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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2019AP1642-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER J. KING, JR.,

Defendant-Appellant.

Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief
Entered in Sauk County Circuit Court,
the Honorable Wendy J.N. Klicko, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Peter J. King, Jr. has been subject a condition of extended supervision which significantly restricted his access to the Internet and from owning any device capable of accessing the Internet. Is this condition of extended supervision unconstitutionally overbroad because it violates Mr. King's constitutional rights and less restrictive alternatives reasonably related to Mr. King's rehabilitation exist?

After a hearing, the circuit court held that the condition did not violate Mr. King's constitutional rights, and denied Mr. King's motion to vacate the condition of extended supervision. (118:17–18; App. 111–12).

II. Did circuit court err as a matter of law when it concluded that the decision in *Packingham*[1] was not applicable to individuals on supervision and therefore did not amount to a new factor for the purposes of sentence modification?

After a hearing, the circuit court denied Mr. King's motion for sentence modification. (118: 17–18; App. 111–12).

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[1] *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730, 1735 (2017).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. King would welcome oral argument should this court desire it. Publication will likely be merited, as this case presents an issue of first impression in Wisconsin.

STATEMENT OF THE CASE AND FACTS

In 2005, Mr. King was charged with one count of child enticement ("Count 1"), one count of use of a computer to facilitate child sex crime ("Count 2"), and one count of misdemeanor possession of THC ("Count 3"). (1:1). The complaint alleged that Mr. King, who was 44 years old at the time, attempted to arrange, through an internet chat application, a sexual encounter with a 15-year-old girl, who was actually an undercover police officer. (1:2–3).

In February 2007, a jury convicted Mr. King of each count (20:1; 21:1; 22:1).[2] In April 2007, the circuit court, the Honorable James Evenson presiding, sentenced Mr. King. On Count 2, the court sentenced Mr. King to four years of initial confinement and four years of extended supervision.

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[2] Mr. King filed a postconviction motion seeking a new trial, which the circuit court denied following a hearing. (46:1). Mr. King appealed, and this court affirmed the postconviction court's ruling and Mr. King's convictions. (61; 60:1).

(110:26; 58:1; 78:2).[3] On Count 1, the court withheld sentence and placed Mr. King on ten years of probation, consecutive to the sentence in Count 2. (110:26; 57:1; 78:1).

As a condition of extended supervision and probation, the court ordered Mr. King to register as a sex offender. (110:27). The court also imposed a blanket prohibition on "use or access to a computer that has Internet access, either be it at your residence of place of employment, and any computer access is to be reported to your supervising agent. Computer access would include a cell phone that permits computer access." (110:27).

In December 2009, the court issued an amendment to Mr. King's condition of supervision regarding computer and internet use. The amendment provided for "Internet access at a job center for application purposes only or place of business of which defendant wishes to work

[3] The original judgments of conviction erroneously interchanged the sentences on Counts 1 and 2. *See* (42:1; 43:1). Corrected judgments of conviction were issued on March 18, 2009, but those judgements erroneously stated that the probationary period in Count 1 was to run consecutive to "Ct. 1 extended supervision," (57:1), and Count 2 was to run "consecutive to Ct. 1 probation," (58:1). In 2016, the court noted this error and issued an order amending the judgments of convictions to reflect that Mr. King serve the eight-year sentence on Count 2, followed by a consecutive ten-year period of probation on Count 1. (76:1–2). In accordance with the court's order, corrected judgements of conviction were entered. (78: 1–3).

for application purposes only, per agent." (59:1).[4] Mr. King was still prohibited from internet use anywhere else or for any other purpose, and from owning or accessing any devices that were capable of accessing the internet. *See* (59:1; 78:2).

While Mr. King was on extended supervision for Count 2, he was revoked and reconfined twice for accessing the internet and using social media, for renting property for a business without approval, and for possessing devices capable of accessing the internet. (80:5, 6). He was not charged with any new criminal offenses during that time period. *See* (80:5–6).

Mr. King was released to supervision on Count 2 in Sauk County in 2014. (80:6). During this time, Mr. King had difficulty finding employment in Sauk County, and he was homeless for a period of time. (80:6). In 2015, he enrolled in a transitional housing program for veterans in Rock County, during which time he obtained employment, completed primary sex offender treatment, and engaged in sex offender aftercare treatment. *See* (80:6, 10).

Mr. King was discharged from extended supervision in July 2016, and he began his ten-year period of probation on Count 1. (80:6). When the veterans program ended in late 2016, Mr. King's

[4] Mr. King's amended judgments of conviction did not include any reference to internet use at a job center solely for application purposes; instead, the conditions provided the same blanket ban on internet use and access to computers or phones capable of accessing the internet. *See* (57:1, 58:1; 78:1–2).

agent directed him to return to Sauk County. *See* (80:7). He lost his employment and he was placed on GPS monitoring because he was homeless and living in a camper. *See* (80:8; 81:10–11).

A revocation order and warrant was filed on January 8, 2018, which recommended that Mr. King receive a 12- to 16-year sentence. (80:11). The revocation order and warrant explained that Mr. King's probation was being revoked because he accessed social media websites, possessed devices with Internet access, started a business without agent approval, started an online relationship with a female without agent approval, and was not forthcoming with his agent about his Internet use. *See* (80: 4–9). Mr. King was not charged with any new criminal offenses prior or subsequent to his revocation. *See* (80:5–6, 9; 91:8 n.6).

As rationales for the sentencing recommendation, the revocation summary posited that Mr. King needed to be punished and the community needed to be protected from him because he "uses the [I]nternet for sexual deviancy or to seek out and manipulate teenage girls." (80:10, 11). The revocation order and warrant did not, however, identify any instances of such conduct aside from the 2005 conduct which led to his convictions. *See* (80: 4–11).

A sentencing after revocation of probation hearing was subsequently held, the Honorable Wendy J.N. Klicko, presiding. The court summarized Mr. King's prior convictions, noted that he had "been

on probation in the past and ha[s] been revoked," and acknowledged that Mr. King is a discharged veteran who completed sex offender treatment. (117:28–29; App. 123–24).

The court acknowledged that Mr. King made significant efforts to obtain employment and find stability, but he was "bounc[ed] back and forth between Sauk and Rock County, and attempting to meet his probation rules." (117:30; App. 125). The court explained that the rules of Mr. King's supervision were meant to be "protective of society and . . . for the defendant not to reoffend in the manner that resulted in the original criminal charge and conviction." (117:30; App. 125). Specific to internet usage, the court found that those conditions were "the most important" because they dealt with "engaging or having access to those very tools" that lead to his charges. (117:31). It noted that the court previously made allowances for Mr. King to use the internet to find employment, but he chose to have "unfettered" access. (117:32; App. 127).

The court sentenced Mr. King to four years of confinement and four years of supervision. (117:33; App. 128). It ordered that all conditions of probation that were previously in place were conditions of extended supervision. (117:33; App. 128).

Mr. King subsequently filed a postconviction motion asserting that his condition of extended supervision regarding internet usage should be removed because it was unconstitutionally overbroad. (91:1, 8–11). The motion also sought resentencing.

(91: 1, 12–14). As an alternative to resentencing, Mr. King moved the court to reduce his sentence on the basis that the condition regarding internet use that he violated was unconstitutional under the holding in under *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730 (2017) and was overbroad. (91:1, 14–17).

After briefing, the court held a hearing on Mr. King's postconviction motion. (118). The court denied Mr. King's motion for resentencing. (118:14; App. 108). With regard to Mr. King's motion to remove his supervision condition regarding internet use, the court determined that Mr. King's First Amendment rights were not unconstitutionally constrained by the conditions restricting his internet access. (118:17; App. 111). Specifically, it found that the decision in *Packingham* was limited to "someone who has served their sentence, and then is on the Registry and there's a statute," and Mr. King's case dealt with a condition of extended supervision where "courts are allowed to put into place certain conditions of supervision that may curtail someone's rights when they have been convicted." (118:17–18; App. 111–12). The court applied that same reasoning regarding the decision in *Packingham* to deny Mr. King's motion to modify his sentence. (118:17–18; App. 111–12).

The court then acknowledged that modification of Mr. King's conditions of extended supervision[5] would be appropriate because "the internet is very different now than it was even a couple of years ago" and his condition curtailed "some perhaps valid access that a defendant may need to have." (118:18; App. 112). The court then left the record open to allow the parties to submit proposed conditions of supervision related to internet use. (118:20–23; App. 114–17).

Following additional submissions by the parties, the court issued a written decision and order. The order explained that Mr. King's motions to vacate his condition of extended supervision and for resentencing were denied for the reasons stated on the record. (95:1; App. 104). The court's order modified Mr. King's condition of extended supervision to permit access to the internet or devices capable of accessing the internet at his agent's discretion. (95:2; App. 105). The court's order further provided that Mr. King's agent should not restrict Mr. King's "access through public devices for purposes of

[5] Mr. King moved solely to vacate his condition of extended supervision; he did not move the court to modify the condition because such a request would have been premature. *See* Wis. Stat. § 302.113(7m)(e)1. (stating that a person may not petition to modify extended supervision conditions earlier than one year before the scheduled date of release to extended supervision); *see also State v. Fisher*, 2005 WI App 175, ¶¶8– 14, 285 Wis. 2d 433, 702 N.W.2d 56 (stating that Wis. Stat. § 302.133(7m)(e)1. does not apply when a person seeks to abolish—rather than modify—a condition of extended supervision).

obtaining employment or performing any legitimate government functions such as filing taxes or renewing driver's license or license plates, etc." (95:2; App. 105). An amended judgment of conviction consistent with the court's order was entered. (96; App. 102). Mr. King's appeal followed. (98).

ARGUMENT

I. The Condition of Extended Supervision Prohibiting Access to Social Media Sites Must Be Vacated Because It Is Unconstitutional and the Result of an Erroneous Exercise of Discretion.

A. Legal principles and standard of review

Sentencing courts have discretion to impose conditions of supervision that are reasonable and appropriate. *State v. Stewart*, 2006 WI App 67, ¶11, 291 Wis. 2d 480, 713 N.W.2d 165. Accordingly, conditions of supervision are reviewed using the erroneous exercise of discretion standard, and the validity and reasonableness of a condition is measured by how well it serves the objectives of supervision—namely, rehabilitation and protection of the community interest. *Id.* An exercise of discretion is erroneous if it is based on an error of fact or law. *Zardner v. Humana Ins. Co.*, 2010 WI 35, ¶21, 324 Wis. 2d 325, 782 N.W.2d 682.

An individual on supervision does not enjoy the same degree of liberty as a regular citizen does, but he still maintains his constitutional rights.

Morrissey v. Brewer, 408 U.S. 471, 482 (1972); *Samson v. California*, 547 U.S. 843, 850 n.2 (2006). Conditions of supervision "may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." *Stewart*, 291 Wis. 2d 480, ¶12. Whether a particular condition of supervision violates a person's constitutional rights is a question of law which appellate courts review de novo. *Id.* (citing *State v. Lo*, 228 Wis. 2d 531, 534, 599 N.W.2d 659 (Ct. App. 1999)).

B. The condition of extended supervision restricting all social media use is unconstitutional because it infringes on Mr. King's First Amendment Rights under *Packingham*.

Since he was first sentenced in 2007, Mr. King has been subject to conditions of extended supervision which significantly restricted his access to the Internet and devices capable of accessing the Internet. These prohibitions on Internet use—specifically with respect to the fact that they imposed a blanket ban on access to social media—violated Mr. King's First Amendment rights.

The First Amendment protects a person's right to use the Internet. "A fundamental principle of the First Amendment is that *all* persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730, 1735 (2017). In 2017, the United States

Supreme Court said that while "in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Id.* (citations omitted). The centrality of access to the Internet to function in today's world is further illustrated by popular publications ceasing print distribution and adopting all-digital formats,[6] and courts throughout Wisconsin transitioning to mandatory electronic filing starting in 2016.[7]

In *Packingham*, the Court recognized the widespread use of the Internet and social media in the modern age, and struck down a law that prohibited registered sex offenders from using social media sites like Facebook, LinkedIn, and Twitter because that ban infringed on an offender's First Amendment right to freedom of speech. *Id.* at 1737. The Court in *Packingham* found that "[t]hese websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* at 1737. Accordingly, the

[6] *See, e.g.*, Tina Brown & Baba Shetty, *A Turn of the Page for Newsweek*, THE DAILY BEAST, Oct. 18, 2012 (updated July 14, 2017), https://www.thedailybeast.com/a-turn-of-the-page-for-newsweek.

[7] Jean Bousquet & Marcia Vandercook, *Are You Ready? Mandatory E-filing in Effect July 1*, WISCONSIN LAWYER, June 1, 2016, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=89&Issue=6&ArticleID=24909.

Court found that prohibiting registered sex offenders from using social media "bars access to what for many are the principle sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.*

When the circuit court denied Mr. King's motion to vacate his restrictive supervision condition, it determined that his case was distinguishable from *Packingham* because the latter involved "someone who has served their sentence, and then is on the Registry and there's a statute."[8] (118:17; App. 111). The circuit court's reasoning, however, was inconsistent with the language used by the Court in *Packingham*—none of which suggests that its holding was limited to the circumstances discussed by the circuit court at the postconviction hearing.

Although the petitioner in *Packingham* had already completed his sentence, the law at issue in that case applied to both sex offender registrants who had completed their sentences and sex offender registrants on supervision. *See* N.C. Gen. Stat. Ann.

[8] This reasoning was consistent with the state's argument during postconviction litigation, which relied on decisions from the Second, Fifth, Eighth, and Eleventh Circuit Courts of Appeals. (118:24); (92:4) (citing *United States v. Browder*, 866 F.3d 504, 511 n.26 (2d Cir. 2017), *United States v. Halverson*, 897 F.3d 645, 658 (5th Cir. 2018), *United States v. Carson*, 924 F.3d 467, 473 (8th Cir. 2019), *United States v. Washington*, 763 F. App'x 870, 872, 2019 WL 1110834 (11th Cir. 2019) (per curium)(unpublished)).

§§ 14-202.5(a) (making it "unlawful for a sex offender who is registered" to access certain social media sites), 14-208.7(a) (stating that individuals with "reportable convictions" are required to register), 14-208.6(4) (defining a "reportable conviction" as a "final conviction" in a state or federal jurisdiction). Notably, the Court's opinion did not distinguish between the two, but instead held that "[a] fundamental First Amendment principle is that *all* persons have access to places where they can speak and listen"—not just those who have completed serving their sentences. *Packingham*, 137 S. Ct 1732. (emphasis added).

When the Court in *Packingham* specified *who* can benefit from access to social media, it wrote "[e]ven convicted criminals—and in some instances—especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform themselves and pursue lawful and rewarding lives." *Id.* "Convicted criminals," without further qualification from the Court—such as convicted criminals *who have completed their sentences*, a term which the Court used the preceding sentence—thus includes individuals who have reentered society and are still under supervision. *See id.* at 1737.

Moreover, the Court's emphasis on convicted criminals as *particularly* well-suited to benefit from social media to "reform themselves," *id*., reflects the rehabilitative goals of supervision. *See, e.g.*, *United States v. Knights*, 534 U.S. 112, 119 (2001) (listing "rehabilitation and protecting society from future

violations" as the "primary goals" of supervision); *see also Stewart*, 291 Wis. 2d 480, ¶11 (stating that the objectives of supervision are, primarily, rehabilitation and protection of the public). Although the opinion in *Packingham* does not expressly speak to the First Amendment rights of supervisees, the premise of the Court's opinion—that social media is a powerful channel of First Amendment expression and the right to receive information for those reintegrating into society—is plainly applicable in the realm of supervision.

The two specific mentions of sex offender registrants who have completed their sentences do not expressly cabin the holding in the manner interpreted by the circuit court here. First, the Court in *Packingham* noted it was "troubling" that "the [North Carolina] law imposes severe restrictions on persons who have already served their sentence and are no longer subject to the supervision of the criminal justice system," but then noted that this was "not an issue before the Court." 137 S. Ct. at 1737; *see also Millard v. Rankin*, 265 F. Supp. 3d 1211, 1228 (D. Colo. 2017) (using the Court's statement as evidence that, as a matter of first impression, it would need to answer a question that the Supreme Court had left open). Second, the Court said "[i]t is unsettling to suggest that only a limited number of websites can be used even by persons who have completed their sentences," but the court then made reference to the afore-discussed broader statement about the internet's utility for "convicted criminals" as a whole. *Packingham*, 137 S. Ct. at 1737.

Thus, the circuit court's conclusion that *Packingham* did not apply to Mr. King's circumstances was based on an error of law. Like the statute at issue in *Packingham*, Mr. King's condition imposes blanket prohibitions internet use and access which significantly infringes on his right to freedom of speech in the modern town square. Provisions allowing limited use for job searching or filing taxes do not render the condition any less restrictive either. If Mr. King wanted to use the internet at some location other than a library, he would still be restricted to the very narrow confines provided by his supervision condition. Furthermore, as his revocation paperwork indicated, using social media—even when used for his personal business—was not considered within the ambit of permissible use. *See* (80:4–11). Thus, his condition amount to a blanket ban on social media use, which is impermissible under *Packingham*.

C. The condition of extended supervision restricting social media use is unconstitutional because it infringes on Mr. King's right to freedom of association.

The United States Supreme Court has recognized that the First Amendment, in conjunction with the Fourteenth Amendment right to due process, protects an individual's right to freedom of association. *City of Dallas v. Stanglin*, 490 U.S. 19, 23–24 (1989). The Court has recognized a constitutionally protected freedom of association in two distinct senses: (1) freedom of expressive

association; and (2) freedom of intimate association. *Roberts v. Jaycees*, 468 U.S. 609, 617–18 (1984). Each of these aspects of the right of association is significantly infringed by the condition of extended supervision prohibiting Mr. King from using the internet for any purpose other than job searching.

First, Expressive association is best understood as "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. By restricting a person from using the internet to communicate and join with others in exercising First Amendment freedoms, a prohibition on social media use or any use other than searching for employment or "legitimate government functions," (96:2; App. 102), purposes limits the right to expressive association just as profoundly as it limits the basic right to free speech.

Second, intimate association involves the right "to enter into and maintain certain intimate human relationships [which] must be secured against undue intrusion by the State because the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts*, 468 U.S. at 617–18. The types of relationships qualifying for the greatest measure of constitutional protection are "those that attend the creation and sustenance of a family—marriage, childbirth; the raising and education of children; and cohabitation with one's relatives." *Id.* at 619 (internal citations omitted).

The Court has further extended these protections to non-marital romantic relationships and even personal friendships. The Court emphasized that the right of association protects those relationships that "presuppose 'deep attachments and commitments to the necessary 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.'" *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (quoting *Roberts*, 468 U.S. at 619–20); *see also Akers v. McGinnis*, 352 F.3d 1030, 1039–40 (6th Cir. 2003) ("personal friendship is protected as an intimate association").

Given the widespread use of social media between family members and friends, a ban on the use of the internet outside the narrow set or circumstances provided in this case directly limits Mr. King's ability to maintain established relationships with family and close personal friends. A ban on social media limits his ability to develop or strengthen family relationships and personal friendships.

D. The condition of extended supervision is overly broad because there are more narrowly-drawn tools available that serve the objectives of supervision.

In addition to erroneously concluding that *Packingham* was inapposite, the postconviction court concluded that Mr. King's conditions were not overbroad because conditions of supervision may

"curtail someone's rights when they have been convicted." (118:17; App. 111). While Mr. King acknowledges that a condition of extended supervision may impinge upon constitutional rights, those conditions cannot be overly broad and must be reasonably related to the objectives of supervision—which, as noted above, are rehabilitation and protection of the public. *Stewart*, 291 Wis. 2d 480, ¶¶11–12. "A condition is reasonably related to the person's rehabilitation 'if it assists the convicted individual in conforming his or her conduct to the law.'" *State v. Rowan*, 2012 WI 60, ¶10, 341 Wis. 2d 281, 814 N.W.2d 854 (quoting *State v. Oakley*, 2001 WI 103, ¶21, 245 Wis. 2d 447, 629 N.W.2d 200).

In light of the prevalence of the internet in both modern life and acknowledging its use in the commission of some sex offenses, there are more narrowly-drawn tools that allow the state to supervise registered sex offenders like Mr. King without over broadly restricting his constitutional rights. For example, under Wis. Stat. § 301.45(2)(a)6m., a person on the sex offender registry must inform the Department of Corrections of:

> [t]he name or number of every electronic mail account the person uses, the Internet address of every Web site the person creates or maintains, every Internet user name the person uses, and the name and Internet address of every public or private Internet profile the person creates, uses, or maintains. The department may not place the

> information provided under this subdivision on any registry that the public may view but shall maintain the information in its records on the person.

In turn, subsection (4) requires the person to inform the department within ten days if any of this information changes. Failure to comply with this provision is a class H felony carrying a penalty of up to six years in prison. Wis. Stat. § 301.45(6)(a)1.

This statute is more narrowly tailored because it does not forbid an individual on the registry like Mr. King from using large portions of the internet that fall outside the narrow confines of "employment purposes" or "legitimate government functions such as filing taxes or renewing driver's license or license plates." (96:2; App. 103). Instead, the statute requires that Mr. King report every email address he uses, every web site he maintains, every Internet user name he adopts, and every public or private Internet profile he creates, uses, or maintains, and imposes a penalty for failing to do so. *See* Wis. Stat. § 301.45(6)(a).

Furthermore, this statute advances the goals of rehabilitation and protecting the public. By providing this information, both law enforcement and concerned individuals can track an individual on the registry's activity online. Although Wis. Stat. § 301.45(2)(a)6m. says that the Department cannot put his internet identifiers "on any registry that the public may view," Wis. Stat. § 301.46(2)(e) permits the head of any local law enforcement agency to

provide "any information to which he or she has access under this subsection" to "members of the general public" if, "in the opinion of the police chief or sheriff," doing so is "necessary to protect the public." Wis. Stat. § 301.46(5)(b)4. also permits law enforcement to share any information they deem "appropriate" with a requesting member of the public.

Thus, under this law, law enforcement and the Department can monitor Mr. King's online activity to ensure that he conform his conduct to the law, and failure to comply carries criminal penalties. Wis. Stat. § 301.45(6)(a). At law enforcement's discretion, Mr. King's identifiers can be shared with the public at large to further monitor his activity and ensure both his rehabilitation and the public's protection.

Even though the facts of Mr. King's underlying convictions justify restrictions on his establishment of sexual relationships and contact with minors over the internet, a condition which essentially imposes a near-blanket ban on social media use is neither narrowly-drawn to address the circumstances of the offense nor reasonably related to his rehabilitative needs. In *Stewart*, the court of appeals held that a condition of supervision banishing a defendant from a certain township within in county was found overly broad and restrictive of a defendant's liberties to travel and association because his conduct took place mostly around his home and was directed at certain people rather than the entire township. 291 Wis. 2d 480, ¶¶ 10–22. Similarly, a condition of supervision

which restricts Mr. King's activity on the Internet to the narrow confines of employment or filing taxes—or even limits his use to that deemed appropriate by his agent—is overbroad and unduly restrictive.

The facts of this case spell out the exact circumstances which *Packingham* proscribed. Since 2007, Mr. King has been reconfined and later sentenced to prison primarily for using the Internet and social media—not for committing new crimes. Despite his agent's representations that Mr. King "use[d] the [I]nterent for sexual deviancy or to seek out and manipulate teenage girls," (80:10), but the record is devoid of instances in which Mr. King was engaging in conduct similar to the underlying 2005 offense in this case, which was chatting with minors online. *See* (80:4–11). Instead, Mr. King was bounced between Rock and Sauk Counties for supervision, and that displacement cost him a job and a place to live. Without access to the Internet to find housing, associate with others, check current events, and engage in the modern public form, it is unsurprising that he was unsuccessful on supervision.

Simply put, this overbroad condition functioned to subdue constitutionally protected activity and repeatedly set Mr. King up to fail. Because there are more narrowly-drawn tools that serve the goals of supervision and would assist Mr. King in conforming his or her conduct to the law, the supervision condition restricting Mr. King's internet access should be removed.

II. Mr. King Presented a New Factor Warranting Sentence Modification.

A. Legal Principles and standard of review

Circuit courts have inherent authority to modify a sentence within certain constraints. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. "This inherent power can be used to prevent the continuation of unjust sentences and must be exercised within defined parameters." *State v. Trujillo*, 2005 WI 45, ¶10, 279 Wis. 2d 712, 694 N.W.2d 933.

A "new factor" is one such parameter. *Harbor*, 333 Wis. 2d 53, ¶35. A new factor is defined as:

> "[A] fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all the parties."

Id., ¶40 (*quoting Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Although the new factor must be highly relevant to the imposition of sentence, it does not need to frustrate the purpose of the original sentence. *Id.*, ¶48.

Deciding a sentence modification motion based on a new factor is a two-step inquiry. *Id.*, ¶36. First, the defendant must demonstrate by clear and convincing evidence that the new factor exists. *Id.*, ¶38. Second, if there is a new factor, the circuit court must determine "whether that new fact justifies

modification of the sentence." *Id.* "The requirement that the defendant demonstrate the existence of a new factor prevents a court from modifying a sentence based on second thoughts and reflection alone." *Id.*

Whether a fact or set of facts constitutes a new factor is a question of law reviewed independently on appeal. *Harbor*, 333 Wis. 2d 53, ¶33. However, the determination of whether a new factor warrants sentence modification involves the circuit court's exercise of discretion, and therefore, is reviewed under an erroneous exercise of discretion standard. *Id*.

B. Under the unique circumstances of this case—specifically that Mr. King had been subject to an unconstitutionally overbroad ban on social media access—the holding in *Packingham* is applicable and relevant to this case.

Although *Packingham* was decided in advance of Mr. King's sentencing after revocation of probation hearing, there was no mention of it at that hearing. But whether or not Mr. King's conditions of supervision were overbroad would serve as a significant mitigating factor in light of the conduct for which he was revoked and the court's rationale for imposing the sentence it did. Thus, the fact that the Supreme Court had recently recognized the centrality of the Internet and social media in everyday life and held that bans on social media use for convicted criminals was unconstitutional was highly relevant to

the sentencing after revocation court's rationales. That holding, and its applicability to the specific facts of this case, is therefore a new factor warranting sentence modification.

At the sentencing after revocation of probation hearing, the court concluded that Mr. King's use of the Internet—specifically social media—was problematic because his "rules were meant to be protective of society . . . and for [him] not to reoffend in the manner that resulted in the original criminal charge and conviction." (117:30). The court further found that Mr. King's internet use was problematic because he chose not to comply with overbroad conditions, but instead opted for "unfettered" access. (117:32).

The holding in *Packingham* was highly relevant to these rationales, but there is no indication in the record that any of the parties were aware of it. As explained in section I.B. of this brief, the Supreme Court issued a strong declaration of the centrality of the Internet—especially social media—to citizens and convicted criminals alike, and declared broad bans on social media use unconstitutional. 137 S. Ct. at 1737–38.

Circuit courts are required to impose the minimum amount of incarceration necessary to further its sentencing objectives. *See State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 196. Had the court been aware that Mr. King's conditions were unconstitutional and overbroad in light of *Packingham*, that information would have been

highly relevant to its conclusion that Mr. King chose to have "unfettered" access to the internet. (117:32; App. 127). Instead, in accordance with *Packingham*, it could have acknowledged that Mr. King had a constitutionally-protected right access to the "vast democratic forums of the internet" without overbroad restrictions. *Packingham*, 137 S. Ct. at . 1735. Such a consideration would mitigate the court's belief that eight years was the minimum sentence necessary to serve sentencing objectives—especially in light of the fact that Mr. King has repeatedly been shuffled between prison and supervision for using the Internet, and not for committing new offenses.

The postconviction court thus erred when it concluded that the holding in *Packingham* was not applicable to Mr. King's case and therefore not a new factor. As explained in section I.B. of this brief, the holding in *Packingham* is in no way limited solely to convicted criminals who have finished serving their sentences. *See Packingham*, 137 S. Ct. at 1737 (noting it was "troubling" that the law imposed restrictions on persons who had already served their sentences, but then clarified that was "not an issue before [it]").

It is noteworthy that the postconviction court found that the effect of the restrictions placed on Mr. King through his conditions of supervision were essentially a new factor sufficient to warrant modification of Mr. King's extended supervision conditions, but not his sentence—which was a byproduct of his revocation due to the same overbroad condition. While it is not clear that the

court had the authority to modify Mr. King's conditions in the manner that it did at that hearing *See* Wis. Stat. § 302.113(7m)(e)1, the postconviction court's rationale for modifying his conditions mirrored the Court's holding in *Packingham*. Specifically, the court found that "the internet is very different now that it was even a couple of years ago" and that Mr. King's condition curtailed "some perhaps valid access" to the Internet. (118:18; App. 112).

Because the court's sentencing after revocation and postconviction rationales conflicted with the holding announced in *Packingham*, the court's conclusion that there was a new factor warranting modification of his conditions but not his sentence was erroneous. As such, Mr. King established the existence of a new factor.

Mr. King does not suggest that the holding in *Packingham* is relevant in every single case involving revocations for violations of conditions involving internet use. Instead, the facts of Mr. King's case make the holding in *Packingham* uniquely applicable. Mr. King has been confined or on supervision since 2007, revoked and reconfined several times for using the Internet in ways which are inconsistent with his convictions and did not amount to new criminal charges. The court's sentencing rationales regarding Mr. King's overbroad conditions being necessary to protect the public suggest that application of the holding in *Packingham* would be highly relevant to the sentence imposed. Furthermore, the court implicitly

acknowledged the relevance of the holding in *Packingham* when it modified Mr. King's conditions of supervision. Because there is no indication in the record that the parties or the court were aware of that holding at the sentencing after revocation, it therefore meets the criteria for a new factor and both unknown or overlooked and highly relevant to the sentence imposed. *See Harbor*, 333 Wis. 2d 53, ¶40.

The new factor presented by Mr. King further warrants sentence modification. But the circuit court did not address this prong of the new-factor test. Therefore, this court should remand to the circuit court for a determination of whether this new factor warrants sentence modification.

CONCLUSION

Based on the foregoing arguments, Mr. King respectfully asks this court to (1) reverse the circuit court's denial of his motion to vacate the condition of his extended supervision regarding internet use and access, and (2) reverse the denial of Mr. King's motion for sentence modification and remand the case to circuit court for a determination of whether the new factor presented justifies sentence modification.

Dated this 16th day of December, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,019 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of December, 2019.

Signed:

MARK R. THOMPSON
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Signed:

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A P P E N D I X

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TO
APPENDIX

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