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Division III  
State of Washington

NO. 32939-9

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

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STATE OF WASHINGTON,

Respondent,

v.

SHAWN BOTNER,

Appellant.

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**BRIEF OF RESPONDENT**

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## I. ISSUES:

1. **Whether, after conducting a thorough evidentiary hearing, the trial court correctly determined that the Structured Risk Assessment Forensic Version (SRA-FV) satisfied the evidentiary requirements set forth in *Frye v. United States*<sup>1</sup>**
2. **Whether Botner's counsel was ineffective for failing to object to evidence related to an actuarial tool that is widely accepted for use in the field and for failing to object during the State's closing argument.**

## II. RESTATEMENT OF THE CASE

Botner was involuntarily committed as a Sexually Violent Predator (SVP) following a jury trial.<sup>2</sup> He contends that his trial counsel was ineffective for failing to object to testimony from the State's expert regarding one of the actuarial instruments he relied upon. Botner also contends that his counsel was ineffective for failing to object to a statement made by the State's attorney during closing argument. But Botner cannot establish ineffective assistance because he cannot show his counsel's performance fell below an objective standard of reasonableness, nor is there

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<sup>1</sup> *Frye v. United States*, 293 F. 1031, 34 A.L.R. 145 (D.C. Cir. 1923).

<sup>2</sup> "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020.

a reasonable possibility that the outcome of the trial would have been different.

Botner also challenged the State's expert's use of the SRA-FV. The trial court held a *Frye* hearing, based on the holding in *In re the Detention of Ritter*, 177 Wn. App. 519, 312 P.3d 723 (2013). Following that hearing, the trial court entered findings of fact and conclusions of law, and concluded that the SRA-FV satisfied the requirements of *Frye*. CP 1700-03. The court concluded that the use of dynamic risk factors in sex offender evaluations is supported by a scientific theory that is generally accepted in the relevant scientific community. CP 1702. The trial court further found that a structured analysis of risk factors is supported by a scientific theory generally accepted in the scientific community. CP 1702. The court specifically determined that the SRA-FV is capable of producing reliable results, and that any limitations or potential errors due to limited number of cross validation studies or inter-rater reliability issues are matters for the trier of fact to assess. CP 1703. Botner argues that the SRA-FV is inadmissible because it is not generally accepted in the scientific community. Appellant Brief 24-41. As the trial court correctly found, Botner's arguments go to weight and not admissibility. The findings of the trial court should be affirmed.

Additionally, Division II of this Court has recently determined that the SRA-FV satisfies the *Frye* standard; specifically that the scientific theories and principles upon which the SRA-FV is based have gained general acceptance in the scientific community and generally accepted methods of applying the instrument exist, such that it is capable of producing reliable results. *In re Detention of Pettis*, 188 Wn. App. 198, 352 P.3d 841 (2015). This Division of the Court should come to the same conclusion.

### **III. RELEVANT FACTS**

Botner has a long history of sexual offending, beginning at puberty. His first sex offenses were committed when he was 14 years old. VRP 316. He admitted that he touched the genitals of a 6 or 7 year old female (VRP 317) and was sentenced to 21-28 weeks in Juvenile Rehabilitation Administration. VRP 317. Although the child reported that it happened more than once, Botner reported that other touching was not intentional. VRP at 438. Botner was also convicted of other juvenile criminal offenses including escape (VRP 318), and vehicle prowling. VRP 318.

At age seventeen, Botner started having thoughts of raping and physically hurting women. VRP 319. He intended to rape a female stranger, Gina, and he attacked her in a restroom in Riverfront Park. VRP 320; 439. He grabbed her from behind around her neck and she sustained facial

injuries. VRP 321; 439. Botner said attacking her was sexually arousing for him. VRP 322. He was convicted of unlawful imprisonment and sentenced to 6 months in custody. VRP 322.

Within 3-4 months of his release from custody, at age 19, he attacked a female stranger, Cari Weber. VRP 324-26. Botner went into an adult educational center looking for someone to sexually assault. VRP 325. Botner had cut a piece of electrical cord and he took it with him. VRP 327. He waited in the hallway and saw Cari Weber come out of the bathroom. VRP 325. He approached her from behind and wrapped an electrical cord around her neck and dragged her back into the bathroom. VRP 325. Botner dragged Ms. Weber into the last stall, while pulling on each end of the cord wrapped around her neck. VRP 328. Ms. Weber lost consciousness and Botner draped her over the toilet intending to sexually assault her. VRP 329. Botner acknowledged that Ms. Weber was injured in the attack, and the record indicates that her eyes almost popped out of her head from the strangulation, she had a fractured nose, and she had badly bitten her tongue. VRP 330; 440. Further, her pants and underwear had been pulled down to below her knees, and although she had lost consciousness, she reported feeling as though she had been penetrated. VRP 440.

Botner was identified as a suspect because his latent palm print was found on the inside of the bathroom stall where the attack occurred. VRP

331. He was charged and plead guilty to Attempted Rape in the First Degree. VRP 331. Botner was sentenced to 100 months in prison, during which he accumulated 7 major infractions, including infractions for fighting and using drugs. VRP 331-33. While in custody, Botner completed a year and a half of sex offender treatment where he learned to identify his high risk behaviors. VRP 370; 372-3. Botner was released from prison April 2, 2001 and started his community supervision. VRP 335. About 6 months after his release, Botner started using methamphetamine (VRP 376) and about a year later he started dressing like a woman. VRP 373; 376.

Thereafter, Botner served over 300 days in custody for various probation violations (VRP 339-40) and another 6 month sentence for a conviction for Failure to Register as a Sex Offender (VRP 341-42) and another year and a day for pulling a knife on co-workers and stealing money. VRP 343-45.

Botner acknowledged that prior to sex offender treatment, he was having fantasies of hurting and raping women and killing people. VRP 374-76; 454-55. Botner said his fantasies about hurting and raping women involved imaginary people, but his thoughts about killing people involved real people. VRP 374-75; 376.

During July of 2006, Botner was out of custody, using methamphetamine and dressing like a woman. VRP 376-77. In July, police

found a small encampment on the Gonzaga campus, where there were several items of woman's clothing, and a duffle bag containing woman's clothing, wigs, pornography, and sex toys. VRP 685-92. The duffle bag also contained mail addressed to Botner and a three ring binder with a handwritten document. VRP 383-84; 687. Botner acknowledged that he wrote the document. VRP 384-86. The hand written document written by Botner read as follows:<sup>3</sup>

- 1) Dildo
- 2) Pocket Pussy
- 3) 2-Sexy Outfits
- 4) Handcuffs
- 5) Vibrator
- 6) Set of Dildos, Vibrators
- 7) More lubricant (Flavored)
- 8) Blow Up Doll

Go in dressed as a woman, get all the items you wish, smash clerk in head with blackjack and lock the door, tie clerk up and tape mouth shut. Get all money and novelty items that you desire. Get clerk's keys and load all items into car. Load clerk last. Take car and go to park and have your way with the whore. Mags, novelties, sexy clothing, whole manequin, take clerk to river and continue to have way with her, take car to remote area and completely douse inside with gas and set on fire, wipe down outside of car for fingerprints. Dismember body with a saw, go buy cheap saw.

VRP 387-389. Botner concedes that the document he wrote described a sexual fantasy and the dismembering of a human body. VRP 390.

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<sup>3</sup> The State's expert, Dr. Hoberman questioned Botner about the document, Botner first reported it was a treatment exercise to write down his fantasies. VRP 549. When Dr. Hoberman challenged him, that the end of the note, "Go buy cheap saw" sounded more like a plan than a fantasy, Botner responded, "[I]t does look real fucking bad." *Id.*

Later in July, 2006, Botner was stopped by Spokane Police Officers at about 2 a.m. RP 390; 706; 709. Botner was riding a bicycle, with a stocking on his head and dressed in some woman's clothing, carrying a couple back packs. RP 391-92; 709-10; 714. Botner was also carrying a hammer, which he tried to throw out of sight when the officers approached him. RP 391; 712-13. In the backpacks, Botner was carrying sex toys, a wig, condoms, rubber gloves, rope and used panties. RP 393-94; 717-18.

Although Botner was not arrested when the officers contacted him, Spokane Police officer Kerncamp was alarmed enough to contact Botner's community corrections officer, Mr. Bromps. VRP 720; 723. In addition to the information from Officer Kerncamp, Mr. Bromps was informed about Botner's property that had been located on Gonzaga campus. VRP 746-47. While trying to locate Botner, Mr. Bromps discovered that Botner had absconded, and on July 28, 2006, he had a warrant issued for Botner's arrest. VRP 748. Botner was arrested on August 11, 2006 and he was held pursuant to a community supervision violation. VRP 750.

Thereafter, the State filed a petition alleging Botner is a sexually violent predator. Botner's case proceeded to trial on August 10, 2009. The jury found beyond a reasonable doubt that he was a Sexually Violent Predator, and the court entered an order of commitment. CP 111-12. That

verdict was reversed on appeal and the case proceeded to trial again in November 2014. CP 114-152.

Prior to the commencement of the re-trial, the parties agreed that the court's pretrial rulings from the 2009 trial would remain in effect. VRP 362. Specifically, in 2009, Botner sought to suppress evidence of one of the actuarial tools, the Sex Offender Risk Appraisal Guide (SORAG). 2009 CP 131-32; 2009 VRP 64-65. The trial court denied his motion to suppress. *Id.* The trial court also clarified one ruling that had previously been reserved, allowing evidence that Botner had voluntary treatment available to him at the SCC. VRP 362-68.

Botner also sought to exclude testimony about the SRA-FV arguing that the instruments failed to satisfy the *Frye* standard. The Structured Risk Assessment-Forensic version (SRA-FV) is an assessment tool that provides evaluators of sexual offenders a structured method for considering dynamic risk factors that they formerly considered using only their unstructured clinical judgment. CP 1905-06. The SRA-FV incorporates factors empirically correlated with sexual recidivism, weights them according to their relative correlations, and allows evaluators to consider weight based on empirical research rather than subjective clinical judgment. *Id.* The tool provides a framework for consistency and has been shown to increase the predictive accuracy of the Static-99, an actuarial instrument universally

accepted as the best instrument in the field. CP 1538-98. The SRA-FV was researched, developed and published using the same methodology underlying all the tools that are commonly used and accepted in the field of sex offender evaluation. CP 1591- 99.

The parties stipulated to evidence related to the admissibility of the Structured Risk Assessment-Forensic Version (SRA-FV).<sup>4</sup> CP 1697-99. The trial court considered the motions and memoranda submitted, the attached exhibits, as well as the testimony and arguments contained in the submitted transcripts. Having considered all that material, the trial court found that the SRA-FV satisfies the *Frye* evidentiary standard. CP 1700-03.

Harry Hoberman, Ph.D., is an experienced evaluator who specializes in evaluating sex offenders. RP 405-07; 415. Dr. Hoberman reviewed extensive records and evaluated Botner in 2006, 2009, and again in 2013. VRP 419-20; 422-23. Dr. Hoberman testified that he was evaluating whether Botner has a mental abnormality and/or a personality disorder. VRP 444. He explained that mental abnormality is a legal term and his evaluation focused on whether Botner has a mental disorder and other characteristics that satisfy the legal term “mental abnormality.” VRP 447. He also testified that the term “personality disorder” is defined in legal terms and in psychological terms. VRP 474-75. Dr. Hoberman testified that

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<sup>4</sup> The stipulated evidence has been designated CP 246-1696 and CP 1891-2219.

he used the DSM V (American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders*, (4th Ed.) (DSM-IV-TR)) to describe the signs and symptoms apparent in Botner.<sup>5</sup> VRP 447.

Dr. Hoberman testified that his psychological evaluation of Botner supported his opinion that Botner has one or more mental abnormalities (VRP 494-95) and one or more personality disorders. VRP 495. Specifically, Dr. Hoberman described Botner as having various paraphilias, including Sadism Disorder, Pedophilic Disorder and Other Specified Paraphilic Disorder, specifically deviant sexual arousal to non-consensual or coercive sexual activity. VRP 452-53; 459; 468-70.<sup>6</sup> Sadism Disorder involves sexual fantasies or urges that involve either physical or psychological suffering of another person or behaviors that involves the psychological or physical suffering of another person. VRP 453. Dr. Hoberman explained that sexual arousal to pain and suffering is really on a continuum with sexual arousal to non-consensual or coercive activity. VRP 469-70. Although he used both paraphilias to describe Botner's pathology, Dr. Hoberman clarified that he was not really diagnosing two

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<sup>5</sup> Dr. Hoberman testified that during the 2006 and 2009 evaluations, he used the DSM IV. The DSM V was published in May of 2013 and he used the DSM V during his 2013 evaluation. He also testified that the changes in newer version of the DSM did not change his opinion in anyway. VRP 452.

<sup>6</sup> Dr. Hoberman also testified that Botner is characterized by transvestic disorder, because Botner is sexually aroused by dressing in women's lingerie. VRP 473-74. This mental disorder does not, in Dr. Hoberman's opinion, constitute a mental abnormality. VRP 617-18.

separate disorders, rather the two descriptions both accurately describe Botner's pathology. VRP 492. Dr. Hoberman also described Botner using the term Pedophilic Disorder, which is characterized by having sexually arousing fantasies, sexual urges or behaviors that involve sexual activity with a prepubescent child or children. VRP 459;544-45.

Dr. Hoberman testified that his opinion was based on Botner's behaviors of engaging in repeated attempted rapes, but was also based on the fact that on a penile plethysmograph Botner showed greater arousal to coerced sexual behavior than he did to consensual sexual behavior, with both adults and minor females. VRP 469; 472; 547. Dr. Hoberman found that Botner had committed two attacks against women in one year where each victim was "choked relatively severely." VRP 454. Both victims had bruises and bloody facial injuries, one of them a broken nose, and one had bitten off the tip of her tongue. *Id.*

Dr. Hoberman testified that the two attempted rapes were examples of sadistic sexual behavior because the crimes involved more force than was necessary to secure the victims. VRP 453-54. Further, Botner had reported being involved in "coercive sexual relationships" where he pressured females to engage in sexual relations and sometimes engaged in what he described as kind of playful bondage. *Id.* Significantly, Botner admitted at various times that starting at age sixteen, he began to fantasize with

increasing frequency about attacking and raping women, and he would engage in “rehearsal behavior” identifying women to potentially attack and fantasizing about raping them. VRP 454-55; 546. Botner acknowledged masturbating to rape fantasies throughout his time in prison. VRP 455.

Dr. Hoberman testified that Botner also has Antisocial Personality Disorder. VRP 474. Dr. Hoberman testified that Botner easily satisfied all the criteria for Antisocial Personality Disorder set forth in the DSM V. VRP 474-84. Further, Dr. Hoberman described Botner as having significant traits of Narcissistic Personality Disorder (VRP 485) and he described the evidence supporting those narcissistic traits. VRP 485-86.

Dr. Hoberman testified that he evaluated Botner for Psychopathy and found that Botner was indeed characterized by Psychopathy. VRP 487. Psychopathy is a psychological construct that identifies a unique type of person, a subgroup of persons who are antisocial who are much more at risk for committing future anti-social behavior. VRP 488; 491. Dr. Hoberman used an instrument called the Psychopathy Checklist Revised (PCL-R) to score Botner’s level of psychopathic traits. VRP 488-89. Dr. Hoberman described the PCL-R as the most widely used measure for rating the risk of criminal and violent recidivism. VRP 489. Finally, Dr. Hoberman testified that his psychological evaluation of Botner supported his opinion that

Botner has one or more mental abnormalities, and one or more personality disorders. VRP 494-95.

As part of his evaluation, Dr. Hoberman also completed a comprehensive risk assessment of Botner. VRP 495-97. Dr. Hoberman authored a model for how evaluators should conduct risk assessment, and the model was adopted by the Association for the Treatment of Sexual Abusers (ATSA), an international professional organization. VRP 497; 408-09. Dr. Hoberman described using numerous types of risk assessment methods. VRP 501; 516-18. Dr. Hoberman used four different actuarial instruments related to static risk factors in evaluating Botner's risk of committing predatory acts of sexual violence in the future. VRP 499-502. He used the Static 99, the Static 99-R, the Static 2002R, and the Sex Offender Risk Appraisal Guide (SORAG). VRP 503-04. Dr. Hoberman testified that psychologists can't predict a particular individual's risk for future offense, but can compare an individual with certain characteristics to group data about individuals with similar characteristics. VRP 507-08. Dr. Hoberman testified that Botner's score on each static actuarial instrument was compared to scores of other known sex offenders, so we know the rate at which other sex offenders with similar characteristics are rearrested and/or reconvicted of new sex offenses. VRP 507-09. For each instrument, Botner's score resulted in high or moderately high risk

comparison. VRP 511; 551. The instruments are viewed as underestimating true risk because the data is based on reconviction rather than the commission of a new sex offense, and because the data is based on only 10-15 year follow ups at most, rather than the life time expectancy of 30 or more years. VRP 509-10.

Dr. Hoberman testified that the Static 99 score was related to a re-offense rate of 52% over 15 years, the Static 99R score was related to a re-offense rate of 42% over ten years, the Static 200R score was related to a re-offense rate of 46% over ten years, and the SORAG score was related to a re-offense rate of 100% re-offense over ten years. VRP 503-06; 508. When reporting the data associated with the SORAG, Dr. Hoberman testified the results indicate Botner was "highly likely" to commit a violent offense:

Now, I would say that because it's measuring interpersonal violence that Mr. Botner has committed at least one act of nonsexual interpersonal violence, and that was the assault in 2003, that it may be an overestimate, okay? So you'd want to treat the 100 percent figure with some, you know, caution, but clearly it says that he's highly likely to commit violent offenses, and in particular sexually motivated violent offenses, over just a 10-year period of time.

VRP 506. On cross examination, Dr. Hoberman testified as follows:

Q. So when you testified yesterday, I think you threw out it was a hundred percent estimate on the SORAG?

A. Right.

Q. That's -- I mean, you cannot testify that his likelihood of recidivism is one hundred percent re-offend, correct?

A. I did not, and I would not. You're right.

VRP 623.

Dr. Hoberman testified that in addition to actuarial instruments that measure static factors, he used other structured methods to evaluate Botner's dynamic risk factors. VRP 517. He used the Structured Risk Assessment Forensic Version (SRA-FV) and the Stable-2007. VRP 518. Dr. Hoberman testified that one must be trained to use the SRA-FV, and there are specific criteria that exist for rating characteristic that fall into three categories: sexual interests, relational styles and self-management. VRP 519. The total score on the SRA-FV identifies a person as having low, medium or high levels of dynamic needs or dynamic risk. 519-20. Dr. Hoberman testified that Botner's score on the SRA-FV indicated that Botner was in the very high needs category, which would mean he requires an exceptional level of risk management. VRP 519. Similarly, Botner scored very high on the Stable-2007, indicating Botner has significant interpersonal needs that must be addressed in order to lower his risk in the community. VRP 522-23.

Dr. Hoberman testified that the SRA-FV was developed for people who are in custody and the Stable 2007 was developed for people who are

out of custody. VRP 521. In Dr. Hoberman's opinion, both instruments were equally appropriate to use to evaluate Botner, because he had spent time both in custody and out of custody prior to his arrest. *Id.* He found the results of the two instruments to be similar because the results showed a very high level of dynamic risk or need. *Id.*

In addition to the static actuarial instruments and the structured methods of evaluating dynamic risk, Dr. Hoberman also considered two primary other sets of risk factors related to criminal sexual offending: psychopathic characteristics and deviant sexual interests. VRP 523. He testified that when both are present, as they are in Botner, their effects are magnified, so Botner has a particularly elevated risk for sexual re-offending. VRP 523. Dr. Hoberman referred to this combination as the "dynamic duo" of sexual recidivism or re-offending. *Id.* He described that Botner is characterized by several forms of deviant sexual arousal including arousal to children, arousal to rape, arousal to causing physical and psychological suffering. *Id.* Dr. Hoberman used the Psychopathy Checklist Revised (PCL-R) to score psychopathy, and he used the Sexual Violence Risk-20 (SVR-20) to evaluate risk for future sexual offending. VRP 515-16.

Further, Dr. Hoberman considered other additional individual factors about Botner, for instance, his long-standing drug and alcohol

problems, another factor that increases Botner's risk for future sexual re-offending (VRP 528-29), his failure in sex offender treatment (VRP 524-25); and his failure to recognize and try to mitigate his own risk. VRP 526.

Dr. Hoberman testified that for each actuarial tool and structured instrument that he used, Botner was moderately high, high, or very high for risk on every other measure. VRP 551. Dr. Hoberman opined that based on his history, psychological testing and Botner's self-report, Botner has difficulty controlling his sexually violent behavior in an extreme degree. VRP 551-58. Considering the totality of the risk factors and instruments that Dr. Hoberman considered, he opined that Botner was more probable than not to commit future predatory acts of sexual violence if not confined in a secure facility. VRP 551.

**A. The Trial Court Correctly Concluded That The SRA-FV Meets The *Frye* Test**

**1. Standard of Review.**

Admission of evidence under *Frye* is reviewed de novo. *State v. Baity*, 140 Wn.2d 1, 9-10, 991 P.2d 1151 (2000). In determining if novel scientific evidence satisfies *Frye*, the court may conduct "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 Wn.2d 244, 255-56, 922 P.2d 1304 (1996) (citing *State v. Cauthron*,

120 Wn.2d 879, 887-88, 846 P.2d 502 (1993) (*overruled in part on other grounds by State v. Buckner*, 133 Wn.2d 63, 65-66, 941 P.2d 667 (1997))).

Under *Frye*, “evidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community.” *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984). “The core concern of *Frye* is only whether the evidence being offered is based on established scientific methodology.” *Cauthron*, 120 Wn.2d at 889.

## **2. Risk Assessment In SVP Evaluations.**

SVP proceedings under RCW 71.09 require assessment of a person’s risk of sexually reoffending. RCW 71.09.020(18). The Washington State Supreme Court (WSSC) long ago approved the use of both clinical judgment and actuarial instruments in such risk assessments, and has held that neither requires a *Frye* hearing. *In re Detention of Thorell*, 149 Wn.2d 724, 756, 72 P.2d 708 (2003). Risk assessment has evolved over the past few decades, and expert use of actuarial instruments and other risk assessment measures has changed as the science has developed. CP 1535; 1543; 1591; 1619.

The actuarial instrument that has been the industry standard for more than 16 years is the Static 99, which looks at “static” or unchanging risk factors, and determines the probability of re-offense based on the

recidivism rate of a group of offenders who score alike. A revised version of that instrument, the Static-99R, is now the most widely used actuarial instrument. CP 1905.<sup>7</sup>; see also CP 1538-39; 1561; 1591. Further research in sex offender risk assessment has shown that consideration of “dynamic” risk factors (those changeable over time) helps evaluators identify sex offender treatment targets and evaluate recidivism risk. CP 2135-64.<sup>8</sup> The dynamic risk are also sometimes referred to as dynamic needs or long term vulnerabilities. VRP 519-20; 630

Psychologists and others conducting risk assessments have traditionally used their clinical judgment to consider and weigh dynamic risk factors, and our courts have consistently recognized that clinical consideration of such factors has been central to SVP evaluations. *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 as part of an overall risk assessment); *In re Detention of Danforth*, 153 Wn. App. 833, 840, 223 P.3d 1241 (2009) (noting the evaluator’s consideration of dynamic risk factors as part of an overall risk assessment); *In re Detention of Reimer*, 146 Wn. App. 179, 196, 190 P.3d 74 (2008) (noting the evaluator’s use of

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<sup>7</sup>Jackson, R. L., & Hess, D. T. (2007). *Evaluation for civil commitment of sex offenders: A survey of experts*. *Sexual Abuse: A Journal of Research and Treatment*, 19, 409-48.

<sup>8</sup> Hanson, R. K. and Harris, A.J. (2000), *Where Should We intervene? Dynamic Predictors of Sexual Offense Recidivism*. *Criminal Justice and Behavior*, Vol. 27 No.1

dynamic risk factors commonly used in SVP evaluations, including poor history of interpersonal relationships, poor impulse control and negative attitudes toward therapeutic intervention); *In re Detention of Jones*, 149 Wn. App. 16, 22, 201 P.3d 1066 (2009) (evaluator opined that association with criminals or continued drug use would constitute elevation of dynamic risk).

The SRA-FV is based on empirical research and was created by one of the developers of the Static-99 to assist evaluators' clinical judgment with a more stable and analytic framework. CP 1905. The SRA-FV takes factors previously considered by clinicians with un-anchored clinical judgment and puts them in a structured construct based on empirical data, in order to achieve a more accurate risk assessment. *Id.* Furthermore, the SRA-FV is not novel science because it was constructed implementing decades of generally accepted research on the subject of sex offender risk assessment, and it has been subject to peer review and validation.<sup>9</sup> The SRA-FV has been published in a peer-reviewed journal. CP 2117-33 (Thornton, D. & Knight, R. (December 2013). *Construction and Validation of SRA-FV Need Assessment*, *Sexual Abuse: A journal of Research and Treatment*).

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<sup>9</sup> The irony in this appeal is that a method that is less scientifically based has been approved by the WSSC, but when researchers in the field tried to make the actuarial assessment more complete, Botner claimed that the manner did not satisfy *Frye*. Had Dr. Hoberman relied only on clinical judgment in reaching the same opinion there would have been no basis for a *Frye* hearing.

As the WSSC has observed: “[S]cience never stops evolving and the process is unending[,]” with each scientific inquiry becoming “more detailed and nuanced.” *Anderson v. Akzo Nobel Coatings*, 172 Wn.2d 593, 607, 260 P.3d 857 (2011). If, however, courts require “‘general acceptance’ of each discrete and evermore specific part of an expert opinion, virtually all opinions based upon scientific data could be argued to be within some part of the scientific twilight zone.” *Id.* at 611. The science of risk assessment is no exception to this rule. The courts of this state have long recognized that, despite this ongoing process of evolution, the underlying procedures and methods used to assess risk are well established and generally accepted.

### **3. The *Frye* Hearing Below**

The State submitted Petitioner’s Motion and Supporting Memorandum for a Finding that the SRA-FV Meets the *Frye* Evidentiary Standard. CP 1891-2219. The parties then submitted the matter to the trial court on a stipulated record. CP 1697-99; RP 517-18.<sup>10</sup> The record includes the testimony of Harry Hoberman, Ph.D. and Amy Phenix, Ph.D, which the State relied upon to explain the development, general acceptance, and

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<sup>10</sup> The parties stipulated the trial court consider the transcripts of testimony and arguments from a *Frye* hearing held May 15 and 16, 2014 from two others cases: *In re: Detention of Robert Aronson*, Cause No. 11-2-02847-4 and *In re: Detention of James Jones*, Cause No. 13-2-00608-6.

widespread use of the SRA-FV in the field of sex offender evaluation and assessment. CP 1505-1643. Dr. Hoberman is a forensic and clinical psychologist specializing in the evaluation of sex offenders. CP 1514-15. Dr. Hoberman works not only in Washington State, but also in Minnesota, Iowa, Missouri, Arizona, and in federal court in North Carolina under the Adam Walsh Act. CP 1515-16.

Dr. Phenix is a forensic psychologist whose area of expertise is the evaluation of sex offenders. CP 1903; 1585-88. She has also worked and testified in a number of jurisdictions, including but not limited to Washington, California, Arizona, Illinois, Missouri, Minnesota, Wisconsin, Florida, New Hampshire, Massachusetts, North Carolina, and Iowa. CP 1904. Dr. Phenix has testified both for the State and for the defense. *Id.* Further, Dr. Phenix is one of the authors of the coding rules for the Static 99R, the most widely used actuarial instrument in the world. CP 1913.

Dr. Hoberman and Dr. Phenix both explained that sex offender evaluators attempt to determine the probability or risk that an offender will commit another offense if released. CP 1517; 1589. When Dr. Phenix began conducting sex offender evaluations, there were no validated actuarial instruments for assessing risk. CP 1589-90. There were known risk factors, and the evaluator would consider each factor, evaluate whether the factor was present and in what strength, and then arrive at an opinion based on

those conclusions. CP 1589; 1596-97. This was known as “clinical judgment” or “unstructured judgment”. CP 1596-97; see also CP 1905. The known risk factors were static factors or dynamic factors; static factors are historically based and don’t change over time; dynamic factors are changeable. CP 1590-91.

Actuarial instruments for evaluating sex offenders were developed by combining risk factors linked to sexual recidivism; the use of actuarial instruments to measure static factors is now the state-of-the-art practice. CP 1589-90. For the actuarial instrument, each factor is weighted statistically according to its contribution to risk. CP 1518. A total risk score is calculated, and from that score the evaluator can determine the recidivism rates for groups of sex offenders who have been studied who have similar scores. CP 1519. These actuarial instruments made assessment more accurate by utilizing statistical weights instead of relying on clinical judgment of weight. CP 1590. Actuarial instruments were first developed on a group of offenders, then validated by testing the instrument on a different group to see how the results compare. CP 1590-91.

In 1999, the Static 99 was released after one validation on a split sample. CP 1590-93. The Static-99 has been revised and is now known as the Static-99R (Revised); it has now validated over 70 times. CP 1590-91.

The Static 99R is the most widely used actuarial risk instrument in the world. CP 1591.

But static, or unchanging factors, do not tell an evaluator everything that can be known about a person's risk. CP 1905; 1594-95. Beginning in the early 2000s, researchers identified dynamic, or changeable risk factors, as important considerations. CP 1594. Before there was a structured instrument, evaluators would look "at lists of dynamic risk factors that had been identified in various research studies and, in effect, use clinical judgment to make a determination as to whether a person did or did not have some more or less significant degree of dynamic risk present." CP 1537. Researchers in the United States and England began working on research of dynamic risk factors, and in 2001, 2002, and 2003 there were many single sample studies that identified dynamic risk factors. CP 1594. The research culminated in a meta-analysis, a study of studies, to definitively guide evaluators to which dynamic factors are actually predictive. CP 1594-95. In a development process similar to the development of the static actuarial instruments, a structured instrument called the Stable-2007 was released, and then more recently, the SRA-FV. CP 1595. The changeable risk factors used in the SRA-FV (and the Stable 2007 and another dynamic risk instrument, the Violence Risk Scale for Sex Offenders [VRSSO]) are supported by research as being associated with

risk for recidivism. CP 1537. The structured method of analyzing dynamic or changeable risk is superior to the unstructured method of evaluating dynamic risk. CP 1595-97.

At the time of the *Frye* hearing, there were three such instruments, the Stable 2007, the Violence Risk Scale – Sex Offender Version (VRSSO) and the Structured Risk Assessment – Forensic version (SRA-FV). CP 1905; 1537. Each of these dynamic risk instruments use statistics to determine a set of empirically derived predictors. *Id.* Evaluators had been using structured risk assessment for dynamic factors for 10 years. CP 1600. The SRA-FV was developed in 2007 by Dr. David Thornton and it was released in 2010. CP 1906; 1604. Dr. Phenix has been using it since its release, about four years at the time of the *Frye* hearing. CP 1604. The SRA-FV score is a guide to determine whether an offender has low, moderate or high dynamic risk factors. CP 1607. The greater the dynamic risk factors, the greater the re-offense rate. CP 1607.

The SRA-FV has three domains, each having a number of items. CP 1906. The domains are Sexual Interests, Relational Style (how the person gets along with others), and Self-Management. *Id.* Using the SRA-FV provides a method of arriving at a more sound conclusion about an offender's risk. CP 1606. This has become evident because, over time, research discovered that those with a particular score on the Static-99 did

not reoffend at the same rate; some were high, some low and some moderate. CP 1606-07.

The SRA-FV, then, provides a score that assists in categorizing an offender as having low, medium or high levels of dynamic risk. CP 1607; see also CP 1905-07. With that measurement, the evaluator can determine whether to compare the person to the routine, preselected or high risk/high needs individuals associated with the Static 99R. *Id.* Thus, the SRA-FV guides the evaluator to the most appropriate risk probability comparison for an individual. *Id.*

Like the Static-99, the SRA-FV was developed and then cross-validated on an entirely different sample. CP 1907. “The cross-validation of the SRA-FV is measured statistically and shows moderate predictive accuracy similar to other instruments and similar to other available instruments that assess dynamic risk factors.” CP 1907. The SRA-FV has been determined to add “incremental validity” or new information to the static risk assessment on Static 99R. *Id.* “Given the incremental validity of the SRA-FV and other similar instruments the accepted practice in the field is to score both a static actuarial instruments (e.g. Static 99R) and a structured measure of dynamic risk factors.” *Id.*

The developer of the SRA-FV, Dr. David Thornton, published his results and documented the improved predictive accuracy and incremental

validity that the SRA-FV provides, in a 2013 peer reviewed paper. CP 702-718 (Thornton, D. & Knight, R. (December 2013). *Construction and Validation of SRA-FV Need Assessment*, Sexual Abuse: A journal of Research and Treatment). CP 1908.

The SRA-FV is widely used and accepted in the field of sex offender evaluation. CP 1909. At the time of the *Frye* hearing, there were clinical trainings available throughout the country on the use and scoring of the SRA-FV and a comprehensive scoring manual was available that added to the clinical agreement of scoring of each item. CP 1908. Trainings had been provided in California, Minnesota, Wisconsin, Colorado, Florida, for the federal government, and in Scotland. CP 1908-09. The SRA-FV is used in all Adam Walsh Child Safety and Protection Act cases conducted for the federal government. *Id.* In 2011, California legislatively adopted the SRA-FV for use with all probationers and parolees. CP 1908. A couple years later California replaced the use of the SRA-FV with the Stable 2007 for probationers and parolees, because it was a more appropriate instrument for that population. CP 1613. Dr. Phenix clarified that the SRA-FV, developed on an incarcerated sample, had been replaced with the Stable 2007 recently shown to have incremental validity and was more appropriate for use with offenders in the community. CP 1613.

The trial court delivered an oral ruling on May 29, 2014, finding that the SRA-FV satisfied the *Frye* standard. CP 1496-99. The court subsequently entered Findings of Fact and Conclusions of Law. CP 1700-03. Specifically, Judge Plese found that the SRA-FV provides a structured assessment of dynamic risk factors that it has been validated and is generally accepted in the scientific community. *Id.*

**4. The Washington Supreme Court Has Held That *Frye* Is Not Applicable To SVP Risk Assessments.**

As a preliminary matter, the State continues to assert that a *Frye* hearing was unnecessary, because neither clinical judgment nor actuarial assessment in SVP proceedings is subject to *Frye*. *Thorell*, 149 Wn.2d at 754. *Frye*'s "core concern ... is only whether the evidence being offered is based on established scientific methodology." *In re Pers. Restraint of Young*, 122 Wn.2d 1, 56, 857 P.2d 989 (1993) (quoting *Cauthron*, 120 Wn.2d at 889). *Frye* requires "general acceptance," not "full acceptance[.]" *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994) (emphasis in original), and "can be satisfied by foundation testimony given in connection with the expert's testimony on the merits." Tegland, *Washington Practice: Evidence Law and Practice*, §702:21, at 100 (citing *In re Strauss*, 106 Wn. App. 1, 20 P.3d 1022 (2001)). "[T]he relevant inquiry under *Frye* is general acceptance within the scientific community, without reference to its forensic

application in any particular case.” *State v. Greene*, 139 Wn.2d 64, 71, 984 P.2d 1024 (1999). “Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact.” *State v. Gregory*, 158 Wn.2d 759, 829-30, 147 P. 3d 1201 (2006).

Because both actuarial and clinical predictions of future dangerousness satisfy *Frye*, they are admissible without a *Frye* hearing if they satisfy ER 401 through 403 and ER 702 through 703. *Ritter*, 177 Wn. App. at 522-23 (*citing Thorell*, 149 Wn.2d at 754-56).

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

Botner argues that the trial court improperly determined that the *Frye* standard was met. The record, however, demonstrates the trial court followed the law and that its findings and conclusions are well-supported. 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). Evidence is admissible under *Frye* if the “science and methods are widely accepted in the relevant scientific community[.]” *Akzo*, 172 Wn.2d at 609. 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 (1994). Courts examine expert testimony, scientific writings subjected to peer review and publication, secondary legal sources, and legal authority from other jurisdictions to determine whether a consensus of scientific opinion has been achieved. *Eakins v. Huber*, 154 Wn. App. 592, 599 (2010) (citing *Copeland*, at 256-57). Additionally, 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)). Rather, evidence is inadmissible under *Frye* only in cases where a significant dispute among qualified scientists in the relevant scientific community exists. *Akzo*, at 603. The relevant inquiry is whether the scientific testimony is generally accepted by scientists, not whether it is generally accepted by courts. *Cauthron*, 120 Wn.2d at 888.

Based on the evidence presented, the trial court correctly found that *Frye* was satisfied. Judge Plese reached the same conclusions as the *Pettis* court. CP 1700-03. Specifically, she ruled that the testimony and supporting materials of Dr. Phenix and Dr. Hoberman show that dynamic risk factors are generally accepted in the scientific community as important risk considerations, and that the SRA-FV provides a structured approach to measuring them. *Id.* Botner has failed to show the existence of a significant dispute within the scientific community, and has failed to show that the methods of applying the SRA-FV are not generally accepted.

**6. Division II of the Court of Appeals Has Recently Held That the SRA-FV Satisfies the *Frye* Standard**

A recent Division II opinion decided the precise issue before this Court. *In re Detention of Pettis*, 188 Wn. App. 198, 352 P.3d 841 (2015). In *Pettis*, the trial court admitted evidence about the SRA-FV after conducting an evidentiary hearing and concluding the instrument satisfied the *Frye* test. 352 P.3d at 848. *Pettis* held that that the SRA-FV is both generally accepted in the scientific community *and* uses acceptable methods in its application, therefore satisfying the *Frye* test. *Id.*

*Pettis* found – as did the trial court in the instant case – that the testimony of the State’s experts and the scientific literature on the SRA-FV supported the conclusion that the SRA-FV is generally accepted. *Id.*; CP 3-

4. *Pettis* noted the existence of some criticism in the field, namely from defense witnesses Dr. Brian Abbott and Dr. Christopher Fisher, but stated the *Frye* standard “does not require unanimity.” *Id.* (citing *Lake Chelan Shores*, at 176). Rather, *Pettis* holds “there does not appear to be a *significant* dispute about the acceptance of the SRA-FV,” and therefore, the SRA-FV is admissible under *Frye*. *Id.* (emphasis in original).

Regarding the second prong, *Pettis* held there are generally accepted methods of applying the SRA-FV. *Id.* at 8. Specifically, the Court found that the SRA-FV “involves a specific training and a standard coding form.” *Id.* Moreover, the Court did not find persuasive *Pettis*’ argument that the SRA-FV’s reliability rating fails the second prong of the *Frye* test. In rejecting that argument, the Court recognized “there is no numerical cutoff for reliability.” *Id.* (citing *Lake Chelan Shores*, at 176). Rather, the court held that the “moderate predictability” of the SRA-FV is sufficiently reliable. *Id.*

In the instant case, as in *Pettis*, the State presented the testimony of Dr. Phenix. As in *Pettis*, she testified that the SRA-FV has been cross-validated on a split sample. CP 1590.<sup>11</sup> (Cross validation is not uncommon in this field. CP 1553). In *Pettis*, Dr. Phenix described the

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<sup>11</sup> Dr. Phenix testified that there was one cross-validation for each of the dynamic risk assessment instruments, maybe two cross-validations for the VRSSO. CP 1614.

interrater reliability of .55 as “modest.” *Pettis* at 207.<sup>12</sup> In the instant case, Dr. Hoberman acknowledged the .55 result from the Wisconsin study base of 15 evaluators was relatively low. CP 1563; 1547. Both Dr. Phenix and Dr. Hoberman testified that the 15 evaluators in the study had not been trained well on how to score the instrument (CP 1548; 1611) and both doctors testified that the interrater reliability for the SRA-FV published in the 2013 article was .78, much higher than the small, early Wisconsin study. CP 1552; 1563.

In *Pettis*, Dr. Phenix testified that the SRA-FV has a predictive accuracy of .73 which she described as “very acceptable predictive accuracy.” *Pettis*, at 207. The *Pettis* Court noted that Dr. Phenix testified that the SRA-FV predictive accuracy was comparable to the actuarial tools, the Static 99R and the Static 2002R. *Id.* In the instant case, Dr. Hoberman similarly testified that the SRA-FV and the Stable 2007 have predictive accuracy comparable to the static actuarial instruments. VRP 628.

In *Pettis*, Dr. Phenix testified that “the SRA-FV shows significant added incremental validity in improving the risk assessment over use of the Static-99R alone.” *Pettis*, at 207. In this case, Dr. Hoberman testified that the SRA-FV provides incremental validity. “It provides information above

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<sup>12</sup> Interrater reliability refers to the likelihood different practitioners provided with identical information would reach the same result through applying the instrument. *Pettis* at n. 5; CP 1610.

and beyond what one gets in terms of predictive accuracy to the static measures.” CP 1534. Dr. Hoberman also described incremental validity in terms that the SRA-FV offers better discrimination between persons who are recidivist and those who are not. CP 1573. Dr. Phenix also testified that the SRA-FV shows incremental validity, or new information to the Static 99R. CP 1602-03; 1622.<sup>13</sup>

**7. Botner’s Arguments Are Not Supported By The Record or The Law.**

Botner argues that the SRA-FV is not generally accepted in the scientific community, but he is applying the wrong standard. Specifically he argues that the method of using the SRA-FV has not achieved consensus (App. Brief at 25-7) and that the testimony at the hearing shows a lack of consensus on the use of the SRA-FV. App Brief at 37-40. But as the *Pettis*

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<sup>13</sup> At least six other trial courts in Washington have conducted evidentiary hearings pursuant to the *Ritter*, 177 Wn. App. at 521, ruling that the SRA-FV should be subject to a *Frye* hearing prior to the admission of expert testimony about it, including *Ritter*, January 9, 2015, Yakima County Cause No. 07-2-00423-7. In every case, the various trial courts have ruled that the SRA-FV meets the *Frye* standard. See *In re the Detention of Aronson*, Spokane County Superior Court Cause No. 11-2-02847-4; *In re the Detention of Jones*, Spokane County Superior Court Cause No.13-2-00608-6; *In re the Detention of Halvorson*, Spokane County Superior Court Cause No. 12-2-01532-0; *In re the Detention of Love*, Franklin County Superior Court Cause No. 01-2-50028-0; *In re: Detention of Ramiriz*, Yakima County Superior Court Cause No. 10-2-01311-2 ; *In re: Detention of McGaffee*, Snohomish County Superior Court Cause No. 95-2-09138-3. *Pettis* was the first case to reach the Court of Appeals.

court noted, general acceptance does not require unanimity. *Pettis*, at 206, (citing *Lake Chelan Shores Homeowners Association*, 176 Wn. App. At 176; 313 P.3d 408). Under *Frye*, the relevant question is whether a scientific theory or principle has achieved general acceptance in the relevant scientific community. See, *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984). “The core concern of *Frye* is only whether the evidence being offered is based on established scientific methodology.” *Cauthron*, 120 Wn.2d at 889.

Botner relied on the testimony of Brian Abbott, Ph.D., in the *Frye* hearing. Even Dr. Abbott agrees that the *theory* or *principal* of evaluating risk by considering dynamic factors has achieved general acceptance in the scientific community. Dr. Abbott confirmed that “dynamic risk factors are considered changeable risk factors that are associated with sexual recidivism risk.” CP 1658. He conceded that the association between some dynamic risk factors and recidivism has been shown through research (CP 1437) and that the majority of identified dynamic factors associated with risk have been published in a peer reviewed article. *Id.* Significantly, Dr. Abbott testified that “clearly I think it’s generally accepted in the relevant scientific community that dynamic risk factors do have some predictive validity as it relates to sexual recidivism.” CP 1660. Finally,

Dr. Abbott testified that research also supports the theory that structured risk assessment is superior to unstructured risk assessment. CP 1438.

Because Botner's own expert agrees that the theory or principal is supported by research, there is no significant dispute that certain dynamic factors increase the risk of recidivism. The theory is generally accepted in the scientific community.

Botner also argues that Dr. Hoberman used the SRA-FV score to determine which Static 99R reference group to compare him to. App. Brief at 27. But Dr. Hoberman did not refer to his choice of reference group during his direct testimony. It was Botner, on cross examination who elicited testimony about the three different reference groups for the Static 99R. VRP 626. Dr. Hoberman testified that he used three different approaches to select among the reference groups; the SRA-FV, the Stable-2007 and a review of collective set of dynamic risk factors to aid in determining which group was appropriate. VRP 627. Dr. Hoberman testified that by each method, he found it appropriate to compare Botner to the high risk/high needs group. VRP 629. He testified that if he had not used the high-risk/high needs group data, the statistic of 42% recidivism would be lower. *Id.* He admitted that there are limitations to using the SRA-FV, which is why he used two other additional methods of making his determination. VRP 627. Because Dr. Hoberman used three different

methods and instruments, all of which indicated Botner was high risk/high needs, even assuming it was error to use the SRA-FV in this manner, Dr. Hoberman would have reached the same conclusion and any error would be harmless.

Botner argues that the SRA-FV does not satisfy the *Frye* standard because the practice of cross validation on a split sample is not a generally accepted practice in the scientific community (App. Brief at 31-5) and there is not general acceptance because it has not been shown to be reliable based on interrater reliability studies. App. Brief at 35-6. Inter-rater reliability and cross-validation are not relevant to the question of whether or not the instrument is based on a generally accepted theory. An instrument has high “inter-rater reliability” when practitioners get similar results when applying the instrument to common subjects. While Dr. Phenix and Dr. Hoberman conceded there are legitimate concerns about the SRA-FV’s inter-rater reliability, the testimony established that interrater reliability has already improved since the *Pettis* case was decided.<sup>14</sup> Dr. Phenix testified, as she did in *Pettis*, that the SRA-FV has indeed been cross validated, on a split

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<sup>14</sup> In *Pettis*, Dr. Phenix described the inter-rater reliability of .55 as “modest.” *Pettis* at 207. Both Dr. Phenix and Dr. Hoberman described the .55 figure came from a very small study in Wisconsin in which the evaluators acknowledged they were not well trained. CP 1547-48; 1563; 1611. Both doctors also testified that the inter-rater reliability figure from the 2013 Thornton article was .78, much higher than the small, early Wisconsin study. CP 1552; 1563.

sample. CP 1590.<sup>15</sup> “Cross-validation” is the process by which a tool’s usefulness is confirmed by applying it to a different group of subjects than the one it was developed on. The SRA-FV was developed and validated on two separate groups of offenders from the same hospital from the 1960s through the 1980s. Further, the evidence established that split sample cross validation is not uncommon in this field; it was done with the Static 99R. CP 1553. Nonetheless, cross validation is not a requirement of the *Frye* test. As the trial court correctly concluded, Botner’s arguments speak to weight, not admissibility. CP 98. “The core concern of *Frye* is only whether the evidence being offered is based on established scientific methodology.” *Cauthron*, 120 Wn.2d at 889.

Finally, Botner argues that admitting evidence of the SRA-FV was a prejudicial error that impacted a material and disputed issue. App. Brief at 40. Specifically Botner argues that the two sides presented dueling expert opinions on whether Botner was likely to reoffend. App. Brief at 40. Further, he argues, that rather than a pure clinical evaluation of risk factors, for which reasonable minds could differ, the State was able to impress the jury with a structured calculation of risk involving those factors. App. Brief at 41.

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<sup>15</sup> Dr. Phenix testified that there was one cross-validation for each of the dynamic risk assessment instruments, maybe two cross-validations for the VRSSO. CP 1614.

But Botner's characterization is misleading. First, there were not dueling experts. Botner did present the testimony of his retained expert who does not accept even indisputably generally accepted risk assessment methods. His expert, Dr. Donaldson, testified at trial and told the jury he does not believe it is possible to identify an SVP through a structured risk assessment. VRP 814-15. He testified, "There's no way we can predict the individual with sufficient accuracy." VRP 814. He believes that the only required analysis is whether the person suffers from the mental abnormality defined at RCW 71.09.020(8). VRP 815. If the person has that condition, Dr. Donaldson opined, then he is likely to reoffend. VRP *Id.* Dr. Donaldson testified that in this case the evidence was "grossly insufficient" to support the conclusion that Botner has a mental abnormality. VRP 785-86. He also testified that Botner does not have antisocial personality disorder. VRP 807-08.

The SRA-FV was only a fraction of Dr. Hoberman's overall risk assessment. Dr. Hoberman testified that for his comprehensive risk assessment he relied on four actuarial instruments related to static factors (VRP 502), two instruments related to dynamic risk factors (RP 517-18), plus the two primary risk factors for sexual offending, psychopathic characteristics and deviant sexual interests. RP 523. He also testified that in addition to these various structured assessments, he relied on other factors

including Botner's long-standing drug and alcohol problems. RP 528-29. Dr. Hoberman testified that he is looking for convergence when using these various instruments. In this case, Dr. Hoberman testified that there was convergence because Botner was high on every single instrument and consideration. VRP 551. Even without the SRA-FV, all of the other consideration pointed to the conclusion that Botner presents a high risk for sexual recidivism. Thus, even assuming there was error in admitting the testimony—an argument the Court of Appeals properly rejected in *Pettis*--any such error was harmless, and would not warrant reversal. *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997).

For all the foregoing reasons, this court should uphold the trial court's determination that the SRA-FV satisfies the *Frye* requirement.

**B. Botner's Counsel Was Not Ineffective For Failing to Object to Evidence And Argument.**

**1. Standard of Review**

To establish ineffective assistance, Botner must show that his counsel's performance fell below an objective standard of reasonableness *and* that there is a reasonable possibility that but for the deficient performance, the outcome of the proceeding would have been different. *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007) citing *State*

*v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). In applying this two part test, courts begin with a strong presumption that counsel's assistance was effective, and the claimant bears the burden of showing otherwise. *Id.*; see also *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Further, if counsel's performance can be characterized as a legitimate trial tactic, the performance is not deficient. *E.g.*, *State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013) citing *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

## **2. The Sex Offender Risk Appraisal Guide**

Botner argues that his counsel was ineffective for failing to object to testimony about the Sex Offender Risk Appraisal Guide (SORAG) on the basis that the testimony was unfairly prejudicial. App. Brief at 41. He contends that the testimony was inflammatory and gave the appearance of certitude. App. Brief at 43; 48. This court should reject his argument as it is not supported by the record or the law.

First, Botner's attorney did move *in limine* to exclude testimony related to the SORAG under Evidence Rule 401 and 402. CP 131-33; See also transcript from the original trial dated 08-0910 VRP 64-5. Botner argued that the SORAG had insufficient probative value related to Botner. 08-09-10 VRP 64-5. But the trial court ruled that the argument went to weight not admissibility. *Id.*

Now, apparently, Botner argues that his attorney should have objected to the same testimony during the trial. He is apparently relying on Evidence Rule 403 (see App. Brief at 46), which provides as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence

Evidence Rule 403. He argues that if counsel had objected, the court would likely have excluded the evidence. But his argument fails to satisfy his two pronged burden.

Counsel's failure to object to evidence cannot prejudice Botner unless the trial court would have ruled the evidence inadmissible. *McLean*, at 248 citing *State v. Hendrickson*, 129 Wash.2d 61, 77-78, 917 P.2d 563 (1996). Any objection based on ER 403 requires the trial court to use its discretion to conduct a balancing test evaluating the potential for unfair prejudice against the evidence's probative value. *In re Det. of Thorell*, 149 Wn.2d 724, 758, 72 P.3d 708, 726 (2003) citing *In re Pers. Restraint of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). Because Botner must show that the trial court would have ruled that the probative value of the evidence was substantially outweighed by unfair prejudice, he simply has not met his burden of showing that the trial court would have excluded the evidence.

Further, withholding an objection during trial can, and often is, a legitimate trial tactic to avoid emphasizing evidence. *State v. McLean*, at 247 citing *In re: Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Here, Botner's counsel sought pretrial to have the evidence excluded, but the motion was denied. Without drawing further attention to the evidence by objecting in front of the jury, trial counsel effectively cross examined Dr. Hoberman about the 100% figure and established that in no way was the doctor reporting Botner's risk at 100%. VRP 623. Further, counsel elicited testimony from Botner's retained expert to discredit the SORAG. Defense asked Dr. Donaldson, "In your practice, do you utilize the SORAG?" VRP 815. Dr. Donaldson answered, "Absolutely not," and he went on to describe why he would not rely on the SORAG. VRP 815-16. Because counsel opted to elicit weaknesses of the testimony on cross examination and through the direct testimony of Botner's expert, the decision on how to approach this issue was a legitimate trial tactic. Accordingly, counsel's performance was not deficient.

Finally, his argument that the testimony was inflammatory and gave the appearance of certitude is without merit. Dr. Hoberman made it clear that he was not testifying that Botner's risk of re-offense was 100%. Dr. Hoberman prefaced testimony about the SORAG by saying that when using the SORAG he needed to be careful because it measures interpersonal

violence among sex offenders rather than sexual re-offense. VRP 505. Dr. Hoberman went on to say on direct examination that the 100% figure should be treated with caution. VRP 506. When cross examined by Botner's counsel, Dr. Hoberman again clarified that he cannot, and did not, testify that Botner's risk of recidivism was 100%. VRP 623. This testimony was neither inflammatory nor did give the appearance of certitude. Instead the testimony was quite equivocal.

Even assuming counsel's performance fell below an objective standard of reasonableness, Botner cannot show that but for this evidence the outcome of the trial would have been different. The testimony about the SORAG was in the context of testimony about other instruments that produced various recidivism rates associated with certain groups, including the Static 99 (52% over 15 years VRP 503-04), the Static 99R (42 % over 10 years VRP 504), the Static 2000R (46% over ten years) and the SORAG (100% over 10 years). According to Dr. Hoberman, each of these static instruments, along with every dynamic factor and dynamic instrument he considered, indicated that Botner was at high, moderately high, or very high risk to re-offend. Furthermore, the State presented substantial evidence that Botner suffered from several serious mental abnormalities and personality

disorders, and that he could not control his behavior.<sup>16</sup> He has failed to show that given the overwhelming evidence of Botner's dangerousness, that absent the testimony about the SORAG the jury would not have concluded that he was an SVP. Thus he has failed to meet the required burden in an ineffective assistance of counsel claim.

### 3. The State's Closing Argument

Botner argues that his counsel was ineffective for failing to object during the State's closing argument. App. Brief at 50. He contends that the State committed misconduct by misstating the law and that his own counsel should have objected. App. Brief at 50.<sup>17</sup> Specifically, he argues that the State suggested the jury could invent its own mental diagnosis or commit Botner without finding any mental diagnosis at all. *Id.* This argument is not supported by the record or law.

The evidence supporting a finding of mental abnormality or personality disorder came from Dr. Hoberman.<sup>18</sup> Dr. Hoberman testified that his psychological evaluation of Botner supported his opinion that

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<sup>16</sup> Botner contends that the State argued in closing that his risk for re-offense was 100%. App. Brief at 49. But Botner has misstated the argument. The State argued that in retrospect, we know that Botner's risk in the past was 100% because he had gone on to commit new offenses. The State never argued that was his current risk.

<sup>17</sup> Botner cites no authority to support his assertion that the state committed misconduct.

<sup>18</sup> Botner's own expert, Dr. Donaldson, testified that there was grossly insufficient evidence to show that Botner had a mental abnormality and he testified that Botner did not have a personality disorder. VRP 785-86; 807-08.

Botner has one or more mental abnormalities (VRP 494-95) and that he had one or more personality disorders. VRP 495. Dr. Hoberman testified to several psychological disorders that characterize Botner. VRP 447. The testimony included describing Botner as having various paraphilias, including Sadism Disorder, Pedophilic Disorder and Other Specified Paraphilic Disorder and Transvestic Disorder. VRP 452-53; 459; 468-70; 473-74. He testified that sadism disorder and other specified paraphilia were not necessarily separate disorders, but rather two descriptions that both accurately describe Botner's pathology. VRP 492. Dr. Hoberman explained that sexual arousal to pain and suffering is really on a continuum with sexual arousal to non-consensual or coercive activity. VRP 469-70. Dr. Hoberman testified that transvestic disorder does not constitute a mental abnormality, rather it constitutes an additional risk factor. VRP 617-18. Dr. Hoberman also testified that Botner has Antisocial Personality Disorder (VRP 474) and significant traits of Narcissistic Personality Disorder. VRP 485-86.

Botner now complains that the prosecutor committed misconduct by telling the jury, "You're just supposed to take the information that you found helpful from their testimony [the experts] that you found credible and apply it to the law." VRP 967. The prosecutor said, "Dr. Hoberman, who is an expert in his field of psychology found that Mr. Botner suffers from

several sexual paraphilic disorders that qualify as mental abnormalities under the law; sexual sadism, paraphilia not otherwise specified NOS, nonconsent and psychopathy. Dr. Hoberman clarified that sexual sadism and the paraphilia NOS are difficult to separate. They're two disorders, but they can be thought of as on a continuum because they cross over." VRP 968. There is nothing remotely wrong with this argument.

Botner also complains that the State invited the jurors to commit Botner based not on the evidence but upon their own speculation. Specifically, he argues that the State argued it's clear to anyone that there is something seriously wrong with Botner. App. Brief at 55. But Botner fails to put the State's argument into context. The comments were made in the context of the State arguing that Botner's retained expert, Dr. Donaldson, was not credible. VRP 972-76.

He [Dr. Donaldson] apparently was ignoring all of the evidence that was aside from Mr. Botner's denial that shows this to be the contrary, but you have to decide what Dr. Donaldson's motives would have been or may be for testifying the way he did for coming to his conclusions.

That's up to you to decide, but it seems awfully hard to believe when it's clear to anyone who's heard the evidence in this case that there is something seriously wrong with Mr. Botner.

VRP 976. This was not an invitation to speculate, but an appropriate argument that based on the totality of the evidence, Dr. Donaldson's testimony was not credible.

Botner argues that at another point the prosecutor suggested jurors speculate, and argued they could base a decision on their own diagnosis or "gut feeling." App. Brief at 54. But what the prosecutor said was as follows:

You did hear testimony from both doctors to try to help you understand how psychology and the law fit together. You're not required when you look at these instructions, as Ms. Jany already told you, you're not required to find any particular paraphilia or any particular named sexual psychosexual pathology, but you heard a lot of testimony about that to help you determine whether or not there is, in fact, a mental abnormality.

VRP 1012-13. It was completely accurate to tell the jury that the testimony of the expert was to help the jury decide whether Botner has a mental abnormality.

The jury was instructed, "It will be your duty to decide the facts in this case based upon the evidence presented to you during this trial." CP 1839; VRP 943. Jurors are presumed to follow the instructions of the court. Here, the court instructed the jury, "As to comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements and arguments are not evidence. You should

disregard any remark, statement or by the evidence or by the law as I have explained it to you.” VRP 945.

Defense counsel’s decision to refrain from objecting during the prosecutor’s closing argument was not deficient performance, but is within the wide range of acceptable professional legal conduct. Given that the prosecutor’s arguments accurately stated the law, there is no likelihood that an objection would have been sustained. Botner concedes that after the State’s initial closing (some of the material he now labels as misconduct), his counsel gave a closing argument pointed out to the jury the many deficiencies of Dr. Hoberman’s diagnoses. As such, the decision to not object was a legitimate trial tactic. Nor can he sustain the burden of showing that absent these isolated statements, taken out of context, that the outcome of the trial would have been different.

Botner has not met either prong of his burden. He has shown neither that his attorney’s performance fell below an objective standard of reasonableness nor that the outcome of the proceeding would have been different. There was overwhelming evidence presented through the testimony of Dr. Hoberman that Botner had one or more mental abnormalities and one or more personality disorders. The State’s arguments were not inappropriate and do not constitute misconduct. It was not ineffective assistance of counsel to not object at the prosecutor’s correct

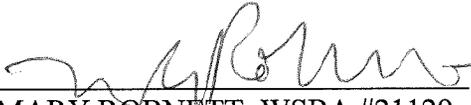
summary of the law. This court should reject his claim of ineffective assistance of counsel.

#### IV. CONCLUSION

The testimony regarding the SRA-FV satisfies the *Frye* standard of admissibility. Botner's claim of ineffective assistance of counsel completely fails: his counsel's performance did not fall below an objective standard of reasonableness, nor is there a reasonable probability that objections to the SORAG and closing arguments changed the outcome of the trial. This court should affirm Botner's commitment.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of November, 2015.

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NO. 32939-9-III

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

In re the Detention of:

SHAWN BOTNER,

Appellant.

DECLARATION OF  
SERVICE

I, Elizabeth Jackson, declare as follows:

On November 24, 2015, I sent via electronic mail true and correct copies of Brief of Respondent, and Declaration of Service, addressed as follows:

Eric Nielsen  
Nielsen, Broman & Koch

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sloanej@nwattorney.net

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

DATED this 24<sup>th</sup> day of November, 2015, at Seattle, Washington.

  
ELIZABETH JACKSON