70044-8

70044-8

COA NO. 70044-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE GABINO,

Appellant.

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

The Honorable Steven J. Mura, Judge
The Honorable Deborra Garrett, Judge

AMENDED BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to a public trial during the jury selection process.

2. The court erred in imposing the following condition of community custody: "Avoid all contact with minors, to *including your own children*, and adhere to the instructions of the Community Corrections Officer concerning residence and employment, unless otherwise authorized by the Department of Corrections and treatment provider with an adult sponsor approved by the provider and the Department of Corrections." CP 112 (emphasis added).

3. The court erred in imposing the following condition of community custody: "Submit to polygraph and/or *plethysmograph assessment at own expense as directed by Department of Corrections* and therapist, but limited to topics related to monitoring compliance with crime-related sentencing conditions." CP 111 (emphasis added).

4. The court erred in imposing the following condition of community custody: "Do not date or form relationships *with people who are less than 20 percent of your age*. You shall discuss with your therapist &/or Community Corrections Officer ahead of time your wish to escalate the relationship into sexual activity and obtain your therapist &/or CCO's

approval. Your partner shall participate in treatment." CP 118 (emphasis added).

5. The court erred in imposing the following condition of community custody: "Do not withhold information or keep secrets from treatment provider or Community Corrections Officer." CP 112.

6. The court erred in imposing the following condition of community custody: "Do not use or possess *sexually explicit material* in any form as described by the treatment provider and/or Community Corrections Officer, including internet use and possession." CP 111 (emphasis added).

Issues Pertaining to Assignments of Error

1. Whether the court violated appellant's constitutional right to a public trial when the for-cause and peremptory challenge portions of the jury selection process took place at private sidebars without analyzing the requisite factors to justify closure?

2. Whether the community custody condition prohibiting contact with appellant's own minor children must be stricken because it is not crime-related and violates appellant's constitutional right to parent his children?

3. Whether the community custody condition requiring appellant to participate in plethysmograph examination at the direction of

the Department of Corrections must be stricken as an unconstitutional bodily intrusion?

4. Whether the community custody condition prohibiting appellant from dating or forming relationships with a certain class of persons must be stricken because it is not crime-related and unconstitutionally infringes on his fundamental right to association?

5. Whether the community custody condition requiring appellant to "not withhold information or keep secrets from treatment provider or Community Corrections Officer" must be stricken because it is unconstitutionally vague in violation of due process?

6. Whether the community custody condition prohibiting use or possession of "sexually explicit material" must be stricken because it is not crime-related, violates appellant's fundamental right to free speech, and is unconstitutionally vague in violation of due process?

B. STATEMENT OF THE CASE

The State charged Jose Gabino with one count of first degree child molestation. CP 3-4. The first trial in 2004 resulted in a hung jury. CP 64-65. At a second trial in 2012, a jury found Gabino guilty. CP 82. At that second trial, L.G. testified Gabino touched her private area over her clothes during a birthday party in 2003 when she was eight years old.

2RP[1] 48, 50, 75-78, 83-84. Gabino, testifying in his own defense, denied touching L.G. 2RP 380-81. The court imposed an indeterminate sentence of 62 months minimum confinement and a lifetime term of community custody. CP 100. This appeal timely follows. CP 115-32.

C. ARGUMENT

1. THE COURT VIOLATED GABINO'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED PORTIONS OF THE JURY SELECTION PROCESS IN PRIVATE.

For-cause challenges and peremptory challenges were exercised at sidebar. The court erred in conducting these portions of the jury selection process in private without justifying the closure under the standard established by Washington Supreme Court and United States Supreme Court precedent. This structural error requires reversal of the conviction.

a. Juror And Peremptory Challenges Were Exercised At Sidebar.

Jury selection took place on October 8, 2012. 1RP. The venire panel was publicly questioned on the record in the courtroom. 1RP 3-100. At the close of questioning, the court stated "when counsel are ready you can approach the bench." 1RP 100. Peremptory challenges were conducted off the record, designated by a "[d]iscussion between court and

[1] The verbatim report of proceedings is referenced as follows: 1RP - 10/8/12 (voir dire); 2RP – 10/8/12 (supplemental); 3RP – two consecutively paginated volumes consisting of 10/8/12, 10/9/12, 10/10/12, 10/11/12; 4RP – 2/26/13.

counsel outside the hearing of the jury panel" in the transcript. 1RP 201; CP 135-36. When the process was finished, the court announced on the record who would serve as jurors for the trial. 1RP 102.

After the jury left the courtroom, the court announced it wanted to "put on the record what we did at side bar regarding jury selection." 2RP 3. Six jurors proposed by the court were excused by agreement. 2RP 3. The State challenged five jurors for cause, which were not objected to by the defense. 2RP 3. The defense challenged seven jurors for cause, five of which were unopposed by the State and two of which were opposed. 2RP 3. The court denied the challenges that were opposed by the State. 2RP 3.

The court then put on the record that the State had used six of its seven peremptory challenges and listed the jurors peremptorily struck by the State. 2RP 3. The court also put on the record that the defense used six of its seven peremptory challenges and listed the jurors peremptorily struck by the defense. 2RP 3.

b. Juror Challenges Conducted At Sidebar Constitute A Closure For Public Trial Purposes.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and

press the right open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Whether a trial court has violated the defendant's right to a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173-74.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5-6.

Furthermore, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Physical closure of the courtroom, however, is not the only situation that

violates the public trial right. Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers or hallway. Lormor, 172 Wn.2d at 93 (chambers); State v. Leyerle, 158 Wn. App. 474, 477, 483, 484 n.9, 242 P.3d 921 (2010) (moving questioning of juror to hallway outside courtroom was a closure).

Here, the trial judge conducted portions of the jury selection process in private. The trial court violated Gabino's constitutional right to a public trial in deciding for cause challenges at sidebar and directing peremptory challenges to be exercised at sidebar. The sidebar is a private proceeding inaccessible to the public. The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Though the courtroom itself remained open to the public, the proceedings were not. Jurors were allowed to remain in the courtroom while challenges were exercised off the record, which demonstrates the sidebars were done in a way that those in the courtroom would not be able to overhear.

Whether a closure — and hence a violation of the right to public trial — has occurred does not turn only on whether the courtroom has been physically closed. A closure occurs even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny. See State v. Slert, 169 Wn. App.

766, 774 n.11, 282 P.3d 101 (2012) ("if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview."), review granted, 176 Wn.2d 1031, 299 P.3d 20 (2013). Members of the public are no more able to approach the bench and listen to an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical impact is the same — the public is denied the opportunity to scrutinize events.

Doubtless the public could *see* that something was going on, but the public could not *hear* what was happening as it was taking place. The public could not hear which potential jurors were challenged for cause as those challenges took place. The public could not hear which jurors were peremptorily struck, who struck them, and in what order they were struck before the final jury was seated. See People v. Williams, 52 A.D.3d 94, 98, 858 N.Y.S.2d 147 (N.Y. App. Div. 2008) (sidebar conferences, by their very nature, are intended to be held in hushed tones).

When jury selection occurs at a private conference, the public is unable to observe what is taking place in any meaningful manner because the public cannot hear what is going on. There is no functional difference

between conducting this aspect of the jury selection process at a private conference in the courtroom and doing the same in chambers or in a physically closed courtroom. In each instance, the proceeding takes place in a location inaccessible to the public. As a practical matter, the judge might as well have conducted the for-cause and peremptory challenge processes in chambers or dismissed the public from the courtroom altogether because the public was not privy to what occurred. What took place in private should have taken place in open court so that the public could contemporaneously observe the for-cause and peremptory challenge processes as they took place in real time.

c. The Conviction Must Be Reversed Because The Court Did Not Justify The Closure Involving For-Cause Challenges Under The Bone-Club Factors.

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 288 P.3d at 1118 (citing State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). Here, the trial judge conducted portions of the jury selection process in private, including for-cause challenges to potential jurors. The trial court violated Gabino's right to a public trial by holding this portion of jury selection at sidebar rather than in public. See Slert, 169 Wn. App. at 769 (right to public trial violated where four potential

jurors excused in an in-chambers meeting without first conducting Bone-Club analysis).

Before a trial judge closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.[2]

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[2] The Bone-Club components are comparable to the requirements set forth by the United States Supreme Court in Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Orange, 152 Wn.2d at 806; see Waller, 467 U.S. at 48 ("[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."); Presley, 558 U.S. at 214 ("trial courts are required to consider alternatives to closure even when they are not offered by the parties.").

There is no indication the court considered the Bone-Club factors before conducting the for-cause challenges at issue here. The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The court here erred in failing to articulate a compelling interest to be served by the closure, give those present an opportunity to object, weigh alternatives to the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically supported the closure. Orange, 152 Wn.2d at 812, 821-22. Appellate courts do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Gabino's conviction must be reversed due to the public trial violation. Id. at 19.

The State may try to argue the issue is waived because defense counsel did not object to conducting the peremptory challenge process in private. That argument fails. A defendant does not waive his right to

challenge an improper closure by failing to object to it. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Indeed, a defendant must have knowledge of the public trial right before it can be waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). Here, there was no discussion of Gabino's public trial right before the challenges were exercised at sidebar. There is no waiver.

The State may also claim there is no public trial violation because what transpired off the record during the private sidebar was put on the record after the jury was seated. That claim fails because the Supreme Court has repeatedly found a violation of the public trial right where the record showed what happened in private. See, e.g., State v. Paumier, 176 Wn.2d 29, 32-33, 288 P.3d 1126 (2012) (public trial violation where in-chambers questioning of prospective jurors "was recorded and transcribed by the court"); Wise, 176 Wn.2d at 7-8 (public trial violation where prospective jurors questioned in chambers where "[t]he questioning in chambers was recorded and transcribed just like the portion of voir dire done in the open courtroom.").

In Slert, four jurors were excused in chambers and following the in-chambers conference, the trial court indicated on the record that it had previously conferred with both counsel and that the parties had mutually agreed to excuse four jurors from the jury venire. Slert, 169 Wn. App. at

771, 774. The Court of Appeals found a public trial violation. Id. at 769, 774. There is no basis to treat Gabino's case differently.

Established law dictates that the Bone-Club factors be considered *before* the closure takes place. Wise, 176 Wn.2d at 12. A proposed rule that a *later* recitation of what occurred in private suffices to protect the public trial right would eviscerate the requirement that a Bone-Club analysis take place *before* a closure occurs. A new trial is required.

d. The Conviction Must Be Reversed Because The Court Did Not Justify The Closure Involving Peremptory Challenges Under The Bone-Club Factors.

The trial court also violated Gabino's right to a public trial in holding peremptory challenges at a private sidebar. "The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends." People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (peremptory challenges conducted in chambers violate public trial right, even where such proceedings are reported), review denied, (Feb 02, 1993). Washington courts recognize the right to a public trial attaches to the portion of jury selection involving peremptory challenges. State v. Wilson,

174 Wn. App. 328, 342-43, 346, 298 P.3d 148 (2013); State v. Jones, 175 Wn. App. 87, 97-101, 303 P.3d 1084 (2013).

In Wilson, the Court of Appeals held the public trial right was not implicated when the bailiff excused the two jurors solely for illness-related reasons before voir dire began. Wilson, 174 Wn. App. at 347. In reaching that holding, the court distinguished the administrative removal of jurors before the voir dire process began to later portions of the jury selection process that implicated the public trial right, including the peremptory challenge process. Id. at 342-43.

The court recognized "both the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, *provided such juror excusals do not amount to* for-cause excusals or *peremptory challenges traditionally exercised during voir dire in the courtroom.*" Id. at 344 (emphasis added). A trial court is allowed "to delegate hardship and other administrative juror excusals to clerks and other court agents, *provided that the excusals are not the equivalent of peremptory or for cause juror challenges.*" Id. (emphasis added). Wilson's public trial argument failed because he could not show "the public trial right attaches to any component of jury selection that does not involve 'voir dire' or a

similar jury selection proceeding involving the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. at 342.

In Jones, the Court of Appeals held the court violated the right to public trial when, during a court recess off the record, the trial court clerk drew four juror names to determine which jurors would serve as alternates. Jones, 175 Wn. App. at 91. It recognized "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 101. The court likened the selection of alternate jurors to the phases of jury selection involving for cause *and peremptory challenges*. Id. at 98 ("Washington's first enactment regarding alternate jurors not only specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the same manner as deliberating jurors and subject to for-cause and peremptory challenges in open court.").

Both Jones and Wilson applied the experience and logic test set forth in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). Jones, 175 Wn. App. at 96-102; Wilson, 174 Wn. App. at 335-47. In Jones, there was a public trial violation because alternate juror selection was akin to the jury selection process involving regular jurors, including the peremptory challenge process. In Wilson, there was no public trial violation because

the administrative removal of jurors for hardship was not akin to other portions of the jury selection process, including the peremptory challenge process. Both cases support Gabino's argument that the public trial right attaches to the peremptory challenge process because it is an integral part of the jury selection process.

The "experience" component of the Sublett test is satisfied here. Historical evidence reveals "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts have historically treated the peremptory challenge process as part of voir dire on par with for cause challenges. Wilson, 174 Wn. App. at 342. CrR 6.4(b) contemplates juror voir dire as involving peremptory and for cause juror challenges. Id. CrR 6.4(b) describes "voir dire" as a process where the trial court and counsel ask prospective jurors questions to assess their ability to serve on the defendant's particular case and to enable counsel to exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of some jurors appearing for service before voir

dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100(1), but only so long as "such juror excusals do not amount to for-cause excusals or *peremptory challenges* traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added).

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." State v. Saintcalle, 178 Wn.2d 34, 74, 309 P.3d 326 (2013) (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Saintcalle, 178 Wn.2d at 62 (Madsen, C.J. concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. McCollum, 505 U.S. at 48-50. A prosecutor is forbidden from using peremptory challenges based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct.

1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992).

The peremptory challenge component of jury selection matters. It is not so inconsequential to the fairness of the trial that it is appropriate to shield it from public scrutiny. Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The public trial right encompasses circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. Brightman, 155 Wn.2d at 514; Leyerle, 158 Wn. App. at 479. An open peremptory process of jury selection acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory removal from taking place in the first instance and, if such a peremptory challenge is exercised, increases the likelihood that the challenge will be denied by the trial judge.

The Supreme Court recently issued an opinion that was fractured on how to deal with the persistence of racial discrimination in the

peremptory challenge process, but all nine justices united in the recognition that the problem exists. See Saintcalle, 178 Wn.2d at 49 (Wiggins, J., lead opinion) (overwhelming evidence that peremptory challenges often facilitate racially discriminatory jury selection), at 60 (Madsen, C.J., concurring) ("Like my colleagues, I am concerned about racial discrimination during jury selection."); at 65 (Stephens, J., concurring) (writing separately "to sound a note of restraint amidst the enthusiasm to craft a new solution to the problem of the discriminatory use of peremptory challenges during jury selection."); at 69 (Gonzalez, J., concurring) ("This splintered court is unanimous about one thing: Racial bias in jury selection is still a problem."); at 118 (Chambers, J., dissenting) ("Batson, by design, does nothing to police jury selection against unconscious racism or wider discriminatory impacts. I am skeptical — given that we have never reversed a verdict on a Batson challenge — that [Batson] does much to police discriminatory purpose itself.").

Justice Wiggins bemoaned the fact that in 42 cases decided since Batson, Washington appellate courts never reversed a conviction based on a trial court's erroneous denial of a Batson challenge. Saintcalle, 178 Wn.2d at 45-46. If discrimination during the peremptory process is not prevented at the trial level, the error will rarely be remedied on appeal. That is what history has taught us.

In light of these justified concerns, it cannot be plausibly maintained that the peremptory challenge process, as it unfolds in real time at the trial level, gains nothing from being open to the public. The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Id. at 17 (quoting Waller, 467 U.S. at 46 n.4). The peremptory challenge process squarely implicates those values.

Division Three of the Court of Appeals recently held no public trail violation occurred during the peremptory challenge phase because the record did not show peremptory challenges were actually exercised at sidebar instead of in open court. State v. Love, __ Wn. App.__, 309 P.3d 1209, 1212 (2013). In extended dicta, Division Three opined that, even if the record showed peremptory challenges were exercised at sidebar, the peremptory challenge process did not need to be open to the public under the "experience and logic" test. Love, 309 P.3d at 1212-14. That discussion was dicta because it was unnecessary to resolve the issue. See In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta

is language not necessary to the decision in a particular case."). Dicta lack precedential value. Campbell v. Reed, 134 Wn. App. 349, 359, 139 P.3d 419 (2006). Moreover, dicta are often ill-considered and should not be transformed into a rule of law. State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989); State ex rel. Hoppe v. Meyers, 58 Wn.2d 320, 329, 363 P.2d 121 (1961).

Division Three's dicta in Love is ill-considered and should not be followed for the reasons already articulated in this brief. The experience prong of the "experience and logic" test is met because the relevant court rule envisions both for cause and peremptory challenges taking place in open court. Wilson, 174 Wn. App. at 342-44; Jones, 175 Wn. App. at 98, 101. Division Three ignored what Jones and Wilson have to say on the issue.

Its reliance on State v. Thomas, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976) as a basis to conclude peremptory challenges do not meet the "experience" prong of the "experience and logic" test is misplaced. Love, 309 P.3d at 1213. In 1976, Thomas noted secret peremptories were used "in several counties." Thomas, 16 Wn. App. at 13. There are 39 counties in Washington. The implication, then, is that only several of the 39

counties used secret peremptories as of 1976.[3] That hardly shows an established historical practice of secret peremptory challenges in this state. Quite the contrary.

Turning to the "logic" prong, Division Three's bald assertion that the exercise of peremptory challenges "presents no questions of public oversight" is simply wrong. Love, 309 P.3d at 1214. The reasons why it is wrong, including the benefit of public oversight to deter discriminatory removal of jurors during the peremptory process, have already been set forth in this brief.

A new trial is required because the court did not apply the Bone-Club factors before closing the peremptory challenge process off from the public. Wise, 176 Wn.2d at 5, 12.

2. THE SENTENCING CONDITION RESTRICTING CONTACT WITH CHILDREN VIOLATES GABINO'S FUNDAMENTAL RIGHT TO PARENT HIS CHILDREN.

Parents have a fundamental liberty interest in the care and companionship of their children protected by due process. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Parents and children share a

[3] The source of the court's information is actually dated 1968. Thomas, 16 Wn. App. at 13 n.2.

constitutional interest in each other's companionship and affection. Moore v. Burdman, 84 Wn.2d 408, 411, 526 P.2d 893 (1974). The right to the preservation of family integrity encompasses the reciprocal rights of both parents and children. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

As a lifelong condition of community custody, the court ordered Gabino to "[a]void all contact with minors, to *including your own children*, and adhere to the instructions of the Community Corrections Officer concerning residence and employment, unless otherwise authorized by the Department of Corrections and treatment provider with an adult sponsor approved by the provider and the Department of Corrections."[4] CP 112 (emphasis added). The restriction on having contact with Gabino's children unconstitutionally infringes on his fundamental parental rights because the prohibition is not reasonably necessary.

The court may impose and enforce crime-related prohibitions in appropriate circumstances. RCW 9.94A.703(3)(f); RCW 9.94A.505(8). A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Crime-related prohibitions may include orders prohibiting contact with specified

[4] Gabino has two children. 1RP 345.

individuals for the statutory maximum term. State v. Armendariz, 160 Wn.2d 106, 116, 156 P.3d 201 (2007).

The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). But courts more carefully review conditions that interfere with a fundamental constitutional right, such as the fundamental right to the care, custody, and companionship of one's children. Rainey, 168 Wn.2d at 374. The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or involves application of an incorrect legal analysis. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Moreover, "a court 'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.'" State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)). Imposition of an unconstitutional community custody condition is therefore manifestly unreasonable. State v. Sanchez Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93.

State interference with a fundamental right is subject to strict scrutiny. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008), cert.

denied, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Under this standard, a reviewing court must determine whether the State proved the restriction on the right to parent was "sensitively imposed" and "reasonably necessary to accomplish the essential needs of the State." Rainey, 168 Wn.2d at 374 (quoting Warren, 165 Wn.2d at 32). To withstand constitutional scrutiny, no contact orders relating to biological children must be reasonably necessary to protect them from harm. Rainey, 168 Wn.2d at 377; State v. Letourneau, 100 Wn. App. 424, 439, 997 P.2d 436 (2000).

Under the controlling legal standard, the prohibition on contact with Gabino's minor children is unconstitutional in scope and duration. The State generally has a compelling interest in preventing future harm to the victims of the crime. Rainey, 168 Wn.2d at 377. But Gabino committed no crime against any of his children or any children under his care. The trial court failed to explain why this prohibition on contact was reasonably necessary to protect Gabino's children. The court abused its discretion in failing to apply the correct legal standard to the restriction. Id. at 375.

Letourneau is instructive. In that case, the defendant, a schoolteacher, was convicted of raping a 13-year-old student. Letourneau, 100 Wn. App. at 428-29. This Court held a condition prohibiting

Letourneau from unsupervised in-person contact with her biological minor children was not reasonably necessary to prevent her from sexually molesting them, where there was insufficient evidence in the record showing it was reasonably necessary to protect the Letourneau's biological children. Id. at 441-42. "There must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention." Id. at 442.

One expert opined Letourneau posed a danger to her children and observed "[m]any sex offenders have offended a victim other than their biological child and later offend their own child of the same or opposite sex." Id. at 439-40. This Court regarded the expert's opinion as insufficient to justify the no-contact order. Id. at 441-42. "The general observation that many offenders who molest children unrelated to them later molest their own biological children, without more, is an insufficient basis for State interference with fundamental parenting rights." Id. at 442.

Similarly, Gabino's offense was committed against a child that was not his own. L.J. was a visitor at her cousin's birthday party, which was hosted by Gabino and his wife and attended by many other relatives. 3RP 50-54, 163-66, 287-88. L.J. had never been to the house before. 3RP 50, 54. She had never met Gabino before. 3RP 84. There is no evidence that

Gabino ever molested his own biological children or any child with whom he lived and was under his care. The order restricting contact with Gabino's minor children is therefore unconstitutional.

Gabino's case is easily distinguishable from those in which a no contact order with a defendant's own children was upheld on appeal. See State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010); State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011).

In Corbett, the defendant was convicted of raping his six-year old stepdaughter. Corbett, 158 Wn. App. at 586. On appeal, he challenged a community custody provision that prohibited him from contacting his biological minor sons. Corbett, 158 Wn. App. at 586. The Court of Appeals affirmed the provision because Corbett abused his parenting role by sexually abusing a minor in his care. Id. at 599.

In reaching that holding, the court in Corbett relied on Berg. Id. at 598-99. Berg was convicted of raping and molesting A.A., a 10 year old girl with whom he lived and acted as a parent. Berg, 147 Wn. App. at 926-27, 942-43. Berg challenged the condition of his sentence prohibiting unsupervised contact with any female minor, which encompassed his biological daughter A.B. with whom he lived. Id. at 941-43. The trial court's order restricting contact was reasonably necessary to protect A.B.

because "A.A. lived in the home where Berg was acting as her parent when the abuse occurred. By allowing Berg to be alone with A.B., who also lived in the home as his child, the court reasonably feared that it would be putting A.B. in the same situation that A.A. was in when Berg sexually abused her." Id. at 942-43.

Unlike Berg and Corbett, Gabino committed no crime against a child with whom he lived and cared for as a parent. Gabino did not abuse a parenting role by sexually abusing a minor in his care. The scope of the no contact condition therefore unconstitutionally infringes on Gabino's right in the care and custody of his children. Letourneau, 100 Wn. App. at 441-42.

Moreover, the sentencing court did not carefully consider the ramifications of a lifetime ban. There is no temporal limit to the restriction on contact with minor children. The condition encompasses not only the minor children Gabino now has but also any minor child that Gabino may father in the future. CP 112. Again, this is a lifetime condition because Gabino is on community custody for life. CP 100.

Reasonable necessity encompasses not only scope (extent of contact) but also duration. Rainey, 168 Wn.2d at 381. The length of the no contact order must also be reasonably necessary. Id. As explained in Rainey, "[t]he duration and scope of a no-contact order are interrelated: a

no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests." Id.

In Rainey, the defendant was convicted of a violent crime against his child (first degree kidnapping) and had a record of continually inflicting measurable emotional damage on his daughter and attempting to leverage the child to inflict emotional distress on the mother. These facts were sufficient to establish that a total no-contact ban, including indirect or supervised contact, was reasonably necessary to protect the child and the mother. Id. at 379-80. Nevertheless, the Court reversed the no-contact order because the sentencing court provided no justification for the order's lifetime duration and the State failed to show why the lifetime prohibition was reasonably necessary. Id. at 381.

As in Rainey, the sentencing court in this case provided no reason for the duration of the no-contact order, nor did the State attempt to justify the lifetime order as reasonably necessary to protect Gabino's minor children. Id. at 381. "A court abuses its discretion if, when imposing a

crime-related prohibition, it applies the wrong legal standard." Id. at 375. That is what happened here.

Defense counsel did not object to this or any other sentencing condition. 4RP 24. Sentencing errors, however, may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Furthermore, a defendant always has standing to challenge the legality of community custody conditions even though he has not been charged with violating them. Sanchez Valencia, 169 Wn.2d at 787. [5]

For the reasons set forth above, the court's prohibition on contact with Gabino's minor children is not reasonably necessary to protect his children from abuse. This Court should therefore strike the challenged provision and remand for resentencing. Letourneau, 100 Wn. App. at 442.

3. THE PLETHYSMOGRAPH CONDITION VIOLATES GABINO'S RIGHT TO BE FREE FROM BODILY INTRUSIONS.

As a condition of community custody, the court ordered Gabino to "[s]ubmit to polygraph and/or *plethysmograph assessment at own expense as directed by Department of Corrections* and therapist, but limited to topics related to monitoring compliance with crime-related sentencing conditions." CP 111. The condition is unconstitutional insofar as it

[5] The above principles apply to all of the challenges brought to conditions of community custody in this appeal.

requires Gabino to submit to plethysmograph testing at the direction of the Department of Corrections.

Plethysmograph testing involves the restraint and monitoring of an intimate part of a person's body while the mind is exposed to pornographic imagery. In re Marriage of Parker, 91 Wn. App. 219, 223-24, 957 P.2d 256 (1998). Such examination implicates the due process right to be free from bodily restraint. Parker, 91 Wn. App. at 224; U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Requiring submission to plethysmograph testing at the discretion of a community corrections officer violates Gabino's constitutional right to be free from bodily intrusions. State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). "Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider." Land, 172 Wn. App. at 605. But such testing is not a routine monitoring tool subject only to the discretion of a community corrections officer. Id. In this case, the language of the condition itself shows it is intended to be nothing more than a monitoring tool. CP 111. The requirement that Gabino submit to the plethysmograph examination at the direction of the Department of Corrections must therefore be stricken. Land, 172 Wn. App. at 605-06.

4. THE SENTENCING CONDITION AFFECTING WHO GABINO IS ABLE TO DATE OR FORM RELATIONSHIPS WITH IS NOT CRIME RELATED AND UNCONSTITUTIONALLY INFRINGES ON GABINO'S FIRST AMENDMENT RIGHT TO ASSOCIATION.

The First Amendment right to freedom of association protects a person's right to enter into and maintain human relationships. State v. Moultrie, 143 Wn. App. 387, 399 n. 21, 177 P.3d 776, review denied, 164 Wn.2d 1035, 197 P.3d 1185 (2008). This fundamental right may be restricted only if it is sensitively imposed and reasonably necessary to accomplish the essential needs of the state and public order. State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993).

The Sentencing Reform Act (SRA), meanwhile, authorizes the court to impose crime-related prohibitions, i.e., conditions that directly relate to the circumstances of the crime. RCW 9.94A.703(3)(f); RCW 9.94A.505(8); RCW 9.94A.030(10). A court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the SRA by imposing a community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

The court ordered "[d]o not date or form relationships with people who are less than 20 percent of your age." CP 112. Gabino's date of birth is May 19, 1974. 2RP 236. He was 38 years old at the time of sentencing on February 26, 2013. 20 percent of 38 years is 7.6 years. Read literally, the condition prohibits Gabino from dating or forming a relationship with any child under 7.6 years old. If the condition is read literally, there is nothing legally wrong with it. But the condition is also absurd because it does not prohibit Gabino from dating or forming relationships with minor children that are eight years old or older. That could not have been what the community corrections officer or the trial court intended,[6] especially in light of another condition, not challenged here, that prohibits Gabino from dating or forming relationships "with families who have minor children, as directed by your Community Corrections Officer." CP 112. The community corrections officer and the trial court got their math wrong, almost certainly mixing up "20 percent" with what was intended to be "80 percent."

Gabino challenges the "20 percent" condition to avoid potential mischief in the future, not for what it literally says but for how it is likely

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[6] As with all the other conditions challenged in this brief, the "20 percent" condition incorporated into the judgment and sentence was taken verbatim from the pre-sentence report prepared by the Department of Corrections. CP 95, 112.

to be interpreted by those responsible for its enforcement. The CCO who drafted this language and the trial court that signed off on it must have understood the condition to mean "Do not date or form relationships with people who are less than 80 percent of your age." 80 percent of 38 years is 30.4. Read in that manner, the condition prohibits Gabino from dating or forming relationships with any person less than 18 years old. There is nothing wrong with that.

The problem is that the condition, interpreted in that manner, also prohibits him from dating or forming a relationship with any *adult* less than 30.4 years old, including those adults who do not have minor children. As the years pass, Gabino will keep getting older and the condition will continue to prohibit him from dating or forming relationships with an increasingly older class of adults who do not have minor children. When he is 50 years old, he will be prohibited from forming a relationship with any such *adult* who is less than 40 years old. When he is 60 years old, he will be prohibited from dating any such *adult* under 48 years old. And so on.

The condition is ill conceived. Conditions of community custody imposed as being crime-related must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

Gabino was convicted of committing a sex offense against a minor child. The circumstances of that offense had nothing to do with dating or forming relationships with adults who do not have minor children.

The above condition must therefore be removed from the judgment and sentence because it is not crime-related. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (community custody conditions prohibiting conduct that are not crime-related must be stricken from the judgment and sentence); State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998) (striking condition prohibiting contact with minors because victim was 19 years old), abrogated on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). For the same reasons, the condition also unconstitutionally infringes on Gabino's fundamental right to association in that it is not sensitively imposed and is otherwise unnecessary to accomplish the essential needs of the state. Riley, 121 Wn.2d at 37-38.

5. THE SENTENCING CONDITION REQUIRING GABINO NOT TO WITHHOLD INFORMATION OR SECRETS IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered "[d]o not withhold information or keep secrets from treatment provider or Community Corrections Officer." CP 112. The condition is

unconstitutionally vague because it does not provide fair notice and invites arbitrary enforcement. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53; State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001). Both requirements must be satisfied to avoid a vagueness violation. Bahl, 164 Wn.2d at 753.

The condition at issue here is written in such a sweeping and open-ended manner that it contains no protection from arbitrary enforcement and ordinary people cannot understand what conduct is prohibited. Ordinary people have a lot of secrets, i.e. things they do not reveal to others. What secrets must be revealed as part of this community custody requirement? Ordinary people are in possession of vast amounts of information. What information must be revealed? The answer to both

questions is limited only by the imagination. The condition is written in a way that directs Gabino to reveal secrets and information without prompting or in response to any question from the community corrections officer. The requirement is not tied to any subject matter or any standard whatsoever. The condition does not specify what kinds of secrets or information needs to be revealed and therefore fails to define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited.

As in Sanchez Valencia, "the vague scope of proscribed conduct fails to provide the petitioners with fair notice of what they can and cannot do." Sanchez Valencia, 169 Wn.2d at 794 (striking down the following condition as unconstitutionally vague: "Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.").

Further, a reasonable person cannot describe a standard necessary to avoid arbitrary enforcement. Compare Bahl, 164 Wn.2d at 754, 758 (holding the following condition unconstitutionally vague because it did not provide ascertainable standards for enforcement: "[d]o not possess or access pornographic materials, as directed by the supervising [CCO].");

Sanchez Valencia, 169 Wn.2d at 785, 794-95 (the condition prohibiting paraphernalia did not provide ascertainable standards of guilt to protect against arbitrary enforcement because it "might potentially encompass a wide range of everyday items").

As the Court in Sanchez Valencia reasoned regarding a vague paraphernalia prohibition, "'an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,' such as sandwich bags or paper . . . Another probation officer might not arrest for the same 'violation,' i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague." Sanchez Valencia, 169 Wn.2d at 794-95.

The same rationale applies here. An inventive community corrections officer could envision the withholding of any commonplace secret or piece of information as sufficient to trigger a violation. The condition, as written, invites arbitrary enforcement and should be stricken from the judgment and sentence.

6. THE PROHIBITION ON SEXUALLY EXPLICIT MATERIAL IS UNRELATED TO THE OFFENSE, IS NOT NECESSARY TO THE ESSENTIAL NEEDS OF THE STATE AND IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered: "[d]o not use or possess *sexually explicit material* in any form as described by the treatment provider and/or Community Corrections Officer, including internet use and possession." CP 111 (emphasis added). This condition is improper for three reasons. First, it is not crime-related. RCW 9.94A.703(3)(f); RCW 9.94A.505(8); 9.94A.030(10). Second, it violates the First Amendment because it is not reasonably necessary to accomplish the essential needs of the state. Third, it violates due process because it is insufficiently definite to apprise Gabino of prohibited conduct and does not prevent arbitrary enforcement. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Substantial evidence must support a determination that a condition is crime-related. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). The sentencing court has discretion to impose crime-related prohibitions as a condition of supervision. RCW 9.94A.703(3)(f); RCW 9.94A.505(8). But nothing in the record indicates Gabino's offense involved sexually explicit material. The condition

should be removed because it does not directly relate to the circumstances of the crime.

Further, conditions restricting the fundamental right to free speech under the First Amendment are permissible only if they are sensitively imposed and reasonably necessary to accomplish the essential needs of the state and public order. Bahl, 164 Wn.2d at 757. The prohibition here fails this standard because the record does not show possession or use of sexually explicit material had anything to do with the offense for which Gabino was convicted. There is no nexus. The condition is therefore unnecessary to accomplish an essential need of the state.

Furthermore, the condition is unconstitutionally vague in violation of due process. Where the challenged law involves First Amendment rights, a greater degree of specificity is required. Bahl, 164 Wn.2d at 757. Standing alone, with no link to a statutory definition or additional context, the prohibition on sexually explicit material is too vague to withstand scrutiny. The condition does not sufficiently provide Gabino with advance knowledge of what is required of him. As written, it embodies a fatally imprecise and subjective standard. See People v. Pirali, 217 Cal. App. 4th 1341, 1352-53, 159 Cal. Rptr.3d 335 (Cal. Ct. App. 2013) (probation condition prohibiting offender from purchasing or possessing pornographic or sexually explicit materials as defined by the probation

officer is unconstitutionally vague); McVey v. State, 863 N.E.2d 434, 447 (Ind. Ct. App.) (post-release condition prohibiting the possession of "sexually explicit materials" is unconstitutionally vague), review denied, 878 N.E.2d 206 (2007); Fitzgerald v. State, 805 N.E.2d 857, 866-67 (Ind. Ct. App. 2004) (same); Smith v. State, 779 N.E.2d 111, 118 (Ind. Ct. App. 2002) (same), review denied, 792 N.E.2d 37 (2003).

Bahl is distinguishable. In that case, the Court upheld a vagueness challenge to a condition that prohibited Mr. Bahl from frequenting "establishments whose primary business pertains to sexually explicit or erotic material." Bahl, 164 Wn.2d at 758. The Court held the condition was "sufficiently clear" when the dictionary definition of the term "explicit" was used in connection and considered together with a prohibition on frequenting businesses, i.e., those in the business of "sexually explicit" materials. Id. at 759.

Unlike Bahl, the prohibition in Gabino's case is not tied to establishments whose primary business pertains to sexually explicit material. The condition is unmoored from any particular context. The context in Bahl that rendered the term sufficiently clear is missing from Gabino's case.

The Court in Bahl also noted the statutory definition of "sexually explicit material" found at RCW 9.68.130(1) bolstered its conclusion that

"sexually explicit" is not unconstitutionally vague "*in the context used.*"[7] Id. at 760 (emphasis added). It declined to decide whether this definition alone would be sufficient notice because Mr. Bahl was not convicted under this statute. Id.

The condition in Gabino's case lacks the comparable context found in Bahl and Gabino was not convicted of an offense under chapter 9.68 RCW. The statutory definition of "sexually explicit material" therefore cannot be used to cure the vagueness problem. A statutory definition of a term does not give notice of the term's meaning as used in a sentence unless the definition is contained in the same criminal statute that the defendant was convicted of violating. Farrell v. Burke, 449 F.3d 470, 487 (2d Cir. 2006) (cited by Bahl, 164 Wn.2d at 755); accord United States v. Thompson, 653 F.3d 688, 696 (8th Cir. 2011); cf. United States v. Rearden, 349 F.3d 608, 619-20 (9th Cir. 2003) (condition specifying that offender not possess any materials depicting sexually explicit conduct as defined in 18 U.S.C. § 2256(2) not unconstitutionally vague).

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[7] RCW 9.68.130(1) defines "sexually explicit material" as "any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition."

The judgment and sentence also fails to link the condition to the statutory definition. CP 111. In Moultrie, the defendant challenged the condition of his sentence prohibiting contact with "vulnerable, ill or disabled adults" as unconstitutionally vague. Moultrie, 143 Wn. App. at 396. The State argued the terms "vulnerable" and "disabled" provided sufficient notice of the type of person with whom Moultrie is to avoid contact because those terms were defined by statute. Id. at 397.

This Court rejected the State's argument because the statutory definitions were more specific than the general terms used in the no contact condition: "Because there is no indication that the trial court in fact intended to limit the terms of the order to these statutory definitions, we will not presume it did so or otherwise rewrite the trial court's order." Id. at 397-98. The court remanded for the trial court to clarify what it meant by those terms. Id. at 398.

Similarly, the term "sexually explicit material" in Gabino's judgment and sentence is not tied to a statutory definition. As in Moultrie, there is nothing in the judgment and sentence that shows the trial court intended to limit the condition on possession or use of "sexually explicit material" to its statutory definition.

On the contrary, the definition of the term is expressly left up to the community corrections officer or treatment provider: "Do not use or

possess sexually explicit material in any form *as described by the treatment provider and/or Community Corrections Officer*, including internet use and possession." CP 111. This community custody condition suffers the same vagueness problems created by a condition that simply delegates the responsibility of defining the scope of the prohibition to another: "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758 (addressing pornography prohibition). The prohibition should be stricken from the judgment and sentence.

D. CONCLUSION

For the reasons set forth, Gabino requests that this Court reverse the conviction and strike the challenged conditions of community custody.

DATED this 14th day of November 2013

Respectfully Submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70044-8-I
	)	
JOSE GABINO,	)	
	)	
Appellant.	)	

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 15TH DAY OF NOVEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE, SUITE 201
BELLINGHAM, WA 98227
Appellate_Division@co.whatcom.wa.us

[X] JOSE GABINO
NO. 205650
WHATCOM COUNTY JAIL
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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF NOVEMBER 2013.

X Patrick Mayovsky