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COA NO. 54086-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID MICHAEL FORD,

Appellant.

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

The Honorable Jerry Costello, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. RCW 9.61.260(1)(b), the cyberstalking statute under which appellant was convicted, is facially overbroad in violation of the First Amendment to the United States Constitution and Article 1, Section 5 of the Washington Constitution.

2. The court erred in imposing community custody conditions related to internet use. CP 103, 118.

3. The court erred in imposing an exceptional sentence.

4. The court erred in imposing "psychosexual" evaluation and treatment as a condition of community custody. CP 103, 117.

5. The court erred in imposing collection and supervision costs in the judgment and sentence. CP 93, 96, 103, 117.

Issues Pertaining to Assignments of Error

1. Whether RCW 9.61.260(1)(b), in criminalizing speech made with intent to embarrass, intimidate, harass or torment by means of repeated or anonymous electronic communication, is facially overbroad in violation of the First Amendment to the United States Constitution and Article 1, Section 5 of the Washington Constitution because it sweeps a substantial amount of protected speech within its prohibition and is not narrowly tailored to achieve a compelling state interest?

2. Whether the internet-related conditions of community custody should be modified to avoid a violation of appellant's free speech rights under the First Amendment?

3. Whether the court erred in imposing an exceptional sentence because one of its reasons for imposing an exceptional sentence is unsupported by law, and the record does not show the court would necessarily have imposed an exceptional sentence otherwise?

4. Whether the court erroneously ordered "psychosexual" evaluation and treatment as a condition of community custody because it did not find a statutorily defined mental illness contributed to the offense?

5. Whether the orders to pay the cost of collecting legal financial obligations and the cost of supervision should be struck from the judgment and sentence as clerical errors because the record shows the court did not intend to impose these obligations?

B. STATEMENT OF THE CASE

David Ford and Christina Nieland were involved in a brief sexual relationship. 1RP¹ 481, 486. Nieland has associative identity disorder, meaning she has three personalities, one of whom is sexually promiscuous.

¹ This brief cites to the verbatim report of proceedings as follows: 1RP – seven consecutively paginated volumes consisting of 9/9/19, 9/10/19, 9/11/19, 9/12/19, 9/16/19, 9/17/19, 9/18/19, 9/19/19, 9/20/19; 2RP – 12/6/19.

1RP 482-85, 529. After Nieland expressed her desire to end the relationship, Ford threatened to expose their affair to Nieland's estranged husband if she did not send him sexual photos and videos of herself and otherwise continue their relationship. 1RP 488-89. Ford communicated with Nieland via text message, Facebook, and Facebook Messenger on multiple occasions, at times using unsavory language and sending depictions of himself in the nude. 1RP 488-528, 579, 600-18, 628-30. Ford also threatened to send sexual material related to their relationship to Nieland's 18-year-old stepdaughter. 1RP 516-17, 559-60, 579-80, 597-98, 741. Ford later contacted Nieland's stepdaughter on Facebook about Nieland's affair and sent sexual depictions of Nieland to her via Facebook Messenger as proof. 1RP 696-97, 790-91, 796-97.

The to-convict instruction permitted the jury to convict Ford of cyberstalking if it found beyond a reasonable doubt that he intended to harass, intimidate, torment or embarrass another by means of a repeated electronic communication. CP 49, 51. Ford stipulated that he had previously been convicted of a no-contact order violation. CP 48. The jury returned general guilty verdicts on one count of second degree extortion and two counts of cyberstalking as well as a special verdict that the extortion offense was committed with sexual motivation. CP 58, 60-62.

The court imposed an exceptional sentence by running the extortion count consecutively to the other counts for a total sentence of 69 months in prison. CP 92, 95, 101. The court found "substantial and compelling reasons for an exceptional sentence due to defendant's high offender score exceeding 9 points and no punishment for two counts of cyberstalking and for the sexual motivation finding under the extortion count." CP 101. The court also imposed 36 months of community custody. CP 96. This appeal follows. CP 109.

C. ARGUMENT

1. THE CYBERSTALKING STATUTE IS OVERBROAD, RENDERING IT FACIALLY UNCONSTITUTIONAL.

RCW 9.61.260(1)(b) makes it a crime to repeatedly or anonymously send an electronic communication with the intent to embarrass, intimidate, harass or torment another. The cyberstalking statute is facially overbroad in violation of the First Amendment of the United States Constitution and Article 1, Section 5 of the Washington Constitution because it sweeps a substantial amount of constitutionally protected free speech activities into its prohibition. Also, the law is a content-based restriction that does not survive strict scrutiny. Ford's cyberstalking convictions must be reversed.

a. The cyberstalking statute criminalizes anonymous or repeated electronic communications made with intent to embarrass, intimidate harass or torment.

Enacted in 2004, RCW 9.61.260 provides in relevant part:

(1) A person is guilty of cyberstalking if he or she, *with intent to harass, intimidate, torment, or embarrass any other person*, and under circumstances not constituting telephone harassment, *makes an electronic communication to such other person or a third party*:

(a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;

(b) *Anonymously or repeatedly whether or not conversation occurs*; or

(c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.

...

(5) For purposes of this section, "electronic communication" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. "Electronic communication" includes, but is not limited to, electronic mail, internet-based communications, pager service, and electronic text messaging. (emphasis added)

b. RCW 9.61.260(1)(b) goes too far in sweeping constitutionally protected free speech activities within its prohibition.

"Constitutional challenges are questions of law subject to de novo review." Amunrud v. Board of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). A challenge to the constitutionality of the statute may be raised for the first time on appeal under RAP 2.5(a)(3). Wenatchee Reclamation Dist. v. Mustell, 35 Wn. App. 113, 119, 665 P.2d 909 (1983).

A statute violates the First Amendment on its face when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." United States v. Stevens, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010). The overbreadth analysis under Article I, Section 5 follows the First Amendment. Bradburn v. N. Cent. Reg'l Library Dist., 168 Wn.2d 789, 804, 231 P.3d 166 (2010).

A law is overbroad "if it sweeps within its prohibitions constitutionally protected free speech activities." State v. Williams, 144 Wn.2d 197, 206, 26 P.3d 890 (2001) (quoting City of Bellevue v. Lorang, 140 Wn.2d 19, 26, 992 P.2d 496 (2000)). In this regard, criminal statutes require "particular scrutiny." Williams, 144 Wn.2d at 206. Under this "very high" standard, speech will be protected "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989) (quoting City of Houston v. Hill, 482 U.S. 451, 461, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987)). Those criminal statutes "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." Hill, 482 U.S. at 459.

"In order to preserve the vital right to free speech, it is imperative that a court carefully assess statements at issue to determine whether they fall within or without the protection of the First Amendment." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." Stevens, 559 U.S. at 470. Some categories of speech, however, are traditionally unprotected, including "libelous speech, fighting words, incitement to riot, obscenity, and child pornography." Kilburn, 151 Wn.2d at 43. True threats are also unprotected. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). The cyberstalking statute prohibits obscene speech and threats of injury. RCW 9.61.260(1)(a), (c).

The cyberstalking statute, though, is not limited to those categories of unprotected speech. RCW 9.61.260(1)(b) separately prohibits "[a]nonymously or repeatedly" "mak[ing] an electronic communication" "with intent to harass, intimidate, torment, or embarrass any other person."

Speech made with intent to embarrass is protected. The statute does not define the term "embarrass." "When a statute does not define a term, the court may consider the plain and ordinary meaning of the term in a standard dictionary." State v. Fuentes, 183 Wn.2d 149, 160, 352 P.3d 152 (2015). "Embarrass" means "to cause to experience a state of self-

conscious distress" and "to place in doubt, perplexity, or difficulties."
Webster's Third New Int'l Dictionary 1739 (1993).

"[C]itizens must tolerate insulting, and even outrageous speech, in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988).² "Speech does not lose its protected character . . . simply because it may embarrass others." N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 910, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (upholding right to publicize names of those who violated boycott of white merchants in segregated town).

In the context of considering the telephone harassment law, the Court of Appeals has intimated that harassment is not protected speech. See State v. Dyson, 74 Wn. App. 237, 244, 872 P.2d 1115 (1994) (citing Thorne v. Bailey, 846 F.2d 241, 243 (4th Cir. 1988)), review denied, 125 Wn.2d 1005, 886 P.2d 1133 (1994). That is by no means categorically true. "Courts have routinely found First Amendment protection extends to speech and conduct that society at large views as vile, politically incorrect,

² The protected speech in Hustler involved a magazine parody of Reverend Jerry Falwell that had him stating in an alleged interview that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. Hustler, 485 U.S. at 48. The parody portrayed Falwell and his mother "as drunk and immoral" and suggested Falwell "is a hypocrite who preaches only when he is drunk." Id.

or borne of hate." Williams, 144 Wn.2d at 209. In Huff, the Supreme Court held telephone calls threatening physical injury or property damage "with the intent to harass, intimidate, torment, or embarrass" was protected speech. Huff, 111 Wn.2d at 925-26.

The dictionary definition of "harass" includes "to vex, trouble, or annoy continually or chronically." Webster's Third New Int'l Dictionary 1031 (1993). The meaning of "torment" includes (1) "to cause (someone) severe suffering of body or mind: inflict pain or anguish on"; and (2) "to cause worry or vexation to." Id. at 2412. To "intimidate" means "mak[ing] timid or fearful: inspir[ing] or affect[ing] with fear: frighten[ing] . . . compel[ling] to action or inaction (as by threats)'. " Huff, 111 Wn.2d at 929 (quoting State v. Maciolek, 101 Wn.2d 259, 265, 676 P.2d 996 (1984) (quoting Webster's Third New International Dictionary 1184)).

Annoying or harassing expressive conduct does not fall outside the ambit of protected speech. State v. Immelt, 173 Wn.2d 1, 12 n.3, 267 P.3d 305 (2011). While the nonspeech elements of protected conduct may be appropriately regulated, "[e]ven criminal harassment statutes must be circumscribed to exclude protected expression." Id. Hence the need to limit the harassment statute to "true threats" — "a statement made in a context or under such circumstances wherein a reasonable person would

foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43).

The cyberstalking statute criminalizes speech made with intent to "harass, intimidate, torment, or embarrass" another by "[t]hreatening to inflict injury on the person or property of the person called or any member of his or her family or household." RCW 9.61.260(1)(c). But it also criminalizes speech that is intended to harass, intimidate, torment, or embarrass but which is not a threat. RCW 9.61.260(1)(b). That's where the constitutional problem arises.

High courts in other states have struck down similar statutes designed to prohibited harassing speech. See People v. Marquan M., 24 N.Y.3d 1, 6, 12, 19 N.E.3d 480, 994 N.Y.S. 2d 554 (N.Y. 2014) (striking down a ban on digital posts with "intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person" as facially unconstitutional); State v. Bishop, 787 S.E.2d 814, 820 (N.C. 2016) (striking down provision making it a criminal offense "for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor").

Speech intended to embarrass, annoy or worry others is a legitimate means of expression. It is used in all sorts of contexts to coerce others into changing their views or actions.³ This includes speech made with intent to intimidate. Because threats are covered by section (1)(c) of the cyberstalking statute, the intent to intimidate as applied to section (1)(b) necessarily covers speech that does not include any threats but is nonetheless designed to compel "action or inaction." Huff, 111 Wn.2d at 929. The intent "to exercise a coercive impact . . . does not remove [speech] from the reach of the First Amendment." Org. for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971).

A substantial amount of constitutionally protected speech is swept up in the cyberstalking statute's facially overbroad prohibitions. The statute covers "electronic communication" transmitted to a target person or a third party. RCW 9.61.260(1). It broadly defines "electronic communication" to encompass any digital transmission of information, including, but not limited to, "internet-based communications." RCW 9.61.260(5). The internet is a "dynamic, multifaceted category of

³ "Overall, 20% of social media users say they've modified their stance on a social or political issue because of material they saw on social media, and 17% say social media has helped to change their views about a specific political candidate." <https://www.pewresearch.org/fact-tank/2016/11/07/social-media-causes-some-users-to-rethink-their-views-on-an-issue/>

communication" that "includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue." Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

The cyberstalking statute does not merely apply to communications made from one person to another. It also applies to speech made about people to the public in cyberspace, including those on a website or through ubiquitous social media platforms such as Facebook,⁴ Twitter,⁵ Instagram⁶ and YouTube.⁷ This is significant because "the most important places (in a spatial sense) for the exchange of views" exist in cyberspace—the "vast democratic forums of the Internet" in general and "social media in particular." Packingham v. North Carolina, __U.S.__, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017) (quoting Reno, 521 U.S.

⁴ Facebook operates one of the largest social media platforms in the world, with over one billion active users. Packingham v. North Carolina, __U.S.__, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017). "About seven in ten adults in the United States use Facebook." Patel v. Facebook, Inc., 932 F.3d 1264, 1267 (9th Cir. 2019).

⁵ Twitter has over 330 million monthly active users. 22 percent of Americans are on Twitter. Kit Smith, 60 Incredible and Interesting Twitter Stats, Brandwatch (June 23, 2020), <https://www.brandwatch.com/blog/twitter-stats-and-statistics/>.

⁶ Instagram has over one billion monthly active users. Instagram, Our Story, <https://instagram-press.com/our-story/>.

⁷ YouTube has over 1.9 billion monthly active users. Kit Smith, 57 Fascinating and Incredible YouTube Statistics, Brandwatch (June 23, 2020), <https://www.brandwatch.com/blog/youtube-stats/>.

at 868). On the internet, anyone "can become a town crier with a voice that resonates farther than it could from any soapbox." Reno, 521 U.S. at 870. "Access to blogs, smartphones, and an extensive network of social media sites (not the least of which are Twitter and Facebook) have transformed all of us into potential members of the media." PG Pub. Co. v. Aichele, 705 F.3d 91, 112, n.24 (3d Cir. 2013). And "[m]any social media platforms like Twitter, Facebook, and Instagram are specifically designed for the participatory 'sharing' — or copying — of content." Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 269 (4th Cir. 2019).

Critically, the cyberstalking statute criminalizes speech directed to individuals as well as the public on matters of public concern, which the U.S. Supreme Court has recognizing as lying at "the heart" of First Amendment protection. Snyder v. Phelps, 562 U.S. 443, 451-52, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

Criticism of official action is often intended to embarrass those in power to change their viewpoints and positions on law. The First Amendment protects the principle that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" against those with whom the speaker disagrees. New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

The cyberstalking statute is unconstitutionally overbroad because it sweeps this exchange of ideas within its prohibition. "The concern with an overbroad statute stems . . . from the possibility that the threat of its application may deter others from engaging in otherwise protected expression." Dyson, 74 Wn. App. at 242. Invective, ridicule, and harsh language is often intended to criticize or call into question the actions and motives of civic leaders and other public figures. Under the cyberstalking statute, "even public criticisms of public figures and public officials could be subject to criminal prosecution and punishment if they are seen as intended to persistently 'vex' or 'annoy' those public figures, or to embarrass them." Rynearson v. Ferguson, 355 F. Supp. 3d 964, 970 (W.D. Wash. 2019).

It is not hard to come up with any number of examples illustrating real world situations where protected speech on matters of public concern are nevertheless subject to criminal prosecution under RCW 9.61.260(1)(b).

George Floyd is choked to death by a police officer in Minneapolis, setting off nationwide protests against police brutality and systemic racism, including in Washington. Suppose someone repeatedly or anonymously posts on social media, accusing members of local government of being racist, corrupt and spineless in failing to protect people of color in the

community. These messages are directed to members of government and also to a wider internet audience. The sender of these electronic communications intends to embarrass local officials to change the status quo by exposing their moral failings, using rough language in making the point. The sender, by means of repeating a message until it cannot be ignored, intends to continually vex, annoy and trouble those in power until something positive and meaningful is done. RCW 9.61.260(1)(b) criminalizes that kind of expressive activity.

All it takes is a referral to the prosecutor's office or police department, or merely the threat of referral, to chill that kind of speech. See Rynearson, 355 F. Supp. 3d at 967 (Bainbridge Island Police Department referred a police report to the Kitsap County Prosecutor finding probable cause for cyberstalking based on online posts critical of the founding board member of the Bainbridge Island Japanese-American Exclusion Memorial, who failed to speak out against political officials that voted for a detention provision in the National Defense Authorization Act).

Suppose someone anonymously posts a YouTube video that parodies members of the police department. The video depicts officers, by name, as incompetent clowns. The video goes viral. The officers feel embarrassed and troubled by the attack on their integrity, which was the poster's intent. Upset, the officers call up the prosecutor's office and

complain. The prosecutor obtains a court order compelling YouTube to reveal the identity of the anonymous poster as part of prosecution for cyberstalking. RCW 9.61.260(1)(b) allows this to happen. See Jennifer Sullivan, [Web cartoons making fun of Renton taken seriously](#), Seattle Times, Aug. 4, 2011 (relying on cyberstalking statute, the Renton Police Department obtained a search warrant to compel Google to identify the individual who had anonymously posted cartoon videos on YouTube making fun of, and criticizing, the department) (available at <https://www.seattletimes.com/seattle-news/web-cartoons-making-fun-of-renton-taken-seriously/>).

Suppose a citizen creates a website protesting Amazon's poor working conditions and its provision of facial recognition technology to Immigration Customs and Enforcement (ICE), which the latter uses to hunt down immigrants for deportation. See Stephanie Grob Plante, [Here's why some activists and shoppers are calling for Amazon Prime Day boycotts](#), July 16, 2019 (available at <https://www.vox.com/the-goods/2019/7/16/20696392/amazon-prime-day-2019-boycott-strikes>). The website creator intends to embarrass and intimidate CEO Jeff Bezos into changing working conditions and ending its relationship with ICE. Bezos continues to be vilified online anonymously and repeatedly. The protest gains traction but the company makes no concession. People boycott

Amazon in large numbers. Amazon, wanting to silence the haters, seeks to make an example of the website protestor by referring the case to law enforcement under the cyberstalking law.

Examples could go on and on. RCW 9.61.260(1)(b) potentially punishes a vast range of harsh rhetoric about political candidates and criticism of civic, political and business leaders on matters of public concern because any anonymous or repeated critique could be viewed as being said with the intent to embarrass, intimidate, harass or torment. This cannot be squared with the principle that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Connick v. Myers, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (internal quotation marks omitted).

Beyond that, the statute punishes a wide range of speech that is part of everyday life on a more intimate level. Suppose friends get into an argument on Facebook on the relative merits of the U.S. president's term in office. The argument turns nasty. One of them repeatedly accuses the other of being a hypocrite and horrible human being, and shares the observation with others in their friend circle. The intent behind the online vitriol is to embarrass the other into changing political allegiance and

voting differently in the upcoming election.⁸ RCW 9.61.260(1)(b) criminalizes that speech.

The reach of RCW 9.61.260(1)(b) extends beyond electronic communications that have serious social value, reaching speech on mundane matters. Someone anonymously posts on a neighborhood blog site that a neighbor does not pick up her dog's poop when out for a walk. The intent is to embarrass the wayward dogwalker into compliance. Criminal? A teenager, tired of seeing the grading curve manipulated by those less scrupulous, repeatedly posts on Snapchat the discomfoting fact that a particular classmate cheated on a test. Criminal? A person anonymously accuses a co-worker on social media of picking his nose at meetings. The intent is to shame the offender into getting him to stop. Criminal? "*Most of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone*

⁸ "According to the Pew Research Center, in the 2012 election, '22% of registered voters have let others know how they voted on a social networking site such as Facebook or Twitter,' '30% of registered voters [were] encouraged to vote for [a particular candidate] by family and friends via posts on social media such as Facebook and Twitter,' and '20% of registered voters have encouraged others to vote by posting on a social networking site.'" Rideout v. Gardner, 838 F.3d 65, 75, n.9 (1st Cir. 2016) (quoting Lee Raine, Pew Research Center, Social Media and Voting (Nov. 6, 2012), <http://www.pewinternet.org/2012/11/06/social-media-and-voting/>).

serious value), but it is still sheltered from government regulation." Stevens, 559 U.S. at 479-80.

The status of a communication as anonymous or repeated does not strip such communication of First Amendment protection. Again, RCW 9.61.260(1)(b) prohibits a speaker, with the requisite intent, from making electronic communications "anonymously or repeatedly whether or not conversation occurs." An electronic communication intended to embarrass, intimidate, harass or torment that does not violate RCW 9.61.260(1)(a) (obscenity) or (1)(c) (threats) is thus rendered criminal merely because it is made repeatedly or anonymously under (1)(b). Under the statute, an intentionally embarrassing online comment is legal if made once but illegal if made twice, regardless of whether the comment even reaches its target. The same comment would be legal if the author's identity is revealed, but not if the comment is made anonymously, again without regard to the target's receipt of the comment.

Anonymous speech is protected by the First Amendment. Talley v. California, 362 U.S. 60, 64-65, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) (striking down a ban on anonymous leafleting). Anonymous online speech stands on the same footing, as there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech. In re Anonymous Online Speakers, 661 F.3d 1168, 1173 (9th Cir. 2011)

(quoting Reno, 521 U.S. at 870). "As with other forms of expression, the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without 'fear of economic or official retaliation . . . [or] concern about social ostracism.'" Id. (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995)).

The right to publish anonymously "extends beyond the literary realm" and protects persecuted groups who might otherwise be unable to communicate their ideas at all. McIntyre, 514 U.S. at 342. And "[w]hile the right to anonymous speech is paramount to protect the political speech of persecuted groups, it also protects advocates who 'may believe [their] ideas will be more persuasive if [their] readers are unaware of [their] identity.'" Signature Mgmt. Team, LLC v. Doe, 876 F.3d 831, 835 (6th Cir. 2017) (quoting McIntyre, 514 U.S. at 342) (internal citation omitted).

Moreover, speech does not lose its protected status simply because it is repeated. Keefe, for example, involved a leaflet campaign targeting a particular real estate broker for his racist activities in the community. Keefe, 402 U.S. at 416. The individuals distributed leaflets on several different occasions. Id. at 417. That is "repeated" speech about a particular individual, but the Supreme Court held it was protected by the First Amendment. Id. at 419. There is no "one and done" rule when it comes

to free speech activity. See Survivors Network of Those Abused by Priests, Inc. v. Joyce, 779 F.3d 785, 787, 794 (8th Cir. 2015) (in a case brought by a group that regularly protested outside of churches, striking down a ban on such protests). "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." Packingham, 137 S. Ct. at 1735.

One federal court has found RCW 9.61.260(1)(b) to be overbroad and facially unconstitutional because it "criminalizes a large range of non-obscene, non-threatening speech, based only on (1) purportedly bad intent and (2) repetition or anonymity." Rynearson, 355 F. Supp. 3d at 969 (granting preliminary injunction prohibiting enforcement of statute); see also Slotemaker v. State, 9 Wn. App. 2d 1060, 2019 WL 3083302, at *1 (2019) (unpublished)⁹ (accepting State's concession that the cyberstalking statute is overbroad). Ford asks this Court to do the same.

c. The telephone harassment statute implicates different concerns, and precedent addressing the constitutionality of that statute is distinguishable.

Cyberspace communications are different than telephone communications. That difference has constitutional ramifications.

⁹ GR 14.1(a) permits citation to unpublished decisions for their non-binding, persuasive value.

In State v. Alexander, 76 Wn. App. 830, 838-39, 888 P.2d 175, review denied, 127 Wn.2d 1001, 898 P.2d 307 (1995), the Court of Appeals held the term "embarrassment" in the telephone harassment statute¹⁰ was not overbroad in violation of the First Amendment. The court upheld the statute in part because its specific intent requirement narrowed the law's proscription. Alexander, 76 Wn. App. at 835-36. The U.S. Supreme Court, however, has since observed a "speaker's motivation" is generally "entirely irrelevant to the question of constitutional protection" because "First Amendment freedoms need breathing space to survive" and "[a]n intent test provides none." F.E.C. v. Wis. Right to Life, Inc., 551 U.S. 449, 468-69, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (Roberts, C.J, lead opinion) (citation omitted); id. at 495 (Scalia, J., concurring in part and concurring in the judgment) (rejecting a motivation-based test).

¹⁰ RCW 9.61.230(1), the telephone harassment statute, provides:
"(1) Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:
(a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
(b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or
(c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household[.]"

Alexander focused on the privacy interests of those subjected to unwanted harassment within the home. "Because telephone communication occurs in a nonpublic forum, it receives substantially less protection than expression in a public forum." Alexander, 76 Wn. App. at 836. It thus applied the standard articulated in Huff: "If a law covers a substantial amount of protected speech in a nonpublic forum, that speech may be regulated if the law draws distinctions that are reasonable in light of the purpose served by the forum and if the law is viewpoint neutral." Id. at 834-35 (citing Huff, 111 Wn.2d at 926).

Within this framework, the court emphasized "substantial privacy interests, which the State may recognize and protect, are involved when communication intrudes into the privacy of the home." Id. at 837. "Telephone communication intrudes into normally private preserves such as the home, thereby invoking privacy considerations. In contrast to communication broadcast on the television and radio, which an unwilling recipient can choose to ignore, '[a] ringing telephone is an imperative which . . . must be obeyed with a prompt answer.'" Id. at 836 (quoting People v. Weeks, 197 Colo. 175, 181, 591 P.2d 91 (Col. 1979)). "The gravamen of the offense is the thrusting of an offensive and unwanted communication upon one who is unable to ignore it." Id. at 837-38. "In light of the privacy concerns invoked by communication over the

telephone and the laws' emphasis on conduct instead of speech," the court found the distinction between communications made with intent to embarrass and other communications "reasonable." Id. at 838-39.

"The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." Frisby v. Schultz, 487 U.S. 474, 487, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988). The Alexander court's treatment of the telephone harassment statute reflects this principle. "There simply is no right to force speech into the home of an unwilling listener." Frisby, 487 U.S. at 485.

Unlike the telephone harassment statute, the cyberstalking statute goes beyond prohibiting distressing speech forced onto an unwilling listener within the privacy of that person's home. The cyberstalking statute applies to protected speech made in a public setting. And it applies to willing listeners. This is one reason why the statute is constitutionally flawed.

Unlike the telephone harassment statute, the cyberstalking statute criminalizes things said about a person in addition to things said to a targeted person. RCW 9.61.260(1)(b) covers online speech to third parties. It goes so far as to criminalize public commentary about people. While "attempting to stop the flow of information into [one's] own

household" may be permissible, trying to block the flow of information to the public isn't. Keefe, 402 U.S. at 420 (striking down an injunction prohibiting an organization from distributing leaflets in town).

Harassing telephone calls "are targeted towards a particular victim and are received outside a public forum." United States v. Bowker, 372 F.3d 365, 379 (6th Cir. 2004). In contrast, "[c]ourts have readily found that the Internet is a public forum." Johnson v. Ryan, 186 Wn. App. 562, 574, 346 P.3d 789 (2015). "Twitter and Blogs are today's equivalent of a bulletin board that one is free to disregard, in contrast, for example, to e-mails or phone calls directed to a victim." United States v. Cassidy, 814 F. Supp. 2d 574, 585-86 (D. Md. 2011). The cyberstalking statute criminalizes speech on the internet. The U.S. Supreme Court analogized the internet to traditional public forums such as the street or the park, characterizing the internet in general and social media in particular as presently "the most important place[] (in a spatial sense) for the exchange of views." Packingham, 137 S. Ct. at 1735. Social media, in short, is "the modern public square." Id. at 1737. Speech made in a public setting on a matter of public concern "cannot be restricted simply because it is upsetting or arouses contempt." Snyder, 562 U.S. at 458.

An "electronic communication" in the cyberstalking statute includes not only information communicated through traditional mediums

like radio and television broadcast, but also internet posts, webcasts, podcasts, blogs, and YouTube videos. RCW 9.61.260(5). "Although the telephone harassment statute cases have held that the intent to embarrass is not unconstitutionally overbroad, contemporary electronic communication, social media, and internet postings are broad in scope. A variety of political and social commentary, including caustic criticism of public figures, may be swept up as an intent to embarrass someone while using rough language." State v. Stanley, 200 Wn. App. 1035, 2017 WL 3868480, at *9 (2017) (unpublished), review denied, 189 Wn.2d 1036, 407 P.3d 1148 (2018).

Alexander and the telephone harassment cases therefore do not control the constitutional fate of the cyberstalking statute. The latter, in prohibiting protected speech made to willing listeners in a public setting, goes too far. Much of the speech covered by the cyberstalking statute, such as websites, blogs, and social media posts, do not invade a person's home like an unwanted telephone call. Rather, the reader, viewer or listener must affirmatively choose to access such material.

d. The cyberstalking statute, as a content-based restriction on speech, fails to satisfy the strict scrutiny test.

"[A]s a general matter, the First Amendment provides that the government has no power to restrict expression because of its message, its

ideas, its subject matter, or its content." Stevens, 559 U.S. at 468. "Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

Defining "regulated speech by its function or purpose" is "based on the message a speaker conveys" and therefore qualifies as a "content-based" restriction. Id. at 163-64. The cyberstalking statute criminalizes speech based on the speaker's purpose in communicating it. A person is guilty of cyberstalking if he or she electronically communicates "with intent to harass, intimidate, torment, or embarrass any other person." RCW 9.61.260(1). It is therefore a content-based restriction.

Moreover, a law is content-based when, "[i]n order to enforce the regulation, an official must necessarily examine the content of the message that is conveyed." Am. Civil Liberties Union of Nev. v. City of Las Vegas, 466 F.3d. 784, 794 (9th Cir. 2006). Determining whether cyberspace speech directed to or about someone was intended to embarrass, intimidate, harass or torment necessarily requires examination of the speech's content. Without that context, there is no way to determine intent in making the communication.

Further, laws that "regulate speech due to its potential primary impact" — such as their emotive impact on the targets of the speech — "must be considered content-based." Boos v. Barry, 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988). RCW 9.61.260(l)(b) aims to control the emotional impact of speech by banning speech intended to embarrass, intimidate, harass and torment. The cyberstalking statute is content-based for this reason as well.

Laws that regulate speech based on content cannot survive unless they pass the strict scrutiny test. Huff, 111 Wn.2d at 926. Under that test, RCW 9.61.260(l)(b) is "presumptively unconstitutional" unless it "furthers a compelling interest and is narrowly tailored to achieve that interest." Reed, 135 S. Ct. at 2226-27. The State "bears the burden of justifying a restriction on speech." Immelt, 173 Wn.2d at 6.

The State cannot meet its burden. The State must be able to show the speech at issue is "necessary to allay some clear and present danger of imminent lawlessness." Williams, 144 Wn.2d at 211. The State has no compelling interest in prohibiting speech intended to embarrass, intimidate, harass or torment because such speech presents no clear and present danger to imminent lawlessness. People get embarrassed or feel annoyed all the time for all sorts of reasons. Speech intended to embarrass, intimidate, harass or torment others is commonplace in cyberspace settings.

Moreover, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989). "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby, 487 U.S. at 485. The restriction must not unnecessarily interfere with First Amendment freedoms. Sable, 492 U.S. at 126.

RCW 9.61.260(1)(b) does not require that the subject of the offending speech suffer any injury, or even be aware that the communication was made. See Bishop, 787 S.E.2d at 820 (reasoning that an anti-cyberbullying statute did not satisfy strict scrutiny in part because the statute did not require that the victim suffer an injury or know about the offending speech).

More than that, RCW 9.61.260(1)(b) restricts a broad range of speech that falls outside any First Amendment exception. A speech restriction that "burn[s] down the house to roast the pig" is not narrowly tailored. Sable, 492 U.S. at 127 (quoting Butler v. Michigan, 352 U.S. 380, 383, 77 S. Ct. 524, 1 L. Ed. 2d 412 (1957)). A restriction that "threatens to torch a large segment of the Internet community" does not meet the standard either. Reno, 521 U.S. at 882. Speech intended to

embarrass or annoy is protected speech. And it is ubiquitous. Many communications critical of another person for any reason, including those touching on matters of legitimate public concern, could be considered done with an intent to embarrass or vex another for the purpose of changing viewpoints or actions. That is a legally acceptable way of interacting with others. The cyberstalking statute goes too far in restricting that type of communication.

- e. The remedy is reversal of the cyberstalking convictions because the State cannot overcome the presumption of prejudice.**

Because Ford was convicted under an unconstitutional statute, a new trial is required unless the State proves beyond a reasonable doubt that he has not been prejudiced by the unconstitutional provision. Williams, 144 Wn.2d at 213. A conviction for violating a facially unconstitutional statute will be reversed if the jury is instructed in a manner that permits it to rely on the unconstitutional provision to convict and there is only a general verdict. Id.; see also Stromberg v. California, 283 U.S. 359, 368, 51 S. Ct. 532, 75 L. Ed. 1117 (1931) (where a constitutional provision forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground). The State cannot meet its burden. The jury was instructed on the clause prohibiting communicating with intent to

"embarrass," "harass" or "torment" through repetition on each of the two cyberstalking counts. CP 49, 51. The jury returned general verdicts. CP 61-62. The State cannot show the jury did not rely on an unconstitutional provision to convict. The cyberstalking convictions must be reversed.

2. THE INTERNET CONDITIONS VIOLATE FORD'S FIRST AMENDMENT RIGHT TO FREE SPEECH.

A condition in Appendix F of the judgment and sentence states: "Community custody officer must approve, in advance, defendant's use of social media, email, and internet." CP 103 (condition VII).

Condition #24 in Appendix H provides: "No Internet access or use without prior approval of the supervising CCO, Treatment Provider, and the Court." CP 118.

Condition #25 in Appendix H mandates:

No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone or computer-related device to which the defendant has access to monitor compliance with this condition. Also, do not access any social media sites (Facebook, Twitter, Snapchat, etc.) of any kind. CP 118.

Ford challenges these conditions as violations of his First Amendment right to free speech. Ford did not challenge them below, but

sentencing errors can be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

When authorized by statute, the trial court's decision to impose a community custody condition is reviewed for abuse of discretion. State v. Johnson, 180 Wn. App. 318, 325-26, 327 P.3d 704 (2014). Unconstitutional conditions are necessarily unreasonable and an abuse of discretion. State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

The First Amendment prohibits the government from proscribing speech or expressive conduct. State v. Halstein, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

"The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Conditions that interfere with fundamental rights "must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" Id. (quoting State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). Courts also consider whether a sentencing condition prohibits a real and substantial amount of constitutionally

protected speech relative to its legitimate sweep. State v. Riles, 135 Wn.2d 326, 346, 957 P.2d 655 (1998), abrogated on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

The U.S. Supreme Court addressed an overbroad internet restriction in Packingham. A North Carolina statute made it a felony for any registered sex offender to "access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." Packingham, 137 S. Ct. at 1733. The Court recognized "the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that presages a sexual crime, like contacting a minor or using a website to gather information about a minor." Id. at 1737. But it warned that any prohibition "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" Id. at 1736 (quoting McCullen v. Coakley, 573 U.S. 464, 486, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014)).

While Packingham's sexual abuse of a 13-year-old girl was a serious crime, North Carolina's prohibition was vast in its breadth, barring access to such sites as Facebook, LinkedIn, and Twitter, and arguably barring access "to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com." Id. at 1736. After describing

North Carolina's restriction as "unprecedented in the scope of First Amendment speech it burdens," the Court reasoned the law "with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." Id. at 1737. "These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard[.]" Id. "[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." Id. The Court struck down the law because the state could not meet its burden to show the sweeping prohibition was necessary to serve its purpose of keeping sex offenders away from vulnerable victims. Id. at 1737-1738.

The internet restrictions in Ford's case are even broader in scope. Aside from an exception for "employment purposes (including job searches)" in condition #25, the restrictions are generalized. The conditions prohibit not only the social media at issue in Packingham, but everything else on the internet as well. Although the government has a legitimate interest in protecting the public, these conditions are sweeping in scope and prohibit a large amount of constitutionally protected speech, including both expressive conduct and access to information. These

conditions are unconstitutionally overbroad. They strike at the heart of Ford's rights to freedom of speech, freedom of association, and freedom to receive information under the First Amendment. Sensitive imposition of a condition affecting the ability to exercise the right to free speech through the internet requires recognition of the sheer breadth of speech activity that a ban on internet access entails in the 21st century. The internet prohibition is overkill.

The Court of Appeals recently upheld a community custody condition restricting internet access in State v. Johnson, 12 Wn. App. 2d 201, 214-16, 460 P.3d 1091 (2020). Mr. Johnson challenged the constitutionality of an order that he "not use or access the World Wide Web unless specifically authorized by CCO through approved filters." Id. at 213. The Court of Appeals concluded the condition was sufficiently tailored to Johnson's crimes because the internet was "the medium through which he committed his crimes" and restricting his internet use was reasonably necessary to prevent him from reoffending. Id. The court also explained the condition was sensitively imposed because it was not an absolute ban on internet-based activities; Johnson was still able to use the internet with authorization and use of approved filters. Id.

Momentarily accepting Johnson as the guiding light, condition #25 imposed on Ford does not pass muster. In prohibiting use of devices with

internet access and any social media sites, no provision is made for authorizing internet usage by means of obtaining permission from the CCO. The other two internet-related conditions at least permit access by means of CCO authorization. As recognized in Johnson, a blanket ban on using a computer or other electronic device is impermissible even where the crime was committed through that medium. Johnson, 12 Wn. App. 2d at 214-15 (citing United States v. Holena, 906 F.3d 288, 294-95 (3d Cir. 2018)). At minimum, to comply with Johnson, condition #25 must allow use of devices with internet access through permission from the CCO.¹¹

That being said, the three internet conditions at issue here are infirm because all three are overbroad. To the extent Johnson holds otherwise, Ford disagrees with it. The bar on using a device with internet access in Condition #25, and the prohibition on internet use in the other two conditions, prevent the legitimate exercise of First Amendment rights.

A restriction is overbroad under the First Amendment if it sweeps a substantial amount of constitutionally protected conduct free speech activity within its prohibitions. Williams, 144 Wn.2d at 206; Hill, 482 U.S. at 459. This standard applies to criminal sentencing conditions. Riles, 135 Wn.2d at 346.

¹¹ At sentencing, the court stated that it wanted the CCO to approve in advance any use of social media and internet, but ultimately endorsed the language used in Appendix H. 2RP 34-36.

The conditions imposed on Ford bar his access to "a quintessential forum for the exercise of First Amendment rights." Packingham, 137 S. Ct. at 1735. The First Amendment protects not only the right of expression, but also "the right to receive information and ideas." Bradburn, 168 Wn.2d at 802. Some of the most important places for the exchange of views can be found in "the 'vast democratic forums of the Internet.'" Packingham, 137 S. Ct. at 1735 (quoting Reno, 521 U.S. at 868). Internet content is as diverse as human thought. Reno, 521 U.S. at 852.

Under the overbreadth standard, there can be no serious doubt that the prohibition on internet access sweeps a substantial amount of protected speech into its gaping maw. Yet the trial court performed no overbreadth analysis before imposing these conditions on Ford. See State v. Bramblee, __Wn. App. 2d__, 2020 WL 3258461, at *3 (slip op. filed June 16, 2020) (unpublished) (remanding for trial court to perform the appropriate overbreadth analysis before imposing any social media restriction).

Sentencing conditions affecting constitutional rights are subject to strict scrutiny. Rainey, 168 Wn.2d at 374. Such prohibitions must be narrowly drawn, meaning there "must be no reasonable alternative way to achieve the State's interest." Warren, 165 Wn.2d at 34-35. Ford used social media to commit his crimes. A narrowly tailored condition would bar access to social media sites absent CCO permission, provided an

ascertainable standard for granting or denying such permission is articulated. See State v. Smith, __Wn. App. 2d__, 2020 WL 3412780, at *3-4 (slip op. filed June 22, 2020) (unpublished) (remanding for clarification of internet conditions because they "supply no guidance to the CCO as to the type of computer usage that should be approved"). There is no need to bar access to the entire internet. The conditions should be modified to comply with constitutional protections.

3. ONE OF THE REASONS RELIED ON BY THE COURT TO IMPOSE AN EXCEPTIONAL SENTENCE DOES NOT JUSTIFY SUCH A SENTENCE AS A MATTER OF LAW.

The court imposed exceptional consecutive sentences under the "free crimes" aggravator in part because the two cyberstalking offenses were not punished. This was error because the cyberstalking offenses were punished. Those offenses only carried an offender score of 7 and the sentence on those counts would have been lower had Ford committed fewer offenses. The free crimes aggravator therefore does not attach to those offenses.

"Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a). By statute, a court may impose an exceptional sentence

outside the standard range if it concludes that "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

In seeking an exceptional sentence under RCW 9.94A.535(2)(c), the State argued that the cyberstalking offenses, in addition to the extortion offense and accompanying sexual motivation enhancement, would go unpunished if an exceptional sentence were not imposed. 2RP 10-11. The court found "substantial and compelling reasons for an exceptional sentence due to defendant's high offender score exceeding 9 points and no punishment for two counts of cyberstalking and for the sexual motivation finding under the extortion count." CP 101; 2RP 44. The court thought a standard sentence would be "nullifying the convictions that the jury came back with for the cyberstalking and the sexual motivation on the extortion." 2RP 33.

An exceptional sentence will be reversed where "the reasons supplied by the sentencing court do not justify a departure from the standard range." RCW 9.94A.585(4). Review is de novo. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

The exceptional sentence statute sets forth the list of aggravating circumstances that can be found by the judge or the jury. RCW 9.94A.535(2), (3). Under RCW 9.94A.535(2)(c), the judge may impose an exceptional sentence if "The defendant has committed multiple current

offenses and the defendant's high offender score results in some of the current offenses going unpunished." This provision is referred to as the "free crimes" aggravator. State v. France, 176 Wn. App. 463, 469, 308 P.3d 812 (2013), review denied, 179 Wn.2d 1015, 318 P.3d 280 (2014).

The offender score is computed based on both prior convictions and current convictions. State v. Alvarado, 164 Wn.2d 556, 567, 192 P.3d 345 (2008); RCW 9.94A.589(1)(a); RCW 9.94A.525(1). The sentencing grid used in calculating the standard range sentence for an offense tops out at "9 or more." RCW 9.94A.510. "[T]he determination of whether an offense goes unpunished under RCW 9.94A.535(2)(c) requires simply objective mathematical application of RCW 9.94A.510's sentencing grid to the current offenses." Alvarado, 164 Wn.2d at 565 (citing State v. Newlun, 142 Wn. App. 730, 742-43, 176 P.3d 529, review denied, 165 Wn.2d 1007, 198 P.3d 513 (2008)).

Of Ford's three convictions, two of them — the cyberstalking counts — had an offender score of 7. CP 91. One of them — the extortion count — had an offender score of 11. CP 91. As a class C felony, a score of 9 or more for the extortion count reaches the statutory maximum of 60 months. CP 91. The sexual motivation enhancement on the extortion count carries a mandatory 12-month term of confinement. CP 95; RCW 9.94A.533(8)(a).

"[W]hen a defendant's offender score equals or exceeds 9, other prior and other current offenses do not increase the standard sentence range." State v. Smith, 7 Wn. App. 2d 304, 308, 433 P.3d 821, review denied, 193 Wn.2d 1010, 439 P.3d 1065 (2019). This is true where the standard sentence range for an offense "is identical to that which would be imposed if the defendant had committed fewer current offenses." France, 176 Wn. App. at 469. "A defendant whose offender score is at or above 9 will have the same standard range sentence regardless of the number of current or prior offenses." Smith, 7 Wn. App. 2d at 308. "In this situation, a standard range sentence fails to punish the defendant for having committed multiple current offenses." Id. at 309.

Because Ford was convicted of multiple offenses and the extortion count carried a score of 11, the extortion offense went unpunished under RCW 9.94A.535(2)(c). Further, the sexual motivation finding attached to the extortion count did not increase the length of the presumptive sentence that Ford already faced because this offense was at the statutory maximum based on the score alone. The sentencing court can take into account whether a sentencing enhancement would go unpunished. State v. Feely, 192 Wn. App. 751, 770-71, 368 P.3d 514, review denied, 185 Wn.2d 1042, 377 P.3d 762 (2016).

The problem is that the court found the cyberstalking counts went unpunished, and relied on this understanding as a basis to impose the exceptional sentence. CP 101. The cyberstalking offenses are punished because they carry an offender score of 7, not 9 or more.

An offense goes unpunished within the meaning of RCW 9.94A.535(2)(c) when the sentence for that offense would be identical regardless of whether the defendant has committed fewer current offenses. France, 176 Wn. App. at 469. That is not the case when the sentence for an offense has not reached 9 points. Smith, 7 Wn. App. 2d at 308-09. Here, the standard range sentence for each cyberstalking count would be lower if he had committed fewer current offenses. If Ford had not committed extortion or one of the cyberbanking offenses or both, the standard range for each cyberstalking offense would be 22-29 months (6 points) or 17-22 months (5 points), not the standard range of 33-43 months attached to an offender score of 7. See 2018 Washington State Adult Sentencing Guidelines Manual.¹² Because the cyberstalking offenses were punished, the court erred as a matter of law in imposing an exceptional sentence based on the erroneous conclusion that they were not.

¹² http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2018.pdf

There is a legal basis for imposing an exceptional sentence because the score for the extortion offense exceeds 9 points, while the accompanying sexual motivation enhancement does not add to the length of the standard range because the statutory maximum is reached based on an offender score of 9+. However, the court erred in relying on the supposed unpunished status of the cyberstalking offenses as a basis to impose an exceptional sentence under the free crime aggravator.

"[R]emand for resentencing is required where the reviewing court cannot conclude from the record that the trial court would have imposed the same sentence if it had considered only the valid aggravating factors." State v. Smith, 67 Wn. App. 81, 92, 834 P.2d 26 (1992). The record does not show the court would have exercised its discretion in the same manner in the absence of the invalid aggravator upon which it relied. The court at no time expressed a view that it would impose the same exceptional sentence even if the cyberstalking offenses were being punished. CP 101; 2RP 33, 44; cf. State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) (appellate court satisfied trial court would have imposed same sentence where it stated any of the factors standing alone would be a substantial and compelling factor justifying the exceptional sentence and indicated in its oral opinion that the primary reason for imposing the exceptional sentence

was based on the remaining valid aggravator). The exceptional sentence must be vacated and this case remanded for resentencing.

4. THE COURT ERRED IN ORDERING PSYCHOSEXUAL EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). A court must follow specific statutory procedures before it can order mental health evaluation and treatment. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008).

RCW 9.94B.080 provides: "The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense."

As a special condition in Appendix F, the court ordered "psychosexual evaluation and comply with all recommended treatment." CP 103. As a special condition in Appendix H, the court ordered Ford to "obtain a psychosexual sexual deviancy evaluation." CP 117.

The condition was discussed at the sentencing hearing. The State wanted a separate condition for mental health evaluation and treatment in addition to a psychosexual evaluation. 2RP 37-38. Defense counsel argued a separate mental health condition was unnecessary because the psychosexual condition included a mental health component. 2RP 36-37. Counsel explained that "[a] psychosexual is a mental health examination plus this extra stuff that has to do with a deficiency, in my experience." 2RP 38. The court agreed with counsel's position, describing the psychosexual evaluation as "essentially a mental health evaluation" and imposing the psychosexual condition because the expert "would be well positioned to understand generally what mental health problems Mr. Ford might have." 2RP 38-39. The condition requiring "mental health evaluation" was accordingly crossed out, CP 118, replaced with the "psychosexual" evaluation. CP 103, 117.

Typically, when a person is convicted of a sex offense, "sexual deviancy" evaluation and treatment are ordered as a condition of the sentence. As Ford was convicted of a sex offense, a sexual deviancy evaluation is lawful. See RCW 9.94A.030(47)(c) ("sex offense" includes a felony with a finding of "sexual motivation.").

The problem is that the "psychosexual" evaluation ordered by the court is a stand-in for a mental health evaluation. The court expressly

equated the two, describing the psychosexual evaluation as "essentially a mental health evaluation." 2RP 38-39. Mental health evaluation and treatment can only be imposed when specific statutory prerequisites are followed. RCW 9.94B.080. Those requirements cannot be evaded by relabeling the evaluation. The court's failure to find Ford suffers from a statutorily defined mental illness that contributed to the offense bars imposition of "psychosexual" evaluation and treatment.

A court cannot order an offender to participate in mental health treatment unless "the offender suffers from a mental illness which influenced the crime." State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003). The court must also find that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025. RCW 9.94B.080; Brooks, 142 Wn. App. at 851. The term "mentally ill person" is specifically defined under RCW 71.24.025(33) (referencing definitions contained in subsections 1, 10, 39, 40). Only those who meet that definition are subject to mental health conditions as part of community custody under the plain language of the statute. State v. Shelton, 194 Wn. App. 660, 676, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002, 386 P.3d 1088 (2017).

The court, in sentencing Ford, did not make the statutorily mandated finding that he was a "mentally ill person" as defined by RCW

71.24.025 and that this mental illness influenced a crime for which he was convicted. The court therefore erred in imposing a condition that is "essentially a mental health evaluation." 2RP 38; Shelton, 194 Wn. App. at 676. The condition must be stricken. State v. Lopez, 142 Wn. App. 341, 354, 174 P.3d 1216 (2007).

The error is properly before this Court for review. "A sentence imposed without statutory authority can be addressed for the first time on appeal, and this court has both the power and the duty to grant relief when necessary." State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003, 20 P.3d 944 (2001).

Moreover, "a defendant cannot empower a sentencing court to exceed its statutory authorization." State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980). Here, defense counsel argued for the imposition of a psychosexual evaluation, with its mental health component, and against a redundant mental health evaluation. 2RP 36-38. Counsel's argument, however, did not give the court authority to impose what is, in substance, mental health evaluation and treatment as a sentencing condition.

In Jones, defense counsel stated in open court that Mr. Jones was bipolar, that he was off his medications at the time of his crimes, and that this combination "obviously resulted" in the crimes. Jones, 118 Wn. App. at 209. The court nevertheless lacked authority to order mental health

treatment in part because it did not make the statutorily required finding that Jones was a person whose mental illness contributed to his crimes. Id.

Similar to Jones, the request by Ford's attorney to only require a psychosexual evaluation did not give the court statutory authority to impose the condition without the requisite finding that a statutorily defined mental illness contributed to the offense. "A trial court's sentencing authority is limited to that expressly found in the statutes. If the statutory provisions are not followed, the action of the court is *void*." State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002) (quoting State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800 (1983)).

5. IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS IS A CLERICAL ERROR.

At sentencing, defense counsel requested that the court not impose "additional fees" based on Ford's indigency. 2RP 30-31. The court stated: "I'm going to find that Mr. Ford is indigent today. I'm going to order only what I must, and that is the crime victim penalty assessment in this case as far as legal financial obligations go." 2RP 32-33. The judgment and sentence reflects that Ford's indigency made "payment of nonmandatory legal financial obligations inappropriate." CP 92.

In a different section of the judgment and sentence, however, a pre-printed provision states: "COLLECTION COSTS The defendant shall

pay the cost of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500." CP 93.

RCW 36.18.190 states "The superior court *may*, at sentencing or at any time within ten years, assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services." (emphasis added). Collection costs are discretionary. State v. Clark, 191 Wn. App. 369, 374, 362 P.3d 309 (2015).

Another boilerplate condition in the judgment and sentence provides: "While on community placement community custody, the defendant shall . . . (7) pay supervision fees as determined by DOC." CP 96. Pre-printed provision condition #4 in Appendix H contains the same requirement, as does Appendix F. CP 103, 117.

RCW 9.94A.703(2)(d) states "Unless waived by the court, . . . the court shall order an offender to: . . . (d) Pay supervision fees as determined by the Department." This fee is discretionary. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), review denied, 193 Wn.2d 1007, 443 P.3d 800 (2019).

In State v. Dillon, 12 Wn. App. 2d 133, 137, 152, 456 P.3d 1199 (2020), the Court of Appeals struck the supervision fee because the record showed that the trial court intended to impose only mandatory LFOs. As in Dillon, the record in Ford's case shows the court intended to impose

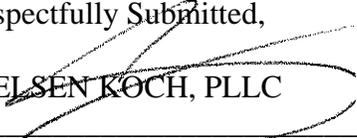
only mandatory LFOs because defense counsel asked that additional fees not be imposed, RP 30-31, the court found Ford's indigency made "payment of nonmandatory legal financial obligations inappropriate," CP 92, and the court stated that it would only impose "what I must," i.e., mandatory LFOs. RP 32-33. The remedy is remand to strike the unintended fees. Dillon, 12 Wn. App. 2d at 137, 152.

D. CONCLUSION

For the reasons stated, Ford requests (1) reversal of the two cyberstalking convictions; (2) reversal of the exceptional sentence; (3) removal or modification of the challenged community custody conditions; and (4) removal of the challenged LFOs.

DATED this 29th day of June 2020

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