SUPREME COURT NO. 100436-2
COA NO. 54086-0-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID FORD,

Petitioner.

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

The Honorable Jerry Costello, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

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

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A. IDENTITY OF PETITIONER

David Ford asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Ford requests review of the decision in State v. David Michael Ford, Court of Appeals No. 54086-0-II (slip op. filed November 2, 2021), attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether community custody conditions that restrict internet access violate Ford's free speech rights under the First Amendment?

2. Whether the conditions, insofar as they require permission from the community corrections officer and treatment provider to access the internet, are unconstitutionally vague in violation of due process because they open the door to arbitrary enforcement?

D. STATEMENT OF THE CASE

David Ford and Christina Nieland had a brief sexual relationship. RP 481, 486. When Nieland wanted to end it, Ford threatened to expose their affair to Nieland's estranged husband if she did not send Ford sexual depictions of herself. RP 488-89. Ford communicated with Nieland via text message, Facebook, and Facebook Messenger on multiple occasions. RP 488-528, 579, 600-18, 628-30. Ford also threatened to send sexual material about the affair to Nieland's 18-year-old stepdaughter. RP 516-17, 559-60, 579-80, 597-98, 741. Ford later contacted Nieland's stepdaughter on Facebook and sent sexual depictions of Nieland via Facebook Messenger as proof of the affair. RP 696-97, 790-91, 796-97.

A jury found Ford guilty of one count of second degree extortion with a sexual motivation enhancement and two counts of cyberstalking. CP 58, 60-62. As part of the sentence, the court imposed 36 months of community custody. CP 96. Three conditions of community custody addressed internet use:

> Community custody officer must approve, in advance, defendant's use of social media, email, and internet. CP 103 (Condition VII).
>
> No Internet access or use without prior approval of the supervising CCO, Treatment Provider, and the Court. CP 118 (Condition 24).
>
> No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone or computer-related device to which the defendant has access to monitor compliance with this condition. Also, do not access any social media sites (Facebook, Twitter, Snapchat, etc.) of any kind. CP 118 (Condition 25).

The Court of Appeals reversed the cyberstalking convictions but rejected Ford's argument that the community custody conditions violated his free speech rights. Slip op. at 1. Ford seeks review of those conditions.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE INTERNET CONDITIONS ARE OVERBROAD AND VIOLATE FORD'S FREE SPEECH RIGHTS.

The internet is a ubiquitous part of modern life and a quintessential forum for the exercise of free speech. Packingham v. North Carolina, __U.S.__, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017); State v. Haag, __Wn. 2d__, 495 P.3d 241, 250 (2021). Considering the constitutional interest at stake, restrictions on access to the internet "must be narrowly tailored to the dangers posed by the specific defendant." State v. Johnson, 197 Wn.2d 740, 745, 487 P.3d 893 (2021).

In Ford's case, community custody conditions restricting access to the internet are overbroad in prohibiting a substantial amount of constitutionally protected speech. Division Two's decision upholding these conditions conflicts with other Court of Appeals decisions, warranting review under RAP 13.4(b)(2).

Further, the law on sentencing conditions restricting access to the internet is in a state of evolutionary flux. The condition addressed in this Court's recent Johnson decision is substantively different than the conditions at issue here. Whether the conditions in Ford's case are overbroad is a significant question of constitutional law warranting review under RAP 13.4(b)(3).

The First Amendment prohibits the government from proscribing speech. State v. Halstein, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

"The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Conditions that interfere with fundamental rights "must be 'sensitively imposed' so that they are 'reasonably

necessary to accomplish the essential needs of the State and public order.'" Id. (quoting State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)).

"Overbreadth goes to the question of whether State action is couched in terms so broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well." In re Pers. Restraint of Sickels, 14 Wn. App. 2d 51, 67, 469 P.3d 322 (2021). Courts consider whether a sentencing condition prohibits a real and substantial amount of constitutionally protected speech relative to its legitimate sweep. State v. Riles, 135 Wn.2d 326, 346, 957 P.2d 655 (1998), abrogated on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

In Johnson, the Supreme Court addressed a community custody condition that required the defendant to "not use or access the World Wide Web unless specifically authorized by [his community custody officer] through approved filters." Johnson, 197 Wn.2d at 744. Johnson's holding that this

condition was not overbroad was based on the premise that the condition only required approved filters before accessing the internet; it did not require Johnson to seek permission every time he would use the internet. Id. at 745.

Condition VIII, however, requires Ford to obtain permission from the CCO every single time he wishes to access the Internet. CP 103. Condition 24 goes even further, requiring Ford to obtain permission not only from the CCO but also the treatment provider and the court. CP 118. Three layers of permission are needed here. That is an unworkable standard that unnecessarily presents an obstacle to exercising the right to free speech in realms that have nothing to do with Ford's crime. Requiring court approval is especially troublesome. There is no practical way a motion could be submitted to the court or a court hearing held every time Ford wants to access the internet, effectively preventing internet access due to this procedural barrier.

The Court of Appeals stated: "Like Johnson, Ford is 'subject to a partial deprivation of his interest in having access to the Internet after he committed crimes through that medium.'" Slip op. at 14 (quoting State v. Johnson, 12 Wn. App. 2d 201, 215, 460 P.3d 1091 (2020), aff'd, 197 Wn.2d 740 (2021)). No one says he isn't. But the conditions restricting access go too far.

The Court of Appeals focused on the purported distinction between a total ban and access conditioned on CCO permission. Slip op. at 14. Even taking that distinction at face value, Condition 25 does not pass muster. In prohibiting use of devices with internet access and any social media sites, no provision is made for authorizing internet usage by means of obtaining permission from the CCO. CP 118. Even the Court of Appeals in Johnson recognized a blanket ban on using a computer is impermissible where the crime was committed through that medium. Johnson, 12 Wn. App. 2d at 214-15

(citing United States v. Holena, 906 F.3d 288, 294-95 (3d Cir. 2018)).

In Packingham, the U.S. Supreme Court struck down a law that prohibited sex offenders from accessing social media web sites because the state could not meet its burden to show the sweeping prohibition was necessary to serve its purpose of keeping sex offenders away from vulnerable victims. Packingham, 137 S. Ct. at 1737-38. The Johnson court concluded its condition was "significantly narrower than the statute struck in Packingham" because "Johnson is not prohibited from accessing any particular social media site. Instead, he is required to use the Internet only through filters approved by his community custody officer." Johnson, 197 Wn.2d at 746.

Condition 25 in Ford's case states: "do not access any social media sites (Facebook, Twitter, Snapchat, etc.) of any kind." CP 118. Unlike in Johnson, Ford is prohibited from accessing particular social media sites and no provision is made

allowing for permission to access them. Unlike Johnson, no condition in Ford's case permits access to the internet through an approved filter.

Conditions that envision potential, limited access through CCO permission do not save those conditions from an overbreadth challenge. The Supreme Court's decision in Johnson, which relied on a filter rather than piecemeal CCO permission, is distinguishable on this ground.

"When a total ban on Internet access cannot be justified . . . a proviso for probation-officer approval does not cure the problem." United States v. LaCoste, 821 F.3d 1187, 1192 (9th Cir. 2016). "And for good reason: If a total ban on Internet use is improper but a more narrowly tailored restriction would be justified, the solution is to have the district court itself fashion the terms of that narrower restriction." Id. In Holena, an internet restriction conditioned on probation officer approval was overbroad in part because it "gave the probation office no

guidance on the sorts of internet use that it should approve." Holena, 906 F.3d at 293.

Division Two's decision in Ford's case is an outlier that runs counter to what Divisions One and Three are doing with this issue. Division Three in Geyer held these conditions were unconstitutionally overbroad: (1) "Do not purchase, possess or use any computer without prior permission from the supervising community corrections officer and the treating sexual deviancy treatment provider" and (2) "Do not purchase, possess or use any electronic device, including a cell phone, capable of connecting to the internet without prior permission from the supervising community corrections officer and the treating sexual deviancy treatment provider." State v. Geyer, __Wn. App.__2d, 496 P.3d 322, 327 (2021).

Geyer reasoned that "unlike in Johnson, the State's supervision of Mr. Geyer's Internet use is not tempered by the use of a filter. Instead, Mr. Geyer's *every action* on a computer

or the Internet must be preapproved. This is unnecessarily broad." Id. at 327.

Ford's case is no different than Geyer. Division Two's decision in Ford's case conflicts with Geyer, making review appropriate under RAP 13.4(b)(2).

Division Three in Sickels held these conditions were unconstitutionally overbroad: (1) "No internet access or use, including email, without the prior approval of the supervising CCO" and (2) "No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches)." Sickels, 14 Wn. App. 2d at 71. "Delegating authority to Mr. Sickels's supervising CCO to approve internet access does not solve the problem; a sentencing court may not wholesaledly abdicate its judicial responsibility for setting the conditions of release." Id. at 73.

The internet conditions in Ford's case are essentially the same as those struck down in Sickels. CP 103 (Condition VII);

CP 118 (Condition 24 and 25); see also In re Pers. Restraint of Carrillo, __Wn. App.__2d, 80793-5-I, 2021 WL 4840818, at *6-7 (2021) (unpublished) (Division One striking down same conditions as overbroad, distinguishing Johnson).

In Ford's case, however, Division Two declined to follow Division Three's decision in Sickels. Slip op. at 14. Once again, review is warranted because the decision in Ford's case conflicts with Court of Appeals precedent. RAP 13.4(b)(2).

Meanwhile, in Forler, a condition stating "No internet use unless authorized by treatment provider and Community Custody Officer" was unconstitutionally overbroad. State v. Forler, 9 Wn. App. 2d 1020, 2019 WL 2423345, at *12-13 (unpublished), review denied, 194 Wn.2d 1011, 452 P.3d 1235 (2019). Division One reasoned "The blanket restriction of 'no internet use' goes beyond tailoring Forler's internet use to a crime-related prohibition." Id. at 2019 WL 2423345, at *13. This Court in Johnson recognized that the condition at issue in Forler, which is the same as one of the conditions in Ford's case,

was "substantively different" than the one at issue in Johnson. Johnson, 197 Wn.2d at 753, n.1.

As cases like Forler, Geyer and Sickels demonstrate, conditions restricting internet access can be overbroad even where the defendant used the internet as the medium to commit his crime. The conditions here prohibit a much broader swath of First Amendment activity than necessary. They restrict access to everything on the internet, including websites and uses unrelated to the crimes for which Ford was convicted.

Breaking with precedent, Division Two has taken an indefensibly extreme position on this issue. Ford asks this Court to provide guidance for what is sure to be a frequently recurring issue in other cases.

2. THE INTERNET CONDITIONS ARE VAGUE, IN VIOLATION OF DUE PROCESS.

Due process requires the State to provide citizens with fair warning of proscribed conduct and ascertainable standards that will prevent arbitrary enforcement. State v. Bahl, 164

Wn.2d 739, 752-53, 193 P.3d 678 (2008); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. A condition of community custody will be struck down as unconstitutionally vague if it fails either requirement. Bahl, 164 Wn.2d at 752-53.

Conditions in Ford's case are vague because they delegate approval authority to the CCO without providing structured parameters for that approval. Under Condition VIII, the CCO "must approve, in advance, defendant's use of social media, email, and internet." CP 103. Under Condition 24, there is no internet access whatsoever "without prior approval of the supervising CCO, Treatment Provider, and the Court." CP 118. These conditions leave too much discretion to the CCO in approving internet access.

Open-ended delegations to probation officers "create opportunities for arbitrary action -- opportunities that are especially worrisome when the subject concerns what people may read." United States v. Scott, 316 F.3d 733, 736 (7th Cir. 2003) (striking down supervision condition that provided "The

defendant shall be prohibited from access to any Internet Services without prior approval of the probation officer.").

This is not just a problem of delegating too much power to the CCO. Delegating power to the treatment provider to grant or withhold internet access, as Condition 24 does, presents the same problem. See United States v. Wagner, 872 F.3d 535, 542-43 (7th Cir. 2017) (district court impermissibly delegated decision-making authority on whether defendant should be banned from accessing adult pornography to treatment provider).

The filter-based condition in Johnson survived a vagueness challenge, but that condition was not read as requiring the defendant to "seek permission every time he would use the Internet." Johnson, 197 Wn.2d at 745. Rather, an appropriate filter was to be used to ensure the defendant should not be allowed to use the internet to solicit commercial sex or sex with children. Id. at 749. Ford's conditions do not

involve a filter. They require Ford to seek permission every time he seeks to access the internet.

In Forler, the Court of Appeals held this condition did not provide an ascertainable standard to protect against arbitrary enforcement: "No internet use unless authorized by treatment provider and Community Custody Officer." Forler, 2019 WL 2423345, at *12-13. Again, this Court in Johnson recognized the condition there was "substantively different" than the one in Forler. Johnson, 197 Wn.2d at 753, n.1. Condition VIII and Condition 24 in Ford's case are likewise substantively different than the condition in Johnson because internet access is not mediated by a filter but rather the say so of the CCO. Ford's conditions are like those struck down in Forler.

In Carrillo, a post-Johnson case, the trial court ordered "[n]o [I]nternet access or use, including e[-]mail, without the prior approval of the supervising CCO." Carrillo, 2021 WL 4840818, at *6 (unpublished). Division One held the trial court "gave the CCO complete control of Carrillo's Internet access,

opening the door to arbitrary enforcement based on the CCO's individual determinations. Without ascertainable standards of enforcement, the condition is unconstitutionally vague." Id. Condition VII and Condition 24 in Ford's case are the same in all material respects. Ford's vagueness challenge raises a significant question of constitutional law under RAP 13.4(b)(3).

Ford did not raise a vagueness challenge in the Court of Appeals, but the Supreme Court retains discretion to grant review of an issue not raised in the Court of Appeals. State v. Mendez, 137 Wn.2d 208, 216-17, 970 P.2d 722 (1999), abrogated on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007); State v. Collins, 121 Wn.2d 168, 178-79, 847 P.2d 919 (1993) (issue not raised in Court of Appeals was not reviewed where it was not properly raised as an issue in the petition for review).

Ford asks the Supreme Court to exercise its discretion in his favor because the propriety of sentencing conditions restricting internet access is a rapidly evolving area of the law.

Johnson, the only Supreme Court precedent involving a vagueness challenge to an internet condition, was decided by this Court well after the briefing in Ford's case was completed.

F. CONCLUSION

For the reasons stated, Ford requests review.

I certify that this document was prepared using word processing software and contains 2832 words excluding those portions exempt under RAP 18.17.

DATED this 2nd day of December 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC

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

Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID MICHAEL FORD, Appellant.	No. 54086-0-II UNPUBLISHED OPINION

WORSWICK, J. — David Ford was convicted of two counts of felony cyberstalking and one count of extortion with sexual motivation, and the trial court imposed an exceptional sentence. He appeals his two convictions for felony cyberstalking, arguing that (1) the cyberstalking statute is unconstitutionally overbroad. He also appeals his sentence, arguing that (2) restriction of internet use violates his free speech rights, (3) the exceptional sentence is unsupported by law, (4) the sentencing condition that he obtain a psychosexual evaluation is not authorized by statute, and (5) legal financial obligations (LFOs) were erroneously imposed. The State concedes that Ford's convictions for cyberstalking should be reversed.

We accept the State's concession that Ford's conviction for cyberstalking must be reversed. We further hold that the trial court did not err in imposing community custody conditions limiting access to telecommunications technology, including the internet, and requiring Ford to undergo a psychosexual evaluation and treatment. We do not consider Ford's other arguments. We reverse Ford's convictions for cyberstalking and remand for resentencing.

FACTS

In September 2018, Christina Nieland had temporarily separated from her husband and was living with a friend at her friend's home where David Ford was also residing. During this time, Nieland and Ford had a brief sexual relationship after which Nieland told Ford that she wanted to end their relationship and reconcile with her husband. Ford reacted very angrily and began obsessively calling and messaging Nieland by phone and social media. At one point, Ford called Nieland ten times repeatedly until she answered.

Nieland told Ford to stop, but Ford persisted. Nieland blocked Ford's phone number, but Ford continued to reach Nieland through various social media accounts and other phone numbers until she relented and unblocked him. Ford demanded that Nieland send him sexually explicit photographs and videos of herself. Ford threatened to reveal their sexual relationship to Nieland's husband if Nieland did not comply with Ford's demands. Afraid that Ford would carry out his threats, Nieland complied.

Eventually, Nieland contacted law enforcement to report Ford's behavior. That same day, Ford threatened to send an explicit video of Ford and Nieland having sex to Nieland's teenage stepdaughter. Ford then carried through with that threat by contacting the stepdaughter through social media, telling her that her stepmother and father were going to get a divorce, and sending her sexually explicit pictures and videos of Nieland.

The State arrested Ford and charged him with one count of second-degree extortion with a sexual motivation[1] and two counts of cyberstalking.[2] The matter proceeded to a jury trial.

The jury instructions defined cyberstalking as follows:

> A person commits the crime of cyberstalking when, with intent to harass, intimidate, or embarrass another, he or she makes an electronic communication using lewd, lascivious, indecent, or obscene words, images, or language; or suggesting the commission of any lewd or lascivious act; or repeatedly; whether or not a conversation occurs and the person had previously been convicted of the crime No Contact/Protection Order Violations against a person who was specifically named in a no-contact order.

Clerk's Papers (CP) at 47.

The jury was also instructed that to convict Ford of cyberstalking, five elements must be proved beyond a reasonable doubt:

> (1) That on, about, or between October 1, 2018, and October 31, 2018, the defendant made an electronic communication to Veronica Nieland;
> (2) That at the time the defendant made the electronic communication the defendant intended to harass, intimidate, torment, or embarrass any other person;
> (3) That the defendant:
>
> a) used lewd, indecent, lascivious, or obscene words, images, or language in the electronic communication;
>
> b) suggested the commission of any lewd or lascivious act in the electronic communication; or
>
> c) made an electronic communication repeatedly, whether or not a conversation occurred;
>
> (4) That the defendant was previously convicted of the crime No Contact/Protection Order Violations against a person who was specifically named in a no-contact order; and
> (5) That the electronic communication was made or received in the State of Washington.

CP at 49-52.

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[1] RCW 9A.56.130.

[2] RCW 9.61.260.

The verdict form simply asked the jury to find Ford guilty or not guilty of cyberstalking without specifying upon which subsection—3(a), (b), or (c)—it had based its decision. The jury found Ford guilty on all three counts. The court ordered that a pre-sentencing investigation report (PSI) be prepared.

Ford's PSI recounted that in 2012, Ford had repeatedly contacted minor girls using social media, and then pressured or enticed them to send him sexually explicit pictures and videos of themselves. When the victims sent pictures or videos, Ford threatened to send the materials to the girls' friends and family unless they complied with his demands to produce and send more sexually explicit materials to him. Based on this behavior, Ford was charged with 25 counts involving seven victims, but pleaded guilty to only one count of second degree extortion and one count of sexual exploitation of a minor. Ford was sentenced to 48 months in prison on that charge. Ford's PSI concluded that Ford's sexual deviancy, accelerating criminal activity, and possible mental health issues increased his risk to reoffend.

The trial court sentenced Ford to an exceptional sentence of 69 months based on the free crimes aggravator,[3] running the extortion count consecutively with the two cyberstalking counts. Ford was also sentenced to 36 months of community custody. The court imposed community custody conditions that included prohibitions against the use of telecommunications technology:

> 24. No internet access or use without prior approval of the supervising CCO, Treatment Provider, and the Court.
>
> 25. No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone or computer-related device to which the defendant has access to

[3] RCW 9.94A.535(2)(c).

> monitor compliance with this condition. Also, do not access any social media sites (Facebook, Twitter, Snapchat, etc.) of any kind.

CP at 85

The trial court also imposed a community custody condition that Ford obtain a psychosexual evaluation and treatment. During the hearing, the court stated that a psychosexual evaluation was "essentially a mental health evaluation," but it did not impose a mental health evaluation as a condition of Ford's community custody. 8 Report of Proceedings (RP) (Dec, 6, 2019) at 38. The court found Ford was indigent and imposed a non-discretionary victim assessment fee of $500. However, the final judgment and sentence contained boiler plate language regarding payment of other fines and fees:

> COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.
> . . . .
> While on community placement or community custody, the defendant shall: . . . (7) pay supervision fees as determined by DOC.

CP at 93, 96.

Ford appeals his convictions for cyberstalking, his exceptional sentence, the conditions of his community custody, and imposition of supervision fees and collection costs.

ANALYSIS

Ford makes five arguments. He argues that (1) his cyberstalking convictions must be reversed because the statute is unconstitutionally overbroad. He further argues that the trial court erred by (2) imposing internet-related conditions of community custody in violation of his free speech rights under the First Amendment; (3) imposing an exceptional sentence under the free crimes aggravator because the cyberstalking offenses were, in fact, punished; (4) ordering a

psychosexual evaluation and treatment as a condition of community custody because Ford was not found to have a statutorily defined mental illness; and (5) imposing discretionary LFOs of collection costs and supervision fees.

We agree that Ford's convictions for cyberstalking must be reversed. We further hold that the trial court did not err in imposing the community custody provisions. We do not consider Ford's arguments regarding the LFOs, because the trial court can reconsider them at resentencing.

I. CONSTITUTIONALITY OF RCW 9.961.260(1)(b)

Ford argues that RCW 9.61.260(1)(b), one of the prongs of the cyberstalking statute by which he was convicted, is overbroad. He argues that his convictions for felony cyberstalking must be reversed because the State cannot prove beyond a reasonable doubt that the inclusion of an unconstitutional prong in his to-convict jury instruction for cyberstalking did not prejudice him.

The State concedes that Ford's cyberstalking convictions must be reversed because RCW 9.61.260(1)(b) was held to be unconstitutional in *Rynearson v. Ferguson*, 355 F. Supp. 3d 964, 972 (W.D. Wash. 2019). The State also relies on an unpublished case from Division One of this court that followed *Rynearson* to accept the State's concession on the same grounds.[4] We accept the State's concession that Ford's cyberstalking convictions must be reversed.

[4] *Slotemaker v. State*, No. 78665-2-I, 2019 WL 3083302 (Wash. Ct. App. July 15, 2019) https://www.courts.wa.gov/opinions/pdf/786652.pdf.

Free speech rights are protected by both the Washington and federal constitutions. WASH. CONST. art. I, § 5; U.S. CONST. amend. I. We review the constitutionality of statutes de novo. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011). We analyze an overbreadth argument under article I, section 5 the same as under the First Amendment. *Immelt*, 173 Wn.2d at 6.

A. *Overbreadth*

A statute is unconstitutionally overbroad if it prohibits a substantial amount of protected speech, and no means exist by which to sever its unconstitutional application. *State v. Gray*, 189 Wn.2d 334, 345, 402 P.3d 254 (2017); *State v. Alphonse*, 147 Wn. App. 891, 903, 197 P.3d 1211 (2008). "A statute or ordinance will be overturned only if the court is unable to place a sufficiently limiting construction on a standardless sweep of legislation." *City of Tacoma v. Luvene*, 118 Wn.2d 826, 840, 827 P.2d 1374 (1992). Federal courts cannot supply limiting constructions on a state statute unless the statute is "'readily susceptible' to such a construction." *United States v. Stevens*, 559 U.S. 460, 481, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010). This is because federal courts "lack jurisdiction authoritatively to construe state legislation." *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369, 91 S. Ct. 1400, 28 L. Ed. 2d 822 (1971).

To prevail in a facial challenge based on the First Amendment, Ford must either demonstrate that "no set of circumstances exists under which [the statute] would be valid," or that "a substantial number of its applications are unconstitutional, judged in relation to the statue's plainly legitimate sweep." *Stevens*, 559 U.S. at 472-73 (internal quotation marks

omitted). Courts generally first examine the statute to determine whether it reaches a substantial amount of protected speech. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001).

If the challenged statute touches upon constitutionally protected speech in a constitutionally impermissible manner, we may turn to whether it is possible to limit the statute's construction or apply severance in order to save its constitutionality. *City of Seattle v. Huff*, 111 Wn.2d 923, 923, 767 P.2d 572 (1989).

The criminal cyberstalking statute provides in relevant part:

> (1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:
>
> (a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;
>
> (b) Anonymously or repeatedly whether or not conversation occurs; or
>
> (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.
>
> . . . .
>
> (5) For the purposes of this section, "electronic communication" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. "Electronic communication" includes, but is not limited to, electronic mail, internet-based communications, pager service, and electronic text messaging.

RCW 9.61.260.

We note that the cyberstalking statute is almost identical to the relevant language found in the criminal telephone harassment statute:

> (1) Every person who, with intent to harass, intimidate, torment, or embarrass any other person, shall make a telephone call to such other person:

> (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
>
> (b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or
>
> (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.]

RCW 9.61.230.[5]

The statute criminalizing telephone harassment has survived numerous constitutional challenges for overbreadth in Washington courts, with courts holding that the telephone harassment statute regulates conduct, not speech. *State v. Dyson*, 74 Wn. App. 237, 243-46, 872 P.2d 1115 (1994); *State v. Alexander*, 76 Wn. App. 830, 832, 888 P.2d 175 (1995). The telephone harassment statute also passed constitutional muster in *United States v. Waggy*, 936 F.3d 1014, 1015 (9th Cir. 2019) for the same reason.

However, the criminal cyberstalking statute, unlike the telephone harassment statute, regulates more than conduct. The statute, by regulating electronic communications, regulates the posting of content on public web pages and social media sites. Thus, the statute prohibits a substantial amount of protected speech.[6] Because of this, the district court in *Rynearson* held that subsection (1)(b) of the cyberstalking statute violated the First Amendment because it targeted speech and could not survive strict scrutiny. *Rynearson*, 355 F. Supp. 3d at 972.

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[5] Moreover, the penalties are the same.

[6] This is so because of the definition of "electronic communication" together with the phrase "under circumstances not constituting telephone harassment." RCW 9.61.260.

In *Rynearson*, the court granted injunctive relief against the State from enforcing RCW 9.61.260. *Rynearson*, 355 F. Supp. 3d at 972. Rynearson was an activist and author who used social media and the internet to criticize public figures and government officials. *Rynearson*, 355 F. Supp. 3d at 967. Rynearson's posts regularly included "invective, ridicule, and harsh language" calling on public officials to be removed from office and highlighting their questionable actions and motives. *Rynearson*, 355 F. Supp. 3d at 967. Public officials sought and obtained a civil protection order against Rynearson for some of his online activity and social media posts criticizing a local leader; Rynearson sought injunctive relief to prevent his prosecution for violating the order. *Rynearson*, 355 F. Supp. 3d at 968.

The *Rynearson* court held that RCW 9.61.260(1)(b) violated the First Amendment based on a plain reading of the statute, not the narrow construction of terms imported from our telephone harassment jurisprudence. *Rynearson*, 355 F. Supp. 3d at 969-70 ("Section 9.61.260(1)(b)'s breadth—by the plain meaning of its words—includes protected speech that is not exempted from protection by any of the recognized areas just described . . . The opportunity for repeating this 'plain meaning' view of the statute to criminalize protected speech calls out for a prompt curative response."). *Rynearson* focused on the "with intent to . . . embarrass" portion of the statute. *Rynearson*, 355 F. Supp. 3d at 972 ("*Anonymous* speech uttered or typed with the intent to *embarrass* a person as here, is protected speech. The plain meaning of the italicized words render 9.61.260(1)(b) unconstitutional."). *Rynearson* reasoned that anonymous online speech intended to merely embarrass might sweep up and criminalize public debate and other critical discourse touching on matters of political, religious, or public concern that have been

historically sacred components of free speech in the United States. *Rynearson*, 355 F. Supp. 3d at 971.

Here, the State simply concedes that Ford's cyberstalking convictions must be reversed based on *Rynearson*. The State offers no argument as to how this court could narrowly construe the statute, nor does the State suggest any narrow construction that could sufficiently limit application of the cyberstalking statute. Because the State offers no such argument, and the parties have briefed no such scenario, we accept the State's concession that RCW 9.61.260(1)(b) is unconstitutional under *Rynearson*.

We hold that RCW 9.61.260(1)(b) is not narrowly tailored because its reach is substantially broader than necessary to achieve the government's goal of preventing cyberstalking. This is because the challenged statute would sweep up a vast array of otherwise protected speech simply because it is made anonymously or repeatedly. Further, because all "internet-based communications" are within its sweep, the challenged statute does not leave open ample alternative channels of communication.

B. *Reversible Error*

Because we accept the State's concession that RCW 9.61.260(1)(b) is unconstitutional, we also presume that Ford was prejudiced. *State v. Williams*, 144 Wn.2d 197, 213, 26 P.3d 890 (2001). The State can overcome the presumption of prejudice if it can show beyond a reasonable doubt that the jury would have reached the same result without the error. *Williams*, 144 Wn.2d at 213.

Here, the jury was instructed that it could find Ford guilty of criminal cyberstalking if "at the time the defendant made the electronic communication the defendant intended to harass,

intimidate, torment, *or* embarrass any other person." (Emphasis added.) CP at 49. Because the instruction uses the disjunctive "or," and because the verdict form did not specify on what basis of intent the jury convicts, there is no way to prove on what basis the jury found Ford guilty. The State also concedes that it is unable to prove that the error is harmless. As a result, we reverse Ford's convictions for cyberstalking.

II. COMMUNITY CUSTODY CONDITIONS

We address two community custody condition issues that may arise at the resentencing.

A. *Limited Use of Telecommunication Technology as Condition of Community Custody*

Ford argues that the conditions of his community custody regarding his use of and access to telecommunications technology, specifically access to the internet, infringe on his First Amendment rights because they are overbroad. We disagree.[7]

Courts may impose "crime-related prohibitions" as conditions to a sentence. RCW 9.94A.505(9). But conditions that interfere with fundamental rights must be sensitively imposed so that they are reasonably necessary to accomplish the essential needs of the State and public order. *In Re Pers. Restraint Pet. of Rainey*, 168 Wn.2d 367, 377, 229 P.3d 686 (2010). Generally, conditions imposed at sentencing are reviewed for abuse of discretion because "the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge's in-person appraisal of the trial and the offender." *Rainey*, 168 Wn.2d at 374-75. Conditions that are unconstitutional are necessarily an abuse of discretion. *State v. Padilla*,

[7] Ford makes no argument that the condition that he obtain permission before accessing the internet is unconstitutionally vague.

190 Wn.2d 672, 677, 416 P.3d 712 (2018). A regulation implicating First Amendment rights must be "narrowly tailored to further the State's legitimate interest." *Padilla*, 190 Wn.2d at 678.

In *State v. Johnson*, 197 Wn.2d 740, 487 P.3d 893 (2021), our Supreme Court considered a community custody provision that provided that Johnson "not use or access the World Wide Web unless specifically authorized by [his community custody officer] through approved filters." *Johnson*, 197 Wn.2d at 744. The court concluded that the limitation on Johnson's future internet use was not overbroad. *Johnson*, 197 Wn.2d at 747. In doing so, the Supreme Court recognized that "[w]hile requiring Johnson to use an overzealous filter might violate the First Amendment, that is a question of appropriate enforcement and a question for another day." *Johnson*, 197 Wn.2d 746-47.

Ford cites to *Packingham v. North Carolina*, __ U.S. __, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017), to support his argument. In *Packingham*, a registered sex offender who did not necessarily use the internet to perpetrate his crimes was completely banned from internet-based activities. *Packingham*, 137 S. Ct. at 1737. Packingham challenged a North Carolina law making it a felony for sex offenders "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." *Packingham*, 137 S. Ct. at 1731. The Supreme Court held that the State had not met its burden to show the law was necessary or that the law legitimately served that purpose. *Packingham*, 137 S.Ct. at 1732-33. But here, unlike in *Packingham*, Ford has repeatedly used the internet to commit crimes, and Ford is not completely banned from internet-based activities.

In Re Pers. Restraint of Sickles, 14 Wn.App.2d 51, 469 P.3d 322 (2020), a case cited by Ford, Division Three of this court held that "[d]elegating authority to [defendant's] supervising CCO to approve internet access does not solve the problem" of what it deemed was an unconstitutionally overbroad prohibition to internet access. *Sickles*, 14 Wn. App. 2d at 73. The language from Sickels' conditions were practically identical to those at issue here. Sickels was convicted of second-degree attempted rape of a child after he solicited an undercover officer posing as a 13-year-old girl on a popular internet classifieds website. *Sickles*, 14 Wn. App. 2d at 57-58.

But the *Sickles* decision is based on *State v. Sansone*, 127 Wn. App. 630, 641-43, 111 P.3d 1251 (2005), which was decided on vagueness grounds, not overbreadth. Moreover, Division Three expressly limited its holding to "the circumstances at hand," reasoning that delegation was not improper if the prohibitions were "not necessarily static" and left to the more objective discretion. *Sansone*, 127 Wn. App. at 643. We decline to follow *Sickels*.

Here, Ford's use of the internet is conditioned by two criteria: it must be for "employment purposes (including job searches)," or he must receive "prior approval of the supervising CCO, Treatment Provider, and the Court." CP at 106. Unlike *Packingham*, Ford's conditions are not absolute because he can still access the internet with requisite permission. Like *Johnson*, Ford is "subject to a partial deprivation of his interest in having access to the Internet after he committed crimes through that medium." *State v. Johnson*, 12 Wn. App. 2d 201, 215, 460 P.3d 1091 (2020), *aff'd*, 197 Wn.2d 740 (2021). Ford's conditions are "crime-related prohibitions" that are reasonably necessary to prevent repeat offense.

We hold that the conditions for Ford's limited use of telecommunications technology, including the internet, are reasonably necessary to accomplish the essential needs of the State, and are therefore not unconstitutionally overbroad.

B. *Psychosexual Evaluation and Treatment*

Ford argues that the court erred in ordering a psychosexual evaluation and treatment as a condition of his community custody. We disagree.

Ford and the State disagree on the statutory authority for the court-ordered psychosexual evaluation. Ford argues that the evaluation is a mental health evaluation under RCW 71.24.025, and that the trial court erred because it did not make a specific finding that he was mentally ill.[8] The State argues that Ford's psychosexual evaluation is included in treatment covered by RCW 9.94A.703(3)(c), which allows the trial court to condition a defendant's community custody on his "[participation] in crime-related treatment or counseling services." We agree with the State.

A trial court lacks authority to order a mental health evaluation and treatment as a condition of community custody unless it finds that (1) reasonable grounds exist to believe that a person is mentally ill, and (2) this condition most likely influenced the offense. *State v. Brooks*, 142 Wn. App. 842, 851–52, 176 P.3d 549 (2008); RCW 9.94A.505(9). A person is "mentally ill" when they are "acutely mentally ill," "chronically mentally ill," a "seriously disturbed person," or a "severely emotionally disturbed child." Former RCW 71.24.025(1), (10), (28), (36), (37) (2018). A "mental disorder" means "any organic, mental, or emotional impairment

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[8] Ford bases his argument on the court's statement at sentencing that the psychosexual evaluation was "essentially a mental health evaluation." 8 RP at 38.

which has substantial adverse effects on a person's cognitive or volitional functions." Former RCW 71.05.020(36) (2018). The term "sexual deviancy" does not appear among these definitions. Therefore, on this record the trial court was not authorized to order a mental health evaluation.

However, the psychosexual evaluation is not a mental health evaluation, it is a sexual deviancy evaluation. Sexual deviancy evaluations and treatment are crime-related conditions for sex offenses. *See In Re Pers. Restraint of Brettell*, 6 Wn. App. 2d 161, 174, 430 P.3d 677 (2018) (upholding community custody condition requiring defendant be evaluated and follow the recommended course of treatment of a certified sexual deviancy counselor); RCW 9.94A.030(47)(c).

Here, because Ford was convicted of a sex offense, the psychosexual evaluation is a crime-related evaluation, permissible under RCW 9.94A.703(3)(c) as part of Ford's conditions of community custody. The court's oral ruling opining on the similarity of the two types of evaluations does not transform one into the other.

We hold that the trial court did not err in ordering Ford undergo a psychosexual evaluation and treatment.

CONCLUSION

We accept the State's concession that Ford's convictions for cyberstalking must be reversed. We hold that the trial court did not err when it imposed limitations to Ford's use of telecommunications technology, including the internet, or a psychosexual evaluation and

treatment as conditions of his community custody.[9] We reverse Ford's cyberstalking convictions and remand to the trial court to vacate those convictions and resentence Ford.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

I concur:

Lee, C.J.

I concur in result only:

Cruser, J.

[9] We decline to resolve the issues of Ford's exceptional sentence or the court's imposition of discretionary costs because the trial court can address these issues at resentencing.

NIELSEN KOCH P.L.L.C.

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