Supreme Court No. ____
(COA No. 86887-0-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHNATHAN DAVID ALEX,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Court of Appeals Cases

United States Supreme Court Cases

Constitutional Provisions

Statutes

Rules

IDENTITY OF PETITIONER AND DECISION BELOW

Johnathan Alex, the petitioner here and appellant below, asks this Court to review the Court of Appeals' July 21, 2025 opinion in *State v. Alex* pursuant to RAP 13.4.[1]

ISSUES PRESENTED FOR REVIEW

1. Conditions of community custody that require a probationer to consent to any search, at any time, for any reason facially violate the right to privacy protected by article I, section 7. Despite the facial unconstitutionality of such conditions, this Court held in *State v. Cates* that such conditions are not ripe for review. That holding conflicts with this Court's well-established principles on ripeness, which do not require a person in Mr. Alex's shoes to violate a condition by

[1] A subsequent motion for reconsideration was denied on August 18, 2025.

denying consent to search and thus risk jail to challenge the condition's facial validity. *Cates* has generated significant turmoil in lower courts, resulting in inconsistent and contradictory opinions. This Court should accept review and overturn *Cates*.

2. The First Amendment right to familial association extends beyond one's immediate family and also protects bonds with nieces, nephews, and cousins. Mr. Alex's conviction did not involve family members in any way. Nevertheless, the court restricted Mr. Alex from any contact with minor nieces, nephews, and cousins for the rest of his life—severing his access to family and violating his First Amendment rights. This Court should accept review to safeguard the constitutional right to familial association and make clear that its protections extend beyond the nuclear family.

3. The First Amendment protects Mr. Alex's right to intimate association. Although the court below recognized that right, it upheld unjustified violations of it. The court restricted Mr. Alex from entering certain dating relationships, purely because his conviction involved minors. This Court should accept review to clarify that the First Amendment demands a greater nexus than the generic category of crime to infringe these constitutional rights while on community custody.

STATEMENT OF THE CASE

The State charged Mr. Alex with rape of a child in the third degree, rape in the second degree, and child molestation in the third degree. CP 1-2. All counts related to the same named victim, A.T. The State alleged that Mr. Alex met A.T. online and dated her for approximately one month. CP 5. At the time,

A.T. was fifteen years old and Mr. Alex was twenty-four years old. CP 5.

The State and Mr. Alex reached a plea agreement to resolve this case as well as other pending felony cases. RP 41; CP 7-23. Pursuant to that agreement, Mr. Alex pleaded guilty to rape of a child in the third degree and rape in the second degree. CP 9. The State dropped count three, child molestation in the third degree, and substituted one count of witness intimidation from one of Mr. Alex's other pending cases. CP 10; RP 49. The State otherwise dismissed these other cases against Mr. Alex. RP 41.

The court ultimately sentenced Mr. Alex to an indeterminate sentence of life imprisonment with the possibility of release after 111 months, followed by lifetime community custody. CP 29-30. The court also

imposed conditions of that community custody in an Appendix H to the judgment and sentence. CP 43-46.

Mr. Alex challenged the legality of numerous conditions of community custody on appeal. The State conceded the illegality of many of those conditions, and the Court of Appeals accepted those concessions. Slip op. at 6-10, 12.

Mr. Alex challenged conditions (b)(8) and (b)(12), which exposed Mr. Alex to limitless searches of his home, the home of anyone he lived with, and electronic devices for the remainder of his natural life. Slip op. at 5. In relevant part, those conditions require that:

> 8. You must consent to DOC home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access.
>
> . . .

> 12. You may not own/use/possess an internet capable device without first meeting with your Community Corrections Officer and fully and accurately completing the "Social Media and Electronic Device Monitoring Agreement" DOC Form #11-080. . . . *Internet capable devices found in your possession are subject to search*.

CP 45 (emphasis added).

On appeal, Mr. Alex contended those conditions violate his right to privacy under article I, section 7. Slip op. at 5. The Court of Appeals declined to review Mr. Alex's claim, holding that it is not ripe for review under *State v. Cates*, 183 Wn.2d 531, 354 P.3d 832 (2015). Slip op. at 5-7.

Mr. Alex also challenged conditions (b)(2), (b)(3), and (b)(4), which collectively prohibit his contact with minors. Slip op. at 8-10. Those conditions state:

> 2. Do not have contact with minors unless you receive prior written approval from your Community Corrections Officer with a sponsor approved by the Department of Corrections. Contact includes but is not

> limited to, in person, telephonic, written, verbal, through a third party, or by any other means. Minors are defined as any individual whose numeric age is less than 18 years of age.
>
> 3. You shall not stay overnight in a residence where there are minor-aged children without the express, prior approval of your Community Corrections Officer.
>
> 4. Do not reside with minors without prior, written approval of your Community Corrections Officer.

CP 44. Mr. Alex challenged those conditions as they relate to his minor son, nephews, nieces, and other family members. Slip op. at 9-10. The State conceded, and the court held, that these conditions are unconstitutional as applied to Mr. Alex's own child. *Id.* But the court rejected Mr. Alex's argument that these conditions impermissibly infringe upon his right to association with other family members, including minor nephews, nieces, or cousins. *Id.* at 10.

Lastly, Mr. Alex challenged condition (b)(9), which states:

> 9. Do not enter any new dating or sexual relationships with individuals who have minor-aged children without approval from your Community Corrections Officer. Your offense history must be disclosed to any potential partner for approval to be received.

CP 45. Mr. Alex contended this condition impermissibly infringed on his right to intimate association. Slip op. at 10-11. The Court rejected this argument. *Id.*

ARGUMENT

I. This Court should accept review to overturn its split opinion in *Cates*, which subjects Mr. Alex to a lifetime deprivation of privacy.

Mr. Alex is subject to lifetime community custody if he is released from prison. *See* CP 30; RCW 9.94A.507(5). Although lifetime community custody will certainly limit Mr. Alex's liberty once released, it does not permit the Department of Corrections ("DOC")

to entirely deprive Mr. Alex of his right to privacy. *See State v. Olsen*, 189 Wn.2d 118, 126, 399 P.3d 1141 (2017).

For a lifetime probationer like Mr. Alex, unconstitutional conditions of community custody are particularly pernicious because they strip him of "fundamental, constitutional right[s] for the rest of his life." *In re Pers. Restraint of Winton*, 196 Wn.2d 270, 279, 474 P.3d 532 (2020) (McCloud, J., concurring).

Nonetheless, this Court held in *Cates* that the ripeness doctrine precludes courts from correcting conditions of community custody that essentially eliminate a person's right to privacy in their own home for the remainder of their life. 189 Wn.2d at 534-36. In the years since this Court decided *Cates*, appellate courts have applied that opinion haphazardly and

inconsistently. This Court should accept review to reconsider and overturn *Cates*.

A. Conditions (b)(8) and (b)(12) facially violate Mr. Alex's right to privacy by requiring him to consent to any search for any reason for the remainder of his life.

Discretionary conditions (b)(8) and (b)(12) permit limitless searches of Mr. Alex's home and internet devices. CP 45. These conditions facially violate his right to privacy. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. Community custody limits, but does not erase, an individual's expectation of privacy. *State v. Cornwell*, 190 Wn.2d 296, 303, 412 P.3d 1265 (2018). In *Cornwell*, this Court held that any search pursuant to community supervision requires both reasonable suspicion of a violation and a nexus between that violation and the locations

searched. *Id.* at 302-06; *accord.* RCW 9.94A.631(1). "[T]here is no compelling argument that the legitimate demands of the probation system require open-ended property searches." *Cornwell*, 190 Wn.2d at 305 (cleaned up).

Cornwell considered the permissible scope of a search by DOC in the context of a defendant's motion to suppress evidence. *Id.* at 300. But by announcing a constitutional rule, *Cornwell*'s protections also limit the permissible scope of a search condition imposed at sentencing. Indeed, courts must sensitively impose conditions of supervision to avoid undue restrictions on constitutional rights. *State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993).

Discretionary condition (b)(8) mandates that Mr. Alex "must consent" to DOC home visits, including "visual inspection of *all areas of the residence in which*

you live or have . . . access." CP 45 (emphasis added). Read naturally, this condition permits DOC to enter Mr. Alex's home, or any other home to which he has access, at any time, for any reason (or for no reason), for the remainder of his natural life. Similarly, discretionary condition (b)(12) requires Mr. Alex to install monitoring software on any internet capable device he owns and states that "[i]nternet capable devices found in [his] possession are subject to search." CP 45.

These conditions do more than simply authorize future searches. They require that he *consent* to any search, otherwise he violates a condition of his parole. As written, these conditions require Mr. Alex to allow DOC to engage in illegal fishing expeditions into Mr. Alex's private affairs or risk incarceration for violating his conditions of release.

Nor do these conditions require a nexus between the scope of the search and the suspected violation as mandated by *Cornwell*. *See* 190 Wn.2d at 306. The conditions would penalize Mr. Alex for declining inspection of "all areas" of his home, notwithstanding their connection (or lack thereof) to an alleged violation. The conditions would require Mr. Alex to consent, for instance, to a search of drawers, medicine cabinets, or other private areas even if those areas bore no relationship to DOC's investigation.

Cornwell's reasoning applies with equal force to the portion of condition (b)(12) giving DOC limitless authority to search Mr. Alex's internet-capable devices. This limitless search condition follows a lengthy—but tailored—set of monitoring requirements on Mr. Alex's devices.

Mr. Alex does not contest the legality of the monitoring software for the limited purposes identified by condition (b)(12). However, immediately following these restrictions, condition (b)(12) goes on to say that "[i]nternet capable devices found in [Mr. Alex's] possession are subject to search." CP 45.

"[I]t is a fundamental principle of statutory construction that courts must not construe [language] so as to nullify, void or render meaningless or superfluous any section or words" of a provision. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 656, 294 P.3d 695 (2013) (first alteration in original) (internal quotation marks omitted); *Gerard v. Smith*, 25 Wn.2d 237, 238-39, 170 P.2d 332 (1946) (applying canons of construction to interpret judgment). This final search provision would be rendered entirely superfluous if it

simply referred to the monitoring software already discussed in the first portion of condition (b)(12).

Instead, this search authorization appears to apply much more broadly. Read plainly, it would authorize not just a search of browser history but any file, document, photograph, calendar invitation, or program found on Mr. Alex's phone or computer. This unrestricted search condition is a sweeping intrusion into Mr. Alex's private affairs. *Riley v. California*, 573 U.S. 373, 394-96 (2014); *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Despite the recognized privacy concerns implicated by warrantless access to internet-capable devices, *see Riley*, 573 U.S. at 394-96, condition (b)(12)'s search provision contains none of the protections required by *Cornwell*.

Given their breathtaking scope, conditions (b)(8) and (b)(12) facially violate Mr. Alex's right to privacy.

B. Despite this Court's holding in *Cates*, conditions (b)(8) and (b)(12) subject Mr. Alex to the immediate requirement that he consent to any search.

Conditions (b)(8) and (b)(12) are facially unconstitutional. By their plain terms, they permit DOC community custody officers to search any home to which Mr. Alex has access and his electronic devices whenever they want, for whatever reason they want, until Mr. Alex dies. They do so in the face of this Court's admonition that Mr. Alex's right to privacy requires a nexus between any search and a violation of community custody. *Cornwell*, 190 Wn.2d at 306.

Notwithstanding the facial invalidity of conditions (b)(8) and (b)(12), the court of appeals held that this Court's opinion in *Cates* precluded it from reviewing those conditions on the merits. Slip op. at 5-6. In *Cates*, this Court held that conditions of community custody exposing probationers to searches

of their homes and devices are not ripe for review. *Cates*, 183 Wn.2d at 534-36. This Court should accept review to overturn *Cates*, which incorrectly held that conditions of community custody permitting limitless searches are not ripe.

Ripeness is a prudential doctrine designed to prevent courts from issuing advisory opinions on abstract or purely theoretical issues. *Id.* at 539-40 (Fairhurst, J., dissenting) (citing *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)); *State v. Valencia*, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010) (describing the doctrine as a "prudential ripeness test" governing pre-enforcement challenges to sentencing conditions).

To avoid purely speculative opinions, courts review conditions of community custody only when "the issues raised are primarily legal, do not require further

factual development, and the challenged action is final." *Valencia*, 169 Wn.2d at 786 (quoting *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008)). Courts also consider the hardship to the parties of deferring consideration. *Cates*, 183 Wn.2d at 534. However, "[c]urrent hardship is not a strict requirement for ripeness" where there is a sufficiently immediate effect of the challenged condition. *See Jafar v. Webb*, 177 Wn.2d 520, 525, 303 P.3d 1042 (2013).[2]

In *Cates*, this Court readily acknowledged that the court's imposition of a nearly identical condition was a "final action" and that the issues involved were primarily legal. *Cates*, 183 Wn.2d at 534. However,

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[2] *Bahl* and *Valencia* both suggest, in dicta, that a search condition would be unripe. *Valencia*, 169 Wn.2d at 789; *Bahl*, 164 Wn.2d at 749. This dicta was not necessary to the holding in either case, and both cases correctly held that the community custody conditions on appeal were ripe for review.

this Court reasoned that no constitutional violation occurs until the State attempts a search, which "'depends on the particular circumstances of the attempted enforcement.'" *Id.* at 535 (quoting *Valencia*, 169 Wn.2d at 789). Thus, this Court held that further factual development was needed for the issue to ripen, and "the State must attempt to enforce the condition by requesting and conducting a home visit after Cates is released from total confinement." *Id.* at 535.

This holding departed from this Court's long-standing principles governing ripeness. As the dissenting opinion in *Cates* recognized, search conditions require immediate compliance by forcing Mr. Alex to consent to any DOC inspection. *Id.* at 542 (Fairhurst, J., dissenting). Thus, "the *Bahl* reasoning applies here. . . . The community custody condition will

immediately constrain [Mr. Alex] the moment he is released." *Id.*

These conditions do not raise a fact-specific question as to whether any individual future search will violate Mr. Alex's right to privacy. Instead, the conditions as written already violate that right. And "the State need not conduct an allegedly illegal search . . . to determine whether the community custody condition itself violates" his rights. *Id.* at 541.

Unlike the Fourth Amendment, which protects Mr. Alex from unreasonable searches, article I, section 7 more generally protects his right to privacy. *Compare* U.S. Const. amend. IV, *with* Const. art. I, § 7. Mr. Alex does not challenge the legality of some hypothetical *future* search. Instead, he challenges the immediate constraint on his conduct caused by

conditions that force open his home at any time, for any reason.

Mr. Alex is, from the moment of his release, already required to consent to those searches for any reason. He is thus constrained. If Mr. Alex cannot challenge these conditions on direct appeal, his only recourse is to refuse consent to a search, thus violating the condition and ensuring a swift return to prison. Ripeness is not a trap that requires Mr. Alex to "wait until he . . . is charged with violating the conditions of community custody, and likely arrested and jailed, before being able to challenge the conditions on this basis." *Bahl*, 164 Wn.2d at 750.

The effects of conditions (b)(8) and (b)(12) are sufficiently immediate to justify pre-enforcement review even without the "[c]urrent hardship" of an unlawful search. *Jafar*, 177 Wn.2d at 525. These

conditions, which are effective immediately on Mr. Alex's release, essentially eliminate any sphere of personal privacy for the remainder of his life. Although they do not impose an *affirmative* obligation on Mr. Alex to do anything, they render anything that he owns, or does, or writes in what would otherwise be the privacy of his phone or digital devices subject to state-sanctioned scrutiny.

C. Lower courts have cast doubt on *Cates* and it has produced inconsistent opinions in the court of appeals.

Lower courts have struggled to reconcile this Court's holding in *Cates* with our State's broader ripeness jurisprudence. A number of lower courts have continued to apply *Bahl* and *Valencia* to hold similar search conditions unconstitutional. *See State v. Gililung*, 31 Wn. App. 2d 718, ¶¶ 102-06, 552 P.3d 813 (2024) (unpublished in relevant part); *State v. Franck*,

12 Wn. App. 2d 1008, 2020 WL 554555, at *9-10 (Wash. Ct. App. Feb. 4, 2020) (unpublished); *State v. Alvarez*, 11 Wn. App. 2d 1005, 2019 WL 5566355, at *11 (Wash. Ct. App. Oct. 29, 2019) (unpublished) . Those opinions recognized that such conditions do not require further factual development, raise purely legal questions, and impose immediate hardships. *Gililung*, 31 Wn. App. 2d 718, ¶¶ 102-06; *Franck*, 12 Wn. App. 2d 1008, at *9-10.

Other opinions, however, have applied *Cates* to bar pre-enforcement challenges to search conditions. *See, e.g.*, *State v. Jeffries-Porter*, No. 59267-3-II, 2025 WL 2401076, at *7 (Wash. Ct. App. Aug. 19, 2025) (unpublished).[3]

This Court's opinion in *Cates* has generated significant uncertainty and confusion among lower

[3] All unpublished cases cited pursuant to GR 14.1 for persuasive value only.

courts struggling to determine whether and how to remedy patently overbroad and unconstitutional search conditions.[4] To the extent courts in *Gililung* or *Franck* failed to adequately distinguish their reasoning from *Cates*, those opinions reveal flaws in the opinion worth reconsidering.

Mr. Alex's challenge is ripe for review, and the conditions themselves are patently overbroad. This Court should accept review to overturn *Cates*.

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[4] This Court most recently considered *Cates* in *State v. Nelson*, ___ Wn.3d ___, 565 P.3d 906 (2025). *Nelson* involved a search condition requiring random drug and alcohol testing, which this Court held is not ripe for review. *Id.* at 913-14. *Nelson* is distinguishable because the condition was facially lawful. *Id.* at 919-20. Therefore, any challenge required further factual development through a future *misapplication* of the condition. *Id.* at 914. This Court can overturn *Cates* without disturbing *Nelson*.

II. The Court should grant review to clarify that community custody may not be used to sever a person's relationship to his extended family.

Mr. Alex has a First Amendment right to "intimate association," which is perhaps more precisely defined as a right to familial association. U.S. Const. amend. I; *State v. Frederick*, 20 Wn. App. 2d 890, 909-10, 506 P.3d 690 (2022). The United States Supreme Court has recognized that the Constitution's respect for familial bonds is not limited to the nuclear family. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503-05 (1977) (plurality opinion).

The lower court, however, ignored Mr. Alex's right to maintain familial bonds with non-biological children in affirming conditions (b)(2) through (b)(4). This Court should accept review to clarify that the right to familial association extends beyond biological children.

The Court of Appeals did not discuss that right other than to dismiss it by incorrectly holding that "the same constitutional protections do not apply to Alex's relationship with other relatives." Slip op. at 10. The opinion quotes *State v. Gantt* for the proposition that "[t]he fundamental right to raise a child does not appear to extend far, if at all, beyond the immediate relationship between parent and child." Slip op. at 10 (quoting 29 Wn. App. 2d 427, 458, 540 P.3d 845 (2024)). That case affirmed similar restrictions by suggesting that "[t]he fundamental right to raise a child" was not implicated by restricting contact with other relatives. *Gantt*, 29 Wn. App. 2d at 458.

Mr. Alex, however, does not claim that an inability to contact his minor relatives implicates his right to raise a child. It instead implicates his right to familial association, as recognized by the United States

Supreme Court and protected by the First Amendment. Although that right might be stronger with respect to his child, the court erred in relying on *Gantt* to hold that Mr. Alex lacked a significant constitutional interest in further association.

Two United States Supreme Court cases are instructive. In *Moore*, a plurality of the Court struck down a Cleveland, Ohio zoning ordinance that prohibited certain extended family members from residing in the same dwelling. 431 U.S. at 495-97. The Court recognized that State intrusion into family living choices requires careful scrutiny. *Id.* at 499. And the Court acknowledged "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children." *Id.* at 504.

Roberts v. United States Jaycees, 468 U.S. 609 (1984), also supports Mr. Alex's argument. That case

recognized a constitutional right to "enter into and maintain *certain intimate human relationships*." *Roberts*, 468 U.S. at 617-18 (emphasis added). But it did not cabin that right to relationships between parents and children. Instead, it recognized that "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619-20.

Conditions (b)(2) through (b)(4) severely infringe upon Mr. Alex's right to maintain those deep attachments and commitments to minor relatives. He may not call to wish them happy birthday. He may not celebrate their accomplishments or shared holidays. He may not bring his minor child to play with their

cousins. And if his immediate family needed to take in one of Mr. Alex's minor relatives, Mr. Alex would not be able to reside in his own home or continue raising his own child.

Given Mr. Alex's strong First Amendment interests, any condition must be "imposed sensitively" and "reasonably necessary to accomplish the essential needs of the state and public order." *Riley*, 121 Wn.2d at 37-38 (cleaned up).

The court instead held that because Mr. Alex's crimes involved non-familial minors, the State may limit his contact with cherished relatives because they are not his biological children. Slip op. at 10. Its holding that the conditions "do not impermissibly burden his right to association" rests on its earlier citation to *Gantt*. Slip op. at 10. But *Gantt* is so

factually distinct that it supports Mr. Alex's contention that the conditions were not sensitively imposed.

In *Gantt*, the appellant challenged restrictions on contact with minor relatives, as did Mr. Alex. 29 Wn. App. 2d at 458-59. But in *Gantt*, the appellant had been convicted of abuse involving his biological daughter. *Id.* at 433. In that case, the condition was sensitively imposed because family members were at the core of Mr. Gantt's crime of conviction.

Unlike Mr. Gantt, Mr. Alex's crimes of conviction had nothing to do with his family members. Yet, conditions (b)(2) through (b)(4) cut Mr. Alex off from any future contact with minor relatives for the remainder of his natural life. This Court should accept review to provide guidance to lower courts that the right to familial association requires close scrutiny of

conditions that fray familial bonds, even when those bonds are with relatives other than one's own children.

III. This Court should accept review to emphasize that courts may not limit the right to intimate association merely because a conviction involves minors.

Condition (b)(9) restricts Mr. Alex's ability to enter new romantic relationships with individuals who have minor children. CP 45. Although the court below acknowledged Mr. Alex's right to intimate association, it nonetheless affirmed the condition because "the State's interest in protecting minors is furthered by limiting opportunities for Alex to come into contact with them." Slip op. at 11. This Court should accept review to clarify that the State's general interest in protecting minors is insufficient to infringe a constitutional right without a nexus to the facts of the crime.

When a condition of community custody infringes upon a constitutional right, the restriction must be *sensitively* imposed and must bear a *reasonable* relationship to the State's interest in public safety. *Riley*, 121 Wn.2d at 37-38. The court's reasoning, however, would uphold *any* condition of community custody that limits Mr. Alex's contact with minors simply because his crime involved minors. The holding thus fails to comport with the requirement that the restriction be sensitively imposed and bear a reasonable relationship to the State's interests.

The nexus required to affirm a condition is more fact-specific than whether the crime itself involved children. As *State v. Geyer* made clear, it is not enough that an "offense raises concerns about children in general." 19 Wn. App. 2d 321, 328, 496 P.3d 322 (2021). The constitutional balancing test requires the

court to "impose any restriction in a sensitive way, guided by what is 'reasonably necessary to accomplish the essential needs of the state and public order.'" *Id.* at 328 (quoting *Riley*, 121 Wn.2d at 37-38).

In *Frederick*, the court upheld a similar condition because Mr. Frederick attempted to meet a child victim through a potential adult romantic partner. 20 Wn. App. 2d at 911. There, the condition mirrored Mr. Frederick's offense conduct and, therefore, was reasonably necessary to further the State's interest in child safety. *Id.* Thus, there must be some nexus between the *method* of committing an offense and the condition itself, not a generalized concern for child safety. Here, Mr. Alex's crime of conviction had nothing to do with meeting children through adult partners.

Mr. Alex's offense conduct lacked a sufficient nexus to the court's restriction on his right to intimate association. The Court of Appeals rubber-stamped the condition because it generally restricted Mr. Alex's conduct with minors. Such a general connection falls short of the reasonable relationship required between the State's interests and any infringement on Mr. Alex's First Amendment rights. This Court should grant review to address this important constitutional issue.

CONCLUSION

For the foregoing reasons, this Court should grant review.

Counsel certifies this petition complies with RAP 18.17 and contains approximately 4,498 words.

DATED this 17th day of September, 2025.

Respectfully submitted,

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APPENDIX

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHNATHAN DAVID ALEX, Appellant.	No. 86887-0-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Johnathan Alex challenges several conditions of community custody, which a court imposed after he pled guilty to rape of a child in the third degree, rape in the second degree, and tampering with a witness. The State asks us to decline review due to invited error or waiver, but concedes multiple errors, should we reach the merits. Where ripe, we are required, or choose to exercise our discretion, to consider the merits of Alex's claims and the State's concessions. As a result, we remand the judgment and sentence for the trial court to strike or amend several of the conditions of community custody.

I. BACKGROUND

Alex pled guilty to one count each of rape of a child in the third degree, rape in the second degree, and tampering with a witness. This global plea resolved charges from four felony cases. The parties presented an agreed sentencing

recommendation of 111 months to life with lifetime community custody. The parties further agreed that the lifetime community custody conditions would be "provided in the [presentence investigation report, (PSI)]." And, Alex marked the box in the plea agreement stating, "[t]he sentence recommendation above, including [legal financial obligations, (LFOs)], is a joint agreement and is part of the plea agreement entered into herein."

The PSI—which was completed after the plea agreement was signed but before sentencing[1]—recommended that the court impose the conditions of supervision in "attached [Department of Corrections] DOC 09-131: PSI -Judgment & Sentence (Felony)- Appendix H Community Placement/Custody."

At sentencing, the trial court specifically ensured that the Judgment & Sentence (J&S) included Appendix H. The trial court stated, "I am following the agreed recommendation for the 111 months as well as the registration and the monitoring requirements. Do you have any questions about your obligations with respect to registration, um, or your obligations to D.O.C. following your release?" Defense counsel responded that there were no questions. The court also informed Alex that "Appendix H goes over all the obligations that you have with D.O.C." and asked defense counsel whether he went "over these fully with Mr. Alex?" Counsel replied, "We went over them at the time of the plea. I don't know that I have gone over that specific document there." The court explained that Appendix H "includes what the restrictions are going to be and what the requirements on D.O.C. will be,

[1] Alex pled guilty and the court accepted the plea agreement on January 2, 2024. The PSI is dated April 29, 2024. Alex was sentenced May 8, 2024.

so, um, I would encourage you to go over this with your attorney as well."

The trial court imposed the recommended sentence and the community custody conditions attached to the PSI. Alex now appeals several community custody conditions.

II. ANALYSIS

Alex challenges several conditions of community custody conditions for the first time on appeal. He contends that two conditions are unconstitutionally vague and other conditions violate his constitutional rights to privacy, familial association, and intimate association. The State argues that we should not review the claims because Alex either waived or invited any error, but concedes that, if we reach the merits of Alex's challenges, many of the conditions should be remanded to be struck or amended. After addressing the issue of invited error, we consider the reviewability and merits of each challenged community custody condition in turn.

A. Invited Error

The State argues that Alex's claims are precluded by invited error. The doctrine of invited error "is meant to prohibit a party from 'setting up an error at trial and then complaining of it on appeal.'" State v. Kelly, 4 Wn.3d 170, 194, 561 P.3d 246 (2024) (quoting In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 312, 979 P.2d 417 (1999)). Invited error "requires affirmative actions to be taken to contribute to the error." Id. at 194-95. In assessing invited error, we consider whether a party affirmatively assented, materially contributed, or benefitted from the error. Id. at 195. Mere failure to object to an error does not amount to invited error. State v. Tatum, 23 Wn. App. 2d 123, 128-29, 514 P.3d 763 (2022). The

State bears the burden of proving that error was invited. Id. at 129.

As part of his plea agreement, Alex checked the box indicating that he agreed with the recommended sentence including the community custody conditions in the PSI. However, the PSI was not completed at the time of Alex's plea. The record is unclear as to whether Alex was provided with the specific community custody conditions at the time that he pleaded guilty and could affirmatively assent to them. During the sentencing hearing, Alex represented to the court that he had reviewed the custody conditions, although not necessarily Appendix H, at the time of the plea. He failed to object to the conditions but did not affirmatively assent.

The State has not proven that Alex invited any error and, therefore, the invited error doctrine does not preclude our review of the challenged community custody conditions.

B. Community Custody Conditions

Alex did not object to the community custody conditions during his sentencing. The State claims that Alex has waived any challenge. However, "'[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). This includes community custody conditions which "may be challenged for the first time on appeal and, where the challenge involves a legal question that can be resolved on the existing record, preenforcement." State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019).

Because he challenges the conditions for the first time on appeal, Alex "is not entitled to review unless he can show that (1) his challenge 'is ripe for review on its merits' and (2) the . . . conditions are a 'manifest error affecting a constitutional right.'" State v. Nelson, 4 Wn.3d 482, 493, 565 P.3d 906 (2025) (citing State v. Cates, 183 Wn.2d 531, 534, 354 P.3d 832 (2015); RAP 2.5(a)(3)); State v. Reedy, 26 Wn. App. 2d 379, 391-92, 527 P.3d 156 (2023). Once these criteria are established, we review community custody conditions for abuse of discretion. Wallmuller, 194 Wn.2d at 238. "A trial court necessarily abuses its discretion if it imposes an unconstitutional community custody condition." Id.

1. Conditions (b)(8) and (b)(12)

Alex contends that condition (b)(8)—which states, "[y]ou must consent to DOC home visits to monitor your compliance with supervision. Home visits include access for the purpose of visual inspection of all areas of the residence. . ."—and condition (b)(12)—which states, "[i]Internet devices found in your possession are subject to search"—permit limitless searches of his home and internet devices and violate his right to privacy. This claim is not ripe for review at this time.

A preenforcement challenge to community custody conditions is ripe for review when the issues are primarily legal, do not require further factual development, and the action is final. Cates, 183 Wn.2d at 534. Additionally, we consider the hardship to the petitioner if we refuse to review the condition on direct appeal. Id.

In Cates, our Supreme Court considered a community custody condition identical to condition (b)(8) imposed on Alex and determined that the challenge

was not ripe for review. 183 Wn.2d at 533-36. The Court noted that "[t]he condition as written does not authorize any searches, and whether inspecting Cates' residence or computer, the State's authority is limited to that needed 'to monitor [Cates'] compliance with supervision." Id. at 535 (citing RCW 9.94A.631(1)). A future attempt to enforce the community custody condition might violate Cates' constitutional right to privacy, but the specific factual circumstances are necessary to assess any possible misapplication of the condition. Id. "Further factual development is therefore needed--- the State must attempt to enforce the condition by requesting and conducting a home visit" after release from confinement. Id. Moreover, the Court determined that Cates would not suffer significant risk of hardship as compliance did not require him "to do, or refrain from doing, anything upon his release until the State requests and conducts a home visit." Id. at 536. Given that Alex's condition (b)(8) is identical to the provision in Cates, a preenforcement challenge is not ripe for review.

Similarly, an attempt to enforce community custody condition (b)(12), which specifies that Alex's internet capable devices are subject to search, may result in a future violation of his right to privacy. However, as no search has occurred, any misapplication of the condition is speculative. As in Cates, the State must attempt to enforce the condition before we can assess its application. Because further factual development is necessary, the search provision of condition (b)(12) is not ripe for preenforcement review.

2. Conditions (a)(9) and (b)(5)

Alex argues that conditions (a)(9) and (b)(5) are unconstitutionally vague.

Condition (a)(9) requires that Alex "[r]emain within geographic boundary, as set forth in writing by the Community Corrections Officer." Condition (b)(5) prohibits Alex from "seek[ing] employment or volunteer positions that would place [him] in contact with or control over minors." The State concedes that both conditions are impermissibly vague.

Our Supreme Court has flatly held that "vagueness challenges to conditions of community custody may be raised for the first time on appeal." Bahl, 164 Wn.2d at 745. Here, both conditions present legal questions which do not require further factual development and are, therefore, also ripe for preenforcement review. See id. at 752 ("In many cases, vagueness questions will be amenable to resolution as questions of law."); State v. Sanchez Valencia, 169 Wn.2d 782, 788-89, 239 P.3d 1059 (2010) (no further factual development is necessary when the condition at issue places immediate restriction on conduct without any action by the State).

"A condition of community custody is unconstitutionally vague if it either fails to give fair warning of what is forbidden or fails to give ascertainable standards that will prevent arbitrary enforcement." State v. Johnson, 197 Wn.2d 740, 747, 487 P.3d 893 (2021). The State acknowledges that community condition (a)(9) is unconstitutionally vague and should be struck. We accept this concession. Our courts have determined that community custody conditions requiring further definition from CCOs are unconstitutionally vague because they do not provide

ascertainable standards for enforcement and allow for arbitrary enforcement.[2] See Bahl, 164 Wn.2d at 757-58; State v. Irwin, 191 Wn. App. 644, 654-55, 364 P.3d 830 (2015). As such, the judgment and sentence must be remanded to strike community custody condition (a)(9).

As for provision (b)(5)—which again prohibits him from "seek[ing] employment or volunteer positions that would place [him] in contact with or control over minors"—Alex argues that the condition is unclear as to "what it would mean for a job to place [him] 'in contact with minors.' "

The State concedes that (b)(5) is impermissibly vague. The concession is well taken. "Without some clarifying language or an illustrative list" the community custody condition does not provide Alex with sufficient notice of the proscribed conduct. Irwin, 191 Wn. App. at 655. The State recommends clarification by specifying that Alex may not have "unsupervised contact" with minors or including a non-exclusive, illustrative list of prohibitions. See Wallmuller, 194 Wn.2d at 245. We remand to the trial court to amend community custody condition (b)(5).

3. Conditions (b)(2), (b)(3), and (b)(4)

Alex contends that conditions (b)(2), (b)(3), and (b)(4), which generally prohibit his contact with minors, are overbroad and unconstitutionally infringe on

[2] Recent unpublished decisions have concluded that the same provision at issue is unconstitutionally vague. See In re Pers. Restraint of Alaniz, No. 39631-2-III, slip op. at 14-15 (Wash. Ct. App. Mar. 21, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/396312_unp.pdf; In re Pers. Restraint of Bratcher, No. 39758-1-III, slip op. at 5-6 (Wash. Ct. App. Apr. 2, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/397581_unp.pdf. These cases are cited for their persuasive value pursuant to GR 14.1 as they are necessary for a reasoned decision.

his right to familial associations.[3] Condition (b)(2) states, "do not have contact with minors unless you receive prior written approval from your Community Corrections Officer;" condition (b)(3) states, "you shall not stay overnight in a residence where there are minor aged children without the express, prior approval of your Community Corrections Officer;" and condition (b)(4) states, "[d]o not reside with minors without prior, written approval of your Community Corrections Officer." According to Alex, "these conditions were drafted so broadly that they cover minor relatives, including Mr. Alex's own child."

"The rights to marriage and to the care, custody, and companionship of one's children are fundamental constitutional rights, and state interference with those rights is subject to strict scrutiny." State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008). Restrictions on those rights must be sensitively imposed and reasonably necessary to accomplish the needs of the State and public order. State v. Geyer, 19 Wn. App. 2d 321, 327-28, 496 P.3d 322 (2021). "[A] condition infringing on the right to parent one's child can only be upheld if the condition is reasonably necessary to accomplish the essential needs of the State and public order." Reedy, 26 Wn. App. 2d at 394.

Here, the State concedes that these conditions should be modified to allow Alex contact with his biological child(ren). We agree and remand for the trial court

[3] Case law discussing prohibitions that implicate the constitutional rights to familial or intimate relationships, such as conditions (b)(2), (b)(3), (b)(4), and (b)(9), generally proceed directly to an analysis of the issues without addressing manifest constitutional error or waiver under RAP 2.5(a). See, e.g., State v. Warren, 165 Wn.2d 17, 31-34, 195 P.3d 940 (2008); State v. Gantt, 29 Wn. App. 2d 427, 458, 540 P.3d 845 (2024); State v. Geyer, 19 Wn. App. 2d 321, 326-28, 496 P.3d 322 (2021). We shall proceed accordingly.

to amend community custody conditions (b)(2), (b)(3), and (b)(4) such that they do not impermissibly burden Alex's right to parent his child(ren).

Alex also argues that these conditions violate his right to familial associations with minor-aged members of his family other than his own child(ren). However, "[t]he fundamental right to raise a child does not appear to extend far, if at all, beyond the immediate relationship between parent and child." State v. Gantt, 29 Wn. App. 2d 427, 458, 540 P.3d 845 (2024). Thus, the same constitutional protections do not apply to Alex's relationship with other relatives.

While Alex argues that his crimes did not involve family and, therefore, community custody conditions should not restrict his contact with members of his family, his crimes involved minors. Restrictions on association may be imposed "to the extent necessary to further the State's interest in protecting children." State v. Frederick, 20 Wn. App. 2d 890, 911, 506 P.3d 690 (2022). Limiting Alex's access to minors, including those related to him, furthers the State's interest in protecting children. These conditions do not impermissibly burden his right to association with respect to minor-aged family members other than his child(ren).

4. Right to Intimate Association

Alex argues that condition (b)(9)—which prohibits him from "enter[ing] any new dating or sexual relationships with individuals who have minor-aged children without approval from [his] Community Corrections Officer. [His] offense history must be disclosed to any potential partner for approval to be received"—violates

his constitutional right to intimate association.[4]

"The First Amendment protects a person's freedom of association, including intimate association," but these rights may be limited if sensitively imposed and reasonably necessary to accomplish the essential needs of the state. Frederick, 20 Wn. App. 2d at 909-10; U.S. CONST. amend I. According to Alex, condition (b)(9) is not sensitively imposed because he did not use prior romantic relationships with adults to access minor children.

The right to form new intimate relationships may be infringed "but only to the extent necessary to further the State's interest in protecting children." Id. at 911. Courts have recognized that "potential romantic partners may be responsible for the safety of live-in or visiting minors." State v. Autrey, 136 Wn. App. 460, 468, 150 P.3d 580 (2006). Thus, the State's interest in protecting minors is furthered by limiting opportunities for Alex to come into contact with them, including through potential intimate partners. Imposition of this community custody condition was not an abuse its discretion.

5. Conditions (a)(5), (a)(12), and (b)(12)

[4] As with the right to familial relationships, case law discussing prohibitions that implicate the constitutional right to intimate relationships, such as condition (b)(9), generally proceed directly to an analysis of the issues without addressing manifest constitutional error or waiver under RAP 2.5(a). See, e.g., Geyer, 19 Wn. App. 2d at 326-28; State v. Mansour, No. 78708-0-I, slip op. (unpublished portion) at 33-34 (Wash. Ct. App. Aug. 24, 2020) https://www.courts.wa.gov/opinions/pdf/787080.pdf; State v. Mecham, No. 79008-1-I, slip op. at 11-16, (Wash. Ct. App. Mar. 2, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/790081.pdf. These unpublished cases are cited only for their persuasive value according to GR 14.1. Again, we shall proceed with the analysis accordingly.

Finally, Alex challenges several financial obligations imposed by his conditions of community custody. Condition (a)(5) requires him to "[p]ay supervision fees as determined by the Department of Corrections," (a)(12) requires him to "[s]ubmit to periodic polygraph assessments at [his] own expense," and (b)(12) requires him to "install an internet monitoring program, on devices capable of using the software, at [his] own expense."

While Alex did not object to these costs, "appellate courts 'regularly exercise their discretion to reach the merits of unpreserved LFO arguments' because LFOs can create a significant hardship for indigent defendants and severely hinder their reintegration into society." State v. Ortega, 21 Wn. App. 2d 488, 498, 506 P.3d 1287 (2022) (quoting State v. Glover, 4 Wn. App. 2d 690, 693, 423 P.3d 290 (2018)).

The State concedes that the record indicates that the trial court intended to waive all discretionary LFOs and that such LFOs are not appropriately imposed on indigent defendants. We accept this concession. Alex was found indigent and the court expressed its intention to waive fees. On remand, these costs should be struck from the community custody conditions. See State v. Nunez, No. 57707-1-II, slip op. at 3-5, (Wash. Ct. App. Jan. 30, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2057707-1-II%20Unpublished%20Opinion.pdf.[5]

III. CONCLUSION

[5] Although Nunez is unpublished, we may properly cite and discuss unpublished opinions where, as here, doing so is "necessary for a reasoned discussion." GR 14.1(c).

We affirm Alex's conviction but remand to the trial court to strike conditions (a)(5) and (a)(9) and amend conditions (a)(12), (b)(2), (b)(3), (b)(4), (b)(5), and (b)(12) in keeping with this opinion.

Díaz, J.

WE CONCUR:

Feldman, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHNATHAN DAVID ALEX, Appellant.	No. 86887-0-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Johnathan David Alex, filed a motion for reconsideration of the opinion filed on July 21, 2025, in the above case. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Díaz, J.

Judge

WASHINGTON APPELLATE PROJECT

September 17, 2025 - 3:18 PM

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