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NO. 51116-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JENNIFER GRAEN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Mark McCauley, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State breached the plea agreement by failing to honor its promise to recommend a low-end standard range sentence.

2. The community custody condition prohibiting the appellant from attending “X-rated movies, peep shows, or adult bookstores without the approval of the sexual deviancy therapist or Community Corrections Officer” (CCO) is not crime-related. CP 78 (condition 6).

3. The community custody condition prohibiting the appellant from going “into bars, taverns, or cocktail lounges” is not crime-related. CP 78 (condition 15).

4. The community custody condition requiring the appellant to inform the CCO “of any romantic relationships,” to verify no minors are involved and that the adult is aware of the appellant’s conviction and conditions of supervision, is unconstitutionally vague. CP 78 (condition 3).

5. The community custody condition prohibiting the appellant from “possess[ing] or perus[ing] any sexually explicit materials, as defined by [the appellant’s] therapist or [CCO], unless given prior approval” is unconstitutionally vague. CP 78 (condition 5).

6. Condition 5, relating to sexually explicit materials, is also unconstitutionally overbroad, in violation of the First Amendment.

### Issues Pertaining to Assignments of Error

1. In exchange for the appellant's guilty plea, the State promised to recommend the low end of the standard range at the sentencing hearing. Rather than arguing for the low end of the standard range at sentencing, however, the State emphasized the appellant's recalcitrance, the seriousness of the crimes, the existence of uncharged crimes, and the severe and possibly life-long impact on the victim. Under the circumstances, did the State breach the plea agreement, in violation of the appellant's right to due process?

2. Should the community custody conditions that are not crime-related be stricken?

3. Should the unconstitutionally vague community custody conditions be stricken?

4. Should condition 5, relating to sexually explicit materials, be stricken as unconstitutionally overbroad?

### B. STATEMENT OF THE CASE<sup>1</sup>

The State charged appellant Jennifer Graen with four counts: second degree dealing in depictions of a minor engaged in sexually explicit

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<sup>1</sup> This brief refers to the verbatim reports as follows: 1RP – 1/17 and 4/7/17; 2RP – 2/1 and 5/15/17; 3RP – 8/18/17; 4RP – 9/15/17; and 5RP – 9/22/17.

conduct<sup>2</sup> (count 1); second degree possession of depictions of a minor engaged in sexually explicit conduct<sup>3</sup> (count 2); sexual exploitation of minor<sup>4</sup> (count 3); and first degree child molestation<sup>5</sup> (count 4). B.A., the complainant/child involved as to each count, is Graen's biological granddaughter, whom Graen had adopted. CP 1-8.

Graen pleaded guilty to counts 1, 3 and 4 pursuant to a plea agreement. CP 9-15 (plea agreement); CP 16-28 (statement of defendant on plea of guilty). In exchange for Graen's plea, the State agreed, among other things, to dismiss count 2 and to allow Graen the opportunity to argue for a Special Sex Offender Sentence Alternative (SSOSA) under RCW 9.94A.670. CP 9-15.

The State had also offered Graen the opportunity to plead to counts 1, 2, and 3, dismissing count 4. Under this option, however, the State would not have permitted Graen to pursue a SSOSA. But—despite the possibility of an indeterminate sentence on count 4<sup>6</sup>—Graen agreed to plead under the former option in the hope that she would receive a SSOSA. CP 44.

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<sup>2</sup> RCW 9.68A.050(2)(a); RCW 9.68A.011(4)(f), (g).

<sup>3</sup> RCW 9.68A.070(2)(a); RCW 9.68A.011(4)(f), (g).

<sup>4</sup> RCW 9.68A.040.

<sup>5</sup> RCW 9A.44.083.

<sup>6</sup> RCW 9.94A.507(1)(a)(i).

In the plea agreement, the State appears to agree that it will recommend a SSOSA if Graen is found to be eligible for the sentencing alternative. CP 11, 13 (State's written "sentence recommendation," including SSOSA "if eligible"). However, at the plea hearing and subsequent hearings, the State repeatedly indicated that it did not intend for the plea agreement to include a SSOSA recommendation by the State; rather, the agreement permitted the defense to argue for a SSOSA. See 2RP 3-4 (prosecutor's recommendation, discussed at plea hearing, prior to plea); 3RP 3 (prosecutor's recommendation summarized at subsequent hearing); 4RP 2 (same).

According to the plea agreement, in the event that a SSOSA was imposed, the State recommended the high end of the standard range be imposed and suspended<sup>7</sup> as part of the SSOSA. In the event that a SSOSA was not imposed, however, the State agreed to recommend the low end of the standard range as to each charge. CP 11-12. Based on an offender score of six, this recommendation reflected 41 months on count 1, 77 months on count 3, and 98 months to life on count 4. CP 12; see RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (crimes included within each

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<sup>7</sup> RCW 9.94A.670(4).

seriousness level); RCW 9.94A.525 (offender score); see also Supp. CP \_\_\_\_ (sub no. 42, Statement of Prosecuting Attorney, at 5).

After the plea hearing, Graen requested, but did not receive funding for, a SSOSA evaluation. CP 45. She therefore moved to withdraw her plea. CP 43-59; 2RP 17-19. Ultimately, the court entered an order that the evaluation be funded at public expense, and Graen withdrew her motion to withdraw the plea. 2RP 19.

At sentencing, however, counsel for Graen informed the court that Graen was withdrawing her request for a SSOSA because her release plan would have required her to reside with her mother. But, Graen did not wish to obstruct any relationship between B.A. and Graen's mother, B.A.'s biological great-grandmother. 5RP 4.

Addressing the court at sentencing, the prosecutor<sup>8</sup> indicated she did object to withdrawal of the SSOSA request because the State had never agreed to recommend a SSOSA. 5RP 4. As for the State's sentencing recommendation, the prosecutor continued:

Essentially, the biggest crime [Graen is] looking at is in Count 4. That's the lifetime sentence. It's a class A [felony]. So 98 months is, I think, the minimum that she's

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<sup>8</sup> At a hearing occurring a week earlier, before a different judge, a substitute prosecutor misrepresented various underlying facts and argued strenuously for a "top end" sentence. 4RP 2-3. The court continued the hearing, and a sentencing hearing was ultimately held before a different judge, with the original prosecutor appearing in lieu of the substitute. 4RP 4-5.

looking at. When Ms. Graen originally pled -- you know, she had been pretty hard when she comes into court and had, I would say, a little bit of an attitude.

But when she pled, was the first time I actually saw her have some emotion. She had stated to the law enforcement officers that she was willing to work with them and make amends for her actions. I did see a human side to [Graen] at that point.

I know the family members are here and would like to speak to the Court as well. I hope that [Graen has] learned her lesson from things. She certainly will be spending quite an amount of time in prison thinking about them. There were other charges that were not filed.

Her violations are quite serious, and the little girl in question has had ongoing issues with her behavior. She acts out sexually with people. She doesn't have appropriate boundaries, and I don't know that she'll ever be able to resolve those issues because it started so young for her.

This is a sad case for everyone. I'm sure the family members can express it more because they are more deeply involved. Her therapist is also here as well. So I'll just ask if people are willing to come forward and who would like to speak.

5RP 4-5.

Several family members and others associated with the case spoke on behalf of imposing the maximum possible sentence. 5RP 5-8.

On counts 1 and 3, the court imposed terms of imprisonment at the high end of the standard range. On count 4, it imposed incarceration of 114 months to life, reflecting the middle of the standard range. CP 63-64.

The court also imposed lifetime community custody and imposed several conditions, including the four Graen now challenges. CP 64, 77-79.

Graen appeals. CP 85-86.

C. ARGUMENT

1. THE PROSECUTOR'S PRESENTATION AT SENTENCING VIOLATED THE PLEA AGREEMENT AND VIOLATED GRAEN'S RIGHT TO DUE PROCESS.

Graen pleaded guilty to several crimes. In return for her plea, the State promised to recommend the low end of the standard range. The State undermined this promise with its remarks at sentencing emphasizing Graen's recalcitrance, the seriousness of the offense, the fact that there were uncharged crimes, and the impact of the crimes on the child victim. The State therefore breached the plea agreement. As a result, Graen must be permitted to elect between specific performance of the plea agreement, or withdrawal of her plea.

"Plea agreements are contracts." State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). Constitutional "[d]ue process requires a prosecutor to adhere to the terms of the agreement." Id. at 839 (citing, inter alia, Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Mabry v. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984), overruled in part on other grounds by Puckett v. United States, 556 U.S. 129, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)). When the State

breaches a plea agreement, it “undercuts the basis for the waiver of constitutional rights implicit in the plea.” State v. Tourtellotte, 88 Wn.2d 579, 584, 564 P.2d 799 (1977).

Because the accused gives up important constitutional rights by pleading guilty, the State must adhere to the terms of the agreement by recommending the agreed-upon sentence. Sledge, 133 Wn.2d at 839. The State’s duty of good faith requires it not undercut the terms of the agreement either explicitly or implicitly by conduct indicating intent to circumvent its terms. Id. at 840; State v. Talley, 134 Wn.2d 176, 183-84, 949 P.2d 358 (1998); State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999).

Plea agreement breach is never harmless error. The plea bargaining process requires that both the State and the accused adhere to their promises. When this process is frustrated, the fairness of the sentencing hearing is in question. Such an error infects the entire proceeding and, as such, cannot be harmless. State v. MacDonald, 183 Wn.2d 1, 8, 346 P.3d 748 (2015); State v. Carreno-Maldonado, 135 Wn. App. 77, 87-88, 143 P.3d 343 (2006) (citing Santobello, 404 U.S. at 458-59; In re Personal Restraint of James, 96 Wn.2d 847, 849-50, 640 P.2d 18 (1982)).

When determining whether the State’s comments breach a plea agreement, appellate courts apply an objective standard, looking at the

sentencing record as a whole. Jerde, 93 Wn. App. at 780. The test is whether the State’s words or conduct—without looking to the intent behind them—contradict the State’s recommendation. Id.

If the plea agreement is breached, the appropriate remedy is to remand for the defendant to choose whether to withdraw the guilty plea or seek enforcement of the State’s agreement. MacDonald, 183 Wn.2d at 21 (citing State v. Barber, 170 Wn.2d 854, 874, 248 P.3d 494 (2011) (disapproving of specific performance as a remedy only where it would allow for the imposition of an illegal sentence, overruling prior precedent)).

The State is obligated not to “undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement.” Sledge, 133 Wn.2d at 840. A breach occurs where the State offers unsolicited information via “report, testimony, or argument that undercuts the State’s obligations under the plea agreement.” Carreno-Maldonado, 135 Wn. App. at 83.

Two cases from this Court are instructive. In State v. Xaviar, 117 Wn. App. 196, 198, 69 P.3d 901 (2003), the prosecutor and the defendant agreed the defendant would plead to several child sex charges in exchange for a recommendation for the low end of the standard range.

But, at sentencing, the prosecutor emphasized the seriousness of the crimes, informed the court regarding charges that the State did not bring,

noted that the State could have sought a 60-year exceptional sentence, and highlighted aggravating factors that would support an exceptional sentence, including a reference to facts that were not otherwise before the court. Id. at 200-01. This Court held that the prosecutor's presentation constituted a breach of the plea agreement. Id. at 201.

Similarly, in State v. Carreno-Maldonado, 135 Wn. App. 77, 79-80, 143 P.3d 343 (2006), in exchange for a guilty plea, the State agreed to recommend the low end of the standard range on a first degree rape charge, and to recommend a mid-range sentence on second degree rape charges.

At sentencing, however, the prosecutor indicated to the court that she wanted to speak "on behalf" of victims who were present but did not wish to address the court. Id. at 80. The prosecutor then described facts supporting aggravating factors, and the court imposed high end sentences on all counts. Id. at 80-82.

On appeal, this Court held that the State breached the plea agreement. Because the State agreed to recommend a low-end sentence, "there was no need for the State to recite potentially aggravating facts." Id. at 84. And, while this Court acknowledged that the State had more leeway on the mid-range recommendation to do so, the prosecutor's remarks "went beyond what was necessary" to support the mid-range recommendation. Id. at 84-85. This Court further noted that the prosecutor's remarks "were not

a response to argument by defense counsel or an attempt to provide information which the court solicited.” Id. at 85.

The facts of this case parallel Xaviar and Carreno-Maldonado. Here, the State failed to honor its bargain to recommend a low-end standard range sentence on each count. Instead, the State emphasized several factors that, when viewed objectively, urged the court to impose a sentence greater than the low end of the standard range.

As a preliminary matter, the prosecutor’s office did not appear to be on board with the recommendation or realize its significance. A week before the sentencing hearing, a substitute prosecutor argued the court should impose the high end of the standard range. 4RP 2-5.

Then, at the sentencing hearing itself, the original prosecutor emphasized Graen’s recalcitrance, tempering the criticism only slightly with an acknowledgment that Graen had worked with law enforcement.

The prosecutor notified the court about uncharged crimes.

The prosecutor characterized Graen’s crimes as serious.

The prosecutor highlighted B.A.’s ongoing serious behavior issues, indicating that they were likely to persist throughout her lifetime.

Finally, the prosecutor appeared to urge B.A.’s family members and therapist to offer the court specifics regarding B.A.’s behavior issues.

Each of these comments was inconsistent with a low-end recommendation. The State, therefore, breached the plea agreement.

The State may argue, as to the final comments, that the State does not breach a plea agreement by merely helping a victim (or victim's representative) exercise her constitutional and statutory rights to communicate information to the sentencing court. See Carreno-Maldonado, at 86 (“In most circumstances, a prosecutor acting as an officer of the court who merely helps a victim exercise her constitutional and statutory right to communicate information to the sentencing court does not breach a plea agreement by that conduct alone.”).

Indeed, article I, section 35 (amendment 84) of the Washington Constitution provides, in relevant part, that if a victim is unable to address the court, “the prosecuting attorney may identify a representative to appear to exercise the victim’s rights.” Cf. RCW 7.69.030(14) (“[t]here shall be a reasonable effort made to ensure that . . . victims and survivors of victims [have the right] to present a statement personally or by representation[ ] at the sentencing hearing for felony convictions.”); RCW 7.69.030(13) (victims, survivors of victims, and witnesses of crimes may also present a victim impact statement to the court).

Putting aside the question of whether the speakers at the hearing qualified as victim representatives, here, the State went further than was

permitted by emphasizing the severe impact of the crimes and then urging those present at the hearing to provide specifics. As in Carreno-Maldonado, therefore, the State's victim-related remarks constituted "unsolicited advocacy" and were "contrary to the State's sentencing recommendation." 135 Wn. App. at 86-87. Thus, any argument that the State was merely facilitating a victim's communication with the court should be rejected.

Graen pleaded guilty to several crimes. In return for her plea, the State promised to recommend that the trial court impose the low end of the standard range. The State undermined this promise with its remarks at sentencing. The State therefore breached the plea agreement.

As stated, the remedy for such a breach is to permit Graen either to withdraw the guilty plea or to seek its specific performance. MacDonald, 183 Wn.2d at 21.

2. THE COMMUNITY CUSTODY CONDITIONS PROHIBITING GRAEN FROM ENTERING SEX-RELATED BUSINESSES, AND FROM ENTERING BARS, TAVERNS, AND COCKTAIL LOUNGES, ARE NOT CRIME-RELATED.

The community custody condition prohibiting Graen from entering X-rated movies, peep shows, or adult bookstores is not crime related and should be stricken. CP 78 (condition 6). The condition prohibiting Graen from entering bars and related business should be stricken for this reason as well. CP 78 (condition 15).

The trial court's authority to impose sentence in a criminal proceeding is strictly limited to that authorized by the legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Any sentencing condition that is not expressly authorized by statute is void. Id.

This Court reviews de novo whether a sentencing court has statutory authority to impose a given condition. Id. In contrast, a trial court's decision to impose a condition is reviewed for abuse of discretion only if that court had statutory authorization to impose it. Id. at 326.

While defense counsel did not object to the improper community custody conditions in the court below, erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable, and some discretionary. No condition related to sex-related businesses or bars and taverns is expressly listed. RCW 9.94A.703. However, a court may impose other “crime-related prohibitions.” RCW 9.94A.703(3)(f).

A crime-related prohibition “means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.” RCW 9.94A.030(10).

Courts interpret statutes by first looking to their plain language as the indicator of legislative intent. TracFone Wireless, Inc. v. Dep’t of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010)). Although the issue of crime-relatedness arises frequently in Washington, to date no court has squarely tackled the phrase “directly relates to the circumstances of the crime” based on its plain meaning.

Generally, where the words in a statute are undefined, a court will rely on dictionary definitions. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). If a statute’s meaning is plain on its face, the court must apply that meaning. State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

The word “circumstance” appears in the statutory definition of crime-related prohibition. “Circumstance” is undefined in the statute but is defined in the dictionary as

a specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place : a condition, fact, or event accompanying, conditioning, or determining another : an adjunct or concomitant that is present or logically is likely to be present[.]

WEBSTER’S THIRD NEW INT’L DICTIONARY 410 (1993). Thus, a circumstance of the crime is a part or attribute of the crime, or something that accompanies, conditions, or determines the crime.

The fact that sex-related business played no part in Graen’s crimes means they do not qualify as a circumstance of the crimes. Similarly, there is no indication that bars, taverns, or cocktail lounges played any role in Graen’s crimes.

But RCW 9.94A.030(10) is even more demanding. It does not permit a prohibition based upon a *loose* connection to a circumstance of the crime, but only one that “directly relates” to such a circumstance.

To “relate” means “to show or establish a logical or causal connection between.” WEBSTER’S, *supra*, 1916. “Directly” means “in close relational proximity.” *Id.* at 641. Understood in this manner, the crime-

related prohibition must pertain to the actual crime, not just to any potential crime within a broad and varied category of criminal activity.<sup>9</sup>

As the leading commentator indicates, the Sentencing Reform Act (SRA) represented a shift in sentencing philosophy, away from the broad notion of coerced rehabilitation, and toward a more circumscribed view of a sentencing court's powers. State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989) (quoting David Boerner, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981 § 4.5 (1985)). The SRA “does not specify how certain the sentencing judge must be that the conduct being prohibited is directly related to the crime of conviction.” Moreover, “[t]he existence of such a relationship will always be subjective.” Parramore, 53 Wn. App. at 530 (quoting Boerner, §4.5). But, “[t]here must be some basis for the “crime-related” determination if the limitation is to have any meaning. For a sentencing judge to base the determination that conduct is crime-related upon belief alone, without some factual basis, would be to read the crime-related requirement out of the statute.” Parramore, 53 Wn. App. at 531 (quoting Boerner, § 4.5).

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<sup>9</sup> This formulation does not eschew caselaw indicating that no strict causal link is required between prohibited activity and the underlying crime. E.g. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992), overruled on other grounds by State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998).

Several cases support this formulation. In State v. Norris, 1 Wn. App. 2d 87, 404 P.3d 83 (2017), review granted, 190 Wn.2d 1002 (2018), the defendant was convicted of child molestation. Division One upheld a prohibition on “sexually explicit” and related materials, as defined by several statutes, based on Norris’s underlying conduct. Id. at 99. But the Court struck down a prohibition similar to the one in this case “because there is no evidence in the record showing that frequenting sex-related businesses is reasonably related to the circumstances of the crime.” Id. at 98;<sup>10</sup> accord State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014) (conditions prohibiting a sex offender from possessing sexually explicit material and frequenting establishments selling such materials were not crime-related “because no evidence suggested that such materials were related to or contributed to his crime.”)<sup>11</sup>.

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<sup>10</sup> That Court also criticized Division Three’s decision in State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016), for employing an impermissible “categorical approach,” that is, reliance on “the broad proposition that a sex offense conviction alone justifies imposition of” of any sex-related prohibition. Such an approach was contrary to the language of the SRA. Norris, 1 Wn. App. 2d at 97-98.

<sup>11</sup> Several recent unpublished cases are in accord. See State v. Starr, noted at 200 Wn. App. 1070, 2017 WL 4653443, at \*5 (2017) (in child molestation case, prohibition on sexually explicit materials not crime related where there was no evidence such materials related to offense); State v. Dossantos, noted at 200 Wn. App. 1049, 2017 WL 4271713, at \*5 (2017) (same); State v. Stewart, noted at 196 Wn. App. 1046, 2016 WL 6459834, at \*3 (2016) (in indecent liberties case, same); State v. Hesselgrave, noted at 184 Wn. App. 1021, 2014 WL 5480364, at \*12 (2014) (prohibition on going to establishments promoting “commercialization of sex” not reasonably crime-related where no evidence suggested such establishments related to child rape); State v. Clausen, noted at 181 Wn. App.

Likewise, in State v. O’Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008), Division One struck a condition prohibiting Internet access because there was

no evidence O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Id. at 775.

Similarly, in State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008), this Court struck a condition prohibiting possession of cell phones or data storage devices because no evidence in the record showed Zimmer used or intended to use such devices to possess or distribute methamphetamine. This was so even recognizing that such devices were commonly used to distribute illegal drugs. Id. at 414.

And in State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010), the Supreme Court struck a community custody

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1019, 2014 WL 2547604, at \*8 (2014) (conditions prohibiting possessing sexually explicit material and patronizing establishments that promote commercialization of sex not crime-related because no evidence suggested Clausen possessed sexually explicit material relating to child rape); State v. Whipple, noted at 174 Wn. App. 1068, 2013 WL 1901058, at \*6 (2013) (prohibition on possessing and frequenting establishments that deal in sexually explicit materials not crime-related where nothing in record suggested child rape offenses involved such materials or establishments).

condition prohibiting contact with “any minor-age children” because “[i]t is not reasonable . . . to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender’s crime.”

Where the record does not support a factual nexus between the prohibition and the commission of the crime, the prohibition may not be imposed as a crime-related prohibition under RCW 9.94A.030(10).

There was no evidence X-rated movies, peep shows, or adult bookstores played any role in the offenses in this case. Similarly, there is no indication in the record that bars or similar establishments played any role. Accordingly, the conditions related to sex-related business and bars and must be stricken because they cannot be considered crime-related under the SRA. Norris, 1 Wn. App. 2d at 98.

3. THE COMMUNITY CUSTODY CONDITION REQUIRING GRAEN TO INFORM HER COMMUNITY CORRECTIONS OFFICER OF ANY ROMANTIC RELATIONSHIP AND PROHIBITING GRAEN FROM POSSESSING SEXUALLY EXPLICIT MATERIALS ARE UNCONSTITUTIONALLY VAGUE.

The condition requiring Graen to inform her CCO of any romantic relationships is unconstitutionally vague. CP 78 (condition 3). The condition prohibiting her from possessing sexually explicit materials is, likewise, unconstitutionally vague. CP 78 (condition 5).

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

A prohibition is thus void for vagueness if it does not (1) define the prohibition with sufficient definiteness such that ordinary people can understand what is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

Generally, “imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable.” Sanchez Valencia, 169 Wn.2d at 791-92. The imposition

of an unconstitutional condition is, however, manifestly unreasonable. Id. at 792.

- a. The romantic relationship condition is unconstitutionally vague.

The condition requiring Graen to inform her CCO of any “romantic” relationship is unconstitutionally vague because it does not provide Graen with adequate notice of what she must do to avoid sanction and does not prevent arbitrary enforcement.

“Subjective terms allow a ‘standardless sweep’ that enables state officials to ‘pursue their personal predilections’ in enforcing the community custody conditions.” Johnson, 180 Wn. App. at 327 (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180 n.6, 795 P.2d 693 (1990) (quoting Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)) (internal quotation marks omitted).

Graen’s liberty during a lifetime of supervised release should not hinge on the accuracy of her prediction about whether a given CCO, prosecutor, or judge would conclude that a targeted relationship had been formed without first informing the CCO. The condition, as written, does not provide a standard by which a reasonable person can understand what qualifies as “romantic relationship” in a non-arbitrary manner.

The question is, of course, what constitutes a “romantic relationship.” United States v. Reeves, 591 F.3d 77 (2d Cir. 2010) is instructive. Reeves held that a condition of supervision requiring the defendant to notify the probation department upon entry into a “significant romantic relationship” was vague, in violation of due process. Id. at 79, 81. The federal court observed that “people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a ‘significant romantic relationship.’” Id. at 81. “What makes a relationship ‘romantic,’ let alone ‘significant’ in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders.” Id. The condition had “no objective baseline,” as “[n]o source provides anyone—courts, probation officers, prosecutors, law enforcement officers, or Reeves himself—with guidance as to what constitutes a ‘significant romantic relationship.’” Id.

Division Three of the Court of Appeals adopted the Reeves court’s reasoning in a persuasive unpublished decision, State v. Dickerson, noted at 194 Wn. App. 1014, 2016 WL 3126480 (2016). There, the trial court imposed a community custody condition prohibiting Dickerson from “enter[ing] a romantic relationship without the prior approval of the

[community corrections officer] and Therapist.” Id. at \*1 (alteration in original).

Relying on Reeves, Division Three of this Court held the condition was unconstitutionally vague because “it is not clear which relationships will require the permission of both the community custody corrections officer and therapist.” Dickerson, 2016 WL 3126480, at \*5. Further, “[t]he condition is open to arbitrary enforcement by community custody officers and therapists with different ideas about the point at which a relationship becomes romantic.” Id.

The condition in Dickerson, prohibiting “romantic” relationships, did not contain “highly subjective qualifiers,” but still the Court found it vague.<sup>12</sup>

There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Imposition of an unconstitutional condition is manifestly unreasonable. Id. at 792. The “romantic relationships” condition here is unconstitutional because it fails to provide reasonable notice as to what Graen must do to

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<sup>12</sup> In State v. Norris, Division One held the phrase “dating relationship,” in regard to a similar condition, was *not* vague. 1 Wn. App. 2d at 95. That issue is currently pending in the Supreme Court under case number 95274-4, which has been consolidated with State v. Hai Min Nguyen under case number 94883-6. Oral argument was heard in those consolidated cases on May 10, 2018.

comply with it. It also exposes her to arbitrary enforcement. As such, the condition violates due process and should be stricken.

- b. The sexually explicit materials prohibition is also vague.

The condition prohibiting Graen from possessing sexually explicit materials is, likewise, unconstitutionally vague.

As stated, a prohibition is unconstitutionally vague if (1) it is not sufficiently definite so that ordinary persons can understand what it proscribes or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. This condition fails under both prongs.

In Bahl, the Supreme Court reasoned that because definitions of pornography can and do differ widely—they may “include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo’s sculpture of David”—a prohibition on perusing pornography was not sufficiently definite to apprise ordinary persons of what is permitted and what is proscribed.” Id. at 756. The same is true of the prohibition on all sexually explicit materials. Countless works of art, literature, film, and music explicitly describe, depict, and relate sex and sexuality. Graen has no way to know which of these works she can possess,

use, access, or view, and which she cannot. Like the ban on pornography, the condition here is unconstitutionally vague.

“Limitations upon fundamental rights are permissible, provided they are imposed sensitively.” State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). When a condition “concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms.” Bahl, 164 Wn.2d at 753. “[A] stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition.” Id.

Condition 5 makes no distinction between sexually explicit materials involving adults, versus children. Sexually explicit materials, such as adult pornography, are protected by the First Amendment. State v. Perrone, 119 Wn.2d 538, 551, 834 P.2d 611 (1992). Pornographic drawings, even of children, are also constitutionally protected. Id. (citing New York v. Ferber, 458 U.S. 747, 764-65, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)). “Books, films, and the like are *presumptively* protected by the First Amendment[.]” Perrone, 119 Wn.2d at 550 (citing Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 109 S. Ct. 916, 103 L. Ed. 2d. 34 (1989)). Paintings, music, poetry, and other such works are “unquestionably shielded” by the First Amendment. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569, 115 S. Ct.

2338, 132 L. Ed. 2d 487 (1995). The blanket ban on *all* sexually explicit materials fails to satisfy the requisite clarity to ensure First Amendment rights are honored. The condition affects Graen's ability to read a certain book, view a certain painting or film, or listen to a certain song. The condition is intolerably vague.

In Bahl, the Supreme Court approved of a condition that prohibited Bahl from "frequenting 'establishments whose primary business pertains to sexually explicit or erotic material.'" Bahl, 164 Wn.2d at 758. The Court discussed dictionary definitions of "sexually explicit" and "erotic," and also pointed out that statutes provided definitions of such terms. Id. at 758-60. The Court held that because "[t]he challenged terms [we]re used in connection with a prohibition on frequenting business," "[w]hen all the challenged terms, with their dictionary definitions, are considered together, we believe the condition is sufficiently clear. It restricts Bahl from patronizing adult bookstores, adult dance clubs, and the like." Id. at 759.

No similar context saves the prohibition here, and the Bahl court explicitly declined to "decide whether th[e] definition [of sexually explicit material] would be sufficient notice (given that Mr. Bahl was not convicted under this statute)[.]" Id. at 760. Under federal law, moreover, even a statutory definition of a term does not give notice of the term's meaning as used in a sentencing condition *unless* the definition is contained in the same

criminal statute that the defendant was convicted of violating. See United States v. Thompson, 653 F.3d 688, 696 (8th Cir. 2011); Farrell v. Burke, 449 F.3d 470, 487 (2d Cir. 2006). Graen was not convicted of violating the statute containing the definition of sexually explicit materials, which is found in chapter 9.68 RCW.

Nor does the condition reference any applicable statutory definition. A reviewing court will not assume a trial court intended to limit a term to an unreferenced statutory definition. In this respect, Graen's case is like State v. Moultrie, in which the defendant challenged as unconstitutionally vague the condition of his sentence prohibiting contact with "vulnerable, ill or disabled adults." 143 Wn. App. 387, 396, 177 P.3d 776 (2008). The State argued the terms "vulnerable" and "disabled" provided sufficient notice of the type of person with whom Moultrie is to avoid contact because those terms were defined by statute. Id. at 397. The Court rejected the State's argument: "Because there is no indication that the trial court in fact intended to limit the terms of the order to these statutory definitions, we will not presume it did so or otherwise rewrite the trial court's order." Id. at 397-98.

In any event, RCW 9.68.130(2) defines "[s]exually explicit material" as

any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

But even the statutory definition compounds rather than mitigates the prohibition's vagueness. Under RCW 9.68.130(2)'s sexually explicit material definition, several works of art might qualify as "flagellation or torture in the context of a sexual relationship," such as those of American photographer Robert Mapplethorpe, who extensively photographed the underground BDSM scene in 1960s and 1970s New York. Reasonable minds still differ as to whether these or other similar works qualify as "works of art or of anthropological significance." Reasonable minds would also differ as to whether an image "emphasiz[ed] the depiction" of genitals. Does a simple nude emphasize genitalia? If not, what line should be drawn? RCW 9.68.130(2) leads to many more questions than answers.<sup>13</sup>

As the Bahl Court pointed out in its reliance on United States v. Loy, 237 F.3d 251 (3d Cir. 2001), judges and lawyers could not possibly answer

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<sup>13</sup> In Moultrie, as well, the statutorily defined terms of "vulnerable adult" and "developmental disability" were identical (or nearly identical) to terms used in the sentencing condition. But the condition was still found vague. 143 Wn. App. at 396-97; see also Johnson, 180 Wn. App. at 328-29 (finding "vulnerable" to be vague for similar reasons).

these questions. Bahl, 164 Wn.2d at 746-48 (discussing Loy). As that court stated

[W]e could easily set forth numerous examples of books and films containing sexually explicit material that we could not absolutely say are (or are not) pornographic . . . . It is also difficult to gauge on which side of the line the film adaptations of Vladimir Nabokov's *Lolita* would fall, or if Edouard Manet's *Le Dejeuner sur L'Herbe* is pornographic (or even some of the Calvin Klein advertisements) . . . .

Loy, 237 F.3d at 264.

The same reasoning applies here. Because the prohibition does not give fair notice of what is allowed and what is disallowed, it is unconstitutionally vague under the first prong of Bahl's vagueness analysis.

Condition 5 is also infirm under Bahl's second prong because it leads to arbitrary enforcement. Where a condition allows a third party to "direct what falls within the condition" it "only makes the vagueness problem more apparent since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758. A creative corrections officer could recite several films, books, artworks, advertisements, songs, and other materials that fall within the prohibition. The prohibition is so broad that a corrections officer could apply it to almost anything. The condition essentially supplies the State with an arbitrary go-to-jail card.

In sum, condition 5 is insufficiently definite and invites arbitrary enforcement. Its vagueness requires that it be stricken.

4. BECAUSE IT ENCOMPASSES SUBSTANTIAL AMOUNTS OF PROTECTED SPEECH UNDER THE FIRST AMENDMENT, THE SEXUALLY EXPLICIT MATERIALS CONDITION IS UNCONSTITUTIONALLY OVERBROAD.

Condition 5 should also be stricken because it is unconstitutionally overbroad.

“When a statute is vague and arguably involves protected conduct, vagueness analysis will necessarily intertwine with overbreadth analysis.” Loy, 237 F.3d at 259 n.2. “A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities.” City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). To determine overbreadth, courts consider whether the condition prohibits a real and substantial amount of constitutionally protected speech relative to its legitimate sweep. Riles, 135 Wn.2d at 346; State v. Homan, 191 Wn. App. 759, 767, 364 P.3d 839 (2015).

As discussed, condition 5’s prohibition on all sexually explicit materials reaches significant amounts of protected speech. The condition does not distinguish between adult and child pornography or between artwork and obscenity. The condition encompasses just as much, if not more, protected speech than unprotected speech.

When a sentencing condition limits an offender's fundamental rights under the First Amendment, the condition "must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation." Bahl, 164 Wn.2d at 757. When it touches First Amendment freedoms, the condition "must be clear and must be reasonably necessary to accomplish essential state needs and public order." Id. at 758. Washington courts have routinely required community custody conditions that place restrictions on fundamental rights, including First Amendment rights, to be narrowly tailored. E.g., In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010) (fundamental right to parent); State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008). (fundamental right to marriage); Bahl, 164 Wn.2d at 757-58 (freedom of speech); Riles, 135 Wn.2d at 346-50 (freedom of association); Riley, 121 Wn.2d at 37-38 (same); Moultrie, 143 Wn. App. at 398-99 (freedom of speech and association).

Loy, discussed in detail in Bahl, is instructive. Loy was convicted of possessing child pornography and was sentenced to a condition that prohibited him from possessing "all forms of pornography, including legal adult pornography." Loy, 237 F.3d at 255, 261. As discussed, the Loy court recited several examples of protected speech that might or might not fall within the condition, such as "*Playboy*, which features nudity but not sexual

conduct,” Nabokov’s *Lolita* (whether the film adaptation or in print), Manet’s *Le Dejeuner sur L’Herbe*, or “even some of the Calvin Klein advertisements.” *Id.* at 264. The court held that to be narrowly tailored, “the condition must not extend to all arguably pornographic materials,” but only those directly related to the goals of protecting the public and promoting rehabilitation. *Id.* “[W]here a ban could apply to any art form that employs nudity,” First Amendment rights are “unconstitutionally circumscribed or chilled.” *Id.* at 266. The “unusually broad condition” could “extend not only to *Playboy* magazine, but also to medical textbooks.” *Id.* “Restricting this entire range of material is simply unnecessary to protect the public, and for this reason the condition is not ‘narrowly tailored.’” *Id.* “[T]o the extent that the condition might apply to a wide swath of work ranging from serious art to ubiquitous advertising, the condition is overly broad and violates the First Amendment.”<sup>14</sup> *Id.* at 267.

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<sup>14</sup> See also *United States v. Hinkel*, 837 F.3d 111, 126-27 (1st Cir. 2016) (condition prohibiting use of “any sex-related” websites overbroad because it would cover, “for example, a large swath of generally accepted modern entertainment, and even news”); *United States v. Goodwin*, 717 F.3d 511, 524-25 (7th Cir. 2013) (condition prohibiting “any material, legal or illegal, that contains nudity or that depicts or alludes to sexual activity or depicts sexually arousing material” overbroad because it could block “possessing much of the Western literary canon—or arguably even . . . possessing a slip copy of this opinion”); *United States v. Zobel*, 696 F.3d 558, 577 (6th Cir. 2012) (condition prohibiting viewing, listening to, or possessing “sexually suggestive” materials overbroad because it “would extend to a host of both highbrow and mainstream literature, art, music, television programs, and movies”).

The same is true here. Graen was convicted of child sex offenses and the sentencing court prohibited access to any and all sexually explicit materials. The condition encompasses just as wide a range of protected material as in Loy.

The condition impermissibly chills Graen's First Amendment rights and therefore must be stricken as unconstitutionally overbroad.

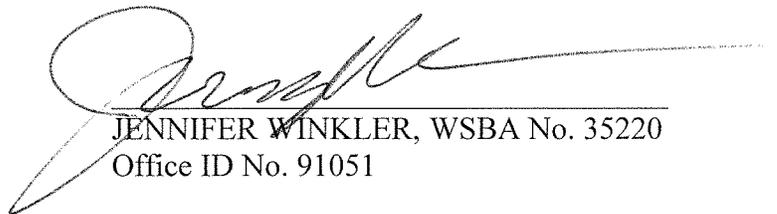
D. CONCLUSION

The State breached the plea agreement. This Court should remand so that Graen may elect to withdraw her plea or seek specific performance. In any event, for several reasons, the four challenged community custody conditions should be stricken

DATED this 25<sup>th</sup> day of June, 2018.

Respectfully submitted,

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