

**FILED**  
**Sep 17, 2015**  
Court of Appeals  
Division III  
State of Washington

NO. 328821-III

---

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

---

In re the Detention of:

JAMES EDWARD JONES,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

---

**OPENING BRIEF OF RESPONDENT**

---

ROBERT W. FERGUSON  
Attorney General

THOMAS D. HOWE  
Assistant Attorney General  
WSBA #34050 / OID # 91094  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-3876

## TABLE OF CONTENTS

I.	ISSUES.....	1
II.	FACTS.....	1
III.	ARGUMENT .....	4
	A. The Trial Court’s Review Of The Pleadings Did Not Violate Jones’ Due Process Rights .....	4
	B. The Trial Court Properly Admitted Testimony Related To The Use Of The SRA-FV .....	8
	1. Standard Of Review .....	8
	2. The Underlying Theoretical Basis Of SRA-FV Has Been Long Accepted In The Community Of Experts Conducting Evaluation And Assessment Of Sexual Offenders .....	9
	3. The SRA-FV Is A Technique That Utilizes Well Accepted Scientific Theory Which Is Capable Of Producing Reliable Results And Is Generally Accepted In The Scientific Community .....	11
	a. The SRA-FV Was Validated Using Well-Established Scientific Principles And Provides Evaluators With Incremental Information About Sex Offender Recidivism Risk.....	11
	b. Adoption Of The SRA-FV In The Community Of Experts Conducting Assessments Of Sexual Offenders Has Been Consistent With Other Widely Accepted Instruments.....	13
	c. Jones’ Criticisms Of The SRA-FV Go To Weight Not Admissibility, And Should Not Be Part Of The <i>Frye</i> Analysis .....	15

C.	Because Jones Was Serving A Sentence For A Sexually Violent Offense On The Day That The SVP Petition Was Filed, The State Did Not Need To Plead Or Prove A Recent Overt Act (ROA) .....	17
IV.	CONCLUSION .....	22

## TABLE OF AUTHORITIES

### Cases

<i>Backlund v. University of Washington</i> , 137 Wn.2d 651, 975 P.2d 950 (1999).....	20
<i>In re Detention of Danforth</i> , 153 Wn.App. 833, 223 P.3d 1241 (Div. 1, 2009).....	9
<i>In Re Detention of Henrickson</i> , 140 Wn.2d 686, 2 P.3d 473 (2000).....	20
<i>In re Detention of Henrickson</i> , 140 Wn.2d 686, 2 P.3d 473 (2000).....	18
<i>In re Detention of Jacobson</i> , 120 Wn.App. 770, 86 P.3d 1202 (Div. 1, 2004).....	9
<i>In re Detention of Jones</i> , 149 Wn.App. 16, 201 P.3d 1066 (Div. 1, 2009).....	9
<i>In re Detention of Marshall</i> , 156 Wn.2d 150, 125 P.3d 111 (2005).....	18, 20
<i>In Re Detention of McNutt</i> , 124 Wash.App 344, 101 P.3d 422 (2004).....	20
<i>In re Detention of Reimer</i> , 146 Wn.App. 179, 190 P.3d 74 (Div. 2, 2008).....	9
<i>In re the Detention of Albrecht</i> , 147 Wash.2d 1, 51 P.3d 73 (2002) .....	17
<i>In Re the Detention of Hovinga</i> , 132 Wash.App 116, 130 P.3d 830 (2006).....	17
<i>In Re the Detention of Kelley</i> , 133 Wash.App 289, 135 P.3d 554 (2006).....	18, 19

<i>In re the Detention of Pettis</i> , 352 P.3d 841 (2015).....	4, 8
<i>In Re the Detention of Ritter</i> , 179 Wash.App. 519, 312 P.3d 723 (2013).....	3
<i>Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire &amp; Marine Ins. Co.</i> , 176 Wash.App. 168, 313 P.3d 408 (2013), <i>review denied</i> , 179 Wash.2d 1019, 318 P.3d 280 (2014) .....	5
<i>State v. Cauthron</i> , 120 Wash.2d 879, 846 P.2d 502 (1993) .....	9
<i>State v. Copeland</i> , 130 Wash.2d 244, 922 P.2d 1304 (1996) .....	6, 8
<i>State v. Riker</i> , 123 Wash.2d 351, 869 P.2d 43 (1994) .....	9
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	11
<i>State v. Sipin</i> , 130 Wash.App. 403, 123 P.3d 862 (2005).....	6

**Statutes**

RCW 71.09.020(12).....	20, 21
RCW 71.09.020(17).....	19
RCW 71.09.060(1).....	18

**Other Authorities**

Eher, R., et. Al. (2011), <i>Dynamic Risk Assessment in Sexual Offenders Using STABLE 2000 and the STABLE-2007</i> Sexual Abuse XX(X) 1-24.....	10
---	----

Hanson, R.K. and Morton-Bourgon, K.E. (2009),  
*The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A  
Meta-Analysis of 118 Predictions Studies*  
Psychological Assessment, 21, 1 ..... 10

Mann, R., Hanson, R.K. and Thornton, D. (2010),  
*Assessing Risk for Sexual Recidivism: Some Proposals on the  
Nature of Psychologically Meaningful Risk Factors*  
Sexual Abuse 22:191 ..... 10, 11

Thornton, D. and Knight, R.A. (2013),  
*Construction and Validation of SRA-FV Need Assessment*  
Sexual Abuse XX(X) 1 – 16 ..... 12

## I. ISSUES

- A. **Where the parties submitted extensive scientific research studies and lengthy expert testimony on the development and validation of the SRA-FV, did the trial court review sufficient evidence to make the evidentiary ruling?**
- B. **Whether, after conducting a lengthy evidentiary hearing, the trial court correctly determined that the SRA-FV satisfied the evidentiary requirements set forth in *Frye v. United States*?**
- C. **Where, when Jones was imprisoned and serving a sentence on a sexually violent offense on the day that the SVP petition was filed, does the Petitioner need to plead and prove a recent overt act?**

## II. FACTS

James Jones has a history of reports of sexual assault of female children and adult women that stretches over two decades beginning in 1986. CP 29-44. On May 30, 1997, a jury convicted Jones of two counts of rape in the second degree and one count of unlawful imprisonment. CP 1348. These convictions stemmed from an August 1996 incident where Jones confined then fourteen year old J.L. in a building and raped her. On September 9, 1996, Jones was sentenced to 198 months of “total confinement in the custody of the department of corrections” on the two rape counts.<sup>1</sup> CP 1354. Jones was released to community placement on December 9, 2011. CP 1318. On September 21, 2011, the Department of

---

<sup>1</sup> Apparently, the unlawful imprisonment count merged with the two rape counts. CP 1348.

Corrections held a community placement hearing that stemmed from Jones arrest on September 7, 2011. CP 1316. At that hearing Jones' community corrections officer (CCO) recommended that he receive a 60 day sanction for a community custody violation. CP 1319. However, the hearing officer did *not* follow that recommendation. Jones' community placement prisoner (CPP) status was revoked and he was ordered to be returned to total confinement at the department of corrections to serve the remainder of his prison sentence for the rape in the second degree conviction. *Id.*, CP 1322.

Even though Jones was under sentence for the 1996 rape case, Yakima County pursued rape charges against Jones stemming from the September 6, 2011 incident. That prosecution ended with Jones pleading guilty to the reduced charge of one count of assault in the third degree. Jones was sentenced to 12 months with credit for 12 months served on one count of assault in the third degree under Yakima County Cause Number 11-1-01300-1 on November 14, 2012. CP 1399-1406. He was returned to the custody of the Department of Corrections to serve the remainder of his sentence for rape in the second degree.

The State filed the SVP petition on February 12, 2013. CP 1.

As the SVP case proceeded toward trial, on November 5, 2013, the Court of Appeals of Washington issued its decision in *In Re the Detention*

of *Ritter*, 179 Wash.App. 519, 312 P.3d 723 (2013). In response to the *Ritter* court's finding that a *Frye* hearing was a prerequisite to use of the Structured Risk Assessment-Forensic Version (SRA-FV) at trial, the State filed its motion for a finding that the SRA-FV met the *Frye* evidentiary standard. Those pleadings were supported by Appendix I which contained 114 pages of articles from technical journals related to SVP risk assessment. CP 449-663.

The trial court held a *Frye* hearing on the SRA-FV that included two days of expert testimony. 2014-05-16 RP, 2014-05-29 RP. During that hearing the State called Dr. Amy Phenix and Dr. Harry Hoberman as witnesses. Respondent called Dr. Brian Abbott as a witness. After hearing the testimony and considering the pleadings, the Court found that the SRA-FV was admissible at trial.

Dr. Harry Hoberman testified at trial. He testified that he used the SRA-FV to assess Jones' level of dynamic risk. 4 RP 561-563. He used the SRA-FV to select the appropriate norm or reference group for the STATIC-99R risk assessment instrument. 4 RP 626-628. Dr. Hoberman also used a second independent dynamic risk instrument, the STABLE-2007 to assess Jones' level of dynamic risk<sup>2</sup>. 4 RP 559-566. Both dynamic

---

<sup>2</sup> The STATIC-99R developers also approve use of the STABLE-2007 to select the STATIC-99R reference group. RP 659.

risk instruments indicated that Jones “categorized in the very high-risk needs group of individuals.” 4 RP 565. Dr. Hoberman was subject to lengthy and detailed cross examination. Jones called Dr. Brian Abbott at trial, and he testified to his research related to the SRA-FV. 5 RP 755-756.

On October 14, 2015, after deliberation, the jury found beyond a reasonable doubt that Jones is a sexually violent predator. 6 RP 988-990.

Well after the trial, on June 4, 2015, the Court of Appeals of Washington (Division II) issued its opinion *In re the Detention of Pettis*, 352 P.3d 841 (2015), in which the Court found that the SRA-FV meets the Frye evidentiary standard.

### III. ARGUMENT

#### A. **The Trial Court’s Review Of The Pleadings Did Not Violate Jones’ Due Process Rights**

Jones argues that his civil commitment as a sexually violent predator violates due process because he believes that the trial court failed to consider his evidence at the *Frye* hearing for the SRA-FV. App. Br. at 3. He misinterprets the record, and his due process claim fails.

The supporting memorandum for Petitioner’s Motion for a Finding that the SRA-FV meets the *Frye* Standard discussed the historical background of the research that eventually culminated in the SRA-FV. CP 440-444. That section of the briefing contained extensive citation to peer

reviewed professional journals from the field of SVP assessment. The 197 page appendix contained copies of the journal articles that were cited. CP 448-646. A survey of those articles reveals, for example, a meta-analysis<sup>3</sup> where researchers use sophisticated regression techniques (CP 460-483); a discussion of how correlation between studies can impact the usefulness of the information that an evaluator might obtain from multiple studies (CP 484-513); the SRA-FV validation study (CP 548-563); and a review of psychologically meaningful risk factors (CP 620-646). Even a casual review of the appendix shows that the content is highly specialized and often requires a background in advanced statistical analysis. A detailed reading of these articles may not be possible for the average member of the bar or bench.

These articles were provided because the court's role in a *Frye* analysis can be complex. On one hand, the role of the court is "not to attempt to determine whether the scientific theory is correct; our review is merely whether the theory is generally accepted in the scientific community." *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wash.App. 168, 175-176, 313 P.3d 408 (2013), *review denied*, 179 Wash.2d 1019, 318 P.3d 280 (2014) (*quoting, State v.*

---

<sup>3</sup> A meta-analysis uses sophisticated statistical techniques to combine results from multiple studies in order to harness the statistical power of the resulting large sample size.

*Sipin*, 130 Wash.App. 403, 414, 123 P.3d 862 (2005)). On the other hand, the court should undertake “a searching review which *may* extend beyond the record and involve consideration of scientific literature as well as secondary legal authority.” *State v. Copeland*, 130 Wash.2d 244, 255-56, 922 P.2d 1304 (1996) (*emphasis added*). When realistically considered in this light, the key word with respect to the review of scientific literature is “may”. In its fact finding role, a court must consider the scientific literature to the extent necessary for that court to understand whether the scientific theory at issue is or is not generally accepted in the scientific community, but need not necessarily review the literature to the depth necessary to be independently convinced that the theory is correct. As the Assistant Attorney General who represented the State at the *Frye* hearing, somewhat colloquially, informed the court:

Also, I presented a number of articles for the Court, and I did that because one of the things that they mention in *Ritter* that I'd kind of forgotten about it's okay for the Court to go outside, you know, the record. So if the Court wants to read those, they can, and I wasn't suggesting that you should or I wasn't suggesting that you shouldn't. 2015-05-29 RP 75.

The trial Court's comment that she “didn't go through all of the attachments and declarations” noted by Jones is a comment that acknowledges that while the trial court considered the pleadings, she did

not claim an exhaustive knowledge of those materials. The Court's oral ruling at the end of the Frye hearing illustrates this:

[T]his is a lot of science. I went to law school. *I didn't have to do the science*, but going through it, the Court still has to go back to whether under a Frye test, whether both the underlying scientific principle and the techniques that employ that principle find general acceptance in the scientific community. 2014-05-16 RP 78 (emphasis added).

The trial court's fact-finding role requires it to make determinations as to the weight to be given to evidence. Those determinations should be informed by the specific questions that the fact finder is to answer—here, general acceptance not whether the theories are ultimately correct. The trial court heard extensive testimony about the processes related to construction and validation of the instrument as well as the development of the underlying theories of risk assessment. The court's ruling illustrates its understanding of the court's role and of the materials provided. The trial court considered and weighed the evidence presented. There was no due process violation. But, even if this Court disagrees, this Court is already conducting a *de novo* review of the *Frye* issue as part of this appeal. Jones' appropriate remedy would be that review.

**B. The Trial Court Properly Admitted Testimony Related To The Use Of The SRA-FV**

Jones argues that the trial court erred by admitting testimony about the SRA-FV because it “has not been properly validated, has low inter-rater reliability, and construct validity.” Jones claims that “it does not appear that dynamic risk assessment tools like the SRA-FV have gained wide acceptance in the scientific community” App. Br. at 18. Jones misunderstands both the *Frye* test and the testimony. As the Court of Appeals of Washington (Division II) held in *In re the Detention of Pettis*, 352 P.3d 841(2015), “[T]he scientific theory or principle upon which the SRA-FV is based has gained general acceptance in the relevant scientific community of which it is a part, and thus passes the first prong of the *Frye* test”, and “[T]here are generally accepted methods of applying the SRA-FV in a manner capable of producing reliable results, and thus it passes the second prong of the *Frye* test.” *Pettis* at 848.

**1. Standard Of Review**

The question of whether evidence meets the *Frye* standard is a mixed question of law and fact which a reviewing court considers *de novo*. *State v. Copeland*, 130 Wash.2d 244, 255, 922 P.2d 1304 (1996).

In examining the *Frye* question, a court looks to see: (1) whether the underlying theory is generally accepted in the scientific community

and (2) whether there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community. *State v. Riker*, 123 Wash.2d 351, 359, 869 P.2d 43 (1994) (citing, *State v. Cauthron*, 120 Wash.2d 879, 888-889, 846 P.2d 502 (1993)). This involves both an accepted theory and a valid technique to implement that theory. *Id.*

The SRA-FV is a tool that uses a variety of researched “dynamic risk factors”, or long-term vulnerabilities that, while they can change over time, will not change quickly. 2014-05-16 RP 28-29. The use of dynamic risk factors in SVP evaluations has long been accepted as part of a broader assessment of risk for sex offenders. *See e.g. In re Detention of Jacobson*, 120 Wn.App. 770, 86 P.3d 1202 (Div. 1, 2004); *In re Detention of Danforth*, 153 Wn.App. 833, 840, 223 P.3d 1241 (Div. 1, 2009); *In re Detention of Reimer*, 146 Wn.App. 179, 196, 190 P.3d 74 (Div. 2, 2008); *In re Detention of Jones*, 149 Wn.App. 16, 22, 201 P.3d 1066 (Div. 1, 2009).

**2. The Underlying Theoretical Basis Of SRA-FV Has Been Long Accepted In The Community Of Experts Conducting Evaluation And Assessment Of Sexual Offenders**

There has been long interest in the scientific community in the types of risk factors that the SRA-FV assesses—stable dynamic risk

factors which can be viewed as enduring (but changeable) psychological characteristics of the individual.<sup>4</sup> As early as 2001, research identified: 1) sexual self-regulation, 2) general self-regulation, 3) intimacy deficits, 4) compliance and understanding the need for treatment and control, 5) existence of supportive significant others, and 6) distorted attitudes or attitudes tolerant of sexual violence as stable dynamic risk factors for sexual offenders.<sup>5</sup> These are the general categories of risk factors examined by the SRA-FV. SRA-FV Scoring Manual, CP 323-336.

The SRA-FV incorporates the two bedrock theoretical principles of risk assessment. First, that structured assessment<sup>6</sup> would generally be preferable to unstructured clinical judgment.<sup>7,8</sup> And, that risk assessment should rely on factors empirically statistically shown to be associated with recidivism risk.<sup>9</sup> The SRA-FV is based on both of those theoretical principles. First, the weights assigned to the applicable risk factors are

---

<sup>4</sup> Eher, R., et. Al. (2011), *Dynamic Risk Assessment in Sexual Offenders Using STABLE 2000 and the STABLE-2007*, Sexual Abuse XX(X) 1-24.

<sup>5</sup> Id. at 2.

<sup>6</sup> Assessment using an instrument where the weight to be given to individual factors of concern is preassigned as opposed to being left to the clinicians judgment.

<sup>7</sup> Hanson, R.K. and Morton-Bourgon, K.E. (2009), *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*. Psychological Assessment, 21, 1.

<sup>8</sup> Jones' expert, Dr. Brian Abbott agreed as to the importance of these principles on cross examination. RP 19 -20. Also, according to Dr. Abbott, "The average [SRA-FV] dynamic risk score does appear to correlate some with an increased risk for sexual recidivism." RP at 24 - 25.

<sup>9</sup> Mann, R., Hanson, R.K. and Thornton, D. (2010), *Assessing Risk for Sexual Recidivism: Some Proposals on the Nature of Psychologically Meaningful Risk Factors*, Sexual Abuse 22:191

dictated by the scoring manual, and not left to the evaluator's whim. CP 323-336. Also, the dynamic risk factors used in the SRA-FV come from the landmark meta-analysis that showed which factors best predicted recidivism risk.<sup>10</sup> 2014-05-16 RP 94-98.

**3. The SRA-FV Is A Technique That Utilizes Well Accepted Scientific Theory Which Is Capable Of Producing Reliable Results And Is Generally Accepted In The Scientific Community**

Jones bases his objection to use of the SRA-FV on what he perceives as sources of excessive error—inter-rater reliability and construct validity. These questions are addressed below, but are not appropriate bases for a challenge to admissibility under *Frye*. If the methodology is generally accepted, the possibility of error in the expert opinions can be argued to the jury. *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994).

**a. The SRA-FV Was Validated Using Well-Established Scientific Principles And Provides Evaluators With Incremental Information About Sex Offender Recidivism Risk**

The SRA-FV was validated using what is known as a split sample methodology. 2014-05-16 RP 113. In this process, the sample population is divided into two parts and the instrument is constructed using one group and then validated using the other group. As Dr. Phenix testified,

---

<sup>10</sup> Mann, R., Hanson, R.K. and Thornton, D. (2010).

this process is “very typical and common”. *Id.* That validation has been published in a scientific journal and is subject to peer review. While it is undisputed that further study of the SRA-FV is desirable and anticipated, that in no way implies that the instrument is not appropriate for use.

The SRA-FV provides increased predictive validity<sup>11</sup> over use of actuarial instruments alone. As Dr. Hoberman testified, “[The] published article indicates that the SRA-FV score adds incremental predictive validity to the static actuarial scores, two different static actuarial scores.” 2014-05-16 RP 69. The predictive validity of the SRA-FV is comparable to the predictive validity of the widely used actuarial risk assessment instruments. 2014-05-16 RP 43-44. The peer reviewed article<sup>12</sup> that documents the validation process indicates:

- 1) Predictive accuracy of the SRA-FV was characterized using the AUC<sup>13</sup> statistic and incremental prediction by fitting logistic regression equations. CP 346.
- 2) The AUC statistic showed that the [SRA-FV] Need score added to the predictive accuracy of the STATIC-99R alone. CP 349.
- 3) The logistic analysis showed that the [SRA-FV] Need score added significant incremental predictive validity to the STATIC 99R. CP 347.

---

<sup>11</sup> Predictive validity is a measure of the instrument’s ability to discriminate between recidivists and non-recidivists. 2014-05-16 RP 69.

<sup>12</sup> Thornton, D. and Knight, R.A. (2013), *Construction and Validation of SRA-FV Need Assessment*, Sexual Abuse XX(X) 1 – 16.

<sup>13</sup> Area Under the (logistic) Curve.

The SRA-FV has been validated using a generally accepted methodology, it has demonstrated the ability to discriminate between recidivists and non-recidivists at a rate comparable to the most commonly used instruments in the field, and it has been shown to increase the information available to evaluators beyond that of actuarial instruments alone.

Finally, as Dr. Phenix noted in her testimony, the SRA-FV is uniquely well suited for use with the SVP population:

Because the SRA-FV was specifically designed to provide ratings on an incarcerated sample, if you will, or detained sample and one that was involved in this adversarial context, that for me provided a mechanism for being able to provide weightings of dynamic needs in a structured fashion. 2014-05-16. RP 56.

The SRA-FV has been shown, in a journal article that was peer-reviewed in the applicable scientific community, that it is an instrument that is capable of producing reliable results.

**b. Adoption Of The SRA-FV In The Community Of Experts Conducting Assessments Of Sexual Offenders Has Been Consistent With Other Widely Accepted Instruments**

Adoption of the SRA-FV has mirrored that of the STATIC-99 when that instrument was released. Within a year of its release, the STATIC-99 became the most widely used risk instrument. At that point only one peer reviewed paper had been published. 2014-05-16 RP 50.

The adoption process in the sex offender evaluation community can be seen as first, using what appears to be the best instrument for the purpose, and then following the line of research to see what degree it either continues to be viewed in that manner or becomes an instrument that becomes less valid or less useful over time. 2014-05-16 RP 50. Here, the instrument has demonstrated predictive accuracy on a population very like that typically seen in SVP evaluations. 2014-05-16 RP 77-78. As Dr. Phenix explained, she adopted the SRA-FV soon after its release because the validation population allowed her to score the instrument, which was not the case for the other validated instruments used to measure long term vulnerabilities. 2014-05-16 RP 102-104. Further, Dr. Phenix testified that as of the time of the *Frye* hearing she had been testifying about the use of the SRA-FV in multiple jurisdictions for over four years. 2014-05-16 RP 134. The SRA-FV validation had been presented at the Association for Treatment of Sexual Abusers (ATSA) conference. 2014-05-16 RP 135. Based on his interactions with evaluators in multiple jurisdictions, Dr. Hoberman opined that the SRA-FV has reached general acceptance. 2014-05-16 RP 69.

The SRA-FV has been presented at professional conferences, relied upon as a basis for expert opinion in multiple jurisdictions and

been the subject of a published, peer-reviewed article. It has reached general acceptance in the appropriate scientific community.

**c. Jones' Criticisms Of The SRA-FV Go To Weight Not Admissibility, And Should Not Be Part Of The *Frye* Analysis**

Jones argues that the SRA-FV does not meet *Frye*, based on construct validity having not been demonstrated. This demonstrates a fundamental misunderstanding of the instrument's purpose. SRA-FV measures the construct of a heterogeneous group of long-term vulnerabilities not a particular trait. 2014-05-16 RP 62-63. As even Dr. Abbott acknowledged, it is impossible to recover individual domain scores from an SRA-FV score. 2014-05-29 RP 33-34. The instrument is not and cannot be used to measure particular vulnerabilities, it is used to gauge an overall level of risk. As noted above, irrespective of whether or not it accurately measures any particular trait, the ultimate score obtained on the SRA-FV is useful in that it has been demonstrated to be capable of producing reliable results by distinguishing between recidivists and non-recidivists. The role of construct validity in assessment of the instrument's performance—if any—is a question of weight for the jury.

Jones argues that the SRA-FV does not meet *Frye*, based on low inner-rater reliability. First, as Dr. Phenix testified, rater agreement is a function of rater training. 2014-05-16 RP 109. Both Dr. Hoberman and

Dr. Phenix noted improvements in the scoring manual that improved the specificity of the definitions of the factors. 2014-05-16 RP 45, 109.

Jones implies that somehow the fact that the state of California no longer requires use of the SRA-FV is somehow a reflection on the efficacy of the instrument. App. Br. at 19. But, as Dr. Phenix explained, when California adopted the SRA-FV it did so because the SRA-FV was the only validated instrument available to measure dynamic risk that provided incremental validity. Subsequently the STABLE 2007 was shown to have incremental validity. Because the California population being evaluated is a community population (meaning the offenders are at large in the community at the time of evaluation) and the STABLE 2007 was validated on a community based sample it is a more appropriate instrument. When no community based instrument was available, California used the SRA-FV in spite of the fact that it was validated on an incarcerated sample because it had been shown to have incremental validity. Instead of a criticism of the instrument that Jones claims to believe this to be, this demonstrates three relevant points. First, incremental validity (not construct validity) is the correct test by which to measure the ability to produce reliable results. Second, that the

incarcerated population upon which the SRA-FV was validated<sup>14</sup> makes it a good match for the SVP population upon which it is used. Finally, California's global adoption of the instrument is yet another indication of its general acceptance. 2014-05-16 RP 110-118.

Ultimately, none of these questions are about either the fundamental theory behind the SRA-FV, or its ability to produce a reliable result. They are questions about error rates and what weight a jury should give a risk assessment that relies—in part—on the information that this instrument provides. They have no relevance to the *Frye* question.

**C. Because Jones Was Serving A Sentence For A Sexually Violent Offense On The Day That The SVP Petition Was Filed, The State Did Not Need To Plead Or Prove A Recent Overt Act (ROA)**

Jones asserts that even though he was incarcerated for a sexually violent offense on the day that the SVP petition was filed, the State needed to plead and prove an ROA. Appellant's Opening Brief at 5. Whether the State is required to prove a recent overt act is a question of law that a reviewing court considers *de novo*. *In Re the Detention of Hovinga*, 132 Wash.App 116, 130 P.3d 830 (2006) (citing, *In re the Detention of Albrecht*, 147 Wash.2d 1, 51 P.3d 73 (2002))

---

<sup>14</sup> Dr. Abbott acknowledged during cross-examination that the sample has been used in "a number of research studies" 2014-05-29 RP at 36.

RCW 71.09.060(1) provides that the State must prove beyond a reasonable doubt that a person committed an ROA *only if* on the day the petition is filed, the person was living in the community after release from custody. *In re Detention of Marshall*, 156 Wn.2d 150, 157, 125 P.3d 111 (2005) (*emphasis in original*). Due process does not require the State to prove an ROA when, on the day the SVP petition is filed, the person is incarcerated for a sexually violent offense or for an act that would itself qualify as an ROA. *Id.*; *In re Detention of Henrickson*, 140 Wn.2d 686, 695, 2 P.3d 473 (2000). When, as here, a person is incarcerated on the day the petition is filed, that question is a matter of law to be determined by the trial court and not the jury.

There is no authority for the proposition that when an individual is incarcerated for a sexually violent offense on the day of the filing of the SVP petition the state must prove a recent overt act. Indeed, the case law holds the exact opposition. *See, In Re the Detention of Kelley*, 133 Wash.App 289, 135 P.3d 554 (2006). The facts of *Kelley* are directly analogous to the facts here. Like Jones, Kelley had been returned to custody for violations that he committed in the community. Like Jones, Kelley was not serving a community placement<sup>15</sup> sanction—he was serving the remainder of his sentence on a sexually violent offense on the

---

<sup>15</sup> Jones was sentenced after community placement was replaced by community custody.

day that the petition was filed. *Kelley* at 294. The *Kelley* court explicitly notes that the correct question is the underlying offense, not the basis for the revocation. *Id.*

Here, the Department of Corrections held a community violation hearing that resulted in Jones being returned to total confinement to serve the remainder of his prison sentence on his rape in the second degree<sup>16</sup> conviction. CP 1316-1321.

The trial court properly found that:

It seems undisputed here that Mr. Jones was incarcerated for a sexually violent offense, although his response is that was based upon the violation of conditions, mainly the consumption or use of marijuana. There is a distinction though between being held on a community-custody violation versus having your sentence carried out. So here, he wasn't held on a violation of community custody. Rather, he was serving out the remainder of his sentence.

Because he was serving out the remainder of his sentence, the State would, therefore, not be required to prove a recent overt act according to statute. 2014-10-06 RP 41.

The correct inquiry is the nature of the charge on which the person is being detained, not, as Jones suggests, what facts led to that detention. Jones was serving the remainder of his sentence on a charge of rape in the second degree, so, proof of a recent overt act is not required.

---

<sup>16</sup> Rape in the second degree is a sexually violent offense. RCW 71.09.020(17).

Because this Court's review is *de novo*, it may find that the incident for which Jones was arrested did in fact constitute a recent overt act. *In Re Detention of McNutt*, 124 Wash.App 344, 348, 101 P.3d 422 (2004)(citing, *In Re Detention of Henrickson*, 140 Wn.2d 686, 697, 2 P.3d 473 (2000)); *Marshall* at 158. Although the trial court based its ruling on the fact that Jones was held on a sexually violent offense on the day that the SVP petition was filed, there are sufficient facts in the record for this Court, in its *de novo* review, to additionally find that the incident did constitute a recent overt act. Under the process outlined in *Marshall*, in order to determine whether a person is incarcerated for an act that qualifies as a ROA, the court must either: 1) determine from the materials relating to the person's conviction whether the person was incarcerated for an act that actually caused harm of a sexually violent nature; or 2) determine whether the person was incarcerated for an act that qualifies as an ROA. *Marshall* at 158. The record contains ample information that supports a finding that the incident that led to the revocation of Jones community custody status constituted an ROA, including:<sup>17, 18</sup>

---

<sup>17</sup> A recent overt act is any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors. RCW 71.09.020(12).

<sup>18</sup> A court acting in its appellate capacity may affirm a trial court's decision on any basis that is adequately supported by the record. *Backlund v. University of Washington*, 137 Wn.2d 651, 975 P.2d 950 (1999) (citations omitted).

1. Jones was an untreated sex offender, who had not participated in the prison sex offender treatment program. CP 1444-1446.
2. Despite acknowledging that drug and alcohol use had played a role in his previous sexual offending, Jones routinely violated his alcohol and drug conditions, including the day of the incident. CP 1453-1463.
3. Jones history includes three prior accusations of sexual assault of females as young as fourteen stretching back to 1986. CP 29-44.
4. Jones admitted to his community corrections officer and in his deposition that he had rough sex with the alleged victim. CP 1416, CP 1475-1477. By Jones' own admission, the alleged victim suffered significant injuries in his presence. CP 1461-1475.

A recent overt act is "any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates reasonable apprehension of such harm in the mind of an objective person who knows the history and mental condition of the person engaging in the act or behaviors." RCW 71.09.020(12).

The combination of facts surrounding Jones' 2011 incident that led to his arrest would create a reasonable apprehension of sexually violent harm in the mind an objective person who knew Jones' history and mental condition.

**IV. CONCLUSION**

For the reasons set forth above, this Court should affirm Jones' commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of September, 2015.

ROBERT W. FERGUSON  
Attorney General



---

THOMAS D. HOWE  
Assistant Attorney General  
WSBA #34050 / OID # 91094  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-3876

NO. 32882-1-III

**WASHINGTON STATE COURT OF APPEALS, DIVISION III**

In re the Detention of:  
  
JAMES JONES,  
  
Appellant.

DECLARATION OF  
SERVICE

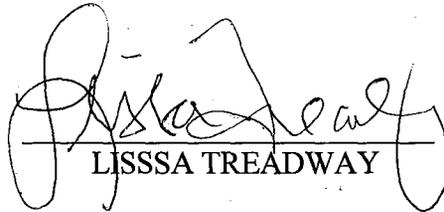
I, Lissa Treadway, declare as follows:

On September 17, 2015, pursuant to the Electronic Service Agreement between the parties, I sent by electronic mail true and correct copies of the Opening Brief of Respondent and Declaration of Service, addressed as follows:

Lila Silverstein  
David Donnan  
Travis Stearns  
[david@washapp.org](mailto:david@washapp.org)  
[travis@washapp.org](mailto:travis@washapp.org)  
[lila@washapp.org](mailto:lila@washapp.org)  
[wapofficemail@washapp.org](mailto: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 17th day of September, 2015, at Seattle,  
Washington.

  
LISSA TREADWAY