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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

SCOTT ALEXIS CASIMIRO,

Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

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RESPONDENT'S BRIEF

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Respectfully submitted:  
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## **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

## **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the sentencing of the Appellant.

## **III. ISSUES**

1. Should the Court review a claim that the standard, courts-approved, registration advisement in the judgment must mirror the statute defining the crime of failure to register, where the Defendant has provided no supporting legal authority and the advisement is authorized by statute?
2. Where the Defendant explicitly waived objection to the community custody conditions imposed in Appendix F, shall this court review the challenges?
3. Did the sentencing court manifestly abuse its discretion in imposing community custody conditions authorized as reasonable affirmative conduct under RCW 9.94A.703(3)(d)?
4. Did the sentencing court abuse its discretion in imposing drug

and alcohol conditions in the face of a record replete with facts demonstrating the crime involved alcohol and drugs?

5. Should this Court follow its own recent and published precedent holding that prohibitions on pornography are crime-related for a sex offense?
6. Does the Defendant demonstrate unconstitutional vagueness by ignoring legal standards and relying on unusual and unreasonable definitions for common words?
7. Did the court manifestly abuse its discretion in prohibiting dangerous weapons where the Defendant's description of the offense involved suicidal ideation and attempted suicide?
8. Did the sentencing court abuse its discretion in finding an ability to pay where the record amply supports the finding and where the court only imposed mandatory LFO's, which must be imposed regardless of ability to pay?

#### **IV. STATEMENT OF THE CASE**

After pleading guilty as charged to Rape of a Child in the Second Degree, on October 17, 2017, the Defendant Scott Casimiro received a standard range sentence. CP 4, 12-21, 70, 72, 77.

The court solicited defense counsel's comments as to the community custody conditions in Appendix F (CP 65-67).

THE COURT: Mr. Stovern, have you had a chance to look through the crime related prohibitions on Appendix F?

MR. STOVERN: No, Your Honor.

THE COURT: Just want to know whether or not you were – I'm not saying you should, I'm saying whether or not you or your client are objecting to any of those conditions as part of the community custody in this matter.

MR. STOVERN: We are not objecting. These I've seen before. We are not objecting to these, Your Honor.

RP 15.

The form provided to the court at sentencing included the State's proposal as to LFO's, which the court could adopt or alter. Specifically, the State proposed the Defendant had the ability to pay, and recommended the court impose the mandatory LFO's as well as \$600 in fees for court appointed counsel and a \$500 fine. CP 73-74. The judge reviewed the Defendant's financial situation, his employment history, and his family support system. CP 30-32; RP 11. The judge struck out all but the mandatory LFO's. RP 74. The judge left intact the finding of ability to pay. RP 73.

On appeal, the Defendant challenges the standard sex

offender registration language, the community custody conditions, and the finding of ability to pay.

## V. ARGUMENT

In times past, this is the kind of record that would have produced an Anders brief. *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); *State v. Stump*, 185 Wn.2d 454, 462, 374 P.3d 89 (2016). The Defendant pled guilty. He received a standard range sentence. He explicitly waived review of the conditions imposed in Appendix F when the court solicited his comment. RP 11. Despite the Defendant's apparent ability to pay, the sentencing judge imposed only the mandatory LFO's.

However, there is no longer any incentive to file an Anders brief. Courts are willing to review sentences where error was not preserved, and perhaps even here when error was explicitly waived. Publicly appointed counsel is paid less for an Anders brief. There is no penalty for claims that have no factual basis in the record or law. And, ABA Criminal Standard 21-2.3 notwithstanding, courts are reluctant to impose appellate costs. There is nothing to deter wasteful public appeals.

The State does its best to anticipate changes in law and to adapt its practice and forms to new case law and statutes. Here the Defendant seeks review, because the State did not divine changes to the forms that, while they offer improvements, do not demonstrate legal error in the earlier forms.

With the exception of the challenge to condition 19, this is appeal is without merit.

A. THE COURT DID NOT EXCEED ITS AUTHORITY IN SIGNING THE COURTS-APPROVED JUDGMENT FORM INSTRUCTING THE DEFENDANT REGARDING SEX OFFENDER REGISTRATION.

The Defendant argues that the advisement in the judgment regarding sex offender registration must be identical to the statute defining the crime of failure to register. Brief of Appellant (BOA) at 5 (arguing that the advisement “conflicts” with the registration statute). No legal authority supports the claim.

Section 5.6 of the judgment instructs the Defendant to register within 24 hours of release with the sheriff’s office in his county of residence. CP 59. This language came from the form provided on the Washington courts website.

In June 2018, the Washington courts uploaded new forms for a

judgment and sentence. Section 5.6 now instructs an incarcerated defendant to register (1) at the time of release with one's community corrections officer and (2) within three business days with the sheriff's office of the residential county. WPF CR 84.0400 PSKO (emphasis added).<sup>1</sup>

The Defendant notes that this longer advisement parallels RCW 9A.44.130(4)(a)(i). BOA at 6. Failure to comply with this statute is a crime under RCW 9A.44.132. While there is a benefit to this parallelism, the Defendant does not show that it is error for the court to instruct as it has – consistent with the form drafted by the Washington Pattern Forms Committee. Every violation of the court's judgment is not necessarily a crime. The sentencing judge is authorized to order an offender to report to the sheriff within 24 hours of release. RCW 9.94A.703(3)(d) (authorizing affirmative acts reasonably related to reducing the risk of re-offense and keeping the community safe).

Without any citation to authority, the Defendant claims that this instruction exceeds the court's authority. BOA at 7. Where no citation supports the argument, the court may assume that, after

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<sup>1</sup> <http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=18>

diligent search, counsel found no supporting authority. *State v. Arredondo*, 188 Wn.2d 244, 262, 394 P.3d 348 (2017). The court did not err in instructing the offender to register within 24 hours of release.

B. THE COMMUNITY CUSTODY CONDITIONS, WHICH THE DEFENDANT EXPLICITLY ACCEPTED ON THE RECORD, DO NOT DEMONSTRATE MANIFEST CONSTITUTIONAL ERROR, CONSTITUTIONAL ERROR, OR LEGAL ERROR.

The standard of review for a challenge to a community custody condition is very high. Generally authorized by RCW 9.94A.703, the conditions are reviewed for abuse of discretion – reversed only if they are “manifestly unreasonable.” *State v. Padilla*, -- Wn.2d --, 416 P.3d 712, 715 (Wash. 2018).

Unpreserved constitutional challenges may be made for the first time on appeal if manifest error is apparent. RAP 2.5(a)(3). Conditions of community custody may be challenged on constitutional grounds, for vagueness, for the first time on appeal if the legal question can be resolved on the existing record. *State v. Padilla*, -- Wn.2d --, 416 P.3d 712, 715 (Wash. 2018).

Except as to condition 19, the Defendant has not demonstrated constitutional error, manifest or otherwise. The court should deny

review.

1. The requirement to comply with conditions set by the Department is lawful.

The Defendant challenges the order to comply with conditions set by the Department of Corrections. This is not only authorized, it is required. “As part of any term of community custody, the court shall require the offender to comply with any conditions imposed by the department under RCW 9.94A.704.” RCW 9.94A.703(1)(b). The language is present twice in the judgment. CP 57, 58.

The Defendant argues that the second iteration of this directive is unlawful, because it does not reference RCW 9.94A.704. BOA at 9. He insists that the court is required to “limit” the Department’s authority. *Id.* This is wrong. The court does not limit the Department’s authority. The judgment is an order upon the Defendant, not the Department. The court is only required to advise the offender that he must submit to supervision. The Department’s authority is circumscribed by statute, not delineated in an order upon the Defendant.

Nor is the Defendant’s reading of CP 57 grammatical. Nowhere is there language of limitation. There is only language of

reference. A citation sentence has a very specific use. A citation sentence does not “limit” the meaning of an argument, but rather “show[s] support for a legal or factual proposition or argument.” *The Bluebook: A Uniform System of Citation*, I.3, Use of Citations Generally (15<sup>th</sup> ed. 1991). A citation without a signal indicates that the authority (1) directly states the proposition; (2) is the source of a quotation; or (3) is referred to in the preceding text. *The Bluebook: A Uniform System of Citation*, B3.1 (19<sup>th</sup> ed. 2011).

Here, the statutes are cited at the end of a list of 10 requirements. The citation indicates only that the Legislature has authorized the Department to supervise an offender during the period of community custody. There is nothing confusing about the emphasis in the judgment.

2. The conditions regarding pornography pass constitutional and statutory muster.

The Defendant challenges conditions 20 and 21, which read:

20. You shall not use/possess sexually explicit material[,] meaning 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 or child human genitals[,] provided however, that works of art of or anthropological significance shall not

be deemed to be within the foregoing definition as defined in RCW 9.68.130(2).

21. Do not attend or frequent any X-rated movies, peep shows, or adult book stores.

BOA 10-20; CP 66-67. The Community Corrections Officer (CCO) at the Department of Corrections proposes community custody conditions in the presentencing report. CP 38-40. The court often adopts these recommendations as an appendix to the judgment and sentence. CP 65-67.

The sentencing court may impose conditions reasonably related to the risk of re-offense or the safety of the community. RCW 9.94A.703(3). A condition restricting a sex offender's use of pornography is reasonable and authorized. It is also crime-related. *State v. Magaña*, 197 Wn. App. 189, 201, 389 P.3d 654 (2016).

Sexual offenses, including child molestation and incest, are related to pornography use. Harmful Effects of Pornography: 2016 Reference Guide, Fight the New Drug (2015).<sup>2</sup> Repeated viewing of arousing pornographic images affects how people think. Pornography affects viewers' beliefs about incest, child molestation, victims enjoying rape, about victims making false accusations, accepting

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<sup>2</sup> <https://fightthenewdrug.org/>

violence against women, etc.. H. Hegna, S. Mossige, & L. Wichstrom, Older adolescents' positive attitudes toward younger adolescents as sexual partners, *Adolescence*, 39, 156, 627-651 (2004); M. Millburn, R. Mather, & S. Conrad, The effects of viewing R-rated movie scenes that objectify women on perceptions of date rape, *Sex Roles*, 43, 645-664 (Nov. 2000); K. Smiljanich & J. Briere, Self-reported sexual interest in children: Sex differences and psychosocial correlates in a university sample, *Violence and Victims*, 11, 1, 39-50 (1996); K. Ohbuchi, T. Ikeda, & G. Takeuchi, Effects of violent pornography upon viewers rape myth beliefs: A study of Japanese males, *Psychology, Crime & Law*, 1, 71-81 (1994); W.L. Marshall, The use of sexually explicit stimuli by rapists, child molesters and non-offenders, *Journal of Sex Research*, 25, 2, 267-288 (1988).

Incest pornography has been rapidly increasing in recent years. Cosmo Frank, *What's Up with the Rise of Incest Porn?*, *Cosmopolitan*, (Apr. 27, 2015). And incidence of sexual abuse within families is extremely high and notoriously underreported. Mia Fontaine, *America Has an Incest Problem*, *The Atlantic* (Jan. 24, 2013). Viewing children and family members in pornography normalizes them as legitimate sexual partners. Gareth May, *Why Is*

*Incest Porn So Popular*, Vice (Feb. 25, 2015) (quoting psychologist Sharna Olfman's 2008 book The Sexualization of Childhood).

The Washington Supreme Court addressed the constitutionality of a pornography prohibition most recently on May 10, 2018. *State v. Padilla*, -- Wn.2d --, 416 P.3d 712, 716 (Wash. 2018). There the condition prohibited the offender's use or possession of "images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts." *Padilla*, 416 P.3d at 714-15. The *Padilla* court found this definition was not narrowly tailored, because it "would unnecessarily encompass" movies like the *Titanic* and television like *Game of Thrones*, which are not created for the sole purpose of sexual gratification and "would not ordinarily be considered 'pornographic material.'" *Id.* at 717.

Here the condition is narrowly tailored. It adopts the statutory definition of "sexually explicit material" and explicitly permits use or possession of works of art or anthropological significance. RCW 9.68.130 criminalizes the display of "sexually explicit material" where it is easily visible from a public thoroughfare, park or playground or from one or more family dwelling units. The statute is not void for vagueness where it conforms to the definition of obscenity based on

contemporary community standards. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 759, 871 P.2d 1050, 1055 (1994).

This Court has recently held that “conditions regarding access to X-rated movies, adult book stores, and sexually explicit materials were all crime related and properly imposed” on a defendant convicted of a sex offense. *State v. Magaña*, 197 Wn. App. 189, 201, 389 P.3d 654 (2016). The Defendant asks the Court to overrule its own published precedent and rely instead upon unpublished opinions from other Divisions. BOA at 11-13. “Unpublished opinions have no precedential value and are not binding on any court.” GR 14.1.

The unpublished opinions from Division One and Two indicate a belief that pornography must be shown to the victim for the defendant’s use of it to be crime-related. *State v. Dossantos*, 200 Wn. App. 1049, 2017 WL 4271713 at \*4 (2017) (unpublished) (not crime-related where trial record did not indicate pornography contributed to the crime); *State v. Hesselgrave*, 184 Wn. App. 1021, 2014 WL 5480364 at \*11 (2014) (unpublished) (crime-related where defendant showed victim pornography); *State v. Clausen*, 181 Wn. App. 1019, 2014 WL 2547604 at \*8 (2014) (unpublished) (not crime-related without “evidence suggesting that he possessed or perused

sexually explicit material in connection with his crime”); *State v. Whipple*, 174 Wn. App. 1068, 2013 WL 1901058 at \*6 (2013) (unpublished) (not crime-related where offenses did not “involve[ ] sexually explicit materials”).

This very limited application demonstrates a misunderstanding of the literature, and therefore is appropriately unpublished. Pornography affects offenders’ beliefs about healthy sex, consent, and appropriate partners. Although obviously not every person who views pornography will become a rapist, where there is a sex offense, there will be a connection to pornography.<sup>3</sup>

Division Two has conceded that nothing prevents the Department from re-imposing the selfsame condition under RCW 9.94A.704. *State v. Clausen*, 2014 WL 2547604 at \*8. Because that is the case, and because the condition is *proposed by* the Department, the Defendant’s objection is a waste of the courts’ time.

3. The prohibition against dangerous weapons is not manifestly unreasonable where the offense involves suicidal ideation and suicide attempts.

The Defendant challenges condition 13, a prohibition against

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<sup>3</sup> “Serial Killer Ted Bundy Admits the Harms of Pornography,” Fight the New Drug, (Sep. 15, 2014) <https://www.youtube.com/watch?v=1NWfys7q4x4> (the day before his execution, Bundy spoke to an interviewer about the effect of pornography on

using or possessing dangerous weapons “to include bow and arrows, hunting knives.” BOA at 20-23.

The Defendant claims that weapons were unrelated to his offense. BOA at 20. While no weapon is named, the Defendant’s description of the offense describes suicidal thoughts or attempts by both himself and his sister. CP 25-27, 28 (“he tried to kill himself but someone stopped him”). In this case and under the very high standard of review respecting the sentencing judge’s discretion, the condition prohibiting dangerous weapons is not “manifestly unreasonable”. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010) (imposing conditions of community custody is within the discretion of the sentencing court and will be reversed only if manifestly unreasonable).

4. Prohibitions regarding drug and alcohol use are crime-related.

The Defendant challenges conditions regarding drug and alcohol use, claiming that “there was no evidence” that the Defendant’s crime was related to his drug use. BOA at 24-31. That boilerplate challenge has no relation to the actual record.

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himself and other inmates).

The Defendant is an admitted drug dealer with a history of drug abuse. CP 30 (would sell “whatever I could get ahold of”), 32 (abused barbiturates and prescription medication). He gave his minor aged victim marijuana before Christmas. CP 24. On Christmas Day, when the rape took place, the Defendant showed up “high on marijuana and drunk.” CP 23. The Defendant was himself under 21 (CP 1), therefore, his use of both substances was illegal. RCW 66.44.270(2)(a); RCW 69.50.4013(3)(a). He claimed that the victim was talking about taking 8-10 anti-anxiety pills at one time. CP 27. He claimed there were glasses of alcohol. CP 27. When they saw each other again on New Year’s Day, the Defendant gave his victim a morphine pill. CP 23-24.

The court had authority to enter community custody conditions regarding drug and alcohol use. RCW 9.94A.703(3) (e) and (f).

5. The requirement that the Defendant notify of vehicles he uses or regularly drives is necessary for his supervision and authorized by law.

The Defendant challenges the order that he notify his Community Correctional Officer (CCO) of the vehicles he owns or regularly drives, arguing that this is a prohibition that is not crime-related. BOA at 29. It is not a prohibition at all, but a requirement for

affirmative conduct, i.e. notification, such as would assist his CCO in supervising him, preventing re-offense, and ensuring the safety of the community. RCW 9.94A.703(3)(d). It is similar to advising his CCO of his residential address. The order is lawful.

6. The requirement that the Defendant notify of romantic relationships is necessary for his supervision and authorized by law.

The Defendant challenges condition 22. BOA at 31-34. Here the court has only ordered the Defendant Casimoro to *notify* his CCO of romantic relationships so that the CCO can take steps to verify that this relationship does not provide him access to minor-aged children.

- a) The affirmative conduct is authorized by RCW 9.94A.703(3)(d).

The Defendant again relies on the argument this condition is a prohibition under RCW 9.94A.703(3)(f). It is not. It is a requirement for affirmative conduct, i.e. notification of the CCO. As such, it is authorized by RCW 9.94A.703(3)(d). In order to properly supervise the Defendant and ensure the safety of the community, his CCO needs to know when the Defendant enters into relationships which may place a minor child at risk.

Because this is not a prohibition, there is no requirement that it

be crime-related. However, insofar as the Defendant argues that this condition has no relation to his past behavior, this is false. The Defendant gained access to a vulnerable and underaged victim through a personal (although not romantic or sexual) relationship with her guardians. After her parents were arrested for the molestation of her older sister, the victim was taken in by her brother and his wife. CP 22. The Defendant, the victim's other brother, came over to the house while the adults were away. CP 24. When they returned to find him in their home, drunk and high, they invited him to spend the night "because it was cold and late and he was walking" – and undoubtedly because he is family. *Id.* After everyone went to bed, from his spot on the couch, the Defendant texted his victim to come out of her room, and then he raped her. *Id.* He had this kind of access to a minor child only because he took advantage of the relationship he had with the victim's guardians.

- b) The condition requiring notification of "romantic" relationships is not vague where the identical language is used in domestic violence laws.

The Defendant argues that the condition is vague. BOA at 32-33. It is not. A condition of supervised release is unconstitutional if it is so vague that "men of common intelligence must necessarily guess

at its meaning and differ as to its application.” *United States v. Simmons*, 343 F.3d 72, 81 (2d Cir. 2003) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed.2d 322 (1926)).

However,

[c]onditions 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. See *Green v. Abrams*, 984 F.2d 41, 46–47 (2d Cir.1993) (holding that, though a probation order did not specify the time for payment of a fine, it gave sufficient notice that failure to pay the fine would work a violation); see also *United States v. Ferryman*, 897 F.2d 584, 590 (1st Cir.) (noting in an analogous context that defendants are entitled only to “fair notice,” not “letter perfect notice”), *cert. denied*, 498 U.S. 830, 111 S.Ct. 90, 112 L.Ed.2d 62 (1990). 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.

*United States v. Gallo*, 20 F.3d 7, 12 (1st Cir. 1994).

A person of common intelligence would understand what is meant by a romantic or sexual relationship and what is meant by immediate notification.

The Defendant relies upon a Second Circuit opinion: *United States v. Reeves*, 591 F.3d 77 (2010).<sup>4</sup> While this Court recently

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<sup>4</sup> Division One has expressed a preference for the term “dating relationship.” *State v. Norris*, 1 Wn. App.2d 87, 94-95, 404 P.3d 83, 87 (2017), *review granted*, 190 Wn.2d 1002, 413 P.3d 12 (2018) (review granted as to the LFO issue only). This

followed *Reeves* in an unpublished decision, the community custody condition at issue there was plainly distinguishable. In that case the condition was a prohibition, as opposed to a requirement for affirmative conduct – therefore triggering a different subsection of the statute. *State v. Dickerson*, 194 Wn. App. 1014, 2016 WL 3126480 at \*1 (2016) (unpublished) (“do not enter a romantic relationship”). And it was an overbroad prohibition on the defendant’s right to have relationships at all. The defendant Dickerson was *prohibited* from *entering* into a romantic relationship without the permission of both his CCO and his therapist. *Id.* The court found the condition violated defendant’s right to association. *Id.* at \*2-3.

Many unpublished decisions in a variety of jurisdictions have declined to follow *Reeves*. The non-Washington cases are attached at the end of this brief, pursuant to GR 14.1(d).

Faced with the identical condition, the same court that issued *Reeves* promptly distinguished it. *United States v. Orozco*, 371 Fed.

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fails to recognize an evolving culture where couples sleep over and move in together having never gone on a date. The concern here is not with how couples label their relationship, but whether there is an intimacy that would provide an offender access to minor children. This also ignores RCW 26.50.010(2) which defines a “dating relationship” as a “social relationship of a romantic nature.” The terms are interchangeable.

Appx. 188, 2010 WL 1239304 (2010) (unpublished). The court noted that in *Reeves*, the defendant did not have notice to make an objection where the condition had not arisen in the context of the presentence report or an on-the-record discussion at sentencing. Therefore, the matter was remanded not as plain error or error at all, but only because the district judge had discretion to modify a condition to eliminate ambiguity. *Orozco*, 371 Fed. Appx. at 190.

In *United States v. Schewe*, 603 Fed. Appx. 805 (11<sup>th</sup> Cir. 2015) (unpublished), the defendant was merely required to *notify* his probation officer before making contact with either his girlfriend or their son with whom he had a history of domestic violence. The court observed that a condition that was not a prohibition on behavior, but rather an affirmative requirement of notification was not deserving of the strict scrutiny analysis applied in *Reeves*. *Schewe*, 603 Fed. Appx. at 812. The same must be said of *Dickerson*, *supra*.

In *United States v. Pennington*, 606 Fed. Appx. 216 (5<sup>th</sup> Cir. 2015) (unpublished), the court was satisfied that a person of ordinary intelligence would know when he had romantic intentions toward another.

[T]he requirement of romantic involvement provides

sufficient specificity to put Pennington on notice of when he must notify and seek approval from his probation officer.

3 We may part ways here with the Second Circuit. See *United States v. Reeves*, 591 F.3d 77, 80–81 (2d Cir.2010) (finding “too vague to be enforceable” a condition requiring the defendant to notify the probation department “when he establishes a significant romantic relationship”). [...] The Second Circuit cites *Hollywood* for the truth that relationships often begin, and continue, with romantic uncertainty. *Reeves*, 591 F.3d at 81. However, while the line between friendship and romance may not be immediately clear to a moviegoer, or even to the target of affections, Pennington should know when he intends to become romantically involved with another person. Regardless, courts every day are obliged to adjudicate criminal cases, even with arrested persons and not twice-convicted sex offenders, and must assess and impose no-contact orders, as well as lesser restrictions on personal associations. 18 U.S.C. § 3142(c)(B)(iv); see generally *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

*Pennington*, 606 Fed. Appx. at 223 (unpublished). The *Pennington* opinion observes that courts everyday decide whether a relationship is romantic. They do so when entering domestic violence no-contact orders.

In 1992 in Washington State, the Legislature recognized increasingly high rates of adolescent dating violence and their relationship to violence in future adult relationships. LAWS OF 1992,

ch. 111, § 1. Our domestic violence laws were amended to include protections in present and past dating relationships. LAWS OF 1992, ch. 111, § 7; RCW 26.50.010(6). See also LAWS OF 1995, ch. 246, § 21; RCW 10.99.020 (3) and (4). A dating relationship is defined as a romantic relationship. RCW 26.50.010(2). It is not determined by the exchange of flowers and chocolate. Cf. *Reeves*, 591 F.3d at 81. The court determines whether there is or was a romantic relationship by taking into account the length and nature of the relationship and the frequency of interaction. RCW 26.50.010(2).

Since the amendment, case law in Washington does not demonstrate that this definition has produced any confusion. The nature of the relationship is expressed by the parties themselves. An offender will know the nature of his own relationship. See *State v. O'Brien*, 115 Wn. App. 599, 602, 63 P.3d 181 (2003) (dating relationship in juvenile disposition was undisputed).

The Vermont Supreme Court agreed. In *State v. Maddox*, 2011 WL 4979925, at \*2 (Vt.2011) (unpublished), the court found that a condition requiring the defendant to “inform the probation officer of his intent to begin a romantic or dating relationship” was “sufficiently clear to put defendant on notice.” The Vermont Supreme Court

distinguished *Reeves* on the ground that the condition did not include the vague qualifier of a “significant” romantic relationship. Our facts are distinguishable in the same way.

The condition is authorized and understandable to persons of common intelligence.

7. The order to disclose sexual criminal history to potential or current employers is necessary for his supervision and authorized by law.

The Defendant challenges conditions 26 and 27 – again by attempting to force a square peg into a round hole. BOA at 35-36. A requirement to disclose is not a prohibition under RCW 9.94A.703(3)(f) which must be crime-related. It is affirmative conduct under subsection (d). It is authorized if it is reasonably related to the risk of re-offense and the safety of the community. Which it is.

The employer needs to know the offender’s history in order to take necessary precautions with customers, other employees, private contractors, and their children. Similarly, advising the landlord of the offender’s history is reasonably related to the risk of re-offense and community safety.

8. The State concedes that the condition regarding contact with minor children should be remanded per *State v. Magaña*.

The Defendant challenges condition 19, which prohibits him from entering areas that cater to minor children. BOA at 36-38. The condition states that “[s]uch establishments may include but are not limited to video game parlors, libraries, parks, shopping malls, pools, skating rinks, school grounds, or any areas routinely used by minors as areas of play/recreation.” CP 67. The Defendant relies upon *State v. Magaña, supra*.

In *Magaña*, this Court held the condition to be:

problematic because it affords too much discretion to Mr. Magaña’s CCO. As explained in *State v. Irwin*, 191 Wash.App. at 654–55, 364 P.3d 830, a community custody condition that empowers a CCO to designate prohibited spaces is constitutionally impermissible because it is susceptible to arbitrary enforcement. This characterization applies fully to condition 14. As written, condition 14 does not place any limits on the ability of Mr. Magaña’s CCO to designate prohibited locations. While the condition lists several prohibited locations and explains that the list covers places where children are known to congregate, the CCO’s designation authority is not tied to either the list or the explanatory statement. As written, the discretion conferred on the CCO by condition 14 is boundless.

*State v. Magaña*, 197 Wn. App. at 201. In other words, on remand the condition may be limited to the specified locations or otherwise rewritten.

9. The court's order requiring the offender to notify his CCO in advance of group activities is authorized.

The Defendant challenges condition 23, again under the mistaken belief that subsection (f) (regarding crime-related prohibitions) is relevant. BOA at 38-41. A requirement to seek approval is a requirement to notify. Requiring that the Defendant notify the CCO before he goes on a youth group retreat or to girls summer volleyball camp is a reasonable condition. It would allow the CCO to contact the group, assess the risk, and take appropriate measures to ensure community safety. The condition is authorized under RCW 9.94A.703(3)(d), which does not require that affirmative conduct be crime-related.

Insofar as the Defendant alleges a First Amendment concern, this is hyperbole. Notification is not a prohibition. It is narrow and reasonable.

The Defendant claims the condition is vague, i.e. that he does not know what is encompassed by "volunteer activities, church

activities, and travel activities.” The argument is labored. BOA at 40. The Defendant seeks out uncommon uses and definitions to describe “church” as a worshipful feeling and “travel” in the figurative sense of “news travels fast” or “she travels with a sophisticated crowd.” These arguments disregard the constitutional standards of employing common sense and common intelligence, and not requiring every possible permutation be spelled out and eliminated to the point of pedantry. *Connally v. General Constr. Co.*, 269 U.S. at 391; *United States v. Gallo*, 20 F.3d 7, 12 (1st Cir. 1994). The condition is plain.

C. THE COURT’S FINDING OF ABILITY TO PAY IS WELL SUPPORTED IN THE RECORD.

The Defendant complains that the sentencing court should have stricken out language in the judgment indicating it found he had an ability to pay. The finding is not boilerplate; the Defendant’s claim is. The record amply supports this finding. Because this is so, the court did not abuse its discretion.

In this case, the court had the benefit of the presentencing report, which it was required to consider. RCW 9.94A.500(1) (court “shall” order a presentence report before imposing sentence for a felony sexual offense). The Department’s report provided a more

thorough, individualized inquiry than is generally performed by the courts in a busy criminal docket. It included the Defendant's entire work history, his support system, and his aspirations.

The Defendant graduated high school early and has his high school diploma. CP 30-31. He has been largely self-sufficient even as a minor. CP 30 ("started buying his own clothes and other personal needs" in seventh and eighth grades). Despite his young age, he has held a variety of jobs: installing artificial turf, working in construction, fast food, and landscaping – as a ranch hand and as a laborer. CP 31. Before this conviction, the Defendant had aspirations to join the military and become a nuclear engineer. CP 31. While this conviction will likely affect his security clearance, he can still become an engineer.

The Defendant said "he is able and willing to work." CP 31. He said he "does not expect it to be difficult finding work as a laborer and in various fields" and is "willing to work wherever." CP 31. His family is willing to assist him when he is released. CP 31-32. His supervision could be transferred to California where his support system is. CP 32.

The Defendant argues that the court did not consider the his

debt, financial resources, or likelihood that his status will change. BOA at 42. This is disingenuous and offensive to the Honorable Judge Swanberg, his history as a criminal defense attorney, and his demonstrated diligence, courage, and heart as a judge. The judge told the Defendant that he read the file the previous night, and it kept him up tossing and turning, trying to make the right decisions. RP 11. The judge explained that in deciding against the SSOSA, he considered “a myriad of reasons, some of which, I would imagine, are beyond your control, such as having a family or other type of support structure to help you to get through this, as well as your financial circumstances and whether or not you would be able to finance the program.” RP 11.

After a full consideration, the judge found an ability to pay. The court did not abuse its discretion. The claim is both without merit and significance. Because the judge only entered the mandatory<sup>5</sup> LFO's, the Defendant's ability to pay is irrelevant.

D. THE JUDGMENT MAY BE CORRECTED AS TO THE FOOTER IN THE PLEADING PAPER AT PAGES 2-3 OF APPENDIX F.

The Defendant notes that the footer in the pleading paper on

two pages of Appendix F incorrectly reads “Joaquin Fernandez-Concha, 361631.” CP 66-67. Contrary to the Defendant’s statement, the footer does not inaccurately reflect his sentence. BOA at 43. It has no bearing on the validity of any part of judgment. However, the footer may be corrected if the Court remands.

E. APPELLATE COSTS ARE AUTHORIZED IF THE COURT CHOOSES.

As the Defendant notes, the Court has discretion in imposing appellate costs. BOA at 44 (citing *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000) (even as to a meritless or frivolous appeal)). The clerk or commissioner does not. RAP 14.2 (commissioner or clerk “will” award costs to substantially prevailing party unless the court directs otherwise).

This Court has information that was not presented to the trial court, namely, the Report as to Continued Indigency. The Defendant is claiming that he has a small debt. This is reasonable to believe. He also claims for the first time that he has “Bipolar Depression (PTSD).” He does not explain whether he is self-diagnosed or otherwise. However, it is apparent from his strong work history that

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<sup>5</sup> With the passage of LAWS OF 2018, ch. 269, fewer LFO’s will be mandatory in every case.

his employment and ability to earn has not been affected.

If the Court chooses to impose costs, there is an ability to pay.

If a small amount is deducted from his inmate account, with waiver of interest, it is highly likely that the Defendant could be released with little to no debt. The beta version of the LFO calculator<sup>6</sup> may be useful in making this decision.

## VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: July 9, 2018.

Respectfully submitted:

SHAWN P. SANT  
Prosecuting Attorney

Teresa Chen  
Teresa Chen, WSBA#31762  
Deputy Prosecuting Attorney

Susan Marie Gasch  
gaschlaw@msn.com

A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED July 9, 2018, Pasco, WA

Teresa Chen  
Original filed at the Court of Appeals, 500  
N. Cedar Street, Spokane, WA 99201

<sup>6</sup> <http://beta.lfocalculator.org/>

## APPENDIX

### UNPUBLISHED, OUT OF STATE CASES

371 Fed.Appx. 188

This case was not selected for publication in the Federal Reporter. United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee, v. David OROZCO, also known as aorozco01@nyc.rr.com, Appellant.

No. 08-4043-cr.

April 1, 2010.

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of New York, Eric N. Vitaliano, J., of possessing child pornography, and sentenced to 30 months' imprisonment followed by three years supervised release. Defendant appealed.

Holding: The Court of Appeals held that Court of Appeals would remand to district court to consider modification of condition of defendant's probation.

Remanded.

West Headnotes (1)

[1] Criminal Law

⚔ Sentence

On appeal of sentence for conviction of possessing child pornography, Court of Appeals would remand to district court to consider modification of condition of defendant's probation requiring him to notify Probation Department when he established significant romantic relationship and inform other party to that relationship of his prior criminal history concerning his sex offense, where modification might eliminate vagueness objection to conditions of supervised release.

18 U.S.C.A. § 2252(a)(4)(B); Fed.Rules Cr.Proc.Rule 32.1(c), 18 U.S.C.A.

Cases that cite this headnote

\*189 Appeal from a judgment of the United States District Court for the Eastern District of New York (Eric N. Vitaliano, Judge).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment is REMANDED for further proceedings.

Attorneys and Law Firms

Abraham Hecht (Warren S. Hecht, on the brief), Forest Hills, N.Y., for Appellant.

Jason A. Jones, Assistant United States Attorney (Benton J. Campbell, United States Attorney, and Susan Corkery, Assistant United States Attorneys, on the brief), Eastern District of New York, for Appellee.

PRESENT: GUIDO CALABRESI, DEBRA ANN LIVINGSTON, Circuit Judges, EDWARD R. KORMAN, \* District Judge.

\* The Hon. Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

SUMMARY ORDER

\*\*1 This is an appeal from a judgment entered by the United States District Court for the Eastern District of New York (Eric N. Vitaliano, Judge ) convicting David Orozco of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and sentencing him to 30 months imprisonment followed by three years of supervised release. On appeal, Mr. Orozco challenges principally the condition of supervised release requiring him to notify the Probation Department when he establishes a significant romantic relationship and inform the other party to that relationship of his prior criminal history concerning his sex offense.

Subsequent to the district court's entry of judgment against Mr. Orozco, we held in United States v. Reeves,

591 F.3d 77 (2d Cir.2010), that an identical condition of supervised release (1) was unconstitutionally vague, (2) was not “reasonably related” to the sentencing objectives of 18 U.S.C. § 3553, as required by § 3583, and (3) “effect[ed] an unnecessary deprivation of liberty.” *Id.* at 80-82. In *Reeves*, the condition was not suggested by the Pre-Sentence Report, nor was it discussed at sentencing. *Id.* at 80. Indeed, the parties first became aware of it when it appeared in the Judgment of Conviction. *Id.* Under these circumstances, even though no objection was taken to the condition at issue, we applied “a relaxed plain error review,” *id.*, and reached the merits of the defendant’s argument.

Unlike *Reeves*, the condition of supervised release was discussed at sentencing in the present case. More specifically, consistent with his commendable practice, the district judge advised the parties that he would announce his intended sentence and then give them an opportunity to “interpose \*190 any legal objection or exception that they [might] have which could lead the Court reconsider its sentence from a legal perspective as opposed to a level of punishment perspective.” He then went on to explain why he intended to downwardly depart from the minimum 51-month sentence proscribed by the Sentencing Guidelines to a period of 30 months, to be followed by a period of three years of supervised release subject to the following terms and conditions:

The defendant may be limited to possessing only one personal Internet-capable device to facilitate the Probation Department’s ability to effectively monitor his Internet-related activities. The defendant shall also permit random examination of his computer systems, Internet-capable devices, or similar electronic devices and related computer media such as CDs under his control.

The defendant shall notify the Probation Department when he establishes a significant romantic relationship and then shall inform the other party of his prior criminal history concerning his sex offense. The defendant understands that he must notify the Probation Department of that significant other’s address, age, and where the individual may be contacted.

\*\*2 The district judge then asked whether “either side [had] any legal objection or exception it wishe[d] to interpose at this time” to the intended sentence. Mr.

Orozco’s attorney asked if he could “have a moment” and, after what the transcript indicates was a “pause,” responded, “No, your Honor.”

We have not decided whether the relaxed form of plain error review is appropriate in the specific factual circumstances present here, where the appellant received notice and an opportunity to object to a condition of supervised release for the first time at his sentencing hearing. These circumstances also distinguish this case from *Reeves* in a way that may affect the manner in which the fourth prong of the plain error rule is applied. *See Johnson v. United States*, 318 U.S. 189, 200-01, 63 S.Ct. 549, 87 L.Ed. 704 (1943); *see also United States v. Caro*, 637 F.2d 869, 876 (2d Cir.1981); *United States v. Manton*, 107 F.2d 834, 846-48 (2d Cir.1939). Under that prong, a “court of appeals has the *discretion* to remedy [an] error ... only if [it] seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Puckett v. United States*, ---U.S. ---, 129 S.Ct. 1423, 1429, 173 L.Ed.2d 266 (2009) (internal quotations omitted); *see also United States v. Gordon*, 291 F.3d 181, 191 (2d Cir.2002).

We need not decide whether traditional or relaxed plain error review applies here, however, nor whether, assuming plain error review is appropriate, the error here may be remanded. The discretion of a district judge to modify a condition of supervised release to eliminate an ambiguity is not circumscribed by the failure of a defendant to raise a timely objection. While a district judge may not modify a sentence because it could not have legally been imposed, *see United States v. Lussier*, 104 F.3d 32, 35 (2d Cir.1997), he does retain the power to modify conditions of supervised release at any time to eliminate ambiguity and to adjust them to changed conditions. *See Fed.R.Crim.P.* 32.1(c), previously subsection (b). As the Advisory Committee Notes observe, “(1) the probationer should be able to obtain resolution of a dispute over an ambiguous term or the meaning of a condition without first having to violate it; and (2) in cases of neglect, overwork, or simply unreasonableness on the part of the probation officer, the probationer should have recourse to the sentencing court when a condition \*191 needs clarification or modification.” *Fed.R.Crim.P.* 32.1(b) advisory committee’s note.

We believe that the district court should consider such relief with respect to the condition of probation which *Reeves* held to be vague (and any other condition subject

to a claim of ambiguity). This would afford the district judge the opportunity to define the term “significant romantic relationship” in a way that might eliminate the vagueness objection altogether. Such action could also have the effect of narrowing the scope of the condition in a way that lessens the degree of interference with Mr. Orozco’s “right to enter into and maintain intimate personal relationships.” *Reeves*, 591 F.3d at 82.

**\*\*3** We note that the severity of the consequences to a defendant of an unobjected-to condition of supervised release is relevant to our analysis under either a traditional or relaxed plain error approach. *See United States v. Dupes*, 513 F.3d 338, 343-44 (2d Cir.2008); *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir.2002). Pursuant to the procedures set forth in *United States v. Jacobson*, 15 F.3d

19, 21-22 (2d Cir.1994), we conclude that it is appropriate in this case to remand to the district court for the purpose indicated above. Such a remand does not offend the plain error rule, which is embodied in Fed.R.Crim.P. 52(b), because relief pursuant to Fed.R.Crim.P. 32.1 is available for this purpose even when an objection based on ambiguity was not voiced when the sentence was announced. *See United States v. McKissic*, 428 F.3d 719, 726 n. 2 (7th Cir.2005). Within ten days of the district court’s ruling on remand, either party to the proceeding may restore the case to this panel by giving notice to the clerk of the court.

**All Citations**

371 Fed.Appx. 188, 2010 WL 1239304

KeyCite Yellow Flag - Negative Treatment  
Distinguished by United States v. Hernandez, E.D.N.Y., September 20, 2016

603 Fed.Appx. 805

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,  
v.  
Nicholas SCHEWE, Defendant–Appellant.

No. 14–10630.  
|  
March 2, 2015.

#### Synopsis

**Background:** Following revocation of supervised release of defendant, who was convicted of conspiracy to possess with intent to distribute mixture or substance containing oxycodone, the United States District Court for the Middle District of Florida, No. 8:13–cr–00500–RAL–MAP–1, sentenced defendant to prison term of six months, to be followed by 30–month term of supervised release, which included special condition prohibiting defendant from having contact with his son without first receiving approval from his probation officer. Defendant appealed.

**Holdings:** The Court of Appeals held that:

[1] special condition was reasonably related to statutory sentencing factors;

[2] special condition did not involve deprivation of defendant's liberty that was greater than reasonably necessary to achieve objectives of statutory sentencing factors;

[3] special condition was not inconsistent with any policy statements from Sentencing Commission; and

[4] District Court was not required to employ heightened scrutiny in imposing condition.

Affirmed.

West Headnotes (4)

#### [1] Sentencing and Punishment

← Validity

Special condition on defendant's term of supervised release which prohibited him from having contact with his son without first receiving approval from his probation officer was reasonably related to statutory sentencing factors, as supported imposition of condition; limitation on contact with son was based on defendant's history of committing acts of domestic violence when he was not receiving mental health treatment, which had put son in danger in past. 18 U.S.C.A. §§ 3553(a), 3583(d)(2).

2 Cases that cite this headnote

#### [2] Constitutional Law

← Supervised release

#### Sentencing and Punishment

← Validity

Special condition on defendant's term of supervised release which prohibited him from having contact with his son without first receiving approval from his probation officer did not involve deprivation of defendant's liberty interest protected by due process that was greater than reasonably necessary to achieve objectives of statutory sentencing factors, as supported imposition of condition; condition imposed only minor burden on defendant's parental rights, and in order to obtain approval, all defendant had to do was stay sober and follow his mental health treatment, and to show probation officer through his adherence to conditions of supervised release that he was stable enough to be around son and son's mother. U.S.C.A.

Const.Amend. 5; 18 U.S.C.A. §§ 3553(a), 3583(d)(2).

Cases that cite this headnote

**[3] Sentencing and Punishment**

➤ Validity

Special condition on defendant's term of supervised release which prohibited him from having contact with his son without first receiving approval from his probation officer was not inconsistent with any policy statements from Sentencing Commission, as supported imposition of condition. 18 U.S.C.A. § 3583(d)(3).

1 Cases that cite this headnote

**[4] Sentencing and Punishment**

➤ Validity

District court was not required to employ heightened scrutiny or use special procedures to impose condition of supervised release which prohibited defendant from having contact with his son without first receiving approval from his probation officer, even if condition implicated defendant's liberty interests protected by due process. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 3583(d).

1 Cases that cite this headnote

**Attorneys and Law Firms**

\*807 Todd B. Grandy, Arthur Lee Bentley, III, Adam M. Saltzman, U.S. Attorney's Office, Tampa, FL, for Plaintiff–Appellee.

Stephen Baer, Federal Public Defender's Office, Tampa, FL, Robert Godfrey, Rosemary Cakmis, Donna Lee Elm, Federal Public Defender's Office, Orlando, FL, for Defendant–Appellant.

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 8:13-cr-00500–RAL–MAP–1.

Before ED CARNES, Chief Judge, COX, Circuit Judge, and ROYAL, \* District Judge.

\* Honorable C. Ashley Royal, United States District Judge for the Middle District of Georgia, sitting by designation.

**Opinion**

PER CURIAM:

Nicholas Schewe appeals his sentence, which the district court imposed after revoking his supervised release. He challenges the special condition forbidding him from having contact with his son without first receiving approval from his probation officer.

**I.**

In September 2009, Schewe pleaded guilty to one count of conspiracy to possess with intent to distribute a mixture or substance containing oxycodone. *See* 21 U.S.C. § 841(a) (1). He was sentenced in February 2010 to thirty-four months in prison, followed by two years of supervised release. His prison term ended in March 2012, at which point he was subject to the conditions of his supervised release.<sup>1</sup> Those conditions required, among other things, that Schewe: (1) not commit a crime; (2) report to his probation officer once a month; and (3) complete written reports to his probation officer once a month.

<sup>1</sup> After Schewe's prison term ended, jurisdiction over his supervised release was transferred from the United States District Court for the District of Maine (where he was sentenced) to the United States District Court for the Middle District of Florida.

After his release from prison, Schewe lived with his girlfriend, Chrissa Belasco, and her two children from an earlier relationship. The couple also had a child of their own, a son, who was an infant at the time of the events that led to the revocation of Schewe's supervised release. Those events started in September 2013 when Belasco alerted law enforcement that Schewe “was hurting himself.” State authorities institutionalized Schewe for a short period of time under Florida's Baker Act. *See* Fla. Stat. § 394.451 *et seq.* After several days, Schewe was released with a

temporary supply of depression and anxiety medications and a referral to a mental-health provider.

On October 8, 2013, about one week after his release, the first incident of domestic violence occurred. Schewe and Belasco got into an argument, and he started choking her. When Belasco's teenage daughter heard the commotion and entered the room holding Schewe's infant son, he grabbed the teenager by the arm in an attempt to take his son from her. Belasco called the police, and the Hernando County Sheriff's Office arrested Schewe on charges of: (1) domestic battery by strangulation, *see* Fla. Stat. § 784.041(2)(a); and (2) child abuse without causing great bodily harm, *see id.* § 827.03(2)(c). The State's child abuse investigator concluded that Schewe was not a risk to the family based on statements by the family members and Schewe's \*808 promise to continue seeking mental-health treatment. The charges were eventually dropped.

Though the State did not take any further steps regarding the October 8 incident, the United States Probation Office did. On October 29, 2013, the probation officer spoke with both Schewe and Belasco about the incident. They told the officer that Schewe had taken mental-health medications before, and that those medications had kept him mentally stable. They both believed that Schewe could be "fully stable" again soon if he continued his medication regimen and enrolled in counseling "to address childhood issues." Based on that interview, the probation officer asked the district court to modify Schewe's conditions of supervision to include a requirement that he seek mental-health treatment. On October 30, 2013, a psychiatrist evaluated Schewe and diagnosed him as having bipolar disorder and post-traumatic stress disorder. The psychiatrist prescribed a specific set of medications based on that diagnosis, and Schewe later told the probation officer that they were making him feel better and more stable.

But Schewe did not stay on his new medications long. He missed his medication management appointment on November 21, 2013, and did not bring money to pay for his prescription at his next visit on December 5, 2013. Schewe's probation officer met with him at home on December 5 and asked for a urine sample, but the sample Schewe provided was room temperature, which indicated that it was not from that day. The officer scheduled an appointment to take another sample the next day at the probation office, but Schewe did not show.

On December 14, 2013, another incident of domestic violence occurred. Belasco and Schewe had an argument over the phone while he was out of the house. When he came home, he pushed the front door open and immediately put his hands around Belasco's neck. Though he did not press so hard that she couldn't breathe, Schewe kept his hands around her neck for about ten minutes, and all while she was screaming at him to stop hurting her.<sup>2</sup>

2 This description of the events is from what Belasco told the probation officer.

Schewe left the apartment before any officers arrived, and the Hernando County Sheriff's Office obtained a warrant for his arrest that night. Though he knew there was a warrant out for him, Schewe fled to New Jersey. The Probation Office then petitioned the district court, seeking a warrant for Schewe's arrest and revocation of his supervised release based on violations of the conditions of his supervision. The court issued a warrant on December 20, 2013, and Schewe was arrested in New Jersey on Christmas Day.

The government charged Schewe with three violations of the conditions of his supervision: (1) new criminal conduct while on supervision, based on the December 14 attack, which amounted to Domestic Violence by Strangulation, *see* Fla. Stat. § 784.041(2)(a); (2) failure to report, based on Schewe missing his December 6 appointment at the Probation Office; and (3) failure to submit monthly reports, based on his not turning in the required written reports to his probation officer for May through November of 2013. The government agreed to dismiss the first alleged violation in return for Schewe admitting that he committed the second and third violations. When the court asked about the dismissal of the first violation, counsel for the government explained that Belasco had "indicated that she was not strangled \*809 on December 14, 2013,"<sup>3</sup> and the probation officer added that she had not pursued criminal charges for either incident of domestic violence because "[s]he [didn't] want to be the reason for him ... having more problems than he already has."

3 The government's statement that Belasco had "indicated that she was not strangled on December 14" does not necessarily contradict the probation officer's report relating Belasco's statement that

Schewe had put his hands around her neck on December 14. *See supra* note 2 and accompanying text. The government's characterization appears to be based on Florida law's definition of "strangulation," which involves "imped[ing] the normal breathing or circulation" of the victim. Fla. Stat. § 784.041(2)(a). Belasco's statement that she could still breathe while Schewe had his hands around her neck indicates that the assault did not legally qualify as a strangling. So the district court could reasonably conclude that the government's legal characterization of the December incident was accurate while still accepting the probation officer's factual description of that incident. *Cf. United States v. Rudisill*, 187 F.3d 1260, 1269 (11th Cir.1999) (applying the clear-error standard to affirm an inference supported by the facts in the record).

After a colloquy with Schewe in which he admitted that he had violated two of the reporting conditions alleged in the Probation Office's petition, the district court turned to the matter of sentencing him. Schewe requested that, after his prison term ended, his supervised release be transferred to South Carolina so that he could be close to Belasco (who had moved there following the second incident of domestic violence). When the court asked what contact Schewe currently had with Belasco, he said that she accepted his collect calls every day, that "she actually wants me to stay with her," and that she had found "schooling and a bunch of other things" for him in South Carolina. The government disputed that, explaining that Belasco had told the probation officer that she did "not want to have any type of relationship with the Defendant other than him being the father of her child." When the district court asked the probation officer why Belasco was accepting the calls, the officer explained that Belasco had said she wanted to help Schewe straighten himself out so that her child could "have a law abiding and mentally stable" father.

The court decided on a prison sentence of six months, followed by a thirty-month term of supervised release.<sup>4</sup> In addition to the ones it had previously imposed, the court added another special condition requiring Schewe to get approval from his probation officer before making contact with either Belasco or their son. Schewe objected to the limit on contact with his son, arguing that it violated his due process rights and was both procedurally and substantively unreasonable. The district court responded that the special condition was justified based on "his history and characteristics." It cited the two incidents of

domestic violence as evidence that Schewe was "prone to committing acts of violence against" Belasco and pointed out that he had also assaulted Belasco's teenage daughter in October. The court explained that the special condition was "appropriate" in light of the danger that Schewe posed to Belasco and the children because "all he has to do is get himself straight [and] convince the Probation Office."

4 Both of the violations to which Schewe admitted were Grade C violations. *See* United States Sentencing Guideline § 7B1.1(a)(3)(B). Those two Grade C violations, coupled with his criminal history category of I, resulted in a guidelines range of 3 to 9 months of imprisonment and 24 to 30 months of supervised release. *See id.* § 7B1.4(a). So he was sentenced to a prison term in the middle of his guidelines range and a term of supervised release that was the maximum length permitted.

\*810 Schewe also objected that the court was basing his sentence on the allegation of Domestic Violence by Strangulation that the government had agreed to dismiss. He argued that "there [was] no evidence of strangulation" and submitted pictures of Belasco's neck from December 14 that "show[ed] no marks of strangulation."<sup>5</sup> The district court accepted the evidence into the record and implicitly overruled the objection.

5 Schewe's objection matched the government's legal characterization in that he did not deny that he had put his hands around Belasco's neck. He asserted only that there was no proof of strangulation. *See supra* note 3.

The court issued its written judgment that same day. The judgment stated: "The defendant shall not have any contact with Chrissa Belasco and his child without the approval [of] the probation officer while incarcerated and while on supervised release." This is Schewe's appeal.

## II.

Schewe challenges the district court's imposition of the special condition that, during his supervised release, he cannot have contact with his son without first receiving permission from his probation officer.<sup>6</sup> In his view, that special condition is a violation of his "constitutionally protected liberty interest in the care,

custody and management of” his son. *Maddox v. Stephens*, 727 F.3d 1109, 1118–19 (11th Cir.2013) (quotation marks omitted). Even when the defendant raises a constitutional challenge, we review the imposition of a special condition of supervised release only for an abuse of discretion. *See United States v. Zinn*, 321 F.3d 1084, 1092 (11th Cir.2003) (applying the abuse of discretion standard to a First Amendment challenge to a special condition). Under that standard, we will reverse only “where the district court applies the wrong law, follows the wrong procedure, bases its decision on clearly erroneous facts, or commits a clear error in judgment.” *United States v. Brown*, 415 F.3d 1257, 1266 (11th Cir.2005).

<sup>6</sup> Schewe's initial brief also challenges the portion of the district court's judgment that, during his imprisonment, barred him from having contact with his son without first receiving approval from his probation officer. Schewe was released from prison on June 18, 2014, which the parties agree moots his challenge to that portion of his sentence. They are correct, and we therefore lack jurisdiction to address that issue. *See United States v. Serrapio*, 754 F.3d 1312, 1317 (11th Cir.2014); *United States v. Farmer*, 923 F.2d 1557, 1568 (11th Cir.1991).

Under 18 U.S.C. § 3583(d), a district court may impose “any condition” on a defendant's term of supervised release so long as § 3583(d)'s three criteria are satisfied. First, the special condition must be “reasonably related” to the sentencing factors set out in § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D). *See* 18 U.S.C. § 3583(d)(1). Second, it must “involve [ ] no greater deprivation of liberty than is reasonably necessary” to satisfy the sentencing factors set out in § 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D). *See* 18 U.S.C. § 3583(d)(2). Those first two criteria do not mean that the special condition has to be justified by every one of the sentencing factors. *See Zinn*, 321 F.3d at 1089 (“[I]t is not necessary for a special condition to be supported by each factor enumerated in § 3553(a).”). Finally, the special condition must be “consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. [§ ] 994(a).” 18 U.S.C. § 3583(d)(3).<sup>7</sup> We address each statutory criterion in turn.

<sup>7</sup> We have also held that the statute should be read together with United States Sentencing Guideline § 5D1.3. *See United States v. Okoko*, 365 F.3d 962, 967 n. 5 (11th Cir.2004). None of the provisions in § 5D1.3

are relevant to the special condition at issue here, so we will not discuss that guideline any further.

**\*811 [1]** We begin with whether the special condition is reasonably related to the statutory sentencing factors. *See id.* § 3583(d)(1). The special condition at issue in the present case reasonably relates to “the history and characteristics of the defendant,” *id.* § 3553(a)(1), as well as to “the need ... to protect the public from further crimes of the defendant,” *id.* § 3553(a)(2)(C). The limitation on contact with his son is based on Schewe's history of committing acts of domestic violence when he is not receiving mental-health treatment, which has put his son in danger in the past (part of Schewe's history and characteristics) and could put his son at risk in the future (relevant to protection of the public from further crimes). The district court explained that it was imposing the special condition based on the two earlier incidents of domestic violence: Schewe's assaults on Belasco and her teenage daughter in October as well as his assault on Belasco in December. Schewe does not dispute that the two incidents occurred, nor does he question the descriptions of them on which the district court relied.<sup>8</sup> Instead, he argues that his conduct during those two incidents is irrelevant to his contact with his son because neither involved an attempt to hurt the infant.

<sup>8</sup> Schewe points out that he presented pictures at the hearing in an attempt to prove that he did not strangle Belasco. But he did not object to or contradict the probation officer's report that, during the December incident, he placed his hands around Belasco's neck, she screamed for ten minutes for him to let her go, and he frightened Belasco's daughter to the point that she called the police. *See supra* note 5 and accompanying text. Nor did he contest that he assaulted Belasco and her daughter in October and that his assault on her daughter was an attempt to pull his infant son away from her. *See id.* The district court could therefore rely on those unobjected-to facts to conclude that both incidents of domestic violence occurred as Belasco had described them to the probation officer. *See supra* note 3; *see also Rudisill*, 187 F.3d at 1269 (applying the clear-error standard to affirm an inference supported by the facts in the record).

Schewe's argument overlooks the fact that his assault on Belasco's daughter was committed as part of an attempt to pull his infant son away from her while she held him. Given that fact, the district court could reasonably conclude that the special condition was related to the

sentencing factors. While Belasco's daughter was holding his son, Schewe grabbed her and tried to wrestle the infant from her. If she had dropped the infant, he could have been seriously injured. Because Schewe's history of committing acts of domestic violence had put his son in danger, there was a reasonable relation between the limitation on contact with his son and his history and characteristics. *See id.* § 3553(a)(1); *see also United States v. Bull*, 214 F.3d 1275, 1278 (11th Cir.2000) (holding that a special condition requiring the defendant to participate in mental-health treatment was reasonably related to his history and characteristics because of his record of domestic violence, which was connected with his mental health). We cannot say that the district court committed a clear error in judgment when it concluded that the special condition was reasonably related to the sentencing factors.

[2] We turn next to whether the special condition involved a deprivation of Schewe's liberty that was greater than reasonably necessary to achieve the objectives of the statutory sentencing factors. *See* 18 U.S.C. § 3583(d)(2). The special condition imposes only a minor burden on \*812 Schewe's parental rights. It permits him to have contact with his son so long as he receives approval from his probation officer first. In order to obtain that approval, all Schewe has to do is “get himself straight”—i.e., stay sober and follow his mental-health treatment—and show his probation officer through his adherence to the conditions of his supervised release that he is stable enough to be around Belasco and their son. That burden is not only light, but also well-tailored to the district court's concern with Schewe's history and characteristics, as well as his son's safety. The district court relied on evidence indicating that Schewe's mental-health issues and substance abuse were directly related to his history of committing acts of domestic violence. The court did not abuse its discretion by requiring him to commit to, and continue, his mental-health treatment and sobriety (in the district court's words to “get himself straight”) because it is key to preventing further incidents.

Furthermore, Schewe's probation officer is best positioned to monitor his commitment to his mental-health treatment and his sobriety and to decide when it would be appropriate and safe for Schewe to have contact with his son. *Cf. Zinn*, 321 F.3d at 1092 (acknowledging “the vital role probation officers fulfill in effectuating the district court's sentence”). We have recognized that making a special condition subject to

the probation officer's approval is a “relatively narrowly-tailored condition” that prevents a restriction from being “overly broad.” *Id.* (holding that a prohibition on the defendant's use of the internet without first receiving approval from the probation officer was “not overly broad”). There was no clear error in judgment here.

[3] Finally, we consider whether the special condition is inconsistent with any policy statements from the Sentencing Commission. *See* 18 U.S.C. § 3583(d)(3). It is not. Schewe does not even attempt to identify a policy statement that conflicts with the special condition, and we are not aware of one that does. Thus, the district court did not commit a clear error of judgment under § 3583(d)'s last criterion.

[4] None of Schewe's contrary arguments are persuasive. Schewe's first contention is that, because the special condition implicated his constitutional rights, the district court erred by not employing heightened factfinding and tailoring standards to justify the special condition. In making his argument, he relies exclusively on precedent from other circuits that require special procedures or impose heightened scrutiny when a special condition burdens a constitutional right. *See, e.g., United States v. Wolf Child*, 699 F.3d 1082, 1089–94 (9th Cir.2012) (requiring the district court to make “enhanced” findings before imposing a special condition that implicates the defendant's constitutional rights); *United States v. Reeves*, 591 F.3d 77, 82–83 (2d Cir.2010) (applying strict scrutiny analysis to special conditions that burden the defendant's constitutional rights). But our own precedents do not require heightened procedures or strict scrutiny. *See, e.g., United States v. Taylor*, 338 F.3d 1280, 1284 (11th Cir.2003) (reviewing a Fifth Amendment challenge to a special condition and doing so without imposing special procedural requirements or applying heightened scrutiny); *Zinn*, 321 F.3d at 1092–93 (doing the same when reviewing a First Amendment challenge). And we are bound to follow our precedent. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n. 8 (11th Cir.2001).

Schewe also contends that the district court's sentence was not “reasonably related” to the sentencing factors identified in 18 U.S.C. § 3583(d)(1). He argues that \*813 the special condition was not based on the “nature and circumstances of the offense” because neither his underlying drug conviction nor his technical violations of the terms of his supervised release involved abuse of

an infant. *See* 18 U.S.C. § 3553(a)(1). That is true, but a special condition does not need to meet all of the sentencing factors listed in 18 U.S.C. § 3583(d)(1). *See Zinn*, 321 F.3d at 1089. And the district court did not abuse its discretion by emphasizing Schewe's history and characteristics and the need to prevent future crimes that could put his son at risk. *See id.*

**AFFIRMED.**

**All Citations**

603 Fed.Appx. 805

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606 Fed.Appx. 216

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee

v.

Kirk PENNINGTON, Defendant–Appellant.

No. 14–60182.

|

April 3, 2015.

#### Synopsis

**Background:** Defendant pled guilty in the United States District Court for the Northern District of Mississippi, No. 3:13–CR–117–1, of failing to register as sex offender under Sex Offender Registration and Notification Act (SORNA), and he was sentenced to prison term of 84 months and five-year term of supervised release, subject to several conditions. Defendant appealed.

**Holdings:** The Court of Appeals, Stephen A. Higginson, Circuit Judge, held that:

[1] defense counsel had adequate notice of facts on which special condition of supervised release was based;

[2] special condition of supervised release was neither overbroad nor impermissibly vague; and

[3] prison term, which was 43 months greater than top of Guidelines range, was procedurally and substantively reasonable.

Affirmed.

West Headnotes (6)

#### [1] Sentencing and Punishment

← Use and effect of report

#### Sentencing and Punishment

← Notice

Pre-sentence report and defendant's own knowledge of prior case gave defense counsel adequate notice of facts on which sentencing court, in prosecution for failing to register as sex offender under Sex Offender Registration and Notification Act (SORNA), relied in imposing special condition of supervised release that defendant refrain from engaging in any relationship or in cohabitation with any individual with children under 18 years of age unless approved by probation officer, where report stated that defendant had been convicted of fondling minor victim and specified exact conduct and particular timeframe, and additional facts that were not found in report, but instead were pulled from offense report, i.e. victim's age and fact that defendant was in relationship with victim's mother, were known to defendant. 18 U.S.C.A. § 2250(a); Fed.Rules Cr.Proc.Rule 32, 18 U.S.C.A.; U.S.S.G. § 6A1.3, p.s., 18 U.S.C.A.

Cases that cite this headnote

#### [2] Constitutional Law

← Sentencing and punishment in general

#### Sentencing and Punishment

← Validity

Term “relationship,” as used in special condition of defendant's supervised release, that he refrain from engaging in any relationship with any individual with children under 18 years of age unless approved by probation officer, involved romantic engagement, and thus condition was not overbroad in prosecution for failing to register as sex offender under Sex Offender Registration and Notification Act (SORNA), where defendant's previous conviction on

which condition was based was for fondling child of girlfriend, thus pointing toward court's concern about use of romantic relationships to reach children. 18 U.S.C.A. §§ 2250(a), 3583(d)(2).

2 Cases that cite this headnote

[3] **Sentencing and Punishment**

☛ Validity

Special condition of defendant's supervised release in prosecution for failing to register as sex offender under Sex Offender Registration and Notification Act (SORNA), that he refrain from engaging in any relationship with any individual with children under 18 years of age unless approved by probation officer, was not rendered redundant by another condition limiting his direct, unsupervised contact with children, even though goals of both conditions were to protect children and prevent recidivism, where challenged condition specifically related to defendant's romantic relationships with parents of minor children. 18 U.S.C.A. §§ 2250(a), 3583(d)(2).

3 Cases that cite this headnote

[4] **Constitutional Law**

☛ Sentencing and punishment in general

**Sentencing and Punishment**

☛ Validity

Special condition of defendant's supervised release in his prosecution for failing to register as sex offender under Sex Offender Registration and Notification Act (SORNA), stating that he was to refrain from engaging in any relationship with any individual with children under 18 years of age unless approved by probation officer, was not impermissibly vague, since requirement of romantic involvement encompassed in term "relationship" provided sufficient specificity to put defendant on notice of when he was required to notify and seek approval from his probation officer, and, contrary to defendant's argument, requirement made it so that condition did not apply to merely

"meeting with a friend" or "striking up a conversation with someone." 18 U.S.C.A. § 2250(a).

1 Cases that cite this headnote

[5] **Sentencing and Punishment**

☛ Requisites and sufficiency

**Sentencing and Punishment**

☛ Sufficiency

Imposing 84-month prison term, which was 43 months greater than top of Guidelines range, was procedurally reasonable in prosecution for failing to register as sex offender under Sex Offender Registration and Notification Act (SORNA), where court listened to defendant's arguments and gave him and his counsel several opportunities to speak, and court then explained why upward variance was appropriate based on relevant statutory factors, including nature and circumstances of his offense, defendant's history and characteristics, need to protect public, and need to afford adequate deterrence to criminal conduct. 18 U.S.C.A. §§ 2250(a), 3553(a).

Cases that cite this headnote

[6] **Mental Health**

☛ Offenses and prosecutions

**Sentencing and Punishment**

☛ Nature, degree, or seriousness of other misconduct

Imposing 84-month prison term, which was 43 months greater than top of Guidelines range, was substantively reasonable in prosecution for failing to register as sex offender under Sex Offender Registration and Notification Act (SORNA), where court considered mitigating factors that defendant presented, but nevertheless concluded that other factors, including defendant's criminal history, supported significant variance. 18 U.S.C.A. §§ 2250(a), 3553(a).

Cases that cite this headnote

### Attorneys and Law Firms

\*218 James Clayton Joyner, Esq., U.S. Attorney's Office, Oxford, MS, for Plaintiff–Appellee.

Gregory Scott Park, Assistant Federal Public Defender, Federal Public Defender's Office, Oxford, MS, for Defendant–Appellant.

Appeal from the United States District Court for the Northern District of Mississippi, USDC No. 3:13–CR–117–1.

Before BARKSDALE, SOUTHWICK, and HIGGINSON, Circuit Judges.

### Opinion

STEPHEN A. HIGGINSON, Circuit Judge: \*

\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Kirk Pennington pleaded guilty to failure to register as a sex offender and was sentenced to a prison term of 84 months and a five-year term of supervised release, subject to a number of conditions. Pennington now challenges his sentence on three grounds. First, he argues that the district court violated the Federal Rules of Criminal Procedure and the Sentencing Guidelines when it failed to give him prior notice of the factual basis for a condition of supervised release. Second, he claims that the same condition is overly broad and impermissibly vague. Third, he argues that his 84-month sentence, an upward variance from the Guidelines range, is procedurally and substantively unreasonable. We affirm.

### FACTS AND PROCEEDINGS

Pennington pleaded guilty to failure to register as a sex offender, in violation of the Federal Sex Offender Registration and Notification Act. *See* 18 U.S.C. § 2250(a). According to the factual basis for his guilty plea, Pennington was convicted of aggravated criminal sexual abuse in 1994 and of “fondling” in 2008. On May 15, 2013, before Pennington was released from the Mississippi Department of Corrections, he signed a

Mississippi Convicted Sex Offender's Duty to Register form that indicated he would be residing on County Road 2359 in New Albany, Mississippi. On June 9, 2013, Pennington was released from the Mississippi Department of Corrections, but he failed to report to the Mississippi Department of Public Safety to register as a sex offender. He also did not report to the Mississippi Department of Corrections \*219 Probation and Parole Officer. On July 12, 2013, the U.S. Marshals Service arrested Pennington in Memphis, Tennessee. When questioned by a marshal, Pennington stated that church members had reneged on their promise to find him a place to live in New Albany, Mississippi. He said he then travelled to Memphis, Tennessee, where he stayed at a hotel, at a hospital, and with friends, before he was apprehended. He said he did not attempt to register as a sex offender in Tennessee.

Several weeks before Pennington's sentencing, the district court advised the parties that the court was considering an upward variance from the Guidelines range of 33 to 41 months, even though the government had not moved for an upward variance. At the sentencing hearing, the district court gave Pennington, the prosecutor, and defense counsel an opportunity to speak. Defense counsel emphasized that when Pennington was released from prison, he had “no money,” “no family,” “no friends,” and “nowhere to go.” Defense counsel also stressed that Pennington has a history of mental illness and a low level of education. He requested a sentence within the Guidelines range. The district court recognized Pennington's “lack of resources,” but said an upward variance was appropriate based on the sentencing factors listed in 18 U.S.C. § 3553(a), including, *inter alia*, “the nature and circumstances of the offense,” “the history and characteristics of the defendant,” the need “to protect the public,” and the need “to afford adequate deterrence to criminal conduct.” The court noted Pennington's two prior convictions for sex offenses, his seven prior convictions for failure to register as a sex offender, and his numerous violations of probation. The court found that Pennington's “conduct is the kind that puts the community at risk, especially in this case, puts the children at risk.”

The court also imposed a number of special conditions of supervised release. One of the conditions (“condition eight”) prohibited Pennington from “engag[ing] in a relationship or cohabit[ing] with any individual who has

children under the age of 18 unless approved by the probation officer....” In explaining its decision to impose these conditions, the court first noted that Pennington had been convicted of aggravated criminal sexual abuse that occurred in 1994, when Pennington was 20 years old. Given the elements of that crime, the victim must have been between 13 and 15 years old. The court added, “of even greater concern is the court’s understanding of the Union County conviction” for “fondling a child,” when Pennington was 33 years old. The court noted that

[a]ccording to the offen[s]e report in that case, Case No. 8MO–017, the victim in that case was a six-year-old child. The circumstances was this child being a child of the woman you were dating or engaged in some relationship with.

And for that reason, the court finds that these conditions are not only merited but necessary in order to protect society, particularly protect victims such as these children.

Pennington’s counsel objected to the reasonableness of the sentence, citing his previous arguments for a within-Guidelines sentence, including Pennington’s history of mental illness and homelessness. Defense counsel further argued that the special conditions are not “reasonably related to Mr. Pennington’s history and this offense in representing a greater deprivation of liberty than reasonably necessary for sentencing purposes.” With respect to the 2008 conviction for fondling a child, defense counsel stated that he “was not aware that the victim was six years of age or involved a person that Mr. Pennington was in a relationship with.” He added, \*220 “we would object to that aspect of it as ... being something that we were not prepared to address and not being in the record.” Defense counsel further objected to condition eight on the ground that it would apply to Pennington’s own daughter if she decided to have a child. In addition, defense counsel argued, “a person of reasonable intelligence who has ... common sense, minds like that could differ as to what would be a violation” of condition eight. The district court overruled these objections, noting that condition eight “is warranted, particularly in the circumstances of the Union County case where we know that child was six years of age and was the child of a girlfriend.”

## DISCUSSION

### I. Notice of the 2008 Offense Report

[1] Pennington argues that Federal Rule of Criminal Procedure 32 and U.S. Sentencing Guidelines Manual § 6A1.3 required the district court to give defense counsel notice, before the sentencing hearing, of the 2008 offense report on which the court relied in imposing condition eight. Because Pennington objected in the district court to the lack of notice, we review this question de novo. See *United States v. Knight*, 76 F.3d 86, 87 (5th Cir.1996).

Section 6A1.3(a) of the Sentencing Guidelines requires that the parties “be given an adequate opportunity” to address “any factor important to the sentencing determination [that] is reasonably in dispute.” U.S.S.G. § 6A1.3(a). Federal Rule of Criminal Procedure 32(i)(1)(C) provides, “[a]t sentencing, the court ... must allow the parties’ attorneys to comment on the probation officer’s determinations and other matters relating to an appropriate sentence.” Fed.R.Crim.P. 32(i)(1)(C). We have noted that “[t]he touchstone of [R]ule 32 is *reasonable* notice to allow counsel adequately to prepare a meaningful response and engage in adversary testing at sentencing.” *United States v. Angeles–Mendoza*, 407 F.3d 742, 749 n. 12 (5th Cir.2005) (internal quotation marks and citation omitted); see also *Irizarry v. United States*, 553 U.S. 708, 715, 128 S.Ct. 2198, 171 L.Ed.2d 28 (2008) (“Sound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues.”). In assessing whether notice was reasonable, we have considered “the abilities of the average defense counsel,” while keeping in mind that “the court must have sufficient flexibility to deal with factors not covered in the PSR or arising after its writing.” *Knight*, 76 F.3d at 88–89. In addition, we have held that “actual knowledge satisfies the ‘reasonable notice’ requirement[ ] of Rule 32....” *United States v. Coenen*, 135 F.3d 938, 944 (5th Cir.1998), *superseded on other grounds by statute as recognized by United States v. Paul*, 274 F.3d 155, 172 (5th Cir.2001); cf. *Knight*, 76 F.3d at 88 (“[A]t least if the defendant has actual knowledge of the facts on which the district court bases an enhancement or a denial of a reduction, the Sentencing Guidelines themselves provide notice of the grounds relevant to the proceeding sufficient to satisfy the requirements of Rule 32 and U.S.S.G. § 6A1.3.”).

Here, the PSR and Pennington's own knowledge of his prior case gave defense counsel adequate notice of the facts on which the district court relied in imposing condition eight. The PSR stated that Pennington had been convicted of “[f]ondling a [c]hild,” and noted that “[a]ccording to the Indictment, between February 15, 2008, and February 16, 2008, the defendant touched and rubbed his hands and/or other \*221 parts of his body on the vagina of A.B., a female under the age of 14.” The PSR did not state two facts, contained in the offense report, which the district court cited at sentencing: the exact age of the child (six), and the fact that Pennington was “dating or engaged in some relationship with” the child's mother when he committed the crime. Nevertheless, the fact that the child was six, and not another age “under ... 14,” as stated in the PSR, did not affect condition eight, which applies to all children under age 18. Although condition eight was based on information, omitted from the PSR, that the child's mother was Pennington's “girlfriend,” Pennington had actual knowledge of that fact.<sup>1</sup> Given the expectation of communication between lawyer and client, above all when a sentencing court informs the parties of its intention to impose a non-heartland Guidelines sentence, Pennington's counsel had adequate notice to meaningfully respond to the district court's reference to facts in the 2008 offense report. We further note that the district court gave defense counsel an opportunity to comment “[a]t sentencing” on the factual basis for condition eight, Fed.R.Crim.P. 32(i)(1)(C), and that defense counsel did not request a continuance to further prepare a response. *Cf. Irizarry*, 553 U.S. at 715–16, 128 S.Ct. 2198 (noting, in the context of an upward variance from the Guidelines, that where “the factual basis for a particular sentence ... come[s] as a surprise to a defendant or the Government,” the “appropriate response” is “for a district judge to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial”).

<sup>1</sup> Pennington has not disputed the accuracy of this fact in the district court or on appeal.

## II. Substantive Challenge to Condition Eight

We review substantive reasonableness challenges to conditions of supervised release for abuse of discretion where, as here, the defendant objected in the district court. *United States v. Ellis*, 720 F.3d 220, 224 (5th Cir.2013). A district court may impose any condition of supervised release “it considers to be appropriate,” as long as certain

requirements are met. 18 U.S.C. § 3583(d); *see also United States v. Weatherton*, 567 F.3d 149, 153 (5th Cir.2009). A condition of supervised release “must be related to one of four factors: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to afford adequate deterrence to criminal conduct; (3) the need to protect the public from further crime of the defendant; and (4) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” *Ellis*, 720 F.3d at 225 (internal quotation marks and alterations omitted) (quoting 18 U.S.C. §§ 3583(d)(1), 3553(a)(1), (a)(2)(B)-(D)). In addition, “the condition cannot impose any ‘greater deprivation of liberty than is reasonably necessary’ to advance deterrence, protect the public from the defendant, and advance the defendant's correctional needs.” *Weatherton*, 567 F.3d at 153 (quoting 18 U.S.C. § 3583(d)(2)). Finally, the condition must be consistent with the policy statements issued by the Sentencing Commission. 18 U.S.C. § 3583(d)(3). Condition eight, as stated in the judgment, provides:

The defendant may not date, engage in a relationship or co-habitat [sic] with an individual who has children under the age of 18 unless approved by the probation officer and third party risk issues have been identified and notification has been provided by the probation officer.

\*222 Pennington challenges only the condition's provisions on “dat[ing]” and “engag[ing] in a relationship,” and not its provision on “co-habit[ing].” In light of vagueness concerns, we note that the record of the sentencing hearing makes clear that the terms “date” and “relationship” are used to convey romantic involvement. The district court, in explaining condition eight, stated that it “would require you to have the conversation with probation about your intent to engage in a relationship or cohabit with a *mate* that had small children so that probation could make *your partner, your girlfriend* aware of your history and let that person have knowledge of propensity.” Based on this understanding of condition eight, we now analyze Pennington's arguments that the condition is overly broad and impermissibly vague.

### A. Overbreadth

[2] Pennington argues that condition eight involves a greater deprivation of liberty than is reasonably necessary to protect the public and prevent recidivism. *See* 18 U.S.C. § 3583(d)(2). Pennington's overbreadth argument depends on a misconstruction of the condition. He argues that under condition eight, he “would have to first get approval to write a letter to someone or if he were to think about striking up a casual conversation with a person anywhere.” Pennington further claims that the condition would apply to his own daughter if she decided to have a child. Pennington overlooks that the terms “date” and “relationship,” as imposed by this sentencing judge, involve romantic engagement.

Understood in the context of this record, condition eight is not overly broad. “Congress has made clear that children ... are members of the public it seeks to protect by permitting a district court to impose appropriate conditions on terms of supervised release.” *United States v. Rodriguez*, 558 F.3d 408, 417 (5th Cir.2009). Pennington's previous conviction for fondling the child of a girlfriend points to a concern about the use of romantic relationships to reach children. *See Ellis*, 720 F.3d at 226 (finding that a restriction on contact with adults who have minor children was “related to public safety” given Ellis's “proclivity to use close relationships to reach children”). In addition, condition eight is not an absolute ban, but rather a requirement to obtain permission from the probation officer. *See U.S. v. Tang*, 718 F.3d 476, 487 (5th Cir.2013) (“The restriction on contact with minors ... is not a greater deprivation than reasonably necessary as Tang can request permission to have contact with minors (or cohabit with someone having minor children).”). Given these factors, condition eight is not broader than is reasonably necessary to protect the public and prevent recidivism. Our court has previously upheld similar conditions against overbreadth challenges. *See Rodriguez*, 558 F.3d at 411, 417–18 (upholding a condition prohibiting the defendant from “associating with any child or children under the age of eighteen, except in the presence and supervision of an adult specifically designated in writing by the probation officer”); *see also United States v. Byrd*, 551 Fed.Appx. 726, 727 (5th Cir.2013) (under plain error review, upholding a condition prohibiting Byrd from “entering into a relationship with anyone with minor children without approval from the probation officer”); *United States v. Cortez*, 543 Fed.Appx. 411, 412 (5th Cir.2013) (under plain error review, upholding a condition “conditionally restricting

[Cortez] from dating or befriending anyone with children under the age of 18 who live at home”).

[3] Contrary to Pennington's argument, condition eight also is not redundant \*223 in light of condition six.<sup>2</sup> While condition six limits direct unsupervised contact with children, condition eight relates to romantic relationships with parents of minor children. Although the district court's purpose for imposing both conditions—to protect children and prevent recidivism—may be the same, the two conditions achieve that purpose in different ways.

2 Condition six provides: “With the exception of unanticipated and/or incidental contact, the defendant shall have no direct unsupervised contact, including by correspondence, telephone, internet or other electronic communication, or through third parties, with children under the age of 18, except in the presence of an adult who has been approved in advance by the probation officer.”

#### B. Vagueness

[4] Pennington also claims that condition eight is impermissibly vague. “Restrictions on an offender's ability to interact with particular groups of people ... must provide fair notice of the prohibited conduct.” *Paul*, 274 F.3d at 166 (internal quotation marks and citation omitted). But conditions need not be “precise to the point of pedantry.” *Id.* at 167. “[C]ategorical terms can provide adequate notice of prohibited conduct when there is a commonsense understanding of what activities the categories encompass.” *Id.*

Under a commonsense reading of condition eight, and in light of the district court's statements at sentencing, Pennington must obtain permission from the probation officer before cohabiting or becoming romantically involved with another person who has a child under age 18. Contrary to Pennington's argument, the condition does not apply to a “meeting with a friend” or “striking up a conversation with someone.” Our court, reviewing for plain error a restriction on friendships, noted in dicta that “the term ‘befriend’ is vague and may have been subject to vacatur and remand to the district court for greater specificity” had the defendant objected on vagueness grounds in the district court. *Ellis*, 720 F.3d at 227 n. 2. However, the requirement of romantic involvement provides sufficient specificity to put Pennington on notice

of when he must notify and seek approval from his probation officer.<sup>3</sup>

<sup>3</sup> We may part ways here with the Second Circuit. See *United States v. Reeves*, 591 F.3d 77, 80–81 (2d Cir.2010) (finding “too vague to be enforceable” a condition requiring the defendant to notify the probation department “when he establishes a significant romantic relationship”). But see *State v. Maddox*, Nos. 2010–194, 2010–195, 2010–196, 2011 WL 4979925, at \*2 (Vt.2011) (finding that a condition requiring the defendant to “inform the probation officer of his intent to begin a romantic or dating relationship” was “sufficiently clear to put defendant on notice” and distinguishing *Reeves* on the ground that the condition did not include the term “significant”). The Second Circuit cites Hollywood for the truth that relationships often begin, and continue, with romantic uncertainty. *Reeves*, 591 F.3d at 81. However, while the line between friendship and romance may not be immediately clear to a moviegoer, or even to the target of affections, Pennington should know when he intends to become romantically involved with another person. Regardless, courts every day are obliged to adjudicate criminal cases, even with arrested persons and not twice-convicted sex offenders, and must assess and impose no-contact orders, as well as lesser restrictions on personal associations. 18 U.S.C. § 3142(c)(B)(iv); see generally *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

### III. Reasonableness of Upward Variance

Pennington challenges the procedural and substantive reasonableness of his 84-month sentence, which is 43 months greater than the top of his Guidelines range. Because Pennington did not challenge the procedural reasonableness of his sentence in the district court, we review that argument \*224 for plain error. Under plain error review, “we may not provide relief unless there was (1) error, (2) that is plain, and (3) that affects substantial rights. Even when these elements are met, we have discretion to correct the forfeited error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Tang*, 718 F.3d at 482–483 (internal quotation marks and citations omitted). Pennington argues that his sentence is procedurally unreasonable because the district court did not adequately explain the sentence and failed to address the mitigating factors that Pennington offered. These factors include

Pennington's history of mental illness, his homelessness, his low level of education, and his lack of family support.

It is procedural error to “fail[ ] to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). “The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.” *Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). “A sentence within the Guidelines range will require little explanation, but where a party ‘presents nonfrivolous reasons for imposing a different sentence ... the judge will normally go further and explain why he has rejected those arguments.’” *United States v. Rouland*, 726 F.3d 728, 732 (5th Cir.2013) (first internal quotation marks and citation omitted) (quoting *Rita*, 551 U.S. at 357, 127 S.Ct. 2456). In *United States v. Fraga*, 704 F.3d 432, 439 (5th Cir.2013), we held that the sentencing judge adequately explained her reasons for rejecting mitigating evidence and imposing an upward variance where she “heard and considered the evidence and arguments, repeatedly questioned Fraga, the prosecution and the probation officer, and gave Fraga multiple opportunities to speak and present mitigating evidence,” before adopting the PSR and concluding that an “upward variance was necessary to deter future criminal conduct and to protect the public.”

[5] At Pennington's sentencing, the district court listened to Pennington's arguments and gave him and his counsel several opportunities to speak. The court told Pennington, “I hear what you are saying regarding the lack of resources that have been available to you.” Nevertheless, the court stated that an upward variance was appropriate based on the sentencing factors listed in § 3553(a), including “the nature and circumstances of the offense,” “the history and characteristics of the defendant,” the need “to protect the public,” and the need “to afford adequate deterrence to criminal conduct.” The court thoroughly explained the factual basis for the variance, including Pennington's two prior convictions for sex offenses, his repeated failure to register as a sex offender, and his numerous violations of probation. We find no plain error in the court's explanation of its sentence or its response to Pennington's arguments.

[6] Pennington also objects to the substantive reasonableness of his sentence. We review Pennington's argument for abuse of discretion because he objected on that basis in the district court. *See id.* In reviewing Pennington's sentence for substantive reasonableness, we must consider "the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall*, 552 U.S. at 51, 128 S.Ct. 586; *see also United States v. Brantley*, 537 F.3d 347, 349 (5th Cir.2008). However, we "must give due deference to the district court's decision that the \*225 § 3553(a) factors, on a whole, justify the extent of the variance." *Gall*, 552 U.S. at 51, 128 S.Ct. 586. Moreover, "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id.* "A sentence is unreasonable if it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *United States v. Peltier*, 505 F.3d 389, 392 (5th Cir.2007) (internal quotation marks and citation omitted). Pennington argues that the district court failed to account for the mitigating factors that he highlighted, and that it gave excessive weight to his criminal history.

We find Pennington's arguments unpersuasive. As noted above, the district court considered the mitigating factors that Pennington presented. The 13 court nevertheless decided that other factors, including Pennington's criminal history, supported a significant variance. We have held that "[a] defendant's criminal history is one

of the factors that a court may consider in imposing a non-Guideline[s] sentence." *United States v. Smith*, 440 F.3d 704, 709 (5th Cir.2006). "And, we have previously found it permissible for a sentencing judge to evaluate the 'nature and circumstances of the offense and the history and characteristics of the defendant' and conclude that it would deviate 'to afford adequate deterrence to criminal conduct' and 'to protect the public from further crimes of the defendant.'" *Fraga*, 704 F.3d at 440 (internal quotation marks, alterations, and citation omitted) (holding that "the district court judge did not abuse her discretion in giving significant weight to Fraga's criminal history and its characteristics"). Given the deference we owe to the sentencing court, we find no abuse of discretion in the imposition of the variance. *See United States v. McElwee*, 646 F.3d 328, 337-38 (5th Cir.2011) (stating that a substantial deviation from the Guidelines did not constitute an abuse of discretion where it was "commensurate with the individualized, case-specific reasons provided by the district court" (internal quotation marks and citation omitted)).

## CONCLUSION

For the above reasons, Pennington's sentence is **AFFIRMED**.

## All Citations

606 Fed.Appx. 216

2011 WL 4979925

Only the Westlaw citation is currently available.

VERMONT SUPREME COURT  
UNPUBLISHED ENTRY ORDER.

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.  
Supreme Court of Vermont.

STATE of Vermont

v.

Todd E. MADDOX, Sr.

Nos. 2010–194, 2010–195 & 2010–196.

|  
Jan. Term, 2011.

|  
Jan. 27, 2011.

**Synopsis**

**Background:** State petitioned for revocation of probation. The District Court, Bennington Circuit, David Suntag, J., granted petition and imposed sentence of 18 to 36 months' imprisonment. Defendant appealed.

**Holdings:** The Supreme Court held that:

[1] probation condition requiring probationer to give notice before beginning “a dating or romantic relationship” gave adequate notice to probationer of conduct prohibited;

[2] evidence of probationer's contacts with a female acquaintance was sufficient to support revocation of probation; and

[3] decision to revoke probation and impose underlying sentence was proper.

Affirmed.

West Headnotes (3)

[1] **Sentencing and Punishment**

☛ **Validity**

Probation condition requiring probationer to give notice before beginning “a dating or romantic relationship” gave adequate notice to probationer of conduct prohibited; condition did not contain qualitative element predicated upon showing that probationer was seeking to initiate “significant” romantic relationship, but merely required that he inform probation officer of his intent to begin romantic or dating relationship, terms which were sufficiently clear to put probationer on notice of conduct subject to requirement.

2 Cases that cite this headnote

[2] **Sentencing and Punishment**

☛ **Sufficiency**

Assuming that probation condition requiring probationer to give notice before beginning “a dating or romantic relationship” gave inadequate notice to probationer of conduct prohibited, evidence of probationer's contacts with a female acquaintance was still sufficient to support revocation of probation, where probationer's statement to acquaintance, telling her not to say anything about his contact with her because he was not allowed contact with females, indicated that he understood probation condition to apply to such relationship.

1 Cases that cite this headnote

[3] **Sentencing and Punishment**

☛ **Violation of Probation Condition**

**Sentencing and Punishment**

☛ **Matters Considered**

Decision to revoke probation and impose underlying sentence, following probationer's failure to comply with condition of probation requiring him to give notice before beginning “a dating or romantic relationship” and his undisputed violation of probation officer's additional order not to contact complainant, was properly predicated on threatening nature of underlying criminal behavior, probationer's demonstrated history of noncompliance with

court orders, and need for institutional programming.

1 Cases that cite this headnote

Appealed from District Court of Vermont, Unit No. 2, Bennington Circuit, Docket Nos. 918–8–09, 932–8–09 & 972–9–09 Bncr, David Suntag, Trial Judge.

Present: REIBER, C.J., JOHNSON and SKOGLUND, JJ.

### ENTRY ORDER

\*1 In the above-entitled causes, the Clerk will enter:

Defendant appeals from a district court order finding that he violated two conditions of probation and imposing the underlying sentence of eighteen to thirty-six months with credit for time served. Defendant contends that one of the probation conditions was void for vagueness and consequently that the sentence must be vacated. We affirm.

In November 2009, defendant pled guilty to several violations of abuse prevention orders obtained by his former wife, was sentenced to a total of eighteen to thirty-six months, all suspended except for forty-five days, and placed on probation. In early January 2010, defendant's probation officer filed a complaint alleging that defendant had violated a probation condition requiring that he inform the officer "of the name and contact information of any person with whom you are planning to have a date or with whom you are planning to begin a dating or romantic relationship, prior to the date or beginning the relationship." The complaint was based upon a report from an acquaintance of defendant that, on several occasions, defendant had appeared without notice at her home and place of employment offering her rides—and on one occasion a flower—and had sent her emails asking her to spend time with him. Defendant had told the complainant not to say anything about his visits with her because he was not allowed contact with females.

Based on the report, the probation officer met with defendant on January 12, 2009, and directed him not to have any contact with the woman in question. Later that

month, however, the probation officer filed another VOP complaint based upon defendant's admission that he had given the woman a ride in direct contravention of the probation officer's directive.

Following a hearing in February 2010, the court found that defendant had committed both violations. The court rejected defendant's assertion that the probation condition prohibiting a "dating" or a "romantic" relationship without prior notice was unconstitutionally vague, finding that the concept was reasonably clear, and that, in any event, defendant understood the prohibition. The court further found that even if the condition was vague and unenforceable, the evidence clearly supported a finding that defendant had committed the additional violation of failing to comply with the probation officer's directive not to contact the complainant, rejecting defendant's claim that the contact was inadvertent. Moreover, the court observed that the latter violation was far from de minimus, finding that it was "precisely why he's on probation," that he "must follow court orders" and had not done so. "[H]e was specifically told not to have contact with her, and he did."

At the subsequent sentencing hearing in May 2010, the court indicated that it viewed imposition of the underlying sentence to be the only viable sentencing option based upon the underlying history of physical and violent confrontations that had resulted in the abuse-prevention orders in the first place, the numerous violations of those orders that had followed, and the intimidating behavior defendant displayed toward the complainant, all of which suggested that he was unable to comply with court orders. Based on that history, the court concluded that a behavioral-counseling program in prison, followed by a transitional furlough or parole program on the outside, was the only reasonable option that remained. Accordingly, the court revoked probation and imposed the underlying sentence of eighteen to thirty-six months plus credit for time served.

\*2 Defendant renews his claim that the probation condition requiring notice before beginning "a dating or romantic relationship" is unconstitutionally vague. He relies on a recent federal circuit decision invalidating as unconstitutionally vague a probation condition requiring notice before the supervisee enters into a "significant romantic relationship." *United States v. Reeves*, 591 F.3d 77, 79 (2d Cir.2010). The federal court found that "[w]hat

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” and thus provided insufficient notice of the prohibited behavior. *Id.* at 81. The State responds that *Reeves* is distinguishable because the condition there required the additional showing of a “significant” relationship, and that defendant understood the prohibited conduct in any event.

[1] [2] We are not persuaded that the probation condition at issue failed to provide adequate notice to defendant of the conduct prohibited. Unlike *Reeves*, the probation condition at issue here did not contain a qualitative element predicated upon a showing that defendant was seeking to initiate a “significant” romantic relationship; it merely required that defendant inform the probation officer of his intent to begin a romantic or dating relationship, and we are satisfied that these terms were sufficiently clear to put defendant on notice of the conduct subject to the requirement. See *State v. Danahey*, 174 Vt. 591, 593–94, 819 A.2d 691 (2002) (mem.) (holding due process satisfied where ordinary language of probation condition would put reasonable person on notice of conduct prohibited). Moreover, even if the condition were somehow unclear in the abstract, the facts

here demonstrate that defendant plainly understood that it applied to this relationship, as evidenced by his request to the complainant not to say anything about his contact with her. Accordingly, we find no infirmity in the finding of a violation.

[3] Furthermore, the trial court here also found that defendant had unquestionably violated the probation officer's additional order not to contact the complainant, a finding which defendant has not challenged on appeal. See *State v. Hammond*, 172 Vt. 601, 602, 779 A.2d 73 (2001) (mem.) (holding that defendant may be put on notice as to what may violate probation condition by instructions and directions of probation officer). Accordingly, we find no error in the court's decision to revoke probation and impose the underlying sentence, a decision predicated, in the court's view, on the threatening nature of the underlying criminal behavior, defendant's demonstrated history of noncompliance with court orders, and the need for institutional programming.

*Affirmed.*

#### All Citations

Not Reported in A.3d, 2011 WL 4979925

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