84940-4

NO. 37446-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID KOENIG,

Respondent,

v.

THURSTON COUNTY and the THURSTON COUNTY PROSECUTING ATTORNEY,

Petitioners.

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STATE OF WASHINGTON

BRIEF OF AMICI CURIAE, THE WASHINGTON DEFENDER ASSOCIATION and THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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A. ARGUMENT

1. WHETHER PROSECUTING ATTORNEYS' OFFICES ARE EXEMPT FROM PRA REQUESTS FOR DEFENSE MITIGATION MATERIALS IS A MATTER OF SUBSTANTIAL PUBLIC INTEREST BECAUSE THE RESOLUTION OF THIS ISSUE WILL IMPACT PLEA NEGOTIATIONS IN CRIMINAL CASES STATEWIDE.

The Koenig decision potentially reaches far beyond the disclosure of psychosexual evaluations provided to the prosecution in the hopes of obtaining a recommendation for the Special Sex Offender Sentencing Alternative (SSOSA). Koenig v. City of Des Moines, 158 Wn.2d 173, 185, 142 P.3d 162 (2006). Should this decision stand, potentially any material provided by the defense to the prosecution for negotiation purposes will be subject to Public Records Act requests. This can include psychiatric evaluations, medication records, psychological evaluations, counseling records, medical records, school records, military records, psychosexual evaluations provided in non-SSOSA sex cases, and any other records and information that the defense may provide to the prosecution in the hopes of receiving leniency from the prosecutor. These records may include information about not only the defendant but the defendant's family, friends, co-workers and others.

The outcome of this issue will determine the course of plea negotiations in potentially every prosecution in the State of Washington. Should defense counsel learn that any potentially private materials they provide to the prosecution in the hopes of achieving a more favorable recommendation could be made available to the public at large to review, they will be unwilling to provide such private information to the prosecution for review. Collateral witnesses will be unwilling to provide information to the parties for fear that their statements will become public. It will dramatically alter the course of plea negotiations statewide, and undoubtedly have a chilling effect on plea negotiations.

Washington courts have previously held that defense mitigation materials provided to the prosecution are not subject to PRA requests. In Cowles Publishing Co. v. Pierce County Prosecutor's Office, 111 Wn.App. 502, 42 P.3d 620 (2002), Division II ruled that the death penalty mitigation package provided by Robert Yates' attorneys to the Pierce County Prosecuting Attorney's Office were exempt from public disclosure laws. The Koenig decision potentially abrogates this decision. Review is necessary so that this Court can clarify that issue.

The Koenig case is critically important to the operation of our criminal justice system, and there can be no question that this is a matter of substantial public interest. This court should accept review to resolve this issue.

2. DISRUPTING THE USE OF THE SSOSA PROGRAM, WHICH REDUCES SEXUAL REOFFENDING, ENCOURAGES THE REPORTING OF SEXUAL ABUSE, AND SUCCESSFULLY REHABILITATES SEXUAL OFFENDERS, IS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

> ...[T]he availability of a treatment option encourages reporting, especially in cases where the offender is a family member. There is a great deal of anecdotal evidence that for many victims or their families, obtaining supervised treatment for the offender is the primary goal in reporting such crimes and cooperating with criminal prosecution.

"The Special Sex Offender Sentencing Alternative: A Study of Recidivism and Decision Making," Berliner et al. (Harborview Sexual Assault Center and Urban Policy Institute, at the request of the Washington State Institute for Public Policy, 1991), attached as Appendix A.

While SSOSA may be perceived as exclusively benefiting the defendant, nothing could be further from the truth. SSOSA reduces crime and encourages the reporting of sexual abuse. Thus, it is not merely criminal defendants who benefit from this program: it is the victims, prosecutors, law enforcement, and the community.

The Special Sex Offender Sentencing Alternative (SSOSA) has been in existence since the adoption of the Sentencing Reform Act in 1984. The efficacy of this program—resulting in reduced recidivism rates and encouraging the reporting of sexual abuse—has been well-documented by Washington social scientists. The above quote was taken from a 1991 study conducted jointly by researchers employed by the Harborview Sexual Assault Center and the Urban Policy Institute and prepared for the Washington State Institute for Public Policy (WSIPP).

WSIPP has conducted other studies recently evaluating the effectiveness of the SSOSA program, and in each study is a testament to the program's impact on reducing sexual reoffending. In the study titled "Sex Offender Sentencing in Washington State: Recidivism Rates," published in 2006 (and attached as Appendix B), the authors determined that out of 1097 offenders who received SSOSAs, only 4.7% went on to commit a new felony offense within a five-year follow-up period, and out of that fraction of offenses, only 1.4% of those felony offenses were sex offenses. A SSOSA sentence is thus an incredibly effective way of treating sex offenders and protecting the community from future acts of sexual violence.

There is no question that the SSOSA program reduces crime by providing for effective rehabilitation of sex offenders and reducing

incarceration costs. There is also no question that SSOSA benefits victims of sexual assault, as many sex offenses involve family members who are perpetrators, and many familial victims are extremely reluctant to report abuse when their family abuser could be sentenced to a prison term.

RCW 42.56.240 exempts the following investigative, law enforcement, and crime victim information from public disclosure:

> Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies...the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

RCW 42.56.240(1). The studies cited above provide ample proof that SSOSA is essential to effective law enforcement, from both the victim and defendant perspective. Because of the highly sensitive nature of the information contained in the psychosexual evaluation, ordering the prosecuting attorney's office to disclose a psychosexual evaluation received for the purposes of pursuing SSOSA will chill the use of this critical sentencing alternative.

First, a psychosexual evaluation is an examination of the most private and personal information. As described in petitioner's brief, a psychosexual evaluation contains the most intimate details of a person's sexual history, as well as information pertaining to sexual abuse that the defendant may have experienced, various sexual behaviors, psychiatric

diagnoses, participation in treatment, and a whole host of other highly sensitive, personal information about the defendant. Criminal defendants who face the prospect of the public reading these most intimate details—or seeing that information in the newspaper—will be unwilling to pursue this sentencing alternative if its privacy cannot be reasonably assured. Losing a proven way of reducing sexual offending and encouraging the reporting of sexual abuse will harm law enforcement.

Additionally, the concern raised by the Washington Coalition of Sexual Assault, and cited in petitioner's brief at p. 10, is well-placed. If criminal defendants are unwilling to pursue SSOSA out of fear this information will become public, they will be more likely to resolve their cases through trial and take their chances with a jury. With this option no longer workable for defendants, more sexual assault victims will have to testify about the abuse they suffered in open court—an outcome that parties in sex cases often go to great lengths to avoid, recognizing that victims are often extremely reluctant to speak publicly about trauma they have suffered.

The privacy concerns are not limited to criminal defendants. Crime victims also suffer a tremendous invasion of their privacy when these documents are made public. The evaluation includes detailed information about the instant offense, including the victim's version, the

defendant's version, and information contained in the discovery provided to the defense. Simply redacting the victim's name does not solve the problem. In many cases, the combination of the offender's identity together with other facts regarding the time, place and manner of the crime will make the victim easily identifiable. For example, were the charges to involve a schoolteacher, other students could review the evaluation and likely identify the victim through the details contained in the evaluation—even if the victim's name is redacted.

A decision that restricts and discourages the use of SSOSA raises questions of substantial public interest that merit review by this Court.

3. PROTECTING A CRIMINAL DEFENDANT'S RIGHT TO PRIVACY BY FORBIDDING PUBLIC DISCLOSURE OF INFORMATION PROTECTED UNDER THE UNIFORM HEALTH CARE INFORMATION ACT IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST MERITING REVIEW BY THE WASHINGTON SUPREME COURT.

In addition to exempting investigative records from public review based on the need to ensure effective law enforcement, RCW 42.56.240(1) also permits exemptions based on "the protection of any person's right to privacy." RCW 42.56.240(1). Under RCW 42.56.050:

> A person's "right to privacy,"...is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public...

A significant portion of the mitigation materials the defense provides to the prosecutor fall within the purview of the Health Care Information Act, RCW 70.02 et seq. RCW 70.02.005(7) defines "health care information" as

> any information, whether oral or record in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care, including a patient's deoxyribonucleic acid and identified sequence of chemical base pairs. The term includes any required accounting of disclosures of health care information.[1]

As stated previously in this brief, the Koenig decision is not limited to SSOSA cases, but opens up any defense mitigation materials provided to the prosecutor for public consumption. First and foremost, this includes psychosexual evaluations provided to the prosecutor in non-SSOSA cases. In sex cases, defendants often seek psychosexual evaluations at the prosecutor's request, regardless of SSOSA eligibility. Whether the defendant has a sexual deviancy, and if so, the extent of the deviancy and the defendant's amenability to treatment factors heavily into a prosecutor's recommendation.

Beyond psychosexual evaluations, this decision extends potentially to any other protected health care information defense attorneys provide to the prosecution as mitigation materials. Very often, criminal activity is

[1]Sex offender treatment providers are considered health care professionals under RCW 18.155.020.

driven by substance abuse, mental illness, or other disorders for which the defendant needs to seek treatment. In order to receive leniency from the prosecutor, and to rehabilitate the defendant, defense attorneys routinely assist their clients in obtaining chemical dependency evaluations, mental health evaluations, and other evaluations that fall under the rubric of "health care information." Encouraging defendants to seek treatment for addictions or mental health disorders is good public policy—we want criminal defendants to be rehabilitated and treat the underlying cause of their criminal activity. In addition, defense attorneys often provide prosecutors with their client's treatment records to advocate for a more favorable recommendation.

This Court has previously held that "where 'the public interest in efficient government could be harmed significantly more than the public would be served by disclosure,' the public concern is not legitimate and disclosure is not warranted." Koenig, 158 Wn.2d at 185. The legislative findings of the Health Care Information Act provide that "[h]ealth care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests." RCW 70.02.005(1). Subjecting these records to public disclosure will effectively shut down plea negotiations between the defense and the state, as the defense will be unwilling to

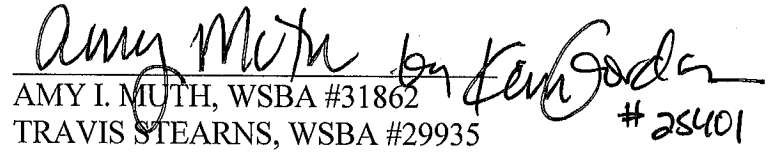
provide these protected health care information records to the state, knowing that their clients' privacy interests—which the legislature has identified as significant—will not be protected.

Whether protected health care information records are subject to public disclosure, and its collateral impact on plea negotiations in all criminal cases, is a matter of substantial public interest meriting review by this Court.

B. CONCLUSION

For the foregoing reasons, amicus curiae urges this court to accept the Petition for Review submitted by Petitioner Thurston County Prosecuting Attorney's Office.

DATED this 1st day of October, 2010.



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Appendix A

THE SPECIAL SEX OFFENDER SENTENCING ALTERNATIVE: A STUDY OF DECISION-MAKING AND RECIDIVISM

REPORT TO THE LEGISLATURE

Harborview Sexual Assault Center
Lucy Berliner, MSW, Principal Investigator
Lisa Lynn Miller, Research Associate

Urban Policy Research
Donna Schram, Ph.D., Research Investigator
Cheryl Darling Milloy, Ph.C., Research Associate

June 1991

THE SPECIAL SEX OFFENDER SENTENCING ALTERNATIVE: A STUDY OF DECISION-MAKING AND RECIDIVISM

EXECUTIVE SUMMARY

June 1991

This study identified demographic, offense, and criminal justice system factors that contribute to the decision to grant Washington State's Special Sex Offender Sentencing Alternative (SSOSA) to certain eligible sex offenders and not to others who are eligible.[1] Comparative rates of recidivism (rearrest and reconviction) for those who did and did not receive this sentence option were also analyzed.

The study is based on data collected on 646 felony sex offenders convicted between January 1985 and July 1986, and survey responses of 52 treatment providers, 137 community corrections officers, and 80 superior court judges in Washington State. The research was mandated as part of the Community Protection Act of 1990. Harborview Sexual Assault Center and Urban Policy Research conducted the study under the direction of the Washington State Institute for Public Policy.

MAJOR FINDINGS:

Recidivism:

- **Reconviction rates for sex offenses were low for both SSOSA and non-SSOSA offenders: 5 percent for each group.** However when time at-risk in the community is considered, rearrest rates for sex offenses were significantly lower for SSOSA offenders than for non-SSOSA offenders during the first two years at-risk to reoffend. After the first two years, the reoffense rates were so low that no differences in recidivism were seen. No significant differences were found with regard to reconviction rates for the two groups.

- **Rearrest and reconviction rates for all other types of crimes were lower for those who received SSOSA.** Higher reconviction rates were found among offenders who were: 1) young (18-30), 2) unmarried, and 3) unemployed; with 4) a history of violence, and 5) prior adult and juvenile convictions. Ethnicity, education, history of substance abuse or substance use during the offense, admission of the offense, seriousness of the offense, and type of legal representation were *not* associated with recidivism.

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[1] SSOSA is a sentencing alternative for sex offenders convicted for the first time of a felony sex offense other than Rape in the First or Second Degree, and whose sentence does not exceed seven and one-half years. Under SSOSA, offenders are almost always required to undergo treatment. Other crime-related prohibitions, such as restricted contact with minors, may be ordered. In addition, the judge may order up to six months in jail. If an offender does not comply with SSOSA conditions, or is not making adequate progress in treatment, then the alternative sentence may be revoked and a determinate sentence imposed. SSOSA has been available since 1984.

Sentencing Decision:

- **Offenders who received SSOSA differed from their non-SSOSA counterparts.** Of the many differences, the five most important characteristics associated with getting SSOSA were, in order of importance: 1) fully admitting the offense, 2) no prior adult convictions, 3) ethnicity (white), 4) having a private attorney, and 5) being married and living with the spouse at the time of the offense.

Professional Perceptions:

- **Professionals involved generally agreed on the relative importance of victim, offense, offender, and system variables in the SSOSA decision.** A majority believe SSOSA is granted at the appropriate rate.

CONCLUSIONS:

Effectiveness:

Current sentencing practices accurately select sex offenders who, with supervision and treatment, will reoffend at lower rates.

Community Safety:

The Special Sex Offender Sentencing Alternative does not increase the risk to the community.

THE SPECIAL SEX OFFENDER SENTENCING ALTERNATIVE: A STUDY OF DECISION-MAKING AND RECIDIVISM

Legislative History

The sentencing structure embodied in Washington State law provides a unique opportunity to evaluate whether a community treatment alternative for sex offenders truly meets the societal objectives it was designed to achieve. In 1981, the legislature passed the Sentencing Reform Act (SRA), which provided a standard range of punishment for all adult criminal offenses. The guiding philosophy of the SRA was that the primary purpose of the criminal justice system was to sanction lawbreakers and that punishment should be a reflection of what the individual has done, not other factors. As originally conceived, suspended or deferred sentences and coerced rehabilitation were eliminated.

Professionals who treated sex offenders as well as those who treated their victims, persuaded the Sentencing Guidelines Commission and the legislature to include a special provision for sex offenders, referred to as the Special Sex Offender Sentencing Alternative (SSOSA). The purpose of SSOSA was to provide an alternative to the determinate sentencing for certain sex offenders. The alternative sentence permitted community supervision and treatment in lieu of incarceration.

During the 1989 session, the Washington State Legislature passed a bill creating the Blue Ribbon Panel on the Special Sex Offender Sentencing Alternative. The purpose of the Panel was to evaluate SSOSA and make recommendations to the legislature. The Panel made a number of recommendations, including extending the length of the period of supervision and increasing accountability for treatment providers. These recommendations were incorporated into the Community Protection Act passed during the 1990 legislative session. The Panel also recommended that a study be undertaken to determine the effectiveness of SSOSA. The Community Protection Act provided the funds for the study, and the Washington State Institute for Public Policy was directed to guide this effort. Harborview Sexual Assault Center and Urban Policy Research conducted the research. This report presents the findings of this study on the effectiveness of the Special Sex Offender Sentencing Alternative in Washington State.

Rationale

Society has long been uncertain as to how to respond to sexual offenders. This societal uncertainty has been reflected both in what behaviors are defined as sexual crimes, as well as in what sanctions are imposed once an individual has been convicted of a sexual offense.

The sanctions imposed on convicted sex offenders also echo the level of seriousness with which the criminal behavior is viewed and beliefs about how to protect society. The criminal justice response to convicted sex offenders has been marked by uncertainty about how to balance the

desired societal goals of punishing criminal behavior and preventing reoffense. The basic dilemma is whether to consider sexual deviance a psychological disorder which requires treatment, or as anti-social behavior which deserves punishment. Community based alternative sentences for sex offenders are predicated on the idea that certain sex offenders suffer from behavioral disorders which, if treated, would prevent reoffense, while incarceration would only temporarily protect the community from offenders who would reoffend upon release.

Professionals who treat offenders maintain that evidence exists that specialized treatment is effective in some cases. Further, the availability of a treatment option encourages reporting, especially in cases where the offender is a family member. There is a great deal of anecdotal evidence that for many victims or their families, obtaining supervised treatment for the offender is the primary goal in reporting such crimes and cooperating with criminal prosecution.

In an effort to address this dilemma between punishment and treatment, the legislature crafted SSOSA for a select group of first time sex offenders. An offender is eligible for SSOSA if he or she is: is convicted of a felony sex offense except Rape in the First or Second Degree; has not been previously convicted of a sex offense; and the determinate sentence for the conviction offenses is not longer than seven and one half years (originally the determinate sentence could not exceed six years). The determinate sentence is ordered and then suspended and a period of community supervision imposed. Offenders are almost always required to undergo treatment; other crime-related prohibitions, such as restricted contact with minors, may be ordered. The judge may order up to six months in jail. Approximately 80% of convicted sex offenders are eligible for SSOSA, most for offenses involving child victims. About half of those eligible receive SSOSA. A judge may revoke SSOSA and impose the determinate sentence if the offender has not complied with sentence conditions or is not making adequate progress in treatment.

While SSOSA has been available as a sentencing alternative since 1984, no data either on the characteristics distinguishing eligible offenders who are granted SSOSA from those who go to prison, or on the relative effectiveness of this alternative in protecting the community have been collected or analyzed. Citizens of Washington State have expressed their continuing concern about the risks posed by sex offenders. This study was designed to provide information to policy makers, citizens, and professionals on the implementation and effectiveness of community treatment sentences for sex offenders.

One question this study does not address is the effectiveness of particular treatment approaches. Under the current system, offenders seek out a treatment provider to determine their amenability and if the court grants SSOSA, a suspended sentence is imposed and the offender enters treatment, often with the same treatment provider who conducted the evaluation. Until recently, there have been no standards for the qualifications of the treatment provider or content of the treatment program. The Community Protection Act mandated certification for sex offender treatment providers to be implemented in 1991.

Research Objectives

The primary goal of this study is to determine the effectiveness of the Special Sex Offender Sentencing Alternative. Three specific research questions are relevant to this goal:

1) What attributes of SSOSA eligible cases (including offender, offense, victim and criminal justice system factors) differentiate between offenders who receive SSOSA and those who do not?

2) What are the differences in rearrest and reconviction rates for SSOSA and non-SSOSA[2] offenders and what factors predict rearrest and reconviction?

3) What are the perceptions and experiences of judges, treatment providers and Community Corrections Officers with regard to the punishment of SSOSA eligible offenders?

Project Design: Sentencing Decision/Recidivism

Sample

The sample consisted of all offenders who were convicted of felony sex offenses between January 1985 and July 1986 and who met the eligibility requirements for SSOSA. This 18 month period was selected because it provided a sample of adequate size to perform meaningful analyses and it permitted a follow-up period of sufficient length of assess recidivism.

The Research Director of the Sentencing Guidelines Commission queried the rich data base maintained by the agency and identified 698 SSOSA eligible offenders who met the criteria for inclusion in the study. The sentence dates and counties of conviction for each member of the sample were also derived from this data base.

Data Sources

Four data sources were used in this research in addition to the automated data base maintained by the Sentencing Guidelines Commission. Prosecutor's files in the individual counties of conviction were used as the source of information related to offender, offense, victim and criminal justice system factors. The Washington Association of Prosecuting Attorneys facilitated access to these files.

[2] SSOSA offenders refers to eligible offenders who received SSOSA and non-SSOSA offenders refers to eligible offenders who did not receive the alternative.

The Offender Based Information Tracking System (OBITS) at the Washington State Department of Corrections was used as the source of information on the length of the initial incarceration (if imposed) and any subsequent incarcerations that occurred during the follow-up period, including revocations of suspended sentences. This information provided the basis upon which the time "at risk" to reoffend in the community was calculated for each offender.

The King County Prosecutor obtained current Washington State Patrol criminal history reports for the members of the sample. These data were used to identify subsequent arrests and convictions. National Crime Information Center Interstate Identification Index reports provided supplemental information on new arrests and convictions which occurred outside the state of Washington. Where the outcome of a felony arrest or any sex offense arrest was not noted, telephone contact was made with the jurisdiction where the arrest occurred to obtain disposition information.

Data Analysis

Several statistical techniques were used in order to examine the relationships between offender, offense, victim and criminal justice system variables, and the sentencing decision or reoffense behavior. Chi-square analysis was used to examine the relationships among pairs of variables, while factor analysis and multiple regression analysis were used to look at relationships among groups of variables.

For the purposes of this study, the concept of recidivism was defined in two ways. Recidivism was defined as any new arrest (excluding traffic infractions) and any new conviction for all offenses that occurred during the follow-up period.

Two different methods of summarizing the recidivism data were also used. The first of these, referred to as the "life table" method, determined the percentage of offenders who were rearrested or reconvicted during each year that they were at risk in the community and then removed them from the sample, or from their respective SSOSA and non-SSOSA groups. The cumulative total percentage was then determined for given periods of time at risk for the entire sample and for the separate groups. A second method was used to examine the number of reoffenses per year at risk. This latter procedure was useful in deriving values that estimated the harm done to society by the entire sample and by the SSOSA and non-SSOSA groups.

Project Design: Survey of Professional Attitudes

Sample

Three groups of community professionals were identified to participate in the survey of attitudes toward and experience with SSOSA: treatment providers who evaluate SSOSA-eligible offenders and make recommendations to the court as to the amenability of offenders; Community Corrections Officers (Department of Corrections personnel) who conduct Pre-Sentence Investigations and make recommendations to the court or supervise offenders in the

community; and Superior Court judges who make decisions regarding who receives SSOSA, as well as revocation decisions.

Survey Instrument

The Gilmore Research Group was contracted to assist in the development of the questionnaire and to conduct the surveys. Focus groups were held with representatives of each of the three groups to identify variables and issues important to each group. The survey instrument was developed on the basis of the results of these focus groups. Telephone interviews were conducted with Community Corrections Officers (n=137) and treatment providers (n=52). Superior Court judges (n=80) were asked identical questions through a written questionnaire.

The survey had three components: 1) variables associated with the sentencing recommendation/decision; 2) responses to violations of SSOSA conditions and; 3) attitudes about related policy issues. Respondents were asked to rate the victim, offender, offense and criminal justice system factors on their degree of importance in the sentencing recommendation or decision. They were also asked to identify the appropriate response to a violation of SSOSA conditions within a range from no further action to revocation of SSOSA. Finally, they were asked to rate the importance of several possible policy options, including the certification of treatment providers, specialized supervision units for sex offenders, and state subsidized treatment.

Results

Description of the sample

There were 698 SSOSA eligible offenders sentenced during the study period. Prosecutor files were located and data extracted on 93% (N=646) of the sample.

- Offender variables. The offender was generally white (85%), male (98%) and had at least a high school education (66%). The offender was between the ages of 22-40 (62%), married (47%), and employed full or part-time at the time of the offense (59%). For offenders where data was available, 29% had a history of sexual abuse, 28% had a history of physical abuse and 29% had a history of violent behavior. There were prior adult convictions in 46% of the cases and prior juvenile convictions in 13% of the cases.

- Victim variables. Physical harm/injury, or the threat of physical harm/injury was used in 18% of the cases. In 16% of the cases, the offender used physical restraint or rendered the victim(s) unconscious or helpless. The offender knew the victim but was not related in any way in 41% of the cases. In 37% of the

cases, the offender was the victim's parent figure (natural, step, adoptive, foster or the partner of the victim's parent), and in 15% of the cases, the offender was related to the victim (other than as a parent figure). In seven percent of the cases, the offender was a stranger.

- Offense variables. Fondling was the most serious offense in approximately one fourth of the cases, while penetration occurred in almost three quarters of the cases. A single contact was made with the victim in 41% of the cases, limited contact (2 to 10 times) in 25% of the cases, and chronic contact (over 10 times) in 34% of the cases. There was more than one victim in 22% of the cases. In 89% of the cases there were one or more female victims and 15% of cases involved one or more male victims.

- Criminal justice system variables. Offenders were represented by public defenders or assigned counsel in 69% of the cases. They admitted the offense fully in 40% of cases, while 45% partially admitted the offense and 15% denied the offense completely. The majority of offenders pled guilty to the original charges (57%). Offenders were convicted by judge or jury in 13% of the cases.

Sentencing Findings

Offenders who received SSOSA and those who did not differed on many of the variables which were examined. The following characteristics were associated with the sentencing decision.

<u>Offender variables</u>

- Age: Offenders 31-50 years of age were *more* likely to receive SSOSA than younger (18-30) or older (50 and over) offenders.

- Education: Offenders with a high school education or more were *more* likely to receive SSOSA.

- Marital Status: Offenders who were married and living with their spouses at the time of the offense were *more* likely to receive SSOSA.

- Employment: Offenders who were employed full-time at the time of the offense were *more* likely to receive SSOSA.

- Sexual Abuse: Offenders with a history of having been sexually abused were *more* likely to receive SSOSA.

- Ethnicity: White offenders were *more* likely to receive SSOSA than minority offenders.

- Prior convictions and history of violent behavior: Offenders with a history of violence or prior adult convictions were *less* likely to receive SSOSA.

Offense variables

- Frequency of sexual contact: Offenders who offended against their victim(s) more than ten times were *more* likely to receive SSOSA than offenders whose sexual contact with the victim occurred only once or a limited number of times.

- Level of force: Offenders who used physical harm, threat of physical harm, physical restraint or rendered their victims unconscious were *less* likely to receive SSOSA than offenders who abused adult authority or told their victims not to tell.

- Sexual acts alleged: In cases that included vaginal or anal penetration by penis or finger/object the offenders were *less* likely to receive SSOSA.

Victim variables

- Age of victim: Offenders whose victims were 6 to 11 years old were *more* likely to receive SSOSA than offenders whose victims were 14 years of age or older. No significant differences were found for children up to 5 years of age and for children 12 to 13.

- Relationship to offender: Offenders whose relationship to the victim was that of a step-parent were *more* likely to receive SSOSA. Offenders who were strangers to the victim were *less* likely to receive SSOSA, while no differences were found for acquaintances, biological parents and other relatives.

Criminal justice system variables

- Admitting the offense: Offenders who fully admitted the offense were *more* likely to receive SSOSA than offenders who denied the offense, although 12 offenders who denied the offense did receive SSOSA.

- Verdict: Offenders who pled guilty to the original charges were *more* likely to receive SSOSA. 14% of the offenders were found guilty in a trial and 12 of these offenders did receive SSOSA.

- Evaluation for amenability: Offenders who received an evaluation were *more* likely to receive SSOSA than those who did not. Almost three fourths of the offenders received an evaluation and three fourths of those offenders were found amenable to treatment.

- Legal representation: Offenders who had an assigned counsel or public defender were *less* likely to receive SSOSA than offenders who had a private attorney.

- County: The population size of the county in which the offender was sentenced was *not* found to be associated with receiving SSOSA.

Explaining variance

Statistical analyses revealed that certain characteristics were significant in predicting the SSOSA decision. The five most important characteristics, in order of importance, were: fully admitting the offense; no prior adult convictions; ethnicity (white offenders were more likely to receive SSOSA); having a private attorney; and being married at the time of the offense.

Recidivism Findings

Violations and Revocations

Judges typically imposed treatment conditions, financial obligations, and crime related prohibitions on SSOSA offenders in exchange for suspended sentences. SSOSA offenders were usually required to participate in sex offenders treatment and submit to supervision for a period of two years. Not all offenders complied with these conditions.

A total of 137 of the 313 SSOSA offenders were known to have violated at least one condition of their sentence. The most common of these concerned violations of the treatment requirements, followed in frequency by non-compliance with financial obligations and crime-related prohibitions. As a result of these violations, the sentences of 52 SSOSA offenders (17 percent) were revoked and their determinate sentences were executed.

Rearrests and Reconvictions

Recidivism was measured by tracking the members of the sex offender sample throughout the follow-up period and recording all new arrests and new convictions. Once recidivism information was collected, it was sorted and analyzed by types of offenses, such as rearrest or reconviction for any new crime, any new sex offense, any new violent or non-violent felony, and any new misdemeanor. This procedure resulted in overlap of categories, since sex offenses may be felonies or misdemeanors.

Table 1 presents the number and percentage of SSOSA and non-SSOSA offenders who were rearrested and reconvicted during the follow-up period. Note that non-SSOSA offenders were much more likely to be rearrested and reconvicted of an offense of any kind (combined), violent and non-violent felony offense and misdemeanor offenses. No significant differences were found between SSOSA and non-SSOSA offenders with regard to new sex offense arrests or convictions.

TABLE 1

NUMBER AND PERCENTAGE OF SSOSA AND NON-SSOSA OFFENDERS WHO WERE REARRESTED OR RECONVICTED DURING THE FOLLOW-UP PERIOD					
	SSOSA (N=313)		NON-SSOSA (N=300)		CHI SQ.
	N	%	N	%	SIG.
Any rearrest	54	17.3	108	36.0	.0000
Sex offense rearrest	19	6.1	26	8.7	.2179
Felony rearrest	33	10.5	81	27.0	.0000
Violent felony rearrest	11	3.5	48	16.0	.0000
Non-violent felony rearrest	25	8.0	56	18.7	.0000
Misdemeanor rearrest	25	8.0	60	20.0	.0000
Any reconviction	35	11.2	77	25.7	.0000
Sex offense reconviction	16	5.1	16	5.3	.9927
Felony reconviction	23	7.3	49	16.3	.0008
Violent felony reconviction	12	3.8	28	9.3	.0074
Non-violent felony reconviction	14	4.5	28	9.3	.0471
Misdemeanor reconviction	16	5.1	41	13.7	.0004

Offense categories are not mutually exclusive and offenders may have been rearrested or reconvicted for more than one type of crime.

When time "at risk" and time to first new arrest or conviction by type of offense were considered, the differences in recidivism between groups were even more pronounced. Non-SSOSA sex offenders were significantly more likely than SSOSA offenders to be arrested for all types of offenses, including sex offenses, during their first two years at risk in the community. Thereafter, the reoffense rates for both groups were so low that no differences in recidivism were seen. Similar patterns were observed with regard to new convictions, although no significant differences were found between groups with regard to reconvictions for sex offenses. This two year suppression effect on recidivism among SSOSA offenders appeared to be permanent and coincided with length of community-based treatment and supervision generally imposed as sentencing conditions on this group.

The number and types of reoffenses per year at risk were also calculated to derive an estimate of the harm done to society by SSOSA and non-SSOSA offenders. Based on this analysis, SSOSA offenders were found to be at risk a total of 1,441 years during the follow-up period compared to 1,139 years for the non-SSOSA offenders. The rearrest and reconviction rates *per year* at risk for each group of sex offenders are presented in Table 2. Note that the overall rearrest rate for SSOSA offenders was 5.6 percent per year at risk compared to 23. 7 percent for non-SSOSA

offenders. Differences in rates between the groups were found for all types of offenses, including sex offenses, where non-SSOSA offenders were 1.7 times more likely to be rearrested for new sex crimes during each year at risk than were SSOSA offenders. Similar differences between groups were also seen in terms of reconviction rates. Non-SSOSA offenders were 4.4 times more likely than SSOSA offenders to be reconvicted of some type of offense and 1.3 times more likely to be reconvicted of a new sex offense.

TABLE 2

REARREST AND RECONVICTION RATES PER YEAR AT RISK FOR SSOSA AND NON-SSOSA OFFENDERS			
	SSOSA	NON-SSOSA	RATE
	RATE	TIME	DIFFERENCE
Any rearrest	5.6%	23.7%	4.2
Felony rearrest	3.4%	13.0%	3.8
Misdemeanor rearrest	2.2%	10.7%	4.9
(Sex offense rearrest)	1.5%	2.5%	1.7
Any reconviction	3.2%	14.0%	4.4
Felony reconviction	1.9%	7.3%	3.8
Misdemeanor reconviction	1.3%	6.4%	4.9
(Sex offense reconviction)	1.3%	1.7%	1.3

Sex offenses overlap with felony and misdemeanor categories.

Recidivism for all types of offenses was found to be associated with several offender, offense and victim variables. For example, sex offenders who were reconvicted of any offense during the follow-up period were young (18-30 years old), unmarried, and unemployed. They had a history of violence and prior adult and juvenile convictions. Their original sex offenses involved single sexual contacts with adolescent victims. No relationships were found between reconvictions and ethnicity, education, history of substance abuse, or other original offense specific and system variables, such as seriousness of the offense, number of victims, type of legal representation, substance use at the time of the offense, and admission of the offense.

The number and types of sex offense reconvictions for SSOSA and non-SSOSA offenders are presented in Table 3. Note that at least 21 of the 32 new convictions involved child victims (child rape, child molestation, incest and communicating with a minor for immoral purposes). Sex offense reconvictions were associated with only three variables: prior adult convictions, alleged prior sexual offenses, and single sexual contacts with their victims.

TABLE 3

NUMBER OF SEX OFFENSE RECONVICTIONS FOR SSOSA AND NON-SSOSA OFFENDERS			
CHARGE	SSOSA	NON-SSOSA	TOTAL
Rape 1	1	1	2
Rape 2	0	2	2
Rape 3	1	0	1
Child Rape 1	5	3	8
Child Rape 2	1	1	2
Child Rape 3	1	1	2
Child Molest 1	0	2	2
Child Molest 3	1	0	1
Indecent Liberties	3	0	3
Incest 2	1	0	1
Communicating w/ minor	1	4	5
Promote Prostitution/ Pornography	1	2	3
TOTAL	16	16	32

In summary, SSOSA offenders were significantly less likely to be rearrested and reconvicted of all types of crimes except sex offenses. When time at risk in the community was considered, however, non-SSOSA offenders were rearrested and reconvicted for sex offenses at higher rates than SSOSA offenders.

Differences in recidivism rates between SSOSA and non-SSOSA offenders were most noticeable during the first two years that offenders were at risk in the community. Offenders from both groups who did not reoffend during this period were unlikely to be rearrested or reconvicted during the remainder of the follow-up period.

Survey Findings

Telephone interviews were conducted with 52 treatment providers and 137 CCOs. Of 147 Superior Court judges who were mailed a questionnaire, 80 completed forms were returned.

There was considerable agreement among all three professional groups about the most significant variables in the SSOSA decision making process. Even where the groups disagreed, the disparity was generally in the level of importance of a given variable, rather than between the variables themselves.

Offender Variables

- All three groups identified the length of known history of sexual offending and the offender's willingness to cooperate as the most important offender variables.

- The CCOs and the treatment providers rated the offender's ability to pay as only moderately important and the judges rate it significantly less important than the other two groups.

Offense/Victim Variables

- Level of force was considered the most important offense variable by all three groups.

- Degree of harm caused by the abuse to the victim was the most important victim variable.

- The most significant difference in attitudes on this question between the CCOs and the treatment providers was in the category of victim factors. While both groups identified degree of harm to the victim as highly important, CCOs rated all victim factors much higher than the treatment providers did.

Criminal Justice System Variables

- The judges and CCOs both identified the availability of treatment resources in the local community as the most important system factor while treatment providers rated the level of supervision as most important.

- Judges and CCOs also rated confidence in the treatment provider as very important.

Conditions of the SSOSA Sentence

- The most significant difference between the CCOs, treatment providers and the judges was with the conditions of SSOSA. The judges overall rated the conditions as much less important than the CCOs and treatment providers did, particularly polygraphs and prohibiting contact with minors and paying for the victim's treatment.

- Treatment providers placed less importance on plethysmographs than either the judges or the CCOs.

Policy Issues

- CCOs believed certification of treatment providers is extremely important while the treatment providers find it only moderately important. The judges' responses fell between the two groups.

- Treatment providers found specialized supervision units very important while CCOs considered them only moderately important. Again, most judges' responses fell in the middle.

- All three groups agree that state subsidies for treatment would have moderate importance for the effectiveness of SSOSA.

- 50% of those surveyed believed that SSOSA is granted in the appropriate number of cases.

Discussion

To a large extent, differences between offenders who receive SSOSA and those who do not are those which would be predicted. Offenders who commit more serious crimes, use force and have a prior history of violence or criminality are more likely to receive jail or prison sentences. Those who admit their offense and appear more stable are more likely to remain in the community and enter treatment.

The fact that offenders whose victims are 14 years or older are less likely to receive SSOSA may be explained because the crimes[3] may be seen as primarily a violation of societal norms rather than a function of sexual deviance. Perhaps these victims are also considered less sympathetic. In additional, the penalties for these offenses are quite low. During the sample period, the amount of jail/prison time established by the sentencing grid was generally only a few months. Offenders may have preferred a brief incarceration to two years of community supervision and treatment.

It is not surprising that stranger offenders would be more likely to go to jail/prison since they are considered more predatory. The fact that stepparents were more likely to receive SSOSA but biological parents and other offenders were not, may be related to family reactions. Maternal support for victims is most likely to be compromised in cases of stepparents and boyfriends. Mothers may be advocating strongly for the offender in these cases which may also influence victims' stated preferences. There is anecdotal evidence from offender treatment providers that they are more willing to accept an offender for treatment if he is involved with a partner who could also participate in the treatment program. The finding that offenders who

[3] Rape 3 and Child Rape 3 (formerly Statutory Rape 3).

offend chronically are more likely to receive SSOSA may reflect the view that they are perceived to be more in need of treatment or it may be explained by the fact that stepparents tend to offend chronically.

It appears that an offender's economic and ethnic status are important in the SSOSA decision. Offenders who cannot afford private attorneys are significantly less likely to get evaluations which are a prerequisite for receiving SSOSA. There is anecdotal evidence from public defenders that they do not refer offenders for evaluation when it appears that they will not be able to afford treatment. It appears that some otherwise appropriate offenders are not referred or do not seek SSOSA simply because they lack the financial resources to obtain therapy.

Ethnic background also appears to make a difference independent of economic situation. Some of the difference may be explained by the fact that ethnic minorities were somewhat more likely to offender against older victims and to use more coercion. It is also possible that ethnic minorities are less likely to perceive therapy as a helpful or desirable alternative. This possibility is supported by the fact that there are virtually no ethnic minority treatment providers serving this population.

The amount of time the sex offenders in this state were incarcerated during the study period does not necessarily reflect current practice. Penalties for most sex offense have been significantly increased since that time. In addition, violent offenders may only receive a 15% good time reduction, as opposed to a reduction of one-third of the time ordered under previous legislation.

SSOSA offenders may be sentenced to up to 6 months in jail. SSOSA offenders from the study were sentenced to an average of 2.4 months and served 1.8 months in full confinement (not including those who suspended sentences were revoked). The small amount of time in full confinement may be explained by the fact that many offenders are granted work-release in order to comply with treatment requirements and continue to work and support their families. Since 1985 that average amount of jail time served has been steadily increasing with SSOSA offenders now being sentenced to 3.6 months. The standard sentence offenders received relatively short sentences with the average sentence being 20.7 and the average time actually served in full confinement being 14.5 months. These rates are lower than the sentences which would currently be imposed.

The overall number and rate of new arrests and new convictions for SSOSA offenders were remarkably lower compared to the level of recidivism observed among non-SSOSA offenders. For the most part, these differences emerged during the first two years that the offenders were "at risk" in the community and were maintained throughout the period of follow-up. The comparatively high rearrest and reconviction rates for non-SSOSA offenders seen during the early stages of their release from incarceration were typical of the recidivism patterns observed among other groups.

If the recidivism of the non-SSOSA offenders mirrored that of other types of offenders, what accounted for the low reoffense rates seen in the SSOSA offenders? Although the answer is not

clear, two explanations are posited. The fist is that judges generally made good decisions about who should receive SSOSA and who should not. The data on sentencing decisions confirm that offenders who received SSOSA differed from their non-SSOSA counterparts in many ways, including age, prior criminal history, full admission of the alleged sexual offense(s), and types of sexual offenses committed[4]. These were several of the same characteristics that distinguished recidivists from non-recidivists. Thus, it appears that judges accurately selected lower risk offenders for SSOSA sanctions and sentenced higher risk offenders to standard jail or prison terms.

Although the judicial selection explanation may account for the overall differences in recidivism rates between SSOSA and non-SSOSA offenders, it does not fully explain the magnitude of the differences observed during the first two years that both groups of offenders were "at risk" in the community. The recidivism curves of non-SSOSA offenders demonstrated the typical early "bubble" observed with other types of offenders, illustrating the fact that reoffense behavior is most likely to occur within the first 24 months. Thereafter, recidivism rates slow considerably. A very different pattern of recidivism was observed among SSOSA offenders. There was no "bubble" — no sign of the early reoffense behavior seen in non-SSOSA offenders. The recidivism curve for SSOSA offenders showed a low, gradual rise throughout the follow-up period similar to that seen in year three and beyond for the non-SSOSA offenders. The only plausible explanation for this two year "suppression effect" concerns the conditions imposed upon SSOSA offenders. Nearly all of these offenders were supervised in the community and required to undergo treatment for a period of 24 months — the same period of time that recidivism rates were more suppressed. Thus, treatment and supervision appeared to produce the desired outcome of decreased recidivism.

Although SSOSA offenders were much less likely than non-SSOSA offenders to reoffend generally, they were only somewhat less likely to be rearrested and reconvicted for new sex offenses. This finding was due, in large part, to the very low rates of sexual reoffense behavior observed in both groups. Only 1.3 percent of the SSOSA offender and 1.7 percent of the non-SSOSA offenders were convicted of new sex offenses for each year that they were at risk in the community.

The low rates of reconviction for sex offenses observed in this study are consistent with other research on sex offender recidivism. Most sex offenders, particularly first offenders like those who are eligible for SSOSA, do not reoffend sexually. Only a very small proportion are so deviant that they become chronic or predatory offenders.

The surveys of professionals involved with SSOSA recommendations and decisions were undertaken because of the recognition that many factors go into the sentencing decision and may

[4] While racial and ethnic minority offenders were significantly less likely than white offenders to receive SSOSA, they were no more likely than white offenders to be convicted of a new felony offense (violent or non-violent), a new misdemeanor offense, or a new sex offense. Thus, although race/ethnicity was associated with the sentencing decision, it was not related to recidivism.

be determined only by contacting the professionals involved in that decision. It was also important to understand the experiences and attitudes of those currently involved because of significant changes in the laws and community attitudes which have occurred since the study time period. It was notable that all three groups, offender treatment providers, CCOs and judges generally agreed on the importance of the various factors.

That CCOs weigh victim impact and preference more than treatment providers accurately reflects their respective roles. CCO's may perceive their job as including consideration of the impact of the crime and the wishes of the victim in the SSOSA decision to a greater extent whereas these factors are not necessarily relevant to the specific determination of treatment amenability. It is quite possible that a victim would be severely harmed and prefer that the offender not have the opportunity to avoid incarceration and the offender still be an appropriate treatment candidate. In general, judges fell between these two groups in the ranking of factors in sentencing reflecting their role of balancing the interests of the community, victims and offenders.

These differences were also observed in attitudes towards community supervision. The CCOs are responsible for monitoring compliance and filing violation reports with the court. The providers roles are often as much supervisory as therapeutic. Both groups, therefore, are more interested in having the court ordered prohibitions and affirmative requirements which they believe are necessary for a successful outcome. Judges, on the other hand, do not participate in the treatment and supervision process and therefore may not place the same level of importance on conditions of supervision. CCOs experience the daily tasks of supervision and monitoring and are less likely to tolerate deviations from the court ordered sanctions.

It is perhaps not surprising that the different groups would be more supportive of special requirements for the other groups. Individual CCOs and treatment providers may be less likely to see the need for specialized supervision or treatment certification, respectively, because they have confidence in their own abilities to be knowledgeable and responsible. There may be other objections as well. Treatment providers already must be registered, certified or licensed to practice. They may view additional certification procedures are restricting practice or as a harbinger of requiring certification for the many specialty areas of practice which exist. CCOs may recognize that specialized units present organizational challenges. It would impose structural requirements and selection procedures which might lead to additional staff or administrative support. The fact that judges tended to be somewhat more moderate in their support for these policies may again reflect their more impartial role. What is most reassuring is that all three groups believe that under current practice, SSOSA is granted about as often as it should be.

One issue which emerged was that CCOs and providers would like to see judges impose more specific conditions. This may reflect the current Department of Corrections' position that a CCO is not empowered to challenge the particular treatment provider who plans not to require anything of an offender which has not been officially ordered by the sentencing judge. It may be that judges assume that CCOs have greater discretion than the Department of Corrections

attorneys believe. For example, if a treatment provider has a questionable program or an offender wished to be employed in a job involving contact with children, unless there is specific authority or a specific prohibition in the Judgement and Sentence, CCOs are powerless to intervene.

Policy Implications

1) SSOSA is an effective sentencing alternative for eligible sex offenders. The community is at no greater risk, criminal justice professionals and treatment providers support the alternative and costs to state government are presumed to be lower.

2) Current sentencing practices accompanied by supervision and treatment produce lower recidivism rates. Professionals accurately select offenders who reoffend at reduced rates when supervised and involved in treatment programs.

3) Insuring that all eligible offenders receive an evaluation to determine amenability will increase fairness. The likelihood that offenders would be unfairly denied the alternative for purely economic reasons would be reduced. This would be consistent with the current state policy of conducting Pre-Sentence Investigations on all sex offenders.

4) A history of prior criminal or violent behavior should be carefully considered in sentencing and supervision decisions. Offenders who have previously behaved in an antisocial fashion represent a substantially greater risk to community safety.

5) Treatment expectations and crime related prohibitions should be explicitly court ordered. CCOs may only enforce conditions established by the sentencing judge.

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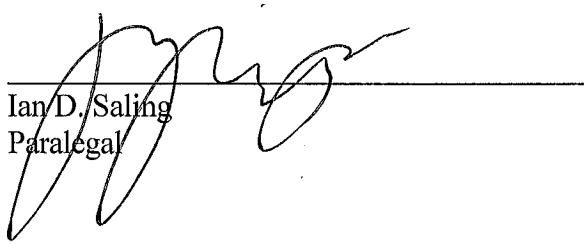
CERTIFICATE OF SERVICE

I CERTIFY under penalty of perjury of the laws of the State of Washington that on this 1st day of October, 2010, I mailed a true and correct copy of the attached *Amici Curiae* brief to the Washington State Supreme Court via 1st class mail.

DATED this 1st day of October, 2010.



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