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A. Assignments of Error

Assignments of Error

1. The trial court erred when it ordered in the judgment and sentence, appendix H Community custody condition 11 which states in part:

“(b) OTHER CONDITIONS; Defendant shall comply with the following other conditions during the term of community placement/custody:

“ 11) Shall not cause to have contact with K.M.A.’s immediate family (except [defendant] may have telephone contact only with Angela Allerdice; effective immediately without prior authorization from therapist and/or CCO.”

2. The trial court erred when it ordered in the judgment and sentence, appendix H Community custody condition 22 which states in part:

“(b) OTHER CONDITIONS: Defendant shall comply with the following other conditions during the term of community placement/custody:

22) Shall submit to urinalysis testing and polygraph examinations to monitor compliance with crime-related behavior.

3. The trial court erred when it entered An Order Revoking Suspension of Sentence, Imposition of Sentence and Warrant of Commitment where it found: “Defendant had contact w/wife when prohibited by court & failed 3 polygraph tests regarding this contact.”

4. The trial court erred when it entered findings of fact and conclusions of law II and concluded: “That the following violation numbers are

proven-- 1,2,3,4 and 5.”

5. The trial court erred when it entered findings of fact and conclusions of law II: “That the following violation numbers are proven-- 1.”

6. The trial court erred when it entered findings of fact and conclusions of law II: “That the following violation numbers are proven-- 2.”

7. The trial court erred when it entered findings of fact and conclusions of law II: “That the following violation numbers are proven--3.”

8. The trial court erred when it entered findings of fact and conclusions of law II: “That the following violation numbers are proven-- 4.”

9. The trial court erred when it entered findings of fact and conclusions of law II: “That the following violation numbers are proven--5.”

10. The trial court erred when it entered An Order Revoking Suspension of Sentence, Imposition of Sentence and Warrant of Commitment and modified the defendant’s sentence with the following condition:

“Community Supervision-community supervision with Department of Corrections is hereby modified to be for life.

11. The trial court erred when it entered An Order Revoking Suspension of Sentence, Imposition of Sentence and Warrant of Commitment and ordered:

“All of the other terms and conditions of the Judgment and Sentence previously entered shall remain in full force and effect.”

12. The defendant's right to freedom of association guaranteed by the Fourteenth Amendment was violated when the Department of Corrections ordered that he could not have face to face contact with his wife.

13. The defendant's right to freedom of association guaranteed by the Fourteenth Amendment was violated when the trial court ordered him not to have any lifetime contact with his wife, except by telephone, after revoking his SSOSA sentence.

14. The defendant's right to due process of law guaranteed in the Fourteenth Amendment was violated when the Department of Corrections ordered that he could not have face to face contact with his wife.

15. The defendant's right to due process of law guaranteed by the Fourteenth Amendment was violated when the trial court ordered him not to have any lifetime contact with his wife, except by telephone, after revoking his SSOSA sentence.

16. The defendant's right to be free from cruel and unusual punishment guaranteed by the Eighth Amendment was violated when the Department of Corrections ordered that he could not have face to face contact with his wife.

17. The defendant's right to be free from cruel and unusual punishment guaranteed by the Eighth Amendment was violated when the trial court ordered him not to have any lifetime contact with his wife, except by

telephone, after revoking his SSOSA sentence.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred when it ordered in its judgment and sentence of October 8, 2010 and in its subsequent revocation of a SSOSA sentence of June 3, 2011 that the defendant could not have any contact with his wife who was the mother of the victim, except by telephone where Mr. Smith was convicted of one count of child molestation and one count of tampering with a witness? (Assignments of Error 1,3,4,6, 10 and 11)
2. Whether the trial court abused its discretion when it ordered in its judgment and sentence of October 8, 2010 and in its subsequent revocation of a SSOSA sentence of June 3, 2011 that the defendant could not have any contact with his wife who was the mother of the victim; where Mr. Smith was convicted of one count of child molestation and one count of tampering with a witness? (Assignments of Error 1,3,6,7,8, 10 and 11.)
3. Whether the defendant's constitutional rights to freedom of association and/or due process and/or absence of cruel and unusual punishment were violated when the trial court ordered as part of its judgment and sentence and its subsequent revocation of a SSOSA sentence that the defendant could not have any contact with his wife except by telephone? (Assignments of Error 1,3,6,7,8,10-17.)

4. Whether the trial court exceeded its statutory authority based on RCW 9.94A.505(8) and RCW 9.94A.030(10) when it ordered that the defendant was required to submit to polygraph examinations as part of his community placement/custody, including his SSOSA sentence?

(Assignments of Error 2,3,4,5,9 and 11.)

B. Statement of the Case.

On March 16, 2010 Jeffrey Brian Smith plead guilty to one count of child molestation in the first degree- domestic violence, alleged to have occurred between January 1, 2007 and August 20, 2009.¹ 3/16/10 RP 1; RCW 9A.44.083; CP 17. Count II alleged tampering with a witness in violation of RCW 9A.72.120; CP 18-9. Id. One of the conditions of the judgment and sentence was to have no contact with the victim, his then seven year old step-daughter, K.M.A.(DOB 9-19-02). RP 3.

Subsequently, a hearing was conducted to appoint special counsel for Mr. Smith to advise him regarding withdrawal of his guilty pleas. This was based on being given inaccurate information as to the potential sentence he would be facing in the event the case went to trial. 7/8/10 RP 1.

¹ Mr. Smith allegedly inserted his private into K.M.A. when she was four years old. 10/08/10 RP 23; CP 40. Both incidents followed each other in short succession over a two day period. CP 48.

Instead of withdrawing his guilty pleas Mr. Smith plead guilty as charged and sentenced on October 8, 2010. Mark Bennett Whitehill, a clinical forensic psychologist, testified that in his opinion Smith, after elaborate testing as well as a polygraph examination, was a mild risk to community safety and was amenable to SSOSA. 10/08/10 RP 9, 15. He testified that Mr. Smith “was largely absent psychopathology.” RP 5. He testified further that Mr. Smith was not a pedophile or shown to have pedophilic orientation or disposition. RP 8, 21, 37.

Nancy Nelson, a Department of Corrections Officer for the State of Washington, submitted a report to the court. CP 39. Her report indicates that Mr. Smith married Angela Allerdice in Seattle in 2007. She had two children of her own, a nine year old son and KMA. She and Mr. Smith have had two daughters in common: a four year old and a two year old. CP 47.

Nelson addressed the court at sentencing and did not recommend a SSOSA sentence. 10/08/11 RP28. Nevertheless, the trial court imposed a SSOSA sentence. The court imposed a suspended sentence of 75 months where the standard range was 57 to 75 months. RP 42. Mr. Smith was sentenced to eight months concurrent on the witness tampering charge. His standard range was 3 to 8 months. id.

Among the conditions was argument on whether Mr. Smith should

be allowed contact with his wife Angela Allerdice. RP 43. The state opposed any contact with Angela until Mr. Smith started treatment. RP 43-4. id. The trial court allowed telephonic contact with Allerdice until his protocols in treatment were in place and the boundaries for the parties were established. RP 44. Appendix H to the judgment and sentence entered on October 8, 2011 entitled “Community Custody stated in part:

“(b) OTHER CONDITIONS: Defendant shall comply with the following conditions during the term of community placement/custody:

11. Shall not cause to have contact with K.M.A.’s immediate family;* effective immediately, without prior authorization from therapist and/or CCO. Contact included in person, in writing, electronically, by phone and/or through third party.

* except [defendant] may have telephone contact only with Angela Allerdice CP 124

This condition could be effective “up to life.”² CP 123.

By February 24, 2011 Nancy Nelson of the Department of Corrections filed a Court-Notice of Violation seeking to revoke Mr. Smith’s SSOSA sentence because he had contact with his wife, Ms. Allerdice. CP 130; 4/8/2011 RP 2. It was alleged: ”1. Failing to provide truthful responses to polygraph examinations on/about 12/15/10 and/or

² “COMMUNITY PLACEMENT/CUSTODY: Defendant additionally is sentenced on convictions herein, for the offenses under RCW 9.894A.712 committed on or after September 1, 2001 to include up to life community custody....” CP 123.

10/10/11 in Port Orchard WA”. 2) “Having intimate contact with a prohibited person, Angela Allerdice, at the Chiefton Motel, Bremerton, on/about 10/08/10.”³ 3. “Having face-to-face contact with a prohibited person, Angela Allerdice, in the parking lot at the Family Pancake House, Bremerton, WA on/about 12/30/10.”⁴

Based on these alleged violations, the state filed a motion for an order revoking the suspended sentence imposed under the SSOSA option. CP 140. In March 2011 Jeffrey B. Smith was summonsed to court by the Department of Corrections alleging a violation of the terms and conditions of his SSOSA sentence. 3/10/11 RP 1. On April 8, 2011 a hearing on revocation was continued to May 20, 2011. RP 8.

In the meantime Mr. Smith was arrested on another SSOSA violation. 5/2/21011 RP 2. On May 4, 2011 a Court-supplemental Notice

³ Mr. Smith related to his therapist Dr. Jensen: “”When Angela showed up at my door at the motel, I was sad, happy, shocked, all at the same time..the whole time I was paranoid...I told her that we were not supposed to see each other, she said that she knew that...nothing further was said at that point about violating the judge’s order...when we separated that evening, I told Angela we could not be seeing each other anymore.” (ellipses are Dr. Jensen’s.) CP 136.

⁴ That was Mr. Smith’s place of employment as a cook at the time. CP 134. Angela Allerdice was emotionally distraught and called Mr. Smith to inform him that her mother had been diagnosed with breast cancer. They met in Angela’s car to talk about Angela’s mother’s health problems. CP 133, 136.

of Violation was filed by Nancy Nelson of the Department of Corrections.

CP 151. This time Nelson alleged two other violations denominated

Violations 4 and 5. She alleged: "Violation 4: Contact with a prohibited

person, Angela Allerdice, since 1-26-11 as revealed by deceptive

polygraph results on/about 4-29-11 in Port Orchard WA." CP 151.

"Violation 5: Failing to comply with conditions of community custody

and/or psychosexual therapy by failing to provide truthful responses during

a polygraph examination on/about 4-29-11 in Port Orchard WA." CP 152.

According to the supplemental report by CCO Nelson:

"At the time of sentencing Smith was restricted from contact with minor children and from all but phone contact with his wife, Angela Allerdice. After Smith failed two compliance polygraph tests in December and January regarding contact with minors and children, he was further restricted by his CCO and therapist from all contact with his wife. Prior to his third compliance polygraph, Smith disclosed to Dr. Jensen that he had, in fact, had contact with his wife immediately after release from jail in 10-10 and later in 12-10. He passed the subsequent polygraph.

(Above italics are appellant's.)

Smith appeared in Court on 4-8-11 to address the matter of Violations 1 through 3. That hearing was continued to 5-20-11 to allow more time for Smith to show more significant evidence of treatment progress and probation compliance.

Smith submitted to a fourth polygraph test on 4-29-11 at the Port Orchard DOC field office... Results of the test show clear deception in Smith's responses when he was asked the question: *Since January 26, 2011,*

have you had any contact or attempted to have contact with your wife? Smith showed inconclusive results on two other relevant questions: *Since your last test, have you had any form of contact with either your daughters or your step-sons?*, and *Since your last test, have you had any unreported contact with minors?* When questioned extensively both during and after the test, Smith was unwilling to provide any further information which would shed light on the deceptive polygraph results. CP 152.

Prior to court hearing Ms. Nelson filed a “Court-Special” advising the court that Mr. Smith’s treatment provider- Joseph A. Jensen, Ph.D. had terminated his treatment in the SSOSA program. CP 170. Mr. Smith was terminated because he contacted his wife by telephone when he was advised by his treatment provider that she was “struggling financially.”⁵ (See appendix for copy of Dr. Jensen’s letter of termination dated May 4, 2011.)

On June 3, 2011 a revocation hearing was conducted. 6/03/2011 RP 2. After hearing witnesses and considering evidence, the trial court revoked Mr. Smith’s SSOSA sentence. RP 29-32. The court found violations of a failed polygraph on December 15, 2010 (violation 1); having contact with his wife Ms. Angela Allerdice as disclosed to his treatment provider (Violation 2); face to face contact with his wife on

⁵ Dr. Jensen stated in his report: “In group therapy session on 4/25/11, I informed Mr. Smith that I met with his wife and that she was struggling financially.” CP 173.

December 30, 2011 (violation 3); admitted contact with his wife on April 29, 2011 (fourth violation) and a failed polygraph on April 29, 2011 (violation five). RP 30-1.

As part of his life-time sentence it was ordered that he could have telephone contact with his wife in prison and after prison, but he could not have face to face contact with her at all. RP 35 (See appendix for colloquy at the end of the revocation hearing RP 34-35.) The Order Revoking Suspended Sentence stated in part “Defendant’s Sentence is modified - Community supervision-Community supervision with the Department of Corrections is hereby modified to be for life.” CP 177.

The defendant appealed on June 30, 2011. CP 180.

C. Summary of the Issues

The paramount issue is whether a trial court has the authority to order that a convicted child molester will never be able to contact his wife, who is also the mother of the alleged victim? 6/3/11 RP 35. Mr. Smith stated to his treatment provider at the time he was prohibited from having any contact with his wife Angela Allerdice whatsoever, including telephone contact:

“I failed the polygraph test, that’s all I know...I don’t know if they’ll try to revoke me..I called Angela on the phone about three times...I tried to pass it off as I didn’t call her... I was concerned about my wife...you told me Angela was struggling financially...you guys are asking me to not be

there for my wife, I'm having trouble with that...my not having contact with her does not have anything to do with my case...I had not contacted Angela until after you told me she was struggling financially...the only concern that you guys have about me having contact with Angela is the possibility of having contact with the kids...I have not had contact with the kids." CP 173.

D. Argument

I. THE TRIAL COURT ERRED WHEN IT REVOKED THE DEFENDANT'S SSOSA SENTENCE BECAUSE MR. SMITH HAD CONTACT WITH HIS WIFE.

FREEDOM OF ASSOCIATION

The Supreme Court decided *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993) regarding the trial court's imposition of the sentencing requirement that Riley was prohibited from associating with any other computer hackers. Riley was convicted of three counts of computer trespass.⁶ The high court stated in part:

"Prohibiting Riley from associating with other computer hackers is also reasonable. Limitations upon fundamental rights are permissible, provided they are imposed sensitively. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975). "[The convict's] freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order." *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974), *cert.*

⁶ Riley was also convicted of four counts of possession of stolen property where he used his home computer to dial repeatedly a telephone company and then enter random numbers in his attempt to obtain long distance telephone access codes of others.

denied, 419 U.S. 1124 (1975).⁷ The prohibition against Riley associating with other computer hackers is punitive and helps prevent Riley from further criminal conduct for the duration of his sentence. It is therefore not an unconstitutional restriction of Riley's freedom of association."

State v. Riley, 121 Wn.2d at 38. Here, the prohibition of anything but telephone contact with his wife, and later prohibiting all contact with his wife, was unreasonable. The trial court did not even consider where K.M.A. was living at the time these sanctions were unreasonably imposed by DOC. At the time of the SSOSA revocation hearing in June 2011 K.M.A. was living with her father in Gold bar in eastern Washington and had been since before the April 8, 2011 admit/deny hearing. 4/8/11 RP 6; CP 41.

As in *Riley* these prohibitions against Smith having contact with his wife were purely punitive. The prohibitions were used by DOC as punitive measures-including threatened use and use of polygraph testing-to verify this condition.

The prohibition against Smith having contact with his wife was not imposed sensitively as *Riley* requires. According to *United States v.*

⁷ According to *Malone* : "A convicted criminal may be reasonably restricted as part of his sentence with respect to his associations in order to prevent his future criminality." *id.* at 556-57. Conversely, in Mr. Smith's case, according to Dr. Whitehill allowing Mr. Smith to have contact with his wife would assist in his rehabilitation. 6/03/11 RP 6-7.

Consuelo-Gonzales, supra, which was a Fourth Amendment probationary, search case, the court also noted:

“Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety.” *id.* at 265.

There was nothing rehabilitative about severely restricting Mr. Smith’s contact with his wife. In fact the only testimony on the rehabilitative aspects of having contact with his wife came from Dr. Mark Whitehill, PhD., a licensed psychologist and certified sex offender treatment provider. During the SSOSA revocation hearing he testified that he was familiar with Jeffrey Smith’s case, having conducted the initial psychosexual evaluation and having recently met with Mr. Smith face to face for over an hour at the county jail.⁸ *id.* ob. 6/3/11 RP 5.

He testified that in his opinion Mr. Smith should be allowed contact with his wife and that a road map should be established at the beginning of treatment to indicate how the contacts could develop over a

⁸ Dr. Whitehill testified: “I have reviewed a variety of reports ...including Dr. Jensen’s treatment reports, in particular his termination report. I have reviewed Ms. Nelson’s violation reports, and I have since had a phone conversation with Ms. Nelson, yesterday, approximately 30 minutes, and I spoke with Mr. Smith’s wife, Angela, yesterday...for around 30 minutes. And finally this morning I spoke with Dr. Jensen for approximately 20 minutes concerning his thoughts about Mr. Smith and the issues that are involved both in his revocation and in treatment.” RP 5-6.

period of time:

“A. Well, if we have an offender who is in a committed partnership, most typically I recommend either a continuance of that relationship, or a road map for the continuance of that relationship. In Mr. Smith’s case for example, I am aware that one of the charges of which he was convicted was witness tampering, in which he had asked Angela to ask [K.M.A.], the victim, not to testify or not to provide statements that would be inculpatory, so I am aware that there is some legitimate concern about Angela’s posture relative to Mr. Smith’s offenses that would give perhaps a reasonable person cause to examine critically that contact.

In general, however, I believe that the continuance of a committed partnership can mitigate or even eliminate certain dynamic risk factors that may predispose an offender to either relapse or to engage in certain lapses which are program violations or problems short of a reoffense. For example, the spouse can mitigate isolation, sexual self-control deficits, the possibility of withdrawal on the part of an offender; that is, continued social support and intimacy is a mitigator of certain dynamic risk factors, so in general I would be supportive of again either the continuance of such contact, or at least the implementation of a road map for the continuance of such contact.”

6/03/11 RP 6-7.

STANDARD OF REVIEW

The prohibitions in this case, intensified by the Department of Corrections,⁹ must be subject “to rigorous scrutiny.” *Zablocki v. Redhail*,

⁹ SMITH told Dr. Jensen about his decision to withhold information on his polygraph examinations ordered by Nancy Nelson: “Before the first polygraph, I figured if I told Nancy on my own that I had made love to my wife, she would send me to prison ...I have a hard time talking to my CCO, I don’t think she likes me...but she didn’t arrest

434 U.S. 374, 387, 98 S.Ct. 673, 681, 54 L.Ed.2d 618 (1978). The restraint against Mr. Smith, which deprives him of the right to procreate with his wife and “...bears no reasonable relationship to the essential needs of the state and public order, [also] that portion of the order would prohibit protected conduct and at least borders on unconstitutional overbreadness.” *State v. Riley*, 135 Wn.2d at 350 (citing *State v. Walsh*, 123 Wn.2d 741, 750, 870 P.2d 1374 (1992) (essentially a statute may be overturned if “...the overbreadth is both real and substantial in relation to the ordinance’s plainly legitimate sweep.) (citation omitted.)

Strict scrutiny of this condition leads to the reasonable conclusion that the trial court exceeded its authority when it imposed this punitive measure. Also, the trial court abused its discretion because imposition of this drastic sanction-affecting both husband and wife- was imposed for an untenable reason: to punish both Mr. Smith and Angela Allerdice. (see *State ex. Rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (“Discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”)

REQUIREMENT OF REASONABLE RELATIONSHIP

The prohibitions were not reasonably related to Smith’s conviction

me that morning, but I thought I was still going to prison.”“
CP 136.

of child molestation. Smith could have been allowed contact with his wife and at the same time any contact with K.M.A. or with their biological children prohibited. Any limitations imposed on fundamental rights during community custody must be “reasonably necessary to accomplish the essential needs of the state.” (See *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998) (court concluded that a prohibition on Riles as a convicted sex offender was not justified where he was ordered to have no contact with minors where the victim was an adult.)

In *Riles* the court ruled that petitioner Gholston’s probationary condition prohibiting any contact with minors bore no reasonable relationship between one of his crimes of first degree rape of a 19 year old female. The court stated:

“RCW 9.94A.120(9)(c)(ii) gives courts authority to order offenders to have no contact with victims or a “specified class of individuals.” The “specified class of individuals seems in context to require some relationship to the crime. It would be logical for a sex offender who victimizes a child to be prohibited from contact with that child, as well as contact with other children. It is not reasonable, though to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender’s crime.” *id.* 135 Wn.2d at 350.

Riles reinforces the notion that under the Sentencing Reform Act, the goals include imposition of punishment, protection of the public and an opportunity for the offender to improve him or herself. RCW

9.94A.010. Although offenders may be offered an opportunity to improve and may be prohibited from doing certain things that are directly related to their crimes, such as in *Riley*, the offender may not be coerced into doing certain things that are believed will rehabilitate them under the guise of crime-related prohibitions.

According to *State v. Julian*, 102 Wn. App. 296, 9 P.3d 851 (Div. III 2000) the SRA “...provides that conditions of community supervision must relate directly to the crime for which the felony offender was convicted. RCW 9.94A.030(8).¹⁰ The appellate court reversed the trial court because it exceeded its authority by prohibiting the use or possession of alcohol when it entered judgment on a plea of guilty to the charge of first degree child molestation. The court stated: “Indeed, nowhere in the record does the court make any connections between the offense and alcohol use.” *id.* at 305.

State v. Letourneau

These issues were addressed in *State v. Letourneau*, 100 Wn. App.

¹⁰ RCW 9.94A.030(8) was re-codified as RCW 9.94A.030(9). Then the legislature apparently deleted the definition of “community supervision.” Community custody is defined as: ““Community custody” means that portion of an offender’s sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to conditions placed on the offender’s movement and activities by the department.” RCW 9.94A.030(5).

424, 997 P.2d 436 (Div. I 2000). Ms. Letourneau was granted a SSOSA sentence initially. Part of the sentence was that she was not to have any contact with her minor, biological children without the supervision of an adult who had knowledge of her convictions of two counts of rape of a child.

The Court of Appeals reversed the trial court's sentencing order as well as vacated the original judgment and sentence that prohibited unsupervised contact between Letourneau and her biological minor children during the term of community custody. The appellate court found, as this court should find in the case at bench, the condition was not reasonably necessary to protect her children.¹¹

Letourneau's prohibition only extended to the time her minor children reached the age of majority. Here, Mr. Smith's prohibition extends throughout his lifetime and included his own children. 7/30/11 RP 45. Smith's Community Supervision by the Department of Corrections was "hereby modified to be for life." (Handwritten by the court). CP 178. This prohibition constitutes cruel and unusual punishment in violation of

¹¹ The appellate court also held that the trial court did not have statutory authority to extend the financial gain prohibition beyond the period of community custody. It reversed the trial court's order of September 22, 1998, as well as the original condition of Letourneau's sentence entered on November 14, 1997, because the financial prohibition did not affect public safety and was not directly related to the crimes.

the Eight and Fourteenth amendments. (see reference to this argument: *State v. Letourneau*, 100 Wn.App. 438, n.4.)

Whereas the fundamental right at issue in *Letourneau* was her right to raise her children without State interference, the issue in the case at bench is Mr. Smith's right to associate with his wife, a constitutionally protected, fundamental liberty interest.

The test of this prohibition is whether the restriction is reasonably necessary to prevent Mr. Smith from sexually molesting the family's minor children. There was no evidence of Mr. Smith engaging in any other sexual misbehavior except with K.M.A. Dr. Whitehall testified:

“For example, there was scant evident (sic) of sexual deviation, which is to say that Mr. Smith in his interview with me, and subsequently in the polygraph, would assert that there have been no other offenses against the victim at issue, nor any other victims of sexual misconduct, which is to say it is unlikely that Mr. Smith is of pedophilic orientation or disposition.”¹² RP 8.

PROHIBITION NOT CRIME RELATED

Arguably, except for the Tampering With a Witness conviction, imposition of the no-contact prohibition between Mr. Smith and his wife is

¹² Compare the findings in *Letourneau*: ““Apart from her sexual relationship with [V.F.], there was no evidence available to indicate that Ms. Letourneau has sexually abused any other children...including her own.”... “[T]here was no evidence that Ms. Letourneau experiences pedophilla or any other paraphilia. “ *id.* at 439.

not crime related, within the meaning of that statutory term.

The defendant's correction officer was the leading advocate of not granting a SSOSA sentence and was instrumental in persuading the trial court not to allow any contact between Mr. Smith and his wife. This prohibition was required by the State because Angela Allerdice may not have been entirely convinced that her husband was guilty of the crime of molestation. The state argued that she could not protect her children.

Nancy Nelson recommended to the court at the time of Mr. Smith's sentencing and consideration of the SSOSA option:

"I also have concerns that Smith may continue to communicate with his wife and/or children if he remains in the community. His wife's intention to reunite and live together as a family, with the victim and her younger siblings in the home, is unrealistic at best. While it is admirable that Smith and his wife love one another and wish to remain in a committed relationship, the primary concern should be the physical and emotional protection of the victim and her siblings...." CP 49.

With regard to Ms. Allerdice the court stated at the time it imposed the SSOSA sentence:

"The state has made argument here that Ms. Allerdice is not concerned about [K.], or is concerned about Mr. Smith, but I do not find that to be the case. Ms. Allerdice, the best I can see, followed through on all recommendations for counseling and acted in the best interests of [K.], and that she saw the same impacts of molestation on [K.] as her counselor did, and the counselor having clinical scales to measure it by versus Ms. Allerdice just making

observations, that she has known [K.] all of her life and is able to make similar observations.” RP 42.

Rather than restrict all contact between Mr. Smith and his wife, other less drastic alternatives existed. Appointing a guardian ad litem for KMA as the court recommended in *Letourneau* may have been an option. *id.* at 441-22. Other alternatives to coerced no contact between husband and wife would be dependency proceedings to protect K.M.A.’s and other siblings’ best interests; family court or even juvenile court ; or professional counselling for Angela Allerdice.¹³

II. THE TRIAL COURT’S IMPOSITION OF THE NO CONTACT CONDITION BETWEEN MR. SMITH AND HIS WIFE WAS UNCONSTITUTIONAL.

The imposition of the condition of sentencing that Mr. Smith could only have telephone contact with his wife and the enforced probation violation that he had intimate and face to face contact with his wife is unconstitutional. (CP 124): Appendix H; CP 131, violations 2 and 3; CP 151, violation 4.) Prohibiting Mr. Smith from having face to face contact with is wife, and then during his probation supervision when he was denied all contact with his wife, are unconstitutional for the following

¹³Angela Allerdice has her own problems to deal with as result of the court’s order where she has other children in common with Mr. Smith and where she is indirectly prohibited from having contact with him, even for financial hardship or for family health problems.

reasons.

“To be considered for the first time on appeal an alleged error must be a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988). “Manifest” means the appellant must make a showing of actual prejudice. *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995); *Scott*, 110 Wn.2d at 688.”

State v. Julian, 102 Wn. App. at 301.

FUNDAMENTAL LIBERTY INTEREST

The fundamental liberty interest at stake in this case is discussed in

Zablocki v. Redhail, supra.. The court quoted from *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967):

“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” *id.*, at 12, 87 S.Ct., at 1824, quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942).”

Zablocki v. Redhail, 434 U.S. at 384.

Other United States Supreme Court decisions have elevated the sanctity of marriage beyond a mere contractual arrangement regulated by statute. Some of these cases are: *Maynard v. Hill*, 125 U.S. 190, 205, 211, 8 S.Ct. 723, 31 L.Ed.654 (1888) (the Court characterized marriage as “the most important relation in life” and as “the foundation of the family

and of society, without which there would be neither civilization nor progress.” In *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed.1042 (1923) the Court recognized that the right “to marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause.” (see also, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. at 316 where marriage was defined as “fundamental to the very existence and survival of the race.”)

The right to marry has been established as part of the fundamental “right of privacy” embodied in the Fourteenth Amendment’s Due Process Clause. For example it was stated in *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965) (“Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred.”

III. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT REQUIRED MR. SMITH TO SUBMIT TO POLYGRAPH TESTING AS PART OF HIS SENTENCE.

Appendix H to the judgment and sentence of October 8, 2010

required the affirmative act as follows:

“ (b) OTHER CONDITIONS. Defendant shall comply with the following other conditions during the term of community placement/custody:...

22) Shall submit to urinalysis testing and polygraph examinations to monitor compliance with crime-related

behavior.¹⁴ CP 125.

Subsequently, the Department of Corrections filed a notice of violations of the judgement and sentence and alleged in part:

“Violation 1: Failing to provide truthful responses to polygraph examinations on/about 12-15-10 and/or 1-10-11 in Port Orchard, Wa. CP 131, and

Violation 5: Failing to comply with conditions of community custody and/or psychosexual therapy by failing to provide truthful responses during a polygraph examination on/about 4-29-11 in Port Orchard, Wa. CP 152.

The applicable standard of review is that statutory interpretation on an appeal involves a question of law that is reviewed de novo. *In re Det. of Williams*, 147 Wn.2d 476, 486, 55 P.3d 597 (2002). Additionally, statutes that involve a deprivation of liberty must be strictly construed. *In re Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) (narrow, restrictive construction compared to a broad, liberal interpretation.)

A court is limited by former RCW 9.94A.120(9)(c)(v)- now codified as RCW 9.94A.505(8)-¹⁵ that requires offenders to comply with

¹⁴ According to *State v. Julian*, 102 Wn.2d at 304 (citing *State v. Paine*, 69 Wn.App. 873, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993): “ A sentence imposed without statutory authority can be addressed for the first time on appeal, and this court has both the power and the duty to grant relief when necessary.”

¹⁵ RCW 9.94A.505(8) now reads:”As part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative

“crime-related prohibitions” as a special condition. This statute formerly authorized the trial court to order convicted felons of sex offenses to comply with “any crime-related prohibitions” during the period of community custody following release from total confinement. However, according to RCW 9.94A.030(10) a sentence that requires an offender to engage in “affirmative conduct” is not a crime-related prohibition. This is a ban on affirmative conduct.

“In *Holland*, Division III determined that polygraph testing requires affirmative conduct and cannot be ordered as a “Crime-related prohibition” under RCW 9.94A.120(9)(c)(v) because the definition of “crime-related prohibition” under RCW 9.94A.030(11) prohibits any affirmative conduct.”¹⁶

State v. Riles, 135 Wn.2d at 339 (quoting *State v. Holland*, 80 Wn.App. 1, 905 P.2d 920 (1995)).

conditions as provided in this chapter.”

¹⁶ RCW 9.94A.120(9)(c)(v) is now RCW 9.94A.505 (8). RCW 9.94A.030(11) has since been amended. It is now codified as RCW 9.94A.030 (10) and states as follows:

““Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.”

Any ambiguity in the statute should be construed in favor of the offender based on the rule of lenity. *State v. Lively*, 130 Wn.2d 1, 14, 921 P 2d 1035 (1996).

Requiring Mr. Smith to submit to a polygraph examination at the discretion of his corrections officer or by this treatment provider is requiring him to undergo affirmative conduct, which is prohibited by RCW 9.94A.030(10). Here, the polygraph was used to gather evidence to be used against Mr. Smith when he was required to respond to the question: “44 Since January 25, 2011 have you had any contact or attempted to have any contact with your wife?.”¹⁷ CP 137. According to the leading case of *In re Detention of Hawkins*, 169 Wn.2d 796, 238 P.3d 1175 (2010) regarding use of the polygraph to inquire into sexual history: “...polygraph examinations are intrusive and implicate constitutional concerns.” *id.* at 803.

In *Hawkins* the state Supreme Court held that polygraph examinations were not authorized in sexual violent predator proceedings without being expressly allowed by statute. The Court stated the broad reaching proposition as follows:

“Because the legislature is undoubtedly aware of the inherent problems with polygraph examinations, it is fair to infer that the legislature intends to prohibit

¹⁷ Patrick M. Seaberg’s report stated in part : “Based on the physiological responses produced by the subject on the polygraph charts, in the professional opinion of this examiner the subject “WAS” attempting deception when he answered “NO” to the following question forty-four.”
Note: the answers to two other incriminating questions were denominated to be inconclusive. CP 137.

compulsory polygraph examinations unless it expressly allows for their use...Unlike RCW 71.09.096(4), RCW 71.09.040(4) does not expressly authorize a compulsory polygraph examination.”

Id. at 803. (RCW 71.09.040(4) authorizes “an evaluation as to whether the person is a sexually violent predator.”)

The *Hawkins* court noted in addition to being unreliable and inadmissible¹⁸ “... polygraph examinations are intrusive and implicate constitutional concerns.” id.. Thus, state statutes must be “strictly construe[d]” because they involve constitutionally protected privacy interests.

It may be argued that both the court, the Department of Corrections and even therapists may require polygraph examinations as part of the SSOSA option. However, *Hawkins* addressed this evasive ploy and concluded:

“Having concluded that RCW 71.09.040(4) prohibits polygraph examinations, it is irrelevant whether the statute also permits DSHS to create other rules pertaining to the conduct of such examinations.”

id. at 804. A state agency cannot create rules and requirements that

¹⁸ *Hawkins* noted with regard to polygraph examinations: “...courts have consistently recognized as unreliable and, unless stipulated to by all the parties, inadmissible. See, e.g., ...*State v. Thomas*, 150 Wn.2d 821, 860, 83 P.3d 970 (2004); *State v. Renfro*, 96 Wn.2d 902, 905, 639 P.2d 737 (1982); *State v. Sutherland*, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980).”

contradict a statute. id.

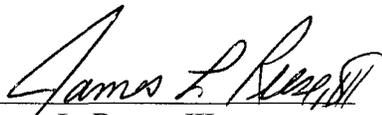
E. Conclusion

This court should follow the procedure employed in *Leutourneau* and reverse those portions of the judgment and sentence and subsequent order revoking the SSOSA sentence that restrict Mr. Smith from having any contact with his wife and/or only telephone contact between Mr. Smith and his wife for life.

The trial court should be reversed, Mr. Smith should be restored into the SSOSA program with a different Corrections Officer assigned to the case.

Dated this 18th day of December 2011.

Respectfully Submitted,


James L. Reese, III
WSBA #7806
Court Appointed Attorney
for Appellant

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during the term of community placement/custody:

- (1) Report to and be available for contact with the assigned Community Corrections Officer as directed;
- (2) Work at Department of Corrections' approved education, employment, and/or community service;
- (3) Not consume controlled substances except pursuant to lawfully issued prescriptions;
- (4) While in community custody not unlawfully possess controlled substances;
- (5) Pay supervision fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location;
- (7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision, or both (RCW 9.94A, 120 (13));
- (8) Notify community corrections officer of any change in address or employment; and
- (9) Remain within geographic boundary, as set forth in writing by the Community Corrections Officer.

WAIVER: The following above-listed mandatory conditions are waived by the Court:

(b) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement / custody:

- 10). Shall not cause or have contact with K.M.A. (dob 9-19-02) for life, effective immediately. Contact includes in person, in writing, telephonically, electronically, and/or through third party.
- 11). Shall not cause or have contact with K.M.A.'s immediate family, effective immediately, without prior authorization from therapist and/or CCO. Contact includes in person, in writing, electronically, by phone and/or through third party. *Δ may have telephone contact only with Annela Alund*
- 12). Shall not cause or have contact with minors under 18 years of age, effective immediately, without authorization from his Community Corrections Officer and therapist.
- 13). Shall not frequent places where minors congregate including parks, playgrounds, schools, campgrounds, arcades, malls, daycare establishments and/or fast food restaurants.
- 14). Shall not own, use or possess firearms, explosives, dangerous weapons, alcoholic beverages, illegal drugs and/or drug paraphernalia, and shall stay out of places where alcohol is the chief item of sale.
- 15). Shall not enter places where sexual entertainment is provided, including but not limited to adult book stores, arcades, and topless establishments.
- 16) Shall not own, use, possess or peruse sexually explicit materials or access devices where these materials may be viewed, including computers, without authorization from the CCO and/or

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Page 2 of 3

therapist.

17). Shall be subject to geographic restrictions and curfew requirements as directed by his CCO.

18). Shall have prior approval for all residential and employment situations, including overnight guests at his approved residence and overnight stays at places other than his approved residence.

19). Shall register as a sex offender in accordance with state statutes.

20). Shall not pursue intimate, romantic or sexual relationships without authorization from his CCO and/or therapist.

21). Shall not form relationships with individuals who have care or custody of minor children without authorization from the CCO and/or therapist.

22) Shall submit to urinalysis testing and polygraph examinations to monitor compliance with crime-related prohibitions and law-abiding behavior.

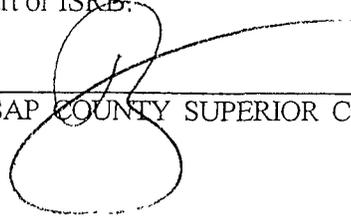
23) Shall submit to GPS monitoring if directed by the Court or ISRB.

Oct 8, 2010

DATE

JUDGE

KITSAP COUNTY SUPERIOR COURT





STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

COURT-NOTICE OF VIOLATION

REPORT TO: The Honorable M.K. Haberly
Kitsap County Superior Court

OFFENDER NAME: SMITH, Jeffery Brian

AKA:

CRIME: Ct.1 : Child Molestation First
Degree, Domestic Violence
Ct. 2: Tampering with a Witness

SENTENCE: Ct. 1: 75 months confinement with
12 months imposed and the
remainder suspended under SSOSA
Ct. 2: 8 months confinement
(concurrent)

LAST KNOWN ADDRESS: 4879 Hart St
Bremerton, WA 98311

MAILING ADDRESS: Same

DATE: 2-14-11
DOC NUMBER: 339185

DOB: 2/3/1980

COUNTY CAUSE #: 09-1-01147-6 (AA)

DATE OF SENTENCE: 10-8-10

TERMINATION DATE: Ct.1: Life
Ct.2:no
supervision

STATUS: Active
CLASSIFICATION: Low

PREVIOUS ACTION:

None.

TOLLING - SRA & PAROLE

Tolling Type	Action Date	Start Date	End Date	Days
None				

SUPERVISION VIOLATION PROCESSES

None

VIOLATION(S) SPECIFIED:

Violation 1: Failing to provide truthful responses to polygraph examinations on/about 12-15-10 and/or 1-10-11 in Port Orchard WA

Violation 2: Having intimate contact with a prohibited person, Angela Allerdice, at the Chiefton Motel, Bremerton, on/about 10-8-10.

Violation 3: Having face-to-face contact with a prohibited person, Angela Allerdice, in the parking lot at the Family Pancake House, Bremerton, on/about 12-30-10.

WITNESS(ES):

A Department of Corrections Community Corrections Officer will testify to the facts presented.

SUPPORTING EVIDENCE:

Violation 1, 2 & 3: At the time of sentencing, Smith was directed to submit to random polygraph examinations to confirm his adherence to crime-related prohibitions and SSOSA treatment requirements. When he completed intake with DOC in 10-10, the importance of truthful responses during polygraph testing was stressed to Smith. Smith was also restricted from contact with Angela Allerdice except by phone. Both Smith and Allerdice were present in Court when this directive was issued, and the restriction was explained to him verbally and in writing when Smith completed intake with DOC in 10-10.

Smith submitted to his first routine polygraph examination on 12-15-10. The test was conducted by polygrapher Pat Seaberg. Smith was questioned about his adherence to probation and treatment standards but showed deception on questions pertaining to contact with minors and face-to-face contact with Angela Allerdice. When I met with Smith after the polygraph, he adamantly stated to both Dr. Jensen and me that he had not met with Angela Allerdice or nor had contact with minors.

Smith was repolygraphed on 1-10-11 by polygrapher Ardith Schrag. He again showed deception regarding face to face contact with Allerdice and with minor children. Again, he informed Dr. Jensen and myself he did not know why he could not pass that part of the polygraph but that he had not violated probation or treatment restrictions.

Dr. Jensen met with Smith for a one-on-one counseling session on 1-26-11. During the session, Smith confessed he had lied on the previous two tests. He admitted he had contact with Allerdice on two occasions. The first incident occurred at the Chiefton Motel in Bremerton on 10-8-10 when he was released from jail. Smith said Allerdice came to the motel where they talked, discussed the fact they were not supposed to see one another and had sexual intercourse with each other. The second incident occurred in December, just before Christmas, in the parking lot of the Family Pancake House when Allerdice came to talk with Smith about her mother's health problems. Smith told Dr. Jensen that he was aware of they were not supposed to see one another, but he felt it was important to console Allerdice who was distressed about her mother's health.

Following these disclosures, Smith was polygraphed for the third time at Dr. Jensen's office on 1-28-11. The results of the third test showed Smith appeared to have made a full and truthful disclosure to Dr. Jensen regarding the two face-to-face contacts with Allerdice.

ADJUSTMENT:

Smith's adjustment to SSOSA supervision has been slow at best. He was not able to secure employment for over two months, until 12-15-10 when hired as a cook at the Family Pancake House in Bremerton. He has not been able to locate affordable housing and lives locally with adult friends in a rental home. The \$4800 IRS refund his wife promised to set aside for him to use when he was released was not available; instead, he received \$500. That money was quickly exhausted.

Smith sought sexual deviancy counseling with Dr. Joe Jensen, who voiced a guarded prognosis and had concerns about amenability for treatment. Dr. Jensen has continued to meet with Smith and a treatment report is forthcoming.

Smith obtained his GED at Olympic Community College shortly after release. He has maintained appropriate reporting requirements, made himself available for unscheduled home and work site visits, and submitted urine samples which were negative for illegal drugs and alcohol.

Jeff Smith's most significant compliance issue to date appears to be his unwillingness to be open and honest about his behavior. Despite being informed by Dr. Jensen and me of the need for transparent accountability, Smith has struggled with this issue from the beginning of supervision. He failed two polygraph examinations on the same basic questions, and required a third test to confirm this once a disclosure was made. He bore the cost of two of these tests (\$150 each) while the DOC paid for the third test.

Attached please note a SSOSA treatment report from Dr. Jensen detailing Smith noncompliance behavior. Though he has not terminated Smith from treatment, Dr. Jensen felt Smith could benefit from a violation hearing and that "the Court may deem Mr. Smith's behavior as not meeting the standards of performance expected of an individual on the SSOSA sentencing program."

RECOMMENDATION:

I recommend a non-compliance hearing be scheduled at the earliest convenience of the Court. If found in violation I recommend the Court consider revocation of the suspended SSOSA sentence.

I certify or declare under penalty of perjury of the laws of the state of Washington that the foregoing statements are true and correct to the best of my knowledge and belief.

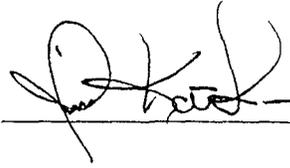
Submitted By:

Approved By



2.16-11

Date



2/14/11

Date

Nancy Nelson
Community Corrections Officer
Port Orchard DOC
1014 Bay Street, Suite 11
Port Orchard WA 98366
Telephone (360) 876-7550

Jim Kathan
CCS 1

NJN/NJN/2-14-11

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File

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KITSAP COUNTY CLERK

2011 MAY -4 AM 8:59

DAVID W. PETERSON



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

**COURT-SUPPLEMENTAL
NOTICE OF VIOLATION**

REPORT TO: The Honorable Anna Laurie
Kitsap County Superior Court

DATE: 4-29-11
DOC NUMBER: 339185

OFFENDER NAME: SMITH, Jeffery B.
AKA:

DOB: 2-3-80

CRIME: Ct. 1: Child Molestation, First
Degree, Domestic Violence
Ct 2: Tampering With a Witness

COUNTY CAUSE #: 09-1-01147-6(AA)

SENTENCE: Ct 1: 75 months confinement,
suspended under SSOSA
Ct 2: 8 months confinement

DATE OF SENTENCE: 10-8-10

LAST KNOWN ADDRESS: 4879 Hart St
Bremerton, WA 98311

TERMINATION DATE: Life

MAILING ADDRESS: Same

STATUS: In custody
CLASSIFICATION: Low

This report supplements the Notice of Violation Report dated 2-14-11, a copy of which is attached.

ADDITIONAL ACTION:

A Violation Hearing has already been scheduled for 5-20-11, 1:30 p.m., to address Violations 1 through 3 as noted on the attached Notice of Violation.

ADDITIONAL VIOLATION(S) SPECIFIED: The above-named offender has violated conditions of supervision by:

Violation 4:

Contact with a prohibited person, Angela Allerdice, since 1-26-11 as revealed by deceptive polygraph results on/about 4-29-11 in Port Orchard WA.

20

Violation 5:

Failing to comply with conditions of community custody and/or psychosexual therapy by failing to provide truthful responses during a polygraph examination on/about 4-29-11 in Port Orchard WA.

SUPPORTING EVIDENCE:

Violations 4 and 5:

At the time of sentencing, Smith was restricted from contact with minor children and from all but phone contact with his wife, Angela Allerdice. After Smith failed two compliance polygraph tests in December and January regarding contact with minors and children, he was further restricted by his CCO and therapist from all contact with his wife. Prior to his third compliance polygraph, Smith disclosed to Dr. Jensen that he had, in fact, had contact with his wife immediately after release from jail in 10-10 and later in 12-10. He passed the subsequent polygraph.

Smith appeared in Court on 4-8-11 to address the matter of Violations 1 through 3. That hearing was continued to 5-20-11 to allow more time for Smith to show more significant evidence of treatment progress and probation compliance.

Smith submitted to a fourth polygraph test on 4-29-11 at the Port Orchard DOC field office. The test was conducted by polygrapher Patrick Seaberg, Gig Harbor Polygraph Services. A copy of the results are attached for the Court's review. Results of the test show clear deception in Smith's responses when he was asked the question: *Since January 26, 2011, have you had any contact or attempted to have contact with your wife?* Smith showed inconclusive results on two other relevant questions: *Since your last test, have you had any form of contact with either your daughters or your step-sons?*, and *Since your last test, have you had any unreported contact with minors?* When questioned extensively both during and after the test, Smith was unwilling to provide any further information which would shed light on the deceptive polygraph results.

Smith was arrested on a DOC detainer for Violations 4 and 5 and transported to the Kitsap County Jail shortly after completing the test. He had driven his vehicle to the field office. When I asked him who he would like me to notify to pick up his car so it would not be towed from our parking lot, Smith said he had already made arrangements for the car to be picked up by a friend before he came in for the polygraph test. I asked Smith if he knew he would fail the polygraph test before he arrived at the office. Smith denied he knew in advance that he would fail the test.

SUBSEQUENT DEVELOPMENTS:

I notified Smith's psychosexual therapist, Dr. Joseph Jensen, of Smith's responses on the polygraph and his subsequent arrest. Dr. Jensen said he intends to make contact with Smith in the jail on Saturday 4-30-11 and will forward an updated treatment report to me after meeting with him.

RECOMMENDATION:

I recommend Violations 4 and 5 be heard in conjunction with Violations 1 thorough 3. If found in violation I recommend the suspended SSOSA sentence be revoked.

I certify or declare under penalty of perjury of the laws of the state of Washington that the foregoing statements are true and correct to the best of my knowledge and belief.

Submitted By:



4-29-11

DATE

Nancy Nelson
CCO III
Port Orchard field office
1014 Bay Street, Suite 11
Port Orchard WA 98366
(360) 876-7550

NJN NJN 4/29/2011

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KITSAP COUNTY CLERK
2011 MAY 10 AM 9:14
DAVID W. PETERSON



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

COURT-SPECIAL

REPORT TO: The Honorable Anna Laurie
Kitsap County Superior Court
OFFENDER NAME: Smith, Jeffery B.
AKA:
CRIME: Ct 1: Child Molestation First
Degree, DV
Ct 2: Witness Tampering
Ct. 1: 75 months confinement,
SENTENCE: suspended under SSOSA
Ct. 2: 8 months confinement

DATE: 5-5-11
DOC NUMBER: 339185

DOB: 2-3-80

COUNTY CAUSE #: 09-1-01147-6

DATE OF SENTENCE: 10-8-10

Present Address: Kitsap County Jail
(LKA: 4879 Hart St.
Bremerton WA 98311)

TERMINATION DATE: Life

MAILING ADDRESS: Same

STATUS: In custody
CLASSIFICATION: Low

TERMINATED

This report is intended to alert the Court that Jeff Smith has been terminated from psychosexual treatment with Joe Jensen, Ph.D., Silverdale. Attached is a memo from Dr. Jensen clarifying why Smith was terminated, subsequent to his arrest on 4-29-11. This information is relevant to Smith's pending violation hearing scheduled for 5-20-11.

I certify or declare under penalty of perjury of the laws of the state of Washington that the foregoing statements are true and correct to the best of my knowledge and belief.

Submitted By:

5-5-11

DATE

Nancy Nelson
CCO III
Port Orchard DOC
1014 Bay St., #11
Port Orchard, Washington 98366
Telephone (360) 876 - 7550

NN/NN/5-5-11

Distribution:

ORIGINAL - Court

COPY – Kellie Pendras, Prosecuting Attorney,
Ron Ness Law Firm, Defense Attorney,
Liberty,
File

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CLEAR CREEK PSYCHOLOGICAL ASSOCIATES
 3501 NW Lowell Street, Suite 201
 Silverdale, Washington 98383
 Phone: (360) 698-8980
 Fax: (360) 6 98-8950

May 4, 2011

Kitsap 09-1-01147-6

Nancy Jo Nelson, Community Corrections Officer
 Washington Dept. of Corrections - Pt. Orchard
 FAX: 360-876-7571

RE: Jeffrey Smith *339185*

Dear Ms. Nelson:

This letter is to inform you that I am terminating Jeffrey Smith from SSOSA-based outpatient sexual offender treatment due to non-compliance with probation rules, specifically having prohibited contact with his wife, withholding that information from probation and treatment, and attempting to manipulate polygraph examination. On 1/26/11, subsequent to disclosures that Mr. Smith had prohibited face-to-face contact with his wife Angela and subsequently lied on two polygraph examinations to that effect, he was instructed to stop all forms of contact with his wife pending a violation hearing in Kitsap County Superior Court.

Mr. Smith failed another polygraph examination on 4/29/11; the question he failed pertained to prohibited contact with his wife, which he denied. At that point, Mr. Smith was taken into custody. I interviewed him at the Kitsap County Corrections Center on 5/3/11. Mr. Smith acknowledged that he had telephone contact with Angela on approximately three occasions during the last week of April 2011; he denied any face-to-face contact.

I met with Angela in a treatment meeting on 4/21/11 during which I informed her of the treatment process as well as the duties and responsibilities of a potential chaperone.

Confidential Evaluation: Jeffrey Smith

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Angela expressed hopes of reuniting her family. She stated that she was struggling financially as she had passed the 60 month maximum TANF benefit period, and all Welfare monetary assistance had been terminated. In group therapy session on 4/25/11, I informed Mr. Smith that I met with his wife and that she was struggling financially.

Regarding prohibited contact with Angela, Mr. Smith stated, "I failed the polygraph test, that's all I know. . . I don't know if they'll try to revoke me. . . I called Angela on the phone about three times. . . I tried to pass it off as I didn't call her. . . I was concerned about my wife. . . you told me that Angela is struggling financially. . . you guys are asking me to not be there for my wife, I'm having trouble with that. . . my not having contact with her does not have anything to do with my case. . . I had not contacted Angela until after you told me that she was struggling financially. . . the only concern that you guys have about me having contact with Angela is the possibility of having contact with the kids. . . I have not had contact with the kids."

Regarding the initial phone call, Mr. Smith stated that Angela was "surprised" that he called. He stated, "We talked about finances. . . I knew that the 60 month TANF expiration was coming, but I didn't know it had happened. . . Angela sounded surprised that I had called, she knows that I'm not supposed to. . . the fact that we are not supposed to talk did not get brought up in the conversation." Mr. Smith stated that he initially telephoned Angela after the evening group therapy session on 4/25 during which he offered her financial assistance. He then called her on two more occasions, stating, "I called her the second and third time because I wanted to. . . to make arrangements to give her money and tell her that I loved her. . . the last time I called her was Friday morning before the polygraph examination to tell her that I loved her and that I might be going to jail."

Mr. Smith stated that in the second and third phone conversations, he and Angela did not talk about the fact that they were violating his probation conditions by speaking on the telephone. Also, he did not tell Angela his plans regarding disclosure of the violation on the polygraph examination. Mr. Smith stated, "I knew I should not have been calling Angela. . . she knew that I should not have been calling her. . . we didn't talk about it, it was an unsaid thing. . . Angela has absolutely nothing to do with the charges but she keeps getting me in trouble, it doesn't make sense. . . my having contact with Angela is the only thing that's keeping me from having success with the program. . . if I stay on the SSOSA program, what then?. . . it would just be a matter of time, I would come back out, try no contact with Angela again, but how long would that last?"

Confidential Evaluation: Jeffrey Smith

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Mr. Smith stated, "I will sign something that if I fail another polygraph, then they can immediately revoke my SSOSA. . . I'm done with this bullshit. . . if I continue the SSOSA and I have contact with Angela, I'll tell the examiner before the test or my CCO". Mr. Smith stated that he had "intentions" of telling the examiner of prohibited contact with Angela, but the polygraph examiner allegedly "cut me off". Mr. Smith stated, "I tried to tell the examiner who kept telling me 'that's not contact' . . . after a while I just gave up." Summarizing his uneven progress related to violations about prohibited contact with his wife, Mr. Smith stated, "It's pointless, all this time that I have out in the community. . . because it doesn't count towards my suspended time anyway."

I informed Mr. Smith that not all probation conditions "make sense", but it is not up to him to pick and choose which conditions to follow, depending on whether they "make sense" to him. I informed Mr. Smith that there were concerns about his character and capacity for compliance, specifically related to his ability to withhold information and not be accountable regarding his activities in the community, including attempts to manipulate polygraph examinations. I told Mr. Smith that when a total No Contact was placed between him and Angela at the end of January 2011, he was again being "tested" whether he would make good choices regarding his responsibilities to SSOSA, which he failed. I told Mr. Smith that, in my opinion, the greater concern regarding his violation behavior was not the contact with his wife per se, but his ability and willingness to attempt to conceal that information; this does not meet the standards of behavior expected of an individual who is participating in the SSOSA program. Mr. Smith stated that he could not tolerate having no contact with his wife during her time of need; that it was his duty to make himself available to her. However, by doing so, he was placing himself at risk for rendering himself unavailable to his wife for a much longer period, i.e., the remainder of his suspended sentence.

Mr. Smith stressed that he was in trouble only for "trying to be a good husband". He did not appear to appreciate the seriousness of concealing information regarding his activities in the community from probation and treatment. When I met with Angela on 4/21, I told her that one of the paramount responsibilities of a spouse and support system was to ensure that the offender with whom they are involved follow all of their probation conditions, including the willingness to contact CCO or therapist when they are aware that the offender has engaged in violation behaviors. Angela's willingness to participate in prohibited telephone calls with her husband is highly problematic and causes grave concerns about her ability to function as a chaperone. The fact that Mr. Smith and his wife were not even discussing the fact that they were violating his probation by engaging in the phone calls is worrisome, reflecting a non-cooperative attitude towards probation.

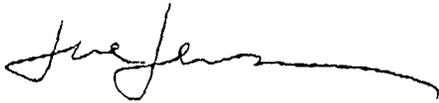
Confidential Evaluation: Jeffrey Smith

Page 4

Based on the above information, I am no longer willing to work with Mr. Smith in SSOSA-based outpatient sexual offender treatment, and I am terminating him from his treatment activities.

If you have further questions, please contact me at 360-698-8980, Ext. 14.

Respectfully submitted,



Joseph A. Jensen, Ph.D.
Clinical Psychologist
WA. License #1853
WA SOTP # FC-111

JJ/kk

1 commitment.

2 MS. HAHN: I guess we can address that when
3 Ms. Pendras gets back.

4 (Ms. Pendras returned to the courtroom.)

5 THE COURT: Ms. Pendras, when you were gone
6 there was some discussion whether the warrant of
7 commitment should be 75 or -- because there's a minimum
8 and a maximum.

9 MS. PENDRAS: I think the warrant of
10 commitment just reads as whatever the sentence is.

11 THE COURT: 75, so it should be 75.

12 MS. PENDRAS: 75, and then it should --
13 It's reflected on the judgment and sentence, and it's
14 reflected on the order revoking that there is a minimum.

15 THE COURT: Then, Department of Corrections
16 will handle it from there.

17 MS. PENDRAS: Correct.

18 State is also adding on to the order revoking that
19 Mr. Smith's community custody is now for life. Before
20 it was under the SSOSA supervision, but now because of
21 the type of crime, it's for life.

22 THE COURT: Correct.

23 MS. PENDRAS: Ms. Nelson has a concern,
24 because the court originally allowed telephone contact
25 with the wife. That was changed by his treatment

1 provider, but she says that the prison will honor the
2 original order by the court.

3 MS. NELSON: If I can speak. Unless it's
4 modified, because when he goes to prison, he will be a
5 parolee, the board will -- they won't countermand
6 anything that's written, but they will take up the issue
7 of should he be allowed contact, and under what
8 circumstances, if the telephone contact is deleted, if I
9 make sense here.

10 THE COURT: So if I delete it, it will be
11 open?

12 MS. NELSON: If you want him to have phone
13 contact with his wife in prison or after prison, then
14 it should be probably left as it is. If you want that
15 decision made by the board, then it should be deleted.

16 THE COURT: I will leave it as it is.

17 MS. PENDRAS: The state is handing forward the
18 order revoking based on the court's ruling today.

19 THE COURT: We'll be at recess.

20 (Court recessed.)
21
22
23
24
25

GIG HARBOR POLYGRAPH SERVICES

PATRICK M. SEABERG

PO BOX 952
GIG HARBOR, WA 98335
(253) 380-4602

CCO Nancy Jo Nelson
Division of Community Corrections
Department of Corrections
1014 Bay Street, Suite 11
Port Orchard, WA. 98366

Client: Jeffery B. Smith
Date: 4-29-11
DOC: 339185
DOB: 2-3-80
Test: Monitoring Test
Results: Deception Indicated.

Kitsap
09-1-01147-6

Dear CCO Nelson,

Pursuant to your request, a polygraph examination was given to the above named individual on April 29, 2011. The purpose of the examination was to determine if the subject has been truthful regarding his fidelity to his conditions of supervision

Based on the physiological responses produced by the subject on the polygraph charts, in the professional opinion of this examiner the subject "WAS" attempting deception when he answered "NO" to the following relevant question forty-four. The remaining two questions were inconclusive.

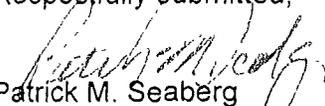
43. SINCE YOUR LAST TEST, HAVE YOU HAD ANY FORM OF CONTACT WITH EITHER YOUR DAUGHTERS OR STEP-SON?

44. SINCE JANUARY 26, 2011 HAVE YOU HAD ANY CONTACT OR ATTEMPTED TO HAVE CONTACT WITH YOUR WIFE?

45. SINCE YOUR LAST TEST, HAVE YOU HAD ANY UNREPORTED CONTACT WITH MINORS?

I did not find any physical or emotional condition, which would preclude a valid result during the pre-test interview.

Respectfully submitted,


Patrick M. Seaberg
Licensed Polygraph Examiner.

CONFIDENTIAL

INFORMATION CONTAINED IN THIS REPORT IS FOR PROFESSIONAL DIAGNOSTIC PURPOSES AND SHOULD NOT BE SHOWN TO THE CLIENT WITHOUT AUTHORIZATION

NAME: JEFFERY B. SMITH.
REPORT PERIOD: SINCE LAST TEST.

ALCOHOL/BARS/TAVERNS:

- ALCOHOL CONSUMPTION.

THE CLIENT DENIED CONSUMING ANY ALCOHOL SINCE HE WAS ARESTED IN LATE 2009.

- FREQUENT BARS/TAVERNS

NOTHING REPORTED.

ILLEGAL DRUG USE:

- MARIJUANA NO.
- MET AMPHETAMINES NO.
- COCAINE NO.
- STEROIDS NO.
- HEROIN NO.
- LSD NO.
- SHERM NO.
- INHALANTS NO.
- HALLUCINOGENICS NO.
- PRESCRIPTION DRUGS NO.
- HASHISH NO.
- SPEED NO.
- PCP NO.
- MUSHROOMS NO.
- DESIGNER DRUGS NO.
- OPIUM NO.

- SOLD ILLEGAL DRUGS: NO.

- AT A PLACE WHERE DRUGS ARE BEING USED: THE CLIENT DENIED THAT ANY OF HIS ROOMMATES ARE CURRENT DRUG USERS.

PORNOGRAPHY:

- *MAGAZINES* NO
- *EROTIC STORIES* NO
- *TELEVISION* NO.
- *VIDEOS* NO.
- *BOOKSTORES* NO.
- *INTERNET* NO.
- *TELEPHONE* NO.
- *ADULT STORES* NO.
- *ADULT THEATERS* NO.
- *TOPLESS LOUNGE* NO.
- *ADVERTISEMENTS* NO

CONTACT WITH MINORS:

- *CONTACT IN PUBLIC:*

THE CLIENT REPORTED THAT HE HAS HAD INCIDENTAL CONTACT WITH MINORS IN PUBLIC PLACES. HE DENIES ENGAGING IN ANY VERBAL OR PHYSICAL CONTACT WITH THESE INDIVIDUALS.

- *AT CLIENT'S RESIDENCE:*

THE CLIENT DENIED THAT ANY ONE HAS ENTERED HIS RESIDENCE WITH CHILDREN SINCE HIS LAST TEST

- *AT OTHER PEOPLE'S HOUSES:*

THE CLIENT DENIED BEING AT HIS WIVES HOUSE SINCE HIS LAST TEST EARLIER THIS YEAR.

- *CONTACTS AT SOCIAL GATHERINGS:*

NOTHING REPORTED.

FREQUENTING PLACES WHERE CHILDREN CONGREGATE (unsupervised):

NOTHING REPORTED.

HIGH RISK SITUATIONS:

- *CHILDREN.*

NOTHING REPORTED

- *ILLEGAL ACTIVITY.*

NOTHING REPORTED.

- *DRUGS*

NOTHING REPORTED.

- ALCOHOL.

NOTHING REPORTED.

CRUISING:

- NOTHING REPORTED.

EXPOSING:

- NOTHING REPORTED.

STALKING:

- NOTHING REPORTED.

FANTASIES:

- VICTIMS.

NOTHING REPORTED.

- MINOR/YOUNGER CHILDREN:

NOTHING REPORTED.

- DEVIANT SEXUAL BEHAVIOR:

NOTHING REPORTED. THE CLIENT RELATED THAT WHEN HE DOES ENGAGE IN SEXUAL FANTASIES THOSE THOUGHTS ARE OF HIS WIFE.

- VIOLENT SEXUAL BEHAVIOR:

NOTHING REPORTED.

CONTACT WITH VICTIM:

- THE CLIENT DENIED HAVING ANY TYPE OF CONTACT WITH HIS VICTIM, WHO IS HIS STEP-DAUGHTER. THE CLIENT ALSO DENIED HAVING ANY FORM OF CONTACT WITH HIS WIFE SINCE JANUARY 26, 2011. HE DID REPORT THAT LAST WEEK WHILE OUTSIDE OF HIS PLACE OF EMPLOYMENT, HE NOTICED HIS WIFE DRIVE BY IN HER VAN. HE RELATED THAT SHE DID NOT SEE HIM. THE CLIENT ALSO DENIED HAVING ANY FORM OF CONTACT WITH EITHER HIS TWO DAUGHTERS OR STEPSON SINCE HIS LAST TEST.

WITHHOLDING INFORMATION FROM CCO NELSON AND JENSEN:

- THE CLIENT DENIED EITHER LYING TO OR MISLEADING HIS CCO OR THERAPIST

ILLEGAL ACTS/POLICE CONTACT:

- NOTHING REPORTED

UNAUTHORIZED TRAVEL/ADDRESS CHANGE:

- *OUT OF COUNTY:
NOTHING REPORTED.*
- *UNAUTHORIZED LOCATIONS:
NOTHING REPORTED.*

FIREARMS/AMMUNITION/WEAPONS:

- *NOTHING REPORTED.*

SEXUAL/ROMANTIC CONTACTS/DATES/PROSTITUTES:

- *HE DENIED BEING SEXUALLY ACTIVE WITH ANYONE SINCE HIS LAST TEST*

SOCIAL CONTACT WITH FELONS:

- *NOTHING REPORTED.*

CURFEW VIOLATIONS:

- *THE CLIENT RELATED THAT HE HAS BEEN OUT PAST HIS CURFEW, HOWEVER
THIS HAS ALWAYS BEEN WORK RELATED*

REPORTED VIOLATIONS.

- *NOTHING REPORTED.*

RCW 9.94A 010

Purpose.

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public,
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

[2011 c 336 § 334, 1999 c 196 § 1, 1981 c 137 § 1.]

Notes:

Severability -- 1999 c 196: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1999 c 196 § 20]

Construction -- Short title -- 1999 c 196: See RCW 72 09 904 and 72 09 905

Report on Sentencing Reform Act of 1981: "The legislative budget committee shall prepare a report to be filed at the beginning of the 1987 session of the legislature. The report shall include a complete assessment of the impact of the Sentencing Reform Act of 1981. Such report shall include the effectiveness of the guidelines and impact on prison and jail populations and community correction programs." [1983 c 163 § 6.]

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

- (1) "Board" means the indeterminate sentence review board created under chapter 9.95 RCW.
- (2) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9 94A.760, is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.
- (3) "Commission" means the sentencing guidelines commission.
- (4) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.
- (5) "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.
- (6) "Community protection zone" means the area within eight hundred eighty feet of the facilities and grounds of a public or private school.
- (7) "Community restitution" means compulsory service, without compensation, performed for the benefit of the community by the offender.
- (8) "Confinement" means total or partial confinement.
- (9) "Conviction" means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty
- (10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.
- (11) "Criminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere
 - (a) The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof, and (ii) whether the defendant has been incarcerated and the length of incarceration
 - (b) A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9 96 060, 9 94A 640, 9 95 240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon
 - (c) The determination of a defendant's criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.
- (12) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity This definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of labor and bona fide nonprofit organizations or their members or agents
- (13) "Criminal street gang associate or member" means any person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street gang
- (14) "Criminal street gang-related offense" means any felony or misdemeanor offense, whether in this state or elsewhere, that is committed for the benefit of, at the direction of, or in association with any criminal street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons
 - (a) To gain admission, prestige, or promotion within the gang;

RCW 9.94A 505
Sentences

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

(i) Unless another term of confinement applies, a sentence within the standard sentence range established in RCW 9 94A 510 or 9 94A 517;

(ii) RCW 9 94A 701 and 9 94A 702, relating to community custody;

(iii) RCW 9 94A 570, relating to persistent offenders;

(iv) RCW 9.94A 540, relating to mandatory minimum terms;

(v) RCW 9 94A 650, relating to the first-time offender waiver;

(vi) RCW 9 94A 660, relating to the drug offender sentencing alternative;

(vii) RCW 9 94A 670, relating to the special sex offender sentencing alternative;

(viii) RCW 9 94A 655, relating to the parenting sentencing alternative;

(ix) RCW 9 94A 507, relating to certain sex offenses;

(x) RCW 9 94A 535, relating to exceptional sentences;

(xi) RCW 9 94A 589, relating to consecutive and concurrent sentences,

(xii) RCW 9 94A 603, relating to felony driving while under the influence of intoxicating liquor or any drug and felony physical control of a vehicle while under the influence of intoxicating liquor or any drug

(b) If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; a term of community custody under RCW 9 94A 702 not to exceed one year; and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement and a community custody term under RCW 9 94A 701 if the court finds reasons justifying an exceptional sentence as provided in RCW 9 94A 535

(3) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail administrators may schedule court-ordered intermittent sentences as space permits

(4) If a sentence imposed includes payment of a legal financial obligation, it shall be imposed as provided in RCW 9 94A 750, 9 94A 753, 9 94A 760, and 43 43 7541.

(5) Except as provided under RCW 9 94A 750(4) and 9 94A 753 (4), a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A 20 RCW

(6) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(7) The court shall order restitution as provided in RCW 9 94A 750 and 9.94A 753.

(8) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

(9) In any sentence of partial confinement, the court may require the offender to serve the partial confinement in work release, in a program of home detention, on work crew, or in a combined program of work crew and home detention.

[2010 c 224 § 4, 2009 c 389 § 1, 2009 c 28 § 6, 2008 c 231 § 25, 2006 c 73 § 6 Prior 2002 c 290 § 17; 2002 c 289 § 6, 2002 c 175 § 6; 2001 2nd sp s c 12 § 312, 2001 c 10 § 2, prior. 2000 c 226 § 2, 2000 c 43 § 1, 2000 c 28 § 5, prior 1999 c 324 § 2, 1999 c 197 § 4, 1999 c 196 § 5, 1999 c 147 § 3, 1998 c 260 § 3; prior 1997 c 340 § 2, 1997 c 338 § 4, 1997 c 144 § 2, 1997 c 121 § 2, 1997 c 69 § 1; prior. 1996 c 275 § 2, 1996 c 215 § 5, 1996 c 199 § 1, 1996 c 93 § 1, 1995 c 108 § 3, prior. 1994 c 1 § 2 (Initiative Measure No 593, approved November 2, 1993), 1993 c 31 § 3, prior 1992 c 145 § 7, 1992 c 75 § 2, 1992 c 45 § 5, prior. 1991 c 221 § 2, 1991 c 181 § 3, 1991 c 104 § 3, 1990 c 3 § 705, 1989 c 252 § 4, prior 1988 c 154 § 3, 1988 c 153 § 2, 1988 c 143 § 21, prior 1987 c 456 § 2, 1987 c 402 § 1, prior 1986 c 301 § 4, 1986 c 301 § 3, 1986 c 257 § 20, 1984 c 209 § 6, 1983 c 163 § 2, 1982 c 192 § 4, 1981 c 137 § 12 Formerly RCW 9 94A 120]

RCW 71.09.040

Sexually violent predator petition — Probable cause hearing — Judicial determination — Transfer for evaluation

(1) Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody.

(2) Within seventy-two hours after a person is taken into custody pursuant to subsection (1) of this section, the court shall provide the person with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the person is a sexually violent predator. In order to assist the person at the hearing, within twenty-four hours of service of the petition, the prosecuting agency shall provide to the person or his or her counsel a copy of all materials provided to the prosecuting agency by the referring agency pursuant to RCW 71.09.025, or obtained by the prosecuting agency pursuant to RCW 71.09.025(1) (c) and (d). At this hearing, the court shall (a) verify the person's identity, and (b) determine whether probable cause exists to believe that the person is a sexually violent predator. At the probable cause hearing, the state may rely upon the petition and certification for determination of probable cause filed pursuant to RCW 71.09.030. The state may supplement this with additional documentary evidence or live testimony. The person may be held in total confinement at the county jail until the trial court renders a decision after the conclusion of the seventy-two hour probable cause hearing. The county shall be entitled to reimbursement for the cost of housing and transporting the person pursuant to rules adopted by the secretary.

(3) At the probable cause hearing, the person shall have the following rights in addition to the rights previously specified: (a) To be represented by counsel; (b) to present evidence on his or her behalf; (c) to cross-examine witnesses who testify against him or her; (d) to view and copy all petitions and reports in the court file. The court must permit a witness called by either party to testify by telephone. Because this is a special proceeding, discovery pursuant to the civil rules shall not occur until after the hearing has been held and the court has issued its decision.

(4) If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. A witness called by either party shall be permitted to testify by telephone.

[2009 c 409 § 4; 2001 c 286 § 6, 1995 c 216 § 4, 1990 c 3 § 1004]

Notes.

Application -- Effective date -- 2009 c 409: See notes following RCW 71.09.020.

Recommendations -- Application -- Effective date -- 2001 c 286: See notes following RCW 71.09.015

AMENDMENT (VIII)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT (XIV)

Ss. 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FILED 20 11:51
STATE OF WASHINGTON
BY _____
DEPUTY

PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

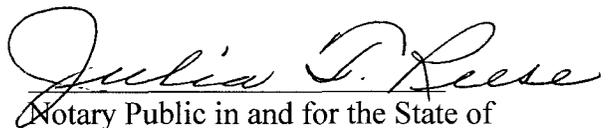
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 19th day of December, 2011, he deposited in the mails of the United States of America, postage prepaid, the original and one (1) copy of Appellant's Brief in State of Washington v. Jeffrey B. Smith, No. 42348-1-II for filing to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant at his last known address; Jeffrey B. Smith, DOC #339185, Airway Heights Correction Center, P.O. Box 1899, Airway Heights, WA 99001-1899.



Signed and Attested to before me this 19th day of December, 2011 by James L. Reese, III.


Notary Public in and for the State of Washington residing at Port Orchard.
My Appointment Expires: 04/04/13