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NO. 89730-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of
STEVEN MONTGOMERY,
Petitioner.

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ellen Fair, Judge

PETITIONER'S SUPPLEMENTAL BRIEF

LENELL NUSSBAUM
Attorney for Petitioner
Market Place One, Suite 330
2003 Western Ave.
Seattle, WA 98121
(206) 728-0996

 ORIGINAL

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A. ISSUES FOR REVIEW

1. When the sentencing court explicitly deleted sentencing conditions that would prohibit petitioner from contact with his own children, intending that he have contact with them, are DOC's conditions prohibiting all contact with his children "contrary to" the court's sentencing conditions, in violation of RCW 9.94A.704(6)?

2. Does DOC's total prohibition of all contact, even indirect, with petitioner's children without DOC prior approval violate his constitutional right to parent his children in violation of due process? U.S. Const., amend. 14; Const., Art. I, § 3.

3. Does a statute enacted after the date of the crime that permits the Department of Corrections to expand conditions to prohibit the offender's contact with his own children, when the sentencing court expressly permitted that contact, violate the ex post facto prohibition of Constitution, Art. I, § 23, U.S. Constitution, Art. I, § 9 or § 10?

B. STATEMENT OF THE CASE

On January 21, 2010, Petitioner Steven Montgomery was sentenced for two crimes a jury found committed on July 13, 2008: child molestation in the third degree, a Class C felony, and communicating with a minor for immoral purposes, a gross misdemeanor. The offenses were against a non-family member. Judgments & Sentences, Motion for Discretionary Review ("MDR"), Appendix B.

The court sentenced him to 60 months for the felony, the standard range and the statutory maximum for that offense, with a consecutive sentence of 365 days suspended for the misdemeanor. Both sentences incorporated the list of conditions of community custody attached as Appendix A to the felony Judgment and Sentence.¹

Judge Ellen Fair ~~deleted~~ the following conditions from Appendix A that the State had recommended:

4. Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense

¹ MDR App. B: Judgment and Sentence (as to Count I only) at 8, ¶ 4.6; Judgment and Sentence (Gross Misdemeanor) (as to Count II only) at 2, ¶ 5.

and has been approved by the supervising Community Corrections Officer.

5. Do not seek employment or volunteer positions, which place you in contact with or control over minor children.
6. Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.
7. Do not possess or access sexually explicit materials, as directed by the supervising Community Corrections Officer. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.
8. Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.
9. Do not possess or control any item designated or used to entertain, attract, or lure children.
10. Do not date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer.
11. Do not remain overnight in a residence where minor children live or are spending the night.

As Judge Fair later described her thinking:

I think it's a fair inference that in crossing all those provisions out I was aware that he had minor children, and I would say that it was clearly not my intent, based on the facts of the underlying case, I didn't believe that there was any safety risk to them, nor

was it my intent to prohibit any contact with them once he was released, because, clearly, these conditions would apply to conditions when he was released from custody.

RP(10/15/2013) at 8, MDR App. G (emphases added).

While Mr. Montgomery served his prison sentence, he had frequent, regular contact and family visits with his wife and his two minor children, a son and daughter, without incident.

Upon Mr. Montgomery's release on April 1, 2013, the Department of Corrections imposed two new conditions of his misdemeanor probation: that he have no contact with minors without prior approval from his CCO, and that he was not allowed "at or around" his family's home without DOC's prior approval.

Mr. Montgomery returned to Judge Fair, moving to vacate the conditions DOC imposed as conflicting with those the Court had imposed. He argued DOC did not have the authority to impose conditions contrary to the Court's conditions.²

² MDR, App. C (Motion to Vacate Conditions, Declaration of Mark Mestel in Support of Motion to Vacate Conditions).

The State and DOC asked the Court to transfer the case as a PRP to the Court of Appeals under RAP 7.8(c)(2), which it did.³

The Court of Appeals ordered a reference hearing back to Judge Fair.⁴ At that hearing, Judge Fair expressed her intent set out above. She entered the following Findings of Fact:⁵

1. At the time of the sentencing hearing, the court did not intend to prohibit the defendant from having contact with his children.

2. The court did not anticipate the possibility that the Department of Corrections would impose any of the conditions that the court had crossed out in Appendix A. The court did not consider what authority the Department might have to impose such conditions.

3. At the time the crime was committed, the Department of Corrections did not have authority to impose additional conditions of supervision. A statute creating such authority took effect after commission of the crime but before sentencing. Laws of 2009, ch. 375. At the time of sentencing, the court did not consider whether that statute applied to this case.

³ MDR, App. E (Order Transferring Motion for Relief from Judgment (5/24/2013)).

⁴ MDR, App. F (Order of Transfer to Superior Court for Reference Hearing and Determination on the Merits).

⁵ MDR, App. H (Findings of Fact on Reference Hearing (11/7/13)).

The Court of Appeals dismissed the petition.

This record further shows:⁶

- DOC has prohibited all contact between Mr. Montgomery and his children or his family's home since his release from prison (with one isolated exception).
- Mr. Montgomery participated in sex offender treatment beginning July, 2013.
- Mr. Montgomery's therapist recommended reunification with his family.
- His daughter's therapist did not recommend she have no contact with him.
- CPS has not been involved with this family since April 15, 2013, when Mr. Montgomery was released from prison.

C. LEGAL AUTHORITY AND ARGUMENT

1. DOC'S CONDITIONS PROHIBITING ALL CONTACT WITH HIS CHILDREN AND THEIR FAMILY HOME IS CONTRARY TO THE CONDITIONS THE COURT IMPOSED AT SENTENCING AND SO VIOLATES DOC'S STATUTORY AUTHORITY.

The department may not impose conditions that are contrary to those ordered by the court

RCW 9.94A.704(6).

At the time of sentencing, the State proposed to the court a list of conditions for community supervision. The court explicitly rejected and

⁶ See Reply in Support of Motion for Discretionary Review and appendices thereto.

deleted many of those conditions. It intended that Mr. Montgomery have contact with his children.

In other words, when asked to prohibit Mr. Montgomery from contact with his children, the court said "no." The court concluded his crime did not present a risk to his own children.

Nonetheless, contrary to the sentencing court's intentions, DOC has prevented Mr. Montgomery from any contact, direct or indirect, with his children for the past two years. The prohibition continues.⁷

The conditions DOC has reimposed thus are contrary to the court's conditions and violate this statute. This Court should vacate the conditions the lower court deleted from Mr. Montgomery's community supervision.

⁷ This issue is not moot. Mr. Montgomery's community custody status has been tolled due to other violations, and presently is extended to September, 2015. See: Dr. Allmon's progress report from sex offender treatment stating being away from his wife and children is a factor that elevates Mr. Montgomery's risk to the community. MDR Reply, App. C. Compare: *State v. Blazina*, Wn.2d ____ (No. 89028-5, 3/12/15) (Slip Op. at 7-9) (indigent defendants' legal financial obligations create impediments to "reentry and rehabilitation").

2. DOC'S CONDITIONS PROHIBITING ALL CONTACT WITH HIS CHILDREN VIOLATES MR. MONTGOMERY'S SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO PARENT HIS CHILDREN.

It is well settled that parents have a "fundamental liberty interest[]" in "the care, custody, and management of their children," which is protected by the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) ("The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children-- is perhaps the oldest of the fundamental liberty interests recognized by this Court.") *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); ("[T]his Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); *In re Dependency of J.H.*, 117 Wn.2d 460, 473, 815 P.2d 1380 (1991) ("It is unquestioned that biological and adoptive parents do have a fundamental liberty and privacy interest in the care, custody and management of their children.").

This fundamental liberty interest includes a parent's "fundamental right to autonomy in child-rearing decisions" and gives parents the freedom to make personal choices in matters of family life. *In re Custody of Smith*, 137 Wn.2d 1, 13, 969 P.2d 21 (1998); see also *Santosky*, 455 U.S. at 753.

Natural parents do not lose these constitutionally protected interests "simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky*, 455 U.S. at 753. *In re Welfare of H.Q.*, 182 Wn. App. 541, 550-51, 330 P.3d 195 (2014).

The family entity is the core element upon which modern civilization is founded. Traditionally, the integrity of the family unit has been zealously guarded by the courts. The safeguarding of familial bonds is an innate concomitant of the protective status accorded the family as a society institution.

H.Q. at 551, quoting *Smith*, 137 Wn.2d at 15.

Because a parent's fundamental right is protected as a matter of substantive due process under the Fourteenth Amendment, any state interference with the right to parent must be subjected to strict scrutiny and "is justified only if the

state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling interest involved."

H.Q., quoting In re Parentage of C.A.M.A., 154 Wn.2d 52, 57, 109 P.3d 405 (2005).

Prevention of harm to children is a compelling state interest, and the State does have an obligation to intervene and protect a child when a parent's "actions or decisions seriously conflict with the physical or mental health of the child." But limitations on fundamental rights are constitutional only if they are "reasonably necessary to accomplish the essential needs of the state." The fundamental right to parent can be restricted by a condition of a criminal sentence if the condition is reasonably necessary to prevent harm to the children.

State v. Ancira, 107 Wn. App. 650, 653-54, 27 P.3d 1246 (2001), citing *Santosky, supra*, 455 U.S. at 753. Thus our courts reverse blanket prohibitions of parental access to their children, as DOC imposed here, as general sentencing conditions.

In *Ancira*, the trial court prohibited the defendant from all contact with his minor children as a sentencing condition for violating a no-contact order with his wife. The court reasoned it needed to protect the children from witnessing domestic violence. The Court of Appeals vacated the no-contact order, finding nothing in the record

to support prohibiting all contact, even indirect by telephone, mail, email, etc. "The condition was not reasonably necessary to protect the children against the harm of witnessing domestic violence between their parents." *Ancira*, 107 Wn. App. at 654-56.

In *State v. Letourneau*, 100 Wn. App. 424, 439, 997 P.2d 436 (2000), the defendant was convicted of second degree rape of a child. The trial court ordered the defendant have no in-person contact with her biological minor children without the supervision of a responsible adult having knowledge of the convictions. The Court of Appeals reversed this condition. The record contained no evidence the defendant was a pedophile.

The general observation that many offenders who molest children unrelated to them later molest their own biological children, without more, is an insufficient basis for State interference with fundamental parenting rights. There must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention.

Letourneau, 100 Wn. App. at 441-42.

In this case, the blanket order prohibiting all contact with Mr. Montgomery's minor children is similarly overly broad and unconstitutional.

[T]he 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

In re PRP of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010); *State v. Howard*, 182 Wn. App. 91, 328 P.3d 969 (2014).⁸

Here the sentencing judge saw no risk to Mr. Montgomery's children. Indeed, there is no suggestion the children experienced any harm by having frequent contact with him while he was incarcerated. Yet he is prohibited from any contact whatsoever, even indirect, while in the community. He is supposed to reintegrate into

⁸ In *Rainey* and *Howard*, the defendants were convicted of domestic violence crimes; the defendant kidnapped his 3-year-old daughter in *Rainey*, and the children witnessed the attempted murder of their mother in *Howard*. Nonetheless, while the courts upheld no contact orders, they remanded to consider whether a lifetime NCO was reasonably necessary to protect the children. In *Howard*, there was no indication the order was necessary to protect the children from physical harm, so indirect contact might be permissible. 182 Wn. App. at 101-02.

Here there was no domestic violence, and Mr. Montgomery's children were not victims of any crime.

society when he is not even permitted to reintegrate into his family.

This Court should vacate all conditions limiting Mr. Montgomery's contact with his children and his family home.

3. APPLICATION OF A STATUTE ENACTED AFTER PETITIONER'S CRIMES VIOLATES THE *EX POST FACTO* PROHIBITIONS OF THE UNITED STATES AND WASHINGTON CONSTITUTIONS.

No Bill of Attainder or ex post facto Law shall be passed.

United States Constitution, Art. I, § 9.

No State shall ... pass any ... ex post facto law

United States Constitution, Art. I, § 10.

No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

Constitution, Art. I, § 23.

A law violates the ex post facto prohibition if it aggravates a crime or makes it greater than it was when committed; permits imposition of a different or more severe punishment than was permissible when the crime was committed; or, changes the legal rules to permit less or different testimony to convict the offender than was required when the crime was committed. ... Legislation further violates the provision if it is made retroactive and disadvantages the offender. ... Finding a violation turns upon whether the law changes legal consequences of acts completed before its effective date.

State v. Edwards, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985) (emphasis added), citing *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648 (1798), and *Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981).

The *ex post facto* clause "'forbids the application [by the legislature] of any new punitive measure to a crime already consummated.'" *Kansas v. Hendricks*, 521 U.S. 346, 370, 117 S. Ct. 2072, 183 L. Ed. 2d 501 (1997) (quoting *California Dep't of Corrections v. Morales*, 514 U.S. 499, 505, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995)).

Mr. Montgomery's crimes occurred July 13, 2008. At that time, the court, not DOC, set conditions of community custody for suspended sentences. Judge Fair considered it appropriate to permit him to have contact with his children.

In 2009, the Legislature enacted provisions permitting DOC to amend conditions of community custody. The statute purports to apply retroactively, and DOC so applied it to Mr. Montgomery.

This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department,

currently incarcerated with a term of community custody or probation with the department, or sentenced after July 26, 2009.

Laws 2009, chapter 375. Former RCW 9.94A.501 (2007) required DOC to supervise people such as Mr. Montgomery, but it did not permit DOC to establish its own conditions of supervision.

Laws 2008, ch. 231 took effect August 1, 2009 -- more than a year after Mr. Montgomery's crimes. See Laws 2008, ch. 231 § 61 (notes following RCW 9.94A.701):

Sections 7 through 58 of this act are intended to simplify the supervision provisions of the sentencing reform act and increase the uniformity of its application. These sections are not intended to either increase or decrease the authority of the sentencing courts or the department relating to supervision, except for those provisions instructing the court to apply the provisions of the current community custody law to offenders sentenced after July 1, 2009, but who committed their crime prior to August 1, 2009, to the extent that such application is constitutionally permissible.

(Emphasis added). Accord: Laws 2009, ch. 375 § 10.

(3) To the extent that application of sections 6 through 58 of this act is not constitutionally permissible with respect to any offender, the sentence for such offender shall be governed by the law as it existed before August 1, 2009,

or on such prior date as may be constitutionally required, notwithstanding any amendment or repeal of provisions of such law.

Laws 2008, ch. 231 § 55.

The Constitutions do not permit retroactive application if it disadvantages the offender. *Weaver v. Graham, supra; State v. Edwards, supra.* DOC's added conditions violate Mr. Montgomery's constitutional liberty interest in the care, custody and control of his children. They are conditions the sentencing court explicitly declined to impose because she saw no evidence the crimes of conviction were a danger to his children. Permitting the DOC to override the court to prohibit all contact with his children under a statute that did not exist at the time of the crime constitutes an ex post facto law.

This is not an issue of Mr. Montgomery having more difficulty making a case for early release, as was rejected in *Morales*. This is a case in which DOC has imposed more punitive and prohibitive conditions on him than the trial court did, based on a law passed after his crime was committed. It does not matter if the trial court could have imposed such conditions; it did not do so. In

fact, Judge Fair explicitly stated she did not see a need for prohibiting Mr. Montgomery from contacting his children and intended he would have contact with them. Thus these conditions expand, conflict with and are contrary to those set by the court, to Mr. Montgomery's and his children's distinct disadvantage.

This Court therefore should vacate the conditions to the extent the sentencing court deleted them from the proposed conditions.

D. CONCLUSION

For the reasons stated above, Steven Montgomery respectfully asks this Court to vacate the conditions of his community supervision that the sentencing court deleted from the proposed Appendix A, and permit him to return to his children and their family home.

DATED this 19th day of March, 2015.

Respectfully submitted,



LENELL NUSSBAUM
WSBA No. 11140
Attorney for Mr. Montgomery

CERTIFICATE OF SERVICE

I certify that on this date I mailed a copy of the attached document, to the following individuals, postage prepaid, addressed as indicated:

Ms. Ronda D. Larson
Attorney General's Office
Corrections Division
P.O. Box 40116
Olympia, Wa 98504

I declare under penalty of perjury under the laws of the State of Washington that the above statement is true and correct to the best of my knowledge.

3.19.2015-SEATTLE, WA
Date and Place


ALEXANDRA EAST

OFFICE RECEPTIONIST, CLERK

To: Alexandra Fast; Lenell Nussbaum; ronda.larson@atg.wa.gov
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Please accept for filing the attached "Petitioner's Supplemental Brief" in regards to Mr. Steven Montgomery case No. 89730-1. A certificate of service is attached to the pleading.

Alexandra Fast
Assistant to:
Lenell Nussbaum, Attorney at Law
Email: Nussbaum@seanet.com
WSBA No. 15277
Lenell Nussbaum, Attorney at Law
2003 Western Ave., Suite 330
Seattle, Wa 98121
USA
Phone: [206-728-0996](tel:206-728-0996)
Fax: [206-448-2252](tel:206-448-2252)