

FILED
SUPREME COURT
STATE OF WASHINGTON
11/20/2017 2:25 PM
BY SUSAN L. CARLSON
CLERK

NO. 94495-4
(Consolidated with 94522-5)

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Donald Herrick

STATE OF WASHINGTON,

Respondent,

v.

DONALD HERRICK,

Petitioner.

RESPONDENT'S SUPPLEMENTAL BRIEF

ROBERT W. FERGUSON
Attorney General

KRISTIE BARHAM
Assistant Attorney General
WSBA No. 32764 / OID No. 91094
Office of the Attorney General
800 Fifth Ave, Suite 2000
Seattle, WA 98104-3188
(206) 389-2004

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES PRESENTED FOR REVIEW.....	1
	A. Is the statute permitting PPG testing constitutional on its face in granting trial courts discretion to order PPG testing at the request of a qualified expert as part of a current, comprehensive evaluation after a finding of probable cause to believe the person is an SVP?.....	1
	B. Is the statute permitting PPG testing constitutional as applied to Herrick where the trial court found good cause to order the testing based on the facts of Herrick’s case?.....	1
	C. Where the statute granting a trial court discretion to order PPG testing is constitutional, did the trial court properly hold Herrick in contempt for refusing to comply with the order?	2
III.	STATEMENT OF THE CASE	2
IV.	ARGUMENT	5
	A. Standard of Review.....	5
	B. RCW 71.09.050(1) Satisfies Substantive Due Process Both on Its Face and As Applied to Herrick.....	5
	1. The State has a compelling interest in protecting society from sexual predators.....	5
	2. This Court has endorsed PPG testing as an effective method for diagnosing and treating sex offenders	7
	3. RCW 71.09.050(1) is constitutional on its face and is narrowly tailored to serve the State’s compelling interest in protecting society from sexual predators.....	9

4.	RCW 71.09.050(1) is constitutional as applied to Herrick.....	11
5.	Herrick’s reliance on <i>Weber</i> is misplaced	13
6.	Herrick’s reliance on Fourth Amendment search and seizure criminal cases has no applicability here.....	16
7.	The statute satisfies procedural due process.....	18
C.	The Statute Authorizing Physiological Testing is Constitutional and the Trial Court Properly Held Herrick in Contempt for Refusing to Comply with the Testing.....	19
V.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<i>Addington v. Texas</i> 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).....	5
<i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 91 P.3d 875 (2004).....	9, 11
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	18
<i>Deskins v. Waldt</i> , 81 Wn.2d 1, 499 P.2d 206 (1972).....	20
<i>In re Det. of Albrecht</i> , 147 Wn.2d 1, 51 P.3d 73 (2002).....	6
<i>In re Det. of Campbell</i> , 139 Wn.2d 341, 986 P.2d 771 (1999).....	5, 6
<i>In re Det. of Danforth</i> , 173 Wn.2d 59, 264 P.3d 783 (2011).....	5
<i>In re Det. of Halgren</i> , 156 Wn.2d 795, 132 P.3d 714 (2006).....	7, 12, 15
<i>In re Det. of Herrick</i> , 198 Wn. App. 439, 393 P.3d 879 (2017)	2, 10, 13
<i>In re Det. of Kistenmacher</i> , 163 Wn.2d 166, 178 P.3d 949 (2008).....	6
<i>In re Det. of Petersen</i> , 145 Wn.2d 789, 42 P.3d 952 (2002).....	7, 15
<i>In re Det. of Stout</i> , 159 Wn.2d 357, 150 P.3d 86 (2007).....	18, 19

<i>In re Det. of Williams</i> , 163 Wn. App. 89, 264 P.3d 570 (2011).....	6
<i>In re Young</i> , 122 Wn.2d 1, 857 P.2d 989 (1993).....	passim
<i>Kansas v. Crane</i> , 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).....	9
<i>King v. Dep't of Soc. & Health Servs.</i> , 110 Wn.2d 793, 756 P.2d 1303 (1988).....	20
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	18, 19
<i>Rochin v. California</i> , 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952).....	16, 17
<i>Schmerber v. California</i> , 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).....	16, 17
<i>State v. McCuiston</i> , 174 Wn.2d 369, 275 P.3d 1092 (2012).....	5, 9, 19
<i>State v. McKinnon</i> , 88 Wn.2d 75, 558 P.2d 781 (1977).....	17
<i>State v. Meacham</i> , 93 Wn.2d 735, 612 P.2d 795 (1980).....	6, 17
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998) <i>abrogated on other grounds by State v. Valencia</i> , 169 Wn.2d 782, 792, 239 P.3d 1059 (2010).....	7, 8, 12, 15
<i>State v. Ward</i> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	6
<i>United States v. Stoterau</i> , 524 F.3d 988, 1004-05 (9th Cir. 2008).....	14

United States v. Weber,
451 F.3d 552 (9th Cir. 2006) 13, 14, 15

Walrath v. United States,
830 F. Supp. 444 (N.D. Ill. 1993) 15

Statutes

RCW 71.09 6

RCW 71.09.010 6

RCW 71.09.050(1) passim

Other Authorities

ATSA, *Practice Guidelines for the Assessment, Treatment, and
Management of Male Adult Sexual Abusers* (2014) 8

WAC 246-930-310(7)(c) 8

WAC 388-880-033 10

Rules

RAP 13.7(b) 2

I. INTRODUCTION

The statute authorizing penile plethysmograph (PPG) testing in a sexually violent predator (SVP) proceeding at the request of a qualified expert as part of a current and comprehensive evaluation after probable cause comports with substantive due process. As a convicted sex offender, Donald Herrick has reduced privacy interests, and the statute is narrowly drawn to serve the State's compelling interest in both protecting society from sexual predators and treating their underlying disorders. The testing is permitted only after the court has found probable cause to believe the person is an SVP and only at the request of a qualified evaluator. The trial court found good cause to order the testing based on the facts of Herrick's case. The Court of Appeals correctly determined that the statute authorizing PPG testing is constitutional both on its face and as applied to Herrick. This Court should affirm.

II. ISSUES PRESENTED FOR REVIEW

- A. **Is the statute permitting PPG testing constitutional on its face in granting trial courts discretion to order PPG testing at the request of a qualified expert as part of a current, comprehensive evaluation after a finding of probable cause to believe the person is an SVP?**
- B. **Is the statute permitting PPG testing constitutional as applied to Herrick where the trial court found good cause to order the testing based on the facts of Herrick's case?**

- C. **Where the statute granting a trial court discretion to order PPG testing is constitutional, did the trial court properly hold Herrick in contempt for refusing to comply with the order?**¹

III. STATEMENT OF THE CASE

The underlying facts are not in dispute. *In re Det. of Herrick*, 198 Wn. App. 439, 442-44, 393 P.3d 879 (2017). In 1997, Herrick was convicted of rape in the first degree for breaking into L.Y.'s home and violently raping her. CP 1093-95. Herrick repeatedly beat L.Y., who lost consciousness during the attack and suffered permanent hearing loss and nerve damage. CP 271-72. Herrick was released from incarceration for this offense in September 2006, and within three months, he stalked a 16-year-old girl, following her home and attempting to enter her bedroom through a window. CP 1095-97. He pled guilty to voyeurism. CP 1096. In September 2008, Herrick was released to the community and participated in outpatient sexual deviancy treatment. CP 1097, 1103. As part of treatment, Herrick participated in PPG testing in March 2009. CP 272-76, 1106.

In November 2010, the State filed an SVP petition while Herrick was in custody for violating community placement conditions by engaging in stalking behavior. CP 1061-62, 1070-76, 251-52. The petition was based on an evaluation conducted by the State's expert, Dr. Brian Judd.

¹ As this Court reviews only questions raised in the petition, the State has not addressed issues Herrick waived. *See* RAP 13.7(b).

CP 1088-1115. Herrick refused to participate in an interview as part of the evaluation. CP 1088. Dr. Judd diagnosed Herrick with paraphilia not otherwise specified (nonconsent), alcohol abuse (by history), cannabis abuse, voyeurism (provisional), and antisocial personality disorder. CP 1105-10. Dr. Judd based the paraphilia diagnosis in part on the 2009 PPG, which showed paraphilic arousal. CP 1106-07. He concluded that the paraphilia diagnosis constitutes a mental abnormality. CP 1110.

Herrick showed signs of manipulation and suppression of responses throughout the 2009 PPG. CP 272-73, 1106. Nevertheless, Herrick demonstrated low but clinically significant arousal to audio recordings describing the rape of a female child and female adult. CP 276, 685, 1106. Although the PPG was deemed inconclusive due to Herrick's "significant manipulation and suppression," Dr. Judd opined that the PPG showed "clear evidence of paraphilic arousal to rape." CP 276, 1106, 1114. After evaluating Herrick's mental condition and dangerousness, Dr. Judd concluded that Herrick meets SVP criteria. CP 1105-15.

Herrick stipulated that there was probable cause to believe he is an SVP, and the court ordered him detained for an evaluation. CP 1058-60. Dr. Judd provided an updated evaluation, which included an interview of Herrick, and again concluded that Herrick meets SVP criteria. CP 675-82. After defense expert Stephen Jensen criticized Dr. Judd for relying on the

2009 PPG, Dr. Judd requested a new PPG in order to have current information about Herrick's arousal patterns and risk. CP 688-94, 684-86. Because Herrick has a history of manipulating and suppressing his arousal on the PPG, including prior efforts to obtain information on how to "cheat" or "beat" the PPG,² Dr. Judd requested a specific-issue polygraph to ascertain whether Herrick used any measures to interfere with the test. CP 685-86.

On January 22, 2013, the trial court entered an order compelling Herrick to comply with PPG and specific-issue polygraph testing. CP 353-55; 1/22/13 VRP at 13-47. On February 11, 2013, the trial court entered an order holding Herrick in contempt for refusing to comply with the testing. CP 296-98, 322-34. The trial court imposed a coercive sanction that Herrick's refusal would be admissible at trial and that other possible remedies would be considered at a future date. CP 296-98.³ This Court accepted review to address both the order compelling the physiological testing and the contempt order, and the cases were consolidated for review.⁴

² While incarcerated in 2010, Herrick asked his girlfriend to research ways to "beat," "cheat," and "win" the PPG. CP 678 n. 19, 701-04.

³ In finalizing the order, the State inadvertently crossed off the purge clause. This was subsequently corrected in an amended order. 8/25/14 VRP at 3; CP 1067-69.

⁴ Herrick's petition involving the order compelling testing is referred to as Pet. No. 1, and the petition involving the contempt order is referred to as Pet. No. 2.

IV. ARGUMENT

A. Standard of Review

Constitutional challenges are questions of law that are reviewed de novo. *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012). Statutes are presumed constitutional. The burden is on the challenger to prove the statute is unconstitutional beyond a reasonable doubt. *In re Det. of Danforth*, 173 Wn.2d 59, 70, 264 P.3d 783 (2011). Wherever possible, “it is the duty of this court to construe a statute so as to uphold its constitutionality.” *Id.*

B. RCW 71.09.050(1) Satisfies Substantive Due Process Both on Its Face and As Applied to Herrick

1. The State has a compelling interest in protecting society from sexual predators

Civil commitment involves a significant deprivation of liberty that requires due process protection. *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *McCuiston*, 174 Wn.2d at 387. When a state law impinges on a fundamental right, such as liberty, it is subject to strict scrutiny and is constitutional only if it furthers compelling state interests and is narrowly drawn to serve those interests. *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993), *superseded by statute on other grounds*; *In re Det. of Campbell*, 139 Wn.2d 341, 347, 986 P.2d 771 (1999). Applying the strict scrutiny test to the SVP statute as a whole, “it 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; *see also In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

The right to privacy is not absolute, and the State may reasonably regulate this right to protect society. *State v. Meacham*, 93 Wn.2d 735, 738, 612 P.2d 795 (1980); *In re Det. of Williams*, 163 Wn. App. 89, 97, 264 P.3d 570 (2011) (court-ordered SVP evaluation did not violate sex offender’s right to privacy). Sex offenders have reduced privacy interests because they threaten public safety. *Campbell*, 139 Wn.2d at 355; *State v. Ward*, 123 Wn.2d 488, 502, 869 P.2d 1062 (1994). This Court acknowledged the truncated privacy interests of convicted sex offenders in SVP proceedings:

Grave public safety interests are involved whenever a known sex offender’s tendency to recommit predatory sexual aggressiveness in the community is being evaluated. This substantial public safety interest outweighs the truncated privacy interests of the convicted sex offender.

Campbell, 139 Wn.2d at 355-56.

“The primary purpose of chapter 71.09 RCW is to protect the public.” *In re Det. of Kistenmacher*, 163 Wn.2d 166, 173, 178 P.3d 949 (2008) (citing RCW 71.09.010). Herrick has a reduced privacy interest as a convicted sex offender being evaluated for his likelihood to commit sexually violent offenses, and the State has a compelling interest in protecting the public from sexual predators. This Court has affirmed the importance of forensic evaluations in SVP proceedings because the mental disorders “involved with predatory

behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential.” *Young*, 122 Wn.2d at 52.

2. This Court has endorsed PPG testing as an effective method for diagnosing and treating sex offenders

Washington courts have endorsed the use of PPGs in general, and in SVP cases in particular. This Court found that “[PPG] testing is regarded as an effective method for diagnosing and treating sex offenders” and held that trial courts may require sex offenders to undergo PPG testing in treatment as a condition of release. *State v. Riles*, 135 Wn.2d 326, 343-45, 352, 957 P.2d 655 (1998) *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). In *Riles*, the Court noted that the conditions outlined in that statute appear “logically related” to protecting society. *Id.* at 341. Notably, the statute at issue in *Riles* did not include any “heightened constitutional limitations” that Herrick asks this Court to impose. This Court also held that the results of a PPG are admissible as part of an expert’s opinion in an SVP case and can be used for diagnostic purposes. *In re Det. of Halgren*, 156 Wn.2d 795, 807, 812, 132 P.3d 714 (2006); *see also In re Det. of Petersen*, 145 Wn.2d 789, 802, 42 P.3d 952 (2002) (SVP’s expert confirmed the positive effects of treatment using a PPG). PPGs are not subject to *Frye* because using the testing for diagnostic purposes is not novel. *Halgren*, 156 Wn.2d at 806-07. Challenges to its admissibility go to the weight of the evidence and not its admissibility. *Id.*

The standards of professional conduct for sex offender treatment providers approve of the use of PPG testing because it “may yield useful information regarding the sexual arousal patterns of sex offenders.” *Riles*, 135 Wn.2d at 344 (citing WAC 246-930-310(7)(c)). This Court recognized that imposing such testing as part of treatment is consistent with these standards, which provide that PPG data is only meaningful “within the context of a *comprehensive evaluation* and/or treatment process.” *Riles*, 135 Wn.2d at 345-46, 352 (emphasis added). Similarly, the use of PPGs as part of a sex offender evaluation is endorsed by the Association for the Treatment of Sexual Abusers (ATSA). See ATSA, *Practice Guidelines for the Assessment, Treatment, and Management of Male Adult Sexual Abusers* 26-28, 70-73 (2014).⁵ The ATSA guidelines indicate that research-supported assessment methods such as phallometry [PPGs] may be useful for obtaining objective behavioral data not readily established through other assessment means and for exploring the reliability of the person’s self-report. *Id.* at 26. The guidelines also indicate that PPG testing provides “objective information about male sexual arousal and is therefore useful for identifying atypical sexual interests[.]” *Id.* at 70. The State must prove beyond a reasonable doubt that Herrick is mentally ill and dangerous and PPG testing is specifically targeted to address

⁵ ATSA is an international, multidisciplinary organization that promotes research and effective practices regarding sex offenders. The ATSA Practice Guidelines provide the “current best practice” for assessing and treating sex offenders. ATSA Guidelines at 1.

these relevant and central issues at trial. The results of PPGs are routinely relied on by experts conducting SVP evaluations and provide relevant information about an offender's arousal patterns and risk. CP 684-86.

3. RCW 71.09.050(1) is constitutional on its face and is narrowly tailored to serve the State's compelling interest in protecting society from sexual predators

A facial challenge to a statute's constitutionality "must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied." *McCuiiston*, 174 Wn.2d at 389 (emphasis in original). "The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative." *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004).

If a statute implicates liberty interests, substantive due process claims are analyzed under a strict scrutiny test and the statute must be narrowly drawn to serve a compelling state interest. *Young*, 122 Wn.2d at 26. The United States Supreme Court has upheld SVP commitment statutes as satisfying substantive due process as long as they involve proper procedures and evidentiary standards and there is a finding of dangerousness linked to a mental disorder. *Kansas v. Crane*, 534 U.S. 407, 409-10, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). This Court has held that Washington's SVP commitment scheme satisfies substantive due process. *Young*, 122 Wn.2d at 26-42.

RCW 71.09.050(1) explicitly authorizes a trial court to order testing if requested by an evaluator. The statute states in relevant 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.

RCW 71.09.050(1). This statute is narrowly drawn to serve the State's compelling interest in treating sexual predators and protecting society from their actions. *See Young*, 122 Wn.2d at 26. First, testing is permitted only after the court finds probable cause to believe the person is an SVP. *See RCW 71.09.050(1)*. Second, as the Court of Appeals correctly noted, the statute does not give the State unfettered authority to order a PPG. *See Herrick*, 198 Wn. App. at 446-47. The trial court is not permitted to order a PPG unless specifically requested by an evaluator as part of a "current" evaluation. RCW 71.09.050(1). Further, the evaluator must have "demonstrated expertise in conducting evaluations of sex offenders, including diagnosis and assessment of reoffense risk" and expertise in providing expert testimony related to sex offenders. WAC 388-880-033. It is within the trial court's discretion to order testing based on the facts of the particular case. *See RCW 71.09.050(1)* (judge "may" require person to

complete any or all tests requested by evaluator). Herrick fails to show that RCW 71.09.050(1) is facially unconstitutional beyond a reasonable doubt.

4. RCW 71.09.050(1) is constitutional as applied to Herrick

Herrick also fails to show that RCW 71.09.050(1) is unconstitutional as applied to him. In an as-applied challenge, a party must prove that application of the statute in his specific context is unconstitutional. *Moore*, 151 Wn.2d at 668. “Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated.” *Id.* at 669.

The trial court ordered Herrick to participate in a PPG only after considering detailed information from the State’s expert, who requested the PPG in order to obtain the most current information possible about Herrick’s arousal patterns and risk. *See* CP 685-86. Dr. Judd’s reliance on the 2009 PPG, which was nearly four years old, was challenged by Herrick’s PPG expert who opined that the results were “non-interpretable” and had “no clinical or predictive value[.]” CP 685, 688-94. Although Herrick showed some deviant arousal during the 2009 PPG, the overall assessment was deemed inconclusive due to Herrick’s attempts to suppress his responses. CP 685. Herrick also subsequently sought information on how to “cheat” or “beat” a PPG. CP 678 n.19, 686, 701-04.

The trial court found several reasons for finding good cause to order PPG testing in Herrick's case: (1) the previous PPG was done before the SVP petition was filed and was for treatment purposes as opposed to evaluation purposes; (2) the record reflects efforts by Herrick to manipulate the previous PPG; (3) *Riles* indicates that PPGs are an effective method for diagnosing sex offenders; (4) *Halgren* allows an expert to rely on PPGs for diagnostic purposes; (5) the statute specifically allows a PPG if requested by an evaluator; and (6) the State's expert requested the PPG. 1/22/13 VRP at 26-30; CP 353-55. Even Herrick's counsel subsequently acknowledged the importance and necessity of the testing:

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 [State] to come to this conclusion, but we knew this pretty much upfront.

2/21/13 VRP at 13. The trial court acknowledged Herrick's concession by stating, "Well, as you point out, the Petitioner needs the new PPG."

2/21/13 VRP at 17. The trial court properly exercised its discretion in finding good cause to order the PPG. Herrick fails to meet his burden of showing that RCW 71.09.050(1) is unconstitutional as applied to him.

5. Herrick's reliance on *Weber* is misplaced

In rejecting Herrick's reliance on *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006), the Court of Appeals correctly noted that Herrick failed to demonstrate how *Weber*, which involves a challenge based on *statutory* grounds to a federal sentence requiring a PPG as a condition of release in a criminal case, is applicable to SVP civil commitment proceedings that explicitly authorize a PPG. *See Herrick*, 198 Wn. App. at 447-48. A statute involving supervised release conditions in a criminal case has no applicability to Herrick's case. In *Weber*, there was not a statute that explicitly authorized PPG testing. Rather, the statute granted trial courts discretion to impose crime-related release conditions as long as they met the *statutory* criteria of being "reasonably related" to the goals of supervised release and involving "no greater deprivation of liberty than is reasonably necessary" to meet those goals. *Weber*, 451 F.3d at 557-59. The Ninth Circuit found that before PPG testing could be ordered as a condition of release in a criminal case, the trial court must make an individualized determination on the record that the condition meets the *statutory* goals of being "reasonably related" to the goals of supervised release and involving "no greater deprivation of liberty than is reasonably necessary." *Id.* at 559-61, 566-70.

Weber does not analyze a constitutional challenge and does not address whether PPG testing as a condition of release violates substantive

due process. *See id.* at 563 n.14. Herrick cites no authority for his claim that the SVP statute authorizing PPG testing must incorporate explicit and heightened constitutional limitations in order to satisfy due process. The proper analysis is strict scrutiny. The statute satisfies strict scrutiny because it furthers the State's compelling interest in obtaining accurate diagnostic information for SVPs in order to protect the public and is narrowly tailored to serve that interest. *See Young*, 122 Wn.2d at 26.

The statutory analysis in *Weber* is inapplicable here. Nevertheless, even if Washington's SVP statute contained the same statutory provisions as the federal statute dealing with supervised release, those provisions were satisfied when the trial court engaged in a thorough analysis on the record and made an individualized determination that there was good cause to order the testing in Herrick's case. *See* 1/22/13 VRP at 26-30; CP 353-55. Although *Weber* discussed the possibility of less intrusive alternatives to PPG testing, that discussion was in the context of *releasing* sex offenders, rather than as part of an evaluation in a commitment proceeding. *See Weber*, 451 F.3d at 567-68. The Court recognized that self-reporting, polygraphs, and Abel testing⁶ may be useful after *Weber* is released. *See Weber*,

⁶ In Abel testing, the subject views slides of different ages and genders and is asked to rate their sexual attractiveness. Subjects are supposed to think they are being tested on their rating, but the critical portion of the test calculates how long the subject gazes at the slide. The reaction time is used to determine sexual interest in the categories of adults and children. *United States v. Stoterau*, 524 F.3d 988, 1004-05 (9th Cir. 2008).

451 F.3d at 567-68. In contrast, the court ordered a PPG for Herrick to further the goal of obtaining an accurate diagnosis upon which to base the commitment decision. In that context, the PPG serves a critical function. *See Halgren*, 156 Wn.2d at 807 (PPG is helpful in understanding an expert's diagnosis). "In an interview, a subject has control over his responses, whereas the [PPG] denies a patient the ability to disguise his reactions, but instead taps directly into involuntary responses." *Walrath v. United States*, 830 F. Supp. 444, 447 (N.D. Ill. 1993). Abel testing also presents problems with manipulation and would be invalidated as soon as the subject was given information about the test. These concerns are particularly significant for Herrick, who was previously caught trying to manipulate test results. *See* CP 276, 678 n. 19, 701-04.

Furthermore, this Court has recognized that PPG testing is an effective method for diagnosing sex offenders. *Riles*, 135 Wn.2d 343-44, 352. The State has an interest in *properly* identifying SVPs and pursuing commitment only against individuals who suffer from a mental abnormality. SVPs have used the results of PPG testing to show a decrease in their mental abnormality such that they are safe to be released. *See e.g.*, *Petersen*, 145 Wn.2d at 802. PPG testing is reasonably related to the goal of ensuring an accurate diagnosis. To the extent the test constitutes a deprivation, it is no greater than what is necessary.

6. Herrick's reliance on Fourth Amendment search and seizure criminal cases has no applicability here

Herrick argues that it is unclear why the Court of Appeals ignored his reliance on *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) and *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952); Pet. No. 1 at 10. Fourth Amendment warrantless search and seizure criminal cases involving forced medical procedures at the direction of police officers prior to probable cause have no applicability to Herrick's case. This Court should reject Herrick's attempt to analogize *court-ordered* testing, which measures physiological responses and is explicitly authorized by statute after probable cause, to invasive medical procedures ordered by police officers to search for evidence of a crime inside a person's body without statutory authority or a court order.

In *Schmerber*, a police officer directed a physician to withdraw blood from a driver's body to search for evidence of intoxication, despite the driver's objection and the lack of a warrant. *Schmerber*, 384 U.S. at 758-59. In upholding the search, the Court considered several factors applicable to "intrusions beyond the body's surface[.]" including whether there is a clear indication that the desired evidence will be found and whether the test used is reasonable and performed in a reasonable manner. *Id.* at 769-72. *Rochin* also addressed a search for evidence inside the body. *Rochin*, 342 U.S. at 166-67, 172. In searching for drugs, a police

officer directed a physician to force a tube into the suspect's stomach and extract the contents. *Id.* at 166, 172. The Court held that this conduct "shocks the conscience" and violates due process. *Id.* at 172-74.

In sharp contrast to the intrusions addressed in *Schmerber* and *Rochin*, a PPG does not intrude into the body. Further, PPG testing in SVP proceedings may be ordered only *after* a court finds probable cause to believe the person is an SVP. *See* RCW 71.09.050(1). This differs significantly from the criminal suspects in *Schmerber* and *Rochin*, where the police officers were searching for evidence in order to establish probable cause that a crime was committed. The trial court found good cause to order Herrick to undergo PPG testing, which is explicitly authorized by statute. *Schmerber's* analysis of a search for evidence of a crime done without a court order is inapplicable to PPG testing authorized by statute and court order. *See Meacham*, 93 Wn.2d at 736-39 (distinguishing *Rochin* and noting that orders requiring blood withdrawal for paternity testing were entered after full adversary hearings). Even if this Court applied the "reasonableness" requirements of *Schmerber*, the record indicates that the order requiring Herrick to undergo PPG testing is reasonable. The question of reasonableness involves balancing the government's interests with the individual's right to be free from intrusions. *State v. McKinnon*, 88 Wn.2d 75, 78-79, 558 P.2d 781 (1977).

7. The statute satisfies procedural due process

Herrick does not raise a challenge under procedural due process, and as such, he has waived that argument. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellant waives assignment of error for failing to present argument or citation of authority). Herrick's discussion of the "reasonableness" of the statute suggests a procedural due process analysis, which is subject to the three-part test in *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In determining whether particular SVP commitment procedures are consistent with due process, the court 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 State's interest, including the fiscal and administrative burdens that additional procedures would impose. *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). Applying this test demonstrates that the procedures governing expert evaluations are consistent with due process.

First, Herrick has reduced privacy interests and the State has a significant and compelling interest in protecting society from sexual predators. Herrick's truncated privacy interest is greatly outweighed by the other two *Mathews* factors, which weigh heavily in the State's favor. SVPs have a

“comprehensive set of rights” and “significant protections” that guard against the risk of an erroneous deprivation of liberty. *Stout*, 159 Wn.2d at 370-71; *McCouston*, 174 Wn.2d 392-94. The court ordered the PPG only after a finding of probable cause and only at the request of a qualified expert after a showing that the test was necessary for diagnostic purposes and that evaluators routinely rely on such testing in SVP cases. *See* CP 353-55, 665-73, 684-86. The trial court provided additional protections by ordering that Herrick could have two representatives present during the testing, including his attorney who was permitted to make legal objections. CP 354. The testing would be conducted in a reasonable manner by a qualified examiner who has a contract with the Special Commitment Center to perform the testing in an isolated, private room set aside solely for physiological testing. *See* CP 685-86. Further, Herrick was appointed a second expert to address PPG results. *See* CP 688-94. Finally, the State has a compelling interest in accurately diagnosing SVPs and protecting society from their actions. Under *Mathews*, RCW 71.09.050(1) satisfies due process.

C. The Statute Authorizing Physiological Testing is Constitutional and the Trial Court Properly Held Herrick in Contempt for Refusing to Comply with the Testing

Herrick does not challenge any aspect of the contempt order other than arguing that it should be rescinded if this Court finds the trial court’s order for PPG testing unconstitutional. *See* Pet. No. 2 at 2. The State agrees that there would be no basis to hold Herrick in contempt if this Court

determines that the statute authorizing the testing is unconstitutional. However, because the statute is constitutional both on its face and as applied to Herrick, the trial court properly held Herrick in contempt for refusing to comply with the order.

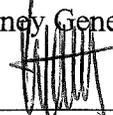
A party refusing to obey a lawful order, even if erroneous, is liable for contempt. *Deskens v. Waldt*, 81 Wn.2d 1, 5, 499 P.2d 206 (1972). An order is “lawful” if the court has jurisdiction over the parties and subject matter and authority to enter the order. *Id.* at 4-5. Contempt orders are reviewed for abuse of discretion. *King v. Dep’t of Soc. & Health Servs.*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). The trial court did not abuse its discretion by finding Herrick in contempt for refusing to comply with the physiological testing. Accordingly, if this Court holds that the statute authorizing the testing is constitutional and affirms, the contempt order should remain in effect.

V. CONCLUSION

The Court of Appeals correctly determined that the statute authorizing PPG testing is constitutional both on its face and as applied to Herrick. For the foregoing reasons, this Court should affirm.

RESPECTFULLY SUBMITTED this 20th day of November, 2017.

ROBERT W. FERGUSON
Attorney General



KRISTIE BARHAM, WSBA #32764
Assistant Attorney General

NO. 94495-4
Consolidated with 94522-5

WASHINGTON STATE SUPREME COURT

In re the Detention of:

DONALD HERRICK,

Petitioner.

DECLARATION OF
SERVICE

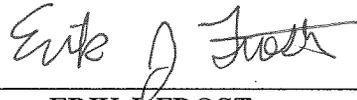
I, Erik J. Frost, declare as follows:

On November 20, 2017, I sent via electronic mail, per service agreement, true and correct copies of Respondent's Supplemental Brief and Declaration of Service, addressed as follows:

SUZANNE LEE ELLIOTT
suzanne-elliott@msn.com

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

DATED this 20th day of November, 2017, at Seattle, Washington.



ERIK J. FROST

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

November 20, 2017 - 2:25 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94495-4
Appellate Court Case Title: In re the Detention of: Donald Herrick
Superior Court Case Number: 10-2-00981-1

The following documents have been uploaded:

- 944954_Briefs_20171120140447SC556005_4555.pdf
This File Contains:
Briefs - Respondents Supplemental
The Original File Name was RespondentsSupplementalBrief.pdf

A copy of the uploaded files will be sent to:

- brookeb@atg.wa.gov
- suzanne-elliott@msn.com
- suzanne@suzanneelliottlaw.com

Comments:

Sender Name: Erik Frost - Email: erikf@atg.wa.gov

Filing on Behalf of: Kristie Barham - Email: kristieb@atg.wa.gov (Alternate Email: crjstvpef@ATG.WA.GOV)

Address:
800 Fifth Avenue
Suite 2000
Seattle, WA, 98104
Phone: (206) 464-6430

Note: The Filing Id is 20171120140447SC556005