Supreme Court No. 98742-4
(Court of Appeals No. 79418-3-I)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN DUSCHENE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Mr. DuSchene asks this Court to review the opinion of the Court of Appeals in *State v. DuSchene*, No. 79418-3-I (filed July 8, 2020). A copy of that opinion is attached in the appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The SRA states the court to "shall consider" six mandatory factors in determining whether to grant a Special Sex Offender Sentencing Alternative (SSOSA). This Court has clarified the phrase "shall consider" requires explicit weighing on the record. Here, the sentencing court failed to explicitly address two mandatory factors. Should this Court accept review in order to clarify that courts are required to weigh all statutory factors on the record in granting or denying a SSOSA? RAP 13.4(b)(1).

2. Pursuant to the SRA, the sentencing court is required to consider the victims' opinions of the request for a SSOSA. This Court has recognized that due process prohibits a sentencing court from relying on disputed information. When presented with disputed facts, sentencing courts are required to either (1) not consider the facts or (2) hold an evidentiary hearing on the point. Here, the victims' opinions were unclear and disputed by the parties, yet the court concluded the victims did not support the request for a SSOSA. Should this Court accept review

because the court below considered disputed facts in violation of precedent? RAP 13.4(b)(1), (2).

3. This Court has held the advocate-witness rule prohibits an attorney from appearing as both a witness and advocate in the same litigation. Here, the prosecutor offered her own conjecture the victims were not in favor of a SSOSA. The prosecutor's testimony was crucial to the court's decision to deny the SSOSA. Should this Court accept review because the prosecutor improperly testified in violation of this Court's precedent? RAP 13.4(b)(1).

4. A sentencing condition is unconstitutionally vague if it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or if it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Additionally, the government may not restrict an individual's exercise of conduct pursuant to a religious belief absent a compelling interest and a nexus of necessity with the asserted interest. Here, the sentencing court imposed a condition that instructed Mr. DuSchene to "stay out of areas where children's activities regularly occur or are occurring," and provided an illustrative, non-exhaustive list, including church services. This condition violated the vagueness doctrine as well as infringed on Mr. DuSchene's freedom of religion. Should this Court accept review because

this condition raises significant questions of constitutional law? RAP 13.4(b)(3).

5. Conditions that restrict fundamental rights, including freedom of speech, freedom of association, and privacy, must be reasonably necessary to accomplish the needs of the state and public order. Here, the sentencing court imposed a condition that restricted Mr. DuSchene's ability to date women, form relationships with families with minor children, as well as required him to disclose his sex offender status and get permission from his Community Corrections Officer (CCO) prior to any sexual contact in a relationship. Mr. DuSchene's convicted crimes did not involve women he was dating or sexual assaults against adults, and thus these conditions were not necessary to serve any legitimate state interest. Should this Court accept review because this condition raises significant issues of constitutional law? RAP 13.4(b)(3).

6. The freedom of speech includes the right to refrain from speaking, and the Fifth Amendment prohibits the State from compelling incriminating testimony. Here, Mr. DuSchene was ordered to submit to polygraph testing as a condition of community custody, in violation of his First and Fifth Amendment rights. Should this Court accept review because this condition raises a significant question of constitutional law? RAP 13.4(b)(3).

7. A criminal conviction does not eradicate one's constitutional right to privacy. Here, Mr. DuSchene was ordered to submit to plethysmograph testing as a condition of community custody, which is both a physical and mental intrusion in violation his privacy rights as well as a cruel and unusual punishment. Is review warranted to consider the constitutionality of this condition? RAP 13.4(b)(3).

8. Probationers retain Fourth Amendment rights. Accordingly, a community custody officer may not search a probationer's home without a warrant absent reasonable cause. Despite these constitutional protections, Mr. DuSchene was ordered to submit to home visits, including a "visual inspection of all areas of the residence," as a condition of community custody. Should this Court accept review in order to assess the constitutionality of this condition, and overrule the justiciability holding in *State v. Cates*?

D. STATEMENT OF THE CASE

In exchange for Mr. DuSchene's agreement to a stipulated bench trial, the prosecutor reduced the charges against Mr. DuSchene so he would be eligible for a SSOSA. CP 128–147; 12/17/18 RP at 13–14; *see also* CP 130, 132. Following a bench trial, the court found Mr. DuSchene guilty on all counts. CP 44–46.

Prior to sentencing, the victims and their parents participated in interviews and submitted statements to the court. CP 163–64, 204, 206, 208. The parents stated they were supportive of the request for a SSOSA because it avoided the need for their children to testify at trial. *See* CP 163–64. However, the parents and their children also stated they wanted to see Mr. DuSchene receive "the maximum time in jail as you think is the best," "significant jail time," and "the maximum." CP 163–64, 204, 206, 208.

Mr. DuSchene's attorney retired prior to sentencing. 12/17/18 RP at 6. Another attorney from the same law firm represented Mr. DuSchene at the sentencing hearing. *See id.* At the hearing, the new attorney acknowledged he had not been part of the negotiations concerning the stipulated bench trial. *See id.* at 6, 14. The victims were not present, and the prosecutor requested a sentence of 120 months, near the top of the standard range. *See id.* at 5. Mr. DuSchene's new attorney reiterated the request for a SSOSA. *Id.* at 7.

As it weighed whether to grant a SSOSA, the sentencing court asked the prosecutor to clarify the position of the victims and their parents on the SSOSA request, stating:

> I'm a little bit confused from the statements that I received because it seems to indicate that they're not opposed, they're not opposed to a SSOSA if they don't have to testify at trial. Certainly at the

> time he agreed to go with the stipulated bench trial there was no chance that this case was going to proceed to trial, so I'm a little bit confused by that statement . . . . I'm not sure if they didn't understand the process, I'm not sure if I should take the statement to mean that because there's no chance they would have to testify that really they're opposed to it.

RP 12/17/18 at 11–12. The prosecutor responded, "[A]ll of them feel that Mr. Du[S]chene needs treatment. I don't think that that's any sort of question there . . . . I do not believe that they are opposed to a SSOSA which is why we proceeded in the first place. But I think that they definitely want him held accountable." *See id.* at 12–13. The court responded, "The way I see it is they're in favor of it or they're not in favor of it, and I'm a little bit confused by the language here. So you're saying that they're not opposed to it, but I look at it are they in favor of it or not." *See id.* at 13. The prosecutor conjectured, "I don't think that they are in favor of it. I think their main reasoning for having him do the SSOSA was to not have the girls have to testify and re-traumatize them." *See id.*

The sentencing court denied the request for a SSOSA, while tacitly acknowledging Mr. DuSchene appeared to have been misled in his agreement to the stipulated bench trial. *Id.* at 14–15. The court noted it was "supposed to give great weight to the victim's opinion, and the opinion, as I understand it, essentially, is that the children themselves who wrote me the statements and the parents are opposed to this alternative."

Id. at 15–16. The court ultimately imposed the lowest standard range minimum sentence of 98 months, with a maximum term of life. CP 28, 31.

On appeal, the Court of Appeals rejected Mr. DuSchene's arguments the SSOSA was improvidently denied and several of the conditions violated the SRA and his constitutional rights. *See* Appendix.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review is warranted in order to provide guidance to lower courts the SSOSA factors must be explicitly weighed on the record.

In consideration of a SSOSA, the SRA states the sentencing court "shall consider" "whether the alternative is too lenient in light of the extent and circumstances of the offense" as well as "whether the offender has victims in addition to the victim of the offense." RCW 9.94A.670(4). In its oral decision, the sentencing court did not clearly consider either one of these factors. *See* 12/17/18 RP 11–22. The court did consider the other statutory factors. *See id.* at 16 (addressing benefit to Mr. DuSchene and the community); *id.* at 18 (addressing amenability to treatment); *id.* at 16, 18, 22 (addressing risk); *id.* at 15–16 (addressing the victims' opinions).

This Court has held that when a statute mandates a court "shall consider" certain factors, these factors must be explicitly weighed on the record. *Matter of K.J.B.*, 187 Wn.2d 592, 603, 387 P.3d 1072 (2017). An on the record balancing "both facilitates appellate review and ensures that

the judge gives thoughtful consideration" to each factor. *See State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995). Without the benefit of an oral decision clearly considering all of the factors, this Court cannot determine whether the sentencing court followed the directive of the statute. *See State v. Fellers*, 37 Wn. App. 613, 618–19, 683 P.2d 209 (1984). This Court should accept review in order to clarify that all SSOSA factors must be explicitly weighed on the record. RAP 13.4(b)(1).

2. This Court should accept review in order to confirm that the consideration of disputed facts at sentencing violates due process.

The SRA forbids sentencing courts from relying on information not admitted, acknowledged, or proved at trial or at the time of sentencing. RCW 9.94A.530(2). "The purpose of this limitation is to protect against the possibility that a defendant's due process rights will be infringed upon by the sentencing judge's reliance on false information." *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012); *see also State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) ("Constitutional and statutory procedures protect defendants from being sentenced on the basis of untested facts."); *State v. Herzog*, 112 Wn.2d 419, 431, 771 P.2d 739 (1989) (citing *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972) and *Townsend v. Burke*, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948)); U.S. Const. XIV; Const. art. I, § 3.

When presented with disputed material facts, the sentencing court is required to either (1) not consider the disputed facts or (2) grant an evidentiary hearing on the point. RCW 9.94A.530(2). Here, the victims' opinions concerning the request for a SSOSA was unclear and disputed, and the court improperly relied on the prosecutor's representations of the victims' wishes in violation of Mr. DuSchene's due process rights. *See Hunley*, 175 Wn.2d at 909.

At sentencing, the court expressed confusion about the opinions of the victims, including the parents, concerning the request for the SSOSA. 12/17/18 RP 11–16. For example, the court acknowledged "I'm not sure if [the victims] didn't understand the process" given the equivocal nature of their statements. 12/17/18 RP at 12. The court expressed uncertainty at how to interpret the statements, noting "I'm struggling with it." *Id.* at 14. The court also acknowledged the equivocal nature of the statements was potentially misleading to Mr. DuSchene's agreement to a stipulated bench trial. *Id.* While the prosecutor asserted the victims were not in favor of the request for a SSOSA, the defense disputed this. *Compare* 12/17/18 at 13 *with id.* at 14 (defense arguing the victims agreed with the request for a SSOSA and this was "the reason for the stipulated facts trial").

Pursuant to the SRA and in accordance with due process as recognized by this Court in *Hunley* and *Grayson*, the sentencing court was

required to either not consider the victims' opinions in its analysis, or grant an evidentiary hearing to determine their opinions by a preponderance of the evidence. *See* RCW 9.94A.530(2); *Hunley*, 175 Wn.2d at 912; *Grayson*, 154 Wn.2d at 338–39. As the Court of Appeals has recognized, "a defendant need not move for an evidentiary hearing, however; it is the trial court's responsibility under RCW 9.94A.530(2) to hold an evidentiary hearing if it wants to consider disputed facts." *State v. Crockett*, 118 Wn. App. 853, 858, 78 P.3d 658 (2003). Because the sentencing court's consideration of disputed facts contravened the precedent of this Court and the Court of Appeals on a significant question of constitutional law, review is warranted. RAP 13.4(b)(1), (2).

3. This Court should accept review in order to clarify the parameters of the advocate-witness rule.

As this Court has recognized, the advocate-witness rule "prohibits an attorney from appearing as both a witness and an advocate in the same litigation." *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) (quoting *United States v. Prantil*, 764 F.2d 548, 552–53 (9th Cir. 1985)). "Adherence to this time-honored rule is more than just an ethical obligation of individual counsel; enforcement of the rule is a matter of institutional concern implicating the basic foundations of our system of justice." *Prantil*, 764 F.2d at 553.

Here, the prosecutor offered her own personal viewpoint on the victims' opinions of the request for a SSOSA. The prosecutor stated both "*I do not believe* that [the victims] are opposed to a SSOSA" as well as "*I don't think* that they are in favor of it." 12/17/18 RP 13 (emphasis added). In doing so, the prosecutor crossed the line from advocate to witness and improperly offered testimony concerning her impressions of the victims' wishes. *Lindsay*, 180 Wn.2d at 437. Further, the prosecutor's testimony was crucial to the court's decision to deny the SSOSA, as the court relied on the testimony in concluding the victims were not in favor of the SSOSA. *See* 12/17/18 RP 13–16. This Court should accept review in order to clarify the parameters of the advocate-witness rule as initially recognized by this Court in *Lindsey*. RAP 13.4(b)(1).

4. This Court should accept review in order to provide guidance to the lower courts in crafting constitutional conditions of community custody.

a. Condition 14 is unconstitutionally vague and infringes on Mr. DuSchene's First Amendment rights.

Condition 14 requires Mr. DuSchene to "[s]tay out of areas where children's activities regularly occur or are occurring." CP 43. The condition also states that these areas include, but are not limited to:

> parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, church services, restaurants, and any

> specific location identified in advance by DOC [Department of Corrections] or CCO [Community Custody Officer].

Id. This condition is both unconstitutionally vague in violation of due process and also infringes on Mr. DuSchene's First Amendment right to the free exercise of religion. U.S. Const. amend. I, XIV.

Due process of law requires that citizens have fair warning of proscribed conduct. *State v. Bahl*, 164 Wn.2d 729, 752, 193 P.3d 687 (2008). A condition is unconstitutionally vague if it (1) "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed," or (2) "does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Id.* at 752–53 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)).

The Court of Appeals recognized in *State v. Irwin* that a restriction on locations "where children are known to congregate" is unconstitutionally vague as it does not give ordinary people sufficient notice to "understand what conduct is proscribed." 191 Wn. App. 644, 655, 364 P.3d 830 (2015), *cited with approval in State v. Wallmuller*, 194 Wn.2d 234, 244, 449 P.3d 619 (2019). Further, the *Irwin* Court held giving a CCO discretion in setting the forbidden locations "would leave the condition vulnerable to arbitrary enforcement" in violation of the

second prong of the vagueness analysis. *See id.* Similarly here, "areas where children's activities regularly occur or are occurring" does not give sufficient notice of what conduct is prohibited, and the condition also explicitly invites arbitrary enforcement by Mr. DuSchene's assigned CCO. CP 43. Accordingly, the condition is unconstitutionally vague.

Additionally, the condition's categorical prohibition on church services is a clear violation of Mr. DuSchene's First Amendment rights. *See* U.S. Const. amend. I ("Congress shall make no law . . . prohibiting the free exercise" of religion). The Court of Appeals held Mr. DuSchene could not raise a First Amendment claim as "he does not argue that he sincerely holds his religious convictions." Op. at 17. However, the Court also recognized Mr. DuSchene "regularly attended church in the past, and that he considers himself a Christian." Op. at 17. Accordingly, he satisfied the threshold for establishing a sincere religious belief. *See Backland v. Board of Com'rs of King Cty. Hosp. Dist. 2*, 106 Wn.2d 632, 639, 724 P.2d 981 (1986) (courts "have nothing to do with determining the reasonableness of the [religious] belief.") (citation omitted).

The government may not restrict an individual's exercise of conduct pursuant to a religious belief absent a compelling interest and a "nexus of necessity" with the asserted state interest. *State v. Meacham*, 93 Wn.2d 735, 798, 612 P.2d 795 (1980); *Burson v. Freeman*, 504 U.S. 191,

199, 112 S. Ct. 1846, 119 L.Ed 2d 5 (1992) (plurality). Further, if the interest can be served "by measures less drastic than restriction of First Amendment rights, the state must utilize such other measures." *Id.* Because a categorical prohibition on church services is not the least restrictive measure, the condition must be considered unconstitutional under the First Amendment.

This Court should accept review because Condition 14 is unconstitutional on both due process and First Amendment grounds, and thus raises significant issues of constitutional law. RAP 13.4(b)(3).

b. Condition 15 is not related to the crime for which Mr. DuSchene was convicted and is unconstitutional.

Condition 15 mandates Mr. DuSchene must not:

> date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections Officer. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider/Community Corrections Officer approves of such.

CP 43.

This condition violates the SRA's requirement that all conditions of custody be "crime-related." *See* RCW 9.94A.505(9). Mr. DuSchene's convicted crimes did not involve women he was dating or sexual assaults against adults. *Cf. United States v. Reeves*, 591 F.3d 77, 82 (2d Cir. 2010) (striking a similar condition when "[n]othing in the record suggests that

[the defendant] has been a threat to a romantic partner.") Concerning the prohibition on relationships with families with minor children, Condition 12 already prohibits Mr. DuSchene from initiating or prolonging contact with minor children "without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer." CP 43. Thus Condition 15 serves only to prohibit Mr. DuSchene from forming social and romantic relationships with adults, wholly unrelated to the facts of his convicted crimes.

Further, by requiring Mr. DuSchene to disclose his sex offender status prior to any sexual contact, the condition compels Mr. DuSchene's speech in violation of his First Amendment rights. *See In re K.H.H.*, 185 Wn.2d 745, 748, 374 P.3d 1141 (2016) (freedom of speech includes "the right to refrain from speaking at all.") (quoting *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977)); U.S. Const. amend. I. Conditions that implicate free speech rights "must be narrowly tailored to serve an important government interest and must be reasonably necessary to achieving that interest." *Id.* at 751 (citing *Bahl*, 164 Wn.2d at 757). Here, there is no governmental interest served by compelling Mr. DuSchene to disclose his sex offender status prior to sexual relations with consenting adults, for the same reasons that this condition is not crime-related.

Lastly, Condition 15's requirement that Mr. DuSchene obtain prior approval from his CCO before dating women, forming relationships with families with children, or engaging in sexual contact in a relationship infringes on his due process right to privacy as well as his First Amendment right to free association. *See Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d (2005) (individuals engaged in private, consensual sexual conduct "are entitled to respect for their private lives" without government intrusion); *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) ("freedom of association" includes the right to enter into and maintain certain human relationships); U.S. Const. amend. I, XIV.

Although an individual's fundamental rights can be restricted pursuant to a condition of sentencing, these limitations must be "imposed sensitively." *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A restriction on private, consensual sexual conduct must further a "legitimate state interest." *See Lawrence*, 539 U.S. at 578. Similarly, a restriction on the freedom of association must be "reasonably necessary to accomplish the essential needs of the state and public order." *Id.* at 37–38 (internal citation and quotation marks omitted). "Our courts have also recognized that it would not be reasonable to order a sex offender to have no contact with a class of individuals who do not share a relationship to the

offender's crime." *State v. Moultrie*, 143 Wn. App. 387, 399, 143 P.3d 776 (2008).

Again, Condition 12 already prohibits Mr. DuSchene from contact with minor children without the supervision of an adult approved by a CCO. *See* CP 43. Condition 15 is thus not necessary to protect the class of individuals related to Mr. DuSchene's convicted crimes. Accordingly, Condition 15 does not further a "legitimate state interest," and is not "reasonably necessary" to serve any "essential needs of the state and public order." *See Lawrence*, 539 U.S. at 578; *Riley*, 121 Wn.2d at 37–38.

This Court should accept review because Condition 15 raises significant questions of constitutional law. *See* RAP 13.4(b)(3).

c. Condition 6 infringes on Mr. DuSchene's First and Fifth Amendment rights.

Condition 6 requires Mr. DuSchene to "[p]articipate in polygraph examinations as directed by the supervising [CCO], to ensure conditions of community custody." CP 42. This condition compels Mr. DuSchene's speech and right to not self-incriminate in violation of his First and Fifth Amendment rights. U.S. Const. amend. I, V, XIV; *see Wooley*, 430 U.S. at 714 (freedom of speech includes the right to refrain from speaking); *United State v. Washington*, 431 U.S. 181, 97 S. Ct. 1814, 52 L. Ed.2d 238 (1977) (self-incriminating testimony may not be compelled). Conditions

that implicate First Amendment rights must be narrowly tailored to serve a compelling state interest. *K.H.H.*, 185 Wn.2d at 748. Here, there are other mechanisms by which Mr. DuSchene's CCO can measure his compliance with community custody conditions, and so the condition offends the First Amendment. The condition also compels Mr. DuSchene to give self-incriminating testimony in violation of the Fifth Amendment. This Court has never considered the constitutionality of mandated polygraph examinations as a condition of community custody. Because the condition raises significant questions of constitutional law, review is warranted. RAP 13.4(b)(3).

d. Condition 7 infringes on Mr. DuSchene's due process right to privacy.

Condition 7 requires Mr. DuSchene to "[s]ubmit to plethysmograph testing, as directed by a certified sexual deviancy treatment provider." CP 42. Plethysmograph testing "involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses." *See United States v. Weber*, 451 F.3d 552, 554 (9th Cir. 2006) (citations omitted). Accordingly, plethysmograph testing "not only encompasses a physical intrusion but a mental one, involving not only a measure of the

subject's genitalia but probing of his innermost thoughts as well." *Id.* at 562–63. Despite his conviction, Mr. DuSchene retains a privacy interest in the integrity of his own person pursuant to article I, section 7 and the Fourth Amendment. Const. art. I, § 7; U.S. Const. amend. IV; *see, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). This condition infringes on Mr. DuSchene's constitutional right to privacy in both his body and mind. It also subjects him to cruel and unusual punishment in violation of the Eighth Amendment. U.S. Const. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 28, 50 L. Ed. 2d 251 (1976) (punishments that are incompatible with "the evolving standards of decency that mark the progress of a maturing society" are unconstitutional). Because this condition raises significant questions of constitutional law, review is warranted. RAP 13.4(b)(3).

e. Condition 10 infringes on Mr. DuSchene's Fourth Amendment rights.

Condition 10 requires Mr. DuSchene to consent to "home visits" by his CCO, including "visual inspection of all areas of the residence." CP 43. Although probationers have a lesser expectation of privacy than the general public, they are still entitled to Fourth Amendment protections. *State v. Winterstein*, 167 Wn.2d 620, 628–29, 220 P.3d 1226 (2009); *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709

(1987); U.S. Const. amend. IV. A CCO may not search a probationer's home without a warrant absent reasonable cause they have violated a "condition or requirement of the sentence." RCW 9.94A.631(1); *Winterstein*, 167 Wn.2d at 628–29. Although this Court declined to address the constitutionality of a similar condition under article I, section 7, finding it was not yet ripe, the decision was split. *State v. Cates*, 183 Wn.2d 531, 354 P.3d 832 (2015). As the dissent recognized, "[t]he State need not conduct an allegedly illegal search for us to determine whether the community custody condition itself violates" the constitution. *Id.* at 836 (Fairhurst, J., dissenting). Review is warranted to revisit *Cates*' justiciability ruling and to determine if this condition complies with constitutional requirements.

F. CONCLUSION

For the reasons stated above, this Court should accept review.

DATED this 8th day of July, 2020.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BENJAMIN MICHAEL DUSCHENE, Appellant.	No. 79418-3-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — After a stipulated bench trial, the trial court found Benjamin DuSchene guilty of three counts of first degree child molestation. The trial court denied DuSchene's request for a Special Sex Offender Sentencing Alternative (SSOSA) and imposed an indeterminate sentence of 98 months. DuSchene appeals, claiming the trial court erred by denying a SSOSA, imposing various conditions of community custody, and imposing an interest accrual provision on his Judgment and Sentence. We affirm, but remand to strike the interest accrual provision.

I. BACKGROUND

The State charged DuSchene with two counts of first degree child molestation and one count of first degree rape of a child. The State amended the information to add three counts of first degree child molestation. DuSchene agreed to a stipulated bench trial on just three child molestation charges and, in exchange, the State agreed to dismiss two counts of child molestation and the

rape charge. The agreement benefitted the minor victims and DuSchene: the victims would not have to testify and risk being re-traumatized and DuSchene, because of the dropped charges, would be eligible to request a SSOSA. If DuSchene received a SSOSA, the court would impose a suspended sentence, a maximum 12-month term, and a term of community custody equal to the length of the suspended sentence, with a treatment period of up to five years. RCW 9.94A.670(5).

After the agreement to proceed to a stipulated bench trial and before trial and sentencing, DuSchene's counsel, David Gehrke, retired.

In the same time period, the minor victims' parents provided impact statements as a part of a presentencing report. Their father stated that he did not want his daughters to have to testify, "so if it means he gets the SSOSA then so be it. If not for that, I would want him to get the maximum time in prison." Their mother stated: "I want him to do time—my daughters were terrified to testify, so we were okay with the SSOSA. But he deserves the maximum and I would like to see him get that." She also stated: "[t]he best closure that we can get is to know that this will never happen to another family. Feel significant jail time is needed in his case."

The minor victims provided impact statements directly to the court. One of the victims stated that she wanted him "to go to jail for a long time so he doesn't hurt any other [families]." Another stated that she would "like him to get the maximum time in jail as you think is the best for what he did . . . to me."

The trial court found DuSchene guilty of three counts of child molestation. The court sentenced him the same day. The State requested a standard-range sentence of 120 months. DuSchene requested a SSOSA. Mike Kelly represented DuSchene.

Before deciding whether to grant the SSOSA, the sentencing court expressed confusion, based on the impact statements, as to whether the minor victims and their parents opposed the SSOSA. Since, after entering into the stipulated bench trial, there was no possibility that the victims would testify, the court expressed uncertainty as to why the parents would thereafter state that they would not oppose the SSOSA so long as the minor victims would not have to testify. The sentencing court wondered whether the victims understood the process and asked the State to clarify their responses. The State responded:

> The parents . . . were mostly concerned with the fact that, A, they—all of them feel that Mr. [DuSchene] needs treatment. I don't think that's any sort of question there. They were mostly concerned of not having to put their children through the trauma of testifying, and thought that if he were to receive a SSOSA they would be okay with that, not having to re-traumatize their children and that he did need treatment. But certainly given what happened to their kids and the victims themselves want him to be held accountable and to do, you know, some time in custody certainly, or as much time in custody as the Court is willing to give him in order to take responsibility for these things given the impact that it's had on the children.
>
> So I would say that as far as the Court is taking into consideration whether the victims are opposed to a SSOSA, I do not believe that they are opposed to a SSOSA, which is why we proceeded in the first place. But I think that they do definitely want him held accountable.

The sentencing court responded that the question was not whether the victims opposed the SSOSA, but whether they were in favor of it. The State responded:

"I don't think that they are in favor of it. I think their main reasoning for having him do the SSOSA was to not have the girls have to testify and re-traumatize them, and I think that is clear from at least [the mother's] statement."

The court asked Kelly whether he had anything to add. Kelly responded:

> No. I guess what I would say, and as Your Honor is aware, I wasn't there, Mr. Gehrke was still practicing at that time, but what I would say is I believe to me it seems clear, that that is the reason for the stipulated facts trial. In other words, the concerns Your Honor just outlined, sort of, was the parties came to that agreement [for a stipulated bench trial] because, in part, these victims said go—let him go ahead with the SSOSA if we don't have this trial, this actual jury trial where we testify.

The court responded: "I don't know that I interpret it that way. That's why I'm struggling with it."

The trial court declined DuSchene's request for a SSOSA and sentenced him within the standard range to 98 months, with his ultimate term to be determined by the Indeterminate Sentencing Review Board. In doing so, the sentencing court stated:

> First of all, it says that the Court's supposed to give great weight to the victim's opinion, and the opinion, as I understand it, essentially, is that the children themselves who wrote me the statements and the parents are opposed to this alternative. If it were entered into solely for purposes of avoiding them having to testify at trial, then they reluctantly were in agreement with it. Based on the way that the case was resolved, there was no chance that the children were going to have to testify once there was a stipulated bench trial. The State did not indicate they were in agreement with the request, but they indicated they would not be opposed to the defense making that request, and ultimately, that was what was bargained for between the parties.

The trial court also imposed various terms of community custody and an interest accrual provision on his Judgment and Sentence. DuSchene appeals.

II. ANALYSIS

A. SSOSA

On multiple grounds, DuSchene argues that the trial court erred in denying his request for a SSOSA. First, he claims that it failed to consider all the sentencing factors required by RCW 9.94A.670(4). Next, he argues that whether the victims favored a SSOSA was a disputed fact, so the court either should have disregarded their impact statements or ordered an evidentiary hearing to determine their opinions. The State argues that the sentencing court considered all the necessary factors, and that there were no disputed facts, so the trial court did not err in denying a SSOSA. We agree with the State.

We review for abuse of discretion a trial court's decision on a request for a SSOSA. State v. Osman, 157 Wn.2d 474, 482, 139 P.3d 334 (2006). "A court abuses its discretion if it categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis." Osman, 157 Wn.2d at 482.

A defendant generally may not appeal a standard range sentence. Osman, 157 Wn.2d at 481; RCW 9.94A.585(1). But they "may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the [Sentencing Reform Act (SRA)] or constitutional requirements." Osman, 157 Wn.2d at 481–82. Here, DuSchene challenges his standard range sentence, but argues that the trial court violated procedural requirements of the SRA by failing to consider factors under RCW 9.94A.670(4) and failing to order an evidentiary hearing as required by RCW 9.94A.530(2).

Consequently, RCW 9.94A.585(1) does not prohibit consideration of these issues.[1]

1. RCW 9.94A.670(4) factors

DuSchene claims the trial court failed to consider two of the six factors that, under RCW 9.94A.670(4), it must consider in determining whether to grant a SSOSA. Specifically, DuSchene argues the trial court did not consider whether the alternative sentence was too lenient or whether he had victims in addition to the victims of the offenses involved. We disagree.

Before deciding whether to grant a defendant's request for a SSOSA, the sentencing court must consider the following factors:

> [W]hether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section.

RCW 9.94A.670(4).

In opposing DuSchene's request for a SSOSA, the State indicated:

> However, only having potentially 12 months in custody and with treatment, I do look at the criterion that states whether it's too lenient

[1] DuSchene also claims, in support of his argument that the sentencing court erroneously denied his SSOSA request, that the State violated the advocate-witness rule by "testifying" as to its impression of the victim's opinions of the SSOSA request. But this claim raises neither procedural issues under the SRA nor constitutional issues. Also, he did not object on these grounds at the trial court, and he provides no legal authority suggesting we must consider it for the first time on appeal. RAP 2.5(a). Thus, we decline to consider it. In any event, if the State was merely interpreting the uncontested contents of the victims' impact statements, the rule does not appear to apply. RPC 3.7(a)(1) ("A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless . . . the testimony relates to an uncontested issue.").

> in light of the circumstances and the facts and the crimes alleged, and in this case, it's not just one victim, there's three victims and multiple times that each of these victims were victimized.

The trial court, after indicating that it would deny a SSOSA on the ground that DuSchene presented too much danger to the community, stated:

> I will indicate to you, just so it's clear, that I have over the objections of victims provided people with SSOSAs that the victims were opposed to, but I don't find this is a proper case for that. It's true, you don't have any prior history, but you engaged in these behaviors with these children. There was three victims, not one. And as one basically changed their behavior patterns, instead of realizing and taking more action to prohibit your behaviors or to get assistance related to it, you just moved on to the next child. And at least from what I reviewed, this family's devastated and has been devastated.

In the context of the State's assertion that a SSOSA would be too lenient because DuSchene had three victims, the sentencing court's recognition of the same fact shows it considered whether a SSOSA would be too lenient. The court's observation that DuSchene moved from victim to victim and the impact on the victims' family also demonstrates its consideration of whether a SOSSA would be too lenient. And by stating that DuSchene had no prior criminal history, the trial court recognized that there were no other victims in addition to the victims of this offense. The sentencing court considered the factors in question, so DuSchene's claim on this ground fails.

2. Disputed facts

DuSchene claims that whether the victims favored a SSOSA was a disputed fact at sentencing. Thus, he argues, the trial court should have either disregarded their impact statements or ordered a hearing to determine their opinions. We disagree.

In determining any sentence, RCW 9.94A.530(2) prohibits a court from relying on information not admitted, acknowledged, or proved at trial or at the time of sentencing. If the defendant disputes any material facts, the sentencing court must either not consider the fact or grant an evidentiary hearing on the point. RCW 9.94A.530(2). "In order to dispute any information presented at the sentencing hearing, the defendant must make a *specific*, timely challenge. The defendant need not move for an evidentiary hearing; however, it is the [sentencing] court's responsibility under RCW 9.94A.530(2) to hold an evidentiary hearing if it wants to consider disputed facts." State v. Crockett, 118 Wn. App. 853, 858, 78 P.3d 658 (2003) (internal citation omitted) (emphasis added).

In deciding on a defendant's request for a SSOSA, a sentencing court must give "great weight" to the victims' opinions of the request.
RCW 9.94A.670(4). Unless the parent or guardian is also the perpetrator of the offense, the parent or guardian of a minor victim is also a victim.
RCW 9.94A.670(1)(c).

At sentencing, the State reasonably interpreted the parent victims' statements to mean that they did not favor a SSOSA as the entry into a stipulated bench trial eliminated the possibility of the minor victims testifying. In response, DuSchene's counsel did not raise any dispute with respect to the contents of any of the victims' statements. Nor did he claim that there was any other source of information regarding the victims' opinions. Instead, he initially said, "I wasn't there" at the time of the agreement for a stipulated bench trial. He

did not specifically challenge the State's interpretation of the parents' statements. He did say, "[T]he parties came to that agreement [for a stipulated trial] because, in part, these victims said go – let him go ahead with the SSOSA if we don't have this trial, this actual jury trial where we testify." If, in saying this, counsel meant that the parents favored a SSOSA, there was no reasonable basis for the interpretation. The minor victims' statements say nothing about a SSOSA. And the parent victims' statements indicated that they favored the stipulated trial, even if it meant DuSchene could request a SSOSA, as it avoided the need for the children to testify—they in no way indicated that they wanted a stipulated trial *because* it meant DuSchene would receive a SSOSA. In any event, because, as required by Crockett, Kelly did not specifically challenge the State's interpretation of the victim impact statements, there was no dispute and the sentencing court did not err.

In light of the foregoing, we conclude that the court did not abuse its discretion in denying the SSOSA.

B. Community Custody Conditions

DuSchene argues that we should remand to strike various community custody conditions from his Judgment and Sentence because they violate his statutory and constitutional rights. The State disagrees, but in any event argues that DuSchene cannot bring these challenges for the first time on appeal, because he invited any such error. We affirm his community custody conditions.

The State correctly notes that where a defendant agrees, without objection, to community custody conditions, they cannot argue for the first time

on appeal that the conditions are not crime related, as they have invited any resulting error. See State v. Casimiro, 8 Wn. App. 2d 245, 248–49, 438 P.3d 137 (2019); RAP 2.5(a)(3); see also State v. Peters, 10 Wn. App. 2d 574, 591, 455 P.3d 141 (2019) (declining to consider an argument that a sentencing condition is not crime related where the defendant raised the issue for the first time on appeal). Here, DuSchene agreed to the community custody conditions without objection. DuSchene argues for the first time on appeal that conditions 10 and 15 are not crime related; we do not consider these claims, because he invited any such error.

The State also argues that we need not consider DuSchene's constitutional challenges to his community custody conditions. But we may consider challenges to sentencing conditions that are final, primarily legal, and do not require further factual development. State v. Cates, 183 Wn.2d 531, 534, 354 P.3d 832 (2015). Courts will regularly consider vagueness challenges to community custody conditions, even for the first time on appeal. Casimiro, 8 Wn. App. 2d at 250.

We review community custody conditions for an abuse of discretion, and reverse conditions "only if they are manifestly unreasonable." Peters, 10 Wn. App. 2d at 583. "A trial court necessarily abuses its discretion if it imposes an unconstitutional community custody condition, and we review constitutional questions de novo." State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019).

1. Condition 6

In his Statement of Additional Grounds (SAG), DuSchene argues that condition 6, which requires him to "[p]articipate in polygraph examinations as directed by the supervising Community Corrections Officer, to ensure conditions of community custody," is unconstitutionally vague and violates his First and Fifth Amendment rights under the United States Constitution. We disagree.

DuSchene argues this condition is unconstitutionally vague, because polygraph testing may be used only to monitor compliance with other community custody conditions, "and not used as a fishing expedition to discover evidence of other crimes past or present." Thus, he argues we should strike the condition or modify it to only allow polygraph testing to ensure compliance with community custody conditions. But the condition already contains such a limitation. Thus, we need not alter it.

DuSchene argues that this condition violates his right to free speech under the First Amendment, and his right not to self-incriminate under the Fifth Amendment. He cites no legal authority to support this argument. Thus, we decline to consider it. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by legal authority need not be considered).

2. Condition 7

In his SAG, DuSchene argues the sentencing court erred by imposing condition 7, which requires him to "[s]ubmit to plethysmograph testing, as directed by a certified sexual deviancy treatment provider," because he is not a

sexually violent predator and because it violates his right to privacy and Eighth Amendment rights under the United States Constitution. We disagree.

Courts need not conclude a defendant is a sexually violent predator to order plethysmograph testing. See State v. Johnson, 184 Wn. App. 777, 780, 340 P.3d 230 (2014) (holding that a court may order plethysmograph testing if it also orders a crime-related treatment regimen for sexual deviancy). DuSchene's challenge on this ground fails.

DuSchene cites no legal authority to support his Eight Amendment argument, so we decline to consider it. See Cowiche, 118 Wn.2d at 809.

3. Condition 10

In his SAG, DuSchene argues the sentencing court imposed condition 10, which requires him to consent to Department of Corrections (DOC) home visits and allow for visual inspections of his residence,[2] in violation of his Fourth Amendment rights under the United States Constitution. He also argues the condition is not crime related. As discussed above, we decline to consider his assertion that the condition is not crime related. We also conclude his constitutional challenge is not yet ripe for review, since it requires further factual development.

[2] Condition 10 states, in full: "You must consent to DOC home visits to monitor your compliance with supervision. Home visits include access for purposes of visual inspection of all areas of the residence in which you live or have exclusive or joint control and/or access."

In Cates, our Supreme Court declined to consider a preenforcement challenge to a substantially similar community custody condition[3] on the grounds that the challenge was not yet ripe. 183 Wn.2d at 536. The court reasoned that it could not consider the constitutionality of the condition without further factual development. As in Cates, DuSchene's challenge to this condition will not become ripe until he is released from confinement and the State attempts to enforce the condition by requesting and conducting a home visit. 183 Wn.2d at 535. DuSchene makes no argument distinguishing Cates. Thus, we decline to consider his challenge.

4. Condition 14

DuSchene argues that condition 14, which prohibits him from entering areas where children's activities regularly occur or are occurring,[4] is unconstitutionally vague in violation of due process and infringes on his First Amendment to free exercise of religion under the United States Constitution. We disagree.

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[3] The community custody condition in Cates stated: "You must consent to [Department of Corrections] home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access, to also include computers which you have access to." 183 Wn.2d at 533.

[4] Condition 14 states, in full:

> Stay out of areas where children's activities regularly occur or are occurring. This includes, but is not limited to: parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, church services, restaurants, and any specific location identified in advance by [the Department of Custody] or [a Community Custody Officer].

a. Vagueness

Specifically, DuSchene argues that the phrase "areas where children's activities regularly occur" is unconstitutionally vague, because it provides no standards for determining the frequency or regularity with which the activities must occur for him to avoid a location. He also argues that the illustrative list includes several areas that are not used solely for children's activities, such as swimming pools, sports fields, arcades, church services, and restaurants. Finally, he argues that the condition's grant of authority to the DOC or a Community Custody Officer (CCO) to determine whether a specific location is prohibited invites arbitrary enforcement in violation of due process.

A community custody condition is unconstitutionally vague, under due process principles of the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, if either a reasonable person would not understand what conduct the condition prohibits or if it lacks ascertainable standards that prevent arbitrary enforcement. Casimiro, 8 Wn. App. 2d at 250 (citing State v. Bahl, 164 Wn.2d 739, 752–53, 193 P.3d 678 (2008)); see also Wallmuller, 194 Wn.2d at 238.

Our Supreme Court recently decided that a similar community custody decision was not unconstitutionally vague in Wallmuller. 194 Wn.2d at 245. The condition in Wallmuller stated: "The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls." 194 Wn.2d at 237. The Court reasoned that "'commonsense' restrictions, including those that use nonexclusive lists to

elucidate general phrases like 'where children congregate,'" provide fair notice of prohibited conduct. Wallmuller, 194 Wn.2d at 242–43.

Addressing DuSchene's first argument, much like the condition in Wallmuller, condition 14 uses a nonexclusive list to illustrate the general phrase "areas where children's activities regularly occur or are occurring." "Areas where children's activities regularly occur" is no less precise than "places where children congregate." The language in condition 14 is specific enough that a person of ordinary intelligence can understand the scope of its prohibition, so it is not unconstitutionally vague.

DuSchene cites no legal authority in support of his additional argument that such illustrative lists may only include areas exclusively used for children's activities. We need not consider arguments not supported by legal authority. See Cowiche, 118 Wn.2d at 809. Furthermore, the condition upheld by our Supreme Court in Wallmuller also included areas not exclusively used for children's activities. 194 Wn.2d at 236. This argument fails.

Finally, DuSchene argues that the condition's grant of discretion to DOC and the CCO to add locations to the illustrative list invites arbitrary enforcement. He analogizes to State v. Irwin, where we remanded to strike a community custody condition that allowed the supervising CCO to define the areas where minor children might congregate and did not provide an illustrative list. 191 Wn. App. 644, 649, 655, 364 P.3d 830 (2015). But unlike in Irwin, here, the DOC or a CCO may only clarify the definition of condition 14 in advance, eliminating the risk that DuSchene will inadvertently violate the condition. The condition's

illustrative list also limits the DOC and CCO's discretion to designate locations to avoid. Thus, the condition does not invite arbitrary enforcement in violation of due process.

b. Free exercise of religion

DuSchene also argues that, because this condition prohibits him from attending church services, it violates his First Amendment right to free exercise of religion. Because DuSchene has not established that the condition has a coercive effect, his claim fails.

The Washington and United States Constitutions protect the free exercise of religion. U.S. CONST. Amend. I; CONST. art. I, § 11. A burden on the exercise of religion, such as a community custody condition prohibiting the defendant from attending church services, must withstand strict scrutiny. State v. Balzer, 91 Wn. App. 44, 53, 954 P.2d 931 (1998). "Under this standard, the complaining party must first prove the government action has a coercive effect on [their] practice of religion." Balzer, 91 Wn. App. at 53. To show coercive effect, the complaining party must first show that they sincerely hold their religious convictions, and that the convictions are central to the practice of their religion. Balzer, 91 Wn. App. at 54. Next, they must show the challenged enactment burdens their free exercise of religion. Balzer, 91 Wn. App. at 54. Once the complaining party establishes a coercive effect, the burden of proof shifts to the government to show the restrictions serve a compelling state interest and are the least restrictive means for achieving that interest. Balzer, 91 Wn. App. at 53–54.

The record shows that DuSchene has regularly attended church in the past, and that he considers himself a Christian. But he does not argue that he sincerely holds his religious convictions, that those convictions are central to the practice of his religion, or that the challenged enactment burdens the free exercise of his religion. Thus, he has not established that the condition has a coercive effect, and his challenge on this ground fails.

5. Condition 15

DuSchene argues condition 15, which concerns dating and sexual contact,[5] violates his constitutional rights. He also argues the condition is not crime related. As addressed above, we decline to consider his claim that the condition is not crime related and disagree that the condition violates his constitutional rights.

As to his constitutional claim, DuSchene argues first that condition 15's requirement that he disclose his sex offender status prior to any sexual contact violates his First Amendment rights by compelling speech. The First Amendment of the United States Constitution protects "both the right to speak freely and the right to refrain from speaking at all." State v. K.H.-H., 185 Wn.2d 745, 748, 374 P.3d 1141 (2016) (citing Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977)). Community custody conditions that restrict free speech

[5] Condition 15 states, in full:

> Do not date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections Officer. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider/Community Corrections Officer approves of such.

rights must be reasonably necessary and sensitively imposed. Bahl, 164 Wn.2d at 757. DuSchene gained access to his minor victims via his wife. A future partner could, like DuSchene's wife, have access to young children, and disclosing his sex offender status protects those children. In light of the compelling need to prevent harm to these children, the sentencing court sensitively imposed a reasonably necessary disclosure requirement. See In re Pers. Restraint of Waggy, 111 Wn. App. 511, 517, 45 P.3d 1103 (2002) ("[P]reventing harm to minor children by a convicted sex offender is a compelling state interest that justifies limitations on the offender's freedoms"). This claim fails.

In a second constitutional claim, DuSchene argues that condition 15's requirement that he obtain prior approval from his CCO before dating women, forming relationships with families with children, or engaging in sexual contact in a relationship infringes on his due process right to privacy as well as his First Amendment right to free association. In Peters, Division III of this court rejected a similar claim, holding that the "delegation of authority to a CCO to approve dating relationships is not manifest constitutional error nor is it illegal or erroneous as a matter of law." 10 Wn. App. 2d at 591. We adhere to Peters and reject DuSchene's claim.

C. Legal Financial Obligations

DuSchene argues the trial court erred in including an interest accrual provision for the legal financial obligations in his Judgment and Sentence. The State concedes error on this issue. Interest cannot accrue on nonrestitution

portions of legal financial obligations. State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

We remand to strike the interest accrual provision from DuSchene's Judgment and Sentence, but affirm his sentence and the community custody conditions.

Chun, J.

WE CONCUR:

Mann, C.J.

Appelwick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79418-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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