

NO. 42348-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-01147-6

BRIEF OF RESPONDENT

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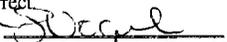
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED April 6, 2012. Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly imposed a temporary limitation on contact, except by phone, between Smith and his wife until such time as his therapist could formulate an expanded contact protocol that would protect the victim and her siblings and advance Smith's SSOSA treatment?

2. Whether Smith's objection to the requirement that he submit to polygraphy as part of his SSOSA treatment is without merit where the Supreme Court has held that the SRA authorizes polygraph testing to monitor compliance with SSOSA sentences, and the SSOSA evaluator included periodic polygraph examinations as part of Smith's treatment plan?

3. Whether, even if the condition was improper, the appropriate remedy is not necessarily restoration of Smith to the SSOSA program?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jeffrey Smith was charged by amended information filed in Kitsap County Superior Court with one count of first-degree rape of a child and one count of first-degree child molestation (both domestic violence). CP 11-12. The victim was his step-daughter KMA, who was between the age of four and seven during the charged period. CP 10, 11.

Smith was also charged with witness tampering. CP 13. This charge

was based on Smith's attempt to get his wife, Angela Allerdice, to change her daughter's story. CP 16.

Subsequently, the State filed a second amended information that dropped the rape of a child charge. CP 17. Smith entered a plea agreement on the amended charges. CP 21. The State agreed to recommend a prison sentence of 66 months on the molestation charge and eight months for the witness tampering charge. CP 22. In the statement of defendant on plea of guilty, Smith set forth the factual basis for the plea:

I has sexual contact w/ KA by placing my privates on her privates sometime between Jan 1, 2007 & Aug 20, 2009 I asked my wife to ask KA if she would say she wasn't touched in any way

CP 35.

The trial court ordered a pre-sentence investigation. CP 39. It also authorized funds for a psychosexual evaluation by Dr. Mark Whitehill, for the purposes of seeking a SSOSA sentence. CP 40.

KMA's father and grandmother both told the PSI writer that they were concerned that Smith would continue to pose a risk to KMA through phone contact with Allerdice, who they feared would try to influence KMA's feelings about her stepfather. CP 42.

The writer also spoke with Allerdice, who believed that KMA had suffered no ill effects from her victimization. CP 42. Allerdice was not even

sure if her daughter was actually molested by Smith. CP 42. She stated that after his arrest, Smith repeatedly denied molesting KMA, and after he pled guilty to the offense, he quit talking about it altogether. CP 42. Allerdice felt that KMA had exhibited numerous behavioral problems “since she was an infant,” that she saw no behavioral changes after Smith reportedly molested KMA, and this has caused her to question whether or not the child was sexually molested by Smith at all. CP 42.

Allerdice nevertheless described her daughter as “extremely possessive” and “completely defiant,” and indicated she has been an aggressive child since before Smith became a part of their family. CP 42.

Allerdice also asserted that Smith was a “kind, caring and laid back” father who did not represent a risk to KMA or to any other children. CP 42. She related that all four of their children cry for their father and ask when he will be coming home on a daily basis. CP 42. Allerdice believed it would be in the best interest of her family to allow Smith the SSOSA option “to move on with his life so he can come home and be a part of the family again.” CP 42.

The PSI writer also interviewed Smith, who also provided her with a written statement:

I was laying in bed my wife was downstairs or outside [KMA] got up on the bed and brushed up against my penis and it felt

good so then I slid her up higher on the bed then rubbed my penis on her privets then masterbated 2 days later I was in the bath room with her and was helping her clean her privets because she complained about itching so I put her on the edge of the counter and when I picked her up she again brushed against my privets and again I was really horny so I then rubbed my privets on hers Then masterbated I know what I did was wrong and felt so guilty I prayed for god to help me to control my urges and to prevent any thing like that from hapening and here I am 2 years later and have not ever done any thing like that again [sic].

CP 42.

Smith's prior criminal history consisted of two assault convictions based on two separate incidents involving his then-wife. CP 44-45.

Whitehill, a licensed psychologist evaluated Smith to determine the appropriateness of a SSOSA sentence. CP 55. Whitehill reviewed the discovery, conducted a clinical interview, and administered a variety of specialized psychometric, actuarial, and psychophysiological assessments. CP 55-56. Whitehill felt a number of factors were relevant to Smith's amenability to treatment:

When asked to explain what motivated the sexual abuse of his stepdaughter, Mr. Smith reported that he had been raped and molested in childhood, and that these experiences may have been "*built into my character*" throughout the years. He asserted that he wants to get the help that he needs for this problem.

Mr. Smith was asked a variety of questions pertaining to the assessment of SSOSA-worthiness.

Do you see your conduct as wrongful? "It is damaging in many ways to her... it is damaging to me, too. I shouldn't

have done it... It was wrong in so many ways."

Do you see your conduct as harmful? "Mentally, she thinks that this is how daughters should be treated. Her feelings towards me: she could be angry or upset, or she could hate me."

Do you believe you need specialized sexual deviance treatment? "I need treatment in this area to keep this from happening again. I never want to be in this situation again."

Do you see yourself as sexually dangerous? "No, I am not a threat to anybody... This happened 12-18-24 months ago, before I ever got arrested and there was never any relapses or mistakes and I was alone in the house with children. I never thought about doing anything. I never wanted to do anything."

CP 59 (italics in original). Whitehill concluded his report of their interview by observing that Smith lacked insight into the reasons for his behavior:

The overall impression of Mr. Smith was that of somewhat poorly socialized individual with deficiencies in academic and occupational attainment, and largely ignorant of his motivations for sexually abusing his stepdaughter.

CP 64. On the MCMI-III assessment, which focuses more specifically on underlying personality structure and functioning, Whitehill again observed that Smith lacked insight and could be exploitative:

Smith generated a report notable for a moderately severe tendency to deny psychological difficulties. Correcting for this, moderate histrionic traits are seen. Persons responding similarly act in ways to garner support and attention from others, often in a self-dramatizing manner. They tend to have shallow interpersonal relationships and may at times be exploitative, self-centered, and indifferent to the welfare of others. Such persons are intolerant of inactivity and are wont to display shortsighted hedonism.

CP 65. Finally, Whitehill administered the MSI II, which is normed on a

population of known sex offenders. He concluded the results were reliable, but noted that the validity indexes suggested that Smith was attempting to portray himself in an overly favorable light. This inventory indicated that Smith was in need of treatment:

While acknowledging having engaged in inappropriate sexual contact, Mr. Smith denied having deviant sexual desires or having been aroused by fantasies involving a child. He also denied ever having groomed or set up a child for sexual activity. Mr. Smith scored in the "moderate" range regarding the commonality of his thinking with a known population of child molesters ... Mr. Smith revealed a number of issues that suggests he has a significant need for treatment. These include his acknowledgement of molesting a child; his non-recognition of grooming, planning, and fantasizing that often accompanies child sexual abuse; his acknowledged emotional and early childhood difficulties; and his disclosure of having been the victim of molestation and rape in childhood.

CP 65. . In his summary, Whitehill noted that although he detected no Axis I psychopathology, Smith had "notable personality pathology on Axis II, including deficits of judgment and social awareness, as well as interpersonal exploitativeness." CP 69.

Whitehill therefore concluded that Smith's amenability to treatment was "guarded, in light of the defensiveness seen on testing and his lack of awareness of any of the thoughts and feelings which preceded the sexual abuse of his stepdaughter." CP 65. Further, although Whitehill felt that Smith was generally amenable to SSOSA treatment, he noted that there were "negative factors ... pertaining to a favorable recommendation for SSOSA

include[ing] his limited awareness of any ‘grooming’ or planning behavior; his general high level of defensiveness, and concerns that he may have been trying to have the victim's mother - his wife - influence the victim's testimony.” CP 70.

Whitehill recommended a treatment plan should the court decide to impose a SSOSA sentence. CP 70. Part of the treatment plan would include regular polygraph assessment as an index of his adherence to the terms of the “therapy contract.” CP 70. This contract would require no contact of any type between Smith and minors, “including his own children.” Whitehill further stipulated that “contact” should be “defined in the broadest possible manner, and includes in-person, phone, letter, email, gift, card, *or any of the above via proxy.*” CP 70 n.1 (emphasis in original).

Whitehill detailed the various elements of the treatment program. CP 72. Among the elements was completion of an “empathy paper” to facilitate the acquisition of victim impact sensibilities by helping Smith to recognize the manner and extent to which he harmed KMA. CP 72. Whitehill noted that this element “*would appear to be an area of special emphasis for Mr. Smith.*” CP 72 (emphasis in original). The ninth and final element of the plan was regular submission to polygraph testing:

Periodic polygraphy, typically arranged in concert with the supervising Community Corrections Officer, is conducted as a check and balance for compliance with the

myriad rules and injunctions of the Judgment and Sentence, DOC probationary conditions, and Therapy Contract.

CP 72.

At the sentencing hearing, Whitehall explained what he meant by the

Axis II diagnosis of histrionic traits:

[S]uch persons will often act in an attention-seeking way, their interpersonal relationships may be shallow or self-centered, even exploitive.

RP (10/8) 6. He again noted that there was “a rather pronounced tendency on the part of Mr. Smith to represent himself as devoid of psychological difficulties. That is, he was in a posture of some □ denial.” *Id.* Whitehill also expressed concern that Smith did not acknowledge any grooming, planning, or fantasizing about KMA before the assault occurred. RP (10/8) 7. This “was significant because almost invariably such features are present.”

Id.

Whitehill also addressed the issue of contact between Smith and

Allerdice:

[T]here would have to be very clear rules of engagement pertaining to how they are to communicate with one another. It would be not okay for example for Mr. Smith to be able to call the family home, because he would not be living in the home of course, without a specific plan that is approved by the CCO and the treatment provider, and if necessary, by the court, to avoid risking contacting a child over the phone, because that would be contact.

RP (10/8) 19.

The trial court imposed a SSOSA sentence of 75 months, and suspended 63 months of it.¹ CP 114; RP (10/8) 42. Among the “sex-crime related” conditions incorporated into the judgment’s supervision schedule was a no-contact provision:

Have no direct or indirect contact with victim(s) or his or her family, including by telephone, computer, letter, in person, or via third party.

CP 117. Appendix H to the judgment also included the following provisions:

10). Shall not cause or have contact with K.M.A. (dob 9-19-02) for life, effective immediately. Contact includes in person, in writing, telephonically, electronically and/or through third party.

11). Shall not cause or have contact with K.M.A.’s immediate family,* effective immediately, without prior authorization from therapist and/or CCO. Contact includes in person, in writing electronically, by phone and/or through third party.

*except Δ may have telephone contact only with Angela Allerdice

CP 124. The final condition provided for polygraphy:

22). Shall submit to urinalysis testing and polygraph examinations to monitor compliance with crime-related prohibitions and law-abiding behavior.

CP 125. The court also entered a separate domestic violence no-contact order pursuant to RCW ch. 10.99. CP 127. The order pertained only KMA and was effective for the remainder of Smith’s life. CP 127, 129.

Four months after Smith was sentenced, the Department of

¹ The incarcerative portion of the sentence amounted to time served. CP 110.

Corrections filed a notice of violation with the court. The notice specified three violations:

Violation 1: Failing to provide truthful responses to polygraph examinations on/about 12-15-10 and/or 1-10-11 in Port Orchard WA

Violation 2: Having intimate contact with a prohibited person, Angela Allerdice, at the Chiefton [sic] Motel, Bremerton, on/about 10-8-10.

Violation 3: Having face-to-face contact with a prohibited person, Angela Allerdice, in the parking lot at the Family Pancake House, Bremerton, on/about 12-30-10.

CP 131. The notice also detailed the supporting evidence.

Both Smith and Allerdice were present in court when the order prohibiting contact with Allerdice except by phone directive was entered. The restriction was also explained to him verbally and in writing when Smith completed intake with DOC in October 2010. CP 131.

Smith's first routine polygraph examination was given on December 15, 2010. Smith showed deception on questions pertaining to contact with minors and face-to-face contact with Angela Allerdice. Afterwards, at a meeting with the CCO and treatment provider Dr. Joseph Jensen, Smith adamantly denied contact with Allerdice or minors. Smith was polygraphed again on January 10, 2011. He again showed deception regarding face-to-face contact with Allerdice and with minor children. He also again denied committing any violations to Jensen and the CCO. CP 132.

Jensen met with Smith for a one-on-one counseling session on January 26, 2011. During the session, Smith confessed he had lied on the previous two tests. He admitted he had contact with Allerdice on two occasions. The first incident occurred at the Chieftain Motel in Bremerton on the day he was released from jail. Smith said Allerdice came to the motel where they talked, discussed the fact they were not supposed to see one another and had sexual intercourse. The second incident occurred in December, just before Christmas, in the parking lot of the Family Pancake House when Allerdice came to talk with Smith about her mother's health problems. Smith told Jensen that he was aware of they were not supposed to see one another, but he felt it was important to console Allerdice who was distressed about her mother's health. CP 132.

Following these disclosures, Smith was polygraphed for the third time on January 28, 2011. The results of the third test showed Smith appeared to have made a full and truthful disclosure the two face-to-face contacts with Allerdice. CP 132.

A progress report from Jensen was included with the violation notice. After summarizing the course of the violations and Smith's proffered explanations of them Jensen offered the following prognosis:

Mr. Smith is struggling with the concept that he cannot have contact with his wife. When we discussed the course of his offending behavior as well as the prosecution of

his case, I pointed out to Mr. Smith that Angela had not given unqualified support to her daughter when she disclosed sexual abuse by Mr. Smith. This situation was exacerbated by the fact that Mr. Smith continued to deny his offense up to the day of his change of plea; i.e., lying to his wife about sexual assault of his daughter. Mr. Smith stated that Angela was "torn" between her daughter's statements and his version of events.

To date Angela has not initiated any contact with this treatment provider asking if or how she can be involved in Mr. Smith's sexual offender treatment. Mr. Smith has been participating in weekly individual therapy sessions pending an opening in sexual offender group. I anticipate that he should be able to begin offender group therapy by March 1, 2011.

It is of great concern that Mr. Smith was violating direct orders from a Superior Court Judge, as well as his Probation Officer, and concealing this information including failing two polygraph examinations. I am not terminating Mr. Smith from his sexual offender treatment at this time; however, I am recommending that he participate in a court hearing where he can address his violation behavior in front of the bench. It is possible that the court may deem Mr. Smith's behavior as not meeting the standards of performance expected of an individual on the SOSSA sentencing program.

CP 137.

On March 31, 2011, the State filed a motion to revoke Smith's SSOSA. CP 140. The motion alleged that in addition to the earlier-reported violations, Smith had since been failing to regularly attend his group therapy sessions. CP 141. A hearing was held on April 8, 2011, at which the trial court decided to continue the hearing until May 20. RP (4/8) 6-8.

On May 4, 2011, DOC filed a supplemental notice of violation. CP 151. Two additional violations were listed:

Violation 4:

Contact with a prohibited person, Angela Allerdice, since 1-26-11 as revealed by deceptive polygraph results on/about 4-29-11 in Port Orchard W A.

Violation 5:

Failing to comply with conditions of community custody and/or psychosexual therapy by failing to provide truthful responses during a polygraph examination on/about 4-29-11 in Port Orchard WA.

CP 151-52. The notice included the following details:

Results of the test show clear deception in Smith's responses when he was asked the question: Since January 26,2011, have you had any contact or attempted to have contact with your wife? Smith showed inconclusive results on two other relevant questions: Since your last test, have you had any form of contact with either your daughters or your step-sons?, and Since your last test, have you had any unreported contact with minors? When questioned extensively both during and after the test, Smith was unwilling to provide any further information which would shed light on the deceptive polygraph results.

CP 152.

On the same date, Jensen terminated Smith from his treatment program:

I am terminating Jeffrey Smith from SSOSA-based outpatient sexual offender treatment due to non-compliance with probation rules, specifically having prohibited contact with his wife, withholding that information from probation and treatment, and attempting to manipulate polygraph examination. On 1/26/11, subsequent to disclosures that Mr. Smith had prohibited face-to-face contact with his wife Angela and subsequently lied on two polygraph examinations to that effect, he was instructed to stop all forms of contact with his wife pending a violation hearing in Kitsap County

Superior Court.

CP 172. After failing the most recent polygraph, Smith had been arrested.

CP 172. Jensen subsequently interviewed Smith at the jail. CP 172. Smith acknowledged that he had contacted Allerdice three times:

Smith stated that he initially telephoned Angela after the evening group therapy session on 4/25 during which he offered her financial assistance. He then called her on two more occasions, stating, "I called her the second and third time because I wanted to...to make arrangements to give her money and tell her that I loved her. . .the last time I called her was Friday morning before the polygraph examination to tell her that I loved her and that I might be going to jail."

CP 173.

Jensen told Smith that "the greater concern regarding his violation behavior was not the contact with his wife per se, but his ability and willingness to attempt to conceal that information; this does not meet the standards of behavior expected of an individual who is participating in the SSOSA program." CP 174. Smith responded that "he could not tolerate having no contact with his wife during her time of need; that it was his duty to make himself available to her." CP 174. Smith stressed that he was in trouble "only for 'trying to be a good husband.'" Jensen concluded that Smith did not appear to appreciate the seriousness of concealing information regarding his activities in the community from probation and treatment. CP 174. Jensen also has reservations about Allerdice:

When I met with Angela on 4/21, I told her that one of the paramount responsibilities of a spouse and support system was to ensure that the offender with whom they are involved follow all of their probation conditions, including the willingness to contact CCO or therapist when they are aware that the offender has engaged in violation behaviors. Angela's willingness to participate in prohibited telephone calls with her husband is highly problematic and *causes grave concerns about her ability to function as a chaperone*. The fact that Mr. Smith and his wife were not even discussing the fact that they were violating his probation by engaging in the phone calls is worrisome, reflecting a non-cooperative attitude towards probation.

CP 174 (emphasis supplied).

At the revocation hearing, Smith called Whitehill to testify. RP (6/3)

4. Although he did not specifically request the no-contact provision with Allerdice, he was “aware that there is some legitimate concern about Angela’s posture relative to Mr. Smith’s offenses that would give perhaps a reasonable person cause to examine critically that contact.” RP (6/3) 6-7.

Whitehill also believed that it was “the deception surrounding the violation which is even of greater concern than the violation itself.” RP (6/3)

9. He and Jensen both agreed that the violations were “repeated and significant in terms of the deception surrounding them.” RP (6/3) 10.

CCO Nancy Jo Nelson testified regarding the violation notices. She noted that polygraph testing was “a big part” of DOC’s monitoring and supervision of SSOSA offenders. RP (6/3) 13.

The court found all five violations had been proven. CP 177. The court revoked the SSOSA sentence and modified the original judgment to stipulate that Smith would be subject to community supervision for life.² CP 177-78. The Court left the contact provisions as they were in the original Appendix H to the judgment. RP (6/3) 35.

B. FACTS

The facts of the offenses are summarized in the PSI. The summary is based on the investigative reports submitted by the Bremerton Police Department, a Kitsap County Child Interviewer, DSHS Child Protective Services, and Harrison Hospital. CP 39.

On August 13, 2009, Child Protective Services (CPS) received a phone report of suspected child sexual abuse from a counselor at the Lakeshore Medical Clinic in Bothell. CP 39. The counselor told CPS staff that one of their patients called to report her granddaughter may have been sexually abused. CP 39. The child was identified as six-year-old KMA, who had been visiting her grandmother and her father, for the summer. CP 39. The grandmother had noticed KMA acting strangely by inserting foreign objects into her vagina. CP 39-40. When questioned about it, KMA responded that her step-father had been “putting his privates into her

² This term is required by RCW 9.94A.507(5), and had been orally ordered by the court at the original sentencing hearing. RP (10/8) 45.

“privates.” CP 40.

CPS alerted police in Bremerton, where the stepfather, appellant Jeffrey Smith, resided. CP 40. KMA was interviewed by Kitsap County child interviewer Karen Sinclair on August 17, 2009. CP 40. KMA disclosed that her step-father had “put his private” inside of her “private” more than once in the family’s Bremerton apartment beginning when KMA was four years of age. CP 40. The child reported the incidents occurred on the bed her mother shared with Smith as well as in the bathroom, and that Smith had told her not to tell anyone. CP 40.³

Angela Allerdice, Smith’s wife and the mother of the victim, was interviewed by police on August 17, 2009. CP 40. Allerdice defended Smith and was defensive toward police; she claimed her daughter would have told her if she had been molested. CP 40. Allerdice blamed the accusation on her daughter’s biological father. CP 40.

Smith was arrested on August 20, 2009. He was interviewed by detectives but denied sexually assaulting his step-daughter and subsequently passed a voice stress test. CP 40.

Smith pled not guilty to the charge and was held in the Kitsap County Jail pending trial. CP 40. Prior to the trial, Smith spoke to his wife by phone

³ A more detailed account of the interview is set forth at CP 41.

on numerous occasions; during one conversation he told his wife that he wanted her to ask KMA to say she was not touched in a sexual manner by him. Smith's wife declined. CP 40.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY IMPOSED A TEMPORARY LIMITATION ON CONTACT, EXCEPT BY PHONE, BETWEEN SMITH AND HIS WIFE UNTIL SUCH TIME AS HIS THERAPIST COULD FORMULATE AN EXPANDED CONTACT PROTOCOL THAT WOULD PROTECT THE VICTIM AND HER SIBLINGS AND ADVANCE SMITH'S SSOSA TREATMENT.

Smith argues in his first point that the trial court's temporary limitation of contact between Smith and his wife to telephonic conversations violated his right to freedom of association. His second point asserts that the limitation is an unconstitutional limitation of his liberty interest in his marriage.⁴ Neither of these claims have merit because the condition furthered valid state interests and was reasonably limited.

This court reviews sentencing conditions for abuse of discretion.

⁴ With regard to his second point, Smith offers no authority or discussion as to how his fundamental liberty interest relates to the State's interest in imposing supervisory conditions on convicted felons. Although the State addresses this contention, this Court is not obliged to. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (“[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970), cert. denied, 401 U.S. 917 (1971))).

State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Under the SRA, trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, ¶¶ 10, 29, 156 P.3d 201 (2007). “Crime-related prohibitions” are orders directly related to “the circumstances of the crime.” RCW 9.94A.030(10). Such conditions are usually upheld if reasonably crime related. *Riley*, 121 Wn.2d at 36–37.

As Smith notes, more careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right. *See State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), *abrogated on other grounds*, *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. *Id.* Additionally, conditions that interfere with fundamental rights must be sensitively imposed. *Riley*, 121 Wash.2d at 37 (*citing United States v. Consuelo–Gonzalez*, 521 F.2d 259, 265 (9th Cir.1975)).

Whether a condition of sentence prohibiting contact with a spouse who is not the direct victim of the crime is reasonably crime related or violates the fundamental right to marriage were addressed as questions of first impression in *State v. Warren*, 165 Wn.2d 17, ¶ 23, 195 P.3d 940 (2008). The Court noted that there were “scant” opinions from other jurisdictions

bearing on the issue, and that even those were not on point. *Id.*, n.8 (collecting cases).

The Court first addressed whether the no-contact provision was not reasonably crime related because the defendant's wife was not the victim of the crime. *Warren*, 165 Wn.2d at ¶ 24. The Court concluded that in this regard the trial court did not abuse its discretion. *Id.* It observed that Washington courts had been up to that time reluctant to uphold no-contact orders with classes of persons different from the victim of the crime. *Id.* (citing *Riles*, 135 Wn.2d at 349 (no-contact order with minors was not related to crime of rape of adult woman); *State v. Ancira*, 107 Wn. App. 650, 656, 27 P.3d 1246 (2001) (no contact order with children not necessary when defendant convicted of domestic violence against wife)).

The Court nevertheless distinguished the foregoing cases. The court found that protecting Warren's wife was directly related to the crimes in this case. *Warren*, 165 Wn.2d at ¶ 24 The Court observed, *inter alia*, that she was the mother of the child victims of sexual abuse for which Warren was convicted and that Warren attempted to induce her not to cooperate in the prosecution of the crime. *Id.* Here, Allerdice is KMA's mother, and similar to Warren, Smith tried to persuade her to participate in witness tampering.

The Court also addressed the claim that the no-contact order violated

his fundamental constitutional right to marriage and to parent his children. *Warren*, 165 Wn.2d at ¶ 25. The Court held that the rights to marriage and to the care, custody, and companionship of one's children are fundamental constitutional rights, and that therefore state interference with those rights is subject to strict scrutiny. *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); *Turner v. Safley*, 482 U.S. 78, 95–96, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)). The Court recognized that crime-related prohibitions affecting fundamental rights must be narrowly drawn. *Warren*, 165 Wn.2d at ¶ 26. The Court also held that there must be no reasonable alternative way to achieve the State's interest. *Id.*

The Court nevertheless concluded that the order prohibiting contact did not violate Warren's fundamental right to marry because it was reasonably necessary to achieve a compelling state interest, namely, the protection of his wife and her daughters. *Warren*, 165 Wn.2d at ¶ 26. The Court distinguished *Ancira*, where the court struck down the no-contact order because the children could be protected through indirect contact by phone or mail, or supervised visitation outside the presence of their mother (who was the victim of the domestic violence at issue). *Warren*, 165 Wn.2d at ¶ 27. Thus, it was not reasonably necessary to cut off all contact with the children. *Id.* In *Warren*, however, preventing all contact appeared reasonably necessary to

protect the wife. *Id.*

Of relevance is *Warren's* adoption of the analysis relating to limitation of contact with a defendant's children to similar prohibitions on marital contact. Washington courts have previously rejected constitutional challenges to community custody conditions imposed on sex offenders that restrict the offender's ability to have contact with children. For instance, in *Riles*, the Court of Appeals noted that a defendant's constitutional rights during community placement are subject to the infringements authorized by the SRA. *State v. Riles*, 86 Wn. App. 10, 15, 936 P.2d 11 (1997) (citing *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996)). In addition, the Court noted that the SSOSA statute expressly authorized the sentencing court to condition a sex offender's community placement by ordering that "[t]he offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals." *Riles*, 86 Wn. App. at 15. Furthermore, an offender's freedom of association may be reasonably restricted. *Riles*, 86 Wn. App. at 15 (citing *Riley*, 121 Wn.2d at 37-38). The *Riles* court concluded, therefore, that the challenged order was plainly authorized by the SRA, and upheld the no-contact condition. *Riles*, 86 Wn. App. at 15.

The Washington Supreme Court affirmed this Court's decision in *Riles*. In so doing, the Supreme Court rejected the defendant's constitutional challenges to the terms of his community custody and held that prohibiting

the defendant “from having contact with minor-age children for the period of his community placement upon his release from prison is a reasonable restriction imposed upon him for protection of the public -- especially children.” *Riles*, 135 Wn.2d at 347.

In *State v. Letourneau*, 100 Wn. App. 424, 438, 997 P.2d 436 (2000), the Court held that the State had failed to demonstrate that restrictions on the defendant’s contact with her children were reasonably necessary. The record in *Letourneau* contained the opinions of four evaluators who discussed the merits of the prohibition, and who “were unanimous in their conclusions that Letourneau [was] not a pedophile.” *Letourneau*, 100 Wn. App. at 441. The court found unpersuasive one evaluator’s opinion that the prohibition was valid because Letourneau “would ‘mold’ her children’s minds based on her distortions as she did with her victim.” *Letourneau*, 100 Wn. App. at 440. Thus, the record did not support the prohibition forbidding Letourneau from contact with her children.

Here, on the other hand, Dr. Whitehill specifically noted that Smith lacked insight into his offense and that had significant personality issues that led to exploitative behavior. CP 64, 65, 69. One of the “negative factors” that led Whitehill to be “guarded” in his prognosis for Smith’s treatment was Smith’s “trying to have the victim's mother - his wife - influence the victim's testimony.” CP 65, 70. The proposed treatment plan thus prohibited

contact of any type between Smith and minors, “including his own children.”

Whitehill further stipulated that “contact” should be “defined in the broadest possible manner, and includes in-person, phone, letter, email, gift, card, *or any of the above via proxy.*” CP 70 n.1 (emphasis in original).

There was other support for the prohibition in the record as well. KMA’s father and grandmother both told the PSI writer that they were concerned that Smith would continue to pose a risk to KMA through phone contact with Allerdice, who they feared would try to influence KMA’s feelings about her stepfather. CP 42. Allerdice’s discussion with the PSI writer was also a cause for concern. Allerdice, believed that KMA had suffered no ill effects from her victimization. CP 42. She went on, despite the fact that Smith had affirmatively confessed by this time to question whether KMA was actually even molested by Smith. CP 42. Indeed, she appeared to attribute the charge itself to the child’s supposed behavioral issues that she had had since “since she was an infant.” CP 42. Contrary to the evidence provided by his confession to the crime, Allerdice also continued to believe that Smith was a “kind, caring” father who did not represent a risk to KMA or to any other children. CP 42. Allerdice finally expressed that in the best interest of her family to allow Smith to “come home and be a part of the family again.” CP 42. Whitehill felt that the fact that “there was a time when Mr. Smith’s wife was essentially supporting his denial, and that of course is a

“very troubling factor.” RP (10/8) 20.

Whitehill specifically addressed the issue of contact between Smith and Allerdice at the sentencing hearing:

[T]here would have to be very clear rules of engagement pertaining to how they are to communicate with one another. It would be not okay for example for Mr. Smith to be able to call the family home, because he would not be living in the home of course, without a specific plan that is approved by the CCO and the treatment provider, and if necessary, by the court, to avoid risking contacting a child over the phone, because that would be contact.

RP (10/8) 19. The CCO concurred and recommended that there be no contact *until* a plan could be worked out with the therapist:

I would recommend if you do allow contact, that it be restricted to telephonic contact only at this point, until she can meet with the psychosexual therapist and the CCO. There needs to be some kind of strategy for how that contact, physical contact is going to occur, where, under what circumstances, how often. Until that’s done, though, I think there’s too much room for erosion of boundaries that neither of them are aware of yet.

RP (10/8) 44. The trial court believed that point was “well taken.” *Id.* Smith acknowledged that not contacting his children was appropriate, but expressed concern that his wife needed his moral support. *Id.* The court responded that it was *temporarily* permitting contact only by phone:

I am going to allow you to have telephonic contact with Ms. Allerdice *until your protocols are put in place and the boundaries are set out*, and Ms. Allerdice also understands what the protocols are in the treatment program, because I don’t want you to be setting him up, either, which I don’t

expect you will, but you need to know what all the boundaries are. They are very strict, I will tell you that, and there's no deviation. Once the protocols are set, the boundaries are set, there's no deviation allowed at all, and you will be closely monitored and supervised in the community. I will just put that out there.

RP (10/8) 44-45 (emphasis supplied).⁵

The court thus did not, as in *Warren*, prohibit all contact. Instead it provided for telephonic contact until such time as Smith could meet with his therapist and they could devise a protocol for further contact that would both protect the children and further Smith's treatment. Of course, that never happened, because Smith violated the temporary restriction within hours of his release.

The record thus reflects that the trial court's intention was not to punish either Smith or Allerdice, but rather to protect KMA and her siblings and to facilitate Smith's treatment. Moreover, the court exercised limited means to achieve these goals. It permitted telephone contact in the short term, with the understanding that greater contact between Smith and his wife would be permitted once the therapist was able to formulate a plan for contact that would protect the children and support Smith's rehabilitation. The condition, which was significantly less severe than that approved in *Warren*, was proper.

⁵ The written condition reflected this understanding as well, leaving open the possibility of

Finally, the State notes that on page 15 of his brief Smith asserts that the conditions in this case were “intensified by the Department of Corrections.” The State is unsure what Smith means by this assertion. He cites to a portion of Dr. Jensen’s report where Smith was attempting to justify his knowing violation of the condition on the *very day* he was released from jail. Clearly, *Jensen* did not accept this attempt at justification:

It is of great concern that Mr. Smith was violating direct orders from a Superior Court Judge, as well as his Probation Officer ...

CP 137. If Smith is referring to Jensen’s order not to contact Allerdice at all, this limitation was imposed after Smith violated the condition, and was thus reasonable. In any event the State is not sure what relevance the fact that Smith subjectively believed his CCO did not like him has to the issues presented.

B. THE SUPREME COURT HAS HELD THAT THE SRA AUTHORIZES POLYGRAPH TESTING TO MONITOR COMPLIANCE WITH SSOSA SENTENCES, AND THE SSOSA EVALUATOR INCLUDED PERIODIC POLYGRAPH EXAMINATIONS AS PART OF SMITH’S TREATMENT PLAN.

Smith next claims that the trial court was without authority to require Smith to submit to polygraph testing. This claim has already been rejected by

contact beyond telephonic with “prior authorization from therapist.” CP 126.

the Washington Supreme Court.

Smith relies on *In re Hawkins*, 169 Wn.2d 796, 238 P.3d 1175 (2010), for his argument, but that case is inapposite. In *Hawkins*, a sexually violent predator case, the State essentially requested a polygraph examination as a matter of pre-trial discovery. See *Hawkins*, 169 Wn.2d at ¶ 6 n.1 (rejecting Court of Appeals reliance on CR 26). The Supreme Court rejected the State’s request for the polygraph as a matter of statutory construction. See *Hawkins*, 169 Wn.2d at ¶ 8 (“We are called upon to determine what the legislature intended with respect to polygraph examinations when it authorized “an evaluation as to whether the person is a sexually violent predator.”). After examining the relevant statutory language in RCW ch. 71.09, the Supreme Court concluded that the Legislature did not intend to permit polygraphs to be ordered in the context presented there. *Hawkins*, 169 Wn.2d at ¶¶ 9-14.

Smith, however, utterly ignores the Supreme Court’s holding in *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998),⁶ *abrogated on other grounds*, *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). In *Riles*, the Court examined whether the Legislature intended to allow submission to polygraph testing as a condition of a SSOSA sentence. The Court concluded that it did:

A trial court has authority to impose monitoring conditions such as polygraph testing. Although the results of

⁶ Notably *Riles* is not referenced in *Hawkins* at all.

polygraph tests are generally not admissible in a trial, this Court has acknowledged their validity as an investigative tool.

Allowing trial courts to impose polygraph testing on sex offenders is consistent with the guidelines provided in WAC 246-930-310(7)(b) for therapists working with sex offenders:

The use of the polygraph examination may enhance the assessment, treatment and *monitoring* processes by encouraging disclosure of information relevant and necessary to understanding the extent of present risk and *compliance with treatment and court requirements. When obtained, the polygraph data achieved through periodic examinations is an important asset in monitoring the sex offender client in the community.*

Riles, 135 Wn.2d at 342 (emphasis the Court's, footnotes omitted). The Court went on to note that in 1997, the Legislature had amended RCW 9.94A.030 and 9.94A.120 to authorize trial courts to order affirmative acts necessary to monitor compliance with sentencing conditions, and making mandatory the affirmative acts necessary to monitor compliance with orders of the court. *Riles*, 135 Wn.2d at 342-43. The Court concluded that these amendments were meant to ratify the imposition of polygraphy conditions:

These amendments suggest the Legislature intended to confirm the practice of allowing testing, such as polygraphs, for monitoring compliance with sentencing conditions. Where there has been doubt or ambiguity surrounding a statute, amendment by the Legislature is interpreted as some indication of legislative intent to clarify, rather than to change, existing law. A subsequent amendment can be further indication of the statute's original meaning where the original enactment was "ambiguous to the point that it generated dispute as to what the Legislature intended." One can conclude from these amendments that the Legislature

intended to clarify and interpret the statute to resolve any dispute concerning its actual meaning

Riles, 135 Wn.2d at 343 (footnotes omitted) (quoting *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 150-51, 736 P.2d 265 (1987)).

Although the SRA has been modified many times since *Riles* was decided, the relevant provisions still contain the language on which the holding in *Riles* relied. For example, RCW 9.94A.030(10) still provides:

“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, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. *However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.*

(Emphasis added). Likewise, RCW 9.94A.505(8) provides:

As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

RCW 9.94A.703(3)(d) permits the court to impose affirmative conditions as part of community custody:

As part of any term of community custody, the court may order an offender to: ... Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

Finally, the SSOSA statute also authorizes affirmative conditions:

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

* * *

(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 ...

RCW 9.94A.670(5) (Emphasis supplied). The referenced subsection, RCW 9.94A.670(3)(b), in turn provides:

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:

* * *

(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.

(Emphasis supplied). Here, Dr. Whitehill's SSOSA treatment plan specifically called for polygraph testing as part of Smith treatment and monitoring regime. CP 70. Because the condition was contemplated by the Legislature, *Riles*, not *Hawkins* controls. This claim should be rejected.

C. EVEN IF THE CONDITION WAS IMPROPER, THE APPROPRIATE REMEDY IS NOT NECESSARILY RESTORATION OF SMITH TO THE SSOSA PROGRAM.

Smith asserts that the proper remedy is strike the offending conditions, reverse his SSOSA revocation and assign him to a different CCO.

However, even if the restriction were improper, any error would be harmless:

Violations of the minimal due process rights at revocation hearings are subject to harmless error analysis. *State v. Dahl*, 139 Wn.2d 678, 688, 990 P.2d 396 (1999). There, the Court observed that in “revocation cases, the harm in erroneously admitting hearsay evidence ... is the possibility that the trial court will rely on unverified evidence in revoking a suspended sentence.” *Dahl*, 139 Wn.2d at 688. The present situation is analogous. *See also, State v. Fry*, 15 Wn. App. 499, 501, 550 P.2d 697 (1976) (judge’s failure at revocation hearing to make written findings of fact was harmless because the judge’s oral opinion provided ample record of evidence on which the judge relied and his reasons for revocation), *review denied*, 87 Wn.2d 1008 (1976); *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (constitutional error in omitting an element from a jury instruction is harmless if “it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’”) (*quoting Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

It was not the violations per se that the court found warranted revocation. It was that they were evidence of Smith’s ongoing lack of candor and failure to follow the rules of his supervision that led the court to revoke rather than sanction on the finding of the violations:

Dr. Jensen expressed concerns about his character, capacity

for compliance, and I have seen that starting from the day of sentencing forward, and I have very serious concerns, and I really don't think Mr. Smith could get into the meat of a sexual treatment program when he can't even comply with some of the basic very understandable court orders. We're not even dealing with the concepts, we are dealing with sexual offender treatment, and Mr. Smith has shown himself not to be accountable. He's withheld information multiple times, and in this court's opinion he's not willing to comply with the court orders and the conditions of his treatment, and he does not appreciate the seriousness of his continued violations, and demonstrated to me over these last 60 days or more, 90 days, to be a poor candidate for treatment. He does not respect boundaries set by the court, set by Dr. Jensen, set by the Department of Corrections, and I am going to revoke the Special Sex Offender Sentencing that I granted earlier.

RP (6/3) 31-32. The court also expressed dismay that Smith and Allerdice had misrepresented to the court how much funding Smith would have available to treatment and housing. RP (6/3) 29.

Moreover, even if the condition were invalid, Smith never asserted his belief that it was. To the contrary, he admitted to repeatedly and knowingly violating it. Thus even if no enforceable violation occurred as to the contact, the basic reasons for revocation, Smith's continuing unsuitability for the program, remained. As noted the claim that the polygraphy requirement was unauthorized borders on frivolous. As a result of those properly imposed exams it was revealed that Smith repeatedly not only violated his conditions, but lied to his therapist about it. As such, there is no reasonable likelihood that if the contact violation were stricken, the trial court would not still

revoke Smith's suspended sentence. Thus, even if the condition were unconstitutional, the revocation should be affirmed. Alternatively, the case should be remanded for the trial court to reconsider its decision.

Finally, Smith cites no evidence or law in support of his claim that he should be assigned to a new CCO. The State is aware of no justification for the court to become involved with the Department of Corrections' internal caseload management. This is particularly true where nothing in the record reflects any personal animus on the CCO's part. The record only reflects that she did not believe Smith was an appropriate candidate for SSOSA. There is no evidence whatsoever that once the sentencing option was granted that she did not execute her duties in a fair impartial and professional manner. This request is without basis and should be rejected.

IV. CONCLUSION

For the foregoing reasons, Smith's conviction and sentence should be affirmed.

DATED April 6, 2012.

Respectfully submitted,

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