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Court of Appeals
Division III
State of Washington

NO. 29920-1

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

In re the Detention of:

JASON MUNS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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Rules

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I. STATEMENT OF THE CASE

The State accepts Muns' Statement of the Case except as otherwise noted below.

II. ISSUES PRESENTED

1. Does Muns have standing to challenge the constitutionality of RCW 71.09.060(1) when he failed to provide the trial court with any evidence that the Community Protection Program was an option that "would exist" for him upon release?
2. If Muns has standing to challenge the constitutionality of the statute, has Muns proven beyond a reasonable doubt that the legislature's decision to exclude evidence of the Community Protection Program violates the equal protection clause when the exclusion applies to all sexually violent predators and the legislature had a legitimate state interest in keeping sexually violent predators separate from developmentally disabled individuals in the Community Protection Program?
3. Is procedural due process implicated when Muns does not have a liberty or property interest in placement in the Community Protection Program and the *Mathews v. Eldridge* factors weigh heavily in favor of the State?
4. Where Muns asserts a right to use evidence of the Community Protection Program as a defense to civil commitment, despite failing to present any evidence that he had been accepted for placement in the program, has he carefully described a fundamental right that implicates substantive due process?
5. Did the trial court abuse its discretion when it admitted evidence of a risk assessment guide that Dr. Sreenivasan used to structure her clinical judgment, finding that a difference of opinion as to the usefulness of the risk

assessment guide went to the weight of the testimony and not its admissibility?

III. ARGUMENT

Muns contends that the provision in RCW 71.09.060(1) excluding evidence of the Community Protection Program as a placement condition or voluntary treatment option is unconstitutional. He argues that the statute violates the equal protection clause because it disparately precludes developmentally disabled sexually violent predators (“SVP”) from offering evidence of a voluntary treatment program. He further argues that the statute violates procedural and substantive due process because it prohibits him from introducing evidence of a voluntary treatment program that would decrease his dangerousness if released to the community.

The Court should reject Muns’ arguments because: (1) he lacks standing to challenge the constitutionality of the statute, as he failed to demonstrate that the Community Protection Program was an option that “would exist” if he were unconditionally released from the SVP petition; (2) even if Muns has standing, he is not being denied equal protection because all SVPs are precluded from introducing evidence of less restrictive alternatives and/or the Community Protection Program in SVP trials; (3) the legislature’s decision to preclude SVPs from offering evidence of a less secure facility, such as the Community Protection

Program, during an initial commitment trial serves a legitimate government interest in protecting the public from the particular dangers and treatment needs of SVPs; and (4) Muns does not have a substantive right to offer evidence of a state-funded program, such as the Community Protection Program, as a defense to civil commitment.

Finally, Muns' claim that the trial court should have conducted a *Frye* hearing before allowing the State's expert to testify about her risk assessment is contrary to well-settled case law and should be rejected.

A. The Trial Court Correctly Excluded Testimony from Dr. Novick Brown That the Community Protection Program was an Appropriate Less Restrictive Alternative for Mr. Muns

1. The Community Protection Program

In 2006, the legislature codified the Community Protection Program ("CPP") in RCW 71A.12.200 *et seq.* The CPP was created in 1996 to provide a "structured, therapeutic environment" for eligible developmentally disabled persons to allow them to "live safely and successfully in the community while minimizing the risk to public safety." RCW 71A.12.200; and Final Bill Report, E2SSB 6630, 59th Leg., 2006 Reg. Sess., 303 (2006)(the "Final Bill Report"). In codifying the CPP, the legislature approved of steps already taken by the Department of Social and Health Services ("DSHS") to create a CPP within the Division of Developmental Disabilities ("DDD"). As part of the codification of the

CPP, the legislature amended RCW 71.09 to preclude courts from ordering placement in the CPP as a less restrictive alternative after commitment and to exclude evidence of the CPP as a placement condition or voluntary treatment option at the initial commitment trial. Second Substitute House Bill Report, E2SSB 6630, 59th Leg., 2006 Reg. Sess., 303 (2006) (“House Bill Report”); RCW 71.09.020(6); and RCW 71.09.060(1).

The CPP is a voluntary, state-funded program. Prior to receiving services through the CPP, an individual must have a psychosexual risk assessment completed by a qualified professional, which may be selected by the individual from a list of state contracted qualified professionals. RCW 71A.12.230(1). The Department of Social and Health Services (“DSHS”) may elect to request an additional evaluation by a qualified professional. *Id.* Any individual being considered for placement in the CPP is informed, in writing, of the right to accept or decline services at the CPP. RCW 71A.12.230(2). The individual is also informed of their right to refuse to participate in the program. *Id.* The individual is also informed of the requirement to sign a pre-placement agreement as a condition of receiving services. *Id.* DSHS retains the right to determine that an individual cannot be managed successfully in the CPP with reasonably available safeguards. RCW 71A.12.230(3)(b). The statute expressly

provides that there is no entitlement to participation in the CPP, nor a right to an administrative hearing on decisions denying placement in the CPP. RCW 71A.12.240(5).

The CPP is not designated by DSHS as a “total confinement facility” as that term is defined in RCW 71.09.020(19). To the contrary, the CPP requires that individuals have an opportunity to receive services in the least restrictive manner and least restrictive environment possible. RCW 71A.12.250. The CPP mandates a review by the treatment team every ninety (90) days to evaluate the use of less restrictive measures and recommend reductions if appropriate. *Id.* A individual may be moved to a less restrictive alternative after only twelve (12) months of participation in the CPP. RCW 71A.12.260.

2. Facts Relating to Community Protection Program

Prior to the initial commitment trial in this case, Muns sought the assistance of a second expert witness, Natalie Novick Brown, Ph.D. Muns had already retained the services of Robert Halon, Ph.D., as an expert forensic psychologist. Dr. Halon opined that Muns was not a sexually violent predator, but rather significantly developmentally delayed and that his sexual interest and behavior with children were merely opportunistic

expressions of Muns' constant craving for sexual excitement and gratification. 3RP 613-15¹.

Less than two months prior to the trial, in February 2011, Muns produced a psychosexual risk assessment by Dr. Novick Brown. In her report, Dr. Novick Brown opined that, since Muns was eligible for Department of Developmental Disability ("DDD") services, the most appropriate *less restrictive alternative* ("LRA") for Muns was the Community Protection Program ("CPP"). CP 282. During her deposition, Dr. Novick Brown explained that she had been retained, not to determine whether Muns met the criteria as a sexually violent predator, but to determine whether Muns was "more appropriate for DDD services and the community protection program as opposed to the SVP setting." CP 530. In other words, Dr. Novick Brown was retained to determine which DSHS facility Muns was best housed in, the CPP or the SCC. See RCW 71A.12.220(5) ("Department' means the department of social and health services") and RCW 71.09.020(1) ("Department' means the department of social and health services.").

¹ For consistency, the State has followed Muns' naming convention for the verbatim report of proceedings. The March 11, 2011 hearing is cited as 1RP. The pretrial motions hearing on April 13, 2011 is cited as 2RP. The trial proceedings from approximately April 18 through May 10, 2011 are cited as 3RP.

Dr. Novick Brown admitted that this was the first time she had completed a risk assessment in which she was asked to opine whether an individual was more appropriate for DDD services and the CPP in an SVP case in Washington². CP 528-529. Dr. Novick Brown did not diagnose Muns with Fetal Alcohol Spectrum Disorder (“FASD”), but rather relied upon DDD’s acceptance of Dr. Halon’s diagnosis of FASD. CP 538; CP 586. Dr. Novick Brown was not working for or in conjunction with DSHS or DDD, but solely on behalf of Muns in the SVP case. CP 560. She was not aware of whether DSHS would receive or even accept her evaluation as the risk assessment required for the CPP pursuant to RCW 71A.12.230(1). CP 561. Dr. Novick Brown acknowledged that she did not know whether Muns remained eligible for DDD services since the initial determination was made in 2005. CP 569. Dr. Novick Brown was also unaware of whether DDD had begun the process of assessment and referral to the CPP for Muns. CP 569-570. Dr. Novick Brown was similarly unaware of whether Muns had been offered placement in the CPP. CP 570. Finally, Dr. Novick Brown had not talked to Muns about whether he wanted to participate in the CPP or would even accept a placement at the CPP if one was offered. CP 573. To the contrary,

² Dr. Novick Brown said she was in the process of conducting two similar evaluations in California, but had not completed those evaluations and had never testified in an SVP case about this type of risk assessment. CP 528-529.

Dr. Novick Brown admitted that Muns wanted to live with his family if released. *Id.*

The State filed a motion in limine to preclude Dr. Novick Brown from testifying that an LRA, specifically the CPP, was the most appropriate DSHS facility to house Muns rather than the SCC. The State argued that individuals subject to the SVP act are not entitled to consideration of LRAs until their first annual review pursuant to *In re the Detention of Thorell*, 149 Wn.2d 724, 751, 72 P.3d 708 (2003). CP 46. The State also argued that the DSHS facility to which a person will be committed has no bearing on whether the person meets the definition of an SVP, as recognized by the Washington Supreme Court *In re the Detention of Turay*, 139 Wn.2d 379, 404, 986 P.2d 790 (1999). *Id.* Finally, the State argued that RCW 71.09.060(1) expressly prohibited testimony relating to the CPP as a placement condition or treatment option that would exist if he were released unconditionally from the petition. CP 45. Dr. Novick Brown could not say whether the CPP was an option that “would exist” for Muns if released from detention on the SVP petition, as she did not know if he would be offered placement in the CPP, or even if he would accept placement in the CPP. CP 47-48.

Muns did not file a response to the State’s motion, but during oral argument on the motion, Muns deflected the issued, instead focusing on

Dr. Novick Brown's qualifications and the alleged failings of the State's expert. 2RP 130-35. Muns never offered the trial court any evidence that he had been accepted into the CPP or had accepted placement in the CPP. Muns simply argued that he was eligible for DDD services. 2RP 134; CP 147-148. Thus, the evidence before the trial court was that the CPP was only a hypothetical or speculative placement, rather than one that would actually exist for Muns if unconditionally released from the SVP petition.

The trial court granted the State's motion and precluded Muns' experts from testifying that he was best housed at an LRA, or the CPP. 2RP 137-38. The trial court made clear that Muns' experts were not precluded from testifying that Muns did not meet the criteria as an SVP or does not have a mental abnormality because of FASD. *Id.* The trial court only limited testimony regarding which DSHS facility, the CPP or the SCC, was a better placement for Muns. *Id.*

3. Standard of Review

A trial court's ruling on the admissibility of evidence is subject to an abuse of discretion standard. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Such an abuse occurs only when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." *Darden*, 145 Wn.2d at 619 (quoting *State v. Powell*,

126 Wn.2d 244, 258, 893 P.2d 615 (1995)). “[T]he trial court’s decision will be reversed only if no reasonable person would have decided the matter as the trial court did.” *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). Muns has failed to satisfy this review standard.

4. Muns Lacks Standing To Challenge The Constitutionality Of RCW 71.09.060(1) Because He Did Not Offer The Trial Court Any Evidence That The CPP Was An Option That “Would Exist” If He Were Unconditionally Released To The Community

Muns does not have standing to challenge the validity of RCW 71.09.060(1) because he was not adversely affected by the challenged provision. “The constitutionality of a statute may not be challenged unless the person bringing the case is adversely affected by a particular feature of the statute claimed to be in violation of the constitution.” *In re Detention of McClatchey*, 133 Wn.2d 1, 7-8, 940 P.2d 646 (1997) (Smith, J. concurring) *citing State v. Rowe*, 60 Wn.2d 797, 799, 376 P.2d 446 (1992). The provision of RCW 71.09.060(1) excluding evidence of the CPP only adversely affects Muns if the CPP was an option that “would exist” for him upon release³.

³ RCW 71.09.060(1) provides in part: “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.” (Emphasis added.)

The term “would exist” means conditions that would actually exist for Muns if he were unconditionally released from custody, rather than a hypothetical condition or placement. See *In re Detention of Mulkins*, 157 Wn. App. 400, 406, 237 P.3d 342 (2010), citing *State v. Harris*, 141 Wn. App. 673, 680, 174 P.3d 1171 (2007). Pursuant to RCW 71A.12.230(3), if DSHS determines that a person is appropriate for placement in the CPP, the person will receive a written determination by DSHS that the person meets the criteria for placement in the CPP. Similarly, if DSHS determines that the person cannot be managed successfully in the CPP, DSHS will notify the person in writing of that decision. RCW 71A.12.230(3)(b). There is no right to an administrative hearing to appeal a decision denying placement in the CPP. RCW 71A.12.240(5).

The *Mulkins* decision is dispositive. There, the Court of Appeals rejected a constitutional challenge to the exclusion of the CPP as a placement condition in RCW 71.09.060(1), holding *Mulkins* did not have standing to challenge its validity. *Id.* at 405. *Mulkins* sought to introduce evidence at his initial commitment trial of his eligibility to participate in the CPP to rebut the State’s evidence that he was likely to reoffend if released to the community. *Id.* at 402. The trial court excluded this evidence pursuant to RCW 71.09.060(1). *Id.* On appeal, *Mulkins* claimed

that the exclusion of the CPP in RCW 71.09.060(1) violated his right to due process. *Id.* at 405. The court determined that Mulkins failed to establish that he had been through the application process for the CPP, had been accepted to the CPP, or had even agreed to participate in the CPP. *Id.* at 406. Therefore, without evidence of actual acceptance or placement in the CPP, Mulkins failed to establish that the CPP was an option that “would exist” for him upon release. *Id.* at 406. The Court of Appeals affirmed holding that Mulkins had not been adversely affected by the statute and did not have standing to challenge its constitutional validity. *Id.* at 407.

The relevant facts here are virtually identical to *Mulkins*. Muns challenges the constitutionality of the statute’s exclusion of evidence of the CPP, but like Mulkins, he failed to present the trial court with any evidence that he had been accepted to the CPP or had agreed to participate in the CPP. The proffered testimony in this case was solely that of Muns’ expert, Dr. Novick Brown, who intended to testify that Muns *appeared to be eligible* for the CPP and that Muns would be a good candidate for DDD-sponsored services in the community. CP 118. During her deposition, Dr. Novick Brown admitted that she did not have any information about whether DDD had completed any of the necessary requirements for Muns to be placed in the CPP. CP 569-570. Dr. Novick

Brown did not know whether DDD would accept her risk assessment as the necessary evaluation for the CPP. CP 561. She did not know whether a case review had been conducted by DDD. CPP 569. She did not know whether funds were available for Muns' placement in the CPP. CP 570. Nor did Dr. Novick Brown know whether an offer of placement in the CPP had been made to Muns. *Id.* Finally, she did not know whether Muns would even accept an offer of placement at the CPP, as Muns had repeatedly expressed a desire to live with his family if released. CP 573.

Muns did not offer a writing evidencing his acceptance in the CPP or his acceptance of CPP services⁴. The only evidence offered to the trial court, and submitted to the jury, was that Muns was eligible for DDD services. CP 147-148. Like the facts in *Mulkins*, a statement of eligibility for DDD services is not sufficient to establish that the CPP is a placement condition or treatment option that would actually exist if Muns were released to the community. At very least, Muns should have produced the writing required by RCW 71A.12.230(3)(a) indicating that he met the criteria for placement in the CPP. Otherwise, it was equally probable that

⁴ RCW 71A.12.230(3)(a) provides: "If the department determines that a person is appropriate for placement in the community protection program, the individual and his or her legal representative shall receive in writing a determination by the department that the person meets the criteria for placement within the community protection program." Muns did not offer evidence of any such writing or his acceptance of CPP services.

DSHS would determine that Muns could not be safely managed in the CPP and would not be offered a placement in the program.

Thus, the CPP is only a hypothetical placement for Muns and not one that “would exist” if he were unconditionally released from the SVP petition. Appellant fails to cite any authority that allows an offender in an SVP case to present evidence of a speculative placement condition or treatment option; indeed, such speculation is directly contrary to the plain language of RCW 71.09.060(1). Unlike criminal community supervision which does not depend upon Muns’ willingness to participate, the CPP is not a placement condition or treatment option that would actually exist for Muns if released from the SVP petition. The CPP was nothing more than a hypothetical placement or treatment option that had the potential to mislead the jury into believing Muns was safe to be released from the SVP petition. As such, the trial court was correct to exclude testimony regarding the CPP. In accord with *Mulkins*, Muns cannot challenge the constitutional validity of RCW 71.09.060(1) because he was not adversely affected by that provision.

B. Muns Has Failed to Prove Beyond A Reasonable Doubt That The Legislature’s Decision to Exclude Evidence of the CPP is Unconstitutional

Muns alleges that exclusion of evidence of the CPP violates the equal protection clause by singling out the CPP from all other voluntary

treatment programs. He claims the statute creates two classes of SVPs – developmentally disabled SVPs who are eligible for the CPP and non-developmentally disabled SVPs. Muns’ argument fails, first and foremost because he does not have standing to challenge the constitutionality of the statute, as Muns did not present any evidence to suggest that it was a placement that “would exist” for him rather than simply a hypothetical placement. *Mulkins, supra*, 157 Wn. App. at 406. Second, Muns’ argument fails because the statute treats all SVPs the same – it precludes all SVPs from presenting evidence of LRAs at the initial commitment trial, including the CPP, but allows all SVPs to present evidence of other placement conditions or treatment options that would exist for them if released. Finally, Muns’ argument fails because the legislature has broad discretion to condition participation in state programs and has a legitimate interest in precluding persons alleged to be mentally ill and dangerous from placement in state-run facilities that are not deemed sufficiently secure. The CPP is a voluntary program that encourages management in the least restrictive environment possible, rather than a total confinement facility. *See* RCW 71A.12.250.

A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt. *State v. Myles*,

127 Wn.2d 807, 812, 903 P.2d 979 (1995). Wherever possible, “it is the duty of this court to construe a statute so as to uphold its constitutionality.” *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985).

The equal protection clause requires that “persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). An SVP is not a member of a suspect or semi-suspect class. *In re Detention of Brooks*, 94 Wn. App. 716, 720–21, 973 P.2d 486 (1999), *aff’d in part, rev’d in part*, 145 Wn.2d 275, 299, 36 P.3d 1034 (2001). Washington courts review equal protection challenges to the SVP Act under the rational basis test. *In re Turay*, 139 Wn.2d 379, 409–10, 986 P.2d 790 (1999), *cert. denied*, 531 U.S. 1125, 121 S. Ct. 880 (2001). “This standard is highly deferential to the legislature, and even ‘rational speculation unsupported by evidence of empirical data’ prevents a court from finding the law unconstitutional under rational basis review.” *Detention of Fox v. State, Dept. of Social and Health Svcs.*, 138 Wn. App. 374, 400-01, 158 P.3d 69 (2007), *quoting Thorell, supra*, 149 Wn.2d at 749. The burden is on the party challenging the classification to prove that the law is “purely arbitrary.” *Thorell*, 149 Wn.2d at 749.

Washington courts apply a three-part test to determine whether a statute survives rational basis scrutiny: (1) does the classification apply equally to all class members, (2) does a rational basis exist for distinguishing class members from non-members, and (3) does the classification bear a rational relationship to the legislative purpose. *Morris v. Blaker*, 118 Wn.2d 133, 149, 821 P.2d 482 (1992); *In re Pers. Restraint of Silas*, 135 Wn. App. 564, 570, 145 P.3d 1219 (2006). Thus, the question before the court is whether Muns has proven beyond a reasonable doubt that the statute treats some SVPs differently from others for a purely arbitrary reason that is wholly irrelevant to the achievement of legitimate state objectives. See *State v. Coria*, 120 Wn.2d 156, 171–72, 839 P.2d 890 (1992). Even if Muns has standing to challenge the constitutionality of RCW 71.09.060(1), he has failed to meet his burden and his equal protection claims fails.

1. There is No Equal Protection Violation Because All Alleged SVPs Are Precluded From Offering Evidence of LRAs at the Initial Commitment Trial

Muns has not met his burden of identifying a classification that affords rights to some SVPs, but not to others. He claims the statute distinguishes between developmentally disabled SVPs and non-developmentally disabled SVPs, but the statute makes no such distinction. The challenged classification applies equally to all SVPs. No SVP is

permitted to present evidence of an LRA, including the CPP, during an initial commitment trial. See RCW 71.09.015⁵; and *Thorell, supra*, 149 Wn.2d at 750 (upholding restriction of evidence of LRAs at initial commitment trials).

The issue of whether testimony relating to LRAs can be presented at the initial commitment trial has long been resolved by the Washington State Supreme Court. In *Thorell*, the Court reviewed several legislative amendments to the SVP Act relating to LRAs, including RCW 71.09.015 (precluding consideration of LRAs during the initial commitment trial); RCW 71.09.020(6)(defining “less restrictive alternative”); RCW 71.09.060(1)(precluding consideration of placement and treatment options other than those available on unconditional release); and RCW 71.09.020(15)(adding to definition of “secure facility”). 149 Wn.2d at 747. The *Thorell* Court rejected equal protection challenges to these statutes and held that SVPs present unique treatment needs and protecting society from the heightened risk of sexual violence presented by SVPs justified delayed consideration of LRAs until after commitment. *Id.* at 750-53.

⁵ RCW 71.09.015 provides in part: “The legislature hereby clarifies that it intends, and has always intended, in any proceeding under this chapter that the court and jury be presented *only with conditions that would exist or that the court would have the authority to order* in the absence of a finding that the person is a sexually violent predator.” (Emphasis added.)

Before trial the State learned, through her report and deposition, that Dr. Novick Brown would testify that the CPP was the most appropriate DSHS facility and *least restrictive alternative* in which to house Muns. See CP 282 and 530. After learning of this proposed testimony, the State filed a motion in limine in the trial court arguing that testimony regarding LRAs was not permitted and argued the same during pretrial motions. See CP 44-49; 2RP at 126-30, 135-36. On appeal, Muns concedes that Dr. Novick Brown would have testified that the CPP “was an appropriate *less restrictive alternative* to commitment that could provide round-the-clock supervision if Muns were unconditionally released.” App. Br. at 18 (emphasis added).

Recognizing that *Thorell* precludes all SVPs from introducing evidence of LRAs at the initial commitment trial, Muns now claims that Dr. Novick Brown was not referring to a court-ordered LRA, but simply the commonly understood meaning of “an alternative that is less restrictive.” App. Br. at 18, fn. 10. However, there is no support in the record for Muns’ assertion and he doesn’t cite to the record to support his claim that Dr. Novick Brown didn’t really mean what she wrote. Further, Muns provides no indication that the trial court was aware that he wasn’t trying to present testimony of an LRA. Muns’ did not refute that it was being presented as an LRA during pretrial motions, but does so for the

first time on appeal. He cannot now make an argument that was not before the trial court. See *In re the Detention of Daniel Audett*, 158 Wn.2d 712, 725-26, 147 P.3d 982 (2006) (rejecting newly-asserted theories on appeal). The evidence before the trial court was that Dr. Novick Brown would testify that the CPP was an appropriate LRA for Muns. But *Thorell* precludes such testimony and the trial court properly excluded Dr. Novick Brown's testimony that the CPP was an appropriate LRA for Muns. Further, *Thorell* holds that there is no equal protection violation on this basis.

Even if Muns had informed the trial court that he did not intend to present Dr. Novick Brown's testimony of the CPP as an LRA, he still cannot identify a classification that affords rights to some SVPs (non-developmentally disabled SVPs), but not to other SVPs (developmentally disabled SVPs). Every SVP is precluded from offering evidence of the CPP as a voluntary treatment option under RCW 71.09.060(1). The statute does not single out developmentally disabled SVPs and treat them any differently than other SVPs. All SVPs are limited in the same manner – they can only present evidence of placement conditions or voluntary treatment options that would exist if unconditionally released from detention of the SVP petition. RCW 71.09.060(1). Thus, Muns has failed to establish the first element of

the equal protection analysis, as there is no classification that affords different rights to non-developmentally disabled SVPs and further constitutional analysis is unwarranted.

2. Legitimate State Interests Warrant Treating SVPs Differently From Non-SVPs or Mentally Ill People

Even if Muns could carry his burden with regard to showing a classification of developmentally disabled SVPs and non-developmentally disabled SVPs, he cannot prove that the classification is wholly irrelevant to legitimate state objectives. *See State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996). The legislature has “broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). “If a court can reasonably conceive of a state of facts to exist which would justify the legislation, those facts will be presumed to exist and the statute will be presumed to have been passed with reference to those facts.” *State v. Conifer Enters.*, 82 Wn.2d 94, 97, 508 P.2d 149 (1973); *State v. Moore*, 79 Wn.2d 51, 54, 483 P.2d 630 (1971). Thus, where scientific opinions conflict on a particular point, *the Legislature is free to adopt the opinion it chooses*, and the court will not substitute its judgment for that of the Legislature. *State v. Dickamore*,

22 Wn. App. 851, 855, 592 P.2d 681 (1979) (emphasis added); *see also State v. Brayman*, 110 Wn.2d 183, 193, 751 P.2d 294 (1988).

The legislature has determined that there is a “small but extremely dangerous group of sexually violent predators” who are likely to engage in repeat acts of predatory sexual violence. RCW 71.09.010. The legislature further determined that these individuals are unamenable to traditional treatment modalities and require very long term treatment in secure facilities. *Id.*

The Washington Supreme Court has repeatedly upheld the legislature’s findings and has concluded that there is a rational basis for treating SVPs differently from other individuals. *See e.g. Thorell, supra*, 149 Wn.2d at 750 (“providing treatment specific to SVPs and protecting society from the heightened risk of sexual violence they present are legitimate state objectives”), *citing Turay, supra*, 139 Wn.2d at 410 (“it is irrefutable that the State has a *compelling interest* both in treating sex predators and protecting society from their actions”) *quoting In re Pers. Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). Indeed, the Supreme Court has indicated that “sexually violent predators are generally considerably more dangerous to others than the mentally ill,” who are also civilly committed. *Young*, 122 Wn.2d at 45.

The legislature certainly had a legitimate reason for excluding individuals who are among the “small but extremely dangerous group of sexually violent predators” from participating in the CPP when it codified that program in 2006. Unlike others who may be eligible for the CPP, Muns has been determined by a forensic psychologist to suffer from a mental abnormality and/or personality disorder that makes it likely that he will engage in predatory acts of sexual violence if not confined in a secure facility. The State filed a Petition which was then reviewed by the trial court at a probable cause hearing held in accordance with RCW 71.09.040. Muns was then detained awaiting trial as an SVP.

Unlike the SCC, the CPP is not a total confinement facility serving the very long-term treatment needs of SVPs, but a voluntary program that encourages treatment in the least restrictive manner and environment possible. RCW 71A.12.250. Individuals are eligible for release to a less restrictive alternative in just twelve (12) months. *Id.*

It is entirely reasonable and appropriate for the legislature to preclude persons alleged and determined to be SVPs from participating in a state-funded program that houses other vulnerable developmentally disabled individuals, and is a facility significantly less secure than total confinement. *See e.g. In re the Detention of Gordon*, 102 Wn. App. 912, 920, 10 P.3d 500 (2000) (“It is reasonable for the Legislature to conclude

that [the SVP] population needs to be secured not only from the public but from other patients in mental institutions that are more informal than the...SCC”).

At the same time that the legislature codified the CPP, it amended the SVP Act to specifically preclude individuals alleged or deemed to be SVPs from participating in the program. Final Bill Report. The provision excluding sex offenders from the CPP was explained in the Second Substitute Senate Bill Report 6630:

The House amendment prohibits the availability of the Community Protection Program as a placement or treatment option available to a person if unconditionally released from detention on a sexually violent predator petition or as a less restrictive alternative for release.

Second Substitute Senate Bill Report, E2SSB 6630, 59th Leg. 2006 Reg. Sess. (2006); *see also* House Bill Report.

The legislature has broad discretion to fashion its programs as it sees appropriate and excluding individuals deemed likely to engage in repeat predatory acts of sexual violence from state-funded programs is a legitimate state objective that is rationally related to Muns' classification as an alleged SVP. In summary, Muns has failed to carry his burden of demonstrating that RCW 71.09.060 treats some SVPs differently from others, and even if he were able to carry that burden, he cannot

demonstrate that the classification is wholly irrelevant to a legitimate state objective. In accord with *Thorell*, Muns' equal protection claim fails.

C. Muns Has No Due Process Right to Placement in the CPP

Muns claims the exclusion of evidence of the CPP in RCW 71.09.060(1) violates procedural due process by increasing the risk of error in civil commitment proceedings. Muns applies the balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976) in support of his claim. However, procedural due process is not implicated because Muns is not entitled to placement in the CPP. The CPP is a discretionary state program and the legislature has broad discretion to impose conditions on participation in a state program. Because Muns does not have a liberty or property interest in the benefit he claims, placement in the CPP, he cannot meet his burden to show that his rights have been infringed.

Even if a procedural due process inquiry were appropriate, the exclusion of the CPP as a placement condition or voluntary treatment option is proper under *Mathews v. Eldridge* because the legislature has broad discretion to limit participation in a state-funded program. Further, exclusion of evidence pertaining to the CPP does not preclude Muns from offering evidence of other placement conditions or voluntary treatment options that would exist for him if released. Rather RCW 71.09.060(1) precludes evidence of a single state-funded program, the CPP, in which

Muns had no entitlement to participation. There is no due process right or violation in this case.

1. Procedural Due Process Does Not Apply Where Muns Does Not Have a Liberty or Property Interest in Placement in the CPP

Procedural due process applies only when state action deprives an individual of a liberty or property interest. *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n.*, 144 Wn.2d 516, 522-23, 29 P.3d 689 (2001); *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893 (1976). Procedural due process “[a]t its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context.” *In re Detention of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007), *citing Mathews*, 424 U.S. at 334.

As a threshold matter, Muns must establish that he has a constitutionally protected liberty or property interest in the underlying object of the procedure. *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 641, 127 P.3d 713 (2005). The procedural flaw that Muns identifies is the exclusion of evidence of the CPP as a placement condition or voluntary treatment option under RCW 71.09.060(1). But Muns does not have a liberty or property interest in placement in the CPP. Muns has no right whatsoever to participate in a discretionary state program. Therefore, he

does not have a procedural due process right to introduce evidence of a discretionary state program.

On the other hand, the legislature has the authority to condition participation in state programs as the legislature deems appropriate. *State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994). Here, the legislature has determined that alleged SVPs, those who are mentally ill and pose a significant risk of sexual reoffense due to serious difficulty controlling their sexually violent behavior, are not eligible for placement in the CPP. The legislature made this decision when it codified the CPP in 2006 and it is within the legislature's right to exclude dangerous sexual predators from a state program. Muns cannot assert that he has a due process right – or liberty interest – in placement in the CPP.

Muns does have a liberty interest in remaining free of civil commitment under the SVP Act. But, the SVP Act has repeatedly been found to include significant protections to minimize the risk of erroneously depriving Muns of his liberty. *See e.g. Stout, supra*, 159 Wn.2d at 370-71 (finding no right to confrontation in SVP cases because “[a] comprehensive set of rights for the SVP detainee already exists”); *State v. McCuiston*, --- Wn.2d ----, 275 P.3d 1092, 1104 (May 3, 2012)(“Given the extensive procedural safeguards in chapter 71.09 RCW, the risk of an erroneous deprivation of liberty...is low.”).

Muns' liberty interest is fully protected by the existing procedures in the SVP Act, including a probable cause hearing, a right to counsel at all stages of an SVP proceeding, a right to a jury, and importantly, a high burden of proof for the State, beyond a reasonable doubt. *Stout*, 159 Wn.2d at 370-71.

Allowing Muns to introduce evidence of a hypothetical placement condition or treatment option that does not actually "exist" for him does nothing to further minimize the risk of erroneous commitment beyond the existing protections in the SVP Act. But, such testimony would risk misleading the jury into believing Muns was entitled to placement in the CPP and would be placed in the CPP if they released him. Muns had no right to placement in the CPP and did not offer any evidence that the CPP had accepted him for placement. Thus, Muns does not have a liberty interest in placement in the CPP or in presenting evidence of the CPP as a placement condition or treatment option if released from the SVP petition.

The next question is whether Muns has a property interest in the CPP. A due process property right exists "when an individual has a reasonable expectation of entitlement deriving from existing rules that stem from an independent source such as state law." *Asche v. Bloomquist*, 132 Wn. App. 784, 797, 133 P.3d 475 (2006). "A claim of entitlement must be more than an abstract need or desire for, or unilateral expectation

of, a state benefit.” *Gray v. Pierce County Housing Auth.*, 123 Wn. App. 744, 753, 97 P.3d 26 (2004), citing *Conard v. Univ. of Wash.*, 119 Wn.2d 519, 529, 834 P.2d 17 (1992). Muns is claiming a due process right to placement in the CPP and to offer evidence of the CPP at trial as a voluntary treatment program that would reduce his dangerousness in the community. But, Muns has no entitlement to placement in the CPP and therefore no procedural due process right to present evidence of the CPP as a placement condition or treatment option.

The statute creating the CPP, RCW 71A.12.230, provides no entitlement. It establishes a program where an individual’s participation is discretionary with the agency. By statute, the agency exercises broad discretion to determine eligible program participants. See RCW 71A.12.230(3)(b)(allowing agency to refuse services upon determination of undue risk). Indeed, the act provides that: “*Nothing in this section creates an entitlement to placement on the community protection waiver nor does it create a right to an administrative hearing on department decisions denying placement on the community protection waiver.*” RCW 71A.12.240(5)(emphasis added). Because there is no entitlement to participate in this program, Muns cannot claim a property interest in the CPP.

Muns' evidence was nothing more than an abstract, unilateral expectation of participation in the CPP. Muns argues that Dr. Novick Brown should have been permitted to testify that Muns was "appropriate" for the CPP and was "safe to be in the community because of [the CPP]." App. Br. at 26, 28. However, Muns was not entitled to placement in the CPP and had not been offered placement in the CPP. Thus, the proposed testimony was purely speculative and would have been misleading to the jury. The legislature acted properly when it limited placement in the CPP and precluded SVPs from the category of individuals who could be placed in the CPP. Muns has failed to establish, as a threshold matter, that he has either a liberty or property interest in the CPP. Thus, Muns' procedural due process claim fails.

2. The *Mathews* Factors Weigh Heavily in Favor of the State

Even if procedural due process applied to this situation, the *Mathews* factors weigh heavily in favor of the State. To determine what procedural due process requires in a particular context, the court must balance the three *Mathews* factors: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and

(3) the governmental interest, including costs and administrative burdens of additional procedures. *Stout, supra*, 159 Wn.2d at 370.

While Muns has a substantial liberty interest, Washington courts have already determined that the SVP Act includes significant procedural safeguards to protect against the erroneous deprivation of Muns' rights. *See e.g. Stout, supra*, 159 Wn.2d at 370-71 (finding a comprehensive set of rights for the SVP detainee exists, including the right to counsel, presentation of evidence, cross-examination of adverse witnesses, high burden of proof and a jury). The second *Mathews* factor weighs in favor of the State. There is little probative value, if any, that the additional procedural safeguard of allowing Muns to introduce evidence about the CPP as a placement or voluntary treatment option. The evidence available to the trial court was that Muns had not been accepted into the CPP, nor had he accepted placement in the CPP. CP 570, 573. All indications were that Muns wanted to live with his family if released and Dr. Novick Brown had not discussed the CPP with him. CP 573. The CPP is a voluntary program and Muns could refuse services if he or his family wanted to, or Muns could elect not to enter the program once released from the SVP petition. RCW 71A.12.230(2). There is simply no evidence in the record to support Muns' position that the CPP was a voluntary treatment option that "would exist" for him if released, much less that

such evidence would demonstrate to the fact finder that he was “safe” to be released to the community. The additional procedural safeguard of presenting evidence of the CPP in Muns’ case would add nothing to the existing procedures available to him.

Additionally, for the reasons cited above, Muns is not entitled to participate in the CPP, whereas the legislature had good reason to exclude SVPs from the CPP.

The third *Mathews* factor also weighs in favor of the State. As Washington courts have determined, the State has a compelling interest in treating and incapacitating sexual predators in order to protect society from the heightened risk of sexual violence that they present. *See e.g. Young*, 122 Wn.2d at 26, and *Thorell*, 149 Wn.2d at 752. Recognizing the high level of danger posed by individuals facing civil commitment pursuant to RCW 71.09, the legislature found that only a total confinement facility is suitably safe to house individuals once probable cause is found. *See* RCW 71.09.060(3) (“The department shall not place the person, even temporarily, in a facility on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.”). Because the CPP is not a total confinement facility, the legislature has a legitimate interest in protecting the public and other developmentally disabled individuals in the CPP from the

heightened danger posed by SVPs. Thus, even if procedural due process did apply, the *Mathews* factors weigh in favor of the State. Muns' argument that he should be permitted to introduce evidence of a less restrictive alternative to civil commitment fails.

D. The SVP Act Satisfies Substantive Due Process

Muns argues that excluding evidence of the CPP as a placement condition or voluntary treatment option violates substantive due process by permitting the commitment of persons who could be safely managed in the community. In other words, Muns is arguing that he should be entitled to present evidence of less restrictive alternatives to total confinement – or the CPP – as a defense to civil commitment. He argues that he is entitled present this evidence in order to demonstrate that he could be safely housed at a different state-run facility rather than the SCC.

The threshold question in any substantive due process analysis is whether the person has identified a “carefully described” fundamental right found to be deeply rooted in our legal tradition. *Washington v. Glucksberg*, 521 U.S. 702, 721-22, 117 S. Ct. 2258 (1997). Without a carefully described due process right, the court applies only a rational basis test to determine whether there is legitimate state interest that justifies the action. *Id.* at 722.

Muns has failed to identify a carefully described fundamental right that implicates substantive due process. It appears he is asserting a right to use placement in a state-funded program, the CPP, as a defense to civil commitment. But Muns has not identified any authority indicating that he has a fundamental right to use a voluntary state-funded program as a defense to civil commitment. Without a fundamental due process right, the rational basis test applies and the court need only determine whether there is a legitimate state interest that justifies the legislature's exclusion of SVPs from the CPP.

The legislature acted properly in determining that SVPs cannot use the CPP as a court-ordered placement (i.e. an LRA) or as a placement or voluntary treatment option before commitment. *See* RCW 71.09.020(6) and RCW 71.09.060(1). The Washington Supreme Court has repeatedly acknowledged and upheld the legislature's determination that SVPs are "highly likely to engage in repeat acts of predatory sexual violence," and have long term treatment needs. *See e.g. Thorell*, 149 Wn.2d at 749-50. The legislature has determined that SVPs need to be supervised in "total confinement" facilities. RCW 71.09.020(19); *Thorell*, 149 Wn.2d at 751. The legislature has further determined that state mental institutions and regional habilitation centers are insufficiently secure for SVPs. RCW 71.09.060(3).

Indeed, the legislature provided the CPP the right to refuse placement to any individual that the program determined could not be “managed successfully” in the less restrictive setting of the CPP. RCW 71A.12.230(3)(b). The CPP is a program that quickly seeks to place clients in less restrictive settings. RCW 71A.12.250 (“Community protection program participants shall have appropriate opportunities to receive services in the least restrictive manner and the least restrictive environments possible.”) This policy runs directly contrary to the legislature’s determination of the long-term, intensive *inpatient* treatment needs of SVPs. *See Thorell*, 149 Wn.2d at 752. It also runs contrary to the legislature’s determination that SVPs should be housed and treated in a total confinement facility. *Id.* at 751.

Therefore, the legislature is justified in keeping more dangerous individuals alleged to be SVPs separate from other developmentally disabled persons who participate in the CPP. As such, the legislature has a legitimate interest in precluding alleged SVPs from introducing evidence of the CPP as a placement or treatment option to as a defense to civil commitment.

If Muns is arguing that the fundamental right at issue is his physical liberty interest, that issue has been resolved by Washington courts. The Washington State Supreme Court has repeatedly held that the

SVP Act satisfies substantive due process. *See e.g. Young*, 122 Wn.2d at 10; and *McCustion*, 275 P.3d at 1100. The court has found the statute as a whole constitutional because it is narrowly tailored to achieve the State's compelling interest in treating sexual predators and protecting society from their actions. *In re Detention of Greenwood*, 130 Wn. App. 277, 283, 122 P.3d 747 (2005). Further, substantive due process is satisfied because the SVP Act includes significant procedural safeguards and requires the State to prove beyond a reasonable doubt that the person has a mental disorder which makes him a danger to society if he is not confined. *Young*, 122 Wn.2d at 27, *citing* RCW 71.09.020(1).

The statutory scheme as a whole does not fail simply because the legislature has excluded evidence of the CPP as a placement condition or voluntary treatment option. Muns does not have a substantive due process right to participate in the CPP. In other words, he cannot demand that the CPP accept him as a client. Further, in this case, Muns did not even provide the trial court with any evidence that the CPP had agreed to accept him as a client or that he had agreed to participate in the CPP. To the contrary, the evidence indicated that Dr. Novick Brown had not discussed the CPP with Muns at all and that Muns wanted to return home to live with his family. CP 573. Muns has no substantive due process right to

insist upon presenting evidence of a hypothetical placement as a defense to civil commitment.

E. The Trial Court Properly Admitted Evidence of Dr. Sreenivasan's Risk Assessment Guide that Aided Her Risk Assessment in this Case

Muns contends that the trial court erred in allowing the State's expert to testify about a clinical assessment guide that she used to structure her risk assessment of Muns without first holding a *Frye* hearing.

In Washington, the standard for assessing allegedly novel scientific procedures is set out in *Frye v. U.S.*, 54 App. D.C. 46, 293 F. 1013, 1014 (1923). *Thorell, supra*, 149 Wn.2d at 754. Pursuant to *Frye*, the trial court determines whether a scientific theory or principle is generally accepted within the relevant scientific community. *Id.* "*Frye* requires only general acceptance, not *full* acceptance, of novel scientific methods." *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). If the methodology is generally accepted, the possibility of error in the expert opinions can be argued to the jury. *Id.*

1. Standard of Review

A court's decision to admit or exclude novel scientific evidence is reviewed *de novo*. *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). However, the ultimate decision to admit or exclude expert testimony under ER 702 is reviewed for an abuse of discretion.

State v. Buckner, 133 Wn.2d 63, 65-67, 941 P.2d 667 (1997). An abuse of discretion occurs only “[w]hen a trial court’s exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons.”

State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

2. The Washington State Supreme Court Has Repeatedly Upheld the Use of Clinical Judgment in Risk Assessments in SVP Cases

Once the Washington State Supreme Court makes a determination that the *Frye* test is met with regards to a specific novel theory or principal, trial courts may rely upon that in future cases. *Cauthron*, 120 Wn.2d at 888, fn. 3. The Washington State Supreme Court has repeatedly upheld the use of clinical and actuarial risk assessments to assist in the prediction of future dangerousness in SVP cases. *See e.g. Young, supra*, 122 Wn.2d at 56-58; *Thorell, supra*, 149 Wn.2d at 753-58; and *In re Detention of Campbell*, 139 Wn.2d 341, 358, 986 P.2d 771 (1999).

In 1993, in *Young*, the Washington State Supreme Court reaffirmed its prior holding that predictions of future dangerousness satisfy the standard for general acceptance in the scientific community under *Frye*, despite the inherent uncertainties of psychiatric predictions. *Young*, 122 Wn.2d at 56, *citing In re Harris*, 98 Wn.2d 276, 280, 654 P.2d 109 (1982). The Court went on to hold that, while mental illness

and future dangerousness are not amenable to precise and verifiable cause and effect relations, the level of acceptance of the sciences of psychology and psychiatry is sufficient to merit consideration at trial. *Id.* at 57.

The Supreme Court again affirmed the admissibility of expert testimony regarding predictions of future dangerousness in *Campbell*. 139 Wn.2d at 355. Unlike *Young*, which involved the use of actuarial instruments, *Campbell* challenged the use of a clinical risk assessment, arguing that it should have been excluded due to the superiority of actuarial risk assessment. *See Thorell*, 149 Wn.2d at 755. The Court rejected *Campbell's* argument, noting that both they and the United States Supreme Court had specifically rejected challenges to the reliability of scientific testimony regarding the prediction of dangerousness. 139 Wn.2d at 357-58. In *Campbell*, the Court held that differences in opinion regarding the validity of predictions of dangerousness go to the weight of the evidence and not its admissibility. *Id.* at 358. The Court noted that the United States Supreme Court had reached a similar conclusion:

In determining that predictions of future dangerousness do not offend the United States Constitution, the United States Supreme Court noted ‘the rules of evidence generally extant at the federal and state levels anticipate that relevant [sic], unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross-examination and contrary evidence by the opposing party.’

Campbell, 139 Wn.2d at 358, fn.3, quoting *Barefoot v. Estelle*, 463 U.S. 880, 898, 103 S. Ct. 3383 (1983).

Finally, in rejecting yet another challenge to the admissibility of scientific evidence pertaining to risk assessments, the Supreme Court in *Thorell* made it abundantly clear that neither clinical nor actuarial predictions of future dangerousness require a *Frye* hearing. *Thorell*, 149 Wn.2d at 755-56. “Based on our established precedent, we reiterate that the *Frye* standard has been satisfied by both clinical and actuarial determinations of future dangerousness.” *Id.* at 756. The Court also reiterated that differences of opinion as to the appropriate methods of risk assessment, both clinical and actuarial, go to the weight of the evidence rather than its admissibility. *Id.*

Pursuant to *Young*, *Campbell* and *Thorell*, a *Frye* hearing was not required for admission of Dr. Sreenivasan’s risk assessment guide. Her risk assessment guide was a clinical model of risk assessment that merely pulled together numerous well-established risk factors into one template to

facilitate a comprehensive risk assessment. 3RP 472. The trial court properly ruled that differences of opinion regarding the clinical and actuarial methods of assessing risk used by Dr. Sreenivasan go to the weight of the evidence, not its admissibility. 3RP 70-71.

In addition to the precedent set in *Young, Campbell, and Thorell* recognizing both clinical and actuarial risk assessments as generally accepted methods in SVP cases, Muns' argument fails for several reasons. First, Muns made a belated request for a *Frye* hearing. Despite filing his motion to exclude Dr. Sreenivasan's opinion using the risk assessment guide in September 2009, Muns failed to note his motion for hearing or request a *Frye* hearing at all until pretrial motions just days before trial in May 2011⁶. See CP 204-221; 2RP 142-47. When he finally did ask for a *Frye* hearing, he provided the trial court with nothing more than his argument, unsupported by affidavits, declarations, scientific literature or any deposition testimony that would assist the trial court in deciding whether the risk assessment guide was a novel scientific theory rather than an accepted clinical or actuarial method of assessing risk⁷. 2RP 142-44.

⁶ Muns filed the same motion on October 12, 2010 immediately prior to a trial scheduled to begin days later on October 25, 2010, however, Muns' counsel again failed to note the motion for hearing or request a *Frye* hearing at any time after filing this motion. CP 222-238. This motion similarly failed to provide the court with any affidavits, scientific literature or testimony to support his argument.

⁷ Muns first filed a motion to exclude on September 16, 2009 and in conjunction with this motion, filed a declaration by his expert, Dr. Halon. CP 183-89. However, like

Instead, Muns asked the trial court to simply rely on Muns' own erroneous understanding of Dr. Sreenivasan's risk assessment guide as a basis for determining that the guide was a novel scientific theory. Given the lack of pertinent information provided to the trial court to support Muns' argument, it was not an abuse of discretion for the court to deny his motion.

Second, Muns falls back on an argument that has been rejected time and again by Washington courts – challenging the reliability of predictions of dangerousness. App. Br. at 33-34. Muns attacks the use of both clinical judgment and actuarial instruments, claiming that both methods fall below the threshold for general acceptance in civil commitment cases. *Id.* The *Campbell* court rejected a similar generalized attack on clinical risk assessments in 1999, when Campbell argued that a risk assessment should have been excluded due to the superiority of actuarial risk assessment. 139 Wn.2d at 357-58. The Court again reaffirmed the validity of both clinical and actuarial predictions of future dangerousness in *Thorell*, reiterating that they had already “accepted the uncertainty surrounding psychiatric predictions and found them amenable

his other motions, Muns never noted the motion for hearing. During oral argument on April 13, 2011, Muns' counsel never referred to Dr. Halon's declaration or directed the court's attention to the declaration. But, even if he had done so, the Dr. Halon's declaration was nothing more than a contradictory expert opinion on how a risk assessment should be conducted.

to due process with procedural safeguards and a heavy burden of proof” in 1982. 149 Wn.2d at 755, *citing In re Harris*, 98 Wn.2d at 280-81. Rather than providing the court with any support for his attack on clinical and actuarial risk assessments, Muns rehashes a general attack on predictions of dangerousness that has been resolved for thirty years. There is nothing new or novel about the underlying science supporting either clinical or actuarial risk assessments in SVP cases.

3. Dr. Sreenivasan’s Risk Assessment Guide is a Method of Structuring Clinical Judgment

Muns attempts to characterize Dr. Sreenivasan’s risk assessment as a new and novel “actuarial plus,” in an effort to support his argument that a *Frye* hearing is required. But, Muns’ characterization of the risk assessment guide is erroneous and is not supported anywhere in the record. He makes it up, following the thread of Muns’ counsel in the cross-examination Dr. Sreenivasan. But, Dr. Sreenivasan repeatedly corrected Muns’ counsel’s characterization of the guide as an actuarial instrument, stating that it was a clinical guide, based in clinical judgment, that gave her a way to structure a comprehensive risk assessment of Muns. 3RP 472-78. Dr. Sreenivasan described the risk assessment guide as a template or method of organizing risk factors that have been associated with sexual recidivism through research and detailed in scientific

literature. 3RP 228, 472. She compared the guide to other clinical risk assessment guides, such as clinical guides routinely used to evaluate suicide risk or violence risk. 3RP 228-29. She reiterated time and again on cross-examination that it is simply a conceptual, clinical model that helps a clinician structure a risk assessment. 3RP 480. She testified that a clinician is free to add risk factors that would help the clinician in understanding different individuals. *Id.* Contrary to Muns' assertion, Dr. Sreenivasan testified that, as a clinical model, there is no need for empirical cross-validation or studies of inter-rater reliability as there might be with actuarial instruments. 3RP 477, 480.

Dr. Sreenivasan testified that the risk assessment guide is a means of bringing together well-accepted principles commonly used in SVP evaluations, including actuarial instruments, such as the Static-99 and RRASOR; risk factors, including dynamic risk factors such as social skills and impulse control deficits; and mitigating factors such as sex offender treatment and release environment. 3RP 222-23, 230-32. All of these things – actuarial instruments, dynamic risk factors, mitigating factors – are routinely used in SVP cases⁸. None are new or novel in the field, but

⁸ There are many Washington SVP cases that refer to various actuarial instruments, dynamic risk factors and mitigating factors. Several listed here are unpublished, but are not included as legal authority, but rather for the fact that these risk factors are repeatedly relied upon in SVP cases: *see e.g. In re Detention of Shaw*, 165 Wn. App. 1021, 2011 WL 6976601; *In re Detention of Timm*, Cause No. 28867-6-III

are well-established principles guiding psychologists in making clinical diagnoses and risk assessments. Dr. Sreenivasan's risk assessment guide simply brings them together into one template to allow a clinician to structure their risk assessment in order to ensure he or she is conducting a comprehensive risk assessment.

The focus of *Frye* "is the science upon which the expert's opinion is founded." *In re Detention of Berry*, 160 Wn. App. 374, 379, 248 P.3d 592 (2011). While Muns has identified some criticism of the use of actuarial instruments and clinical judgment in risk assessments, he has not established that such methods are no longer generally accepted in civil commitment cases. As such, the risk assessment guide, as a conceptual clinical model comprised of well-accepted principles in SVP risk assessments, falls within the standards already accepted by the Supreme Court in *Young, Campbell and Thorell*.

The trial court did not abuse its discretion in determining that differences of opinion regarding the method of conducting a risk assessment go to the weight of the evidence and not its admissibility. Muns' counsel had ample opportunity to cross-examine Dr. Sreenivasan

(Wash. Ct. App., 2011); *In re Detention of Townsend*, 160 Wn. App. 1017, 2011 WL 1005617; *In re Detention of Dollicker*, 159 Wn. App. 1012, 2011 WL 56054; *In re Detention of Mackey*, 153 Wn. App. 1011, 2009 WL 3825852; *In re Detention of Reimer*, 146 Wn. App. 179, 190 P.3d 74 (2008); *In re Detention of Lewis*, 134 Wn. App. 896, 143 P.3d 833 (2006); *In re Jacobson*, 120 Wn. App. 770, 86 P.3d 1202 (2004).

about the risk assessment guide, and indeed, spent a significant amount of time during the cross-examination attacking the risk assessment guide. The jury had a full opportunity to gain an understanding of the purported weaknesses of Dr. Sreenivasan's method of assessing risk and weigh it against Dr. Halon and Dr. Novick Brown's contrary opinions in reaching a verdict.

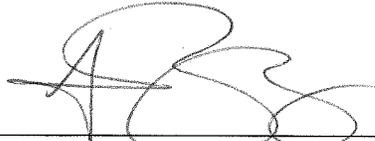
Muns has failed to provide the Court with any relevant authority that would distinguish Dr. Sreenivasan's risk assessment from those conducted in *Young*, *Campbell*, or *Thorell*.

IV. CONCLUSION

For the foregoing reasons, the trial court's order committing Jason Muns should be affirmed.

RESPECTFULLY SUBMITTED this 25th day of July, 2012.

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