

COA NO. 70044-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSE GABINO,

Appellant.

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

The Honorable Steven J. Mura, Judge  
The Honorable Deborra Garrett, Judge

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BRIEF OF APPELLANT

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CASEY GRANNIS  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining To Assignments Of Error</u> .....	2
B. <u>STATEMENT OF THE CASE</u> .....	3
C. <u>ARGUMENT</u> .....	4
1. THE SENTENCING CONDITION RESTRICTING CONTACT WITH CHILDREN VIOLATES GABINO'S FUNDAMENTAL RIGHT TO PARENT HIS CHILDREN. ..	4
2. THE PLETHYSMOGRAPH CONDITION VIOLATES GABINO'S RIGHT TO BE FREE FROM BODILY INTRUSIONS.....	12
3. THE SENTENCING CONDITION AFFECTING WHO GABINO IS ABLE TO DATE OR FORM RELATIONSHIPS WITH IS NOT CRIME RELATED AND UNCONSTITUTIONALLY INFRINGES ON GABINO'S FIRST AMENDMENT RIGHT TO ASSOCIATION .....	13
4. THE SENTENCING CONDITION REQUIRING GABINO NOT TO WITHHOLD INFORMATION OR SECRETS IS UNCONSTITUTIONALLY VAGUE.....	17
5. THE PROHIBITION ON SEXUALLY EXPLICIT MATERIAL IS UNRELATED TO THE OFFENSE, IS NOT NECESSARY TO THE ESSENTIAL NEEDS OF THE STATE AND IS UNCONSTITUTIONALLY VAGUE. ....	20
D. <u>CONCLUSION</u> .....	25

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

Dix v. ICT Group, Inc.,  
160 Wn.2d 826, 161 P.3d 1016 (2007)..... 5

In re Marriage of Parker,  
91 Wn. App. 219, 957 P.2d 256 (1998)..... 12

In re Pers. Restraint of Rainey,  
168 Wn.2d 367, 229 P.3d 686 (2010)..... 5, 6, 10, 11

In re Welfare of Sumey,  
94 Wn.2d 757, 621 P.2d 108 (1980)..... 4

Moore v. Burdman,  
84 Wn.2d 408, 526 P.2d 893 (1974)..... 4

State v. Armendariz,  
160 Wn.2d 106, 156 P.3d 201 (2007)..... 5

State v. Bahl,  
164 Wn.2d 739, 193 P.3d 678 (2008) ..... 11, 17, 19, 21-23, 25

State v. Barnett,  
139 Wn.2d 462, 987 P.2d 626 (1999)..... 14

State v. Berg,  
147 Wn. App. 923, 198 P.3d 529 (2008),  
abrogated on other grounds by  
State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011) ..... 8, 9

State v. Corbett,  
158 Wn. App. 576, 242 P.3d 52 (2010)..... 8, 9

State v. Halstien,  
122 Wn.2d 109, 857 P.2d 270 (1993)..... 17

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>State v. Iniguez</u> , 167 Wn.2d 273, 217 P.3d 768 (2009).....	5
<u>State v. Land</u> , 172 Wn. App. 593, 295 P.3d 782 (2013).....	12, 13
<u>State v. Letourneau</u> , 100 Wn. App. 424, 997 P.2d 436 (2000).....	6-9, 11
<u>State v. Motter</u> , 139 Wn. App. 797, 162 P.3d 1190 (2007), <u>overruled on other grounds</u> , <u>State v. Sanchez Valencia</u> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	20
<u>State v. Moultrie</u> , 143 Wn. App. 387, 177 P.3d 776, <u>review denied</u> , 164 Wn.2d 1035, 197 P.3d 1185 (2008) .....	13, 24
<u>State v. Murray</u> , 118 Wn. App. 518, 77 P.3d 1188 (2003).....	14
<u>State v. O’Cain</u> , 144 Wn. App. 772, 184 P.3d 1262 (2008).....	16
<u>State v. Parramore</u> , 53 Wn. App. 527, 768 P.2d 530 (1989).....	16
<u>State v. Paulson</u> , 131 Wn. App. 579, 128 P.3d 133 (2006).....	14
<u>State v. Perez</u> , 137 Wn. App. 97, 151 P.3d 249 (2007).....	6

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998), <u>abrogated on other grounds</u> , <u>State v. Sanchez Valencia</u> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	16
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	13, 16
<u>State v. Sanchez Valencia</u> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	6, 11, 18, 19
<u>State v. Sullivan</u> , 143 Wn.2d 162, 19 P.3d 1012 (2001).....	17
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	6

### FEDERAL CASES

<u>Duchesne v. Sugarman</u> , 566 F.2d 817 (2d Cir. 1977) .....	4
<u>Farrell v. Burke</u> , 449 F.3d 470 (2d Cir. 2006) .....	23
<u>Santosky v. Kramer</u> , 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).....	4
<u>United States v. Rearden</u> , 349 F.3d 608 (9th Cir. 2003) .....	23
<u>United States v. Thompson</u> , 653 F.3d 688 (8th Cir. 2011) .....	23

**TABLE OF AUTHORITIES (CONT'D)**

Page

**OTHER STATE CASES**

Fitzgerald v. State,  
805 N.E.2d 857 (Ind. Ct. App. 2004) ..... 22

McVey v. State,  
863 N.E.2d 434 (Ind. Ct. App.),  
review denied, 878 N.E.2d 206 (2007)..... 21

Smith v. State,  
779 N.E.2d 111 (Ind. Ct. App. 2002),  
review denied, 792 N.E.2d 37 (2003)..... 22

People v. Pirali,  
217 Cal. App.4th 1341, 159 Cal. Rptr.3d 335 (Cal. Ct. App. 2013) ..... 22

**RULES, STATUTES AND OTHER AUTHORITIES**

18 U.S.C. § 2256(2)..... 24

RCW 9.68.130(1)..... 23

RCW 9.94A.030(10)..... 5, 13, 20

RCW 9.94A.505(8)..... 5, 13, 20, 21

RCW 9.94A.703(3)(f)..... 5, 13, 20

Sentencing Reform Act..... 13, 14

U.S. Const. amend. I..... 13, 20, 21

U.S. Const. amend. XIV ..... 4, 12, 17, 20

Wash. Const. art. I, § 3 ..... 4, 12, 17, 20

A. ASSIGNMENTS OF ERROR

1. The court erred in imposing the following condition of community custody: "Avoid all contact with minors, to *including your own children*, and adhere to the instructions of the Community Corrections Officer concerning residence and employment, unless otherwise authorized by the Department of Corrections and treatment provider with an adult sponsor approved by the provider and the Department of Corrections." CP 112 (emphasis added).

2. The court erred in imposing the following condition of community custody: "Submit to polygraph and/or *plethysmograph assessment at own expense as directed by Department of Corrections* and therapist, but limited to topics related to monitoring compliance with crime-related sentencing conditions." CP 111 (emphasis added).

3. The court erred in imposing the following condition of community custody: "Do not date or form relationships *with people who are less than 20 percent of your age*. You shall discuss with your therapist &/or Community Corrections Officer ahead of time your wish to escalate the relationship into sexual activity and obtain your therapist &/or CCO's approval. Your partner shall participate in treatment." CP 118 (emphasis added).

4. The court erred in imposing the following condition of community custody: "Do not withhold information or keep secrets from treatment provider or Community Corrections Officer." CP 112.

5. The court erred in imposing the following condition of community custody: "Do not use or possess *sexually explicit material* in any form as described by the treatment provider and/or Community Corrections Officer, including internet use and possession." CP 111 (emphasis added).

Issues Pertaining to Assignments of Error

1. Whether the community custody condition prohibiting contact with appellant's own minor children must be stricken because it is not crime-related and violates appellant's constitutional right to parent his children?

2. Whether the community custody condition requiring appellant to participate in plethysmograph examination at the direction of the Department of Corrections must be stricken as an unconstitutional bodily intrusion?

3. Whether the community custody condition prohibiting appellant from dating or forming relationships with a certain class of persons must be stricken because it is not crime-related and unconstitutionally infringes on his fundamental right to association?

4. Whether the community custody condition requiring appellant to "not withhold information or keep secrets from treatment provider or Community Corrections Officer" must be stricken because it is unconstitutionally vague in violation of due process?

5. Whether the community custody condition prohibiting use or possession of "sexually explicit material" must be stricken because it is not crime-related, violates appellant's fundamental right to free speech, and is unconstitutionally vague in violation of due process?

B. STATEMENT OF THE CASE

The State charged Jose Gabino with one count of first degree child molestation. CP 3-4. The first trial in 2004 resulted in a hung jury. CP 64-65. At a second trial in 2012, a jury found Gabino guilty. CP 82. At that second trial, L.G. testified Gabino touched her private area over her clothes during a birthday party in 2003 when she was eight years old. 1RP<sup>1</sup> 48, 50, 75-78, 83-84. Gabino, testifying in his own defense, denied touching L.G. 1RP 380-81. The court imposed an indeterminate sentence of 62 months minimum confinement and a lifetime term of community custody. CP 100. This appeal timely follows. CP 115-32.

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP – two consecutively paginated volumes consisting of 10/8/12, 10/9/12, 10/10/12, 10/11/12; 2RP – 2/26/13.

C. ARGUMENT

1. THE SENTENCING CONDITION RESTRICTING CONTACT WITH CHILDREN VIOLATES GABINO'S FUNDAMENTAL RIGHT TO PARENT HIS CHILDREN.

Parents have a fundamental liberty interest in the care and companionship of their children protected by due process. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Parents and children share a constitutional interest in each other's companionship and affection. Moore v. Burdman, 84 Wn.2d 408, 411, 526 P.2d 893 (1974). The right to the preservation of family integrity encompasses the reciprocal rights of both parents and children. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

As a lifelong condition of community custody, the court ordered "Avoid all contact with minors, to *including your own children*, and adhere to the instructions of the Community Corrections Officer concerning residence and employment, unless otherwise authorized by the Department of Corrections and treatment provider with an adult sponsor approved by the provider and the Department of Corrections."<sup>2</sup> CP 112 (emphasis added). The restriction on having contact with Gabino's

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<sup>2</sup> Gabino has two children. 1RP 345.

children unconstitutionally infringes on his fundamental parental rights because the prohibition is not reasonably necessary.

The court may impose and enforce crime-related prohibitions in appropriate circumstances. RCW 9.94A.703(3)(f); RCW 9.94A.505(8). 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). Crime-related prohibitions may include orders prohibiting contact with specified individuals for the statutory maximum term. State v. Armendariz, 160 Wn.2d 106, 116, 156 P.3d 201 (2007).

The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). But courts more carefully review conditions that interfere with a fundamental constitutional right, such as the fundamental right to the care, custody, and companionship of one's children. Rainey, 168 Wn.2d at 374. The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or involves application of an incorrect legal analysis. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Moreover, "a court 'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.'" State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d

768 (2009) (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)). Imposition of an unconstitutional community custody condition is therefore manifestly unreasonable. State v. Sanchez Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93.

State interference with a fundamental right is subject to strict scrutiny. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008). Under this standard, a reviewing court must determine whether the State proved the restriction on the right to parent was "sensitively imposed" and "reasonably necessary to accomplish the essential needs of the State." Rainey, 168 Wn.2d at 374 (quoting Warren, 165 Wn.2d at 32). To withstand constitutional scrutiny, no contact orders relating to biological children must be reasonably necessary to protect them from harm. Rainey, 168 Wn.2d at 377; State v. Letourneau, 100 Wn. App. 424, 439, 997 P.2d 436 (2000).

Under the controlling legal standard, the prohibition on contact with Gabino's minor children is unconstitutional in scope and duration. The State generally has a compelling interest in preventing future harm to the victims of the crime. Rainey, 168 Wn.2d at 377. But Gabino committed no crime against any of his children or any children under his

care. The trial court failed to explain why this prohibition on contact was reasonably necessary to protect Gabino's children. The court abused its discretion in failing to apply the correct legal standard to the restriction. Id. at 375.

Letourneau is instructive. In that case, the defendant, a schoolteacher, was convicted of raping a 13-year-old student. Letourneau, 100 Wn. App. at 428-29. This Court held a condition prohibiting Letourneau from unsupervised in-person contact with her biological minor children was not reasonably necessary to prevent her from sexually molesting them, where there was insufficient evidence in the record showing it was reasonably necessary to protect the Letourneau's biological children. Id. at 441-42. "There must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention." Id. at 442.

One expert opined Letourneau posed a danger to her children and observed "[m]any sex offenders have offended a victim other than their biological child and later offend their own child of the same or opposite sex." Id. at 439-40. This Court regarded the expert's opinion as insufficient to justify the no-contact order. Id. at 441-42. "The general observation that many offenders who molest children unrelated to them

later molest their own biological children, without more, is an insufficient basis for State interference with fundamental parenting rights." Id. at 442.

Similarly, Gabino's offense was committed against a child that was not his own. L.J. was a visitor at her cousin's birthday party, which was hosted by Gabino and his wife and attended by many other relatives. 1RP 50-54, 163-66, 287-88. L.J. had never been to the house before. 1RP 50, 54. She had never met Gabino before. 1RP 84. There is no evidence that Gabino ever molested his own biological children or any child with whom he lived and was under his care. The order restricting contact with Gabino's minor children is therefore unconstitutional.

Gabino's case is easily distinguishable from those in which a no contact order with a defendant's own children was upheld on appeal. See State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010) and State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011).

In Corbett, the defendant was convicted of raping his six-year old stepdaughter. Corbett, 158 Wn. App. at 586. On appeal, he challenged a community custody provision that prohibited him from contacting his biological minor sons. Corbett, 158 Wn.App. at 586. The Court of Appeals affirmed the provision because Corbett abused his parenting role by sexually abusing a minor in his care. Id. at 599.

In reaching that holding, the court in Corbett relied on Berg. Id. at 598-99. Berg was convicted of raping and molesting A.A., a 10 year old girl with whom he lived and acted as a parent. Berg, 147 Wn. App. at 926-27, 942-43. Berg challenged the condition of his sentence prohibiting unsupervised contact with any female minor, which encompassed his biological daughter A.B. with whom he lived. Id. at 941-43. The trial court's order restricting contact was reasonably necessary to protect A.B. because "A.A. lived in the home where Berg was acting as her parent when the abuse occurred. By allowing Berg to be alone with A.B., who also lived in the home as his child, the court reasonably feared that it would be putting A.B. in the same situation that A.A. was in when Berg sexually abused her." Id. at 942-43.

Unlike Berg and Corbett, Gabino committed no crime against a child with whom he lived and cared for as a parent. Gabino did not abuse a parenting role by sexually abusing a minor in his care. The scope of the no contact condition therefore unconstitutionally infringes on Gabino's right in the care and custody of his children. Letourneau, 100 Wn. App. at 441-42.

Moreover, the sentencing court did not carefully consider the ramifications of a lifetime ban. There is no temporal limit to the restriction on contact with minor children. The condition encompasses not

only the minor children Gabino now has but also any minor child that Gabino may father in the future. CP 112. Again, this is a lifetime condition because Gabino is on community custody for life. CP 100.

Reasonable necessity encompasses not only scope (extent of contact, if any) but also duration. Rainey, 168 Wn.2d at 381. The length of the no contact order must also be reasonably necessary. Id. As explained in Rainey, "[t]he duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests." Id.

In Rainey, the defendant was convicted of a violent crime against his child (first degree kidnapping) and had a record of continually inflicting measurable emotional damage on his daughter and attempting to leverage the child to inflict emotional distress on the mother. These facts were sufficient to establish that a total no-contact ban, including indirect or supervised contact, was reasonably necessary to protect the child and the mother. Id. at 379-80. Nevertheless, the Court reversed the no-contact

order because the sentencing court provided no justification for the order's lifetime duration and the State failed to show why the lifetime prohibition was reasonably necessary. Id. at 381.

As in Rainey, the sentencing court in this case provided no reason for the duration of the no-contact order, nor did the State attempt to justify the lifetime order as reasonably necessary to protect Gabino's minor children. Id. at 381. "A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard." Rainey, 168 Wn.2d at 375. That is what happened here.

Defense counsel did not object to this or any other sentencing condition. 2RP 24. Sentencing errors, however, may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Furthermore, a defendant always has standing to challenge the legality of community custody conditions even though he has not been charged with violating them. Sanchez Valencia, 169 Wn.2d at 787.<sup>3</sup>

For the reasons set forth above, the court's prohibition on contact with Gabino's minor children is not reasonably necessary to protect his children from abuse. This Court should therefore strike the challenged provision and remand for resentencing. Letourneau, 100 Wn. App. at 442.

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<sup>3</sup> The above principles apply to all of the challenges brought to conditions of community custody in this appeal.

2. THE PLETHYSMOGRAPH CONDITION VIOLATES GABINO'S RIGHT TO BE FREE FROM BODILY INTRUSIONS.

As a condition of community custody, the court ordered Gabino to "Submit to polygraph and/or *plethysmograph assessment at own expense as directed by Department of Corrections* and therapist, but limited to topics related to monitoring compliance with crime-related sentencing conditions." CP 111. The condition is unconstitutional insofar as it requires Gabino to submit to plethysmograph testing at the direction of the Department of Corrections.

Plethysmograph testing involves the restraint and monitoring of an intimate part of a person's body while the mind is exposed to pornographic imagery. In re Marriage of Parker, 91 Wn. App. 219, 223-24, 957 P.2d 256 (1998). Such examination implicates the due process right to be free from bodily restraint. Parker, 91 Wn. App. at 224; U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Requiring submission to plethysmograph testing at the discretion of a community corrections officer violates Gabino's constitutional right to be free from bodily intrusions. State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). "Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider." Land, 172 Wn. App. at 605. But such testing is not a

routine monitoring tool subject only to the discretion of a community corrections officer. Id. In this case, the language of the condition itself shows it is intended to be nothing more than a monitoring tool. CP 111. The requirement that Gabino submit to the plethysmograph examination at the direction of the Department of Corrections must therefore be stricken. Land, 172 Wn. App. at 605-06.

3. THE SENTENCING CONDITION AFFECTING WHO GABINO IS ABLE TO DATE OR FORM RELATIONSHIPS WITH IS NOT CRIME RELATED AND UNCONSTITUTIONALLY INFRINGES ON GABINO'S FIRST AMENDMENT RIGHT TO ASSOCIATION.

The First Amendment right to freedom of association protects a person's right to enter into and maintain human relationships. State v. Moultrie, 143 Wn. App. 387, 399 n. 21, 177 P.3d 776, review denied, 164 Wn.2d 1035, 197 P.3d 1185 (2008). This fundamental right may be restricted only if it is sensitively imposed and reasonably necessary to accomplish the essential needs of the state and public order. State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993).

The Sentencing Reform Act, meanwhile, authorizes the court to impose crime-related prohibitions, i.e., conditions that directly relate to the circumstances of the crime. RCW 9.94A.703(3)(f); RCW 9.94A.505(8); RCW 9.94A.030(10). A court may impose only a sentence authorized by

statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing a community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

The court ordered "Do not date or form relationships with people who are less than 20 percent of your age." CP 112. Gabino's date of birth is May 19, 1974. 1RP 236. He was 38 years old at the time of sentencing on February 26, 2013. 20 percent of 38 years is 7.6 years. Read literally, the condition prohibits Gabino from dating or forming a relationship with any child under 7.6 years old. If the condition is read literally, there is nothing legally wrong with it. But the condition is also absurd because it does not prohibit Gabino from dating or forming relationships with minor children that are eight years old or older. That could not have been what the community corrections officer or the trial court intended,<sup>4</sup> especially in light of another condition, not challenged here, that prohibits Gabino from dating or forming relationships "with families who have minor children, as

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<sup>4</sup> As with all the other conditions challenged in this brief, the "20 percent" condition incorporated into the judgment and sentence was taken verbatim from the pre-sentence report prepared by the Department of Corrections. CP 95, 112.

directed by your Community Corrections Officer." CP 112. The community corrections officer and the trial court got their math wrong, almost certainly mixing up "20 percent" with what was intended to be "80 percent."

Gabino challenges the "20 percent" condition to avoid potential mischief in the future, not for what it literally says but for how it is likely to be interpreted by those responsible for its enforcement. The CCO who drafted this language and the trial court that signed off on it must have understood the condition to mean "Do not date or form relationships with people who are less than 80 percent of your age." 80 percent of 38 years is 30.4. Read in that manner, the condition prohibits Gabino from dating or forming relationships with any person less than 18 years old. There is nothing wrong with that.

The problem is that the condition, interpreted in that manner, also prohibits him from dating or forming a relationship with any *adult* less than 30.4 years old, including those adults who do not have minor children. As the years pass, Gabino will keep getting older and the condition will continue to prohibit him from dating or forming relationships with an increasingly older class of adults who do not have minor children. When he is 50 years old, he will be prohibited from forming a relationship with any such *adult* who is less than 40 years old. When he is 60 years old, he

will be prohibited from dating any such *adult* under 48 years old. And so on.

The condition is ill conceived. Conditions of community custody imposed as being crime-related must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). Gabino was convicted of committing a sex offense against a minor child. The circumstances of that offense had nothing to do with dating or forming relationships with adults who do not have minor children.

The above condition must therefore be removed from the judgment and sentence because it is not crime-related. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (community custody conditions prohibiting conduct that are not crime-related must be stricken from the judgment and sentence); State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998) (striking condition prohibiting contact with minors because victim was 19 years old), abrogated on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). For the same reasons, the condition also unconstitutionally infringes on Gabino's fundamental right to association in that it is not sensitively imposed and is otherwise unnecessary to accomplish the essential needs of the state. Riley, 121 Wn.2d at 37-38.

4. THE SENTENCING CONDITION REQUIRING GABINO NOT TO WITHHOLD INFORMATION OR SECRETS IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered "Do not withhold information or keep secrets from treatment provider or Community Corrections Officer." CP 112. The condition is unconstitutionally vague because it does not provide fair notice and invites arbitrary enforcement. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53; State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001). Both requirements must be satisfied to avoid a vagueness violation. Bahl, 164 Wn.2d at 753.

The condition at issue here is written in such a sweeping and open-ended manner that it contains no protection from arbitrary enforcement

and ordinary people cannot understand what conduct is prohibited. Ordinary people have a lot of secrets, i.e. things they do not reveal to others. What secrets must be revealed as part of this community custody requirement? Similarly, ordinary people are in possession of vast amounts of information. What information must be revealed? The answer to both questions is limited only by the imagination. The condition is written in a way that directs Gabino to reveal secrets and information without prompting or in response to any question from the community corrections officer. The requirement is not tied to any subject matter or any standard whatsoever. The condition does not specify what kinds of secrets or information needs to be revealed and therefore fails to define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited.

As in Sanchez Valencia, "the vague scope of proscribed conduct fails to provide the petitioners with fair notice of what they can and cannot do." Sanchez Valencia, 169 Wn.2d at 794 (striking down the following condition as unconstitutionally vague: "Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.").

Further, a reasonable person cannot describe a standard necessary to avoid arbitrary enforcement. Compare Bahl, 164 Wn.2d at 754, 758 (holding the following condition unconstitutionally vague because it did not provide ascertainable standards for enforcement: "[d]o not possess or access pornographic materials, as directed by the supervising [CCO]."); Sanchez Valencia, 169 Wn.2d at 785, 794-95 (the condition prohibiting paraphernalia did not provide ascertainable standards of guilt to protect against arbitrary enforcement because it "might potentially encompass a wide range of everyday items").

As the Court in Sanchez Valencia reasoned regarding a vague paraphernalia prohibition, "an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,' such as sandwich bags or paper . . . Another probation officer might not arrest for the same 'violation,' i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague." Sanchez Valencia, 169 Wn.2d at 794-95.

The same rationale applies here. An inventive community corrections officer could envision the withholding of any commonplace secret or piece of information as sufficient to trigger a violation. The

condition, as written, invites arbitrary enforcement and should be stricken from the judgment and sentence.

5. THE PROHIBITION ON SEXUALLY EXPLICIT MATERIAL IS UNRELATED TO THE OFFENSE, IS NOT NECESSARY TO THE ESSENTIAL NEEDS OF THE STATE AND IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered: "Do not use or possess *sexually explicit material* in any form as described by the treatment provider and/or Community Corrections Officer, including internet use and possession." CP 111 (emphasis added). This condition is improper for three reasons. First, it is not crime-related. RCW 9.94A.703(3)(f); RCW 9.94A.505(8); 9.94A.030(10). Second, it violates the First Amendment because it is not reasonably necessary to accomplish the essential needs of the state. Third, it violates due process because it is insufficiently definite to apprise Gabino of prohibited conduct and does not prevent arbitrary enforcement. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Substantial evidence must support a determination that a condition is crime-related. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). The sentencing court has discretion to impose crime-related prohibitions as a condition of supervision. RCW

9.94A.703(3)(f); RCW 9.94A.505(8). But nothing in the record indicates Gabino's offense involved sexually explicit material. The condition should be removed because it does not directly relate to the circumstances of the crime.

Further, conditions restricting the fundamental right to free speech under the First Amendment are permissible only if they are sensitively imposed and reasonably necessary to accomplish the essential needs of the state and public order. Bahl, 164 Wn.2d at 757. The prohibition here fails this standard because the record does not show possession or use of sexually explicit material had anything to do with the offense for which Gabino was convicted. There is no nexus. The condition is therefore unnecessary to accomplish an essential need of the state.

Furthermore, the condition is unconstitutionally vague in violation of due process. Where the challenged law involves First Amendment rights, a greater degree of specificity is required. Bahl, 164 Wn.2d at 757. Standing alone, with no link to a statutory definition or additional context, the prohibition on sexually explicit material is too vague to withstand scrutiny. The condition does not sufficiently provide Gabino with advance knowledge of what is required of him. As written, it embodies a fatally imprecise and subjective standard. See McVey v. State, 863 N.E.2d 434, 447 (Ind. Ct. App.) (post-release condition prohibiting the possession of

"sexually explicit materials" is unconstitutionally vague), review denied, 878 N.E.2d 206 (2007); Fitzgerald v. State, 805 N.E.2d 857, 866-67 (Ind. Ct. App. 2004) (same); Smith v. State, 779 N.E.2d 111, 118 (Ind. Ct. App. 2002) (same), review denied, 792 N.E.2d 37 (2003); People v. Pirali, 217 Cal. App.4th 1341, 1352-53, 159 Cal. Rptr.3d 335 (Cal. Ct. App. 2013) (probation condition prohibiting offender from purchasing or possessing pornographic or sexually explicit materials as defined by the probation officer is unconstitutional vague).

Bahl is distinguishable. In that case, the Court upheld a vagueness challenge to a condition that prohibited Mr. Bahl from frequenting "establishments whose primary business pertains to sexually explicit or erotic material." Bahl, 164 Wn.2d at 758. The Court held the condition was "sufficiently clear" when the dictionary definition of the term "explicit" was used in connection and considered together with a prohibition on frequenting businesses, i.e., those in the business of "sexually explicit" materials. Id. at 759.

Unlike Bahl, the prohibition in Gabino's case is not tied to establishments whose primary business pertains to sexually explicit material. The condition is unmoored from any particular context. The context in Bahl that rendered the term sufficiently clear is missing from Gabino's case.

The Court in Bahl also noted the statutory definition of "sexually explicit material" found at RCW 9.68.130(1) bolstered its conclusion that "sexually explicit" is not unconstitutionally vague "*in the context used.*"<sup>5</sup> Id. at 760 (emphasis added). It declined to decide whether this definition alone would be sufficient notice because Mr. Bahl was not convicted under this statute. Id.

The condition in Gabino's case lacks the comparable context found in Bahl and Gabino was not convicted of an offense under chapter 9.68 RCW. The statutory definition of "sexually explicit material" therefore cannot be used to cure the vagueness problem. A statutory definition of a term does not give notice of the term's meaning as used in a sentence unless the definition is contained in the same criminal statute that the defendant was convicted of violating. Farrell v. Burke, 449 F.3d 470, 487 (2d Cir. 2006) (cited by Bahl, 164 Wn.2d at 755); accord United States v. Thompson, 653 F.3d 688, 696 (8th Cir. 2011); cf. United States v. Rearden, 349 F.3d 608, 619-20 (9th Cir. 2003) (condition that offender not

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<sup>5</sup> RCW 9.68.130(1) defines "sexually explicit material" as "any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition."

possess any materials depicting sexually explicit conduct as defined in 18 U.S.C. § 2256(2) not unconstitutionally vague).

The judgment and sentence also fails to link the condition to the statutory definition. CP 111. In Moultrie, the defendant challenged the condition of his sentence prohibiting contact with "vulnerable, ill or disabled adults" as unconstitutionally vague. Moultrie, 143 Wn. App. at 396. The State argued the terms "vulnerable" and "disabled" provided sufficient notice of the type of person with whom Moultrie is to avoid contact because those terms were defined by statute. Id. at 397.

This Court rejected the State's argument because the statutory definitions were more specific than the general terms used in the no contact condition: "Because there is no indication that the trial court in fact intended to limit the terms of the order to these statutory definitions, we will not presume it did so or otherwise rewrite the trial court's order." Id. at 397-98. The court remanded for the trial court to clarify what it meant by those terms. Id. at 398.

Similarly, the term "sexually explicit material" in Gabino's judgment and sentence is not tied to a statutory definition. As in Moultrie, there is nothing in the judgment and sentence that shows the trial court intended to limit the condition on possession or use of "sexually explicit material" to its statutory definition.

On the contrary, the definition of the term is expressly left up to the community corrections officer or treatment provider: "Do not use or possess sexually explicit material in any form *as described by the treatment provider and/or Community Corrections Officer*, including internet use and possession." CP 111. This community custody condition suffers the same vagueness problems created by a condition that simply delegates the responsibility of defining the scope of the prohibition to another: "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758 (addressing pornography prohibition). The prohibition should be stricken from the judgment and sentence.

D. CONCLUSION

For the reasons set forth, Gabino requests that this Court strike the challenged conditions of community custody.

DATED this 5<sup>th</sup> day of September 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
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CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70044-8-1
	)	
JOSE GABINO,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5<sup>TH</sup> DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE  
311 GRAND AVENUE, SUITE 201  
BELLINGHAM, WA 98227  
[SHopkins@co.whatcom.wa.us](mailto:SHopkins@co.whatcom.wa.us)
  
- [X] JOSE GABINO  
NO. 205650  
WHATCOM COUNTY JAIL  
311 GRAND AVENUE  
BELLINGHAM, WA 98225

**SIGNED** IN SEATTLE WASHINGTON, THIS 5<sup>TH</sup> DAY OF SEPTEMBER 2013.

x *Patrick Mayovsky*

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