

No. 29173-1-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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In re:

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

ROBERT ALAN STRENGE,  
Defendant/Appellant.

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BRIEF OF APPELLANT ROBERT ALAN STRENGE

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Camerina B. Zorrozua, WSBA 36249  
Attorney for Appellant

Maxey Law Offices, P.S.  
1835 W. Broadway Ave.  
Spokane, WA 99201  
(509) 326-0338

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**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR.....1  
B. STATEMENT OF THE CASE.....2  
C. STANDARD OF REVIEW.....24  
D. ARGUMENT.....25  
E. CONCLUSION.....39

**TABLE OF AUTHORITIES**

**Table of Cases**

*Bishop v. Miche*, 137 Wash.2d 518,  
973 P.2d 465 (1999).....31

*Hill v. United States*, 368 U.S. 424, 82 S. Ct.  
468,  
7 L.Ed.2d 417 (1962).....29

*In re Pers. Restraint of Echeverria*, 141 Wash.2d  
323,  
6 P.3d 573 (2000).....29

*State v. Adamy*, 151 Wash.App. 583,  
213 P.3d 627 (2009) ..... 27, 28, 35

*State v. Armendariz*, 160 Wash.2d 106,  
156 P.3d 201 (2007) .....24

*State v. Badger*, 64 Wash.App. 904,  
827 P.2d 318 (1992) .....24, 32, 33, 35

*State v. Canfield*, 120 Wash.App 729, 86 P.3d 806  
(2004), reversed on other grounds, 154 Wash.2d  
698,116 P.3d 391 2005) .....26, 29, 32

*State v. Dahl*, 139 Wash.2s 678,  
990 P.2d 396 (1999) .....33

*State v. Daniels*, 73 Wash.App. 734,  
871 P.2d 634 (1994) .....32

*State v. McFarland*, 127 Wash.2d 322,  
899 P.2d 1251 (1995) .....28

<i>State v. Neeley</i> , 113 Wash.App. 100, 52 P.3d 539 (2002) .....	31
<i>State v. Nelson</i> , 103 Wash.2d 760, 697 P.2d 579 (1985) .....	33
<i>State v. Partee</i> , 141 Wash.App. 355, 170 P.3d 60 (2007) .....	24, 31, 32, 35
<i>State v. Ramirez</i> , 140 Wash.App. 278, 165 P.3d 61 (2007) .....	24
<i>State v. Rohrich</i> , 149 Wash.2d 647, 71 P.3d 638 (2003) .....	24
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984).....	27

**Court Rules**

RAP 12.2.....	29, 35, 38
---------------	------------

**Statutes**

RCW 9.94A.500.....	25
RCW 9.94A.633.....	30, 31, 34, 35, 36
RCW 9.94A.670.....	30, 36
RCW 9A.44.076.....	2

## **A. ASSIGNMENTS OF ERROR**

1. The Superior Court of Spokane County, State of Washington, erred in refusing, at the end of presentation of all evidence in this case, to allow Mr. Strengé the opportunity for allocution. [RP 42]. Further, Mr. Strengé's attorney did not inform him of the right to allocution, or the requirement to invoke this right at sentencing to ask the court for leniency. Ineffective assistance of counsel resulted in denial of the right to allocution.

2. The Superior Court of Spokane County, State of Washington, erred by failing to acknowledge alternative dispositions for the violations of the suspended sentence, including imposition of up to 60 days jail time for each violation, suspending the remaining sentence for continuation of sex offender treatment with added conditions. [RP 29, 43-47]. Further, Mr. Strengé's attorney did not argue for sanctions under RCW 9.94A.633, as permitted under RCW 9.94A.670 (12), constituting ineffective assistance of counsel.

3. The Superior Court of Spokane County, State of Washington, abused its discretion by revoking the Special Sex Offender Sentencing Alternative in light of testimonial evidence that Robert Strengé was amenable to treatment and had not been in the program long enough to become appropriately involved in treatment. [RP 29-30].

## **B. STATEMENT OF THE CASE**

1. Factual and Procedural Background. The Information was filed on November 25, 2008, charging Robert Alan Strenge with Rape of a Child in the Second Degree under RCW 9A.44.076. [CP 1]. On September 15, 2009, Robert Alan Strenge pled guilty to Second Degree Rape of a Child and was sentenced by the Honorable Judge Michael Price, Department 5 of the Spokane County Superior Court in and for the State of Washington, on October 28, 2009, under the Special Sex Offender Sentencing Alternative. [CP 2-5]. Mr. Strenge was sentenced on Count 1 to a minimum term of 102 months to the statutory maximum, life. [CP 5]. The Court imposed 44 days, with credit for 44 days served, suspending the remaining sentence for life, "for completion of the special sex offender sentencing alternative." [CP 5]. Mr. Strenge was placed on Community Custody with the

Washington State Department of Corrections, and ordered to complete outpatient treatment with Sharon Hinze for five years. [CP 6]. Restitution and other statutory costs were also ordered in the amount of \$800.00. [CP 7].

The Court entered a lifetime No Contact provision within the judgment and sentence, protecting the victim Brittany Wenzel. [CP 8]. Mr. Streng satisfied the judgment on October 29, 2009. [CP 14]. On March 26, 2010 Community Corrections Officer (CCO) Lincoln Hathaway filed a Court-Notice of Violation alleging Mr. Streng had contact with Brittany Wenzel since on or about December 12, 2009. [CP15]. The report stated that Mr. Streng completed his intake with the Department of Corrections on November 9, 2009, and the conditions of his sentence were clearly spelled out for him, "including the condition forbidding contact with the victim Brittany

Wenzel for life." [CP 16].

Upon suspicion that Mr. Strenge had been in contact with the victim, Mr. Hathaway arranged a polygraph examination for Mr. Strenge. [CP 16]. The polygraph occurred on December 9, 2009, and Mr. Strenge did not pass this exam. [CP 16]. Thereafter, Mr. Strenge did not admit to any wrongdoing. [CP 16]. CCO's Jeannette Hibdon and Lincoln Hathaway met with Heidi Wenzel, the victim's mother, expressing their concerns. [CP 16]. Ms. Wenzel was not aware of any contact. [CP 17]. CCO's Hathaway and Hibdon spoke with Brittany Wenzel, who denied having any contact. [CP 17]. CCO's Hibdon and Hathaway, and Ms. Heidi Wenzel, all believed that Brittany Wenzel was concealing having contact with Mr. Strenge. [CP 17].

Mr. Strenge was placed on a more strict reporting schedule with additional conditions of

supervision. [CP 17]. A follow-up polygraph examination took place on December 30, 2009, and Mr. Strenge denied having contact with the victim. [CP 17]. Mr. Strenge passed this examination. [CP 17].

On February 9, 2010, Heidi Wenzel contacted CCO Hathaway, stating that Mr. Strenge had engaged in on-going contact with Brittany Wenzel over the past several months. [CP 17]. Ms. Wenzel reported that her daughter admitted to having contact with Mr. Strenge, as recently as that day at her school. [CP 17]. Ms. Wenzel had found call history on her daughter's cell phone, which included Mr. Strenge's number. [CP 17]. Brittany Wenzel placed six calls to Mr. Strenge between 1:33 pm on February 8, 2010, and 3:28 pm on February 9<sup>th</sup>. [CP 17]. CCO's Hibdon, Hathaway and Carpenter proceeded to Mr. Strenge's residence and took him into custody. [CP 18]. Upon a search

of the residence the officers seized a phone bill, a letter, and Mr. Strenge's cell phone. [CP 18]. While en route to the jail, CCO Hathaway informed Mr. Strenge that he would be recommending revocation of the SSOSA sentence. [CP 18]. Mr. Strenge then admitted to having contact with the victim for the last 3 months, 3-4 times per week. [CP 18]. Mr. Strenge denied having face-to-face contact with the Brittany Wenzel more than one time. [CP 18]. This occurred after she requested Spokane Chiefs hockey tickets and he brought them to her school on February 9, 2010 at approximately 11:00 am. [CP 18]. Mr. Strenge denied having any romantic feelings for the Brittany Wenzel. [CP 18]. On February 16, 2010, CCO's Hibdon and Hathaway interviewed Brittany Wenzel with Victim Advocate Darby Stewart. [CP 18]. Brittany Wenzel admitted that she initiated contact with Mr. Strenge, and that he responded to her contacts and requests. [CP

18]. Brittany Wenzel reported that contacts occurred between 2-3 times per day since approximately 6 weeks after Mr. Strenge was sentenced. [CP 18]. Brittany Wenzel denied having more than one face-to-face contact with Mr. Strenge and denied that any of their conversations were romantic in nature. [CP 19]. Brittany Wenzel admitted to calling Mr. Strenge on February 9, 2010, to ask for hockey tickets. [CP 19]. Mr. Strenge agreed to meet her at the bus pullout at Ferris High School during her lunch hour. [CP 19]. At 11:00 am Brittany Wenzel met Mr. Strenge and got into his vehicle. [CP 19]. They talked for 5 minutes, and no touching or kissing occurred. [CP 19]. Mr. Strenge gave her the hockey tickets. [CP 19]. Before leaving, Heidi Wenzel informed CCO Hathaway that Mr. Strenge called her home twice from the jail on February 9, 2010, and Brittany Wenzel answered both times. [CP 19].

In his report, CCO Hathaway recommended revocation of Mr. Strenge's suspended 102 month SSOSA sentence along with Mr. Strenge's incarceration. [CP 21]. The Court-Notice of Violation included a letter from the SSOSA treatment provider, Sharon Hinze. [CP 34]. Based upon the contacts between Mr. Strenge and the victim, denials of said contacts, and the February 2010 face-to-face contact, Ms. Hinze found it evident that Mr. Strenge is not amenable to treatment. [CP 34]. Ms. Hinze wrote that Mr. Strenge was not being truthful to her, as he denied having telephone contact, but later disclosed to CCO Hathaway that telephone contact did occur. [CP 34]. Ms. Hinze wrote that it was her opinion that contact did not occur during the three weeks between the two polygraph examinations. [CP 35]. In light of the information provided through CCO Hathaway, Ms. Hinze declined to provide Mr. Strenge with sex

offender treatment any further, believing he is not amenable to treatment and is unwilling to follow his treatment or supervision rules, putting the victim at risk for further damage. [CP 35].

On March 30, 2010, the State of Washington filed a Petition for Order Modifying Sentence/Revoking Sentence/Confining Defendant. [CP 36]. The Petition asserted that Mr. Strenge failed to comply with the requirements and conditions of sentence, pursuant to the report of CCO Hathaway dated March 23, 2010, and filed with the Court on March 26, 2010. [CP 36].

A hearing on the Petition to Revoke SSOSA commenced on June 3, 2010. [RP 1].

a. Stipulation to Violation.

At the hearing Mr. Strenge stipulated to a violation of supervision, having telephone

contacts with Brittany Wenzel and one face-to-face contact as reflected above. [RP 4]. The parties proceeded to disposition and calling of witnesses. [RP 4].

b. Testimony of Lincoln Hathaway, Community Corrections Officer.

Officer Hathaway testified that he has worked for the State of Washington since 2001, and that he worked in corrections and probation, supervising sex offenders, since 1998. [RP 6]. Officer Hathaway stated that he supervised Mr. Strenge since his conviction in 2009 until he was arrested in February 2010. [RP 6]. Officer Hathaway met with Mr. Strenge on a weekly basis initially, which became every other week until problems arose in December 2009. [RP 7]. Mr. Strenge went back to weekly reporting, and additional conditions were imposed. [RP 7]. Officer Hathaway testified that he does not

believe Mr. Strenge should be maintained in the community, despite a letter provided by Ed Averett that Mr. Strenge could benefit from sex offender treatment, and Mr. Averett was willing to provide said treatment. [RP 7, CP 61-63].

On cross-examination CCO Hathaway described statements from Brittany Wenzel regarding the face-to-face contact with Mr. Strenge at Ferris High School, which lasted "about five minutes sitting in his car." [RP 11]. There was no specific information provided with respect to any physical sexual contact between Mr. Strenge and Brittany Wenzel. [RP 11]. CCO Hathaway testified that he would continue to be Mr. Strenge's CCO if Mr. Strenge remained on community custody and received treatment from another provider. [RP 11]. If Mr. Strenge did return to community custody, CCO would have "daily" contact with him. [RP 12].

On redirect examination CCO Hathaway stated that the face-to-face contact was verified from three sources, Mr. Strenge, Brittany Wenzel, and Heidi Wenzel. [RP 12]. The contact occurred at Ferris High School at 11:00 am during the victim's lunch break after she contacted Mr. Strenge and requested that he bring her hockey tickets. [RP 12]. Mr. Strenge did bring the hockey tickets. [RP 12]. They sat in Mr. Strenge's car and talked for five minutes, then Brittany Wenzel got out of the car and went back to school. [RP 12-13]. In CCO Hathaway's opinion this contact included classic grooming techniques and Mr. Strenge was "clearly back in cycle." [RP 13].

c. Testimony of Sharon Hinze, Sex Offender Treatment Provider.

On direct examination Sharon Hinze testified that she is a certified sex offender treatment

provider and a licensed mental health counselor. [RP 15]. Ms. Hinze began working in sex offender treatment in 1991, went into private practice in 1997, and was certified in 1999. [RP 15]. Ms. Hinze became an affiliate by completing 50 hours of continuing education credits in the field, and was supervised by a fully credited provider for six years. [RP 15]. Ms. Hinze completes a minimum of 40 hours of continuing education ever two years, 30 of which are sex offender specific. [RP 15].

Ms. Hinze testified that she worked with Mr. Strenge for two months before his judgment and sentencing, and three months after he received a SSOSA sentence. [RP 16]. Normally Ms. Hinze would not recommend revocation so early in treatment, after three months, but Mr. Strenge had been in treatment for five months. [RP 16]. Ms. Hinze stated that Mr. Strenge provided her with five

months worth of reports that did not reflect any contact or potential contact or avoiding of contact with his victim. [RP 16].

Ms. Hinze had severe questions about amenability in light of the amount of contact Mr. Strenge admitted to having to CCO Hathaway in such a short time of being in treatment. [RP 16-17]. When Ms. Hinze went to the jail to discuss the matter with Mr. Strenge, he only admitted to one phone contact and the face-to-face contact, denying the other contacts that had previously been admitted to CCO Hathaway. [RP 17]. Ms. Hinze explained that the first two months of treatment were about "open, honest disclosure," if he could be found amenable to treatment. [RP 17]. Ms. Hinze felt that Mr. Strenge knew what was expected in treatment. [RP 17]. Ms. Hinze recommended revocation because she believes that Mr. Strenge is not amenable to treatment. [RP

17].

Ms. Hinze had reviewed the report provided by Ed Averett. [RP 18]. Ms. Hinze has reservations with this report, as Mr. Averett made no effort to contact her until the morning before. [RP 18]. If she had done an evaluation, she would may every attempt to make contact with a prior therapist. [RP 19]. Ms. Hinze testified that she would not treat Mr. Strenge any longer and does not believe his is amenable to treatment. [RP 19].

On cross-examination Ms. Hinze acknowledged that she believed Mr. Strenge might be amenable to treatment and should be given a chance at SSOSA in March 2009. [RP 20]. Ms. Hinze stated that Mr. Strenge initially made progress in treatment, but multiple contacts with the victim represents a lack of progress. [RP 20]. Ms. Hinze recognized that treatment is a process. [RP 20-21]. Upon review of her letter to Dr. Wert, Ms. Hinze

stated that Mr. Strenge experienced some shame with regard to the charge because he had been a social worker. [RP 21-22]. The letter stated that Ms. Hinze had been treating Mr. Strenge for six weeks at the time it was prepared for Dr. Wert. [RP 22]. Based upon those six-weeks of contact, Ms. Hinze suggested that Mr. Strenge should be given a chance at SSOSA. [RP 22-23]. Ms. Hinze stated she "might agree" that early in treatment some clients may still have impulse control issues to address, but did not agree that it would include contact with the victim. [CP 23]. Ms. Hinze did not believe Mr. Strenge could be treated successfully, which is why she refused to continue treating him. [CP 23]. Ms. Hinze left it up to the Court to decide whether another provider treated Mr. Strenge. [CP 23].

On redirect examination Ms. Hinze opined that Mr. Strenge's behavior is the "continuation of a

pattern he's had for years." [RP 24].

d. Other Witnesses.

Heidi Dyer (Wenzel) and Brittany Wenzel did not appear. [RP 25].

e. Testimony of Edward Averett.

On direct examination, Edward Averett testified that he is a self-employed certified sex offender treatment provider. [RP 27]. Mr. Averett stated that he had been certified since 1991. [RP 27]. Mr. Averett had met with Mr. Strenge and reviewed the original evaluation done by Dr. Wert, the violation report, and the letter from Sharon Hinze terminating Mr. Strenge from treatment. [RP 28]. Mr. Averett attempted to contact Ms. Hinze prior to the hearing. [RP 28].

Mr. Averett completed a report dated May 3, 2010. [RP 28, CP 61-64]. Mr. Averett stated that Mr.

Strenge had violated the conditions of his probation, and he should be punished for that violation. [RP 29]. Mr. Averett found that he would be willing to accept Mr. Strenge into treatment despite the violation. [RP 29]. Mr. Averett would recommend that Mr. Strenge not have a cell phone or any other device to make it easier to contact him. [RP 29]. Mr. Averett agreed that "sex offender treatment is a prolonged process," and it takes time to get results. [RP 29]. Mr. Averett agreed that it would take more than a few months to get appropriately involved in a sex offender treatment program. [RP 30].

On cross-examination Mr. Averett acknowledged that he did not attempt to contact Ms. Hinze or CCO Hathaway prior to preparing his report. [RP 30]. Mr. Averett stated that he met with Mr. Strenge in the jail, and Mr. Strenge disclosed

having one face-to-face contact with the victim, Brittany Wenzel, and talked to her about once per week. [RP 31]. Mr. Averett was aware that this disclosure was inconsistent with what was reported by Mr. Strenge to CCO Hathaway. [RP 31]. The extent of contact was not particularly relevant in the decision of whether Mr. Strenge needs further treatment, but is evidence that Mr. Strenge needs to be treated. [RP 32]. Mr. Averett felt it was possible Mr. Strenge minimized the contact, which would be consistent with his psychological profile. [RP 32]. Mr. Averett trusted Mr. Strenge not to contact Brittany Wenzel again, asking that Mr. Strenge be given another change to be in the community. [RP 33].

On redirect Mr. Averett stated that he attempted to contact Ms. Hinze the day before the hearing, and at that time she had already terminated Mr. Strenge from treatment. [RP 36]. Despite

minimization by Mr. Strenge, Mr. Averett agreed to treat him. [RP 36].

f. Closing Argument for the State of Washington.

On behalf of the State of Washington, Deputy Prosecutor Ed Hay asked the Court to revoke SSOSA based upon Mr. Strenge's failure to abide by the No Contact Order and evidence that he will continue to contact Brittany Wenzel. [RP 38].

g. Closing Argument for Robert Strenge.

On behalf of Robert Strenge, Attorney Richard Bechtolt argued that a treatment alternative is available for Mr. Strenge, and revocation is premature. [RP 39-40]. Mr. Bechtolt asked the Court to reinstate the SSOSA sentence to allow Mr. Strenge to have the opportunity to be treated by Ed Averett with additional safeguards for the community. [RP 41].

h. Robert Strenge's Stipulation to the Facts.

Judge Price asked Mr. Strenge if he was stipulating to the facts, and Mr. Strenge indicated that he was. [RP 42]. The Court found that there was a clear stipulation by Mr. Strenge. [RP 42].

i. Allocution.

No opportunity was given for allocution prior to sentencing. Mr. Strenge's attorney never instructed him of his right to allocution, nor did he inform Mr. Strenge that he needed to assert that right in order to ask the court for leniency with regard to sentencing.

j. Court's Decision.

Having reviewed the file, reports, testimony of witnesses, and argument of counsel, the Court recognized that the question to be decided is

whether Mr. Strenge should be permitted to return to SSOSA-offered treatment on community supervision, or whether SSOSA should be revoked and Mr. Strenge be incarcerated. [RP 44]. The Court recognized that it is not unusual to hear of violations for SSOSA offenders, but it is unusual to have such a significant violation so close to the original judgment and sentence date. [RP 44-45].

The Court found that Mr. Strenge was employing "classic grooming techniques" in having contact with the victim, causing grave concern for the Court. [RP 46]. The Court found that Mr. Strenge was fully advised at judgment and sentencing that violation of SSOSA could result in being returned to prison. [RP 46]. The Court found that Mr. Strenge would violate the SSOSA if given the opportunity to complete treatment in the community, thus revoking his SSOSA sentence. [RP

46-47].

Mr. Strenge was directed to serve the balance of his sentence in custody, 102 months with credit for any time served. [RP 47]. Mr. Strenge was placed on Community Custody for the maximum term that he is not in custody. [RP 47]. The Court signed Order Revoking Sentence/Order of Confinement/Warrant of Confinement on June 3, 2010. [CP 65-68].

k. Notice of Appeal.

On June 24, 2010, Robert Strenge filed a Notice of Appeal with the Spokane County Superior Court. [CP 73]. This appeal was also filed with the Court of Appeals, Division III of the State of Washington on that date and served upon the Spokane County Prosecutor's Office. [CP 73].

### C. STANDARD OF REVIEW

A trial court's decision to revoke a SSOSA suspended sentence is reviewed for abuse of discretion. *State v. Partee*, 141 Wash.App. 355, 361, 170 P.3d 60 (2007) (citing *State v. Badger*, 64 Wash.App. 904, 908, 827 P.2d 318 (1992)). "A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds." *Partee*, 141 Wash.App. at 361 (citing *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003)).

Statutory interpretation issues are reviewed de novo. See *State v. Ramirez*, 140 Wash.App. 278, 290, 165 P.3d 61 (2007) (citing *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007)). If a statute is unambiguous it "will be enforced in accordance with its plain meaning." *Ramirez*, 140 Wash.App. at 290, 165 P.3d 61 (quoting *Armendariz*, 160 Wash.2d at 110, 156 P.3d

201).

#### D. ARGUMENT

1. The Superior Court of Spokane County, State of Washington, erred in refusing, at the end of presentation of all evidence in this case, to allow Mr. Strenge the opportunity for allocution, and the failure of his attorney to inform him of this right and the affirmative duty to exercise it constitutes ineffective assistance of counsel. [RP 42]. [Issue No. 1].

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, *the offender*, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed. (Italics added) RCW 9.94A.500 (1).

The right to address the sentencing court has

been extended to revocation hearings. “[I]n the context of a revocation hearing, the defendant must be allowed to allocute if he so chooses.” *State v. Canfield*, 154 Wash.2d 698, 706, 116 P.3d 391 (2005).

The sentencing court did not afford Mr. Strenge the opportunity to be heard with regard to leniency or mitigating factors. Rather, the court sought affirmation of the stipulation to a violation of the conditions of Mr. Strenge’s sentence, and left it at that. [RP 42].

“[A] defendant must give the court some indication of his wish to plead for mercy or offer a statement in mitigation of his sentence.” *Canfield*, 154 Wash.2d at 707, 116 P.3d 391. In this case, Mr. Strenge did not affirmatively assert his right to allocution at sentencing. Indeed, Mr. Strenge was not aware of this right, nor was he aware of the duty to inform the court

that he wished to make a statement. Richard Bechtolt, Mr. Strenge's attorney, failed to instruct Mr. Strenge of the right to allocution, and further failed to inform Mr. Strenge that he must exercise that right. Had Mr. Strenge been aware of the right, he could have argued for leniency, and/or informed the court of his remorse, and/or commit himself to abide by additional conditions of release and a more stringent treatment plan with Edward Averett. Counsel's failure to inform Mr. Strenge of the right and duty of allocution constitutes ineffective assistance of counsel.

To show ineffective assistance from counsel, one must show that "(1) defense counsel was deficient and (2) that counsel's deficient performance prejudiced the defense." *State v. Adamy*, 151 Wash.App. 583, 588, 213 P.3d 627 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104

S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wash.2d 322, 334-45, 899 P.2d 1251 (1995)). Performance is deficient where, "there is a reasonable probability that but for counsel's unprofessional errors, the proceeding's results would have been different." *Adamy*, 151 Wash.App. at 588, 213 P.3d 627 (citing *McFarland*, 127 Wash.2d at 335, 899 P.2d 1251)). There is a presumption in favor of reasonableness, which must be overcome. *Id.*

In this case Mr. Strenge did not have the opportunity to address the court with regard to sentencing. He had no opportunity to convey remorse, to ask for leniency, to argue mitigating factors, or to pledge to continue with a more stringent treatment plan that included additional conditions and closer monitoring by Edward Averett. It is unreasonable to withhold information from a defendant that affects his

rights and liberty interests. Allocution is a "procedural due process right," which grants a defendant the opportunity to be heard. See *Canfield* at 706-07 (citing *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962); *In re Pers. Restraint of Echeverria*, 141 Wash.2d 323, 332, 6 P.3d 573 (2000)). Undoubtedly giving up one's right to allocution before sentencing will prejudice their defense. Arguably, had Mr. Strenge invoked his right to address the court to offer statements reflected above, the outcome would have been different. As such, revocation of the SSOSA sentence is subject to reversal under RAP 12.2.

2. The Superior Court of Spokane County, State of Washington, failed to acknowledge alternative dispositions for the violations of the suspended sentence, including imposition of up to 60 days jail

time for each violation, suspending the remaining sentence for continuation of sex offender treatment with added conditions, and counsel's failure to argue for sanctions under RCW 9.94A.633, as permitted under RCW 9.94A.670 (12), constitutes ineffective assistance of counsel. [Issue No. 2].

Under RCW 9.94A.670 (10), sanctions under RCW 9.94A.633 (1) are an alternative to revocation. "An offender who violates any condition or requirement of a sentence may be sanctioned for up to sixty days confinement for each violation." RCW 9.94A.633 (1) (a). "Nothing in this subsection is intended to limit the power of the sentencing court to respond to a probationer's violation of conditions." RCW 9.94A.633 (3). Thus, the sentencing court had the ability to sanction Mr. Strenge with 60 days confinement,

and maintain SSOSA treatment and the suspended sentence.

The sentencing judge summarized the question to be decided as "whether Mr. Strenge should be permitted to return to SSOSA-offered treatment while in the community... or whether SSOSA should be revoked and Mr. Strenge should be incarcerated." [RP 44]. This fails to acknowledge the available sanctions under RCW 9.94A.633 (1). "Whether a trial court has discretion to impose probation sanctions in lieu of revoking SSOSA is a question of law, which we review de novo." *Partee*, 141 Wash.App. at 362, 170 P.3d 60 (citing *Bishop v. Miche*, 137 Wash.2d 518, 523, 973 P.2d 465 (1999); *State v. Neeley*, 113 Wash.App. 100, 106, 52 P.3d 539 (2002)). Further, "it may be an abuse of discretion where, in selecting one particular sentencing option, the court erroneously believes that its alternatives

are limited such that it fails to consider other legally available options." *Id.* at 361-362 (citing *Badger*, 64 Wash.App. at 910, 827 P.2d 318). "Division Three...has consistently held that sentencing judges have discretion to sanction violation of a SSOSA condition either as a probation violation or by revoking the SSOSA." *Id.* at 362 (citing *Badger* at 910; *State v. Daniels*, 73 Wash.App. 734, 736-37, 871 P.2d 634 (1994); *Canfield*, 120 Wash.App. at 733, *reversed on other grounds*, 154 Wash.2d 698, 116 P.3d 391 (2005)).

Here the trial court failed to acknowledge the "probation violation" sanction, discussing the options as either allowing Mr. Streng to remain in the community on SSOSA, or to be incarcerated pursuant to the original Judgment and Sentence on revocation of SSOSA. This was an abuse of discretion.

“SSOSA provides that a sentencing court may suspend the sentence of a first time sexual offender if the offender is shown to be amenable to treatment.” *State v. Dahl*, 139 Wash.2d 678, 682, 990 P.2d 396 (1999). “An offender facing revocation of a suspended sentence has only minimal due process rights.” *Dahl*, 139 Wash.2d at 683, 990 P.2d 396 (citing *State v. Nelson*, 103 Wash.2d 760, 763, 697 P.2d 579 (1985)). “Sexual offenders who face SSOSA revocation are entitled the same minimal due process rights as those afforded during the revocation of probation or parole.” *Id.* (citing *Badger*, *supra*). “Due process requires that judges articulate the factual basis of the decision.” *Id.* at 689 (citing *Nelson*, 103 Wash.2d at 767, 697 P.2d 579).

The trial court failed to make any findings with regard to denial of alternative sanctions for the violations. In fact, the trial court essentially ignored the possibility of ordering any sanctions

short of revocation of SSOSA. As reflected in the court's oral ruling, the only options discussed were allowing Mr. Strenge to continue treatment in the community or that he serve out the entire suspended sentence. There are thus inadequate findings to discern that the court had in mind any alternative sanctions.

Furthermore, counsel for Mr. Strenge did not argue that Mr. Strenge could or should have been sanctioned for a probation violation under RCW 9.94A.633 (1) (a). Counsel's assistance was thus ineffective. If Mr. Bechtolt would have referenced the probation sanction statute, arguably, the court would have been aware of this sentencing option and had the opportunity to *both* incarcerate Mr. Strenge for the violation *and* order that he continue sex offender treatment under the direction of Edward Averett, with additional conditions. Thus, the court's erroneous belief that it could only impose *one* of

these sanctions affected its decision. Counsel was deficient, and the deficiency prejudiced the defense. See *Adamy*, supra.

It was unreasonable for counsel to omit argument for RCW 9.94A.633 (1) (a) sanctions in lieu of complete SSOSA revocation. As such, the matter should be remanded to the trial court based upon ineffective assistance of counsel, and the reasons set forth in *Partee* and *Badger*, supra. Further, the revocation should be reversed under RAP 12.2.

3. Contrary to the Court's decision revoking SSOSA, Mr. Strenge should have been ordered to continue sex offender treatment with Edward Averett and comply with additional conditions of his sentence, as he was found to be amenable to treatment and had little time or opportunity to become integrated into SSOSA treatment

before the revocation hearing. [Issue No. 3].

RCW 9.94A.670 (10) (a) provides that RCW 9.94A.633 sanctions may be imposed for violation of the SSOSA sentence, or referral may be made to the court for recommended revocation. Available sanctions include alternatives to confinement, work release, home detention, work crew, inpatient treatment, daily reporting, curfew, "or any other sanctions available in the community." RCW 9.94A.633 (1) (b). The court ignored these options.

In this case, Edward Averett testified that he would be willing to treat Mr. Strenge, finding that he was amenable to treatment. [RP 29]. Mr. Averett stated that he would provide or suggest additional appropriate conditions of treatment, including a restriction on devices such as cellular telephones, which make it easier for the

victim to contact Mr. Strenge. [RP 29].

Mr. Averett testified that it would take more than a few months before an offender is appropriately involved in a sex offender treatment program. [RP 30]. Sharon Hinze agreed that early in treatment some clients may still have impulse control issues, but did not agree that contact with the victim would be included. Nevertheless, Ms. Hinze did not object to another provider treating Mr. Strenge. [RP 23].

Likewise, the court acknowledged that, "it's not particularly unusual to hear a violation suggestion as to an individual that's in SSOSA." [RP 44]. The court also acknowledged that offenders typically have relapse issues. [See RP 45]. The court could not find the violation "benign" since it involved direct contact with the victim. [See *Id.*] However, most of the contacts were initiated by the victim via

cellular telephone, only one contact was face-to-face, and there was no allegation of physical or sexual contact whatsoever.

The evidence established that it is not uncommon for offenders to have relapse and impulse control issues in the early stages of their treatment.

The evidence also established that at least one provider felt that Mr. Strenge was amenable to treatment. Further, this provider, Edward Averett, was comfortable providing sex offender treatment to Mr. Strenge. Mr. Averett would impose additional conditions, including a restraint on cellular telephone use.

As such, the evidence established that there were available alternative sanctions short of revocation of the SSOSA sentence. It was an abuse of discretion for the trial court to revoke SSOSA in light of the alternative options for disposition. Under RAP 12.2, the revocation of

SSOSA should be reversed and/or modified.

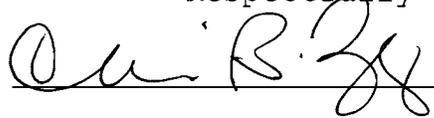
#### **E. CONCLUSION**

Based upon the foregoing points and authorities, the appellant, Robert Alan Strenge, respectfully requests that the order revoking his suspended sentence in this matter be reversed, and SSOSA reinstated, on the basis that the trial court abused its discretion by failing to recognize the option of sanctions, including up to sixty days incarceration for each violation, under the probation statute cited herein. Furthermore, appellant asks for relief based upon the ineffective assistance of his counsel, by his failure to argue for probationary sanctions, and by not advising Mr. Strenge of his right and obligation to allocution. In any event, appellant further requests that this matter be remanded to the Superior Court of Spokane County, State of Washington, for a full hearing on the State's motion to revoke SSOSA, and for written findings

regarding the availability of alternative sanctions and amenability to treatment with additional conditions.

DATED this 3<sup>rd</sup> day of December, 2010.

Respectfully submitted:



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Camerina B. Zorrozua, WSBA #36249

Attorney for Appellant,

ROBERT ALAN STRENGE