NO. 45499-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Brent Pettis,

Appellant,

v.

State of Washington,

Respondent.

RESPONDENT'S BRIEF

ROBERT W. FERGUSON
Attorney General

Mary Robnett
Assistant Attorney General
WSBA No. 21129
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-6430

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. SUMMARY OF ARGUMENT

Following an unconditional release trial, the jury returned a verdict that Pettis remains a Sexually Violent Predator (SVP). Prior to the trial, Pettis sought transfer to a less restrictive alternative (LRA), but he failed to follow any of the established procedures and he failed to establish probable. The trial court ruling denying his LRA trial was appropriate and the evidentiary rulings throughout the unconditional release trial were correct.

II. ISSUES

A. Whether Pettis' confinement at the Special Commitment Center (SCC) violates substantive and procedural due process?

Whether the trial court's denial of a motion to summarily order a less restrictive alternative for Pettis violated due process where Pettis voluntarily withdrew his request for a less restrictive alternative trial and otherwise failed to follow statutory procedures.

B. Whether the trial court erred by admitting evidence of the SRA-FV.

Whether, after conducting a Frye hearing, the trial court erred by admitting evidence of the Structured Risk Assessment-Forensic Version (SRA-FV).

C. Whether the trial court impermissibly commented on the evidence.

When Pettis' retained expert misstated the law to the jury, whether the trial court impermissibly commented on the evidence when the

trial court instructed the jury to disregard the expert's statement regarding the law?

D. Whether Pettis' trial counsel was ineffective.

When it was undisputed that Pettis had not arranged for housing, had no source of income, nor did he have a support network of friends or family upon his release, was Pettis' counsel ineffective for failing to rebut this evidence?

E. Whether the trial court erred by admitting evidence of Pettis' living circumstances if released?

Where the State's expert relied on Pettis' representations that if released he would have no place to live and no income, and where the expert believed this information was very significant in increasing Pettis' risk for re-offense, did the trial court abuse its discretion by allowing the expert to testify that she relied on Pettis' representations?

III. FACTS

Pettis has a long history of sexually assaulting prepubescent boys and girls. His first sexually violent offense resulting in a conviction occurred on or about May 15, 1985 in Vancouver, Washington. Six-year-old M.M. was left alone with Pettis. She told her mother that Pettis had "kissed her between her legs." CP Exhibits 1-4.

Pettis testified that he had been "horseplaying" with M.M and had pulled her pants down and kissed her on the vagina. RP 134. He testified that on four or five occasions he put M.M. to bed at night and fondled her,

rubbing her thighs, legs, bottom, and vagina. RP 135-36. Pettis pled guilty to one count of Indecent Liberties against a child under the age of fourteen (CP Exhibits 1-3) and he was sentenced under the Special Sexual Offender Sentencing Alternative (SSOSA) to 13 months confinement. CP Exhibit 4; RP 137. This was suspended for a period of two years, subject to 30 days of partial confinement, maintaining employment or school, outpatient sex offender treatment, and no contact with children. CP Exhibit 4.

Between the spring of 1985 and the summer of 1986, with his sentence suspended, Pettis was in sex offender treatment but secretly having sexual contact with eight-year-old M.A. and her brother, six-year-old D.A. RP 139, 141. Pettis testified at his unconditional release trial that he fondled their chests and genitals, performed oral sex on both children, and penetrated M.A.'s vagina. RP 143. He assaulted each child hundreds of times. RP 145-46. His sexual contact with M.A. and D.A. constituted violations of his probation and his suspended sentence was revoked. RP 139; 140.

Pettis also testified that during 1986 he sexually molested 12-year-old J.B. four to five times by kissing her, fondling her breasts, kissing her breasts, touching her genitals, performing oral sex on her, and penetrating her vagina. RP 155-56.

On December 18, 1987, Pettis was convicted of his second sexually violent offense, Statutory Rape First Degree, involving J.B. RP 158; CP Exhibits 11, 12. Pettis was sentenced to 42 months in prison. CP Exhibit 12. Although police and prosecutors were aware of Pettis' crimes against eight-year-old M.A. and six-year-old D.A., the charges were held in abeyance when Pettis pled guilty to the crimes involving J.B. RP 1014.

Following his release from prison in April 1990, and while he was in sex offender treatment, Pettis sexually assaulted E.A., the 15-year-old son of Pettis' friends. RP 1015: 159. [1] E.A.'s parents were members of volunteer prison ministry, and they met and befriended Pettis while he was in prison. RP 159. Shortly after Pettis was released from prison in April 1990, and while he was involved in sex offender treatment, he began grooming E.A., desensitizing him to sexual contact, kissing him, manipulating his penis, and penetrating his anus. RP 161, 166-68.

In October 1990, Pettis pled guilty to Third Degree Child Molestation for his crimes against E.A. He was sentenced to a maximum term of 54 months in prison.

[1] Although he was 15-years-old, E.A. was prepubescent when Pettis offended against him. RP 214.

When the molestation of E.A. came to light, Clark County prosecuted Pettis for the 1987 cases involving M.A. and D.A., charges previously held in abeyance. RP 168-69. Pettis pled guilty to two counts of Statutory Rape involving M.A. and D.A. and was sentenced to 144 months in prison. RP 169.

Prior to his release from prison, in September 2001, the State filed a petition alleging that Pettis is a sexually violent predator as defined in RCW 71.09.020(18). RP 170. On April 12, 2002, the parties entered stipulated Findings of Fact and Conclusions of Law that Pettis was a Sexually Violent Predator (SVP). CP Exhibit 24A. The Court accepted the stipulation and entered an order of commitment. CP Exhibit 24A. Pettis has been confined at the Special Commitment Center (SCC) since the State filed the petition in this matter.

Thereafter, the SCC conducted annual reviews of Pettis and each year found that he continued to meet the criteria as an SVP. On January 13, 2013, this court held a show cause hearing and considered the annual evaluation conducted by an SCC evaluator, Carla van Dam, Ph.D., who opined that Pettis continued to meet criteria as an SVP. The court also considered the report of Pettis' retained expert, Christopher Fisher, Ph.D., who opined that Pettis no longer meets the definition of an SVP. CP 94. The trial court found that the State

presented prima facie evidence that Pettis' condition remained such that he continued to meet the statutory definition of SVP and that a less restrictive alternative was not in Respondent's best interest. CP 214. The court also found that Pettis presented prima facie evidence that his mental condition had so changed due to a positive response to treatment, that he had generally matured, and that there had been wholesale changes in the field of risk assessment, that he no longer met the criteria of a sexually violent predator. CP 214. Accordingly, the court ordered Pettis' continued confinement but set an unconditional release trial on September 16, 2013. CP 214.

About one month before trial, Pettis sought to morph the pending unconditional release trial into a joint trial where the trier of fact would consider both unconditional release and conditional release to an LRA. CP 100. Pettis did not file or serve a petition for release to an LRA.[2] The State filed a response, opposing combining the pending unconditional release trial with an LRA trial for which probable cause pursuant to RCW 71.09.090 had never been shown.[3] CP 101-18. Then, less than one

[2] Although Pettis filed a document captioned "PETITION FOR RELEASE TO LESS RESTRICTIVE ALTERNATIVE (LRA)," the document contains one paragraph and indicates only that Pettis "intends to seek conditional release in the alternative pursuant to RCW 71.09.090" during the September 16, 2013 unconditional release trial. CP 100.

[3] Pettis later withdrew his motion, conceding that a trial on both issues would be improper. RP 28; 30; 340.

week before the trial date, Pettis moved for a summary order transferring him to an LRA at the SCC's Secure Community transitional Facility (SCTF). CP 246. The court denied his motion.

At trial, Amy Phenix, Ph.D., testified that she conducted an 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 Pettis with pedophilia. RP 30; 278-79. She assessed Pettis' risk to re-offend by considering both static and dynamic risk factors. RP 302. She used two actuarial instruments, the Static 99R and the Static 2002R, both of which placed Pettis in the moderate-high category of risk to re-offend. RP 316, 317. Dr. Phenix testified that offenders who score like Pettis on the Static 99R are convicted of a new sex offense at a rate of up to 33.6 percent within ten years. RP 401. [4] Sex offenders who score like Pettis on the Static 2002R re-offend at a rate of up to 52.5 percent within ten years. RP 508. Dr. Phenix testified that the actuarial instruments were less important in her overall risk assessment than what's happened to Pettis in the last twenty years. RP 316.

[4] Dr. Phenix testified that she is trying to determine whether Pettis is likely to *commit* a new sex offense. The actuarial tools are based on new *convictions* for sex offenses. 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 used the Structured Risk Assessment – Forensic Version (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.

Pettis challenged the admissibility of the SRA-FV (RP 332), and following a *Frye* hearing (RP 332-53), the trial court admitted the testimony about the SRA-FV. [5] RP 353. During the *Frye* hearing, Dr. Phenix testified that the SRA-FV was cross-validated and submitted and accepted for publication in the Journal of Sexual Abuse, a peer-reviewed journal. RP 337-38. She testified that the SRA-FV has fairly acceptable predictive accuracy and strong, compelling, and solid incremental validity. RP 341.

Pettis asserts that Dr. Phenix acknowledged that the "scientific community generally requires a reliability score of either 0.8 or 0.9." Appellant's Opening Brief ("App. Br.") at 20. But there was no such testimony. When asked whether it was Dr. Marshal's opinion that "you need like a .9 to be able to use a tool in a forensic setting," Dr. Phenix said

[5] *Frye v. United States*, 293 F. 1013 (1923).

she did not know Dr. Marshal's opinion on that. Dr. Phenix went on to testify that inter-rater reliability scores of "a .8 and above would be great." RP 337. Dr. Phenix said the SRA-FV has inter-rater reliability that is "fair" or "modest." RP 337-38. Dr. Phenix said that there had only been one inter-rater reliability study, on a "very small sample of evaluators." RP 341. She went on to explain that there were just two items on the SRA-FV that seemed to be "particularly difficult" to score, which brought the inter-rater reliability down in the one small study that had been done. RP 339.

The SRA-FV was developed over a number of years by Dr. David Thornton, the developer of the Static 99R, and was presented with a coding manual in 2010 at the Association for Treatment of Sex Abusers (ATSA) [6] annual meeting. RP 325-26. The developer, Dr. Thornton, is a well-known researcher and the SRA-FV has been fairly widely accepted in cases where offenders have been incarcerated for a lengthy period of time. RP 340. In addition to presentation of SRA-FV research at ATSA, there have been many trainings presented on the SRA-FV. RP 340. Dr. Phenix testified that most people she knows who conduct SVP evaluations are using the SRA-FV. She is one of six evaluators who work for the federal government in the Adam Walsh cases,

[6] ATSA is an international professional association. RP 325.

all of whom use the SRA-FV. RP 344-45. Dr. Phenix acknowledged that there had been quite a bit of criticism of the SRA-FV "from a handful of experts who testify only for the defense." RP 351-52.[7]

During the *Frye* hearing, the court focused on whether the evidence was generally accepted as reliable in the relevant scientific community. RP 333. Noting that *Frye* does not require unanimity, the court determined that testimony about the SRA-FV would be admissible. RP 352. The court reasoned that criticism and weaknesses of the instrument could be exposed through cross-examination, just as counsel had done during the *Frye* hearing. RP 352. In fact, Dr. Phenix was subsequently cross examined about the SRA-FV at length in front of the jury. RP 483-526.

Dr. Phenix testified that Pettis has many dynamic risk factors including: Sexual preference for children (RP 374); sexual preoccupation and coping (RP 375-77);[8] lack of adult relationships (RP 378-79); emotional congruence with children (RP 379-81); callousness (RP 381);

[7] Although the State was allowed to elicit that Dr. Phenix is routinely retained and testifies for both the Defense and the State, the State was precluded from eliciting in front of the jury that Pettis' own defense counsel have previously retained her. RP 421, 91.

[8] Dr. Phenix testified that when Pettis gets stressed or overwhelmed, he masturbates to make himself feel better, sometimes accompanied by deviant thoughts, which continues to present a risk factor for Pettis. RP 377.

grievance thinking (RP 384-85); and self-management (RP 387).[9] Self-management includes: lifestyle impulsivity (RP 387- 88); resistance to rules and supervision (RP 388-90); and dysfunctional coping (RP 390-92). 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 testified that Pettis would have been in the high risk/high need norm group even under the standards used prior to the development of the SRA-FV. RP 400.

Dr. Phenix noted that, although Pettis had engaged in treatment at the SCC for nine years, he dropped out of treatment more than two years prior to the trial, and had been terminated from another program at the SCC called "Barriers to Treatment." RP 481. She considered it to be very significant, and Pettis agreed, that to be successful if released to the community, he would need "support, structure and treatment." RP 406. Dr. Phenix testified that Pettis himself has "been the most vocal proponent of believing that he needs this structure when he gets out, to transition slowly back into the community, to manage the challenges that come up for him." RP 406. [10] Accordingly, Dr. Phenix opined that "unconditional

[9] Dr. Phenix testified that self-management is also measured by the PCL-R items "Need for stimulation, proneness to boredom and parasitic lifestyle. RP 388.

[10] It was undisputed that Pettis testified in his deposition that his preference was to not be unconditionally discharged; that he would prefer an LRA. RP 70. He also

discharge into the community would be unduly risky for [Pettis] and for the community." RP 407. Pettis had not arranged for housing, and had neither a source of income, nor a support network of friends or family in the event of his release. RP 407.

Pettis objected to this evidence, and the court heard extensive argument from counsel and an offer of proof prior to admitting it. RP 192-260. As an offer of proof, Dr. Phenix testified she views a "release plan" as follows:

> That includes all the logistics of being in the community: where he's going to go, where he's going to live, is that safe environment, a supportive environment? Who his support team is in the community, what kind of treatment programming he would be receiving in the community, and can he afford that? How is he going to support himself, is he able to work, is he marketable, does he have any money and family support in any way? And what is the environment like? Is it a -- an area where there's a lot of criminality or perhaps other sex offenders that may be a negative environment for him? And then also is there community supervision along with whatever that person's release plan is because we know the best plan is treatment -- oh, and -- and treatment. Treatment, containment with community supervision, and stability in the community.

RP 212. Dr. Phenix testified that Pettis' lack of plan was very significant to her and definitely weighed in her opinion about whether or not Pettis was at risk to re-offend. RP 212. She also testified that it was significant

---

confirmed that he had no place lined up to live, no income source lined up, no family, and no friends. RP 69-71.

to her that Pettis himself was concerned about it; "He's nervous about it; he's scared." RP 241. He recently said he did not want to go out without support. RP 242. Dr. Phenix testified she had reviewed testing of Pettis and read on a daily basis what happens to him at the SCC: When Pettis experienced stress, feelings of being overwhelmed, and negative emotionality, he would get depressed and use sexualized coping and masturbation to deal with it. He would experience more frequent intrusive deviant fantasies, though he was able to keep them in check because of the enormous amount of positive support at the SCC. RP 242. Dr. Phenix also testified that Pettis is a very needy man. RP 242. She opined that if released without structure, "His – his emotions will turn very negative, he will revert to sexualized coping . . ." RP 243.[11]

While objecting to the admission of this evidence, Pettis' own counsel conceded he had no plans for housing, or income, or support:

> Mr. Pettis -- if -- if something happens, the jury releases him, we would probably propose that he stay in the SCC for a couple of -- you know, several weeks to a month or two and we would try to arrange some housing. He's going to be eligible for some -- for -- for some whatever you get when you're disabled and I mean, I -- I don't think it's appropriate for the -- for the Prosecutor to assume that he's absolutely going to have no place to live.

[11] Pettis' counsel conceded: "[I]f Ms. Robnett can lay the foundation for Dr. Phenix to link these things to risk to re-offend, I admit that, you know, we would have a hard time keeping it out. RP 70.

RP 232.

After extensive argument on the issue, the court conducted a balancing test and ruled that the evidence that Pettis has no structure, no place to live, no source of income, no insurance, and no friends or family if unconditionally discharged, was admissible. RP 192-260. The court also precluded the use of the word "homeless." RP 258. [12]

Dr. Phenix ultimately testified that Pettis' pedophilia constitutes a mental abnormality and causes him serious difficulty with his volition because his deviant sexual arousal has not significantly decreased with age. RP 284-85. She determined that he is likely to re-offend if unconditionally released to the community. RP 424.

Dr. Christopher Fisher, an expert retained by the defense, testified that there is no dispute that Pettis has pedophilia. RP 776-77. However, Dr. Fisher did not believe Pettis' pedophilia constituted a "mental abnormality." RP 777. In Dr. Fisher's view, Pettis' pedophilia is not a mental abnormality because it does not affect his volitional capacity or predispose him to commit crimes. RP 777-78.

Dr. Fisher also testified on cross-examination that if Pettis were to be released after the trial, "he has to stay in the SCC for a minimum of

[12] The State conceded, "I -- I will instruct the witness not to use the words "homelessness" or "poverty." I think those are emotional words. I -- I agree with that." RP 258.

30 days for the community notification process to happen." RP 1056. Dr. Fisher testified that 30 days would, in his opinion, be enough time for Pettis to work with a social worker to obtain an SSI disability benefit, obtain medical insurance, and arrange for housing. RP 1056. Thereafter, Dr. Fisher represented that he was familiar with the SVP statute, RCW 71.09. RP 1056. When the State began to cross examine Dr. Fisher about the statute, Pettis' counsel objected and asked for a hearing outside the presence of the jury. RP 1056.[13] The relevant statutory section provides that if a person is found to not be an SVP, they are to be released within 24 hours. RCW 71.09.080.

After the jury had been excused, Pettis' counsel argued extensively that the State should be precluded from cross-examining Dr. Fisher about the law. RP 1056-65. His counsel argued it was not their intent that Pettis be immediately released and Dr. Fisher's testimony was based on his conversation with Pettis' counsel. RP 1057. The State argued that since

---

[13] Cross examination by Ms. Robnett:

Q. I direct your attention to 71.09.080, do you have it?

A. No.

Q. Would it surprise you --

MS. SANDERS: Your Honor, I would -- I would object to this. Ask for a -- a -- a hearing outside of the presence of --

MS. ROBNETT: He's just testified about what the law is, Your Honor. I think it's fair for me to cross-examine him.

Dr. Fisher had testified incorrectly about the law, it was fair to cross-examine him about the actual law. RP 1058. [14]

As an appeasement to Pettis' counsel, the court agreed to instruct the jury to disregard the comment of Dr. Fisher and precluded the State from further cross-examination on that issue. RP 1065. Pettis' counsel wanted reassurance that after the instruction to disregard Dr. Fisher's comment, there would be no further cross-examination of Dr. Fisher on the topic. RP 1065. When the jury returned, Judge Collier said the following:

> Okay. I'm going to give you an instruction. As you heard throughout this trial and particularly at the beginning, there will be times when the Court's going to instruct you on the law. At the conclusion of this trial, I'm going to give you some additional instruction on the law. At this point, one comment I have to make is Dr. Fisher's last statements about what the law was in Washington and the housing, you are to disregard. It was not accurate. It wa -- and disregard it. You may move on.

RP 1065-66. Thereafter the State did not cross examine Dr. Fisher about the law.

---

[14] MS. ROBNETT: I -- I did not in -- in any way try to go to the law. Dr. Fisher offered it up in response to what his housing plans were.

MS. SANDERS: Well, because that --

MS. ROBNETT: And it's fair for me to cross-examine him about what the actual law is, Your Honor, since he's testified to what it is.

The jury returned a verdict finding that Pettis continues to meet the definition of an SVP. RP 1294. On September 26, 2014, the court ordered his continued confinement. CP 237. Pettis timely appealed.

IV. ARGUMENT

A. Pettis Was Not Entitled To Summary Transfer To The SCTF

Pettis asks this Court to resolve the constitutional question of whether the statute, either on its face or as applied to him, violates due process because it does not contain a mechanism whereby the trial court, on the basis of "undisputed" evidence, may order that the SCTF accept a particular resident, where only an "unwritten rule" against acceptance of a resident not in treatment prevents such transfer, and where he has no means to seek review of a refusal to accept him.

This case, however, does not present this issue. First, because of the entirely irregular way in which Pettis' request for transfer to the SCTF came before the trial court, there was no opportunity to determine — through an orderly process of discovery — what the facts actually were. Second, the "facts" which Pettis asserts range from, at best, "possibly true" to, at worst, demonstrably false. Nor, even if this Court were to consider the constitutional claim, does it have merit. Pettis has a constitutional right under the equal protection clause to consideration of a less restrictive alternative to confinement, the mechanism for which is

clearly set forth in RCW 71.09.090. Pettis, however, completely disregarded this procedure in favor of what effectively amounts to a last-minute, truncated version of a motion for summary judgment. Finally, even if the "facts" alleged by Pettis were in fact true — which the State disputes — 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.

1. The Statute Sets Forth A Clear Path To Consideration Of An LRA

RCW 71.09.090 sets forth the procedure for consideration of a request for LRA placement. An individual determined by the court to be an SVP[15] is committed to the custody of Department of Social and Health Services (DSHS) for placement in a secure facility:

> for control, care, and treatment until such time as: (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community.

[15] 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).

RCW 71.09.060(1). DSHS is required to conduct a yearly evaluation of the SVP's mental condition in order to determine whether he continues to meet the statutory criteria for commitment. RCW 71.09.070. Unless the SVP affirmatively waives the right to a hearing, the trial court must schedule a show cause hearing. RCW 71.09.090(2).

At a show cause hearing, the State bears the burden to present prima facie evidence that the person continues to meet the definition of an SVP and that conditional release to a less restrictive alternative (LRA) would not be appropriate. RCW 71.09.090(2)(c); *State v. McCuistion,* 174 Wn.2d 369, 380, 275 P.3d 1092 (2012) *cert. denied*, 133 S.Ct. 1460. If the State does not make this prima facie showing, there is probable cause to believe continued confinement is not warranted and the matter must be set for a trial. RCW 71.09.090(2)(c); *In re Detention of Petersen,* 145 Wn.2d 789, 798, 42 P.3d 952 (2002).

In addition to the annual show cause hearing where the State bears the burden, an SVP may also petition at any time for either an unconditional discharge trial or an LRA trial. RCW 71.09.090(2)(c). At the resulting show cause hearing, the trial court may order either an unconditional discharge trial or an LRA trial based on a showing a probable cause. RCW 71.09.090(c); *Petersen,* 145 Wn.2d at 798.

A trial court may not, however, 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). The specific requirements for the proposed placement are as follows:

> (1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18.155 RCW;
>
> (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report progress to the court on a regular basis, and will report violations immediately to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center;
>
> (3) housing exists in Washington that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center if the person leaves the housing to which he or she has been assigned without authorization;
>
> (4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and
>
> (5) the person will be under the supervision of the department of corrections and is willing to comply with supervision requirements imposed by the department of corrections.

RCW 71.09.092.

Once a court has found probable cause for either an unconditional release or an LRA trial, that trial includes the same protections as an initial commitment trial. RCW 71.09.090(3)(a); *In re Detention of Bergen*, 146 Wn. App. 515, 526, 195 P.3d 529 (2008). For instance, the State and the respondent each have the right to a jury trial. RCW 71.09.090(3)(a). The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state. *Id.* The judge may require the person to complete any or all of the following procedures or tests if requested by the evaluator: (i) A clinical interview; (ii) psychological testing; (iii) plethysmograph testing; and (iv) polygraph testing. *Id.* The judge may order the person to complete any other procedures and tests relevant to the evaluation. *Id.* At trial, the State must prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community. RCW 71.09.090(3)(d); RCW 71.09.094(2).

2. 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 the statutory procedure by filing a last-minute request for his summary transfer by the trial court to

the SCTF. This request sought to bypass all of the procedures established by statute: The show cause hearing at which a threshold showing of probable cause for trial is shown, discovery, trial by a neutral and unbiased fact-finder, and a demonstration of the specific requirements that must be met before the trial court can order an LRA. The trial court properly denied his motion.

a. Procedural background

In June of 2012, DSHS filed its 2012 Annual Review. CP 1-21. The report, authored by Dr. Carla van Dam, indicated that Pettis continued to meet commitment criteria and was not appropriate for placement in an LRA. CP 11. The State noted a show cause hearing (CP 22-47) and Pettis, two months later, petitioned for a trial on the issue of unconditional discharge. CP 47-100. His Petition did not include a request for hearing on the question of whether he should be place in an LRA. *Id.* After a contested hearing in January of 2013, the trial court found that Pettis had demonstrated probable cause for an unconditional release trial, but stated that DSHS' annual review provided prima facie evidence that an LRA was not appropriate. *Id.* at 213. Trial on the issue of unconditional release was scheduled for September 16, 2013. *Id.* at 214.

On August 15, 2013, roughly one month prior to trial, Pettis filed a one-paragraph document entitled "Petition For Release To Less

Restrictive Alternative (LRA)" indicating only that Respondent "intends 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 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. *Id.* at 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. *Id.* at 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 Secure Community Transition Facility, or SCTF, a less restrictive alternative facility operated by the SCC. CP 246. When the matter came before the trial court on the first day of trial, counsel for Pettis stated that Pettis was withdrawing his August 15, 2013 LRA Petition (RP 1327), and later acknowledged that it was improper to consider both unconditional discharge and release to an LRA in the same trial. RP 30-32. Instead,

Pettis asked that the court rule on his September 10, 2013 SCTF motion. RP 1327-28. The State, which had not submitted a written response to the SCTF motion, 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 a trial on the issue of placement in an LRA, the statute did not contemplate, nor would it be appropriate, to dispose of the matter in the summary manner requested by Pettis. *Id.* at 1335-47. Alluding to the incomplete record before the trial court, the State noted that, if LRA placement were at issue at trial, "the trier of fact would want to hear from someone from that agency about why they are not willing to accept him." *Id.* at 1340; 1346.

The trial court denied Pettis' motion. In doing so, it relied upon the procedure for seeking placement in an LRA set forth in the statute, including a show cause hearing, a petition by the Respondent, and the trial court's finding that the requirements of RCW 71.09.092 have been met. RP 1355. While agreeing with Pettis that "it is appearing that all experts involved in this latest report are saying [that an] LRA is appropriate for him," and acknowledging that the parties would in all probability be back shortly on this issue, LRA placement "is not to be decided today." *Id.* "We'll just have to take these as they factually come up and be presented. [sic]" *Id.*

b. Pettis Failed To Follow Statutory Procedure

Pettis' request for summary transfer to the SCTF failed to comply with the statutory procedure 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).[16] Filing of such a petition would have triggered a show cause hearing at which the court could determine whether probable cause for an trial on that issue exists. At the show cause hearing, the parties may submit evidence, including affidavits and declarations, and the State may reply. RCW 71.09.090(2)(b). 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. The SCC had not authorized Pettis to live at the SCTF, so 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 summarily order his transfer to the SCTF. Even assuming Pettis had followed established procedures and been able to

[16] 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.

establish probable cause for an LRA trial, the State would be entitled to a jury trial. RCW 71.09.090(3). Because the State bears the burden of proof at an LRA trial, 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 Petersen* at 801 (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). "For instance," the Court observed, "a proposed treatment or housing provider may decline to participate in an SVP's proposed LRA during the course of discovery. Alternatively, the State may learn that an SVP's proposed supervisor cannot provide the level of supervision that the Department of Corrections (DOC) requires of all LRAs..." *Id.*

Finally, where the Statute 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. Here, where there was no petition filed, no show cause

hearing noted, and no opportunity for discovery, the trial court correctly denied Pettis' motion.

3. The Procedures Followed Below Comport With Both Substantive And Procedural Due Process

a. The "Facts" Upon Which Pettis bases His Constitutional Claim Are Not Supported By The Record

Because Pettis did not follow the appropriate statutory procedure which would have allowed for discovery and an exchange of information, the facts underlying his claim have not been established, and are, in some cases, demonstrably false. Pettis argues, for example, that it is "undisputed that he can safely be treated" at the SCTF and "every expert who has examined Mr. Pettis opines that transfer is appropriate." App. Br. at 16-17. This is simply not true. While certain experts supported a move to the SCTF, others did not. Dr. James Manley, who conducted DSHS' annual review in 2010, and Dr. Amy Phenix, retained by the State for the September 16, 2013 unconditional release trial, agreed that placement at the SCTF was appropriate (CP 269; 403). Dr. Carla van Dam, who submitted DSHS' 2012 annual review, however, stated that "conditional release to a secure facility, such as the Pierce County SCTF, would ***not*** be in his best interest at the present time." *Id.* at 12 (emphasis added). Dr. Daniel Yanisch, in an annual review filed days before the

September 2013 trial and submitted in support of Pettis' SCTF motion, agreed that an LRA was appropriate but did not recommend the SCTF, noting that Pettis was at times "adamant" about having no further involvement with the SCC program. *Id.* at 424-25. Likewise, Dr. Cathi Harris, Administrative Services Chief at the SCC, former Acting Clinical Director and a member of the Senior Clinical team[17] since 2002 (*Id.* at 280), and Dr. Holly Coryell, Clinical Director of the SCC and a current member of Senior Clinical, expressed concerns about his suitability for placement at the SCTF.[18]

Nor, contrary to Pettis' assertions, does the available evidence demonstrate that "only an unwritten SCC policy prevents Mr. Pettis from being transferred to the SCTF." App. Br. at 14. Indeed, Pettis submitted no evidence that the SCC or Senior Clinical had even been asked to consider his transfer since 2010. Senior Clinical review, Dr. Coryell explained, is generally triggered by an SCC annual review recommending a change in status, such as unconditional release or release to an LRA.

[17] 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.

[18] Both Drs. Harris and Coryell were deposed by Pettis prior to trial. This testimony was attached to Pettis' SCTF motion. CP 279-287; 427-451

CP 432.[19] The last such recommendation appears to have been contained in Dr. Manley's 2010 report, at which time Senior Clinical considered and rejected Dr. Manley's recommendation. *Id.* at 432. Senior Clinical had had no occasion to consider his status or transfer since 2010.[20] *Id.* at 439.

Nor is Pettis' insistence that "only" this "unwritten rule" prevents his transfer to the SCTF persuasive. Pettis has refused to participate in treatment since 2011. CP 409. Although Dr. Harris testified that she "believes" that Pettis is regarded as currently ineligible for the SCTF for that reason (*Id.* at 382), there is nothing in the record demonstrating that Pettis or his counsel had made any request, whether official or unofficial, asking for transfer to the SCTF. Indeed, Dr. Coryell 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, suggesting strongly that they had not done so. *Id.* at 433. Moreover, she stated that "there's certainly a possibility" that Pettis, despite currently not being in treatment, could be recommended for an LRA. *Id.*

---

[19] Senior Clinical review can also be triggered by a request by the SCC's CEO. CP 432.

[20] Dr. Phenix's evaluation, because it did not originate with SCC staff, did not "trigger" such a review. Dr. Yanisch's September 10, 2013 review (CP 408-425), which does recommend release to an LRA and would appear to trigger Senior Clinical review, had not yet been filed at the time of Dr. Coryell's (August 22, 2013) deposition.

When the SCC last had occasion to consider Pettis' transfer to the SCTF (in 2010-2011), it had valid and specific concerns regarding his suitability for transfer. Dr. Harris testified that, when Senior Clinical had reviewed Pettis' case, the team had raised concerns that Pettis was not very "resilient" and that "the SCTF requires a lot more resiliency than the main facility." CP 283. Moreover, Pettis, who was "sometimes histrionic," had continued targeting some of the younger individuals at the SCC. CP 283. His "mentoring" of younger men, Dr. Coryell testified, "was the same kind of mentoring brother role as the role he played when he was engaged in the church and finding individuals to victimize there." CP 439. Dr. Harris testified that, in what appears to have been a response to these concerns, Pettis was referred to a program called "Barriers to Discharge" (CP 283); Pettis, however, was later terminated from the "Barriers" program due to poor attendance and non-participation. RP 697. Dr. Coryell expressed concerns that Pettis continued to have significant treatment needs, noting that Pettis had recently expressed a significant cognitive distortion that allows him to masturbate to images of 14-year-olds. CP 441.

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. Dr. Harris testified that,

when the Senior Clinical Team considers an SVP for placement at the SCTF, it must consider the best interests of the person and the community. CP 284. Senior Clinical, she said, would consider this question: "And can we manage this person at the SCTF or in a community placement?" CP 284.

This comment is entirely consistent with the goals of the statute. 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)), most recently in *McCuistion*. There, addressing the question of whether the statute's requirement of treatment as a precondition for obtaining a trial on the issue of unconditional release violated procedural or substantive due process, the court noted that "the State has a substantial interest in encouraging treatment..." *McCuistion,* 174 Wn.2d at 394. Citing numerous scholarly articles supportive of the proposition that successful treatment is

associated with a reduction in recidivism, the court further noted 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." *Id.* at 394-95. The statutory scheme "provide[s] avenues through which committed persons who successfully progress in treatment will be supported by the state in a conditional release to a less restrictive alternative that is in the best interest of the committed person and provides adequate safeguards to the community and is in the appropriate next step in the person's treatment." *Bergen,* 146 Wn. App. at 528, citing RCW 71.09.090 Findings. The statute's release requirements "account[t] for the inherent dangerousness of SVPs and their unique, extended treatment needs," and relate to "the SVP's successful treatment, ensuring that the LRA does not remove "incentive for successful treatment participation" or "distract[ ] committed persons from fully engaging in sex offender treatment." *Id.*

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 focused on determining Pettis' best interests and adequate community protection, and not "arbitrary."

4. The Statutory Process For Obtaining An LRA Satisfies Due Process

Because the factual premises upon which Pettis' constitutional claim 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 this claim, it fails. Pettis has not established that he has a constitutionally protected liberty interest under the due process clause to summary placement in the SCTF, and the statute's failure to provide him with this avenue does not render the statute unconstitutional.

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). As discussed above, the factual assertions upon which his constitutional claim is based, are not supported by the record and some — such as the "universal agreement" among all experts that he is appropriate for the SCTF — are demonstrably false. Pettis' complete failure to observe statutory procedure, and the resulting irregularity of the proceeding, is sufficient grounds upon which to find that the trial court correctly denied his motion.

Even if this Court reaches the constitutional issue, his argument fails. Our Supreme 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," the court 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 the 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 for the court to summarily order the SCTF to accept an SVP, the statute violates his right to both substantive and procedural due process. App. Br. at 13-17. 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 complete 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. App. Br. at 11-15. 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 *Bergen,* 146 Wn. App. at 524, *review denied*, 165 Wn.2d 1041 (2009), which he does not cite. 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. App. Br. at 11-14.)

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).[21] No court has 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.

[21] 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.

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

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

Pettis argues that the trial court improperly allowed testimony about the SRA-FV. But prior to admitting the testimony, the trial court held a *Frye* hearing. *Frye v. United States*, 293 F. 1031, 34 A.L.R. 145 (App. D.C. 1923). 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. *Id.* After hearing testimony during the *Frye* hearing, the trial court determined that the SRA-FV was generally accepted in the relevant scientific community. There was no error.

Dr. Phenix testified that she used the SRA-FV score to determine which normative group Pettis should be compared to, based on his Static 99R score. RP 398-99. The trial court held a *Frye* hearing outside

the presence of the jury, to determine whether this structured method for assessing dynamic risk factors was generally accepted as reliable in the relevant scientific community. RP 333. 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 has been cross validated, presented at professional conferences and many trainings, accepted for publication in a peer reviewed professional journal, has fair inter-rater reliability, and has been fairly widely accepted. RP 337-38; 340. Pettis did not present any contrary evidence. RP 321; 332-353.

The trial court found the evidence admissible, noting that satisfying the *Frye* legal standard does not require unanimity. RP 352. The court reasoned that criticism and weaknesses of the instrument could be exposed through cross-examination. Based on the record before the court, the trial court did not err or abuse its discretion in determining that the SRA-FV satisfied *Frye*. The undisputed evidence presented during the Frye hearing is sufficient to satisfy the *Frye* standard for admissibility.

Furthermore, even if this evidence had not been admitted at trial, Dr. Phenix would hold the same opinion. Dr. Phenix testified that, based on the method used prior to the development of the SRF-FV, she still would have compared Pettis to the high risk/high needs normative group

of the Static 99R. The admission of testimony about the SRA-FV did not change Dr. Phenix's risk assessment or ultimate opinion. Even assuming there was error in admitting the testimony, any such error was harmless. *State v. Bourg*eois, 133 Wn.2d 389, 945 P.2d 1120 (1997). This issue does not warrant reversal of Pettis' commitment.

C. The Trial Court Did Not Impermissibly Comment on the Evidence

The trial court's instruction the jury to disregard incorrect testimony regarding the law was not a comment on the evidence and was provided to appease Pettis' counsel, who objected to cross examination on the issue.

Pettis concedes that his retained expert, Dr. Fisher, "mistakenly told the jurors that Mr. Pettis would be required to remain at the SCC for thirty days after his release." App. Br. at 23 (*see* RP 1056). Dr. Fisher testified that the required thirty days would, in his opinion, be enough time for Pettis to work with a social worker to obtain an SSI disability benefit, obtain medical insurance, and arrange for housing. RP 1056. Pettis' counsel objected to the State's attempts to cross examine Dr. Fisher about the applicable statute, which provides for release within twenty-four hours. [22] RP 1056.

[22] RCW 71.09.080 provides that if a trier of fact determines that a person does not meet civil commitment criteria, the person shall be released within twenty-four hours

Article 4, section 16 of the Washington State constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of the constitutional provision is to prevent juries from being influenced by knowledge conveyed to it by the trial judge. *State v. Swan,* 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).

This constitutional provision prohibits the trial judge from any action or words which would convey to the jury his personal opinion as to the truth or falsity of any evidence. *State v. Brown*, 19 Wn.2d 195, 142 P.2d 257 (1943). "An instruction which does no more than accurately state the law pertaining to an issue in the case does not constitute an impermissible comment on the evidence by a trial judge under article 4, section 16." *Seattle v. Smiley,* 41 Wn. App. 189, 192, 702 P.2d 1206, *review denied,* 104 Wn.2d 1017 (1985).

Here, Pettis' trial counsel argued extensively that the State should be precluded from cross-examining Dr. Fisher about the law. RP 1056-65. As an appeasement to Pettis' counsel, the court agreed to instruct the jury that Dr. Fisher's comment stating what the law is was inaccurate and to

---

of service of the release order on the superintendent of the special commitment center, or later by agreement of the person who is the subject of the petition.

disregard it. RP 1065. This was agreeable to Pettis' counsel to avoid further cross-examination. RP 1065. When the jury returned, Judge Collier instructed them as follows:

> Okay. I'm going to give you an instruction. As you heard throughout this trial and particularly at the beginning, there will be times when the Court's going to instruct you on the law. At the conclusion of this trial, I'm going to give you some additional instruction on the law. At this point, one comment I have to make is Dr. Fisher's last statements about what the law was in Washington and the housing, you are to disregard. It was not accurate. It wa -- and disregard it. You may move on.

RP 1065-66.

As the record shows, the trial court prefaced these remarks by indicating the remarks constitute an instruction on the law. A court is required to instruct the jurors on the law. *State v. Steen*, 155 Wn. App. 243, 247, 228 P.3d 1285 (2010) (court's instruction, which comprised neutral and accurate statement of the law, was not comment on the evidence; it neither contained facts nor conveyed the trial court's belief or disbelief in any testimony).

Pettis now argues that the court's instruction was too broad, and erroneously suggested that Dr. Fisher's testimony that Pettis intended to voluntarily stay at the SCC was also not accurate. App. Br. at 23. But

Dr. Fisher never testified that Pettis planned to voluntarily stay; instead he testified that he was required to stay for 30 days. RP 1056.

Furthermore, prior to the jury beginning its deliberations, the trial court gave the jury another curative instruction:

> The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion either during the trial or in giving these instructions, you must disregard it entirely.

VRP 1169. Jurors are presumed to follow the court's instructions. *Richardson v. Marsh,* 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). To the extent any juror may have taken the court's instruction to disregard Dr. Fisher's testimony about the law as the court's opinion about the value of the evidence, such a misunderstanding would have been corrected by this curative instruction.

The trial court's instruction was a neutral and an accurate instruction on the law. The court gave the instruction as a compromise, because Pettis' counsel wanted to avoid having Dr. Fisher cross-examined about the law. The court further instructed the jury to disregard entirely any comment by the judge, if it appeared the judge was expressing an opinion about the value of any evidence. This argument has no merit.

D. Pettis' Counsel Was Not Ineffective

Pettis argues that his counsel was ineffective because counsel failed to rebut the claim that Pettis would be "homeless" and "destitute" if released. App. Br. at 26. [23] Pettis now argues that his defense counsel failed to elicit testimony about Pettis' plan. App. Br. at 26.

To establish ineffective assistance, Pettis must show that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced. *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). Courts reviewing an ineffective assistance claim begin by assuming that counsel's assistance was effective, and the claimant bears the burden of showing otherwise. *Id.*

Pettis' own counsel conceded that Pettis had no plans for housing, or income, or support. RP 232. It is undisputed that Pettis had not arranged for housing, nor did he have a source of income, nor a support network of friends or family in the event of his release. RP 407. He cannot claim his trial counsel was ineffective for failing to produce evidence that does not exist. The court should reject Pettis' claim of ineffective assistance.

[23] The State conceded that the words "homeless" and "poverty" were emotional words and would not be used by the witness. RP 258. Likewise, the word "destitute" does not appear in the record.

E. The Court Did Not Err By Admitting Evidence That Pettis Did Not Have A Release Plan

Pettis argues that the court abused its discretion by admitting "misleading" evidence that Pettis would be "homeless" and "penniless" and "broke." App. Br. at 28-30. [24] Pettis argues that any probative value was substantially outweighed by the risk of unfair prejudice. App. Br. at 30.[25]

Generally relevant evidence is admissible and irrelevant evidence is inadmissible. ER 402. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." ER 403. The trial court has broad discretion in administering this rule, and deference should be given the trial judge who can evaluate the evidence based on personal observation. *E.g.*, *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668, 674 (1984) (citations omitted).

In an SVP trial, one issue for the jury to decide is whether the respondent's risk of re-offending is so high that he should be committed to a secure facility. The statute does this by focusing the attention of the jury

[24] These are terms from Pettis' Brief, but as discussed earlier, the words "homeless," "penniless," "destitute," "broke" or the like, were never used by witnesses in front of the jury.

[25] Pettis mistakenly argues that this evidence was the subject of a motion in limine, but it was not. Pettis did object to the evidence and the court heard an offer of proof and ruled on admissibility prior to introducing the evidence at trial. *See* CP 160-172.

on what would happen if the respondent were living freely in the community. *In re Detention of Post,* 170 Wn.2d 302, 312, 241 P.3d 1234. The statute provides that the jury may consider "only placement conditions and voluntary treatment options that would exist for the person if unconditionally released." RCW 71.09.060(1); *See also Turay,* 139 Wn.2d at 404. "To be sure, the State may offer evidence of the treatment and placement conditions that are necessary to mitigate the respondent's dangerousness, and the State may offer evidence that these components are lacking in the respondent's proposed arrangements for unconditional release." *In re Detention of West*, 171 Wn.2d 383, 399, 256 P.3d 302 (2011) (citing *Post,* 170 Wn.2d at 313–14).

Dr. Phenix testified that she considered it to be very significant, and Pettis agreed, that to be successful if released to the community, he would need "support, structure and treatment." RP 406. The court heard an offer of proof outside the presence of the jury and the court conducted a balancing test before admitting the evidence. RP 192-260. Dr. Phenix confirmed Pettis' lack of plan was very significant and definitely weighed in her opinion about whether or not Pettis was at risk to re-offend. RP 212. It was also significant to her that Pettis himself was concerned about it; "He's nervous about it; he's scared." RP 241. Pettis recently said he did not want to go out without support. RP 242. She opined that if

released without structure: "His – his emotions will turn very negative, he will revert to sexualized coping . . ." RP 23.

Pettis' counsel conceded that if Dr. Phenix relied on Pettis' lack of a release plan to evaluate his risk to re-offend, they would "have a hard time keeping it out." RP 70. Further, to avoid any unfair prejudice, the court instructed the parties to not use the terms "homelessness" or "low income," and no such words were ever used by the witnesses. RP 228.

Because the evidence constitutes evidence of treatment and placement conditions that are necessary to mitigate Pettis' dangerousness, and because the State offered evidence that these components are lacking in Pettis' proposed arrangements for unconditional release, the court properly determined that the evidence was highly probative, and not outweighed by the risk of unfair prejudice. The trial court did not abuse its discretion in admitting this evidence. This Court should affirm.

V. CONCLUSION

None of Pettis' claims merit reversal of the jury's decision that he remains a sexually violent predator who is likely to re-offend if released into the community. Specifically, Pettis' continued confinement at the SCC does not violate due process. He has not established probable cause for an LRA trial and there is no provision for summary transfer to an LRA. The trial court did not abuse its discretion in determining that the

SRA-FV was generally accepted as reliable in the relevant scientific community and the record supports such a finding. The trial court's instruction to the jury to disregard Dr. Fisher's testimony on the law was neutral statement of the law and did not convey the judge's opinion regarding factual evidence. Pettis' counsel was not ineffective for failing to rebut undisputed evidence. The trial court did not abuse its discretion in determining that Pettis' release plan was very significant evidence and would not result in unfair prejudice.

Pettis' civil commitment should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of September, 2014.

ROBERT W. FERGUSON
Attorney General

MARY E. ROBNETT, WSBA #21129
Assistant Attorney General

NO. 45499-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of: BRENT PETTIS, Respondent.	DECLARATION OF SERVICE

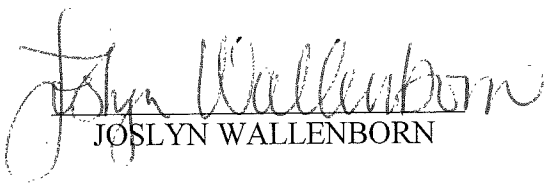
I, Joslyn Wallenborn, declare as follows:

On September 22, 2014, I sent via electronic mail and USPS mail a true and correct copy of Respondent's Brief and Declaration of Service, postage affixed, addressed as follows:

Jodi Backlund
Backlund & Mistry
P.O. Box 6490
Olympia, WA 98507
backlundmistry@gmail.com
stilloutraged@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 22nd day of September, 2014, at Seattle, Washington.



JOSLYN WALLENBORN

WASHINGTON STATE ATTORNEY GENERAL

September 22, 2014 - 2:48 PM

Transmittal Letter

Document Uploaded: 454998-Respondent's Brief.pdf

Case Name: In re the Detention of Brent Pettis
Court of Appeals Case Number: 45499-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Joslyn Wallenborn - Email: joslynw@atg.wa.gov

A copy of this document has been emailed to the following addresses:

mary.robnett@atg.wa.gov
backlundmistry@gmail.com
stilloutraged@gmail.com