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Court of Appeals  
Division I  
State of Washington

NO. 73712-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT JACOBS,

Appellant.

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

The Honorable Brian Gains, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

|  | Page |
|--|------|
| A. <u>ASSIGNMENT OF ERROR</u> .....  | 1    |
| <u>Issue Pertaining to Assignment of Error</u> .....   | 1    |
| B. <u>STATEMENT OF THE CASE</u> .....  | 1    |
| C. <u>ARGUMENT</u> .....   | 4    |
| 1. THE ORDERS PROHIBITING OR LIMITING<br>CONTACT WITH JACOBS' CHILDREN ARE NOT<br>AUTHORIZED AND VIOLATE HIS FUNDAMENTAL<br>RIGHT TO PARENT..... | 4    |
| 2. APPEAL COSTS SHOULD NOT BE IMPOSED .....  | 11   |
| D. <u>CONCLUSION</u> .....   | 13   |

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

|  |                |
|--|----------------|
| <u>In re Pers. Restraint of Rainey</u><br>168 Wn.2d 367, 229 P.3d 686 (2010) ..... | 5, 6, 7, 9, 11 |
| <u>Staats v. Brown</u><br>139 Wn.2d 757, 991 P.2d 615 (2000) .....                 | 12             |
| <u>State v. Ancira</u><br>107 Wn. App. 650, 27 P.3d 1246 (2001) .....              | 6, 9           |
| <u>State v. Armendariz</u><br>160 Wn.2d 106, 156 P.3d 201 (2007) .....             | 5              |
| <u>State v. Bahl</u><br>164 Wn.2d 739, 193 P.3d 678 (2008) .....                   | 4              |
| <u>State v. Berg</u><br>147 Wn. App. 923, 198 P.3d 529 (2008), .....               | 10             |
| <u>State v. Blazina</u><br>182 Wn.2d 827, 344 P.3d 680 (2015) .....                | 12             |
| <u>State v. Corbett</u><br>158 Wn. App. 576, 242 P.3d 52 (2010) .....              | 10             |
| <u>State v. Howard</u><br>182 Wn. App. 91, 328 P.3d 969 (2014) .....               | 8, 9           |
| <u>State v. Iniguez</u><br>167 Wn.2d 273, 217 P.3d 768 (2009) .....                | 5              |
| <u>State v. Kinneman</u><br>155 Wn.2d 272, 119 P.3d 350 (2005) .....               | 5              |
| <u>State v. Mutch</u><br>171 Wn.2d 646, 254 P.3d 803 (2011) .....                  | 10             |

**TABLE OF AUTHORITIES (CONT'D)**

|   | Page |
|---|------|
| <u>State v. Sanford</u><br>128 Wn. App. 280, 115 P.3d 368 (2005) .....  | 7, 9 |
| <u>State v. Sinclair</u><br>192 Wn. App. 380, 367 P.3d 612<br><u>review denied</u> , ___ P.3d ___ (June 29, 2016) ..... | 12   |
| <u>State v. Warren</u><br>165 Wn.2d 17, 195 P.3d 940 (2008) .....   | 4, 5 |

**FEDERAL CASES**

|  |   |
|--|---|
| <u>North Carolina v. Alford</u><br>400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) ..... | 1 |
| <u>Santosky v. Kramer</u><br>455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) .....    | 5 |

**RULES, STATUTES AND OTHER AUTHORITIES**

|                     |    |
|---------------------|----|
| RAP 14 .....        | 12 |
| RCW 9.94A.030 ..... | 4  |
| RCW 9.94A.505 ..... | 4  |
| RCW 9.94A.507 ..... | 3  |
| RCW 9.94A.703 ..... | 4  |
| RCW 10.73.160 ..... | 12 |

A. ASSIGNMENT OF ERROR

The sentencing court erred when it entered, as conditions of appellant's sentence and community custody, prohibitions and restrictions on appellant's contact with his non-victim biological children.

Issue Pertaining to Assignment of Error

Must the conditions of sentence and community custody concerning appellant's biological children be stricken because they are not crime related and have not been shown reasonably necessary to protect these children from harm?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Robert Jacobs with four counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree. CP 11-12. The victim for all five charges was seven-year-old E.C., the daughter of Jacobs' girlfriend. CP 4.

Jacobs entered an Alford<sup>1</sup> plea, pleading guilty to two counts of Child Molestation. CP 13-27; 1RP<sup>2</sup> 24-25. Under the terms of

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

<sup>2</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – April 6, 2015; 2RP – June 3, 2015.

the plea agreement, the State indicated that it would recommend – as a condition of Jacobs’ sentence – a lifetime ban on contact with E.C. and a ban on contact with “any minors without the supervision of a responsible adult who had knowledge of this conviction and sentence.” CP 36; 1RP 12-13.

At sentencing, the State included these bans among its recommendations. 2RP 3-4. Jacobs indicated he had four biological children of his own (the youngest a seven year old boy) and lamented the fact they had not been permitted to contact him while the case was pending. 2RP 20-21. He noted that all of his children, and his nieces and nephews, loved him and would attest to the fact he would never hurt them.<sup>3</sup> 2RP 22-23. He asked the court to allow him to return to his children, who were struggling without him. 2RP 23.

The Honorable Brian Gain imposed a standard range sentence of 72 months to life. CP 113; 2RP 29. Judge Gain adopted the State’s recommendation that Jacobs not have contact with E.C. for life and not have any unsupervised contact with other minors as a condition of his sentence. CP 113; 2RP 29. He also imposed, as a condition of community custody, a prohibition stating

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<sup>3</sup> Jacobs’ daughter (CP 147), two nieces (CP 157-158), and a nephew (CP 159) wrote letters in support of Jacobs for consideration at his sentencing.

Jacobs was to “[h]ave no direct and/or indirect contact with minors.”<sup>4</sup> CP 118.

Judge Gain noted that DOC was recommending an extensive review of Jacobs’ sexual history, including a polygraph examination. 2RP 28-29; CP 131. He also noted that, in the absence of that review, he did not have the type of information typically available in these types of cases. 2RP 29.

Addressing contact with Jacobs’ biological children, Judge Gain said, “Now, with regard to the – Mr. Jacobs’ own children, I’m satisfied after there’s sufficient evaluation of his circumstances that the contact with his children may or may not be authorized. But at this point, there is not a sufficient information that this Court can make the determination.” 2RP 30 (emphasis added). After noting that Jacobs would undergo a sexual deviancy evaluation, Judge Gain added, “So at this point, there will be some further evaluation and testing to determine what the risk is of Mr. Jacobs to others and continued need for treatment.” Nonetheless, Judge Gain did

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<sup>4</sup> Upon his release from prison, Jacobs will be on community custody for life. CP 113; 2RP 30; RCW 9.94A.507(5).

not modify the judgment to permit Jacobs to have contact with his biological children.<sup>5</sup>

Jacobs timely appeals. CP 133.

C. ARGUMENT

1. THE ORDERS PROHIBITING OR LIMITING CONTACT WITH JACOBS' CHILDREN ARE NOT AUTHORIZED AND VIOLATE HIS FUNDAMENTAL RIGHT TO PARENT.

As a condition of community custody, a sentencing court may order an offender to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” RCW 9.94A.703(3)(b). Under RCW 9.94A.505(9), the court may also impose “crime-related prohibitions” as a condition of sentence. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Such prohibitions may include “an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). No-contact orders may extend up to the statutory maximum for the

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<sup>5</sup> Although defense counsel did not object following this ruling, erroneous or illegal sentences, including unauthorized community custody conditions, may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-745, 193 P.3d 678 (2008).

crime in question. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007).

Parents have a fundamental liberty interest in the “care, custody, and management” of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). But appellate courts more carefully review conditions that interfere with a fundamental constitutional right. Id. A sentencing court necessarily abuses its discretion by violating an accused’s constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A court also abuses its discretion when its decision is based on incorrect legal analysis or an erroneous view of the law. State v. Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

State interference with the fundamental right to parent is subject to strict scrutiny. Warren, 165 Wn.2d at 34. “[C]onditions that interfere with fundamental rights must be sensitively imposed” with “no reasonable alternative way to achieve the State’s interest.” Id. at 32, 35. Thus, a sentencing court may not impose a no-contact order between a defendant and his biological children as a

matter of routine practice. Rainey, 168 Wn.2d at 377-82. Instead, the court must consider whether the order is reasonably necessary in scope and duration to prevent harm to the children. Id. Less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless there is a compelling State interest barring all contact. Warren, 165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001).

Prior case law guides this Court's decision and requires remand for modification of the orders prohibiting or restricting Jacobs' contact with his biological children.

In Ancira, the defendant was charged with violating an order prohibiting contact with his wife. Ancira, 107 Wn. App. at 652. He drove away with his four-year old child, whom he refused to return until his wife agreed to talk with him. Id. Following conviction for violation of the original no-contact order, the court imposed another order that also prohibited contact with Ancira's children for five years. Id. at 652-53. This Court held that the no-contact order violated Ancira's fundamental right to parent. Id. at 654. The State had a compelling interest in preventing children from witnessing domestic violence. But the State failed to demonstrate how supervised visitation without the mother's presence, or indirect

contact by telephone or mail, would jeopardize this goal. Id. at 654-55.

In State v. Sanford, 128 Wn. App. 280, 282, 289, 115 P.3d 368 (2005), the defendant was convicted of assaulting the mother of his children out of the children's sight and hearing. There were no allegations Sanford committed or threatened violence against the children. This Court held that the sentencing judge erred in restricting Sanford to supervised visitation with his children in the absence of any showing this restriction was reasonably necessary to protect the children. Id.

In Rainey, the defendant was convicted of kidnapping his three-year-old daughter. 168 Wn.2d at 371. In addition to kidnapping, Rainey attempted to use the daughter to harass the mother. Id. at 379-80. For example, he sent letters to his daughter from jail blaming the mother for breaking up the family. Id. The sentencing court imposed a lifetime no-contact order with the child. Id. at 374. On review, the Supreme Court agreed the facts were sufficient to establish that some duration of no-contact order, including a prohibition on indirect and supervised contact, was reasonably necessary to protect the child. Id. at 380.

The Court nevertheless reversed the order because the State failed to show why the lifetime prohibition was reasonably necessary, and the sentencing court provided no justification for it.

Id. at 381-82. The Court explained:

The 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. The restriction's length must also be reasonably necessary.

Id. at 381. The court therefore struck the no-contact order and remanded for resentencing, "so that the sentencing court may address the parameters of the no-contact order under the 'reasonably necessary' standard." Id. at 382.

In State v. Howard, 182 Wn. App. 91, 95, 328 P.3d 969 (2014), the defendant was convicted of attempted murder for attempting to shoot his wife in the presence of their children. At sentencing, the judge imposed a lifetime ban on contact with his biological children, which Howard challenged on appeal. Id. at 96. It was apparent that some protections were warranted to ensure the emotional welfare of the children given that they had witnessed

their father attempt to kill their mother. Id. at 102. But where Howard had not attempted to harm his children, the State did not argue the ban on contact was necessary, and the record did not reveal the need for a total ban, this Court concluded that remand was necessary for the trial court to “sensitively impose a condition that is reasonably necessary” to protect Howard’s children. Id. at 102 (citing Rainey, 168 Wn.2d at 381-382).

Ancira, Sanford, Rainey, and Howard establish the need for sentencing courts to carefully assess prohibitions or restrictions on parent/child contact and require that the record fully support and justify any limitation on contact as reasonably necessary to protect the children.

Jacobs was convicted of offenses against a victim who was not his biological child. The condition of sentence prohibiting any unsupervised contact with minors (CP 113) and the even broader condition of community custody that he “[h]ave no direct and/or indirect contact with minors” (CP 118) – neither of which make any exception for his biological children – are therefore not directly related to the circumstances of these crimes. Nor has there been any showing of their reasonable necessity.

In State v. Letourneau, 100 Wn. App. 424, 442, 997 P.2d 436 (2000), this Court recognized that, “The general observation that many offenders who molest children unrelated to them later molest their own biological children, without more, is an insufficient basis for State interference with fundamental parenting rights.” In subsequent cases, where the record disclosed – and the sentencing judge found – that the defendant posed a similar danger to his own children, courts have been permitted to extend as “reasonably necessary” such prohibitions to biological children. See State v. Corbett, 158 Wn. App. 576, 597-6019, 242 P.3d 52 (2010); State v. Berg, 147 Wn. App. 923, 941-944, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011).

In Jacobs’ case, however, Judge Gain specifically found *insufficient information* to warrant prohibitions or restrictions on contact with Jacobs’ biological children, noting that a sufficient evaluation of his circumstances had not been conducted. 2RP 29-30. In other words, despite the absence of evidence demonstrating the prohibition and restrictions were related to the crimes of conviction or reasonably necessary, Judge Gain imposed them anyway. This was an abuse of discretion.

The State generally has a compelling interest in preventing future harm to the victims of the crime. Rainey, 168 Wn.2d at 377. But Jacobs was not convicted of committing a crime against his biological children and he was not convicted of any crime against male children. The State failed to argue, and Judge Gain failed to explain, why the prohibitions or restrictions on contact were reasonably necessary in scope to protect Jacobs' own children, male or female.

As it currently stands, Jacobs is prevented entirely from contact with his children during the period of community custody. CP 118. And, until then, he is prohibited from all contact with them unless supervised by an adult with knowledge of his convictions. CP 113. Because Judge Gain provided no justification for the scope of these orders, and the State made no attempt to justify them as reasonably necessary to protect Jacobs' biological children, they must be stricken.

## 2. APPEAL COSTS SHOULD NOT BE IMPOSED

In his motion for order of indigency, Jacobs revealed that he owns no real property, owns no personal property beyond his personal effects, has no source of income, has accrued \$8,000.00 in medical debt, and was unable to contribute anything toward the

costs of review. Supp. CP \_\_\_\_ (sub no. 93, Motion For Order Of Indigency). He relied on his mother for the costs of legal representation below. CP 127. Judge Gain found Jacobs to be indigent and entitled to appeal at public expense. Supp. CP \_\_\_\_ (sub no. 94, Order of Indigency).

Moreover, Jacobs is serving a *minimum* six-year sentence. CP 113. His prospects for paying appellate costs are dismal. Therefore, if Jacobs does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (instructing defendants on appeal to make this argument in their opening briefs), review denied, \_\_\_\_ P.3d \_\_\_\_ (June 29, 2016).

RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a

“case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Jacobs’ ability to pay must be determined before discretionary costs are imposed.

The trial court made no finding of ability to pay. In fact, the trial court waived all discretionary LFOs. See CP 111; 2RP 29. Without a basis to determine that Jacobs has a present or future ability to pay anything, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal

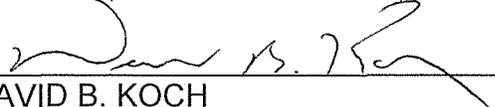
D. CONCLUSION

This Court should strike the current no-contact provisions because they unreasonably prevent or limit Jacobs’ contact with his biological children.

DATED this 29<sup>th</sup> day of July, 2016.

Respectfully submitted,

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