SUPREME COURT NO. 92609-3

NO. 46524-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Detention of Duane Brennan,

STATE OF WASHINGTON,

Respondent,

v.

DUANE BRENNAN,

Petitioner.

FILED
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

The Honorable Toni Sheldon, Judge

PETITION FOR REVIEW

JENNIFER WINKLER
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER

Petitioner Duane Brennan asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in In re Detention of Brennan, filed October 20, 2015, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. RCW 71.09.050(1) provides that after probable cause finding and before a commitment trial, a judge "may require" a 71.09 RCW respondent to complete plethysmograph (PPG) testing. PPG interferes with the fundamental rights. Interference with a fundamental right is permissible only if the State can show a compelling interest and that such interference is narrowly tailored. Where the petitioner demonstrated PPG testing is widely regarded as unreliable in a forensic setting, and the State had less intrusive means of evaluating the petitioner, did the court violate the petitioner's constitutional rights?

2. Was the petitioner's counsel ineffective for entering into an agreement that inadvertently removed judicial oversight?

D. STATEMENT OF THE CASE

On November 30, 2012, the State filed a petition to commit Duane Brennan under 71.09 RCW. RCW 71.09.020 (18); CP 138-39. Brennan was then serving a sentence for two 2001 convictions for first degree child molestation, each a "sexually violent offense" under RCW 71.09.020(17). CP 138. The State also asserted Brennan suffered from mental abnormalities including pedophilia and anti-social personality disorder (APD), as diagnosed by State expert Dr. Amy Phenix. RCW 71.09.020(8), (9); CP 138. The State alleged these conditions led Brennan to have serious difficulty controlling his behavior and made him "likely" to engage in predatory acts of sexual violence unless confined to a secure facility. RCW 71.09.020(7), (18); CP 138-39.

The State concurrently filed a certification for determination of probable cause listing the details of the 2001 offenses. CP 71-73; RCW 71.09.040 (2). In 2001, Brennan was a babysitter for a seven-year-old boy and a nine-year-old boy. Two 10-year-old neighbor girls visited the boys' home. Brennan encouraged the boys to engage in sexual activity with the girls. In addition, Brennan attempted to have sex with the first girl. He also licked her vagina and had her put her mouth on his penis. CP 72. The second girl reported Brennan touched her vagina and had her put her hand down his pants. The second girl's brother saw Brennan appear to have sex

with her. Brennan pled guilty to the charges and later admitted to some of the acts forming the basis for the charges. CP 73.

According to the probable cause certification, Brennan said he had additional victims in the same age range and stated a sexual preference for nine- to 14-year-old girls. CP 74. Brennan refused treatment in the DOC's Sexual Offender Treatment Program and told a program employee he believed he would offend again if released to the community. CP 74, 137; see also CP 117-18, 121-22, 124, 126, 137 (disclosures to Dr. Phenix and prior evaluator, Dr. Hupka, as reported in Dr. Phenix's 2012 evaluation). In a 2012 clinical interview, Brennan also told Dr. Phenix he normally masturbated to fantasies of 13- to 17-year-old girls, or women who appeared that age, but also masturbated to fantasies of pre-pubescent girls. CP 117. Based in part on the foregoing, Dr. Phenix concluded Brennan met commitment criteria. CP 74-77, 123-37. Dr. Phenix also relied on Brennan's childhood behavior issues, criminal history, and behavior while incarcerated. CP 125-26 (APD diagnosis).

On December 3, 2012, Brennan signed a "Stipulated Order Affirming the Existence of Probable Cause and Directing the Custodial Detention and Evaluation of Respondent." Supp. CP 26-28. Brennan stipulated there was probable cause to believe he met 71.09 RCW commitment criteria. Supp. CP 28. He also stipulated that:

> Consistent with RCW 71.09.050(1), Respondent shall now submit to an evaluation by an expert chosen by the State. The evaluation may include any of the following procedures or tests if requested by the State's expert:
>
> . . . .
>
> c. Penile plethysmograph testing (PPG)[.]

Supp. CP 27.

A commitment trial was set for early 2013. CP 62, 69-70. On January 8, 2014, however, the parties agreed to a continuance, CP 61, and provided the court the following information: Brennan had reported to his expert witness, Dr. Brian Abbott, that he had exaggerated his interest in children and the number of child victims to Dr. Phenix and to Dr. Hupka, who interviewed Brennan in 2011. CP 63. Dr. Phenix's evaluation relies on a number of Brennan's statements to Hupka. E.g. CP 117-18, 122, 124. Brennan told Dr. Abbott that, in fact, he did not experience the "thoughts, urges, or behaviors" concerning prepubescent children that he previously reported. He also told Dr. Abbott that he did not, in reality, have a number of unadjudicated victims. He did not believe he would reoffend if released. CP 64. Brennan made the earlier statements because he had been incarcerated most of his adolescence and adulthood and feared release. CP 63-64.

Following Brennan's disavowal, Dr. Phenix re-interviewed Brennan, who confirmed he had fabricated his original statements. Supp.

CP 3. Dr. Phenix contacted the State to request Brennan be subjected to physiological testing, including a PPG and a sexual history polygraph. CP 65; Supp. CP 3. Brennan, however, declined to participate. Supp. CP 3.

On June 16, 2014 the State filed a motion and supporting memorandum to require Brennan to engage in the requested testing with an attached declaration from Dr. Phenix. Supp. CP 3, 14-19. The declaration repeats Brennan's earlier admissions. Supp. CP 15. Dr. Phenix notes that after re-interviewing Brennan in 2013 she determined "a sexual history polygraph as well as a [PPG] test battery would be appropriate to verify and/or clarify the sexual history previously reported by Mr. Brennan." Supp. CP 16. Moreover, it would help her form an opinion about Brennan's "mental state, sexual history and attitudes, and sexual arousal patterns." Supp. CP 17. Further, Dr. Phenix believed that under the law, the State had the right to a "current evaluation" following a probable cause finding. In addition, Brennan had agreed to engage in physiological testing if requested by an evaluator. Supp. CP 16.

Dr. Phenix also asserted she had an "ethical duty" to ensure her evaluation was complete and accurate via the use of such testing. According to Dr. Phenix, such testing was commonly used and accepted within the "sexual offender field" for the assessment and treatment of sexual offenders and was "endorsed as a part of a comprehensive sexual

evaluation by various agencies and sexual offender organizations." Supp. CP 17. Further, a PPG could evaluate whether Brennan experienced deviant sexual arousal by measuring his responses to a variety of sexual stimuli. This would be useful in determining whether he suffered from a mental abnormality. This would also aid in determining the risk of reoffense, given the link between deviant arousal and risk. Supp. CP 17. Dr. Phenix also requested a post-PPG polygraph to detect any attempt to manipulate PPG test results. Supp. CP 18.

Brennan filed a response arguing such testing was unreliable, unnecessary, and violated substantive due process. CP 16-38. He attached a declaration from Dr. Abbott. CP 40-49. Dr. Abbott noted that while PPG testing was accepted for use in treatment, it was not generally considered "reliable" for forensic evaluation. CP 41, 47.[1] Further, Dr. Abbott questioned the "validity" of PPG results, that is, whether a test measures what it purports to measure, in this case deviant vs. non-deviant sexual interests.[2] He noted that no studies demonstrated the link between

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[1] The measure of reliability is the comparison of two tests ("test/retest reliability") and is measured on a scale of 0 (fails to measure sexual interests) to 1.0 (accounts for all sexual interests). If the test were reliable, two test results would be expected to be similar. Subtracting the reliability value from 1.0 reflects the error involved in the measurement. CP 41. The single study involving a PPG used on child molesters revealed a 47 per cent error rate. CP 42. This falls below the accepted standard of reliability, or .80. CP 42.

[2] Dr. Abbott also observed that the actuarial instruments Dr. Phenix relied on, the Static-99R and the Static-2002R, accounted for deviancy in other ways, and consideration of additional variables (such as PPG results) did not increase the instruments' powers of

PPG results and a mental abnormality (a legal, not a psychological, concept), a diagnosis of pedophilia, or sexual recidivism risk. CP 43. Finally, while Dr. Phenix claimed an ethical duty to ensure her evaluation was as complete and accurate as possible, this ignored that current standards promulgated by the Association for the Treatment of Sexual Abusers (ATSA) did not support use of PPG in forensic evaluations. CP 46. Dr. Abbott opined that American Psychological Association guidelines *prohibited* the use of such PPG testing ethical grounds. CP 48.

The court held a hearing on June 30, 2014. Brennan's counsel argued PPGs were unreliable as a test for sexual deviancy and the actuarial instruments already had a means of identifying, and considering, sexual deviancy without resorting to unreliable PPG results. RP 8, 12, 15. Counsel acknowledged a case relied on by the State, In re Detention of Halgren,[3] approved expert testimony regarding PPG results under ER 703. But in Halgren, PPG results were obtained during earlier treatment. RP 11. In contrast, PPG results were unreliable in a forensic setting. RP 11.

In its oral ruling, the court ordered Brennan to submit to testing on the sole ground that he had previously agreed to the testing. Rather than

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prediction. CP 44-45. Another study had shown that sexual preference as measured by a PPG is not "significantly predictive of sexual recidivism," and thus two prominent researchers omitted PPG results from their Violence Risk Appraisal Guide – Revised, which replaced the prior the Sex Offender Risk Appraisal Guide (SORAG). CP 45.

[3] In re Det. of Halgren 156 Wn.2d 795, 805, 132 P.3d 714 (2006).

inviting additional judicial oversight for the testing, the stipulated order was "self-executing," meaning Brennan had agreed to whatever testing the State's evaluator wished. RP 19-21. The court's written order also noted Dr. Phenix had requested the testing and found that "such information is routinely relied upon" by mental health professionals in conducting [71.09 RCW commitment] evaluations for purposes of assessing sexual preferences and assessing risk." CP 13-14 (Finding 3). The court therefore found "good cause" for such testing. CP 14 (Finding 3).

The court concluded "RCW 71.09.050 (1) grants [the State] the right to a current evaluation and specifically authorizes the Court to order . . . physiological testing if requested by the evaluator [including] PPG . . . and polygraph testing." CP 14 (Conclusion 2). The court reserved ruling on contempt so Brennan could decide whether to participate. RP 30.

At a hearing a week later, counsel informed the court Brennan would not submit to testing and argued the stipulation purportedly agreeing to testing was contrary to RCW 71.09.050(1), which required court approval for such testing. RP 34-36, 38. The court declined to reconsider its ruling. RP 36-37. The court also found Brennan was in contempt and, as a sanction, stayed trial while he remained at the SCC. He could purge contempt by completing the testing. RP 38-40; CP 10-12.

Brennan appealed the contempt order and the underlying order requiring him to submit to testing.[4] CP 2-9. He argued the trial court order requiring him to submit to pre-commitment PPG testing violated his substantive due process and privacy rights because the court failed to recognize it had discretion and failed apply the statute in a way that balanced his rights against the State's interests. Brief of Appellant at 12.

The Court of Appeals disagreed, finding in part that Brennan's rights were circumscribed based on his status a sex offender. Slip. Op. at 4-6. Brennan now asks this Court to accept review of his case.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(3) BECAUSE THE CASE PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION.

This Court should grant review because the case presents a significant question of law under the state and federal constitutions. RAP 13.4(b)(3). The superior court ruled in part that RCW 71.09.050 (1) authorized testing upon any request by a State's evaluator. But, as a number of courts and commentators have observed, PPG testing is widely regarded as unreliable in a forensic setting. Moreover, the State has alternative, less intrusive means of evaluating for commitment criteria. In failing to recognize its own discretion under the statue and in failing to

[4] See Diaz v. Washington State Migrant Council, 165 Wn. App. 59, 71 n.4, 265 P.3d 956 (2011) (contempt order and underlying order appealable of right) (citing RCW 7.21.070).

apply the statute in a manner that satisfied Brennan's substantive due process rights, the court's order violated Brennan's rights.

Under RCW 71.09.050(1), within 45 days after the completion of the probable cause hearing, the court shall conduct a trial to determine whether the person should be committed. "The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state." Id. The court "may require" the 71.09 RCW respondent "to complete any or all of the following procedures . . . if requested by the evaluator: (a) A clinical interview; (b) psychological testing; (c) plethysmograph testing; and (d) polygraph testing." Id.[5]

The statute's plain language, while allowing for such testing, leaves to the judge's discretion whether such testing is required. See State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (rule's use of the word "may" denotes judicial discretion). A court's failure to exercise discretion is an abuse of discretion. In re Detention of Mines, 165 Wn. App. 112, 125, 266 P.3d 242, 248 (2011).

The statute lists the types of testing a court may order if requested by the State's evaluator. PPG testing is not, however, a "run of the mill

[5] In In re Detention of Hawkins, 169 Wn.2d 796, 805, 238 P.3d 1175 (2010), this Court held the applicable statutes prohibited the State from compelling 71.09 RCW respondents to submit to polygraph examinations. In 2012, however, the legislature amended the statutes to explicitly provide for polygraph and other physiological testing. Laws of 2012, ch. 257, §§ 4, 5 (eff. July 1, 2012).

medical procedure." United States v. Weber, 451 F.3d 552, 562 (9th Cir. 2006). The examination requires procedures that courts have generously described as "intrusive," United States v. McLaurin, 731 F.3d 258, 262-63 (2d Cir.2013), and "especially unpleasant and offensive," Berthiaume v. Caron, 142 F.3d 12, 16 (1st Cir. 1998). The description of the procedure is one which "one would expect to find . . . gracing the pages of a George Orwell novel." Weber, 451 F.3d at 554. The testing involves placing a mercury strain gauge around a man's penis. State v. Riles, 135 Wn.2d 326, 343 n.57, 957 P.2d 655 (1998), abrogated on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). The test subject is then "instructed to become fully aroused, either via self-stimulation or by the presentation of so-called 'warm-up stimuli' in order to derive a baseline against which to compare later erectile measurements." Jason R. Odeshoo, Of Penology And Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 9 (2004). "After the individual has returned to a state of detumescence," he is presented with various "stimulus materials, auditory and visual, encouraging him to think about and look at materials indicative of sexual activity with different ages of people, different genders and different sexual activities." Id. at 9; Riles, 135 Wn.2d at 343 n. 57. Some of the scenarios presented are extremely violent and

disturbing. RP 10. The gauge then is used to "determine the man's level of sexual attraction by measuring minute changes in his erectile responses." Odeshoo, supra, at 2. One commentator has described the procedure as more invasive than body cavity or strip searches. Id. at 23. Whether or not PPG is more physically intrusive than other physical tests, and whether or not it is more psychologically intrusive than other psychological tests, PPG "combines these physical and psychological invasions in a way that other searches . . . do not." Id.

Here, the court ruled that there was "good cause" to require PPG based on Dr. Phenix's representation that the testing was "routinely relied upon" by evaluators assessing risk. CP 14 (Finding 3). But the court then concluded RCW 71.09.050(1) authorized testing simply upon request by a State's evaluator, without any requirement that the court exercise its discretion. CP 14 (Conclusion 2). The order violates substantive due process because it invades Brennan's personal autonomy without being narrowly tailored to achieve a compelling government interest.

Constitutional violations are reviewed de novo. In re Det. of Strand, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009). Substantive due process imposes limits on what a state may do, regardless of what procedural protections are provided. Harrington v. Almy, 977 F.2d 37, 43 (1st Cir. 1992). To support a substantive due process claim, a challenged

act must "shock the conscience" or constitute "a violation of an identified liberty or property interest." Id. (internal citations omitted).

The Fourteenth Amendment provides "heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 719, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). The right to personal autonomy in matters of sexual activity is a fundamental liberty interest, triggering strict constitutional scrutiny. Cf. Lawrence v. Texas, 59 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (right to liberty under the due process clause includes the right to engage in consensual sexual conduct without interference from the government). If the right to privacy in sexual matters protects the choice to engage in sexual conduct, it must also protect the right to refrain from sexual conduct. For example, in Harrington, the First Circuit reversed summary judgment against a suspended police officer required to submit to PPG testing as a condition of reinstatement. 977 F.2d at 44-45. The court described the PPG process as "degrading" bodily manipulation and, reversing a summary judgment in favor of the defendant city, held that a reasonable fact finder could find the requirement violated substantive due process. Id.

Article I, section 7 provides even greater protection for personal autonomy than the federal constitution. Butler v. Kato, 137 Wn. App.

515, 527, 154 P.3d 259 (2007). It protects the right to privacy with no express limitations. State v. Ferrier, 136 Wn.2d 103, 110, 960 P.2d 927 (1998). As the Court of Appeals pointed out, sex offenders have more limited privacy rights than do the general population based on public safety concerns. In re Det. of Williams, 163 Wn. App. 89, 97-99, 264 P.3d 570 (2011) (the mental health evaluation permitted under statute was not limited to records review). But they do retain some level of privacy rights, especially in the face of intrusive physiological testing. In re Det. of Hawkins, 169 Wn.2d 796, 803, 238 P.3d 1175, 1178 (2010) (as to respondents in 71.09 RCW proceedings, pretrial polygraph examinations are intrusive and implicate constitutional concerns); cf. McNabb v. Dep't of Corr., 163 Wn.2d 393, 404, 180 P.3d 1257 (2008) (inmate retains a limited right of privacy, including the limited right to refuse artificial means of nutrition and hydration).

Interference with a fundamental right is constitutional only if the State can show that it has a compelling interest and such interference is narrowly drawn to meet that interest. In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) aff'd sub nom Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); see also Butler, 137 Wn. App. at 527 (infringement of fundamental right to autonomy under Washington's constitution requires strict scrutiny and is impermissible unless narrowly

tailored to achieve a compelling government interest). The government may not compel Brennan to submit to PPG unless the requirement is narrowly tailored to serve a compelling government interest.

Here, the court ordered ruled that RCW 71.09.050(1) authorized PPG testing upon any request by an expert. CP 14 (Conclusion 2). While the statute provides that the court *may* order such testing, the order requiring testing here does not satisfy strict scrutiny. Brennan recognizes the State has a compelling interest both in treating sex offenders and protecting society from their actions. In re Young, 122 Wn.2d 18, 26, 57 P.2d 989 (1993). Although the court found Dr. Phenix had "requested" the testing, the court made no finding Dr. Phenix *needed to* rely on such invasive testing in forming her opinions.

The State may argue, as it did below, that Washington courts have previously upheld reliance on PPG testing in a forensic setting and the court's ruling should be upheld on that ground. Below, the State relied on this Court's opinions in Halgren and Riles to argue the method was commonly accepted in evaluation of sex offenders. RP 5, 16, 19. In Halgren, this Court observed that

> in [Riles, 135 Wn.2d 326], this court concluded that "[p]lethysmograph testing is regarded as an effective method for *diagnosing and treating* sex offenders." Id. at 343-44 (footnote omitted) . . . . Riles . . . cited extensively

> to psychiatric journals and cases from other jurisdictions in support of this conclusion. Id. at 343-44 nn. 57-59.

Halgren, 156 Wn.2d at 806 (emphasis added). Examination of the cases Riles relied on reveals that Halgren overstates the authority.

First, consistent with Dr. Abbott's assertion the procedure is accepted in treatment rather than a forensic setting, a number of the cited cases address treatment only. Riles, 135 Wn.2d at 344 n. 59. For example, Walrath v. United States[6] approved PPG testing against a Fourth Amendment challenge as part of a parolee's *treatment* program. Vermont v. Emery[7] likewise commented PPG testing was used in sex offender treatment programs.[8] While State v. S.H.[9] arguably refers to use of PPG testing in a diagnostic setting—to support a probation counselor's opinion on need for treatment—in that case as well, the test appears to have been used in a treatment setting.

A second category of cases deals with expenditure of public funds for such testing when requested by an accused. See State v. Young, 125

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[6] 830 F.Supp. 444 (N.D.Ill.1993), aff'd, Walrath v. Getty, 35 F.3d 277 (7th Cir.1994).

[7] 156 Vt. 364, 593 A.2d 77 (1991).

[8] See also Rund v. Board of Parole and Post-Prison Supervision, 152 Or.App. 231, 953 P.2d 766 (1998) (use in treatment), opinion withdrawn (Mar. 20, 1998); Leyba v. State, 882 P.2d 863 (Wyo. 1994) (use in treatment); Von Arx v. Schwarz, 185 Wis.2d 645, 517 N.W.2d 540 (1994) (use in treatment).

[9] Wn. App. 1, 877 P.2d 205 (1994), overruled on other grounds by State v. Sledge, 83 Wn. App. 639, 645, 922 P.2d 832 (1996).

Wn.2d 688, 888 P.2d 142 (1995) (upholding ruling to permit funds for such testing); Stowers v. State, 215 Ga.App. 338, 449 S.E.2d 690 (1994) (upholding ruling *denying* defendant's request for funds for such testing).

Finally, in People v. John W., an expert, Walker, testified that PPG testing for diagnosis and treatment of sex offenders was "widely accepted." 185 Cal.App.3d 801, 229 Cal.Rptr. 783, 785 (1986), implied overruling on other grounds by People v. Stoll, 49 Cal.3d 1136, 783 P.2d 698, 265 Cal.Rptr. 111 (1989). But the court upheld a trial court ruling *rejecting* testimony on the results of PPG testing. Id. John W. is not alone in excluding the testing as unreliable. In Marriage of Parker, 91 Wn. App. 219, 957 P.2d 256 (1998), for example, a GAL in a dissolution action recommended a sexual deviancy evaluation based on the father's "'history of violence' and the 'largely unexplored possibility of sexual boundary issues.'" Id. at 222. The Court held a court-ordered PPG violated a father's fundamental liberty interest in the custody and care of his son. As the Parker Court observed, "using a plethysmograph to monitor compliance with conditions of treatment or community placement is different from using it to determine sexual deviancy." Id. at 225-26. The Parker court rejected such use.

This Court should reject the notion that Washington courts have uniformly found PPG reliable in a forensic setting. Moreover, consistent

with Abbott's declaration, the reliability of PPG testing has been strongly questioned not only by the courts but by other experts in the field. Weber, 451 F.3d at 564. The examination is susceptible to user manipulation. Id. (quoting W.L. Marshall & Yolanda M. Fernandez, Phallometric Testing with Sexual Offenders: Limits to Its Value, 20 Clinical Psychol. Rev. 807, 810 (2000)). The test suffers from a lack of "uniform administration and scoring guidelines." Weber, 451 F.3d at 565 (quoting Walter T. Simon & Peter G.W. Schouten, The Plethysmograph Reconsidered: Comments on Barker and Howell, 21 Bull. Am. Acad. Psychiatry & L. 505, 510 (1993)). This problem is compounded by reports indicating that some administering clinicians lack the requisite training. Weber, 451 F.3d at 565 (citing D. Richard Laws, Penile Plethysmography: Will We Ever Get it Right?, in Sexual Deviance: Issues and Controversies 82, 87 (Tony Ward et al. eds., 2003)). Because there are no accepted standards, many courts have held PPG results are inadmissible as evidence. E.g., Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir.2000). Moreover, there are other, far less intrusive methods of assessing sexual deviancy. Weber, 451 F.3d at 567-68 (discussing alternatives to PPG testing); Odeshoo, supra, at 13-14 (same).

The Weber court considered whether compulsory PPG testing was permitted under federal law requiring conditions of release involve "no

greater deprivation of liberty than is reasonably necessary for the purposes of supervised release."[10] 451 F.3d at 567. The court first discussed the "exceptionally intrusive" nature of the PPG. Id. at 563. Noting the substantial liberty interest at stake, the court stated, "Harrington[11] rests on the premise that the strong liberty interest in one's own bodily integrity is impaired by the plethysmograph. We find the First Circuit's analysis persuasive." Weber, 451 F.3d at 563-64. Although PPG testing had been declared useful in treatment, it "should not be used to 'determine or make statements about whether someone has committed a specific sexual offense or whether someone "fits the profile" of a sexual offender.'" Id. (quoting Laws, supra, at 98).

The Weber court then employed the narrow tailoring analysis required by federal statute. 451 F.3d at 566-67. The court held that, before PPG testing could be required as a condition of supervised release, the trial court must explain on the record (1) why the test is likely to accomplish what it is intended to accomplish and (2) why other, less intrusive procedures are inadequate. Id. at 567-68. The Weber court vacated the condition because no such findings were made. Id. at 570.

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[10] Although Weber was decided on statutory, rather than due process grounds, the court's reasoning is also instructive in a substantive due process analysis. 451 F.3d at 563 n. 14.

[11] Harrington, 977 F.2d 37.

This Court should follow the outline of the analysis in Weber and hold the superior court's order, entered without the required balancing of interests, is invalid. Significantly, Brennan raised serious questions as to whether PPG is reliable in a forensic setting. Prior case law overstates the procedure's use. Moreover, as Brennan argued in the superior court and in the Court of Appeals, the State has other means available to assess whether Brennan meets commitment criteria.

Finally, the superior court found Brennan agreed to any and all testing requested by the State's expert. Supp. CP 27. The defense stipulation, which differs from the statutory language, arguably removed the judge's discretion. As Brennan argued in the Court of Appeals, any such stipulation therefore constituted ineffective assistance, and this Court should so find.

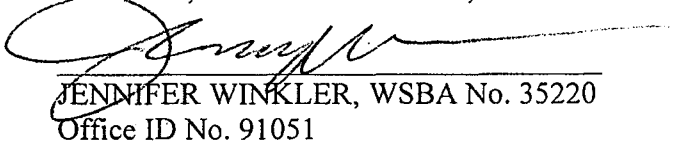
F. CONCLUSION

This Court should accept review of Brennan's case.

DATED this 10th day of November, 2015

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051

Attorneys for Petitioner

APPENDIX

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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of: DUANE BRENNAN, Appellant.	No. 46524-8-II UNPUBLISHED OPINION

LEE, J. — Duane Brennan was found in contempt of court for refusing to comply with an order compelling penile plethysmograph (PPG) testing as part of a pre-civil commitment trial evaluation.[1] Brennan appeals both the order compelling PPG testing and the order holding him in contempt. He argues that (1) the order compelling PPG testing violated his constitutional right to privacy and (2) he received ineffective assistance of counsel. Brennan's claims fail because (1) he has limited privacy rights as a sexual offender and (2) he fails to demonstrate that his counsel was deficient. Thus, we affirm.

FACTS

The underlying facts are not in dispute. Brennan was convicted of a sexually violent offense. At the end of his incarceration in November 2012, the State petitioned to civilly commit Brennan as a sexually violent predator under chapter RCW 71.09. In support of the petition, the State included Dr. Amy Phenix's psychological evaluation of Brennan. Dr. Phenix concluded that Brennan met "the criteria as a sexually violent predator as described in [chapter] RCW 71.09."

[1] Civil commitment pursuant to chapter RCW 71.09—Sexually Violent Predators.

Clerk's Papers (CP) at 137. Dr. Phenix's report details Brennan's extensive criminal history, including Brennan's own admissions related to his history of violence and sexually assaulting minors. Brennan reported that "he did not see himself being able to stop his sexually deviant behavior." CP at 137.

In December 2012, Brennan stipulated to the existence of probable cause and agreed to undergo an evaluation by the State's expert. In the stipulated order, Brennan agreed, "Consistent with RCW 71.09.050(1), [he] shall now submit to an evaluation by an expert chosen by the State. The evaluation may include any of the following procedures or tests if requested by the State's expert: . . . Penile plethysmograph testing (PPG)."[2] Suppl. CP at 11.

In November 2013,[3] before Brennan's civil commitment trial, Brennan retained an expert, Dr. Brian Abbott, to conduct an evaluation. CP at 63. Brennan told Dr. Abbott that "he made up the extent of his deviant interests in prepubescent children and his history of sexually offending against children in order to convince [the State's experts] to recommend commitment because he was afraid of being released from prison with no resources nor community support." CP at 63-64;

In light of Brennan's statements to Dr. Abbott and in preparation for trial, Dr. Phenix requested a current evaluation of Brennan, including a polygraph and a PPG. Brennan argued that the PPG testing was unnecessary because Dr. Phenix had the necessary information that she sought to obtain through the PPG testing. Brennan further argued that the stipulated order was

[2] Brennan did not challenge the stipulated order at the time nor does he assign error to it in this appeal.

[3] While RCW 71.09.50(1) provides for a trial within 45 days of the probable cause determination, the parties agreed to trial continuances.

inconsistent with the statute because the stipulation fails to provide for judicial discretion. VRP at 34-35, 7. Brennan also argued that the PPG testing violated his constitutional rights. Brennan claimed that "[c]ases where the courts have permitted PPG testing involve the testing as a direct consequence of a criminal defendant's conviction or sentence. On the other hand, cases where the courts have not permitted PPG examinations involve instances, like the case at bar, of civil pre-trial discovery." CP at 33 (citations omitted).

The superior court rejected Brennan's arguments, finding that PPG testing is authorized by RCW 71.09.050(1) and that Brennan agreed to the testing. Accordingly, the superior court ordered Brennan to participate in the testing requested by Dr. Phenix. Brennan refused to comply with the court's order. The superior court found Brennan in contempt and stayed the commitment proceedings until he fully complied with the order compelling PPG testing. Brennan appeals. CP at 2.

ANALYSIS

Brennan appeals the order compelling PPG testing and the order finding him in contempt of the court for refusing to submit to PPG testing.[4] He argues that the underlying order compelling PPG testing is illegal, and therefore, we should reverse the order finding him in contempt. We disagree.

[4] Brennan assigns error to the superior court's finding of fact 3 and conclusion of law 2. However, he does not offer substantive argument or authority regarding the assignments of error. "A party that offers no argument in its opening brief on a claimed assignment of error waives the assignment." *Brown v. Vail*, 169 Wn.2d 318, 336 n.11, 237 P.3d 263 (2010); RAP 10.3. We do not address his assignments of error without argument.

A. PRIVACY IMPLICATIONS OF PPG TESTING

Brennan claims that the superior court violated his substantive due process right to privacy by ordering him to undergo PPG testing. We disagree.

RCW 71.09.050(1) authorizes the court to order a sex offender to submit to PPG testing after probable cause has been determined. Brennan acknowledges that RCW 71.09.050 authorizes PPG testing. And Brennan does not appear to challenge the constitutionality of RCW 71.09.050(1). Rather, Brennan appears to challenge the constitutionality of *the order* requiring him to undergo PPG testing.

Brennan contends that "[a]rticle I, section 7 protects the right to privacy with no express limitations." Br. of Appellant at 19. Brennan misunderstands his privacy rights.

Washington recognizes a fundamental right to privacy. *In re Det. of Williams*, 163 Wn. App. 89, 97, 264 P.3d 570 (2011). However, in "Washington, sex offenders have reduced privacy interests because they threaten public safety." *Id.*; *see also In re Det. of Campbell*, 139 Wn.2d 341, 355-56, 986 P.2d 771 (1999), *cert. denied*, 531 U.S. 1125 (2011). Thus, "[t]he privacy that Washington's article I, section 7 protects is not absolute, and the State 'may reasonably regulate this right [in order] to safeguard society.'" *Williams*, 163 Wn. App. at 97 (second alteration in original) (quoting *State v. Meacham*, 93 Wn.2d 735, 738, 612 P.2d 795 (1980)). Even Brennan recognizes the State has a compelling interest both in treating sex offenders and protecting society from their actions.

Brennan argues that the PPG testing violated his privacy rights, and "although the superior court found that such testing is 'routinely relied upon . . . this does not answer the question of

whether such mandatory testing satisfies strict scrutiny." Br. of Appellant at 23. His argument fails.

In *Williams*, the sexually violent predator argued that the court-ordered, statutorily-authorized, pre-trial evaluations violated his constitutional right to privacy.[5] 163 Wn. App. at 97. The court considered the authorized pre-trial evaluations, which included PPG testing, and weighed the nature of the testing against the State's compelling need to "'safeguard society.'" *Williams*, 163 Wn. App. at 97 (quoting *Meacham*, 93 Wn.2d at 738). The court rejected the sexually violent predator's claim, and held that the evaluations, authorized by statute, did not improperly infringe on the sex offender's constitutional right to privacy. *Williams*, 163 Wn. App. at 97. The court held that "substantial public safety interest outweighs the truncated privacy interests of the convicted sex offender." *Williams*, 163 Wn. App. at 97 (quoting *Campbell*, 139 Wn.2d at 356). Accordingly, Brennan's claim that the superior court's order compelling PPG testing violated his privacy rights fails because, as in *Williams*, the "substantial public safety interest outweighs [Brennan's] truncated privacy interests." *Williams*, 163 Wn. App. at 97.

Brennan suggests that we follow the analysis in *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006). But, *Weber* did not hold PPG testing unconstitutional.[6] *Weber*, 451 F.3d at 569-70.

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[5] In *Williams*, the court addressed whether the pre-trial mental health examinations unconstitutionally invaded the sex offender's privacy. *Williams*, 163 Wn. App. at 98. Although the applicable statutes have changed since *Williams*, PPG testing was among the available testing both then and now.

[6] Furthermore, the defendant in *Weber* objected to PPG testing based on "*statutory* grounds-that such testing is not reasonably related to the goals of supervised release." The *Weber* court stated that it "express[es] no opinion on the question whether requiring [PPG] testing as a condition of supervised release amounts to a substantive due process violation." *Weber*, 451 F.3d at 563, n.14.

Instead, *Weber* held that before PPG testing can be imposed as a term of supervised release, the trial court must make an individualized determination that the testing is necessary, considering the constitutional rights of the offender. *Weber*, 451 F.3d at 569-70.

Furthermore, Brennan fails to demonstrate how *Weber* is applicable to the civil commitment proceedings under chapter RCW 71.09. RCW 71.09.050(1) explicitly authorizes PPG testing, and Brennan agreed to submit to PPG testing, if requested. Brennan fails to provide authority requiring a court to make an individualized determination regarding the necessity of PPG testing in sexually violent predator civil commitment proceedings.[7] Thus, *Weber* is not applicable to the circumstances in this case.

Brennan's claim fails because he does not make considered constitutional arguments that account for his limited right to privacy, rendering his arguments lacking in relevant authority and analysis. "Parties raising constitutional issues must present considered arguments to this court"—"'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986); *State v. Bonds*, 174 Wn. App. 553, 567 n.3, 299 P.3d 663, *review denied*, 178 Wn.2d 1011 (2013). Moreover, Brennan does not make arguments based on his limited privacy interest. Rather, Brennan's arguments are based on his misconception that sex offenders have limitless privacy rights. Thus, we reject Brennan's constitutional challenge.

[7] "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

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B. RELIABILITY OF PPG TESTING

Brennan next challenges the superior court's finding that courts routinely rely upon PPG testing. We reject Brennan's challenge.

Brennan appears to argue that courts should not utilize PPG testing because it is unreliable. Although Brennan identifies criticisms of PPG testing, he does not establish, or argue, that it is no longer accepted or authorized.

Washington courts have held that PPG testing is useful as part of a diagnostic process. *In re the Det. of Halgren*, 156 Wn.2d 795, 807, 132 P.3d 714 (2006); *State v. Riles*, 135 Wn.2d 326, 352, 957 P.2d 655 (1998); *cf. State v. Johnson*, 184 Wn. App. 777, 780, 340 P.3d 230 (2014) (holding PPG testing is a valid condition of community placement "'within the context of a comprehensive evaluation or treatment process'") (quoting *Riles*, 135 Wn.2d at 352); *State v. Castro*, 141 Wn. App. 485, 494, 170 P.3d 78 (2007) (holding that PPG testing is a valid sentencing condition and "is regarded as a 'treatment device' for diagnosing and treating sex offenders"). Furthermore, the legislature has deemed it permissible to utilize PPG testing as evidenced by RCW 71.09.050(1)'s express authorization. RCW 71.09.050(1); *see In re Det. of Hawkins*, 169 Wn.2d 796, 803, 238 P.3d 1175 (2010) (noting that the legislature deems an evaluation method permissible when a statute specifically authorizes the method).

In addition, Brennan's challenge of a generally accepted test goes to the weight of the evidence, not the constitutionality of the superior court's order.[8] *See In re Det. of Berry*, 160 Wn.

[8] To the extent that Brennan asserts that the admissibility of PPG testing at trial affects his constitutional privacy rights, that argument fails. First, the trial court did not rule on whether the results of the specific PPG test ordered would be admissible in Brennan's commitment trial, expressly reserving the issue for trial. Further, Brennan's commitment trial has been stayed.

App. 374, 382, 248 P.3d 592, *review denied*, 172 Wn.2d 1005 (2011). The weight of evidence is an issue reserved for the finder of fact. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Thus, Brennan's challenge to the superior court's finding that courts routinely rely on PPG testing fails.

C. LANGUAGE OF THE PPG TESTING ORDER

Brennan appears to argue that the order compelling PPG testing is unlawful because it relied on the stipulated order, which "did not track the language of the statute, but inexplicably removed judicial oversight." *See* Br. of Appellant at 13. Brennan's challenge is to the stipulated order, which he did not assign error to. He offers no authority for the proposition that he can now challenge an unappealed stipulated order for the first time with no assignment of error. *See* RAP 10.3. Brennan also fails to offer argument or authority suggesting that the superior court erred by relying on an order, to which Brennan agreed and did not challenge. Therefore, we need not address Brennan's argument. RAP 10.3; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). However, even if we do address the issue, Brennan's argument fails.

Brennan contends that the stipulated order was illegal because it not include all of the language from RCW 71.09.050(1). We disagree.

Therefore, the superior court did not make a decision regarding admissibility that we can review. Second, Washington courts have held that the results of PPG testing are not subject to a *Frye* examination because PPG testing does not involve novel science, and that discussion of results of PPG testing "as one component among many in diagnosing" a sexual deviant may be admissible. *Halgren*, 156 Wn.2d at 806-07. Third, Brennan makes no argument and offers no authority for the claim that the admissibility of expert discussion about the results of PPG testing controls whether a sex offender can be ordered to undergo PPG testing prior to a civil commitment trial.

While the stipulated order does not recite RCW 71.09.050(1)'s language verbatim, Brennan provides no authority for the proposition that a stipulated order must contain all of the language of the applicable statute. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer*, 60 Wn.2d at 126.

Furthermore, Brennan's argument is factually incorrect. The order compelling PPG testing mirrors the language of RCW 71.09.050(1). The order compelling PPG testing provides in relevant part: "The forensic evaluator who is conducting the RCW 71.09.050 evaluation, Dr. Amy Phenix, has requested [PPG testing] with specific-issue polygraph testing and a sexual history polygraph of [Brennan] in order to obtain current information for his evaluation." CP at 4-5 (Finding of Fact 2). The superior court also found that "RCW 71.09.050 grants [the State] 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." CP at 5 (Conclusion of Law 2). Based on these findings, the superior court ordered Brennan to undergo the testing requested by Dr. Phenix.

The superior court's order reflects both the stipulated order and the language of RCW 71.09.050. RCW 71.09.050(1) provides 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.

The stipulated order provided, in relevant part:

> 4. . . . Consistent with RCW 71.09.050(1), [Brennan] shall now submit to an evaluation by an expert chosen by the State. The evaluation may include any of the following procedures or tests if requested by the State's expert:
>
> . . . .
>
> c. Penile plethysmograph testing (PPG);
>
> . . . .
>
> 5. Should the evaluation become stale prior to trial, [Brennan] may be required to submit to supplemental evaluation procedures.

Suppl. CP at 11. The stipulated order is consistent with RCW 71.09.050(1). Therefore, Brennan's challenge fails.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Brennan argues that "[t]o the extent that counsel agreed to [PPG] testing in the stipulated order, counsel was ineffective." Br. of Appellant at 27 (underlining omitted). We disagree.

To prevail on an ineffective assistance of counsel claim, the defendant must establish that (1) defense counsel's performance was deficient and (2) defense counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

Our review of counsel's performance is highly deferential, and we strongly presume reasonableness. *State v. Witherspoon*, 180 Wn.2d 875, 885, 329 P.3d 888 (2014). To rebut the presumption of reasonableness, the defendant bears the burden of establishing a lack of any legitimate trial tactic or strategy. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "And to establish prejudice, a defendant must show a reasonable probability that the outcome would

have differed absent the deficient performance." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Brennan's claim of ineffective assistance of counsel fails because Brennan fails to demonstrate counsel's performance was deficient. Brennan states, "While there may have been a valid reason to stipulate to the existence of probable cause in light of the materials submitted by the State under RCW 71.09.040(2), counsel had no legitimate reason to hand the State's expert unfettered discretion to conduct invasive testing." Br. of Appellant at 28. Brennan's argument fails because Brennan fails to demonstrate that agreeing to the statutorily authorized testing amounts to "unfettered discretion to conduct invasive testing." Brennan did not receive ineffective assistance of counsel based on counsel's agreement to statutorily authorized testing and evaluation procedures.[9] Because Brennan fails to establish that counsel's performance was deficient, his claim of ineffective assistance fails.

E. CONTEMPT

Brennan asserts that the superior court erred by finding him in contempt. Specifically, he asserts that "because the underlying order was illegal, this Court should also reverse the contempt order." Br. of Appellant at 29. Brennan's claim that the underlying order is illegal fails. Therefore, his claim that the contempt order should be reversed also fails. Brennan does not offer any other argument or authority regarding the contempt order.

[9] Brennan asserts that co-counsel "expressed dismay at the wording of the order and informed the court he believed the order was contrary to statute and a 'mistake[].'" Br. of Appellant at 29. Brennan argued below that the superior court's ruling compelling PPG testing was "an erroneous ruling because the [s]tatute is what governs . . . 'cause it's based on—it's not based in the law. It's based on a mistaken stipulation." Verbatim Report of Proceeding at 34. Brennan did not explain then, nor does he explain now, what a "mistaken stipulation" means.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Bjorgen, A.C.J.

Maxa, J.