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Division II
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NO. 50282-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD COCOM-VAZQUEZ,

Appellant.

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

The Honorable Gregory Gonzalez
The Honorable David E. Gregerson
The Honorable Derek J. Underwood

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated the appearance of fairness doctrine by failing to recuse itself after using its own Spanish language skills, not tested by cross-examination, to find that Mr. Cocom-Vazquez understood Spanish and made a knowing and intelligent waiver of his *Miranda* rights.

2. The trial court erred by impermissibly inserting himself as a witness in violation of ER 605 to resolve disputed CrR 3.5 issues as to Mr. Cocom-Vazquez's Spanish language skills.

3. The trial court erred by not recusing itself and allowing another judge, untainted by Spanish language skills, to resolve issues pertaining to Mr. Cocom-Vazquez's abilities in the Spanish language.

4. The court erred in refusing to recuse himself after improperly inserting itself as a witness at the CrR 3.5 hearing.

5. The trial court erred in refusing Mr. Cocom-Vazquez an extension of time to prepare and present expert witness testimony on Maya and Spanish, given the trial court inserting itself at the CrR 3.5 hearing as a witness on Spanish and Maya languages.

6. The trial court erred in entering CrR 3.5 written findings of fact 5, 6, 7, and 9, and conclusions of law 7.

7. The trial court imposed a vague and unconstitutionally overbroad condition of community custody prohibiting Mr. Cocom-Vazquez from “no unauthorized use of electronic media.”

8. The judgment and sentence incorrectly lists the date of Mr. Cocom-Vazquez’s non-jury trial as April 28, 2017, when it was actually March 27, 2017.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Basic due process requires a case be tried before a fair tribunal. Washington’s appearance of fairness doctrine requires the court to appear to be impartial. Was Mr. Cocom-Vazquez unfairly prejudiced by the trial court’s use of its own Spanish language skills, untested by cross-examination, to hold that Mr. Cocom-Vazquez, a native Yucatan Maya speaker, had adequate Spanish language skills to make a knowing waiver of his *Miranda* rights after being read the rights in Spanish?

2. Whether the community custody condition prohibiting Mr. Cocom-Vazquez from unauthorized use of electronic media is void for vagueness?

3. Whether Mr. Cocom-Vazquez’s case should be remanded to the trial court to correct the scrivener’s errors on the judgment and sentence as to the date of the non-jury trial?

C. STATEMENT OF THE CASE

Through an investigation, Clark County detectives learned that an IP address associated with Mr. Cocom-Vazquez's residence had downloaded and had available to share videos of what appeared to be young girls engaged in sexual activity. RP2 202. The detectives obtained a search warrant to search computers and associated computer equipment in Mr. Cocom-Vazquez's home. RP2 201-02. Mr. Cocom-Vazquez was home when the police served the warrant. RP2 205.

Mr. Cocom-Vazquez is a native Yucatan Maya speaker. RP1 104, 159. He lived in Mexico for the first 20 years of his life. RP1 160. His wife grew up in a nearby town and is also a native Maya speaker. RP1 100. The couple moved to the Vancouver area after their oldest child was born. A second child was born in the United States. RP1 101.

Mr. Cocom-Vazquez worked planting trees and in a family-owned pallet making business. His co-workers mostly speak Maya. RP1 160-61. Away from work, Mr. Cocom-Vazquez associated mostly with family who, like him, spoke Maya. RP1 84, 86. Mr. Cocom-Vazquez learned a little Spanish along the way but had no proficiency in the language. RP1 87, 167, 172. Mr. Cocom-Vazquez's children spoke English and a little

Spanish. RP1 101. Because of the language barrier, the children had limited verbal exchanges with their father. RP1 105.

After serving the warrant, Detective David Brown determined Mr. Cocom-Vazquez was from Mexico and Mr. Cocom-Vazquez acknowledged speaking a little Spanish. RP2 205-06. Detective Brown, who did not speak Spanish, called the language line and directed an interpreter to give Mr. Cocom-Vazquez his *Miranda* rights in Spanish. RP2 206-07. The language line interpreter ostensibly translated the rights into Spanish. RP2 206-10. The language line interpreter clearly had a problem trying to explain the nature of the allegations against Mr. Cocom-Vazquez. RP2 228.

Washington State Patrol Lieutenant Randy Hullinger was summoned to the home to help with Spanish language translation. RP1 39. Lieutenant Hullinger took Spanish in high school and college before serving a two year religious mission in Argentina where he spoke Spanish daily. RP1 33. After returning from his mission, Lieutenant Hullinger continued to use Spanish regularly and has assisted in translating in Spanish while working for the State Patrol. RP1 33-37. He believed he had the skills to recognize a non-native Spanish speaker. RP1 37-38. He read Mr. Cocom-Vazquez *Miranda* rights in Spanish and had Mr. Cocom-

Vazquez sign an advice of rights form. RP1 39-42, 175. He talked with Mr. Cocom-Vazquez in Spanish and Mr. Cocom-Vazquez made statements about images of young girls and viewing them on his computer. RP1 47; RP2 210.

The state charged Mr. Cocom-Vazquez with possessing and dealing in images of minors engaged in sexually explicit conduct. CP 1-6, 148-50, 161-62.

Mr. Cocom-Vazquez motioned the court to suppress his statements based on his inability to understand Spanish language. CP 7-34; RP1 33-189, RP2 201-305.

Mr. Cocom-Vazquez was assisted in court with a Maya translator after it became apparent he did not communicate adequately in Spanish. RP1 12-14.

At the CrR 3.5 hearing, wife Antonia Ruiz-Vazquez, testified her husband spoke Maya and had very limited Spanish. RP1 83. Maya Interpreter Alvaro Gangora had interpreted for Mr. Cocom-Vazquez and in his opinion, Mr. Cocom-Vazquez barely understands Spanish. RP1 114. Gangora reviewed the *Miranda* rights form and noted many words used had no Maya equivalent. RP1 114. He also said that in the Maya culture, people are very polite and will say “yes” or “no” to a situation just to get

rid of the situation and this was particularly true when dealing with an authority figure such as a police officer. RP1 116-17.

Translation in the Maya language is problematic because there is no literal translations. In other words, in translating another language into Maya, the actual meaning of a word must be explained. RP1 114, 120.

Clark County district court translator Korrine Wells provided Spanish language interpretation for Mr. Cocom-Vazquez at an initial court hearing. RP1 140. She reviewed a video of the hearing. She realized in hindsight that Mr. Cocom-Vazquez did not track well when she interpreted English to Spanish. RP1 142.

Mr. Cocom-Vazquez testified he told the police he did not understand Spanish or English. RP1 166-67. He could not understand the Spanish speaker on the language line. RP1 168-69. When communicating with Lieutenant Hullinger, he only signed the rights form because it was given to him to sign and when a person is given something to sign, they do so. RP1 174-75. He did not understand Lieutenant Hullinger's Spanish. RP1 17-72.

Mr. Cocom-Vazquez's Spanish language abilities were tested by defense witness Nancy Brewer-Conta, a qualified Spanish interpreter

who had spent many years of her life working in Spanish language education at Barbier International. RP2 233-34. Mr. Cocom-Vazquez tested at a beginner level in reading and spoken Spanish. RP2 241. His ability to communicate with her was poor. RP2 242. Given his limited proficiency in Spanish, she believed he would have a difficult time understanding the concepts in *Miranda* rights. RP2 246-48.

At various times during the CrR 3.5 hearing, the court interjected in Spanish. The court told the parties he spoke a little Spanish. He asked Lieutenant Hullinger words in Spanish and had him translate them to English. RP1 75.

The state prepared and the court entered written findings of fact and conclusions of law on the CrR 3.5 hearing. The court's complete findings and conclusions are attached as Appendix. For this appeal the relevant findings and conclusions follow.

I. FINDINGS OF FACT

5. The defendant was present at his residence when the search warrant was served. Detective Brown asked the defendant if he spoke English. The defendant responded that he spoke "a little". Detective Brown ascertained that the defendant spoke Spanish. The defendant is from Mexico. The defendant's native language is Maya. Detective Brown utilized a telephonic "language line" interpreter to speak to the defendant in Spanish. Detective Brown advised the defendant of his Constitutional Rights in Spanish using the interpreter. (*The State is unable to produce the language line

statement made by the defendant through the language line interpreter.)

6. Washington State Patrol Sgt. Randy Hullinger arrived at the defendant's residence. Trooper Hullinger is fluent in Spanish. Trooper Hullinger advised the defendant of his Constitutional Rights in Spanish, and presented them to the defendant in writing using an English/Spanish Constitutional Rights form. The defendant signed the form and indicated that he understood his rights and would speak with the police.

7. The defendant, through Sgt. Hullinger, then admitted to police that they would find images of child pornography on his computer and that they would find the ARES file sharing program. The dependent told police how he was introduced to images of younger girls and how he would use ARES to search for child pornographic images.

8. The Defendant's answers to Sgt. Hullinger's questions were appropriately responsive. Sgt. Hullinger and the defendant conversed with no indication of any difficulty in communicating and understanding each other.

II. CONCLUSIONS OF LAW

7. The statements the defendant made to the police were made after a knowing and voluntary waiver of his Constitutional Rights. Under the totality of circumstances the defendant's statements were voluntarily made and are admissible.

CP 178-82.

Mr. Cocom-Vazquez waived his right to a jury trial and the court found him guilty at a stipulated facts bench trial of one count of dealing in depictions of minors engaged in sexually explicit conduct in the first degree and two counts of possession of depictions of minors engaged in

sexually explicit conduct in the first degree. CP 163-82. The finding related to the charges in the third amended information. CP 161-62.

The court sentenced Mr. Cocom-Vazquez to 57 months in prison plus 36 months of community custody with certain conditions. CP 187-188. As part of the community custody conditions the court required Mr. Cocom-Vazquez have no “unauthorized use of electronic media.” CP 202. Mr. Cocom-Vazquez did not object to any of his community custody conditions. RP2 342-345.

Mr. Cocom-Vazquez appeals all portions of his judgment and sentence. CP 205.

D. ARGUMENT

Issue 1: Mr. Cocom-Vazquez’s convictions should be reversed based on hearing judge testifying at the CrR 3.5 hearing in violation of the appearance of fairness doctrine.

a. The appearance of fairness doctrine requires judges to disqualify themselves when their partiality may be questioned.

A fair tribunal is a basic tenant of due process. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Under the state and federal constitutions, a criminal defendant has the right to be tried and sentenced by an impartial court. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22. Under the appearance of fairness doctrine, a judicial proceeding is valid if

a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *Id.*

The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts. *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017); *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias.

Gamble, 168 Wn.2d at 187.

ER 605, Competency of a Judge as a Witness, provides

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Here the impropriety of the court, and the unfairness of the CrR 3.5 hearing is proven by the court's testifying as a witness by interjecting its Spanish language skills into the case to resolve the essential issue of whether Mr. Cocom-Vazquez had enough Spanish language skills to have made a knowing and intelligent waiver of his *Miranda* rights. This issue was

vociferously objected to by Mr. Cocom-Vazquez and was the issue at the CrR 3.5 hearing. RP1 32-189; RP2 210-63.

In hearing and deciding the issue, the court repeatedly interjected its Spanish language skills into the mix. The court told the parties he spoke a little Spanish. RP1 75. During Lieutenant Hullinger's testimony, the court threw words at the lieutenant and asked him to translate them from Spanish to English. RP1 75.

During Mr. Cocom-Vazquez's testimony, the court inquired partially in English and, apparently, partially in Spanish, as to whether the interpreter was interpreting everything.

THE COURT: Well, let me clarify, because I thought I heard something (speaking Spanish) somewhere in there, and I didn't hear that in the translation so

THE INTERPRETER: Yeah, this interpreter is only interpreting what this interpreter is interpreting.

RP1 167.

During direct examination of its expert witness on spoken Spanish, Ms. Brewer-Conta, the court cut off the defense when it attempted to point out differences in Spanish from a person who speaks, or learns, Spanish in Argentina, such as Lieutenant Hullinger, versus someone who might learn Spanish in Mexico, such as a language line interpreter.

THE COURT: Well, to save time, Counsel, we need to finish at the end of the day. I'm aware of some general dialectic and grammatical difference. For example, the use of the informal (Court speaks Spanish) in an Argentinean Spanish; so don't want to waste a lot of time on this. Let's get to the most germane points.

RP2 249.

The court later repeatedly asked Ms. Brewer-Conta to translate words from the court's Spanish into English. RP2 261-62.

Finally, in ruling that Mr. Cocom-Vazquez's statements to law enforcement were admissible, the court placed special emphasis on its own Spanish language skills.

I will also note that during the course of these proceedings, I have during the relay translation and I noted several important words that appear to be identical to both Spanish and Mayan; words that pertain to the advisement and alleged waiver of rights in responses given. Words which in English are: Eleven, twelve, telephone, bank, account, document, not guilty, police, rights, attorney, television; many if not all, of those words appeared to the Court to be identical in both languages.

RP2 303-04.

None of these instances of the court asserting its knowledge of the Spanish language were subject to cross examination by the defense. The court made itself a witness in complete denial of any appearance of fairness. In calling for the court to recuse itself, this was not lost on defense counsel:

What's at issue is the court using its own perceived knowledge and skill to make conclusions based on facts that are not part of the record. We do not know the court's background, education, training, and experience and skill with the Spanish language. Counsel has no way to make a record or any objection based on conclusions the court has reached based on its "own" findings. Had the court not used that knowledge during the conduct of the case in the way it did this wouldn't be an issue.

CP1 152.

The court's interjection of its untested personal knowledge of Spanish made the court a witness at the CrR 3.5 hearing, a patent violation of the appearance of fairness doctrine and a violation of ER 605.

Mr. Cocom-Vazquez is entitled to a CrR 3.5 hearing free of judicial unfairness and most especially where the judge does not put himself in the place of an untested witness.

b. A different judge should hear the case on remand.

A party may seek reassignment for the first time on appeal, which is usually done where the trial judge "will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue." *State v. McEnroe*, 181 Wn.2d 375, 386, 333 P.3d 402 (2014). The remedy of reassignment on appeal is available only in limited circumstances; even where a trial judge has expressed a

strong opinion as to the matter appealed, reassignment is generally not available as an appellate remedy if an appellate opinion offers sufficient guidance to effectively limit trial court discretion on remand. *Id.* Erroneous rulings generally are proper grounds for appeal, not for recusal. *Id.* at 388. But where review of facts in the record shows the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge. *See Sherman*, 128 Wn.2d at 206; *Solis-Diaz*, 187 Wn. 2d at 540.

Issue 2: The “no authorized use of electronic media” community custody condition is unconstitutionally vague and must be stricken.

a. The condition is void for vagueness because it does not provide fair notice and it invites 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 art. I, § 3 of the Washington Constitution, 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 so 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.

In *State v. Irwin*, 191 Wn. App. 644, 649, 364 P.3d 830 (2015), the court considered a vague, overbroad community custody condition which read, “Do not frequent areas where minor children are known to congregate, as defined by the supervising” community corrections officer. On review, the court 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 the Supreme Court’s decision in *Bahl*, the court held a community 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 Mr. Cocom-Vazquez from “unauthorized use of electronic media” fails to provide sufficient definiteness. CP 202. The condition does not tell Mr. Cocom-Vazquez what he can and cannot use in context of the broad term “electronic media” and if he wanted to access it, who would be responsible for authorizing the access. The condition is not sufficiently definite to distinguish between what is prohibited and what is allowed. Electronic media is everywhere. Does the “no unauthorized use of electronic media” mean Mr. Cocom-Vazquez can or cannot watch the news on TV, read an electronic billboard,

check his email from a phone or a computer, go to a movie, or watch a message from his spiritual advisor or read a book on an iPad? Who would he turn to for authorization? Mr. Cocom-Vazquez has no way of knowing. Because no ordinary person would know what conduct is prohibited, the condition fails 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), *rev’d on other grounds*, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)).

The conditions prohibiting Mr. Cocom-Vazquez from using electronic media implicates the First Amendment because it broadly restricts what he can view on electronic media with no regard to its content or his offenses. Because the condition has the very real effect of

precluding Mr. Cocom-Vazquez his exercise of religion and speech, to be valid the condition must meet a more definite, clearer standard. The vague community custody condition 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 "no unauthorized use of electronic media" does not delegate the parameters of the condition to anyone. See CP 202. 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.

The challenged community custody condition prohibiting Mr. Cocom-Vazquez unauthorized use of electronic media is unconstitutional

because it fails to provide reasonable notice on what conduct is prohibited and exposes him to arbitrary enforcement. This court should hold that the condition is void for vagueness and strike it from Mr. Cocom-Vazquez's 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 – does the condition prohibiting Mr. Cocom-Vazquez from unauthorized access to electronic media 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 condition is final because Mr. Cocom-Vazquez has been sentenced to abide by it. *Sanchez Valencia*, 169 Wn.2d 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 Mr. Cocom-Vazquez with violating the conditions, this preenforcement challenge to the conditions is ripe for review. See *Irwin*, 191 Wn. App. at 651-52. This Court should strike the condition from his judgment and sentence.

Issue 3: The court should remand for correction of a scrivener’s error in the judgment and sentence.

Scrivener’s errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its initiative or on the motion of any party. The remedy for a scrivener’s error in a judgment and sentence is remand to the trial court for correction. CrR 7.8(a); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010).

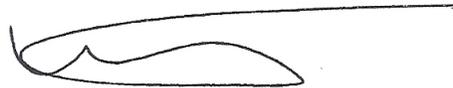
The judgment and sentence, Section 2.1, incorrectly listed the date of the non-jury trial as April 28, 2017. CP 183. The court actually heard the stipulated facts, non-jury trial, to include issuing its verdict, on March 27, 2017. CP 172-77; RP 327-32. Mr. Cocom-Vazquez's case should be remanded to the trial court for correction of the date.

E. CONCLUSION

The trial court's ruling on CrR 3.5 admitting the statements of Mr. Cocom-Vazquez should be reversed and his case remanded for further action without the use of the statements.

In the alternative, Mr. Cocom-Vazquez's case should be remanded to strike the no unauthorized use of electronic media community custody condition and to correct the scrivener's error on the date of the non-jury trial.

Respectfully submitted November 29, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for Edward Cocum-Vazquez

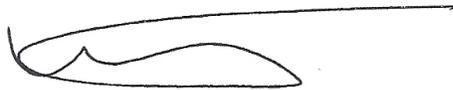
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Clark County Prosecutor's Office, at Cnty.GeneralDelivery@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Edward Cocom-Vazquez, DOC#398229, Coyote Ridge Corrections Center, PO Box 769 Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 29, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Edward Cocom-Vazquez, Appellant

APPENDIX

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FILED
MAR 27 2017 9:18
Scott G. Weber, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,
v.
EDWARD COCOM-VAZQUEZ,
Defendant.

No. 14-1-01659-0

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW FOR SUPPRESSION HEARING
HELD OCTOBER 13 AND OCTOBER 28,
2016**

THIS MATTER having come before the above-entitled Court for a Criminal Rule 3.6 Motion to Suppress Evidence, and a Criminal Rule 3.5 Motion to Suppress Statements on October 13 and October 28, 2016, the Defendant being personally present and represented by his then trial attorney of record, Ed Dunkerly, and the Plaintiff being represented by Jeff McCarty, Deputy Prosecuting Attorney for Clark County, State of Washington, and the Court having heard and considered testimony, physical evidence, and pleadings and argument of counsel in this case, now enters the following:

I. FINDINGS OF FACT

1. These acts occurred in Clark County, Washington.
2. In 2014, the Vancouver Police and Clark County Sheriff's Digital Evidence and

Cybercrimes Unit (DECU) conducted an investigation regarding the possession and

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m

1 distribution of digital files containing images of child sexual abuse. A DECU
2 investigator used Ares, a peer-to-peer file sharing program to search for computers that
3 were using the same program to share digital files containing such images. Police
4 used a modified version of Ares that would allow them to make a direct connection to a
5 single Internet Protocol (IP) address and download files from a single IP address.
6 Using that program, On May 5, 2014 and again on June 21, 2014, police were able to
7 locate a specific IP address from which they were able to download files containing
8 images of child sex abuse.

9
10 3. Law enforcement subsequently obtained a search warrant for subscriber information for
11 the identified IP address. That search warrant was served upon Comcast on July 29,
12 2014. Investigators received a response from Comcast and learned that the IP
13 address in question was assigned to the Defendant. Comcast also provided a physical
14 address associated with the IP address.

15 4. Investigators used the subscriber information, along with the information regarding the
16 previously downloaded files, to seek and obtain a search warrant for the Defendant's
17 residence and related computer equipment. The search warrant was supported by an
18 affidavit authored by Vancouver Police Detective David Brown and presented to Clark
19 County District Court Judge Vern Schreiber on August 11, 2014. That search warrant
20 was served on August 13, 2014. Police seized numerous items of evidence during the
21 search, including the Defendant's computer and an attached external hard drive.
22 Police found evidence, ^{on the external hard drive,} that the defendant had possessed, download, and made
23 available to share, images of minors engaged in sexually explicit activity.

24
25 5. The defendant was present at his residence when the search warrant was served.
26 Detective Brown asked the defendant if he spoke English. The defendant responded
27 that he spoke "a little". Detective Brown ascertained that the defendant spoke Spanish.

1 The defendant is from Mexico. The defendant's native language is Maya. Detective
2 Brown utilized a telephonic "language line" interpreter to speak to the defendant in
3 Spanish. Detective Brown advised the defendant of his Constitutional Rights in
4 Spanish using the interpreter. (*The State is unable to produce the language line
5 interpreter as a witness and has indicated it will not offer at trial any statements made
6 by the defendant through the language line interpreter).

7 6. Washington State Patrol Sgt. Randy Hullinger arrived at the defendant's residence.
8 Trooper Hullinger is fluent in Spanish. Trooper Hullinger advised the defendant of his
9 Constitutional Rights in Spanish, and presented them to the defendant in writing using
10 a English/Spanish Constitutional Rights form. The defendant signed the form and
11 indicated that he understood his rights and would speak with the police.
12

13 7. The defendant, through Sgt. Hullinger, then admitted to police that they would find
14 images of child pornography on his computer and that they would find the ARES file
15 sharing program. The defendant told police how he was introduced to images of
16 younger girls and how he would use ARES to search for child pornographic images.
17

18 8. The defendant's answers to Sgt. Hullinger's questions were appropriately responsive.
19 Sgt. Hullinger and the defendant conversed with no indication of any difficulty in
20 communicating and understanding each other.
21

22 II. CONCLUSIONS OF LAW

23 1. The warrants were issued after a determination of probable cause by neutral and
24 detached magistrates.

25 2. The search warrant for defendant's residence was not overly broad and did not violate
26 the particularity requirement of the Fourth Amendment. The warrant's authorization to
27 search for a broad list of items, such as computers, electronic devices, or other items

1 such as "hard disk drives, floppy disks, CD's, DVD's, magnetic tape, external drives,
2 flash drives, and memory chips," was permissible because a more specific description
3 of the items being sought was not possible; and the warrant referenced the specific
4 crimes being investigated which provided limits and guidance regarding the content
5 being searched for.

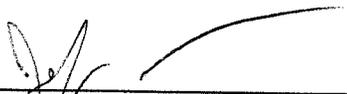
- 6 3. The affidavit contained sufficient descriptions of the downloaded content for the
7 reviewing magistrate to find probable cause that they depicted minors engaged in
8 sexually explicit conduct.
- 9 4. The warrants were not issued based upon illegally obtained evidence. Use of the
10 Ares peer-to-peer file sharing program to connect to the defendant's computer was not
11 a violation of the defendant's privacy rights. The defendant had no reasonable
12 expectation of privacy in files that he had made publicly available via the same file
13 sharing program.
- 14 5. Use of a modified Ares file sharing program that allows law enforcement to direct
15 connect and download files from a single IP address does not negate probable cause.
- 16 6. The Court finds that the affidavit contained sufficient facts to establish probable cause
17 to search, and all evidence recovered is admissible.
- 18 7. The statements the defendant made to police were made after a knowing and
19 voluntary waiver of his Constitutional Rights. Under the totality of the circumstances,
20 the defendant's statements were voluntarily made and are admissible.
21
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23 Done in open court this 27 day of March, 2017.

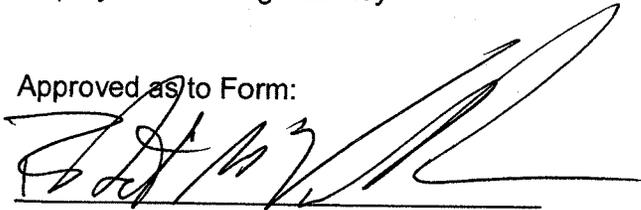
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THE HONORABLE DAVID GREGERSON
JUDGE OF THE SUPERIOR COURT

1 Presented by:

2 
3 _____
4 Jeff McCarty, WSBA #33134
5 Deputy Prosecuting Attorney

6 Approved as to Form:

7 
8 _____

9 Attorney for Defendant

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LAW OFFICE OF LISA E TABBUT

November 29, 2017 - 1:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50282-8
Appellate Court Case Title: State of Washington, Respondent v Edward Cocom-Vazquez, Appellant
Superior Court Case Number: 14-1-01659-0

The following documents have been uploaded:

- 5-502828_Briefs_20171129134334D2392766_8655.pdf
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Briefs - Appellants
The Original File Name was Edward Cocom-Vazquez Brief of Appellant.pdf

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