

No. 69818-4-I
Linked with No. 69993-8-I

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

In re the Detention of Donald Herrick:

STATE OF WASHINGTON,

Respondent,

v.

DONALD HERRICK,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

- A. **Whether the provision in RCW 71.09.050(1) granting trial courts discretion to order plethysmograph testing as part of a comprehensive SVP evaluation violates privacy and substantive due process, where convicted sex offenders have a diminished right to privacy and the State has a compelling interest in protecting the public from them.**
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- C. **Whether SSB 6493, which among other things permitted trial courts to order plethysmograph testing for sexually violent predator evaluations if requested by the expert, satisfies Article II, section 19 of the Washington Constitution because its subdivisions have a rational unity with its general title.**

II. STATEMENT OF THE CASE

Herrick committed his first known sexual offense on April 24, 1997, when he was 21 years old. CP 1070-71. With an accomplice, he broke into the home of L.Y. while she was sleeping and violently raped her. *Id.* After orally raping L.Y. and ejaculating in her mouth, Herrick beat her into unconsciousness. *Id.* L.Y. suffered hearing loss, nerve damage and other injuries. *Id.* Herrick was convicted of first degree rape in Island County on October 23, 1997 and released from incarceration for that offense on September 15, 2006. *Id.*

Three months after his release and while under supervision by the Department of Corrections (DOC), Herrick stalked a 16-year-old girl he

met on a city bus. CP 1071-72. After exiting the bus, the victim, L.J., turned around and saw Herrick jump behind a tree, so she sought the assistance of a stranger, telling him that she thought she was being followed. CP 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 Herrick looking through his daughter's window. *Id.* 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.*

In 2009, while under DOC supervision, Herrick stalked a female employee of the Auburn branch of Work Source. CP 252.

In 2010, still under DOC supervision, Herrick stalked a woman from the Auburn Public Library on several occasions. CP 1074-75. The victim, M.M., reported that Herrick followed her in a car after she encountered him at the library. CP 1075. DOC filed a violation report and after a hearing Herrick was sanctioned 120 days confinement. *Id.* While he was incarcerated for those violations the State filed the sexually violent predator (SVP) petition.

The State filed its SVP petition in Island County on November 29, 2010. CP 1061-62.¹ The State filed an amended petition on February 15, 2013, alleging an additional recent overt act. CP 251-52. The Petition was supported by evaluations of Herrick conducted by Brian Judd, Ph.D. *See* CP 675-82, 1088-1115.

In reaching his diagnostic and risk assessment opinions, Dr. Judd had relied in part on penile plethysmograph (PPG) testing of Herrick conducted on March 5, 2009, by Northwest Treatment Associates (NTA). CP 1106. The PPG testing took place during Herrick's community sexual deviancy treatment. *Id.* The testing suffered from what NTA described as "signs of manipulation and suppression of responses . . . across all categories" by Herrick. *Id.* 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.*

Concerned about the possible invalidating effect of Herrick's efforts to manipulate and suppress his PPG testing, the State moved pretrial to compel updated PPG testing. CP 654-711. Also supporting the State's request was Herrick's attack on that testing by way of a report

¹ 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.

from one of his experts, opining that the 2009 PPG testing was inconclusive and that Dr. Judd improperly relied upon it. CP 688-94. Herrick filed a response opposing updated PPG testing to which the State replied. CP 361-565, 566-600.

The trial court heard oral argument on the State's motion to compel on January 22, 2013. 1RP 13-24.² The testing was permitted by RCW 71.09.050(1) "if requested by the evaluator," and the evaluator, Dr. Judd, had requested it. CP 684-86. The court ordered that Herrick comply with PPG testing and a specific-issue polygraph test, entering the Order Compelling Physiological Testing (PPG order). 1RP 28-31; CP 353-55. The polygraph testing was necessary to address whether Herrick had again manipulated or suppressed his responses to PPG testing, a concern made greater from an August 20, 2010, recorded King County Jail phone call in which Herrick asked his girlfriend to research ways to "beat," "cheat," or "win" the PPG. CP 701, 703-4.

Herrick's counsel notified the State that Herrick refused to comply with the PPG Order. CP 334. The State moved for a finding of contempt, to which Herrick responded. CP 306-19, 322-34. The trial court held a

² The verbatim reports of proceedings cited by the State are as follows: 1RP is the January 22, 2013 motions hearing; 2RP is the February 11, 2013 contempt hearing; 3RP is the February 21, 2013 remedies hearing; and 4RP is the August 25, 2014 motion hearing.

contempt hearing on February 11, 2013. 2RP. The court found Herrick in contempt and entered the Order on Petitioner's Motion to Hold Respondent in Contempt (Contempt Order). CP 296-98. The court denied the State's request to jail Herrick as a coercive sanction. 2RP 28. When the State lined out the language providing for a coercive jail remedy, it inadvertently crossed off the order's purge clause. CP 298. That error was corrected when this Court permitted the trial court to enter an Amended Order Holding Respondent in Contempt (Amended Contempt Order). CP 1067-69. The trial court ordered a coercive sanction: The fact of Herrick's contempt would be admissible at trial, with other possible remedies to be considered at a future date. CP 298, 1069.

The trial court held a hearing on other possible contempt remedies on February 21, 2013. Though on January 11, 2013, Herrick had opposed PPG testing, one month later his counsel conceded that it was necessary, admitting that to say it was "needed" was probably an "understatement:"

To say that Mr. Ross needs this PPG exam is probably an understatement that we've known since the filing of this case back in 2011. Because we knew right up front in the initial discovery that the 2009 PPG exam was an inconclusive exam that we believed was ultimately going to be invalid and not be relied upon.

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

3RP 13.

Herrick appealed the Contempt Order and that appeal is linked to this case (No. 69993-8-I). In the instant appeal he moved for discretionary review of the PPG Order; review was initially denied by a ruling dated October 2, 2013, but his motion to modify that ruling was eventually granted by this Court. *See* Order Lifting Stay and Granting Motion to Modify, July 30, 2015.

III. ARGUMENT

A. RCW 71.09.050(1) Is Constitutional On Its Face And As It Was Applied In This Case

Herrick challenges the constitutionality of RCW 71.09.050(1), arguing that it violates due process, both on its face and as it was applied to him. He fails to specify whether he is raising a procedural or a substantive due process challenge. 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.

1. 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). This Court presumes the statute is constitutional and 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 Det. of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993)).

2. The Statute Does Not Violate Substantive Due Process Because Convicted Sex Offenders have a Diminished Privacy Expectation and the State Has a Compelling Interest in Protecting the Public from Sexual Predators

a. 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 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. 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 Det. 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*³ and was admissible under ER 702). Its use is well-supported in the scientific literature.⁴

³ *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

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

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).

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. Deviant sexual interests can be interpreted as clear support for a paraphilic diagnosis. Likewise . . . there 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, Intrapsychic 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) (“Phallometry is an essential technology in the assessment and treatment of the sexual aggressor. . . . [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.”).

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 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 Herrick in admitting the evidence at trial does not substantially outweigh its probative value. *Halgren II*, 156 Wn.2d at 807; ER 403.

c. 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 Pers. Restraint of 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 Det. 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 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 Det. 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. McCuiston*, 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.

Herrick relies extensively 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. The appellant objected to PPG testing based on “*statutory grounds—that such testing is not reasonably related to the goals of supervised release.*” *Id.* at 563 n.14 (emphasis in original). *Weber* therefore 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. *Weber* “express[es] no opinion on the question whether requiring [PPG] testing as a condition of supervised release amounts to a substantive due process violation.” *Id.* 563 n.14. 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.

Persuasive, 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. 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.

Herrick also relies on a case where the imposition of PPG testing was found to be error in a dissolution case. *In re Marriage of Parker*, 91 Wn. App. 219, 957 P.2d 256 (1998). *Parker* held that an order requiring the father to undergo PPG testing violated his substantive due process rights. 91 Wn. App. at 221. But *Parker* turned on the fact that the

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.

father had never been convicted of a sexual offense, and contrasted his circumstances with those of convicted sex offenders who – like Herrick – have “liberty interests [that] have already been severely limited based on their proven criminal conduct[.]” *Id.* at 225-26. *Parker* supports the State’s argument because Herrick has been convicted of rape in the first degree. Consequently, and as this Court has previously held, *Parker* does not preclude the use of PPG data in SVP cases. *In re Det. of Halgren*, 124 Wn. App. 206, 224, 98 P.3d 1206 (2004) (*Halgren I*), *aff’d*, 156 Wn.2d 795, 132 P.3d 714 (2006).

Herrick has not established that RCW 71.09.050(1) violates his truncated right to privacy or substantive due process, on its face or as it was applied to him. The trial court’s order should be affirmed.

3. The Statute Satisfies Procedural Due Process

a. The Mathews Test Favors the State’s Interests over Herrick’s Interests in this SVP Case

Procedural due process is a flexible concept that is evaluated in the context within which it is applied. *In re Det. 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 Det. 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, 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 Herrick with a "comprehensive set of rights" protects Herrick from erroneous deprivation of liberty. *Stout*, 159 Wn.2d at 370-71.

b. Herrick Conceded the Necessity for PPG Testing in the Trial Court

Herrick argues that the statute fails the second part of the Mathews test because RCW 71.09.050(1) has insufficient safeguards – a request by the evaluator – against unnecessary PPG testing. But he cannot make this argument now because the doctrines of waiver, invited error, and/or judicial estoppel prevent him from raising it. In the trial court, Herrick conceded that the State needed new PPG test data:

To say that Mr. Ross needs this PPG exam is probably an understatement that we've known since the filing of this case back in 2011. Because we knew right up front in the initial discovery that the 2009 PPG exam was an inconclusive exam that we believed was ultimately going to be invalid and not be relied upon.

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

3RP 13. Further supporting Herrick's concession was his expert opinion evidence that the previous testing had "no clinical or predictive value in this case." CP 693. 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 Herrick's concession when holding Herrick in contempt: "Well, as you point out, the Petitioner needs the new PPG." 3RP 17.

The doctrine of waiver applies where a person concedes an issue in the trial court, but then attempts to raise it on appeal. *State v. Nitsch*, 100 Wn. App. 512, 522, 997 P.2d 1000 (2000). Here, Herrick conceded the necessity of the testing and should not be permitted to argue on appeal that the statute allowed the court to order unnecessary testing.

Judicial estoppel “prevents a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position in another court proceeding. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). Three factors guide a court in deciding whether to apply the judicial estoppel: (1) whether a party’s later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) (internal quotation marks and citation omitted).

Here, Herrick conceded in the trial court that the State needed additional PPG testing and now asserts that the State evaluator’s request is an insufficient basis for finding the testing to be necessary. His dual arguments are entirely inconsistent, and allowing Herrick to take

inconsistent positions in the trial and appellate courts would give him an unfair advantage in the SVP litigation. Therefore, his argument in this court should be judicially estopped.

Alternatively, if the trial court erred, its error was invited. The doctrine of invited error prohibits a party from facilitating an error in the trial court and then raising it on appeal. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999). The trial court here clearly relied on Herrick's concession: "Well, as you point out, the Petitioner needs the new PPG." 3RP 17. Because Herrick conceded the necessity of PPG testing, he invited any error committed by the trial court.

Lastly, 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).

The following Findings of Fact are therefore verities on appeal:

2. The forensic evaluator who is conducting the RCW 71.09.050 evaluation, Dr. Brian Judd, has requested plethysmograph and specific-issue polygraph testing of Respondent in order to obtain current information for his evaluation.

3. The information requested by Dr. Judd is routinely relied upon by mental health professionals in conducting sexually violent predator evaluations for purposes of assessing sexual preferences and assessing risk and, based on the evidence before the Court, there is good cause to require Respondent to comply with the requested procedures.

CP 353-54. These findings further undermine Herrick's arguments on appeal.

c. The Procedures and Protections Inherent in RCW 71.09 are Constitutionally Sufficient

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 trial court here explained its reasons for ordering the testing:

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 Herrick. The court ordered that 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 719. 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 Herrick's

liberty. Under the *Mathews* test, RCW 71.09.050(1) does not violate Herrick’s right to procedural due process, on its face or as it was applied.

B. SSB 6493 Did Not Violate Article II, Section 19 of the Washington Constitution

Herrick argues that RCW 71.09.050 was unconstitutionally amended by SSB 6493 (attached as App. 1) because the bill violated Article II, Section 19 of the Washington Constitution, which provides: “No bill shall embrace more than one subject, and that shall be expressed in the title.” App. Opening Brf. at 22. His argument should be rejected because SSB 6493 embraced a single subject – sexually violent predator civil commitment cases – and each of its sections has a rational unity to the bill’s title and to the other sections.

1. Standard of Review

Challenges to the constitutionality of legislation are reviewed *de novo*. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 389, 143 P.3d 776 (2006). A reviewing court construes Article II, Section 19 liberally in favor of upholding legislation. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 249, 88 P.3d 375 (2004). The court presumes the bill is constitutional, and Herrick bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt. *Pierce Cty. v. State*, 144 Wn. App. 783, 819, 185 P.3d 594 (2008), *as amended on denial of*

reconsideration (July 15, 2008) (citing *Pierce County v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003)).

2. SSB 6493 Embraced the Single Subject of Sexually Violent Predator Civil Commitment Cases and Each of Its Sections has a Rational Unity to the Bill’s Title and to the Other Sections

The Washington Constitution, Article II, Section 19 contains two parts. First, a bill may not embrace more than one subject, the “single subject rule.” Second, the subject of every bill shall be expressed in its title – the “subject-in-title rule.” Herrick argues that SSB 6493 violated the “single subject rule.”

The purpose of the single subject rule is “to prevent grouping of incompatible measures as well as the pushing through of unpopular legislation by attaching it to popular or necessary legislation.” *Wash. Ass’n of Neighborhood Stores v. State*, 149 Wn.2d 359, 368, 70 P.3d 920 (2003). Herrick asserts that the single subject rule “is violated whenever the *potential* for logrolling is established.” App. Opening Brf. at 23 (emphasis added). However, while a party is not required to establish *actual* logrolling, the case Herrick relies on did not hold that statutes are invalidated by the mere *possibility* of logrolling. See *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 212 n.5, 11 P.3d 762 (2000), *as amended* (Nov. 27, 2000), *opinion corrected*, 27 P.3d 608 (2001).

Such a standard would be contrary to the presumption of constitutionality, as well as the requirement that bill titles and Article II, Section 19 be liberally construed to uphold, rather than overturn, statutes.

The first step is to determine whether the ballot title is general or restrictive. *Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001). “A general title is broad, comprehensive, and generic as opposed to a restrictive title that is specific and narrow.” *Id.* The title of SSB 6493 is general: “An act relating to sexually violent predator cases.” Legislation bearing a general title is constitutional “even if the general subject contains several incidental subjects or subdivisions. . . . All that is required is that there be some ‘rational unity’ between the general subject and the incidental subdivisions.” *State v. Broadaway*, 133 Wn.2d 118, 126-27, 942 P.2d 363 (1997) (internal quotation marks omitted) (quoting *State v. Grisby*, 97 Wn.2d 493, 498, 647 P.2d 6 (1982)).

One way to satisfy the rational unity test is to examine “whether the matters within the body of the initiative are germane to the general title and whether they are germane to one another.” *Burien*, 144 Wn.2d at 826. Washington courts have never favored a narrow construction of the term “subject” as used in Article II, Section 19. *State v. Waggoner*, 80 Wn.2d 7, 9, 490 P.2d 1308 (1971). A bill may properly contain one broad subject embracing many provisions without violating the single subject rule. *Id.*

Even “matters which ordinarily would not be thought to have any common features or characteristics might, for purposes of legislative treatment, be grouped together and treated as one subject.” *Amalgamated*, 142 Wn.2d at 209-210 (quoting *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 33, 377 P.2d 466 (1962)). Here, SSB 6493 addresses several subtopics, but they all relate to the subject of sexually violent predator civil commitment cases and to each other.

Herrick claims that amendment to RCW 71.09.050 (granting discretion to trial courts to order evaluation procedures) is unrelated to the other provisions of the bill. He is incorrect. SSB 6493 transferred financial responsibility for SVP evaluations from the Department of Social and Health Services (DSHS) to the prosecuting agencies and the Office of Public Defense (OPD) and, at the same time, removed DSHS rule-making authority over evaluators and evaluation procedures. Thus, it was necessary to transfer discretion about the components of the evaluations to the trial courts.

The amendments to RCW 71.09.040(4) and .050 demonstrate this necessary transfer of authority. Former RCW 71.09.040(4) (2010) (attached as App. 2) granted rule-making authority to DSHS to determine the evaluation procedures. DSHS then promulgated rules regarding evaluator qualifications (WAC 388-880-033, attached as App. 3) and rules

governing conduct and procedures of commitment evaluations (WAC 388-880-034, attached as App. 4). The agency articulated the information and testing that the evaluator should consider, according to what he or she “deems necessary.” App. 4 at WAC 388-880-034(2). The rules allowed that the evaluator could deem necessary a review of PPG testing. App. 4 at WAC 388-880-034(2), -034(2)(e)). The agency even provided for possible contempt proceedings in the event an alleged SVP refused to cooperate with “physiological testing,” i.e., PPG testing. WAC 388-880-035 (attached as App. 5).

DSHS formerly funded the evaluations for both the State and the Respondent’s counsel (*see* App. 2 at former RCW 71.09.050(1), .050(2)). When SSB 6493 transferred financial authority for defense costs to OPD, it amended RCW 71.09.040(4) to remove DSHS rule-making authority over evaluations. It also amended RCW 71.09.050(1) to substitute the “prosecuting agency” as the funding agency, replacing DSHS. To compensate for the fact that DSHS rules would no longer govern evaluations, SSB 6493 gave trial courts the discretion to determine the evaluation’s components, based on the procedures requested by the evaluator. RCW 71.09.050(1).

The provision Herrick challenges, therefore, is part and parcel of the transfer of authority from DSHS to OPD and the prosecuting agency,

and therefore has ‘rational unity’ with the general subject of “sexually violent predator civil commitment cases.” *Broadaway*, 133 Wn.2d at 126-27. Herrick has not shown, beyond a reasonable doubt, that SSB 6493 violates Article II, Section 19 of the Washington Constitution.

Herrick also relies on *In re Det. of Hawkins*, 169 Wn.2d 796, 238 P.3d 1175 (2010). *Hawkins* held that the legislature could not have intended to include polygraph examinations in the mandatory evaluation under former RCW 71.09.040(4) without explicitly saying so. 169 Wn.2d at 802-3. But *Hawkins* did not address PPG testing and left the door open to that and other procedures. *Id.* at 803-4 (“This conclusion, as the foregoing analysis makes clear, applies only to polygraph examinations; the failure of the statute to enumerate other methods of conducting an examination does not necessarily preclude their use.”). In any event, amended RCW 71.09.050(1) indisputably shows that the legislature very much intended to make polygraph and other types of testing available to evaluators.

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IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the order requiring Herrick to take part in updated PPG testing.

RESPECTFULLY SUBMITTED this 31st day of October, 2016.

ROBERT W. FERGUSON
Attorney General



MALCOLM ROSS, WSBA #22883
Senior Counsel
Attorneys for Respondent

APPENDIX 1

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 6493

62nd Legislature
2012 Regular Session

Passed by the Senate March 7, 2012
YEAS 49 NAYS 0

President of the Senate

Passed by the House March 6, 2012
YEAS 93 NAYS 0

Speaker of the House of Representatives

Approved

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 6493** as passed by the Senate and the House of Representatives on the dates hereon set forth.

Secretary

FILED

**Secretary of State
State of Washington**

SUBSTITUTE SENATE BILL 6493

AS AMENDED BY THE HOUSE

Passed Legislature - 2012 Regular Session

State of Washington

62nd Legislature

2012 Regular Session

By Senate Human Services & Corrections (originally sponsored by Senators Regala, Hargrove, Stevens, Harper, Kline, Carrell, and Shin)

READ FIRST TIME 02/03/12.

1 AN ACT Relating to sexually violent predator civil commitment
2 cases; amending RCW 2.70.020, 71.09.040, 71.09.050, 71.09.080,
3 71.09.090, 71.09.110, 71.09.120, and 71.09.140; adding a new section to
4 chapter 2.70 RCW; adding new sections to chapter 71.09 RCW; creating
5 new sections; and providing an effective date.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Sec. 1.** RCW 2.70.020 and 2008 c 313 s 4 are each amended to read
8 as follows:

9 The director shall:

10 (1) Administer all state-funded services in the following program
11 areas:

12 (a) Trial court criminal indigent defense, as provided in chapter
13 10.101 RCW;

14 (b) Appellate indigent defense, as provided in this chapter;

15 (c) Representation of indigent parents qualified for appointed
16 counsel in dependency and termination cases, as provided in RCW
17 13.34.090 and 13.34.092;

18 (d) Extraordinary criminal justice cost petitions, as provided in
19 RCW 43.330.190;

1 (e) Compilation of copies of DNA test requests by persons convicted
2 of felonies, as provided in RCW 10.73.170;

3 (f) Representation of indigent respondents qualified for appointed
4 counsel in sexually violent predator civil commitment cases, as
5 provided in chapter 71.09 RCW;

6 (2) Submit a biennial budget for all costs related to the office's
7 program areas;

8 (3) Establish administrative procedures, standards, and guidelines
9 for the office's program areas, including cost-efficient systems that
10 provide for authorized recovery of costs;

11 (4) Provide oversight and technical assistance to ensure the
12 effective and efficient delivery of services in the office's program
13 areas;

14 (5) Recommend criteria and standards for determining and verifying
15 indigency. In recommending criteria for determining indigency, the
16 director shall compile and review the indigency standards used by other
17 state agencies and shall periodically submit the compilation and report
18 to the legislature on the appropriateness and consistency of such
19 standards;

20 (6) Collect information regarding indigent defense services funded
21 by the state and report annually to the advisory committee, the
22 legislature, and the supreme court;

23 (7) Coordinate with the supreme court and the judges of each
24 division of the court of appeals to determine how appellate attorney
25 services should be provided.

26 The office of public defense shall not provide direct
27 representation of clients.

28 NEW SECTION. Sec. 2. A new section is added to chapter 2.70 RCW
29 to read as follows:

30 In providing indigent defense services for sexually violent
31 predator civil commitment cases under chapter 71.09 RCW, the director
32 shall:

33 (1) In accordance with state contracting laws, contract with
34 persons admitted to practice law in this state and organizations
35 employing persons admitted to practice law in this state for the
36 provision of legal services to indigent persons;

1 (2) Establish annual contract fees for defense legal services
2 within amounts appropriated based on court rules and court orders;

3 (3) Ensure an indigent person qualified for appointed counsel has
4 one contracted counsel appointed to assist him or her. Upon a showing
5 of good cause, the court may order additional counsel;

6 (4) Consistent with court rules and court orders, establish
7 procedures for the reimbursement of expert witness and other
8 professional and investigative costs;

9 (5) Review and analyze existing caseload standards and make
10 recommendations for updating caseload standards as appropriate;

11 (6) Annually, with the first report due December 1, 2013, submit a
12 report to the chief justice of the supreme court, the governor, and the
13 legislature, with all pertinent data on the operation of indigent
14 defense services for commitment proceedings under this section,
15 including:

16 (a) Recommended levels of appropriation to maintain adequate
17 indigent defense services to the extent constitutionally required;

18 (b) The time to trial for all commitment trial proceedings
19 including a list of the number of continuances granted, the party that
20 requested the continuance, the county where the proceeding is being
21 heard, and, if available, the reason the continuance was granted;

22 (c) Recommendations for policy changes, including changes in
23 statutes and changes in court rules, which may be appropriate for the
24 improvement of sexually violent predator civil commitment proceedings.

25 NEW SECTION. **Sec. 3.** (1) All powers, duties, and functions of the
26 department of social and health services and the special commitment
27 center pertaining to indigent defense under chapter 71.09 RCW are
28 transferred to the office of public defense.

29 (2)(a) The office of public defense may request any written
30 materials in the possession of the department of social and health
31 services and the special commitment center pertaining to the powers,
32 functions, and duties transferred, which shall be delivered to the
33 custody of the office of public defense. Materials may be transferred
34 electronically and/or in hard copy, as agreed by the agencies. All
35 funds, credits, or other assets held in connection with the powers,
36 functions, and duties transferred shall be assigned to the office of
37 public defense.

1 (b) Any appropriations made to the department of social and health
2 services for carrying out the powers, functions, and duties transferred
3 shall, on July 1, 2012, be transferred and credited to the office of
4 public defense.

5 (3) Notwithstanding the effective date of this section, if
6 implementation of office of public defense contracts would result in
7 the substitution of counsel within one hundred eighty days of a
8 scheduled trial date, the director of the office of public defense may
9 continue defense services with existing counsel to facilitate
10 continuity of effective representation and avoid further continuance of
11 a trial. When existing counsel is maintained, payment to complete the
12 trial shall be prorated based on standard contract fees established by
13 the office of public defense under section 2 of this act and, at the
14 director's discretion, may include extraordinary compensation based on
15 attorney documentation.

16 **Sec. 4.** RCW 71.09.040 and 2009 c 409 s 4 are each amended to read
17 as follows:

18 (1) Upon the filing of a petition under RCW 71.09.030, the judge
19 shall determine whether probable cause exists to believe that the
20 person named in the petition is a sexually violent predator. If such
21 determination is made the judge shall direct that the person be taken
22 into custody and notify the office of public defense of the potential
23 need for representation.

24 (2) Within seventy-two hours after a person is taken into custody
25 pursuant to subsection (1) of this section, the court shall provide the
26 person with notice of, and an opportunity to appear in person at, a
27 hearing to contest probable cause as to whether the person is a
28 sexually violent predator. In order to assist the person at the
29 hearing, within twenty-four hours of service of the petition, the
30 prosecuting agency shall provide to the person or his or her counsel a
31 copy of all materials provided to the prosecuting agency by the
32 referring agency pursuant to RCW 71.09.025, or obtained by the
33 prosecuting agency pursuant to RCW 71.09.025(1) (c) and (d). At this
34 hearing, the court shall (a) verify the person's identity, and (b)
35 determine whether probable cause exists to believe that the person is
36 a sexually violent predator. At the probable cause hearing, the state
37 may rely upon the petition and certification for determination of

1 probable cause filed pursuant to RCW 71.09.030. The state may
2 supplement this with additional documentary evidence or live testimony.
3 The person may be held in total confinement at the county jail until
4 the trial court renders a decision after the conclusion of the seventy-
5 two hour probable cause hearing. The county shall be entitled to
6 reimbursement for the cost of housing and transporting the person
7 pursuant to rules adopted by the secretary.

8 (3) At the probable cause hearing, the person shall have the
9 following rights in addition to the rights previously specified: (a)
10 To be represented by counsel, and if the person is indigent as defined
11 in RCW 10.101.010, to have office of public defense contracted counsel
12 appointed as provided in RCW 10.101.020; (b) to present evidence on his
13 or her behalf; (c) to cross-examine witnesses who testify against him
14 or her; (d) to view and copy all petitions and reports in the court
15 file. The court must permit a witness called by either party to
16 testify by telephone. Because this is a special proceeding, discovery
17 pursuant to the civil rules shall not occur until after the hearing has
18 been held and the court has issued its decision.

19 (4) If the probable cause determination is made, the judge shall
20 direct that the person be transferred to ~~((an appropriate facility for~~
21 ~~an evaluation as to whether the person is a sexually violent predator.~~
22 ~~The evaluation shall be conducted by a person deemed to be~~
23 ~~professionally qualified to conduct such an examination pursuant to~~
24 ~~rules developed by the department of social and health services. In~~
25 ~~adopting such rules, the department of social and health services shall~~
26 ~~consult with the department of health and the department of~~
27 ~~corrections)) the custody of the department of social and health
28 services for placement in a total confinement facility operated by the
29 department. In no event shall the person be released from confinement
30 prior to trial. ~~((A witness called by either party shall be permitted~~
31 ~~to testify by telephone.))~~~~

32 **Sec. 5.** RCW 71.09.050 and 2010 1st sp.s. c 28 s 1 are each amended
33 to read as follows:

34 (1) Within forty-five days after the completion of any hearing held
35 pursuant to RCW 71.09.040, the court shall conduct a trial to determine
36 whether the person is a sexually violent predator. The trial may be
37 continued upon the request of either party and a showing of good cause,

1 or by the court on its own motion in the due administration of justice,
2 and when the respondent will not be substantially prejudiced. ((The
3 department is responsible for the cost of one expert or professional
4 person to conduct an evaluation on the prosecuting agency's behalf.))
5 The prosecuting agency shall have a right to a current evaluation of
6 the person by experts chosen by the state. The judge may require the
7 person to complete any or all of the following procedures or tests if
8 requested by the evaluator: (a) A clinical interview; (b)
9 psychological testing; (c) plethysmograph testing; and (d) polygraph
10 testing. The judge may order the person to complete any other
11 procedures and tests relevant to the evaluation. The state is
12 responsible for the costs of the evaluation. At all stages of the
13 proceedings under this chapter, any person subject to this chapter
14 shall be entitled to the assistance of counsel, and if the person is
15 indigent as defined in RCW 10.101.010, the court, as provided in RCW
16 10.101.020, shall appoint office of public defense contracted counsel
17 to assist him or her. The person shall be confined in a secure
18 facility for the duration of the trial.

19 (2) Whenever any indigent person is subjected to an evaluation
20 under this chapter, the ((department)) office of public defense is
21 responsible for the cost of one expert or professional person to
22 conduct an evaluation on the person's behalf. When the person wishes
23 to be evaluated by a qualified expert or professional person of his or
24 her own choice, the expert or professional person must be permitted to
25 have reasonable access to the person for the purpose of such
26 evaluation, as well as to all relevant medical and psychological
27 records and reports. In the case of a person who is indigent, the
28 court shall, upon the person's request, assist the person in obtaining
29 an expert or professional person to perform an evaluation or
30 participate in the trial on the person's behalf. Nothing in this
31 chapter precludes the person from paying for additional expert services
32 at his or her own expense.

33 (3) The person, the prosecuting agency, or the judge shall have the
34 right to demand that the trial be before a twelve-person jury. If no
35 demand is made, the trial shall be before the court.

36 **Sec. 6.** RCW 71.09.080 and 2010 c 218 s 2 are each amended to read
37 as follows:

1 (1) Any person subjected to restricted liberty as a sexually
2 violent predator pursuant to this chapter shall not forfeit any legal
3 right or suffer any legal disability as a consequence of any actions
4 taken or orders made, other than as specifically provided in this
5 chapter, or as otherwise authorized by law.

6 (2)(a) Any person committed or detained pursuant to this chapter
7 shall be prohibited from possessing or accessing a personal computer if
8 the resident's individualized treatment plan states that access to a
9 computer is harmful to bringing about a positive response to a specific
10 and certain phase or course of treatment.

11 (b) A person who is prohibited from possessing or accessing a
12 personal computer under (a) of this subsection shall be permitted to
13 access a limited functioning personal computer capable of word
14 processing and limited data storage on the computer only that does not
15 have: (i) Internet access capability; (ii) an optical drive, external
16 drive, universal serial bus port, or similar drive capability; or (iii)
17 the capability to display photographs, images, videos, or motion
18 pictures, or similar display capability from any drive or port
19 capability listed under (b)(ii) of this subsection.

20 (3) Any person committed pursuant to this chapter has the right to
21 adequate care and individualized treatment. The department of social
22 and health services shall keep records detailing all medical, expert,
23 and professional care and treatment received by a committed person, and
24 shall keep copies of all reports of periodic examinations made pursuant
25 to this chapter. All such records and reports shall be made available
26 upon request only to: The committed person, his or her attorney, the
27 prosecuting ((attorney)) agency, the court, the protection and advocacy
28 agency, or another expert or professional person who, upon proper
29 showing, demonstrates a need for access to such records.

30 (4) At the time a person is taken into custody or transferred into
31 a facility pursuant to a petition under this chapter, the professional
32 person in charge of such facility or his or her designee shall take
33 reasonable precautions to inventory and safeguard the personal property
34 of the persons detained or transferred. A copy of the inventory,
35 signed by the staff member making it, shall be given to the person
36 detained and shall, in addition, be open to inspection to any
37 responsible relative, subject to limitations, if any, specifically
38 imposed by the detained person. For purposes of this subsection,

1 "responsible relative" includes the guardian, conservator, attorney,
2 spouse, parent, adult child, or adult brother or sister of the person.
3 The facility shall not disclose the contents of the inventory to any
4 other person without consent of the patient or order of the court.

5 (5) Nothing in this chapter prohibits a person presently committed
6 from exercising a right presently available to him or her for the
7 purpose of obtaining release from confinement, including the right to
8 petition for a writ of habeas corpus.

9 (6) No indigent person may be conditionally released or
10 unconditionally discharged under this chapter without suitable
11 clothing, and the secretary shall furnish the person with such sum of
12 money as is required by RCW 72.02.100 for persons without ample funds
13 who are released from correctional institutions. As funds are
14 available, the secretary may provide payment to the indigent persons
15 conditionally released pursuant to this chapter consistent with the
16 optional provisions of RCW 72.02.100 and 72.02.110, and may adopt rules
17 to do so.

18 (7) If a civil commitment petition is dismissed, or a trier of fact
19 determines that a person does not meet civil commitment criteria, the
20 person shall be released within twenty-four hours of service of the
21 release order on the superintendent of the special commitment center,
22 or later by agreement of the person who is the subject of the petition.

23 **Sec. 7.** RCW 71.09.090 and 2011 2nd sp.s. c 7 s 2 are each amended
24 to read as follows:

25 (1) If the secretary determines that the person's condition has so
26 changed that either: (a) The person no longer meets the definition of
27 a sexually violent predator; or (b) conditional release to a less
28 restrictive alternative is in the best interest of the person and
29 conditions can be imposed that adequately protect the community, the
30 secretary shall authorize the person to petition the court for
31 conditional release to a less restrictive alternative or unconditional
32 discharge. The petition shall be filed with the court and served upon
33 the prosecuting agency responsible for the initial commitment. The
34 court, upon receipt of the petition for conditional release to a less
35 restrictive alternative or unconditional discharge, shall within forty-
36 five days order a hearing.

1 (2) (a) Nothing contained in this chapter shall prohibit the person
2 from otherwise petitioning the court for conditional release to a less
3 restrictive alternative or unconditional discharge without the
4 secretary's approval. The secretary shall provide the committed person
5 with an annual written notice of the person's right to petition the
6 court for conditional release to a less restrictive alternative or
7 unconditional discharge over the secretary's objection. The notice
8 shall contain a waiver of rights. The secretary shall file the notice
9 and waiver form and the annual report with the court. If the person
10 does not affirmatively waive the right to petition, the court shall set
11 a show cause hearing to determine whether probable cause exists to
12 warrant a hearing on whether the person's condition has so changed
13 that: (i) He or she no longer meets the definition of a sexually
14 violent predator; or (ii) conditional release to a proposed less
15 restrictive alternative would be in the best interest of the person and
16 conditions can be imposed that would adequately protect the community.

17 (b) The committed person shall have a right to have an attorney
18 represent him or her at the show cause hearing, which may be conducted
19 solely on the basis of affidavits or declarations, but the person is
20 not entitled to be present at the show cause hearing. At the show
21 cause hearing, the prosecuting (~~(attorney or attorney general)~~) agency
22 shall present prima facie evidence establishing that the committed
23 person continues to meet the definition of a sexually violent predator
24 and that a less restrictive alternative is not in the best interest of
25 the person and conditions cannot be imposed that adequately protect the
26 community. In making this showing, the state may rely exclusively upon
27 the annual report prepared pursuant to RCW 71.09.070. The committed
28 person may present responsive affidavits or declarations to which the
29 state may reply.

30 (c) If the court at the show cause hearing determines that either:
31 (i) The state has failed to present prima facie evidence that the
32 committed person continues to meet the definition of a sexually violent
33 predator and that no proposed less restrictive alternative is in the
34 best interest of the person and conditions cannot be imposed that would
35 adequately protect the community; or (ii) probable cause exists to
36 believe that the person's condition has so changed that: (A) The
37 person no longer meets the definition of a sexually violent predator;
38 or (B) release to a proposed less restrictive alternative would be in

1 the best interest of the person and conditions can be imposed that
2 would adequately protect the community, then the court shall set a
3 hearing on either or both issues.

4 (d) If the court has not previously considered the issue of release
5 to a less restrictive alternative, either through a trial on the merits
6 or through the procedures set forth in RCW 71.09.094(1), the court
7 shall consider whether release to a less restrictive alternative would
8 be in the best interests of the person and conditions can be imposed
9 that would adequately protect the community, without considering
10 whether the person's condition has changed. The court may not find
11 probable cause for a trial addressing less restrictive alternatives
12 unless a proposed less restrictive alternative placement meeting the
13 conditions of RCW 71.09.092 is presented to the court at the show cause
14 hearing.

15 (3)(a) At the hearing resulting from subsection (1) or (2) of this
16 section, the committed person shall be entitled to be present and to
17 the benefit of all constitutional protections that were afforded to the
18 person at the initial commitment proceeding. The prosecuting agency
19 shall represent the state and shall have a right to a jury trial and to
20 have the committed person evaluated by experts chosen by the state.
21 (~~The department is responsible for the cost of one expert or~~
22 ~~professional person to conduct an evaluation on the prosecuting~~
23 ~~agency's behalf.)) The prosecuting agency shall have a right to a
24 current evaluation of the person by experts chosen by the state. The
25 judge may require the person to complete any or all of the following
26 procedures or tests if requested by the evaluator: (i) A clinical
27 interview; (ii) psychological testing; (iii) plethysmograph testing;
28 and (iv) polygraph testing. The judge may order the person to complete
29 any other procedures and tests relevant to the evaluation. The state
30 is responsible for the costs of the evaluation. The committed person
31 shall also have the right to a jury trial and the right to have experts
32 evaluate him or her on his or her behalf and the court shall appoint an
33 expert if the person is indigent and requests an appointment.~~

34 (b) Whenever any indigent person is subjected to an evaluation
35 under (a) of this subsection, the (~~department~~) office of public
36 defense is responsible for the cost of one expert or professional
37 person conducting an evaluation on the person's behalf. When the
38 person wishes to be evaluated by a qualified expert or professional

1 person of his or her own choice, such expert or professional person
2 must be permitted to have reasonable access to the person for the
3 purpose of such evaluation, as well as to all relevant medical and
4 psychological records and reports. In the case of a person who is
5 indigent, the court shall, upon the person's request, assist the person
6 in obtaining an expert or professional person to perform an evaluation
7 or participate in the hearing on the person's behalf. Nothing in this
8 chapter precludes the person from paying for additional expert services
9 at his or her own expense.

10 (c) If the issue at the hearing is whether the person should be
11 unconditionally discharged, the burden of proof shall be upon the state
12 to prove beyond a reasonable doubt that the committed person's
13 condition remains such that the person continues to meet the definition
14 of a sexually violent predator. Evidence of the prior commitment trial
15 and disposition is admissible. The recommitment proceeding shall
16 otherwise proceed as set forth in RCW 71.09.050 and 71.09.060.

17 (d) If the issue at the hearing is whether the person should be
18 conditionally released to a less restrictive alternative, the burden of
19 proof at the hearing shall be upon the state to prove beyond a
20 reasonable doubt that conditional release to any proposed less
21 restrictive alternative either: (i) Is not in the best interest of the
22 committed person; or (ii) does not include conditions that would
23 adequately protect the community. Evidence of the prior commitment
24 trial and disposition is admissible.

25 (4) (a) Probable cause exists to believe that a person's condition
26 has "so changed," under subsection (2) of this section, only when
27 evidence exists, since the person's last commitment trial, or less
28 restrictive alternative revocation proceeding, of a substantial change
29 in the person's physical or mental condition such that the person
30 either no longer meets the definition of a sexually violent predator or
31 that a conditional release to a less restrictive alternative is in the
32 person's best interest and conditions can be imposed to adequately
33 protect the community.

34 (b) A new trial proceeding under subsection (3) of this section may
35 be ordered, or a trial proceeding may be held, only when there is
36 current evidence from a licensed professional of one of the following
37 and the evidence presents a change in condition since the person's last
38 commitment trial proceeding:

1 (i) An identified physiological change to the person, such as
2 paralysis, stroke, or dementia, that renders the committed person
3 unable to commit a sexually violent act and this change is permanent;
4 or

5 (ii) A change in the person's mental condition brought about
6 through positive response to continuing participation in treatment
7 which indicates that the person meets the standard for conditional
8 release to a less restrictive alternative or that the person would be
9 safe to be at large if unconditionally released from commitment.

10 (c) For purposes of this section, a change in a single demographic
11 factor, without more, does not establish probable cause for a new trial
12 proceeding under subsection (3) of this section. As used in this
13 section, a single demographic factor includes, but is not limited to,
14 a change in the chronological age, marital status, or gender of the
15 committed person.

16 (5) The jurisdiction of the court over a person civilly committed
17 pursuant to this chapter continues until such time as the person is
18 unconditionally discharged.

19 (6) During any period of confinement pursuant to a criminal
20 conviction, or for any period of detention awaiting trial on criminal
21 charges, this section is suspended.

22 NEW SECTION. **Sec. 8.** A new section is added to chapter 71.09 RCW
23 to read as follows:

24 The following activities, unless provided as part of investigation
25 and preparation for any hearing or trial under this chapter, are beyond
26 the scope of representation of an attorney under contract with the
27 office of public defense pursuant to chapter 2.70 RCW for the purposes
28 of providing indigent defense services in sexually violent predator
29 civil commitment proceedings:

30 (1) Investigation or legal representation challenging the
31 conditions of confinement at the special commitment center or any
32 secure community transition facility;

33 (2) Investigation or legal representation for making requests under
34 the public records act, chapter 42.56 RCW;

35 (3) Legal representation or advice regarding filing a grievance
36 with the department as part of its grievance policy or procedure;

1 (4) Such other activities as may be excluded by policy or contract
2 with the office of public defense.

3 **NEW SECTION. Sec. 9.** A new section is added to chapter 71.09 RCW
4 to read as follows:

5 (1) The office of public defense is responsible for the cost of one
6 expert or professional person conducting an evaluation on an indigent
7 person's behalf as provided in RCW 71.09.050, 71.09.070, or 71.09.090.

8 (2) Expert evaluations are capped at ten thousand dollars, to
9 include all professional fees, travel, per diem, and other costs.
10 Partial evaluations are capped at five thousand five hundred dollars
11 and expert services apart from an evaluation, exclusive of testimony at
12 trial or depositions, are capped at six thousand dollars.

13 (3) The office of public defense will pay for the costs related to
14 the evaluation of an indigent person by an additional examiner or in
15 excess of the stated fee caps only upon a finding by the superior court
16 that such appointment or extraordinary fees are for good cause.

17 **Sec. 10.** RCW 71.09.110 and 2010 1st sp.s. c 28 s 3 are each
18 amended to read as follows:

19 The department of social and health services shall be responsible
20 for ~~((all))~~ the costs relating to the ~~((evaluation and))~~ treatment of
21 persons committed to their custody whether in a secure facility or
22 under a less restrictive alternative ~~((under any provision of))~~ as
23 provided in this chapter. ~~((The secretary shall adopt rules to contain~~
24 ~~costs relating to reimbursement for evaluation services.))~~
25 Reimbursement may be obtained by the department for the cost of care
26 and treatment of persons committed to its custody whether in a secure
27 facility or under a less restrictive alternative pursuant to RCW
28 43.20B.330 through 43.20B.370.

29 **Sec. 11.** RCW 71.09.120 and 1990 c 3 s 1012 are each amended to
30 read as follows:

31 (1) In addition to any other information required to be released
32 under this chapter, the department is authorized, pursuant to RCW
33 4.24.550, to release relevant information that is necessary to protect
34 the public, concerning a specific sexually violent predator committed
35 under this chapter.

1 (2) The department and the courts are authorized to release to the
2 office of public defense records needed to implement the office's
3 administration of public defense in these cases, including research,
4 reports, and other functions as required by RCW 2.70.020 and section 2
5 of this act. The office of public defense shall maintain the
6 confidentiality of all confidential information included in the
7 records.

8 (3) The inspection or copying of any nonexempt public record by
9 persons residing in a civil commitment facility for sexually violent
10 predators may be enjoined following procedures identified in RCW
11 42.56.565. The injunction may be requested by:

12 (a) An agency or its representative;

13 (b) A person named in the record or his or her representative;

14 (c) A person to whom the request specifically pertains or his or
15 her representative.

16 **Sec. 12.** RCW 71.09.140 and 1995 c 216 s 17 are each amended to
17 read as follows:

18 (1) At the earliest possible date, and in no event later than
19 thirty days before conditional release or unconditional discharge,
20 except in the event of escape, the department of social and health
21 services shall send written notice of conditional release,
22 unconditional discharge, or escape, to the following:

23 (a) The chief of police of the city, if any, in which the person
24 will reside or in which placement will be made under a less restrictive
25 alternative;

26 (b) The sheriff of the county in which the person will reside or in
27 which placement will be made under a less restrictive alternative; and

28 (c) The sheriff of the county where the person was last convicted
29 of a sexually violent offense, if the department does not know where
30 the person will reside.

31 The department shall notify the state patrol of the release of all
32 sexually violent predators and that information shall be placed in the
33 Washington crime information center for dissemination to all law
34 enforcement.

35 (2) The same notice as required by subsection (1) of this section
36 shall be sent to the following if such notice has been requested in

1 writing about a specific person found to be a sexually violent predator
2 under this chapter:

3 (a) The victim or victims of any sexually violent offenses for
4 which the person was convicted in the past or the victim's next of kin
5 if the crime was a homicide. "Next of kin" as used in this section
6 means a person's spouse, parents, siblings, and children;

7 (b) Any witnesses who testified against the person in his or her
8 commitment trial under RCW 71.09.060; and

9 (c) Any person specified in writing by the prosecuting ((attorney))
10 agency.

11 Information regarding victims, next of kin, or witnesses requesting
12 the notice, information regarding any other person specified in writing
13 by the prosecuting ((attorney)) agency to receive the notice, and the
14 notice are confidential and shall not be available to the committed
15 person.

16 (3) If a person committed as a sexually violent predator under this
17 chapter escapes from a department of social and health services
18 facility, the department shall immediately notify, by the most
19 reasonable and expedient means available, the chief of police of the
20 city and the sheriff of the county in which the committed person
21 resided immediately before his or her commitment as a sexually violent
22 predator, or immediately before his or her incarceration for his or her
23 most recent offense. If previously requested, the department shall
24 also notify the witnesses and the victims of the sexually violent
25 offenses for which the person was convicted in the past or the victim's
26 next of kin if the crime was a homicide. If the person is recaptured,
27 the department shall send notice to the persons designated in this
28 subsection as soon as possible but in no event later than two working
29 days after the department learns of such recapture.

30 (4) If the victim or victims of any sexually violent offenses for
31 which the person was convicted in the past or the victim's next of kin,
32 or any witness is under the age of sixteen, the notice required by this
33 section shall be sent to the parents or legal guardian of the child.

34 (5) The department of social and health services shall send the
35 notices required by this chapter to the last address provided to the
36 department by the requesting party. The requesting party shall furnish
37 the department with a current address.

1 (6) Nothing in this section shall impose any liability upon a chief
2 of police of a city or sheriff of a county for failing to request in
3 writing a notice as provided in subsection (1) of this section.

4 NEW SECTION. **Sec. 13.** If specific funding for the purposes of
5 this act, referencing this act by bill or chapter number, is not
6 provided by June 30, 2012, in the omnibus appropriations act, this act
7 is null and void.

8 NEW SECTION. **Sec. 14.** This act takes effect July 1, 2012.

--- END ---

APPENDIX 2

file and prosecute a case under this chapter, then the county shall charge the attorney general only the fees, including filing and jury fees, that would be charged and paid by the county prosecuting attorney, if the county prosecuting attorney retained the case. [2009 c 409 § 3; 2008 c 213 § 12; 1995 c 216 § 3; 1992 c 45 § 4; 1990 1st ex.s. c 12 § 3; 1990 c 3 § 1003.]

*Reviser's note: RCW 10.77.020 was amended by 1998 c 297 § 30, deleting subsection (3).

Application—Effective date—2009 c 409: See notes following RCW 71.09.020.

Additional notes found at www.leg.wa.gov

71.09.040 Sexually violent predator petition—Probable cause hearing—Judicial determination—Transfer for evaluation. (1) Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody.

(2) Within seventy-two hours after a person is taken into custody pursuant to subsection (1) of this section, the court shall provide the person with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the person is a sexually violent predator. In order to assist the person at the hearing, within twenty-four hours of service of the petition, the prosecuting agency shall provide to the person or his or her counsel a copy of all materials provided to the prosecuting agency by the referring agency pursuant to RCW 71.09.025, or obtained by the prosecuting agency pursuant to RCW 71.09.025(1) (c) and (d). At this hearing, the court shall (a) verify the person's identity, and (b) determine whether probable cause exists to believe that the person is a sexually violent predator. At the probable cause hearing, the state may rely upon the petition and certification for determination of probable cause filed pursuant to RCW 71.09.030. The state may supplement this with additional documentary evidence or live testimony. The person may be held in total confinement at the county jail until the trial court renders a decision after the conclusion of the seventy-two hour probable cause hearing. The county shall be entitled to reimbursement for the cost of housing and transporting the person pursuant to rules adopted by the secretary.

(3) At the probable cause hearing, the person shall have the following rights in addition to the rights previously specified: (a) To be represented by counsel; (b) to present evidence on his or her behalf; (c) to cross-examine witnesses who testify against him or her; (d) to view and copy all petitions and reports in the court file. The court must permit a witness called by either party to testify by telephone. Because this is a special proceeding, discovery pursuant to the civil rules shall not occur until after the hearing has been held and the court has issued its decision.

(4) If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall con-

sult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. A witness called by either party shall be permitted to testify by telephone. [2009 c 409 § 4; 2001 c 286 § 6; 1995 c 216 § 4; 1990 c 3 § 1004.]

Application—Effective date—2009 c 409: See notes following RCW 71.09.020.

Recommendations—Application—Effective date—2001 c 286: See notes following RCW 71.09.015.

71.09.050 Trial—Rights of parties. (1) Within forty-five days after the completion of any hearing held pursuant to RCW 71.09.040, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. The department is responsible for the cost of one expert or professional person to conduct an evaluation on the prosecuting agency's behalf. At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. The person shall be confined in a secure facility for the duration of the trial.

(2) Whenever any person is subjected to an evaluation under this chapter, the department is responsible for the cost of one expert or professional person to conduct an evaluation on the person's behalf. When the person wishes to be evaluated by a qualified expert or professional person of his or her own choice, the expert or professional person must be permitted to have reasonable access to the person for the purpose of such evaluation, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an evaluation or participate in the trial on the person's behalf. Nothing in this chapter precludes the person from paying for additional expert services at his or her own expense.

(3) The person, the prosecuting agency, or the judge shall have the right to demand that the trial be before a twelve-person jury. If no demand is made, the trial shall be before the court. [2010 1st sp.s. c 28 § 1; 2009 c 409 § 5; 1995 c 216 § 5; 1990 c 3 § 1005.]

Application—Effective date—2009 c 409: See notes following RCW 71.09.020.

71.09.060 Trial—Determination—Commitment procedures. (1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition. The community protection program under RCW 71A.12.230 may not be considered as a placement condition or treatment option available to the person if unconditionally released from detention on a sexually violent predator petition. When

APPENDIX 3

WAC 388-880-033

Evaluator—Qualifications.

Professionally qualified persons employed by the department or under contract to provide evaluative services must:

- (1) Have demonstrated expertise in conducting evaluations of sex offenders, including diagnosis and assessment of reoffense risk;
- (2) Have demonstrated expertise in providing expert testimony related to sex offenders or other forensic topics; and
- (3) Provide documentation of such qualification to the department.

[Statutory Authority: Chapter 71.09 RCW and RCW 72.01.090. WSR 10-13-130, § 388-880-033, filed 6/22/10, effective 7/23/10. Statutory Authority: RCW 71.09.040(4). WSR 03-23-022, § 388-880-033, filed 11/10/03, effective 12/11/03.]

APPENDIX 4

WAC 388-880-034

Evaluator—Supplemental and post commitment evaluation responsibilities.

The evaluation done in accordance with WAC 388-880-030(1) in preparation for a trial or hearing must be based on the following:

- (1) Examination of the resident, including a forensic interview and a medical examination, if necessary;
- (2) Review of the following types of records, tests or reports relating to the person that the evaluator deems necessary, including but not limited to:
 - (a) All available criminal records, to include arrests and convictions, and records of institutional custody, including city, county, state and federal jails or institutions, with any records and notes of statements made by the person regarding criminal offenses, whether or not the person was charged with or convicted of the offense;
 - (b) All necessary and relevant court documents;
 - (c) Sex offender treatment records and, when permitted by law, substance abuse treatment program records, including group notes, autobiographical notes, progress notes, psycho-social reports and other material relating to the person's participation in treatment;
 - (d) Psychological and psychiatric testing, diagnosis and treatment, and other clinical examinations, including records of custody in a mental health treatment hospital or other facility;
 - (e) Medical and physiological testing, including plethysmography and polygraphy;
 - (f) Any end of sentence review report, with information for all prior commitments upon which the report or reports were made;
 - (g) All other relevant and necessary records, evaluations, reports and other documents from state or local agencies;
 - (h) Other relevant and appropriate tests that are industry standard practices;
 - (i) All evaluations, treatment plans, examinations, forensic measures, charts, files, reports and other information made for or prepared by the SCC which relate to the resident's care, control, observation, and treatment.

[Statutory Authority: Chapter 71.09 RCW and RCW 72.01.090. WSR 10-13-130, § 388-880-034, filed 6/22/10, effective 7/23/10. Statutory Authority: RCW 71.09.040(4). WSR 03-23-022, § 388-880-034, filed 11/10/03, effective 12/11/03.]

APPENDIX 5

WAC 388-880-035

Refusal to participate in a supplemental or post commitment pretrial evaluation.

If the person refuses to participate in examinations, forensic interviews, psychological testing, physiological testing, or any other interviews necessary to conduct the supplemental or post commitment evaluation under WAC 388-880-030(1), the evaluator must notify the SCC forensic services manager. The SCC will notify the prosecuting agency for potential court enforcement.

[Statutory Authority: Chapter 71.09 RCW and RCW 72.01.090. WSR 10-13-130, § 388-880-035, filed 6/22/10, effective 7/23/10. Statutory Authority: RCW 71.09.040(4). WSR 03-23-022, § 388-880-035, filed 11/10/03, effective 12/11/03.]

No. 69818-4-I
Linked with No. 69993-8-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention of:

DONALD HERRICK,

Appellant.

DECLARATION OF
SERVICE

I, Joslyn Wallenborn, declare as follows:

On October 31, 2016, I sent via electronic mail, per electronic service agreement, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

SUZANNE 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 31st day of October, 2016, at Seattle, Washington.


JOSLYN WALLENBORN