RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Dec 09, 2015, 1:28 pm
BY RONALD R. CARPENTER
CLERK

E
RECEIVED BY E-MAIL

SUPREME COURT NO. 92609-3

COURT OF APPEALS NO. 46524-8-II

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

DUANE BRENNAN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

BROOKE BURBANK
Assistant Attorney General
WSBA #26680 / OID #91094
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 389-3017

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

I. INTRODUCTION AND DECISION BELOW 1

II. COUNTERSTATEMENT OF ISSUES 1

III. COUNTERSTATEMENT OF THE FACTS 2

IV. STANDARD OF REVIEW 6

V. REASONS REVIEW SHOULD BE DENIED 7

A. The Court of Appeals Correctly Determined That Physiological Testing as Part of a Comprehensive Mental Examination Does Not Violate Brennan's Limited Rights to Privacy 7

1. Brennan's Truncated Privacy Rights Are Outweighed By The State's Compelling Interest In Treating And Incapacitating Dangerous Sexual Offenders 8

2. It Is Not An Abuse Of Discretion To Enter An Order Requiring Testing Specifically Permitted By The Governing Statute And When The Parties Stipulate To Such An Order 11

B. Brennan's Counsel Was Not Ineffective For Agreeing To An Order That Tracked The Statutory Language 15

VI. CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Cowich Canyon Conservancy v. Bosley,
118 Wn.2d 801, 828 P.2d 549 (1992)... 12

Emmerson v. Weilep,
126 Wn. App. 930, 110 P.3d 214 (2005)... 6

Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2,
117 Wn. App. 183, 69 P.3d 895 (2003)... 6

In re Det. Of Campbell,
139 Wn.2d 341, 986 P.2d 771 (1999)... 9, 10

In re Rosier,
105 Wn.2d 606, 717 P.2d 1353 (1986)... 15

In re Stout,
159 Wn.2d 357, 150 P.3d 86 (2007)... 16

In re the Detention of Andre Young,
122 Wn.2d 1, 857 P.2d 989 (1993)... 9

In re the Detention of Duane Brennan,
No. 46524-8-II, 2015 WL 6441717
(Wash. App. Div. II, October 20, 2015)............................ 1, 7, 8, 9, 11, 12

In re the Detention of Thorell,
149 Wash. 2d 724, 72 P.3d 708 (2003)... 10

In re the Detention of Williams,
163 Wn. App 89, 264 P.3d 570 (2011)... 9

State v. Adams,
91 Wn.2d 86, 586 P.2d 1168 (1978)... 16

State v. Johnson,
119 Wn.2d 167, 829 P.2d 1082 (1992)... 15

State v. McFarland,
127 Wn.2d 322, 899 P.2d 1251 (1995) 16

State v. Varga,
151 Wn.2d 179, 86 P.3d 139 (2004) 16

U.S. West Communications, Inc., v. Washington Utilities,
134 Wn.2d 74, 949 P.2d 1337 (1997) 15

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

Statutes

RCW 71.09 .... 2, 3

RCW 71.09.050 .... 1, 12

RCW 71.09.050(1) 3, 7, 11, 12

Rules

RAP 10.3 .... 11, 12

RAP 10.3(g) 6

RAP 13.4(b) 1, 6, 17

RAP 13.4(b)(4) 6

RAP 13.4(f) 15

I. INTRODUCTION AND DECISION BELOW

Duane Brennan seeks review of an October 20, 2015 decision by the Court of Appeals, *In re the Detention of Duane Brennan*, No. 46524-8-II, 2015 WL 6441717 (Wash. App. Div. II, October 20, 2015). The decision affirmed the trial court's order compelling a penile plethysmograph pursuant to RCW 71.09.050 after Brennan claimed he lied to the state's evaluator during a pre-trial evaluation about the extent of his sexual deviancy. The decision also affirmed the order holding Brennan in contempt and determined that Brennan had failed to demonstrate that his counsel was ineffective.

II. COUNTERSTATEMENT OF ISSUES

This Court should deny review because this case presents no issues that warrant review under RAP 13.4(b). However, if the Court were to accept review, the following issues would be presented:

A. Where Brennan stipulated to an order allowing the trial court to require physiological testing specifically authorized by statute, and where he later contended that he had previously lied to the State's evaluator about his sexual deviancy, history of sex offending, and risk to reoffend, did the trial court abuse its discretion by ordering Brennan to submit to physiological testing?

B. Where the Statute specifically authorizes physiological testing, was counsel ineffective in stipulating to an order which tracked the statutory language authorizing such testing?

III. COUNTERSTATEMENT OF THE FACTS

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

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

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

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

On December 3, 2012, Brennan stipulated to the existence of probable cause and the Court ordered that he be detained at the Special Commitment Center for further evaluation. SUPP CP at 26-28. Consistent with RCW 71.09.050(1)[1], the order further provided that Brennan, shall

[1] RCW 71.09.050(1) provides, in pertinent 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. (Emphasis added.)

submit to an evaluation by an expert chosen by the state and the evaluation may include "penile plethysmograph testing (PPG)." SUPP CP at 27. Brennan read the agreed order and had the opportunity to discuss the document with his attorney. SUPP CP at 26. The agreed order is signed by both Brennan and his attorney. SUPP CP at 28. He did not seek appellate review of this order.

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

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

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

The State filed a motion and supporting memorandum requesting the trial court compel Brennan to participate in the requested physiological testing. SUPP CP at 2-25. The State based this request, among other arguments, on 1) the language in the statute authorizing such testing if requested by the evaluator, 2) on the stipulated order finding probable cause, which provided these tests would be permitted upon request of the State's evaluator, and 3) a declaration from Dr. Phenix requesting the physiological testing because of Brennan's questionable veracity. SUPP CP at 2-25. On June 30, 2014, the trial court ordered Brennan to participate in the physiological testing requested by the State's evaluator. CP at 13-15. At a hearing held on July 7, 2014, Brennan informed the trial court that he would not comply with the court's order. RP at 38. Based on his refusal to comply with the court's lawful order, the trial court held Brennan in contempt. CP at 10-12. The trial court stayed the proceedings until Brennan purged his contempt by completing the requested physiological testing. CP at 10-12.

Brennan appealed to Division Two of the Court of Appeals, challenging the order compelling the penile plethysmograph, asserting that the order finding him in contempt was erroneous because the underlying order was unlawful.[2] CP at 2-9. The Court of Appeals held that the order compelling a plethysmograph did not infringe on his constitutional rights and he failed to demonstrate ineffective assistance of counsel. This Court should deny review.

IV. STANDARD OF REVIEW

Acceptance of review of a decision of the Court of Appeals is governed by RAP 13.4(b). Although Brennan alleges that his Petition involves an issue of substantial public interest that should be determined by this Court (RAP 13.4(b)(4)), he does not demonstrate that this is in fact the case. This case involves a clear application of judicial discretion, does not conflict with any decisions of this Court or any other appellate court, and does not present a significant question of law under the Constitution. Because the issues presented in his Petition do not meet any of the specified criteria for review, this Court should deny this review.

---

[2] Brennan did not assign error to the stipulated order of probable cause, or the imposed sanction. Consequently, he has waived any challenge to those orders. RAP 10.3(g). *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214 (2005) (citing *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2,* 117 Wn. App. 183, 190, 69 P.3d 895 (2003)(It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.)

V. REASONS REVIEW SHOULD BE DENIED

A. The Court of Appeals Correctly Determined That Physiological Testing as Part of a Comprehensive Mental Examination Does Not Violate Brennan's Limited Rights to Privacy

Brennan argues that the trial court, by ordering testing that 1) he agreed to and 2) is specifically authorized by the statute, violated his substantive due process right to privacy.[3] In doing so, Brennan attempts to "constitutionalize" his various challenges to the trial court's discretionary discovery ruling. The Court of Appeals properly rejected this argument, noting that his arguments are "based on his misconception that sex offenders have limitless privacy rights." *Brennan*, 2015 WL 6441717 at *6. Likewise, Brennan's argument that his substantive due process rights were violated by the potential use of an "unreliable" test such as the PPG lacks merit where Washington courts have repeatedly held that PPG testing is useful as part of a diagnostic process and where Brennan's challenge goes to the weight of the evidence rather than the constitutionality of the superior court's order. Finally, the language of the order compelling the PPG testing mirrors statutory language, and any

---

[3] As noted by the Court of Appeals, Brennan does not appear to challenge the constitutionality of RCW 71.09.050(1). *See Brennan*, 2015 WL 6441717 at *4. Rather, he appears to challenge the constitutionality of the superior court's order requiring the PPG testing. *Id.*

claim that it does not is, as noted by the Court of Appeals, "factually incorrect." *Brennan*, 2015 WL 6441717 at *9.

Brennan further asserts that the State has "less intrusive means" of evaluating him, despite the fact that the state attempted a less intrusive means of evaluation by interviewing him before Brennan claimed to have lied regarding the extent of his sexual deviancy. His arguments ignore the plain language of the statute, and the facts of the case. He further makes the incomprehensible argument that the trial court failed to use its own discretion when issuing the (discretionary) ruling. The Court of Appeals correctly rejected all of Brennan's arguments. This court should deny review.

1. Brennan's Truncated Privacy Rights Are Outweighed By The State's Compelling Interest In Treating And Incapacitating Dangerous Sexual Offenders

Brennan argues that the trial court's order compelling him to submit to a PPG "violates substantive due process because it invades Brennan's personal autonomy without being narrowly tailored to achieve a compelling government interest." Pet. at 12. The Court of Appeals properly rejected this argument, correctly recognizing that Brennan, as a convicted sex offender, has a reduced privacy interest. *Brennan*, 2015 WL 6441717 at *4-5. Washington case law specifically recognizes that the State's substantial interest in public safety outweighs the truncated privacy

interests of the convicted sex offender. *In re the Detention of Williams*, 163 Wn. App 89, 97, 264 P.3d 570 (2011). Sex offenders have reduced privacy interests because they threaten public safety. *Id.* at 97; *see also In re Det. Of Campbell,* 139 Wn.2d 341, 356, 986 P.2d 771 (1999) ("grave" and "substantial" public safety interests outweigh the truncated privacy interests of convicted sex offenders). Furthermore, this Court long ago affirmed the importance of forensic evaluations in sex predator proceedings. "The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential." *In re the Detention of Andre Young*, 122 Wn.2d 1, 52, 857 P.2d 989 (1993).

The Court of Appeals also correctly rejected Brennan's repeated efforts to rely on *United States v. Weber,* 451 F.3d 552 (9th Cir. 2006) in support of his argument. *Brennan*, 2015 WL 6441717 at *5-6. *Weber*, the court correctly noted, did not hold PPG testing unconstitutional. The *Weber* court merely decided that before PPG testing can be imposed *as a term of supervised release in a criminal case,* the trial court must make an individualized determination that the testing is necessary. 451 F.3d at 569-70. The *Weber* Court acknowledged that PPG testing "has become routine in the treatment of sexual offenders and is often imposed as a condition of supervised release." *Id.* at 554 Moreover, even if the *Weber* standard

requiring "an individualized determination that the testing is necessary" were applied here, such an individualized determination was in fact made, where the testing was ordered based primarily on Brennan's own conduct.

Finally, Brennan repeatedly asserts there are other, less intrusive, methods to assess sexual deviancy. Pet. at 1, 9, 18, & 20. He never, however, articulates what these other means might be.[4] Brennan ignores the fact that Dr. Phenix did employ a "less intrusive" means by initially interviewing him without requesting a PPG. It was during this "less intrusive" interview that Brennan told her that he had sexually assaulted numerous children and would do it again. CP at 116-17. Dr. Phenix took him at his word, and was satisfied that she had correctly assessed his level of sexual deviancy and dangerousness. It was only when he subsequently claimed that he had lied to her that she requested the testing that could corroborate his self-report. CP at 62-64; SUPP CP at 17.

Brennan's truncated privacy interests are outweighed by the "grave" and "substantial" public safety interests protected by the SVP law. *In re Det. Of Campbell,* 139 Wn.2d 341, 356, 986 P.2d 771 (1999). The trial court's order furthered those substantial interests in public safety, and

[4] Brennan appears to be claiming that the actuarial instruments can determine sexual deviancy. Pet. at 6, N 2. This is false. Actuarials only measure risk for certain forms of reoffense and are not designed to determine sexual deviancy. *In re the Detention of Thorell*, 149 Wn.2d 724, 753 - 58, 72 P.3d 708 (2003).

the Court of Appeals correctly denied Brennan's challenge. This Court should deny review.

2. It Is Not An Abuse Of Discretion To Enter An Order Requiring Testing Specifically Permitted By The Governing Statute And When The Parties Stipulate To Such An Order

Brennan next argues that the stipulated order compelling PPG testing was unlawful because it did not mirror the language of RCW 71.09.050(1), and did not require the court to exercise discretion.[5] Pet. at 12, 15, 19, 20. This, he argues, violated his rights to privacy because "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. " Pet. at 15 (emphasis in original). These arguments fail for several reasons. As a threshold matter and as noted by the Court of Appeals, Brennan did not seek review of the stipulated order, and offered no authority "for the proposition that he can now challenge an unappealed stipulated order for the first time with no assignment of error." *Brennan*, 2015 WL 6441717 at *8; RAP 10.3. Nor does Brennan make any cogent

---

[5] Brennan asserts that "[t]he court ...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)" Pet. at 12. Elsewhere, he urges that "the court ordered [sic] ruled that RCW 71.09.050(1) authorized PPG testing upon any request by an expert. CP 14 (Conclusion 2)" Pet. at 15. In addition, he argues that it is invalid because it was "entered without the required balancing of interests." Pet. at 19. Finally, Brennan argues that the defense stipulation, "which differs from the statutory language, arguably removed the judge's discretion." Pet. at 20.

argument to suggest that the superior court erred in relying on an order to which Brennan stipulated and at no point challenged. Relying on *Cowich Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) and RAP 10.3, the Court of Appeals correctly determined that it "need not address Brennan's argument." *Brennan*, 2015 WL 6441717 at *8.

Even if these arguments were considered, they fail, based as they are on misrepresentations both of the record and of the language of the statute.

Conclusion of Law No. 2, cited by Brennan, reads as follows:

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

CP at 14. RCW 71.09.050(1), in turn, reads as follows:

> 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.

Brennan's argument that the trial court's order differs in any discernable way from the clear language of the statute is without any basis in fact. Nor does Brennan cite any authority for the proposition that the language of

the stipulated order is required to be precisely the same as that of the statute.

Finally, Brennan's argument that the trial court failed to use discretion in its ruling ordering him to submit to physiological testing (Pet. at 9, 12), or did not engage in a "balancing of interests" (Pet. at 20) is without basis in fact. In forming her opinion that Brennan meets statutory criteria as an SVP, Dr. Phenix, in good faith, relied on numerous statements Brennan made to both her and another evaluator, Dr. Hupka, in which he had admitted to both assaults of and fantasies regarding children, as well as to his own fears that he would reoffend. *See infra* at 3. His statements regarding his sexual deviancy, his sexual offending, his sexual fantasies, his likelihood of reoffending, and every other fact that has bearing on his mental abnormality and risk for sexual re-offense was called into question when he claimed, to Dr. Abbott, that he had been lying during two different evaluations. It was Brennan's own statements about his sexual deviancy and his subsequent statements that he had lied to Dr. Phenix during her forensic examination that led Dr. Phenix to request the testing, stating that she had determined "that a sexual history polygraph as well as a penile plethysmograph test battery would be appropriate and useful to verify and/or clarify the sexual history previously reported by Mr. Brennan." SUPP CP at 16-18. Dr. Phenix, who

has significant expertise in the field of sex offender evaluations and risk assessments (SUPP CP at 15-16) and is well aware of the scientific literature that demonstrates an empirical link between physiological testing and paraphilic deviant arousal, testified that:

> [s]uch instruments for physiological assessment are commonly used and accepted within the sexual offender field for the assessment and treatment of sexual offenders and are endorsed as part of a comprehensive sexual offender evaluation by various agencies and sexual offender organizations.

SUPP CP at 18. Dr. Phenix further explained that:

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

SUPP CP at 17.

Given the evidence that was before it, the trial court properly exercised its discretion in finding that there was good cause to order a PPG. The trial court's order compelling Brennan to submit to physiological testing is consistent with controlling appellate authority, the statute and the Constitution. The trial court did not abuse its discretion when it found good cause to require Brennan to comply with the requested procedures and held him in contempt when he refused to comply.

B. Brennan's Counsel Was Not Ineffective For Agreeing To An Order That Tracked The Statutory Language

In the final paragraph of his Petition, Brennan briefly suggests that, "As Brennan argued in the Court of Appeals," the stipulated order that agreed to PPG testing "therefore constituted ineffective assistance..." Pet. at 20. Brennan's attempt to incorporate his briefing in the Court of Appeals should not be permitted and he should be deemed to have waived this issue. *U.S. West Communications, Inc., v. Washington Utilities,* 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997). While, in *U.S. West*, this Court was addressing a party's attempt to incorporate trial court briefing by reference, the same rule should apply here: RAP 13.4(f) limits petitions for review to 20 pages. Allowing a party "to expand the issues subject to appeal by reference" to briefing below "would render that Rule meaningless." *Id.* 134 Wn.2d at 112. Parties raising constitutional issues "must present considered arguments to this court" and "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)). Brennan's ineffective assistance argument contains neither legal authority nor citations to the record, and as such should not be considered by this Court.

Even if considered, his claim fails. To be successful on an ineffective assistance claim, the appellant in a sexually violent predator proceeding must establish not only that counsel's conduct fell below an objective standard of reasonableness, but must show as well that, but for counsel's error, there is a reasonable probability the outcome would have been different. *In re Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). On review there is a strong presumption that counsel's representation was effective. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This presumption will be rebutted only by a clear showing of incompetence. *State v. Varga,* 151 Wn.2d 179, 199, 86 P.3d 139 (2004). If trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim of ineffective assistance of counsel (*State v. Adams,* 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)) and it is the burden of the defendant to show there were no conceivable legitimate strategic or tactical reasons explaining counsel's performance. *McFarland,* 127 Wn.2d at 336.

Brennan cannot show that his counsel was ineffective for agreeing to a provision that is expressly included in the statute. Further, Brennan cannot make the showing that the outcome would have been different, either at the probable cause hearing if his attorney had not agreed to include the statutory language in the order, or later at the hearing on the

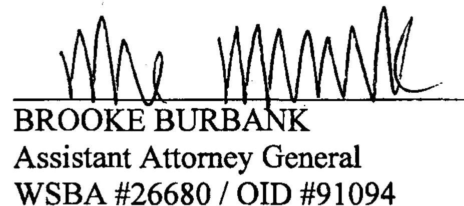
State's motion to compel a PPG after Brennan claimed to have lied to Dr. Phenix. The most obvious explanation for Brennan's counsel having agreed to include a provision that tracks the statute is that that is what the statute says. Brennan cannot show that the trial court would not have ordered the testing even if he had opposed inclusion of the contested language. The Court of Appeals correctly rejected this argument.

VI. CONCLUSION

Brennan has not demonstrated that this case merits review pursuant to RAP 13.4(b). The Court of Appeals correctly held that the trial court did not abuse its discretion when it ordered the plethysmograph requested by the State's expert after Brennan claimed he had lied about the extent of his sexual deviancy. Furthermore, it was not ineffective for his counsel to agree to an order that was explicitly permitted under the statute. For the foregoing reasons, the State respectfully requests that this Court deny review.

RESPECTFULLY SUBMITTED this 9th day of December, 2015.

ROBERT W. FERGUSON
Attorney General



BROOKE BURBANK
Assistant Attorney General
WSBA #26680 / OID #91094

SUPREME COURT NO. ________________

NO. 46524-8-II

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of: DUANE BRENNAN, Petitioner, v. STATE OF WASHINGTON, Respondent.	DECLARATION OF SERVICE

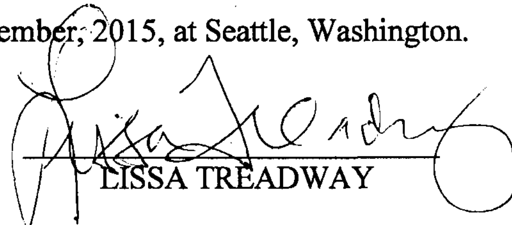
I, Lissa Treadway, hereby declare as follows:

On December 9, 2015, pursuant to the Electronic Service Agreement between the parties, I sent via electronic mail true and correct copies of Answer to Petition for Review and Declaration of Service, addressed as follows:

Jennifer Winkler
winklerJ@nwattorney.net
sloanej@nwattorney.net

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

DATED this 9th day of December, 2015, at Seattle, Washington.



LISSA TREADWAY

OFFICE RECEPTIONIST, CLERK

To: Treadway, Lissa (ATG)
Cc: Burbank, Brooke (ATG)
Subject: RE: In re the Detention of Duane Brennan, WSSC No. ___________ (COA 46524-8-II)

Received 12-9-15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Treadway, Lissa (ATG) [mailto:LissaT@ATG.WA.GOV]
Sent: Wednesday, December 09, 2015 1:26 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Burbank, Brooke (ATG) <BrookeB@ATG.WA.GOV>
Subject: In re the Detention of Duane Brennan, WSSC No. ___________ (COA 46524-8-II)

Good afternoon. I attach the following for filing in the referenced case. As of today ACORDS did not list a case number for Mr. Brennan's Petition for Review. The Court of Appeals Case No. is 46524-8-II.

- Answer to Petition for Review
- Declaration of Service

The attached is filed on behalf of:

AAG Brooke Burbank
WSBA #26680 / OID #91094
(206) 389-3017

Please do not hesitate to contact our office with any questions.

Lissa Treadway | Legal Assistant to AAGs Kristie Barham and Brooke Burbank
Office of The Attorney General |Criminal Justice Division
800 Fifth Avenue | Suite 2000 | Seattle WA 98104
206.389.3010 | LissaT@atg.wa.gov

NOTICE: This communication may contain privileged or other confidential information. If you know or believe that you have received it in error, please advise the sender by reply e-mail and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.