STATE OF WISCONSIN

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

DISTRICT II

Case No. 2024AP581-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHAN JAMES PETERSEN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE ANTHONY G. MILISAUSKAS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

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ISSUES PRESENTED

1. Is Defendant-Appellant Jonathan James Petersen judicially estopped from challenging, or did he forfeit the right to challenge, the "no social media" condition of his extended supervision when he agreed to the condition at sentencing?

When the prosecutor asked the court to impose as a condition of Petersen's extended supervision that he have no access to social media, defense counsel agreed that the condition was appropriate at least until Petersen demonstrates that he can use it responsibly. Accordingly, the court ordered "no social media" as a condition of his extended supervision.

Petersen moved postconviction to modify the condition to allow him to access social media with the approval of his agent.

This Court should hold that Petersen is judicially estopped from taking inconsistent positions at sentencing and postconviction, or that he forfeited the right to review of the trial court's order denying his motion to modify the "no social media" condition when he did not object and expressly agreed to the condition at sentencing.

2. Did the trial court properly exercise its discretion when it imposed as a condition of Petersen's extended supervision that he have no access to social media sites?

The trial court imposed as a condition of the extended supervision portion of Petersen's sentence for stalking with a dangerous weapon, kidnapping with a dangerous weapon, and making terrorist threats with a dangerous weapon, that he have no access to social media sites.

This Court should hold that the trial court properly exercised its broad discretion when it imposed the "no social media" condition on Petersen's extended supervision. This was a reasonable and appropriate condition because

Petersen's use of social media sites to threaten and harass the victim was an important component of his stalking behavior culminating in his extremely dangerous criminal actions while armed that threatened the lives of the targeted victim and many others.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State agrees with Petersen that oral argument and publication are not warranted.

STATEMENT OF THE CASE

On June 13, 2022, Petersen walked into a Kwik Trip gas station and convenience store armed with a knife and brandishing what appeared to be an AR-15 gun. (R. 9:6–7.) He was looking for FEP, a former co-worker who rejected his romantic advances in person and on social media for several months. (R. 9:9–10.) Although FEP had blocked Petersen's persistent efforts to contact her via social media, a person with a username similar to Petersen's made abusive comments on her posts, then deleted the comments, and deleted the account. (R. 9:10.) FEP obtained a two-year restraining order against Petersen on April 18, 2022. (R. 9:9.)

FEP tried to hide when Petersen entered the Kwik Trip store on June 13 but he found her and pointed the gun in her face. (R. 9:8–9.) While Petersen held FEP at gunpoint, panicked customers and employees hid or fled and called police. When police arrived, they convinced Petersen to put down the gun, but he held the knife to his throat threatening suicide and pleading with officers to shoot him. Officers were able to subdue Petersen and arrest him without injury to himself, police, or anyone else inside the store. (R. 9:7–8.) Petersen told police that, after completing his mission at Kwik Trip, he planned to engage in the same sort of terrorist actions at a Pick 'n Save store where he used to work because

he had an issue with a former co-worker there as well. (R. 9:9.) The gun that appeared to be an AR-15 was actually a facsimile BB gun modified to make it look real. (R. 9:8.)

The State charged Petersen with 18 counts of making terrorist threats while using a dangerous weapon, one count of stalking FEP while using a dangerous weapon, one count of false imprisonment of FEP while using a dangerous weapon, and one count of knowingly violating a harassment restraining order while using a dangerous weapon. (R. 9; 13.)

Petersen pled guilty to an amended information that charged one count of stalking while using a dangerous weapon, one count of false imprisonment while using a dangerous weapon, and two counts of making terrorist threats while using a dangerous weapon. (R. 19; 45:8–9.) The charge of knowingly violating a harassment restraining order (R. 19:2), was dismissed but read into the record for sentencing purposes (R.45:2, 13). On the Plea Questionnaire /Waiver of Rights form he filled out and signed, Petersen acknowledged "that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court." (R. 18:2.) The court found a factual basis for the plea "based upon the Defendant's statement here in Open Court." (R. 45:14.)

The court imposed a global sentence on the three counts totaling five years and six months of initial confinement in prison followed by six years of extended supervision. (R. 30:1–2; 35:28–29.)

At sentencing, the prosecutor asked the court to impose as a condition of extended supervision that Petersen not be allowed to access social media sites, "given the description of his usage of social media to harass [FEP] and then how he was creating fake social media to continue pursuing her against her wishes." (R. 35:12.) Defense counsel agreed that

this condition recommended by the State was "appropriate." (R. 35:19.) "He shouldn't use social media until he can demonstrate that he can use it responsibly without harassing other people," counsel stated. (R. 35:19.) The trial court agreed and imposed among other conditions, "No weapons of any kind . . . and no social media." (R. 35:30–31.)

Petersen filed a postconviction motion seeking modification of the "no social media" condition of extended supervision, "to allow social media with agent approval." (R. 48:7.) He argued that the condition imposed by the trial court was "overly broad." (R. 48:7–9.) The trial court denied this aspect of the motion at a non-evidentiary hearing held on January 22, 2024. (R. 58:11–13.)

The prosecutor explained why he requested the "no social media" condition: "FEP had reported blocking him on social media. When that occurred he started showing up where she worked. And he would also put things on social media about her. Had multiple accounts that he would use to harass her during the pendency of the stalking she reported." (R. 58:6.) Petersen did not dispute the accuracy of that statement.

The prosecutor explained further that leaving it up to the supervising agent to monitor Petersen's access to social media sites would be inadequate because "the Department of Corrections has admitted they have no way to monitor it." (R. 58:7.) Access to social media with the agent's approval will not adequately "protect other potential victims who [Petersen] feels slighted by for not pursuing relationships with him." (R. 58:7.) The condition, he argued, is not overly broad and is reasonably related to Petersen's rehabilitation. (R. 58:7–8.)

Defense counsel asked the court to modify the condition "to give Mr. Petersen's agent some oversight, some purview on this so they can monitor what sites he is accessing whether or not the DOC believes that those sites are social media." (R.

58:9.) Counsel noted that sex offenders must provide agents with their usernames and passwords for accounts like Facebook. (R. 58:9.) In response, the court pointed out that Petersen cannot access any social media while serving the confinement portion of his sentence. Defense counsel then answered "yes" to the court's question whether he wanted the condition modified to provide that, "when he goes on supervision . . . no social media unless allowed by the Probation [sic] Agent." (R. 58:10.)

Because the condition would not go into effect for several years, the court opted to reserve ruling until "he is ready to go on probation [sic]." (R. 58:11.) Defense counsel argued in response that the court lacked the authority to hold the condition in abeyance until Petersen begins extended supervision. (R. 58:12.) To resolve this issue, the prosecutor suggested that the court simply deny the motion to modify the condition. Petersen can file another motion to modify when it comes time for him to begin serving the extended supervision portion of his sentence. (R. 58:12.) The trial court agreed and denied the motion. It ruled as follows:

> [Petersen] was involved with the victims in social media usage that was disturbing, creating fake accounts using comments and deleting them. That was a concern for the Court at Sentencing, but like I said, he is able to refile that Motion. I will make that Finding when he is ready to go on Supervision because that's when it would effect [sic] the Defendant and the Court would have more information as to the Defendant's participation in Challenge Incarceration. And his activity in the prison system.

(R. 58:12–13.)

Petersen appeals from the judgment and order. (R. 59.)

STANDARD OF REVIEW

This Court reviews de novo the issue whether a defendant adequately preserved or forfeited his right to appellate review of a particular claim. *State v. Coffee*, 2020 WI 1, ¶ 17, 389 Wis. 2d 627, 937 N.W.2d 579.

The issue whether Petersen should be judicially estopped from taking inconsistent positions in legal proceedings is addressed to the trial court's discretion. *State v. English-Lancaster*, 2002 WI App 74, ¶ 18, 252 Wis. 2d 388, 642 N.W.2d 627.

The trial court has broad discretion to impose reasonable and appropriate conditions of extended supervision. *State v. King*, 2020 WI App 66, ¶ 20, 394 Wis. 2d 431, 950 N.W.2d 891. "[W]e generally 'review such conditions 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.'" *Id.* ¶ 25 (citation omitted).

This Court independently reviews the question of law whether a condition of extended supervision violates the defendant's constitutional rights. *King*, 394 Wis. 2d 431, ¶ 25. A content-neutral condition is subject to intermediate judicial scrutiny: it will be upheld if it is narrowly tailored to serve a legitimate state interest. *Id.* ¶ 23.

ARGUMENT

I. This Court should hold that Petersen is judicially estopped from challenging, or forfeited his right to challenge, the "no social media" condition of extended supervision when he agreed to it at sentencing.

A. Petersen is judicially estopped from taking inconsistent positions in legal proceedings.

Petersen argues that imposition of the "no social media" condition to help rehabilitate him and to protect the public "is not a conclusion that a reasonable judge would reach under the facts and circumstances here." (Petersen's Br. 14.) That is the exact opposite of what Petersen told the court through counsel at sentencing. Petersen assured the court that the condition was "appropriate." (R. 35:19.)

As noted above, the prosecutor asked the court at sentencing to impose a condition of extended supervision banning Petersen's access to social media, "given the description of his usage of social media to harass [FEP] and then how he was creating fake social media to continue pursuing her against her wishes." (R. 35:12.) Defense counsel agreed that this condition as recommended by the State was "appropriate." (R. 35:19.) "He [Petersen] shouldn't use social media until he can demonstrate that he can use it responsibly without harassing other people," counsel stated. (R. 35:19.) The trial court agreed and imposed among other conditions of extended supervision, "no social media." (R. 35:30–31.)

Postconviction, Petersen argued for the first time that the court violated his constitutional rights in not allowing him access to social media while on extended supervision, and it should now "allow social media with agent approval." (R. 48:7.) This Court should hold that Petersen is judicially estopped from taking these diametrically opposed positions regarding the "no social media" condition.

Wisconsin's judicial estoppel rule is an equitable principle that precludes a party from adopting inconsistent positions in legal proceedings. *English-Lancaster*, 252 Wis. 2d 388, ¶ 18. "The purpose of judicial estoppel is to preserve the integrity of the judicial system and prevent litigants from playing 'fast and loose' with the courts." *Id.* (citation omitted). "Judicial estoppel is an equitable rule applied at the discretion of the court to prevent a party from adopting inconsistent positions in legal proceedings." *Id.* The rule "applies to inconsistent positions taken in judicial actions and proceedings." *In re H.N.T.*, 125 Wis. 2d 242, 253, 371 N.W.2d 395 (Ct. App. 1985).

In *State v. Michels*, 141 Wis. 2d 81, 414 N.W.2d 311 (Ct. App. 1987), the defendant was charged with and tried for second-degree murder. He requested and received a jury instruction on the lesser-included offense of manslaughter, heat of passion, based on his argument that the evidence supported it. *Michels*, 141 Wis. 2d at 97. On appeal, Michels argued that there was insufficient evidence to support the jury's verdict finding him guilty of manslaughter, heat of passion. *Id.* This Court held that he was judicially estopped from making that argument because it was directly contrary to the position he took at trial.

> Michels argues that the evidence is insufficient to support his conviction for manslaughter, heat of passion. The manslaughter, heat of passion charge was, however, submitted to the jury at Michels' request as a lesser-included offense of second-degree murder. In making this request, Michels argued that there existed sufficient evidence to support his conviction on the lesser charge. Consequently, we conclude that Michels is judicially estopped from raising this issue because it is directly contrary to that argued in the trial court.

Id. at 97–98 (citation omitted).

The same reasoning applies here. This Court should apply the judicial estoppel rule to prevent Petersen from

advocating for one position at sentencing and the opposite position on postconviction review and appeal. It will preserve the integrity of the judicial system for this Court to avoid having to decide a First Amendment claim not raised at sentencing, and having to review the trial court's discretionary decision to impose a condition of extended supervision that Petersen agreed was "appropriate."

B. Petersen forfeited his right to appellate review of the order denying his motion to modify the condition.

Petersen did not object to the "no social media" condition at sentencing. He agreed with the prosecutor that this condition was "appropriate." (R. 35:19.) The court agreed and imposed it. Petersen's failure to object to the condition as unconstitutional, and his statement to the court fully embracing it at sentencing, works as a classic forfeiture of his right to appellate review of his constitutional challenge to the condition.

Failure to timely object generally forfeits appellate review of an error, even an error of constitutional dimension. *E.g.*, *State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis. 2d 486, 611 N.W.2d 727; *see State v. Pinno*, 2014 WI 74, ¶¶ 8, 56–68, 356 Wis. 2d 106, 850 N.W.2d 207 (the right to appellate review of even a structural constitutional violation may be forfeited by the failure to timely object). "The forfeiture rule fosters the fair, efficient, and orderly administration of justice." *Coffee*, 389 Wis. 2d 627, ¶ 19.

To properly preserve an objection for review, the litigant must "articulate the specific grounds for the objection unless its basis is obvious from its context . . . so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." *State v. Agnello*,

226 Wis. 2d 164, 172–73, 593 N.W.2d 427 (1999) (citations omitted).

Petersen could have opposed the prosecutor's recommendation to ban social media access at sentencing. Instead, he agreed with it. Petersen could have argued that banning access to social media would violate his First Amendment rights to free speech and association. He did not make that argument. Or, Petersen could have asked the court to allow him access to social media while on extended supervision, but subject to his agent's approval. He did not request that either. Instead, Petersen inexplicably waited until after sentencing to challenge the condition.

By waiting until after sentencing to raise his constitutional challenge, Petersen deprived the trial court of the opportunity to determine before it imposed the condition whether it would be unconstitutional. The court could have better explained why access to social media with the agent's approval would not adequately aid in Petersen's rehabilitation or protect the public. Or, it may have been convinced to impose a condition that was not as broad. At the very least, the court could have clarified the boundaries of its "no social media" condition if Petersen convinced it that the condition goes too far. Instead, Petersen agreed with the prosecutor's recommendation to ban access to all social media sites until he proves that he can access them responsibly. (R. 35:19.) The court followed the parties' joint recommendation.

This Court should summarily affirm on the ground that Petersen either is judicially estopped from taking inconsistent positions, or he forfeited his right to appellate review of the trial court's order denying his postconviction motion to modify the "no social media" condition of extended supervision. This ruling will not, as discussed at "II. C." below, prevent Petersen from challenging the condition when it becomes ripe for review for reasonableness and appropriateness after he completes the initial confinement portion of his sentence.

C. The State is not estopped from arguing estoppel or forfeiture.

Petersen may argue in his reply brief that the State is itself estopped from making an estoppel or forfeiture argument because it did not argue either one postconviction. That is unavailing given that Petersen may have gotten the court to change or eliminate the condition had he simply brought his constitutional concerns to the court's attention at sentencing before it imposed the condition.

Moreover, Petersen in his motion never acknowledged the inconsistent position that his attorney took at sentencing when he agreed that the condition was appropriate. He does not acknowledge it here either. Petersen also failed to develop a First Amendment challenge in his motion. He merely argued that the condition was "overly broad" (R. 48:7), and improperly "banished" him from social media (R. 48:7–8). The only time Petersen specifically mentioned that the condition violated his "First Amendment rights to expression and association" was at the tail end of his motion. (R. 48:9.)

The trial court denied the motion without reaching the merits of his constitutional challenge. It held instead that Petersen may challenge the reasonableness and appropriateness of the condition when his term of extended supervision begins. (R. 58:12–13.) By applying judicial estoppel or forfeiture now, this Court will avoid having to decide a First Amendment challenge that should have been raised at sentencing and was not fully developed in Petersen's postconviction motion.

In any event, as discussed at "II. C." below, Petersen will still be able to challenge the condition when the issue becomes ripe after completion of the initial confinement portion of his sentence, and this Court will be in a far better position to review it for reasonableness and appropriateness. Depending on what happens before then, neither the lower

court nor this Court may ever have to decide whether the condition as originally imposed violated the First Amendment.

II. The trial court properly exercised its discretion when it imposed the reasonable and appropriate condition that Petersen is not allowed access to social media sites while on extended supervision.

Petersen argues that the "no social media" condition of extended supervision is both unreasonable and unconstitutional. (Petersen's Br. 8–14.) He is wrong on both counts.

The condition is reasonably related to Petersen's rehabilitation and to public protection because he used both real and fake social media accounts to harass, threaten, and stalk the victim. This obsessive behavior culminated in Petersen's armed encounter with the victim and the acts of terrorism threatening the lives of many others at the Kwik Trip store on June 13, 2022.

The condition is constitutional. As a convicted felon serving a sentence, Petersen's constitutional protections are greatly limited. He had no right of access to social media while serving the confinement portion of his sentence. It was reasonable for the court to keep that ban in place throughout the extended supervision portion of his sentence.

If circumstances change, Petersen or the Department of Corrections may petition the court to modify the condition when it comes time for him to begin serving the extended supervision portion of the sentence.

A. The trial court may impose reasonable and appropriate conditions of extended supervision including one that restricts access to social media sites.

The trial court has broad discretion to impose what it finds to be reasonable and appropriate conditions on the extended supervision portion of a criminal sentence. Wis. Stat. § 973.01(5); *King*, 394 Wis. 2d 431, ¶ 20. The condition need not relate directly to the offense of conviction so long as it is reasonably related to the purposes of extended supervision: protection of the public and rehabilitation of the offender. *State v. Miller*, 2005 WI App 114, ¶ 13, 283 Wis. 2d 465, 701 N.W.2d 47. "A condition of supervision is reasonably related to a defendant's rehabilitation if the condition 'assists the convicted individual in conforming his or her conduct to the law.'" *King*, 394 Wis. 2d 431, ¶ 22 (citations omitted).

"As instructed by the supreme court, our discussion must include an 'individualized determination that the [extended supervision] condition was necessary based on the facts in this case,' and we must determine whether the condition is overly broad in light of the history and actions of this particular" defendant. *Id.* ¶ 58 (alteration in original) (citation omitted).

A condition of extended supervision is constitutional if it is not overly broad, it serves to protect the community and the victim, and it is reasonably related to the defendant's rehabilitation. *State v. Rowan*, 2012 WI 60, ¶¶ 4, 10, 341 Wis. 2d 281, 814 N.W.2d 854.

> It is also appropriate for circuit courts to consider an end result of encouraging lawful conduct, and thus increased protection of the public, when determining what individualized probation, extended supervision, or parole conditions are appropriate for a particular person. Unsurprisingly, public safety is often mentioned in connection with the goal of rehabilitation: decreased criminality and greater

> public safety are logically connected to successful rehabilitation efforts.

Id. ¶ 18 (footnote omitted).

Convicted felons have only a conditional liberty interest when released under supervision and they do not enjoy the same constitutional protections as do citizens who are not convicted. *King*, 394 Wis. 2d 431, ¶ 20. The State has a legitimate interest in restricting the rights of those convicted of crimes. *Meachum v. Fano*, 427 U.S. 215, 224–25 (1976). For instance, the State may severely limit a convicted individual's right to travel. *Jones v. Helms*, 452 U.S. 412, 419 (1981). The State may do so both to protect the community and rehabilitate the offender. *Griffin v. Wisconsin*, 483 U.S. 868, 874–75 (1987); *see Predick v. O'Connor*, 2003 WI App 46, ¶ 18, 260 Wis. 2d 323, 660 N.W.2d 1 (The reviewing court considers the "facts, circumstances and total atmosphere" of the individual case to determine whether geographical restrictions are reasonable and appropriate.).

Petersen bears the burden of proving that there is sufficient cause to modify or remove the condition of his extended supervision. *King*, 394 Wis. 2d 431, ¶ 24.

B. The "no social media" condition is reasonably related to Petersen's rehabilitation, it protects the public while he is on extended supervision, and it is reasonably limited in scope.

Petersen must prove that "the condition is overly broad in light of the history and actions of this particular" defendant. *King*, 394 Wis. 2d 431, ¶ 58. The condition of Petersen's supervision was narrowly tailored to serve legitimate state interests. *Id.* ¶ 23. The court only barred Petersen from accessing interactive social media sites such as Facebook and Twitter (now "X"), and only while he is on extended supervision. It only barred him from accessing social media sites that enable him to interact with other persons to

prevent a repeat of what happened here: After being blocked by FEP on social media because he kept harassing her, Petersen created fake accounts to further harass her and then took down those fake accounts. (R. 9:10.)

Petersen also completely ignored a restraining order obtained by FEP in Kenosha County circuit court two months before his armed threat on her life and his terrorist threats to others at the Kwik Trip store. (R. 9:9.) The restraining order prohibited any contact of any kind with FEP. The restraining order only emboldened Petersen, as evidenced by his relentless efforts after it was issued to contact her on social media, but now surreptitiously, as well as in person. It was reasonable for the court to believe that Petersen might use social media to again contact her while on extended supervision.

Petersen complains that the court could have narrowed the condition to ban only his use of social media to contact FEP "and all of the other victims." (Petersen's Br. 10–11.) This modification would not have been sufficient or realistic. The need to protect the public demanded more. The condition did not have to be the least restrictive means of advancing the legitimate state interests in play here so long as it was reasonably related to protecting those interests that might not otherwise be successfully achieved without the condition. *King*, 394 Wis. 2d 431, ¶ 23.

Petersen complains that he "has been effectively banished from social media to protect a handful of victims." (Petersen's Br. 10.) As originally charged, there were at least 18 victims of his terrorist threats. (R. 9; 13.) Even assuming FEP and 18 other victims is deemed to be only a "handful" of people, prohibiting Petersen's access to social media to protect not only them but anyone else in the community, and only while he is on extended supervision, is eminently reasonable. Petersen fails to explain why it is not.

Rather than list FEP and the 18 people that Petersen could not contact, it was reasonable for the court to disallow any social media contact with anyone. The fact that Petersen did not use social media "to plan or perpetuate [sic] his activity" (Petersen's Br. 11), is neither here nor there. He used social media to repeatedly harass and threaten the victim. He resorted to using fake accounts and fake usernames when she blocked him. He blatantly ignored a court restraining order banning any contact whatsoever with FEP. He reacted violently after FEP blocked him on social media and obtained the restraining order. In short, Petersen's interactions with FEP on social media appear to have been a significant impetus for his terrorist acts.

As the prosecutor argued, there is every reason to believe that Petersen might engage in similar pernicious social media activity whenever he feels slighted by another potential victim in whom he develops a romantic interest. (R. 58:7.) Being "blocked" and subjected to a restraining order only increases Petersen's rage and the danger he poses, as happened in this case. Anyone who resorts to acts of terrorism and threatens a mass shooting merely because he was "blocked" on social media by a love interest cannot be trusted to behave while communicating with anyone on social media sites. It was reasonable for the court to prevent this from happening again at least while Petersen is on extended supervision.

The condition furthers Petersen's rehabilitation. It eliminates the temptation to use social media to harass and threaten others, increasing the likelihood that Petersen will responsibly use social media when his six years on extended supervision are done. Petersen will then be free, like any other citizen, to access social media sites as soon as his sentence is completed.

In *King*, the circuit court imposed a condition of extended supervision that restricted the defendant's access to

any computer or cell phone with internet access. 394 Wis. 2d 431, ¶ 13. The court then modified the condition postconviction allowing him to "possess device(s) capable of accessing the internet only with the express permission of the defendant's agent" and allowing him access to the internet "only to the extent and manner as approved by the defendant's agent." The agent "shall not withhold" the defendant's internet access "for purposes of obtaining employment or performing any legitimate government function such as filing taxes or renewing [a] driver's license or license plates, etc." *Id.* ¶ 15 (alteration in original). The court also required the defendant to provide his agent with the names of every e-mail account he uses and "the internet address of every website he creates or maintains," his usernames, and the name and address of any "internet profile he creates, uses, or maintains." *Id.* "To summarize, the internet conditions do not bar King from possessing devices capable of accessing the internet, and King may access the internet. To do either, King must have the prior approval of his DOC agent, and the agent is restricted to some degree, as noted in paragraph 2 of the conditions, in his or her ability to withhold approval." *Id.* ¶ 31.

This Court upheld those conditions as reasonable, appropriate, and narrowly-tailored against the same challenges to the "no social media" condition that Petersen lodges here. *King*, 394 Wis. 2d 431, ¶¶ 45–75. Those strict conditions on internet access served the dual state interests of rehabilitating the offender and protecting the public. *Id.* ¶¶ 46–67. They were sufficiently narrow to serve those legitimate state interests without unduly impeding the defendant's limited First Amendment rights to free speech and association as a convicted offender then serving a sentence. *Id.* ¶¶ 68–75.

The same reasoning supports the condition imposed by the trial court here. Given the aggravated facts and the

disturbing role that social media interaction played here, the "no social media" condition was, as defense counsel acknowledged, "appropriate." (R. 35:19.) And, again, Petersen's constitutional protections are greatly limited because he is a convicted felon serving a prison sentence.

Petersen's reliance on *Packingham v. North Carolina*, 582 U.S. 98 (2017), for the proposition that the "no social media" condition is overbroad in violation of the First Amendment is misplaced. (Petersen's Br. 12–14.) There, the Court struck down a North Carolina statute that banned registered sex offenders from accessing social media sites even after they had completed their sentences and were no longer under state supervision. *Id.* at 101. Packingham violated the statute when he posted on Facebook about a traffic ticket after he had completed his sentence. *Id.* at 102–03.

The *Packingham* decision does not apply to a convicted felon such as Petersen who is still serving his sentence on extended supervision. *King*, 394 Wis. 2d 431, ¶¶ 37–38 (and cases cited therein). "We conclude, as have numerous courts, that the Court's holding in *Packingham* does not control the issue of the constitutionality of internet access supervision conditions ordered by a court as part of a sentence for a crime." *Id.* ¶ 43.

The condition is therefore reasonably related to Petersen's need for rehabilitation, it protects the public including any of Petersen's love interests from harassment and threats, and it is appropriately limited in scope consistent with those purposes. Petersen will be free, unlike the defendant in *Packingham*, to access social media sites as soon as his sentence is completed.

Petersen insists that the condition amounted to his "banishment" from social media akin to the banishment of someone from an entire geographic area. (Petersen's Br.

10−12.) This is an overstatement. The condition was not "banishment" from the internet at all. It was limited to social media sites and only during the term of Petersen's extended supervision. *See King*, 394 Wis. 2d 431, ¶ 52 ("requiring a supervising agent's approval of internet use is not a 'ban' on access to the internet").[1]

Moreover, the court did not as in *King* bar Petersen from accessing the internet; it only barred him from having or accessing social media accounts. (R. 58:7.) The exact parameters of the condition are not, however, clear because Petersen did not ask the court to clarify its parameters either at sentencing or even postconviction. Presumably, Petersen still can watch YouTube videos or check the weather online.

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[1] Even total "banishment" may be appropriate under proper circumstances. In *State v. Nienhardt*, 196 Wis. 2d 161, 164–66, 537 N.W.2d 123 (Ct. App. 1995), this Court upheld a condition of probation banishing the defendant from the city of Cedarburg for making harassing telephone calls to one Cedarburg resident, where there was evidence that she also was seen stalking the victim, and "had engaged in a persistent pattern of harassing phone calls in addition to those she was convicted of." This Court held that the banishment condition was reasonable and appropriate because it would aid in the defendant's rehabilitation. *Id*. at 168. The restriction on her right to travel in Cedarburg was "no more than an inconvenience." *Id*. at 169.

In *Predick v. O'Connor*, 2003 WI App 46, 260 Wis. 2d 323, 660 N.W.2d 1, this Court upheld a court order banishing the defendant from all of Walworth County because the victims needed a "zone of protection." *Id*. ¶ 1; *see also State v. Rowan*, 2012 WI 60, ¶¶ 11–19, 341 Wis. 2d 281, 814 N.W.2d 854 (upholding a condition of supervision that allowed police to search the defendant's person, vehicle, or residence for firearms at any time, without reasonable suspicion); *State v. Oakley*, 2001 WI 103, ¶¶ 20–21, 245 Wis. 2d 447, 629 N.W.2d 200 (upholding a condition that prohibited the defendant from having more children unless he proved the ability to support current and expected children).

The trial court properly exercised its discretion. The restriction on Petersen's access to social media sites while on extended supervision was based on the court's "individualized determination." *Rowan*, 341 Wis. 2d 281, ¶ 4. It was reasonable and appropriate given the "facts, circumstances and total atmosphere" of this case. *Predick*, 260 Wis. 2d 323, ¶ 18. The condition was necessary to both protect the community and assist Petersen in conforming his conduct to the law. *King*, 394 Wis. 2d 431, ¶ 22. It was sufficiently narrow to serve those legitimate state interests. *Id.* ¶ 23.

Petersen failed to prove that this was not a reasonable and appropriate condition of his extended supervision. *Id.* ¶ 24.

C. Petersen or his agent may move to modify the condition when the issue is ripe after he completes the confinement portion of his sentence.

Petersen is not without remedy if this Court affirms. Petersen, or his agent on his behalf, may move to modify the "no social media" condition when it comes time for him to commence the extended supervision portion of his sentence. The trial court will then entertain the motion when the issue is ripe. (R. 58:12–13.)

The trial court may modify the condition of Petersen's extended supervision to allow social media access subject to supervision by the Department of Corrections only after Petersen or the Department formally petitions the court to so modify it pursuant to Wis. Stat. § 302.113(7m). *State v. Williams-Holmes*, 2023 WI 49, ¶ 12, 408 Wis. 2d 1, 991 N.W.2d 373. As our supreme court has explained:

> The statutes also provide that conditions imposed by the court for both extended supervision and probation are not set in stone; they can be modified. See Wis. Stat. §§ 302.113(7m)(a); 973.09(3)(a). This occurs via a formal process. A party seeking "to modify any

> conditions of extended supervision set by the court"—and modification can be requested by DOC or the person subject to extended supervision—"may petition the sentencing court" to do so. § 302.113(7m)(a). The statute then provides various processes, standards, and restrictions governing the sentencing court's consideration of the petition. Ultimately, the court can grant the petition only "if it determines that the modification would meet the needs of the department and the public and would be consistent with the objectives of the person's sentence." § 302.113(7m)(c).

Williams-Holmes, 408 Wis. 2d 1, ¶ 12 (footnote omitted).

Upon completion of the confinement portion of his sentence, Petersen or the Department may petition the court to modify the condition to allow access to social media sites during the term of extended supervision. If the petition satisfies the statutory criteria, the court may then decide to modify the condition at a time when the issue is ripe for its consideration. If the court does not modify the condition at that time, the issue will then become ripe for appellate review. The decision whether to modify the condition is not ripe for consideration now because it depends on future events and hypothetical facts. *State v. Armstead,* 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998). This Court will not consider issues that are not yet ripe for review. *Id.*

Petersen and the Department are free to petition the trial court for social media access subject to approval by his agent, to petition for access with restrictions similar to those approved by this Court in *King*, or to petition for elimination of the "no social media" condition entirely, when the issue becomes ripe for review; after completion of the confinement portion and before commencement of the extended supervision portion of Petersen's sentence.

CONCLUSION

This Court should affirm the judgment and order.

Dated this 16th day of August 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 5,880 words.

Dated this 16th day of August 2024.

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of August 2024.

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
Assistant Attorney General