No. 45499-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

Brent Pettis,

Appellant.

Clark County Superior Court Cause No. 01-2-03870-6

The Honorable Judge Scott Collier

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Pettis's continued confinement at the Special Commitment Center (SCC) violates his right to procedural and substantive due process, given the undisputed consensus that he can safely reside at the less-restrictive Secure Community Treatment Facility (SCTF).

2. The trial court erred by denying Mr. Pettis's motion to order him transferred to the SCTF.

3. The absence of any statutory mechanism for timely judicially-ordered transfer to the SCTF renders RCW 71.09 unconstitutional.

4. The SCC administration's role as exclusive gatekeeper to the SCTF violates substantive and procedural due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.

5. The SCC administration's role as exclusive gatekeeper to the constitutionally-mandated SCTF is not narrowly tailored to serve a compelling state interest, because it permits total deprivations of liberty even when the community can be protected and treatment provided through less-restrictive means.

6. The SCC administration's role as exclusive gatekeeper to the constitutionally-mandated SCTF permits deprivations of liberty based on arbitrary governmental action.

> **ISSUE 1:** Governmental interference with a fundamental liberty interest must be narrowly tailored to meet a compelling state interest. Here, the department continues to hold Mr. Pettis in total confinement even though it is undisputed that he can be safely treated at the department's less-restrictive Secure Community Treatment Facility. Does Mr. Pettis's continued total confinement violate his Fourteenth Amendment right to substantive due process?
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> **ISSUE 2:** Substantive due process prohibits confinement based on arbitrary government action. Here, the SCC administration is permitted to keep Mr. Pettis in total confinement based on an arbitrary unwritten policy, despite the consensus that he can be safely treated at the SCTF. Does Mr.

Pettis's continued total confinement violate his Fourteenth Amendment right to due process?

7. Mr. Pettis was denied his right to procedural due process.

8. The court erred by declining to conduct meaningful review of the SCC administration's refusal to transfer Mr. Pettis to the SCTF.

9. The SCC administration's role as exclusive gatekeeper to the constitutionally-mandated SCTF deprives certain detainees of procedural due process because it permits the department to retain a detainee in total confinement without any opportunity for judicial review.

10. Mr. Pettis's interest in freedom from total confinement, the risk of error posed by arbitrary and unreviewable decision-making regarding transfer to the SCTF, and the lack of any countervailing state interest all weigh in favor of a constitutional right to judicial review of the SCC administration's refusal to approve a qualified candidate's transfer to the SCTF.

ISSUE 3: The process due a person facing deprivation of a liberty interest depends on the nature of the interest, the risk of error under the current procedure, and any state interest in maintaining the current procedure. RCW 71.09 fails to provide for review of the SCC's decision not to transfer Mr. Pettis to the less-restrictive community facility, based on an arbitrary unwritten policy. Does RCW 71.09 violate procedural due process under the Fourteenth Amendment?

11. The court erred by admitting evidence based on the Structured Risk-Assessment – Forensic Version (SRA-FV) actuarial instrument.

12. The SRA-FV is not generally accepted in the relevant scientific community.

13. The SRA-FV is not capable of producing reliable results.

14. SRA-FV evidence is inadmissible under the *Frye* test.

15. The erroneous admission of SRA-FV evidence prejudicially affected the outcome of Mr. Pettis's trial.

ISSUE 4: Evidence based on novel scientific methodology is inadmissible unless it is generally accepted by the relevant professional community and capable of producing reliable results. Over Mr. Pettis's objection, the court admitted evidence based on a novel actuarial instrument that is not generally accepted in the psychiatric community and has only a 50% reliability rating. Did the court err by admitting evidence that does not pass the *Frye* test?

16. The trial court violated Wash. Const. art. IV, § 16 by commenting on the evidence.

17. The trial court's comment impermissibly expressed the judge's opinion regarding the truth value of a witness's testimony.

18. The trial judge's improper comment on the evidence prejudiced Mr. Pettis.

ISSUE 5: The Washington State Constitution prohibits judicial comments on the evidence. Here, the judge erroneously told jurors that the testimony of Dr. Fisher (Mr. Pettis's expert) was "not accurate." Did the trial court violate art. IV, § 16 of the state constitution?

19. Mr. Pettis was denied his Fourteenth Amendment due process right to the effective assistance of counsel.

20. Mr. Pettis was denied his statutory right to the effective assistance of counsel.

21. Defense counsel rendered deficient performance.

22. Mr. Pettis was prejudiced by his attorney's deficient performance.

23. Defense counsel should have rebutted inaccurate evidence presented by the state.

24. Defense counsel should have rehabilitated Dr. Fisher after the court made a misleading comment on the truth value of his testimony.

ISSUE 6: Defense counsel provides ineffective assistance by performing deficiently in a manner that prejudices the accused. Mr. Pettis's attorneys failed to rebut misleading evidence presented by the state and failed to rehabilitate Dr. Fisher

following a misleading judicial comment, leaving the jury with the impression that Mr. Pettis would be homeless and destitute if released. Was Mr. Pettis denied his statutory and Fourteenth Amendment right to the effective assistance of counsel?

25. The court erred by admitting Dr. Phenix's inaccurate testimony regarding Mr. Pettis's financial status if released.

26. Evidence that Mr. Pettis would allegedly have been homeless and penniless if released was not relevant under ER 401 and 402.

27. The probative value of Dr. Phenix's testimony that Mr. Pettis would allegedly have been homeless and penniless if released was outweighed by the danger of unfair prejudice and of misleading the jury under ER 403.

ISSUE 7: Evidence is inadmissible if it is irrelevant, or if its probative value is outweighed by the risk of unfair prejudice or of misleading the jury. Here, the court admitted inaccurate evidence that Mr. Pettis would have been homeless without a source of income if released. Was the evidence inadmissible under ER 402 and 403?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Upon his release from prison in 2001, Brent Pettis stipulated to his status as a sexually violent predator (SVP). RP 170, 670. For ten years thereafter, he voluntarily waived his right to petition for a release trial. During that time he actively engaged in sex offender treatment at the Special Commitment Center (SCC) on McNeil Island. RP 1110.

After years of treatment, Mr. Pettis had one of the best treatment portfolios at the SCC. RP 672; CP 64. His treatment assignments demonstrated detailed, thorough, and transparent work. CP 67. He discussed his offense cycle and risk factors openly and honestly. CP 66-67. He internalized the principles he learned and put them to use in his daily life. RP 670. He successfully employed treatment techniques to reduce his deviant arousal from 40% to 7% in one test.[1] CP 65.

In 2011, Mr. Pettis decided that the SCC's formal treatment program no longer benefited him. RP 674. His treatment provider described his decision to forego additional formal treatment as reasonable and measured, not reactionary. RP 674.

[1] Mr. Pettis also underwent a penile plethysmograph (PPG) test in August of 2013.[1] CP 415. The results showed that he had significantly higher arousal to consensual activity with adult men than to children. CP 415.

Mr. Pettis continued treatment on his own. RP 676. He authored a workbook of more than seventy pages. His workbook incorporated his Native American spiritual beliefs into what he'd learned during his ten years of formal treatment. RP 690, 693; CP 411.

In January 2013, Mr. Pettis petitioned the court for a release trial. CP 47-99. The court found that Mr. Pettis had presented *prima facie* evidence that his condition had so changed through treatment that he no longer met the definition of a sexually violent predator. CP 213. The court set his case for a release trial. CP 213.

By the time of trial, three different experts had evaluated Mr. Pettis. None of them thought that he needed to be confined at the SCC. CP 404; 425; 291-337. The state's expert witness, Dr. Amy Phenix, reported that Mr. Pettis could be safely treated in the community and that such treatment was in his best interest. CP 404. Dr. Phenix recommended that he be placed at the Secure Community Transition Facility (SCTF).[2] CP 404. Dr. Daniel Yanisch, who authored Mr. Pettis's annual review, agreed that Mr. Pettis's condition had changed such that he could be safely treated at the SCTF. CP 425. Mr. Pettis's own expert, Dr. Christopher

[2] The SCTF was created pursuant to a federal injunction, after a finding that the SCC's failure to provide meaningful treatment violated the constitution. CP 251. The federal court found that a meaningful "step-down facility" was constitutionally required. CP 251 (*citing Turay*).

Fisher, also opined that Mr. Pettis should not be confined at the SCC. CP 331.

Despite the expert consensus, SCC staff refused to place Mr. Pettis at the SCTF. This decision resulted from an unwritten policy prohibiting transfer of any resident not in formal treatment at SCC. CP 283.

At the beginning of trial, Mr. Pettis moved the court for an order transferring him to the SCTF. CP 246-51; RP 1327-1331. He argued that due process did not permit the state to keep him in total confinement under the circumstances. CP 246-51; RP 1328-29. The court denied Mr. Pettis's motion. RP 1354. The trial judge accepted the state's argument that the statute did not permit transfer to the SCTF unless the administration agreed in writing to house Mr. Pettis there. RP 1337, 1354.

After receiving Dr. Yanisch's annual review, Mr. Pettis sought to expand the scope of trial to include the question of release to a less-restrictive alternative. CP 100. He withdrew that motion after the state threatened to seek interlocutory review. RP 1327.

If he prevailed at trial, Mr. Pettis planned to remain at the SCC for approximately a month. During that time, a social worker from the Office of Public Defense would help him find housing. RP 1055-58. Upon release, he would have been eligible for SSI benefits. RP 1058.

At trial, Dr. Phenix, testified that Mr. Pettis had no release plan. RP 407, 546-47. She stated that he would have nowhere to go and no support system, which would cause him significant stress. RP 407, 546-47. Dr. Phenix opined that such stress would make Mr. Pettis more likely to commit future offenses. RP 406, 546-47.

Mr. Pettis moved in *limine* to exclude this testimony and objected to it when it occurred. RP 64-71; 219-61. He argued that the evidence was irrelevant, misleading, and would encourage the jury to commit Mr. Pettis based on poverty rather than on the statutory definition. RP 66-68, 224-39. He also pointed out that no scientific study had found that the risk of re-offense increased for homeless people. RP 219. The court admitted the evidence over Mr. Pettis's objection because Dr. Phenix had relied upon it in forming her opinion. RP 71, 261.

Mr. Pettis's expert witness, Dr. Christopher Fisher, outlined Mr. Pettis's plan to remain at the SCC for a month following release:

> AG: And I think that brings us -- is Mr. Pettis' housing plan something that you considered in forming your opinion?
>
> FISHER: In the sense that it was my understanding that he wasn't going to be homeless, that the Public Defender's Office has a social worker who makes arrangements for housing for people when they're leaving prison or the SCC.
>
> ...
>
> AG: Do you know what his housing arrangements are, if any?

> FISHER: His housing arrangements are that the social worker will find a place for him to go. They're not going to just kick out of the SCC with 20 bucks for a bus ticket.
>
> AG: This is speculation that they will find him a place to live?
>
> FISHER: No, that's the plan. I don't think that -- I mean we know that if he were to be released after this trial, he has to stay in the SCC for a minimum of 30 days for the community notification process to happen. So I -- I think that's enough time to obtain his SSI for disability, get him hooked up with medical insurance providers, and find a place to live with the assistance of the social worker.
>
> AG: Dr. Fisher, is there any plan in place for where he will live right now?
>
> FISHER: No, it -- it's pending the outcome of this trial.
> RP 1055-56.

After a brief conference with counsel, the court gave the following instruction to the jury, in the middle of Dr. Fisher's testimony:

> At this point, one comment I have to make is Dr. Fisher's last statements about what the law was in Washington and the housing, you are to disregard. It was not accurate.
> RP 1066.

Dr. Phenix based a significant portion of her opinion on the Structured Risk-Assessment – Forensic Version (SRA-FV) tool. RP 373-93. Mr. Pettis objected to any testimony about that tool, noting that the state could not lay a proper foundation because its reliability was so low.

RP 332. The court treated the objection as a *Frye* challenge[3] and permitted *voir dire* of the state's witness. RP 347.

On *voir dire*, Dr. Phenix testified that the SRA-FV had an inter-rater reliability score of 0.55. She explained that this meant that professionals evaluating an offender with the instrument would agree only 55% of the time. She described this result as "moderate" or "fair." RP 338- 339, 351. She said that some experts opine that an instrument's reliability should be at least 0.9 before it is used in a forensic setting. RP 338. Dr. Phenix admitted that a rating of 0.8 or above was desirable and that she hoped the SRA-FV's rating would go up over time. RP 338.

The court permitted the state to rely on the SRA-FV evidence.[4] RP 352.

The jury found that Mr. Pettis continued to qualify for civil commitment. RP 1293. The court ordered that he remain at the SCC, and Mr. Pettis sought review. CP 237; CP 240-42.

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[3] *Frye v. United States,* 293 F. 1013, 34 A.L.R. 145 (D.C.Cir.1923).

[4] Even with the SRA-FV evidence, no actuarial instrument placed Mr. Pettis's risk of re-offense above 50% within five years. RP 401. Instead, his risk was assessed at 17.4-23.1%. RP 401. The instrument assigning Mr. Pettis the highest risk assigned him a re-offense range of 52.2% within ten years, but only at the highest end of the very wide confidence interval. RP 508.

ARGUMENT

I. THE SCC ADMINISTRATION'S ROLE AS EXCLUSIVE GATEKEEPER TO THE SECURE COMMUNITY TREATMENT FACILITY VIOLATES DUE PROCESS BECAUSE IT PERMITS TOTAL CONFINEMENT EVEN WHEN PUBLIC SAFETY CAN BE ASSURED AND TREATMENT NEEDS ADDRESSED IN A LESS-RESTRICTIVE SETTING AVAILABLE THROUGH DSHS.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014).

B. The civil commitment scheme violates substantive due process as applied to Mr. Pettis because it is not narrowly tailored to achieve the acts purposes, and it permits deprivation of liberty based on arbitrary government action.

The Fourteenth Amendment right to due process includes a substantive component. *Lawrence v. Texas*, 539 U.S. 558, 565, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). This component has "fundamental significance in defining the rights of the person." *Lawrence,* 539 U.S. at 565. Substantive due process goes beyond mere procedural protections to actually limit the government's ability to operate in certain realms. *Id,* at 578; *Troxel,* 530 U.S. at 65. Substantive due process guarantees freedom

from restraint based on arbitrary government action. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

Freedom from physical detention is "the most elemental of liberty interests..." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Substantive due process therefore affords physical liberty the strongest of its protections: strict scrutiny. *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). Under strict scrutiny, the provisions of RCW 71.09 are unconstitutional unless narrowly tailored to further a compelling interest. *Id; In re Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

If a less restrictive alternative would serve the government's purpose, the legislature must use that alternative. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (applying strict scrutiny in the free speech context). Failure to use the least restrictive means renders a statute unconstitutional. *Id.*

The government has a compelling interest in protecting society and treating those who qualify for commitment under RCW 71.09. *Young*, 122 Wn.2d at 26 *superseded on other grounds as recognized by In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). But "not all sex predators present the same level of danger, nor do they require identical treatment conditions." *Young,* 122 Wn.2d at 47.

In order to comply with the constitution, a civil commitment scheme such as RCW 71.09 must include provisions for a step-down facility. This is so because "[m]ental health treatment, if it is to be anything other than a sham, must give the confined person the hope that if he gets well enough to be safely released, then he will be transferred to some less restrictive alternative." *See Turay v. Selig*, May 5, 2000 p. 11 (*contained within* Lieb, R, *After Hendricks: Defining Constitutional Treatment for Washington State's Civil Commitment Program*, Washington State Institute for Public Policy, 2003).[5]

The constitutionality of RCW 71.09 rests in part on the existence of the SCTF, Washington's step-down facility. However, the statute permits courts to conditionally release a person to the SCTF (pursuant to a least restrictive alternative (LRA) order) only if the SCTF agrees in writing to accept the detainee for conditional release. RCW 71.09.092(3). There is no statutory provision requiring the SCTF to accept a person even if all of the experts agree that housing at the SCTF would effectuate the purposes of the act. *See* RCW chapter 71.09 *generally*. There is, likewise, no provision permitting the court to order the SCTF to accept such a person. *Id.*

[5] Available at: http://www.wsipp.wa.gov/Reports/93

Accordingly, RCW 71.09 permits the SCC to hold a person in total confinement even when it is undisputed that s/he could be safely treated in the less restrictive SCTF. The court is powerless to step in if the gatekeepers at the SCC refuse to agree to the person's admission to the SCTF. This violates substantive due process as applied to Mr. Pettis for two reasons.

First, the SCC administration's role as exclusive gatekeeper to the SCTF permits total confinement based on arbitrary government action. *Foucha*, 504 U.S. at 80. Only an unwritten SCC policy prevents Mr. Pettis from being transferred to the SCTF. CP 283. The unwritten policy permits Mr. Pettis to be kept in total confinement despite the fact that he can be safely treated at the SCTF. The SCC administration's refusal to transfer Mr. Pettis to the SCTF despite the fact that their own internal review recommends the step constitutes arbitrary government action. This arbitrary action violates Mr. Pettis's right to due process. *Foucha*, 504 U.S. at 80.

Second, the scheme is not narrowly tailored to achieve its purpose. *Playboy Entm't Grp., Inc.*, 529 U.S. at 813. No expert believes that Mr. Pettis requires total confinement. Public safety can be assured and Mr. Pettis's treatment needs can be met at the SCTF. Even so, the SCC administration's gate-keeping role allows him to be kept in total

confinement pursuant to unwritten policies unrelated to the purposes of the act. This violates Mr. Pettis's right to due process because it permits the government to completely deprive him of liberty in a manner that is not narrowly tailored to achieve a compelling interest. *Id.; Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

The SCC administration's role as exclusive gatekeeper to the SCTF violates Mr. Pettis's right to due process because it permits his total confinement based on arbitrary government action. *Foucha*, 504 U.S. at 80. The statutory scheme, which permits total confinement even when a person can be safely treated at the SCTF, violates due process because it is not narrowly tailored. *Glucksberg*, 521 U.S. at 721. This court must reverse the lower court's denial of Mr. Pettis's motion to be placed at the SCTF. The case must be remanded with instructions to order the SCC to transfer Mr. Pettis to the SCTF.

C. The SCC administration's role as exclusive gatekeeper to the SCTF violates procedural due process as applied to Mr. Pettis because it does not provide a process through which he can seek review of his total confinement.

Civil commitment procedures must also comport with procedural due process. *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. The process due under the Fourteenth Amendment depends on a balance

of (1) the private interest affected by governmental action; (2) the risk of erroneous deprivation of fundamental rights; and (3) the government's interest, including any fiscal burden. *Addington*, 441 U.S. at 425 (*citing Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

As outlined above, the statutory scheme does not permit a person in Mr. Pettis's situation to move from the total confinement of the SCC to the less restrictive SCTF unless the agency that runs both facilities agrees in writing to house him at the SCTF. RCW 71.09.092(3). Because of an unwritten policy, the administration will not agree to move Mr. Pettis to the SCTF even though it is undisputed that he can be safely treated in that environment. There is currently no mechanism in place for Mr. Pettis to seek review of the administration's refusal to house him at the SCTF.

The *Mathews* factors weigh in favor of judicial review of the SCC administration's refusal to transfer Mr. Pettis to the SCTF. First, Mr. Pettis's private interest in freedom from unreasonable confinement is extremely high. *See Addington,* 441 U.S. at 425.

Second, the risk of the erroneous deprivation of Mr. Pettis's liberty resulting from the SCC administration's refusal to transfer him is also high. As demonstrated by this case, the current procedure permits the administration to refuse transfer to the less-restrictive SCTF even when

every expert who has examined Mr. Pettis opines that transfer is appropriate. The SCC administration's role as the exclusive gatekeeper to the relative freedom of the SCTF, subject to whims and unwritten policies, creates a significant risk of erroneous deprivation of liberty.

Finally, the state has no interest in holding people in total confinement when doing so no longer serves treatment needs or public safety. *See Addington,* 441 U.S. at 426. The cost of an additional review process would be minimal. Indeed, Mr. Pettis's unique circumstances are unlikely to recur in many cases.

All three *Mathews* factors weigh in favor of judicial review when the SCC unreasonably refuses to transfer a person to the SCTF. *Mathews*, 424 U.S. at 335. The court violated Mr. Pettis's right to procedural due process by declining to review the SCC administration's refusal to transfer him the SCTF. *Mathews*, 424 U.S. at 335; *Addington*, 441 U.S. at 425. The trial court's denial of his motion must be reversed, and the case remanded with instructions to order the SCC to transfer Mr. Pettis to the SCTF. *Id.*

II. THE COURT UNREASONABLY ALLOWED DR. PHENIX TO TESTIFY BASED ON A NOVEL RISK ASSESSMENT THAT DOES NOT MEET THE *FRYE* TEST.

A. Standard of Review.

Admissibility of novel scientific evidence under the *Frye* test is reviewed *de novo*. *Det. of Ritter v. State*, 177 Wn. App. 519, 522, 312 P.3d 723 (2013).

B. The SRA-FV is not generally accepted in the relevant scientific community.

Washington courts assess the admissibility of novel scientific evidence under *Frye*. *Ritter*, 177 Wn. App. at 522. Expert testimony applying novel methodology is inadmissible under the *Frye* test unless:

> (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) *review denied,* 179 Wn.2d 1019, 318 P.3d 280 (2014). Improper admission of evidence requires reversal if there is a reasonable probability that it materially affected the outcome of the proceeding. *State v. Acosta*, 123 Wn. App. 424, 438, 98 P.3d 503 (2004).

Actuarial tools and clinical evaluations for assessing the risk of persons confined under RCW 71.09 are admissible under *Frye*. *Ritter*, 177 Wn. App. at 523. But the Structured Risk-Assessment – Forensic Version (SRA-FV) is "neither purely actuarial nor purely clinical." *Id.* Because of this, the SRA-FV presents a novel scientific methodology that must be analyzed under *Frye*. *Id.* at 525. Prior to *Ritter,* no state or federal court had addressed the admissibility of the SRA-FV in a published opinion. *Id.*[6]

The SRA-FV is a "structured clinical judgment tool" for synthesizing "stable dynamic risk factors" and "static risk factors" measured by actuarial instruments. *Ritter*, 177 Wn. App. at 523. The tool has an inter-rater reliability rating of 0.55. This means that two experts applying the SRA-FV will agree only 55% of the time. RP 338, 486. Furthermore, the SRA-FV does not account for age, one of the most accurate dynamic predictors of recidivism. RP 504, 804.

At the time of Mr. Pettis's trial, the SRA-FV had not been published in a peer-reviewed journal. RP 337. California temporarily adopted the SRA-FV as its official dynamic risk assessment in 2011, but abandoned it two years later for unspecified reasons. *Ritter*, 177 Wn. App.

[6] There does not appear to be any authority regarding the admissibility of the SRA-FV published in the months since the *Ritter* opinion.

at 524. Due in part to its low inter-rater reliability, the SRA-FV's utility in a forensic setting has been questioned by some forensic psychologists. RP 487. A basic mathematical assumption underlying the SRA-FV is also subject to challenge by experts. *Ritter*, 177 Wn. App. at 524 (*citing* Richard Wollert & Elliot Cramer, *The Constant Multiplier Assumption Misestimates Long–Term Sex Offender Recidivism Rates,* 36 Law & Hum. Behav. 390 (2012)). At least one peer-reviewed article has opined that "...clinicians who choose to conduct SRA-FV assessments would be hard pressed to justify its use statistically and ethically when selecting Static-99R reference groups, and for that matter, in other forensic applications." RP 351.

Here, the trial court improperly permitted testimony based on the SRA-FV. The tool is not generally accepted by the relevant scientific community and is not "capable of producing reliable results." *Lake Chelan Shores*, 176 Wn. App. at 175. The SRA-FV's low reliability rating, by itself, renders it inadmissible under *Frye*. *Lake Chelan Shores*, 176 Wn. App. at 175. Even Dr. Phenix acknowledged that the scientific community generally requires a reliability score of either 0.8 or 0.9 for forensic use. RP 338, 965. Her "hope" that the SRA-FV's reliability rating would improve over time is insufficient to cure the tool's proven reliability of only 0.55.

The court admitted the evidence based in part on California's adoption of the SRA-FV for persons on probation or parole. RP 342, 346. As noted by the *Ritter* court, however, California later abandoned the tool. *Ritter*, 177 Wn. App. at 524. The court also analogized the SRA-FV to disagreements about different types of cancer treatments. RP 352. But the SRA-FV is not like FDA-approved cancer treatments. Instead, it is a novel, unpublished tool with reliability of just over 50%. This was not a matter of reasoned disagreement among experts, but of a tool that is not generally accepted and that has not proven reliable.

Mr. Pettis was prejudiced by the improper admission of the SRA-FV evidence. *Acosta*, 123 Wn. App. at 438. Dr. Phenix testified at length about her analysis of Mr. Pettis based on the SRA-FV. RP 373-93. She also used that analysis to assign Mr. Pettis to the "high risk – high needs group" for analysis under the Static-99R actuarial instrument. RP 398-401. There is a reasonable probability that the court's improper admission of unreliable "scientific" evidence affected the outcome of Mr. Pettis's trial. *Acosta*, 123 Wn. App. at 438.

The court erred by admitting extensive evidence based on a novel and unreliable instrument that does not pass the *Frye* test. *Lake Chelan Shores*, 176 Wn. App. at 175. Mr. Pettis's commitment must be reversed and the case remanded for a new trial.

III. THE COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASH. CONST. ART. IV, § 16.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Dellen*, 179 Wn. App. at 626. A comment on the evidence "invades a fundamental right" and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

B. The court commented on the evidence by incorrectly instructing jurors that a portion of Dr. Fisher's testimony was "not accurate."

Under art. IV, § 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, § 16. A judicial comment is presumed prejudicial and is only harmless if the record affirmatively shows no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). This is a higher standard than that normally applied to constitutional errors. *Id.*

A trial court's comment on the evidence requires reversal if the court's "feeling... as to the truth value of the testimony of a witness has been communicated to the jury." *In re Det. of Pouncy*, 144 Wn. App. 609, 621, 184 P.3d 651 (2008) *aff'd,* 168 Wn.2d 382, 229 P.3d 678 (2010).

Here, the trial court improperly commented on the evidence. The comment came after Dr. Fisher's testimony regarding Mr. Pettis's plans should he prevail at trial. RP 1055-56. Dr. Fisher accurately described Mr. Pettis's intent to voluntarily remain at SCC for 30 days after release, and his plan to work with a social worker to seek housing and apply for SSI. Dr. Fisher mistakenly told jurors that Mr. Pettis would have been required to remain at the SCC for thirty days after his release. RP 1055-56; RP 1057-58.

Following this testimony and after brief argument, the court gave the following instruction:

> At this point, one comment I have to make is Dr. Fisher's last statements about what the law was in Washington and the housing, you are to disregard. It was not accurate.
> RP 1066.

By referencing "Dr. Fisher's last statements," and referring broadly to "the housing," the court erroneously suggested that Dr. Fisher had made a mistake about more than just "what the law was in Washington." RP 1066. Instead, the judge conveyed his opinion that Dr. Fisher was "not accurate" about Mr. Pettis's plan to voluntarily remain at the SCC, to work with a social worker to obtain housing, and to seek SSI benefits following his release.

In fact, Mr. Pettis did intend to remain at the SCC. As Dr. Fisher indicated, Mr. Pettis planned to work with an OPD social worker to find housing and obtain SSI benefits. RP 1055-58. Dr. Fisher's only mistake was in suggesting that the law *required* Mr. Pettis to do so. The court did not limit its instruction to this misstatement. Instead, the court's broad instruction improperly informed the jury that all of "Dr. Fisher's last statements" were "not accurate." RP 1066. The court's comment directly implicated the "truth value" of the defense expert's testimony and requires reversal. *Pouncy*, 144 Wn. App. at 621.

The state cannot overcome the presumption of prejudice in this case. *Levy*, 156 Wn.2d at 725. The state's expert relied heavily on her assumption that Mr. Pettis would be homeless and destitute if he were released. RP 407, 546-47. She said that the stress of that situation would make him more likely to commit future offenses. RP 407, 546-47. The court unfairly and erroneously undermined Mr. Pettis's response by describing as "not accurate" Dr. Fisher's testimony about Mr. Pettis's plan to remain at the SCC and to work with a social worker. RP 1066. This was a direct comment on his veracity concerning a central issue in the case. The court's comment on the evidence prejudiced Mr. Pettis. *Levy*, 156 Wn.2d at 725.

The court violated Mr. Pettis's constitutional rights by making an impermissible comment on the evidence. *Levy*, 156 Wn.2d at 724-23. Mr. Pettis's commitment must be reversed and his case remanded for a new trial. *Id.* at 727.

IV. MR. PETTIS WAS DENIED HIS STATUTORY AND DUE PROCESS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

The *Strickland* standard[7] applies to ineffective assistance claims in proceedings under RCW 71.09. *In re Det. of Stout*, 128 Wn. App. 21, 27, 114 P.3d 658, 661 (2005) *aff'd,* 159 Wn.2d 357, 150 P.3d 86 (2007). Reversal is required if counsel's deficient performance prejudices the accused person. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend. VI; *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *Id.*

[7] *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a); *See also e.g. Stout*, 128 Wn. App. at 28.

B. Counsel unreasonably failed to rebut Dr. Phenix's misleading claim that Mr. Pettis would be homeless and destitute if released.

The SCC will generally hold a detainee for 30 days after release, to carry out community sex offender notification. RP 1055-58. Mr. Pettis and his attorneys intended to take advantage of that 30-day period. During that time, he planned to work with a social worker from the state Office of Public Defense to find low income housing and apply for SSI benefits. RP 1055-58.

The state's expert testified, however, that she based her opinion in part on her understanding that Mr. Pettis had no release plan. RP 407, 546-47. She opined that his lack of anywhere to go or any source of income would make him more likely to reoffend. RP 407, 546-47.

Nonetheless, defense counsel failed to elicit testimony about Mr. Pettis's plan. *See* RP *generally.* Nor did counsel ever explain to the jury why Mr. Pettis would have difficulty securing housing or a source of income while he remained under indefinite court order committing him to the SCC. RP 249-50, 258; *See* RP *generally.*

Mr. Pettis's expert offered his plan in response to one of the state's questions on cross-examination. RP 1066. But the court erroneously responded by instructing the jury that his comments about Mr. Pettis's housing were "not accurate."[8] RP 1066. Defense counsel took no steps to rehabilitate the expert on the issue or to clarify that his understanding of the plan was accurate. RP 1066-67.

Defense counsel provided deficient performance by failing to rebut Dr. Phenix's testimony and by failing to rehabilitate Dr. Fisher. *Kyllo*, 166 Wn.2d at 862. Although counsel initially moved to prevent the state's expert from testifying about Mr. Pettis's lack of a formal release plan, the motion was denied. RP 64-71, 219-59. Following the court's ruling on that motion, an objectively reasonable attorney would have introduced evidence outlining Mr. Pettis's plan. Similarly, after the court's comment on the evidence, counsel should have made clear that Mr. Pettis planned to remain at the SCC, to work with a social worker, to obtain housing, and to apply for SSI benefits. Counsel's failure to introduce this evidence fell below an objective standard of reasonableness and cannot be justified as a tactical decision. *Id.*

[8] As argued above, this instruction by the court represented an impermissible comment on the evidence.

Mr. Pettis was prejudiced by counsel's deficient performance. *Id.* The jury was left with the mistaken impression that release would leave him homeless and destitute. The state's expert testified that such a scenario would increase his chance of re-offense. RP 407, 546-47. The state relied on that opinion in closing argument. RP 1228-29. There is a reasonable probability that his attorneys' error affected the outcome of the proceedings. *Id.*

Mr. Pettis was denied his statutory and due process right to the effective assistance of counsel. *Kyllo*, 166 Wn.2d at 862. His commitment must be vacated and his case remanded for a new trial. *Id.*

V. THE STATE'S RELIANCE ON IRRELEVANT AND MISLEADING EVIDENCE PREJUDICED MR. PETTIS.

A. Standard of Review.

Evidentiary errors are reviewed for abuse of discretion. *In re Det. of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). A court abuses its discretion if its decision if manifestly unreasonable or based on untenable grounds. *Id.*

B. The misleading evidence that Mr. Pettis would be homeless and penniless upon his release was inadmissible under ER 402 and 403.

Irrelevant evidence is not admissible. ER 401, 402. Even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or of misleading the jury. ER 403. The court must balance the probative value and risk of unfair prejudice on the record. *Acosta*, 123 Wn. App. at 433.

An evidentiary error requires reversal if, within a reasonable probability, it materially affected the outcome of the trial. *Acosta*, 123 Wn. App. at 438. The prejudice resulting from the introduction of inadmissible evidence increases if the testimony is "thorough, systematic, and repeated" rather than merely mentioned in passing. *Post*, 170 Wn.2d at 315.

Here, the court erred by admitting Dr. Phenix's testimony that Mr. Pettis would be homeless and destitute if released. The court ruled that the evidence was admissible because Dr. Phenix relied on it when forming her opinion. RP 258. But expert testimony must still meet the admissibility thresholds at ER 402 and 403. *See e.g. State v. Lewis*, 141 Wn. App. 367, 388, 166 P.3d 786 (2007).

The evidence of Mr. Pettis's economic status upon his release was irrelevant. ER 401, 402; *Post*, 170 Wn.2d at 312. Even if it had been true

that release would render Mr. Pettis homeless, that status did not make him more likely to meet the definition at RCW 71.09.020(18). The evidence was inadmissible under ER 401 and 402.

Additionally, any probative value of the evidence was substantially outweighed by the risks of unfair prejudice and of misleading the jury. Mr. Pettis's plan was, in fact, to secure housing and a source of income before leaving the SCC. RP 1055-58. Nonetheless, the evidence that he would have nowhere to live and no money encouraged the jury to continue his commitment based on the fact that it is impossible to secure housing and public benefits while confined at the SCC. If the jury were permitted to consider the person's financial situation in all 71.09 cases, only people with access to private funds would be released. Because the evidence was not an accurate portrayal of Mr. Pettis's situation if released, it also raised a high risk of misleading and confusing the jury. The evidence of Dr. Phenix's misconception that Mr. Pettis would have been homeless and broke if released was inadmissible under ER 403.

There is a reasonable probability that the erroneous admission of this evidence affected the outcome of the trial. *Acosta*, 123 Wn. App. at 438; *Post*, 170 Wn.2d at 315. Dr. Phenix discussed the issue at length. RP 407, 546-47. She claimed that Mr. Pettis's alleged future homelessness would make him more likely to reoffend. RP 407, 546-47.

The state repeated that opinion in closing. RP 1228-29. The systematic and repeated nature of the irrelevant and misleading evidence prejudiced Mr. Pettis. *Post*, 170 Wn.2d at 315.

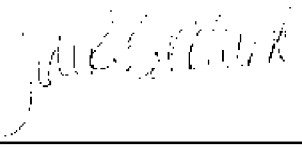
The trial court erred by admitting evidence that was inadmissible and whose probative value was far outweighed by the risk of unfair prejudice and of misleading the jury. ER 402, 403; *Post*, 170 Wn.2d at 315. Mr. Pettis's case must be remanded for a new trial. *Id.*

CONCLUSION

The SCC administration's role as exclusive gatekeeper to the SCTF violates substantive and procedural due process as applied to Mr. Pettis. The court made an improper comment on the evidence by telling the jury that Mr. Pettis's expert's testimony was "not accurate." The court erred by admitting expert testimony based on a novel and unreliable "scientific" instrument that does not pass the *Frye* test. Mr. Pettis was denied his due process and statutory right to the effective assistance of counsel. The state relied on evidence that was irrelevant and whose probative value was outweighed by the risk of unfair prejudice and of misleading the jury. The court's order committing Mr. Pettis to the SCC must be reversed.

Respectfully submitted on June 30, 2014,

BACKLUND AND MISTRY



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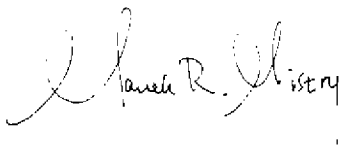

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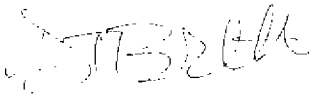

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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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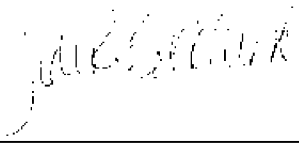
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 30, 2014.



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