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No. 35680-9-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

SCOTT ALEXIS CASIMIRO,
Defendant/Appellant.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Samuel P. Swanberg, Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in requiring Casimiro to register as a sex offender with the county sheriff within twenty-four hours of release from custody.

2. The sentencing court erred in imposing invalid conditions of community custody.

3. The judgment and sentence contains a finding of fact that is not supported in the record.

4. The judgment and sentence contains a scrivener's error that should be corrected.

Issues Pertaining to Assignments of Error

1. Whether the community custody condition requiring registration as a sex offender with the county sheriff within twenty-four hours of release from custody conflicts with the statutory registration requirements.

2. Does a sentencing court exceed its statutory authority and/or abuse its discretion by imposing certain conditions of community custody that are not crime-related, are unconstitutionally vague and/or conflict with other conditions?

3. Should the boilerplate finding that Casimiro has the ability or likely future ability to pay the legal financial obligations imposed at sentencing be stricken where it is not supported in the record?

4. Does the judgment and sentence contain a scrivener's error that should be corrected where the footer to Appendix F Additional Conditions of Sentence contains the name and DOC number of an offender other than the defendant herein? CP 66–67.

B. STATEMENT OF THE CASE

The State charged Scott Alexis Casimiro with second degree rape of a child. CP 4. Casimiro pleaded guilty as charged. 7/11/2017 RP 5. In his statement on plea of guilty, Casimiro stated that, “I engaged in sexual intercourse with a person who was 13 years old while I was more than 36 months older than her. We were not married. This happened in Franklin County, Washington on or about 12/25/2016.” CP 18.

The State recommended a standard range sentence of 78 months. CP 15. Casimiro requested a Special Sex Offender Sentencing Alternative (SSOSA) sentence. 7/11/2017 RP 8–9. The State did not object to Casimiro's request. CP 15; 7/11/2017 RP *passim*.

The court considered but denied Casimiro's request for a SSOSA sentence. 7/11/2017 RP 11–13. The court imposed an indeterminate

sentence of a minimum term of 78 months to life. CP 56. That term was followed by community custody for up to life. CP 57; 10/17/2017 RP 14. Section 5.6 of the judgment and sentence includes a registration requirement that states,

1. General Applicability and Requirements: Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the State of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

CP 59. As conditions of community custody, the sentencing court required that Casimiro:

Obey all laws.

and

Register as a sex offender with the County Sheriff's Office in the county of residence as defined by RCW 9.94A.030.

CP 67 at conditions 25 and 28.

The trial court imposed additional community custody conditions in both the judgment and sentence and Appendix F to the judgment and sentence. CP 58 (judgment and sentence); CP 65–67 (Appendix F).

The judgment and sentence contains a boilerplate finding that “the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.” CP 52. Without recommendation or discussion, the court imposed a \$500 victim assessment fee, \$200 criminal filing fee and \$100 Felony DNA collection fee. CP 53. The court-appointed attorney fee of \$600 and a \$500 fine assessed under RCW 9A.20.021 were lined out on the document. *Id.*

Casimiro now appeals. CP 68–69. The court found he was indigent for purposes of appeal. CP 88–89.

C. ARGUMENT

1. The condition of community custody requiring registration as a sex offender with the county sheriff within twenty-four hours of release from custody exceeds the trial court's authority because it conflicts with the statutory requirements and creates confusion as to Casimiro's obligations.¹

Casimiro did not object below to the portions of the sentence he now challenges. Nevertheless, a defendant cannot agree to a sentence in

excess of what the legislature authorized. *In re Personal Restraint of Moore*, 116 Wn.2d 30, 38–39, 803 P.2d 300 (1991). An offender may challenge an unlawful sentence for the first time on appeal. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013).

RCW 9A.44.130 imposes registration requirements on a sex offender. Here, the requirement to register with the county sheriff within twenty-four hours of release conflicts with the statutory obligations. The language further fails to identify the correct statutory recipient of the registration under the twenty-four hour requirement.

The lengthy statute, RCW 9A.44.130 declares, in part:

(1)(a) Any adult or juvenile residing whether or not the person has a fixed residence, or who is a student, is employed, or carries on a vocation in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense . . . shall register with the county sheriff for the county of the person’s residence. . . . When a person required to register under this section is in custody of the state department of corrections . . . as a result of a sex offense or kidnapping offense, the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person.

(b) Any adult or juvenile who is required to register under (a) of this subsection must give notice to the county sheriff of the county with whom the person is registered within three business days:

(i) Prior to arriving at a school or institution of higher education to attend classes;

¹ This Court recently addressed a similar issue in *State v. Aristeo Garcia Rubio*, noted at 2018 WL 2041542 (COA No. 34958-6-III, May 1, 2018) (unpublished), cited pursuant to GR 14.1(a) as non-binding authority).

(ii) Prior to starting work at an institution of higher education; or

(iii) After any termination of enrollment or employment at a school or institution of higher education.

...

(4)(a) Offenders shall register with the county sheriff within the following deadlines:

(i) OFFENDERS IN CUSTODY. Sex offenders or kidnapping offenders who are in custody of the state department of corrections . . . must register **at the time of release from custody** with an official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register **within three business days from the time of release** with the county sheriff for the county of the person's residence. . . . The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

(Emphasis added).

In pertinent part RCW 9A.44.130 thus imposes two registration obligations on a sex offender. First, the offender must register with the Department of Corrections on his release from incarceration or within twenty-four hours of the release. Second, the offender must register with the sheriff of the county, in which the offender resides, within three business days of release.

Casimiro's judgment and sentence fails to distinguish between the two distinct registration requirements. Paragraph 5.6 expressly and incorrectly imposes on Casimiro the obligation to register with the county sheriff within twenty-four hours of his release, instead of the three

business days allowed by statute to accomplish the obligation. Casimiro is ordered to obey all laws, yet paragraph 5.6 fails to identify the correct statutory recipient of the registration under the twenty-four hour requirement. Because the condition that Casimiro register as a sex offender with the county sheriff within twenty-four hours of his release from custody is not required by the registration statute and affirmatively misinforms him as to the twenty-four hour reporting obligation, that portion of the condition exceeds the sentencing court's authority and should be stricken.

2. Several community custody conditions are not crime-related and/or are too vague to be enforced and/or give unbridled discretion to the Community Corrections officer and/or conflict with each other, and must be stricken from Casimiro's judgement and sentence.

An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Appellate courts routinely consider pre-enforcement challenges to sentencing conditions. *State v. Sanchez Valencia*, 169 Wn.2d 782, 786–90, 239 P.3d 1059 (2010). Pre-enforcement constitutional challenges to sentencing conditions are ripe for review “if the issues raised are primarily legal, do

not require further factual development, and the challenged action is final.” *Id.* at 786 (quoting *Bahl*, 164 Wn.2d at 751).

A sentencing court lacks authority to impose a community custody condition unless it is authorized by the legislature. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009). Any condition imposed in excess of a court’s statutory authority is void. *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014).

Under RCW 9.94A.703(3)(f), the trial court is authorized to require an offender to “[c]omply with any crime-related prohibitions.” “‘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.” RCW 9.94A.030(13). Directly related community custody conditions must be “reasonably crime-related” to the underlying offense. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870, *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014).

Whether the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the condition was statutorily

authorized, crime-related prohibitions are reviewed for abuse of discretion. *Armendariz*, 160 Wn.2d at 110 (citing *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)). But conditions that do not reasonably relate to the circumstances of the crime, the risk of reoffense, or public safety are unlawful, unless explicitly permitted by statute. *See Jones*, 118 Wn .App. at 207–08.

a. Complying with any and all conditions ordered by the

Department of Corrections.

The judgment and sentence requires that Casimiro:

[A]bide by any additional conditions imposed by Department of Corrections order. RCW 9.94A.704 and .706.

CP 57, paragraph 4.6 at pre-printed Condition (10). It also requires that Casimiro:

Comply with any and all conditions as ordered by the Department of Corrections.

CP 58, paragraph 4.6, box checked as imposing the pre-printed condition.

These two conditions appear to be in conflict with each other. The first condition is limited to additional conditions imposed pursuant to RCW 9.94A.704 (general) and .706 (firearms). The second condition is not limited in any manner.

The second condition “does not place any limits on the ability of”

Casimiro’s CCO to designate additional mandatory obligations. *State v. Magana*, 197 Wn. App. 189, 201, 389 P.3d 654 (2016). In *Magana*, this Court struck a community custody condition barring the defendant from going to “parks, schools, malls, family missions or establishments where children are known to congregate or other areas defined by supervising CCO.” *Id.* at 200–201. This condition was fatally flawed because it “affords too much discretion” to the assigned CCO and is “susceptible to arbitrary enforcement.” *Id.* Similar to the condition stricken in *Magana*, the condition here enables an individual CCO to direct Casimiro to do any particular thing the CCO demands and makes it a violation of community custody should he fail to adequately comply. CP 59. It is not limited to complying with the conditions listed in the judgment and sentence. CP 58. This “boundless” requirement that Casimiro comply with unnamed “conditions as ordered” by a CCO is impermissibly vague. The second condition should be stricken. *Magana*, 197 Wn. App. at 201.

b. Using/possessing sexually explicit material and frequenting adult book stores.

Condition 20 of Appendix F states:

You shall not use/possess sexually explicit material; meaning any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual

relationship, or emphasizing the depiction of adult or child human genitals; provided however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition as defined in RCW 9.68.130(2).

CP 66–67.

Condition 21 of Appendix F states:

Do not attend or frequent any X-rated movies, peep shows, or adult book stores.

CP 67.

(1) The conditions are not crime-related. The crime here is second degree rape of a child. There is no evidence in the record that connects the circumstances of the crime to the use or possession of sexually explicit material or attendance at X-rated movies, peep shows, or adult book stores. In *Kinzle*. Division One accepted the State’s concession that a condition ordering the defendant to refrain from possessing sexually explicit material “must be stricken because no evidence suggested that such materials were related to or contributed to his crime” of child molestation. *Kinzle*. 181 Wn. App. at 785.

In similar cases the Court of Appeals has struck down community custody conditions related to possession of sexually explicit materials or patronizing places that promote or deal in sexually explicit material. *See, e.g., State v. Clausen*, noted at 181 Wn. App. 1019, 2014 WL 2547604, at

*8 (2014) (unpublished) (conditions prohibiting possessing sexually explicit material and patronizing establishments that promote commercialization of sex not crime-related because no evidence suggested Clausen possessed sexually explicit material in connection with crime of child rape); *State v. Whipple*, noted at 174 Wn. App. 1068, 2013 WL 1901058, at *6 (2013) (unpublished) (prohibition on possessing and frequenting establishments that deal in sexually explicit materials not crime-related where nothing in record suggested child rape offenses involved such materials or establishments); *State v. Hasselgrave*, noted at 184 Wn. App. 1021, 2014 WL 5480364, at *12 (2014) (unpublished) (prohibition on going to establishments promoting “commercialization of sex” not reasonably crime-related where no evidence suggested such establishments related to crime defendant’s crime of child rape); *State v. Dossantos*, noted at ___ Wn. App. ___ 2017 WL 4271713, at *5 (2017) (unpublished) (this Court agreed that the community custody condition preventing Dossantos from joining or perusing public social media websites, Skype, or calling sexually-oriented 900 numbers is not crime-related).² The same holds true here. There was no evidence presented that possessing or perusing sexually explicit material played any role in

² Pursuant to GR 14.1(a), Casimiro cites these unpublished cases as nonbinding authorities, but given their relevance he asks that the cases be accorded significant

Casimiro's crime.

Casimiro acknowledges Division Three's opinion that reaches a contrary conclusion. *State v. Magana*, 197 Wn. App. at 201. There, the court concluded, without any analysis, "Because Mr. Magana was convicted of a sex offense, conditions regarding access to X-rated movies, adult book stores, and sexually explicit materials were all crime related and properly imposed." *Id.* This does not represent valid legal reasoning and relies on an overreaching assumption that the commission of a sex crime renders an offender incapable of responsibly possessing sexually explicit materials, even where such materials played absolutely no role in the crime. The decision also usurps the legislature's role by exempting a set of crimes— sex crimes— from the clear statutory requirement that a community custody condition must be related to the circumstances of the crime. This court should not follow the *Magana* court's reasoning but remain faithful to the legislative directive. *See State v. Bruno*, noted at ___ Wn. App. ___ 2017 WL 5127781, at *10 (2017) (unpublished) (Division One declines to follow "*Magana's* cursory reasoning" because the court "did not provide any citation to supporting facts in the record demonstrating that the offender's engagement with X-rated movies, adult

persuasive value.

book stores, or sexually explicit materials was related to the circumstances of his offense”).³

Because the prohibitions are not in any way related to Casimiro’s crime, the trial court’s imposition of the prohibitions exceeded its authority. The conditions should be stricken.

(2) The ban on sexually explicit materials is unconstitutionally vague. The condition banning sexually explicit materials is also unconstitutionally void because it fails to provide adequate notice of prohibited materials and allows for arbitrary enforcement, and because it is so broad it encompasses a substantial amount of material protected by the First Amendment.⁴

In *State v. Bahl*, the Washington Supreme Court struck down a community custody ban against possessing pornography because it was unconstitutionally vague. The court reasoned that because definitions of pornography can and do differ widely—they may “include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo's sculpture of David”—the prohibition on perusing

³ Pursuant to GR 14.1(a), Casimiro cites this unpublished case as nonbinding authority but asks that the case be accorded significant persuasive value.

⁴ The issues of whether the prohibition of sexually explicit materials is crime-related and/or constitutionally vague are presently before the Washington State Supreme Court in *State v. Hai Minh Nguyen*, No. 94883-6 (consolidated). The case is currently set for oral argument on May 10, 2018.

pornography was not sufficiently definite to apprise ordinary persons of what is permitted and what is proscribed. *Bahl*, 164 Wn.2d at 756. The same is true of the prohibition on depictions of sexually explicit conduct. Countless works of art, literature, film, and music explicitly describe, depict, and relate sex and sexuality. Casimiro has no way to know which of these works he can possess, use, access, or view, and which he cannot. Like the ban on pornography, the condition here is unconstitutionally vague.

Additionally, depictions of sexually explicit conduct are protected by the First Amendment. The offending condition makes no distinction between sexually explicit materials involving adults versus children. Sexually explicit materials, such as adult pornography, are protected by the First Amendment. *State v. Perrone*, 119 Wn.2d 538, 551, 834 P.2d 611 (1992). Pornographic drawings, even of children, are also constitutionally protected. *Id.* (citing *New York v. Ferber*, 458 U.S. 747, 764–65, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)). “Books, films, and the like are presumptively protected by the First Amendment” *Id.* at 550 (citing *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S. Ct. 916, 103 L. Ed. 2d. 34 (1989)). Paintings, music, poetry, and other such works are “unquestionably shielded” by the First Amendment. *Hurley v. Irish-Am.*

Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). The blanket ban on all sexually explicit materials fails to satisfy the requisite clarity to ensure First Amendment rights are honored. The condition impacts Casimiro's ability to read a certain book, view a certain painting or film, or listen to a certain song. The condition is intolerably vague.

The statutory definition compounds rather than mitigates the prohibition's vagueness. "Sexually explicit conduct" under RCW 9.68A.011(4) applies to actual or simulated depictions of, in part, sexual intercourse, masturbation, sadomasochistic abuse, and touching a person's clothed or unclothed genitals. Under this definition, could Casimiro watch a movie or TV show with a sex scene that showed no actual nudity but simulated intercourse? Would this prohibition preclude viewing music videos featuring crotch-grabbing Michael Jackson or Madonna? Could Casimiro view a museum's exhibit of photos by American photographer Robert Mapplethorpe, who extensively photographed the underground BDSM scene in 1960s and 1970s New York?

As the *Bahl* court pointed out in its reliance on *United States v. Loy*, 237 F.3d 251 (3rd Cir. 2001), judges and lawyers could not possibly answer these questions. *Bahl*, 164 Wn.2d at 746–48 (discussing *Loy*).

[W]e could easily set forth numerous examples of books and films containing sexually explicit material that we could not absolutely say are (or are not) pornographic It is also difficult to gauge on which side of the line the film adaptations of Vladimir Nabokov's *Lolita* would fall, or if Edouard Manet's *Le Dejeuner sur L'Herbe* is pornographic (or even some of the Calvin Klein advertisements)

Loy, 237 F.3d at 264.

The same reasoning applies here. Because the prohibition does not give fair notice of what is allowed and what is disallowed, it is unconstitutionally vague under the first prong of *Bahl*'s vagueness analysis.

A vague definition cannot save the condition from a vagueness challenge. *State v. Padilla*, No. 94605-1, ___ P.3d ___, 2018 WL 2144529 *6 (Wash. May 10, 2018), *citing Bahl*, 164 Wn.2d at 757 (*quoting State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). There, Padilla was convicted of communicating with a minor for immoral purposes, but was prohibited from accessing all pornographic materials, defined as “images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts. *Padilla*, 2018 WL 2144529 at *4–5. Noting the definition makes no distinction between child and adult pornography, and encompasses a broad range of protected materials under the First Amendment, and the record makes no connection between Padilla’s

inappropriate messaging and imager of adult nudity or simulated intercourse, the court held the condition in question is unconstitutionally vague because “the condition fails to define the scope of those prohibited materials.” *Id.* at *5–6.

The offending condition here is also infirm under *Bahl*’s second prong because it leads to arbitrary enforcement. Where a condition allows a third party—here, presumably the Community Corrections officer—to “direct what falls within the condition” it “only makes the vagueness problem more apparent since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” *Bahl*, 164 Wn.2d at 758. The condition’s exclusion of “works of art or of anthropological significance” does not save it from vagueness or arbitrary enforcement because reasonable minds may differ in categorization of a given piece of material.

Here, the condition and purported definition is similarly insufficiently definite and invites arbitrary enforcement. Its vagueness requires that it be stricken.

The condition is also unconstitutionally overbroad. “When a statute is vague and arguably involves protected conduct, vagueness analysis will necessarily intertwine with overbreadth analysis.” *Loy*, 237

F.3d at 259 n.2. “A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities.” *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). To determine overbreadth, courts consider whether the condition prohibits a real and substantial amount of constitutionally protected speech relative to its legitimate sweep. *State v. Riles*, 135 Wn.2d 326, 346, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Sanchez-Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010); *State v. Homan*, 191 Wn. App. 759, 767, 364 P.3d 839 (2015). Prohibitions on materials implicated by First Amendment protections “must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation.” *Bahl*, 164 Wn.2d at 757.

The offending condition’s prohibition on all sexually explicit materials reaches significant amounts of protected speech. The condition and the statutory definition it contains do not distinguish between adult and child pornography, between artwork and obscenity, or between literature and smut. The condition carries a very real risk that reading a certain book, viewing a certain film or painting, or listening to a certain song will result in violation. It places a prior restraint on Casimiro's ability to create his own writings and depictions. Neither the State nor the courts

have demonstrated how restricting Casimiro’s access to all materials—art, literature, film, and the like—that depict or relate sex or sexuality is necessary to achieve the State’s needs or protect the public. Nor is it apparent how such a condition promotes rehabilitation given that it sweeps in so much protected material that is completely unrelated to Casimiro’s crime. The condition impermissibly chills Casimiro’s First Amendment rights and therefore must be stricken as unconstitutionally overbroad.

c. Using/possessing dangerous weapons.

Condition 13 of Appendix F states:

Do not own, use or possess any dangerous weapons to include, bow and arrows, hunting knives.

CP 66. This condition is invalid because there is no evidence that any weapons, or “dangerous weapons,” played a part in Casimiro’s crime. *See* RCW 9.94A.703(3)(f) (court in its discretion may impose a crime-related prohibition). Prohibiting possession of a “dangerous weapon” is not one of the conditions that a court may impose at its discretion, such as prohibiting the consumption of alcohol. *See* RCW 9.94A.703(3)(e). Since this condition is invalid on the grounds of being unrelated to Casimiro’s crime, it must be stricken.

Furthermore, the prohibition is unconstitutionally vague. While RCW 9.94A.706(1) does make it illegal for Casimiro, as a convicted felon,

to possess, use, or own a firearm⁵, there is no law in Washington prohibiting him from mere possession of any dangerous weapon. Because the dangerous weapon prohibition exceeds the court's authority, it should be stricken.

Under Wash. Const. art. I § 3 and U.S. Const., Fourteenth Amendment, "a statute is void for vagueness if its terms are 'so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" *State v. Worrell*, 111 Wn.2d 537, 540, 761 P.2d 56 (1988), quoting *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984). This rule applies equally to conditions of community custody which have the effect of a criminal statute in that their violation can result in a new term of incarceration. *State v. Simpson*, 136 Wn. App. 812, 150 P.3d 1167 (2007).

The test for vagueness rests on two key requirements: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. *Bahl*, 164 Wn.2d at 752–753. "A sentencing condition is not a law enacted by the legislature, however, and does not have the same presumption of validity. Instead, imposing conditions of community custody is within the discretion of the sentencing court and *will be*

⁵ Condition 12 of Appendix F properly prohibits Casimiro from owning, using or possessing "any firearms, ammunition or any components thereof." CP 66.

reversed if manifestly unreasonable.” *Bahl*, 164 Wn.2d at 753 (emphasis added), *citing Riley*, 121 Wn.2d at 37. Imposition of an unconstitutional condition would, of course, be manifestly unreasonable. *Bahl*, 164 Wn.2d at 753.

In *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005), a condition of community placement that prohibited the defendant from possessing or perusing pornography without approval from his probation officer was unconstitutionally vague, in large part because Sansone had to show the material to the probation officer just to get a determination if the material was pornographic. In *State v. Bahl*, *supra*, a similar condition was found unconstitutionally vague where statutory definitions of "lewd matter", "obscene matter," and "obscenity" were insufficient to provide adequate notice of the meaning of “pornography.” *Bahl*, 164 Wn.2d at 757.

Here, as in *Sansone* and *Bahl*, there is no concrete definition of the term “dangerous weapon.” Chapter 9.41 RCW is titled “Firearms and Dangerous Weapons.” RCW 9.41.230(1)(c) prohibits setting a trap using a “spring pistol, rifle, or other dangerous weapon.” RCW 9.41.280(1)(a) and (b) prohibit bringing onto school grounds a firearm or “any other dangerous weapon as defined in RCW 9.41.250.” RCW 9.41.250 does not

actually define “dangerous weapon”, but prohibits with certain exceptions the manufacture, sale, disposition, possession of:

[W]eapon[s] of the kind usually known as slung shot, sand club, or metal knuckles, or spring blade knife;

RCW 9.41.250(1)(a). The statute defines “spring blade knife” as:

[A]ny knife, including a prototype, model, or other sample, with a blade that is automatically released by a spring mechanism or other mechanical device, or any knife having a blade which opens, or falls, or is ejected into position by the force of gravity, or by an outward, downward, or centrifugal thrust or movement. ...

and further prohibits the “furtive carrying with intent to conceal” of:

[A]ny dagger, dirk, pistol, or other dangerous weapon;

RCW 9.41.250(1)(b).

These statutory examples of “dangerous weapons” do not make the term “dangerous weapon” any less vague as it applies to Casimiro possessing a dangerous weapon. May he legally possess a kitchen knife, a tire iron, an ice pick, a screwdriver or any other common household item? Or, is he only in violation if he uses any of the above items in a manner likely to produce harm or death? As in *Sansone* and *Bahl*, an ordinary person cannot tell what conduct is prohibited, thus leaving the way for arbitrary enforcement. The condition prohibiting possession of “any dangerous weapons” is constitutionally vague. The imposition of an

unconstitutional condition is manifestly unreasonable, and therefore the condition must be stricken. *Bahl*, 164 Wn.2d at 753, 757

d. Possession of drug paraphernalia and loitering for the purpose of engaging in drug-related activity.

The judgment and sentence requires that Casimiro:

Shall not unlawfully possess or deliver or use or introduce into his/her body without a valid prescription for its use, any controlled substances or legend drug, *and shall not possess or use drug paraphernalia or commit the offense of loitering for the purpose of engaging in drug related activity.*

CP 58, paragraph 4.6, box checked as imposing the pre-printed condition (emphasis added).

Condition 5 of Appendix F requires that Casimiro:

[N]ot possess any paraphernalia for the use of controlled substances.

CP 65. The prohibitions against possession of drug paraphernalia and loitering for the purpose of engaging in drug-related activity are not authorized by statute because they are not crime-related and are unconstitutionally vague, and they should be stricken.

Under the Sentencing Reform Act, some community custody conditions are mandatory, while the sentencing court has discretion in imposing others. RCW 9.94A.703. Under RCW 9.94A.703(3)(d), a sentencing court may order the defendant to "perform affirmative conduct

reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(e) specifically permits the court to order a defendant not to consume alcohol. RCW 9.94A.703(2)(c) directs the court to order the defendant to "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions" unless the condition is waived. Under RCW 9.94A.703(3)(f), the sentencing court may also order the defendant to "comply with any crime-related prohibitions."

A "crime-related prohibition" is "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); *State v. Motter*, 139 Wn. App. 797, 802, 162 P.3d 1190 (2007), *overruled on other grounds*, *State v. Sanchez Valencia*, 169 Wn.2d 782, 785, 239 P.3d 1059 (2010). Such a prohibition must be supported by evidence showing the factual relationship between such prohibition and the crime being punished. *State v. Parramore*, 53 Wn. App. 527,531, 768 P.2d 530 (1989); *see Motter*, 139 Wn. App. at 801 (substantial evidence must support that the prohibition is crime-related).

Here, there was no evidence that "drugs," illegal or otherwise, or "drug paraphernalia" or loitering for the purpose of engaging in drug-

related activity played any role in Casimiro's offense. By its nature, a crime-related prohibition must be specific to the offense. *State v. O'Cain*, 144 Wn. App. 772,775, 184 P.3d 1262 (2008); *Parramore*, 53 Wn. App. at 531; *cf. Motter*, 139 Wn. App. at 803–04 (prohibition on drug paraphernalia upheld where crime related to offender's substance abuse). "For a sentencing judge to base the determination that conduct is crime-related upon belief alone, without some factual basis, would be to read the crime related requirement out of the statute." *Parramore*, 53 Wn. App. at 531 (quoting David Boerner, *Sentencing in Washington* § 4.5 (1985)).

In *State v. Munoz-Rivera*—which like Casimiro's case originated out of Franklin County—this Court struck identical conditions. It stated:

The State presented no evidence that possession or use of drug paraphernalia or loitering for the purpose of engaging in drug-related activity was in any way related to the crimes for which he was convicted. Additionally, "mere possession of drug paraphernalia is not a crime." *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). Therefore, these conditions must be stricken.

190 Wn. App. 870, 892, 361 P.3d 182 (2015). Similarly, the conditions prohibiting Casimiro from possessing and using "drug paraphernalia" and loitering for the purpose of engaging in drug related activity must be stricken because they are not crime-related. *Munoz-Rivera*, 190 Wn. App. at 892; *O'Cain*, 144 Wn. App. at 775.

They should also be stricken because they are unconstitutionally vague. "[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct." *Bahl*, 164 Wn.2d at 752. This assures that ordinary people can understand what is and is not allowed, and that they are protected against arbitrary enforcement of the laws. *Id.* at 752–53.

In *Sanchez-Valencia*, the Court addressed a sentencing condition that prohibited possession of "any paraphernalia used to ingest, process, or facilitate the sale of controlled substances." The Court concluded the provision was vague because it failed to provide fair notice and to prevent arbitrary enforcement. *Id.*, 169 Wn.2d at 794–95.

These conditions suffer from a similar infirmity. Moreover, the possession of "drug paraphernalia"⁶ is not in itself illegal. Rather, its use is illegal. RCW 69.40.412. The vague conditions must be stricken.

Sanchez-Valencia, 169 Wn.2d at 795.

⁶ RCW 69.10.102 defines "drug paraphernalia" to mean "all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance."

e. Association with drug users or dealers or being in high drug use areas.

The judgment and sentence requires that Casimiro:

Shall not associate with any known user or dealer of unlawful controlled substances nor frequent any places where the same are commonly known to be used, possessed or delivered.

CP 58, paragraph 4.6, box checked as imposing the pre-printed condition.

This condition is not authorized by statute because it is not crime-related and the condition should be stricken.

RCW 9.94A.703(3)(b) provides a court may in its discretion order an offender to “refrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” When ordering an offender to have no contact with a “specified class of individuals”, the specified class must bear some relationship to the crime. *Riles*, 135 Wn.2d at 350; *cf. State v. Llamas–Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) (“[s]ince associating with individuals who use, possess, or deal with controlled substances is conduct intrinsic to the crime for which Llamas was convicted, it is directly related to the circumstances of the crime.”).

In *Munoz-Rivera*, this Court struck an identical condition. It agreed with the reasoning set forth in the preceding paragraph and additionally stated:

Furthermore, it is not illegal to associate with drug users or dealers or to be in high drug use areas. Therefore, because this condition is not sufficiently crime related in this case, in which there is no evidence of drug use, it must also be stricken.

Id., 190 Wn. App. at 893.

There was no evidence of drug use in the commission of Casimiro's offense. The condition must be stricken because it is not crime-related. *Id.*

f. Vehicles owned or regularly driven by Casimiro.

The judgment and sentence requires that Casimiro:

Notify the community corrections officer of any vehicles owned or regularly driven by defendant.

CP 58, paragraph 4.6, box checked as imposing the pre-printed condition.

In *State v. Weatherwax*, this Court struck an identical condition. In that consolidated case, co-defendants Weatherwax and Rodgers successfully obtained reversal of drive-by shooting convictions. The court determined the challenged condition was therefore not-crime-related and must be stricken, stating:

With the reversal of the drive-by shooting convictions, the requirement and Mr. Rodgers keep his CCO [community corrections officer] informed of vehicles owned or regularly driven does not relate directly to the circumstances of his remaining convictions. The condition should be excluded when Mr. Rodgers is resentenced.

193 Wn. App. 667, noted in unpublished portion at paragraph 68⁷, 376 P.3d 1150 (2016), *reversed on other grounds*, *State v. Weatherwax*, 188 Wn.2d 139, 392 P.3d 1054 (2017).

Here there was no evidence of use of a vehicle in the commission of Casimiro’s offense. This condition is not authorized by statute because it is not crime-related. The condition should be stricken.

g. Use of alcohol.

The judgment and sentence requires that:

Defendant shall not consume any alcohol.

CP 58, paragraph 4.6, box checked as imposing the pre-printed condition.

Condition 7 of Appendix F orders Casimiro to:

[N]ot use, consume or possess any alcohol.

CP 65.

The court had authority to prohibit consumption and possession of alcohol, but lacked authority to prohibit Casimiro from using alcohol. The “use” aspect of the condition is not crime-related and should be stricken from the judgment and sentence.

Under RCW 9.94A.703(3)(e), a sentencing court may order an offender to refrain from consuming or possessing alcohol. Such a

⁷ Pursuant to GR 14.1(a), Casimiro cites this unpublished portion of the case as nonbinding authority but asks that the portion be accorded significant persuasive value.

condition is authorized regardless of whether alcohol contributed to the offense. *Jones*, 118 Wn. App. at 207. But the only possible statutory authority for the prohibition on "use" of alcohol is RCW 9.94A.703(3)(f), which authorizes the court to impose crime-related prohibitions. There is no evidence that Casimiro used alcohol in connection with the events forming the basis for conviction.

There are many ways to use alcohol that do not involve consuming it, from sterilizing cuts to killing snails in the garden to getting the food odor out of a wooden cutting board. The "use" aspect of the condition should be stricken because it is not crime-related. *See State v. Nease*, noted at 189 Wn. App. 1048, 2015 WL 5139088 at *12 (2015) (unpublished) (for condition that ordered "do not use/possess/consume alcohol," holding the "use" aspect of the condition was invalid because it was not crime-related).⁸

h. Notification of any romantic or sexual relationship.

Condition 22 Appendix F requires Casimiro to:

Immediately notify the community corrections officer and sex offender treatment therapist of any romantic or sexual relationship to verify there is no access to minor-aged children.

⁸ Pursuant to GR 14.1(a), Casimiro cites this unpublished portion of the case as nonbinding authority but asks that the portion be accorded significant persuasive value.

CP 67. The requirement of “immediate notification” of “any romantic or sexual relationships” to verify there is no access to minor-aged children is not crime-related. There was no evidence the offense involved children with whom Casimiro came into contact through a romantic or sexual relationship with their parents, and the condition should be removed from the judgment and sentence. *See Kinzle, supra*.

Further, the requirement is unconstitutionally vague and should be stricken. The judge did not clarify what actions would be considered “immediate” or what conduct would amount to “any romantic or sexual relationship.” CP 67.

This condition implicates Casimiro’s right to freedom of association (including his right to intimate association) and his right to privacy. U.S. Const. Amend. I, XIV; Wash. Const. art. I, §§3, 7; *see State v. Clinkenbeard*, 130 Wn. App. 552, 563, 123 P.3d 872 (2005); *see also Am. Legion Post #149 v. Washington State Dep’t of Health*, 164 Wn.2d 570, 596-605, 192 P.3d 306 (2008). Accordingly, the condition must be reviewed with extra care. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), *cert. denied*, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).

The adverb “immediately” can relate to without lapse of time, without delay, instantly, at once; but it can also mean promptly, shortly or

soon. See *Dictionary.com Unabridged*. Random House, Inc. (2017);⁹
Roget's 21st Century Thesaurus, Third Edition, Philip Lief Group
(2009).¹⁰

The word “sexual” can mean of, relating to, or for sex, but it can also mean passionate or loving. See *Dictionary.com*;¹¹ *Roget's Thesaurus*.¹² The word “romantic” can relate to love or strong affection, but it can also mean fanciful, impractical, unrealistic, or glamorous. See *Dictionary.com*;¹³ *Roget's Thesaurus*.¹⁴ The word “relationship” can mean any kind of connection, association, or involvement. *Dictionary.com*.¹⁵ It is not limited to sexual involvement, but can mean an emotional connection or some other kind of rapport or bond. *Dictionary.com*;¹⁶ *Roget's Thesaurus*.¹⁷

The phrase “romantic or sexual relationship” is unconstitutionally vague. As one federal court put it, addressing a similar prohibition:

[P]eople of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a ‘significant romantic relationship.’ What makes a relationship

⁹ Available at <http://www.dictionary.com/browse/immediately> (accessed: May 11, 2018).

¹⁰ Available at <http://www.thesaurus.com/browse/immediately> (accessed: May 11, 2018).

¹¹ Available at <http://www.dictionary.com/browse/sexual> (accessed: May 11, 2018).

¹² Available at <http://www.thesaurus.com/browse/sexual> (accessed: May 11, 2018).

¹³ Available at <http://www.dictionary.com/browse/romantic> (accessed: May 11, 2018).

¹⁴ Available at <http://www.thesaurus.com/browse/romantic> (accessed: May 11, 2018).

¹⁵ Available at <http://www.dictionary.com/browse/relationship> (accessed: May 11, 2018).

¹⁶ Available at <http://www.dictionary.com/browse/relationship> (accessed: May 11, 2018).

¹⁷ Available at <http://www.thesaurus.com/browse/relationship> (accessed: May 11, 2018).

‘romantic,’ let alone ‘significant’ in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders. For some, it would involve the exchange of gifts such as flowers or chocolates; for others, it would depend on acts of physical intimacy...The history of romance is replete with precisely these blurred lines and misunderstandings. See, e.g., Wolfgang Amadeus Mozart, *The Marriage of Figaro* (1786); Jane Austen, *Mansfield Park* (Thomas Egerton, 1814); *When Harry Met Sally* (Columbia Pictures 1989); *He's Just Not That Into You* (Flower Films 2009).

United States v. Reeves, 591 F.3d 77, 81 (2d Cir. 2010).

Nor is it clear what marks entry into a romantic or sexual relationship and thus at what point notification would be required. One person might believe the exchange of letters commences a romantic or sexual relationship; another person might draw the line at meeting face to face, or engaging in “acts of physical intimacy.” *Id.* Here, as in *Reeves*, the sentencing condition “has no objective baseline.” *Id.*

There are no statutory definitions or other external sources providing guidance as to what it means to enter a romantic or sexual relationship. Casimiro’s freedom “should not hinge on the accuracy of his prediction of whether a given probation officer, prosecutor, or judge would conclude” that he’d entered into a qualifying relationship and that the notification requirement was triggered. *Id.* The relationship provision must be stricken. *Riles*, 135 Wn.2d at 350.

i. Disclosure of sexual criminal history to employers or landlords.

Conditions 26 and 27 of Appendix F require Casimiro to:

Disclose all sexual criminal history to any potential or current [employer] [landlord].

CP 67. These conditions are not related to the circumstances of Casimiro's offense and are not otherwise authorized by statute. They must be stricken from the judgment and sentence.

Crime-related prohibitions may not include orders that direct an offender to perform affirmative conduct. RCW 9.94A.030(10); *State v. Acrey*, 135 Wn. App. 938, 945, 146 P.3d 1215 (2006). "Persons may be punished for their crimes and they may be prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed will rehabilitate them." *Parramore*, 53 Wn. App. at 531–32) (emphasis omitted) (quoting David Boerner, *Sentencing in Washington*, § 4.5 (1985)). Consequently, any order directing an offender to affirmatively do something is an affirmative condition and must be expressly authorized by the SRA.

The SRA provides for a number of affirmative conditions that can be imposed depending on the' circumstances. *See, e.g.*, RCW 9.94A.607(1) (where offender's chemical dependency contributed to his offense, court may order him to participate in rehabilitative programs);

RCW 9.94A.670(5), (6) (court may impose affirmative conditions as part of special sex offender sentencing alternative); RCW 9.94A.703(3)(d) (as condition of community custody, court may order offender to perform affirmative conduct reasonably related to circumstances of offense); RCW 9.94A.030(10) (trial court may require affirmative acts necessary to monitor compliance with other conditions or orders).

These statutes do not apply to Casimiro. There is no allegation that the circumstances of his conviction of second degree child rape had anything to do with any potential or current employer or landlord. The offending conditions are unnecessary to monitor the order that Casimiro register as a sex offender with the county sheriff. Nor does any other SRA provision independently authorize the affirmative disclosure of sexual criminal history, which clearly requires Casimiro to affirmatively engage in some conduct. Thus, there is no statutory authority allowing the imposition of the disclosure condition in the first instance. The conditions must be stricken. *State v. Button*, 184 Wn. App. 442, 446–48, 339 P.3d (2014).

j. Frequenting businesses or areas that cater to minor children.

Condition 19 of Appendix F requires that Casimiro:

[N]ot enter into or frequent business establishments or areas that cater to minor children. Such establishments may include but are

not limited to video game parlors, libraries, parks, shopping malls, pools, skating rinks, school grounds, or any areas routinely used by minors as areas of play/recreation.

CP 66. This condition is unconstitutionally vague and must be stricken.

In *State v. Irwin*, the court held that a similarly worded condition, which prohibited Mr. Irwin from frequenting “areas where minor children known to congregate, as defined by the supervising CCO,” was constitutionally impermissible because it did not provide sufficient notice of what conduct was proscribed. 191 Wn. App. 644, 650, 655, 364 P.3d 830 (2015). The court struck the finding after determining that even if the community custody officer provided a list of locations, the potential for arbitrary enforcement rendered the condition void for vagueness under the second prong of the vagueness analysis. *Id.* at 655.

This Court reached the same conclusion in *Magana*, where the community custody condition prohibited the defendant from frequenting “parks, schools, malls, family missions or establishments where children are known to congregate or other areas as defined by supervising CCO treatment providers.” 197 Wn. App. at 200. The court held the condition unconstitutionally vague, explaining:

[w]hile the condition lists several prohibited locations and explains that the list covers places where children are known to congregate, the CCO’s designation authority is not tied to either the list or the

explanatory statement. As written, the discretion conferred on the CCO by [the condition] is boundless.

Id. at 201. The Court vacated the condition. *Id.*

As in *Irwin* and *Magana*, community custody condition 19 provides a list of examples where children are known to congregate, but allows for the community custody officer to arbitrarily designate other “areas where minor children are known to congregate.” CP 66. This condition must be stricken as unconstitutionally vague. *See Irwin*, 191 Wn. App. at 655; *Magana*, 197 Wn. App. at 201.

k. Advance approval of volunteer, church and travel activities.

Condition 23 of Appendix F requires that:

Volunteer activities, church activities and travel activities must be approved in advance by the community corrections officer and the sex offender treatment therapist.

CP 67. This condition is not crime-related and is unconstitutionally vague, and must be stricken.

A “ ‘[c]rime-related prohibition’... directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10); *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). There is no evidence that Casimiro’s offense involved volunteer, church or travel activities, and thus the condition is not crime-related. It must be stricken.

The rights to associate, practice religion and move freely in public places are constitutionally protected first amendment rights. U.S. Const. amend. 1, 14. Conditions that affect fundamental rights require additional scrutiny—they must be reasonably necessary to achieve a compelling State interest. They must be narrowly drawn, and there must be no reasonable alternative way to achieve the State’s interest. *Warren*, 165 Wn.2d at 34–35. Both the scope and the duration of the condition must be reasonable. *In re Rainey*, 168 Wn.2d 367, 381–82, 229 P.3d 686 (2010). The record should reflect that the sentencing court considered these requirements. *See State v. Torres*, 198 Wn. App. 685, 393 P.3d 894 (2017) (reversing condition preventing defendant from contacting his son because sentencing court did not explain the justification for that condition).

Under the Due Process Clause of the Fourteenth Amendment, a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Thus, a condition of community custody is unconstitutionally vague if it fails to do either. *Bahl*, 164 Wn.2d at 753.

Here, the offending condition fails both prongs of the vagueness test. This condition is insufficiently definite to enable an ordinary person to understand what conduct will be prohibited.

More importantly, the condition is unconstitutionally vulnerable to arbitrary enforcement where it requires advance approval of certain “activities” but does not provide any ascertainable standards of guilt. The word “volunteer” can relate to one who voluntarily offers himself or herself for a service or undertaking, but it can also mean one who suggests or proposes. *See Dictionary.com*;¹⁸ *Roget's Thesaurus*.¹⁹ The word “church” can relate to a building or congregation for worship, but it can also simply mean the public worship of God. *See Dictionary.com*.²⁰ The word “travel” can relate to journeying or passing through or over a country or road, but it can also mean to associate or consort with a particular group. *See Dictionary.com*.²¹ The word “activity [plural: activities]” can mean a specific deed, action, function, or sphere of action, but it can also mean normal mental or bodily power, function, or process. *See Dictionary.com*.²²

¹⁸ Available at <http://www.dictionary.com/browse/volunteer> (accessed: May 13, 2018).

¹⁹ Available at <http://www.thesaurus.com/browse/volunteer> (accessed: May 13, 2018).

²⁰ Available at <http://www.dictionary.com/browse/church> (accessed: May 13, 2018).

²¹ Available at <http://www.dictionary.com/browse/travel> (accessed: May 13, 2018).

²² Available at <http://www.dictionary.com/browse/activity> (accessed: May 13, 2018).

Given the lack of ascertainable standards, the condition requiring advance approval of volunteer, church and travel activities covers innocent and constitutionally protected conduct. As in *Reeves*, the sentencing condition “has no objective baseline.” *Reeves*, 591 F.3d at 81.

There are no statutory definitions or other external sources providing guidance as to what activities require Casimiro to seek prior approval. Nor are any limits placed on the withholding or granting of approval. Casimiro’s freedom “should not hinge on the accuracy of his prediction of whether a given probation officer, prosecutor, or judge would conclude” that he’d sought prior approval for a qualifying activity. Even if the Community Corrections officer or sex offender treatment therapist approves or disapproves one specific activity, this does not establish approval or disapproval of a different future activity and thus does nothing to deter arbitrary enforcement of the condition. See *Irwin*, 191 Wn. App. at 654–55.

The prior approval of volunteer, church and travel activities provision must be stricken. *Riles*, 135 Wn.2d at 350.

3. The boilerplate finding in the judgment and sentence that Casimiro has the ability or likely future ability to pay the legal

financial obligations imposed at sentencing should be stricken where it is not supported in the record.

In paragraph 2.5 of the judgment and sentence, the court made the following boilerplate finding:

[X] That the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.743.

A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

There was no evidence in the record below that the court “considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change.” CP 52 at paragraph 2.5 (boilerplate). Casimiro’s financial status

was never discussed at sentencing. *See* 10/17/17 RP 4–16. The court’s factual finding is clearly erroneous and should be stricken.

4. The judgment and sentence contains a scrivener’s error that should be corrected.

The footer to Appendix F of the judgment and sentence incorrectly contains the name and DOC number of an offender other than the defendant herein. CP 66–67. Casimiro is entitled to the benefit of having a corrected judgment and sentence so that the document accurately reflects the sentence imposed upon him. *See, e.g., State v. Nallieux*, 158 Wn. App. 630, 647, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, incorrectly stating the terms of confinement imposed).

5. Appeal costs should not be awarded.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors .

. . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual’s other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual’s age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant “cannot contribute anything toward the costs of appellate review.” *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in

administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

The court appointed trial counsel due to Casimiro’s indigency, and found he remained indigent for purposes of this appeal and was entitled to appointment of counsel and costs of review at public expense. CP 86, 88.

In light of Casimiro’s indigent status, and the presumption under RAP 15.2(f), that he remains indigent “throughout the review” unless the appellate court finds his financial condition has improved “to the extent [he] is no longer indigent,”²³ this court should exercise its discretion to waive appellate costs.²⁴ RCW 10.73.160(1).

²³ *Accord*, RAP 14.2, which provides in pertinent part:

When 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**. (Emphasis added).

²⁴ Appellate counsel anticipates filing a report as to Casimiro’s continued indigency no later than 60 days following the filing of this brief.

D. CONCLUSION

For the reasons stated, this matter should be remanded to strike the referenced conditions of sentence and finding of ability to pay, and to correct the scrivener's error. Should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on May 14, 2018.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office, P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 14, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Scott A. Casimiro (#400841)
Airway Heights Corrections Center
PO Box 2049
Airway Heights WA 99001

E-mail: appeals@co.franklin.wa.us
Shawn P. Sant
Franklin County Prosecutor's Office

s/Susan Marie Gasch, WSBA #16485

GASCH LAW OFFICE

May 14, 2018 - 8:44 AM

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