STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019AP1642-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER J. KING, JR.,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN SAUK COUNTY CIRCUIT COURT, THE HONORABLE WENDY J.N. KLICKO, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. In *Packingham*,[1] the United States Supreme Court held unconstitutional on First Amendment grounds a state law that made it a felony for any registered sex offender to access a commercial social networking website. Defendant-Appellant Peter J. King, Jr., brought a postconviction motion to "remove his condition of extended supervision restricting internet access" on the grounds that under *Packingham* the condition violates his First Amendment rights. Does *Packingham* require vacating the condition restricting King's internet access?

The circuit court answered no.

This Court should answer no.

2. *Roberts*[2] recognized constitutional protections of the freedom to enter into and maintain certain intimate human relationships, and to associate for the purpose of engaging in activities protected by the First Amendment. King asserts that the condition limiting his internet access impermissibly infringes on those rights. Does the condition violate King's right to freedom of association?

The circuit court answered no.

This Court should decline to address the argument as it is undeveloped. If this Court reaches the question, it should answer no.

3. Conditions of supervision may impinge upon constitutional rights if they are not overly broad and are reasonably related to the person's rehabilitation. King was convicted of using a computer to facilitate a child sex crime.

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

[2] *Roberts v. Jaycees*, 486 U.S. 609, 617–18 (1984).

He challenges a supervision condition stating that he may access the internet on public devices for obtaining employment and performing such online tasks as tax filing and vehicle registration, and may not otherwise access the internet or possess internet-capable devices unless he obtains his probation agent's express approval. Is the condition narrowly tailored and reasonably related to the objectives of supervision?

The circuit court answered yes.

This court should answer yes.

4. A defendant is entitled to sentence modification if a new factor exists and modification is warranted. King asserted that the holding in *Packingham* was overlooked by all the parties at sentencing and was highly relevant because he was being sentenced for conduct that *Packingham* defined as constitutionally protected. Is King entitled to sentence modification?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests publication but not oral argument.

It is well established that a condition of supervision can impinge on constitutional rights provided it is narrowly tailored and is reasonably related to the objectives of supervision. No Wisconsin case has yet analyzed how internet-restrictive conditions of supervision are affected by the holding in *Packingham*, a 2017 United States Supreme Court decision striking down on First Amendment grounds a state statute banning access to social media for all sex offenders. A published decision would help circuit courts fashion constitutionally sound extended supervision

conditions that limit internet access for the supervisee's rehabilitation and the protection of the public.

Oral argument is unnecessary because the issues are adequately addressed in the briefs.

INTRODUCTION

The primary issue presented is the extent to which a court can constitutionally impose limitations on internet access as a condition of extended supervision for someone serving a sentence for a child sex crime committed with a computer. The case requires applying well established law that permits limitations on the supervisee's First Amendment rights as long as the limits are not overly broad and are reasonably related to the person's rehabilitative needs and the protection of the public. *See State v. Stewart*, 2006 WI App 67, ¶ 12, 291 Wis. 2d 480, 713 N.W.2d 165. King relies on *Packingham*, a 2017 United States Supreme Court opinion containing broad language about a First Amendment right to access social media and striking down a state law that banned all sex offenders from using social media even if they had completed their sentences.

But the majority of jurisdictions interpreting *Packingham* have not applied its holding as King asks this Court to apply it. Rather, they have upheld conditions that ban social media access—and internet access altogether—when the limitation applied during a period of supervision while serving a sentence (King's does), when the underlying conviction involved using the internet to commit a crime (King's did), when the condition did not impose a "total Internet ban" (King's did not), and when the condition allowed access with the probation agent's approval (King's does).

STATEMENT OF THE CASE

King is convicted and sentenced.

In December 2005 King contacted and began communicating with a person online he believed to be a 15-year-old girl. (R. 1:1–2.) In reality he was communicating with a Sauk Prairie police officer. (R. 1:1–2.)

King initiated sexually explicit messages and described a plan to meet the girl and her 14-year-old friend for sex at a Sauk City motel on December 29. (R. 1:2–3.) He sent the girls detailed instructions about the meeting. (R. 1:3.) The items in King's possession at the time of arrest—bottles of Budweiser, condoms, a camera, and a red rose—matched what he had promised to provide in the messages. (R. 1:2–3.) Police also found marijuana in King's car. (R. 1:3.) Police apprehended King at the motel after he checked in, and he was charged with child enticement, using a computer to facilitate a child sex crime, and possession of THC. (R. 1:3; 4.)

A jury convicted King of all three counts. (R. 4; 20–22.)

On the charge of using a computer to facilitate a child sex crime, the circuit court sentenced King to four years of initial confinement and four years of extended supervision. (R. 78:2; 110:26.) On the charge of child enticement, the circuit court withheld sentence and placed King on probation for ten years, to be served consecutive to his prison sentence. (R. 78:1; 110:26.) The misdemeanor sentence (R. 41) is not relevant to this appeal.

King's convictions are affirmed on direct appeal.

King appealed, seeking to reverse his conviction on the grounds of improperly admitted evidence. (R. 61:2.) He specifically argued that the circuit court had erred in 1) admitting evidence of his 1986 conviction for the sexual assault of a 13-year-old girl when he was about 25 years old, and 2) admitting evidence that police found child pornography

when they searched his house during the investigation of this case. (R. 61:3, 5, 8; 117:7.) This Court affirmed, holding that in both cases, the evidence was admissible as proper impeachment evidence after King testified and made assertions that the State was entitled to rebut. (R. 61:11.) Those issues are not raised in this appeal.

King's revocations for internet violations while serving the first part of his sentence.

King served his initial confinement and was released on December 15, 2009 to complete extended supervision for Count 2, use of computer to facilitate a child sex crime. (R. 80:5.) The conditions of his supervision included that he have no use or access to an internet-enabled computer, which was amended to permit access at limited locations for the purpose of completing online job applications. (R. 59; 80:5.)

King's extended supervision on that count was revoked on October 7, 2011, "for having a Facebook account, possession of computers, possession of internet services, possession of a blackberry phone, and viewing sexual[ly] explicit websites." (R. 80:5.) He served a seven-month revocation sentence and was released again on May 15, 2012. (R. 80:6.)

He was revoked a second time and served another twelve months' revocation sentence for, among other things, "being in possession of two computers, accessing the internet, possessing sexually explicit pictures, having a profile on sugardaddyforme.com . . . possess[ing] a cellphone that had a camera and internet capabilities and g[iving] his agent false information." (R. 80:6.) He completed this portion of his sentence on July 23, 2016. (R. 80:6.)

King's violations and the revocation underlying this case.

Upon completing the first part of his sentence in 2016, King started the ten-year probation term that was ordered to

run consecutive to the prison sentence. (R. 80:6.) The rules of supervision for King's probation permitted Internet use for job search and other agent-approved uses, but otherwise prohibited it. (R. 80:5.)

On December 14, 2017, King's supervision was revoked for thirteen violations of his supervision rules, including having an active Facebook account, accessing the Internet, possessing a computer, failing to notify his agent of cellphone possession, and lying to his agent about social media access. (R. 80:1, 4.) King refused to disclose the username and password for the laptop. (R. 80:5.)

At sentencing, King's counsel recommended a year in jail rather than a prison sentence on the grounds that the revocation was solely for rules violations and there were "no new charges of any kind." (R. 117:20–21.) The State, which was requesting ten years of initial confinement and six years of extended supervision, clarified that there was evidence of new violations of law, but that no charging decisions had been made at that point:

> [A]ny time we see a failure to notify sex offender registry of things such as your Facebook account, your Internet identity and your business, those are rules required by the sex offender registration law and those are in fact violations of law. Our office did receive a referral for the Facebook-related violation as a felony failure to comply with sex offender registration law. Additional information was requested on that, and no decision has been made pending that additional information, so *there are law violations here* when one does not comply with the sex offender registry.
>
> I would also advise the [c]ourt regarding the computer that was sent in [for forensic review]. The results of that computer search revealed that the defendant was searching for terms that included "teen" and there was what would be considered pornography on that computer. However, no charges have been filed at this point given the fact that these

> images were not images that could be confirmed as to whether or not they were under 18 or just over 18. So that gives a little background as to what the defendant is doing when he is accessing the Internet and using these things contrary to his rules.

(R. 117:22–23 (emphasis added).)

The circuit court noted that King had submitted a letter that stated in part, "I have not caught another crime. If it wasn't for my court-ordered rules, I would have succeeded." (R. 81:13.) The court stated that King "missed the point." "There were court-ordered rules that needed to be followed, and if you don't follow those you aren't successful, and Mr. King admitted he did have rule violations." (R. 117:31.) The court also noted that the rules related to "those very tools which the defendant used in order to engage in the criminal conduct that was the basis of the charge." (R. 117:31.) The circuit court stated that "the problem was the defendant chose to have that access that was unfettered and unsupervised, and that does give the Court great pause in regards to what risk that shows." (R. 117:32.) The court sentenced King to four years of initial confinement and four years of extended supervision, with the previously stated conditions. (R. 117:33.)

The postconviction motion and amendment of the internet access condition.

King then brought the postconviction motion that underlies this appeal. In it, he asked the court to "vacate conditions of extended supervision prohibiting use of the internet and access to devices capable of accessing the internet," and sought sentence modification.[3] (R. 91:1.)

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[3] He also argued that he was entitled to resentencing, an argument he does not pursue on appeal. (R. 91:12.)

At the hearing, King argued that because Wis. Stat. § 301.45(2)(a)6m.[4] imposes narrowly tailored specific disclosure requirements on sex offenders who use the Internet and serves the same goals as the supervision condition, the broader supervision condition is unconstitutional. (R. 118: 4–5.) The circuit court asked the State why the statutory disclosure requirements were not sufficient. (R. 118:12.) The prosecutor responded:

> [T]he [S]tate's position on that is, while that one is certainly more narrowly drawn, I think it is inappropriate simply because of the defendant's conduct while he was on probation as it related to, you know, possessing a computer, his conduct that led to the sentencing after revocation hearing. . . .
>
> I think that the total ban with the exception of job purposes is appropriate, given the nature of the offense for which we're here for, Judge, as well as conduct while he was on probation.
>
> I also think it's a little bit cleaner, Judge. There isn't really room for interpretation when it is a ban with the exception of jobs. I mean, we're not . . . falling into any gray areas here, Judge. I think it puts Mr. King on better notice.

(R. 118:12–13.)

The circuit court denied the request for resentencing, concluding that contrary to King's assertion, the *Packingham* case did not constitute a new factor because it was

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[4] The statute requires registrants to provide and the registry to maintain "[t]he name or number of every electronic mail account the person uses, the Internet address of every website 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. . . . This subdivision applies only to an account, website, Internet address, or Internet profile the person creates, uses, or maintains for his or her personal, family, or household use." Wis. Stat. § 301.45(2)(a)6m.

inapplicable to a person who is on extended supervision. (R. 118:17–18.)

The circuit court also denied the motion to vacate the Internet access supervision condition, saying that it was "not willing to just solely rely upon the Registry [requirements]." (R. 118:19.) However, it asked the parties to submit proposals that would modify the Internet restriction. (R. 118:19–20.) The parties did so, and the circuit court subsequently issued a written order that stated the rules of extended supervision regarding access to the internet and devices capable of accessing the internet:

> 1. The defendant may possess device(s) capable of accessing the internet only with the express permission of the defendant's agent.
>
> 2. The defendant may access the internet only to the extent and manner as approved by the defendant's agent. However, the agent shall not withhold permission for the defendant's access through public devices for purposes of obtaining employment or performing any legitimate government functions such as filing taxes or renewing driver's license or license plates, etc.
>
> 3. If the possession of devices or access to the internet is approved, the defendant shall provide his agent with the name or number of every electronic mail account he uses, the internet address of every website he creates or maintains, every internet user name he uses, and the name and address of every public or private internet profile he creates, uses, or maintains.

(R. 95:2.)

This appeal follows. (R. 98.)

ARGUMENT

I. *Packingham* does not require this Court to vacate King's supervision condition restricting his internet use except with agent approval.

A. *Packingham*'s holding concerned a statute imposing a broad ban on all sex offenders.

Packingham held unconstitutional a state statute that criminalized access to certain social media sites for all sex offenders, including those who had completed their sentences. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733–34, 1737 (2017). The Court noted that the case "is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet." *Id.* at 1736.

After discussing the prominent role of social media in modern society, the Court concluded that the statute violated the First Amendment because "[b]y prohibiting sex offenders from using those websites, [the state] with one broad stroke bars access to what for many are the principal 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.* at 1737.

Whether or not King's internet probation condition is constitutional under *Packingham* is a legal issue subject to this Court's plenary review. *See Stewart*, 291 Wis. 2d 480, ¶ 12.

B. As courts in other jurisdictions have held, *Packingham* does not foreclose supervision conditions like the one in this case.

King concedes that *Packingham* "does not expressly speak to the First Amendment rights of supervisees," but he argues that "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." (King's Br. 14.) He argues that the supervision condition imposed on him imposes "blanket prohibitions [on] internet use and access" just like the statute struck down in *Packingham* and therefore must be vacated. (King's Br. 15.) But he reads more into *Packingham*'s holding than any jurisdiction has found there.

Packingham has been interpreted and applied by numerous courts.[5] As noted in the State's response to the postconviction motion, almost all the federal courts of appeals interpreting *Packingham* have held that it simply does not apply to supervised release conditions limiting internet use in individual cases. Furthermore, most of these cases have uniformly refused to apply *Packingham* where the defendant's *post-sentence* internet access is not affected. *See United States v. Browder*, 866 F.3d 504, 511 n.26 (2d Cir. 2017) ("*Packingham* is not directly on point. It involved an internet ban . . . and that ban extended beyond the completion of a sentence."); *United States v. Halverson*, 897 F.3d 645, 658 (5th Cir. 2018) ("Because supervised release is part of Halverson's sentence (rather than a post-sentence penalty) . . . we find that *Packingham* does not . . . apply to the supervised-release context."); *United States v. Carson*, 924 F.3d 467, 473 (8th Cir. 2019) ("Because supervised release is part of a defendant's sentence, *Packingham* does not render a district court's restriction on access to the internet during a term of supervised release plain error."); *United States v.*

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[5] This court has discussed *Packingham*'s holding in the context of a challenge to a statute's constitutionality. It rejected a First Amendment challenge to a provision of the Wisconsin sex offender registry statute, Wis. Stat. § 301.45(2)(a)6m. (2017–18) requiring registrants to disclose e-mail addresses, Internet user names, Internet profiles, and websites created or maintained by the registrant. *State v. Jackson*, 2020 WI App 4, ¶ 1.

Peterson, 776 F. App'x 533, 534 & n.2 (9th Cir. 2019) (citation omitted) (calling defendant's reliance on *Packingham* "misguided" and upholding a prohibition on computer possession because the district court has "broad discretion in setting conditions of supervised release, including restrictions that infringe on fundamental rights"); *United States v. Washington*, 763 F. App'x 870, 872 (11th Cir. 2019) ("The Supreme Court in *Packingham* considered dissimilar issues and did not 'directly resolv[e]' whether conditions . . . are constitutional."); *United States v. Rock*, 863 F.3d 827, 831 (D.C. Cir. 2017) (upholding supervised-release condition barring access to the internet without agent approval because it was "part of [a] supervised-release sentence" and therefore unaffected by *Packingham*'s holding).

The Third and Fourth Circuits have found that supervised-release conditions restricting internet access are invalid under *Packingham*. But those courts did not hold that such conditions are invalid per se, rather they held that the particular conditions at issue were overly broad. Accordingly, the courts remanded the cases to the district court for more complete factual development of the basis for the conditions imposed, more narrowly tailored conditions, or both. *See*, *e.g.*, *United States v. Wroblewski*, 781 F. App'x 158, 163–64 (4th Cir. 2019) (vacating and remanding for further proceedings where the district court provided no explanation for the imposition of the condition and there was no "evidence that computers or the internet played any role in [the] offense"); *United States v. Holena*, 906 F.3d 288, 291 (3d Cir. 2018) (noting the "sparse record" and remanding for the district court to "make findings to support any restrictions it chooses to impose on Holena's internet and computer use").

In this case, King's internet restriction is constitutional and not prohibited by *Packingham* for several reasons. First, it is part of supervision while he is serving a sentence, not after it is completed. Second, his underlying crime involved

the use of the internet to solicit sex from someone he thought was a minor; therefore, the condition imposed very reasonably restricted him from using the tools of his crime. Third, King had repeated revocations for violating the internet restriction condition throughout the sentence, at least one of which[6] arose from his attempt to use the internet for sex. Fourth, the condition was not a blanket ban, but permitted some internet use without his agent's permission. And, finally, the condition permitted any internet use his agent approved. In light of the facts in this case, *Packingham*'s holding does not require vacating the internet condition.

II. The condition imposed on King is constitutional because it is narrowly tailored and is reasonably related to the goals of supervision.

A. Standard of review.

Conditions of extended supervision are reviewed under the erroneous exercise of discretion standard to determine their validity and reasonableness measured by how well they serve their objectives: rehabilitation and protection of the state and community interest. *Stewart*, 291 Wis. 2d 480, ¶ 11. Whether a particular condition violates a defendant's constitutional right is a question of law and is reviewed de novo. *Id.*

B. Legal principles.

Sentencing courts have wide discretion and may impose any conditions of probation or supervision that appear to be reasonable and appropriate. *State v. Nienhardt*, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct. App. 1995); *State v. Koenig*, 2003 WI App 12, ¶ 7, 259 Wis. 2d 833, 656 N.W.2d 499.

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[6] One rule violation for which King was revoked was having a profile on the website "sugardaddyforme.com." (R. 80:6.)

The conditions 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. Convicted felons do not enjoy the same degree of liberty as those individuals who have not been convicted of a crime. *State v. Oakley*, 2001 WI 103, ¶ 17, 245 Wis. 2d 447, 629 N.W.2d 200.

When evaluating the constitutionality of restrictions on speech, courts employ the intermediate-scrutiny test, which allows the government to impose reasonable, content-neutral restrictions on speech that are "narrowly tailored to serve a significant governmental interest, and that . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994). "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (citation omitted). "Narrow tailoring in this context requires, in other words, that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate needs.'" *Id*. (citation omitted).

C. The State has a well-recognized and significant interest in protecting the public from recidivist sex offenders.

The purpose of Wisconsin's sex offender registry statute is to effectuate an "intent to protect the public and assist law enforcement"; it is "related to community protection"; and is designed to "further the governmental interests of public safety and enhance strategies for crime detection and prevention." *State v. Smith*, 2010 WI 16, ¶ 26, 323 Wis. 2d

377, 780 N.W.2d 90; *see also State ex rel. Kaminski v. Schwarz*, 2001 WI 94, ¶ 41, 245 Wis. 2d 310, 630 N.W.2d 164. This general purpose is well-recognized as a legitimate, substantial public interest. *Smith*, 323 Wis. 2d 377, ¶ 26. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982); *see also Smith v. Doe*, 538 U.S. 84, 90 (2003) (noting that since 1996 every state in the nation had enacted sex offender registry statutes).

King does not dispute the legitimacy of the State's substantial interest; he instead claims that the condition is not narrowly tailored to advance that interest and therefore violates his right to free speech. As discussed below, he is wrong.

D. The condition is narrowly tailored to achieve the State's interest.

As described above, the circuit court gave careful consideration to King's postconviction motion, with particular attention to the scope of the internet restriction. At the postconviction hearing, the circuit court acknowledged that without modification the condition did "curtail some perhaps valid access that a defendant may need to have" and in addition to job searches, "there may be other valid uses that you can only do through the internet." (R. 118:18.) The court added, "The question is how to get at that and still allow the protection of the public, which the Court does believe is appropriate and tailored to this particular offense and this particular defendant's history with that." (R. 118:18–19.)

King had made specific arguments at the postconviction hearing: "Practically speaking, he can't file taxes. He can't do online banking. He can't even access CCAP in order to check the status of his case were he out in the community." (R. 118:5–6.) In response to these points, the circuit court ultimately modified the condition substantially to permit

access to "legitimate government functions" and to allow possession of internet-enabled devices and additional access to the internet as approved by his agent. (R. 95:2.)

King's argument that the State should rely on the internet restrictions in the sex offender statute misses the point. The State has a legitimate interest, given the specific facts of this case, to monitor King's internet activity more closely than Wis. Stat. § 301.45(2)(a)(6m. provides for. Importantly, a restriction on free speech need not be the *least* speech-restrictive option in order to be constitutional. *See Turner Broad. Sys., Inc.*, 512 U.S. at 662.

In light of the facts and circumstances in this case (King's convictions for using the internet to solicit sex from minors and his history of repeated revocations for refusing to comply with internet restrictions) the circuit court's final order satisfies the governing constitutional test because it imposes a narrowly tailored condition that serves a significant governmental interest.

III. The condition does not violate King's constitutional right to association.

As an initial matter, this court has stated that it does not "decide the validity of constitutional claims that are broadly stated but not specifically argued." *Nienhardt*, 196 Wis. 2d at 168 (citation omitted). King's argument about the right to association is such an argument. (King's Br. 15–17.) His argument consists only of a four-paragraph summary of the law recognizing a constitutional right to freedom of association followed by an assertion that limiting his internet access and banning social media "limits his ability to develop or strengthen family relationships and personal friendships." (King's Br. 17.) He has not cited any law for the proposition that persons on supervision have an absolute right to freedom of association that cannot be abridged by supervision conditions. Because King's argument is not adequately

developed, this Court need not reach it and the State need not respond to it. *See*, *e.g.*, *State v. Jones*, 2002 WI App 196, ¶ 38 n.6, 257 Wis. 2d 319, 651 N.W.2d 305.

If this court reaches this argument, it should hold that this constitutional right, like all others, can be limited so long as the supervision condition imposed is narrowly tailored and reasonably related to King's rehabilitation. In addition to non-internet methods of developing and strengthening interpersonal relationships, the condition allows King any internet use that his agent approves for these purposes.

IV. King is not entitled to sentence modification because he has not shown a new factor.

A. Standard of review and legal principles.

Wisconsin circuit courts have inherent authority to modify criminal sentences. *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828. A court may base a sentence modification upon the defendant's showing of a "new factor." *Id.* "Deciding a motion for sentence modification based on a new factor is a two-step inquiry." *Id.* ¶ 36. "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." *Id.* "Whether the fact or set of facts put forth by the defendant constitutes a 'new factor' is a question of law." *Id.*

"The existence of a new factor does not automatically entitle the defendant to sentence modification." *Id.* ¶ 37. "Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." *Id.* "In making that determination, the circuit court exercises its discretion." *Id.*

B. *Packingham* does not apply to conditions of supervision and therefore does not constitute a new factor.

Neither party addressed *Packingham* at King's revocation sentencing hearing. King argues that he is therefore entitled to a sentence modification because *Packingham* is relevant "in light of the conduct for which he was revoked and the court's rationale for imposing the sentence it did." (King's Br. 23.) He argues that the "court's sentencing after revocation and postconviction rationales conflicted with the holding announced in *Packingham*," and therefore he has established a new factor warranting sentence modification. (King's Br. 26.)

His argument is based on an incorrect premise, which is that *Packingham* holds that persons on supervision have an absolute constitutional right to access the internet. As explained above, that is not an interpretation that has been adopted by any court that has addressed the question.

Packingham did not magically turn all of King's prior violations into lawful acts, and it did not prohibit the conditions imposed in the new sentence.[7] It was therefore not highly relevant to the imposition of sentence, and is not a new factor.

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[7] At points in his brief, King appears to include arguments concerning the conditions imposed in his prior sentences (extended supervision and probation) along with arguments about the conditions imposed in the sentence under review (the sentence imposed Feb. 13, 2018, after probation was revoked). (*See* King's Br. 10, 15, 21.) He does not make a separate argument about the application of *Packingham* to the penalty for violating the conditions of the previous sentence. The focus of this appeal is the condition of extended supervision imposed by the order issued following the sentencing hearing on revocation. (R. 95; 117.)

CONCLUSION

This court should affirm the circuit court's order denying King's postconviction motion.

Dated this 17th day of March 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,612 words.

Dated this 17th day of March 2020.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 17th day of March 2020.

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