

67678-4

67678-4

No. 67678-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PAUL JONES,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2012 MAR 30 PM 4:48

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

The Honorable Dave Needy

APPELLANT'S OPENING BRIEF

RABI LAHIRI
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

ASSIGNMENTS OF ERROR	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
STATEMENT OF THE CASE.....	7
ARGUMENT	12
I. Police relied on an unconstitutionally overbroad warrant to search Mr. Jones’s home.....	12
a. The warrant provision authorizing search and seizure of "[a]ny and all evidence of" child molestation or sexual exploitation of a minor authorized an unconstitutional general search of Mr. Jones's home.	15
b. The warrant authorized police to search for material presumptively protected by the First Amendment without any meaningful limitation.	18
c. The warrant improperly authorized a broad search of all digital files, without any limitation on the scope of the search.	20
d. The invalid portions of the warrant may not be severed from the remaining provisions.	23
II. The trial court entered community custody conditions that exceeded its statutory authority and violated Mr. Jones's constitutional rights.....	24
a. The prohibitions addressing pornography and sexual stimulus material are unconstitutionally vague.....	27
i. Possessing or accessing pornographic material	27
ii. Possessing or controlling sexual stimulus material for his particular deviancy	28
b. Several of the conditions are unconstitutionally overbroad.....	30

i. Possessing or controlling "any item designated or used to entertain, attract or lure children"	31
ii. Possessing or controlling any still or video camera.....	32
iii. Prohibiting Internet access without preapproval from the supervising Community Corrections Officer	34
iv. Plethysmograph testing at the direction of the supervising Community Corrections Officer.....	35
v. Prohibiting any and all contact with minors	39
c. Several of the conditions are not statutorily authorized.....	42
i. Prohibiting Internet access without preapproval from the supervising Community Corrections Officer is not crime-related.	42
ii. The condition ordering Mr. Jones not to "frequent establishments whose primary business pertains to sexually explicit or erotic material" is not crime-related. ..	43
iii. Prohibiting mere possession of items that might prove attractive to children, without requiring the intent to use the items in an impermissible way, is not crime-related....	44
iv. Paying the costs of crime-related counseling and medical treatment is not a statutorily authorized community custody condition.....	45
CONCLUSION.....	45

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 795 P.2d 693 (1990).....	27
<i>Eggert v. City of Seattle</i> , 81 Wn.2d 840, 505 P.2d 801 (1973).....	41
<i>In re Postsentence Review of Leach</i> , 161 Wn.2d 180, 163 P.3d 782 (2007)	24, 25

<i>O'Hartigan v. State Dep't of Personnel</i> , 118 Wn.2d 111, 821 P.2d 44 (1991).....	37
<i>State v. Afana</i> , 169 Wn.2d 169, 233 P.3d 879 (2010).....	13, 15, 23
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	passim
<i>State v. Clark</i> , 143 Wn.2d 731, 24 P.3d 1006 (2001).....	14
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	25
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003).....	37
<i>State v. McCorkle</i> , 137 Wn.2d 490, 973 P.2d 461 (1999).....	25
<i>State v. Morse</i> , 156 Wn.2d 1, 123 P.3d 832 (2005).....	15
<i>State v. Patton</i> , 167 Wn.2d 379, 219 P.3d 651 (2009).....	13
<i>State v. Perrone</i> , 119 Wn.2d 538, 834 P.2d 611 (1992).....	passim
<i>State v. Reep</i> , 161 Wn.2d 808, 167 P.3d 1156 (2007).....	14
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	35, 36
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	14, 30, 31
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	13, 14, 21, 22
<i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	26, 27, 35
<i>State v. Varga</i> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	24
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	31, 39, 41

Washington Court of Appeals Decisions

<i>Butler v. Kato</i> , 137 Wn.App. 515, 154 P.3d 259 (2007).....	37
<i>In re Marriage of Parker</i> , 91 Wn. App. 219, 957 P.3d 256 (1998)....	37, 38
<i>In re Marriage of Ricketts</i> , 111 Wn.App. 168, 43 P.3d 1258 (2002).....	38
<i>State v. Ancira</i> , 107 Wn. App. 650, 27 P.3d 1246 (2001).....	31

<i>State v. Kelley</i> , 52 Wn. App. 581, 762 P.2d 20 (1988).....	14
<i>State v. Maddox</i> , 116 Wn. App. 796, 67 P.3d 1135 (2003).....	23
<i>State v. O’Cain</i> , 144 Wn. App. 772, 184 P.3d 1262 (2008).....	43
<i>State v. Sansone</i> , 127 Wn. App. 630, 111 P.3d 1251 (2005).....	28

United States Supreme Court Decisions

<i>Andresen v. Maryland</i> , 427 U.S. 463, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976).....	15, 21
<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)	19
<i>City of Chicago v. Morales</i> , 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).....	41
<i>Fort Wayne Books, Inc. v. Indiana</i> , 489 U.S. 46, 109 S. Ct. 916, 103 L. Ed. 2d 34 (1989)	18
<i>Groh v. Ramirez</i> , 540 U.S. 551, 121 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004).....	14
<i>Katz v. United States</i> , 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).....	14
<i>New York v. Ferber</i> , 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).....	19
<i>Procunier v. Martinez</i> , 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).....	28
<i>Rochin v. California</i> , 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 2d 183 (1952)	37
<i>Sell v. United States</i> , 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).....	37
<i>Stanford v. Texas</i> , 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965)13, 18	

<i>Turner v. Safley</i> , 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) ..	38
<i>United States v. Gilliland</i> , 312 U.S. 86, 61 S. Ct. 518, 85 L. Ed. 598 (1941).....	16
<i>United States v. Stevens</i> , ___ U.S. ___, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).....	33
<i>Washington v. Glucksberg</i> , 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).....	37

Decisions of Other Jurisdictions

<i>Carrieri v. Jobs.com, Inc.</i> , 393 F.3d 508 (5th Cir. 2004)	16
<i>Coleman v. Dretke</i> , 395 F.3d 216 (5th Cir. 2004)	38
<i>De Gorter v. Federal Trade Commission</i> , 244 F.2d 270 (9th Cir. 1957) .	16
<i>Fordyce v. City of Seattle</i> , 55 F.3d 436 (9th Cir. 1995).....	33
<i>Glik v. Cunniffe</i> , 655 F.3d 78 (1st Cir. 2011)	33
<i>Harrington v. Almy</i> , 977 F.2d 37 (1st Cir. 1992).....	38
<i>United States v. Gantt</i> , 194 F.3d 987 (9th Cir. 1999)	13
<i>United States v. Hale</i> , 784 F.2d 1465 (9th Cir. 1986)	18
<i>United States v. Silva</i> , 247 F.3d 1051 (9th Cir. 2001)	13
<i>United States v. Weber</i> , 451 F.3d 552 (9th Cir. 2006).....	25, 38

Constitutional Provisions

Const. art. I, § 3.....	27, 37
Const. art. I, § 7.....	12, 14, 37
U.S. Const. amend. IV	13, 37
U.S. Const. amend. XIV	27, 37

Other Authorities

Jason R. Odesloo, "Of Penology and Perversity: The Use of Penile
Plethysmography on Convicted Child Sex Offenders," 14 Temp. Pol. &
Civ. Rts. L. Rev. 1 (2004)..... 37

ASSIGNMENTS OF ERROR

1. The trial court erred by finding that the search warrant described the items to be seized with constitutionally sufficient particularity and in denying Mr. Jones's motion to suppress.

2. The trial court erred by entering a community custody condition prohibiting Mr. Jones from having any contact whatsoever with minors.

3. The trial court erred by entering a community custody condition requiring Mr. Jones to pay the costs of another person's crime-related counseling and medical treatment.

4. The trial court erred by entering a community custody condition forbidding Mr. Jones from possessing or accessing pornographic materials and from frequenting establishments whose primary business relates to sexually explicit or erotic materials.

5. The trial court erred by entering a community custody condition prohibiting Mr. Jones from possessing sexual stimulus material for his particular deviancy.

6. The trial court erred by entering a community custody condition ordering Mr. Jones not to possess or control any item designated or used to entertain, attract, or lure children.

7. The trial court erred by entering a community custody condition forbidding Mr. Jones from possessing or controlling any item designated to take photographs.

8. The trial court erred by entering a community custody condition forbidding Mr. Jones from possessing or controlling any item designated to take video.

9. The trial court erred by entering a community custody condition prohibiting Mr. Jones from accessing the Internet without prior approval from his supervising Community Corrections Officer (CCO).

10. The trial court erred by entering a community custody condition requiring Mr. Jones to undergo plethysmograph examinations at the direction of his supervising CCO.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution require a search warrant to describe the items to be seized as particularly as possible under the circumstances of the case. This requirement is heightened where execution of the warrant may threaten First Amendment interests. Was the warrant in this case unconstitutionally overbroad where it used broad language and general classifications to authorize the seizure of many items presumptively protected by the First Amendment, even though

significantly more detail was available about the nature of the items for which probable cause had been established? (Assignment of Error 1.)

2. The federal and state constitutions prohibit the issuance of general exploratory warrants. Was the warrant in this case, which authorized a search for any and all evidence of a crime without including any factual details about the nature or circumstances of the crime to limit the scope of the search, an unconstitutional general warrant? (Assignment of Error 1.)

3. Community custody conditions that impact fundamental rights must be narrowly drawn and reasonably necessary to accomplish compelling state interests. The right to travel within a state is a fundamental constitutional right, and forbidding Mr. Jones from having any contact with minors would effectively banish him from all public places. Is the community custody condition prohibiting any such contact unconstitutionally overbroad where other, narrower conditions also entered in the case will adequately protect against the future victimization of children? (Assignment of Error 2.)

4. Did the trial court err in ordering Mr. Jones to pay for another person's crime-related counseling and medical costs as a condition of community custody when the Sentencing Reform Act of 1981 (SRA) does not grant courts the authority to do so? (Assignment of Error 3.)

5. The word “pornography” does not provide adequate notice of what it encompasses or an ascertainable standard to prevent arbitrary enforcement. Possession of pornography is protected by the First Amendment and article I, section 5. Is the condition of community custody prohibiting Mr. Jones from possessing pornography unconstitutionally vague? (Assignment of Error 4.)

6. The record does not indicate that Mr. Jones has ever visited an establishment whose primary business pertains to sexually explicit or erotic material, or that visiting such a business contributed to the crimes for which he was convicted. Is the condition of community custody prohibiting Mr. Jones from frequenting such establishments a valid crime-related prohibition? (Assignment of Error 4.)

7. The record does not establish that any particular sexual deviancy has been diagnosed or identified in Mr. Jones. Is the community custody condition requiring him not to possess any sexual stimulus material for his particular deviancy therefore unconstitutionally vague? (Assignment of Error 5.)

8. Community custody conditions that impact fundamental rights must be narrowly drawn and reasonably necessary to accomplish compelling state interests. The community custody condition prohibiting Mr. Jones from possessing any item that might prove alluring to children

will forbid him from possessing many items that are fully protected by the First Amendment. Is the imposition of this condition without any requirement that the items actually be intended for use to entertain, attract, or lure children unconstitutionally overbroad? (Assignment of Error 6.)

9. The SRA limits the scope of crime-related prohibitions to conduct that directly relates to the crimes for which a person was convicted. The community custody condition prohibiting Mr. Jones from possessing any item designated or used to entertain, attract, or lure children will prohibit him from possessing many everyday items that bear no relation to the crimes for which he was convicted. Is this condition authorized by the SRA? (Assignment of Error 6.)

10. Prohibiting Mr. Jones from taking photographs and making videos will substantially impair his ability to participate in protected First Amendment activities that are not related to the circumstances of the crimes for which he was convicted. Community custody conditions that impact fundamental rights must be narrowly drawn and reasonably necessary to essential state needs and public order. Are the conditions that categorically forbid Mr. Jones from possessing or controlling still or video cameras unconstitutionally overbroad? (Assignments of Error 7, 8.)

11. Prohibiting Internet access except when preapproved by a supervising CCO will significantly inhibit Mr. Jones's exercise of his First

Amendment freedoms. Is the community custody condition ordering such a ban unconstitutionally overbroad when there is no evidence that Internet use played any part in the crimes for which Mr. Jones was convicted?

(Assignment of Error 9.)

12. In the absence of any evidence that Internet use directly related to the circumstances of the crimes for which Mr. Jones was convicted, did the SRA authorize the trial court to enter a crime-related prohibition forbidding Mr. Jones from using the Internet without preapproval from a supervising CCO? (Assignment of Error 9.)

13. The due process clauses of the federal and state constitutions protect fundamental rights, including the right to be free from government intrusion in one's body. Qualified professionals may utilize penile plethysmograph testing in the diagnosis and treatment of sexual deviancy, but the test may not be used to monitor conditions of community custody. Does the condition of community custody requiring Mr. Jones to submit to penile plethysmograph testing at the pleasure of his supervising CCO, rather than by a treatment or medical professional for constitutionally limited purposes, violate his constitutional right to be free from bodily intrusions? (Assignment of Error 10.)

STATEMENT OF THE CASE

From approximately 2006 until 2009, DRP, a child born in 2000, lived with his family in a trailer park in Hamilton, Washington. Clerk's Papers (CP) Sub no. 49 at 1; Sealed CP Sub No. 45 (hereinafter "SCP") 15.¹ During that time, Paul Jones lived in a motor home in the same trailer park. CP Sub no. 49 at 1; SCP 15. DRP spent a significant amount of time in Mr. Jones's home during this period. Verbatim Report of Proceedings, 8/24/2011 (RP) 6.

Some time after DRP and his family moved out of the trailer park, DRP received a letter from Mr. Jones that upset him. SCP 16. Within days of receiving the letter, DRP told his parents, and then police, about a series of incidents involving sexual contact between Mr. Jones and DRP during the period when they were neighbors. *Id.* DRP stated that during these incidents, he had been shown male homosexual pornography, used sex toys, slept nude in Mr. Jones's bed, and played a game called "face painting," which involved applying and then washing off paint from both his and Mr. Jones's genitals. SCP 15-16; CP Sub no. 49 at 2. DRP also claimed that Mr. Jones had photographed and videotaped some of these incidents, sometimes using his computer and sometimes using a camera. SCP 16; CP Sub no. 49 at 2. DRP stated that at other times, Mr. Jones

¹ A copy of the trial court order sealing this portion of the file is attached as Appendix A.

would allow him to play airplane games on the computer and watch cartoons. SCP 15; CP Sub no. 49 at 1. DRP further claimed to have seen a picture of a nude family, two guns, and yellow mouthwash inside the home. SCP 16; CP Sub no. 49 at 2.

Based on this information, Detective Theresa Luvera of the Skagit County Sheriff's Office prepared an affidavit of probable cause to search Mr. Jones's motor home. SCP 15-18. The affidavit requested a warrant to search for and seize the following items, on suspicion of first-degree child molestation and sexual exploitation of a minor:

- Bedding, to include blankets
- Guns of any make or model
- Signs or images
- Photographs,
- Computer
- Camera
- Sex related material to include,
- Books, literature, object, toys, pumps and vibrators
- Documents of Domain and control
- Registrations
- Video and media storage devices
- VHS/DVD/CD and movies
- Paints and paint brushes
- Mouth wash
- Any and all evidence of this crime

SCP 15-18.

Skagit County District Court Commissioner Dianne Goddard granted the search warrant. CP Sub no. 25 at 16-17. The warrant repeated verbatim the affidavit's list of items sought, and authorized the seizure of

all of those items. *Id.* The warrant identified the suspected crimes as first-degree child molestation and sexual exploitation of a minor, and included correct citations to the relevant statutes. *Id.* The warrant also stated in preprinted text that Detective Luvera had signed an affidavit and that Commissioner Goddard found probable cause to believe that the facts contained in the affidavit were true. *Id.* The warrant did not, however, include any of the factual information from the affidavit, and it did not incorporate the affidavit by reference. *See id.*

Several officers of the Skagit County Sheriff's Office, including Detective Luvera, timely executed the warrant. SCP 19-20, 169-74. The officers found Mr. Jones at home and arrested him prior to the search. SCP 169-70. Detective Luvera showed Mr. Jones a copy of the warrant, but the record does not indicate whether the affidavit of probable cause was attached. SCP 170. Officers thoroughly searched the motor home, finding and seizing items generally consistent with DRP's claims, including nude photographs and videos of DRP and other children. SCP 19-20, 122-23, 185-86. On one DVD or CD, Detective Luvera located "a few Russian web sites with juvenile males, naked and posing or touching each other sexually." SCP 176. The record does not indicate whether any of the remaining items were downloaded from the Internet, nor does it contain

any suggestion that Mr. Jones ever uploaded any files to the Internet. *See* SCP 19-20, 122-23, 185-86.

The State charged Mr. Jones with five counts of first-degree child molestation and two counts of sexual exploitation of a minor. CP Sub no. 24 at 1-4. Mr. Jones moved to suppress the evidence recovered from his home, based on (1) lack of particularity in the warrant, (2) lack of probable cause that he was living at the address listed on the warrant, and (3) staleness of the information used to establish probable cause. CP Sub no. 25 at 1-10. The trial court denied the motion. CP Sub no. 43 at 1-5. The court later convicted Mr. Jones of three counts of first-degree child molestation of DRP after a bench trial on stipulated facts. RP 3-8. The court dismissed the remaining counts as per the stipulation agreement. RP 6; CP Sub no. 47 at 1-2.

The court sentenced Mr. Jones to three concurrent 130-month sentences in prison and lifetime community custody. CP Sub no. 54 at 1-15. The community custody conditions included standard conditions, preprinted on the Judgment and Sentence form. *Id.* at 4-5, § 4.2. The court also entered a number of additional conditions. On the Judgment and Sentence form, the court ordered Mr. Jones to "have no contact with minors under [the] age of 18," as well as not to commit any crimes and to comply with all conditions set by the Department of Corrections (DOC).

Id. at 5, § 4.2(B). In an appendix, the court also adopted 17 conditions that were recommended by DOC in the Pre-Sentence Investigation report.

These conditions were:

1. Have no direct or indirect contact with D.R.P. or [his] immediate family for life.
2. Pay the costs of crime-related counseling and medical treatment required by D.R.P.
3. Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising [CCO].
4. Do not seek employment or volunteer positions which place you in contact with or control over minor children.
5. Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO.
6. Do not possess or access pornographic materials, as directed by the supervising CCO. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.
7. Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising CCO and therapist except as provided for therapeutic purposes.
8. Do not possess or control any item designated or used to entertain, attract or lure children.
9. Do not possess or control any item designated to take photographs, such as cameras and cell phones with picture capabilities.
10. Do not possess or control any item designated to take video.
11. Do not date women or form relationships with families who have minor children, as directed by the supervising CCO.
12. Do not remain overnight in a residence where minor children live or are spending the night.

13. Do not access the Internet on any computer in any location, unless such access is approved in advance by the supervising CCO.
14. Participate and make progress in sexual deviancy treatment with a DOC approved treatment provider. Follow all conditions outlined in your treatment contract. Do not change therapists without advanced permission of DOC.
15. Participate in polygraph and plethysmograph examinations as directed by the supervising CCO.
16. Your residence, living arrangements and employment must be approved by the supervising CCO.
17. You must consent to DOC home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access.

Id. at 14-15; CP Sub no. 49 at 7-8.

Mr. Jones now appeals his conviction and the entry of community custody conditions 2, 6-10, 13, the portion of condition 15 relating to plethysmograph testing, and the condition ordering him not to have any contact with minors.

ARGUMENT

I. Police relied on an unconstitutionally overbroad warrant to search Mr. Jones's home.

The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. This provision is broader than the Fourth Amendment, and therefore "requires no less" than the protections of the

Fourth Amendment. *State v. Afana*, 169 Wn.2d 169, 177, 233 P.3d 879 (2010) (quoting *State v. Patton*, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009)). Under the Fourth Amendment, a search warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This requirement serves to prohibit general warrants, to limit the discretion of the officers executing the warrant, and to notify the subject of a search of the extent of the officers' legitimate authority. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992); *United States v. Silva*, 247 F.3d 1051, 1057 (9th Cir. 2001) (quoting *United States v. Gantt*, 194 F.3d 987, 1001 (9th Cir. 1999)).

The particularity requirement is somewhat flexible, so that in cases "where the precise identity of items sought cannot be determined when the warrant is issued, a generic or general description of items will be sufficient if probable cause is shown and a more specific description is impossible." *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997) (citations omitted). In other cases, however, the particularity standard may be heightened. Where a warrant's execution may threaten First Amendment rights, for example, the particularity standard must be applied with "scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

"Whether a warrant meets the particularity requirement of the Fourth Amendment is reviewed de novo." *State v. Reep*, 161 Wn.2d 808, 813, 167 P.3d 1156 (2007) (quoting *State v. Clark*, 143 Wn.2d 731, 753, 24 P.3d 1006 (2001)). "An overbroad warrant may be cured for the purposes of meeting the particularity requirement of the Fourth Amendment where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with 'suitable words of reference.'" *Stenson*, 132 Wn.2d at 696 (quoting *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993) and citing *State v. Kelley*, 52 Wn. App. 581, 585, 762 P.2d 20 (1988)). The personal knowledge of an officer executing the warrant, however, may not save an overbroad warrant. *Riley*, 121 Wn.2d at 28-29. Similarly, a search based on an overbroad warrant is unconstitutional even if the actual search conducted could have been justified by a properly limited warrant. *Groh v. Ramirez*, 540 U.S. 551, 561, 121 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (quoting *Katz v. United States*, 389 U.S. 347, 356, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)).

Under the Washington Constitution, the fruits of a search based on an overbroad warrant must be suppressed, regardless of whether the executing officers relied on the warrant in good faith. Const. art. I, § 7;

Afana, 169 Wn.2d at 180; *see also State v. Morse*, 156 Wn.2d 1, 9-10, 13, 123 P.3d 832 (2005).

a. The warrant provision authorizing search and seizure of "[a]ny and all evidence of" child molestation or sexual exploitation of a minor authorized an unconstitutional general search of Mr. Jones's home.

General exploratory searches are the primary evil against which the Fourth Amendment's particularity clause was directed. *Perrone*, 119 Wn.2d at 545-46 ("The problem posed by the general warrant is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. The Fourth Amendment addresses the problem by requiring a 'particular description' of the things to be seized.") (quoting *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)) (internal editing marks omitted).

The warrant in this case authorized the seizure of a list of broadly defined items, at the end of which it further included "[a]ny and all evidence of this crime." CP Sub no. 25 at 16-17. In its response to Mr. Jones's motion to suppress, the State admitted that, if used alone, the language "any and all evidence of this crime" might be insufficiently particular, but claimed that the phrase's scope was limited in this case by its placement at the end of a list of other items. CP Sub no. 29 at 7. The

trial court agreed with both the State's framing of the argument and its conclusion. RP 17-18; CP Sub no. 43 at 3-4.

The State's position, adopted by the trial court, essentially invokes the *ejusdem generis* canon of statutory construction. *Ejusdem generis* "states that the general language of a statute is limited by the specific words and phrases that precede the general language." *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 518 n.11 (5th Cir. 2004). The doctrine is used as a tool for discerning legislative intent where the text of a statute may be ambiguous. *See De Gorter v. Federal Trade Commission*, 244 F.2d 270, 277 (9th Cir. 1957) (quoting *United States v. Gilliland*, 312 U.S. 86, 93, 61 S. Ct. 518, 85 L. Ed. 598 (1941)).

In this case, the trial court effectively used this concept to hold that "any and all evidence" did not really mean "any and all evidence," but instead meant "any other evidence similar to the items listed above." Neither the State nor the court cited any authority in support of this contention. It is doubtful, in fact, whether reliance on the doctrine of *ejusdem generis*, which is used to assess legislative intent, is appropriate when examining a warrant, where intent is irrelevant. But even assuming the propriety of applying the principle to warrants in general, it would not save the warrant in this case.

Ejusdem generis is useful only where a general term follows language that is more specific in a way that meaningfully informs the intended scope of the general language. Here, however, most of the supposedly specific items preceding the "any and all" clause in fact were broadly defined and lacked any apparent theme or common characteristics that might have served to limit the broader language. The warrant authorized the seizure of such diverse items as bedding, guns, paint, mouthwash, sex toys, literature, and any signs, images, photographs, or videos of any kind. Those items do not have any discernible classification or characteristics in common. And it is impossible to deduce, based on the warrant alone,² what connection these items shared to any alleged acts of child molestation or sexual exploitation of a minor.

Thus, without any apparent common thread of relevance, the warrant's list of supposedly "specific" items could not establish any guiding principles that might have limited the authority granted to search for "[a]ny and all evidence of [the] crime." Instead, that final, unbounded term authorized a general exploratory search through Mr. Jones's home. The warrant was therefore invalid.

² The contents of the affidavit of probable cause are irrelevant to this inquiry, since the warrant did not incorporate the affidavit.

b. The warrant authorized police to search for material presumptively protected by the First Amendment without any meaningful limitation.

When a search warrant addresses materials that are presumptively protected by the First Amendment—including, of course, literature, images, and movies—because of the ideas they contain, the Fourth Amendment's particularity requirement must "be accorded the most scrupulous exactitude." *Perrone*, 119 Wn.2d at 548 (quoting *Stanford*, 379 U.S. at 485). This standard applies even when police are searching for material that is not actually constitutionally protected, such as obscenity or child pornography. *Id.* at 550 (citing *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S. Ct. 916, 103 L. Ed. 2d 34 (1989); *United States v. Hale*, 784 F.2d 1465, 1469 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986)).

The search warrant in this case authorized the police to search for and seize "signs or images," "photographs," "sex related material, to include[] [b]ooks [and] literature," and "VHS/DVD/CD and movies." CP Sub no. 25 at 16-17. Under the authority granted by this warrant, police could have seized political signs or cartoons, family photographs, adult heterosexual pornography,³ titillating books or literature, or run-of-the-mill Hollywood films. All of these items enjoy the full protection of the

³ Adult homosexual pornography is, of course, also protected by the First Amendment. Given the allegations in the affidavit of probable cause, however, that material may have been properly the subject of a warrant in this case if it had been particularly specified.

First Amendment, and none of them were even allegedly related to this crime.

Further, the warrant authorized a search for these items based on their content—i.e., the ideas they contained—and therefore needed to meet the heightened particularity standard described in *Perrone*. The warrant referenced the suspected crimes of child molestation and sexual exploitation of a minor, and included a specific authorization to seize sex-related books and literature. It did not limit the search to items that were allegedly involved in any specific crime or related to any particular victim or act. Thus, even given its narrowest possible reading—i.e., limiting each term to items that could be relevant to unspecified acts of child molestation or sexual exploitation of a minor—the warrant authorized much more than a search for evidence of any particular crime. Rather, it authorized seizure of any material falling within broad categories of constitutionally protected speech, based entirely on the fact that the material fell within those categories.⁴

⁴ Even material directly related to child molestation or sexual exploitation of a minor is fully protected by the First Amendment, so long as no actual children were involved in its production. *Perrone*, 119 Wn.2d at 551-52 (citing *New York v. Ferber*, 458 U.S. 747, 764-65, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)). Thus, items such as literary descriptions of child molestation or computer-generated child pornography are constitutionally protected. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-51, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). A warrant authorizing the seizure of such items therefore must satisfy the heightened particularity requirement noted in *Perrone*. Simply using broad content-based categorizations even where more particular descriptions are available, as occurred here, directly threatens established First Amendment rights.

Because this warrant authorized the search and seizure of constitutionally protected materials, the need for it to specify particularly the items to be seized was paramount. The affidavit of probable cause shows that the alleged victim provided significant details regarding the specific kinds of photographs and videos he had seen that might be relevant to prosecuting the alleged crimes. SCP 15-18. Detective Luvera could have used this information to limit the scope of her request, and obtained a warrant that authorized the seizure of all items for which she had probable cause without unnecessary risk to Mr. Jones's First Amendment rights. Instead she requested, and received, authorization to seize all signs, images, photographs, videos, and movies, and all sex-related books or other literature, found in Mr. Jones's home. That broad authorization clearly did not meet the standard of "scrupulous exactitude" required by the Fourth Amendment in this case.

c. The warrant improperly authorized a broad search of all digital files, without any limitation on the scope of the search.

The warrant also authorized the police to search for and seize all computers, cameras,⁵ and "[v]ideo and media storage devices." CP Sub no. 25 at 16-17. Given the affidavit's allegations that Mr. Jones repeatedly

⁵ While the warrant phrased "[c]omputer" and "[c]amera" in the singular, CP Sub no. 25 at 16, the lack of any accompanying description of particular devices sought renders these terms effectively the same as "all computers" and "all cameras."

took and displayed photos and videos using a computer, this description may have been sufficiently particular under the circumstances to authorize the search for these devices in his home and their physical seizure. But the warrant was not sufficiently particular to satisfy the Fourth Amendment when it came to the actual inspection of those devices' contents.

A search through the contents of computers, cameras, and storage devices implicates the same First Amendment concerns as does a search for printed signs, images, photographs, literature, and movies. The need to apply the particularity requirement with "scrupulous exactitude" therefore applies just as strongly to these digital items as to their tangible counterparts.

Computer searches also have profound privacy implications entirely apart from any First Amendment concerns. A personal computer, for example, will often contain documents that could comprehensively expose the most private areas of its owner's life. Courts have long since recognized the need to be especially careful in limiting the authorized scope of a search through personal documents. *See, e.g., Stenson*, 132 Wn.2d at 692 (citing *Andresen v. Maryland*, 427 U.S. at 482 ("We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not

necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable.")).

The affidavit in this case mentioned only four types of computer files related to the allegations—"airplane games," certain icons, photographs, and videos. SCP 15-16. At the very least, then, the warrant should have been limited to these kinds of files.⁶ Other files, including word-processing documents, spreadsheets, web browsing histories, and email archives—just to name a few—should, and easily could, have been excluded from the scope of the search in order to protect Mr. Jones's legitimate privacy and First Amendment interests. But the commissioner failed to incorporate available details of the allegations to limit the scope of the search, and instead authorized a blanket search of all digital files for anything that might have piqued the investigators' interest. The warrant therefore did not satisfy the constitutional obligation to describe the items for which probable cause had been established as particularly as possible under the circumstances. *See Stenson*, 132 Wn.2d at 692.

⁶ Mr. Jones does not concede that a warrant to examine these general categories of files, without further description, would have been sufficiently particular under the Fourth Amendment. The example is presented simply to demonstrate the egregious overbreadth of the warrant as it actually issued.

d. The invalid portions of the warrant may not be severed from the remaining provisions.

Items seized pursuant to an invalid warrant generally must be suppressed. *Afana*, 169 Wn.2d at 180. Where part of a warrant is valid and part invalid, items seized in connection with the valid part of the warrant may be severed—i.e., not suppressed—under certain circumstances. *Perrone*, 119 Wn.2d at 556. Courts must not apply the severability doctrine, however, "where to do so would render meaningless the standards of particularity which ensure the avoidance of general searches and the controlled exercise of discretion by the executing officer." *Id.* at 558. Thus, if a search is predicated on an unconstitutional general warrant, or if the valid parts of the warrant are "relatively insignificant" in relation to the invalid portions, severability does not apply. *Id.* at 556-57; *see also State v. Maddox*, 116 Wn. App. 796, 807-09, 67 P.3d 1135 (2003).

Both of those disqualifying conditions apply in this case. The warrant authorized a general exploratory search, because it contained no effective limitation on the authority that it granted officers to seize "[a]ny and all evidence" related to abstract allegations of child molestation and sexual exploitation of a minor. And the warrant's arguably valid authorizations—for items such as bedding, guns, penis pumps and vibrators, documents of domain and control, paint supplies, and

mouthwash—pale in comparison to the scope of the invalid authorizations. Severability therefore does not apply, and everything seized during the search of Mr. Jones's home must be suppressed.

II. The trial court entered community custody conditions that exceeded its statutory authority and violated Mr. Jones's constitutional rights.

When a person is convicted of a felony, the sentencing court must impose punishment as authorized by the Sentencing Reform Act of 1981 (SRA). RCW 9.94A.505(1); *In re Postsentence Review of Leach*, 161 Wn.2d 180, 183, 163 P.3d 782 (2007) ("It is the legislature's purview to decide what one can and cannot be punished for."). The sentencing court must apply the statutes in effect at the time the defendant committed the crime. RCW 9.94A.345; *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Mr. Jones was convicted of offenses occurring in November 2009 (Count I) and between January 2006 and December 2009 (Counts II and III).⁷ CP Sub no. 54 at 1, § 2.1.

⁷ The Washington Legislature recodified the SRA's community custody provisions in 2008 and 2009. *See* Laws of 2008, ch. 231; Laws of 2009, ch. 28. These provisions became effective on August 1, 2009. Laws of 2008, ch. 231, § 61; Laws of 2009, ch. 28, § 43. The current version of the statute thus applies directly only to Count I. Even with respect to Counts II and III, however, the substance of the relevant provisions did not change as a result of the recodification. *Compare* RCW 9.94A.703(3) *with* Former RCW 9.94A.712(6)(a)(i) (effective until July 1, 2006). Thus, for the sake of simplicity, this brief will cite only to the current version of the statute.

Where the SRA authorizes a sentence only in certain circumstances, the burden logically falls on the State to demonstrate that those circumstances exist before the court may rely on them. *See State v. McCorkle*, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature and existence of out-of-state conviction necessary to establish offender score and standard sentence range); *accord State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); *United States v. Weber*, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to demonstrate that discretionary supervised release condition is appropriate in a given case). The question of whether a sentencing court has exceeded its statutory authority is one of law, reviewed *de novo*. *Leach*, 161 Wn.2d at 184. Erroneous sentences may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008); *Ford*, 137 Wn.2d at 477.

In this case, the statute directed the sentencing court to impose an indeterminate sentence and community custody. RCW 9.94A.507. RCW 9.94A.703(1) sets forth certain mandatory conditions of community custody, such as complying with conditions set by the Department of Corrections (DOC). RCW 9.94A.703(2) describes further default conditions, such as reporting to DOC, that the court may waive if it chooses.

The sentencing court may, in its discretion, order certain additional conditions as well. Under this authority, the court may order an offender to:

- (a) Remain within, or outside of, a specified geographical boundary;
- (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) Participate in crime-related treatment or counseling services;
- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
- (e) Refrain from consuming alcohol; or
- (f) Comply with any crime-related prohibitions.

RCW 9.94A.703(3). 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). A crime-related prohibition cannot require an offender to perform any affirmative conduct except as necessary to monitor compliance with a court order. *Id.*

Community custody conditions are reviewed on appeal for abuse of discretion, and "will be reversed if manifestly unreasonable." *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010) (quoting *Bahl*,

164 Wn.2d at 753). Unconstitutional conditions are per se manifestly unreasonable. *Id.* Unlike statutes, community custody conditions do not benefit from any presumption of constitutionality. *Id.* at 792-93.

a. The prohibitions addressing pornography and sexual stimulus material are unconstitutionally vague.

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. XIV; Const. art. I, § 3; *Bahl*, 164 Wn.2d at 752. As a result, a condition of community custody must be sufficiently definite that ordinary people can understand what conduct is illegal, and the condition must provide ascertainable standards to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53 (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). Two of the conditions imposed in this case fail to satisfy these constitutional requirements.

i. Possessing or accessing pornographic material

When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. *Bahl*, 164 Wn.2d at 752; *see also Proconier v. Martinez*, 416 U.S. 396, 408-09, 94 S. Ct. 1800, 40

L. Ed. 2d 224 (1974) (offenders retain First Amendment right of free expression). An even stricter standard of definiteness therefore applies when community custody condition prohibits access to material protected by the First Amendment. *Bahl*, 164 Wn.2d at 753.

The trial court adopted DOC's recommendation that Mr. Jones not be permitted to "possess or access pornographic materials, as directed by the supervising CCO." CP Sub no. 54 at 14 ¶ 6. Adult pornography is constitutionally protected speech. *Bahl*, 164 Wn.2d. at 757. The term "pornography" itself, however, is notoriously difficult to define. *See id.* at 754-56. Thus, Washington courts have repeatedly held that blanket prohibitions on possessing pornography are unconstitutionally vague. *See, e.g., id.* at 757-58; *State v. Sansone*, 127 Wn. App. 630, 634, 111 P.3d 1251 (2005). In fact, the Washington Supreme Court in *Bahl* invalidated an anti-pornography condition identical to the one ordered in this case. 164 Wn.2d at 754. Accordingly, the condition prohibiting Mr. Jones from possessing pornography is unconstitutionally vague and must be stricken.

ii. Possessing or controlling sexual stimulus material for his particular deviancy

The trial court ordered Mr. Jones not to "possess or control sexual stimulus material for [his] particular deviancy as defined by the supervising CCO and therapist except as provided for therapeutic

purposes." CP Sub no. 54 at 14 ¶ 7. The court did not, however, specify what particular deviancy it had in mind.

In *Bahl*, the Washington Supreme Court addressed a challenge to a "sexual stimulus material" condition identical to the one entered in this case. The defendant in *Bahl* had been convicted of second-degree rape. 164 Wn.2d at 743. The Court noted that despite the rape conviction, the record failed to establish that any particular deviancy had been identified or diagnosed. *Id.* at 761. The Court thus held that the condition was unconstitutionally vague, since the defendant could not possibly know what materials might be prohibited without first knowing what the State considered his deviancy to be. *Id.*

As in *Bahl*, the record here does not identify any "particular deviancy" that the court considered Mr. Jones to have. While it might seem easy to point to pedophilia as the court's obvious concern, in fact that is not clear from the record. For one thing, the court had before it no evidence from medical or other expert witnesses who could have identified a specific deviancy or disorder. And some of the other court-ordered conditions—for example, those prohibiting Mr. Jones from possessing adult pornography, CP Sub no. 54 at 14 ¶ 6, or photography and video equipment, *id.* at 15 ¶¶ 9-10—indicate that the court might have considered Mr. Jones's "particular deviancy" to include more general

sexual impulse control issues or voyeurism. *See, e.g., Bahl*, 164 Wn.2d at 766 (Johnson, J., concurring) (noting that the trial court had prohibited the defendant from possessing pornography because the circumstances of the crime "showed him to be egregiously unable to control himself when in a state of sexual stimulus.") (quotation omitted).

Absent an affirmative finding, or some other specific identification in the record, of what deviancy the court intended to address, Mr. Jones does not have constitutionally adequate notice of what materials he may not possess. *See id.* at 761 ("The condition cannot identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed, and this record does not show that any deviancy has yet been identified."). The condition is therefore unconstitutionally vague and must be stricken.

b. Several of the conditions are unconstitutionally overbroad.

Conditions limiting fundamental rights must be "imposed sensitively." *Id.* at 757 (citing *Riley*, 121 Wn.2d at 37). Thus, the Washington Supreme Court has held that "restrictions implicating . . . First Amendment rights must be clear and must be reasonably necessary to accomplish essential state needs and public order." *Id.* at 758. And the Court has held more generally that "crime-related prohibitions affecting

fundamental rights must be narrowly drawn," and that "[t]here must be no reasonable alternative way to achieve the State's interest" in such cases. *State v. Warren*, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008) (citing *Riley*, 121 Wn.2d at 38; *State v. Ancira*, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001)). Several of the conditions entered in this case, however, significantly and unnecessarily infringe on Mr. Jones's fundamental rights to privacy, travel, and freedom of expression.

i. Possessing or controlling "any item designated or used to entertain, attract or lure children"

The trial court ordered Mr. Jones not to "possess or control any item designated or used to entertain, attract or lure children." CP Sub no. 54 at 15 ¶ 8. The breadth of this condition can hardly be overstated. By its terms, it includes anything that could be used to entertain a child—a description that few items would fail to satisfy. This problem renders the condition invalid under both the SRA, *see infra*, Part (c)(iii), and the United States Constitution.

This condition would prevent Mr. Jones from possessing many items that fall squarely within the protections of the First Amendment. Any book or movie that might appeal to anybody under the age of 18 would be off limits, regardless of its intended audience or legitimate appeal to adults. Mr. Jones literally could not sit alone in a room reading

the Bible without violating his conditions of community custody. Such a broad prohibition is certainly not "reasonably necessary to accomplish essential state needs and public order" in this case, as the Constitution requires. *Bahl*, 164 Wn.2d at 758.

To the degree that the sentencing court was concerned about Mr. Jones actually using such items to "attract or lure children," other community custody conditions not challenged here—those prohibiting him from initiating or prolonging contact with children, from seeking employment or volunteer positions where he would interact with children, from frequenting areas where children are known to congregate, and from spending the night in homes where children live or are present—will achieve this goal without unnecessarily limiting Mr. Jones's First Amendment rights. A blanket prohibition on owning any item that children might find alluring, on the other hand, will not. The condition is therefore unconstitutionally overbroad.

ii. Possessing or controlling any still or video camera

The trial court also ordered Mr. Jones not to possess or control "any item designated to take photographs, such as cameras and cell phones with picture capabilities," or "any item designated to take video." As with other art forms, photographs and videos enjoy First Amendment protection

as to their expressive function. *United States v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010). Courts have also treated photographs and videos as protected material based on other important First Amendment interests, such as documenting the public conduct of government officials. *See Glik v. Cunniffe*, 655 F.3d 78, 83-84 (1st Cir. 2011) (collecting cases) (citing *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a “First Amendment right to film matters of public interest”)). Prohibiting a person from owning any type of camera thus impacts significant First Amendment rights.

The prohibition entered by the trial court would prevent Mr. Jones from using any kind of camera at any time, regardless of his purpose or intent in doing so and regardless of what he actually recorded. This broad ban would limit Mr. Jones's First Amendment rights far more than is reasonably necessary for the State to accomplish any legitimate goal related to the crimes for which he was convicted. The court easily could have crafted a much narrower order—for example, prohibiting Mr. Jones from taking photographs or videos of children—that would have left intact those portions of his First Amendment rights that do not threaten "essential state needs and public order." The actual condition entered, which completely bans the possession of any type of camera, needlessly prohibits any such activity. It is therefore unconstitutionally overbroad.

iii. Prohibiting Internet access without preapproval from the supervising Community Corrections Officer

The pervasiveness of the Internet in modern life can hardly be overstated. While a substantial amount of illicit material undoubtedly flows through the Internet, a great deal of Internet activity—checking the news, applying for jobs, streaming movies, and communicating with friends, just to name a few—involves lawfully creating or accessing material that is fully protected by the First Amendment. Requiring Mr. Jones to obtain preapproval from his supervising CCO before "access[ing] the Internet on any computer in any location" therefore significantly impedes his First Amendment rights.

In this case, such a broad restriction is not "reasonably necessary to accomplish essential state needs and public order." *Bahl*, 164 Wn.2d at 758. In the first place, there is no evidence that the crimes for which Mr. Jones was convicted ever involved use of the Internet. It is thus unclear how even a limited Internet-access ban would serve "essential state needs and public order." And even if the State could show the need for some restriction, due process requires that it be "imposed sensitively." *Bahl*, 164 Wn.2d at 757. For example, a condition requiring Mr. Jones not to communicate with minors online might be constitutional if the State made the requisite showing of reasonable necessity. But a complete ban on

Internet access without prior permission is decidedly more than is "reasonably necessary to accomplish essential state needs and public order." *Id.* at 758.

The record in this case does not indicate that even a limited Internet restriction is justified. Nevertheless, the trial court ordered a total ban on non-preapproved Internet access, which will significantly impair Mr. Jones's exercise of his legitimate First Amendment rights. Because the condition entered was neither reasonably necessary nor imposed sensitively, it is unconstitutionally overbroad.

iv. Plethysmograph testing at the direction of the supervising Community Corrections Officer

The Washington Supreme Court has recognized the usefulness of plethysmograph testing in the diagnosis and treatment of sex offenses. *State v. Riles*, 135 Wn.2d 326, 343-44, 957 P.2d 655 (1998), *abrogated by Valencia*, 169 Wn.2d at 792-93. The Court has therefore upheld plethysmograph testing for a sex offender as part of court-ordered sexual deviancy therapy. *Id.* at 344-45. At the same time, the Court noted that "plethysmograph testing does not serve a monitoring purpose . . . It is instead a treatment device that can be imposed as part of crime-related treatment or counseling." *Id.* at 345. The Court thus invalidated a community custody condition in that case that required plethysmograph

testing for an offender who was not ordered to undergo sexual deviancy treatment. *Id.* at 345-46.

The trial court in this case did order Mr. Jones to "[p]articipate and make progress in sexual deviancy treatment." CP Sub no. 54 at 15 ¶ 14. Under *Riles*, then, the court could have ordered plethysmograph testing as part of Mr. Jones's treatment. But the court instead ordered Mr. Jones to submit to such testing "as directed by the supervising CCO" rather than at the direction of his sexual deviancy treatment provider. *Id.* at 15 ¶ 15. The testing was ordered in the same sentence with polygraph testing, *id.*, which DOC uses to monitor compliance, *see Riles*, 135 Wn.2d at 342-43. *Riles* explicitly held, however, that plethysmograph testing is not useful or permissible as a tool for monitoring compliance with community custody conditions. 135 Wn.2d at 345-46.

The sentencing statute does now contain one pertinent provision that it did not have when *Riles* was decided. That provision authorizes a sentencing court to order, as a condition of community custody, that an offender "[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(d). But that provision is, like all others, subject to

constitutional limitations, and one of those limitations is the right to privacy.

The right to privacy protects the right to non-disclosure of intimate information. *Butler v. Kato*, 137 Wn.App. 515, 527, 154 P.3d 259 (2007) (citing *O'Hartigan v. State Dep't of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991)); Jason R. Odesloo, "Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders," 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (2004). The Fourth and Fourteenth Amendments protect a citizen from bodily invasion. U.S. Const. amend. IV; U.S. Const. amend. XIV; *Sell v. United States*, 539 U.S. 166, 177-78, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003); *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 2d 183 (1952); *In re Marriage of Parker*, 91 Wn. App. 219, 224, 957 P.3d 256 (1998). The Washington Constitution also contains its own due process protections and an explicit right to privacy that is broader than the privacy guaranteed by the federal constitution. Const. art. I, §§ 3, 7; *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003) ("It is now settled that article I, section 7 is more protective than the Fourth Amendment.").

This right is fundamental. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). Further, people convicted of crimes retain certain fundamental liberty interests. *Turner v.*

Safley, 482 U.S. 78, 84, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Courts have noted that penile plethysmograph testing implicates this liberty interest and that the reliability of testing is questionable. *In re Marriage of Ricketts*, 111 Wn.App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); *Parker*, 91 Wn.App. at 226 (test violated father's constitutional interests in privacy, noting no showing of reliability of penile plethysmograph testing or absence of less intrusive measures); *Weber*, 451 F.3d at 562, 564 (explaining that plethysmograph testing is not a "run of the mill" medical procedure and studies have shown its results may be unreliable); *Coleman v. Dretke*, 395 F.3d 216, 223 (5th Cir. 2004) (concluding the "highly invasive nature" of the test implicates significant liberty interests), *cert. denied*, 546 U.S. 938 (2005); *Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992) (noting lack of showing regarding the test's reliability or that other less intrusive means are not available for obtaining the information); *Weber*, 451 F.3d at 570-71 (Noonan, J., concurring) ("[A] prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmography testing crosses it.").

Because the right to privacy is fundamental, a community custody condition that affects it must be "imposed sensitively" and "reasonably

necessary to essential state needs and public order." *Bahl*, 164 Wn.2d at 757. In light of this standard, plethysmography conducted by a therapist as part of crime-related treatment, or in order to assess "[an] offender's risk of reoffending, or the safety of the community," RCW 9.94A.703(3)(d), may be constitutional in some circumstances. But even assuming that plethysmograph testing would be appropriate in this case, the purposes for which it is used and the manner in which it is conducted must be narrowly tailored to the goals of treatment, rehabilitation, and public safety. *See Bahl*, 164 Wn.2d at 757; *Warren*, 165 Wn.2d at 34-35.

The condition entered here does not meet that standard. The court's order authorizes plethysmograph testing at the direction of a CCO for any reason, instead of by a therapist or other medical professional and only for constitutionally permissible purposes. Such an order to submit to invasive testing at the pleasure of the supervising CCO is not "narrowly drawn," *Warren*, 165 Wn.2d at 34, nor is it reasonably necessary to achieve the legitimate State goals underpinning the SRA. The condition is therefore unconstitutional and must be stricken.

v. Prohibiting any and all contact with minors

The trial court entered a number of community custody conditions relating to Mr. Jones's contact with minors. Most of the conditions were

proposed by DOC in the Pre-Sentence Investigation report and adopted in an appendix to the Judgment and Sentence. CP Sub no. 54 at 14-15; CP Sub no. 49 at 7-8. These conditions include: "Do not initiate or prolong contact with minor children" unless accompanied by a preapproved adult with knowledge of the offense; "Do not seek employment or volunteer positions which place you in contact with or control over minor children"; "Do not frequent areas where minor children are known to congregate"; "Do not date women or form relationships with families who have minor children"; and "Do not remain overnight in a residence where minor children live or are spending the night." CP Sub no. 54 at 14-15 ¶¶ 3-5, 11-12. These prohibitions are reasonably limited to situations where a person might form a trust relationship or be alone with a minor, and they are not challenged here.

The court entered an additional community custody condition in the Judgment and Sentence itself, however, that ordered Mr. Jones to "have no contact with minors under [the] age of 18." CP Sub no. 54 at 5 § 4.2(B). The court did not limit this restriction in any way or provide for any exceptions, such as supervision by a knowledgeable adult or preapproval by DOC. Unlike the DOC-proposed conditions listed in the appendix, this complete prohibition on all contact with minors will

effectively banish Mr. Jones from all public places. That banishment violates Mr. Jones's constitutional right to travel.

The Washington Supreme Court has recognized the fundamental constitutional right to travel both within and between states. *Eggert v. City of Seattle*, 81 Wn.2d 840, 845, 505 P.2d 801 (1973); *see also City of Chicago v. Morales*, 527 U.S. 41, 53-54, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) ("[T]he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment.") (plurality opinion). Hence, like the First Amendment rights discussed above, due process requires that any condition that burdens the right to travel must be "narrowly drawn," and "[t]here must be no reasonable alternative way to achieve the State's interest." *Warren*, 165 Wn.2d at 34-35.

The unqualified ban on contact with minors does not meet this standard. Simply by venturing onto a public street, taking a bus, or shopping for groceries, Mr. Jones would almost certainly come into contact with minors and thereby violate the community custody condition. The State unquestionably has a compelling interest in preventing the victimization of children, but the broad prohibition ordered by the trial court here is not necessary to protect that interest. The DOC-proposed conditions adopted by the court will prevent Mr. Jones from forming any

inappropriate relationships with minors, while still allowing for the reasonable exercise of his right to travel. Further prohibiting *any* contact with minors, on the other hand, guts that fundamental constitutional right without serving any public purpose. The condition is thus unconstitutionally overbroad and must be stricken from the sentence.

c. Several of the conditions are not statutorily authorized.

i. Prohibiting Internet access without preapproval from the supervising Community Corrections Officer is not crime-related.

Under the SRA, a crime-related prohibition may only address "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Thus, the trial court had no authority under the SRA to prohibit Mr. Jones from accessing the Internet unless the record established a direct relation between Mr. Jones's Internet use and the crimes for which he was convicted.

The record in fact reveals no such connection. Police did find some evidence that Mr. Jones may have used the Internet to obtain illicit material. *See* SCP 176. But he was not charged in connection with any of these materials, and there is no apparent nexus between those materials and the crimes for which Mr. Jones was convicted. Police did not find any evidence, for example, that Mr. Jones had contacted children via the

Internet, or that he shared the pictures and videos he had taken with anybody, online or otherwise. The sentencing court thus had no basis to conclude that Internet use was "directly relate[d] to the circumstances of the crime." RCW 9.94A.030(10); *see also State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (holding that an Internet access ban was not a valid crime-related prohibition as applied to a defendant convicted of raping a 15-year-old, because there was no evidence that the defendant "accessed the [I]nternet before the rape or that [I]nternet use contributed in any way to the crime" and "[t]he trial court made no finding that [I]nternet use contributed to the rape."). The court therefore had no authority under the SRA to enter a crime-related prohibition forbidding Mr. Jones from using the Internet as a condition of community custody.

ii. The condition ordering Mr. Jones not to "frequent establishments whose primary business pertains to sexually explicit or erotic material" is not crime-related.

As with the Internet-access ban, the condition ordering Mr. Jones not to "frequent establishments whose primary business pertains to sexually explicit or erotic material" is completely unrelated to the crimes of conviction. The record contains no indication that Mr. Jones has ever even been to such a business, much less that visiting one somehow contributed to or was otherwise "directly relate[d] to the circumstances of

the crime." RCW 9.94A.030(10). Thus, as with the Internet prohibition, the trial court lacked statutory authority to impose this condition and it must be stricken.

iii. Prohibiting mere possession of items that might prove attractive to children, without requiring the intent to use the items in an impermissible way, is not crime-related.

The trial court further ordered Mr. Jones not to "possess or control any item designated or used to entertain, attract or lure children." CP Sub no. 54 at 15 ¶ 8. Because nearly anything could be "used to entertain, attract or lure children," this ban is extremely broad. Most such items are entirely innocent when used for their ordinary purposes, and some of them—such as a car and food—are basic necessities of life.

In order for a prohibition along these lines to be "directly relate[d] to the circumstances of the crime," as required by the SRA, the condition must at least require that the items be possessed with the actual intent to use them to "entertain, attract or lure children." Otherwise, the condition would prohibit Mr. Jones from possessing many common household objects that bear no relation to the crimes for which he was convicted. The SRA does not authorize a sentencing court to order such a prohibition as a condition of community custody. The condition therefore must be stricken.

iv. Paying the costs of crime-related counseling and medical treatment is not a statutorily authorized community custody condition.

Nothing in the SRA authorizes a sentencing court to order an offender to pay for another person's counseling or medical treatment as a condition of community custody. *See* RCW 9.94A.703. Nevertheless, the trial court ordered Mr. Jones to "[p]ay the costs of crime-related counseling and medical treatment required by D.R.P." CP Sub no. 54 at 14 ¶ 2. Because this condition exceeded the court's statutory sentencing authority, the court erred in entering it and the condition must be stricken.

CONCLUSION

Skagit County Sheriff's Deputies searched Mr. Jones's home based on a warrant that did not particularly describe the items to be seized, as required by both the federal and state constitutions. Because the defects pervaded the warrant and authorized a general search of Mr. Jones's home, the valid provisions may not be severed from the invalid. This Court must therefore suppress all of the fruits of that search and vacate Mr. Jones's convictions, which were obtained based on that evidence.

Alternatively, if the Court upholds Mr. Jones's convictions, it should order the trial court to strike the community custody condition in section 4.2(B) of the Judgment and Sentence that requires Mr. Jones not to

have any contact with minors. This Court should also order the trial court to strike from Appendix F conditions 2, 6-10, 13, and the portion of condition 15 relating to plethysmograph testing. Each of these conditions is invalid due to a lack of statutory authorization, unconstitutional vagueness, unconstitutional overbreadth, or a combination thereof. In order to limit the sentencing court's authority to that granted by the legislature and to uphold Mr. Jones's constitutional rights, these conditions must be stricken from the sentence.

DATED this 30th day of March, 2012.

Respectfully submitted,



Rabi Lahiri, WSBA 44214
Washington Appellate Project
Attorney for Appellant

Appendix A

SUPERIOR COURT OF WASHINGTON - COUNTY OF SKAGIT

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

Cause No. 10-1-00530 ⁵³¹⁻⁴ 11/24 AM 10:15

Clerk's Action required

STATE OF WASHINGTON,

PLAINTIFF,

vs.

ORDER RE:

* Clerk's Action required

- CONTINUANCE
- TRIAL CONTINUANCE
- PRESENTENCE REPORT
- CORRECTING NAME/DOB
- WAIVER SPEEDY TRIAL (DEFENDANT)
- WAIVER SPEEDY SENTENCING (DEFENDANT)
- BAIL (SHERIFF'S ACTION REQUIRED)
- QUASHING WARRANT (SHERIFF'S ACTION REQUIRED)
- SETTING HEARING DATE
- SETTING SENTENCING DATE
- OTHER ^{Sealing Report} _{Special set before Judge Needy, approved by Court Admin}

Paul Jones

DEFENDANT.

The Court, being fully advised and good cause having been shown, Now, Therefore, ORDERS:

- CONTINUANCE: This matter is continued to _____ at _____ am/pm for _____
Reason: _____
- BAIL: Bail is set at \$ _____
- WARRANTS: Outstanding warrants in this cause are quashed. Next hearing date is: _____
- CORRECTING NAME/DOB: To: _____
- SENTENCING DATE: The defendant (waiving below if necessary) shall appear for sentencing on 9/7/11 at 9:00 A.M.
- PRESENTENCE: Presentence investigation pursuant to CrR7.1 (a) Defendant is in custody at the Skagit County Jail.
 Defendant is not in custody and resides at * Court Clerk shall provide a copy of this order to DAC
- SETTING NEW DATES: The court hearing dates at which the defendant's presence is required are: _____

OMNIBUS _____ 3.5/3.6 HEARING _____ TRIAL CONFIRMATION _____ 1:30 pm

- TRIAL CONTINUANCE: by agreement of the parties; by motion of party/court the trial date is continued to _____ resulting in speedy trial of _____ (30 days after trial date).
- OTHER: The police reports submitted for the stipulated trial are hereby sealed to protect the interests of the minor victim(s).

DATED: 8/24/11

Deane Needy
Judge of the above-entitled court

WAIVERS BY DEFENDANT

- SPEEDY ARRAIGNMENT: The undersigned, having been advised by my Attorney of Record of my right to arraignment as determined by CrR 4.1, hereby waive my right to have my arraignment within that time period.
- SPEEDY TRIAL: The undersigned, having been advised by my Attorney of Record that I have the right to be brought to trial within 60/90 days of the commencement date, hereby requests that trial in this matter be re-set. I am aware of and wish to waive my right to speedy trial as provided in CrR 3.3 by resetting a commencement date of: _____ resulting in a new speedy trial date of: _____ (60/90 days after commencement date).
- SENTENCING: The undersigned, having been advised of my right to be sentenced within 40 court days from the date of guilty plea or conviction, and being aware of and hereby waive the right to a speedy sentencing pursuant to RCW 9.94A.500. Further, I acknowledge that this waiver is my personal request and that I will not be prejudiced by this continuance.

DATED: 8/24/11

[Signature]
Defendant

C. Wesley Richards
Attorney for Defendant

[Signature]
Prosecuting Attorney

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

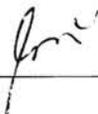
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67678-4-I
v.)	
)	
PAUL JONES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-----|--|-------------------|-------------------------------------|
| [X] | ERIK PEDERSEN, DPA
RICHARD WEYRICH, DPA
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] | PAUL JONES
351854
COYOTE RIDGE CORRECTIONS CENTER
PO BOX 769
CONNELL, WA 99326-0769 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF MARCH, 2012.

X _____


Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎ (206) 587-2711