

NO. 94522-5

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Detention of:

DONALD HERRICK,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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**STATE'S ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

Donald Herrick seeks review of an April 3, 2017 decision by the Court of Appeals, *In re the Detention of Donald Herrick*, No. 69993-8-I. The decision affirmed the trial court's order holding him in contempt of court for refusal to comply with an order compelling penile plethysmograph (PPG) and specific-issue polygraph testing as part of a sexually violent predator (SVP) pre-civil commitment trial evaluation.

The order compelling the PPG and specific-issue polygraph are the subject of a second Petition for Review currently before this Court: Sup. Ct. No. 94495-4. Mr. Herrick offers no reasons why further review of this contempt order should be granted other than "if this Court accepts review of the constitutionality of [the order compelling PPG and polygraph testing], this Court should also grant review of this case. Pet. at 2. This request does not meet any of the RAP 13.4 prerequisites for review. Therefore, it should be denied.

## II. COUNTERSTATEMENT OF THE ISSUE

There is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. If this Court were to accept review, the following issue would be presented:

**Whether the trial court had tenable reasons for holding Herrick in contempt, where Herrick intentionally disobeyed an order of the court.**

### III. COUNTERSTATEMENT OF THE CASE

The State filed the SVP petition in Island County on November 29, 2010. CP at 1061-62. The Petition is supported by evaluations of Herrick conducted by Brian Judd, Ph.D. CP at 675-82. Dr. Judd relied in part on a PPG of Herrick conducted on March 5, 2009, during Herrick's community sexual deviancy treatment. *Id.* The testing suffered from what the testing agency described as clear "signs of manipulation and suppression of responses . . . across all categories" by Herrick. *Id.*

Concerned about the possible invalidating effect of Herrick's efforts to manipulate and suppress his PPG testing, the State moved pretrial to compel updated PPG testing. CP at 654-711. Also supporting the State's request was Herrick's attack on the 2009 PPG results. He obtained a report from a qualified expert who opined that the PPG testing was inconclusive and that Dr. Judd improperly relied upon it. CP at 688-94. Herrick filed a response opposing updated PPG testing to which the State replied. CP at 361-565, 566-600.

The trial court heard oral argument on the Petitioner's Motion to Compel Physiological Testing on January 22, 2013. 1RP at 13-24.<sup>1</sup> The testing was permitted by RCW 71.09.050(1) "if requested by the evaluator." The evaluator, Dr. Judd, had requested the testing. CP at 684-86. The court ordered that Herrick comply with PPG testing and a specific-issue

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<sup>1</sup> Consistent with Herrick's convention for identifying the VRPs: 1RP is the January 22, 2013 motions hearing; 2RP is the February 11, 2013 contempt hearing; 3RP is the February 21, 2013 remedies hearing; and 4RP is the August 25, 2014 motion hearing.

polygraph test, entering the Order Compelling Physiological Testing (PPG Order). 1RP at 28-31; CP at 353-55. The polygraph testing was necessary to address whether Herrick had again manipulated or suppressed his responses to PPG testing, a concern made greater from an August 20, 2010, recorded King County Jail phone call in which Herrick asked his girlfriend to research ways to “beat,” “cheat” or “win” the PPG. CP at 701-04.

Herrick’s counsel later notified the State that Herrick refused to comply with the PPG Order. CP at 334. The State moved for a finding of contempt. CP at 322-34. Herrick responded. CP at 306-19. The trial court held a contempt hearing on February 11, 2013. 2RP. The court found Herrick in contempt and entered the Order on Petitioner’s Motion to Hold Respondent in Contempt (Contempt Order). CP at 296-98. The court denied the State’s request to jail Herrick as a coercive sanction. 2RP at 28. The trial court provided as a coercive sanction that the fact of Herrick’s contempt would be admissible at trial, with other possible remedies to be considered at a future date. CP at 298, 1069.

The trial court held a hearing on other possible contempt remedies on February 21, 2013. Though on January 11<sup>th</sup> Herrick opposed the PPG testing, one month later his counsel conceded that it was necessary, admitting that to say it was “needed” was probably an “understatement.”

To say that Mr. Ross needs this PPG exam is probably an understatement that we’ve known since the filing of this case back in 2011. Because we knew right up front in the initial discovery that the 2009 PPG exam was an

inconclusive exam that we believed was ultimately going to be invalid and not be relied upon.

I don't know why it's taken so long for the AG to come to this conclusion, but we knew this pretty much upfront. . . .

3RP at 13.

Herrick appealed the contempt order, and it was upheld by Division One in an unpublished Opinion dated April 3, 2017.

#### **IV. STANDARD OF REVIEW**

Acceptance of review of a decision of the Court of Appeals is governed by RAP 13.4(b). Mr. Herrick does not allege that the decision below conflicts any other precedent or that his Petition involves a significant question of law and/or an issue of substantial public interest that should be determined by this Court (RAP 13.4(b)(1) through (4)). Because his Petition does not meet any of the specified criteria for review, review should be denied.

#### **V. REASONS WHY REVIEW SHOULD BE DENIED**

##### **A. None of the RAP 13.4 criteria are met or even alleged**

There is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. Even Mr. Herrick offers no reasons why further review of this contempt order should be granted. Instead, he simply states that "if this Court accepts review of the constitutionality of [the order compelling PPG and polygraph testing], this Court should also grant review of this case. Pet. at 2. This request does not meet any of the RAP 13.4 prerequisites for review. Therefore, it should be denied.

**B. The trial court is better situated to address issues related to Mr. Herrick's contempt**

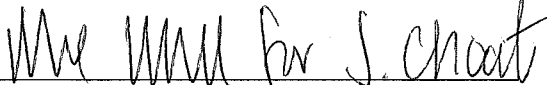
The order compelling physiological testing was upheld by the Court of Appeals based on well-established Washington precedent, and further review of that order is unwarranted. Nonetheless, even if review of that order were granted by this Court, there still would be no reason for further review of the contempt order that underlies this Petition. Should the order for testing later be modified for any reason, the trial court will necessarily have to address Mr. Herrick's contempt status. On the other hand, if review of the testing order is denied, Mr. Herrick offers no reason why the contempt order should be reviewed. Mr. Herrick's Petition is superfluous given the ability of the trial court to continue to monitor and address the contempt order as needed.

**VI. CONCLUSION**

Mr. Herrick failed to specify any RAP 13.4 reasons justifying review in his Petition. The decision below does not create a constitutional question or conflict with any Washington precedent. Accordingly, discretionary review is not justified in this case.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of July, 2017.

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