

69734-0

69734-0

COA NO. 69734-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOVAL GUTIERREZ,

Appellant.

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

The Honorable Vickie I. Churchill, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE
2013 APR 30 PM 4:22

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining To Assignments Of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
1. THE COURT LACKED AUTHORITY TO IMPOSE PROHIBITIONS ON INTERNET AND COMPUTER USE BECAUSE THEY ARE NOT DIRECTLY RELATED TO THE CRIME.....	6
a. <u>Standard of Review</u>	6
b. <u>The Internet And Computer Restrictions Must Be Removed Because They Are Not Directly Related To The Crime</u>	8
2. THE COURT LACKED AUTHORITY TO IMPOSE CONDITIONS RELATED TO MINORS THAT ARE NOT DIRECTLY RELATED TO THE CRIME AND VIOLATE THE FUNDAMENTAL RIGHT TO PARENT	9
a. <u>Community Custody Prohibitions Related To Minors Are Not Crime-Related</u>	9
b. <u>The Conditions Violate Gutierrez's Fundamental Right To Parent His Child</u>	12
3. THE CONDITIONS PROHIBITING PORNOGRAPHY AND SEXUAL STIMULUS MATERIALS ARE UNCONSTITUTIONALLY VAGUE.....	16
4. THE CONDITION PROHIBITING POSSESSION OF DRUG PARAPHERNALIA IS NOT CRIME-RELATED AND IS UNCONSTITUTIONALLY VAGUE.....	19

a.	<u>There Is No Statutory Authority To Impose The Drug Paraphernalia Prohibition Because It Is Not Crime-Related</u>	19
b.	<u>The Condition Violates Due Process Because It Does Not Provide Fair Notice And Invites Arbitrary Enforcement..</u>	20
5.	THE PROHIBITION ON POSSESSION OR CONTROLLING ANY ITEM USED TO ENTERTAIN, ATTRACT OR LURE CHILDREN IS NOT CRIME-RELATED AND IS UNCONSTITUTIONALLY VAGUE.....	22
6.	IN THE ABSENCE OF A RESTITUTION ORDER, THE COMMUNITY CUSTODY CONDITION REQUIRING PAYMENT OF COUNSELING AND MEDICAL COSTS MUST BE STRICKEN.....	23
7.	THE PLETHYSMOGRAPH CONDITION VIOLATES GUTIERREZ'S RIGHT TO BE FREE FROM BODILY INTRUSIONS.....	25
D.	<u>CONCLUSION</u>	26

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Marriage of Parker</u> , 91 Wn. App. 219, 957 P.2d 256 (1998).....	25
<u>In re Parentage of C.A.M.A.</u> , 154 Wn.2d 52, 109 P.3d 405 (2005).....	13
<u>In re Pers. Restraint of Carle</u> , 93 Wn.2d 31, 604 P.2d 1293 (1980).....	7
<u>In re Pers. Restraint of Rainey</u> , 168 Wn.2d 367, 229 P.3d 686 (2010).....	6, 7, 13-16
<u>In re Pers. Restraint of Sappenfield</u> , 92 Wn. App. 729, 964 P.2d 1204 (1998).....	24
<u>In re Welfare of Sumey</u> , 94 Wn.2d 757, 621 P.2d 108 (1980).....	12
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008)	7, 16-18, 20, 22
<u>State v. Barnett</u> , 139 Wn.2d 462, 987 P.2d 626 (1999).....	7
<u>State v. Dahl</u> , 139 Wn.2d 678, 990 P.2d 396 (1999).....	12, 23
<u>State v. Halstien</u> , 122 Wn.2d 109, 857 P.2d 270 (1993).....	16
<u>State v. Iniguez</u> , 167 Wn.2d 273, 217 P.3d 768 (2009).....	13
<u>State v. Kinneman</u> , 122 Wn. App. 850, 95 P.3d 1277 (2004).....	24

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Kisor,
68 Wn. App. 610, 844 P.2d 1038 (1993)..... 24

State v. Land,
172 Wn. App. 593, 295 P.3d 782 (2013)..... 17, 19, 22, 24-26

State v. Letourneau,
100 Wn. App. 424, 997 P.2d 436 (2000)..... 14

State v. McCormick,
166 Wn.2d 689, 213 P.3d 32 (2009)..... 21

State v. Motter,
139 Wn. App. 797, 162 P.3d 1190 (2007),
overruled on other grounds,
State v. Sanchez Valencia,
169 Wn.2d 782, 239 P.3d 1059 (2010)..... 19

State v. Murray,
118 Wn. App. 518, 77 P.3d 1188 (2003)..... 7

State v. O’Cain,
144 Wn. App. 772, 184 P.3d 1262 (2008)..... 9

State v. Parramore,
53 Wn. App. 527, 768 P.2d 530 (1989)..... 11

State v. Paulson,
131 Wn. App. 579, 128 P.3d 133 (2006)..... 7

State v. Perez,
137 Wn. App. 97, 151 P.3d 249 (2007)..... 13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Riles,
135 Wn.2d 326, 957 P.2d 655 (1998),
abrogated on other grounds,
State v. Sanchez Valencia,
169 Wn.2d 782, 239 P.3d 1059 (2010)..... 11

State v. Sanchez Valencia,
169 Wn.2d 782, 239 P.3d 1059 (2010)..... 7, 13, 20, 21

State v. Sullivan,
143 Wn.2d 162, 19 P.3d 1012 (2001)..... 17

State v. Warren,
165 Wn.2d 17, 195 P.3d 940 (2008)..... 13, 14

Whatcom County v. City of Bellingham,
128 Wn.2d 537, 909 P.2d 1303 (1996)..... 24

FEDERAL CASES

Santosky v. Kramer,
455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)..... 12

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.20.021(1)(a) 9

RCW 9A.44.100(2)(b) 9

RCW 9.94A.030(10)..... 6, 19

RCW 9.94A.030(42) 24

RCW 9.94A.507(5)..... 9

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.670(3)(b)(v)	11
RCW 9.94A.670(5).....	11
RCW 9.94A.670(6)(g)	23
RCW 9.94A.703	12, 23
RCW 9.94A.703(3)(f).....	6, 9, 19, 20, 22
RCW 9.94A.753(1).....	24
RCW 9.94A.753(3).....	24
Senmtencing Reform Act.....	7
U.S. Const. amend. XIV	12, 16, 19, 22, 25
Wash. Const. art. I, § 3	12, 16, 19, 22, 25

A. ASSIGNMENTS OF ERROR

1. The court erred in imposing the following condition of community custody: "Do not access the Internet or subscribe to any internet service provider, by modem, LAN, DSL or any other avenue (to include but not limited to, satellite dishes, PDAs, electronic games, web televisions, internet appliances and cellar [sic]/digital telephones, or I-pads/I-pods). And you shall not be allowed to use another's persons' [sic] internet or use the internet through any venue until approved in advance by DOC. Any electronic device, cell phone or computer to which you have access is subject to search." CP 36.

2. The court erred in imposing the following condition of community custody: "Do not use computer chat rooms/social networking sites." CP 36.

3. The court erred in imposing the following condition of community custody: "Do not use a false identity at any time on a computer." CP 36.

4. The court erred in imposing the following condition of community custody: "You must subject to searches or inspections of any computer equipment to which you have regular access." CP 36.

5. The court erred in imposing the following condition of community custody: "You may not possess or maintain access to a computer, unless specifically authorized by a Community Corrections Officer. You may

not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices or receivers, CD/DVD burners, or any device to store or reproduce digital media or images." CP 36.

6. The court erred in imposing the following condition of community custody: "Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by a Community Corrections Officer." CP 35.

7. The court erred in imposing the following condition of community custody: "Do not seek employment or volunteer positions, which place you in contact with or control over minor children." CP 35.

8. The court erred in imposing the following condition of community custody: "Do not enter areas where minor children are known to congregate, to include but not limited to camp grounds, parks, playgrounds, schools, pools, beaches, unless approved in advanced [sic] by a supervising Community Corrections Officer." CP 35.

9. The court erred in imposing the following condition of community custody: "Do not date women or form relationships with families who have minor children, unless approved in advance by a Community Corrections Officer." CP 36.

10. The court erred in imposing the following condition of community custody: "Do not remain overnight in a residence where minor children live or are spending the night, unless approved in advance by a Community Corrections Officer." CP 36.

11. The court erred in imposing the following condition of community custody: "Do not possess or access pornographic materials, as directed by a Community Corrections Officer." CP 35.

12. The court erred in imposing the following condition of community custody: "Do not possess or control sexual stimulus material for your particular deviancy as defined by a Community Corrections Officer and therapist except as provided for therapeutic purposes." CP 36.

13. The court erred in imposing the following condition of community custody: "Do not possess drug paraphernalia." CP 36.

14. The court erred in imposing the following condition of community custody: "Do not possess or control any item designated or used to entertain, attract or lure children unless approved in advance by a Community Corrections Officer." CP 36.

15. The court erred in imposing the following condition of community custody: "Pay the costs of crime-related counseling and medical treatment required by SR." CP 35.

16. The court erred in imposing the following condition of community custody: "Participate in . . . plethysmograph examinations as directed by a Community Corrections Officer." CP 37.

Issues Pertaining to Assignments of Error

1. Whether the community custody conditions related to the Internet and computers must be stricken because they are not crime-related? (assignments of error 1-5)

2. Whether the community custody conditions related to minors must be stricken because they are not crime-related and violate appellant's constitutional right to parent his child? (assignments of error 6-10)

3. Whether the community custody conditions prohibiting pornography and sexual stimulus material must be stricken because they are unconstitutionally vague in violation of due process? (assignments of error 11-12)

4. Whether the community custody condition prohibiting possession of drug paraphernalia must be stricken because it is not crime-related and is unconstitutionally vague in violation of due process? (assignment of error 13)

5. Whether the community custody condition prohibiting appellant from possessing or using any item designated or used to entertain, attract or lure children must be stricken because it is not crime-related and is

unconstitutionally vague in violation of due process? (assignment of error 14)

6. Whether the community custody condition requiring payment of counseling and medical costs must be stricken as unauthorized in the absence of a restitution order? (assignment of error 15)

7. Whether the community custody condition requiring appellant to participate in plethysmograph examination at the direction of his community corrections officer must be stricken as an unconstitutional bodily intrusion? (assignment of error 16)

B. STATEMENT OF THE CASE

Christoval Gutierrez pled guilty to one count of indecent liberties by forcible compulsion committed against 21-year-old S.R. CP 76, 82. The court granted a special sex offender sentencing alternative (SSOSA) and imposed a number of conditions as part of the suspended sentence. 1RP¹ 17-18; CP 27-28, 35-37.

The court subsequently revoked the SSOSA following a hearing after finding violations of the condition prohibiting Gutierrez from entering areas where minors are known to congregate, a violation on having contact with minors, and a violation of having contact with a

¹ The verbatim report of proceedings is referenced as follows: 1RP - 9/12/11; 2RP 12/6/12.

woman that the community corrections officer had forbidden him from contacting. CP 3-5; 2RP 13, 118-23. The court vacated the SSOSA and ordered execution of the sentence, which consists of an indeterminate term of 75 months minimum to a maximum term of life, with community custody up to the statutory maximum. CP 5, 27. This appeal follows. CP 1-2.

C. ARGUMENT

1. THE COURT LACKED AUTHORITY TO IMPOSE PROHIBITIONS ON INTERNET AND COMPUTER USE BECAUSE THEY ARE NOT DIRECTLY RELATED TO THE CRIME.

The offense did not involve use of the Internet or a computer in any way, shape or form. The community custody conditions prohibiting Gutierrez from accessing or using the Internet or a computer must be removed from the judgment and sentence because they are not crime-related.

a. Standard Of Review

RCW 9.94A.703(3)(f) authorizes the court to impose crime-related prohibitions. A condition is "crime-related" only if it "directly relates to the circumstances of the crime." RCW 9.94A.030(10).

The court's decision to impose a crime-related prohibition is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey,

168 Wn.2d 367, 375, 229 P.3d 686 (2010). "A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard." Rainey, 168 Wn.2d at 375.

Further, a court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing a community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A defendant always has standing to challenge the legality of community custody conditions even though he has not been charged with violating them. State v. Sanchez Valencia, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010). When a sentence has been imposed for which there is no authority in law, appellate courts have the power and the duty to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980).²

² The above principles apply to all of the challenges brought to conditions of community custody in this appeal.

b. The Internet And Computer Restrictions Must Be Removed Because They Are Not Directly Related To The Crime.

As conditions of community custody, the court ordered the following prohibitions related to Internet and computer usage:

- "15. Do not access the Internet or subscribe to any internet service provider, by modem, LAN, DSL or any other avenue (to include but not limited to, satellite dishes, PDAs, electronic games, web televisions, internet appliances and cellar [sic]/digital telephones, or I-pads/I-pods). And you shall not be allowed to use another's persons' [sic] internet or use the internet through any venue until approved in advance by DOC. Any electronic device, cell phone or computer to which you have access is subject to search." CP 36.
- "16. Do not use computer chat rooms/social networking sites." CP 36.
- "17. Do not use a false identity at any time on a computer." CP 36.
- "18. You must subject to searches or inspections of any computer equipment to which you have regular access." CP 36.
- "19. You may not possess or maintain access to a computer, unless specifically authorized by a Community Corrections Officer. You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices or receivers, CD/DVD burners, or any device to store or reproduce digital media or images." CP 36.

These five conditions are invalid in their entirety because they are not directly related to the circumstances of the offense. The Internet and the computer had nothing to do with the crime. There is no evidence of a connection. CP 82.

In State v. O'Cain, a condition prohibiting the defendant from accessing the Internet without prior approval from his community custody officer or treatment provider was not crime-related and therefore needed to be stricken. State v. O'Cain, 144 Wn. App. 772, 773, 184 P.3d 1262 (2008). As in O'Cain, there is no evidence in the record that the condition in this case is crime-related. O'Cain, 144 Wn. App. at 775. For example, there is no evidence that Gutierrez accessed the Internet before the sexual offenses or that Internet or computer use contributed in any way to the crime. Id. This is not a case where a defendant used the Internet to contact and lure a victim into an illegal sexual encounter. Id.

Gutierrez will be on community custody following release from incarceration for the rest of his life.³ This means the Internet and computer restrictions will remain in place for the rest of his life unless they are removed now. This Court should strike the Internet and computer conditions. O'Cain, 144 Wn. App. at 775.

³ See RCW 9A.44.100(2)(b) (indecent liberties by forcible compulsion is class A felony); RCW 9A.20.021(1)(a) (maximum sentence for Class A felony is life); RCW 9.94A.507(5) ("When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.").

2. THE COURT LACKED AUTHORITY TO IMPOSE CONDITIONS RELATED TO MINORS THAT ARE NOT DIRECTLY RELATED TO THE CRIME AND VIOLATE THE FUNDAMENTAL RIGHT TO PARENT.

The post-confinement community custody conditions restricting contact with minors are not crime-related under RCW 9.94A.703(3)(f). In addition, such conditions violate Gutierrez's fundamental liberty interest in the care and custody of his child. The conditions must be removed from the judgment and sentence.

- a. Community Custody Prohibitions Related To Minors Are Not Crime-Related.

The court imposed the following community custody conditions:

- "4. Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by a Community Corrections Officer." CP 35
- "5. Do not seek employment or volunteer positions, which place you in contact with or control over minor children." CP 35.
- "6. Do not enter areas where minor children are known to congregate, to include but not limited to camp grounds, parks, playgrounds, schools, pools, beaches, unless approved in advanced [sic] by a supervising Community Corrections Officer." CP 35.
- "10. Do not date women or form relationships with families who have minor children, unless approved in advance by a Community Corrections Officer." CP 36.
- "11. Do not remain overnight in a residence where minor children live or are spending the night, unless approved in advance by a Community Corrections Officer." CP 36.

Conditions of community custody imposed as being crime-related must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). Gutierrez was convicted of committing a sex offense against a 21-year-old adult. CP 76, 82. The circumstances of that offense had nothing to do with children. CP 82. The above conditions must therefore be removed from the judgment and sentence because they are not crime-related under RCW 9.94A.703(3)(f). See State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998) (striking condition prohibiting contact with minors because victim was 19 years old), abrogated on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

The court previously had the authority to impose these prohibitions as conditions of the SSOSA suspended sentence under RCW 9.94A.670(5) because the evaluator made similar recommendations as part of the SSOSA treatment plan.⁴ CP 72. But once the SSOSA was revoked and

⁴ RCW 9.94A.670(5) provides "As conditions of the suspended sentence, the court must impose the following: . . . (d) Specific prohibitions and affirmative conditions relating to the known precursor activities or behaviors identified in the proposed treatment plan under subsection (3)(b)(v) of this section or identified in an annual review under subsection (8)(b) of this section." RCW 9.94A.670(3)(b)(v) states "The examiner shall assess and report regarding the offender's amenability to treatment and relative risk to the community. A proposed treatment plan shall be

vacated, the conditions of that suspended sentence ceased to have any legal effect. CP 5. Upon revocation, the sentence reverted to an ordinary, non-SSOSA sentence. See State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999) ("Once a SSOSA is revoked, the original sentence is reinstated."). The community custody conditions imposed as part of that non-SSOSA sentence must meet the requirements of RCW 9.94A.703, including the requirement that prohibitions must be directly related to the offense. The conditions related to minors must therefore be stricken.

b. The Conditions Violate Gutierrez's Fundamental Right To Parent His Child.

Gutierrez is the father of a child born by S.R.⁵ Parents have a fundamental liberty interest in the care and companionship of their children protected by due process. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. The community custody conditions that restrict Gutierrez from having contact with minors (conditions 4, 5, 6, 10, 11)

provided and shall include, at a minimum: . . . (v) Recommended crime-related prohibitions and affirmative conditions, which must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances.").

⁵ Gutierrez and S.R. had been friends for years and were in a relationship. IRP 4-5, 7-8. The child was not the product of the criminal incident. Id.

unconstitutionally infringe on his fundamental parental rights because the restrictions are not reasonably necessary.

There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. "[A] court 'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.'" State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)). Imposition of an unconstitutional community custody condition is therefore manifestly unreasonable. Sanchez Valencia, 169 Wn.2d at 792.

Courts carefully review conditions that interfere with a fundamental constitutional right, such as the fundamental right to the care, custody, and companionship of one's children. Rainey, 168 Wn.2d at 374. State interference with a fundamental right is subject to strict scrutiny. In re Parentage of C.A.M.A., 154 Wn.2d 52, 60-61, 109 P.3d 405 (2005). Strict scrutiny requires the infringement be narrowly tailored to serve a compelling state interest. C.A.M.A., 154 Wn.2d at 61.

Under this standard, a reviewing court must determine whether the State proved the restriction on the right to parent was "sensitively imposed" and "reasonably necessary to accomplish the essential needs of the State." Rainey, 168 Wn.2d at 374 (quoting State v. Warren, 165

Wn.2d 17, 32, 195 P.3d 940 (2008)). To withstand constitutional scrutiny, restrictions on contact with biological children must be reasonably necessary to protect them from harm. Rainey, 168 Wn.2d at 377; State v. Letourneau, 100 Wn. App. 424, 439, 997 P.2d 436 (2000).

It is impossible to determine whether the court intended the conditions at issue here to encompass Gutierrez's own child. In any event, the court did not explain why it was reasonably necessary to impose conditions that restricted Gutierrez's ability to parent his child without state interference.

The State generally has a compelling interest in preventing future harm to the victims of the crime. Rainey, 168 Wn.2d at 377. But Gutierrez committed no crime against his child. The court failed to explain why restrictions on contact were reasonably necessary to protect Gutierrez's child.

Reasonable necessity encompasses not only scope (extent of contact) but also duration. Id. at 381. The length of the no contact order must also be reasonably necessary. Id. As explained in Rainey, "[t]he duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that

restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests." Id.

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

Gutierrez will be on community custody following release from incarceration for the rest of his life, which means the restrictions on being able to have contact with his child will, if left intact, be in place until the child reaches the age of majority. As in Rainey, the court in this case provided no reason for the duration of the restrictions nor did the State attempt to justify the restrictions as reasonably necessary to protect Gutierrez's child. "A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard." Rainey,

168 Wn.2d at 375. That is what happened here. In the event conditions 4, 5, 6, 10, and 11 are not stricken altogether for the reasons set forth in section C. 2. a., supra, they must be modified to remove the restrictions impacting Gutierrez's ability to parent his child.

3. THE CONDITIONS PROHIBITING PORNOGRAPHY AND SEXUAL STIMULUS MATERIALS ARE UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered "Do not possess or access pornographic materials, as directed by a Community Corrections Officer." CP 35. The court also ordered "Do not possess or control sexual stimulus material for your particular deviancy as defined by a Community Corrections Officer and therapist except as provided for therapeutic purposes." CP 36. Both conditions are unconstitutionally vague and must be stricken from the judgment and sentence.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is

prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53; State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

The Supreme Court in Bahl held the following condition unconstitutionally vague because it did not provide ascertainable standards for non-arbitrary enforcement: "[d]o not possess or access pornographic materials, as directed by the supervising [CCO]." Bahl, 164 Wn.2d at 754, 758. The court imposed the same condition imposed on Gutierrez. CP 35. It must be stricken from the judgment and sentence. See also State v. Land, 172 Wn. App. 593, 604, 295 P.3d 782 (2013) (striking this condition as unconstitutionally vague: "Do not possess, access, or view pornographic materials, as defined by the sex offender therapist and/or Community Corrections Officer.").

The sexual stimulus condition is also unconstitutionally vague because it does not provide ascertainable standards of non-arbitrary enforcement. Land, 172 Wn. App. at 604 ("Do not possess sexual stimulus material for your particular deviancy as defined by a Community Corrections Officer and therapist except as provided for therapeutic purposes" is unconstitutionally vague) (citing Bahl, 164 Wn.2d at 744-45).

The same condition was held to be unconstitutionally vague in Bahl. Bahl, 164 Wn.2d at 761. "The condition cannot identify materials

that might be sexually stimulating for a deviancy when no deviancy has been diagnosed, and this record does not show that any deviancy has yet been identified. Accordingly, the condition is utterly lacking in any notice of what behavior would violate it." Id.

Gutierrez was evaluated as part of his SSOSA, but no deviancy was diagnosed or identified in any manner that would provide notice of what behavior would violate this prohibition. CP 56-73. The evaluator provisionally diagnosed Gutierrez with "R/O Depressive Disorder NOS with Suicidal Ideation" and "R/O Attention Deficit Hyperactivity Disorder, Predominately Inattentive Type." CP 70. Neither mental problem can be considered a deviancy.

This community custody condition also suffers the same vagueness problems created by a condition that simply delegates the responsibility of defining the scope of the prohibition to the CCO: "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758.

4. THE CONDITION PROHIBITING POSSESSION OF
DRUG PARAPHERNALIA IS NOT CRIME-RELATED
AND IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered, "Do not possess drug paraphernalia." CP 36. This condition is improper for two reasons. First, it is not crime-related. RCW 9.94A.703(3)(f); RCW 9.94A.030(10). Second, it violates due process because it is not sufficiently definite to apprise Gutierrez of prohibited conduct and does not prevent arbitrary enforcement. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

a. There Is No Statutory Authority To Impose The
Drug Paraphernalia Prohibition Because It Is Not
Crime-Related.

Substantial evidence must support a determination that a condition is crime-related. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). There is no evidence that drug use or possession of drug paraphernalia bore any relation to Gutierrez's offense. Cf. Motter, 139 Wn. App. at 803-04 (prohibition on drug paraphernalia upheld where crime related to offender's substance abuse). In striking down the same condition, this Court in Land recognized it cannot be justified as a monitoring tool. Land, 172 Wn. App. at 605. The drug

paraphernalia condition must be stricken because it is not a crime-related prohibition under RCW 9.94A.703(3)(f).

b. The Condition Violates Due Process Because It Does Not Provide Fair Notice And Invites Arbitrary Enforcement.

In Sanchez Valencia, the Supreme Court struck down the following condition as unconstitutionally vague: "Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices." Sanchez Valencia, 169 Wn.2d at 785, 794-95. The court concluded the provision violated both prongs of the vagueness test: it failed to provide fair notice and failed to prevent arbitrary enforcement. Id. at 794-95.

The condition here is even less specific and must likewise be stricken. Again, under the due process clause, a condition is unconstitutionally vague if (1) it does not define the criminal offense with sufficient definiteness that ordinary persons can understand what conduct is proscribed, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 753. If either one of these requirements is unsatisfied, the condition must fall as unconstitutionally vague. Id.

The second prong of the vagueness test — whether a condition provides ascertainable standards of guilt to protect against arbitrary enforcement — is of particular concern. As reasoned in Sanchez Valencia, "an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,' such as sandwich bags or paper . . . Another probation officer might not arrest for the same 'violation,' i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague." Id. at 794-95. As in Sanchez Valencia, the breadth of potential violations under this condition offends the second prong of the vagueness test.

To make matters worse, the condition is written in terms of strict liability. There is no mens rea attached to the condition prohibiting possession of drug paraphernalia. CP 36; see Sanchez Valencia, 169 Wn.2d at 794 ("The Court of Appeals also erroneously read into the condition an intent element. Intent is not part of the condition as written."). In light of recent Washington case law relieving the State from its burden to prove the "willfulness" of sentencing violations,⁶ it is now even more important for community custody conditions to be specific and clear. A

⁶ See State v. McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009) (State need not prove nonfinancial violations of sentence are willful).

person should not be exposed to punishment for inadvertently violating an unconstitutionally vague condition.

5. THE PROHIBITION ON POSSESSION OR CONTROLLING ANY ITEM USED TO ENTERTAIN, ATTRACT OR LURE CHILDREN IS NOT CRIME-RELATED AND IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered "Do not possess or control any item designated or used to entertain, attract or lure children unless approved in advance by a Community Corrections Officer." CP 36.

Gutierrez did not commit his offense again a child. CP 82. Use of any such item played no role in the offense. CP 82. The condition must be stricken because it is not a crime-related prohibition under RCW 9.94A.703(3)(f).

This condition is also unconstitutionally vague. Land, 172 Wn. App. at 604 (striking same condition on this ground); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. There is no evidence in the record that Gutierrez used particular items to attract or entertain children as part of his offense. Thus, this condition is "utterly lacking in any notice of what behavior would violate it." Land, 172 Wn. App. at 604-05 (quoting Bahl, 164 Wn.2d at 761).

6. IN THE ABSENCE OF A RESTITUTION ORDER, THE COMMUNITY CUSTODY CONDITION REQUIRING PAYMENT OF COUNSELING AND MEDICAL COSTS MUST BE STRICKEN.

As a condition of community custody, the court ordered Gutierrez to "Pay the costs of crime-related counseling and medical treatment required by SR." CP 35. In the absence of a restitution order, there is no statutory authority to impose these costs as part of Gutierrez's non-SSOSA sentence.

The court did have authority to order payment of counseling and medical costs as a condition of the suspended sentence under the SSOSA statute. RCW 9.94A.670(6)(g). Revocation and vacature of the SSOSA means there are no conditions of the suspended sentence in effect, including the condition requiring such payment. CP 5; Dahl, 139 Wn.2d at 683 ("Once a SSOSA is revoked, the original sentence is reinstated.").

No remaining statutory authority allows imposition of such costs as part of the community custody attached to Gutierrez's non-SSOSA sentence that is currently in effect. RCW 9.94A.703 authorized the court to impose many conditions on Gutierrez's' community custody. But it did not authorize the court to require Gutierrez to pay counseling and medical costs for the victim as a condition of community custody.

Such costs can only be imposed as part of a restitution order under RCW 9.94A.753(3). The court never entered an order of restitution. The 180-day statutory time period for requesting restitution has long since passed. RCW 9.94A.753(1). The condition must therefore be stricken. Land, 172 Wn. App. at 604 (striking nearly identical condition for same reason).

Numerous statutory and constitutional safeguards surround the legitimate imposition of restitution. See In re Pers. Restraint of Sappenfield, 92 Wn. App. 729, 742, 964 P.2d 1204 (1998) (due process requires notice and a hearing before the court may imposed the obligation to pay restitution); State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004) (State has the burden of establishing, by preponderance of evidence, causal connection between restitution requested and crime), aff'd, 155 Wn.2d 272, 119 P.3d 350 (2005); State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) (due process requires defendant have opportunity to rebut evidence presented at restitution hearing and evidence must be reasonably reliable); RCW 9.94A.030(42) (restitution must be for specific sum).

The court cannot circumvent those safeguards by ordering counseling costs as a condition of community custody. Allowing the court to impose such costs as a condition of community custody would render the restitution statute superfluous. See Whatcom County v. City of Bellingham,

128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."). The condition related to counseling and medical costs must be stricken. Land, 172 Wn. App. at 604.

7. THE PLETHYSMOGRAPH CONDITION VIOLATES GUTIERREZ'S RIGHT TO BE FREE FROM BODILY INTRUSIONS.

As a condition of community custody, the court ordered Gutierrez to "Participate in urinalysis, breathalyzer, polygraph and plethysmograph examinations as directed by a Community Corrections Officer." CP 37. The plethysmograph aspect of this condition is unconstitutional and must be stricken from the judgment and sentence.

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

Requiring submission to plethysmograph testing at the discretion of a community corrections officer violates Gutierrez's constitutional right to be free from bodily intrusions. Land, 172 Wn. App. at 605.

"Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider." Id. Such testing is not a routine monitoring tool subject only to the discretion of a community corrections officer. Id. The reference to the plethysmograph examination must therefore be stricken. Id. at 605-06.

D. CONCLUSION

For the reasons set forth, Gutierrez requests that this Court strike the challenged conditions of community custody.

DATED this 30th day of April 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 69734-0-1
)	
CHRISTOVAL GUTIERREZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF APRIL, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ISLAND COUNTY PROSECUTING ATTORNEY
P.O. BOX 5000
COUPEVILLE, WA 98239
ICPAO_webmaster@co.island.wa.us

- [X] CHRISTOVAL GUTIERREZ
DOC NO. 351895
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

2013 APR 30 PM 4:22
FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL, 2013.

X Patrick Mayovsky