

NO. 49327-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE STARR,

Appellant.

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

The Honorable Robert Lewis, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The community custody conditions requiring Lawrence Alfonso Starr not to enter or frequent business establishments or areas that cater to children or where children congregate are unconstitutionally vague.

2. The community custody condition prohibiting Starr from viewing or possessing sexually explicit material is unconstitutionally vague and is not crime-related.

Issues Pertaining to Assignments of Error

1. Are the community custody conditions prohibiting Starr from entering or frequenting establishments or areas that cater to children or where children congregate void for vagueness?

2a. Is the community custody condition prohibiting Starr from viewing or possessing sexually explicit material void for vagueness?

2b. Does the community custody condition prohibiting Starr from viewing or possessing sexually explicit material exceed the trial court's sentencing authority because it is not crime-related?

B. STATEMENT OF THE CASE

The State charged Starr with attempted child molestation in the first degree, assault in the fourth degree with sexual motivation, and communication with a minor for immoral purposes with sexual motivation.

CP 1-2. Prior to trial, the State amended the information, dismissing the fourth degree assault charge. CP 35; RP 6-7.

Starr pleaded guilty to communication with a minor for immoral purposes. CP 38-45; RP 7-15. Starr waived his right to jury and the matter proceeded to a trial to the bench on the attempted first degree child molestation charge. CP 34; RP 15.

The attempted first degree child molestation charge arose from H.K.'s allegation that, while she was sleeping in the living room of her brother's home, Starr lay down next to her and began touching her hair. RP 25-26. After asking H.K. how old she was and what school she attended, Starr allegedly asked H.K. if she wanted to "touch his private parts." RP 27-28. H.K. responded, "no," and Starr returned to the spare bedroom or the bathroom." RP 28. H.K. then got up and told her brother what had happened; H.K.'s brother asked Starr to leave his house.<sup>1</sup> RP 28-29.

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<sup>1</sup> In the statement on plea of guilty, Starr stated what happened in his own words:

Between November 21, 2014 and December 1, 2104 and on only one occasion, the victim, HJK was in the living room of her brother[']s residence, where she was sleeping. I was in the spare bedroom. HJK was asleep when she woke up to me brushing her hair with my hand. I asked HJK if she had ever seen a man's private parts. HJK said no and that she was only 10 years old. I then asked HJK if she wanted to see my privates and she said no. I asked HJK if she wanted to touch my private parts and she said no. HJK told me that I needed to leave. HJK then ran into her brother's room; whereupon her brother told me I had to leave. The

The trial court determined Starr had taken a substantial step towards committing the crime of child molestation and therefore found Starr guilty of attempted child molestation in the first degree. CP 66; RP 150-56.

The trial court imposed an indeterminate sentence of 45 months to life. CP 73-74; RP 177. The trial court waived all discretionary legal financial obligations based on Starr's indigency. CP 75-76; RP 178. The trial court determined that the attempted first degree child molestation and communication with a minor for immoral purposes convictions constituted the same criminal conduct under RCW 9.94A.589(1)(a); thus, the trial court declined to impose a separate sentence on the communication with a minor for immoral purposes. RP 179-80.

The trial court imposed the following community custody conditions:

7. You shall not enter into or frequent business establishments or areas that cater to minor children without being accompanied by a responsible adult approved by DOC and sexual deviancy treatment provider. Such establishments may include but are not limited to video game parlors, parks, pools, skating rinks, school grounds, or any areas routinely used by minors as areas of play/recreation, or any other area designated by DOC . . . .<sup>[2]</sup>

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only time that I touched HJK was when she woke up and I was brushing her hair with my hand.

CP 42.

<sup>2</sup> The trial court agreed to strike "malls" from this condition as one of the prohibited establishments. RP 177.

21. You shall not view or possess sexually explicit material as defined in RCW 9.68.130(2) without prior approval of DOC and sexually deviancy treatment provider.

CP 83-84. The trial court imposed a separate community custody condition that read, “May not enter into or frequent establishments or areas where minors congregate without being accompanied by a responsible adult approved by DOC and sex offender treatment provider to include, but not limited to: school grounds, parks, or any other area designated by DOC[.]” CP 86.

This timely appeal follows. CP 93.

C. ARGUMENT

1. THE COMMUNITY CUSTODY CONDITIONS PROHIBITING STARR FROM AREAS THAT “CATER TO MINOR CHILDREN” OR “WHERE MINORS CONGREGATE” ARE UNCONSTITUTIONALLY VAGUE

The trial court imposed two community custody conditions prohibiting Starr from entering businesses or areas where children would be. The first condition prohibited Starr from entering into or frequenting “business establishments or areas that cater to minor children without being accompanied by a responsible adult approved by DOC and sexual deviancy treatment provider.” CP 83. The second condition stated Starr may not “enter into or frequent establishments or areas where minors congregate without being accompanied by a responsible adult approved by DOC and sex offender

treatment provider.” CP 86. These conditions are unconstitutionally vague because they insufficiently apprise Starr of the prohibited conduct and permit arbitrary enforcement. The conditions should be stricken from the judgment and sentence.

- a. The conditions are void for vagueness because they do not provide fair notice and invite arbitrary enforcement

An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Under the due process clauses of the Fourteenth Amendment and article I, section 3, the State must provide citizens fair warning of prohibited conduct. Id. at 752. This due process vagueness 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 prohibition with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. If it fails either prong, the prohibition is unconstitutionally vague. Id. at 753.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782,

792-93, 239 P.3d 1059 (2010). Imposition of unconstitutionally vague conditions is manifestly unreasonable, requiring reversal. Id. at 791-92.

Recently, in State v. Irwin, 191 Wn. App. 644, 649, 364 P.3d 830 (2015), Division One considered a condition like the one at issue here, which read, “Do not frequent areas where minor children are known to congregate, as defined by the supervising” community corrections officer. Division One struck this condition as unconstitutionally vague and remanded for resentencing. Id. at 655.

The Irwin 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. (quoting Bahl, 164 Wn.2d at 753). The court acknowledged that it “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. But this is not sufficient because it would still “leave the condition vulnerable to arbitrary enforcement,” thereby failing the second prong of the vagueness analysis. Id.

In State v. Riles, the Washington Supreme Court upheld the constitutionality of a community custody condition almost identical to the one at issue in Irwin and at issue here. 135 Wn.2d 326, 349, 957 P.2d 655 (1998), abrogated by Sanchez Valencia, 169 Wn.2d 782. However, the Riles court’s

analysis presumed the condition was constitutional, a presumption that the Sanchez Valencia court later expressly repudiated. 169 Wn.2d at 792-93.

Thus, the Irwin court concluded Riles did not control and instead relied primarily on the Washington Supreme Court's more recent decision in Bahl. There, the court held a condition unconstitutionally vague where it prohibited Bahl from possessing or accessing pornographic material "as directed by the supervising Community Corrections Officer." Bahl, 164 Wn.2d at 743. "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." Id. at 758.

As in Bahl and Irwin, the conditions prohibiting Starr from areas that cater to children or where children congregate fails to provide sufficient definiteness. The conditions do not tell Santos where he can and cannot go. Some locations, such as those enumerated in the conditions are more or less obvious—school grounds, video game parlors, skating rinks. But other locations are not so obvious: bowling alleys, places of worship, hiking trails, buses, trains, grocery stores, farmers markets, restaurants, and so on are not sufficiently definite to distinguish between what is prohibited and what is

allowed.<sup>3</sup> Furthermore, many of the prohibited places listed by the trial court as examples, such as pools or parks, may or may not be areas that cater to children and where children typically congregate. Do all pools, such as those in a university intramural center qualify as such areas? Do trails contained on national park land or wilderness areas cater to children? Starr has no way of knowing, even in spite of the trial court's attempt to provide some examples. Because no ordinary person would know what conduct is prohibited, the conditions fail the first prong of the vagueness test.

“In addition, when a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms.” Bahl, 164 Wn.2d at 753 (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). 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.” Id. (quoting United States v. Williams, 444 F.3d 1286, 1306 (11th Cir. 2006),

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<sup>3</sup> The indefiniteness of this type of condition was fully recognized by our supreme court in State v. McCormick, 166 Wn.2d 689, 692-96, 213 P.3d 32 (2009), in which McCormick was held in violation of a similar condition when he went to a food bank that, unbeknownst to him, happened to be in the same building as a public school.

rev'd on other grounds, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)).

The conditions prohibiting Starr from going where children congregate or are likely to be present implicate the First Amendment. Indeed, the conditions might very well subject Starr to exclusion from most if not all houses of worship given children's likely presence there. Because the conditions have the very real effect of precluding Starr's free exercise of religion and assembly, to be valid they must meet a more definite, clearer standard. The vague community custody conditions cannot satisfy the first prong of Bahl's vagueness analysis. This court should strike the conditions and remand for resentencing.

The conditions also fail the vagueness test's second prong. Both Bahl and Sanchez Valencia involved delegation to a community corrections officer to define the parameters of a condition. Sanchez Valencia, 169 Wn.2d at 794; Bahl, 164 Wn.2d at 758. The Sanchez Valencia court determined that where a condition leaves so much discretion to an individual corrections officer, it suffers from unconstitutional vagueness. 169 Wn.2d at 795.

Here, the community custody conditions delegate the parameters of the conditions to DOC or a sexual deviancy treatment provider. See CP 83, 86. As such, there are no ascertainable standards of guilt to protect against arbitrary enforcement; nor is there any mechanism for obtaining such

ascertainable standards from a corrections officer or treatment provider. Cf. Bahl, 164 Wn.2d at 752-53. Because Starr would be required to seek advanced approval before going to any place alone where there is even the barest potential that children congregate, the trial court's imposition of the condition "virtually acknowledges that on its face" the condition "does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758.

The community custody conditions prohibiting Starr from going to areas where children congregate without a chaperone are unconstitutional because they fail to provide reasonable notice as to what conduct is prohibited and expose Starr to arbitrary enforcement. This court should hold that the conditions are void for vagueness and strike them from the judgment and sentence.

b. This preenforcement claim is ripe for review

Appellate courts routinely consider preenforcement challenges to sentencing conditions. Sanchez Valencia, 169 Wn.2d at 787. Such challenges are ripe for review "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." Id. at 786 (quoting Bahl, 164 Wn.2d at 751).

Here, the issue is primarily legal—do the conditions prohibiting Starr from areas that cater to children or where children congregate violate due process vagueness standards? See Sanchez Valencia, 169 Wn.2d at 790-91

(condition prohibiting use of drug-related paraphernalia was ripe for vagueness review); Bahl, 164 Wn.2d at 752 (condition prohibiting perusal of pornography was ripe for vagueness review).

This question is not fact-dependent. A written condition provides constitutional notice and protection against arbitrary enforcement or it does not. Sanchez Valencia, 169 Wn.2d at 788-89 (“[I]n the context of ripeness, the question of whether the condition is unconstitutionally vague does not require further factual development.”).

The challenged conditions are final because Starr has been sentenced to abide by them. Id. at 789 (“The third prong of the ripeness test, whether the challenged action is final, is indisputably met here. The petitioners have been sentenced under the condition at issue.”).

Although the State has not charged Starr with violating the conditions, this preenforcement challenge to the conditions is ripe for review. See Irwin, 191 Wn. App. at 651-52. Starr asks that this court strike the conditions from his judgment and sentence.

2. THE COMMUNITY CUSTODY CONDITION FORBIDDING STARR FROM VIEWING OR POSSESSING SEXUALLY EXPLICIT MATERIAL IS UNCONSTITUTIONALLY VAUGE AND NOT CRIME-RELATED

As a community custody condition, the trial court ordered, “You shall not view or possess sexually explicit material as defined in RCW 9.68.130(2)

without prior approval of DOC and sexually deviancy treatment provider.”

CP 84. This condition must be stricken because it is unconstitutionally vague and because it is not crime-related.

a. The condition is void for vagueness because it does not provide fair notice and invites arbitrary enforcement

i. Failure to provide fair notice

As the Bahl court discussed at length, a prohibition on perusing pornography is unconstitutionally vague. 164 Wn.2d at 754-58. The court relied on federal circuit courts of appeals, which

described the term ‘pornography’ as ‘entirely subjective,’ and rejected the argument that any vagueness problem was cured by the probation officer’s authority to interpret the restriction because ‘[t]his delegation . . . creates “a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating.

Id. at 755 (alterations in original) (internal quotation marks omitted) (quoting United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002) (quoting United States v. Loy, 237 F.3d 251, 266 (2001))). This reasoning is persuasive. Because definitions of pornography can and do differ widely—they may “include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo’s sculpture of David,” Bahl, 164 Wn.2d at 756—the prohibition on perusing pornography is not sufficiently definite to apprise ordinary persons of what is permitted and what proscribed. The condition thus violates the first prong of Bahl’s vagueness analysis.

The community custody prohibition on perusing or possessing sexual explicit materials in any medium suffers from the same vagueness. Many great works of literature and film describe and depict sex and sexuality in great detail. Starr has no way of knowing which of these works he is allowed to view or possess and which he is not. The prohibitory condition on any sexually explicit materials, like the ban on pornography, is unconstitutionally vague.

This is especially true where prohibitions implicate materials protected by the First Amendment. Bahl, 164 Wn.2d at 757-58. Any restrictions on the materials Starr may possess or view implicate the First Amendment and therefore “must be clear and must be reasonably necessary to accomplish essential state needs and public order.” Id. The blanket prohibitions on all sexually explicit materials (or pornography) fail to satisfy the requisite clarity to ensure Starr’s First Amendment rights are honored. The prohibitory conditions are unconstitutionally vague.

To be sure, the Bahl court discussed and approved of a condition that prohibited Bahl from “frequenting ‘establishments whose primary business pertains to sexually explicit or erotic material.’” 164 Wn.2d at 758 (emphasis added). The court discussed dictionary definitions of “sexually explicit” and “erotic,” and noted that Washington statutes defined the term “sexually explicit.” Id. at 758-60. However, in approving the condition, the court was

careful to hold that context matters: Because “[t]he challenged terms [we]re used in connection with a prohibition on frequenting businesses,” “[w]hen all of the challenged terms, with their dictionary definitions, are considered together, we believe the condition is sufficient clear. It restricts Bahl from patronizing adult bookstores, adult dance clubs, and the like.” Id. at 759.

No context saves the blanket prohibition on all sexually explicit materials at issue here. Starr was ordered not to view or possess any sexually explicit material. This extremely broad prohibition gives no context that would enable an ordinary person to understand what is disallowed, unlike the prohibition in Bahl. Because more specificity is required to inform Starr what is considered sexually explicit and what is not, the ban on possessing or viewing “sexually explicit material” is unconstitutionally vague.

Nor do statutory definitions provide sufficient guidance.<sup>4</sup> RCW 9.68.130(2) defines “Sexually explicit material” as

any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

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<sup>4</sup> The Bahl court did “not decide whether this definition [of sexually explicit material] would be sufficient notice (given that Mr. Bahl was not convicted under this statute) . . . .” 164 Wn.2d at 760. Starr was not convicted under the statute defining “sexually explicit material” either.

It would be difficult to fairly distinguish pictures displaying flagellation or torture in the context of a sexual relationship from pictorial material that fell short of depicting such flagellation or torture. It would also be challenging to know in advance whether a picture, part of which showed adult genitals, actually “empahsiz[ed] the depiction” of the genitals. And, how would an ordinary person know whether certain materials qualified as “works of art or of anthropological significance” and therefore fell outside the definition of sexually explicit material, when reasonable minds would certainly differ on this point? RCW 9.68.130(2)’s definition fails to provide adequate notice of what is prohibited and does not save the blanket prohibition on sexually explicit material from unconstitutional vagueness.

ii. Failure to protect against arbitrary enforcement

The prohibition on viewing or possessing sexually explicit material is also unconstitutionally vague because it allows the DOC or a treatment provider to enforce the prohibition in an arbitrary manner. Where a condition gives enormous discretion to an individual to define the parameters of the prohibition, the condition is unconstitutionally vague. Sanchez Valencia, 169 Wn.2d at 795; Bahl, 164 Wn.2d at 758. A treatment provider could classify a great breadth of materials sexually explicit by virtue of their mere mention of sex or sexuality. This brief thus might even qualify as prohibited material.

This condition would give the DOC or Starr's treatment providers unfettered discretion to define what is and what is not illegal. Moreover, to ascertain whether certain materials qualified as sexually explicit, Starr would have to show them to a community custody officer or a treatment provider, thereby exposing himself to the risk that they would give an after-the-fact determination that Starr violated the condition. The condition allows a treatment provider to "direct what falls within the condition," which "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. The community custody condition fails under Bahl's arbitrary-enforcement prong of the vagueness test. The unconstitutionally vague condition prohibiting the viewing or possession of sexually explicit material must be stricken.

- b. Sexually explicit materials have nothing to do with this case and the trial court has authority only to impose crime-related community custody prohibitions

RCW 9.94A.703(1) through (4) provide mandatory, waivable, discretionary, and special community custody conditions, respectively. Under RCW 9.94A.703(3)(f), the trial court may require an offender to "[c]omply with any crime-related prohibitions." The prohibition on possessing or viewing sexual explicit material does not qualify as crime-related. Therefore, it must be stricken.

There was not even a hint of evidence presented in this case that possessing or viewing sexually explicit materials played any role in the crime. In State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), Division One accepted the State's concession that a condition ordering the defendant to refrain from possessing sexually explicit material "must be stricken because no evidence suggested that such materials were related to or contributed to his crime." The same holds true here. Because the prohibition on sexually explicit material is not in any way related to the crimes at issue, the trial court's imposition of these prohibitions exceeded its authority. This condition should accordingly be stricken.

c. This preenforcement claim is ripe for review

Conditions almost identical to those at issue here were determined to be adequately ripe for review by our supreme court in Bahl, 164 Wn.2d at 751-52. Starr's challenge is likewise ripe for appellate review because the issue is primarily legal: this court must answer the legal question of whether, under a due process vagueness standard, the condition is unconstitutional. Sanchez Valencia, 169 Wn.2d at 790-91; Bahl, 164 Wn.2d at 752. No further factual development is necessary because the question is whether the conditions as written provide the requisite constitutional notice and protection against arbitrary enforcement. See Sanchez Valencia, 169 Wn.2d at 788-89 ("[T]he question of whether the condition is unconstitutionally vague does not require

further factual development.”). Finally, it is “indisputabl[e]” that the conditions at issue are final because Starr has “been sentenced under the condition at issue.” *Id.* at 789. Starr’s challenges to the community custody condition prohibiting him from viewing or possessing sexually explicit materials are ripe for review.

3. THIS COURT SHOULD DENY APPELLATE COSTS

In the event Starr does not substantially prevail on appeal, this court should deny any request by the State for appellate costs.

This court indisputably has discretion to deny appellate costs. RCW 10.73.160(1) (“The court of appeals . . . may require an adult offender convicted of an offense to pay appellate costs.” (emphasis added)); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (holding RCW 10.73.160 “vests the appellate court with discretion to deny or approved a request for an award of costs”), review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016).

There are several reasons this court should exercise discretion and deny appellate costs.

a. Starr is presumed indigent throughout review

The trial court determined Starr was indigent, allowing Starr to “appeal from the certain judgment and sentence and every part thereof . . . at public expense -- to include the following: . . . Attorney fees and costs of preparation of briefs . . . [and] Costs of preparation of the statement of facts

which shall contain the verbatim report of . . . proceedings.” CP 97. Based on the trial court’s determination of indigency, Starr is presumed indigent throughout this review. RAP 15.2(f); Sinclair, 192 Wn. App. at 393 (“We have before us no trial court order finding that Sinclair’s financial condition has improved or is likely to improve . . . . We therefore presume Sinclair remains indigent.”). This court should presume Starr indigent and deny any request by the State for appellate costs.

- b. Attempting to fund the Office of Public Defense on the backs of indigent persons when their public defenders lose their cases undermines the attorney-client relationship and creates a perverse conflict of interest

Furthermore, any reasonable person reading the order of indigency issued by the trial court would believe that Starr was entitled to an attorney to represent him on appeal at public expense and that Starr would pay nothing due to his indigency, win or lose. Under the current appellate cost scheme, however, this reasonable belief is incorrect and trial court indigency orders are falsehoods.

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not win the day, they will be assessed, at minimum, thousands of dollars in appellate costs. Unlike other lawyers whose clients pay them, the client’s ability to pay does not factor into an appellate defendant’s representation of his or her client. Yet appellate

defenders must still play the role of financial planner, hedging the strength of their arguments against the vast sums of money their clients will owe, and attempt to advise their clients accordingly. This undermines the attorney's fundamental role in advancing all issues of arguable merit on their clients' behalf and thereby undermines the relationship between attorney and client.

Not only do appellate defenders have to explain to clients they will face substantial appellate costs if their arguments are unsuccessful, they also have to explain that the Office of Public Defense gets most of the money. Many clients immediately see the perverse incentive this creates: The Office of Public Defense, through which all appellate defenders represent their clients, collects money only when the appellate defender is unsuccessful. This is readily apparent as a conflict of interest and undermines any appearance that the appellate cost scheme is fair. See RPC 1.7(a)(2) (a conflict exists where "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer"); Wood v. Georgia, 450 U.S. 261, 268-70, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (acknowledging conflict when interest of third part paying lawyer is at odds with client's interest); Winkler v. Keane, 7 F.3d 304, 308 (2d Cir. 1993) (contingent fee in criminal case creates actual conflict of interest); United States v. Horton, 845 F.2d 1414, 1419 (7th Cir. 1988) (conflict of interest arises when defense attorney

must “make a choice advancing his own interest to the detriment of his client’s interests”).

The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the organization that funds their attorneys when they lose. Franz Kafka himself would strain to imagine such a design. The appellate cost scheme creates a perverse conflict of interest implicating the constitutional right to conflict-free counsel. This is a good reason to exercise discretion and deny costs.

c. The record establishes waiver of appellate costs is appropriate

In Starr’s indigency screening paperwork, Clark County Corrections indicated Starr was staying with a friend and was otherwise unable to verify any residence. See Appendix.<sup>5</sup> Although the screening papers indicated Starr was employed, he had only held this job for three weeks prior to arrest. Based on this information, Clark County Corrections determined Starr qualified for court-appointed counsel. In Starr’s motion for an indigency order on appeal, Starr indicated his “financial circumstances have not changed since [the previous] finding of indigency.” CP 95.

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<sup>5</sup> Starr has filed a supplemental designation of clerk’s papers to include Clark County Corrections Court Information and Financial Screening for Appointed Counsel, filed June 24, 2015. To facilitate this court’s review, the pertinent portions of this document are appended to this brief.

In addition, the trial court waived all discretionary legal financial obligations, including court costs and fees for court-appointed counsel. CP 75-76; RP 178.. To impose thousands of dollars in appellate costs now would be incongruous with the trial court's waiver of discretionary legal financial obligations. Division One recently recognized that carrying an obligation to pay thousands of dollars in appellate costs plus accumulated interest "can be quite a millstone around the neck of an indigent offender." Sinclair, 191 Wn. App. at 391. There is no basis in the record to place this millstone around Starr's neck. Any request by the State for appellate costs should be denied.

D CONCLUSION

Starr asks that the challenged community custody conditions be stricken from the judgment and sentence.

DATED this 22 day of December, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

KEVIN A. MARCH

WSBA No. 45397

Office ID No. 91051

Attorneys for Appellant

**NIELSEN, BROMAN & KOCH, PLLC**

**December 22, 2016 - 12:51 PM**

**Transmittal Letter**

Document Uploaded: 7-493276-Appellant's Brief.pdf

Case Name: Lawrence Starr

Court of Appeals Case Number: 49327-6

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

copy sent to Lawrence Starr, 391142 Coyote Ridge Corrections Center PO Box 769  
Connell, WA 99326

Sender Name: John P Sloane - Email: [sloanej@nwattorney.net](mailto:sloanej@nwattorney.net)

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