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NO. 94883-6
(CONSOLIDATED FROM 95274-4)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOMINIQUE DEBRA NORRIS,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Does a community-custody condition requiring Norris to report “any dating relationship” give constitutionally sufficient notice because the term is commonly defined and commonly understood by ordinary people?

2. Did the sentencing court properly exercise its discretion in prohibiting Norris, who was convicted of child molestation for repeatedly having sex with a 12-year-old boy, and who text-messed a sexually suggestive photo of herself to the boy, from sex-related businesses, i.e., where the primary source of business is related to sexually explicit material?

B. STATEMENT OF THE CASE

Dominique Norris repeatedly had sex with a 12-year-old boy, a relative of the father of Norris’s children, lasting for a period of months. CP 3, 27. Norris, who was 24 at the time, told the boy she loved him, and text-messed him a sexually suggestive photo of herself in her underwear. Id. Eventually the boy told a coach. Id. Norris admitted to a member of her church that she had been having sex with the boy. CP 3-4, 27-28.

In March 2012, Norris pleaded guilty to three counts of second-degree child molestation. CP 9-34. The sentencing court imposed a 72-

month standard range sentence, suspended under a special sexual offender sentencing alternative (SSOSA). CP 35-41. The judgment and sentence included an appendix with standard and special conditions of community custody. CP 43. After a pattern of violations, the SSOSA was revoked in May 2016 and the sentencing court imposed the original 72-month term, including the community-custody conditions. CP 47-68, 96-97.

Norris appealed several of her community-custody conditions. The court of appeals, in a published opinion, affirmed two of the conditions, reversed two others entirely and ordered still two more to be partially stricken. State v. Norris, 1 Wn. App. 2d 87, 95-99, 404 P.3d 83, No. 75258-8-I (Wash. Ct. App. October 30, 2017).

Relevant to the issues now before this Court, the court of appeals:

- affirmed a condition requiring Norris to report “any dating relationship,” holding that the term is not unconstitutionally vague.¹
- reversed a crime-related prohibition on entering “sex-related businesses, including x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material” — reasoning that frequenting such businesses was not involved in the commission of Norris’s crimes.²
- affirmed a prohibition on possessing, using, accessing, or viewing sexually explicit material because Norris had sent sex-related text

¹ 1 Wn. App. 2d at 95; CP 43.

² Id. at 97-98; CP 43.

messages and a sexually suggestive photo to her victim, making such a prohibition “reasonably related” to her offense.³

Norris petitioned this Court for review of the court of appeals’ decision that the “dating relationship” condition is not unconstitutionally vague. The State cross-petitioned for review of the lower court’s holding that the prohibition on entering sex-related businesses must be stricken as not reasonably crime-related. This Court granted review on both issues.

This court has consolidated this case with State v. Hai Minh Nguyen,⁴ in which the court of appeals affirmed a community-custody condition prohibiting possession, use, access, or viewing of sexually explicit or erotic material, holding that the condition was not unconstitutionally vague and that it was reasonably crime-related.

C. ARGUMENT

1. THE COMMUNITY CUSTODY CONDITION REQUIRING NORRIS TO DISCLOSE “ANY DATING RELATIONSHIP” IS NOT UNCONSTITUTIONALLY VAGUE.

Norris maintains that a community-custody condition requiring her to report “any dating relationship” is unconstitutionally vague, complaining that it is hard to know with absolute certainty what kinds of relationships she must report. But as the court of appeals correctly held,

³ Id. at 99; CP 43.

⁴ No. 95274-4, 2017 WL 3017516 (Wash. Ct. App. July 17, 2017).

the term “dating relationship” is a common term that is easily understood by ordinary people. Norris’s attempts to compare her condition to other cases involving entirely different words is fallacious. This Court should hold that a community-custody condition requiring a sex offender to report “any dating relationship” is not unconstitutionally vague.

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution require that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008) (citing City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A statute or community custody condition is unconstitutionally vague if (1) it does not define the condition with sufficient definiteness such that ordinary people can understand what conduct is proscribed, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. This court reviews community-custody conditions for abuse of discretion, and will reverse only if the condition is “manifestly unreasonable,” which an unconstitutionally vague condition would be. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

In determining whether a term is unconstitutionally vague, this Court considers the term in the context in which it is used. Bahl, 164

Wn.2d at 754 (citing Douglass, 115 Wn.2d at 180). When a statute or condition does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. Bahl, 164 Wn.2d at 754 (citing State v. Sullivan, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001)). A condition of community custody is sufficiently definite “[i]f persons of ordinary intelligence can understand what [it] proscribes, notwithstanding some possible areas of disagreement.” Bahl, 164 Wn.2d at 754 (quoting Douglass, 115 Wn.2d at 179).

Moreover, impossible standards of specificity are not required. City of Seattle v. Eze, 111 Wn.2d 22, 26-27, 759 P.2d 366 (1988) (citing Kolender v. Lawson, 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). “Condemned to the use of words, we can never expect mathematical certainty from our language.” Grayned v. Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). “[I]f men of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement, it is not wanting in certainty.” State v. Maciolek, 101 Wn.2d 259, 265, 676 P.2d 996 (1984) (emphasis added).

For example, in Sanchez Valencia, this Court found a community custody prohibition on possessing or using “any paraphernalia that can be used for the ingestion or processing of controlled substances” was unconstitutionally vague because the phrase encompassed a virtually

limitless variety of commonplace items. 169 Wn.2d at 785, 793-95. But this Court noted that the more-specific phrase “drug paraphernalia” would not have been unconstitutionally vague. Id. at 794 (explaining that the mistake in affirming the condition was in erroneously reading the adjective “drug” into the condition). See also id. at 795 (J.M. Johnson, J., concurring) (“[a] ban on drug paraphernalia is sufficient to inform the petitioners of what is proscribed and prevent arbitrary enforcement”).

Similarly, the term “dating relationship,” along with the terms “date,” and “to date,” are common terms of ordinary understanding. The court of appeals here pointed to a commonly understood definition of “date” in this context as “an appointment between two persons” for “the mutual enjoyment of some form of social activity,” “an occasion (as an evening) of social activity arranged in advance between two persons.” 1 Wn. App. 2d at 95 (quoting Webster’s Third New International Dictionary 576 (2002)).⁵ This is not an unusual word or term for ordinary people to understand.

It follows, then, that the term “dating relationship” also is not indecipherable for ordinary people. While the term “relationship” — as

⁵ Webster’s dictionary includes the phrase “persons of the opposite sex” in its definitions in this context, but the court of appeals omitted those in quoting the dictionary, presumably to acknowledge same-sex dating relationships. The context remains the same.

with “paraphernalia” in Sanchez Valencia —is an expansive term encompassing a wide range of situations, the term “*dating* relationship” — as with “*drug* paraphernalia” — sufficiently narrows the range so as to provide fair warning of what an offender must report, and is definite enough to protect against arbitrary enforcement.

In her petition for review, Norris complained that the court of appeals mentioned in a footnote that the legislature has defined “dating relationship” in the context of domestic relations to mean “a social relationship of a romantic nature.” Petition for Review (PFR) at 10 (citing Norris, 1 Wn. App. 2d at 95 fn 6 (citing RCW 26.50.020(2))). The court of appeals did not use the statutory definition to conclude that the term is common and easily understood by ordinary people.

But it could have. This Court can look to other statutes in assessing the vagueness of a statute or community custody condition, because the other statutes are “[p]resumptively available to all citizens.” In re Pers. Restraint of Dyer, 164 Wn.2d 274, 295-96, 189 P.3d 759 (2008) (alteration in original) (internal quotation marks omitted) (quoting State v. Watson, 160 Wn.2d 1, 8, 154 P.3d 909 (2007)). And while the existence of a statutory definition alone might not provide sufficient notice, it can bolster a conclusion that a term is not unconstitutionally vague in the context it is used. Bahl, 164 Wn.2d at 760.

Norris imagines various scenarios that might confuse her or a community corrections officer. But “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.” Sanchez Valencia, 169 Wn.2d at 793 (internal quotation marks omitted). The law does not say that a condition is vague any time it is subject to hair-splitting.

Norris’s argument below principally relied on a single nonbinding federal case, United States v. Reeves, as “instructive.” 591 F.3d 77 (2d Cir. 2010). However, in Reeves, the condition at issue was to notify a probation officer of any “significant romantic relationship.” Id. at 80. The circuit court in Reeves found that the layers of adjectives left too much room for confusion about the scope of the requirement: “What makes a relationship ‘romantic,’ let alone ‘significant’ in its romantic depth, can be the subject of endless debate that varies across generations, regions and genders.” Id. at 81 (citing Mozart, Jane Austen, and Hollywood romantic comedies of the 1980’s and 2000’s).

However, as the court of appeals here readily identified, Norris’s condition to disclose “any dating relationship” is quite different from the condition in Reeves, which contains a highly subjective qualifier —

“significant” — and completely different adjectives.⁶ Norris’s invocation of Reeves is a false analogy.

Norris fails to show how the common term “dating relationship” is so ambiguous, subjective or confusing that an ordinary person cannot figure out what it means. This Court should affirm the court of appeals.

2. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY IMPOSING A COMMUNITY CUSTODY CONDITION PROHIBITING NORRIS FROM ENTERING SEX-RELATED BUSINESSES.

With passage of the Sentencing Reform Act of 1981 (SRA), our legislature gave sentencing courts limited discretion to impose “crime-related prohibitions” during an offender’s term of community custody, meaning they may prohibit “conduct that directly relates to the circumstances of the crime.” RCW 9.94A.703(3)(f); RCW 9.94A.030(10). Previously, sentencing judges had been using their sentencing power expansively “and a wide variety of affirmative conditions [had] commonly been required as a condition of probation.” State v. Barclay, 51 Wn. App. 404, 406, 753 P.2d 1015 (1988) (quoting DAVID BOERNER, SENTENCING IN WASHINGTON §4.4 (1985)).

⁶ Virtually identical vagueness challenges to the term “dating relationship,” chiefly relying on Reeves, were raised unsuccessfully in at least three other cases at the court of appeals before this Court accepted review of the issue here. See State v. Santiago, No. 74421-6-I, 2017 WL 5569209 at *6-*7 (Wash. Ct. App. Nov. 20, 2017); State v. Amaya-Ontiveros, No. 74356-2-I, 2017 WL 3225997 at *6-*7 (Wash. Ct. App. July 31, 2017); State v. Trotman, No. 74549-2-I, 2017 WL 1533240 at *5-*6 (Wash. Ct. App. April 24, 2017).

The intent was to narrow probation conditions to those that had a direct relationship to the crime itself and preventing its reoccurrence. Id.

Nonetheless, the appellate courts immediately recognized that “there is room for construction as to the scope of ‘directly relates’ and the meaning of ‘circumstances of the crime.’” Id. (quoting D. Boerner, §4.5).

While the terms were meant to be narrow, importantly:

The Act does not specify how certain the sentencing judge must be that the conduct being prohibited is directly related to the crime of conviction. ... The existence of such a relationship will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge.

Id. at 407 (quoting D. Boerner, §4.5).

So as appellate courts began considering crime-related conditions under the SRA, they afforded the sentencing courts latitude to decide what reasonably “relates” to the circumstances of each particular crime. For example, a general condition of obedience to the law was not “directly related” to the crime of car prowling. Barclay, 51 Wn. App. at 407. But a condition that a marijuana dealer refrain from drug use generally and submit to urinalysis was properly within the sentencing court’s discretion even though there was no evidence that he himself had ingested drugs. State v. Parramore, 53 Wn. App. 527, 532, 768 P.2d 530 (1989).

Thus, it long has been the standard in Washington that “no causal link need be established between the condition imposed and the crime

committed, so long as the condition relates to the circumstances of the crime.” State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) (prohibiting drug dealer from associating with other drug users or dealers sufficiently related to the crime). To the present day, our courts continue to recognize that a community-custody condition “need not exactly mirror the means and methods of the charged crime to be crime related.” State v. Gonzales, 1 Wn. App. 2d 809, 821, 408 P.3d 376 (2017).

For example, a molester of a four-year-old child could be prohibited from contact with all minors generally — even though there was no evidence he molested older children or teens. State v. Julian, 102 Wn. App. 296, 306, 9 P.3d 851 (2000). A man who raped his girlfriend’s 12-year-old daughter could be prohibited from having sex with *anyone* without prior approval because it was reasonably related to keeping the public safe from the circumstances of his crime — “potential romantic partners may be responsible for the safety of live-in or visiting minors.” State v. Autrey, 136 Wn. App. 460, 468, 150 P.3d 580 (2006).

To present, the appellate courts continue to respect the discretion of sentencing courts, who are in the best position to evaluate their individual cases, by reversing community-custody prohibitions only where there is “no evidence” of a reasonable relationship between the prohibition

and the circumstances of the crime. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015). If there is “some basis for the connection,” the condition should be upheld. Id. at 657. For example, a community-custody condition prohibiting a child molester from dating women with children was proper even though he had never victimized the children of women he dated. State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Typically, when the appellate courts have rejected conditions as not crime-related, the record is devoid of a reasonable rationale connecting the prohibition and the crime. For example, in State v. Letourneau, the court of appeals decided that former schoolteacher Mary Kay Letourneau could not be prohibited as part of community custody from profiting from her story of raping a young boy because, in part, there was no evidence she raped her victim in order to profit from telling the story, and such a prohibition bore no relation to keeping her from reoffending. State v. Letourneau, 100 Wn. App. 424, 435, 997 P.2d 436 (2000). In other words, there was no reasonable relationship to the circumstances of the crime *or to preventing the circumstances of crime from reoccurring*.

This Court, too, has recognized that the legislature entrusted sentencing judges with some latitude to consider whether a condition is “reasonably crime related” in each particular case. State v. Warren, 165

Wn.2d 17, 32-33, 195 P.3d 940, 947 (2008). That standard led this Court in Warren to conclude that a lifetime prohibition directing Warren to avoid contact with the mother of Warren's child-molestation and child-rape victims, even though the mother was not a victim, was not an abuse of discretion. Id.

But here, in State v. Norris — unlike in the consolidated case, Hai Minh Nguyen — the court of appeals strayed from its predecessors. It ignored the trial court's discretion to conclude there was a reasonable relationship between Norris's molestation of a child — a crime that involved having sex with a preteen boy and text-messaging sexually suggestive photos of herself to him — and entering businesses that peddle in sexual performance and sexually explicit materials.

By holding that a prohibition on entering sex-related businesses was not crime-related because there was “no evidence in the record” showing sex-related businesses were themselves involved in the commission of the crime, the appellate court here made two mistakes: (1) it contradicted its own holding in the same case affirming a prohibition on accessing sexually explicit material itself and (2) it imposed an unworkable and untenable narrowing of “related to the circumstances of the crime.”

Addressing the first mistake, Norris's case is somewhat different than Nguyen because here, the court of appeals found that sexually explicit material was actually involved in the commission of Norris's crimes, leading it to affirm the prohibition on accessing or possessing such materials. 1 Wn. App. 2d at 99 ("Norris and the ... boy had a code for sex, exchanged sex-related text messages, and Norris sent the boy 'a photo of herself in pants and a bra.'"). Id. That means that even under Norris's (and Nguyen's) erroneously narrow interpretation, the fact that sexually explicit material was itself a circumstance of the crime also supports the prohibition on entering sex-related businesses.

That is because the purpose of prohibiting sex offenders from entering sex-related businesses is not to keep them away from the business of sex or the buildings in which it is housed — it is to keep them away from sexually explicit material. So if a ban on accessing or viewing sexually explicit material is reasonably crime-related here, then so is a ban on entering businesses where the whole point is to view and access sexually explicit material. The two prohibitions are intertwined. This Court should reverse the court of appeals based on this contradiction alone.

Even so, the broader issue this Court should decide in this consolidated case is whether a community-custody prohibition is crime-

related only if its subject was itself involved in the commission of the crime, not just *related to* the circumstances, i.e., the nature of the offense. Norris's position, which the court of appeals here followed, essentially means that a community-custody prohibition is permissible only if the subject was itself directly involved in the crime.

To elaborate, Norris's argument (essentially the same as Nguyen's) is that because there was "no evidence that presence in or frequenting of a sex-related business had any connection with the crimes for which Norris was convicted," then the condition was not crime-related. Brief of Appellant at 8. She is essentially arguing that the term "related to" is meaningless, and that the subject of a prohibition itself must have been a circumstance of the crime to be related to the circumstances. This Court should reject this interpretation. The legislature is presumed to have used no superfluous words, and our courts must accord meaning, if possible, to every word in a statute. In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 10 P.3d 1034 (2000). If the legislature had wanted to restrict prohibitions to the actual means used in committing the crime, it would have said so. But it did not.

If taken to its logical conclusion, Norris's narrow interpretation would prevent any number of quite reasonable community-custody conditions that are important for public safety and preventing recidivism. For example, by Norris's (and Nguyen's) reasoning, a felon convicted of burglarizing a home by breaking a window could not be prohibited from possessing lock-picks or other burglary tools because they weren't used in that burglary. An arsonist who put a match to a pile of paper could not be prohibited from possessing explosives because explosives were not actually used in committing that arson fire. That reading of the statute would undercut the legislature's intent to prohibit "crime related" behavior and protect public safety. The more reasoned interpretation in these examples is that prohibiting the burglar from having lock-picks and the arsonist from possessing explosives would be directly and reasonably related to the circumstances of breaking into buildings and destroying them by fire.

The more measured and commonsense interpretation, which the court of appeals properly recognized in Nguyen, allows sentencing courts the discretion to look at the overall circumstances of each crime — including the criminal act itself — to impose reasonable prohibitions

aimed at preventing the circumstances of the crime from reoccurring.⁷

That means, as here, that a prohibition on entering sex-related businesses — to prevent access to sexually explicit material — is reasonably related to preventing the circumstances of sexually victimizing and objectifying a child. But Norris's rigid interpretation that requires those materials to have been actually utilized in the commission of the crime would prevent such reasonable conditions and endanger the public.

Last month, division three of the court of appeals took much the same position that the State does here, recognizing — in a very factually similar case — that it is well within the sentencing court's discretion to make a subjective determination whether a relationship exists between a sex crime and a prohibition on sexually explicit material. State v. Alcocer, C. The appeals court in Alcocer concluded that “it is not manifestly unreasonable for trial judges to restrict access to sexually explicit materials for those convicted of sex offenses” even if, as Alcocer argued, “sexually explicit material was not involved in his offenses.” 2018 WL 1415657 at *2. The appeals court explained:

⁷ The court of appeals in Nguyen concluded: “Here, Nguyen was convicted of rape of a child and child molestation based on numerous acts over several years. Viewed in a light most favorable to the State, these constituted acts of sexual deviancy involving the inability to control sexual conduct. Whether viewed under the sufficiency of the evidence or abuse of discretion standard, Nguyen's criminal conduct is reasonably related to restricting access to sexually explicit or erotic material because of the inherent sexual nature of the materials.” 2017 WL 3017516 at *6.

An individual who has been convicted of a sex offense has demonstrated an inability to control sexual stimulation and arousal. Accordingly, the State has a legitimate interest in restricting access to sexually explicit content in an effort to reduce recidivism. In addition, the sexual activity portrayed in pornography typically fails to model realistic behavior or affirmative consent by equal partners. The simple fact of a sex offense conviction is indicative of a defendant's manifest inability to process the complex messages sent by pornography in a healthy and legal manner. Just as the State has an interest in restricting access to explicit pornography by minors ... so too does it have a legitimate interest in restricting access to those convicted of sex offenses.⁸

Id.

This Court should similarly reject Norris's narrow reading of "directly relates to the circumstances of the crime" and hold that the trial court in this case did not abuse its discretion in imposing a prohibition on entering sex-related businesses because it reasonably relates to the circumstances of Norris's crimes of molesting a child.

⁸ The community-custody condition in Alcocer's case was not to "use or possess any pornographic materials, to include magazines, internet sites, and videos." The court of appeals, finding the term "pornographic materials" vague under Bahl, remanded the case for the superior court to change the restriction to limit use or possession of materials depicting "sexually explicit conduct" as defined in RCW 9.68A.011. This is much the same as the condition regarding sexually explicit material in both Nguyen's and Norris's cases.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm the decision of the court of appeals that the condition requiring Norris to report “any dating relationship” is not unconstitutionally vague and to reverse the lower court’s decision that a prohibition on entering sex-related businesses is not reasonably crime-related.

DATED this 11th day of April, 2018.

Respectfully submitted,

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