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Division II
State of Washington
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COA No. 50656-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEVIN LEE FORLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KITSAP COUNTY

The Honorable Jeffrey P. Bassett

REPLY BRIEF

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A. REPLY ARGUMENT

THE PROSECUTOR CONCEDES CERTAIN CHALLENGED COMMUNITY CUSTODY CONDITIONS BUT THE STATE’S OTHER ARGUMENTS AS TO CONDITIONS MUST FAIL.

1. First, Mr. Forler agrees¹ with the Respondent, see SRB at pp. 34-36, that the community custody condition that he not possess or access “sexually explicit materials, and/or information pertaining to minors via the internet,” should be modified to make clear that the prohibition addresses only materials and information that are (a) sexually explicit, and (b) involve minors. CP 174; see AOB at pp. 55-56. Such modification will cure the problems of lack of crime-relatedness, and constitutional vagueness, that Mr. Forler argued in his Opening Brief. See also State v. Norris, 1 Wn. App. 2d 87, 97-98, 404 P.3d 83 (2017) (mere fact that crime was child sex offense does not permit more general restriction on sexual materials or businesses).

2. Mr. Forler argues the the blanket restriction on internet usage is not crime-related and is overly broad. See AOB, at pp. 56-59

¹ This brief does not address all the State’s concessions as to certain community custody conditions, most of which are simple, as scrivener’s errors or the like.

(addressing CP 181 - Appendix F's blanket restriction on internet usage absent CCO approval).

The Respondent contends that the restriction is crime-related because the crime involved use of the internet. CP 35. (Specifically, the defendant allegedly sought to engage in criminal sexual conduct by answering an advertisement on "Craigslist," a web site that publishes classified advertisements for goods and services, but also advertises regarding romantic and sexual matters.

The Respondent also contends that the condition is not unconstitutionally too broad because it allows the CCO to control the types of web sites that Forler accesses. SRB, at p. 35.

However, as argued in the Opening Brief, the restriction, to be crime-related, must be limited to internet usage pertaining to the same areas of concern as the trial court's other community custody conditions – sexual information about children. AOB, at pp. 55-57. The SRA allows imposition of non-enumerated conditions that are crime-related. State v. Irwin, 191 Wn. App. 655, 656, 364 P.3d 830 (2015). The access of non-sexual information about children on the internet bears no factual relationship to the present case, and this condition, which

exceeds the court's authority, must be stricken. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

If not so limited, the condition, as argued, is constitutionally vague, including because it gives the CCO excessive discretion. As argued, individuals on community custody have a right to access and transmit material protected by the First Amendment. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); see AOB, at pp. 56-59.

Further, as argued, modern cellular telephones, likewise, are now essentially also internet devices. Riley v. California, ___ U.S. ___, 134 S. Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014). The conditions of community custody barring Mr. Forler using the internet absent approval by his CCO is therefore further overly broad in violation of his First Amendment rights. See also Packingham v. North Carolina, ___ U.S. ___, 137 S. Ct. 1730, 1735, ___ L. Ed. 2d ___ (2017) (Supreme Court, holding unconstitutional a North Carolina statute that barred sex offenders from accessing social media sites); United States v. Freeman, 316 F.3d 386 (3d Cir. 2003) (striking a condition of supervised release that banned the defendant from using any online computer service without his probation officer's written approval because the condition was overly broad). AOB, at pp. 58-59. For example, in United States

v. Freeman, 316 F.3d 386 (3d Cir. 2003), the federal court struck a special condition of supervised release that banned the defendant from possessing any computer in his home or using any online computer service without his probation officer's written approval because the condition was overly broad. The court noted that, even 14 years ago, a total ban on internet access prevents the use of email, getting a weather forecast, or reading the newspaper. Freeman, 316 F.3d at 387, 391-92.

Finally, restricting internet usage, which comprises a prohibition on using a cellular telephone, invest excessive discretion in the CCO, so as to render the condition too broad. It is true that a condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited. State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010). Sanchez Valencia, 169 Wn.2d at 793. But this condition in Forler's judgment invests the determination of requirements, and assessment of violations, in one person, thus it "does not place any limits" on the ability the CCO to create obligations and find them violated; this lack of limits is fatal under vagueness doctrine. State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016); State v. Norris, 1 Wn. App. 2d at 95 (restriction on frequenting places where

children congregate was so inspecific as to invest CCO with the power of arbitrary enforcement).

The challenged conditions must be stricken or remanded for clarification by the sentencing court.

B. CONCLUSION

Mr. Forler believes that the Opening Brief addresses the State's argument regarding the assignments of error as to juror bias, attorney ineffectiveness in not seeking an entrapment instruction, and outrageous conduct by the police, Mr. Kevin Forler respectfully requests that this Court reverse his convictions and his sentence.

DATED this 30 day of April, 2018.

Respectfully submitted,

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)	
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)	
Appellant.)	

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