64648-6

64648-6

NO. 64648-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL KELLY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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A. ARGUMENT

THE ISSUES ARE NOT MOOT.

In his opening brief, Mr. Kelly argued that the probation condition prohibiting him from wearing a "badge or security paraphernalia or uniform" was unreasonable and unconstitutionally vague as applied to him. He also argued that the State failed to prove he violated the condition, because he was wearing a plain olive-green button-down shirt and a plain black jacket. Although the jacket originally bore security patches, it was undisputed that Mr. Kelly had removed those patches.

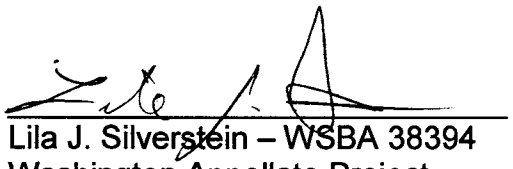
In response, the State argues the issues are moot because Mr. Kelly already served his 208-day sentence waiting for this appeal to perfect. However, the issues are not moot because the same condition was imposed upon Mr. Kelly in another case for which he is still under supervision, Snohomish County No. 08-1-02166-6. Exhibit 1 at 6. Thus, this Court can provide effective relief by agreeing with Mr. Kelly's arguments that the condition is unreasonable and/or vague, and by clarifying that the type of clothing he was wearing is not "security paraphernalia".

B. CONCLUSION

For the reasons above, as demonstrated by Exhibit 1, this Court should reach the issues raised in Mr. Kelly's opening brief.

DATED this 1st day of September, 2010.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

EXHIBIT 1

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

CONDITIONS, REQUIREMENTS, AND INSTRUCTIONS

OFFENDER	DOC #	FOS#	COUNTY/CAUSE #
KELLY, Michael John	310153		Snohomish County 08-1-02166-6(AB)

State:
Interstate Compact Supervision Type: ☐ Parole ☐ Probation ☐ Special:

I understand that under the provisions of RCW 9.94A or 9.95 or 9.95.270 or 10.77, I am subject to all conditions and requirements the Court/ Indeterminate Sentence Review Board/Department of Corrections (DOC) has imposed and that the terms of supervision can be revoked, modified, or changed at any time during the course of supervision. Furthermore, I understand that I am under the supervision of the Department of Corrections and that I must comply with the instructions of the Department herein. Should I violate any of these conditions, requirements or instructions, I understand that I may be brought before the Court/Indeterminate Sentence Review Board/Department of Corrections Hearing Officer for a hearing and/or imposition of additional sanctions.

STANDARD CONDITIONS:

- Secure written permission from the community corrections officer before leaving the state of Washington.
- Remain within a geographic area as directed by the Department of Corrections as follows: _____
- Obtain written permission from the community corrections officer before traveling outside the county in which you reside, unless you have been advised in writing by your community corrections officer that it is not necessary to do so.
- Notify the community corrections officer before changing residence or employment.
- If sex offender who committed your crime(s) on or after 6/6/96, with a minor child victim, avoid contact with victim or minor children of similar age UNLESS authorized by the community corrections officer.
- Abide by written or verbal instructions issued by the community corrections officer.
- CCI and OAA Only: Abide by any DOC imposed conditions:
  1. OAA Only: **Obey all municipal, county, state, tribal, and federal laws.**

Offenders from out of state (FOS), who are being supervised by WA DOC, and who have been designated as being "victim sensitive" by the sending state, must secure written permission from their community corrections officer prior to changing address, returning to the sending state, or obtaining a travel permit. CCO's **will notify Washington State Interstate Compact** of the change or request.

COURT-ORDERED CONDITIONS/REQUIREMENTS:

Snohomish County 08-1-02166-6(AB)
Per J & S dated July 17th, 2009, p is ordered to forfeit any firearm he/she owns or possesses.

FINANCIAL OBLIGATIONS: (NOT APPLICABLE TO FOS CASES)

- The Court has ordered me to pay legal financial obligations, including accrued interest. I am required to make payments under the following cause numbers and in the amounts listed:

Snohomish County 08-1-02166-6(AB)

Restitution:	TBD	Court Costs:		Attorney Fees:	
Fine:		Victim's Compensation:	$500.00	Other:	
Drug Fund:		Lab Fee: (DNA)	$100.00	Total:	$600.00

I agree to pay not less than 50 per month beginning 01/09 to the Snohomish County Clerk office located at 3000 Rockefeller Avenue Everett, WA 98201 until my financial obligation is paid in full.

COMMUNITY SERVICE HOURS:

☐ Complete _____ hours of community service at a rate of _____ hours per ☐ week ☐ month as directed by the Department of Corrections. Report as directed to the Department of Corrections.

REPORTING INSTRUCTIONS:

- I am required to report and be available for contact with the assigned community corrections officer as directed until instructed to no longer report, or a court order is issued closing the case.
- Failure to report and/or provide a valid address may result in the filing of escape charges if on community custody status. _____
  Sign with initials

Report to: CCO Iris Peterson

Address: 1550 4th Ave. South, Seattle, WA 98134

Telephone: 206 516 7610

Reporting Instructions: In person on the day(s) listed below, or as otherwise directed by my CCO.

☒ 1st ☒ 2nd ☒ MONDAY ☒ TUESDAY
☒ 3rd ☒ 4TH ☐ WEDNESDAY ☐ THURSDAY ☐ FRIDAY
☒ Other: daily, if homeless unless otherwise directed by CCO

COST OF SUPERVISION:

- Unless waived by the Court or DOC, I will be assessed a supervision fee of $20 to $40 monthly while on active supervision. The amount charged will vary depending on my supervision status and classification level. I will be sent a billing statement detailing my costs of supervision and the amount I am required to pay. **Beginning _____, I will mail my supervision fee payments only in the form of a cashier's check or money order, made payable to: The Department of Corrections, PO Box 9700, Olympia WA 98507-9700. I will put my name and DOC number on every cashier's check or money order.**

NOTICES:

- Firearms: I have been advised and understand if I have been convicted of a crime in category checked below, I am prohibited by law from owning, possessing, receiving, shipping, or transporting a firearm, ammunition, or explosives. I understand the prohibition extends to every sort of gun, rifle, or explosive device or similar device including the frame or receiver of firearms. I understand that this may also be a violation of my supervision per RCW 9.94A.120(16).
  - Any Felony Offense
  - Misdemeanant Offense (RCW 9.41.040, 10.99.020):

    Includes the following misdemeanor offenses, when committed by one family or household member against another, committed on or after July 1, 1993:

    Stalking* (RCW 9A.46.110)
    Assault 4 (RCW 9A.36.041)
    Reckless Endangerment 2 (RCW 9A.36.050)
    Coercion (RCW 9A.36.070)
    Violation of a Protective Order - No Contact (RCW 10.99.040)*, (RCW 26.50.060, 070, 130)

    *Can also be a felony offense.

    I further understand that I should seek legal advice if I wish to possess a firearm after I am discharged from supervision.

- Debt: I have been advised and understand that failure to make payments toward my legal financial obligations as scheduled can result in an increase in my monthly payment rate and/or referral of my case to the county clerk's office for collection. Should I fall behind in my monthly payment in an amount equal or greater than the amount payable for one month, the Department of Corrections may issue a Notice of Payroll Deduction. Without further notice, my employment earnings are subject to a Notice of Payroll Deduction and my earnings or property, or both, are subject to an Order to Withhold and Deliver. Any net proceeds obtained through either a Notice of Payroll

Deduction or an Order to Withhold and Deliver will be applied to my court-ordered financial obligations. (Not Applicable to FOS Cases)

- Grievance Procedure: The DOC grievance procedures have been explained to me and I understand them.

☒ Registration: I have been advised and understand the registration requirements for offenders. I have signed the Registration Notification Requirements Form (DOC 20-312). M. J. K Sign with Initials

- Arrest, Search, and Seizure: I am aware that I am subject to search and seizure of my person, residence, automobile, or other personal property if there is reasonable cause on the part of the Department of Corrections to believe that I have violated the conditions/requirements or instructions above.

- Computerized Billing System: I am aware I will receive a monthly bill from the Department of Corrections for each cause number on which I owe legal financial obligations. I understand I am to mail the stub along with my payment to the appropriate county clerk. (Not Applicable to FOS Cases)

Tolling: I have been advised that those periods that I am unavailable for supervision (i.e., in jail, on abscond status) will not count towards my supervision period. (FOS Cases subject to Home State rules regarding tolling.)

- Imposed Conditions: I am aware that I must submit a written request to my CCO within 24 hours of being served with a DOC Imposed Condition if I wish to appeal the condition.

- Threats to Staff: I am aware that if I threaten my Community Corrections Officer or other Department of Corrections staff or contractors, I may be arrested and charged under RCW 9.46.195 Obstruction of Public Servant, and that this may also be a violation of my supervision.

- Custodial Sexual Misconduct: I am aware that sexual conduct between a DOC offender and DOC employee is a violation of Washington State Law under RCW 9A.44.160. Any allegation of custodial sexual misconduct will be investigated and may result in the prosecution of the employee. I understand that under the law, there is no consensual sex between an employee of a correctional agency and a person under correctional supervision. I understand the reporting process for custodial sexual misconduct. *If you have any questions, you may contact your regional field administrator _____ Phone number_____ or by calling 1-800-586-9431.*

I have read or have had read, to me the foregoing conditions and sentence requirements which are applicable in my case. Each of these conditions/requirements have been explained to me and I hereby agree to comply with them.

- I have received a copy of the Judgment and Sentence on this cause. M. J. K Sign with Initials

OFFENDER SIGNATURE	DATE
X Michael J. Kelley	8/12/09
CURRENT ADDRESS	
[illegible]	8.12.09
CCO SIGNATURE	DATE
[illegible]	08.12.09
LOCATION	TELEPHONE
1550 4th Ave. South, Seattle, WA 98134	206 516 7610

Distribution:

	ORIGINAL - Offender File,	COPY - Offender
CCI/CCP ONLY:	ORIGINAL - Central File,	COPY - Field File, Offender
FOS ONLY:	ORIGINAL – Offender File,	COPY(2) – FOS Compact Administrator

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information
and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, RCW 42.17, and RCW 40.14

STATE OF WASHINGTON
DEPARTMENT OF
CORRECTIONS

CHEMICAL DEPENDENCY—
CONSENT FOR DRUG/ALCOHOL TESTING (FIELD)

OFFENDER NAME	DOC NUMBER	COUNTY/CAUSE #
KELLY, Michael John	310153	Snohomish County 08-1-02166-6(AB)

As a condition of your supervision, you are required to submit to drug/alcohol testing, as directed by the Community Corrections Officer. In addition to the standard conditions of supervision, the Department of Corrections' testing program requires the following:

1. The Community Corrections Officer must be able to contact you to report for testing, either directly or through a reliable person, or as otherwise arranged and agreed upon.
2. When notified to report for testing, you must report on the day indicated. Testing may be required on any day of the week.
3. Your failure to report for testing, following notification, may constitute a violation of your community custody.
4. Changes in your address, employment, or telephone numbers must be reported to the Community Corrections Officer immediately.
5. Prior to testing, you must advise the Community Corrections Officer of any drugs, alcohol, narcotics, or medication that you are taking, whether prescribed or not. Any prescribed medicines will require written verification from your doctor.
6. You are not to take any medicines or drugs prescribed for persons other than yourself.
7. You are not to ingest any items containing poppy seeds.
8. Refusal/failure to provide a sample within one hour may result in an infraction/violation, which may result in corresponding sanctions.

Nothing in the above instructions is meant to interfere with legitimate medical treatment. If, as a result of your drug usage, withdrawal is necessary, you are urged to seek detoxification under medical supervision.

FAILURE TO COMPLY WITH ANY OF THE ABOVE INSTRUCTIONS, REFUSAL TO SUBMIT TO TESTING, DELIBERATE EVASION, OR USE OF DEVICES OR ADDITIVES TO AVOID OR ALTER TESTING WILL RESULT IN VIOLATION PROCEEDINGS.

I understand that it may be necessary for the Community Corrections Officer to inform my doctor of my parole/community custody and of this condition of drug/alcohol testing. If this action occurs, a "Release of Information" will be secured prior to contact.

I authorize Comprehensive Toxicology Services (CTS) to release the results of all tests submitted by me to the Department of Corrections.

I understand and agree to abide by these additional instructions as part of my supervision, and acknowledge receipt of a copy of these instructions.

SIGNATURE	DATE
Michael J. Kelly	8/12/09
WITNESS	DATE
[illegible]	8-12-09

The contents of this document may be eligible for public disclosure.

Social Security Numbers are considered confidential information and will be redacted in the event of such a request.
This form is governed by Executive Order 00-03, RCW 42.17, and RCW 40.14.

Distribution: WHITE – File CANARY - Offender

Washington State
DEPARTMENT OF CORRECTIONS

OFFENDER CONDITION STATEMENT

Offender Name: Kelly, Michael DOC No.: 310153 Date: 3/3/2010

Assigned CCO: Peterson, Iris Assigned Facility: Special Assault Unit

As authorized by RCW 9.94A.120 (14) (B), and DOC Policy 200.260, the following conditions have been imposed:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636846, Shall reside at a location and under living arrangement as approved by CCO Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636845, Register with sheriffs office in the county of residence as required Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636844, Upon release report to your CCO and thereafter make a correct report as directed Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636843, Pay cost of supervision fees to Department of Corrections as directed by CCO Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100907913, Electronic Monitoring Ordered Effective Date: 3/3/2010

Narrative: Mr. Kelly is to participate in the electronic (GPS) monitoring program and comply with all GPS rules.

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100882759, OTHER (see narrative) Effective Date: 2/11/2010

Narrative: Mr. Kelly is prohibited from possessing, wearing or displaying any military or security personnel style clothing or paraphernalia, including shirts, jackets, hats, badges or patches. He is also to not possess or display any style weapon, including but not limited to knifes, swords, guns, air pellet guns.

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636842, Pay all court ordered legal financial obligations and/or restitution as directed by CCO Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636841, Obey all municipal County State Tribal and Federal laws Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636840, Maintain lawful employment & provide proof of employment to DOC staff as directed Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636839, Maintain Educational Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636838, Submit to DNA blood draw and testing as directed Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636837, Do not use/possess/consume any controlled substances without a lawfully issued prescription

Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636836, Do not consume controlled substance except pursuant to lawfully issued prescriptions

Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636835, Report to and be available for contact with assigned community corrections officer as directed

Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636834, Notify CCO upon receipt of a prescription for controlled substances

Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636833, Abide by any DOC Conditions Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636832, Do not purchase own have in your possession or under your control any firearm or deadly weapon Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636831, Perform affirmative acts as ordered by court and/or Department of Corrections Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: Court Ordered

Condition Name:

100636830, Obey and comply with instruction Effective Date: 7/17/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635023, Enter into and successfully complete a sex offender treatment program Effective Date: 8/12/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635022, Enter into and participate in mental health treatment as directed Effective Date: 8/12/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635020, Do not possess or peruse pornographic materials unless authorized Effective Date: 8/12/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635019, Submit to polygraph examination as directed Effective Date: 8/12/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635017, Obtain permission from CCO before changing residence Effective Date: 8/12/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635016, Have no contact with minors Effective Date: 8/12/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635015, Do not work at or be in places frequented by minors Effective Date: 8/12/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635014, Do not enter parks playgrounds or schools Effective Date: 8/12/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635013, Do not enter sex related business to include x-rated movies Effective Date: 8/12/2009

Narrative:

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635012, Remain within or outside of geographical boundaries as specified Effective Date: 8/12/2009

Narrative: Remain in King County

Cause Prefix: AB Cause No: 081021666 County: Snohomish Imposing Authority: DOC Imposed

Condition Name:

100635009, Do not use alcohol Effective Date: 8/12/2009

Narrative:

Lifetime Conditions:

I have read or have had read to me the foregoing conditions and sentence requirements which are applicable in my case. Each of these conditions/requirements has been explained to me and I hereby agree to comply with them.

X Michael J. Kelly 310153 — 03/04/10

Kelly, Michael DOC No. 310153 Date

CCO/CC — 03/04/10

Date

CPM/Supervisor/Designee Date