

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
4/30/2020 2:36 PM  
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No. 97452-7

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IN THE SUPREME OF THE STATE OF WASHINGTON

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In re the Personal Restraint Petition of DON WESLEY WINTON

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RESPONSE OF DON WESLEY WINTON  
TO AMICUS BRIEF OF  
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS

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## I. INTRODUCTION

In its amicus brief, Washington Association of Criminal Defense Attorneys (hereinafter “WACDL”) argues that this court should apply strict scrutiny in reviewing the geographic restriction imposed upon Mr. Winton. Petitioner, Don Wesley Winton, concurs in WACDL’s analysis.

## II. ARGUMENT

As urged by WACDL in its amicus brief, the court should apply strict scrutiny in its review of the geographic restriction at issue in Mr. Winton’s case and make clear that this is the applicable standard of review when a condition of community custody implicating a fundamental constitutional right, such as the right to travel, is challenged. The need for clear guidance in adopting conditions which infringe upon fundamental constitutional rights is evident in both Mr. Winton’s case and In re Pers. Restraint of Martinez, 2 Wn. App. 2d 904, 413 P.3d 1043 (2018). The Board operates with virtually unchecked authority as review of conditions imposed is inaccessible, as a practical matter, to most individuals subject to the Board’s authority. Most offenders do not have the resources necessary to pursue a personal restraint petition, and, as discussed in WACDL’s amicus brief, there is no procedure in place for direct review of conditions which may run afoul of constitutional rights. Until Mr. Winton filed the instant personal restraint petition, he was banished from the entire City of Seattle for no discernable reason, and he was also barred from

half of the State of Oregon. The condition subject to review in this case impedes Mr. Winton's ability to utilize two major highways, including Interstate-5, to travel to his home in Cape Arch, despite the fact that he has received a permanent travel pass which allows him to travel between Des Moines and Cape Arch.

Much of the dispute regarding the applicable standard of review in this case stems from amicus and the parties' differing interpretations of the language used in State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993). In that case, the court addressed a statutory challenge raised by a defendant who asserted that a condition of his sentence was not reasonably crime related as required by former RCW 9.94A.120(5) and RCW.9.94A.030(7). Although the court briefly touched on the issue of limitations on the right to freely associate, this issue was not directly before the court, and the court therefore did not undertake a thorough analysis of the standard of review applicable where a defendant raises a challenge to a condition on the ground that it infringes upon a constitutional right. The court's assertion in Riley, 121 Wn.2d at 37-38, that "limitations upon fundamental rights are permissible, provided that they are imposed sensitively" is not inconsistent with applying strict scrutiny when reviewing the constitutionality of such conditions. In the sentence which follows, the court, borrowing language from the 9th Circuit in United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (1975), indicates that such conditions

must be “reasonably *necessary* to accomplish the *essential needs* of the State and public order” (emphasis supplied). *Id.* This language is substantively indistinguishable from the “narrowly tailored to serve a compelling governmental interest” language used by the Court of Appeals in reviewing Mr. Winton’s condition. *In re Pers. Restraint of Winton*, 9 Wn. App. 2d 1050 (2019). The court should reject any invitation to water down the applicable standard of review and affirm the Court of Appeals, as urged by WACDL.

Another reason for the parties’ differing views concerning the applicable standard of review is that the Board relies on cases in which this issue was not squarely addressed by the court. For example, in *State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018), an opinion on two consolidated cases, the defendants challenged community custody conditions on constitutional vagueness and statutory grounds. Neither defendant’s challenge rested on the assertion that the conditions at issue unconstitutionally infringed upon a fundamental constitutional right. The court rejected the defendants’ vagueness challenges because the conditions were sufficiently definite such that a person of reasonable intelligence could understand the nature of the proscribed conduct. In its analysis, the court did not squarely address the standard of review applicable when a defendant asserts that a community custody condition violates substantive due process by unconstitutionally infringing upon a fundamental right as that issue was not before the court. The

defendants also challenged conditions on statutory grounds, asserting that the conditions at issue were not sufficiently crime related as required by RCW 9.94A.030(10). The Board relies in its briefing on language from the court's statutory analysis under RCW 9.94A.030(10) in support of its argument that the court should adopt a lesser standard of review when a constitutional violation is asserted, to-wit: that conditions which are "reasonably related to the underlying crime" are "usually upheld." ISRB Resp. to Amicus Brief of WACDL at 10, citing Nguyen, supra. While it is true that reasonably crime related conditions are appropriately upheld against such statutory challenges, Mr. Winton does not challenge the geographic restriction at issue in the present case on statutory grounds.

### III. CONCLUSION

Mr. Winton respectfully urges the court, upon considering WACDL's amicus brief, to apply strict scrutiny in reviewing the geographic restriction at issue in the instant case.

SUBMITTED this 30<sup>th</sup> day of April, 2020.



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April 30, 2020 - 2:36 PM

## 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

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