Supreme Court No. 97273-7
(COA No. 77334-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SCOTT CARY MILLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(3), Scott Miller, petitioner here and appellant below, asks this Court to accept review of a Court of Appeals decision affirming the revocation of his Special Sex Offender Sentencing Alternative (SSOSA) and upholding certain conditions of community custody. A copy of the Court of Appeals' opinion, issued on April 29, 2019, is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. The First Amendment protects speech delivered and received via social media because it is the modern medium used to freely exchange ideas. While Mr. Miller was serving a suspended sex offender sentencing alternative (SSOSA), the court issued a court order that, in effect, prohibited him from accessing all social media websites. The court later revoked Mr. Miller's SSOSA because he accessed social media websites, and the Court of Appeals affirmed.

Does the Court of Appeals' opinion conflict with both the First Amendment and United States Supreme Court caselaw affirming an individual's First Amendment right to access social media? RAP 13.4(b)(1), RAP 13.4(b)(3).

2. Because defendants possess a liberty interest in maintaining their SSOSA, the constitution provides defendants facing revocation of their SSOSA with due process protections. Among the protections the constitution affords SSOSA recipients is the right to confront and cross-examine the witnesses against them unless good cause exists for not allowing confrontation.

Here, the court exclusively relied on hearsay evidence when it found that Mr. Miller was not making satisfactory progress in treatment, but it did not find that good cause existed to rely on hearsay evidence. Did the court improperly fail to observe Mr. Miller's right to due process when it revoked his SSOSA? RAP 13.4(b)(3).

3. Courts cannot impose sentencing conditions that are unconstitutionally vague. A condition of community custody is unconstitutionally vague if it fails to (1) provide ordinary people fair warning of proscribed conduct; and (2) have standards that are definite enough to protect against arbitrary enforcement.

a. Should this Court hold that a community custody condition that prohibits individuals from "frequent[ing] establishments where alcohol is the chief commodity for sale" is unconstitutionally vague? RAP 13.4(b)(3).

b. Should this Court hold that a community custody condition that prohibits individuals from "associ[ating] with known users or sellers of illegal drugs" is unconstitutionally vague? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

In 2012, Snohomish County detectives knocked on Scott Miller's door to investigate whether he molested his daughter when she was four or five years old. CP 25-26; RP 137. Now a teenager, Mr. Miller's told a friend that her father molested her when she was a child. CP 25. Mr. Miller confirmed his daughter's recollection was correct. CP 26. Mr. Miller later informed the court that he was "ashamed and disgusted with [himself]" for what he did to his daughter a decade ago, and "to use the word 'remorse' is but an understatement of the turmoil in [his] conscience" for what he had done to his daughter and his family. CP 27; RP 7, 24.

The State charged Mr. Miller with one count of child molestation in the first degree and one count of a rape of a child in the first degree. CP 146, 163. On December 9, 2013, Mr. Miller had a bench trial based on documentary evidence, and the court found him guilty as charged. RP 5. This was Mr. Miller's first offense, and he met other statutory criteria, so the court found Mr. Miller was a good candidate for a sex offender sentencing alternative (SSOSA) and granted him a SSOSA. The court sent

Mr. Miller to prison for a year and suspended the majority of Mr. Miller's sentence. CP 28; RP 25.

On December 9, 2015, the court held a hearing to see if Mr. Miller was abiding by the terms of his SSOSA. RP 37. At the time, Randy Green was Mr. Miller's sexual health treatment provider. RP 45. Everyone at the hearing reported that Mr. Miller was in full compliance with his SSOSA, and the court agreed. RP 37-39, 43.

However, circumstances changed by the time of Mr. Miller's next SSOSA review hearing on March 7, 2016. While taking a polygraph examination, Mr. Miller admitted to viewing pornography, which violated one of the terms of his sex offender treatment contract. RP 53, 64. The Department of Corrections also viewed his behavior as violating another term of his sex offender treatment contract: "not being transparent with his issues, feelings, thoughts, relationships, behaviors, and activities." RP 64. Despite these violations, neither the Department of Corrections, Mr. Green, nor the State asked the court to revoke Mr. Miller's SSOSA. RP 45-46, 48. However, the court continued the hearing to determine whether to impose a sanction or revoke Mr. Miller's SSOSA. RP 57.

Mr. Green testified at the continued hearing on April 21, 2016. RP 66. Mr. Green stated Mr. Miller's risk of re-offense was low despite Mr. Miller having viewed pornography. RP 67. Mr. Green also stated Mr.

Miller was largely in compliance with other aspects of his SSOSA; Mr. Green also explained a "pretty overwhelming" number of mitigating factors rendered Mr. Miller's risk of re-offense low. RP 68. Due to the violation, the court ordered Mr. Miller to not use the internet for one month and also ordered Mr. Miller to get monitoring software installed on all of his internet accessible devices. RP 81-84.

On January 31, 2017, Mr. Miller attended another court hearing due to new alleged violations of the terms of his SSOSA. At the January 31st hearing, the State revealed that Mr. Green was no longer treating Mr. Miller due to payment disputes; however, Mr. Miller promptly obtained a new provider.[1] RP 88. The court continued the hearing.[2]

At the March 16, 2017 hearing, the State and the Department of Corrections alleged that Mr. Miller engaged in the following violations: (1) masturbated to non-pornographic pictures of adult breasts; (2) possessed nude photographs of Helen Fox (author); (3) viewed pornography on a pornographic website; (4) uninstalled internet monitoring software; (5) failed to abide with his treatment program by not being transparent about his feelings; and (6) failed to abide with his treatment program by having his treatment suspended due to non-payment.

[1] *Id*. at 4.

[2] *See also* 1/31/17RP 7-9. This VRP is the only VRP that is not in consecutive paginated order with the other proceedings.

RP 90. Despite these allegations, Mr. Miller's new sex treatment provider, Gianna Leoncavallo, did not express concerns about Mr. Miller's treatment. RP 88-89.

Mr. Miller admitted to masturbating to the non-pornographic image of adult breasts and admitted to not divulging everything with Mr. Green. RP 90, 98. Mr. Miller also admitted he uninstalled the monitoring software so that his son could use his device without Mr. Miller getting in trouble for whatever page his son visited. RP 94-95. In regard to the nude pictures, Mr. Miller stated his wife inadvertently scrolled through images of the author and the nude materials showed up on the screen. RP 100-01. However, Mr. Miller denied watching pornography on the internet, and a polygraph test determined Mr. Miller's denial was credible. RP 91.

The court found all of these allegations occurred except for Mr. Miller's alleged viewing of pornography on the internet. RP 106-08. In turn, the court restricted Mr. Miller's access to the internet for six months. RP 115. The court entered an order allowing Mr. Miller to only conduct a small number of activities on the internet, including (1) searching for employment; (2) accessing email; (3) scheduling medical appointments specifically for plasma donation; (4) advertising wood products; and (5)

arranging jail visits with his son.[3] CP 120. Additionally, the court order allows Mr. Miller to access "church applications."[4] CP 120. In effect, the order banned Mr. Miller from accessing all social media websites.

On August 9, 2017, Mr. Miller was held in custody due to another alleged violation of his SSOSA. By this time, Ms. Leoncavallo had terminated Mr. Miller from treatment, and the State was now petitioning to revoke Mr. Miller's SSOSA. RP 120-21. After Ms. Leoncavallo terminated Mr. Miller from treatment, Mr. Miller promptly made an appointment with a new provider. RP 123.

The next hearing was a SSOSA revocation hearing. RP 127. At the revocation hearing, the State and the Department of Corrections advocated in favor for revoking Mr. Miller's SSOSA, alleging that Mr. Miller failed to make satisfactory progress in treatment. RP 129. Ms. Leoncavallo did not testify. Mr. Miller presented evidence that a new provider was willing to work with him. RP 130.

Additionally, Mr. Miller used the internet in violation of the March court order. CP 120; RP 130. Mr. Miller believed the court order expired in June rather than in September. RP 134. So, after June of 2017, Mr. Miller accessed numerous social media websites and YouTube.

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[3] By the time of this hearing, Mr. Miller's son was incarcerated. RP 104.

[4] Presumably, "church applications" means downloadable religious applications (or "apps") one can install on their phone/computer/tablet.

The court revoked Mr. Miller's SSOSA, believing Mr. Miller was not making satisfactory progress in treatment and finding that his use of the internet in contravention of the court order cemented its belief that he could not make progress in treatment. RP 147. The court promptly sent Mr. Miller to prison. RP 145, 147.

D. ARGUMENT

1. This Court should accept review because the Court of Appeals' decision affirming the revocation of Mr. Miller's SSOSA is contrary to the First Amendment and the United States Supreme Court's decision in *Packingham*.

This Court should accept review because the Court of Appeals' decision raises First Amendment concerns and is also contrary to the United States Supreme Court's decision in *Packingham v. North Carolina*, __ U.S. __, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017). RAP 13.4(b)(1); RAP 13.4(b)(3).

Both the federal and state constitutions restrain the government from proscribing speech or expressive conduct. U.S. CONST. amend. I; Const. art. I, § 5; *State v. Halstien*, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). While a convicted person's right to free speech "may be restricted if reasonably necessary to accomplish the essential needs of the state and public order," courts must sensitively impose a condition that restricts a convicted person's free speech rights. *See Bahl*, 164 Wn.2d at 687-88,

quoting Malone v. United States, 502 F.2d 554, 556 (9th Cir. 1974). If a court chooses to infringe upon a convicted person's right to free speech, the restriction must be narrowly drawn to achieve a compelling State interest. *See State v. Warren*, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008).

Conditions that restrict a person's use of the internet necessarily restrict a person's right to free speech. This is because the internet is a medium used for many purposes, including the free exchange of ideas the First Amendment was designed to protect. *See Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 850, 117 S. Ct. 2329, 138 L. Ed. 874 (1997).

Here, with extremely narrow exceptions, the court barred Mr. Miller from accessing the internet for six months. CP 120. Notably, the court's order, in effect, prohibited Mr. Miller from accessing social media websites. CP 120.

But a broad bar on an individual's use of social media websites is incompatible with the First Amendment. In *Packingham v. North Carolina*, the United States Supreme Court assessed the constitutionality of a North Carolina law that criminalized a registered sex offender's use of social networking websites. __ U.S. __, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017). The North Carolina Supreme Court upheld the law, believing the law was "carefully tailored…to prohibit registered sex offenders from accessing only those websites that allow them the

opportunity to gather information about minors" because the law still allowed alternative means of communication from websites like the Paula Deen Network and the local NBC website. *Id*. at 1735 (quoting *State v. Packingham*, 368 N.C. 380, 389-90, 777 S.E.2d 738 (2015)).

The United States Supreme Court summarily rejected the North Carolina Supreme Court's decision upholding the law and instead ruled the law was impermissible under the First Amendment's Free Speech Clause. *Id*. at 1733; U.S. CONST. amend. I. The court recognized social media allows people to "engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Id*. at 1735-36 (quoting *Reno***,** 521 U.S. at 870). Indeed, the court characterized the internet and social media as a vast democratic forum used to "debate religion and politics," "advertise for employees," and engage with "elected representatives…in a direct manner." *Id*. at 1735.

The court found the law burdened substantially more speech than necessary to further the government's legitimate interest. *Id*. at 1737. The Government "may not suppress lawful speech as the means to suppress unlawful speech." *Id.* at 1738 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)). While the State argued the law was necessary to prevent convicted sex offenders from accessing vulnerable victims, the court concluded the law was too

burdensome because it broadly barred access to "principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id*.

Here, the court's order burdened substantially more speech than was necessary to further the government's legitimate interest. The government possessed an interest in ensuring that Mr. Miller did not obtain pornographic materials because Mr. Miller's access to pornographic materials was related to his crime; thus, the government's interest here was akin to the government's interest in *Packingham*: to protect the public. 137 S. Ct. at 1738; RP 46, 53, 68-70.

However, the Court of Appeals believed the condition conformed to both the First Amendment and the Supreme Court's directive in *Packingham* because the condition still allowed him to use other websites. Op. at 11-12. But the court in *Packingham* squarely rejected this reasoning. While the statute at issue in *Packingham* allowed the defendant to access other websites, the statute was still defective under the First Amendment because it created a broad bar against using *social media* websites, which hold an elevated protection under the First Amendment. *Packingham*, 137 S. Ct. at 1736-37.

Again, in effect, the court's order prohibited Mr. Miller from accessing all social media websites, online newspapers, and political websites. CP 120.[5] But social media did not contribute to Mr. Miller's offense, and neither did online newspapers nor political websites. Notably, Mr. Miller had a Facebook page that was "100 percent Bible and faith-based." RP 51. He used his Facebook page to communicate with missionaries and pastors who share his same faith. RP 51.

Mr. Miller possessed a First Amendment right to access these websites, and the government did not possess an interest in forbidding Mr. Miller from accessing websites without pornographic content. The court's order forbidding Mr. Miller from accessing such websites was unconstitutionally overbroad and not narrowly tailored to achieve the State's interest. Consequently, the court erred when it revoked his SSOSA based on his lawful exercise of his First Amendment right to access social media.

This Court should accept review. RAP 13.4(b)(1); RAP 13.4(b)(3).

[5] This list is non-exhaustive.

2. This Court should accept review because the court violated Mr. Miller's right to Due Process when it relied on hearsay evidence to revoke his SSOSA.

Because defendants possess a liberty interest in maintaining their SSOSA, the constitution provides defendants facing the revocation of their SSOSA with due process protections. U.S. CONST. amend. XIV; Const. art. I, § 3; *Morrissey v. Brewer*, 408 U.S. 471, 481-82, 92 S. Ct. 259, 333 L. Ed. 2d 484 (1972); *Dahl*, 139 Wn.2d at 683. One of the minimal due process protections courts must afford a SSOSA recipient in a revocation hearing include the right to confront and cross-examine witnesses,[6] unless good cause exists for not allowing confrontation. *Dahl*, 678 Wn.2d at 683. To determine if "good cause" exists, courts assess the difficulty and costs in obtaining live witnesses and also assess whether reliable evidence can be used in lieu of live testimony. *Id*. If a court chooses to admit hearsay evidence in lieu of live testimony, the court must explain its reason for

[6] This issue was not raised below, so Mr. Miller raised it for the first time on appeal under RAP 2.5(a)(3). Op. Br. at 25-26. This Court recently held that issues involving the Confrontation Clause cannot be raised for the first time on appeal. *State v. Burns*, __ Wn.2d __, 438 P.3d 1183, 1192 (2019). Because the right to confront witnesses at a SSOSA revocation hearing derives from a person's right to Due Process rather than a person's right to confront and cross-examine witnesses under the Sixth Amendment, *Burns* does not bind this Court from reaching the merits of Mr. Miller's petition. *See Dahl*, 139 Wn.2d at 683.

admitting the hearsay evidence. *State v. Abd-Rahmaan*, 154 Wn.2d 280, 390, 11 P.3d 1157 (2005).

Here, the court erroneously relied exclusively on hearsay when it found that Mr. Miller was not making satisfactory progress in treatment and revoked his SSOSA. Mr. Miller's SSOSA treatment provider between early January 2017 and mid-July of 2017 was Gianna Leoncavallo. CP 114.[7] In late July, Ms. Leoncavallo sent a letter to Mr. Miller's CCO which stated in relevant part:

> I terminated offender Scott Miller…from my sex offender treatment group. In spite of ongoing feedback from both his group members and myself, Mr. Scott has continued to be resistant, argumentative, defensive, and controlling in group. I do not believe he is capable of making progress in my program at this time.

CP 114 (emphasis added).

Ms. Leoncavallo did not testify at Mr. Miller's SSOSA proceedings, but the court considered the letter she sent to Mr. Miller's CCO when it terminated Mr. Miller's SSOSA. RP 129-30. Additionally, Mr. Miller's CCO related other statements Ms. Leoncavallo made during the proceedings; allegedly, Ms. Leoncavallo noted that Mr. Miller "would use spirituality as a crutch" and he "wanted to use religion as specifically

[7] *See also* 1/31/17RP 7. This VRP is the only VRP that is not in consecutive paginated order with the other proceedings.

his treatment." RP 145. The court never explained its reason for admitting any of the hearsay yet it relied on it when it revoked Mr. Miller's SSOSA.

Because the court deprived Mr. Miller of his right to Due Process when it relied on this hearsay, this Court should accept review. RAP 13.4(b)(3).

3. This Court should accept review because the Court of Appeals' opinion upholds numerous unconstitutionally vague conditions of community custody.

A sentencing court abuses its discretion when it imposes an unconstitutional condition of community custody. *State v. Bahl,* 164 Wn.2d 739, 753, 193 P.3d 678 (2008). This Court does not presume community custody conditions are constitutional. *Irwin*, 191 Wn. App. at 652 (referencing *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 364 P.3d 830 (2015)).

The Due Process Clause of the Fourteenth Amendment and article I, section 3 of the Washington constitution forbid vague laws. U.S. CONST. amend. XIV; *Bahl*, 164 Wn.2d at 752-53. To comport with both the federal and Washington constitutions, laws must "(1) provide ordinary people fair warning of proscribed conduct; and (2) have standards that are definite enough to protect against arbitrary enforcement." *State v. Irwin*, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015). The same analysis applies when courts determine whether a community custody condition is

unconstitutionally vague, and a community custody condition is unconstitutionally vague if it fails to do either. *Id*. at 652-53.

Here, the Court of Appeals affirmed the imposition of several conditions of community custody that fail to provide fair warning on proscribed conduct and are subject to arbitrary enforcement. CP 10-11; CP 159-60; Opinion at 14-17. These conditions are as follows:

> 11. Do not frequent establishments where alcohol is the chief commodity for sale.
>
> 13. Do not associate with known users or sellers of illegal drugs.

Condition 11 (do not frequent establishments where alcohol is the chief commodity for sale) is vague and subject to arbitrary enforcement. The condition fails the first prong of the vagueness test because it is unclear what the term "chief commodity" means: does this mean that alcohol comprises the majority of the establishment's sales, or does this mean that the majority of the establishment's stock inventory consists of alcohol? Additionally, how can someone learn whether alcohol is the chief commodity for sale?

Condition 11 also fails the second prong of the vagueness test. Because the term "chief commodity" is so vague, a CCO could prohibit Mr. Miller from ever entering a restaurant where alcohol is sold, as the

CCO could simply assume that alcohol is the "chief commodity" for sale. The same is true of a grocery store.

However, the Court of Appeals concluded this condition was not unconstitutionally vague, interpreting the condition to mean that a person is prohibited from entering "an establishment where alcohol is the most important good for sale or whose primary purpose is the sale of alcohol." Opinion at 15 (internal citations omitted). But this interpretation only emphasizes the vagueness of this condition. People do not generally know whether alcohol is the most "important" good for sale when they enter a grocery store or any other store. And people generally do not know whether their neighborhood grill and bar's primary purpose is to sell alcohol—indeed, it could be argued that a bar and grill has two equally important dual purposes—to sell food and alcohol. This condition is vague, and the Court of Appeals' attempt to define it only highlights its vagueness.

Condition 13 ("do not associate with known users or sellers of illegal drugs") is also unconstitutionally vague and subject to arbitrary enforcement. This condition fails the first prong of the vagueness test because it is unclear what exactly constitutes a "known user or seller of illegal drugs." Must it be "known" to Mr. Miller that a person is a "known user or seller of illegal drugs", or must it be "known" to Mr. Miller's

CCO? Or, must the community share the collective knowledge that a person is a "known user or seller of illegal drugs?" Because this condition fails to give Mr. Miller any sort of warning as to what exactly constitutes a "known drug user," the condition fails the first prong of the vagueness test.

Condition 13 also fails the second prong because it is subject to arbitrary enforcement. For example, a CCO could punish Mr. Miller for associating with a "known" drug user that was "known" to the CCO but not to Mr. Miller. Therefore, this Court should also strike this condition.

However, the Court of Appeals concluded the condition was constitutional because prior case law has interpreted similar conditions to mean that "knowledge" refers to the knowledge of the offender. Opinion at 16. But the way the condition 13 is currently written does not make this clear.

Accordingly, this Court should accept review. RAP 13.4(b)(3).

E. CONCLUSION

Based on the foregoing, Mr. Miller respectfully requests that this Court grant review.

DATED this 29th day of May, 2019.

Respectfully submitted,

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FILED
4/29/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. MILLER, SCOTT CARY, Appellant.	)	No. 77334-8-I UNPUBLISHED OPINION FILED: April 29, 2019

SCHINDLER, J. — The State charged Scott Cary Miller with child molestation in the first degree and rape of a child in the first degree. Following a stipulated trial, the court found Miller guilty as charged. Miller submitted a sexual deviancy evaluation in support of his request for a special sex offender sentencing alternative (SSOSA). The court agreed to impose a SSOSA and suspended 77 months on child molestation in the first degree and 119 months on rape of a child in the first degree. Miller appeals the decision to revoke the SSOSA and challenges a number of community custody conditions. We affirm the decision to revoke the SSOSA. We affirm imposition of community custody conditions 11, 13, and 14 but remand to strike condition 8 and to strike or clarify conditions 6 and 15.

FACTS

In 2012, 15-year-old R.M. told a high school counselor that her father Scott Cary Miller "raped her when she was five years old." The counselor reported the sexual

assault to the police. R.M. told Everett Police Officer Karen Kowlachyk that when she was "about 4 ½ to 5" years old, Miller "would make her touch his penis." R.M. said Miller put her on his bed and "told her to grab his penis" and "rub her hand up and down." R.M. described "three or four other incidents" of sexual contact with Miller. R.M. said they were "in the bedroom" "three different times" and "one time on the couch in the living room." R.M. said on one occasion, Miller "put her mouth on his penis" and told her to "lick his penis . . . '[l]ike a lollipop.' " In a written statement, R.M. said that one time, Miller "brought a video and told me to do what the lady did" on the video.

Officer Kowlachyk interviewed Miller. Miller told Officer Kowlachyk he "wasn't going to deny the 'touching penis thing.' " Miller admitted, "[I]t happened . . . maybe 'two or three times.' " Miller "remember[ed] the time on the couch and the 'mouth part' " and "recalled one or two other times in the bedroom where he had her touch him." Miller said, "During that time, he was drinking a lot" and that he was " 'horny and frisky' " and took "advantage of an opportunity." Miller said he "made a conscious decision to stop" because "it had gone too far."

The State charged Miller with child molestation in the first degree and rape of a child in the first degree of R.M. Miller stipulated to a bench trial. On December 9, 2013, the court found Miller guilty as charged and entered findings of fact and conclusions of law.

Before sentencing, certified sex offender treatment provider Norman Glassman conducted a sexual deviancy evaluation of Miller. Miller told Glassman he was an alcoholic and he was "frequently drunk" and "using marijuana at the time he was abusing his daughter." Miller said that he "subscribed to an [I]nternet pornographic

website" and he "watched X-rated videos as recently as several weeks before the evaluation."

Glassman recommended the court impose a special sex offender sentencing alternative (SSOSA) and Miller obtain a substance abuse evaluation. Glassman concluded, "Mr. Miller is an opportunistic offender and has not re-offended in many years." Glassman said Miller's "issues can be addressed in treatment." Glassman recommended Miller follow all SSOSA conditions and after a substance abuse evaluation, all treatment recommendations. Glassman specifically recommended that Miller "enter and complete a weekly comprehensive sexual deviancy treatment program"; "not use any alcohol or illegal drugs during the entire treatment period"; "not buy or have in his possession any pornographic materials," including "computer and/or [I]nternet generated pornography"; "have [I]nternet access only with permission of his CCO[1] and therapist"; and "not date women who have minor children or form relationships with families who have minor children."

At the sentencing hearing on December 9, 2013, the court agreed to impose a SSOSA. The court sentenced Miller to 89 months for molestation of a child in the first degree, count 1; and 131 months for rape of a child in the first degree, count 2. The court suspended 77 months as to count 1 and 119 months on count 2. The court ordered Miller to serve 12 months and imposed a term of community custody for life.

The judgment and sentence states Miller shall undergo sex offender treatment for three years. The court imposed a number of conditions. But the court did not impose any conditions related to use of computers or the Internet.

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[1] Community corrections officer.

After his release from jail, Miller began sex offender treatment with certified treatment provider Randy Green. On January 15, 2016, Green sent a "Treatment Violation Report" to the CCO. Green states Miller "reported pornography use" that violated two provisions of the "Treatment Contract." The two provisions of the Treatment Contract that Miller violated state:

> Item Number 7) No part of a client's life is considered "private" with respect to treatment. This includes issues, feelings, thoughts, relationships, behaviors, and activities. Clients are expected to bring up anything important which has come up since the last session and to discuss major life decisions or changes in advance of making such decisions or changes.
>
> Item Number 16) Clients must not view or possess pornography and erotic material. This includes sexually explicit computer or Internet images, pornographic magazines (both "soft" and "hard" porn), pornographic books; X-rated movies and/or videos; the Playboy channel or other sexually explicit TV[2] programs; sexually suggestive or explicit telephone services; peepshows and "adult bookstores"; and anything else which is pornographic or sexually exploitative. Client must not masturbate while watching television or use non-pornographic materials for deviant purposes.

Green stated Miller's "access to pornography was prominent in his offending behavior, and his doing so now should be recognized as an increase factor in his risk for reoffense." Green stated Miller's "continued accessing pornography is made more troubling because of the elaborate denial and avoidance with which he concealed it." However, Green concluded that "[w]hile we are saddened by revelations that he has been accessing pornography all the while, we nonetheless resist a conclusion that the treatment violation is 'fatal' . . . and only informs the path forward." Green recommended Miller "be restricted from any kind of [I]nternet access for a minimum of

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[2] Television.

six months." On January 19, the CCO submitted a "Notice of Violation" that attached the Treatment Violation Report.

On February 5, 2016, the State filed a "Petition for Order Modifying Sentence/ Revoking Sentence/Confining Defendant" with the January 15 Treatment Violation Report and the January 19 Department of Corrections (DOC) Notice of Violation. The petition states Miller violated the conditions of his SSOSA by (1) "[f]ailing to abide by his Sex Offender Treatment contract by not being transparent about his issues, feelings[,] thoughts, relationships, behaviors, and activities" and (2) "[f]ailing to abide by his Sex Offender Treatment contract by viewing and possessing pornographic/erotic material."

At the hearing on March 7, 2016, Miller stipulated to the two violations of the SSOSA conditions. The court continued the hearing to determine whether to impose a sanction or revoke the SSOSA.

Green and the supervising CCO testified at the hearing on April 21, 2016. Green testified Miller's "risk to re-offend is low." Green said Miller "viewing pornography" is "a factor in his offending" but it does not "necessarily increase our assessment of his risk to re-offend." Green testified Miller "completed the assignments that I gave him relative to this violation . . . with the exception I think of getting [I]nternet monitoring software."

The court found Miller violated the SSOSA conditions. The court entered an order modifying the SSOSA. The court modified the SSOSA to order Miller to purchase "monitoring software" and "take all of his Internet-capable devices to 5/03/16 appointment with CCO for installation."

On December 1, 2016, Green submitted a progress report to the CCO. Green states Miller violated the terms of the treatment agreement by using "images of b[r]easts

during lactation . . . for erotic purposes." Green states that in October, Miller "requested to cancel a few appointments, offering scarcely believable reasons for doing so, and was still struggling to work on his treatment assignments." Green suspended treatment in November. Green said Miller wanted "to find another treatment provider" because Green " 'persecute[s]' him because of his Christian faith."

On December 13, the State filed a petition for an order to modify the SSOSA and the November 30, 2016 DOC violation report. The petition states Miller did not comply with the following six SSOSA conditions:

1. Failing to abide by Sex Offender Treatment contract by viewing non-pornographic for the purposes of sexual gratification, masturbating to "lactating breast" video on or about 11-8-16;

2. Failing to abide by Sex Offender Treatment contract by viewing or possessing pornographic and erotic materials, by viewing nude photos of "Helen Fox" on or about 11-8-16;

3. Failing to abide by Sex Offender Treatment contract by viewing or possessing pornographic and erotic materials, by viewing a pornographic website "twistynetwork.com" on or about 11-18-16;

4. Uninstalling Covenant Eyes monitoring software on his cell phone for an unknown period of time without permission on or about 11-22-16;

5. Failing to abide by Sex Offender Treatment contract by not being transparent about his issues, feelings, thoughts, relationships, behaviors, and activities since on or about October 2016; and,

6. Failing to abide by Sex Offender Treatment contract by having treatment services suspended due to failure to pay balance since on or about 11-21-16.

In January 2017, Miller entered into treatment with certified sex offender treatment provider Gianna Leoncavallo.

At a hearing on March 16, 2017, Miller stipulated to masturbating to a lactating breast, viewing nude photographs, and uninstalling the Internet monitoring software from his cell phone.

The court found that Miller willfully violated the conditions of his SSOSA by "masturbating while looking at a breast," viewing nude photographs, uninstalling Internet monitoring software from his cell phone, failing to abide by his Treatment Contract by "not being transparent," and failing to abide by his Treatment Contract for failure to pay. The court found that Miller did not violate the conditions of his SSOSA by viewing the website "Twistynetwork.com."

As previously recommended by the SSOSA treatment provider, the court entered an order modifying the SSOSA to limit Miller's Internet access for six months:

> Internet access is prohibited until 09/13/17 @ 1:00 pm except for searches for employment, access to email, church applications, scheduling medical appointments, Spectrum, plasma donations[,] . . . to advertise wood products, [and] to set up jail visits with his son.

On July 13, 2017, Leoncavallo terminated treatment with Miller. In a letter to the CCO, Leoncavallo states Miller "has continued to be resistant, argumentative, defensive and controlling in group. I do not believe he is capable of making progress in my program at this time."

On August 10, 2017, the CCO submitted a Notice of Violation. The Notice of Violation states that on July 26, the CCO received an "Accountability Report" from Internet monitoring company Covenant Eyes. The Accountability Report showed Miller installed Facebook and Instagram applications on his phone and accessed the website Reddit.com. Covenant Eyes also flagged a YouTube website video accessed by Miller as "Highly Mature."

On August 17, 2017, the State filed a petition to modify or revoke the SSOSA and the August 10 Notice of Violation. The petition alleged Miller violated the conditions of his SSOSA by (1) "[f]ailing to enter into and successfully complete a sex offender treatment program" and (2) "[u]sing the [I]nternet contrary to court instruction."

At the revocation hearing on September 1, Miller stipulated to the violations. Miller testified he "read everything" in the Notice of Violation, as well as what the "other participants that have written information that you have read, and I can't argue with a lot of it."

Defense counsel argued the court should not revoke the SSOSA because a third treatment provider is "willing to take him on as a patient" and Miller is "amenable to treatment." Defense counsel argued there was some "confusion" and Miller believed his "six-month term on the [I]nternet access expired in June."

The court found Miller violated the conditions of his SSOSA. The court found Miller "is not at this point making satisfactory progress and he has not successfully completed" treatment. The court found, "Both treatment providers have indicated that they felt he was not making successful progress or satisfactory progress."

The court found Miller violated the conditions of the SSOSA by using the Internet "contrary to the Court's instructions." The court found that the "court order is clear. Internet access is prohibited until, and it's clear, September 13, 2017." The court noted this is not Miller's "first violation." The court stated:

> You've been here before. And I view that your violation here, in direct conflict with the order, is proof that you are not going to successfully complete treatment, because you're stubborn, you're hardheaded, and you're opinionated, and you're going to do whatever you want to do and whenever you want to do it."

The court concluded revocation of the SSOSA was the "appropriate thing to do based on the numerous violations that have occurred." The court entered an order revoking the SSOSA. The order states Miller willfully violated the terms and conditions of his SSOSA by "[f]ailing to successfully complete a sex offender treatment program" and using the Internet "contrary to court instruction." The order states Miller "failed to make satisfactory progress in treatment."

ANALYSIS

SSOSA Revocation

Miller contends the court improperly revoked the SSOSA based on violation of the Internet use condition that infringed on his First Amendment right to free speech, United States Constitution, amendment I.

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the court has the statutory authority to revoke a SSOSA if (a) the offender "violates the conditions of the suspended sentence" or (b) "the court finds that the offender is failing to make satisfactory progress in treatment." RCW 9.94A.670(11); State v. Miller, 180 Wn. App. 413, 416, 325 P.3d 230 (2014). We review community custody conditions for abuse of discretion. State v. Nguyen, 191 Wn.2d 671, 678, 425 P.3d 847 (2018); State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). The imposition of an unconstitutional condition is manifestly unreasonable. Nguyen, 191 Wn.2d at 678; Padilla, 190 Wn.2d at 677.

The First Amendment prohibits the government from proscribing speech or expressive conduct. Where a sentencing court interferes with a fundamental constitutional right, the condition must be reasonably necessary to accomplish the

essential needs of the State and public order. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). "[C]onditions that interfere with fundamental rights must be sensitively imposed." Warren, 165 Wn.2d at 32.

An offender's constitutional rights during community custody are subject to the infringements authorized by the SRA. State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). A court has the statutory authority to impose crime-related prohibitions. Warren, 165 Wn.2d at 32. A "crime-related prohibition" prohibits "conduct that directly relates to the circumstances of the crime." RCW 9.94A.030(10).

Miller concedes the State has an interest in preventing him from accessing pornography because pornographic materials are "related to his crime." Miller cites Packingham v. North Carolina, ___ U.S. ___, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017), to argue the condition limiting his use of the Internet for six months "unlawfully suppressed significantly more speech than necessary to achieve the government's interest."

In Packingham, the United States Supreme Court held that a North Carolina law that "makes it a felony for a registered sex offender 'to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages' " violated the First Amendment because it restricted lawful speech. Packingham, 137 S. Ct. at 1733, 1738 (quoting N.C. GEN. STAT. § 14-202.5(a)).

The Supreme Court acknowledged that " '[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people' " and "a legislature 'may pass valid laws to protect children' and other victims of sexual assault

'from abuse.' " Packingham, 137 S. Ct. at 1736 (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 244-45, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)). However, the Court concluded the North Carolina law that prohibits access to "websites like Facebook, LinkedIn, and Twitter" was not narrowly tailored and was "unprecedented in the scope of First Amendment speech it burdens." Packingham, 137 S. Ct. at 1737. The Court states that to "foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." Packingham, 137 S. Ct. at 1737. The Court concluded:

> By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox."

Packingham, 137 S. Ct. at 1737 (quoting Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)).

Here, unlike in Packingham, the court did not foreclose Miller's access to social media altogether. The court restricted Miller's Internet access for six months after Miller violated the conditions of his SSOSA by masturbating to images of a lactating breast, viewing nude photographs of a woman, and uninstalling the Internet monitoring software. Because Miller consistently violated the conditions designed to prevent him from accessing pornographic materials, the six-month condition limiting Miller's access to the Internet but allowing him to use the Internet to search for employment, access

church applications and media, and schedule medical appointments and visits with his son was narrowly tailored and reasonably necessary.

The uncontroverted record established Miller repeatedly violated the SSOSA conditions and the six-month limitation on using the Internet to access pornography. The court did not abuse its discretion by revoking the SSOSA.

Right to Confrontation

Miller contends the court violated his right to confront and cross-examine witnesses at the revocation hearing. "The revocation of a suspended sentence is not a criminal proceeding." State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). In SSOSA revocation hearings, offenders are entitled to the same minimal due process rights as those afforded in probation or parole revocation hearings. Dahl, 139 Wn.2d at 683.

Minimal due process requires (a) written notice of the claimed violations, (b) disclosure to the defendant of the evidence against him, (c) the opportunity to be heard in person and to present witnesses and documentary evidence, (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation), (e) a neutral and detached hearing body, and (f) a written statement by the court as to the evidence relied upon and the reasons for the revocation. Morrissey v. Brewer, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). "Courts have limited the right to confrontation afforded during revocation proceedings by admitting substitutes for live testimony, such as reports, affidavits and documentary evidence." Dahl, 139 Wn.2d at 686. The court may consider hearsay evidence if there is "good cause to forego live testimony." Dahl, 139 Wn.2d at 686.

Miller contends the court abused its discretion by admitting treatment provider Leoncavallo's letter terminating his treatment and the CCO's testimony that Leoncavallo told him Miller "wasn't making progress" and was using "spirituality as a crutch."

At the hearing, Miller testified that he struggled in treatment because it was "a very confrontational environment" and "an environment that's not friendly to hear, oh, I read in the Bible this or that; that wasn't received well." Miller testified that he is "stubborn" and "hardheaded" because of "God and Jesus Christ in my life that has given me a spirit, a fear for the system and fear of God to tell the truth and to be honest."

The CCO testified:

> So when I spoke with the treatment provider, [Leoncavallo], the things that she kind of pointed to me in group why he wasn't making progress is because of many of the things that Mr. Miller spoke about to you, being hardheaded, being argumentative, and one of the things that she specifically spoke on was spirituality. That he would use spirituality as a crutch and not use SOTP[3] treatment. And so he would not go through what she wanted him and he wanted to use religion as specifically his treatment.

Even if admission of the hearsay statements was error, the error was harmless. Dahl, 139 Wn.2d at 688 ("Violations of a defendant's minimal due process right to confrontation are subject to harmless error analysis."). There is no dispute that Miller failed to successfully complete a sex offender treatment program with either Green or Leoncavallo. Miller stipulated that he violated the SSOSA by failing to "successfully complete" a sex offender treatment program and admitted that he was terminated from the two treatment programs.

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[3] Sex offender treatment program.

Community Custody Conditions

Miller challenges imposition of the following six community custody conditions:

> 6. Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.
>
> . . . .
>
> 8. Do not date women as directed by the supervising Community Corrections Officer. Mr. Miller may continue his current relationship with his wife, Marjorie Miller, and his other children . . . .
>
> . . . .
>
> 11. Do not . . . frequent establishments where alcohol is the chief commodity for sale.
>
> . . . .
>
> 13. Do not associate with known users or sellers of illegal drugs.
>
> 14. Do not possess drug paraphernalia.
>
> 15. Stay out of drug areas, as defined in writing by the supervising Community Corrections Officer.

Miller contends the court exceeded the statutory authority to impose the conditions because the conditions are unconstitutionally vague.

"The Fourteenth Amendment to the United States Constitution along with article I, section 3 of the Washington State Constitution require that citizens be afforded fair warning of proscribed conduct." Nguyen, 191 Wn.2d at 678. A community custody condition is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement. State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008) (citing City of Spokane v. Douglass,

115 Wn.2d 171, 178, 795 P.2d 693 (1990)). But " 'a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.' " State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010)[4] (quoting State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009), rev'd, 169 Wn.2d 782). In determining whether a term is unconstitutionally vague, "the terms are not considered in a 'vacuum,' rather, they are considered in the context in which they are used." Bahl, 164 Wn.2d at 754. "When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary." Bahl, 164 Wn.2d at 754.

Miller contends condition 11 that prohibits him from frequenting establishments where alcohol is the "chief commodity for sale" is unconstitutionally vague because a reasonable person would not know what "the term 'chief commodity' means" and the condition is subject to arbitrary enforcement. We disagree. The dictionary defines "chief" as "marked by greatest importance, significance, influence" and defines "commodity" as "an economic good." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 387, 458 (2002). An establishment where "alcohol is the chief commodity for sale" is an establishment where alcohol is the most important good for sale or whose primary purpose is the sale of alcohol. Because an ordinary person would understand the prohibition, condition 11 is not unconstitutionally vague.

Miller contends condition 13 that prohibits him from associating with "known users or sellers of illegal drugs" is unconstitutionally vague because it is unclear who

[4] Internal quotation marks omitted.

must have knowledge that a person is a "known" user or seller of illegal drugs. In In re Personal Restraint of Brettell, 6 Wn. App. 2d 161, 169, 430 P.3d 677 (2018), we considered and rejected the same argument. We held Washington case law does not support the conclusion that " 'known,' when used in a community custody condition, refers to the knowledge of anyone other than the offender." Brettell, 6 Wn. App. 2d at 169; see also United States v. Vega, 545 F.3d 743, 749-50 (9th Cir. 2008) (condition prohibiting association with " 'any member of any criminal street gang' " limited to people "known" by the defendant to be gang members). Because the condition prohibits association with people known by Miller to be users or sellers of illegal drugs, condition 13 is not unconstitutionally vague.

Citing Sanchez Valencia, 169 Wn.2d 782, Miller argues condition 14 that prohibits possession of "drug paraphernalia" is unconstitutionally vague. We disagree. In Sanchez Valencia, the Washington Supreme Court concluded a condition prohibiting " 'any paraphernalia' " generally, rather than "drug paraphernalia," was unconstitutionally vague. Sanchez Valencia, 169 Wn.2d at 794. Here, unlike in Sanchez Valencia, condition 14 specifically prohibits possession of "drug paraphernalia." RCW 69.50.102(a) defines "drug paraphernalia" as follows:

> [A]ll equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

Miller contends conditions 6 and 15 that prohibit him from frequenting areas where minors congregate or drug areas as defined by the supervising CCO are unconstitutionally vague. The State concedes that the superior court should either

clarify or strike these conditions. We accept the concession as well taken. See State v. Irwin, 191 Wn. App. 644, 655, 364 P.3d 830 (2015) (requiring "clarifying language or an illustrative list of prohibited locations"). We remand to clarify or strike conditions 6 and 15.

Miller contends condition 8 that prohibits him from "dat[ing] women as directed by the supervising Community Corrections Officer" is vague and infringes on his fundamental right to marry. The right to marry is a fundamental right. Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Any condition affecting a fundamental right must be narrowly drawn after deciding that no reasonable alternative exists to achieve the State's interest. Warren, 165 Wn.2d at 34-35.

There is no dispute that where the crime involves a sexual act against a child with whom the defendant has contact through a parental relationship or "social relationship with their parents," the court may impose a community custody condition directing the offender to refrain from dating women who have minor children. State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014); see also State v. Autrey, 136 Wn. App. 460, 465, 468, 150 P.3d 580 (2006) (affirming condition requiring "prior approval" of therapist and CCO before engaging in sexual contact because "the offender's freedom of choosing even adult sexual partners is reasonably related to the[ ] crimes because potential romantic partners may be responsible for the safety of live-in or visiting minors"). Such a condition does not improperly infringe on the fundamental right to marry. Kinzle, 181 Wn. App. at 785.

But here, unlike in Kinzle, the condition states Miller shall "not date women as directed by the supervising Community Corrections Officer." Because condition 8

prohibits Miller from dating any women subject to the discretion of his CCO, the condition implicates the fundamental right to marry and is not narrowly drawn. We remand to strike the condition without prejudice to imposing a narrowly drawn condition that prohibits Miller from dating women who have minor children.

We affirm the decision to revoke the SSOSA. We affirm imposition of community custody conditions 11, 13, and 14. We remand to strike condition 8 and to strike or clarify conditions 6 and 15.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77334-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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