SUPREME COURT NO. 91350-1
COA NO. 70044-8-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE GABINO,

Petitioner.

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

The Honorable Steven J. Mura, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jose Gabino asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Gabino requests review of the decision in State v. Jose Gabino, Court of Appeals No. 70044-8-I (slip op. filed Jan. 20, 2015), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether the constitutional right to a public trial attaches to the for-cause and peremptory challenge stages of jury selection?

D. STATEMENT OF THE CASE

The State charged Jose Gabino with one count of first degree child molestation. CP 3-4. Jury selection took place on October 8, 2012. 1RP.[1] The venire panel, after filling out the juror questionnaire, went to the courtroom and was sworn in. 1RP 3-4. The 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. An off-the-record

[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.

discussion then took place, described by the court reporter as a "[d]iscussion between court and counsel outside the hearing of the jury panel." 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 said 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.

The case was thereafter tried to the jury, which found Gabino guilty. CP 82. The court imposed an indeterminate sentence of 62 months minimum confinement. CP 100.

On appeal, Gabino argued the manner in which the for-cause and peremptory challenges were exercised during jury selection violated his

right to a public trial. Amended Brief of Appellant at 4-22; Reply Brief at 1-6. The Court of Appeals held the right to a public trial does not attach to the for-cause and peremptory challenge phases of the jury selection process. Slip op. at 1. Gabino seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE COURT VIOLATED GABINO'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED THE FOR-CAUSE AND PEREMPTORY CHALLENGE PORTIONS OF THE JURY SELECTION PROCESS IN PRIVATE IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The federal and state constitutions guarantee the right to a public trial to every criminal defendant. Presley v. Georgia, 558 U.S. 209, 212-13, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012); U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

For-cause challenges and peremptory challenges were exercised in private at sidebar. The trial court committed structural error 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.

The issue of whether for-cause challenges and peremptory challenges implicate the right to a public trial is already before this Court in State v. Love (No. 89619-4). Review is appropriate because this case presents a significant question of constitutional law under RAP 13.4(b)(3), as shown by the Court's decision to grant review in Love.

a. The Public Trial Right Attaches To For-Cause Challenges During Jury Selection.

It is established that the right to a public trial encompasses the questioning of prospective jurors to determine fitness to serve on a particular case. Presley, 558 U.S. at 212-13; Wise, 176 Wn.2d at 11. In State v. Slert, the Court considered the related question of whether a pre-voir-dire in-chambers discussion of prospective jurors' answers and the dismissal of four jurors for outside knowledge of the case violated the right to a public trial. State v. Slert, 181 Wn.2d 598, 600, 334 P.3d 1088 (2014) (Gonzalez, J., lead opinion). The lead opinion, joined by three justices, found the record was insufficient to determine whether a public trial violation occurred, characterizing the proceeding as merely involving the "examination of jury questionnaires" before jurors were sworn and the voir dire process had begun. Slert, 181 Wn.2d at 605-08.

The remaining five justices, viewing the record differently, believed voir dire had begun and agreed the taking of jury challenges is a

proceeding to which the public trial right attaches. Id. at 610-11 (Wiggins, J., concurring),[2] at 618 (Stephens, J., dissenting).

The record in Gabino's case is better than the record in Slert. It is clear that a number of prospective jurors in Gabino's case were excused for cause at an off-the-record sidebar *after* the jury panel was sworn in and voir dire began. 1RP 3-4; 2RP 3; CP 134. They were excused in private without justifying the closure based on the test set forth in State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).[3] That is a violation of the public trial right under the five-justice majority in Slert.

Before the Supreme Court's decision in Slert, Division Three in Love held for-cause challenges do not implicate the public trial right. State v. Love, 176 Wn. App. 911, 918-20, 309 P.3d 1209 (2013), review

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[2] Justice Wiggins, in his concurrence, would have held the failure to object precluded review. Slert, 181 Wn.2d at 612. On the same day the Slert decision came out, the Court reaffirmed that failure to object in the trial court does not preclude appellate review of a public trial claim under RAP 2.5(a). State v. Njonge, 181 Wn.2d 546, 554-55, 334 P.3d 1068(2014).

[3] 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, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). In re Pers. Restraint of Orange, 152 Wn.2d 795, 806, 100 P.3d 291 (2004); 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.").

granted, (No. 89619-4). Division One relied on Love in rejecting Gabino's challenge. Slip op. at 2-3. This Court granted review of the issue in Love. Gabino asks this Court to do the same.

b. The Public Trial Right Attaches To Peremptory Challenges During Jury Selection.

Divisions Two and Three of the Court of Appeals have categorically held the peremptory challenge process does not implicate the right to a public trial under the experience and logic test. Love, 176 Wn. App. at 920; State v. Webb, 183 Wn. App. 242, 246-47, 333 P.3d 470 (2014) (same); (adopting Love analysis); State v. Marks, __Wn. App.__, 339 P.3d 196, 198-200 (2014) (same). Division One recognized the public trial right could be implicated, but held there is no violation where "[t]he written form on which the attorneys wrote down their peremptory challenges was kept and filed in the court record at the end of the case." State v. Filitaula, __Wn. App.__, 339 P.3d 221, 223 (2014), review pending (No. 91192-4). Relying on such cases, the Court of Appeals in Gabino's case held the exercise of peremptory challenges does not implicate the public trial right. Slip op. at 1.

But application of the "experience and logic" test set forth in State v. Sublett, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012) shows the peremptory challenge process implicates the core values of the public trial

right and therefore must be subject to contemporaneous public scrutiny. 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 experience prong is satisfied because the criminal rules of procedure show courts have historically treated the peremptory challenge process as part of voir dire on par with for-cause challenges. Division Two, for example, has described the peremptory challenge stage as part of the voir dire process that should be conducted in open court. See State v. Wilson, 174 Wn. App. 328, 342-44, 346, 298 P.3d 148 (2013) (in holding public trial right not implicated when bailiff excused jurors solely for illness-related reasons before voir dire began, contrasting voir dire process involving for-cause and peremptory challenges), review pending (No. 88818-3);[4] State v. Jones, 175 Wn. App. 87, 97-101, 303 P.3d 1084 (2013) (in holding private drawing of alternates violated right to public trial, comparing it to voir dire process involving for-cause and peremptory challenges), review pending (No. 89321-7); see also People v. Harris, 10

[4] Cf. Marks, 339 P.3d at 199 (where a different panel in Division Two disavowed Wilson's description of peremptory challenges as on par with voir dire challenges).

Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) ("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."), review denied, (Feb 02, 1993).

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, a prosecutor is forbidden from using peremptory challenges to remove a juror based on race, ethnicity, or gender. McCollum, 505 U.S. at 48-50; 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). 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). In Filitaula, Division One recognized an open peremptory challenge process serves the values associated with the public trial right: "A record of information about how peremptory challenges were exercised could be important . . . in assessing whether there was a pattern of race-based peremptory challenges." Filitaula, 339 P.3d at 223.

The public trial right encompasses circumstances in which the public's supervision 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. Wise, 176 Wn.2d at 5-6. 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.

This Court should grant review to determine whether this integral aspect of the jury selection process is subject to the public trial right. Again, this Court granted review of the same issue in Love.

c. Making An After-The-Fact Record Of What Occurred In Private Does Not Cure A Public Trial Violation Because The Bone-Club Factors Must Be Considered Before The Closure Takes Place, Especially Where Significant Information About What Took Place In Private Is Omitted From The Later Disclosure.

The linchpin for determining whether a closure occurs for public trial purposes is whether the proceeding at issue was held in a place or manner that was inaccessible to the public. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Sidebars are by nature private and inaccessible to the public. The public cannot hear what is happening at a sidebar. See 1RP 201 ("Discussion between court and counsel outside the hearing of the jury panel.").

After the jury was selected, the trial court announced which prospective jurors had been excused for cause at sidebar, but the court did not put the basis for excusing any of the jurors for cause on the record in open court. 2RP 3. That result was put on the record but not why it was appropriate for those jurors to be excused for cause. The basis for removing those jurors remained a secret.[5]

Further, while the court subsequently announced which party exercised peremptory challenge on which juror numbers in open court, the court did not specify the names of the jurors, the order in which those

[5] The basis for defense counsel's unsuccessful challenge to one of two prospective jurors was put on the record. 2RP 4.

challenges occurred, nor the manner in which jurors took the place of those who had already been challenged. 2RP 3; compare Filitaula, 339 P.3d at 223 (finding no public trial violation because the peremptory challenge list "contains *the names* and numbers of the prospective jurors who were removed by peremptory challenge, *lists the order in which the challenges were made*, and identifies the party who made them"); Harris, 10 Cal. App. 4th at 683 n.6 (holding peremptory challenges conducted in chambers violated public trial right where the sequence of events through which the eventual constituency of the jury "unfolded" was kept private, i.e., which party exercised which peremptory challenge; *the order in which the peremptory challenges were made*; *and the order in which supplemental prospective jurors were "moved forward" to take the place of the prospective jurors who had been peremptorily challenged*).

Moreover, courts have repeatedly found a violation of the public trial right where the record subsequently showed what happened in private. See, e.g., State v. Paumier, 176 Wn.2d 29, 32-33, 37, 288 P.3d 1126 (2012) (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."); Jones, 175 Wn. App. at 95-96, 103-04 (public trial violation where alternate jurors chosen during recess and names of alternate jurors

subsequently announced in open court); State v. Leyerle, 158 Wn. App. 474, 477-78, 486, 242 P.3d 921 (2010) (public trial violation where prospective juror challenged for cause in chambers and then court announced in open court that juror was excused).

The Bone-Club factors must 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.

In Gabino's case, the court announced which prospective jurors had been excused after the jury was seated. 1RP 102; 2RP 3; CP 135. Contemporaneous public observation of jury selection proceedings fosters public trust in the process and holds both the judge and the attorneys accountable at a time when it matters most — before the jury is seated. Once the jury is seated, the damage is done. It is unrealistic to expect that any post hoc concerns voiced by the public about a for-cause or peremptory challenge will result in any action being taken after the seated jury is sworn. Any improper challenges are effectively insulated from remedial oversight. The deterrent effect of public scrutiny is undermined when all the public is left with is an after-the-fact record of what has already happened.

F. CONCLUSION

For the reasons stated above, Gabino requests that this Court grant review.

DATED this 19th day of February 2015.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. JOSE ALFREDO GABINO, Appellant.	)	No. 70044-8-I DIVISION ONE UNPUBLISHED OPINION FILED: January 20, 2015

TRICKEY, J. — The exercise of challenges for cause and peremptory challenges during jury selection at a sidebar conference does not violate the right to a public trial.

In April 2003, the State charged Jose Gabino with child molestation in the first degree. The victim, a minor at the time, was not Gabino's biological child. The trial resulted in a hung jury. Following a second trial in 2012, a jury convicted Gabino as charged. The trial court imposed a minimum term of 62 months confinement and a lifetime term of community custody.

Gabino appeals his conviction and several community custody conditions in the judgment and sentence. We affirm, but remand to the trial court for proceedings consistent with this opinion.

PUBLIC TRIAL RIGHT

Gabino maintains that the trial court violated his constitutional right to a public trial by allowing for-cause and peremptory challenges to take place during a sidebar conference without first analyzing the requisite factors set forth in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). This contention fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to a public trial. State v.

Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). Certain proceedings must be held in open court unless the trial court first considers on the record the five-factor test set forth in Bone-Club, and finds the factors justify a closure of the courtroom. 128 Wn.2d at 258-59. The threshold determination when addressing an alleged violation of the public trial right is whether the proceeding at issue implicates the right. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). "[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial or constitute a closure if closed to the public." Sublett, 176 Wn.2d at 71.

Here, during jury selection, the jury venire was questioned in an open courtroom and on the record. At the close of questioning, the trial court held a sidebar conference with counsel outside the presence of the jury panel and off the record. The trial court did not conduct a Bone-Club analysis before convening the sidebar conference. Following the sidebar conference, the trial court announced in open court which jurors had been selected to sit on the jury. After the jury left the courtroom, the trial court stated it wished "to put on the record what we did at side bar regarding jury selection."[1] The trial court made a clear indication of the discussion that took place during the sidebar conference, and announced which party challenged which juror and the results of those challenges. The court reporter notes indicated the same. Washington appellate courts have repeatedly rejected Gabino's argument and similar ones. State v. Filitaula, __ Wn. App. __, 339 P.3d 221 (2014); State v. Marks, __ Wn. App. __, 339 P.3d 196 (2014); State v. Webb, 183 Wn. App. 242, 333 P.3d 470 (2014); State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014); State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), petition for

[1] 2 Report of Proceedings (October 10, 2012) (Supp.) at 3.

review granted in part, No. 89619-4 (Wash. Jan. 6, 2015). Following those decisions, we conclude that the trial court did not violate Gabino's public trial right.

COMMUNITY CUSTODY CONDITIONS

Gabino next challenges several of the crime-related conditions of sentence imposed upon him during the lifetime term of community custody.

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, a court has the authority to impose "crime-related prohibitions" and affirmative conditions as part of a felony sentence. RCW 9.94A.505(8). "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). A court may order compliance "with any crime-related prohibitions" as a condition of community custody. RCW 9.94A.703(3)(f). "We review the imposition of community custody conditions for an abuse of discretion, and reverse only if the decision is manifestly unreasonable or based on untenable grounds." State v. Johnson, No. 44194-2-II, 2014 WL 6778299, at *1 (Wash. Ct. App. Dec. 2, 2014).

Condition 13 ordered Gabino to "[a]void all contact with minors, to including your own children, and adhere to the instructions of the Community Corrections Officer [(CCO)] 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."[2] Gabino asserts that the trial court violated his fundamental right to parent because it did not consider whether the condition was reasonably necessary to effectuate a compelling state interest.

[2] Clerk's Papers (CP) at 112.

"More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right." State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The right to the care, custody, and companionship of one's children constitutes such a fundamental constitutional right. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 299 P.3d 686 (2010). Thus, sentencing conditions burdening this right "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 Warren, 165 Wn.2d at 32).

In State v. Letourneau, the defendant was convicted of second degree rape of a child. 100 Wn. App. 424, 427, 997 P.2d 436 (2000). The victim was a minor to whom the defendant was not related. Letourneau, 100 Wn. App. at 428-29. As a condition of her sentence, Letourneau was prohibited from unsupervised contact with her biological children until they reached the age of majority. Letourneau, 100 Wn. App. at 437-38. Because there was no evidence that the defendant might molest her own children, we found that the condition was not reasonably necessary to accomplish the State's compelling interest. Letourneau, 100 Wn. App. at 441-42.

Similarly, in Rainey, the Supreme Court struck a lifetime no-contact order prohibiting the defendant from all contact with his child. 168 Wn.2d 367, 381-82, 299 P.3d 686 (2010). The court based its decision on the fact that the sentencing court did not articulate any reasonable necessity for the lifetime duration of that order. Rainey, 168 Wn.2d at 381-82. Recognizing the "fact-specific nature of the inquiry," the court remanded to the trial court for resentencing so that the court could "address the

parameters of the no-contact order under the 'reasonably necessary' standard." Rainey, 168 Wn.2d at 382.

As in Rainey, the trial court here provided no explanation as to whether the no-contact order was reasonably necessary to realize a compelling state interest. Although the State has a compelling interest in protecting children from harm, the State did not demonstrate how prohibiting all contact between Gabino and his children was reasonably necessary to protect that interest, especially in light of the fact that his children were not victims of Gabino's offenses. See Letourneau, 100 Wn. App. at 441-42. And the State presented no evidence to indicate that Gabino would molest his own children. Moreover, there is no temporal limit on the restriction on contact with minor children because Gabino was sentenced to lifetime community custody. If Gabino were to have children in the future, he would be prohibited from contacting them.

The State responds that the no-contact order was proper because Gabino's children are minors and therefore fall within the same class as that of the victim. In addition to crime-related prohibitions, a court may order an offender to have no contact with victims or a "specified class of individuals." RCW 9.94A.703(3)(b). The specified class must bear some relationship to the crime. State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). The State's cursory argument fails to demonstrate with specificity how Gabino's children fall within the same "specified class" as the victim. We are not persuaded by this argument.

The sentencing condition prohibiting contact with his biological children implicates Gabino's fundamental right to parent his children. Therefore, the State must make some

showing that the condition is reasonably necessary to accomplish the essential needs of the state and the public order. The State failed to do so. We therefore strike the portion of Condition 13 that prohibits Gabino from contacting his own children.

Condition 3 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."[3] Gabino argues that this condition violates his right to be free from bodily intrusions insofar as it requires him to submit to plethysmograph testing at the direction of the Department of Corrections for purposes of monitoring compliance with sentencing conditions. He does not challenge the polygraph aspect of the condition.

RCW 9.94A.703(3)(c) allows a trial court to order an offender to "[p]articipate in crime-related treatment or counseling services." But requiring an offender to submit to plethysmograph testing incident to crime-related treatment is a proper community custody condition, so long as the testing is not used as a routine monitoring tool subject only to the discretion of a CCO. State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782, review denied, 177 Wn.2d 1016, 304 P.3d 114 (2013); see also Johnson, 2014 WL 6778299, at *2 (holding that CCO may order plethsymograph testing, but scope of the CCO's authority is limited to ordering such testing only for purposes of sexual deviancy treatment). Accordingly, we affirm the trial court's imposition of condition 3 with directions to the trial court to clarify that a CCO may order plethsymographs only for the purpose of sexual deviancy treatment.

[3] CP at 111.

Condition 6 prohibited Gabino from "us[ing] or posess[ing] sexually explicit material in any form as described by the treatment provider and/or [CCO], including [I]nternet use and possession."[4] Relying on State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), Gabino contends that this condition is unconstitutionally vague.

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution require that citizens have fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. Community custody conditions that fail to provide ascertainable standards of guilt to protect against arbitrary enforcement are unconstitutionally vague. Bahl, 164 Wn.2d at 752-53; State v. Sansone, 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005). Because sentencing conditions are not laws enacted by the legislature, they are not afforded the same presumption of constitutionality as legislative enactments. State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010); Bahl, 164 Wn.2d at 753. Nevertheless, "'a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'" Sanchez Valencia, 169 Wn.2d at 793 (internal quotation marks omitted) (quoting State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009)). "If persons of ordinary intelligence can understand what the [condition] proscribes, notwithstanding some possible areas of disagreement, the [condition] is sufficiently definite." City of Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990).

In Bahl, our Supreme Court reviewed a similar condition of community custody, which stated the following: "Do not possess or access pornographic materials, as directed

[4] CP at 111.

by the supervising [CCO]. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material." 164 Wn.2d at 743. The court first held that the prohibition on possessing pornographic materials was vague and that the discretion of the CCO only made the vagueness more apparent because it "acknowledges that on its face it does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758. Second, the court held that the terms "sexually explicit" and "erotic" were not unconstitutionally vague when considering the context in which they are used, their dictionary definitions, and the statutory definition. Bahl, 164 Wn.2d at 759. We likewise find that the condition here was sufficiently definite to give notice to Gabino of the proscription against using or possessing explicit materials. Nor does the condition fail to provide ascertainable standards of guilt to protect against arbitrary enforcement.

Nevertheless, the trial court abused its discretion in imposing this condition. Restrictions implicating First Amendment rights must be reasonably necessary to accomplish essential state needs and public order. Bahl, 164 Wn.2d at 757-58. No evidence indicates that use of sexually explicit material was related to Gabino's conviction of first degree child molestation. And the State failed to establish that this prohibition was reasonably related to a compelling state interest and public order. Accordingly, we remand with instructions to strike condition 6.

Conditions 12 and 16 state, respectively: "Do not withhold information or keep secrets from treatment provider or [CCO]," and "[d]o not date or form relationships with people who are less than 20 percent of your age."[5] The State correctly concedes that

[5] CP at 112.

these conditions are vague and not crime-related. We accept the State's concessions and remand to strike conditions 12 and 16.

We affirm Gabino's conviction, but remand for the trial court to (1) strike the portion of condition 13 that prohibits Gabino's contact with his children, (2) clarify that condition 3 authorizes a CCO to order plethsymographs only for the purpose of sexual deviancy treatment, (3) strike condition 6, and (4) strike conditions 12 and 16.[6]

Trickey, J

WE CONCUR:

Schindler, J

Cox, J.

[6] In a statement of additional grounds, Gabino asserts that he received ineffective assistance of counsel and that he was unlawfully sentenced under the current version of the SRA, even though he committed the criminal act in 2003. We discern no error.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. JOSE GABINO, Petitioner.	))))))))	SUPREME COURT NO. _____ COA NO. 70044-8-I

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 19TH DAY OF FEBRUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSE GABINO
NO. 716709
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF FEBRUARY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 19, 2015 - 1:07 PM

Transmittal Letter

Document Uploaded: 700448-Petition for Review.pdf

Case Name: Jose Gabino
Court of Appeals Case Number: 70044-8

Party Respresented:
Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

Appellate_Division@co.whatcom.wa.us