Supreme Court No. 95141-1

(Court of Appeals No. 74222-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN CARLO FREE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

John Free, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. Free*, No. 74222-1-I (Slip Op. filed October 2, 2017). A copy of the opinion is attached as Appendix A. The Court of Appeals ruled that Mr. Free's Special Sex Offender Sentencing Alternative ("SSOSA") was properly revoked, that the standard of proof did not violate due process, and that the conditions imposed did not violate the First Amendment or relevant statutes.

B. ISSUES PRESENTED FOR REVIEW

1. Does the standard of proof for revoking a SSOSA violate due process because it requires merely that the court be "reasonably satisfied" that the defendant committed the alleged violation? RAP 13.4(b)(3), (4).

2. Did the conditions prohibiting Mr. Free from accessing the internet for any purpose other than a job search violate his rights under the First Amendment? RAP 13.4(b)(3), (4).

3. Were the conditions imposed upon Mr. Free unconstitutionally vague? RAP 13.4(b)(3).

4. Did the trial court err in admitting hearsay evidence at the revocation hearing? RAP 13.4(b)(4).

5. Does due process require a preliminary hearing prior to a revocation proceeding? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

John Carlo Free lived with his mother, his sister, and his sister's son and daughter. In 2009 Mr. Free pleaded guilty to two counts of first-degree rape of a child for crimes he committed against his nephew. CP 6-41. Under a separate cause number, he later pleaded guilty to communication with a minor for immoral purposes against his niece. RP (2/1/11)[1] 1-10.

Mr. Free's family strongly supported the option of a Special Sex Offender Sentencing Alternative, and Mr. Free received such a sentence pursuant to RCW 9.94A.670. CP 35-36; RP (12/09/09) 21. He was sentenced to 131 months to life in prison, with all but 11 months suspended. CP 35. The court ordered Mr. Free to engage in sex offender treatment with William Satoran for three years, to follow all of Mr. Satoran's treatment recommendations, and to comply with all conditions imposed by the Department of Corrections (DOC). CP 36, 40.

Mr. Free was released from prison in April of 2012 and began treatment with Mr. Satoran in May. 1 RP 24-36. He attended weekly treatment sessions and also met with his Community Corrections Officer ("CCO") regularly. 1 RP 36-38. In September of 2012 both his treatment

[1] The Reports of Proceedings labeled "Volume I," "Volume II," and "Volume III" will be cited as "1 RP," "2 RP," and "3 RP." The other volumes will be cited by date.

provider and CCO reported that he was complying with his obligations. 1 RP 42-43. They again reported that Mr. Free was in compliance in December of 2012. 1 RP 48-50. He was participating in group therapy and doing weekly homework assignments. Ex. 4. Mr. Free was still in compliance in July of 2013, more than a year after beginning treatment. 1 RP 52-56. The court told Mr. Free, "It sounds like you're doing pretty well in treatment and on supervision." 1 RP 53.

In 2014, however, Mr. Satoran terminated Mr. Free from his treatment program. Mr. Free had had difficulty keeping up with his payments, and was also inconsistent about doing his homework. 1 RP 59-60; ex. 7. The court ordered Mr. Free to serve 60 days in jail and then enter into a 90-day probationary period with a new treatment provider, Myrna Pinedo. CP 42-43; 1 RP 77-78; exs. 8-9.

On August 18, 2014, Dr. Pinedo terminated Mr. Free from her program. Ex. 10. She provided four reasons for termination, all of which involved Mr. Free's allegedly unauthorized internet access. Ex. 10 at 2-3; 2 RP 188-94. Mr. Free's previous treatment provider, Mr. Satoran, had imposed a blanket prohibition on internet access for everyone in his program. 2 RP 118-19. Under his rules, no one could access the internet without permission from both him and DOC. Ex. 3 at 10. Dr. Pinedo's treatment contract did not prohibit internet access. Exs. 8, 9; CP 76-77.

But according to Dr. Pinedo, both she and Mr. Free's CCO had orally advised him that he could not access the internet except to look for a job. Ex.10 at 2; 2 RP 170-71; CP 78-149. Additionally, Mr. Free was told his internet use had to be monitored by a tracking program called Covenant Eyes. 2 RP 171, 209-10; Ex. 12; CP 78-149. Dr. Pinedo claimed Mr. Free was not permitted to go online at all when he was at home, but only when he was at an agency like WorkSource. 2 RP 171-72. The CCO was not aware that Dr. Pinedo had this rule; the two of them were confused about each other's requirements. 2 RP 170-73; 3 RP 234.

The CCO and Dr. Pinedo believed that Mr. Free had violated their rules limiting internet access. 2 RP 174-75; CP 78-149. Dr. Pinedo stated that Mr. Free "was on the Internet at his home without my permission... ." 2 RP 174. The Covenant Eyes program revealed that Mr. Free was not just looking for jobs but was also performing standard tasks like buying bicycle components and researching how to install them. Ex. 13. The CCO believed that Mr. Free attempted to circumvent the tracking program. 2 RP 174-75. The Covenant Eyes report revealed that in addition to visiting typical websites like amazon, facebook, twitter, reddit, youtube, and google, Mr. Free visited sites whose purpose is to protect privacy. Exs. 13-15; 2 RP 218-20. Dr. Pinedo terminated Mr. Free from her program based on these alleged rules violations. 2 RP 188-94; Ex. 10 at 2-3.

The State petitioned for revocation of Mr. Free's SSOSA, claiming the following violations of community custody:

1. Failure to abide by the instruction of DOC and treatment program rules by accessing the internet for non-work related purposes on 8/1/14.

2. Accessing the internet without prior approval from 8/1/14 through 8/6/14.

3. Accessing private search (proxy) websites to circumvent Covenant Eyes between 8/1/14 and 8/10/14.

4. Failing to comply with sexual deviancy treatment by being terminated by Dr. Pinedo on 8/8/14.

CP 52[2], 80.

After hearing testimony from the treatment providers, CCO, and family members, the court found the State proved the violations by "substantial evidence" and revoked Mr. Free's SSOSA. 3 RP 333; CP 73-74.

On appeal, Mr. Free argued that the conditions prohibiting internet use for anything other than a job search were unlawful. He also argued that the trial court erred in invoking the "substantial evidence" standard, because it is an appellate standard of review, not a trial court standard of proof. Mr. Free argued due process requires proof of the allegations by a preponderance of the evidence before a SSOSA may be revoked. In a pro

[2] The State originally alleged but dismissed a fifth violation. 2 RP 102.

se Statement of Additional Grounds, Mr. Free argued that the conditions imposed upon him were unconstitutionally vague and that the trial court erred in admitting unreliable hearsay evidence and permitting the mischaracterization of other evidence.

The Court of Appeals affirmed. It sidestepped the First Amendment issue by ruling that "while both treatment providers imposed limitations on Free's internet access, and both faulted him for violating those limitations, their primary reasons for terminating Free were based on his failure to participate in the program and his continued dishonesty." Slip Op. at 10.

As to the standard of proof, the Court of Appeals acknowledged that the standard the trial court cited, "substantial evidence," is an appellate standard of review. Slip Op. at 12. But it held "any error in the use of this language was harmless" because the record demonstrated that the trial court found sufficient proof under the "reasonably satisfied" standard. *Id.* The Court rejected the argument that due process requires application of the "preponderance of the evidence" standard, ruling that only this Court can address that issue. Slip Op. at 12-13.

The Court also rejected the issues raised in the pro se Statement of Additional Grounds. Slip Op. at 14-16. Mr. Free seeks review in this Court.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review because the "reasonably satisfied" standard for revoking a SSOSA is insufficient to satisfy Due Process; it is a relic from the days when Due Process depended on the distinction between a privilege and a right.

The Court of Appeals stated, "A SSOSA may be revoked at any time during the period of community custody if there is *sufficient proof to reasonably satisfy* the court that the offender (1) has violated a condition of the suspended sentence or (2) is failing to make satisfactory progress in treatment." Slip Op. at 12 (emphasis in original). But the "reasonably satisfied" standard of proof is insufficient under the Due Process Clause of the Fourteenth Amendment. Br. of Appellant at 18-24; Reply Br. of Appellant at 2-7. The Court of Appeals rejected this argument, stating it was "bound by the decisions of our Supreme Court[.]" Slip Op. at 13. Thus, this Court should take the opportunity to address this important constitutional issue. RAP 13.4(b)(3), (4).

The Court of Appeals is correct that courts previously held that in order to revoke a SSOSA, the trial court need only be "reasonably satisfied" that the defendant violated conditions. *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972); *State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). This standard is akin to probable cause – far less than a preponderance of the evidence. *Cf. Maryland v. Pringle,* 540 U.S.

366, 371, 124 S.Ct. 795 (2003) (describing probable cause standard as "a reasonable ground for belief of guilt").

The reasonable satisfaction standard is insufficient to satisfy due process in the revocation context. It is a relic from the days when due process depended on the distinction between a privilege and a right, rather than on whether the defendant would suffer a grievous loss of liberty. This Court should grant review and hold that due process requires application of a preponderance of the evidence standard in SSOSA revocation hearings.

In our state, the "reasonably satisfied" standard can be traced back to the case of *State v. Shannon*, 60 Wn.2d 883, 889, 376 P.2d 646 (1962).[3] There, the Court stated, "The granting of a deferred sentence and probation, following a plea or verdict of guilty, is a rehabilitative measure, and as such is not a 'matter of right but is a matter of grace, privilege, or clemency granted to the deserving, and withheld from the undeserving,' within the sound discretion of the trial judge." *Id.* at 888. Thus:

> The court need not be furnished with evidence establishing beyond a reasonable doubt guilty by the probationer of criminal offenses. All that is required is that the evidence and facts be such as to **reasonably satisfy** the court that probationer is violating the terms of his probation, or

[3] *Badger* cites *Kuhn*, 81 Wn.2d at 650. *See Badger*, 64 Wn. App. at 908. *Kuhn*, in turn, relies on *Shannon*. *See Kuhn*, 81 Wn.2d at 650.

> engaging in criminal practices, or is abandoned to improper associates, or living a vicious life.

Id. at 888-89 (internal citations omitted) (emphasis added).

One of the cases this Court relied on was *Escoe v. Zerbst*, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed.1566 (1935). *See Shannon*, 60 Wn.2d at 888, 889. There, the U.S. Supreme Court held that although the *statute* at issue guaranteed a hearing prior to the revocation of probation, *due process* did not require notice or a hearing prior to revocation:

> [W]e do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose.

Escoe, 295 U.S. at 492-93. According to the Court, Congress had the power "to dispense with notice or a hearing" in the context of probation revocation if it wanted to do so. *Id.* at 493.

The Court of course subsequently held to the contrary in *Morrissey v. Brewer*[4] and *Gagnon v. Scarpelli*.[5] In holding that due process *does* guarantee notice and a hearing in the revocation context, the Court renounced the privilege/right distinction espoused in *Escoe*:

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[4] *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)

[5] *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

> We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As Mr. Justice Blackmun has written recently, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege." *Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971). Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970).

Morrissey, 408 U.S. at 481; *accord Scarpelli*, 411 U.S. at 782 & n.4 (holding same due process protections apply to probation revocation as to parole revocation and noting, "It is clear at least after *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, 295 U.S. 490, 492, 55 S.Ct. 818, 819, 79 L.Ed. 1566 (1935), that probation is an 'act of grace.'"). Because revocation of both probation and parole constitutes a "grievous loss of liberty," some due process protections apply to these proceedings. *Morrissey*, 408 U.S. at 482; *Scarpelli*, 411 U.S. at 782; U.S. Const. amend. XIV.

These protections include a standard of proof that ensures revocation will be based on "verified facts," rather than merely reasonable belief. *Morrissey,* 408 U.S. at 484. Indeed, in *Morrissey*, the Court

explained that reasonable belief, i.e. probable cause, is the appropriate standard for the *initial hearing*, *not* for the final revocation hearing:

> The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. ... [D]ue process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.

Id. at 485. Later, the actual revocation hearing "must be the basis for *more than* determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Id.* at 488 (emphasis added).

Washington state has appropriately abandoned the pre-*Morrissey* standard of proof in certain other types of revocation proceedings. For example, in community custody violation hearings, "[t]he department has the obligation of proving each of the allegations of violations by a preponderance of the evidence." WAC 137-104-050(14). And the Court of Appeals has held that due process requires application of the preponderance of the evidence standard in DOSA revocation hearings – even for individuals who are serving the in-custody portion of DOSA.

State v. McKay, 127 Wn. App. 165, 168-69, 110 P.3d 856 (2005). The preponderance standard is necessary to meet the due process requirement that "a violation finding will be based on verified facts ... and accurate knowledge." *Id.* (quoting *Morrissey,* 408 U.S. at 484).

The court in *McKay* recognized that after *Morrissey*, "[t]he assessment of what process is due depends upon the 'extent to which an individual will be condemned to suffer a grievous loss.'" *Id.* at 169 (quoting *Morrissey*, 408 U.S. at 481). The court noted that a defendant has "a significant liberty interest" in remaining on community custody. *Id.* at 170. Furthermore, the State also has an interest in ensuring that revocations are based on verified facts and accurate knowledge because the defendant's rehabilitation and reintegration into society serves not only the individual but also the community at large. *Id.* Thus, "[t]he proper standard of proof at DOSA revocations is a preponderance of the evidence." *Id.*

The same must be true for SSOSA revocations. The liberty interest at stake is at least as great in SSOSA revocation hearings as in DOSA revocation hearings. *Cf. Scarpelli,* 411 U.S. at 772 (holding there is no difference for due process purposes between parole revocation hearings and probation revocation hearings); *In re the Personal Restraint of McNeal,* 99 Wn. App. 617, 631-33, 994 P.2d 890 (2000) (liberty interest

of individual on community custody is substantially similar to that of a person on parole, thus same due process protections must be applied at community custody revocation hearings), *disagreed with on other grounds by Grisby v. Herzog*, 190 Wn. App. 786, 362 P.3d 763 (2015). The State's interest in assuring accurate results is also just as great, because, as in the DOSA context, it is better for society if defendants finish treatment and contribute to the community.

That Washington has not yet updated the SSOSA standard of proof to comport with due process is merely accidental. The issue has not yet been addressed in any published opinion since *Morrissey* and *Scarpelli*, yet the low standard of proof has been reiterated in dicta. *E.g. State v. McCormick*, 166 Wn.2d 689, 213 P.3d 32 (2010) (issue was whether State had to prove defendant "willfully" violated conditions; Court mentioned "reasonably satisfied" standard in passing in black-letter law section).

This Court should take the opportunity to re-evaluate the minimum standard of proof required to revoke a SSOSA consistent with due process. In light of the significant shift in Fourteenth Amendment case law since the "reasonably satisfied" standard was adopted, this Court should hold that due process requires application of a preponderance of the evidence standard in SSOSA revocation proceedings. RAP 13.4(b)(3), (4).

2. This Court should grant review because the conditions prohibiting Mr. Free from accessing the internet for any purpose other than a job search violated his rights under the First Amendment.

Mr. Free's SSOSA was revoked based on four violations, all of which related to accessing the internet and being dishonest about accessing the internet. CP 73; 2 RP 188-92; *see also* 3 RP 315 (defense counsel in closing argument notes, "This is about five days of access to the internet."). But Mr. Free's internet access should not have been restricted to begin with. The restriction violates the First Amendment because, in light of the fact that Mr. Free did not use the internet in the commission of the crimes, the restriction is not necessary to serve a compelling state interest. Because the SSOSA was revoked based on alleged violations of unconstitutional conditions, this Court should grant review. RAP 13.4(b)(3), (4).

In general, the First Amendment prevents government from proscribing speech or expressive conduct. *State v. Halstien*, 122 Wn.2d 109, 121, 857 P.2d 270 (1993); U.S. Const. amend. I. The First Amendment protects not only the right to speak, but also the right to receive information. *See Lamont v. Postmaster Gen. of U. S.*, 381 U.S. 301, 307, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965). Individuals on community custody have a right to access and transmit material protected

by the First Amendment. *See State v. Bahl,* 164 Wn. 2d 739, 753, 193 P.3d 678 (2008).

The internet is unquestionably a critical medium for transmitting and receiving communications and expressive materials that are protected by the First Amendment. The internet is a "unique ... medium of world-wide human communication" that "enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850, 117 S. Ct. 2329, 138 L. Ed. 874 (1997)

In determining whether a condition of probation barring a probationer from accessing the internet is overly broad, courts generally ask whether the condition involves a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct and protect the public. *United States v. Freeman*, 316 F.3d 386, 391-92 (3d Cir. 2003).

In cases where a person was convicted of a sexual offense involving a minor, courts will generally strike down a probation condition barring internet access as overly broad if the defendant did not use the internet to facilitate commission of the crime. *See United States v. Burroughs*, 613 F.3d 233, 242-43 (D.C. Cir. 2010) (striking down probation condition limiting access to internet where defendant did not use computer to facilitate crimes of sexual exploitation of a minor,

transportation of a minor to engage in prostitution, and first degree child sexual abuse); *United States v. Perazza-Mercado*, 553 F.3d 65, 70-71 (1st Cir. 2009) (striking down condition prohibiting access to internet where offender did not use internet as instrumentality of crime of knowingly engaging in sexual contact with a female under 12); *In re Stevens*, 119 Cal. App. 4th 1228, 1231, 1239, 15 Cal. Rptr. 3d 168 (2004) (striking down prohibition on internet usage of offender convicted of lewd conduct with a minor, where offender did not use internet to facilitate commission of crime or for other illegal purpose); *Com. v. Houtz*, 982 A.2d 537, 540, 2009 PA Super 186 (2009) (striking down ban on access to internet where "there is no evidence that Appellant's sexual offense involving a minor child was facilitated by or incorporated the use of a computer/Internet.").

As in the above cases, the condition barring Mr. Free from using the internet except for job searches is overly broad in violation of his First Amendment rights because there is no evidence that he used the internet to facilitate commission of the crime. This Court should grant review of this important First Amendment issue. RAP 13.4(b)(3), (4).

3. This Court should grant review of the issues Mr. Free raised in his pro se Statement of Additional Grounds for Review.

In his Statement of Additional Grounds for Review, Mr. Free argued that the conditions imposed upon him were unconstitutionally

vague. SAG at 1. He pointed out that even the Community Corrections Officer and the treatment provider did not have the same understanding of the limitations and allowances regarding internet use. SAG at 2-3. Thus, the condition was not sufficiently clear and was subject to arbitrary enforcement.

Mr. Free also argued that the trial court improperly admitted unreliable hearsay when denied his motion to exclude the Covenant Eyes report (exhibit 13). SAG at 4-7. He challenged the admission of exhibit 12, the CCO's chronological event notes, because it was "prepared for court" and violated the rule of completeness. SAG at 10-11. Mr. Free argued the court also should have excluded exhibits 14 and 15, which were printouts from privacy protection (proxy server) websites. SAG at 11. He argued the State mischaracterized the exhibits, and that they had hearsay and chain-of-custody problems. *Id.* Finally, Mr. Free argued that due process requires a preliminary hearing, not just a final fact-finding hearing, and that he was improperly denied a preliminary hearing. SAG at 12-14.

The Court of Appeals rejected these arguments, and Mr. Free seeks review in this Court. Slip Op. at 14-16.

E. CONCLUSION

For the reasons set forth above John Free respectfully requests that this Court grant review.

DATED this 24th day of October, 2017.

/s Lila J. Silverstein
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Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JOHN CARLO FREE, Appellant.	)	No. 74222-1-I DIVISION ONE UNPUBLISHED OPINION FILED: October 2, 2017

MANN, J. — After pleading guilty to two counts of first degree rape of a child, John Free received a Special Sex Offender Sentencing Alternative (SSOSA) that required he undergo sexual deviancy treatment. After Free was terminated from two treatment programs, the trial court revoked Free's SSOSA. Free appeals the revocation and challenges conditions imposed by his treatment providers limiting his access to the internet. Free also argues that the trial court applied the wrong standard of proof in the hearing to revoke the SSOSA.

We affirm.

FACTS

In August 2009, in a negotiated plea deal, Free pleaded guilty to two counts of first degree rape of a child for crimes he committed against his nephew. The State

agreed to consider recommending a SSOSA depending on the results of a sexual deviancy evaluation.

Free underwent a polygraph and had a sexual deviancy evaluation with William Satoran, a certified sex offender treatment provider (CSOTP). Free admitted that between the ages of 35 and 38, he viewed child pornography 50 to 100 times and masturbated while viewing. Free also admitted that he obtained both still photo and video pornography from the internet, and that he would masturbate while viewing. Overall, Satoran determined Free appeared eligible for a SSOSA "in that he is a manageable danger to be at large providing he is in treatment with a CSOTP." Satoran recommended Free be required to enter, and successfully complete, a three-year specialized sexual deviancy treatment program. Recommended conditions included maintaining full time employment and the requirement to "abide by all rules of his treatment program and probation, as well as any other rules his therapist and probation counselor deem appropriate."

Free was sentenced to 131 months to life in prison, with all but 11 months suspended. The court ordered Free to engage in sex offender treatment with Satoran for three years, required Free to abide by all conditions of treatment, to follow all of Satoran's treatment recommendations, and to comply with all conditions imposed by the Department of Corrections (DOC).

On December 30, 2009, Free signed a DOC Conditions, Requirements, and Instructions document indicating that he understood the conditions of community custody, including that he was to follow Satoran's recommended treatment plan. On February 8, 2010, Free signed a treatment contract with Satoran that provided the rules

of the program along with the warning that any violation was grounds for termination. The contract specifically stated that "[h]onesty is demanded by the Program." The contract also required clients to attend 100 percent of their scheduled therapy sessions, complete all "readings and other assignments within prescribed time limits," and to "participate actively in group therapy." The contract prohibited clients from using "pornography in any form" and from using the internet "unless they have special permission from the CCO [community corrections officer] and treatment provider and are using porn filters."

In May 2010, Free's niece reported that the he had molested her on multiple occasions starting when she was seven or eight years old. Free entered into a negotiated plea of guilty to a reduced charge of felony communication with a minor for immoral purposes and was sentenced to 24 months, with his SSOSA deferred until his release from custody.

Free was released from prison in April 2012 and resumed treatment with Satoran on June 5, 2012. In his March 2013 SSOSA progress report, Satoran noted several issues with Free over the proceeding months, such as accessing the internet contrary to treatment rules, missing sessions, remaining unemployed, and obfuscation. Satoran concluded "Despite the rule violation I am not recommending a SSOSA revocation hearing at this time. However, due to the violation and the missed sessions this following month he bears watching and will need to show significant improvement over the next 3 months." In July 2013, Satoran reported that Free was not complying with his homework assignments or his requirements for his treatment group and that his participation was "not up to group standards."

On November 22, 2013, Free was suspended from Satoran's treatment program. The DOC filed a notice of violation of Free's SSOSA. When the CCO contacted Satoran, Satoran stated the defendant had been suspended for nonpayment of fees, for not completing the homework, and for not actively participating in group sessions. Free had quit his job, disregarding group advice, saying it was "a minimum wage, bottom of the barrel job." Free was not actively participating in job search activities.

Satoran reinstated Free in December 2013, but the problems continued. Free was not consistent in turning in his weekly impulse charts, mood logs, or weekly checklists. He was still not in in compliance with his homework, remained out of work, and owed $1500 in fees. Satoran suspended Free again on January 7, 2014, and then terminated him from the treatment program on January 27, 2015.

The DOC filed a second violation report specifically noting the termination from Satoran's group and Free's growing hostility with his CCO. The CCO recommended that the court evaluate whether a SSOSA sentence is appropriate for Free. Free was taken into custody pending a revocation hearing.

Free's counsel referred him to Dr. Myrna Pinedo, who reviewed Free's evaluation, progress reports, polygraph, and case file, then interviewed Free before agreeing to allow him to join her treatment program for a 90-day probationary period.

A violation hearing was held and the defendant admitted to violating his SSOSA by failing to make reasonable progress in treatment and being terminated from the required treatment program. Free was granted a 90-day probationary period for reentry into treatment with Dr. Pinedo. Agreed conditions of the probation included: (1) enrolling in Dr. Pinedo's treatment program, (2) complying with all conditions of

treatment and supervision "without complaint, negotiation, or argument," (3) seeking and maintaining employment, (4) completing all homework assignments, and (5) not possessing, using, accessing or viewing any sexually explicit or erotic material. By agreeing to the terms of probation, Free understood:

> that if he does not meet the standards of behavior and participation of Dr. Pinedo's program, has one unexcused absence from a treatment session, misses one payment, does not present homework assignments on the day that they are due, or commits any violation of treatment or supervision, that he will be immediately terminated from treatment, the Court will immediately order a no-bail bench warrant for defendant's arrest, and the State will recommend revocation of his suspended sentence. Defendant further understands and has been given clear and explicit notice from the Court that 100% strict compliance with all conditions noted above is required.

The court ordered Free to serve 60 days in jail and then enter into the 90-day probationary period with Dr. Pinedo. Free was released from confinement in July 2014, and reported to Dr. Pinedo's treatment program. Dr. Pinedo informed Free that her program had stringent requirements that were strictly enforced, and any violation of the rules set by the program or the DOC would result in immediate termination. Dr. Pinedo believed the strict boundaries may make it more likely for Free to be successful in the program. Free agreed to Dr. Pinedo's treatment program rules. In addition to the written treatment program rules, Dr. Pinedo testified at the revocation hearing that none of the men in her program are allowed to use the internet "unless they have written up some boundaries," and that she had informed Free of this restriction. Dr. Pinedo testified that she informed Free that he could access the internet at an agency such as WorkSource for job searches so long as he was monitored.

In August 2014, Free's CCO, Brian Dalton, received a report from the monitoring program on Free's computer, Covenant Eyes, indicating Free may have acted to evade the security levels on his computer. Dalton ordered Free to undergo a polygraph examination, however the test was inconclusive due to Free using "purposeful physical movements in an attempt to influence the results." When confronted Free became agitated, angry, and defensive.

After hearing these reports, Dr. Pinedo terminated Free from her program. Dr. Pinedo's termination report identified four treatment rules that Free violated: (1) failing to comply with all probation orders and treatment directives by attempting to circumvent Covenant Eyes, (2) violating a treatment rule by accessing websites not approved by his CCO or the counselor, (3) failing to disclose completely and honestly his intent to access unapproved websites and by being secretive and uncooperative, and (4) omitting information from his treatment provider. Dr. Pinedo summarized:

> Mr. Free has demonstrated a persistent pattern of deviant thinking, attitudes and behaviors that support potential reoffending. He was given an opportunity by the court to remain in community based treatment after termination from Mr. Satoran's sexual deviancy program. He clearly intended to manipulate and deceive his community corrections officer and this sexual deviancy treatment provider which would indicate no reduction in his potential for reoffending. Therefore, he has been terminated from this sexual deviancy treatment program on the basis that he is considered to be a High Risk for reoffense in the community.

The State petitioned for revocation of Free's SSOSA, asserting the following violations of community custody:

1. Failure to abide by the instruction of the Department of Corrections and Sex Offender and Treatment Program Rules by accessing the internet for non-work related purposes on 8/1/14.
2. Accessing the internet without prior approval from 8/1/14 through 8/6/14.

3. Accessing private search (proxy) websites to circumvent Covenant Eyes between 8/1/14 and 8/10/14.
4. Using intentional movement during a Polygraph Test in an attempt to influence the results on 8/12/14.
5. Failing to comply with sexual deviancy treatment by being terminated by Dr. Pinedo on 8/8/14.

At the revocation hearing, Free informed the court that he could not find a sex offender treatment provider willing to accept him into treatment.

After hearing the evidence and reviewing the record, the trial court determined the State had proved the violations by "substantial evidence" and revoked the SSOSA. The court made the following findings:

1. The defendant failed to make reasonable progress in court ordered sexual deviancy treatment—having been terminated from the treatment program of William Satoran (1/27/14) and Dr. Myrna Pinedo (8/18/14).
2. Failing to abide by DOC and SOTP rules by accessing the Internet on 8/1/14.
3. Accessing the Internet without prior approval from 8/1/14 to 8/8/14.
4. Accessing private search (proxy) websites to circumvent Covenant Eyes.

The court found "that revocation of the suspended sentence is appropriate based upon any one of the violations above, as well as all violations." Free was directed to serve the remainder of his indeterminate sentence of 131 months to life.

ANALYSIS

Revocation for Violation of a Condition

"Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, a first-time sex offender may be eligible for a suspended sentence under the SSOSA provisions." State v. Miller, 180 Wn. App. 413, 417, 325 P.3d 230 (2014); RCW 9.94A.670(2). The

"SSOSA was created because it was believed that for certain first-time sexual offenders, 'requiring participation in rehabilitation programs is likely to prove effective in preventing future criminality.'" Miller, 180 Wn. App. at 417 (quoting State v. Goss, 56 Wn. App. 541, 544, 784 P.2d 194 (1990) (quoting DAVID BOERNER, SENTENCING IN WASHINGTON § 2.5(c) (1985))).

A SSOSA may be revoked at any time during the period of community custody and the sentence reinstated if there is sufficient evidence to convince the trial court that the offender has either "violated a condition of the suspended sentence or failed to make satisfactory progress in treatment." State v. McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009); RCW 9.94A.670(11). "Revocation of a suspended sentence due to violations rests within the discretion of the trial court and will not be disturbed absent an abuse of discretion." McCormick, 166 Wn.2d at 705-06. "An abuse of discretion occurs only when the decision of the court is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" McCormick, 166 Wn.2d at 706 (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Here, the trial court did not abuse its discretion in revoking the suspended sentence. The trial court listed four independent reasons for suspending the SSOSA, the first being a finding that Free "failed to make reasonable progress in court ordered sexual deviancy treatment—having been terminated from the treatment program of William Satoran . . . and Dr. Myrna Pinedo." The evidence supports this finding.

Free's original judgment and sentence required that he participate in sex offender treatment for three years and that he follow all recommendations of his treatment provider. He subsequently agreed to conditions for his 90-day probationary period that

also required that he comply with all conditions of treatment and supervision "without complaint, negotiation, or argument." It is undisputed that Free was terminated from treatment by both Satoran and Dr. Pinedo. It is also undisputed that at the time of Free's revocation hearing there were no treatment providers willing to take him. Since a SSOSA may be revoked for any violation of a condition of the suspended sentence or failure to make satisfactory progress in treatment, this finding alone was sufficient for the trial court to revoke Free's suspended sentence.

Limitation on Access to Internet

Free's primary arguments on appeal concern the trial court findings for revocation, as they relate to regulations on his use of the internet. Free argues (1) the treatment provider conditions limiting his access to the internet were not authorized by statute because they were not crime related, (2) the DOC condition limiting his internet access was not in writing, and (3) conditions limiting access to the internet violate Free's First Amendment rights.

Free argues that the reason he was terminated from treatment was impermissible as it was primarily because of his violation of the treatment providers' internet restrictions. We disagree.

At the outset, we note there is currently no Washington case law or statute that restricts a treatment provider's ability to regulate a participant's use of the internet. In State v. O'Cain, this court reversed an internet restriction set by the trial court for not being "crime-related;" although we specifically clarified that the decision "does not preclude control over internet access being imposed as part of sex offender treatment if recommended after a sexual deviancy evaluation." 144 Wn. App. 772, 775, 184 P.3d

1262 (2008). However, we do not explore this issue further. In this case, while both treatment providers imposed limitations on Free's internet access, and both faulted him for violating those limitations, their primary reasons for terminating Free were based on his failure to participate in the program and his continued dishonesty.

Free's SSOSA required that he engage in sex offender treatment with Satoran for three years and that he abide by all conditions of treatment and follow all of Satoran's treatment recommendations. Free signed a treatment contract with Satoran that required honesty, required he participate fully in treatment, and required that he not access the internet without permission. Satoran terminated Free for nonpayment, for failing to complete his homework, failing to actively participate, and for exhibiting a poor attitude toward treatment. After hearing testimony from Satoran, the trial court agreed: "I think any way you look at it from Mr. Satoran's testimony and the documents that he's filed in this case, Mr. Free did not make satisfactory progress in treatment."

Despite his termination from Satoran's treatment program, Free was given a second chance to reenter treatment with Dr. Pinedo. As a condition of a 90-day probationary period, Free agreed to enroll with Dr. Pinedo, and comply with all treatment conditions without complaint, negotiation, or argument. Dr. Pinedo's conditions included the requirement for complete and honest disclosure.

When Dr. Pinedo terminated Free from her program, she did consider his unauthorized use of the internet, however, only because this use of the internet was indicative to his lack of commitment and honesty. Dr. Pinedo found Free's attempts to circumvent internet safety controls constituted a failure to completely and honestly participate in the program. Dr. Pinedo concluded that Free "has demonstrated a

persistent pattern of deviant thinking, attitudes and behaviors that support potential reoffending." After hearing testimony and reviewing documents, the trial court agreed:

> One of the core principles, what's necessary to be successful and make reasonable progress in a SSOSA is to be honest, honest with your CCO and honest with your treatment provider, and that was clearly not the case with Mr. Free. And so I don't find that he made reasonable progress in treatment with Dr. Pinedo as well, and that's supported by substantial evidence.[1]

Thus, we hold the trial court did not abuse its discretion in revoking Free's suspended sentence based on his failure to make progress in treatment.

We need not address the subsequent claims challenging the remaining findings. We draw a direct analogy to a court's imposition of an exceptional sentence on multiple grounds. In that circumstance, "an exceptional sentence may be upheld on appeal even where all but one of the trial court's reasons for the sentence have been overturned." State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Remand is only necessary "where it is not clear whether the trial court would have imposed an exceptional sentence on the basis of only the one factor upheld." Gaines, 122 Wn.2d at 512; See also State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). In this case, the trial court left no ambiguity in specifically finding "revocation of the suspended sentence is appropriate based upon any one of the violations above."

Standard of Proof for Revocation

Free next argues that the trial court applied the incorrect evidentiary standard of proof in determining whether to revoke Free's SSOSA, violating his right to due process. We disagree.

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[1] Report of Proceedings (RP) (Oct. 31, 2014) at 339.

"The revocation of a suspended sentence is not a criminal proceeding, but rather an extension of the original criminal conviction." McCormick, 166 Wn.2d at 699. "An offender facing a revocation of a suspended sentence has only minimal due process rights because the trial has already occurred and the offender was found guilty beyond a reasonable doubt." McCormick, 166 Wn.2d at 700 (citing State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999)).[2]

A SSOSA may be revoked at any time during the period of community custody if there is sufficient proof to reasonably satisfy the court that the offender (1) has violated a condition of the suspended sentence or (2) is failing to make satisfactory progress in treatment. McCormick, 166 Wn.2d at 705 (emphasis added).

At trial, the State argued, "ultimately, the court is only being asked to find whether there is substantial evidence to prove the violation certainly on a much lesser standard than proof beyond a reasonable doubt." The trial court then stated it was applying the "substantial evidence" standard in making its rulings. Free is correct that "substantial evidence" is the appellate standard of review. However, a finding by the trial court that "substantial evidence" supports each violation, though not the exact language of the standard, adequately demonstrates that the trial court found "sufficient proof to reasonably satisfy the court." Thus, we find that any error in the use of this language was harmless.

Free next argues that the trial court should have applied the "preponderance of the evidence" standard in determining whether the SSOSA should be revoked. Free

[2] "The Supreme Court has extended some due process protections when probation is revoked for the failure to pay fines or fees." McCormick, 166 Wn.2d at 700.

argues that the U.S. Supreme Court decision Morrissey v. Brewer, 408 U.S. 471, 484, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), and this court's decision In re Pers. Restraint of McKay, 127 Wn. App. 165, 169, 110 P.3d 856 (2005), require this heightened evidentiary standard. We disagree.

The Washington Supreme Court addressed the added due process requirements as proscribed by Morrissey in State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999), where the court added several minimal requirements in order to satisfy due process.[3] "These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts." Dahl, 139 Wn.2d at 683 (citing Morrissey, 408 U.S. at 484); See also McCormick, 166 Wn.2d at 700. Since then, our Supreme Court has declined to reconsider the "sufficient proof to reasonably satisfy the court" evidence requirement. See McCormick, 166 Wn.2d 689 (holding "a SSOSA sentence may be revoked at any time if there is sufficient proof to reasonably satisfy the court."); See also Dahl, 139 Wn.2d at 705 (holding "an offender's SSOSA may be revoked at any time if a court is reasonably satisfied.").

Free invites this court to presume that those decisions "accidentally" relied on the same evidence requirement. We decline their invitation. We are bound by the decisions of our Supreme Court, and "overruling a prior decision . . . is not a step that should be taken lightly." Keene v. Edie, 131 Wn.2d 822, 831, 935 P.2d 588 (1997). We

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[3] In Dahl, the Washington Supreme Court incorporated the United States Supreme Court's holding that minimal due process entails:

> (a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for revocation.

Dahl, 139 Wn.2d at 683; McCormick, 166 Wn.2d at 700.

will not abandon an established rule absent a showing that the rule is "incorrect and harmful." In re Stranger Creek and Tributaries in Stevens County, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Free has failed to meet that burden.

Statement of Additional Grounds

In his statement of additional grounds, Free argues that the trial court erred in admitting several exhibits including: (1) the Covenant Eyes report, (2) Dalton's DOC chronological event notes that pertain to his conversations with Free, and (3) the printouts of the proxy server webpages. Free argues that the Covenant Eyes report was hearsay and violated his right to confront the witness, as the person who created the report was not present to testify at trial. He also argues that Dalton's report containing his chronological events could have been doctored, noting the rule of completeness, and should not have been admitted. Finally, Free argues that the proxy server printouts should not have been admitted because they mischaracterized the evidence.

Hearsay evidence is admissible at revocation hearings if good cause outweighs the defendant's right to confront and to cross-examine witnesses. State v. Nelson, 103 Wn.2d 760, 765, 697 P.2d 579 (1985). "The minimal due process right to confront and cross-examine witnesses is not absolute. Courts have limited the right to confrontation afforded during revocation proceedings by admitting substitutes for live testimony, such as reports, affidavits and documentary evidence." Dahl, 139 Wn.2d at 686. "Hearsay evidence should be considered only if there is good cause to forgo live testimony." Dahl, 139 Wn.2d at 686; Nelson, 103 Wn.2d at 765. Good cause exists when procuring the witness would be difficult and expensive and the State can show that the proffered

evidence was demonstrably reliable or clearly reliable. See Dahl, 139 Wn.2d at 686 (quoting Nelson, 103 Wn.2d at 765). "Unreliable hearsay may not be the sole basis for revocation of probation." Nelson, 103 Wn.2d at 765.

In this case, we hold good cause outweighs Free's right to confront the creator of the report. Covenant Eyes is a commonly used monitoring system for the DOC. The State adequately showed the Covenant Eyes report was reliable by having Dalton testify to his experience with their accuracy and how commonly they are used. Expecting the DOC to procure the specific person who created the report for Covenant Eyes would be unnecessarily difficult and expensive.

We also hold good cause existed to allow Dalton to reference his probationary notes taken during the time he worked with Free. Other courts have found "evidence from the court files and state probation reports" though hearsay, were "'reliable and obviously sufficient to satisfy the court that appellant had violated the terms of his probation.'" Nelson, 103 Wn.2d at 764-65 (quoting United States v. Miller, 514 F.2d 41 (9th Cir. 1975)). As the Washington Supreme Court clarified,

> where it not only appears that the reports of program staff therapists contain factual assertions about defendant's use of the program solely to avoid prison and his failure to expend sufficient time and energy to succeed in the program, but also that these assertions are corroborated by the statements of probationer and other witnesses, such hearsay report evidence is demonstrably reliable.

Nelson, 103 Wn.2d at 765. Such is the case here. Although Dalton was present to testify to his conversations with Free and Dr. Pinedo, the evidence provided additional clarification as to the times and dates of the conversations, information that was corroborated by the witnesses. Regarding Free's argument that the evidence should

not be admitted under "the rule of completeness," that objection was not made at the trial court, and we do not consider it here.

Finally, Free argues he was owed both a preliminary hearing and a revocation hearing in order to comply with the requirements set by Morrissey. As previously discussed, this court has already addressed the due process requirements as proscribed by Morrissey. Morrissey requires,

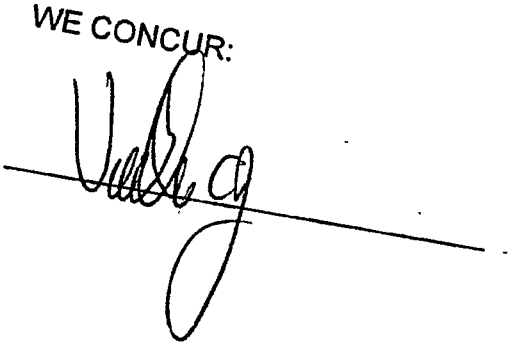
> written notice of the claimed violations of parole, disclosure to the parolee of evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, a neutral and detached hearing body, and a written statement by the fact finders as to the evidence relied on and the reasons for revoking parole.

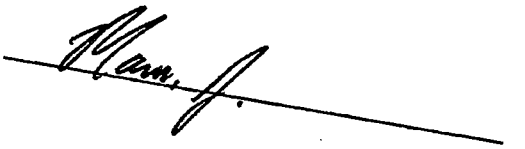
In re Lain, 179 Wn.2d 1, 18, 315 P.3d 455 (2013) (citing Morrissey, 408 U.S. at 489).

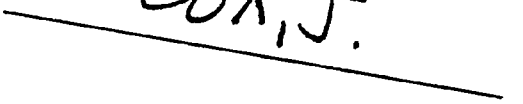
Free's only remaining argument is that the trial court's ruling was based entirely on "unreliable hearsay." Here, the trial court heard several witnesses, including Free's CCO and both of Free's treatment providers, Satoran and Dr. Pinedo. Free's argument is essentially that Dalton "misrepresented" the facts, i.e., the use of the proxy server printouts, and that the allegations were "unsubstantiated." However, Free was given the opportunity to cross-examine these witnesses and present his own defense. "We will not substitute our judgment for the trial court's, weigh the evidence, or adjudge witness credibility." Greene v. Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

We affirm.

WE CONCUR:







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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74222-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: October 24, 2017

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