

71303-5

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No. 71303-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JOSE MARRUFO-SARINANA,

Appellant.

---

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

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REPLY BRIEF

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A. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING THE CONDITION OF COMMUNITY CUSTODY PROHIBITING COMMUNICATION WITH FAMILIES WITH MINOR CHILDREN, AND INVITED ERROR DOES NOT APPLY.

The State argues that the invited error doctrine precludes Mr. Marrufo-Sarinana from appealing from his conditions of supervision. Brief of Respondent at 18.

The authority cited by the State in support of this proposition, State v. Phelps, does not say what the State seems to suggest it does. 113 Wn. App. 347, 353, 57 P.3d 624 (2002). The Phelps Court was careful to distinguish “invited error” from “waiver.” Id. The Phelps Court noted that “the invited error doctrine applies only where the defendant engaged in some affirmative action by which he knowingly and voluntarily set up the error.” Id. (internal citation omitted); see also State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990).

The Washington Supreme Court has also noted the distinction between invited error and waiver:

The failure to except to an erroneous instruction is different than actually proposing an erroneous instruction; the former is a failure to preserve error, the latter is error invited by the defense.

State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995).

In Henderson, the Supreme Court also held that the doctrine of invited error is designed to prevent either party from setting up an error in the trial proceedings and then complaining of it on appeal. 114 Wn.2d at 870 (citing State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984); State v. Boyer, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979)); see also State v. Fischer, 40 Wn. App. 506, 512, 699 P.2d 249 (stating that “invited error” should apply only in the situation where a party “request[s] some affirmative action from the trial court, and then, after having been afforded that action, complain[s] on appeal that it constituted error”).

Here, Mr. Marrufo-Sarinana clearly did not affirmatively propose the condition of community custody prohibiting him from maintaining communication with friends and family members who “have minor children” – instead, this was, at best, a condition that respondent concedes, “the lawyers had agreed upon.” Respondent’s Brief at 19.

Because this condition of community custody is written so broadly as to apparently prohibit Mr. Marrufo-Sarinana from maintaining communication with all friends or family members who “have minor children” – whether the children live with those families or not -- he may

challenge the condition on appeal because its imposition was unconstitutional and was an abuse of discretion.

Despite respondent's argument, Mr. Marrufo-Sarinana is not precluded from litigating his conditions of supervision under the invited error doctrine. Phelps, Wn. App. at 353; Gentry, 125 Wn.2d at 646.

Because an erroneous sentence may be challenged for the first time on appeal, this Court should remand this matter for resentencing, so that the unconstitutional community custody condition can be removed. State v. Bahl, 164 Wn.2d 739, 752, 758, 193 P.3d 678 (2008) (finding condition prohibiting possession of pornography ripe for review and unconstitutionally vague); see, e.g., In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002) (defendant cannot agree to sentence in excess of that which is lawful); In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980); Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009).

#### B. CONCLUSION

For the foregoing reasons, as well as those raised in the Opening Brief, Mr. Marrufo-Sarinana respectfully requests this Court reverse his conviction, or in the alternative, remand this matter for re-sentencing.

DATED this 13<sup>th</sup> day of October, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jan Trasen", is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

JAN TRASEN (WSBA 41177)  
Washington Appellate Project (91052)  
Attorney for Appellant

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13<sup>TH</sup> DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] | MARA ROZZANO, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201         | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | JOSE MARRUFO-SARINANA<br>370004<br>COYOTE RIDGE CORRECTIONS CENTER<br>PO BOX 769<br>CONNELL, WA 99326-0769 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2014.

X \_\_\_\_\_ *[Signature]*