

NO. 34506-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES B. SHAUGHNESSY,

Appellant.

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

The Honorable D. Gary Steiner, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's treatment provider violated his right to religious belief and to the free exercise of religion guaranteed by Article 1, § 11 of the Washington Constitution.

2. The court's revocation of Appellant's Special Sex Offender Sentencing Alternative (SSOSA) was both an abuse of discretion and a denial of due process.

Issues Pertaining to Assignments of Error

1. James Shaughnessy pled guilty to Child Molestation in the Second Degree and to Assault of a Child in the First Degree and received a SSOSA. Shaughnessy has been a practicing Christian for a number of years, and his religion is essential to him. His SSOSA treatment provider, however, put greater limitations on church attendance than on other activities in the community, and espoused policies that created an environment hostile to practicing Christians. Upon encountering this hostility, Shaughnessy panicked and fled the jurisdiction. Upon his return, the State moved to revoke his SSOSA. Did the treatment provider violate Shaughnessy's absolute right to religious beliefs and his right to the free exercise of his religion? If so, was this violation a fact in mitigation that deserved careful consideration by the court?

2. For SSOSA revocations, due process requires a two part analysis: whether verified facts establish the alleged violations; and whether those violations in the context of mitigating factors warrant revocation. The court must be guided by accurate knowledge of the defendant's behavior. The court below did not enter a written determination of which facts guided its decision, and -- in its oral decision -- engaged in groundless speculation regarding Shaughnessy's behavior during his period of flight, and gave no weight to the treatment provider's violation of Shaughnessy's religious freedoms. Is a decision to revoke a SSOSA that fails to adequately delineate its factual basis -- and includes groundless speculation -- an abuse of discretion? Does such a decision also violate due process?

B. STATEMENT OF THE CASE

At the time of the incident in this case, James Shaughnessy was 46 years old and had been a practicing Christian for approximately 20 years. 1RP 4-6;<sup>1</sup> 5RP 75, 86; Ex 11 at 9-10.<sup>2</sup> Prior to the current charges,

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP - June 15, 2001; 2RP - July 22, 2005; 3RP - August 22, 2005; 4RP - December 9, 2005; 5RP - February 7, 2006; 6RP - March 3, 2006.

<sup>2</sup> Exhibit 11 -- Marsha Macy's SSOSA evaluation of Shaughnessy -- was admitted at the evidentiary hearing, and has been forwarded to this Court.

Shaughnessy had no felony violations and no misdemeanor offenses other than DWIs when he was in his twenties. CP 8; Ex 11 at 4.

In September 2001, Shaughnessy was in a relationship with a woman named Ruth, who had a thirteen-year-old daughter -- "RZ." CP 2; Ex 11 at 3. Shaughnessy, Ruth, and RZ went to the Puyallup Fair, where Ruth obtained employment. CP 2; Ex 11 at 3. When it became apparent that Ruth would be working late, Shaughnessy took RZ to his house, where the incident leading to the current charges occurred. CP 2; Ex 11 at 3. RZ said that Shaughnessy engaged in vaginal intercourse with her. CP 2; Ex 11 at 3. Shaughnessy acknowledged that he touched RZ sexually -- rubbing his penis on her and kissing her on the vagina -- but denied penile contact with, or penetration of, RZ's genitals. CP 2; Ex 11 at 4.

Shaughnessy was initially charged with Rape of a Child in the Second Degree. CP 1-3. He was evaluated for a SSOSA by Marsha Macy -- a certified treatment provider -- who concluded that Shaughnessy was "a good SSOSA candidate, amenable to treatment, and having a good prognosis." Ex 11 at 13.

The State agreed to recommend a SSOSA, but required that Shaughnessy enter a plea to an amended information in exchange for that recommendation. 1RP 2. The amended information charged Shaughnessy

with two counts -- Count I: Child Molestation in the First Degree (which alleged that RZ's age was less than 12-years old); and Count II: Assault of a Child in the First Degree (which alleged that Shaughnessy caused "great bodily harm" and that RZ's age was less than 13-years old). SupCP 90-91. The State's reasons for the amendment were that it more accurately reflected Shaughnessy's conduct and would result in a longer standard range. 1RP 2; CP 89.

At the sentencing hearing, the court agreed to accept the plea agreement, while voicing concerns regarding Shaughnessy's sincerity. 1RP 8-10. Shaughnessy received a standard range sentence of 89 months on Count I and 130 months on Count II, suspended on condition that he serve six months in jail and that he successfully complete three years of out-patient sex offender treatment with Macy. CP 12-13. Under his community custody conditions in Appendix H, Shaughnessy was not permitted to change therapists without prior approval of his Community Corrections Officer (CCO). CP 21. Shaughnessy was sentenced on June 15, 2001 and immediately commenced his jail term. 5RP 13; 6RP 86. Shaughnessy was released on September 28, 2001. 5RP 13.

By all accounts, Shaughnessy was excited about the prospect of entering treatment and getting to the root of his sexual issues. 5RP 76-77,

84, 86-87. While there is some disagreement in the record, it appears that Shaughnessy attended two treatment sessions with Macy -- including a one-on-one and a group session. 5RP 41-43, 89.

Macy has very strict policies regarding religious beliefs and practices during the course of SOSSA treatment. The Bible was not permitted in therapy sessions. 5RP 38-39, 90-91; CP 65. Macy opined that offenders hide behind religion. CP 65. Macy also expected members of her group sessions to confront each other -- and permitted confrontations about religious beliefs. 5RP 38-39, 90-91; CP 67, 71-72. When Shaughnessy brought a Bible to his evaluation, Macy reported that he had come "armed with his Bible." Ex 11 at 5.

Macy's contract with her clients required offenders to avoid children while attending church services by attending adult only sessions or by making special arrangements -- such as remaining in the minister's office during the service -- to be completely separated from areas where children frequent. CP 69. In practice, however, Macy refused to permit men under her treatment regime to attend church bible studies at any time when children might be present anywhere on the church grounds -- even in a different building. 5RP 52-53, 70-71. She would, however, permit those same men to shop in stores, at times when large numbers of children were

not expected to be present, provided they reported any chance encounters. 5RP 71; CP 69.

When Shaughnessy appeared at the second session with a Bible in hand, Macy told him that he could not have the Bible. 5RP 90-91. When Shaughnessy went to the group session, he was confronted by the group members for "hiding behind religiosity." CP 67. Some members of the group told him that they had believed in God at one time, but that they did not anymore, or that God was a crutch. 5RP 91.

In the face of this confrontation, Shaughnessy felt that he was under attack for his Christian beliefs, and became afraid that he would be revoked from the treatment program on that basis. 5RP 91. While still in the meeting, Shaughnessy panicked and decided to flee. 5RP 91-92. Shaughnessy left the meeting, returned to the place he was staying, packed a few things in a backpack, and took off in his truck. 5RP 93; 6RP 112-13. He felt that "fleeing was the only option" and he left without telling his mother or friends. 6RP 113. Approximately 30 hours later, Shaughnessy crossed the border into Mexico without a passport. 5RP 93, 100; 6RP 112-13.

In the meantime, DOC had no record of Shaughnessy reporting to his CCO. Shaughnessy testified that he had appeared at the designated

office to report within three days of his release from jail. 5RP 88-89. According to DOC, however, Shaughnessy did not appear. 5RP 13-14. A notice of violation was sent on October 23, 2001, and a bench warrant was issued on November 14, 2001. CP 27, 31-32. At that point, DOC recommended a sanction of 60 days in jail. CP 31-32.

Shaughnessy spent approximately a year in Mexico, living day-to-day doing odd jobs, playing his guitar to meet his expenses, and learning Spanish along the way. 5RP 93-94. At some point, a ship arrived, and the captain befriended him, offering him a job on the ship with passage to Venezuela. 5RP 94. Shaughnessy agreed, but he needed a passport. 5RP 94. Shaughnessy was aware that a warrant had probably been issued for him and felt he could not use his own name to secure a passport. 5RP 94-95. He had, however, found a birth certificate and social security card that had been left by a prior resident in Shaughnessy's hotel room. 5RP 94-95; 6RP 114-15. Shaughnessy used those documents to obtain a photo identification card under the former resident's name. 5RP 94-95; 6RP 114. Financed by the ship's captain, Shaughnessy then obtained a passport at the local United States consulate offices. 6RP 115.

Shaughnessy worked on the ship both in the Mexican harbor and at sea en route to Venezuela. 5RP 95; 6RP 115. Once let off in

Venezuela, Shaughnessy resumed the style of day-to-day existence he had left in Mexico. 5RP 96. At some point, Shaughnessy crossed into Columbia without realizing that he had left Venezuela. 5RP 96. The Columbian authorities ordered Shaughnessy to leave, but never enforced that order. 5RP 104. Eventually, however, Shaughnessy was robbed at knifepoint in Cartagena, where he lost most of his money and his documents -- including the passport issued under the false name. 5RP 96. Shaughnessy took a bus to Medellin with the last of his money and filed a police report regarding the robbery. 5RP 97. The police in Medellin placed him on a bus to Bogotá. *Id.* Shaughnessy's intentions at this point were to turn himself over to the authorities at the United States Embassy and return to Washington to face the consequences. *Id.*

On September 7, 2004, Shaughnessy was flown to Miami, Florida where he was charged with two federal offenses regarding the false passport. 5RP 28-30; CP 44-45. Shaughnessy entered a guilty plea without a plea bargain and received a ten-month sentence. CP 50, 55. Upon release from federal custody, Shaughnessy was returned to Washington and placed into custody. 5RP 22.

In Washington, the State moved to revoke Shaughnessy's SSOSA based on five violations: (1) failure to notify DOC of a change of address;

(2) failure to comply with -- and being terminated from -- his sex offender treatment; (3) failure to register as a sex offender; (4) failure to become gainfully employed at an approved employment program; and (5) failure to remain within the geographic boundaries of Pierce County and the United States. CP 27-29. Shaughnessy stipulated to those violations and asked the court to exercise its discretion to continue his SOSSA treatment with a different provider. 5RP 8-9, 18; CP 56. The issue for Shaughnessy was not whether the violations occurred, but rather, why they occurred. 5RP 8-9.

Shaughnessy argued that by failing to accommodate his religious beliefs, Macy failed to satisfy the requirement that treatment providers tailor their programs to meet the unique needs of their clients. CP 60-61. In addition, Shaughnessy contended that his ability to maintain his religious beliefs while under Macy's treatment regime was not well communicated to him.<sup>3</sup> CP 61. Further, Shaughnessy argued that the legislative intent of protecting society would be better served if he were permitted to serve a sanction of additional jail time followed by resumption of his SOSSA

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<sup>3</sup> In preparation for the hearing on the State's motion to revoke Shaughnessy's SOSSA, a conflict developed between Shaughnessy and his public defender -- Dino Sepe. 3RP 2-4. As a result, the court appointed Linda King, an attorney from the private bar. 3RP 6.

sentence with a treatment provider willing to accommodate his religious beliefs. CP 61-62.

During the hearing, the court heard testimony from DOC (5RP 10-31), Macy (5RP 32-65), Sharon Chambers -- a member of Shaughnessy's church who had experience dealing with Macy (5RP 66-85), Shaughnessy himself (5RP 85-104; 6RP 112-27), and finally Dino Sepe -- Shaughnessy's original public defender, who negotiated the SOSSA and introduced Macy as the treatment provider (6RP 127-38). The court then revoked Shaughnessy's SOSSA and ordered him confined for the full term of his 130-month sentence.<sup>4</sup> 6RP 145-46. This appeal timely follows. 6RP 147-48; CP 82.

### C. ARGUMENT

1. **MACY'S INTERFERENCE WITH SHAUGHNESSY'S RIGHT TO THE FREE EXERCISE OF RELIGION -- GUARANTEED UNDER ARTICLE 1, § 11 OF THE WASHINGTON CONSTITUTION -- IS A VIOLATION OF A FUNDAMENTAL RIGHT REQUIRING REINSTATEMENT OF THE SSOSA.**

Religious freedom is guaranteed by both the First Amendment of the United States Constitution and by Article 1, § 11 of the Washington Constitution. The First Amendment provides that "Congress shall make

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<sup>4</sup> A subsequent court order correcting the length of Shaughnessy's community custody term is not at issue in this appeal. CP 85-86.

no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Article 1, § 11 of the Washington Constitution provides in pertinent part:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

While the analysis of religious freedom in this brief starts with the federal Constitution, Shaughnessy's claim ultimately rests on this State's stronger constitutional protections of the free exercise of religion.

The liberties guaranteed by the First Amendment are fundamental to the concept of liberty embodied in the Fourteenth Amendment,<sup>5</sup> and are thus, applicable to the States. Cantwell v. State of Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). The First Amendment

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<sup>5</sup> Section 1 of the Fourteenth Amendment provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

encompasses two concepts of religion. The first -- freedom of conscience or belief and the freedom to adhere to any religious organization or form of worship -- is absolute and cannot be restricted by law. Cantwell, 310 U. S. at 303; *see also* United States v. Ballard, 322 U.S. 78, 86, 64 S. Ct. 882, 88 L. Ed. 1148 (1944) (the law knows no heresy -- the truth or verity of religious belief or doctrines are protected by the First Amendment). The second -- the freedom to act or to freely exercise a chosen form of religion -- is not absolute and is subject to regulation for the protection of society. *Id.* at 303-04. "The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Id.* at 304

In Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), the federal Supreme Court formulated the test for whether government regulation unduly infringed the free exercise of religion. Government cannot regulate religious belief as such, compel affirmation of beliefs repugnant to those claiming the free exercise right, or penalize those who hold beliefs repugnant to the government. Sherbert, 374 U.S. at 402. The government can, however, restrict conduct prompted by

religious beliefs or principles when those acts pose a substantial threat to public safety, peace or order. *Id.* at 403.

Where conduct falls outside of the legitimate sphere of governmental regulation action, no infringement on the right of free exercise is permissible unless that infringement represents an incidental burden on the exercise of religion, and it was justified by a compelling state interest. *Id.* Even then, the state must show that no alternative form of regulation would address that interest without infringing the First Amendment guarantees of religious freedom. *Id.* at 407. Thus, the government must show that its infringement represents the least restrictive means of achieving a compelling state interest. Thomas v. Review Board of Indiana Employment Sec. Div., 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981), *abrogation recognized by* Jolly v. Coughlin, 894 F. Supp. 734 (S.D.N.Y. 1995).

In 1990, however, the Federal Supreme Court limited its previous holding in Sherbert and announced a new free-exercise test, significantly less protective of religious freedom. Employment Div., Dept of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (upholding state refusal to pay unemployment benefits to human resource workers dismissed for participation in religious rituals involving peyote). Under the Smith test, the First Amendment is not

offended by the incidental effects of generally applicable and otherwise valid regulations. Smith, 494 U.S. at 878. "The right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (citations omitted).

Washington's Supreme Court rejected the Smith test in First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203, 840 P.2d 174 (1992), a case involving a church's challenge to the designation of its sanctuary as a heritage structure that was on remand from the United States Supreme Court for reconsideration in light of Smith. Initially, the Washington Court distinguished Smith: Smith had arisen under the police power while First Covenant had not; the heritage ordinance at issue in First Covenant was not neutral and generally applicable; and First Covenant presented a hybrid claim -- involving elements of both the free exercise and free expression clauses of the First Amendment -- which the Smith Court had reasoned were entitled to greater protection than claims arising solely under the free exercise clause. First Covenant, 120 Wn.2d at 214-18. Thus, the Washington Court applied strict scrutiny under the Sherbert "compelling interest" test and ruled for the church. *Id.* at 218-23.

The Washington Court, however, did not stop there. Rather, the Court expressed dissatisfaction with the Smith decision as injecting "uncertainty" into what had been well-established precedent governing free exercise cases. First Covenant, 120 Wn.2d at 223. The Washington Court then conducted a Gunwall<sup>6</sup> analysis and determined that this State's Constitution provides greater protection for religious freedom than the First Amendment. *Id.* at 223-25.

The First Covenant Court did not, however, end its analysis with the Gunwall factors. Rather, the Court noted that the Smith test was based on a case that had been overruled, it represented a significant departure from established law, and it subordinated the position of free exercise. *Id.* at 225-26. Finally, the Court rejected the Smith test because it places minority religions at a disadvantage, permitting the majority to use the political process to control a minority's right of free exercise -- a prospect which Washington Courts have rejected. *Id.* at 226.

Given this analysis, the First Covenant Court found that resort to independent state grounds was warranted in that case, and that Const. art. 1, § 11 extends broader protection than the First Amendment. *Id.* at 226, 229-30, 234; *see also* Munns v. Martin, 131 Wn.2d 192, 199, 930 P.2d

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<sup>6</sup> State v. Gunwall, 106 Wn.2d 54, 59, 720 P.2d 808 (1986).

318 (1997) (free exercise is a fundamental right -- applying strict scrutiny under Const. art. 1, § 11 in a church land use case); State v. Balzer, 91 Wn. App. 44, 954 P.2d 931, *rev. denied*, 136 Wn.2d 1022 (1998) (applying strict scrutiny under greater protection of Const. art. 1, § 11 to free exercise claim for religious use of marijuana as an affirmative defense in a drug prosecution); *but see* Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 151-52, 995 P.2d 33 (2000) (applying Const. art. 1, § 11 without Gunwall analysis because that was the basis for the decision below -- noting such analysis still required where applicable legal principles are not firmly established).

As noted, First Covenant dealt with land use rather than the application of a criminal sanction, which is involved in this case. Subsequently, this Court applied the broader protection of Const. art. 1, § 11 in State v. Balzer to determine whether a jury should be instructed that free exercise of religion provides an affirmative defense to a charge of possession of marijuana. Balzer, 91 Wn. App. at 52-54. Balzer provided this Court with a Gunwall analysis, and this Court -- relying upon First Covenant and Munns v. Martin -- invoked the strict scrutiny provided by Const. art. 1, § 11. *Id.*

Based on the First Covenant Court's clear statement of disagreement with the Smith test, and subsequent applications of the strict scrutiny test approved in First Covenant, further Gunwall analysis should not be necessary to assert a claim under Const. art. 1, § 11. But in light of the fact that this case addresses Shaughnessy's assertion of his Const. art. 1, § 11 right to free exercise in the context of the SOSSA provisions of the SRA -- an aspect of law not addressed in First Covenant or Balzer -- additional Gunwall analysis is provided in an abundance of caution.

Factors 1, 2, 3 and 5 -- textural language of the state constitution, comparisons between the language of the state and federal provisions, state constitutional and common law history, and the structural differences between the state and federal constitutions -- deal with issues of text and structure that are invariable regardless of the context in which the claim of greater state constitutional protection is raised. Thus, the Supreme Court's analysis of those factors in First Covenant applies to subsequent cases considering the same constitutional provisions. *See State v. Boland*, 115 Wn.2d 571, 575-76, 800 P.2d 1112 (1990) (where the same constitutional provisions have been subject to prior Gunwall analysis, courts adopt the analysis of the first, second, third and fifth factors and examine only the fourth and sixth factors as they apply to the current case). Under

First Covenant, Munns v. Martin, and State v. Balzer, those factors favor independent application of the broader protections of Const. art. 1, § 11.

Addressing the fourth Gunwall factor -- preexisting bodies of state law, including statutory law -- it has been noted that this factor usually pertains to state law prior to ratification of the state constitution. Malyon v. Pierce County, 131 Wash.2d 779, 797, 935 P.2d 1272 (1997) (analyzing Const. art. 1, § 11 in regard to the establishment clause). It is pertinent that the federal Bill of Rights did not apply to the states at the time Washington adopted its constitution, and -- although the federal Bill of Rights had been well establish at that time -- the framers of Washington's constitution chose not to adopt its language. *See* State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001). Instead, Washington's framers copied much of our Declaration of Rights from the constitutions of older states, clearly indicating that they did not consider the language of the federal Constitution to adequately state the extent of the rights to be protected by the Washington Constitution. *Id.*

Further, the development of the law after ratification shows that the interpretation of the First Amendment being applied by the current federal Supreme Court does not comport with the understanding of the right to free expression applied by Washington courts. In cases decided before the

federal court's decision in Smith, the courts of this State readily applied the broader strict scrutiny rule to address claims of religious freedom in criminal cases arising under the First Amendment. *See, e.g., State v. Vebron*, 167 Wash. 140, 8 P.2d 1083 (1932) (refusing to extend any greater protection under Const. art. 1, § 11 where state regulation of the medical profession was an exercise of the police power "essential in the preservation of the public health and general welfare[.]"); *State v. Motherwell*, 114 Wn.2d 353, 788 P.2d 1066 (1990) (decided the same year as Smith -- applying strict scrutiny to free exercise claim of religious counselors charged with failure to report child abuse); *State v. Clifford*, 57 Wn. App. 127, 787 P.2d 571 (1990) (applying pre-Smith strict scrutiny test to asserted First Amendment free exercise defense to a charge of driving without a license); *State v. Norman*, 61 Wn. App. 16, 23-24, 808 P.2d 1159 (1991) (noting Washington's history of applying the First Amendment to free exercise challenges under the strict scrutiny test). In contrast, the post-Smith, post-First Covenant case of *State v. Balzer*, decided the free exercise issue under Const. art. 1, § 11. Balzer, 91 Wn. App. at 52-54.

Thus, the state of the law -- both pre-existing ratification, and as it has developed in relation to the First Amendment before and after Smith

-- favors application of strict scrutiny under Const. art. 1, § 11 in this case addressing the free exercise of religion as a mitigating factor in a SSOSA revocation hearing.

In regard to the sixth factor -- whether the matter is one of particular local concern -- the First Covenant Court said that free exercise of religion was not a local concern, but the Court went on to note that "our State exhibits a long history of extending strong protection to the free exercise of religion." First Covenant, 120 Wn.2d at 225; cf. Malyon, 131 Wn.2d at 798 (finding that "nearly everything is local in nature" under an establishment clause analysis, while noting that the First Covenant Court had determined that free exercise was not a local concern).

In the context of this case, however, Washington courts have found that law enforcement in general, and the operations of courts, are matters of particular local interest. See State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004) (jury trials for adults in determination of prior convictions is a matter of local concern, not requiring national uniformity); State v. Schaaf, 109 Wn.2d 1, 16, 743 P.2d 240 (1987) (providing jury trials for juveniles is a matter of local concern, not requiring national uniformity); Richmond v. Thompson, 130 Wn.2d

368, 382-83, 922 P.2d 1343 (1996) (right to petition regarding police misconduct -- law enforcement is a matter of particular local concern).

Given that the Gunwall factors discussed above favor independent application -- and that the First Covenant Court found that the greater protections of Const. art. 1, § 11 applied regardless of whether free expression was a matter of state concern or local interest -- Shaughnessy asks this Court to proceed under the strict scrutiny test approved in First Covenant.

This case presents two aspects of free exercise analysis. The first involves Shaughnessy's religiously motivated conduct in fleeing the coercive environment of Macy's therapy setting. That conduct posed a threat to public safety, peace and order, and is properly regulated by the State. Sherbert, 374 U.S. at 403; Munns, 131 Wn.2d at 200. Thus, Shaughnessy stipulated to the violations and requested a period in jail before being permitted to re-start his SSOSA with a different provider. 5RP 8-9; 6RP 140; CP 56.

The second aspect of free exercise, however, addresses the environment created by Macy's therapy regime, which directly precipitated that flight. That environment was coercive to Shaughnessy's absolute right to believe and to protected conduct in his free exercise of those beliefs.

Shaughnessy asked the court below to consider Macy's infringements on his rights guaranteed by Const. art. 1, § 11 -- to hold religious beliefs and to engage in legitimate conduct in the exercise of those beliefs -- as mitigation for his flight. 5RP 8-9; 6RP 140; CP 61-62. As discussed below, the court gave scant attention to this argument in mitigation, abusing its discretion and violating due process.

The test for a free-exercise challenge under Const. art. 1, § 11, set out in First Covenant, is:

If the "coercive effect of [an] enactment" operates against a party "in the practice of his religion", it unduly burdens the free exercise of religion. . . . A facially neutral, evenhandedly enforced statute that does not directly burden free exercise may, nonetheless, violate article 1, section 11, if it indirectly burdens the exercise of religion. . . .

State action is constitutional under the free exercise clause of article 1 if the action results in no infringement of a citizen's right or if a compelling state interest justifies any burden on the free exercise of religion. . . . A "compelling interest" is one that has a "clear justification . . . in the necessities of national or community life" . . . that prevents a "clear and present, grave and immediate" danger to public health, peace, and welfare. . . . The State also must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available.

First Covenant, 120 Wn.2d at 226-27 (citations omitted).

To satisfy his claim of a violation of his right to free exercise of religion, Shaughnessy must first show that his religious convictions are sincerely held and central to the practice of his religion. Balzer, 91 Wn.

App. at 54. The court will not inquire into the truth or reasonableness of his convictions or beliefs, and will recognize even "arguably religious" beliefs for purposes of constitutional analysis. *Id.*

In this case, there is no question of the sincerity of Shaughnessy's beliefs or the centrality of his beliefs in the practice of his religion. Shaughnessy is a professed Christian, and had been for twenty-three years when he testified at the revocation hearing. 5RP 86. Prior to his encounter with Macy's therapy regime, and his subsequent flight, he was a member of a congregation with a permanent sanctuary, and he regularly participated in church outreach activities. 5RP 70-71, 75; Ex 11 at 9-10. In addition, Shaughnessy presented witnesses at both his sentencing hearing and at his revocation hearing who testified to the significance of religion in Shaughnessy's life. 1RP 5-6; 5RP 75. Those beliefs were also noted by the CCO in his pre-sentence report to the court and by Macy in her evaluation for the SOSSA and in her testimony. 5RP 35; Ex 11 at 9-10. It is undisputed that Shaughnessy has a sincere religious belief, and that the practices of church participation are central to his belief.

In addition, Shaughnessy must demonstrate that the challenged enactment -- in this case, the regulatory regime established by his sex offender treatment provider -- burdened his free exercise of religion.

Balzer, 91 Wn. App. at 54. An enactment -- or regulation -- unduly burdens the free exercise of religion if its "coercive effect . . . operates against a party in the practice of his [or her] religion." *Id.* (quoting Munns, 131 Wn.2d at 200). A direct burden is not required, and even "a facially neutral, even-handedly enforced statute that does not directly burden free exercise may nonetheless violate Article 1, § 11 if it indirectly burdens the exercise of religion." *Id.* (citing First Covenant, 120 Wn.2d at 226).

Here, Shaughnessy encountered two burdens on his free exercise of religion. First, Macy's regulations made it virtually impossible for Shaughnessy to attend his church. Macy claimed that her clients were permitted to attend church services, but her agency played no part in those arrangements. 5RP 62. The condition on this attendance is that no children are to be present when the service is conducted. 5RP 62. Macy's regulations provide:

[I]f you think you need to be involved in religious services or organizations, it is up to you to attend only those sessions that are adult only or make special arrangements to be completely separated from areas where children frequent. Many offenders have made special arrangements to sit in the pastor or minister's office while church services are being presented so the contact with church can continue, but contact with children will be avoided at all costs.

CP 69 (emphasis added).

Interpreting this regulation, however, Macy told Chambers that she refused to let clients attend bible studies at any time when children were present on church grounds -- even when those children were in another building at some distance from the sanctuary. 5RP 70-71; CP 69. In contrast, Macy's regulations permit clients to enter commercial establishments at times when children were not likely to be present and to report any chance encounters -- "If you are shopping for necessities, such as food and clothing, you will not be in violation if you make reasonable attempts to avoid contact with children." CP 69 (emphasis added). Application of a more stringent rule towards church attendance than the purchase of a shirt improperly burdens religion.

In addition, Macy's regime entered the prohibited zone of infringing upon Shaughnessy's religious beliefs *per se*. Macy required Shaughnessy to participate in group sessions where the other participants were outwardly hostile to religion, calling God "a crutch" and participants said they had lost their former belief in God. 5RP 91. This group response seems naturally to flow from Macy's personally expressed suspicion that offenders with strong religious beliefs hide behind those beliefs to avoid treatment issues. 5RP 35-36, 38-39; CP 65-66. Thus, Sepe testified that some of his Christian clients had experienced difficulties with Macy, but that he was

not aware of that problem when he arranged Shaughnessy's SSOSA. 6RP 136-37.

The burden on Shaughnessy's free exercise is further evidenced by his answer to question number 23 -- regarding church attendance -- on Macy's contract quiz. Based on his understanding of Macy's rules, Shaughnessy answered that the no-contact order (with children) applied to church despite the constitutional guarantees. CP 75. Macy testified that Shaughnessy was mistaken in his understanding, but she did not testify that she had done anything to disabuse him of his belief that he was not permitted to attend church services while being treated as a sex offender. 5RP 61. Under Const. art. 1, § 11, even an indirect burden on the free exercise of religion violates the constitution. Balzer, 91 Wn. App. at 54 (citing First Covenant, 120 Wn.2d at 226).

Because Shaughnessy has demonstrated his sincere belief and a burden to his free exercise by Macy's treatment regime, the State must now show that this burden was required by a compelling state interest, and that the least restrictive means were employed to achieve those ends. Balzer, 91 Wn. App. at 56. To show a compelling interest, the State must show that its objectives were based on the necessities of national or community life, such as threats to public health, peace, and welfare. *Id.*

It is clear that the State has a compelling interest in the rehabilitation of sex offenders through its SOSSA program. What is not clear, however, is that the government must intrude upon the free exercise of religion in pursuit of that interest.

On the contrary, religion is generally considered to be an important component in treatment situations, such as Alcoholics Anonymous (AA). *See Henson v. Employment Security Division*, 113 Wn.2d 374, 779 P.2d 715 (1989) (Durham, J. diss.) (addressing the strong religious and spiritual elements of the AA program -- noting that it is best suited to those open to spiritual values, but ineffective when in conflict with an individual's culture or personality). Ironically, cases involving AA usually come up in Establishment Clause challenges to its religious content. *See Personal Restraint of Garcia*, 106 Wn. App. 625, 630, 24 P.3d 1091, 33 P.3d 750 (2001) (holding mandatory attendance at AA classes violates the establishment clause unless alternative classes without religious-based content are provided). Thus, there is no compelling government interest in denying Shaughnessy his right to free exercise -- or free belief -- in the SSOSA program.

In addition, the State cannot show that the burden on religion enforced in Macy's regime represents the least restrictive means of pursuing

its interests. The record in this case clearly shows that there was at least one other licensed treatment provider who was willing to incorporate Shaughnessy's Christian beliefs into the treatment protocol and that this provider was willing to accept Shaughnessy into treatment in the event that the court reinstated the SOSSA sentence. 5RP 54, 73-74; 6RP 141-42; CP 59-60, 62. Thus, this record shows that less restrictive means were available for the State to address its interests.

Under Const. art. 1, § 11, Shaughnessy has demonstrated a violation of his absolute right of religious belief and his right to reasonable free exercise. This violation hits a vital right, yet -- as discussed below -- the court trivialized the impact of Macy's violations in refusing to consider mitigation. Macy's violation of Shaughnessy's rights to religious freedom should be sufficient for this Court to remand for re-instatement of the SSOSA with a different provider.

2. REVOCATION OF THE SSOSA WAS BOTH AN ABUSE OF DISCRETION AND A VIOLATION OF DUE PROCESS.

The Fourteenth Amendment of the United States Constitution guarantees the right of due process to defendants facing revocation of parole or probation. Morrissey v. Brewer, 408 U.S. 471, 482, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (parole revocation); Gagnon v. Scarpelli, 411

U.S. 778, 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (probation revocation). Applying this right to due process, Washington courts provide the procedures outlined in Morrissey and Gagnon when the State moves to revoke a SSOSA sentence. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1998) (citing State v. Badger, 64 Wn. App. 904, 907, 827 P.2d 318 (1992)).

The Morrissey Court determined that due process is required in revocation proceedings because the person's interest in continued liberty -- albeit conditional -- shares many of the interests of unqualified liberty, such that its termination inflicts a "grievous loss." 408 U.S. at 482. The Court also found that the State had no real interest in not providing adequate procedures before revoking an offender's conditional liberty. *Id.* at 483. Further, the Court found that society had an interest in not having revocations based on erroneous information or an erroneous evaluation of whether the violations required revocation. *Id.* at 484. The Court also recognized society's interest in basic fairness because "fair treatment in . . . revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Id.* Thus, the Court determined that revocation required "some orderly process, however informal." *Id.* at 482.

Morrissey requires States to provide due process before revoking a person who is at liberty on conditions. At a minimum, that process includes: (a) written notice of the claimed violations; (b) disclosure to the offender of the evidence against him; (c) an opportunity to be heard in person and to present live and documentary evidence; (d) the right to confront and cross-examine adverse witnesses; (e) a neutral and detached hearing body; and (f) a written statement by the factfinder as to the evidence relied on and the reasons for revocation. *Id.* at 489.

As outlined in Morrissey, revocation hearings address two questions: (1) whether the offender has violated his or her conditions; and (2) if a violation has occurred, should the offender be committed to prison or should other steps be taken to protect society and improve the chances that the offender will be rehabilitated. Morrissey, 408 U.S. at 479-80. While the first question addresses relatively simple factual determinations, the second is far more complex. *Id.* at 480. The decision of whether an offender's conduct requires revocation implicates both predictions about the ability of that person to live in society without committing antisocial acts and an exercise of the court's discretion. *Id.* Thus, that question requires the court "to know not only that some violation was committed but also to know accurately how many and how serious the violations

were." *Id.* Upon this basis, the revocation hearing addresses the question of whether the facts as determined warrant revocation. *Id.* at 488. This determination, however, must also consider the offender's showing that circumstances in mitigation indicate that revocation is not warranted. *Id.*

In regard to SSOSA revocation hearings, the due process standard shares striking similarities with the abuse of discretion standard. Judicial discretion means "a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court abuses its discretion when it renders a decision arbitrarily or on untenable grounds or for untenable reasons. *Id.* The "untenable grounds" analysis addresses the factual determinations underlying the decision. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); *cf.* Morrissey, 408 U.S. at 484 (revocations to be decided on verified facts). In regard to the question of whether the verified facts support the court's exercise of discretion, the abuse of discretion standard considers a balance:

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interest of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

Junker, 79 Wn.2d at 26. Thus, this question also addresses the issue of whether the verified facts -- when balanced against the mitigating circumstances -- support a decision to revoke. Morrissey, 408 U.S. at 479-80, 487-88. Considered in this light, an abuse of the court's discretion in a revocation proceeding also constitutes a violation of the fundamental right to due process.

In this case, the court below abused its discretion -- and violated Shaughnessy's right to due process -- when it refused to adequately consider the violation of his religious freedoms discussed above as a factor in mitigation of his flight from Macy's and when it speculated on other possible victims during Shaughnessy's period of flight.

In its oral ruling, the court rejected Shaughnessy's mitigation claim without even determining whether or not that claim was valid, or the extent of the violation.

I do not see this as a religious freedom case. He went into his first -- I believe it was just the first meeting carrying his Bible, first or second. The people there, including the provider, indicated that he should not rely on that as a -- or hide behind it. Whether that is appropriate or not, his course would be to, of course, go to his attorney and say, listen, this is wrong. I can't go to this place. He knew that. He received copies of the papers. He knew he was under very, very strict conditions from me. This religion business, while very, very important in our life and his, is not a basis for him to throw up his hands and say I'm going to Venezuela.

6RP 145.

The court failed to address the verified fact that whatever had happened during his encounter with Macy had left Shaughnessy with the belief that attending church was not permitted under his SSOSA treatment. Shaughnessy expressed that belief when he answered question 23 of Macy's contract quiz in a manner indicating that attendance at church services was not permitted despite the constitutional guarantees. CP 75.

As discussed above, religious freedom is a highly significant value in this State, afforded broad protections under our State Constitution. Mitigation in the form of a claim that an agency -- charged with treating offenders placed in their care -- had managed to convince Shaughnessy that he no longer had his right to the free exercise of his religion deserves consideration commensurate with the significance recognized by this State's constitutional protections. A proper exercise of discretion requires such balancing. *See Junker*, 79 Wn.2d at 26 (requiring a balancing of the compelling public or private interests of those affected by a decision).

Instead, the court engaged in an act of speculation, positing that the paperwork Shaughnessy had received provided adequate notice that he could come back to court and ask that he continue under a different treatment provider.

As a starting point, Dino Sepe -- Shaughnessy's public defender when the SSOSA was originally negotiated -- had no memory of his discussions with Shaughnessy, and he testified only about his usual practices. 6RP 132. Therefore, there is no verified factual basis in the record upon which the court could find that Sepe had specifically informed Shaughnessy that he could change his treatment provider. In addition, nothing in the transcript of the hearing where the SSOSA was entered indicates that Shaughnessy was informed that he should return to the court if he felt the need to change treatment providers. 1RP 1-10.

Thus, the only verified factual evidence of the possibility of changing providers comes from the Judgment and Sentence form, which says, "Defendant shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, community corrections officer and the court and shall not change providers without court approval after a hearing if the prosecutor or community corrections officer objects to the change." CP 13. In addition, Appendix H of the Judgment and Sentence includes a condition, "Do not change therapists without prior approval of your CCO." CP 21.

As the prosecutor pointed out in cross-examination, however, this is inferential notice at best.<sup>7</sup> 6RP 118-20. Nowhere in the documents Shaughnessy signed is there a clear statement that he could change treatment providers, and neither is there any indication of how he should go about accomplishing that feat.

Whatever oral advice Sepe gave Shaughnessy regarding changing treatment providers would have been given at least three months before Shaughnessy had any actual experience with Macy. Yet the court ascribed certain knowledge to Shaughnessy based on nothing more than the potential forgotten content of an oral explanation that was supposed to have taken place and an inference that may have been drawn by an unsophisticated -- and relatively uneducated -- defendant facing his first felony sentencing. 6RP 141 (counsel's argument to court).

Even if Shaughnessy had made this inferential leap, however, nothing at the initial sentencing hearing would lead him to suspect that the judge would entertain such a motion. At that hearing, the judge indicated that he did not believe Shaughnessy to be sincere, that he felt Shaughnessy

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<sup>7</sup> It is perhaps significant that when asked to read the provision in Appendix H requiring permission from the CCO before changing therapists, Shaughnessy read the word "court" for "CCO." 6RP 118. At the end of the cross-examination on this subject, Shaughnessy was left with the feeling that his first step in changing providers was "coming to somebody in the system to say I want to change providers." 6RP 120.

was a danger to the children of his co-religionist who had spoken in support of the SSOSA application, and that he felt that Shaughnessy's street outreach activities -- conducted under the auspices of his church -- were incompatible with his SSOSA sentencing.

Okay. You should probably go to prison for a long time because this lady [the victim's mother] is right, that your remorse is questionable and you are manipulating a little bit what took place that evening.

. . . .

But you are blowing sunshine up my robe about a lot of this. She spotted it. I spotted it. The probation officer spotted it. If you continue to do it during treatment and I feel you continue to not look to your problems and get them taken care of, I am going to send you to the joint, okay?

The Defendant: Yes, Your Honor.

The Court: So change and change right now. Admit what you did in totality. Don't come anywhere near another kid. This friend of yours is a wonderful friend, but you have a liking for kids, to say it in a nice way, and I wouldn't trust you around my daughter or my horse. Don't mess with me.

The Defendant: Yes sir. Okay. Yes, Your Honor.

. . . .

You are going to be severely scrutinized. I understand that you are going -- I understand that you are down on the street with the homeless playing your guitar and doing what appears to be some very nice things for these people that are less fortunate. I have no quarrel with that, except in that it puts you in a place where you are near young girls

who are homeless, having difficulties. I am not going to let you do it, okay? So you are going to have to adjust your life-style to what I want, okay?

The Defendant: All right, sir.

1RP 8-10.

Even if Shaughnessy were to have made the inferential leap between the prohibition against changing treatment providers without the court's permission and the possibility that one could change providers, there is nothing in the court's conduct at the original sentencing hearing that would lead a reasonable person to believe that this judge would entertain such a request when brought on religious grounds. The court's assertion that -- faced with the onslaught against his religious beliefs at Macys -- Shaughnessy "knew" he could go to his attorney and seek meaningful recourse to Macy's attack on his religious beliefs and practices is speculative at best.

The court engaged in further speculation when it addressed the reasons why it was revoking the SSOSA.

I was looking at his history done by Macy way, way, way back. He's charged in this case with sexually assaulting a 13-year-old. He had previously sexually assaulted a ten-year-old. Although not charged, as I understand it. His history of deriving sexual arousal by lifting children by their buttocks, this is -- he's been diagnosed and he is a pedophile. Paraphilia, pedophilia, chronic, personality disorder with histrionic personality features.

He goes to Mexico, then I think Venezuela, then I think, as I remember, a third country in South America. Literally, from what I understand, generally, where there are literally thousands of unprotected and vulnerable children, young girls. It just scares me that he was unsupervised during that period of time. He indicates that nothing happened. He is a pedophile that was on the loose for a considerable number of months and years. In addition, committed a federal crime.

I'm not so sure that in hindsight I should have granted this SSOSA. I think this is an innocent sounding man, but very manipulative and quite convincing. I think convincing to kids. Very scary.

I'm revoking his SSOSA for all the reasons advanced by the State. As I understand it, it is 67 to 89, so it would be 89 running concurrent with 130, I believe. It was suspended so that he do it and do it in a very meticulous and careful fashion. He really has not done it. He's run away from it. Committed a federal crime. I don't feel comfortable having him out in the community.

6RP 145-46.

The court's oral statement of reasons here includes reference to the State's arguments at the hearing. Those reasons were simply that Shaughnessy had absconded and that he had committed the federal passport offenses -- for which he served a federal sentence before being returned to Washington. 6RP 139-40. The problem with these reasons is that they both relate to the fifth violation, and as such cannot provide a sufficient basis for the court to revoke without further analysis. Morrissey, 408 U.S.

at 479-80 (the fact that a violation has occurred merely opens the issue of whether revocation is the appropriate action).

Instead of the careful balancing required for the exercise of judicial discretion and the dictates of due process, the court rested on sheer speculation about the "literally thousands of unprotected and vulnerable children, young girls" Shaughnessy might have encountered during his time in Mexico, Venezuela, and Columbia, and about whatever Shaughnessy may or may not have done with them. 6RP 146. Grounding a decision to revoke a SSOSA upon such bald speculation violates due process, and is an abuse of discretion. *See State v. Lawrence*, 28 Wn. App. 435, 624 P.2d 201 (1981) (court violated due process by considering speculative issues when revoking probation); *In re Personal Restraint of Dyer*, No. 76730-1, 2006 WL 2103994 (Wash. S. Ct., July 27, 2006) (ISRB abused its discretion by relying on speculation and conjecture).

It is worth noting that we have no written reasons for the court's decision in this case. While that violates the minimum due process provisions of *Morrissey*, Washington courts will accept an oral decision as long as it is sufficiently detailed to permit judicial review. *Dahl*, 139 Wn.2d at 689. In this case, however, the oral decision includes the court's

obvious speculation about Shaughnessy's activities while outside of the United States. 6RP 146.

In regard to the court's speculation about the thousands of young girls Shaughnessy was supposed to have encountered while outside of the country, Lawrence is instructive. In that case, the trial court revoked Lawrence's probation on two grounds -- absconding from probation supervision and assaulting his wife after being placed on probation. 28 Wn. App. at 436-37. Lawrence acknowledged absconding, but denied the assault on his wife. *Id.* at 437. The court ruled orally:

I would make a finding that Mr. Lawrence has in fact violated his probation (under both convictions) in failing to report. I will not make a finding on the assault.

I should make the record clear that at the time I released Mr. Lawrence (in January 1979), I was unaware of the November assault, and possibly what one might be able to assume was some connection between the assault, the wife eight months pregnant and the premature death of the (couple's) baby.

*Id.*

The court then refused to permit proffered testimony from Lawrence's wife regarding whether the alleged assault took place. *Id.* When asked for clarification of the basis of its decision, the court said, "I'm revoking Mr. Lawrence for failing to report, which is an admitted violation of probation, and I am taking into consideration, in the disposition of that

violation, everything I know and did not know at the time I released him from jail and what has been going on since." *Id.*

The Court reversed for due process violations, ruling in part, that the revocation court's oral opinion failed to fully articulate the factual basis for its decision. *Id.* at 438-39. In like manner here, the court failed to fully articulate the factual basis for its decision.

Likewise, in Dahl, the court failed to adequately articulate the reasons for its decision to revoke a SSOSA, and the Supreme Court reversed. 139 Wn.2d at 687-89. Dahl was subject to revocation for failing to make adequate progress in his treatment. *Id.* at 680. Part of the treatment provider's assessment included two alleged incidents -- one of which was grounded solely in four-levels of hearsay. *Id.* at 681. The Court determined that this incident was not supported by verified facts at the hearing and, thus, that it was improper for the court to consider it. *Id.* at 686-87.

The Court then determined that this was prejudicial. "Because the trial judge's rationale is vague, it is difficult to tell what weight she placed on the hearsay evidence of Dahl's exposure to the two girls. However, the gravity of the incident and the fact that the judge specifically mentioned the allegation in her oral ruling indicates that the incident did influence the

court's decision to revoke Dahl's SSOSA." *Id.* at 689. Upon this basis, the Court remanded for a new hearing. *Id.*

Like Dahl, and Lawrence, the vague oral ruling of the court in this case, incorporating elements of pure speculation, requires remand for a new hearing. Further, because the court below has expressed its opinion that the original granting of the SSOSA was a mistake, 6RP 145-46, and has expressed doubt about Shaughnessy's religious beliefs and his legitimate religiously-motivated conduct, fundamental fairness requires that this hearing be conducted before a different judge.

D. CONCLUSION

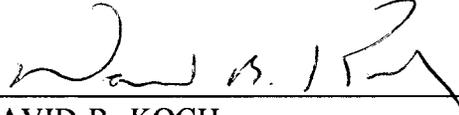
For the reasons stated above, this Court should reverse, and remand for a new hearing before a different judge.

DATED this 1<sup>st</sup> day of September, 2006.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 34506-4-II
	)	
JAMES SHAUGHNESSY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1<sup>ST</sup> DAY OF SEPTEMBER 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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WASHINGTON STATE PENITENTIARY  
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WALLA WALLA, WA 99362

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DIVISION II  
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STATE OF WASHINGTON  
BY PM  
DEPUTY

**SIGNED** IN SEATTLE WASHINGTON, THIS 1<sup>ST</sup> DAY OF SEPTEMBER, 2006.

x Patrick Mayovsky