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STATE OF WASHINGTON
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NO. 94495-4

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

DONALD HERRICK,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

STATE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Donald Herrick seeks review of an April 2, 2017 decision by the Court of Appeals, *In re the Detention of Donald Herrick*, 198 Wn. App. 439, 393 P.3d 879 (2017). The decision affirmed the trial court's order compelling a penile plethysmograph (PPG) and related polygraph exam pursuant to RCW 71.09.050(1).[1]

In November 2010, the State filed the underlying Petition in this case which alleged that Donald Herrick is a "sexually violent predator" (SVP) as that term is defined by RCW Ch. 71.09. Specifically, that Petition alleged in part that Mr. Herrick has a mental abnormality that causes him serious difficulty controlling his sexually violent behavior, and makes it likely that Mr. Herrick will commit an additional crime of sexual violence if he is not confined to a secure facility.

The Petition was supported in part by a psychological evaluation conducted by Dr. Brian Judd, an expert retained by the State for purposes of this proceeding. In January 2011, Herrick stipulated to the existence of probable cause and agreed to undergo an additional evaluation by the State's expert, as was required by former RCW 71.09.040(4).[2] As part of that

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[1] Despite this order, Mr. Herrick continued to refuse to participate in the testing. He was found to be in contempt of court. He also appeals that order (Sup. Ct. No. 94522-5)

[2] While former RCW 71.09.040(4) required that, upon a finding of probable cause, the alleged SVP must "be transferred to the appropriate facility for an evaluation as to whether the person is a sexually violent predator." The statutory scheme was since amended, to clarify the prosecuting agency's "right to a current evaluation of the person by experts chosen by the state." RCW 71.09.050(1). As part of that evaluation, the trial 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." *Id.*

evaluation, Dr. Judd requested that Mr. Herrick undergo testing via penile plethysmograph (PPG) and a specific-issue polygraph designed to ensure the validity of the PPG result. Mr. Herrick declined to participate and the State brought the matter to the trial court, which ordered that he undergo the tests. Mr. Herrick appealed.

The order that Mr. Herrick participate in physiological testing comports with the Constitution and with the Sexually Violent Predator Statute. The request for testing came from a qualified expert who identified specific reasons for the testing request. The Court of Appeals' decision does not conflict with other appellate decisions, or present a question of substantial public interest. This Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES

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 issues would be presented:

A. After a finding that probable cause exists that a person meets SVP criteria, does the Constitution permit the trial court to compel the person to participate in physiological testing when requested by a qualified evaluator tasked with performing a required evaluation of the person?

B. Is the statutory provision that permits such physiological testing to be compelled unconstitutional as applied to Mr. Herrick?

III. COUNTERSTATEMENT OF THE CASE

As noted in the appellate decision below, the underlying facts are not in dispute. *In re Det. of Herrick*, 198 Wn. App. 439, 442-44,

393 P.3d 879, 881–83 (2017). In 1997, Mr. Herrick was convicted of rape in the first degree. With an accomplice, he broke into the home of L.Y. while she was sleeping and violently raped her. CP at 1070-71. After orally raping L.Y. and ejaculating in her mouth Mr. Herrick beat her into unconsciousness. *Id.* L.Y. suffered hearing loss, nerve damage and other injuries. *Id.* Mr. Herrick was released from incarceration for that offense on September 15, 2006. *Id.*

Three months after his release, Mr. Herrick stalked a 16-year-old he met on a city bus. CP at 1071-72. After exiting the bus, the victim, L.J., turned around and saw Mr. Herrick jump behind a tree, so she sought the assistance of a stranger, telling him that she thought she was being followed. CP at 1072. Believing she had safely reached her home, she went inside and undressed for a shower. *Id.* A short while later her father pulled into the driveway and saw Mr. Herrick looking through his daughter's window. *Id.* Mr. Herrick appeared to be trying to remove the window screen. *Id.* He fled but was apprehended and pled guilty to one count of voyeurism on June 28, 2007. *Id.* He was released from custody on September 23, 2008. *Id.*

Following this release, Mr. Herrick entered outpatient sexual deviancy treatment with Northwest Treatment Associates. In March 2009, as part of his treatment, he participated in PPG testing.

In February and June 2010, Mr. Herrick violated his conditions of community placement by engaging in stalking two different women. DOC filed a violation report and after a hearing Mr. Herrick was sanctioned

120 days confinement. CP at 1075. While he was incarcerated for those violations the State filed an SVP petition under chapter 71.09 RCW. CP at 1061-62.[3] The State filed an amended petition on February 15, 2013, alleging an additional recent overt act. CP at 251-52. The Petition was supported by evaluations of Herrick conducted by the State's expert, psychologist Brian Judd, Ph.D. *See* CP at 675-82, 1088-1115.

Prior to filing the petition, Dr. Judd, completed a clinical evaluation, based on a records review. He also attempted to interview Mr. Herrick, but Mr. Herrick declined. CP at 1088. Based on the available information, Dr. Judd concluded that Mr. Herrick met the diagnostic criteria for paraphilia not otherwise specified (nonconsent), alcohol abuse, cannabis abuse, voyeurism (provisional), and antisocial personality disorder. CP at 1105-10. Of these disorders, Dr. Judd determined that paraphilia not otherwise specified (nonconsent) met the criteria for abnormality as defined in chapter 71.09 RCW. *Id.* His opinion was based, in part, on Mr. Herrick's 2009 PPG testing, which demonstrated a preference for coercive sexuality, and actuarial testing, which predicted a high risk of recidivism. *Id.*

In January 2011, Herrick stipulated to the existence of probable cause and agreed to undergo an evaluation by the State's expert. CP at 1059-59. He was ordered to be held at the Special Commitment Center for custodial detention and evaluation. *Id.*

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[3] Herrick's opening brief in this appeal cites to the record in linked case No. 69993-8-I, Herrick's appeal of his contempt order, and the State will follow suit.

Dr. Judd thereafter completed an updated clinical evaluation that included an interview of Herrick and a records review. In April 2012, Dr. Judd provided an addendum, again opining that Herrick met the definition of an SVP, and again relying in part on the results of the 2009 PPG, which he characterized as detecting a clear arousal to humiliation rape of an adult female and rape of a female minor, despite apparent attempts to suppress arousal. CP at 675-682.

The 2009 testing suffered from what the testing agency described as "signs of manipulation and suppression of responses . . . across all categories" by Herrick. CP at 1106. Nevertheless, Herrick demonstrated significant arousal to scenes describing the rapes of an adult female and of a female child. *Id.* The clinician concluded of Herrick: "If he is not a full-blown rapist by now, he is on his way to developing that problem." *Id.* Despite that conclusion, the clinician deemed the testing results "inconclusive" due to Mr. Herrick's attempts to manipulate the outcome.

The SVP statutory scheme has always required that, upon a finding of probable cause, the alleged SVP must undergo an evaluation by an expert of the State's choosing. The statutory scheme was amended effective July 1, 2012, to clarify the prosecuting agency's "right to a current evaluation of the person by experts chosen by the state." RCW 71.09.050(1). Since July 2012 the statute has provided that, as part of that evaluation, the trial 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." *Id.*

Concerned about the possible invalidating effect of Herrick's efforts to manipulate and suppress his PPG testing, the State moved in December 2012 to compel updated PPG testing. CP 654-711. Also supporting the State's request was Mr. Herrick's attack on that testing by way of a report from one of his experts, opining that the 2009 PPG testing was inconclusive and that Dr. Judd improperly relied upon it. CP 688-94. The need for updated testing was also explained by Dr. Judd:

> Mr. Herrick has a history of apparently attempting to manipulate and suppress his arousal when assessed on the PPG and has previously made efforts to obtain information on how to dissimulate on the PPG. As such, I believe that independent verification of Mr. Herrick's participation in the PPG consistent with the examiner's instructions is necessary to ensure that Mr. Herrick does not use countermeasures to minimize deviant arousal during the PPG. This can be assessed through a post-PPG specific-issue polygraph administered immediately following the PPG.

CP at 686.

Dr. Judd's statement about Mr. Herrick's previous "efforts to obtain information on how to dissimulate on the PPG" referred to an August 2010 recorded jail phone call in which Mr. Herrick asked his girlfriend to research ways to "beat," "cheat," or "win" the PPG. CP at 701, 703-04; CP at 678, n.19.

On January 22, 2013, the trial court granted the State's motion to compel PPG and specific-issue polygraph testing. CP at 354. Mr. Herrick

moved for, and was ultimately granted discretionary review of the order. The Court of appeals affirmed the trial court.

IV. STANDARD OF REVIEW

Acceptance of review of a decision of the Court of Appeals is governed by RAP 13.4(b). Mr. Herrick alleges that the decision below conflicts with Supreme Court precedent and 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)(3) and (4)). However, he fails to 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.

V. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court Of Appeals' Interpretation of RCW 71.09.050(1) Does Not Create Any Constitutional Concerns.

Mr. Herrick argues that the Court of Appeals failed to address his claim that RCW 71.09.050(1) does not contain necessary constitutional protections. Consequently, he argues that the provision permitting a court to order physiological testing violates due process and his right to privacy, both on its face and as it was applied to him. Pet. at 6-8. He fails to specify whether he is raising a procedural or a substantive due process challenge.

These claims misinterpret the decision of the Court of Appeals to create a constitutional question that does not exist.

1. Standard of review.

Constitutional challenges are questions of law that are reviewed *de novo*. *State v. McCuistion*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012). This Court presumes the statute is constitutional and Mr. Herrick bears the burden of proving it unconstitutional beyond a reasonable doubt. *In re Det. of Bergen*, 146 Wn. App. 515, 524, 195 P.3d 529 (2008) (citing *In re Detention of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993)).

2. The Decision Below That RCW 71.09.050(1) Does Not Violate Substantive Due Process Is Consistent With Previous Decisions By This Court And The Court Of Appeals.

Mr. Herrick asserts that the statute violates sex offenders' right to privacy under the Washington Constitution, and presumably, substantive due process. His argument fails because the State's compelling interest in protecting society from sexual predators outweighs the limited privacy interests of those convicted of sexually violent offenses. The Court of Appeals understood that RCW 71.09.050 does not allow a court to order physiological testing "simply upon request" by the State, but rather only in cases where evidence establishes good cause for the test. *In re Herrick*, 198 Wn. App. At 447-8. Further review is not warranted.

a. It is settled that the community's grave public safety interests outweigh sex offenders' limited privacy Rights.

The Washington constitution places greater emphasis on privacy than the federal constitution, but the State can reasonably regulate privacy rights to protect the public. *In re Det. of Williams,* 163 Wn. App. 89, 97, 264 P.3d 570 (2011) (SVP evaluation under former RCW 71.09.040 did not violate appellant's privacy rights under Washington constitution, article I, section 7). Sex offenders have reduced privacy interests because they threaten the public safety. *Id.*; *In re Det. of Campbell,* 139 Wn.2d 341, 356, 986 P.2d 771 (1999) (noting the "truncated privacy interests of the convicted sex offender" in SVP proceedings).

In comparison, the public has "[g]rave public safety interests" that outweigh the "truncated" privacy interests of SVP respondents like Mr. Herrick. *Id.* The State's compelling interest in "both treating sex predators and protecting society from their actions," therefore, is "irrefutable." *Young*, 122 Wn.2d at 26.

b. Our courts have determined that the PPG is an accepted and routinely used diagnostic and treatment tool in Washington.

In Washington, "[PPG] testing is regarded as an effective method for diagnosing and treating sex offenders." *State v. Riles,* 135 Wn.2d 326, 343-44, 957 P.2d 655 (1998) (citing WAC 246-930-310(7)(c)), *abrogated on other grounds by State v. Sanchez Valencia,* 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). Using the PPG for diagnostic purposes – as intended here – can assist a jury in understanding a sexual deviancy diagnosis.

In re Detention of Halgren, 156 Wn.2d 795, 807, 132 P.3d 714 (2006) (*Halgren* II) (expert in SVP trial could rely on and testify about PPG data, which did not implicate *Frye* and was admissible under ER 702). *Frye v. United States,* 54 App. D.C. 46, 293 F. 1013 (1923). Its use is well-supported in the scientific literature.[4]

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[4] *See e.g.,* G Woodworth & J. Kadane, *Expert Testimony Supporting Post-Sentence Civil Incarceration of Violent Sexual Offenders*, 3 Law, Probability, & Risk 211, 229 (2004) ("The single best predictor [of risk] was phallometric assessment of deviant sexual preference."); M. Carter, K. Bumby & T. Talbot, *Promoting Offender Accountability and Community Safety through the Comprehensive Approach to Sex Offender Management*, 34 Seton Hall L.Rev. 1273, 1285 (2004) ("psychosexual assessments may incorporate the use of psychophysiological measures (e.g., penile plethysmography, viewing time) to assess objectively the presence of deviant sexual arousal, preference, and interest."); D. Doren, *Evaluating Sex Offenders* at 46 (2002) ("The potential utility of PPG results is in both the diagnostic and risk assessment portions of the evaluation. . . . [T]here seems significant reason to believe that deviant PPG results are meaningful when assessing the risk for sexual recidivism."); R. Hamill, *Recidivism of Sex Offenders: What You Need to Know*, 15 Criminal Justice 24, 29 (ABA 2001) (citing 1996 and 1998 studies by R. Hanson and M. Bussiere that showed "plethysmographic preference for children" as having the strongest predictive value among 21 factors for predicting sexual recidivism.); R. Schopp, M. Scalora & M. Pearce, *Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator after Hendricks*, 5 Psychology, Public Policy & Law 120, 135 (1999) ("Deviant sexual preferences, as measured through plethysmographic assessment, increase the probability of recidivism."); J. Bailey & A. Greenburg, *The Science and Ethics of Castration: Lessons from the Morse Case*, 92 Nw. U.L.Rev. 1225, 1226 (1998) ("Paraphilias can often be assessed via penile plethysmography."); G. Harris, M. Rice & V. Quinsey, *The Science in Phallometric Measurement of Male Sexual Interest*, 5 Current Directions in Psychological Science 156-160, 159 (1996) ("Phallometry is the best available scientific measure of men's sexual preferences. . . ."); R. Langevin & R.J. Watson, *Major Factors in the Assessment of Paraphilics and Sex Offenders, in Sex Offender Treatment: Biological Dysfunction, Intraphyschic Conflict, Interpersonal Violence* 42 (1996) ("plethysmography is one of the most reliable and valid physiological measures available. . . . [and is] in a league of its own."); W. Pithers & D. Laws, *Phallometric Assessment in the Sex Offender: Collections, Treatment and Legal Practice*, 12-2 (1995) ("[A]ny restrictions imposed on a specially trained clinician's ability to employ phallometry in assessing and treating sex offenders would be analogous to depriving a physician the right to obtain x-rays in cases of bone injuries." [internal citation omitted]); R. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predator Statute*, 15 U. Puget Sound L. Rev. 597, 610 (1992) (recommending plethysmography as part of the evaluation of sex offenders); and B. Maletzky, *Treating the Sexual Offender* at 31 (1991) ("erectile responses via the penile plethysmograph have assumed the leading if not definitive role in present-day assessment of deviant sexual arousal.").

Trial courts routinely order PPG testing as a sentencing condition in criminal cases, as a component of community sexual offender treatment. *Riles,* 135 Wn.2d at 352. The only prerequisite for compelling the testing is that it be requested by the person's treatment provider. *Id.* at 337; *State v. Johnson*, 184 Wn. App. 777, 780, 340 P.3d 230 (2014); *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013).

PPG testing, therefore, is appropriately ordered in an SVP proceeding as part of comprehensive evaluation. Just as in criminal sentencing, RCW 71.09.050(1) permits a trial court to order an SVP respondent, as part of his statutory evaluation, to participate in PPG testing "if requested by the evaluator[.]" To pursue its compelling interest in protecting the public, the State carries a heavy burden: It must prove beyond a reasonable doubt that Herrick *currently* suffers from a sexually deviant mental disorder. PPG results will provide important information about Mr. Herrick's mental state and "are routinely relied upon by mental health professionals in conducting sex offender and sexually violent predator evaluations[.]" CP 685. Any prejudice to Mr. Herrick in admitting the evidence at trial does not substantially outweigh its probative value. *Halgren II*, 156 Wn.2d at 807; ER 403.

c. The Court of Appeals applied well established precedent in holding RCW 71.09.050(1) satisfies substantive due process.

Substantive due process analysis "protects against certain government actions 'regardless of the fairness of the procedures used to implement them.'" *In re Bush*, 164 Wn.2d 697, 706, 193 P.3d 103 (2008)

(quoting *Daniels v. Williams,* 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)). SVP statutes satisfy substantive due process so long as they involve proper procedures, evidentiary standards and a finding of dangerousness that is linked to a mental disorder. *In re Detention of Post*, 145 Wn. App. 728, 754-55, 187 P.3d 803 (2008) (citing *Kansas v. Crane,* 534 U.S. 407, 409-10, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)).

Washington's SVP commitment scheme has repeatedly been found to satisfy substantive due process. *Young*, 122 Wn.2d at 36-39. It has also been upheld against specific challenges. *See, e.g., In re Detention of Berry*, 160 Wn. App. 374, 380-381, 248 P.3d 592 (2011) (noting *Young's* rejection of a substantive due process challenge to the same rape disorder with which Herrick is diagnosed); *State v. McCuistion*, 174 Wn.2d 369, 386, 275 P.3d 1092 (2012) (rejecting challenge to post-commitment release trial provisions); *Bergen*, 146 Wn. App. at 529 (2008) (rejecting challenge to less restrictive alternative release standards).

Here, the SVP statute grants discretion to trial courts to order a variety of testing, including PPG testing, but only as part of a comprehensive SVP evaluation, and only when the evaluator has requested it. RCW 71.09.050(1). It therefore goes no further than what is already accepted for sentencing conditions, where PPG testing can be compelled if requested by a treatment provider. *Riles,* 135 Wn.2d at 352; *Johnson*, 184 Wn. App. at 780; *Land*, 172 Wn. App. at 605. Trial courts cannot order the testing outside of an evaluation, or when it is not needed. It is an appropriate tool in SVP cases because its results are routinely relied upon

by mental health professionals, and it is recognized as effective for diagnosing sex offenders. CP 685; *Riles,* 135 Wn.2d at 343-44. It can assist a jury in understanding a diagnosis and its results are admissible under ER 703 and 705. *Halgren* II, 156 Wn.2d at 807.

The appellate court correctly held that Herrick failed to establish that RCW 71.09.050(1) violates his truncated right to privacy or substantive due process. This Court should affirm.

3. The Court of Appeals followed this Court's guidance when assessing Mr. Herrick's procedural due process claim.

Procedural due process is a flexible concept that is evaluated in the context within which it is applied. *In re Detention of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007) (citing *Mathews v. Eldridge,* 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). The *Mathews* test balances: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Id.*

Previous applications of the *Mathews* test in SVP cases have always resulted in a determination that the State's interests outweigh the respondent's. *Stout* applied the *Mathews* test to the denial of an SVP respondent's right to confront witnesses at trial or deposition. *Stout* concluded that, while the respondent's liberty interest was substantial, the other two factors favored the State. *Id.* at 370-71. A "comprehensive set of rights" exists in SVP cases that protect against erroneous deprivation of

liberty. *Id.* Stout held that, "given the myriad procedural safeguards surrounding an SVP trial, an SVP detainee does not have a due process right to confront witnesses at his or her commitment trial nor at depositions." *Id.* at 380-81. *See also In re Detention of Coe*, 175 Wn.2d 482, 510-11, 286 P.3d 29 (2012) (*Mathews* factors favor state where SVP expert testified about five victims who were never deposed).

Here, Mr. Herrick also has a substantial liberty interest, but as in *Stout* and *Coe*, the State's interest is greater. "[I]t is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions." *Young*, 122 Wn.2d at 26. The SVP statute provides Mr. Herrick with a "comprehensive set of rights" that protect him from erroneous deprivation of liberty. *Stout*, 159 Wn.2d at 370-71.

The procedure in RCW 71.09.050(1) for compelling PPG testing in SVP cases is, if anything, more stringent than it is for requiring the testing as part of a criminal sentence. In the latter cases, PPG testing can be compelled if requested by a sexual deviancy treatment provider. *Riles,* 135 Wn.2d at 352; *Johnson*, 184 Wn. App. at 780; *Land*, 172 Wn. App. at 605. But in SVP cases, the request comes from a highly qualified forensic psychologist. *See*, e.g., WAC 388-880-033 (rule establishing forensic evaluator qualifications); CP 1078-86 (curriculum vitae of Brian Judd, Ph.D.). Thus, it is probable that an SVP forensic expert who requests PPG testing will be more highly qualified than the community treatment therapist envisioned in cases like *Riles*, *Johnson* and *Land.*

The Court of Appeals recounted the reasons the testing was ordered: 1) The previous test was conducted before the SVP petition was filed and was done for treatment as opposed to evaluation purposes; 2) the record reflected efforts by Herrick to manipulate the PPG results; 3) *Halgren* II indicates that the expert there relied on the PPG in forming his diagnostic opinions; 4) Riles indicates that the PPG is an effective method for diagnosing sex offenders; 5) the statute provides for the testing; and 6) Dr. Judd, the State's expert, requested it as part of his evaluation. 1RP 26-30.

The trial court went further, providing additional protections to Mr. Herrick. The court ordered that Mr. Herrick could have two representatives present at the PPG testing and his counsel can make legal objections during the polygraph test, to protect his Fifth Amendment rights. CP 354. As in *Halgren* II, the PPG evidence would be admitted only under ER 703 and 705, to explain the bases of the experts' opinions. CP 354; 156 Wn.2d at 805-06. Mr. Herrick has been appointed his own PPG expert, in addition to his forensic psychologist. CP 688-94. The procedural protections in place are substantial and will guard against erroneous deprivation of Mr. Herrick's liberty. Under the *Mathews* test, RCW 71.09.050(1) does not violate Mr. Herrick's right to procedural due process on its face.

4. There is no constitutional question regarding the application of RCW 71.09.050(1) to Mr. Herrick.

Mr. Herrick also argues that appellate court should have found RCW 71.09.050 unconstitutional as applied. He offers no suggestion regarding how, instead claiming there was not enough "heightened scrutiny" of the testing request. "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." *State v. Hunley*, 175 Wn.2d 901, 916, 287 P.3d 584 (2012) (citing *City of Redmond v. Moore*, 151 Wn.2d 664, 668-9, 91 P.3d 875 (2004)). "Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated." *Id.*

Not only does Mr. Herrick's fail to identify with specificity how RCW 71.09.050 was unconstitutionally applied to him, but he also ignores his concession to the trial court that the State needed new PPG test data:

> To say that [the State] 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 13.

Further supporting Mr. Herrick's concession was his expert opinion evidence that the previous testing had "no clinical or predictive value in this

case." CP 693. Mr. Herrick's concession occurred in a contempt hearing held after the trial court had ordered PPG testing, but for waiver, invited error and judicial estoppel purposes the concession should be considered binding. The trial court relied on Mr. Herrick's concession when holding him in contempt: "Well, as you point out, the Petitioner needs the new PPG." 3RP 17.

In addition, Mr. Herrick does not challenge the trial court's findings of fact establishing that the State's evaluator is seeking "current information," that PPG testing is "is routinely relied upon by mental health professionals in conducting sexually violent predator evaluations for purposes of assessing sexual preferences and assessing risk," or that "based on the evidence before the Court, there is good cause to require Respondent to comply with the requested procedures." CP 353-54. Unchallenged findings of fact are verities on appeal. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 819, 828 P.2d 549 (1992). All of above are reasons why review of the Court of Appeals' decision is unwarranted here.

B. The Court Of Appeals Decision Is Consistent With Previous Decisions By This Court And The Court Of Appeals.

As he did below, Mr. Herrick relies heavily on *United States v. Weber,* 451 F.3d 552 (2006). *Weber* concerned a challenge to a federal sentence requiring PPG testing as a condition of supervised release. 451 F.3d at 555-56. However, *Weber* did not analyze a due process claim, it interpreted a federal sentencing statute: 18 U.S.C. § 3583. *Id.* at 557. *Weber* ultimately held that before a U.S. District Court could impose PPG

testing as a term of supervised release under § 3583, it had to determine whether the testing is necessary. *Id.* at 569-70. Significantly, *Weber* 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, unpublished Washington authority has distinguished *Weber* in the context of compelled PPG testing for SVP detainees. *In re Det. of Brennan*, 190 Wn. App. 1038 (2015), *review denied*, 185 Wn.2d 1021, 369 P.3d 500 (2016) (2015 WL 6441717).[5] In *Brennan*, the appellant challenged the constitutionality of the PPG order, rather than of the statute, but the analysis distinguishing *Weber* applies here. 2015 WL 6441717 at *2. *Brennan* concluded that:

> Brennan fails to provide authority requiring a court to make an individualized determination regarding the necessity of PPG testing in sexually violent predator civil commitment proceedings. Thus, *Weber* is not applicable to the circumstances in this case.

Id. at *3 (footnote omitted). The same is true here. Mr. Herrick fails to show why *Weber's* analysis of a federal sentencing statute requires Washington to grant him greater constitutional protections in an SVP proceeding than other convicted sex offenders. More importantly, he fails to show how the Court of Appeals' decision conflicts with *Weber*. It does not, and further review is unnecessary.

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[5] The State cites *Brennan* as persuasive authority pursuant to Amended GR 14.1, effective September 1, 2016, which now permits citation to unpublished Washington cases filed on or after March 1, 2013.

VI. CONCLUSION

The Court of Appeals properly construed RCW 71.09.050(1) as permitting a trial court to order physiological testing is when there is an evidence-based request for testing made by a qualified evaluator. The decision 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 day of July, 2017.

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NO. 94495-4

WASHINGTON STATE SUPREME COURT

In re the Detention of: DONALD HERRICK, Petitioner.	DECLARATION OF SERVICE

I, Kelly Hadsell, declare as follows:

On July 31, 2017, I sent via electronic mail and deposited in the United States mail true and correct cop(ies) of the State's Answer To Petition For Review and Declaration of Service, postage affixed, addressed as follows:

Suzanne Elliott suzanne-elliott@msn.com
705 Second Avenue, Suite 1300
Seattle, WA 98104-1797

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

DATED this 31st day of July, 2017, at Seattle, Washington.

Kelly Hadsell
KELLY HADSELL

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

July 31, 2017 - 12:09 PM

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