

NO. 34506-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES B. SHAUGHNESSY,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable D. Gary Steiner, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. The State invokes the federal test for whether Macy's rules and practices infringed on Shaughnessy's right to freedom of belief and free exercise of religion. The Washington Supreme Court has rejected that test. Should this Court address the religious issues under the test articulated for Article 1, § 11 of the Washington State Constitution?

2. The State argues that even if Macy's practices infringe on Shaughnessy's freedom of religion, Macy is a private party and not a state actor. However, (a) Macy was acting under a certification that the State developed solely for the treatment of offenders under sentence of the court; (b) in the SSOSA negotiations, the prosecutor approved of Macy; (c) the court ordered Shaughnessy to undergo therapy with Macy; (d) Shaughnessy could not change therapists without permission from state officials, and (e) his termination by Macy automatically brought Shaughnessy back before the court. In such circumstances, is Macy a state actor?

B. ARGUMENT IN REPLY

1. **THE STATE APPLIES THE WRONG STANDARD TO THE INFRINGEMENT OF SHAUGHNESSY'S RELIGIOUS FREEDOMS.**

As discussed in the Opening Brief, the test recognized in Washington for whether government action constitutes an unconstitutional infringement

of religious freedom is that found in Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). See Br. of Appellant at 12-21 (discussing the Washington Supreme Court decision in First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203, 840 P.2d 174 (1992) and its rejection of the federal Supreme Court's decision in Employment Div., Dept of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)).

This test requires the courts to apply strict scrutiny to infringements of religious freedom. Munns v. Martin, 131 Wn.2d 192, 199, 930 P.2d 318 (1997). Even facially neutral and even-handedly enforced statutes may violate art. 1, § 11 if they indirectly burden the exercise of religion. First Covenant, 120 Wn.2d at 226. In Washington, the State must show a compelling interest that justifies any burden on the free exercise of religion. *Id.* The State must also demonstrate that its means are necessary and the least restrictive available. *Id.* at 227.

The sincerity of Shaughnessy's religious beliefs is undisputed, and in his Opening Brief, Shaughnessy established the burden placed on his religious freedoms by Macy's rules and practices. Br. of Appellant at 23-26. The burden thus fell on the State to demonstrate that the infringement was required by a compelling interest and that the means used were both

necessary and the least restrictive. First Covenant, 120 Wn.2d at 226-27; *see also* Br. of Appellant at 26-28 (addressing compelling state interest and necessary, but least restrictive, means).

Instead, however, the State makes only a passing reference to the broader protection of Washington's Constitution, choosing instead to argue under the Smith test that the Washington Supreme Court clearly and unequivocally rejected in First Covenant. Br. of Respondent at 14-18; *cf.* First Covenant, 120 Wn.2d at 223-26. As discussed in the Opening Brief, Smith does not apply and Macy's conduct violates the First Covenant standard.¹ Br. of Appellant at 13-28.

¹ The cases cited by the State are inapplicable to Shaughnessy's situation. In three of those cases, the Court failed to address the religious issue. *See* United States v. Tolla, 781 F.2d 29, 36 n.3 (2nd Cir. 1986) (the court was not persuaded by religious issue raised by *amicus curia*); United States v. Nolan, 932 F.2d 1005 (1st Cir. 1991) (refusing to address religious issue on procedural grounds); United States v. Ofchinick, 937 F.2d 892, 898 (3rd Cir. 1991) (court determines restitution amount was reasonable based on probationer's income and lavish lifestyle without analyzing religious claim -- no authority cited for Appellant's proposition that court could not direct him to re-order his priorities between restitution payments and charitable contributions).

The State's other cases are easily distinguished factually. In United States v. Myers, 864 F. Supp. 794 (N.D. Ill. 1994), the outcome would have been the same under either Smith or Sherbert/First Covenant because of the District Court's doubts that Myers' asserted religious beliefs were sincerely held. Myers, 864 F. Supp. at 798 n.7. There are no similar doubts regarding Shaughnessy. In United States v. Israel (f/k/a Jarvis Jefferson), 317 F.3d 768 (7th Cir. 2003) (cited in the State's brief as United (continued...))

The State argues that Macy's policies and conduct cannot be attributable to the State as constituting state action. Br. of Respondent at 18. But the actions of private therapy providers can implicate violations of religious freedoms when participation is required by the court, or by corrections or probation authorities. See Personal Restraint of Garcia, 106 Wn. App. 625, 24 P.3d 1091 (2001) (required attendance at Alcoholics Anonymous violates Establishment Clause unless non-religious alternatives are provided); see also Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) (in an Establishment Clause challenge, fact that an outside agency -- Narcotics Anonymous -- provided treatment was immaterial to issue of state action when inmate was required to attend religiously based treatment or face potential negative effects on parole eligibility); Warner v. Orange County Dep't of Probation, 115 F.3d 1068 (2d Cir. 1996) (42 U.S.C. § 1983

¹(...continued)

States v. Jefferson, 317 F.3d 786), the Court upheld application of the marijuana laws despite the burden to Israel's Rastafarian beliefs under Smith and the Sherbert/First Covenant test of compelling State interest and least restrictive means. Israel, 317 F.3d at 770-72; cf. State v. Balzer, 91 Wn. App. 44, 954 P.2d 931, *rev. denied*, 136 Wn.2d 1022 (1998) (in drug prosecution, state marijuana laws withstand free exercise challenge of religious use under strict scrutiny required by the greater protection of Const. art. 1, § 11). While it's clear the marijuana laws withstand constitutional scrutiny, Shaughnessy's claim has nothing to do with those obviously constitutional provisions.

Establishment Clause suit, requiring atheist to attend Alcoholics Anonymous meetings as probation condition implicated state action).

Arising under the Establishment Clause, these cases provide the mirror image of Shaughnessy's situation -- where his right to free exercise was abridged. And these Establishment Clause cases are directly on point for the principle that State action is implicated when First Amendment (and art. 1, § 11) rights are abridged by private therapists providing counseling to those under court order to receive them.

In addition, Macy was a state actor because there was significant State involvement with Shaughnessy's SSOSA sentencing. As a general rule, state action is found where the State is "significantly intertwined with the acts of the private parties." Stephanus v. Anderson, 26 Wn. App. 326, 335, 613 P.2d 533 (1980) (citations omitted). A person is a "state actor" if "he is a state official, . . . he has acted together with or has obtained significant aid from state officials, or . . . his conduct is otherwise chargeable to the State." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

In this case, the State's actions were completely intertwined with those of Macy and Shaughnessy at every step of the process. Macy acted together with -- and received significant aid from -- state officials and the

agency's conduct was chargeable to the State by virtue of the State's delegation of a significant corrections function to the agency.

Moreover, the SSOSA sentence was the result of a negotiated settlement between the prosecutor and public defender. 1RP 2-4. The selection of Macy as treatment provider was subject to acceptance by the prosecutor. 6RP 130-31. The court ordered Shaughnessy to undergo treatment at Macy. 1RP 2-3, 9; CP 13. Further, Shaughnessy could not change providers unless both the prosecutor and his community corrections officer agreed, or the court approved the change. 6RP 132-33; CP 13, 21. Thus, Macy acted together with, and received significant aid from, state officials.

Furthermore, the certification under which Macy was authorized to provide court-ordered treatment to Shaughnessy explicitly states that its sole purpose is to provide treatment to those under court order. RCW 18.155.010.² Thus, in addition to being a state actor, Macy was acting

² RCW 18.155.010, Findings -- Construction, provides:

The legislature finds that sex offender therapists who examine and treat sex offenders pursuant to the special sexual offender sentencing alternative under RCW 9.94A-.670 and who may treat juvenile sex offenders pursuant to RCW 13.40.160, play a vital role in protecting the public from sex offenders who remain in the community following conviction. The legislature finds that the qualifications,
(continued...)

under color of state law, and the agency's policies constitute state action. See Lugar, 457 U.S. at 928-36 (discussing the distinction between state actors and those acting under color of state law).

The State also suggests that Shaughnessy waived his claim that he was forced to go into treatment with Macy because he presented the evaluation from that agency and requested treatment there. Br. of Respondent at 18. This argument ignores the procedures that led to Macy's appointment as Shaughnessy's treatment provider and wrongly implies that Shaughnessy exercised a knowing choice in the selection of his provider.

The record here shows that the SSOSA was the result of negotiations in which the State wielded power. At the original sentencing hearing, the

²(...continued)

practices, techniques, and effectiveness of sex offender treatment providers vary widely and that the court's ability to effectively determine the appropriateness of granting the sentencing alternative and monitoring the offender to ensure continued protection of the community is undermined by a lack of regulated practices. The legislature recognizes the right of sex offender therapists to practice, consistent with the paramount requirements of public safety. Public safety is best served by regulating sex offender therapists whose clients are being evaluated and being treated pursuant to RCW 9.94A.670 and 13.40.160. This chapter shall be construed to require only those sex offender therapists who examine and treat sex offenders pursuant to RCW 9.94A.670 and 13.40.160 to obtain a sexual offender treatment certification as provided in this chapter.

(Emphasis added).

State acknowledged that Shaughnessy's charges were amended for a higher standard range in exchange for the SSOSA recommendation. 1RP 2. According to Dino Sepe -- Shaughnessy's public defender who negotiated the SSOSA -- the State insisted that the information be amended up as a condition of the SSOSA recommendation. 6RP 135. Significantly, Sepe explained that the State had to agree with the choice of provider, "there are certain ones that the State will not consider, certain ones that they will." 6RP 130-31. Thus, the record shows that the State had significant authority in the selection of Macy as Shaughnessy's treatment provider.

Sepe also stated that, while he discussed various treatment providers with offenders, his clients tended not to know the various providers. 6RP 130-31. His clients relied on his judgment regarding the choice of providers. 6RP 131. The record also shows, however, that Sepe had no knowledge of Macy's position towards religion when Shaughnessy's SSOSA was negotiated. 6RP 136. Thus, the record fails to support the State's argument that Shaughnessy somehow knowingly agreed to participate in treatment with a provider whose position was hostile to his free exercise of religion.

Arguing that Shaughnessy exaggerates his claims that Macy exhibited animosity towards religion, the State says, "Macy allows her patients to

attend church programs as long as there are no children present." Br. of Respondent at 19 (citing 5RP 52-53). The right to attend church programs, however, is guaranteed by the free exercise provisions of both the federal and Washington constitutions. As Macy herself acknowledged, church attendance is a constitutional right. 5RP 61. The degree of animosity Shaughnessy experienced towards his religious beliefs at Macy's is discussed in the Opening Brief at 24-26.

The State concludes by arguing that Shaughnessy's failure to participate in treatment at Macy's "leaves an untreated sex offender in the community which is a 'practice[] inconsistent with the peace and safety of the state' and falls into an express exemption to the protection of article I, section 11 of the state constitution." Br. of Respondent at 20. This argument demonstrates confusion about what constitutes a religious practice and what constitutes a violation of a sentencing condition -- and about the basis for Shaughnessy's request for a new hearing.

Shaughnessy acknowledges that he violated the conditions of his SSOSA when he absconded. Br. of Appellant at 9; 5RP 8-9; CP 56. The reason he absconded is that he felt that adhering to the treatment protocol at Macy's would require him to abandon his firmly and sincerely held Christian religious faith. Contrary to the State's argument, Shaughnessy

does not claim that absconding is a practice that grows from his religious beliefs. Thus, Shaughnessy does not claim that his flight from the treatment protocol at Macy's is constitutionally protected. Rather, Shaughnessy raises his free exercise of religion claim as a mitigating factor and to establish the degree of care required from the court to provide due process and in the exercise of its discretion.

As argued in the Opening Brief, the court below failed to attach any significance to Macy's animosity towards Shaughnessy's religious beliefs and the free exercise of his religious practices -- especially attending services and bible study. The State has made no argument as to why the court should have accepted Macy's burdening of religion to a higher degree than Shaughnessy's commercial activities (such as shopping for clothes) -- especially when a less-restrictive alternative was available in the form of another certified treatment provider who was willing to accommodate Shaughnessy's religious beliefs and practices. *Cf.* Br. of Appellant at 23-28. That, however, is the significant issue of religious freedom presented in this case, not -- as the State argues -- whether Christian practices require offenders to abscond from religiously hostile treatment providers.

2. THE COURT'S VIOLATION OF DUE PROCESS AND ABUSE OF DISCRETION REQUIRE A NEW HEARING BEFORE A DIFFERENT JUDGE.

The State acknowledges that the trial court failed to enter written findings and conclusions regarding its decision to revoke Shaughnessy's SSOSA. Br. of Respondent at 9-10. The State then asserts that Shaughnessy is asking this Court to "improperly overrule the trial court on the persuasiveness of defendant's evidence that he left treatment -- and the country -- because he found treatment at Macy's hostile to his religious beliefs." Br. of Respondent at 13. In the absence of written findings -- relying solely on the oral decision of the court below -- however, it is impossible to determine what the court found persuasive and what the court simply failed to address.

Contrary to the State's assertion, Shaughnessy's due process claim goes way beyond the lack of written findings. Br. of Respondent at 9. As discussed in the Opening Brief at 28-31, the court ignored the due process requirement that it carefully consider and balance whether the verified facts -- in combination with the mitigating circumstances -- require revocation or whether some other resolution better serves the purposes of the SSOSA sentencing. See Morrissey v. Brewer, 408 U.S. 471, 479-80, 488, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (revocation hearings must

go beyond establishing whether violations occurred to carefully consider whether facts warrant revocation and the offender's showing of mitigating circumstances). In like manner, the State's reliance solely on the fact that Shaughnessy does not contest the violations ignores the due process requirement that the facts -- along with the offender's mitigating circumstances -- must be carefully considered to determine whether revocation is required. Br. of Respondent at 10.

Because Shaughnessy presented a compelling case that his freedom of religious belief and his free exercise of religion were violated by Macy's policies and practices, the court below needed to carefully balance this mitigating factor against Shaughnessy's acknowledged violations of conditions. Because the court below failed to carry out such a balancing, this Court should remand for a new revocation hearing. And because the court below has already announced that it believed its initial decision to grant the SSOSA was a mistake, this hearing should be before a different judge.

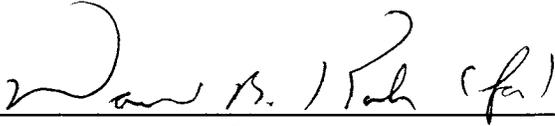
C. CONCLUSION

For the reasons discussed above and in Shaughnessy's Opening Brief, this Court should remand for a new revocation hearing before a different judge.

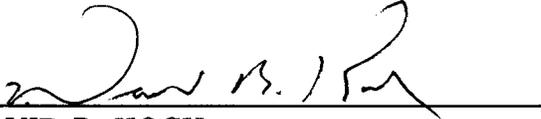
DATED this 12th day of February, 2007.

Respectfully submitted,

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STATE OF WASHINGTON
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12th DAY OF FEBRUARY 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 12th DAY OF FEBRUARY 2007.

x Patrick Mayovsky