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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 30845-6-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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IN RE THE DETENTION OF:

STEVEN RITTER

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR YAKIMA COUNTY

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APPELLANT'S SUPPLEMENTAL BRIEF

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A. INTRODUCTION.

To establish that an individual respondent meets the involuntary civil commitment criteria of RCW 71.09, the State must prove beyond a reasonable doubt that he or she is “more likely than not” to engage in a future predatory act of sexual violence unless confined to a secure facility. RCW 71.09.020(18). The “more likely than not” standard represents an absolute statistical probability exceeding 50%. In re Det. of Brooks, 145 Wn.2d 275, 295, 36 P.3d 1034 (2001), overruled on other grounds by In re Det. of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003). In general, the State attempts to meet this burden by presenting actuarial risk assessment instruments that gauge whether certain static – unchangeable – risk factors apply. “The actuarial approach evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense.” Thorell at 753.

At appellant Steven Ritter’s commitment trial, the State had psychologist Dr. Dale Arnold testify about how Mr. Ritter scored on actuarial risk assessment instruments like the Static-99R. Dr. Arnold also 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 which Static-99R reference group to

compare him against. In re det. of Ritter, 177 Wn.App. 519, 521, 312 P.3d 723 (2013); RP 781-83, 809-22. Below, respondent's objection to the admissibility of the SRA-FV, made under Frye v. United States, 293 F. 1013 (D.C.Cir.1923), was denied.

On appeal from Mr. Ritter's commitment order, this Court correctly identified the SRA-FV to be a novel dynamic risk assessment, remanded the case for a Frye hearing, and ordered this supplemental briefing. Ritter at 525. ("The bottom line is Dr. Arnold partly derived his prediction of Mr. Ritter's future dangerousness from a novel dynamic risk assessment instrument.")

Indeed, new scientific ideas that have yet to gain general acceptance in the relevant community are not admissible evidence in court. Unlike actuarial risk assessment measures focused on static risk factors, which have over time proven themselves to be sufficiently accurate in practice, the psychometric instrument SRA-FV is in its infancy.

The SRA-FV is supposed to objectively assess personality traits (habitual patterns of behavior, thought, and emotion) that relate to risk of sexual offending but are unaccounted for in the Static-99R actuarial risk assessment instrument.<sup>1</sup> The developer of the measure claims that his

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<sup>1</sup> Ritter, at 523, n.4. (Describing SRA-FV's three domains of stable dynamic risk factors.)

numerical formula of assigning meaning to a combination of dynamic risk factors of his choosing improves the predictive accuracy of assessing risk posed by a given sex offender re-entering the community.

However, the SRA-FV author concedes he has not shown the instrument actually measures what it purports to measure. *It lacks construct validity.* Scoring the instrument is so subjective that different raters cannot agree on how to grade the same subjects. *There is insufficient inter-rater reliability.* 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. *There has been no cross-validation.*

When it ordered the Frye hearing, this Court asked if “the SRA-FV may be a viable tool structuring clinical judgment of stable dynamic risk factors in Washington.” Ritter, at 524. The answer is a resounding no.

The SRA-FV has not gained general acceptance in the relevant scientific community, because it has not emerged out of the experimental cocoon. The State’s pitch in favor of admitting the measure rests on wishful thinking, not data. On remand, in ruling that all of the SRA-FV’s shortcomings go to weight, not admissibility, the trial court erred. This Court should reverse and order a new commitment trial.

B. ASSIGNMENTS OF ERROR.<sup>2</sup>

1. The novel psychometric instrument SRA-FV lacks validity. The trial court's finding #4 is in error and not supported by substantial evidence.

2. For the same reason, finding #5 is likewise error and not supported by substantial evidence.

3. Research into dynamic risk factors, and how they may fit within a risk assessment, remains ongoing. Finding #7 is in error and not supported by substantial evidence.

4. The SRA-FV lacks construct validity and its definitions of dynamic risk factors do not track previous research. Finding #9 is in error and not supported by substantial evidence.

5. The SRA-FV has not been subject to any cross-validation studies. Findings #10 is in error and not supported by substantial evidence.

6. For the same reason, finding #11 is likewise error and not supported by substantial evidence.

7. The fact that the SRA-FV was developed using a "split sample" method, and the fact that the instrument was developed on the dated

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<sup>2</sup> For ease of access, the trial court's "Findings of Fact and Conclusions of Law on Frye hearing on the SRA-FV" are attached as Appendix A.

Bridgewater sample, detract from, not add to, any validity. Finding #12 is in error and not supported by substantial evidence.

8. To the extent the trial court omits the fact that American Psychological Association (APA) Code of Ethics, Specialty Guidelines for Forensic Psychology, and Standards for Educational and Psychological Testing take precedence over any Association for the Treatment of Sexual Abusers (ATSA) practice guidelines, finding #13 is error and not supported by substantial evidence.

9. For the same reason, finding #12 is likewise error and not supported by substantial evidence.

10. For the same reason, finding #13 is likewise error and not supported by substantial evidence.

11. To the extent the trial court accepted the State's proposal to describe only one of the three experts who testified below to be "credible," finding #16 is in error and not supported by substantial evidence.

12. The SRA-FV has not gained acceptance in the relevant scientific community, and, at this early point in its development, cannot do so. Finding #19 is error and not supported by substantial evidence.

13. For the same reason, finding #20 is likewise error and not supported by substantial evidence.

14. The SRA-FV is an untested invention which creates a false illusion of numerical certainty regarding the significance of subjectively assessed psychological constructs. Finding #23 is in error and not supported by substantial evidence.

15. The scientific community accepts that consideration of research-based dynamic risk factors is important, but there is no validated method of doing so that increases predictive accuracy above and beyond a strict actuarial approach to risk assessment. Trial court conclusion #3 is error and not supported by substantial evidence.

16. For the same reason, conclusion #4 is likewise error and not supported by substantial evidence.

17. The relevant scientific community relies on cross-validation to gauge whether a predictive instrument is generalizable. Conclusion #5 is in error and not supported by substantial evidence.

18. No one beside the instrument's author has ever shown that the SRA-FV "is capable of producing reliable results." To the contrary, peer-reviewed publications have challenged the notion that the SRA-FV can be trusted and the instrument has not gained general acceptance in the scientific community. Conclusion #6 is in error and not supported by substantial evidence.

19. The lack of construct validity, lack of inter-rater reliability, and lack of cross-validation, are all reasons why the SRA-FV has not gained general acceptance in the relevant scientific community. The instrument does not meet Frye admissibility. Conclusion #7 is in error and not supported by substantial evidence.

20. For the same reason, conclusion #8 is likewise error and not supported by substantial evidence.

21. The shortcomings in the SRA-FV are severe. Psychologists who may rely on the instrument would not be doing so “reasonably.” Because of its veneer of mathematical certainty, the instrument is more likely to mislead, than assist, any trier of fact. Conclusion #9 is in error and not supported by substantial evidence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Frye excludes scientific evidence not shown to be capable of producing reliable results and not generally accepted within the relevant 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 actuarial like the Static-99R.

Psychometric measures are judged on their (1) construct validity, (2) inter-rater reliability, and (3) cross-validation. 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.”<sup>3</sup>

Did the trial court err in ruling these red flags “are a matter to be resolved by the finder of fact,” rather than an outright bar to admissibility under Frye?

D. STATEMENT OF FACTS.

**1. The SRA-FV, as the State’s witnesses use it.**

The psychologist who testified against Mr. Ritter at the initial commitment trial, Dr. Arnold, assessed risk using “static” actuarial instruments such as the Static-99R. Ritter at 521. The expert called by the State at the Frye hearing, forensic psychologist Dr. Amy Phenix, also anchors her RCW 71.09 evaluations in actuarial risk assessment instruments. 12/9/14 RP 29-31. Actuarial instruments score a subject against a list of known static “risk factors that are established in the

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<sup>3</sup> Dr. Dale Glaser 12/10/14 RP 56; Dr. Brian Abbott, 12/11/14 RP 10. For the purpose of the Frye hearing, appellant Ritter’s case was consolidated with that of another RCW 71.09 respondent, David Ramirez. 12/9/14 RP 9. Dr. Glaser, a statistician and expert in psychometric measures, was called by Mr. Ritter’s counsel. Dr. Abbott, a forensic psychologist with expertise in sex offender risk assessment, was called by Mr. Ramirez’s counsel.

research that when present increase the risk of sexual reoffense and when absent decrease the risk of sexual reoffense.” 12/9/14 RP 29, 30-31. The ideal actuarial risk instrument would have perfect *predictive accuracy*, meaning that those with high scores would reoffend and those with a low score would not. 12/9/14 RP 38-39.

Actuarial risk assessment instruments are more accurate than clinical judgment, in part because they eliminate the problem of clinicians individually weighing risk factors. 12/9/14 RP 34-35. Dr. Phenix conceded that when it comes to identifying likely recidivists and non-recidivists, clinicians making subjective decisions about risk fare “no better than flipping a coin.” 12/9/14 RP 34.

The scientific community views the Static-99 actuarial as “the gold standard.” 12/9/14 RP 36. Dr. Phenix emphasized the instrument earned acceptance through repeated cross-validation: “It’s been validated or tested on every conceivable type of [offender] in various jurisdictions: Low risk, medium risk, high risk, developmentally-delayed, various ethnic groups... it’s been widely, widely tested over many years.” 12/9/14 RP 36; 79.

Unlike the Static-99R, the SRA-FV is not an actuarial risk assessment instrument. Dr. Abbott testified that the SRA-FV is a

psychological measure, a psychometric.<sup>4</sup> 12/10/14 RP 111. In theory, people have enduring inflexible personality characteristics and “those personality characteristics dictate how they respond to specific situations.” 12/10/14 RP 110. The SRA-FV was designed to have a clinician measure personality characteristics that cause a person to react in a way that may lead to them acting in dysfunctional or possibly sexually-abusive ways. 12/10/14 RP 106. Dr. Phenix confirmed that the SRA-FV is not designed to give a risk estimate for sexual re-offense and does not give one as the Static-99 instrument does. 12/9/14 RP 159-60.

The SRA-FV represents how its author, Dr. Thornton proposed clinicians include dynamic risk factors in a risk assessment. 12/9/14 RP 45. Dr. Thornton broadly categorized dynamic factors into “domains,” with the first category being sexual interests, the second “relational style, how the person relates to other people,” and the third, “self-management, and this is how the person acts out in the community.” 12/9/14 RP 45-46.<sup>5</sup>

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<sup>4</sup> Dr. Abbott is a forensic psychologist with 36 years of experience treating sex offenders. 12/10/14 RP 99-101. For the last twelve years, he has been evaluating individual sex offenders alleged to meet involuntary civil commitment criteria in California, Missouri, and Washington. 12/10/14 RP 101-03. Dr. Abbott has published five peer-reviewed articles on sex offender risk assessments, including the Static-99/Static-99R actuarials. 12/10/14 RP 101-103.

<sup>5</sup> Dr. Abbott explained these three domains are subdivided into ten total items, each of which can be scored a zero, one, or two. 12/10/14 RP 106, 109. Because some items receive fractional scores, there are 62 possible numerical scores. 12/10/14 RP 106-107.

Dr. Phenix boldly claimed that this form of clinical judgment works: “the higher the level of dynamic risk factors or the total score on SRA-FV, the higher the absolute probability of sexual re-offense.” 12/9/14 RP 60.<sup>6</sup>

But, the SRA-FV on its own is not designed to give a risk estimate of probability for sexual re-offense; the Static-99 does that. 12/9/14 RP 159-160. The Static-99 instrument gives an individual score and reports a corresponding predicted recidivism estimate. 12/9/14 RP 71. There are different “normative groups,” or “norms” on the Static-99R, and each corresponds to a different recidivism estimate, even for one given score. 12/9/14 RP 61-65; See also Dr. Abbott at 12/10/14 RP 130-131.

“There is a good deal of variability” in samples of sex offenders and the Static-99 authors “attempted to account for that.” 12/9/14 RP 66. The norms are supposed to reflect a difference in risk among groups of offenders. 12/9/14 RP 62-63. Dr. Phenix said incorrectly selecting a group can lead to gross errors in estimating risk. 12/9/14 RP 68-69.

An aggregate score of all of the SRA-FV risk factors is called a “Level of Need Index” or “LONI.” 12/9/14 RP 60. According to Dr. Phenix, these LONI scores indicate which of the Static-99R norms to use.

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<sup>6</sup> This is similar to how Dr. Arnold testified about the SRA-FV at Mr. Ritter’s initial commitment trial. RP 781-83, 809-22.

12/9/14 RP 61. She said this is how the SRA-FV helps her “match” an individual to a reference group.<sup>7</sup> 12/9/14 RP 64, 70-71.

At the initial commitment trial, Dr. Arnold had done the same. He scored Mr. Ritter on the SRA-FV, and based on the calculated “LONI,” decided that Mr. Ritter should be compared to the “high risk/high need” Static-99R reference group. RP 815, 819.

## **2. Ethical psychological practice demands reliability and validity.**

Dr. Abbott explained how the APA Code of Ethics applies to forensic evaluations and the development of tests and measures. 12/10/14 RP 153-54. The ethics code requires that a psychologist's work be “based upon established scientific and professional knowledge of the discipline.” 12/10/14 RP 155. (Emphasis added.) Forensic testimony is to be based on “information and techniques sufficient to substantiate their findings.” 12/10/14 RP 155-56. The ethics code further requires that: “Psychologists use assessment instruments whose validity and reliability have been established for use with the members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitation of the test results and interpretations.” 12/10/14

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<sup>7</sup> Dr. Phenix used the SRA-FV this way even though the idea to do so did not come from the peer-reviewed publication, but a training. 12/9/14 RP 95-96, 135, 137, 152-54, 159.

RP 156. (Emphasis added) In addition, the APA Specialty Guidelines for Forensic Psychology state that psychologists involved in legal matters have the obligation to “provide opinions and testimony that are sufficiently based upon adequate scientific foundation and reliable and valid principles and methods that have been applied appropriately to the facts of the case.”

12/10/14 RP 157. (Emphasis added.) Similarly, the Standards of Educational & Psychological Testing (co-authored by APA and the American Educational Research Association) require that psychologists who design a psychometric test “produce reliable and valid measures as well as guiding practitioners in the reliable and valid use of the measures.”

12/10/14 RP 158. (Emphasis added.)

Dr. Abbott made clear that the above ethical codes, not ATSA standards, control the “design, validation, development, replication of psychological instruments such as the SRA-FV.” 12/10/14 RP 159. Dr. Abbott testified that given the ethics rules, “it would be difficult to imagine considering an instrument that had substandard validity and reliability [like the SRA-FV] as being generally accepted.” 12/10/14 RP 156-157.

### **3. The SRA-FV lacks construct validity.**

Dr. Phenix claimed that the SRA-FV domains and categories were consistent with a prior meta-analysis of dynamic risk factors. 12/9/14 RP 47. Dr. Abbott disagreed. 12/10/14 RP 111-112. First, the very idea of “long-term vulnerabilities [is] a concept that has yet to be tested in the literature.” 12/10/14 RP 112. Second, the factors from the SRA-FV were not taken from the meta-analysis referred to by Dr. Phenix, because the SRA-FV was developed eight years before the meta-analysis was published. 12/10/14 RP 114-115. The “domains” in the SRA-FV are the authors’ original work. 12/10/14 RP 115-117, 120.

The SRA-FV method for assessing so-called sexual interest in children differs from that of the meta-analysis. 12/10/14 RP 117-18. The same criticism applies to how the SRA-FV defines sexual violence and sexual pre-occupation. 12/10/14 RP 118-119. (“Dr. Thornton uses different methods to define the risk factors than what was done in the underlying studies used in the Meta-Analysis by Mann et al.” RP 119.) Three out of the four risk factors listed in the SRA-FV relational-style domain were also measured differently than in the underlying studies examined in the meta-analysis, creating the same construct validity problem that exists for the sexual interest domain. 12/10/14 RP 123. The

same problem exists with respect to the self-management domain.

12/10/14 RP 124.

In sum, nine out of ten alleged risk factors in the SRA-FV instrument are measured differently than how the scientific community earlier measured them. 12/10/14 RP 124-125, 128. Dr. Thornton's modification of prior research renders the SRA-FV an untested instrument without construct validity. 12/10/14 RP 120-121. Dr. Abbott was clear: "we can't assume that the SRA-FV items are valid measures of these long-term vulnerabilities because [the authors are] using different methods than what was studied in the literature." 12/10/14 RP 123-124.

Dr. Abbott pointed out that the SRA-FV authors admit there is a corresponding "lack of construct validity of the factors." 12/10/14 RP 125. This means there could be a risk domain, or items on the measure, that do not "correlate to domains and may not even be predictive of sexual recidivism." 12/10/14 RP 126-127. SRA-FV scoring may be "inflated by items that are not valid or not associated with sexual recidivism." 12/11/14 RP 14. "[A]s a psychologist using the instrument, I don't know to what extent any of the items I'm scoring the individual on actually are predictive of sexual recidivism." 12/11/14 RP 16. Before the SRA-FV emerges out of its experimental phase, a "statistical study using methods of construct

validity to see if the items actually measure what they intend to measure,” is needed. 12/10/14 RP 127-128.

Dr. Phenix agreed that there are concerns over the SRA-FV’s “construct validity,” or whether the instrument actually measures what it says it measures. 12/9/14 RP 97-98. Dr. Phenix plainly said that in terms of the SRA-FV items “[t]here’s no construct validity on them.” 12/9/14 RP 138. She said: “that would be nice,” but claimed construct validity is “not something that’s necessary and not necessary right now.” 12/9/14 RP 98-99. 12/10/14 RP 28-29. Dr. Phenix contested that it is “acceptable in prediction” to use an instrument without actually knowing that it measures what it purports to measure. 12/9/14 RP 131, 132, 143.

Dr. Glaser, a statistician with 20 years of experience in psychometric testing, disagreed.<sup>8</sup> He testified the APA holds that construct validity is a “paramount” requirement of psychometric testing. 12/10/14 RP 50. Dr. Glaser concurred with Dr. Abbott’s assessment that the lack of construct validity is a major defect. 12/10/14 RP 49, 56-57.

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<sup>8</sup> The bulk of Dr. Glaser’s work has been in applied statistics, analyzing military, education, and healthcare data. 12/10/14 RP 39-40, 80. He conducts reliability and validity testing for scientists who develop predictive instruments like the SRA-FV. 12/10/14 RP 86-87. Statistical analysis of psychometric measures is similar across disciplines, because methods to test incremental validity, predictive accuracy, construct validity fall under laws of statistics which have universal application. 12/10/14 RP 92-94. Dr. Phenix is not a statistician and did not work on the development of the SRA-FV. 12/9/14 RP 188. What she knows about the measure comes from a training she attended in 2010 and the authors’ 2013 publication. 12/9/14 RP 187-88.

#### **4. The SRA-FV lacks inter-rater reliability.**

Items scored on the Static-99 and Static-99R tally sheets call for straightforward “yes” or “no” responses.<sup>9</sup> In contrast, the SRA-FV “domains” or “constructs” represent a psychologist’s subjective assessment of the test subject’s personality. The clinician uses “all sorts of information” to score the SRA-FV. 12/9/14 RP 51-53. Dr. Phenix said the SRA-FV manual gives “guidance” on how to say whether a particular factor is not present, somewhat present, or strongly present, but is more subjective than the Static-99R. 12/9/14 RP 49, 55.<sup>10</sup>

With respect to psychometric measures like the SRA-FV, inter-rater reliability refers to consensus in ratings given by different judges for the same test subject. 12/10/14 RP 161. Disagreement among raters suggests “the measure is not a reliable measure of what it's intending to measure.” 12/10/14 RP 161. “Inter-rater reliability is important because essentially you can say that it's a measure of trustworthiness of the instrument.” 12/10/14 RP 162. The observed “low inter-rater agreement when using the SRA-FV” is evidence that the instrument “may not

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<sup>9</sup> (See [http://www.static99.org/pdfdocs/static-99-coding-rules\\_e71.pdf](http://www.static99.org/pdfdocs/static-99-coding-rules_e71.pdf) and <http://www.static99.org/pdfdocs/static-99rcodingform.pdf>, both last accessed May 11, 2015.)

<sup>10</sup> There is no requirement about the education level of who uses the SRA-FV; they just have to be “trained” in it. 12/9/14 RP 55.

actually be measuring what [it's] supposed to be measuring.” 12/10/14 RP 125; 156-57; 161-65.

Science requires psychometric measures to meet “minimum levels of 80 percent and 90 percent” of inter-rater reliability, but “[t]he SRA-FV fails. The one assessment [of inter-rater reliability] was 55%.” 12/10/14 RP 163, 164. See also 12/11/14 RP 20 (SRA-FV authors acknowledging that the inter-rater reliability of their instrument “is less than desirable.”) Just as she did with respect to the missing construct validity, Dr. Phenix conceded there are “legitimate concerns” because the SRA-FV has poor inter-rater reliability. 12/9/14 RP 90-91, 114.

##### **5. The SRA-FV has not been cross-validated.**

Dr. Phenix agreed that it is important to validate an instrument “on as many samples as possible.” 12/9/14 RP 124, 125. When asked if that had been done with the SRA-FV, she said: “No, not yet.” 12/9/14 RP 125.

Dr. Phenix acknowledged there has been criticism in the scientific community about the unique sample on which the SRA-FV was developed. 12/9/14 RP 86. She said “both the construction sample and the validation sample are offenders from the same hospital,” and this so-called “split-sample” validation method drew criticism. 12/9/14 RP 87-88. She agreed that it is important to establish the comparability of this sample to

current offenders, but that has not been done with the SRA-FV. 12/9/14 RP 125-126. She knows that even the authors, in their published paper, said the validity of their findings will “depend on new studies carried out with other samples.” 12/9/14 RP 107-09.

Dr. Abbott explained that the SRA-FV was built on a data set of men evaluated under a “sexually dangerous person” law in Massachusetts between 1958 and 1986. 12/10/14 RP 134. The group is referred to as the “Bridgewater sample,” named after the state hospital where they were involuntarily committed. 12/10/14 RP 135. Dr. Abbott pointed out that the SRA-FV authors acknowledge that there is a problem in the “applicability of the results from the SRA-FV to contemporary groups of sex offenders.” 12/10/14 RP 135. This is due to age, and the outlier nature, of the sample. 12/10/14 RP 136. Overall, the recidivism rate of the Bridgewater group “is substantially higher than by contemporary standards... a little over three times higher than what we typically see with contemporary groups of sexual offenders.” 12/10/14 RP 136.

Again, Dr. Phenix conceded that there has been no cross-validation: “[t]hat has not been done yet.” 12/9/14 RP 88. Consequently, there is doubt whether the SRA-FV results can be “generalized to modern SVP commitment programs.” 12/9/14 RP 108, 111.

Dr. Glaser testified that such replication, or external validity, is essential for a psychometric measure. 12/10/14 RP 47-48.

**6. Any claim of increased predictive validity is premature.**

Dr. Abbott and Dr. Phenix agreed that the single SRA-FV publication showed “incremental predictive validity” over using just the Static-99. 12/10/14 RP 139. But, there has been no correlational study done between the SRA-FV items and the Static-99R items. 12/10/14 RP 140-143. Since some of the SRA-FV domains appear to overlap with risk factors already considered by the Static-99R, they may be “measuring the same thing, [in which case] it’s likely that the incremental validity result could be a spurious result.” 12/10/14 RP 143-44. The absence of a correlation study “casts a large shadow of doubt on whether the SRA-FV achieves incremental predictive validity over the Static-99R.” 12/10/14 RP 144. The same problem applies to the sexual deviance risk domain. 12/10/14 RP 145-146. (“[I]t looks like there is overlap between the two instruments,” which is why more testing is needed “to see if the correlation between the two measures are producing a false finding of incremental predictive validity.” 12/11/14 RP 32.)

Notably, other past attempts to improve on the predictive validity of the Static-99 using dynamic risk factors failed to replicate. 12/10/14 RP

148-150. As such, experts cannot “be confident that the results from a single study will be reproduced in other groups unless that’s been statistically tested and validated.” 12/10/14 RP 151. Replication in other contemporary samples is necessary to see whether the preliminary SRA-FV results are genuine. 12/11/14 RP 5-7. Most original research results are false and exposed as such through independent replication attempts. 12/11/14 RP 7-8. Because the authors did not replicate the SRA-FV, Dr. Abbott testified, the measure must be treated as “an unconfirmed discovery.” 12/11/14 RP 10. He put it this way:

So if I was to use the SRA-FV in Mr. Ritter's case or Mr. Ramirez's case in the population they come from, I really have no idea if the SRA-FV would work as Thornton and Knight found in the Bridgewater sample. It may and it may not, but I have no data to support that it would work in a different population.

12/11/14 RP 10.

In science, “replication is clearly a benchmark by which we gauge general acceptance.” 12/11/14 RP 11. “[E]ven [the SRA-FV authors] caution about transferring those results from their study to contemporary groups of sex offenders” and “said that replication of their results is essential.” 12/11/14 RP 11.

**7. Static-99R authors do not approve of turning to the SRA-FV to select a Static-99R reference group.**

At the December 2014 Frye hearing, Dr. Abbott testified that he expected the Static-99 authors would soon disavow mechanically using the SRA-FV to select a Static-99R reference group. 12/11/14 RP 26-27, 130. He also testified that the “Bridgewater sample,” upon which the SRA-FV was built, would no longer be included in any Static-99R reference group: “They decided that statistically that's now considered an outlier, meaning the risk estimates are so far out of whack that they're not going to even include it any longer.” 12/11/14 RP 123-124.

Dr. Abbott previously published a peer-reviewed paper criticizing the notion that an expert could use the SRA-FV LONI score to decide which Static-99R reference norm to use. 12/10/14 RP 166-171; 12/11/14 RP 129. Dr. Abbott explained this method had “never been tested in actual groups of sex offenders to see if it works.” 12/10/14 RP 171. The SRA-FV authors “did no replication of it.” 12/10/14 RP 171. The fact that the same LONI scores can appear in members of different reference groups “disproves that the LONI system is valid.” 12/10/14 RP 173-74.<sup>11</sup>

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<sup>11</sup> Dr. Abbott’s approach, for selecting an appropriate reference group on the Static-99R has been to match base rates of reoffending. 12/11/14 RP 95-96.

Indeed, 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).<sup>12</sup> The authors abandoned the use of four reference groups in favor of just two. They excluded the Bridgewater sample 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 criticized 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. (Emphasis added.) 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.

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<sup>12</sup> This article was published after the trial court’s *Frye* hearing and is not part of the record, but this Court has already stated its *Frye* analysis can extend beyond the record. *Ritter*, 177 Wn.App. at 522. An “in press” version of the article is available here: [http://www.static99.org/pdffdocs/Research-Hanson\\_Thornton\\_Helmus\\_Babchishin-2015.pdf](http://www.static99.org/pdffdocs/Research-Hanson_Thornton_Helmus_Babchishin-2015.pdf). (Last accessed, May 13, 2015.) Counsel for the appellant will provide a published copy upon request.

**8. The instrument is not generally accepted in the community.**

Dr. Glaser reviewed the SRA-FV study “[t]o assess if construct validity and/or psychometric testing had been sufficient and conducted for this instrument.” 12/10/14 RP 43. He used standards and principles that are established in the field of statistics, and psychometric measuring, in particular. 12/10/14 RP 43. He has peer-reviewed other proposed psychometric measures. If asked to do that with the SRA-FV, he would reject it and recommend a revision “with major changes.” 12/10/14 RP 57.

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. 12/10/14 RP 128-129. Dr. Abbott said that the instrument has not achieved general acceptance in the field because it is relatively new and because of the “limitations that the [authors] lay out in the 2013 article regarding whether it’s appropriate to use it with contemporary groups of sexual offenders.” 12/10/14 RP 129. He explained:

[W]ithout knowing the extent to which the items are significantly correlated or associated with sexual recidivism, I would have really a lack of confidence in trying to interpret the total score, and if we’re unable to have confidence that the total score is accurate, I

can't imagine that an instrument would be generally accepted in the relevant scientific community.

12/11/14 RP 17.

The SRA-FV, “clearly by the generally-accepted standards in the forensic field, it doesn't pass muster in terms of being reliable enough to apply to make decisions about individuals.” 12/11/14 RP 21. In reaching this conclusion, Dr. Abbott emphasized that the APA ethical codes and the Standards of Educational and Psychological Testing require that a psychometric show reliability and validity before its use. 12/11/14 RP 24. ATSA guidelines are inapplicable; they “do not dictate how instruments are designed, developed, validated and cross-validated.” 12/11/14 RP 82.

Dr. Abbott was clear that the SRA-FV authors have not fully complied “with the applicable standards to develop a valid and reliable instrument.” 12/11/14 RP 131-132.

E. ARGUMENT.

1. **The trial court erred in ruling that an experimental psychometric instrument neither capable of producing reliable results, nor generally accepted in the scientific community, can be admitted under Frye.**

a. Scientific evidence is inadmissible when it fails reliability or lacks general acceptance

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).

The trial court acts as gatekeeper, assessing the reliability and admissibility of expert testimony before permitting its admission. Id. at 600.

Under Frye, expert testimony is admissible where:

(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), rev. denied, 179 Wn.2d

1019 (2014) (quoting State v. Sipin, 130 Wn.App. 403, 414, 123 P.3d 862

(2005)). “Both the theory underlying the evidence and the methodology

used to implement the theory must be generally accepted in the scientific community for evidence to be admissible under Frye. ” Id. The court does not decide the correctness of the proposed expert testimony, but “whether the theory has achieved general acceptance in the appropriate scientific community.” Id. at 175-76 (quoting State v. Riker, 123 Wn.2d 351, 359-60, 869 P.2d 43 (1994)).

“[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). The reliability of the scientific methods “depends upon three factors: (1) the validity of the underlying principle, (2) the validity of the technique applying that principle, and (3) the proper application of the technique on a particular occasion.” Sipin, 130 Wn.App. at 414-15 (citing *inter alia* Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum. L.Rev. 1197, 1201 (1980)).

“The rationale of the Frye standard, which requires general acceptance in the relevant scientific community, is that expert testimony should be presented to the trier of fact only when the scientific community has accepted the reliability of the underlying principles.” State v. Copeland, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996). “If there is a

significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted.” Id., quoting from State v. Canaday, 90 Wn.2d 808, 887, 585 P.2d 1185 (1978).

“The trial court’s gatekeeper role under Frye involves by design a conservative approach, requiring careful assessment of the general acceptance of the theory and methodology of novel science, thus helping to ensure, among other things, that ‘pseudoscience’ is kept out of the courtroom.” Copeland 130 Wn.2d at 259.

For example, in Sipin, the defendant moved to exclude the State’s accident reconstruction expert’s opinion about who was driving the car based on a computer generated simulation of the occupant’s movements during the crash. 130 Wn.App. at 408. At a Frye hearing, the expert said he had used this same computer program for his testimony in other trials. The program was premised on established laws of physics and mathematical equations. Id. at 408, 415. This Court held that for the results of a computer-generated simulation program to be admissible, it must be “generally accepted by the appropriate community of scientists to be valid for the purposes at issue in the case.” Id. at 416.

Reviewing the evidence, the court found insufficient proof the program “has been validated, or is universally accepted by the relevant

scientific community, as an accurate predictive model for the accident reconstruction used at trial.” Id. at 419. While the State argued the evidence should be admitted and the jury could weigh the expert’s testimony based on cross-examination, this Court held that the inadequate support among the scientific community rendered the expert testimony inadmissible under Frye. “[T]he relevant group of scientists have not reached consensus” as to the reliability of the method the expert used for his opinion on how the accident occurred. Id. at 420.

In State v. Cissne, 72 Wn.App. 677, 686, 865 P.2d 564 (1994), this Court held that horizontal gaze nystagmus evidence would be excluded under Frye, unless “[t]he State is able to prove that [the alcohol intoxication test] rests on scientific principles and uses techniques which are not ‘novel’ and are readily understandable by ordinary persons.” Cissne emphatically called on the trial court, on remand, to “evaluate, weigh and consider” whether the HGN test “is novel, and if it is novel, whether it is reliable as an indicator of the probability of impairment or of a specific alcohol level.” Id. (Emphasis added.)

Full acceptance of a process in the relevant scientific community obviates the need for a Frye hearing. Sipin, 130 Wn.App. at 415. But, general acceptability is not satisfied “if there is a significant dispute

between qualified experts as to the validity of scientific evidence.” State v. Kunze, 97 Wn.App. 832, 853, 988 P.2d 977, review denied, 140 Wn.2d 1022 (2000). (citing Cauthron, 120 Wn.2d 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 provides that the facts or data relied on by an expert must be admissible into evidence if they are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”

This court reviews a lower court’s evidentiary rulings for an abuse of discretion. E.g., State v. George, 150 Wn.App. 110, 117, 206 P.3d 697 (2009). However, 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 at 255-56.)

- b. Even the State’s witness and the SRA-FV authors concede the SRA-FV does not meet basic measures of scientific trustworthiness.

The trial court should have found that the SRA-FV does not satisfy Frye because it is not reliable. The State’s expert, Dr. Phenix, made a number of concessions that, taken together, only lead to the conclusion that the SRA-FV instrument is too new to be trusted. 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 the SRA-FV items lack construct validity, meaning, it is unclear whether the instrument actually measures what it says it measures. 12/9/14 RP 97-98, 138. She conceded the fact that the SRA-FV has poor inter-rater reliability is a legitimate concern. 12/9/14 RP 90-91, 114. 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, the validity of their findings will depend on new studies carried out with other samples. 12/9/14 RP 107-09.

The trial court's findings #4, #7, #9, #10, #11, #12, #19, #22, and conclusions #3, #5, #6, are all inexplicably at odds with these concessions and admissions regarding validity and reliability.<sup>13</sup> "Substantial evidence" is evidence sufficient to persuade fair-minded person of truth of declared premise. Hensel v. Department of Fisheries, 82 Wn.App. 521, 919 P.2d 102 (1996). Where the State's expert conceded weakness after weakness, a fair reading of the evidence presented at the Frye hearing shows these findings and conclusions are not supported by the record.

The underlying methodology is novel and dubious. There have been no efforts to replicate the original SRA-FV study, but replication is a benchmark of reliable science, as well as a requirement under Frye. See Sipin, 130 Wn.App. at 414-15. The trial court erred.

- c. A respected statistician and forensic psychologist testified that the SRA-FV authors' claims remain unproven and unacceptable to the scientific community at large.

SRA-FV lacks reliability and validity and the record shows that there is at least as much, if not more, published criticism of the SRA-FV, than support for it. Dr. Abbott and Dr. Glaser provided clear and coherent criticism of the SRA-FV. There is no reason for the trial court to have selected Dr. Phenix as a "credible" witness, but not deemed these two

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<sup>13</sup> Finding #12, that the SRA-FV used a "split sample" method is somewhat correct, but the entirety of the record shows this was not sufficient or meaningful validation.

experts to have been equally credible. Finding #16 is in error. More importantly, Dr. Abbott and Dr. Glaser provided the Court with a record of how, and why, the SRA-FV lacks acceptance in the general relevant scientific community. Finding #4, #5, #9, #11, #19, #22 are all in error and not supported by substantial evidence. See Hensel.

There is a convergence between the Frye requirement that a novel scientific method or theory be capable of producing reliable results and how statisticians and psychologists treat psychometric measures. Both are prerequisites to acceptance. Accord State v. Copeland, 130 Wn.2d at 255. (“[E]xpert testimony should be presented to the trier of fact only when the scientific community has accepted the reliability of the underlying principles.”) Dr. Abbott explained how the APA Code of Ethics, the APA Specialty Guidelines for Forensic Psychology, and the Standards of Educational & Psychological Testing demand reliability and validity. 12/10/14 RP 153-58. The omission of any reference to these ethical rules from the trial court’s order is concerning. Findings #13, #14, #15, regarding ATSA guidelines, are inapplicable and in error.

The trial court should have ruled that the lack of construct validity described by Dr. Abbott is fatal to the State’s claim. 12/10/14 RP 111-127. Dr. Glaser, an expert in psychometrics, testified that the American

Psychological Association holds that construct validity is a “paramount” requirement of psychometric testing, but the trial court overlooked this testimony. 12/10/14 RP 50. This was error. Dr. Abbott’s testimony clearly established that the SRA-FV is a failure in terms of inter-rater reliability, but the trial court erroneously dismissed this prerequisite to admissibility. 12/10/14 RP 163-64; Conclusion #7. With respect to cross-validation, the record does not show that there is “limited cross-validation.” Conclusion #7. (Emphasis added.) The record shows that there is none. 12/9/14 RP 88, 107-09, 125.

There was extensive testimony regarding doubt that the SRA-FV carries with it any increased predictive validity over the Static-99R, but that too is missing from the trial court’s findings and conclusions. (Without the necessary replication, finding #11 is in error and contrary to the evidence. 12/10/14 RP 139-151; 12/11/14 RP 5-11, 32.)

The record on the whole demonstrates that the SRA-FV is a novel instrument that has not gained general acceptance in the field. To the contrary, there is a “significant dispute between qualified experts,” which is why reversal is needed. Copeland; Canaday; Sipin.

d. Mr. Ritter is entitled to a new initial commitment trial

When a judge erroneously admits evidence, a new trial is necessary “where there is a risk of prejudice and ‘no way to know what value the jury placed upon the improperly admitted evidence.’” Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) (quoting Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). The heightened procedural protections accorded a person facing long term civil commitment under RCW 71.09 reflect the massive curtailment of liberty at stake and the corollary importance of ensuring a full and meaningful opportunity to defend against the allegations. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992); Thorell, 149 Wn.2d at 732; U.S. Const. amend. 14; Wash. Const. art, I, § 3.

On remand, the Frye hearing record demonstrates that the SRA-FV instrument should have never been admitted, and that it was not reasonably relied upon by the expert as required by ER 702 and ER 703. The admission of the SRA-FV at the commitment trial calls for reversal.

Dr. Arnold used the SRA-FV in his risk assessment of Mr. Ritter. RP 781-83, 809-22. He specifically used the SRA-FV LONI cut-off score to compare Mr. Ritter against the high risk/high need reference group on the Static-99R and claim he is dangerous and meets criteria. RP 815, 819.

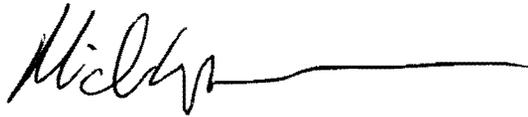
The commitment should be reversed. State v. Cissne, 72 Wn.App. at 687. (Granting new trial where prosecution was allowed to present HGN test evidence without first satisfying Frye.)

F. CONCLUSION.

For the reasons stated above, and in the appellant's opening brief, Mr. Ritter's commitment should be reversed and a new trial ordered.

DATED this 13<sup>th</sup> day of May 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mick", followed by a long horizontal line extending to the right.

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MICK WOYNAROWSKI (WSBA 32801)  
Washington Appellate Project (91052)  
Attorneys for Appellant

In re det. of Steven RITTER

No. 30845-6-III

Appendix A to Appellant's Supplemental Brief - The trial court's "Findings of Fact and Conclusions of Law on Frye hearing on the SRA-FV."

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**STATE OF WASHINGTON  
YAKIMA COUNTY SUPERIOR COURT**

In re the Detention of:

STEVEN RITTER,

Respondent.

NO. 07-2-00423-7

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON FRYE  
HEARING ON THE SRA-FV

This matter came before the Court on December 9-11, 2014 on remand from the Court of Appeals for the Trial Court to conduct a hearing on whether the Structured Risk Assessment-Forensic Version (SRA-FV) meets the evidentiary standard outlined in *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923), (1923). Petitioner, State of Washington, was represented by Assistant Attorneys General Thomas Howe and Fred Wist. Respondent, Steven Ritter, was represented by his counsel, Peter Connick. The Court considered the briefing of the parties, the testimony of witnesses, exhibits 1 through 20 that were admitted into evidence, heard the arguments of counsel, and reviewed the file and the pleadings herein. Being in all things duly advised and having issued an oral ruling, the Court now enters the following Findings of Fact and Conclusions of Law:

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1 I. FINDINGS OF FACT

2 1. The Court heard expert testimony from Dr. Amy Phenix, Ph.D., for the  
3 Petitioner, and from Dr. Brian Abbott, Ph.D. and Dr. Dale Glaser, Ph.D., for the Respondent.

4 2. The industry approach to risk assessment of sex offenders has evolved over  
5 time; beginning with unstructured clinical judgment, followed by examining static factors  
6 using actuarial instruments like the Static-99R, and today including structured consideration of  
7 dynamic risk factors.  
8

9 3. The Structured Risk Assessment—Forensic Version (SRA-FV) is a dynamic  
10 risk assessment instrument developed by David Thornton, Ph.D.

11 4. The SRA-FV, VRSSO, and Stable-2007 are validated tools for evaluating  
12 dynamic risk factors.  
13

14 5. The SRA-FV is the only dynamic risk assessment tool validated on an in-  
15 custody population.

16 6. The SRA-FV was an approved dynamic risk assessment tool used by the State  
17 of California for probationers and parolees, before being replaced by the Stable-2007, which is  
18 designed for an out-of-custody population.

19 7. Research has established that dynamic risk factors, also known as long-term  
20 psychological vulnerabilities, show a statistical association with recidivism risk of sex  
21 offenders.  
22

23 8. Research has established that a risk assessment where risk factors are weighted  
24 independently from the evaluator's clinical judgment is superior to unstructured use of risk  
25 factors in sex offender assessment.  
26

1           9.     Research has established that the specific dynamic risk factors used in the SRA-  
2 FV are associated with recidivism risk.

3           10.    The SRA-FV provides a structured assessment of those dynamic risk factors.

4           11.    The SRA-FV provides evaluators with additional incremental predictive  
5 information beyond that obtained from the STATIC-99R alone.

6           12.    The SRA-FV was validated by using a "split sample" method where the  
7 instrument was developed using one subset of the "Bridgewater Study Group" and then  
8 validated on a different subset of that group.

9           13.    The Association for the Treatment of Sexual Abusers (ATSA) is a large  
10 international organization of professionals who work in the field of assessment and treatment  
11 of sexual abusers/offenders. Both Dr. Amy Phenix and Dr. Brian Abbott are ATSA members.

12           The ATSA 2104 Practice Guidelines provide current "best practice" guidance to  
13 ATSA members regarding assessment and treatment of male adult sexual abusers.

14           14.    ATSA assessment guideline 6.02 provides that members conducting risk  
15 assessments on sexual abusers are well versed in the contemporary research regarding static  
16 and dynamic factors linked to recidivism. Among the factors explicitly listed are sexual  
17 deviancy, antisocial orientation, intimacy and relationship difficulties, and self-regulation  
18 difficulties.

19           15.    ATSA assessment guideline 6.03 provides that members "conducting risk  
20 assessments of sexual abusers use empirically supported instruments and methods rather than  
21 unstructured clinical judgment." Such instruments include "structured, empirically guided risk  
22 protocols." The Court finds that the SRA-FV is a structured, empirically guided risk protocol.

23           16.    The Court finds the testimony of Dr. Amy Phenix about the SRA-FV to be  
24 Credible.

1 17. The 2010 Annual ATSA Conference included a presentation on the use of the  
2 SRA-FV in risk assessments of sexual abusers.

3 18. Specific training on the use of the SRA-FV is required for evaluators. Dr.  
4 Phenix has been trained on how to use the SRA-FV.

5 19. The SRA-FV is used extensively in the relevant scientific community, to  
6 include Dr. Amy Phenix.

7 20. Dr. Brian Abbott does not use the SRA-FV, but testified that some evaluators  
8 use it and some do not.

9 21. Research on the SRA-FV has been presented in a peer reviewed and published  
10 article.

11 22. The SRA-FV is generally accepted within the community of experts who  
12 evaluate sex offenders and assess their recidivism risk.

13 23. Specialized testimony on the SRA-FV will assist the trier of fact to understand  
14 the evidence or to determine a fact in issue.

## 15 II. CONCLUSIONS OF LAW

16 1. Dr. Amy Phenix and Dr. Brian Abbott are both qualified to present expert  
17 testimony on the issues arising in this *Frye* hearing.

18 2. *In re the Detention of Ritter*, 177 Wn. App. 519, 312 P.3d 723 (2013), holds  
19 that evidence about the SRA-FV is inadmissible until it has been established the evidence  
20 meets the standard set forth in *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923). *Ritter* is  
21 controlling and binding on this court.

22 3. The use of dynamic risk factors that have been identified by research to be  
23 associated with recidivism in sex offender evaluations is supported by a scientific theory that is  
24 generally accepted in the scientific community.  
25  
26

1 4. The use of structured analysis of risk factors in sex offender evaluations is  
2 supported by a scientific theory that is generally accepted in the scientific community.

3 5. The use of a split sample for validation of a risk assessment instrument is  
4 supported by a scientific theory that is generally accepted in the relevant scientific community.  
5

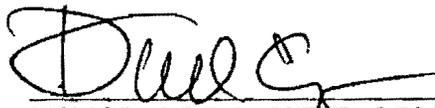
6 6. The SRA-FV is an instrument that is capable of producing reliable results and is  
7 generally accepted in the scientific community.

8 7. Limitations or potential errors related to use of the SRA-FV due to limited  
9 cross-validation or inter-rater reliability are a matter to be resolved by the finder of fact.

10 8. The SRA-FV satisfies the *Frye* evidentiary standard.

11 9. The SRA-FV satisfies the evidentiary standard under ER 702 and ER 703.  
12

13 DATED this 9 day of January, 2015.  
14

15   
16 HONORABLE DAVID ELOFSON  
17 Judge of the Superior Court  
18

19 Presented by:

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