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No. 61996-9-I

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

STATE OF WASHINGTON,

Respondent,

vs.

JORGE A CRESPO-ORTIZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
Cause No. 07-1-03968-2 SEA

The Honorable Catherine Shaffer, Judge

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS

JORGE A. CRESPO-ORTIZ DOC#319397
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

A. STATEMENT OF ADDITIONAL GROUNDS (SAG)

1. The trial court erred when it failed to suppress Jorge Crespo-Ortiz's entire statement to the police.

2. The trial court erred by allowing the state to characterize Jorge Crespo-Ortiz's statement as a confession to the offense -- denying him a fair trial.

3. The trial court erred by allowing the state to argue that Jorge Crespo-Ortiz had a lustful disposition -- denying him a fair trial.

4. The trial court erred by refusing to grant Jorge Crespo-Ortiz's request to discharge his attorney, Terri Ann Pollock, and appoint another attorney.

5. The trial court erred when it refused to grant Jorge Crespo-Ortiz treatment under the First Time Special Sex Offender Sentencing Alternative (SSOSA).

6. The cumulative effect of the errors denied Jorge Crespo-Ortiz a fair trial.

Issues related to Additional Grounds

1. Was Crespo-Ortiz properly Mirandized and did he knowingly, voluntarily and intelligently waive his rights when the totality of the circumstances, including the defective first reading and proper second reading of his rights, demonstrate that the detectives inept Spanish and overbearing "don't tell

me that" interrogation tactic, combined with Crespo-Ortiz's intoxication and/or hangover caused his will to resist to be compromised, resulting in a confession that was not voluntary. (SAG 1).

2. Did defense counsel, Terri Ann Pollock, provide ineffective assistance of counsel, in violation of Crespo-Ortiz's Sixth and Fourteenth Amendment rights to the U.S. Constitution when, for the CrR 3.5 hearing, she failed to call an expert on the toxicological effects of alcohol consumption, its rate of dissipation and, based on the dissipation rate, how long one may continue to be impaired after consumption. (SAG 1).

3. Did the trial court violate Crespo-Ortiz's rights under the Fifth, Sixth & Fourteenth Amendments to the U.S. Constitution and Article 1, sections 3 & 22 of the Washington State Constitution, when it allowed the state to characterize Crespo-Ortiz's statement as a confession, when the Spanish speaking detectives used words that were neither English or Spanish when describing 'penetration' and 'penis,' resulting in an unreliable and involuntary confession. (SAG 2).

4. Did the prejudicial effect of the state's 'Lustful Disposition' argument outweigh its probative value as it related to the states 'visa-versa' argument regarding Count 1, where the evidence on Count 2 was insufficient to establish a prior contact or penetration, denying Crespo-Ortiz a fair trial for

Count 1, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, sections 3 & 22 of the Washington State Constitution. (SAG 3).

5. Did the trial court abuse its discretion when it refused to grant Crespo-Ortiz's motion to discharge his attorney, Terri Ann Pollock, and appoint another attorney. (SAG 4).

6. Did the trial court violate Crespo-Ortiz's constitutional rights when it denied SSOSA because he took the case to trial. (SAG 5).

7. Did the trial court violate Crespo-Ortiz's equal protection rights under the Fourteenth Amendment to the U.S. Constitution and Article 1, section 12 of the Washington State Constitution, when it denied his request for SSOSA based on his status as an alien facing possible deportation. (SAG 5).

8. The cumulative effect of the errors denied Crespo-Ortiz a fair and impartial trial. U.S. Const. Amends. 6 & 14; Article 1, sections 3 & 22 Wash. State Const. (SAG 6).

B. STATEMENT OF THE CASE

1. Procedural Facts

The state charged Jorge Crespo-Ortiz with two counts of rape of a child. CP 1 & 53. The court held an evidentiary hearing under CrR 3.5, after which it found admissible Crespo-Ortiz's statements -- including an alleged confession

to the first count -- to two detectives during an interview at the Regional Justice Center. CP 67; RP2 9-86, RP3 2-28, RP5 3-15, RP6 2-8, RP 7 11-17. The trial court found that Detective Knudsen smelled the odor of alcohol coming from Crespo-Ortiz's person, but that he was not intoxicated during the interview. CP 67. Although a disputed fact, the trial court concluded Crespo-Ortiz was likely hung over but not intoxicated/impaired at the time he spoke with the police on 4/2/07. CP 67.

At the 3.5 hearing Crespo-Ortiz testified that he did not understand he could refuse to answer the police officers' questions, or that he could have asked for an attorney while talking to the police. RP2 54-86. He testified that he drank at least 24 beers and was intoxicated. RP2 56. He testified that he did not understand what the right to remain silent meant. RP2 63. And when he signed the waiver form, he did so only because the officer told him to. RP2 85. The trial court also ruled the state could argue that Crespo-Ortiz had a lustful disposition. CP 63; RP2 3, RP3 41-45, RP10 68-70. Mr. Crespo-Ortiz also moved to discharge his attorney Terri Ann Pollock, and the trial court denied his motion. RP1 5; CP 54. A King County jury found Crespo-Ortiz guilty of the first count and not guilty of the second count. CP 79. The trial court imposed a standard range sentence of 90 months to life. CP

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2. Trial

As was his custom on weekends, Crespo-Ortiz visited his sister, Angela Crespo, the mother of M.D., as well as several other relatives at Angela's home. RP8 9-11. Crespo-Ortiz drank all day and was drunk. RP8 11-13. Detectives Chris Knudsen and Robin Cleary testified that Crespo-Ortiz admitted to them during an interview that he had sexual intercourse with M.D. in the laundry room of Angela Crespo's home. RP9 23-27, 33-35, RP10 8-12. One other guest walked into the laundry room and saw what Crespo-Ortiz and M.D. were doing, so Crespo-Ortiz pulled up his pants and left the room. RP9 25-26.

The guest spoke with Angela Crespo the following morning. RP8 13-14. Angela Crespo then took M.D. to the hospital for an examination to find out if Crespo-Ortiz abused her. RP8 13-16, 26-27, RP9 8-9. An examination revealed a laceration at the base of the vaginal opening consistent with intercourse or penetration. RP9 37-39. Later, additional testing disclosed the presence of M.D.'s DNA on Crespo-Ortiz's penis. RP9 47-54, 58-59, 64-68, 91-98.

3. Sentencing Hearing

At sentencing the state opposed the SSOSA. RP11 5-6.

The state argued the SSOSA was for people who took responsibility and accepted their conduct. And Crespo-Ortiz did not because he elected to go to trial -- even when the state offered him a deal for a single count. RP11 6. The defense asked for the SSOSA because the evaluator thought it was worth giving Crespo-Ortiz an opportunity to have treatment. RP11 7. The SSOSA issue boiled down to eligibility, Crespo-Ortiz's willingness to accept responsibility for his actions, and whether an INS hold for deportation would prevent treatment as an option. RP11.

The trial court agreed that Crespo-Ortiz was eligible for treatment under the statute, but that the legislature wanted sex offenders who receive the option to take responsibility for their behavior. And anticipated that those who did would be people who actually admitted their guilt, in full -- implying that Crespo-Ortiz did not. The court noted that the treatment provider indicated Crespo-Ortiz was a moderate risk for treatment in the community if he remained substance free. RP11 14-15. The court also noted that Crespo-Ortiz had an INS hold, indicating that he would be deported -- which in the trial court's view "would put a crimp in sexual offender treatment." RP11 14-15. The court concluded that treatment would not serve the community and that it would not be feasible to impose the SSOSA in this case. RP11 15.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS CRESPO-ORTIZ'S ENTIRE STATEMENT TO THE POLICE.

Crespo-Ortiz contends the trial court erroneously denied his motion to suppress statements made during an interview in a police car directly after his arrest, and statements made later during an interview at the Regional Justice Center. He claims he was so intoxicated that he was incapable of knowingly, voluntarily and intelligently waiving his rights and that he signed the waiver form because he was afraid and the detective told him to sign, rather than asked if he wanted to.

A defendant's intoxication alone does not render the waiver of Miranda rights involuntary, although it is a factor to consider. State v. Gardner, 28 Wn.App. 721, 723, 626 P.2d 56 (1981); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The trial court determined that Crespo-Ortiz was not so intoxicated that he could not knowingly and voluntarily waive his constitutional rights and agree to talk with the detectives. RP3 19-28.

The suitability of this ruling depends on whether there is substantial evidence that Crespo-Ortiz's statements were voluntary made. Id. at 723-24. In this state, there are two tests to determine voluntariness: (1) the due process test and (2) the Miranda test. State v. Reuben, 62 Wn.App. 620, 624,

814 P.3d 1177 (1991).

Under the due process test, the court determines whether the behavior of the law enforcement officer was overbearing, causing the suspects will to resist to be compromised, which results in a confession that was not freely self-determined. This question has to be answered with complete disregard of whether the suspect actually spoke the truth in his confession. Id. (quoting State v. Vannoy, 25 Wn.App. 464, 467, 610 P.2d 380 (1980)). The record here contains substantial evidence demonstrating the detectives overcame Crespo-Ortiz's will to resist, so that he could not freely answer their questions.

Crespo-Ortiz testified that he was still drunk when the detectives arrested him at work. RP2 55-56. He was frightened because they were wearing normal clothing and did not look like police officers. RP2 57-58. After he was handcuffed and placed in an unmarked police vehicle, one officer was speaking Spanish, but Crespo-Ortiz did not know what it meant to waive his rights. RP2 62. He remembered that there was no interpreter present and remembered being advised that he had the right to remain silent, but that he could not remember what he said, and he did not understand what it meant. RP2 63. Crespo-Ortiz testified that he felt like he had to talk to them because they locked him up in the car. He spoke with the detectives because they told him he had to, and because he was feeling sick and

drunk. He explained that he answered 'yes' because his mind was drugged, and that he did not know that he could ask for a lawyer while talking to the police. RP2 63-64. Although the detective spoke Spanish Crespo-Ortiz did not understand most of what was being said. RP2 64.

After arriving at the Regional Justice Center, Crespo-Ortiz remembered a woman officer, but did not remember where he was. He testified that she did not identify herself and indicated only that she wanted to talk with him. RP2 65. He also did not remember that the officer read him the rights form. He did not read the form or understand what was on it, and signed it only because the detective told him he had to sign. RP2 64-67. Crespo-Ortiz testified that he felt forced to answer questions, but that he could not remember all of the questions which were asked or whether they were asked repeatedly. RP2 67-68. He also could not remember whether the detectives voice was soft or loud when asking questions. RP2 68-69.

Crespo-Ortiz testified that he had only been in the United States one year at the time he was arrested, and that he had never seen police officers who weren't in a uniform. He did not understand that he could have asked for an attorney while talking to the police or that he did not have to answer their questions. RP 83-84. He only signed the waiver form because the detective pointed to two places and told him to sign. And

he signed because he was scared and because he was told to do so. RP2 84-85.

Detective Robin Cleary testified that her voice remained pretty much conversational. RP2 29 & 31. She also admitted that her tone may have changed slightly, but not too much. RP2 32. She testified that Crespo-Ortiz did not appear to be under the influence of alcohol or drugs. RP2 30 & 35. Detective Cleary admitted on cross-examination that she pressed Crespo-Ortiz by asking questions repeatedly because she did not believe him. RP2 33. And that she used words like "don't tell me that," "yes, you do remember," "tell me how it happened," and "tell me the truth." RP2 33-34.

Detective Chris Knudsen testified that Crespo-Ortiz did not appear to be intoxicated. RP9 27-28. He admitted that there was a slight odor of alcohol. RP9 28. On cross-examination he admitted that he smelled intoxicants, but that he did not know if it was coming from Crespo-Ortiz's breath or from his body. He also admitted that people sweat out alcohol when they have previously consumed a lot. RP9 36. He testified that Crespo-Ortiz told him he had a lot to drink the day before, and that he was really drunk. RP9 38. Detective Knudsen also admitted that he was not fluent in Spanish. RP9 36. And that detective Cleary repeated commands like "don't say that to me. Don't tell me that," "Well, no, no. Don't tell me that."

RP9 32-33.

Angela Crespo testified that Jorge Crespo-Ortiz was her brother, and that he was M.D's. uncle. RP8 9. She testified that Crespo-Ortiz had been drinking alcohol all day. RP8 11. She indicated that he was drunk on April 1, 2007, but not to the extent that she had seen in the past when throwing up and stumbling around. RP8 11-13.

The Miranda test places upon the state the burden of establishing that a defendant was fully advised of his rights, understood them, and then knowingly and intelligently waived them. Reuben, 62 Wn.App. at 625. Voluntariness is determined by a preponderance of the evidence. State v. Bradford, 95 Wn.App. 935, 944, 978 P.2d 534 (1999). A reviewing court determines whether statements are voluntary after considering the 'totality of the circumstances.' State v. Broadway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). As noted above, intoxication is factor to consider when deciding whether a defendant understood and consciously waived his rights. Gardner, 28 Wn.App. at 723.

The record indicates that Crespo-Ortiz did not understand or consciously waive his rights. He and his sister testified that he drank beer all day. Although intoxication is just a factor to be considered, the totality of circumstances clearly demonstrate Crespo-Ortiz was not fully advised of his rights,

he did not understand them, and thus did not knowingly and intelligently waive them. At the time he was arrested he was impaired. The detectives, wearing plain cloths and driving an unmarked car, placed him in handcuffs and began interrogating him with broken Spanish. During the interview process, although they partially advised him of his rights, they did not give him an opportunity to say no -- instead they assumed that he decided to talk and began asking questions. RP3 11; RP3 21-25 (trial court's finding).

And the second reading of his rights and signing of the waiver form did not remove the taint from the first garbled reading, because the interview was essentially one long interview, contrary to the trial court's division and ruling regarding the second advisement. RP3 26-27. Crespo-Ortiz testified that he didn't remember much of the interview, and that he signed the forms only because the detective told him to. The transcript of the interview at pages 23-25 demonstrates the detectives obviously took advantage of an impaired suspect:

Okay. ... What's wrong with you?

Were you sleeping, or what?

I fell down.

Oh, you fell down?

Yes.

Okay.

So, these are the rights that I read to you in the car.

You need to go over them again on tape.

They're already on tape. ... do it again?

Oh, okay.

Do you want to read me your rights again?

Yes.

Okay. ... Detective Knutsen.

[laughs]. Just read it to him.

Okay.

[reads rights]. Do you understand all of them?

Yes.

Okay.

Just have him sign.

Sign ... here.

... if I understood?

Yes.

Your signature [laughter]. [reads rights]. Do you understand this?

Yes.

Okay.

Do you want to talk to us? About this.

Yes.

Yes? Okay. Well, sign -- sign here. Do you understand me well or not?

Yes.

CP 72 - Transcript of Interview, pgs. 22-25.

This portion of the transcript raises considerable doubt about whether Crespo-Ortiz understood the advisement of his rights and knowingly and intelligently waived them. The detective clearly observed that something was wrong with Crespo-Ortiz and asked him if he was sleeping. He responded that he fell down. When the detectives asked if he knew how to read, he said "Yes," and then the other officer laughs and says in English "just read it to him." Then after reading him the rights, the detective told the other one in English again "just have him sign." After the waiver portion is read and the detective asks "Do you want to talk to use?", the detective is clearly unsure whether he answered affirmatively and repeats the answer "yes?" and then asks "do you understand me well or not?" CP 72 - Transcript of Interview, pgs. 23-25. This record shows the detectives taking advantage of an impaired suspect.

Based on the 'totality of the circumstances' this court should reverse the trial court's finding that Crespo-Ortiz's waiver was knowingly, voluntarily and intelligently made. RP3 27 (trial court's findings). And because these involuntary statements were used against Crespo-Ortiz as part of the state's case in chief, this court should reverse and remand the case for a new trial.

A. DEFENSE COUNSEL, TERRI ANN POLLOCK, PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF CRESPO-ORTIZ'S 6th & 14th U.S. CONSTITUTIONAL RIGHTS WHEN SHE FAILED TO CALL AN EXPERT FOR THE CRR 3.5 HEARING ON THE TOXICOLOGICAL EFFECT OF ALCOHOL AND ITS RATE OF DISSIPATION.

Article 1, section 22 of the Washington Constitution and the 6th and 14th Amendments to the U.S. Constitution guarantee criminal defendants receive effective representation by counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). A defendant receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices the defendant. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn.App. 544, 551-52, 903 P.2d 514 (1995). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998).

Prejudice exists where, but for the deficient performance, there is a reasonable probability the verdict would have been different. State v. B.J.S., 140 Wn.App. 91, 100, 169 P.3d 34 (2007). A reasonable probability is a probability sufficient

to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

In Crespo-Ortiz's case, there could have been no legitimate reason for counsel to not call an expert on the toxicological effects of alcohol and its rate of dissipation. Crespo-Ortiz testified that he drank at least 24 beers the day before his arrest and that he'd only slept four hours that night before going to work. As a result, he testified that he was still feeling drunk when the detectives arrested him. RP2 56-57. The victim's mother Angela Crespo corroborated the fact that Crespo-Ortiz "... was drinking all day." RP8 11. She also testified that he appeared to be very intoxicated, that he was drunk but not to the extent she'd seen in the past. RP8 12-13.

On cross-examination detective Knudsen admitted that Crespo-Ortiz said he was drunk and didn't remember a lot. He also admitted that he smelled intoxicants, but that he did not know if it was from Crespo-Ortiz's breath or his body. He acknowledged further that people sweat out alcohol when they've previously consumed a lot to drink. RP9 35-36. As previously mentioned the transcript of the detectives interview shows impairment as well. When Detective Knudsen returned to the interview room with detective Cleary, asked Crespo-Ortiz "what's wrong with you? ... were you sleeping, or what?" Crespo-Ortiz

responded that he fell down. CP 72 - Transcript of Interview, pg. 23. From this evidence, it is clear Crespo-Ortiz consumed alcohol all day on April 1st, and into the early morning of the next day, April 2nd -- the day he was arrested. RP2 69-70. Detective Knudsen testified that he began interviewing Crespo-Ortiz at 12:15 p.m. on April 2, 2007. RP2 14-15. According to these times, Crespo-Ortiz would have had his last beer approximately eight hours before being arrested and interviewed.

Based on this evidence an expert could have provided an opinion on one's blood alcohol level, based on the amount consumed in a specified period of time, and whether one would still be impaired eight hours from the time of the last drink, based on the known scientific rate that alcohol dissipates from one's body. Moreover, there is a reasonable likelihood that counsel's deficient performance affected the outcome because the detectives testified that Crespo-Ortiz confessed to the offense. Had these alleged confessions been suppressed, there is a reasonable probability the outcome of the trial would have been different. Additionally, there is a reasonable probability the outcome of the 3.5 hearing would have been different. The trial court indicated that Crespo-Ortiz "was likely hung over," but that he was not "impaired." RP3 20. The trial court indicated that Crespo-Ortiz's testimony was not believable and

found that he did understand his rights and waiver. RP3 26-27. This finding is not tenable because a hung over person who is sleep deprived may still be impaired, and an expert on the subject could have provided the necessary scientific data demonstrating this fact -- a fact the court found was likely, i.e., that Crespo-Ortiz was likely hung over, but not impaired. This court should conclude that counsel provided deficient performance prejudicing Crespo-Ortiz's defense, and accordingly reverse and remand the case for a new trial.

2. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO CHARACTERIZE CRESPO-ORTIZ'S STATEMENT AS A CONFESSION TO THE OFFENSE -- DENYING HIM A FAIR AND IMPARTIAL TRIAL.

Article 1, sections 3 & 22 of the Washington Constitution and the 5th, 6th and 14th Amendments to the U.S. Constitution guarantee the right to remain silent and a fair and impartial trial. Miranda v. Arizona, supra. A reviewing court determines whether statements are voluntary after considering the 'totality of the circumstances.' State v. Broadway, supra.

Crespo-Ortiz incorporates the argument and facts from additional ground #1 above, and contends the trial court violated his rights when it allowed the state to characterize his statement as a confession to the jury, when the totality of the circumstances show that the alleged confession is unreliable based on the interviewing detectives inept Spanish.

Crespo-Ortiz testified that he didn't remember much of the interview, and that he signed the advisement and waiver forms only because the detective told him to. As previously argued the transcript of the interview at pages 23-25 demonstrates the detectives obviously took advantage of an impaired suspect. Later in the same interview the detectives elicit what they considered a confession.

Detective Knudsen testified that after they arrived at the Regional Justice Center, he sought out detective Robin Cleary because she was fluent in Spanish. RP9 20 & 36. The state then asked detective Knudsen to tell the jury about the interview. RP9 23. And he read what the state characterized a confession in closing argument. RP9 23-39; RP10 41, 59-60, 72-73.

Detective Robin Cleary testified that she was fluent in Spanish. RP10 7-8. The State asked detective Cleary if Crespo-Ortiz admitted having raped the victim. And detective Cleary answered "Yes." RP10 10. Detective Cleary admitted on cross-examination that Crespo-Ortiz initially denied having had sex with M.D.. And she admitting^{ed} saying to him "don't tell me that, don't tell me you don't remember, or don't tell me you didn't." She admitting^{ed} saying "don't tell me that," at least five times. RP10 14.

The question here is whether Crespo-Ortiz actually

confessed, or was his responses to the detectives inept Spanish and overbearing manner a mischaracterization of a confession. When reviewing the transcript the 'totality of the circumstances' demonstrate Crespo-Ortiz was confused. Detective Cleary asks Crespo-Ortiz "Well, have you penetrated her or not?" Crespo-Ortiz answers "Hmm." Detective Cleary then asks him "with your pinoose. Have you penetrated her? Yes." Crespo-Ortiz asks "Penetrate means ... uh" Detective Cleary says "You have gone into her vagina." Crespo-Ortiz says "I think so." CP 72 -- Transcript of Interview, pgs. 30-31. Detective Cleary uses the word "Pinoose" in conjunction with 'penetration,' 'vagina,' 'go in' and 'from' at least ten times. Id. pgs. 30-31, 35-37. The problem with labeling these transactions a confession is the word "pinoose" is not a word in Spanish or English. Id. pg. 31 *fn6. Thus, for all practical purposes Crespo-Ortiz was not confessing to "penetrating, going in, and pulling from," a vagina his penis as the state characterized it. The fact is "pinoose" is not a word so it cannot be said Crespo-Ortiz admitted penetrating the victim's vagina with his penis. This characterization was highly prejudicial. As a consequence it was error for the state to characterize this evidence as a confession of penetration, and doing so violated Crespo-Ortiz's right to fair and impartial trial.

This court should reverse the conviction and remand the

case for a new trial. In assessing the totality of the circumstances, a reviewing court must consider any ... misrepresentations made by the interrogating officers and any language barriers. State v. Broadway, supra, 133 Wn.2d at 132; State v. Lopez, 74 Wn.App. 264, 872 P.2d 1131 (1994). Article 1, section 9 of the Washington Constitution provides: "No personal shall be compelled in any criminal case to give evidence against himself." See also 5th Amend. to the U.S. Constitution. Detective's Cleary and Knudsen used a language barrier and misrepresented the word 'penis' with 'pinoose' which is not a word in English or Spanish. Through this misrepresentation they characterized Crespo-Ortiz's response to a word that is not a word -- a confession by connecting 'penetration,' 'go in,' and 'from' with vagina. This violated Crespo-Ortiz's rights and reversal is required.

3. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO ARGUE THAT CRESPO-ORTIZ HAD A LUSTFUL DISPOSITION -- DENYING HIM A FAIR AND IMPARTIAL TRIAL

Crespo-Ortiz contends the trial court erred when it allowed the state to elicit testimony from the victim M.D. for the purpose of a lustful disposition -- visa-versa, both ways as to incidents of alleged sexual contact and/or penetration prior to 4-1-07 (Count II) being admissible to show Crespo-Ortiz's lustful disposition toward M.D. on 4-1-07 (Count I), and the

evidence of his alleged sexual contact and/or penetration with M.D. on 4-1-07 being admissible to show a lustful disposition toward M.D. on those occasions prior to 4-1-07. CP 63 - STATE'S TRIAL MEMORANDUM, pgs 7-10; RP3 41-42. Even though the jury acquitted Crespo-Ortiz of Count II, he maintains the prejudicial impact of this evidence deprived him of a fair trial has it relates to Count I. RP10 68-70. 6th & 14th Amends. to the U.S. Constitution, Article 1, sections 3 & 22 of the Washington Constitution (Fair Trial).

The admission of evidence of a defendant's prior misconduct under ER 404(b) is reviewed under the abuse of discretion standard. State v. Suttle, 61 Wn.App. 703, 812 P.2d 199 (1991). In prosecutions for sexual offenses, the defendant's previous sexual contacts with the victim are admissible because evidence of collateral sexual misconduct shows the defendant's lustful disposition toward the victim. State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991). To admit evidence of other misconduct under Washington law, the trial court must (1) identify the purpose for which the party seeks to introduce the evidence, (2) determine whether the evidence is relevant to prove an element of the crime charged, and (3) weigh the probative value of the evidence against its prejudicial effect. Additionally, the party offering the evidence of prior misconduct generally has the burden of proving by a preponderance of the evidence

that the misconduct actually occurred. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Additionally, once evidence has been ruled admissible, the court should give an instruction to the jury limiting the purpose for which the evidence may be considered. The trial court should explain the purpose for which it was admitted to the jury, and give a cautionary instruction to consider it for no other purposes. State v. Lynch, 58 Wn.App. 83, 88, 792 P.2d 167 (1990)(review denied, 115 Wn.2d 1020 (1990)). Our supreme court has recognized that evidence of collateral sexual contact in sex cases is properly admitted when it shows the defendant's lustful disposition directed towards the victim. Ray, 116 Wn.2d at 547-48; State v. Guzman, 119 Wn.App. 176, 79 P.3d 990 (2003). Prior sexual contacts between the same defendant and victim evince a sexual desire for the particular victim and thus, make it more probable that the charged offense was committed. State v. Ferguson, 100 Wn.2d 131, 133-34 (such evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the victim, which in turn makes it more probable that the defendant committed the offense charged); State v. Thorne, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953).

The trial court identified the purpose and relevance of the evidence. The court: "... I think what happened before

April 1st, certainly is admissible to prove the state's other count [i.e. Count II]. I do think we're going into the Petridge Instruction. RP3 44; RP10 4; CP 75 - COURT'S INSTRUCTIONS TO THE JURY, #8. Secondly, I think also admissible ... for the specific purpose of establishing the fact that the defendant, in fact, had a sexual interest in this child. The fact the defendant had allegedly sexual contact with her on April 1st, tends to show he had a sexual interest. Which makes it more likely, in fact, he had a sexual encounter during the earlier charging period; that, in fact, his sexual interest occurred earlier with her, its interpreted its more likely he was sexually interested in her, even before he had the encounter with her on April 1st. So my way of thinking this is a classic lustful disposition evidence" RP3 44-45.

The state and defense counsel agreed on a Petridge instruction, which limited allegations of multiple prior acts of rape of a child to one particular act for count II, requiring the jury to unanimously agree as to which act was proven beyond a reasonable doubt. CP 75, Instruction #8. This limiting instruction, as well as the court's consideration of the issue, indicates the court did weigh the prejudicial effect of such testimony against its probative value.

The state, however, failed to show that the prior misconduct actually occurred. Some discussion was had about whether the

victim admitted something similar happened once in the past or multiple times. RP3 42-43. After the state rested its case, defense counsel moved to dismiss count II because the evidence was insufficient. The victim testified that this happened several time before when she was 12, but she could not give any more specifics. The mother, Angela Crespo, testified that he touched her, but that there was no penetration. RP10 17. Among other things, the state argued that "... the incident on April 1st certainly is an indication of his lustful disposition towards her on prior occasions." RP10 18. The trial court denied the motion. Id. The jury acquitted Crespo-Ortiz of Count II. CP 79.

During closing arguments the state argued, in relevant part:

The fact that the defendant had sex with M.D. on April 1st, ... is overwhelming And you can take that evidence, ... and what does that really tell you? What does it indicate to you? Well, one thing it should tell you is he as a sort of lustful disposition for M.D.. There is certainly evidence to that fact. And so it should come to you as no surprise that April 1st ... was not the first time that he had ever had sex with her.

RP10 68-69.

Even though the jury acquitted Crespo-Ortiz of count II this argument was highly prejudicial and violated the limiting instruction. The uncharged subsequent acts of alleged contact and/or penetration were to be admitted to show a lustful

disposition toward count II. The state's argument abandoned the limiting instruction. Additionally, even if the jury could not unanimously agree on a single prior act for purposes of the Petridge instruction relating to count II, the probative value of the alleged subsequent misconduct did not outweigh its prejudicial effect toward count I. In relevant part, the state argued: "Do you honestly think that the defendant would just basically come into the laundry room, ..., some random occasion on April 1st, for the first time, and just out of the blue have sex with her? Do you think that was really the first time something like this happened? ... He knew she hadn't reported any of the other occasions. So he probably figured he'd get away with it again on April 1st." RP10 69.

The state argued that the subsequent misconduct limited to Count II by the Petridge instruction applied to Count I, "do you think that was really the first time something like this happened? He knew she hadn't reported any of the other occasions. So he probably figured he'd get away with it again on April 1st." Even if the jury couldn't unanimously agree on a single subsequent act to convict for count II, they could have used the prior misconduct evidence for count I based on the prosecutor's improper closing argument. This application of the evidence and argument prejudiced Crespo-Ortiz's defense and denied him a fair trial. This court should reverse and

remand the case for a new trial.

4. THE TRIAL COURT ERRED BY REFUSING TO GRANT CRESPO-ORTIZ'S REQUEST TO DISCHARGE HIS ATTORNEY, TERRI ANN POLLOCK, AND APPOINT ANOTHER ATTORNEY.

Trial court decisions relating to attorney/client differences are generally reviewed for abuse of discretion. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). The reviewing court considers three issues when reviewing the denial of a request for new counsel: (1) the extend of the conflict; (2) the adequacy of the trial court's inquiry; and (3) whether the motion was timely. Id. at 607 (quoting In re Personal Restraint Petition of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001)).

Here, the extent of the conflict was very serious. On February 15, 2008, after spending nearly a year in jail Crespo-Ortiz moved to discharge his court appointed attorney, Terri Ann Pollock. He complained that she hadn't done anything for him. When they spoke, on very limited occasions, she would repeat to him that he was going to jail for a long time. When Crespo-Ortiz asked for her help she advised him and repeated over and over "what you did was wrong." RP1 5. Based on these statements, Crespo-Ortiz indicated there was no trust. RP1 6. He did not believe she was representing his best interests because she believed what he did was wrong, so he advised

the court that he did not want to talk to her. RP1 6.

The trial court indicated "what I am hearing thus far is that the defendant does not like what Ms. Pollock is telling him. I dare say he does not like the situation that he's in. Based on what has been communicated to this court, ... [the] motion is denied." RP1 7; CP 54-55.

The conflict was not what Ms. Pollock was telling him, rather it was how she felt. She felt that what he did was wrong and told him he was going to jail for a long time. This scared Crespo-Ortiz because her feelings toward the crime made him believe she would not represent his interests to the best of her ability. There was a breakdown in trust between Crespo-Ortiz and Ms. Pollock and he wanted another attorney, one that would fully represent him. This was an actual conflict of interest.

Second, the trial court failed to conduct an adequate inquiry. The court asked Crespo-Ortiz how Ms. Pollock scared him. RP1 5. He tried to articulate the conflict. RP1 6, pg. 5, lines 16-21; RP1 6, lines 11-15. The court dismissed his complaint by indicating that Ms. Pollock had an "obligation to communicate that information to [him] whether or not [he] liked it and whether or not it might scare [him]." RP1 6. This was an inadequate inquiry. The actual conflict was Ms. Pollock's feelings about the crime and Crespo-Ortiz's lack of trust for her feelings, not her obligation to communicate the

charges brought by the state. Moreover, during the court's inquiry, Ms. Pollock did not deny her feelings or making these statements to Crespo-Ortiz when addressing the court. Her feelings should have been kept to herself, and there is no doubt that any attorney who expressed a belief that her client is guilty and what he did was wrong, especially a female attorney on a sex case, would create a serious conflict of interest, a scary one that would breakdown all attorney client trust.

Third, Crespo-Ortiz's motion was timely. It was brought nearly three months before trial began. The trial court did not address the issue of timeliness.

The trial court failed to conduct an adequate inquiry and identify the actual conflict. As a consequence, the trial court abused its discretion when it denied Crespo-Ortiz's motion to discharge his court appointed attorney. This court should reverse and remand the case for a new trial.

5. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT CRESPO-ORTIZ TREATMENT UNDER THE FIRST TIME SPECIAL SEX OFFENDER SENTENCING ALTERNATIVE (SSOSA).

A. The trial court erred when it denied SSOSA.

Crespo-Ortiz contends the trial court erred when it denied SSOSA based on the fact that he took the case to trial. He contends that both the state and the trial court impermissibly penalized him for exercising his right to trial.

Under SSOSA, certain first-time sex offenders may receive a suspended sentence if they are amenable to treatment and comply with a program as ordered by the court. A standard range sentence is generally not reviewable absent an abuse of discretion. State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). However, this prohibition is not absolute. State v. Garcia-Martinez, 88 Wn.App. 322, 329, 944 P.2d 1104 (1997). A court has broad discretion in deciding whether to impose a SSOSA sentence. State v. Frazier, 84 Wn.App. 752, 753, 930 P.2d 45, review denied 132 Wn.2d 1007 (1997); State v. Onefrey, 119 Wn.2d 572, 575, 835 P.2d 213 (1992); State v. Hays, 55 Wn.App. 13, 16, 776 P.2d 718 (1989). An abuse of discretion occurs when the court's decision is manifestly unreasonable or exercised on untenable ground or for untenable reasons. Hays, 55 Wn.App. at 16. A court also abuses its discretion if it categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis. State v. Khanteechit, 101 Wn.App. 137, 139, 5P.3d 727 (2000).

Prior to trial Crespo-Ortiz petitioned for a SSOSA evaluation. The trial court continued trial for nearly five months to accommodate Crespo-Ortiz's SSOSA evaluation. CP 14-44. Crespo-Ortiz exercised his right to trial and took the case to a jury. The jury convicted him on Count I, but acquitted him on Count II. CP 79. A sentencing hearing was held on July

11, 2008, before the Honorable Catherine Shaffer. RP11.

The state recommended a mid range sentence of 90 months, based on an offender score of zero and a standard range sentence of 78 to 102 months minimum to life as an indeterminate sentence. RP11 2-3. As a condition of the sentence, the state also recommended a deviancy evaluation and treatment, among other things. Id. The state also indicated that it opposed SSOSA. RP11 5. The state listed four main reasons for denying treatment, (1) that Crespo-Ortiz might not be able to afford treatment because he had no history of stable employment, (2) that he was going to be deported anyway, (3) that he did not accept responsibility for the offense, even though he admitted guilt at the 3.5 hearing, and (4) that SSOSA is for people who take responsibility and accept their conduct, and Crespo-Ortiz did not because he put his family through a trial, even after the state offered a plea agreement for just one count. RP11 5-6.

Crespo-Ortiz's attorney reminded the court that the SSOSA evaluator thought it was worth giving him an opportunity to have treatment. She also opined that the statute allows treatment, even for those individual's who exercise their right to trial RP11 7-10. In view of the trial court categorically denying treatment before the hearing started (RP11 5, lines 3-7), she asked the court to impose the bottom of the standard

range. RP11 10.

In relevant part, the trial court ruled:

All right. Well, here is my difficulty with the request for treatment in the community via SSOSA alternative. First of all, although I agree with the defense that Mr. Crespo-Ortiz is eligible under the language of the statute, I am pretty certain that the legislature wants sex offenders who receive this option to take responsibility for their behavior. And anticipated that those who did would be people who actually admitted their guilt, in full. ... So, I do not think that it would serve the community or would be feasible to impose SSOSA in this case.

RP11 10-15. The trial court clearly indicated it was "pretty certain that the legislature wants sex offenders who receive this option to take responsibility for their behavior. And anticipated that those who did would be people who actually admitted their guilt, in full." RP11 13. The state argued the same thing, moments before -- "...SSOSA is for people who take responsibility He did not do that, by putting the family through a trial. And we ... offered just the one count as well," on a plea agreement. RP11 6, lines 17-22. Both the state and the trial court penalized Crespo-Ortiz for exercising his right to trial.

Here, the state's reason for opposing, and the trial court's reason for denying SSOAS was that Crespo-Ortiz put the family through a trial, and by doing so he did not take responsibility for his behavior or fully admit his guilt. This was a violation

of Crespo-Ortiz's constitutional rights. Notwithstanding the common belief that an offender must accept responsibility for his behavior in order for treatment to be successful, the minimal protections provided by the United States Constitution may not be violated. State v. Montgomery, 105 Wn.App. 442, 446 fn10, 17 P.3d 1237, 22 P.3d 279 (2001)(citing State v. Strauss, 93 Wn.App. 691, 698, 969 P.2d 529 (1999)(citing State v. Easter, 130 Wn.2d 228, 234-41, 922 P.2d 1285 (1996)). A defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial. United States v. Carter, 804 F.2d 508 (9th Cir. 1986).

In State v. Montgomery, the sentencing court refused to grant a SSOSA because the defendant had 'caused the victim to go to trial,' which was an 'indication of his unwillingness and inability to acknowledge what he did and his need for treatment.' The appellate court held "the trial court erred when it denied SSOSA to Montgomery because he took the case to trial." Montgomery, 105 Wn.App. at 446.

Crespo-Ortiz's case is practically identical. As a result, the trial court erred when it denied SSOSA to Crespo-Ortiz because he 'put the family through a trial,' and by doing so he did not 'actually admit his guilt, in full.' Both the state and the trial court violated Crespo-Ortiz's constitutional rights. This court should reverse and remand the case for a

new sentencing hearing based on permissible reasoning and for the purpose of the SSOSA.

B. The trial court erred when it denied SSOSA.

Crespo-Ortiz contends the trial court violated his equal protection rights under the Fourteenth Amendment and Article 1, section 12 of the Washington Constitution by denying his request for a SSOSA based on his status as an alien.

The Fourteenth Amendment states "No State shall ... deny to any person within its jurisdiction the equal protections of the laws." U.S. Const. Amend. 14, sec. 1. Article 1, section 12 of the Washington Constitution states "No law shall be passed granted to any citizen, class of citizens, ..., privileges or immunities which upon the same terms shall not equally belong to all citizens" The Fourteenth Amendment and Article 1, section 12 are substantially identical and subject to the same analysis. State v. Shawn P., 122 Wn.2d 53, 559-60, 859 P.2d 1220 (1993).

When evaluating an equal protection claim, the reviewing court must first determine whether the individual claiming the violation is similarly situated with other persons. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and

that the disparate treatment was the result of intentional or purposeful discrimination. Id. at 290. Although equal protection does not require that the state treat all persons identically, any classification must be relevant to the purpose of the disparate treatment. In re Det. of Thorell, 149 Wn.2d 724, 745, 72 P.3d 708 (2003)(citing Baxstrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966)). Depending on the type of classification or right determines which of three tests courts apply. State v. Smith, 117 Wn.2d 263, 277, 814 P.2d 652 (1991). Reviewing courts apply strict scrutiny if the individual is a member of a suspect class or the state action threatens a fundamental right. Shawn P., 122 Wn.2d at 560. Intermediate scrutiny is applied if the individual is a member of a "semisuspect" class or the state action threatens "important" rights. Id. If the state action does not threaten a fundamental or "important" right, or if the individual is not a member of a suspect or semisuspect class, a rational relationship or rational basis test is applied. Id.

The Fourteenth Amendment "entitles both citizens and aliens to the equal protections of the laws of the State in which they reside." Graham v. Richardson, 403 U.S. 356, 371, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); Hsieh v. Civil Serv. Comm'n, 79 Wn.2d 529, 531-32, 488 P.2d 515 (1971). State action violates equal protection rights if it separates individuals into discrete

classes based on citizenship and subjects those individuals who are not citizens to disparate treatment. Graham, 403 U.S. at 371, 377. A classification based on an individual's status as an alien is "inherently suspect and subject to close judicial scrutiny." Id. at 372.

Although courts generally subject restraints on the rights of aliens to strict scrutiny, they have placed some limits on their equal protection rights. Foley v. Connelie, 435 U.S. 291, 294, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1987). Courts subject state action to strict scrutiny if it excludes aliens, as a class, from education benefits and the ability to practice a licensed profession. Id. at 295. However, courts have applied rational basis when reviewing state action relating to the right to vote, running for elective office, holding important nonelective positions, or working as a police officer. Id. at 296-98. In addition, classifications among aliens are generally subject to the less stringent rational basis review. Mathews v. Diaz, 426 U.S. 67, 78-79, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)(recognizing that not all aliens are members of the same legal classification because "the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country."); Angulo-Dominquez v. Ashcroft, 290 F.3d 1147, 1151 (2002). Illegal aliens are not members of a suspect class and courts have consistently subjected restrictions

of their rights to rational basis review. Plyler v. Doe, 475 U.S. 202, 219 n.19, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

Crespo-Ortiz contends the Fourteenth Amendment entitles both citizens and aliens to the equal protection of the laws of the state in which they reside, Graham, supra, 430 U.S. at 371, and thus with respect to the SRA and the SSOSA, he is similarly situated with all 'citizen' felony first time sex offenders facing a sentence under the SRA. Therefore, his status as an alien facing deportation or not facing deportation is irrelevant to the application of the SSOSA. Nevertheless, he contends the trial court treated him differently than a regular citizen and denied SSOSA because he was an alien.

Additionally, Crespo-Ortiz's Fourteenth Amendment equal protection right is a 'fundamental right' under the constitution, even if his alienage status does not place him in a suspect or semisuspect class. State action violates equal protection rights if it separates individuals into discrete classes based on citizenship and subjects those who are not citizens to disparate treatment. Graham, 430 U.S. at 371, 377. Here, the trial court classified Crespo-Ortiz an alien and applied the SRA and the SSOSA differently than it would have been applied to a citizen under similar or identical circumstances. This classification was 'inherently suspect' and should be subject to close judicial scrutiny. Id. at 372.

At Crespo-Ortiz's July 11, 2008, sentencing hearing, the state opposed the SSOSA, RP11 5, and pointed out that he had an INS hold. The state believed an intensive treatment program would not be practical because "he's going to be deported anyway." RP11 6. Defense counsel thought it to be somewhat curious that the state opposed the SSOSA because he was facing deportation, yet in their recommendation they recommended treatment, essentially pointing out that if he's not going to get it through a SSOSA he shouldn't have to get it at the end of his sentence. The trial court said: "True." RP11 9-10. The state respondent that he could get treatment in prison or in the community if he returned to the United States. And "one way or another ... if he's here, he needs to get treatment." RP11 11.

The trial court found that Crespo-Ortiz was eligible for treatment under the language of the statute. RP11 13. The court noted the SSOSA evaluator indicated that he would require strong supervision and a cooperative relationship with the treatment provider and his community correction's officer. That he was a moderate risk for treatment in the community if he remained substance free. RP11 13-14. Lastly, the trial court noted that the prosecutor confirmed an INS hold which, in the court's view, meant that upon release from prison or jail Crespo-Ortiz would face deportation and be subject to prosecution

if he returned to the United States. RP11 1415. The court said: "that would put a crimp in sexual offender treatment too. So, I do not think that it would serve the community or would be feasible to impose a SSOSA in the case." RP11 15.

This state action violated Crespo-Ortiz's fundamental equal protection rights under the Fourteenth Amendment. The trial court classified him an 'alien' subject to deportation and applied the SSOSA differently that it would have been applied to a citizen under similar circumstances. A citizen who was eligible for treatment and only a moderate risk for treatment in the community would have certainly been given the opportunity for the SSOSA, and the opportunity to arrange appropriate employment and living conditions suitable for a very structured treatment program, including strong supervision from the court, family, treatment provider and community corrections officer. Contrary to the court's finding that Crespo-Ortiz's family was not supportive of treatment and would not help closely supervise him, his family was very close and they took the necessary steps to report the incident and get him help. Therefore, they were, in fact, in support of treatment and most certainly would have complied with any conditions necessary to see their loved one treated, as any other "citizen's" family would do. Moreover, Crespo-Ortiz was employed when he was arrested. Therefore, he was employable, and most certainly could have afforded

treatment and a pre-arranged living situation recommended by the SSOSA evaluator, whether it was with an approved responsible family member or a half-way house designed to meet conditions necessary for treatment.

The SRA does not expressly prohibit imposition of SSOSA if the defendant is an alien. Nor does it expressly prohibit a court from considering alienage or deportability when determining whether a SSOSA is appropriate in a particular case. The SRA gives courts discretion to consider various risk factors applicable to the defendant when imposing a sentence. And this risk includes the effect possible deportation would have on a defendant's treatment and punishment. State v. Osman, 157 Wn.2d 474, 139 P.3d 334 (2006).

The Fourteenth Amendment is violated if state action separates individuals into discrete classes based on citizenship and subjects those individuals who are not citizens to disparate treatment. Graham, supra, 402 U.S. at 371, 377. This fundamental right entitles both citizens and aliens to the equal protection of the laws of the state in which they reside. Id. Therefore, applying the effect of possible 'risk factors' in a manner not commensurate with a 'citizen' may violate equal protection. Under the SRA, a citizen is not subject to possible deportation and this fact is irrelevant when determining whether a defendant is an appropriate candidate for the SSOSA.

Thus, according to the Osman decision, there is two classes of individuals eligible for the SSOSA under the SRA. Citizens or aliens with no risk of deportation and those citizens or aliens with the risk of being deported. The Osman court essentially provided sentencing courts in this state with a license to violate the equal protection clause by allowing disparate state action based on 'possible risk factors' associated only with a discrete class of citizens or aliens subject to possible deportation. Any citizen or alien in this class will always be discriminated against based on the risk of deportation, and thus never qualify for the SSOSA -- as citizen would without this risk.

This certainly places Crespo-Ortiz in a suspect class. Under strict scrutiny, reviewing courts will uphold state action if it is necessary to achieve a compelling state interest. State v. Smith, supra, 117 Wn.2d at 277. The state has a compelling interest in treating first time sex offenders, hence the legislative enactment of the SSOSA. Moreover, treating first time sex offenders promotes this interest by protecting society with prevention, i.e., a treatment option designed to reduce the risk of reoffending; a compelling state interest and purpose cited for the SSOSA legislation.

Here, the trial court's denial of the SSOSA in Crespo-Ortiz's case based on a possible risk factor related

to his status as an alien facing possible deportation was irrelevant and did not advance the legislative purpose for the SSOSA. The state is purposely and systematically denying the SSOSA based on an individual's status as an alien facing possible deportation. Take the deportation risk out, and the alien falls into the eligible class. On these terms the punishment imposed is not commensurate with other similarly situated citizens. This violated Crespo-Ortiz's equal protection rights.

Even under the less stringent rational basis test, state action does not violate the equal protection clause if there is a rational relationship between the classification and a legitimate state interest. State v. Simpson, 26 Wn.App. 687, 693, 615 P.2d 1297 (1980). Again, there is none here. Courts will generally uphold state action unless "it rests on grounds wholly irrelevant to the achievement of a legitimate state objective." Shawn P., 122 Wn.2d at 561; Smith, 117 Wn.2d at 277; State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987). Disparate treatment of those within and without a designated class rationally relates to achievement of the state's objective if there is some basis in reality for the distinction between the two classes and the distinction serves the purpose intended by the legislature. Shawn, P., 122 Wn.2d at 560-67.

As shown above, individuals are treated differently by the state for purposes of SSOSA depending on whether they fall

into or out of risk of deportation. Here, the trial court's denial of a SSOSA was not rationally related to the legislative purpose of the SRA. The purpose of the SSOSA was to provide treatment and reduce recidivism, the only chapter in the SRA contrary to the SRA's goal of standardized sentencing and retribution, instead of rehabilitation. There is no compelling interest for denying an eligible individual treatment. The trial court violated Crespo-Ortiz's equal protection rights and this court should remand the case for resentencing for the purpose of the SSOSA.

6. THE CUMULATIVE EFFECT OF THE ERRORS DENIED CRESPO-ORTIZ HIS CONSTITUTIONALLY PROTECTED RIGHT TO A FAIR TRIAL.

Even if this court does not grant reversal based upon any one of the individual errors argued above, reversal should nevertheless be granted, because the cumulative effect of those errors deprived Crespo-Ortiz of his constitutional right to a fair trial. State v. Coe, 101 Wn.2d. 772, 789, 684 P.2d 668 (1984). These errors all went to the heart of the case. First, the court failed to suppress Crespo-Ortiz's entire statement to the police. Then the trial court erroneously allowed the state to characterize his statement as a confession, when the words associated with the alleged confession were neither Spanish

or English. Next, the prosecutor was allowed to argue that Crespo-Ortiz had a lustful disposition, but the limiting instruction was ignored during closing argument. This allowed the state to use highly inflammatory prior uncharged misconduct to establish an element of the charged offense, when no details could be given by the victim regarding the prior misconduct. The trial court also erred when it failed to grant Crespo-Ortiz's request to discharge his attorney, who later moved to discharge herself for admitting incriminating evidence against her own client. RP9 & RP10. All of these errors clearly compounded one another, and the result was a trial that was far less than fair. This court should reverse the case and remand for a new trial.

C O N C L U S I O N

For the reasons stated herein, Crespo-Ortiz respectfully asks this court to reverse his conviction and remand the case for a new trial. Additionally, Crespo-Ortiz asks this court to find he was eligible for the SSOSA and that the trial court erroneously penalized him for exercising his right to trial and violated his equal protection rights when denying his request for the SSOSA based on the fact that he went to trial and faced risk of deportation.

DATED this 10th day of August, 2009.

Respectfully Submitted,



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