STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2019AP001642-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER J. KING, JR.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW AND APPENDIX

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ISSUES PRESENTED

1. Is the circuit court's order barring Mr. King from possessing any device capable of accessing the Internet while on extended supervision without agent permission, and barring access to the Internet except as approved by the agent other than on "public devices" to seek employment or perform government functions such as filing taxes or renewing a driver's license, insufficiently narrowly tailored and therefore overbroad and violative of King's First Amendment rights?

The circuit court at the conclusion of a postconviction hearing ruled the conditions did not violate Mr. King's constitutional rights, and denied Mr. King's motion to vacate the conditions. (118:17-18; App. 149-50).

The court of appeals ruled "the extended supervision conditions imposed by the circuit court that will restrict King's access to the Internet are not overly broad and do not improperly infringe King's First Amendment rights to freedom of speech and freedom of association." Slip Op. at ¶ 4. (App. 102). Regarding access contingent on agent approval, the court of appeals ruled it would be "in derogation of common sense" to believe a government agent would "use his or her discretion unreasonably." *Id.* at ¶ 55. (App. 123).

2. Did the court err in concluding the holding or rationale of *Packingham v. North Carolina*, 137 S.Ct. 1735 (2017), inapplicable to persons on supervision and therefore not a new factor for purposes of sentence modification?

After a hearing the circuit court denied Mr. King's motion for sentence modification. (118:17-18). (App. 149-50).

The court of appeals affirmed, ruling *Packingham* not controlling. Slip Op. at ¶ 80. (App. 132).

CRITERIA FOR REVIEW

This court should grant review to develop and clarify the law regarding a circuit court's discretion to impose supervision conditions relating to restricting Internet access that are not narrowly tailored to a legitimate sentencing purpose and which impermissibly impinge on supervisees' First Amendment rights. Wis. Stat. § 809.62(1r)(c). This is a rapidly developing area of law which requires this court's analysis and guidance to reject the imprimatur the court of appeals grants to draconian supervision conditions which do nothing but set up supervisees to fail and more importantly violate rights guaranteed by the First Amendment. The court should also grant review and rule clarification of the law regarding impermissible Internet restrictions was a new factor warranting resentencing.

STATEMENT OF FACTS

In 2005, Mr. King was charged with child enticement, use of a computer to facilitate child sex crime, misdemeanor possession of THC. (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 someone posing as 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).[1] In April 2007, the circuit court, the Honorable James Evenson presiding, sentenced King on use of computer conviction to four years of initial confinement and four years of extended supervision. (110:26; 58:1; 78:2).[2] On child enticement conviction, the court

[1] 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).

[2] 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

withheld sentence and placed Mr. King on ten years' probation, consecutive to the prison sentence. (110:26; 57:1; 78:1).

As a condition of extended supervision and probation, the court ordered 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 order amending 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 for application purposes only, per agent." (59:1).[3] 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. (59:1; 78:2).

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court's order, corrected judgments of conviction were entered. (78:1–3).

[3] 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).

While King was on extended supervision, he was revoked and re-confined twice for accessing the Internet and using social media, for operating 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. (80:5, 6).

Mr. King was released to supervision in Sauk County in 2014. (80:6). During this time King had difficulty finding employment and was homeless for a period of time. (80:6). In 2015, King 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. (80:6, 10).

Mr. King was discharged from extended supervision in July 2016, and he began his ten-year probation term. (80:6). When the veterans program ended in late 2016, King's agent directed him to return to Sauk County. (80:7). King lost his employment and he was placed on GPS monitoring because he was homeless and living in a camper. (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 averred that 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. (80:4–9). King was not charged with any new criminal offenses prior or subsequent to his revocation. (80:5–6, 9; 91:8 n.6).

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. (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 King is a discharged veteran who completed sex offender treatment. (117:28–29; App. 184-85).

The court acknowledged that Mr. King made significant efforts to obtain employment and find stability, and he was "bounc[ed] back and forth between Sauk and Rock County, and attempting to meet his probation rules." (117:30; App. 186). The court explained that the rules of 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. 186). 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 led to his charges. (117:31). It noted that the court previously made allowances for King to use the Internet to find employment, but he chose to have unfettered access. (117:32; App. 188).

The court sentenced Mr. King to four years of confinement and four years of extended supervision. (117:33; App. 189). It ordered that all conditions of probation previously in place were to be conditions of extended supervision. (117:33; App. 189).

Mr. King subsequently filed a postconviction motion asserting his extended supervision conditions regarding Internet usage should be removed because they were unconstitutionally overbroad. (91:1, 8–11). The motion also sought resentencing. (91: 1, 12–14). As an alternative to resentencing, King moved the court to reduce his sentence on the basis that the condition regarding Internet use that he violated was overbroad and unconstitutional under the rationale articulated in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). (91:1, 14–17).

After briefing, the court held a hearing on King's postconviction motion. (118). The court denied the motion for resentencing. (118:14; App. 146). Regarding the supervision condition restricting Internet use, the court determined that King's

First Amendment rights were not unconstitutionally constrained. (118:17; App. 149). Specifically, it found 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 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. 149-50). The court applied that same reasoning to deny King's motion to modify his sentence. (118:17–18; App. 149-50).

The court then acknowledged that modification of Mr. King's conditions of extended supervision 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. 150). The court left the record open to allow the parties to submit proposed conditions of supervision related to Internet use. (118:20–23; App. 152-55).

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. 193). The court's order modified 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. 194). The court's order further provided

that King's agent should not restrict King'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." (95:2; App. 194). An amended judgment of conviction consistent with the court's order was entered. (96; App. 195-97). King appealed. (98).

On appeal Mr. King renewed his arguments that the extended supervision conditions relating to Internet access violated rights guaranteed to him by the First Amendment and that he was entitled to resentencing based upon a new factor. The court of appeals acknowledged a split of authority regarding the applicability of *Packingham*'s holding to a person on supervision because the specific facts of that case involved restrictions imposed on a sex offender registrant. Slip Op. at ¶¶ 38-43 (App. 114-17). Though the Court in *Packingham* noted 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" [137 S. Ct. at 1737], the court of appeals here ruled *Packingham* inapplicable and rejected King's arguments on that basis. The court ruled conditions which granted Mr. King no personal right to access the Internet except through some sort of public device for purposes of gaining

employment or a government function such as filing taxes were sufficiently narrowly tailored and not overbroad. This was so because King could gain access for protected First Amendment use at the discretion of his agent, and it would be "in derogation of common sense" to suggest that an agent would unreasonably restrict such access. Slip Op. at ¶¶ 55, 71, 80.

Mr. King petitions this court for review.

ARGUMENT

I. Extended supervision conditions barring Mr. King from possessing Internet devices and access to social media sites, except at the discretion of his agent, were not sufficiently narrowly tailored to protect rights guaranteed to King under the First Amendment, and were therefore imposed as the result of an erroneous exercise of discretion.

The court of appeals makes a baseless claim that "[i]n asking to vacate portions of the extended supervision conditions, King attempts to re-write the history that was before the circuit court." Slip Op. ¶ 67. (App. 127). Nothing could be further from the truth. King acknowledges the nature of his conviction, and his struggle in failing to comply with what had been essentially a total ban on Internet use as a supervision condition, particularly after the transitional housing program for veterans he was in

ended and he became homeless. King acknowledges while he has engaged in no new criminal conduct, he nevertheless impermissibly and repeatedly accessed the Internet while attempting to feed, clothe and shelter himself and maintain his sanity while on supervision for a sex crime. King acknowledges the government's authority to heavily monitor his Internet activity, and to bar him from sites or activities relevant to the sentencing goal of preventing him from preying on children. The court of appeals, though, rejects what the SCOTUS and other courts recognize; that the world of ideas, of commerce, of information, of social interaction, has largely moved on-line, and is accessible only via the Internet and that overly restricting access violates rights guaranteed to all, including supervisees, under the First Amendment.

The court of appeals here fails to recognize that a supervision condition granting an agent near total discretion to bar King from the Internet except to apply for a job or file taxes is not a condition sufficiently narrowly tailored to a legitimate sentencing purpose and violates King's First Amendment rights, and therefore must be stricken or reconsidered to protect such rights. The court of appeals' decision is at odds with the rationale of *Packingham v. North Carolina*, 137 S.Ct. 1735, 1737 (2017), and decisions in other jurisdictions that have considered the issue of Internet restrictions for supervisees. *See e.g. State v. R.K.*, 232 A.3d 487 (N.J. Ct. App. 2020); *Matter of Sickels*, 469 P.3d 322 (WA Ct. App. 2020); *People v. Morger*, No. 123643,

2019WL6199600 (IL Nov. 21, 2019); and *Fazilli v. Commonwealth*, 835 S.E.2d 87 (VA Ct. App. 2019); & *Mutter v. Ross*, 811 S.E.2d 866 (WV 2018). This court should grant review and reverse.

A. Relevant law and standard of review.

Wisconsin circuit courts have a broad largely undefined discretion to impose "reasonable, appropriate, and legally correct" conditions on persons serving an extended supervision term. *State v. Hoppe*, 2014 WI App 51, ¶ 7, 354 Wis. 2d 219, 847 N.W.2d 869; Wis. Stat. § 973.01(5). Generally, a circuit court's discretionary decisions are accorded deferential review which, as a practical matter, means a reviewing court will affirm even seemingly counter-productive supervision conditions if but a thin veneer or appearance of relevance exists to support a legitimate sentencing goal. *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. must be narrowly tailored to a legitimate sentencing goal), 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 in 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.

United States v. Eaglin, 913 F.3d 83, 91 (2nd Cir. 2019).

In *Packingham* the Court noted 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." *United States v. Holena*, 906 F.3d 288, 293 (3rd Cir. 2018).

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.

As the court of appeals acknowledges at ¶ 15 the circuit court imposed as a condition of Mr. King's extended supervision that he not "possess device[s] capable of accessing the internet" except with "express permission of [his] agent," and that except for "access through public devices for purposes of

obtaining employment or performing any legitimate government functions" King may not access any other Internet site except "to the extent an manner as approved by [his] agent." (App. 115). What the court of appeals does not seem to recognize is that the order grants King's agent discretion to bar King from possessing any Internet-capable device and grants nearly unfettered discretion to bar King from accessing any Internet content including First Amendment-protected content such as that relating to news, religion, commerce, medicine, or politics, or anything else except for job applications and governmental functions like filing taxes or obtaining a driver's license.

In *Packingham* the Court underscored the significance it 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. While *Packingham*'s facts involved conditions imposed on a sex offender registrant and not a supervisee, the Court's rationale is written to suggest broader application, with the Court noting "[e]ven 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." 137 S.Ct. at 1737. Many courts, particularly those which engage with *Packingham*'s rationale rather than just the narrowest view of its holding, agree.

In *State v. R.K.*, 232 A.3d 487 (N.J. Ct. App 2020), the court surveyed conflicting opinions and ruled "we now conclude the logic expressed by the Supreme Court in Packingham applies to the social networking ban as a [community supervision] condition of R.K.'s supervised release." *Id.*, 232 A.2d at 500. The court ruled the restriction barring R.K. from Internet access except at the discretion of his agent "unconstitutionally overbroad because it completely denies access to R.K.'s ability to express himself in the protected forum of public debate through social networking." *Id.* at 501. The court ruled the "'escape valve' provision" of agent approval "is not sufficient to save the ban from constitutional fatality;" drawing an analogy to a statute which would be "unconstitutional if it gives a public official such broad powers 'that the exercise of constitutionally protected conduct depends on [the official's] own subjective views as to the propriety of the conduct." *Id.* at 501-02.

In this same vein, while the court in *Matter of Sickels*, 469 P.2d 322 (WA Ct. App. 2020), recognized *Packingham*'s narrow holding applied to registrants and not supervisees, it held that the "limitation of internet use to employment purposes is overly broad" for a supervisee convicted of the identical crime as Mr. King. *Id.* at 335, ¶ 52. The court ruled "[d]elegating authority to Mr. Sickels's supervising CCO to approve internet access does not solve the problem." *Id.* The court ruled the restriction was not sufficiently narrowly tailored, but indicated language suggested by the state along the lines of "No internet

use of websites including email, to contact minors, to gather information about minors, or access personal webpages of minors" would work and not be vague or overbroad. *Id.* at 334-35, ¶¶ 47, 53. *See also Mutter v. Ross*, 811 S.E.2d 866, 868 (WV 2018) ("Because Mr. Ross's condition of parole is broader than the statute struck down in *Packingham*, we find that it is an overbroad restriction of free speech in violation of the First Amendment).

The court in *Fazili v. Commonwealth*, 835 S.E.2d 87 (VA Ct. App. 2019), reached a similar conclusion. In that child sexual assault case the circuit court imposed a broad "condition of probation, that Fazili 'have no use of any device that can access the internet unless approved by his Probation Officer.'" *Id.* at 94. The reviewing court ruled without a sound articulable reason for imposing such a broad ban, the condition was improper. If there was a reason for not allowing Fazili access to First Amendment protected activities (e.g. news, commerce etc.) the sentencing court needed to so articulate that reason "or more narrowly tailor any internet-use restrictions to effectuate specific purposes related to probation." *Id.*

In *People v. Morger*, the Illinois Supreme Court 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. *Morger*, 2019WL6199600, at ¶¶ 33-59. *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. *Morger* references *United States v. Holena*, 906 F.3d 288 (3rd Cir. 2018), which has facts nearly identical to those presented 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 King, after serving a prison term was released to supervision with conditions barring Internet use without agent approval. Holena, like 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, 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 court of appeals here has essentially ruled because the specific narrow factual holding in *Packingham* applies to registrants and not supervisees, the rationale articulated therein does not carry the day. The court is saying because the SCOTUS has not ruled directly that supervisee's First Amendment rights cannot be broadly restricted or left to the subjective discretion of a supervising agent, conditions such as those imposed on Mr. King are constitutional until the SCOTUS says they are not. The court does not address or explain how barring King, 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 King's First Amendment rights or is reasonably related to the goal of public protection. *Packingham*, 137 S. Ct. at 1736-37. The court of appeals stating at ¶ 55 it would be "in derogation of common sense" to believe an agent would unreasonably restrict a supervisee's access to First Amendment-protected content via the Internet evinces a faith in human nature and in government agents granted unfettered power or discretion that is not borne out by reality. (App. 123).

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. Moreover, as a practical matter, with the emergence of Amazon.com's dominance displacing superstores, which previously displaced traditional local commerce, Internet access is essential to acquiring goods and information relating to commerce to meet one's basis needs. This was so before the advent of

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

A sentencing court is free to impose supervision conditions which mandate close monitoring of all of Mr. King's 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*, 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 is a condition which imposes total or near total banishment from the Internet and social media, or which grants access only via the subjective decisions of a supervising government agent.

For this same reason, the overly broad Internet restrictions imposed on 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. For example, such a restriction might possibly be reasonable for a person convicted of crimes related to computer hacking and the like, but not for a person like King who though he violated the previously imposed near total Internet ban, he did not do so in a manner that relates to his conviction for child enticement or committing new crimes.

The circuit court could have imposed narrowly tailored Internet restrictions mandating real-time monitoring capability and barring 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 view, interact with or communicate with children. Instead, the court's rules are overly broad and leave too much undirected discretion to 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). There simply is no legitimate basis to bar King from the Internet generally, or to grant King's agent discretion to ban King from First Amendment-protected activity not related to children.

The court of appeals reliance on *Krebs v. Schwarz*, 212 Wis. 2d 127, 568 N.W.2d 26 (Ct. App. 1997), and *State v. Miller*, 175 Wis. 2d 204,

499 N.W.2d 215 (Ct. App. 1993), to justify broad Internet restrictions subject to his agent's discretion is misplaced. Slip Op. ¶¶ 53-55. (App. 122-23). Both cases actually support King's position on appeal in that both involved narrowly tailored restrictions directly related to the crimes of conviction. In *Krebs* a defendant convicted of sexual assault was required to obtain agent approval prior to engaging in any intimate or sexual relationship. In *Miller* a defendant convicted of making harassing phone calls to women was required to obtain agent approval prior to making any call to a woman not related to him. Had the circuit court here imposed a similar condition requiring King to obtain agent approval prior to engaging with any child via the Internet, such a condition would have been perfectly reasonable and would not violate King's First Amendment rights.

The court of appeals states at ¶ 52 that "courts have recognized the obvious: requiring a supervising agent's approval of internet use is not a 'ban' on access to the internet." The courts in *State v. R.K.*, *Id.*; *Matter of Sickels*, *Id.*; and *Fazili v. Commonwealth*, *Id.* apparently then missed this "obvious" point. The fact is if Mr. King upon release borrows an iPhone and opens the Wall Street Journal's or his church's webpage, he will have violated his supervision conditions. The supervision conditions regarding Internet restrictions imposed here 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.

King below argued 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 his right to freedom of associate because the conditions are not narrowly drawn and reasonably related to legitimate sentencing goals. The state argued 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). Though King never made any claim regarding any sort of "absolute right," the court of appeals, essentially ruled against King on that basis. That is, the court ruled correctly that King conceded "the State can properly impose on supervisees restrictions limiting association with persons or groups," but incorrectly ruled that because a court can do so, the circuit court here did not err.

There is no doubt 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. Again, as noted in the previous section, it would have been reasonable for the court to impose a condition barring King from interacting with children

on the Internet. But as also explained in the previous section, the court's decision to impose a near total ban, or granting King's agent discretion to bar King from nearly all Internet activity, was overly broad and unreasonable, and therefore impermissibly impinged on 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. 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 about the transgressions 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. 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). While that is indeed *Packingham*'s narrow factual holding, the circuit court's ruling regarding a new-factor basis for resentencing is wrong.

The evolution of the law regarding the First Amendment and the Internet was highly relevant to the sentence imposed and was overlooked. The circuit court's ruling rejecting King's new factor argument is incongruous with its ruling that the previous conditions imposed needed to be modified. That is, the circuit court seemed to agree its previous total Internet ban was improper, but somehow there was no new factor.

The court of appeals did not engage with the issue beyond "*Packingham* is not controlling" and thus "the holding in *Packingham* was not overlooked by the circuit court in the imposition of King's sentence and is not a new factor." Slip Op. ¶ 80. (App. 132). The court is wrong. King's argument was not premised on the *Packingham*'s narrow holding, but on the premise articulated in *Packingham* and other cases that a near total ban on Internet access violated King's First Amendment rights, and that fact was overlooked by the sentencing court.

CONCLUSION

For the above-stated reasons, Mr. King asks that this court grant review and rule as argued above that the extended supervision conditions imposed violate rights guaranteed to King under the First Amendment and rule King is entitled to resentencing.

Dated this 19th day of October, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,985 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 19th day of October, 2020.

Signed:

JOSEPH N. EHMANN
Regional Attorney Manager

APPENDIX

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