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Division III
State of Washington

NO. 30845-6-III

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

In re the Detention of:

STEVEN RITTER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. SUMMARY OF THE ARGUMENT

The Structured Risk Assessment – Forensic Version (SRA-FV) is an assessment tool that provides evaluators of sexual offenders a structured method for considering risk factors that they formerly considered using only their clinical judgment. The SRA-FV incorporates factors empirically correlated with sexual recidivism, weights them according to their relative correlations, and allows evaluators to weight those factors based on empirical research rather than subjective clinical judgment. 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. In fact, the developers of the Static-99 recommend use of the SRA-FV in sex offender evaluations. 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.

After his commitment as a sexually violent predator, Appellant Steven Ritter challenged on appeal, among other things, the State's expert's use of the SRA-FV without it first being subjected to a hearing pursuant to *Frye v. United States*.¹ This Court remanded to the trial court for an evidentiary hearing on that issue alone. *In re the Detention of Ritter*,

¹ 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923).

177 Wn. App. 519, 312 P.3d 723 (2013). After conducting the evidentiary hearing, the trial court entered detailed findings of fact and conclusions of law, and found that the SRA-FV satisfied the requirements of *Frye* as well as the evidentiary requirements of ER 702 and ER 703. CP 1726-30. The court found 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. The trial court further found that a structured analysis of risk factors is supported by a scientific theory generally accepted in the scientific community. 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 1729-30. Appellant now argues to this Court that the SRA-FV is inadmissible because it does not purport to be a perfect predictor of sexual recidivism. As the trial court correctly found, Ritter's arguments go to weight and not admissibility. The findings of the trial court on remand should be affirmed, and Ritter's commitment as a sexually violent predator (SVP) should be upheld.

Additionally, Division II of this Court has recently determined 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 the Detention of Brent Pettis*, ___ Wn. App. ___, 352 P.3d 841 (2015). This Court should come to the same conclusion.

II. ISSUE

Whether, after conducting a lengthy evidentiary hearing, the trial court correctly determined that the SRA-FV satisfied the evidentiary requirements set forth in *Frye v. United States*.

III. RELEVANT FACTS

A. Procedural History

Steven Ritter is a severely psychopathic pedophile whose first known sexual assault occurred when he was only 14. Ritter dragged an eight-year-old girl out of a piano practice room in her church, sexually assaulted her, threw her down a flight of stairs, sexually assaulted her a second time as she lay face down in a snow bank, and then threatened to kill her if she told anyone what had happened. RP at 640-646. Not long thereafter, Ritter sexually assaulted both a seven-year-old boy and Ritter's 46-year-old aunt, who reportedly had the mental capacity of a 10-year-old. RP at 732. Ritter was convicted for the offense against his aunt and, after spending roughly two and a half years in sex offender treatment, was released. Less than a year later, he sexually assaulted a nine-year-old girl

in a public library. RP at 629-638. Ritter later described the child to the State's expert, Dale Arnold, Ph.D., as "a damn little slut," accusing her of having "come on" to him. RP at 742. Ritter was convicted of first degree child molestation for this offense. Ex. 9.

Prior to Ritter's release from prison in February of 2007, the State filed a petition alleging that he is a SVP. CP at 1-53. Trial began in January 2012. Several days into the trial, the trial court heard Ritter's motion for a *Frye* hearing on the SRA-FV. RP at 809.² Ritter's motion, when originally filed, was unsupported by any declarations, and at no point during the hearing on that motion did Ritter refer to any supporting declarations. CP at 633-70; RP at 572-597.³ The trial court rejected Ritter's motion on both procedural and substantive grounds, ruling first that, since Ritter's counsel had known for almost two months that Dr. Arnold intended to refer to the SRA-FV, the timing of Ritter's motion was not reasonable. RP at 596. In addition, noting that the SRA-FV is a "statistical analysis," the court ruled that the Washington State Supreme court had addressed that issue "squarely" in *In re Thorell*, 149 Wn.2d 724,

² A copy of the SRA-FV can be found at CP 791. A discussion of its scoring is at RP 806-22. The SRA-FV is a tool used to evaluate "stable dynamic risk factors," or factors which, while changeable over time, will not change quickly. RP at 783,791. It was developed by Dr. David Thornton, one of the developers of the Static-99.

³ Ritter does appear to have filed an unsigned, undated "declaration," purportedly by Dr. Richard Wollert, after the hearing ended. CP at 820-26. These documents were filed at 4:02 PM (CP at 820), whereas the hearing began sometime after 2:30 PM. RP at 572.

72 P.3d 708 (2003). RP at 596. The court found that testimony regarding the SRA-FV is admissible under ER 702 and 703 because it “will be helpful to the jury and does have a scientific basis.” *Id.* at 596-97.

At trial, Dr. Arnold testified to Ritter’s scores on various actuarial instruments indicating risk for re-offense. *Ritter*, 177 Wn. App. at 521. Among other tools, Dr. Arnold used the SRA-FV to measure whether Ritter presented with dynamic risk factors, and to select the appropriate Static-99R reference group for comparison. *Id.* at 521; RP 781-83, 809-22. After a five-day trial, a unanimous jury determined that Ritter was a SVP, and the trial court ordered his commitment. CP at 999, 1000.

Ritter timely appealed. CP at 1208-11. He argued, *inter alia*, that the trial court should have granted his request for a *Frye* hearing on the SRA-FV. This Court, discussing the origins of the SRA-FV, characterized it as “neither purely actuarial nor purely clinical.” 177 Wn. App. at 523. The Court entered an interlocutory order remanding the matter to the trial court for a *Frye* hearing on the SRA-FV. *Id.* at 521.

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B. Risk Assessment In SVP Evaluations

SVP proceedings under RCW 71.09 require assessment of a person's risk of sexually reoffending.⁴ The WSSC long ago approved the use of both clinical judgment and actuarial instruments in such risk assessments, and the *Thorell* Court held that neither method required a *Frye* hearing. 149 Wn.2d at 756. 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. RP 12/9/14 at 65-69.

The actuarial instrument that has been the industry standard for more than 16 years has been 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.⁵ 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

⁴ 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(18) (emphasis added)

⁵Jackson, 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.

recidivism risk.⁶ Examples of such factors are treatment participation and progress, stability of release plan, and intimacy deficits.

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 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 this clinical judgment with

⁶ 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

a more stable and analytic framework. 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. 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.⁷

As our Supreme Court 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.

⁷ The irony in this appeal is that a method that is less scientifically based has been approved by the State Supreme Court, but when researchers in the field tried to make the actuarial assessment more complete, Ritter claimed that the manner did not satisfy Frye. If Dr. Arnold had relied merely on his clinical judgment in reaching the same opinion he reached by applying the SRA-FV, there would have been no basis for a *Frye* hearing.

C. The Evidentiary Hearing On Remand

The Hon. David Elofson conducted the detailed *Frye* hearing on December 9-11, 2014. (RP 12/9/14, 12/10/14, 12/11/14). The State submitted a declaration by Amy Phenix, Ph.D., who explained the development, general acceptance and widespread use of the SRA-FV in the field of sex offender evaluation and assessment. CP 1396-1402. In addition to her declaration, Dr. Phenix testified at length at the hearing. RP 12/9/14 at 18-189; RP 12/10/14 at 4-36. Dr. Phenix is a clinical psychologist specializing in forensic psychology. RP 12/9/14 at 19. She has been working with sex offenders since 1989. CP 1396. Since 1995 she has been evaluating sexual offenders, and has been conducting SVP evaluations in Washington State since 2001. RP 12/9/14 at 21-22. She has been supervising and training other evaluators in the field since the mid-1990s. RP 12/9/14 at 22. She has been qualified as an expert in California, Washington, New Hampshire, Florida, Iowa, Wisconsin, Illinois, Massachusetts, Missouri, Minnesota, North Carolina and Arizona. CP 1397. Dr. Phenix testifies for both for the state and the defense. CP 1397. She has conducted over 450 SVP evaluations. CP 1397. Additionally, she has supervised thousands of evaluators conducting sex offender evaluations. RP 12/9/14 at 24. Dr. Phenix has testified in numerous *Frye* and/or *Daubert* hearings across the country on the admissibility of the

various actuarial and risk assessment tools and the methodology in sex offender risk assessment. CP 1397.

Dr. Phenix is a member of the Association for Treatment of Sexual Abusers (ATSA) where she has presented on risk assessment of sex offenders numerous times. She is also a member of the American Psychological Association, and several California Associations where she is based. RP 12/9/14 at 25. Dr. Phenix described the lengthy procedures involved in conducting an evaluation to determine if someone meets the criteria as a SVP, including the detailed risk assessment and use of actuarial instruments. RP 12/9/14 at 27-31. It is undisputed in the field that both static and dynamic risk factors need to be considered in sex offender evaluations. RP 12/9/14 at 95. The accepted practice in the field is to use both a static actuarial instrument and a structured measure of dynamic risk. CP 1400. Actuarials apply statistical weight to empirically derived factors, so that clinical judgment is not used to weigh those factors. 12/9/14 at 31. Dr. Phenix described an actuarial instrument as “a list of static risk factors that predict sexual re-offense.” RP 12/9/14 at 29. Static factors are historically based and do not change, thus, they provide a “baseline of risk.” RP 12/9/14 at 29. Evaluators add up the total risk score on the Static-99 and obtain “absolute probabilities” of sexual reconviction. RP 12/9/14 at 31. Dr. Phenix related the history of the development of risk

assessment, beginning with clinical judgment in the 1960s and 1970s, to the current state of actuarially-centered risk assessments. RP 12/9/14 at 32-35. She described the statistical relationship with risk factors that have been correlated with sexual recidivism. RP 12/9/14 at 36-38. Dr. Phenix testified that using several tests could give “incremental validity” to the test results, meaning there is a more accurate determination of the probability of sexual reoffending. RP 12/9/14 at 37-38. The instruments used in the field of sex offender evaluations all have “moderate” predictive accuracy. RP 12/9/14 at 39.

Experts in the field recognized that actuarials were thus limited, because once the baseline risk level was established, there was no way to measure a change in risk. Research indicates that risk assessment is improved when empirically-validated dynamic risk factors are incorporated into a risk assessment using a structured method. CP 1398. Thus, researchers in the field looked to “dynamic” or changeable risk to better measure current risk. RP 12/9/14 at 30. Dynamic risk factors are generally the targets of sex offender treatment. RP 12/9/14 at 39. The SRA-FV incorporates dynamic risk factors that have been correlated with recidivism to increase the predictive validity of the Static-99. RP 12/9/14 at 38; 40-41. Research on dynamic factors began in 2002, but was not definitive until a meta-analysis in 2010 determined which factors should

be included in a dynamic risk assessment tool. RP 12/9/14 at 41.⁸ Dr. Phenix testified that research has demonstrated that incorporating “long term vulnerabilities” or “needs” into risk assessment results in a better prediction. RP 12/9/14 at 43. She testified that she has been using dynamic risk factors in her evaluations for a number of years, but the tool first designed for this assessment (the Stable 2000 and Stable-2007) was not designed for an in-custody population, and the candidates for SVP civil commitment are in custody. RP 12/9/14 at 44-45. The items included on the SRA-FV are not new, and their correlation with recidivism has been studied for many years. RP 12/9/14 at 44. All of the items on the SRA-FV have been found to predict sexual recidivism. RP 12/9/14 at 142. Dr. Phenix summarized the development of the SRA-FV:

[T]he Structured Risk Assessment was really a methodology of conducting dynamic risk proposed by Dr. David Thornton, who’s the author of the SRA-FV. And he basically said that when we conduct dynamic risk assessments, we need to look at four broad categories of risk factors, and he outlined those in the Structured Risk Assessment... . [B]ut what Dr. Thornton established is in order to do a comprehensive risk assessment, you need to look at this category of risk factors that are dynamic.

RP 12/9/14 at 45-46 (emphasis added). She stated that the initial research looking at dynamic risk factors which began in 2002 was confirmed in the

⁸ Mann, R.E., Hanson, R. K., and Thornton, D. (2010) *Assessing Risk for Sexual Recidivism: Some Proposals on The Nature of Psychologically Meaningful Risk Factors*. Sexual Abuse: A journal of Research and Treatment.

2010 meta-analysis. RP 12/9/14 at 47. Dr. Phenix described how to use the SRA-FV by scoring the different domains (sexual interests, relationship style, self-management). RP 12/9/14 at 47-53. She testified that the individual items on the SRA-FV were shown to be predictive of sexual re-offense in the 2010 meta-analysis by Mann, Hanson, and Thornton. RP 12/9/14 at 48. Each of the factors is rated on a scale of zero – two: zero (not present); one (some evidence of the item); and two (strongly present). RP 12/9/14 at 49. The SRA-FV has a Coding Manual that gives operational definitions for each possible score, as well as the individual factors. RP 12/9/14 at 49; 52. Anyone who uses the SRA-FV needs to be trained on how to use the instrument and they need to attend updated trainings. RP 12/9/14 at 55. The SRA-FV provides a structured method for evaluators to consider dynamic risk as part of a comprehensive risk assessment, rather than the evaluator relying on their own clinical judgment to assign a value to the factors. CP 1399. The SRA-FV is not a psychological test, and unlike psychological testing, it can be administered by probation officers, parole officers, and other non-psychologists. Nor is it listed in the Mental Yearbook which lists all psychological tests. RP 12/9/14 at 93-94. Dr. Phenix explained how an evaluator obtains a weighted score for the items, and the total score. RP 12/9/14 58-59. The total score is not a probability of risk, but equates to a level of dynamic

risk. RP 12/9/14 at 59. The Static-99 has four “normative” groups which have differing probabilities of re-offense associated with different scores. 12/9/14 at 62-64. The SRA merely aids in determining which normative group on the Static-99 to use:

[W]hat’s meaningful about the SRA-FV is that the higher the level of dynamic risk factors or the total score on SRA-FV, the higher the absolute probability of sexual reoffense for that individual, okay. So I would look at what’s called the LONI Level of Need Index, *which is an index that tells you which group of norms to use for Static-99 in order to get the best estimate of the probability of sexual reconviction* for that offender over five or ten years. So this instrument I use in conjunction with Static-99R.

12/9/14 at 60.

The SRA-FV does not have an independent set of probabilities associated with recidivism, but the score from SRA-FV “tells you which of the norms to use for Static-99 that already have probabilities of sexual reoffense established for each cutoff score.” RP 12/9/14 at 61. The developers of the Static-99 (Karl Hanson and David Thornton) are the ones who direct that the SRA-FV be used in conjunction with the Static-99. RP 12/9/14 at 96. Prior to 2010, evaluators used clinical judgment to select the Static-99 normative group. RP 12/9/14 at 69. The SRA-FV looks at research-derived risk factors that are dynamic in nature and apply to incarcerated individuals to give more information about the true probability of risk for sexual re-offense. RP 12/9/14 at 76. The SRA-FV

was first presented at ATSA in 2010 and then a peer-reviewed paper on the instrument was published in 2013. RP 12/9/14 at 77. The peer-review process means that other experts have been tasked with reviewing the research to make sure it meets the standard in the relevant field of science. After peer-reviewed publication, the data and research is accepted by professionals in the field. RP 12/9/14 at 77-78. The 2010 Meta-analysis confirmed what dynamic risk factors were relevant, and those were included in the SRA-FV. RP 12/9/14 at 78. Using the SRA-FV to select the normative group on the Static-99 improves the predictive accuracy of the Static-99. RP 12/9/14 at 96-97; 99-100; 153. Dr. Phenix testified that evaluators using clinical judgment to consider dynamic risk either underestimate or overestimate the risk, which is why it is important to use the structure of the SRA-FV. RP 12/9/14 at 97. Dr. Phenix reiterated on cross-examination that despite the limitations of the instrument, it increased predictive accuracy of evaluations for sexual recidivism. RP 12/9/14 at 130-33. Dr. Thornton also published the results of the improved predictive accuracy and incremental validity in the 2013 paper. RP 12/9/14 at 135; 138. (Thornton, D. & Knight, R. (December 2013). *Construction and Validation of SRA-FV Need Assessment*, Sexual Abuse: A Journal of Research and Treatment.)

The court delivered an oral ruling on December 19, 2014 finding that the SRA-FV satisfied the *Frye* standard, as well as ER 702 and ER 703. RP 12/19/14 at 3. The court subsequently entered detailed Findings of Fact and Conclusions of Law. CP 1726-30. Specifically, Judge Elofson found that there is a general scientific consensus that “dynamic risk factors” are important, and that the SRA-FV provides a structured approach to measuring them. RP 12/19/14 at 4. Judge Elofson further found that the SRA-FV had been peer-reviewed in a published article, was being presented in trainings of evaluators throughout the country, and was used extensively by practitioners evaluating sexual offenders. He further found that the SRA-FV had been validated and cross-validated. *Id.* at 5-6. Judge Elofson entered an order on January 8, 2015 determining that the SRA-FV satisfied the *Frye* evidentiary standards as well as the evidentiary standards of ER 702 as being helpful to the jury and ER 703 as generally accepted in the community of experts who evaluate sex offenders and assess their risk of sexual recidivism. CP 1730.

IV. ARGUMENT

A. 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.

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

As a preliminary matter, 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. Restr. 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).

C. The Trial Court Correctly Ruled That The SRA-FV Satisfies The *Frye* Standard

Ritter argues that the trial court improperly determined that the *Frye* standard was met. He is incorrect because the record demonstrates the trial court followed the law and 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, 869 P.2d 43 (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 (Wash. Ct. App. Div. III 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.

1. The Pettis Decision

A recent Division II opinion decided the precise issue before this Court. *In re Detention of Pettis*, ___ Wn. App. ___, 352 P.3d 841 (2015).⁹ In *Pettis*, the trial court admitted evidence about the SRA-FV after conducting an evidentiary hearing and concluding the instrument satisfied the *Frye* test. *Pettis*, 352 P.3d at 848. The *Pettis* Court held that that the SRA-FV is both generally accepted in the scientific community *and* uses acceptable methods in its application, and therefore satisfies the *Frye* test. *Id.*

⁹ At least four other trial courts in Washington have conducted evidentiary hearings pursuant to this Court's ruling that the SRA-FV should be subject to a *Frye* hearing prior to the admission of expert testimony about it. (Ritter, 177 Wn. App. at 521.) All of those trial courts have ruled that the SRA-FV meets the *Frye* standard. See CP 1710-13, Findings of Fact and Conclusions of Law, *In re the Detention of Aronson*, Spokane County Superior Court; CP 1714-17, Findings of Fact and Conclusions of Law, *In re the Detention of Jones*, Spokane County Superior Court; CP 1718-21, Findings of Fact and Conclusions of Law, *In re the Detention of Halvorson*, Spokane County Superior Court; and CP 1722-25, Findings of Fact and Conclusions of Law, *In re the Detention of Love*, Franklin County Superior Court. *In re Pettis* was the first case to reach the Court of Appeals.

The *Pettis* Court found – as did the trial court in the instant case – that the testimony of Amy Phenix, Ph.D., and the scientific literature on the SRA-FV supported the conclusion that the SRA-FV is generally accepted. *Id.* *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.*

2. The Evidence at the Hearing Supports a Finding that *Frye* is Satisfied

In the instant case, as in *Ritter*, the State presented the testimony of Dr. Amy Phenix. With regard to the first prong of the *Frye* test, Dr. Phenix testified to the broad acceptance the SRA-FV enjoys in the scientific community. Specifically, she stated that the SRA-FV is “widely used and accepted in the field of sex offender evaluation.” CP 1401. The SRA-FV is commonly used by evaluators conducting SVP assessments in several jurisdictions. CP 1401. It is used by all evaluators in the federal system conducting evaluations for the government pursuant to the federal SVP law, The Adam Walsh Child Safety and Protection Act. CP 1401. She testified that the SRA-FV was validated in 2010, and a peer-reviewed article about the SRA-FV was published in 2013. RP 12/9/14 77-79; 102-03, 106-07. She testified that the SRA-FV’s dynamic risk factors all have been studied and found to predict future sexual re-offense. RP 12/9/14 at 142. Additionally, Dr. Phenix testified that research supporting the SRA-FV has been peer-reviewed, and published, and the instrument is acceptable to use in the field of sex offender evaluations. RP 12/9/14 at

115.¹⁰ The Association for the Treatment of Sexual Abusers (ATSA) is the umbrella organization for psychologists conducting evaluations of sex offenders. *ATSA's* website lists consideration of both dynamic and static factors as best practice. RP 12/10/14 at 38.

Addressing the second prong of the *Frye* test, Dr. Phenix testified that qualified professionals in the field conduct trainings on how to apply the SRA-FV and during these trainings they recommend the SRA-FV as a useful tool for SVP proceedings. RP 12/9/14 at 112. Additionally, the instrument has a detailed coding manual that explains and directs the scoring, as well as the subsequent selection of the Static-99 group from the score results. (RP 12/9/14 at 49).

Dr. Phenix testified about the results of two independent studies which concluded that the SRA-FV has an inter-rater reliability which Dr. Phenix considers “moderate.” RP 12/9/14 at 128. These are essentially the same factors the *Pettis* court found supported the reliability of the SRA-FV. The *Pettis* court correctly held “there are generally accepted methods of applying the SRA-FV in a manner capable of producing reliable

¹⁰ One of Ritter’s witnesses, Dr. Abbott, was also a witness called by the appellant in *Pettis*. Similar to his previous testimony, here Dr. Abbott expressed doubts as to the general acceptance of the SRA-FV. RP 12/10/14 at 156-157. The *Pettis* court did not find the testimony of Dr. Abbott to be persuasive. 352 P.3d at 847-848. Rather, *Pettis* held that the disagreement between appellant’s witnesses and Dr. Phenix did not amount to a showing of a “*significant* dispute” in regards to the acceptance of the SRA-FV. *Id.* (emphasis in original).

results, and thus it passes the second prong of the Frye test.” 352 P.3d at 848. This Court should likewise find the SRA-FV satisfies this prong.

At Ritter’s trial, prior to the *Frye* hearing, Dr. Arnold testified that he had attended numerous trainings held by the developer of the instrument, Dr. Thornton. RP 814-18. He further testified that he applied the instrument consistently with the manner in which he was instructed, which was consistent with the manner about which Dr. Phenix testified. RP 819-21. The score he obtained on the SRA-FV helped guide Dr. Arnold’s decision to compare Ritter to certain group scores (the “norms”) on the Static-99 actuarial. *See* RP 12/9/14 at 60 for methodology described by Dr. Phenix.

3. The Trial Court Correctly Found *Frye* was Satisfied

In the current case on remand, Judge Elofson reached the same conclusions as the *Pettis* court in ruling that the SRA-FV meets the requirements of the *Frye* test. RP 12/19/14 at 3. Specifically, he ruled that the testimony and supporting materials of Dr. Phenix show “dynamic risk factors” to be generally accepted in the scientific community as important risk considerations, and that the SRA-FV provides a structured approach to measuring them. RP 12/19/14 at 4. Additionally, Judge Elofson ruled that because the SRA-FV has been peer-reviewed in a published article, is taught in professional trainings throughout the country, is used extensively

by practitioners, and has been validated and cross-validated, these prove the SRA-FV is “generally accepted in the scientific community.” RP 12/19/14 at 5-6. Judge Elofson did not find that Dr. Abbott’s testimony supported the notion that the SRA-FV was not generally accepted, only that some practitioners in the field “use it, some don’t.” RP 12/19/14 at 6. Judge Elofson went on to find the SRA-FV is generally accepted, and meets the requirements of both prongs of *Frye*. RP 12/19/14 at 6. Ritter 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. Therefore, the trial court properly admitted testimony about the SRA-FV into evidence, and Ritter’s commitment as a SVP should be affirmed.

4. Ritter’s Argument Speaks to Weight, Not Admissibility

Ritter argues that expert testimony regarding the SRA-FV should not be admissible under *Frye* because the SRA-FV has below ideal construct validity, inter-rater reliability, and cross-validation. *Appellant’s Supplemental Brief* at 14, 17 and 18. As the trial court correctly concluded, these arguments speak to weight, not admissibility. (*See* Conclusion of Law No. 7, CP 1730.) “The core concern of *Frye* is *only* whether the evidence being offered is based on established scientific methodology.” *Cauthron*, 120 Wn.2d at 889.

Dr. Phenix testified that practitioners in the field of sex offender evaluation use the SRA-FV to measure the “level of dynamic risk factors for... [a] group of sex offenders.” RP at 90. She further testified that practitioners measure these risk factors by merging the SRA-FV with the Static-99, which increases the predictive value of the Static-99 from a score of .68 to a score of .74. RP 12/9/14 at 100. While Dr. Phenix testified it is unclear *why* using the SRA-FV increases the predictive accuracy of the Static-99, she stated that practitioners in the field recognize and accept that it does increase the accuracy. *Id.* Moreover, Dr. Phenix testified that the effect of the SRA-FV on the Static-99 is discussed in a peer-reviewed article published in 2013. RP. 12/9/5 at 103. Dr. Phenix further testified that once research becomes peer-reviewed, it can be and is used in the field. RP 12/9/14 at 115. Judge Elofson ruled that the underlying theory of measuring dynamic risk factors with a structured tool was generally accepted in the scientific community. RP 12/19/14 at 6.

Construct validity, 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. Research has “construct validity” when there is proof that the tool measures what it purports to measure. RP 12/9/14 at 97-98. While Dr. Phenix conceded that “[it] would be nice” to know whether the SRA-FV measures what it purports to measure, it is not necessary for

the purposes of improving the score of the Static-99. RP 12/9/14 at 98. Rather, Dr. Phenix testified that it is enough that peer-reviewed research has confirmed that the SRA-FV improves the accuracy of the Static-99. RP 12/9/14 at 99; 103. Dr. Phenix testified that, “the instrument was developed, released, published, peer-reviewed with no construct validity and fairly widely used *because it helps us predict. It improves our prediction.*” RP 12/9/14 at 132. It doesn’t matter if the SRA-FV accurately measures the specific dynamic factors (which is what construct validity measures); what matters is that the SRA-FV enhances the overall predictive accuracy of the entire risk assessment. RP 12/9/14 at 143.¹¹

“Inter-rater reliability” is also not a construct that is necessary to satisfy the *Frye* test. An instrument has high “inter-rater reliability” when practitioners get similar results when applying the instrument to common subjects. RP 12/9/14 at 90. While Dr. Phenix conceded there are “legitimate concerns” about the SRA-FV’s inter-rater reliability, she stated it is likely to improve as training becomes more standardized. RP 12/9/14 at 91. For example, Dr. Phenix testified that while a Wisconsin survey of 15 evaluators found an inter-rater score of .55, Dr. Phenix was personally

¹¹ Dr. Phenix testified that if the SRA-FV is being used to tailor a treatment program to an individual’s needs, construct validity would be more important than when the SRA-FV is used to determine the appropriate normative group on the Static-99. See RP 12/10/14 at 28-29.

able to achieve an inter-rater reliability rating of .78 with a colleague. RP 12/9/14 at 91-92. Dr. Phenix credited her higher level of training with the instrument and experience applying the SRA-FV over 200 times as the reason for her higher inter-rater reliability rating. RP 12/9/14 at 93. As the training becomes more standardized, Dr. Phenix testified that in her opinion the inter-rater reliability scores will increase. RP 12/9/14 at 92-93.

Finally, Ritter's assertion that the SRA-FV has not been cross-validated was proved incorrect by the testimony of Dr. Phenix, who emphasized that the instrument has indeed been cross validated. Nonetheless, cross validation is not a requirement of the *Frye* test. "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. RP 12/9/14 at 86-87. The SRA-FV was developed and validated on two separate groups of offenders from the same hospital from the 1960s through the 1980s. RP 12/9/14 at 87-88; CP 1400. Dr. Phenix opined that she would like to see the SRA-FV cross-validated again on a contemporary sample, but that it has not been done yet. RP 12/9/14 at 88. However, it is Dr. Phenix's opinion that it does not matter whether or not cross-validation has occurred because of the SRA-FV's proven effect on the Static-99. *Id.* Dr. Phenix further stated that the Stable-2007 and VRS-SO instruments have very strong cross-validation and have predictive

accuracy “very similar” to the SRA-FV. RP 12/9/14 at 88. Dr. Phenix testified that this indicates that all three of the instruments, (Stable-2007, VRS-SO, and SRA-FV), measure the same risk factors and are working across different jurisdictions and communities. RP 12/9/14 at 88.

Therefore, while Appellant has pointed out perfectly valid criticisms addressing the weight the trier of fact should apply to testimony regarding the SRA-FV as evidence, he fails to identify how any of it speaks to *admissibility*. Judge Elofson properly concluded that it is generally accepted to use the SRA-FV to measure the level of dynamic risk factors in sex offenders, as Dr. Phenix testified. RP 12/9/14 at 90. Furthermore, adding the information from the SRA-FV in order to select the Static-99 normative group adds predictive accuracy to the overall risk assessment. The trial court properly admitted evidence of the SRA-FV and Ritter’s commitment should be affirmed.

5. The Trial Court Correctly Recognized that Dr. Abbott is an Outlier in the Field

Brian Abbott is a defense witness who has only testified for individuals facing civil commitment. He testified for the defense in several *Frye* hearings in Washington on the use of the SRA-FV in selecting normative groups on the Static-99. RP 12/10/14 at 104; 12/11/14 at 34-35. Dr. Abbott considers the SRA-FV a “psychological test”, despite the fact

that it meets none of the psychological testing criteria. RP 12/10/14 at 111. Dr. Abbott acknowledged that the use of the SRA-FV has been wide spread by evaluators since the publication of the article in 2013-2014. RP 12/11/14 at 52-53. He also noted that many evaluators were using the instrument even before it was published in a peer-reviewed journal, and many began using it after the developers presented the tool at a training in 2010. RP 12/11/14 at 53.

Dr. Abbott admitted that the use of the SRA-FV increases the predictive accuracy of the Static-99. RP 12/10/14 at 140; 12/11/14 at 58-59. He further acknowledged that the SRA-FV displays incremental validity. RP 12/11/14 at 42. He understands and agrees that moderate predictability is as good as it gets in the field. RP 12/11/14 at 59.

Dr. Abbott acknowledged on cross examination that in his declaration for a 2003 SVP case, he made the same criticisms of the Static 99 that he now makes of the SRA-FV, even though the Static-99 was well-accepted at that time. RP 12/11/14 at 111. That is, he referred to the Static-99 as “quasi-scientific” and claimed that its use did not meet the necessary APA ethical standards. *Id.* Dr. Abbott described his SVP risk assessment process in detail. RP 12/11/14 at 88-106. Ultimately, he acknowledged that his unique risk assessment process would always cause him to conclude that the individual being evaluated did not meet the statutory risk

threshold and he could therefore never find someone to be an SVP -- absent one improbable scenario.¹² RP 12/11/14 at 106. Finally, even Dr. Abbott had to acknowledge that the SRA-FV is the type of instrument recommended for use in sex offender evaluation by ATSA. RP 12/11/14 at 114-115.

The trial court correctly recognized that Dr. Abbott's opinions and methodology deviate from the generally accepted practices in the SVP evaluation community. Thus, while the court found Dr. Phenix's testimony credible, it made no such finding about Dr. Abbott. CP at 1728 (Finding of Fact No. 16).

6. The Trial Court Properly Gave Little Weight to Dr. Glaser's Opinions With Respect to what Constitutes General Acceptance in the SVP Evaluation Community and About the Effectiveness of the SRA-FV in SVP Evaluations

Until shortly before his *Frye* hearing testimony, Dr. Dale Glaser had never heard about the Static-99, despite the fact that it is the actuarial instrument most commonly used in the field and an indirect subject of the hearing because the SRA-FV is used to select its normative groups. RP 12/10/14 at 66-67. Dr. Glaser is not a member of the relevant scientific community. He is a statistician who works primarily on statistical

¹² Dr. Abbott testified he could only find someone likely to reoffend if that person said he would reoffend if released. RP 12/11/14 at 105-106.

psychometric testing and consulting. RP 12/10/14 at 38. Dr. Glaser has a Ph. D. in industrial organizational psychology. RP 12/10/14 at 38. He has never worked on SVP cases. RP 12/10/14 at 41-42. Dr. Glaser has never conducted a risk assessment of a sexual offender nor has he done any work in the area of sexual evaluations or assessments. RP 12/10/14 at 62. Dr. Glaser does not know the best practices for conducting an SVP risk assessment, nor does he have any idea how to conduct one. RP 12/10/14 at 62. He has never used the Static-99 or the SRA-FV, and had never heard of either instrument prior to three weeks before the hearing when he was hired by Mr. Ritter. RP 12/10/14 at 62-63. He was likewise unaware that actuarial instruments are routinely used in sex offender risk assessments. RP 12/10/14 at 63. He is not a member of ATSA and in fact was not aware of ATSA until this proceeding. RP 12/10/14 at 78. He had never heard of the SRA-FV until he responded to an advertisement placed in an on-line list-serve. RP 12/10/14 at 63. He then spent 15 hours reading journals on the use of actuarials. RP 12/10/14 at 64. His exposure to the field of SVP risk assessment came from a total of four journal articles. *Id.* He was unaware that hundreds of relatively current articles on the topic were available. RP 12/10/14 at 95.

Dr. Glaser's cross examination revealed he had no knowledge of anything related to the field of sex offender evaluation and assessment. RP

12/10/14 at 66-70. He further acknowledged that two techniques he had testified on direct examination should be used as part of the SRA-FV analysis—time series analysis and differential equations—are not used in SVP evaluations. *Id.* He conceded that every piece of scientific research has limitations and the authors/researchers are cautious to ensure they do not overstep their research. RP 12/10/14 at 74-75. The only other source of information that Dr. Glaser relied on to form his opinions was a conversation with Dr. Abbott, the retained defense expert in this matter. RP 12/10/14 at 71. Dr. Glaser further acknowledged that, even though he was familiar with the process used by scientists to answer their questions about published research, he made no effort to use that process to resolve any questions he might have about the SRA-FV prior to testifying. RP 12/10/14 at 75. The sum total of Dr. Glaser's experience in the field of sex offender evaluation was information that he reviewed in preparation for this litigation.

7. Even Dr. Glaser Agreed that the SRA-FV Provides Increased Predictive Validity Over use of the Static-99 Alone

Dr. Glaser acknowledged that using the SRA-FV increases the predictive validity of the Static-99. RP 12/10/14 at 47. He further admitted that the SRA-FV improved the area under the curve (AUC) by about 9%, when the SRA was used to determine the Static-99's normative group. RP

12/10/14 at 77-78. The AUC measures the probability that someone assessed on the instrument is properly classified as a recidivist or non-recidivist. RP 12/10/14 at 84. Because the SRA-FV increases the AUC, it enhances its predictive accuracy of the Static-99.

Dr. Glaser is a statistician and is undoubtedly an expert in probabilities. But while his testimony cited above supported the trial court's *Frye* determination, in general he lacks an understanding of the *relevant* scientific community and what is the generally accepted practice in risk assessment of sexual offenders. Consequently, beyond his confirmation of the AUC improvement, his testimony offered nothing helpful to determine if the SRA-FV is generally accepted in the field of sexual offender evaluation and assessment.

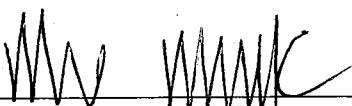
V. CONCLUSION

After a lengthy evidentiary hearing, the trial court correctly determined that the SRA-FV meets the requirements of *Frye* because it is generally accepted in the relevant scientific community and is applied with generally accepted methods. As in *Pettis*, the record below supports such a

finding. Judge Elofson's order admitting the SRA-FV into evidence should be affirmed.

RESPECTFULLY SUBMITTED this 9th day of September, 2015.

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NO. 30845-6-III

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of:

STEVEN RITTER,

Appellant.

DECLARATION
OF SERVICE

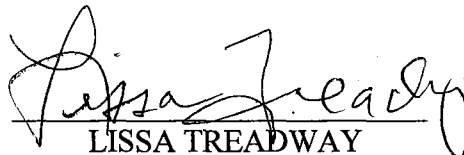
I, Lissa Treadway, declare as follows:

On September 9, 2015, pursuant to the Electronic Service Agreement between the parties, I sent by electronic mail, true and correct copies of the Supplemental Brief of Respondent and Declaration of Service, addressed as follows:

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

DATED this 9th day of September, 2015, at Seattle, Washington.


LISSA TREADWAY