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Court of Appeals
Division III
State of Washington

NO. 32882-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

IN RE THE DETENTION OF

JAMES JONES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Mr. Jones commitment under RCW 71.09 should be reversed and a new trial ordered. The court's failure to consider Mr. Jones evidence at the *Frye* hearing, the admission of unreliable evidence which does not meet *Frye* standards and the lack of proof Mr. Jones committed a recent overt act entitles him to a new trial.

1. The failure to consider Mr. Jones evidence at the *Frye* hearing is a violation of his due process rights.

The State asserts in its reply brief that the trial court was not obligated to review the evidence submitted to it before rendering a decision on whether the SRA-FV met the *Frye* test for scientifically valid evidence which could be submitted to a fact finder and that “a detailed reading of these articles may not be possible for the average member of the bar or bench.” Reply at 5.

This assertion is in direct conflict with the core due process principle of the right to be meaningfully heard. *Mathews. v. Eldridge*, 242 U.S. 319, 334, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). This basic right includes the right to present relevant, admissible evidence. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S. Ct. 2449, 124 L.Ed.2d (1993). This right is only given meaning when the

court actually considers the evidence which is presented to it. Courts are expected to fully consider the evidence presented before them. Keith Swisher, *The Modern Movement of Vindicating Violations of Criminal Defendants' Rights Through Judicial Discipline*, 14 Wash. & Lee J. Civil Rts. & Soc. Just. 255, 274 (2008), *see also* Code of Judicial Conduct 2.5.

In fact, it is an abuse of discretion for a court to fail to allow evidence to be considered which is material and relevant. A court abuses its discretion where it fails to allow evidence to be considered which is material and relevant. *State v. Roberts*, 80 Wn. App 342, 356, 908 P.2d 892 (1996). The resolution to having complicated evidence presented to it by the parties is not to inform the defendant that the court is not considering the evidence it has been presented with, but adjourning the matter so that it can conduct a meaningful review of the information. If the evidence presented to the court is material and relevant, the court must consider it. *Id.* If the court needs more information in order to understand the evidence presented to it, they may ask for further clarification from the parties. This Court should reject the arguments that trial courts either lack the ability to understand the evidence presented to them or that due process is satisfied when the

court merely collects but does not review the evidence presented to it by a defendant.

This Court should also reject the State's argument that because a court is not obligated to look beyond the record in assessing whether scientific evidence is reliable that it is not obligated to review the evidence presented to it. Reply at 6. While it is true that *Copeland* uses permissive language when it states a court may look beyond the record to assess whether evidence meets the *Frye* test, nothing in the opinion suggests a court should not consider the evidence presented to it by the defendant. *State v. Copeland*, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996). This argument is contrary to the Mathews right to be meaningfully heard. *Mathews*, 242 U.S. at 334.

Instead, this Court should make clear that courts are expected to perform their duties competently and diligently. CJC 2.5(a). This requires the court when acting as a fact finder to review the evidence presented to it by the defendant. *Swisher*, at 274. Here, the non-testimonial evidence presented to the court was not even extensive. It consisted of a 28 page declaration by Dr. Abbott, a 15 page scientific journal written by Dr. Thornton, a 29 page article written by Dr. Abbott, an 11 page declaration by Dr. Hoberman, a 12 page declaration

by Dr. Donaldson, a 19 page declaration by Dr. Phenix and 6 pages of letters written to Gov. Jerry Brown. *See* CP 277-417. In total, Mr. Jones submitted 149 pages of declarations and scientific journals, which is hardly an overwhelming amount of information for the court to read and review. *Id.* The failure of the trial court to consider Mr. Jones evidence violated his due process and entitles him to a new hearing.

2. The SRA-FV is an unreliable test which should have been excluded by the court.

In August 2015, *Science* magazine found that a high number of psychological studies published in three scientific journals were flawed. Brian Nosek, “Estimating the reproducibility of psychological science”, *Science* 349 (2015).¹ This study was the result of an attempt to reproduce 100 experimental and correlational studies using high-powered designs and original materials were available. *Id.* The scientists attempting to reproduce these studies came to the conclusion that “a large proportion of replications produced weaker evidence for the original findings despite using materials provided by the original

¹ The Reproducibility Project was created in 2011 when a University of Virginia psychologist decided to find out whether suspect science was a widespread problem. He recruited a team of 250 researchers, identified the 100 studies published in 2008 and rigorously redid the experiments in close collaboration with the original authors. Carey, “Many Psychology Findings Not as Strong as Claimed, Study Says” *New York Times* (August 27, 2015).), available at <http://www.sciencemag.org/content/349/6251/aac4716> (last visited 9/23/2015)

authors.” *Id.* Researchers discovered they could replicate the original findings in less than half of the studies published in *Psychological Science*, the *Journal of Personality and Social Psychology* and the *Journal of Experimental Psychology: Learning, Memory, and Cognition*. *Id.* As a result, of the 100 studies the researchers attempted to reproduce, 60 of those studies did not hold up. Benedict Carey, “Many Psychology Findings Not as Strong as Claimed, Study Says” *New York Times* (August 27, 2015)². This analysis found no evidence of fraud or that any study was purposefully false. Instead, the report concluded that the evidence for most published findings was not as strong as claimed. *Id.*

This study is consistent with the findings the National Academy of Sciences completed regarding forensic science. The Academy found the “forensic science system, encompassing both research and practice, has serious problems” requiring “change and advancements, both systemic and scientific ... to ensure the reliability of [many] disciplines, establish enforceable standards, and promote best practices and their consistent application.” National Research Council of the National

² Available at http://www.nytimes.com/2015/08/28/science/many-social-science-findings-not-as-strong-as-claimed-study-says.html?_r=0 (last visited 9/23/2015)

Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* xx (2009). As a result, scientists have called for the need for greater scrutiny for all types of forensic science, including psychological testing. Kirk Heilbrun, Stephanie Brooks, *Forensic Psychology and Forensic Science: A Proposed Agenda for the Next Decade*, 16 Psychol. Pub. Pol'y & L. 219, 228 (2010).

It is for this reason that courts must be wary and limit the admission of psychological testing where it has not been rigorously scrutinized. *See, State v. Black*, 109 Wn.2d 336, 349-50, 745 P.2d 12 (1987) (en banc). Without rigorous testing, courts should question and repudiate forensic sciences once thought reliable. Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 935-36 (2008).

This Court should reject the SRA-FV as a test which is not supported by scientifically reliable evidence. *State v. Copeland*, 130 Wn.2d 244, 259, 922 P.2d 1304 (1996). Because there is a “significant dispute” between qualified experts as to the validity of the proposed evidence, this court should closely scrutinize the evidence and ultimately find it is not admissible. *Id.* The SRA-FV satisfies neither element required to be admissible: it is not accepted in the scientific

community and there are no 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), *rev. denied*, 179 Wn.2d 1019 (2014).

First, the SRA-FV has not yet been accepted by the general scientific community. There appear to be very few states which employ this test. Some, like California, have abandoned it for other tests. *See*, Cal.Penal Code §§ 290.04. Like the general unreliability that has been established for psychological tests, peer reviewed articles have called into question the reliability of the SRA-FV. Karl Hanson, et al., *What Sexual Recidivism Rates Are Associated With Static-99R And Static-2002R Scores?* 15 Sexual Abuse: J. Res. & Treatment 1 (2015). Dr. Hanson cautions that “the ability of evaluators to improve accuracy by choosing reference groups has yet to be empirically tested.” *Id.*, at 24.

Second, generally accepted methods have not been established to show the SRA-FV is capable of producing reliable results. It has not been properly validated and replicated. 5/16/14 VR 112; 115.

According to the State’s expert, there is “a concern that persons using a very particular data set that was described as thin, that was an older

data set, that was collected prior to most of the contemporary research on sex offending risk factors didn't include all of the information ...”

5/16/14 VR 44.

Before novel scientific evidence may be presented to a fact finder, the court must conduct a careful assessment of the general acceptance of the theory and methodology in order to exclude, among other things, “pseudoscience” from the courtroom. *Copeland*, 130 Wn.2d at 259. Psychological tests which lack validation, interrater reliability and construct validity raise the danger signs that the scientific community has used to identify that the majority of recent psychological studies could not hold up to scrutiny. Because the SRA-FV lacks the type of testing required to ensure its reliability, it was error for the court to find it admissible. This Court should reverse that decision and remand this matter for a new trial.

3. The failure of the court to determine whether Mr. Jones committed a recent overt act entitles him to a new trial.

The State argues that because Mr. Jones had been ordered to serve the remainder of his sentence for violating his community placement, the State was not required to prove he had committed a recent overt act. Reply at 17. Instead, due process requires the State to

prove a recent overt act when seeking to commit a person under RCW 71.09 when that person has been released from total confinement. This Court is guided by *In re Det. of Albrecht*, where a previously convicted sex offender was released from prison, placed into community supervision and confined for a community supervision violation. 147 Wn.2d 1, 3, 51 P.3d 73 (2002). In *Albrecht*, the court made clear due process was not satisfied unless the State is able to prove a recent overt act. *Id.* at 11. As here, Albrecht was returned to custody for violating his supervision conditions. *Id.* at 5. When the trial court found Albrecht had not committed a recent overt act in violating his supervision, the State amended its petition to delete the allegation of a recent overt act. *Id.* at 6. In rejecting this theory, the Supreme Court held that due process is only satisfied when the State proves the existence of a recent overt act thus satisfying the dangerousness element required by due process. *Id.* at 11.

This Court should decline to follow the State's argument that the facts in this matter are "directly analogous" to the facts in *Kelley*. Reply at 18. *Kelley* distinguishes itself from *Albrecht* on the fact that Kelley was serving a parole sentence, which is not the case here. *See, In Re the Detention of Kelley*, 133 Wn.App 289, 135 P.3d 554 (2006).

Instead, this Court is guided by the case law which analyzes community placement or community custody violations and holds that the State must prove beyond a reasonable doubt that a recent overt act occurred. *In re Detention of Davis*, 109 Wn. App. 734, 745, 37 P.3d 325 (2002) (incarceration for community placement violation does not constitute incarceration for underlying sexually violent offense), *see also, In re Det. of Broten*, 115 Wn. App. 252, 256, 62 P.3d 514, 516 (2003) (new trial required because no recent overt act found where respondent was returned to serve remainder of sentence when his community custody status was revoked).

Mr. Jones was not currently in custody when the State moved to commit him under RCW 71.09. He had been released from total confinement December 19, 2010 and did not receive his administrative hearing until September 21, 2011. He was committed for a community custody violation for “recent drug use.” CP 1393-96. This violation, according to the State, “had nothing to do with the kind of simultaneous rape charge.” 1 VR 14. Unlike *Kelley*, Mr. Jones had been in the community for a period of time where proof of a recent overt act was “no longer an impossible burden for the State to meet.” *Broten*,

115 Wn. App. 252, 257, 62 P.3d 514 (2003) *quoting Albrecht*, 147 Wn.2d at 10.

This Court should instead affirm *Albrecht* and require the State to prove present sufficient facts that Mr. Jones committed a recent overt act. Proof presented to an administrative officer that Mr. Jones violated his community supervision is insufficient to establish Mr. Jones committed a recent overt act. This Court should also reject that notion that due process is satisfied because Mr. Jones was arrested for conduct the State argues would constitute a recent overt act. These contested allegations require proof beyond a reasonable doubt, which is not the standard for arrest. Because Mr. Jones had been released from total confinement and was sentenced for a violation of his supervision conditions, this Court should reverse the commitment order and order a new trial.

B. CONCLUSION

Mr. Jones was denied a fair trial. For the reasons stated above, Mr. Jones commitment should be reversed and a new trial ordered.

DATED this 28th day of September 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

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)	
JAMES JONES,)	NO. 32882-1-III
)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 29TH DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] THOMAS HOWE, AAG [Thomash1@ATG.WA.GOV] [crjsvpef@atg.wa.gov] OFFICE OF THE ATTORNEY GENERAL 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104-3188</p>	<p>() U.S. MAIL () HAND DELIVERY (X) AGREED E-SERVICE VIA COA PORTAL</p>
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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF SEPTEMBER, 2015.

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