

No. 42185-2-II

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

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**STATE OF WASHINGTON,**  
**Respondent,**

**v.**

**STEVEN D. WHITCHER,**  
**Appellant.**

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**APPELLANT'S BRIEF**

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## I. INTRODUCTION/SUMMARY OF THE ARGUMENT

In 2010, the Appellant in this case, Steven D. Whitcher, pleaded guilty to rape of a child and child molestation in the first degree committed between June 2001 and June 2006. The victim was a young girl, the granddaughter of his fiancé.

Mr. Whitcher was evaluated for eligibility for the Special Sex Offender Sentencing Alternative of RCW 9.94A.670 (SSOSA) and found to be "at low risk for further sexual offending and amenable to treatment in the community." CP 111. The superior court suspended all but six months of a 131-month sentence and imposed SSOSA. Mr. Whitcher was released to the community on September 28, 2010. In December of that year, the trial court revoked his suspended sentence for not being amenable to treatment, posing a danger to the community, and being terminated from treatment.

On appeal, Mr. Whitcher argues 1) his due process rights were violated because, of the reasons for which his suspended sentence was revoked, the State provided written notice only of being terminated from treatment;

2) the reasons for which the court revoked him were not lawful reasons under RCW 9.94A.670(11); and 3) his counsel was ineffective in failing to ask for a lesser sanction than revocation of his SSOSA sentence.

## **II. ASSIGNMENT OF ERROR**

### **A. Assignment of Error**

1. The superior court erred in revoking Mr. Whitcher's suspended sentence without adequate notice of the grounds for revocation.

2. The superior court erred in revoking Mr. Whitcher's suspended sentence for reasons not allowable under RCW 9.94A.670(11).

3. The superior court erred in revoking Mr. Whitcher's SSOSA sentence when its factual determinations were not supported by the evidence.

4. The superior court erred in revoking Mr. Whitcher's SSOSA sentence in the absence of effective assistance of counsel.

### **B. Issues Pertaining to Assignment of Error**

1. When the State's petition to revoke Mr. Whitcher's suspended SSOSA sentence alleged four

reasons for termination, one stating he was terminated from sex offender treatment but none suggesting he was not amenable to treatment or a danger to others, did the superior court violate his due process rights in revoking his suspended sentence for reasons not included in the State's allegations?

2. When RCW 9.94A.670(11) allows a court to revoke a suspended sentence for two reasons only, if the defendant "violates the conditions of the suspended sentence" or "the court finds that the offender is failing to make satisfactory progress in treatment," did the trial court abuse its discretion in revoking Mr. Whitcher's suspended sentence because he was not amenable to treatment, was terminated from treatment and posed a danger to others?

3. Was trial counsel's performance ineffective when he failed to ask the court to impose a 60-day sanction for a probation violation instead of revoking Mr. Whitcher's 131-month suspended sentence when there is a reasonable probability the trial court would have imposed the lesser sanction had counsel asked for it?

### III. STATEMENT OF THE CASE

#### A. Procedural History

In 2010, Mr. Whitcher pleaded guilty to rape of a child in the first degree and child molestation in the first degree committed between June 2001 and June 2006. See Clerk's Papers on Appeal (CP) 1-2. On May 17, 2010, the superior court, the Honorable Bryan E. Chushcoff presiding, imposed sentence of 131 months to life on Count I and 89 months to life on Count II. Finding Mr. Whitcher eligible for a SSOSA sentence, the court suspended all but six months of the custodial sentence. CP 9-10.

Mr. Whitcher was released from custody on September 28, 2010. Verbatim Report of Proceedings, Volume 1 (1VRP), at 11. On December 22, the State filed a Petition to Determine Noncompliance with Condition or Requirement of Sentenced. CP 21-24. It filed an Amended Petition on January 12, 2011. CP 25-88.

After a hearing on the matter, the superior court revoked Mr. Whitcher's suspended sentence on May 5, 2011. CP 93-95.

Notice of appeal was timely filed. CP 96-99.

**B. Substantive Facts**

**a. The Psychosexual Evaluation Finding Mr. Whitcher Eligible for SSOSA Placement**

The psychosexual evaluation and treatment plan prepared by Michael Comte of Comte's & Associates provided the basis for the superior court's initial decision to impose a SSOSA sentence. In January 2010, Mr. Comte found Mr. Whitcher to be "at low risk for further sexual offending and amenable to treatment in the community." CP 111.

Psychological testing revealed Mr. Whitcher is very intelligent, but has poorly-developed social skills. He "presents in the superior range of intellectual ability," CP 109, but has "a dearth of social skills" and is "unaware how his presentation affects others." CP 106. He presented with a flat affect, no sense of humor, and as depressed and anxious. CP 106 & 110.

Computer analysis indicated he "may behave in a self-centered, sociopathic manner," CP 109, and Comte noted "[m]en with his profile type tend to . . . [be] impulsive, sometimes irresponsible and angry." CP 109-110. However, Comte found "no evidence of antisocial personality characteristics." CP 110. Moreover, Mr. Witcher was "able and willing to consider the impact of his behavior on the alleged victim." CP 110.

Nevertheless, at the time of the evaluation, Mr. Witcher still assigned some blame to the victim. Comte found this "tendency to assign blame" "not unusual for child molesters" and not inconsistent with amenability to treatment. CP 109. What Mr. Witcher needed was time in therapy:

After he has experience in group counseling and he begins to trust his therapist and treatment group members, he will be able to shed his defenses and accept full responsibility for his behavior. He presents at low risk for further offending.

CP 109. Mr. Comte recommended Mr. Witcher for SSOSA.

CP 111.

**b. Conditions of the Suspended Sentence**

Among other conditions imposed with the SSOSA sentence, Mr. Whitcher was to "attend and complete sexual deviancy treatment with: Comte's & Associates," CP 15, not change treatment providers without court approval, follow all rules set forth by the treatment provider, submit to polygraph and plethysmograph examinations, not consume alcohol or controlled substances, not have contact with the victim, maintain law-abiding behavior, register as a sex offender, and comply with all treatment recommendations. CP 10, 15 & 18. The full conditions are set forth in the Judgment and Sentence and appendices. CP 15 & 17-19.

In addition, both Mr. Whitcher's treatment provider and his community corrections officer (CCO) established the rule that he avoid contact with minors without prior written approval. 1VRP 20-21; 2VRP 68.

Mr. Whitcher's SSOSA conditions do not limit his use of the Internet. CP 10, 15 & 17-19. However, his therapist had an oral rule that participants not use

social networking sites. This rule was apparently never explained to Mr. Whitcher. 2VRP 69-70.

Finally, on October 20, 2010, the CCO serving as duty officer required Mr. Whitcher to participate in a DOC Program known as "Getting it Right" to sanction him for telling what the officer believed was a lie. 2VRP 131-32. Mr. Whitcher had told the officer he was reporting for the first time, when, in fact, it was his second time. Mr. Whitcher apologized and explained he had been confused. 2VRP 132; 3VRP 184. He had been trying to say it was his first time to visit the office for a regular monthly report and did not know the procedures. 3VRP 184.

**c. The State's Amended Petition for Revocation and the Trial Court's Reasons for Revocation**

The State alleged the following violations of Mr. Whitcher's SSOSA conditions in its amended petition:

Violation I: Defendant has been terminated from DOC Program Getting it Right due to lack of attendance as directed on 10/20/10

Violation II: Failed to maintain law abiding behavior by being arrested on 10/29/2010 for Theft 3<sup>rd</sup> degree and Criminal Trespass 2<sup>nd</sup> Degree by Fife PD (Case # 2010004109)

Violation III: Having contact with a minor without the permission of his therapist and his CCO on or about 12/18 or 12/18/2010

Violation IV: Being terminated from sex offender treatment on 12/23/2010

CP 25-26.

A hearing was conducted on these matters. See VRP. Although the court heard testimony on all the violations, see below, it ultimately was most interested in how Mr. Whitcher interacted with the CCOs and in his therapist's evaluation of his amenability to treatment.

At the outset of Mr. Whitcher's community custody, a conflict arose between him and his CCO, Lynne Hudson. 1VRP 11-13. The Judgment and Sentence had directed Mr. Whitcher to enter an outpatient sex offender treatment program with Comte's & Associates. CP 10 & 15. In addition, a DOC officer had given him a list of approved providers shortly after his release from custody. 3VRP 91. However, CCO Hudson referred Mr. Whitcher to therapist Jeanglee Tracer for treatment. 3VRP 191. Tracer was neither associated

with Mr. Comte nor on the list provided by the DOC officer. 3VRP 190-91.<sup>1</sup>

Mr. Whitcher believed that to follow the court order, he had to see a therapist associated with Comte's & Associates. 3VRP 191. Being ordered to see a different therapist made him feel "backed into a corner" and very stressed. 1VRP 13. Hudson saw him as "very defiant" about the matter and said he argued with her about whether Tracer should be his provider. 1VRP 12-13 & 15-16.

Hudson noted other difficulties with Mr. Whitcher. She found his two and a half month progress in SSOSA to have been "poor to say the least." 1VRP 27. He blamed others, questioned her "on every little thing" and was "defiant." 1VRP 28.

Another CCO, Joe Sofia, shared Hudson's opinion. He overheard Hudson's initial interview with Mr. Whitcher, when Mr. Whitcher demanded to know what Hudson's supervision qualifications were. 1VRP 49-52.

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1. Jeanglee Tracer had formerly been with Comte's & Associates. 2VRP 63. At the time of the referral, Hudson believed she was an still associate of Mr. Comte's. 1VRP 16.

Believing Mr. Whither was being defiant, Sofia stepped in to ensure Mr. Whitcher understood his participation in SSOSA was a privilege. 1VRP 51-52. Sofia found Mr. Whitcher's willingness to heed authority "nonexistent" and believed he had "been disobedient to Ms. Hudson pretty much from day one." 1VRP 53.

The therapist, Jeanglee Tracer was asked whether she believed Mr. Whitcher was amenable to treatment. She answered no, because he still blamed the victim, lacked the heightened awareness of the rules typically displayed by her clients, played the victim, was deceptive, and did not "take[] responsibility this early into treatment." *Id.*

At the end of the third day of testimony, the judge provided an indication of his then-current position:

The thing that I heard here and bothers me the most is this . . . Mr. Whitcher was described by Mr. Sofia and by Ms. Hudson as really having a bad attitude. . . . He was largely uncooperative. He challenged everything that they said, and I have witnessed that, too, of Mr. Whitcher.

3VRP 211-12. The judge noted he had experienced a similar attitude from Mr. Witcher, "[H]e had an attitude where he wanted to know what everybody's right was to do everything. It was everybody else's fault." 3VRP 212.

The judge indicated that only the State's final alleged violation was an issue for him and noted he was concerned about whether treatment could help Mr. Witcher: "I'm worried, seriously, about whether or not he would benefit from treatment." 3VRP 213. He advised Mr. Witcher to provide the testimony of the therapist who was willing to treat him, Larry Arnholt. 3VRP 213.

Dr. Larry Arnholt began his career in mental health therapy in 1973. In 1985, after obtaining his Ph.D., he began working at Western State Hospital. Maintaining a private practice in addition to his work at the hospital, he has worked with sex offenders for 18 years. 4VRP 221.

Dr. Arnholt assessed Mr. Witcher to determine whether, after Witcher's failure with Tracer, Arnholt

could provide treatment. Before determining he could accept Mr. Whitcher as a patient, Arnholt reviewed the psychosexual evaluation prepared by Mr. Comte, the State's original and amended petitions for revocation, the polygraph report, and Tracer's letter of termination, in addition to interviewing Mr. Whitcher. Def. Exh. No. 9; 4VRP 222-23 & 225-26. Dr. Arnholt diagnosed and was prepared to treat Mr. Whitcher's psychological issues in addition to his psycho-sexual issues. 4VRP 223-24.

Arnholt agreed to accept Mr. Whitcher into treatment provided he met his financial obligations toward his previous therapist, attended all scheduled sessions and complied with all expectations of the SSOSA sentence. 4VRP 222. He explained he would be unusually strict with compliance, given the history of the case. 4VRP 224.

At the end of the hearing, the court found only the final allegation was founded and required sanction, that Mr. Whitcher was terminated from treatment. 4VRP 255-57. The court next discussed Mr. Whitcher's amenability to treatment. It noted Comte's

original report found him amenable, but held that the testimony of the CCOs and the therapist, Tracer, led it to conclude Mr. Whitcher was not amenable to treatment. 4VRP 259-68. The court concluded: "I don't believe at this point that he is amenable to treatment based on his behavior." 4VRP 268.

The written findings state Mr. Whitcher was "not amenable to SSOSA treatment (violation #4) & poses a danger to others." CP 93. The findings note a technical violation of the condition described in Violation I, attending the DOC program "Getting it Right," but imposed no sanction. *Id.* The findings hold the two remaining alleged violations, failure to maintain law-abiding behavior and unapproved contact with minors, had not been proven. CP 94. The revocation order concluded: "The court revoked the defendant's SSOSA sentence for violation #4 (terminated from treatment & defendant not amenable to treatment)." *Id.*

**d. Events Leading to Tracer's Termination of Mr. Whitcher from Treatment**

Mr. Whitcher first met with Jeanglee Tracer, a psychotherapist practicing for ten years, as scheduled on October 27, 2010. 2VRP 63-64. He missed the next scheduled appointment, November 1, 2010, because he had been arrested and was in jail. 2VRP 65. However, he met with her again on November 8, attended a double group session on November 15, and attended another group session on November 29. 2VRP 65-66. That was apparently his last scheduled session prior to Tracer terminating him.

The arrest that prevented Mr. Whitcher from attending his second therapy session happened on October 29 in Fife, on allegations of third degree theft and criminal trespass. 1VRP 25; CP 61. He and another man had been collecting scrap metal from the property of an RV dealership under the mistaken belief they had permission. 2VRP 94-96; 2VRP 107-10; 3VRP 185-87. The charges against Mr. Whitcher were dismissed without prejudice. 1VRP 25-26. The trial

court did not find the incident to have violated the SSOSA requirement that he abide by the law. CP 93-95.

During the two months Tracer met with Mr. Whitcher, she was concerned about his tardy payments. He did not bring any payment to his first meeting, as he had previously been directed to do. At his next appointment, he only paid \$100 on a \$350 balance. He explained to Tracer that his landscaping business was slow at that time of year, but he would be able to pay once business picked up again. 2VRP 64-66; CP 66. When she explained that was not acceptable, "he said that he felt like he was backed into a corner, that he was expected to pay for treatment, but he didn't have any money for treatment." 2VRP 66.

Tracer's fee agreement was not signed until after Mr. Whitcher's first two appointments, on November 15. Prior to his arrest, Mr. Whitcher had paid Tracer a total of \$432, leaving a balance of \$120. 2VRP 74-75.

At the hearing, Tracer testified she terminated Mr. Whitcher because she learned he had had unsupervised contact with a minor. She also was

concerned with his Facebook account and his deception about it. 2VRP 67-71.

The unsupervised contact with a minor occurred at Mr. Whitcher's mother's birthday party, celebrated at his sister's house. 3VRP 187. His 24-year-old niece was there; Mr. Whitcher had known she was pregnant but not that she had given birth. The baby was just beginning to crawl. 3VRP 188-89. Mr. Whitcher did not go within 10 feet of the child but also did not immediately leave because he did not have a ride home; he was relying on his fiancé to pick him up. He called her 15 minutes after his arrival and began walking down the driveway before she arrived. 3VRP 189-90.

Mr. Whitcher self-reported this incident during a maintenance polygraph examination. 1VRP 20; Pl. Exh. 6 at 2. The trial court did not find the encounter to be a violation of his SSOSA conditions. CP 93-95.

In December, Mr. Whitcher's CCO and her field partner learned during a field visit that Mr. Whitcher had a Facebook account and had recently visited it. 1VRP 38. The Facebook profile page was in the name of "Eve Whitcher" and featured a picture of a woman under

30 on its "wall." Mr. Whitcher first said he opened the account shortly after sentencing, then said it was prior to sentencing. 1VRP 40-41. He also said the name "Eve" was a typo of "Steve" and he did not know how the woman's photograph ended up on his wall. He readily provided the CCOs with the password for the account. 1VRP 41.

During a maintenance polygraph examination on December 20, 2010, Mr. Whitcher initially denied having the Facebook account. When he admitted he opened the account, he said he "thought it would be interesting to pose as a woman to meet men." 2VRP 129; Pl. Exh. 6 at 5. At the time of the polygraph, he had obeyed the earlier directive of his CCO to close the account. Pl. Exh. 6 at 5. The polygraph examiner's report indicates Mr. Whitcher ultimately told the truth about his use of the Facebook account, as the Results portion states, "NO DECEPTION INDICATED." Pl. Exh. 6 at 1. No evidence indicated he used the site to solicit children. In the polygraph exam, he apparently truthfully denied "any occasion of soliciting or

attempting to solicit minors via the Internet.” Pl. Exh. 6 at 2.

Tracer terminated Mr. Whitcher from her treatment program by letter dated December 23, 2010. Mr. Whitcher’s difficulty with payment was the reason given in the first paragraph of the letter. The second paragraph discussed Whitcher’s missing an appointment due to his incarceration, noted his insufficient payments, and described his reaction of feeling backed into a corner by his inability to pay. The third paragraph discussed the unsupervised contact with his niece’s daughter. The final paragraph addressed the deceptive Facebook account. CP 66-67.

#### IV. ARGUMENT

**Point I: Revocation of Mr. Whitcher’s Suspended SSOSA Sentence for the Reasons He Was Not Amenable to Treatment and Posed a Danger to Others Violated His Due Process Rights as the State Did not Give Written Notice of these Grounds**

Mr. Whitcher’s due process rights were violated when the State failed to give adequate written notice of the grounds on which the court revoked his suspended sentence. Because the revocation of a suspended

sentence is not a criminal proceeding, an offender facing revocation has only minimal due process rights. State v. Dahl, 139 Wn.2d 678, 683, 990 P. 2d 396 (1999). These minimal rights include, *inter alia*, "written notice of the claimed violations." *Id.*, *citing*, Morrissey v. Brewer, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); In re Personal Restraint of Blackburn, 168 Wn.2d 881, 884, 232 P.3d 1091 (2010) (holding notice of offender's alleged violation of condition to obey all laws was insufficiently specific and violated due process); State v. McCormick, 166 Wn.2d 689, 700, 213 P.3d 32 (2009) (due process requires written notice of claimed violations); U.S. Const. amend. XIV; Wash. Const. art. 1 § 22.

When the State failed to inform Mr. Witcher he faced revocation for not being amenable to treatment and being a danger to others, the notice in this case was inadequate. Before a SSOSA sentence is revoked, due process requires the State to provide "proper notice . . . set[ting] forth all alleged parole violations so that a defendant has the opportunity to

marshal the facts in his defense.” Dahl, 139 Wn.2d 678, 684. In Dahl, the Supreme Court held the State provided adequate written notice when its revocation petition cited defendant’s failure to make progress in treatment, but did not mention two specific allegations of misconduct discussed in court. The Court found the State’s notice adequate because the two incidents were not independent SSOSA violations, merely examples of the alleged violation. 139 Wn.2d at 684-85.

In this case, by contrast, the trial court did more than just discuss uncharged incidents supporting the charged grounds for revocation. Here the court explicitly relied for revocation on two grounds not included in the State’s written notice. It revoked the suspended sentence because it found Mr. Witcher was not amenable to treatment and posed a danger to others. CP 93-94. Thus, unlike in Dahl, the court in this case explicitly revoked the suspended sentences for reasons not provided in the notice. Under these circumstances, Mr. Witcher’s due process rights were violated by the lack of adequate notice and this Court should reverse the trial court’s ruling.

In addition, the trial judge did not correct the deficient notice by announcing during the hearing that "I'm worried, seriously, about whether or not [Mr. Witcher] would benefit from treatment." 3VRP 213. Although the court let Mr. Witcher know it was "worried" about whether he could benefit from treatment, Mr. Witcher could have no reason to understand the court might revoke him for being unamenable to treatment when a) the State's petition did not allege this reason as a grounds for revocation and b) RCW 9.94A.670(11) does not permit revocation for this reason. See Part II, below. In addition, even if the oral notice could somehow be deemed adequate, Mr. Witcher was never even orally informed he faced revocation because he posed a danger to the community. See VRP.

Indeed, the Supreme Court recently described five "core concerns" underpinning the notice requirement in the revocation context:

[T]he contents of a notice must be sufficient to satisfy the core concerns of due process. Several such concerns are manifested here. First, when a potential sanction is the offender's return to total confinement, "many

of the core values of unqualified liberty" are in jeopardy. Second, the offender needs enough information about the charges to prepare a meaningful defense. Third, "[s]ociety has a stake in whatever may be the chance of restoring him to normal and useful life within the law." Fourth, "an effective but informal hearing" is necessary to ensure that DOC's "exercise of discretion will be informed by an accurate knowledge of the [offender's] behavior." Finally, and most fundamentally, a government deprivation of liberty must abide by "prevailing notions of fundamental fairness."

Blackburn, 168 Wn.2d 881, 885 (citations omitted).

These concerns were all compromised by the absence of notice in this case.

As in Blackburn, the inadequate notice in this case prevented Mr. Whitcher from preparing an adequate defense. That, in turn, increased the risk of a decision based on inaccurate information and led to Mr. Whitcher's erroneously being deprived of his conditional liberty. See 168 Wn.2d 881, 886. Indeed, the lack of notice and resultant surprise prevented counsel from arguing that not being amenable to treatment and posing a danger to others are not lawful revocation reasons under RCW 9.94A.670(11). See Part II, below.

In addition, the inadequate notice improperly allowed the State to change its theory under which it sought revocation. As the Supreme Court admonished in Blackburn, the defendant should not be asked to hit a moving target:

An offender whose liberty is in jeopardy should not be misled, subjected to guessing games, or asked to hit a moving target. The realization of these dangers would harm the individual's protected interest in liberty and society's interest in rehabilitating law-abiding offenders.

168 Wn.2d 881, 886. Here, the State provided written notice of four grounds for termination and then spent much of the hearing obtaining testimony of Mr. Whitcher's amenability to treatment, a charge not alleged in its amended petition, in violation of Blackburn.

For all these reasons, Mr. Whitcher's due process rights were violated and this Court should reverse the trial court's revocation order.

**Point II: Revocation of Mr. Whitcher's Suspended Sentence for Not Being Amenable to Treatment, Posing a Danger to Others, and Being Terminated From Treatment Was Illegal Under RCW 9.94A.670(11)**

If this Court finds Mr. Whitcher's due process rights were not violated, the trial court abused its discretion by revoking Mr. Whitcher's suspended sentence for reasons not permissible under the statute.

A SSOSA sentence may be revoked for two reasons:

(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); see McCormick, 166 Wn.2d 689, 698 (noting trial court "may revoke a SSOSA sentence whenever the defendant violates the conditions of the suspended sentence or the court finds the defendant is failing to make satisfactory progress in treatment"). In this case, the court abused its discretion by revoking Mr. Whitcher's SSOSA sentence for neither statutory reason.

This Court reviews a trial court's revocation of a SSOSA sentence for abuse of discretion. State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007),

*citing, State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). "A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. This includes when its discretionary decision is contrary to law." State v. Nation, 110 Wn. App. 651, 661, 41 P.3d 1204 (2002) (citations omitted); State v. Miller, 159 Wn. App. 911, 918, 247 P.3d 457 (2011) ("A decision based on an error of law is based on an untenable reason and may constitute an abuse of discretion."). Here, the revocation decision was an abuse of discretion as it was contrary to RCW 9.94A.670(11).

This Court reviews issues of statutory interpretation de novo. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010) (citation omitted). It will not "construe plain and unambiguous statutes." State v. Ramirez, 140 Wn. App. 278, 290, 165 P.3d 61 (2007), *citing, State v. Nolan*, 141 Wn.2d 620, 625, 8 P.3d 300 (2000). Instead, an unambiguous statute will "be enforced in accordance with its plain meaning." Ramirez, 140 Wn. App. at 290, *citing, State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The plain, unambiguous meaning of RCW 9.94A.670(11) provides only two reasons to revoke a SSOSA sentence: a violation of a condition of the suspended sentence or failure to make satisfactory progress in treatment.

The trial court in this case revoked Mr. Whitcher's SSOSA sentence for three reasons, none of them statutory reasons. It revoked because he was not amenable to treatment, he posed a danger to others, and he was terminated from treatment. CP 93-94. The first two reasons fail to provide a statutorily-authorized reason to revoke because they neither violate conditions of the suspended sentence nor indicate Mr. Whitcher was failing to make satisfactory progress in treatment. RCW 9.94A.670(11).

Indeed, by revoking Mr. Whitcher for not being amenable to treatment and posing a danger to others, the court essentially reconsidered its original decision to impose the SSOSA sentence. It is at the initial sentencing hearing that a court must, *inter alia*, "consider whether the offender is amenable to treatment [and] consider the risk the offender would present to the community." RCW 9.94A.670(4).

Once the initial determination to impose SSOSA is made, the RCW 9.94A.670(4) considerations are not to be re-evaluated at each revocation proceeding. The State's petition to revoke a suspended sentence does not function like a motion for reconsideration, returning to the court its initial discretion. To the contrary, once the court makes the initial decision to impose SSOSA, it can revoke the sentence only for one of the two statutory reasons. RCW 9.94A.670(11). This statutory scheme effectuates finality and fairness. Without adherence to RCW 9.94A.670(11), the State could essentially bring the defendant into court for de novo sentencing hearings at will. For these reasons, the court abused its discretion by terminating Mr. Whitcher's SSOSA sentence for improper reasons.

Moreover, the court's findings that Mr. Whitcher was not amenable to treatment and posed a danger to the community were not supported by the record. Violations of a suspended sentence need not be proven beyond a reasonable doubt but must only "reasonably satisfy" the court that the violation occurred. Badger, 64 Wn. App. at 908. In this case, the court had found Mr.

Whitcher amenable to SSOSA treatment in May 2010. Insufficient evidence in May 2011 warranted a reversal of that determination.

The initial decision to grant SSOSA was based on the court's interaction with Mr. Whitcher and on Mr. Comte's psychosexual evaluation. Notably, Comte's evaluation predicted all the behaviors the CCOs and Tracer subsequently found difficult to deal with. Mr. Whitcher blamed the victim, CP 101, he had "a dearth of social skills," CP 106, and a flat affect. CP 106. He could be impulsive, irresponsible and angry, CP 109-110, and might "behave in a self-centered, sociopathic manner," CP 109. Despite all these negative traits, Mr. Comte and the superior court found Whitcher to be at low risk of reoffending and amenable to treatment in the community. CP 111.

These previously-documented personality challenges are what led the CCOS, individuals clearly unqualified to determine an offender's amenability to treatment, and Tracer, a less-experienced professional than Comte, to write Mr. Whitcher off after two and a half months in the community. Hudson found Mr. Whitcher defiant

and argumentative. 1VRP 12-16 & 28. Sofia found Mr. Whitcher's behavior defiant and disobedient, 1VRP 51 & 53, and his willingness to heed authority "nonexistent." *Id.* at 53. Tracer was troubled that Mr. Whitcher still blamed the victim, felt "backed into a corner," due to his money concerns, had the deceptive Facebook account and the unapproved contact with a minor, and was irresponsible. 2VRP 71.

Notably, however, all of these issues and challenges were predicted in Comte's psychosexual evaluation and thus could not provide a basis for finding Mr. Whitcher unamenable to treatment or a risk to the community. Indeed, an extremely experienced therapist deemed Mr. Whitcher amenable to treatment. Dr. Larry Arnholt, a mental health professional who has worked with sex offenders for 18 years, was willing to treat Mr. Whitcher. 4VRP 221. Without in any way underestimating the challenges Mr. Whitcher posed, Dr. Arnholt found Mr. Whitcher amenable to treatment. Def. Exh. No. 9; 4VRP 222-23, 225-26 & 230. For all these reasons, the evidence did not support the court's

finding that Mr. Whitcher was not amenable to treatment and was a danger to the community.

In addition, the court's third reason for revocation, that Mr. Whitcher was terminated from treatment, is also not a statutorily-authorized reason to revoke Mr. Whitcher's suspended sentence. First, none of Mr. Whitcher's SSOSA conditions require that Tracer not terminate his treatment. Indeed, the court ordered Mr. Whitcher to "attend and complete sexual deviancy treatment with Comte's & Associates," not with Tracer at all. CP 15. Moreover, being terminated from treatment is different from failing to make satisfactory progress in treatment. RCW 9.94A.670(11). Indeed, Tracer did not terminate Mr. Whitcher for failure to make satisfactory progress, but for the following reasons: not honoring his commitments regarding payment, getting arrested on charges of theft and trespass, having unsupervised contact with his niece's daughter, and having a Facebook account in a woman's name. CP 66-67. For all these reasons, the trial court abused its discretion in revoking Mr. Whitcher's SSOSA sentence on impermissible grounds

under RCW 9.94A.670(11) and this Court should reverse the trial court's order.

**Point III: Mr. Whitcher's Counsel was Ineffective For Failing to Ask for a Lesser Sanction than Revocation**

When revocation resulted in reinstatement of a 131-month sentence less time served, Mr. Whitcher's State and federal constitutional rights to effective counsel were violated when his counsel failed to ask the judge to impose a lesser sanction. The right to counsel includes the right to effective counsel. See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both a) that defense counsel's representation fell below an objective standard of reasonableness and b) prejudice. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (reaffirming adherence to the Strickland test).

The Court begins with "a strong presumption that counsel's performance was reasonable." Grier, 171 Wn.2d 17, 33. Moreover, "legitimate trial strategy or

tactics" fall outside the bounds of an ineffective assistance of counsel claim. *Id.* Nevertheless, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 34 (citation omitted).

In this case, counsel's performance was deficient when he failed to ask the court to impose a 60-day sanction instead of revoking Mr. Witcher's entire SSOSA sentence. Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Grier, 171 Wn.2d 17, 33-34, quoting, Strickland, 466 U.S. at 687. Here the error was that serious when counsel failed to seek a known alternative to an extraordinarily long sentence.

A person who violates the conditions of a SSOSA sentence faces either revocation of the suspended sentence or confinement under the probation violation statute, RCW 9.94B.040(3)(c) (formerly RCW 9.94A.634(3)(c)). State v. Partee, 141 Wn. App. 355, 360, 170 P.3d 60 (2007). Under the probation violation

statute, up to 60 days confinement may be imposed per violation. RCW 9.94B.040(3)(c). When a sanction for a probation violation would have involved momentarily less incarceration than revocation of Mr. Witcher's suspended sentence, trial counsel was deficient in not asking the court to impose that sanction.

Failure to ask for the 60-day sanction could in no way be seen as strategic because, when compared to a 125-odd month sentence, there is no downside to 60 days in jail. Thus, this situation is markedly different from, for example, an attorney's failure to request a lesser-included instruction. In that situation, the attorney could legitimately believe that, although risky, "an all or nothing strategy was the best approach to achieve an outright acquittal." Grier, 171 Wn.2d at 43. Here, by contrast, an all or nothing strategy has little or no upside.

Moreover, counsel's performance was prejudicial when there is a reasonable probability the trial court would have imposed the lesser sanction had it been presented with the option. Prejudice is shown if "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. 668, 694; Grier, 171 Wn.2d at 34.

In this case, the trial court imposed a SSOSA sentence in May 2010, finding Mr. Whitcher amenable to treatment and at a low risk of offending. At that time, it clearly believed the best option for Mr. Whitcher and the community was treatment. After the revocation hearing, in May 2011, the court found Mr. Whitcher's attitude presented an impediment to treatment. 4VRP 260-62. However, this was Mr. Whitcher's first revocation proceeding. He had not had time to obtain treatment. Had the court realized it could have given Mr. Whitcher a reality readjustment by putting him in jail for 60 days, it likely would have taken that option and given him another chance at SSOSA.

For all these reasons, trial counsel's performance was both deficient and prejudicial and this Court

should reverse the trial court's order revoking Mr. Whitcher's SSOSA sentence.

**V. CONCLUSION**

For all of these reasons, Steven D. Whitcher respectfully requests asks this Court to reverse the superior court's ruling revoking his SSOSA sentence.

Dated this 2nd day of December 2011.

Respectfully submitted,

/s/ Carol Elewski  
Carol Elewski, WSBA # 33647  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I certify that on this 2nd day of December 2011, I caused a true and correct copy of Appellant's Brief to be served by e-filing, on:

Respondent's Attorney  
Pierce County Prosecutor's Office at  
pcpatcecf@co.pierce.wa.us; and, by U.S. Mail, on:

Mr. Steve D. Whitcher  
DOC # 339513  
Coyote Ridge Corrections Center  
P.O. Box 769, 1301 N. Ephrata Avenue  
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/s/ Carol Elewski  
Carol Elewski

# ELEWSKI, CAROL ESQ

**December 02, 2011 - 8:46 AM**

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