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SUPREME COURT NO. _____
COA NO. 68321-7-I

IN THE SUPREME COURT OF WASHINGTON

VLADIK BYKOV,

Petitioner,
v.

HONORABLE STEVEN ROSEN AND CITY OF SEATTLE

Respondents.

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

The Honorable Monica J. Benton, Judge

PETITION FOR REVIEW

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STATE OF WASHINGTON

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RULES, STATUTES AND OTHER

A. IDENTITY OF PETITIONER

Vladik Bykov, the appellant below, asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Bykov requests review of the decision in Vladik Bykov v. Honorable Steven Rosen and City of Seattle, Court of Appeals No. 68321-7-I (slip op. filed August, 12, 2013), attached as Appendix A. The Court of Appeals denied Bykov's motion to reconsider on September 6, 2013. See Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the sentencing condition that completely prohibits Bykov from accessing the Internet violates his fundamental constitutional right to free speech?

2. Whether facts relied on to justify a sentence must be proved by a preponderance of the evidence to comport with due process?

D. STATEMENT OF THE CASE

Bykov was charged with 13 counts of cyberstalking and 5 counts of harassment in Seattle Municipal Court. Slip op. at 2. At trial on half-time defense motions, the court dismissed with prejudice 16 of 18 charges based on "problems of proof." Slip op. at 3. The jury acquitted Bykov on

one of the remaining counts of harassment, leaving him guilty of only one count of harassment based on an email sent to Brian Fresonke. Slip op. at 3; CP 28, 59, 149, 172-75. As part of Bykov's suspended sentence, the court ordered Bykov to "not use any device connected to the internet." CP 60.

Bykov filed a pro se application for writ of habeas corpus pursuant to chapter 7.36 RCW. CP 1-7. Bykov argued the sentencing condition prohibiting Internet access was an unconstitutional restriction on his right to free speech. CP 4-5, 13-14. The superior court denied the writ, concluding, "Inasmuch as the basis for petitioner's conviction was an email he sent to the victim, prohibiting petitioner from further use of the instrumentality of his crime is neither unreasonable nor unconstitutional. The constitutional rights of a convicted defendant are subject to reasonable restrictions to protect the public. Petitioner's ability to use a telephone or mail to contact his lawyer and to use a law library for legal research is not impaired. Petitioner has ample and adequate substitutes for use of the internet." CP 155-56.

On appeal, Bykov continued to argue the Internet ban violated his right to free speech. See Amended Brief of Appellant; Reply Brief; Motion to Reconsider. The Court of Appeals affirmed, claiming a total ban on Internet access is appropriate when the Internet is used as an instrument of a crime. Slip op. at 1, 9; App. B.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW IS WARRANTED BECAUSE THE PROPRIETY OF A CATEGORICAL BAN ON INTERNET ACCESS AS A SENTENCING CONDITION PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND IS OF SUBSTANTIAL PUBLIC IMPORTANCE.

The Internet is a ubiquitous presence in 21st century life. Devices connected to the Internet, including phones, are legion. The Internet is now a primary means of expressing and receiving protected speech. The court order prohibiting Bykov from accessing any device connected to the Internet strikes at the heart of his right to freedom of speech, freedom of association, and freedom to receive information under the First Amendment of the United States Constitution and article I, section 5 of the Washington Constitution. The sentencing condition is unconstitutional because it is neither reasonably necessary nor narrowly drawn to protect a compelling state interest.

Bykov challenged the sentencing condition by writ of habeas corpus under chapter 7.36 RCW. CP 1-7. "Under RCW 7.36.140 this court is required to determine whether or not the petitioner has been denied a right guaranteed by the federal constitution." Smith v. Whatcom County Dist. Court, 147 Wn.2d 98, 113, 52 P.3d 485 (2002). Whether the fundamental right to free speech exercised over the Internet is sacrificed

whenever a person uses the Internet to commit a crime is a significant question of constitutional law calling for review under RAP 13.4(b)(3). Further, the issue is bound to recur with increasing frequency because the Internet is now such a pervasive means to communicate with others and its use continues to increase. Bykov's case therefore presents an issue of substantial public interest warranting review under RAP 13.4(b)(4).

a. The Internet Ban Does Not Survive Strict Scrutiny.

A convicted defendant's constitutional rights are subject to infringement. State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). But the infringements themselves must be constitutional. "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.'" Rainey, 168 Wn.2d at 374 (quoting State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). Crime-related prohibitions affecting fundamental rights must therefore be narrowly drawn. Warren, 165 Wn.2d at 34. "There must be no reasonable alternative way to achieve the State's interest." Id. at 34-35.

The Internet is "the most participatory form of mass speech yet developed." Reno v. American Civil Liberties Union, 521 U.S. 844, 863, 117 S. Ct. 2329, 138 L. Ed. 2d. 874 (1997) (quoting American Civil Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996)). It provides relatively unlimited capacity for communication of all kinds. Reno, 521 U.S. at 870. "'Computers and Internet access have become virtually indispensable in the modern world' and their permeation of all aspects of our lives is increasing exponentially." United States v. Voelker, 489 F.3d 139, 148 n.8 (3d Cir. 2007) (quoting United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001)).

It has been 20 years since this Court addressed a computer prohibition as part of a sentence. State v. Riley, 121 Wn.2d 22, 36-38, 846 P.2d 1365 (1993). At that time, the Internet was in its infancy. The Court upheld a sentencing prohibition on computer possession and bulletin board access against a self-proclaimed hacker whose use of the computer was an intrinsic, indispensable part of computer trespass crimes. Riley, 121 Wn.2d at 37-38. The Court in Riley did not even recognize the existence of the Internet.

It is time for this Court to address whether a categorical ban on Internet access is constitutionally justified based on the mere fact that the Internet was an incidental instrument of the crime perpetrated. Sensitive

imposition of a condition affecting the ability to exercise the fundamental right to free speech through the Internet requires recognition of the sheer breadth of speech activity that a complete ban on Internet access entails in the 21st century.

The Internet ban in Bykov's case is unconstitutional because it is not narrowly tailored to protect the victim from further harassment. Protecting victims of crime from future harm is a compelling state interest. Rainey, 168 Wn.2d at 377. Courts routinely and appropriately impose no-contact orders as part of a sentence to achieve that interest. See, e.g., id. at 377-80; Warren, 165 Wn.2d at 31-32; State v. Noah, 103 Wn. App. 29, 41, 9 P.3d 858 (2000), review denied, 143 Wn.2d 1014, 22 P.3d 802 (2001); State v. Armendariz, 160 Wn.2d 106, 120, 156 P.3d 201 (2007) (trial courts may impose crime-related prohibitions, including no-contact orders, for a term of the maximum sentence to a crime).

The municipal court in Bykov's case imposed a no contact condition that prohibited Bykov from contacting Fresonke. CP 60. The no contact provision of the sentence is narrowly drawn. Its existence shows there are reasonable alternative ways to achieve the state's interest short of a complete ban on Internet use. The Internet ban is overkill. Bykov's sentence already contains an order that effectively covers what the Internet ban seeks to accomplish. See United States v. Riley, 576 F.3d

1046, 1049-50 (9th Cir. 2009) (striking down Internet restriction where other sentencing conditions validly prohibited same kind of criminal conduct the Internet ban was meant to achieve).

Unlike the inveterate computer hacker in Riley, 121 Wn.2d 22 supra, Bykov did not commit a crime that intrinsically relied on the medium itself for its accomplishment. The commission of harassment via email was incidental to the crime. Harassment may be committed through many means. Sending an email is one means. Uttering a threat in person, over the telephone, or in a letter are others. There is nothing special about the crime of harassment that links it to Internet use. Furthermore, there is no basis in this case to conclude that an Internet ban was necessary to discourage communication with others who would support and encourage Bykov to commit a new crime of harassment. This is another factor that separates Bykov's case from this Court's decision in Riley.

The Court of Appeals believes a total ban on Internet access is appropriate when the Internet is used an instrument of a crime. Slip op. at 9. That approach is too blunt and does disservice to the importance of the fundamental right at stake. This Court has cautioned sentencing conditions affecting fundamental rights must be "sensitively" imposed. Rainey, 168 Wn.2d at 374. Merely focusing on whether the Internet is an instrument used to commit a crime is far too simplistic in deciding

whether an Internet restriction is permissible. United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002).

Suppose Bykov harassed Fresonke by means of a written letter sent through the United States Postal Service. Would the sentencing court have been justified in prohibiting Bykov from using the mails? Suppose Bykov uttered a true threat over the telephone instead of making one in an email. Could the sentencing court constitutionally prohibit Bykov from talking on the telephone? Suppose Bykov had walked up to someone and uttered a true threat in person. Could the sentencing court constitutionally prohibit Bykov from personally speaking to anyone as a means to prevent further harassment?

The answer is no. See Peterson, 248 F.3d at 83 (in striking down Internet ban, reasoning "[a]lthough a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones. Nor would defendant's proclivity toward pornography justify a ban on all books, magazines, and newspapers."); Sofsky, 287 F.3d at 126 (in striking down Internet ban, reasoning a prohibition on the use of the mails imposed on a defendant convicted of mail fraud would not pass muster); Voelker, 489 F.3d at 145 (Internet ban was the functional equivalent of prohibiting a defendant who pleads guilty to possession of magazines containing child pornography

from possessing any books or magazines of any type); United States v. White, 244 F.3d 1199, 1207 (10th Cir. 2001) ("Given the openness of cyberspace, if the court instead chooses to prohibit Mr. White's using any computer, we must caution against this broad sweep under the facts and circumstances here. The communication facilitated by this technology may be likened to that of the telephone. Its instant link to information is akin to opening a book."); United States v. Holm, 326 F.3d 872, 879 (7th Cir. 2003) (while parolees typically have fewer constitutional rights than ordinary persons, a strict Internet ban was "the early 21st century equivalent of forbidding all telephone calls, or all newspapers.").

Why should use of the Internet be treated any differently? Internet access is worthy of more protection, not less, because it has become a vast repository of free speech in the 21st century, as well as a ubiquitous means of engaging in speech and receiving information. The Internet prohibition prevents Bykov from accessing or engaging in a whole range of constitutionally protected speech that has nothing at all to do with the crime for which he was convicted.

"[I]n a time where the daily necessities of life and work demand not only internet access but internet fluency, sentencing courts need to select the least restrictive alternative for achieving their sentencing purposes." United States v. Albertson, 645 F.3d 191, 200 (3d Cir. 2011).

Astonishingly, the Court of Appeals relies on the importance of the Internet as an everyday means to express and receive free speech as a reason to ban it. Slip op. at 9-10.

The complete ban on Internet use is the antithesis of a narrowly tailored infringement on the fundamental free speech right. In addition to imposing a no contact order, there are other ways short of an absolute ban on Internet access to achieve the state's interest in preventing further victimization. Reasonable alternatives short of a complete Internet ban exist. Such alternatives include (1) conditioning Internet access on a supervision officer's permission; (2) allowing Internet usage but prohibiting e-mail usage. The Court of Appeals ignored these alternative ways of achieving the state's interest.

b. A Sentencing Court Cannot Rely On Alleged Facts Attached To Charges For Which There Is No Conviction And Which Have Not Otherwise Been Proven By A Preponderance Of The Evidence.

In holding the Internet ban is constitutional, the Court of Appeals relied on facts attached to the many charges for which Bykov was not convicted and which were not found to be proven by a preponderance of the evidence. Slip op. at 1-2, 10. The Court of Appeals decision conflicts with the requirements of due process and United States Supreme Court precedent. U.S. Const. Amend XIV; United States v. Watts, 519 U.S. 148,

156, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997). Review is warranted under RAP 13.4(b)(1) and (b)(3).

"Although facts at sentencing need not be proved beyond a reasonable doubt, fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). "Information relied upon at sentencing 'is false or unreliable' if it lacks 'some minimal indicium of reliability *beyond mere allegation.*'" Ford, 137 Wn.2d at 481 (quoting United States v. Ibarra, 737 F.2d 825, 827 (9th Cir.1984)) (internal quotation marks omitted).

The facts alleged in the certificate of probable cause, Fresonke's pre-trial interview and the police report do not rise above mere allegation because Bykov was not convicted of any of the charges to which those factual allegations attached. Bykov was not convicted of these additional charges because the City was unable to prove the alleged offenses happened: Bykov was acquitted of one offense by the jury and the other additional charges were dismissed on half-time motion due to "proof problems," i.e., insufficient evidence to take the matter to the jury. Slip op. at 3; CP 28, 59, 172-75. It is a perversion of due process to allow a

sentencing condition that restricts a fundamental constitutional right to be based on facts connected to other charges that could not be proven.

It is true that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Watts, 519 U.S. at 156. In Bykov's case, the conduct for which he was acquitted or for which the charges were dismissed based on insufficient evidence were not found proven by a preponderance of evidence or any other standard. See People v. Black, 33 A.D.3d 338, 343, 821 N.Y.S.2d 593 (N.Y.A.D. 2006) ("Critically, no finding has been made by a preponderance of the evidence that defendant committed two unjustified shootings. Accordingly, because the conduct of which defendant was acquitted was improperly considered by the sentencing court, a remand for resentencing is required."). There is therefore no basis for any court to rely on those alleged facts to justify the challenged sentencing condition here.

The determination of probable cause at the probable cause hearing does not amount to a preponderance of the evidence finding on any conduct for which Bykov was not convicted. CP 23. Trial standards of proof such as preponderance of the evidence do not apply to probable cause determinations because courts do not weigh evidence to determine

probable cause. In re Detention of Petersen, 145 Wn.2d 789, 797-98, 42 P.3d 952 (2002). Trial standards of proof only apply to "determinations on the merits after a full presentation of all the evidence where that evidence can be weighed and disputes can be resolved by the fact finder." Petersen, 145 Wn.2d at 797-98.

Bykov, meanwhile, did not acknowledge the truth of any additional factual allegations by attaching the probable cause hearing and pre-trial interview transcripts, or a police report, to his petition for writ of habeas corpus. CP 18-23, 43-54, 56-57. Bykov, acting pro se at the time, attached those things to his petition as a basis to argue the trial court erred or defense counsel was ineffective in failing to admit these items into evidence. CP 2-4. According to Bykov, those sources showed Fresonke was not telling the truth based on inconsistent statements or conduct, and the failure to admit those inconsistencies into evidence prevented Bykov from creating a reasonable doubt on the single conviction for which he was convicted. Id.

The attorney representing Bykov at argument before the superior court on the petition, and the City attorney himself, addressed the significance of those extra-evidentiary sources exclusively in that context. RP 7-8, 15-16. The City argued the sentencing condition was proper based on the email sent by Bykov that formed the basis for his conviction.

RP 19. The City did *not* argue the additional factual allegations contained in the probable cause transcript, pre-trial interview transcript, or police report should be taken into account in determining the constitutionality of the sentencing condition. RP 19; CP 170.

The superior court's findings of fact and conclusions of law on the habeas petition track the limited purpose for which those items were introduced. CP 150-54. The superior court based its decision on the single email that formed the basis for Bykov's sole conviction: "Inasmuch as the basis for petitioner's conviction was an email he sent to the victim, prohibiting petitioner from further use of the instrumentality of his crime is neither unreasonable nor unconstitutional." CP 155. The superior court did not rely on additional factual allegations that were never proven to deny Bykov's challenge to the sentencing condition, nor could it have done so consistent with due process. CP 155-56. The Court of Appeals did rely on additional factual allegations that were never proven to justify the Internet ban. That is a violation of due process.

F. CONCLUSION

For the reasons stated above, Bykov respectfully requests that this Court grant review.

DATED this 7th day of October 2013.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

VLADIK BYKOV, Appellant, v. HONORABLE STEVEN ROSEN and CITY OF SEATTLE, Respondents.	)	No. 68321-7-I DIVISION ONE UNPUBLISHED OPINION FILED: August 12, 2013

BECKER, J. — At issue is a sentencing condition that prohibits appellant, who was convicted in municipal court of misdemeanor harassment, from using the Internet during the 343-day period of his suspended sentence. We conclude the prohibition is not an unconstitutional infringement on his free speech rights.

According to pleadings on file with the superior court, the present appeal arises from appellant Vladik Bykov's interactions with attorney Brian Fresonke. Fresonke represented Bykov's neighbor, a Seattle police officer, when the officer was sued by Bykov in 2010 for intentional infliction of emotional distress. The neighbor prevailed when the court dismissed Bykov's suit and entered a judgment of $1,600 in attorney fees against Bykov.

Bykov appealed. While the appeal was pending, Bykov began sending threatening e-mails to Fresonke. Fresonke contacted police. Police arrested Bykov on November 8, 2010. At a probable cause hearing in King County District Court the following day, Fresonke informed the court that for about six

months, Bykov had been sending him e-mails containing "thinly veiled threats of physical violence."

> Mr. Bykov made an express threat that I am going to end up like Rasputin. And he specifically mentioned a dagger. He told me there is still time if I wish to atone . . . . He said if I would vacate the judgment there will not be bad consequences. He said just because . . . my office is on the 32nd floor of my building that doesn't mean I'm safe from harm.

According to Fresonke, Bykov had sent him threatening e-mails attaching photographs of Fresonke's father and his father's home, filed a frivolous state bar complaint against Fresonke, and opened fraudulent e-mail accounts under Fresonke's name. From these accounts, according to Fresonke, Bykov sent messages to third parties and a number of Seattle law firms describing Fresonke as "armed and dangerous" and claiming that he was an "income tax evader."

The district court found probable cause for misdemeanor harassment and set bail at $25,000. Bykov was released from custody three days after his arrest, on November 11, 2010, when a relative posted his bail.

No criminal charges were filed against Bykov until February 2011, when the City of Seattle filed a criminal complaint in Seattle Municipal Court. The City alleged one count of cyberstalking under RCW 9.61.260, which occurred by means of an "electronic communication" sent by Bykov between July 26, 2010, and November 5, 2010, and one count of harassment under Seattle Municipal Code 12A.06.040, occurring on November 4, 2010.

In June 2011, the City filed an amended criminal complaint, charging 13 counts of cyberstalking and 5 counts of harassment. The cyberstalking charges

identified 12 electronic faxes sent anonymously to Fresonke's associates in the legal community and a fictitious web site created under Fresonke's name. The City alleged the web site was created on or before the date of Bykov's arrest on November 8, 2010, and reflected further changes made on November 11, 2010, the date Bykov was released from jail. The harassment charges identified four e-mails Bykov sent to Fresonke between September 17 and November 4, 2010, and a photograph Bykov allegedly took of Fresonke's father's home.

A jury trial lasting four days was held in municipal court in October 2011. On half-time defense motions, the court dismissed with prejudice 16 of the charges based on problems of proof. This left only two harassment charges for the jury, based on e-mails Bykov sent to Fresonke on November 2 and 4, 2010. The jury found Bykov guilty of one count of harassment based on the November 4 e-mail.

Bykov was sentenced to 364 days, 21 of which were to be served in jail immediately. The remaining 343 days were suspended. A suspended fine of $5,000 was imposed. The municipal court entered a number of conditions of the suspended sentence, including a mental health diagnosis and treatment, no contact with the victim, and a general prohibition on Internet use: "Do not use any device connected to the internet, be subject to search by probation, and cooperate by providing access."

Bykov, through counsel, filed a direct appeal to King County Superior Court. Acting pro se, he also petitioned for a writ of habeas corpus. He argued,

among other theories, that the Internet condition was an unconstitutional restraint on speech that denied him his right to counsel. He had been communicating with his attorney by e-mail, and he relied on the Internet to conduct legal research.

> It is unfair to prohibit Petitioner from using the Internet when he needs to do legal research and communicate with counsel. The prohibition is no different than a prohibition against using the U.S. Mail for communication.

In a declaration supporting his petition, Bykov explained that his attorney was slow to respond to voice messages because she did not have time to communicate "in real time over telephone," but she responded quickly to his e-mails. Over six months, he said, he had exchanged over 500 e-mail messages with his attorney and had communicated with her "as early as 6 am and as late as 12 am midnight." He claimed to have no way to exchange documents with his attorney other than by e-mail. He argued that requiring him to go to a brick and mortar law library to conduct his own legal research amounted to a "complete prohibition of access to the law" because there was not a law library near his home.

> As a practical matter, I have been denied access to legal material. It's simply impractical to research law other than through the Internet – unless one is rich and can afford to purchase the case books. And, taking a one and half hour trip to the library to look at a case or two – when the information is needed quickly – is effectively a complete prohibition of access to the law.

Bykov's habeas petition was consolidated with his direct appeal. The superior court heard argument in December 2011. Appointed counsel appeared for Bykov at the hearing. Bykov argued he was being singled out among

defendants found guilty of harassment by being completely prohibited from using the instrumentality he used to commit the crime:

> Normally when a person makes the crime of harassment, they say something to somebody . . . and never have I seen a judge order that person then not be able to talk to anybody. They haven't silenced them like that. And . . . what Judge Rosen has done by putting that condition on is silencing Mr. Bykov by not allowing him to get on the computer.

He also argued the prohibition should be lifted because it was not convenient: "Mr. Bykov . . . lives far away and going to a law library is not convenient. Getting onto a computer is convenient."

The superior court entered findings of fact and conclusions of law denying Bykov's habeas petition. In conclusion of law 5, the court ruled that the Internet prohibition was a reasonable restriction to protect the public and that it was not a meaningful barrier to conducting legal research or communicating with his attorney:

> 5. Inasmuch as the basis for petitioner's conviction was an e-mail he sent to the victim, prohibiting petitioner from further use of the instrumentality of his crime is neither unreasonable nor unconstitutional.[See State v. Riley, 121 Wn.2d 22, 36-38, 846 P.2d 1365 (1993) (sentence condition imposed on defendant convicted of Computer Trespass prohibiting owning computer or communicating with computer bulletin boards not unreasonable or unconstitutional).] The constitutional rights of a convicted defendant are subject to reasonable restrictions to protect the public.[State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000) (prohibition on using computer not unconstitutional).] Petitioner's ability to use a telephone or mail to contact his lawyer and to use a law library for legal research is not impaired. Petitioner has ample and adequate substitutes for use of the internet.

Bykov appeals from the superior court's decision to deny his petition for

habeas corpus. He requests relief in the form of striking the Internet restriction from his municipal court sentence.

Bykov contends the Internet restriction is an unlawful restraint because it infringes on his rights to freedom of speech, freedom of association, and freedom to receive information under the First Amendment of the U.S. Constitution and article I, section 5 of the Washington Constitution.

A person may prosecute a writ of habeas corpus in the superior court to challenge the lawfulness of government restraint. RCW 7.36.010; In re Pers. Restraint of Becker, 96 Wn. App. 902, 903, 982 P.2d 639 (1999), aff'd, 143 Wn.2d 491, 20 P.3d 409 (2001). This court reviews de novo the superior court's decision whether to grant a writ of habeas corpus. Butler v. Kato, 137 Wn. App. 515, 520-21, 154 P.3d 259 (2007). Review of constitutional questions is de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

Bykov's first argument is that the Internet restriction is impermissible as a prior restraint. Because the restriction on Bykov is a sentencing condition, it is not susceptible to analysis as a prior restraint. Rather, it belongs in that genre of cases where courts have considered the constitutionality of sentencing conditions that to some extent restrict a convicted defendant's future speech. See, e.g., Riley, 121 Wn.2d at 37-38; Combs, 102 Wn. App. at 953.

Bykov's second argument is that the Internet restriction is unconstitutional because it is not the least restrictive means of achieving the government's interest and therefore does not survive strict scrutiny. State interference with

fundamental rights is subject to strict scrutiny. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008), citing Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), cert. denied, 129 S. Ct. 2007 (2009). Sentencing conditions that interfere with fundamental constitutional rights must be reasonably necessary to accomplish the essential needs of the State and public order. Warren, 165 Wn.2d at 32; In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

The appropriate standard of review for a sentencing condition is abuse of discretion, even where the sentencing condition infringes on a fundamental right. Rainey, 168 Wn.2d at 374. Rainey involved a lifetime no contact order between the appellant, convicted of first degree kidnapping, and his daughter, the kidnapping victim. He argued the order infringed on his fundamental parenting rights. The court held that even in such a case, where a sentencing condition interferes with a right as fundamental as the right to contact one's children, abuse of discretion remains the appropriate standard of review.

> Our prior case law has not definitively set forth the standard of review for a trial court's imposition of crime-related prohibitions. We generally review sentencing conditions for abuse of discretion. But we 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. Such conditions must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny. *Nevertheless,* 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, *the appropriate standard of review remains abuse of discretion.*

Rainey, 168 Wn.2d at 374-75 (emphasis added) (citations omitted).

Thus, while freedom of speech is a fundamental right, see Collier v. City of Tacoma, 121 Wn.2d 737, 745, 854 P.2d 1046 (1993), a trial court does not necessarily abuse its discretion by imposing some infringement upon speech as a sentencing condition. Bykov states his constitutional arguments in the abstract, citing many cases outside the context of criminal law. Most of his brief ignores the well-settled principle that a convicted defendant's constitutional rights are subject to infringement. State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). An offender's usual freedom of association may be restricted if the restriction is reasonably necessary to accomplish the needs of the State and public order. State v. Bobenhouse, 143 Wn. App. 315, 332, 177 P.3d 209 (2008), aff'd, 166 Wn.2d 881, 214 P.2d 907 (2009). A sentencing condition "may prohibit a defendant's access to a means or medium through which he committed a crime." Rainey, 168 Wn.2d at 380, citing Riley, 121 Wn.2d at 37-38. "Limitations upon fundamental rights are permissible, provided they are imposed sensitively." Riley, 121 Wn.2d at 37; see also Combs, 102 Wn. App. at 953.

In Riley, the defendant was convicted of computer trespass. Conditions of his sentence prohibited him from owning a computer, associating with computer hackers, or communicating with computer bulletin boards—precursors to the Internet. Riley, 121 Wn.2d at 36. Our Supreme Court rejected the defendant's constitutional free speech arguments, and affirmed the conditions as reasonably related to the defendant's crime and as a reasonable means of discouraging

repeat offenses. Riley, 121 Wn.2d at 37-38.

Similarly, in Combs, the defendant was convicted of child molestation after using a computer in the course of his crime to show pornographic images to his victims and then requiring them to repeat the postures. Combs, 102 Wn. App. at 953. A sentencing condition prohibited him from using computers during his period of community supervision. The court rejected the defendant's arguments that this condition unconstitutionally infringed on his rights to free speech and expressive conduct. Combs, 102 Wn. App. at 953.

Bykov argues his case is factually distinct from Riley because in that case, the crime of computer trespass, by definition, could only be carried out by using a computer. Bykov argues that his own use of the Internet was only incidental to his conviction for harassment, a crime that may be committed without using a computer. This argument is not compelling. By his own account, Bykov was an avid user of the Internet who relied on the Internet's enabling of instant, immediate communication, 24 hours a day—for example, he claims he relied on this immediacy and frequency of communication for purposes of effectively communicating with this attorney. Bykov committed his crime using the Internet. Restricting him from further access to the instrumentality of his crime during his supervisory period was reasonably related to his crime, and it was a reasonable means of discouraging repeat offenses.

Bykov attempts to distinguish Riley and Combs by arguing that the Internet is more central to everyday life now than when those cases were

decided. But this fact only increases the Internet's potential as a tool for harassment. It lends support to the court's decision to prohibit Bykov's use of it while serving his suspended sentence.

At oral argument, Bykov argued for the first time that in measuring the reasonable necessity of the sentencing condition, this court may consider only the single e-mail for which Bykov was convicted of harassment.

This argument was raised too late to warrant our consideration. Unless we order otherwise, we must "decide a case only on the basis of issues set forth by the parties in their briefs." RAP 12.1. Where an issue is not raised until oral argument, it is not properly before the court and need not be considered. State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 893 n.3, 969 P.2d 64 (1998); State v. Johnson, 119 Wn.2d 167, 170-71, 829 P.2d 1082 (1992).

The municipal court's prohibition of Internet use during the suspended sentence satisfies the standard applied in Riley and Combs. Imposing this condition was not an abuse of discretion. The superior court properly denied Bykov's petition for a writ of habeas corpus.

Affirmed.

Becker, J.

WE CONCUR:

Cox, J.

APPENDIX B

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

VLADIK BYKOV, Appellant, v. HONORABLE STEVEN ROSEN and CITY OF SEATTLE, Respondents.	No. 68321-7-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Vladik Bykov, has filed a motion for reconsideration of the opinion filed August 12, 2013; and the court has determined that said motion should be denied;

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DONE this 6th day of September, 2013.

FOR THE COURT:

Becker, J.

Judge

IN THESUPREME COURT OF THE STATE OF WASHINGTON

VLADIK BYKOV, Petitioner, vs. HONORABLE STEVEN ROSEN, Respondent.	)))))))))	SUPREME COURT NO. _____ COA NO. 68321-7-I

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 7TH DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VLADIK BYKOV
14156 91ST CT NE
BOTHELL, WA 98011

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF OCTOBER 2013.

X Patrick Mayovsky