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NO. 52187-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

GARY LARSON,

Appellant.

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

The Honorable Christopher X. Melly, Judge

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Mr. Larson is the father of a minor son. After Mr. Larson pleaded guilty to two counts of rape of a child in the first degree, the court, at sentencing, ordered as a condition of community custody that Larson not have contact with minors unless authorized by DOC.

Seven years later, Mr. Larson motioned the trial court to authorize contact with his son, now nine-years-old. At the state's urging, the court found the motion time-barred under RCW 10.73.090(1) and denied Mr. Larson relief.

Mr. Larson's request for modification of the no-contact condition was not time-barred because Mr. Larson's judgment and sentence is facially invalid due to the trial court having imposed improper and unconstitutional community custody conditions related to contact with minors and use of the internet.

This court should grant Mr. Larson's appeal and remand his case to the trial court to allow Larson to request contact with his son unrestricted by arbitrary DOC limitations. The trial court previously, in open court, expressed its approval of contact between Mr. Larson and his son.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Larson's motion to modify the judgment and sentence to allow contact with his minor son time-barred.

2. The trial court erred when it denied Mr. Larson's timely request to modify the community condition of "no contact with minors" to allow him contact with his minor son.¹

3. The trial court erred in imposing a community custody condition requiring Mr. Larson not enter into, frequent, or loiter at places where children tend to congregate except as authorized by his community corrections officer.²

4. The trial court erred in imposing a community custody condition requiring Mr. Larson not possess any devices capable of accessing the internet unless authorized by his community corrections officer.³

5. The trial court erred in imposing a community custody condition requiring Mr. Larson not access the internet without first authorized by his community corrections officer.⁴

¹ Community custody condition 7. CP 67.

² Community custody condition 19. CP 67.

³ Community custody condition 26. CP 68.

⁴ Community custody condition 27. CP 68.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in finding Mr. Larson's request to modify the trial court's community custody conditions to allow him contact with his minor son was time-barred when invalid community custody conditions made the judgment and sentence facially invalid?

2. Without first determining whether the order was reasonably necessary to serve a compelling state interest, did the trial court err when it interfered with Mr. Larson's constitutional right to parent his minor son by imposing a no-contact condition which would not expire until his son reached the age of majority or DOC moved to rescind the condition?

D. STATEMENT OF THE CASE

In 2011, the state charged Gary Larson with two counts of rape of a child in the first degree. CP 53. The victim was a friend's young daughter born in June 1998. Supplemental Designation of Clerks' Papers (Supp. DCP), Presentence Report (PSI) at 2-5. The incidents occurred between June 10, 2002, and June 11, 2010. CP 53.

In July 2011, Mr. Larson pleaded guilty to both counts. CP 53. At the court's request, DOC prepared a PSI. Supp. DCP, PSI. Mr. Larson, hoping to receive an alternative sex offender sentence, underwent an

evaluation process. The evaluator filed his report and recommendation in December 2011. Supp. DCP, Psychosexual Evaluation and Treatment Plan.

At the November 2011 sentencing, the court declined to impose an alternative sex offender treatment sentence and instead sentenced Mr. Larson to an indeterminate sentence with a minimum term of 120 months and a maximum term of life. CP 56-57. The sentence also obligated Mr. Larson to be on lifetime community custody. CP 57. The court imposed community custody conditions listed on the judgment and sentence to include on Appendix F. CP 57-59, 67-68. Among these conditions are:

7. You shall not contact or communicate with: Minor children under the age of 18 unless given prior written permission by CCO and SOTP therapist.
19. Do not enter into, frequent or loiter at places where children tend to congregate except as authorized by CCO.
26. You shall not possess any devices that are capable of accessing the Internet unless previously authorized to do so by CCO.
27. You shall not access the Internet through any device without the prior authorization of your CCO.

CP 67-68.

Without regard to Mr. Larson's right to parent his biological son, Dakota, then age 2, the court's broadly worded community custody

condition to not have contact with “minor children unless expressly authorized by DOC” prevented Mr. Larson from contact with his son. Supp. DCP, PSI at 6; RP 4-7. Although Mr. Larson had had regular contact with his son pending charges, once he was transferred to a DOC facility, DOC refused to allow him contact with his minor son because of the court’s broad order disallowing contact with minors. RP 6-7, 34; CP 50.

On June 6, 2017, Mr. Larson filed a Motion of Resumption of Visitation Rights with Biological Son. CP 50-53.

His son was eight years old when Mr. Larson filed his motion for visitation. PSI at 6.

The state argued the motion was time-barred under RCW 10.73.090.⁵ CP 43-44; RP 28. Mr. Larson filed a reply brief on February 16,

⁵ (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
(3) For the purposes of this section, a judgment becomes final on the last of the following dates:
(a) The date it is filed with the clerk of the trial court;
(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction.

2018, arguing the motion was not untimely as his judgment and sentence was facially invalid because of the court having imposed improper community custody conditions and a facially invalid judgment and sentence meant no time clock was running. CP 9-26.

The court heard Mr. Larson's motion on February 28. RP 24-37. Mr. Larson appeared for the hearing by phone. RP 24-37. The state asked the court to deny the request as time-barred. RP 28. The court encouraged Mr. Larson to find relief through DOC approving contact. RP 30-36. The hearing ended with the court telling DOC it has "no quarrel" with Mr. Larson visiting his son. RP 35. The prosecutor also expressed a lack of concern with visitation between the father and son. RP 36. The court found Larson's request to modify the condition time-barred. RP 33-34; CP 8.

In finding the request time-barred, the court did not specifically address Mr. Larson's argument challenging the facial invalidity of the judgment and sentence and the consequent lack of a running clock. RP 24-37. Mr. Larson moved this court for discretionary review of the trial

court's decision. CP 7. This court approved his appeal as a matter of right per RAP 2.2(a)(13).⁶

E. ARGUMENT

Issue 1: The trial court erred in finding Mr. Larson's request to modify the judgment and sentence to allow contact with his minor son time-barred.

Contrary to the trial court's ruling, Mr. Larson's request to modify a community custody condition to allow contact with his son was not time-barred as improperly imposed conditions of community custody made the judgment and sentence facially invalid. This court should reverse the condition denying Mr. Larson's relief as time-barred. His case should be remanded to the trial court for reconsideration of Mr. Larson's requested relief, to have contact with his son, especially as the trial court and the prosecutor supported Mr. Larson having contact with his minor son. RP 31, 36.

a. Facially invalid conditions are reviewable under RCW 10.73.090.

A petition challenging a judgment and sentence generally must be filed within one year after the judgment becomes final. RCW

⁶ The appellate court limited the appeal to those matters addressed in the trial court's February 28, 2018, order.

10.73.090(1).⁷ The time limit may be avoidable if the judgment and sentence is invalid on its face. RCW 10.73.090(1). A judgment is invalid on its face under RCW 10.73.090(1) where the trial court exceeded its statutory authority in entering the judgment or sentence. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 135, 267 P.3d 324 (2011).

“Invalid on its face” is a term of art that, like many terms of art, obscures, rather than illuminates its meaning. *Coats*, 173 Wn.2d at 133-40. Generally, a judgment and sentence is not valid on its face if it demonstrates that the trial court did not have the power or the statutory authority to impose the judgment or sentence. “Invalid on its face” does

⁷ (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
(3) For the purposes of this section, a judgment becomes final on the last of the following dates:
(a) The date it is filed with the clerk of the trial court;
(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

not mean that the trial judge committed some legal error. *In re Scott*, 173 Wn.2d 911, 916, 271 P.3d 218 (2012). Rather, the general rule is that a judgment and sentence is not valid on its face if the trial judge exercised authority (statutory or otherwise) it did not have. *Id.*, at 917.

In addition, a judgment and sentence is invalid on its face if it reveals the invalidity without further elaboration. *See In Re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002).

Mr. Larson filed his motion for relief more than one year after finality of his case. Therefore, RCW 10.73.090(1) arguably barred the petition as untimely unless the judgment and sentence was invalid on its face. RCW 10.73.100.⁸ Mr. Larson submits the challenge to the facial

⁸ The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds: (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion; (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct; (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution; (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction; (5) The sentence imposed was in excess of the court's jurisdiction; or (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the

validity of his judgment and sentence is nevertheless reviewable under RCW 10.73.090(1). *In re Hankerson*, 149 Wn.2d 695, 704, 72 P.3d 703 (2003).

b. The conditions of being in places where children congregate and denial of internet access are improper and thus reviewable.

The trial court's imposition of improper community custody conditions makes the judgment and sentence facially invalid. Under the due process clause, a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Thus, a condition of community custody is unconstitutionally vague if it fails to do either. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

i. The prohibition on frequenting or loitering at places where children tend to congregate except as authorized by a community corrections officer is facially invalid.

Condition 19, which purports to bar Mr. Larson frequenting or loitering at places where “minor children are known to congregate” is facially invalid.

In *Irwin*, this Court struck the same condition of community custody on vagueness grounds:

While *Bahl* and *Sansone* involved the intractably undefinable term “pornography,” this case simply requires ordinary people to understand where “children are known to congregate.” But, as *Irwin* points out, whether that would include “public parks, bowling alleys, shopping malls, theaters, churches, hiking trails” and other public places where there may be children is not immediately clear. Trial counsel requested that, rather than leave the definition of this condition to the discretion of the CCO, the court should list prohibited places as examples. When presented with this argument at sentencing, the trial court explained that that [sic] *Irwin* should not “frequent areas of high concentration of children.” But, the final condition did not include that clarification.

...

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. But, although that would help the condition satisfy the first prong of the vagueness analysis, it would leave the condition vulnerable to arbitrary enforcement. See *Bahl*, 164 Wn.2d at 753, 193 P.3d 678; *Sansone*, 127 Wn. App. at 639, 111 P.3d 1251. The potential for arbitrary

enforcement would render the condition unconstitutional under the second prong of the vagueness analysis. See *Bahl*, 164 Wn.2d at 753, 193 P.3d 678. Therefore, this court reverses the trial court, strikes the condition as being void for vagueness, and remands to the trial court for resentencing.

State v. Irwin, 191 Wn. App. 644, 654-55, 364 P.3d 830 (2015) (internal footnotes omitted); *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005).

ii. The ban on internet access and computer possession or access violates substantive due process because it is overbroad.

The requirement that Mr. Larson gain his CCO's approval before accessing the Internet or even possessing any devices capable of accessing the internet is unconstitutionally overbroad.⁹

"Overbreadth is a question of substantive due process—whether the statute is so broad that it prohibits constitutionally protected activities as well as unprotected behavior." *State v. McBride*, 74 Wn. App. 460, 464, 873 P.2d 589 (1994). Overbreadth doctrine creates a limited exception to the general rule that a party "will not be heard to challenge [a] statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."

⁹ Community custody conditions 26 and 27. CP 68.

Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Washington courts apply federal overbreadth analysis to these challenges. *State v. Talley*, 122 Wn.2d 192, 210, 858 P.2d 217 (1993). While overbreadth challenges usually invoke First Amendment challenges to the United States Constitution rights, Washington courts have applied overbreadth analysis to other constitutionally protected rights. *See State v. Lee*, 135 Wn.2d 369, 389–90, 957 P.2d 741 (1998) (applying overbreadth analysis to an anti-stalking statute and determining that the statute did not improperly infringe on the constitutional right to travel and move freely in public places); *McBride*, 74 Wn. App. at 465 (applying overbreadth analysis to a statute prohibiting drug traffickers from frequenting areas known for drug activity and noting that such an analysis applies regardless of whether the constitutional right involved is free speech or the right to move about freely and travel).

The first step in overbreadth analysis is determining if a statute reaches constitutionally protected conduct. *McBride*, 74 Wn. App. at 464. “Statutes which regulate behavior and not purely speech will not be overturned unless the overbreadth is both real and substantial in relationship to the conduct legitimately regulated by the statute.” *Id.*

Even if a statute is substantially overbroad, it “will be overturned only if the court is ‘unable to place a sufficiently limited construction upon the standardless sweep of [the] legislation.’” *Id.* (alteration in original) (internal quotation marks omitted), quoting *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990).

Overbreadth analysis measures how statutes (or conditions of community custody) that prohibit conduct fit within the universe of constitutionally protected conduct. See *State v. Halstien*, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). A condition of community custody is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment. *Id.* Offenders on community custody have a right to access and transmit material protected by the First Amendment. *Bahl*, 164 Wn.2d at 753.

The First Amendment “embraces the right to distribute literature, and necessarily protects the right to receive it.” *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). It protects material disseminated over the internet and by the means of communication devices used prior to the high-tech era. *Reno v. ACLU*, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Restrictions upon access to the Internet necessarily curtail First Amendment rights.

Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004). A total ban on internet access would unreasonably encroach on protected liberties because such a ban “prevents use of e-mail, an increasingly widely used form of communication and . . . prevents other common-place computer uses such as ‘do[ing] any research, get[ting] a weather forecast, or read[ing] a newspaper online.’” *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (citation omitted).

The requirement that Mr. Larson gains his CCO’s approval before his access to or use of the internet, computer, cell phones or any other device capable of accessing the internet for all purposes is unconstitutionally overbroad. This condition restricts lawful use of a computer device and deprives Mr. Larson of the easiest way to pay his bills, check the weather or road conditions, stay on top of current events, and keep in touch with friends. *See Bahl*, 137 Wn. App. at 714-15 (a community custody condition is overbroad if the condition encompasses matters that are not crime related).

The importance of having access to a computer, thus allowing access to the Internet has been expressed by several courts. “Computers and Internet access have become virtually indispensable in the modern

world of communications and information gathering.” *United States v. Peterson*, 248 F.3d 79, 83-84 (2d Cir. 2001). The Supreme Court has characterized the Internet as “a vast library including millions of readily available and indexed publications....” *Reno*, 521 U.S. at 853. In 2004, there are approximately 233.1 million users of the internet. *Ashcroft*, 542 U.S. 656.

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail (e-mail), automatic mailing list services (‘mail exploders,’ sometimes referred to as ‘listservs’), ‘newsgroups,’ ‘chat rooms,’ and the ‘World Wide Web.’ All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium—known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet. E-mail enables an individual to send an electronic message—generally akin to a note or letter—to another individual or to a group of addressees.” (*Reno v. American Civil Liberties Union, supra*, 521 U.S. at p. 851, 117 S.Ct. 2329.) “[P]ublic debate is enabled by removing perhaps the most significant cost of human interaction—synchronicity. I can add to your conversation tonight; you can follow it up tomorrow; someone else, the day after.” (Lessig, *Code and Other Laws of Cyberspace* (1999) p. 10 (Lessig).)

...

“The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since

the founding [of the Republic]. Two hundred years after the framers ratified the Constitution, the Net has taught us what the First Amendment means... The model for speech that the framers embraced was the model of the Internet-distributed, noncentralized, fully free and diverse.” (Lessig, *supra*, at pp. 167, 185.) “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.” (*Reno v. American Civil Liberties Union*, *supra*, 521 U.S. at p. 870, 117 S.Ct. 2329.)

In re Stevens, 119 Cal.App.4th 1228, 1236, 15 Cal.Rptr.3d 168, 172 (2004).

The Court in *United States v. Perazza-Mercado* noted the necessity of the Internet is in today’s connected world:

Moreover, we must be cognizant of the importance of the internet in today’s world. An undue restriction on internet use “renders modern life—in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website—exceptionally difficult.” *United States v. Holm*, 326 F.3d 872, 878 (7th Cir.2003); *see also United States v. Voelker*, 489 F.3d 139, 145 (3d Cir.2007) (“The ubiquitous presence of the internet and the all encompassing nature of the information it contains are too obvious to require extensive citation or discussion.”); *United States v. Peterson*, 248 F.3d 79, 83 (2d Cir.2001) (“Computers and Internet access have become virtually indispensable in the modern world of communications and information gathering.”). In addition, there are many legal activities on the internet that are not easily conducted in public. For example, online banking or managing medical records are

potentially important activities that one might not wish to conduct in public because of a legitimate interest in keeping the information private.

553 F.3d 65, 72-73 (1st Cir. 2009).

Courts have upheld conditions barring internet access in cases of sexual abuse of a minor only where the offender used the internet to engage in predatory behavior, such as by soliciting sexual contact with children or by otherwise personally endangering children. *See, e.g., United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999) (upholding condition restricting all internet access where defendant used internet to contact young children and solicit inappropriate sexual contact with them). But there was no evidence that Mr. Larson used the computer or the Internet to access the child.

The result of this blanket ban in Mr. Larson's case is it essentially denies him the ability to communicate with others, access mail, newspapers, books, and magazines, etc. This ban is overbroad because it impermissibly infringes on core First Amendment rights. *See Peterson*, 248 F.3d at 83 ("Although a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones. Nor would defendant's proclivity toward pornography justify a ban on all books,

magazines, and newspapers. We believe this restriction was overbroad and therefore was not ‘reasonably related’ to Peterson’s offense or his history and characteristics”).

The blanket ban on Mr. Larson’s access to computers and the Internet was overbroad and violated the First Amendment. These conditions further evidence the facial invalidity of Mr. Larson’s judgment and sentence.

c. The facial invalidity of the judgment and sentence requires remand for its correction and affords Mr. Larson the opportunity to address the court regarding contact with his son.

The improperly imposed community custody conditions prevents changes to Mr. Larson’s judgment and sentence from being time-barred. Mr. Larson is entitled to return to the superior court and request a change to the provision preventing him from contact with his young son.

Issue 2: The court imposed a no-contact condition that impermissibly restricts Mr. Larson’s constitutional right to have a relationship with his minor son.

The trial court violated Mr. Larson’s fundamental right to parent when it entered a broad no-contact condition preventing him from having contact with his son until his son reached majority at age 18 unless DOC took action to modify or rescind the no-contact condition.

a. Mr. Larson has a constitutional right to have a relationship with his son.

A parent has a fundamental liberty and privacy interest in the care, custody and enjoyment of his child. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). A sentencing court may not impose a no-contact order between a defendant and his biological child as a matter of routine practice. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010). Before imposing an order that restricts contact between a parent and child, the court must consider whether the order barring all contact is “reasonably necessary in scope and duration to prevent harm to the child.” *Id.* at 381. Both the duration of the order and the restrictions on contact must be reasonably necessary to protect the child. *Id.*

As part of Mr. Larson’s sentence, the court prohibited him from having contact with “minor children.” CP 67. His son was not the victim. Instead, Mr. Larson knew the victim through a close family friend.

Before resolution of these charges, and while in custody at the Clallam County Jail, the court allowed Mr. Larson to visit with his son while

under the supervision of an adult. The court's broad no contact with minors community custody condition effectively bars any contact between Mr. Larson and his son.

b. The sentencing condition barred Mr. Larson from having any contact with his son without considering reasonable alternatives.

Even a parent convicted of a sexual offense involving a child is not automatically prohibited from having contact with his own children, including a limitation on only supervised contact. *State v. Letourneau*, 100 Wn. App. 424, 441, 997 P.2d 436 (2000). A years-long no-contact provision is a draconian prohibition that must be justified. *Rainey*, 168 Wn.2d at 381.

When imposing a no-contact order as part of a criminal sentence, the order may not impact a parent's right to contact his child unless the state presents evidence and the court finds the limitations are reasonably necessary to protect the child from harm. *Rainey*, 168 Wn.2d at 381; *Letourneau*, 100 Wn. App. at 441.

In *Letourneau*, the court rejected a no-contact order entered as a sentencing condition that permitted only supervised contact between a mother and her minor children. 100 Wn. App. at 437. The defendant was convicted of two counts of rape of a child in the second degree for her illicit

relationship with a minor student, but she was also the mother of three young children whom she had not been accused of mistreating. *Id.* at 442.

While recognizing the state's interest in preventing harm to Letourneau's children, the court found the restriction allowing only supervised contact was not reasonably necessary. *Id.* at 441. The *Letourneau* court further noted there are "more appropriate forums than the criminal sentencing process to address the best interests of dependent children" regarding their contact with their parents, such as family court for dissolution issues and juvenile court for dependency matters. *Id.* at 443. In these more appropriate forums, a guardian ad litem could investigate the children's needs regarding their relationship with their mother, or offer the children "professional intervention" as the individual circumstances required. *Id.* at 442. In sum,

[i]t is the business of the family and juvenile courts to address the best interests of minor children with respect to most other kinds of harm that could arise during visitation with a parent who has been convicted of a crime, including psychological harm that might arise from that parent's communications with the children regarding the crime. To that end, the family and juvenile courts . . . have broad discretion to tailor orders that address the needs of children in ways that sentencing courts in criminal proceedings cannot. Sentencing courts in criminal proceedings must necessarily operate within the limitations on court discretion contained in the SRA.

Id.

Similarly to *Letourneau*, Mr. Larson has a child not involved in his offenses. Supp. DCP, PSI at 2. But the court's no-contact condition prohibits any contact between Mr. Larson and his son until his son, arbitrarily, reaches his majority at age 18. The court's order effectively barred Mr. Larson from sending letters or having telephone calls with his son. The court gave no reason for the "until no longer a minor" duration of the order barring contact which undermines the lawfulness of the court's order. See *Rainey*, 168 Wn.2d at 381.

What is reasonably necessary to protect the state's interests can change over time. The command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the state's interests. The restriction's length must also be reasonably necessary. See *State v. Gitchel*, 5 Wn. App. 93, 94–95, 486 P.2d 328 (1971) (holding "unhesitatingly" that a sentencing condition banishing the defendant from the state forever would be unconstitutional); *In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 311, 12 P.3d 585 (2000) (approving of *Gitchel* as "quite proper[]"); cf. *State v. Warren*, 165 Wn.2d 17, 34–35, 195 P.3d 940 (2008) (upholding a lifetime no-contact order when the

defendant had been convicted of murder and of beating the subject of the order, who had testified against the defendant).

The broad no contact with minors restriction may not be ordered without the state demonstrating it is reasonably necessary to realize a compelling state interest. *Rainey*, 168 Wn.2d at 381-82. Because the sentencing condition implicates Mr. Larson's fundamental constitutional right to parent his son, the state must show that no less restrictive alternatives would prevent harm to him. *Id.* Any limitations must be narrowly drawn. *Id.*

c. The remedy is to strike the no-contact provision and impose only reasonably necessary conditions involving contact with the son.

Any condition that limits Mr. Larson's ability to exchange letters, telephone calls, or have visits with his son must be predicated on proven findings regarding necessary limitations on contact. The sentencing condition barring any contact between Mr. Larson and his son until he reaches majority at 18 should be stricken and, at a new sentencing hearing, the court should consider the reasonable alternatives after conducting the necessary fact-specific inquiry regarding the needs of Mr. Larson's son. *Rainey*, 168 Wn.2d at 382.

F. CONCLUSION

This court should remand Mr. Larson's case to the trial court where the trial court can act on its stated interest, and the interest of the state, in allowing Mr. Larson contact with his son and by deleting the sentencing conditions that are unconstitutional or facially invalid.

Respectfully submitted October 7, 2018.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', written over a horizontal line.

LISA E. TABBUT/WSBA 21344
Attorney for Gary Larson

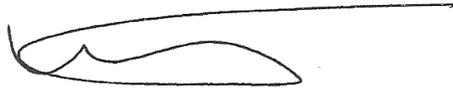
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I filed the Brief of Appellant to (1) Clallam County Prosecutor's Office, at jespinoza@co.clallam.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Gary Larson, DOC#350625, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001.

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

Signed October 7, 2018, 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 Gary Larson, Appellant

LAW OFFICE OF LISA E TABBUT

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