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State of Washington  
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54213-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

LYNN JOHNSON,

Appellant.

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

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BRIEF OF APPELLANT

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## **A. ASSIGNMENTS OF ERROR**

1. The court abused its discretion when it imposed an exceptional sentence upon Mr. Johnson which was clearly excessive.

2. The court erred and exceeded its sentencing authority in restricting Mr. Johnson's internet access.

## **B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Under RCW 9.94A.585(4)(b), a sentence must be reversed where it is clearly excessive. Mr. Johnson was convicted of a number of sexual offenses after pleading guilty. Had the court imposed a sentence within the standard range, Mr. Johnson faced a minimum sentence of 210-280 months to life on the top count, without enhancements. The court imposed a sentence of 420 months, which would make Mr. Johnson approximately 103 years old before he is eligible for release. Did the court abuse its discretion when it imposed a clearly excessive sentence?

2. Sentencing courts may not impose discretionary community custody conditions unless they are directly related to the crime of conviction. In addition, conditions that infringe on First Amendment free speech rights are unconstitutionally overbroad and are prohibited. Here, the court imposed the condition that Mr. Johnson "not access internet unless previously authorized by CCO and/or SOTP therapist." Where Mr. Johnson's crimes of conviction did not involve the internet, is this

condition unrelated to Mr. Johnson's convictions and unconstitutionally overbroad, requiring this Court to strike the condition?

### **C. STATEMENT OF THE CASE**

Lynn George Johnson is a 68-year-old man from Clallam County, Washington. CP 84.<sup>1</sup> In February 2019, Mr. Johnson was charged with nine sexual offenses against five neighborhood teenagers. CP 113-19.

In November 2019, Mr. Johnson entered a guilty plea. CP 84-101. Mr. Johnson pled guilty to all nine offenses: two counts of rape of a child in the second degree, one count of rape of child in the third degree, three counts of child molestation in the second degree, two counts of child molestation in the third degree, and one count of communicating with a minor for an immoral purpose. *Id.*; RP 5-30.

As part of his plea agreement, Mr. Johnson admitted to several aggravating circumstances charged in the information. CP 40, 84-101. Mr. Johnson admitted that his offenses were part of an ongoing pattern of sexual abuse of the girls, who were under age 18. CP 40, 96-97. Mr. Johnson also admitted that he knew or should have known that one of the victims was particularly vulnerable or incapable of resistance. CP 40, 97.

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<sup>1</sup> In the plea agreement, Mr. Johnson's stated age is 68; the Judgment and Sentence lists his year of birth as 1951, which is consistent. CP 43, 84. The court erroneously refers to Mr. Johnson's age as 60 during the plea colloquy. RP 5.

Lastly, Mr. Johnson admitted he engaged the victims in sexual conduct in return for a fee. CP 40, 96-97.

Although the State recommended a sentence within the standard range, the court imposed an exceptional sentence of 420 months to life. CP 39-42, 43-61. The court imposed lifetime community custody, with a condition prohibiting internet access without authorization. CP 61.

#### **D. ARGUMENT**

**1. The court abused its discretion when it imposed a clearly excessive sentence on Mr. Johnson, requiring reversal and remand for resentencing.**

- a. A trial court is prohibited from imposing an excessive sentence.

Appellate review of a defendant's sentence is controlled by statute. State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). When the trial court orders an exceptional sentence, that sentence must be reversed where the court's reasons are not supported by the record or where the reasons do not justify the sentence. Id.; RCW 9.94A.585(4)(a). If support is not found in the record, then the sentence must be reversed if it "was clearly too excessive or clearly too lenient." Ritchie, 126 Wn.2d at 392; RCW 9.94A.585(4)(b).

The trial court's imposition of an exceptional sentence is reviewed for an abuse of discretion. Ritchie, 126 Wn.2d at 392. The trial court

abuses its discretion where the sentence is based on untenable grounds or imposed for untenable reasons, or the court takes action that no reasonable person would have taken. Id. at 393. When the length of a sentence is so long that it “shocks the conscience of the reviewing court,” the trial court has acted in a way that no reasonable person would, and has therefore abused its discretion. Ritchie, 126 Wn.2d at 396 (quoting State v. Ross, 71 Wn. App. 556, 573, 861 P.2d 473 (1993)).

In Ritchie, the Court examined the sentences of three defendants. 126 Wn.2d at 398-404. Each defendant had been convicted of crimes of extreme brutality – including the attempted rape and murder of an elderly woman with dementia, the rape of a six-week-old baby, and the torture and assault of a toddler. Id. at 398-403.

In the first matter with the murder of an elderly victim, the defendant received a sentence of 900 months (approximately three times the standard range). Id. at 399. In the infant rape case, the defendant was sentenced to 312 months (approximately four and one-half times the top of the standard range). Id. at 401. In the toddler assault case, the defendant received a sentence of 84 months (approximately nine times the top of the standard range). Id. at 404.

The Ritchie Court affirmed each sentence, finding none shocked the conscience. Id. at 404. In each case, the defendant had engaged in

brutally violent acts against a particularly vulnerable victim, and the sentences imposed were three to nine times the top of that defendant's standard range. Cases following Ritchie have shown such sentences are justified, as long as the facts are similarly egregious. See, e.g., State v. Haley, 140 Wn. App. 313, 325, 165 P.3d 409 (2007) (sentence of five times the top of the standard range affirmed in case of rape of a five-year-old child).

In contrast, the facts of Mr. Johnson's case were notably less severe than those in Ritchie. Likewise, even under the standard range sentence the prosecution asked for, Mr. Johnson would be 91 when eligible for release. And even then, the Indeterminate Sentence Review Board (ISRB) would decide whether he was sufficiently rehabilitated to be released. This, too, distinguishes Mr. Johnson's case from Ritchie.

b. Mr. Johnson's sentence was clearly excessive and must be reversed by this Court.

Mr. Johnson stipulated to aggravating factors. However, even where a trial court acted within its authority to impose an exceptional sentence, that sentence may still be appealed as unlawfully excessive. Here, where Mr. Johnson was 68 years old at the time of sentencing, the court's sentence of 420 months was shocking in light of the circumstances. These circumstances include Mr. Johnson's efforts to cooperate with the

court and the State, in order to spare the teenaged victims the difficulty of a trial. RP 64-65. This Court should also consider that Mr. Johnson’s first eligibility to appear before the ISRB will be when he is approximately 103 years old and unlikely to reoffend.<sup>2</sup> This de facto life sentence shocks the conscience, particularly comparing Mr. Johnson’s crimes with the heinous crimes in Ritchie. 126 Wn.2d at 396.

The sentence should be reversed and the case remanded for resentencing. See Ritchie, 126 Wn.2d at 392.

**2. The community custody condition restricting Mr. Johnson’s internet access is unauthorized by the statute and is unconstitutional.**

- a. A court may only impose conditions of community custody authorized by statute and permitted by the constitution.

RCW 9.94A.507 authorizes the court to sentence Mr. Johnson to a lifetime of community custody and to impose conditions of community custody. RCW 9.94A.505(9), 9.94A.507(5), 9.94A.703. Permissible conditions of community custody are those identified by statute (either as mandatory or waivable) and those within a court’s discretion if they are “crime-related prohibitions.” RCW 9.94A.703(1)(mandatory conditions), .703(2)(waivable conditions), RCW 9.94A.703(3) (discretionary

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<sup>2</sup> Recidivism among elderly sex offenders is extremely rare. See <https://www.theatlantic.com/health/archive/2017/06/aging-sex-offenders/528849/>; see also <https://pubmed.ncbi.nlm.nih.gov/26893232/> (last reviewed Jun. 28, 2020).

conditions). “[C]rime-related prohibition[s]” are conditions that “directly relate[] to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10), 9.94A.703(3)(f); see also RCW 9.94A.505(9) (authorizing courts to “impose and enforce crime-related prohibitions and affirmative conditions”).

Crime-related conditions must serve at least one of the purposes of the SRA, namely to protect the public or offer the individual an opportunity for self-improvement. State v. Letourneau, 100 Wn. App. 424, 431, 997 P.2d 436 (2000). For this statutory requirement to have any meaning, some factual basis must exist for finding that the conduct proscribed is related to the crime of conviction. State v. Parramore, 53 Wn. App. 527, 531, 769 P.2d 530 (1989).

A court’s authority to impose a community custody condition is reviewed de novo. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). “Any condition imposed in excess of this statutory grant of power is void.” Id. Only where this Court determines the trial court acted within its statutory authority does the Court review the trial court’s decision for an abuse of discretion. Id. at 326.

A community custody condition must not only be statutorily authorized but must also comply with constitutional restraints. Community custody conditions do not enjoy a presumption of

constitutionality. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010).

- b. The condition restricting Mr. Johnson's internet access is not crime related and is unconstitutionally overbroad.

As a condition of community custody, the court ordered Mr. Johnson “not access internet unless previously authorized by CCO and/or SOTP therapist.” CP 61 (Condition 20, Appendix F). None of Mr. Johnson’s nine convictions involved the internet or computers.<sup>4</sup> Therefore, this condition is not related to Mr. Johnson’s crimes, and the court exceeded its statutory authority in imposing the restriction.

In Johnson, this Court reversed a condition of community custody prohibiting the defendant from accessing computers and the internet without the permission of the court. 180 Wn. App. at 330. The court noted that such a prohibition is statutorily authorized only where it is crime-related and that “a sentencing court may not prohibit a defendant from using the Internet if his or her crime lacks a nexus to Internet use.” Id. Because the sentencing court made no findings that the defendant’s offenses involved the internet, the court held the sentencing court

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<sup>4</sup> Mr. Johnson communicated with one of the teens by text message; however, internet or computer usage were not alleged. RP 69, 77-78.

exceeded its sentencing authority under the statute and remanded for the condition to be stricken. Id. at 331.

In State v. O’Cain, this Court reversed a condition of community custody prohibiting the defendant from “access[ing] the Internet without the prior approval of your supervising Community Corrections Officer and sex offender treatment provider.” 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). The court held that such a condition was only statutorily permissible where it was crime-related and, since the defendant’s convictions did not involve the use of the internet, the prohibition was not crime-related. Id. at 775. The court remanded for the sentencing court to strike the internet prohibition from the defendant’s conditions of community custody supervision. Id.

In addition, the condition restricting Mr. Johnson’s ability to access the internet violates Mr. Johnson’s right to free speech. A condition is impermissibly overbroad when it prohibits constitutionally protected conduct. See State v. Halstien, 122 Wn.2d 109, 121-22, 857 P.2d 270 (1993). Conditions prohibiting free speech activities protected by the First Amendment and article I, section 5 are unconstitutionally overbroad. Id.

Defendants serving community custody sentences enjoy the right to access and transmit materials protected by the First Amendment. State

v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). The First Amendment “embraces the right to distribute literature, and necessarily protects the right to receive it.” Martin v. City of Struthers, Ohio, 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). It protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era. Reno v. American Civil Liberties Union, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Thus, restrictions upon access to the Internet necessarily curtail First Amendment rights. Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004).

The United States Supreme Court has recognized the importance of the internet in “the Cyber Age” and found unwarranted restrictions on internet access and social media violates the First Amendment. Packingham v. North Carolina, \_\_\_ U.S. \_\_\_, 137 S.Ct. 1730, 1736, 198 L.Ed.2d 273 (2017). In Packingham, the defendant, a registered sex offender, was convicted under a statute which barred registered sex offenders from “access[ing] 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.” 137 S.Ct. 1733. The Supreme Court noted:

[T]he statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina 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. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox.”

Id. at 1737 (quoting Reno, 521 U.S. at 870). The Court noted, “[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights,” and held the statute violated the First Amendment.

The community custody condition restricting Mr. Johnson’s right to use the internet is overbroad in that it impermissibly infringes on a core First Amendment and article I, section 5 right. Packingham, 137 S.Ct. at 1737. In addition, it is not crime related and is unauthorized by the statute. This Court should strike this condition of community custody.

- c. The condition must be stricken from Mr. Johnson's judgment and sentence.

The court exceeded its statutory authority in imposing Condition of Community Custody 20. CP 61 (Appendix F). In addition, the restriction on internet access violates the First Amendment and article I, section 5. For these reasons, this Court must strike the condition of community custody from the judgment and sentence.

#### **E. CONCLUSION**

This Court should vacate Mr. Johnson's sentence and remand for resentencing within the standard range. In addition, the Court should remand to correct the error in the condition of community custody. Resentencing is required.

DATED this 29th day of June, 2020.

Respectfully submitted,

s/ Jan Trasen

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

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STATE OF WASHINGTON,	)	
	)	
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	)	
v.	)	NO. 54213-7-II
	)	
LYNN JOHNSON,	)	
	)	
Appellant.	)	

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