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THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent,

v.

KEVIN ARTHUR PETERS,
Appellant.

Court of Appeals No. 31755-2-III

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Respondent is the State of Washington (hereinafter the “State”). Appellant is Kevin Arther Peters (hereinafter “Mr. Peters”).

For around three years, Mr. Peters repeatedly raped his two daughters, molested his young son, and provided all three children with drugs. CP 37-39, 60-64. His children, two girls and one boy, were aged 13, 9, and 12, respectively, at the time of sentencing on October 30, 2012. CP 91-102.

Mr. Peters was originally charged in Stevens County Superior Court with four counts: Rape of a Child in the First Degree, Rape of a Child in the Second Degree, Rape of a Child in the First Degree, and Possession with Intent to Manufacture or Deliver Marijuana or Other Non-Narcotic Schedule I, II, or III Controlled Substance Other than Amphetamine or Methamphetamine. CP 01-03. Mr. Peters was later charged by Amended Information with six counts: Rape of a Child in the First Degree, Rape of a Child in the Second Degree, Rape of a Child in the First Degree, Rape of a Child in the First Degree, Assault of a Child in the Third Degree, and Possession with Intent to Manufacture or Deliver Marijuana or Other Non-Narcotic Schedule I, II, or III Controlled Substance Other than Amphetamine or Methamphetamine. CP 18-22. Eventually, Mr. Peters

pleaded guilty to a Second Amended Information, charging him with three counts: Rape of a Child in the First Degree, Rape of a Child in the First Degree, and Child Molestation in the First Degree. CP 37-39. Mr. Peters entered into a Plea Agreement on September 19, 2012. CP 44. After Mr. Peters filed a Statement of Defendant on Plea of Guilty, the Superior Court entered an Order for Presentence Investigation Report (hereinafter “PSI”). CP 58-59.

Department of Corrections Officer Travis Hurst conducted the PSI at the Stevens County Jail and generated his report on October 18, 2012. CP 60-74. The PSI contained detailed discussion about Mr. Peters’ crimes against his minor children, social history, and criminal history. CP 60-74. Attached to the PSI were the Department of Corrections’ (hereinafter “DOC”) proposed Additional Conditions of Sentence, embodied in “Appendix H—FELONY Additional Conditions of Sentence.” CP 74-77. DOC’s Appendix H was adopted by the Superior Court Judge and was imposed at Mr. Peters’ Sentencing. CP 104-106.

The Conditions became Judgment and Sentence (Felony) Appendix H Community Placement/Custody. CP 104-106. The Conditions were divided into two categories: Mandatory Conditions and Other Conditions. CP 104-106. Mr. Peters challenges Other Conditions 1, 3, 4, 7, 9, 10, 11, 13, 16, 22, 23, and 24. Brief of Appellant at 1-2.

II. STANDARD OF REVIEW

Sentencing conditions are reviewed for abuse of discretion. *State v. Nguyen*, 425 P.3d 847, 853 (Wash. 2018); see also *State v. Riley*, 121 Wash.2d 22, 37, 846 P.2d 1365 (1993).

III. SUMMARY OF ARGUMENT

Some of the Conditions proposed by the Department of Corrections and adopted by the Superior Court should be clarified or modified on remand. Other Conditions, such as the prohibition on contact between Mr. Peters and his victims, are substantiated by the record and are not unconstitutional.

IV. ARGUMENT

A “proper community custody condition must be authorized by the legislature because it is solely within the legislature’s province to determine legal punishments.” *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (Div. II, 2008), *review denied*, 165 Wn.2d 1050 (2009). A criminal defendant always has standing to challenge his or her sentence on grounds of illegality. *State v. Sanchez Valencia*, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010). However, a probationer’s challenge is subject to ripeness requirements. *Id.* at 787-88. An appellate court reviews the imposition of community custody conditions for abuse of discretion and will reverse only if the trial court’s decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d

1365 (1993). “Thus, a sentence will be reversed only if it is ‘manifestly unreasonable’ such that no reasonable man would take the view adopted by the trial court.” *Id.* (internal quotations omitted). A condition may be manifestly unreasonable if the court has no authority to impose it. *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

Although the conduct prohibited during community custody must be directly related to the crime, it need not be causally related to the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). For example, this court affirmed a crime-related prohibition requiring a person who was convicted of delivery of marijuana to undergo urinalysis to monitor his use of marijuana, even though his crime did not involve the use of marijuana. [*State v. Parramore*, 53 Wn. App. [527] at 531 [768 P.2d 530 (1989)]. But in the same case, we struck a condition prohibiting that person from consuming alcohol because the State failed to show any connection between his use of alcohol and his delivery of marijuana conviction. *Id.*

State v. Letourneau, 100 Wn. App. 424, 432, 997 P.2d 436 (Div. I, 2000).

“As a condition of community custody, a sentencing court may, in its discretion, impose any crime-related prohibitions.” *State v. Nguyen*, 425 P.3d 847, 853 (Wash. 2018) (internal quotations omitted); see also 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.” *Id.* (internal quotations omitted); see also RCW 9.94A.030(10).

“Such conditions are usually upheld if reasonably crime related.” *State v. Nguyen*, 425 P.3d 847, 853 (Wash. 2018). “A court does not abuse its discretion if a ‘reasonable relationship’ between the crime of conviction and the community custody condition exists.” *Id.* (citing *State v. Irwin*, 191 Wash. App. 644, 658-59, 364 P.3d 830 (2015)). The prohibited conduct need not be identical to the crime of conviction, but there must be “some basis for the connection.” *Id.* (citing *Irwin*, 191 Wash.App. at 657).

1. The Ban on Mr. Peters’ Contact with His Children, Who He Victimized, is not Unconstitutional and is a Valid Crime-Related Prohibition.

Condition 1: “Have no direct or indirect contact with Victims...for Life.” CP 105. At some point, Mr. Peters will need to come to the realization that he hurt his minor children very badly and that his conduct toward them was disgusting and deplorable. Until that time, no condition on his behavior will make any sense to him.

As with all conditions, there must be a relationship between the underlying crime and the conditions. “More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.” *State v. Warren*, 165 Wash. 2d 17, 32, 195 P.3d 940, 947 (2008). “Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and

public order.” *Id.* “Additionally, conditions that interfere with fundamental rights must be sensitively imposed.” *Id.*

In *Warren*, the defendant sexually abused his two stepdaughters. *Id.* at 23. As a condition of his sentence, the defendant was prohibited from having contact with his wife, the mother of his victims. *Id.* at 31. While the defendant’s wife was not the victim of his crimes, the Supreme Court affirmed the no-contact order because it was “reasonably related” to the crime. *Id.* at 34. Thus, even when the protected party is not the direct victim, our courts may impose prohibitions on contact.

Mr. Peters alleges that “...there is no basis in the record for an absolute life-time ban on contact with children who become adults and who themselves may want to have contact with their father.” Brief of Appellant at 11. The absurdity of that statement is truly astounding. Without recounting each and every time Mr. Peters raped his two daughters, molested his son, gave them drugs, or made one daughter watch as Mr. Peters raped her sister, or even every time Mr. Peters physically assaulted his son, this Court need only look at one page of the record to know without a doubt that he Superior Court did not abuse its discretion by ordering a lifetime ban on contact with them.

Mr. Peters fails to grasp that the lifetime ban is for the protection of his children; it is not a punishment meant for him. If this Court were to

remove the ban on contact, Mr. Peters could have unrestrained contact with the children he brutalized. It appears Mr. Peters' argument is that once his children reach the age of majority, they no longer have anything to fear from them. Brief of Appellant at 10. Apparently, Mr. Peters muses that it might be "therapeutic" for them to see him. Brief of Appellant at 10. No one, with or without education in treatment of mental or emotional trauma, can rationally front that position. Mr. Peters didn't lose his temper and step slightly over the line of discipline; he violated his children. Mr. Peters' desire to have the Condition lifted, demonstrates the need for it.

Mr. Peters claims that not only is the Condition unrelated to his crime, he claims that the duration of the Condition violates his constitutional rights. Brief of Appellant at 10. Parental rights are not absolute; they may be subject to reasonable regulation. *City of Sumner v. Walsh*, 148 Wash. 2d 490, 526, 61 P.3d 1111, 1129 (2003).

The Superior Court had and the record contains statements from all three of Mr. Peters' children. CP 78-80, 86-88. After reading each statement, it is clear that a lifetime ban on contact between Mr. Peters and his victims was not an abuse of discretion.

2. The Ban on Contact with Minors is Not Vague and is a Valid Crime-Related Prohibition.

Condition 3: "Have no contact with Minors unless approved by

your assigned Community Corrections Officer, and if applicable, Sex Offender Treatment Provider.” CP 105.

”Minor child’ means a biological or adopted child of the offender who is under age eighteen at the time of the offender's current offense.” RCW 9.94A.030(32). “Child” therefore means the biological offspring or the adopted child of the offender. No guesswork is required to conclude that “minor” clearly means an individual under the age of eighteen.

Mr. Peters’ primary class of victims was minors. There is no evidence in the record that he victimized any individuals over the age of 18. In fact, prior to his rape and molestation charges, Mr. Peters had no felonies and only fishing and driving-related offenses. CP 64-65. Viewing the entire record, the only evidence is that Mr. Peters preyed on minors and used alcohol and illegal drugs. The Superior Court imposed restrictions on Mr. Peters’ contact with minors, contact with his minor children, and prohibited him from using, possessing, consuming, or going near drug users. CP 105-06; argument *infra*.

There is substantial evidence in the record to support a prohibition on having contact with any minors.

3. The Ban on “Sexually Explicit Materials” is a Valid Crime-Related Prohibition and is Constitutional.

Condition 4: “Do not access, use, or possess any sexually explicit

materials, unless authorized by your Community Corrections Officer, and if applicable, Sex Offender Treatment Provider.” CP 105.

Mr. Peters challenges Condition 4 on constitutional grounds but the Washington Supreme Court has examined and ruled on this issue. Three days after Mr. Peters filed his Opening Brief, the Supreme Court decided *State v. Nguyen*, 425 P.3d 847 (2018).

Nguyen was convicted of first degree child molestation, first degree child rape, second degree child molestation, and second degree child rape. *Id.* at 849. As part of his community custody conditions, Nguyen was prohibited from “possessing, using, accessing, or viewing any sexually explicit material...” *Id.* at 851. The condition specifically 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.*

The Supreme Court distinguished Nguyen’s prohibition on “sexually explicit material” from “pornographic material.” *Id.* “However, this case does not concern the ascertainability of ‘pornographic material’ but, rather, the ascertainability of ‘sexually explicit material. In [*State v.*] *Bahl*, [164 Wash.2d 738, 193 P.3d 678 (2008)] we drew a distinction

between the two.” *Id.* “Unlike ‘pornographic material,’ we held that the term ‘sexually explicit material’ was not unconstitutionally vague.” *Id.* (citing *Bahl*, 164 Wash.2d at 760).

The Supreme Court continued by analyzing *Bahl* and RCW 9.68.130(2), which provided a definition of “sexually explicit material.” *Id.* at 851-52. In *Bahl*, the condition prohibited Bahl from frequenting “establishments whose primary business pertains to sexually explicit ... material.” *Id.* at 758, 193 P.3d 678. The Supreme Court 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. Using the “ordinary intelligence” standard, the Supreme Court concluded:

Despite Nguyen’s concerns that countless 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. The term “sexually explicit material” is not unconstitutionally vague. *Id.* at 852.

The term “sexually explicit material” is also very much related to Mr. Peters’ crimes. Mr. Peters showed K.M.P. and K.Y.P., his minor daughters, sexually explicit movies. CP 62. Mr. Peters took photos and

video of himself having sex with K.Y.P. CP 61. Mr. Peters even forced K.M.P. to take photos of himself and K.Y.P. having sex. CP 62. This Court should leave Condition 4 undisturbed.

4. The Restriction on Romantic Relationships is a Valid Crime-Related Prohibition and is Constitutional, but the Condition is Vague.

Condition 7: “Do not enter into any romantic relationships without the prior approval of your supervising Community Corrections Officer, and if applicable, Sex Offender Treatment Provider.” CP 105. The State concedes that the term “romantic” is vague and as such, does not oppose an order remanding the matter for the Superior Court to amend the Condition to read, “[d]o not enter into any sexual and/or dating relationship without the prior approval of your supervising Community Corrections Officer, and if applicable, Sex Offender Treatment Provider.” The Condition, however, is not an outright ban on relationships.

Two Divisions of our Court of Appeals have held that “romantic relationship” is vague. See *State v. Green*, 2018 WL 5977988 (Div. II, 2018) (unpublished opinion) (cited under WA GR 14.1, for persuasive value and not binding authority) and *State v. Metcalf*, 4 Wash.App.2d 1068 (Div. I, 2018) (unpublished opinion) (cited under WA GR 14.1, for persuasive value and not binding authority), review denied 2018 WL 6241556 (November 28, 2018).

In *dicta*, the Washington Supreme Court has questioned terms associated with relationships, in the context of post-conviction conditions. *State v. Nguyen*, 425 P.3d 847, 852-53 (2018). Dominique Norris, convicted of three counts of second degree child molestation and a co-petitioner in *Nguyen*, was required to inform her Community Corrections Officer of any “dating relationships.” *Id.* at 852. The Supreme Court analyzed the term, using three tools: *State v. Bahl*, *United States v. Reeves*, and the definition of RCW 26.50.010(2), which defined a “dating relationship” as:

“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 852–53 (quoting RCW 26.50.010(2)). “As we did in *Bahl*, here, we ‘may consider the plain and ordinary meaning as set forth in a standard dictionary.’” *Id.* at 852 (quoting *State v. Bahl*, 164 Wash.2d at 754, 193 P.3d 678. “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.”” *Id.* (quoting Webster’s Third New International Dictionary 576 (2002)). “A ‘relationship’ is defined as “a state of affairs existing between

those having relations.” *Id.* (quoting Webster’s Third New International Dictionary 1916 (2002)).

Resorting again to the “person of ordinary intelligence” standard, the Supreme Court concluded that “...a person of ordinary intelligence can distinguish a “dating relationship” from other types of relationships. 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.”” *Id.* at 853.

In *United States v. Reeves*, 591 F.3d 77, 79 (2d Cir. 2010), the United States Court of Appeals, Second Circuit held that the term “significant romantic relationship” was unconstitutionally vague. Our Supreme Court nodded approvingly at the analysis in *Reeves*:

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.”

Nguyen, 425 P.3d at 853 (quoting *Reeves*, 591 F.3d at 81). The Supreme Court distinguished Norris’ condition from the condition in *Reeves*: “The terms ‘significant’ and ‘romantic’ are highly subjective qualifiers, while ‘dating’ is an objective standard that is easily understood by persons of

ordinary intelligence.” *Id.* “We hold that ‘dating relationship’ is not an unconstitutionally vague term.” *Id.*

Romance is a very subjective term. One can have a dating relationship without romance or romance without a dating relationship. One can also have sexual intercourse without a romantic relationship or even a dating relationship. The danger is that Mr. Peters needed neither romance nor dating to engage in deviant and criminal sexual activity. Given Mr. Peters’ conduct, the Condition should have included the terms “dating” and “sexual”, in order to make the Condition clear. As the Supreme Court in *Nguyen* noted, “romantic” is highly subjective.

Condition 7 should be declared vague and the Condition should be remanded to the Superior Court for clarification, preferably to be amended to a restriction on “sexual and/or dating relationships”

5. The Potential Requirement to Submit to a Plethysmograph is Not Ripe for Challenge and Even if it Were Ripe, is not an Invalid Condition.

Condition 9: “Submit to Plethysmograph testing as directed.” CP 105. Conditions of community custody are within the discretion of the sentencing court and will be reversed only for manifest unreasonableness. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

A sentencing court has authority to order the defendant to submit to plethysmograph testing, but only if the court has also ordered sexual

deviance treatment which is crime related. *State v. Johnson*, 184 Wn. App. 777, 780, 340 P.3d 230 (Div. II, 2014). It is to be used only for treatment purposes. *Id.* at 781.

Mr. Peters is correct that plethysmograph testing is “extremely intrusive.” *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782, *review denied*, 177 Wn.2d 1016, 304 P.3d 114 (2013). In *Land*, the court struck the condition of plethysmograph testing because it was left to the discretion of the community corrections officer. *Id.* at 605-06. The following year, however, in *State v. Johnson*, 184 Wn. App. 777, 340 P.3d 230 (Div. II, 2014), Division II of the Court of Appeals affirmed the plethysmograph condition but clarified that the community corrections office’s authority was limited to ordering the testing for treatment purposes but not for monitoring. *Johnson*, 184 Wn. App. at 781. Based upon that case, the condition should not be stricken from Mr. Peters’ Judgment and Sentence. Also based upon that case, it must be clear to the Department of Corrections that its authority is limited to using the plethysmograph for treatment purposes.

6. The Restrictions on Mr. Peters going to Places Where “Children Congregate” is Not Vague and is not Unconstitutional.

Condition 10: “Do not go to places where children congregate (i.e. schools, playgrounds, parks, etc.)” CP 105. Mr. Peters claims that this

Condition is vague and unconstitutional. Brief of Appellant at 22. The Condition should stand, with one modification, because common sense tells us the Condition is not vague in its scope and because Mr. Peters cannot substantiate his constitutional argument. The only portion of the Condition that should be modified is the word “children” should be amended to “minors”, given that the term “children” means ones issue (biological or adopted) and “minor” means an individual under 18 years of age. See argument Subsection 2, *supra*.

The remainder of the Condition, prohibiting Mr. Peters from going to places where children congregate, is not vague such that a person of reasonable intelligence should know what he is or is not to do. A very similar and persuasive case is that of *United States v. Paul*, 274 F.3d 155, 166–67 (5th Cir., 2001).

Mr. Paul pleaded guilty to a charge of knowingly possessing child pornography. *Id.* at 157. The sentencing court imposed a release condition prohibiting the probationer from going to “places, establishments, and areas frequented by minors.” *Id.* at 166. Mr. Paul challenged the condition as vague. *Id.* at 157-58. The 5th Circuit noted, conditions “...on an offender's ability to interact with particular groups of people, to hold certain types of employment, and to frequent certain places must provide ‘fair notice’ of the prohibited conduct. *Id.*

“It is clear from the plain language of Paul's restriction that he is permitted to visit places, establishments, or areas that are not frequented by minors.” *Id.* (emphasis in original). “The only potential vagueness problem with the restriction at issue in the instant case is whether a reasonable person can predict which specific locations Paul is permitted to frequent.” *Id.*

“This lack of specificity is not necessarily fatal to the validity of the restriction.” *Id.* at 166 (emphasis added). A probationer is entitled to notice of what behavior will result in a violation, “...so that he may guide his actions....” *Id.* at 166-67. Accordingly, “...conditions of probation do not have to be cast in letters six feet high, or to describe every possible permutation, or to spell out every last, self-evident detail.” *Id.* (internal quotations omitted). “Conditions of probation “may afford fair warning even if they are not precise to the point of pedantry. In short, conditions of probation can be written—and must be read—in a commonsense way.” *Id.* at 167. The 2nd Circuit explained the difficulty faced by sentencing courts when trying to place parameters around the conduct of probationers:

Certainly, it would be impossible to list within the text of Paul's condition every specific location that he is prohibited from frequenting during the term of his release. Sentencing courts must inevitably use categorical terms to frame the contours of supervised release conditions. Such categorical terms can provide adequate notice of prohibited conduct when there is a commonsense understanding of what activities the categories encompass. Indeed,

it is well established that the requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.

Id. (emphasis added) (internal quotations omitted). The 2nd Circuit found “...that there is sufficient common understanding of the types of locations that constitute ‘places, establishments, and areas frequented by minors’ to satisfy the constitutional requirement of reasonable certainty in this case.

Id. The ultimate conclusion of the 2nd Circuit was that “[t]he supervised release conditions restricting Paul's contact with minors are neither impermissibly vague nor unreasonably broad.” *Id.* In fact, “[t]hese restrictions are reasonably necessary in light of the nature and circumstances of Paul's offense and the legitimate need to prevent recidivism and protect the public.”

Conditions must be viewed in light of common sense. The Superior Court could not list each and every place minors may frequent simply because doing so would make Appendix H a 30-page document, rather than a 3-page document. At some point, the sane and concise principle of judicial economy must take over and a convict must understand the nature of his crimes and know just why it is that he can't go to parks and playgrounds—because it's where minors congregate and he victimized minors. In light of the nature of Mr. Peters' crimes, it is reasonably

necessary to prevent him from going to places where minors tend to congregate.

7. The Potential Requirement to Allow Home Visits is Not Ripe for Review.

Condition 11: “Submit to Home Visits to monitor compliance with supervision. Home Visits include access for the purpose of visual inspection of all areas you live, or have exclusive/joint control or access.” CP 105.

“Mr. Peters acknowledges that the Supreme Court has held that a challenge of this type of condition is not ripe for review in a pre-enforcement context.” Brief of Appellant at 26. Mr. Peters is correct; our Supreme Court has ruled this Condition is not ripe for review. See *State v. Cates*, 183 Wash.2d 531, 535-36, 354 P.3d 832 (2015). Because this Condition is not ripe for review, it should not be reviewed by this Court.

8. The Ban on Residing within 888 Feet of a Community Protection Zone is Not Illegal or Otherwise Unconstitutional, but Should be Clarified.

Condition 13: “Do not reside in a location within 888 feet of a Community Protection Zone.” CP 105. Condition 13 is mandatory, pursuant to RCW 9.94A.703(1)(c) if certain requirements are met. The requirements are that the offender be convicted of one of the offenses listed in RCW 9.94A.507(1)(a). Subsection 1(a) includes rape of a child

in the first degree and second degrees and child molestation in the first degree. Whether or not Condition 13 is illegal is answered simply by looking to the definition supplied by the Sentencing Reform Act of 1981.

“‘Community Protection Zone’ means the area within eight hundred eighty feet of the facilities and grounds of a public or private school.” RCW 9.94A.030(6). Undoubtedly, Condition 13 is inartfully written. It would be better to say “do not reside within a community protection zone, as defined in RCW 9.94A.030(6).” However, to the extent that Condition 13 cannot be made to read in accordance with RCW 9.94A.030(6), it should, at the most, be clarified by the Superior Court on remand and not stricken.

Mr. Peters requests this Court strike Condition 13 on constitutional grounds. Brief of Appellant at 29. Mr. Peters claims that this Court should disregard the statutory definition of “community protection zone” and replace it with one of its own making. Mr. Peters request is both dangerous and unnecessary. The legislature defined the term and without a showing that the statutory definition is fatally vague, this Court should leave the term undisturbed.

Mr. Peters claims the word “school” is vague. Brief of Appellant at 29. Mr. Peters asks, “[d]oes the condition only apply to public or private schools serving children, or does it apply to a private or public university

(which are also “schools”)?” Brief of Appellant at 29. Condition 13 is not vague and clearly does not apply to universities.

The term “school”, as used in RCW 9.94A.030(6), is not vague if one reads further in the definitions contained in RW 9.94A.030. “Private school” and “public school” are both defined. See RCW 9.94A.030(40) and (41), respectively. “Private school” is defined as “...a school regulated under chapter 28A.195 or 28A.205 RCW.” RCW 9.94A.030(40). “Public school” is defined as “...the common schools as referred to in Article IX of the state Constitution, charter schools established under chapter 28A.710 RCW, and those schools and institutions of learning having a curriculum below the college or university level as now or may be established by law and maintained at public expense.” RCW 9.94A.030(41) and RCW 28A.150.010.

Condition 13 should, at the most, be clarified by the Superior Court on remand and not stricken. Condition 13 should be amended to read, “[d]o not reside in a Community Protection Zone.”

9. The Employer Notification Requirement is Not Ripe for Challenge and even if it Were, it is Constitutional.

Condition 16: “Notify any employer(s) regarding the nature of your sex offenses.” CP 106. Condition 16 is quite inartfully written, but inartfulness is not the same as unenforceability. If the Condition were to

say, “[n]otify any employer(s) of your sex offenses,” the Condition would be so narrow as to be useless. Mr. Peters could simply say that he had been convicted of sex offenses, but elaborate no further. Mr. Peters’ offenses were extreme and particularized to minors; details that should not be left out.

Mr. Peters is a very long way off from needing to obtain employment. Whether or not Mr. Peters will need employment or will be eligible for employment remains to be seen and thus is not ripe. Mr. Peters, at the time he raped and molested his children, had been declared disabled and received disability payments. CP 67. Mr. Peters was declared disabled in 2005, for physical injuries and his mental state from childhood injuries. CP 67.

Even if Mr. Peters’ challenge to Condition 16 is ripe, the Condition is still both crime-related and constitutional. “To resolve crime-relatedness issues, a court will review the factual basis for the condition under a substantial evidence standard.” *State v. Padilla*, 190 Wash. 2d 672, 683, 416 P.3d 712, 718 (2018) (internal quotations omitted) (citing *Irwin*, 191 Wash. App. at 656, 364 P.3d 830). “The court will strike the challenged condition if there is no evidence in the record linking the circumstances of the crime to the condition.” *Id.* “There is no requirement that the

condition be factually identical to the crime.” *Id.* (emphasis added). “If there is a reasonable basis for the condition, the court will uphold it.” *Id.*

Mr. Peters preyed upon minors. The State has a compelling interest to protect minors wherever Mr. Peters may obtain employment. Getting a job that might involve minors or even situations that may expose him to minors, regardless of the setting, would not only pose a danger to the minors, but may also mean potential liability for any employer. For example, in 2009, prior to his charging, law enforcement received a report of Mr. Peters’ proclivities with his children. CP 63. A woman by the name of Kathryn Hughes reported that she lived with Mr. Peters for approximately 6 months after Mr. Peters’ wife died. CP 63. Ms. Hughes reported that Mr. Peters engaged in what sounded like sexual activity with the eldest daughter. CP 63. Ms. Hughes also reported that she had seen Mr. Peters’ children run around the house, while naked. CP 63. Therefore, no matter the setting, whether around other adults or not, Mr. Peters was not dissuaded from engaging in inappropriate behavior. To say that it is unreasonable for Mr. Peters to notify an employer about his criminal convictions is tempting fate. An employer has the right to know that Mr. Peters was convicted of child rape and molestation.

Mr. Peters claims unconstitutionality based on *Janus v. American Federation of State, County and Mun. Employees, Council 31*, _____ U.S.

_____, 138 S.Ct. 2448 (2018). *Janus* is wholly inapplicable to Mr. Peters’ case. *Janus* dealt with the compelled subsidization of private speech on matters of public concern.

A more applicable case is found in *State v. K.H.-H.*, 185 Wash. 2d 745, 748–50, 374 P.3d 1141, 1142–43 (2016), because our Supreme Court acknowledged the difference between compelling certain speech of citizens versus compelling speech of those convicted of crimes.

In *State v. K.H.-H.*, a defendant challenged an order requiring him to write a letter of apology to his victim. *Id.* at 748. K.H.-H., a 17-year-old male, was charged with assault with sexual motivation. *Id.* The juvenile court sentenced K.H.-H. to three months of community supervision and ordered him to “write a letter of apology to victim C.R. that is approved by the Probation Officer and the State. *Id.* at 748. Counsel for K.H.-H. objected and appealed. *Id.* The Court of Appeals affirmed the sentence. *Id.* The Washington Supreme Court granted review and noted:

This court has never addressed the question of whether it is a violation of the First Amendment or our own article I, section 5 of the Washington Constitution to order a juvenile defendant in a criminal case to write a letter of apology.

Id. “The United States Supreme Court has held that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”

Id. “The protection from compelled speech extends to statements of fact as well as of opinion.” *Id.* at 749. “Article I, section 5 of the Washington Constitution guarantees that every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” *Id.* (quoting Wash. Const. art. I, § 5) (internal quotations omitted).

K.H.-H. did not invite the Supreme Court to engage in a separate state constitutional analysis, so the Court analyzed the issue under the First Amendment. *Id.* “Because a forced apology involves making an offender say something he does not wish to say, it implicates the compelled speech doctrine.” *Id.* “The compelled speech doctrine generally dictates that the State cannot force individuals to deliver messages that they do not wish to make.” *Id.* “First Amendment rights are not absolute, however, particularly in the context of prison and probation, where constitutional rights are lessened or not applicable.” *Id.* “[C]riminal convictions result in loss or lessening of constitutional rights. *Id.* The Court ultimately held:

One must face the consequences of a conviction, which often include the loss or lessening of constitutional rights. There is a whole range of constitutional rights that can be affected by a conviction, not the least of which is a loss of liberty. There may be a limitation on the degree to which First Amendment rights may be restricted for those convicted of crimes, but an apology letter condition does not approach that limit.

Id. at 756. The Court affirmed the Court of Appeals and the juvenile court. *Id.*

Just as the letter of apology was not unconstitutional in *K.H.-H.*, it is not unconstitutional to require Mr. Peters to inform his prospective employer as to the nature of his crime. Mr. Peters must face the consequences of his conviction. One of the costs of his conviction is to lose his right to be free from compelled speech in this instance. The State does not argue that Mr. Peters must find the highest point in the town and shout out that he raped and molested his minor children. Condition 16 is limited; Mr. Peters must inform a limited and defined class of individuals.

Mr. Peters claims the Condition is too vague and thereby unenforceable. Brief of Appellant at 32. Mr. Peters' argument is simply that if he asks a bunch of questions and throws up his hands and claims he can't figure it out, it must be too vague. The Condition needs no more definition because to excise the word "nature" from the condition results in too little information (see argument, *supra*) and to require more definition would make the Condition unwieldy. Instead, nature suffices to inform a potential employer of the basic constitution of Mr. Peters' crimes. Black's Law Dictionary defines "nature" as "[a] fundamental quality that distinguishes one thing from another; the essence of something." NATURE, Black's Law Dictionary (10th ed. 2014).

Condition 16 does not require Mr. Peters to abandon his beliefs or his moral convictions, if he has any. The Condition requires Mr. Peters

disclose information about his crimes to a certain class of individuals, namely, employers. Mr. Peters should be required to disclose the nature of his crimes. Mr. Peters victimized his minor children and any potential employer should receive more information than the minimal fact that Mr. Peters is a sex offender.

10. The Three Conditions Prohibiting Drug Activity are Vague and Should be Defined on Remand.

Condition 22: “Do not possess Drug Paraphernalia.” CP 106.

Condition 23: “Do not associated [sic] with known abusers/sellers of Illegal and prescribed Drugs.” CP 106.

Condition 24: “Do not enter areas identified by your Community Corrections Officer as Drug Locations.” CP 106.

There is no question that drugs played an integral role in Mr. Peters’ criminal behavior. Mr. Peters gave drugs to K.M.P. when she was eight years old. CP 61. Mr. Peters gave drugs to K.R.P. and K.Y.P. CP 61. Mr. Peters gave methamphetamine to K.Y.P. CP 61-62. Mr. Peters gave K.Y.P. drugs and alcohol and then would rape all three children. CP 62. Mr. Peters used cocaine in front of his children. CP 61. Mr. Peters gave K.Y.P. a marijuana pipe for her twelfth birthday. CP 62.

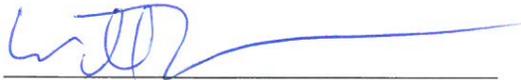
Condition 22 should be amended to prohibit the use of paraphernalia associated with illegal drugs and non-prescribed drugs. Condition 23 is quite strange. Condition 23 can literally be read as prohibiting Mr. Peters

from associating with known sellers of prescribed drugs. Such a condition can be read as prohibiting Mr. Peters from associating with his local pharmacist. It isn't a stretch to conclude that while Mr. Peters abused illegal drugs, non-prescribed drugs, and one drug that is now legal (marijuana), he shouldn't be prohibited from using or possessing paraphernalia and drugs associated with diagnosed medical conditions. Likewise, Condition 24 is vague. Condition 24 could be read to mean that Mr. Peters could not go to the local pharmacy, as the local pharmacy could be a "Drug Location."

IV. CONCLUSION

For the reasons stated above, this Court should affirm some of the Conditions imposed by the Stevens County Superior Court and remand the remainder for clarification and/or amendment.

Dated this 10th day of December, 2018.



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Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, and e-mailed a true and correct copy to Neil M. Fox, nf@neilfoxlaw.com on December 10, 2018.



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