

FILED
Court of Appeals
Division III
State of Washington
9/10/2018 11:16 AM
No. 31755-2-III

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN ARTHUR PETERS,

Appellant.

OPENING BRIEF OF APPELLANT

On Appeal From Stevens County Superior Court
No.12-1-00077-2
The Hon. Patrick Monasmith, Presiding

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A. ASSIGNMENTS OF ERROR

1. Appellant Kevin Peters assigns error to the entry of the *Judgment and Sentence – Prison*. CP 91-106.

2. The trial court erred when it imposed a series of “other conditions” of community custody:

a. “Other Condition” No. 1 (no contact with Peters’ own children);

b. Other Condition No. 3 (no contact with minors);

c. Other Condition No. 4 (regarding sexually explicit materials);

d. Other Condition No. 7 (regarding romantic relationships);

e. Other Condition No. 9 (regarding plethysmographs)

f. Other Condition No. 10 (regarding places where children congregate);

g. Other Condition No. 11 (regarding home visits);

h. Other Condition No. 13 (regarding residential restrictions);

i. Other Condition No. 16 (regarding employer notification);

j. Other Condition No. 22 (regarding drug paraphernalia);

k. Other Condition No. 23 (regarding association with known abusers/sellers of drugs);

l. Other Condition No. 24 (regarding entering drug locations).

CP 105-06 (copy attached in Appendix A).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are various community custody conditions imposed on Mr. Peters valid crime-related prohibitions?

2. Are various community custody conditions imposed on Mr. Peters constitutionally valid?

C. STATEMENT OF THE CASE

By a second amended information, filed in Stevens County Superior Court on September 19, 2012, the State charged Mr. Peters with three intra-familial sex offenses: Count 1, rape of a child in the first degree of K.Y.P. between December 17, 2008, and May 9, 2011;

Count 2, rape of a child in the first degree of K.M.P. between December 17, 2008, and April 5, 2012; and Count 3, child molestation in the first degree of K.R.P. between December 17, 2008, and February 18, 2012. CP 37-39. Mr. Peters pled guilty to this amended information on September 19, 2012. CP 40-55.

On October 30, 2012, the Hon. Patrick Monasmith imposed sentence on Mr. Peters, giving him indeterminate life sentences for each count, with minimum terms of 216 months for Counts 1 and 2 and 130 months for Count 3. CP 95. The court ordered that Mr. Peters be placed on community custody for any time that he is released from prison before the expiration of the statutory maximum – in other words, community custody for life once Peters is released by the ISRB. CP 96. The court ordered a variety of “mandatory conditions” of community custody as well a series of as “other conditions.” CP 105-106 (App. A).

Mr. Peters filed an untimely direct appeal from the judgment on June 12, 2013. CP 107. The appeal was initially dismissed in September 2013, and the case mandated. On May 24, 2017, Mr. Peters filed a motion to recall the mandate and to extend the time for filing the

notice of appeal. Although this Court denied the motion, on April 4, 2018, the Supreme Court ordered that the mandate be withdrawn and ordered that this Court allow for the filing of a late appeal. Supreme Court No. 95146-2.

D. ARGUMENT

1. *Introduction*

Mr. Peters will be under the control of the State of Washington for the rest of his life. He is now only 47 years old, and thus, because of the life sentences, when he is released from prison Mr. Peters will be under the supervision of the Department of Corrections (“DOC”) for decades into the future.

Over the next 40 or 50 years even, a government employee from DOC will continue to exercise incredible power over the most private aspects of Mr. Peters’ life. For instance, under the judgment, Mr. Peters needs the permission of a Community Corrections Office (“CCO”) before he can enter a “romantic” relationship. Other Condition No. 7, CP 105. The CCO will be able exercise control – decades from now – over what types of books or magazines or films

Mr. Peters can view or read, what parks he can go to, and whether he could even send a birthday card to a grandchild from a nursing home. Other Conditions Nos. 3, 4, & 10, CP 105. Even if his children wish to have contact with Mr. Peters decades from now, when they are adults and he is old and feeble, Mr. Peters will not be able to have contact with them at all. Other Condition No. 1. CP 105.

Mr. Peters challenges many of the conditions of community custody in this appeal.¹ The fact that Mr. Peters has not yet been released from prison does not bar him from raising most of these challenges now. *State v. Bahl*, 164 Wn.2d 739, 744-52, 193 P.3d 678 (2008).² Because there may not be a scienter requirement for a violation of these conditions,³ particular scrutiny is required so that 40 years from now Mr. Peters is not incarcerated because of an alleged

¹ Although there was no objection to these conditions below, such challenges are suitable to be considered for the first time on appeal. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018); *State v. Johnson*, 4 Wn. App.2d 352, 357, 421 P.3d 969, *pet. pending* Sup. Ct. No. 96192-1 (2018).

² *But see* the challenge to Other Condition No. 11, *infra* (§(D)(9)).

³ *See State v. McCormick*, 166 Wn.2d 689, 697-705, 213 P.3d 32 (2009) (State does not need to prove a willful violation of community custody conditions before revoking a SSOSA sentence).

violation of a vague condition, a condition that is enforced in an arbitrary manner.

In this regard, it is important to realize that while many of the conditions are written in the alternative, giving power to either to a CCO or “treatment provider” to make decisions, it is unlikely that Mr. Peters will have a treatment provider for most of the rest of his life. Other Condition No. 6 requires that Mr. Peters obtain a sex offender treatment evaluation and follow through with all recommendations. CP 105. However, there is no guarantee that this evaluation will in fact recommend sexual deviancy treatment, and, if Peters does have such treatment, the treatment would likely finish in a year or two. Thus, for most of the rest of his life, Mr. Peters will not have a treatment provider at all, and the only person who will decide such things as with whom or when Mr. Peters can enter into a romantic relationship or what materials he can read or view will be a CCO, who may or may not have expertise in determining what is appropriate for someone whose alleged offense took place many decades earlier.

2. *A Trial Court’s Authority to Impose Community Custody Conditions is Limited*

Under the Sentencing Reform Act of 1981, RCW 9.94A, a court has the authority to impose “crime-related prohibitions and affirmative conditions” as part of a felony sentence. RCW 9.94A.505(9). RCW 9.94A.703(3)(f) currently allows a court to order, as condition of community custody, compliance with any “crime-related prohibition.”⁴

“‘Crime-related prohibition’ means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). To determine whether a condition is directly related, a court reviews the factual basis for the condition for “substantial evidence” and “will strike the challenged condition if there is no evidence in the record linking the circumstances of the crime to the condition.” *State v. Padilla*, 190 Wn.2d 672, 683, 416 P.3d 712 (2018).

⁴ In 2008, the Legislature adopted a new statute regarding community custody provisions. Laws of 2008, chapter 231, § 9. This statute is now codified (with some changes) at RCW 9.94A.703. It should be noted that the charging period in this case goes back to 2008.

While review of most conditions of community custody is for “abuse of discretion,” *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010), a “[m]ore careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). “Imposition of an unconstitutional condition would, of course, be manifestly unreasonable.” *State v. Bahl*, 164 Wn.2d at 753. While a convicted person’s rights can be restricted as a result of a criminal conviction, the restrictions must be “only to the extent it is reasonably necessary to accomplish the essential needs of the state and the public order.” *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Sanchez Valencia*, 169 Wn.2d at 792. This is in line with the general principle that the restriction of fundamental freedoms, including freedom of speech, can only be justified by “compelling” state interests with narrowly drawn restrictions. *See Bering v. Share* 106 Wn.2d 212, 237-45, 721 P.2d 918 (1986).

Community custody conditions can also be unconstitutionally vague, in violation of the guaranty of due process, contained in the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, if the conditions do not provide fair warning of the proscribed conduct and are not definite enough to prevent arbitrary enforcement. *State v. Bahl*, 164 Wn.2d at 752-53; *State v. Irwin*, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015). A community custody condition is unconstitutionally vague if either “(1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *State v. Padilla*, 190 Wn.2d at 677. Conditions can also violate other provisions of the United States and Washington Constitutions, such as the First Amendment. *State v. Padilla*, 190 Wn.2d at 677-78.

3. *The Absolute Ban on Mr. Peters' Life-Long Contact with Own Children Is Unconstitutional and is Not a Valid Crime-Related Prohibition*

Other Condition No. 1 provides: "Have no direct or indirect contact with Victims K. Y.P. [DOB]; K.M.P. [DOB]; and K.R.P. [DOB] for Life." CP 105. Thus, when Mr. Peters' children are adults themselves and want to visit their elderly father, perhaps for their own therapeutic reasons, they will be unable to have such contact, even with the permission of the CCO. This absolute life-time ban is illegal.

Mr. Peters (as well as his children) has a right to familial relations, protected by various provisions of the federal and state constitutions and their penumbra. *See In re Rainey*, 168 Wn.2d 367, 374 & 377, 229 P.3d 686 (2010); U.S. Const. amends. I, IV, V, IX, & XIV; Const. art. I, §§ 3, 5, & 7. In *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984), the Supreme Court recognized the right to form intimate human relationships, which included marriage, childbirth, the raising and educating of one's children, and cohabitation with one's relatives. *Id.* at 619.

While some restrictions on contact in a case of intra-familial sex abuse are obviously appropriate, the lack of any justification for an absolute *life-time* ban on having contact with the victims, even after they become adults, even upon their initiative and even if a CCO would allow it, makes the condition illegal. *In re Rainey*, 168 Wn.2d at 381-82 (striking down lifetime ban on contact with daughter, without justification). “Reviewing courts must analyze the scope and duration of no contact orders in light of the facts in the record.” *State v. Howard*, 182 Wn. App. 91, 101, 328 P.3d 969 (2014). A remand is required if this Court is not able to determine whether the scope or duration of a term is reasonably necessary. *See Rainey*, 168 Wn.2d at 382.

Here, there is no basis in the record for an absolute life-time ban on contact with children who become adults and who themselves may want to have contact with their father. The life-time ban, without any exceptions, is not a valid “crime-related prohibition” under the SRA and violates the aforementioned constitutional provisions, and should either be stricken or modified on remand.

4. *The Ban on Contact With “Minors” is Vague, and, as Currently Written, It is Not a Valid Crime-Related Prohibition and Unconstitutionally Interferes with Peters’ Associational Rights*

Other Condition No 3 prevents Mr. Peters from having contact with “Minors” without approval of the CCO or treatment provider. CP 105. Yet, the term “minor” is not defined, and it is unclear whether it means someone under the age of 16,⁵ someone under the age of 18,⁶ or someone under the age of 21.⁷ The term “minors” is therefore unconstitutionally vague in violation of the Due Process Clauses of the Fourteenth Amendment and article I, section 3. *See State v. Padilla*, 190 Wn.2d at 677; *State v. Bahl*, 164 Wn.2d at 752-53.

Moreover, to the extent it pertains to contact with “minors” over the age of 16, it is not a valid crime-related prohibition under RCW 9.94A.703(3)(e) and RCW 9.94A.505(8), since the children in this case

⁵ *See* RCW 46.61.5055(6) (penalties for driving while intoxicated if minor passenger in vehicle, defining “minor” as being under 16).

⁶ *See* RCW 9.68A.011(5) (sexual exploitation of children chapter defines “minor” to be someone under 18).

⁷ *See* RCW 66.44.270 (crime of furnishing alcohol to “minors” is defined as people under 21).

were all under the age of 16. This condition, as it currently is written, therefore violates Mr. Peters’s right to freedom of association and freedom of speech under the First Amendment and article I, sections 4 & 5. *See State v. Riles*, 135 Wn.2d at 349-50 (striking condition of no contact with minors for person convicted of raping 19-year-old woman).

5. *The Ban on “Sexually Explicit Materials” is Not a Valid Crime-Related Prohibition and is Unconstitutional*

Other Condition No. 4 prohibits Mr. Peters from accessing, using or possessing “any sexually explicit materials” unless authorized by the CCO or the treatment provider. CP 105. The term “sexually explicit materials” is not defined, and thus would seem to include the viewing of “R”-rated movies, works of literature such as those by D.H. Lawrence, steamy romance novels, or works of art such as those by Egon Schiele. Thus, the condition infringes on the right of freedom of speech, protected by the First Amendment and article I, section 5, as well as not being a “crime-related prohibition” under the SRA.

In *State v. Bahl*, *supra*, the Supreme Court struck down on vagueness and First Amendment grounds a condition of community custody that banned accessing or possessing pornographic materials. *Bahl*, 164 Wn.2d at 753-58. More recently, in *State v. Padilla*, *supra*, the Supreme Court found to be unconstitutionally vague a condition that banned “pornographic materials” that were even specifically defined as “images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts,” finding that such a ban “impermissibly extends to a variety of works of arts, books, advertisements, movies, and television shows.” *Id.* at 681.⁸

Previously, this Court has rejected a challenges to conditions restricting the defendant from X-rated movies, adult book stores and sexually explicit materials. *State v. Magana*, 197 Wn. App. 189, 201, 389 P.3d 654 (2016); *State v. Alcocer*, 2 Wn. App. 2d 918, 413 P.3d

⁸ On May 10, 2018, the Supreme Court heard oral arguments in a case involving a challenge to a condition banning possession of more a narrow version of “sexually explicit” materials. *State v. Nguyen*, Sup. Ct. No. 94883-6. [Http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/May2018.pdf](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/May2018.pdf).

1033, *pet. pending* Sup. Ct. No. 95735-5 (2018).⁹ However, in light of *Padilla*, this Court recently overruled those two cases: “The mere fact that Mr. Johnson has been convicted of a sex offense, and thus exhibited an inability to control sexual impulses, is insufficient to provide the necessary link. . . . To the extent that our prior decisions in *Alcocer* and *Magana* condoned conditions such as 19 and 20 as generally crime related in sex offense cases, those decisions appear to no longer be good law after *Padilla*.” *State v. Johnson*, 4 Wn. App. 2d 352, 359-60, 421 P.3d 969, *pet. pending* Sup. Ct. No. 96192-1 (2018).¹⁰

⁹ The Supreme Court stayed consideration of the petition in *Alcocer* pending its decision in *State v. Nguyen*, Sup. Ct. No. 94883-6 (consolidated with No. 95274-4 - *State of Washington v. Dominique Debra Norris*). See *State v. Alcocer*, 2018 Wash. LEXIS (7/11/18).

In *Alcocer*, this Court actually remanded the case to make it clear that the ban was not on just “sexually explicit” materials, but only those which “limit use or possession of materials depicting ‘sexually explicit conduct’ as defined in RCW 9.68A.011(4).” 2 Wn. App.2d at 922. The restriction in Other Condition No. 4 does not reference RCW 9.68A.011(4) and is invalid even under *Alcocer*. Similarly, if the condition was qualified to include only depictions of people under 18, then the ban would be lawful as it would be tied to depictions that were already illegal under RCW 9.68A.070.

¹⁰ It should be noted that the defendant in this recent *Johnson* case filed a *pro se* petition for review, raising only challenges to his underlying convictions, and thus this Court’s decision regarding the community custody provisions is not actually on review in the Supreme Court. Sup. Ct. No. 96192-1. <https://www.courts.wa.gov/content/petitions/96192-1%20Petition%20for%20Re> (continued...)

To be sure, in this case, there were allegations that Mr. Peters showed films involving sex and children to his own children. CP 13. Narrowly tailored limitations may well be constitutional and “crime-related.” As in *Padilla*, a remand to the trial court is required for further definition of the term “sexually explicit” “following a determination of whether the restriction is narrowly tailored” based on Mr. Peters’ conviction. *Padilla*, 190 Wn.2d at 684. However, as it exists now, Other Condition No. 4 is not a valid crime-related prohibition under the SRA and is unconstitutional.

6. *The Restriction on Romantic Relationships is Not a Valid Crime-Related Prohibition and is Unconstitutional*

Special Condition No. 7 provides: “Do not enter into any romantic relationships without the prior approval of your supervising Community Corrections Officer, and if applicable, Sex Offender Treatment Provider.” CP 105. Thus, for the rest of Mr. Peters’ life, a government-employee will have an absolute and standardless veto

¹⁰(...continued)
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power over whether he can even form a romantic relationship with another person and who that person might be.

This condition is not a valid crime-related prohibition under RCW 9.94A.505(9) and RCW 9.94A.703(3)(f). However, in *State v. Autrey*, 136 Wn. App. 460, 150 P.3d 580 (2006), this Court held that a condition requiring prior approval of adult sexual conduct was reasonably related to sex crimes involving children “because potential romantic partners may be responsible for the safety of live-in or visiting minors.” *Id.* at 468. However, Other Condition No. 7 is not tied to sexual conduct, but only involves “romantic” relationships, a much broader term that may involve only digital communications and emotional attachments.

Moreover, *Autrey*’s broad holding has been eroded over time. For instance, in *State v. Kinzle*, 181 Wn. App. 774, 326 P.3d 870 (2014), the court cited *Autrey*, but only to uphold a very narrow condition that Mr. Kinzle not “date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections Officer.” *Id.* at 785. This condition passed

muster because of its connection to the allegation that the defendant in *Kinzle* met his victims through social relationships with their families. Here, there is no allegation that Mr. Peters met the mother of his own children for the purpose of ingratiating himself into a family to exploit the children. Thus, the restriction on “romantic relationships” without advance permission is not a valid crime-related prohibition.

The condition also violates various provisions of the federal and state constitutions and their penumbra related to the right to form intimate relationships. U.S. Const. amends. I, IV, V, IX, & XIV; Const. art. I, §§ 3, 5, & 7; *Roberts v. United States Jaycees, supra*. An outright ban on Mr. Peters’ having a romantic relationship with someone in the future, without government permission, would violate this fundamental right. To the extent such relationships lead to normal sexual activity, the ban constitutes cruel or unusual punishment under the Eighth Amendment and article I, section 14. *See Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (striking down forced sterilization as punishment for convictions); *Mickle v. Henrichs*, 262 F. 687 (D.C. Nev. 1918) (punishment of

vasectomy violates 8th Amendment); *State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985) (voluntary surgical castration to obtain suspended sentence void as cruel and unusual).

The condition is also unconstitutionally vague, in violation of the Due Process Clauses of the Fourteenth Amendment and article I, section 3, because it is not even clear what a “romantic relationship” entails. Does such a relationship require sex, or can someone have a “romantic” relationship without sexual contact? Would a sexual relationship without romance be okay? Would a digital “romance” count, or would in-person contact be required?¹¹

A lifetime ban on Mr. Peters ever having a romantic relationship, without the permission of a state employee (a CCO), is also unconstitutionally vague because the condition does not require any reason to be given for the CCO’s veto power nor are there any guidelines for the exercise of discretion. *See State v. Irwin*, 191 Wn. App. at 655 (striking down geographic restrictions because of unbridled

¹¹ Ironically, because Mr. Peters is not banned from having sex without permission, the condition encourages him to have sexualized relationships that are not “romantic.”

power of CCO); *State v. Magana*, 197 Wn. App. at 201 (striking down geographic restrictions due to “boundless” discretion of CCO).¹²

In *United States v. Reeves*, 591 F.3d 77 (2nd Cir. 2010), the Second Circuit concluded that a condition requiring the offender to notify the probation department “when he establishes a significant romantic relationship” was insufficiently clear. 591 F.3d at 80-81. This Court relied on *Reeves* to strike down, in an unpublished decision, a condition nearly identical to Other Condition 7. *State v. Dickerson*, 194 Wn. App. 1014, 2016 Wash. App. LEXIS 1230, 2016 WL 3126480, Slip Op. at 2, 9-10 (No. 32899-6-III, 5/26/16) (unpub.) (cited under GR 14.1; has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate) (striking down as unconstitutionally vague a condition that “you do not enter a romantic relationship without the prior approval of the [community corrections officer] and Therapist.”): *Accord: State v. Landeros*, 2018 Wash. App. LEXIS 2048, Slip Op. at 7 (35478-4-III, 8/30/18)(unpub.) (cited under GR 14.1; has no precedential value, is not

¹² This portion of *Magana* was not overruled by *State v. Johnson*, *supra*.

binding on any court, and is cited only for such persuasive value as the court deems appropriate).¹³

Accordingly, this Court should strike down Other Condition No. 7 under the SRA as it is not a valid crime-related prohibition and under the aforementioned federal and state constitutional provisions.

7. *Because the Plethysmograph Requirement is Not Tied to Treatment, It is Not a Valid Condition Under the SRA*

Other Condition No. 9 requires Mr. Peters to “[s]ubmit to Plethysmograph testing as directed.” CP 105. This condition is not a valid crime-related condition under the SRA because the condition is not tied to such testing done in the course of treatment. As Division Two recently recounted, the Supreme Court has:

made it clear, however, that plethysmograph testing can be used only for treatment purposes. We affirm the condition at issue here but write to clarify that the CCO's scope of authority is limited to ordering plethysmograph testing for the purpose of sexual deviancy treatment and not for monitoring purposes.

¹³ Currently before the Supreme Court is a case involving a challenge to a condition that an offender inform her CCO or treatment provider of any “dating relationships.” *State v. Norris*, Sup. Ct. No. 95274-4, consolidated with *State v. Nguyen*, Sup. Ct. No. 94883-6 (argued on May 10, 2018).

State v. Johnson, 184 Wn. App. 777, 781, 340 P.3d 230 (2014) (citing *Riles*). *Accord: State v. Mason*, 2 Wn. App. 2d 504, 410 P.3d 1173, Slip Op. at 11 (No. 75408-4-I, 2/12/18) (unpub. portion of opinion) (cited under GR 14.1; has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate). Here, the condition is not so limited and is therefore illegal under the SRA.

8. *The Restrictions on Places Where “Children Congregate” is Vague and Violate Several Constitutional Provisions*

Other Condition No. 10 provides: “Do not go to places where children congregate (i.e. schools, playgrounds, parks, etc.)” CP 105. This condition is vague because of its breadth and lack of definition, particularly since it uses the abbreviation “etc”, for *et cetera*, a Latin expression meaning “and similar other things” or “and so on.”¹⁴ The condition is not clear that children even need to be present. Thus, it is unclear if Mr. Peters could go to a park if children are not present at that time. Or is he banned forever from any place where children *might*

¹⁴ <https://en.wikipedia.org/wiki/ETC> (accessed 9/5/18).

sometimes congregate? Is the entire park off-limits, or only those portions where children are present?

Such a provision is vague, is not crime-related under RCW 9.94A.505(9) and RCW 9.94A.703(3)(f), and violates Mr. Peters's associational rights, due process, freedom of travel, and freedom of speech under the First, Fourth, Fifth, Ninth and Fourteenth Amendments and article I, sections 3, 4 and 5. *See United States v. Peterson*, 248 F.3d 79, 86 (2nd Cir. 2001) (“[I]t is unclear whether the prohibition applies only to parks and recreational facilities in which children congregate, or whether it would bar the defendant from visiting Yellowstone National Park or joining an adult gym.”); *State v. Irwin*, 191 Wn. App. at 652-55 (striking down condition “Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO.”).

In a split decision, this Court recently rejected a challenge to a similar condition in *State v. Johnson*, 4 Wn. App.2d at 360-61 (“[a]void places where children congregate to include, but not limited to: parks, libraries, playgrounds, schools, school yards, daycare centers, skating

rinks, and video arcades.”). *But see Johnson*, 4 Wn. App.2d at 362-66 (Fearing, J., dissenting in part).¹⁵ However, even the majority of this Court held that the condition would have to make it clear that “children” referred to people under 16 years of age. *Johnson*, 4 Wn. App.2d at 361-62 & n.3. Other Condition No. 10 does not make this clear and thus at the very least, if the Court upholds the condition, the case needs to be remanded for the court to specify that the condition only applies to where children under 16 congregate.

In any case, Mr. Peters respectfully asks that this Court follow Judge Fearing’s opinion in *Johnson*, rather than the majority, and invalidate Other Condition No. 10 as it is currently written, both as not being a valid crime-related prohibition under the SRA and under the aforementioned constitutional provisions.

¹⁵ See also *State v. Norris*, 1 Wn. App. 2d 87, 404 P.3d 83 (2017), review granted, 190 Wn.2d 1002, 413 P.3d 12 (2018) (striking down condition reading: “Do not enter any parks/playgrounds/schools and or any places where minors congregate.”); *State v. Wallmuller*, ___ Wn. App. 2d ___, ___ P.3d ___, 2018 Wash. App. LEXIS 1806, 2018 WL 3737093 (50250-0-II, 8/7/18) (split decision; following *Irwin*, disagreeing with *Johnson*).

9. *The Condition Regarding Submitting to Home Visits Violates the SRA and is Unconstitutional – If Mr. Peters Cannot Challenge this Condition Now, the State Should Be Required to Return to Court to Seek Permission to Engage in Home Visits*

In Other Condition No. 11, the court ordered that Mr. Peters:

Submit to Home Visits to monitor compliance with supervision. Home Visits include access for the purposes of visual inspection of all areas you live, or have exclusive/joint control/access.

CP 105.

Even granted the diminished right to privacy that someone on supervision may have, a condition that allows a CCO to search a house (albeit visual inspection only) without a warrant and without even a reasonable suspicion that Mr. Peters violated the terms of community custody is not authorized by statute.

RCW 9.94A.631(1) currently requires at least “reasonable cause” for a search:

If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender’s person, residence, automobile, or other personal property.

Other Condition No. 11, though, allows a search for no reason at all and therefore violates the SRA. Such a search, without even reasonable suspicion, also violates the Fourth and Fourteenth Amendments and article I, section 7. *State v. Winterstein*, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009) (citing in part *Motley v. Parks*, 432 F.3d 1072 (9th Cir. 2005), *overruled on other grounds United States v. King*, 687 F.3d 1189 (9th Cir. 2012)).¹⁶

Mr. Peters acknowledges that the Supreme Court has held that a challenge to this type of condition is not ripe for review in a pre-enforcement context. *State v. Cates*, 183 Wn.2d 531, 354 P.3d 832 (2015). If this Court cannot review Other Condition No. 11 because of *Cates*, then the Court should hold that if the State and its employees at the DOC wish to enforce the condition in the future – i.e., search Mr. Peters’ residence without a warrant – the State and DOC should first be

¹⁶ See also *State v. Cornwell*, 190 Wn.2d 296, 297, 412 P.3d 1265 (2018) (“It is well established that an individual on probation has a reduced expectation of privacy, and a community corrections officer (CCO) may conduct a warrantless search if he or she suspects the individual has violated a probation condition. The issue in this case is whether there are any limitations on the scope of the CCO’s search. We hold that article I, section 7 of the Washington Constitution requires a nexus between the property searched and the suspected probation violation.”).

required to return to court and obtain permission of the superior court. This would shift the onus of enforcement to the party which seeks relief, and would protect Mr. Peters from having to risk refusing a warrantless search, with all of the attendant serious consequences (being sent back to prison). This procedure would also insure that there are no surprises, either to Mr. Peters or to the CCO, and would set up a procedure in advance by which the legality of Other Condition No. 11 could be tested under whatever circumstances arise.

Division One once recognized the “challenge faced by an individual who is compelled to engage in an invasive procedure and who faces contempt for refusing to comply. An appeal as a matter of right after the invasive procedure could be a hollow remedy.” *In re Det. of Herrick*, 198 Wn. App.1029, 2017 Wash. App. LEXIS 786, Slip Op. at 8 n.21 (No. 69993-8-1, 4/3/17) (unpub.) (cited under GR 14.1; has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate), Slip Op. at 8 n.21, *aff’d* 190 Wn.2d 236, 412 P.3d 293 (2018). Similarly, here, if 20 years from now, Mr. Peters declines to allow a CCO to come into his

home unannounced, and as a result, a violation is filed and Mr. Peters is sent back to prison, a direct appeal in which he raises the legality of the CCO's actions would be a hollow remedy.

Accordingly, the Court should order that, if the CCO wants to search Mr. Peters' residence without a warrant, the State and/or DOC should have to file motion in the superior court ahead of time so the legality of Other Condition No. 11 can be tested in due course, without risk to Mr. Peters.

10. *The Ban on Residing Within 888 Feet of Community Protection Zone is Too Broad and Does Not Track Current Statutory Language and is Unconstitutional*

Other Condition No. 13 states: "Do not reside in a location within 888 feet of a Community Protection Zone." CP 105. This condition appears to derive from the mandatory condition required by RCW 9.94A.703(1)(c)-- "If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection

zone.”¹⁷ RCW 9.94A.030(6) in turn provides: “‘Community protection zone’ means the area within eight hundred eighty feet of the facilities and grounds of a public or private school.”).

Apart from the 880 v. 888 foot difference, Other Condition No. 13 is too broad in that it requires Mr. Peters to reside 888 feet from the zone itself – not 888 feet from the school grounds, but 888 feet from the boundaries of the zone, an additional distance not authorized by the statute. The condition should be stricken and the case remanded to correct this issue.

Moreover, the condition is not clear. Does the condition only apply to public or private schools serving children, or does it apply to a private or public university (which are also “schools”)? Generally, people have the constitutional right under the First, Fourth, Fifth, Ninth and Fourteenth Amendments and article I, sections 3, 5 and 7, to reside where they want to.¹⁸ While residential restrictions on those convicted

¹⁷ The original version referred to former RCW 9.94A.712 and RCW 9.94A.712(1)(a). Laws of 2008, chapter 231, § 9.

¹⁸ See *United States v. Wheeler*, 254 U.S. 281, 293, 41 S. Ct. 133, 65 L. Ed. 270 (1920) (“In all the States from the beginning down to the adoption of the
(continued...)”)

of sex offenses may be appropriate, *Doe v. Miller*, 405 F.3d 700, 712 (8th Cir. 2005), the conditions need to be clear. Other Condition No. 13 is not clear and should be changed, not only to conform to RCW 9.94A.703(1)(c) and RCW 9.94A.030(6), but to make it clear it pertains only to schools where children under 16 attend.

11. *The Forced Employer Notification Requirement is Not a Valid Crime-Related Prohibition; It is Unconstitutionally Vague and Its Compelled Nature Violates Mr. Peters' Right to Freedom of Speech*

Other Condition No. 16 requires Mr. Peters to “[n]otify any employer(s) regarding the nature of your sex offense.” CP 106. Practically, this condition will lead to Mr. Peters being unable to find suitable employment when he is released from prison. But apart from the unintended anti-social characteristics of the condition, which will actually diminish Mr. Peters’ ability to be a fully integrated member of

¹⁸(...continued)

Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the States to forbid and punish violations of this fundamental right.”).

society, the condition is invalid because it is not a proper “crime-related” prohibition and is unconstitutional.

The origins of Other Condition No. 16 are not clear. RCW 9.94A.703 does not list such a condition as a mandatory, waivable, discretionary or special condition. Notably, the condition is not a employment restriction that would prohibit Mr. Peters from certain categories of employment (i.e., such as restrictions against working with children). Rather, it directs him simply to tell an employer not just the fact of a prior conviction, but the “nature” of the convictions.

The condition is not a valid crime-related prohibition, analyzed under *State v. Padilla*, 190 Wn.2d at 682-83. Nothing about the facts of this case had to do with Mr. Peters’ employment or work life, and there is no allegation that Mr. Peters abused a position of trust within a job to commit a crime. Accordingly, the employment restriction (forcing him to reveal the “nature” of his offenses to an employer) is not a valid crime-related prohibition under the SRA. It “is not

reasonably necessary to accomplish the essential needs of the state and public order.” *State v. Padilla*, 190 Wn.2d at 683.¹⁹

Other Condition No. 16 also suffers from unconstitutional vagueness. It is not clear what the “nature” of the convictions is – is it simply the names of the convictions that matter, or is Mr. Peters required to disclose the State’s graphic allegations in the certificate of probable cause? Can Mr. Peters be sent to prison for life because his version of the facts differs from that endorsed by his CCO? The vague requirements of the condition do not provide Mr. Peters with fair warning as to what is required of him and opens him up to the possibility of arbitrary enforcement. The condition violates Due Process of Law protected by the Fourteenth Amendment and article I, section 3. *State v. Padilla*, 190 Wn.2d at 680-82.

¹⁹ See also *United States v. Peterson*, 248 F.3d at 85-86 (“An occupational restriction must be based on the offense of conviction If the court believes such notification should be mandatory for certain types of employment but not others, the court may specify guidelines to direct the probation officer, but may not simply leave the issues of employer notification to the probation officer's unfettered discretion.”); *Doe v. Fauver*, 3 F. Supp. 2d 485 (D.N.J. 1997) (requiring hearing before forcing employer notification).

Other Condition No. 16 also implicates Mr. Peters' rights to freedom of speech under both the First Amendment and article I, section 5. Unlike Other Condition No. 4, which bans possession of various material, Other Condition No. 16 implicates the constitutional protection against compelled speech. As the U.S. Supreme Court recently held:

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). . . .

. . .

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. . . .

. . .

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning

Janus v. AFSCME, Council 31, ___ U.S. ___, 138 S. Ct. 2448, 2463-64, 201 L. Ed. 2d 924 (2018).

Here, Mr. Peters is at jeopardy of being sent back to prison for life if he does not describe the “nature” of his offenses in a way that a CCO may wish him to describe it. One can easily imagine a CCO concluding that Mr. Peters was “minimizing” the “nature” of the offenses, or that he did not give proper details. In this way, the requirement that Mr. Peters describe the offenses in a particular way violates the protection of the First and Fourteenth Amendments and article I, section 5.

For these reasons, the Court should strike the condition.

12. *The Bans on Drug Paraphernalia and Association with Known Abusers/Sellers Are Vague, as is the Restriction on Entry into “Drug Locations”*

Other Condition No. 22 states: “Do not possess Drug Paraphernalia.” CP 106. Other Condition No. 23 prohibits Mr. Peters from associating with “known abusers/sellers of illegal and prescribed Drugs.” CP 106. Other Condition No. 24 states: “Do not enter areas

identified by your Community Corrections Officer as Drug Locations.” CP 106. Given the allegations of substance use in this case,²⁰ some restrictions regarding substance abuse may be appropriate crime-related prohibitions under the SRA. *See generally State v. Munoz-Rivera*, 190 Wn. App. 870, 892-93, 361 P.3d 182 (2015) (striking drug paraphernalia and drug associate conditions as not being crime-related in domestic violence case). The problem, however, is that the conditions imposed here are unconstitutionally vague, in violation of Due Process of Law protected by the Fourteenth Amendment and article I, section 3.

In *State v. Sanchez Valencia, supra*, the Supreme Court struck down on vagueness grounds a condition that banned the defendant from possessing “any paraphernalia that can be used for the ingestion or processing of controlled substances.” 169 Wn.2d at 785. The Court based its holding on the fact that “the condition might potentially encompass a wide range of everyday items,” such as plastic sandwich

²⁰ Mr. Peters’ guilty plea statement notes that he did not recall the factual allegations in Count 2 due to his drug use, CP 54, and there were other allegations of drug use tied to the facts of the case. CP 60-62.

bags, and thus it did not provide sufficient standards to protect against arbitrary enforcement. *Id.* at 794-95. Other Condition No. 22 suffers the same defect.

As for association with “known abusers/sellers of illegal and prescribed Drugs” (Other Condition No. 23), the condition is unclear. “Known” to whom? To Mr. Peters or to a CCO? What is an “abuser” of “prescribed Drugs?” Is Mr. Peters’ prohibited from associating with a pharmacist, a lawful “seller” of “prescribed Drugs?” The condition should vacated and clarified upon remand. *See, e.g., State v. Martin*, 198 Wn. App. 1068, 2017 Wash. App. LEXIS 1044, Slip Op. at 5-6 (34037-6-III, 5/5/17) (unpub.) (cited under GR 14.1; has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate) (striking down vague drug association conditions and providing clearer language for remand).²¹

²¹ This Court approved of the following language:

(7) Defendant shall not associate with persons involved in the unlawful use, sale, and/or possession of controlled substances.

(continued...)

Finally, regarding exclusion from “Drug Locations” (Other Condition No. 24), while RCW 9.94A.703(3)(a) allows a court to enter discretionary conditions, including ordering an offender to “[r]emain within, or outside of, a specified geographical boundary,” Other Condition No. 24 gives the CCO complete discretion to exclude Mr. Peters from whole geographic areas, without any standards. It is not known what a “Drug Location” is – is it a pharmacy? Is it a park where others have been seen consuming lawful drugs?

In *State v. Irwin, supra*, Division One struck down geographic restrictions (related to where children “congregate”) because the condition gave the CCO the power to define the areas affected, allowing for arbitrary enforcement. *Irwin*, 191 Wn. App. at 655. The same principles apply here – Other Condition No. 24 provides no guidelines to a state employee to use when deciding, over the next four

²¹(...continued)

(8) Defendant shall not enter into or remain in areas where controlled substances are being unlawfully sold/purchased, possessed, and/or consumed.

State v. Martin, supra (unpub.) (cited under GR 14.1; has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate).

decades or so, where Mr. Peters can go to and what locations qualify as “Drug Locations.” The condition is invalid as vague, in violation of due process under the Fourteenth Amendment and article I, section 3.

Accordingly, the Court should strike Other Conditions Nos. 22, 23, and 24 as currently written, and remand for new valid conditions to be imposed.

E. CONCLUSION

For the foregoing reasons, the Court should reverse the judgment and order that Other Conditions Nos. 1, 3, 4, 7, 9, 10, 11, 13, 16, 22, 23, and 24 be stricken or modified upon remand to remove and correct illegal provisions. The Court should order that before DOC can enforce Other Condition No. 11, the State or DOC must return to court.

Dated this 10th day of September 2018.

Respectfully submitted,

s/ Neil M. Fox
WSBA NO. 15277
Attorney for Appellant

APPENDIX A

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during the term of community placement/custody:

- (1) Report to and be available for contact with the assigned Community Corrections Officer as directed;
- (2) Work at Department of Corrections' approved education, employment, and/or community service;
- (3) Not consume controlled substances except pursuant to lawfully issued prescriptions;
- (4) While in community custody not unlawfully possess controlled substances;
- (5) Pay supervision fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location;
- (7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision, or both (RCW 9.94A.505);
- (8) Notify community corrections officer of any change in address or employment; and
- (9) Remain within geographic boundary, as set forth in writing by the Community Corrections Officer.

WAIVER: The following above-listed mandatory conditions are waived by the Court:

(b) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement / custody:

- 1) Have no direct or indirect contact with Victims K.Y.P. (DOB: [REDACTED]); K.M.P. (DOB: [REDACTED]); and K.R.P. (DOB: [REDACTED]) for Life.
- 2) Register as a Sex Offender as required by Law.
- 3) Have no contact with Minors unless approved by your assigned Community Corrections Officer, and if applicable, Sex Offender Treatment Provider.
- 4) Do not access, use, or possess any sexually explicit materials, unless authorized by your Community Corrections Officer, and if applicable, Sex Offender Treatment Provider.
- 5) Submit to DNA and HIV testing as required by Law.
- 6) Obtain a State Certified Sex Offender Treatment Evaluation, and fully comply with any and all recommended treatment.
- 7) Do not enter into any romantic relationships without the prior approval of your supervising Community Corrections Officer, and if applicable, Sex Offender Treatment Provider.
- 8) Submit to Polygraph Examinations to monitor compliance with Community Custody at the direction of your Community Corrections Officer.
- 9) Submit to Plethysmograph testing as directed.
- 10) Do not go to places where children congregate (i.e. schools, playgrounds, parks, etc.).
- 11) Submit to Home Visits to monitor compliance with supervision. Home Visits include access for the purpose of visual inspection of all areas you live, or have exclusive/joint control or access.
- 12) Obey all Municipal, County, State, Tribal, and Federal Laws.
- 13) Do not reside in a location within 888 feet of a Community Protection Zone.
- 14) Obtain a Chemical Dependency Evaluation and comply with any recommended treatment.

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- 15) Obtain a Mental Health Evaluation and comply with any recommended treatment.
- 16) Notify any employer(s) regarding the nature of your sex offenses.
- 17) Do not consume or possess Alcohol or Alcohol containers.
- 18) Do not enter places where the primary source of income is the sale of Alcoholic Beverages (i.e. Bars, Taverns, Lounges, Liquore Stores).
- 19) Submit to Breathalyzer testing at the direction of your Community Corrections Officer.
- 20) Do not use or possess controlled substances unless legally prescribed by a licensed physician.
- 21) Submit to urinalysis testing or any other testing to ensure drug/alcohol free status.
- 22) Do not possess Drug Paraphernalia.
- 23) Do not associated with known abusers/sellers of Illegal and prescribed Drugs.
- 24) Do not enter areas identified by your Community Corrections Officer as Drug Locations.

10-JU-12

DATE

Patrick A. Mansueti

JUDGE, ~~Allen C. Nielson~~ COUNTY SUPERIOR COURT

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STATUTORY APPENDIX

Relevant Rules and Statutory and Constitutional Provisions

GR 14.1 provides in part:

(a) Washington Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

RCW 9.68A.011 provides in part:

(4) "Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation;

(d) Sadomasochistic abuse;

(e) Defecation or urination for the purpose of sexual stimulation of the viewer;

(f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

(5) "Minor" means any person under eighteen years of age.

RCW 9.68A.070 provides:

(1)(a) A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e).

(b) Possession of depictions of a minor engaged in sexually explicit conduct in the first degree is a class B felony punishable under chapter 9A.20 RCW.

(c) For the purposes of determining the unit of prosecution under this subsection, each depiction or image of visual or printed matter constitutes a separate offense.

(2)(a) A person commits the crime of possession of depictions of a minor engaged in

sexually explicit conduct in the second degree when he or she knowingly possesses any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g).

(b) Possession of depictions of a minor engaged in sexually explicit conduct in the second degree is a class B felony punishable under chapter 9A.20 RCW.

(c) For the purposes of determining the unit of prosecution under this subsection, each incident of possession of one or more depictions or images of visual or printed matter constitutes a separate offense.

RCW 9.94A.030(10) provides:

(10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.505(9) provides:

(9) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. "Crime-related prohibitions" may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical

dependency or substance abuse contributed to the offense.

(Underlined portion added by Laws of 2015, ch. 81, § 1).

RCW 9.94A.631(1) provides in part:

If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.703 (originally Laws of 2008, chapter 231, § 9), in 2008, provided in part:

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) **Mandatory conditions.** As part of any term of community custody, the court shall:

(a) Require the offender to inform the department of court-ordered treatment upon request by the department;

(b) Require the offender to comply with any conditions imposed by the department under section 10 of this act;

(c) If the offender was sentenced under RCW 9.94A.712 for an offense listed in RCW 9.94A.712(1)(a), and the victim of the offense was

under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone.

(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as determined by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions

RCW 46.61.5055(6) provides in part:

Penalty for having a minor passenger in vehicle. If a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 committed the offense while a passenger under the age of sixteen was in the vehicle, the court shall

RCW 66.44.270 provides in part:

Furnishing liquor to minors—Possession, use—Penalties—Exhibition of effects—Exceptions.

(1) It is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years or permit any person under that age to consume liquor on his or her premises or on any premises under his or her control. . . .

U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VIII provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. IX provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. XIV, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 4 provides:

The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

Wash. Const. art. I, § 5 provides:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Wash. Const. art. I, § 7 provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Wash. Const. art. I, § 14 provides:

Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Declaration of Service

I hereby certify that on the 10th day of September 2018 I electronically filed the foregoing OPENING BRIEF OF APPELLANT with the Clerk of the Court using the Appellate Courts Portal which will send notification of such filing and an electronic copy to attorneys of record for the Respondent and any other party.

I also certify that I caused to be deposited into the U.S. Mail with proper postage affixed a copy of this brief in an envelope addressed to:

Kevin A. Peters
DOC No. 360891
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001-1899

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of September 2018, at Seattle, WA.

s/ Neil M. Fox
WSBA NO. 15277