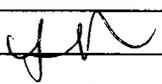


NO. 35736-4-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DERRICK BOYD, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Beverly Grant

No. 04-1-00005-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant afforded his due process rights during his SSOSA revocation hearing when the court used the well-established “reasonably satisfied” burden of proof at the hearing and when defendant received and acknowledged written and verbal notice of the alleged violations before the hearing?

B. STATEMENT OF THE CASE.

On January 2, 2004, the Pierce County Prosecutor’s Office charged DERRICK LEE BOYD, hereinafter “defendant,” with three counts of first degree child molestation and one count of second degree child molestation. CP 1-4. The State amended this information on July 29, 2004, to charge defendant with two counts of first degree child molestation, and one count of third degree child assault. CP 5-6. Defendant pleaded guilty to this amended information. CP 8-21; RP(1)

11.<sup>1</sup> The State agreed to recommend a Special Sex Offender Sentencing Alternative (“SSOSA”) in exchange for defendant’s plea. RP(1) 9. The court found defendant guilty, granted SSOSA, and sentenced defendant to serve a 131 months’ confinement, with 125 months suspended as part of the SSOSA. RP(2) 11, 15, 16; CP 37-49. The court gave defendant credit for serving 46 days’ confinement. RP(2) 16; CP 37-49. Appendix “H” of defendant’s Judgment and Sentence outlined the conditions with which defendant was required to comply while on SSOSA. CP 56-58. Appendix “H” read, *inter alia*,

17. Do not initiate or prolong physical contact with children under the age of 18 for any reason.
18. Inform community corrections officer of any romantic relationships to verify there are no victim-age children involved.

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<sup>1</sup> The Verbatim report of Proceedings is contained in 12 volumes that are not numbered consecutively. Page citations to the volume dated July 29, 2004, will be preceded by “RP(1).” Page citations to the volume dated September 10, 2004, will be preceded by “RP(2).” Page citations to the volume dated March 17, 2005, will be preceded by “RP(3).” Page citations to the volume dated June 3, 2005, will be preceded by “RP(4).” Page citations to the volume dated August 12, 2005, will be preceded by “RP(5).” Page citations to the volume dated September 13, 2005, will be preceded by “RP(6).” Page citations to the volume dated December 9, 2005, will be preceded by “RP(7).” Page citations to the volume dated March 10, 2006, will be preceded by “RP(8).” Page citations to the volume dated June 19, 2006, will be preceded by “RP(9).” Page citations to the volume dated November 9, 2006, will be preceded by “RP(10).” Page citations to the volume dated November 30, 2006, will be preceded by “RP(11).” Page citations to the volume dated December 7, 2006, will be preceded by “RP(12).”

21. Avoid places where children congregate. (Fast-food outlets, libraries, theaters, shopping malls, play grounds, and parks).  
\*\*\*
23. Follow all conditions imposed by your sexual deviancy treatment provider.

CP 56-58; RP(11) 29. Defendant signed this Judgment and Sentence. CP 37-49; RP(11) 29.

On January 25, 2005, defendant signed an agreement with his SSOSA treatment provider in which he agreed not to use controlled substances. RP(5) 18. Defendant also signed a document entitled “Definition of Terms Regarding Contact with prohibited Persons” that explained he was prohibited from being in proximity of minor children. CP 116-120. The document defined proximity contact as follows: “Proximity Contact: Being in the proximity of a PERSON, such as in the same house, yard, store, or restaurant, where communication could be established with the PERSON.” CP 116-120. Defendant was informed that while he was in treatment, he could not be in a romantic relationship without permission. RP(11) 32, 87-88.

On February 15, 2005, defendant was terminated from treatment for using cocaine and marijuana. RP(3) 3-4; RP(5) 3, 16, 22. On March 17, 2005, the court held a revocation hearing in which defendant stipulated that he had been expelled from his SSOSA treatment center for using

marijuana and cocaine. RP(3) 3-4; RP(5) 3, 16, 22; CP 73-74. The court set a disposition hearing to determine whether the court should allow defendant to continue treatment. RP(5) 3-4. The matter was continued until August 12, 2005. RP(3) 1-RP (4) 7. At that hearing, the court chose to allow defendant to continue treatment, and did not revoke his SSOSA. RP(6) 3-4. The court took pains to admonish defendant that this was his last chance and that the court would be watching his progress closely. RP(6) 1-18. The court told defendant, "I am very concerned that you have no contact with children at all...in any program." RP(6) 6.

On June 12, 2006, defendant told his treating physician, Dr. Vincent Gollogly, that he was having a relationship with a woman who had minor children. RP(11) 67-68, 78. Defendant indicated that he had gone to her house when the children were home, but that he had ignored the children or the children were upstairs. RP(11) 67-68, 78, 82. Although defendant was in treatment at the time, he failed to get permission before beginning this relationship. RP(11) 32, 88. Dr. Gollogly told defendant to end the relationship, and defendant agreed to do so. RP(11) 27, 68, 69. On June 19, 2006, defendant told Dr. Gollogly that he had ended the relationship. RP(11) 79. On June 31, 2006, defendant again told Dr. Gollogly that he wanted to reinstate a relationship with the woman with three minor children. RP(11) 69, 79. Dr. Gollogly again told defendant that defendant could not see her and said that only the court could give defendant permission to date her.

RP(11) 69. Defendant then reported that he met with the woman one more time in order to end the relationship. RP(11) 69. This last meeting occurred at the woman's house while the children were in the house. RP(11) 73.

On September 13, 2006, defendant took a polygraph test administered by Sherry Aalborg, defendant's community corrections officer. RP(11) 27, 28, 49, 50, 91-92; CP 116-120. During this polygraph test, defendant admitted that he "had begun a relationship with a woman who had three minor children." RP(11) 27, 28, 49, 50, 91-92; CP 116-120. While defendant told Dr. Gollogly he had only been in the house with the children once, he admitted to Ms. Aalborg that the children "had been present but upstairs on multiple occasions that [defendant] had been present in the family home." RP(11) 27, 28, 49, 50, 91-92; CP 116-120. Defendant also admitted that he was around people who were drinking alcohol on September 6, 2006. CP 116-120. Based on these admissions, Ms. Aalborg reported to the court that defendant had violated the conditions of his SSOSA prohibiting proximity contact with minor children and possession or consumption of mood-altering substances. RP(11) 50, 56-57; CP 116-120. Ms. Aalborg recommended that defendant's SSOSA be revoked. CP 116-120. On September 15, 2006, the State petitioned the court to revoke defendant's SSOSA. RP(10) 6; CP 121-124. Defendant was served with a copy of Ms. Aalborg's report and the State's petition. RP(10) 6, 8, 11.

The court scheduled a revocation hearing for November 30, 2007, a date that the State and defense agreed would provide them adequate time to prepare their cases. RP(10) 13-15. The court heard testimony from Ms. Aalborg and Dr. Gollogly. RP(11) 1-96. At the hearing, defense counsel argued that defendant did not understand that being in the same house as minor children violated the proximity contact condition of his SSOSA. RP(11) 100-102. Defense counsel said,

I think there was a question here, a significant question as to the meaning of proximity contact, as Ms. Aalborg has defined it and Dr. Gollogly... found that...the policy of his agency needed to be clarified with regard to this subject and that need for clarification came about at the time that Mr. Boyd made his disclosure.

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**The definition of [proximity contact] becomes the whole subject matter and gravamen of the violation**, what is meant by contact with these children and that certainly was an issue for Dr. Gollogly himself as a professional.

RP(11) 101-102 (emphasis added). Defendant never refuted evidence that he was present in the house with the three minor children. RP(11) 1-113. The court found that defendant had violated the proximity contact condition of his SSOSA, but not the mood altering substance condition. CP 129-133. The court entered Findings of Fact and Conclusions of Law in support of its findings. CP 129-133 (attached hereto as "Appendix A"). The court revoked defendant's SSOSA, imposed 125 months'

confinement on defendant, sentenced defendant to 36-48 months' community custody, and gave defendant credit for 306 days served. CP 129-133. From entry of this revocation order, defendant has filed a timely notice of appeal. CP 137-141.

C. ARGUMENT.

1. DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BECAUSE THE COURT USED THE WELL-ESTABLISHED "REASONABLE BELIEF" BURDEN OF PROOF AND DEFENDANT HAD NOTICE OF THE VIOLATIONS THE STATE ALLEGED DEFENDANT COMMITTED.

When a convicted person receives a SSOSA, the court imposes a standard sentence, suspends the sentence, and imposes conditions on the suspended sentence. RCW 9.94A.670(4); State v. Dahl, 139 Wn.2d 678, 682, 990 P.2d 396 (1999). Once a person has been granted a SSOSA, the court may revoke the SSOSA and impose the original sentence if

(a) [t]he offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment.

RCW 9.94A.670(10). A suspended sentence is a sentence that is "actually imposed but the execution thereof is thereafter suspended." State v. Whitaker, 112 Wn.2d 341, 344, 771 P.2d 332 (1989). "Revocation of a suspended sentence rests within the discretion of the court." State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). To revoke the

SSOSA, the court does not have to find that a violation occurred beyond a reasonable doubt; the court must only be reasonably satisfied that the violation has occurred or that the offender is failing to make satisfactory progress. Dahl, 139 Wn.2d at 683; Badger, 64 Wn. App. at 908; State v. Shannon, 60 Wn.2d 883, 888-889, 376 P.2d 646 (1962). A revocation hearing is not a criminal proceeding, so “[a]n offender facing revocation of a suspended sentence has only [the] minimal due process rights” afforded in parole or probation violation hearings. Id. (citing State v. Badger, 64 Wn. App. 904, 907, 827 P.2d 318 (1992)). This minimal due process requires

- (a) written notice of the claimed violations;
- (b) disclosure to the parolee of the evidence against him;
- (c) the opportunity to be heard;
- (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation);
- (e) a neutral and detached hearing body; and
- (f) a statement by the court as to the evidence relied upon and the reasons for the revocation.<sup>2</sup>

Dahl, 139 Wn.2d at 683 (quoting Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972)). This process exists to ensure that the revocation is based on verified facts. Id.

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<sup>2</sup> For ease of reference, the State will refer to these six requirements as the Morrissey-Dahl requirements.

- a. The burden of proof used at defendant's violation hearing did not violate due process.

The court applied the burden of proof required by Washington law in this case, stating that it was reasonably satisfied that the violation had taken place in this instance. CP 129-133; RP(12) 8. Defendant does not dispute that the court implemented the burden of proof required by Washington law during SSOSA revocation hearings. Br. of Appellant at 7. Defendant only claims that the "reasonably satisfied" burden violates due process. Br. of Appellant at 11.

- i. **The well-established "reasonably satisfied" standard of proof satisfies the minimal due process requirements for SSOSA revocation hearings.**

The burden of proof that the court used in revoking defendant's SSOSA did not violate due process. A person is entitled to minimal due process during probationary hearings like a SSOSA revocation hearing. Dahl, 139 Wn.2d at 683. When a court makes factual findings after implementing the Morrissey-Dahl requirements, those facts are said to be verified. Id.; Morrissey, 408 U.S. 471. Defendant does not claim that the State failed to disclose the evidence against defendant, that defendant was denied an opportunity to be heard, that defendant was deprived his right to confront and examine witnesses, that the court was impartial, or that the court failed to state the evidence it relied upon or its reasons for revoking

defendant's SSOSA sentence.<sup>3</sup> See Dahl, 139 Wn.2d at 683; Morrissey, 408 U.S. 471. In fact, defendant was granted each of these rights. See CP 37-49, 56-58, 121-124, 129-133; RP(11) 1-113. Because the court followed the minimal due process rights provided for in Morrissey, the facts on which his revocation were based were verified. The means by which the court satisfied the reasonable satisfaction burden also satisfied due process by fulfilling the Morrissey-Dahl requirements.

Defendant mistakenly assumes that once a court fulfills the Morrissey-Dahl requirements, it must separately inquire whether the facts on which the SSOSA revocation were based constituted "verified facts." The Morrissey and Dahl courts both concluded that the minimal due process requirements listed in Morrissey "exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts." Dahl at 683; Morrissey at 484. By fulfilling the Morrissey-Dahl requirements, the court ensured that its conclusions were based on verified facts that satisfy the minimal due process requirements of revocation hearings. Nothing in either Morrissey or Dahl suggests that

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<sup>3</sup> Defendant does claim that the first Morrissey-Dahl requirement, written notice of claimed violations, was violated. The next section addresses this issue. Defendant may claim that because he was not given written notice, the Morrissey-Dahl elements have not been fulfilled and the facts are thus not verified as required by minimal due process. If that is the case, then defendant's two claimed due process violations collapse into a single issue: whether he received written notice of the violations with which he was charged. Subsection b, *infra*, answers that issue.

a reviewing court should conduct the further review contemplated by defendant in this case.

Even if this Court performs a separate analysis to determine whether the facts on which the court relied constituted verified facts, defendant fails to point to a single reason that this court should doubt the verity of the facts in this case. Defendant hasn't assigned error to any of the findings of fact supporting the revocation, so they are verities on appeal. See State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994); Br. of Appellant at 1. During the revocation hearing, the State presented evidence that defendant had been in his girlfriend's house when her children were present, which violated the conditions of his SSOSA. RP(11) 27, 28, 49, 50, 91-92; CP 116-120. There was no evidence contrary to this point. In fact, defendant told Ms. Aalborg that he was in the house with the children, "on multiple occasions." CP 116-120. When the parties argued whether defendant's SSOSA should be revoked, they focused primarily on whether presence under the same roof constituted "proximity" for the purposes of the SSOSA conditions. RP(11) 101-102. Defendant did not argue that there was insufficient evidence to support the claimed violation, and on appeal defendant fails to indicate what other evidence should have been presented to verify that he was in the house with the children. CP 129-133. The court below based its determination on verified facts.

Defendant is incorrect that SSOSA revocation hearings are the only hearings that use the “reasonably satisfied” burden of proof. See Br. of Appellant at 9-11. Washington courts have regularly employed the “reasonably satisfied” standard in revoking probation and suspended sentences, including SSOSA, for over 40 years. Dahl, 139 Wn.2d 678; Badger, 64 Wn. App. 904; Shannon, 60 Wn.2d 883; State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). The Washington Supreme Court has reaffirmed this standard in the light of Morrissey v. Brewer. Dahl, 139 Wn.2d 678; see Br. of Appellant at 11.

Although defendant challenges the burden of proof the sentencing court used and argues that the court failed to verify the facts underlying the revocation, he admits that the facts underlying the revocation are true. Defendant has never contested that after he was granted a SSOSA, he was repeatedly in the same house as minor children. RP(11) 67-68, 78, 82. On appeal, he does not contest that this presence violated the proximity contact condition of his SSOSA. See Br. of Appellant. He admits the facts that establish he violated his SSOSA; he cannot simultaneously claim that those facts were unproved or unverified.

**ii. Defendant improperly analogizes  
DOSA revocation hearings to  
SSOSA revocation hearings.**

Defendant improperly analogizes SSOSA revocation hearings to DOSA revocation hearings; the two hearings are entirely different

proceedings. When a court imposes a SSOSA sentence, it sentences the offender to a standard range sentence, suspends that sentence, and imposes conditions on that suspension. RCW 9.94A.670. The offender is then placed on community custody while the sentence is suspended. RCW 9.94A.670(4)(a). To revoke a SSOSA, a court must only be reasonably satisfied that a defendant violated the SSOSA conditions. Dahl, 139 Wn.2d at 683; Badger, 64 Wn. App. at 908; Shannon, 60 Wn.2d at 888-889. DOSA sentences, on the other hand, are never suspended. An offender receiving a DOSA is sentenced to an immediate period of total confinement that is equal to twelve months or half the midpoint of the offender's standard range sentence, whichever is longer. RCW 9.94A.660(5)(a).<sup>4</sup> After serving this period of total confinement, the offender is then released on community custody so that he or she can attend drug treatment. RCW 9.94A.660(5)(b). To revoke a DOSA, the Department of Corrections must find by a preponderance of the evidence that a defendant violated the DOSA conditions. In re Personal Restraint Petition of McKay, 127 Wn. App. 165, 168-169, 110 P.3d 856 (2005).

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<sup>4</sup> The State recognizes that under RCW 9.94A.660(6), an offender may be placed on community custody instead of being immediately confined. That option, however, is only available when the midpoint of an offender's standard range is 24 months or less. RCW 9.94A.660(4)(a). Defendant's argument rests in part on In re the Personal Petition of McKay, 127 Wn. App. 165, 169, 110 P.3d 856 (2005), a case in which the offender received a 73 month DOSA, so RCW 9.94A.660(6) is not applicable to defendant's argument. Moreover, defendant's sentence was much longer than 24 months, so RCW 9.94A.660(6) does not apply to defendant's case. In any event, RCW 9.94A.660(6) offers community custody, not a suspended sentence, and thus it is very different from a SSOSA sentence.

Thus, the form of sentencing alternative is different in the case of a SSOSA than it is in the case of a DOSA; rationale that applies to revoking one does not necessarily apply to revoking the other.

Although defendant is correct that McKay, 127 Wn. App. at 168-169, requires the State to prove DOSA violations by a preponderance of the evidence, this standard is unique to DOSA revocation hearings, and the rationale employed in McKay does not apply to SSOSA revocations. In McKay, Division I held that the Morrissey-Dahl requirements, and the preponderance of the evidence standard, were part of the process due in DOSA revocations, saying, “For DOSA violations allegedly committed while on community custody, DOC practice is to afford the procedural due process protections established in Morrissey v. Brewer, including the preponderance of the evidence standard of proof, which ensures a violation finding will be based on ‘verified facts and . . . accurate knowledge.’” Id. at 168-169. In support of this conclusion, the court cited In re Pers. Restraint of McNeal, 99 Wn. App. 617, 628, 994 P.2d 890 (2000), and WAC 137-104-050. McKay, 127 Wn. App. at 169, n. 8. McNeal simply states that the Morrissey-Dahl factors apply in community custody revocation hearings; it does not require the preponderance standard in those hearings. The preponderance standard adopted in McKay comes instead from WAC 137-104-050(14), which requires the Department of Corrections to employ a preponderance standard when revoking a DOSA. The McKay court thus holds that the standard DOC

practice outlined in WAC 137-105-050 is part of the process due when the *Department of Corrections* revokes *DOSA*, a *community custody* sentence. The present case is different; here, the *sentencing court* has revoked a *suspended* sentence and imposed the sentence because defendant violated the *SSOSA* conditions. It does not follow that two very distinct hearings conducted by different entities and reviewing different types of sentencing alternatives require the same process. McKay has no effect on the present case.

The burden of proof required in *DOSA* revocation hearings breaks with the traditional standard required in most revocation hearings, which suggests the Legislature intended to treat *DOSA* revocations differently than other revocation proceedings. The reasonable satisfaction standard used in *SSOSA* revocations is the traditional standard used in all probationary revocation hearings, indicating that the Legislature did not intend to treat revocation of *SSOSA* any differently than it did other probation revocations. Dahl, 139 Wn.2d 678; Badger, 64 Wn. App. 904; Shannon, 60 Wn.2d 883; Kuhn, 81 Wn.2d at 650.

Moreover, the difference between the entities that preside over *SSOSA* and *DOSA* revocation hearings justifies using a different burden of proof in revoking a *SSOSA* than in revoking a *DOSA*. *SSOSA* revocation hearings are overseen by the judiciary, which is presumed to be impartial and has extensive experience in adjudicating facts and drawing legal conclusions from those facts. *DOSA* revocation hearings are

overseen by the Department of Corrections, an arm of the Executive Branch. McKay, 127 Wn. App. 165. The Executive Branch does not enjoy the same presumption of impartiality that the judiciary does, and it is less experienced at adjudicating facts than the judiciary is. It is thus reasonable that the Legislature requires a stricter burden of proof in DOSA revocation hearings to compensate for this difference in presumption and experience.

b. Defendant received written notice that he had violated the conditions of his SSOSA.

**i. Defendant failed to preserve his objection of lack of notice.**

This Court “may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a)(3). “[A] person accused of violating the conditions of sentence has some responsibility in ensuring that his or her rights under Morrissey are protected. The accused must, at a minimum, place the court on notice that due process is being violated by making an appropriate objection.” State v. Robinson, 120 Wn. App. 294, 297, 85 P.3d 376 (2004). If a person fails to object to notice at a hearing in which the court reviews the conditions of his SSOSA sentence, that person waives the objection and a court will not consider it on appeal. Id. at 299-300.

Defendant has not preserved his objection to lack of notice. He did not object to notice on the record when the court delivered its ruling revoking defendant's SSOSA, and the parties signed the Conclusions of Law. RP(12) 1-10; 129-133. This court should not consider defendant's claim on appeal that he did not have notice of the violations against him because he was present at the revocation hearing and failed to object.

**ii. Defendant received notice of the one violation for which the court revoked his SSOSA: proximity contact with minors.**

Defendant received ample notice that he had violated the proximity contact condition by going to his girlfriend's house when her children were there. Defendant began the relationship without Dr. Gollogly's or Ms. Aalborg's permission. RP(11) 32, 88. When Dr. Gollogly learned of the relationship, he told defendant to end it. RP(11) 27, 68, 69. Defendant later told Dr. Gollogly he wanted to reinstate the relationship, and Dr. Gollogly told him he could not. RP(11) 69. Defendant then met with the woman at her house while her children were there. RP(11) 73. When Ms. Aalborg learned of the relationship and the multiple times defendant had been in the house with the children, she recommended that defendant's SSOSA be revoked. RP(11) 27, 28, 49, 50, 91-92; CP 116-120. On September 15, 2006, the State filed a petition asking the court to revoke defendant's SSOSA for violating the proximity condition of his sentence.

RP(10) 6; CP 121-124. Defendant was aware of Ms. Aalborg's recommendation and received a copy of the State's petition weeks before the revocation hearing took place. RP(10) 6, 8, 11. When the court scheduled the revocation hearing, defense counsel said that the date gave her enough time to prepare a defense to the violations the State had alleged. RP(10) 13-15.

Defendant's argument erroneously assumes that the court's third Conclusion of Law at the revocation hearing constituted a third violation of which he was not notified before the hearing; each of these conclusions pertained to the State's contention that defendant had violated the proximity condition of his SSOSA. Br. of Appellant at 12-15. The court's first three Conclusions of Law read,

1. The defendant was fully informed of the conditions of his SSOSA sentence, including his prohibition from being in the proximity of minors.
2. There is a reasonable belief that the defendant violated the conditions of his SSOSA sentence by having proximity contact with minor children on several occasions.
3. There is a reasonable belief that the defendant violated the conditions of his SSOSA sentence by failing to request permission from both CCO Aalborg and **his** treatment provider to enter into a relationship with a particular woman who had three children.

CP 129-133 (emphasis in original). In the first conclusion, the court addressed whether defendant had notice of the proximity contact condition before he violated it, and concluded he had notice. In the second conclusion, the court addressed whether defendant violated that condition and concluded he violated the conditions of his SSOSA when he was in a house with minor children on several occasions. In the third conclusion, the court addressed defendant's claim that he thought he had permission to have a relationship with the woman with three children and concluded that he did not have permission.

Defendant claims this third conclusion constituted a separate violation, but it is clear from the record that the court considered it part of defendant's violation of the proximity contact condition. When the court delivered its verbal ruling and the parties signed the Conclusions of Law, the court and parties only discussed two violations: the proximity violation and the alleged alcohol violation. RP(12) 3-5. No third violation was ever alleged, discussed, or found by the court. The court included the third conclusion to rule on whether it believed defendant's defense, not to conclude that defendant had committed an additional violation.

- iii. Even if the third Conclusion of Law were a second charge of which defendant did not receive notice, such error is harmless because the court would have revoked defendant's SSOSA for violating the "proximity contact" condition of his SSOSA.**

Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Rose v. Clark, 478 U.S. 570, 577, 92 L.Ed.2d 460, 106 S.Ct. 3101 (1986). "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Neder v. United States, 119 S.Ct. 1827, 1838, 144 L.Ed.2d 35 (1999)(internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." Brown v. United States, 411 U.S. 223, 93 S. Ct. 1565, 36 L.Ed.2d 208 (1973)(internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)("The harmless error rule preserves an accused's right to a fair trial

without sacrificing judicial economy in the inevitable presence of immaterial error.”).

Even if the third conclusion constituted a separate violation of which defendant did not receive notice, such a violation would be harmless beyond a reasonable doubt because the court would have revoked his sentence after finding defendant had been within proximity of minor children. At the conclusion of defendant’s March 17, 2005, revocation hearing, the court warned defendant that he had one last chance to adhere to the conditions of his SSOSA, and that the court would be watching him closely to ensure that he complied. RP(6) 1-18. When the court delivered its ruling revoking the SSOSA, the court stated that it had “made it very, very clear that [it] wouldn’t tolerate *any* violations.” RP(12) 8 (emphasis added). The court had lost patience with defendant’s repeated violations, and one more violation was sufficient to compel the court to revoke defendant’s SSOSA.

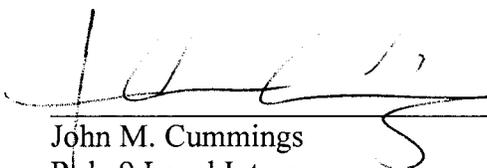
D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the court's revocation of defendant's SSOSA.

DATED: November 30, 2007.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
Kathleen Proctor  
Deputy Prosecuting Attorney  
WSB # 14811

  
John M. Cummings  
Rule 9 Legal Intern

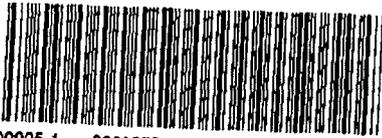
Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

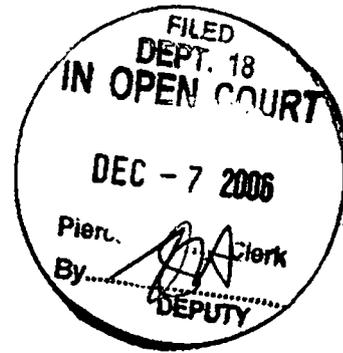
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## **APPENDIX “A”**

*Findings of Fact and Conclusions of Law*



04-1-00005-1 26828524 FNFL 12-08-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-00005-1

vs.

DERRICK LEE BOYD,

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON SSOSA  
REVOCATION HEARING

Defendant.

THIS MATTER came on before the Honorable Beverly Grant on the 30th day of November, 2006. The defendant was present and represented by his attorney, Judith Mandel. The State was present and represented by Deputy Prosecuting Attorney Rosalie Martinelli. The court heard testimony, observed the demeanor and manner of witnesses, and read reports and exhibits submitted by the parties. The court was duly advised in all matters. The court, having rendered an oral ruling revoking the defendant's suspended (SSOSA) sentence, herewith makes the following Findings and Conclusions.

**THE UNDISPUTED FACTS**

- 1. On September 4, 2004, the defendant was sentenced to 131 months at the Department of Corrections for convictions of Child Molestation in the First Degree (2 counts) and one count of Assault of a Child in the Third Degree. He was sentenced pursuant to the

1 Special Sex Offender Sentencing Alternative, RCW 9.94A.670. All but six months of his  
2 131 month sentence was suspended and he was placed on community custody for the  
3 length of the suspended sentence. He was ordered to fully comply with all conditions of  
4 the court, the treatment provider, and Department of Corrections. The court also  
5 approved the conditions set forth in Appendix H.

- 6 2. The defendant was notified in Appendix H to the Judgment and Sentence that he was  
7 supposed to inform his community corrections officer of any romantic relationships to  
8 verify there are no victim-aged children involved.
- 9 3. The defendant was notified in Appendix H to the Judgment and Sentence that he was to  
10 avoid places where children congregate and also to follow all conditions imposed by the  
11 sexual deviance treatment provider.
- 12 4. The defendant was ordered to submit to polygraph testing at the request of the  
13 Department of Corrections or the treatment provider.
- 14 5. On December 27, 2004, the defendant signed a Definition of Terms Regarding Contact  
15 with Prohibited Persons, which was set forth by the Department of Corrections. This  
16 document prohibits the defendant from being in proximity of a minor. Proximity is  
17 defined as being in the "same house" with a minor. The defendant was also warned  
18 orally of this condition by CCO Aalborg.
- 19 6. **Dr. Vince Gollogly is a licensed clinical psychologist and a certified sex offender**  
20 **treatment provider. He testified that offenders in his treatment program are advised**  
21 **that they must ask for permission from the treatment provider to enter into a romantic or**  
22 **intimate relationship before entering into such relationship. He testified that that there**  
23 **existed some confusion in his treatment group about the definition of "contact" with**  
24  
25

1 a minor: that is whether proximity alone would violate supervision rules. He  
2 testified that the defendant had made progress in treatment and was still eligible to  
3 receive treatment with him.

4 7. On September 13, 2006, the defendant submitted to a routine polygraph examination.  
5 After the examination, CCO Sherry Aalborg contacted the defendant to address issues of  
6 alcohol usage and contact with minor children.

7 8. The defendant admitted to CCO Aalborg that he had begun a relationship with a woman  
8 who had three minor children and that these children were in the house while he was  
9 present on multiple occasions. The defendant denied having any specific contact with the  
10 children. The defendant stated that he ended the relationship two months prior and that  
11 he had previously informed his treatment provider, Dr. Vince Gollogly.

12 9. CCO Aalborg testified that prior to entering into the relationship with this particular  
13 woman, the defendant did not inform CCO Aalborg so she could approve or disapprove  
14 of the relationship.

15 10. CCO Aalborg testified that the defendant also admitted to having been around people  
16 who were drinking alcohol, but he denied using alcohol himself.

17 11. Dr. Vince Gollogly testified that on June 12, 2006, the defendant told him that he was in  
18 a relationship with a woman who had children and that he had known the woman for  
19 years. The defendant admitted to Dr. Gollogly that the children were in the same house  
20 while he was present. The defendant was told by Dr. Gollogly to immediately cease the  
21 relationship. Dr. Gollogly testified that approximately one week later, the defendant  
22 stated that he ceased the relationship.  
23  
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04-1-00005-1

12. Dr. Gollogly testified that on July 31, 2006, the defendant told him that he would like to have permission to have a relationship with that same woman, the defendant was told he would need the permission of the judge.

13. Both CCO Aalborg and Dr. Vince Gollogly testified that it is a significant risk for the defendant to be around minor children.

THE DISPUTED FACTS

There are no disputed facts.

FINDINGS AS TO DISPUTED FACTS

Not applicable.

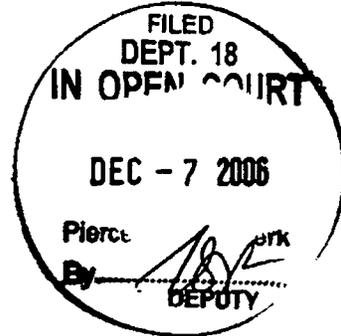
CONCLUSIONS OF LAW

1 The defendant was fully informed of the conditions of his SSOSA sentence, including his prohibition from being in the proximity of minors.

2. There is a reasonable belief that the defendant violated the conditions of his SSOSA sentence by having proximity contact with minor children on several occasions.

3. There is a reasonable belief that the defendant violated the conditions of his SSOSA sentence by failing to request permission from both CCO Aalborg and his treatment provider to enter into a relationship with a particular woman who had three children.

DONE IN OPEN COURT this 7 day of December, 2006.



*Jewelry G. Hunt*  
JUDGE

Presented by:  
*Rosie Martinelli*  
ROSIE MARTINELLI  
Deputy Prosecuting Attorney  
WSB # 25078

4. The court found there was no violation as to charge 2 concerning usage of alcohol in violation of conditions & terms of SSOSA sentence. *(Signature)*

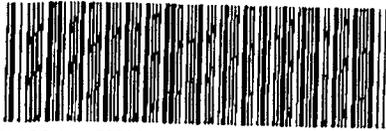
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Approved as to Form:

  
\_\_\_\_\_  
JUDITH MANDEL  
Attorney for Defendant  
WSB # 8677

## **APPENDIX “B”**

*Information and Declaration of Probable Cause*



04-1-00005-1 20262188 INFO 01-02-04

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IN COUNTY CLERK'S OFFICE

A.M. JAN 02 2004 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-00005-1

vs.

DERRICK LEE BOYD,

INFORMATION

Defendant.

289 42929

DOB: 6/20/1962  
PCN#:

SEX : MALE  
SID#: 11888839

RACE: BLACK  
DOL#: WA BOYD\*DL385LO

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse DERRICK LEE BOYD of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, committed as follows:

That DERRICK LEE BOYD, in the State of Washington, during the period between the 30th day of November, 2000 and the 11th day of July, 2003, did unlawfully and feloniously, being at least 36 months older than R.K., have, or knowingly cause another person under the age of eighteen to have, sexual contact with R.K., who is less than 12 years old and not married to the defendant, contrary to RCW 9A.44.083, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse DERRICK LEE BOYD of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That DERRICK LEE BOYD, in the State of Washington, during the period between the 30th day of November, 2000 and the 11th day of July, 2003, did unlawfully and feloniously, being at least 36

INFORMATION- 1

**ORIGINAL**

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930 Tacoma Avenue South, Room 946  
Tacoma, WA 98402-2171  
Main Office (253) 798-7400

04-1-00005-1

1 months older than R.K., have, or knowingly cause another person under the age of eighteen to have,  
2 sexual contact with R.K., who is less than 12 years old and not married to the defendant, contrary to RCW  
3 9A.44.083, and against the peace and dignity of the State of Washington.

4 COUNT III

5 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
6 authority of the State of Washington, do accuse DERRICK LEE BOYD of the crime of CHILD  
7 MOLESTATION IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime  
8 based on the same conduct or on a series of acts connected together or constituting parts of a single  
9 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
10 difficult to separate proof of one charge from proof of the others, committed as follows:

11 That DERRICK LEE BOYD, in the State of Washington, during the period between the 30th day  
12 of November, 2000 and the 29th day of November, 2001, did unlawfully and feloniously, being at least  
13 36 months older than R.K., have, or knowingly cause another person under the age of eighteen to have,  
14 sexual contact with R.K., who is less than 12 years old and not married to the defendant, contrary to RCW  
15 9A.44.083, and against the peace and dignity of the State of Washington.

16 COUNT IV

17 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the  
18 authority of the State of Washington, do accuse DERRICK LEE BOYD of the crime of CHILD  
19 MOLESTATION IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime  
20 based on the same conduct or on a series of acts connected together or constituting parts of a single  
21 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be  
22 difficult to separate proof of one charge from proof of the others, committed as follows:

23 That DERRICK LEE BOYD, in the State of Washington, during the period between the 30th day  
24 of November, 2002 and the 11th day of July, 2003, did unlawfully and feloniously, being at least 36  
months older than R.K., have, or knowingly cause another person under the age of eighteen to have,  
sexual contact with R.K, who is at least 12 years old but less than 14 years old, and not married to the  
defendant, contrary to RCW 9A.44.086, and against the peace and dignity of the State of Washington.

DATED this 21st day of January, 2004.  
~~17th day of November, 2003.~~

PIERCE COUNTY SHERIFF  
WA02700

GERALD A. HORNE  
Pierce County Prosecuting Attorney

sko

By: [Signature]  
SUNNY KO  
Deputy Prosecuting Attorney  
WSB#: 20425

INFORMATION- 2

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PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
DEPUTY

NO. 04-1-00005-1

DECLARATION FOR DETERMINATION OF PROBABLE CAUSE

SUNNI Y. KO, declares under penalty of perjury:

That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the PIERCE COUNTY SHERIFF, incident number 031941391;

That the police report and/or investigation provided me the following information;

That in Pierce County, Washington, on or about the 14th day of July, 2003, the defendant, DERRICK LEE BOYD, did commit the crimes of child molest in the first degree and child molest in the second degree.

R. K. is 12 years old and her DOB is 11-30-90. Her mother, Annett Britz, is the defendant, Derrick Boyd's girlfriend. Boyd has lived the Britz and her children for 3 1/2 years since R.K. was 9 years old. In July of 2003, R.K. and Boyd got into a heated argument. After Boyd fell asleep, R.K. handed her mother a letter. The letter read, "I really don't know how to tell you this, but sometimes Derrick touches me and sometimes he makes me touch him for money and I do it sometimes and sometimes I don't want to and I have told him many times I don't want to but he says it would be the last time so I say ok. Please don't be mad or don't take him to court or anything, just talk to him. Hope you not made at me still. It was really hard for me to tell you so please be nice to me and him!" Mom confronted Boyd. He denied the allegations. He was told to leave the house.

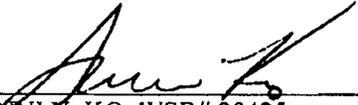
During a forensic interview, R.K. disclosed that she was 9 or 10 years old when the first incident occurred. She told the interviewer that Boyd would take her into her mom's room, sit on the bed, pull down his pants and say, "Touch it." Sometimes when she would say no, he would tell her that it would be the last time she had to do it. He would promise that he would never ask her again. When she touched his penis, "white stuff" came out of his penis. Defendant would then clean himself with a towel and put the towel with the dirty clothes. Once, defendant took R.K. into the bathroom, locked the door, sat on the toilet and asked her to get on her knees. He then told her to put her mouth on his penis. She refused and left the room. R.K. disclosed that sometimes defendant would offer her money if she touched him. She told the interviewer that sometimes he touched him for money and sometimes she did not. On one occasion, R.K. was sitting on her mother's bed watching her mom on the computer. After her mother left the room, defendant came in and shut the door. He then put his foot on the door. He made R.K. masturbate him and then he made R.K. pull her pants down. He asked if he could put his mouth on her genital area. She told him "No", pulled her pants up and left the room. Once, R.K. was in the bathroom looking for a Band-Aid for a cut on her finger. Defendant came in and shut the door. R.K. sat on the toilet to put on her Band-Aid. Defendant pulled down his pants and asked her to masturbate him. She did. He then told her to put her mouth on it. She told him she didn't want to. He told her to close her eyes. She did. He moved his penis closer to her face. She then saw his semen drip onto her clothes. She left and changed her clothes. Once, R.K. was playing on her mom's computer. Defendant came in, turned her chair towards him and pulled her pants and panties down to right above her knees. He then got on his knees, opened her legs and put his mouth on her genital area, moving his tongue around her private. Defendant tried this many times but was successful only once. The last times it occurred, defendant was lying on his bed. He took out his penis and asked her to masturbate him. She did. Afterwards, he

04-1-00005-1

1 gave her money. When she asked him why he was giving her money, he told her, "Because you do all this for me so  
2 I should give you something for doing to me." She told him, "You shouldn't make me do this at all."

3 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
4 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

5 DATED: ~~November 17, 2003~~ 1-2-04.  
6 PLACE: TACOMA, WA

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DECLARATION FOR DETERMINATION  
OF PROBABLE CAUSE -2

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