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Court of Appeals
Division I
State of Washington

NO. 73727-9-I

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

IN RE THE DETENTION OF PATRICK MCGAFFEE

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

As a youth and a young adult, Patrick McGaffee offended against prepubescent boys. These acts appropriately resulted in criminal convictions and incarceration. In 1995, the State relied on the “Sexually Violent Predator Act,” RCW 71.09, to keep him from reentering the community. For the last two decades, McGaffee has been involuntarily held at the Special Commitment Center (SCC).

Now 46-years-old, McGaffee engaged in the facility’s treatment program. Over time, he changed how he thought and behaved. In 2014, relying on expert opinion that his pedophilic disorder had remitted, McGaffee challenged the State to re-establish the commitment criteria.¹ Unfortunately, his unconditional discharge trial was fraught with error.

The State used an untested and unreliable psychometric instrument to inflate claims about McGaffee’s risk. The State highlighted grossly prejudicial relative risk statistics, even though absolute risk is the statute’s focus. McGaffee’s attempt to parry some of the State’s attacks was closed off by judicial rulings that infringed on his right to present a defense. Last, when the prosecutor’s closing

¹ Forensic psychologist Dr. Brian Abbott opined that McGaffee had matured, come to terms with his homosexuality, and reoriented himself towards age-appropriate partners. RP1553-56. The State’s expert likewise acknowledged that years had gone by without any observed evidence of a current pedophilic disorder. RP1299-1300, 1303.

argument shifted the burden of proof, referenced evidence the State had induced the trial court to exclude, and misstated the law on reasonable doubt, the trial court refused to check the misconduct.

In sum, the jurors were led astray by evidence admitted, evidence rejected, and the State's improper argument. On these terms, there can be no confidence in the verdict. The matter should be reversed for a new unconditional discharge trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that a novel psychometric measure SRA-FV is capable of producing reliable results, is generally accepted in the scientific community, and meets the Frye standard of admissibility. 10/21/14 RP4-7.

2. Where the testimony below indicated that independent cross-validation in another sample is a prerequisite for validation, the trial court finding that the SRA-FV was sufficiently "validated by using a split sample method," and that the method is generally accepted in the relevant scientific community, is not sufficiently supported by the record and in error. 10/21/14 RP4, 6.

3. Where the testimony below indicated there is an unknown amount of overlap between the SRA-FV psychometric measure and the

Static-99R actuarial, the trial court erred in finding that the SRA-FV provides evaluators with additional predictive information beyond those obtained from the Static-99R alone, and that finding is not sufficiently supported by the record and in error. 10/21/14 RP4.

4. The trial court erred in concluding that using the SRA-FV to select a Static-99R reference group is a scientific method generally acceptable in the relevant community, capable of producing reliable results, satisfies Frye, and that any limitations or potential errors related to this particular use of the novel psychometric measure are a matter to be resolved by the finder of fact. 10/21/14 RP7.

5. The trial court erred in allowing a State's witness to testify about confusing and prejudicial relative risk estimates.

6. The trial court impermissibly limited McGaffee's right to present a defense when it kept his expert from testifying that a newly revised actuarial risk instrument used by the State expert, the VRAG-R, has not been generally accepted by fellow scientists.

7. The trial court impermissibly limited McGaffee's right to present a defense when it kept his expert witness from testifying that future attempts to replicate the VRAG-R are likely to fail.

8. The trial court impermissibly limited McGaffee's right to present a defense when it refused to ask a juror's question about the defense expert's risk assessment tools and scoring.

9. In arguing in closing argument that McGaffee had failed to put on evidence showing he was safe to be released, the prosecutor engaged in burden-shifting misconduct.

10. In arguing in closing argument that McGaffee had failed to explain the basis for his expert's opinion, the prosecutor, who had induced the trial court to exclude that evidence, committed misconduct.

11. In arguing to the jury that the absence of current symptoms of a pedophilic disorder should be viewed as evidence of its continued existence, the prosecutor misstated the law on reasonable doubt and thus committed misconduct.

12. The cumulative effect of the above errors prejudiced McGaffee's right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Frye excludes scientific evidence shown to be either not capable of reliable results or not generally accepted in the relevant expert community. The SRA-FV is a hypothetical model of calculating subjectively scored "dynamic risk factors." The psychometric measure

– which is not an actuarial risk assessment instrument – allegedly quantifies an offender’s level of risk beyond what is already captured by the venerable Static-99R actuarial tool.

The State’s expert used the SRA-FV to pick a Static-99R reference group against which to compare McGaffee and also to argue that McGaffee’s risk is greater than what his Static-99R score suggests.

The Frye hearing revealed that no peer-reviewed scientific publication has recommended the SRA-FV be used to select a Static-99R reference group. Furthermore, the SRA-FV instrument lacks construct validity, suffers from poor inter-rater reliability, and has yet to be cross-validated on any modern population. Two highly qualified experts testified the SRA-FV lacks general acceptance in the scientific community, in part because it is very new. Should the SRA-FV have been excluded under Frye? Even if the tool overall satisfies Frye, should the expert’s choice to use it to select a Static-99R reference group been rejected?

2. The “more likely than not” RCW 71.09 commitment standard requires the State to prove that an individual’s risk of

reoffending exceeds 50%.² This is a question of absolute, not relative, risk. Did the trial court err in allowing the State's expert to testify he believes McGaffee's risk of reoffense is greater than that of 94% detected sex offenders, when that irrelevant information confuses the issue at hand and inflames the passions of the jury?

3. The constitutional right to present a defense includes the right to call witnesses in one's own behalf, including expert witnesses. The statute explicitly grants a respondent the right to use an expert witness to challenge the State's case. RCW 71.09.050(2).

Did the trial court violate McGaffee's right to present a defense when it prevented his expert from testifying that one of the actuarial risk instruments used by the State expert, the VRAG-Revised, lacks general acceptance in the scientific community and will likely fail future replication attempts?

A juror wanted to know what instruments Dr. Abbott had used in assessing McGaffee's risk to reoffend (as compared to the State expert's approach), but the question was refused. Was this also a violation of McGaffee's right to present a defense?

² State v. 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).

4. A prosecuting attorney has the obligation to secure a fair and just verdict. This obligation includes a prohibition on making arguments that constitute burden shifting, reference facts not in evidence, or misstate the law.

In closing argument, the prosecutor told the jury he thinks of risk assessment “as a soup... [t]he soup has to be completed.”³ The prosecutor then claimed that the State expert – but not the defense expert – properly produced the “ingredients that go into the soup.” Earlier, when a juror attempted to asked the defense expert about the methodology of his risk assessment, the prosecutor argued to the judge that “the answer is not needed” and the question was refused. RP1780.

In rebuttal, the prosecutor also argued that the absence of observed current evidence of a pedophilic disorder should be interpreted as evidence of its continued existence, because a “vacuum” [sic] is really the presence of something: “you can’t observe the vacuum. That doesn’t mean it’s not there.” RP1869. Was the burden-shifting argument misconduct? Was reference to evidence the State had induced the court to exclude misconduct? Was the misstatement of the reasonable doubt standard misconduct?

³ RP1832-33, 1835; CP 492-519 (State’s closing argument PowerPoint presentation).

5. Did the overall cumulative effect of these errors deprive McGaffee of a fair trial?

D. STATEMENT OF THE CASE

Patrick McGaffee is 46 years old, but looks younger than his stated age. RP434, 1212. He is only 5' 5" tall and has scoliosis (curvature of the spine) that gives him an unusual posture. RP700-01; RP1211-12. He wears hearing aids in both ears. RP1211-12.

McGaffee's IQ has been measured at 78, which represents the borderline range of cognitive abilities and is consistent with cognitive deficits. RP1213-18. As a child, he was placed in special education classes. RP440, 1213. When he was just nine years old, a teenager raped him. RP478-80. This victimization caused McGaffee distress in childhood, in adulthood, and is still something he thinks about. RP480.

Since he was twelve or thirteen, McGaffee knew he was gay, but he hid his homosexuality until he was about twenty-two years old. RP457. He was in prison when he came out. RP458. His parents, who are now deceased, were shocked, but ultimately accepted his sexual orientation. RP457. McGaffee has had consenting sexual relationships with other incarcerated adult males, but not since 2005. RP461-62.

In the SCC treatment program, McGaffee disclosed his sexual history, including his sexual offending against prepubescent boys. RP477, 710-15 (Exhibit 16). He pursued treatment and made these disclosures because he thought he needed to change and wanted to change. RP690-92. He admits that in the past, he offended against younger boys, sometimes offering them money to let him molest them, or to obtain items of their clothing for his own sexual stimulation. RP483-94; 508-09; 570. In the past, he was sexually attracted to boys. RP513. Back then, he used boys as a misguided outlet to cope with untreated depression and stress. RP474. When recently interviewed about his index offense, McGaffee told the State's evaluator he thought the sentence he received for his crime was fair and he understood that his fifteen-year-old victim was emotionally hurt. RP1343. He expressed a commitment not to reoffend. RP1343.

McGaffee understands a pedophile to be someone who is attracted to prepubescent children and he agrees this label applied to him. RP657. As the State's expert testified, pedophilia differs from a pedophilic disorder, which requires current distress or impairment. RP1228. Pedophilia appears to be a lifelong condition. RP1232. On the other hand, a pedophilic disorder may change over time with, or even

without, treatment. RP1232-33. The DSM acknowledges that the propensity to act out on an attraction to prepubescent children may abate over time. RP1233. The goal of treating a pedophile is to get them to manage their arousal so they do not act on it. RP1233.

McGaffee's treatment at the SCC included a sexual arousal modification program. RP764. As a result, he no longer has thoughts of inappropriate relationships with underage children. RP628-29, 659. He has not had a sexual fantasy involving a child for many years. RP727. His current preferred age range for a sexual partner would be from thirty years of age to about his own age. RP520. He is on Prozac to treat his depression and anxiety. RP655, 788. The medication he now takes has also reduced his arousal. RP655-56.

McGaffee stipulated to his commitment in 1998. RP770. At times during the first decade of his commitment, he violated facility rules. McGaffee admitted that he was attracted to some fellow SCC residents and engaged in sex with them, up to the year 2005. RP457, 461-62, 579, 585-87, 618. He admitted that having sex with others at the SCC was against the rules. RP591.

There was varying testimony as to who these other residents were and the nature of their past relationships with McGaffee. E.g.

RP945-46 (one resident offering sex to McGaffee for things of value); 600-18 (discussion of whether these fellow residents were ‘special needs’); but see: RP1755 (defense expert opining that McGaffee himself could be classified ‘special needs’ under the SCC definition); RP869-72, 884 (no SCC mandatory reporter reported McGaffee as abusing any ‘adult dependent person or vulnerable adult’); RP666, 669 (two residents described as larger in stature than McGaffee and with facial hair); RP703-04, 1571 (discussion of possibility that he had substituted one of these adult male relationships for a prepubescent male); RP1276; 1574-75 (IQ of one of the men tested at 77, just one point lower than McGaffee’s score of 78).

Additionally, before 2007, McGaffee possessed at the SCC some movies and images that depicted children. RP463-64; 700; 1564. However, while child pornography was discovered at the institution in this timeframe, McGaffee had clothed pictures of children, and there was no child pornography on his computer either the first or second time it was searched. RP1285-87.

According to McGaffee, he has not had sexual contact with another person since about 2006. RP1714-15. Even the State’s evaluator agreed that there is no data in the records suggesting that

McGaffee has had any sexual relationship or been sexually acting out since 2011. RP1299-1300. Again, even from the perspective of the State evaluator, there are no observed behaviors to demonstrate a pedophilic disorder since 2011. RP1303. In response to a jury question, the defense expert, Dr. Abbott, testified that an individual suffering from an active and present pedophilic disorder, “would not be able to control manifestations of it for two years.” RP1777.

McGaffee considered seeking release in 2008, but held back because he wanted more outside support in place. RP776. He participated in treatment for four more years up to 2012 but then stopped. RP654. He felt that he had gone as far as he could go in treatment, finishing the required assignments. RP787. He also felt that he was not being credited by his SCC treatment providers for the progress that he had made. RP971.

At trial, forensic psychologist Dr. Abbott opined that McGaffee does not meet commitment criteria. Dr. Abbott has extensive expertise in treatment and risk assessment of sex offenders. RP1518-31, 1594, 1629, 1735-36, 1738 (“29, 30 years of experience in long-term treatment of sex offenders.”)

Dr. Abbott does not believe that McGaffee currently suffers from a pedophilic disorder, even if he suffered from it in the past. RP1533, 1553, 1565, 1642, 1693. Dr. Abbott testified that McGaffee “has made substantial progress through the treatment that he's received at SCC” causing the pedophilic disorder to remit. RP1555.

Specifically, McGaffee “has matured significantly emotionally and socially compared to when he was living out in the community and during his early years at SCC.” RP1555. Dr. Abbott noted that McGaffee was finally able to “come to terms with and accept his homosexuality.” RP1555. He has “gone through quite a bit of sexual arousal modification treatment at the SCC... that helped him also reorient himself towards age-appropriate sexual partners.” RP1556. The remission of the pedophilic disorder is linked in part to McGaffee realizing his offending caused real harm:

A third area that I think is important in terms of explaining the remission of his pedophilic disorder has been the empathy that he's developed for the victims. When he was committing his sexual offenses, he lacked empathy or the ability to understand that what he was doing was harming the victim.

RP1557.

Now, McGaffee knows that sexual interest in prepubescent children or adolescent males is wrong and harmful. RP1557. He has

gained the ability to inhibit his arousal, which is “what we try to teach sex offenders in treatment who have the type of condition that Mr. McGaffee has.” RP1560-62; 1649. Last, he has developed a comprehensive relapse prevention plan. RP1558. Dr. Abbott viewed McGaffee’s decision to leave treatment in 2012 as “understandable under the circumstances” and it did not change his opinion of the influence that treatment had on McGaffee. RP1590.

Dr. Abbott also discussed McGaffee’s past use of clothing for sexual stimulation. RP1575-1581. Dr. Abbott opined this condition, diagnosable as a fetishistic disorder, has remitted. RP1575-77. Dr. Abbott testified that even if McGaffee engaged in similar behavior with an adult, “that does not indicate that he’s going to revert back to pedophilic activity.” RP1581.

Not only did Dr. Abbott opine that McGaffee lacks any qualifying mental disorder, he also opined that McGaffee’s risk “falls below the [statutory] threshold of more likely than not.” RP1595-97.

The trial court made a series of rulings, all adverse to McGaffee, each dealing with information related to risk of reoffense. First, the trial court denied a defense Frye motion to keep the State’s evaluator from testifying about a novel psychometric measure, the SRA-FV. 10/21/14

RP4-7. Second, over objection, the trial court allowed the State's evaluator to present relative risk ranking data comparing McGaffee to other sex offenders. RP 997-98, 1002-31. Third, the trial court barred Dr. Abbott from testifying that a newly revised actuarial risk instrument used by the State's expert was not generally accepted in the scientific community and would likely fail replication. RP1608, 1617. Fourth, over objection, the trial court refused to pose a jury question asking Dr. Abbott what instruments he – as compared to the State's expert – used in his risk assessment. RP1778-86.

Finally, in closing argument, the trial court overruled defense objections as to the State's comparison between how their expert and Dr. Abbott approached risk assessment in the case. RP1831-33; CP 492-519. Similarly, the trial court overruled defense objections to the prosecutor's use of a "vacuum" analogy to tell the jury that the absence of observed signs of a pedophilic disorder was evidence of its existence. RP1868-69.

The jury returned a verdict finding that McGaffee continues to meet RCW 71.09 commitment criteria and that is what the trial court ordered. CP 491; CP 1131.

E. ARGUMENT

1. The Trial Court Should Have Found The State’s Expert’s Use Of The SRA-FV Does Not Satisfy The Frye Standard Of Scientific Evidence Admissibility.

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%. State v. Brooks, 145 Wn.2d at 295.

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 149 Wn.2d at 753.

The SRA-FV is supposed to 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.

Since McGaffee’s trial concluded, Division III of this Court ruled that the SRA-FV on the whole satisfies Frye. In re Det. of Ritter, 192 Wn.App. 493, ___ P.3d ___ (2016), as amended (Apr. 12, 2016). A Division II opinion did the same, albeit in a case with a one-sided record. In re Det. of Pettis, 188 Wn.App. 198, 211, 352 P.3d 841 (2015).

The record in McGaffee’s Frye hearing differs from that presented in the Ritter and Pettis matters, even if a similar legal question is at issue. This Court should carefully review the facts presented below and determine for itself whether to agree with the Ritter opinion that the SRA-FV on the whole is generally accepted and capable of producing reliable results. In particular, the record below shows that using the SRA-FV to select a Static-99R normative group – as the State’s expert chose to – is not generally accepted in the scientific community.

- 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. 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. (emphasis added). 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.

Full acceptance of a process in the relevant scientific community obviates the need for a Frye hearing. Sipin, 130 Wn.App. at 415. However, 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, ER 702 and 703 limit the introduction of expert testimony. Under ER 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. ER 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.”

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. Messing around with an untested method: the SRA-FV and how the State’s expert used it.

Below, the parties presented significantly conflicting evidence regarding the validity, reliability, and general acceptance of the SRA-FV psychometric measure.⁴ Dr. Amy Phenix testified for the State,

⁴ The Frye hearings were held on 8/15/14, 9/2/14, 9/3/14am, 9/3/14pm, 9/4/14, and 10/2/14. The transcripts for these pretrial hearings were not consecutively paginated.

while Mr. McGaffee called forensic psychologists Dr. Howard Barbaree and Dr. Brian Abbott.⁵

Dr. Barbaree has been a leading researcher in the field of sex offender treatment and assessment since 1976. 9/2/14 RP24-43. He is the Chair of the Canadian Psychological Association. From 2004 to 2010, he was the editor in chief of the Association for the Treatment of Sexual Abusers (ATSA) journal *Sexual Abuse*. 9/2/14 RP40-43. His own published work consists some 100 articles and book chapters, all about sexual abuse, assessment and treatment of sex offenders. He has been involved in the development and cross-validation of risk assessment tools, including the Static-99R. 9/2/14 RP46-48 (CV admitted as Exhibit 9).

Dr. Abbott has years of experience providing treatment to sexually abused children as well as to sexual abusers. He has been an expert witness in sex offender commitment cases in many states. He has published five peer-reviewed articles on sex offender risk assessment. 9/3/14pm RP20-27 (CV admitted as Exhibit 15).

Dr. Abbott explained that Dr. Goldberg – who evaluated Mr. McGaffee in response to his petition for unconditional discharge –

⁵ Dr. Abbott and Dr. Phenix were also experts in Ritter. Dr. Barbaree did not participate in either the Ritter or Pettis litigation.

“used the SRA-FV for two purposes.” 10/2/14 RP20. First, Dr. Goldberg used the SRA-FV total score “to identify [a] specific Static 99-R reference group.” Id. Second, Dr. Goldberg used the SRA-FV “to increase the probability estimate of the Static 99-R.” Id.

- c. There is no valid basis for using the SRA-FV to select a Static-99R reference group and this use of the instrument is not generally accepted in the scientific community.

Dr. Abbott testified that the Static-99R was designed to mechanically order sex offenders by relative risk, not to explain why they might reoffend. 9/3/14pm 34-36. That instrument is “generally accepted as having some association with sexual recidivism.” 9/3/14pm RP38-39. It has gained that acceptance after several cross-validations showing that it consistently sorted recidivists from non-recidivists. 9/3/14pm RP43. The instrument is focused on historical, unchangeable, risk factors.

However, “what’s not generally accepted about the Static-99R is the way in which one selects the reference groups.” 9/3/14pm RP39. The Static-99R authors have not endorsed the SRA-FV for this purpose. 9/4/14 RP123. Furthermore, there is evidence suggesting that the reference group concept overall just does not work. 9/3/14pm

RP39-40. And, there is data showing the SRA-FV does not work in selecting a single Static-99R reference group. 10/2/14 RP43-44.

The State's expert, Dr. Phenix all but conceded that using the SRA-FV to select a Static-99R reference group is unfounded.

Dr. Phenix admitted the Static-99R manual does not instruct a user of the instrument to rely on the SRA-FV to select a Static-99R reference group; this is only a suggestion of its inventor. 8/15/14 RP45-47, 55, 69-70. Dr. Phenix ostensibly believes that peer-review is an important first step toward the scientific community evaluating an idea. 8/15/14 RP107. Yet, she conceded no peer-reviewed professional journal article advocates for turning to the SRA-FV to select a Static-99R reference group. 8/15/14 RP70, 78.

In fact, as Dr. Phenix knows, the only peer-reviewed publication commenting on the SRA-FV argues that using it for that purpose is improper. 8/15/14 RP69-70, 78-79. Brian R. Abbott, *The Utility of Assessing "External Risk Factors" When Selecting Static-99R Reference Groups*, 5 OPEN ACCESS JOURNAL OF FORENSIC PSYCHOLOGY, 89, 102 (2013).

Like Dr. Abbott, Dr. Barbaree refuted the claim that Dr. Goldberg's decision to rely on SRA-FV scoring to select a Static-99R

reference group was a “generally accepted” scientific method. Dr. Barbaree called that use of the instrument “speculative at this stage.” 9/2/14 RP130-31. It is nothing more than an un-validated “hypothesis.” 9/2/14 RP132-33. Because Dr. Abbott’s publication has shown that this approach can be wrong, Dr. Barbaree testified: “you shouldn’t rely on the SRA-FV [to select a Static-99R reference group.]” 9/2/14 RP134-35; 9/3/14 RP9-10.

In Ritter, Division III wrote that “[t]he SRA–FV is used to sort the individual into one of those [Static-99R] normative groups.” In re Det. of Ritter, 192 Wn.App. at 493. That assertion just does not square with the record in McGaffee’s Frye hearing. The record below shows this use of the instrument is based on a suggestion made at a conference training presentation and not in any sort of peer-reviewed scientific journal. To label this untested use of a hypothesis as somehow having general acceptance in the scientific community is to turn a blind eye to the Frye standard.

Even if the idea that dynamic risk factors play a role in a risk assessment is a generally accepted theory, the SRA-FV is not a “methodology used to implement the theory” that has gained acceptance. Lake Chelan 176 Wn.App at 175. The trial court erred.

Here, the trial court findings that the SRA-FV is capable of producing reliable results and is generally accepted in the scientific community, that the split-sample validation was sufficient, and that using the SRA-FV to select a Static-99R reference group satisfies Frye are just not supported by the evidence. 10/21/14 RP4-7. “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).

- d. Contrary to the Ritter findings, the record below shows that the lack of cross-validation, substandard inter-rater reliability, and unknown construct validity, and all show that any use of the SRA-FV is prone to serious error.

The parties contested whether the instrument overall was already generally accepted by the scientific community. Dr. Phenix, an early adopter of the instrument⁶, thought nothing of using the SRA-FV before it had been published in a peer-reviewed journal. On the other hand, Dr. Barbaree and Dr. Abbott testified the tool was just too new – and too faulty – to be viewed as “generally accepted.”

⁶ Dr. Phenix used the SRA-FV shortly after she was trained on it and before this hypothetical quantification of dynamic risk factors was announced in any peer-reviewed journal. 8/15/14 RP27, 66.

i. No cross-validation: a critical knowledge gap.

Dr. Phenix testified that when a risk prediction instrument is developed, it may initially “work pretty well” on the sample it was developed on, but attempts to cross-validate the instrument “on a wholly different group of individuals” often fail, and there is “shrinkage or a lowering of the predictive accuracy.” 8/15/14 RP21-22. There has to be cross-validation. 8/15/14 RP22.

Cross-validation is done to find out if the instrument works with samples of offenders other than the sample upon which it was initially validated, but this has not been done with the SRA-FV. 8/15/15 RP71-75; 9/4/14 RP51; 10/2/14 RP42. Rather, the tool’s authors conducted a “split-sample” validation. 8/15/14 RP23. This involved cutting the developmental population into two sub-groups. This approach is not cross-validation on a “wholly different group of individuals,” but testing the instrument on two sub-groups of the same population. 8/15/14 RP22-23, 71-72.

Both Dr. Abbott and Dr. Barbaree testified that the terms “validation” and “cross-validation” cannot be used interchangeably. 9/4/14 RP51; 9/2/14 RP123. The former is a prerequisite to the latter, but the one SRA-FV study is only “a validation study” and the

instrument “has not been cross-validated.” 9/4/14 RP51; 10/2/14 RP42.

A cross-validation would mean that someone else was testing the instrument on a different sample of individuals. 9/2/14 RP123-24.

Dr. Barbaree testified that a truly independent cross-validation must be done by people who “don’t have a stake in the instrument.” 9/2/14 RP98. “In order for us to know really how an instrument performs, it has to be evaluated by people who haven’t been involved in the development of it.” 9/2/14 RP99; 9/2/14 RP123 (testifying that independent cross-validation of the SRA-FV is lacking).⁷

Even Dr. Phenix admitted “research still needs to be done to validate this – cross-validate this instrument on other types of sex offenders, particularly since it was cross-validated on the same sample, in a split sample.” 8/15/14 RP49.⁸ The unique make-up of the SRA-FV developmental sample suggests reason for concern. Dr. Phenix admitted the SRA-FV was developed on a dated population of sexual psychopaths, the so-called Bridgewater sample. 8/15/14 RP24. That

⁷ Again, the Ritter opinion misses the distinction between validation and cross-validation, fails to acknowledge the split-sample problem presented by how the SRA-FV was developed, and ignores the reality that there never was any independent cross-validation of the instrument. See In re Det. of Ritter, 192 Wn.App. at 493 (“The SRA-FV was constructed from a sample obtained from the Massachusetts Hospital in Bridgewater and then cross-validated on a separate sample from that same hospital.”)

⁸ In contrast, the Static-99R actuarial risk assessment instrument has been subject to some 65 validations. 8/15/14 RP18, 20-21.

group has been criticized as unusual and may be different from contemporary populations of sex offenders. 8/15/14 RP26, 73.

In sum, while she is willing to use the SRA-FV, Dr. Phenix admitted that because of the lack of cross-validation, any claims about the SRA-FV's predictive accuracy are premature. 8/15/14 102-04, 124, 127-28.

Dr. Barbaree put it this way:

one study, a single study, can lead you astray... You can go down the garden path on the basis of findings from one study that don't stand up in the end.

9/2/14 RP92; 106.

He added that publication attracts scientific readers who may attempt replication. 9/2/14/ RP91. But, quite often, even published paper findings cannot be replicated. 9/2/14 RP91 (describing how actuarial MnSOST-R failed independent cross-validation.) Replication is a benchmark of reliable science, as well as a requirement under Frye. See Sipin, 130 Wn.App. at 414-15. In this respect, Dr. Barbaree's testimony and the Frye standard converge. The trial court erred.

ii. Poor interrater reliability.

The APA Code of Ethics requires that before an instrument is used, it has to have been validated, cross-validated, with both reliability and validity shown. 9/3/14pm RP30-31.

Dr. Phenix conceded that inter-rater reliability – or the extent to which two raters would agree as to the scoring for one subject – is poor. 8/15/14 RP50-51. She knows the authors conceded this weakness as well. 8/15/14 RP90-91.

Dr. Barbaree knows that the inter-rater reliability of the SRA-FV is very low. 9/2/14 RP127. And, he testified that if an instrument lacks good inter-rater reliability, “there’s something wrong with the instrument.” 9/2/14 RP81.

iii. Construct validity problems.

Dr. Abbott explained that the SRA-FV purports to be an “empirically validated way of guiding dynamic risk assessment.” 9/3/14pm RP53. The instrument involves a mathematical computation of a “total needs score.” 9/3/14pm RP51-61. Dr. Abbott also pointed out that since the SRA-FV and the Static-99R both focus on sexual deviance and anti-social behavior, the two instruments overlap to an unknown extent. 9/3/14pm RP65-67.

But, as Dr. Barbaree testified, for the SRA-FV, “[t]here is no construct validity,” meaning that it is not clear that the instrument is actually measuring dynamic risk as it claims to. 9/2/14 RP125. The instrument may not be necessarily measuring things independent of the Static-99R: there’s a lot of overlap.” 9/2/14 RP164-65.

Even setting that issue aside, the SRA-FV’s claim of improved predictive validity – over using the Static-99R by itself – has to do with ranking of offenders by their relative risk. 9/3/14pm RP68-69. This is different than the statutory question of determining an offender’s actual absolute risk. 9/3/14pm RP69.

The Washington statute’s focus is absolute risk, the “more likely than not” standard. 9/2/14 RP50-52; 140. Dr. Barbaree testified that sex offender recidivism risk research has focused on ranking offenders in terms of their dangerousness relative to each other, but not on figuring out their actual absolute likelihoods to reoffend. 9/2/14 RP62-63.

- d. The record below shows that the SRA-FV has not gained general acceptance in the scientific community and is too new to be used in court.

Dr. Abbott explained in depth why the SRA-FV has not gained general acceptance:

Well, it’s still a relatively new instrument. It has one peer-reviewed study available. In my opinion it’s an incomplete

validation study. There's some significant gaps in the validation study that's been published that would be important in terms of deciding is it generally accepted in the relevant scientific community. There's been no cross-validation of the instrument on a different sample nor is the method that they've used in the study considered a cross-validation method. And so it's not been cross-validated on a separate -- this idea of split sample is just really a misstatement about cross-validation... There's been no construct validity established for each of the ten items so we really don't know if the items measure dynamic risk factors as they've been established in the literature that supposedly supports this instrument, which is a critical thing. It has poor inter-rater reliability. It was based on the Bridgewater sample which we know is a highly biased sample. That is not a good sample to use data to predict the performance of contemporary groups of sexual offenders. There's been no publication or validation using it for selecting Static-99R groups... The article that I had published in 2013 has shown that the method that Dr. Thornton proposes for using the SRA-FV to select reference groups didn't work as he hypothetically posed it. It's not in general use by practitioners at this time.

9/3/14pm RP70-71; see also 9/3/14pm RP73-98 and 9/4/14 8-14; 19-56

(additional detail presented to support Dr. Abbott's conclusions that the instrument lacks general acceptance).

Dr. Barbaree, a preeminent scholar of sex offender risk assessment research, mirrored and expanded upon Dr. Abbott's testimony. He testified the scientific community accepts those instruments which have been tested and shown to be able to actually predict recidivism. 9/2/14 RP63-64. These are instruments with low error rates. 9/2/14 RP68-69. The best practice approach involves using

instruments and methodologies that are empirically supported in the literature and empirically validated. 9/3/14 RP14-15.

Dr. Barbaree would say that the broad knowledge about a tool is a prerequisite to general acceptance and “that a significant proportion of the practitioners in the area are using the instrument or the methodology.” 9/2/14 RP88-89.⁹ He believes that “a number of steps that have to occur to – that leads to general acceptance.” 9/2/14 RP88-89. He identified these sequential steps:

Unless the members in the field are familiar with the instrument or the methodology, then they can't be accepting of it, so the communication of it as an instrument and methodology via publication is the first step, and then a publication on the instrument occurs, and then someone reads that in the literature, and then uses the instrument and the sample that they have, and general acceptance kind of evolves from there.

9/2/14 RP88-89.

Publication in a peer-reviewed journal is “a kind of a quality control measure... if it's not in the literature, then it can't possibly be generally accepted.” 9/2/14 RP89-90. A conference presentation is simply not an adequate substitute for peer-reviewed publication. 9/2/14 RP89-90; 9/2/14 RP123. This is in part because of authors' bias:

⁹ Dr. Barbaree added that general acceptance does not mean that everyone in the field is using the tool, but it does mean that the people using the tool are agreeing that the results are valid and meaningful. 9/2/14 RP94.

Usually the presenter at the conference is highlighting what they see as being the most positive aspects of the study. The other aspects of it that are limiting, that are less positive and end up not being presented.

9/2/14 RP89-90.

To put it bluntly, Dr. Barbaree “can’t imagine how you could have general acceptance of anything unless it’s been published in the peer-reviewed literature.” 9/2/14 RP91. The SRA-FV publication is just too new; the future of the instrument is unknown. 9/2/14 RP110-11 (“we don’t know what the impact of it on the field will be yet.”)

In sum, Dr. Barbaree testified the SRA-FV is not generally accepted at the moment. 9/2/14 RP120-22. He noted that the instrument is not in use in Canada, where many risk assessment instruments have originated. 9/2/14 RP137.

Dr. Abbott, in deciding whether a scientific method has gained general acceptance, similarly focuses on:

publication in a peer-reviewed journal, replication of the instrument, establishing its validity, establishing its reliability, and then also looking at use by professionals

9/3/14pm RP29.

Dr. Abbott does not believe the SRA-FV has gained general acceptance in the relevant scientific community. 9/3/14 RP69. The APA Code of Ethics requires that an instrument be validated, cross-

validated, with both reliability and validity shown. 9/3/14pm RP30-31.

The special forensic code of ethics also requires that opinions and testimony be made “upon adequate scientific foundation, and reliable and valid principles and methods that have been applied appropriately to the facts of the case.” 9/3/14pm RP32.

Dr. Phenix said the SRA-FV was used for a period of time in California, but then “replaced by a different instrument.” 8/15/14 RP27, 29-30. She said the SRA-FV was used in federal cases. 8/15/14 RP28.

However, Dr. Abbott explained that the instrument was not used in California to pick a Static-99R reference group the way Dr. Goldberg did. 9/4/14 RP 15-16; 10/2/14 RP27-28. Dr. Abbott also made clear that the SRA-FV is not used in federal court to establish an absolute risk threshold, but rather, to understand whether the individual has a qualifying mental disorder, “a completely different purpose.” 9/4/14 RP17-19. The SRA-FV has not been used in federal court in the method that Dr. Goldberg used it. 10/2/14 RP37.

This record is compelling that the instrument is not generally accepted. The oft-repeated adage that hard facts make bad law bears repeating here. Allowing the admission of the SRA-FV – a proposed but never independently cross-validated tool – under Frye, opens the

gates to who knows what kind of untested ‘science.’ The prosecutor’s blasé invitation that “error rates are for the trier of fact to sort out,” ignores just how impactful expert witness testimony is to a jury. 9/2/14 RP11.

Our judicial system deserves better, in part because we know that bad forensic science has resulted in countless wrongful convictions. See e.g. Balko, R., *A brief history of forensics*, Washington Post, April 21, 2015 (discussing discredited ‘voice printing,’ arson investigation techniques, hair and fiber analysis, the ‘shaken baby syndrome’ diagnosis, ‘ear print’ matching, bite marks, and so on.¹⁰ Accord In re Fero, 192 Wn.App. 138, 165, 367 P.3d 588 (2016) (granting PRP for a woman who spent a decade in prison for an alleged assault against a child because “the scientific explanations that were offered as evidence against [her] in her trial are no longer generally accepted in the medical community.”)

e. McGaffee is entitled to a new 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.

¹⁰ Available at: <https://www.washingtonpost.com/news/the-watch/wp/2015/04/21/a-brief-history-of-forensics/> (last accessed June 29, 2016).

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 the proceeding is a fair one. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992); Thorell, 149 Wnd at 732; U.S. Const. amend. 14; Wash. Const. art, I, § 3.

The Frye hearing record demonstrates that the SRA-FV instrument should have never been admitted and that Dr. Goldberg's use of it to select a Static-99R reference group is not a generally accepted method for incorporating dynamic risk factors into a risk assessment.¹¹ The admission of the SRA-FV at the unconditional discharge trial calls for reversal.

Dr. Goldberg specifically used the SRA-FV cut-off score to compare McGaffee against the high risk/high need reference group on the Static-99R. RP 1162-63, 1359. Based on this selection, Dr. Goldberg testified as to highly inflated risk estimates. RP 1151. If

¹¹ Defense counsel correctly argued that just because there is general acceptance regarding the need for an evaluator to consider dynamic risk factors, that does not mean that the SRA-FV's untested mathematical approach is generally accepted or admissible. 9/2/14 RP12-13.

compared to the routine (not high risk/high need) reference group, McGaffee's risk estimates on the Static-99R would have been far lower, 27.2%. RP1415.

The matter 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.)

2. The Trial Court Wrongfully Allowed The State To Bolster Claims About McGaffee's Risk With Prejudicial And Confusing Relative Risk Ranking Data

- a. Evidence that is irrelevant or prejudicial or confusing should be excluded.

Evidence is relevant and admissible if it has any tendency to make the existence of a fact more or less probable. ER 401. But relevant evidence may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Washington cases agree that unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors. Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994); Lockwood v. AC & S, Inc., 109 Wn.2d 235, 257, 744

P.2d 605 (1987); State v. Cameron, 100 Wn.2d 520, 529, 674 P.2d 650 (1983).

A trial court's evidentiary rulings are reviewed for an abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Even a discretionary decision is reversible if it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. See State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

- b. The record demonstrates that the relative risk ranking evidence was irrelevant, prejudicial, and confusing.

Pretrial, McGaffee moved to exclude mention of relative risk rankings and even renewed this motion. RP997-98. The State's witness, Dr. Goldberg, was questioned outside the presence of the jury about the relative risk rankings. RP 1000-31. He understood the difference between absolute and relative risk. RP1002. He agreed that the statutory focus is on absolute risk; whether an individual's absolute risk exceeds the 50% threshold. RP1002. He agreed that most professionals who communicate the results of the Static-99R actuarial risk assessment instrument do not use the relative risk percentile rankings. RP1012. He also agreed that communicating both relative risk and absolute risk data could be confusing:

Say, oh, he's in the high risk category versus he's in the 90 percent category is important to the jury. You know, I could easy [sic] define that as meaning he's not a 90 -- he's not going to reoffend at a 90 percent rate, but according to this, I mean, his absolute risk is just as confusing to the jury as the categorical risk -- as the relative risk. I'm sorry.

RP1016.

Dr. Goldberg assigned a relative percentile rank of 97% to McGaffee, even though his absolute risk of reoffense was estimated to be only about 43% in ten years. RP1027. Taken at face value, the absolute risk estimate indicates that McGaffee's likelihood of committing a sexual offense falls below the statutory threshold. On the other hand, the relative risk ranking suggests he is more dangerous than nearly all other sex offenders. The trial court ruled this testimony would be admitted and that the defense would be forced to challenge it on cross-examination. RP1031.

Ultimately, Dr. Goldberg let the jury know that McGaffee had a "score of seven" on the Static-99R instrument and that this put him "in the high risk category for sexual reoffense." RP1149. But when asked to explain the score, the witness began by emphasizing the alarming relative risk data:

Well, it tells us a couple things. One is that, besides the category, **it tells us that he is a much higher risk for sex offense than other sexual offenders. He's over the 99th**

percentile in that regard, or 94th percentile in that regard. That's just comparison with other sex offenders. He's not 94 percent chance of reoffending. It just means compared to other sex offenders, he's in the 94th percentile, meaning that's where he falls. And it also gives estimates for his risk over a period of five and ten years.

RP1150 (emphasis added).

The absolute recidivism risk estimates came later. RP1151.

These figures were reported as 30.7% over a period of five years and 42.8% over a period of 10 years. RP1151.

As to be expected, the information about relative risk attracted the jury's attention. One of the jurors asked:

The first question is Mr. McGaffee falls into the 94th percentile of sex offender, but it doesn't mean 94 percent chance of reoffending. **What does it mean?**

RP1506-07 (emphasis added).

In responding, Dr. Goldberg again acknowledged this was a confusing topic and irrelevant to the absolute risk question:

Yeah. That's a good question. When you say he's in the 94th percentile, what that means, in comparison to other sex offenders. For example, if you got a 94 percent on your test as compared to other people in your class, that's what that would mean. So -- **but that doesn't mean he's a 94 percent risk for reoffense. That's a totally different issue.** It just means when you compare him to the other sex offenders, he's 94 percent higher risk than -- he's 94 percent of a higher risk than other sex offenders. **I hope I made that clear. It doesn't mean he's 94 percent going to reoffend.** In the group of all sex offenders,

he's 94 percent higher, as far as risk is concerned, than other sex offenders.

RP1507 (emphasis added).

c. The trial court's error calls for reversal.

The trial court abused its discretion in allowing the State's expert to throw-out the menacing figure "94 percent" in describing the concept of relative risk. By the witness's own admission, this was irrelevant and confusing information. ER 401; 403. The jury's question shows that it was drawn to the prejudicial statistic.

There is a reasonable probability that the inclusion of this information bolstered the State's case. First, as indicated by the jury question, the distinction between relative and absolute risk was unclear. There is no certainty that Dr. Goldberg's confusing explanation came through. Second, even if the jurors understood the difference between relative and absolute risk, there is a real chance that the inclusion of a statistical figure a hair below 100% – what most people understand as the representation of certainty – bolstered the State's case with respect to the contested statutory question of absolute risk.

In this case, the Static-99R risk estimates fell below the required 50% threshold. Dr. Goldberg acknowledged this. RP1489. When asked to state McGaffee's estimated risk, Dr. Goldberg refused to give "an

exact percentage.” RP1489. Rather, he claimed that the risk posed by McGaffee is “more likely than not.” RP1489.

In other words, the expert took one set of numbers – the group absolute risk estimates from the Static-99R – and increased them to assert that Mr. McGaffee’s risk was over the 50% threshold. The relative risk percentile of 94% was irrelevant to the question of absolute risk, but aided the State’s expert’s claim that the absolute risk threshold had been breached. And, when it came time to argue the case to the jury, the prosecution was more than willing to keep the two concepts blended as one: “we talked about risk assessment. I’m not going to go into a lot of grueling detail on it, but Dr. Goldberg, he used a variety of different methods to be able to arrive to his conclusion.” RP1832.

This Court should recognize that the trial court erred in allowing the State to present the relative risk percentile. ER 401, ER 403. The error was prejudicial because the irrelevant and misleading relative risk data eased the State’s statutory burden of proof as to a key element.¹²

¹² The fact that the defense expert was forced to come back to the alarming statistic and explain that it “has nothing to do with the probability of risk” does not reduce the prejudicial impact of the wrongfully admitted data. RP1626.

3. The Trial Court Violated McGaffee’s Right To Present A Defense When It Set Arbitrary Limits On How He Could Criticize The VRAG-Revised Actuarial Risk Assessment Instrument And When It Refused To Ask A Jury Question About Dr. Abbott’s Risk Assessment.

a. The right to present a defense is an essential trial right.

The right to present witnesses in one’s own defense is an essential trial right: “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Franklin, 180 Wn.2d 371, 378, 325 P.3d 159 (2014).

A trial court’s decision to admit or exclude evidence is generally reviewed for abuse of discretion. State v. Darden, 145 Wn.2d, 612, 619, 41 P.3d 1189 (2013). A court necessarily abuses its discretion if it denies a criminal defendant’s constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). The Court reviews a claim of the denial of constitutional rights de novo.

b. The trial court incorrectly kept McGaffee’s expert from informing the jury how and why he was critical of the State’s expert’s use of the VRAG-Revised actuarial.

At the pretrial Frye hearing regarding the SRA-FV, Dr. Abbott testified that scientists “can’t rely on a single published study... to gauge general acceptance until the findings have been determined to be

true discoveries or whether they're actual fallacy or false finding.”

9/3/14pm RP35. This is because “[t]here is research that shows that approximate[ly] between 30 percent and 95 percent of original psychological results could be determined as false upon replication.”

9/4/14pm RP34-35. In that same hearing, the State’s expert Dr. Phenix testified that “shrinkage” in predictive accuracy has been observed as actuarial risk instruments underwent cross-validation. 8/15/14 RP102-03.

The State’s expert, Dr. Goldberg, used the VRAG-Revised instrument to assess McGaffee’s risk for re-offense. RP 1154-58. The instrument had not been validated outside its own sample. RP1431-32. It defines reoffense far more broadly than RCW 71.09. RP1430-31. Unlike Dr. Goldberg, Dr. Abbott did not use the VRAG-R instrument to conduct his risk assessment of Mr. McGaffee. RP1595-99. Not only that, he held the opinion that using the VRAG-R, as Dr. Goldberg had used it, was inappropriate. RP1608-1611, 1617.

The trial court barred Dr. Abbott from presenting this evidence to the jury. RP1608. Dr. Abbott could not testify that he believed using the VRAG-R was generally inappropriate in a forensic evaluation.

RP1608. He was only allowed to say that he does not use the instrument. RP1608.

Dr. Abbott testified that the VRAG-R was unreliable in part because it had not been cross-validated on other populations. RP1615. The developmental sample was not representative of the group of offenders to whom McGaffee belongs. RP1614. Dr. Abbott held the opinion, based on the scientific community's experience with developing actuarial risk assessment instruments, that cross-validation of the VRAG-R would likely show reduced predictive validity. RP1615-17. This opinion was consistent with what was adduced at the Frye hearing. 9/4/14pm RP34-35. But, claiming that "you can't predict into the future," the trial court barred Dr. Abbott from sharing this criticism of the instrument with the jury. RP1617.

Because of the erroneous ruling, McGaffee missed-out on the opportunity to criticize the approach taken by the State's forensic psychologist, the main witness against him. The information McGaffee attempted to offer was plainly relevant. ER 401, 403. It directly rebutted claims made by Dr. Goldberg, the witness the State was relying on to establish that McGaffee was so risky as to warrant civil commitment under RCW 71.09. Dr. Goldberg had testified that the

VRAG-R scores played a role in his risk assessment. RP1154-58. See also RP1427-32. As such, his methodology was plainly subject to rebuttal and criticism.

Dr. Abbott should have been allowed to opine that Dr. Goldberg's reliance on the VRAG-R was not only something that Dr. Abbott personally did not approve of, he should have been allowed to say that in his opinion the instrument was not reliable for use in this context on the whole. Likewise, Dr. Abbott's opinion that the VRAG-R would not be replicated – an opinion based on past experience of the scientific community – should have been admitted.

There was no reason to take these arguments off the table just because they were opinions that related to future events. RP1617. That reasoning would render much of RCW 71.09 expert testimony inadmissible. The State was entitled to cross-examine Dr. Abbott on his opinion, but the testimony should have been allowed. ER 401, ER 403, ER 703.

- c. The trial court likewise infringed on McGaffee's right to present a defense when it refused to let Dr. Abbott answer a jury question as to his risk assessment methodology.

Civil Rule 43(k) provides that jurors may submit written questions to a witness.

Juror Questions for Witnesses. The court shall permit jurors to submit to the court written questions directed to witnesses. Counsel shall be given an opportunity to object to such questions in a manner that does not inform the jury that an objection was made. The court shall establish procedures for submitting, objecting to, and answering questions from jurors to witnesses. The court may rephrase or reword questions from jurors to witnesses. The court may refuse on its own motion to allow a particular question from a juror to a witness.

CR 43(k).

The merit of the jury-question procedure is well-recognized.

[J]uror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror.

United States v. Sutton, 970 F.2d 1001, 1005 n.3 (1st Cir. 1992).

CR 43(k) applies to RCW 71.09 proceedings. "Because SVP trials are civil in nature, jurors may ask questions of the witnesses." In re Det. of W., 171 Wn.2d 383, 393, 256 P.3d 302 (2011).

When Dr. Abbott completed his testimony, the trial court gave the jurors the ability to ask questions. RP1776. One question was asked, but a second one was refused. RP1778, 1785-86.

The refused question was: "You testified you completed a risk assessment to compare with Dr. Goldberg's. What instruments did you use and what were the scores?" RP1778. The trial court seemed stuck on the notion that this information was outside the scope of Dr. Abbott's testimony. RP1779. The prosecutor also argued the question was outside the scope, would be time-consuming, and did not need to be answered. RP1780.¹³ Although defense counsel initially did not take a position regarding the question, ultimately McGaffee wanted the question asked. RP1781, 1785-86 (trial court overruling the objection).

The trial judge also had concerns over how much time it would take to get into Dr. Abbott's assessment. RP1783-85. Ultimately, the trial court refused to have the juror's question posed and said that Dr.

¹³ The prosecutor had argued, in part:

I'm sure we can do it, it will be fairly time consuming, and ultimately I don't know that it would be that illuminating to the jury given that Dr. Abbott's testimony was that Mr. McGaffee is under 50 percent in his assessment. So we're not going to get any new information out of it, other than the fact that he used an instrument, and what that instrument's score was. So the answer is not needed. The evidence that Dr. Abbott has is in.

RP1780.

Abbott was therefore done being a witness: “Dr. Abbott can step down from his chair.” RP1785.¹⁴

The jury wanted the question answered and so did McGaffee. Dr. Abbott had already given his opinion that he believed that McGaffee’s risk of reoffense fell below the civil commitment threshold. RP1593-95. The jury’s question was most certainly within the scope of this testimony; it simply probed deeper than what had already been discussed in court. And, the jury question specifically asked Dr. Abbott to compare his approach with that of Dr. Goldberg’s. RP1780.

McGaffee’s expert should have been allowed to provide an answer to what the jury was curious about. The evidence was plainly relevant. The question itself highlights the jury’s interest in the specifics of Dr. Abbott’s risk assessment and establishes why not asking that question was prejudicial. The prosecutor’s argument, discussed below, only exacerbated this error.

¹⁴ At this point, defense counsel did not make a request to recall Dr. Abbott and ask this question on their own, rather than through the CR 43(k) procedure, but the reasonable interpretation of the court’s ruling is that the trial court deemed the subject matter inadmissible.

4. The Prosecutor Committed Misconduct In Closing Argument.

- a. Misconduct by the prosecutor can violate a defendant's constitutional right to a fair trial.

An accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. 1, §§ 3, 21, 22.

A prosecutor is obligated to perform two functions: “enforce the law by prosecuting those who have violated the peace and dignity of the state” and serve “as the representative of the people in a quasijudicial capacity in a search for justice.” State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor “owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” *Id.* See also State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); State v. Boehning, 127 Wn.App. 511, 518, 111 P.3d 899 (2005).

- b. The prosecutor's argument about the difference between Dr. Goldberg and Dr. Abbott's risk assessment methodologies was misconduct.

In closing argument, the prosecutor addressed the risk element of the statute. RP1832. The prosecutor let the jury know that with respect to risk assessment, he was “not going to go into a lot of

grueling detail.” RP1832. He said that Dr. Goldberg “used a variety of different methods to be able to arrive to his conclusion,” including actuarial risk assessment instruments and dynamic risk factors.

RP1832. A PowerPoint presentation accompanied the argument. CP 492-519. One of the PowerPoint slides displays Dr. Goldberg’s name and shows four arrows pointing toward the center of the page, where the word “risk assessment” appears. CP 510.

Turning to the next slide, the prosecutor compared the State’s expert’s approach to that of an able cook:

I’d like to think of this as a soup. So a soup is not a soup if it doesn’t have all of its ingredients. Right? If you don’t have the chicken and the noodles and the vegetables, all you have is broth. If you don’t have the broth, all you have is chicken and noodles. Right?

RP1832.

The State’s PowerPoint actually shows an image of a pot of soup with Dr. Goldberg’s name above it. CP 510.¹⁵

¹⁵ The State returned to this awkward analogy a bit later. “So we have some percentages. That’s just data. That’s one of the ingredients that go into the soup -- or three of the ingredients that go into the soup.” RP1835.

Dr. Goldberg



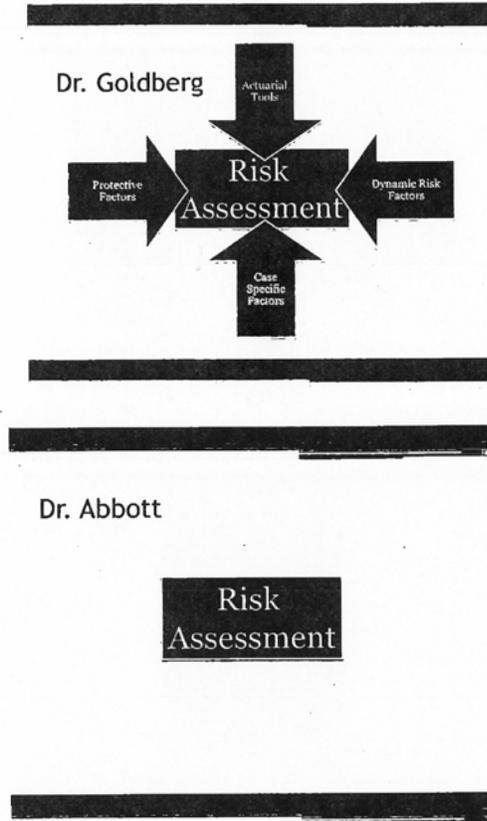
Next, the prosecutor contrasted his claim that Dr. Goldberg fed the jury a hearty stew, with an assertion that Dr. Abbott had left them hungry:

So if we were to go back and look at the risk assessment, **if you only have the actuarial tools**, you don't have a risk assessment, you don't have soup. If you don't have dynamic risk factors, or you just have case-specific factors, and protective factors, you don't have a risk assessment. **The soup has to be completed, and Dr. Goldberg completed the risk assessment. Dr. Abbott, this is his risk assessment.**

RP1832 (emphasis added).

The slide accompanying this argument is the same design as what the prosecutor used to depict Dr. Goldberg's approach, but shows nothing except the word "risk assessment." CP 510.

This is how the two slides appear one after the other:



Defense objected and moved for a mistrial. RP1832. The objection was overruled and the prosecutor pressed on with the idea that Dr. Abbott's testimony was insufficient:

He criticized the use of the VRAG, he talked a little bit about the use of the percentile rankings, **but he did not support his conclusion. Dr. Goldberg is the only one that did.**

RP1832 (emphasis added).

Defense counsel's additional objections and request for a mistrial were overruled. RP1833. To make matters worse, when the prosecutor resumed, he suggested that the jurors could find for the State based on their subjective beliefs as to McGaffee's risk:

"More likely than not" is defined as 50 percent, greater than 50 percent, in your instruction. That means that based on the evidence, **you believe** there's at least 50 percent plus something that he will reoffend; **that does not mean that the actuarial percentage has to be above 50 percent.**

RP1834 (emphasis added).

Rather than accept the burden of proof on the question of risk, the prosecutor punted that difficult task to the jury:

Actuarials cannot predict the future. We don't have a crystal ball. We don't know whether or not he will reoffend or won't reoffend. That's not what you're being asked. **You're being asked to see whether or not it's likely.**

RP1835 (emphasis added).

The State's argument was improper and the defense objections should have been sustained. For one, the law unequivocally requires that the State produce evidence, rising in quality to proof beyond a reasonable doubt, that McGaffee's future risk of committing a predatory sexually violent offense exceeds 50%. RCW 71.09.020(7). The soup analogy, combined with the invitation that the jurors beliefs as to risk mattered more than the evidence presented, diminished the

importance of both the quality and quantity of proof required for commitment.

“Arguments by the prosecution that shift or misstate the State’s burden to prove the defendant’s guilt beyond a reasonable doubt constitute misconduct.” State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) citing State v. Gregory, 158 Wn.2d 759, 859–60, 147 P.3d 1201 (2006). Arguments that compare a critical legal standard to everyday decision making are improper because they minimize and trivialize the State’s burden of proof. In Lindsay, that was the Supreme Court’s conclusion with respect to a prosecutor’s comparing the reasonable doubt standard to a pedestrian’s judgment as to what is a safe time to cross a street. Lindsay at 436.

The State’s invitation that the jurors satisfy themselves with what Dr. Goldberg threw in the boiling “risk assessment” pot trivialized a key legal concept. This Shakespearean “witches’ brew” argument and accompanying visual were dramatic, but improper.¹⁶

¹⁶ Fillet of a fenny snake,
In the cauldron boil and bake;
Eye of newt and toe of frog,
Wool of bat and tongue of dog,
Adder's fork and blind-worm's sting,
Lizard's leg and howlet's wing,
For a charm of powerful trouble,
Like a hell-broth boil and bubble.

Furthermore, the argument was misconduct because it hoisted the State's burden onto McGaffee's shoulders. In every RCW 71.09 trial, it is for the State to establish each and every commitment element to the beyond a reasonable doubt standard. The respondent has no burden to demonstrate that he is safe to be at large. The respondent has the right to expert assistance, but no obligation to present any evidence, and certainly no obligation to develop risk assessment testimony.

This improper argument forced McGaffee's trial counsel to defend against not just the facts, but the burden-shifting itself.

[T]he State has somehow suggested that Mr. McGaffee has this burden when it made a comment that Dr. Abbott didn't explain his risk assessment. Well, Dr. Abbott didn't have any duty to do so. He doesn't carry any burden and Mr. McGaffee doesn't either.

RP1852-53.

In rebuttal, the State asserted that since McGaffee called a witness to testify in his behalf, the jury "can evaluate what the witness said." RP1868. However, the "soup" argument went far beyond that. Defense objected again. RP1868.

Double, double, toil and trouble;
Fire burn and cauldron bubble.

WILLIAM SHAKESPEARE, MACBETH act 4, sc. 1.

The State's misconduct was particularly egregious because it was based on directly exploiting the earlier trial court ruling that kept Dr. Abbott from telling the jury about his risk assessment methodology, the tools he used, and how he scored McGaffee. The juror's question that had gone unasked was: "You testified you completed a risk assessment to compare with Dr. Goldberg's. What instruments did you use and what were the scores?" RP1778. In arguing that the question did not need to be answered, the prosecutor said to the judge:

I don't know that it would be that illuminating to the jury given that Dr. Abbott's testimony was that Mr. McGaffee is under 50 percent in his assessment. So we're not going to get any new information out of it, other than the fact that he used an instrument, and what that instrument's score was. So the answer is not needed. The evidence that Dr. Abbott has is in.

RP1780.

But addressing the jury in argument, the prosecutor turned around and blamed McGaffee for not presenting a fully-developed expert opinion. First, parroting the question, he said that Dr. Abbott "did not support his conclusion. Dr. Goldberg is the only one that did."

RP1832.

Then, in rebuttal, after the trial court had overruled defense objections, the prosecutor doubled-down on this rhetoric:

Dr. Abbott did not support his opinion. He doesn't have a burden to explain it. That's not burden shifting. Right? **He has the option to explain it. He chose not to.**

RP1868 (emphasis added).

This argument was misconduct. State v. Kassahun, 78 Wn.App. 938, 952, 900 P.2d 1109 (1995). A prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record. State v. Pierce, 169 Wn.App. 533, 553, 280 P.3d 1158 (2012); State v. Clafin, 38 Wn.App. 847, 850–51, 690 P.2d 1186 (1984). A prosecutor cannot mischaracterize the burdens of proof. State v. Jackson, 150 Wn.App. 877, 885, 209 P.3d 553 (2009).

Here, like in State v. Kassahun, the prosecutor committed misconduct by arguing that McGaffee should be faulted for not presenting evidence the prosecutor knew to have been earlier excluded by judicial order. In Kassahun, the owner of a gas station and convenience store was charged with murder after he shot and killed someone outside his business. The State successfully moved in limine to exclude all mention of gangs and gang activity with respect to the deceased and prosecution witnesses. At trial, Kassahun testified that he believed the murder victim was a gang member when he shot him.

Then, like in McGaffee’s case, the prosecutor argued, over defense objection, that there was no evidence that lawless gangs were taking over and running the show in the parking lot of Kassahun's store. On appeal, this Court found prosecutorial misconduct:

Having prevailed by motion in limine in its effort to preclude Kassahun from discovering objective evidence of Walker’s gang membership and gang activities and that of some of the witnesses who were in the parking lot at the time of the shooting, it was misconduct for the prosecutor to imply in argument to the jury that Kassahun was being untruthful because he failed to offer objective evidence to support his belief that his business was being overrun by gangs.

Kassahun, 78 Wn.App. at 952.

The prosecutor’s decision to claim the State’s expert’s risk assessment was superior to that of Dr. Abbott – when the prosecutor knew the trial court had stopped the defense from eliciting the nuts and bolts of Dr. Abbott’s risk assessment opinion – was highly improper. The defense objection and request for a mistrial should have been granted.

- c. The prosecutor’s argument about the lack of evidence was misconduct because it misstated the law.

Additionally, the prosecutor’s “vacuum” analogy in closing argument was misconduct because it constituted a misstatement of the law. Even though a reasonable doubt may arise from the evidence – or

the lack of evidence – the prosecutor told the jury that the absence of evidence of a current pedophilic disorder proved such a mental abnormality existed:

So say a vacuum – I’m not talking about the vacuum cleaner, because we can all see a vacuum cleaner -- but a vacuum is the absence of – there’s going to be someone on here that knows a better definition of me, so I’m going to screw it up. But a vacuum is like the absence of air. It’s that sucking that happens. You can’t see it, you can’t observe the vacuum. That doesn’t mean it’s not there. Right? How do we know that it’s there? You look at the evidence around the vacuum. You look at what’s going on around it, that things are being pulled into it. Right? So you can see what’s happening to the feather when you hold it up next to the vacuum, and that’s how you know there’s a vacuum.

RP1869.

Under the law, the very converse of what was asserted is true.

“Where there is a vacuum of evidence and argument on a specific issue, the party with the burden to prove the issue at trial loses.” S.H. ex rel. A.H. v. Plano Indep. Sch. Dist., 487 Fed. Appx. 850, 872-73 (5th Cir. 2012) (internal citations omitted). And, the prosecutor’s argument directly contradicted the court’s instruction with respect to the definition of reasonable doubt, which specified that “A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” CP 526 (Instruction No. 4).

A prosecutor's statements are improper if they misstate the applicable law. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). This argument was improper and prejudicial. McGaffee should be granted a new trial.

- d. Reversal is needed because the misconduct had a substantial likelihood of affecting the jury's verdict.

Once a defendant establishes that a prosecutor's statements were improper, courts then determine whether the defendant was prejudiced; the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. Emery, 174 Wn.2d at 760.; Anderson, 153 Wn.App. at 427.

Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.

In re the Personal Restraint of Glasmann, 175 Wn.2d 696, 712, 286 P.3d 673 (2012) (internal citations omitted).

Here, the improper "soup" argument told the jurors that they should find in favor of the State because McGaffee's expert had not sufficiently shown that McGaffee was safe to be released. This was improper burden-shifting. As the juror's question demonstrated, the

jury was paying attention to the details of risk assessment, but the State told them to gloss over the details and go with what they subjectively believed to be true. The “vacuum” argument similarly invited the jury to overlook the absence of evidence and the jury instruction on reasonable doubt. There is a real possibility that the outcome of the proceeding would have been different but for this misconduct. A new trial should be ordered.

5. The Cumulative Effect Of These Errors Deprived McGaffee Of A Fair Trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together, the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. 1, § 3; e.g., Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel’s errors in determining that defendant was denied a fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d

668, 678 (1984); State v. Alexander, 64 Wn.App. 147, 150-51, 822 P.2d 1250 (1992).

Here, the trial court errors largely centered on the question of the risk of re-offense that McGaffee would pose if released into the community. To a layperson juror, a member of the community the respondent is attempting to reenter, the question of risk is likely to be of more importance than that of mental illness. However, due process requires proof of both mental illness and dangerousness, and so does the statute. Foucha v. Louisiana, 504 U.S. 71; RCW 71.09.020(18).

The error in admitting the SRA-FV evidence calls for reversal standing alone, but also certainly in conjunction with the other errors related to risk. The relative risk ranking percentile – the striking 94% figure – signaled to the jury that McGaffee must be dangerous. His expert’s attempt to discredit Dr. Goldberg’s ultimate opinion as to risk was refused, both in terms of the VRAG rulings and the unasked jury question. The misconduct in closing argument – which in part capitalized on the earlier risk-related errors – was more of the same messaging: McGaffee is highly dangerous.

However, McGaffee’s criminal history is dated. He is now in his fifth decade of life and is no longer the same person he was when he

went to prison. He seriously engaged in extensive psychological treatment while at the SCC. There is at least a four-year absence of evidence he is affected by a pedophilic disorder. Dr. Abbott's well-reasoned conclusion that McGaffee's past mental abnormality had remitted due to treatment should have driven a barnyard-door's worth of reasonable doubt in the State's case.

The errors outlined above truly sullied the proceeding. The prosecution's closing argument – and its avoidance of the “details” of evidence of risk – is a strong signal that what mattered in their presentation was broadly painting McGaffee as a menace. The trial court errors let them do that and they also took away McGaffee's ability to fight back.

F. CONCLUSION.

In this trial, there can be no confidence in the jury's verdict. The matter should be remanded for a new and fair trial.

DATED this 1st of July 2016

Respectfully submitted,

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