

No. 34395-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

DAVID VASQUEZ ALCOCER,

Appellant

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

NO. 15-1-00274-4

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

DIANA RUFF, Deputy
Prosecuting Attorney
BAR NO. 41702
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
II. STATEMENT OF FACTS	1
III. ARGUMENT	6
A. The community custody condition prohibiting the defendant from having contact with his biological children is a valid, reasonable, crime-related prohibition.....	7
B. The community custody condition requiring that the defendant submit to plethysmograph testing should remain in place	16
C. The State concedes that the condition that the defendant possess no pornographic material is unconstitutionally vague.	18
D. The State takes no position on whether the Court should deny appellate costs.....	19
IV. CONCLUSION.....	20

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>In re Pers. Restraint of Rainey</i> , 168 Wn.2d 367, 229 P.3d 686 (2010).....	12, 13
<i>State v. Ancira</i> , 107 Wn. App. 650, 27 P.3d 1246 (2001) ...	6, 10, 11, 12, 13
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	6
<i>State v. Barklind</i> , 87 Wn.2d 814, 557 P.2d 314 (1976).....	19
<i>State v. Berg</i> , 147 Wn. App. 923, 198 P.3d 529 (2008)	8, 11, 12, 15
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	19
<i>State v. Corbett</i> , 158 Wn. App. 576, 242 P.3d 52 (2010).....	7, 8, 9, 10, 15
<i>State v. Howard</i> , 182 Wn. App. 91, 328 P.3d 969 (2014).....	13
<i>State v. Johnson</i> , 184 Wn. App. 777, 340 P.3d 230 (2014).....	6, 16, 17, 18
<i>State v. Land</i> , 172 Wn. App. 593, 295 P.3d 782 (2013).....	16
<i>State v. Letourneau</i> , 100 Wn. App. 424, 997 P.2d 436 (2000).....	10, 11
<i>State v. Mahone</i> , 98 Wn. App. 342, 989 P.2d 583 (1999).....	19
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	19
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	16, 17, 18
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	7
<i>State v. Sanford</i> , 128 Wn. App. 280, 115 P.3d 368 (2005)	11, 12
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	19, 20
<i>State v. Torres</i> , 198 Wn. App. 685, 393 P.3d 894 (2017).....	14, 15
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	7

UNITED STATES SUPREME COURT CASES

<i>Prince v. Massachusetts</i> , 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944).....	7
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).....	7

UNITED STATES COURT OF APPEALS CASES

<i>United States v. Dotson</i> , 324 F.3d 256 (4th Cir. 2003).....	16
<i>United States v. Guagliardo</i> , 278 F.3d 868 (9th Cir. 2002).....	18, 19
<i>United States v. Weber</i> , 451 F.3d 552 (9th Cir. 2006).....	16

WASHINGTON STATUTES

RCW 9.68A.011.....7, 18, 19
RCW 9.94A.030(10).....7
RCW 9.94A.505(9).....7
RCW 10.01.160(2).....19
RCW 10.73.16019

COURT RULES AND REGULATIONS

RAP 14.2.....19

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The community custody condition that the defendant not have any contact with minors under the age of 18, including his biological children, without his community corrections officer's approval is a valid condition because it is a reasonable crime-related prohibition.
- B. The community custody condition that the defendant submit to plethysmograph testing at the request of the community corrections officer or therapist is not illegal because it was ordered in conjuncture with a sexual deviancy evaluation and treatment.
- C. The State concedes the third assignment of error, the condition that the defendant possess no "pornographic material," is unconstitutionally vague.

II. STATEMENT OF FACTS

On March 11, 2015, Benton County Sheriff's Deputies Hansen and Benitez, and Sergeant Gonzalez responded to the home of Maris Roche after she made a child sex report. CP 4, 76. Ms. Roche told the deputies that her daughter, M.A.R. (D.O.B. 10/22/2002), disclosed to her that for the past few weeks, the defendant (D.O.B. 04/18/1971), M.A.R.'s stepfather, had been touching her inappropriately. CP 1, 4, 76.

Ms. Roche said that she had noticed M.A.R. acting despondent and depressed over the last few weeks. CP 76. After asking her if she was okay several times, M.A.R. finally disclosed to Ms. Roche that the defendant had been touching her genitals and breasts while her mother worked the night shift at Douglas Fruits. CP 4, 76. Ms. Roche was shocked; however, she did not know of any reason why M.A.R. would make up these allegations. CP 76.

Deputy Benitez interviewed M.A.R. in the presence of her mother. CP 4, 76. M.A.R. was crying and visibly distressed. CP 76. She told him that a few weeks ago, the defendant walked in on her getting out of the shower. CP 4, 76. M.A.R. stated the situation made her feel uncomfortable, but that the defendant had not touched her at that time. CP 76. M.A.R. stated that about two days later, the defendant told her to sit on his lap. CP 4, 76. During this incident, the defendant touched her underneath her clothing and fondled her breasts and genitals. CP 4, 76-77.

M.A.R. indicated that this type of incident happened multiple times, with the last incident occurring on approximately March 9, 2015. CP 4, 77. On that date, the defendant came into her room, lay down next to her in her bed, and again put his hands underneath her clothing, fondling her breasts and genitals. CP 5, 77.

Following this interview, Ms. Roche transported M.A.R. to Kids Haven, where Mari Murstig conducted a forensic interview. CP 5, 77. M.A.R.'s statement remained the same, yet she described the contact in more detail. CP 5, 77. M.A.R. indicated that the defendant had fondled her vagina and penetrated her with his finger several times. CP 5, 77. M.A.R. indicated that his fingernail had scratched the inside of her vagina, and that it "hurt." CP 77. She also indicated that the defendant fondled her buttocks and squeezed her bare breasts, CP 77, and on one occasion had offered her ten dollars if he could touch her while she was nude, CP 5.

At 6:30 p.m. that evening, Detectives Gerry and Cantu and Sergeant Gonzales detained the defendant when he arrived home from work. CP 5, 77. The defendant was then transported to the Benton County Sheriff's Office and Detective Cantu read him his Miranda warnings in Spanish, which were acknowledged and waived. CP 5, 77.

In post-Miranda statements, the defendant admitted he had rubbed and penetrated M.A.R.'s vagina and fondled her bare breasts. CP 5. The defendant stated that on one occasion he had massaged M.A.R.'s legs and then put his hands inside her shorts and under her underwear. CP 77. He admitted that he touched the bare skin of her vagina and then penetrated her vagina using his right index finger. CP 77. He also admitted that he had massaged and squeezed her breasts. CP 78. The defendant indicated

that the touching occurred while M.A.R.'s mother was at work, CP 5, and that he had an erection during the incident, CP 77.

An Information was filed on March 16, 2015, charging the defendant with two counts of Rape of a Child in the Second Degree with an Aggravating Circumstance Allegation of Position of Trust. CP 1-3. On August 21, 2015, the State amended the Information to charge the defendant with two counts of Child Molestation in the Second Degree with an Aggravating Circumstance Allegation of Position of Trust. CP 30-32. On September 21, 2015, the defendant filed a Motion for Ineffective Assistance of Counsel. CP 33-36. Based on the record, the court granted Ms. Bennett's request to withdraw as counsel for the defendant and appointed Mr. Swanberg. RP 09/21/2015 at 24-25.

On February 29, 2016, the State filed a Second Amended Information charging the defendant with two counts of Assault in the Third Degree with a Sexual Motivation Allegation and Enhancement, CP 59-60, and the defendant pleaded guilty that same day, RP 02/29/2016 at 15-19; CP 62-72.

A Pre-Sentence Investigation was conducted and filed with the court on March 28, 2016. CP 76-82. During this investigation, the defendant indicated that he believed that this incident was traumatic for M.A.R. and that she has been negatively impacted. CP 81.

The court accepted the State's recommendation and sentenced the defendant on April 20, 2016, to 27 months confinement and 24 months community custody. CP 86; RP 04/20/2016 at 25-26. Along with the mandatory conditions, the court also ordered the defendant to: (1) have no contact with minors under the age of 18 without prior approval from supervising community corrections officer or sex offender treatment provider; (2) obtain a sexual deviancy evaluation, at his own expense, and follow the recommended treatment; (3) submit to a polygraph and/or plethysmograph testing upon request of therapist and/or his community corrections officer, at his own expense; (4) not use or possess any pornographic materials; and (5) have absolutely no contact with the victim, M.A.R., until March 20, 2021. CP 96; RP 04/20/2016 at 26-28. The court also imposed a total fine of \$800.00. CP 87; RP 04/20/2016 at 28.

The defendant filed a Notice of Appeal on April 28, 2016, and requested that he be appointed counsel to represent him in the appeals process. CP 101-02. On June 14, 2016, the court found the defendant lacked sufficient funds to prosecute an appeal, appointed counsel, and waived court fees. CP 103-04. The defendant filed his brief with this court on April 28, 2017. This response follows.

III. ARGUMENT

The defendant challenges three conditions of his community custody: conditions one, three, and four as listed above. Community custody conditions imposed on a defendant are reviewed for abuse of discretion, and this Court should only reverse the trial court's decision if it was manifestly unreasonable or if the decision was based on untenable grounds. *State v. Johnson*, 184 Wn. App. 777, 779, 340 P.3d 230 (2014); *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). "A condition is manifestly unreasonable if it is beyond the court's authority to impose." *Johnson*, 184 Wn. App. at 779. While the conditions have yet to be enforced, pre-enforcement challenges to community custody conditions are ripe for review. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008).

The State maintains that community custody condition one requiring that the defendant obtain permission from a community corrections officer or treatment provider to contact minors under the age of 18, and condition three, that defendant must submit to plethysmograph testing when ordered by a therapist or community corrections officer, were properly imposed on the defendant. However, the State concedes that the condition ordering the defendant not possess pornographic material is

unconstitutionally vague and should be amended to prohibit “sexually explicit conduct” as defined in RCW 9.68A.011.

A. The community custody condition prohibiting the defendant from having contact with his biological children is a valid, reasonable, crime-related prohibition.

Under the Sentencing Reform Act of 1981, a trial court may impose “crime-related prohibitions,” that directly relate to the circumstances of the crime, and are “reasonably crime related.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); RCW 9.94A.505(9); RCW 9.94A.030(10). This Court should review the imposition of a crime-related prohibition for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

While 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), that right is not absolute, *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). “Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State’s compelling interest in preventing harm and protecting children.” *State v. Corbett*, 158 Wn. App. 576, 598, 242 P.3d 52 (2010).

Further, courts have found that prohibiting contact between a defendant and his biological children is a valid crime-related prohibition. *State v. Berg*, 147 Wn. App. 923, 927, 198 P.3d 529 (2008), *reconsideration denied*; *Corbett*, 158 Wn. App. at 587.

In *Berg*, the defendant was convicted of one count of Rape of a Child in the Third Degree and two counts Child Molestation in the Third Degree of the defendant's stepdaughter, 14-year-old A.A. *Berg*, 147 Wn. App. at 927, 929-30. The sentencing court imposed a condition that the defendant not have contact with "[a]ny female minors without supervision of a responsible adult who has knowledge of his conviction." *Id.* at 930. The defendant appealed the condition, arguing it interfered with his fundamental right to parent his biological minor child, two-year old A.B. *Id.* at 927, 942. The Division I court upheld the no-contact order, reasoning the sentencing court "reasonably feared that it would be putting A.B. in the same situation that A.A. was in when Berg sexually abused her." *Id.* at 943. The court further determined that even though the court order prohibits "all forms of contact, not just physical contact, it addresses the potential for the same kind of abuse at issue, which Berg was able to achieve by exploiting a child's trust in him as a parental figure." *Id.* at 944. Thus, the court found that the provision was reasonably necessary to protect the defendant's biological daughter, A.B. *Id.* at 943.

In *Corbett*, the defendant was convicted of four counts of child rape of his six-year-old stepdaughter. *Corbett*, 158 Wn. App. at 582-83, 586. The defendant appealed the community custody provision that he have “[n]o contact with any minors without prior approval of the [Department of Corrections/Community Corrections Officer (DOC/CCO)] and Sexual Deviancy Treatment Provider,” because it prohibited contact with his biological sons, ages 10 and 14. *Id.* at 586, 597. Corbett argued that the State had failed to show how he was a danger to his biological sons, and thus the condition was not a valid crime-related prohibition. *Id.* at 597. The court disagreed and reasoned that the defendant “abused his parenting role by sexually abusing a minor in his care.” *Id.* at 599. The court reasoned that this case was no different from *Berg* and upheld the no-contact order as “reasonably necessary to protect Corbett’s children because of his history of using the trust established in a parenting role to satisfy his own prurient desire to sexually abuse minor children.” *Id.*

The facts of this case closely mirror those of *Corbett*. Similarly to *Corbett*, the defendant sexually abused his stepdaughter. M.A.R. was living in the home with the defendant, and he was acting in a parenting role. Both sentencing courts imposed almost identical community custody conditions prohibiting the defendant’s contact with minors under 18 unless approved by either a treatment provider or a community

corrections officer. Similarly to *Corbett*, the State's records indicate that the defendant has three biological sons, ages seven, five, and two.¹

Further, similar to *Corbett*, the defendant abused his role as a parent when he sexually abused M.A.R. and thus, a no-contact order is reasonably necessary to protect the defendant's other children.

Additionally, following the reasoning in *Berg*, given that the defendant exploited M.A.R.'s trust in him as a parental figure when he sexually abused her, the order prohibiting all contact, not just physical, with his biological children protects them from the potential for this same type of abuse. Given the nature and severity of the crime, and the State's compelling interest in protecting the defendant's children from abuse, it was not an abuse of the trial court's discretion to impose the condition.

The defendant cites to a number of cases to support his proposition that the no-contact order violates his fundamental right to parent. Br. of Appellant at 7-10. However, in each of these cases the facts are readily distinguishable from this case.

First, the defendant argues *State v. Ancira* and *State v. Letourneau*, 100 Wn. App. 424, 997 P.2d 436 (2000), support this

¹ The defendant indicates that he has two biological children; however, his brief does not indicate the age or sex of these children. The State's records indicate the defendant has three biological sons, based on an Affidavit of Indigency signed by the defendant on May 24, 2016, and filed with Superior Court on June 6, 2016. See Affidavit of Indigency, designated in this court on July 27, 2017.

proposition. However, the *Berg* court already distinguished its decision from both of these cases. *Berg*, 147 Wn. App. at 943. Specifically, the *Berg* court reasoned that its decision to keep the no-contact order in place was distinguishable from the *Letourneau* court's decision to reverse because in *Letourneau* the victim was a student, not a family member of the defendant who lived in the home; the defendant was not evaluated as a pedophile; and nothing in the record indicated that she posed a threat to her own children. *Id.* The *Berg* court also distinguished its decision from the *Ancira* court's decision to reverse, reasoning that in *Ancira*, the lower court did not have any "reason to believe allowing [the defendant] contact with his children would cause them further exposure to *domestic violence*." *Id.* (emphasis added).

The additional cases cited by the defendant can be readily distinguished as well. In *State v. Sanford*, 128 Wn. App. 280, 284, 115 P.3d 368 (2005), the defendant was convicted of Assault in the Fourth Degree with a domestic violence allegation against the mother of his children. The sentencing court limited Sanford to supervised contact with his children. *Id.* at 284. On appeal, the court relied exclusively on *Ancira* and *Letourneau* to come to its holding that the no-contact order was "not reasonably necessary to protect the children from witnessing domestic violence between the parents." *Id.* at 289. Given the court's reasoning in

Berg, distinguishing it from *Ancira*, and the strong similarities between *Sanford* and *Ancira*, *Sanford* does not lend support to the defendant's argument.

In *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 371, 229 P.3d 686 (2010), the defendant was convicted of telephone harassment of his wife and first degree kidnapping of his then three-year-old daughter. The sentencing court ordered the defendant have no contact with his daughter for life. *Id.* On appeal, the court reasoned that the compelling State interest in ordering no contact between the defendant and his minor daughter was to protect the child from "witnessing domestic violence between her parents." *Id.* at 379. Given the facts and circumstances, the court found that "it was not an abuse of discretion for the sentencing court to conclude that a no-contact order of some duration was appropriate." *Id.* at 380. However, the court reversed due to the lifetime duration of the no-contact order. *Id.* at 381-82.

This case is distinguishable given the difference in terms of the no-contact order—life versus until the child is 18—as well as the facts of the case—kidnapping in order to cause the mother emotional distress versus sexual abuse of a child in the defendant's care. Additionally, in coming to its decision the *Rainey* court relied heavily on *Ancira*, which *Berg* clearly established was distinguishable.

In *State v. Howard*, 182 Wn. App. 91, 97-98, 328 P.3d 969 (2014), the defendant was convicted of attempted first degree murder and found that the crime was committed “within the sight or sound of the minor children,” after the defendant attempted to shoot and kill his wife in the presence of their children. The sentencing court imposed a lifetime no-contact order between the defendant and his four biological children, which he appealed. *Id.* at 99. While the reviewing court reversed the sentencing court’s decision, it did so by relying heavily on *Ancira* and *Rainey*. Further, the court determined that a no-contact order was reasonably necessary, given that the children witnessed their father attempt to kill their mother. *Id.* at 102. The court reasoned that the lifetime order was outside the scope of reasonably necessary because “Mr. Howard’s biological children are young and may one day wish to have contact with their father when they are old enough to make that decision for themselves.” *Id.*

While *Howard* is distinguishable from the instant case for the same reasons addressed above—reliance on *Ancira* as well as the difference in time frame of the no-contact order—it is also distinguishable because the terms of the order directly address the concern that the minor children may one day wish to have contact with their father when they are of age to make that decision. Here, the defendant is only prohibited from contacting

his children until they are 18, the very time when each child may make his own decision of whether or not to have contact with his father.

Finally, the defendant relies on *State v. Torres*, 198 Wn. App. 685, 393 P.3d 894 (2017), which too is distinguishable. In *Torres*, the defendant's son, N.B., died while in his father's care. *Id.* at 688. The defendant was charged with witness tampering after telling his other son, M.T., to "make up lies" to investigators about the circumstances of N.B.'s death. *Id.* The defendant entered into an *Alford* plea and was sentenced to six months confinement and \$1,960.00 in legal financial obligations. *Id.* at 689. The State asked for a six-month no-contact order between the defendant and his other son, M.T.; however, the sentencing court disregarded this recommendation and instead imposed a five-year no-contact order. *Id.* at 688-89. On appeal, the court found that the trial court failed to recognize the defendant's fundamental right to parent nor did it put forth a reasoning as to why a five-year no-contact order was reasonably necessary to further the State's interests. *Id.* at 689. However, in rendering this decision, the court also made clear that a "trial court certainly can impose a no-contact order to advance the State's fundamental interests in protecting children," so long as it is done "in a nuanced manner that is sensitive to the changing needs and interests of the parent and child." *Id.* at 689-90.

First, it is clear that the facts of *Torres* are readily distinguishable from this case. Second, unlike the no-contact order entered in *Torres*, the order in this case is sufficiently nuanced to take into account the changing needs and interests of the parent and child. The defendant is not prohibited from all contact with his biological children; he is simply required to ask permission of his community corrections officer or treatment provider prior to making contact. Should particular events arise such that contact between the defendant and his children is appropriate, the officer and treatment provider can make that decision. Further, the terms are sufficiently nuanced because the order has a finite period of time—it will expire when the children turn 18 years of age. At that time, each child may make her/his own decision as to whether s/he wishes to have contact with her/his father, or petition the court for another no-contact order.

Given the case law particularly on point as to the issue before the Court—*Berg* and *Corbett*—as well as the State’s compelling interest in protecting the defendant’s children from abuse and the nuanced manner of the condition allowing for changing needs and interests of both the defendant and his children, the Court should not strike the condition.

B. The community custody condition requiring that the defendant submit to plethysmograph testing should remain in place.

“Today, plethysmograph testing has become rather routine in adult sexual offender treatment programs, with one survey noting that approximately one-quarter of adult sex offender programs employ the procedure.” *United States v. Weber*, 451 F.3d 552, 562 (9th Cir. 2006). While concerns regarding the intrusive nature, as well as the accuracy and reliability, of this testing have been raised in the Federal Circuit, courts have rejected the argument that this testing is categorically unreasonable, specifically if it is used in the context of sexual deviancy treatment. *Id.* at 566; *United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003).

Washington courts have made a similar determination. *State v. Riles*, 135 Wn.2d 326, 345, 957 P.2d 655 (1998); *Johnson*, 184 Wn. App. at 781; *cf. State v. Land*, 172 Wn. App. 593, 605-06, 295 P.3d 782 (2013) (striking plethysmograph testing condition because an accompanying treatment requirement was not included). In *Riles*, one defendant, Gholston, was ordered to “make reasonable progress in mental health counseling, and/or sexual deviancy therapy, with a therapist approved by your Community Corrections Officer,” and “Submit to polygraph and plethysmograph testing upon the request of your therapist and/or

Community Corrections Officer, at your own expense.” 135 Wn.2d at 337.

The other defendant, Riles, was required to “submit to polygraph & plethysmograph testing upon request of therapist and/or CCO, at own expense,” however, there was no requirement that Riles obtain any sexual deviancy treatment. *Id.* at 333.

The court reasoned that the testing serves no purpose in monitoring compliance, but instead is a device that can be used to impose the crime-related treatment. *Id.* at 345. Thus, the court upheld the plethysmograph testing condition for Gholston and struck it for Riles, reasoning that “[i]t is not permissible for a court to order plethysmograph testing without also imposing crime-related treatment which reasonably would rely upon plethysmograph testing as a physiological assessment measure.” *Id.* at 345.

Consistent with this ruling, the court in *State v. Johnson* similarly affirmed a community custody condition requiring plethysmograph testing because the sentencing court also imposed sexual deviancy treatment. *Johnson*, 184 Wn. App. at 781. In *Johnson*, the sentencing court required the defendant “[s]ubmit to polygraph and/or plethysmograph testing upon direction of [his] Community Corrections Officer and/or therapist at [his] expense.” *Johnson*, 184 Wn. App. at 779. The court affirmed this condition and clarified that a community corrections officer’s authority is

“limited to ordering plethysmograph testing for the purpose of sexual deviancy treatment and not for monitoring purposes.” *Id.* at 781.

Given the nature of the offense in this case, the condition imposing plethysmograph testing on the defendant is not manifestly unreasonable. Just as in *Johnson and Riles*, the condition imposing plethysmograph testing was included alongside a condition requiring the defendant obtain a sexual deviancy evaluation and suggested treatment. While the Court may find it appropriate to clarify that the plethysmograph testing condition be limited for the purposes of treatment and not as a form of monitoring, the condition nonetheless should remain in place.

C. The State concedes that the condition that the defendant possess no pornographic material is unconstitutionally vague.

The defendant contends that the community custody condition prohibiting him from possessing pornography is unconstitutionally vague. The State agrees. The condition should be amended to prohibit “sexually explicit conduct” as defined in RCW 9.68A.011.

The defendant challenges as unconstitutionally vague the provision of his supervised release prohibiting him from possessing or perusing “pornographic material.” In *United States v. Guagliardo*, 278 F.3d 868 (9th Cir. 2002), the court held as impermissibly vague a similar supervised release term. *Guagliardo* was prohibited from possessing “any

pornography,' including legal adult pornography." *Id.* at 872. Because "a probationer cannot reasonably understand what is encompassed by a blanket prohibition on 'pornography,'" the court remanded for clarification. *Id.* The condition imposed on the defendant is indistinguishable from the one imposed on Guagliardo.

Thus, the condition prohibiting the defendant from perusing and possessing pornography should be amended to prohibit "sexually explicit conduct" as defined in RCW 9.68A.011 so that the prohibition is clear.

D. The State takes no position on whether the Court should deny appellate costs.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). The legal principle that convicted offenders contribute toward the costs of a case, including appointed counsel, is well-established. *See State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976); *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000); RAP 14.2; RCW 10.01.160(2).

In *State v. Sinclair*, 192 Wn. App. 380, 389, 367 P.3d 612 (2016), the court noted that while the defendant's ability to pay is an important factor an appellate court should consider, it is not the only one, and facts

relevant to an exercise of discretion can be set out in a brief. Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. The appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

Thus far, the defendant has claimed he is indigent and was appointed counsel during the initial proceedings as well as for this appeal. While he is unemployed while serving his term of incarceration, during sentencing the court did discuss that the defendant had the ability to work, and would have the ability to pay his court fines and costs. RP 04/20/2016 at 24-25, 28. However, the sentencing court also reduced his fees to \$800.00 total. RP 04/20/2016 at 28.

This defendant's age, criminal history, employment, education, family resources, and length of sentence are factors cited by *Sinclair* that an appellate court can consider in deciding whether to assess costs. Here, those factors certainly weigh in the defendant's favor when the Court is making its decision. Given his history, the State takes no position as to whether this Court should require the defendant to pay his own costs.

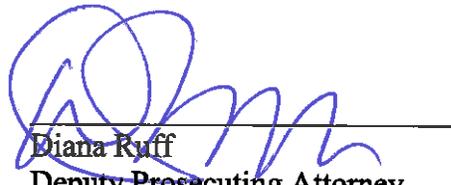
IV. CONCLUSION

Based on the facts of this case and the reasoning articulated above, the Court should affirm community custody condition one requiring that

the defendant obtain permission from a community corrections officer or therapist to contact minors under the age of 18, including his minor children, and condition three, that the defendant must submit to plethysmograph testing when ordered by his community corrections officer or treatment provider. However, the Court should strike condition four ordering the defendant not possess pornographic material because it is unconstitutionally vague and remand the case to the trial court to amend the condition to prohibit “sexually explicit conduct.”

RESPECTFULLY SUBMITTED this 27th day of July, 2017.

ANDY MILLER
Prosecutor



Diana Ruff
Deputy Prosecuting Attorney
Bar No. 41702
OFC ID NO. 91004

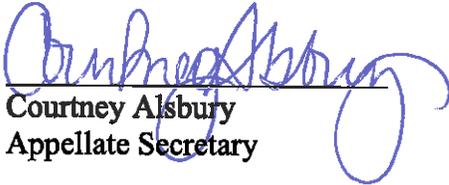
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Jennifer Winkler
Nielsen, Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122

E-mail service by agreement
was made to the following
parties: Sloanej@nwattorney.net

Signed at Kennewick, Washington on July 27, 2017.



Courtney Alsbury
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

July 27, 2017 - 2:41 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34395-2
Appellate Court Case Title: State of Washington v. David Vasquez Alcocer
Superior Court Case Number: 15-1-00274-4

The following documents have been uploaded:

- 343952_Briefs_20170727144105D3901553_3975.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 343952 David Vasquez Alcocer - Brief of Respondent.pdf
- 343952_Designation_of_Clerks_Papers_20170727144105D3901553_1283.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was 343952 David Vasquez Alcocer - Supp DCP.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- andy.miller@co.benton.wa.us
- nielsene@nwattorney.net
- winklerj@nwattorney.net

Comments:

Sender Name: Courtney Alsbury - Email: courtney.alsbury@co.benton.wa.us

Filing on Behalf of: Diana Nicole Ruff - Email: diana.ruff@co.benton.wa.us (Alternate Email: prosecuting@co.benton.wa.us)

Address:
7122 W. Okanogan Place
Kennewick, WA, 99336
Phone: (509) 735-3591

Note: The Filing Id is 20170727144105D3901553