69818-4

FILED
Aug 04, 2016
Court of Appeals
Division I
State of Washington

No. 69818-4-I
Island County Superior Court No. 10-2-00981-1

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

In re the Detention of

DONALD HERRICK,

Petitioner-Appellant.

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

The Honorable Alan R. Hancock, Judge

PETITIONER-APPELLANT'S OPENING BRIEF

Suzanne Lee Elliott
Attorney for Petitioner-Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

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ASSIGNMENT OF ERROR

The trial court erred in ordering Herrick to submit to plethysmograph testing [PPG].

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is RCW 71.09.050(1), which allows the trial court to order a pre-commitment detainee to submit to a PPG upon a request by the State's evaluator, unconstitutional on its face because it violates the pretrial detainee's state and federal constitutional rights to privacy and due process of law?

2. In the alternative, is RCW 71.09.050(1) unconstitutional as applied to Herrick under the specific facts of this case?

3. Did the enactment of RCW 71.09.050(1) violate Const. Art. II, § 19, the "single subject" rule?

III.
STATEMENT OF THE CASE

In November 2010, the State filed a petition seeking to commit Donald Herrick as a sexually violent predator pursuant to RCW 71.09. Herrick stipulated to probable cause and has been housed at the Special Commitment Center ever since. The petition alleged that in 1997 Herrick was convicted of first-degree rape. In February and June, 2010 he had

committed new "overt" acts of stalking. And, finally, the petition alleged that Herrick suffered from a mental abnormality: Paraphilia not otherwise specified and anti-social personality disorder. Herrick stipulated to probable cause. CP 661-663.

Prior to filing the petition, the State's expert, psychologist Dr. Brian Judd, completed a clinical evaluation record review. In an evaluation dated October 9, 2010, Dr. Judd opined that Herrick met the diagnostic criteria for paraphilia not otherwise specified (NOS), alcohol abuse, cannabis abuse, voyeurism (provisional), and antisocial personality otherwise specific (NOS). Of these disorders, Dr. Judd determined that paraphilia NOS met the criteria for a mental abnormality as defined in RCW 71.09. His opinion was based on Herrick's predicate offenses, the 2009 PPG testing, which he said demonstrated that Herrick had a preference for coercive sexuality, and actuarial testing. Judd opined that Herrick's results on these tests predicted a high risk of recidivism.

Dr. Judd completed an updated clinical evaluation using 2,000 pages of Herrick's previous records. He had a meeting with Herrick but Herrick declined to participate in a clinical interview. In April 2012, Dr. Judd provided an addendum and again opined that Herrick met the definition of a sexually violent predator. Dr. Judd used the Structured Risk Assessment, the Static 99 and the SORAG. He also relied on the

results of Herrick's 2009 PPG, which he characterized as demonstrating a clear arousal to humiliation rape of an adult female and rape of a female minor, despite apparent attempts to suppress arousal. CP 675-683.

In May 2012, defense expert, Stephen Jensen, M.A., criticized Dr. Judd's report as it related to the 2009 PPG. Mr. Jensen opined that he concurred with the Northwest Treatment Associates evaluator who found the PPG inconclusive:

> The [PPG] assessment was conducted appropriately and followed ... standards. The conclusions by the evaluators appear to accurately reflect the assessment data. The data was correctly assessed as "inconclusive," which indicated it is not clinically predictive. Dr. Judd incorrectly concluded that this data reflected a preference for aberrant sexual behavior, while in reality no preference was clear to any form of sexual behavior.

CP 688-694.

Herrick deposed Dr. Judd on November 28, 2012. In that deposition he stated that:

> Now with regard to the PPG, that is utilized, from my standpoint for identification of range of deviancy, In some cases it is also utilized for confirmation of a diagnostic formulation, and also looking at the -- ensuring that I have an understanding of the full range of deviancy and that I can actual target the treatment to those specific areas where the individual is having difficulty.

CP 458.

On December 10, 2012, about 90 days before trial, the State moved for an order requiring Herrick to submit to a second PPG pursuant to

RCW 71.09.050(1). CP 684-86. In support of this motion the State submitted a declaration from Dr. Judd signed the day after his deposition. He said:

> In order to provide the most current information possible, I am requesting another PPG of Mr. Herrick and a follow-up clinical interview.

Id. No other justification was given.

Herrick objected to the second PPG. He also provided an expert declaration from Dr. Joseph Plaud, a certified sex offender treatment provider. Dr. Plaud stated that he used PPGs in his practice and had conducted evaluations in Washington at the Special Commitment Center. He stated that in his professional opinion:

> The PPG is not like other forms of psychological assessment. It is an extremely invasive procedure which must be conducted by competently trained evaluators in a safe and secure environment, and with the full and free consent of the individual being assessed. The validity of the PPG is largely dependent upon these factors being present. The process of obtaining consent through the coercion of a court-ordered PPG evaluation would violate these principles and therefore under most circumstances would be considered both unethical (from a psychological professional standpoint) and invalid (from a procedural standpoint). In my professional experience over the past approximately 25 years of conducting PPG evaluations, I have never encountered a situation at the pre-commitment stage involving any client (whether in clinical or forensic professional contexts) in which PPG results were created from the coercion of a court order.

CP 504-507.

On January 22, 2013, the trial court granted the State's motion to compel PPG testing. In his oral ruling the judge said he understood that Dr. Judd relied on the prior PPG to formulate his position that Herrick should be committed, but that it was "understandable" that he would want an "updated" PPG. 1/22/13 RP 27. He also stated that "the statute provides for it." In sum, the judge said:

> I do find there is good cause to order the testing in the present case given the prior plethysmograph, which was before this case was filed. The statute allows for the Court to order such testing. Dr. Judd has indicated in his declaration that he requests that this testing be undertaken as part of the formulation of his analysis here. So I find that there is good cause.

Id. The trial court did not place any limits on the subject matter or duration of the testing.

Mr. Herrick moved for discretionary review. Review was granted and the order compelling the PPG was stayed.

IV.
ARGUMENT

A. THERE ARE CONSTITUTIONAL LIMITS TO THE LEGISLATURE'S UNFETTERED POWER TO AUTHORIZE A SECOND PHYSICAL AND MENTAL INTRUSTION INTO A CIVIL, PRETRIAL DETAINEE'S MIND AND BODY. BECAUSE RCW 71.09.050(1) DOES NOT REQUIRE THE STATE, ITS EXPERT OR THE TRIAL COURT TO IDENTIFY A COMPELLING STATE INTEREST IN A PPG TEST, IT IS UNCONSTITUTIONAL ON ITS FACE.

1. The Statute

To evaluate a statute's constitutionality, a court's task is to look at its plain wording. *In re Detention of Campbell*, 139 Wn.2d 341, 348, 986 P.2d 771, 775 (1999), *as corrected* (Dec. 14, 1999), *cert. denied*, 531 U.S. 1125, 121 S.Ct. 880, 148 L.Ed.2d 789 (2001).

In 2010, the Legislature amended RCW 71.09.050(1) to provide that:

> Within forty-five days after the completion of any hearing held pursuant to RCW 71.09.040, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. 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.

(Emphasis added).

The amendment was in response to the Supreme Court's decision in *In re Detention of Hawkins*, 169 Wn.2d 796, 802, 238 P.3d 1175 (2010). There, the Court held that because the legislature undoubtedly knows of the inherent problems with polygraph examinations, and because RCW 71.09 did not provide for pre-commitment polygraph examinations, it was fair to conclude that the legislature intended to prohibit compulsory

polygraph examinations unless it specifically allowed for their use. *Id.* at 803. And the Court noted that, even where a respondent refuses to participate and no existing polygraph examination results are available, an expert can still reach an opinion whether the respondent is an SVP. *Id.* at 804.

Hawkins did not discuss PPG testing, but the Legislature inserted additional language giving express authority for PPG testing when adding express language regarding polygraphs.

2. The PPG Invades the Mind and Body

> Penile plethysmograph testing is a procedure that "involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses." 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, 2 (2004). Although one would expect to find a description of such a procedure gracing the pages of a George Orwell novel rather than the Federal Reporter, plethysmograph testing has become routine in the treatment of sexual offenders and is often imposed as a condition of supervised release.

United States v. Weber, 451 F.3d 552, 554 (9th Cir. 2006).

Prior to beginning the test, the subject is typically instructed what the procedure entails. He is then asked to place the device on his penis and is instructed to become fully aroused, either via self-stimulation or by the presentation of so-called "warm-up stimuli," to derive a baseline against

which to compare later erectile measurements. After the individual returns to a state of detumescence, he is presented with various erotic and non-erotic stimuli. He is instructed to let himself become aroused in response to any of the materials he finds sexually exciting. These stimuli come in one of three modalities – slides, film/video clips, and auditory vignettes – though sometimes different stimuli are presented simultaneously. The materials depict individuals of different ages and genders – in some cases even possessing different anatomical features – and portray sexual scenarios involving varying degrees of coercion. The stimuli may be presented for periods of varying length – from mere seconds to four minutes or longer. Changes in penile dimension are recorded after the presentation of each stimulus. *Id.* at 562 (citing to 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, 8-9 (2004) (*Odeshoo*).

Historically, the procedure was "[i]nitially developed by Czech psychiatrist Kurt Freund as a means to study sexual deviance, plethysmograph testing was also at one time used by the Czechoslovakian government to identify and 'cure' homosexuals." *Weber*, 451 F.3d at 562 (citing David M. Friedman, A Mind of Its Own: A Cultural History of the Penis at 232 (2001)).

"The First Circuit has noted, putting it mildly, that plethysmograph testing is likely to 'strike most people as especially unpleasant and offensive.'" *Weber*, 451 F.3d at 562 (quoting *Berthiaume v. Caron*, 142 F.3d 12, 16 (1st Cir. 1998)). The First Circuit stated in *Berthiaume* that "there are plenty of ordinary medical procedures that are disagreeable or upsetting to the patient," 142 F.3d at 16, however, "[the penile plethysmograph] test is not a run-of-the-mill medical procedure." *Weber*, 451 F.3d at 562. "Plethysmograph testing not only encompasses a physical intrusion but a mental one, involving not only a measure of the subject's genitalia but a probing of his innermost thoughts as well." *Id.* at 562-63 (citing *Odeshoo* at 23).

It does not appear that the State contests that the PPG is exceedingly invasive and humiliating. Even if the State argued otherwise, this Court can easily conclude that plethysmograph testing is exceptionally intrusive and humiliating.

> It is true that cavity searches and strip searches are deeply invasive, but [plethysmograph testing] is substantially more invasive. Cavity searches do not involve the minute monitoring of changes in the size and shape of a person's genitalia. Nor do such searches last anywhere near the two or three hours required for penile plethysmography exams. Nor do cavity or strip searches require a person to become sexually aroused, or to engage in sexual self-stimulation.

Odeshoo at 23.

3. Pre-Commitment Detainees Retain a Limited Right to Privacy and Due Process

Instead, the State argues that such an invasion solely upon a request from the State's evaluator is constitutional because Herrick is a "convicted sex offender." And according to the State, he has no cognizable due process or privacy rights that would prevent the trial court from ordering him to comply.

The State bases this argument on its reading of *In re Detention of Campbell*, supra, and *In re Detention of Williams*, 163 Wn. App. 89, 264 P.3d 570 (2011). Neither case, however, supports the State's arguments.

In *Campbell*, the Court considered whether a sexually violent predator had the right to insist upon a closed courtroom because he had a right to nondisclosure of intimate personal information. In the opinion the Court found that Campbell had a "reduced" right to privacy as a convicted sex offender. When that "reduced right" was balanced against the state constitution's provision for the open administration of justice, closure was not justified.

> There is a constitutional principle that both civil and criminal case proceedings are open to the public. Washington Constitution article I, section 10 requires that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Therefore, proceedings under RCW 71.09 allow public access. Closure of such proceedings must be affirmatively mandated by statute or where there is a serious and imminent threat to some

> important issue. "We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice." *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); see also *Cohen v. Everett City Council*, 85 Wn.2d 385, 388-89, 535 P.2d 801 (1975).

Campbell, 139 Wn.2d at 355. But *Campbell* says nothing about Herrick's right to resist bodily intrusions. The "invasion" of privacy that is attendant to a public court proceeding is simply not comparable to the invasion occasioned by PPG testing.

In determining that a convicted sex offender had a reduced right to privacy, the *Campbell* court relied upon the decision in *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994). There the defendants challenged their convictions for failing to register as sex offenders after release from prison. They argued that registration should be eliminated because it was a "badge of infamy" and subjected them to danger in the community. The Supreme Court held that convicted sex offenders have a reduced expectation of privacy. But in upholding the registration requirement, the Court also found that the Legislature "placed significant limits" on dissemination of the registrant information. *Id.* at 502. The statute required the registering agency to have evidence of the registrant's future dangerousness and limited what the public notice could contain and the geographic scope of dissemination. The Court also noted that law

enforcement agencies routinely collected and retained criminal history and that "it is inconceivable that filling out a short form with eight blanks creates an affirmative disability." *Id.* at 501.

In *Williams,* the petitioner argued that a pre-commitment mental health examination violated his right to privacy. The Court of Appeals recognized that Washington "'clearly recognizes an individual's right to privacy with no express limitations' and places greater emphasis on privacy" than do federal constitutional provisions. *Id.* at 97. However, relying on *Campbell*, that court held that sex offenders have "reduced privacy interest." The court concluded that "substantial public safety interest outweighs the truncated privacy interests of the convicted sex offender" and he could be ordered to undergo a pre-commitment "evaluation." The Court discussed no particular aspects of that examination and did not mention any intrusive procedures or PPG testing.

4. Because the Statute Permits a Significant Intrusion on Herrick's Right to Due Process and Reduced Right to Privacy, RCW 71.09.050(1) is Unconstitutional on its Face

Given the invasive nature of the testing and Herrick's right to privacy and due process, even if somewhat "reduced," RCW 71.09.050(1) is unconstitutional on its face because it provides for compulsory testing simply upon request.

When considering whether a person can be compelled to submit to similar invasive medical procedures, the Supreme Court has required the State to do more than simply ask. In *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), the Supreme Court considered the constitutional interest inherent in avoiding unwanted bodily intrusions or manipulations. Those cases establish that non-routine manipulative intrusions on bodily integrity must be subject to heightened scrutiny to determine whether there are less intrusive alternatives available.

Regarding PPG testing in particular, the Ninth Circuit, relying on *Rochin* and *Winston*, held that convicted sex offenders retain a significant liberty interest in being free from plethysmograph testing. *Weber* explained that the defendant enjoyed "heightened procedural protections" before a district court could mandate submission to PPG testing if a sex offender treatment program used the procedure. *Id.* at 570. These protections required that the district court undertake a "consideration of evidence that plethysmograph testing is reasonably necessary for the particular defendant based upon his specific psychological profile." *Id.* at 569-70. *Weber* further explained that, under the governing statute, a district court needed to consider available alternatives to PPG testing, such as self-reporting interviews, polygraph testing, and "Abel testing," which

measures the time a defendant looks at particular photographs. *Id.* at 567-68.

This Court has also forbidden unfettered plethysmograph testing of convicted sex offenders at the discretion of a community corrections officer because it violates a defendant's constitutional right to be free from bodily intrusions. Because plethysmograph testing is intrusive, it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer. *State v. Land*, 172 Wn. App. 593, 605-06, 295 P.3d 782, 787-88, *review denied*, 177 Wn.2d 1016, 304 P.3d 114 (2013).

Like the convicted sex offenders in *Weber* and *Land*, even Herrick's reduced expectation of privacy and due process is violated by a statute that permits the unwanted bodily intrusions or manipulations of the PPG simply upon request by the State. Because the statute does not require a heightened level of scrutiny, it is unconstitutional. The remedy for holding a statute facially unconstitutional is to render the statute inoperative. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875, 878 (2004).

B. IN THE ALTERNATIVE, AS APPLIED TO HERRICK, RCW 71.09.050(1) IS UNCONSTITUTIONAL

An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional. *City of Redmond*, 151 Wn.2d at 668-69. If this Court might find that the statute is not unconstitutional on its face or that it can be construed to incorporate the "heightened procedural protections" discussed above, it was unconstitutional as applied to Herrick.

The trial court did not apply a heightened level of scrutiny. Although the judge appeared to incorporate a "good cause" requirement into the statute, he did not require the State to demonstrate a compelling State interest in an additional PPG test. The feeble justification provided by the State was that their expert wanted to provide "the most current information as possible."

But Dr. Judd had current information from the Special Commitment Center, his results on the Structured Risk Assessment, the Static 99R and the SORAG. Dr. Judd had no problem concluding that Herrick was a sexually violent predator based upon those less intrusive tests. And there is nothing in the record to suggest that Dr. Judd believed the results of a new PPG would alter his conclusion that Herrick met the

commitment criteria. The timing of Dr. Judd's request suggests that it was made in response to the defense expert's criticism of the reliability of the 2009 results.

The trial court gave no consideration to other, less intrusive testing or examinations – even though Dr. Judd's own testing demonstrated there were other risk assessment tools available to him. These tools could be fully utilized by reference to Herrick's criminal history and his prior treatment records. See also *Weber*, 451 F.3d at 567-68 (discussing far less intrusive methods of assessing sexual deviancy).

Finally, Dr. Judd did not dispute Dr. Plaud's declaration that the results of a compelled PPG test would be worthless.

There was no compelling justification for forcing Herrick to engage in this embarrassing and intrusive testing for a second time.

While the trial judge made a finding that PPG testing is "routinely" used by professionals to assess sexual preference and risk, the trial judge made no finding that the PPG was reasonably necessary for Herrick based upon his *specific* psychological profile. The court's blanket finding that Washington courts have found PPG tests reliable in a forensic setting is not sufficiently specific to justify PPG testing without reference to the specific individual and the facts of his case.

The reliance on this blanket finding is subject to significant debate. While in some settings, a PPG may be useful, Washington courts have rejected the claim that the PPG is an appropriate diagnostic tool. In *Marriage of Parker*, 91 Wn. App. 219, 957 P.2d 256 (1998), a guardian ad litem 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 plethysmograph violated a father's fundamental liberty interest in the custody and care of his son. As the *Parker* Court aptly 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 to diagnose sexual deviancy.

Further, Herrick presented evidence that PPG testing was not useful in diagnosing coercive sexuality, the paraphilia from which Dr. Judd asserted Herrick suffered. During the development of the DSM-V new PPG testing was employed to determine if a criteria for a rape diagnosis traditionally known as Paraphilic Coercive Disorder or Other Specified Paraphilic Disorder, non-consent could be successfully developed. Once again the researchers could not develop a diagnostic criteria, in substantial part because the extensive PPG testing could not

distinguish the rapists from the sexual sadists. Hence, there still are no diagnostic criteria for Rape in the new DSM-V. Knight, Sims-Knight, Guay, "Is a separate diagnostic category defensible for paraphilic coercion?", Journal of Criminal Justice 41, pp. 90-99 (2013).

C. PPG RESULTS ARE NOT UNIFORMLY RELIABLE OR ADMISSIBLE

Relying on *In re Detention of Halgren*, 156 Wn.2d 795, 132 P.3d 714 (2006), the trial court held that PPG results are admissible under ER 703 and 705. There, the Court observed that

> in [*Riles*, 135 Wn.2d 326], this court concluded that "[plethysmograph testing is regarded as an effective method for diagnosing and treating sex offenders." *Id.* at 343-44 (footnote omitted)... The *Riles* court 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. A close examination of the cases *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), relied on, however, reveals the *Halgren* Court's reliance on *Riles* was misplaced, at least as to PPG use in a forensic setting.

Several cases cited in *Riles* address treatment only. *Riles*, 135 Wn.2d at 344 n. 59. For example, *Walrath v. United States*, 830 F.Supp. 444 (N.D.Ill. 1993), *aff'd*, *Walrath v. United States*, 35 F.3d 277 (7th Cir. 1994), approved PPG testing against a Fourth Amendment challenge as

part of a parolee's treatment program. *Vermont v. Emery*, 156 Vt. 364, 593 A.2d 77 (1991), likewise commented that PPG testing was used in sex offender treatment programs. 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, *review denied*, 525 N.W.2d 733 (1994) (use in treatment).

While *State v. S.H.*, 75 Wn. App. 1, 877 P.2d 205 (1994), *review denied*, 125 Wn.2d 1016, 890 P.2d 20 (1995), *overruled on other grounds by State v. Sledge*, 83 Wn. App. 639, 645, 922 P.2d 832 (1996), arguably refers to use of PPG testing in a diagnostic setting – to support a probation counselor's opinion as to a 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 public expenditure of funds for such testing when requested by an accused. See *State v. Young*, 125 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 a defendant's request for funds to pay for such testing to support his defense).

Finally, one of the cases cited in the *Riles* footnote militates against PPG to diagnose deviancy. In *People v. John W.*, an expert, Walker, testified that PPG testing for diagnosis and treatment of sex offenders was "widely accepted." *People v. John W.*, 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.*

The reliability of penile plethysmograph testing has been strongly questioned not only by the courts but also by other experts in the field. *Weber*, 451 F.3d at 564. The examination is susceptible to user manipulation, as test subjects have been known to "significantly inhibit their arousal by using mental activities to distract themselves." *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 has also been found to suffer 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 clinicians who administer the test 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 in the scientific community, many courts have held that the results of plethysmograph examinations are inadmissible as evidence. Eg., *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir. 2000); *Gentry v. Georgia*. 213 Ga. App. 24, 443 S.E.2d 667, 669 (1994); see also *Billips v. Virginia*, 274 Va. 805, 652 S.E.2d 99, 102 (2007) (plethysmograph evidence was inadmissible because it lacked the foundation); *North Carolina v. Spencer*, 119 N.C. App. 662, 667-68, 459 S.E.2d 812, *review denied*, 341 N.C. 655, 462 S.E.2d 524 (1995) (trial court did not abuse its discretion by excluding such evidence because it is unreliable); *In re A.V.*, 849 S.W.2d 393, 399 (Tex. App. 1993) (the record did not establish the reliability of the penile plethysmograph).

While this Court does not need to definitively answer whether or not PPG testing is uniformly reliable, this debate strengthens Herrick's argument that subjecting pre-commitment detainees to PPG testing should be subject to the highest scrutiny. It is one thing to mandate invasive testing that every expert in the field agrees is reliable. It is quite another to mandate invasive testing whose reliability is subject to such significant debate.

D. RCW 71.09.050 WAS UNCONSTITUTIONALLY AMENDED TO PERMIT THE COURT TO ORDER PPG TESTING IN VIOLATION OF ARTICLE II, § 19

Over 100 years ago, the Washington Supreme Court declared that Article II, § 19 is "the most salutary provision in our state constitution." *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 516, 104 P. 791 (1909). Under Article II, § 19, "(1) No bill shall embrace more than one subject ['single subject rule']; and (2) the subject of every bill shall be expressed in the title ['(subject-in-title rule)']." *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 23, 200 P.2d 467 (1948) (*Wash. Toll Bridge Auth. I*). "[W]hen laws are enacted in violation of this constitutional mandate, the courts will not hesitate to declare them void." *Patrice v. Murphy*, 136 Wn.2d 845, 852, 966 P.2d 1271 (1998); *Wash. Toll Bridge Auth. I,* 32 Wn.2d at 24.

The first clause in Article II, § 19 requires every bill to contain only a single subject. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000), *opinion corrected*, 27 P.3d 608 (2001) (*ATU 587*). The single subject rule ensures that every legislative proposal passes or fails on its own merits. See, e.g., *Wash. Toll Bridge Auth. v. State,* 49 Wn.2d 520, 525, 304 P.2d 676 (1956) (*Wash. Toll Bridge Auth. II*). Basic democratic principles underlie the requirement that all legislative proposals contain only one subject. *Washington Fed'n of*

State Employees v. State, 127 Wn.2d 544, 901 P.2d 1028 (1995), *reconsideration denied* (Oct 12, 1995) (*Washington Fed'n*).

The single subject rule prevents "log-rolling," which occurs when a bill or initiative requires a legislator "to vote for something of which he disapproves in order to obtain approval of another unrelated law" or vice versa. See, e.g., *Washington Fed'n*, 127 Wn.2d at 552. The single subject rule is violated whenever the potential for log-rolling is established. *ATU 587*, Wn.2d at 212 n.5 (petitioners need not demonstrate logrolling in fact). Because SSB 6493 is a classic example of log-rolling, it violates the single subject rule.

SSB 6493 is a clear instance of "log-rolling." Senate Bill 6493, which amended 71.09.050, clearly embraces a matter – authorizing the court to compel specific types of intrusive examinations – that is not at all germane to the principle matter of the bill – changing the administration of indigent defense expenses and procedures from DSHS to Office of Public Defense.

In 2012, RCW 71.09.050 was amended to include:

> 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 state is responsible for the costs of evaluation.
>
> This section was added with the passage of Senate Bill 6493.

Senate Bill 6493 made sweeping changes to 71.09 with no regard to the state agency responsible for the costs of providing indigent funding: the State Office of Public Defense was now responsible for administering and paying for defense services (appointed counsel and expert services) for indigent persons charged as sexually violent predators. This major change was thought to be a cost savings measure.

The construction of the bill places legislators in a position to vote for an item which they would likely oppose – for instance, expensive additional expert evaluations and intrusive, unreliable and expensive physiological testing – to gain legislation which they would almost certainly favor – here, the promise of significant cost reduction in the administration and legal defense of "sexually violent predator" cases. This unconstitutional contradiction caused by the content of SSB 6493 is clearly outlined by Washington State Representative Appleton's testimony at the February 21, 2012 House Public Safety and Emergency Preparedness Committee, where amendment number 053 concerning compulsory pretrial PPG's and additional state evaluations was discussed for less than four minutes. (See

http://www.tvw.org/watch/?customID=2012021115, at time 1:16-1:20 (last accessed (7/27/16)).

Twice, Representative Appleton stated her concerns on the record regarding the potential costs of the amendment. Finally, she remarked near the end of the brief hearing, "I really do have fiscal concerns about the evaluations, so...but I am going to be 'yes' on this bill, because I know this is a good bill. I just am worried about the fiscal part of it." In other words, she was required to vote for an item she opposed – the increased costs due to additional evaluations and testing – to vote for an item she favored – an amendment to reduce the administrative costs of RCW 71.09 civil commitment cases. This is a clear and unambiguous example of "log-rolling" pertaining to the content of SSB 6493, the 2012 amendment to RCW 71.09.050. This is precisely what the single-subject rule protects against.

It concerns a bill proposed to reduce costs by transferring responsibilities from DSHS to the Office of Public Defense would, at the last minute, include a provision that would only increase costs. (See: SSB 6493 legislative history infra.) It is even more concerning that the legislature would add such an unrelated provision to a cost savings bill when one considers the then recent Supreme Court case of *In re Detention of Hawkins*, supra. At issue in *In re Detention of Hawkins* was whether the

then existing statute granted the trial court authority to compel polygraph examinations. The Supreme Court accepted review because of the issue's significant implications. The Court rejected the prosecution argument, reiterated its disdain for polygraph examinations, and held the statute did not allow a trial court to order such an examination. *In re Detention of Hawkins*, supra.

The issue implicates constitutional, ethical, and moral issues. The exact issue of physio-psychological testing was of enough concern that both the Court of Appeals and the Supreme Court heard the issue on discretionary review. See *In re Detention of Hawkins*, 169 Wn.2d at 796. Moreover, the legislature had previously considered the issue of physio-psychological testing the year prior, but did not vote it into law. In 2011, Senate Bill 5202 would have amended RCW 71.09 to require a respondent to participate in polygraph and plethysmograph testing at the request of the prosecution's expert. This bill did not become law.

Article II Section 9's purpose is to make sure all proposed legislation is properly heard and considered. The purpose is to prevent pushing legislation through by attaching it to other legislations. *ATU 587*, 142 Wn.2d at 207. Clearly this occurred here. The amendment was pushed through the legislature by attaching it to an emergency bill dealing solely

with reducing costs by transferring the administration of defense services to a different government agency.

Therefore, this Court should find the bill, SSB 6493, which in part amended RCW 71.09.050 to permit the court to compel PPG and polygraph exams as a part of the discovery process for a pre-commitment SVP trial, violates the single subject rule of the Washington State Constitution. Thus, this Court should deny the prosecutor's motion to compel a pre-commitment trial PPG and polygraph exams under this amended statutory language.

V.
CONCLUSION

For the foregoing reasons, the trial court order requiring him to submit to a PPG should be reversed.

DATED this 4th day of August, 2016.

Respectfully submitted,

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Donald Herrick

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email where indicated and by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Mr. Malcolm Ross
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Email: malcolmr@atg.wa.gov

Mr. Donald Herrick
P.O. Box 88600
Steilacoom, WA 98388-0647

08/04/2016
Date

Peyush Soni