NO. 91876-7

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

BRENT PETTIS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

STATE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This appeal arises within the context of the post-commitment release procedures of the Sexually Violent Predator Act (SVPA).

Pettis stipulated to civil commitment as a Sexually Violent Predator (SVP) in 2002, and has been detained since that time. In 2013, he was granted a trial on the issue of unconditional release. Pettis raises two issues. First, he argues that the trial court's denial of his motion, filed one week before trial, to forego the scheduled trial on the issue of unconditional release and instead to "compel" his placement in a state-operated less restrictive alternative facility on McNeil Island violated his right to due process. Second, Pettis argues that the trial court erred in determining that the SRA-FV[1], a tool developed to identify relatively enduring psychological factors that function as long- term vulnerabilities for sexual offending, comports with the *Frye* standard and admitting testimony based on that instrument.

The Court of Appeals properly rejected these arguments. Pettis had refused all treatment for the two years before trial, and his assertion that all of the experts who had considered his case agreed that he should be placed in the state-run facility misstates the record in this case. Nor did Pettis demonstrate that "only" an "unwritten rule" prevented his transfer to the less restrictive facility. Pettis failed to demonstrate that he has requested transfer to the state-run less restrictive alternative (SCTF). Even if there were such a policy, it is reasonable and consistent with legislative intent behind the SVPA. Finally, Pettis completely disregarded the clear statutory procedure in place for obtaining less restrictive placement in factor of his

[1] SRA-FV stands for Structured Risk Assessment-Forensic Version.

last-minute motion for summary transfer to the SCTF in lieu of trial. Those statutory procedures comport with due process, and there is no basis to review the Court of Appeals' decision affirming the trial court.

Nor is his argument relating to the SRA-FV well taken: The evidence presented at the *Frye* hearing established that the SRA-FV is generally accepted by experts in the relevant fields and that it is capable of being applied in such a way as to obtain reliable results.

II. COUNTERSTATEMENT OF THE ISSUES

There is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. If this Court were to accept review, the following issues would be presented:

A. Whether the trial court's denial of a last-minute motion to compel Pettis' placement in a less restrictive alternative violated due process where Pettis failed to follow statutory procedures for obtaining release.

B. Whether, after conducting a *Frye* hearing, the trial court erred by admitting evidence of the SRA-FV.

III. COUNTERSTATEMENT OF THE CASE

A. Factual History

Pettis has a long history of sexually assaulting prepubescent children. Between 1985 and 1990, often while in sex offender treatment, Pettis sexually assaulted at least six prepubescent children. He has been convicted of Indecent Liberties (CP Exhibits. 1-3), Statutory Rape in the First Degree (RP 158; CP Exhibits 11, 12) and Child Molestation in the Third Degree. RP 168. These assaults have

included fondling (CP Exs. 1-3, RP 139-46), oral sex (RP 143; 155-56), vaginal penetration (RP 143, 155-56), and anal penetration. RP 161, 166-68.

Prior to his release from prison in September 2001, the State filed a petition alleging that Pettis is a Sexually Violent Predator (SVP) as defined in RCW 71.09.020(18).[2] RP 170. Pettis stipulated to commitment in 2002 and has been confined at the Special Commitment Center (SCC) since that time. *In the Detention of Pettis,* -- Wn. App. ---; 352 P.3d 841 (2015), Slip Op. at *2.

Pettis, although he participated in treatment for roughly nine years, had, as of the time of trial, refused all treatment for two years. In 2010, while Pettis was still in treatment, James Manley, Ph.D. recommended his transfer to the SCTF, a less restrictive alternative (LRA) facility operated by DSHS on McNeil Island in an annual review conducted pursuant to RCW 71.09.070. *See* CP at 11.[3] The Senior Clinical Team, however, did not support transfer, expressing concerns that Pettis "had a tendency to get into victim stance which fuels negative emotionality," and that, when pressed on key issues related to his cycle of offending, he "got defensive and shut down." CP 377.[4] They concluded "that it did not appear that Mr. Pettis was

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[2] An SVP is defined as a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18). "Likely to engage..." means that the person more probably than not will engage in such acts if unconditionally released. RCW 71.09.020(7).

[3] As used herein, the term "SCTF" refers specifically to the secure community transition facility operated by DSHS on McNeil Island. *See* CP at 11. As defined by statute, the term "secure community transition facility" has a broader meaning and can include a variety of different residential facilities operated by or under contract with the Secretary of DSHS. *See* RCW 71.09.020(15).

[4] The Senior Clinical Team (often referred to simply as "Senior Clinical") is a group of professionals at the SCC consisting of psychiatrists, psychology Ph.Ds., and managers. RP 735. If an annual review includes a recommendation for a change in the SVP's status, Senior Clinical will review the matter, meet with the resident, and make a recommendation to the CEO. CP 432. *See also* WAC 388-880-056.

very resilient and that the SCTF required a lot more resiliency than the main facility." CP 378. Concerns regarding his mentoring of younger males in the Native American Group, "which is a good way to pick up a young impressionable man," were also expressed. CP 422. Despite concerns, he was placed in a group called "Barriers to Treatment" in anticipation of an eventual move to the SCTF. CP 377. In March of 2011, however, he was suspended due to lack of progress and low attendance, and was described by the group therapist as "passive-aggressive and resistant." CP 378, 379. By May of 2011, he had formally dropped out of treatment. CP 382.

In light of his refusal to continue treatment, Dr. Manley, in his 2011 Annual Review, withdrew his 2010 recommendation that Pettis go to the SCTF indicating that, although he had the skills and aptitude to complete the work necessary to gain support for such placement, a less restrictive alternative (LRA) was not, at that point, in his best interest. CP 381, 387. Not long thereafter, Pettis reported himself as being "in cycle," and described sexualizing the younger male special needs resident in the yard. CP 381. He was described as "a burned out, disheartened and depressed individual who has lost motivation to engage in treatment." CP 382. Likewise, Carla van Dam, Ph.D., who conducted the 2012 annual review, described Pettis as "stuck," making complaints about the SCC's treatment program and "blaming his sexual deviance on the fact that he was homosexual." CP 383. She did not recommend LRA or SCTF placement. CP 11.

1. Petition for summary transfer to SCTF

After receipt of Dr. van Dam's report, the State noted a show cause hearing pursuant to RCW 71.09.090. CP 22-47. Two months later, Pettis submitted a petition, supported by a report by Christopher J. Fisher, Psy.D., requesting unconditional discharge. CP 289-330. Pettis did not request, and Dr. Fisher did not support, placement in a less restrictive alternative. *Id.* After a contested hearing in January of 2013, the trial court found that Pettis had demonstrated probable cause for an evidentiary hearing on the issue of unconditional release. CP 213. Because the State had made a prima facie showing that LRA placement was not appropriate, no trial was set on the issue of release to an LRA. RCW 71.09.090(2)(c). Trial on the issue of unconditional release was scheduled for September 16, 2013. CP 214.

Roughly one month prior to trial, Pettis filed a one-paragraph document entitled "Petition For Release To Less Restrictive Alternative (LRA)" indicating only that he "intend[ed] to seek conditional release in the alternative pursuant to RCW 71.09.090" during the September 16, 2013, unconditional release trial. CP 100; RP 1310. The "Petition" was not supported by any other documents. The State filed a response in opposition, arguing that the trial court had found probable cause for a trial on the issue of unconditional release, and not on the issue of conditional release to an LRA. CP 101-118. Pettis, the State argued, had not presented a specific plan comporting with RCW 71.09.092 and had, at best, provided a generalized description of parts of an LRA plan to be proposed in the future. CP 104. The State further argued that Pettis' last-minute request provided the State, which would bear the burden of proof at any such trial, with no opportunity for discovery. CP 104-105.

On September 10, 2013, one week before trial, Pettis filed a 204-page motion asking that the trial court "compel" his placement at the SCTF. CP 246. By statute, placement at the SCTF must be approved by the Secretary of DSHS. RCW 71.09.250(1)(a). When the matter came before the trial court on the first day of trial, counsel for Pettis stated that Pettis was withdrawing his earlier, August 15, 2013, LRA Petition. RP 1327; RP 30-32. Instead, Pettis asked that the court rule on his September 10, 2013, motion that the court "compel" his placement at the SCTF, despite the fact that there was no evidence that the Secretary had ever agreed that he could be housed there. RP 1327-28. The State argued that, while the reports of various experts recommending placement in either an LRA or the SCTF might be sufficient to establish probable cause for an LRA trial, the statute did not contemplate that an individual would simply be summarily transferred to the SCTF. RP 1335-47. The trial court denied Pettis' motion, citing the statutory procedure for obtaining an LRA. RP 1355. Although the trial court acknowledged that the parties would in all probability be back shortly on this issue, it ruled that LRA placement "is not to be decided today."[5] RP 1355.

2. Trial testimony

At trial, Amy Phenix, Ph.D., testified regarding her evaluation of Pettis' mental condition and risk for re-offense. The evaluation included a comprehensive records review and clinical interview of Pettis. RP 180-82. Dr. Phenix diagnosed

[5] This is in fact precisely what happened. While this appeal was pending, Pettis requested and obtained an LRA trial pursuant to RCW 71.09.090, and, after a bench trial, was granted release to an LRA. *See* State's Motion to Supplement the Record, and Petitioner's Answer to State's Motion to Supplement, Declaration of Counsel, in this cause. The fact that he has now been granted a community LRA arguably renders this entire issue moot, in that "the substantial questions in the trial court no longer exist." *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994).

Pettis with Pedophilia (RP 30; 278-79) and assessed his risk to re-offend by considering both "static" and "dynamic" factors.[6] RP 302. After assessing his "static" risk on two actuarial instruments, the Static 99R and the Static 2002R, Dr. Phenix testified that offenders who receive scores similar to those of Pettis are convicted of a new sex offense at a rate of between 33.6 and 52.5 percent within ten years. RP 401, 508. Because these actuarial tools are based on new convictions for sex offenses, and because many sex offenses go undetected, the actuarial tools underestimate the probability of committing a new sex offense. RP 527.

As part of her risk assessment, Dr. Phenix also considered various dynamic factors.[7] To assist in this analysis, she used the SRA-FV, a tool developed to identify relatively enduring psychological factors that function as long- term vulnerabilities for sexual offending. RP 320, 483. The SRA-FV provides a structured way of looking at the various known risk factors and helps inform a clinician about which norm groups should be used for comparison with the Static 99R. RP 321-22. During her testimony, Pettis challenged the admissibility of the SRA-FV. RP 332. The court held a *Frye* hearing, at which Dr. Phenix testified that the SRA-FV has been cross-validated, had been accepted for publication in the *Journal of Sexual Abuse*, a peer-reviewed journal (RP 337-38), that it has fairly acceptable predictive accuracy and strong, compelling, and solid incremental validity. RP 341. Following the

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[6] A "static" risk factor is one that does not change over time, whereas a "dynamic" risk factor may change. RP 302.

[7] Dynamic risk factors included in her analysis were, *inter alia,* sexual preference for children (RP 374); sexual preoccupation and coping (RP 375-77); lack of adult relationships (RP 378-79); emotional congruence with children (RP 379-81); callousness (RP 381); grievance thinking (RP 384-85); and self-management (RP 387). Self-management includes: lifestyle impulsivity (RP 387-88); resistance to rules and supervision (RP 388-90); and dysfunctional coping. RP 390-92.

hearing, the trial court admitted the testimony about the SRA-FV. RP 353. Dr. Phenix testified that, based on the SRA-FV analysis, she would compare Pettis to the "high risk/high needs" norm group. RP 398-99. She also testified, however, that Pettis would have been in that group even under the standards used prior to the development of the SRA-FV. RP 400.

The jury returned a verdict finding that Pettis continues to meet the definition of an SVP. The Court of Appeals, in a partially published decision, affirmed. *Pettis* Slip Op. at *28. The court held that the SRV-FV comported with *Frye,* and that there had been no error in admitting testimony related to that tool. *Id.* at *13. The court declined to review various constitutional issues raised relating to summary placement in the SCTF, holding that Pettis' underlying factual allegations were unsupported, based upon an incorrect reading of the SVPA, and that he had failed to follow the statutory procedure for obtaining less restrictive placement. *Id.* at *17-21.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Pettis argues that his constitutional rights were violated by the trial court's denial of his request that the court "compel" his transfer to the SCTF in the face of the "undisputed" "consensus" of "all experts" that such transfer is appropriate. He also argues that "only an unwritten SCC policy" requiring current treatment participation prevented his transfer to the SCTF. The "facts" upon which he bases these claims are, however, unsupported by the record and as such this case does not present the constitutional issues he seeks to have this Court address. First, various experts expressed concerns regarding Pettis' suitability for conditional release, and there was no "undisputed" "consensus" that SCTF placement was appropriate.

Second, Pettis did not demonstrate the existence of an "unwritten policy" preventing his transfer to the SCTF. While Pettis has a constitutional right under the equal protection clause to consideration of a less restrictive alternative to confinement, he completely disregarded the statutory procedures in place for obtaining conditional release in favor of lodging a last-minute demand that the trial court simply "compel" his placement at the SCTF in lieu of going forward with the trial that the trial court had ordered and for which the parties had prepared. Pettis has failed to demonstrate beyond a reasonable doubt that the statutory procedure for consideration of less restrictive alternatives to confinement is unconstitutional or that he is entitled to relief of any kind.

Nor is his argument relating to the SRA-FV well taken: The evidence presented at the *Frye* hearing established that the SRA-FV is generally accepted by experts in the relevant fields and that it is capable of being applied in such a way as to obtain reliable results. The Court of Appeals' decision was correct, and this Court should deny review.

A. Pettis's Factual Allegations Are Unsupported By the Record

Due to the entirely irregular way in which Pettis' request for transfer to the SCTF came before the trial court (*see* Sec. IV (B)), there was no opportunity to determine — through an orderly process of discovery — what the facts relating to Pettis' attempts to be transferred to the SCTF actually were. That said, the "facts" upon which Pettis bases his constitutional claims range, at best, from "possibly true" to, at worst, demonstrably false, and as such, the court below properly declined to consider this argument.

Pettis asserts that it is "undisputed that he can safely be treated" at the SCTF (Pet. at 7, 12) and "every expert who has examined Mr. Pettis opines that transfer is appropriate." *Id.* at 13. This is simply not correct. While it is true that certain experts supported a move to the SCTF, others did not. Dr. Manley, in his 2010 annual review, supported placement at the SCT. CP 269. This recommendation was, however, not supported by the Senior Clinical Team (CP 377-78) and Dr. Manley did not include that recommendation in his 2011 report, having become concerned, apparently after having talked to Pettis' treatment providers, that Pettis "may be masturbating to deviant fantasies." CP 387. Dr. van Dam, who submitted DSHS' 2012 annual review, agreed, stating that "conditional release to a secure facility, such as the Pierce County SCTF, would not be in his best interest at the present time." CP 12. Likewise Dr. Yanisch, contrary to Pettis' assertions, did not opine that Pettis "could be safely treated at the SCTF." Pet. at 3. In fact, in the annual review to which Pettis refers, Dr. Yanisch agreed that an LRA was appropriate but did not recommend the SCTF, noting that Pettis' refusal to re-engage in treatment "appears quite self-defeating and stubborn, and poses a significant barrier to getting what he professes to want." CP 421. Had Pettis remained in treatment rather than dropping out in 2011, Dr. Yanisch notes, "he would likely be supported in his pursuit of an SCTF placement by this time." CP 424. Likewise, both the current Clinical Director and the former Acting Clinical Director of the SCC, whose depositions were before the trial court at the time of Pettis' motion for summary transfer, expressed concerns about his suitability for placement at the SCTF. CP 279-287; 427-451.While Dr. Phenix, in her 2013 report to the court, supported placement at the SCTF (CP

403), Pettis' own expert, Dr. Fischer, made no LRA recommendation, noting that Pettis, who at one point wanted to be placed at the SCTF, now supported unconditional release. CP 309.

Nor, contrary to Pettis' assertions, does the available evidence demonstrate that "only an unwritten SCC policy [that the SVP be in "formal treatment"] prevents Mr. Pettis from being transferred to the SCTF." Pet. at 4, 12. Dr. Holly Coryell, Clinical Director of the SCC and a current member of Senior Clinical Team, testified that Senior Clinical would review any case if requested to do so by the SCC's CEO, and that Pettis' attorneys would be "welcome" to request such review. CP 433. Pettis, however, submitted no evidence that the SCC had even been asked to consider his transfer to the SCTF since Dr. Manley had made that recommendation in 2010. CP 432; 439.

Even if it were established that the SCC has an "unwritten rule" that transfer to the SCTF can occur only if the person is currently in treatment, such a policy is entirely reasonable and consistent with the legislative goal of community protection. The requirement of treatment as a prerequisite for release is central to the SVP law, intended to address the "small but extremely dangerous group of sexually violent predators" whose "likelihood of engaging in repeat acts of predatory sexual violence is high," the prognosis for curing them "poor," and their treatment needs "very long term." RCW 71.09.010 Findings. The central role of treatment in the sex predator scheme has been discussed on numerous occasions. *In re Detention of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993); *In re Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003); *In re Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999). This Court has noted the

State's "substantial interest" in encouraging treatment, commenting that "[b]y making treatment the only viable avenue to a release trial (absent a stroke, paralysis, or other physiological change), the State creates an incentive for participation in treatment," and protects public safety "by restricting evidentiary hearings to those who have participated in treatment." *State v. David McCuistion*, 174 Wn.2d 369, 394-95, 394, 275 P.3d 1092 (2012). Thus even assuming that Pettis is currently ineligible for placement at the SCTF because he is not in treatment, that position is reasonable, based on the legislative finding and intent, and not "arbitrary."

B. Pettis Failed To Follow Mandatory Statutory Procedures For Consideration Of An LRA

Rather than following the procedure clearly set forth in RCW 71.09.090, Pettis sought to circumvent that procedure by filing a last-minute request for his summary transfer to the SCTF. The Court of Appeals properly determined that these procedures were available to him, and that he had not shown his right to due process was violated.

A person determined by the court to be an SVP is committed to the custody of DSHS for placement in a secure facility until such time as release, whether conditional or unconditional, is appropriate. RCW 71.09.060(1). If, following commitment, the Secretary of DSHS determines that the person's condition has "so changed" such that s/he should be released (whether conditionally or unconditionally), the Secretary may authorize the person to file a petition for release, and a trial must be set within 45 days. RCW 71.09.090(1).

Even without the authorization of the Secretary, an SVP may petition at any time for either an unconditional discharge trial or an LRA trial. RCW 71.09.090(2)(c). At the resulting hearing, the trial court may order an evidentiary hearing based on a showing a probable cause. RCW 71.09.090(c). While, depending on the history of the case, the SVP may or may not need to show change in order to be granted an evidentiary hearing on the issue of conditional release to an LRA,[8] a trial court may not find probable cause for an LRA trial unless and until a specific proposal has been presented to the court. RCW 71.09.090(3)(d). Specifically, the SVP must show that a qualified treatment provider has agreed to provide care, has proposed a specific course of treatment, and has agreed to certain reporting requirements. RCW 71.09.092(1) & (2). The SVP must also demonstrate that s/he has obtained housing that is "sufficiently secure," and is willing to cooperate with both the Department of Corrections and the treatment provider. RCW 71.09.092(3)-(5).

By filing his request that the trial court "compel" his transfer to the SCTF, Pettis disregarded established statutory procedures in every possible regard. First, he did not file a petition for consideration of an LRA as required by RCW 71.09.090(2)(a).[9] Filing of such a petition would have triggered a show cause hearing at which the court could have determined whether probable cause for a trial

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[8] If release has been previously considered, either through a trial on the merits or through summary judgment as outlined in RCW 71.09.094(1), the SVP must present evidence that he or she has "so changed" such that release is appropriate. RCW 71.09.090(2)(c) & (d). If the court has not previously considered the issue of release to a less restrictive alternative, no showing of change is required. RCW 71.09.090(2)(d).

[9] Although, as noted above, Pettis did in fact file his one-paragraph "Petition" roughly one month before trial (CP 100), he subsequently withdrew it (RP 1327) and it is not at issue in this appeal.

on that issue existed. Nor did Pettis present a proposed LRA that satisfied the conditions of RCW 71.09.092. Specifically, he did not produce a treatment plan or a written housing agreement. Instead, Pettis unilaterally proposed that he be transferred to the SCTF, an LRA housing facility administered by the SCC for which Pettis had not been approved. *See* RCW 71.09.250(1)(a). As such, he had no written agreement that he be housed there. Absent a written treatment plan and a written housing agreement, Pettis could not establish probable cause for an LRA trial.

Nor was there any statutory authority for Pettis' unilateral request that the trial court "compel" his transfer to the SCTF. Even assuming Pettis had followed established procedures and been able to establish probable cause for an LRA trial, the State would have been entitled to a jury trial. RCW 71.09.090(3). Because the State bears the burden of proof at an LRA trial (RCW 71.09.090 (3)(c), the statute and the case law provide for a period of discovery both prior to the show cause hearing and prior to any LRA trial ordered as a result of the show cause hearing. *See In re Detention of Petersen,* 145 Wn.2d 789, 801, 42 P.3d 952 (2002) (SVP allowed to conduct discovery prior to a show cause hearing in accordance with rules of civil procedure). Such discovery, the Court of Appeals has noted, could affect the sufficiency of an SVP's proposed LRA. *In re Jones*, 149 Wn. App. 16, 28-29, 201 P.3d 1066 (2009). Finally, because the SVPA does not contemplate such summary action on the part of the trial court, it would have been completely improper for the court to order DSHS, which was not a party to the SVP proceeding and had not been provided with notice of his motion, to place Pettis in the SCTF without first providing DSHS with an opportunity to be heard on the issue.

C. The Statutory Process for Obtaining an LRA Satisfies Due Process

A court will not decide an issue on constitutional grounds when that issue can be resolved on other grounds. *See Tommy P. v. Board of County Comm'rs,* 97 Wn.2d 385, 391, 645 P.2d 697 (1982). Because the factual premises upon which Pettis' constitutional claims are based are not correct, and because this issue can be resolved simply by reference to his failure to follow statutory procedure, this Court should decline to reach his asserted constitutional question.

Even if the Court considers these claims, they fail. Pettis has not established that he has a constitutionally protected liberty interest under the due process clause to summary placement at the SCTF, and the statute's failure to provide him with this avenue does not render the statute unconstitutional. This Court has determined that the statutory procedure for post-commitment release comports with substantive due process and accurately identifies those who are no longer mentally ill and dangerous. "Substantive due process," this Court has held, "requires only that the State conduct periodic review of the patient's suitability for release." *McCuistion,* 174 Wn.2d at 385 (citing *Jones v. United States,* 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)). "[A]dditional safeguards that go *beyond* the requirements of substantive due process" are provided by the statutory right to show that one's condition has "so changed" as to merit a new trial. *Id.* (emphasis added). The statute, the Court noted, requires DSHS to authorize a petition for relief where DSHS determines that the person no longer meets criteria for commitment. *Id.* at 388. Thus, "[t]his statutory scheme comports with substantive due process because it does not permit continued

involuntary commitment of a person who is no longer mentally ill and dangerous." *Id.*

Pettis contends, however, that because the statute lacks a provision requiring the SCTF to accept an SVP, the statute violates his right to both substantive and procedural due process. Pet. at 7. Statutes are presumed constitutional and the challenging party has the burden of proving it is unconstitutional beyond a reasonable doubt. *Young,* 122 Wn.2d at 26. Pettis makes no such showing. Because Pettis has not established that he has a constitutionally protected right under the due process clause to the sort of summary proceeding he demands, his argument fails.

The requirement that the courts consider less restrictive alternatives to total confinement derives from the equal protection clause. *Young* 122 Wn.2d at 47, *accord Thorell* 149 Wn.2d 724. Pettis' challenge, however, is based in due process, and he claims not only that he is constitutionally entitled to consideration of an LRA; he claims that he is constitutionally entitled to be summarily placed, without trial and without any opportunity for the State or DSHS to respond, in a specific LRA of his choosing and over the (apparent) objections of that placement. Pet. at 7. Beyond citing to a variety of cases that stand broadly for the proposition the civil commitment implicates due process, however, he cites to no cases that support his contention. Indeed, his claim that, under the due process clause, he has a constitutionally-protected liberty interest in an LRA, was specifically rejected by Division I in *In re Bergen,* 146 Wn. App. at 524, *review denied,* 165 Wn.2d 1041 (2009). There, Bergen, a committed SVP appealing the results of his LRA trial, argued that the statutory provision allowing the State to defeat a proposed LRA

placement based on proof that it is not in the offender's "best interest" violated his right to due process. *Id.* at 523-24. He asserted, as does Pettis, that he "has a fundamental liberty interest in his conditional release because '[i]nvoluntary civil commitment and indefinite detention are serious infringements of an individual's liberty interest.'" *Id.* at 525. (*Cf.* Pet. at 6-11).

Rejecting his argument, the court noted that this assertion was based on cases "involving due process challenges to the initial SVP commitment, not to a post-commitment petition for an LRA, which is at issue here," and held that the due process clause "does not create a liberty interest when a sexually violent predator seeks release ***before the court has determined that he or she is no longer likely to reoffend or that he or she is entitled to conditional release to a less restrictive alternative***." *Id.*, citing *Detention of Enright,* 131 Wn.App. 706, 714, 128 P.3d 1266 (2006), *review denied,* 158 Wn.2d 1029, 152 P.3d 1033 (2007) (emphasis added).[10] No court had, at the time of trial, ever made even a threshold determination of probable cause for trial on the issue of conditional release, much less found that Pettis is entitled to release. As such, Pettis has not demonstrated his asserted constitutionally-protected liberty interest in release.

Nor does Pettis have a right to the sort of specific placement he seeks. Pettis fails to cite a single case in which a court has ordered a specific placement of a person in custody — whether civilly or criminally detained — over the objections of that facility. Pettis has not demonstrated beyond a reasonable doubt that the statute is

[10] The court noted that, although a statute can create a liberty interest, creation of that liberty interest is dependent upon complying with the "substantive predicates" and "specific directives" of the statute. *Bergen,* 146 Wn. App at 526-27. Unlike Bergen, Pettis did not observe those "substantive predicates" and instead sought to simply bypass the entire statutory procedure for an LRA trial.

unconstitutional or that his rights to due process have been violated, and his argument, if the Court reaches it, should be rejected.

D. The Trial Court Did Not Err in Finding That the SRA-FV Satisfies the *Frye* Standard.

The *Frye* standard for admissibility requires that if an expert's opinion is based upon a scientific theory or method, the theory or method must be one that is generally accepted in the relevant scientific community. *Frye v. United States,* 293 F.1013 (D.C. Cir. 1923). The Court of Appeals correctly determined that the SRA-FV was both generally accepted in the relevant scientific community and that there are generally accepted methods of applying the instrument in a manner capable of producing reliable results. The evidence elicited at the *Frye* hearing proved that the SRA-FV has acceptable predictive accuracy and strong, compelling and solid incremental validity. RP 341. The SRA-FV had, at the time of trial, been cross validated, presented at professional conferences and many trainings, accepted for publication in a peer reviewed professional journal, determined to have fair inter-rater reliability, and had been fairly widely accepted. RP 337-38; 340. Pettis did not present any contrary evidence. RP 321; 332-353.

Reviewing this evidence, the Court of Appeals noted that "the sources available, both at the *Frye* hearing below and in the scientific literature, suggest that most practitioners accept the SRA-FV as one of many useful tools to evaluate the risk of future sexual offenses." Slip Op. at *11. Dr. Phenix, the court noted, "testified unequivocally that the tool was widely accepted in her field due to its good predictive accuracy." *Id.* Moreover, "there does not appear to be a significant dispute

about the acceptance of the SRA-FV." *Id.* While noting that there is "some criticism" from Pettis' experts, the court correctly noted that "the *Frye* standard does not require unanimity." *Id.* Nor does the instrument's low inter-rater rating, by itself, affect this result, and Pettis misrepresents the record when he argues that "even the state's expert acknowledged that the scientific community generally requires a reliability score of either .8 or .9 for forensic use. RP 338, 965." Pet. at 16. Dr. Phenix did not "admit" that an inter-rater reliability score of .9 was required. Rather, she was asked if another expert—who did not testify at trial-- had asserted this statistic, and responded that she did not know. RP at 337. The SRA-FV's inter-rater reliability, she testified, is regarded as "fair" or "modest." RP 337-38. The tool's statistical predictive accuracy, she testified, was .73, which, as compared to widely used actuarial instruments such as the Static 99R and the Static 2002R, was "very acceptable." RP 341. In addition, use of the SRA FV "shows significant incremental validity in improving the risk assessment over the use of the Static-99R alone." Slip Op. at *8-9, citing Supp. CP at 398. As correctly noted by the court, while one factor considered under *Frye* is whether "there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results" (citing *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.* 176 Wn.App.168, 175, 313 P.3d 408 (2013), *review denied*, 179 Wn.2d 1019, 318 P.3d 280 (2014)), "there is no numerical 'cutoff' for reliability." Slip Op. at *12. The court correctly determined that there are generally accepted methods of applying the SRA-FV in a manner capable of producing reliable results, and that as such it passes the second prong of the *Frye* test. *Id.*

Pettis argues that, had the SRA-FV testimony not been admitted, there is a "reasonable probability" that he would not have been committed. Pet. at 17. This argument is not persuasive. Dr. Phenix testified that, even without considering the SRA-FV, her opinion would have been the same, and that, based on the method used prior to the development of the SRA-FV, she still would have compared Pettis to the high risk/high needs normative group of the Static 99R. RP 400. Consideration of the SRA-FV did not change Dr. Phenix's risk assessment or ultimate opinion. Thus even assuming there was error in admitting the testimony—an argument the Court of Appeals properly rejected-- any such error was harmless, and would not warrant reversal. *State v. Bourg*eois, 133 Wn.2d 389, 945 P.2d 1120 (1997).

V. CONCLUSION

Based on the foregoing reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 16th day of September, 2015.

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NO. 91876-7

WASHINGTON STATE SUPREME COURT

In re the Detention of: Brent Pettis, Appellant.	DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On September 16, 2015, I sent via electronic mail true and correct copies of State's Answer to Petition for Review, and Declaration of Service, addressed as follows:

Jodi Backlund
backlundmistry@gmail.com

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

DATED this 16th day of September, 2015, at Seattle, Washington.

Elizabeth Jackson
ELIZABETH JACKSON

OFFICE RECEPTIONIST, CLERK

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In re the Detention of Brent Pettis
Case no. 91876-7

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