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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SHAWN DEE MORGAN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John Hickman

No. 16-1-03330-1

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this Court affirm the community custody condition ordering defendant not to “use or consume alcohol and/or marijuana” where a prohibition on the “use” of alcohol is statutorily authorized? (Assignment of Error No. 2)
2. Did the trial court properly impose statutorily authorized and reasonably crime-related community custody conditions where the record shows that defendant’s chemical dependency contributed to his offenses? (Assignments of Error Nos. 1 and 2)
3. Should this Court affirm the community custody condition relating to “dating relationships” where the Washington Supreme Court recently upheld such language in *Norris*, and should this Court remand for modification of the “drug areas” condition where the portion giving discretion to CCOs has recently been found to be unconstitutionally vague? (Assignments of Error Nos. 3, 4, and 5)

4. Pursuant to House Bill 1783, should this Court order that the imposition of the \$200 criminal filing fee, the \$100 DNA fee, and the non-restitution interest be stricken where defendant was found indigent and his DNA has previously been collected? (Defendant's Supplemental Assignment of Error)

B. STATEMENT OF THE CASE.

On August 18, 2016, the State charged Shawn Morgan ("defendant") with 47 counts of first degree possession of depictions of minors engaged in sexually explicit conduct. CP 4-20. The State filed an amended information on December 20, 2017, charging defendant with eight counts of first degree possession of depictions of minors engaged in sexually explicit conduct. CP 65-68. The court accepted the State's amended information, noting the potential impact trial would have on a jury. 12-20-17 RP 10. Defendant pleaded guilty to the amended charges. CP 71-82. Defendant made a factual statement in his statement on plea of guilty:

Between January 1, 2015, and February 16, 2016, I, Shawn Morgan, possessed videos and images of children between the ages of 0-13 having sexual intercourse with adults. I had more than 8 of these images and videos. I kept these images and videos on my electronic devices including my computer,

SD cards, CDs, and USB drive and I knew they were there. This was illegal and happened in Pierce County, Washington. Two of these images/videos was on a CD taken by law enforcement on 1/30/16. One of these images/videos was on a CD found in my trailer. Two of these images/videos were on a computer found in my trailer. All of these images were different. Please see also the attached stipulation.

CP 79; *see also*, CP 88-89 (Stipulation regarding counts I through VIII as separate and distinct crimes).

In addition to his factual statement, defendant also permitted the trial court to review the police reports and probable cause declaration to establish a factual basis for his plea. CP 79. According to the declaration for determination of probable cause,

[I]n Pierce County, Washington, on or about November 25, 2015, the defendant, SHAWN DEE MORGAN (hereinafter referred to as Morgan), did possess depictions of minors engaged in sexually explicit conduct.

Morgan and Kierra Hall (hereinafter referred to as Hall) have both been charged with multiple counts of Rape of a Child in the First Degree and Child Molestation in the First degree against A.M. (Morgan's biological son) under cause numbers 16-1-01561-3 (Morgan) and 16-1-01560-5 (Hall). These new charges are a result of further investigation.

While at a rehabilitation facility in the fall of 2015, Hall told her counselor that she and Morgan sexually assaulted Morgan's son, A.M. On November 24, 2015, Hall agreed to be interviewed by FBI agents. Hall said Morgan had child pornography in his trailer which he kept on DVDs, his phone, a flash drive and a couple of SD cards. Hall believed the children in the pornography appeared to be between two and 13-years-old. She and Morgan watched the pornography together. Hall was advised of her rights which she waived.

She said Morgan and A.M. "jacked each other off." A.M. also performed oral sex on Morgan. Hall recalled an incident when she believed Morgan and A.M. possibly raped her while she was under the influence of drugs. Hall said the defendant abused A.M. three times within the last six months. Morgan digitally penetrated A.M. anally in preparation for anal sex. She said A.M. performed oral sex on Morgan. Hall also said Morgan digitally penetrated a female child. Morgan also attempted penile-vaginal penetration, but the child was too small.

On February 24, 2016, A.M. was forensically interviewed. A.M. substantiated what Hall told the FBI agents, except in greater detail regarding the ways Morgan and Hall sexually abused him. A.M. also disclosed that Morgan and Hall would have him watch "porn".

While Hall's initial disclosure to the FBI was still being investigated (and prior to any criminal charges being filed), she left the treatment center in Spokane and returned to Pierce County. On January 23, 2016, PCSD detectives were contacted by a social worker who was with Hall for a child visitation. The social worker stated Hall had brought with her a USB drive purporting to contain child pornography. A detective responded to the scene. Hall told the detective she had taken the USB drive from a cabinet in Morgan's trailer. Hall stated it would corroborate what she had told the FBI. The detective took possession of the drive and instructed Hall to not take anything else from Morgan's trailer. The following week Hall's social worker again contacted detectives, stating that Hall had a compact-disc that allegedly contained child pornography taken from Morgan's residence. An officer responded to the scene to take possession of the compact disc.

A search warrant was obtained for the USB drive and the compact disc. Both of the items were forensically examined. The USB drive contains a video titled "9 yo Linda takes dad up ass & sucks cum & swallows." The video depicts an adolescent female approximately 8-10 years-old. The child is seen touching an adult male's penis with her hand before

putting his penis in her mouth. Later in the video the adult male anally penetrates the young child. The video ends with the male removing his penis from the child's rectum and ejaculating on the child (COUNT I). The USB drive also contains 11 images depicting female minors engaging in sexual acts (COUNTS II-XII). Eight of the images appear to be of children between the ages of 3-9 years-old engaging in oral sex. Three of the images depict young girls being vaginally penetrated.

The compact-disc contains over 30 images of minors engaging in sexually explicit acts ranging from oral sex to vaginal penetration. At least 5 of the images depict female infants under the age of 2-years-old being sexually penetrated by an adult male's penis (COUNTS XIII-XLIII).

Based partially on Hall's initial disclosure to the FBI as well as the USB drive and compact-disc that Hall had already provided, a search warrant was issued for Morgan's residence. During the search various items were seized including several memory cards and a Sony laptop.

The memory cards were forensically examined. One of the memory cards contains videos titled "Moscow 5-1 (VHS) 7yo daughter Pedo Mom - (Rare dad & Daughter PTHC Video)((Kingpass))....1.avi" and "(Pthc) 4Yo 8Yo 11Yo Girls Compilation". The first video is an 18-minute long home video of an approximately 10 to 11 year-old white female being sexually abused by an adult male and female. The adult female is seen holding the child's legs up so the adult male has access to the young child's vagina. The male is seen touching the child's naked vagina with his fingers and penis. The video ends with the male ejaculating onto the child's face (COUNT XLIV).

The second video is approximately 34-minutes long and appears to be a compilation of two separate videos. The first portion of the video shows a juvenile female taking her clothes off before masturbating. Later, an adult male is seen rubbing his penis on her vagina then ejaculating on her buttocks. The second portion of the video involves three

juvenile girls appearing to be of varying ages (seeming to match the ages in the title - 4, 8, and 11 years old) in a bed. The two older girls have the younger girl in between them. The two older girls are naked from the waist down and the youngest girl is completely naked. One of the older girls appears to be holding a vibrator against the approximately 4-year-old's vagina. After several minutes an adult male is seen touching the same approximately 4-year-old's vagina with his hand and what appears to be the same vibrator. The adult male is then seen inserting his finger, then his penis into the approximately 4-year-old's vagina and anus. The video ends with the adult male ejaculating on the approximately 4-year-old's stomach (COUNT XLV).

The above videos were also found on the hard-drive of the Sony laptop. Two additional photos were also found on the laptop. One of the photos appears to be an approximately 9-12 year-old naked white female lying on her back. An adult white male is kneeling next to her while inserting his penis into her mouth. A second photo is of a 2 or 3 year-old naked female. An adult male is seen with his fingers on the child's vagina while also attempting to insert his erect penis into her vagina or anus (COUNTS XLVI and XLVII).

Several forensic markers on the laptop's system evidenced the defendant's use of the laptop and contact with video files containing child pornography. Additionally, Hall identified the existence of these media devices containing child pornography and stated she and Morgan viewed the child pornography while sexually abusing children, while also having the children watch the child pornography.

CP 1-3.

The trial court accepted defendant's guilty plea as being freely and voluntarily made on December 20, 2017. 12-20-17 RP 19; CP 71-82.

The trial court ordered defendant to be held without bail pending sentencing. 12-20-17 RP 19.

Prior to sentencing, the trial court ordered a pre-sentence investigation report (PSI). CP 143. According to the PSI, defendant stated that he first tried alcohol “when he was in elementary school.” CP 156. Defendant “freely admitted that Methamphetamine (Meth) has been the most problematic controlled substance for him in his life, and he first tried it in 2000.” *Id.* Community Corrections Officer (CCO) Joe Sofia concluded that drug dependency and associating with individuals with criminal backgrounds are factors that would put defendant at risk for re-offending. CP 158. Officer Sofia further advocated that defendant obtain “both a Chemical Dependency Evaluation and a Mental Health Evaluation.” CP 159.

Sentencing occurred on February 23, 2018. 2-23-18 RP 3374. Defendant was sentenced under three separate cause numbers on that date. 02-23-18 RP 3374. In addition to this case, defendant was sentenced in another case for five counts of first degree child rape and five counts of first degree child molestation (Superior Court No. 16-1-01561-3), and in another case for manufacturing methamphetamine (Superior Court No. 16-1-00709-2). 2-23-18 RP 3376, 3395; CP 99-100.

In this case, the court sentenced defendant to a total of 102 months in prison, concurrent with the sentences imposed in his other two cases. CP 103-04. The trial court ordered 36 months of community custody on each

count. CP 104. The court further ordered defendant to pay a \$500 crime victim assessment, a \$100 DNA database fee, and a \$200 criminal filing fee. CP 102. Interest was ordered on all financial obligations. *Id.* Defendant was found indigent. CP 139-40.

Additionally, the court ordered defendant to comply with all community custody conditions provided in Appendix H. CP 105, 110. Those included standard conditions, special sex offense conditions, and additional crime-related prohibitions. CP 112-13. Conditions pertinent to defendant's timely appeal include the following:

...

5. Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.

...

11. Do not use or consume alcohol and/or Marijuana.

...

19.  Do not purchase or possess alcohol.
20.  Do not enter drug areas as defined by court or CCO.
21.  Do not enter any bars/taverns/lounges or other places where alcohol is the primary source of business. This includes casinos and or any location which requires you to be over 21 years of age.
22.  Obtain  alcohol  chemical dependency evaluation upon referral and follow through with all recommendations of the evaluator. Should chemical dependency treatment be recommended, enter

treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming.

CP 112-13. Defendant filed a timely notice of appeal. CP 116.

C. ARGUMENT.

1. THE CONDITION ORDERING DEFENDANT NOT TO “USE OR CONSUME ALCOHOL AND/OR MARIJUANA” SHOULD BE AFFIRMED BECAUSE PROHIBITING “USE” OF ALCOHOL IS STATUTORILY AUTHORIZED.

As part of defendant’s term of community custody, the trial court ordered defendant to comply with a condition stating “[d]o not use or consume alcohol and/or Marijuana.” CP 112 (condition 11).<sup>1</sup> RCW 9.94A.703(3)(e) authorizes a trial court to order an offender to “[r]efrain from possessing or consuming alcohol” as part of any term of community custody. Condition 11 was ordered under that statute. CP 112.

The distinction between “use” and “consumption” of alcohol was recently scrutinized in *State v. Norris*, 1 Wn. App.2d 87, 99-100, 404 P.3d 83 (2017), *affirmed in part and reversed in part on other grounds by State*

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<sup>1</sup> Marijuana is listed as a Schedule I controlled substance under both federal and state law. *See* United States Controlled Substances Act, 21 U.S.C. § 812; RCW 69.50.204(c)(22). Based on the classification of marijuana as a controlled substance, courts have authority under RCW 9.94A.703(2)(c) to impose a community custody condition which prohibits the possession and consumption of marijuana. Defendant does not challenge the portion of the condition prohibiting consumption of marijuana.

*v. Nguyen*, \_\_\_ Wn.2d \_\_\_, 425 P.3d 847 (2018). There, the court held that the “use” of alcohol is different from the “consumption” of alcohol. *Id.* at 100. On remand, the court ordered the trial court to strike the words “use or” from the condition. *Id.*

*Norris*, 1 Wn. App.2d 87, however, addressed a previous version of RCW 9.94A.703(3)(e) (LAWS of 2009, ch. 214, §3), which authorized a court to impose a community custody condition prohibiting offenders “from consuming alcohol,” regardless of whether alcohol contributed to the offense. *Norris*, 1 Wn. App.2d at 99-100. On appeal, *Norris* claimed that the trial court exceeded its authority by prohibiting her from the “use” of alcohol. *Id.* at 100. The State argued that the terms “consume” and “use” are synonymous and, therefore, the trial court acted within its discretion. *Id.* Division I disagreed with the State’s analysis, holding that “[b]ecause former RCW 9.94A.703(3)(e) authorizes the imposition of a condition only on ‘consuming alcohol,’ on remand, the court shall strike the words ‘use or’ from condition 12.” *Id.*

Former RCW 9.94A.703(3)(e) was modified in 2015 to include the term “possessing” in addition to “consuming.” RCW 9.94A.703(3)(e)

(LAWS of 2015, ch. 81, §3).<sup>2</sup> Thus, unlike in *Norris*, at the time of defendant's sentencing, a trial court was authorized to order defendant to "[r]efrain from possessing or consuming alcohol[.]" RCW 9.94A.703(3)(e). Here, the trial court ordered defendant not to "use or consume alcohol and/or Marijuana." CP 112 (condition 11). But, in order to "use" alcohol, you must necessarily "possess" it. Thus, by ordering defendant not to use alcohol, the court necessarily prohibited defendant from possessing it, and, as a result, acted in accordance with RCW 9.94A.703(3)(e). This Court should affirm condition 11.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING COMMUNITY CUSTODY CONDITIONS THAT ARE STATUTORILY AUTHORIZED.

The Sentencing Reform Act of 1981 authorizes the trial court to impose "crime-related prohibitions and affirmative conditions" as part of any sentence. RCW 9.94A.505; *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). When a court sentences an offender to a term of community custody, the court must sentence that offender to conditions of community custody listed in RCW 9.94A.703(1) and (2). The court must

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<sup>2</sup> The court applies the statute in effect when the offense was committed. *State v. Munoz-Rivera*, 190 Wn. App. 870, 891 n.3 & n.4, 361 P.3d 182 (2015). Here, the amendments to RCW 9.94A.703(3)(e) went into effect July 24, 2015. Defendant committed his offenses from January 1, 2015, to February 16, 2016. CP 79, 97-98. Defendant acknowledges in his plea of guilty that two of the counts occurred on January 30, 2016. CP 79.

order the offender to comply with all conditions imposed by the Department of Corrections (DOC). RCW 9.94A.703(1)(b); RCW 9.94A.030(17). The court may also order those conditions provided in RCW 9.94A.703(3).

Pursuant to RCW 9.94A.703(3), the trial court may impose, as part of any term of community custody, conditions that defendant:

- (a) Remain within, or outside of, a specified geographical boundary;
- (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) Participate in crime-related treatment or counseling services;
- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
- (e) Refrain from possessing or consuming alcohol; or
- (f) Comply with any crime-related prohibitions.

“A ‘crime-related prohibition’ is an order prohibiting conduct that directly relates to the circumstances of the crime.” *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (internal citation and emphasis omitted). *See also*, RCW 9.94A.030(10). A prohibition of conduct must be directly related to the crime but need not be causally related. *Zimmer*, 146 Wn. App. at 413. A community custody prohibition designed to prevent the offender from further criminal conduct of the type for which the offender was convicted can be crime-related. *See State v. Riley*, 121

Wn.2d 22, 37, 846 P.2d 1365 (1993). Generally, the court will uphold crime-related prohibitions if they are reasonably related to the crime. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Whether a trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110 P.3d 201 (2007); *Johnson*, 180 Wn. App. at 325. A community custody condition is beyond the court's authority to impose if it is not authorized by the legislature. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). However, imposing statutorily authorized conditions of community custody is within the discretion of the sentencing court and is reviewed for abuse of discretion. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); *Johnson*, 180 Wn. App. at 326. Community custody conditions generally will be reversed only if their imposition is manifestly unreasonable.<sup>3</sup> *State v. Valencia*, 169 Wn.2d 782, 791-92, 139 P.3d 1059 (2010).

The trial court here ordered a PSI prior to sentencing. CP 143. That report indicated that defendant has experienced a long-term substance abuse problem, beginning as a child. CP 144-62. Defendant stated that he first tried alcohol "sometime when he was in elementary school." CP 156.

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<sup>3</sup> The imposition of an unconstitutional condition is manifestly unreasonable. *Valencia*, 169 Wn.2d at 792; *Bahl*, 164 Wn.2d at 753.

Defendant “freely admitted that Methamphetamine (Meth) has been the most problematic controlled substance for him in his life, and he first tried it in 2000.” *Id.* Defendant’s prior convictions have involved meth as well. *Id.* One of them was for Endangerment with a Controlled Substance where “the Endangerment piece involved manufacturing meth in the location where his infant son at the time was[.]” *Id.* Officer Sofia noted factors that would put defendant at risk of re-offending, and those included “drug dependency.” CP 158. Finally, Officer Sofia completed the report by advocating that defendant be ordered to obtain both a chemical dependency evaluation and a mental health evaluation. CP 159.

In defendant’s statement on plea of guilty, defendant agreed in a notification relating to specific crimes that “[i]f I am subject to community custody and the judge finds that I have a chemical dependency that has contributed to the offense, the judge may order me to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonable related to the circumstances of the crime for which I am pleading guilty.” CP 78. The trial court marked four checkboxes under “Offenses Involving Alcohol/Controlled Substances” in Appendix H of defendant’s judgment and sentence. CP 112-13. They are numbered 19-22. *Id.* Defendant challenges all of them. Brief of Appellant at 5-9. Each are discussed individually below.

a. Condition 19

The trial court ordered defendant to “not purchase or possess alcohol.” CP 113. RCW 9.94A.703(3)(e) authorizes a trial court to prohibit a defendant “from possessing or consuming alcohol” as part of any term of community custody. Therefore, alcohol need not be directly crime-related for the court to impose conditions regarding it. *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003), provides support. In *Jones*, Division II held that “the trial court had authority to order [defendant] not to consume alcohol, despite the lack of evidence that alcohol had contributed to his offenses.” *Id.* at 207.

The trial court did not commit a manifest abuse of discretion by ordering defendant “not to purchase or possess alcohol” pursuant to RCW 9.94A.703(3)(e), particularly where defendant’s PSI indicates a history of substance abuse, beginning with defendant consuming alcohol in elementary school. CP 113 (condition 19), 156; *Valencia*, 169 Wn.2d 782, 791-92. RCW 9.94A.703(3)(e) contains the words “possessing” and “consuming.” Webster’s Dictionary defines “purchase” as “to get into one’s possession.” *Webster’s Third New International Dictionary* 1844 (2002). Because purchasing something necessitates possession of it, the trial court was statutorily authorized to prohibit defendant from either purchasing or possessing alcohol. RCW 9.94A.703(3)(e); see *Webster’s*

*Third New International Dictionary* 1844 (2002). The trial court's order, therefore, cannot be said to be a manifest abuse of discretion under RCW 9.94A.703(3)(e). *Valencia*, 169 Wn.2d 782, 791-92.

The trial court similarly had statutory authority to impose the condition because it is crime-related under RCW 9.94A.703(3)(f). As stated above, according to the PSI, defendant began abusing substances in elementary school, starting with alcohol. CP 156. Methamphetamine later became "the most problematic controlled substance for him in his life[.]" *Id.* Based on this long-term substance abuse history, prohibiting defendant from purchasing or possessing alcohol was reasonably crime-related. Imposition of this condition cannot be said to be "manifestly unreasonable," and it should therefore be affirmed. *See Valencia*, 169 Wn.2d 782, 791-92.

b. Condition 20

Under condition 20, the trial court ordered defendant to "not enter drug areas as defined by court or CCO." CP 112-13. The trial court did not abuse its discretion by imposing this condition. RCW 9.94A.703(3)(a) permits a trial court to order a defendant to "[r]emain within, or outside of, a specified geographical boundary[.]" regardless of the nature of the offense. *See, e.g., State v. White*, 76 Wn. App. 801, 811, 888 P.2d 169 (1995) (Trial court did not exceed its authority in imposing as part of a

community placement order requirement that defendant have no contact with areas designated as SODA (stay out of drug areas) zones by city police department, where the court was statutorily authorized to order defendant to “remain within, or outside of, a specified geographic boundary”). Ordering defendant to not enter drug areas under RCW 9.94A.703(3)(a) was appropriately within the trial court’s discretion here, where the trial court was aware of defendant’s history of drug involvement that predated and coincided with the crimes he was convicted of in this case. 02-23-18 RP 3374, 3395; CP 99-100, 156.

The trial court was also authorized to order defendant to not enter drug areas under RCW 9.94A.703(f) as a crime-related prohibition. As previously stated, defendant’s PSI indicated that methamphetamine “has been the most problematic controlled substance for [defendant] in his life[.]” CP 156. Officer Sofia noted several factors that would increase the likelihood of defendant reoffending. CP 158. Among others, those included “drug dependency” and “associating with individuals with criminal backgrounds.” *Id.* Officer Sofia recommended that defendant “be ordered to obtain both a Chemical Dependency Evaluation and a Mental Health Evaluation.” CP 159. Further, the trial court sentenced defendant for manufacturing methamphetamine on the same day it sentenced him for the case at hand. 02-23-18 RP 3374, 3395. According to defendant’s

judgment and sentence, the date range for the methamphetamine charge coincided with the period of time defendant was convicted of possessing depictions of minors engaged in sexually explicit conduct. CP 99-100.<sup>4</sup>

For the above stated reasons, prohibiting defendant from entering “drug areas” was not manifestly unreasonable where it was statutorily authorized under both RCW 9.94A.703(3)(a) and (f). The trial court did not commit a manifest abuse of discretion. *Valencia*, 169 Wn.2d at 791-92.

c. Condition 21

Like condition 20, the trial court was authorized to order defendant to “not enter any bars/taverns/lounges or other places where alcohol is the primary source of business... [including] casinos and or any location which requires you to be over 21 years of age” under RCW 9.94A.703(3)(a) (authorizing a trial court to order a defendant to remain within, or outside of, a specified geographical boundary) and RCW 9.94A.703(3)(f) (authorizing a trial court to order compliance with crime-related prohibitions). CP 113. Defendant admitted to a history of substance abuse, which started with defendant using alcohol as a child, CP 156; he was charged and convicted of manufacturing methamphetamine during the

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<sup>4</sup> The unlawful manufacturing case (Superior Court No. 16-1-00709-2) listed a date of crime period of 02/16/16-02/16/16. CP 99-100. The date of crime period in this case was 01/01/15-02/16/16. CP 97-98.

same period of time as the circumstances providing the basis for defendant's convictions in this case, CP 99-100; he was sentenced in both cases on the same day, 02-23-18 RP 3374, 3395. Ordering defendant to refrain from entering places where alcohol is the primary source of business was, therefore, appropriately within the trial court's discretion and could not be said to be manifestly unreasonable. *Valencia*, 169 Wn.2d at 791-92. The condition should be affirmed.

d. Condition 22

Finally, the trial court ordered defendant to obtain alcohol and chemical dependency evaluations "upon referral and follow through with all recommendations of the evaluator. Should chemical dependency treatment be recommended, enter treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete recommended programming." CP 113.

RCW 9.94A.703(3)(c) authorizes a court to order a defendant to "[p]articipate in crime-related treatment or counseling services[.]" Similarly, subsection (d) permits a trial court to order a defendant to "[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]"

Given all of the information known to the trial court at the time of sentencing, including: (1) defendant's chemical dependency and childhood alcohol consumption, CP 156; (2) Officer Sofia's conclusion that drug dependency put defendant at-risk for reoffending, CP 158; (3) Officer Sofia's recommendation that defendant obtain a chemical dependency evaluation, CP 159; and (4) that defendant was convicted of manufacturing methamphetamine during the same period of time that he was in the process of committing the crimes he was convicted of in this case, CP 99-100; the trial court did not commit a manifest abuse of discretion by imposing conditions relating to evaluations for both alcohol and controlled substances upon referral. *Valencia*, 169 Wn.2d at 791-92. The conditions are reasonably related to the "circumstances of the offense" and defendant's "risk of reoffending." RCW 9.94A.703(3)(d). And, for those reasons, the condition also pertains to crime-related treatment under RCW 9.94A.703(3)(c). Thus, it was not manifestly unreasonable for the court to order defendant to obtain both alcohol and chemical dependency evaluations upon referral for evaluation under either RCW 9.94A.703(3)(c) or (d). CP 113; *Valencia*, 169 Wn.2d at 791-92. This Court should affirm condition 22.

3. THIS COURT SHOULD AFFIRM THE  
COMMUNITY CUSTODY CONDITION  
RELATING TO “DATING RELATIONSHIPS”  
AND REMAND TO MODIFY THE CONDITION  
RELATED TO “DRUG AREAS.”

Due process requires that laws, including sentencing conditions, not be vague. U.S. Const. amend. XIV, §1; Wash. Const. art. 1, §3; *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). To withstand a vagueness challenge, a condition of sentence must (1) provide ordinary people fair warning of proscribed conduct, and (2) have standards that are sufficiently definite enough to protect against arbitrary enforcement. *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008); *Irwin*, 191 Wn. App. at 652-53.

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.” *City of Seattle v. Eze*, 111 Wn.2d 22, 27, 759 P.2d 366 (1988). “[I]mpossible standards of specificity are not required.” *Id.* at 26. All that is required is that the proscribed conduct is sufficiently definite in the eyes of an ordinary person. *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). A trial court’s imposition of community custody conditions are reviewed for an abuse of discretion. *State v. Nguyen*, \_\_\_ Wn.2d \_\_\_, 425 P.3d 847, 851 (2018).

- a. The community custody condition requiring defendant to report any “dating relationship” is not unconstitutionally vague.

The Washington Supreme Court recently considered the constitutionality of a community custody condition requiring an offender to inform his or her community corrections officer of any “dating relationship” in *State v. Nguyen*, \_\_ Wn.2d \_\_, 425 P.3d 847 (2018). There, the Court rejected the defendant’s attempt to compare the “dating relationship” condition to the “significant romantic relationship” condition found to be unconstitutionally vague in *United States v. Reeves*, 591 F.3d 77 (2d Cir. 2010). *Nguyen* distinguished “significant romantic relationship” from “dating relationship” by holding that,

[t]he terms ‘significant’ and ‘romantic’ are highly subjective qualifiers, while ‘dating’ is an objective standard that is easily understood by persons of ordinary intelligence.

425 P.3d at 853. Accordingly, the Court held that the term “dating relationship” is not unconstitutionally vague. *Id.* at 853.

Here, the trial court imposed a special sex offense condition, requiring defendant to “[i]nform the supervising CCO and sexual deviancy treatment provider of any dating relationship.” CP 112 (condition 5). Because the Washington Supreme Court has recently determined that such a condition is not unconstitutionally vague, this Court should affirm the

trial court's imposition of the "dating relationship" condition. *Nguyen*, 425 P.3d at 853.

- b. The community custody condition prohibiting defendant from entering "drug areas" should be modified to strike the "or CCO" language.

In *State v. Brown*, No. 75458-1-II, 2018 WL 1275932, at \*10 (Wash. Ct. App.2d March 12, 2018) (unpublished),<sup>5</sup> Division I held that a community custody condition requiring the defendant to avoid "drug areas" as determined by his Community Corrections Officer was unconstitutionally vague and overbroad. The Washington Supreme Court granted review on other grounds on July 11, 2018. *State v. Brown*, 190 Wn.2d 1025, 421 P.3d 460 (2018).

*Brown* held that under *Irwin*, 191 Wn. App. 644, leaving the definition of "drug areas" open to the community corrections officer's discretion deprives the defendant of fair warning and allows for arbitrary enforcement. *Brown*, 2018 WL 1275932, at \*10. *Irwin* held that giving authority to community corrections officers to interpret "places where

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<sup>5</sup> GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

children are known to congregate” would allow for unconstitutionally arbitrary enforcement. *Id.*

Since its decision in *Brown*, Division I has come to similar conclusions in *State v. Hammerquist*, No. 75949-3-I, 2018 WL 2021877, at \*2 (Wash. Ct. App.2d April 30, 2018) (unpublished); *State v. Wood*, No. 76221-4-I, 2018 WL 3026102, at \*7 (Wash. Ct. App.2d June 18, 2018) (unpublished); and *State v. Baus*, No. 76962-6-I, 2018 WL 5802523, at \*6 (Wash. Ct. App.2d November 5, 2018) (unpublished).<sup>6</sup> In each of those cases, the “drug areas” condition was left only to the CCOs, and not to the court, to define. Particularly in *Baus*, the court held that “while it is true that [defendant] may have notice of the prohibited conduct once the CCO sets forth a definition of ‘drug areas’ in writing, the condition still fails under the second prong of vagueness analysis because it is vulnerable to arbitrary enforcement” where discretion is left to the CCO to define “drug areas.” 2018 WL 5802523 at \*7 (citing *Irwin*, 191 Wn. App. at 655).

Notably, here, the condition imposed by the trial court states that defendant is not to “enter drug areas as defined by *the court or CCO.*” CP

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113 (condition 20) (emphasis added). In *State v. Alvarez*, No. 48560-5-II, 2018 WL 1505491, at \*16-17 (Wash. Ct. App.2d March 27, 2018) (unpublished),<sup>7</sup> review denied, *State v. Alvarez*, 191 Wn.2d 1003, 422 P.3d 916 (2018), this Court upheld a community custody condition prohibiting the defendant from going places where “children congregate” in a similar vagueness challenge. There, the Court rejected the defendant’s attempt to analogize his case to *State v. Bahl*, 164 Wn.2d 739, 758, 193 P.3d 678 (2008), because *Bahl* involved discretion exercised by CCOs, and the case at hand involved discretion exercised by the court. *Alvarez*, No. 48560-5-II, 2018 WL 1505491, at \*16 (n. 10).

Defendant’s citation of *Bahl*, 164 Wn.2d 739, 758, for the proposition that “[t]he fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards of enforcement” is therefore misplaced. *See* Brief of Appellant at 11. This case does not involve discretion exercised solely by defendant’s CCO; it also leaves discretion to the court. CP 113 (condition 20).

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<sup>7</sup> GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

Thus, insofar as the condition allows defendant's CCO to define "drug areas," the State agrees that it could allow for arbitrary enforcement and should be stricken pursuant to *Bahl*, 164 Wn.2d 758, and *Irwin*, 191 Wn. App. at 655. However, where the condition leaves discretion to the court to define drug areas, it does not allow for arbitrary enforcement and should be upheld. Additionally, since the trial court can provide notice of the prohibited conduct to defendant in writing, the condition is not unconstitutionally vague. *Bahl*, 164 Wn.2d 739, 752-53; see *Baus*, No. 76962-6-I, 2018 WL 5802523, at \*7 ("And while it is true that [defendant] may have notice of the prohibited conduct once the CCO sets forth a definition of 'drug areas' in writing, the condition still fails under the second prong of vagueness analysis because it is vulnerable to arbitrary enforcement"). The appropriate remedy, therefore, is to remand the matter to the trial court to strike only the words "or CCO" from condition 20. CP 113.<sup>8</sup>

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<sup>8</sup> However, even if this Court remands to strike any of the conditions, RCW 9.94A.704(2)(a) authorizes the department to "establish and modify additional conditions of community custody based upon the risk to community safety" after assessing the offender's risk of re-offending.

4. THIS COURT SHOULD ORDER THAT THE IMPOSITION OF THE \$200 CRIMINAL FILING FEE, THE \$100 DNA COLLECTION FEE, AND THE IMPOSITION OF NON-RESTITUTION INTEREST BE STRICKEN FROM DEFENDANT'S JUDGMENT AND SENTENCE PURSUANT TO HOUSE BILL 1783.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), effective June 7, 2018, prohibits the imposition of the \$200 criminal filing fee on defendants who were indigent at the time of sentencing, prohibits imposition of the \$100 DNA collection fee where the offender's DNA has been previously collected, and eliminates any interest accrual on non-restitution legal financial obligations. House Bill 1783 applies to cases that are on appeal and not yet final. *State v. Ramirez*, \_\_\_ Wn.2d \_\_\_, 426 P.3d 714 (2018).

The State acknowledges that defendant was found indigent by the sentencing court. CP 139-40. Defendant acknowledges he has previously been convicted of a felony, so his DNA has already been collected. Brief of Appellant at 3; CP 99. The State's records also show that defendant's DNA was previously collected and is on file with the Washington State Patrol Crime Lab. Accordingly, the State respectfully requests this Court remand this case to the trial court with orders to amend the judgment and sentence to strike the imposition of the \$200 criminal filing fee, the \$100

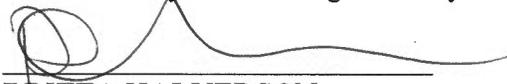
DNA collection fee, as well as the imposition of interest on any remaining non-restitutional legal financial obligations.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions and community custody conditions 5, 11, 19, 21, and 22. The State agrees this Court should remand with orders to modify condition 20 as explained above. Finally, the State agrees this Court should remand this case to the trial court to strike the imposition of the \$200 criminal filing fee, the \$100 DNA collection fee, and interest on any non-restitution legal financial obligations.

DATED: December 4, 2018

MARK LINDQUIST  
Pierce County Prosecuting Attorney



BRITTA HALVERSON  
Deputy Prosecuting Attorney  
WSB # 44108



Madeline Anderson  
Rule 9 Intern

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12/4/18 *J. Johnson*  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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