Supreme Court No. 96307-0
(COA No. 76456-0-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW METCALF,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

A. IDENTITY OF PETITIONER

Matthew Metcalf, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Metcalf seeks review of the Court of Appeals decision dated August 6, 2018, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Is the community custody provision prohibiting Mr. Metcalf from entering into "friend" relationships with persons who have children without his community custody officer's approval unconstitutionally vague?

2. Is the community custody provision prohibiting Mr. Metcalf from possessing "sexually explicit material" unconstitutionally vague?

3. Did the failure to exempt Mr. Metcalf's wife and children from the community custody conditions restricting contact with persons who have minor children without the consent of his community custody officer interfere with Mr. Metcalf's constitutional right to parent and to marry?

D. STATEMENT OF THE CASE

Mr. Metcalf pled guilty to four counts of child molestation in the second degree. RP 6-8 2/14/2017. These charges did not involve his wife or children, whom he credited for helping him to take responsibility for his misdeeds. *Id*. Mr. Metcalf entered into an agreed sentence but argued that several of the conditions of community custody were unconstitutionally vague. *Id*.

The conditions objected to include:

> 6. Do not possess or view any pornography or sexually explicit material.
>
> 7. Do not enter into any dating, romantic, or sexual relationships without the express written approval of your [CCO].
>
> 8. Do not enter into any dating, romantic, sexual, or friend relationships with people who have minor children without the express written approval of your [CCO].

CP 41.

While the Court of Appeals agreed that the terms "pornography" and "romantic" were unconstitutionally vague, it disagreed with Mr. Metcalf on whether the terms "sexually explicit material" and "friend" were also vague. Slip Op. at 1.

In addition, the Court of Appeals found that while Mr. Metcalf had demonstrated that these restrictions infringed on his right to parent

and to marry, the Court also found that Mr. Metcalf had not satisfied RAP 2.5 and declined to reach this issue. Slip Op. at 9.

E. ARGUMENT

1. The term "friend" in Mr. Metcalf's judgment and sentence is unconstitutionally vague and subject to arbitrary enforcement.

The Court of Appeals held that the term "friend" in Mr. Metcalf's judgment and sentence is not unconstitutionally vague, determining that the dictionary definition provides sufficient guidance about what types of relationships are within the scope of the scope of the condition prohibiting Mr. Metcalf from making friends with persons with children. Slip. Op. at 7. There are no reported cases on whether the dictionary definition provides sufficient guidance. The word "friend" is, however, open to broad and subjective interpretation. This Court should take review in order to protect Mr. Metcalf's constitutional rights and because this is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

The guarantee of due process contained in the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires that laws not be vague. *State v. Magana*, 197 Wn. App. 189, 200, 389 P.3d 654 (2016); U.S. Const.

amend. 14; Const. art. I, § 3. Because a violation of a community custody condition can subject a person to arrest and incarceration, vagueness prohibitions extend to community custody conditions. *See State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). A community custody condition is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018) (citing *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008); *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

The Court of Appeals used the definition of "friend" found in Webster's Dictionary. This definition is extremely broad and open to the type of interpretation that the vagueness doctrine prohibits. The Court of Appeals stated that "friend" can include the following:

> one that seeks the society or welfare of another whom he holds in affection, respect, or esteem or whose companionship and personality are pleasurable: an intimate associate esp. when other than a lover or relative. . . : one not hostile or not an enemy. . . : a favored date : a boyfriend or girlfriend...

> . . . FRIEND applies to a person one has regarded with liking and a degree of respect and has known for a time in a pleasurable relationship neither notably intimate nor dependent wholly on business or professional ties.

Slip Op. at 7 (citing Webster's Third International Dictionary 911 (2002)).

This definition is remarkably all-encompassing. It includes persons whom another "holds in affection, respect, or esteem" and also includes persons who are "not hostile or not an enemy." Webster's at 911. A friend can also be a "favored date: a boyfriend or girlfriend." *Id.* And while the Court of Appeals states that the specific exclusion of notably intimate relationships and those not wholly dependent on business or professional ties helps to limit the definition of friend, it would appear that the community corrections officer could exclude Mr. Metcalf from having casual contact with almost any person who does not identify themselves as an enemy. Slip Op. at 7.

The definition the Court of Appeals relies on fails to provide the structure this Court required in *Padilla*. First, the term "friend" fails to provide the kind of notice that enables ordinary persons to understand what conduct is prohibited. *Padilla*, 190 Wn.2d at 679 (citing *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (plurality opinion)). According to this definition, it is almost

impossible to determine when a person has become a friend. *See* Webster's at 911. For example, a person who frequents the same coffee shop every day may think of their barista as a friend, while the barista may only consider that they have friendly conversations. This same example can be applied to almost any situation, including an office, a recreational sports team, or any other place where people have frequent contact with each other. The term "friend" as defined by Webster's Dictionary is simply too vague to provide Mr. Metcalf with sufficient warning of who he should avoid unless the term really is intended for him to avoid contact with almost everyone. This cannot have been the court's intention. The term "friend" fails to provide Mr. Metcalf with sufficient notice of what conduct he should avoid.

Next, the language is void because it "may authorize and even encourage arbitrary and discriminatory enforcement." *Id*. (citing *Morales*, 527 U.S. at 56 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). Allowing the community corrections officer to determine when a relationship has passed the threshold into friendship is unconstitutional. Allowing this provision to stand allows for the arbitrary enforcement that has been prohibited in other cases. *See State v. Sansone*, 127 Wn. App. 630, 642,

111 P.3d 1251 (2005). Delegating the authority to determine when a violation occurs to an individual community corrections officer creates a danger of subjective enforcement based on the individual officer's subjective opinions. *Padilla*, 190 Wn.2d at 682 (citing *Bahl*, 164 Wn.2d at 755). As such, this violates Mr. Metcalf's federal and state constitutional rights. U.S. Const. amend. 14; Const. art. I, § 3.

The question of whether Mr. Metcalf can enter into friendships with persons who have children without his community custody officer's permission is unconstitutionally vague. Mr. Metcalf asks this Court to take review. RAP 13.4(b).

2. The term "sexually explicit material" in Mr. Metcalf's judgment and sentence should be stricken as unconstitutionally vague.

The Court of Appeals held that the term "pornography" in Mr. Metcalf's judgment and sentence was vague but that the term "sexually explicit material" was not. Slip Op. at 5. The term "sexually explicit material" is, however, subjective and requires the community correction officer to determine what material actually violates Mr. Metcalf's judgment and sentence. Like "pornography", the term "sexually explicit material" is unconstitutionally vague. U.S. Const. amend. 14; Const. art. I, § 3. Mr. Metcalf asks this Court to accept

review of this significant constitutional question in order to address whether it constitutional to impose such a vague condition in Mr. Metcalf's judgment and sentence. RAP 13.4(b).

The prohibition on sexually explicit material is similar to the prohibition against possession of pornographic material stricken by this Court in *Padilla*. 190 Wn.2d at 674. In *Padilla*, the sentencing court prohibited Mr. Padilla from possessing pornographic material. *Id*. The term "pornographic material" was defined as "images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts." *Id*. Despite the narrowing of this definition, this Court held that it could not withstand constitutional scrutiny. *Id*. at 712.

The Court of Appeals held that unlike "pornography," "sexually explicit material" applies only to material that is unequivocally sexual in nature. Slip Op. at 5. But this interpretation is not consistent with how others interpret this term. For example, many television shows and movies have been described as sexually explicit, including *Game of Thrones* (HBO)[1], *Jamestown* (PBS)[2], and *Grey's Anatomy* (ABC)[3]. *See also Padilla*, 190 Wn.2d at 681 (*Game of Thrones* and *Titanic*). It is

[1] https://www.imdb.com/title/tt0944947/parentalguide
[2] https://m.imdb.com/title/tt5650650/parentalguide/nudity
[3] https://www.imdb.com/title/tt0413573/parentalguide

unlikely that the sentencing court ever intended to restrict Mr. Metcalf from viewing mainstream television or movies. And yet the sentencing court's restriction on "sexually explicit material" could restrict such material. As such, it is unconstitutionally vague and must be stricken.

This restriction was especially concerning to this Court in *Padilla* because it implicated the First Amendment. *Padilla*, 190 Wn.2d at 677–78. In *Padilla*, this Court emphasized that "a vague condition infringing on protected First Amendment speech can chill the exercise of those protected freedoms." *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); U.S. Const. amend. 1.) The term sexually explicit material implicates the First Amendment just as much as does the term pornography. *Id*. As such, a restriction implicating First Amendment rights demands a greater degree of specificity and must be reasonably necessary to accomplish the essential needs of the state and public order. *Id*. at 678 (citing *State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (quoting *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974)). The restrictions here fail to provide this specificity.

Ultimately, community correction officers will use their subjective opinion to determine what "sexually explicit material"

means. This is, of course, is unconstitutional. *See Sansone*. 127 Wn. App. at 642. Delegating the authority to determine the prohibition boundaries to an individual community correction officer creates a real danger that the prohibition on sexually explicit material is likely to translate into a prohibition on whatever the officer personally finds "titillating." *Bahl*, 164 Wn.2d at 755. The prohibition against sexually explicit material fails to adequately put Mr. Metcalf on notice of which materials are prohibited and leaves him vulnerable to arbitrary enforcement. *Padilla*, 190 Wn.2d at 682. As such, this prohibition must be stricken.

This Court has not yet had an opportunity to address whether a sentencing court can prohibit a person from possessing "sexually explicit material" when they are on community custody, unlike pornography. But like pornography, this term "sexually explicit material" is unconstitutionally vague. This Court should accept review to protect Mr. Metcalf's constitutional rights and to address this important constitutional question for future sentencing courts. RAP 13.4(b).

3. The restrictions placed on Mr. Metcalf's right to marry and parent must be stricken from Mr. Metcalf's judgment and sentence.

On appeal, Mr. Metcalf argued that the restrictions placed on him by the trial court preventing him from entering into most types of relationships without his community custody officer's permission violated his right to marriage and to parent his children. The Court of Appeals declined to reach the issue, determining that the error was not manifest. Slip Op. at 9. This Court should accept review of this issue as it satisfies both RAP 2.5(a) and RAP 13.4(b).

A party may raise errors for the first time on review when they are manifest errors affecting a constitutional right. RAP 2.5(a). Because the right to marry and have a family are fundamental rights that the United States Supreme Court have recognized as among the oldest fundamental liberty interests enjoyed under the constitution, this standard is met. *See Troxel v. Ganville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

"The rights to marriage and to the care, custody, and companionship of one's children are fundamental constitutional rights, and state interference with those rights is subject to strict scrutiny." *State v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940 (2008) (quoting

Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). "Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order." *Id.*

There is no evidence that Mr. Metcalf is a danger to his wife or his children. Conditions preventing him from seeing his family are not reasonably necessary to accomplish the government's needs. *See State v. Letourneau*, 100 Wn. App. 424, 427, 997 P.2d 436 (2000). In *Letourneau*, the Court of Appeals struck a condition requiring Ms. Letourneau to be supervised during contact with her children because even though she had been convicted of sexual crimes against children there was no proof she was known to molest her own children. *Id.* at 428. Similarly, the prosecution offered no proof that Mr. Metcalf has ever harmed his own children.

The Ninth Circuit also recognizes that a person who commits sexual acts against children should not be presumed to also be likely to commit acts against their own children. *United States v. Wolf Child*, 699 F.3d 1082 (9th Cir. 2012). In *Wolf Child*, the sentencing court imposed conditions of community custody that forbade Mr. Wolf Child from contacting minors or adults who have minor children without

regard for his affected family relationships. *Id*. at 1087. The Ninth Circuit recognized, "Not all sex offenders are the same; nor are all who plead to a particular type of sex offense." *Id*. at 1094. Proof Mr. Wolf Child had abused other children did not support a finding that he would harm his own children. *Id*. at 1094, 1099. The restriction against contact between Mr. Wolf Child and his children was lifted. *Id*. at 1103.

The Court of Appeals stated that Mr. Metcalf had failed to show the prejudice to himself by restricting his ability to continue in a relationship with his family. Slip Op. at 9. But Mr. Metcalf was clear that this relationship was critical to his recovery. RP 6-8 2/14/2017 ("I'd like to ask for the ability to talk to my family again, they are the reason for my change.") By not allowing him to continue in his relationship with his children, he was deprived of his fundamental right to marry and parent his children without constitutional authority.

By restricting Mr. Metcalf from having a relationship with his wife and children without his community custody officer's approval, the sentencing court unconstitutionally interfered with Mr. Metcalf's right to marriage and to parent. Because this is a fundamental right, it satisfies the requirements of RAP 2.5(a). A court cannot delegate

authority to a community correction officer to determine when a person can have contact with their family when that condition is not crime-related. Mr. Metcalf asks this Court to accept review of this issue in order to provide guidance for when a court may restrict contact between a person convicted of an offense and their family. RAP 13.4(b).

F. CONCLUSION

Based on the foregoing, Mr. Metcalf respectfully requests this that review be granted pursuant to RAP 13.4(b).

DATED this 5th day of September 2018.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

Table of Contents

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MATTHEW JOSEPH METCALF, Appellant.	No. 76456-0-I DIVISION ONE UNPUBLISHED OPINION FILED: August 6, 2018

TRICKEY, J. — Matthew Metcalf pleaded guilty to four counts of second degree child molestation. The trial court imposed community custody conditions that in part prohibited Metcalf from possessing or viewing pornography or sexually explicit material; entering into any dating, romantic, or sexual relationships without the express written approval of his community corrections officer (CCO); and entering into any dating, romantic, sexual, or friend relationships with adults with minor children without the express written approval of his CCO. Because the terms "pornography" and "romantic" are unconstitutionally vague in the context of Metcalf's community custody conditions, we reverse in part and remand. We otherwise affirm.

FACTS

Metcalf pleaded guilty to four counts of second degree child molestation. The victims were not related to him.

In Metcalf's judgment and sentence, the trial court imposed several community custody conditions. The conditions included:

> 6. Do not possess or view any pornography or sexually explicit material.
> 7. Do not enter into any dating, romantic, or sexual relationships without the express written approval of your [CCO].
> 8. Do not enter into any dating, romantic, sexual, or friend relationships with people who have minor children without the express written approval of your [CCO].[1]

Metcalf appeals.

ANALYSIS

Unconstitutional Vagueness

Metcalf argues that the trial court abused its discretion when it imposed community custody conditions containing unconstitutionally vague terms. We examine each of the challenged terms in turn.

"[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct." State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). Thus, laws must both "'(1) provide ordinary people fair warning of proscribed conduct and (2) have standards that are definite enough to 'protect against arbitrary enforcement.'" State v. Irwin, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015) (internal quotation marks omitted) (quoting Bahl, 164 Wn.2d at 752-53).

When determining whether challenged language is sufficiently definite to provide fair warning, the reviewing court must read the language in context and

[1] Clerk's Papers (CP) at 41.

give it a "sensible, meaningful, and practical interpretation." City of Spokane v. Douglass, 115 Wn.2d 171, 180, 795 P.2d 693 (1990). If a term is undefined, "the court may consider the plain and ordinary meaning as set forth in a standard dictionary." Bahl, 164 Wn.2d at 754.

"'[A] community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'" State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010) (internal quotation marks omitted) (quoting State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009)). Rather, a community custody condition is sufficiently definite if persons of ordinary intelligence would understand what behavior is proscribed. Douglass, 115 Wn.2d at 179.

"This court reviews community custody conditions for abuse of discretion." Irwin, 191 Wn. App. at 652. "Imposing an unconstitutional condition will always be 'manifestly unreasonable.'" Irwin, 191 Wn. App. at 652 (quoting Sanchez Valencia, 169 Wn.2d at 792).

Pornography

Metcalf argues that the trial court abused its discretion when it imposed a community custody condition prohibiting him from possessing or viewing "pornography."[2] Community custody conditions that restrict "accessing or possessing pornographic materials" are unconstitutionally vague. Bahl, 164 Wn.2d at 758. Therefore, we conclude that the trial court abused its discretion,

[2] CP at 41.

and remand for the trial court to strike the term from the community custody condition.

Sexually Explicit Material

Metcalf argues that the trial court abused its discretion when it imposed a community custody condition prohibiting him from possessing or viewing "sexually explicit material" because the term "sexually explicit material" is unconstitutionally vague.[3] We disagree.

Community custody conditions that implicate material protected under the First Amendment are held to a stricter standard of definiteness to avoid a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 753.

The dictionary definition of "explicit" is "characterized by full clear expression : being without vagueness or ambiguity . . . UNEQUIVOCAL." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 801 (2002).

In Bahl, the Washington Supreme Court upheld a community custody condition that prohibited the defendant from frequenting "'establishments whose primary business pertains to sexually explicit or erotic material.'" 164 Wn.2d at 758. The court relied on the dictionary definition of "explicit" to conclude that the term "sexually explicit" was not unconstitutionally vague in the context of the community custody condition. Bahl, 164 Wn.2d at 758-60. The court also looked to the statutory definition of "sexually explicit material" under RCW 9.68.130(2)[4] to

---

[3] CP at 41.

[4] RCW 9.68.130(2) defines "sexually explicit material" as

> any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works

support its conclusion, although it noted that the defendant was not convicted under the statute. Bahl, 164 Wn.2d at 759-60.

Here, the community custody condition imposed on Metcalf prohibited him from possessing or viewing sexually explicit material. Under the reasoning in Bahl, the dictionary definition of "explicit" renders the term "sexually explicit material" not unconstitutionally vague, as it applies only to material that is unequivocally sexual in nature. Thus, it sufficiently warns Metcalf of what material is within the scope of the community custody condition, and prevents arbitrary enforcement of the condition by his CCO. But on remand, the trial court may consider adding additional language or statutory references to provide further clarification of what material is prohibited.

Romantic Relationships

Metcalf argues that the trial court abused its discretion when it imposed community custody conditions prohibiting him from entering into "romantic" relationships without the consent of his CCO because the term is unconstitutionally vague.[5] We agree.[6]

The dictionary definition of "romantic" is, in relevant part, "consisting of or similar in form or content to a romance . . . : having an inclination or desire for

---

of art or of anthropological significance shall not be deemed to be within the foregoing definition.

[5] CP at 41.

[6] Metcalf also argues that the term "dating" is unconstitutionally vague in the heading of the relevant section of his opening brief. Appellant's Opening Br. at 12. But he does not provide substantive argument in support of this contention. See Appellant's Opening Br. at 12; see also Appellant's Reply Br. at 9-10 (reference to "dating" without substantive argument that it is unconstitutionally vague). Because Metcalf has not provided substantive argument in support of his claim, we decline to address this issue. RAP 10.3(a)(6).

romance . . . : characterized by a strong personal sentiment, highly individualized feelings of affection, or the idealization of the beloved or the love relationship." WEBSTER'S, supra, at 1970.

The dictionary definition of the related term "romance" is, in relevant part, "the quality or state of being romantic . . . : a love, love affair, or marriage of a romantic nature . . . : LOVEMAKING . . . : an attraction or aspiration of an emotional or romantic character . . . : to seek the favor or influence of by personal attention, flattery, or gifts." WEBSTER'S, supra, at 1969-70 (internal footnotes omitted).

Here, based on the dictionary definitions of "romantic" and the related term "romance," a romantic relationship includes heightened feelings of affection toward an individual, rising to the level of love. Such feelings are inherently unique to an individual, making the existence of a romantic relationship highly subjective. Given this subjectivity, the dictionary definitions of "romantic" and the related term "romance" fail to provide ordinary people with fair warning of the conduct proscribed by the community custody conditions. Further, relying on the outside perspective of Metcalf's CCO to determine whether Metcalf is exhibiting such subjective emotions does not protect him from arbitrary enforcement of the conditions.

Therefore, we conclude that the trial court abused its discretion when it imposed the community custody conditions because the term "romantic" is unconstitutionally vague. On remand, the trial court should strike the term "romantic" from the conditions in which it appears.

Friend Relationships

Metcalf argues that the trial court abused its discretion when it imposed a community custody condition prohibiting him from entering into "friend" relationships with people who have minor children without the consent of his CCO. Because the dictionary definition of "friend" provides sufficient guidance about what types of relationships are within the scope of the condition, we disagree.

The dictionary definition of "friend" is, in relevant part,

> one that seeks the society or welfare of another whom he holds in affection, respect, or esteem or whose companionship and personality are pleasurable : an intimate associate esp. when other than a lover or relative . . . : one not hostile or not an enemy . . . : a favored date : a boyfriend or girlfriend. . . .
>
> . . . FRIEND applies to a person one has regarded with liking and a degree of respect and has known for a time in a pleasurable relationship neither notably intimate nor dependent wholly on business or professional ties.

WEBSTER'S, supra, at 911.

Here, the dictionary definition of "friend" applies to relationships Metcalf seeks because he enjoys the company of another, or because he holds an individual in some "affection, respect, or esteem." WEBSTER'S, supra, at 911. It specifically excludes relationships that are notably intimate or are developed through business or professional ties. The broad scope of the dictionary definition of "friend," along with its specific exclusions, is sufficient to notify Metcalf of when he must seek his CCO's approval prior to entering certain relationships and prevents arbitrary enforcement of the condition by his CCO. Therefore, we conclude that the term "friend" is not unconstitutionally vague in the context of the

community custody condition requiring Metcalf to obtain the permission of his CCO prior to entering into "friend" relationships with adults who have minor children.

In sum, we agree with Metcalf that the trial court abused its discretion when it imposed community custody conditions containing unconstitutionally vague terms. Therefore, on remand, the trial court should strike the terms "pornography" and "romantic" where relevant. We also conclude that although the term "sexually explicit material" is not unconstitutionally vague, the trial court may add additional language or statutory citations to clarify the scope of the term on remand. We affirm the trial court's imposition of the community custody condition requiring Metcalf to obtain the permission of his CCO prior to entering into "friend" relationships with adults who have minor children.

Infringement of Constitutional Rights

Metcalf argues that the trial court interfered with his constitutional rights to parent and to marry when it did not exempt his wife and children from the community custody condition prohibiting him from entering into various relationships with people who have minor children without the consent of his CCO. Because Metcalf failed to object to the community custody condition on this ground below and has not shown on appeal that any error was manifest, we decline to reach the merits of this issue.

"The rights to marriage and to the care, custody, and companionship of one's children are fundamental constitutional rights." State v. Warren, 165 Wn.2d 17, 34; 195 P.3d 940 (2008).

An appellant may raise a claim of "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3). "[T]he appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (second alteration in original) (quoting State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). "To demonstrate actual prejudice, there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" O'Hara, 167 Wn.2d at 99 (alteration in original) (quoting Kirkman, 159 Wn.2d at 935).

Here, Metcalf did not object to the imposition of the community custody condition prohibiting him from entering various relationships with people who have minor children on the ground that it interfered with his constitutional rights. Therefore, on appeal, he bears the burden of both identifying a constitutional right that was infringed and establishing that the error was manifest.

Metcalf has identified his constitutional rights to parent and to marry, and thus has likely satisfied the first prong of his burden. But he has not argued on appeal that the error was manifest. Rather, his arguments focus exclusively on the existence of the constitutional rights he asserts. Because Metcalf has not carried his burden of establishing that the claimed constitutional error was manifest, we decline to review his argument on appeal under RAP 2.5.

Affirmed in part, reversed in part, and remanded.

Trickey, J

WE CONCUR:

Cox, CJ

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76456-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Hilary Thomas, DPA
[Appellate_Division@co.whatcom.wa.us]
Whatcom County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 5, 2018

WASHINGTON APPELLATE PROJECT

September 05, 2018 - 4:44 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76456-0
Appellate Court Case Title:	State of Washington, Respondent v. Matthew Joseph Metcalf, Appellant
Superior Court Case Number:	14-1-01006-3

The following documents have been uploaded:

- 764560_Petition_for_Review_20180905164328D1584734_4492.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.090518-09.pdf

A copy of the uploaded files will be sent to:

- appellate_division@co.whatcom.wa.us
- erichey@co.whatcom.wa.us
- greg@washapp.org
- hthomas@co.whatcom.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180905164328D1584734