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

STATE OF WASHINGTON,

Respondent,

v.

ADAM HENDRON,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Karena Kirkendoll

No. 08-1-02118-3

BRIEF OF RESPONDENT

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I. INTRODUCTION

Adam Hendron pled guilty to two counts of rape of a child in the second degree in 2008 for sexually abusing a 13-year-old girl. The court imposed a Special Sex Offender Sentencing Alternative (SSOSA) sentence in 2009. Shortly after his release from custody, Hendron absconded to Mexico where he lived undetected by U.S. authorities for about 7 years. The court allowed him to resume his SSOSA following his 2016 extradition.

Despite the second chance to adhere to a SSOSA, Hendron failed to comply with the conditions of community custody. He failed to comply with polygraph testing, refused to divulge his cell phone password, and failed to be amenable to sex offender treatment. The court properly exercised its discretion in revoking Hendron's SSOSA based on his demonstrated unwillingness to comply with court-ordered conditions. The court granted Hendron phone or email contact with his son in Mexico per his request, upon approval from the child's mother.

Hendron's repeated violations demonstrated he was a flight risk and danger to the public while serving his sentence in the community. This Court should affirm the trial court's revocation of Hendron's SSOSA, and should remand the case for the limited purpose of allowing the trial court to determine whether there are less restrictive alternatives for contact with his son while also considering the State's interest in protecting children.

II. RESTATEMENT OF THE ISSUES

- A. Whether the trial court properly revoked Hendron's SSOSA based on multiple and significant violations evincing his disregard for his SSOSA conditions and preventing DOC from monitoring him in the community.
- B. Whether this case should be remanded for the trial court to consider on the record whether less restrictive alternatives exist for allowing Hendron contact with his son, and to reasonably tailor any conditions in the interest of protecting Hendron's son and other minors.

III. STATEMENT OF THE CASE

On May 2, 2008, the Pierce County Prosecutor's Office charged Hendron with three counts of rape of a child in the second degree, and one count of child molestation in the second degree. CP 1-2. These charges stemmed from Hendron's sexual abuse of a 13-year-old girl, C.R., when he was 21 years old. CP 124-25. Hendron met C.R. and her family at church and began sexually abusing C.R. while her parents allowed him to live at their home to provide him with a stable address to serve to a term of electronic home monitoring for another criminal case. CP 124. C.R. revealed that Hendron began kissing her daily and escalated his abuse to include digital penetration of her vagina and oral sex. CP 124-25.

C.R. told a forensic interviewer that Hendron was "trying to convince her to run away with him" after she and Hendron had "professed

their love to each other.” CP 124-25. She added that Hendron had “proposed to her and given her a ring.” CP 124-25.

Hendron pled guilty to two counts of rape of a child in the second degree as charged in the amended information. CP 126-27, 128-39. The court granted Hendron a special sex offender sentencing alternative (SSOSA), ordering 131 months in prison, with all but 12 months suspended. CP 10-18. The SSOSA required Hendron to refrain from contact with minor children, stay within a specific geographical boundary, comply with crime related prohibitions, comply with sexual deviancy treatment, and perform affirmative acts necessary to monitor compliance with court orders as required by the Department of Corrections (DOC). CP 16 – 17.

Hendron was released from jail and reported to DOC for supervision on May 1, 2009. CP 22. Less than two months later, Hendron failed to report for his polygraph and called later in the day to acknowledge that he missed the appointment. CP 22. His Community Corrections Officer (CCO) instructed him to report in two days to discuss how to get back into compliance with his conditions. CP 22. Hendron failed to report two days later as instructed, failed to attend sex offender treatment throughout the month of June, and had no further communication with DOC. CP 22-23. Hendron had absconded less than two months after his release from jail, and a warrant was issued for his arrest. CP 24, 143.

Hendron lived in Mexico for 7 years and his whereabouts were unknown to U.S. authorities. CP 24; 11/18/2016 RP 5. While in Mexico, Hendron completely disregarded his conditions. He was involved in an unapproved romantic relationship, got married, and had a child. 11/18/2016 RP 15; CP 81, 153. He also worked an unapproved job at a religious ranch that housed 60 minor children from the very poor local community. CP 17,146, 148. Hendron later explained, “When [I] left for Mexico in 2009 I was hoping to start life over again. I got married had a family and got a job. Life was great.” CP 74.

Hendron was eventually apprehended in Mexico and extradited to the U.S. in 2016. CP 81; 11/18/2016 RP 5. The State moved to revoke Hendron’s SSOSA upon his return. CP 144. Hendron stipulated to four violations of his SSOSA: failure to report to his community corrections officer, failure to submit to a polygraph on June 22, 2009, failure to provide a current address to Department of Corrections since June 22, 2009, and failure to comply with sex offender treatment since June 22, 2009. CP 154-55; 11/18/2016 RP 2-4. The trial court noted that “[t]here was a presentence investigation, psychosexual evaluation by Dr. Comte...it appears that Mr. Hendron just kind of blew it off entirely, left the state, left the country, hoping this would all disappear.” 11/18/2016 RP 8. The court also clarified that “part of the deal [was] that he comply with the conditions that he

apparently has ignored entirely.” 11/18/2016 RP 8. The court ultimately declined to revoke Hendron’s SSOSA and sentenced him to 60 days in jail for each violation. 11/18/2016 RP 24.

Hendron first challenged restrictions on contact with his minor child in March of 2018. Hendron moved to remove or modify the terms of Appendix “G” – Conditions for SSOSA Sentence Sections I and II. CP 42-44, 45-73, 74-75. He claimed that Section II violated his fundamental rights as a father when applied to his biological children. CP 42-44, 45-73, 74-75, 160. Section II states that “the defendant shall not have any contact with the victim(s) or any minor child (without prior written authorization from the treatment provider and community corrections officer....” CP 17. The court denied Hendron’s motion without prejudice, stating that “the Court, prior to reconsideration of this motion, requires input from the defendant’s treatment provider and community corrections officer.” CP 76.

Hendron again began violating his conditions. He displayed “uncooperative behavior” on a regular maintenance polygraph test conducted on August 21, 2018, where the polygrapher noted that Hendron was “breathing deep...changing his answers ...on the control questions,” making it “impossible to conduct a valid test.” 04/12/2019 RP 14. In order to conduct a valid test, a subject’s responses to control questions should not change. 04/12/2019 RP 9, 26, 36-37. During the August 21st polygraph

test, the polygrapher spoke to Hendron “several times about controlling his breathing or breathing accurately or breathing normal...and not changing his answers, cooperating with test procedure.” 04/12/2019 RP 15. Ultimately, Hendron’s actions on August 21, 2018, produced invalid test results. 04/12/2019 RP 16. The polygrapher notified Hendron’s CCO Jessica Bullock that Hendron was uncooperative during the test. 04/12/2019 RP 16. She declined to sanction Hendron. 04/12/2019 RP 49.

On his next polygraph examination on January 23, 2019, Hendron once “again continued to change his answers from ‘no’ to ‘yes’ on the control questions, continued to breathe deep.” 04/12/2019 RP 16. The polygrapher reminded Hendron several times during the test to stop breathing heavily; the polygrapher believed that Hendron was “being uncooperative with the polygraph” when he was changing his answers and continuing to breathe deep. 04/12/2019 RP 20-21. The polygrapher recalled that Hendron was “fully aware of the expectation that he stop engaging in the deep breathing he was doing.” 04/12/2019 RP 38. The polygrapher needed Hendron to complete “three charts [recording breathing, heart rate and sweat production] to come up with valid conclusions” and “stopped the test procedure after the second chart and returned him to the CCO” when Hendron became uncooperative again. 04/12/2019 RP 16.

The polygrapher reported Hendron's behavior to his new CCO, Julie Johnson, and she discussed the case with her supervisor while Hendron waited outside of her office. 04/12/2019 RP 50. 04/12/2019 RP 49. Upon review of Hendron's file, the supervisor found Hendron had committed a "willful violation and said that he would need to be detained." 04/12/2019 RP 49. Hendron was detained. 04/12/2019 RP 49-50.

When Hendron was informed he was being detained because of his behavior during the polygraph examination he suddenly claimed to have trouble breathing, said he felt dizzy and lightheaded, and laid down on the floor. 04/12/2019 RP 50. He started crying and claimed he was having a "panic attack and he had PTSD." 04/12/2019 RP 51. CCO Johnson noted that before this incident, Hendron never self-identified as having PTSD. 04/12/2019 RP 52. Hendron drew the attention of other officers when he began to yell, "Don't touch me" while lying in a fetal position on the floor. 04/12/2019 RP 51. Hendron then propped himself up to a sitting position on the floor leaning against the refrigerator. 04/12/2019 RP 52. 911 was called. 04/12/2019 RP 51.

Emergency Medical Services (EMS) arrived and did a full and thorough evaluation on Hendron. 04/12/2019 RP 53. The EMS workers repeatedly told Hendron to stop holding his breath. 04/12/2019 RP 53. Hendron told the medics "his post-traumatic stress disorder kicks in

whenever he sees someone dressed like a police officer.” 04/12/2019 RP 54. However, a male CCO was with Hendron during his EMS evaluation in the small office for safety reasons, and the male CCO “was making jokes, cracking jokes, and Hendron was laughing and smiling.” 04/12/2019 RP 55.

That CCO accompanied Hendron to the hospital in an ambulance to medically clear him for booking. 04/12/2019 RP 56. DOC did not want to hazard Hendron traveling alone based on his previous flight to Mexico. 04/12/2019 RP 56. Hendron did not display any breathing issues while at the hospital. 04/12/2019 RP 57-58. Without addressing anyone in particular, Hendron made statements at the hospital about recent events. 04/12/2019 RP 58. He said, “I was supposed to lie on the polygraph control questions”; “[m]arijuana can cause short-term memory loss”; “DOC took my wife and children from me”; and “I did not remember what I answered to the control questions.” 04/12/2019 RP 58. He also stated, “[a]fter the last polygraph I had with that guy, I did research on polygraphs.” 04/12/2019 RP 59. CCO Johnson found those statements concerning: “[w]hat started me writing down what he was saying is he was laughing and joking and making these comments, and I just felt that was totally out of character for the current situation.” 04/12/2019 RP 59. Hendron was medically cleared and booked into jail. 04/12/2019 RP 63-64.

The following day, CCO Johnson visited Hendron at the jail and requested the passwords to his cellular devices per his affirmative conditions for community custody monitoring under his SSOSA. CP 16-18; 04/12/2019 RP 64. CCO Johnson explained that an offender is required to turn over a cell phone for inspection if requested by DOC. 06/14/2019 RP 154. CCO Johnson was concerned that “due to the past questions that we’d ask him on the polygraph and other interactions with Mr. Hendron that there might be additional violations on his cellular devices, specifically contacting minors or his son...” 04/12/2019 RP 64-65. Despite Hendron’s earlier request, he had not obtained the required DOC-approved chaperone to allow for telephonic contact with his son. 04/12/2019 RP 66.

CCO Johnson was also concerned about Hendron’s admitted research into polygraphs: “From my professional experience, the offenders I’ve worked with that have researched polygraphs have stated they’ve done it to try to... fool the polygraph.” 04/12/2019 RP 66-67. CCO Johnson believed evidence of that violation might be found on Hendron’s cell phone based on his comments at the hospital. 04/12/2019 RP 66-68. She did not “know why he wouldn’t supply that if there was nothing on that phone that would possibly lead to maybe further problems for him.” 06/14/2019 RP 154. CCO Johnson read Hendron the DOC condition to which he had agreed as part of his SSOSA: “I am aware that I’m subject to the search and

seizure...of my person, residence, automobile, or other personal property if there's reasonable cause on the part of the Department of Corrections to believe that I violated the conditions...." 06/14/2019 RP 116. Hendron responded, "I want my attorney. I want to speak to my attorney." 04/12/2019 RP 68-69, 06/14/2019 RP 154. Hendron had lied when he was asked if he had any cellular devices and he responded that he left them at home; upon a search of his vehicle, two cellular devices were located. 04/12/2019 RP 74-75. CCO Johnson felt Hendron's overall lack of transparency showed he was unable to be safe in the community. 04/12/2019 RP 74.

CCO Johnson updated Hendron's sex offender treatment provider, Mr. Dewaelsche, of Hendron's lack of cooperation with the polygraph. 04/12/2019 RP 69-70. Mr. Dewaelsche subsequently terminated Hendron's treatment for several reasons. 04/12/2019 RP 70, 6/14/2019 RP 160, 166. Mr. Dewaelsche was no longer comfortable treating Hendron because of Hendron's arrest for uncooperative behavior ultimately thwarting any valid results from the January 2019 polygraph test, his failure to provide his cellphone password to CCO Johnson, and repetitive and problematic behaviors Dr. Dewaelsche observed throughout treatment that "go back to when Hendron was originally charged." 06/14/2019 RP 166-67.

Specifically, Mr. Dewaelsche was concerned that Hendron was not making progress with his “feeling victimized by all the systems,” that Hendron continually “alluded to the fact that there are ways to countermeasure if he wanted to,” and that Hendron “had discussed at times that he – if he wanted to, he could leave the country because he knew how to do that.” 06/14/2019 RP 167, 170. Mr. Dewaelsche did not feel comfortable allowing Hendron back into treatment when Hendron was preoccupied with leaving the country. 06/14/2019 RP 156.

Ultimately, Mr. Dewaelsche opined that Hendron was not amenable to treatment because Hendron’s behavior in not following rules or working with DOC was “real similar to the behaviors he’d engaged in before” he absconded to Mexico. 06/14/2019 RP 154-55. Mr. Dewaelsche indicated that “[b]ased on Mr. Hendron’s history of violating court orders and continued unwillingness to cooperate with DOC ... he is not amenable to participate in sex offender treatment.” 06/14/2019 RP 154.

The State filed a motion to revoke Hendron’s SSOSA on February 6, 2019 and the court held the revocation hearing on April 12, June 14, and July 26, 2019. CP 79-80, 163, 164. The court heard testimony from Hendron, polygrapher Patrick Seaburg, CCO Julie Johnson, Dr. Dewaelsche, and physician assistant Michael Elliott who provided Hendron

treatment in the emergency room. 04/12/2019 RP 7-39, 40-75, 06/14/2019 RP 134-174, 7/26/2019 RP 186-203, 204-249.

CCO Johnson testified she had been shocked and continually surprised by Hendron's "very peculiar" attitude towards his SSOSA from their very first meeting. 04/12/2019 RP 70. She found it very "out of the norm," that upon meeting her, Hendron asked her if she "knew who he was" or if his previous CCO had told her about him. 04/12/2019 RP 70-71. She also found it strange that Hendron seemed compelled to share that he had gone to Mexico, had a child and got married there, and DOC had brought him back to the United States. 04/12/2019 RP 71-72. She testified that Hendron continued to fantasize about leaving the country. 04/12/2019 RP 72-73. At his monthly check-in on January 22, he stated that "if he were to be violated, he would leave the country again." 04/12/2019 RP 73. He clarified that "he would not go to Mexico but he would go someplace like Cuba. He mentioned that the US would never get him back from Cuba." 04/12/2019 RP 73. He stated, "If you know the right people and what to do, you can lay low." 04/12/2019 RP 73.

CCO Johnson was in favor of revocation, citing Hendron's casual disregard for the truth, his termination from treatment, his non-compliance with DOC supervision, and Mr. Dewaelsche's determination that he wasn't amenable to treatment. 04/12/2019 RP 75. Overall, CCO Johnson felt that

Hendron would threaten public safety if allowed out in the community as an untreated sex offender. 04/12/2019 RP 74-75.

Hendron testified that he did not take any of his prescribed antianxiety medication on the day of his last polygraph. 07/26/2019 RP 213. He contended that his alleged anxiety attack during the polygraph was a result of not taking his antianxiety medications that day. 07/26/2019 RP 266-67. Hendron also claimed that CCO Johnson did not read Mr. Hendron's affirmative conditions to him when she requested access to his electronic devices. 07/26/2019 RP 272.

The court concluded based on the totality of the evidence that Hendron was not "going to be successful or be able to sufficiently comply or complete the SSOSA sentence." 07/26/2019 RP 281. The court found Hendron's claim that his anxiety attack was caused by not taking antianxiety medication unbelievable, stating that, "the violations that we've been discussing today are more than just happenstance...I do not believe that missing one day of antianxiety medication, or antidepressant, would lead to the type of reaction that Hendron reportedly had during the polygraph exam." 07/26/2019 RP 281. Regarding Hendron's contention that CCO Johnson should have read his affirmative conditions to him when requesting his cell phone password, the court said that it was not Officer Johnson's

responsibility to go over all the terms of the SSOSA again as Hendron had been familiar with the terms since 2009. 07/26/2019 RP 281-82.

The court revoked Hendron's SSOSA, stating: "[s]o the treatment termination, the failure to comply with the polygraph, the failure to turn over the cell phone password, the totality of all these things lead me to revoke the SSOSA that was given to Mr. Hendron." 07/26/2019 RP 282; CP 113-115. Hendron was ordered to serve his 131 months in custody at DOC followed by lifetime community custody. CP 114.

Following revocation Hendron again asked the "Court to permit him to have phone contact with his son...or email...." 07/26/2019 RP 285. The State was apprehensive to agree to allow phone or email contact when it had not had contact with the mother or the child:

[N]ot having the okay from the [son's] mother saying, 'Yes, I want this man to have contact with my child,' even though he's...going to prison for these types of charges, I don't feel comfortable signing off on it without at least providing them some notice or an opportunity to speak one way or the other.

07/26/2019 RP 286.

The court agreed with the State and requested that Hendron's counsel either provide the mother's contact information to the State or obtain a notarized statement signifying support from the mother so that the State and Hendron could come to an agreement to facilitate contact. 07/26/2019 RP 286. The court stated it would then sign the agreement.

07/26/2019 RP 286. In its order revoking the SSOSA the court stated: “after inquiry...defendant may not have contact with minor children except for email and phone contact with biological son: J.H.V. upon approval of bio mom via email.” CP 114. Under Condition II under Appendix “F” the court indicated: “The offender shall not have direct or indirect contact with ...minor children except he may have phone or email contact with his biological son J.H.V.” CP 115. Hendron timely appealed. CP 118-121.

IV. ARGUMENT

A. The trial court properly revoked Hendron’s SSOSA after reviewing significant evidence of Hendron’s continued violations evincing his disregard for his SSOSA conditions.

The purpose of the SSOSA is to treat offenders who are amenable to treatment. *Doe v. Department of Corrections*, 190 Wn.2d 185, 196, 410 P.3d 1156 (2018). “SSOSA was created because it was believed that for certain first-time sexual offenders, ‘requiring participation in rehabilitation programs is likely to prove effective in preventing future criminality.’” *State v. Miller*, 180 Wn. App. 413, 417, 325 P.3d 230, 233 (2014). Full cooperation with conditions is required to maintain a SSOSA sentence to fulfill the goals of treatment and rehabilitation. RCW 9.94A.670(11), (12).

Under RCW 9.94A.670(3)(b)(v), a treatment plan can include “[r]ecommended crime-related prohibitions and affirmative conditions,” to monitor offenders’ compliance to SSOSA conditions to assess an offender’s

safety in the community. Polygraphs and searches of a probationer's person and belongings are reasonable to monitor an offender's compliance with treatment under RCW 9.94A.670(3)(b)(iii). *See State v. Riles*, 135 Wn. 2d 326, 343, 957 P.2d 655 (1997) (overruled in part on other grounds by *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010)). Additionally, polygraphs are also permitted for monitoring other affirmative conditions of community custody, outside of compliance with treatment requirements. *State v. Combs*, 102 Wn. App. 949, 952, 10 P.3d 1101 (2000).

Furthermore, RCW 9.94A.631(1) provides that "if there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property." RCW 9.94A.631(1). Washington courts have recognized that DOC may conduct reasonable searches of probationers, their homes, or effects, based on a well-founded suspicion that a violation has occurred and there is a nexus between the property searched and the alleged probation violation. *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996); *State v. Cornwell*, 190 Wn.2d 296, 306, 412 P.3d 1265 (2018).

To revoke a SSOSA sentence, a court need only be "reasonably satisfied" that the offender violated a condition of the suspended sentence;

the court is not required to find that the offender violated his conditions “beyond a reasonable doubt.” *State v. Ramirez*, 140 Wn. App. 278, 290, 165 P.3d. 61 (2007). A special sex offender sentencing alternative sentence (SSOSA) may be revoked at any time if there is sufficient proof to reasonably satisfy the court that the offender has violated a condition of the suspended sentence or failed to make satisfactory progress in treatment. *State v. McCormick*, 166 Wn. 2d. 689, 705, 213 P.3d 32 (2009); RCW 9.94A.670(11)(a)-(b).

The trial court’s revocation of a SSOSA sentence is reviewed for abuse of discretion. *Ramirez*, 140 Wn. App. at 290. A trial court only abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P. 3d 638 (2003). Absent these conditions, a trial court’s ruling must remain undisturbed.

The revocation of a suspended sentence is not a criminal proceeding. *State v. Dahl*, 139 Wn. 2d 678, 683, 990 P.2d 396 (1999). An offender facing revocation of a suspended sentence has only minimal due process rights akin to one facing revocation of probation or parole. *Id.* In the context of revocation proceedings, minimal due process includes, “a statement by the court as to the evidence relied upon and the reasons for the revocation.” *Id.* The purpose of these requirements is to ensure that an articulated

violation resulting in revocation is based upon verified facts. *Id.* As such, oral rulings are permitted so long as the court articulates the verified facts upon which it bases its revocation decision to sufficiently allow for appellate review. *See Id.* at 689.

The record in this case clearly reflects that the trial court relied on several specific violations by Hendron for its decision to revoke Hendron's SSOSA. The court stated, "[s]o the treatment termination, the failure to comply with the polygraph, the failure to turn over the cell phone password, the totality of all these things lead me to revoke the SSOSA that was given to Mr. Hendron." 07/26/2019 RP 282. These violations were established by the reports and testimony of Mr. Dewaelsche, the polygrapher Patrick Seaburg, and CCO Johnson. First, Mr. Dewaelsche testified that he terminated Hendron's treatment because he believed that Hendron was not amenable to treatment due to noncompliance and failure to progress. 04/12/2019 RP 70, 6/14/2019 RP 160, 166-67. Second, polygrapher Patrick Seaburg testified that Hendron was uncooperative with the affirmative conditions of his SSOSA when he kept deep breathing and changing his answers on the polygraph questions. 04/12/2019 RP 16. Finally, CCO Johnson testified that Hendron did not adhere to his affirmative conditions when he refused to divulge his password to his electronic devices, even after she read him the DOC standard condition to which Hendron agreed by

signing the SSOSA that required him to submit to DOC searches of his electronic devices. 04/12/2019 RP 68-69, 06/14/2019 RP 115-16. Therefore, sufficient evidence illustrates that Hendron had violated the terms of his SSOSA and the court did not abuse its discretion in revoking his sentence. *Ramirez*, 140 Wn. App. at 290.

Washington courts have upheld SSOSA revocations for less serious and less numerous violations than those committed by Hendron. In *State v. Miller*, the court upheld the trial court's revocation of Miller's SSOSA when Miller failed to commence sexual deviancy treatment within 90 days of his release from confinement as was required by his SSOSA because he could not afford to pay for treatment. *State v. Miller*, 180 Wn. App. at 415. The appellate court upheld Miller's SSOSA revocation because "substantial evidence" supported the trial court's finding that Miller was at risk for reoffending if he was not in sexual deviancy treatment. *Id.* at 425. Hendron, unlike Miller, committed several SSOSA violations—he attempted to avoid transparency, investigated ways to avoid monitoring of his compliance, and lied to avoid adherence to DOC surveillance. He also had several opportunities to correct his behavior and comply with his conditions but repeatedly failed to cooperate.

Hendron demonstrated deliberately deceptive behavior heightening concerns about his safety in the community beyond the mere fact he had

violated his conditions. In another case, also called *State v. Miller*, the court properly exercised its discretion in revoking the defendant's SSOSA when the defendant became involved with a woman who had a vulnerable child close to the age of his victim, did not completely disclose his offense behavior to them, and lied about his violations to a number of people. *State v. Miller*, 159 Wn. App. 911, 919 - 923, 247 P.3d 457 (2011). The court found the nature of Miller's violations to be "extremely serious" because they involved deception and a vulnerable child; the court determined that with less than one year remaining in his community custody, Miller would not have time to demonstrate that he had changed his deeply troubling behavior. *Id.* at 921-23.

Like Miller, Hendron has demonstrated the same tendency to deceive, in his case by engaging in behavior to circumvent monitoring by DOC. His attempt to thwart his polygraph tests and his lie to prevent access to his cell phones demonstrates he does not appreciate the importance of his conditions meant to ensure public safety by monitoring his compliance.

The court considered evidence from Hendron's entire SSOSA history in its decision to revoke his SSOSA. See *Miller*, 180 Wn. App. at 425. It began by commenting that it expected someone receiving such an unexpected second chance at a SSOSA to strictly comply to the conditions: "One would expect, given this extraordinary set of circumstances, that Mr.

Hendron would have been hypervigilant in complying with the terms of the SSOSA, but it appears that as time went on Mr. Hendron has grown a bit complacent.” 07/26/2019 RP 281. Not only did Hendron abuse his extraordinary second chance, but also his activity during his seven-year absconson in Mexico demonstrated his risk to the community without monitoring and treatment. He engaged in an unapproved relationship, had a child with his new partner, and worked at a religious ranch that housed 60 children from a very poor community. CP 17, 81, 146, 148, 153; 11/18/2016 RP 15. All of this took place while he was away from needed sex offender treatment and prohibited from having contact with minors due to his abuse of a child in the same household where he lived. CP 17, 81.

Hendron asserts the revocation of his SSOSA should be reversed because the findings of fact are insufficient under *Matter of Detention of G.D.*, 11 Wn. App. 2d 67, 450 P.3d 668 (2019) and *In re Detention of LaBelle*, 107 Wn.2d 196, 728 P.2d 138 (1986). However, those cases involved “boilerplate” written findings on involuntary commitment orders where the court only checked boxes on an order and did not offer sufficiently specific oral findings for appellate review, violating MPR 2.4(3) that required written findings. Unlike *LaBelle* and *Detention of G.D.*, the trial court here made a sufficient record for appellate review based on the testimony and reports that supported revocation, and in its detailed oral

findings it related the specific facts upon which it based its decision to revoke the SSOSA. *See Dahl*, 139 Wn.2d at 689.

Full cooperation, transparency, and honesty with DOC and treatment providers are necessary for successfully completing a SSOSA. CP 16-17 140-42; 04/12/2019 RP 68-69; RCW 9.94A.670(11), (12). Not only were there specific violations sufficient for revocation but the deceitful and manipulative nature of those violations meant DOC could not ensure he was not a risk to public safety. 04/12/2019 RP 69. CCO Johnson emphasized that in order for a SSOSA to be successful, transparency is key: “[i]f there’s not full transparency and full cooperation, then an offender cannot proceed – with treatment and move forward in not violating their conditions or having any other law violations. It’s...imperative we work as a team.” 04/12/2019 RP 69. Hendron’s inability to be transparent and honest with DOC, his treatment provider, and the polygrapher foreclosed his ability to remain in the community.

Polygraphs are important tools to monitor compliance and encourage transparency. *State v. Riles*, 135 Wn. 2d 326 at 351-52. Hendron was required to “submit to polygraph and plethysmograph testing upon direction of [his] community corrections officer or therapist....” CP 16-17, 140-42. The record shows Hendron’s attempts to deliberately manipulate two polygraph tests. Hendron was overt about what he was doing, bragging

to CCO Johnson and Mr. Dewaelsche about researching polygraph tests and countermeasures. 04/12/2019 RP 58, 67-68; 06/14/2019 RP 146, 170. CCO Johnson recognized that Hendron was researching polygraphs to “try to quote/unquote, fool” them. 04/12/2019 RP 67. Hendron’s behavior thwarted DOC’s ability to monitor him in the community.

Hendron’s deceit and attempts to avoid surveillance regarding his electronic devices also compromised DOC’s ability to ensure he was safe to be in the community. Hendron’s SSOSA conditions required that he submit to searches of his devices and computers at the request of his CCO to monitor his compliance with the SSOSA conditions and DOC was permitted to do so provided the existence of reasonable cause and a nexus. 04/12/2019 RP 64, 06/14/2019 RP 154; CP 6-18, 27-28, 140-42; RCW 9.94A.631(1); *Cornwell*, 190 Wn.2d at 306.

Hendron’s lie about the location of his phone, his behavior during the polygraph examination, and his comments at the hospital about researching methods of fooling polygraphs, provided reasonable cause for CCO Johnson to believe Hendron had violated his affirmative conditions by researching methods to fool the polygraph, and had likely done so to conceal additional violations. 04/12/2019 RP 58-59, 66-69;06/14/2019 118. *See Massey*, 81 Wn. App. at 200; *Cornwell*, 190 Wn. 2d at 306. A search of a device Hendron could use to research countermeasures was permissible

under these circumstances. *Cornwell*, 190 Wn. 2d at 306. CCO Johnson also had reasonable suspicion Hendron had violated conditions regarding contact with his son, other minors, and access to the internet based on his conduct during polygraph examinations where those specific questions and conditions were at issue. 04/12/2019 RP 18-20, 64-68.

Hendron argues for the first time on appeal that it is “debatable” whether CCO Johnson violated his Fifth and Sixth Amendment constitutional rights when she requested his cell phone password. Br. of Appellant at 14. It is not. RCW 9.94A.631 authorizes a search of an offender’s personal property when there is reasonable cause the offender has violated a condition or requirement of sentence. This Court has held in an unpublished opinion that DOC may search an offender’s cell phone pursuant to RCW 9.94A.631. *State v. Bell*, 8 Wn. App.2d 1016, 8, 2019 WL 1399882 (2019).¹ Evidence of violations on an offender’s phone may inform decisions about whether they are safe to remain in the community. *See Ramirez*, 140 Wn. App. at 292-93 (finding that Ramirez’s possession of pictures of nude women on his phone were additional risk factors that constituted violations of his SSOSA that supported SSOSA revocation).

¹ Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

Because Hendron was on community custody he was required to consent to the search. *State v. Rooney*, 190 Wn. App. 653, 659-60, 360 P.3d 913 (2015). His refusal to comply with that legally-authorized search is not a constitutionally-protected right. *See, e.g. State v. Baird*, 187 Wn.2d 210, 226, 386 P.3d 239 (2016) (evidence of refusal of breath test admissible as evidence of guilt where there is no constitutional right to refuse test). Furthermore, the Fifth Amendment does not apply to questions relevant to Hendron's conditions of community custody or evidence presented at a revocation hearing. *See State v. King*, 78 Wn. App. 391, 385, 897 P.2d 380 (1995) ("compelled incriminating statements may be used in revoking probation."); *see also In Re Ecklund*, 139 Wn.2d 166, 172, 985 P.2d 342 (1999); *Reina v. United States*, 364 U.S. 507, 513, 81 S.Ct. 260 (1960).

Hendron's CCO was not searching for evidence of crimes and requiring Hendron to incriminate himself but was rather carrying out an authorized search for evidence of violations of his conditions when she had reasonable cause that those violations had been committed. RCW 9.94A.631; *See State v. Powell*, 193 Wn. App. 112, 120, 370 P.3d 56 (2016); *King*, 78 Wn. App at 385. Hendron's refusal to let his CCO look through his phone when she was legally authorized to do so was akin to refusing access to his home or personal property. *Rooney*, 190 Wn. App. at 659-60.

Hendron's argument to the contrary fails. Hendron cites *State v. Sargent*, 111 Wn.2d 641, 762 P.2d 1127 (1988) and *State v. Willis*, 64 Wn. App. 634, 825 P.2d 357 (1992) to incorrectly assert that he was not required, under the Fifth and Sixth Amendments, to divulge passwords to his electronic devices upon CCO Johnson's request; he argues that under *In re Grand Jury Subpoena Deuces Tecum*, 670 F.3d 1335 (11th Cir. 2012) DOC's use of his password to "decryptify digital data" is sufficiently "testimonial" to invoke Fifth Amendment protections. Br. Of Appellant at 13-14. However, *Willis* and *Sargent* involved the interview of prisoners related to crimes they were suspected of committing or had committed and did not involve agreed upon SSOSA conditions and statutory authority to search. *Willis*, 64 Wn. App. at 636; *Sargent*, 111 Wn. 2d at 643. And *Subpoena Deuces Tecum* involved a witness producing the unencrypted contents of a hard drive of his own laptop to a grand jury; unlike Hendron, the witness had not yet been found guilty of a crime that bound him, by agreement, to conditions requiring his compliance. 670 F.3d at 1339-40.

Finally, Hendron was required to attend sex offender treatment ordered by the court. RCW 9.94A.670(5)(c). However, Mr. Dewaelsche opined that Hendron was not amenable to treatment, and therefore terminated his treatment. 06/14/2019 RP 154-55. SSOSA sentences are impossible for offenders not amenable to treatment. 06/14/2019 RP 154 –

55; *See Doe*, 190 Wn.2d at 196. Hendron incorrectly contends that Mr. Dewaelsche terminated his treatment just because of the polygraph violation; Mr. Dewaelsche had also determined that Hendron had not progressed in treatment because he was not able to change his thinking or gain insight on his perception of himself as a “victim of the system.” 06/14/2019 RP 145, 155, 168-69, 172. Finally, Hendron’s preoccupation with leaving the country was an ongoing concern and it posed a credible threat given his history of absconsion. 06/14/2019 RP 145, 155, 168-69, 172. Hendron’s treatment violations demonstrate he was unable to comply with the requirements of a SSOSA sentence.

The court, in its discretion, properly revoked Hendron’s SSOSA based on the overwhelming evidence that Hendron continually attempted to deceive and manipulate measures taken to monitor his compliance to his SSOSA:

[A]fter listening to all the testimony...after I review my notes, I simply do not believe that Mr. Hendron is going to be successful or be able to sufficiently comply or complete the SSOSA sentence.... So, the treatment termination, the failure to comply with the polygraph, the failure to turn over the cell phone password, the totality of all of these things lead me to revoke the SSOSA that was given to Mr. Hendron.

07/26/2019 RP 281-82. The court found reasonable cause to believe the terms of the SSOSA were violated based on the totality of the circumstances

indicating Hendron was unable to comply with the requirements of a SSOSA sentence. *See, e.g. Ramirez*, 140 Wn. App. at 290.

The court rejected Hendron's explanation that a lack of medication was responsible for his polygraph violations, explaining that "[t]he violations that we've been discussing today are more than just happenstance. I want to say that I do not believe that missing one day of antianxiety medication, or antidepressant, would lead to the type of reaction that Hendron purportedly had during the polygraph exam." 07/26/2019 RP 282. The court also rejected Hendon's contention that CCO Johnson failed to read Hendron's affirmative conditions to Hendron by saying, "it was not Officer Johnson's responsibility to go over all of the terms of the SSOSA again with Mr. Hendron. He's had those terms gone over with him numerous times since 2009." 07/26/2019 RP 272, 282.

That Hendron so blatantly disregarded the "gift" of his second chance at a SSOSA was not lost on the court: "Mr. Hendron was given what I always call a gift during sentencing, the gift of the SSOSA. On July 30th of 2009, a bench warrant issued because he fled the country and he remained out of reach of authorities until the fall of 2016." 07/26/2019 RP 280. The court elaborated that Hendron "went on with his life...he fell in love. He had a child. He had a job." 07/26/2019 RP 280. And the court contemplated, "I'm sure that even Mr. Hendron was surprised at that luck and generosity

of the Court” when his SSOSA resumed upon his extradition from Mexico, and that “[o]ne would expect, given this extraordinary set of circumstances, that Mr. Hendron would have been hypervigilant in complying with the terms of a SSOSA, but it appears that as time went on Mr. Hendron has grown a bit complacent.” 07/26/2019 RP 281.

The record overwhelmingly reflects that Hendron abused the second chance of his restored SSOSA after absconding to Mexico where he blatantly ignored his court-ordered obligations for roughly seven years. The evidence produced at the revocation hearing demonstrated that Hendron was unable to adhere to his SSOSA conditions. The trial court properly exercised its discretion in revoking Hendron’s SSOSA, and this Court should affirm the revocation.

B. This case should be remanded for the trial court to consider on the record whether less restrictive alternatives exist for allowing Hendron contact with his son, and to reasonably tailor any conditions in the interest of protecting Hendron’s son and other minors.

“The due process clause of the Fourteenth Amendment protects a parent’s right to the custody, care, and companionship of [his or] her children.” *Matter of Dependency of W.W.S.*, ___ Wn. App. ___, 460 P.3d 651, 659 (2020), (quoting *In re Welfare of Key*, 119 Wash.2d 600, 609, 836 P.2d 200 (1992)). A parent’s liberty and privacy interest in the care and custody of their children is fundamental. *In re Welfare of R.H.*, 176 Wn.

App. 419, 425, 309 P.3d 620 (2013). That fundamental right cannot be abridged without due process of law, and appellate courts review an alleged deprivation of due process de novo. *Dependency of W.W.S.*, 460 P.3d at 659.

The State may interfere in a parent-child relationship “if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens,” constitutional claims notwithstanding. *Flaggard v. Hocking*, ___ Wn. App. ___, 463 P.3d 775, 778 (2020). A crime-related prohibition that interferes with the fundamental right to parent must be “reasonably necessary to accomplish the essential needs of the State.” *State v. Letourneau*, 100 Wn. App. 424, 438, 997 P.2d 436 (2000) (finding that State hadn’t proven Letourneau was a risk to molest her own children and that her contact with them was better determined by family court). And, a trial court must consider on the record whether there are less restrictive alternatives when interfering with the fundamental right to parent even where the condition serves a compelling state interest. *State v. DeLeon*, 11 Wn. App.2d 837, 840-41, 456 P.3d 405 (2020).

Specifically, “[p]revention of harm to children is a compelling state interest, and the State does have an obligation to intervene and protect a child when a parent’s actions or decisions seriously conflict with the physical or mental health of the child.” *DeLeon*, 11 Wn. App.2d at 841 (quoting *State v. Ancira*, 107 Wn. App. 650, 653-54, 27 P.3d 1246 (2001)).

Therefore, a court may impose a condition infringing upon the fundamental right to parent if the condition is reasonably necessary to prevent harm to a child. *DeLeon*, 11 Wn. App.2d at 841.

1. Tailored restrictions upon Hendron’s contact with his minor son are reasonably necessary to serve the State’s compelling interest in preventing harm to children when Hendron abused a child with whom he lived.

Washington courts have upheld restrictions upon the rights of parents accused of sex offenses when they have used a position of trust to abuse a child with whom they lived, committed abuse that was not gender specific, or at some point cared for a child that they abused. *See State v. Corbett*, 158 Wn. App. 576, 242 P.3d 52 (2010); *State v. Berg*, 147 Wn. App. 927, 198 P.3d 527 (1998). Restrictions upon Hendron’s contact with his son are necessary to achieve the State’s compelling interest in preventing harm to children, given that Hendron abused a child with whom he lived.

The court may restrict parental contact with biological children who are not the same age or gender as the victim when the nature of the offense is not gender specific and the perpetrator abused his position of trust while caring for children. *Corbett*, 158 Wn. App. at 598-601. In *Corbett*, the defendant engaged in oral sex with his six-year-old stepdaughter while he held a position of trust as her stepfather. *Id.* at 599. The court held that restrictions upon his contact with all of his children were reasonable because he committed the abuse while his three-year old stepson was in the home,

because the method of abuse was not gender specific, and because his victim was someone that Corbett parented. *Id.* Here, Hendron clearly exploited his position of trust when left alone with C.R., a minor who likely viewed him as a responsible adult. Accordingly, Hendron's inability to make responsible decisions regarding minors in his care extends to his parental relationship with his minor son.

Courts have also upheld restrictions on a parent's contact with his biological children when to the offender previously groomed and sexually abused a child in his care. *See Berg*, 147 Wn. App. at 943-944. In *Berg*, the court held that restricting Berg's contact with his two-year-old daughter was reasonable when he was convicted of molesting a 14-year-old girl in his care because Berg was able to groom her for abuse, and the court feared the same fate would come of his young daughter. *Berg*, 147 Wn. App. at 943-44.

Here, though Hendron was not C.R.'s parent, he lived with her as a trusted adult and exploited that relationship when he groomed her for abuse by telling her he loved her and that they should run away together. CP 124-25. The facts of his case indicate Hendron does not appreciate appropriate adult/child boundaries for minors to whom he is a trusted adult. His continued regard of himself as a "victim of the system" gives concern that he lacks insight into his prior behavior of sexually exploiting children in his

care. Conditions to monitor contact with his son are reasonable to prevent his son or other children from becoming victims of Hendron's poor judgment and inappropriate behavior around minors.

2. This Court should remand so the trial court can consider on the record whether there are less restrictive alternatives to achieve the State's compelling interest in protecting Hendron's son and other minors.

This Court should remand so the trial court can consider, on the record, whether less restrictive alternatives exist to accomplish the interest of the State of protecting Hendron's son and other minors. A trial court must consider on the record whether there are less restrictive alternatives when imposing conditions that impinge on fundamental rights even where the condition serves a compelling state interest. *DeLeon*, 11 Wn. App. 2d at 840-41.

In *DeLeon*, the trial court granted the State's request that DeLeon have no contact with his own biological children when he was convicted of molesting and raping his former stepchildren. *DeLeon*, 11 Wn. App.2d at 839-840. The trial court prohibited contact with all minors because of the defendant's "danger...to society." *Id.* at 839. However, the court did not consider whether the restriction was reasonably necessary and whether there were less restrictive alternatives to a total prohibition on contact given DeLeon's fundamental right to parent. *Id.* The appellate court noted that "[w]hile it may be possible that such alternatives do not exist, the trial court

must consider this issue on the record.” *Id.* at 841; *See also State v. Warren*, 165 Wn. 2d 17, 195 P.3d 940 (2008).

This case must be remanded so the trial court can put on the record its analysis regarding any conditions impacting Hendron’s right to parent. *See Deleon*, 11 Wn. App. 2d at 841. The record must include analysis of whether the restrictions are reasonably necessary to accomplish the State’s interest in protecting minors based on Hendron’s specific offense and his offender pathology. *Id.*; *Letourneau*, 100 Wn. App. at 439. Finally, the record must include consideration of whether the condition must be crafted to allow modification based on the age of his child or DOC’s later determination once Hendron is released from custody. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377, 229 P.3d 686 (2010) (finding that “the interplay between the sentencing conditions and fundamental rights is delicate and fact-specific, not lending itself to broad statements or bright line rules”); *see also State v. Petterson*, 198 Wn. App. 673, 681, 394 P.3d 385 (2017) and *State v. Wandell*, 175 Wn. App. 447, 451, 311 P.3d 28 (2013). Here, similar to the trial court in *DeLeon*, the trial court did not address on the record the impact of its order on Hendron’s constitutional right to parent and whether there are less restrictive alternatives.

The record suggests that the trial court may have intended to limit the conditions on contact with Hendron’s son to his time in prison based on

the exchange between the court, defense counsel, and the State. 07/26/2019 RP 285. The condition regarding the child's mother was presumably based on the reasonable desire that she be informed of the nature of his offenses to make safety choices and on a practical level facilitate contact from Mexico. 07/26/2019 RP 285-86, 289-90. However, the court must explicitly state these reasons on the record and consider whether some details are best determined by a family court. *DeLeon*, 11 Wn. App. 2d at 841; *Letourneau*, 100 Wn. App. at 439; *see also State v. McGuire*, 12 Wn. App. 2d 88, 456 P.3d 1993 (2020). This Court should remand the case for the limited purposes of allowing the trial court to consider all of these factors to craft appropriate limitations on Hendron's contact with his son while accommodating the State's interest in protecting minors, and for the trial court to make these considerations on the record as required under *DeLeon*.

V. CONCLUSION

The court properly exercised its discretion in revoking Hendron's SSOSA based on the evidence of Hendron's multiple SSOSA violations, but it did not consider on the record whether there are less restrictive alternatives for contact between Hendron and his son that still protect children. Accordingly, this Court should affirm the revocation of Hendron's SSOSA, and it should grant limited remand for the purpose of determining on the record if less restrictive alternatives exist to allow Hendron contact

with his son and to reasonably tailor conditions of contact to achieve the State's interest in protecting Hendron's son and other children.

RESPECTFULLY SUBMITTED this 17th day of July, 2020.

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

7-17-20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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