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NO. 67948-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER KIM,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE
JENNIFER KIM

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

The Honorable Linda C. Krese, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>ASSIGNMENTS OF ERROR</u>	3
<u>Issues Pertaining to Assignments of Error</u>	3
C. <u>STATEMENT OF THE CASE</u>	4
1. <u>Underlying Facts</u>	4
2. <u>Sentencing</u>	9
D. <u>ARGUMENT</u>	13
1. THE COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING THE ABOVE NON-CRIME-RELATED CONDITIONS.....	13
2. THE COMMUNITY CUSTODY CONDITIONS RESTRICTING APPELLANT’S CONTACT WITH HER BIOLOGICAL DAUGHTER VIOLATE APPELLANT’S FUNDAMENTAL RIGHT TO PARENT. 15	15
E. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Dependency of C.B.</u> 79 Wn. App. 686, 904 P.2d 1171 (1995)	15
<u>In re Pers. Restraint of Call</u> 144 Wn.2d 315, 28 P. 3d 709 (2001)	15
<u>In re Sumeey</u> 94 Wn.2d 757, 621 P.2d 108 (1980)	16
<u>State v. Ancira</u> 107 Wn. App. 650, 27 P.3d 1246 (2001)	16, 19
<u>State v. Armendariz</u> 160 Wn.2d 106, 156 P.3d 201 (2007)	14
<u>State v. Barnett</u> 139 Wn.2d 462, 987 P.2d 626 (1999)	13
<u>State v. Flores-Moreno</u> 72 Wn. App. 733, 866 P. 2d 648 <u>rev. denied</u> , 124 Wn.2d 1009 (1994)	15
<u>State v. Jones</u> 118 Wn.App. 199, 76 P.3d 258 (2003)	13
<u>State v. Kolesnik</u> 146 Wn.App. 790, 192 P.3d 937 (2008) <u>review denied</u> , 165 Wn.2d 1050 (2009)	13
<u>State v Letourneau</u> 100 Wn. App. 424, 997 P.2d 436 (2000)	16, 17, 18, 19, 20
<u>State v. Motter</u> 139 Wn.App. 797, 162 P.3d 1190 (2007)	14
<u>State v. O'Cain</u> 144 Wn. App. 772, 184 P.3d 1262 (2008)	15

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998)	16
<u>State v. Sanford</u> 128 Wn. App. 280, 115 P.3d 368 (2005)	16, 19

FEDERAL CASES

<u>Santosky v. Kramer</u> 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)	15
---	----

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A	14
RCW 9.94A.030	14
RCW 9.94A.120	18
RCW 9.94A.505	14
Sentencing Reform Act of 1981.....	14

A. INTRODUCTION

Korean native Jennifer Kim emigrated here as a young woman, following her arranged marriage to Paul Kim. RP 176, 178-79.¹ Jennifer is appealing from the judgment and sentence of first degree rape and incest involving M.K., her and Paul's son.² CP 1-39. The evidence at trial showed Paul forced Jennifer and M.K. to engage in the sexual activity. RP 92 (M.K.'s testimony). When Jennifer tried to resist on several occasions, Paul hit her. RP 44-45. M.K. testified his mother was not a willing participant and appeared disgusted when Paul forced them to engage in such acts. RP 92.

Although the jury rejected Jennifer's duress defense, the court imposed an exceptional sentence below the standard range, finding that while not constituting a complete defense, the evidence of duress was sufficiently mitigating to merit a sentence below the standard range. RP (10/6/11) 46. The pre-sentence report prepared by the department of corrections (DOC) had recommended an exceptional sentence below the standard range, concluding Jennifer did not suffer from sexual deviancy, but was

¹ Unless otherwise specified, "RP" refers to the two volumes of trial transcripts, consecutively paginated and dated: February 22 and 23, 2011 (Vol. I); and February 24 and 25, 2011 (Vol. I).

forced by her husband to engage in the conduct alleged. CP 54-56; see also CP 84-87 (psychological evaluation and risk assessment).

At sentencing, the prosecutor agreed Jennifer did not represent a danger to children – other than a failure to protect those in her custody – and that she was not a predator. RP (10/16/11) 35. Similarly, the court found “it’s fairly clear that Ms. Kim presents at this time a fairly low risk to the victim, to the community, or to a person of similar age and circumstances as the victim at the time of these offenses.” RP (10/16/11) 43. And significantly, the court expressly declined to prohibit contact between Jennifer and M.K. RP 50.

Despite these sentiments, the court imposed a number of community custody conditions that are aimed at predatory or grooming-type behavior, such as the condition that Jennifer not frequent places where minors are known to congregate. CP 35-36. Jennifer will argue such conditions are not crime-related.

Moreover, to the extent these conditions restrict contact with Jennifer’s own biological daughter, Mi.K., Jennifer will argue they

² To avoid confusion, this brief refers to Paul and Jennifer by their first names.

unconstitutionally infringe on her fundamental right to parent, as there was no evidence Jennifer abused Mi.K.

B. ASSIGNMENTS OF ERROR

1. The court acted outside its authority in imposing conditions of community custody that were not crime-related.

2. The trial court's imposition of community custody conditions restricting appellant's contact with minors – including her own biological daughter – unconstitutionally infringed on her fundamental right to parent.

3. The court erred in imposing community custody conditions 2-7. CP 35-36.

Issues Pertaining to Assignments of Error

1. Where the evidence showed appellant was forced to commit the charges offenses, the offenses were non-predatory, appellant did not suffer from sexual deviancy and the court found appellant presented a low risk to other minor-aged children, did the court act outside its authority in imposing community custody conditions that are designed to protect the community from sexual predators?

2. Where the conditions restricting appellant's contact with her own biological daughter are not necessary to protect her

from harm, do such restrictions violate appellant's fundamental right to parent?

C. STATEMENT OF THE CASE

1. Underlying Facts

Appellant Jennifer Kim came to America from Korea as a young woman, following her arranged marriage to Paul Kim. RP 176-80. Jennifer was raised in an environment where the husband/her father was the head of the household and used force to maintain respect and obedience. RP 185, 187-88, 191. When Jennifer arrived here, she spoke very little English and felt isolated. RP 60, 81-82, 180-82.

Jennifer and Paul have three children together: Their eldest daughter V.K., who was 21 years old at the time of Jennifer's trial; M.K., who was 19 at the time of trial; and their youngest daughter, Mi.K., who was 11 at the time of trial. RP (1/20/11) 5, 7, 15; RP 63, 183.

Paul was convicted in an earlier, separate trial of multiple sex offenses involving M.K., as well V.K. and Mi.K. Supp. CP ___ (sub. no. 40, State's Trial Memorandum, 2/22/11). There was no evidence Jennifer knew of, or facilitated, Paul's abuse of V.K. or Mi.K. RP (10/6/11) 39. In fact, M.K. had no idea his father abused

his sisters, until after his own disclosures. RP 8. M.K. testified no one else was ever in the room when his father forced sexual contact between M.K. and his mother. RP 59-60. Consequently, the parties agreed Paul's abuse of M.K.'s sisters was irrelevant to Jennifer's trial and was excluded. RP 8-9.

According to M.K., the first time his father abused him was when he was age 9, and the family lived in Mountlake Terrace. RP 33-34. M.K. testified his father moved him from his bed into his parents' bed and physically moved him his hands about, like a puppet, forcing him to touch his mother's private parts. RP 34-35. According to M.K., his father forced him to engage in this "groping" activity frequently, and the degree of sexual intimacy Paul forced elevated over time. RP 36, 38.

M.K. recalled that before his 12th birthday, his father forced him to engage in oral and vaginal intercourse with his mother. RP 38-39. Again, M.K. described his father as moving his body around "like a puppet/puppeteer." RP 39, 41.

M.K. saw his father hurt his mother on multiple occasions when she tried to resist this coerced sexual activity. RP 44-45. Once, after Paul moved M.K. into his parents' bedroom, Paul tried to undress Jennifer, but she resisted. RP 45. In response, Paul

slapped Jennifer several times. RP 45. M.K. testified this happened on more than one occasion. RP 45.

M.K. testified that Paul continued to force him and his mother to have sex after his 12th birthday. RP 46-47. Around this time, M.K. noticed that his father had begun to drink more heavily and became more aggressive, as a result:

When he comes in, he's all excited, happy, but then when he was wanting me to have sexual intercourse with my mom, because we don't – we don't try to do it. I guess I was just frustrated, would make – be more aggressive with us by pushing us harder, forcing us against each other, in ways like that and – yeah.

RP 50.

Sometimes, Paul would come into M.K.'s room and demand that M.K. go into his parents' bedroom by himself and have sex with his mother. RP 52. When his father was not watching, M.K. would go in and just sit on his parents' bed for a while, and upon returning to his own room thereafter, tell his father he had complied. RP 52. M.K. testified his mother would agree with him to pretend they complied. RP 57. Once Paul caught M.K. lying in this manner, however, and became angry. RP 53-54.

By the time M.K. was in high school, he knew this type of activity was wrong, despite his father's assurances to the contrary,

and began to resist by arguing back. RP 65-66. M.K. testified his mother did as well:

A. She would get really angry, frustrated, mad, so sometimes, she would just walk away, walk out, leave her room.

Q. How did he respond to that?

A. He would get very mad as well. He would sometimes he would follow her and try to bring her back. Other times he just let it go.

RP 67.

M.K. moved out June 1, 2009, after one final forced sexual encounter. RP 68. Paul had not forced the sexual contact for a couple months, after a previous fight about it. RP 68. On this occasion, however, Paul was angry about a fight he had gotten into with relatives. RP 68. According to M.K., Paul forced sexual contact when he was angry. RP 68. Although M.K. told his father "this is very wrong," M.K. testified it happened again, "sexual intercourse happened again with us three." RP 68. But "June 1st was the last day it happened." RP 68. M.K. disclosed the abuse to his cousin and the authorities were notified. RP 69-73.

M.K. maintained Paul forced both him and his mother to engage in the sexual activity. RP 92. M.K. "could tell from the way [his] mom acted when it was happening that she did not want this to

happen.” RP 92. In fact, M.K. described her as “having a look of disgust when these things were being done to her.” RP 92. From M.K.’s perspective, his mom obeyed his father because she was afraid of him. RP 92, 94.

Jennifer testified she never wanted the sexual activity to occur, but Paul forced her. RP 184. She explained that when she first came to the United States, Paul took her shooting. Jennifer testified that while holding one of his guns, Paul told her “a gun is a scary thing, so you listen to me always very well.” RP 193. Although Paul did not point the gun directly at her, Jennifer was frightened. RP 194.

Paul’s temper would surface when Jennifer did not do as he directed. RP 185. One time, when she failed to clean the living room sufficiently, Paul threw furniture, shook Jennifer, hit her in the face and threw her on the couch. RP 186. On another occasion, when Jennifer reportedly was not listening sufficiently, Paul took a golf club and destroyed their bedroom furniture. RP 191-92.

When Paul first forced the sexual contact between Jennifer and M.K., Jennifer begged him to stop. RP 197. When she tried to resist, Paul hit her and “start smashing items around.” RP 199-200. Jennifer was afraid Paul might kill her, or take his anger out on her

children if she did not comply. RP 200. And she was too ashamed to ask for help. RP 196.

The jury was instructed on the defense of duress. At one point they inquired as to the meaning of "reasonable person" as it relates to the definition of "reckless." CP 123, 140. The jury had also been instructed that the defense of duress is not available if the defendant intentionally or recklessly placed herself in a situation in which it was probable that she would be subject to duress. CP 137. Ultimately, as indicated above, the jury convicted Jennifer of the charged crimes. CP 121-122.

2. Sentencing

In advance of sentencing, DOC submitted a pre-sentence report recommending a standard range sentence with across-the-board community custody conditions, such as those aimed at curbing sexual recidivism, as well as those relating to drug use and embezzlement. CP 89-97.

Sentencing was continued, however, to allow Jennifer to undergo a psychosexual evaluation to determine whether a special sex offender sentencing alternative (SSOSA) might be appropriate. CP 61-88. While the evaluating psychologist found Jennifer "does not display sexual deviancy," the evaluator recommended the

sentencing alternative, although based on an atypical treatment modality:

With respect to treatment content, Jennifer Kim does not display sexual deviancy. Thus, standard SOTP treatment is contraindicated in her case since a primary objective in such treatment is elimination or reduction of sexual deviancy. Rather, she and the community would most benefit from targeted psychological and psychosexual treatment from a Korean-speaking mental health provider who regularly consults with an SOTP therapist and Ms. Kim's probation officer regarding risk/relapse prevention.

CP 87.

Based on this evaluation, the department submitted a revised presentence report. CP 54-56. The corrections officer disagreed with the SSOSA recommendation on grounds Jennifer did not display sexual deviancy. CP 54. However, the officer recommended an exceptional sentence below the standard range with the following special community custody conditions:

1. Have no direct or indirect contact with M.L.
2. Pay the costs of crime-related counseling and medical treatment required by M.L.
3. Obey all municipal, county, state, tribal and federal laws.
4. Participate in targeted psychological and psychosexual treatment from a Korean-speaking mental health provider. Treatment should be broad based and address factors that are relevant in M. Kim's offense behavior: cultural assimilation, communication, relationship and parenting skills,

family therapy, and the development of healthy assertiveness and coping skills.

5. Complete ESL while in treatment.

CP 55.

At sentencing, the prosecutor acknowledged Jennifer did not represent a danger to children and engaged in the following colloquy with the court:

MR. HUNTER [prosecutor]: . . . She's [a] sympathetic woman. I agree, I don't think she poses a future danger, other than a failure to protect, any other child that might possibly be in her custody.

THE COURT: Which would be a condition of her sentence, that he [sic] couldn't have a child, lifetime community custody, right?

MR. HUNTER: I would hope so. She apparently has plans to raise her youngest child, according to her comments. I would hope that would never be a possibility. My point was, I agree with Ms. Mann [defense counsel] that Ms. Kim's not some sort of predator[.]

RP (10/6/11) 35.

The court agreed Jennifer represented a low risk to the community:

I think it is clear from the record that she is amenable to some treatment to address not sexual deviancy, but other reasons why she may have cooperated and participated in this offense. Consider the risk the offender represents to the community, to the victim or the persons of similar age and circumstances as the victim. I think that it's fairly clear that Ms. Kim

presents at this time a fairly low risk to the victim, to the community, or to a person of a similar age and circumstances as the victim at the time of these offenses, largely because, on one hand, it's hard to imagine the circumstances existing for this sort of thing to happen again, and because Ms. Kim, whatever else the Court does at sentencing, will be subject to a life time prohibition about being in positions of responsibility with a person of the age of the victim at the time.

RP (10/6/11) 43.

As indicated in the introduction, the court imposed an exceptional sentence below the standard range, based on duress.

CP 24. As also indicated, the court declined to restrict Jennifer's contact with M.K. RP (10/6/11) 50. And in keeping with the revised DOC report, the court imposed the broad-based treatment recommended by the corrections officer. CP 36.

However, apparently relying on the DOC's first report, the court also imposed the following community custody conditions:

2. 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 Community Corrections Officer.
3. Do not seek employment or volunteer positions, which place you in contact with or control over minor children.
4. Do not frequent areas where minor children are known to congregate, as defined by the Community Corrections Officer.

5. Do not date men or form relationships with families who have minor children, as directed by the supervising Community Corrections officer.

6. Do not remain overnight in a residence where minor children live or are spending the night.

7. Do not hold employment without first notifying your employer of this conviction.

CP 36; RP (10/6/11) 50-53.

D. ARGUMENT

1. THE COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING THE ABOVE NON-CRIME-RELATED CONDITIONS.

A trial court may impose only a sentence which is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Because it is solely the legislature's province to fix legal punishments, a proper community custody condition must be authorized by the legislature. State v. Kolesnik, 146 Wn.App. 790, 806, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009).

In general, conditions that do not reasonably relate to the circumstances of the crime are unlawful unless specifically permitted by statute. State v. Jones, 118 Wn.App. 199, 205, 76 P.3d 258 (2003). This Court reviews the imposition of a crime-related prohibition for an abuse of discretion. State v. Armendariz,

160 Wn.2d 106, 110, 156 P.3d 201 (2007). However, the issue of whether the trial court exceeded its statutory authority in imposing community custody conditions is reviewed de novo. Armendariz, 160 Wn.2d at 110; State v. Motter, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007).

The Sentencing Reform Act of 1981, chapter 9.94A RCW, authorizes the trial court to impose crime-related prohibitions as a condition of a sentence. RCW 9.94A.505(8). A crime-related prohibition prohibits conduct that *directly* relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10).

The community custody conditions set forth above are aimed at preventing predatory behavior and curbing risk that the offender will reoffend. In Jennifer's case, the SSOSA evaluator, the DOC pre-sentence investigator, the prosecutor and the court agreed Jennifer is not a predator and represents a low risk to other minors – other than in her failure to protect children in her custody. None of the above conditions (2-7) directly relate to the circumstances of her offenses, with the exception of dating or forming relationships with men who have minor children. The court therefore abused its discretion and acted outside its authority in imposing the above

conditions. See e.g. State v. Flores-Moreno, 72 Wn. App. 733, 746, 866 P. 2d 648, rev. denied, 124 Wn.2d 1009 (1994) (to be valid a crime-related prohibition must "directly relate" to the defendant's crime).

"Courts have the duty and power to correct an erroneous sentence upon its discovery." In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P. 3d 709 (2001). Community custody conditions prohibiting conduct that are not crime-related must be stricken from the judgment and sentence. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). This Court should therefore order the sentencing court to strike the non crime-related conditions.

2. THE COMMUNITY CUSTODY CONDITIONS RESTRICTING APPELLANT'S CONTACT WITH HER BIOLOGICAL DAUGHTER VIOLATE APPELLANT'S FUNDAMENTAL RIGHT TO PARENT.

Parents have a fundamental liberty interest in the care, custody, and control of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Prevention of harm to children is a compelling state interest, In re Dependency of C.B., 79 Wn. App. 686, 690, 904 P.2d 1171 (1995), and the state does have an obligation to intervene and protect a

child when a parent's "actions or decisions seriously conflict with the physical or mental health of the child." In re Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). But limitations on fundamental rights are constitutional only if they are "reasonably necessary to accomplish the essential needs of the state." State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). The fundamental right to parent can be restricted by a condition of a criminal sentence only if the condition is reasonably necessary to prevent harm to the children. State v. Sanford, 128 Wn. App. 280, 115 P.3d 368 (2005); State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001); State v. Letourneau, 100 Wn. App. 424, 439, 997 P.2d 436 (2000).

As conditions of community custody, the court ordered: (2) 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 Community Corrections Officer; (3) Do not seek employment or volunteer positions, which place you in contact with or control over minor children; (4) Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer; (5) Do not date men or form relationships with families who have minor children, as directed by the supervising Community Corrections

officer; and (6) Do not remain overnight in a residence where minor children live or are spending the night. CP 35-36.

Because Jennifer has a minor age daughter of her own, Mi.K., these conditions impact her fundamental right to parent.³ Because there is no evidence these restrictions are necessary to protect Jennifer's biological daughter from harm, the conditions unconstitutionally infringe on Jennifer's fundamental right to parent.

This Court's opinion in Letourneau is instructive. Although Letourneau was convicted of second degree rape of a child, this Court found that sentencing conditions prohibiting her from having unsupervised contact with her own biological children were not reasonably necessary to prevent harm to them.

On this record, we conclude that the State failed to demonstrate that prohibiting Letourneau from unsupervised in-person contact with her biological children during the term of community custody is reasonably necessary to protect those children from the harm of sexual molestation by their mother. The SSOSA evaluators were unanimous in their conclusions that Letourneau is not a pedophile. Even the evaluator who pointed out that many people who molest children unrelated to them later offend against their own children did not opine that Letourneau is a pedophile, and noted specifically that "[a]ll sexual offenders are not alike." [citation to record omitted] We can readily agree with that evaluator that children

³ Conditions (2) and (6) appear to have the most potential to interfere with Jennifer's constitutional right to parent Mi.K. However, to the extent the other conditions may likewise interfere, Jennifer challenges them as well.

of sex offenders are entitled to the same protection from being molested by the offender as all other children in society. The Legislature has specifically authorized courts to require offenders who are convicted of a felony sex offense against a minor victim after June 6, 1996, as Letourneau was, to comply with terms and conditions of community placement imposed by the Department of Corrections relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim. See RCW 9.94A.120(9)(b)(vi). But this does not mean that either the court or the Department has the authority to place restrictions upon an offender's contact with his or her own biological children who are not of similar age or circumstances as a previous victim, where the restriction is neither a crime-related prohibition within the meaning of that statutory term nor otherwise necessary to protect the offender's biological children from the harm of sexual molestation.

Letourneau, 100 Wn. App. at 441-42 (emphasis added).

This case is different than Letourneau in that Jennifer's convictions involved one of her biological children. As the record amply demonstrated, however, the contact was not something that she desired to bring about. As Jennifer's son testified, Jennifer resisted to the point of being slapped by Paul on several occasions. M.K. testified it was clear the contact was not desired by his mother, and that she, in fact, looked disgusted.

The evidence showed Jennifer is not a pedophile and would not have otherwise committed the charged acts had she not been

compelled to do so by her husband. Paul has been sentenced to 318 months for his crimes and is no longer a threat to any of his children. Supp. CP ___ (sub. no. 40, State's Trial Memorandum, 2/22/11). Accordingly, as in Letourneau, there is nothing on the record indicating that preventing Jennifer from unsupervised contact with her biological daughter is necessary to protect her from the harm of sexual molestation.

There was never any allegation Jennifer abused Mi.K. Significantly, M.K. testified no one beside his mother and father were ever in the room when his abuse occurred. See, e.g., Sanford, 128 Wn. App. at 289 (where children were not in the room at the time of the alleged domestic violence between Sanford and his wife, and there was no allegation Sanford ever committed or threatened violence against the children, restricting Sanford to supervised visits was not reasonably necessary to protect them from domestic violence); Ancira, 107 Wn. App. at 654-55 (where there was no evidence that prohibiting Ancira from all contact with his children for a lengthy period of time was reasonably necessary to prevent them from the harm of witnessing domestic violence, condition was "extreme" and "unreasonable").

Whether some limitation on Jennifer's contact with Mi.K. would be appropriate, the criminal sentencing court is not the proper forum to make such a determination, especially since the record indicates there is already CPS involvement with Mi.K. RP (1/20/11) 7, 24; RP 87-88, 102-103, 139. As indicated in Letourneau, the juvenile court is the better forum to determine visitation issues. Letourneau, at 443. This Court should order Jennifer's sentence be remanded with instructions to strike the conditions restricting her contact with her biological daughter. Letourneau, at 444.

E. CONCLUSION

This Court should remand for resentencing so that the unauthorized and unconstitutional community custody conditions may be stricken from her judgment and sentence.

Dated this 31st day of May, 2012

Respectfully submitted

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