 2006 Reg. Sess., 303 (2006) (hereinafter "Final Bill Report"). Muns proffered evidence that he met the criteria for admission to the CPP because he was convicted of a qualifying offense and was determined to have a developmental disability. RCW 71A.12.210; CP 147; Ex. 9. Novick Brown would have testified this was an appropriate less restrictive alternative<sup>10</sup> to commitment that could provide round-the-clock supervision if Muns were unconditionally released. CP 282, 330.

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<sup>9</sup> RCW 71.09.060(1) provides in relevant part:

The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition. The community protection program under RCW 71A.12.230 may not be considered as a placement condition or treatment option available to the person if unconditionally released from detention on a sexually violent predator petition.

<sup>10</sup> In this context, and in Novick Brown's report, the phrase "less restrictive alternative" means simply the common understanding of an alternative that is less restrictive. It does not refer to the statutory definition of a less restrictive alternative (LRA), which a committed person may petition for and a court may order under chapter 71.09 RCW. Muns does not dispute that the court could not have ordered him to participate in CPP.

But the court excluded this evidence because the statute requires the factfinder to remain ignorant of this reality. 2RP 137. The statute is unconstitutional because it singles out developmentally disabled persons in violation of state and federal equal protection. It also violates procedural and substantive due process because, by depriving the jury of relevant information, it dramatically increases the risk of erroneous commitment and permits commitment of those who would not actually be dangerous. These constitutional issues are reviewed de novo. Ludvigsen v. City of Seattle, 162 Wn.2d 660, 668, 174 P.3d 43 (2007).

- a. Barring Evidence of the Community Protection Program Violates Equal Protection By Depriving Only Developmentally Disabled Persons of the Right to Present Evidence of Voluntary Treatment Options.

Voluntary treatment plans may reduce the risk of re-offense and are relevant to the jury's determination at trial. Thorell, 149 Wn.2d at 751; RCW 71.09.060. Yet not all voluntary treatment plans are treated alike. RCW 71.09.060 singles out one voluntary treatment plan – the CPP – and forbids the jury from considering it. That program is available only to developmentally disabled persons. RCW 71A.12.210. By singling out the CPP from other voluntary treatment programs, the statute violates equal protection. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

The Washington State Constitution, art. 1, § 12, provides that “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” U.S. Const., amend. 14 provides in part that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Equal protection is violated when similarly situated persons are not treated similarly under the law. City of Cleburne, 473 U.S. at 439.<sup>11</sup>

In this case, the law creates two arbitrary classes of respondents in civil commitment proceedings: those who are developmentally disabled and eligible for the CPP and those eligible for any other voluntary treatment program. Individuals who plan to engage in voluntary treatment may present that evidence to the jury and have the jury consider whether it reduces their risk and rebuts the assertion that commitment is necessary to protect the community. Those who qualify for the CPP, in contrast, are arbitrarily denied that opportunity.

Distinctions between persons violate equal protection when they bear no rational relationship to any valid governmental objective. City of Cleburne, 473 U.S. at 440. It is well established that some legislation

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<sup>11</sup> Unless a law grants positive favoritism to a minority class, the constitutional analysis under the privileges and immunities clause is the same as federal equal protection analysis. Andersen v. King County, 158 Wn.2d 1, 9, 138 P.3d 963 (2006).

singling out persons with developmental disabilities for special treatment “reflects the real and undeniable differences between the retarded and others.” Id. at 444. Some legislation, however, lacks such a rationale. In City of Cleburne, the court reasoned that requiring a permit for a group home for the mentally retarded violated equal protection unless “those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.” Id. at 448 (emphasis added). By analogy, the State may not prohibit developmentally disabled persons from presenting evidence of CPP as a voluntary treatment program unless to do so would threaten legitimate state interests in a way that evidence of other voluntary treatment plans would not. No such unique threat exists.

In 1996, the Department of Social and Health Services (DSHS) created the CPP to serve the needs of persons with developmental disabilities who have exhibited violent or sexually violent behavior. Final Bill Report. As of 2006, 100 of the 390 participants in the program were registered sex offenders. Final Bill Report. At the time, the program was not mentioned in the commitment statutes of chapter 71.09 RCW.

Ten years after creation of the CPP, the Legislature codified it. Laws of 2006, ch. 303, § 1. The original bill was not intended to create major policy changes, but merely to implement the existing program. House Bill

Report, E2SSB 6630, 59<sup>th</sup> Leg., 2006 Reg. Sess., 303 (2006) (hereinafter “House Bill Report”). However, the House of Representatives amended the bill to preclude the use of CPP as evidence of voluntary treatment options under RCW 71.09.060 and as a less restrictive alternative for those already committed under chapter 71.09 RCW. House Bill Report.

The testimony in favor of the bill focused largely on the needs of the developmentally disabled persons served by the program. Senate Bill Report, E2SSB 6630, 59<sup>th</sup> Leg., 2006 Reg. Sess., 303 (2006). In one committee hearing, a concern was raised that courts should not be able to *order* sexually violent predators into the CPP as a Less Restrictive Alternative (LRA) under chapter 71.09 RCW: “[S]omeone being put into a community protection program rather than being incarcerated and that has been covered as well as if they’re coming out of a program to a less restrictive environment, this is not where they will go.”<sup>12</sup> RCW 71.09.020, specifically precludes placement of those already committed as sexually violent predators in the CPP as an LRA.

Excluding evidence of the CPP in the commitment trial has no bearing on the court’s authority to order that program as an LRA. The state may have a valid interest in protecting the developmentally disabled persons in the CCP from those committed as sexually violent predators. But for

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<sup>12</sup> [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2006021188](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2006021188) (2/23/2006 Committee Hearing) at ~6.

those who have not yet been determined to meet the criteria, this interest is premature. The mere fact that the State has chosen to file a petition does not prove the person would not be appropriately placed in the CPP.

Testimony also showed the amendments were a response to prosecutors' concerns regarding persons being considered for civil commitment: "There were concerns that, if the community protection program were available as an option for placement, that that could be used essentially as a defense to being civilly committed into this program. So it prevents it from being used as a defense . . . ."<sup>13</sup>

This testimony shows the purpose of this provision. It is designed to deprive people like Muns of a defense that is available to all others facing civil commitment. This provision did not arise out of concerns for fairness or even finances. The concern was that if this evidence were permitted, the State might lose. Depriving certain respondents of an otherwise valid defense is not a rational basis for legislation. Whether a respondent's voluntary participation in CPP can adequately protect the community is a question for the jury. The State has no valid interest in depriving the jury of relevant information necessary to that determination.

Equal protection requires that developmentally disabled persons subject to civil commitment proceedings receive the same opportunity as

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<sup>13</sup> [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2006021188](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2006021188) (2/23/2006 Committee Hearing) at ~2:30, at ~6.

other respondents to present evidence of a voluntary treatment plan. RCW 71.09.060 precludes this. The result is an unconstitutional violation of Muns' right to equal protection.

b. Banning Evidence of the CPP Violates Procedural Due Process By Increasing the Risk of Error in Commitment Proceedings.

Both the United States and Washington Constitutions protect Muns' right to due process of law. U.S. Const. amend. 5; U.S. Const. amend. 14; Const. art. 1, § 3. Because indefinite commitment under chapter 71.09 RCW is a restriction on the fundamental right to physical liberty, the process must be narrowly tailored to the State's interest in protecting the community from those who are both mentally ill and dangerous. Kansas v. Hendricks, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); Foucha v. Louisiana, 504 U.S. 71, 77 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); Thorell, 149 Wn.2d at 731-32.

To determine the nature of the process that is due before a respondent may be deprived of his liberty, courts apply the balancing test from Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In re Pers. Restraint of Young, 122 Wn.2d 1, 43-44, 857 P.2d 989 (1993). The courts balance (1) the importance of the private interest at stake, (2) the risk of erroneous deprivation and the probable value of additional

safeguards, and (3) the financial and administrative burden on the State of the additional safeguards. Mathews, 424 U.S. at 335.

Muns' private interest is that "most elemental of liberty interests, namely, the right to be "free from physical detention by one's own government." Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). Civil commitment is a "massive curtailment of liberty." In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)). The importance of the private interest at stake cannot be seriously disputed. Muns' liberty interest weighs in favor of maximum procedural protections.

The risk of erroneous commitment increases when relevant evidence is prohibited. By expressly permitting consideration of voluntary treatment options, RCW 71.09.060(1) acknowledges their relevance to one of the primary questions before the jury.<sup>14</sup> The Washington Supreme Court recognized the importance of voluntary treatment options, finding in Thorell that such evidence bears directly on the question put to the factfinder in a commitment trial: whether the statutory definition is met. Thorell, 149 Wn.2d at 751.

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<sup>14</sup> "In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released." RCW 71.09.060(1).

RCW 71.09.060(1) nevertheless deprives to those eligible for the CPP the opportunity to present evidence of their voluntary treatment plans. RCW 71.09.060(1). In this case, Muns was prepared to present expert testimony that he was appropriate for the program. CP 282, 330. By excluding the relevant CPP evidence, the statute kept a crucial fact from the jury's consideration. This risk of error highlights the need for heightened procedural protection.

The third Mathews factor is the fiscal or administrative burden on the State. Mathews, 424 U.S. at 335. It is important to note that when this legislation was passed, the concern was not that consideration of the CPP would increase the fiscal or administrative burdens of commitment proceedings. The Multiple Agency Fiscal Note Summary mentions no expenses relating to the evidentiary provision of E2SSB 6630.<sup>15</sup> Moreover, all others subject to commitment proceedings are entitled to present evidence of voluntary treatment programs that would exist for them. The cost of permitting developmentally disabled persons who are eligible for CPP to do the same would not add significantly to the cost of commitment proceedings.

In summary, Muns has a fundamental liberty interest at stake. By depriving him of the benefit of relevant evidence, the provision excluding

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<sup>15</sup> Multiple Agency Fiscal Note Summary, E2SSB 6630, 59<sup>th</sup> Leg., Reg. Sess., 303 (2006), available at <https://fortress.wa.gov/ofm/fnspublic/legsearch.asp?BillNumber=6630&SessionNumber=59>.

evidence of the CPP introduces risk of error. That risk can be eliminated with little or no fiscal or administrative burden. Under the Mathews balancing test, the statute that deprived Muns of this relevant evidence violates due process, and his commitment must be reversed.

c. The Provision Banning Evidence of the Community Protection Program Violates Substantive Due Process Because It Permits Commitment Of Persons Who Could Be Safely Supervised in the Community.

“A frequent recurrence to fundamental principles is essential to the security of individual right.” Wash. Const. art. I, § 32. This case is governed by fundamental principles regarding involuntary and indefinite civil commitment enunciated in Foucha. Such confinement violates the individual’s substantive due process right to liberty unless the person is proven to be both mentally ill and dangerous. Foucha, 504 U.S. at 77; In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002); Young, 122 Wn.2d at 41-42.

Crucial to the dangerousness analysis is the question of what conditions may reduce risk if the person is not committed. Post, 170 Wn.2d at 316-17; Thorell, 149 Wn.2d at 751. Even if the person might appear dangerous, the jury may consider voluntary treatment plans and other conditions that would exist upon release and that would decrease the danger. Post, 170 Wn.2d at 316-17; Thorell, 149 Wn.2d at 751; RCW 71.09.060(1).

Not so, however, for the Community Protection Program. No matter how effectively that program, with its targeted treatment and constant supervision, would reduce or even eliminate the danger, the jury may not hear about it. RCW 71.09.060(1).

Evidence of Muns' eligibility for the CPP would show he does not meet the commitment criteria because the CPP is sufficient to protect the community. CP 282, 330. Categorically excluding this evidence violates Muns' constitutional right to physical liberty under substantive due process because it permits the State to confine him even if he would be, as Novick Brown testified, "safe to be in the community because of that network of support services." 3RP 1060; Young, 122 Wn.2d at 41-42.

2. THE COURT ERRED IN ADMITTING THE RISK ASSESSMENT GUIDE WITHOUT HOLDING A FRYE HEARING.

Novel scientific evidence is not admissible in Washington unless it passes the so-called Frye test. State v. Gregory, 158 Wn.2d 759, 829, 147 P. 3d 1201 (2006). The goal of the test is to determine whether scientific evidence is based on established methodology. State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). There must be general acceptance in the relevant scientific community of both the underlying theory and the technique used to implement it. Id.; State v. Cauthron, 120 Wn.2d 879, 889, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Buckner,

133 Wn.2d 63, 941 P.2d 667 (1997). Although unanimity is not required, whenever there is a significant dispute within the relevant scientific community, the evidence must be excluded. State v. Copeland, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996); State v. Gentry, 125 Wn.2d 570, 585-86, 888 P.2d 1105 (1995). If the Frye test is satisfied, the trial court must then determine whether the evidence would assist the trier of fact under ER 702. Copeland, 130 Wn.2d at 256.

A trial court's decision not to conduct a Frye hearing is reviewed de novo. Gregory, 158 Wn.2d at 830. Appellate courts perform a searching review that is not confined to the trial record. Copeland, 130 Wn.2d at 255-56. The court may consider scientific literature, secondary legal authority, law review articles, and cases from other jurisdictions. Id.; Cauthron, 120 Wn.2d at 887-88.

Sreenivasan evaluated Muns' risk of re-offense using an assessment guide she and a colleague developed. 3RP 229. The court concluded the guide was not novel and declined to hold a Frye hearing. 3RP 70. This was error. The guide does not meet the Frye standard. First, the risk assessment is a new technique for assessing risk. Second, that technique is not generally accepted as valid in the scientific community. Finally, it is unfairly prejudicial and not helpful to the trier of fact.

a. The Newly Developed Guide for Assessing Recidivism Risk of Developmentally Disabled Offenders Is Novel Science.

Sreenivasan created this guide because she believed there were no valid methods for assessing recidivism risk among developmentally disabled sex offenders. 3RP 549. She believed the Static-99 was not valid because it was unknown whether developmentally disabled people were included in the original sample population. 3RP 549. She and a colleague surveyed the literature and compiled a checklist of factors they deemed associated with sexual re-offense among developmentally disabled persons. 3RP 473-74. Practitioners may add or remove factors, and weighting of the factors is left up to the judgment of individual practitioners. 3RP 482. When she employed the guide with Muns, it had not yet been published. CP 184-85. This guide is a new instrument for assessing risk.

Risk assessment heretofore has generally involved either clinical judgment based on observation and experience or actuarial analysis based on statistics. Thorell, 149 Wn.2d at 753. Although actuarials are significantly more accurate than clinical judgment, courts have held that “[b]ased on our established precedent . . . the Frye standard has been satisfied by both clinical and actuarial determinations of future dangerousness.” Thorell, 149 Wn.2d at 756; In re Detention of Fox, 138 Wn. App. 374, 395 n.14, 158 P.3d 69 (2007) (citing Eric S. Janus & Robert A. Prentky, Forensic Use of

Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability, 40 Am. Crim. L. Rev. 1443, 1444 (2003)).

Sreenivasan's risk assessment guide is neither an actuarial instrument nor a clinical risk assessment based on observation and experience. It is, in essence, a new animal, a hybrid, an "actuarial plus."

The trial court erred when it declined to hold a Frye hearing merely because the guide was "not based on any type of novel scientific theory." 3RP 70. It is not only the underlying theory, but also the technique used to implement it, that must be generally accepted. Cauthron, 120 Wn.2d 879, 889. Here, the technique was novel. Sreenivasan supplemented her actuarial analysis of static risk factors with other factors selected from research without concern for cross-validation or reliability. 3RP 237, 472-74. This new technique required a Frye hearing.

Muns also presented evidence that this technique is not, as required by Frye, generally accepted in the scientific community. Halon explained the scientific community generally requires such instruments must be cross-validated to verify their predictive power and must be shown to be reliable across various users. CP 189-90. Sreenivasan conceded her risk assessment guide has not been cross-validated or shown to have inter-rater reliability. 3RP 472, 480. She also conceded that adding or subtracting factors from the actuarials destroys their statistical validity. 3RP 496-97. Yet, the court

ruled that differences of opinion regarding the validity of her technique go to weight, rather than admissibility. 3RP 70. This rationale cannot be squared with the Frye standard.

“When general acceptance is reasonably disputed, it must be shown, by a preponderance of the evidence, at a hearing.” State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999). The court erred in failing to hold a Frye hearing on this novel technique for assessing risk of recidivism. Cauthron, 120 Wn.2d at 888 n.3. Since the court failed to even hold a Frye hearing, it would be appropriate simply to remand for a hearing. But if this Court should engage in a Frye analysis on appeal, Muns presents the following brief discussion of legal and scientific literature on risk assessment.

b. Sreenivasan’s Assessment Guide Is Not Generally Accepted in the Relevant Scientific Community.

Under Frye, trial courts are to take a conservative approach to scientific evidence. Copeland 130 Wn.2d at 25. The court’s gatekeeper role requires “careful assessment of the general acceptance of the theory and methodology of novel science.” Id. The goal is to “ensure, among other things, that ‘pseudoscience’ is kept out of the courtroom.” Id.

Courts abdicate that crucial role when they simply rely on precedent of admissibility without holding a Frye hearing to consider new

developments. Concepts and techniques that once were generally accepted often become laughable in light of new research and understanding. This is why even if a theory or technique is not new, a Frye hearing is required whenever there is evidence of a significant dispute in the scientific community. Cauthron, 120 Wn.2d at 888 n.3. Earlier case holdings do not represent a blanket acceptance for all time of any and all recidivism risk assessments. Cauthron, 120 Wn.2d at 888 n.3. Moreover, Washington cases discussing risk assessments fail to address both the flaws evidenced in this particular guide and the current state of the scientific dispute.

Although courts have repeatedly declined to acknowledge it, there is a vehement and ongoing dispute within the scientific community as to whether any risk assessment method actually produces reliable results. 3RP 570-78; Fredrick E. Vars, Rethinking The Indefinite Detention Of Sex Offenders, 44 Conn. L. Rev. 161 (2011); Melissa Hamilton, Public Safety, Individual Liberty, And Suspect Science: Future Dangerousness Assessments And Sex Offender Laws, 83 Temp. L. Rev. 697 (2011). Studies show clinical judgment rarely does better than random chance at predicting recidivism. Barefoot v. Estelle, 463 U.S. 880, 920, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting); John Monahan, A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients, 92

Va. L. Rev. 391, 406-07 (2006). While actuarial instruments are more precise, they also fall below the threshold of general acceptance for the purpose of indefinite civil commitment. See Vars, supra, at 167 (“[A]n instrument as good as the Static-99 largely fails to identify any individuals who met the legal standards for commitment.”).

But even setting aside the dispute regarding risk assessment in general, the idea that risk can be reliably assessed by adding new factors to adjust the actuarial outcome fails under Frye. Frye requires generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). This assessment guide has not been shown to produce reliable results. Sreenivasan conceded one cannot add or remove factors from actuarials and expect the results to be accurate. 3RP 496-97. She conceded she does not know if the factors included in her guide are empirically correlated with recidivism. 3RP 472-74. She conceded the assessment guide has not been cross-validated or shown to have inter-rater reliability. 3RP 472, 480.

A novel technique that represents an unwarranted extension of the underlying theory does not pass muster under Frye. See Riker, 123 Wn.2d at 360-62. In Riker, the court considered expert testimony that battered woman syndrome was responsible for the defendant’s actions. Id. at 358. On

appeal, the court first noted it did not question the underlying theory of battered person syndrome. Id. at 360. However, the expert witness in that case extended the syndrome to facts in which the typical close relationship between battered person and abuser was missing. Id. at 360-62. The court concluded this “extension” of the underlying theory was not generally accepted in the scientific community and did not pass muster under Frye. Id. at 362.

The court also found an unwarranted extension of a valid underlying scientific theory in State v. Leuluaialii, 118 Wn. App. 780, 77 P.3d 1192 (2003). The trial court in Leuluaialii permitted the state’s expert witness to apply the product rule to canine DNA. Id. at 789. The product rule in human DNA statistical analysis has been generally upheld as meeting the Frye standard. Copeland, 130 Wn.2d at 267. However, the court concluded the identification of a dog with high statistical probability via canine DNA analysis was novel and declared, “A Frye hearing was absolutely necessary.” Leuluaialii, 118 Wn. App. at 789. After examining the scientific literature, the court was “not convinced” canine DNA identification had achieved general acceptance in the scientific community or that reliable techniques existed to implement it in the forensic setting. Id. at 790.

The risk assessment guide is analogous to the misuse of gas chromatography in State v. Huynh, 49 Wn. App. 192, 198, 742 P.2d 160

(1987). In Huynh, an arson case, an expert testified the gas recovered from the fire “matched” gas found in the defendant’s car. Id. at 193-94. The underlying theory of gas chromatography was generally accepted in the scientific community. Id. at 196. On appeal, however, the court held the testimony was not admissible under Frye because the scientific community was divided on the effectiveness of gas chromatography when the sample gas has been burned. Id. at 196-98. The court noted the “glaring lack of corroborative testing.” Id. at 198.

Sreenivasan’s “actuarial plus” risk assessment guide fails the Frye test because it is an unwarranted extension of generally accepted underlying theories. See Riker, 123 Wn.2d at 360-62; Leuluaialij, 118 Wn. App. at 789-90. Rather than relying on clinical judgment or actuarials with established validity, Sreenivasan took the Static-99 as a jumping-off point, and added numerous other considerations that may or may not be empirically correlated with recidivism. 3RP 474. This is not a reliable technique for risk assessment. On the contrary, it shows the same “glaring lack of corroborative testing” that existed in Huynh. 49 Wn. App. at 198.

Because of that lack, Halon testified, a guide like this one is can be helpful in the exploratory research phase that precedes creation of a valid instrument, but is far from ready for use in clinical or forensic settings. 3RP 685-87. Even assuming the general acceptance of actuarial and clinical risk

prediction, that acceptance does not extend to the hybrid “actuarial plus” technique of the assessment guide in this case.

c. The Court Should Have Excluded the Risk Assessment Guide Because It Is Misleading.

The purpose of the Frye rule is to prevent a jury from being misled by unproven and unsound scientific methods. People v. Shirley, 31 Cal. 3d 18, 53, 723 P.2d 1354, 181 Cal. Rptr. 243 (1982). This purpose overlaps with the provision of ER 403 permitting exclusion of evidence when any probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury and with the requirement of ER 702 that expert testimony must be helpful to the trier of fact. Under each of these standards, the risk assessment guide should have been excluded because it is misleading to the jury.

While the risk assessment guide is not an actuarial based on verifiable and validated statistical analysis, it bears the superficial trappings of statistically valid instruments such as the Static-99. Ex. 16. Use of the guide strongly indicates to the jury that the results are based on an objective, almost mechanical assessment of the relevant factors (as is the case with an actuarial instrument). In this way, it misleads the jury by masking inherently subjective and personal clinical judgment in the guise of more objective determinations.

Sreenivasan testified she created her guide because the Static-99 does not sufficiently predict risk for developmentally disabled persons. 3RP 236-37. With her guide added to the actuarial rates, Sreenivasan testified Muns would, more likely than not, re-offend. 3RP 252. By identifying a perceived flaw in the actuarial and purporting to remedy that flaw with her additional analysis, her testimony suggested to the jury that the guide was more reliable than the Static-99 alone would have been.

But the opposite is true. “A growing body of research suggests that actuarial risk assessments are more reliable than clinical analyses.” Fox, 138 Wn. App. at 395 n.14, (citing Janus & Prentky, supra, at 1444)). Carefully cross-validated actuarial instruments are the preferred method for assessing risk. Association for the Treatment of Sexual Abusers, Policy Paper, Civil Commitment of Sexually Violent Predators, <http://www.atsa.com/civil-commitment-sexually-violent-predators> (“Sexual predator assessments should be conducted using empirically validated risk assessment instruments, measures, and methods.”). Modifying those instruments with a guide like this one diminishes their predictive power. 3RP 496-97.

Additionally, the purported flaw that supposedly triggered the need to adjust the actuarial in Muns case – the lack of a sample representing persons with developmental disabilities – turned out not to be true. Sreenivasan testified she later learned that the samples used to create the

Static-99 contained sufficient numbers of persons with developmental disabilities that the Static-99 can be considered valid for that group as well. 3RP 237.

Muns' score of 6 on the Static-99 results in a recidivism risk of 14 to 42 percent. 3RP 238-39, 488-89. That puts him well beneath the more than 50 percent required for commitment. See In re Detention of Brooks, 145 Wn.2d 275, 295-96, 36 P.3d 1034 (2001) (defining "more likely than not," in the context of chapter 71.09 RCW, as a prediction of statistical probability of more than 50 percent). The addition of clinical judgment and other risk factors via the risk assessment guide was not necessary to address a flaw in the actuarial and does not improve the predictive power. Sreenivasan's "actuarial plus" risk assessment guide is not helpful to the jury. It should have been excluded under Frye, ER 702, and ER 403 because it misleads the jury by suggesting it is more accurate than the Static-99.

d. This Error Requires Reversal Because the State Relied on Sreenivasan's Risk Assessment to Show the Likelihood of Reoffense.

The erroneous admission of expert testimony is reversible error when it was critical and the other evidence was not overwhelming. Huynh, 49 Wn. App. at 198. In attempting to show Muns would, more likely than not, re-offend, the State relied heavily on Sreenivasan's risk assessment. 3RP 1236-39. Although the jury heard Tucker's opinion on rebuttal, that opinion was

based on a relatively limited review of the case and expert reports, including Sreenivasan's. 3RP 1086, 1130. Finally, Halon testified he would not advocate for unconditional release. 3RP 822.

Novick Brown, however, testified that in her opinion, Muns was safe to come home. 3RP 1058-60. On these facts, Sreenivasan's risk assessment was critical to the State's case and the other evidence was not overwhelming. Muns' commitment should be reversed.

D. CONCLUSION

Muns was denied the right to present relevant evidence in violation of his constitutional rights to equal protection and due process. Additionally, his trial was tainted by misleading scientific evidence that did not meet the Frye standard. Muns therefore requests this Court reverse his commitment.

DATED this 25<sup>th</sup> day of May, 2012.

Respectfully submitted,

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In re Detention of Jason Muns

No. 29920-1-III

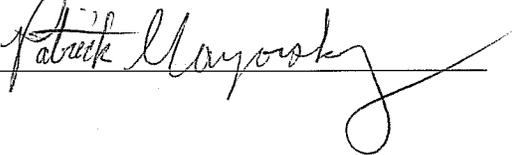
Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 25<sup>th</sup> day of May, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Tricia Boerger  
Office of the Attorney General  
[triciab1@atg.wa.gov](mailto:triciab1@atg.wa.gov)  
[crjsvpef@atg.wa.gov](mailto:crjsvpef@atg.wa.gov)

Signed in Seattle, Washington this 25<sup>th</sup> day of May, 2012.

X 

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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In re the Detention of Jason Muns,	)	
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 29920-1-III
	)	
JASON MUNS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF MAY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON MUNS  
SPECIAL COMMITMENT CENTER  
P.O. BOX 88600  
STIELACOOM, WA 98388

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF MAY, 2012.

x *Patrick Mayovsky*