

FILED  
June 15, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 74648-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

PAUL AUSTIN,

Appellant.

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

The Honorable John R. Ruhl, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in revoking appellant's special sex offender sentencing alternative (SSOSA) based on a finding that appellant had indirect contact with the protected party when he viewed her public Facebook page.

2. The condition of appellant's SSOSA prohibiting him from having indirect contact with the protected party is unconstitutionally vague.

3. Appellant was denied his constitutional right to due process because he was not given notice that failure to make satisfactory progress in treatment would be a basis on which the State would seek revocation of his SSOSA.

4. The trial court's finding that appellant failed to make reasonable progress in treatment is not supported by substantial evidence.

5. The trial court erred in revoking appellant's SSOSA and ordering him to serve the remainder of his sentence in confinement.

6. The community custody condition ordering appellant to avoid places where minors are known to congregate is unconstitutionally vague.

7. The community custody condition prohibiting appellant from using or possessing controlled substances "without the written prescription of a licensed physician" exceeds the trial court's statutory authority.

Issues Pertaining to Assignments of Error

1. Does viewing a protected party's public Facebook page, without any actual communication, constitute "indirect contact," justifying revocation of a SSOSA?

2. Is the SSOSA condition prohibiting appellant from having indirect contact with the protected party unconstitutionally vague?

3. Was appellant denied his right to due process when the State provided him written notice that it sought revocation on the basis that he violated the conditions of his SSOSA, but not that he failed to make reasonable progress in treatment?

4. Is the trial court's finding that appellant failed to make reasonable progress in treatment not supported by substantial evidence where appellant made consistent progress over three years in treatment, and his treatment provider did not consider appellant's conduct to be part of his offense pattern and was confident they could address it therapeutically before the end of his SSOSA?

5. The trial court found appellant both violated the conditions of his SSOSA and failed to make reasonable progress in treatment. The court did not specify it would revoke his SSOSA solely on one of those alternative bases. Must the SSOSA revocation order be revoked, then, if this Court determines either basis is invalid?

6. Is the community custody condition ordering appellant to avoid places where minors are known to congregate unconstitutionally vague?

7. Did the trial court exceed its statutory authority in ordering appellant to refrain from using or possessing controlled substances “without the written prescription of a licensed physician,” where Washington law allows many others than just physicians to write lawful prescriptions?

B. STATEMENT OF THE CASE

On April 1, 2011, Paul Austin pled guilty to one count of second degree child molestation and two counts of third degree child rape, for having sexual contact and sexual intercourse with his stepdaughter, N.T. CP 1-24. The trial court sentenced Austin to a standard range sentence of 75 months. CP 29-30.

The trial court suspended all but 12 months of Austin’s sentence under the special sex offender sentencing alternative (SSOSA). CP 29. Conditions of Austin’s SSOSA included (1) 12 months confinement; (2) reasonable progress in and successful completion of sex offender treatment; (3) compliance with treatment conditions; and (4) compliance with community custody conditions. CP 29-35.

The court also ordered Austin to “have no contact, direct or indirect, in person, in writing, by telephone, or through third parties” with N.T., as specified in the sexual assault protection order (SAPO). CP 30. The sexual assault protection order prohibited Austin from “[h]aving any contact with the protected person(s) directly, indirectly or through third parties regardless of whether those third parties know of the order (to include harassing, stalking or threatening).” CP 108-09. The order specified that violation of these terms “is a criminal offense under chapter 26.50 RCW and will subject the violator to arrest.” CP 108. The court also imposed a community custody condition ordering Austin to “[h]ave no direct or indirect contact with the victim.” CP 34.

After serving his 12-month jail term, Austin began weekly treatment with Jo Langford on April 11, 2012. CP 55; RP 92. By 2015, Austin was “reduced to once-per-month therapy sessions due to his success thus far in treatment and his high trust level.” CP 55. Langford reported Austin had done particularly well abstaining from alcohol and pornography, two of his greatest risk factors. CP 59. Austin had no reported or discovered violations of his SSOSA throughout this time. CP 55. As of April 2015, Austin’s risk of reoffense was low based on his Static-99 score, an actuarial tool used to predict risk of recidivism for sex offenders. CP 61.

On November 19, 2015, Austin's community corrections officer (CCO) James Saad filed a violation report, alleging Austin violated a SSOSA condition: "Initiated indirect contact and violated the Sex Assault Protection Order with the victim [N.T.] on or about 10/27/15." CP 63. Saad stated that on October 27, 2015, Austin completed a polygraph and there was a significant reaction to the question, "Have you had any direct contact with [N.T.] since your last polygraph?" CP 64. Upon Saad's questioning the following day, Austin admitted he purposefully accessed N.T.'s Facebook page. CP 64. Saad therefore believed Austin "violated the conditions of the [SAPO] order by stalking [N.T.] on or about 10/27/15." CP 64.

Saad went on to claim "Austin is engaging in offense cycle behavior." CP 64. Saad argued Austin was "being deceitful and manipulative" by minimizing his "contact" with N.T. on Facebook. CP 64. Saad pointed out Austin told Langford he inadvertently saw N.T.'s Facebook page while searching for his ex-wife, but claimed he did not visit N.T.'s page. CP 64. "However we determined this to not be true," because Austin later admitted he purposefully viewed N.T.'s Facebook page. CP 64. Saad further argued the court should consider the impact of Austin's actions on N.T. who was "clearly traumatized and upset" by it. CP 64. However, it was the community victim liaison who informed N.T. that Austin viewed her

Facebook page—not any action actually taken by Austin. CP 64. Saad reported no other violations of the suspended sentence. See CP 62-86.

Claiming Austin was at “a high risk to reoffend,” Saad asked the trial court to revoke Austin’s SSOSA. CP 65. Alternatively, Saad recommended Austin serve 60 days in jail and be barred from social media. CP 65.

The State joined in Saad’s recommendation to revoke Austin’s SSOSA, citing Austin’s “indirect contact with N.T.” CP 117. The State emphasized Austin “violated the conditions of his sentence” by intentionally accessing N.T.’s Facebook page. CP 120. He then lied about it to his treatment provider and CCO. CP 120. Like Saad, the State argued “[t]his behavior is offense cycle behavior and raises concerns about whether the defendant will in fact act out sexually against his victim or some other minor.” CP 120.

Langford, the treatment professional, opposed revocation. CP 87-89, 103-04. He acknowledged Austin was not entirely truthful about viewing N.T.’s Facebook page. CP 88. However, Langford explained:

Though this behavior is inappropriate, disturbing to both [K.T.] and her daughter and a clear and willful violation, this behavior (based on the available risk predication tools) does not raise his risk level for reoffense to High. Though it is a clear lie, both to the polygrapher and myself, and his trust level has been severely impacted, I think this is a lapse in judgment and a treatment issue, though not truly part of Mr. Austin’s “Offense cycle,” which revolves more around substance use and proximity to available, vulnerable others.

“Hands-Off” offenses, such as Cyberstalking and the like, have not been a part of Mr. Austin’s known offense profile.

CP 88; see also CP 103 (same).

Langford commended Austin on his “relatively issue-free treatment career thus far, and his success in sobriety (which is a much more significant risk for him specifically).” CP 89. Austin met regularly with Langford “over the better part of the last three years, and has completed all assigned treatment work in that time.” CP 103. Langford noted Austin showed “honest and open communication,” as well as “consistent, good judgment.” CP 103. Langford further explained Austin “is aware of his risk situations, has a strong support system, and has had no treatment violations of any kind since I have known him.” CP 103.

Finally, Langford emphasized “responsible and positive behavior” characterized “the bulk of [Austin’s] treatment career thus far,” and believed they could reestablish proper boundaries online. CP 104. Accordingly, Langford requested the court not revoke Austin’s SSOSA but instead consider the alternative of GPS monitoring, a ban on social media, and a reversion to bi-monthly treatment sessions. CP 89.

The court held a revocation hearing on January 6, 2016. CCO Saad testified, reiterating Austin “initiated indirect contact” with N.T. RP 22. Saad again claimed Austin’s conduct was “very indicative of offense cycle

behavior.” RP 30-31. Saad admitted, however, he was not a licensed therapist and had no experience as a sex offender treatment provider. RP 36-38. Saad agreed Austin only viewed N.T.’s Facebook page for a short period of time and did not attempt to communicate with her. RP 51. Saad further agreed Austin had otherwise been successful in sex offender and substance abuse treatment. RP 45. N.T.’s mother also testified and said Austin did not actually communicate with N.T. through Facebook. RP 77-78.

Langford testified at the hearing. Langford has been a licensed sexual deviancy treatment provider in Washington since 1999 and has worked with numerous SSOSA clients over the years. RP 88. Langford explained his “primary obligation is for the safety of the community, but my obligations to Mr. Austin and other clients are to help them create a life that is structured and safe and with the goal of being offense free.” RP 90.

Langford testified the term “offense cycle” has “fallen out of favor” in the profession, but it “generally refers to a pattern of behavior by someone in these kinds of situations, inappropriate sexual behavior.” RP 94. Contrary to the State’s claim, Langford explained, Austin’s offense pattern “revolved mostly around depression; around substance abuse, specifically pain killers and -- and the availability of [N.T.] who, obviously, was a vulnerable person at that time.” RP 96. Langford emphasized:

So, that's his red flags and there have not been any big markers for that.

He's had a couple of periods over the few years where he's felt more depressed than other times, but other than that there haven't been any red flags, particularly for him, that would be considered part of an offense cycle for him.

RP 96. In particular, Austin "has not had any lapses with substance abuse" during the entire treatment period. RP 96. Austin had also been successful in avoiding interactions with anyone under age 18. RP 97-98.

Langford testified Austin's viewing of N.T.'s Facebook page was not part of his offense pattern, only a "lapse in judgment," which Langford believed was a therapeutic issue rather than a revocable offense. RP 96, 100. Langford explained "it's something that I believe, based on my relationship with him and his track record so far, that -- that he and I would be able to work through." RP 100. Langford also explained "[i]t's anticipated that clients have lapses and -- and violation issues," and "[i]t's actually very rare to have a client go all the way through a SSOSA . . . program and not have any violations." RP 112. Ultimately, there had not been "any problems" that led Langford to believe Austin was not benefitting from therapy and making progress in treatment. RP 104.

In closing argument, Austin's counsel argued that merely viewing a Facebook page, without more, did not constitute "contact." RP 131-35.

Counsel explained:

So, again, if something is in the public ether and is available; is not the same thing as making an attempt to be in contact with the person who created that particular item. As I -- I indicated, we can take it to its logical conclusions, which is essentially anything that a person creates, once it is viewed by another person, that person is now -- those people are not in contact with one another. And that is just simply not the case and the State knows it's not the case because they elected not to file any criminal charges based upon him viewing a Facebook page.

RP 135. As such, counsel argued, the State failed to establish Austin's conduct was a violation of the SSOSA conditions, which was the only alleged basis for revocation. RP 135-38.

In rebuttal, the State claimed "[t]he idea that this is not a violation" is "not a correct argument" because "DOC considers it direct contact." RP 139. For the first time the State also argued, "this court can consider anything you want in whether to revoke and the fact that he is about to be off supervision and hasn't successfully completed treatment because of what has happened here is something this court's allowed to consider." RP 140.

The court found Austin to have violated the terms of his SSOSA because "there was contact with the victim," even though "there's no testimony that the victim knew about the contact." RP 142-43. The court

mistakenly believed Austin was near the end of his supervision period and found that to be “very problematic.” RP 142. However, the court asked for additional briefing from the parties because it seemed too “extreme” to revoke Austin’s SSOSA. RP 142-43.

The parties reconvened on January 28, 2016. RP 148. Langford again opined that Austin’s conduct could be addressed therapeutically by the time his SSOSA was scheduled to end in August 2017. RP 158-59; CP 107. Austin also agreed to extend his SSOSA beyond that date, if needed. RP 169-70. Langford emphasized viewing N.T.’s Facebook page “doesn’t technically actually raise his risk for re-offense in any way. It’s definitely a boundary issue and a trust issue between he and I that we can work on. But his risk for re-offense has not risen in terms of this.” RP 160.

Despite Langford’s testimony, the court concluded “the SSOSA needs to be revoked,” reasoning “this program isn’t working.” RP 177. The court ruled “the SSOSA treatment has not been effective,” pointing to the fact that Austin initially lied about viewing N.T.’s Facebook page. RP 178.

In its written revocation order, the court found:

[Austin] did willfully violate the terms and conditions of his suspended sentence as set forth in the Judgment and Sentence dated May 20, 2011 to wit:

(1) the defendant failed to make reasonable progress in a sexual deviancy program with Jo Langford by having

indirect contact with the victim and lying to his CCO and sex offender treatment provider.

CP 100. The court accordingly revoked Austin's SSOSA and ordered him to serve the remainder of his 75-month sentence in confinement, with credit for time served. CP 101. Austin timely appealed. CP 95.

C. ARGUMENT

A first-time sex offender may be eligible for a suspended sentence under the SSOSA provisions of RCW 9.94A.670. "SSOSA was created because it was believed that for certain first-time sexual offenders, 'requiring participation in rehabilitation programs is likely to prove effective in preventing future criminality.'" State v. Goss, 56 Wn. App. 541, 544, 784 P.2d 194 (1990) (quoting D. BOERNER, SENTENCING IN WASHINGTON § 2.5(c) (1985)).

A trial court may revoke a SSOSA only if the offender (1) violates the conditions of the suspended sentence or (2) fails to make satisfactory progress in treatment. RCW 9.94A.670(11). Otherwise, revocation constitutes an abuse of discretion. State v. McCormick, 166 Wn.2d 689, 705-06, 213 P.3d 32 (2009). A court necessarily abuses its discretion if it based its ruling on an error of law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Once a SSOSA is revoked, the original sentence is reinstated. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

1. THE REVOCATION ORDER SHOULD BE VACATED BECAUSE AUSTIN DID NOT HAVE INDIRECT CONTACT WITH THE PROTECTED PARTY.

The trial court erred in revoking Austin's SSOSA based on his "indirect contact" with N.T., a purported violation of its conditions. But viewing N.T.'s publicly accessible Facebook page did not constitute indirect contact, within any meaning of the term "contact." Austin therefore did not violate a SSOSA condition. Furthermore, if viewing public information about a protected party could constitute contact, then the prohibition on indirect contact is unconstitutionally vague.

- a. Viewing a publicly accessible Facebook page does not constitute indirect contact.

As a condition of community custody, courts 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). Trial courts may likewise enter sexual assault protection orders prohibiting "any contact with the victim." RCW 7.90.150(1)(a). The sexual assault protection order statute defines "nonphysical contact" as including, but not limited to, "telephone calls, mail, email, fax, and written notes." RCW 7.90.010(6). The Sentencing Reform Act of 1981, chapter 9.94A RCW, does not define "contact," either direct or indirect.

When there is no statutory definition, words should be given their ordinary meaning. State v. Roden, 179 Wn.2d 893, 904, 321 P.3d 1183 (2014). Appellate courts consult the dictionary to determine the ordinary meaning of undefined statutory terms. Id. The noun “contact” means “a condition or an instance of meeting, connecting, or communicating,” and “an instance of establishing communication with someone.” WEBSTER’S THIRD NEW INT’L DICTIONARY 490 (1993). The verb “contact” means “to make connection with : get in communication with : REACH — used often where the means is not precisely specified,” as well as “to talk or confer with.” Id.

“Contact” is not defined in Black’s Law Dictionary, but “communication” is defined as “[t]he expression or exchange of information by speech, writing, gestures, or conduct.” BLACK’S LAW DICTIONARY 296 (8th ed. 2004). Washington courts have adopted this definition. State v. Athan, 160 Wn.2d 354, 369, 158 P.3d 27 (2007). For instance, saliva used to seal an envelope was not “communication” because there was no intent or expectation that the saliva would be “an expression or exchange of information.” Id.

In its ordinary sense, “direct” has several potential meanings. The most appropriate definition in this context is, likely, “transmitted back and forth without an intermediary.” WEBSTER’S, supra, at 640. By contrast, “indirect” means “deviating from a direct line or course : not proceeding

straight from one point to another : proceeding obliquely or circuitously.”  
WEBSTER’S, supra, at 1151.

It does not appear that Washington courts have expressly defined indirect contact. However, in State v. Ancira, this Court struck down a no-contact order because the children could be adequately protected through “indirect contact,” which the court considered to be “telephone, mail, e-mail, etc.” 107 Wn. App. 650, 655, 27 P.3d 1246 (2001). The supreme court subsequently acknowledged the holding of Ancira, noting indirect contact included mail. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 378-79, 229 P.3d 686 (2010).

The indirect contact described in Ancira is consistent with the definition of nonphysical contact in the sexual assault protection order statute: telephone, mail, e-mail, fax, and written notes. RCW 7.90.010(6). It is also consistent with the court’s order prohibiting Austin from having contact with N.T. “in person, in writing, by telephone, or through third parties.” CP 30. This demonstrates that “contact” is not an all-encompassing term. Rather, “general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or ‘comparable to’ the specific terms.” Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 151, 3 P.3d 741 (2000) (quoting John H. Sellen Constr. Co. v. Dep’t of Revenue, 87 Wn.2d 878, 883-84, 558 P.2d

1342 (1976)). Thus, “contact” incorporates only communication forms similar to mail, telephone, e-mail, and in-person contact. Viewing a publicly accessible Facebook page is not similar to those forms of contact, because it does not involve actual communication.

These definitions and case law suggest direct contact means in-person communication, or at least contemporaneous communication, like a telephone conversation. They also demonstrate indirect contact requires some form of *communication*—like a letter, e-mail, voicemail, or relaying communication through a third person. In other words, there must be an exchange of information.<sup>1</sup> This is consistent with one of the purposes of the sexual assault protection order statute—to protect the individual “from future interactions with the offender.” RCW 7.90.005 (emphasis added).

Viewing a publicly accessible Facebook page, without more, does not constitute “contact” within any meaning of the term. There is no communication—the owner of the Facebook page is not notified who views her page and she has absolutely no way of knowing who views it. Austin’s

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<sup>1</sup> Federal circuit courts recognize indirect contact requires some form of communication. See, e.g., United States v. Ingram, 589 F. App’x 398, 399 (9th Cir. 2015) (finding indirect contact where Ingram left messages for the protected party’s employer and posted a comment in response to a presentation the protected party posted online); United States v. Riekenberg, 448 F. App’x 643, 645, 647 (8th Cir. 2011) (finding indirect contact where Riekenberg located a friend of the protected party’s on Facebook and sent him three electronic messages, one of which Riekenberg explained was to apologize to the protected party for posting inappropriate photos of her online).

CCO acknowledged this at the revocation hearing. RP 51. In fact, this is one of the hallmarks of Facebook—neither Facebook itself nor third party websites allow you to track visitors to your Facebook page.<sup>2</sup>

Instead, viewing a Facebook page is akin to viewing a person’s name and address in the phone book, viewing a person’s biography on his employer’s website, or looking at photos you have of the person. There is no communication with that person, because there is no expression or exchange of information. And, depending on an individual’s privacy settings, a Facebook page may reveal very little. While such behavior may need to be addressed therapeutically, it is not “contact” with the protected person.

Austin viewed N.T.’s Facebook page for a short period of time and then left the page. RP 51. He never attempted to communicate with her through Facebook, either by messaging her, writing on her timeline, or sending her a friend request. They did not interact in any way. There was no “contact.” As such, Austin did not violate the conditions of his SSOSA.

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<sup>2</sup> See Garth Sundem & Chris Opfer, How to See Who Views Your Facebook Profile, HOWSTUFFWORKS.COM (July 12, 2011), <http://computer.howstuffworks.com/internet/tips/how-to-see-who-views-your-facebook-profile.htm> (concluding “definitively, finally, and with an exclamation point” that you cannot see who views your profile on Facebook, explaining “[t]he only way to know for sure who’s viewing your Facebook profile is to actually see them do it”); Facebook Help Team, Who Viewed My Profile?, FACEBOOK (last visited May 17, 2016), <https://www.facebook.com/help/community/question/?id=403518403093919> (“Facebook doesn’t let you track who views your timeline or your posts. Third party apps are also unable to do this.”).

Because the trial court revoked Austin's SSOSA based on its erroneous finding of indirect contact, the revocation order must be reversed and the matter remanded for restoration of the SSOSA.

- b. At best, the condition prohibiting Austin from having indirect contact with the protected party is unconstitutionally vague.

Even if this Court determines that viewing a publicly accessible Facebook page, without more, could constitute indirect contact, then that condition is unconstitutionally vague. Forbidding "indirect contact" with N.T. was not sufficiently definite to apprise Austin of prohibited conduct and allowed for arbitrary enforcement by his CCO.

The due process vagueness doctrine requires the State to provide citizens fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is unconstitutionally vague if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a sentencing condition. Bahl, 164 Wn.2d at 753; State v. Sanchez Valencia,

169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Imposition of an unconstitutionally vague condition is manifestly unreasonable, requiring reversal. Sanchez Valencia, 169 Wn.2d at 791-92.

In Bahl, the supreme court held the following condition to be unconstitutionally vague: “Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer.” 164 Wn.2d at 743, 758. The court explained that “[b]ecause of the inherent vagueness of language, citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute.” Id. at 756 (quoting State v. Watson, 160 Wn.2d 1, 8, 154 P.3d 909 (2007)). But this principle did not assist in determining the ordinary meaning of “pornography,” because the relevant statutes did not provide adequate definitions. Id. at 757.

In Sanchez Valencia, the supreme court held the following condition violated both prongs of the vagueness test: the 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.” 169 Wn.2d at 785.

First, the term “paraphernalia,” without specifying *drug* paraphernalia, was so broad that it failed “to provide the petitioners with fair notice of what they can and cannot do.” Id. at 794. Second, the condition

“might potentially encompass a wide range of everyday items,” like sandwich bags or paper, depending on the particular CCO’s whim. Id. “A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.” Id. at 795.

Similarly, in State v. Irwin, the trial court imposed the condition: “Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO.” 191 Wn. App. 644, 649, 364 P.3d 830 (2015). This Court struck the condition as void for vagueness. Id. at 652-55. The court explained, “Without some clarifying language or an illustrative list of prohibited locations . . . the condition does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” Id. at 655 (quoting Bahl, 164 Wn.2d at 753). The court acknowledged “[i]t may be true that, once the CCO sets locations where ‘children are known to congregate’ for Irwin, Irwin will have sufficient notice of what conduct is proscribed.” Id. However, this “would leave the condition vulnerable to arbitrary enforcement,” rendering it unconstitutional under the second prong of the vagueness analysis. Id.

These cases demonstrate that prohibiting “indirect contact” is unconstitutionally vague. Under the first prong of the vagueness test, the condition did not provide sufficient definiteness such that Austin knew what he could and could not do. Some contact is obvious: telephone, e-mail, mail,

and in-person contact, either direct or conveyed through a third person. But other “contact” is not, like viewing the protected person’s website, work biography, name and address in the phonebook, photograph, or Facebook page, as here.

If such activity constitutes contact, would watching a movie the person is in, or reading a book or article she wrote, also constitute indirect contact? This encompasses material protected under the First Amendment, which “can cause a chilling effect on the exercise of sensitive First Amendment freedoms.” Bahl, 164 Wn.2d at 753. “Vagueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statutes because their consequences are more severe.” United States v. Williams, 444 F.3d 1286, 1306 (11th Cir. 2006), rev’d on other grounds, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

Furthermore, neither the statutes nor definitions of contact provide enough guidance as to what conduct was prohibited. In fact, as discussed above, statutes, case law, and dictionary definitions suggest contact requires communication with the protected person. Austin did not have adequate notice as to the meaning of indirect contact, if indirect contact actually encompasses viewing publicly available information about the person on the Internet. This prohibition therefore fails the first prong of the vagueness test.

The prohibition also fails the second prong because it allows for arbitrary enforcement by the CCO. Bahl, Sanchez Valencia, and Irwin all involved delegation to the CCO to define the parameters of a vague condition. This did not sufficiently protect against arbitrary enforcement. The same is true here. The State essentially acknowledged this at the revocation hearing, arguing Austin's conduct constituted indirect contact because "DOC considers it indirect contact." RP 139. This case involves actual arbitrary enforcement by Austin's CCO, given that contact in DOC's view required no form of communication—only viewing public information about the protected party.

The SSOSA condition prohibiting Austin from having indirect contact with N.T. is unconstitutionally vague because it failed to provide reasonable notice as to what conduct was prohibited and exposed Austin to arbitrary enforcement. The SSOSA revocation therefore cannot be sustained on the basis that Austin had "indirect contact" with N.T.

2. AUSTIN WAS DENIED DUE PROCESS BECAUSE THE STATE FAILED TO NOTIFY HIM THAT IT SOUGHT TO REVOKE HIS SSOSA ON THE BASIS THAT HE FAILED TO MAKE REASONABLE PROGRESS IN TREATMENT.

The revocation of a suspended sentence is not a criminal proceeding, but rather an extension of the original conviction. McCormick, 166 Wn.2d at 699. Accordingly, the due process rights afforded at a revocation hearing

are not the same as those afforded at the time of trial. Dahl, 139 Wn.2d at 683. Instead, individuals facing SSOSA revocation are entitled to the same due process rights as those afforded during the revocation of probation or parole. Id. These due process rights, articulated by the U.S. Supreme Court and adopted in Dahl, include:

(a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation.

Id. (emphasis added) (citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

More particularly, “[d]ue process requires that the State inform the offender of the specific violations alleged and the facts that the State will rely on to prove those violations.” Id. at 685. “A proceeding begun on one ground and continued on another, without any opportunity to define and contest the new allegations, constitutes a fundamental deprivation of due process.” In re Welfare of H.S., 94 Wn. App. 511, 522, 973 P.2d 474 (1999) (citing Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948); In re Det. of Cross, 99 Wn.2d 373, 384-85, 662 P.2d 828 (1983)).

In Dahl, the trial court revoked Dahl’s SSOSA, noting his poor performance in treatment, which was possibly caused by cognitive and

physical impairments. 139 Wn.2d at 682. On appeal, Dahl argued he received inadequate notice because the only ground alleged as a basis for revocation was his failure to make reasonable progress in treatment. Id. at 683-84. Dahl asserted the revocation petition should have also listed two specific incidents—which the court considered in revoking his SSOSA—as independent violations.<sup>3</sup> Id. at 684.

The supreme court rejected Dahl’s argument because the two incidents were not, by themselves, violations that served as grounds for revocation. Id. Rather, they were examples of Dahl’s failure to make progress in treatment—“taken into account for the purpose of assessing Dahl’s overall treatment progress.” Id. Dahl was ultimately “informed of the State’s contention that he had failed to make reasonable progress in his treatment program.” Id. at 685. He was also given copies of the treatment reports, which detailed the two incidents as cause for serious concern. Id. at 685-86. “Given that the State notified Dahl both of his alleged SSOSA violation and of the facts supporting the State’s claim,” the court held Dahl received constitutionally adequate notice. Id. at 686.

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<sup>3</sup> These two incidents were the “exposure incident” and the “note incident.” Dahl, 139 Wn.2d at 681. The exposure incident involved two young girls who complained that a man fitting Dahl’s description exposed himself to them near the site of Dahl’s work release. Id. The note incident involved a sexually graphic note Dahl sent to a young bank teller. Id.

Cross provides a useful contrast to Dahl. Cross was a gravely disabled person involuntarily committed for less restrictive outpatient treatment, with several specific conditions. Cross, 99 Wn.2d at 375. The State petitioned to revoke her less restrictive treatment, alleging only that she failed to comply with the condition that she take her prescribed medication. Id. At a hearing, the court commissioner found the State failed to prove this allegation, but nevertheless ordered Cross to return to inpatient status because it would be dangerous to allow her to remain free. Id. at 375-76.

The supreme court reversed on two grounds. First, the trial court had no authority to return Cross to inpatient status, absent a new commitment proceeding or a finding that she failed to adhere to her treatment conditions. Id. at 384.

Second, the State did not provide Cross adequate notice of the alternative grounds on which her less restrictive treatment could be revoked. Id. at 384-85. Before a court may revoke a less restrictive treatment order, the State must provide the individual with a petition that ““summarize[s] the facts which support the need for further confinement”” and ““describe[s] in detail the behavior of the detained person which supports the petition.”” Id. at 382 (quoting RCW 71.05.290(2)). The Cross court concluded this required “a statement of all alternative grounds on which revocation or modification is sought.” Id. The court explained the central purpose of

notice is “to apprise the affected individual of, and permit adequate preparation for, an impending hearing.” Id. (quoting Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978)). The petition must therefore “indicate the issues which will be addressed at the hearing.” Id.

Cross was given notice that the State sought revocation of her less restrictive treatment on the basis that she failed to comply with its conditions. Id. at 383. But she was not given notice that her return to inpatient status was sought on any other ground. Id. The court held “[t]his failure to state each of the alternative grounds on which respondents sought to detain Ms. Cross violated the statutory notice requirements described above.” Id. at 383-84. Had she been given adequate notice, she might have presented her defense quite differently. Id. at 384.

Despite resolving the issue on statutory grounds, the Cross court also recognized a potential constitutional violation, explaining: “A number of federal courts have ruled that the due process clause requires that a person whom the state seeks to have civilly committed must be given adequate notice, including notice of the grounds upon which the proposed detention is justified.” Id. at 383 (citing cases).

A SSOSA can be revoked for two reasons: (1) the individual violates the conditions of his suspended sentence, or (2) the court finds the individual

is failing to make satisfactory progress in treatment. RCW 9.94A.670(11). In the written violation report, CCO Saad alleged only that Austin violated the conditions of his SSOSA by initiating indirect contact with N.T. CP 63. Saad did not allege Austin failed to make progress in treatment.<sup>4</sup> In adopting Saad's recommendation, the State likewise advocated for revocation on the basis that Austin violated the conditions of his SSOSA through indirect contact with N.T. CP 118-21.

In revoking Austin's SSOSA, however, the court relied on the unalleged basis that Austin failed to make progress in treatment. CP 100. Austin's counsel pointed out to the court "the sole violation that was alleged in the violation report was initiated indirect contact and violated the sexual assault protection order with the victim". RP 178. The court nevertheless believed "the lying, especially several years into treatment, is one of the primary reasons that shows that the SSOSA treatment has not been effective." RP 178.

Reading Dahl and Cross together demonstrate the State must provide an individual with written notice of all the alternative grounds on which it seeks to revoke a SSOSA. The State was therefore required to give Austin written notice that it sought revocation on the basis that he failed to make

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<sup>4</sup> The State's decision to not allege this alternative is not surprising, because the allegation could not be sustained by sufficient evidence. See infra argument 3.

progress in treatment. But the State notified Austin only that it sought revocation on the basis that he violated the conditions of his SSOSA. This failure to state each of the alternative grounds for revocation violated the due process notice requirements of Dahl.

One reason for the notice requirement was discussed in Cross, 99 Wn.2d at 384. Had Austin been given notice that the State alleged he failed to make progress in treatment, he might very well have prepared his defense differently. See id. He could have elicited different testimony from Langford, focusing more on whether he made progress in treatment. In fact, he could have asked Langford point blank whether he had made reasonable progress in treatment. But, without proper notice, Austin did not have an opportunity to adequately prepare for the revocation hearing and tailor his direct examination of Langford accordingly.

This case is distinguishable from Dahl. The bottom line there was Dahl received notice the State sought revocation on the basis that he failed to make progress in treatment. 139 Wn.2d at 684. Dahl also received notice of the factual basis for that allegation through the treatment reports. Id. at 685. The two specific incidents were used only as examples of his lack of progress in treatment. Id.

By contrast, the State gave notice that it sought revocation of Austin's SSOSA solely on the basis that he violated a specific condition. CP

63. Only at the end of the revocation hearing, in rebuttal, did the State argue Austin also failed to make progress in treatment. RP 140. The State claimed, “this court can consider anything you want in whether to revoke and the fact that he is about to be off supervision and hasn’t successfully completed treatment of what has happened here is something this court’s allowed to consider.” RP 140. This is precisely the forbidden scenario where a proceeding begins on one ground and continues on another, without an opportunity “to define and contest the new allegations.” H.S., 94 Wn. App. at 522.

The State failed to provide Austin adequate notice of all alternative grounds on which it sought revocation of the SSOSA. This Court should accordingly reverse the revocation order.

3. THE TRIAL COURT’S FINDING THAT AUSTIN FAILED TO MAKE REASONABLE PROGRESS IN TREATMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The trial court found Austin “failed to make reasonable progress in a sexual deviancy treatment program” and revoked his SSOSA in part on that basis. CP 100. Not only did Austin not have adequate notice that this could be a basis for revocation, but the finding lacks support in the record.

Though proof of violations need not be established beyond a reasonable doubt, the trial court must be reasonably satisfied that the

individual violated the conditions of his SSOSA. State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). A trial court's findings of fact must be supported by substantial evidence in the record. State v. Halstein, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). "Substantial evidence exists where the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation." Id. at 129.

CCO Saad claimed Austin's conduct of viewing N.T.'s Facebook page constituted "offense cycle behavior." CP 64; see also RP 30-31. At the revocation hearing, however, Saad admitted he was neither a licensed therapist nor a sex offender treatment provider. RP 36-38. The State nevertheless adopted Saad's language and argued Austin engaged in "offense cycle behavior," which the State claimed raised concerns about whether he "will in fact act out sexually against his victim or some other minor." CP 120.

Simply calling Austin's conduct "offense cycle behavior" does not make it so. On the contrary, Langford explained Austin's offense pattern revolved around depression, substance abuse, and "proximity to available, vulnerable others." CP 88; RP 96. Langford testified that viewing N.T.'s Facebook page was not part of Austin's offense pattern. RP 96. Langford explained "[h]ands-[o]ff" offenses, such as Cyberstalking and the like, have not been a part of Mr. Austin's known offense profile." CP 88. Langford

likewise explained Austin did not exhibit obsessive behaviors, so he was not worried about Austin stalking N.T. online. RP 115.

Langford testified Austin made significant progress in treatment addressing his actual offense pattern. Specifically, Austin achieved sobriety and abstained from pornography. CP 59, 89. Though he struggled at times with depression, Austin demonstrated “honest and open communication” about his feelings. CP 103. Through treatment, Austin became “aware of his risk situations,” built “a strong support system,” and “had no treatment violations of any kind.” CP 103. Langford believed viewing N.T.’s Facebook page was simply a lapse in judgment that could be addressed therapeutically before the end of Austin’s SSOSA in August 2017. RP 100, 158-60. Langford also emphasized several times that Austin’s conduct did not demonstrate an increased risk of reoffense. CP 88; RP 160.

Langford expects clients to have lapses and violations. RP 112. In fact, it is rare for a client to make it all the way through a SSOSA without any violations. RP 112. Austin is no different. Even if viewing N.T.’s Facebook page constituted a violation, the record demonstrates Austin made significant progress during his three years and a half in treatment and had only one minor setback that entire time. The only “evidence” that Austin failed to do so was the CCO’s and the State’s unsubstantiated and unsophisticated claim that Austin engaged in offense cycle behavior. These

bald assertions are not sufficient to persuade a fair-minded, rational person of the truth of the (uncharged) allegation.

This Court should reverse the revocation order because the finding that Austin “failed to make reasonable progress in a sexual deviancy treatment program” is not supported by substantial evidence.

4. REMAND IS NECESSARY EVEN IF THIS COURT DETERMINES ONE OF THE ALTERNATIVE BASES FOR REVOKING THE SSOSA IS VALID.

Austin did not violate any SSOSA condition because he did not have indirect contact with N.T. However, the trial court relied on the alleged indirect contact to revoke Austin’s SSOSA. Likewise, Austin did not fail to make progress in treatment, as demonstrated by his treatment provider’s testimony. Nor did he receive notice the State sought revocation on this alternative basis. The trial court nevertheless relied on it to revoke Austin’s SSOSA. For these reasons, this Court should reverse and remand for restoration of the SSOSA.

Even if this Court determines one of the two alternative bases for revocation is valid, remand is still necessary. In reversing a SSOSA revocation, the Washington Supreme Court has held remand was necessary where the revocation was “based, at least in part,” on a legally erroneous finding. Dahl, 139 Wn.2d at 402. Similarly, a sentence modification is invalid and should be reversed to the extent the trial court relies on erroneous

reasons. State v. Abd-Rahmaan, 154 Wn.2d 280, 290-91, 111 P.3d 1157 (2005). In the context of exceptional sentence review, remand is appropriate unless the State can show the sentencing court did not place considerable weight on any invalid factor. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993) (“[R]emand for resentencing is necessary where it is not clear whether the trial court would have imposed an exceptional sentence on the basis of only the one factor upheld.”); State v. Bourgeois, 72 Wn. App. 650, 664, 866 P.2d 43 (1994) (reversing where trial court placed “significant weight” on invalid factors).

When applied here, the principles in these cases support remand. The trial court expressed great trepidation about revoking Austin’s SSOSA: “I am very concerned about the Hobson’s choice that -- that appears to be put in my lap here. It’s -- it’s extreme.” RP 142. Langford opposed revocation of Austin’s SSOSA. Austin had remained offense-free for the entire treatment period. He successfully abstained from drugs and alcohol. He did not have any other violations of the SSOSA or community custody conditions. There was no series of violations like in McCormick, 166 Wn.2d at 706 (noting McCormick’s three prior violations), or State v. Miller, 159 Wn. App. 911, 919-22, 247 P.3d 457 (2011) (noting Miller’s history of multiple violations). Though the State characterized the purported indirect contact as “extremely concerning,” the State did not file any criminal

charges against Austin, very likely because the “contact” of viewing a public Facebook page is not criminal.<sup>5</sup> RP 33, 123.

The loss of a SSOSA is a “significant consequence” and imposes the greatest punishment the court can impose at that juncture. State v. Sims, 171 Wn.2d 436, 443, 256 P.3d 285 (2011). The trial court did not find it would revoke Austin’s SSOSA solely on either alternative basis. Because the State cannot show the trial court would still revoke the SSOSA if only one valid basis remains, this Court should reverse the revocation order and remand for a new hearing.

5. ILLEGAL COMMUNITY CUSTODY CONDITIONS  
MUST BE STRICKEN FROM THE JUDGMENT AND  
SENTENCE.

Austin’s original judgment and sentence includes illegal community custody conditions, which should be stricken. Illegal or erroneous sentences may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 744. And, as discussed above, the revocation of a suspended sentence is simply “an extension of the original criminal conviction.” McCormick, 166 Wn.2d at 699. It is therefore proper to challenge the illegal conditions now.

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<sup>5</sup> Indeed, the sexual assault protection order specified violating its terms, including indirect contact with N.T., “is a criminal offense under chapter 26.50 RCW and will subject the violator to arrest.” Supp. CP\_\_ (Sub. No. 93). But no one alleged viewing N.T.’s Facebook page was a criminal offense, which calls into question whether the State actually believed Austin violated the sexual assault protection order. At the very least, it demonstrates the weakness in the claim that viewing a public Facebook page constitutes “contact.”

- a. The community custody condition requiring Austin to avoid places where minors are known to congregate is void for vagueness.

As a condition of community custody, the court ordered Austin to “[a]void places where minors are known to congregate without the specific permission of the Community Corrections Officer.” CP 34. This Court held in Irwin that “[w]ithout some clarifying language or an illustrative list of prohibited locations,” this condition “does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” 191 Wn. App. at 655 (quoting Bahl, 164 Wn.2d at 753). The Irwin court accordingly struck the condition as void for vagueness and remanded for resentencing. Id. Given Irwin’s clear holding, this Court should do the same.

- b. The trial court exceeded its statutory authority in prohibiting Austin from using or possessing controlled substances without a written prescription from a licensed physician.

Under RCW 9.94A.703(2)(c), the trial court may order an offender to “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions” as a condition of community custody. (Emphasis added.) The trial court ordered Austin to “not use or possess illegal or controlled substances without the written prescription of a licensed physician.” CP 35 (emphasis added).

Prescriptions can be lawfully issued by many more individuals than just physicians, such as registered nurses, physician assistants, advanced registered nurse practitioners, optometrists, and dentists. RCW 69.41.030. In drafting RCW 9.94A.703(2)(c), the legislature was obviously aware it authorized many different medical, dental, and other health practitioners to write valid prescriptions. See Wynn v. Earin, 163 Wn.2d 361, 371, 181 P.3d 806 (2008) (“The legislature is presumed to know the law in the area in which it is legislating.”). The legislature chose to authorize possession of the much broader “lawfully issued prescriptions.” By limiting Austin to possessing prescriptions only from licensed physicians, the trial court overrode this legislative decision. The condition therefore exceeds the trial court’s statutory authority.

6. APPEAL COSTS SHOULD NOT BE IMPOSED.

If Austin does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts “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). This Court has ample discretion to deny the State’s request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State’s request for costs).

Austin's ability to pay must be determined before discretionary legal financial obligations (LFOs) are imposed.<sup>6</sup> The trial court made no such finding. The court did, however, enter an order of indigency, finding Austin "unable by reason of poverty to pay for any of the expenses of appellate review." CP 97. Austin reported having no assets or income. CP 122-25. Austin was 56 years old at the time of revocation. CP 103. He worked as a caregiver to his elderly mother in exchange for housing and other necessities. CP 58. He was not otherwise employed during his SSOSA. CP 48, 53, 58. He is now serving more than five years in prison. These facts demonstrate Austin will have significant difficulty paying thousands of dollars in appellate costs.

There has been no order finding Austin's financial condition has improved or is likely to improve. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court must presume Austin remains indigent and give him the benefits of that indigency.

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<sup>6</sup> See State v. Duncan, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2016 WL 1696698, at \*2 (Wash. Apr. 28, 2016) (recognizing "[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations," and a "constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements," including "[r]epayment may only be ordered if the defendant is or will be able to pay" and "[t]he financial resources of the defendant must be taken into account" (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992)).

RAP 15.2(f). For these reasons, this Court should not assess appellate costs against Austin in the event he does not substantially prevail on appeal.

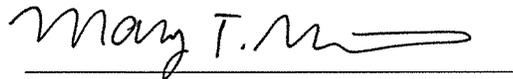
D. CONCLUSION

This Court should reverse the trial court and remand for restoration of Austin's SSOSA.

DATED this 15<sup>th</sup> day of June, 2016.

Respectfully submitted,

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State V. Paul Austin

No. 74648-1-I

Certificate of Service

On June 15, 2016, I e-filed, served and or mailed directed to:

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Containing a copy of the opening brief, re Paul Austin  
Cause No. 74648-1-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the  
foregoing is true and correct.

  
\_\_\_\_\_  
John Sloane  
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Nielsen, Broman & Koch

06-15-2016  
Date  
Done in Seattle, Washington