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No. 68826-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ALLEN MILLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Alan R. Hancock

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Washington Constitutional Provisions

United States Supreme Court Decisions

United States Constitutional Provisions

Statutes

Other Authorities

A. INTRODUCTION

The trial court revoked Christopher Allen Miller's SSOSA because he was poor. Mr. Miller was in perfect compliance with the SSOSA, however as a convicted sex offender with limited job skills in an exceptionally difficult employment market, Mr. Miller was unable to secure the means to pay for sexual deviancy treatment at the frequency mandated in the judgment and sentence.

The due process and equal protection clauses of the Fourteenth Amendment promise fundamental fairness and equal justice for all. Key to these guarantees are the elementary pledges that a person's conditional liberty may not be revoked based upon his indigency, and that poor people may not be denied a benefit because of their economic status.

In revoking Mr. Miller's SSOSA, the trial court agreed that Mr. Miller's poverty was involuntary, but found that RCW 9.94A.670, governing SSOSAs, imposes on offenders the "responsibility" to acquire the means to pay for treatment, and, if they are unable to do so, then the SSOSA

must be revoked. Mr. Miller asks this Court to hold that the revocation based on his indigency violated due process. Further, to the extent that the trial court properly found the SSOSA statute discriminates based upon ability to pay, the statute violates equal protection and is unconstitutional.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in revoking Mr. Miller's Special Sex Offender Sentencing Alternative (SSOSA) based on his indigence.

2. The trial court erred in revoking Mr. Miller's SSOSA absent proof of a willful violation of the conditions of the Judgment and Sentence.

3. The revocation of Mr. Miller's SSOSA denied him due process of law and his right to equal protection.

3. To the extent the finding may be construed as a finding of a willful violation of the conditions of his Judgment and Sentence, the trial court erred in entering Finding of Fact 7.[1]

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[1] The Findings of Fact and Conclusions of Law entered by the trial court in support of the revocation of Mr. Miller's SSOSA are attached as an Appendix.

4. To the extent the finding may be construed as ascribing blame to Mr. Miller for his lack of resources, the trial court erred in entering Finding of Fact 8.

5. For the same reason, the trial court erred in entering Finding of Fact 9.

6. For the same reason, the trial court erred in entering Finding of Fact 10.

7. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact 11.

8. To the extent the finding suggests Mr. Miller's noncompliance is due to reasons other than his indigence, the trial court erred in entering Finding of Fact 13.

9. The trial court erred in entering Finding of Fact 14.[2]

10. The trial court erred in concluding that Mr. Miller did not comply with the conditions of the Judgment and Sentence by not entering sexual deviancy treatment, and that he has no due process right to have sexual deviancy treatment paid for at public expense.

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[2] Finding of Fact 14 is more properly a legal conclusion.

12. To the extent that RCW 9.94A.670 operates to deny a SSOSA to indigent persons who, despite bona fide efforts, cannot pay for treatment, where similarly-situated wealthy persons may avail themselves of the sentencing alternative, the statute is unconstitutional.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process prohibits the revocation of conditional liberty based upon the involuntary circumstance of a person's indigency. Mr. Miller was found to be an appropriate candidate for a SSOSA. He maintained perfect compliance with the conditions of the SSOSA but, due solely to his poverty and despite his extraordinary efforts to secure the funding to do so, was unable to commence sexual deviancy treatment at the frequency mandated by the trial court's sentence. Did the termination of Mr. Miller's SSOSA on this basis violate due process?

2. Did the trial court improperly find that an indigent person who has made bona fide efforts to obtain the requisite resources to pay for sexual deviancy treatment and

otherwise meets the statutory criteria for a SSOSA has no due process right to treatment at public expense?

3. At its most basic level, the equal protection clause of the Fourteenth Amendment guarantees equal justice for all. Assuming the trial court correctly found that a person who, because of his involuntary indigency, cannot pay for sexual deviancy treatment is not entitled to a SSOSA, does RCW 9.94A.670 unconstitutionally discriminate based on ability to pay, in violation of equal protection?

D. STATEMENT OF THE CASE

1. The charged offense and Mr. Miller's amenability to a SSOSA.

Appellant Christopher Allen Miller has lived in Island County his entire life. On March 5, 2010, when Mr. Miller was 26 years old, Mr. Miller was charged with rape of a child in the first degree based on an incident in 2007 involving his aunt's foster child TMF, whom he was babysitting. This episode was Mr. Miller's first and only criminal behavior of any kind.

A competency evaluation was conducted of Mr. Miller on September 23, 2010 by Dr. Ray Hendrickson. Dr.

Hendrickson reported that Mr. Miller was open and cooperative during the evaluation and found him competent to stand trial. Supp. CP __ (Outpatient Forensic Mental Health Evaluation, filed September 29, 2010 (hereafter "Competency Evaluation"), at 5-7). With regard to the future dangerousness evaluation mandated by RCW 10.77.060, Dr. Hendrickson found that Mr. Miller was a low to moderate risk to reoffend, stating,

> Based upon Mr. Miller's criminal history record, information obtained through clinical and collateral interviews, and a review of risk factors, it is my professional opinion that he is currently a low to moderate risk for future serious dangerous behavior and other forms of dangerous behavior, and for reoffending.

Id. at 8.

Mr. Miller pleaded guilty as charged and submitted to a forensic psychological evaluation to determine his suitability for a SSOSA. Mr. Miller attended three separate interviews with forensic psychologist Steven Johansen, participated in psychological testing and an actuarial risk assessment, and completed a polygraph and penile plethysmograph. Supp. CP __ (Report of Forensic Evaluation

of the Defendant, filed March 25, 2011, at 1-2 (hereafter "Johansen Report")).

Dr. Johansen diagnosed Mr. Miller with Asperger's disorder, Attention Deficit/Hyperactivity Disorder, Anxiety Disorder NOS, Pedophilia, and Dependent Personality Disorder, Avoidant Traits. Id. at 18-19. He described Mr. Miller as

> a very introverted person who is generally reclusive, introverted, and interpersonally avoidant. He has trouble meeting and interacting with other people. He is shy and emotionally distant. He tends to be very uneasy, rigid, and overcontrolled in social situations ... His proneness to experience anxiety, obsessive thinking, and unusual thoughts might make it difficult for him to think clearly or function effectively. His low self-esteem probably characterizes a somewhat ineffective manner of approaching new tasks. His basic insecurity and lack of self-confidence might make it difficult for him to implement change-oriented plans.

Id. at 12.

The Department of Corrections Presentence Investigation described Mr. Miller as an "avid reader" who spends four to five hours a day at the library. Supp. CP __ (Presentence Investigation, Filed March 17, 2011, at 8).

Consistent with Mr. Miller's shy and introverted personality, his sexual experience is quite limited. He had sexual intercourse on two occasions with a girlfriend two years older than him that he met in Job Corps. Id. at 8. He was sexually victimized by his father on one occasion when he was 16 years old. Id.

Rick Minnich, the polygraph examiner, asked Mr. Miller whether he had engaged in sexual contact with anyone besides EMF under the age of 18 since his 19th birthday, whether he had engaged in sexual contact with any minor, besides EMF, more than two years younger than him, and whether he had ever viewed any child pornography. He answered all these questions in the negative. According to the polygrapher, no deception was indicated. Id. at 17.

Mr. Miller's employment experience was also limited. He graduated from high school and completed two years of Job Corps, earning a certificate in business. Id. at 10. At the time of the evaluation he was unemployed, having last worked a manual labor job for Labor-Ready. Id.

Dr. Johansen conducted actuarial testing to assess Mr. Miller's likelihood of reoffense.[3] Like Dr. Hendrickson, Dr. Johansen estimated that Mr. Miller was a low to moderate risk to reoffend. Johansen Report at 18.

Dr. Johansen recommended the court grant Mr. Miller a SSOSA. Dr. Johansen noted that Mr. Miller "is openly accepting responsibility for his actions and manifests the capacity to comply with requirements of the sentence and maintain cooperation with expectations of his Community Corrections Officer while in the community." Id. at 21. At the same time, Dr. Johansen noted concerns about Mr. Miller's "ability to access and financially support needed treatment," given his current unemployment, his limited work history, and his limited occupational skills. Id. Dr. Johansen stressed that Mr. Miller's unemployed status was of "particular concern" because "[t]o a large degree, he will

[3] Dr. Johansen administered the Static-99 R (Revised) based upon Mr. Miller's age (18 to 34.9 years) and his not ever having lived with a lover for at least two years.

need full-time employment to meet the financial burden imposed by needed treatment." Id.[4]

2. Sentencing.

The trial court granted Mr. Miller's request for a SSOSA. The court found that both Mr. Miller and the community would benefit from use of the alternative. 3/25/11 RP 17.[5] The court noted that the circumstances of the offense did not weigh against the SSOSA being granted, that Mr. Miller had no other victims, and that his polygraph examination indicated he was being truthful. Id. at 18. The court also noted that Mr. Miller was amenable to treatment, notwithstanding his financial circumstances. Id. at 19. Finally, considering the risk that Mr. Miller would pose to the community, the court noted,

> Mr. Miller has no other offenses ... He's been released on personal recognizance for a lengthy period of time while these charges were pending.

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[4] Mr. Miller's financial circumstances appear to have been the reason why the Department of Corrections did not join in the recommendation for a SSOSA. See Presentence Investigation at 10 ("it appears it will be extremely difficult if not impossible for Mr. Miller to pay for community-based treatment").

[5] The verbatim report of proceedings is referenced by date followed by page number. A transcript from May 8, 2012 containing the trial court's ruling is referenced as "5/8/12 RP (Ruling)" followed by page number.

> He did have to report to jail in January when he pled guilty, but other than that, he was crime free to the best of our knowledge and did not victimize other persons.

Id.

On the subject of Mr. Miller's indigency and ability to pay for treatment, the court ruled,

> As I understand the law, sex offenders are not entitled to have the government pay for treatment at public expense ... And so Mr. Miller has the responsibility of paying for treatment. If he gets SSI or other governmental support because of disabilities, that will certainly help, and he needs to move forward with that as quickly as possible so that the funding will be in place at the time he completes his jail sentence.
>
> Perhaps family can assist to some extent, but it's going to be Mr. Miller's responsibility to pay for treatment and if he doesn't do that, then the Court will have no alternative but to revoke the SSOSA and impose the prison sentence.

Id. at 22.

The court imposed 12 months of jail time and granted the SSOSA, suspending the 93-month standard-range sentence. Id. at 24. The court declined to require that Mr. Miller be employed, but ordered him to "make all reasonable efforts to seek employment or job training and enter

employment opportunities that are available to him." Id. at 25-26.

The Community Corrections Officer noted that it would be difficult for Mr. Miller to submit the necessary applications for mental health treatment and government funding while Mr. Miller was in jail, so the court ordered Mr. Miller to commence sexual deviancy treatment within 90 days of his release. Id. at 28-30, 34.

3. January 27, 2012 motion to revoke the SSOSA based on Mr. Miller's homelessness.

Mr. Miller was released from jail on January 19, 2012. 1/27/12 RP 4. Upon his release, he learned that the trailer park where his father resided was unwilling to accept him as a resident, and he had no immediate prospects of finding a long-term home. Id. at 2. Based upon this report, the State moved to have Mr. Miller remanded to custody pending a SSOSA revocation hearing. Id. at 3.

The court remarked,

> Well this is a most unusual situation and a difficult situation. Mr. Miller has not violated any court order except to the extent that he has to provide the Department of Corrections with an address where he'll be residing. And just since

> his release from jail on his one-year commitment under the Sex Offender Sentencing Alternative, he has learned that he is unable to reside with his parents at the trailer park where they live. And so, essentially, through no fault of his own, he doesn't have a place to live right now.

Id. at 6.

Given these circumstances, the court thought it would be inappropriate to confine Mr. Miller, as Mr. Miller had not violated any condition of his sentence. Id. The court, however, ordered Mr. Miller to report daily to the Department of Corrections, Monday through Friday, and provide information about his search for a place to live. Id. at 6-7.

4. February 27, 2012 motion to revoke based on Mr. Miller's continued homelessness and indigency.

The State renewed its motion to revoke Mr. Miller's SSOSA a month later. At that hearing, Lisa Lee, from DOC, told the court,

> Mr. Miller has been reporting daily, as directed at his last court hearing. And he has been essentially homeless. He's lived in various motels paid for by Island County ... He has applied for benefits through DSHS. He has participated in a psychological evaluation, but we still have not heard back from DSHS as to whether he'll be approved or once approved, how

much money he will be receiving in disability benefits.

He's currently living with a friend of a friend, who also receives Social Security benefits, in a trailer park and does not know if she can have him stay at her house for more than 14 days ...

Prior to that he was living with another friend, who also had the same type of situation, where he couldn't stay any longer than 14 days.

So Mr. Miller is going from residence to residence for no more than 14 days. Some of those residences have not been particularly something I would necessarily approve of due to proximity to a middle school. However, it was that or homeless.

And so he's barely surviving on the street right now. He has a food card. And that's all the benefits he's receiving.

His father will not even allow him to visit his home at the trailer park due to his stepmother's wishes. So he can't even go home to shower or have meals. And he – he's –

He's barely surviving. He's doing the best he can with what he has.

However, I don't know how he can maintain a SSOSA sentence, which includes sexual deviancy treatment. His income is basically zero at this time. Even if he does receive Social Security, it's a stretch for him to be able to pay for housing and also in treatment [sic].

2/27/12 RP 3-4.

After hearing Ms. Lee's presentation, the State agreed to allow Mr. Miller an additional 30 days to get into treatment. Id. at 5.

Mr. Miller's counsel reiterated that Mr. Miller was in full compliance with the order that he check in with DOC every working day, and that he was also checking in with the jail as a homeless offender. Id. at 6. He noted, "a Special Sex Offender Sentencing Alternative should not be limited to the more wealthy members of society." Id.

The court authorized Mr. Miller a further 30 days to secure treatment. Id. at 7.

5. May 8, 2012 motion to revoke based on Mr. Miller's indigency.

A final hearing was held on the State's motion to revoke on May 8, 2012.

Lisa Lee again testified at the hearing. She stated that since the court ordered him to do so, Mr. Miller had checked in every day with DOC, and had not missed a single day. 5/8/12 RP 9. She stated that Mr. Miller was in compliance with every single condition of the SSOSA save for entering sexual deviancy treatment. Id. at 10. Mr. Miller had met

with Oliver Platte, a certified sexual deviancy treatment provider, who would be a suitable treatment provider for Mr. Miller. Id. at 11. However the monthly cost for treatment with Mr. Platte was $560. Mr. Miller's income consisted of $197 per month through general assistance[6] and $200 in food stamps. Id. at 12. Mr. Platte reported to Ms. Lee that he would only be able to accept Mr. Miller into treatment of the frequency of the mandated treatment was altered or Mr. Miller acquired the means to pay for it. Id. Ms. Lee reiterated that Mr. Miller's sole impediment to his being in treatment was his financial status. Id. at 13.

Ms. Lee stated that Mr. Miller also was still having difficulties finding housing, principally because of his status as a convicted sex offender. At the time of the hearing, he was staying with a friend, Madge, whom Ms. Lee described

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[6] Washington's "general assistance unemployable program" was retitled by the Legislature the "disability lifeline program." The "disability lifeline program" was terminated in 2011 and replaced, instead, by three programs: the Aged, Blind, or Disabled Assistance Program, the Pregnant Women Assistance Program, and the Essential Needs and Housing Support Program. House Bill Report, ESHB 2082, available at http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/House/2082-S.E%20HBR%20PL%2011%20E1.pdf, last accessed December 3, 2012. Because the parties refer to "general assistance" in this case, to minimize confusion, the program is similarly referenced in this brief.

as a "hoarder," in her single wide trailer. 5/8/12 RP 13. Mr. Miller slept on the floor, in the hallway. Id. The water was undrinkable, and Mr. Miller was unable to shower there. Id. To bathe, Mr. Miller showered once a week at his father's home. Id. at 14.

Ms. Lee stated that they had exhausted all other options for places to live for Mr. Miller. She explained that he was not allowed to live with his father because of the trailer park rules. Id. He had been temporarily living with a friend, Violet, but when she tried to add him to her lease, the landlord did a background check and banned him from the premises. Id. He stayed in motels for two weeks. Id. Madge was his last resort. Id.

Ms. Lee acknowledged that Mr. Miller was trying to find a job. He attended classes at Work Source and went there frequently in an effort to find work. Id. He used the computer of Lisa Henley, the jail transition coordinator, to apply for jobs, applied for jobs in person, and applied to the Division of Vocational Resources (DVR). Id. at 14-15. at 34. His efforts got him nowhere. Id. at 15.

Ms. Henley testified that she had been working with Mr. Miller for a year to try to find him housing. 5/8/12 RP 20. She had appointments with him twice a week, on Tuesdays and Thursdays; he had not missed a single one, and was always punctual. Id. at 21. She explained that he had applied for social security disability payments, but the approval process would take a few months, and there was an additional five- or six-month waiting period before the payments would kick in. Id. at 21, 28. If approved for social security payments, Mr. Miller would receive a minimum of $697 per month. Id. at 22. Ms. Hensley stated that both the housing and the employment markets in Island County were poor, and Mr. Miller's job prospects were very, very poor. Id. at 22, 27.

Mr. Miller also testified at the hearing. He said that he had applied for 35 jobs since his release from jail. Id. at 34. He obtained his food handler's permit, secured clothing for job interviews, and was using both DVR and Work Source as resources. Id. at 36. Until he found work or qualified for social security benefits, he was willing to apply his entire

general assistance check towards sexual deviancy treatment, which would pay for two sessions per month. Id. at 43. With the assistance of Ms. Henley, he had arranged counseling with Compass Mental Health, and was willing to take medications, if needed. Id. at 45.

6. Trial court order revoking Mr. Miller's SSOSA.

The trial court granted the motion to revoke Mr. Miller's SSOSA. The court acknowledged that Mr. Miller's failure to enter sexual deviancy treatment was due to his financial inability to do so. 5/8/12 RP (Ruling) 11. The court opined, however, that a SSOSA is a privilege, not a right. Id. The Court observed that "from the standpoint of human compassion," it was "regrettable" that "people find themselves in positions such as Mr. Miller where they lack financial assistance or the financial means to get into treatment." Id. Nevertheless the court opined that a serious crime had been committed, "and it requires that people take responsibility to get themselves into a position to be able to undertake sexual deviancy treatment." Id. The court rejected any due process or equal protection argument, and

found there was no right, statutory or otherwise, to sexual deviancy treatment at public expense. Id. at 14-15.

The court entered written findings of fact and conclusions of law in support of its ruling. CP 27-30. Mr. Miller appeals. CP 1-23.

E. ARGUMENT

1. **Persons who have been granted a SSOSA have a liberty interest protected by the Fourteenth Amendment.**

Like probationers and parolees, a person who has been granted a SSOSA pursuant to RCW 9.94A.670 has a liberty interest in his freedom from confinement that is protected by the Fourteenth Amendment. Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); State v. Dahl, 138 Wn.2d 678, 684, 990 P.2d 396 (1999); U.S. Const. amend. XIV; Const. art. I, § 3. As the Supreme Court stated in Morrissey, "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." 408 U.S. at 482.

Society shares the SSOSA recipient's interest in his continued conditional liberty. Morrissey, 408 U.S. at 484.

> Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions ... And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

Id. (internal citation omitted). As the Court stated a year later in Gagnon v. Scarpelli, 411 U.S. 778, 98 S.Ct. 1756, 36 L.Ed.2d 656 (1973), "[b]oth the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion—the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." Gagnon, 411 U.S. at 785. Washington has long applied these requirements of fundamental fairness in the context of parole and probation revocations. See e.g. In re Personal

Restraint of Boone, 103 Wn.2d 224, 230-33, 691 P.2d 964 (1984).

2. **A person's fundamental liberty interest protects him against arbitrary decision-making, which at its most basic level includes decisions based upon a person's indigency.**

a. The fundamental fairness guaranteed in revocation hearings precludes decision-making based upon unfair or arbitrary grounds.

The due process protections that apply in the probation revocation context are intended to ensure a fair hearing, that the revocation is not based upon arbitrary or unfair grounds, and, in essence, that a person will not be deprived of his liberty without due process of law. Morrissey, 408 U.S. at 499 (Brennan, J., concurring in result); In re Personal Restraint of Blackburn, 168 Wn.2d 881, 884-85, 232 P.3d 1091 (2010); State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). This same concern animates the due process vagueness doctrine, because it implicates a probationer's due process right to fair notice of what conduct will cause him to lose his liberty. Bahl, 164 Wn.2d at 752-53.

Evaluating the due process interest at stake, the Washington Supreme Court has explained: "[f]irst, when a potential sanction is the offender's return to total confinement, 'many of the core values of unqualified liberty' are in jeopardy." Blackburn, 168 Wn.2d at 885 (quoting Morrissey, 408 U.S. at 482. Second, an offender has the right to sufficient information about the charges to prepare a meaningful defense. Id. Third, "[s]ociety has a stake in whatever may be the chance of restoring him to normal and useful life within the law." Id. (quoting Morrissey, 408 U.S. at 484). Fourth, an effective hearing is necessary to ensure that the fact-finder's exercise of discretion is informed by accurate knowledge of the offender's behavior. Id. (citation omitted). Fundamental fairness, therefore, precludes revocation of conditional liberty on arbitrary or unfair grounds.

b. It is fundamentally unfair to revoke conditional liberty based upon a person's involuntary indigency.

Where a person's poverty is the basis for the revocation of conditional liberty, the protections of "[d]ue

process and equal protection converge." Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). In Bearden, the United States Supreme Court considered whether the Fourteenth Amendment prohibits a state from revoking a defendant's probation for his failure to pay a fine and restitution, where that failure resulted from the involuntary circumstance of his indigency. Id. at 661. The Court held that the question implicated both due process and equal protection, and noted:

> To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose ...."

Id. at 665-67 (quoting Williams v. Illinois, 399 U.S. 235, 260, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) (internal footnotes and citations omitted)).

The Court held that "if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." 461 U.S. at 468-69. In this circumstance, the defendant's lack of fault "provides a 'substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate.'" Id. (quoting Gagnon, 411 U.S. at 790 (alterations in original)).

The Court reasoned that given the significant liberty interest such an individual has in remaining on probation,

> the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.

Id. at 671 (internal footnote omitted).

Thus, in revocation proceedings based upon failure to pay a financial penalty, where, despite sufficient bona fide efforts to acquire the means to do so the probationer was unable to pay, "the court must consider alternate measures of punishment other than imprisonment." Id.

> Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Id. at 672-73.

c. Mr. Miller's SSOSA was revoked because of his involuntary indigency.

Mr. Miller did not enter sexual deviancy treatment. Or, more precisely, Mr. Miller did not commence the weekly sexual deviancy treatment required under the terms of his judgment and sentence, although Mr. Miller did apply the entirety of the meager funds he received from general assistance towards semimonthly sessions with Mr. Platte. 5/8/12 RP 43. Mr. Miller's failure to enter the mandated

sexual deviancy treatment was not because of any reluctance to do so or willful disregard of the conditions of his SSOSA. Mr. Miller, in fact, made near-heroic efforts to comply with the terms of his SSOSA.

Mr. Miller applied for approximately 35 jobs. 5/8/12 RP 34. He also attempted to find work through DVR and Work Source. 5/8/12 RP 14, 36. Ms. Henley testified that the job market in Island County was poor, and Mr. Miller's job prospects very, very poor due to his sex offender status and his lack of qualifications for specialized work. 5/8/12 RP 22, 27. This state of affairs had a spillover effect upon his housing: because of his conviction, Mr. Miller was barred from two homes that would otherwise have been available to him, and the least expensive alternative housing available to him would cost $500 per month – roughly $300 more than he received through general assistance. 5/8/12 RP 39. As the court noted in its findings of fact, Madge's single-wide trailer did not have potable water and Mr. Miller slept on the floor surrounded by garbage. CP 28.

Despite Mr. Miller's difficult personal circumstances, he met twice weekly with Lisa Hensley, the jail transition coordinator and was punctual for each of these meetings, and checked in with DOC every single day. 2/27/12 RP 3; 5/8/12 RP 9, 21. Mr. Miller maintained perfect compliance with every term of his SSOSA except entering sexual deviancy treatment for the mandated frequency, and this omission was due entirely to his financial status. 5/8/12 RP 10, 13.

The State argued, and the court found, that Mr. Miller's SSOSA was being revoked because he did not comply with the requirement of sexual deviancy treatment (while conceding that this violation was not willful), rather than because of his indigency. CP 28-29. But this is a sophistic characterization.

Mr. Miller's sole reason for not entering sexual deviancy treatment was because he could not pay for it. No one questioned his willingness to engage in treatment and to address the problems underlying the commission of the charged offense. His efforts to acquire the necessary funds

were frankly remarkable. Under similar conditions, many other people would have become disheartened or flagged in their efforts. Mr. Miller remained hopeful, even cheerful, demonstrating in every way his desire to fulfill the expectations of the court and DOC.

At sentencing, the court found that Mr. Miller satisfied the statutory criteria for granting a SSOSA set forth in RCW 9.94A.670(4).[7] 3/25/11 RP 17-19. Yet, one of the court's

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[7] RCW 9.94A.670(4) directs the court to:

> consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment. If the court determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.507 a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence as provided in this section.

RCW 9.94A.670(4).

stated reasons for later revoking the SSOSA was the court's determination that if Mr. Miller remained in the community without sexual deviancy treatment, Mr. Miller posed a "significant risk to re-offend." CP 29 (finding of fact 11). But this factual finding was not supported by substantial evidence in the record.

Mr. Miller was in the community crime-free for three years following his commission of the charged offense, despite the fact that he did not receive sexual deviancy treatment. As the court observed at sentencing, Mr. Miller was also released on his personal recognizance "for a lengthy period of time" while the charges were pending. 3/25/11 RP 19. Two experts – Dr. Hendrickson, who tested Mr. Miller's competency and assessed his future dangerousness evaluation pursuant to RCW 10.77.060, and Dr. Johansen, who evaluated Mr. Miller's amenability to a SSOSA – determined that Mr. Miller presented a low to moderate risk of reoffense. Competency Evaluation at 8; Johansen Report at 18. Mr. Miller checked in daily with DOC, met twice weekly with Lisa Hensley, enrolled in mental health

treatment, and committed to attending two sexual deviancy treatment sessions per month until his financial circumstances improved. Even without the risk assessments provided by the qualified mental health professionals, Mr. Miller's resolute adherence to the conditions of the SSOSA and the augmented conditions imposed by the court at the January 27, 2012 hearing support the conclusion that he presented a very low risk to offend indeed, not the "significant" risk identified by the court.

d. *McCormick* and *Wrathall* are not on point and their application here violates due process.

The trial court determined that it did not need to find Mr. Miller's failure to enter sexual deviancy treatment was willful in order to revoke his SSOSA, relying upon State v. McCormick, 166 Wn.2d 689, 213 P.3d 32 (2009), and In re Detention of Wrathall, 156 Wn. App. 1, 232 P.3d 569 (2010). Neither case is on point, as neither case involved a defendant's inability to comply with the terms of his SSOSA due to indigency.

In McCormick, the defendant, a wheelchair-bound disabled man, went to a food bank located on the same

premises as an elementary school, in violation of the condition that he avoid areas where children are known to congregate. Mr. McCormick attempted to analogize his case to Bearden, contending that his SSOSA was being revoked because of his indigency. 166 Wn.2d at 702 n. 5. The Supreme Court rejected the comparison, observing that "there is no evidence McCormick's attending that specific food bank was the only way for him to obtain food." Id. Additionally, Mr. McCormick had previously violated the terms of his SSOSA, a fact that the trial court noted when it made the decision the SSOSA should be revoked. Id. at 696. Here, by contrast, there is no question that Mr. Miller's inability to enter the sexual deviancy treatment at the mandated frequency was due solely to his indigency. Further, Mr. Miller was otherwise in perfect compliance with the SSOSA.

In Wrathall, the sole question was whether the State needed to prove a willful violation of the conditions of release of a sexually violent predator to a less restrictive alternative placement. 156 Wn. App. at 5. The Court's holding – that a

finding of willfulness was not required – conflicts with the elementary requirement of due process that an offender may be deprived of his liberty for what he has done, rather than what he could not control. See Gagnon, 411 U.S. at 390; Morrissey, 408 U.S. at 484.

This Court need not reach this issue here, however, because Mr. Miller's SSOSA was terminated simply and solely because of his indigence. McCormick and Wrathall are thus inapplicable. The revocation of Mr. Miller's SSOSA violated due process.

3. **To the extent that the trial court properly construed RCW 9.94A.670 as barring a SSOSA for a defendant who, due to the involuntary circumstance of his indigency, cannot afford sexual deviancy treatment, the statute is unconstitutional.**

a. Limiting the availability of a SSOSA to those who have the means to pay for treatment denies poor offenders a core liberty interest and bears little relation to the Legislative purpose behind the enactment of this community-based sentencing alternative for eligible sex offenders.

The trial court dispensed with the due process question by concluding that Mr. Miller had no right to treatment at public expense. The court premised this

conclusion on its characterization of a SSOSA as a "privilege," rather than a "right." 5/8/12 RP (Ruling) 11.

Whether the interest is a "right" or a "privilege" is beside the point; in fact, it is immaterial. Morrissey, 408 U.S. at 481 ("this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'") (quoting Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)). Indeed, the Court in Bearden gave short shrift to this type of differentiation. 461 U.S. at 665 (dismissing the parties' "vigorous" debate over whether strict scrutiny or rational basis was the appropriate standard of review).

If the right versus privilege distinction employed by the trial court is a faulty and ill-chosen premise, then the analysis turns upon "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the

purpose ...." Bearden, 461 U.S. at 666-67; Williams, 399 U.S. at 260.

It is established that the deprivation even of conditional liberty is a "grievous loss" that implicates core concerns of due process. Morrissey, 408 U.S. at 482; Blackburn, 168 Wn.2d at 885. In the case of a potential SSOSA recipient, the extent to which this interest is affected is so great as to be unquantifiable: it is the difference between a life in the community in which all of the inalienable rights endowed by our founders may be enjoyed unabridged, and prison for an indeterminate term up to life.

With regard to the third factor, the rationality of the connection between the legislative means and purpose, denying financial assistance for treatment to SSOSA-amenable offenders who, through no fault of their own, would otherwise be unable to successfully complete the treatment portion of a SSOSA bears little discernible relation to the purpose of the SSOSA. Community based alternative sentences for sex offenders, such as the SSOSA,

> are predicated on the idea that certain sex offenders suffer from behavioral disorders which,

> if treated, would prevent reoffense, while incarceration would only temporarily protect the community from offenders who would reoffend upon release.

Lucy Berliner et al., The Special Sex Offender Sentencing Alternative: A Study of Decision-Making and Recidivism, Report to the Legislature at 2 (June 1991).[8] State-commissioned studies have found that SSOSA recipients have substantially lower recidivism rates than other sex offenders. Robert Barnoski, Sex Offender Sentencing in Washington State: Special Sex Offender Sentencing Alternative Trends: Washington State Institute For Public Policy, Document Number 06-01-1205 at 1, 4 (2006).[9]

RCW 9.94A.670 contains a provision authorizing treatment at public expense for persons who were minors when the crime was committed. RCW 9.94A.670(14).[10] This

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[8] Available at http://www.wsipp.wa.gov/rptfiles/Soff_alternative.pdf, last accessed December 3, 2012. The report was prepared pursuant to the recommendation of the Blue Ribbon Panel on the Special Sex Offender Sentencing Alternative. Berliner at 1.

[9] Available at http://www.wsipp.wa.gov/rptfiles/06-01-1205.pdf , last accessed December 3, 2012.

[10] RCW 9.94A.670(14) states, "If the offender is less than eighteen years of age when the charge is filed, the state shall pay for the cost of initial evaluation and treatment."

provision reflects a legislative acknowledgment that certain conditions – such as minority – may impact an offender's ability to pay for treatment, without otherwise undermining the offender's suitability for the sentencing alternative.

No similar provision is available for adult defendants who are unable to pay for their treatment due to their involuntary indigency. Such a provision is absent despite the legislative acknowledgment in other contexts that poverty is frequently unavoidable.

For most people, poverty is neither a voluntary nor a desirable condition. Washington state public policy reflects this essential truth by providing benefits to persons who, despite bona fide efforts, or due to a physical or mental disability, are unable to secure the basic means of subsistence for themselves. For example, cash, housing, and other forms of assistance are available to low-income adults without dependents who are temporarily unable to work due to a physical or mental disability that lasts at least 90 days. General Assistance Programs for Unemployable

Adults: Washington State Institute for Public Policy, Document Number 09-12-4101 at 2 (2009).[11]

In 2010, enacting changes to the general assistance unemployable program, the Legislature found that:

> Low-income families and individuals often face barriers to receiving the services and benefits that they are qualified to receive. These services are essential to meeting individuals' basic needs, and provide critical support to low-income individuals who are working or who have disabilities that prevent them from working.

Laws 2010, ch. 8, § 1 (E2SB 2782) (emphasis added).

b. A distinction based on ability to pay renders the availability of SSOSAs illusory for indigent offenders, and works an invidious discrimination that violates equal protection.

The trial court found that a sex offender who wishes to avail himself of a SSOSA must "take responsibility to get themselves into a position to be able to undertake sexual deviancy treatment." 5/8/12 RP (Ruling) 11. According to the trial court's logic, a person's inability to acquire the means to pay for treatment due to a disability or despite bona fide efforts renders him ineligible for a SSOSA at the

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[11] Available at http://www.wsipp.wa.gov/rptfiles/09-12-4101.pdf, last accessed December 3, 2012.

outset, or makes him a certain prospect for revocation. In every instance, the indigent adult defendant will be forced into a prison sentence and indefinite confinement up to the statutory maximum, even when the community would benefit from the imposition of a SSOSA. See RCW 9.94A.670(4). In other words, the inevitable consequence of shrugging off the issue by saying that people have the "responsibility" to engineer themselves into a position where they can afford treatment passes the buck to the defendant, and renders the SSOSA an illusory benefit for those who cannot afford it.[12]

In Williams, the United States Supreme Court declared that an analogous statutory scheme violated equal protection:

> Here the Illinois statutes as applied to Williams works an invidious discrimination solely because

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[12] Any claim that taxpayer dollars are better spent than on treatment for sex offenders is dispelled by an examination of incarceration costs which, according to a study by the non-partisan group the Vera Project, totals an annual average of $46,897 per inmate in Washington state. Christian Henrichson and Ruth Delaney, The Vera Project, The Price of Prisons: What Incarceration Costs Taxpayers: at 10 (Updated July 20, 2012), available at http://www.vera.org/download?file=3542/Price%2520of%2520Prisons_updated%2520version_072512.pdf, last accessed December 3, 2012. Mr. Miller's sexual deviancy treatment would have cost $560 per month, or $6,720 per year. 5/8/12 RP 9.

> he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds.

Williams, 399 U.S. at 242.

The Illinois statute at issue in Williams permitted persons who possessed the financial resources to pay a fine to avoid confinement for the statutory maximum. Id. at 236-37. In finding the statute unconstitutional, the Court elaborated:

> Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

The Fourteenth Amendment carries the "basic command that justice be applied equally to all persons."[13]

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[13] This dictate illustrates why a "right versus privilege" distinction is inapposite when "the kind of trial a man gets depends on the amount of money he has." Griffin, 351 U.S. at 19.

Id. at 241 (citing Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956)). To the extent that a trial court may properly revoke a SSOSA because an offender, despite bona fide efforts, lacks the means to pay for treatment, the SSOSA is functionally unavailable to persons who lack the requisite resources.

RCW 9.94A.670 thus sets up a two-tiered system, wherein wealthy offenders who meet the statutory criteria remain in the community, while their hapless indigent counterparts go to prison. This scheme results in "an impermissible discrimination that rests on ability to pay," and is unconstitutional. Williams, 399 U.S. at 241. This Court should conclude that to the extent RCW 9.94A.670 is properly construed to preclude a SSOSA from being available to otherwise-amenable persons who cannot afford sexual deviancy treatment, the statute violates equal protection.

F. CONCLUSION

This Court should conclude that the revocation of Mr. Miller's SSOSA violated due process. This Court should further conclude that to the extent that RCW 9.94A.670 confers the benefit of a community-based sentencing alternative for sex offenders upon the wealthy alone, while consigning those without resources to prison, it discriminates based upon the ability to pay and violates equal protection.

DATED this 4th day of December, 2012.

Respectfully submitted:

#35012 for

SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. CHRISTOPHER ALLEN MILLER, Defendant.	NO. 10-1-00037-3 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the court on May 8, 2012, for a hearing on the State's motion to revoke the Special Sex Offender Sentencing Alternative should be revoked and the suspended sentence imposed. The defendant was present with counsel Peter Simpson of the Law Offices of Thomas Pacher.

EVIDENCE RELIED UPON

1. Report of Violation, Department of Corrections Community Correction Officer Lisa Lee dated May 1, 2012.
2. Letter from Cheryl May (Exhibit 2 entered into evidence May 8, 2012).
3. Testimony of CCO Lisa Lee
4. Testimony of Lisa Hensley, Island County Jail Transition Coordinator
5. Testimony of defendant, Christopher Miller
6. Court file in this case, including but not limited to the defendant's Evaluation.for SSOSA and Pre-Sentence Investigation.

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The court makes the following:

II. FINDINGS OF FACT

1. The defendant entered a guilty plea to one count of Rape of a Child in the First Degree on January 24, 2011.
2. On March 25, 2011, the defendant was sentenced by the court at which time the defendant was granted a Special Sex Offender Sentencing Alternative sentence (SSOSA).
3. The defendant was ordered to be confined for 12 months under the SSOSA with 93 months to life suspended.
4. Among many other conditions, the defendant was ordered to commence sexual deviancy treatment within 90 days of release from jail.
5. The defendant was released from the Island County Jail on January 19, 2012 after serving 12 months in jail as ordered in the Judgment and Sentence.
6. As of May 8, 2012, more than 90 days have elapsed since the defendant was released from jail.
7. The defendant has not commenced sexual deviancy treatment.
8. The defendant currently does not have the financial resources to commence sexual deviancy treatment at the mandated level.
9. The defendant will not have the resources to commence sexual deviancy treatment within a reasonable amount of time.
10. The defendant's current living situation is unstable. The defendant could become homeless at any time. The defendant has no prospects of a more stable residence within a reasonable amount of time. The defendant's current residence does not have potable water. The defendant sleeps on the floor surrounded by garbage.

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11. The defendant represents a significant threat to re-offend. The risk to re-offend is heightened further by the fact that the defendant is not in sexual deviancy treatment and does not have the financial ability to pay for sexual deviancy treatment within an acceptable time period.

12. The defendant has dismal prospects for employment. It is likely the only way the defendant would ever be able to pay for sexual deviancy treatment would be with public assistance. It is unknown if the defendant would be eligible for benefits (SSI) which could potentially pay for treatment. In any case, the earliest the defendant would receive benefits from SSI would be 12 months after release from jail.

13. The defendant has not complied with the conditions of the Judgment and Sentence. Specifically, the defendant has not commenced sexual deviancy treatment within 90 days of release from jail.

14. The State's interest in keeping the community and children safe outweigh any due process interest the defendant may have in having his suspended sentence revoked only for "willful violation of conditions of the Judgment and Sentence."

THEREFORE, the court enters the following:

III. CONCLUSIONS OF LAW

The defendant has not complied with the conditions of the judgment and sentence. Specifically, the defendant has not commenced sexual deviancy treatment within 90 days of release from jail.

There is no Due Process right to have sexual deviancy treatment paid for at public expense.

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Dated this 22nd day of May, 2012.

JUDGE OF THE SUPERIOR COURT

Presented by:

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: _____
ERIC M. OHME
DEPUTY PROSECUTING ATTORNEY
WSBA # 28398

Approved for ~~Entry/Copy Received~~ as to form only:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68826-0-I
v.	)	
	)	
CHRISTOPHER MILLER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ERIC OHME, DPA ISLAND COUNTY PROSECUTOR'S OFFICE P.O. BOX 5000 COUPEVILLE, WA 98239	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] CHRISTOPHER MILLER 346653 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF DECEMBER, 2012.

X_____

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