

NO. 41110-5-II

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON

DEPT. 16

DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

CRAIG D. OLSON,

Appellant.

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**BRIEF OF APPELLANT**

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## **A. ASSIGNMENTS OF ERROR**

### Assignments of Error

1. The court below erred in failing to conduct the annual hearing required by RCW 9.94A.670(8)(b) to review Olson's progress in treatment.
2. The court below erred in denying Olson's right to due process under the federal and state constitutions.
3. The court below erred in failing to observe the treatment termination requirements of RCW 9.94A.670(7) and (9).
4. The court below erred in revoking Olson's suspended sentence
5. The court below erred in revoking Olson's suspended sentence on untenable grounds or for untenable reasons.
6. The court below erred in failing to apply the standard of decision-making for revoking SSOSA sentences set forth in RCW 9.94A.670(11).

### Issues Pertaining to Assignments of Error

1. Did the court below violate the treatment monitoring requirements of RCW 9.94A.670(8)(b) by failing to conduct a hearing on Olson's progress in treatment at least once a year (assignment of error no. 1)?
- B. Did the court below deny Olson's right to due process under the federal and state constitutions by failing to observe the treatment termination requirements of RCW 9.94A.670(7) and (9) (assignments of error nos. 2 and 3)?
- C. Did the court below abuse its discretion in revoking Olson's suspended sentence by failing to apply the statutory standard

of decision-making set forth in RCW 9.94A.670(11)  
(assignments of error nos. 4, 5 and 6)?

## B. STATEMENT OF THE CASE

### Relevant Facts

*Background.* The defendant below and appellant herein, Craig Donald Olson, is presently 47 years of age and, prior to his convictions on the instant offenses, had no criminal history of any kind (CP 13, 16, 19-20).

Born in Seattle on January 21, 1963, Olson was the fourth child of parents who were successful small business owners and real-estate investors (CP 109). At birth, he had an evident amblyopia, which affects his sight in one eye and contributes to poor depth perception (CP 111), and was later diagnosed with *Treacher-Collins syndrome* (CP 110), a condition associated with facial deformities—namely, downward slanting eyes, small lower jaw, underdeveloped cheek bones, drooping eyelids, and malformed or absent ears.<sup>1</sup>

In Olson’s case, a syndrome-related defect in his sinuses was partly remedied by the insertion of tubes in his ears to aid drainage (CP

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<sup>1</sup> See the WIKIPEDIA article on Treacher-Collins syndrome and related citations.

110). He also had eyelid surgery (CP 111). A syndrome-related hearing loss affected his speech acquisition as a child and later resulted in the need for him to undergo speech therapy (CP 120). He was picked on and teased as a child mainly as a result of his speech problems (CP 115, 120). His appearance can be easily mistaken to be that of an intellectually impaired person—see, for example, the polygraph examiner’s inquiry of Special Sex Offender Sentencing Alternative (“SSOSA”) evaluator Michael Comte (CP 114). But Olson is of normal intelligence (CP 114, 122).

He graduated from high school when he was 18 years of age (CP 111) and completed college at Washington State University (B. A. 1987) when he was 24 years of age (CP 111). According to testing, he reads at the college level of achievement (CP 121-22). His employment, since finishing college, has been at marinas owned or operated by his father, first in Seattle from 1988 to 1995 and then in Tacoma from 1995 until (excepting a period of incarceration in 2005) the instant incarceration beginning in late June 2010; his job was that of a moorage agent, which involved signing up customers, collecting payments, and doing bookkeeping. CP 114, 120-21; Ex 5, p. 3 (“Recent Developments in the Case”).

Growing up, Olson was not popular in school and kept to himself (CP 120). According to Michael Comte, LICSW, ACSW, the Tacoma social worker and certified sex offender treatment provider (“SOTP”) who evaluated Olson’s amenability for treatment, Olson “presents with the emotional maturity of an adolescent” (CP 113). In summarizing Olson’s personal history, Comte observed: “. . . Mr. Olson has been socially introverted and withdrawn throughout his life. As a result, he never matured. His social development seemed to cease at an adolescent level. Probabilities are fear of involvement and rejection contributed to his social reticence.” CP 111-12.

Olson considered his two brothers and father to be alcoholics and admitted to his own illicit drug use and alcohol abuse in adolescence (CP 22). He “would consume up to nine beers or wine coolers on average of three times per week” (CP 22). He denied any alcohol use, however, since 1990 when he was about 27 years old (CP 22, 112, 121) and, in 2005, claimed to be “mystified by the number of offenders in the jail who had alcohol and drug dependencies” (CP 115).

Olson’s main difficulty appeared not to be alcohol, however, but sexuality. He was attracted to females, but never, throughout his entire

life, had he ever had sexual relations with a female, until one illicit sexual act at age 40 (CP 109, 113, 121).

*Offenses.* Olson's adult sexual activity based on his own account, as verified by polygraph testing (CP 109), included masturbating to images and fantasies of pubescent and post-pubescent females (CP 112-13). He admitted to a pattern of using Internet chat rooms to contact and converse with teenage girls (CP 113). On three occasions, he had arranged to meet such females (CP 113). Two stood him up (CP 18, 113), but one, who said that she was 15 years old, met him in Oregon in January 2004 and permitted him to perform cunnilingus on her (CP 20, 109, 113; Ex 5, p. 2 ("Prior Evaluation")). She told him that she was sexually involved with a "much older man," and they did not meet again (CP 20, 113).

While online on March 22, 2005, Olson spotted a chat-room participant whose screen name was "grlspoiled4ever" (CP 17). Her online account profiled her as a 13-year-old female named "Whitni" (CP 17). Olson contacted her and engaged in a sexually-explicit conversation with her (CP 17-18, 118-19). He exchanged basic information with her (e.g., given name, age and location), spoke with her on the telephone and

arranged to meet her at 12:30 p.m. on the following day in the Food Court of the Capital Mall in Olympia (CP 109, 118-19).

Olson appeared at the appointed place on March 23, 2005, and was arrested by troopers of the Washington State Patrol (CP 18). Olson, it turned out, had actually been the target of a “sting” operation by the state patrol’s Missing and Exploited Children Task Force (CP 17). A male detective (Jason Glantz) had played the role of Whitney on the Internet, and a female detective (Rachel Edwards) impersonated her on the telephone (CP 17, 118). Search of the hard drive of Olson’s home computer, made pursuant to warrant, located nude photographs of minor females, some of whom were engaged in sexually explicit conduct (CP 18, 109).

*Evaluation.* After his arrest, Olson remained in custody until disposition on August 30, 2005 (CP18). In early May 2005, an experienced Olympia forensic psychologist (Ex 6), Brett C. Trowbridge, Ph.D., J.D., evaluated Olson to assess his risk of re-offense (CP 118-23). In June 2005, as previously mentioned, Comte evaluated Olson’s appropriateness for SSOSA (CP 108-17).

Both evaluators noted Olson’s concern, if not preoccupation, with health issues (CP 113-14, 120-21). Aside from sensory impairments and

chronic sinus issues, Olson lives with allergies and asthma and is frequently congested and short of breath (CP 114, 120-21). He takes medication for acid reflux and high blood pressure and complains of sleep apnea and exhaustion (CP 111, 113).

Olson's mother Barbara and his housemate Carlo Donato both mentioned their belief that Olson was depressed (CP 18, 121), although his score on the Beck Depression Inventory II suggested otherwise (CP 121). For example, Olson was prescribed an anti-depressant medication that he discontinued because it made him lethargic (CP 111). Trowbridge and Comte agreed from Olson's history, however, that he suffered from *dysthymia* (CP 111, 122), a lifetime chronic mood disorder less severe than depression.<sup>2</sup> CP 111, 122.

Trowbridge examined Olson for *psychopathy*—a trait applicable to a proportion of offenders with anti-social personalities who commit the majority of serious offenses, including serial and repeat rapists.<sup>3</sup> Trowbridge applied the most widely accepted instrument for assessing psychopathy—namely, the *Hare Psychopathy Checklist Revised* (“PCL-

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<sup>2</sup> See the WIKIPEDIA article on dysthymia and related citations.

<sup>3</sup> See, generally, the WIKIPEDIA article on psychopathy and related citations, including ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* (1993).

R”)<sup>4</sup>—and concluded that Olson was “not at all psychopathic, receiving a raw score of only one” (CP 122).

Both the psychologist and the social worker agreed, however, that Olson met the diagnostic criteria for *schizoid personality disorder* (CP 112, 122).<sup>5</sup> “Adults with that diagnosis prefer solitary activity, are involved in few activities, lack close friends or confidantes and appear emotionally detached” (CP112). Olson’s history showed that he was “very much of a ‘loner’” (CP 122). Summarizing, Comte stated:

Mr. Olson’s personality and behavior problems likely evolved from childhood experiences. He was probably always a sensitive child. By his perception he experienced rejection, teasing and taunting from other children, because of his speech impediment. He has experienced health problems throughout his life. Because he experienced little satisfaction interacting with others, he eventually withdrew. He was able to function in his work role, because he had a specific role and enjoyed interacting with the public. Of course those interactions were brief and superficial. Instead of in vivo experiences he entered into a fantasy world via online communications and attempted to meet his affiliation, romantic and sexual needs by interacting with others online, especially young adolescent females.

While both evaluators considered Olson’s sexual interests to be deviant (CP 115, 122), Comte regarded Olson’s deviant arousal to be

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<sup>4</sup> See the WIKIPEDIA article on the PCL-R and related citations.

<sup>5</sup> See the WIKIPEDIA article on schizoid personality disorder and related citations.

*hebephilia* rather than pedophilia and therefore easier to treat (CP 115-16, 122).<sup>6</sup>

Both evaluators thought that Olson presented a low risk of re-offending (CP115, 122). Comte observed, based on testing, that Olson’s “response set suggests he has more in common with the ‘milder end of the spectrum’ of offenders,” who are “less likely to engage in egregious behavior” (CP 114-15). Trowbridge’s opinion was based upon the application of an actuarial risk-assessment instrument known as the

SORAG:

The Sex Offender Risk Appraisal Guide (SORAG) . . . was developed by reviewing the files on numerous sex offenders who had been released and had lived in the community for long periods of time, and determining which factors correlated with re-offending. . . .

On the SORAG there are nine categories of risk, and an individual is placed in one of those nine categories based on historical factors. Mr. Olson’s score on the SORAG places him in the second lowest category for risk of future re-offending, and his probability of re-offending is estimated at 12 percent over a ten year period of being released and being in the community.

CP 122. In Trowbridge’s opinion, protective factors such as participation in a SSOSA program and supervision by a community corrections officer

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<sup>6</sup> See the WIKIPEDIA article on hebephilia and related citations.

would “diminish Mr. Olson’s risk of re-offense beyond the already low value predicted by his SORAG score” (CP 123).

Comte concluded that Olson was safe to be at large and amenable to treatment (CP 116). He regarded Olson “as a viable SSOSA treatment candidate” and assigned a “positive prognosis” to his treatment (CP 117).

*Pleas and Sentence.* Based on this evaluation of Olson’s appropriateness for a SSOSA, the State offered him a plea bargain. Namely, in return for his pleas of guilty to one count of attempted rape of a child in the second degree and two counts of unlawful possession of depictions of minor engaged in sexually explicit conduct, the State would recommend that a sentence of 93.75 months to life be suspended upon completion of a SSOSA (CP 4-12). Olson entered those guilty pleas before the Thurston County Superior Court on July 19, 2005 (CP 6-12). After a presentence investigation concurring with the recommendation for a SSOSA (CP 16-27), he was so sentenced by the same Court on August 30, 2005 (CP 28-37).

Included among the many conditions imposed by the Court upon Olson as part of his SSOSA were that he have no unsupervised contact with minors, that he not access the Internet unless approved by his SOTP “for business purposes only,” that he not possess or consume alcohol,

and that he abide by restrictions imposed by his community corrections officer (“CCO”) upon his living conditions and residential and geographic locations (CP 36-37).

*Treatment program.* Olson started in a SSOSA treatment program at Comte’s and Associates immediately after his release from custody in September 2005 (Ex 3). He was continuously involved in sex offender treatment until his return to custody in June 2010 (Ex 3). The total period of time that he spent in treatment was 57 months (Ex 3). During that time Olson was required, except for excused absences, to attend individual or group sessions with the SOTP at least one time per week (Ex 3).<sup>7</sup>

The content of Olson’s treatment program is reflected in the written reports that his SOTP submitted quarterly to the Court pursuant to RCW 9.94A.670(8)(a). Ex 3. During the course of his treatment, Olson was expected to accomplish some 34 tasks divided into three “goal” areas—namely, personal, group and relapse-prevention (Ex 3). These individual tasks are listed in the following table (Ex 4):

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<sup>7</sup> Weekly attendance is required by WAC 246-930-330(1).

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### **Personal Goals**

- 1) Demonstrates adequate self-esteem.
- 2) Appears in touch with own emotions.
- 3) Appropriately expresses feelings and ideas.
- 4) Demonstrates awareness of others feelings.
- 5) Shows awareness of own needs and has practical goals which can help fulfill them.
- 6) Has demonstrated adequate control over impulses.
- 7) Exhibits healthy communication skills, including listening.
- 8) Demonstrates the ability to appropriately assert self.
- 9) Understands and is able to talk about sex and sexual issues.
- 10) Appears to have satisfactory social skills and manifests them in appropriate social activities.
- 11) Has healthy coping strategies for depression or anxiety.
- 12) Appears to understand and play an appropriate role in family.
- 13) Appears to differentiate between sex and affection and understands where each is appropriate.
- 14) Appears successful in handling any substance abuse problem (NA).
- 15) If appropriate, has dealt with own sexual abuse as child (NA).
- 16) Appears to have appropriate sexual and affectional outlets.

### **Group Goals**

- 1) Has developed mutually trusting, helping and respectful relationships with other group members.
- 2) Communicates freely with other group members.
- 3) Is able to and does set appropriate limits within group setting.
- 4) Listens attentively to what other groups members are saying.
- 5) Demonstrates ability and willingness to use the group for assistance.
- 6) Is open to positive influence by group members.

### **Relapse Prevention Goals**

- 1) Clearly understands the dynamics of sexual abuse in general.
- 2) Clearly understands the dynamics of own offense.
- 3) Is able to describe the details of own offense.
- 4) Is able to describe method of coercion/force used.

- 5) ~~Is able to express feelings about the offense, both positive and negative.~~ (Deleted after 12/07.)
  - 6) Shows empathy for the victim.
  - 7) Takes responsibility for the offense.
  - 8) Understands the precipitating factors behind the offense.
  - 9) Has clear understanding of personal, marital, and family danger signs or red flags.
  - 10) Appears to be exhibiting appropriate sexual fantasies.
  - 11) Has developed strategies for avoiding getting into dangerous situations.
  - 12) Has practiced relapse prevention strategies.
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Olson's therapist throughout the entire period of his treatment program was SOTP Jeanglee Tracer, LICSW, ACSW (Ex 3). Tracer had obtained her certification as an SOTP in 2006, during the time that Olson was one of her charges (RP 20-21). In July 2009, Tracer left Comte's firm and entered into her own practice, and Olson was transferred to her agency (Ex 3).

All of Olson's 18 quarterly reports, as completed by Tracer, from December 2005 through May 2010 are included in Ex 3. Each of the quarterly reports (a) enumerates Olson's attendance, (b) assesses whether, with respect to each treatment goal, he has "accomplished task," is "doing well," or "needs work," (c) gives an "overall" assessment of his treatment progress, and (d) provides a further "risk assessment" narrative. Ex 3.

Tracer's first quarterly report on Olson in her own practice was not submitted until July 2009 (Ex 3). At that point, it was a month late (Ex 1-3). She apparently also missed the third quarter report on Olson that would have been filed in September 2009 and, instead, filed the fourth quarter report a month early in November 2009 (Ex 1-3). The next report on Olson was filed three months later in February 2010, and the final report three months later in May 2010 (Ex 1-3).<sup>8</sup>

Of the some 34 original goals of his treatment program, two were not considered applicable to Olson's treatment—namely, personal goals 14) successful handling of any substance abuse problem and 15) dealing with one's own sexual abuse as child (Ex 3). One relapse-prevention goal—i.e., 5) expressing feelings about the offense, both positive and negative—was deleted after the December 2007 quarterly report (Ex 3). One relapse-prevention goal was never evaluated except as “on-going”—i.e., 12) practicing relapse prevention strategies (Ex 3).

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<sup>8</sup> Attached as Appendix 1 are modified versions of the summary charts admitted as Ex 1 and 2. These exhibits set forth summaries of Olson's progress in treatment relative to Tracer's assessment of where Olson “needed work,” on the one hand, and where he had “accomplished task,” on the other hand. The Appendix 1 versions are identical to Ex 1 and 2, except that they include the information from the March 2007 report missing from Ex 1 and 2 and omit references made in those exhibits to the missing June 2009 report submitted as the July 2009 report.

There is no evidence that Olson was ever, during the entire period of his SSOSA treatment program, brought before the Court for any annual hearing required by RCW 9.94A.670(8)(b). Hearings to review his progress in treatment—which would have been held at the end of the third quarters of 2006, 2007, 2008, and 2009—were not held. The additional written compliance and progress reports to the Court and parties that would have been required by RCW 9.94A.670(9) were never submitted.

Olson's quarterly reports show that over that period he had difficulties accomplishing seven goals in particular—namely, five personal goals: 10) having satisfactory social skills and manifesting them in appropriate social activities, 11) having healthy coping strategies for depression or anxiety, 12) understanding and playing an appropriate role in family, 13) differentiating between sex and affection and understanding where each is appropriate, and 16) having appropriate sexual and affectional outlets, and two relapse-prevention goals: 9) understanding personal, marital and family danger signs or red flags and 11) having developed strategies for avoiding dangerous situations (Ex 1-3).

Tracer was not aware that Olson had been diagnosed by Trowbridge and Comte as having schizoid personality disorder (RP 29). In fact, when later asked to define the malady, she was unable to do so (RP 29). She did not recognize Olson's difficulties in accomplishing certain treatment tasks, or his inability to express emotions, as being related to this disorder (RP 31, 34).

Even so, in Tracer's judgment, by May 2009, Olson had accomplished all the goals of the treatment program with the exception of personal goals 10, 12 and 16 and relapse-prevention goal 11. For each of those tasks, he was nevertheless rated as "doing well" (Ex 3, Offender Quarterly Evaluation dated May 31, 2010). Accordingly, Tracer was ready to release (i.e., terminate) Olson from treatment, and, in preparation, had him undergo a final polygraph examination on June 9, 2010 (CP 50; RP 25).

*Violations.* During the polygraph examination, Olson was detected attempting deception and admitted to the examiner that he had been using alcohol while cooking (RP 9, 14-15). Indeed, earlier, Olson's previous CCO had caught Olson using wine (Sherry) for cooking and had directed him to stop (RP 23). Olson spoke to his current CCO, Holly Ohman, about the failed polygraph test and use of alcohol (RP 15).

Ohman, approaching her fourth year as a CCO (RP 6), had been supervising Olson since April 2009 (RP 13). She found Olson “difficult” to talk to (RP 14). He was “not confrontive [sic], but almost childish in his way of pouting if he didn’t get his way” (RP 14). In her opinion, “it was just not normal behavior for somebody who’s that far along in treatment or been on supervision that long to still be testing with conditions” (RP 14).

Ohman did not arrest Olson but directed him to write a letter as to “how alcohol had a negative effect on my life” (RP 15; CP 54). Olson wrote the letter on June 11, 2010 (CP 54).

On June 22, 2010, at the next meeting with Tracer and the treatment group that he attended, Olson reported the polygraph failure (RP 17-18, 23). At first evasive and minimizing about alcohol use, he eventually admitted to having drunk small amounts of alcohol repeatedly since the previous polygraph examination in October 2009 (RP 24). This was the first time that he had admitted any alcohol consumption while in treatment (RP 24-25).

Based on his deceptive behavior in concealing his alcohol use from her and the group and his repeated falsification of a weekly check-in sheet in which he had denied alcohol use, Tracer expelled him from her

program (RP 38, 40). On the following day, June 23, 2010, Olson traveled from his residence in Tacoma to Moses Lake, where he spent the night at the Motel Oasis, and on June 24, 2010, traveled to Missoula, Montana, where he stayed at the City Center Motel (RP 10-11, 18).

On the next day, June 25, 2010, Ohman, having learned that Olson had been expelled from treatment, ordered him to report to her office in Tacoma (RP 10, 18). When he arrived later that day, she arrested him (RP 10, 18).

#### Procedure Below

*Petition and response.* On June 28, 2010, the State filed a petition to set aside or modify the suspended sentence, alleging two violations—namely, (1) that Olson had consumed alcohol no less than seven times since October 2009 and (2) that he had been “terminated” (i.e., expelled) from his treatment program (CP 38-42). On July 6, 2010, a “supplemental” petition was filed to revoke the SSOSA, alleging three additional violations—namely, (3) that Olson had failed to obtain permission to stay overnight at a residence other than his registered residence on June 23, 2010, (4) that he had left the state on June 24, 2010, and (5) that he had failed to obtain permission to stay overnight at

a residence other than his registered residence on June 24, 2010 (CP 43-54).

Olson filed a response admitting all five violations and requesting that the State's petition for revocation be denied and that his conditions of community custody be modified to include termination from treatment (CP 55-60).

*Hearing.* A hearing on this matter was held on August 9, 2010, before Thurston County Superior Court Judge Gary R. Tabor. Testimony was taken from two witnesses called by the State—namely, CCO Ohman (RP 6-19) and SOTP Tracer (RP 20-43), and exhibits proposed by Olson (Ex 1 through 7) were admitted into evidence (RP 27-28).

During her testimony, Ohman acknowledged that Olson during his period of community custody had not committed any new crimes and had not breached any other conditions of his sentence, including strictures on Internet use, use of child pornography, or intentional contact with minor females (RP 19). Ohman argued, however, that “he has not processed his original crime behavior” and claimed that “[t]here’s no admittance to responsibility on my end” (RP12).

Tracer made similar observations while discussing Olson's first three and one-half years in treatment—that even though there were no

violations and he was showing up and participating as he should be, there was no progress, no acceptance and no change (RP 22). Then, finally, he became invested in therapy, began volunteering, met a new friend, and when he read his relapse prevention plan “he broke down and cried” (RP 22-23).

In Tracer’s view, despite repeated earlier reporting by her to the Court that Olson was “taking responsibility” (RP 32-33), “showing empathy” for the victim (RP 33-34), and otherwise “making progress” (RP 36-37), he never *really* made progress until this “breakthrough” (RP 36). Then Tracer “started seeing [in] his advice to other members in group that he really got the concept” (RP 36).

So Tracer “was really surprised,” indeed, “honestly . . . shocked that he was drinking alcohol because that’s never been an issue for him” (RP 24).

In his letter dated August 2, 2010 (Ex 5), Trowbridge updated his risk assessment of Olson. Testing showed that Olson was not particularly depressed or anxious (Ex. 5, p. 4 “Test Findings”). Trowbridge’s diagnostic impression continued to be schizoid personality disorder, but MCMI-II results now supported an additional diagnosis of *dependent personality disorder*, “as almost all of his employment history involves

working for his family, and as his parents have always been very supportive of him” (Ex 5, p. 6 “Conclusions and Recommendations”).<sup>9</sup>

Trowbridge concluded:

I continue to be of the opinion that Mr. Olson’s probability of re-offending if he is released is low. He did not re-offend during the almost five years that he was under treatment with Ms. Tracer. All of the research relating to age and sexual recidivism shows that a sex offender’s probability of reoffending decreases as his age increases, and Mr. Olson is now in an age range where re-offense is unlikely.

Ex 5, p. 6.

*Decision.* The Court decided to revoke the SSOSA (RP 51), because “the bottom line is he did not successfully complete the SSOSA program” (RP 52). SSOSA is “an opportunity to in fact enter and successfully complete sexual deviancy treatment and then come out the other side a person who is able to deal with triggers and issues” (RP 52). The Court made the findings, among others, that “Mr. Olson was getting tired of being in the program” (RP 52); that “he was being dishonest about his use of alcohol” (RP 53); that he tried to lie about his alcohol use on the polygraph test (RP 53); that “he was succeeding in a number of ways, but there were still areas that he needed to work on” (RP 54); and

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<sup>9</sup> See WIKIPEDIA article on dependent personality disorder and related citations.

that “when this all was coming to a head,” he chose to “get out of Dodge, to run” (RP 54).

On the same date, the Court entered an amended felony judgment and sentence revoking the SSOSA and imposing a term of confinement in the state Department of Corrections of 93.75 months to life (CP 74-87).

*Appeal.* Olson filed a notice of appeal from this decision on August 19, 2010 (CP 88-102), and on the same date the Court below entered an order of indigency finding Olson indigent and authorizing the costs of review at public expense (CP 103-04).

### **C. ARGUMENT**

1. The Sentencing Court Violated the Treatment Monitoring Requirements of RCW 9.94A.670(8)(b) by Failing to Conduct a Hearing on Olson’s Progress in Treatment at Least Once a Year.

A current copy of the SSOSA statute, RCW 9.94A.670, is set forth in Appendix 2. This is a relatively complex statute that bears multiple readings. It contains 14 subsections addressing the following matters:

Sub-section	Subject Matter→	
1	Definitions	(a) Treatment provider, (b) substantial bodily harm, (c) victim
2	SSOSA sentence decision-making	Six offender eligibility criteria for SSOSA
3		Examination of offender for SSOSA treatment amenability—(a) content of report, (b) content of treatment plan, (c) second examination
4		Factors for court to weigh in granting or denying SSOSA; victim opinion; offender admission; suspended sentence
5		Mandatory conditions of SSOSA sentence—(a) confinement, (b) community custody, (c) treatment, (d) conditions relating to known precursor behaviors
6		Seven permissive conditions of SSOSA sentence
7	Treatment	Setting treatment termination hearing at sentencing
8		Review of offender's progress in treatment—(a) quarterly reports; (b) annual hearing
9		Termination hearing notice to victim; required reports; independent examination as to advisability of termination; court's termination authority
10	Violation of conditions	Violations relating to precursor behaviors—(a) 1 <sup>st</sup> violation, (b) 2 <sup>nd</sup> violation
11		Revocation of SSOSA sentence by court—(a) violation of conditions or (b) failure to make satisfactory progress; CTS
12		Sanctions for violations of conditions other than those of subsections 5 or 6
13	Qualifications of SSOSA examiner	
14	Costs of evaluation and treatment for minors	

Since Olson’s sentencing on August 30, 2005, the legislature has amended this statute three times: Laws of 2006, chap. 133, sec. 1, rewriting subsection (2)(a); Laws of 2008, chap. 231, sec. 31, inserting subsection (12); and Laws of 2009, chap. 28, updating statutory references codified in subsections (4) and (5)(b). None of these amendments, however, changed the basic scheme of the statute, which specifies how the court is to (1) decide SSOSA sentences, (2) monitor and terminate SSOSA treatment and (3) resolve violation allegations.<sup>10</sup>

Subsection (8) of RCW 9.94A.670 is a part of the SSOSA statute that addresses treatment monitoring and termination. It provides as follows:

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

(b) *The court shall conduct a hearing on the offender's progress in treatment at least once a year. At least fourteen days prior to the hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the*

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<sup>10</sup> As shown in the chart above, SSOSA decision-making is set forth in subsections 2 through 6. Monitoring and terminating treatment is described in subsections 7 through 9, and handling of violations of sentencing conditions is specified in subsections 10 through 12.

court regarding the offender's supervision and treatment. At the hearing, the court may modify conditions of community custody including, but not limited to, crime-related prohibitions and affirmative conditions relating to activities and behaviors identified as part of, or relating to precursor activities and behaviors in, the offender's offense cycle or revoke the suspended sentence.

RCW 9.94A.670(8) (emphasis supplied).

This language provides for the sentencing court's review of the offender's progress in treatment through both quarterly reports and a hearing to be held "at least once a year." The quarterly reports go not only to the court but also to "the parties," and the hearing notice must be "given to the victim" as well. Obviously, not only is the victim "given the opportunity to make statements to the court regarding the offender's supervision and treatment" but also the parties, including the offender. Based on the information received at the hearing, the court can "modify conditions of community custody" as well as "revoke the suspended sentence." RCW 9.94A.670(8)(b).

The annual hearing requirement is cast in unambiguous mandatory language: "The court *shall* conduct a hearing on the offender's progress in treatment at least once a year." RCW 9.94A.670(8)(b) (emphasis supplied). The duty described by this language—to conduct a hearing on the offender's progress in treatment

at least once per year—is placed upon the court. Nothing precludes the court from accepting the assistance of the parties in fulfilling this duty, but, according to this language, the responsibility for ensuring that the hearing is conducted lies squarely on the court. It is not placed upon any other party or government agency.

The statute states the purpose of the hearing—that of examining or reviewing the offender’s progress in treatment. It does not state the necessity for this hearing, but it is nevertheless clear what functions are being performed. The hearing allows the parties concerned to obtain resolution of violation claims, conflicts and other disagreements that might arise among them. It is an opportunity for the parties to seek timely adjustments, additions and corrections of treatment plans and conditions of community custody. It allows the offender to request changes in treatment provider, the setting of a treatment termination date, and even termination of treatment. It gives the offender an opportunity to be heard before decisions are made about his supervision and treatment by the CCO and the SOTP as well as by the court. It also serves to improve community safety and treatment efficacy, because it allows the knowledge, experience and insight of the judicial officer and

other legal professionals to be added to the efforts of the CCO and SOTP in addressing these problems.

Obviously, the SSOSA program can be considerably diminished when no review hearings are conducted and when no one other than the CCO and the SOTP provides oversight and feedback to the offender. In our view, the instant case presents a lucid example, when the record is examined closely, of where the problem-solving ability of the Court would have been of great help to the parties. Annual review hearings could have been held in this case as many as four times. Indeed, such hearings could have served not only to avert the violations that occurred here but also to improve Olson's success in treatment. In the course of Olson's SSOSA program, annual review hearings might have been used to:

1. address Olson's difficulty in attaining certain treatment goals,
2. inquire into the effect of his schizoid personality disorder on his treatment progress,
3. add therapeutic measures or activities specifically addressing this disorder,
4. take up the question of his use and possession of alcohol for cooking,

5. re-examine whether, in light of his history, intervention for alcohol abuse was called for,
6. set a treatment termination date, etc.

When there are no review hearings, problems that could have been addressed may continue to go unaddressed—as they did here—and precipitate into grounds for revocation—as they did here.

2. The Sentencing Court Denied Olson’s Right to Due Process under the Federal and State Constitutions by Failing to Observe the Treatment Termination Requirements of Subsections (7) and (9) of RCW 9.94A.670.

Together, subsections (7) and (9) of RCW 9.94A.670 provide as follows:

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

(9) At least fourteen days prior to the treatment termination hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding the offender's supervision and treatment. Prior to the treatment termination hearing, the treatment provider and community corrections officer shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community custody conditions. The court may order an evaluation regarding the advisability of termination from treatment by a sex offender treatment provider who may not be the same person who treated the offender under subsection (5) of this section or any person who employs, is employed by, or

shares profits with the person who treated the offender under subsection (5) of this section unless the court has entered written findings that such evaluation is in the best interest of the victim and that a successful evaluation of the offender would otherwise be impractical. The offender shall pay the cost of the evaluation. At the treatment termination hearing the court may: (a) Modify conditions of community custody, and either (b) terminate treatment, or (c) extend treatment in two-year increments for up to the remaining period of community custody.

RCW 9.94A.670(7) and (9).

The due process clause of the Fourteenth Amendment to the United States Constitution guarantees that no State shall “deprive any person of life, liberty, or property without due process of law.” U.S. Const. Amend. XIV. The Washington Constitution contains an almost identical provision: “No person shall be deprived of life, liberty, or property, without due process of law.” Const., art. I, sec. 3. The purpose of the due process clause is to protect the individual from arbitrary and erroneous State action by requiring some kind of hearing prior to the deprivation of “life, liberty, or property.” See, e.g., *Matthew v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Beginning with *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), a case establishing that parole is a liberty interest protected by due process, the United States Supreme Court has implemented a two-part inquiry to determine whether governmental

deprivation of the liberty or property interests of a prisoner or parolee triggers the application of due process protections. The threshold inquiry requires the court to determine whether a “liberty” or “property” interest within the meaning of the Due Process Clause is at stake. If government action implicates such an interest, the court then proceeds to a second inquiry determining the level of process due under the circumstances to protect the individual against unwarranted deprivations. See *Morrissey v. Brewer*, 408 U.S. at 481. (“Once it is determined that due process applies, the question remains what process is due.”)

A liberty or property interest deserving the procedural protections of the Due Process Clause may arise from the federal constitution itself or from State statutes, regulations and practices. See *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). When State deprivations imposed on prisoners or parolees are so severe or so different from the normal conditions of custody that they can be considered outside the terms of the imposed sentence, the Constitution itself confers a liberty interest entitled to due process protection—see, for example, *Morrissey v. Brewer*, 408 U.S. at 482 (the revocation of parole); *Vitek v. Jones*, 445 U.S. 480, 493, 100 S.Ct. 1254, 1265, 63 L.Ed.2d

552 (1980) (the involuntary transfer of a prisoner to a state mental hospital); *Washington v. Harper*, 494 U.S. 210, 221, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (involuntarily administration of antipsychotic medication); and *Young v. Harper*, 520 U.S. 143, 145, 117 S.Ct. 1148, 137 L.Ed.2d 270 (1997) (removal of a prisoner from an Oklahoma pre-parole program).

For conditions of custody within the range of punishment authorized by a criminal sentence, however, the prisoner or parolee must look to state law to justify application of procedural due process safeguards. In a series of decisions (prior to *Sandin v. Conner*, 515 U. S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995)), the United States Supreme Court held that a State creates a liberty interest protected by due process when its statutes and regulations contained language requiring that certain procedures “shall” or “must” be employed, in combination with “specific substantive predicates” which limit official discretion.

For example, in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), the Supreme Court held that Nebraska law, creating the right to good-time credits and mandating that they could be forfeited only for serious misconduct, created a liberty interest. *Id.* 418 U.S. at 557. In *Greenholtz v. Inmates of Nebraska Penal and Correctional*

*Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), the Supreme Court held that under Nebraska law mandating that the parole board “shall” order an inmate’s release “unless” one or more specific reasons were found, the discretion of state officials to deny parole was sufficiently curbed to give rise to a state-created liberty interest. *Id.* 442 U.S. at 11. Similarly, in *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed. 2d 675 (1983), the Supreme Court held that in light of Pennsylvania regulations mandating that administrative segregation would not occur absent specific substantive predicates, the discretion to segregate prisoners was sufficiently restricted to give rise to a state-created liberty interest. *Id.* 459 at 472.

Under this *state-created entitlement doctrine*, prisoners asserting due process violations were required to prove they were entitled to some benefit (such as good-time credits, freedom from disciplinary segregation, parole release, etc.) by pointing to state law containing language requiring the use of certain procedures in conjunction with substantive predicates limiting the discretion of State officials. In the 1995 decision in *Sandin v. Conner*, the Supreme Court significantly limited the state-created entitlement doctrine, however, finding that the doctrine had not only discouraged States from drafting progressive prison

management procedures out of fear they would create liberty interests but also led to significant federal court involvement in the day-to-day operations of prisons. *Id.* 515 U.S. at 482. While recognizing that the States can create liberty interests protected by due process, the *Sandin* majority held such state-created liberty interests were limited to those prison conditions that impose an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.* 515 U.S. at 483-484.

Washington courts acknowledged the *Sandin* holding—see, e.g., *In re Gronquist*, 138 Wn.2d 388, 397, 978 P.2d 1083 (1999) (no liberty interest in contesting minor infractions)—but continue to adhere to the state-created entitlement doctrine in a form established by the Washington Supreme Court in *In re Cashaw*, 123 Wn.2d 138, 866 P.2d 8 (1994). There the Supreme Court refused to find a due process violation when the Indeterminate Sentencing Review Board reset a prisoner’s minimum term to his maximum term without observing its own mandatory notice and hearing procedure, because the board exercised discretion relative to the inmate’s “parolability,” which apparently was not subject to substantive predicates. The rule, as the Court later stated in *In re Mattson*, 166 Wn.2d 730, 214 P.3d 141 was: “For a state law to

create a liberty interest, it must place substantive limits on official decision making in the form of ‘specific directives to the decision maker that if the regulations’ substantive predicates are present, a particular outcome must follow.’” *Id.* 166 Wn.2d at 145.

See, e.g., *In re Meyer*, 142 Wn.2d 608, 16 P.3d 563 (2001) (no liberty interest in not having sex offender status subject to community notification); *In re Dyer*, 143 Wn.2d 384, 20 P.3d 907 (2001) (no liberty interest in extended family visits); *State v. Baldwin*, 150 Wash.2d 448, 78 P.3d 1005 (2003) (no liberty interest in the application of the Sentencing Guidelines statute); *In re McCarthy*, 161 Wn.2d 234, 164 P.3d 1283 (2007) (limited liberty interest in being released to community custody); *In re Bush*, 164 Wn.2d 697, 193 P.3d 103 (2008) (liberty interest in revocation of commuted sentence); *In re Mattson*, 166 Wn.2d 730, 737-738, 214 P.3d 141 (2009) (no liberty interest of offenders meeting criteria for civil commitment in being released to community custody); *In re Pullman*, 167 Wn.2d 205, 218 P.3d 913 (2009) (no liberty interest in earning 50 percent good time credits); *In re Adams*, 132 Wn.App. 640, 134 P.3d 1176 (Div. 1 2006) (liberty interest in not having risk assessment re-scored); etc.

RCW 9.94A.670(7) expressly directs the court at the time of sentencing to “set a treatment termination hearing for three months

prior to the anticipated date for completion of treatment.” RCW 9.94A.670(9) then places substantive limits on the decision of the court at the treatment termination hearing by stating that “the court may: (a) modify conditions of community custody, and either (b) terminate treatment, or (c) extend treatment in two-year increments for up to the remaining period of community custody.” No other outcomes are permitted by the language of RCW 9.94A.670(7) and (9). At the treatment termination hearing, the offender is either released from treatment or extended in treatment up to two years at a time.

It is obvious, from a review of RCW 9.94A.670, that the substantive predications for such a treatment decision of the court are (a) that the offender not violate the conditions of his suspended sentence and (b) that he make satisfactory progress in treatment.

Procedurally, for an offender to arrive at the previously set treatment termination hearing, he must have avoided revocation during the period prior to that hearing. Under RCW 9.94A.670, a revocation proceeding can be held at any annual review hearing required by RCW 9.94A.670(8)(b) or at any time during community custody pursuant to RCW 9.94A.670(11). The latter statute states the conditions allowing a sentencing court to revoke the suspended sentence—specifically:

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

RCW 9.94A.670(11). Therefore, the substantive predicates for the offender, both to avoid revocation and to be subject to either release from treatment or extension in treatment, are that he not violate conditions of sentence and that he make satisfactory progress in treatment.

The treatment termination hearing should have been set this case at the time of sentencing on August 30, 2005, but was not. See the original Judgment and Sentence, specifically paragraph 4.7 (CP 33). Comte recommended a three-year period of psychotherapy in Olson's treatment plan (CP 116) and the sentencing Court set the same period in paragraph 4.5(d) of the Judgment and Sentence (CP 32). The three-year point of Olson's SSOSA treatment program would have fallen on August 30, 2008. As shown in the summaries set forth in Appendix 1, Olson was consistently making progress in treatment as well as accomplishing many of the tasks of the program. Up to that point, there had not been any breaches of his sentencing conditions.

August 30, 2008, came and went, however, with no treatment termination hearing. No decision whether Olson was going to be released or extended in treatment was made by the sentencing court, and there is no evidence that Olson was asked to waive his right to a treatment termination hearing or that he was consulted or asked to consent to continue in treatment. Again, much to Olson's prejudice, a decision that should have been made was not made and problems that could have been addressed then were not addressed.

3. The Sentencing Court Abused Its Discretion in Revoking Olson's Suspended Sentence by Failing to Apply the Statutory Standard of Decision-Making Set Forth in RCW 9.94A.670(11).

The decision to revoke a suspended sentence is reviewed for the trial court's abuse of discretion. *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). "Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79

Wn.2d 12, 26, 482 P.2d 775 (1971) (citations omitted). Proof of a violation of a sentencing condition need not be established beyond a reasonable doubt but only must reasonably satisfy the trial court that the violation occurred. *Id.* *State v. Kuhn*, 81 Wn.2d at 650; *State v. McCormick*, 166 Wash.2d 689, 705, 213 P.3d 32 (2009); *City of Aberdeen v. Regan*, \_\_\_ Wn.2d \_\_\_, 239 P.3d 1102, 1104 (2010).

An offender's SSOSA may be revoked at any time if a court finds that the offender is failing to make satisfactory progress in treatment or the offender violates any of the conditions of the suspended sentence. RCW 9.94A.670(11); *State v. Dahl*, 139 Wash.2d 678, 682-83, 990 P.2d 396 (1999). Here the Court below failed to state whether the revocation was because Olson failed to make satisfactory progress in treatment or because he violated any condition of his suspended sentence or because he did both. Instead the Court stated that the “bottom line is that he did not successfully complete the SSOSA program that was part of his sentence” (RP 52). The Court appeared to be relying principally upon the decision of the SOTP to expel Olson for lying to her about drinking.<sup>11</sup> This

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<sup>11</sup> The Court also mentioned that Olson “tried to get away with” lying about alcohol use on the polygraph examination. Polygraph testing is mainly a verification technique—see WAC 246-930-310(7)(b). Technically, the conditions of Olson’s sentence do not require him to “pass” such tests but to “submit” to them—see CP 37.

deception, while clearly a lapse of the treatment program's rules, was not a tenable reason or ground to expel Olson from treatment.

RCW 9.94A.670 provides for three categories of SSOSA conditions—namely, subsection (5) mandatory conditions, subsection (6) permissive conditions, and subsection (12) conditions. There are four *subsection (5) mandatory conditions*: (a) confinement, (b) community custody (c) treatment, and (d) prohibitions relating to precursor activities or behaviors. RCW 9.94A.670(5). *Subsection (6) permissive conditions* include crime-related prohibitions, employment, prescribed geographical boundaries, reporting as directed, paying all court-ordered legal-financial obligations, performing community-restitution work, and reimbursing the victim for counseling costs. RCW 9.94A.670(6). The third category of conditions—*Subsection (12) conditions*—consists of all conditions other than those pursuant to subsections (5) or (6). RCW 9.94A.670(12).

The three types of conditions fall into a two-tiered hierarchy of options for their handling by the Department of Corrections. Instead of referring any and all violations to the court for adjudication, the department has the option of imposing a sanction of up to 60 days confinement or other community-based sanction for violations of any subsection 12 conditions—see RCW 9.94A.670(12))—or for first-time

violations of precursor behaviors or activities under subsection (5)—see RCW 9.94A.670(5).<sup>12</sup> All other violations are mandatory referrals to the court for adjudication.

During the revocation proceeding below, the State alleged and Olson admitted five violations—namely, (1) consuming alcohol no less than seven times since October 2009, (2) being “terminated” (or expelled) from his treatment program on June 22, 2010, (3) failing to obtain permission to stay overnight at an unregistered residence on June 23, 2010, (4) leaving the State on June 24, 2010, and (5) failing to obtain permission to stay overnight at an unregistered residence on June 24, 2010. Deceit about alcohol consumption was not one of the violations alleged.

The last three violations admitted by Olson—essentially, leaving his prescribed geographic limits without permission of the CCO—were mentioned by the Court (“getting out of Dodge”) but not explicitly relied upon. These were violations of permissive conditions and mandatory referrals to the Court. The behaviors in question, however, were clearly related to emotions (fear, dread, etc.) precipitated by his expulsion from treatment. That these violations were mitigated by Olson’s compliance in

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<sup>12</sup> The sanctions are set forth in RCW 9.94A.633(1)—see Appendix 3.

reporting back to his CCO was hinted at by the Court: “it’s to his advantage that he came back as far as I’m concerned” (RP 54).

Prior to Olson’s expulsion from treatment, he had no history of violations, although the discovery of his possession of alcohol for cooking by his prior CCO could have been considered a technical violation. The “no alcohol” condition in this case would *not* have constituted a mandatory or permissive condition, since it does not fall within one of the enumerated subcategories. It is not a “crime-related prohibition,” as that term is defined (in principal part) in RCW 9.94A.030(10): “‘Crime-related prohibition’ means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” No alcohol consumption was involved in Olson’s underlying convictions.

Nor was alcohol consumption a “precursor activity or behavior.” The expression “precursor activities or behaviors,” while not expressly defined in RCW 9.94A.670, is used in RCW 9.94A.670(3)(b)(v), giving us a clear indication of what is meant:

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

or use of alcohol or controlled substances.

RCW 9.94A.670(3)(b)(v)—see also the usage in RCW 9.94A.670(8)(b). A precursor activity or behavior, therefore, would be a specific behavior, activity or step that characteristically *precedes* the sex offense. Though no precursor activities or behaviors were explicitly identified in his proposed treatment plan, SSOSA evaluator Comte did recommend that Olson be prohibited from three activities closely related to the offenses in this case—namely, unsupervised contact with minors, access to the internet, and viewing of pornographic stimuli (CP 116). Olson’s polygraph results verified that there had been no new offenses and no violations of the prohibitions on precursor activities during his community custody.

Had his SOTP not expelled him from the treatment program, the alcohol violation alleged here could have been treated by the CCO as a basis for non-judicial sanctions under RCW 9.94A.670(12).

According to his original Judgment and Sentence, Olson was subject to a mandatory condition under paragraph 4.5(d) that he undergo and complete a “sex offender treatment program with Michael Comte of Comte & Associates for a period of three years” (CP32—see also CP 37). While Olson admitted that he had been expelled from Tracer’s treatment program, the decision to end his involvement in treatment was not

actually one made by him. It was, of course, made by SOTP Tracer based on Olson's revealing on June 22, 2010, the extent of his drinking and the deception surrounding it. This behavior, which is not uncommon to the disease of alcoholism,<sup>13</sup> wiped out any conviction on Tracer's part that Olson was ready to be released from treatment. Tracer was surprised by Olson's alcohol use, because "that has never been a part of his life" (RP 26).

The signs, however, had been present—e.g., Olson's family history, his admittedly heavy use of alcohol during his youth, followed by strict self-imposed abstinence, and then a relatively recent incident in which he had been caught using alcohol for cooking. Tracer claimed that she had "gone to bat for people who have violated with alcohol just because they miss the drink" (RP 26). But instead of going to bat for Olson and making an alcohol treatment referral, she chose to expel him: "Well, he's not violated with his internet. But he's using alcohol to escape his current stressors. So he's just replacing one maladaptive behavior for another." RP 26.

The SOTP missed the signs of alcoholism in Olson's case, just as she missed the importance of his schizoid personality disorder diagnosis.

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<sup>13</sup> See WIKIPEDIA article on alcoholism and related citations.

Her expulsion of Olson was an erroneous act, as was the Court's ratification of this act.

**D. CONCLUSION**

For the reasons stated, Olson's revocation should be vacated and his case remanded for hearing to modify conditions of community custody and to determine whether he should be terminated or continued in treatment.

DATED this 6<sup>th</sup> day of January, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'CHW', is written over a horizontal line. To the right of the signature, there are initials 'MS' and a horizontal line extending to the right.

CHARLES H. WILLIAMS  
Attorney for Appellant  
WSBA No. 11674

## **APPENDICES**

**Appendix 1: Quarterly Evaluation Summaries**

**Appendix 2: RCW 9.94A.670**

**Appendix 3: RCW 9.94A.633**

## APPENDIX 1: Quarterly Evaluation Summary—“Needs Work”

GOALS	Comte's & Associates														Tracer Therapy			
	12-05	3-06	6-06	9-06	12-06	3-07	6-07	9-07	12-07	3-08	6-08	9-08	12-08	3-09	7-09	11-09	2-10	5-10
Personal																		
1	X	X	X	X	X											X		
2	X	X	X	X	X													
3																		
4		X																
5	X															X		
6	X	X																
7	X	X	X													X		
8	X	X	X															
9	X	X	X	X														
10	X	X	X	X	X	X	X	X	X	X	X	X						
11	X	X	X	X	X	X												
12	X	X	X	X	X	X	X	X	X									
13	X	X	X	X	X	X	X											
14	NA	-	-	-	-		-	-	-	-	-	-	-	-	-	-	-	-
15	NA	-	-	-	-		-	-	-	-	-	-	-	-	-	-	-	-
16	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X			
Group																		
1	X	X	X															
2																		
3	X																	
4																X		
5																X		

APPENDIX 1: Quarterly Evaluation Summary—"Needs Work" (cont'd) 2<sup>nd</sup> Page

6																		
Relapse Prevention																		
1	X	X																
2	X	X																
3	X	X																
4	X	X	X	X														
5	X	X	X	X														
6	X	X																
7	X	X																
8	X	X																
9	X	X	X	X	X	X	X	X										
10	X																	
11	X																	
12	X	OG	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
<b>Overall</b>	<b>NW</b>	<b>MP</b>	<b>DW</b>	<b>DW</b>	<b>DW</b>	<b>DW</b>												

Notes:

- (1) "NA" means "not applicable."
- (2) "OG" means "on-going."
- (3) "NW" means "needs work."
- (4) "MP" means "making progress."
- (5) "DW" means "doing well."

## APPENDIX 1: Quarterly Evaluation Summary—“Accomplished Task”

Comte's & Associates														Tracer Therapy				
GOALS	12-05	3-06	6-06	9-06	12-06	3-07	6-07	9-07	12-07	3-08	6-08	9-08	12-08	3-09	7-09	11-09	2-10	5-10
Personal																		
1																	X	X
2										X	X	X	X				X	X
3										X	X	X	X	X	X	X	X	X
4										X	X	X	X					X
5																	X	X
6										X	X	X	X	X	X	X	X	X
7										X	X	X	X					X
8																		X
9										X	X	X	X	X	X	X	X	X
10																		
11										X	X	X	X	X	X	X	X	X
12																		
13																		X
14	NA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
15	NA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
16																		
Group																		
1									X	X	X	X	X	X	X	X	X	X
2									X	X	X	X	X	X	X	X	X	X
3									X	X	X	X	X	X	X	X	X	X
4									X	X	X	X	X	X	X			X
5									X	X	X	X	X	X	X			X

APPENDIX 1: Quarterly Evaluation—"Accomplished Task" (cont'd) 2<sup>nd</sup> Page

6									X	X	X	X	X	X	X			X
Relapse Prevention																		
1									X	X	X	X	X	X	X	X	X	X
2									X	X	X	X	X	X	X	X	X	X
3									X	X	X	X	X	X	X	X	X	X
4									X	X	X	X	X	X	X	X	X	X
5									-	-	-	-	-	-	-	-	-	-
6									X	X	X	X	X	X	X	X	X	X
7									X	X	X	X	X	X	X	X	X	X
8										X	X	X	X	X	X	X	X	X
9										X	X	X	X	X	X	X	X	X
10																		X
11																		
12		OG	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
<b>Overall</b>	<b>NW</b>	<b>MP</b>	<b>DW</b>	<b>DW</b>	<b>DW</b>	<b>DW</b>	<b>DW</b>											

Notes:

(1) "NA" means "not applicable."

(2) "NW" means "needs work."

(3) "MP" means "making progress."

(4) As of December 2007, goal 5 under relapse prevention was no longer listed.

(5) From March 2006 on, goal 12 under relapse prevention ("practiced relapse prevention strategies") was listed as "on-going" ("OG").

(6) "DW" means "doing well."

## APPENDIX 2: RCW 9.94A.670

### Special sex offender sentencing alternative

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The offender's offense history;

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

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

(v) Other evaluation measures used.

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

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

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

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

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

(iv) Anticipated length of treatment; and

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

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

(4) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment

disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment. If the court determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.507, a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence as provided in this section.

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

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

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

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

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

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

(a) Crime-related prohibitions;

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

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

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

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

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

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

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

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

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

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

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

subsections (7) and (9) of this section.

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

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

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

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

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

(b)(i) No certified sex offender treatment providers or certified affiliate

sex offender treatment providers are available for treatment within a reasonable geographical distance of the offender's home; and

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

(14) If the offender is less than eighteen years of age when the charge is filed, the state shall pay for the cost of initial evaluation and treatment.

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

### APPENDIX 3: RCW 9.94A.633

#### **Violation of condition or requirement — new offense — sanctions — procedures**

(1)(a) An offender who violates any condition or requirement of a sentence may be sanctioned with up to sixty days' confinement for each violation.

(b) In lieu of confinement, an offender may be sanctioned with work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or counseling sessions, supervision enhanced through electronic monitoring, or any other sanctions available in the community.

(2) If an offender was under community custody pursuant to one of the following statutes, the offender may be sanctioned as follows:

(a) If the offender was transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.728, the offender may be transferred to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation.

(b) If the offender was sentenced under the drug offender sentencing alternative set out in RCW 9.94A.660, the offender may be sanctioned in accordance with that section.

(c) If the offender was sentenced under the parenting sentencing alternative set out in RCW 9.94A.655, the offender may be sanctioned in accordance with that section.

(d) If the offender was sentenced under the special sex offender sentencing alternative set out in RCW 9.94A.670, the suspended sentence may be revoked and the offender committed to serve the original sentence of confinement.

(e) If the offender was sentenced to a work ethic camp pursuant to

RCW 9.94A.690, the offender may be reclassified to serve the unexpired term of his or her sentence in total confinement.

(f) If a sex offender was sentenced pursuant to RCW 9.94A.507, the offender may be transferred to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation.

(3) If a probationer is being supervised by the department pursuant to RCW 9.92.060, 9.95.204, or 9.95.210, the probationer may be sanctioned pursuant to subsection (1) of this section. The department shall have authority to issue a warrant for the arrest of an offender who violates a condition of community custody, as provided in RCW 9.94A.716. Any sanctions shall be imposed by the department pursuant to RCW 9.94A.737. The department shall provide a copy of the violation hearing report to the sentencing court in a timely manner. Nothing in this subsection is intended to limit the power of the sentencing court to respond to a probationer's violation of conditions.

(4) The parole or probation of an offender who is charged with a new felony offense may be suspended and the offender placed in total confinement pending disposition of the new criminal charges if:

(a) The offender is on parole pursuant to RCW 9.95.110(1); or

(b) The offender is being supervised pursuant to RCW 9.94A.745 and is on parole or probation pursuant to the laws of another state.

[2010 c 258 § 1; 2010 c 224 § 12; 2009 c 375 § 12; 2009 c 28 § 7; 2008 c 231 § 15.]

