

FILED
SUPREME COURT
STATE OF WASHINGTON
4/28/2020 9:12 AM
BY SUSAN L. CARLSON
CLERK

NO. 97452-7

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:
DON WESLEY WINTON

**RESPONSE OF INDETERMINATE SENTENCE REVIEW BOARD
TO AMICUS CURIAE BRIEF OF WASHINGTON ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS**

ROBERT W. FERGUSON
Attorney General

ALICIA O. YOUNG, WSBA 35553
Deputy Solicitor General

HOLGER SONNTAG, WSBA 55251
Assistant Attorney General

Office ID 91021
PO Box 40100
Olympia, WA 98504-0100
(360) 586-2697
Alicia.Young@atg.wa.gov

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. FACTS PERTINENT TO AMICUS BRIEF3

 A. Winton Was Released into Community Custody to Live
 and Work in King County Consistent with his Own
 Proposed Release Plan3

 B. Winton Challenges Only the Board-Imposed Clark
 County Restriction Here6

III. ARGUMENT7

 A. The Clark County Restriction Is Not a Banishment Order7

 B. This Court’s Existing Cases Set Forth the Proper
 Standard for Evaluating Community Custody Conditions10

 C. Regardless of the Test Employed, the Clark County
 Condition Should Be Upheld13

IV. CONCLUSION16

TABLE OF AUTHORITIES

Cases

<i>Dunn v. Blumstein</i> , 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed.2d 274 (1972).....	11
<i>Edison v. State</i> , 709 P.2d 510, (Alaska Ct. App. 1985).....	14
<i>Eggert v. City of Seattle</i> , 81 Wn.2d 840, 505 P.2d 801 (1973).....	11
<i>In re Personal Restraint of Martinez</i> , 2 Wn.App.2d 904, 413 P.3d 1043 (2018).....	8, 12
<i>In re Personal Restraint of Rainey</i> , 168 Wn.2d 367, 229 P.3d 686 (2010).....	10
<i>In re White</i> , 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (1979).....	14
<i>Johnson v. State</i> , 672 S.W.2d 621 (Tex. App. 1984).....	15
<i>Jones v. State</i> , 727 P.2d 6 (Alaska Ct. App. 1986).....	14
<i>Oyoghok v. Municipality of Anchorage</i> , 641 P.2d 1267 (Alaska Ct. App. 1982).....	2
<i>People v. Beach</i> , 147 Cal. App. 3d 612, 195 Cal. Rptr. 381, 385 (1983).....	14
<i>People v. Brockelman</i> , 933 P.2d 1315 (Colo. 1997).....	13-16
<i>Predick v. O'Connor</i> , 260 Wis.2d 323, 660 N.W.2d 1 (Wis. Ct. App. 2003).....	13

<i>Shapiro v. Thompson</i> , 394 U.S. 618, 89 S. Ct.1322, 22 L. Ed. 2d 600 (1969).....	11
<i>State v. Alphonse</i> , 147 Wn. App. 891, 197 P.3d 1211 (2008).....	9
<i>State v. Franklin</i> , 604 N.W.2d 79 (Minn. 2000)	14
<i>State v. Muhammad</i> , 2002 MT 47, 309 Mont. 1, 43 P.3d 318.....	14
<i>State v. Nguyen</i> , 191 Wn.2d 671, 425 P.3d 847 (2018).....	1, 10-11, 13
<i>State v. Nienhardt</i> , 196 Wis.2d 161, 537 N.W.2d 123 (Wis. Ct. App. 1995).....	16
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	1, 10-11
<i>State v. Schimelpfenig</i> , 128 Wn. App. 224, 115 P.3d 338 (2005).....	1, 7, 9, 12-13
<i>State v. Sims</i> , 152 Wn. App. 526, 216 P.3d 470 (2009).....	9, 12
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	10
<i>United States v. Bee</i> , 162 F.3d 1232 (9th Cir. 1998)	13
<i>United States v. Watson</i> , 582 F.3d 974 (9th Cir. 2009)	9, 13

Unpublished Opinions

<i>In re Pers. Restraint of Winton</i> , No. 52371-0-II, 2019 WL 2811126 (Wash. Ct. App. July 2, 2019).	6-7, 16
---	---------

Statutes

RCW 9.94A.507(5)..... 3, 4
RCW 9.94A.507(6)..... 3, 4
RCW 9.94A.704..... 3, 4
RCW 9.95.420 3, 4
RCW 9.95.420(2)..... 16

Rules

RAP 13.7(b) 7

I. INTRODUCTION

Amicus Washington Association of Criminal Defense Lawyers (WACDL) urges this Court to adopt a new rule that would impose heightened scrutiny whenever persons serving criminal sentences in community custody are subjected to geographic restrictions. But recognizing the fact-specific nature of community custody conditions, this Court's precedent already provides a framework in which to evaluate them under the abuse of discretion standard. *State v. Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018). Even if a condition infringes on a fundamental right, it will be upheld when reasonably necessary to accomplish the essential needs of the State and public order. *State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993). To that end, conditions expressly authorized by the Sentencing Reform Act, including crime-related prohibitions, are usually upheld. *See Nguyen*, 191 Wn.2d at 683-86.

Despite this well-settled authority, Winton and WACDL argue this Court should adopt and apply a new strict scrutiny test specifically when reviewing travel-related conditions, as the Court of Appeals did in a handful of cases beginning with *State v. Schimelpfenig*, 128 Wn. App. 224, 115 P.3d 338 (2005). They claim such scrutiny is necessary to avoid impermissible banishment orders.

This Court should decline to do so. First, as explained below and in the Board’s supplemental brief, and unrebutted by WACDL here, persons still serving their criminal sentences do not enjoy a constitutional right to travel freely.¹ Second, the only condition at issue in this appeal is a narrow Board-imposed condition requiring Winton—a convicted sex offender serving an indeterminate life sentence—to first obtain permission before traveling over 200 miles from his home in King County to Clark County, where his victims live, work, and attend school. It is not a banishment of any sort. Third, the abuse of discretion standard is appropriate for reviewing travel restrictions just as it is for reviewing other community custody conditions, even those that impact fundamental rights, such as those that limit computer use or access to sexually-explicit materials.

Regardless of the test employed, the Court should conclude that the narrow restriction at issue here is reasonable and within the Board’s discretion to impose. Here, where Winton resides, owns a home, works, and has a support system in King County, it is reasonable for the Board to

¹ See Supplemental Brief of the Indeterminate Sentence Review Board at 7-12; Personal Restraint Petition Response (PRP Resp.) at 8-14. See also *Oyoghok v. Municipality of Anchorage*, 641 P.2d 1267, 1271 (Alaska Ct. App. 1982) (Singleton, J., concurring) (“[T]he claim that a probation condition violates a constitutional right to intrastate, or in this case intracity travel, is untenable. Execution aside, there is no greater restriction on travel than imprisonment. If violation of a law could, consistent with the constitution, result in imprisonment, it can constitutionally result in restrictions on movement less severe. If such a condition is invalid, it is because it is not reasonably necessary to effectuate rehabilitation, not because it infringes on intrastate travel.”).

require him to provide notification and obtain permission before traveling hundreds of miles to Clark County, where Winton's victims reside, work, and attend school at locations throughout the county. This is especially so where Winton disclaims any need to visit Clark County at all. Imposing this modest condition allows the Board and the Department of Corrections to monitor Winton's compliance with conditions prohibiting him from contacting his victims and certain family members, to generally keep track of his whereabouts (and thus properly supervise him), and to help protect his victims from further harm through contact with the man who sexually molested them. The Board respectfully requests that the Court reverse the Court of Appeals and dismiss Winton's Personal Restraint Petition.

II. FACTS PERTINENT TO AMICUS BRIEF

A. Winton Was Released into Community Custody to Live and Work in King County Consistent with his Own Proposed Release Plan

As someone serving a criminal sentence for a sex offense, Winton is subject to a number of conditions imposed by the court, the Board, and the Department for the duration of his sentence. *See generally* RCW 9.94A.507(5)-(6); RCW 9.95.420; RCW 9.94A.704; PRP Resp. Exs. 1, 5. He is, for example, required to register as a sex offender, live in a location and under such arrangements as are approved by his Community Corrections Officer (CCO), submit to polygraph examinations, refrain from

contacting his victims and certain family members, refrain from dating or forming relationships with families with minor children without written approval from his CCO, stay within geographic boundaries designated by his CCO, and consent to Department home visits and visual inspections. RCW 9.94A.507(5)-(6); RCW 9.95.420; RCW 9.94A.704; PRP Resp. Exs. 1, 5. He challenges none of these restrictions.

Before he was released from prison into community custody, Winton submitted a proposed offender release plan requesting that he be permitted to live in South King County, where he owns a home, has a support network, works, and attends church. PRP Resp. Ex. 10. In a letter following his release hearing, Winton reiterated “the importance of [his] request to live in King County,” where he has “a strong support system in place.” PRP Resp. Ex. 11. He claimed, in fact, that he has “no support in other counties.” PRP Resp. Ex. 11. In response to concerns apparently expressed by his daughter at the release hearing, Winton acknowledged that “reasonable restrictions could be” imposed, “such as not going within a certain distance of her home.” PRP Resp. Ex. 11. Winton never expressed any concern or need to travel to Clark County. PRP Resp. Ex. 11; *See also* Answer to Motion for Discretionary Review (Ans. To Mot. for Discr. Rev.) at 13 (“Mr. Winton has not requested or attempted to enter Clark County

except for the purpose of traveling through the county on Interstate-5 or Interstate-205.”).

Consistent with Winton’s request, the Department recommended, and the Board approved, a release plan in which Winton would reside and work in King County. PRP Resp. Ex. 2. Due to community safety concerns involving the victims and certain members of their family, the Department recommended, and the Board imposed, certain geographic restrictions that required Winton to provide notification and obtain approval before visiting the City of Seattle, Clark, or Clallam Counties. PRP Resp. Exs. 2, 5.²

As explained in more detail in the Board’s response to Winton’s Personal Restraint Petition (PRP), the Board deemed the Clark County restriction necessary to protect Winton’s victims from further contact with him, whether purposeful or inadvertent. PRP Resp. at 14-15, Ex. 16. Both adjudicated victims, one unadjudicated victim, and one of their family members reside, work, and attend school in locations throughout Clark County. PRP Resp. Ex. 16. Winton is precluded by separate conditions he does not challenge from contacting these individuals. PRP Ex. B; PRP Resp. Ex. 5. The varied locations of these individuals’ homes, work,

² WACDL also points out that Winton is required by a separate Department-imposed community custody condition to obtain permission from his CCO before he can travel outside of King County, but Winton has not introduced any such facts of this condition nor challenged it in this Petition.

and schools prevent the Board from imposing a narrower geographic restriction without revealing the locations of where the victims live, work, and attend school. PRP Resp. Ex. 16. Requiring Winton to first provide notice and obtain authorization before traveling to the county allows the victim liaison to inform the victims, helping to avoid their contact with Winton. PRP Resp. Ex. 16. It also allows the Board and the Department to supervise Winton and see that he complies with his conditions of community custody.

B. Winton Challenges Only the Board-Imposed Clark County Restriction Here

Winton originally challenged all of the Board-imposed geographic conditions and a Board-imposed condition that required that he submit to urinalysis testing. PRP at 1. With the exception of the Clark County condition, all of the other Board-imposed geographic conditions were lifted after Winton filed his PRP. Accordingly, Winton argued to the Court of Appeals that “the only remaining issues to be addressed in this matter” were the Clark County condition and the urinalysis testing requirement. PRP Reply at 1. Therefore, the Court of Appeals addressed only those issues. *In re Pers. Restraint of Winton*, No. 52371-0-II, 2019 WL 2811126, at *1 n.1 (Wash. Ct. App. July 2, 2019) (unpublished). The Board, as the petitioner, has not sought review of the Court of Appeals decision regarding

the urinalysis testing requirement. Mot. for Discr Rev. Winton has not cross-petitioned for review of any issue. Ans. to Mot. for Discr. Rev. Thus, this appeal concerns only the Clark County restriction. RAP 13.7(b).

III. ARGUMENT

A. The Clark County Restriction Is Not a Banishment Order

The Court of Appeals below stated that “we apply strict scrutiny when reviewing a banishment order.” *In re Pers. Restraint of Winton*, 2019 WL 281112, at *4 (citing *Schimelpfenig*, 128 Wn. App. at 226). But the condition at issue here is nothing like a banishment order.

As WACDL itself argues, a “banishment,” is “the punishment of being sent away,” and to “banish” is “to drive out or remove from a home or place of usual resort or continuance.” WACDL Amicus Br. at 2 (quoting <https://www.merriam-webster.com/dictionary/banish>). Here, Winton was released into community custody into the county he requested: where he owns a home, conducts business, and has a support system. PRP Resp. Exs. 2, 10-11. In fact, he argued to the Board that he has no support system anywhere but King County. PRP Resp. Ex. 11. This is a far cry from Winton being sent away or driven out of his home.

Additionally, Winton has not been excluded even from Clark County. He is merely required to provide notice and obtain permission before traveling there, to minimize the risk of contact between him and his

victims. As the Board reminded Winton, and as Winton’s travel history demonstrates, Winton has routinely requested and been granted authorization to travel to a number of locations for work, pleasure, and other purposes. PRP Resp. Exs. 12 (“Your current geographic boundaries permit for travel to/through Clark County ... provided that you have an appropriate reason and prior approval from your CCO and the ISRB.”), 15 (chronological case notes related to Winton’s supervision). This includes traveling through Clark County to get to other destinations, when he has requested it. *See, e.g.*, PRP Resp. Ex. 15 at 12 (“P is approved to travel through Clark County only for the purpose of a one-day trip to Portland on Sunday.”). And, as Winton acknowledges, Winton is now expressly permitted to travel through Clark County on I-5 or I-205 without any restriction. Ans. to Mot. for Discr. Rev. at 11 n. 7. *See also* Winton Supp. Br. at 4 (speaking of condition in the past tense).³

This case is unlike *In re Personal Restraint of Martinez*, 2 Wn.App.2d 904, 915, 413 P.3d 1043 (2018), where the CCO “refused to even consider Martinez’s request” to be permitted to travel to Thurston County, where Martinez’s parents and his potential employment were

³ Nothing in the record indicates Winton ever requested and was denied the ability to travel through Clark County to another approved destination, even before the condition was modified to expressly permit travel through the county without first obtaining authorization. The record indicates the condition was in place to avoid contact with Winton’s victims in Clark County. PRP Resp. Exs. 15-16.

located, as well as support for certain mental conditions (and despite language in the restriction that suggested the CCO was required to consider such requests). Here, Winton has received approval to travel to multiple locations, including traveling through Clark County, when he has requested to do so.

Nor is the condition at issue here like the permanent prohibitions restricting probationers from ever residing or returning to their counties of residence, like those at issue in *Schimelpfenig*, 128 Wn. App. at 226 (order prohibiting Schimelpfenig from residing in Grays Harbor County for the rest of his life); *State v. Sims*, 152 Wn. App. 526, 216 P.3d 470 (2009) (order precluding Sims from residing in or entering Cowlitz County except to travel through for the rest of his life); and *State v. Alphonse*, 147 Wn. App. 891, 197 P.3d 1211 (2008) (order prohibiting Alphonse from entering the City of Everett unless for legal or judicial reasons). In contrast to those cases, Winton is allowed to travel to Clark County; he is simply required to provide notice and obtain authorization first. *See also United States v. Watson*, 582 F.3d 974, 984 (9th Cir. 2009) (upholding condition that defendant not enter city of San Francisco (where he lived) without permission of his probation officer, reasoning in part that fact that defendant could obtain permission “helps to mitigate the severity” of the limitation”). Thus, even if some travel restrictions amounting to banishments do raise

constitutional concerns warranting special treatment, this case does not involve a banishment order.

B. This Court’s Existing Cases Set Forth the Proper Standard for Evaluating Community Custody Conditions

Rather than resorting to a special test for evaluating community custody conditions that impact an offender’s travel, the Court should instead apply its own well-established precedent governing review of any community custody conditions. As set forth in the Board’s Supplemental Brief, this Court’s precedent already provides that community custody conditions are reviewed for abuse of discretion, and, while sentencing conditions restricting constitutional rights must be imposed sensitively, they are permitted when reasonably necessary to accomplish the essential needs of the State and public order. *Nguyen*, 191 Wn.2d at 678; *Riley*, 121 Wn.2d at 37-38. To that end, conditions authorized by sentencing laws, such as prohibitions reasonably related to the underlying crime are “usually upheld.” *Nguyen*, 191 Wn.2d at 683-84 (quoting *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)).⁴

⁴ Citing *Warren*, this Court in *In re Personal Restraint of Rainey* stated that the “extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny.” *In re Personal Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). But the Court also repeated the *Riley* standard that conditions interfering with fundamental constitutional rights need only be “reasonably necessary to accomplish the essential needs of the State and public order,” and acknowledged the fact-specific nature of sentencing conditions, which warrant review for abuse of discretion. *Id.* 374-75.

While acknowledging this precedent, WACDL proceeds to ignore it, and instead urges the Court to find that community custody conditions that infringe on fundamental rights must satisfy strict scrutiny, and, accordingly, be “narrowly tailored to serve a compelling governmental interest” to survive. WACDL Br. at 10. Several cases WACDL cites as support do not review community custody conditions. WACDL Br. at 10 (citing *Shapiro v. Thompson*, 394 U.S. 618, 627, 89 S. Ct.1322, 22 L. Ed. 2d 600 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 335-60, 92 S. Ct. 995, 31 L. Ed.2d 274 (1972); *Eggert v. City of Seattle*, 81 Wn.2d 840, 843-45, 505 P.2d 801 (1973)).

Only as to sentencing conditions characterized as “banishments,” WACDL does find support in a handful of Court of Appeals cases beginning with *Schimelpfenig*. But, as explained above, the travel condition at issue here is nothing like the banishment at issue in *Schimelpfenig*. And, to the extent those Court of Appeals cases hold that travel restrictions should be subjected to heightened strict scrutiny, such a holding is inconsistent with this Court’s cases that hold probation conditions may restrict fundamental rights as long as such conditions are reasonably related to the purposes of the state’s sentencing and probation laws, which include protecting the victims and the public, and rehabilitating and reforming the offender. *Nguyen*, 191 Wn.2d at 678; *Riley*, 121 Wn.2d at 37-38.

Another reason counseling against application of *Schimelpfenig* and its progeny is that many of those cases lacked an adversarial process with respect to the constitutionality of the travel restriction, which might otherwise have resulted in a more robust debate of the proper analysis. In *Schimelpfenig* itself, in fact, the State conceded error, and did not attempt to defend the legality of the condition precluding Schimelpfenig from entering Grays Harbor County. *Schimelpfenig*, 128 Wn. App. at 226. Likewise, in *Sims*, the State conceded that the order prohibiting Sims from entering or residing in Cowlitz County was in error. *Sims*, 152 Wn. App. at 528. In *Personal Restraint of Martinez*, the petitioner did not argue that his right to travel was infringed, but the Court addressed the constitutionality of a travel restriction *sua sponte*, without requesting additional briefing (although the State did brief the issue). *Martinez*, 2 Wn. App.2d at 912-13. In any event, this Court has never held that a heightened strict scrutiny test applies specifically to community custody conditions impacting offenders' ability to travel.

Rather than adopting the strict scrutiny test advanced by Winton and WACDL, this Court should reaffirm that “[s]o long as it is reasonable to conclude that there is a sufficient connection between the prohibition and the crime of conviction” or some other legitimate purpose reflected in the state sentencing laws, the Court “will not disturb” such “community

custody conditions.” *Nguyen*, 191 Wn.2d at 685-86. *See also Watson*, 582 F.3d at 985 (finding challenged condition to be “reasonably related to the goals of rehabilitation and deterrence” and “no broader than legitimately necessary to serve those purposes,” noting that “[e]ven very broad conditions are reasonable if they are intended to promote the probationer’s rehabilitation and to protect the public’”) (quoting *United States v. Bee*, 162 F.3d 1232, 1236 (9th Cir. 1998)).

C. Regardless of the Test Employed, the Clark County Condition Should Be Upheld

Even considering the five “nonexclusive factors” applied in the *Schimelpfenig* case, the Clark County restriction should be upheld. The Court of Appeals in *Schimelpfenig* adopted these five factors from a Colorado Supreme Court decision. *Schimelpfenig*, 128 Wn. App. at 229 (citing *People v. Brockelman*, 933 P.2d 1315 (Colo. 1997)).⁵ In *People v. Brockelman*, the Colorado Supreme Court reviewed a geographic probation restriction for an individual convicted of third-degree assault. *Brockelman*, 933 P.2d at 1316. The Colorado court reviewed that condition to determine whether it was “reasonably related to the statutory purposes of

⁵ The *Schimelpfenig* decision also cited *Predick v. O’Connor*, 260 Wis.2d 323, 325, 660 N.W.2d 1 (Wis. Ct. App. 2003), but that case reviewed an injunction, not a probation condition imposed as part of a criminal sentence.

probation.” *Brockelman*, 933 P.2d at 1319. In doing so, the court articulated

five “not exhaustive” factors that courts should consider, including:

- (1) whether the restriction is reasonably related to the underlying offense;
- (2) whether the restriction is punitive to the point of being unrelated to rehabilitation;
- (3) whether the restriction is unduly severe and restrictive because the defendant resides in the area and is forced to relocate, or is employed or anticipates employment in the area;
- (4) whether the defendant may petition the court to lift the restriction temporarily when necessary; and
- (5) whether less restrictive means are available.

Id. Applying those factors, the Colorado Supreme Court concluded that a geographic condition “designed to prevent any possibility of physical contact, *however inadvertent*, between the defendant and the victim for the period of probation” easily satisfied the “reasonably related” test. *Id.* at 1319-20 (emphasis added). Distinguishing cases in which geographic restrictions were stricken,⁶ the court emphasized that *Brockelman* “neither

⁶ See, e.g., *Edison v. State*, 709 P.2d 510, 511 (Alaska Ct. App. 1985) (striking restriction excluding defendant from town where defendant worked as not reasonably related to offense of driving under the influence); *People v. Beach*, 147 Cal. App. 3d 612, 195 Cal. Rptr. 381, 385 (1983) (striking condition forcing defendant to relocate from home of twenty-four years); *Jones v. State*, 727 P.2d 6 (Alaska Ct. App. 1986) (striking condition that included defendant’s residence and place of employment, where condition lacked connection with underlying offense); *In re White*, 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (1979) (court found excluding defendant from a metropolitan area could cause defendant to violate probation inadvertently when traveling through the area on public transportation). See also, e.g., *State v. Franklin*, 604 N.W.2d 79, 83–84 (Minn. 2000) (striking order banishing probationer with substantial ties to a city from that city, where she had trespassed into a building on the outskirts of the city, finding there was an “insufficient nexus” between “the exclusion from Minneapolis and Franklin’s rehabilitation or the preservation of public safety”); *State v. Muhammad*, 2002 MT 47, 309 Mont. 1, 43 P.3d 318 (holding district court’s condition banishing defendant from county where he and other family resided was “unduly severe and punitive to the point of being unrelated to rehabilitation,” particularly where defendant was “precluded from petitioning

lived nor worked” in the restricted area, nor did he face any “danger of inadvertently traveling through” the restricted area. *Brockelman*, 933 P.2d at 1320-21. Because the restriction was “statutorily authorized and reasonable under the circumstances of this case,” the court found “no obligation for the court to use less restrictive means than were ordered.” *Id.* Additionally, the court acknowledged that if the victim left the restricted area, the trial court possessed the power to modify the condition it imposed due to changed circumstances. *Id.* Critically, the court did not impose a strict scrutiny standard, instead deeming its charge to determine whether the restriction was “reasonably related to the statutory purposes of probation.” *Id.* at 1319.

Likewise here, Winton does not live, work, or have a support system in Clark County, nor face any risk of inadvertently traveling through it. And like the restriction in *Brockelman*, the restriction here is designed to prevent any possibility of contact, “however inadvertent,” between Winton and his victims. Additionally, relevant to the fourth *Brockelman/Schimelpfenig* factor, Winton can request the Board to “lift the restriction temporarily when necessary,” and the Board has, in fact, done so upon

the District Court to temporarily lift the restriction”); *Johnson v. State*, 672 S.W.2d 621, 623 (Tex. App. 1984) (holding banishment from county in which defendant (who was convicted of unauthorized use of a vehicle) resided, “particularly when he is broke and unemployed is not reasonably related to his rehabilitation,” and chastising political subdivision for “dump[ing] persons it considers undesirable upon another”).

request. *See, e.g.*, PRP Resp. Ex. 15 at 12.⁷ Because the geographic restriction is “statutorily authorized and reasonable under the circumstances of this case,” this Court should similarly uphold the restriction. *See also State v. Nienhardt*, 196 Wis.2d 161, 168, 537 N.W.2d 123 (Wis. Ct. App. 1995) (“[E]ven if certain constitutional rights are implicated by the condition, probation conditions may impinge such rights if they are not overly broad and are reasonably related to the person’s rehabilitation.”) (finding no compelling reason why probationer needed to be in restricted area).

IV. CONCLUSION

The limited requirement that Winton first provide notice and obtain permission before traveling over 200 miles from his home county to a county he admittedly has no reason to visit, where his victims and other subjects of no-contact restrictions live, work, and attend school, is

⁷ The Court of Appeals’ treatment of this prong (4) below is puzzling. As demonstrated from the case in which this test originated, this prong is concerned with a sentencing body’s ability to temporarily modify the conditions it previously imposed, based on changed circumstances. *See Brockelman*, 933 P.2d at 1320-21 (noting trial court possesses the power to modify conditions of probation it imposes when circumstances change). As the record here demonstrates, the condition as written already contains a built-in mechanism for Winton to travel to Clark County, simply by requesting authorization. Additionally, the Board is clearly authorized to, and, in fact, has, modified the community conditions it has imposed when changed circumstances so warrant it. *See RCW 9.95.420(2)* (authorizing Board to “modify conditions of community custody following notice to the offender”). Nonetheless, the Court of Appeals agreed with Winton that this prong was not satisfied here, because Winton was not able to get certain other restrictions permanently removed until after filing his PRP. *In re Pers. Restraint of Winton*, 2019 WL 2811126, at *6.

reasonably related to the essential needs of the State and public order, as reflected in the state sentencing laws. This Court should reverse the Court of Appeals and dismiss the Petition.

RESPECTFULLY SUBMITTED this 28th day of April 2020.

ROBERT W. FERGUSON
Attorney General

s/ Alicia O. Young
ALICIA O. YOUNG, WSBA 35553
Deputy Solicitor General
HOLGER SONNTAG, WSBA 55251
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the foregoing ISRB RESPONSE TO WACDL AMICUS CURIE with the Clerk of the Court using the electronic filing system which will serve the document to the following case participants as indicated below:

Elizabeth Penner: elizabeth@dellinolaw.com

David L. Donnan: david@meryhewlaw.com

Amy I. Muth: amy@amymuthlaw.com

Thomas E. Weaver: tweaver@tomweaverlaw.com

Attorneys for WACDL

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of April 2020, at Olympia, WA.

s/ Stacey McGahey
STACEY MCGAHEY
Legal Assistant
Solicitor General's Office
P.O. Box 40100
Olympia, WA 98504
(360) 586-3114
Stacey.Mcgahey@atg.wa.gov

SOLICITOR GENERAL OFFICE

April 28, 2020 - 9:12 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97452-7
Appellate Court Case Title: Personal Restraint Petition of Don Wesley Winton
Superior Court Case Number: 06-1-02237-8

The following documents have been uploaded:

- 974527_Briefs_20200428090943SC731974_8207.pdf
This File Contains:
Briefs - Answer to Amicus Curiae
The Original File Name was 26-AmCurieResponse.pdf

A copy of the uploaded files will be sent to:

- Angel@dellinolaw.com
- amy@amymuthlaw.com
- correader@atg.wa.gov
- david@meryhewlaw.com
- epenner@mckinleyirvin.com
- holger.sonntag@atg.wa.gov
- ian@amymuthlaw.com
- jdawson@mckinleyirvin.com
- tweaver@tomweaverlaw.com

Comments:

RESPONSE OF INDETERMINATE SENTENCE REVIEW BOARD TO AMICUS CURIAE BRIEF OF
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Sender Name: Kristin Jensen - Email: kristinj@atg.wa.gov

Filing on Behalf of: Alicia O Young - Email: alicia.young@atg.wa.gov (Alternate Email: SGOOlyEF@atg.wa.gov)

Address:
PO Box 40100
1125 Washington St SE
Olympia, WA, 98504-0100
Phone: (360) 753-4111

Note: The Filing Id is 20200428090943SC731974