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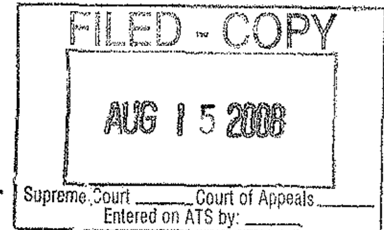
COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 34308
	)	
v.	)	
	)	
BRIAN C. COBLER,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	



REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Brian Cobler pleaded guilty to sexual battery of a minor child, sixteen or seventeen years of age and received a unified sentence of ten years, with two years fixed. Mr. Cobler appealed, asserting that the district court imposed an excessive sentence, and thereby abused its discretion, and that the district court abused its discretion when it denied his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion for a reduction of sentence. Mr. Cobler also asserted that the district court abused its discretion when it entered the criminal no contact order against him and when the court denied his motion to modify the no contact order entered against him. This claim was based on Mr. Cobler's assertion that the no contact order entered against him was vague, overbroad, unduly restrictive of his parental rights, and outside the scope of the authority granted pursuant to I.C. § 18-920 and I.C.R. 46.2. As a component of Mr. Cobler's First Amendment vagueness challenges, he asked that this Court revisit the appropriate standard for a claim that a criminal statute is void for vagueness on its face.

The State responded by asserting that most of Mr. Cobler's constitutional and statutory challenges were being raised for the first time on appeal and that this Court should therefore decline to entertain the merits of those challenges. (Respondent's Brief, pp.4-6.) The State further asserted, without augmenting any documentation in support of this claim into the record, that Mr. Cobler's parental rights had been terminated, and therefore he lacked standing to support his claims of a violation of his fundamental rights as a parent. (Respondent's Brief, pp.5-6.) Finally, in a footnote, the

State asserted that the district court's failure to specify a definite date of termination was consistent with I.C.R. 46.2. (Respondent's Brief, pp.4-5, n.1.)

This Reply Brief is necessary to clarify that Mr. Cobler's constitutional and statutory claims with regard to the no contact order entered against him are preserved for appeal and properly justiciable by this Court. The State's bare allegation that Mr. Cobler's parental rights have been terminated is not supported by any evidence in the record, and therefore cannot be considered by this Court. Moreover, the State failed to assert any state interest that would be served by the statute at issue, much less a compelling state interest; and likewise failed to assert any basis to find that I.C. § 18-920 was narrowly tailored to that unidentified state interest. Because Mr. Cobler has established a *prima facie* case that I.C. § 18-920 is unconstitutionally vague and overbroad, both on its face and as applied, strict scrutiny review shifts the burden of proof, which includes the burden of production, affirmatively to the State as to these showings. The complete absence of any attempt to make either of these showings means that the State has not met its burden of proof under strict scrutiny, and therefore the presumption of unconstitutionality must prevail.

Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Mr. Cobler's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Are Mr. Cobler's constitutional and statutory issues with regard to the no contact order entered against him preserved for appeal because they are implicit in the claims raised in his motion to modify the no contact order, they are likely to recur on remand, they are fundamental errors that involve Mr. Cobler's basic rights, the State has failed to provide a record upon which to conclude that Mr. Cobler lacks standing to raise these issues, and because the district court has reached some of these issues of its own initiative?

2. Is the State's failure to assert any compelling state interest, or assert any basis upon which to conclude that I.C. § 18-920 is narrowly tailored to that unidentified interest, fatal to an attempt on the part of the State to meet its burden under strict scrutiny review, which is the applicable standard of review for Mr. Cobler's assertions of vagueness and overbreadth in this case?

ARGUMENT

I.

Mr. Cobler's Constitutional And Statutory Issues With Regard To The No Contact Order Entered Against Him Are Preserved For Appeal Because They Are Implicit In The Claims Raised In His Motion To Modify The No Contact Order, They Are Likely To Recur On Remand, They Are Fundamental Errors That Involve Mr. Cobler's Basic Rights, The State Has Failed To Provide A Record Upon Which To Conclude That Mr. Cobler Lacks Standing To Raise These Issues, And Because The District Court Has Reached Some Of These Issues Of Its Own Initiative

A. Introduction

In its Respondent's Brief, the State relies entirely on assertions that the issues raised by Mr. Cobler are not preserved for appeal, and fails to address in any way the substance of those issues. (Respondent's Brief, pp.4-6.) Mr. Cobler asserts that all of his issues are preserved for appeal, and are therefore properly justiciable by this Court.

B. Mr. Cobler's Constitutional Claims Regarding Violation Of His Fundamental Rights As A Parent Were Clearly Asserted In His Motion To Modify The No Contact Order, And Most Of His Remaining Constitutional And Statutory Claims Are Implicit In The Issues He Raised Before The District Court

In Mr. Cobler's *pro se* motion to the district court seeking to modify the no contact order summarily entered against him at his arraignment, Mr. Cobler raised various issues that put the district court on notice of the claims he is currently raising on appeal. Because some of Mr. Cobler's claims are implicit in his motion, these issues are properly before this Court. Therefore, the State's assertion that all of Mr. Cobler's constitutional and statutory claims are not justiciable on appeal is without merit.

1. Mr. Cobler's Assertion Of His Fundamental Constitutional Rights As A Parent Is Clearly Preserved In His Motion To Modify The No-Contact Order, Mr. Cobler Has Previously Established His Standing To Raise This Issue As A Parent, And The State Has Made No Record Establishing That Mr. Cobler Lacks Standing As A Parent To Raise This Issue

As an initial matter, there is no dispute in this case that Mr. Cobler is the father of three minor children. (Presentence Investigation Report (*hereinafter*, PSI), p.15.) As such, he has established standing to assert his claim of a violation of his fundamental rights as a parent. There is also no dispute that the no contact order entered against Mr. Cobler preventing contact with "all minors" operates as a legal bar to his having any contact with his three children, directly or through third parties, and that Mr. Cobler is under threat of criminal sanction should he violate this order. I.C. § 18-920. (R., p.7.) Finally, a review of Mr. Cobler's motion to modify the no contact order entered against him reveals that his central and express purpose in seeking modification is to remedy the legal barrier that this order places between Mr. Cobler and his children. (Motion to Modify Protection Order, pp.1-3.)

Idaho Appellate Rule 35 requires that arguments contained within the Respondent's Brief be supported by "citations to the authorities, statutes and *parts of the transcript or record relied upon.*" I.A.R. 35(b)(6). Courts will not review an issue presented by a party that fails to comply with the requirements of I.A.R. 35. *See, e.g., State v. Young,* 144 Idaho 646, 649, n.1, 167 P.3d 783, 786 (Ct. App. 2006); *cf. Weaver v. Searle Bros.*, 129 Idaho 497, 502-503, 927 P.2d 887, 892-893 (1996) (declining to address issue where respondent did not make pertinent evidence part of the record on appeal). This Court is restricted to the record before it on appeal and "may not consider matters outside of the record." *State v. Flint*, 114 Idaho 806, 809,

761 P.2d 1158, 1161 (1988) (quoting *Parsons v. State*, 113 Idaho 421, 428, 745 P.2d 300, 307 (Ct. App. 1987)).

The State alleges in its Respondent's Brief that, based on the personal knowledge of opposing counsel, Mr. Cobler's parental rights have been terminated and that he therefore lacks standing to pursue his assertion that his fundamental rights as a parent have been violated. (Respondent's Brief, pp.5-6.) The State makes this assertion without any citation to the record in this case. (Respondent's Brief, pp.5-6.)

Further, the State has not even attempted to create a record upon which to sustain its allegations that Mr. Cobler lacks standing. Rather than seeking to augment into the record the proceedings during which the State claims that Mr. Cobler's rights have been terminated, opposing counsel merely relates that he had conversations with unidentified persons during which he was allegedly informed that Mr. Cobler's rights had been terminated. (Respondent's Brief, p.6.) While the State does provide a very lengthy citation to a website URL in a footnote, when one actually attempts to access this web address, all that is displayed is a mostly blank screen that reads "Case Sealed By Court Rule or Judicial Order." (*See* print out of web page attached as an appendix to this brief; Respondent's Brief, p.7, n.2.) Neither the State's reiteration of hearsay provided from an unnamed source nor the blank screen indicating an unidentified case that has been sealed creates a record sufficient for appellate review of the State's claim that Mr. Cobler's parental rights have been terminated.

Moreover, even assuming that there exists a termination order, the State does not address which (if any) of Mr. Cobler's three children this order applies to. (Respondent's Brief, pp.5-6; PSI, p.15.) This Court should note that there is no

indication whether this purported order applies to one of Mr. Cobler's three children, Aeriel Cobler, who currently resides in Missouri and has no apparent personal connection to the State of Idaho. (PSI, p.15.) The fact that this Court is left to speculate as to which, if any, of Mr. Cobler's children may be affected by this order makes clear exactly why the State's allegations are not appropriate for this Court's consideration – because there is nothing more than incomplete double hearsay for this Court to rely on. Because the State has created no record regarding whether Mr. Cobler's parental rights have been terminated, nor which of his three children this alleged termination may have affected, there is no basis for this Court to conclude that Mr. Cobler lacks standing to present his claims of a violation of his fundamental rights as a parent.

In addition to failing to create a record that demonstrates Mr. Cobler's parental rights have been terminated, the State also presents no argument or legal authority that would explain the ultimate effect of any potential termination action that was consummated by the State on the issues in this case. (Respondent's Brief, pp.5-6.) This Court will not consider on appeal any assertions that are not supported by authority or argument. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996); I.A.R. 35.

It is undisputed from the record that Mr. Cobler is the father of three children who are affected by the no contact order at issue in this case. (PSI, p.15.) Because this order interferes with Mr. Cobler's ability to maintain any contact with his children or otherwise exercise his fundamental rights as a parent in any meaningful way, this order violates Mr. Cobler's fundamental rights as a parent. (*See* Appellant's Brief, pp.21-16.) Mr. Cobler brought this violation directly to the district court's attention in his motion to modify the no contact order. The State has created no record upon which this Court

can rely to refute Mr. Cobler's standing as a parent to raise his claim of a violation of his fundamental rights as a parent. Therefore, the State's attempt to assert that this claim is not justiciable by this Court is unavailing.

2. Under A Liberal Reading Of Mr. Cobler's Motion To Modify The No Contact Order, He Has Raised Facts Sufficient To Put The District Court On Notice Of The Substance Of Many Of His Other Assertions Of Error On Appeal

Generally, *pro se* defendants are held to the same standards and rules as defendants acting with the benefit of counsel. *State v. Sima*, 98 Idaho 643, 644, 570 P.2d 1333, 1334 (1977). As such, status as a *pro se* petitioner does not excuse a defendant from failing to comply with applicable rules on appeal. *Id.* However, in contexts where *pro se* petitioners are often required to request relief from the district court on their own initiative, there is generally a relaxed standard applied with regard to the preservation of issues. For example, petitions for a writ of *habeas corpus* "are liberally construed and *that construction is particularly applicable in a case where the petition was prepared by a prisoner unlearned in the law and without the aid of counsel.*" *Goff v. State*, 91 Idaho 36, 37, 415 P.2d 679, 680 (1966) (emphasis added).

In cases involving a pro se defendant, it is the essential facts establishing the claim that control, rather than the formal classification of the right asserted. *Hauschulz v. State*, 143 Idaho 462, 467, 147 P.3d 94, 99 (Ct. App. 2006). As noted by the court in *Hauschulz*:

> The mere classification of a right is not essential. First, we recognize the claimed right and, after such recognition, it is entitled to enforcement, whether the name given it accords exactly with the general understanding thereof.

Id. (quoting *Fidelity Trust Co. v. State*, 72 Idaho 137, 146, 237 P.2d 1058, 1064 (1951)).

Additionally, this Court has previously recognized the difficulty of a *pro se* defendant in precisely articulating his claims, and reached the merits of the issues raised on appeal by considering the substance of the *pro se* defendant's assertions. *State v. McCabe*, 101 Idaho 727, 728, 620 P.2d 300, 301 (1980) (reformulating and discussing defendant's contentions on appeal despite the fact that these issues were "not completely articulated.")

Mr. Cobler was not assisted by counsel in his filing of the motion to modify the no contact order entered against him. (Motion to Modify Protection Order, pp.1-3.) It appears that Mr. Cobler actively sought the assistance of his trial counsel in seeking to modify the no contact order, but his efforts at obtaining legal assistance were unavailing. (Motion to Modify Protection Order, p.2.) However, under a liberal reading of his motion to modify the no contact order, he argued the essential facts of many of his claims on appeal.

Mr. Cobler brought to the district court's attention that, "as the no contact order stands," it "will expire upon dismissal of [his] case." (Motion to Modify Protection Order, p.2.) He also pointed out that only the district court could modify this provision of his no contact order. (Motion to Modify Protection Order, p.2.) Mr. Cobler's purpose in bringing these facts to the district court's attention was to point out one of the issues that was raised in Mr. Cobler's Appellant's Brief: that the no contact order contains no discernible date of expiration because Mr. Cobler's case was never dismissed. (Appellant's Brief, pp.26-28.) As such, Mr. Cobler raised the substance of his claim on appeal that the no contact order was invalid because it failed to contain a definite date

of expiration, and therefore applied against him perpetually unless modified by the district court.

Mr. Cobler also argued some of the essential facts underpinning his assertions of vagueness and overbreadth in his motion. In particular, Mr. Cobler has pointed out that his underlying offense didn't involve his own children, which are covered under the no contact order. (Motion to Modify Protection Order, p.2.) He also pointed out that the charges levied against him were relating to someone who was far older than his children (a girl a few months shy of her 18th birthday). (Motion to Modify Protection Order, p.2; R., pp.8-10.) This raises the question of the potential unconstitutional scope of the order, and of the statute upon which the order was purportedly entered, based on the fact that there was no relationship between the underlying offense and those included in the group covered by the no contact order entered against him. (*See also,* Appellant's Brief, p.9.)

Moreover, as previously noted, Mr. Cobler has clearly asserted his fundamental rights as a parent in his motion to modify the no contact order. *See* Point I(B)(1) *supra.* Certain of his fundamental rights as a parent are coextensive with his First Amendment rights of speech and intimate association that are implicated in Mr. Cobler's vagueness and overbreadth challenges. Familial relationships, such as the parent-child relationship, are a classic example of the type of intimate associations that receive heightened First Amendment protection. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-620 (1984). This Court should note that "intimate association" is a legal term of art that refers to the First Amendment right to associate with others in individualized relationships and affiliations, but does not refer to "intimacy" in the common sense of the

term that would otherwise connote any form of romantic or sexual involvement. *Id.* Because Mr. Cobler's assertion of a violation of his fundamental rights as a parent encompasses an assertion of a violation of his First Amendment rights to intimate association with his family members, Mr. Cobler's vagueness and overbreadth claims are implicit in his assertion of his rights as a parent.

C. Assuming, *Arguendo*, That Some Of Mr. Cobler's Constitutional And Statutory Challenges Are Raised For The First Time On Appeal, They Are Likely To Recur Upon Remand And Therefore This Court May Properly Consider Them

As previously noted, Mr. Cobler asserts that some of his constitutional and statutory challenges on appeal were implicit in the claims raised when he moved the district court to modify the no contact order it entered against him. However, even if some of these issues were not properly raised below, Mr. Cobler asserts that these issues are justiciable before this Court because they are likely to recur upon remand of his case.

Generally, questions of law, such as challenges to the constitutionality or construction of a statute, cannot be raised for the first time on appeal. *See, e.g., Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). However, an exception to this rule applies where the appellant presents questions of law which may arise in further proceedings as a result of the disposition of the appeal. *Messmer v. Ker*, 96 Idaho 75, 78, 524 P.2d 536, 539 (1974).

Here, there is at least one ground that was unquestionably preserved for this Court's review and which invalidates the district court's no contact order in this case: the district court's entry of a no contact order that is in violation of Mr. Cobler's fundamental rights as a parent and that was entered without meeting the constitutional

requirements of due process. (*See* Point I(B)(1) *supra*, Appellant's Brief, pp.21-26.) Moreover, Mr. Cobler has raised, and the district court has reached, the substance of the issue regarding the lack of any discernible date of termination for the no contact order at issue in this case. (*See* Point I(E) *infra*; Motion to Modify Protection Order, p.2.; Appellant's Brief, pp.26-28.) Assuming that this Court does not find that the additional questions of law regarding the no contact order have been adequately raised before the district court, this Court should nonetheless deem these issues justiciable, because they are likely to recur upon remand should the district court attempt to modify and re-enter the no contact order in this case.

D. Mr. Cobler's Statutory And Constitutional Issues Are Justiciable By This Court Because They Are Assertions Of Fundamental Errors That Affect Mr. Cobler's Most Basic And Fundamental Rights

Certain errors, known as fundamental errors, are reviewable on appeal regardless of whether these errors were actually raised before the district court. *See, e.g., State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989). "Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits." *Id.* (quoting *State v. Garcia*, 128 P.2d 459, 462 (N.M. 1942).

A direct violation of an important constitutional right may constitute a fundamental error that is reviewable by this Court for the first time on appeal. *See, e.g., State v. Kenner*, 121 Idaho 594, 597, 826 P.2d 1306, 1309 (1992) (finding that allegation that district court violated constitutional right against self-incrimination is allegation of a

fundamental error); *State v. Yakovic*, 145 Idaho 437, 442, 180 P.3d 476, 481 (2008) (fundamental error not shown when alleged error did not violate a fundamental right); *State v. Christiansen*, 144 Idaho 463, 470, 163 P.3d 1175, 1182 (2007) (alleged violation based on defendant's exercise of Fourth Amendment rights is fundamental error); *State v. Timmons*, 145 Idaho 279, 291, 178 P.3d 644, 656 (Ct. App. 2007); *Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007) (presuming for purposes of appeal that violation of Confrontation Clause is allegation of fundamental error).

There can be no question as to the fundamental nature of the rights being asserted by Mr. Cobler that were violated by the no contact order entered by the district court. It is well established that the constitutional rights of freedom of speech and of association, as guaranteed by the First Amendment of the U.S. Constitution, are among the most fundamental, indispensable, and important of all individual rights. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1039 (1991); *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958); *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 638 (1943); *c.f. Johnson v. Sunshine Mine Co., Inc.*, 106 Idaho 866, 869, 684 P.2d 268, 271 (1984) (recognizing freedom of speech as a fundamental right); *Holloway v. Palmer*, 105 Idaho 220, 227, 668 P.2d 96, 103 (1983) (recognizing First Amendment freedom of association as a fundamental right).

Likewise, it is equally well-established that parents have a basic, fundamental right to involvement, decision making, and associational rights with regard to their children's lives. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *State v. Doe*, 144 Idaho 534, 536, 164 P.3d

814, 816 (2007). This Court should note that the Court in *Doe* has already held that an alleged violation of one's fundamental rights as a parent constitutes an allegation of a fundamental error that is reviewable for the first time on appeal. *Doe*, 144 Idaho at 535-536, 164 P.3d at 815-816. Each of these fundamental rights are at the core of the constitutional violations asserted by Mr. Cobler in his motion to modify the no contact order and on appeal. *See* Point I(B) *supra*; Appellant's Brief *generally*.

Additionally, the related issues of whether a no contact order may be entered pursuant to I.C § 18-920 against an entire class of persons and whether these orders may persist "until dismissal" in absence of any concrete date of termination are essential to the determination of whether the no contact order in this case and the statute authorizing such orders are unconstitutionally vague and overbroad. If this Court determines that I.C. § 18-920 permits the entry of a no contact order against entire classes of persons, as opposed to against a named and identifiable individual, then the statutory problems of vagueness and overbreadth will multiply exponentially with the number of members of the class of persons in whose favor the no contact order is entered. *See* Appellant's Brief, pp.6-21, 28-29. Likewise, if the no contact order can rightfully be entered against a person indefinitely, as would be the result where the district court enters a no contact order to expire "upon dismissal" of the case when no dismissal occurs, then the constitutional problems of vagueness and overbreadth would accumulate over the lifetime of the person subject to the order. (*See* Appellant's Brief, pp.6-21, 26-28.) Mr. Cobler's assertions of error regarding the entry of a no contact order against a class of persons rather than a named individual and regarding the lack of a discernible date of expiration are inextricably intertwined with his assertions of

violations of his fundamental rights to speech and association. As such, all issues raised by Mr. Cobler regarding the no contact order entered against him are properly reviewable by this Court as fundamental errors.

E. <u>The District Court In This Case Reached The Issue Of A Lack Of A Discernible Date Of Termination Of Its Own Initiative When It Relied On This Lack Of An Expiration Date In Denying Mr. Cobler's Motion To Modify The No Contact Order; And Therefore This Court May Properly Review This Issue</u>

As has been noted, most issues generally cannot be raised for the first time on appeal. *State v. DuValt*, 131 Idaho 550, 553, 961 P.2d 641, 644 (1998). "An exception to this rule, however, has been applied by this Court when the issue was argued to *or decided by the trial court*." *Id.* (emphasis added.) When an issue has been decided by the district court below, this Court will decide the issue on appeal. *Id.*

Of its own initiative, the district court in this case made a determination regarding the fact that the no contact order failed to contain any discernible date of expiration, and relied on this determination when it denied Mr. Cobler's request to modify the no contact order. The district court relied on the fact that there was no discernible expiration date for the no contact order at issue in this case when it denied Mr. Cobler's motion to modify the no contact order. (Second Memorandum Decision Re Defendant's Motion For Reduction of Sentence Pursuant to I.C.R. 35, Augment.[1]) In that order, the district court addresses Mr. Cobler's motion to modify the no contact order and states that, "That order was to remain in effect until dismissal of the case." (Second Memorandum

[1] The district court's Second Memorandum Decision Re Defendant's Motion For Reduction of Sentence Pursuant to I.C.R. 35 was augmented into the record through a motion to augment filed by Mr. Cobler that this Court granted on May 2, 2008.

Decision Re Defendant's Motion For Reduction of Sentence Pursuant to I.C.R. 35, Augment.) With no further analysis, the district court proceeded to deny any request to modify Mr. Cobler's sentence, including his request to modify the no contact order. (Second Memorandum Decision Re Defendant's Motion For Reduction of Sentence Pursuant to I.C.R. 35, Augment.)

Because the district court affirmatively reached the issue of a lack of a discernible expiration date in its denial of Mr. Cobler's motion to modify the no contact order, this issue is properly before this Court.

II.

The State's Failure To Assert Any Compelling State Interest, Or Assert Any Basis Upon Which To Conclude That I.C. § 18-920 Is Narrowly Tailored To That Unidentified Interest, Is Fatal To An Attempt On The Part Of The State To Meet Its Burden Under Strict Scrutiny Review, Which Is The Applicable Standard Of Review For Mr. Cobler's Assertions Of Vagueness And Overbreadth In This Case

A. Introduction

In its Respondent's Brief, the State failed to address the substance of any of Mr. Cobler's claims regarding the no contact order that was entered against him in this case, and instead relied exclusively on argument that Mr. Cobler's issues with regard to this order were not preserved for appeal. (Respondent's Brief, pp.4-6.) As noted above, Mr. Cobler's issues are, in fact, properly justiciable by this Court.

Among the issues presented in Mr. Cobler's Appellant's Brief are claims that the no contact order entered against him, and the statute authorizing such orders, are unconstitutionally vague and overbroad. (Appellant's Brief, pp.5-21.) As is discussed more fully below, strict scrutiny review applies to Mr. Cobler's First Amendment claims

in this case. Under strict scrutiny review, the burden of proof shifts to the State upon a *prima facie* showing of unconstitutionality. The State then has the burden of both production and persuasion to establish that the challenged statute serves a compelling state interest and that the statute is narrowly tailored to that interest.

Here, Mr. Cobler, in his Appellant's Brief, established a *prima facie* showing that I.C. § 18-920 was unconstitutionally vague and overbroad, both on its face and as applied.[2] The State has made no attempt to identify any state interest that is served by the statute authorizing entry of criminal no contact orders, nor has the State addressed how I.C. § 18-920 is narrowly tailored to that unidentified interest. Because the burden of proof has shifted affirmatively to the State to make these showings, the State has failed to meet its burden to overcome the presumption of unconstitutionality of I.C. § 18-920.

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[2] As a component of Mr. Cobler's assertion that I.C. § 18-920 is unconstitutionally vague on its face and as applied to his case, he has asked this Court to revisit the appropriate showing required in order to establish facial vagueness in the context of criminal statutes. (Appellant's Brief, pp.13-16.) Mr. Cobler wishes to make a clarification regarding one of the cases that he has asked this Court to re-examine. As noted in his Appellant's Brief, *State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003) relies primarily on the case of *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982) as authority for requiring a showing of vagueness in all applications in order to establish facial vagueness, even in the context of criminal statutes. (Appellant's Brief, p.14.) Mr. Cobler wishes to clarify that, in addition to *Hoffman Estates*, the Court in *Korsen* relied upon *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, just as in *Hoffman Estates*, in *Salerno* the United States Supreme Court addressed a regulatory statute, not a statute which imposes criminal punishment. *Salerno*, 481 U.S. at 746. Thus, application of the standards articulated in *Salerno* is inappropriate when the statute at issue authorizes criminal penalties, i.e. punishment. (Appellant's Brief, pp.13-16.)

B. Strict Scrutiny Is The Appropriate Standard For Review In This Case; And The State's Failure To Assert Any Compelling State Interest, Or Assert Any Basis Upon Which To Conclude That I.C. § 18-920 Is Narrowly Tailored To That Unidentified Interest, Is Fatal To An Attempt On The Part Of The State To Meet Its Burden Under This Standard Of Review

The statute at issue in this case, I.C. § 18-920, criminalizes two forms of constitutionally protected activity: the First Amendment freedom of speech and communication, and the First Amendment freedom of intimate association. As applied to Mr. Cobler's case, this statute imposed a prior restraint on speech and on any individual associational activity (intimate association) with any person under the age of 18, including his own children.

As noted in Mr. Cobler's Appellant's Brief, the no contact order entered against him operates as an injunction that constitutes a prior restraint on speech. (Appellant's Brief, p.8.) "The term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.' Temporary restraining orders and permanent injunctions – *i.e.* court orders that actually forbid speech activities – are classic examples of prior restraints." *Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p.4-14 (1984)) (internal citations omitted). Because the no contact order entered against Mr. Cobler is a judicial order forbidding all communications with minors, directly or indirectly, that was issued prospectively (prior to such communication occurring), this no contact order is a prior restraint on speech. *See also In re Marriage of Suggs*, 93 P.3d 161, 164 (Wash. 2004); *State v. Hague*, 547 N.W.2d 173, 176 (S.D. 1996). "Any system of prior restraints of expression comes to

this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

The no contact order at issue in this case also constitutes an injunction against Mr. Cobler engaging in his First Amendment right of association with those who are under the age of 18, including his own children. In determining the degree of scrutiny that applies to an alleged infringement of associational freedoms, this Court considers such attributes as relative smallness, the degree of selectivity in associational contacts, and seclusion from others in critical aspects of the association, among other considerations. *Roberts*, 468 U.S. at 620. In this case, the unconstitutional violations of both of these First Amendment freedoms are subject to strict scrutiny review. *See, e.g., Roberts*, 468 U.S. at 619-620 (discussing how familial and selective individual relationships merit highest protection);*NAACP v. Button*, 371 U.S. 415, 438-439 (1963); *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (strict scrutiny review applies to prior restraints on speech); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765-766 (1994) (injunctions imposing a prior restraint on speech must burden no more speech than necessary to serve a significant government interest); *Suggs*, 93 P.3d at 83 (anti-harassment protection order is prior restraint on speech and therefore "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order").

It is a firmly established and basic tenet of strict scrutiny analysis that, once an individual challenging a statute has established a constitutional violation to which strict scrutiny applies, the *burden of proof shifts to the State* to establish that the statute furthers a compelling State interest, and that the challenged statute is necessary to

further that interest (i.e. there are no less restrictive alternatives available). *See Rudeen v. Cenarrusa*, 136 Idaho 560, 569, 38 P.3d 598, 607 (2001); *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001); *Simpson v. Cenarrusa*, 130 Idaho 609, 615, 944 P.2d 1372, 1378 (1997) (Silak, J., concurring); *Button*, 371 U.S. at 439; *Corning v. Board of Elections of Albany County*, 440 N.E.2d 1326, 1328 (NY 1982) (strict scrutiny test places the burden on the State itself to demonstrate both that a compelling State interest is served by the classification and that the classification constitutes the least drastic means available to satisfy that interest).

Under a strict scrutiny analysis, "the presumption in favor of constitutionality is not applicable" and the State "must show a compelling interest to vindicate the law." *Bradburry*, 136 Idaho at 69, 38 P.3d at 1012. The shifting of the burden of proof to the State includes the burden of production. *See Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004) (articulating strict scrutiny standard in the context of an alleged violation of First Amendment right of access to public documents); BLACK'S LAW DICTIONARY 209 (8th ed. 2004) (defining the scope of burden of proof to encompass "both the *burden of persuasion* and the *burden of production*).).

In meeting its burden of production, the State must present specific reasons in support of its position. *Virginia Dep't of State Police*, 386 F.3d at 575. This includes a requirement, not only that the State identify what compelling interest is being served by the challenged legislation or action, but further requires the State identify reasons why this compelling state interest is implicated in that particular case. *Id.* at 579. The failure on the part of the State to present any evidence or argument supporting the existence of

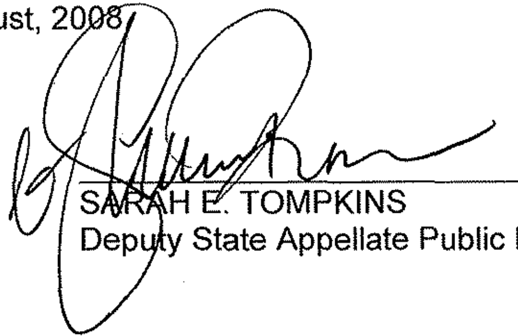
a compelling state interest is fatal to its attempt to establish the validity of a statute or regulation. *Id.* at 580.

Here, Mr. Cobler has established in his Appellant's Brief a showing that I.C. § 18-920, both on its face and as applied to the facts and circumstances of his case, is unconstitutionally vague and overbroad in its restriction of First Amendment freedoms. (Appellant's Brief, pp.5-21.) As a result, the burden of proof shifted to the State to establish a compelling state interest served by I.C. § 18-920, and to further establish how the statute is narrowly tailored to that interest. *Rudeen*, 136 Idaho at 569, 38 P.3d at 607; *Bradbury*, 136 Idaho at 69, 28 P.3d at 1012; *Button*, 371 U.S. at 439. The State has made no attempt to meet this burden. Where the State has completely failed to allege *any* interest in support of the challenged legislation in the face of a *prima facie* case supporting the finding of unconstitutionality, the presumption of unconstitutionality must prevail. *C.f. Smith v. Idaho Com'n on Redistricting*, 136 Idaho 542, 545, 38 P.3d 121, 124 (2001) (finding that redistricting action was unconstitutional where individual challenging redistricting had established prima facie case of discrimination and "the State has not presented *any* evidence that the reason(s) for the population disparity result from advancement of a rational state policy.").

CONCLUSION

Mr. Cobler respectfully requests that this Court vacate the no contact order entered against him. Mr. Cobler further respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 15th day of August, 2008.



SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of August, 2008, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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