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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt Gerald Kang communicated with “Donna,” a minor or a person he believe to be a minor, for immoral purposes, Count II.

2. The State did not prove beyond a reasonable doubt Gerald Kang communicated with “Deb,” a minor or a person he believed to be a minor, for immoral purposes, Count III.

3. The communication with a minor for immoral purposes statute is unconstitutionally vague as applied to Mr. Kang’s speech in Count II.

4. The communication with a minor for immoral purposes statute is unconstitutionally vague as applied to Mr. Kang’s speech in Count III.

5. The trial court erred by ordering Mr. Kang not to possess or consume any alcohol as a condition of community custody.

6. The trial court erred by ordering Mr. Kang not to enter any establishment where alcohol is the primary commodity for sale as a condition of community custody.

7. The trial court erred by ordering Mr. Kang to not possess drug paraphernalia as a condition of community custody.

8. The trial court erred by ordering Mr. Kang not to possess or look at pornographic material as a condition of community custody.

9. The trial court erred by ordering Mr. Kang to undergo plethysmograph testing as directed by his community corrections officer as a condition of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal defendant may only be convicted of communication with a minor for immoral purposes if the State proves beyond a reasonable doubt that he communicated with a minor or someone he believed was a minor with the predatory purpose of promoting the minor's involvement in sexual misconduct. The State presented evidence that Mr. Kang communicated via the internet with someone who called herself "Donna" and claimed to be a minor, but did not prove Mr. Kang believed "Donna" was a minor. Mr. Kang did not encourage the person identified as "Donna" to participate in future sexual misconduct, but simply asked about her purported past sexual experiences. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable doubt that Mr.

Kang communicated with a person he believed to be a minor for immoral purposes?

2. For Count II, the State presented evidence that Mr. Kang communicated via the internet with someone who called herself "Deb" and claimed to be a minor, but did not prove Mr. Kang believed "Deb" was a minor. Mr. Kang did not encourage the person identified as "Deb" to engage in future sexual misconduct but simply talked about past purported sexual activity. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable doubt that Mr. Kang communicated with a person he believed to be a minor for immoral purposes?

3. Due process requires that statutes provide citizens with fair notice of what conduct is prohibited and ascertainable standards to protect against arbitrary government enforcement. A statute that arguably prohibits conduct protected by the First Amendment and article 1, section 5 may unconstitutionally chill the free exercise of those rights. Where Mr. Kang chatted over the internet with a person he believed was an adult pretending to be a child about purported sexual experiences but made no effort to induce a child to engage in actual sexual misconduct, is the communication with a minor for immoral purposes statute

unconstitutionally vague as applied to his conduct in Count II?

4. Where Mr. Kang chatted over the internet with a person he believed was an adult pretending to be a child about purported sexual experiences but made no effort to induce a child to engage in actual sexual misconduct, is the communication with a minor for immoral purposes statute unconstitutionally vague as applied to his conduct in Count III?

5. Under the Sentencing Reform Act (SRA), the trial court may impose prohibitions on an offender as discretionary conditions of community custody only if the prohibitions are crime-related. In the absence of any evidence alcohol contributed to Mr. Kang's offenses, is the condition of community custody prohibiting him from purchasing, possessing, or consuming alcohol a crime-related prohibition authorized by the SRA?

6. In the absence of any evidence alcohol contributed to Mr. Kang's offenses, is the condition of community custody prohibiting him from entering any business where alcohol is the primary commodity for sale a crime-related prohibition authorized by the SRA?

7. In the absence of any evidence illegal drug use contributed to Mr. Kang's offenses, is the condition of community

custody prohibiting him from possessing drug paraphernalia authorized by the SRA?

8. The word "pornography" does not provide adequate notice of what conduct is prohibited or an ascertainable standard to prevent arbitrary enforcement. Possession of pornography is protected by the First Amendment and article I, section 5. Is the condition of community custody prohibiting Mr. Kang from possessing pornography unconstitutionally vague?

9. The due process clauses of the federal and state constitutions protect fundamental rights, such as the right to be free from government intrusion in one's body. Qualified professional may utilize penal plethysmograph testing in the diagnosis and treatment of sexual deviancy, but the test may not be used to monitor conditions of community custody. Does the condition of community custody requiring Mr. Kang to submit to penal plethysmograph testing as required by his community corrections officer violate Mr. Kang's constitutional right to be free from bodily intrusions?

C. STATEMENT OF THE CASE

When his laptop computer would not start in March 2008, Gerald Kang took it to the Adnet Company in Aberdeen. RP 44-45,

145.¹ Employee Kyle Henderson worked on the computer, noticed photographs he believed were illegal, and called the police. RP 47, 54. After viewing the photographs and seizing the computer, the police told Mr. Henderson to inform Mr. Kang the computer was ready for pickup. RP 47-49, 56-57, 67. When Mr. Kang arrived to pick up his computer, police escorted him to a back office where he was arrested. RP 49, 58-59, 65-66.

Mr. Kang told the police officers he did not think it was a crime to have pictures of girls on his computer. RP 65-66. Mr. Kang was taken to the Hoquiam Police Department where he gave a written statement to Detective Steve Fretts explaining he collected chat room logs because he was researching a possible book. RP 67-68; Ex. 32. He stated he was not sexually aroused by the photographs. RP 86.

Mr. Kang consented to a search of his residence and assisted the police in the search. RP 69-70, 150. The police seized several volumes of printed internet chat logs and an inoperable desktop computer. RP 51, 149, 70-71, 75-76. The

¹ The verbatim report of proceedings for February 20, February 23, March 10, March 11, and May 4, 2009, is in one volume prepared by court reporter Carman Prante. It will be referred to as RP.

Part of the sentencing hearing on May 4, 2009, is in a separate volume prepared by court reporter Brenda F. Johnston. It will be referred to as SRP.

computers were sent to the Washington State Patrol (WSP) Crime Laboratory where the hard drives were copied and the copies examined. RP 78, 95-96, 98, 102.

Mr. Kang was charged by amended information with one count of possession of depictions of minors engaged in sexually explicit conduct, RCW 9.68A.070, and two counts of communicating with a minor for immoral purposes, RCW 9.67A.090(2). CP 7-8.

At trial before the Honorable F. Mark McCauley, the State introduced copies of photographs depicting young women and a video which the WSP obtained from their copy of Mr. Kang's computers' hard drives.² RP 103-05, 143-44. A pediatrician reviewed the still images and video tape. He testified a large number of the pictures depicted pre-pubescent children, although some were probably 16 years old and that those in the video tape were under 16.³ RP 136.

The communication with a minor for immoral purposes charges were based upon copies of four chat room logs, with

² The video tape was found on the inoperable desk top computer on Mr. Kang's floor. RP 105

³ The hard drives also contained pictures of adults, but these were not reproduced. RP 105-06, 150-51, 158.

attached photographs. RP 115-18; Ex. 37-40. Detective Fretts testified the people who were on the computer claimed to be minors, and he opined they either acted as if they were young or actually were fairly young. RP 119.

Mr. Kang explained to the jury that he did not believe the people he communicated with in the internet chat rooms were actually children. RP 147-48, 154, 155. The writers did not sound like children, they talked about subject matter children would not understand, and everyone lies in the internet chat rooms. RP 147, 154, 155, 160. As Mr. Kang told Detective Frett, "the stories were too far fetched and their escapades were not believable." Ex. 32 at 1. Mr. Kang suspected at least one of the people was a police officer, but Detective Frett told him they were more likely adult men. RP 119-21, 151; Ex. 32 at 1.

Mr. Kang explained he kept the pictures sent by the people he communicated with because he was puzzled by the web address, where he seemed to reach different people at different times. RP 146, 148, 151-2. Mr. Kang was also curious about the subject matter, and he was interested in writing adult fiction. RP 148-49, 153-54, 159. He was not sexually aroused by the depictions or the conversations and did not meet or intend to meet

any of the people with whom he interacted. RP 145-46, 149, 151, 160-61.

The jury convicted Mr. Kang as charged. CP 19-21. The court imposed a 54-month sentence for the possession of child pornography charge and 26-month sentences for each of the communication counts, followed by a term of 36 to 48 months community custody. CP 37-39. The court ordered Mr. Kang to comply with all of the recommended conditions of community custody included in the Department of Corrections (DOC) pre-sentence report. CP 40; SRP 13. The DOC recommendations, however, are not attached to the Judgment and Sentence. CP 37-46.

The 28 conditions of community custody recommended by DOC include no possession of alcohol or entering a business where alcohol is the primary commodity for sale, no possession of drug paraphernalia, no possession of pornographic materials, and plethysmograph testing as required by the community corrections officer (CCO) SuppCP ____ (DOC Pre-Sentence Investigation, sub. no. 56, April 10, 2009) (hereafter referred to as DOC Pre-Sentence Investigation).

Mr. Kang appeals to this Court. CP 47.

D. ARGUMENT

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. KANG WAS GUILTY OF THE TWO COUNTS OF COMMUNICATING WITH MINOR FOR IMMORAL PURPOSES

Mr. Kang was convicted of two counts of communication with a minor for immoral purposes. The State, however, did not prove beyond a reasonable doubt that Mr. Kang believed the internet chatters he communicated with were minors. In addition, Mr. Kang's communication was not done with the predatory intent to involve minors in future sexual misconduct. His convictions must be reversed.

a. The State was required to prove beyond a reasonable doubt every element of communication with a minor for immoral purposes. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.⁴ Apprendi v. New Jersey, 530 U.S.

⁴ The Fourteenth Amendment states in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The Sixth Amendment is applicable to the states through the due process provisions of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Article I, section 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). The appellate court draws all reasonable inferences in favor of the State. Hosier, 157 Wn.2d at 8.

Free speech is a “vital right” that requires a reviewing court to “carefully assess” whether speech is protected by the First Amendment. State v. Kilburn, 151 Wn.2d 36, 42, 94 P.3d 1215, 1224 (2004). Any statute that criminalizes speech must be interpreted in light of the commands of the First Amendment. Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1072 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003).

While laws may proscribe “all sorts of conduct” the same is not true of speech; the law “is not free to interfere with speech for no better reason than promoting an approved

Article I, section 22 provides specific rights in criminal cases. “In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury.”

message or discouraging a disfavored one, however enlightened either purpose may strike the government.”

Kilburn, 151 Wn.2d at 42 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 579, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995)). This Court therefore reviews the sufficiency of the evidence with special care when a conviction depends upon the content of one’s expression, as expression that is protected by the First Amendment may not be subject to criminal sanctions no matter how distasteful. Kilburn, 151 Wn.2d at 52.

Mr. Kang was convicted of two counts of communicating with a minor for immoral purposes based upon his email conversations with internet chatters identified as “Donna” and “Deb.” CP 17 (Instructions 19-20), 20-21. The communication statute, RCW 9.68A.090, reads:

(1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.

(2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone

the person believes to be a minor for immoral purposes through the sending of an electronic communication.

RCW 9.68A.090 (emphasis added).⁵ Thus, the statute prohibits communication by words or conduct that is (1) done for immoral purposes, (2) intended to reach a minor, and (3) received by someone the defendant knew or believed to be a minor. Id; State v. Aljutily, 149 Wn.App. 286, 292, 202 P.3d 1004 (2009), rev. denied, 166 Wn.2d 1026 (2009). In order to protect the constitutional right to free speech, the Washington Supreme Court has interpreted the statute to prohibit “communication with children with the predatory purpose of promoting their exposure to and involvement in sexual misconduct.” Hosier, 157 Wn.2d at 9 (quoting State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)); see RCW 9.68A.001 (Legislature finds children may be protected from sexual exploitation without infringing on constitutionally protected activity).

b. The State did not prove beyond a reasonable doubt that Deb and Donna existed, that they were children, or that Mr. Kang believed they were children. A necessary element of communication with a minor for immoral purposes is that the

⁵ Mr. Kang had no prior record, but was convicted of sending an electronic communication. CP 17 (Instructions 19-20), 22.

immoral communication actually reaches a minor or someone the defendant believes is a minor. Aljutily, 149 Wn.App. at 296-97.

The State alleged that Mr. Kang communicated with “Deb” and “Donna,” each of whom was either a person under the age of 18 or a person Mr. Kang believed was under the age of 18. CP 7-8.

There was, however, no proof that “Deb” or “Donna” existed and certainly no proof of their ages. Instead, the State relied solely upon the chat logs to prove the charges and argued Mr. Kang believed the internet chatters were children. RP 176-77, 190.

Because one of the people said she was 10 and the other said she was 12, the State claimed, Mr. Kang believed they were children. RP 176-77.

Mr. Kang did not know how old the people who called themselves Deb and Donna were and did not believe they were really children. Mr. Kang’s belief is logically supported. First, Mr. Kang expected people in internet chat rooms to lie. As Detective Fretts told Mr. King, it was very likely Mr. Kang was talking to other older men. RP 120-21. Mr. Kang, for example, told the person he was anonymously communicating with that he was 16 when he was

actually much older.⁶ Ex. 39 at 1. The person or persons identified as “Donna” also provided two different ages for the character. Ex. 38 at 2; Ex. 39 at 1. And, in one exhibit utilized by the State to prove Mr. Kang was communicating illegally with “Donna,” the person identifies herself as a 14-year-old named Diane. Ex. 40. Even the names “Deb” and “Donna” are much more common for people born in the 1950’s than those who under 18.⁷

Additionally, the speakers did not sound like children. While the prosecutor argued some abused children do have sexual knowledge, it is impossible to believe a 10-year old would actually have intercourse simultaneously with three people while typing on the computer keyboard. Ex. 37 at 4, 6. Nor would a child say coyly, “my parents are very affectionate lets say so just assume im [sic] home a lot[.]” Ex. 37 at 5.

The trial court in Luther found that “it is very common for people to lie to one another and play fictional roles while chatting . .

⁶ Mr. Kang was 64 years old at the time of sentencing. DOC Pre-Sentence Investigation at 7.

⁷ While Deborah and Debra were the fifth and seventh most popular names for baby girls in the 1950’s, the names were not in the top 100 in the 1990’s; Deborah was the 629th most popular name in the 2000’s. The popularity of the name Donna has declined from being in the top ten names in the 1950’s and 1960’s to number 454 in the 1990’s and number 800 in the 2000’s.

www.ssa.gov/OACT/babynames/decades/names2000s.html;

www.ssa.gov/OACT/babynames/decades/names1990s.html;

www.ssa.gov/OACT/babynames/decades/names1960s.html;

www.ssa.gov/OACT/babynames/decades/names1950s.html.

. It is therefore impossible for a person chatting . . . to know anything about the person they are chatting with to any degree of certainty, including name, age, and even gender.” State v. Luther, 157 Wn.2d 63, 68-69, 134 P.3d 205 (2006). Here, Mr. Kang was engaged research for a book when he entered internet chat rooms. Given the fantastic stories and lack of consistency, Mr. Kang’s belief that he was not communicating with children was reasonable. The State did not prove beyond a reasonable doubt that Mr. Kang believed “Deb” and “Donna” were children.

c. The State did not prove beyond a reasonable doubt that Mr. Kang had an immoral sexual purpose. Washington’s communication with a minor for immoral purposes statute is designed to prevent expose of children to sexual misconduct for the gratification of another. Hosier, 157 Wn.2d at 9-10. Thus, an element of the crime is that the communication is done with the immoral or predatory purpose of exposing or involving a minor in sexual misconduct. Aljutily, 149 Wn.App. at 296-97. Additionally, the defendant must invite or induce the minor to engage in prohibited sexual conduct. State v. Jackman, 156 Wn.2d 736, 748, 132 P.3d 136 (2006); McNallie, 120 Wn.2d at 934. Mr. Kang

chatted over the internet about purported past sexual behavior, but he did not encourage future sexual misconduct.

This Court's recent decision upholding the communication statute in light of a First Amendment challenge demonstrates the requirement that the defendant encourage the minor's involvement in improper sexual activity. In Aljutily, the defendant communicated over the internet with a police officer who claimed to be a 13-year-old girl named Amber. Aljutily, 149 Wn.App. at 289-90. The defendant invited "Amber" to have sex with him, sent her pictures of his penis and of himself masturbating, and provided her with links to two pornographic web sites. Id. at 290-91. It was thus clear that the defendant's conduct was done "with the immoral or predatory purpose of exposing or involving a minor in sexual misconduct," and the defendant intended to reach a minor. Id. at 296-97.

In other reported cases addressing the communication statute, the defendant also attempted to induce a minor to participate in sexual misconduct. Hosier, 157 Wn.2d at 4-6 (defendant placed sexually explicit and somewhat threatening notes fantasizing about sexual contact with children in places where children were likely to find them); Jackman, 156 Wn.2d at 739-40 (defendant convicted of both communication and sexual

exploitation of minor where he paid boys and provided them alcohol so they would masturbate while he videotaped them); McNallie, 120 Wn.2d at 926-27 (defendant approached girls aged 10 and 11, asked if anyone in the area would give him a “hand job,” and suggested people could earn money in this way); State v. Pietrzak, 100 Wn.App. 291, 293, 997 P.2d 947 (2000) (defendant communicated with his 16-year-old niece in order to get her to submit to nude photography after which they had sexual intercourse; niece believed activity required in exchange for room and board).

Here, in contrast, Mr. Kang did not encourage a minor to engage in sexual misconduct. Instead, he talked to people over the internet about their purported past sexual behavior.⁸ Ex. 37-39. Nothing in the exhibits shows that Mr. Kang encouraged further illegal activity, and he did not initiate any type of sexual contact with the purported minor himself.

d. Mr. Kang’s convictions must be reversed and dismissed.

The State was required to prove every element of each count of communication with a minor for immoral purposes. Here, the State

⁸ In the one instance where “Donna” claimed to be having sexual intercourse with three people while typing on her computer, it was Donna who brought up the activity. Ex. 37 at 5.

failed to prove beyond a reasonable doubt that Mr. Kang knowingly communicated with someone he believed was a minor for immoral purposes. Mr. Kang's two convictions must be reversed and dismissed.

2. THE COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES STATUTE IS UNCONSTITUTIONALLY VAGUE BECAUSE IT CRIMINALIZES MR. KANG'S EXERCISE OF HIS RIGHT TO FREE EXPRESSION

A criminal statute is unconstitutionally vague if it fails to give citizens fair warning of what conduct is prohibited, fails to provide clear standards to prevent arbitrary enforcement, or if it chills the exercise of free expression by arguably including protected speech in its purview. If this Court does not reverse Mr. Kang's convictions for communication with a minor for immoral purposes on the grounds of insufficient evidence, it must find the communication statute is unconstitutionally vague as applied to Mr. Kang's conduct because he was exercising his constitutional right to free expression.

a. A statute is unconstitutionally vague if it may be interpreted to criminalize conduct protected by the First Amendment and/or article I, section 5. The due process clauses of the federal and state constitutions require that citizens be provided

with fair warning of what conduct is illegal. U.S. Const. amend. XIV; Const. art. I, § 3; State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). As a result, a criminal statute must define the prohibited conduct with sufficient definiteness so that (1) ordinary people understand what conduct is illegal and (2) ascertainable standards are provided to protect against arbitrary enforcement. United States v. Williams, ___ U.S. ___, 128 S.Ct. 1830, 1845, 170 L.Ed.2d 650 (2008); Bahl, 164 Wn.2d. at 752-53. A statute is unconstitutionally vague when the determination of what is and/or is not proscribed by the statute depends upon subjective judgments. Williams, 128 S.Ct. at 1846.

When it is unclear if a vague statute prohibits conduct permitted by the First Amendment, it may have a chilling effect on the exercise of freedom of expression. Bahl, 164 Wn.2d at 753. Thus, a stricter standard of definiteness applies if material protected by the First Amendment falls within the conduct prohibited by the statutes. City of Bellevue v. Lorang, 140 Wn.2d 19, 31, 992 P.2d 496 (2000) (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).

b. The state and federal constitutions protect a person's right to free speech. The government may not impose criminal

penalties upon an individual for expression that is protected by the constitution.⁹ Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); U.S. Const. amend. 1; Const. Art. I, § 5. Content-based restrictions on speech must satisfy the court's strict scrutiny, requiring the government have a compelling state interest in regulating the speech and use the least restrictive means available to achieve its objective. Sable Communications, Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989).

Sexual expression that is indecent but not obscene is protected by the First Amendment. Sable Communications, 492 U.S. at 126. In New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the Supreme Court ruled for the first time that the First Amendment does not protect a person's freedom to sell pornography involving children even where the images do not meet the legal standard for obscenity. The ruling was based upon the harmful sexual abuse that occurs to the children used to make

⁹ The First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech."

Article I, section 5 asserts that, "Every person may freely speak, write, or publish on all subjects, being responsible for the abuse of that right." This right is broader than the First Amendment when it comes to restrictions placed upon pure speech. Ino Ino Inc. v. City of Bellevue, 137 Wn.2d. 103, 115, 937 P.2d 154 (1997).

the pornography. Id. at 756-58. However, the Ferber Court carefully delineated the breadth of its holding, ruling that, “where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.” Free Speech, 535 U.S. at 251 (citing Ferber, at 764-65).

Similarly, a federal statute criminalizing the possession or production of pornography that only appeared to be a minor was an unconstitutional limit on free speech. Free Speech, 535 U.S. at 251.¹⁰ The Supreme Court ruled that the possibility of harm to minors from the sexual images of people who merely appear to be minors was too tenuous and indirect to be permit prosecution under the rigorous rules applied when the government suppresses speech. Id. at 250-54.

The Free Speech Court relied upon the well-established tenet that sexual expression may be indecent, but that does not make it obscene and therefore a legitimate subject of criminal sanctions. Free Speech, 535 U.S. at 245; see Reno v. American Civil Liberties Union, 521 U.S. 844, 874, 117 S.Ct. 2329, 138

¹⁰ Two provisions of 18 U.S.C. 2256(8) were challenged in Free Speech: subsection (B) barred any depiction that “appears to be” a minor engaging in sexually explicit conduct; subsection (D) barred any sexually explicit image that was presented or described “in such a manner that conveys the impression” it depicts a minor engaging in sexually explicit conduct. 535 U.S. at 241-42.

L.Ed.2d 874 (1997). “The Government may not suppress lawful speech as the means to suppress unlawful speech.” Free Speech, 535 U.S. at 255. Moreover, depictions of what appears to be a minor engaging in sexually explicit acts have legitimate and historical uses in art, literature, movies, and other forums and thus may not be made illegal solely based on the low value of the speech. Id. at 248-49.

c. The communication statute is unconstitutionally vague as applied to Mr. Kang because it forbids speech protected by the constitution. Mr. Kang was convicted of two counts of communicating with a minor for immoral purposes, RCW 9.68A.090. “Communicate,” as used in the statute, includes conduct and words, and “immoral purposes” refers to sexual misconduct. State v. Schimmelpfennig, 92 Wn.2d 95, 102, 594 P.2d 442 (1979); Pietrzak, 100 Wn.2d at 294-95. As the McNallie Court explained, the statute prohibits “communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.” McNallie, 120 Wn.2d at 933.

Appellate cases upholding the communication statute demonstrate the requirement of a predatory purpose. For example, this Court recently found the statute was not unconstitutionally

vague as applied to a defendant who communicated with his 16-year-old niece in order to photograph her nude for his own sexual stimulation and “quid pro quo” for supporting her. Pietrzak, 100 Wn.App. at 294. This Court concluded that a person of common intelligence would understand this conduct fell within the reach of the communication statute. Id. at 295-96. Similarly, the Washington Supreme Court found a person of common understanding would know asking a small child to enter a van and engage in sexual activities fell within the communication statute. Schimmelpfennig, 92 Wn.2d at 103.

Here, however, Mr. Kang’s internet communication consisted of communicating with adults about fantasies of children’s sexual experiences. Mr. Kang asked the people he was chatting with to tell him about past purported sexual experiences, but he did not try to promote a child’s future involvement in sexual misconduct. The statute is therefore unconstitutionally vague as applied to Mr. Kang’s free expression. Mr. Kang’s convictions for communication with a minor for immoral purposes must be reversed.

3. THE CONDITIONS OF COMMUNITY CUSTODY
ADDRESSING ALCOHOL AND DRUG
PARAPHERNALIA ARE NOT CRIME-RELATED OR
REASONABLY RELATED TO HIS REHABILITATION

There was no evidence presented at trial or sentencing that demonstrated that alcohol or drug use contributed to Mr. Kang's involvement in his offenses or that he had an alcohol or drug problem. The trial court nonetheless entered special conditions of community custody forbidding Mr. Kang from possessing or consuming alcohol, entering establishments where alcohol was the primary commodity for sale, and possessing drug paraphernalia. These conditions are not authorized by the sentencing statutes because they are not crime-related.

a. The SRA authorizes the sentencing court to require an offender to comply with sentencing conditions that are crime-related. When a person is convicted of a felony, the sentencing court must impose punishment as authorized by the Sentencing Reform Act (SRA). Former RCW 9.94A.505 (effective until August 1, 2009); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature). The sentencing court must look to the statutes in effect at the time the defendant committed the crime.

RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Mr. Kang was convicted of offenses occurring in April 2007 and between March and April 2008. CP 15, 17, 19-21.

In this case, former RCW 9.94A.505 directed the sentencing court to impose a standard range sentence and community custody. Former RCW 9.94A.505(2)(a)(i), (ii) (effective until August 1, 2009) (2008); Former RCW 9.94A.505(2)(a)(i), (iii) (2007).

Because Mr. Kang was convicted of crimes that are classified as sex offenses, he was subject to a term of community custody under the conditions authorized in RCW 9.94A.700(4), (5). Former RCW 9.94A.030(42) (effective until July 1, 2007), (2008); Former RCW 9.94A.710 (effective until August 1, 2009); Former RCW 9.94A.715 (2007).

Former RCW 9.94A.700(4) sets forth the mandatory standard conditions of community custody, such as reporting to the Department of Corrections (DOC). In addition, the court may order special discretionary conditions set forth at RCW 9.94A.700(5), such as having no contact with the crime victim or a class of individuals, participating in crime-related treatment or counseling,

not consuming alcohol, or other “crime-related prohibitions.”¹¹ Bahl, 164 Wn.2d at 744. In addition, former RCW 9.94A.505(8) authorizes the sentencing court to impose “crime-related prohibitions and affirmative conditions as provided in this chapter.” A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” Former RCW 9.94A.030(13) (2008).

Logically, the burden is on the State to demonstrate the condition of community supervision is statutorily authorized. See State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature and existence of out-of-state conviction necessary to establish offender score and standard sentence range); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (accord); United States v. Weber, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case).

¹¹ Former RCW 9.94A.715(2)(a) permits the court to require the defendant, as a condition of community custody, to participate in rehabilitative programs or other affirmative conduct “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.”

Here, several of the conditions of community custody imposed by the sentencing court are not crime-related and should be stricken. Erroneous sentences may be challenged for the first time on appeal, so Mr. Kang may challenge conditions of community custody even if he did not pose an objection in the trial court. Bahl, 164 Wn.2d at 744-45; Ford, 137 Wn.2d at 477.

b. The sentencing court lacked authority to enter orders forbidding Mr. Kang from possessing, consuming or acquiring alcohol, from entering an establishment where alcohol is the primary commodity sold. DOC recommended the sentencing court require Mr. Kang to (1) not purchase, possess, or consume alcohol, and (2) not enter any business where alcohol is the primary commodity for sale. DOC Pre-Sentence Investigation at Appendix page 2. The State, however, failed to provide any support for the recommendation.

There was no evidence produced at trial to show the offenses were committed when Mr. Kang was under the influence of alcohol or drugs, and the State did not claim at sentencing that he had drug or alcohol problems. CP 25-31. Information provided to the sentencing court by Mr. Kang's relatives also did not demonstrate a connection between the crimes and alcohol or

drugs. CP 24; SuppCP ____ (letters, sub. no. 65, May 4, 2009).

The only possible support for the State's recommendation is found in DOC's sentencing report which shows that Mr. Kang did not have a drug or alcohol problem, but occasionally drank alcohol and had consumed marijuana and cocaine in the past. DOC Pre-Sentence Investigation at 6.

A similar issue was before the federal appellate court in United States v. Betts, 511 F.3d 872 (9th Cir. 2007). There, a defendant sentenced for conspiracy was ordered to abstain from illicit drugs and alcohol as a condition of supervised release. Id. at 874, 877. There was, however, nothing in the record to suggest alcohol played any role in the defendant's crime or that he had any past problems with alcohol. Id. at 878. The trial court did not believe the defendant had an alcohol problem, but imposed the condition as part of his routine, finding the defendant had the burden of convincing the court that the discretionary condition was not required. Id. at 880.

The Betts Court found the condition was improper because the government did not meet its burden of demonstrating prohibiting the defendant from consuming alcohol was appropriate in his individual case, as the condition did not meet the statutory

goals of rehabilitation, protection of the public, or deterrence of future criminal behavior. Betts, 511 F.3d at 878, 880.

Moderate consumption of alcohol does not rise to the dignity of our sacred liberties, such as freedom of speech, but the freedom to drink a beer while sitting in a recliner and watching a football game is nevertheless a liberty people have, and it is probable exercised by more people than the liberty to publish a political opinion. Liberties can be taken away during supervised release to deter crime, protect the public, and provide correctional treatment, but that is not why it was taken away in this case.

Id.

The SRA provides even more limited power to the sentencing court to prohibit conduct as a condition of community custody than does the federal statute at issue in Betts. In Washington, prohibitions must be crime-related, although affirmative conduct may be imposed as needed for rehabilitation or community protection. Former RCW 9.94A.715(2)(a). There is no indication that alcohol played a part in Mr. Kang's criminal activities, and thus conditions of community custody forbidding him from obtaining, possessing or consuming alcohol or even entering a bar are not authorized by the SRA.

c. The sentencing court lacked authority to prohibit Mr. Kang from possessing drug paraphernalia as a condition of community custody. The trial court also entered a community custody condition forbidding Mr. Kang from possessing drug paraphernalia. CP 40; DOC Pre-Sentence Investigation, Appendix at 2. The SRA requires the court to prohibit an offender from possessing controlled substances without a prescription, but the same is not true for drug paraphernalia. Former RCW 9.94A.700(4)(c).

A condition prohibiting the possession of drug paraphernalia is crime-related where the conviction is related to drugs or substance abuse. State v. Valencia, 148 Wn.App. 302, 323, 198 P.3d 1065 (defendants convicted of possession of marijuana with intent to deliver and conspiracy to commit possession of marijuana with intent to deliver), rev. granted, 166 Wn.2d 1010 (2009). Here, Mr. Kang's crime is not related to drugs or substance abuse, and the condition that he not possess any drug paraphernalia is thus not crime-related or reasonably related to his offense, risk of re-offending, or protection of the public.

d. This Court must vacate the conditions of community supervision addressing alcohol and drug paraphernalia. The conditions of community custody prohibiting Mr. Kang from

consuming or possessing alcohol, going to a bar, or possessing drug paraphernalia are not reasonably related to his crimes because there is no evidence that alcohol or drugs contributed to the offenses. This Court must vacate the portions of the Judgment and Sentence requiring Mr. Kang to comply with conditions of community custody that he (1) not purchase or possess any alcohol, (2) not go to an establishment where alcohol is the main commodity for sale, and (3) not possess drug paraphernalia. State v. Riles, 135 Wn.2d 326, 353-53, 957 P.2d 655 (1998) (striking condition of community placement not reasonably related to offense and therefore not authorized by statute).

4. THE CONDITION OF COMMUNITY CUSTODY PROHIBITING MR. KANG FROM POSSESSING OR PERUSING PORNOGRAPHIC MATERIALS IS UNCONSTITUTIONALLY VAGUE

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. XIV; Const. art. I, § 3; Bahl, 164 Wn.2d at 752. As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement.

Id. at 752-53. Additionally, even offenders on community custody retain a constitutional right to free expression. See Procnier v. Martinez, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail). When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 752. An even stricter standard of definiteness therefore applies when community custody condition prohibits access to material protected by the First Amendment. Id.

Here, the trial court adopted DOC's recommendation that Mr. Kang not be permitted to "possess or peruse any pornographic material." DOC Pre-Sentence Investigation, Appendix at 2. Adult pornography is constitutionally protected speech. Bahl, 164 Wn.2d at 757. And the term "pornography" is unconstitutionally vague. Id. at 757-58; State v. Sansone, 127 Wn.App. 630, 639, 111 P.3d 1251 (2005). Thus, a condition of community placement prohibiting an offender from "possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer" is unconstitutionally vague. Bahl, 164 Wn.2d at 754, 758; accord

Sansone, 127 Wn.App. at 634, 639-41. Here, too, the condition prohibiting Mr. Kang from possessing pornography is unconstitutionally vague and must be stricken.

5. THE CONDITION OF COMMUNITY CUSTODY
REQUIRING MR. KANG TO UNDERGO
PLETHYSMOGRAPH TESTING AS REQUIRED BY
HIS COMMUNITY CORRECTIONS OFFICER
VIOLATED MR. KANG'S CONSTITUTIONAL RIGHT
TO BE FREE FROM BODILY INTRUSIONS

The trial court ordered Mr. Kang to undergo penile plethysmograph testing as required by his community corrections officer. Plethysmograph testing is used in the diagnosis and treatment of sexual offenses, but is not a monitoring tool to be used by a community corrections officer. Given the invasive nature of the test, the requirement of plethysmograph testing at the discretion of a CCO rather than a qualified treatment provider violates Mr. Kang's constitutional right to be free from bodily intrusions.

a. Mr. Kang has a fundamental privacy interest in freedom from government intrusions into his body and private thoughts. The due process clauses of the state and federal constitutions include a substantive component providing heightened protection against government interference with certain fundamental rights and liberty

interests.¹² Troxell v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The right to privacy protects the right to non-disclosure of intimate information. Butler v. Kato, 137 Wn.App. 515, 527, 154 P.3d 259 (2007) (citing O'Hartigan v. State Dep't of Personnel, 118 Wn.2d 111, 117, 821 P.2d 44 (1991)); Jason R. Odeshoo, "Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders," 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (2004). Additionally, both the Fourth and Fourteenth Amendments protect a citizen from bodily invasion. Sell v. United States, 539 U.S. 166, 177-78, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952); In re Marriage of Parker, 91 Wn.App. 219, 224, 957 P.3d 256 (1998).

The Fourteenth Amendment does not permit any infringement upon fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997). People convicted

¹² In addition to the due process protection found at Article 1, section 3, Article 1, section 7 of the Washington constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The enumeration of certain rights in the state constitution "shall not be construed to deny others retained by the people." Wash. Const. art. 1, § 30.

of crimes retain certain fundamental liberty interests. Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); Weber, 451 F.3d at 570-71 (Noonan, J., concurring) (“[A] prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmography testing crosses it.”).

b. Penile plethysmograph testing implicates the test subject’s constitutional right to freedom from bodily restraint. The freedom from bodily restraint is at the core of the interests protected by the Due Process Clause. Parker, 91 Wn.App. at 222-23. Courts have noted that penile plethysmograph testing implicates this liberty interest and that the reliability of testing is questionable. In re Marriage of Ricketts, 111 Wn.App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); Parker, 91 Wn.App. at 226 (test violated father’s constitutional interests in privacy, noting no showing of reliability of penile plethysmograph testing or absence of less intrusive measures); Weber, 451 F.3d at 562, 564 (explaining that plethysmograph testing is not a “run of the mill” medical procedure and studies have shown its results may be unreliable); Coleman v. Dretke, 395 F.3d 216, 223 (5th Cir. 2004)

(concluding the “highly invasive nature” of the test implicates significant liberty interests), cert. denied, 546 U.S. 938 (2005); Harrington v. Almy, 977 F.2d 37, 44 (1st Cir. 1992) (stating has been “no showing” regarding the test’s reliability or that other less intrusive means are not available for obtaining the information); see United States v. Powers, 59 F.3d 1460, 1471 (4th Cir. 1995) (holding trial court did not abuse its discretion by refusing to admit plethysmograph test results as evidence because test fails to satisfy “scientific validity” prong of Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)), cert. denied, 516 U.S. 1077 (1996).

The Ninth Circuit Court’s opinion in Weber is instructive. Weber pled guilty to possession of child pornography, and the district court ordered special conditions of supervised release that included participation in mental health counseling and/or a sexual offender treatment program. Weber, 451 F.3d at 555. The court further ordered Weber to comply with all conditions of his treatment program, including submission to risk assessment evaluations, and physiological testing, including but not limited to polygraph, plethysmograph and Abel testing. Id. Weber objected only to the requirement that he undergo plethysmograph testing. Id.

Under the federal statute governing supervised release after a prison term, the district court has wide discretion to impose special conditions of supervised release, even conditions that infringe upon fundamental rights. Weber, 451 F.3d at 557. Conditions of supervision, however, must be rationally related to the “goal of deterrence, protection of the public, or rehabilitation of the offender.” Id. at 558 (quoting United States v. T.M., 330 F.3d 1235, 1240 (9th Cr. 2003), citing 18 U.S.C. §§ 3553(a), 3583(d)). Special conditions may involve “no greater deprivation of liberty than is necessary for the purposes of supervised release.” Id., quoting T.M., 330 F.3d at 1240, in turn quoting 18 U.S.C. § 3583(d)(2).

The Weber Court reviewed psychological studies both critical and supportive of plethysmographic testing of sex offenders. Although the court concluded that it could not categorically rule out plethysmograph testing for all offenders, it noted problems with the test. Weber, 451 F.3d at 566. The American Psychiatric Association, for example, has expressed reservations concerning the reliability and validity of plethysmograph testing. Id. at 564 (citing Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-R 567 (4th ed. 2000)). Additionally, at

least one study found “phallometry has either limited or no application” to patients like Mr. Kang whose offense is viewing child pornography. Id. at 579 n.20 (citing W.L. Marshall & Yolanda M. Fernandez, Phallometric Testing with Sexual Offenders: A Limit to Its Value, 20 *Clinical Psychol. Rev.* 807, 809 (2000)).

The court went on to point out the relevant question is whether plethysmograph testing will promote the goals of rehabilitation and deterrence in an individual case, because supervised release conditions must be “‘reasonably related’ to ‘the nature and circumstances of the offense and the history and character of the defendant.’” Id. (quoting 18 U.S.C. § 3583(d)(1), 3553(a)(1)). “Only a finding that plethysmograph testing is likely given the defendant’s characteristics and criminal background to reap its intended benefits can justify the intrusion into a defendant’s significant liberty interest in his own bodily integrity.” Id. at 567. Even then, the district court must consider if other less invasive alternatives are open, as there are several alternatives available in the treatment of sexual offenders. Id. at 567-68. The court therefore remanded Weber’s case for an evidentiary hearing. Id. at 570.

c. Mr. Kang's constitutional right to freedom from bodily intrusion is violated by the requirement that he submit to penile plethysmograph testing at the pleasure of his community corrections officer. The Washington Supreme Court recognized the usefulness of plethysmograph testing in the diagnosis and treatment of sex offenses. Riles, 135 Wn.2d at 343-44. As a result, the court upheld plethysmograph testing for a sex offender as part of court-ordered sexual deviancy therapy, but not for an offender who was not ordered to undergo sexual deviancy treatment. Id. at 344-46. “[P]lethysmograph testing does not serve a monitoring purpose . . . It is instead a treatment device that can be imposed as part of crime-related treatment or counseling.” Id. at 345.

Here, the court required Mr. Kang to submit to such testing “as directed by the CCO” rather than at the direction of his sexual deviancy treatment provider. DOC Pre-Sentence Investigation, Appendix at 3. The testing was ordered in the same sentence with polygraph testing, which is a procedure utilized by DOC to monitor compliance. Riles, 135 Wn.2d at 342-43.

The danger is that the testing is not connected to Mr. Kang’s sexual deviancy diagnosis or treatment, but can be ordered by the

CCO for any reason, including monitoring Mr. Kang's compliance with community custody conditions. In addition, the trial court ordered Mr. Kang to submit to invasive plethysmograph testing without any individual determination that such testing would be valuable in his case, even though studies have found the test of little use in treating people for viewing child pornography. In these circumstances, the testing requirement violated Mr. Kang's constitutional right to be free from bodily intrusions. This Court should strike the requirement that Mr. Kang submit to plethysmograph testing as required by his CCO.

E. CONCLUSION

Mr. Kang's two convictions for communication with a minor for immoral purposes must be reversed and dismissed because the State did not prove every element of the crime beyond a reasonable doubt. In the alternative, the convictions must be dismissed because the statute was unconstitutionally vague as applied to Mr. Kang's case.

In addition, several conditions of community custody must be stricken. Conditions related to alcohol consumption, entering bars, and possession of drug paraphernalia are not authorized by the SRA because they are not reasonably related to Mr. Kang's crimes.

The condition forbidding pornography is unconstitutionally vague. And the condition requiring Mr. Kang to submit to invasive penile plethysmograph testing at the direction of his community corrections officer violates his fundamental constitutional right to be free from bodily invasion by the government.

DATED this 11th day of December 2009.

Respectfully submitted,



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

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.) NO. 39268-2-II
)
GERALD KANG,)
)
APPELLANT.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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