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No. 36153-5-III

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

IN RE THE DETENTION OF:
DONALD CURBOW, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE JUDGE RAYMOND F. CLARY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR..... 1

II. STATEMENT OF FACTS 1

ASSESSMENT AND EXPERT TESTIMONY..... 6

1. Testimony Of Dr. Fisher: Expert For Respondent 6

2. State Expert Testimony: Dr. Harry Hoberman..... 13

3. Testimony of Director of the Sex Offender Treatment and
Assessment Programs for DOC. 19

4. Sex Offender Treatment Provider: Dr. Abghari 20

III. ARGUMENT 21

A. The State Presented Insufficient Evidence That Mr. Curbow
Met The Requirements Under RCW 71.09 For Civil
Commitment..... 21

IV. CONCLUSION 34

TABLE OF AUTHORITIES

Washington Cases

In re Detention of Campbell, 139 Wn.2d 341,986 P.2d 771 (1999) 24

In re Detention Of Morgan, 180 Wn.2d 312, 330 P.3d 774 (2014) 22

In re Detention of Thorell, 149 Wn.2d 724,72 P.3d 708 (2003) 22

In re Harris, 98 Wn.2d 276, 654 P.2d 109 (1982)..... 23

In the Matter of Detention of Belcher, 196 Wn. App. 592, 385 P.3d 174 (2016)..... 22

L.M. by and through Dussault v. Hamilton, 193 Wn.2d 113, 436 P.3d 803 (2019) 25

State v. Gregory, 158 Wn.2d 759,147 P.3d 1201 (2006) 24

State v. Ha'mim, 132 Wn.2d 834,940 P.2d 633 (1997). 32

State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017).... 33

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015)..... 33

State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014) 25

Volk v. DeMeerleer, 187 Wn.2d 241, 386 P.3d 254 (2016) 25

Federal Cases

Graham v. Florida, 560 U.S.48,130 S.Ct. 2011, 17 L.Ed.2d 825 (2010)..... 33

Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002)..... 23

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)..... 33

Roper v. Simmons, 543 U.S. 551,125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)..... 32

Constitutional Provisions

Const. art. I §3 22
U.S. Const. amend. XIV 22

Statutes

RCW 71.09 22
RCW 71.09.020(18)..... 23
RCW 71.09.020(8)..... 23

Other

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Varela, Jorge G., Sam Houston State University, University of
Virginia, *Static-99R Reporting Practices in Sexually Violent
Predator Cases: Does Norm Selection Reflect Adversarial
Allegiance?* 39 Law and Human Behavior, 209. Copyright 2014
American Psychological Association..... 29
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Offenders 2005-01, publicsafety.gc.ca..... 26
Hanson, R.K. & Thornton, D. (2000). *Improving Risk Assessments
for Sex Offenders: A Comparison of Three Actuarial Scales*. Law
and Human Behavior, 24(1), 119-136. 26
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Journal of Research and Treatment*, 24(1), 64-101 26
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http://www.static99.org/pdffdocs/Static-99RandStatic-2002R_EvaluatorsWorkbook-Jan2015.pdf (Last visited 5/19/19).
..... 26

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I. ASSIGNMENTS OF ERROR

A. The State Presented Insufficient Evidence That Mr. Curbow Met The Requirements For Civil Commitment Under RCW 71.09.

LEGAL ISSUE: Due Process is not satisfied where the State presents insufficient evidence that the individual is more likely than not to reoffend. Did the State prove beyond a reasonable doubt that Mr. Curbow met the requirements for civil commitment under RCW 71.09?

II. STATEMENT OF FACTS

Donald Curbow grew up in Idaho. RP 1962. He described his parents as loving and caring. RP 1962. At age 12 or 13, he knew he was gay but did not talk about it with his parents. RP 1971. His father died when Mr. Curbow was 14 years old. RP 1967.

He struggled with learning disabilities, and after his father died, he stopped going to school in the 9th grade. RP 1968. He lived with his mother until she passed away four years later. RP 1967. He joined the military but left after the 90-day training program. RP 1969. Mr. Curbow took up the life of a hobo, riding freight trains around the country for several years. RP 1969-70.

In the 1970s, when Mr. Curbow was in his early twenties, he engaged in promiscuous sexual encounters with gay men. RP 1973,1975-76. He participated in consensual voyeurism. RP 1985. When he was 21, Mr. Curbow had sexual contact with a 14-year old male, and at age 24, he had sexual contact with a 13-year old male. CP 1074. He reported the total of young males he had sexual contact with was 5 or 6¹. CP 1074.

Between 1983 and 1991, Mr. Curbow committed misdemeanors: disorderly conduct, simple assault, marijuana possession, thefts, and failure to have a valid driver's license, and possession of paraphernalia. RP 637. In 1985, while in California, Mr. Curbow was arrested but not charged on allegations of sodomy and oral copulation by the individuals who had stolen his car. CP 1044-45.

Mr. Curbow's first prosecuted sexual offense occurred in 1995. RP 1981. He met a young male in downtown Portland, who he believed to be a street person. CP 1056,1061. Mr. Curbow

¹. When Mr. Curbow was incarcerated in Washington, he told the sex offender treatment providers that he had between 10 and 20 victims between the ages of 12 and 17. He said he had been advised that if acknowledged fewer, it would look like he was lying, or he would not get into the prison sex offender treatment program. CP 1075-76. He told Dr. Hoberman that he had between five and possibly 10 victims, although not all were 13 or younger. RP 583.

learned the male was a prostitute, and later became aware the male was 13 years old. CP 1065, 1057. After his arrest, Mr. Curbow pleaded guilty to two counts of attempted sexual abuse in the first degree. CP 556. There were no allegations of physical violence. CP 1055-1061. The court imposed a 36-month sentence in an Oregon prison. CP 3. He participated in sex offender treatment while incarcerated in Oregon, but on reflection stated he was not ready for treatment and learned little from it. RP 1982-83.

When released from prison, Mr. Curbow remained on supervision in temporary housing for about ten months. CP 966-68. He left Oregon while still on supervision and settled in Spokane. CP 970,973. Mr. Curbow ate his meals at the Mission and subsisted on day jobs that paid in cash. CP 978-79.

Within a short while of coming to Spokane, Mr. Curbow required emergency surgery. CP 980. He recovered at a skilled nursing home in the Spokane Valley. CP 980. During his recovery, he became friends with a worker. CP 980.

Mr. Curbow spent time with her family and eventually was left alone to look after the woman's 11-year-old grandson. CP 981-83, 985,988. Mr. Curbow videotaped the child exposing himself,

and another time videotaped himself performing oral sex on him.
CP 1010,1012.

In September 1999, in a separate incident, Mr. Curbow was arrested for voyeurism at a public bathroom. RP 1026; 1035-36. After his arrest, the nursing facility cleared out his room and discovered the videotape along with pictures of young males. RP 1643-44; 1772. Mr. Curbow pleaded guilty to first-degree child molestation and first-degree rape of a child and was sentenced to 200 months in a Washington state prison. RP 1991.

While in prison, he and others cut out and collected pictures of teenaged and adult males found in magazines. RP 2007-2008. Mr. Curbow participated in the sex offender treatment program at Twin Rivers Corrections Center and completed the course in 2014. RP 1999, 2003.

The State filed a petition for civil commitment as a sexually violent predator on 59-year-old Donald Curbow on June 1, 2016. CP 1-2. The court conducted an ex-parte probable cause hearing the following day. 6/2/16 RP 3-12. On June 7, 2016, the court held a hearing and entered an order affirming the existence of probable cause. CP 187-188; 6/7/16 RP 65.

PRETRIAL MOTIONS AND RULINGS

Mr. Curbow filed a motion in limine to preclude the State's expert from testifying about "relative risk" of the likelihood for sexual recidivism, as it was irrelevant, potentially misleading, confusing to the jury, and prejudicial to Mr. Curbow. The motion sought to confine expert testimony to "absolute risk" rather than relative risk. CP 568. The court held that because actuarial instruments had been upheld in earlier caselaw², and each side could cross-examine the experts; the prejudice to Mr. Curbow did not outweigh the probative value. RP 438, CP 1118.

Mr. Curbow also sought to preclude the admission of the results of the Sex Offender Risk Appraisal Guide (SORAG) as irrelevant and highly inflammatory and not helpful to the trier of fact. RP 438-39,440; CP 579-580. Counsel cited to the small sample size, which came from institutions that used hallucinogenic drugs on actively psychotic individuals, and the reoffense percentages had been found to be highly inflated. RP 439, 441; CP 579-580. And the scientific community no longer used the SORAG because the population sample was not relevant to individuals like Mr. Curbow. RP 439, 440.

² *In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003); *In re Detention of Meirhofer*, 182 Wn.2d 632, 343 P.3d 731 (2015).

The court determined the SORAG was reasonably relied upon by experts in forming their opinion and found it admissible. RP 733.

ASSESSMENT AND EXPERT TESTIMONY

1. Testimony Of Dr. Fisher: Expert For Respondent

Dr. Fisher interviewed Mr. Curbow and reviewed the records. RP 1431. He diagnosed Mr. Curbow with a mental disorder of pedophilia. RP 1458,1460-61. Pedophilia generally refers to an arousal and sexual attraction pattern or preference for prepubescent children. RP 1446. It is a lifelong condition which can change over time, with or without treatment. RP 1447-48.

Pedophilia is classified as a disorder if there is a significant impairment in the individual's life, or if the individual has offended against a child because of those urges. RP 1446.

The diagnosis of pedophilic disorder does not automatically associate with volitional impairment. RP 1451, 1454. Individuals diagnosed with pedophilic disorder do not necessarily have a "mental abnormality." RP 1450.

A "mental abnormality" requires that the diagnosed mental disorder cause an emotional or volitional impairment that makes the

risk to reoffend more likely than not. RP 1460. Dr. Fisher noted that if every individual released from prison with a diagnosis of pedophilic disorder were marked by volitional impairment, the recidivism rate would be much higher than the recorded average of a 16 or 17 percent rate. RP 1455.

Dr. Fisher diagnosed Mr. Curbow with pedophilic disorder but determined that it did not cause him the volitional impairment that would make him more likely than not to reoffend. RP 1461. He stated that the pedophilic disorder that Mr. Curbow suffers from is *not* characterized by actively seeking prepubescent children for sexual purposes. He characterized the offenses as opportunistic; Mr. Curbow took the opportunity with prepubescent children occasionally, but his sexual interests were more focused on older adolescents and adult men. RP 1573-74.

Dr. Fisher also used the recommended Static- 99R and Psychopathy Check List-Revised (PCL-R) instruments in his risk assessment evaluation of Mr. Curbow. RP 1503,1518. He scored Mr. Curbow as a “20” on the psychopathy scale. RP 1565.

He explained that risk assessment, in general, is a comparison. Evaluators use samples of sex offenders released from confinement and share some characteristics with an

individual, such as Mr. Curbow. They offenders are a known quantity as there is evidence of the number of released offenders who reoffended and the number who did not. RP 1495.

The goal of the evaluation is to find the most applicable sample, those who are most like Mr. Curbow and use those measures of recidivism data to help approximate how likely he is to reoffend. RP 1495.

Based on the directions in the manual for scoring the Static-99R, he rated Mr. Curbow a "5". RP 1517, 1534-1536, 1538. The next step is to choose a comparison group of either "high need/high risk" or "routine/complete." RP 1538-39.

The "routine" group contains independent unique samples of sex offenders described as "typical sex offenders." RP 1539. Nothing identifies the offenders as particularly high risk: they typically have been sent to state prison and released. RP 1539. The "routine/complete" group includes the high needs/high risk group. RP 1540. Dr. Fisher testified the default is to select the routine/complete group unless there were a strong case and specific reason for selecting the other sample. RP 1722.

The "high needs/high risk" group is a subset of the routine/complete group and comprises five samples of sex

offenders that have been preselected based on a variety of factors as being higher risk than the typical routine sex offenders. RP 1540.

The determination for which group to use as the comparison group has typically been based on scores from the Stable-2007 or the Sexual Risk Assessment Forensic Version (SRA-FV). RP 1541. If a score from one of the instruments met a particular defined threshold, the individual would be placed in the high needs/high risk comparison group. RP 1541. Dr. Fisher testified that approach had never been evaluated empirically and has never been shown to lead to an accurate choice of comparison group or a more accurate assessment of risk. RP 1541.

Dr. Fisher determined an appropriate comparison group by conducting an analysis based on research that had identified and proven mathematically that risk assessment is based on two general statistical principles: the base rate, or recidivism rate of the comparison group and likelihood ratio, or how well correlated the instrument being used is with recidivism. RP 1542.

He used information from studies on individuals who were candidates for commitment as sexually violent predators, and information on men committed as sexually violent predators and

later released, including the type of supervision they underwent after release. RP 1545. He included the sexual recidivism rate for each sample. RP 1547.

Of the individuals committed as sexually violent predators and released, one study found a recidivism rate of 4.3 percent with a follow-up time of 4.7 years. The second study showed a 3.8 percent of recidivism, but no report of follow up time. The third was a recidivism rate of 3.2 percent with a follow-up time of 2.5 years. The final study, from Texas, had a zero percent recidivism rate³. The study results had been published in government reports. RP 1548.

Of the individuals who were candidates but not committed as sexually violent predators, the recidivism rate ranged from 6.5 percent over four years, to 10.5 percent over six and a half years. RP 1551. The Washington state numbers showed a 23 percent recidivism rate on a sample of 151 men.

For the 16 sex offenders in the Washington sample, who like Mr. Curbow, were aged 50 or older, there was no recidivism. RP

³ The Texas sexually violent predator program holds individuals in an outpatient program, and are committed to locked facilities, but are allowed in the community with supervision every time they leave the facility. RP 1547.

1551. Other studies have shown that a recidivism rate for individuals over the age of 60 was near five percent. RP 1553.

Dr. Fisher placed Mr. Curbow in the group most like him: men who scored a five on the Static-99R and are SVP candidates. RP 1540. He predicted a risk for reoffense of 15.2 percent over five years. RP 1555-56. This meant that 84.8 percent of offenders with a similar score were predicted to not reoffend sexually. RP 1557. He reported that even if Mr. Curbow scored as a "6" under Dr. Hoberman's calculations, the predictive recidivism rate would be 25.7 percent. RP 1558, 1561.

Regarding personality disorder diagnoses, Dr. Fisher said Mr. Curbow had had a significant remission of anti-social personality disorder (ASPD) symptoms, and more pro-social personality traits. In his opinion, Mr. Curbow no longer met the diagnostic criteria for ASPD. RP 1463-64. He stated that Mr. Curbow had challenges with impulsivity and responsibility but concluded that he no longer had the pervasive pattern associated with ASPD. RP 1466. He also rejected a diagnosis of narcissistic personality disorder (NPD). RP 1478.

Dr. Fisher agreed with Mr. Curbow's self-assessment that he had been a very sexual person for the majority of his adult life.

However, he rejected a diagnosis of “hypersexual disorder” and noted it was rejected as even a viable diagnosis in the DSM-V. RP 1474.

Dr. Fisher identified the sex offender therapy demonstrated that an individual with a historic diagnosis of pedophilic disorder could change over time in a positive way. RP 1464. He testified there was considerable evidence of significant change in Mr. Curbow. RP 1462. He observed that since 2013 or 2014, Mr. Curbow had been “described as pretty universally as being transparent, and that means more than just being honest about that aspect of his life.” RP 1483; RP 1578. He said Mr. Curbow never denied being attracted to adolescent boys and added that Mr. Curbow had been open to discussing his attraction, sharing in a group, talking to his counselor and case manager in individual settings and doing treatment assignments about his offenses. RP 1483-84.

From his experience as a sex offender treatment provider, Dr. Fisher opined that Mr. Curbow had a good grasp on the cognitive distortions that led to his offending. RP 1578. He added that Mr. Curbow needed further treatment in the community to continue progress in managing his risk to reoffend. RP 1582.

Dr. Fisher determined that Mr. Curbow suffered from pedophilic disorder, but that he did not have a mental abnormality because he did not have current serious difficulty controlling his behavior. RP 1588. He concluded that if Mr. Curbow were not confined in a secured facility it was *not more likely* that he would reoffend. RP 1590.

2. State Expert Testimony: Dr. Harry Hoberman

Dr. Harry Hoberman, a forensic and clinical psychologist, also evaluated Mr. Curbow. RP 482, 485,561. As part of his evaluation, he also reviewed all the records, administered three self-report assessment instruments, and conducted in-person forensic evaluation interviews. RP 584-86.

Dr. Hoberman stated that in 1996, while incarcerated in Oregon, Mr. Curbow's score on the Multiphasic Sex Inventory (MSI-I) was significant, corresponding with his self-reported interest in children. RP 591. In 1999, he was evaluated for entry in the sex offender treatment program in Washington and reported having sexual thoughts about boys as young as 13. RP 592.

By 2013, Mr. Curbow reported having had similar thoughts, but at a reduced rate. RP 592. Dr. Hoberman noted that Mr. Curbow discussed his risk factors for offending and his

interventions to stop deviant fantasies of underage children. RP 592.

In 2016, Dr. Hoberman administered the Multiphasic Sex Inventory II, (MSI-II) and Mr. Curbow's self-report was interpreted as being "quite disclosing" about sexual fantasies involving children. RP 593.

In 2017, he said that Mr. Curbow identified he had an attraction to males ages 11 to 13. RP 593. Based on the self-reports and criminal record, he diagnosed Mr. Curbow with the mental abnormalities of pedophilic disorder (attraction to males under age 13) and hebephiliac disorder (attraction to males from ages 13-18). RP 579, 598-99,601. Dr. Hoberman also diagnosed Mr. Curbow with hypersexuality and substance abuse but did not categorize either as a "mental abnormality." RP 620, 625, 627.

As one of only a few experts in Washington State who used personality testing in evaluations for RCW 71.09 civil commitment, Dr. Hoberman used the Minnesota Multiphasic Personality Inventory -2 (MMPI-2), and the Millon Clinical Multiaxial Inventory III (MCMI-III) in his evaluation. RP 510-511, 832-33; 885.

He diagnosed Mr. Curbow with ASPD. RP 630. ASPD can be characterized by a long-standing pattern of behavior that

involves violation of the rights of others since at least age 15. RP 635. Dr. Hoberman used Mr. Curbow's history of arrests, deceitfulness, use of aliases, and manipulation of others for personal profit or pleasure, as evidence of the diagnosis of ASPD. He added that impulsivity, irresponsibility, reckless disregard of the safety of others, and irritability and aggression had been characteristic of Mr. Curbow for much of his life. RP 641-42. His testing indicated that Mr. Curbow showed no evidence of guilt or shame about his sexual behaviors. RP 648.

In his opinion, Mr. Curbow had significant traits associated with narcissistic personality disorder. (NPD). Dr. Hoberman described the NPD traits in Mr. Curbow were demonstrated by a sense of entitlement, self-centeredness, and a lack of empathy for others. RP 652.

Dr. Hoberman used actuarial risk assessment instruments to determine Mr. Curbow's risk of committing a new sexual offense based on the comparison of his characteristics and history with group data gathered from studies. RP 775. He used the Static-99, Static 99-R and the Static 2002-R. RP 678, 682.

Although the instrument developers directed evaluators to use the Static -99R instead of the original Static-99, Dr. Hoberman

believed the predictive accuracy was equivalent, and he could get different information relative to recidivism rates associated with particular scores on the Static-99 and the Static -99R⁴. RP 690.

On the Static-99 he rated Mr. Curbow as a “9”. He was in a high-risk category, with a 44 percent likelihood of being reconvicted for a new sex offense over five years after release and a 54 percent rate over 10 years. RP 748.

On the Static 99-R, he rated Mr. Curbow as a “6”. He described the relative risk as a “4”, meaning his relative risk was approximately four times the risk of the median score. RP 749. He interpreted the score to mean a recidivism rate of 26 percent over five years and a 37 percent over ten years⁵. RP 749-750. He derived the predictive recidivism rate percentage numbers based on the placement of Mr. Curbow in a “high needs/high risk category” reflective of dynamic risk factors or treatment needs. RP 750.

He scored Mr. Curbow with a “6” on the Static 2002-R, which produced a relative risk of “3”. RP 751. Using the ranking system,

⁴ When the Static-99 was developed, the protectiveness of age was not understood and the test did not capture that protectiveness. RP 1502.

⁵. There was some question at the trial of whether the score of ‘6’ was a miscalculation. RP 749-50; 794.

this meant that 82 percent of offenders scored lower than Mr. Curbow, eight percent scored higher, and seven percent had the same score. RP 752. The recidivism rate for individuals with that score was 23 percent over a five-year period. RP 752.

Over objection, Dr. Hoberman testified that according to the SORAG⁶, Mr. Curbow's predictive sex offense recidivism, as measured by interpersonal violence would be between 72 and 80 percent. RP 753. He opined that Mr. Curbow was characterized to some degree in 14 out of 20 domains or elements or risk factors identified on the Sexual Violence Rating (SVR) Scale. RP 756⁷.

The Static 99-R provides that specific risk assessment procedures (assessment tools) should be based on a carefully reasoned judgment concerning appropriateness for the specific

⁶ Sex Offender Risk Appraisal Guide. RP 439.

⁷ The SORAG measures re-offense rates for patients who could have been hospitalized for mental health reasons or after being found not guilty by reason of insanity. RP 1511. The SORAG was designed in conjunction with the VRAG. The definition of violence used by the developers for both the SORAG and VRAG was violence, which included but was not limited to sexual violence. RP 1512.

The instruments made no distinction between sexual recidivism and nonsexual violence recidivism. RP 1512. Dr. Fisher said that by definition, the recidivism rates would be inflated with respect to sexual violence. RP 1512. Additionally, four measures on the SORAG have *not* been found to be predictive of sexual recidivism in other studies. RP 1512. Scores on those items automatically inflated the perceived risk to reoffend. RP 1513.

offender for a specific purpose. RP 1184. Dr. Hoberman agreed that the MSI test he administered showed Mr. Curbow to be similar to the "normal" group of men rather than men committed child molesters. RP 1161.

Dr. Hoberman acknowledged that research about high risk/high need group of sex offenders showed that of the 39 men studied who were over the age of 60, not one of them reoffended. RP 1138,1140.

The final area Dr. Hoberman considered was whether receiving or completing sex offender treatment was associated with a decreased risk of recidivism. RP 772. He concluded, "the fact is that there is no strong scientific evidence that sex offender treatment is effective for persons generally." RP 772. He described sex offender treatment as "coloring book therapy," that is, "Just fill in the blanks." RP 1120. However, he agreed that the MSI test showed Mr. Curbow to be an amenable candidate for sex offender treatment. RP 1124-1125. The test report indicated Mr. Curbow was open and non-defensive about his sexual interest and desire and capable of showing effort in treatment. RP 1129.

Agreeing that the average predictive accuracy of the various forms of risk assessment was .46, and that men over the age of 60

rarely reoffend, Dr. Hoberman nevertheless concluded that Mr. Curbow had mental abnormalities and a personality disorder that affected his volitional capacity in a way which made him more likely than not to commit future acts of predatory sexual violence. RP 782, 1140,1053.

3. Testimony of Director of the Sex Offender Treatment and Assessment Programs for DOC.

Ms. Harris directs the sex offender treatment and assessment programs for the Washington State Department of Corrections. RP 1241.

She testified the treatment model for sex offenders at DOC and DOC community therapy had changed within the past several years. RP 1244. The previous model focused on relapse prevention, and the new program is an evidence-based supportive, value-driven model. RP 1241.

The program treats the dynamic risk factors⁸ (DRF) in the individual's life to decrease recidivism by concentrating on changing maladaptive attitudes and beliefs that drive offending behavior. RP 1258-59. She testified that individuals, like Mr.

⁸ A dynamic risk factor is a factor that impairs the individual's life and functioning in various areas of daily activities such as interpersonal relationships, occupational functioning, academic functioning, or social functioning. RP 1366.

Curbow, who have completed the sex offender treatment program while incarcerated, are eligible for participation in the community treatment programs. RP 1245.

She explained the science behind the amount and length of treatment rested on the concept there is a “dosage” of individual and group therapy which corresponded to risk to offend. RP 1255. Individuals at the highest risk to reoffend receive the highest dosage of treatment at about 300 -400 hours however, more treatment continues to help them manage their risk⁹. RP 1256,1324.

4. Sex Offender Treatment Provider: Dr. Abghari

Mr. Curbow participated in treatment at the Special Commitment Center while awaiting his trial. RP 1339; 2012. His therapist, Dr. Abghari, also provided his case management services. RP 1339. Dr. Abghari recalled his initial impression of Mr. Curbow was as a very angry, impulsive person, who could not tolerate perceived criticism or disrespect. RP 1341.

Dr. Abghari identified Mr. Curbow’s anger and emotional dysregulation, preoccupation with sex, and sexualized coping as

⁹ Individuals who have been categorized as low risk to reoffend should have about hundred hours of treatment and more becomes counter-productive. RP 1324.

DRFs for reoffending. RP 1358,1366. He testified that through the group therapy, Mr. Curbow began a pattern of intervention of his DRFs and made "great strides" in developing an awareness of his internal thoughts that led to the anger, emotional dysregulation and sexualized coping. RP 1347-38;1372-73;1380;1422.

Dr. Abghari testified that when assessing treatment progress, he looked for patterns of attempting to intervene with a DRF, for example. RP 1370. If he saw the intervention, he acknowledged it as progress. RP 1371. He reported that Mr. Curbow had made progress but needed ongoing sex offender treatment. RP 1376.

On June 20, 2018, a jury found Mr. Curbow met the RCW 71.09 commitment criteria. RP 2232, CP 1113. He filed a timely notice of appeal. CP 1128-1130.

III. ARGUMENT

B. The State Presented Insufficient Evidence That Mr. Curbow Met The Requirements Under RCW 71.09 For Civil Commitment.

Civil commitment is a significant deprivation of liberty, and individuals facing commitment under RCW 71.09 are entitled to due

process. *In re Det. Of Morgan*, 180 Wn.2d 312, 320, 330 P.3d 774 (2014). Due process is not satisfied where the State presents insufficient evidence an individual suffers from a mental abnormality which makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility beyond a reasonable doubt. U.S. Const. Amend. XIV; Const. Art. I §3; *In re Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003).

As in a criminal trial, if viewing the evidence in the light most favorable to the State, a reasonable trier of fact could not find the essential elements beyond a reasonable doubt, the evidence is insufficient. *In the Matter of Detention of Belcher*, 196 Wn. App. 592, 602, 385 P.3d 174 (2016).

The central issue, in this case, is whether the actuarial and testimonial evidence was sufficient when its validity and usefulness has been questioned by researchers and experts who evaluate individuals for civil commitment under RCW 71.09.

To commit an individual as a sexually violent predator (SVP) per chapter 71.09 RCW, the State must prove beyond a reasonable doubt that the individual (1) has been convicted or charged with a

crime of sexual violence and (2) suffers from a mental abnormality¹⁰ or personality disorder (3) which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18).

Expert testimony is generally necessary to help the trier of fact determine whether the individual suffers from a mental abnormality which makes him more likely to engage in predatory acts of sexual violence if not confined in a secure facility. *Kansas v. Crane*, 534 U.S. 407, 410, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); *In re Det. Of Thorell*, 149 Wn.2d 724, 731, 72 P.3d 708 (2003).

In RCW 71.09 risk assessment, an evaluator develops an opinion about the probability that an individual might do something at some future point in time. Thirty-seven years ago, the Court struggled with the question of what to do when the psychiatric profession acknowledges its inability to predict dangerousness precisely. *In re Harris*, 98 Wn.2d 276, 280-81, 654 P.2d 109 (1982)

¹⁰ A mental abnormality is defined by statute as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.” RCW 71.09.020(8).

In the evaluation for a mental health commitment, the Court “accepted the uncertainty surrounding psychiatric predictions and found them amenable to due process with procedural safeguards and a heavy burden of proof.” *In re Detention of Thorell*, 149 Wn.2d at 755.

Nevertheless, strictly clinical predictions of dangerousness and actuarial methods have in the past been found highly unreliable. *In re Detention of Campbell*, 139 Wn.2d 341, 376, 986 P.2d 771 (1999).

Although significant advances have been made in the ability to predict sex offender recidivism, the application of these schemes to individuals convicted under sexual predator laws is still problematic. Even though the actuarial prediction scheme significantly improved prediction over chance, there are still a number of false positives and negatives.

In re Det. Of Campbell, 139 Wn.2d at 376 (internal citation omitted).

On the surface, it would seem Washington case law directs that once a methodology, such as clinical and actuarial risk assessment, has been accepted in the scientific community, applying that science to a particular case goes to weight and not admissibility under ER 702. *State v. Gregory*, 158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006), *overruled on other grounds by State v.*

W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014); *In re Detention of Thorell*, 149 Wn.2d at 725.

However, knowledge and research from the scientific community for predictive statistics has evolved and sharpened since the Court initially accepted the uncertainty surrounding them. Questions of validity, reliability, evaluator allegiance raise the question of whether evidence should be admissible, and whether the State has proven its case.

Washington courts must serve as gatekeepers to bar unreliable scientific evidence. *L.M. by and through Dussault v. Hamilton*, 193 Wn.2d 113, 436 P.3d 803 (2019). Unreliable testimony is not considered helpful to the trier of fact and should be excluded. *Volk v. DeMeerleer*, 187 Wn.2d 241, 277, 386 P.3d 254 (2016). Advances in science and expert understanding of that science make it incumbent on the courts to consider whether an expert's predictions of dangerousness is based on outdated and invalid instruments. And if so, the requirements of due process have not been met.

For example, the original Static-99, one instrument relied on by Dr. Hoberman, used data derived from four groups of non-American sex offenders based on the recidivism patterns of about

1200 offenders, most of whom had been released from prison in the 1970's¹¹. The instrument ranks offenders according to their relative risk for sexual recidivism. It is considered moderately accurate in estimating relative predictive recidivism risk in all age groups¹².

The test developers later noted that older offenders (like Mr. Curbow) displayed lower sexual recidivism rates than would be expected based on the Static-99 risk categories. The five-year recidivism rates of offenders over 60 years of age was only two percent¹³. In other words, for individuals over the age of 60 who had been evaluated for civil commitment, reported risk numbers were likely inflated.

In 2009, the instrument was revised to allow for a new age weighting to improve the predictive accuracy,¹⁴ and to provide

¹¹ Hanson, R.K. & Thornton, D. (2000). *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*. *Law and Human Behavior*, 24(1), 119-136.

¹² Phenix, Amy, Helmus, L., Hanson, R.K., (2016). *Static 99-R and Static 2002-R Evaluator's Workbook*. http://www.static99.org/pdfdocs/Static-99RandStatic-2002R_EvaluatorsWorkbook-Jan2015.pdf (Last visited 5/19/19).

¹³ Hanson, Karl R., *The Validity of Static-99 with Older Sexual Offenders 2005-01*, publicsafety.gc.ca.(last visited 5/20/19).

¹⁴ Helmus, L., Thornton, D., Hanson, R.K., & Babchishin, K.M. (2012). Improving the predictive accuracy of Static-99 and Static-2002 with older sex offenders: Revised age weights. *Sexual Abuse: A Journal of Research and Treatment*, 24(1), 64-101.

updated norms for more contemporary samples¹⁵. The test developers found the test had moderate predictive accuracy, did not include all the factors that might be included in a comprehensive risk assessment, and the absolute recidivism rates associated with specific risk scores varied across samples in a way that made an estimate of absolute levels of recidivism risk more complex. *Id.*

Absolute and relative risk levels can be illustrated. Relative risk compares the odds for two groups against each other. For example, if smokers are 25 percent more likely to have dementia than non-smokers, the relative risk is 25 percent. It provides some information about risk, but it does not provide the actual odds of something happening.

The absolute risk of something happening is the odds of it happening over a stated period of time. If 25 people out of 100 will suffer from dementia in their lifetime, the absolute risk is 25/100 over the course of a life.

Assume the absolute risk of a non-smoker getting dementia is 10 percent over a lifetime. If smokers have an increased risk of

¹⁵ www.static99.org/pdfdocs/Coding_manual_2016v2.pdf p.6-8 (last visited on 5/19/19).

25 percent, the 25 percent refers to the 10 percent. Thus, the relative risk increase of developing dementia over the course of a lifetime jumps from 10/100 for nonsmokers to 12.5/100 for smokers, a 25 percent increase¹⁶.

In 2012, a published study of a meta-analysis of the Static-99R and Static-2002-R showed the instruments were very consistent at ranking high-risk offenders as more likely to reoffend than low-risk offenders. (relative risk).¹⁷

Most importantly, they learned for both scales, the predicted recidivism rates within each risk score demonstrated large and significant variability. This meant that evaluators could not, “in an unqualified way, associate a single reliable recidivism estimate with a single score on the Static-99R or Static-2002R risk scales.” *Id.* at 1166. (absolute risk).

The authors' proposed jurisdictions collect local norms as one solution to the issue. Another approach was to simply ignore base rate variability. The researchers wrote that in contexts where

¹⁶ <http://www.statisticshowto.datasciencecentral.com/calculate-relative-risk>. (last visited 5/18/19).

¹⁷ Helmus, Leslie R., Hudson, Karl R., Thornton, David, Babchishin, Kelly M., Harris, Andrew J.R., *Absolute Recidivism Rates Predicted By Static-99R and Static 2002R Sex Offender Risk Assessment Tools Vary Across Samples: A Meta-Analysis*. Criminal Justice and Behavior vol. 39, No.9, September 2012.

a probation department had resources to conduct home visits for about 20 percent of the highest risk offenders, the relative risk ranking was adequate. And the final recommendation was that evaluators who needed the absolute recidivism rates should rely on their own structured professional judgment to gather external risk factors to determine the sample an offender most closely resembled. *Id.* at 1166.

However, using external risk factors brought its own set of issues. Researchers have studied and concluded there is evidence for adversarial allegiance in Static-99R score reporting and interpretation practices¹⁸. While both the State and the respondent's evaluators may score the Static-99R similarly, the problem is found in the score reporting and interpretation process. Selection of the norm group, "high risk/high need" or "routine/complete" was a subjective choice of the evaluator.

The study found the odds of prosecution evaluators using the high need/high risk norm were 34.0 times larger than the odds of the defense evaluators using the same norm. The odds of a

¹⁸ Chevalier, Caroline S., Boccaccini, Marcus T., Murrie, Daniel C., Varela, Jorge G., Sam Houston State University, University of Virginia, *Static-99R Reporting Practices in Sexually Violent Predator Cases: Does Norm Selection Reflect Adversarial Allegiance?* 39 *Law and Human Behavior*, 209. Copyright 2014 American Psychological Association.

defense evaluator using the routine/complete same norms were 10 times larger than the odds of the prosecution evaluators using the same. *Id.*

[r]eporting practices differed depending on the side for which evaluators typically performed evaluations. Defense evaluators were more likely to endorse reporting practices that convey the lowest possible level of risk (e.g., routine sample recidivism rates, 5-year recidivism rates) and the highest level of uncertainty (e.g., confidence intervals, classification accuracy), whereas prosecution evaluators were more likely to endorse practices suggesting the highest possible level of risk (e.g., high risk/need sample recidivism rates, 10-year recidivism rates). Reporting practices from state-agency evaluators tended to be more consistent with those of prosecution evaluators than defense evaluators, although state-agency evaluators were more likely than other evaluators to report that it was at least somewhat challenging to choose an appropriate normative comparison group. Overall, findings provide evidence for adversarial allegiance in Static-99R score reporting and interpretation practices.

The actuarial instrument (Static-99R) most widely used by evaluators of candidates for sexually violent predator civil commitment provides probabilities about future behavior that are moderately predictive, are influenced by evaluator allegiance and produced inflated estimates of risk due to oversampling of high-risk offenders.

Here, the State's attorney agreed with the respondent's expert, saying:

I think it's clear the scientific literature is clear that these things [actuarials] have significant limitations, particularly when applied to an individual. But, you know, these are the tools that are available. So, you know, the dynamic and static risk, it's clear that neither one tells the whole picture. It's clear, and for reasons that are obvious to me that will never be a situation where you can say this is what's going to happen to this guy.

RP 437.

The requirement in an RCW 71.09 commitment is for the State to prove beyond a reasonable doubt that a mental abnormality makes it seriously difficult for that individual at that time, to control sexually violent behavior. *In re Det. Of Thorell*, 149 Wn.2d at 743,745. Where the parties agree

Here, the best intersect of evidence with predictive dangerousness is Mr. Curbow's age. At over 60 years old, the research instruments categorically indicate the risk for reoffense plummets. Dr. Hoberman acknowledged that research even in the high risk/high need group of sex offenders showed that of the 39 men studied who were over the age of 60, not one of them reoffended. RP 1138,1140. The 2009 re-norming of recidivism rates of offenders over 60 years of age was only two percent. Dr. Fischer testified that of the 16 sex offenders in the Washington sample, who like Mr. Curbow, were aged 50 or older, there was no

recidivism. RP 1551. He allowed that other studies have shown that a recidivism rate for individuals over the age of 60 was near five percent. RP 1553. Simply put, age very much matters when considering current and future dangerousness.

The series of cases in the United States Supreme Court and the Washington Supreme Court, recognizing the fundamental difference between adolescent and mature brains is instructive. In *State v. Ha'mim*, the Court noted that while age was not "alone a substantial and compelling reason to impose an exceptional [downward] sentence", the trial court could rely on the defendant's capacity to appreciate the wrongfulness of his conduct or conform to the requirements of the law was significantly impaired." *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997).

Not until 2005 did the Supreme Court recognize the sentencing of youth for criminal behavior must include an understanding that there is a fundamental difference between "adolescent and mature brains in the areas of risk and consequence assessment, impulse control, the tendency toward antisocial behaviors and susceptibility to peer pressure." *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183

L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S.48,130 S.Ct. 2011, 17 L.Ed.2d 825 (2010); *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015); *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). The Courts and the legislature adjusted their understanding of youthful offenders and appropriate sentencing factors based on the most recent science.

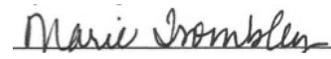
Similarly, the advances in research and meaningful statistical analysis have yielded one thing the experts can agree on concerning RCW 71.09 evaluations. As an offender reaches 60 years and older, the impulsivity and tendency toward antisocial behaviors significantly diminish to such a point that risk of reoffense is, at its highest five percent and zero at its lowest.

Even viewed in the light most favorable to the State, no rational trier of fact could find beyond a reasonable doubt, that Mr. Curbow, over 60 years of age, suffers from a mental abnormality which makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Curbow respectfully asks the Court to reverse his commitment based on insufficient evidence.

Respectfully submitted this 28th day of May 2019.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on May 28, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to: Office of the Attorney General at crjsvpef@atg.wa.gov and to Donald Curbow, Special Commitment Center, PO Box 88600, Steilacoom WA 98388-0647.


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