

No. 70457-5-I

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

King County No. 08-1-04249-5 SEA

STATE OF WASHINGTON,

Respondent,

v.

PETER ANSELL,

Appellant.

APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

Table of Authorities ..... ii

I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

    A. Assignments of Error ..... 1

    B. Issues Pertaining to Assignments of Error.....2

II. STATEMENT OF THE CASE .....4

    A. Procedural Background .....4

    B. The Defendant’s Background and Treatment History.....9

    C. The Judge’s Most Recent Decision ..... 12

III. ARGUMENT.....17

    A. The Standard of Review ..... 17

    B. Application of the Legal Standard to the Facts of This Case..... 18

IV. CONCLUSION.....21

Proof of Service

**TABLE OF AUTHORITIES**

**Washington State Cases**

*In re Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010).....4, 15, 16, 17, 18, 20

*State v. Ancira*, 107 Wn.App. 650, 27 P.3d 1246 (2001) .....18, 19, 20

*State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008).....4, 5, 18

**State Statutes**

RCW 26.09.191 ..... 6, 12, 15

**I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**A. Assignments of Error**

1. The trial court erred after Defendant's successful appeal in failing to enforce the mandate from this Court, which directed the trial court to "determine the parameters of Ansell's sentencing conditions pursuant to the proper standard," which this Court defined as limiting the Defendant's contact with his children only as "reasonably necessary" to protect his "children from harm," with due deference to Mr. Ansell's "fundamental constitutional right to parent his children." *See* Exhibit 1 to this Brief (Slip Opinion from previous appeal of same issue).

2. The trial court erred in denying Defendant's Motion to Modify his Judgment and Sentence by limiting the Defendant's contact with his children to "indirect contact by written correspondence with his children during his period of incarceration, provided that such written contact is approved by a counselor or therapist for the children who gives consideration to the emotional and psychological impact of the contact on the children." CP 201-204, Order ¶ 2.

3. The trial court erred in prohibiting the Defendant from having any contact with his children by telephone, even if supervised by a

responsible adult with knowledge of the Defendant's conviction. CP 212-214, Order ¶ 3.

4. The trial court erred by ignoring all the evidence from many sources that concluded the Defendant posed no threat to his children, and by relying on hypothetical concerns that the Defendant might pose a threat to the welfare of his children, in order to severely limit his contact with them to monitored, written correspondence after more than five years of no contact whatsoever, and in failing to give due deference to the Defendant's "fundamental right to parent."

5. The trial court erred in entering Finding of Fact 4 that the Defendant "has not produced to the Court or State a sexual deviancy or psychosexual evaluation that appears to comply with Washington Administrative Code (WAC) 246-930-320." CP201-204, Finding 4.

6. The trial court erred in entering Finding of Fact 5, that "Defendant has not engaged in sex offender treatment since ordered by the Court as a condition of sentencing." CP 201-204, Finding 5.

**B. Issues Pertaining to Assignments of Error**

1. Whether there must be some evidence that the Defendant poses a risk to his children's welfare before a trial court can severely restrict a defendant's access to his biological children. (Assignments of Error 1-4.)

2. Whether there is any basis in fact, or in the record, to impose any restrictions on the Defendant's contact with his children in writing, by telephone, or in person, where all such contact would occur under supervision of a responsible adult with knowledge of his conviction. (Assignments of Error 5-6.)

3. Whether the duration and scope of the no contact provision was reasonable and necessary based on the evidence in the record about the Defendant and his history and positive relationship with his children. (Assignments of Error 1-6.)

4. Whether the trial court recognized the Defendant's "fundamental right to parent" in imposing strict conditions based on purely hypothetical concerns. (Assignment of Error 1-6.)

5. Whether the trial judge balanced the importance of the Defendant's fundamental constitutional right to parent his children against any supposed "indirect" or hypothetical threat the Defendant poses to the welfare of his children. (Assignments of Error 1-6.)

6. Whether the repeated failure of the trial judge to follow this Court's mandate requires that the case be transferred to a different judge upon remand. (Assignments of Error 1-6)

## II. STATEMENT OF THE CASE

### A. Procedural Background

On June 19, 2009, the Honorable Michael Fox sentenced the Defendant to a period of 130 months imprisonment based upon the Defendant's guilty plea to three counts of child molestation in the first degree. The Defendant's children were not in any way alleged to be victims in the case, yet one of the conditions of that Judgment and Sentence provided that there be "No contact with the Defendant's own children until they reached the age of majority (18)." CP 1-10, ¶ 4.6 at p. 6.

Mr. Ansell filed a motion to modify the conditions of his sentence, requesting that the trial court strike the portion of the no-contact order pertaining to his own children, but that motion was denied by the trial judge. CP 11, 12-13. The Defendant then appealed, relying on *In re Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010) and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008), and this Court reversed and ordered that prohibition stricken. *See* Exhibit 1 to this Brief. Applying constitutional principles to the prohibition against the Defendant's contact with his own children, the Court stated:

"More careful review of sentence and conditions is required where those conditions interfere with a fundamental constitutional right." *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The right to the care, custody, and companionship of one's children constitutes such a

fundamental constitutional right. *Rainey*, 168 Wn.2d at 374. Thus, sentencing conditions burdening this right “must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” *Rainey*, 168 Wn.2d at 273 (quoting *Warren*, 165 Wn.2d at 32).

*Id.*, Slip Opinion at 4-5. This Court further reasoned: “A crime-related prohibition that interferes with a fundamental constitutional right is lawful only where there is no reasonable alternative way to achieve the State’s interest.” *Id.*, Slip Opinion at 5 (citing *Warren*, 165 Wn.2d at 34-35).

Analyzing the prohibition in this case, this Court observed that:

In imposing the challenged sentencing condition, the trial court set forth no explanation as to whether the no-contact order is reasonably necessary to realize a compelling State interest. *See Rainey*, 168 Wn.2d at 381-82. Moreover, although the State has a compelling interest in protecting children from harm, the State has failed to demonstrate how prohibiting all contact between Ansell and his children until they reach the age of majority, particularly where the children were not victims of Ansell’s offenses, is reasonably necessary in order to effectuate that interest. Because the sentencing condition implicates Ansell’s fundamental constitutional right to parent his children, the State must show that no less restrictive alternative would prevent harm to those children. We do not conclude that Ansell’s contact with his children must be subject to no limitations. Any such limitations, however, must be narrowly drawn. *See Warren*, 165 Wn.2d at 34. (“[C]rime-related prohibitions effecting fundamental rights must be narrowly drawn.”).

*Id.* at 7-8. This Court then concluded its opinion by holding:

we strike this sentencing condition prohibiting Ansell’s contact with his children and remand for further proceedings. We are confident that, on remand, the trial court will

determine the parameters of Ansell's sentencing conditions pursuant to the proper standard.

*Id.* at 8.

Following remand, the trial court entered an Order on March 15, 2012 modifying the original no contact order but still imposing insurmountable burdens on the Defendant's ability to have any contact, even by mail or telephone, with his biological children. *See* CP 133-175, Declaration Exhibit 3. The trial judge determined that Mr. Ansell was "subject to rebuttable presumption that he poses a present danger to F.A. (DOB 7/5/2001) and A.A. (DOB 2/20/2004) and shall have no contact with his children of any kind until he rebuts the presumption as set out in RCW 26.09.191(2)(f)." *Id.*, Exhibit 3.

The Court then stated that the Court would, in the future, "consider the following additional factors," with regard to the rebuttable presumption, including the Defendant "successfully participating in prison-based sex offender treatment or its equivalent or community based sex offender treatment (depending on his custody status) and the results of his treatment or progress are provided to the State and the Court and defense." *Id.*, Para. (A). The Court stated it "may consider" state certified sex offender counselor's recommendations from the State or defense "that contact is appropriate and presents minimal risk to his children." *Id.*, Para. (B).

In addition to these requirements, the Court also required: “That the Defendant’s current State certified sex offender treatment or counselor or provider reviews and approves any contact plan between the Defendant and his children.” *Id.*, Para. (C). Numerous additional conditions were imposed, including the appointment of a GAL (Guardian Ad Litem); supervision “by a neutral and independent adult . . . approved by the Defendant’s DOC sex offender treatment provider or counselor”; an additional hearing “with notice to the children’s mother, that the supervising adult is willing and capable of protecting the child from harm”; and other conditions. *Id.*

In the course of the hearing, defense counsel advised the Court and the prosecutor that the Defendant would not be eligible for enrollment in a “prison-based sex offender treatment” program, as required by every aspect of the judge’s ruling, for several years, until approximately twelve months before his release, which is not scheduled to occur until February 24, 2019. The Defendant’s last contact with his children was more than five years earlier, on May 22, 2008. If he was forced to wait until he begins receiving treatment in prison, this would add another six years of no contact for a total of eleven years, when his children will be fifteen and eighteen years of age, which is essentially the same prohibition this Court found to be unconstitutional. This was hardly “reasonably necessary,” and is extremely

harmful to both him and to his children, who need to have contact with their father.

In response to the trial court's ruling, the defense spent months collecting considerable documentation to prove that none of the resources ordered by the court were available in prison.<sup>1</sup> The defense then renewed its motion to modify these conditions, which were insurmountable, and the State agreed that they were inappropriate, so the Court conducted yet another hearing on April 19, 2013. But, despite the agreement by both the State and the defense that any contact between the Defendant and his biological children should be determined by the family court, in accordance with an agreed parenting plan, the court nevertheless imposed its own additional restrictions, limiting the Defendant's contact with his children to

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<sup>1</sup> On March 21, 2012 the Defendant submitted a DOC form entitled "Health Services Kite," asking: "Can I get counseling for psycho-sexual issues? If so can you please make me an appointment for counseling?" On that same form he received an answer two days later stating: "We do not treat psychosexual issues." See CP 133-175, Declaration, Exhibit 5. On April 2, 2012, defense counsel sent a letter to Fredrick Rodgers at the Department of Corrections asking that the Defendant be accepted

into your sex offender treatment program at the present time, rather than forcing him to wait another eight or nine years before he can even apply. I know this is an unusual request but I think it is fully justified given the reasoning of the Court of Appeals that he has a fundamental constitutional right to have access to his own children under the least restrictive possible conditions.

*Id.* On May 1, 2012, Gynger Steele, the Director of the Sex Offender Treatment Program at Monroe/Twin Rivers Unit, responded that "The Sex Offender Treatment Program staff does not facilitate such evaluations." *Id.* Another document from the Department of Corrections, the application form for the SOTP program, stated explicitly that no one is eligible to even apply to the program until they are "within 18 months of your release date at the time you apply to the program." *Id.*

indirect contact by written correspondence with his children during his period of incarceration, provided that such written contact is approved by a counselor or therapist for the children who gives consideration to the emotional and psychological impact of the contact on the children.

CP 201-204. The defense filed a motion to allow monitored phone contact, but this was denied. CP 205, 212-214.

The Defendant has now filed a second appeal of both orders, and seeks to have these limitations stricken and to have the case referred to a different judge who will fulfill this Court's Mandate upon remand. CP 206-122; 215-219.

**B. The Defendant's Background and Treatment History**

Prior to this case, the Defendant had no criminal history, he had been very involved in his community, with his wife and with his children, and he still has strong family support from his parents and siblings. He obtained a degree in history from the University of Washington in 1988, enlisted in the U.S. Army Reserves and received an honorable discharge in 1986. He had an excellent work history with various companies, and formed his own business that earned him upwards of \$70,000 to \$90,000 annually. Clifford Thurman, who wrote the presentence investigation, described Peter Ansell as "a good candidate for treatment as his motivation seems heightened." The Defendant's father, Julian Ansell, a retired physician and professor of medicine at the University of Washington, submitted a declaration

describing Peter Ansell's very positive relationship with his children and the "tremendous grief" he is suffering "from five years of having no contact with them." CP 177-180. He and his wife do have contact with the children and Dr. Ansell attached an email from their mother describing the therapy that the children have successfully completed, and recounting "each child" asking "when they will see daddy again," and "where is daddy?" *Id.*<sup>2</sup>

For more than a year before sentencing, Mr. Ansell had been involved in counseling with G. Christian Harris, M.D., a state certified Sex Offender Treatment Provider (SOTP). Dr. Harris, a psychiatrist, prepared a sexual deviancy evaluation which was attached as Exhibit 1 to the Defendant's Sentencing Memorandum. CP 133-175, Ex. 6. Dr. Harris had more than 50 sessions with the Defendant "in psychotherapy specifically

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<sup>2</sup> Numerous individuals, including friends and family members with children of their own, wrote extensive letters on behalf of the Defendant, which were attached as exhibits to Defendant's Sentencing Memorandum. Each of these individuals had questioned their own children to determine that Peter never interacted inappropriately with any of them. Quite to the contrary, he was described "as a very committed parent."

The Defendant's sister Jody confirmed that Peter had never had any inappropriate contact with her children: "To the contrary, Peter has always been involved with our children in a loving and positive way."

The Defendant's sister Ellen, a professor at the University of Pittsburgh, verified that Peter had never done anything inappropriate with her children either and observed that "Peter is instrumental in nurturing family connection" because "he initiates and organizes some of our core family gatherings," which she listed in great detail. She stated: "Peter enjoys family bonds and respects family traditions. I know this. Thus, it is cruelly ironic that he will be separated from family for so long."

Peter Ansell's divorce lawyer, Alan Funk, wrote that "Peter took the high road in the divorce . . . was cooperative and sought to make compromises when appropriate," including the payment of child support "even though he lost his job." Mr. Funk described Mr. Ansell as "thoughtful of others, including his wife and children, and he remained levelheaded under difficult circumstances."

dealing with his sexual offenses, a treatment modality now characterized as a SOTP, or sex offender treatment program.” Dr. Harris observed that “Mr. Ansell has been intensely involved in his therapy” and that he

has displayed great remorse, tearfulness, empathy, and a somewhat relentless and obsessive self-questioning as to what type of regressive cognitive processes may have been involved in the deterioration and erosion of his usual sense of morality.

Dr. Harris no longer considered Peter Ansell to be a threat to the community because “he has openly declared his guilt and taken responsibility for his offense behaviors.” *Id.*

Each of his supporters similarly described Mr. Ansell’s dedication to his treatment and rehabilitation with Dr. Harris, stating that he was “taking ownership of his poor choices and their effect.” As noted by Carol Grant:

He told me he considered all the children involved in coming to his decision to plead guilty. Peter said that his guilty plea would prevent further trauma to the children by avoiding their involvement in trial and testimony. Peter has repeatedly told me he takes full responsibility and recognizes personal deficits that will require ongoing treatment.

*Id.*<sup>3</sup>

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<sup>3</sup> Similarly, Christopher Banks, a friend of 30 years, acknowledged that Peter “has shown remarkable strength in facing this and has accepted his responsibility in these matters. He has fully embraced the treatment he has started and he is very eager to continue treatment wherever he is ultimately confined.” CP 118. Mr. Banks also confirmed with his children that Peter Ansell had never acted inappropriately with them.

Steven Ansell, the Defendant’s brother and the principle violist for the Boston Symphony Orchestra, verified that the Defendant had “never treated my children in an inappropriate manner or behaved inappropriately toward them in any way.” He, too,

**C. The Judge's Most Recent Decision**

As already noted, despite all this evidence Judge Oishi has persisted in limiting Mr. Ansell's contact with his children to monitored, written correspondence, and the judge has prohibited even monitored telephone contact.<sup>4</sup> At the hearing on April 19, 2013, Judge Oishi began by reference to the family court parenting plan "that was entered on or about . . . February 26, 2009" in the dissolution proceeding, and he focused on RCW 26.09.191, a statute applicable to family court that creates a rebuttable presumption that a parent convicted of a sex crime "poses a present danger to his children and shall have no contact until he rebuts the presumption." RP (4/19/3) at 5.

Defense counsel disagreed with this approach, arguing that "this court needs to focus on what the Court of Appeals has said . . . based on constitutional principles . . ." and noted that the rebuttal of presumption in family court is:

somewhat academic for this court because this court has a specific mandate from the Court of Appeals. And the order that was entered by this court before flies in the face of that mandate. It would have prevented my client from having any contact with his kids until they were virtually 18, which is what the Court of Appeals says was unconstitutional. I mean, that's very, very clear.

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commented on the Defendant's dedication to treatment and the fact that he "has taken responsibility for his actions," such that "he will never repeat the behavior he is being punished for." *Id.*

<sup>4</sup> The children live with their mother on the east coast, so in-person contact is not an option.

*Id.* at 6-7. Defense counsel noted the “conundrum” he was facing,

which has been exceedingly frustrating and costing my client’s family a great deal of money to litigate something that I think is actually very simple, and it’s also causing a huge delay. It’s already been over five years since he’s had any contact.

*Id.* at 7. Defense counsel argued that Judge Oishi was “tying the hands of Family Court” by “preventing us from even going to Family Court to try and satisfy the rebuttable presumption.” *Id.* Defense counsel urged Judge Oishi to “just let it go to Family Court.” *Id.*

However the judge persisted in asking “how can he rebut the presumption?” *Id.* at 8. Defense counsel responded that the defendant “has done that,” by satisfying all “three requirements of the rebuttable presumption.” *Id.* Defense counsel referred to police reports that had been submitted to the court in connection with defense counsel’s declaration, which established that the police thoroughly interviewed the children, CPS interviewed the children, and there were emails from the children asking to have contact with their father. *Id.*<sup>5</sup>

Defense counsel’s “second point” was that the defendant had engaged in “50 sessions over 11 months with a certified state-registered sex

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<sup>5</sup> But despite the repeated interviews by Detective Stangland, CPS, and the children’s mother, which revealed no inappropriate conduct at all between the Defendant and his biological children, the prosecutor argued: “We can’t rely on their denials. We know, and I accept the fact,

offender treatment provider who has written numerous reports to this court,” establishing that the defendant poses “no risk” to his children. *Id.* at 8-9. Defense counsel reminded Judge Oishi that the defendant would not be eligible for any additional treatment in prison until “five or six years from now, which would extend the period of no contact with his kids until at least one of them is 18 and the other is 16 or 17. The Court of Appeals said that is unconstitutional. And we keep losing sight of that in this courtroom.” *Id.* at 9. The prosecutor noted: “And I recognize that Mr. Ansell cannot get treatment in prison. I do acknowledge that.” *Id.* at 14.

Finally, the defense quoted from all the reports in evidence establishing that the defendant posed “no risk” to his children, noting that there was “nothing from the state, nothing from Nancy Leonard, nothing from anybody saying he poses a risk to his children.” *Id.* at 9. The defense discussed the close monitoring that was available through the prison and through Family Court for any contact the defendant would have with his children either in writing, on the phone, or in person. *Id.* at 9-10.

In response, the State agreed “that the Family Court has had an opportunity to really look at the entire family structure. So it has more information than Your Honor has before you.” *Id.* at 11. The prosecutor stated “I’m happy to agree with Mr. Hansen, I do believe we have to go with  

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that they have denied it,” then made the incongruous argument that they

what the Court of Appeals has suggested.” *Id.* The prosecutor also agreed with defense counsel that the rebuttable presumption statute was not “controlling on this court,” since it specifically applies to “Family Court.” *Id.* at 19. The prosecutor had “consulted with our appellate unit on that and that’s all I can offer to the court,” but the judge persisted in “struggling” with the application of RCW 26.09.191 in the criminal case. *Id.* at 20.

Defense counsel pressed his position

that we need to let Family Court deal with this where Nancy Leonard is represented by counsel, which she isn’t here. And I think we should delegate the application of the rebuttable presumption statute to Family Court where we can get input from therapists for the children and a guardian ad litem and hear from the mother.

*Id.* at 20-21. Alternatively, counsel argued that the defense had “satisfied a rebuttable presumption but Family Court should decide that. And that, in any event, the rebuttable presumption needs to be read in light of the *Rainey* decision, which raises constitutional concerns in a situation, in a very narrow situation where you are dealing with a parent and a child.” *Id.* at 21. Defense counsel urged the criminal court “to release restrictions and allow the Family Court, with the participation of a therapist, a GAL and Nancy Leonard and her attorney to apply the statute and taken into consideration the

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were somehow “indirect victims.” RP (4/19/13) at 16.

*Rainey* decision in doing so.” *Id.* Defense counsel asked the prosecutor if she agreed with this presumption, and she said “that’s correct.” *Id.*

Defense counsel reiterated that Family Court was better equipped to make the decision in a manner consistent with *Rainey* because Family Court “involves GALs, the mother’s input and therapists and a lot of input that I think Family Court is geared up to receive and evaluate and it’s got the mechanisms in place.” *Id.* at 22. The judge’s order in the criminal case had “created a roadblock for us to even go to Family Court.” *Id.* The State then agreed that the criminal court “should leave the 26.09.191 to Family Court in the family law case,” especially in light of the fact “that Mr. Ansell is in prison.” *Id.*

The prosecutor also acknowledged that the defendant’s children “are 11 and 9 currently. They have not had contact with their father for over half of their life.” *Id.* at 16. The prosecutor reiterated: “These are children who haven’t seen their father in years, five, six, seven years. And right or wrong, that is a reality.” *Id.* at 17.

The Court concluded the hearing by stating:

I honestly did not anticipate both counsel coming in and agreeing in principle that I shouldn’t really be applying 26.09.191 to this case. So I, I need to kind of reassess.

*Id.* at 23. But despite this agreement by both parties, the Court issued its own order restricting Mr. Ansell's contact with his children to written correspondence that had to be screened by some unspecified therapist. CP 201-204; 212-214.

### III. ARGUMENT

#### A. The Standard of Review

At the outset of its analysis, the Supreme Court noted in *Rainey* that sentencing conditions are normally reviewed "for abuse of discretion," but that the Court would

more carefully review conditions that interfere with a fundamental constitutional right, such as the fundamental right to the care, custody and companionship of one's children. Such conditions must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny.

168 Wn.2d at 374 (several citations to *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008) omitted). In discussing this "fundamental right to parent," the *Rainey* Court noted that:

A defendant's fundamental rights limit the sentencing court's ability to impose sentencing conditions: "[c]onditions 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." *Warren*, 165 Wn.2d at 32, 195 P.3d 940.

*Id.* at 377. The *Rainey* Court held that “The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny.” *Id.*, at 374.

The *Rainey* Court next discussed the scope of the no contact order, and required that it be reasonably necessary and related to a legitimate concern:

As to the “reasonable necessity” requirement, the interplay of sentencing conditions and fundamental rights is delicate and fact-specific, not lending itself to broad statements and bright line rules.

*Id.*, citing *State v. Ancira*, 107 Wn.App. 650, 27 P.3d 1246 (2001) (holding that the State did not show that no contact with the defendant’s non-victim children was reasonably necessary to protect their safety) and *State v. Warren*, *supra*. Later in its opinion, the Court described this as a “command that restrictions on fundamental rights be sensitively imposed.” 168 Wn.2d at 381.

**B. Application of the Legal Standard to the Facts of This Case**

In applying *Rainey* to the facts of this case on the first appeal, this Court struck the sentencing condition prohibiting Mr. Ansell’s contact with his children until the age of 18 and remanded “for further proceedings” applying the proper constitutional standard. This Court reasoned:

Because the sentencing condition implicates Ansell's fundamental constitutional right to parent his children, the State must show that no less restrictive alternative would prevent harm to those children. We do not conclude that Ansell's contact with his children must be subject to no limitations. Any such limitations, however, must be narrowly drawn. [Citation omitted.]

See Slip Opinion, copy attached as Exhibit 1, at 7-8.

In this case, the rationale of *State v. Ancira, supra*, would apply because there is absolutely no factual basis for the Court to find:

4. Defendant has not produced to the Court or State a sexual deviancy or psychosexual evaluation that appears to comply with Washington Administrative Code (WAC) 246-930-320.

5. Defendant has not engaged in sex offender treatment since ordered by the Court as a condition of sentencing.

CP 201-204, Findings 4-5. Relatedly, there was no basis for the trial judge to conclude that "the Defendant is currently an untreated sex offender." *Id.* Conclusion of Law 1.

Nor is the second Conclusion of Law a basis for severely restricting the Defendant's contact with his children. There, the court concluded that these very strict "prohibitions" were justified because the "Defendant sexually abused child victims in close proximity to his own children," based upon the judge's review of the "Certification for Determination of Probable Cause." *Id.*, Conclusion 2 and Finding of Fact 1. Accordingly, it was legally erroneous for the court to conclude:

3. The crime-related prohibition set forth in this order are narrowly drawn to effectuate the compelling State interest of protecting children, specifically the Defendant's children.

*Id.*, Conclusion 3.

These Findings of Fact and Conclusions of Law fly in the face of this Court's mandate to Judge Oishi, the factual records showing no evidence whatsoever of misconduct toward the Defendant's own children, and the holding of the Supreme Court in *Rainey*, *Ancira*, and other cases. To reiterate: CPS, the mother, the police and therapists have all interviewed Mr. Ansell's children over the past five years and found absolutely no evidence of any abuse or any negative influence upon them. This is in stark contrast to the *Rainey* decision where the Defendant was guilty of first degree kidnapping of his daughter as a means to get even with his ex-wife following "a bitter divorce predicated on Rainey's domestic violence and threat," including his false allegations of child abuse against his ex-wife's boyfriend. *Rainey*, 168 Wn.2d at 372. The record in *Rainey* included testimony from family members expressing extreme concern about the risk that he posed to his wife and daughter, and the judge stating "that domestic violence had 'permeated these offenses.'" *Id.* at 373.

#### **IV. CONCLUSION**

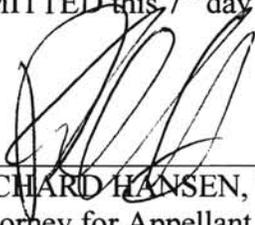
It has already been more than five years since Peter Ansell has had any contact with his children, directly or indirectly, and the minimal contact that the judge has now authorized is contingent on the review and discretion of a therapist and is limited to written correspondence. Moreover, these prohibitions will continue “during his period of incarceration,” which will last another five years or more. On the record in this case, there is absolutely no evidence to support these severe restrictions since the Defendant has never been shown to be a danger to his children, nor is there any evidence that he has ever engaged in any misconduct with them. To the contrary, he successfully engaged in counseling for over a year following his arrest and was no longer deemed to pose a risk to anyone.

This is totally inconsistent with another provision of the Judgment and Sentence that no one has challenged, which allows the Defendant to have contact with minors generally if there is “supervision of a responsible adult who has knowledge of this conviction.” *See* CP 1-10, para. 4.6 at p. 6. Det. Stangland, CPS, and Dr. Harris have all concluded that the Defendant does not pose a risk to his children and has never abused them in any way, yet his access to them has been far more restricted than being around other children who are total strangers. This makes no sense and it certainly does not conform to the legal standard set forth by this Court that the “the State

must show that no less restrictive alternative would prevent harm to those children,” and that “Any such limitations . . . must be narrowly drawn.” Slip Opinion at 7-8.

Accordingly, this Court should strike the no contact order in its entirety from the Judgment and Sentence, and defer to Family Court to determine if and when, and under what circumstances, Mr. Ansell should be allowed to have contact with his children. And finally, this Court should order that the case be remanded to a different judge to ensure that the mandate is followed.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of August, 2013.



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RICHARD HANSEN, WSBA #5650  
Attorney for Appellant

**PROOF OF SERVICE**

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

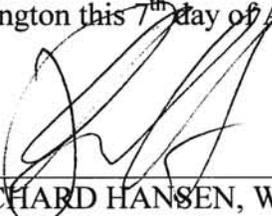
On the 7<sup>th</sup> day of August, 2013, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

Appellate Division  
King County Prosecutor's Office  
King County Courthouse  
516 Third Ave., W554  
Seattle, WA 98104

And mailed to Appellant:

Peter Ansell, #331217  
Appellant  
Monroe Corrections Center  
P.O. Box 777  
Monroe, WA 98272-0777

DATED at Seattle, Washington this 7<sup>th</sup> day of August, 2013.

  
\_\_\_\_\_  
RICHARD HANSEN, WSBA #5650  
Attorney for Appellant

# **EXHIBIT 1**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

STATE OF WASHINGTON,	)	
	)	No. 66068-3-1
Respondent,	)	
	)	
v.	)	MANDATE
	)	
PETER DANIEL ANSELL,	)	King County
	)	
Appellant.	)	Superior Court No. 08-1-04249-5 SEA
_____	)	<b><i>Court Action Required</i></b>

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on September 12, 2011, became the decision terminating review of this court in the above entitled case on October 28, 2011. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

c: Richard Alan Hansen  
Sean Patrick O'Donnell  
Hon. Michael J. Fox

***Court Action Required:*** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



**IN TESTIMONY WHEREOF,** I have hereunto set my hand and affixed the seal of said Court at Seattle, this 28th day of October, 2011.

  
**RICHARD D. JOHNSON**  
Court Administrator/Clerk of the Court of Appeals, State of Washington, Division I.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 66068-3-1
	)	
v.	)	
	)	
PETER DANIEL ANSELL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 12, 2011
_____		

DWYER, C.J. — Peter Ansell pleaded guilty to three counts of child molestation in the first degree. As a condition of Ansell's sentence, the trial court imposed a lifetime no-contact order with the victims and their families. In addition, the trial court ordered that Ansell have no contact with his own two young children, who were not victims of the offenses, until they reach the age of majority. Ansell filed a motion to modify the condition of his sentence prohibiting him from having contact with his own children. The trial court denied the motion. Ansell appeals.

1

Based upon offenses committed against three young girls, Ansell pleaded guilty to three counts of child molestation in the first degree. Ansell was provided access to the girls through a babysitting cooperative arrangement between three families, including Ansell's, who lived in the same neighborhood. Ansell has two

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No. 66068-3-I / 2

young children of his own, who, at the time of the offenses, were less than seven years old.

*The anticipated terms of the State's sentencing recommendation, other than the period of incarceration, were set forth in Ansell's plea agreement.* Pursuant to the plea agreement, Ansell agreed to a lifetime no-contact order with the victims and their families. With regard to contact with other minors, the agreement provided that Ansell would be required to seek the approval of his community corrections officer (CCO) and that any such contact "must be in [the] company of [a] responsible adult aware of these convictions." Clerk's Papers (CP) at 7. With regard to Ansell's own children, the plea agreement provided for contact "as approved by [the] CCO and when in [the] company of [an] adult aware of these charges." CP at 7. It further provided that "this may be modified by [the] treatment provider with respect to [Ansell's] children dependent on [whether Ansell's] performance in treatment is acceptable." CP at 7.

*The State's sentencing recommendation to the trial court, however, was much less detailed.* The State recommended that the court impose a lifetime no-contact order with the victims and their families. In addition, the State recommended that Ansell have no contact with "any minors without the supervision of a responsible adult who has knowledge of this conviction and order." CP at 32. However, the sentencing recommendation did not specifically address Ansell's contact with his own children.

At Ansell's sentencing hearing, on June 19, 2009, the trial court ordered that the defendant have no contact for life with the victims and their families.

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No. 66068-3-I / 3

With respect to Ansell's own children, the trial court ordered:

With regard to his own children, I will provide for no contact until the children reach the age of majority. At that point, it's up to the children to determine whether or not they want to have contact with their family – with their father and how contact is to be reestablished, if it is.

There are individuals who are professionals who can . . . be involved in family reconciliation if it is appropriate. But that's a matter that these children, who are now young, should be capable of exercising when they reach the age of majority and have their own personal sovereignty.

CP at 66-67. Similarly, the judgment and sentence provided that Ansell shall have "no contact with [his] children until they reach the age of majority (18)." CP at 38.

On July 6, 2010, Ansell filed a motion to modify the conditions of his sentence, requesting that the trial court strike the portion of the no-contact order pertaining to his own children. Ansell contended that the condition impermissibly restricts his "fundamental right to parent" and that there was no evidence that he was a danger to, or had engaged in misconduct with, his own children. CP at 48. Ansell requested that the court "defer to family court to determine if and when, and under what circumstances, [he] should be allowed to have contact with his children." CP at 49.

On September 8, 2010, the trial court denied Ansell's motion to modify the conditions of his sentence.

Ansell appeals.

II

Ansell contends that the trial court erred by prohibiting him from having

contact with his own children until they reach the age of majority and by denying his motion to modify the conditions of his sentence by either limiting or deleting that condition. Ansell asserts that the trial court impermissibly failed to weigh his “fundamental right to parent” against the State’s interest in protecting his children. Because it does not appear that the sentencing court considered whether the condition imposed is reasonably necessary to effectuate a compelling state interest, we strike the no-contact order pertaining to Ansell’s children and remand for further proceedings consistent with this opinion.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, authorizes the trial court to impose “crime-related prohibitions” as a condition of a sentence. RCW 9.94A.505(8). A “crime-related prohibition” prohibits “conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). “[B]ecause the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge’s in-person appraisal of the trial and the offender, the appropriate standard of review [is] abuse of discretion.” In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). With regard to the imposition of a crime-related prohibition, the trial court abuses its discretion if it applies the wrong legal standard. Rainey, 168 Wn.2d at 375.

“More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.” State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The right to the care, custody, and companionship of one’s children constitutes such a fundamental constitutional

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No. 66068-3-1 / 5

right. Rainey, 168 Wn.2d at 374. Thus, sentencing conditions burdening this right “must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” Rainey, 168 Wn.2d at 373 (quoting Warren, 165 Wn.2d at 32).

A crime-related prohibition that interferes with a fundamental constitutional right is lawful only where there is no reasonable alternative way to achieve the State’s interest. Warren, 165 Wn.2d at 34-35. For instance, we have held that a no-contact order prohibiting a defendant from all contact with his children was “extreme and unreasonable given the fundamental rights involved,” where less stringent limitations on contact would successfully realize the State’s interest in protecting the children. State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001). There, the trial court imposed the no-contact order, prohibiting Ancira from all contact with his wife and children, as a condition of Ancira’s sentence for felony violation of a domestic no-contact order. Ancira, 107 Wn. App. at 652-53. Although we recognized the State’s interest in preventing the children from witnessing domestic violence, we determined that the State had “failed to demonstrate that this severe condition was reasonably necessary” to prevent that harm. Ancira, 107 Wn. App. at 654. Rather, indirect contact, such as mail, or supervised contact without the mother’s presence, we concluded, might successfully satisfy the State’s interest in protecting the children. Ancira, 107 Wn. App. at 655.

Similarly, in Rainey, our Supreme Court struck a lifetime no-contact order prohibiting Rainey from all contact with his child, because the sentencing court

No. 66068-3-I / 6

did not articulate any reasonable necessity for the lifetime duration of that order. 168 Wn.2d at 381-82. In reaching this decision, the court noted that the fact that the child was a victim of Rainey's crime was not in itself determinative as to whether the no-contact order was proper: "It would be inappropriate to conclude that, simply because [the child] was a victim of Rainey's crime, prohibiting all contact with her was reasonably necessary to serve the State's interest in her safety." Rainey, 168 Wn.2d at 378. Recognizing "the fact-specific nature of the inquiry," the court remanded to the trial court for resentencing so that the court could "address the parameters of the no-contact order under the 'reasonably necessary' standard." Rainey, 168 Wn.2d at 382.

Here, the trial court ordered that Ansell have "no contact with [his] children until they reach the age of majority (18)." CP at 38. Because the no-contact order implicates Ansell's fundamental right to the care, custody, and companionship of his children, "[t]he question is whether, on the facts of this case, prohibiting all contact with [his children], including indirect or supervised contact, is reasonably necessary to realize [a compelling State interest]." Rainey, 168 Wn.2d at 379. In order for the sentencing condition to be constitutionally valid, "[t]here must be no reasonable alternative way to achieve the State's interest." Warren, 165 Wn.2d at 34-35.

The State contends that the trial court did not abuse its discretion in imposing the no-contact order pertaining to Ansell's children. This is so, the State asserts, because Ansell agreed to the sentencing condition as part of his plea agreement. This is not true. Rather, the plea agreement provided that the

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No. 66068-3-I / 7

State was to recommend to the sentencing court that Ansell have contact with his own children “as approved by [the] CCO and when in [the] company of [an] adult aware of these charges.” CP at 7. It further provided that the condition “may be modified by [Ansell’s] treatment provider . . . dependent on [whether Ansell’s] performance in treatment is acceptable.” CP at 7. The State’s sentencing recommendation to the court, however, was silent as to Ansell’s contact with his own children.

We will not deem Ansell to have agreed to this sentencing condition by virtue of the terms of his plea agreement. Contrary to the State’s factually unsupported argument on appeal, Ansell never agreed to a sentencing condition prohibiting him from having any contact with his children. We will not construe the record herein in such a way as to deprive Ansell of that for which he bargained in entering his plea.

In imposing the challenged sentencing condition, the trial court set forth no explanation as to whether the no-contact order is reasonably necessary to realize a compelling state interest. See Rainey, 168 Wn.2d at 381-82. Moreover, although the State has a compelling interest in protecting children from harm, the State has failed to demonstrate how prohibiting all contact between Ansell and his children until they reach the age of majority, particularly where the children were not victims of Ansell’s offenses, is reasonably necessary in order to effectuate that interest. Because the sentencing condition implicates Ansell’s fundamental constitutional right to parent his children, the State must show that no less restrictive alternative would prevent harm to those children. We do not

No. 66068-3-1 / 8

conclude that Ansell's contact with his children must be subject to no limitations. Any such limitations, however, must be narrowly drawn. See Warren, 165 Wn.2d at 34 (“[C]rime-related prohibitions affecting fundamental rights must be narrowly drawn.”).

Because whether a particular crime-related prohibition satisfies the “reasonably necessary” standard is a fact-specific inquiry, we strike the sentencing condition prohibiting Ansell’s contact with his children and remand for further proceedings. We are confident that, on remand, the trial court will determine the parameters of Ansell’s sentencing conditions pursuant to the proper standard.

Dupuy, C. S.

We concur:

Appelwhite, J.

Grosse, J.