69326-3

69326-3

No. 69326-3

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

STATE OF WASHINGTON,

Respondent,

v.

DARREN PATRICK BARKER,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

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

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A. SUMMARY OF ARGUMENT

Darren Barker was charged with one count of second degree child molestation for allegedly having sexual contact with his step-daughter. At trial, the court permitted the jury to hear that Mr. Barker had possessed images of "incest-related pornography" on his computer. The court's ruling was erroneous because the evidence was categorically forbidden by ER 404(b). In a prosecution for child molestation, a court may not admit evidence that the accused possessed pornography, unless the pornography is somehow connected to the alleged victim of the current charge. Because there was no such connection in this case, the inflammatory evidence merely encouraged the jury to draw the improper conclusion that Mr. Barker *must* have committed the charged crime because of his apparent interest in incestuous sex. The erroneous admission of the evidence in violation of ER 404(b) requires reversal.

In addition, the condition of community custody entirely barring Mr. Barker from using the internet must be stricken because there is no evidence that Mr. Barker used the internet to facilitate commission of the crime, and because the condition unreasonably curtails his First Amendment rights.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting evidence that Mr. Barker possessed "incest-related pornography."

2. The condition of community custody barring Mr. Barker from using the internet is not statutorily authorized because it is not "crime-related."

3. The condition of community custody barring Mr. Barker from using the internet is unconstitutionally overbroad.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court may not admit evidence that the defendant possessed pornography in a prosecution for child molestation unless the pornography is somehow connected to the alleged victim of the current charge. Did the trial court abuse its discretion in admitting evidence that Mr. Barker possessed "incest-related pornography," where the pornography had no connection to the alleged victim of the current charge?

2. A trial court is statutorily authorized to impose "crime-related prohibitions" only if they are directly related to the circumstances of the crime. A condition barring internet use is "crime-related" only if the defendant used the internet to facilitate commission

of the crime. Did the court err in barring Mr. Barker from using the internet as a condition of community custody where he did not use the internet to facilitate commission of the crime?

3. A person on community custody has a First Amendment right to access and distribute written and visual material on the internet. A condition of community custody infringing on this right is constitutional only if the condition is narrowly tailored and sensitively imposed, and only if there are no reasonable alternative ways to protect the public. Is the condition of community custody completely barring Mr. Barker from using the internet unconstitutionally overbroad, where the record does not show such a sweeping prohibition is necessary to protect the public?

D. STATEMENT OF THE CASE

Mr. Barker and Michelle Hutcheson were married in 1997. 8/07/12RP 26. The couple had three children together. 8/07/12RP 25. Ms. Hutcheson also had an older daughter, C.B., with her previous husband. 8/07/12RP 25. In Spring 2007, the couple and their four children were living together in Darrington, Washington 8/07/12RP 27.

Mr. Barker acted like a father to C.B. and the two generally got along well. 8/07/12RP 28, 88. C.B. felt Mr. Barker did not give her enough privacy, however. 8/07/12RP 90-93. Sometimes he would walk into her bedroom, which did not have a door, without knocking, or into the bathroom while she was taking a shower. Id. He also sometimes grounded her for things for which other kids would not have got in trouble. 8/07/12RP 136.

In late March 2007, when C.B. was 13 years old, Ms. Hutcheson took the youngest child to Texas for a week for her grandmother's funeral. 8/07/12RP 30, 84. The other children stayed home with Mr. Barker. Id. The night before Ms. Hutcheson returned home, she called the house several times but no one answered. 8/07/12RP 31. After a while, Mr. Barker picked up the phone. Id. He told his wife he had been talking to C.B. about sex and had the girl look at her private parts in a hand mirror. 8/07/12RP 31-32. He admitted his behavior was inappropriate and he had gone "overboard." Id. Ms. Hutcheson was angry and confused because the couple had agreed it was not Mr. Barker's place to teach C.B. about sex. 8/07/12RP 29. Ms. Hutcheson then talked to C.B., who said she was fine and did not say anything more had happened. 8/07/12RP 32.

When Ms. Hutcheson got home, she talked to Mr. Barker and C.B. again about the incident. Both Mr. Barker and C.B. said he was in the room with C.B. while he had her look at herself in the mirror. 8/07/12RP 34. They both said her clothing was off but his remained on. 8/07/12RP 34. Neither one said anything more had happened.

A few weeks later, Mr. Barker's employer discovered he had been accessing "incest-related pornography" on his work computer. 8/07/12RP 145; 9/12/12RP 94. CPS and the police were notified and, after talking with the family members, investigators learned about the March incident. C.B. and Mr. Barker again explained that Mr. Barker had C.B. take off her clothes and look at her private parts in a hand mirror while he talked to her about sex; they both said he did not touch her. 8/07/12RP 111; 8/08/12RP 9.

The family entered an agreed safety plan and Mr. Barker left the home for several months. 8/07/12RP 36. In December 2009, long after Mr. Barker had returned home, Ms. Hutcheson again asked C.B. about the March 2007 incident. 8/07/12RP 40. This time, C.B. said Mr. Barker touched her private parts while he had her look at herself in the hand mirror. 8/07/12RP 114. At trial, C.B. said she told her mother in December 2009 that Mr. Barker had touched her because at around that

time, he had begun to make her uncomfortable by giving her gifts and making comments about how attractive she was. 8/07/12RP 115.

Ms. Hutcheson called police. 8/07/12RP 42. The State charged Mr. Barker with one count of second degree child molestation, RCW 9A.44.086.[1] CP 7-8.

Prior to trial, defense counsel moved to exclude any reference to Mr. Barker viewing pornography on his work computer. CP 28. There was no evidence that the images were of children. CP 3, 28. The State did not object. CP 38. The court granted the motion and excluded "any evidence about pornography on the computer." 8/06/12RP 6.

At trial, C.B. testified that during the March 2007 incident, Mr. Barker told her to try on some clothes they had received from a friend. 8/07/12RP 94. He insisted she try on the clothes in front of him. 8/07/12RP 96. When she refused, he took off her clothes, took a mirror from the nightstand, and had her look at herself between her legs. 8/07/12RP 101-04. He touched her private parts in about five different places while instructing her on the purpose of each part. 8/07/12RP 104. He did not take off his own clothes. 8/07/12RP 106. C.B. could not tell if he had an erection. 8/07/12RP 106.

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[1] The State also charged and convicted Mr. Barker of one count of bail jumping. That conviction is not at issue in this appeal.

After C.B.'s testimony, outside the presence of the jury, the prosecutor requested the court reconsider its earlier ruling and admit evidence that Mr. Barker had viewed "incest-related pornography" on his work computer. 8/07/12RP 145. The prosecutor argued the evidence was relevant to show Mr. Barker acted for the purpose of sexual gratification.[2] 8/07/12RP 146. Defense counsel strenuously objected and argued this was inadmissible propensity evidence. 8/07/12RP 146. The court overruled the objection, finding the relevance of the evidence outweighed its potential for prejudice. 8/07/12RP 148-49.

Subsequently, a police detective testified, again over defense objection, that Mr. Barker told him he had viewed what Mr. Barker believed was "incest-related pornography" on the internet. 8/08/12RP 10-11.

The jury found Mr. Barker guilty as charged of second degree child molestation. CP 59.

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[2] To prove the charged crime of second degree child molestation, the State was required to prove that Mr. Barker had "sexual contact" with C.B., which required the State to prove that he touched her "sexual or other intimate parts . . . for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(c)(2), .086(1).

E. ARGUMENT

1. **The trial court erred in admitting inflammatory evidence that Mr. Barker viewed "incest-related pornography" on his computer because the evidence was relevant only for the improper purpose of showing he had a predisposition to commit incest**

a. ER 404(b) categorically excludes evidence that the accused possessed child pornography in a prosecution for child molestation, unless the evidence is connected to the particular alleged victim of the current charge.

In State v. Sutherby, 165 Wn.2d 870, 884-86, 204 P.3d 916 (2009), the Washington Supreme Court held that, in a prosecution for child molestation, evidence that the defendant possessed child pornography is inadmissible unless it shows a sexual desire for the particular alleged victim. Otherwise, such evidence is relevant only for the improper purpose of showing the defendant was predisposed to molest children. Therefore, it is categorically excluded by ER 404(b). Id.

ER 404(b)[3] prohibits the use of other misconduct evidence to prove the character of a person in order to show that he acted in

[3] ER 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes,

conformity with that character. Sutherby, 165 Wn.2d at 886. The evidence is excluded—even if it is relevant—because it is unfairly prejudicial. Id.; State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982) ("In no case, . . . regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show he acted in conformity therewith."). The rule is based on the fundamental notion that a defendant must be tried only for the offense charged. Sutherby, 165 Wn.2d at 886-87. A jury may not be permitted to infer that, since the accused committed some other offense, he must also have committed the crime for which he is being tried. United States v. Fosher, 568 F.2d 207, 212 (1st Cir. 1978).

In deciding whether other misconduct evidence is admissible, the trial court must determine if the evidence is logically relevant to a material issue other than propensity. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). The Washington Supreme Court has consistently and repeatedly insisted that trial courts be especially careful about excluding improper character evidence in sex abuse cases. See Sutherby, 165 Wn.2d at 886-87; State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984); Saltarelli, 98 Wn.2d at 363. That is

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such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

because "[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." Saltarelli, 98 Wn.2d at 363 (internal quotation marks and citation omitted). In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence. Sutherby, 165 Wn.2d at 886-87.

In a prosecution for child molestation, evidence that the accused possessed child pornography is excluded by ER 404(b) because it is generally relevant only to show the defendant's predisposition to molest children. Id. at 886. It may be admissible under limited circumstances to show the defendant's "lustful disposition" toward the particular alleged victim. Id.; State v. Medcalf, 58 Wn. App. 817, 822-23, 795 P.2d 158 (1990). But if the pornography has no connection with the alleged victim, it must be excluded. Medcalf, 58 Wn. App. at 822-23.

A trial court's interpretation of ER 404(b) is reviewed de novo as a matter of law. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets ER 404(b) correctly, the Court reviews the trial court's decision to admit misconduct evidence for an

abuse of discretion. Id. A trial court abuses its discretion if it fails to abide by the rule's requirements. Id.

b. The trial court erred in admitting evidence that Mr. Barker possessed "incest-related pornography" because the evidence had no connection to C.B.

Just as ER 404(b) precludes evidence that the accused possessed child pornography in a prosecution for child molestation, it also precludes evidence that the accused possessed "incest-related pornography" in a prosecution for child molestation where the alleged victim is the defendant's stepdaughter.

The evidence was not relevant to show Mr. Barker had a "lustful disposition" toward C.B. because it had no connection to C.B. See Medcalf 58 Wn. App at 822-23. There is no evidence that Mr. Barker possessed any pornographic images of C.B. Apparently, the pornography he viewed involved images of adults, not children. CP 3, 28. There is no evidence that C.B. ever viewed the pornography or knew anything about it.

Instead, the evidence was relevant only for the improper purpose of showing that Mr. Barker had a predisposition to commit incest. See Sutherby, 165 Wn.2d at 886-88. The prosecutor explicitly stated that this was the reason why she offered the evidence. The

prosecutor argued that the evidence was relevant because it showed "[Mr. Barker] is interested in incest, and he is carrying it out." 8/07/12RP 146. The prosecutor's argument, and the trial court's decision to admit the evidence, contravened the fundamental principles underlying ER 404(b). Contrary to the prosecutor's argument, evidence of other acts of sexual misconduct is *not* admissible to show the accused had a particular deviant sexual interest that he acted upon in this particular case. Sutherby, 165 Wn.2d at 886-87; Saltarelli, 98 Wn.2d at 363. In sum, the trial court's decision to admit the evidence violated ER 404(b).

c. The trial court's error in admitting the inflammatory evidence was not harmless.

The erroneous admission of evidence in violation of ER 404(b) requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). Evidence of other sexual misconduct is particularly inflammatory and prejudicial in a prosecution for a sex offense. The Washington Supreme Court has not hesitated to reverse a sex offense conviction where evidence of other sexual misconduct was erroneously admitted. See, e.g., Gresham,

173 Wn. 2d at 433-34; Sutherby, 165 Wn.2d at 887; Saltarelli, 98 Wn.2d at 367.

In Gresham, a prosecution for child molestation, the trial court erroneously admitted evidence that the defendant had previously molested another child. 173 Wn.2d 405. The untainted evidence consisted of the alleged victim's testimony that Gresham molested her, her parents' corroboration that he had the opportunity to do so, and the investigating officer's testimony. Id. at 433-34. The Supreme Court held that, although this evidence was sufficient for the jury to convict, there was nonetheless a reasonable probability that absent the highly prejudicial other misconduct evidence, the jury's verdict would have been materially affected. Id.

In Sutherby, the defendant was convicted of first degree child rape and first degree child molestation for allegedly inserting his finger into his granddaughter's vagina. 165 Wn.2d at 874-85. He was also convicted of possession of child pornography for possessing images of children unrelated to his granddaughter. The Supreme Court held that defense counsel provided ineffective assistance of counsel for failing to move to sever the child rape and molestation counts from the child pornography counts. Id. at 884-87. Counsel's ineffective assistance

required reversal of the child rape and molestation convictions because, had the charges been severed and the evidence of child pornography not been admitted at a separate trial on the rape and molestation counts, there was a reasonable probability that the outcome of that separate trial would have been different. Id. at 887; see also Saltarelli, 98 Wn.2d at 367 (conviction for first degree rape reversed where trial court erroneously admitted evidence of defendant's prior sexual assault against a different woman).

Just as in Gresham, Sutherby, and Saltarelli, the erroneous admission of highly inflammatory evidence of other sexual misconduct was not harmless in this case. Once the jury learned that Mr. Barker possessed "incest-related pornography," they likely concluded—as the prosecutor intended—that he *must* have molested his stepdaughter due to his apparent interest in incestuous sex. There is a reasonable probability that, absent the improper evidence, the outcome of the trial would have been different. The remaining, untainted evidence consisted primarily of C.B.'s testimony that Mr. Barker touched her, which contradicted several of her earlier statements. At the same time, the evidence showed C.B. had a possible motive to fabricate the allegations so that Mr. Barker, who made her uncomfortable and

disciplined her harshly, would have to leave the home. Thus, the erroneous admission of evidence in violation of ER 404(b) was not harmless and the conviction must be reversed.

2. The condition of community custody barring Mr. Barker from using the internet must be stricken

At sentencing, the court imposed 36 months of community custody. CP 65. Over defense objection, the court imposed the following condition: "Do not have access to the Internet, or any social media on the internet, cell phone or other electronic devices without the permission from the Community Corrections Officer." CP 75. This condition must be stricken because it is not "crime-related" and because it unreasonably infringes Mr. Barker's First Amendment rights.

A court's sentencing conditions are reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). A sentencing court abuses its discretion in imposing a condition if it applies the wrong legal standard. Id. The court also abuses its discretion if it imposes a condition that is unconstitutional. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

a. The condition is not "crime-related" because Mr. Barker did not use the internet to facilitate commission of the crime.

When imposing a term of community custody following a criminal conviction, a court may order an offender to "[c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(f). 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). The philosophy underlying the "crime-related" provision is that offenders may be punished for their crimes and may be prohibited from doing things that are directly related to their crimes, but they may not be coerced into doing things that are believed to rehabilitate them. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993); David Boerner, Sentencing in Washington, §4.5, at 4-7 (1985).

A court may not prohibit an offender from using a computer or accessing the internet during community custody unless the offender used a computer or the internet to facilitate commission of the crime. In Riley, for example, Riley was convicted of three counts of computer trespass for "hacking" into the computer systems of two telephone companies. 121 Wn.2d at 27. As a condition of his sentence, the court

prohibited him from possessing a computer. Id. The Supreme Court held the condition was properly "crime-related" because "[a]llowing Riley to possess a computer would facilitate his commission of computer trespass in the future." Id. at 37. Also, prohibiting him from possessing a computer was a reasonable punishment for a "self-proclaimed hacker." Id.

Similarly, in State v. Combs, 102 Wn. App. 949, 951, 10 P.3d 1101 (2000), Combs was convicted of two counts of second degree child molestation. As a condition of community supervision, the court prohibited him from using computers. Id. at 953. This Court upheld the condition because Combs had used a computer to facilitate commission of the crimes. Combs had used a computer to show pornographic images to his victims and then required them to pose with him in the same positions they had just viewed on the computer. Id.

In contrast, in State v. O'Cain, 144 Wn. App. 772, 774, 184 P.3d 1262 (2008), the Court struck down a condition barring O'Cain from using the internet because there was no evidence that he used the internet to facilitate commission of the crime. O'Cain was convicted of second degree rape. As a condition of community custody, the court ordered him not to access the internet without the prior approval of his

supervising community corrections officer and sex offender treatment provider. Id. In striking the condition, the Court reasoned, "[t]here [was] no evidence that O'Cain accessed the internet before the rape or that internet use contributed in any way to the crime." Id. at 775. O'Cain did not use the internet to contact and lure a victim into an illegal sexual encounter. Id.

O'Cain requires that the community custody condition here also be stricken as not crime-related. There is no evidence that Mr. Barker used the internet to facilitate commission of the crime. He did not use the internet to contact C.B. or lure her into an illegal sexual encounter. He did not download pornography from the internet and show it to C.B. There is no evidence that he accessed the internet at all before the crime occurred.

The prosecutor argued the internet prohibition was appropriate because: (1) Mr. Barker had possessed "incest-related pornography" on his work computer, which he downloaded from the internet, and (2) he had read C.B.'s emails and then sent an anonymous email to his wife, referring to the content of C.B.'s emails, in an attempt to get C.B. in trouble. 9/12/12RP 94-95; CP 3-6. But both of these acts, even if they

occurred, took place *after* the March 2007 incident. They in no way facilitated commission of the crime.

Because the condition barring Mr. Barker from using the internet is not "crime-related," it must be stricken. State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 65 (1998).

b. The condition barring Mr. Barker from using the internet unreasonably infringes his First Amendment rights.

In general, the First Amendment[4] prevents government from proscribing speech or expressive conduct. State v. Halstien, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). Offenders on community custody have a right to access and transmit material protected by the First Amendment. See Bahl, 164 Wn.2d at 753).

Overbreadth analysis measures how statutes (or conditions of community custody) that prohibit conduct fit within the universe of constitutionally protected conduct. See Halstien, 122 Wn.2d at 121. A condition of community custody is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment. See id.

The Court carefully scrutinizes sentencing conditions that

[4] The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech."

interfere with fundamental constitutional rights. Rainey, 168 Wn.2d at 374. 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. They must be narrowly drawn and there must be no reasonable alternative way to achieve the State's interest. State v. Warren, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008).

Unlike statutes, conditions of community custody are not presumed valid. Bahl, 164 Wn.2d at 753.

The internet is unquestionably a critical medium for transmitting and receiving communications and expressive materials that are protected by the First Amendment. The internet is a "unique and wholly new medium of world-wide human communication" that "enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world." Reno v. Am. Civil Liberties Union, 521 U.S. 844, 850, 117 S. Ct. 2329, 138 L. Ed. 874 (1997) (internal quotation marks and citation omitted). It is a widely-accessible, low-cost, "dynamic, multifaceted category of communication," which encompasses content "as diverse as human thought." Id. at 870 (internal quotation marks and citation omitted).

Due to the crucial and widespread role the internet plays in enabling human communication, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." Id. The government may not regulate access to the internet in a manner that silences speakers whose messages are entitled to constitutional protection, unless it meets the heavy burden of demonstrating a compelling governmental need that could not be achieved through a less restrictive provision. See id. at 874, 879.

In determining whether a condition of probation barring a probationer from accessing the internet is overly broad, courts generally ask whether the condition involves a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct and protect the public. United States v. Freeman, 316 F.3d 386, 391-92 (3d Cir. 2003). Courts examine the length and breadth of the prohibition, as well as the nature and severity of the offender's underlying conduct. United States v. Maurer, 639 F.3d 72, 83 (3d Cir. 2011). A total ban on internet access is particularly likely to encroach unreasonably on protected liberties because such a ban "prevents use of e-mail, an increasingly widely used for of communication and . . . prevents other common-place computer uses such as 'do[ing] any

research, get[ting] a weather forecast, or read[ing] a newspaper online.'" United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002) (citation omitted).

In cases where an offender was convicted of a sexual offense involving a minor, courts will generally strike down a probation condition barring internet access as overly broad if the offender did not use the internet to facilitate commission of the crime or for another illegal purpose. See United States v. Burroughs, 613 F.3d 233, 242-43 (D.C. Cir. 2010) (striking down probation condition limiting access to internet where defendant did not use computer to facilitate crimes of sexual exploitation of a minor, transportation of a minor to engage in prostitution, and first degree child sexual abuse); United States v. Perazza-Mercado, 553 F.3d 65, 70-71 (1st Cir. 2009) (striking down condition prohibiting access to internet where offender did not use internet as instrumentality of crime of knowingly engaging in sexual contact with a female under 12, and did not have history of using internet to engage in illegal conduct); In re Stevens, 119 Cal. App. 4th 1228, 1231, 1239, 15 Cal. Rptr. 3d 168, (2004) (striking down prohibition on internet usage of offender convicted of lewd conduct with a minor, where offender did not use internet to facilitate

commission of crime or for other illegal purpose); Com. v. Houtz, 982 A.2d 537, 540, 2009 PA Super 186 (2009) (striking down ban on access to internet where "there is no evidence that Appellant's sexual offense involving a minor child was facilitated by or incorporated the use of a computer/Internet.").[5]

Here, under the authorities cited, the condition of community barring Mr. Barker from using the internet is overly broad in violation of his First Amendment rights because there is no evidence that he used the internet to facilitate commission of the crime or for any other illegal purpose. There is no evidence that Mr. Barker used the internet prior to commission of the crime. Even if he used the internet after the crime occurred to download "incest-related pornography," there is no evidence the images were of children. CP 3, 28.

Generally, courts uphold conditions barring internet access in cases of sexual abuse of a minor only where the offender used the internet to engage in predatory behavior, such as by soliciting sexual

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[5] The Indiana Court of Appeals upheld a condition barring internet use in a case where the internet played no role in the crime, but for the reasons given in this brief, that opinion is not persuasive. See McVey v. State, 863 N.E.2d 434, 450 (Ind. Ct. App. 2007) (upholding ban on internet usage for offender convicted of child molestation because "accessing prohibited material is easily accomplished with a computer," and because internet "offers unlimited access to people, including children").

contact with children or by otherwise personally endangering children. See United States v. Legg, 713 F.3d 1129, 1132 (D.C. Cir. 2013) (upholding ban on internet usage where offender used internet to initiate and facilitate offense by contacting person he believed to be a minor in attempt to induce him to engage in sexual activity); United States v. Maurer, 639 F.3d 72, 84 (3d Cir. 2011) (upholding total ban on internet use where offender used internet to facilitate sexual encounter with individual he believed to be a minor); United States v. Bender, 566 F.3d 748, 751 (8th Cir. 2009) (affirming that total ban on internet usage is appropriate only where "defendant sold, transferred, produced, or attempted to arrange sexual relations with minors" through use of internet); United States v. Ristine, 335 F.3d 692, 695-96 (8th Cir. 2003) (upholding ban on internet usage where offender used internet to exchange pornographic images of children with others and to arrange sexual relations with underage girls); United States v. Paul, 274 F.3d 155, 169 (5th Cir. 2001) (upholding condition restricting all access to internet where offender used internet to seek out fellow "boy lovers" and provide them with advice on how to find and obtain access to "young friends"); United States v. Crandon, 173 F.3d 122, 125 (3d Cir. 1999) (upholding condition restricting all internet access where

defendant used internet to contact young children and solicit inappropriate sexual contact with them).

In such cases, where the offender used the internet in a particularly egregious manner to endanger children, imposing a total ban on internet use during probation may be reasonably necessary to protect the public. But here, in contrast, the ban is unreasonable because Mr. Barker did not use the internet in any manner that presented a danger to children.

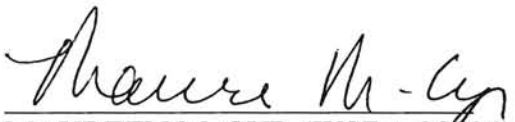
Finally, courts recognize that barring a probationer from using the internet during probation can be a significant barrier to full reentry into society. Perazza-Mercado, 553 F.3d at 73. That is a crucial consideration in this case. At sentencing, counsel explained to the court that Mr. Barker had spent most of his adult life working in computers and hoped to be able to use his skills to get a job in the industry to support himself once he is released. 9/12/12RP 90-92. If Mr. Barker is barred from using the internet for three years after he is released from prison, he will be significantly hampered in any attempt to find employment during that period.

The condition barring Mr. Barker from using the internet is unconstitutionally overbroad because it is not reasonably necessary to deter future criminal conduct or protect the public. It must be stricken.

F. CONCLUSION

The trial court erred in admitting highly inflammatory and unfairly prejudicial evidence that Mr. Barker possessed "incest-related pornography." Therefore, the conviction must be reversed. In addition, the condition of community custody barring Mr. Barker from using the internet was not statutorily authorized and was unconstitutionally overbroad. Therefore, the condition must be stricken.

Respectfully submitted this 25th day of June, 2013.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69326-3-I
v.	)	
	)	
DARREN BARKER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF JUNE, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	ROSEMARY KAHOLOKULA, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	DARREN BARKER 360580 COYOTE RIDGE CC PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF JUNE, 2013.

X_____

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