NO. 94439-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIK PETTERSON,

Petitioner.

BRIEF OF AMICUS CURIAE, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Criminal Defense Lawyers ("WACDL") was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 1000 members – private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL joins this brief as a part of its mission to promote justice and protect individual constitutional rights.

II. INTRODUCTION

The Special Sex Offender Sentencing Alternative has been in existence in Washington State since the adoption of the Sentencing Reform Act in 1984. Although the Legislature has amended the statute over the years, the general premise remains the same: in exchange for completion of community-based treatment, a person convicted of a sex offense who meets the eligibility requirements will see most of his or her sentence suspended. RCW 9.94A.670.

Not surprisingly, a significant portion of sex offense cases are resolved through SSOSA. The Washington State Institute for Public Policy has complied sentencing data from 2000-2004, with a sample size of 5178 sex offenders. *See* R. Barnoski (2005). Initial Sentencing Decision

(Document No. 05-09-1202) at 2, available at http://www.wsipp.wa.gov/ReportFile/910/Wsipp_Initial-Sentencing-Decision_Initial-Sentencing-Decision.pdf. Of that sample size, 1096, or 21% of sex offenders, received SSOSAs. *Id.* In other words, one-fifth of sex offenders receive SSOSAs.

Nearly all SSOSA cases involve a child victim, which means that a substantial percentage of SSOSAs will fall under the jurisdiction of the Indeterminate Sentencing Review Board (ISRB). In the same study, WSIPP determined that 95% of SSOSAs are imposed on defendants who commit child sex offenses, with first degree child molestation comprising 29.9% of those cases. Id. at 4. Several of the sex offenses involving children are class A indeterminate sentences, meaning that offenders who receive SSOSAs for crimes like Rape of a Child in the First Degree (RCW 9A.44.040, .045), Rape of a Child in the Second Degree (RCW 9A.44.076), and Child Molestation in the First Degree (RCW 9A.44.083) will be placed on lifetime community custody, as individuals are sentenced pursuant to former RCW 9.94A.712 (recodified as RCW 9.94A.507) are placed on community custody for the statutory maximum of the offense.

Placing an individual on lifetime community custody raises special concerns. A substantial majority of individuals—68%, according to WSIPP—are under the age of 40 at the time of sentencing. That means

that an individual who is 28 years old when placed on SSOSA could have conditions that last for 60 years. R. Barnoski (2005). Sex offender sentencing in Washington State: How sex offenders differ from other felony offenders (Document No. 05-09-1201), available at http://www.wsipp.wa.gov/ReportFile/909/Wsipp_How-Sex-Offenders-Differ-From-Other-Felony-Offenders_Sex-Offenders-vs-Non-sex-Offenders.pdf. Additionally, conditions that are imposed in response to life circumstances when the defendant is 28 may make little sense at age 60.

It is not merely the defendant who suffers from a rigid, inflexible system which provides no meaningful ability to seek modification of sentencing conditions. SSOSA is primarily awarded in familial victim cases; indeed, having an established relationship between the victim and offender is a necessary predicate to qualify for this alternative. RCW 9.94A.670(2)(e). A condition of no contact with minors, and no contact with victims, is entered in virtually every SSOSA case. A victim who cannot countenance reconciliation at the time of sentencing may have a different view seven, or ten, or fifteen years in the future. Additionally, a defendant may successfully complete sex offender treatment with flying colors, and with the support of his therapist, enter into a loving

relationship and decide to start a family. Or he may desire to have contact with his existing children.

Sentencing courts must have the ability to refashion community custody conditions in order to account for these life changes, which raise issues of constitutional magnitude. While the Department of Corrections (DOC) gets to make the initial decision regarding a defendant's conditions, the court must always remain a check on the constitutionality of the Department's decisionmaking. Interpreting RCW 9.94A.670 consistent with Mr. Petterson's petition for review will ensure that this check remains in place.

Resolving the issue of whether and to what extent trial courts can modify community custody conditions related to these fundamental rights, issues that will be presented in virtually every SSOSA case, is an issue of substantial public importance.

III. ARGUMENT

1. Whether a party in SSOSA case—defendant or victim—has any recourse to petition the sentencing judge for modifications or terminations of no contact orders at any time during supervision is a matter of substantial public importance.

Family reconciliation is a critical stage of many SSOSAs and requires time and care by a trial court.

> The goal of the family clarification process is to facilitate healing for the child and the family and offer the person who harmed a child the opportunity to take responsibility for his or her actions. Even if many years have passed since the abuse occurred, the clarification process may be a helpful place for healing. When the people involved speak together about what happened and have a chance to discuss the role each person played in the situation, it can offer the person causing the harm a chance to take full responsibility for his or her actions. The clarification process may also serve as a point of assessment for possible future family contact, interaction, or reunification.
>
> The ultimate goal of family reunification is healing, as well as preserving the safety of the child, the family, and the public (Gilligan & Bumby, 2005).

Tabachnick, J., & Pollard, P. (2016). *Considering family reconnections and reunification after child sexual abuse: A road map for advocates and service providers.* Enola, PA: National Sexual Violence Resource Center, available at http://www.nsvrc.org/sites/default/files/publications_nsvrc_guides_considering-family-reconnection-reunification-after-child-sexual-abuse.pdf.

According to the National Sexual Violence Research Center (NSVRC), the family reunification process in sexual abuse cases can involve many years. It is entirely conceivable that a victim in a child sexual abuse case may not be ready to reconcile with her father-abuser at the SSOSA termination hearing. A DOC officer, who faces civil liability for making the wrong decision, should not be put in the position to decide an issue of fundamental constitutional importance.

Should the Court of Appeals decision stand, a victim who wants to reconcile with her father is stuck writing a letter or placing a phone call to a CCO, who may or may not be willing to consider the input of a treatment provider, and who certainly will not be conducting a hearing on the matter. Then, if the victim is unsuccessful, the defendant will need to file a personal restraint petition to contest the CCO's determination. An appellate court will then have to render a decision based solely on written materials appended to a PRP. This is not fair to victims or defendants.

The decisionmaking process that courts adopt in these circumstances is an issue of substantial public importance that merits accepting review.

2. Conditions that touch on fundamental constitutional rights, like restrictions on contact with one's children, require judicial review in order to ensure that those rights are respected.

Additionally, in SSOSA cases, defendants will often be restricted from having contact with all minors, including their own children, at the time of sentencing. However, while limitations on a probationer's fundamental rights that help prevent probationer's "from further criminal conduct are constitutional... such limitations must be reasonably necessary to accomplish the essential needs of the state." *State v. Letourneau*, 100 Wn.App. 424, 428-29, 932 P.2d 72 (2000) (internal citations omitted). Thus, some review of those conditions, in order to

evaluate whether they comport with the constitution, is necessary. Because this review requires a legal analysis of issues related to fundamental constitutional magnitude, and an often-complicated analysis (and one on which reasonable legal minds can often differ), a judicial officer, not a DOC officer, must provide a check on these conditions when situations demand it.

In *Letourneau*, teacher Mary Kay Letourneau was convicted of sexually assaulting one of her students, who was 13 years old. 100 Wn.App. 424, 428-29 (2000). No abuse was alleged against her own biological children, but the trial court prohibited her from having in-person contact with them unless the contact was supervised. *Id.* At 430. Ms. Letourneau challenged the constitutionality of the trial court's restriction.

The appellate court found that the restriction violated Ms. Letourneau's fundamental right to parent her children, but not before engaging in a complicated constitutional analysis. In order to evaluate whether this restriction violated Ms. Letourneau's constitutional rights, the appellate needed to identify a compelling state interest that justified interference with Ms. Letourneau's ability to parent her biological children (which the court identified as the prevention of harm to her biological children) and evaluate whether there was evidence to show that the

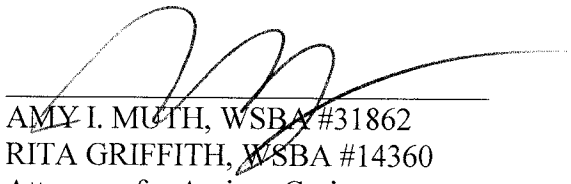
restriction was reasonably necessary to prevent Ms. Letourneau from molesting her own children. *Id.* At 439. The court then reviewed materials from three different evaluators to conclude that this restriction was not warranted. *Id.* At 440-441.

This analysis requires legal training. First, as was the case here, there was disagreement from many legal officers—defense attorney, prosecutor, trial judge, appellate judges—over what the law required. If the sentencing court and the appellate court are unable to agree on what the law requires, a DOC officer, with no legal training, can hardly be expected to conduct the kind of rigorous constitutional analysis that is required whenever a restriction on contact with one's biological children is imposed. These restrictions are part and parcel of a substantial majority of SSOSA cases. Deciding whether judges or DOC officers get to make decisions impacting matters of fundamental liberty will impact virtually every SSOSA case. This Court has a strong interest in ensuring the smooth functioning of the SSOSA program. Resolving how victims get to petition courts for relief from restrictions on contact with defendants in SSOSA cases is an issue of substantial public important meriting acceptance of Mr. Petterson's petition for review.

IV. CONCLUSION

For the foregoing reasons, WACDL urges this Court to accept review of Mr. Petterson's petition.

DATED this 30th day of June, 2017.



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CERTIFICATE OF SERVICE

I CERTIFY under penalty of perjury of the laws of the State of Washington that on this 30th day of June, 2017, I served true and correct copies of the attached BRIEF OF AMICUS CURIAE on the persons hereinafter named via the method so described:

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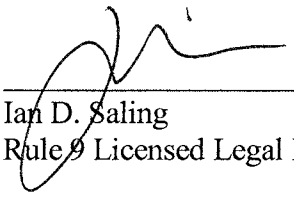
DATED this 30th day of June, 2017 in Seattle, WA.

Law Office of Amy Muth, PLLC



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