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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DAVID FORD,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello

No. 18-1-04716-3

BRIEF OF RESPONDENT

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I. INTRODUCTION

Based on David Ford's conviction for a felony sex offense, the trial court properly ordered Ford to obtain psychosexual treatment and restricted his access to the internet since it was the medium he used to commit his crimes. The State proceeded to trial, however, with an unconstitutional prong of the cyberstalking statute in its to-convict instructions. Therefore, both of the cyberstalking convictions should be vacated. This Court should affirm the trial court's authority to impose crime-related conditions of release, but remand to vacate the cyberstalking convictions and resentence Ford on his remaining conviction for extortion in the second degree.

II. RESTATEMENT OF THE ISSUES

- A. Should this Court vacate Ford's two cyberstalking convictions based on recent federal case law declaring RCW 9.61.260(1)(b) overbroad and facially unconstitutional?
- B. Should this Court address whether the trial court had a lawful basis for an exceptional sentence when the issue is rendered moot by the State's concession of error on Ford's two cyberstalking convictions?
- C. Did the court unlawfully restrict Ford's internet access when he used the internet to extort and threaten his victims?
- D. Should this Court grant review of Ford's requirement to obtain psychosexual treatment when he failed to object at sentencing, cannot demonstrate manifest constitutional error, and the treatment was sufficiently crime-related?
- E. Should this Court remand the issue of discretionary legal financial obligations to the trial court when the issue of collection costs and supervision fees were never addressed at sentencing?

III. STATEMENT OF THE CASE

In September 2018, Christina Nieland¹ temporarily separated from her husband and moved into her friend Tressa's home. 1RP 485.² During this time, she entered into a brief, but intense two-week sexual relationship with David Ford. 1RP 486. In mid-October 2018, Christina told Ford that she wanted to end their relationship to get back with her husband. 1RP 487-88. Ford became angry and obsessive. 1RP 488. Ford began calling, messaging, and texting her constantly. *Id.* If she didn't respond to his messages, he would call up to ten times until she answered. *Id.*

Ford threatened to expose their affair to Christina's husband anytime Christina stopped talking to him. 1RP 489, 498-99, 519. Ford used this threat to force Christina to send him nude photographs and videos of herself. 1RP 488-89. She repeatedly asked Ford to stop contacting her, but he would not stop. 1RP 488, 528.

Christina blocked Ford's phone number multiple times 1RP 564. Her attempts never worked because Ford would contact and threaten her

¹ For the sake of clarity, the State will refer to Christina Nieland as Christina and her step-daughter, Veronica Nieland, as Veronica. It is not intended as a sign of disrespect.

² For the Court's convenience, the State is using the same verbatim report of proceedings (RP) citation system as set forth in the Brief of Appellant at 2, n. 1.

through social media accounts and spoofed³ numbers until she unblocked his number. 1RP 564; Ex. 4-28.

Christina finally contacted the police. 1RP 594-95. That same day, Ford sent her a text message: “I guess I’ll have to show him a video of the two of us fucking. I still don’t see how he believes anything you have to say. You lied to the both of us. I’ll forward it to Veronica.” 1RP 609. Veronica is Christina’s 19-year-old stepdaughter. 1RP 788.

Ford eventually carried out his threat. 1RP 788-89. He contacted Veronica through Facebook and told her that Christina was planning on divorcing her father. 1RP 789. When Veronica asked for proof, Ford sent her explicit nude pictures and videos of Christina. 1RP 790.

At trial, the State proceeded on three felony charges: extortion in the second degree with sexual motivation and two counts of cyberstalking. CP 15-17. The State elected to pursue prongs a and b of RCW 9.61.260 to prove each of the cyberstalking charges. CP 49-52. The parties agreed to use the standard WPIC to-convict instruction. CP 49-52; *see* WPIC 36.84. The to-convict instruction permitted the jury to find Ford guilty if he made the electronic communication “repeatedly, whether or not a conversation occurred.” *Id.*

³ “Spoofing” is when a caller deliberately falsifies the information transmitted to a caller ID display to disguise his or her identity. *Caller ID Spoofing*, Fed. Communications Comm’n (Aug. 17, 2020), <http://fcc.gov/consumers/guides/spoofing-and-caller-id>.

The jury found Ford guilty of all three counts. 1RP 1034-35; CP 58, 61-62. The jury found that the charge of extortion was sexually motivated. 1RP 1035; CP 60. The verdict form for the cyberstalking charges did not specify which prong the jury relied upon to find Ford guilty. CP 61-62. The court set over sentencing and ordered a pre-sentencing investigation report. RP 1040.

Department of Corrections Officer Joe Sofia completed the Presentencing Investigation Report (“PSI”). CP 64-85. Defense did not make any exceptions or objections to any of the facts or statements within the PSI. 2 RP 1-44. The PSI provided details from Ford’s 2012 conviction for extortion in the second degree and sexual exploitation of a minor. CP 69-71. Ford was initially charged with 25 counts involving 7 victims. *Id.* The probable cause statement alleged the following: (1) Ford contacted 15-year-old H.S. over Facebook, asked her to show him her breasts, and then told her “I want to stick my fat cock between your tits;” (2) Ford repeatedly contacted 16-year-old C.S. over Facebook and asked her to pose for him in exchange for concert tickets. He then threatened to send the images to her friends and family; (3) Ford contacted 15-year-old C.J.T over Facebook and offered her \$500 if she stripped for him. When she said no, Ford threatened to post nude photos of her friend online; (4) Ford contacted 17-year-old K.A.B. on Facebook and convinced her to expose her breasts to him; (5)

Ford contacted 17-year-old S.R.A. on Facebook and offered her alcohol, money, and gift cards if they would get naked; (6) Ford asked 15-year-old D.A.T. to pose for him and threatened to expose nude images of her to her friends; (7) Ford contacted 16-year-old A.K.K. on her cell phone and offered her money to send him nude photos; he later threatened to send the photos to her family and friends if she did not send more. *Id.*

The PSI concluded that there were multiple risk factors that need to be addressed to reduce the risk of Ford reoffending including “his sexual deviancy, his accelerating criminal activity, and possible mental health issues.” CP 77. Based on these risk factors, Sofia recommended Ford obtain psychosexual, domestic violence, and mental health treatment. CP 78. Appendix H from the PSI recommended that Ford’s internet usage be restricted as follows:

(24) “No internet access or use without prior approval of the supervising CCO, Treatment Provider, and the Court;”

(25) “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 85.

The court heard argument for sentencing on December 6, 2019.

Pursuant to a plea agreement, the State recommended that the sentence run

concurrent to the sentence previously imposed on Ford's conviction for failure to register as a sex offender under Pierce County cause number 18-1-04602-7. 2RP 7-8. The State recommended an exceptional upward sentence based on the free crimes aggravator under RCW 9.94A.535(2)(c). 2 RP 10-11. Ford argued for a standard range sentence of 60 months. 2RP 20. Ford stipulated that Ford's criminal history provided a legal basis for the court to impose an exceptional sentence but argued that it was not warranted in this case because his criminal history is only so high because of the multiplier effect of sexual crimes. 2RP 21-24. Ford argued that he was indigent and unable to pay any non-mandatory fines. CP 30.

The court found that there was a basis for an exceptional sentence. 2RP 33. The court ran the extortion count consecutive to the two cyberstalking charges for a total sentence of 69 months in prison. 2RP 34; CP 95. The court followed the parties' joint recommendation to run the current sentence concurrent with Ford's conviction for failure to register as a sex offender. 2RP 31; CP 95.

The court sentenced Ford to 36 months of community custody. CP 96. The court orally ruled that "the community custody officer must approve in advance the defendant's use of social media, any use of social media, his use of and access to the internet, his use and access to email, essentially his computer usage needs to be monitored and approved in advance by his

community corrections officer.” 2RP 34-35. The court adopted this language into Appendix F. CP 103. Ford noted that the language in Appendix H closely mirrored what the court orally ruled but was not exactly the same. 2RP 36. The court reviewed the language in Appendix H and chose to adopt it. *Id.* Ford did not object. *Id.*

The court also ordered that Ford be required to undergo a psychosexual evaluation and follow up treatment. 2RP 35. Ford did not object to the psychosexual evaluation. 2RP 37. Instead, Ford argued that the additional recommended mental health treatment is not necessary because the psychosexual treatment program would include a mental health component. *Id.* The State requested both forms of treatment based on Ford’s prior history and the extreme nature of the crimes. *Id.* The court rejected the State’s request noting that a mental health professional conducting a psychosexual evaluation would also be able to address any mental health issues. 2RP 38. The court noted that the psychosexual evaluation is essentially a mental health evaluation with additional requirements. *Id.*

The court conducted a *Blazina*⁴ analysis and found that Ford was indigent. 2RP 32. The court stated: “I’m going to order only what I must, and that is the crime victim penalty assessment in this case as far as legal

⁴ *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

financial obligations go.” *Id.* Neither party nor the court ever addressed whether Ford should be required to pay collections costs for any unpaid legal financial obligations or supervision fees as determined by the Department of Corrections. The judgment and sentence, however, states (1) “COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute;” and (2) “While on community placement or community custody, the defendant shall: ... pay supervision fees as determined by DOC.” CP 93, 96. Ford did not object to either of these portions of the judgment and sentence.

IV. ARGUMENT

A. The State concedes that reversal of Ford’s two convictions for cyberstalking is warranted because RCW 9.61.260(1)(b) is unconstitutional.

The State concedes error that Ford’s two convictions for cyberstalking should be vacated because they may be based on an unconstitutional prong of RCW 9.61.260. Recent federal case law declared RCW 9.61.260(1)(b) unconstitutional. Even though Ford’s own conduct would not be protected free speech, he has standing to challenge the statute’s constitutionality because its overbreadth implicates the First Amendment. The State is unable to prove that the error is harmless because the jury did not designate whether it convicted Ford through the constitutional or unconstitutional prong of RCW 9.61.260. Therefore, this

Court should remand with instructions to dismiss both cyberstalking convictions and resentence Ford on his remaining conviction for extortion in the second degree.

Ford has standing to challenge the statute's breadth even though it did not infringe on his constitutional rights. Both the Washington Supreme Court and United States Supreme Court altered their traditional standing rules to enable defendants to challenge a statute's overbreadth even where it would not be unconstitutional as applied to the defendant. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *Sanders City of Tacoma v. Luvene*, 118 Wn.2d 826, 840, 827 P.2d 1374 (1992) ("Because of the importance of First Amendment rights an enactment may be invalidated for overbreadth where it would be unconstitutional as applied to others even if not as applied to the litigant."). Therefore, Ford may challenge the overbreadth of RCW 9.61.260 even though his criminal actions were not protected free speech.

The State concedes that RCW 9.61.260(1)(b) is unconstitutionally overbroad. A statute is overbroad if constitutionally protected free speech activities are swept within its prohibitions. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000). Statutes are presumed to be constitutional so the party challenging the statute's constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt. *In*

the Matter of the Detention of Danforth, 173 Wn.2d 59, 70, 264 P.3d 783 (2011). Whenever possible, courts must “construe a statute so as to uphold its constitutionality.” *Id.* Despite this high bar, the Western District of Washington recently declared RCW 9.61.260(1)(b) facially unconstitutional. *Rynearson v. Ferguson*, 355 F. Supp. 3d 964, 972 (W.D. Wash. 2019). Based on *Rynearson*, Division 1 recently accepted the State’s concession of error that RCW 9.61.260(1)(b) is facially unconstitutional. *Slotemaker v. State*, No. 78665-2-I, 2019 WL 3083302 (Wash. Ct. App. July 15, 2019).⁵ Based on this precedent, the State concedes that RCW 9.61.260(1)(b) is facially overbroad and unconstitutional.

Ford’s cyberstalking convictions should be vacated because the State is unable to prove that the error is harmless. There is a presumption of prejudice if a defendant is convicted under a prong that has been deemed unconstitutional. *State v. Williams*, 144 Wn.2d 197, 213, 26 P.3d 890 (2001). The presumption of prejudice can only be overcome if the State can show beyond a reasonable doubt that the jury would have reached the same result without the error. *Id.* RCW 9.61.260 includes the following severability clause: “If any provision of this act or its application to any

⁵ Division I denied the ACLU’s amicus brief requesting a published opinion. As an unpublished opinion, *Slotemaker* has no precedential value and is not binding on any court. Unpublished opinions filed after March 1, 2013, however, may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. RCW 9.61.260(6). Although the severability clause would have enabled the State to proceed on the constitutionally valid prong—RCW 9.61.260(1)(a)—the jury did not indicate which prong it relied upon to convict Ford. CP 61-62. Therefore, the State is unable to prove that the error is harmless. For the aforementioned reasons, the State asks this Court to remand for dismissal of both cyberstalking convictions and resentencing on Ford’s remaining conviction for extortion in the second degree.

B. The validity of the court’s exceptional sentence is moot because the State concedes error on both of Ford’s cyberstalking convictions.

This Court should not address Ford’s argument regarding the validity of the exceptional sentence because the issue has been rendered moot by the State’s concession of error on both cyberstalking convictions. Courts will not consider an issue that has become moot unless it is a question of continuing and substantial public interest. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). The trial court based its exceptional sentence on Ford’s two cyberstalking convictions going unpunished with a standard range sentence. 2RP 33. The State’s concession of error on Ford’s two cyberstalking convictions will remove the basis for the trial court’s exceptional sentence and require the trial court to resentence Ford within

the standard range. Therefore, Ford's claim of error to the trial court's exceptional sentence is moot and should not be addressed.

C. The court did not abuse its discretion by restricting Ford's access to the internet when that was the medium he used to extort and threaten his victim.

The trial court acted within its proper authority by limiting Ford's access to the medium he used to commit his crimes. The Sentencing Reform Act (SRA) authorizes trial courts to impose "crime related conditions of sentence." These "crime related conditions" are reviewed under an abuse of discretion standard. A court does not abuse this discretion even when it imposes conditions that infringe on a defendant's fundamental constitutional rights so long as they are sensitively imposed. The internet restrictions imposed upon Ford require clarification, but this Court should affirm the trial court's authority to restrict Ford's internet usage because it was the medium he used to commit his crimes.

The trial court properly restricted Ford's internet usage because it was the medium Ford used to commit his crimes. Under the SRA, a trial court has authority to impose "crime related prohibitions." RCW 9.94A.505(9); *In re Rainey*, 158 Wn.2d 367, 374, 229 P.3d 686 (2010). Specifically, a sentencing condition "may prohibit a defendant's access to a means or medium through which he committed a crime." *Rainey*, 158 Wn.2d. at 380. Both state and federal courts have repeatedly upheld

conditions of release that limit a convict's internet and computer usage when they are connected to the underlying crime. *See, e.g., State v. Riley*, 121 Wn.2d 22, 36, 846 P.2d 1365 (1993); *State v. Irwin*, 191 Wn. App. 644, 658-59, 364 P.3d 830 (2015); *United States v. Perrin*, 926 F.3d 1044, 1048-50 (8th Cir. 2019); *United States v. Halverson*, 897 F.3d 645, 657 (5th Cir. 2018). Ford's crimes are directly connected to his access and use of the internet. Ford used Facebook Messenger to send Christina threatening messages. RP 486-88, 495-98, 528. Ford then carried out his threat by contacting Veronica through Facebook in order to send her nude photographs and videos of Christina's affair. RP 789-90. Therefore, the trial court's prohibition on Ford's internet usage is a valid crime-related prohibition under the SRA. *See* RCW 9.94A.505(9).

The trial court's restrictions on Ford's internet usage should be reviewed for an abuse of discretion. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (finding that sentencing conditions "are usually upheld if reasonably crime related"); *but see Rainey*, 158 Wn.2d at 374 ("[W]e more carefully review conditions that interfere with a fundamental constitutional right."). The appellant bears the burden of proving the trial court abused its discretion. *State v. Ashley*, 186 Wn.2d 32, 39, 375 P.3d 673 (2016). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Arredondo*, 188 Wn.2d 244, 256, 394 P.3d

348 (2017) (finding an abuse of discretion only when “no reasonable judge would have ruled as the trial court did.”). The trial court did not abuse its discretion in restricting Ford’s internet usage because it is in line with long standing case law.

The restriction on Ford’s internet access did not improperly infringe on Ford’s First Amendment rights. Sentencing conditions may restrict fundamental rights so long as the limitations are sensitively imposed. *Riley*, 121 Wn.2d at 37; *Rainey*, 168 Wn.2d at 377. Ford objects to his internet restrictions as a violation of his First Amendment rights, but courts have repeatedly held that a convict’s First Amendment rights may be restricted so long as it is “reasonably necessary to accomplish the essential needs of the state and public order.” *State v. Bahl*, 164 Wn.2d 739, 757, 193 P.3d 678 (2008); *State v. Johnson*, 12 Wn. App. 2d 201, 214, 460 P.3d 1091 (2020). Restricting Ford’s internet was reasonably necessary to protect the public safety as demonstrated by both his actions in this case as well as his history of using the internet to contact, manipulate, and sexually abuse teenage girls as demonstrated by Ford’s 2012 conviction for sexual exploitation of a minor and extortion. CP 69-72.

Ford’s reliance on *Packingham v. North Carolina* is misplaced. *Packingham* declared a statute unconstitutional that prohibited all sex offenders from accessing any social network websites that permit minor

children to be members regardless of whether those sites had any connection to their underlying criminal behavior. *Packingham v. North Carolina*, — U.S. —, 137 S.Ct. 1730, 1731, 198 L.Ed.2d 273 (2017). The Supreme Court struck down this prohibition not because a trial court is unable to restrict a convict’s internet usage, but because it was a blanket restriction that was not narrowly tailored to each defendant. *Id.* at 1737-38. Such a blanket restriction is not an apt comparison to the present case. Here, the trial court had extensive insight into the dangers Ford posed to the community through the facts that were elicited at trial as well as an extensive PSI report that detailed Ford’s risk factors and the details of his prior sexual offenses including his use of social media to manipulate and extort minor girls into sexual acts. CP 64-85; 2RP 20. Therefore, the trial court did not impose a blanket prohibition solely because Ford is a sex offender, but rather opted to restrict Ford’s internet after an individualized analysis of the danger Ford poses to the community and finding that Ford has “serious issues” that need to be addressed. 2RP 34-35.

The reasoning in *Packingham* does not apply where the prohibition against internet usage is crime related and sensitively imposed. In *Johnson*, this Court distinguished *Packingham* in a nearly identical scenario to the case here. *Johnson*, 12 Wn. App. 2d at 214. In *Johnson*, the trial court ordered that the defendant could “not use or access the World Wide Web

unless specifically authorized by CCO through approved filters.” *Id.* at 213. This Court found that *Packingham* did not apply because the internet restriction was tailored to the defendant’s crimes by restricting the medium he used to commit his crimes. *Id.* at 215. This Court distinguished the internet prohibition from the absolute ban in *Packingham* because the defendant could still access the internet through permission from his CCO. *Id.* The same analysis applies here. The trial court used almost identical language in its internet prohibition in Appendix F—“Community custody officer must approve, in advance, defendant’s use of social media, e-mail, and internet”—as well as provision 24 in Appendix H: “No internet access or use without prior approval of the supervising CCO, Treatment Provider, and the Court.” CP 103, 106. Like *Johnson*, Ford used the internet as a medium to commit his crime. RP 486-88, 495-98, 528, 789-90. Like *Johnson*, Ford’s internet restriction was sensitively imposed because he could still access the internet by obtaining prior approval. Therefore, the analysis in *Packingham* does not apply.

The trial court also properly exercised its discretion to impose restrictions on Ford’s access to computer devices. In *Riley*, the Washington Supreme Court upheld a condition that prohibited the defendant from possessing a computer altogether. *Riley*, 121 Wn.2d at 37. This is far more restrictive than the sentencing condition the court imposed here, which still

enables Ford to use a computer for employment purposes or for internet usage that has been previously approved by his community corrections officer. CP 106. Therefore, Ford fails to show the trial court abused its discretion in imposing this restriction.

The State concedes, however, that the trial courts conditions require clarification. If a trial court's sentencing conditions contradict one another, they must be remanded for clarification. *United States v. Holena*, 906 F.3d 288, 291 (3rd Cir. 2018) (finding that a prohibition on possessing or using any computer device was contradictory to a subsequent condition allowing internet access only with advance approval from the probation officer). Much like in *Holena*, the trial court's sentencing conditions require clarification. In Appendix F, the court granted the community corrections officer authority to approve Ford's access to the internet, e-mail, and social media. CP 103. In Appendix H, however, Ford is prohibited from accessing any social media sites of any kind regardless of prior approval. CP 106. Secondly, the condition in Appendix F only requires approval from the community corrections officer while Appendix H requires "prior approval of the supervising CCO, Treatment Provider, and the Court." *Id.* This Court should uphold the trial court's authority to restrict Ford's internet usage and/or access to computer devices because Ford used that medium to

commit his crime. However, this Court should remand this case to the trial court to clarify the contradictory portions of its conditions of release.

D. This Court should affirm the requirement to obtain psychosexual treatment because it is a crime-related condition of release and Ford waived the issue by not objecting below.

This Court should deny Ford's claim that the trial court erred in ordering a psychosexual evaluation and follow up treatment. Ford waived this issue by not objecting at sentencing and cannot demonstrate that it presents a manifest constitutional error. Further, even if this court grants review, the trial court had authority to impose the psychosexual treatment under the SRA because it is crime-related to his conviction for a felony sex offense.

1. This Court should deny review because Ford failed to object at sentencing and cannot show manifest constitutional error.

This Court should deny review of Ford's release condition requiring psychosexual treatment because he waived the issue by failing to object at sentencing. Generally, appellate courts will not consider an issue that a party raises for the first time on appeal unless it is a manifest error affecting a constitutional right. *State v. A.M.*, 194 Wn.2d 33, 38, 448 P.3d 35 (2019). Under RAP 2.5(a)(3), "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98217 P.3d 756 (2009). Ford did not object to the imposition of psychosexual treatment at sentencing. 2RP 36-37. Rather,

Ford used the imposition of psychosexual treatment as the basis for its argument against requiring mental health treatment. *Id.* Since Ford failed to object at sentencing, this Court should deny review absent a showing of manifest constitutional error.

Ford, however, cannot show manifest constitutional error. In fact, Ford does not even challenge the constitutionality of ordering psychosexual treatment. Br. of App. 44-48. Rather, Ford argues that the court failed to meet the statutory requirements of RCW 9.94B.080. *Id.* Statutory interpretation, without more, does not raise *constitutional* concerns. *See, e.g., In re Detention of Boynton*, 152 Wn. App. 442, 456 n. 9, 215 P.3d 1089 (2009); *Milican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 901, 313 P.3d 1215 (2013). Since Ford’s argument does not implicate constitutional concerns, it does not warrant appellate review.

2. The trial court properly imposed psychosexual treatment as a crime-related condition of release for a felony sex offense.

The trial court properly exercised its authority to order Ford to obtain a psychosexual evaluation and complete any recommended treatment. The court had authority to order psychosexual treatment because it is crime related to Ford’s conviction for the felony sex offense—extortion in the second degree with a finding of sexual motivation. *See* RCW 9.94A.030(47)(c) (“sex offense” includes a felony with a finding of “sexual

motivation.”). This Court should reject Ford’s argument that the psychosexual treatment fell under the guise of RCW 9.94B.080 once the judge commented on it being a form of mental health treatment. Such a broad interpretation of RCW 9.94B.080 would undermine the restorative purpose of the SRA.

The trial court had authority to order Ford to obtain a psychosexual evaluation and treatment because it is crime related. RCW 9.94A.703(3)(c) provides the court authority to order an offender to “[p]articipate in crime-related treatment or counseling services.” The Supreme Court has upheld not only the court’s authority to order crime-related sexual deviancy treatment, but also the ability to require reasonable progress in treatment. *State v. Riles*, 135 Wn.2d 326, 351-53, 957 P.2d 655 (1998). Ford even acknowledges that the court may lawfully order a sexual deviancy evaluation following a conviction for a sex offense. Br. of App. 45. Since the court had authority to order the psychosexual evaluation and treatment, Ford has the burden of showing the court abused its discretion in imposing the condition. *Warren*, 165 Wn.2d at 32.

Contrary to Ford’s argument, psychosexual treatment programs do not constitute “mental health treatment” as understood by RCW 9.94A.080. Ford provides no case law supporting his argument that psychosexual treatment programs constitute mental health treatment as understood by

RCW 9.94A.080. Br. of App. 44-46. Instead, Ford bases his argument on comments from Ford's defense counsel and the trial court that psychosexual evaluations include mental health components. *Id.* at 45. Contrary to Ford's argument, a psychosexual treatment program does not change based on the comments of judge or counsel. Rather, they are employed by mental health professionals in the community. RCW 9.94A.080 does not apply here because the court did not order mental health treatment.

Ford's argument, taken to its logical conclusion, would undermine the State's restorative treatment model. Under RCW 9.94A.080, mental health treatment may only be ordered for the "mentally ill." Under RCW 71.24.025(32), the "mentally ill" is limited to (1) the acutely mentally ill, (2) chronically mentally ill adults, (3) seriously disturbed persons, or (4) severely emotionally disturbed children. RCW 71.24.025(32). It is well known that drug addiction, domestic violence, sexual deviancy, and other criminal issues are often connected to other underlying mental health issues such as depression or anxiety that do not rise to the level of "mentally ill." If the court cannot order treatment that contains a mental health component without complying with RCW 9.94A.080 then almost no inmate would be eligible for treatment. This is not in line with the restorative purpose of the SRA. RCW 9.94A.010(5) and (7). This Court should dismiss Ford's claim

because psychosexual treatment is a crime-related treatment condition for a conviction of a felony sex offense.

E. This Court should remand to the trial court to address the collection costs and supervision fees since they were never addressed at sentencing

This Court should remand the issue of legal financial obligations back to the trial court to provide clarity on its ruling because the contested collection costs and supervision fees were never addressed. Although the court is prohibited from imposing discretionary costs on an indigent defendant, supervision assessments and collection costs are not “costs” as defined by RCW 10.01.160. Therefore, the imposition of those legal financial obligations is solely within the discretion of the trial court. Although the court signaled its intent to waive any non-mandatory legal financial obligations, this Court should allow the trial court to address this issue directly since neither party brought it up at sentencing and this case must be remanded for resentencing anyway.

The law prohibits the imposition of discretionary costs on indigent defendants, but neither supervision assessments nor collection costs are “costs” as defined by RCW 10.01.160. Courts are prohibited from imposing discretionary costs on indigent defendants. RCW 10.01.160(3); RCW 9.94A.760; *State v. Ramirez*, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). “Costs” are limited to “expenses specially incurred by the state in

prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” RCW 10.01.160(2). The supervision assessments and collections costs do not fall under this definition as they were not incurred in Ford’s prosecution. Therefore, trial courts still have discretion to impose them.

Supervision assessments and collection costs are discretionary legal financial obligations (LFOs) that are within the sole discretion of the trial court. Courts are given authority to impose collection costs under RCW 36.18.190, which 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). The word “may” signifies that imposition of the cost is left to the discretion of the sentencing court. *See State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Likewise, sentencing courts are provided the authority to waive supervision fees for community custody. RCW 9.94A.703(2)(3). Therefore, both supervision assessments and collection costs are discretionary legal financial obligations.

The fact that a fine or fee is discretionary, however, does not make it a discretionary “cost” within the meaning of RCW 10.01.160(3). *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015). In a series of

unpublished decisions, this Court has held that supervision fees were properly imposed by the trial court regardless of the defendant's ability to pay. *See, e.g., State v. Estavillo*, No. 51629-2-II, 2019 WL 5188618 at *5-6 (Wash. Ct. App. Oct. 15, 2019); *State v. Abarca*, No. 51673-0-II, 2019 WL 5709517 at *1, 10-11 (Wash. Ct. App. Nov. 5, 2019).⁶ This Court noted that there are strong policy arguments in favor of considering a defendant's ability to pay discretionary LFOs, but still left the final decision to the sentencing court. *Id.*

Although the trial court signaled its intent to waive all non-mandatory legal financial obligations, this Court should leave this issue to the trial court to provide clarification considering the case will already need to be remanded for resentencing on the remaining count of extortion. In *State v. Dillon*, Division I remanded to strike the supervision fee after concluding that the trial court intended to impose only mandatory LFOs, but inadvertently imposed the supervision fee because it was "buried in a lengthy paragraph on community custody." *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020). Admittedly, this is very similar to the facts

⁶ As unpublished opinions, *Estavillo* and *Abarca* have no precedential value and are not binding on any court. Unpublished opinions filed after March 1, 2013, however, may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

of the case here where the trial court stated: “I’m going to find Mr. Ford is indigent today. I’m going to order only what I must.” 2RP 32. Neither party, however, ever mentioned either the community custody supervision fees or the collection costs. There is no need to interpret the trial court’s intention in this regard, as this case already needs to be remanded for resentencing based on the State’s concession of error on Ford’s two cyberstalking convictions. Therefore, the cleaner and simpler approach is to remand this issue back to the trial court to clarify its intention regarding the collection costs and supervision fees.

V. CONCLUSION

For the foregoing reasons, this Court should remand this case back to the trial court with instructions to dismiss both cyberstalking convictions, resentence Ford on the remaining count of extortion, provide clarity on its position regarding collection costs and supervision fees, and eliminate the conflicting portions of its restrictions on Ford’s internet access. This Court should uphold the trial court’s authority to impose crime-related conditions

of release including restrictions on Ford's internet usage and requiring him to obtain a psychosexual evaluation and treatment.

RESPECTFULLY SUBMITTED this 28th day of August, 2020.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

8-28-20 s/Therese Kahn
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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