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

STATE OF WASHINGTON,
Respondent,

v.

JENNIFER DENISE GRAEN,
Appellant.

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

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF THE CASE

a. Procedural History and Relevant Facts

The Appellant was originally charged by Information with the crime of Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct in the Second Degree in Count 1, Possessing Depictions of Minor Engaged in Sexually Explicit Conduct in the Second Degree in Count 2, Sexual Exploitation of a Minor in Count 3, and Child Molestation in the First Degree in Count 4 on October 14, 2016. CP 1. The charges were related to the alleged victimization of the Defendant's 6-year old granddaughter whom she had adopted.

The Appellant entered a plea agreement to which she agreed to plead guilty to Counts 1, 3, and 4 with Count 2 being dismissed on February 1, 2017. CP 34. At that hearing on February 1, 2017 and at several other hearings held thereafter, the State made it clear that the State was not agreeing with the SSOSA. RP from February 1, 2017 May 15, 2017 at 3, RP from August 18, 2017 at 3, RP from September 15, 2017 at 2, and RP from September 22, 2017 at 4. The State advised that the Appellant did qualify so the State was not objecting to the consideration of a SSOSA and that it would be up to the Court to make the decision on the SSOSA at the time of sentencing. RP from February

1, 2017 May 15, 2017 at 3, 4. The Court went on to inquire twice with the Appellant that she understood that the evaluation for a SSOSA itself and even a recommendation for a SSOSA did not mean she was going to get a SSOSA evaluation. *Id.* at 4-5 and 8. The Court also went through the plea agreement with the Appellant, ensuring that she understood everything that was contained in the agreement. *Id.* at 5-9. The Appellant pled guilty to the three charges 10-11. The Court found that the Appellant knowingly, intelligently, and voluntarily pled guilty to the three charges, that she understood the charges and the consequences of her pleas, that there was a factual basis for her plea on each count, and that the Appellant pled guilty to each count. *Id.* at 14. Presentencing and SSOSA evaluations were requested and the Appellant was held without bail pending sentencing per statute. *Id.* Sentencing was set for March 3, 2017. *Id.*

Sentencing was continued several times thereafter by the Appellant. On April 7, 2017, the Appellant's attorney advised the Court that sentencing could not proceed because she had not received funding for the Appellant's SSOSA evaluation. RP from January 17, 2017 April 7, 2017 at 6. The Appellant's attorney advised that she needed \$3,700.00 in funding for the evaluation or else the Appellant would need to

withdraw her guilty plea. *Id.* The Court advised the Appellant that it was within the Court's discretion to even cross the threshold for considering a SSOSA and the Court had already denied funding, which the Court did not believe would be a basis for moving to withdraw a guilty plea. *Id.* at 6-7. The Court, however, advised that the Appellant may file a motion to do so if that was what she wished to do. *Id.* at 7. On May 15, 2017, the Appellant's request for expert witness fees to pay for her SSOSA evaluation and, in the alternative, her request to withdrawal her guilty plea, if the evaluation fees were not granted, were heard. RP from February 1, 2017 May 15, 2017 at 17. At that hearing, the Appellant claimed that she had entered her plea unknowingly, namely that she did not know that she had to fund her own expert for the SSOSA evaluation. *Id.* at 18. The Court granted the Appellant's request for funding and the Appellant withdrew her motion to withdraw her guilty plea. *Id.* at 19. Although the Appellant was granted the funds for her SSOSA evaluation on May 15, 2017, no evaluation paperwork was presented and there had been no word from the Appellant's attorney on when the SSOSA evaluation was going to be completed. The State, therefore, set a hearing on August 18, 2017 to set a sentencing date as there had been no apparent action by the Appellant to complete her evaluation. RP on August 18,

2017 at 3. The Appellant's attorney claimed she had issues with the initial evaluator selected, but was on track with the evaluation with a second evaluator, and stated sentencing could be scheduled for mid-September. *Id.* at 4. Sentencing was therefore set for September 15, 2017. *Id.*

On September 15, 2017, the Appellant's attorney claimed she was still not ready for sentencing, having only just received her SSOSA evaluation that morning. RP on September 15, 2017 at 4. The Appellant's attorney asked to set over sentencing for one week. *Id.* The Court advised that it was concerned that the assigned prosecutor was not present and that it had taken at least five months for sentencing to occur, stating that the delay was ridiculous. *Id.* The Court granted the one week continuance and advised that sentencing would occur on September 22, 2017, unless it was going to be a hardship on the victim's family, who had appeared for sentencing. *Id.* at 4-5. Sentencing was finally held on September 22, 2017. See RP on September 22, 2017. At that hearing, the Appellant's attorney stated that she had only received the SSOSA evaluation the night before, but that the Appellant was withdrawing her request for a SSOSA and that she just wanted to be sentenced that day. *Id.* at 3-4.

The State advised the Court that the Appellant had pled guilty quite some time ago and that there had been a delay for an extended amount of time while waiting on the Appellant's SSOSA evaluation. RP on September 22, 2017 at 4. The State reminded the Court again that the State was never in support of the SSOSA. *Id.* At sentencing, the assigned prosecutor stated as follows:

“Essentially, the biggest crime she's looking at is in Count 4. That's the lifetime sentence. It's a class A. 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 Ms. Graen at that point.

I know the family members are here and would like to speak to the Court as well. I hope that she's 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 had 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. I'll

just ask if people are willing to come forward and who would like to speak.”

Id. at 4-5.

Thereafter, the family spoke to the court. RP for September 22, 2017 at 5-9. Alexei Graen, the Appellant’s older daughter, spoke first to the Court. Alexei Graen spoke of the Appellant’s wrongs, how the Appellant had ruined her life, and made it impossible for [B.A.] to get better because she thinks about it all the time, what the Appellant had done to her. *Id.* at 6. Evelyn Monn, B.A.’s therapist, spoke next to the Court. Ms. Monn described the child’s issues with her emotions, toileting, boundaries, and behaviors based on the modeling her received. *Id.* at 7. Ms. Monn stated that B.A. had an awful long way to go and had been very deeply devastated by the violation of trust as a five-year old child. *Id.* Jordan Mann, B.A.’s other grandmother, spoke next to the Court. Ms. Mann described the difficulty of watching her 7-year old granddaughter go through what she had been going through and the impact what the Appellant had done has had. *Id.* at 7-8. Ms. Mann talked about B.A. having to try to overcome the trauma and that she just wanted B.A. to get better. *Id.* at 8. Ms. Mann talked about not wanting to ever see the Appellant on the streets ever again and that she didn’t want B.A. to be able to not think out the Appellant getting out. *Id.* The

last to speak to the Court on behalf of the victim and family was Christina Evans, who was a family friend and had treated the Appellant like she was her mother. *Id.* at 8-9. Ms. Evans spoke to the Court about having been around the Appellant growing up and that she and her family thought she was a safe person to be around. *Id.* Ms. Evans stated that they thought the Appellant would be better with or get better with B.A., but she didn't and had made it worse. *Id.* Ms. Evans stated that the Appellant should not get any leniency and, speaking directly to the Appellant, stated that she just hoped that she could live with what she did and not to expect anybody's forgiveness because they had trusted her. *Id.* at 9. Ms. Evans stated to the Appellant that she had not looked a single person in the eye and accepted this. *Id.*

The Appellant's attorney spoke to the Court as well and stated that the Appellant had taken responsibility and spoke about the Appellant working with law enforcement, providing them with her passwords so that they could have access to more sexual predators. RP for September 22, 2017 at 9-10. The Appellant's attorney spoke about the difficulty the Appellant had at first to come to terms with what she had done, but felt that she had done a really good job of doing that at this point. *Id.* at 10. The Appellant's attorney went on to state that the Appellant had decided

not to pursue the SSOSA for the good of the child and argued that the bottom of the range on the most serious charge at 98 months with treatment would allow for the Appellant to recover from this. *Id.* The Appellant's attorney went on to state that the Appellant has mental health issues as well with borderline personality disorder and bipolar disorder so she needs significant help. *Id.* The Appellant addressed the Court as follows:

"I can't find the words to say how sorry I am for failing my family and what I've done, the hurt and the pain I've cause them. I remember that and I will live in hell for the rest of my life because I've not only lost them but my girls and my grandkids lost..."

Id. at 11.

Before the sentence, the Court addressed the parties as follows:

"All right. I've had too many of these cases this morning. It's just devastating, as you can see, to the family but most particularly to this little girl that's having problems. And I can guarantee you she's going to have ongoing problems for the rest of her life. Hopefully good counseling can help minimize it, but it's there forever.

I'm going to impose the top of the range on Count 1, 51 months; top of the range on Count, I think it's Count 3, 102 months; and the middle of the range – because you pled guilty and have conceded that you are going to go to prison for a long time – 114 months would be the middle of the range on the most serious offense; 114 months to life.

And I'm going to follow the remaining recommendations regarding treatment and other requirements set for the in the statement of the prosecuting attorney.”

RP for September 22, 2017 at 11. The Court ordered only mandatory fees and fines and included the Appendix F Community Custody conditions requested by the Department of Corrections as part of the Department's Presentencing Evaluation. See Felony Judgment and Sentence for Jennifer Denise Graen for Cause Number 16-1-452-3 form September 22, 2017.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. Violation of Plea Agreement by Prosecutor Claim

Whether a breach of a plea agreement has occurred is a question of law reviewed de novo. *State v. Neisler*, 191 Wn. App. 259, 265, 361 P.3d 278 (2015), *review denied*, 185 Wn.2d 1026 (2016). A defendant may raise the issue of a prosecutor's breach of a plea agreement for the first time on appeal. *State v. Xaviar*, 117 Wn. App. 196, 199, 69 P.3d 901 (2003). Because a defendant gives up important constitutional rights by agreeing to a plea bargain, due process considerations come into play. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). “Due process requires a prosecutor to adhere to the terms of the agreement.” *Sledge*, 133 Wn.2d at 839. Although the State need not enthusiastically make the

sentencing recommendation, it must act in good faith, participate in the sentencing proceedings, answer the court's questions candidly, and hold back no relevant information regarding the plea agreement. *Id.* at 840, 947 P.2d 1199.

Concomitantly, the State is also 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.” *State v. Carreno–Maldonado*, 135 Wn.App. 77, 83, 143 P.3d 343 (2006); *see, e.g., id.* at 84–85, 143 P.3d 343 (breach where the State described the crime as more egregious than a typical crime of the same class, thus going beyond what was necessary to support the midrange sentencing recommendation); *Xaviar*, 117 Wn.App. at 200–02, 69 P.3d 901 (breach where the State referred to aggravating sentencing factors and other charges not pursued, and called the defendant “one of the most prolific child molesters” indicated lack of support for standard range sentence); *State v. Williams*, 103 Wn.App. 231, 236–39, 11 P.3d 878 (2000) (breach where the State's sentencing memorandum and oral argument suggested the court go beyond the high-

end recommendation and made unsolicited references to statutory aggravating factors, which trial judge adopted in order to impose an exceptional sentence); *State v. Van Buren*, 101 Wn.App. 206, 217, 2 P.3d 991 (2000) (breach where the State downplayed midrange sentencing recommendation, focused the court's attention on two aggravating factors contained in the presentence report, proposed an aggravating factor not addressed in the report, and argued the validity of one of the aggravating factors); *State v. Jerde*, 93 Wn.App. 774, 782, 970 P.2d 781 (1999).

In determining whether a prosecutor has breached a plea agreement's terms, we review the sentencing record as a whole using an objective standard. *State v. Carreno-Maldonado*, 135 Wn.App. 77, 83, 143 P.3d 343 (2006). "When the prosecutor breaches the plea agreement, the appropriate remedy is to remand for the defendant to choose whether to withdraw the guilty plea or specifically enforce the State's agreement." *State v. Jerde*, 93 Wn. App. 774, 782-83, 970 P.2d 781 (1999).

Here, the Appellant claims that the State violated the plea agreement through its brief factual summation to the Court, intimating that the State had supported a SSOSA recommendation, which the record clearly shows not to be the case. The Appellant clearly mischaracterizes the State's summation in which the assigned prosecutor gave the

Appellant credit for her change in attitude from defiant to remorseful, that she showed emotion at her plea, and that she showed an intent to make amends for her actions by working with law enforcement. The assigned prosecutor stated facts such as the most serious crime being Count 4, which was a Class A with a lifetime sentence that carried a minimum sentence of 98 months. The assigned prosecutor also hoped that the Appellant had learned her lesson and stated a fact that would certainly be spending quite an amount of time in prison thinking about them. The assigned prosecutor again stated facts that the Appellant's violations were quite serious and that the little girl in question has had ongoing issues with her behavior. The assigned prosecutor acknowledged that it was a sad case for everyone, which clearly included the Appellant, and advised the Court that the family members and the child's therapist would be speaking further as they were more deeply involved.

Several members of the victim's family and the victim's counselor spoke about the impact the Appellant's actions had on the family and the child, which is a right granted by statute. There was no objection by the Appellant's attorney to anything that the assigned prosecutor or any of the family members and counselor stated to the Court and the Appellant's own attorney reiterated much of the same

information in her summation. The assigned prosecutor in no way violated the plea agreement or otherwise encouraged the Court to do anything more than what was stated in the plea agreement. Certainly, there was nothing in the brief statement made by the assigned prosecutor that in any way rises to the level of commentary displayed in the case law cited by both the Appellant and the State where it was found that a prosecutor violated their duty to uphold the plea agreement. The State did not state in any way that the case was more egregious than any other similar case, did not reference any aggravating sentencing factors at all, did not suggest that the Court go beyond the recommendation and make unsolicited references to statutory aggravating factors, or do anything of the like.

Rather, the record as a whole shows that the Appellant is once again unhappy with the outcome simply because she didn't get what she wanted and is seeking to blame the State for the Court's sentence, which was well within the judge's discretion to order. The record and the law both support that there is simply no basis for the Appellant's claim and it must be denied.

2) Constitutionality of Community Custody Conditions Claim

We review the decision to impose supervision conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993); *State v. Snedden*, 166 Wn.App. 541, 543, 271 P.3d 298 (2012). A sentencing court abuses its discretion if its decision is manifestly unreasonable, meaning it is beyond the court's authority to impose, or if exercised on untenable grounds or for untenable reasons. *Riley*, 121 Wn.2d at 37; *State v. Corbett*, 158 Wn.App. 576, 597, 242 P.3d 52 (2010); see *State v. Jones*, 118 Wn.App. 199, 208, 76 P.3d 258 (2003). Sentencing courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 118–19, 156 P.3d 201 (2007). Crime-related prohibitions directly relate to the circumstances of the crime. RCW 9.94A.030(10). The Court stated that it typically upholds sentencing conditions if reasonably crime related. *Riley*, 121 Wn.2d at 36–37.

RCW 9.94A.704 governs community custody supervision by the Department of Corrections and conditions set by the department. Under RCW 9.94A.704, the department shall assess the offender's risk of re-offense and may establish and modify additional conditions of community custody based upon the risk to community safety. RCW 9.94A.704(2)(a).

The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions. RCW 9.94A.704(6). The department shall notify the offender in writing of any additional conditions or modification and an offender may request administrative review of a condition imposed or modified by the department under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender's risk of reoffending, or the safety of the community. RCW 9.94A.704(7)(a) and (b).

a) Conditions Not Crime-Relation Claim

The Appellant is arguing that the conditions set by the Department of Corrections (DOC) that were incorporated into the judgment and sentence under Appendix F are not crime-related and/or unconstitutional vague. The issue of conditions set by DOC needing to be crime-related was directly addressed in *In the Matter of the Personal Restraint Petition of George Golden, Petitioner*, Court of Appeals, Division 3, 172 Wn.App. 426, 290 P.3d 168 (2012). In re Golden, the Petitioner, who was previously convicted of Rape in the Second Degree and Unlawful Imprisonment, then convicted of Robbery in the Second Degree while still

on community custody, challenged 13 conditions imposed by the

Department of Corrections, including:

- No gambling casinos
- Curfew from 5:00 p.m. to 6:00 a.m.
- No sexual contact with anyone without his or her explicit consent and not before informing DOC.
- No contact with areas and facilities where minors are known to congregate, for example, but not limited to video arcades, malls, playgrounds, fairs, carnivals, parks, schools, or other children play areas. When in doubt, always contact DOC for clarification.
- No residing on premises where minors are also residing and do not stay the night on premises where minors might spend the night without permission of CCO/DOC.
- No dating women or men with minor children or form any relationships with families who have minor children without approval of CCO or treatment provider (if applicable).
- No romantic relationships with anyone without full disclosure to that person and not without permission of the Department of Corrections.
- Obtain mental health evaluation if directed by DOC and follow all requirements, including taking prescribed medication as directed.
- If participating in the Housing Voucher program, must remain violation free and successfully complete the 120 day Community Justice Center Program.
- If homeless, may only reside at House of Charity or Truth Ministries.
- Must participate and successfully complete the 120 day program at the Community Justice Center.
- Do not operate any motor vehicle.
- No STA [Spokane Transit Authority] plaza.

Id. at 431-432.

The Court of Appeals found that the DOC conditions did not conflict with the standard judgment and sentence conditions set by the Court. Similarly to this case at hand, Mr. Golden argued that the department's conditions violated various constitutional rights and were not

crime-related so could not be imposed. *Id.* at 432. The Court stated that this argument missed the mark. *Id.* A “crime-related prohibition” is defined as “an order of a *court* prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted,” Former RCW 9.94A.030(13) (2006) (emphasis added). This definition does not apply to DOC, which is an agency and not a court. Instead, DOC's authority to impose conditions of community custody on Mr. Golden came from former RCW 9.94A.715(2)(b) (2006), which directed the department to perform a risk assessment and then impose “additional conditions of the offender's community custody based upon the risk to community safety.” *Id.* at 433.

Nothing in the text of former RCW 9.94A.715, or its successor statute, RCW 9.94A.704, limits DOC's supervisory conditions to those that are “crime-related.” *Id.* Instead, it must perform a risk assessment and then impose conditions with public safety in mind. The statute grants DOC broader authority than that given the trial courts in order to follow up on the department's duty to conduct an individualized risk assessment. While the trial court must focus generally on the defendant's crime, the department focuses on the risks posed by the defendant. It thus can, as

here, impose conditions related to defendant's history as a sex offender even though he is not being supervised for a sex offense. *Id.*

b) Conditions Unconstitutionally Vague Claim

As a general rule, the imposition of community custody conditions is within the discretion of the court and will be reversed only if manifestly unreasonable. *State v. Bahl*, 164 Wash.2d 739, 753, 193 P.3d 678 (2008). The imposition of an unconstitutional condition is manifestly unreasonable. *State v. Sanchez Valencia*, 169 Wash.2d 782, 792, 239 P.3d 1059 (2010). There is no presumption that a community custody condition is constitutional. *Id.* at 793. A sentencing condition that interferes with a constitutional right must be “sensitively imposed” and “reasonably necessary to accomplish the essential needs of the State and public order.” *State v. Warren*, 165 Wash.2d 17, 32, 195 P.3d 940 (2008).

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution require fair warning of proscribed conduct. *Bahl*, 164 Wash.2d at 752, 193 P.3d 678. A condition is void for vagueness if the condition either (1) does not define the prohibition with sufficient definitiveness that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards that “ ‘protect against arbitrary enforcement.’ ” *Id.*

at 752-53 (quoting *City of Spokane v. Douglass*, 115 Wash.2d 171, 178, 795 P.2d 693 (1990)). If either requirement is not met, the condition is unconstitutional. *Id.* at 753. However, a community custody condition is not unconstitutionally vague “ ‘merely because a person cannot predict with complete certainty the exact point at which [her] actions would be classified as prohibited conduct.’ ” *Sanchez Valencia*, 169 Wash.2d at 793, 239 P.3d 1059 (quoting *State v. Sanchez Valencia*, 148 Wash.App. 302, 321, 198 P.3d 1065 (2009)). Importantly, the disputed terms are considered in the context in which they are used, and “[i]f persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite.” *Douglass*, 115 Wash.2d at 179, 795 P.2d 693.

In the case at hand, the Appellant is challenging the condition that requires the Appellant to “Inform the Community Corrections Officer of any romantic relationships to verify that there are no minors involved and that the adult is aware of your crime and conditions of supervision” and the prohibition that the Appellant not “possess or peruse any sexually explicit materials, as defined by your therapist or Community Corrections Officer, unless given prior approval by your therapist or Community Corrections Officer.”

c) “Romantic Relationships” Condition

The issue of conditions related to “dating” or “romantic” relationships was most recently addressed in *State v. Norris* by the Supreme Court of Washington, ___P.3d ___, 2018 WL 43559948 (September 13, 2018) and *State v. Nguyen* by the Supreme Court of Washington, ___P.3d ___, 2018 WL 43559948 (September 13, 2018).

Norris challenged the community custody condition that required her to inform the community corrections officer of any “dating relationship.” *Id.* at 4. Norris argues that the term “dating relationship” was unconstitutionally vague because a reasonable person cannot understand what qualifies as “dating relationship” in a nonarbitrary manner. *Id.* Norris attempted to bolster this point by offering a series of hypothetical scenarios:

Suppose Norris has dinner with a man in a restaurant. Is that a date? Would that constitute a “dating relationship”? What if it was a one-time occasion? Is that enough to form a “relationship” with someone? Does meeting someone twice for a social activity turn an ordinary relationship into a dating relationship? Three times? Suppose Norris strikes up a relationship with a man online, and then they go out to a movie. Is that a dating relationship? What if Norris and another person enjoy social activities together, but (perhaps contrary to outward appearances) they consider themselves “just friends.” Does that qualify as a dating relationship?

The Court found that Norris correctly acknowledged that some level of ambiguity will always remain in community custody conditions. However, “impossible standards of specificity are not required.” *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). And a convicted person is not entitled to complete certainty as to the exact point at which his actions would be classified as prohibited conduct. *Id.* at 27, 759 P.2d 366. Instead, all that is required is that the proscribed conduct is sufficiently definite in the eyes of an ordinary person. *Spokane v. Douglass*, 115 Wash.2d 171, 179, 795 P.2d 693 (1990).

As we did in *Bahl*, here, we “may consider the plain and ordinary meaning as set forth in a standard dictionary.” 164 Wash.2d at 754, 193 P.3d 678 (citing *State v. Sullivan*, 143 Wash.2d 162, 184-85, 19 P.3d 1012 (2001)). A “date” is defined as “an appointment between two persons” for “the mutual enjoyment of some form of social activity,” “an occasion (as an evening) of social activity arranged in advance between two persons.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 576 (2002). A “relationship” is defined as “a state of affairs existing between those having relations.” *Id.* at 1916. Additionally, “dating relationship” is defined in RCW 26.50.010(2), which states:

“Dating relationship” means a social relationship of a romantic nature. Factors that the court may consider in

making this determination include: (a) The length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the parties.

Id. at 5.

Indeed, a person of ordinary intelligence can distinguish a “dating relationship” from other types of relationships. *Id.* The Court found that despite Norris’ contentions, a reasonable person, in considering the factors, would not conclude that individuals who are “just friends” or engage in a single social activity with one another are in a “dating relationship.”

Norris also argued that the term “dating relationship” was unconstitutionally vague in light of the federal decision *United States v. Reeves*, 591 F.3d 77 (2d Cir. 2010). There, the court held that the term “significant romantic relationship” was unconstitutionally vague. *Id.* at 79. In coming to its conclusion, the court explained:

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. For some, it would involve the exchange of gifts such as flowers or chocolates; for others, it would depend on acts of physical intimacy; and for still others, all of these elements could be present yet the relationship, without a promise of exclusivity, would not be “significant.”

Id. at 81.

The Court, however, found Norris' argument is unpersuasive, as the key facts in *Reeves* are distinguishable from her case. *Id.* The terms "significant" and "romantic" are highly subjective qualifiers, while "dating" is an objective standard that is easily understood by persons of ordinary intelligence. The Court held, therefore, that "dating relationship" is not an unconstitutionally vague term.

Here, the State does not believe that the term used in the case at hand of "romantic relationship" is any less easily understood by a person of ordinary intelligence than "dating relationship" and should equally be held not to be an unconstitutionally vague term. The State's reading of *Reeves* is that the problematic wording in that condition was "significant" and less so the term "romantic," which is contained in the statutory definition of "dating relationship" under RCW 26.50.010(2) as cited in Norris. Here, the department did not include the word "significant" or any other suggestive qualifier. Particularly given that a "dating relationship" is a "social relationship of a romantic nature," the terms "dating relationship" and "romantic relationship" are synonymous and, thus, interchangeable and they are both easily understood by a person of ordinary intelligence and neither are unconstitutionally vague. Therefore, the Court should find that "romantic relationship," minus any qualifier

such as “significant,” is not unconstitutionally vague in line with the Supreme Court’s finding in *State v. Norris* and uphold the condition as requested by the department and ordered in the judgment and sentence.

d) “Sexually Explicit Materials” Condition

The issue of conditions related to the possession or viewing of “sexual explicit material” as unconstitutionally was also addressed in *State v. Norris* by the Supreme Court of Washington, __P.3d __, 2018 WL 43559948 (September 13, 2018) and *State v. Nguyen* by the Supreme Court of Washington, __P.3d __, 2018 WL 43559948 (September 13, 2018).

In *Nguyen*, the defendant argued that the community custody condition prohibiting him from possessing, using, accessing, or viewing any sexually explicit material is “intolerably vague.” *Id.* at 3. Specifically, *Nguyen*’s condition stated: Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider. *Id.* *Nguyen* primarily relied on the decision in *Bahl*, where the Court held the term “pornographic materials” was unconstitutionally

vague. *Id.* Nguyen correctly asserted that “pornographic material” “may ‘include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo’s sculpture of David.’ ” *Id.* (quoting *Bahl*, 164 Wash.2d at 756, 193 P.3d 678). However, the Court found that Nguyen’s case did not concern the ascertainability of “pornographic material” but, rather, the ascertainability of “sexually explicit material.” *Id.* In *Bahl*, the Court drew a distinction between the two.

Unlike “pornographic material,” we held that the term “sexually explicit material” was not unconstitutionally vague. *Bahl*, 164 Wash.2d at 760, 193 P.3d 678. Specifically, we held “[w]hen all of the challenged terms, with their dictionary definitions, are considered together, we believe the condition is sufficiently clear.” *Id.* at 759, 193 P.3d 678. In *Bahl*, the condition prohibited Bahl from frequenting “ ‘establishments whose primary business pertains to sexually explicit ... material.’ ” *Id.* at 758, 193 P.3d 678. We found that a person of ordinary intelligence, considering the dictionary definition of establishments whose primary business pertains to “sexually explicit material,” would understand those establishments to include “adult bookstores, adult dance clubs, and the like.” *Id.* at 759, 193 P.3d 678.

We also noted that “sexually explicit material” is defined in RCW 9.68.130(2). *Id.* at 4. And while we did not determine whether a statutory definition is sufficient to give the requisite notice of proscribed conduct, we did recognize that it bolsters the conclusion that “sexually explicit material” is not an unconstitutionally vague term. RCW 9.68.130(2) states:

“Sexually explicit material” ... means 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.

The Court found that despite Nguyen’s concerns that “[c]ountless works of art, literature, film, and music explicitly describe, depict, and relate sex and sexuality,” persons of ordinary intelligence can discern “sexually explicit material” from works of art and anthropological significance. *Id.* at 4. The Court, therefore, held that the term “sexually explicit material” is not unconstitutionally vague. *Id.*

Here, the argument is exactly the same as the arguments presented in Nguyen in which the Supreme Court found that the terms used in his condition were not unconstitutionally vague. Therefore, the Court must find that the Appellant’s condition related to her not to possess or peruse

any sexually explicit materials as not unconstitutionally vague and uphold the condition as requested by the department and ordered in the judgment and sentence.

III CONCLUSION

For the aforementioned reasons, the State humbly requests that this Court affirm the conviction and uphold the conditions of the judgment and sentence in this case.

DATED this 1st day of October, 2018.

Respectfully Submitted,

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