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DIVISION II

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STATE OF WASHINGTON

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NO. 37773-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JACK IRVIN SIMS,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

P/m 10/21/08.

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court's order banishing the defendant from Cowlitz County and the City of Castle Rock violates the defendant's right to due process and equal protection under the United States Constitution, Fifth and Fourteenth Amendments

Issues Pertaining to Assignment of Error

Does a trial court's order banishing a defendant from his county and city of residence as part of a sentence imposed under RCW 9.94A.670 violate that defendant's right to due process and equal protection under the United States Constitution, Fifth and Fourteenth Amendments, when that order is not narrowly tailored to serve a compelling governmental interest?

STATEMENT OF THE CASE

By information filed June 21, 2007, the Cowlitz County Prosecutor charged the defendant Jack Irvin Sims with one count of first degree child molestation and, in the alternative, one count of fourth degree assault with sexual motivation. CP 1-2. The defendant has no juvenile or adult felony or misdemeanor criminal record. CP 25-26. The probable cause statement alleged that the defendant, who was a neighbor, had entered the house of the complaining witness while she was taking a shower, and that he had taken a sponge and washed her back with it, even though she did not want to him to do this. CP 2

At the time the state brought the charge, Mr. Sims and his wife had been living at their family home at 446 3rd Avenue SW in the City of Castle Rock in Cowlitz County for 43 years. CP 26-28. Mr. Sims was then 63-years-old and retired after working 38 years for the Cowlitz County Roads Department. CP 24. He takes care of his wife, who suffers from a medical disability. CP 27. He is a life long resident of Castle Rock and graduated from Castle Rock High School. CP 26. All of his brothers and sisters live in the Castle Rock area, and he visits daily with one of his brothers. CP 26. The Sims' two grown children and all of the Sims' grandchildren also live in Cowlitz County in the Castle Rock area. CP 26-28.

In this case, the defendant appeared before the court on a summons,

and was released on bail. CP 1. As part of his conditions of release, the court ordered the defendant to have no contact with the complaining witness, who lived with her family on the same street as Mr. Sims and his wife. CP 26-28. The defendant abided by this order during the entire pendency of this case in Superior Court, which took over a year to resolve. *Id.*

On February 21, 2008, the defendant appeared back before the Cowlitz County Superior Court and entered a guilty plea to one count of first degree child molestation. CP 11-21. As part of this guilty plea, the defendant admitted the conduct claimed in the probable cause statement. CP 18. Upon accepting the plea, the court remanded the defendant into custody of the Cowlitz County Corrections Department and ordered the Department of Corrections (DOC) to prepare a pre-sentence information report (PSI) in the case. RP 9-10.¹

Prior to sentencing, the defendant underwent a psycho-sexual evaluation with a state certified sex offender treatment provider, who found the defendant amenable to treatment, a low risk of re-offense, and a reasonable risk for release within the community. CP 35-46. Thus, the evaluator recommended that the court consider the defendant for sentencing

¹The record on appeal includes one volume of continuously numbered verbatim reports of the proceedings in this case held on 2/21/08, 3/27/08, 4/3/08, 4/10/08, 4/24/08, and 5/1/08, referred to herein as “RP [#]”.

under the sex offender special sentencing alternative (SOSSA) found in RCW 9.94A.670. *Id.* DOC also prepared a PSI report, which recommended that the court impose a life sentence with minimum mandatory time of 51 months in prison to serve before consideration of release, and that the court suspend that sentence of confinement under the SOSSA option with conditions that the defendant serve 9 months in jail. CP 23-34. The PSI did not recommend that the defendant be banished from Cowlitz County generally or from the City of Castle Rock specifically. *Id.*

On March 28, 2007, the parties appeared back before the Superior Court for a sentencing hearing. RP11. At that time, the state and the family members of the complaining witness recommended that the court impose a standard range sentence. RP 11-43. The defendant and his family members also spoke, requesting sentencing under the SOSSA option. *Id.* After hearing the arguments on both sides, the court decided to follow the recommendation of the defense, with a requirement that the defendant serve 180 days in the county jail. *Id.* As a result, the court sentenced the defendant to life in prison with a minimum mandatory time of 60 months to serve before first being considered for release, with that sentence suspended under the SOSSA option. CP 65-78. As part of the conditions of the judgment and sentence, the court banished the defendant from Cowlitz County and the City of Castle Rock. CP 55. That order within the judgment and sentence stated:

Other Conditions: Do not reside in Cowlitz County, do not enter Cowlitz County other than to travel from a location outside the county to a destination outside the county. If in Cowlitz County, the defendant shall not leave his transportation. Do not enter the city limits of Castle Rock.

CP 55.

Under paragraph 4.5(d), the court set the term of the suspended sentence, ordering as follows.

- (d) **Suspension of Sentence.** The court suspends execution of this sentence; and places the defendant in community custody under the charge of DOC for the length of the suspended sentence, the length of the maximum term sentence under RCW 9.94A.712, or three years, whichever is greater.

CP 54.

Since, in this case, the court sentenced the defendant under RCW 9.94A.712 on a Class A felony with a maximum term of life, the conditions of the suspended sentence, including the banishment from Cowlitz County and the City of Castle Rock, will run for the defendant's entire lifetime. CP

54.

The trial court later reiterated the banishment order by entering a separate "Order on Additional Conditions," which state as follows:

The defendant shall not reside in Cowlitz County, not to enter Cowlitz County other than to travel from a location outside the county to a destination outside the county. If in Cowlitz County, the defendant shall not leave his transportation, and shall not enter the city limits of Castle Rock, per the order of the court on APRIL, 24, 2008.

CP 79.

Following imposition of this sentence, the defendant filed timely notice of appeal. CP 80. He now seeks reversal of the court's banishment order.

ARGUMENT

THE TRIAL COURT'S ORDER BANISHING THE DEFENDANT FROM COWLITZ COUNTY AND THE CITY OF CASTLE ROCK VIOLATES THE DEFENDANT'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION, FIFTH AND FOURTEENTH AMENDMENTS.

Although not explicitly stated within the language of the Bill of Rights, the United States Supreme Court has, from its earliest days, recognized that freedom of inter and intrastate travel is one of the fundamental, basic rights guaranteed under the Constitution. *See Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972); *Edwards v. California*, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941); *See also, discussion, Eggert v. Seattle*, 81 Wn.2d 840, 845, 505 P.2d 801 (1973). This fundamental right includes not just the right to “enter” into any State, but also includes the right to “abide in any State in the Union.” *Dunn*, 404 U.S. at 338. Although originally grounded in the Fifth Amendment right to due process, the Supreme Court has also recognized it as one of the specific guarantees under the equal protection clause of the Fourteenth Amendment. *Id.*

Since banishment orders restricting freedom of movement within the United States infringe upon a fundamental constitutional right, the court applies the strict scrutiny test when called upon to determine the restriction's

1322, 22 L. Ed, 2d 600 (1969). Thus, banishment orders and other rules restricting travel are only constitutional if they are narrowly tailored to serve a compelling governmental interest. *Halstead v. Sallee*, 31 Wn. App. 193, 197, 639 P.2d 877 (1982); *Schall v. Martin*, 467 U.S. 253, 264, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984); *State v. Lee*, 135 Wn.2d 369, 389-92, 957 P.2d 741 (1998).

In *State v. Schimelpfenig*, 128 Wn.App. 224, 229, 115 P.3d 338 (2005), the Court of Appeals examined the case law reviewing the constitutionality of orders restricting the right to travel and then recognized the following five non-exclusive criteria for determining whether such an order violates the constitution. The court stated:

To determine whether a specific geographic restriction permissibly infringes on a defendant's right to travel, a sentencing court should consider the following nonexclusive factors: (1) whether the restriction is related to protecting the safety of the victim or witness of the underlying offense; (2) whether the restriction is punitive and unrelated to rehabilitation; (3) whether the restriction is unduly severe and restrictive because the defendant resides or is employed in the area from which he is banished; (4) whether the defendant may petition the court to temporarily lift the restriction if necessary; and (5) whether less restrictive means are available to satisfy the State's compelling interest. Consideration of such factors ensures that the use of a geographical restriction will always turn on a careful analysis of the facts, circumstances, and total atmosphere of the case.

State v. Schimelpfenig, 128 Wn.App. at 228-229 (citations omitted).

In *Schimelpfenig*, the defendant was convicted of murder committed in Grays Harbor County. As part of his judgment and sentence, the trial court

ordered that upon his release the defendant not reside in Grays Harbor County or have any contact with the murder victim's family for the remainder of the defendant's life. The court of appeals, after a careful review of case law involving restrictions on the right to travel and analysis of the required factors, vacated the order prohibiting the defendant from residing in Grays Harbor County. The court held:

There is no evidence in the record that Schimelpfenig ever posed a threat to Benner's family or that he has desired continued contact with them when he is released. There also is no evidence that the Benner family frequents so much of the 1,917 square miles of Grays Harbor County as to justify a countywide ban. Moreover, the record suggests that Schimelpfenig has some form of mental disability and, as a result of this disability, he has lived with his family in Grays Harbor County for his entire life. Banning him for life from residing in the county is therefore likely to heavily burden his family and be counterproductive to rehabilitation. Under these facts, the banishment order fails strict scrutiny.

In so ruling, we do not imply that countywide or other types of jurisdictional prohibitions will always be inappropriate. Relying on the well-defined boundaries of a county or city fosters the uniform enforcement of such a restriction. But the propriety of such restrictions must turn on the facts of each case. The facts of this case suggest that a more narrowly-tailored restriction would satisfactorily protect the Benner family from being reminded of their loss. We emphasize that the trial court could, and did, continue to prohibit Schimelpfenig from having contact with the Benner family and require him to stay a specified distance away from their homes or workplaces. But because the sentencing court's order forbidding Schimelpfenig from residing in Grays Harbor County is too broad for its stated purpose, we vacate it.

State v. Schimelpfenig, 128 Wn.App. at 230.

Similarly, in *State v. Alphonse*, 142 Wn.App. 417, 174 P.3d 684

(2008), a defendant convicted of misdemeanor and felony telephone harassment appealed his conviction and that portion of his judgment and sentence that banned him from appearing within “the city limits of the City of Everett” unless required for “legal or judicial reasons.” The defendant argued that this banishment order violated his constitutional right to travel because it was not sufficiently narrowly tailored to serve a compelling governmental interest. Although the court affirmed the defendant’s conviction, it vacated the court’s banishment order, holding as follows:

Applying the factors here, we hold that the trial court’s banishment order does not survive strict scrutiny. The restriction is related to protecting the safety of the victim and other police officers Alphonse included in his harassing phone calls, which has been found to be a compelling State interest. It is not unduly severe and restrictive because Alphonse neither lives nor works in the city of Everett. But less restrictive means were available to serve the State’s interest, and the restriction was unrelated to rehabilitation. Finally, other than permitting him to appear for court hearings related to this offense, the order did not allow Alphonse to petition the court to temporarily lift the restriction.

The most significant of these factors is the availability of less restrictive means to serve the court’s stated purpose in issuing the order. Even though the purpose was a compelling State interest, the court did not narrowly tailor the order to serve that interest. An order restricting contact with Meyers and his family, requiring Alphonse to stay a specified distance from Meyers, his home and the police department, and restricting any uninitiated contact with any member of the police force absent emergency circumstances could adequately serve the State’s interest in protecting the victim. We also note that cases in which such banishment orders have been upheld involved either brutal assaults of the victim, repeated harassment, or repeated violations of no contact orders, and banishment was the only effective means of protecting the victim. The record here contains no such

allegations of brutality, repeated offenses, or previous violations of orders restricting contact.

State v. Alphonse, 142 Wn.App. at 440-441.

The decisions in *Schimelpfenig* and *Alphonse* both involve conditions of a judgment and sentence in criminal cases in which the court recognized a legitimate governmental interest in protecting the victim and the victim's family from having contact with the defendant. In both cases, the court imposed no contact orders prohibiting intentional contact between the defendant and the victim and the victim's family. Neither court found any violation in such prohibitions. Similarly, in the case at bar, the trial court entered a no contact order that prohibited the defendant from having contact with the victim and her family. The defendant does not contest the legitimacy of this order.

However, in *Schimelpfenig* and *Alphonse*, the courts did find constitutional error in the banishment orders because the trial courts did not narrowly tailor them to protect the defendants' constitutional right to movement. In *Schimelpfenig*, the court particularly found the county wide ban onerous because the defendant was a resident of that county and all of his family contacts were within that county. Similarly, in the case at bar, all of the defendant's contacts with his family and home are solely within the boundaries of Cowlitz County and the City of Castle Rock. He is now 64-

boundaries of Cowlitz County and the City of Castle Rock. He is now 64-years-old and has lived his entire life in Castle Rock and Cowlitz County. His family home of 43 years that he has shared with his wife is in Castle Rock. All of his siblings live in Cowlitz County in the Castle Rock area. Both of his adult children and all of his grandchildren live in Cowlitz County and in the Castle Rock area. Although now retired, his ex-employer and his ex-fellow employees are all located in Cowlitz County. All of his friends live in the Castle Rock area.

In the same manner that banning the defendant in *Schimelpfenig* from Grays Harbor county for life was “likely to heavily burden his family and be counterproductive to rehabilitation,” so in the case at bar, banning Mr. Sims from Castle Rock and Cowlitz County for life is “likely to heavily burden his family and be counterproductive to rehabilitation.” Both orders are overbroad and they are not tailored to make the least impact on the defendant’s fundamental rights while still meeting the legitimate needs of the state. Thus, in the same manner that the general banishment order in *Schimelpfenig* violated the defendant’s fundamental constitutional rights, so the general banishment order in the case at bar violates Mr. Sims’ fundamental constitutional rights.

The decision in *Alphonse* also illustrates the error in the banishment order in the case at bar. As was noted in *Alphonse*, the defendant did not

municipality did not have the impact on him as did banishing the defendant in *Schimelpfenig* from Grays Harbor county. However, the court in *Alphonse* still struck down the banishment order because the trial court could have tailored less restrictive rules to protect the recognized governmental interest. Instead of doing this, as the constitution demands, the court simply entered a general order of banishment.

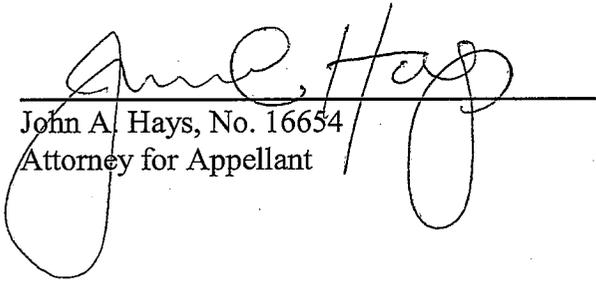
Similarly, in the case at bar, the trial court could also have entered narrowly tailored restrictions that would have met the governmental interest instead of simply entering a general banishment order. In fact, in the case at bar, the trial court did not even try to narrowly tailor the restrictions. Rather, in the case at bar, as in *Alphonse*, the trial court did just the opposite by entering a general banishment order without even considering lesser restrictive alternative as is must under the constitution. Thus, in the same manner that the banishment order in *Alphonse* violated the fundamental constitutional rights of the defendant, so the banishment order in the case at bar violated Mr. Sims' fundamental constitutional rights. Consequently, in the same manner that the appellate courts in *Schimelpfenig* and *Alphonse* vacated the banishment orders in both of those cases, so this court should vacate the trial court's orders banishing the defendant from Cowlitz County and the City of Castle Rock.

CONCLUSION

The trial court violated the defendant's fundamental constitutional rights to due process and equal protection under United States Constitution, Fifth and Fourteenth Amendments, when it banned him from entering into and living in the City of Castle Rock and Cowlitz County.

DATED this 21st day of October, 2008.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 5**

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

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

