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COA NO. 68321-7-I

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

VLADIK BYKOV,

Appellant,

v.

JUDGE STEVEN ROSEN AND CITY OF SEATTLE,

Respondents.

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

The Honorable Monica J. Benton, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The municipal court violated appellant's constitutional rights under the First Amendment to the United States Constitution and article I, section 5 of the Washington Constitution in ordering appellant, as a condition of his suspended sentence, to "not use any device connected to the internet." CP 60.

2. The superior court erred in denying appellant's petition for writ of habeas corpus. CP 156.

3. The superior court erred in entering conclusion of law 5. CP 155-56.

Issues Pertaining To Assignments Of Error

1. Does the sentence condition completely prohibiting appellant from accessing the Internet constitute an unconstitutional prior restraint on speech under article I, section 5 of the Washington Constitution?

2. Does the sentence condition completely prohibiting appellant from accessing the Internet violate appellant's rights under the First Amendment of the United States Constitution and article I section 5 of the Washington Constitution because it is not reasonably necessary to serve a compelling State interest and is not narrowly tailored to achieve such interest?

B. STATEMENT OF THE CASE

Vladik Bykov was convicted of harassment in Seattle Municipal Court based on an email sent to Brian Fresonke. CP 149. On November 3, 2011, the municipal court sentenced Vladik to 364 days in jail with 343 days suspended. CP 59. The box next to "Suspended Sentence 24 months" is checked in the judgment and sentence. CP 59. The court imposed various conditions of the suspended sentence, including the condition that Bykov "not use any device connected to the internet." CP 60. Bykov was ordered to report for commitment on December 4, 2011 to serve 21 days in jail. CP 62.

On November 17, 2011, Bykov filed a pro se application for writ of habeas corpus pursuant to chapter 7.36 RCW. CP 1-7. Bykov raised the following issues: (1) violation of the right to a fair trial because the jury did not hear evidence of certain out-of-court statements made by the complaining witness and the witness was not properly impeached; (2) violation of the right to speedy trial due to late amendment of the information; (3) denial of the right to a fair and impartial jury due to a potential juror's emotional outburst during voir dire and because one of the sitting jurors was heard to say he was sick and tired of the case; (4) the sentencing condition ordering Bykov to "be subject to search by probation and cooperate by providing access" was unconstitutional; and (5) the

sentencing condition prohibiting Internet access was unconstitutional. CP 1-7; 8-62.

Bykov contended the Internet prohibition constituted an unconstitutional prior restraint on speech. CP 5. He expressed concern that the condition prevented him from communicating with anyone by email, and effectively denied him the ability to communicate with his attorney and research legal issues. CP 4-5, 13-14.

The Honorable Ronald Kessler initially denied the writ of habeas corpus. CP 63. Bykov filed an amended application for writ of habeas corpus, raising the same substantive issues as in the first application. CP 72-79, 81-135. Treating the amended application as a motion for reconsideration, Judge Kessler granted the motion and assigned another judge to hear the matter. CP 80.

On December 2, 2011, Bykov filed an emergency motion for stay of the judgment and sentence pending resolution of the habeas corpus proceeding. CP 138-48. The State opposed this motion. CP 168-209.

On December 14, 2011, the Honorable Monica J. Benton heard argument on the writ. RP[1] 3-21. Counsel represented Bykov at this hearing. RP 3. The court stated for the record that Bykov had begun serving his

[1] The verbatim report of proceedings is referenced as follows: RP - 12/14/11.

sentence because the court had denied his motion to stay execution of the sentence. RP 3. Following argument, the court denied the writ. RP 22.

The court entered written findings of fact and conclusions of law. CP 149-57. Regarding the sentencing prohibition on Internet access, the court concluded, "Inasmuch as the basis for petitioner's conviction was an email he sent to the victim, prohibiting petitioner from further use of the instrumentality of his crime is neither unreasonable nor unconstitutional. The constitutional rights of a convicted defendant are subject to reasonable restrictions to protect the public. Petitioner's ability to use a telephone or mail to contact his lawyer and to use a law library for legal research is not impaired. Petitioner has ample and adequate substitutes for use of the internet." CP 155-56 (citing State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993) and State v. Combs, 102 Wn. App. 949, 10 P.3d 1101 (2000)). Bykov appeals to this Court. CP 158-67.

C. ARGUMENT

1. THE CATEGORICAL BAN ON INTERNET ACCESS AS A CONDITION OF THE SUSPENDED SENTENCE IS UNCONSTITUTIONAL.

The court's order prohibiting Bykov from accessing any device connected to the Internet strikes at the heart of his rights to freedom of speech, freedom of association, and freedom to receive information under

the First Amendment of the United States Constitution and article I, section V of the Washington Constitution.

The condition constitutes a prior restraint on speech and is therefore per se unconstitutional under article I, section 5 of the Washington Constitution. Furthermore, the complete Internet ban violates both the First Amendment and article I, section 5 because it is not reasonably necessary to protect a compelling State interest and is not narrowly drawn.

a. Use Of The Internet As A Means Of Conveying And Receiving Speech Is Protected By The First Amendment To The United States Constitution And Article I, Section 5 Of The Washington Constitution.

Review of constitutional questions and the superior court's decision whether to grant a writ is de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009); Butler v. Kato, 137 Wn. App. 515, 521, 154 P.3d 259 (2007). The constitutional question raised here is whether the Internet ban violates Bykov's fundamental right to free speech, including the right to expressive association and the right to receive information and ideas.

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. 1. Article 1, section 5 of the Washington Constitution provides "[e]very person may

freely speak, write and publish on all subjects, being responsible for the abuse of that right."

Article 1, section 5 of the Washington Constitution and the First Amendment protect freedom of speech. O'Day v. King County, 109 Wn.2d 796, 802, 749 P.2d 142 (1988). "The freedom of speech which is secured by the First Amendment is 'among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.'" Collier v. City of Tacoma, 121 Wn.2d 737, 745, 854 P.2d 1046 (1993) (quoting Burson v. Freeman, 504 U.S. 191, 196, 112 S. Ct. 1846, 119 L. Ed. 2d 5, 12 (1992)).

The First Amendment protects the freedom of expressive association, including freedom of assembly, petition for redress of grievances, and the exercise of religion. City of Bremerton v. Widell, 146 Wn.2d 561, 575, 51 P.3d 733 (2002); Roberts v. U.S. Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). The right encompasses association with others for the purpose of engaging in political and nonpolitical speech. City of Tacoma v. Luvene, 118 Wn.2d 826, 841 n.5, 827 P.2d 1374 (1992).

The First Amendment and article I, section 5 also protect the right to receive information and ideas. Bradburn v. North Cent. Regional Library Dist., 168 Wn.2d 789, 802, 231 P.3d 166 (2010) (citing

Kleindienst v. Mandel, 408 U.S. 753, 762–63, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972)); Fritz v. Gorton, 83 Wn.2d 275, 297, 517 P.2d 911 (1974) ("Freedom of speech without the corollary — freedom to receive — would seriously discount the intendment purpose and effect of the first amendment.").

The relationship between free speech protections and the Internet is obvious. The Internet is "the most participatory form of mass speech yet developed." Reno v. American Civil Liberties Union, 521 U.S. 844, 863, 117 S. Ct. 2329, 138 L. Ed. 2d. 874 (1997) (quoting American Civil Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996)). It provides relatively unlimited capacity for communication of all kinds. Reno, 521 U.S. at 870.

"E-mail enables an individual to send an electronic message — generally akin to a note or letter — to another individual or to a group of addressees." Reno, 521 U.S. at 851. VoIP technology enables consumers to conduct voice communications (calls) via Internet connection. Vonage America, Inc. v. City of Seattle, 152 Wn. App. 12, 15, 216 P.3d 1029 (2009). Skype technology enables live voice and video communication by means of the Internet. McKimmy v. Melling, 291 Mich. App. 577, 584 n.2, 805 N.W.2d 615 (Mich. Ct. App. 2011).

But these means of communication are only part of a huge range of communicative activities available on the Internet. "This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." Reno, 521 U.S. at 870.

The volume of content on the Internet is as diverse as human thought and "comparable, from the reader's viewpoint, to . . . a vast library including millions of readily available and indexed publications." Id. at 853, 870. "The ubiquitous presence of the internet and the all-encompassing nature of the information it contains are too obvious to require extensive citation or discussion. Even a casual user of the 'information highway' will realize that it instantly provides near universal access to newspapers such as the New York Times; the Wall Street Journal and the Washington Post; to popular magazines such as Newsweek and Time, such respected reference materials as the Encyclopedia Britannica and World Book Encyclopedia, and much of the

"A prior restraint is an official restriction imposed on speech or another form of expression in advance of its occurrence." Bradburn, 168 Wn.2d at 802 (citing Sanders v. City of Seattle, 160 Wn.2d 198, 224, 156 P.3d 874 (2007); Soundgarden v. Eikenberry, 123 Wn.2d 750, 764, 871 P.2d 1050 (1994)). In other words, a prior restraint seeks to prohibit future speech. Bradburn, 168 Wn.2d at 802.

The sentencing court's order that Bykov "not use any device connected to the internet" constitutes a prior restraint on speech. CP 60. By preventing Bykov from using any device connected to the Internet, the court order prevents Bykov from accessing the Internet for any reason whatsoever, including for reasons associated with the exercise of protected free speech. Bykov is unable to communicate with anyone via the Internet on any topic. He is unable to associate with anyone for any purpose. He is totally unable to receive information and ideas via the Internet.

Court orders that actually forbid speech activities are classic examples of prior restraints. In re Marriage of Suggs, 152 Wn.2d 74, 81, 93 P.3d 161 (2004) (citing Alexander v. United States, 509 U.S. 544, 550, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993)). The Internet ban imposed on Bykov fits squarely into the category of a prior restraint on speech.

In Bradburn, the Supreme Court concluded a library's filtering policy governing patron access to the Internet did not constitute a prior

restraint on speech because the "policy does not prevent any speech and in particular it does not ban or attempt to ban online speech before it occurs." Bradburn, 168 Wn.2d at 803. The opposite is true here. The court order prevents Bykov from engaging in any protected speech over the Internet and in particular bans his speech before it occurs.

Our state provision categorically prohibits prior restraints on constitutionally protected speech. Bradburn, 168 Wn.2d at 801. There are no exceptions. JJR, 126 Wn.2d at 6; O'Day, 109 Wn.2d at 804. The Internet prohibition must therefore be struck from the judgment and sentence.

c. The Internet Ban Does Not Survive Strict Scrutiny.

Even if the Internet ban does not constitute a prior restraint on speech under article I, section 5, it is still unconstitutional because it does not survive strict scrutiny. "The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Under the strict scrutiny standard, "[w]here a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved." In re Custody of Smith, 137

Wn.2d 1, 15, 969 P.2d 21 (1998), aff'd sub nom., Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

The State bears a heavy burden of justification where First Amendment rights are threatened. State v. Conifer Enterprises, Inc., 82 Wn.2d 94, 99, 508 P.2d 149 (1973). "[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." Conifer, 82 Wn.2d at 99 (quoting National Ass'n for the Advancement of Colored People v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, 341, 9 L. Ed. 2d 405 (1963)). The requisite connection between the limitation and the permissible state interest is necessity; a mere rational, reasonable, or even substantial relationship will not suffice. Conifer, 82 Wn.2d at 99.

A convicted defendant's constitutional rights are subject to infringement. State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). But the infringements themselves must be constitutional. Conditions that interfere with fundamental rights "must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" Rainey, 168 Wn.2d at 374 (quoting State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). Crime-related prohibitions affecting fundamental rights must therefore be narrowly

drawn. Warren, 165 Wn.2d at 34. "There must be no reasonable alternative way to achieve the State's interest." Id. at 34-35.

In upholding the Internet prohibition, the superior court relied on State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993). CP 155-56. Riley was convicted of three counts of computer trespass and four counts of possession of a stolen access device after he used his home computer to obtain long distance telephone access codes from telephone company computers. Riley, 121 Wn.2d at 25. He challenged three conditions of his sentence on the ground that they were not directly crime-related: the prohibitions against Riley owning a computer, associating with other computer hackers, and communicating with computer bulletin boards. Id. at 36. The Court held the conditions were reasonably related to Riley's convictions of computer trespass. Id. at 36, 38.

Riley is distinguishable from Bykov's case. In assessing the computer prohibition, the Riley court did not apply an analysis suited to conditions that infringe on fundamental constitutional rights. Riley only argued the conditions were not crime-related as required by the Sentencing Reform Act. Id. at 36-37.

Moreover, Riley did not involve a ban on Internet use. In fact, the word Internet does not even appear in the opinion.[3] The conditions at issue in Riley did not prohibit access to the Internet.

Much has changed in the 20 years since Riley was decided. What was once a marginal technology has now become a central means of communication. See Sigram Schindler Beteiligungsgesellschaft mbH v. Cisco Systems, Inc.. 726 F. Supp.2d 396, 428 n.51 (D. Del. 2010) (noting explosive growth of Internet in 1996 and 1997); ACLU, 929 F. Supp. at 831 (by 1993, 1,000,000 computers were linked); Internet World Stats: July 2012, http://www.internetworldstats.com /stats.htm (last visited July 16, 2012) (360,985,492 users in 2000, 2,267,233,742 users in 2012). "[T]he growth of the Internet has been and continues to be phenomenal." Reno, 521 U.S. at 885.

The Supreme Court recently cautioned "the interplay of sentencing conditions and fundamental rights is delicate and fact-specific, not lending itself to broad statements and bright line rules." Rainey, 168 Wn.2d at 377. Sentencing conditions affecting fundamental rights must be "sensitively" imposed. Id. at 374.

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[3] It was not until 1997 that the existence of the Internet was acknowledged in a Washington appellate decision. US West Communications, Inc. v. Wash. Utilities and Transp. Com'n, 134 Wn.2d 74, 106, 949 P.2d 1337 (1997).

Sensitive imposition of a condition affecting the ability to exercise the right to free speech through the Internet requires recognition of the sheer breadth of speech activity that a complete ban on Internet access entails in the 21st century. "'Computers and Internet access have become virtually indispensable in the modern world' and their permeation of all aspects of our lives is increasing exponentially." Voelker, 489 F.3d at 148 n.8 (quoting United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001)). The same cannot be said of the computer bulletin boards that Riley was prohibited from accessing. Bulletin board services were precursors of the Internet. Snowden v. Lexmark Intern., Inc., 237 F.3d 620, 621 (6th Cir. 2001).

In any event, the Riley court determined the prohibition on accessing bulletin boards was "reasonably crime related as a means of discouraging his communication with other hackers." Riley, 121 Wn.2d at 38. Indeed, Riley was a self-proclaimed hacker. Id. at 37. And use of the computer was an intrinsic, indispensable part of Riley's crime of computer trespass.

Bykov's case is different. Bykov did not commit a computer crime. The commission of harassment via email was incidental to the crime itself, rather than part and parcel of it. Harassment may be committed through many means. Sending an email is one means. Uttering a threat in person,

over the telephone, or in a letter are others. There is nothing special about the crime of harassment that links it to Internet use. Furthermore, there is no basis in this case to conclude that an Internet ban was necessary to discourage communication with others who would support and encourage Bykov to commit a new crime of harassment. This is another factor that separates Bykov's case from Riley.

In rejecting Bykov's challenge to the Internet prohibition, the superior court also cited State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000). CP 155-56. Combs was convicted of two counts of child molestation. Combs, 102 Wn. App. at 951. He used a computer to show pornographic images to his female victims and then required the young girls to pose with him in the same positions they had just viewed on the computer. Id. at 953. Under these circumstances, Division Three concluded the prohibition on using computers as a condition of community placement "appears to be a reasonable means to accomplish the needs of the state and public order." Id.

Combs is inapposite because, as in Riley, the condition did not prohibit Internet access, let alone comprise a complete ban on such access. Moreover, Combs did not meaningfully apply the correct legal standard to sentencing restrictions on fundamental rights. The standard is not simply whether the prohibition is a reasonable means to accomplish the needs of

the State and public order. The correct standard is whether the condition is sensitively imposed and reasonably *necessary* to accomplish the essential needs of the State and public order. Rainey, 168 Wn.2d at 374. To this end, any such prohibition must be narrowly drawn and there must be no alternative means to achieve the State's interest. Warren, 165 Wn.2d at 34-35.

Applying the correct legal standard in Bykov's case leads to the conclusion that the Internet prohibition is overkill. The superior court's observation that Bykov has "ample and adequate substitutes for use of the internet" turns the proper standard upside down. CP 156. The standard is not whether there are alternatives to the Internet. The standard is whether no other alternative to the restriction will suffice to achieve an essential state interest. Warren, 165 Wn.2d at 34-35.

"An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" Suggs, 152 Wn.2d at 83 (quoting Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968) (internal quotation marks omitted)). "In other

words, the order must be tailored as precisely as possible to the exact needs of the case." Suggs, 152 Wn.2d at 83 (quoting Carroll, 393 U.S. at 183).

Protecting victims of crime from future harm is a compelling State interest. Rainey, 168 Wn.2d at 377. Courts routinely and appropriately impose no-contact orders as part of a sentence to achieve that interest. See, e.g., Rainey, 168 Wn.2d at 377-80; Warren, 165 Wn.2d at 31-32; State v. Armendariz, 160 Wn.2d 106, 120, 156 P.3d 201 (2007) (trial courts may impose crime-related prohibitions, including no-contact orders, for a term of the maximum sentence to a crime). In fact, the district court in this case imposed a no contact condition that prohibited Bykov from contacting Fresonke. CP 60. This is a pinpointed condition.

The complete ban on Internet use, however, is the antithesis of a narrowly tailored infringement on the fundamental free speech right. A number of court decisions addressing similar Internet bans illustrate the point.

In United States v. Sofsky, the defendant pled guilty to receiving child pornography. United States v. Sofsky, 287 F.3d 122, 124 (2d Cir. 2002). As a special condition of supervised release, Sofsky was prohibited from using a computer or the Internet without the approval of his probation officer. Sofsky, 287 F.3d at 124. The Second Circuit held

the condition was reasonably related to the purposes of sentencing but inflicted a greater deprivation on Sofsky's liberty than was reasonably necessary. Id. at 126.

Acknowledging the government's point that permitting Sofsky access to a computer and the Internet could facilitate continuation of his electronic receipt of child pornography, the court was more persuaded by the observation that "[a]lthough a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones." Id. at 126 (quoting Peterson, 248 F.3d at 83). "The same could be said of a prohibition on the use of the mails imposed on a defendant convicted of mail fraud. A total ban on Internet access prevents use of e-mail, an increasingly widely used form of communication and, as the Tenth Circuit noted, prevents other common-place computer uses such as "do[ing] any research, get[ting] a weather forecast, or read[ing] a newspaper online." Sofsky, 287 F.3d at 126 (quoting United States v. White, 244 F.3d 1199, 1206 (10th Cir. 2001)). The court vacated the special condition and remanded to the district court for entry of a more restricted condition. Sofsky, 287 F.3d at 127.

In Sofsky, the special condition allowed the defendant to use a computer or the Internet with the consent of his probation officer. Sofsky, 287 F.3d at 124. No such dispensation is allowed to Bykov. The

condition in this case is even more restrictive than the one struck down in Sofsky.

Moreover, as recognized by the Sofsky court, merely focusing on whether the Internet is an instrument used to commit a crime is far too simplistic in deciding whether an Internet restriction is permissible. Sofsky, 287 F.3d at 126. Yet that was the reasoning advanced by the State and accepted by the superior court in Bykov's case to justify a total ban on Internet access for two years. CP 155; RP 19.

Suppose Bykov had harassed Fresonke by means of a letter written on a piece of paper with the aid of a pen or pencil. Would the court have been justified in prohibiting Bykov from accessing pieces of paper and writing utensils for two years? See ACLU, 929 F. Supp. at 834 (e-mail is "comparable in principle to sending a first class letter."). Suppose Bykov had uttered a true threat over the telephone instead of making one in an email. Could the court constitutionally prohibit Bykov from talking on the telephone as a condition of his sentence? Undersigned counsel has not located any Washington case where a prohibition on telephone use or mail use was imposed as a sentencing condition.

"Although a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones. Nor would defendant's proclivity toward

pornography justify a ban on all books, magazines, and newspapers." Peterson, 248 F.3d at 83; see also Voelker, 489 F.3d at 145 (lifetime ban from Internet was the antithesis of a "narrowly tailored" sanction; it was the functional equivalent of prohibiting a defendant who pleads guilty to possession of magazines containing child pornography from possessing any books or magazines of any type).

Why should use of the Internet be treated any differently? Internet access is worthy of more protection, not less, because it has become a vast repository of free speech in the 21st century, as well as a ubiquitous means of engaging in speech and receiving information. The breadth of the prohibition on free speech at issue here appears unprecedented.

In White, the supervised release condition at issue dictated that the defendant, who was convicted of receiving child pornography, "shall not possess a computer with Internet access throughout his period of supervised release." White, 244 F.3d at 1201. The condition overreached to the extent the district court intended to deny White any access whatsoever to the Internet, as it "would bar Mr. White from using a computer at a library to do any research, get a weather forecast, or read a newspaper online." Id. at 1206. "Given the openness of cyberspace, if the court instead chooses to prohibit Mr. White's using any computer, we must caution against this broad sweep under the facts and circumstances here.

The communication facilitated by this technology may be likened to that of the telephone. Its instant link to information is akin to opening a book." Id. at 1207.

The Seventh Circuit expressed similar concerns in United States v. Holm, 326 F.3d 872 (7th Cir. 2003). Holm pled guilty to possession of child pornography downloaded onto his computer and was prohibited from using or possessing any computer with Internet capability as a post-prison release condition. Holm, 326 F.3d at 873-74. The court determined a total ban on Internet use swept more broadly and imposed a greater deprivation on Holm's liberty than was necessary, and thus was not narrowly tailored.[4] Id. at 877.

The court on appeal understood why the sentencing court thought that a strict ban on all Internet use was warranted, "but such a ban renders modern life—in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website—exceptionally difficult." Id. at 877-78. The ban on Internet access was overbroad. Id. at 878-79.

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[4] 18 U.S.C. § 3583(d)(2) provides conditions of supervised release must be "no greater deprivation of liberty than is reasonably necessary[.]" The Holm court described this standard as "the narrow tailoring requirement." Holm, 326 F.3d at 877. As noted, Washington law requires restrictions on fundamental rights be narrowly tailored. Warren, 165 Wn.2d at 34-35.

While parolees typically have fewer constitutional rights than ordinary persons, a strict ban was "the early 21st century equivalent of forbidding all telephone calls, or all newspapers." Id. at 879.

The reasoning employed in Holm and White applies in Bykov's case. The complete ban on Internet use is a classic example of overreaching, in direct violation of the requirement that sentencing conditions affecting fundamental rights be narrowly tailored. Warren, 165 Wn.2d at 34-35. The Internet prohibition prevents Bykov from accessing or engaging in a whole range of constitutionally protected speech that has nothing at all to do with the crime for which he was convicted.

Bykov's argument is further supported by United States v. Riley, 576 F.3d 1046 (9th Cir. 2009). In Riley, a computer was instrumental in the commission of the offense of possession of child pornography: Riley used a computer to order the child pornography; images of child pornography were found on his computer; and Riley sent an undercover officer explicit messages and images relating to minors in the course of ordering the pornography later delivered to his residence. Riley, 576 F.3d at 1047, 1049. As a condition of supervision, the trial court ordered that Riley "shall not access via computer any material that relates to minors. [Riley] shall not have another individual access the internet on his behalf

to obtain files or information which he has been restricted from accessing, or accept restricted files or information from another person." Id. at 1048.

The Ninth Circuit held the condition was impermissibly overbroad, imposing a far greater deprivation of liberty than reasonably necessary to achieve legitimate goals of supervised release. Id. at 1049. The condition swept extremely wide and restricted a sheer range of unrelated activity. Id. at 1049-50. For example, it prohibited Riley (1) from watching any movie on his computer that had children in it; (2) using a computer to send his own young relatives birthday cards; (3) taking a job at a health insurance company that required him to enter minors' claims information into a database. Id. at 1049. Moreover, the condition imposed a blanket ban on Riley's use of a computer, not even subject to approval by his probation officer. Id.

The government maintained the condition, despite its breadth, was necessary to promote the goals of supervised release: the prevention of Riley's recidivism, the promotion of his rehabilitation, and the protection of the public. Id. The court rejected this argument because the condition restricted uses of computers in situations that bore no relation to protecting the public from child pornography or exploitation, promoting rehabilitation, or preventing recidivism. Id. The court also observed other conditions validly prohibited Riley from engaging in the same kind of

criminal conduct and therefore the restriction on computer access to all material relating to minors did little, if anything, additional to promote the goals of supervised release. Id. at 1049-50.

Bykov's sentence likewise already contains an order that effectively covers what the Internet ban seeks to accomplish. The no contact order suffices to accomplish the State's goal of protecting the victim from further harassment. CP 60. There is no evidence that Bykov has harassed anyone else, let alone use email to accomplish the harassment. The no contact order is sufficient. The Internet ban is overkill. The superior court erred in determining the ban was constitutional. CP 155-56 (CL 5). The condition should be stricken from the judgment and sentence.

d. Relief Is Appropriate Under The Standards For Granting A Writ Of Habeas Corpus.

RCW 7.36.010 provides "Every person restrained of his or her liberty under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal."

A writ of habeas corpus is a civil action to enforce the right to personal liberty. Honore v. Wash. State Bd. of Prison Terms & Paroles, 77 Wn.2d 660, 663, 466 P.2d 485 (1970). "[R]elease from confinement is no longer the sole function of the writ of habeas corpus." Born v.

Thompson, 154 Wn.2d 749, 766, 117 P.3d 1098 (2005) (quoting In re Pers. Restraint of Powell, 92 Wn.2d 882, 887, 602 P.2d 711 (1979). Habeas corpus relief can serve to relieve the burden of an invalid sentence. Powell, 92 Wn.2d at 888. This view of habeas corpus is consistent with RAP 16.4(b), which states a petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case. Powell, 92 Wn.2d at 888.

The sentencing order banning Bykov from accessing the Internet limits his freedom of speech. The order therefore constitutes a form of restraint under habeas rules.

Appeal from a criminal conviction is not a prerequisite to habeas relief. Weiss v. Thompson, 120 Wn. App. 402, 405, 407, 85 P.3d 944, review denied, 152 Wn.2d 1033, 103 P.3d 202 (2004).[5] A petitioner claiming a constitutional error in a collateral attack is entitled to relief if actual and substantial prejudice is shown. Harris v. Charles, 171 Wn.2d

[5] It may be noted, however, that the record indicates Bykov filed a RALJ appeal and an attorney was appointed to represent Bykov in that proceeding. CP 210; RP 4. At the writ hearing, Bykov's attorney noted "The RALJ appeal can take months, if not a year, to go through the whole process." RP 6. Those words have proved prophetic. No substantive action has been taken on the RALJ appeal since December 2011 and there is still no hearing scheduled on the matter, as shown by the superior court docket accessed via acordsweb.courts.wa.gov on July 16, 2012.

455, 461, 256 P.3d 328 (2011). As set forth in sections C. 1. b. and c., supra, the sentencing condition unconstitutionally restricts Bykov's fundamental free speech rights. The restriction is substantial because it prevents Bykov from participating in a mode of communication that permeates modern life. The restriction is actual because it genuinely and effectively bans Bykov from exercising his right to free speech through the Internet, with the threat of imprisonment hanging over his head in the event he disregards the restriction. Bykov is prejudiced by a court order that substantially limits his ability from exercising his right to free speech. He is entitled to relief.

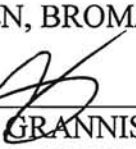
D. CONCLUSION

Bykov requests that this Court strike the sentencing condition prohibiting him from using any device connected to the Internet from his judgment and sentence.

DATED this 2nd day of August, 2012

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

VLADIK BYKOV,	)	
	)	
Petitioner,	)	
	)	
vs.	)	COA NO. 68321-7-I
	)	
HONORABLE STEVEN ROSEN,	)	
	)	
Respondent.	)	

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 2ND DAY OF AUGUST 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD GREENE
SEATTLE CITY ATTORNEY
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SEATTLE, WA 98124

[X] VLADIK BYKOV
14156 91ST CT NE
BOTHELL, WA 98011

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF AUGUST 2012.

x Patrick Mayovsky