NO. 92927-1

THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Detention of Steven Ritter:

STATE OF WASHINGTON,

Respondent,

v.

STEVEN RITTER,

Petitioner.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Brooke Burbank
Assistant Attorney General
WSBA No. 26680
800 Fifth Ave, Suite 2000
Seattle, WA 98104
(206) 389 3017
OID No. 91094

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Steven Ritter was committed as a sexually violent predator in 2012 by a unanimous jury after a fair trial. The Court of Appeals remanded for an evidentiary *Frye*[1] hearing to determine the admissibility of an assessment tool the State's expert used: the Sexual Recidivism Assessment-Forensic Version (SRA-FV). This tool was developed using standard methodologies to incorporate and consider current "dynamic" risk factors. The tool is widely used by experts who conduct assessments of sexual offenders and has been shown by research to improve the predictive accuracy of the actuarial instruments. The trial court found the tool to be admissible.

Ritter urges this Court to accept review of his case by presenting arguments that would deprive experts and courts of virtually all possible evidence of his future dangerousness. First, he relies on several criminal cases to argue that his conduct as a juvenile and young adult should not have been considered in his commitment trial. He conceded that risk assessment tools assessing historical (and unchangeable) data are the best way to determine risk for re-offense, but argues that the State should not have been permitted to introduce evidence of his sexually deviant conduct that occurred before he was 23 years old.

---

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Second, he argues that the Court should invalidate a test that was developed specifically to include more current (and changeable) evidence of his recent functioning in the risk assessment. His arguments were rejected by the trial court and the Court of Appeals, and he provides no basis for this Court's acceptance of review. This Court should deny review.

II. ISSUES PRESENTED FOR REVIEW

The State does not believe that Ritter has raised any issues that are appropriate for review pursuant to RAP 13.4(b). However, if this Court were to accept review, the issues presented would be:

1. **Has Ritter demonstrated that RCW 71.09, which permits the civil commitment of an adult who committed sexual offenses both as a juvenile and as an adult, violates due process?**

2. **Where actuarial instruments and clinical judgment have both been repeatedly determined to be admissible in commitment trials, did the trial court properly determine that a tool that allows evaluators to consider dynamic risk factors in a structured way satisfied the *Frye* test?**

III. RESTATEMENT OF THE CASE

The State chronicled Ritter's criminal sexual history in detail in its responsive briefing below. *See* Respondent's Opening Brief, No. 30845-6, pp. 1-12; *see also In re Detention of Ritter*, 177 Wn. App 519, 312 P.3d 723 (2013). Of particular note, within a year of being released from prison for sexually assaulting his developmentally-delayed aunt, and

while on community supervision, 18-year-old Ritter sexually assaulted a nine-year-old girl, T.B., in a public library. RP 1/19/2012 at 627-38; 733. He was convicted of Child Molestation in the First Degree.

Shortly before his release from prison for that crime, Dale Arnold, Ph.D., conducted an evaluation to determine whether Ritter met criteria as a Sexually Violent Predator (SVP). As part of his assessment, Dr. Arnold reviewed over 1,300 pages of records relating to Ritter's social, sexual, psychological, and criminal history. RP 1/19/2012 at 717-19. He met with and interviewed Ritter twice in 2006. *Id.* Ritter, who was then 25 years old, blamed T.B. for the sexual assault, telling Dr. Arnold that the nine-year-old was promiscuous and had "come on" to him. RP 1/19/2012 at 742. Calling her a "damn little slut," he said that she had grabbed his hand and walked him down the aisle, which made him want to have sex with her. *Id.*

In determining that Ritter suffers from pedophilia, Dr. Arnold also relied in part on extensive writings Ritter penned from 2003 (when he was 21 or 22 years old) in which Ritter depicts sexual contact between 15-year-old and 6-year-old boys. *Id.* at 734; RP 1/23/2012 at 866. This, Dr. Arnold explained, is evidence of "ongoing fantasies to have sex with children." RP 1/19/2012 at 734. Ritter also continued his writing while confined at the Secure Commitment Center (SCC) and described having sex with a female child whose "eyes pop out" because it is her first time.

RP 1/23/2012 at 894-95. Ritter's pedophilia is the "nonexclusive type," which means that Ritter is attracted to both children and adults. *Id.* at 739; RP 1/19/2012 at 740.

In explaining his diagnosis of Anti-Social Personality Disorder (ASPD), Dr. Arnold testified that he relied upon Ritter's behaviors both as a young man and as an adult. RP 1/19/2012 at 751-58. A diagnosis of ASPD, Dr. Arnold explained, requires evidence of a conduct disorder prior to age 15. *Id.* at 752. He testified Ritter was "fairly consistently" placed in special education classes because of severe behavior disturbances. *Id.* Ritter's problematic behavior—characterized by a failure to conform to social norms with respect to lawful behaviors, deceitfulness, and impulsivity—has continued into adulthood. *Id.* at 756. While in prison custody as an adult, Ritter, "on a fairly regular basis," got into trouble for threatening, possessing obscene materials, or having sexual contact with other inmates. *Id.* at 759. He was "very frequently" placed in intensive management while in prison and generally has been housed in the most intensive management unit available while in DSHS custody. *Id.*

Ritter's commitment trial began in January 2012. Dr. Arnold used the Sexual Recidivism Assessment-Forensic Version (SRA-FV), among others, to measure whether Ritter presented with dynamic risk factors and to select the appropriate Static-99R reference group for comparison.

Id. at 521; RP 781-83, 809-22. The SRA-FV is a tool used to evaluate "stable dynamic risk factors," or factors which, while changeable over time, will not change quickly. RP at 783,791. It was developed by Dr. David Thornton, one of the developers of the Static-99.[2]

Several days into the trial, Ritter moved for a *Frye* hearing on the SRA-FV. RP at 809. The trial court rejected the motion on both procedural and substantive grounds. It ruled that the timing of Ritter's motion was not reasonable, because Ritter's counsel had known for almost two months that Dr. Arnold intended to refer to the SRA-FV. RP at 596. It also ruled that this Court had addressed the issue "squarely" in *In re Detention of Thorell,* 149 Wn.2d 724, 72 P.3d 708 (2003). RP at 596. The trial court found that testimony regarding the SRA-FV is admissible under ER 702 and ER 703 because it "will be helpful to the jury and does have a scientific basis." *Id.* at 596-97.

Nevertheless, the Court of Appeals entered an order remanding the matter to the trial court for a *Frye* hearing on the SRA-FV. *Ritter,* 177 Wn. App. at 521. An extensive evidentiary hearing was held in

[2] Dr. Arnold formed his opinion in 2006 that Ritter met the criteria for commitment and confirmed it again in 2009 without the use of the SRA-FV. When he did apply the tool it did not change his opinion. At Ritter's trial, Dr. Arnold also testified that he had attended numerous trainings held by the developer of the instrument, Dr. Thornton. RP 814-18. He further testified that he applied the instrument consistently with the manner in which he was instructed. RP 819-21. A copy of the SRA-FV is at CP 791. Its scoring is discussed at RP 806-22.

December 2014 regarding the admissibility of the SRA-FV. RP 12/9/14, 12/10/14, 12/11/14.

Based on substantial evidence the State provided (summarized below at pages 14 to 19), the trial court found that the SRA-FV satisfied the *Frye* standard, as well as ER 702 and ER 703. RP 12/19/14 at 3; CP 1726-30. Specifically, Judge Elofson found that there is a general scientific consensus that "dynamic risk factors" are important and the SRA-FV provides a structured approach to measuring them. RP 12/19/14 at 4. He found that the SRA-FV had been peer-reviewed in a published article, was being presented in trainings of evaluators throughout the country, and was used extensively by practitioners evaluating sexual offenders. *Id.* He found that the SRA-FV had been validated and cross-validated. *Id.* at 5-6. The trial court entered an order on January 8, 2015, ruling that the SRA-FV satisfied the *Frye* standards, as well as the evidentiary standards of ER 702 (helpful to the jury) and ER 703 (generally accepted in the community of experts who evaluate sex offenders and assess their risk of sexual recidivism). CP 1730.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Acceptance of review of a Court of Appeals decision is governed by RAP 13.4(b). Although Ritter cites RAP 13.4(b)(1), (2), and (3) as the bases for review (PFR at 1), he does not put forward any argument as to why any of

these criteria have been met. He does not cite any case from this Court or the Court of Appeals that conflicts with the decision below. There are no such cases; Ritter's commitment is consistent with well-settled law from this Court and the Court of Appeals. Because the issues presented in his petition do not meet any of the specified criteria for review, this Court should deny review.

A. Civil Commitment of an Adult Who Committed Sexual Offenses Both as a Juvenile and as an Adult Does Not Violate Due Process.

Ritter argues that his civil commitment as an SVP violates due process because it is based on conduct that occurred when he may have been "in a state of continuing development." PFR at 7. He argues that the State should not have been permitted to rely on evidence of his conduct until his brain was fully mature, despite not knowing exactly when that would be.[3] Although Ritter's commitment was based on behavior that included sexual offending committed when he was an adult, he urges this Court to ignore that fact and find "it is of no consequence" because it is possible his brain wasn't capable of volitional control until he was "well into his 20s." PFR at 11. Although he argues that "a juvenile's mind does

[3] The cases he cites do not support his argument. For example, he relies on *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), for the principle that juveniles are less culpable than neurologically mature adults. That was not the Court's holding. The Court did not conclude that juveniles necessarily are less culpable than adults, that all juveniles lack volitional control, or that a trial court must somehow assume that a particular juvenile lacks volitional control or culpability. It held that because the Legislature did not necessarily consider youth when it established the standard range sentences applicable under the Sentencing Reform Act, a trial court is not barred *in an appropriate case* from considering the defendant's youth when sentencing. *Id.* at 690-96.

not fully develop until his or her *late teens or early twenties*" (PFR at 7), Ritter also argues evidence of *his* conduct in his late teens and early twenties should not be considered. This logic would essentially prevent the State from acting to protect the public and incapacitate and treat dangerous sex offenders until some unknown date and time in which the brain's full maturation could be proven. Due process does not require this.

Moreover, Ritter was not a juvenile at the time of his commitment, nor was he a juvenile at the time of his most recent crime. He was 18 when he attacked nine-year-old T.B, he was 19 when convicted, and he was 30 when committed as an SVP. Second, there was overwhelming evidence that Ritter was both mentally ill and dangerous *at the time of his commitment*, and as such due process was satisfied. Third, Ritter will have a review to determine his mental status and suitability for continued commitment each year until he is determined not to meet criteria. *See* RCW 71.09.070. Due process requires nothing more.

1. The statute satisfies due process.

The core concern of substantive due process is the protection from restraint from arbitrary government action. *Foucha v. Louisiana,* 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2nd 437 (1992). Substantive due process requires that those civilly committed under the sexually violent predator law be demonstrated to be both mentally ill and dangerous.

Kansas v. Hendricks, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Therefore, a sexually violent predator can be involuntarily committed only if the State proves: (1) the person has a mental illness coupled with and linked to serious difficulty controlling behavior; and (2) together, these features both pose a danger to the public and sufficiently distinguish the person from a dangerous but typical criminal recidivist. *In re Detention of Ritter,* No. 30845-6-III, 2016 WL 503128, at *5 (Wash. Ct. App. April 12, 2016) (citing *Kansas v. Crane,* 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) ; *Kansas v. Hendricks,* 521 U.S. at 357–60 ; *Thorell,* 149 Wn.2d at 736, 742). The constitutionality of Washington's statute has been repeatedly upheld against various due process challenges. *In re Detention of Young,* 122 Wn.2d 1, 857 P.2d 989 (1993); *Thorell*, 149 Wn.2d 724; *In re Detention of McCuistion*, 174 Wn.2d 369, 275 P.3d 1092 (2012). Ritter does not address this body of case law.

2. Prohibitions against cruel and unusual punishment do not apply in civil cases because they are not punitive.

Ritter relies on three cases from the United State Supreme Court and argues that, because juvenile *criminal* offenders cannot be sentenced to death (*Roper v. Simmons,* 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)), given mandatory life-without-parole sentences

(*Miller v. Alabama,* 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)), or receive a life-without-parole sentence where the juvenile offender did not commit homicide (*Graham v. Florida,* 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)), the State "should refrain from indefinitely committing individuals whose predicate conduct derives from the period of time when their volitional capacity was immature or continuing to develop." PFR at 10. His argument is entirely unsupported by law.

As this Court recently reaffirmed, Washington appellate courts have held consistently and repeatedly that the constitutional rights expressly conferred upon criminal defendants do not apply in SVP cases, which are "resolutely civil in nature."[4] Washington law is clear that although SVP detainees are undisputedly entitled to due process of law, the constitutional trial rights expressly conferred upon criminal defendants do not apply in SVP cases, which are civil in nature.

---

[4] *In re Detention of Reyes*, 184 Wn.2d 340, 346-48, 358 P.3d 394 (2015) (declining to apply structural error to SVP cases). *See also Young*, 122 Wn.2d at 18-25 (5th Amendment double jeopardy and prohibition against ex post facto do not apply in SVP cases); *In re Detention of Stout*, 159 Wn.2d 357, 370-71, 150 P.3d 86 (2007) (6th Amendment right to confrontation does not apply); *In re Detention of Law*, 146 Wn. App. 28, 42-48, 204 P.3d 230 (2008) (right against self-incrimination and the presumption of innocence does not apply), *review denied*, 165 Wn.2d 1028 (2009); *In re Detention of Coe*, 175 Wn.2d 482, 509-10, 286 P.3d 29 (2012) (no right to confront declarants of hearsay statements relied upon by experts); *In re Detention of Morgan*, 180 Wn.2d 312, 320-22, 330 P.3d 774 (2014) (SVP detainees need not be competent to stand trial); *In re Detention of Leck,* 180 Wn. App. 492, 503-08, 334 P.3d 1109 (prohibition against submitting uncharged alternative means to the jury does not apply to SVP proceedings), *review denied*, 181 Wn.2d 1008 (2014).

The Court of Appeals correctly rejected Ritter's argument, because the cases Ritter relies on were "concerned with questions presented under the Eighth Amendment . . . when harsh punishment of crimes committed by juveniles is prescribed or imposed without taking into consideration their relative lack of volitional control." *Ritter,* 2016 WL 503128, at *6.

The court correctly reasoned that unlike the criminal cases Ritter cites, a "civil commitment proceeding does not raise an issue of cruel and unusual punishment forbidden by the Eighth Amendment." *Id.* Elaborating on the difference, the court noted that criminal cases "mete[ ] out an appropriate punishment" while civil commitment proceedings only "look[ ] back at a respondent's past as a source of relevant evidence, either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness." *Id.* (citing *Hendricks,* 521 U.S. at 362). The Court of Appeals determined that Ritter had not demonstrated that "evidence of sexual misconduct as a juvenile has no probative value in deciding whether a respondent presents a risk of reoffending if not confined in a secure facility." *Id.* That finding is a correct application of this Court's definitive rulings on the constitutionality of RCW 71.09. The Court should deny review.

B. The SRA-FV Satisfies the *Frye* Standard and Was Properly Admitted.

Ritter has also failed to satisfy the RAP 13.4(b) requirements regarding the SRA-FV. He has not shown that the Court of Appeals decision affirming the trial court conflicts with any decision from this Court. Indeed, he cannot because this Court has held that neither clinical judgment nor actuarial assessment in SVP proceedings is subject to *Frye*. *Thorell,* 149 Wn.2d at 754. He also cannot show that there are conflicting Court of Appeals decisions. Division II also affirmed the admissibility of the SRA-FV. *In re Detention of Pettis*, 188 Wn. App. 198, 352 P.3d 841, *review denied*, 184 Wn.2d 1025 (2015).[5]

After conducting the evidentiary hearing, the trial court entered detailed findings of fact and conclusions of law, and found that the SRA-FV satisfied the requirements of *Frye* as well as the evidentiary requirements of ER 702 and ER 703. CP 1726-30. The trial court found that a structured analysis of dynamic risk factors is supported by a scientific theory generally accepted in the scientific community. *Id.* The court specifically determined that the SRA-FV is capable of producing reliable results, and that any limitations or potential errors are matters for

[5] At least four other courts have held *Frye* hearings due to the *Ritter* ruling. All four courts ruled that the SRA-FV meets the *Frye* standard. See CP 1710-13, *In re Detention of Aronson*; CP 1714-17, *In re Detention of Jones*; CP 1718-21, *In re Detention of Halvorson*; and CP 1722-25, *In re Detention of Love*. *In re Detention of Pettis* was the first case to reach the appellate courts.

the trier of fact to assess. CP 1729-30. The Court of Appeals correctly upheld this finding, noting that "there is no dispute that the principles underlying the SRA-FV are generally accepted in the scientific community." *Ritter,* 2016 WL 503128, at *4.

1. Standard of review.

Whether scientific evidence is admissible presents a mixed question of law and fact which is reviewed de novo. *Pettis*, 188 Wn. App at 204-5. Scientific testimony is admissible under *Frye* if a two-part test is satisfied: (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 175, 313 P.3d 408 (2013). Courts do not evaluate whether the scientific theory is correct, but whether it has gained general acceptance in the relevant scientific community. *State v. Riker*, 123 Wn.2d 351, 359-60, 869 P.2d 43 (1994). There is no numerical cut off for determining the "reliable results" prong. *Lake Chelan Shores*, 176 Wn. App. at 175. Moreover, the *Frye* standard does not require unanimity among scientists for evidence to be generally accepted. *Id.* at 176 (citing *State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001)).

Frye requires "general acceptance," not "*full* acceptance." *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994).

2. This Court has held that SVP risk assessment tools satisfy *Frye*.

"Based on our established precedent, we reiterate that the *Frye* standard has been satisfied by both clinical and actuarial determinations of future dangerousness." *Thorell*, 149 Wn.2d at 756 (citing *Young*, 122 Wn.2d at 56; *In re Detention of Harris*, 98 Wn.2d 276, 280-81, 654 P.2d 109 (1982); *In re Detention of Campbell*, 139 Wn.2d 341, 355, 986 P.2d 771 (1999)). *Frye*'s "'core concern ... is only whether the evidence being offered is based on established scientific methodology.'" *Young*, 122 Wn.2d at 56 (quoting *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993)).

Experts have traditionally used clinical judgment to consider and weigh dynamic risk factors, and Washington courts have consistently recognized that clinical consideration of such factors has been central to SVP evaluations.[6] The SRA-FV is based on empirical research and was created by one of the developers of the Static-99 to assist clinical judgment with a more stable and analytic framework. The SRA-FV was researched, developed, and

---

[6] *See e.g. In re Detention of Jacobson*, 120 Wn. App. 770, 777, 86 P.3d 1202 (2004) (noting the evaluator's consideration of dynamic risk factors); *In re Detention of Danforth*, 153 Wn. App. 833, 840, 223 P.3d 1241 (2009); *In re Detention of Reimer*, 146 Wn. App. 179, 196, 190 P.3d 74 (2008).

published using the same methodology underlying all the tools that are commonly used in the field of sex offender evaluation. The SRA-FV is not novel science—it was constructed implementing decades of generally accepted research on the subject of risk assessment, and it has been subject to peer review and validation. The SRA-FV takes factors previously considered by clinicians with unanchored clinical judgment and puts them in a structured construct based on empirical data, in order to achieve a more accurate risk assessment.

3. The SRA-FV is generally accepted by experts conducting sexual risk assessments.

The State submitted a declaration by Amy Phenix, Ph.D., who explained the development, general acceptance, and widespread use of the SRA-FV in the field of sex offender evaluation and assessment. CP 1396-1402. She also testified at length at the hearing. RP 12/9/14 at 18-189; RP 12/10/14 at 4-36. Dr. Phenix is a clinical psychologist specializing in forensic psychology. RP 12/9/14 at 19. She has conducted over 450 SVP evaluations and has supervised thousands of evaluators conducting sex offender evaluations. CP 1397; RP 12/9/14 at 24. She has been qualified as an expert in California, Washington, New Hampshire, Florida, Iowa, Wisconsin, Illinois, Massachusetts, Missouri, Minnesota, North Carolina,

and Arizona, and has testified in numerous *Frye* and/or *Daubert*[7] hearings on the admissibility of the various actuarial and risk assessment tools, and methodology in sex offender risk assessment. CP 1397. She has testified for both for the state and the defense. CP 1397.

With regard to the first prong of the *Frye* test, Dr. Phenix testified to the broad acceptance of the SRA-FV, it being "widely used and accepted in the field of sex offender evaluation." CP 1401. It is commonly used by evaluators conducting SVP assessments in several jurisdictions, and by all government evaluators conducting evaluations pursuant to the federal Adam Walsh Child Safety and Protection Act. CP 1401. The SRA-FV was validated in 2010, and a peer-reviewed article about the research supporting it was published in 2013.[8] RP 12/9/14 at 77-79; 102-03; 106-07; 115. The SRA-FV's dynamic risk factors all have been studied and found to predict future sexual re-offense. RP 12/9/14 at 142.

Judge Elofson reached the same conclusions as the *Pettis* court in ruling that the SRA-FV meets the requirements of the *Frye* test. RP 12/19/14 at 3. He ruled that the testimony and supporting materials show "dynamic risk factors" to be generally accepted in the scientific

---

[7] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[8] David Thornton & Raymond A. Knight, *Construction and Validation of SRA-FV Need Assessment*, 27 Sexual Abuse: A Journal of Research and Treatment, 360-75 (July 2015) (published online before print, Dec. 30, 2013, at http://sax.sagepub.com/content/early/2013/12/13/1079063213511120.abstract).

community as important risk considerations, and that the SRA-FV provides a structured approach to measuring them. RP 12/19/14 at 4. Even Dr. Abbott (Ritter's expert) acknowledged that the SRA-FV is the type of instrument recommended for use in sex offender evaluation by the Association for the Treatment Sexual Abusers (ATSA). RP 12/11/14 at 114-115.[9] For all of these reasons, the trial court found the SRA-FV is "generally accepted in the scientific community." RP 12/19/14 at 5-6. The Court of Appeals determined that the SRA-FV used "essentially the same process used in applying static risk factors" as the actuarials that have long been approved by this Court. *Ritter,* 2016 WL 503128, at *4.

4. The SRA-FV is capable of producing reliable results.

Addressing the second prong of *Frye*, Dr. Phenix explained that before 2010 evaluators used clinical judgment to select the Static-99 normative group. RP 12/9/14 at 69. Using the SRA-FV to select the normative group on the Static-99 improves the predictive accuracy of the Static-99. RP 12/9/14 at 96-97; 99-100; 153. Dr. Phenix testified that evaluators using clinical judgment to consider dynamic risk may either underestimate or overestimate the risk, which is why it is important to use the structure of the

[9] Judge Elofson did not find that Dr. Abbott's testimony showed that the SRA-FV was not generally accepted, only that some in the field "use it, some don't." CP 1729; RP 12/19/14 at 6.

SRA-FV. RP 12/9/14 at 97. Dr. Phenix reiterated on cross-examination that, despite the limitations of the instrument, it increased predictive accuracy of evaluations for sexual recidivism. RP 12/9/14 at 130-33.

Dr. Phenix testified that qualified professionals in the field conduct trainings on the SRA-FV and during these trainings they recommend it as a useful tool for SVP proceedings. RP 12/9/14 at 112. Additionally, the instrument has a detailed coding manual that explains and directs the scoring, as well as the subsequent selection of the Static-99 group from the score results. RP 12/9/14 at 49. Dr. Phenix testified about the results of two independent studies which concluded that the SRA-FV has an inter-rater reliability which Dr. Phenix considers "moderate." RP 12/9/14 at 128. Dr. Phenix testified that construct validity isn't necessary for the purposes of improving the score of the risk assessment. RP 12/9/14 at 98. Rather, it is enough that peer-reviewed research has confirmed that the SRA-FV improves the accuracy of the risk assessment. RP 12/9/14 at 99; 103. Dr. Phenix testified that, "the instrument was developed, released, published, peer-reviewed with no construct validity and fairly widely used because it helps us predict. It improves our prediction." RP 12/9/14 at 132. She testified that the SRA-FV enhances the overall predictive accuracy of the entire risk assessment. RP 12/9/14 at 143. The trial court specifically found that the SRA-FV is an instrument that is capable of producing

reliable results. CP 1730. Judge Elofson concluded the SRA-FV meets the requirements of both prongs of *Frye*. CP 1730; RP 12/19/14 at 6.

5. Ritter's arguments do not address admissibility under *Frye*.

Ritter argues that expert testimony regarding the SRA-FV should not be admissible under *Frye* because the SRA-FV has less than ideal construct validity, inter-rater reliability, and cross-validation. PFR at 2.[10] As the trial court correctly concluded, these arguments speak to weight, not admissibility. CP 1730. "The core concern of *Frye* is *only* whether the evidence being offered is based on established scientific methodology." *Cauthron,* 120 Wn.2d at 889.

Furthermore, Dr. Dale Glaser, Ritter's expert upon whom he bases these arguments, is not a member of the relevant scientific community, and he lacks an understanding of what is generally accepted in risk assessment of sexual offenders. Dr. Glaser is a statistician with a Ph.D. in industrial organizational psychology who works primarily on statistical psychometric testing and consulting. RP 12/10/14 at 38. He has never worked on SVP cases. RP 12/10/14 at 41-42. Dr. Glaser has never conducted a risk assessment of a sexual offender nor has he done any work in the area of sexual evaluations or assessments. RP 12/10/14 at 62. He does not know the best practices for

[10] *See* the State's Supplemental Brief Regarding *Frye*, pages 25-29, for detailed response to Ritter's criticisms.

conducting an SVP risk assessment, nor does he have any idea how to conduct one. RP 12/10/14 at 62. He was likewise unaware that actuarial instruments are routinely used in sex offender risk assessments. RP 12/10/14 at 63. He is not a member of ATSA and in fact was not aware of ATSA until this proceeding. RP 12/10/14 at 78. He had never heard of the SRA-FV until he responded to an advertisement placed in an online list-serve. RP 12/10/14 at 63. His exposure to the field of SVP risk assessment came from a total of four journal articles. *Id.* He was unaware that hundreds of relatively current articles on the topic were available. RP 12/10/14 at 95. Nonetheless, Dr. Glaser agreed that the instrument "showed significant incremental improvement in predictive accuracy." *Ritter,* 2016 WL 503128, at *4.

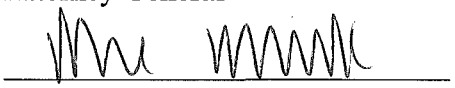
Judge Elofson properly concluded that it is generally accepted to use the SRA-FV when assessing sex offenders (RP 12/9/14 at 90) and the Court of Appeals correctly affirmed that decision.

V. CONCLUSION

Ritter has failed to meet any of the RAP 13.4(b) factors for review.

RESPECTFULLY SUBMITTED this 27th day of April, 2016.

ROBERT W. FERGUSON
Attorney General



BROOKE BURBANK,
Assistant Attorney General
WSBA No. 26680

NO. 92927-1

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON, Respondent, v. STEVEN RITTER, Petitioner.	DECLARATION OF SERVICE

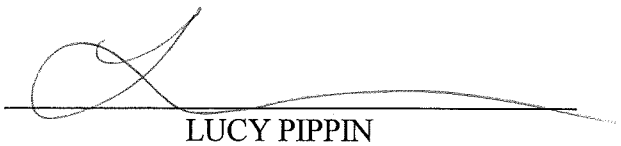
I, Lucy Pippin, declare as follows:

On April 27, 2016, I sent, via electronic mail, a true and correct copy of Answer to Petition for Review and Declaration of Service, addressed as follows:

Mick Woynarowski and Marla Zink
mick@washapp.org
marla@washapp.org
wapofficemail@washapp.org

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

DATED this 27th day of April, 2016, at Seattle, Washington.



LUCY PIPPIN