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STATE OF WISCONSIN

COURT OF APPEALS – DISTRCT IV

Case No 2019AP001642-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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Conditions of Extended Supervision Prohibiting Possession of Internet Devices and Access to Social Media Sites are Unconstitutional and the Result of an Erroneous Exercise of Discretion.

The state argues the challenged supervision conditions survive constitutional scrutiny because they do not impose a total ban on possessing internet capable devices or on all internet use. (State's brief pp. 12-13). The state is wrong. Mr. King purchasing an iPhone or similar device upon release from confinement would violate his supervision rules. The possibility that an agent may in the future permit access does not save the day as it implies the agent can bar access, which would render the conditions unconstitutional. The state argues the conditions do not violate the First Amendment because Mr. King is permitted "through public devices" to access the internet "for purposes of obtaining employment or performing any legitimate government functions such as filing taxes or renewing driver's license or license plates, etc." *Id.* (95:2). The state is wrong. The conditions do not survive constitutional scrutiny because they are not sufficiently narrowly tailored in that they do not guarantee access for religious, political, news, public safety, commercial/consumer, public discourse or other First Amendment-protected purposes unrelated to legitimate purposes of sentencing.

The state's argument that a majority of jurisdictions have not applied *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017), in the manner Mr. King proposes is not exactly true. *Id.* Mr. King cites *Packingham* primarily to demonstrate the significance the Court ascribes to government action limiting internet access as curtailing First Amendment rights, and the care that must be taken when doing so, even for sex offenders. *Packingham* recognizes the degree to which internet access and use permeates nearly all aspects of societal and political discourse—to the extent these days in the words of a recent Nobel Laureate, literally and metaphorically, "you don't need a weatherman to know which way the wind blows," but you do need the internet.[1] Moreover, courts that engage with *Packingham*'s legal analysis rather than its narrow factual holding interpret the case as Mr. King argues regarding supervision conditions that impermissibly curtail First Amendment rights. *See e.g. People v. Morger*, 2019 IL 123643, 2019 WL 6199600 (IL S. Ct. op. Nov. 21, 2019) (App. 101-12); *United States v. Eaglin*, 913 F.3d 83 (2nd Cir. 2019); *United States v. Holena*, 906 F.3d 288 (3rd Cir. 2018).

A. Relevant law and standard of review.

Wisconsin circuit courts have broad undefined discretion to impose "reasonable, appropriate, and legally correct" conditions on persons serving an extended supervision term. *State v. Hoppe*, 2014 WI

[1] Bob Dylan, *Subterranean Homesick Blues* (1965).

App 51, ¶ 7, 354 Wis. 2d 219, 847 N.W.2d 869; Wis. Stat. § 973.01(5). Generally, a court's discretionary decisions are accorded deferential review which, as a practical matter, means this court will affirm even tangential or seemingly counter-productive supervision conditions when merely a thin veneer or appearance of relevance exists to support legitimate sentencing goals. *Id.* However, supervision conditions that impinge on constitutional rights are different in that they (1) are not accorded deferential review, (2) must not be "overly broad" (i.e. they must be narrowly tailored) and (3) must be "reasonably related" (not just appear to be) to the purposes of sentencing. *State v. Stewart*, 2006 WI App 67, ¶ 12, 291 Wis. 2d 480, 713 N.W.2d 165. Whether a supervision condition violates a defendant's constitutional rights is a question of law this court reviews *de novo*. *Id.*

In cases analyzing the balance between protecting constitutional rights and the government's interest in imposing order through its prosecutorial power, the SCOTUS has recognized the degree to which the line between analog and digital reality has blurred, and how fully incorporated the internet is into nearly every aspect of society. One court has noted:

> As the Supreme Court recently reiterated, "cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society." *Carpenter v. United States*, __ U.S. __, 138 S.Ct. 2206, 2210, 201 L. Ed. 2d

> 507 (2018) (quoting *Riley v. California*, __ U.S. __, 134 S. Ct. 2473, 2478, 189 L. Ed. 2d 430 (2014)); *see also Packingham v. North Carolina*, __ U.S. __, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017). Although internet access through smart phones and other devices undeniably offers the potential for wrongdoing, to consign an individual to a life virtually without access to the Internet is to exile that person from society.

Eaglin, *Id.* 913 F.3d at 91.

Packingham notes regarding social media access "in the legitimate exercise of First Amendment rights" that not "just persons who have completed their sentence," but "[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means of access to the world of ideas, in particular if they seek to reform and pursue lawful and rewarding lives." *Packingham*, 137 S. Ct. at 1737. Thus, if the goal in a given case is protection of the public to prevent a supervised person from "preying on children," the court "must tailor its restriction to that end" and cannot bar First Amendment-protected "internet and computer uses that have nothing to do with preying on children." *Holena*, *Id.* 906 F.3d at 293).

Under this line of cases, as with limitations on physical movement, a court is free to set carefully delineated narrowly tailored restrictions limiting access to sites on the internet relevant to the legitimate goal of public protection. *E.g. State v. Simonetto*, 2000 WI App 17, 232 Wis. 2d 315, 606 N.W.2d 275 (condition barring sex offender from

going "where children may congregate" upheld.). But in "only highly unusual circumstances will a total Internet ban imposed as a condition of supervised release be substantively reasonable and not amount to a 'greater deprivation of liberty than is reasonably necessary' to implement the statutory purposes of sentencing." *Eaglin*, *Id.* 913 F.3d at 97.

B. The device and internet restrictions the court imposed on Mr. King are overbroad and not reasonably related to the goals of rehabilitation or public protection.

The gist of the state's argument seems to be that because *Packingham*'s factual holding is not directly on point the case is irrelevant and King loses. (State's brief pp. 11-12). Attorney Thompson in Mr. King's opening brief acknowledged, in what the state labels a "concession," that *Packingham*'s narrow factual holding does not expressly speak to the First Amendment rights of supervisees, as Packingham was a sex offender registrant and not supervisee. (State's brief p. 10). However, the state ignores *Packingham*'s language regarding applicability of its rationale in terms of the care that must be taken when restricting First Amendment rights not just for "persons who have completed their sentences" [i.e. sex offender registrants] but also for "convicted criminals—and in some instances especially convicted criminals" [i.e. persons on supervision] who "might receive legitimate benefits from these means for access to the world of ideas, in particular if they

seek to reform and to pursue lawful and rewarding lives." *Packingham*, 137 S. Ct at 1737.

The Illinois Supreme Court recently in *People v. Morger* persuasively explains why the *Packingham* Court's reference to barring access to all but "a limited set of websites" impermissibly limits exercise of First Amendment rights for supervisees and not just sex offender registrants. *People v. Morger*, *Id.* at ¶¶ 33-59 (App. 101-12). *Morger* surveys federal decisions and explains the *Packingham* Court's specific reference to its rationale's applicability to "convicted criminals" and "especially convicted criminals" should "carr[y] momentous weight," but is ignored by courts which limit *Packingham* to sex offender registry cases. *Id.* at ¶ 34. (App. 107). *Morger* references *United States v. Holena*, 906 F.3d 288 (3rd Cir. 2018), which has facts nearly identical to those presented at bar here, as persuasive authority establishing *Packingham*'s applicability to conditions of supervision.

In *Holena* the defendant, like Mr. King, was convicted of soliciting sex via internet communication from a law enforcement officer posing as an underage teenager. Holena, like Mr. King, after serving a prison term was released to supervision with conditions barring internet use without his agent's approval. Holena, like Mr. King, violated his supervision conditions twice; first by accessing the internet for non-criminal activities—in Holena's case going on line to update social media profiles and answer email, and then by logging into Facebook. Like Holena, Mr. King was re-incarcerated based on

the rules violations and not for committing new crimes. The *Holena* court ruled it could:

> …see no justification for stopping Holena from accessing websites where he probably will never encounter a child, like Google Maps or Amazon. The same is true for websites where he cannot interact with others or view explicit materials, like Dictionary.com or this Court's website.

Holena, 906 F.3d at 293. The court ruled the conditions unconstitutional because they were not sufficiently narrowly tailored to Holena's conduct and applied too "broadly to many internet and computer uses that have nothing to do with preying on children." *Id.*

The state here does not really meaningfully engage with Mr. King's First Amendment argument, and posits simply that because King communicated via the internet with the purported victim in his child enticement conviction (actually, a police officer) back in 2005, the court imposing a total or near total ban on internet use is *ipso facto* an appropriately narrowly tailored supervision condition. (State's brief pp. 12-13). The state is wrong. The state does not attempt to explain how barring or permitting King to be barred from access to sites *Packingham* identifies such as "Amazon.com, Washingtonpost.com and Webmd.com" or "Facebook, LinkedIn and Twitter" is a condition narrowly tailored to protect Mr. King's First Amendment rights or is reasonably related to the goal of public protection. *Packingham*, 137 S. Ct. at 1736-37.

The takeaway from *Packingham* is the Court's recognition that "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" which the First Amendment protects, often now are accessed, and sometimes are only accessible, via the internet and social media. *Id.* at 1737. *Packingham* recognizes the inadequacy of legacy modes of communication such as print media, broadcast television or radio, and land-line phones as pertaining to exercise of First Amendment rights.

With the advent of virtual town hall meetings and other exclusively on-line political activities or events, meaningful participation in political discourse requires internet access. News outlets have shifted content online, and many of the most important offer on-line access only. For example, *Wisconsin Watch*, by the Wisconsin Center for Investigative Journalism, is an on-line only entity, and would be the only place Mr. King would have access to articles highly relevant to his own situation such as *Cruel and Unusual: Rules Violations Cause 40% of Prison Admissions*, *State figures show supervision violations, not new crimes, drive prison admissions*, Izabela Zaluska, posted July 3, 2019. (App. 113-20). Moreover, as a practical matter, with the emergence of Amazon.com's dominance replacing superstores which previously displaced much of traditional local commerce, internet access is essential to access to commerce and information relating to commerce to meet one's basis needs. This was so even before the

advent of the current COVID-19 crisis, but is unquestionably true now.

The court's decision here to allow Mr. King "access through public devices for purposes of obtaining employment or performing any legitimate government functions" presupposes the existence of "public devices," as though internet-connected computer terminals exist somewhere like phone booths. They do not, particularly for convicted sex offenders. In this regard internet restrictions should not be treated differently from non-internet restrictions, and conditions impinging on constitutional rights in either realm must be narrowly tailored and reasonably related to the legitimate objectives of sentencing.

A court is free to impose supervision conditions which mandate monitoring internet activity, as sex-offender registry rules already do, and could impose conditions barring access to sites or activities akin to those that can be imposed in the physical world. *E.g. State v. Simonetto*, *Id.* 232 Wis. 2d 315, at ¶¶ 6-8 (prohibition barring child pornographer from "go[ing] where children may congregate" was reasonable and not overly broad). To be sure, protection of the public is most decisively achieved by incarceration. However, just as neither incarceration [*State v. Larson*, 2003 WI App 235, 268 Wis. 2d 162, 672 N.W.2d 322] nor broad physical banishment [*State v. Stewart*, 291 Wis. 2d 480] are sufficiently narrowly tailored supervision conditions, nor are conditions which impose total or near total banishment from the internet and social media.

For this same reason, the overly broad internet restrictions imposed on Mr. King also are not *reasonably* related to the purposes of sentencing. The justification for the restrictions presumably is public protection, but the breadth of the restrictions is not reasonably related to that end. As the court in *Eaglin* noted, "[i]n only highly unusual circumstances will a total internet ban imposed as a condition of supervised release be substantively reasonable and not amount to a 'greater deprivation of liberty than is reasonably necessary' to implement the statutory purposes of sentencing." *Eaglin*, 913 F.3d at 97.

The circuit court could have imposed narrowly tailored internet restrictions mandating real-time monitoring capability and barring Mr. King from internet sites or activities relevant to the sentencing goal of preventing King from preying on children. That is, the court could have imposed a condition barring Mr. King from using the internet to interact or communicate with children. *See State v. Sanders*, 2014AP2646 (Unpublished op. 6-6-2017) (App. 121-26) (supervision condition barring contact with children upheld). Instead, the court's rules are overly broad and leave too much undirected discretion to Mr. King's agent, who under the court-imposed conditions could bar Mr. King from all access except "through public devices for purposes of obtaining employment or performing…legitimate government functions…." (95:2). The supervision conditions thus impermissibly infringe on rights guaranteed to Mr. King under the First Amendment, and therefore must be vacated.

C. The supervision conditions violate Mr. King's right to freedom of association.

The state argues this court need not reach this issue claiming "King's argument is not adequately developed." (State's brief pp. 16-17). The state is wrong.

A conventional legal argument structure employs the IRAC method—an acronym for Issue, Rule, Analysis, Conclusion. Mr. King's opening brief states the issue: the internet restrictions imposed impermissibly infringe on Mr. King's right to freedom of association. (King's brief p. 15). King's brief cites multiple cases establishing the rule that the First Amendment includes a right to freedom of association. *Id.* pp. 16-17. King's brief argues that the conditions which guarantee internet access through public devices for job searching and conducting government business, or at his agent's discretion, impermissibly restrict the right because they are not narrowly drawn and reasonably related to legitimate sentencing goals. *Id.* pp. 9-21. King's brief states a conclusion: the conditions violate his constitutional rights and therefore should be vacated.

It is not clear what the state finds wanting. On the merits the state offers that Mr. King "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." (State's brief p. 16). True enough. But Mr. King made no such claim of an "absolute right."

When facts so warrant, a court can impose narrowly tailored reasonable restrictions limiting association with specific persons or groups of persons. *E.g. State v. Lo*, 226 Wis.2d 531, 599 N.W.2d 659 (Ct. App. 1999)(barring contact with "gang members."). But the court here did not do that and instead, as explained in the previous section, it imposed conditions that are overly broad and unreasonable, and which therefore impermissibly impinge on Mr. King's First Amendment rights.

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

Mr. King's probation was revoked for violating a condition that essentially imposed a complete ban on internet access or use. Specifically, Mr. King was revoked not for committing any new crime or for any activity involving children, but for accessing social media websites including Facebook, possessing internet capable devices, starting a property management business without agent approval, and initiating a relationship with an adult female via Facebook without agent approval. (80: 4-9). When confronted by his agent, Mr. King responded "You try to live without the internet." (80:5).

Although *Packingham* was decided shortly before Mr. King was revoked and sentenced, the case and its ramifications were unknowingly overlooked by the parties and the court. Specifically, Mr. King was revoked and resentenced for violating supervision conditions which impermissibly infringed upon his First Amendment rights.

The circuit court ruled there was no new factor because *Packingham* involved "someone who has served their sentence and then is a on the Registry and there's a statute." (118: 17). The state advances the same argument, that *Packingham* is inapposite, that it did not create "an absolute constitutional right to access to the internet," and "did not magically turn all of King's prior violations into lawful acts." (State's brief p. 18).

Mr. King does not argue any sort of unfettered "absolute right" to internet access exists, and does not suggest magic plays any role in the case. Mr. King argues that the court erred because the evolution of the law regarding the First Amendment and the internet was highly relevant to the sentence imposed and was overlooked, and the court ruling that the previous conditions imposed needed to be modified was inconsistent with its ruling that there was no new factor.

This court should find that the circuit court erred when concluding no new factor exists, and should remand for the circuit court to determine if the new factor warrants sentence modification.

CONCLUSION

Mr. King asks that this court vacate the supervision conditions impermissibly restricting internet access, rule that Mr. King presented a new factor for sentencing, and remand the case to the circuit court for determination of whether the new factor warrants sentence modification.

Dated this 17th day of April, 2020.

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 2,996 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 17th day of April, 2020.

Signed:

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A P P E N D I X

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