COA NO. 35613-2-III

NO. 965862

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JULIAN GARCIA,

Petitioner.

PETITION FOR REVIEW

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the sentencing of the Petitioner.

III. ISSUES

1. Where, contrary to the Defendant's representations, *State v. Riles* states that "there is no express requirement under RCW 9.94A.120(9)(c) that the special conditions be crime-related" and holds that the condition was not "an unconstitutional infringement," has the petition demonstrated any conflict under RAP 13.4(b)(1)?
2. Has the Defendant's bare assertion demonstrated that the standard prohibition against associating with parolees and probationers offers a First Amendment significant question so as to justify review under RAP 13.4(b)(3)?
3. Has the Defendant offered any basis under RAP 13.4(b) to

review a meritless LFO claim which was raised for the first time in a motion for reconsideration?

IV. STATEMENT OF THE CASE

The Defendant Julian Garcia was charged with two counts of assault in the second degree (domestic violence) and interfering with the reporting of domestic violence. CP 4-6. The charges were reduced for plea, and the Defendant invited the court to review the police reports at his change of plea. RP 11.

The police report describes that the Defendant had been harming puppies – holding them by their necks and causing them to yelp. CP 1. When his mother took the dogs away from him and put them in a room, the Defendant punched the door and had to be restrained so he did not damage the door. CP 1. When his mother was unable to restrain him, she went to call his father. CP 2. The Defendant struggled with his mother over the phone and pushed her to the floor. CP 2. When his brother came to her rescue, the Defendant fought with both his mother and brother. CP 2. He struck his brother in the face with his fist three times. CP 2. He attacked both family members, first with broken glass and then a large kitchen

knife. CP 2. While armed with the knife, the Defendant said he was going to kill them. CP 2. Both victims told police they believed the Defendant would carry out his threats to kill them. CP 3.

On September 13, 2017, the 22-year-old Defendant pled guilty to reduced domestic violence charges of assault in the third degree and assault in the fourth degree. CP 9-20. The State did not seek any LFOs outside of the mandatory ones. CP 23 ($800 total); RP 17. Because the Defendant's ability to pay was irrelevant to those LFOs, the court made no inquiry. RP 17-18.

The court imposed credit for time served and 12 months of community custody. CP 25. He is no longer under community custody. Those now former community conditions included a requirement that the Defendant "obtain a chemical dependency assessment and comply with all recommendations" and "not associate with any individuals who are on probation or parole." CP 29. The Defendant challenged these community custody conditions on appeal. The court of appeals reversed one condition and affirmed the other. Unpublished Opinion.

The Defendant filed a Motion for Reconsideration. One of the

arguments therein asked for the first time that the court strike a $200 legal financial obligation. The court called for the State's response[1] and then denied this motion.

V. ARGUMENT

A. BECAUSE THE DEFENDANT HAS FINISHED SERVING HIS COMMUNITY CUSTODY TERM, HIS CHALLENGE OF A COMMUNITY CUSTODY CONDITION IS MOOT.

The Defendant states, even if this case "becomes" moot, the Court should grant review. Petition at 17. The case did not become moot while this petition was pending. The Defendant finished serving his term of community custody in September, the month before the Unpublished Opinion issued. With the delay caused by the motion for reconsideration, the Defendant's petition was filed two months after any relief could be granted. It relies upon a careless misreading of a single case. Numerous other cases make clear that the Defendant's claim is without merit. There is no value in review.

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[1] In its motion for reconsideration, the Defendant argued the court's unpublished opinion was mistaken in describing his sentence as a First Time Offender Waiver (FTOW). The court of appeals called for the State's response. The State confirmed the Honorable Judge Korsmo's interpretation of the record where the prosecutor had recommended the FTOW, and the superior court had imposed a sentence below the standard range. State's Answer at 2 (explaining an offender score of 1 under RCW 9.94A.030(42)(a)(i) and RCW 9.94A.525(21)(d) resulted in a standard range of 3-8 months on the felony).

B. THE COURT WAS STATUTORILY AUTHORIZED TO IMPOSE THE CONDITION PROHIBITING CONTACT WITH PROBATIONERS AND PAROLEES.

The Defendant seeks review of the affirmed, standard[2] prohibition against associating with persons on probation or parole both under the statute and under the constitution.

1. The condition is authorized under RCW 9.94A.703(3)(b).

The Defendant has argued that the condition is not authorized, because it is not crime-related as required if it were entered under the authority in RCW 9.94A.703(3)(f). Petition at 8. A different subsection, RCW 9.94A.703(3)(b), authorizes the superior court to order an offender to "refrain from direct or indirect contact with [...] a specified class of individuals," which includes a prohibition against associating with parolees and probationers. *State v. Acevedo*, 159 Wn. App. 221, 233, 248 P.3d 526, 531 (2010).

2. There is no conflict with *State v. Riles.*

The Defendant argues that the requirements in subsection (f)

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[2] It is a standard condition recommended by the Sentencing Commission that an offender may not associate with convicted felons. *United States v. Napulou*, 593 F.3d 1041 (9th Cir. 2010) (citing U.S. Sentencing Guidelines Manual § 5D1.3(c)(9) (2008)). The prohibition is not impermissibly vague. *United States v. King*, 608 F.3d 1122, 1128-29 (9th Cir. 2010).

should be imputed subsection (b). Petition at 10. This is ungrammatical. The subsections are parallel, not subsidiary.

The argument conflicts with the plain language of the statute and with case law. RCW 9.94A.703(3)(b); *State v. Bobenhouse*, 143 Wn. App. 315, 332, 177 P.3d 209, 217 (2008), *aff'd*, 166 Wn.2d 881, 214 P.3d 907 (2009); *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239, 243 (1992) (a condition imposed under this section need not be crime-related).

It is also a careless misreading of the single case cited for support – *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), *abrogated by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010).

The petitioners in *Riles* challenged a prohibition against contact with minors (not probationers). *State v. Riles*, 135 Wn.2d at 336, 338. The *Riles* opinion consolidated the petitions of two sex offenders. Riles had been convicted of raping a six year old boy; Gholston had been convicted of raping a nineteen year old woman. *State v. Riles*, 135 Wn.2d at 332, 336.

The defendant Riles contended the prohibition against contact

with minors was "overbroad." *State v. Riles*, 135 Wn.2d at 336. He did not and could not have argued it was not crime-related where his victim had been 6 years old. *Id.* at 332. As to Riles, the court upheld the condition, finding it neither overbroad nor vague. *Id.* at 347-49.

Gholston also claimed the condition was vague and overbroad. *Id.* at 338. And because his victim had been 19, he argued the prohibition was not crime-related, citing the former RCW 9.94A.120. *Id.* As to Gholston, the court noted that "there is no express requirement under RCW 9.94A.120(9)(c) that the special conditions be crime-related." *Id.* at 349. The court was unwilling to hold the condition to be "an unconstitutional infringement." *Id.* at 350. However, it found that "because that particular restraint upon Petitioner Gholston's freedom of association bears no reasonable relationship to the ***essential needs of the state and public order***," the prohibition "at least borders on unconstitutional overbroadness." *Id.* (emphasis added). The court directed the condition stricken as "unreasonable" or "not justified." *Id.*

In other words, this case does not hold that a prohibition against contact with minors is unauthorized under the statute. And

it does not hold that such a prohibition is even categorically impermissible under the constitution. *Id.* ("Although we conclude the provision is not justified under the facts in Petitioner Gholston's case, we do not see it as an unconstitutional infringement.") *Riles* only requires that the condition be reasonable, justifiable, and essential to the needs of the state and public order to be constitutional.

The Defendant's interpretation of *Riles* is without merit. There is no conflict.

C. THE EXPIRED CONDITION PROHIBITING ASSOCIATION WITH OTHER PROBATIONERS OR PAROLEES WAS CONSTITUTIONAL.

The Defendant challenges the prohibition under the First Amendment, arguing that it "bear[s] no reasonable relation to the goal of promoting safety and public order." Petition at 14.

It is axiomatic that a sentencing court has broad discretion to prohibit association between and among convicted felons. Discouraging supervised offenders from associating with each other is a time-honored probationary practice designed to encourage compliance with the law by disrupting old associational patterns. *Cf. State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993)

(prohibition against associating with other computer hackers is not an unconstitutional restriction but rather helps prevent Riley from further criminal conduct for the duration of his supervision); *United States v. Gracia*, 755 F.2d 984 (2d. Cir. 1985) (prohibition against association with known criminals advanced legitimate probation objectives of protecting the public and rehabilitating the defendant and was not an unduly harsh condition).

> [I]t is beyond question that preventing a probationer from associating with those apparently involved in criminal activities is "reasonably related" to the probationer's rehabilitation and the protection of the public. See United States v. Consuelo-Gonzales, 521 F.2d 259, 264 (9th Cir. 1975) (en banc).

United States v. Furukawa, 596 F.2d 921, 923 (9th Cir. 1979). Preventing reoffense by limiting contact with other offenders is a compelling state interest. And the court acts within its discretion when it imposes a condition prohibiting association with felons in order to better protect the public and better assist the defendant achieve rehabilitation. *Id.* Such restrictions are reasonably necessary and narrowly drawn to accomplish the essential needs of the state and public order. *State v. Warren*, 134 Wn. App. 44, 70-71, 138 P.3d 1081 (2006).

In a recent, unpublished opinion, the court of appeals pointed out that a challenge to a community custody condition prohibiting association may fall under either the First Amendment freedom of "expressive association" or the Fourteenth Amendment right to "intimate association." *State v. Dickerson*, 194 Wn. App. 1014, 2016 WL 3126480 (2016) (unpublished, nonbinding, but citable under GR 14.1).

> The source of the right is critical, because it affects the grounds on which the community custody condition may be challenged. [...] courts have "generally confined the overbreadth argument to statutes or ordinances impinging on First Amendment activities." *City of Seattle v. Montana*, 129 Wn.2d 583, 598 n.7, 919 P.2d 1218 (1996).

State v. Dickerson, 2016 WL 3126480 at *3 (denying the challenge where the right was determined to arise under the Fourteenth Amendment). The First Amendment guards speech, assembly, petition for the redress of grievances, and the exercise of religion. *Dickerson*, 2016 WL 3126480 at *2. The Fourteenth Amendment guards intimate human relationships that attend the creation and sustenance of a family, including marriage, childbirth, the raising and educating of one's children, and cohabitation with one's relatives, but

not extending to the ability to choose one's fellow employees. *Dickerson*, 2016 WL 3126480 at *3.

In the *Dickerson* case, the restriction was on romantic relations, such that the source of the right was clear. Here, the Defendant's challenge is vague. The Defendant does not explain what the purpose of his associating with parolees or probationers would have been, whether he would have wanted to associate with this group for romantic/familial versus political/religious purposes. He did not ask for any exemption to associate with an identified intimate partner; and he did not allege that parolees were gathering with a political speech purpose. Because no explanation was provided, it is likely none of these purposes were present when the condition was in effect. The State's concern would have been that the Defendant's purpose in associating with parolees and probationers would have been to engage in criminal behavior, e.g. assaultive or drug abusing behavior. Such is not a protected purpose.

An offender's usual freedom of association may be restricted if the restriction is reasonably necessary to accomplish the needs of

the State and public order. *State v. Bobenhouse*, 143 Wn. App. at 332. Accordingly, a court may order a drug offender not to associate with people who use drugs. *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006) (upholding prohibition from associating with known drug offenders); *State v. Llamas-Villa*, 67 Wn. App. at 455-56 (upholding prohibition from associating with persons using, possessing, or dealing controlled substances). And a court may prohibit association with known felons and members of a specified gang. *State v. Weatherwax*, 193 Wn. App. 667, 677–81, 376 P.3d 1150, 1155 (2016), *review granted on other grounds*, 186 Wn.2d 1009, 380 P.3d 490 (2016), *and rev'd*, 392 P.3d 1054 (Wash. 2017).

In this case, the facts of Mr. Garcia's offense include likely animal abuse, domestic abuse, and drug abuse. It is a broad range of offenses. The twelve month period of supervision limited his association with a class of persons who were then being supervised for commission of similar criminal acts. In any case, because the circumstances of Mr. Garcia's offense include a variety of criminal behavior, the prohibition against contact with criminal association was a reasonable crime-related sentencing condition.

D. THE DENIAL OF THE LFO CLAIM, RAISED FOR THE FIRST TIME IN MOTION FOR RECONSIDERATION, IS NOT REVIEWABLE UNDER RAP 13.4(b).

In the Petition for Review, the Defendant does not argue that his LFO claim merits review under RAP 13.4(b). Nor can he. He asserts instead that if the Court finds one issue merits review under RAP 13.4(b), then this LFO matter can hitch a ride. There is no authority for such an assertion. The court will "only" accept review under RAP 13.4(b).

The Defendant argues that striking the criminal filing fee would be "consistent with" *State v. Ramirez*, -- Wn.2d --, 426 P.3d 714 (2018). This is untrue. First, the procedural postures are different. Ramirez's case was about LFOs. Therefore when Ramirez raised the matter in his supplemental brief, the State did not object. *State v. Ramirez*, Petitioner's Supplemental Brief, 2018 WL 2323707 (Wash., filed Apr. 20, 2018), 10-14. The Defendant Garcia here never challenged LFOs in the appeal. And the State does object.

Second, there is no merit to the claim. In *Ramirez*, the court addressed the passage of HB 1783 which, in part, amended RCW 36.18.020(2)(h) (emphasis added):

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case ***shall be liable*** for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent ***as defined in RCW 10.101.010(3) (a) through (c)***.

The amended statute mandates the imposition of the criminal filing fee unless the defendant is indigent "as defined in RCW 10.101.010(3)(a) through (c)." The Defendant does not allege any fact establishing (a), (b), or (c). The record does not establish the presence of (a), (b), or (c). Therefore, the criminal filing fee remains mandatory.

The court must impose the fee unless there is a record that the defendant is on public assistance, has been committed involuntarily to mental hospital, or earns 125% or less than the federal poverty guidelines. The Defendant Garcia does not allege any of these. He only claims that counsel was appointed on appeal, i.e. subsection (d) of RCW 10.101.010(3).[3] The Legislature

[3] The Defendant argues that he has been found indigent for purposes of appointment of counsel. Petition at 18 (citing CP 51-52). The affidavit in support of the motion for appointment of counsel only claims the Defendant had no income *while he was incarcerated.* CP 52. But the court released him on the day of sentencing, imposing a sentence of time served. CP 25. Therefore, there was no

specifically excluded this subsection as a consideration in HB 1783; the appointment of counsel has no relevance in this context. Accordingly, under the amended law the court shall impose the fee. There was no error.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny review.

DATED: December 21, 2018.

Respectfully submitted:

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Jennifer M Winkler winklerj@nwattorney.net sloanej@nwattorney.net	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED December 21, 2018, Pasco, WA

factual basis even for appointment of counsel at public expense.

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