

NO. 36049-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER HOURIHAN,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
07 SEP 21 PM 12:11
STATE OF WASHINGTON
BY DEPUTY

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

The Honorable Leila Mills, Judge

BRIEF OF APPELLANT

DANA M. LIND
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	16
1. THE COURT VIOLATED HOURIHAN'S RIGHT TO DUE PROCESS WHEN IT REVOKED HIS SSOSA BASED ON AN ALLEGATION FOR WHICH HE HAD NO NOTICE.	16
2. THE COURT ACTED OUTSIDE ITS AUTHORITY WHEN IT REVOKED HOURIHAN'S SENTENCE BASED ON THE VIOLATION OF A SENTENCING CONDITION THE COURT HAD NO AUTHORITY TO IMPOSE.	22
D. <u>CONCLUSION</u>	26

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Dependency of C.B.</u> , 79 Wn. App. 686, 904 P.2d 1171 (1995)	23
<u>In re Sumey</u> , 94 Wn.2d 757, 621 P.2d 108 (1980)	23
<u>State v Letourneau</u> , 100 Wn. App. 424, 997 P.2d 436 (2000)	23-26
<u>State v. Ancira</u> , 107 Wn. App. 650, 27 P.3d 1246 (2001)	23, 25
<u>State v. Badger</u> , 64 Wn. App. 904, 827 P.2d 318 (1992)	16
<u>State v. Dahl</u> , 139 Wn.2d 678, 990 P.2d 396 (1999)	16-22
<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998)	23
<u>State v. Sanford</u> , 128 Wn. App. 280, 115 P.3d 368 (2005)	23
 <u>FEDERAL CASES</u>	
<u>Morrissey v. Brewer</u> , 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)	17, 22

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

Santosky v. Kramer,
455 U.S. 745, 102 S. Ct. 1388,
71 L. Ed. 2d 599 (1982) 23

RULES, STATUTES AND OTHERS

RCW 9.94A.120(9)(b)(vi) 25
RCW 9.94A.670(10) 16

A. ASSIGNMENTS OF ERROR

1. Appellant's due process right to notice was violated when the court revoked his special sex offender sentencing alternative sentence (SSOSA) based on an uncharged violation.

2. The court acted outside its authority when it revoked appellant's SSOSA for violating a condition it had no authority to impose.

3. The SSOSA and community custody conditions restricting appellant's contact with his two sons violate appellant's fundamental right to parent.

Issues Pertaining to Assignments of Error

1. Were appellant's due process rights violated where the state alleged appellant violated the conditions of his SSOSA by (a) shoplifting soap and coffee when he was destitute and (b) having 15-30 seconds of "unsupervised" contact with his minor son during a pre-approved visit supervised by appellant's brother and father, but the court revoked appellant's SSOSA based on the community corrections officer's (CCO) uncharged allegation that appellant failed to timely report violations of his SSOSA conditions thereby rendering him inappropriate for continued SSOSA participation?

2. Did the court err in revoking appellant's SSOSA based on a violation of a condition it had no authority to impose, specifically that he have no unsupervised contact with minor children, including his two biological sons, when there was no indication the contact restriction was necessary to insure the boys' safety?

3. Should the conditions restricting appellant's contact with his biological sons be stricken from the conditions of his SSOSA as well as the conditions of community placement as violative of his fundamental right to parent?

B. STATEMENT OF THE CASE

Near the end of March 2004, appellant Christopher Hourihan was accused of molesting his girlfriend's daughter (I.J.S.) on several occasions between December 2003 and 2004. CP 4-5. When interviewed by police, Hourihan admitted the conduct and signed a written confession detailing three incidents. CP 4. Ironically, ten days before his confession, Hourihan had started counseling with Dan Pippinger, M.S. CP 32.

On April 12, 2004, the Kitsap County Prosecutor's Office charged Hourihan with domestic violence first degree child molestation. CP 1. During his third session with Pippinger, Hourihan disclosed his arrest for "domestic violence and sexual misconduct with a minor." CP 32.

Pippinger reported that "[a]fter this session, Kit [Hourihan] became so motivated to find answers to his confusion around his behavior that we started doing two sessions a week at his request." CP 32.

In December 2004, Hourihan waived his right to a jury trial and agreed to a bench trial on stipulated facts. The parties jointly requested the court to continue the case to a future date, at which time the prosecutor would allow Hourihan to change his plea. In exchange, Hourihan would be allowed to request a SSOSA, although it was understood the state would oppose the request. CP 10-13.

Hourihan underwent a SSOSA evaluation by Michael Comte, MSW. Supp. CP __ (sub. No. 37, State's Response to Defendant's Sentencing Memorandum, 3/2/05). Compte diagnosed Hourihan as meeting the criteria for pedophilia, alcohol dependence, and heavy marijuana use. CP 43. Because Hourihan failed two polygraphs in which he was asked about his sexual history, Compte did not recommend a SSOSA. CP 43.

Hourihan thereafter underwent evaluation by Leslie Rawlings, Ph.D. CP 34. As part of the evaluation, Hourihan underwent two polygraph tests. On the first occasion, deception was detected when Hourihan answered that he had disclosed all molestation victims. CP 43. Following the first test, Hourihan disclosed others, including his biological daughter K.C. CP 16,

35, 55, 61-62; 5RP 8, 11.¹ At some point during his evaluation with Rawlings, Hourihan also disclosed "a pattern of masturbating while in bed with women with whom he had been involved while the women were asleep." CP 38. According to Rawlings, "[h]e reported the appeal of this behavior was being sneaky and doing something without getting caught." CP 38. But Hourihan also stated "he is amazed that it has taken him so long to realize what he needs to do about his behavior and noted that he had been in denial about his pedophilia." CP 40. No deception was detected during the second polygraph when Hourihan answered that he had disclosed all persons he molested. CP 43-44.

As part of the evaluation with Rawlings, Hourihan also underwent plethysmograph testing. Although he exhibited arousal to stimuli involving female children, he did not experience any arousal to stimuli involving male children, or to stimuli involving sexual coercion or rape. CP 44.

Rawlings assessed Hourihan as a low to moderate risk to reoffend. CP 45. Despite her assessment, Rawlings gauged Hourihan as a "marginal

¹ This brief refers to the transcripts as follows: 1RP - 3/11/05; 2RP - 3/22/06; 3RP - 3/30/06; 4RP - 4/17/06; 5RP - 5/15/06; 6RP - 10/2/06; 7RP - 10/11/06; 8RP - 11/14/06; 9RP - 11/27/06; 10RP - 11/28/06; 11RP - 11/21/06; 12RP - 12/22/06; 13RP - 2/6/07 & 2/15/07; and 14RP - 2/22/07.

candidate for community based treatment." CP 45. Nevertheless, her report notes:

Mr. Hourihan reports a strong interest in controlling his sexual behavior. Though his therapy was not designed to address his sexual problems, Mr. Hourihan has participated in psychological services on a voluntary basis and appears to have benefited from such treatment.

CP 45.

Following Rawlings' evaluation, Hourihan underwent a final evaluation -- including eight therapeutic sessions -- with Senior Psychologist Allen Traywick of the Special Commitment Center. CP 48, 53. Traywick reviewed discovery materials as well as Rawlings' evaluation. CP 54. Regarding Rawlings' evaluation, Hourihan "reported the process was an awakening event in that he concluded it was necessary to begin honestly examining self." CP 54, 63. Traywick assessed Hourihan as at a low to moderate risk for reoffense and recommended treatment in the community. CP 53.

Hourihan submitted numerous letters of support from family and friends in support of his SSOSA request. CP 22-30, 64-85. One of Hourihan's supporters was Linda Scott, the mother of Hourihan's 5-year-old

son M.H.² CP 67. Scott asked the court to allow continued contact between Hourihan and M.H. CP 67.

CCO David Payne opposed Hourihan's SSOSA request because Hourihan initially "failed to disclose the full depth and breadth of his sexual deviancy and additional victims to those commissioned to determine his amenability to treatment." Supp. CP __ (sub. no. 33, Court-Special, 2/22/05). As countered by defense counsel, however, it was not unusual for a sex offender to have difficulty admitting the full extent of his offending behavior. CP 16. So it was with Hourihan, especially concerning his biological daughter. CP 16; 5RP 8.

A hearing was held on March 2, 2005. Although the minutes do not indicate a finding of guilt based on stipulated facts, the judgment and sentence entered on March 11 does so indicate. CP 87-94; Supp. CP __ (sub. no. 34, Minutes, 3/2/05). The court granted Hourihan's request for a SSOSA, imposed a low-end 51-month sentence, and suspended all but six months of it on conditions that Hourihan: obey all laws; remain within prescribed geographical boundaries; consume no alcohol or controlled substances without a legal prescription; have no contact with the victim or her family; and have no contact with any children under the age of 18

² Hourihan has another son (born 2/1/97) with the mother of I.J.S. CP 34, 57.

without the presence of an adult who is knowledgeable of the conviction and who has been approved by the CCO. CP 87-93.

In the event Hourihan's SSOSA were revoked, the court also imposed the following community custody conditions requiring that Hourihan:

- (1) Shall not cause or have contact with victim IJC (DOB: 11/16/94) and/or her family for the statutory maximum. Contact includes in person, in writing, electronically, telephonically, and/or through a third person.
- (2) Shall not cause or have contact with minors under 18 years of age without authorization from his Community Corrections Officer.

CP 96.

On March 22, 2006, over a year after the court imposed the SSOSA, CCO Payne filed a notice with the court alleging four SSOSA violations, specifically that Hourihan: (1) violated the geographical boundary condition by leaving Kitsap County without obtaining prior approval; (2) violated the alcohol condition by drinking a glass of wine with his sister during an authorized visit to Maine over the Thanksgiving holiday; (3) violated the condition prohibiting unsupervised contact with minors by driving his daughter to or from work on three occasions with her mother's permission; and (4) that he had "one puff" of marijuana when he was staying with someone who regularly smoked it. CP 101-02; 5RP 12-13, 18.

The polygrapher detected no deception when Hourihan answered no to the following questions:

Other than [sic] what you disclosed, have you been alone with your daughter, [K.] on more occasions than you disclosed?

Have you had lied [sic] to me about spending any night at a friend's house where children live?

Did you lie to me about smoking more marijuana than [sic] you reported today?

Supp. CP __ (sub. no. 49, Court -- Notice of Violation, 3/22/06).

Although no deception was indicated during the polygraph, Payne wrote in his report that:

Deception is Hourihan's calling card. Mr. Hourihan expressed on several occasions in the discourse of the Psychological Sexual Evaluation, that much of his deviant anti-social behavior is driven by being "sneaky and doing something without being caught."³

. . . There exists no condition in which Mr. Hourihan has voluntarily provided information without the threat of or during the course of a polygraph.

CP 103. According to Payne's own report, however, Hourihan admitted the first three violations to Payne on March 16, 2006; he underwent the polygraph test five days later. CP 101-02; Supp. CP __ (sub. no. 49, Court -- Notice of Violation, 3/22/06).

³ As indicated previously, Hourihan's admission in this respect was made when explaining the allure of masturbating while his girlfriends were asleep. CP 38.

Hourihan likewise admitted the violations to the court and appeared for disposition on May 15, 2006. Hourihan's treatment provider recommended he remain in the SSOSA program. 5RP 8. The court resolved to keep Hourihan in community-based treatment following an additional 30 days of incarceration; Hourihan had already served 55 days. 5RP 20.

On October 2, Payne filed a second notice with the court alleging two SSOSA violations, specifically that Hourihan: (1) failed to abide by the condition prohibiting unsupervised contact with a minor by being alone with his five-year-old son for approximately 30 seconds on September 24, 2006; and (2) failed to obey all laws by shoplifting soap and coffee from a store while making a delivery as a courier. Supp. CP __ (sub. no. 67, Notice of Violation, 10/2/06); 10RP 13-14.

In his report, Payne repeated his prior complaint that "[t]here exists absolutely no condition in which Mr. Hourihan has voluntarily provided information without the threat of or during the course of a polygraph." Supp. CP __ (sub. no. 67, Notice of Violation, 10/2/06). Payne alleged that during an office meeting on September 26, Hourihan disclosed leaving the geographic boundary without prior approval. Payne purportedly asked whether Hourihan "had anything more he had to confess before the

polygraph scheduled on 09/29/06," and Hourihan said no. Supp. CP __ (sub. no. 67, Notice of Violation, 10/2/06). After the polygraph, however, Payne learned of Hourihan's statements to the polygraph examiner admitting momentary unsupervised contact with his son and shoplifting soap and coffee because he had no money. Id.; see also 10RP 16-17, 20. In his report, Payne wrote "I am extremely concerned that Mr. Hourihan is not progressing satisfactorily in treatment and coupled with violation behavior poses a serious risk to the community." Supp. CP __ (sub. no. 67, Notice of Violation, 10/2/06).

Hourihan denied the allegations and a fact-finding hearing was held before the Honorable Russell W. Hartman on November 28, 2006. 10RP. Although uncharged, the state attempted to elicit the geographic boundary violation to which Hourihan admitted in Payne's office. 10RP 21. Although Hourihan argued it was not relevant to the charged violations, the state countered that "part of what the state is going to be arguing for revocation in this case has to do with a pattern of behavior regarding when Mr. Hourihan reports information." 10RP 21. According to the state, Hourihan "only discloses information when confronted with a polygraph, and in bits and pieces." 10RP 21. The state claimed Hourihan's meeting

with Payne was relevant "because [i]t goes to whether or not this is a good candidate to be on an actual SSOSA." 10RP 22.

The court recognized Payne's report contained "concerns about Mr. Hourihan's performance as a probationer under SSOSA that are beyond the scope of the specific alleged violations." 10RP 23. The court resolved that these "other violations or issues or concerns that relate to the defendant's suitability to continue as a SSOSA probationer . . . should be addressed at the disposition hearing," assuming the court found the charged violations. 10RP 26.

Regarding the first charged violation, Hourihan argued his contact was not "unsupervised." 10RP 46, 50. He sought and received prior approval by Payne to spend time with his son while under the supervision of his brother and father. 10RP 33-34. All four went to the beach together. 10RP 42. When M.H.'s clothes got wet, all four proceeded toward the public restroom to change the boy's shirt. 10RP 42-43. Hourihan's brother momentarily stopped at the car to unlock it for the father. 10RP 44. Hourihan's brother continued to the restroom, reaching it approximately 15-30 seconds behind Hourihan. 10RP 44. Hourihan's brother testified nothing untoward was occurring. 10RP 44.

As defense counsel explained, Hourihan's admission to "unsupervised" contact with his son was the result of "hyper-vigilance" rather than a desire to deceive:

And in order for Mr. Hourihan to pass the polygraph he needs to basically have a introspective view of his own life and say is it possible I could have violated anything in my Judgment and Sentence, even no matter how minor, because it's important for me to not be deceptive on this polygraph.

10RP 49. As for the second violation, counsel pointed out that the state had not charged Hourihan with shoplifting. 10RP 51.

The court found the violations proven. 10RP 53. In the interest of fairness, the court questioned whether it should set the matter for a "real facts" hearing, recognizing "there's a ton of stuff in the report that has to do with concerns that the probations officer has[.]" 10RP 55. Defense counsel asked the court to base its decision solely on the proven violations:

Well, I guess I would ask the Court to rely upon what its [sic] found today to be true and the facts that are well-established in the file, the previous violations, the procedural history of this case.

I don't think the opinions of the CCO -- I get the sense that there's this general discontent by Mr. Payne with Mr. Hourihan's performance. I understand that he's recommending revocation. But I don't know that his general feeling that Mr. Hourihan hasn't taken it seriously is particularly relevant.

I mean, the issue here is whether these violations merit revocation. I concede that the procedural history and the fact this is a second revocation colors the issue. But

ultimately, are these violations the type that merit revocations; that's the ultimate question from my perspective.

10RP 56-57. The court continued the matter for disposition. 10RP 58.

At the next hearing, Judge Hartman discovered the state had filed an affidavit of prejudice against him before the initial sentencing. 11RP 17. The court voided its findings and set the matter for a new fact finding before a different judge. 11RP 17.

Hourihan thereafter decided to take a "different tact" and admitted the two violations. 13RP 3. In advance of the disposition hearing, Hourihan submitted a report from his therapist Allen Traywick, who recommended continuing the SSOSA. He noted that the violations at issue did not place the community at risk for sexual re-offense:

Regarding the issue of unsupervised contact with his son, Moe, existing information indicates the time span of being alone with the boy was approximately thirty seconds. While of concern, it is also true that Mr. Hourihan has no same sex interest and he is considered to pose minimal risk to male children. The primary risk Mr. Hourihan poses to community safety concerns contact with female children. Regarding the issue of taking soap and coffee, the behavior noted is not considered a risk factor for sexual acting out on behalf of the client. Mr. Hourihan is not a criminally oriented individual and the theft was more likely due to the existing financial situation previously referenced.

Supp. CP __ (sub. no. 91, Submission, 2/6/07). Traywick described Hourihan as "an individual who presents as having the ability to productive-

ly move forward, however it is also true such has not occurred at the same pace demonstrated by other SSOSA participants." Id.

Payne acknowledged the current violations were "admittedly not exceptionally serious." 13RP 10. Regardless, Payne recommended revocation based on what he characterized as "deception, a pattern of conduct that's continued since the day [Hourihan] went in for his first evaluation." 13RP 7. Payne also latched onto to Traywick's observation that Hourihan had not progressed at the same pace as others in the program. 13RP 10. Finally, Payne argued Hourihan should be revoked because of his fragile financial situation. 13RP 8-9.

Defense counsel criticized Payne's position, noting that "[h]e says very little about the two violations that were actually admitted in the subject of this hearing." 13RP 14. Based on the de minimis nature of the violations and Trayweek's opinion that they did not increase Hourihan's risk, the defense asked for the 60-day maximum for each violation.⁴ 13RP 19. The court took the matter under advisement. 13RP 22.

At its subsequent oral ruling on February 22, 2007, the court characterized the department's reasons for revocation as follows:

⁴ At the time of the disposition, Hourihan had already served more than 120 days. 13RP 19.

Based upon the new violations, the department is seeking revocation, and the department has voiced concerns that the defendant has failed to come forward with the violations on his own, but for the prospect of a polygraph examination, and the department submits that in and of themselves, the violations, as described are not particularly or especially serious. What is serious, according to the department's position, and how they have presented their concerns in this case, is the delay in coming forward with the information, and what the department perceives to be a continuing pattern of deception on the part of Mr. Hourihan.

14RP 3.

Based on its review of the file, the court agreed "deception has been a continuing theme." 14RP 4. In deciding to revoke Hourihan's SSOSA, the court noted that the current violations occurred after confinement for prior violations and that one was for a repeat violation, unsupervised contact with a child. 14RP 6. Of particular import to the court, however, was the "pattern of deception," as argued by the department:

Moreover, as presented by the department, Mr. Hourihan has not been forthcoming when he has violated the conditions. He did not provide information surrounding the violations until such time as he was presented with the polygraph or the eminent threat of a polygraph.

I find Mr. Hourihan has been deceptive in failing to come forward with the violations in a reasonable and timely matter. Unsupervised contact with his son, occurred on the 24th. Mr. Hourihan was reminded of the conditions on September 26th. And it was not until September 29th that he came forward with the information, and that was when the polygraph was conducted.

Mr. Hourihan was also told, as a condition to the SSOSA at sentencing, he was to obey all criminal laws. It

was not until the polygraph of September 29th, that he admitted to the shoplifting.

Necessary for the success of a SSOSA is a willingness of [a] participant to submit openly and honestly with the community corrections officer, thereby addressing all issues that brought him into the court system for the underlying offense, and in this case, the underlying offense was child molestation. Mr. Hourihan was not forthcoming until such time presented with such polygraph. I am sensitive to the comment by the examiner, Ardith Schrag, who is quoted to have said, "The fact that he comes in just before the polygraph is scheduled and makes some admissions is a dangerous practice."

In light of the deception or at the very least, lack of coming forward, Mr. Hourihan has proved he is not an appropriate participant to continue to participate in the SSOSA program.

14RP 6-7. Hourihan appeals the revocation of his sentence. CP 122-25.

C. ARGUMENT

1. THE COURT VIOLATED HOURIHAN'S RIGHT TO DUE PROCESS WHEN IT REVOKED HIS SSOSA BASED ON AN ALLEGATION FOR WHICH HE HAD NO NOTICE.

An offender's SSOSA may be revoked at any time if a court is reasonably satisfied that an offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment. RCW 9.94A.670(10); State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999); State v. Badger, 64 Wn. App. 904, 908-09, 827 P.2d 318 (1992). Although revocation of a suspended sentence is not a criminal proceeding,

an offender facing revocation is entitled to minimal due process rights.

Dahl, 139 Wn.2d at 683. Those rights include:

(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.

Dahl, 139 Wn.2d at 683 (citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

Hourihan was given written notice of two violations: failing to abide by the condition that he obey all laws; and failing to abide by the condition he have no unsupervised contact with minors. He was not charged with violating conditions that he refrain from engaging in a "pattern of deception" or that he "come forward with the violations in a reasonable and timely manner." 14RP 3, 16-17. Nor could he be. Neither was a condition of his SSOSA sentence. CP 90. Yet Hourihan's supposed failure to timely report violations was the primary reason the court revoked his SSOSA. 14RP 3-4, 6-7. This violated Hourihan's due process right to notice.

The circumstances in Dahl are instructive. Dahl received a SSOSA after pleading guilty to sexually abusing his stepdaughter. After Dahl began

treatment with Michael O'Connell and Associates, the state petitioned to revoke Dahl's SSOSA on grounds he was failing to make reasonable progress in treatment. The state had received a report from O'Connell indicating that Dahl might have a learning disorder, was not consistently taking his anti-compulsivity medication, and might be intentionally sabotaging his polygraph tests. After a hearing, the court ordered Dahl to serve 30 days of confinement and set a review hearing three months out; the court cautioned Dahl he must show discernable progress in treatment in order to maintain his SSOSA. Dahl, 139 Wn.2d at 680.

O'Connell submitted a treatment report in advance of the review hearing. The report recounted two incidents of concern to O'Connell. First, Dahl's CCO told O'Connell that two young girls had complained that a man fitting Dahl's description exposed himself to them near the site of Dahl's work release. O'Connell noted, however, that Dahl had shown truthful in a polygraph exam when he denied exposing himself to the girls. Dahl, at 681. Second, O'Connell reported that Dahl sent a note to a bank teller describing his sexual offense and recent fantasies. Dahl told O'Connell he was trying to reach out and develop a friendship with the woman. Dahl again showed truthful in a polygraph exam when he denied hoping to engage in sexual activity with the teller. O'Connell concluded

that Dahl had made some progress, but continued to present a difficult case. Dahl, at 681.

At the conclusion of the hearing, the court revoked Dahl's SSOSA. In her oral ruling, the trial judge noted that Dahl may suffer cognitive and physical impairments that hinder his progress. She also noted that Dahl's treatment providers had been unable to ascertain the reasons for his poor performance. The judge determined the letter to the teller showed that Dahl was unable to recognize sexually inappropriate behavior. But the judge also noted that the polygraph seemed to indicate Dahl was not involved in the exposure incident, although the judge remembered past polygraphs had been inaccurate. Dahl, at 682.

On appeal, Dahl argued the state's notice was inadequate because it cited as grounds for revocation only Dahl's failure to make satisfactory progress in treatment. Dahl argued the notice should have listed the exposure and note incidents as independent violations. Dahl, at 683-84. The court disagreed, however, reasoning that the exposure and note incidents were exemplative of Dahl's failure to make satisfactory progress in treatment rather than separate violations.

[T]he prosecutor did not represent the note and exposure incidents as independent violations of SSOSA. Rather, the State claimed that Dahl had failed to make reasonable

progress and supported this contention with myriad examples of his failure.

. . . The CCO also stated that she was "kind of appalled" at Dahl's blatant disregard of the work release rules and his inability to account for his whereabouts when he was supposed to be at work through work release. Just as with the exposure and note incidents, these examples were not presented as specific violations of the conditions of his suspended sentence. Rather, they were mentioned as evidence of Dahl's lack of progress after almost three years of treatment.

Due process requires that the State inform the offender of the specific violations alleged and the facts that the State will rely on to prove those violations. Here, Dahl was informed of the State's contention that he had failed to make reasonable progress in his treatment program. He was also supplied with copies of the treatment provider reports, upon which the State relied to prove Dahl's SSOSA violation. . . . Given that the State notified Dahl both of his alleged SSOSA violation and of the facts supporting the State's claim, we hold that the notice provided to Dahl met minimal due process standards.

Dahl, 139 Wn.2d 678 (emphasis added).

The issue presented here is the inverse of that in Dahl. As the primary reason supporting revocation, CCO Payne alleged instances of what he considered to be examples of Hourihan's failure to come forward with violations. As indicated above, however, Hourihan's supposed failure to timely report violations was not a violation of any condition of his suspended sentence. Rather, it was the conduct to which he admitted that constituted the violation. Accordingly, Hourihan's supposed failure to timely come forward had to have been viewed by the CCO and in turn, the

court, as evidence of Hourihan's failure to make satisfactory progress in treatment. See Dahl, at 685. It serves no other purpose. Unlike Dahl, however, the state gave no notice of its contention that Hourihan was failing to make satisfactory progress in treatment. This lack of notice violated due process.

In response, the state may argue Hourihan had sufficient notice based on Payne's comments to the court and his violation report, wherein he at one point wrote, "I am extremely concerned that Mr. Hourihan is not progressing satisfactorily in treatment." Supp. CP __ (sub. no. 67, Notice of Violation, 10/2/06); 13RP 10. Any such argument should be rejected.

Payne's isolated comments do not suffice for written notice of the state's contention that Hourihan violated his sentence by failing to make satisfactory progress in treatment, especially when buried in the middle of his report apart from the listed violations. As evidenced by defense counsel's comments before Judge Hartman, Hourihan had no actual notice concerning the relevance of Payne's allegations:

I don't think the opinions of the CCO -- I get the sense that there's this general discontent by Mr. Payne with Mr. Hourihan's performance. I understand that he's recommending revocation. But I don't know that his general feeling that Mr. Hourihan hasn't taken it seriously is particularly relevant.

I mean, the issue here is whether these violations merit revocation. I concede that the procedural history and

the fact this is a second revocation colors the issue. But ultimately, are these violations the type that merit revocations; that's the ultimate question from my perspective.

10RP 56-57 (emphasis added).

For purposes of minimal due process, proper notice must set forth all alleged parole violations so that a defendant has the opportunity to marshal the facts in his defense. Morrissey, 408 U.S. at 489. Hourihan was not allowed that opportunity in this case. This Court should reverse. See Dahl, 139 Wn.2d at 689 (due process error not harmless where it affected court's decision to revoke).

2. THE COURT ACTED OUTSIDE ITS AUTHORITY WHEN IT REVOKED HOURIHAN'S SENTENCE BASED ON THE VIOLATION OF A SENTENCING CONDITION THE COURT HAD NO AUTHORITY TO IMPOSE.

The court based its revocation decision in part on Hourihan's failure to abide by the condition that he have no unsupervised contact with minors. The prohibition makes no exception for Hourihan's biological sons, to whom Hourihan poses no risk. In that respect, the prohibition is unconstitutional. Because the court had no authority to impose the unconstitutional condition in the first place, the court acted outside its authority in revoking Hourihan's sentence for violating the condition. Because this condition is unconstitutional, as well as the condition that Hourihan have no contact whatsoever with the victim's family (which does

not exempt Hourihan's other biological son), the conditions should be stricken from Hourihan's SSOSA sentence, as well as the conditions of community placement (in the event his SSOSA is revoked).

Parents have a fundamental liberty interest in the care, custody, and control of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Prevention of harm to children is a compelling state interest, In re Dependency of C.B., 79 Wn. App. 686, 690, 904 P.2d 1171 (1995), and the state does have an obligation to intervene and protect a child when a parent's "actions or decisions seriously conflict with the physical or mental health of the child." In re Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). But limitations on fundamental rights are constitutional only if they are "reasonably necessary to accomplish the essential needs of the state." State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). The fundamental right to parent can be restricted by a condition of a criminal sentence only if the condition is reasonably necessary to prevent harm to the children. State v. Sanford, 128 Wn. App. 280, 115 P.3d 368 (2005); State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001); State v Letourneau, 100 Wn. App. 424, 439, 997 P.2d 436 (2000).

As conditions of Hourihan's SSOSA and community custody (in the event his SSOSA is revoked), the court prohibited him from having any unsupervised contact with minors generally, and no contact whatsoever with the victim or her family. There is no exception for Hourihan's biological sons. Because there is no evidence these restrictions are necessary to protect Hourihan's own children from harm, the conditions unconstitutionally limit his fundamental right to parent.

This Court's opinion in Letourneau is instructive. Although Letourneau was convicted of second degree child rape, this Court found that sentencing conditions prohibiting her from having unsupervised contact with her own children were not reasonably necessary to prevent harm to them.

On this record, we conclude that the State failed to demonstrate that prohibiting Letourneau from unsupervised in-person contact with her biological children during the term of community custody is reasonably necessary to protect those children from the harm of sexual molestation by their mother. The SSOSA evaluators were unanimous in their conclusions that Letourneau is not a pedophile. Even the evaluator who pointed out that many people who molest children unrelated to them later offend against their own children did not opine that Letourneau is a pedophile, and noted specifically that "[a]ll sexual offenders are not alike." [citation to record omitted] We can readily agree with that evaluator that children of sex offenders are entitled to the same protection from being molested by the offender as all other children in society. The Legislature has specifically authorized courts to require offenders who are convicted of

a felony sex offense against a minor victim after June 6, 1996, as Letourneau was, to comply with terms and conditions of community placement imposed by the Department of Corrections relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim. See RCW 9.94A.120-(9)(b)(vi). But this does not mean that either the court or the Department has the authority to place restrictions upon an offender's contact with his or her own biological children who are not of similar age or circumstances as a previous victim, where the restriction is neither a crime-related prohibition within the meaning of that statutory term nor otherwise necessary to protect the offender's biological children from the harm of sexual molestation.

Letourneau, 100 Wn. App. at 441-42.

As in Letourneau, there is nothing on the record indicating that preventing Hourihan from unsupervised contact (or from having any contact whatsoever) with his sons is necessary to protect them from the harm of sexual assault. There was never any allegation that Hourihan sexually abused his sons. And significantly, it was determined via plethysmograph that Hourihan has no sexual attraction to male children. Because the restrictions on Hourihan's contact are not necessary for his sons' protection, they unconstitutionally infringe on Hourihan's fundamental right to parent. See, e.g., Ancira, 107 Wn. App. at 654-55 (where there was no evidence that prohibiting Ancira from all contact with his children for a lengthy period of time was reasonably necessary to prevent them from the harm

of witnessing domestic violence, condition was "extreme" and "unreasonable").

Because Hourihan's SSOSA was revoked in part based upon his alleged violation of an unconstitutional condition of his SSOSA, that revocation should be reversed. This Court should remand Hourihan's sentence with instructions to strike the conditions restricting contact with his sons. Letourneau, at 444.

D. CONCLUSION

The court revoked Hourihan's SSOSA based on an alleged violation for which Hourihan had no notice. Part of the court's revocation decision was also based on the violation of a condition the court lacked authority to impose in the first instance. This Court should remand for a new revocation hearing. This Court should also remand to strike the unconstitutional restrictions on Hourihan's fundamental right to parent.

DATED this 20th day of September, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DANA M. LIND, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 36049-7-II
)	
CHRISTOPHER HOURIHAN,)	
)	
Appellant.)	

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 20TH DAY OF SEPTEMBER 2007, 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.

- [X] RUSSELL HAUGE
KITSAP COUNTY PROSECUTOR'S OFFICE
MSC 35
614 DIVISION STREET
PORT ORCHARD, WA 98366-4681

- [X] CHRISTOPHER HOURIHAN
DOC NO. 877579
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 1899
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF SEPTEMBER 2007.

x *Patrick Mayovsky*