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Court of Appeals  
Division II  
State of Washington  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

GARY LARSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 11-1-00064-7

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court properly dismissed Larson's petition to modify the judgment and sentence because Larson did not establish that the condition prohibiting contact with minors without DOC approval was invalid on its face?
2. Whether the court was required to dismiss Larson's mixed petition because Larson failed to establish facial invalidity for each of the conditions of community custody he alleged to be invalid?

## **II. STATEMENT OF THE CASE**

The defendant entered a plea of guilty to two counts of Rape of a Child in the First Degree. CP 53. At sentencing on Nov. 9, 2011, the trial court imposed community custody and ordered, "You shall not have direct or indirect contact with the following specified class of individuals: minor children unless expressly authorized by DOC." CP 57, 58. The court adopted community custody conditions recommended by the Dept. of Corrections including the corresponding condition no. 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." CP 67.

On June 6, 2017, Larson filed a petition to modify the judgment and sentence to allow him to have contact with his minor son. CP 47. The State responded that the motion was time-barred under RCW 10.73.100. CP 43-44.

Larson filed a reply arguing that his petition was not time-barred because the judgment and sentence was not facially valid. CP 9–26. More specifically, Larson asserted, “The prohibitions set forth in the judgment and sentence are unconstitutionally vague or not crime related and require modification in order to avoid arbit[r]ary interpretation.” CP 9. “Because some of the conditions imposed in the original judgment and sentence are unconstitutionally vague or are not crime-related, as will be further elaborated below, the judgment and sentence itself is invalid on its face.” CP 10.

In his reply, Larson expanded his motion to modify the judgment and sentence challenging conditions 12, 19, 20, 26, and 27 on pages 15 and 16, Appendix F, in the judgment and sentence “as being unconstitutionally vague or not crime-related and therefore, facially invalid.” CP 11, 67, 68; RP 31–32 (Feb. 28, 2018).

On Feb. 28, 2018 trial court entered an “order dismissing the motion to modify judgment and sentence due to it being time-barred.” CP 8.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT PROPERLY DISMISSED LARSON'S PETITION AS TIME-BARRED UNDER RCW 10.73.090 BECAUSE LARSON FAILED TO ESTABLISH ANY EXCEPTION.**

“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.” RCW 10.73.090(1).

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, . . . ;
- (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 . . . ;
- (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, . . . .

RCW 10.73.100 (Collateral attack—When one year limit not applicable)(emphasis added).

“[T]o avoid RCW 10.73.090's one-year time bar on challenging judgments that are valid on their face, the error must render the judgment and sentence “invalid.” Not every error renders a judgment and sentence “invalid.”” *In re Coats*, 173 Wn.2d 123, 135, 267 P.3d 324 (2011) (citing *In re Pers. Restraint of McKiearnan*, 165 Wn.2d 777, 783, 203 P.3d 375 (2009)).

“Second, the judgment and sentence must be valid “on its face.” “On its face” modifies “valid.” Put another way, for the petitioner to avoid the one-year time bar, he or she must show that the judgment and sentence is “facially invalid.”” *In re Coats*, 173 Wn.2d at 138 (*In re Pers. Restraint of LaChapelle*, 153 Wn.2d 1, 6, 100 P.3d 805 (2004) (citing *In re Pers.*

*Restraint of Goodwin*, 146 Wn.2d 861, 865–67, 50 P.3d 618 (2002)).

Here, Larson fails to establish that the court’s order prohibiting contact with minors was facially invalid. Therefore the trial court did not err in finding the petition to be time-barred.

**1. The no contact condition was not facially invalid because the trial court had statutory authority to impose it.**

“[A] careful review of our cases reveals that we have found errors rendering a judgment invalid under RCW 10.73.090 only where a court has in fact exceeded its statutory authority in entering the judgment or sentence.” *In re Coats*, 173 Wn.2d at 135.

“As we reasoned in *Stoudmire* and *Thompson*, under RCW 10.73.090(1), ‘invalid on its face’ means the judgment and sentence evidences the invalidity without further elaboration.” *In re Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002) (citing *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 354, 5 P.3d 1240 (2000); *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000)).

A trial court has authority to impose a community custody condition when the legislature has authorized it. *See State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009).

“As part of any term of community custody, the court may order an offender to: . . . (b) *Refrain from direct or indirect contact with the victim of*

*the crime or a specified class of individuals[.]*” RCW 9.94A.703(3)(b) (emphasis added).

Here, the court ordered community custody (CP 57) and ordered Larson: “You shall not have direct or indirect contact with the following specified class of individuals: minor children unless expressly authorized by DOC.” CP 58. Larson contested this condition in his petition. CP 11. RCW 9.94A.703(3)(b) authorizes the court to order the defendant to refrain from having contact with a specified class of individuals. The court followed the language of the RCW 9.94A.703(3)(b) almost to the letter. The statute clearly authorizes the no contact condition. Further elaboration is required to establish an invalidity as to this condition. *In re Goodwin*, 146 Wn.2d at 866.

Moreover, at sentencing, a defendant's freedom of association may be restricted when reasonably necessary to accomplish the state's interest in protecting the public. *State v. Riley*, 121 Wn.2d 22, 37–38, 846 P.2d 1365 (1993) (citing *Malone v. United States*, 502 F.2d 554, 556 (9th Cir.1974), *cert. denied*, 419 U.S. 1124, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975)).

Here, Larson was convicted of two counts of Rape of a Child in the First Degree. Conditions requiring no contact with minors have been upheld as furthering a State's interest in protecting the public. *See State v. Corbett*, 158 Wn. App. 576, 601, 242 P.3d 52 (2010) (upholding condition prohibiting contact with defendant's own children and all other minors without DOC

approval). Further elaboration is required to show how the no contact condition in this case would be invalid.

Therefore, the condition was not facially invalid because the court was authorized by legislature to impose it. *In re Coats*, 173 Wn.2d at 135.

**2. Larson’s challenges to additional community custody conditions turned his petition to modify the judgment and sentence into a mixed petition which was properly dismissed.**

Larson argues that *other* conditions of community custody imposed were facially invalid, and therefore his petition should not have been time barred. *See* Appellant’s Br. at 19. This argument fails to recognize that the additional claims in the Larson’s reply brief turned his petition into a mixed petition which is subject to dismissal without further consideration.

“Where one or more of the grounds asserted for relief fall within the exceptions in RCW 10.73.100 and one or more do not, then the petition is a ‘mixed petition’ that must be dismissed.” *In re Turay*, 150 Wn.2d 71, 85–86, 74 P.3d 1194 (2003) (citing *In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 702–03, 72 P.3d 703 (2003); *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 349, 5 P.3d 1240 (2000)).

“Therefore, once the court determines that any one of the claims raised does not fall within an exception, the petition must be dismissed without any further consideration.” *In re Turay*, 150 Wn.2d at 86 (citing *Hankerson*, 149 Wn.2d at 702–03). “The court will not advise as to which

claims are time barred and which are not, nor will the court decide claims under RCW 10.73.100 that are not time barred.” *In re Turay*, 150 Wn.2d at 86 (citing *Hankerson*, 149 Wn.2d at 703).

Here, Larson failed to point out to the trial court any authority which holds that the trial court lacked statutory authority to impose a community custody condition requiring no contact with minors. Therefore, Larson’s mixed petition was properly dismissed because Larson failed to establish that *all* the challenged conditions were facially invalid.

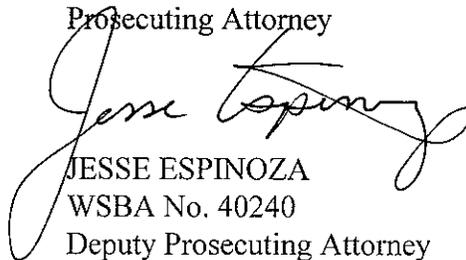
#### IV. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court’s Feb. 28, 2018 order dismissing the petition to modify the judgment and sentence.

Respectfully submitted this 28th day of December, 2018.

Respectfully submitted,

MARK B. NICHOLS  
Prosecuting Attorney

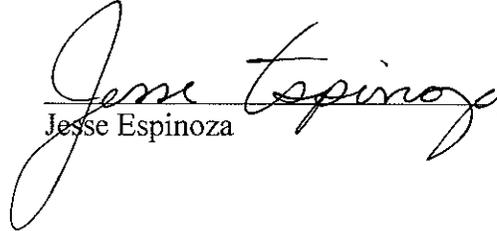


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**CERTIFICATE OF DELIVERY**

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lisa E. Tabbut on December 28, 2018.

MARK B. NICHOLS, Prosecutor

  
Jesse Espinoza

**CLALLAM COUNTY DEPUTY PROSECUTING ATTORN**

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**Transmittal Information**

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**Appellate Court Case Title:** State of Washington, Respondent v. Gary M. Larson, Appellant  
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