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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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In re Detention of Ausagetalitama Faga,

STATE OF WASHINGTON,

Respondent.

v.

AUSAGETALITAMA FAGA,

Appellant.

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**BRIEF OF RESPONDENT**

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## **I. ENTITY OF RESPONDENT**

The Respondent is the State of Washington.

## **II. DECISION BELOW**

Ausagetalitama Faga appeals the Pierce County Superior Court's order denying his motion to lift remedial contempt sanctions and set a trial date.

## **III. ISSUE PRESENTED FOR REVIEW**

Where the court has compelled Faga to comply with a sexual history polygraph, psychological testing, and a clinical interview as expressly allowed by statute, did the trial court abuse its discretion where it determined that Faga failed to present credible evidence of his inability to comply with the order, where the "inability to comply" is Faga's refusal to sign informed consent forms required by the evaluators, and where Faga has not asked the court for an exemption to or modification of the waivers?

## **IV. STATEMENT OF THE CASE**

Ausagetalitama Faga is a serial offender who is being detained pending trial on a sexually violent predator (SVP) petition pursuant to RCW 71.09. Petitioner, State of Washington, is entitled to discovery, including psychological and physiological evaluations of Faga. Faga has been held in contempt for refusing to comply with the court's discovery orders, specifically an evaluation by the State's expert and psychological

testing that the expert requested. CP 170-73. The proceedings have been stayed as a coercive contempt sanction. *Id.*

Faga has repeatedly attempted to be relieved of the coercive stay without complying with the court's order. He now asserts that he does not have the ability to purge his contempt. He argues that he is willing to submit to the required evaluations as order by the trial court, but he is unwilling to sign the paperwork required by the evaluators, which he asserts has rendered him "incapable" of purging the contempt. The trial court did not abuse its discretion in denying Faga's motion.

**A. Factual History**

Faga has been convicted of three burglaries that involved sexual assaults. His most recent offense occurred in 1998 when he broke into the house of 77-year-old widow (H.E.) in the middle of the night. She lived alone. He entered through a window, attacked her in her bed, raped her, and stole her wedding ring, which he pawned the next day. He was convicted of Rape, Burglary, and Possession of Stolen Property. CP 311; 358-60.

Several years earlier, in April of 1990, Faga broke into the residence of a 47-year-old single woman (J.F.) who lived alone. He entered through a window, attacked her while she was in her bed, and he fled when she resisted. CP 311-12; CP 353. Faga was convicted of Burglary. CP 353. Later that same year, in December of 1990, Faga broke into the residence

of a single woman (L.C.) who was alone in her residence. He was armed with a shotgun and entered through a window. He attacked her in her bed, tied her up, threatened her with the shotgun, raped her, and stole several items from the residence. CP 312-13; CP 354. Faga plead guilty to Residential Burglary. CP 355.

**B. Procedural History**

Prior to Faga's scheduled release from prison in 2012, the State filed a petition alleging that he was a sexually violent predator. CP 308-09. The petition was based in part on a psychological evaluation finding that Faga has a mental abnormality. CP 310-14; 423. Specifically, the evaluator found evidence of a paraphilia and indications that Faga is extremely psychopathic, ranking in the upper one percent of adult criminal offenders. CP 313-14. The trial court found probable cause and ordered that Faga submit to additional psychological and physiological evaluations. CP 168-69; *In re Detention of Faga*, No. 45911-6-II, Ruling Denying Review, at \*1 (Wash. Ct. App. August 21, 2014).

The State's evaluator, Dr. Harry Hoberman, coordinated with Faga's attorney to schedule two days to meet with Faga to conduct an updated psychological evaluation, and one day for Faga to meet with Mr. Rick Minnich for a plethysmograph (PPG) test and a polygraph test. CP 170-71. At significant expense to the State, Dr. Hoberman flew to

Washington from Minnesota in order to conduct the evaluation. *Id.* Dr. Hoberman and Faga's attorney traveled to the Special Commitment Center (SCC) for the scheduled meeting, but Faga refused to meet with them. *Id.* A few days later, the State's attorney and paralegal, Faga's attorney, and a court reporter traveled to the SCC to conduct Faga's scheduled deposition, but Faga refused to appear at his deposition. *Id.* On February 7, 2014, following a contested hearing, the trial court found Faga in contempt of court for failure to comply with the deposition and failure to comply with the Dr. Hoberman's evaluation procedures. CP 170-73.

It was apparent that Faga was trying to set his own limitations on the evaluation process. Specifically, Faga offered to submit to the evaluation process if the court would limit the State's case against him, order the State to respond to his requests for admissions, and find good cause for the appointment of a second expert for him. *In re Detention of Faga*, No. 45911-6-II, Ruling Denying Review, at \*2-3 (Wash. Ct. App. August 21, 2014). The trial court declined to impose the restrictions Faga was requesting. The court stated, "It seems to me that you are trying to strong arm the Court." *Id.* at 3.

The trial court stayed the proceedings as a coercive sanction. The order provides as follows:

4. That Respondent may purge his contempt by fully complying with the June 21st order and by participating in a deposition. Complying with the court's order shall include meeting with Dr. Hoberman, cooperating with the evaluation, submitting to a clinical interview and such psychological and physiological testing as deemed appropriate by Dr. Hoberman, and complying with all other applicable provisions of the June 21st order.

CP 172. The court set periodic mandatory review dates to follow the status of the contempt. CP 482-89. Faga sought Discretionary Review of the contempt order, arguing that his refusal to meet with Dr. Hoberman was "not unequivocal." *In re Detention of Faga*, No. 45911-6-II, Ruling Denying Review, at \*2-3 (Wash. Ct. App. August 21, 2014). This Court denied his motion, ruling that the trial court did not commit probable error and the contempt sanction did not substantially limit his freedom to act. *Id.* at 6-8.

Since then, Faga has repeatedly sought to have the stay lifted without complying with the court's order. In May 2014, Faga filed a Notice of Intent to Purge Contempt, and he filed a Motion to Lift the Stay. CP 473-74. The motion was denied because he had not yet complied with the court's order requiring him to submit to testing, a clinical interview, and a deposition. CP 477-78. Thereafter, Faga again indicated his desire to

comply with the testing, and the State arranged for Mr. Minnich to travel to the SCC to conduct the PPG test. When Mr. Minnich arrived, Faga refused to meet with him. CP 233. In November 2014, Faga again requested that the trial court set a trial date, which was denied because he had not fully complied with the court's order. CP 482-83. During a February compliance hearing, Faga asked the court to clarify what he was required to do to comply with the PPG test. The court entered a detailed order clarifying the requirements. CP 479-81. In January 2015, Respondent again asked the court to lift the stay and set a trial date, and his request was denied. CP 484-85.

In February 2015, Faga finally completed the PPG testing. As specified in the court's clarifying order, the PPG test was to include a post-test polygraph to determine whether a participant has used "countermeasures" to manipulate the results. CP 479-81. In this case, Mr. Minnich declined to conduct the follow-up polygraph because Faga admitted during the post-test interview that he had been "bored" and "may have missed" parts of the stimuli. Mr. Minnich reported that Respondent's disclosure puts the validity of the PPG results in question. CP 180-81.

In May 2015, Faga appeared in court via telephone seeking to clarify whether he still had to participate in a sexual history polygraph. The court confirmed that Faga was still required to participate in a sexual history

polygraph. CP 183. Between May 2015 and April 2016, Faga took no steps to purge his contempt. CP 298. In February 2016 Faga appeared through counsel at a mandatory review hearing. CP 486- 88. In April 2016, Faga again appeared through counsel for a mandatory review hearing and the parties updated the court on the status of the contempt, noting that the sexual history polygraph and psychological evaluation were being scheduled. CP 489. Faga's attorney specifically asked that any informed consent paperwork be provided in advance. *Id.* The State arranged for Faga to meet with the sexual history polygrapher, Mr. Brooks Raymond, and thereafter to meet with Dr. Hoberman to conduct the psychological testing and clinical interview. The State provided Faga's attorney with the paperwork in advance as requested. Prior to the scheduled meetings, Faga's attorney informed the State that Faga would not sign the consent forms. CP 298. After checking with Mr. Raymond and Dr. Hoberman, the State informed Faga's attorney the professionals involved would not go forward without the signed forms. *Id.* The tests were cancelled to avoid incurring further costs. *Id.*

Almost three weeks after the scheduled polygraph evaluation, Faga's counsel sent the State the signed consent forms, heavily redacted and altered, with a message stating his position:

“Mr. Faga is (and has been) available for the sexual history polygraph and Dr. Hoberman's re-evaluation and the reason they are not being completed is because the State has not retained a polygrapher willing to conduct an examination in these circumstances: namely, a forced polygraph in which the subject is not willing to waive liability for potential negligence by the polygrapher.”

CP 202. In August 2016, Faga filed a motion to lift the contempt sanction and set a trial date. He took the position that he was willing to submit to the psychological and polygraph evaluations, but unwilling to sign the paperwork required by the evaluators. CP 184-91. He argued that he would participate in the evaluations when the State elects to hire professional evaluators who do not require impermissible waivers. *Id.* at 191. Thus, he asserted the State was withholding from him the opportunity to purge his contempt. *Id.* Faga has never asked the trial court to intervene, exempt him from the experts' requested waivers, or to alter the language to indicate that he was being court-ordered to comply.

The motion to lift the contempt sanction was heard on October 14, 2016. The trial court entered Findings of Fact and denied the motion, concluding that Faga had not met his burden of producing persuasive, credible evidence that he does not have the ability, through no

fault of his own, to purge his contempt. CP 296-99. Faga now appeals the trial court's denial of his motion to lift the contempt sanctions.

**V. THE TRIAL COURT'S ORDER IS REVIEWED FOR ABUSE OF DISCRETION**

A trial court's determination regarding whether a contemnor has the ability to comply with a coercive order is reviewed for abuse of discretion. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995), citing *In re Pers. Restraint of King*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). "An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, or based on untenable grounds." *Id.* at 40, citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *Coggle v. Snow*, 56 Wn. App. 499, 506-07, 784 P.2d 554 (1990).

Faga has not challenged any of the trial court's Findings of Fact. Unchallenged findings of fact are verities on appeal. *Henrickson v. State*, 92 Wn. App. 856, 863, 965 P.2d 1126, 1130 (1998), *aff'd sub nom. Det. of Henrickson v. State*, 140 Wn.2d 686, 2 P.3d 473 (2000), citing *Sherwood v. Bellevue Dodge, Inc.*, 35 Wn. App. 741, 748, 669 P.2d 1258 (1983); *Moreman v. Butcher*, 126 Wn.2d 36, 39-40, 891 P.2d 725 (1995). Accordingly, the only issue before this court is whether the trial court

abused its discretion when it entered an Order denying Faga's motion to lift the contempt, which was based on the undisputed findings.

#### **VI. FAGA FAILED TO MEET HIS BURDEN TO SHOW HE CANNOT COMPLY**

In civil contempt proceedings, the law presumes that one is capable of performing those actions the court requires, and the inability to comply is an affirmative defense. *In re Pers. Restraint of King*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988). As a contemnor, Faga bears the burdens both of production and persuasion to demonstrate his claimed inability to comply with the court's order. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). To meet his burdens, Faga must "offer evidence as to his inability to comply and the evidence must be of a kind the court finds credible." *Moreman*, 126 Wn.2d at 40-41 (quoting *King*, 110 Wn.2d at 804). Additionally, Faga must be unable to comply through no fault of his own. 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Handbook on Civil Procedure* § 638, at 45 (5th ed. 1996). It is not a defense to contempt when a contemnor has voluntarily or contumaciously brought on himself the disability to obey the court order. *State v. Phipps*, 174 Wn. 443, 446, 24 P.2d 1073, 1074 (1933).

Faga mistakenly asserts that this Court must conduct a de novo review. He relies on public records cases where a specific statute provides

for de novo judicial review of administrative actions if the record consists of affidavits and documents. He also cites zoning cases where the court is limited to review of the written record from below. De novo review is only appropriate, however, if the trial court has neither seen nor heard testimony, nor assessed credibility or competency, nor had to weigh evidence or reconcile conflicting evidence in reaching a decision. *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283, 285 (1989) (citations omitted); *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592, 598 (1994), citing *Smith v. Skagit County*, 85 Wn.2d 715, 718, 453 P.2d 832 (1969).

Here, the trial court had to assess whether Faga produced credible evidence of his inability to comply with the court order. *Moreman v. Butcher*, 126 Wn.2d 36, 40-1, 891 P.2d 725 (1995) (quoting *In re King*, 110 Wn.2d at 804). This court should defer to the trial court's determination regarding the credibility, weight and reliability of Faga's claimed inability to purge his contempt. *See, e.g., In re Detention of Coe*, 160 Wn. App. 809, 831, 250 P.3d 1056, 1067 (2011), *aff'd on other grounds*, 175 Wn.2d 482, 286 P.3d 29 (2012), citing *Foxhoven*, 161 Wn.2d at 176, 163 P.3d 786; *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Although Faga argues that only the isolated documents associated with the October 14, 2016 hearing should be considered by this court, Faga's contempt has been on-going since February 2014. CP 296-99. The trial court, which has authority to coerce compliance with its lawful discovery orders, has presided over many hearings associated with Faga's on-going contempt where Faga sought to limit the theories and discovery available to the State, to lift the sanctions without complying, and to clarify the requirements of the court order. *Id.* Faga's pattern of behavior, set forth in the unchallenged Findings of Fact, demonstrates that Faga has engaged in a series of attempts to have the contempt sanction lifted without actually complying with the court's order. *Id.* Faga's pattern of behavior supports the trial court's conclusion that Faga had "not met his burden of producing persuasive, credible evidence that he does not have the ability, through no fault of his own, to comply with the court's earlier order." CP 299.

**A. Faga never sought exemption from or modification of the evaluators' informed consent forms.**

Faga has cited other cases where psychological testing and/or evaluation has been completed without the use of signed "informed consent" forms. CP 269-71; CP 273-74. The materials cited by Faga indicate that other SVP respondents have sought intervention from a trial court to satisfy the informed consent requirements of the evaluator without

requiring the SVP Respondent to sign “informed consent.” *Id.* But Faga has not sought any trial court intervention, exemption, or even language clarifying that the tests are court-ordered. Faga is not trying to comply with the court order, instead he has been trying to avoid compliance. This most recent attempt to have the coercive sanction lifted without complying with the underlying court order is just the latest version of the same pattern.

Faga argues that he is willing to submit to the evaluations as required by the court, but he is unwilling to sign the required paperwork, rendering him incapable of purging the contempt. His position seems contrived to once again attempt to be alleviated of the court’s coercive contempt order without actually complying with the order. Based on the entire record that was before the trial court, the trial court’s unchallenged Findings of Fact, the trial court’s order that Faga has not met his burden of producing persuasive and credible evidence of his inability to comply with the court’s order is well within the court’s discretion and does not constitute error. *See Moreman v. Butcher*, 126 Wn.2d at 40, *infra*.

**B. Faga’s ability to purge his contempt is not dependent on the acts of third parties.**

Faga argues that he is unable to purge his contempt because the State’s experts refuse to meet with him without the signed paperwork. Because he does not have the power to compel the experts to meet with him,

he argues, his ability to purge his contempt is dependent on a third party and the purpose of the contempt order is defeated. Faga relies on *In re M.B.*, which held that a coercive contempt sanctions requiring a contemnor to “be accepted” into a treatment program in order to purge contempt gave the “keys to the prison doors” to a third party rather than the contemnor. 101 Wn. App. 425, 459-60, 3 P.3d 780 (2000).

Faga ignores the critical fact that it is his refusal to sign the paperwork that is keeping the contempt in place. At some point, Faga learned that the experts would not complete the evaluations without his signed acknowledgement regarding the purpose of evaluations. He requested the paperwork in advance and then notified the State that he was refusing to sign the paperwork. Faga has on three prior occasions refused to meet with experts and/or attorneys who have traveled to the SCC to conduct evaluations and depositions. Faga’s earlier refusal to meet with Dr. Hoberman, from January of 2014, resulted in over \$6,000 of needless expenses, even after Dr. Hoberman was able to mitigate the costs. CP 171. In May 2016, Faga communicated unequivocally that he was refusing to sign the paperwork. CP 194. Because of Faga’s unequivocal refusal, the experts declined to travel to the SCC as scheduled in order to mitigate further unnecessary costs. *Id.* This is not a blanket refusal on the part of the experts, as Faga now argues, it is instead mitigating additional expense

caused by Faga's refusal to sign the required paper work and his refusal to seek judicial intervention regarding the required paperwork.

Weeks after Faga's initial refusal (and after the scheduled meetings with evaluators had been cancelled), Faga submitted the signed forms, heavily redacted and altered. CP 202-06. The altered forms were forwarded to the experts, both of whom declined to accept the forms as altered. CP 202. Thereafter, Faga took the position that it is the "third party" retained experts who are refusing to comply with the court's order rather than himself.

This contrived argument does not constitute credible and persuasive evidence that Faga is unable to comply with the court's order. Faga took the position that he was willing to submit to the psychological and polygraph evaluations, but unwilling to sign the paperwork required by the evaluators. CP 190. He argued that he would participate in the evaluations when the State elects to hire professional evaluators who do not require impermissible waivers. *Id.* As previously noted, Faga did not ask the trial court to intervene or exempt him from the experts' requested waivers or to alter the language to indicate that he was being court-ordered to comply. He is not trying to comply with the court order, he is trying to have the coercive order lifted without complying.

Unlike the *M.B.* case, the trial court is not requiring a particular result from these evaluators, as was the case in *In re M.B.* The "keys to the

door” are still in Faga’s hands and the evaluations will be completed as soon as he signs, acknowledging informed consent, or as soon as the trial court intervenes to exempt him from signing waivers or alter the language of the waivers. The trial court did not abuse its discretion in finding that Faga had not presented credible evidence of his inability to comply.

**C. Requiring Faga to acknowledge Informed Consent is a reasonable requirement and does not constitute an onerous modification of the coercive sanction**

Faga argues that the original contempt order did not require Faga to sign paperwork related to his evaluations, so requiring him to sign paperwork demanded by the evaluators constitutes a modification of, and increasing onerousness of, the purge conditions. In support of his argument, Faga again relies on *In re M.B.*, 101 Wn. App. 425, 462, 3 P.3d 780 (2000), where the trial court detained a juvenile contemnor and informed the child he could purge his contempt by writing a 15-page paper explaining why he refused to follow the court’s order and how he would comply in the future. *Id.* When the contemnor submitted a written paper, the trial court rejected it, finding that it was not sufficient because it did not contain sufficient detail describing how the contemnor’s behavior resulted in his mother losing her housing. *Id.* at 461. The reviewing court held that the trial court should have stated “its expectations with sufficient clarity to communicate

what it required.” *Id.* The fact that the court later added content requirement constituted an improper modification. *Id.*

“Informed consent” is a term used to denote an acknowledgement of the purpose, scope, and potential consequences of an evaluation, both the benefits and risks. CP 256. It is important that competent persons, even under coercive court order, be informed of and understand the purpose and potential uses of an evaluation. *Id.* Informed consent is standard in many instances, including polygraph exams and psychological testing. *Id.*

The trial court has specified, and even repeatedly clarified the requirements for Faga to purge his contempt. This is not a situation where the trial court has modified the requirement, such as requiring Faga to “pass” a polygraph test, or to perform in a specified way. Although the trial court did not detail every step that may be required for compliance with the evaluations, it is reasonable that the standard paperwork associated with the tests will be required. Indeed, Faga’s argument that this is a new and onerous modification of the court’s order is undermined by the fact that he signed the informed consent paperwork (indicating that he was voluntarily participating) during at least one earlier court ordered evaluation, the 2015 plethysmograph test. CP 241-43.

Further, Faga has never asked the trial court to intervene or exempt him from the experts’ requested forms or to alter the language to indicate

that he was being court-ordered to comply. Asking Faga to acknowledge “informed consent” is a reasonable requirement and does not constitute an onerous modification of the requirement to purge contempt. Faga is not trying to comply with the order, he is trying to avoid compliance and deprive the State of discovery.

**D. Requiring Faga to acknowledge Informed Consent does not violate his first amendment rights**

Faga argues that the court’s order compels him to falsely state that his participation in the evaluation and testing is voluntary, violating his first amendment protection against compelled speech. He argues that compelling him to sign these forms is Orwellian.

Asking Faga to acknowledgement of the purpose, scope, and potential consequences of an evaluation, both the benefits and risks, is reasonable and customary for polygraph and psychological evaluations. CP 256. The trial court’s coercion is completely separate and apart from whether Faga understands the purpose and potential consequences of participating in the evaluation. The trial court’s coercion is also separate and apart from whether Mr. Raymond or Dr. Hoberman are coercing Faga to participate. There is no doubt and no dispute that the court has ordered Faga to comply with the sexual history polygraph, the psychological testing and the clinical interview with Dr. Hoberman. The paperwork required by the

evaluators inform Faga of the purpose of the evaluations and describe the relationship and participation between Faga and the evaluators. The evaluators require Faga to acknowledge the purpose and potential consequences of the evaluations and to acknowledge that the evaluators have not made threats or promises to induce Faga to participate.

Contrary to Faga's assertion, Dr. Hoberman's form does not even use the word "voluntary." Rather, Dr. Hoberman's form indicates that interviews and testing are typically court-ordered. CP 203. The paperwork describing the relationship between the evaluators and Faga in no way alters the fact that Faga is under a coercive order from the superior court.

The paperwork at issue in this case, the acknowledgement that these professionals are not threatening or coercing him and the acknowledgement that the results may be used against him in an SVP case, does not change the fact that Faga is under a contempt order in the trial court and that he is being coerced by the court. Faga is able to comply with the evaluation process but remains in contempt because he is willfully refusing to sign required paperwork. The paperwork is reasonable and customary and Faga did not seek any other avenue, like court intervention or exemption from the experts' waiver/consent forms. Accordingly, the trial court did not abuse its discretion in finding that Faga's self-made impediment does not constitute credible and persuasive evidence of his inability to comply.

**E. None of Faga's other arguments have any merit**

Faga argues that the paperwork required by the experts in this case requires him to sign away important rights, specifically his attorney-client privilege, his right to discovery, his right to seek redress for negligence or malfeasance, and his right to limit distribution of information. But these arguments mischaracterize the situation.

The informed consent paper work does not implicate Faga's attorney-client privilege. Dr. Hoberman's testing process reasonably includes questions about whether a participant has sought or received any information or coaching about the tests, questionnaires, or instruments. The form in question specifies that if the participant has sought or received such information, the participant "agree[s] to inform Dr. Hoberman that has occurred." It is the fact of coaching that is relevant to Dr. Hoberman, not the source or nature of the coaching. CP 256. If a participant acknowledges they have sought or obtained information regarding the tests, questionnaires or instruments, Dr. Hoberman will not inquire further, but will consider that fact along with all the other information he has in forming his opinion in the case. *Id.*

The paperwork in question acknowledges that Faga's attorney may actually be present and accompany Faga while Dr. Hoberman is interviewing him. CP 250. Faga's argument that this proviso infringes on

the right to counsel is not credible and the trial court did not abuse its discretion in find that this did not render Faga unable to comply with the court's order.

Further, contrary to his assertions, the paperwork related to the polygraph does not require him to sign away his right to discovery. Dr. Hoberman retained the polygrapher, Mr. Raymond, to conduct Faga's sexual history polygraph. CP 193. Mr. Raymond has reasonably requested that Faga acknowledge that results of the interview and examination, the written reports, and his opinions will be the property of Dr. Hoberman. CP 206. The paperwork requires Faga to waive his right to obtain the results directly from Mr. Raymond, but this does not constitute a waiver of his right to discovery. Faga is entitled to discovery, including the results of the polygraph, through the discovery process including depositions, production of documents, and requests for admission. *See* CR 26; CR 31; CR 36. While the form makes it clear that the polygrapher is not obligated to provide the results to Faga, the State remains obligated to provide the information to him through civil discovery. The trial court did not abuse its discretion in finding that Faga's claimed inability to comply with the court's order is not credible and persuasive. Faga cannot rely on his "claimed inability" to comply because it is of his own making. *State v. Phipps*, 174 Wn. 443, 446,

24 P.2d 1073, 1074 (1933); *See also* 15 Karl B. Tegland, *Washington Practice: Handbook on Civil Procedure* § 43:21, at 227-28 (2d ed. 2009).

Finally, Faga's claim that he is foregoing a potential tort claims for negligence or malfeasance or intentional misconduct is also not credible. These evaluations are for the purpose of a jury trial litigation where Faga has an attorney, his own retained experts, the right to discovery, cross examination and the benefit of a unanimous jury verdict beyond a reasonable doubt. His claim that waiving liability render him incapable of complying with the court's order is not credible. The trial court did not abuse its discretion is ruling that it does not constitute credible evidence that he has the inability to comply.

**F. The trial court's order of contempt does not violate due process**

Faga argues that he has been held on a finding of probable cause and that unless the contempt sanction is lifted, confinement will continue indefinitely subject to the cooperation of third parties. Faga's argument is essentially a reiteration that his ability to purge his contempt is dependent on third parties. His argument overlooks the fact that the State is entitled to discovery in this case and it is Faga who is willfully depriving the State of necessary discovery. If Faga were genuinely trying to comply with the trial court's order, he could sign the required paperwork or he would seek

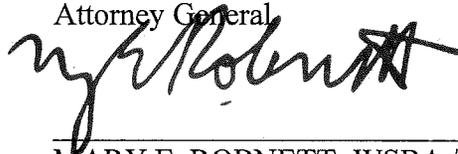
judicial intervention to avoid signing the experts' paperwork. Instead, he seeks yet again to have the contempt sanction lifted without complying.

## VII. CONCLUSION

Faga is in contempt for willful disobedience of the trial court's lawful order. Faga's refusal to sign the necessary paperwork for a sexual history polygraph, for a clinical interview, and for the scoring of his psychological tests is a continuation of his intentional manipulation of the process. The trial court did not abuse its discretion when it ruled that Faga had not met his burden of producing persuasive and credible evidence that he does not have the ability to comply with the court's order. The trial court order should be affirmed.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of July, 2018.

ROBERT W. FERGUSON  
Attorney General



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Assistant Attorney General  
Attorneys for Respondent

NO. 50077-9-II

**WASHINGTON STATE COURT OF APPEALS, DIVISION II**

In re the Detention of:

AUSAGETALITAMA FAGA

Appellant.

DECLARATION OF  
SERVICE

I, Joslyn Wallenborn, declare as follows:

On July 11, 2018, I sent via electronic mail, per service agreement, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

BACKLUND & MISTRY  
BACKLUNDMISTRY@GMAIL.COM

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

DATED this 11<sup>th</sup> day of July, 2018, at Seattle, Washington.

  
\_\_\_\_\_  
JOSLYN WALLENBORN

**WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION**

**July 11, 2018 - 3:44 PM**

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