NO. 46524-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of Duane Brennan,

STATE OF WASHINGTON,

Respondent,

v.

DUANE BRENNAN,

Appellant.

STATE OF WASHINGTON'S OPENING BRIEF

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I. INTRODUCTION

In two separate forensic interviews, Duane Brennan disclosed to two different psychologists that, in addition to his two convictions for Child Molestation in the First Degree, he also had a lengthy history of undetected sexual offenses against children. He further admitted sexually deviant fantasies involving children, and unequivocally stated that he would sexually reoffend against other children if he were released from confinement. Based in part on this information, the State initiated civil commitment proceedings against him pursuant to RCW 71.09. Subsequently, he told an evaluator retained by his attorneys that he had fabricated those admissions. When the State's evaluator requested physiological testing in an effort to verify his sexual deviance, Brennan refused to submit to the testing. The trial court determined that the statute specifically authorizes the testing if, as was the case here, it is requested by the evaluator and that Brennan had previously agreed to any testing requested by the State's evaluator. Correctly interpreting its discretionary authority provided by the statute, and based on the unique conundrum created by Brennan's contradictory statements about his mental condition and risk for re-offense, the trial court found good cause to compel him to submit to the testing. When Brennan refused to comply, the court found intentional disobedience, and found him in contempt of court. As a

remedial sanction, the court struck his commitment trial date, and stayed further proceedings until he purged the contempt.

Brennan has only appealed the order finding him in contempt and the underlying order compelling him to undergo a plethysmograph. He has not appealed the sanction. Brennan has not shown that the trial court lacked jurisdiction to enter the order holding Brennan in contempt, nor has he shown that the underlying order is appealable. The trial court should be affirmed.

II. RESTATEMENT OF THE ISSUES

A. **Did the Trial Court Abuse Its Discretion By Ordering Brennan to Submit to Physiological Testing That Is Specifically Permitted Under RCW 71.09 When Brennan Contends He Lied to the State's Evaluator About His Sexual Deviancy, Sexual Offending History and His Own Concerns About His Risk For Sexually Reoffending?**

B. **Does Physiological Testing Which Is Specifically Permitted By RCW 71.09 In A Forensic Evaluation Violate Brennan's Truncated Privacy And Due Process Rights?**

C. **Does The Trial Court Have Jurisdiction Over the Proceedings Pursuant to RCW 71.09 And Is It Thus Permitted To Hold Brennan In Contempt For Failure To Comply With A Court Order?**

D. **Does Stipulating To An Order Which Tracked the Statutory Language Authorizing Physiological Testing Constitute Ineffective Assistance Of Counsel?**

III. RESTATEMENT OF THE CASE

Duane Brennan was convicted of two counts of Child Molestation in the First Degree in Mason County in 2001 for repeatedly sexually abusing four children whose ages ranged from seven to ten. CP at 72. Brennan's offenses against these children began only a few months after his release from prison for a 1999 Assault conviction. CP at 72. In violation of the conditions of his release, Brennan moved in with a woman who had two young boys and began babysitting for them. CP at 72. When two young neighbor girls came over, he began grooming the four children by playing Truth or Dare, and getting the children to touch him. CP at 72. Brennan forced the children to sexually touch each other, and to pull their pants down. CP at 71. Brennan also made the girls touch and suck his penis, tried to put his penis in in one of the girls' anus, and performed oral sex on both girls. CP at 71. Although he initially denied it, Brennan later confirmed what the children reported. CP at 73.

He was ultimately sentenced to a term of one hundred and thirty months in the department of corrections. CP at 73. Shortly before his scheduled release, the State filed a sexually violent predator (SVP) petition pursuant to RCW 71.09 on November 30, 2012. CP at 138-39. In support of its initial petition, the State submitted a 53-page psychological

evaluation of Brennan conducted by Dr. Amy Phenix, Ph.D. *Id.*; CP at 71-137.

As part of her evaluation Dr. Phenix conducted a clinical interview. CP at 88-137. Brennan admitted to a long history of sexual deviancy, including having approximately twenty-five unreported child victims. CP at 90-95; 116-18. Brennan admitted to engaging in repeated sexual contact with boys and girls between the ages of seven to fourteen, further admitting that his preference is for young girls ages nine to fourteen. CP at 116. He further admitted to his ongoing sexual fantasies of young children and stated that he believed if he was released he would molest a child again. CP at 116-17. Dr. Phenix relied upon these admissions as part of her opinion that Brennan met criteria for civil commitment under RCW 71.09. SUPP CP at 16.

On December 3, 2012, Brennan stipulated to the existence of probable cause and the Court ordered that he be detained at the Special Commitment Center for further evaluation. SUPP CP at 26-28. The order further provided that Brennan shall submit to an evaluation by an expert chosen by the state and the evaluation may include any of the following procedures or tests if requested by the state's expert:

a. A clinical interview;
b. Psychological testing;
c. Penile plethysmograph testing (PPG);

d. **Polygraph testing;** and
e. Any other testing or procedures deemed appropriate by the evaluator.

SUPP CP at 27 (emphasis added). Brennan read the agreed order and had the opportunity to discuss the document with his attorney. SUPP CP at 26. The agreed order is signed by both Brennan and his attorney. SUPP CP at 28. He did not seek appellate review of this order.

A year later, in December 2013, Dr. Phenix received an evaluation conducted by Brennan's retained expert, Dr. Brian Abbott. SUPP CP at 16-17. When interviewed by Dr. Abbott, Brennan recanted a number of admissions he had made to Dr. Phenix. CP at 63-64; SUPP CP at 16-17. He stated that he does not fantasize about young children, that he does not have an additional twenty five unreported child victims and that he does not believe he will reoffend if released into the community. CP at 63-64; SUPP CP at 16-17. Dr. Abbott's evaluation was the first time the State and Dr. Phenix had learned that Brennan had disavowed statements that Dr. Phenix had relied on as part of her opinion that Brennan met criteria for civil commitment. CP at 62-64.

After reviewing Dr. Abbott's evaluation, Dr. Phenix re-interviewed Brennan in December of 2013. SUPP CP at 17. During this second interview Brennan informed Dr. Phenix that he had fabricated the existence of unreported victims, his sexual fantasies of children, and his

belief that he would reoffend if released. SUPP CP at 17. Based on the statements that he had lied to her previously, Dr. Phenix requested Brennan participate in a sexual history polygraph as well as a penile plethysmograph (PPG). SUPP CP at 17. He refused to participate in such testing. SUPP CP at 22-23.

On June 16, 2014, the State filed a motion and supporting memorandum requesting the trial court compel Brennan to participate in the requested physiological testing. SUPP CP at 2-25. The State based this request, among other arguments, on the language in the statute authorizing such testing if requested by the evaluator, on the stipulated order finding probable cause, which provided these tests would be permitted upon request of the State's evaluator, and a declaration from Dr. Phenix requesting the physiological testing. SUPP CP at 2-25. On June 30, 2014, the trial court ordered Brennan to participate in the physiological testing requested by the State's evaluator. CP at 13-15. At a hearing held on July 7, 2014, Brennan informed the trial court that he would not comply with the court's order. RP at 38. Based on his refusal to comply with the court's lawful order, the trial court held Brennan in contempt. CP at 10-12. The trial court stayed the proceedings until Brennan purged his contempt by completing the requested physiological testing. CP at 10-12.

Brennan filed a notice of appeal, challenging the order compelling the penile plethysmograph, and briefly asserting that the order finding him in contempt was erroneous because the underlying order was unlawful.[1] CP at 2-9. He did not appeal the sanction imposed by the court. The State filed a motion to re-designate the appeal of the Order Compelling Physiological Testing as a motion for discretionary review pursuant to RAP 2.3(b). (Appendix 1). The Commissioner denied the motion, ruling that "[t]he contempt order is appealable as a matter of right." (Appendix 2.)

IV. ARGUMENT

Indefinite civil commitment as an SVP is predicated on an individual's mental abnormality and/or personality disorder and dangerousness. *In re Pers. Restraint of Young,* 122 Wn.2d 1, 27-32, 37-38, 857 P.2d 989 (1993). RCW 71.09, Washington's SVP statute, "makes proof of a *current* mental disorder a condition of commitment." *Id.* at 38 (emphasis in original). The state must prove both mental condition and

[1] Brennan has not assigned error to the trial court's order of a sexual history polygraph, nor the specific issue polygraph following the PPG testing. Nor has he challenged the sanction imposed. Consequently, he has waived any challenge to the order compelling his submission, and the contempt flowing from his refusal to submit, as well as the sanction the court imposed. RAP 10.3(g). *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214 (2005) (citing *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2,* 117 Wn. App. 183, 190, 69 P.3d 895 (2003)(It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.)

dangerousness beyond a reasonable doubt. 122 Wn.2d at 13; RCW 71.09.060(1). Therefore, a careful and thorough assessment of the individual's mental condition and risk of re-offense is required. Moreover, as a convicted sex offender, Brennan has a reduced privacy interest that is outweighed by the State's interest in protecting the public from violent offenders. Washington case law specifically recognizes that sex offenders have reduced privacy interests because they threaten public safety. *In re Det. of Williams,* 163 Wn. App. 89, 97, 264 P.3d 570 (2011); *see also In re Det. Of Campbell,* 139 Wn.2d 341, 356, 986 P.2d 771 (1999) ("grave" and "substantial" public safety interests outweigh the truncated privacy interests of convicted sex offenders). Furthermore, the Washington Supreme Court long ago affirmed the importance of forensic evaluations in sex predator proceedings. "The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential." 122 Wn.2d at 52.

Here, where the State's evaluator relied on Brennan's numerous statements and admissions of deeply-ingrained sexual deviancy, only later to be told that Brennan had recently claimed to have fabricated them, physiological testing is not only permissible, but necessary. RCW 71.09 specifically authorizes certain physiological testing during the state's

forensic examination if the evaluator conducting the assessment requests the tests. Additionally, Brennan entered into a stipulated order at the probable cause hearing wherein he agreed that both PPG and Polygraph testing could be administered if Dr. Phenix requested them. The trial court's order compelling Brennan to submit to physiological testing is consistent with controlling appellate authority, the statute and the constitution. It was not an abuse of discretion when it ruled that there was good cause to require Brennan to comply with the requested procedures and hold him in contempt when he refused to comply.

A. The Order Compelling Physiological Testing Is Not Appealable as a Matter of Right But Is Subject to The Considerations Governing Review of RAP 2.3(b)

Brennan's challenge to the order compelling him to submit to a PPG should not be considered because he has not met the threshold requirements of RAP 2.3(b). Indeed, Brennan does not attempt to make this showing and instead cites to a footnote in a Division III case to support his contention that he may appeal the underlying order as a matter of right. See Opening Brief at p. 12, citing *Diaz v. Washington State Migrant Council,* 165 Wn. App. 59, 265 P.3d 956 (2011). Nowhere in the court's holding or the footnote does it state that a "contempt order and underlying order are appealable as a matter of right" as Brennan claims.

The *Diaz* opinion was limited to the order finding contempt and the order imposing sanctions:

> The Migrant Council sought interlocutory review, asking this court to determine that the trial court's order finding contempt and imposing sanctions was appealable as a matter of right under RCW 7.21.070.[FN4] ... Our commissioner found that the order finding contempt and imposing sanctions was appealable as a matter of right and, in the alternative, discretionary review was warranted.
>
> FN4. RCW 7.21.070 provides that a party may appeal an adjudication of contempt if it is a final order or judgment, including an order or judgment that is final because willful resistance has been established and the sanction is a coercive one designed to compel compliance with the court's order. *Seattle Nw. Sec. Corp. v. SDG Holding Co.*, 61 Wn. App. 725, 733, 812 P.2d 488 (1991) (citing *Arnold v. Nat'l Union of Marine Cooks & Stewards Ass'n,* 41 Wn.2d 22, 246 P.2d 1107 (1952)).

Diaz v. Washington State Migrant Council, 165 Wn. App. 59, 71-72, 265 P.3d 956, 963 (2011)(emphasis added).

Brennan appealed the order of contempt, but did not appeal the imposition of a sanction. His reliance on *Diaz* to support his joining an appeal of the underlying order to the contempt order is erroneous. The cited footnote refers to RCW 7.21.070 which provides only that parties may appeal from an adjudication of contempt if it is a final order or judgment, and it does not discuss the underlying order. RCW 7.21.070. *Diaz* is inapplicable to this case. Brennan's attempt to litigate the

underlying order without making the proper showing pursuant to RAP 2.3(b) should be rejected.

B. The Trial Court Exercised Its Discretion In Ordering Brennan To Submit To Physiological Testing

Nonetheless, if this court decides to address the merits of the underlying order, the trial court's ruling should be upheld. A trial court is afforded broad discretion to implement controls on the discovery process to permit full disclosure of relevant information while guarding against harmful side effects. *Rhinehart v. Seattle Times Co.,* 98 Wn.2d 226, 232, 654 P.2d 673 (1982), *aff'd,* 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). Such discovery orders are reviewed for abuse of discretion that results in prejudice to a party or person. *John Doe v. Puget Sound Blood Ctr.,* 117 Wn.2d 772, 777, 819 P.2d 370 (1991).

Brennan argues that the trial court failed to use discretion in its oral ruling ordering him to submit to physiological testing. (Opening Brief at 13-14). But the court clearly did exercise discretion when it found that there was good cause to compel Brennan to submit to the testing as requested by Dr. Phenix. CP at 14, Finding 3. The trial court further ruled that the statute specifically authorized the trial court to order testing "if requested by the evaluator" as was the case here. CP at 14, Conclusion of Law 2.

1. It is not an abuse of discretion to enter an order requiring tests specifically permitted by the governing statute

RCW 71.09 explicitly authorizes a trial court to order testing if the evaluator requests it. The statute states in relevant part:

> The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state. The judge may require the person to complete any or all of the following procedures or tests if requested by the evaluator: (a) A clinical interview; (b) psychological testing; (c) plethysmograph testing; and (d) polygraph testing. The judge may order the person to complete any other procedures and tests relevant to the evaluation.

RCW 71.09.050(1). The Washington Supreme Court has determined that in commitment proceedings the evaluation is mandatory. *See, e.g., In re Det. of Kistenmacher,* 163 Wn.2d 166, 172, 178 P.3d 949 (2008) ("Those subject to commitment as sexually violent predators are statutorily *required* to undergo a psychological examination") (emphasis in original).[2]

If the evaluator believes the physiological testing will be helpful in determining whether or not an individual meets criteria, there is a statutory basis to order it. Brennan's arguments ignore the fact that the legislature intended evaluators to be able to obtain and rely on testing if they determined it was necessary. Based on his interview, Dr. Phenix was

[2] *Kistenmacher* cites to RCW 71.09.040(4), which was recodified in 2012 as RCW 71.09.050(1).

initially able to opine that Brennan qualified as an SVP without the testing, but subsequent to his claims of deceit, she asked to the State to seek authority to obtain further testing as authorized by statute. The trial court did not abuse its discretion in following the clear language in the statute.

Brennan appears to be arguing that the trial court erred because it did not use discretion when ordering him to submit to a PPG. Opening Brief at 14 ("[T]he court abused its discretion by failing to recognize its discretion in concluding the statute alone authorized any testing requested by the State's evaluator.") It is difficult to understand this argument, as the facts and the record stand in stark contrast to this assertion.

First, the State's evaluator requested further testing procedures once she learned that Brennan was claiming to have lied about highly material facts. SUPP CP at 17. The State filed a motion with the court to compel the testing. SUPP CP at 2-25. Brennan opposed it in a written response and asked the court to deny the motion. CP at 16-59. The trial court found that there was good cause to grant the State's motion and ordered Brennan to comply with the requested procedures. CP at 13-15. The court ultimately ruled that the statute "specifically authorizes the Court to order" the tests. CP at 14. This is a classic example of a proper exercise of discretion.

2. The evidence before the trial court established good cause

Brennan ignores the fact that *his* actions are what drove the request for additional testing. His statements regarding his sexual deviancy, his sexual offending, his sexual fantasies, his likelihood of reoffending, and every other fact that has bearing on his mental abnormality and risk for sexual re-offense has been called into question because he now claims that he was lying during two different evaluations.

In forming her opinion that Brennan meets statutory criteria as an SVP, Dr. Phenix, in good faith, relied on numerous statements Brennan made to both her and another evaluator, Dr. Hupka. SUPP CP at 16. Brennan revealed a substantial history of sexual deviancy, numerous unreported instances of sexual assaults on children, sexual fantasies, and his own concern that he has serious difficulty controlling his sexual deviancy. SUPP CP at 16 - 17.

Dr. Phenix did not request any physiological tests until she learned that Brennan had admitted he lied to her about significant events, fantasies, crimes and his belief that he was at substantial risk for re-offense. Brennan cannot shield himself from evaluation by distorting the truth, whether to Dr. Phenix or to Dr. Abbott. Brennan fails to address the fact that it was his contradictory statements about his sexual deviancy and

his subsequent statements that he lied to Dr. Phenix during her forensic examination that forced Dr. Phenix to request the testing. "I determined that a sexual history polygraph as well as a penile plethysmograph test battery would be appropriate and useful to verify and/or clarify the sexual history previously reported by Mr. Brennan." SUPP CP at 17.

Given that he has admitted that he lied to her during at least one of his forensic evaluations, Dr. Phenix is well-within her professional boundaries to request physiological testing that may assist her in her final assessment. Dr. Phenix has serious professional and ethical obligations to obtain the best possible information regarding Brennan's sexual interests and history. SUPP CP at 17-18. This obligation is further compounded because the individual is facing indefinite civil commitment if she ultimately testifies that he meets criteria. SUPP CP at 18.

Dr. Phenix has significant expertise in the field of sex offender evaluations and risk assessments. SUPP at 15-16. Dr. Phenix is well aware of the scientific literature that demonstrates an empirical link between physiological testing and paraphilic deviant arousal. SUPP CP at 18. Her testimony established that:

> Such instruments for physiological assessment are commonly used and accepted within the sexual offender field for the assessment and treatment of sexual offenders and are endorsed as part of a comprehensive sexual

> offender evaluation by various agencies and sexual offender organizations.

SUPP CP at 18.

And further:

> In order for me to form opinions about Mr. Brennan's current mental state and recidivism risk, and based on the fact that Mr. Brennan has now recanted a number of his admissions to the existence of unreported victims, sexual fantasies of children and his belief that he will reoffend if released, I require current information about his sexual interests and history.

SUPP CP at 17.

Given the information that was before the trial court, it properly found that there was good cause to order a PPG, and did not abuse its discretion in doing so.

C. Use Of The PPG Does Not Violate Brennan's Right To Due Process

Brennan argues that the order compelling him to participate in a PPG violates his right to due process, describing PPG testing as "Orwellian." Appellant's Brief at 14. Because the clear language of the statute permits the court to order PPG testing, Brennan, in making this argument, effectively charges that the statute itself is unconstitutional. The SVP statute has, however, repeatedly been held to comply with the requirements of substantive due process, thus any due process challenge must be analyzed as a procedural, rather than substantive, challenge. This

challenge fails because Brennan's liberty interests are limited, the risk of erroneous deprivation of liberty is minimal, and the State's interests are compelling. Finally, Brennan's charge that use of a PPG here "shocks the conscience" and as such violates substantive due process fails as well. The use of such examinations during sex offender evaluations is a routine and accepted practice that has been widely upheld by the courts. Given the careful and detailed consideration of both the need for the PPG and the circumstances under which it is to be conducted, there was no violation of Brennan's right to due process.

1. The SVP Statute Has Repeatedly Been Upheld As Satisfying Substantive Due Process

The clear language of the SVP statute provides for PPG testing. RCW 71.09.050(1). In challenging the ability of the trial court to order PPG testing, then, Brennan effectively charges that the Statute violates due process. This challenge fails. RCW 71.09 has repeatedly been found to satisfy the requirements of substantive due process. A substantive due process challenge like the one raised here is facial because Brennan does not argue that he is being detained absent a mental illness or dangerousness. "[A] facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied." *In re Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999)

(*quoting with approval Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012, 113 S. Ct. 633, 121 L. Ed. 2d 564 (1992) (Scalia, J., dissenting)).

Liberty is a fundamental right, *Foucha v. Louisiana,* 504 U.S. 71, 86, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992), and a civil commitment scheme satisfies substantive due process constraints if it is narrowly tailored to serve compelling state interests. In involuntary commitment schemes, substantive due process is satisfied if the state proves the individual is mentally ill and dangerous. *Addington v. Texas,* 441 U.S. 418, 426, 99 S. Ct. 1804, 1809–10, 60 L. Ed. 2d 323 (1979). *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). Civil commitment statutes meet this requirement when both initial and continued confinement are predicated on the individual's mental illness and dangerousness. *Foucha*, 504 U.S. at 77–78; *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975).

Washington's SVP statute has repeatedly been found to satisfy this standard. "Applying the strict scrutiny test to the Statute as a whole, it is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions." *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989, 1000 (1993), citing *Addington v. Texas,* 441 U.S. 418, 426, 99 S. Ct. 1804, 1809–10, 60 L. Ed. 2d 323 (1979); *Vitek v.*

Jones, 445 U.S. 480, 495, 100 S. Ct. 1254, 1264–65, 63 L. Ed. 2d 552 (1980). Under substantive due process, the indefinite civil commitment of sexually violent predators is permitted whenever there is clear and convincing evidence that a person is both mentally ill and dangerous. *In re the Detention of Andre Young,* 122 Wn.2d 1, 25-42, 857 P.2d 989, 1001 (1993); *Kansas v. Hendricks,* 521 U.S. 346, 356-60, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). The indefinite commitment remains constitutional as long as the "nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jones v. U.S.,* 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983). The Washington Supreme Court reaffirmed this standard in *State v. McCuistion,* 174 Wn.2d 369, 388, 275 P.3d 1092, 1101 (2012).

Even if this Court were to entertain a new a substantive due process challenge to the statute -- specifically, to that portion authorizing a judge to order PPG testing -- it fails. First, this Court must presume the statute is constitutional, and the party challenging it must demonstrate its unconstitutionality beyond a reasonable doubt. *Tunstall* v. *Bergeson,* 141 Wn.2d 201, 220, 5 P.3d 691 (2000). Statutes are presumed constitutional, and the burden is on the challenger to prove otherwise. *State v. McCuistion,* 174 Wn.2d 369, 387, 275 P.3d 1092, 1101 (2012). Any reasonable doubt is resolved in favor of finding it constitutional.

Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 205, 11 P.3d 762 (2000), *opinion corrected by* 27 P.3d 608 (2001). Parties raising constitutional issues must present considered arguments to this court. *See, e.g., Pub. Hosp. Dist. No. 1 of King County v. Univ. of Wn.*, 182 Wn. App. 34, 327 P.3d 1281, 1289 (2014) ('[N]aked castings into constitutional seas are not sufficient to command judicial consideration and discussion.') *State v. Johnson,* 179 Wn.2d 534, 558, 315 P.3d 1090 (2014), *cert. denied,* 2014 WL 2763761 (2014), citing *State v. Blilie,* 132 Wn.2d 484, 493 n. 2, 939 P.2d 691 (1997) (alteration in original). Brennan must by "argument and research show that there is no reasonable doubt that the statute violates the constitution." *Id.* He has not done so, and has not even touched on how the administration of a PPG infringes on the substantive requirements that the State prove he is mentally ill and dangerous; indeed, the requested testing is specifically targeted to determine that he is mentally ill and dangerous. His substantive due process challenge fails.

2. Brennan's Right To Procedural Due Process Was Not Violated

Because the SVP Statute has repeatedly been found to satisfy substantive due process, any challenge Brennan now makes must relate to the procedures in place to implement the statutorily-permissible testing. Nowhere, however, does Brennan raise a challenge under procedural due

process, and as such, he has waived that argument. An appellant waives an assignment of error if it fails to present argument or citation to authority in support of that assignment. *Skagit Cnty. Pub. Hosp. Dist. No. 1 v. State Dep't of Revenue*, 158 Wn. App. 426, 440, 242 P.3d 909 (2010).

Even if this Court were to treat this as a challenge under procedural due process, it fails. Whether particular SVP commitment procedures are consistent with due process is governed by the three-part test announced in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *In re Detention of Stout,* 159 Wn.2d 357, 370, 150 P.3d 86 (2007). Due process is a flexible concept that is evaluated in the context within which it is applied. 159 Wn.2d at 370 (citing *Mathews,* 424 U.S. at 334. Specifically, the reviewing court should consider: 1) The private interest affected by the procedure at issue; 2) The risk of an erroneous deprivation of the private interest through the procedure used, and the probable value, if any, of additional procedural safeguards; and 3) The State's interest, including the fiscal and administrative burdens that the additional procedures would impose. *Id.*

Stout applied the *Mathews* test to the denial of an SVP respondent's right to confront witnesses at trial or deposition. *Stout* concluded that, while the respondent's liberty interest was substantial, the other two factors favored the State. *Id.* at 370-71. A "comprehensive set of rights"

exists in SVP cases that protect against erroneous deprivation of liberty. *Id. Stout* held that, "given the myriad procedural safeguards surrounding an SVP trial, an SVP detainee does not have a due process right to confront witnesses at his or her commitment trial nor at depositions." *Id.* at 380-81. *See also In re Detention of Coe*, 175 Wn.2d 482, 510-11, 286 P.3d 29 (2012) (*Mathews* factors favor state where SVP expert testified about five victims who were never deposed).

Applying this test demonstrates that the procedure governing expert evaluations is consistent with due process.

a. Brennan's Private Interests Are Limited

The private interest affected by SVP commitment is the liberty interest in freedom from unnecessary confinement, as well as from the stigma sometimes associated with civil commitment. *Addington v. Texas*, 441 U.S. 418, 425-26, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). However, Washington courts have long acknowledged the truncated privacy rights of convicted sex offenders and sexually violent predators. "In Washington, convicted sex offenders have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government." *In re Detention of Campbell,* 139 Wn.2d 341, 355-56, 986 P.2d 771 (1999) (citing *State v. Ward,* 123 Wn.2d 488, 502, 869 P.2d 1062 (1994)) (quoting Laws of 1990, ch. 3, section 116). "Although [SVPs] are

entitled to more considerate treatment and conditions of confinement than criminals, they do not enjoy the same Fourth Amendment protections as ordinary citizens." *In re Personal Restraint of Paschke,* 80 Wn. App. 439, 447, 909 P.2d 1328 (1996), *remanded on other grounds,* 156 Wn.2d 1030, 131 P.3d 905 (2006) (internal citations omitted.)

The privacy cases Brennan cites are inapposite. Brennan has no privacy right in regard to his criminal sexual past. The PPG is not designed to seek his thoughts and feelings about reproduction or contraception with a consenting partner, but about his deviant sexual impulses and acts. There is no fundamental right to sexually assault another person. In this case Brennan's interest in privacy is greatly outweighed by the other two *Mathews* factors, which both weigh heavily in favor of the State.

b. The risk of erroneous deprivation is minimized by use of physiological testing

Robust statutory guarantees in chapter 71.09 RCW provide substantial protection against an erroneous deprivation of liberty. *In re Stout,* 159 Wn.2d at 370–71, 150 P.3d 86; *McCuistion,* 174 Wn.2d at 378–79, 275 P.3d 1092. The due process protections built into the pre-commitment provisions of RCW 71.09 provide a high degree of confidence in the validity of the initial commitment decision. Before

commitment proceedings may even be initiated, the State must show probable cause. At the probable cause hearing, the respondent facing potential SVP proceedings has the right to counsel at public expense, to present evidence on his or her own behalf, to cross-examine adverse witnesses, and to view and copy all petitions and reports in the court file. RCW 71.09.040(3). For the SVP determination, the respondent has the right to a jury of 12 peers. RCW 71.09.050(3). At trial, the State carries the burden of proof beyond a reasonable doubt, and in a jury trial, the verdict must be unanimous. RCW 71.09.060(1). Throughout the proceedings, the respondent has the right to counsel, including appointed counsel, to meaningfully access this panoply of rights and procedural protections. RCW 71.09.050(1). The Washington Supreme Court found that these procedural protections greatly reduce the risk of an erroneous commitment determination in an SVP case. *In re Detention of Stout*, 159 Wn.2d at 370-71. *See also In re Detention of Morgan*, 180 Wn.2d 312, 323, 330 P.3d 774, 780 (2014) (finding no additional protections that would minimize the risk of error without significantly undermining compelling State interests).

This factor weighs heavily in favor of the State. The risk that the evaluation procedure may erroneously deprive Brennan of his liberty is low, and in fact physiological testing helps to ensure that an erroneous

deprivation does not occur. The court's ruling here specifically permitted Brennan's attorney to observe the PPG testing procedure and inspect the area prior to the examination. CP at 14. The trial court has reserved ruling on the admissibility of any test result, (CP at 14) and Brennan's attorneys will have an opportunity to litigate whether the results are admissible at trial and what limitations will be imposed on any testimony about the results.

Brennan argues that there are less intrusive methods of assessing sexual deviancy.[3] Opening Brief at 24. Brennan ignores the fact that it is his own behavior that has necessitated this testing. When she conducted the initial evaluation, Dr. Phenix did not request a PPG because Brennan provided her with sufficient information for her to form an opinion about his mental condition and risk for re-offense. It was only after she learned

[3] Brennan appears to claim that actuarial instruments measure sexually deviant interests and could be used rather than a PPG here. Opening Brief at 26, citing respondent's trial court brief, CP 25-27. However, actuarial instruments do not measure sexual deviancy. Rather, they are used to assess risk of re-offense in a variety of sexual offenders, regardless of the level of sexual deviancy. "Actuarial approaches use statistical analysis to identify a number of risk factors that assist in the prediction of future dangerousness." *In re the Detention of Thorell*, 149 Wn.2d 724, 753, 72 P.3d 708, 724 (2003). Brennan's citation to *Hanson and Morton-Bourgon*, 2005 refers to a study that determined adding a separate measure of sexual deviancy as an additional factor does not increase the risk measured by the actuarials. His suggestion that actuarials can replace PPGs to determine deviancy is unsupported by the literature he cites. *See Hanson* at 1158. (The different approaches used to assess deviant sexual interests included self-report, phallometric assessments, offense history, and structured clinical ratings relying on multiple sources of information such as the Sexual Deviance item from Sexual Violence Risk–20.)

that Brennan later claimed he had lied to her that she requested the testing that experts in her field routinely request to assess the very question before her. Certainly, conducting a forensic interview of the individual and relying on statements about sexual interest is a less intrusive method, and one that was initially employed by the State. However, because he now claims he lied during the interview, Dr. Phenix has an "ethical duty to ensure that the evaluation is as complete and accurate as possible." SUPP CP at 18. The PPG will offer her "valuable information about the nature and degree of [Brennan's] sexual arousal pattern" (SUPP CP at 18) over and above what the less intrusive manner Dr. Phenix first utilized.

Brennan essentially proposes a hard and fast rule that disallows physiological testing in all cases. The probable value of adopting Brennan's interpretation would do great harm to the ability of experts to rely on generally accepted tests to support an opinion regarding civil commitment. The legislature clearly thought physiological testing had value in SVP cases and provided judicial oversight to ensure experts could obtain tests if needed. Here, the risk of erroneous deprivation of liberty is lessened by the use of physiological testing, because it can clarify for Dr. Phenix whether or not Brennan's initial statements of sexual deviancy are supported by physiological testing. That provision "is to be liberally construed so as to sustain the validity of a legislative enactment." *State ex.*

rel. Citizens Against Tolls v. *Murphy,* 151 Wn.2d 226, 249, 88 P.3d 375 (2004).

c. The State's Interest is Compelling

The third factor also weighs heavily in favor of the State. "[I]t is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions." *In re the Detention of Andre Young,* 122 Wn.2d 1, 26, 857 P.2d 989 (1993) (citing *Addington v. Texas,* 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)); *In re Det. of Thorell,* 149 Wn.2d 724, 750, 72 P.3d 708 (2003). As our supreme court has noted, "[t]he problems associated with the treatment of sex offenders are well documented, and have continued to confound mental health professionals and legislators. The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential." *Young,* 122 Wn. 2d at 52. The State's ability to achieve these compelling interests would be fatally undermined by a rule that prevents evaluators from obtaining physiological testing even in cases where the subject initially reports extensive sexual deviancy and dangerousness, and then later changes his mind and claims to have lied. The State's compelling interest in protecting the community and treating dangerous sex offenders far outweighs Brennan's right to avoid

the very testing that can validate his admissions that he is mentally ill and dangerous and appropriate for civil commitment.

3. PPG Testing Complies With Due Process

Brennan argues that PPG testing is "Orwellian" and "shocks the conscience." Opening Brief at 14. The use of such examinations during sex offender evaluations, however, is a routine and accepted practice. SUPP CP at 16-18. Physiological tests such as the penile plethysmograph can provide information that is relevant to the questions posed to an SVP evaluator. *See e.g. In re the Detention of Halgren*, 156 Wn.2d 795, 806, 132 P.3d 714 (2006).

The use of a sexual history polygraph as part of a sex offender evaluation is endorsed by the Association for the Treatment of Sexual Abusers (ATSA). ATSA is an international organization consisting of mental health professionals who engage in evaluating and treating sex offenders. *See http://www.atsa.com*. The guidelines for ATSA indicate that "research-supported assessment methods such as phallometry [PPGs] ... may be useful for (a) obtaining objective behavioral data about the client that may not be established through other assessment means; [and] (b) exploring the reliability of client self-report[.]" *See ATSA Practice Guidelines* (2014) at 26. The guidelines also state that PPG testing provides "objective information about male sexual arousal and is therefore

useful for identifying atypical sexual interests[.]" *ATSA Practice Guidelines* at 70. Additionally, there is substantial support in the scientific literature for the use of a PPG as part of a sex offender evaluation.[4] A PPG

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[4] *See e.g.,* G. Woodworth & J. Kadane, *Expert Testimony Supporting Post-Sentence Civil Incarceration of Violent Sexual Offenders*, 3 Law, Probability, & Risk 211, 229 (2004) ("The single best predictor [of risk] was phallometric assessment of deviant sexual preference."); M. Carter, K. Bumby & T. Talbot, *Promoting Offender Accountability and Community Safety through the Comprehensive Approach to Sex Offender Management*, 34 Seton Hall L.Rev. 1273, 1285 (2004) ("psychosexual assessments may incorporate the use of psychophysiological measures (e.g., penile plethysmography, viewing time) to assess objectively the presence of deviant sexual arousal, preference, and interest."); D. Doren, *Evaluating Sex Offenders* at 46 (2002) ("The potential utility of PPG results is in both the diagnostic and risk assessment portions of the evaluation. Deviant sexual interests can be interpreted as clear support for a paraphilic diagnosis. Likewise . . . there seems significant reason to believe that deviant PPG results are meaningful when assessing the risk for sexual recidivism."); R. Hamill, *Recidivism of Sex Offenders: What You Need to Know*, 15 Criminal Justice 24, 29 (ABA 2001) (citing 1996 and 1998 studies by R. Hanson and M. Bussiere that showed "plethysmographic preference for children" as having the strongest predictive value among 21 factors for predicting sexual recidivism.); R. Schopp, M. Scalora & M. Pearce, *Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator after Hendricks*, 5 Psychology, Public Policy & Law 120, 135 (1999) ("Deviant sexual preferences, as measured through plethysmographic assessment, increase the probability of recidivism."); J. Bailey & A. Greenburg, *The Science and Ethics of Castration: Lessons from the Morse Case*, 92 Nw. U.L.Rev. 1225, 1226 (1998) ("Paraphilias can often be assessed via penile plethysmography."); G. Harris, M. Rice & V. Quinsey, *The Science in Phallometric Measurement of Male Sexual Interest, 5 Current Directions in Psychological Science* 156-160, 159 (1996) ("Phallometry is the best available scientific measure of men's sexual preferences. . . ."); R. Langevin & R.J. Watson, *Major Factors in the Assessment of Paraphilics and Sex Offenders, in Sex Offender Treatment: Biological Dysfunction, Intraphyschic Conflict, Interpersonal Violence* 42 (1996) ("plethysmography is one of the most reliable and valid physiological measures available. . . . [and is] in a league of its own."); W. Pithers & D. Laws, *Phallometric Assessment in The Sex Offender: Collections, Treatment and Legal Practice*, 12-2 (1995) ("Phallometry is an essential technology in the assessment and treatment of the sexual aggressor. . . . [A]ny restrictions imposed on a specially trained clinician's ability to employ phallometry in assessing and treating sex offenders would be analogous to depriving a physician the right to obtain x-rays in cases of bone injuries." [internal citation omitted]); R. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predator Statute*, 15 U. Puget Sound L. Rev. 597, 610 (1992) (recommending plethysmography as part of the evaluation of sex offenders); and B. Maletzky, *Treating the Sexual Offender* at 31 (1991) ("erectile responses via the penile plethysmograph have assumed the leading if not definitive role in present-day assessment of deviant sexual arousal.").

can establish the presence or absence of deviant sexual preferences in sex offenders, particularly against child victims, as is the case with Brennan.[5] In addition, sexual deviance was found to have the highest association with sexual recidivism in a meta-analysis of several risk factors.[6]

The PPG and polygraph are both methods routinely used by mental health professionals to conduct SVP evaluations. SUPP CP at 18. ATSA has issued standards for evaluating sex offenders, which provide that an evaluation may include physiological assessments.

Likewise, the Washington Supreme Court has held that the results of a plethysmograph are admissible as part of an expert's opinion in SVP proceedings. *In re the Detention of Michael Halgren,* 156 Wn.2d 795, 805-07, 132 P.2d 714 (2006). In *Halgren*, the State's expert, relied upon the results of a plethysmograph done by another expert. The plethysmograph results showed that Halgren "was twice as aroused by depictions of violent rape than by depictions of adults engaged in consensual sexual behavior." *Id.* The expert was allowed to tell the jury at the commitment trial that the plethysmograph results formed part of the

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[5] Michaud, P. & Proulx, J. "*Penile-Response Profiles of Sexual Aggressors During Phallometric Testing.*" Sexual Abuse: A Journal of Research and Treatment, 21:3, 308-334 (2009) (The authors cite 16 additional studies supporting the finding that plethysmograph testing is particularly affective on offenders with child victims).

[6] Hanson, R.K. & Morton-Bourgon, K.E. "*The Characteristics of Persistent Sexual Offenders: A Meta-analysis of Recidivism Studies.*" Journal of Consulting and Clinical Psychology (2005), 73:6, 1154-1163.

basis of his opinion that Halgren suffered from a mental abnormality. *Id.* at 806.

On appeal, Halgren argued that the testimony regarding the plethysmograph violated *Frye,* ER 403, and ER 702. The Supreme Court rejected these arguments, holding that plethysmograph results were not subject to a *Frye* analysis because the plethysmograph has been accepted for purposes of diagnosis and no new method of proof or scientific evidence is at issue. *Id.* 156 Wn.2d at 807. The court rejected the ER 702 and 403 challenges as well, finding that the plethysmograph "could be helpful to the jury under ER 702 by assisting the jurors in understanding [the expert]'s sexual deviancy diagnosis. . . . [A]ny potential prejudice to Halgren was outweighed by the relevance of the evidence and because Halgren had an opportunity to attack the weight of this evidence through cross-examination." *Id.* The court commented that criticism from some quarters regarding the PPG go the weight, and not the admissibility, of the evidence. *Id.* The Washington Supreme Court has found the results of a PPG sufficiently reliable to be presented to a jury, thus Brennan's argument that PPGs are not reliable enough for an expert to request one must fail.

In support of his argument that use of the PPG violates his liberty interests, Brennan cites cases regarding PPGs in criminal cases and

dissolution proceedings. None of these cases are helpful, however, in that none are SVP cases in which the individual has repeatedly lied to the evaluator about his sexual deviancy and in which the evaluator, in response, reasonably sought physiological testing to verify his statements. And none of the cited cases involve a controlling statute that specifically authorizes the testing.

Brennan primarily relies on *United States v. Weber,* 451 F.3d 552 (9th Cir. 2006) in support of his argument. *Weber*, however, did not hold PPG testing unconstitutional. The *Weber* court merely decided that before PPG testing can be imposed *as a term of supervised release in a criminal case,* the trial court must make an individualized determination that the testing is necessary. *Id.* at 569–70. Furthermore, *Weber* acknowledges that PPG testing "has become routine in the treatment of sexual offenders and is often imposed as a condition of supervised release." 451 F.3d at 554 Moreover, here the trial court did make an individualized determination that the testing was necessary, based primarily on Brennan's own conduct.

The trial court determined that the requested testing was routinely relied on by mental health professionals conducting such evaluations, CP at 14, Finding of Fact 3, and that the state had demonstrated good cause to compel it here. CP at 14. Trial court's findings of fact are reviewed for substantial evidence. *In re Marriage of Rideout,* 150 Wn.2d 337, 351, 77

P.3d 1174 (2003). Substantial evidence is "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003). An appellate court cannot substitute its judgment for the trial court's regarding conflicting evidence or the credibility of witnesses. *In re Marriage of Rich,* 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).

Here, where Brennan's truthfulness has been put at issue by his own statements, Dr. Phenix is simply attempting steps to verify (or disprove) her initial opinion. The trial court found that she was well within the generally accepted practice. The court's order compelling him to submit to a PPG should be affirmed.

4. Various controls were requested to limit the likelihood of erroneous results

Brennan cites to "user manipulation" as evidence that use of the PPG in a forensic setting violates his right to due process. Opening Brief at 23. Although admission of the results at trial is not relevant for purposes of this motion,[7] Brennan's arguments are more appropriate for cross examination of Dr. Phenix, not whether or not there is good cause to order a PPG.

[7] Brennan argues numerous points about the PPG that are relevant to the question of admissibility of PPG results, not whether the court has the authority to order them. The trial court expressly declined to rule on the admissibility of any test result reserving that for trial. CP 14. Consequently, those issues are not before this court.

Furthermore, this is precisely why Dr. Phenix requested not just a PPG, but a polygraph immediately following to ensure that Brennan did not try to manipulate the results of the test. SUPP CP at 18-19. Dr. Phenix specifically requested that PPG testing be conducted in a controlled environment, with follow-up testing to control for any effort to manipulate the test. SUPP CP at 19. To ensure valid results from these procedures, Dr. Phenix also requested that: (1) Brennan not be informed in advance of the PPG and polygraph examinations; (2) Brennan's counsel observe, but not intervene or interfere with the testing; and (3) counsel not be present in the same room as Brennan during the testing, as it would violate testing protocol and could result in unusable results. SUPP CP at 19-20. The procedures requested by Dr. Phenix will provide necessary and relevant information regarding Brennan's current mental state and risk in order to address whether Brennan has a mental abnormality or personality disorder that make him likely to reoffend. SUPP CP 19-20.

"The polygraph exam is integrated into these treatment and supervision practices to verify that the offender is being truthful about his or her past and present harmful behaviors." English et al., *The Value of Polygraph Testing in Sex Offender Treatment* at 14 (2000). Our Supreme Court has recognized the value of polygraph testing in the context of a SVP evaluation. *In re the Detention of Petersen*, 145 Wn.2d 789, 802, 42

P.3d 952, 960 (2002) (noting the positive effect sex offender treatment had on appellant was confirmed by blood tests, polygraph tests, and plethysmograph tests).

It is Dr. Phenix's professional opinion that the requested testing is necessary in order to ensure his evaluation is both comprehensive and current. Because the information that will be provided by the physiological testing procedures are central to the issues at trial and specifically enumerated within the SVP statute, the trial court did not abuse its discretion in ordering Brennan to participate.

D. The Court Had Jurisdiction And Authority To Order Brennan To Submit To The Testing, And To Find Him In Contempt When He Willfully Disobeyed

"Contempt of court" is defined by statute and includes intentional disobedience of a lawful court order. RCW 7.21.010. Like a decision granting or denying a motion for relief from a judgment, a decision on a motion for contempt is reviewed for abuse of discretion. *In re Marriage of Williams,* 156 Wn. App. 22, 28, 232 P.3d 573 (2010). "Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal." *King v. Dep't of Soc. & Health Servs.,* 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). Courts will uphold a finding of contempt if they can find any proper basis for it. *Trummel v. Mitchell,* 156 Wn.2d 653, 672,

131 P.3d 305 (2006). "The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" *Maness v. Meyers,* 419 U.S. 449, 459, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975), quoting *United States v. United Mine Workers*, 330 U.S. 258, 293, 67 S. Ct. 677, 91 L. Ed. 2d 884 (1947). An order is "lawful" if it issues from a court with jurisdiction over the parties and the subject matter, even if the order is in error or later invalidated. *Deskins v. Waldt,* 81 Wn.2d 1, 4–5, 499 P.2d 206 (1972); *State v. Breazeale,* 99 Wn. App. 400, 413, 994 P.2d 254 (2000), *aff'd in part, rev'd in part,* 144 Wn.2d 829, 31 P.3d 1155 (2001). '(W)here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt.' *Mead School Dist. No. 354 v. Mead Ed. Ass'n (MEA)*, 85 Wn.2d 278, 280, 534 P.2d 561, 563 (1975), citing *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490, 495 (1968). 'The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry, not whether its conclusion in the course of it was right or wrong.' *Mead v. MEA*, 75 Wn. 2d at 280 (internal citations omitted.) "A judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power

to enter the particular order involved." *State v. Coe,* 101 Wn.2d 364, 370, 679 P.2d 353, 357 (1984) citing *Bresolin v. Morris,* 86 Wn.2d 241, 245, 543 P.2d 325 (1975). "The contempt order is therefore vitiated where there is 'an absence of jurisdiction to issue the type of order, to address the subject matter, or to bind the defendant ...'" *Mead,* at 284, 534 P.2d 561.

Brennan does not challenge the trial court's jurisdiction and authority to enter an order in this proceeding. As such, he has waived any challenge to the order on contempt because those are the only bases for which an order on contempt may be challenged. RAP 10.3(g). Nor does he dispute that he refused to comply with the court's order. He merely asserts that the underlying order was illegal, and argues several reasons why it was "wrongly" entered. Thus, he has no basis to challenge the court's order finding him in contempt, and the court's order should be affirmed.

E. Brennan Did Not Have Ineffective Assistance of Counsel

Brennan's arguments regarding the Order on Probable Cause may not be considered because he is prohibited by the collateral bar rule from raising them at this time. "Our 'collateral bar' rule states that a court order cannot be collaterally attacked in contempt proceedings arising from its violation, since a contempt judgment will normally stand even if the order violated was erroneous or was later ruled invalid." *State v. Coe,* 101 Wn.2d 364, 369-70, 679 P.2d 353 (1984).

Brennan did not appeal the order on probable cause, nor did he file a timely ineffective assistance claim pertaining to the order. Consequently, his argument should be rejected.

Nonetheless, his argument fails. To be successful on an ineffective assistance claim, the appellant in a sexually violent predator proceeding must establish not only that counsel's conduct fell below an objective standard of reasonableness, but must show as well that, but for counsel's error, there is a reasonable probability the outcome would have been different. *In re Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); *In re Det. of Smith,* 117 Wn. App. 611, 617-18, 72 P.3d 186 (2003).

On review there is a strong presumption that counsel's representation was effective. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This presumption will be rebutted only by a clear showing of incompetence. *State v. Varga,* 151 Wn.2d 179, 199, 86 P.3d 139 (2004). If trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim of ineffective assistance of counsel (*State v. Adams,* 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)) and it is the burden of the defendant to show there were no conceivable legitimate strategic or tactical reasons explaining counsel's performance. *McFarland,* 127 Wn.2d at 336.

Brennan cannot show that his counsel was ineffective for agreeing to a provision that is expressly included in the statute. Further, Brennan cannot make the showing that the outcome would have been different, either at the probable cause hearing if his attorney had not agreed to include the statutory language in the order, or later at the hearing on the State's motion to compel a PPG after Brennan claimed to have lied to Dr. Phenix. The most obvious explanation for Brennan's counsel agreeing to include a provision that tracks the statute, is because that is what the statute says.

The Order Compelling Physiological Testing (CP 13-15) concludes as a matter of law that: "RCW 71.09.050 grants Petitioner the right to a current evaluation and *specifically authorizes the Court to order psychological and physiological testing* if requested by the evaluator, which can include a PPG and polygraph testing." CP 14, Conclusion 2. Brennan cannot show that the trial court would not have ordered the testing even if he had not stipulated to probable cause.

Brennan argues that trial counsel was ineffective because the order removed any discretion from the trial court because it stated that the evaluation "*may* include any of the following procedures or tests if requested by the evaluator." Opening Brief at 27, citing SUPP CP at 27. But Brennan ignores the meaning of the very phrase he cites. The

stipulated order on probable cause tracked the statute's use of the permissive "may." It did not remove any discretion from the trial court, but rather necessitated a discretionary ruling from the trial court after the evaluator requested the testing. This is exactly what happened here, when the state moved the court to compel the testing requested by Dr. Phenix, and the trial court found that the statute "specifically authorizes the Court to order psychological and physiological testing if requested by the evaluator." Furthermore, even if counsel had not entered the agreed order, Brennan cannot show that the trial court would not have entered the exact same order – because the statute "specifically authorizes the court to order" such testing.

Brenan has failed to show that his counsel's performance was deficient or that it prejudiced him in any way. Accordingly, the court should affirm.

V. CONCLUSION

Brennan has failed to show an abuse of discretion. Because the order compelling Brennan to submit to physiological testing was expressly permitted by statute, and was supported by a request from a qualified expert, the trial court did not abuse its discretion, and the order compelling should be upheld. When Brennan refused to comply with its order, the trial court was within its authority to hold him in contempt. RCW 71.09 has

repeatedly been found to satisfy substantive and procedural due process. The statute's evaluation procedure, which was followed here, more than satisfies the *Matthews* test, and Brennan has failed to meet his burden to show beyond a reasonable doubt that allowing physiological testing violates his rights. Furthermore, Brennan has failed to show that his counsel's performance was deficient and that he has been prejudiced. This court should affirm.

RESPECTFULLY SUBMITTED this 23rd day of February, 2015.

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Appendix 1

NO. 46524-8

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

In re the Detention of: DUANE BRENNAN, Appellant.	RESPONDENT'S MOTION TO REDESIGNATE

1. NAME OF MOVING PARTY

The moving party is the State of Washington, respondent herein and petitioner below.

2. STATEMENT OF RELIEF SOUGHT

The State of Washington asks that Mr. Brennan's appeal of the trial court's Order Compelling Physiological Testing be re-designated as a Motion for Discretionary Review, and that the parties be permitted to submit briefing on the question of whether review should be accepted pursuant to the criteria set forth in RAP 2.3(b).

3. STATEMENT OF GROUNDS FOR RELIEF SOUGHT

Because the Mason County Superior Court's Order Compelling Physiological Testing does not satisfy any of the criteria listed in RAP 2.2(a), it is therefore not reviewable as a matter of right, and Mr. Brennan's appeal should be re-designated as a motion for discretionary review.

4. RELEVANT FACTS

In November 2012, the State filed a petition and certification of probable cause seeking the involuntary civil commitment of Mr. Brennan as a sexually violent

predator pursuant to RCW 71.09 *et seq.* In support of the petition, the State relied on an evaluation by Dr. Amy Phenix. On December 3, 2012, Mr. Brennan stipulated to the existence of probable cause and the Court ordered that he be detained at the Special Commitment Center for further evaluation. The order on Probable Cause contained a provision that Brennan submit to any physiological testing requested by the evaluator. That order was signed by both parties.

Mr. Brennan initially met with Dr. Phenix and made numerous statements relevant to his risk for sexual reoffense. Mr. Brennan later claimed he was not telling her the truth when he made the statements. Dr. Phenix subsequently requested physiological testing in an effort to verify her opinions.

On June 13, 2013 the State filed a motion requesting the trial court compel Mr. Brennan to participate in physiological testing as requested by Dr. Phenix. On June 30, 2014 the trial court granted the State's motion and ordered Mr. Brennan to comply with the physiological testing requested by Dr. Phenix. Attachment A. On July 7, 2014 based on Mr. Brennan's refusal to comply with the court's order, the court held Mr. Brennan in contempt and stayed all proceedings. Attachment B. Mr. Brennan now seeks review of the trial court's order compelling him to engage in physiological testing. Attachment C.

5. ARGUMENT

Pursuant to RAP 2.2(a), "a party may appeal ***only*** from the enumerated categories of trial court rulings contained in the Rules of Appellate Procedure. *See* RAP 2.2(a)(1-13) (emphasis added). "Failure to mention a particular proceeding in

RAP 2.2(a) indicates this court's intent that the matter be reviewable solely under the discretionary review guidelines of RAP 2.3." *In re Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989), *affirming* 52 Wn. App. 541 (1988). This case involves appeal of an order compelling physiological testing. As such, it is not one of the orders appealable as of right under RAP 2.2(a)(1) through (a)(12).

The order compelling Mr. Brennan to submit to physiological testing is not a decision that may be appealed pursuant to RAP 2.2. While Mr. Brennan also claims to appeal the trial court's order holding him in contempt, his attack on that order is based solely on the collateral attack of the underlying order compelling the physiological testing, claiming that the order of contempt must be reversed because the underlying order was illegal. Brennan submitted a 30 page brief, of which one sentence was devoted to the contempt order. "Here, because the underlying order was illegal, this court should also reverse the contempt order." See page 29 of Opening Brief. The remainder of the brief challenges the underlying order compelling Brennan to submit to the testing. Therefore, Mr. Brennan's appeal rests solely on his attack of the order compelling the physiological testing.

Mr. Brennan cites to a footnote in *Diaz v. Washington State Migrant Council* for authority that a contempt order and the underlying order are appealable of right. 165 Wn. App. 59, 71 n.4, 265 P.3d 956 (2011). Respondent's reliance on *Diaz* is erroneous however, as the cited footnote refers to RCW 7.21.070 which provides only that parties may appeal from an adjudication of

contempt if it is a final order or judgment, and does not discuss the underlying order. RCW 7.21.070. Diaz is inapplicable to this case.

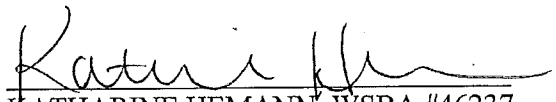
The Order Compelling Physiological Testing does not satisfy RAP 2.2(a). The proper avenue to seek review of a trial court compelling Respondent to participate in physiological testing is a Motion for Discretionary Review, pursuant to RAP 2.3. While the state believes Mr. Brennan has not met his burden to show that review is warranted pursuant to RAP 2.3, he is not entitled to an appeal as a matter of right under RAP 2.2 on this issue.

6. CONCLUSION

The State respectfully requests that this Court re-designate Mr. Brennan's appeal as a motion for discretionary review pursuant to RAP 2.3 and set a briefing schedule to permit the parties to submit briefing on the issue of whether discretionary review should be accepted by this Court.

RESPECTFULLY SUBMITTED this 15 day of December, 2014.

ROBERT W. FERGUSON
Attorney General



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ATTACHMENT A

STATE OF WASHINGTON
MASON COUNTY SUPERIOR COURT

In re the Detention of: DUANE BRENNAN, Respondent.	NO. 12-2-1041-6 ORDER COMPELLING PHYSIOLOGICAL TESTING

THIS MATTER came before the Court on the Petitioner's Motion to Compel Physiological Testing. At the hearing on the motion, the Petitioner was represented by Assistant Attorneys General KATHARINE HEMANN and ERIN C. DYER. Respondent was present telephonically and represented in court by his counsel, PETER MACDONALD.

In ruling on the Petitioner's motion, the Court considered the motion, the response, as well as files and records herein. Based upon these, the Court enters the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. On December 3, 2012, the Court entered a stipulated probable cause order requiring the custodial detention and evaluation of Respondent, as required by RCW 71.09.040 and .050.

2. The forensic evaluator who is conducting the RCW 71.09.050 evaluation, Dr. Amy Phenix, has requested penile plethysmograph (PPG) with specific-issue polygraph

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testing and a sexual history polygraph of Respondent in order to obtain current information for his evaluation.

3. The information requested by Dr. Amy Phenix is routinely relied upon by mental health professionals in conducting sexually violent predator evaluations for purposes of assessing sexual preferences and assessing risk and, based on the evidence before the Court, there is good cause to require Respondent to comply with the requested procedures.

CONCLUSIONS OF LAW

1. The Court has personal and subject matter jurisdiction in this case.

2. RCW 71.09.050 grants Petitioner the right to a current evaluation and specifically authorizes the Court to order psychological and physiological testing if requested by the evaluator, which can include PPG testing and polygraph testing.

~~3. The results of PPG testing are admissible in evidence, under ER 703 and ER 705, in an SVP trial. *In re Detention of Halgren*, 156 Wn.2d 795, 805-07, 132 P.3d 714 (2006).~~ Reserved for trial

BASED ON THE ABOVE FINDINGS:

IT IS ORDERED:

1. As part of the RCW 71.09.050(1) examination previously ordered by this Court, Respondent shall comply with a PPG testing and a sexual history polygraph. The testing will take place at the Special Commitment Center.

2. Respondent shall comply with specific-issue polygraph testing following the PPG testing, to provide information about whether he engaged in any counter-measures.

3. Respondent's attorneys may observe the procedures but shall not interfere with or obstruct the testing in any manner. Without Respondent present, Mr. McDonald and/or Mr. Gaer may inspect the area in which the PPG and polygraph will occur before the examinations

begin. However, Mr. McDonald and/or Mr. Gaer may not accompany Respondent into the booth where the PPG examination takes place.

4. Respondent shall not be told the date or time of the PPG or the polygraph until such examination is set to begin.

5. Respondent has no blanket privilege against self-incrimination in these civil commitment proceedings. He shall answer all questions posed to him by the test administrator except those which relate to matters for which he could still be criminally prosecuted.

6. Failure to comply with this Order may result in the imposition of appropriate sanctions as described in CR 37.

DONE IN OPEN COURT this 30 day of June, 2014.

THE HONORABLE TONI SHELDON
Judge of the Superior Court

Presented by:

ROBERT W. FERGUSON
Attorney General

KATHARINE HEMANN, WSBA #46237
ERIN C. DYER, WSBA #35585
Assistant Attorneys General
Attorneys for Petitioner

Copy received; approved as to form; notice of presentation waived:

PETER MACDONALD, WSBA #30333
IVAL GAER, WSBA #31043
Attorneys for Respondent

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Seattle, WA 98104-3188

ATTACHMENT B

STATE OF WASHINGTON
MASON COUNTY SUPERIOR COURT

In re the Detention of: DUANE BRENNAN, Respondent.	NO. 12-2-1041-6 ORDER ON PETITIONER'S MOTION TO HOLD RESPONDENT IN CONTEMPT

THIS MATTER came before the Court on the Petitioner's Motion and Memorandum to Hold Respondent in Contempt. At the hearing on the motion, the Petitioner was represented by Assistant Attorneys General Katharine Hemann and Erin C. Dyer. Respondent is detained at the Special Commitment Center. He was present telephonically, and represented in court by his counsel, Peter MacDonald.

In ruling on the Petitioner's motion, the Court considered the motion, the Respondent's Response, as well as the files and records herein. Based upon these, the Court enters the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. On June 30, 2014, the Court entered its Order Compelling Physiological Testing requiring Respondent to comply with penile plethysmograph (PPG) with specific issue polygraph testing and a sexual history polygraph, as requested by Dr. Amy Phenix, and pursuant to RCW 71.09.050(1).

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Seattle, WA 98104-3188

2. After inquiry by the Court, the Respondent indicated that he would not comply with the June 30th order.

CONCLUSIONS OF LAW

1. The Court has personal and subject matter jurisdiction in this case.

2. The Court's order required the Respondent to participate in PPG with specific issue polygraph testing and a sexual history polygraph.

5. The Court's order is a lawful court order.

3. On July 7, 2014, Respondent refused to take part in the testing ordered by the Court.

4. The Respondent's refusal to comply with the required testing constitutes intentional disobedience of the Court's order.

6. The appropriate remedy for the Respondent's disobedience of a lawful court order is remedial sanctions designed to coerce his compliance with the evaluation order.

7. Based on the evidence, the Court should enter an order finding Respondent in contempt of the Court's order, and providing remedial sanctions to ensure future compliance.

BASED ON THE ABOVE FINDINGS:

IT IS ORDERED:

1. That Respondent Duane Brennan, is in contempt of court.

2. That, as a remedial sanction, the current trial date of August 5, 2014, is hereby stricken.

3. That further proceedings in this matter are immediately STAYED.

4. That Respondent may purge his contempt by fully complying with the June 30th order. Complying with the court's order shall include submitting to a penile

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plethysmograph (PPG) with specific issue polygraph testing and a sexual history polygraph and complying with all other applicable provisions of the June 30th order.

IT IS FURTHER ORDERED: Mr. Brennan is to remain at the Special commitment center on McNeil Island until further order of this court.

DONE IN OPEN COURT this 7th day of July, 2014.

Toni A. Sheldon
THE HONORABLE TONI SHELDON
Judge of the Superior Court

Presented by:

ROBERT W. FERGUSON
Attorney General

KATHARINE HEMANN, WSBA #46237
ERIN C. DYER, WSBA #35585
Assistant Attorneys General
Attorneys for Petitioner

Copy received; approved as to form; notice of presentation waived:

PETER MACDONALD, WSBA #30333
IVAL GAER, WSBA #31043
Attorneys for Respondent

ATTACHMENT C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR MASON COUNTY

In re the Detention of DUANE BRENNAN, Respondent.	No. 12-2-01041-6 SEA NOTICE OF APPEAL TO COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION TWO **Clerk's Action Required**

The Respondent, Duane Brennan, seeks review by the designated appellate court of the trial court's "ORDER COMPELLING PSYSIOLOGICAL TESTING," entered on June 30, 2014, and the court's "ORDER ON PETITIONER'S MOTION TO HOLD RESPONDENT IN CONTEMPT," entered on July 7, 2014. A copy of each order is attached.

Respectfully submitted this 21st day of July, 2014.

Pete MacDonald, WSBA #30333
Ival Gaer WSBA #31043
Attorneys for Mr. Brennan

LAW OFFICES OF
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petemacdonaldlaw@gmail.com

NO. 46524-8

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of: DUANE BRENNAN, Appellant.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On December 11, 2014, I deposited in the United States mail true and correct cop(ies) of Respondent's Motion to Redesignate and Declaration of Service, postage affixed, addressed as follows:

Jennifer Winkler
Nielsen Broman & Koch PLLC
1908 E Madison Street
Seattle, WA 98122-2842

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

DATED this 11th day of December, 2014, at Seattle, Washington.

Allison Martin
ALLISON MARTIN

Appendix 2

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

January 8, 2015

Katharine Hemann
Office of the Attorney General
800 5th Ave Ste 2000
Seattle, WA 98104-3188
katharine.hemann@atg.wa.gov

Jennifer M Winkler
Nielson, Broman & Koch, PLLC
1908 E Madison St
Seattle, WA 98122-2842
winklerj@nwattorney.net

CASE #: 46524-8-II
In re the Detention of: Duane Brennan

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

Respondent's motion to redesignate the notice of appeal as a notice for discretionary review is denied. The contempt order is appealable as a matter of right. *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 71 n.4, 265 P.3d 956 (2011); RCW 7.21.070. The respondent's brief is due 30 days from the date of this ruling.

Very truly yours,

David C. Ponzoha
Court Clerk

NO. 46524-8-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: Duane Brennan, Appellant.	DECLARATION OF SERVICE

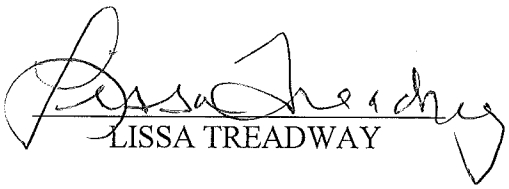
I, Lissa Treadway, declare as follows:

On February 23, 2015, I sent via electronic mail and United States mail true and correct copies of State of Washington's Opening Brief and Declraation of Service, first class delivery, postage affixed, addressed as follows:

Jennifer Winkler
Nielsen Broman & Koch PLLC
1908 E Madison Street
Seattle, WA 98122-2842
winklerJ@nwattorney.net

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

DATED this 23rd day of February, 2015, at Seattle, Washington.



LISSA TREADWAY

WASHINGTON STATE ATTORNEY GENERAL

February 23, 2015 - 12:22 PM

Transmittal Letter

Document Uploaded: 1-465248-Respondent's Brief.pdf

Case Name: Detention of Duane Brennan
Court of Appeals Case Number: 46524-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lissa Y Treadway - Email: lissat@atg.wa.gov