

FILED  
Court of Appeals  
Division II  
State of Washington  
12/20/2018 2:18 PM

NO. 51688-8-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL NOVCASKI,

Appellant.

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

---

---

REPLY BRIEF OF APPELLANT

---

---

MARY T. SWIFT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
1. THE TRIAL COURT, NOT THE DEPARTMENT OF CORRECTIONS, IMPOSED THE CONDITIONS AT ISSUE, SO THOSE CONDITIONS MUST BE CRIME-RELATED. ....	1
2. THE OVERBREADTH OF SEXUALLY EXPLICIT MATERIALS CONDITIONS REMAINS AN OPEN QUESTION FOLLOWING <u>NGUYEN</u> .....	3
3. THIS COURT SHOULD FOLLOW THE PUBLISHED, CONTROLLING DECISION IN <u>WALLMULLER</u> , RATHER THAN THE UNPUBLISHED, NONBINDING DECISION IN <u>RAMOS-RAMIREZ</u> . ....	6
B. <u>CONCLUSION</u> .....	7

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

In re Det. of Cross  
99 Wn.2d 373, 662 P.2d 828 (1983)..... 3

In re Elec. Lightwave, Inc.  
123 Wn.2d 530, 869 P.2d 1045 (1994)..... 5

In re Pers. Restraint of Golden  
172 Wn. App. 426, 290 P.3d 168 (2012)..... 1, 2, 3

State v. Nguyen  
191 Wn.2d 671, 425 P.3d 847 (2018)..... 3, 4, 5

State v. Padilla  
190 Wn.2d 672, 416 P.3d 712 (2018)..... 4, 5

State v. Ramos-Ramirez  
50911-3-II, 2018 WL 5014248 (Oct. 16, 2018) (unpublished) ..... 6

State v. Wallmuller  
4 Wn. App. 2d 698, 423 P.3d 282 (2018)..... 6

**RULES, STATUTES, AND OTHER AUTHORITIES**

Former RCW 9.94A.715 (2006) ..... 1, 2

GR 14.1 ..... 6

RCW 9.68.130 ..... 5

RCW 9.94A.030..... 3

RCW 9.94A.703..... 3

RCW 9.94A.704 ..... 2

A. ARGUMENT IN REPLY

1. THE TRIAL COURT, NOT THE DEPARTMENT OF CORRECTIONS, IMPOSED THE CONDITIONS AT ISSUE, SO THOSE CONDITIONS MUST BE CRIME-RELATED.

The State does not provide any substantive response to Novcaski's crime-relatedness challenges. Instead, the State contends only that the conditions in Appendix H were set by the Department of Corrections (DOC), which is not limited to imposing crime-related conditions. Br. of Resp't, 2-5. The State relies exclusively on In re Pers. Restraint of Golden, 172 Wn. App. 426, 290 P.3d 168 (2012), for this claim. Br. of Resp't, 2-5. Golden, however, is inapposite.

Golden was sentenced and served time in confinement. Golden, 172 Wn. App. at 429. Upon his release, DOC imposed numerous supervision conditions on Golden. Id. Golden then challenged those conditions in a habeas corpus petition, which was transferred to the court of appeals for consideration as a personal restraint petition. Id.

The court of appeals upheld the conditions because they did not conflict with the "standard judgment and sentence conditions" imposed by the trial court at sentencing. Id. at 432. The court emphasized the "crime-related prohibition" definition "does not apply to DOC, which is an agency and not a court." Id. The court held "[n]othing in the text of former RCW

9.94A.715, or its successor statute, RCW 9.94A.704, limits DOC's supervisory conditions to those that are 'crime related.'" Id. at 433.

The obvious flaw with the State's reliance on Golden is the *trial court*—not DOC—imposed the conditions at issue. The State is correct that DOC recommended the particular conditions at issue, after conducting a presentence investigation. CP 36-43. However, the court then adopted those conditions and incorporated them into the judgment and sentence as Appendix H. CP 61-63. The appendix is entitled:

JUDGMENT AND SENTENCE (FELONY)

APPENDIX H

COMMUNITY PLACEMENT / CUSTODY

CP 61. Appendix H states, "[t]he court having found the defendant guilty of offense(s) qualifying for community placement, it is further ordered as set forth below." CP 61 (emphasis added). The appendix mandates "Defendant shall comply with the following other conditions . . . ." CP 62. Perhaps most significantly, Appendix H is then signed by the trial judge. CP 63.

Novcaski's case is in an entirely different procedural posture than Golden. Novcaski was sentenced and is now serving his term of confinement. He has not yet been released and DOC has not yet imposed supervisory conditions. The community custody conditions mandated in Appendix H, attached to the judgment and sentence, were clearly imposed

by the trial court. The trial court may impose only crime-related prohibitions. RCW 9.94A.030(10), .703(3)(f). The State's reliance on Golden is misplaced and its argument should be rejected.

The State's failure to respond to the substance of Novcaski's crime-related challenges should be treated as a concession. In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."). For the sake of brevity, Novcaski will not repeat those arguments here.

2. THE OVERBREADTH OF SEXUALLY EXPLICIT MATERIALS CONDITIONS REMAINS AN OPEN QUESTION FOLLOWING NGUYEN.

The State does not address Novcaski's vagueness or overbreadth challenges to the sexually explicit materials condition. Though the State does not discuss it, Novcaski acknowledges the Washington Supreme Court's recent decision in State v. Nguyen, 191 Wn.2d 671, 425 P.3d 847 (2018), issued the same day as Novcaski filed his opening brief.

In Nguyen, the supreme court held the term "sexually explicit materials" is not vague. Id. at 681. Notably, however, the condition at issue in Nguyen referenced several statutes defining sexually explicit materials in more detail. Id. at 679. The condition at issue in Novcaski's case contains no such definitions in barring Novcaski's possession and perusal of sexually explicit materials. CP 62. Novcaski thus maintains the

condition remains vague and not narrowly tailored under State v. Padilla, 190 Wn.2d 672, 416 P.3d 712 (2018). See Br. of Appellant, 9-10, 14-15 (discussing Padilla).

The Nguyen court also held conditions barring access to sexually explicit materials and entry into sex-related businesses are crime-related when the defendant is convicted of a sex offense. 191 Wn.2d at 686-87. This is so, the court held, even where the record does not demonstrate sexually explicit materials or sex-related businesses played a role in the offenses. Id. On its face, Nguyen would appear to control.

However, the Nguyen court did not expressly overrule Padilla, issued only a few months earlier. The Padilla court held the condition at issue there “impermissibly extend[ed] to a variety of works of arts, books, advertisements, movies, and television shows.” 190 Wn.2d at 681. Similarly, the court emphasized, “[t]here is currently no connection in the record between Padilla’s inappropriate messaging and imagery of adult nudity or simulated intercourse.” Id. at 684.

Novcaski maintains that Padilla controls. Here, without any definition of sexually explicit materials, the condition encompasses the protected material identified in Padilla—art, books, movies, and so on. In Nguyen, by contrast, one of the provided statutory definitions expressly exempted “works of art or of anthropological significance.” Nguyen, 191

Wn.2d at 680 (quoting RCW 9.68.130(2)). Without the definitions of sexually explicit materials provided in Nguyen, the condition here remains vague. Furthermore, like in Padilla, there is no connection in Novcaski's record between the convicted offense and simulated intercourse or adult nudity. The condition therefore still fails the crime-relatedness standard.

Even if this Court holds the sexually explicit materials condition is crime-related and not vague under Nguyen, Novcaski has also challenged the condition as overbroad. Br. of Appellant, 1 (assigning error to overbreadth), 15-16 (discussing overbreadth). The Nguyen court did not consider whether the sexually explicit materials condition was unconstitutionally overbroad. 191 Wn.2d at 681, 686 (considering only vagueness and crime-relatedness).

Overbreadth therefore remains an open question this Court should address. In re Elec. Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue."). Overbreadth is particularly problematic in Novcaski's case where, like in Padilla, the condition could encompass simulated materials. Padilla, 190 Wn.2d at 680-81.

3. THIS COURT SHOULD FOLLOW THE PUBLISHED, CONTROLLING DECISION IN WALLMULLER, RATHER THAN THE UNPUBLISHED, NONBINDING DECISION IN RAMOS-RAMIREZ.

Finally, with regard to the “where minor children congregate” condition, the State relies solely on State v. Ramos-Ramirez, 50911-3-II, 2018 WL 5014248 (Oct. 16, 2018) (unpublished). The State does not acknowledge, as required by GR 14.1, that Ramos-Ramirez is an unpublished case, with no precedential value. See GR 14.1(a) (specifying an unpublished case “may be cited as nonbinding authorities, if identified as such by the citing party” (emphasis added)).

While failing to acknowledge Ramos-Ramirez is unpublished, the State also fails to address State v. Wallmuller, 4 Wn. App. 2d 698, 423 P.3d 282 (2018), which is published and therefore controlling.<sup>1</sup> A discussion of Wallmuller is provided in Novcaski’s opening brief and will not be repeated here. Br. of Appellant, 24-25.

---

<sup>1</sup> A petition for review has been filed in Wallmuller and will be considered by the Washington Supreme Court on January 8, 2019.

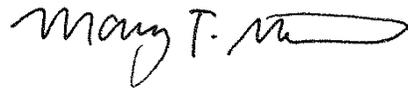
B. CONCLUSION

For the reasons discussed here and in the opening brief, this Court should remand for the trial court strike or modify several community custody conditions.

DATED this 20th day of December, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift", with a horizontal line extending to the right from the end of the signature.

---

MARY T. SWIFT  
WSBA No. 45668  
Office ID No. 91051

Attorneys for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**December 20, 2018 - 2:18 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51688-8  
**Appellate Court Case Title:** State of Washington, Respondent v. Michael Novcaski, Appellant  
**Superior Court Case Number:** 17-1-00653-2

**The following documents have been uploaded:**

- 516888\_Briefs\_20181220141524D2584315\_6412.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was RBOA 51688-8-II.pdf*

**A copy of the uploaded files will be sent to:**

- EJany@co.grays-harbor.wa.us
- appeals@co.grays-harbor.wa.us

**Comments:**

Copy mailed to: Michael Novcaski, 405901 Washington Corrections Center PO Box 900 Shelton, WA 98584-

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Mary Swift - Email: swiftm@nwattorney.net (Alternate Email: )

Address:  
1908 E. Madison Street  
Seattle, WA, 98122  
Phone: (206) 623-2373

**Note: The Filing Id is 20181220141524D2584315**