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No. 98493-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JOHNSON,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

Christopher Johnson responded to a “women for men” post on Craigslist. An undercover police officer had posted the ad. She originally described herself as a woman, but later falsely claimed to be 13 years old. Mr. Johnson proceeded with plans to meet. Although Craigslist banned people under 18 years of age from using the section, and Mr. Johnson stated he did not intend to have sex with a child, he was convicted of attempted rape of a child. The court sentenced him to a minimum of 10 years in prison, with community custody for the rest of his life.

The court imposed the following condition of community custody: “Do not use or access the World Wide Web unless specifically authorized by CCO¹ through approved filters.” The condition is overbroad in violation of the First Amendment and vague in violation of Due Process. Absent CCO approval, it bars access to “the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”² And it vests unbridled discretion in the CCO to permit or deny such access. The condition is unconstitutional, and this Court should reverse.

¹ Community Corrections Officer

² *Packingham v. North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017).

B. ISSUES

Over Mr. Johnson's objection, the sentencing court imposed the following condition of community custody: "Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters."

1. Is the condition overbroad in violation of the First Amendment because it is not narrowly tailored to further a legitimate government interest?

2. Is the condition vague in violation of the Fourteenth Amendment because it vests unbridled discretion in the community corrections officer to determine which websites – if any – Mr. Johnson may access?

C. STATEMENT OF THE CASE

Christopher Johnson is a husband and father who had no criminal history prior to this case. CP 82. He served in the Navy for 10 years, then joined Progeny Systems, a primary Department of Defense contractor, where he performed computer work on submarines for another 10 years. CP 82. He provided for his family, which includes his wife, their biological son, their adopted daughter, and his wife's children from a prior relationship. RP (3/27/18) 656-57.

In October of 2017 Mr. Johnson responded to a post on the “Casual Encounters” section of Craigslist. RP (3/27/18) 553, 610-11. The section is for adults only, and users must confirm they are 18 or over when logging in. RP (3/27/18) 576, 637, 686. An undercover police officer had posted the advertisement and titled it “crazy and young. Looking to explore – w4m Bremerton.” RP (3/27/18) 552. The phrase “w4m” means “women for men.” RP (3/27/18) 552.

A different police officer, Detective Kristl Pohl, e-mailed and texted Mr. Johnson. RP (3/27/18) 547-94. She eventually falsely described herself as a 13-year-old named Brandi, asked Mr. Johnson if he could “help out with \$\$ or something,” and arranged for them to meet at an address in Bremerton. RP (3/27/18) 549, 553-54, 558, 567.

Police stopped Mr. Johnson in Bremerton and arrested him. RP (3/26/18) 487. The officers seized his wallet, which contained just a little over \$40. RP (3/26/18) 480.³

The State charged Mr. Johnson with one count of attempted rape of a child in the second degree, one count of attempted commercial sexual

³The ruse police employed in this case was called “Operation Net Nanny” and is described more fully in a recent New York Times article. See Michael Winerip, *Convicted of Sex Crimes, but With No Victims*, NY Times Mag. (Aug. 6, 2020), <https://www.nytimes.com/2020/08/26/magazine/sex-offender-operation-net-nanny.html>.

abuse of a minor, and one count of communicating with a minor for immoral purposes. CP 1-4. At trial, the State introduced the lurid e-mail and text message exchanges, and police witnesses testified about their false claims and Mr. Johnson's responses. RP (3/27/18) 547-600, 606-45.

Mr. Johnson testified he did not believe the person who posted the ad was actually 13 years old and would not have had sex with a real 13-year-old. RP (3/27/18) 672-75, 684-86. He argued he was only seeking casual sex with a woman, that infidelity is not a crime even if it is dishonorable, and that he happened to have a little over \$40 in his wallet, which is not an amount one would pay for sex. RP (3/28/18) 826-33.

The jury entered guilty verdicts on all three counts. CP 66. Mr. Johnson had no criminal history, but the court sentenced him to a minimum of 10 years in prison, with a maximum of life. CP 95-96. After his release from prison, Mr. Johnson will be on community custody for the remainder of his life. CP 96-97.

At the sentencing hearing, the prosecutor requested numerous conditions of community custody. As relevant here, he stated, "I'm asking that the defendant not be allowed to use or access the worldwide web through any means including but not limited to the internet, unless authorized. I'm not asking he never can, but that it be authorized by the CCO so that that could be tracked." RP (5/18/18) 16.

Defense counsel objected and argued the prosecutor's proposed condition was overbroad:

No access to the worldwide web. That is simply too broad. I don't know how a person would function in today's world without accessing the web. You can't send an e-mail to your wife. You can't look for a job. You can't sell your car. I think it's appropriate that there be some monitoring, there are filters that can be imposed. Those are appropriate. But simply saying no access to the worldwide web unless specifically authorized by a CCO is overly broad.

RP (5/18/18) 37-38. Counsel suggested an appropriate condition could "prohibit Mr. Johnson from making certain phone calls or contacting certain people or going to certain web sites." RP (5/18/18) 38.

The sentencing court seemed to appreciate the argument. It stated, "I don't want to exclude Mr. Johnson entirely from accessing the web. ... But I think that there has to be some mechanism to control so he's not on websites related to the conduct here." RP (5/18/18) 51-52.

Yet at the State's suggestion, the court decided adding an "approved filter" clause would cure the problem. RP (5/18/18) 52. The final condition reads: "Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters." CP 99.

D. ARGUMENT

The condition prohibiting web access absent CCO approval is unconstitutional. It bans a broad swath of protected internet activity in violation of the First Amendment, and vests standardless discretion in the CCO in violation of the Fourteenth Amendment. This Court should reverse and remand for imposition of a narrowly tailored condition.

1. The condition prohibiting any use of the World Wide Web absent CCO approval is overbroad in violation of the First Amendment.

- a. A community custody condition implicating the First Amendment must be narrowly tailored to further the State's legitimate interest.

“A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” *Packingham*, 137 S. Ct. at 1735; U.S. Const. amend. I. In the modern world, the “vast democratic forums of the Internet” are the “most important places” for this exchange of ideas. *Id.* (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)). People access websites to “debate religion and politics[,]” “look for work[,]” and “petition their elected representatives[.]” *Id.* Thus, courts “must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks” online. *Id.* at 1736.

Recognizing these principles, this Court has held community custody conditions implicating the First Amendment “must be narrowly tailored to further the State’s legitimate interest.” *State v. Padilla*, 190 Wn.2d 672, 678, 416 P.3d 712 (2018) (citing, *inter alia*, *Packingham*, 137 S. Ct. at 1736). The condition at issue here fails this test.

- b. The condition at issue here is not narrowly tailored to the State’s legitimate interests in preventing recidivism and facilitating reentry.

The State has a legitimate interest in preventing recidivism, protecting the public, and facilitating reentry. RCW 9.94A.010. But this condition is not narrowly tailored to further these interests. To the contrary, the ban is breathtaking in its scope, prohibiting all access to the Web unless a community corrections officer approves the access. It is not tailored to preventing recurrence of these crimes and it hinders the mutual goal of successful reintegration.

As trial counsel noted, much of modern life is online. People use the web to send e-mail, search for employment, purchase necessities, read news, post political opinions, view art, listen to music, watch videos, and conduct meetings. The coronavirus pandemic has driven even more of daily life online, but a vaccine will not reduce reliance on the virtual world. Technology will continue to advance, and these advancements will only increase our need to go online to connect, communicate, and survive.

In light of these realities, the U.S. Supreme Court in *Packingham* held that a limitation on internet access violated the First Amendment – even though the limitation was much narrower than the one at issue here. North Carolina made it a felony for a registered sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal web pages.” *Packingham*, 137 S. Ct. at 1733 (citing N.C. Gen. Stat. Ann. §§14-202.5 (2015)). The law exempted websites that provided only photo-sharing, e-mail, chat, or instant messenger services, and exempted websites whose primary purpose was commercial transactions. *Id.* at 1734.

But even this comparatively limited prohibition was invalid, and the Court reversed the conviction of a child rapist who had violated the social media ban. *Id.* at 1734-35. Acknowledging that child sexual abuse is a most serious crime and that states may pass laws to protect children, the Court emphasized such laws “must not burden substantially more speech than is necessary” to further that legitimate goal. *Id.* at 1736. It is permissible to enact “narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.” *Id.* at 1737. But the law at issue was unconstitutionally overbroad

because it barred access to “the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.” *Id.* The Court held, “the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.” *Id.* at 1738.

Following *Packingham*, the Third Circuit invalidated a condition of supervised release that was similar to the condition imposed on Mr. Johnson. *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018). In *Holena*, the defendant was convicted of “using the internet to try to entice a child into having sex.” *Id.* at 290. The sentencing judge imposed a condition of supervised release forbidding the defendant from using the internet without his probation officer’s approval. *Id.* The court later added a ban on all computer use. *Id.* at 290. The Court of Appeals reversed because the two conditions contradicted each other and because each ban was impermissibly broad. *Id.* at 291-95.

As to the condition banning internet access absent a probation officer’s approval, the court stated, “The goal of restricting Holena’s internet use is to keep him from preying on children. The District Court *must tailor its restrictions to that end.*” *Id.* at 293 (emphasis added). The court ruled the trial judge “may not prevent Holena from doing everyday

tasks that have migrated to the internet, like shopping, or searching for jobs or housing. The same is true for his use of websites conveying essential information, like news, maps, traffic, or weather.” *Id.* at 294. “Under *Packingham*, blanket internet restrictions will rarely be tailored enough to pass constitutional muster.” *Holena*, 906 F.3d at 295. “Their ‘wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child.’” *Id.* (quoting *Packingham*, 137 S. Ct. at 1741 (Alito, J., concurring)).

This Court also recently held a community custody condition was insufficiently tailored in light of First Amendment concerns. *Padilla*, 190 Wn.2d at 677-82. In that case, the defendant was convicted of communicating with a minor for immoral purposes after he sent sexually explicit messages to a (real) nine-year-old on Facebook. *Id.* at 674-75. The trial court sentenced him to 75 days of confinement and 12 months of community custody. *Id.* at 676. One condition of community custody prohibited the defendant from accessing “pornographic materials, as directed by his CCO.” *Id.*

This Court invalidated the condition because it was unconstitutionally vague – an issue Mr. Johnson discusses below. *Padilla*, 190 Wn.2d at 682. But it also condemned the condition because it “encompass[e]d a broad range of speech protected by the First

Amendment.” *Id.* at 680-81 (citing *State v. Bahl*, 164 Wn.2d 739, 756, 193 P.3d 678 (2008)). Unlike in *Bahl*, where this Court also invalidated a pornography ban, the condition in *Padilla* included a definition of “pornographic materials.” *Padilla*, 190 Wn.2d at 679. But that definition was itself overbroad and vague. *Id.* at 679-81. It encompassed “depictions of intimate body parts,” which “impermissibly extends to a variety of works of arts, books, advertisements, movies, and television shows.” *Id.* at 681. Because the definition of “pornographic materials” included “a broad range of protected materials[,]” this Court reversed and remanded for further definition of the term “following a determination of whether the restriction is narrowly tailored based on Padilla’s conviction.” *Id.* at 684.

If a prohibition on pornography was impermissibly overbroad for a person who used Facebook to sexually target a real nine-year-old, the prohibition on the entire World Wide Web is impermissibly overbroad for a person who used an adults-only section of Craigslist to communicate with a fake 13-year-old. As broad as it was, the pornography ban in *Padilla* encompassed just one specific category of protected speech. The ban here encompasses the entire World Wide Web – a repository of untold quantities of information protected by the First Amendment.

Indeed, Division Three of the Court of Appeals held a similar condition violated the First Amendment in *Matter of Sickels*, ___ Wn.

App. 2d ___, 469 P.3d 322 (2020). There, as here, the defendant responded to a Craigslist post by a police officer posing as a 13-year-old. *Id.* at 326-27. The defendant pleaded guilty to attempted rape of a child, and later challenged various conditions of community custody. *Id.* at 327. One condition stated: “No internet access or use, including email, without the prior approval of the supervising CCO.” *Id.* at 333.

The State conceded the condition was overbroad and suggested substituting it with a more tailored condition prohibiting the targeting of minors online. *Id.* at 334. The Court of Appeals agreed that the original condition was “overly broad” (and “even more objectionable” than another condition limiting internet use to employment purposes). *Id.* at 335. It accepted the State’s concession and remanded to strike the condition “and consider whether to impose a more narrowly-tailored condition.” *Id.*

Sickels did not rely on *Packingham* in concluding the condition was overbroad; Division Three noted that some federal courts described *Packingham* as inapplicable in the supervised release context. *Sickels*, 469 P.3d at 334 (citing, e.g., *United States v. Carson*, 924 F.3d 467, 473 (8th Cir. 2019)). However, like the Third Circuit in *Holena*, this Court already recognized that *Packingham* applies to community custody conditions. *Padilla*, 190 Wn.2d at 678 n.4. Other courts agree. *E.g. State v. R.K.*, 463

N.J. Super. 386, 232 A.3d 487, 496-501 (2020) (citing cases and applying *Packingham* to invalidate supervised release condition banning social media access for a defendant who had committed sex crimes against 14-year-olds). Both individuals on supervised release (as here) and individuals subject to sex offender registration (as in *Packingham*) are rehabilitating themselves and rejoining society. *See id.* at 500-01. The State and the individuals share the goal of successful reentry. RCW 9.94A.010; *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). *Packingham* itself made this point: “Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.” *Packingham*, 137 S. Ct. at 1737.

Regardless, this Court need not rely on *Packingham* to recognize a condition banning all internet access for any reason absent CCO approval is overbroad. Long before *Packingham*, this Court and others held that sentencing conditions infringing constitutional rights must be narrowly tailored to serve the legitimate goals of supervised release. *E.g. Bahl*, 164 Wn.2d at 757-78 (applying heightened scrutiny to sentencing condition limiting First Amendment right to view pornography, and endorsing federal cases that had done the same); *State v. Warren*, 165 Wn.2d 17, 34–

35, 195 P.3d 940 (2008) (stating “crime-related prohibitions affecting fundamental rights must be narrowly drawn” and “[t]here must be no reasonable alternative way to achieve the State's interest”).

The State properly concedes this standard applies. Br. of Respondent at 24 (acknowledging “There must be no reasonable alternative way to achieve the State's interest.”). The condition at issue here fails this test, because it prohibits access to a massive amount of protected material that has no relation to the crime at issue. *Sickels*, 469 P.3d at 335.

Moreover, the condition at issue here is arguably underinclusive in addition to being overly broad. It is overbroad because it prohibits any Web access absent CCO approval, but it is underinclusive in that it bans Mr. Johnson only from the “World Wide Web” and *not* from apps or other means of interacting over the internet.⁴ Like most of us, the CCO may treat “internet” and “World Wide Web” as synonyms, thereby solving the problem of underinclusiveness. But if the CCO has the power to deviate from the strict meaning of the text, that authority only exacerbates an

⁴ See, e.g., *The Internet and the World Wide Web Are Not the Same Thing*, NBC News (March 12, 2014), <https://www.nbcnews.com/tech/internet/internet-world-wide-web-are-not-same-thing-n51011>.

already serious vagueness problem (discussed below). A properly tailored condition could solve all of these constitutional concerns.

In sum, like the conditions in *Padilla*, *Holena*, and *Sickels*, the condition at issue here violates the First Amendment. This Court should remand with direction to strike the condition. The trial court may impose a narrowly tailored condition to prevent Mr. Johnson from soliciting minors online, and may authorize the use of an equally tailored filter to ensure compliance.

2. The condition prohibiting any use of the World Wide Web absent CCO approval is vague in violation of the Fourteenth Amendment.

- a. A community custody condition is unconstitutionally vague if it vests standardless discretion in a community corrections officer.

In addition to being overbroad in violation of the First Amendment, the condition at issue is vague in violation of the Fourteenth Amendment.

A community custody condition is vague in violation of due process if it either (1) fails to provide adequate notice as to what conduct is proscribed, or (2) fails to provide ascertainable standards to protect against arbitrary enforcement. *Padilla*, 190 Wn.2d at 677; *Bahl*, 164 Wn.2d at 752-53; U.S. Const. amend. XIV. “Terms should be established by judges *ex ante*, not probation officers acting under broad delegations

and subject to loose judicial review *ex post*[.]” *United States v. Scott*, 316 F.3d 733, 736 (7th Cir. 2003).

At a minimum, the condition here fails the second prong of the vagueness test.⁵ The condition vests standardless discretion in the CCO to determine whether Mr. Johnson may access the Web at all, and if so, which sites he may visit.

- b. This condition vests standardless discretion in the CCO to decide whether Mr. Johnson may access the Web at all, and which sites he may access if so.

Again, the condition at issue reads: “Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters.” CP 99. The condition provides no standards by which the CCO is to determine *whether* to authorize any web access or *what* to permit if so. It is the epitome of an unconstitutionally vague condition.

In *Padilla*, this Court held a ban on “pornographic materials, as directed by [the defendant’s] CCO” was unconstitutionally vague. *Padilla*, 190 Wn.2d at 682. Among other reasons, this Court noted that “delegating the authority to determine the prohibition boundaries to an individual CCO creates ‘a real danger that the prohibition on pornography may ultimately

⁵ The First Amendment overbreadth argument above is sometimes raised and considered under the first prong of a vagueness challenge rather than as a standalone issue. Both approaches are valid, and these issues are often intertwined. *See Bahl*, 164 Wn.2d at 757-78.

translate to a prohibition on whatever the officer personally finds titillating.’ ” *Id.* (quoting, inter alia, *Bahl*, 164 Wn.2d at 755).

The condition here presents an even greater danger of subjective, arbitrary enforcement, because Mr. Johnson may not use the Web *at all* unless the CCO decides, in their mercy, to allow it. The plain language of this condition would permit the CCO to deny access based on mood, whim, or caprice. And even if the CCO attempted to restrict Mr. Johnson only from websites relevant to the crime of conviction, such attempts would be based on the CCO’s own determination of what standards should apply. *Cf. Holena*, 906 F.3d at 293 (although condition permitted internet use with the probation officer’s prior approval, the sentencing court “gave the probation office no guidance on the sorts of internet use that it should approve.”). This delegation violates due process.

Division One reached this conclusion in a recent case. *State v. Forler*, No. 79079-0-I, 2019 WL 2423345 (Wash. Ct. App. 2019) (unpublished; *see* GR 14.1). While Division Three in *Sickels* relied on the First Amendment to invalidate an internet ban in a Net Nanny case, Division One relied on the Fourteenth Amendment and struck the condition as unconstitutionally vague. *Id.* at *12-*13.

Forler was convicted of crimes after responding to undercover Net Nanny police officers promising sex with a 7-year-old and 11-year-old. *Id.*

at *1. The sentencing court imposed a condition stating “No internet use unless authorized by treatment provider and Community Custody Officer[.]” *Id.* at *12. The Court of Appeals noted the myriad valid and essential uses of the internet and described the condition as “unconstitutionally overbroad.” *Id.* at *13. It reversed and remanded for the trial court to revise the condition “to include limiting language that prohibits Forler from using the internet to solicit minors.” *Id.* at *13. But it stated it was technically not reaching the First Amendment issue, and instead it invalidated the condition “because it fails the second prong of the vagueness analysis.” *Id.* “The condition does not protect against arbitrary enforcement, because it does not provide ascertainable standards for enforcement.” *Id.* The same is true in Mr. Johnson’s case.

The “approved filters” clause does not solve the problem. CP 99. The condition does *not* say, “Defendant may access the World Wide Web only through approved filters.” The parties in this case have assumed DOC’s filters are appropriately tailored, so a condition framed in this manner would not be overbroad and would not vest standardless discretion in the CCO. The CCO would simply provide the filters and make sure Mr. Johnson did not access the Web without them. But this is not what the condition states. The condition *prohibits* use of the World Wide Web *unless* the CCO authorizes the access – at which point “approved filters”

may also be required. CP 99. The condition is overbroad and delegates standardless discretion to the CCO to permit or deny Web access.

“Courts should do what they can to eliminate open-ended delegations, which create opportunities for arbitrary action —opportunities that are especially worrisome when the subject concerns what people may read.” *Scott*, 316 F.3d at 736. “[A] sentencing court may not wholesaledly abdicate its judicial responsibility for setting the conditions of release.” *Sickels*, 469 P.3d at 335. The sentencing court abdicated its responsibility to set standards here, and this Court should reverse.

E. CONCLUSION

The community custody condition prohibiting all Web access absent CCO approval is overbroad in violation of the First Amendment and vague in violation of Due Process. Mr. Johnson asks this Court to remand with instructions to strike the condition from the judgment and sentence. The trial court may impose a substitute condition narrowly tailored to prevent recidivism, protect the public, and promote reentry.

Respectfully submitted this 8th day of October, 2020.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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)	
Respondent,)	
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CHRISTOPHER JOHNSON,)	
)	
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