No. 96505-6
COA No. 76676-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN T. STARK,

Petitioner

On Appeal from King County Superior Court
The Honorable Andrea Darvas, Presiding

PETITION FOR REVIEW

NEIL M. FOX,
WSBA No. 15277
Attorney for Petitioner
2125 Western Ave. Suite 330
Seattle WA 98121

Phone: 206-728-5440
e-mail: nf@neilfoxlaw.com

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A. IDENTITY OF PETITIONER

Brian T. Stark, petitioner herein, asks this Court to accept review of the Court of Appeals' decision terminating review set out in Part B.

B. COURT OF APPEALS' DECISION

Mr. Stark seeks review of the Court of Appeals' decision in *State of Washington v. Brian T. Stark*, No. 76676-7-I, an unpublished opinion issued on October 15, 2018. A copy of this decision is attached in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court overrule *State v. Nguyen*, ___ Wn.2d ___, 425 P.3d 848 (2018), and instead follow the recent decision in *State v. Padilla*, 190 Wn.2d 672, 416 P.3d 712 (2018)?

2. Are the following conditions of community custody valid "crime related" prohibitions or unconstitutional:

   a. Special Condition 5 which orders that Mr. Stark "[d]isclose sex offender status prior to any sexual contact";

   b. Special Condition 8 which gives the CCO the power to search Mr. Stark's home;

   c. Special Condition 9 that prohibits Mr. Stark from entering sex-related businesses;

   d. Special Condition 10 which prohibits Mr. Stark from accessing "sexually explicit" material;

e. Special Condition 16 prohibiting contact with minors under 16 without permission.

D. STATEMENT OF THE CASE

In 2010, in King County Superior Court, Mr. Stark was convicted and sentenced for four sex offenses involving allegations of intra-familial abuse between 1999 and 2008. On Count 2, child molestation in the first degree, the trial court (the Hon. Andrea Darvas, presiding) imposed an indeterminate life sentence, with a minimum term of 180 months. CP 1-13. The convictions were affirmed on direct appeal. *State v. Stark*, 172 Wn. App. 1041, 2013 Wash. App. LEXIS 87 (No. 66766-1-I, 1/14/13) (unpub.) (CP 99-105).

Mr. Stark filed a timely Personal Restraint Petition. On October 17, 2016, the Court of Appeals granted relief to Mr. Stark regarding Count 1, attempted child molestation in the first degree, a count that had been filed after the statute of limitations lapsed. The Court of Appeals denied relief regarding Mr. Stark's challenge to a jury instruction and an issue about whether he received ineffective assistance of counsel. *In re Pers. Restraint of Stark*, 196 Wn. App. 1030, 2016 Wash. App. LEXIS 2511, 2016 WL 6084106 (73580-2-I, 10/17/16) (unpub.). Mr. Stark also had challenged a series of sentencing conditions. Because of the dismissal of Count 1,

resentencing on the other counts was required and the Court of Appeals held that the issues were not ripe for review and that the trial court should consider them upon resentencing. *In re Pers. Restraint of Stark*, Slip Op. at 16 (CP 35).

Mr. Stark was resentenced on March 24, 2017, and the trial court imposed an indeterminate life sentence with a minimum term of 125 months for Count 2. The trial court imposed a series of new conditions of community custody. CP 117-28 (App. B). Mr. Stark appealed these conditions. CP 130-44.[1] On October 15, 2018, the Court of Appeals issued an unpublished opinion, affirming in part, reversing in part and remanding for a new sentencing hearing. App. A.

Mr. Stark now seeks review in this Court only of the portions of the Court of Appeals' decision which affirmed some of the community custody conditions.

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[1] Mr. Stark filed a second PRP. When Division One dismissed it, he filed for discretionary review, a motion which is still pending in this Court. No. 96328-2. Mr. Stark's timely federal habeas petition has been "stayed and abeyed" pending resolution of all state proceedings. *Stark v. Russell*, Western WA No. C14-1538 JCC/JPD.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. *A Lifetime Requirement that Mr. Stark "Disclose Sex Offender Status Prior to Any Sexual Contact" is Not Crime-Related and Unconstitutional*

In its modified form, in accordance with the Court of Appeals' decision in this case, Special Condition No. 5 now provides:

> Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. *Disclose sex offender status prior to any sexual contact*. ~~Sexual contact in a relationship is prohibited until the treatment provider and/or CCO approves of such, with the exception that sexual contact with the defendant's wife, Danelle Stark, is permitted.~~

CP 125 (emphasis added). Mr. Stark seeks review regarding the italicized portion of this condition.

Division One rejected Mr. Stark's challenge, noting that Mr. Stark was "convicted of sex crimes against the minor child of a woman with whom he was having sexual contact." Slip Op. at 10. The court concluded that the condition was "sensitively imposed and reasonably necessary . . . to protect the public." Slip Op. at 10. The court cited to no case authority upholding such a condition and did not explain how the condition was "sensitively imposed."

Forced disclosure of a past sexual offense to a future sexual partner is not a crime-related prohibition under RCW 9.94A.505(9) and RCW

9.94A.703(3)(f); it is unconstitutionally vague, interferes with Mr. Stark's right to freedom of speech and privacy, and violates substantive due process, guaranteed under the explicit language and the penumbra of the First, Fourth, Ninth and Fourteenth Amendments and article I, sections 3, 5 & 7, which guarantee freedom from government intrusion into private sexuality. *See Lawrence v. Texas*, 539 U.S. 558, 562, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

In *State v. Padilla*, *supra*, this Court held that a crime-related prohibition must be directly related to the circumstances of the crime of which the defendant was convicted, but also "a restrictive condition must be reasonably necessary to accomplish essential state needs and public order. . . . And when the regulation implicates First Amendment speech, it must be narrowly tailored to further the State's legitimate interest." *Padilla*, 190 Wn.2d at 682-83 (internal quotes and citations omitted).

In light of *Padilla*, it is apparent that the forced disclosure condition is not "crime related" because it is not narrowly tied only to those with whom Mr. Stark forms a tight romantic bond, nor is it limited to partners who might have children. It covers a "one-night stand" in addition to sexual contact in

exchange for a fee in a jurisdiction where such an arrangement is not unlawful (i.e. areas of Nevada, the UK, most of the EU or New Zealand). There is simply no connection between Mr. Stark having sexual relations with consenting adults in the future and the offenses he allegedly committed against his wife's daughter a decade to two decades ago. If the issue is disclosure to the CCO of the identity of the person Mr. Stark is dating or who he is in a relationship with, that is one thing.[2] But compelling Stark to reveal to any potential sexual partner (including those with whom he is *not* in a dating relationship) his prior criminal history before having sex has no bearing on protecting any hypothetical children that the sexual partner may or may not have. The Court of Appeals illogically conflated having sex with entering into a quasi-matrimonial relationship.

Moreover, the condition requires the very type of enforced speech that the First Amendment bans:

> The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain

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[2] In *State v. Nguyen*, *supra*, this Court held that a condition that required the defendant to inform her community corrections officer of any "dating relationship" was not unconstitutionally vague. 425 P.3d at 852-53. The issue in this case is not disclosure to the CCO, but rather to an anticipated sexual partner.

> from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). . . .
>
> . . .
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> Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. . . .
>
> . . .
>
> When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning.

Janus v. Am. Fed'n of State, County, and Mun. Emps., Council 31, ___ U.S. ___,138 S. Ct. 2448, 2463-64, 201 L. Ed. 2d 924 (2018).

Special Condition No. 5 forces Mr. Stark to engage in a particular type of speech (disclosure of his sex offender status) before he can engage in another constitutionally protected activity (sex with a consenting adult). Not only would this compelled speech interfere with Stark's ability even to have sex with a consenting adult, forcing him into pariah status (thereby violating his federal constitutional rights to privacy and sexuality under *Lawrence* and *Griswold*), but it is unconstitutionally vague in violation of the Due Process Clauses of the Fourteenth Amendment and article I, section 3 in the sense that it is not clear what words he must say. Would the condition be satisfied if he

gave a citation simply to the RCW section he was convicted of violating? Does he have to explain the details of the testimony against him at trial? Can he deny guilt ("I was convicted of violating RCW 9A.44.083, but I was innocent and my attorney was ineffective by not calling a key witness at trial.")? These questions are not being asked facetiously but are realistic given the extraordinary number of decades under which Mr. Stark will be on supervision and the risk that Mr. Stark will be sent back to prison for life because decades from now he has sex with someone without giving the degree of detail of his offender status that some government employee (a CCO) believes he should have given.

The Court of Appeals' decision conflicts with *Padilla*, and review should be granted under RAP 13.4(b)(1). The lack of any citation to authority by the Court of Appeals when it affirmed this condition is a key reason why this Court should accept review under RAP 13.4(b)(3) & (4). There clearly are significant federal and state constitutional issues at stake, and there are issues of substantial public importance related to this condition. The Court should accept review and strike the condition.

2. *If Special Condition No. 8 is Not Ripe for Review, DOC or the State Should be Required to Go to Court First to Seek Enforcement of the Condition*

In Special Condition No. 8, the trial court ordered that Mr. Stark:

> Consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive/joint control/access.

CP 125.

Even given the diminished right to privacy that someone on supervision may have, a condition that allows a CCO to search a house (albeit visual inspection only) without a warrant and without even a reasonable suspicion that Mr. Stark violated the terms of community custody is not authorized by either statute or the state or federal constitutions.

RCW 9.94A.631(1) requires at least "reasonable cause" for a search:

> If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

Special Condition No. 8, though, allows a search for no reason at all and therefore violates the SRA. Such a search, without even reasonable suspicion, also violates the Fourth and Fourteenth Amendments and article I, section 7. *State v. Winterstein*, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009) (citing

in part *Motley v. Parks*, 432 F.3d 1072 (9th Cir. 2005), *overruled on other grounds United States v. King*, 687 F.3d 1189 (9th Cir. 2012)). *See also State v. Cornwell*, 190 Wn.2d 296, 297, 412 P.3d 1265 (2018) ("We therefore hold that article I, section 7 permits a warrantless search of the property of an individual on probation only where there is a nexus between the property searched and the alleged probation violation.").

The Court of Appeals did not disagree with that Special Condition No. 8 was illegal, but simply cited to this Court's prior decisions that held that a challenge to this type of condition is not ripe for review in a pre-enforcement context. Slip Op. at 10-11 (citing *State v. Cates*, 183 Wn.2d 531, 354 P.3d 832 (2015)). While this is an accurate recitation of *Cates*,[3] the Court of Appeals ignored Mr. Stark's argument (*Reply Brief of Appellant* at 16-18) that if a pre-enforcement challenge to a clearly illegal condition cannot be brought, the State and/or DOC should be the ones who seek enforcement in the future,.

This Court should accept review and hold that if the State and its employees at the DOC wish to enforce Special Condition No. 8 in the future – i.e., search Mr. Stark' residence without a warrant – the State and DOC

[3] Although it is not clear why Special Condition No. 8 cannot be addressed as a matter of law, without regard to any facts.

should first be required to obtain permission of the superior court before they enforce the condition. This would shift the onus of enforcement to the party which seeks relief, and would protect Mr. Stark from having to risk refusing a warrantless search, with all of the attendant serious consequences (being sent back to prison). This procedure would also insure that there are no surprises, either to Mr. Stark or to the CCO, and would set up a procedure in advance by which the legality of Special Condition No. 8 could be tested under whatever circumstances arise.

Because Mr. Stark's federal and state constitutional rights under the Fourth and Fourteenth Amendments and article I, section 7, are violated by Special Condition No. 8, and because of the issues of public importance at stake, the Court should grant review under RAP 13.4(b)(3) & (4) and reverse.

3. *This Court Should Accept Review Regarding Special Conditions 9 and 10, Follow Padilla and Overrule Nguyen*

In Special Condition No. 9 bars Mr. Stark from going into "sex-related businesses" without permission, while Special Condition No. 10 prohibits Mr. Stark from looking at or accessing any "sexually explicit

material as defined by RCW 9.68.130." CP 125.[4] The Court of Appeals rejected Mr. Stark's challenges, citing to this Court's recent decision in *State v. Nguyen*, *supra*. Slip Op. at 3, 5. In *Nguyen*, this Court upheld similar conditions on the theory that those who commit sex crimes have an inability to control their sexual urges and thus such restrictions are reasonable. *Nguyen*, 425 P.3d at 854-55.

With all due respect, this Court should accept review under RAP 13.4(b)(3) & (4) and overrule *Nguyen*. The decision is both harmful and incorrect. *See In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The decision also conflicts with this Court's recent decision in *State v. v. Padilla*, *supra*, and this Court should accept review to resolve the conflict between these two recent unanimous decisions.

In *Padilla*, as noted above, this Court comprehensively surveyed First Amendment law and held that "[a] regulation implicating First Amendment speech must be narrowly tailored to further the State's legitimate interest. .

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[4] Special Condition No. 10 also bans Mr. Stark from accessing "erotic materials as defined by RCW 9.68.050 or any material depicting any person under age 18 in sexually explicit conduct as defined by RCW 9.68A.011(4)." CP 125. Mr. Stark has not challenged these provisions as they are linked, explicitly or through definitions, to materials related to minors. The challenged restrictions in Special Conditions No. 9 and 10 are not so limited and cover sexual materials involving adults that cannot normally be banned. *See Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) (First Amendment protects private possession of obscenity).

. . Accordingly, a restriction implicating First Amendment rights demands a greater degree of specificity and must be reasonably necessary to accomplish the essential needs of the state and public order." *Padilla*, 190 Wn.2d at 678. The Court of Appeals' decision in this case fails to analyze Special Conditions Nos. 9 and 10 in light of this strict test adopted in *Padilla*.

Curiously, this Court's unanimous decision in *Nguyen* makes no mention of *Padilla* or the test adopted just a few months earlier. Because this Court does "not overrule . . . binding precedent sub silentio," *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999), essentially there are now two competing lines of cases in this state, with different tests and different outcomes – *Nguyen* and *Padilla*.[5] Review should be granted under RAP 13.4(b)(4) to resolve the conflict between these two cases and to clarify what

[5] Thus, in *State v. Johnson*, 4 Wn. App. 2d 352, 421 P.3d 969 (2018), Division Three recently overruled prior decisions and struck down, under *Padilla,* a series of conditions related to X-rated moves, adult bookstores and materials showing sexual acts: "Pursuant to *Padilla*, '[t]here is currently no connection in the record' between Mr. Johnson's offense conduct and the type of materials and locations identified in conditions 19 and 20. 190 Wn.2d at 684. The mere fact that Mr. Johnson has been convicted of a sex offense, and thus exhibited an inability to control sexual impulses, is insufficient to provide the necessary link. *Id*." *Johnson,* 4 Wn. App. at 359-60. Does *Johnson*, based on *Padilla*, survive *Nguyen*? Review is necessary to clear up this conflict between two unanimous decisions issued by this Court in the past six months.

It should be noted that a pro se petition for review was filed in *Johnson* which addresses only issues other than the community custody conditions. No. 96192-1.

the standard of review is where a community custody condition infringes on constitutional rights.

In this regard, *Nguyen* is incorrect and should be overruled, in favor of *Padilla*, because there is no evidence, in this record,[6] that exposure to legal sexually explicit materials or sex-related businesses generally has any relationship to intra-familial sex abuse.[7] And in this case in particular, there was no evidence that exposure to sexually explicit material was in any way related to the State's allegations. *See State v. Padilla*, 190 Wn.2d at 684 ("Padilla was convicted of communicating with a minor for immoral purposes, but is prohibited from accessing all pornography with no distinction between child and adult pornography. . . . There is currently no connection in the record between Padilla's inappropriate messaging and imagery of adult nudity or simulated intercourse."). *Compare State v.*

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[6] Whether there is any type of link between sexually explicit materials and sexual violence is a subject for which there is much scientific dispute, with the researcher's political or religious beliefs often dictating the results. *See, e.g.*, K. Lerum & S. Dworkin, "'Bad Girls Rule': An Interdisciplinary Feminist Commentary on the Report of the APA Task Force on the Sexualization of Girls," JOURNAL OF SEX RESEARCH, 46(4), 250–263 (2009) (feminist critique of American Psychological Association's report on sexualization of girls); Attorney General's Commission on Pornography (1986) (finding link between pornography and sex offenses).

[7] If anything, one would think that exposure to lawful sexually explicit literature or images involving *adults* would be a more positive influence on someone who allegedly harmed *children*.

Nguyen, 425 P.3d at 850 (detailing how defendant Norris sent sexually explicit photos of herself to minor).

The result of *Nguyen* is also harmful -- harmful to the United States and Washington Constitutions. Life-time restrictions on access to sexually explicit materials and life-time restrictions on access to bookstores, movie theaters or even strip clubs, dependent on a government employee's approval, clearly restrict Mr. Stark's rights under the First Amendment and article I, section 5, putting a CCO into the position of a censor. *See Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) (First Amendment protects private possession of obscenity).[8] While the Court in *Nguyen* addressed the vagueness issues related to the challenged conditions, the decision never addressed a key First Amendment concept – whether the proffered restrictions on access to protected information were narrowly tailored and advanced a significant government interest (or compelling interest under article I, section 5). *See United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983); *Bering v. Share*, 106 Wn.2d 212, 229-32, 721 P.2d 918 (1986). The restrictions here do not satisfy these

[8] *See also World Wide Video v. Tukwila*, 117 Wn.2d 382, 387-980, 816 P.2d 18 (1991) (recognizing peep shows as protected under article I, section 5 and the First Amendment); *City of Seattle v. Davis*, 174 Wn. App. 240, 251, 306 P.3d 961(2012) (adult cabarets are protected under the First Amendment).

key First Amendment concepts and therefore *Nguyen* is harmful and should be overruled. In contrast, the Court's decision in *Padilla* does follow the accepted federal constitutional tests, and thus is more faithful to the dictates of the U.S. Constitution than *Nguyen*.

Moreover, *Nguyen* never really solved the vagueness issues inherent in conditions like Special Conditions Nos. 9 and 10. Are Robert Mapplethorpe's works exempted as "works of art?" If a work is not of "anthropological significance," but is of psychological or biological significance, is it still banned? Who decides? The government employee CCO? The ban also appears to include films that might not qualify as "art" but which contain nudity or sex scenes. Requiring Mr. Stark, for the rest of his life, to get permission from a CCO to view a film that might contain a "depiction of adult human genitals" or be sent to prison (without any scienter requirement)[9] unduly burdens even a convicted sex offender's freedoms under the First Amendment and article I, section 5 and due process of law under the Fourteenth Amendment and article I, section 3.

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[9] *See State v. McCormick*, 166 Wn.2d 689, 697-705, 213 P.3d 32 (2009) (State does not need to prove a willful violation of community custody conditions before revoking a SSOSA sentence).

The Court of Appeals' decision conflicts with this Court's decision in *Padilla*; because of the issues of public importance involved and the violation of Mr. Stark's rights under the First and Fourteenth Amendments and article I, sections 3 and 5, the Court should accept review under RAP 13.4(b)(1), (3) & (4), overrule *Nguyen* and reverse the Court of Appeals.

4. *The Ban on Contacts with Minors is Ripe and Illegal*

In Special Condition No. 16, the trial court ordered:

> Have no direct and/or indirect contact with minors under the age of 16 without the prior approval of the CCO.

CP 126.

The lifetime ban on Mr. Stark's contacts with minors, without permission of a government employee with no standards for the exercise of discretion, interferes with Stark's own ability to be a parent in the future, a right that is protected by various provisions of the federal and state constitutions and their penumbra. *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); U.S. Const. amends. I, IV, VIII, IX, & XIV; Const. art. I, §§ 3, 5, 7 & 14. The ban also impacts Mr. Stark's ability, when he is a senior citizen for instance, to have natural contacts with his

grandchildren or great-nephews or nieces – writing a holiday greeting card, or telling his cousin to tell her grandchild to do well on a school test or to have a good time at summer camp ("indirect contact"). All of these things are part of normal familial life rituals, also part of the penumbra of familial relations protected by the aforementioned state and federal constitutional provisions and cases. *See also Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 2597, 192 L.Ed.2d 609 (2015) ("In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

The Court of Appeals held that Special Condition No. 16 was "crime related" because Mr. Stark was convicted of sex crime against a child. Slip Op. at 5. While some restrictions are obviously appropriate in a case of intra-familial sex abuse, the lack of any justification for a *lifetime* ban on having direct or indirect contact with all minors without a CCO's standardless discretionary decision makes the condition illegal, both as not being "crime-related" and as a violation of the aforementioned state and federal constitutional rights. *See In re Rainey*, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010) (striking down lifetime ban on contact with daughter).

The Court of Appeals avoided the constitutional problems with the condition, concluding that because Stark's son is now over 16 and because Stark does not yet have grandchildren, the condition is not "ripe." Slip Op. at 14. In *Padilla*, though, this Court held that "where the challenge involves a legal question that can be resolved on the existing record, the challenge may be addressed before any attempted enforcement of the condition." 190 Wn.2d at 677. Here, the propriety of Special Condition No. 16 can be resolved on the existing record, as a matter of law.

It is not speculative that Mr. Stark either currently has (or will in the future have) relatives who have children under 16. Given the lifetime duration of community custody and the unbridled discretion given to the CCO, the dangers of arbitrary enforcement are clear. *See State v. Irwin*, 191 Wn. App. 644, 655, 364 P.3d 830 (2015) (striking down geographic restrictions because the condition gave the CCO the unbridled discretion to define the areas affected). Special Condition No. 16 violates Mr. Starks' federal and state constitutional rights to familial relations. The Court should grant review under RAP 13.4(b)(1)-(4) and reverse.

F. CONCLUSION

For the foregoing reasons, this Court should accept review and strike the above-noted challenged portions of Special Conditions Nos. 5, 8, 9, 10 and 16, and order that if Special Condition No. 8 is going to be enforced, the State and/or DOC go to court first to get authorization to search Mr. Stark's home without a warrant.

DATED this 13th day of November 2018.

Respectfully submitted,

s/ Neil M. Fox
WSBA No. 15277
Attorney for Petitioner

APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. BRIAN T. STARK, Appellant.	)	No. 76676-7-I UNPUBLISHED OPINION FILED: October 15, 2018

ANDRUS, J. — In 2010, Brian T. Stark was convicted of four domestic violence sex offenses: attempted first-degree child molestation, first-degree child molestation, first-degree incest, and third-degree child molestation. His convictions were affirmed on direct appeal in 2013. In 2016, this court granted Stark's personal restraint petition and vacated the first count as time barred. Stark was resentenced in 2017. He now appeals seven conditions of community custody imposed on resentencing, arguing that these conditions are not crime related or are unconstitutionally vague. We affirm in part, reverse in part, and remand.

FACTS

Stark dated a woman, Danelle, who had a young daughter, C.W.[1] Stark and Danelle later married and had a son. Stark abused C.W. for several years, beginning when she was in first grade. The abuse was disclosed to law enforcement when C.W. was in high school. The State charged Stark with four domestic violence sex offenses: attempted first-degree child molestation, first-degree child molestation, first-degree incest, and third-degree child molestation. A jury found Stark guilty as charged, and this court affirmed.

In a personal restraint petition, Stark argued that count one, which was based on the incident when C.W. was in first grade, was time barred. The State conceded the error. This court vacated Stark's conviction for attempted first-degree child molestation and remanded for resentencing. At resentencing, the court imposed an indeterminate sentence with a minimum term of 125 months on the first degree child molestation conviction, count 2, and standard range sentences of 61 months and 54 months on counts 3 (incest) and 4 (third degree child molestation), respectively. The sentencing court also imposed several conditions of community custody. Stark challenges seven of these conditions

ANALYSIS

Crime related challenges

A sentencing court may impose conditions of community custody, including prohibitions on "conduct that directly relates to the circumstances of the crime for

[1] This court considered the facts underlying Stark's convictions in In re Pers. Restraint Petition of Stark, 196 Wn. App. 1030 (Wash. Ct. App. Oct. 17, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/735802.pdf, and State v. Stark, noted at 172 Wn. App. 1041, slip op. at 1 (2013).

which the offender has been convicted." RCW 9.94A.030(1); RCW 9.94A.703(3). Because the imposition of crime-related prohibitions is necessarily fact-specific and based on the sentencing judge's in-person appraisal of the trial and offender, the appropriate standard of review is abuse of discretion. State v. Norris, 1 Wn. App. 2d 87, 97, 404 P.3d 83 (2017). The State need not establish that the prohibited conduct directly contributed to the offense. State v. Nguyen, No. 94883-6, slip op. at 13 (Wash. Sept. 13, 2018).[2] "So long as it is reasonable to conclude that there is a sufficient connection between the prohibition and the crime of conviction, we will not disturb the sentencing court's community custody conditions." Id. at 13-14.

In Nguyen, the Supreme Court upheld a prohibition on accessing sexually explicit material as reasonably related to the crimes of child rape and molestation. Id. at 16. The Nguyen court held that by committing sex crimes, the defendant established his inability to control sexual urges. Id. at 14. It was thus reasonable to prohibit the offender, Nguyen, from accessing materials whose only purpose was to stimulate sexual urges. Id. In considering conditions imposed on a separate offender, Norris, the Nguyen court upheld a prohibition on entering sex-related businesses as reasonably related to the crime of rape of child. Id. at 15-16. Although there was no evidence that sex-related businesses played a role in the offender's crime, the court held that the condition was related to Norris's inability to control her sexual urges. Id.

[2] http://www.courts.wa.gov/opinions/pdf/948836.pdf

Stark first challenges Condition 5, which concerns sexual contact. The condition requires Stark to:

> Inform the supervising CCO [Community Corrections Officer] and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider and/or CCO approves of such, with the exception that sexual contact with the defendant's wife, Danelle Stark, is permitted.

Stark argues the prohibition on "[s]exual contact in a relationship" without prior approval of a CCO or treatment provider is not crime related. The State concedes that the prohibition is not related to Stark's crime. We accept the State's concession and remand for the sentencing court to strike the prohibition.

Stark also challenges as not crime related the portion of Condition 5 requiring him to disclose his sex offender status prior to any sexual contact. This challenge, however, is based on Stark's constitutional right to privacy, not on the statutory "crime related" requirement, which applies to prohibitions. See RCW 9.94A.703(3). We address the challenge below.

Stark next challenges Condition 9, which prohibits him from entering sex-related businesses, and Condition 10, which prohibits him from accessing sexually explicit material. At oral argument, Stark relied on State v. Padilla, 190 Wn.2d 672, 683, 416 P.3d 712 (2018), to argue that there must be evidence in the record linking the prohibition to the circumstances of the crime. Because there is no evidence that Stark frequented sex-related businesses or viewed sexually explicit materials, he argues that Conditions 9 and 10 are not crime related. The State's position is that Padilla is distinguishable on its facts, as the defendant in that case was convicted of communication with a minor for immoral purposes, not child rape

or molestation. The State argues that Stark's offenses involved the inability to control sexual urges, urges which are stimulated by access to sexually explicit materials.

In light of the Supreme Court's recent decision in Nguyen, we agree with the State. Like the defendants in that case, Stark committed offenses that demonstrate an inability to control sexual urges. Prohibitions on accessing materials and entering businesses whose purpose is to stimulate sexual urges is reasonably crime related.

Finally, Stark contends Condition 16, which requires him to: "Have no direct and/or indirect contact with minors under the age of 16 without the prior approval of the CCO," is not crime related. This argument is without merit. Stark committed sex crimes against a child. The prohibition on contact with minors is crime related. See State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998) (upholding a prohibition on contact with minors as crime related where the defendant was convicted of rape of a child).

Vagueness challenges

The guarantee of due process requires that laws not be vague. U.S. CONST. amend. XIV, §1; WASH. CONST. art. 1, §3. A condition is unconstitutionally vague if it (1) does not sufficiently define the prohibition so an ordinary person can understand the prohibition; or (2) does not provide sufficiently ascertainable standards to protect against arbitrary enforcement. State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). Conditions that implicate an offender's First Amendment rights must meet a stricter standard of definiteness. Id. at 753. But

impossible standards of specificity are not required. Id. at 760. "If persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite." Id. (internal quotation marks omitted) (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). A community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. Nguyen, slip op. at 6.

In Nguyen, the Supreme Court rejected two vagueness challenges. The court upheld a community custody condition that required the offender to inform the CCO of any "dating relationship," holding that a person of ordinary intelligence can distinguish a dating relationship from other types of relationships. Id. at 10. The Nguyen court also upheld a prohibition on accessing sexually explicit material. Id. at 14. The condition in that case required the offender not to "possess, use, access or view any sexually explicit material as defined by RCW 9.68.130." Id. at 3. The referenced statute defines sexually explicit material as:

> [A]ny pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

Id. at 8 (quoting RCW 9.68.130(2)). The Nguyen court held that the phrase "sexually explicit material" is sufficiently clear. Id. The court rejected an argument that the statutory definition invites arbitrary enforcement, holding that persons of ordinary intelligence can discern works of art and anthropological significance. Id.

In this case, Condition 9 prohibits Stark from entering "sex-related businesses, including . . . any location where the primary source of business is related to sexually explicit material." Condition 10 prohibits accessing or viewing "any sexually explicit material as defined by RCW 9.68.130." Stark contends "sexually explicit material," as used in these conditions, is impermissibly vague. The argument is foreclosed by Nguyen. The conditions are not unconstitutionally vague.

Stark also raises a vagueness challenge to Condition 18, which requires him to avoid "areas where children's activities regularly occur or are occurring." We considered similar conditions in State v. Irwin, 191 Wn. App. 644, 364 P.3d 830 (2015) and Norris, 1 Wn. App. 2d at 87.

In Irwin, we struck a condition requiring the defendant not to "frequent areas where minor children are known to congregate, as defined by the supervising CCO," holding that, "[w]ithout some clarifying language or an illustrative list of prohibited locations," the phrase was impermissibly vague. Irwin, 191 Wn. App. at 652, 655. And, because the condition allowed the CCO to define which areas were prohibited, it invited arbitrary enforcement. Id.

In Norris, the condition at issue prohibited the defendant from "any parks/playgrounds/schools and or any places where minors congregate." Norris, 1 Wn. App. 2d at 95. The State conceded that "and or any places" should be stricken from the condition. Id. at 95-96. With that concession, the condition

prohibited entering "any parks, playgrounds, or schools where minors congregate." Id. at 96. We upheld the amended condition as sufficiently clear.[3] Id.

> The condition at issue in this case requires that Stark:
>
> > Stay out of areas where children's activities regularly occur or are occurring without the prior approval of the CCO and/or treatment provider. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or CCO.

Stark objects to the phrase "areas where children's activities regularly occur," arguing that it is unclear when children's activities "regularly occur" and how far an "area" extends. He also asserts that the condition gives unbridled discretion to the CCO. And, at oral argument, Stark argued that the condition is vague because it refers to "children" and "youth" without establishing if these terms are synonymous.

We agree in part. The phrase "regularly occur" is unclear because it provides no standards for determining the frequency or regularity with which a children's activity must take place for the area to be permanently off limits. And the State has provided no rationale for requiring Stark to stay out of areas where children's activities sometimes occur, such as a sports field, even when no children are present. The phrase "areas where children's activities are occurring," in

---

[3] The Supreme Court accepted review of two issues in Norris and consolidated the case with Nguyen. Nguyen, slip op. at 1-2. The prohibition on entering "any parks, playgrounds, or schools where minors congregate" was not before the Supreme Court. Since Norris, Divisions Two and Three have divided over whether the phrase "places where children congregate," accompanied by an illustrative list, is sufficiently clear. State v. Johnson, ___Wn. App. ___, 421 P.3d 969 (2018); State v. Wallmuller, ___Wn. App. ___, 423 P.3d 282 (2018). A majority of the Johnson court held that the condition provided fair notice that the offender must "avoid locations where individuals under 16 collect together in groups. Outside of special circumstances (such as a children's day or event), universities, national parks, and adult areas of worship would not be covered." Johnson, 421 P.3d at 973. The majority in Wallmuller, in contrast, held that the word "congregate" is impermissibly vague, the illustrative list did not cure the inherent vagueness, and the condition invited arbitrary enforcement. 423 P.3d at 285.

contrast, is not unconstitutionally vague. A person of ordinary intelligence can discern and avoid an area where a children's activity is occurring. We remand for the sentencing court to strike the words "regularly occur" or fashion a new condition consistent with this opinion.

We agree with Stark that the use of "children" and "youth" is impermissibly vague because it is unclear whether, in this context, the words are synonymous. Upon remand, the sentencing court may replace the word "youth" with the word "children's" or otherwise redact the condition for consistency.

We reject Stark's argument that Condition 18 gives unbridled discretion to the CCO. In this case, the first sentence establishes a standard and requires Stark to stay out of areas where children's activities are occurring. The second sentence provides an illustrative list, ending with "any specific location identified in advance by DOC or CCO." Unlike the condition in Irwin, the condition in this case only authorizes the CCO to designate in advance a specific location where children's activities are occurring. It does not invite arbitrary enforcement.

Other constitutional challenges

Stark challenges several conditions on the grounds that they impermissibly restrict constitutional rights. The sentencing court may impose limitations upon fundamental rights provided they are imposed sensitively. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Such restrictions must be reasonably necessary to accomplish the essential needs of the state and public order. Id. at 37-38 (quoting Malone v. United States, 502 F.2d 554, 556 (9th Cir.1974)). See

also Bahl, 164 Wn.2d at 757-58 (discussing conditions that restrict First Amendment rights).

A portion of Condition 5, discussed above, requires Stark to disclose his sex offender status prior to any sexual contact. Stark argues that a future relationship between consenting adults is unrelated to his offense and, thus, a restriction on such a relationship is not reasonably necessary to protect the public. He cites Janus v. Am. Fed'n of State, County, and Mun. Emps., Council 31, ___ U.S. ___, 138 S. Ct. 2448, 2463-64, 201 L. Ed. 2d 924 (2018), for the proposition that compelling speech implicates a person's First Amendment rights.

Although the challenged condition implicates Stark's First Amendment rights, it is sensitively imposed and reasonably necessary. Stark was convicted of sex crimes against the minor child of a woman with whom he was having sexual contact. Requiring Stark to disclose his sex offender status before commencing a sexual relationship is reasonably necessary to protect the public.[4]

Stark next challenges Condition 8, which requires him to:

> Consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of residence in which the offender lives or has exclusive/joint control/access.

Stark argues that this condition violates his rights under the Fourth and Fourteenth Amendments. The constitutionality of an inspection condition, however, depends

[4] Stark's case is distinguishable from United States v. Reeves, 591 F.3d 77, 80 (2nd Cir. 2010), in which the court struck a condition requiring an offender to "notify the Probation Department when he establishes a significant romantic relationship and . . . inform the other party of his prior criminal history concerning his sex offenses." The offender in that case maintained relationships with his children and there had been no allegations of abuse or domestic violence in those relationships. Id. at 81-82.

on the particular circumstances of enforcement. State v. Cates, 183 Wn.2d 531, 535-36, 354 P.3d 832 (2015) (quoting Sanchez v. Valencia, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010)). The condition is not ripe for pre-enforcement review. Id.

Next, Stark challenges a condition requiring him to submit to urinalysis and breathanalysis. The sentencing court imposed a standard condition requiring Stark to refrain from controlled substances except where lawfully prescribed. See RCW 9.94A.703(2)(c) (stating that this condition shall be imposed unless waived by the court). But the court declined to impose a prohibition on consuming alcohol because there was no connection between alcohol and Stark's offenses. Condition 12 requires Stark to "[b]e available for and submit to urinalysis and/or breathanalysis upon the request of the CCO and/or the chemical dependency treatment provider."

Stark contends Condition 12 violates his privacy interests under the Fourth Amendment and article I, section 7 of the Washington Constitution. He argues that random drug testing is only constitutional where it promotes rehabilitation, as where the defendant has been convicted of a drug offense. The State concedes that the breathanalysis portion of Condition 12 is invalid because the sentencing court did not prohibit Stark from consuming alcohol. But the State argues that, because the court properly prohibited Stark from using controlled substances, it may require him to submit to urinalysis to monitor compliance with this prohibition.

The parties rely on State v. Olsen, in which the Washington State Supreme Court upheld random urinalysis for probationers convicted of driving under the influence (DUI). 189 Wn.2d 118, 134, 399 P.3d 1141 (2017). The Olsen court

held that, because random drug testing implicates probationers' privacy interests, the intrusion is only lawful where it is narrowly tailored to meet a compelling state interest. Id. at 127-28. The court upheld the condition because the State has a strong interest in supervising DUI probationers and random urinalysis is narrowly tailored to meet that interest. Id. at 128, 134.

In discussing this issue, the Olsen court stated that random drug tests may be imposed "to assess compliance with a valid prohibition on drug and alcohol use." Id. at 130. The Olsen court reasoned that the trial court properly conditioned the defendant's release upon her agreement to refrain from drugs and alcohol and "[i]t follows that the trial court also has authority to monitor compliance with that condition through narrowly tailored means." Id. The court rejected an argument that upholding the condition would open the door to permitting random, suspicionless searches in all situations. Id. at 132. The Olsen court held that the condition authorized only a search to test for drugs and alcohol, a search that was reasonable in the circumstances of that case:

> Olsen was convicted of DUI, a crime involving the abuse of drugs and alcohol. A probationer convicted of DUI can expect to be monitored for consumption of drugs and alcohol, but should not necessarily expect broader-ranging intrusions that expose large amounts of private information completely unrelated to the underlying offense.

Id. at 133. Reiterating its conclusion that random drug testing, in that case, was narrowly tailored and directly related to the probationer's rehabilitation, the Olsen court stated that "random UAs [urine analyses], under certain circumstances, are a constitutionally permissible form of close scrutiny of DUI probationers." Id. at 134.

Stark argues that, under Olsen, random urinalysis is permissible in a DUI probation case but not in a case such as his, where the crime is unrelated to drugs or alcohol. Stark also asserts that Olsen is distinguishable because the defendant in that case was subject to a maximum of five years' probation, whereas Stark is subject to lifetime supervision. The State contends that, under Olsen, the court may require suspicionless drug testing in any case where a prohibition on controlled substances is imposed.

We read Olsen to hold that requiring random urinalyses was permissible in that case because it was narrowly tailored to address the probationer's DUI offense. Id. at 129, 133. Olsen does not support the general proposition that random urinalysis is constitutional to monitor a standard condition prohibiting the use of controlled substances. Stark was not convicted of a drug offense, and the State points to no evidence of a connection between Stark's offenses and drugs. We conclude that the urinalysis requirement is not narrowly tailored or reasonably necessary. Condition 12 must therefore be stricken.

Finally, Stark challenges Condition 16 on constitutional grounds. The condition, discussed above, prohibits Stark from contact with minors under the age of 16. Stark argues that this condition interferes with his fundamental right to familial relationships because it will prevent contact with future children or grandchildren. The State argues that, because the existence of future children or grandchildren is speculative, this issue is not ripe for review.

An issue is not ripe for review when it requires further factual development. Bahl, 164 Wn.2d at 751. Likewise, a claim that is speculative and hypothetical is

not ripe for review. Lewis County v. State, 178 Wn. App. 431, 440, 315 P.3d 550 (2013). In this case, Stark points to no evidence that he has minor children or grandchildren. C.W. and Stark's child with Danelle are both over the age of 16. Because any infringement of Stark's right to a relationship with future children or grandchildren is speculative, Stark's challenge to Condition 16 as a violation of his fundamental right to parent is not ripe for review.

We remand for the sentencing court to strike that portion of Condition 5 prohibiting sexual contact in a relationship and Condition 12 in its entirety. We remand for the court to redact Condition 18 or fashion a new condition consistent with this opinion. We affirm the remaining conditions.

Andrus, J.

WE CONCUR:

Dwyer, J.

Cuppelwick, C.J.

APPENDIX B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 09-1-05650-8 KNT
vs.	)	JUDGMENT AND SENTENCE
	)	APPENDIX H - SEX OFFENSES
BRIAN T STARK, Defendant.	)	COMMUNITY CUSTODY

STANDARD CONDITIONS

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

1. Report to and be available for contact with the assigned community corrections officer as directed;
2. Work at Department of Corrections-approved education, employment, and/or community restitution;
3. Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4. Pay supervision fees as determined by the Department of Corrections;
5. Receive prior approval for living arrangements and residence location;
6. Not own, use, or possess a firearm or ammunition. (RCW 9.94A.706);
7. Notify community corrections officer of any change in address or employment;
8. Upon request of the Department of Correction, notify the Department of court-ordered treatment; and
9. Remain within geographic boundaries, as set forth in writing by the Department of Correction Officer or as set forth with SODA order.

SPECIAL CONDITIONS - SEX OFFENSES **RCW 9.94A.703 & .704**

Defendant shall:

1. Obey all municipal, county, state, tribal, and federal laws.
2. Indeterminate Sentences: Abide by any Washington State Department of Corrections (DOC) conditions imposed (RCW 9.94A.704).
3. Have no direct or indirect contact with the victim(s) of this offense.
4. Within 30 days of release from confinement (or sentencing, if no confinement is ordered) obtain a sexual deviancy evaluation with a State certified therapist approved by your Community Corrections Officer (CCO) and follow through with all recommendations of the evaluator. Should sexual deviancy treatment be recommended, enter treatment and abide by all programming rules, regulations and requirements. Attend all treatment-related appointments (unless excused); follow all requirements, conditions, and instructions related to the recommended evaluation/counseling; sign all necessary releases of information; and enter and complete the recommended programming.
5. Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such, WITH THE EXCEPTION THAT SEXUAL CONTACT WITH THE DEFENDANT'S WIFE, DANELLE STARK, IS PERMITTED. AND/OR CCO
6. Obtain prior permission of the supervising CCO before changing work location.
7. If a resident at a specialized housing program, comply with all rules of housing program.
8. Consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of residence in which the offender lives or has exclusive/joint control/access.
9. Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material, UNLESS GIVEN PRIOR APPROVAL BY YOUR SEXUAL DEVIANCY TREATMENT PROVIDER AND/OR CCO.
10. Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person UNDER AGE 18 engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider, V TREATMENT AND/OR CCO.

~~11. Do not use or consume alcohol.~~

12. Be available for and submit to urinalysis and/or breathanalysis upon the request of the CCO and/or the chemical dependency treatment provider.
13. Submit to and be available for polygraph examination as directed to monitor compliance with conditions of supervision.
14. Register as a Sex Offender with sheriffs office in the county of residence as required by law.

Additional Crime-Related Prohibitions: (the condition must be related to the crime being sentenced)

15. [ ] Abide by a curfew of 10pm-5am unless directed otherwise. Remain at registered address or address previously approved by CCO during these hours.

Offenses Involving Minors -

16. [X] Have no direct and/or indirect contact with minors UNDER THE AGE OF 16 WITHOUT THE PRIOR APPROVAL OF THE CCO
17. [ ] Do not hold any position of authority or trust involving minors.
18. [X] Stay out of areas where children's activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or CCO, WITHOUT THE PRIOR APPROVAL OF THE CCO AND/OR TREATMENT PROVIDER

Offenses Involving Alcohol/Controlled Substances -

19. [ ] Do not purchase or possess alcohol.
20. [ ] Do not enter drug areas as defined by court or CCO.
21. [ ] Do not enter any bars/taverns/lounges or other places where alcohol is the primary source of business. This includes casinos and or any location which requires you to be over 21 years of age.
22. [ ] Obtain [ ] alcohol [ ] chemical dependency evaluation upon referral and follow through with all recommendations of the evaluator. Should chemical dependency treatment be recommended, enter treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming.

Offenses Involving Computers, Phones or Social Media -

23. [ ] No internet access or use, including email, without the prior approval of the supervising CCO.
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.

Offenses Involving Mental Health Issues -

25. [ ] Obtain a mental health evaluation upon referral and follow through with all recommendations of the evaluator, including taking medication as prescribed. Should mental health treatment be recommended, enter treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming.

Other conditions may be imposed by the court or Department during community custody.

Community Custody shall begin upon completion of the term(s) of confinement imposed herein, or at the time of sentencing if no term of confinement is ordered. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions and may issue warrants and/or detain defendants who violate a condition.

Date: 3/24/17

JUDGE

STATUTORY APPENDIX

Relevant Statutory Provisions and Rules

RAP 13.4 provides in part:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RCW 9.68.130(2) provides:

> "Sexually explicit material" as that term is used in this section means any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

RCW 9.94A.505(9) provides:

> (9) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. "Crime-related prohibitions" may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense.

RCW 9.94A.631(1) provides in part:

> If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.703 provides in part:

> (2) Waivable conditions. Unless waived by the court, as part of any term of community custody, the court shall order an offender to:
>
> (a) Report to and be available for contact with the assigned community corrections officer as directed; (b) Work at department-approved education, employment, or community restitution, or any combination thereof; (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions; (d) Pay supervision fees as determined by the department; and (e) Obtain prior approval of the department for the offender's residence location and living arrangements.
>
> (3) Discretionary conditions. As part of any term of community custody, the court may order an offender to: (a) Remain within, or outside of, a specified geographical

> boundary; (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals; (c) Participate in crime-related treatment or counseling services; (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community; (e) Refrain from possessing or consuming alcohol; or (f) Comply with any crime-related prohibitions.

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. IX provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 5 provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Wash. Const. art. I, § 7 provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Wash. Const. art. I, § 14 provides:

> Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Declaration of Service

I hereby certify that on the 13th day of November 2018, I electronically filed the foregoing PETITION FOR REVIEW with the Clerk of the Court using the Appellate Courts Portal which will send notification of such filing and an electronic copy to attorneys of record for the Respondent and any other party.

I also certify that I caused to be deposited into the U.S. Mail with proper postage affixed a copy of this petition in an envelope addressed to:

Brian T. Stark
DOC No. 344634
Washington Corrections Center
PO Box 900
Shelton, WA 98584

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 13th day of November 2018 at Seattle, WA.

s/ Alex Fast
Legal Assistant

LAW OFFICE OF NEIL FOX PLLC

November 13, 2018 - 11:23 AM

Transmittal Information

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