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NO. 98493-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER R. JOHNSON,

Appellant.

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ON DISCRETIOANRY REVIEW FROM  
THE COURT OF APPEALS, DIVISION II  
Court of Appeals No. 51923-2-II  
Superior Court No. 17-1-01536-7

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SUPPLEMENTAL BRIEF OF RESPONDENT

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DATED October 8, 2020, Port Orchard, WA   
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether, in sentencing an offender for sex offenses committed by use of the internet, the imposition of a community custody condition ordering “Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters.” unconstitutionally restricts internet use?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Christopher R. Johnson was charged by information filed in Kitsap County Superior Court with attempted second degree rape of a child, attempted commercial sexual abuse of a minor, and communication with a minor for immoral purposes (felony). CP 1-4.

After trial, Johnson was convicted of all three counts. 7RP 852-53; CP 66. On the attempted child rape count, Johnson received a minimum term of 120 months and a maximum term of life. CP 96. Concurrent sentences were imposed on the sexual exploitation and communication counts. CP 95.

Sentencing included the imposition of the condition at issue--“Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters.” CP 99. The condition is there listed as being crime related. The trial court engaged a discussion of the condition

of sentence at issue. The trial court was concerned about a complete internet prohibition. RP, 5/18/18, 51 (“I don't want to exclude Mr. Johnson entirely from accessing the web.”). The trial court was unsure of the “filtering” of Johnson’s internet activity. RP, 5/18/18, 51-52. The state suggested the “approved filters” language and the trial court adopted the suggestion without further discussion or input, or objection, from the defense. Id.

**B. FACTS<sup>1</sup>**

The Missing and Exploited Children Task Force (MECTF) conducts proactive “sting” operations aimed at detecting crimes against children. 6RP 606-07. The Task Force posted an ad on Craigslist. 6RP 608 (ad admitted as exhibit 13 at 6RP 551). The ad was posted in the “casual encounters” area of Craigslist. 6RP 610. The ad was targeted to the Kitsap/West Puget area. 6RP 615.

The ad was titled “Crazy and Young, Looking to Explore.” 6RP 552. The body of the ad said “Bored and home alone. Been watching videos all day. Really looking to meet a clean DDF guy that can teach me what it’s like to be an adult. HMU if interested, winking smiley face. I’m lots of fun.” 6RP 552. DDF stands for “drug and disease free.” 6RP 552. HMU means “hit me up.” Id.

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<sup>1</sup> Quoted from the state’s brief in the Court of Appeals.

Police received a response. 6RP 553. Police engaged in e-mail exchanges with the responder for around three hours. Id. The responder was Johnson. 6RP 554. Soon into the conversation, Johnson's response included asking the age of the policewoman and where the tryst would occur. 6RP 556. The police responded "I'm 13 and on my own. Crashing on a friend's couch but her mom is gone for a few days, so you can come here. We in Bremerton." 6 RP 556-57. Twelve minutes later, Johnson acknowledges the stated age by saying "Who will be at the house. I'm trying to be cautious as you are underage. Would you like to meet somewhere public first?"

They discuss meeting at a nearby minimart and, responding to the police question as to what he will teach her, Johnson sent that he will "teach you how to suck my cock, how to cum, how to ride my cock, how to take my cock deep." 6RP 558. The putative 13-year-old mentioned money. 6RP 558. Johnson said he can give a little, expressed nervousness, but also expressed that he wanted to proceed. 6RP 559.

Soon, Johnson communicated that he just got to Bremerton and wanted to know about meeting. 6RP 559. The police officer responded that she needed a shower first. 6RP 560. Johnson responded in the affirmative and asked how long they would have together. 6RP 560. The police asked Johnson if later would be better, adding that the friend's

mother would be out all night. 6RP 561. Johnson replied that now was fine and asked what minimart he would meet her at. 6RP 561. She said “There’s a 7-eleven on Wheaton. How long will it take you to get there?” 6RP 561. He said “about 15 minutes.” 6RP 561.

The girl asked Johnson how she would know him. 6RP 562. Johnson responded that he is “Scott” and is driving a black Suburban. 6RP 562. Johnson arrived at the appointed 7-eleven and the two communicated as to whether he was in the right place. 6RP 565. Then, she said her house was close and provided Johnson with the address. 6RP 567. The two switched from e-mail to text messaging and he said he was on his way and asked her if she would meet him outside. 6RP 571. She said she would meet him outside. 6RP 573. But before that happened Johnson was in custody. 6RP 574.

Police had followed Johnson from the 7-eleven. 5RP 476-77. Police pulled Johnson’s car over while he was driving toward the provided address. 5RP 487.

Johnson said that he began the day of his arrest by going to work. 6RP 663. He accessed Craigslist on his smartphone. 6RP 664. He looked in the women for men section, saw two ads, and replied to the ad in question in this case. 6RP 665. Johnson claimed that he did not carefully read the ad and just responded because it was the one of the two ads he

had seen that did not appear to be “spam.” 6RP 667.

Johnson responded because he was interested in casual sex. 6RP 668. By the time he got an email reply to his response, the ad was gone from craigslist. 6RP 669. He claimed that when he asked about age and location of the person on the other end of the conversation, he had no idea of the age or gender of the person he was communicating with. 6RP 670-71. Johnson believed that the picture he had received was “modified” and did not believe it to be real. 6RP 671-72.

When the person on the other end said that she was 13 years old, Johnson claimed that he believed the situation was an “age-play fetish.” 6RP 672. Johnson testified that his email telling the police that he needs to be “cautious as you are underage” was aimed at the fact that the police had mentioned another person that he was trying to find out about. 6RP 673. He wanted to meet in public so he could see with whom he was communicating. 6RP 674.

Johnson claimed that he never thought that the person at the other end was a child wanting to learn sex. 6RP 675. He claimed that the sex acts he described were are part of the role-play fetish that he thought he was engaged in. 6RP 676. Johnson claimed that curiosity was behind his drive to the 7-eleven. 6RP 679-80.

## II. ARGUMENT

### A. THE STATE'S STRONG AND ABIDING INTEREST IN THE SUPERVISION OF INTERNET ACCESS AND USE BY A PERSON WHO HAS ENGAGED IN CRIMINAL SEXUAL BEHAVIOR ON THE INTERNET ALLOWS THE IMPOSITION OF REASONABLE, NARROWLY TAILORED CONDITIONS OF SENTENCE THAT RESTRICT THAT PERSON'S FIRST AMENDMENT RIGHTS.

Johnson claims that the condition of sentence restricting his internet use is unconstitutionally vague in that it both fails to define prohibited conduct with sufficient specificity for Johnson to know what conduct is prohibited and that the vagueness of the provision allows for arbitrary enforcement by his CCO. In neither his briefing in the Court of Appeals nor his petition for review in this Court does Johnson argue that the condition is not “crime-related” under RCW 9.94A.703(3)(f). This Court has ordered review of the constitutionality of the condition.

As the Court of Appeals properly noted, since the trial court had statutory authority following from the crime-relatedness of the condition in issue, the imposition of the present condition is reviewed for abuse of discretion; and, that discretion is abused by the imposition of an unconstitutional condition. *Slip. op.* at 10, *citing State v. Hai Minh Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018).

A community custody condition is unconstitutionally vague if either ““(1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *Slip. op.* at 13, quoting *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Moreover, conditions that interfere with fundamental rights must be “reasonably necessary to accomplish the essential needs of the State and public order.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (condition prohibiting contact with nonvictim spouse where children were victims). At bottom, “There must be no reasonable alternative way to achieve the State's interest.” *Warren*, 165 Wn.2d at 34-35.

Similarly, impact on First Amendment rights requires that a law be narrowly tailored to serve significant governmental interests. *Packingham v. North Carolina*, \_\_ U.S. \_\_, 137 S.Ct. 1730, 1736, 198 L.Ed.2d 273 (2017).

***1. The Court of Appeals in this case approached the question of supervision of a person who uses the internet to commit crimes against children in a straight-forward, practical manner, correctly finding that a person of ordinary intelligence will understand what conduct is prohibited by the condition of community custody that it imposed.***

In *State v. Forler*, 9 Wn. App.2d 1020, \_\_P.3d \_\_, (2019) (UNPUBLISHED) Division I considered a condition that provided “No

internet use unless authorized by treatment provider and Community Custody Officer.” 9 Wn. App.2d at 13. The Court struck the condition because of a lack of ascertainable standards of enforcement and overbreadth in its impact on protected speech. *Forler*, 9 Wn. App.2d at 13.

On the overbreadth prong, the *Forler* Court, treating the condition as “blanket restriction” on internet use, found that the condition was “manifestly unreasonable” because not narrowly tailored to address Forler’s criminal use of the internet. 9 Wn. App. at 13. The Court remarked on the ubiquity of the medium and proceeded with a list of uses of the internet. *Id.* The *Forler* Court concluded that because a person can do these many things on the internet, things that in Forler’s case were unrelated to his offenses, the prohibition was overbroad. *Id.*

The *Forler* Court analysis is driven by the its understanding of the usefulness of the medium. This is understandable in light of the United States Supreme Court’s decision in *Packingham*, *supra*. There, the Supreme Court was clear that all the useful applications of the internet make cyberspace a protected area of free expression. *Packingham*, 137 S.Ct. at 1735-36. But, unlike Division I of the Court of Appeals, the United States Supreme Court took time to recognize the nefarious side of the invention; its ripeness for exploitation by the “criminal mind.” 137

S.Ct. at 1736.

The present case does not include a blanket restriction on internet use. *See slip.op.* at 12. Johnson may use it but with restrictions. Thus, observations about the nature of the internet are too general a consideration. Internet usefulness says nothing about Christopher Johnson's ability to understand how he is to use the internet—with CCO approval and through approved filters. The *Packingham* Court did not decide an issue about acceptable conditions of a sex offender's sentence. In dictum, the Supreme Court intimated that a state could regulate internet behavior with narrow, specific laws that constitute "the State's first resort to ward off the serious harm that sexual crimes inflict." *Packingham*, 137 S.Ct. at 1737.

The *Packingham* Court observes the distinction between overbreadth analysis of a general criminal statute that criminalizes free speech and the case of internet restriction placed on an internet offender. In the latter case, reasonable, narrowly tailored restrictions of otherwise protected speech are allowed. The criminal statutes--communication with a minor in particular--under which Johnson was convicted are examples of reasonable and narrowly tailored laws that impact free association and speech.

Here, in terms of restrictions on particular offenders, the

requirement of “approved filters” segment of the condition is a first amendment restriction that is reasonably and narrowly tailored to address the offending behavior of Cristopher Johnson and as such criminalizes nothing. The target is to restrain Johnson’s devices. Filters are necessary and appropriate on his phone, his tablet, his laptop, his desktop, and his smart television. For example, a person with a suspended driver’s license may still travel. When this Court considered a right to travel challenge to Washington’s habitual traffic offender license revocation statute, it said

There is no constitutional right to a particular mode of travel. The right to travel is not being denied. The defendants are being prohibited from using a particular mode of travel in a particular way, due to their repeated offenses, in order to protect the public at large which we find to be reasonable under the circumstances.

*State v. Sheffel*, 82 Wn.2d 872, 880-01, 514 P.2d 1052 (1973).

An habitual traffic offender is not prohibited from owning a car; she simply cannot drive it. Unlike the habitual traffic offender, Johnson may, under the present order, use any of his devices. He can phone or text loved ones, physicians, grocers, or pharmacists without supervision. Insofar as electronic mail does not rely on the internet, he may also communicate in that manner. He can listen to music or play video games that have already been downloaded (with the permission of his CCO). At bottom, this condition does little or nothing to Johnson’s ability to engage in day-to-day electronic communication.

In the present case, Division II took an approach more in keeping

with the rule that

When reviewing the challenged language to determine if it is sufficiently definite to provide fair warning, the court must read the language in context and give it a “sensible, meaningful, and practical interpretation.”

*Forler*, 9 Wn. App. at 12, citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990). The “sensible, meaningful, and practical” interpretation of the condition is simply that Johnson must seek permission before accessing the internet. *Slip.op.* at 13. This is all that Johnson must understand. Johnson can predict with nearly complete certainty what is required of him. See *State v. Hai Minh Hguyen*, 191 Wn.2d 671, 679, 425 P.3d 847 (2018) (“A community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.”).

***2. The condition is not amendable to arbitrary enforcement because the CCO need only approve or deny Johnson’s internet use and the specific reasons for a denial must be delegated to the Department of Corrections.***

Johnson can understand the simple directive of seeking permission before accessing the internet. He further complains that the provision provides his CCO with the room for arbitrary enforcement. Enforcement of this provision is simply a matter of imposing sanctions if Johnson does access the internet without permission. Thus either the CCO has proof

that he engaged in unauthorized access or the CCO does not that proof.

The Court of Appeals recognized this direct and non-arbitrary aspect of enforcement; “the CCO merely approves or rejects Johnson’s use of the internet before he accesses it.” *Slip.op.* at 14. Again, the Court of Appeals placed a “sensible, meaningful, and practical” interpretation on the condition. But Johnson’s claim looks beyond this practical interpretation and complains about the circumstances in which he complies with the permission aspect of the condition and the answer is “no.” From the “no” answer, Johnson circles back to the possibility that the “no” answer may too broadly affect his protected speech.

Again here, as above, the first premise, gleaned from *Packingham*, is that Johnson may be subject to some reasonable and narrowly tailored restrictions of his first amendment rights. This Court recently resolved continuing litigation over conditions of community custody prohibiting sex offenders from being in places where children congregate. *State v. Wallmuller*, 194 Wn.2d 234, 449 P.3d 619 (2019). *Wallmuller* was ordered “not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls.” *Wallmuller*, 194 Wn.2d at 237. This Court reviewed conflicting Washington Court of Appeals cases and collected a number of federal cases dealing with demonstrative lists of prohibited places. This Court held that

There are doubtless a number of ways that the challenged community condition in paragraph 17 of Wallmuller's sentence could be drafted, but reading this condition in a commonsense way and in the context of the other conditions, an ordinary person can understand the scope of the prohibited conduct.

*Wallmuller*, 194 Wn.2d at 245; *see also Hai Minh Nguyen*, 191 Wn.2d at 679 (“the disputed terms are considered in the context in which they are used.”). Further, without analysis the *Wallmuller* Court concluded that the clarity of the condition foreclosed arbitrary enforcement. *Id.*

This Court and the Court of Appeals thus share an analytical framework. Reasonable, narrowly tailored restrictions on offender behavior are not to be read in a hyper-technical manner; they are to be given a practical and commonsense construction. And this Court adds the rule that the construction should be acute to the other conditions involved.

In this case, Johnson's right to travel was restricted, being required to notify his CCO of any changes in address. CP 99; CP 107. He must seek Department of Corrections approval for education and employment. *Id.* He is required to provide his CCO with copies of his cellular phone records. *Id.* He is restricted from association with “any persons under the age of 18.” *Id.* He has further geographical and associational restrictions in that he may not loiter “where minors congregate.”<sup>2</sup> *Id.* Johnson must submit to a polygraph at the request of the CCO or treatment provider. *Id.*

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<sup>2</sup> Here, the nonexclusive list includes internet cafes. CP 99.

Johnson objected to none of these conditions in the trial court.

Johnson may not have a sexual relationship without his CCO's authorization. CP 107; *see State v. Autry*, 136 Wn. App. 460, 150 P.3d 580 (2006) (upholding such authorization on child molestation conviction). The condition at issue in this case is in fact a single piece of a comprehensive set of conditions of community custody that have severe impact on Johnson's associational rights. The CCO's discretion as to internet use is less intrusion than the discretion the CCO has to say "no" to sexual relationships. Placed in the context of the other conditions, the internet restriction at issue here is easily understood and easily applied. Not to mention that the context includes the unassailable relatedness to Johnson's crimes.

It remains that Johnson may believe that a particular "no" answer may too broadly impact his first amendment rights. Here, however, is the reason that the trial court must delegate that decision process, quasi-judicial as it may be. *See Autry, infra*. As before, the state asserts that some restriction are allowed; restrictions are allowed in light of the state's overwhelming interest in protecting children from a person with proven predatory tendencies.

In *Autry*, the condition requiring authorization for sexual partners was attacked on the grounds of crime relatedness and vagueness. The

arbitrary enforcement part of vagueness was argued in terms of improper delegation of the trial court's authority. *Autry*, 136 Wn. App. at 468-69.

The Court applied the rule that

While it is the function of the judiciary to determine guilt and impose sentences, the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body.

136 Wn. App. at 468-69 (internal quotation and page break omitted). And

the Court held that

Here, the court properly delegated therapeutic decisions, including the appropriateness of Mr. Autrey and Mr. Abbott's sexual partners, to the therapists (and CCO in Mr. Autrey's case). It is well settled that some delegation of the court's power is permitted, and if the condition of approval before sexual contact is permitted for treatment purposes, assigning the responsibility of such approval to Mr. Autrey and Mr. Abbott's therapist (and Mr. Autrey's CCO) would not constitute an excessive delegation.

136 Wn. App. at 469.<sup>3</sup> And, finally, the Court observed that "If, after their release, the supervision as applied appears intrusive as appellants fear, they may seek a sentencing condition review." *Id.*

The *Autry* Court's conclusion can be heard in this Court's decision of *State v. Hai Minh Nguyen*. Appellant Norris complained that a prohibition on her going to "sex-related businesses" was not crime related.

This Court agreed to a degree

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<sup>3</sup> Johnson was also ordered to "Complete a psychosexual evaluation and follow through with all treatment recommendations by CCO and/or treatment provider. . ." CP 99.

Norris asserts that “[t]here is no evidence that sex-related businesses, including businesses ‘where the primary source of business is related to sexually explicit material’ played any role in the crimes in this case.” Am. Suppl. Br. of Pet’r (Norris) at 15. Indeed, nothing in the record suggests that Norris met her victim in a “sex-related business” or that her presence in such a business played a role in her crimes.

However, like Nguyen’s condition discussed above, this condition has more to do with Norris’ inability to control her urges and impulsivities than it does with the specific facts of her crimes. Norris’ case is like *Kinzle*, in that it was clear that the prohibition was imposed to prohibit conduct that might cause the convict to reoffend. Here, it is unlikely that Norris will meet a minor, and potential victim, in a “sex-related business.” But, it is reasonable to conclude that Norris will struggle to rehabilitate from her sexual deviance so long as she frequents “sex-related businesses.” Norris’ crimes have as much to do with her inability to control her sexual urges as they do with her access to minors.

191 Wn.2d at 687.

These cases inform the present case. The twin policies in favor of rehabilitation and against recidivism justify certain restrictions on sex offenders. Enforcement of these sensitive conditions in these sensitive cases must fall to the professional persons charged with the task. People like therapists and community corrections officers must monitor the offenders and consider various aspects of the individual’s presentation and progress “on the ground” and over time. Indeed, the Department of Corrections is statutorily commanded to do just that: “The department shall assess the offender’s risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety.” RCW 9.94A.704(2)(a).

A trial court simply cannot fill in the blanks or provide some definitive list in this context. Even if it were possible to list and prohibit a precise list of prurient internet sites today, that list will be different tomorrow.

Finally, as the *Autry* noted, upon release from custody, Johnson is not bereft of remedy. If he feels that his CCO's "no" answer is arbitrary or if he thinks it is simply petty, he may seek relief in court.

Christopher Johnson need only understand that he must ask permission. The CCO need only give an affirmative or negative answer to the question. If the "no" answer aggrieves Johnson, he may seek redress in court. No vagueness attends the condition on a commonsense, practical reading grounded in all the circumstances of the case. And Johnson's due process right to challenge a disagreement with the CCO is intact.

### III. CONCLUSION

For the foregoing reasons, the Court of Appeals decision of this issue should be affirmed.

DATED October 8, 2020.

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