

NO. 34395-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID VASQUEZ ALCOCER,

Appellant.

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

The Honorable Carrie Runge, Judge
The Honorable Cameron Mitchell, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	4
1. THE CONDITION PROHIBITING CONTACT WITH VASQUEZ ALCOCER’S BIOLOGICAL CHILDREN IS UNAUTHORIZED AND VIOLATES HIS FUNDAMENTAL RIGHT TO PARENT.	4
2. THE REQUIREMENT THAT VASQUEZ ALCOCER SUBMIT TO PPG TESTING SOLELY AT THE REQUEST OF HIS CCO IS ILLEGAL AND SHOULD BE STRICKEN.	11
3. THE CONDITION THAT VASQUEZ ALCOCER POSSESS NO “PORNOGRAPHIC” MATERIALS VIOLATES DUE PROCESS BECAUSE IT DOES NOT PROVIDE FAIR NOTICE AND INVITES ARBITRARY ENFORCEMENT.	14
4. APPELLATE COSTS SHOULD BE DENIED.	17
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
 <u>In re Marriage of Parker</u>	
91 Wn. App. 219, 957 P.2d 256 (1998).....	13
 <u>In re Pers. Restraint of Rainey</u>	
168 Wn.2d 367, 229 P.3d 686 (2010).....	5, 6, 8, 9, 10
 <u>State v. Acevedo</u>	
159 Wn. App. 221, 248 P.3d 526 (2010).....	12
 <u>State v. Ancira</u>	
107 Wn. App. 650, 27 P.3d 1246 (2001).....	6, 7, 9
 <u>State v. Armendariz</u>	
160 Wn.2d 106, 156 P.3d 201 (2007).....	4, 5, 12
 <u>State v. Bahl</u>	
164 Wn.2d 739, 193 P.3d 678 (2008).....	4, 12, 14, 15, 16
 <u>State v. Berg</u>	
147 Wn. App. 923, 198 P.3d 529 (2008).....	10
 <u>State v. Bernarde</u>	
noted at 184 Wn. App. 1057, 2014 WL 6975858 (2014).....	14
 <u>State v. Combs</u>	
102 Wn. App. 949, 10 P.3d 1101 (2000).....	12
 <u>State v. Corbett</u>	
158 Wn. App. 576, 242 P.3d 52 (2010).....	10
 <u>State v. Halstien</u>	
122 Wn.2d 109, 857 P.2d 270 (1993).....	15
 <u>State v. Howard</u>	
182 Wn. App. 91, 328 P.3d 969 (2014).....	9

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Iniguez</u> 167 Wn.2d 273, 217 P.3d 768 (2009).....	5
<u>State v. Johnson</u> 184 Wn. App. 777, 340 P.3d 230 (2014).....	13
<u>State v. Kinneman</u> 155 Wn.2d 272, 119 P.3d 350 (2005).....	5
<u>State v. Land</u> 172 Wn. App. 593, 295 P.3d 782 <u>review denied</u> , 177 Wn.2d 1016 (2013)	13
<u>State v. Letourneau</u> 100 Wn. App. 424, 997 P.2d 436 (2000).....	10
<u>State v. Mutch</u> 171 Wn.2d 646, 254 P.3d 803 (2011).....	10
<u>State v. Parramore</u> 53 Wn. App. 527, 768 P.2d 530 (1989).....	12
<u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	12, 15
<u>State v. Sanford</u> 128 Wn. App. 280, 115 P.3d 368 (2005).....	7, 9
<u>State v. Torres</u> _ Wn. App. _, _ P.3d _, 2017 WL 1372506 (Apr. 13, 2017).....	6, 9, 11
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008) <u>cert. denied</u> , 556 U.S. 1192 (2009).....	5, 6

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Santosky v. Kramer

455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)..... 5

RULES, STATUTES AND OTHER AUTHORITIES

RAP 14.2..... 17, 18

RAP 15.2..... 17, 18

RCW 9.94A.030 3, 5

RCW 9.94A.500 3

RCW 9.94A.505 5

RCW 9.94A.533 2

RCW 9.94A.701 3

RCW 9.94A.703 4, 12

RCW 9.94A.835 2

RCW 9A.36.031 2

U.S. CONST. amend. XIV..... 13

CONST. art. 1, § 3 13

A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it entered a community custody condition and corresponding order prohibiting contact with all minors, including the appellant's biological children. CP 96.

2. The sentencing court erred when it entered a condition and order requiring the appellant to "[s]ubmit to a polygraph and/or penile plethysmograph [(PPG)] testing upon the request of [his] therapist and/or Community Corrections Officer [(CCO)], at [his] own expense." CP 96.

3. The sentencing court erred when it entered a condition and order prohibiting the appellant from "us[ing] or possess[ing] any pornographic materials, to include magazines, internet sites, and videos." CP 96.

Issues Pertaining to Assignments of Error

1. Must the community custody condition and order prohibiting contact with minors, including appellant's own biological children, be stricken, where there is no indication that the prohibition is narrowly tailored or reasonably necessary to protect the children from harm?

2. Did the sentencing court exceed its authority, and violate the appellant's constitutional rights, by requiring the appellant submit to PPG testing solely at the request of his CCO?

3. Where the condition prohibiting the appellant from possessing pornographic materials fails to provide him with fair notice of what he can and cannot do, and exposes him to arbitrary enforcement, should the condition be stricken?

B. STATEMENT OF THE CASE¹

The State charged David Vasquez Alcocer with two counts of second degree child rape based on allegations that he inappropriately touched his then-12-year-old stepdaughter. CP 1-5. He ultimately pleaded guilty to two counts of third degree assault with sexual motivation. CP 62-72; 2RP 15-20; see also RCW 9A.36.031(1)(f) (third degree assault); RCW 9.94A.533(8) (providing for sentence enhancement); RCW 9.94A.835 (addressing allegations of sexual motivation).

Sentencing occurred on April 20, 2016. The court imposed a total sentence of 27 months of confinement. This total included concurrent three-month base sentences, with two 12-month “sexual motivation” sentence enhancements running consecutive to the base sentences, and to each other. CP 88-89; 2RP 26.

¹ This brief refers to the verbatim reports as follows: 1RP – 3/17/15, 9/21/15, 3/30/16; 2RP – 4/15/15, 12/2/15, 2/10/16, 2/29/16, 4/20/16; 3RP – 6/10/15, 9/23/15; and 4RP – 9/2/15 and 12/23/15. The volumes are assigned these designations based on the first date appearing in each volume.

The court also sentenced Vasquez Alcocer to 36 months of community custody. CP 89; RCW 9.94A.701(1)(a); RCW 9.94A.030(47)(c).

The court ordered Vasquez Alcocer to have no contact with the complainant for five years, the statutory maximum for the offense. CP 90; 2RP 27-28. The court imposed community custody conditions as recommended by a presentence investigation report.² CP 84, 96; 2RP 26-28. These included that Vasquez Alcocer obtain a sexual deviancy evaluation and “follow through with recommended treatment if directed by [his CCO] or therapist[.]” CP 96.

Also included are the three conditions Vasquez Alcocer now challenges, that he (1) “[h]ave no contact with minors under the age of 18 without prior approval from his supervising [CCO] and/or sex offender treatment provider,” (2) “[s]ubmit to a polygraph and/or [PPG] testing upon the request of [his] therapist and/or [CCO], at [his] own expense,” and (3) “not use or possess any pornographic materials, to include magazines, internet sites, and videos.” CP 96. The court also incorporated by reference these conditions into the sentence itself. CP 90.

Vasquez Alcocer timely appeals. CP 67.

² RCW 9.94A.500.

C. ARGUMENT

1. THE CONDITION PROHIBITING CONTACT WITH VASQUEZ ALCOCER'S BIOLOGICAL CHILDREN IS UNAUTHORIZED AND VIOLATES HIS FUNDAMENTAL RIGHT TO PARENT.

The condition and corresponding order prohibiting contact with all minors including Vasquez Alcocer's biological children are not authorized and violate his fundamental right to parent. Vasquez Alcocer was convicted of two offenses against a complainant who is not his biological child. The record, which is sparse, does not demonstrate the court considered whether the condition was related to the circumstances of the crimes. Nor does the record indicate the court considered whether the condition was reasonably necessary to prevent harm to the children.

Erroneous or illegal sentences, including unauthorized community custody conditions, may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008). Whether the trial court has statutory authority to impose specific community custody conditions is a question of law that is reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

As a condition of community custody, a sentencing court may order an offender to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” RCW 9.94A.703(3)(b).

Under RCW 9.94A.505(9), the court may also impose “crime-related prohibitions” as a condition of sentence. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009). Such prohibitions may include “an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). No-contact orders may extend up to the statutory maximum for the crime in question. Armendariz, 160 Wn.2d at 119-20.

Nonetheless, parents have a fundamental liberty interest in the “care, custody, and management” of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). But appellate courts review more carefully conditions that interfere with a fundamental constitutional right. Id.

A sentencing court necessarily abuses its discretion by violating an accused’s constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A court likewise abuses its discretion when its decision is based on incorrect legal analysis or an erroneous view of the law. State v. Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005). Similarly, a court abuses its discretion when, in imposing a condition prohibiting contact with

biological children, the court fails to acknowledge the fundamental right to parent or to explain why the scope and duration of the order is necessary. State v. Torres, ___ Wn. App. ___, ___ P.3d ___, 2017 WL 1372506, at *2 (Apr. 13, 2017).

State interference with the fundamental right to parent is subject to strict scrutiny. Warren, 165 Wn.2d at 34. “[C]onditions that interfere with fundamental rights must be sensitively imposed” with “no reasonable alternative way to achieve the State’s interest.” Id. at 32, 35. Thus, a sentencing court may not impose a no-contact order between a defendant and his biological children as a matter of routine practice. Rainey, 168 Wn.2d at 377-82. Instead, the court must consider whether the order is reasonably necessary in scope and duration to prevent harm to the children. Id. Less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless there is a compelling State interest in barring all contact. Warren, 165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001); see also Torres, 2017 WL 1372506 at *2 (trial court can impose a no-contact order to advance the State’s interest in protecting children, but it must do so in a “nuanced manner that is sensitive to the changing needs and interests of the parent and child”).

Prior case law guides this Court's decision and requires, at a minimum, remand for modification of the orders prohibiting Vasquez Alcocer from having contact with his biological children.

In Ancira, for example, the defendant was charged with violating an order prohibiting contact with his wife. Ancira, 107 Wn. App. at 652. He drove away with his four-year old child, whom he refused to return until his wife agreed to talk with him. Id. Following conviction for violation of the original no-contact order, the court imposed another order that also prohibited contact with Ancira's children for five years. Id. at 652-53. The Court held that the no-contact order violated Ancira's fundamental right to parent. Id. at 654. The State had a compelling interest in preventing children from witnessing domestic violence. But the State failed to demonstrate how supervised visitation without the mother's presence, or indirect contact by telephone or mail, would jeopardize this goal. Id. at 654-55.

In State v. Sanford, 128 Wn. App. 280, 282, 289, 115 P.3d 368 (2005), the defendant was convicted of assaulting the mother of his children out of the children's sight and hearing. There were no allegations that Sanford committed or threatened violence against the children. The Court of Appeals held that the sentencing judge erred in restricting Sanford to

supervised visitation with his children in the absence of any showing that this restriction was reasonably necessary to protect the children. Id.

In Rainey, the defendant was convicted of kidnapping his three-year-old daughter. 168 Wn.2d at 371. In addition, Rainey attempted to use the daughter to harass the mother. Id. at 379-80. For example, he sent letters to his daughter from jail blaming the mother for breaking up the family. Id. The sentencing court imposed a lifetime no-contact order with the child. Id. at 374. On review, the Supreme Court agreed the facts were sufficient to establish that some duration of no-contact order, including a prohibition on indirect and supervised contact, was reasonably necessary to protect the child. Id. at 380.

The Court nevertheless reversed the order because the State failed to show why the lifetime prohibition was reasonably necessary, and the sentencing court provided no justification for it. Id. at 381-82. The Court explained:

The duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests. The restriction's length must also be reasonably necessary.

Id. at 381. The Court therefore struck the no-contact order and remanded for resentencing, “so that the sentencing court may address the parameters of the no-contact order under the ‘reasonably necessary’ standard.” Id. at 382.

In State v. Howard, 182 Wn. App. 91, 95, 328 P.3d 969 (2014), the defendant was convicted of attempted murder for trying to shoot his wife in the presence of their children. At sentencing, the judge imposed a lifetime ban on contact with his biological children, which Howard challenged on appeal. Id. at 96. It was apparent that some protections were warranted to ensure the children’s emotional welfare considering that they had witnessed their father attempt to kill their mother. Id. at 102. But where Howard had not attempted to harm his children, the State did not argue the ban on contact was necessary, and the record did not reveal the need for a total ban, the Court concluded that remand was necessary for the trial court to “sensitively impose a condition that is reasonably necessary” to protect Howard’s children. Id. at 102 (citing Rainey, 168 Wn.2d at 381-82).

In Torres, this Court recently held that a trial court’s failure to acknowledge the defendant’s fundamental right to parent his child, or to explain why a five-year prohibition on all personal contact was reasonably necessary to further the State’s interests, was error even under the deferential abuse of discretion standard. Torres, 2017 WL 1372506 at *2.

Ancira, Sanford, Rainey, Howard, and most recently, Torres, establish the need for sentencing courts to carefully assess prohibitions or restrictions on parent/child contact and require that the record fully support and justify any limitation on contact as reasonably necessary to protect the children.

In addition, in State v. Letourneau, 100 Wn. App. 424, 442, 997 P.2d 436 (2000), the Court recognized that “[t]he general observation that many offenders who molest children unrelated to them later molest their own biological children, without more, is an insufficient basis for State interference with fundamental parenting rights.” In contrast, in subsequent cases, where the record disclosed, and the sentencing judge found, that the defendant posed a similar danger to his own children, courts have been permitted to extend as “reasonably necessary” such prohibitions to biological children. See State v. Corbett, 158 Wn. App. 576, 597-601, 242 P.3d 52 (2010); State v. Berg, 147 Wn. App. 923, 941-44, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011).

Here, the complainant is Vasquez Alcocer’s wife’s daughter from a previous relationship. CP 80. Regarding Vasquez Alcocer’s biological children, the presentence investigation report contains few details, other than there are two children. CP 80.

In the report, there is no discussion of any specific risk that Vasquez Alcocer poses to these children. Moreover, there was no such discussion at sentencing.

The State generally has a compelling interest in preventing future harm to the victims of the crime. Rainey, 168 Wn.2d at 377. But Vasquez Alcocer was not convicted of committing a crime against his biological children. The State failed to argue, and the sentencing court failed to explain, why the prohibitions or restrictions on contact were reasonably necessary in scope and duration to protect those children. Because no justification was provided for the scope and duration of this condition, and the State made no attempt to justify it as reasonably necessary to protect Vasquez Alcocer's children, it was error to impose it. Torres, 2017 WL 1372506 at *2. The condition must be stricken.

2. THE REQUIREMENT THAT VASQUEZ ALCOCER SUBMIT TO PPG TESTING SOLELY AT THE REQUEST OF HIS CCO IS ILLEGAL AND SHOULD BE STRICKEN.

The condition and corresponding order regarding polygraph and PPG testing, which require in part that Vasquez Alcocer submit to PPG testing solely at the request of his CCO, are illegal insofar as Vasquez Alcocer may be subjected to PPG solely at the discretion of the CCO for

any unspecified purpose. The condition and corresponding order must be modified to protect Vasquez Alcocer's constitutional rights.

Erroneous or illegal sentences, including unauthorized community custody conditions, may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 744-45. Again, whether the sentencing court had statutory authority to impose a community custody conditions is a question of law that is reviewed de novo. Armendariz, 160 Wn.2d at 110.

The condition that Vasquez Alcocer submit to PPG is not among the mandatory, waivable, or discretionary conditions of community custody listed in RCW 9.94A.703. Nor is it found in RCW 9.94A.704, which lists conditions that may be imposed by the DOC. A trial court may, however, require an offender to undergo testing to assure compliance with the conditions of community custody. State v. Acevedo, 159 Wn. App. 221, 233, 248 P.3d 526 (2010) (upholding requirement that defendant submit to polygraph and/or urinalysis testing to ensure compliance with other community custody conditions); State v. Combs, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000) (polygraph testing may be used to monitor compliance with other conditions); State v. Parramore, 53 Wn. App. 527, 531-32, 768 P.2d 530 (1989) (upholding urinalysis to monitor the defendant's illegal drug use as part of sentence for delivery of marijuana).

This Court should strike a community custody condition if it is manifestly unreasonable. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). PPG testing involves the restraint and monitoring of an intimate part of a person's body while the mind is exposed to pornographic imagery. In re Marriage of Parker, 91 Wn. App. 219, 223-24, 957 P.2d 256 (1998). Such examination implicates the due process right to be free from bodily restraint. Id. at 224; see U.S. CONST. amend. XIV; CONST. art. 1, § 3.

Requiring Vasquez Alcocer to submit to PPG testing solely at the CCO's order would violate his constitutional right to be free from bodily intrusions. State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782, review denied, 177 Wn.2d 1016 (2013). Such testing is "extremely intrusive" and can be ordered only as part of crime-related treatment by a qualified provider. Id. Such testing is not considered a routine monitoring tool subject only to the CCO's discretion. Id.; cf. State v. Johnson, 184 Wn. App. 777, 781, 340 P.3d 230 (2014) (Division Two case "affirming" condition with the caveat 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.").³ The problem here is that, as

³ In an unpublished opinion issued after Johnson, Division Two again "affirmed" the condition but stated

written, the condition permits Vasquez Alcocer to be subjected to PPG solely at the discretion of the CCO for any unspecified purpose, including prohibited purposes.

In summary, the condition requiring that Vasquez Alcocer submit to PPG solely at his CCO's request is not a valid monitoring condition and violates his constitutional right to be free from bodily intrusion. This Court should order this illegal condition removed.

3. THE CONDITION THAT VASQUEZ ALCOCER POSSESS NO "PORNOGRAPHIC" MATERIALS VIOLATES DUE PROCESS BECAUSE IT DOES NOT PROVIDE FAIR NOTICE AND INVITES ARBITRARY ENFORCEMENT.

The condition and corresponding order that Vasquez Alcocer not use or possess pornographic materials are unconstitutionally vague and should also be stricken.

Accordingly, we affirm the trial court's imposition of condition 19, with the clarification that the CCO has authority to order plethysmograph testing only for purposes of sexual deviancy treatment. *We also direct the State to provide a copy of this portion of the opinion to [the Department of Corrections] and the CCO.*

State v. Bernarde, noted at 184 Wn. App. 1057, 2014 WL 6975858, at *5-6 (2014) (emphasis added). Pursuant to RAP 10.8 and GR 14.1, the appellant respectfully cites this unpublished decision as nonbinding authority, to be accorded such persuasive value as this Court deems appropriate

The due process vagueness doctrines under the Fourteenth Amendment and article I, section 3 require the state to provide citizens fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrines also protect against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the prohibited act with sufficient definiteness such that ordinary people can understand what conduct is proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Community custody conditions must be reversed if manifestly unreasonable. Id. at 791-92. Imposition of an unconstitutionally vague condition is manifestly unreasonable. Id. at 792.

In Bahl, the trial court ordered that the defendant “not possess or access pornographic materials, as directed by the supervising [CCO].” 164 Wn.2d at 743 (quoting clerk’s papers). The Supreme Court held this to be unconstitutionally vague. Id. at 758. That Court explained, “The fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more

apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Id.

In Sanchez Valencia, the challenged condition specified the “defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.” 169 Wn.2d at 785 (quoting clerk’s papers). The Supreme Court held the condition failed both prongs of the vagueness test.

First, the term paraphernalia, without specifying drug paraphernalia, was so broad that it failed to provide the probationers with fair notice of what they can and cannot do. Id. at 794. Second, the condition might potentially encompass a wide range of everyday items, like sandwich bags or paper, depending on the CCO’s whim. Id. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague. Id. at 795.

In summary, the community custody condition prohibiting Vasquez Alcocer from using or possessing pornographic materials does not provide sufficient definiteness such that Vasquez Alcocer would know what he can or cannot do. The term “pornography” has never been given a precise legal definition and is entirely subjective. Bahl, 164 Wn.2d at 754. The condition

also exposes Vasquez Alcocer to arbitrary enforcement. The condition does not meet the requirements of due process and should be stricken.

4. APPELLATE COSTS SHOULD BE DENIED.

In the unlikely event that Alcocer Vasquez does not substantially prevail on appeal, appellate costs should be denied.

The Supreme Court recently amended RAP 14.2 to state, in part that

[w]hen the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The trial court entered an indigency order here, stating Vasquez lacked sufficient resources to prosecute an appeal and honoring his right to "review wholly at public expense." CP 103. Vasquez Alcocer has been incarcerated since entry of the judgment and sentence, so there is no reason to believe his financial circumstances have improved, let alone significantly improved. CP 89; see also 2RP 24 (discussion of Vasquez Alcocer's limited financial means at sentencing hearing). Thus, under RAP 14.2, there is no basis to impose appellate costs.

It should be the State, not Vasquez Alcocer, that bears the burden of showing an improvement to financial circumstances and ability to pay. In addition, the record indicates Vasquez Alcocer primarily speaks Spanish.

See, e.g., CP 72, 75 (documents indicating that interpreter was required); 2RP 24 (discussion at sentencing hearing). Vasquez Alcocer will attempt to comply with this court's general order on cost awards by submitting a report of continued indigency. However, this task will necessarily be complicated the fact that this Court has not supplied a Spanish translation of its form and there appears to be none in existence.

In any event, Vasquez Alcocer asserts that this Court's procedure is now inconsistent with the letter of RAP 14.2 and unfairly shifts the burden of proof and production to an indigent party who is entitled to the RAP 15.2(f) presumption of continued indigency. In summary, any request by the State for appellate costs should be denied.

D. CONCLUSION

This Court should remand for resentencing as to the invalid conditions and related orders.

DATED this 28th day of April, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorney for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON
JENNIFER M. WINKLER

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI
E. RANIA RAMPERSAD

State V. David Alcocer

No. 34395-2-III

Certificate of Service

On April 28, 2017, I e-served and or mailed the brief of appellant directed to:

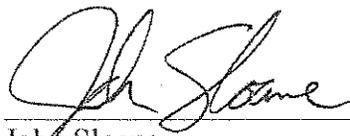
Andrew Miller
Benton County Prosecutors Office
Via Email Per Agreement prosecuting@co.benton.wa.us
andy.miller@co.benton.wa.us

David Alcocer 382628
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326-0769

Re: Alcocer

Cause No. 34395-2-III, in the Court of Appeals, Division III, for the state of Washington.

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



John Sloane
Office Manager
Nielsen, Broman & Koch

04-28-2017

Date

Done in Seattle, Washington

NIELSEN, BROMAN & KOCH, PLLC
April 28, 2017 - 2:17 PM
Transmittal Letter

Document Uploaded: 343952-BOA 34395-2-III.pdf

Case Name: David Alcocer

Court of Appeals Case Number: 34395-2

Party Represented:

Is This a Personal Restraint Petition? Yes No

Trial Court County: Benton - Superior Court #: _____

Type of Document being Filed:

- Designation of Clerk's Papers / Statement of Arrangements
- Motion for Discretionary Review
- Motion: _____
- Response/Reply to Motion: _____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill / Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition / Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to andy.miller@co.benton.wa.us, prosecuting@co.benton.wa.us, and winklerj@nwattorney.net.

Sender Name: John P Sloane - Email: sloanej@nwattorney.net