Supreme Court 929271
(Court of Appeals No. 30845-6-III)

IN THE SUPREME COURT THE STATE OF WASHINGTON

---

IN RE: DETENTION OF:

STEVEN RITTER,

Petitioner.

---

# PETITION FOR REVIEW

---

Mick Woynarowski
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Washington Supreme Court Decisions



### Washington Court of Appeals Decisions



### United States Supreme Court Decisions

**Constitutional Provisions**



**Other Authorities**

## A. IDENTITY OF PETITIONER AND OPINION BELOW

Pursuant to RAP 13.4(b)(1), (2) and (3) Steven Ritter asks this Court to accept review of the February 4, 2016 opinion of the Court of Appeals in *In re det. of Ritter*, --- P.3d ----, 30845-6-III decision terminating review designated in Part B of this petition. (Appendix A.)

## B. ISSUES PRESENTED FOR REVIEW

1. Research has shown that fundamental neurological differences between adolescent and mature adult brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure, all take away from juveniles' ability to control their behavior. Over the last decade, the United States Supreme Court, and most recently this Court, have confirmed that juveniles are therefore less culpable than neurologically mature adults. *State v. O'Dell*, 183 Wn.2d 680, 692-93, 358 P.3d 359 (2015) (internal citations omitted).

In the civil commitment arena, principles of substantive due process require that no individual be indefinitely committed absent a showing of lack of volitional control. Should this Court grant review and reverse on due process grounds because Mr. Ritter's indefinite civil commitment under RCW 71.09 was premised on conduct that occurred when his volitional functioning was still neurologically undeveloped?

2. *Frye* excludes scientific evidence not shown to be capable of producing reliable results and not generally accepted within the scientific community. The SRA-FV is an invented psychometric measure – a mathematical scheme for adding together subjectively-scored "dynamic risk factors" – in order to come up with a quantitative assessment of risk posed by an individual allegedly different from what is already considered by an established actuarial like the Static-99R.

Psychometric measures are judged on their (1) construct validity, (2) inter-rater reliability, and (3) cross-validation. On remand for a *Frye* evidentiary hearing, the State expert conceded the SRA-FV fails each of these essential checks. A renowned statistician described the tool as an unusable "first draft" and a published forensic psychologist called it "an unconfirmed discovery."[1]

Did the trial court and the Court of Appeals err in ruling these red flags are a matter to be resolved by the finder of fact, rather than an outright bar to admissibility? Should this Court inform the lower courts that respondents in RCW 71.09 proceedings cannot be involuntarily committed on social science experiments that may, or may not, pan out?

---

[1] Dr. Dale Glaser 12/10/14 RP 56; Dr. Brian Abbott, 12/11/14 RP 10.

C. STATEMENT OF THE CASE

1. Childhood trauma and State's reliance on ensuing juvenile offense history to justify commitment.

Mr. Ritter's biological mother physically and sexually victimized him at a young age. CP 22, 25; RP 1053.[2] Mr. Ritter was next abused by women from two different foster families. CP 25. What he endured led to a "long history of anger and contempt for females." CP 25; accord 1RP 77-78. Life in his adoptive family provided no solace. CP 22; RP 1054.

His adopted parents did not let Mr. Ritter be himself, isolated him, and made clear he would go to hell if he was a homosexual. CP 952-53. Mr. Ritter acted out and was classified as behaviorally disturbed. CP 953, CP 23. He suffered from "profoundly unreconciled attachment issues, trust issues with people." RP 1055. As a damaged child, "his whole life has been turmoil." RP 1056.

Mr. Ritter spent time in juvenile detention for sexually assaulting his 46-year-old aunt. RP 732. Later, he was incarcerated at 19 years old following an incident where he fondled a nine-year-old at a library. RP 627-38, 733. He responded reasonably well to treatment. RP 664-65, 668,

[2] The designation "CP" is used to refer to the Clerk's Papers. Consecutively paginated volumes 1 and 2 of the verbatim reports of proceedings are referred to as 1RP and 2RP, respectively. Consecutively paginated volumes I through X are referred to simply as "RP"; and the transcript of the September 18, 2009 hearing is referred to as "9/18/09RP."

679. But, at the conclusion of his sentence, the State filed a petition for indefinite civil commitment. At the commitment trial, the State also produced evidence of uncharged crimes allegedly occurring when Mr. Ritter was just 14 or 15 years of age. RP 641-45, 647, 731-32.

The State's expert, Dr. Dale Arnold, diagnosed Mr. Ritter with pedophilia and antisocial personality disorder (ASPD). RP 723-38, 751-54; CP 965. Dr. Arnold diagnosed Mr. Ritter with pedophilia even though his sexual history shows attraction to adults and individuals close to his age. RP 739-40. Dr. Arnold claimed pedophilia does not require "strong preference" for prepubescent children and he described Mr. Ritter's alleged attraction to prepubescent children as "non-exclusive." RP 739-40.

In diagnosing Mr. Ritter with ASPD, Dr. Arnold relied heavily on Mr. Ritter's conduct as an adolescent and younger. RP 751-58.

Defense expert Dr. Robert Halon disagreed the evidence amounted to a diagnosis of pedophilia because of insufficient evidence of pedophilic fantasies and urges. RP 1068, 1077. Dr. Halon also disagreed with Dr. Arnold's personality disorder diagnosis: "[W]hat looks like antisocial personality in Mr. Ritter is really his way of handling his misery, his stress that he's been in probably his whole life long." RP 1047; 1066. Psychometric testing showed Mr. Ritter as below the cutoff for a diagnosis of ASPD. RP 1043-47. Personality testing indicated that Mr. Ritter has

normal self-control. RP 1051; accord RP 1061-62. This confirmed for Dr. Halon that Mr. Ritter's impulsivity was a result of distress, not of a volitional impairment. RP 1051, 1062, 1066, 1088-89.

Despite Dr. Halon's testimony, the jury found Mr. Ritter to be a sexually violent predator and committed him indefinitely. CP 999-1000.

2. The SRA-FV instrument and remand for Frye hearing.

Relying on statistical theories and actuarial tests, Dr. Arnold reported Mr. Ritter would "more likely than not" engage in predatory acts if not confined. CP 966-68; RP 763-64. Dr. Arnold testified about how Mr. Ritter scored on actuarial risk assessment instruments like the Static-99R. Dr. Arnold used a novel tool called the Structured Risk Assessment – Forensic Version (SRA-FV) to gauge whether Mr. Ritter presented with dynamic – changeable – risk factors and to pick a Static-99R "reference group" to compare him against. *In re det. of Ritter*, 177 Wn.App. 519, 521, 312 P.3d 723 (2013) (attached as Appendix B); RP 781-83, 809-22. Mr. Ritter objected under *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

The Court of Appeals remanded for an evidentiary hearing: "The bottom line is Dr. Arnold partly derived his prediction of Mr. Ritter's future dangerousness from a novel dynamic risk assessment instrument." *Ritter* at 525. On remand, the trial court concluded that all of the SRA-

FV's shortcomings go to weight, not admissibility. In the February 4, 2016 Opinion, the Court of Appeals affirmed. (Appendix A.)

At the *Frye* hearing, Mr. Ritter presented expert testimony that: 1) the SRA-FV *lacks construct validity*, meaning, that it is unclear that the instrument actually measures what it purports to measure, 2) that there is *insufficient inter-rater reliability*, meaning that scoring the instrument is so subjective that different raters cannot agree on how to grade the same subjects, and 3) that there has been *no cross-validation*, meaning, that because the instrument has never been tested on a population other than the aged group of outliers it was formed on, it is unknown whether the findings generalize to a modern-day population.

Petitioner's supplemental briefing, filed with the Court of Appeals on May 13, 2015, details how the SRA-FV instrument works and the objections lodged by Mr. Ritter below. Because the testimony at the *Frye* hearing was highly technical and voluminous, Mr. Ritter respectfully asks this Court, to carefully review the supplemental briefing filed by both parties following the *Frye* remand.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

**1. This Court should grant review because Mr. Ritter's involuntary commitment – premised on conduct occurring before he developed mature volitional control – violates due process.**

Substantive due process principles require that indefinite civil commitment be premised upon a showing of actual impairment of volitional control. As the United States Supreme Court has recognized, science now explicitly shows that a juvenile's mind does not fully develop until his or her late teens or early twenties. One of the last stages of development is volitional control. Throughout adolescence and into the age of majority, humans generally lack the ability to effectively control their behaviors to the degree of fully-developed adults.

This Court, which has already given credence to these principles in *State v. O'Dell*, should grant review on this important constitutional issue and hold that indefinite commitment violates due process if it is premised upon conduct that occurred when the respondent was in a state of continuing development. For Mr. Ritter, any past volitional control difficulties likely resulted from the passing state of juvenile immaturity, not the type of permanent impairment that could justify civil commitment.

A person's right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from

arbitrary government action." *Foucha v. Louisiana*, 504 U.S. 71, 80. 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); U.S. Const. amend. XIV; Const. art. I, § 3. The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty. *Id.* at 77; *In re Det. of Thorell*, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Principles of substantive due process therefore prohibit indefinite civil commitment except in the narrowest of circumstances. *See Kansas v. Hendricks*, 521 U.S. 346, 356-57, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

Critically, mere dangerousness is insufficient to justify indefinite, involuntary civil commitment. *Id.*. at 358; *Kansas v. Crane*, 534 U.S. 407, 412, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). There has to be proof of volitional impairment, meaning, serious difficulty in controlling behavior. *Hendricks*, 521 U.S. at 358; *Crane*, 534 U.S. at 412; *Thorell*, 149 Wn.2d at 731-32, 735-36. The serious difficulty controlling behavior must derive from a mental illness that distinguishes the respondent from the "typical recidivist in an ordinary criminal case." *Crane*, 543 U.S. at 413. Due process requires volitional impairment to be proved before an individual can be indefinitely confined. *Id.* Here, Mr. Ritter argues that if juvenile brain immaturity is typical, then civil commitment based on juvenile brain immaturity is unconstitutional.

Indeed, science demonstrates that young adults as a class temporarily lack volitional control while their brain continues to develop. There are "fundamental differences between juvenile and adult minds" in "parts of the brain involved in behavior control." *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 2026, 176 L. Ed. 2d 825 (2010). "Adolescents are overrepresented statistically in virtually every category of reckless behavior." *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Immature brain development is by definition of undeveloped volitional control.

Juveniles have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). They are more susceptible to outside pressures, negative influences, and psychological damage. *Roper*, 543 U.S. at 569; *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982). Their character is not as "well formed" as that of an adult. *Roper*, 543 U.S. at 570.

"Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'" *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012) (quoting

*Graham*, 130 S. Ct. at 2029 (internal quotation omitted)). "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 130 S. Ct. at 2026 (citing *Roper*, 543 U.S. at 573).

The Supreme Court has accordingly held it unconstitutional to sentence a juvenile offender to death. *Roper*, 543 U.S. at 578. Mandatory life-without-parole sentences are unconstitutional when imposed on juveniles. *Miller*, 132 S. Ct. at 2465. And the constitution outright "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham*, 130 S. Ct. at 2034; *accord State v. O'Dell*, 183 Wn.2d at 693.

Indefinite confinement must be premised upon a finding of serious difficulty controlling behavior which must derive from a mental illness that distinguishes the respondent from the "typical recidivist in an ordinary criminal case." *Crane*, 543 U.S. at 413. But such a finding cannot be scientifically proven based upon conduct prior to mature brain development. Just as youth matters in sentencing, this State should refrain from indefinitely confining individuals whose predicate conduct derives from the period of time when their volitional capacity was immature or continuing to develop.

Here, Mr. Ritter was confined by age 19 on the predicate offense, which was committed when he was 18 years old. Exhibit 1.9 (judgment and sentence). To prove Mr. Ritter was a pedophile with antisocial personality disorder and volitional impairment, the State relied nearly exclusively on conduct from before the age of 18. As discussed above, during this time, Mr. Ritter's brain was continuing to develop and he was undergoing hormonal changes that rendered him temporarily unable to control his behaviors as society and science expects of a 30 or 40 year old.

Under the State's view, Mr. Ritter could be indefinitely committed based on actions taken while his volitional capacity remained developmentally infirm as well as psychological risk factors that exhibited only during adolescence, the height of his behavioral development, i.e. change. In fact, the State's expert counted Mr. Ritter's youth as a strike against him. For example, Dr. Arnold testified that Mr. Ritter's incident with his 46-year-old aunt showed a lack of volitional control. RP 857, 916-17, 921; *see also* RP 873-73. On the other hand, there is limited information about Mr. Ritter as an adult to support the commitment.

The fact that Mr. Ritter was 18 when he committed the offense against Ms. Barnes is of no consequence to the constitutional due process question. "[P]arts of the brain involved in behavior control continue to develop well into a person's 20s." *State v. O'Dell*, 183 Wn.2d at 691-92

(internal quotations omitted); "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574.

**2. This Court should likewise grant review because the Court of Appeals has sanctioned the use of a novel and untested scientific instrument - the SRA-FV - as means of justifying RCW 71.09 commitment, even though the scientific community would reject the use of such an unreliable tool.**

In determining the reliability and admissibility of scientific evidence, Washington courts apply the *Frye* standard. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 600-01, 260 P.3d 857 (2011); *State v. Greene,* 139 Wn.2d 64, 70, 984 P.2d 1024 (1999); *see Frye*, 293 F. at 1014. Under *Frye,* evidence based on a scientific theory or principle must have "achieved general acceptance in the relevant scientific community" before it is admissible at trial. *State v. Gentry*, 125 Wn.2d 570, 585, 888 P.2d 1105 (1995). "[T]he core concern... is only whether the evidence being offered is based on established scientific methodology." *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993). General acceptability is not satisfied if there is a significant dispute between qualified experts as to the validity of scientific evidence. *Id.* at 887.

In addition, ERs 702 and 703 limit the introduction of expert testimony. Under rule 702, expert evidence may be admitted only if "helpful to the jury in understanding matters outside the competence of ordinary lay persons." *Anderson*, 172 Wn.2d at 600. Rule 703 requires that the facts or data relied on by an expert must be admissible into evidence unless they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

Admissibility of evidence under *Frye* is a mixed question of law and fact subject to de novo review. *Anderson*, 172 Wn.2d at 600 (citing *State v. Copeland*, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996)).

The SRA-FV is an untested invention which creates a false illusion of numerical certainty regarding the significance of subjectively assessed psychological constructs. While the initial Court of Appeals' order remanding for a *Frye* hearing was appropriate, the ultimate analysis of the question was woefully inadequate. The Opinion omits critical evidence that showed that the SRA-FV is nothing more than conjecture. And, the Court of Appeals ignored evidence that the broader scientific community would reject the use of a novel psychometric tool like the SRA-FV until it has been truly cross-validated and shown to be reliable. *E.g.* 12/10/14 RP 153-59 (Dr. Abbott testifying about American Psychological Association Code of Ethics and his opinion that the SRA-FV lacks general

acceptance); 12/10/14 RP 50 (statistician Dr. Glaser testifying that construct validity is a paramount requirement of psychometric testing).

Actuarial risk assessment tools – that assess historical and unchangeable data – are the best standard measure for estimating future re-offense risk. 12/9/14 RP 34-35. The Static-99R is the gold standard because of how often it has been cross-validated, meaning, because of how often the hypothesis of the instrument's authors – that the list of historical factors they identified as having a direct correlation, in equal terms, to future risk – has been tested and retested. 12/9/14 RP 36; 79.

The SRA-FV is a psychometric measure, not an actuarial risk assessment instrument, and it does not give a risk estimate. 12/9/14 RP 159-60. Its authors' hope is that the SRA-FV will improve upon how the Static-99R assesses risk.

But, the risk of reoffense associated with the "dynamic risk factors" considered by the SRA-FV may already be accounted for in the Static-99R. 12/10/14 RP 143-44 (Dr. Abbott testifying "it's likely that the incremental validity result could be a spurious result.") In other words, the single study – done by the SRA-FV author only – may simply be noise. No one can tell until there is a real cross-validation done on a population

(sample) other than the one from which the SRA-FV was developed. *E.g.* 12/11/14 RP 32.[3]

Even the State's expert Dr. Phenix knows that the strength of the actuarial risk assessment instruments built upon static risk factors is based on their multiple cross-validations. 12/9/14 RP 34, 36, 79. Research into dynamic risk factors, on the other hand, remains ongoing. 12/9/14 RP 41. She conceded that cross-validation is important, but lacking. 12/9/14 RP 88, 108, 111, 124-126. She conceded that the developmental sample has been criticized as an outlier and is not generalizable unless replication occurs. 12/9/14 RP 86.

Moreover, the record shows that the SRA-FV authors themselves admit a lack of construct validity. 12/10/14 RP 125. They admit poor inter-rater reliability of their instrument. 12/11/14 RP 20. They admit there is a problem with the applicability of the results from the SRA-FV to contemporary groups of sex offenders. 12/10/14 RP 135. They admit that replication is essential. 12/11/14 RP 11. And, they admit that ultimately,

[3] Given the page restrictions of RAP 13.4(f), petitioner respectfully asks that the Court consider the Supplemental Brief filed on May 13, 2015 in Division III to review all of the shortcomings of the SRA-FV that the record of the *Frye* hearing revealed.

the validity of their findings will depend on new studies carried out with other samples. 12/9/14 RP 107-09.

Page 2 of the Opinion notes that Dr. Arnold "revised his reports to apply the [SRA-FV] to Mr. Ritter's dynamic factors." Op. at 2. The Opinion, however, fails to mention that his other use of the instrument – to select a Static-99R reference group – has been disavowed.

In the supplemental briefing, Mr. Ritter pointed out for the Court of Appeals that while this appeal has been pending, the Static-99R authors published a peer-reviewed article confirming what Dr. Abbott foreshadowed. Karl Hanson, et al., *What Sexual Recidivism Rates Are Associated With Static-99R And Static-2002R Scores?* 15 Sexual Abuse: J. Res. & Treatment 1 (2015). The authors abandoned the use of four reference groups in favor of just two. They excluded the Bridgewater sample upon which the SRA-FV was developed because it is dated "and it was an outlier in certain analyses." *Id.* at 8. The authors recognized that some in the field used the SRA-FV as a means of selecting an appropriate Static-99R reference group, but called that choice as premature: "empirically combining STATIC scores with other measures has the effect of creating a new actuarial measure, which needs to be evaluated on its own merits." *Id.*, at 21. The authors likewise cautioned that "the ability of evaluators to improve accuracy by choosing reference groups has yet to be

empirically tested." *Id.*, at 24. The 2015 publication confirms that acceptance of a novel method only comes after an affirmative showing of reliability and validity, which for the SRA-FV, is yet to come. The *Frye* ruling was error. *State v. Cissne*, 72 Wn.App. 677, 686, 865 P.2d 564 (1994) (horizontal gaze nystagmus evidence excluded under *Frye* because State had not established the test rested no principles and techniques which are not novel).

On page 4, the Opinion claims that when the SRA-FV was released for psychologists to use, it was "essentially providing a structured application of the [Hanson, 2010] meta-analysis." Op. at 4. However, the record belies this assertion. *E.g.* State's expert Dr. Phenix conceding that it is unclear whether the SRA-FV actually measures what it says it measures. 12/9/14 RP 97-98, 138. Unfortunately, both the Court of Appeals and Dr. Phenix brushed this problem aside, by claiming that construct validity does not matter to risk assessment. *Compare* Op. at 10 *with* 12/10/14 RP50 (testimony that American Psychological Association considers construct validity to be a paramount requirement).

Also on page 4, the Opinion writes that "in 2013, Dr. Thornton published a peer-reviewed article establishing the development and validity of the SRA-FV." Op. at 4 (emphasis added). This is not true. In science, and in social science, the author of a theory cannot establish its

validity on his or her own. Replication – by others, in other populations – is the benchmark for validity of a scientific theory. 12/10/14 RP 47-48; 12/9/14 RP 107-09.

Because the assertions of the SRA-FV authors have not been cross-validated in other samples, the Court of Appeals errs in parroting what the SRA-FV authors have claimed. On page 5, the Opinion writes: "Higher overall scores on each domain correspond to a higher probability of reoffense." Op. at 5. This unqualified claim should not be accepted, certainly not when what is at issue is Mr. Ritter's liberty.

The Opinion makes another mistake with the claim that the SRA-FV was "cross-validated on a separate sample from the same [Bridgewater] hospital." Op. at 5-6. The same study group was used to both develop the SRA-FV and test it; this is not cross-validation. The Opinion leaves out reasons in the record for why the SRA-FV authors' attempt at "split sample" validation is inadequate. 12/9/14 RP87-88. Lack of cross-validation is a fundamental flaw and the unique weaknesses of the Bridgewater sample raise additional red flags. 12/10/14 134-36.

Again, on pages 6-7 of the Opinion, the Court of Appeals gives lip service to the reality that the SRA-FV lacks interrater validity, but in the end, overlooks that shortcoming. This too is error. *E.g.* 12/11/14 RP 24 (Dr. Abbott testifying that American Psychological Association ethical

codes require that a psychometric measure show reliability and validity before its use).

Notably, Division III's reliance on *In re Det. of Pettis*, 188 Wn. App., 198, 204-05, 352 P.3d 841 (2015) is misplaced because the record in *Pettis* did not involve any contested *Frye* evidentiary hearing. *Id.* at 209.

There is a wealth of evidence below that psychometric testing – which is what the SRA-FV is – does not gain general acceptance in the scientific community if and until: 1) there is construct validity, 2) sufficient interrater reliability, and 3) cross-validation.

Dr. Glaser described the SRA-FV as an instrument "still in its development... a good first draft." 12/10/14 RP 56, 57. In its current state, the SRA-FV is not a psychometric appropriate for use for serious issues. 12/10/14 RP 58-59. Dr. Abbott testified "there's a dispute" over the SRA-FV and that it would not be generally accepted in the relevant scientific community at this time. 12/10/14 RP 128-129.

The fact that some forensic psychologists choose to use the SRA-FV prematurely is no reason for Washington Courts to follow on such a fool's errand and certainly not in a case such as this one where individual liberty is at stake.

E. CONCLUSION

Mr. Ritter's commitment violates due process because he was committed based on conduct arising before his capacity to control volition had developed. The admission of the SRA-FV, a novel instrument not yet shown to be reliable, was also error. This Court should grant review and reverse.

DATED this 7th day of March, 2016

Respectfully submitted,

*s/ Mick Woynarowski*

Mick Woynarowski – WSBA 32801
Washington Appellate Project
1511 3rd Ave. Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
E-mail: wapofficemail@washapp.org

APPENDIX A:

*In re the Det. of Steven Ritter*

Court of Appeals Opinion No. 30845-6-III (published in part)

**FILED**
**February 4, 2016**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

| | | |
|---|---|---|
| In the Matter of the Detention of | ) | |
| | ) | No. 30845-6-III |
| STEVEN G. RITTER, | ) | |
| | ) | |
| | ) | |
| Petitioner. | ) | OPINION PUBLISHED IN PART |

KORSMO, J. — After remanding for a hearing following our initial consideration of this appeal, we now consider Steven Ritter's challenges to the jury's decision to commit him as a sexually violent predator. In the published portion of this opinion, we address his challenge to the dynamic risk assessment tool used at trial. We affirm.

## FACTS

The salient facts in this appeal largely concern procedural matters. Additional facts related to the issues considered in the unpublished portion of this opinion will be addressed in conjunction with those arguments.

Mr. Ritter, at age 15, sexually assaulted his 46-year-old aunt. He spent about 30 months in juvenile sex offender treatment in Oklahoma and was released at age 18. Within the year, he molested a 9-year-old girl at a public library in Yakima. He was convicted of that offense and served his sentence at the Twin Rivers facility in Monroe.

There were additional uncharged incidents of sexual misconduct as a juvenile that were admitted into evidence at trial.

When his sentence was drawing to a close, the State had Mr. Ritter evaluated by Dr. Dale Arnold. Dr. Arnold applied three actuarial instruments to Mr. Ritter's static risk factors and his own clinical judgment to Mr. Ritter's dynamic risk factors. Dr. Arnold concluded in written reports in 2006 and 2009 that Mr. Ritter met the criteria of a sexually violent predator (SVP). In late 2011, after the State had filed SVP proceedings against Mr. Ritter, Dr. Arnold revised his reports to apply the forensic version of the Structured Risk Assessment—Forensic Version (SRA-FV) to Mr. Ritter's dynamic factors.

Mr. Ritter unsuccessfully tried to exclude use of the SRA-FV and two of the static instruments at trial. After he was committed by the jury, Mr. Ritter timely appealed to this court. His appeal raised four issues, including a challenge to the use of the SRA-FV. We exercised our authority to remand for a *Frye*[1] hearing on that issue. *In re Det. of Ritter*, 177 Wn. App. 519, 520-21, 312 P.3d 723 (2013).

Both sides presented expert testimony at the remand hearing. The State presented the testimony of Dr. Amy Phenix to establish the inception and validity of the SRA-FV. The defense presented two experts: a statistician, Dr. Dale Glaser, and a psychologist, Dr.

[1] *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

Brian Abbott. The basics of forensic testing were not in dispute. The first step in analyzing a sexual offender's risk of future reconviction is to score that person on one or more of several actuarial instruments. These are widely used, validated, and well-established since at least 1998. They look at the presence or absence of various static factors that affect the risk of sexual reoffense. These static factors are immutable, and consist primarily of facts about the offender and the offense committed, such as number of offenses and the sex of victim(s).

The static factors were established individually by various studies[2] looking at populations of sex offenders that were released from prison, and then correlating reoffense with the presence or absence of the various factors. In 1998, Dr. Karl Hanson published a meta-analytic study, compiling all the existing studies into a cohesive, single framework. This gave rise to the Static-99 actuarial instrument. Subsequent studies and analysis have further refined the factors and given rise to several newer instruments that may incorporate additional factors or structure the analysis differently. All of these instruments have moderate predictive accuracy; employing additional instruments incrementally increases that accuracy.

Because an analysis based only on static risk factors will never change, the psychological community began looking for dynamic factors that could be used both to

[2] The impetus for these studies arose out of other studies that showed that treatment did no better than random in predicting reoffense.

refine the risk analysis and help guide treatment. In 2002-2003, Drs. Thornton and Beecham published a series of analytical papers that served as a methodological foundation for the SRA-FV. They looked at each dynamic factor as falling into one of four constructs: sexual interest, relational style, self-management, and attitudes.[3] They posited that in order to have any degree of accuracy, a comprehensive analysis would need to examine at least three of those constructs. They then developed the SRA-FV to examine the first three constructs.[4]

In 2010, a meta-analytic study was published on the research into dynamic risk factors comparable to the 1998 study and provided the statistical basis for developing an instrument based on those dynamic factors. The SRA-FV was released to the psychological community for use that same year, essentially providing a structured application of the meta-analysis. Subsequently, in 2013, Dr. Thornton published a peer-reviewed article establishing the development and validity of the SRA-FV.

A professional administering the SRA-FV looks to their diagnostic interactions with the individual and to facts available in that person's record, and then scores each dynamic risk factor against an operational guideline, from 0 to 2: 0—the factor is absent;

---

[3] For example, sexual interest in children or sexual violence falls into the sexual interest construct, while impulsivity or response to authority falls into the self-management category.

[4] Attitudes were omitted because there is no valid way of determining their presence or absence in an individual.

weighted and summed to arrive at three domain scores, corresponding to those three constructs the instrument is assessing. Higher overall scores on each domain correspond to a higher absolute probability of reoffense. However, the SRA-FV does not return any actual probability of reoffense, but is instead used in conjunction with the Static-99R.

Because the statistical data underpinning the Static-99 was derived from many different studies, those studies were amalgamated in order to create a large population base. However, different data sets involve different types of people. Consequently, as the Static-99 was refined, the instrument was adjusted to account for the varying inherent recidivism rates in the studied populations by separating the studies into several normative groups. Under the revised Static-99R, the examiner must score the static risk factors, then compare that score against one of the normative groups to arrive at a probability that the offender will be convicted of a future sex crime.[5] The SRA-FV is used to sort the individual into one of those normative groups.

The SRA-FV was constructed from a sample obtained from the Massachusetts Hospital in Bridgewater[6] and then cross-validated on a separate sample from that same

[5] After arriving at that number, practitioners will also look at individual case factors that may affect their determinations but were not included in the instruments.

[6] The hospital treated high-risk sex offenders who had been civilly committed from the '60s through the '80s.

hospital. Trial testimony showed there is some criticism in the psychological community that the dated sample might not correlate with a modern sample. However, contemporary samples employed in comparable instruments, the Stable-2007 and the VRS-SO, suggest that the sample should be accurate. Of note, the SRA-FV sample is the only sample set that includes long-term, incarcerated offenders rather than people in the community. Employing the SRA-FV in conjunction with the Static-99R leads to an incremental increase in predictive accuracy from .68 to .74.

In addition to the Bridgewater sample issue, the SRA-FV was criticized for its lack of construct validity and low inter-rater reliability. All of these were stated limitations in the peer-reviewed article. First, construct validity has not been established for any of the particular dynamic risk factor ratings employed by the SRA-FV. Construct validity refers to a measure of whether a psychometric test measures what it claims to measure. In the context of the SRA-FV, the question is whether the assessment of the particular risk factors and composite constructs actually measures what they purport to measure. The concern is that the mechanisms for measuring the dynamic factors are not identical between the SRA-FV and the studies used to establish correlations between the factors and reoffense.

The final limitation to the SRA-FV is that it has shown a relatively low inter-rater reliability. Essentially, this is a measure of how frequently different people administering

the instrument reach the same result. Although low, it is not low enough to be considered invalid.

After hearing the testimony and reviewing the exhibits, the trial court determined that opinions based on the SRA-FV are admissible under *Frye*. The trial court entered extensive findings of fact and conclusions of law. The parties filed supplemental briefs concerning the *Frye* hearing; Mr. Ritter challenged many of the court's findings. A panel subsequently considered the case without oral argument.

## ANALYSIS

In light of the previous remand, the primary issue presented by this appeal is whether the SRA-FV satisfies the *Frye* standard for admissibility. We conclude, as did Division Two of this court while this matter was on remand, that the SRA-FV does satisfy *Frye*.

Whether novel scientific evidence is admissible presents a mixed question of law and fact which this court reviews de novo. *In re Det. of Pettis*, 188 Wn. App. 198, 204-05, 352 P.3d 841 (2015) (finding that the SRA-FV satisfies *Frye*). *Pettis* involved the same two primary psychological experts who testified in this case—Dr. Amy Phenix and Dr. Brian Abbott. *Id.* at 208-10. Dr. Abbott did not testify in *Pettis*, but his critical article concerning the test was discussed in the opinion. *Id.* at 209.

Washington applies the *Frye* test to gauge whether expert testimony premised on scientific evidence may be admissible. *State v. Copeland*, 130 Wn.2d 244, 261, 922 P.2d

1304 (1996). *Frye* requires that expert testimony be based on principles generally accepted in the scientific community. *State v. Canaday*, 90 Wn.2d 808, 812, 585 P.2d 1185 (1978). The test is two prong: (1) whether the underlying theory is generally accepted in the scientific community, and (2) whether there are techniques utilizing the theory which are capable of producing reliable results. *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). The court does not assess the reliability of the evidence, but if there is significant dispute between qualified experts as to its validity, it may not be admitted. *Copeland*, 130 Wn.2d at 255. If the scientific principle satisfies *Frye*, the trial court applies ER 702 in determining whether to admit testimony. *Pettis*, 188 Wn. App. at 205. This court reviews the trial court's ER 702 ruling for abuse of discretion. *Id.* Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, there is no dispute that the principles underlying the SRA-FV are generally accepted in the scientific community. It is based on research linking dynamic risk factors with the probability that a sex offender will reoffend in the future. There also is general agreement that a structured analysis of those factors leads to a more reliable prediction than a haphazard, individualized inquiry. *Accord Pettis*, 188 Wn. App. at 207-10. This is essentially the same process used in applying static risk factors. The first prong of the *Frye* test is satisfied.

The real dispute is whether the SRA-FV is capable of producing reliable results, thereby satisfying the second prong of the *Frye* test. The defense challenged the test in the trial court by arguing several weaknesses in the current model. First, the defense experts challenged the efficacy of the test by pointing out the lack of additional[7] validation studies. The statistician, Dr. Glaser, was dissatisfied with the data presented in support of the SRA-FV, but he agreed that what was available did establish that the instrument showed a significant incremental improvement in predictive accuracy. More critically, neither Dr. Glaser nor any other witness suggested that the SRA-FV was inaccurate or produced invalid results.

The defense also challenged the reliability of the test, stressing that the inter-rater reliability was somewhat low. This challenge is significant because inter-rater reliability, the ability of different evaluators to obtain similar results, represents the instrument's precision. Subsequent studies, however, have indicated higher rates of inter-rater reliability that are well within the range accepted by the psychological community. This evidence establishes that there are generally accepted methods of applying the SRA-FV. *Pettis*, 188 Wn. App. at 210.

Finally, at trial and on appeal the defense placed great weight on the lack of construct validity. In psychometric testing, construct validity is of paramount importance

[7] The SRA-FV has been cross-validated with the Static-99R.

because a test purporting to establish a construct is useless if it does not actually establish that construct. However, the SRA-FV is not primarily a psychometric test; it is a predictive test. Dr. Phenix pointed out that construct validity might be useful in refining the test in the future, but if any of the metric components of the instrument measured something other than what they were supposed to measure, it did not affect the predictive accuracy of the SRA-FV. As with the previous arguments, this challenge is unavailing.

The trial court correctly determined that the arguments presented against the SRA-FV went to the weight of the assessment, not its admissibility. *Pettis*, 188 Wn. App. at 211. Accordingly, we reach the same conclusion that the *Pettis* court did:

> We hold that there are generally accepted methods of applying the SRA-FV in a manner capable of producing reliable results, and thus it passes the second prong of the *Frye* test. Thus, we hold that the SRA-FV passes the *Frye* test.

*Id.*

The trial court properly admitted the SRA-FV assessment in Mr. Ritter's trial. Thus, we affirm the commitment order.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Mr. Ritter presents three additional arguments, although we need not address his cumulative error argument in light of our determination that there was no error. We first address his contention that his substantive due process rights were violated by relying upon evidence of his juvenile conduct and his diagnosis of an antisocial personality disorder. We then turn to his argument that his procedural due process rights were violated by the jury instructions.

*Substantive Due Process*

Mr. Ritter contends that his substantive due process rights were violated both by the reliance on evidence of his sexual misconduct while a juvenile and by use of the diagnosis of antisocial personality disorder. We briefly discuss substantive due process in the context of SVP proceedings before turning to his two specific contentions.

The core concern of substantive due process is the protection from restraint from arbitrary government action. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). Therefore, a sexually violent predator can only be involuntarily committed if the State proves (1) the person has a mental illness coupled with and linked to serious difficulty controlling behavior and (2) together, these features both pose a danger to the public and sufficiently distinguish the person from a dangerous but typical criminal recidivist. *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 357-60, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *In re Det. of Thorell*, 149 Wn.2d 724, 736, 742, 72 P.3d 708 (2003).

The legislature codified these mandates in the SVP statute, chapter 71.09 RCW. Three definitions from that chapter are at issue in this appeal. Civil commitment is authorized when the State establishes beyond a reasonable doubt that a person is an SVP—a "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). A "personality disorder" is defined as "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment." RCW 71.09.020(9). "'Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7).

*Juvenile Sexual Misconduct.* Mr. Ritter argues that developing case law and science on juvenile brain development made it unconstitutional to consider his juvenile sexual misconduct at the SVP proceeding. *See Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Miller* v. *Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). All three cases were concerned with questions presented under the Eighth

Amendment to the United States Constitution when harsh punishment of crimes committed by juveniles is prescribed or imposed without taking into consideration their relative lack of volitional control.

Unlike the criminal prosecutions under review in the three Supreme Court cases, however, a civil commitment proceeding does not raise an issue of cruel and unusual punishment forbidden by the Eighth Amendment. A criminal prosecution is backward-looking and metes out an appropriate punishment, while a civil commitment proceeding is forward-looking in order to protect the public. A civil commitment proceeding looks back at a respondent's past as a source of relevant evidence, "either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness." *Hendricks*, 521 U.S. at 362. Because juvenile misconduct is only evidence and not a basis for punishment in civil commitment proceedings, current brain science raises a substantive due process issue only if it reveals that a respondent's inability to control sexual conduct while a juvenile is not relevant to his or her present or future inability to control behavior.

To demonstrate a deprivation of due process, Mr. Ritter must back up his contention that evidence of sexual misconduct as a juvenile has no probative value in deciding whether a respondent presents a risk of reoffending if not confined in a secure facility. At best, he points to scientific evidence that juveniles' brains are in a state of maturation that increases their prospect of rehabilitation. That does not equate to

evidence that acts committed while a juvenile are irrelevant to assessing the risk of their future inability to control behavior. The evidence was relevant.

Here, the defense had the opportunity to cross-examine the State's witness on this topic and make argument to the jury. Due process requires nothing more.

*Antisocial Personality Disorder.* Mr. Ritter also argues that substantive due process considerations barred the State from relying on evidence of his antisocial personality disorder because the definition is overly broad and imprecise given its prevalence among male prisoners. He relies, in part, on *Foucha*, a case where antisocial behavior was at issue.[8]

However, the Washington Supreme Court rejected his reading of *Foucha* in *In re Personal Restraint of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). Our court noted that unlike the antisocial behavior at issue in *Foucha*, antisocial personality disorder is a recognized personality disorder defined by the Diagnostic and Statistical Manual of Mental Disorders. *Id.* at 37 n.12.

Both of Mr. Ritter's substantive due process arguments are without merit.

---

[8] He also relies on *Crane* and *Hendricks*. However, his reading of those cases is incorrect because neither of those cases forecloses reliance on antisocial personality disorder. 534 U.S. at 411-17; 521 U.S. at 357-60.

*Procedural Due Process*

Mr. Ritter also argues that the definitions from RCW 71.09.020(7) and (18), noted earlier, improperly lower the State's burden of proof. He properly notes that the Washington Supreme Court has rejected this argument, but asks that we reexamine that precedent. We are not in a position to do so.

As recounted previously, those definitions required the State to prove that a respondent's mental abnormality or personality disorder makes him or her "*likely* to engage in predatory acts of sexual violence if not confined in a secure facility," RCW 71.09.020(18) (emphasis added), and that they were "'[l]ikely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person *more probably than not* will engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7) (emphasis added). He alleges that these definitions conflict with the constitutionally mandated burden of proving an SVP commitment by clear, cogent, and convincing evidence.

Our Supreme Court rejected this same argument more than a decade ago, pointing out that it confuses the burden of proof, which is the degree of confidence the trier of fact should have in the correctness of its conclusions, with a fact to be proved, which in the case of this element, is one couched in terms of statistical probability. *In re Det. of Brooks*, 145 Wn.2d 275, 297, 36 P.3d 1034 (2001), *overruled on other grounds by In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). The court pointed out that "RCW

71.09.060(1)'s demand that the court or jury determine beyond a reasonable doubt that a defendant is an SVP means that the trier of fact *must have the subjective state of certitude in the factual conclusion that the defendant more likely than not would reoffend* if not confined in a secure facility." *Id.* at 297-98 (emphasis added). One of the "fact[s] to be determined" is "not whether the defendant will reoffend, but whether the probability of the defendant's reoffending exceeds 50 percent." *Id.* at 298. Yet the SVP statute still requires that the fact finder have the subjective belief that it is *at least highly probable* that this fact is true. *Id.*

Mr. Ritter acknowledges that *Brooks* rejected his argument but nonetheless asks that we reexamine *Brooks* in light of later federal and state case law recognizing that involuntary commitment is unconstitutional absent proof that an individual has serious difficulty in controlling behavior. He points to the United States Supreme Court's decision in *Kansas v. Crane* and our Supreme Court's decision in *Thorell.*

It is not this court's place to "reexamine" a decision by the Washington Supreme Court that it has not overruled. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (citing *Godefroy v. Reilly*, 146 Wash. 257, 259, 262 P. 639 (1928)). *Thorell* implicitly rejected Mr. Ritter's suggestion that the State's burden to prove an individual's serious difficulty controlling behavior has ramifications for the State's burden of proving that the individual is "'likely to engage in predatory acts of sexual violence if not confined in a secure facility.'" *Thorell* explicitly approves the language of a to-commit instruction

similar to the pattern instruction in use at the time of this commitment trial. 149 Wn.2d at 742; *cf.* 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 365.10, at 568 (6th ed. 2012). The instruction approved in *Thorell* includes the same "likely to engage in predatory acts" element to which Mr. Ritter objects and that he asks us to reexamine. Yet, according to *Thorell*, the instruction continues to pass constitutional muster because it "requires the fact finder to find a link between a mental abnormality and the likelihood of future acts of sexual violence if not confined in a secure facility." 149 Wn.2d at 743.

Thus, even if we had authority to reconsider a decision of the Washington Supreme court, this is not the case to do so. The procedural due process argument, as *Brooks* already noted, confuses the burden of proof with a fact to be proved. That fact simply does not reduce the State's burden of proof. This argument, too, is without merit.

The commitment order is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

APPENDIX B:

*In re det. of Ritter*, 177 Wn.App. 519, 312 P.3d 723 (2013) (ordering remand for an evidentiary *Frye* hearing)

177 Wash.App. 519
Court of Appeals of Washington,
Division 3.

In re the DETENTION OF
Steven G. RITTER, Appellant,
v.
STATE of Washington, Respondent.

No. 30845–6–III.
|
Nov. 5, 2013.

**Synopsis**

**Background:** State petitioned to have convicted sexual offender civilly committed as sexually violent predator. Following jury trial, the Superior Court, Yakima County, David A. Elofson, J., granted petition and ordered sex offender committed. Sex offender appealed.

**[Holding:]** The Court of Appeals, Brown, J., held that *Frye* hearing was required on expert's prediction regarding sex offender's future dangerousness to extent prediction was based on results of novel risk assessment instrument.

Remanded.

West Headnotes (3)

**[1] Evidence**
⇐ Necessity and sufficiency

In determining if novel scientific evidence satisfies the *Frye* standard of general acceptance within the relevant scientific community, the court performs a searching review which may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority.

1 Cases that cite this headnote

**[2] Evidence**
⇐ Necessity and sufficiency

The core concern of *Frye's* standard for the admission of novel scientific evidence as generally accepted within the relevant scientific community is only whether the evidence being offered is based on established scientific methodology.

1 Cases that cite this headnote

**[3] Mental Health**
⇐ Experts

*Frye* hearing was required on State's expert's prediction regarding convicted sex offender's future dangerousness, on a petition for civil commitment of the offender as a sexually violent predator, to extent expert's prediction relied in part on results of novel dynamic risk assessment instrument.

Cases that cite this headnote

**Attorneys and Law Firms**

****723** David L. Donnan, Washington Appellate Project, Seattle, WA, for Appellant.

Brooke Elizabeth Burbank, Assistant Attorney General, Sarah Sappington, Office of The Atty General, Seattle, WA, for Respondent.

**Opinion**

BROWN, J.

***520** ¶ 1 Steven G. Ritter appeals his involuntary commitment as a sexually violent predator (SVP). He contends, among other things, that the trial court should have held a *Frye* [1] hearing on a predictive tool, the forensic version of the Structured Risk Assessment (SRA–FV). Because we agree with him, we exercise our discretion to "take ***521** any other action as the merits of the case and the interest of justice may require." RAP 12.2; *see* RAP 12.3(b). We remand solely for the trial court to hold a *Frye* hearing on the SRA–FV and to enter factual findings and legal conclusions for our review. We retain jurisdiction over the remaining issues and allow supplemental briefing concerning the outcome of the *Frye* hearing.

## FACTS

¶ 2 After committing various sexual assaults between ages 14 and 19, Mr. Ritter eventually pleaded guilty to first degree child molestation. He spent about seven years in prison, where he was diagnosed with pedophilia ****724** and antisocial personality disorder. Then, in February 2007, the State petitioned to involuntarily commit Mr. Ritter as an SVP.

¶ 3 In July 2006 and November 2009, Dale R. Arnold, PhD, wrote reports concluding Mr. Ritter met all SVP criteria. Dr. Arnold applied actuarial instruments, including the revised Static–99 (Static–99R), the revised Static–2002 (Static–2002R), and the revised Minnesota Sex Offender Screening Tool (MnSOST–R), to Mr. Ritter's static risk factors; additionally, Dr. Arnold applied his clinical judgment to Mr. Ritter's stable dynamic risk factors.[2] In November 2011, Dr. Arnold revised his prior reports to incorporate the SRA–FV as a tool structuring his clinical judgment of Mr. Ritter's stable dynamic risk factors.

¶ 4 Mr. Ritter unsuccessfully challenged the SRA–FV in a motion in limine citing *Frye*. Without holding a *Frye* hearing, the court concluded upon the briefing and argument that the SRA–FV satisfied *Frye* as either an actuarial or clinical prediction of future dangerousness. At a jury trial in January 2012, the State relied upon evidence of Mr. Ritter's juvenile and adult conduct; his diagnosed pedophilia and ***522** antisocial personality disorder; and predictions of his future dangerousness derived from the Static–99R, Static–2002R, and SRA–FV. The trial court ordered Mr. Ritter's commitment after the unanimous jury found he met all SVP criteria. He appealed.

## ANALYSIS

**[1]** ¶ 5 The issue is whether the trial court should have held a *Frye* hearing on the SRA–FV before allowing Dr. Arnold to use it at trial. Mr. Ritter contends this predictive tool does not satisfy *Frye*.[3] We review evidence admission under *Frye* de novo. *State v. Baity*, 140 Wash.2d 1, 9–10, 991 P.2d 1151 (2000). In determining if novel scientific evidence satisfies *Frye*, we perform "a searching review which may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority." *State v. Copeland*, 130 Wash.2d 244, 255–56, 922 P.2d 1304 (1996) (citing *State v. Cauthron*, 120 Wash.2d 879, 887–88, 846 P.2d 502 (1993)).

**[2]** ¶ 6 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 Wash.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 Wash.2d at 889, 846 P.2d 502. 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 ***523** through 703. *See Thorell*, 149 Wash.2d at 754–56, 758, 72 P.3d 708.

¶ 7 Mr. Ritter argues the SRA–FV does not satisfy *Frye* because it is not based on established scientific methodology and has not achieved general acceptance in the scientific community predicting future dangerousness. The SRA–FV is a structured clinical judgment tool for evaluating "stable dynamic risk factors" and integrating them with "static risk factors" considered by actuarial instruments.[4] Clerk's Papers (CP) at 47, 785, ****725** 968; Report of Proceedings (RP) at 592, 782–83.[5] *See generally* RAYMOND A. KNIGHT & DAVID THORNTON, EVALUATING AND IMPROVING RISK ASSESSMENT SCHEMES FOR SEXUAL RECIDIVISM 18–19 (Nat'l Inst. of Justice, U.S. Dep't of Justice Document No. NCJ 217618, 2007) ("In general, [structured risk assessment] is better conceptualized as a heuristic framework that can be used to guide the selection and organization of variables from any relevant data set."). Thus, a prediction of future dangerousness based on the SRA–FV is neither purely actuarial nor purely clinical.

¶ 8 By our research, structured risk assessment originated in April 2002. David Thornton, *Constructing and Testing a Framework for Dynamic Risk Assessment*, 14 Sexual Abuse: J. Res. & Treatment 139 (2002). A forensic version emerged as the "SRA Need Assessment" in March 2007 and became known as the "SRA–FV" in October 2009 and December 2010. Knight & Thornton, *supra, passim;* ***524** David Thornton & Raymond A. Knight, Using SRA Need Domains Based on Structured Judgment to Revise Relative Risk Assessments Based on Static–2002 and Risk Matrix 2000, Presentation at the 28th Annual Research and Treatment Conference of the Ass'n for the Treatment of Sexual Abusers (Oct. 1, 2009); David Thornton, Structured Risk Assessment: Using the Forensic Version of the SRA in Sex Offender

Risk Assessment, Presentation at a Workshop By Cent. Coast Clinical & Forensic Psychology Servs. (Dec. 2, 2010).

¶ 9 The SRA–FV has been presented at professional conferences and is expected to be published soon in a peer-reviewed journal titled *Sexual Abuse: A Journal of Research and Treatment.* Meanwhile, Mr. Ritter's expert witness, Richard Wollert, PhD, has criticized an assumption underlying structured risk assessment. Richard Wollert & Elliot Cramer, *The Constant Multiplier Assumption Misestimates Long–Term Sex Offender Recidivism Rates,* 36 Law & Hum. Behav. 390 (2012).

¶ 10 In February 2011, California adopted the SRA–FV as its official dynamic risk assessment instrument for evaluating sex offenders' future dangerousness. Letter from Janet Neely, Deputy Att'y Gen. of Cal., on Behalf of the Cal. State Authorized Risk Assessment Tool for Sex Offenders Comm., to Jerry Brown, Governor of Cal. (Feb. 25, 2011); *see* CAL.PENAL CODE §§ 290.04, .09. But in September 2013, California switched to the Stable–2007/Acute–2007 for unspecified reasons. *Risk Assessment Instruments,* CAL. STATE AUTHORIZED RISK ASSESSMENT TOOL FOR SEX OFFENDERS COMM., http://saratso. org/index.cfm?pid=467 (last visited Oct. 22, 2013).

¶ 11 Nonetheless, the SRA–FV may be a viable tool structuring clinical judgment of stable dynamic risk factors in Washington. *See* Amy Phenix, Current Research on Assessing the Risk of Sexual Offenders, Presentation at the ***525** Annual Conference of the Wash. Ass'n for the Treatment of Sexual Abusers (Feb. 23, 2013) (presentation slides available at *Wash. Ass'n for the Treatment of Sexual Abusers,* http://www.watsa.org/Resources/Documents/4. Phenix% 20Handouts% 202–23–13.pdf (last visited Oct. 22, 2013)).

**[3]** ¶ 12 We have found no published state or federal judicial opinion addressing the admissibility of the SRA–FV or any similar dynamic risk assessment instrument. Absent mandatory or persuasive authority, we conclude where an expert witness derives a prediction of future dangerousness in whole or part from a novel dynamic risk assessment instrument like the SRA–FV, the trial court must hold a *Frye* hearing on the instrument before the expert may use it at trial. Here, Dr. Arnold's report said "all of the instruments Mr. Ritter was rated on are simply tools designed to guide a clinical opinion." CP at 788. Dr. Arnold's trial testimony confirmed this approach:

> Q. Doctor, ... would you believe you met commitment criteria to a reasonable degree ****726** of psychological certainty if you didn't have the [instruments] to use?
>
> A. Yes.
>
> Q. You would have that confidence today without their usage?
>
> A. With Mr. Ritter in this case I would.
>
> Q. So you basically would be relying on your clinical judgment?
>
> A. I would be relying upon a guided empirical approach because I know what factors are related to sexual offender recidivism, and in this case they're quite clear.

RP at 977–78; *see* RP at 764. Contrary to these statements, Dr. Arnold ultimately used the SRA–FV in a mechanical way, assigning Mr. Ritter recidivism probabilities partly based on his domain scores. The bottom line is Dr. Arnold partly derived his prediction of Mr. Ritter's future dangerousness from a novel dynamic risk assessment instrument, the SRA–FV. Therefore, we conclude the trial court should ***526** have held a *Frye* hearing on the SRA–FV before allowing Dr. Arnold to use it at trial. Considering our analysis, we do not reach Mr. Ritter's remaining issues at this time.

¶ 13 Remanded for proceedings consistent with this interlocutory decision.

WE CONCUR: CORSMO, C.J., and FEARING, J.

**All Citations**

177 Wash.App. 519, 312 P.3d 723

Footnotes

1 *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923).

2 See *infra* note 7 for the definitions of static and stable dynamic risk factors.

3 Our Supreme Court adopted the *Frye* test for determining admissibility of novel scientific evidence. *State v. Martin,* 101 Wash.2d 713, 719, 684 P.2d 651 (1984); *see also State v. Riker,* 123 Wash.2d 351, 360 n. 1, 869 P.2d 43 (1994) (reaffirming the *Frye* test in a criminal case despite *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)); *Young,* 122 Wash.2d at 56, 857 P.2d 989 (applying the *Frye* test in an SVP commitment after *Daubert); Thorell,* 149 Wash.2d at 754, 72 P.3d 708 (same).

4 Risk factors are either static, which are unchangeable, or dynamic, which are changeable; dynamic risk factors are either stable, which can change slowly, or acute, which can change quickly. The SRA–FV considers three domains of stable dynamic risk factors: "Sexual Interests," "Relational Style," and "Self–Management." CP at 670, 786; RP at 992. The sexual interests domain includes "Sexual preferences for children," "Sexualized violence," and "Sexual preoccupation." CP at 670. The relational style domain includes "Emotional congruence with children," "Lack of emotionally intimate relationships [with adults]," "Callousness," and "Grievance thinking." CP at 670. The self-management domain includes "Lifestyle impulsivity," "Resistance to rules [and] supervision," and "Dysfunctional coping." CP at 670.

5 Unless otherwise noted, all citations to the Report of Proceedings reference the transcript of the jury trial held between January 11 and 26, 2012.

---

**End of Document**

## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| IN RE THE DETENTION OF | ) | |
| | ) | |
| | ) | |
| STEVEN RITTER, | ) | NO. 30845-6-III |
| | ) | |
| | ) | |
| PETITIONER. | ) | |

### DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 7TH DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARAH SAPPINGTON, AAG
[sarahs@atg.wa.gov]
[crjsvpef@atg.wa.gov]
OFFICE OF THE ATTORNEY GENERAL
800 FIFTH AVENUE, SUITE 2000
SEATTLE, WA 98104-3188

( ) U.S. MAIL
( ) HAND DELIVERY
(X) AGREED E-SERVICE VIA COA PORTAL

**SIGNED** IN SEATTLE, WASHINGTON THIS 7TH DAY OF MARCH, 2016.

X_____

**Washington Appellate Project**
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711