Supreme Court No. 90391-2
Court of Appeals No. 68826-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ALLEN MILLER,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

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 assurances that a person's conditional liberty may not be revoked based upon his indigency, and that poor people may not be denied the justice afforded the wealthy because of their economic status.

Christopher Miller's community-based sentence was revoked because, due to the involuntary circumstance of his poverty, he was unable to commence sexual deviancy treatment at the frequency mandated by the trial court's sentence. He was otherwise in perfect compliance with the conditions imposed by the trial court. All parties agreed Mr. Miller's poverty was involuntary. The trial court found, however, that offenders have the "responsibility" to acquire the means to pay for treatment, and, if they are unable to do so, then the suspended sentence must be revoked.

This case is an exemplar of systemic flaws that lead to the unjust and unfair differential treatment of the poor and disadvantaged: Mr. Miller was deprived of his conditional liberty solely because of his poverty, where a similarly-situated wealthy person would not have been imprisoned. The Court of Appeals nevertheless affirmed the revocation in a published opinion. This Court should grant review.

B. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Christopher Miller, the appellant below, asks this Court to accept review of the Court of Appeals opinion, No. 68826-0-I. An order denying Mr. Miller's motion for reconsideration, withdrawing opinion, and filing a new opinion was issued on March 31, 2014. Copies of the order and substitute opinion are attached as Appendices A and B.

C. ISSUES PRESENTED FOR REVIEW

1. Due process prohibits the revocation of conditional liberty based upon the involuntary circumstance of a person's indigency. Should this Court review the Court of Appeals opinion finding the revocation of Mr. Miller's Special Sex Offender Sentencing Alternative (SSOSA) based solely on his indigency did not violate due process? RAP 13.4(b)(1); RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Should this Court hold that a person who otherwise would be granted a SSOSA but cannot afford sexual deviancy treatment has a due process right to treatment at public expense? RAP 13.4(b)(3); RAP 13.4(b)(4).

3. 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, is RCW 9.94A.670

unconstitutional as applied because it discriminates based on ability to pay, in violation of equal protection? RAP 13.4(b)(3); RAP 13.4(b)(4).

4. The Court of Appeals determined that the revocation of Mr. Miller's SSOSA was not an abuse of discretion, holding that, without treatment, Mr. Miller was a "threat to society." Substantial evidence did not support this finding: Mr. Milller was in the community crime-free for three years on his own recognizance after the crime was committed; even before the SSOSA was granted, Mr. Miller's risk to reoffend was deemed "low to moderate"; after it was granted, Mr. Miller checked in daily with DOC, met twice weekly with the jail transition coordinator, enrolled in mental health treatment, and committed to attending two sexual deviancy treatment sessions per month until his financial circumstances improved. Should this Court review the Court of Appeals' erroneous determination of the facts? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

Petitioner 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. This episode was Mr. Miller's first and only criminal allegation of any kind.

Mr. Miller was allowed to remain out of custody pending resolution of the case on his own recognizance. He ultimately pleaded guilty as charged and underwent a forensic psychological evaluation to determine his suitability for a SSOSA.

Dr. Johansen, the evaluator, assessed Mr. Miller's likelihood of re-offense as low to moderate. CP 101. He recommended the court grant Mr. Miller a SSOSA, but noted concerns about Mr. Miller's "ability to access and financially support needed treatment," given that he was poor, had limited occupational skills, and was unemployed. CP 104.

At sentencing, the court imposed a SSOSA. The court found that both Mr. Miller and the community would benefit from use of the sentencing alternative. 3/25/11 RP 17. 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. 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. 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.

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.

Upon Mr. Miller's release from jail in January 2012, 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. 1/27/12 RP 2. Based upon this report, the State moved to have Mr. Miller remanded to custody pending a SSOSA revocation hearing. Id. at 3. Because Mr. Miller had not violated any court order and the lack of housing was no fault of his, the court was unwilling to revoke him. Id. The court, however, ordered Mr. Miller to report daily to the Department

of Corrections (DOC), Monday through Friday, and provide information about his search for a place to live. Id. at 6-7.

The State renewed its motion to revoke Mr. Miller's SSOSA a month later. At that hearing, Lisa Lee, from DOC, told the court that "Mr. Miller has been reporting daily, as directed at his last court hearing." 2/27/12 RP 3. She noted, though, that because he was a convicted sex offender, he was having difficulty finding a place to live and was "essentially homeless." Id. at 3-4.

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 argued, "A [SSOSA] should not be limited to the more wealthy members of society." Id.

The State again moved to revoke Mr. Miller's SSOSA on May 8, 2012. Lee again testified at the hearing. She stated that since the court had 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 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[1] 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 if 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 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 acknowledged that Mr. Miller was trying to find work. He attended classes at Work Source and went there frequently. Id. He used the computer of Lisa Henley, the jail transition coordinator, to apply

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[1] 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 April 28, 2014. Because the parties referred to "general assistance" below, to minimize confusion, the program is similarly referenced in this brief.

for jobs, applied for jobs in person, and applied to the Division of Vocational Resources (DVR), without success. Id. at 14-15.

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 based on diagnoses of Asperger's Syndrome and anxiety disorder, 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. Henley 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.

The trial court granted the State's motion to revoke Mr. Miller's SSOSA. The court acknowledged that the only reason Mr. Miller had not entered sexual deviancy treatment was because he could not pay for it. 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 stated that because a serious crime had been committed, "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.

In a published opinion, the Court of Appeals affirmed the revocation order, applying an abuse-of-discretion standard. As set forth below, this Court should grant review.

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); cf., also, State v. Dang, 178 Wn.2d 868, 877-79, 312 P.3d 30 (2013) (insanity acquittee has liberty interest in his conditional release); U.S. Const. amend. XIV; Const. art. I, § 3.

Society shares the SSOSA recipient's interest in his continued conditional liberty. Morrissey, 408 U.S. at 484. "[S]ociety 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). "Both 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 v.

Scarpelli, 411 U.S. 778, 785, 98 S.Ct. 1756, 36 L.Ed.2d 656 (1973). 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. **The Fourteenth Amendment prohibits the State from depriving a person of his liberty based on involuntary poverty.**

a. 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 required:

> 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.

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

Mr. Miller was unable to immediately 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, applying for nearly 35 jobs, meeting twice weekly (always punctually) with the jail transition coordinator, and checking in with DOC every single day. But for his financial status, Mr. Miller would have been in perfect compliance with every term of his SSOSA; his failure to enter sexual deviancy

treatment at the mandated frequency was due entirely to the involuntary circumstance of his poverty. 5/8/12 RP 10, 13.

c. Substantial evidence did not support the lower courts' determination that Mr. Miller was a threat to community safety.

At sentencing, the court found that Mr. Miller satisfied the statutory criteria for granting a SSOSA set forth in RCW 9.94A.670(4). 3/25/11 RP 17-19. Yet, one of the court's 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). The Court of Appeals, in affirming the revocation, agreed with this statement, concluding it weighed against "alternative measures of punishment." Slip Op. at 13.[2] But the factual finding is wholly without support 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 trial 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.

[2] In affirming the finding, the Court of Appeals cited to the actuarial testing of Dr. Johansen, specifically, "On an actuarial basis, persons with history similar to Mr. Miller's have a probability of reoffending of .09 over 5 years, .13 over 10 years, and .16 over 15 years." Slip Op. at 13. These figures do not establish a "significant risk" of re-offense. Additionally, the Court apparently refused to consider requiring the State to fund the treatment as an alternative to punishment. This remedy would have been appropriate given the liberty interest at stake.

Two experts determined that Mr. Miller presented a low to moderate risk of reoffense. CP 101, 128. For over three months, Mr. Miller checked in daily with DOC, met twice weekly with Henley, 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 courts.

d. *McCormick* is not on point.

In revoking the SSOSA, the trial court relied in part on this Court's opinion in State v. McCormick, 166 Wn.2d 689, 213 P.3d 32 (2009). But McCormick did not involve a defendant's inability to comply with the terms of his SSOSA due to indigency. Rather, this Court concluded that the record did not support the conclusion that the SSOSA was being revoked because of McCormick's poverty, and noted that a previous violation of the SSOSA supported the revocation. 166 Wn.2d 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. This Court should grant review and clarify that McCormick does not control here.

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 Court of Appeals did not resolve Mr. Miller's constitutional challenge to RCW 9.94A.670,[3] but the trial court defended its ruling by characterizing a SSOSA as a "privilege," rather than a "right." 5/8/12 RP (Ruling) 11. But whether the interest is a "right" or a "privilege" 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'") (citation omitted). Indeed, the Court in Bearden gave short shrift to the parties' "vigorous" debate over whether strict scrutiny or rational basis was the appropriate standard of review. 461 U.S. at 665.

[3] A copy of the statute is attached as Appendix C.

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.

The deprivation even of conditional liberty is a "grievous loss" that implicates core concerns of due process. Morrissey, 408 U.S. at 482. In the case of a potential SSOSA recipient, the impact on this interest is nearly 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 virtually 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, a statutory scheme that results in automatic revocation – or denial outright – of a SSOSA to otherwise-amenable offenders, where the offender and the community both would benefit from the alternative, 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.[4]

State-commissioned studies have found that SSOSA recipients have substantially lower recidivism rates than other sex offenders.[5]

This Court recognizes that for most people, poverty is neither a voluntary nor a desirable condition, and justice may not be denied based on financial means. See Jafar v. Webb, 177 Wn.2d 520, 530, 303 P.3d 1042 (2013) (holding that "principles of due process and equal protection require that indigent litigants have access to the courts", and affirming Washington's historical commitment to ensuring equal access to justice regardless of financial means).

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.

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[4] 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). Available at http://www.wsipp.wa.gov/rptfiles/Soff_alternative.pdf, last accessed April 29, 2014. The report was prepared pursuant to the recommendation of the Blue Ribbon Panel on the Special Sex Offender Sentencing Alternative. Berliner at 1.

[5] 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). Available at http://www.wsipp.wa.gov/rptfiles/06-01-1205.pdf, last accessed April 29, 2014.

The trial court found that a sex offender who wants 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. But 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 indigent defendant, and gives the poor a different "justice" than that afforded the wealthy.[6]

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 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 Fourteenth Amendment carries the "basic command that justice be applied equally to all persons."[7] Id. at 241 (citing Griffin v.

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[6] 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/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf, last visited April 28, 2014. Mr. Miller's sexual deviancy treatment would have cost $560 per month, or $6,720 per year. 5/8/12 RP 9.

[7] This dictate illustrates why a "right versus privilege" distinction is inapposite

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.

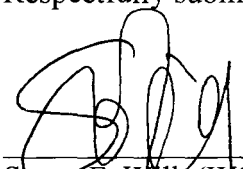
RCW 9.94A.670 thus sets up a two-tiered system, wherein wealthy offenders who meet the statutory criteria remain in the community, while their hapless indigent counterparts go to prison. This scheme results in "an impermissible discrimination that rests on ability to pay," Williams, 399 U.S. at 241, and is unconstitutional. 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

For the foregoing reasons, this Court should grant review.

DATED this 29th day of April, 2014.

Respectfully submitted:



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when "the kind of trial a man gets depends on the amount of money he has." Griffin, 351 U.S. at 19.

State v. Miller, No. 68826-0-I

Appendix A

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

STATE OF WASHINGTON,	)	No. 68826-0-I
Respondent,	)	ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND WITHDRAWING OPINION
v.	)	
CHRISTOPHER A. MILLER,	)	
Appellant.	)	

Appellant Christopher Miller moved for reconsideration of the opinion filed in this case on December 16, 2013. The panel hearing the case called for an answer from the State. The court considered the motion and answer, together with the records and files, and has determined that the motion for reconsideration should be denied. The court also determined that the opinion should be withdrawn and a new opinion filed. The court hereby

ORDERS that the motion for reconsideration is denied and the opinion in the above captioned case filed on December 16, 2013 is withdrawn.

Dated this 31st day of March 2014.

FOR THE PANEL:

Cox, J.

Judge

State v. Miller, No. 68826-0-I

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 68826-0-I
Respondent,	)	DIVISION ONE
v.	)	
CHRISTOPHER A. MILLER,	)	PUBLISHED
Appellant.	)	FILED: March 31, 2014

Cox, J. — Christopher Miller appeals the revocation of the special sex offender sentencing alternative (SSOSA) of his suspended sentence. The trial court revoked this SSOSA because Miller failed to commence sexual deviancy treatment within 90 days of his release from confinement, as required by his sentence. Miller claims this revocation violated his due process and equal protection rights. Because the trial court did not abuse its discretion in revoking this SSOA, we affirm.

In 2010, Miller pleaded guilty to one count of first degree rape of a child. As a first-time offender, he submitted to a forensic psychological evaluation to determine his suitability for a SSOSA.

In 2011, without objection from the State, the sentencing court granted Miller a SSOSA and ordered 12 months of confinement with 93 months to life suspended. One of the SSOSA conditions was that Miller commence sexual deviancy treatment "within 90 days from the Defendant's release from jail." When the trial court granted the SSOSA, it made clear that Miller was responsible for paying for this treatment.

In January 2012, Miller was released from jail. Approximately a week later, the State informed the court that he did not have a stable residence. Miller told his correctional officer that he thought that he was going to be able to live with his father. But the mobile home park that his father lived in would not accept him as a resident. The trial court found no violation of any SSOSA condition at that point, but it ordered Miller to check in daily with his correctional officer.

A month later, the State moved to revoke Miller's SSOSA. Miller's correctional officer reported that Miller checked in with her daily and had applied for benefits. But she also testified that Miller continued to not have a stable residence and that he did not have enough money to pay for sexual deviancy treatment. The trial court granted Miller 30 days to show compliance with the SSOSA condition for treatment.

The State renewed its motion to revoke the SSOSA. In May 2012, the trial court heard testimony from Miller, his correctional officer, and the jail transition coordinator. At the end of the hearing, the trial court gave its oral ruling. It revoked Miller's SSOSA and imposed 93 months of confinement because he was not then in sexual deviancy treatment, as the sentence required.

The trial court later entered its written findings of fact and conclusions of law. The trial court found that Miller did not have the financial resources to commence treatment at the mandated level. It also found that he would not have the resources to commence treatment within a reasonable amount of time.

The court did not make any determination whether the failure to comply with the sentencing condition was willful.

Miller appeals.

REVOCATION OF SSOSA

Miller argues that the trial court abused its discretion in revoking his SSOSA, violating his rights to due process and equal protection. We disagree.

"A SSOSA sentence may be revoked at any time if there is sufficient proof to reasonably satisfy the court that the offender has violated a condition of the suspended sentence or failed to make satisfactory progress in treatment."[1]

"Revocation of a suspended sentence due to violations rests within the discretion of the trial court and will not be disturbed absent an abuse of discretion."[2] "An abuse of discretion occurs only when the decision of the court is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'"[3]

Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, a first-time sex offender may be eligible for a suspended sentence under the SSOSA provisions.[4] "SSOSA was created because it was believed that for certain first-time sexual offenders, 'requiring participation in rehabilitation programs is likely to prove effective in preventing future criminality.'"[5]

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[1] State v. McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009).

[2] Id. at 705-06.

[3] Id. at 706 (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

[4] RCW 9.94A.670(2).

[5] State v. Goss, 56 Wn. App. 541, 544, 784 P.2d 194 (1990) (quoting D. BOERNER, SENTENCING IN WASHINGTON § 2.5(c) (1985)).

Under RCW 9.94A.670(11), "The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment." As the supreme court has noted, the plain language of this provision does not require that a trial court find that a violation of either of the above conditions was willful in order to revoke the suspended sentence.[6]

Nonetheless, the United States Supreme Court has recognized "substantive"[7] protections when an offender's probation is revoked because he or she failed to pay imposed fines or restitution.[8]

In Bearden v. Georgia, the State charged Danny Bearden with felonies of burglary and theft.[9] Georgia's trial court sentenced him to three years of probation for the burglary charge and a concurrent year of probation for the theft charge.[10] One of the conditions to his probation was that he pay a $500 fine and

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[6] McCormick, 166 Wn.2d at 697-98 (citing former RCW 9.94A.120(8)(a)(vi), which contains identical language to RCW 9.94A.670(11)).

[7] See Black v. Romano, 471 U.S. 606, 611, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985) (citing Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)) (explaining that the Bearden court "recognized substantive limits on the automatic revocation of probation where an indigent defendant is unable to pay a fine or restitution").

[8] McCormick, 166 Wn.2d at 700 (citing Bearden, 461 U.S. at 666).

[9] 461 U.S. 660, 662, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

[10] Id.

$250 in restitution.[11] Bearden borrowed some money from his parents to partially pay these obligations, but he was laid off from his job before he could pay the remaining balance.[12] The record showed that Bearden, who had "only a ninth grade education and [could not] read, tried repeatedly to find other work but was unable to do so."[13] The trial court revoked his probation because he failed to pay the full amount he owed.[14]

The Court began with acknowledging that it has "long been sensitive to the treatment of indigents in our criminal justice system."[15] The Bearden Court explained that the question presented was "whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate."[16]

In its analysis of this issue, the Court explained that due process and equal protection principles "converge."[17] In determining what protections should be afforded to an offender when the State seeks to revoke his or her probation based on a failure to pay an imposed fine or restitution, the Court engaged in "a

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[11] Id.

[12] Id. at 662-63.

[13] Id.

[14] Id. at 663.

[15] Id. at 664.

[16] Id. at 665.

[17] Id.

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 . . . .'"[18]

After examining the interests of Bearden and the State, the Court held that due process and equal protection principles require that a trial court "inquire into the reasons" why a probationer has failed to pay fines or restitution.[19]

> If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative 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.[20]

The Court reversed the judgment and remanded so that the lower courts could determine if Bearden had made "sufficient bona fide efforts to pay."[21] And

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[18] Id. at 666-67 (alterations in original) (quoting Williams v. Illinois, 399 U.S. 235, 260, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970)).

[19] Id. at 672.

[20] Id. at 672-73.

[21] Id. at 674.

if so, whether an "alternate punishment" or an "alternate measure" was available and was "adequate to meet the State's interest in punishment and deterrence."[22]

In State v. McCormick, our supreme court explained the limitations to the holding in Bearden.[23] Our supreme court explained, "The Bearden Court did not address whether a finding of willfulness was required in other settings and, if anything, it indicated a finding of willfulness would not be required if the condition is a threat to the safety or welfare of society."[24]

There, a SSOSA condition was at issue. Specifically, the condition prohibited McCormick, who was convicted of first degree rape of a child, from "'frequent[ing] areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.'"[25] The trial court found that McCormick violated this condition when he went to a food bank located on a school's property.[26]

McCormick argued that the "due process clauses of the state and federal constitutions require the State to prove a willful violation of community custody conditions before revoking a suspended sentence."[27] The supreme court disagreed.

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[22] Id.

[23] 166 Wn.2d 689, 701, 213 P.3d 32 (2009).

[24] Id.

[25] Id. at 693.

[26] Id. at 696.

[27] Id. at 699.

The court "conduct[ed] a careful inquiry" into the factors that Bearden identified.[28] As noted above, these factors included "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between the legislative means and purposes, and the existence of alternative means for effectuating the purpose."[29] After conducting this inquiry, the court concluded:

> Given the State's strong interest in protecting the public, McCormick's diminished interest because of his status as a convicted sex offender serving a SSOSA sentence, and that McCormick's proposed scenario leads to dangerous situations where McCormick can frequent places where minors are known to congregate, due process does not require the State to prove that McCormick willfully violated the condition.[30]

Unlike Bearden, the trial court in McCormick did not have to "inquire into the reasons" why McCormick violated the condition.[31] The court based this conclusion on the fact that the violation of this condition was a "threat to the safety or welfare of society."[32]

Here, the SSOSA condition at issue is both similar to and different from the conditions in McCormick and Bearden. As noted above, one of Miller's SSOSA conditions required that he commence sexual deviancy treatment "within

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[28] Id. at 701-02 (citing Bearden, 461 U.S. at 666-67).

[29] Id. (citing Bearden, 461 U.S. at 666-67).

[30] Id. at 703.

[31] Compare id. at 705, with Bearden, 461 U.S. at 672.

[32] McCormick, 166 Wn.2d at 701, 706.

90 days from the defendant's release from jail." Additionally, Miller was ultimately responsible for paying for this treatment.

Like McCormick, a violation of Miller's condition is a threat to the safety and welfare of society. Sexual deviancy treatment will help ensure that Miller will not reoffend, and the ability to participate in treatment and rehabilitate is the purpose of granting a SSOSA.[33] But, unlike McCormick, Miller's condition involves a financial burden.

In contrast, Miller's condition is like the condition in Bearden because that condition involved a financial burden—payment of fines and restitution. But, unlike Bearden, Miller's condition related to the safety and welfare of society.

Thus, the issue is whether the trial court properly exercised its discretion when it revoked Miller's SSOSA for failing to participate in sexual deviancy treatment, which he had to pay for, without considering whether the violation was willful.

As noted above, whether a finding of willfulness is required begins with a "careful inquiry" into the interests affected.[34] Here, we consider Miller's and the State's interests respectively.

Miller has an interest in being "punished only when he acted willfully in violating the terms of his probation" like the probationer in McCormick.[35] As the McCormick court explained, this "interest comes from the idea that a person is

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[33] See Goss, 56 Wn. App. at 544.

[34] McCormick, 166 Wn.2d at 701-02 (citing Bearden, 461 U.S. at 666-67).

[35] Id. at 702.

punished only for the acts within his or her control."[36] "That interest is affected if the State does not have to prove McCormick acted willfully."[37]

Additionally, Miller argues that he has a significant interest in remaining on probation.[38] Specifically, he argues that under Bearden, he has an interest in not having his SSOSA revoked because of his "involuntary indigency."[39] He contends that revoking his SSOSA based on his inability to pay for treatment is "'punishing a person for his poverty.'"[40]

The State has "'an important interest in protecting society, particularly minors, from a person convicted of raping a child,'" as the McCormick court also recognized.[41] "That interest is rationally served by imposing stringent conditions related to the crime" that Miller committed."[42] Here, the condition that required Miller to participate in sexual deviancy treatment serves as a way to prevent Miller from reoffending.[43] But requiring Miller to pay for the treatment when he cannot afford it does not necessarily serve this purpose.

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[36] Id.

[37] Id.

[38] Brief of Appellant at 25 (citing Bearden, 461 U.S. at 671).

[39] Id. at 23-26.

[40] Id. at 25 (quoting Bearden, 461 U.S. at 671).

[41] Brief of Respondent at 11 (quoting McCormick, 166 Wn.2d at 702).

[42] McCormick, 166 Wn.2d at 702.

[43] See id.

Because Miller's ability to pay for the treatment determines if he can fulfill the SSOSA condition, the rule announced in Bearden controls here: "[I]f the probationer has made all reasonable efforts to pay [for treatment], 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."[44] "This lack of fault provides a 'substantial reaso[n] which justifie[s] or mitigate[s] the violation and [could] make[] revocation inappropriate."[45] Our task, then, is to determine whether the trial court in this case fulfilled its obligation under this rule.

Here, the trial court inquired into the reasons why Miller was not in treatment and why he could not pay for treatment. The court appeared to acknowledge that Miller was willing to undergo treatment but was unable to pay for it. It stated, "[I]t is regrettable that people find themselves in positions such as Mr. Miller where they lack financial assistance or the financial means to get into treatment."[46] In its written findings, the trial court stated:

> 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.[47]

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[44] Bearden, 461 U.S. at 668-69.

[45] Id. at 669 (some alterations in original).

[46] Report of Proceedings II (May 8, 2012) at 11.

[47] Clerk's Papers at 7.

The trial court acknowledged that Miller tried to find employment but was unable to do so. The court further explained that Miller's family members initially led the court to believe they could help pay for treatment but that was no longer the case. As Bearden requires, the trial court impliedly acknowledged that Miller made bona fide efforts to pay for treatment but was unable to do so.

The trial court then properly considered whether there were alternative forms of punishment other than incarceration.[48] It noted in its oral ruling that Miller was receiving free mental health treatment, but it would not replace the sexual deviancy treatment. In its written findings, the trial court found that the fact that Miller was not in sexual deviancy treatment increased the risk that Miller would reoffend. Consequently, this mental health treatment was not an adequate alternative measure to meet the State's interest in punishment and deterrence.[49]

Because Miller was not receiving sexual deviancy treatment for which he had to pay and there were no adequate alternative measures, the trial court did not abuse its discretion when it revoked Miller's SSOSA. Although the trial court needed to inquire into the reasons why Miller was not participating in treatment that he had to pay for, the court did not need to find that Miller's failure was willful in order to revoke the SSOSA.

Miller argues that the court's finding that "if Mr. Miller remained in the community without sexual deviancy treatment, Mr. Miller posed a 'significant risk

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[48] See Bearden, 461 U.S. at 672.

[49] Id. at 672-73.

to re-offend' . . . was not supported by substantial evidence."[50] But this argument is not supported by the record.

This court reviews findings of fact for substantial evidence.[51] Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise."[52]

Here, the Report of Forensic Psychological Evaluation, which was before the trial court, stated that Miller's "long-term risk of sexual recidivism falls in the low-moderate range."[53] Specifically, "On an actuarial basis, persons with history similar to Mr. Miller's have a probability of sexual reoffending of .09 over 5 years, .13 over 10 years, and .16 over 15 years."[54] It recommended that Miller enter into sexual deviancy treatment for a period not less than three years. The report explained that "[t]reatment objectives should include relapse prevention."[55]

Given this report, substantial evidence supports the trial court's finding that Miller was at risk for reoffending if he was not in sexual deviancy treatment. Miller's arguments to the contrary are not persuasive.

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[50] Brief of Appellant at 30.

[51] Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

[52] Price v. Kitsap Transit, 125 Wn.2d 456, 464, 886 P.2d 556 (1994).

[53] Clerk's Papers at 105.

[54] Id.

[55] Id. at 106.

Miller also makes separate due process and equal protection arguments in his opening brief. But, as discussed above, the Supreme Court has explained that due process and equal protection principles converge for this type of issue.[56] Thus, there is no separate evaluation of these constitutional provisions for purposes of this issue.

Miller purports to challenge the constitutionality of RCW 9.94A.670. He offers no authority or argument supporting any challenge beyond the constitutional issues that are fully addressed in this opinion. Accordingly, we do not further address this challenge.

In sum, even though the trial court did not explicitly apply the rule in Bearden, it followed the principles of that case. The court inquired into the reasons why Miller was not in sexual deviancy treatment and why he could not pay for this treatment. Because there were no adequate alternative measures, the court properly exercised its discretion in revoking the SSOSA in this case.

We affirm the orders revoking the SSOSA.

Cox, J.

WE CONCUR:

[56] See Bearden, 461 U.S. at 665.

State v. Miller, No. 68826-0-I

Appendix C

RCW 9.94A.670
Special sex offender sentencing alternative.

(1) Unless the context clearly requires otherwise, the definitions in this subsection apply to this section only.

(a) "Sex offender treatment provider" or "treatment provider" means a certified sex offender treatment provider or a certified affiliate sex offender treatment provider as defined in RCW 18.155.020.

(b) "Substantial bodily harm" means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any body part or organ, or that causes a fracture of any body part or organ.

(c) "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. "Victim" also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

(2) An offender is eligible for the special sex offender sentencing alternative if:

(a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense. If the conviction results from a guilty plea, the offender must, as part of his or her plea of guilty, voluntarily and affirmatively admit he or she committed all of the elements of the crime to which the offender is pleading guilty. This alternative is not available to offenders who plead guilty to the offense charged under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and *State v. Newton*, 87 Wash.2d 363, 552 P.2d 682 (1976);

(b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state;

(c) The offender has no prior adult convictions for a violent offense that was committed within five years of the date the current offense was committed;

(d) The offense did not result in substantial bodily harm to the victim;

(e) The offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime; and

(f) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years.

(3) If the court finds the offender is eligible for this alternative, the court, on its own motion or the motion of the state or the offender, may order an examination to determine whether the offender is amenable to treatment.

(a) The report of the examination shall include at a minimum the following:

(i) The offender's version of the facts and the official version of the facts;

(ii) The offender's offense history;

(iii) An assessment of problems in addition to alleged deviant behaviors;

(iv) The offender's social and employment situation; and

(v) Other evaluation measures used.

The report shall set forth the sources of the examiner's information.

(b) The examiner shall assess and report regarding the offender's amenability to treatment and relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum:

(i) Frequency and type of contact between offender and therapist;

(ii) Specific issues to be addressed in the treatment and description of planned treatment modalities;

(iii) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;

(iv) Anticipated length of treatment; and

(v) Recommended crime-related prohibitions and affirmative conditions, which must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances.

(c) The court on its own motion may order, or on a motion by the state shall order, a second examination regarding the offender's amenability to treatment. The examiner shall be selected by the party making the motion. The offender shall pay the cost of any second examination ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost.

(4) After receipt of the reports, the court shall 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.

(5) As conditions of the suspended sentence, the court must impose the following:

(a) A term of confinement of up to twelve months or the maximum term within the standard range, whichever is less. The court may order the offender to serve a term of confinement greater than twelve months or the maximum term within the standard range based on the presence of an aggravating circumstance listed in RCW 9.94A.535(3). In no case shall the term of confinement exceed the statutory maximum sentence for the offense. The court may order the offender to serve all or part of his or her term of confinement in partial confinement. An offender sentenced to a term of confinement under this subsection is not eligible for earned release under RCW 9.92.151 or 9.94A.728.

(b) A term of community custody equal to the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.507, or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department under RCW 9.94A.703.

(c) Treatment for any period up to five years in duration. The court, in its discretion, shall order outpatient sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court. If any party or the court objects to a proposed change, the offender shall not change providers or conditions without court approval after a hearing.

(d) Specific prohibitions and affirmative conditions relating to the known precursor activities or behaviors identified in the proposed treatment plan under subsection (3)(b)(v) of this section or identified in an annual review under subsection (8)(b) of this section.

(6) As conditions of the suspended sentence, the court may impose one or more of the following:

(a) Crime-related prohibitions;

(b) Require the offender to devote time to a specific employment or occupation;

(c) Require the offender to remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(d) Require the offender to report as directed to the court and a community corrections officer;

(e) Require the offender to pay all court-ordered legal financial obligations as provided in RCW 9.94A.030;

(f) Require the offender to perform community restitution work; or

(g) Require the offender to reimburse the victim for the cost of any counseling required as a result of the offender's crime.

(7) At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment.

(8)(a) The sex offender treatment provider shall submit quarterly reports on the offender's progress in treatment to the court and the parties. The report shall reference the treatment plan and include at a minimum the following: Dates of attendance, offender's compliance with requirements, treatment activities, the offender's relative progress in treatment, and any other material specified by the court at sentencing.

(b) The court shall conduct a hearing on the offender's progress in treatment at least once a year. At least fourteen days prior to the hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding the offender's supervision and treatment. At the hearing, the court may modify conditions of community custody including, but not limited to, crime-related prohibitions and affirmative conditions relating to activities and behaviors identified as part of, or relating to precursor activities and behaviors in, the offender's offense cycle or revoke the suspended sentence.

(9) At least fourteen days prior to the treatment termination hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding

the offender's supervision and treatment. Prior to the treatment termination hearing, the treatment provider and community corrections officer shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community custody conditions. The court may order an evaluation regarding the advisability of termination from treatment by a sex offender treatment provider who may not be the same person who treated the offender under subsection (5) of this section or any person who employs, is employed by, or shares profits with the person who treated the offender under subsection (5) of this section unless the court has entered written findings that such evaluation is in the best interest of the victim and that a successful evaluation of the offender would otherwise be impractical. The offender shall pay the cost of the evaluation. At the treatment termination hearing the court may: (a) Modify conditions of community custody, and either (b) terminate treatment, or (c) extend treatment in two-year increments for up to the remaining period of community custody.

(10)(a) If a violation of conditions other than a second violation of the prohibitions or affirmative conditions relating to precursor behaviors or activities imposed under subsection (5)(d) or (8)(b) of this section occurs during community custody, the department shall either impose sanctions as provided for in RCW 9.94A.633(1) or refer the violation to the court and recommend revocation of the suspended sentence as provided for in subsections (7) and (9) of this section.

(b) If a second violation of the prohibitions or affirmative conditions relating to precursor behaviors or activities imposed under subsection (5)(d) or (8)(b) of this section occurs during community custody, the department shall refer the violation to the court and recommend revocation of the suspended sentence as provided in subsection (11) of this section.

(11) The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.

(12) If the offender violates a requirement of the sentence that is not a condition of the suspended sentence pursuant to subsection (5) or (6) of this section, the department may impose sanctions pursuant to RCW 9.94A.633(1).

(13) The offender's sex offender treatment provider may not be the same person who examined the offender under subsection (3) of this section or any person who employs, is employed by, or shares profits with the person who examined the offender under subsection (3) of this section, unless the court has entered written findings that such treatment is in the best interests of the victim and that successful treatment of the offender would otherwise be impractical. Examinations and treatment ordered pursuant to this subsection shall only be conducted by certified sex offender treatment providers or certified affiliate sex offender treatment providers under chapter 18.155 RCW unless the court finds that:

(a) The offender has already moved to another state or plans to move to another state for reasons other than circumventing the certification requirements; or

(b)(i) No certified sex offender treatment providers or certified affiliate sex offender treatment providers are available for treatment within a reasonable geographical distance of the offender's home; and

(ii) The evaluation and treatment plan comply with this section and the rules adopted by the department of health.

(14) 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.

[2009 c 28 § 9; 2008 c 231 § 31; 2006 c 133 § 1. Prior: 2004 c 176 § 4; 2004 c 38 § 9; 2002 c 175 § 11; 2001 2nd sp.s. c 12 § 316; 2000 c 28 § 20.]

Notes:

Effective date -- 2009 c 28: See note following RCW 2.24.040.

Intent -- Application -- Application of repealers -- Effective date -- 2008 c 231: See notes following RCW 9.94A.701.

Severability -- 2008 c 231: See note following RCW 9.94A.500.

Severability -- Effective date--2004 c 176: See notes following RCW 9.94A.515.

Effective date -- 2004 c 38: See note following RCW 18.155.075.

Effective date -- 2002 c 175: See note following RCW 7.80.130.

Intent -- Severability -- Effective dates -- 2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application -- 2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

Technical correction bill -- 2000 c 28: See note following RCW 9.94A.015.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68826-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Eric Ohme, DPA
Island County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 29, 2014