NO. 102635-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

J.H.-M.,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

LEESA MANION (she/her)
King County Prosecuting Attorney

IAN ITH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Federal:

Statutes

Washington State:

Rules and Regulations

Washington State:

A. INTRODUCTION

This Court has heard and settled this debate before. The issue is whether a convicted sex offender under community-custody supervision can be prohibited from possessing or viewing depictions of sexually explicit conduct without running afoul of the constitution. This Court has repeatedly answered in the affirmative. This case is no different.

Unfortunately, two paragraphs of a single published opinion of the Court of Appeals, State v. Sickels,[1] has created ambiguity as to whether a community-custody or supervision condition that prohibits a sex offender from possessing or viewing "material depicting any person engaged in sexually explicit conduct," as defined by statute, is unconstitutionally vague. Subsequent decisions by the Court of Appeals, including this one, have identified the flaws of reasoning in Sickels and declined to follow it. Still, the confusion persists, as evidenced by this petition for review.

---

[1] 14 Wn. App. 2d 51, 65-66, 469 P.3d 322 (2020).

The State of Washington respectfully asks this Court to summarily affirm the published opinion of the Court of Appeals in this case by overruling Sickels because it is plainly incorrect. Alternatively, this Court should accept review here, affirm this case and overrule Sickels.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

This case is in conflict with another published decision of the Court of Appeals, Sickels, which was plainly incorrect and can be easily overruled to settle the law.

C. STATEMENT OF THE CASE

In May 2020, J.H.-M. was adjudicated guilty in juvenile court of forcibly raping a girl in February 2020. CP 1, 19, 29-41; RP 30, 115, 350. The juvenile court imposed a Special Sex Offender Disposition Alternative of 30-40 weeks confinement, suspended for 24 months. RP 368, 374; CP 51.

When imposing disposition, the court declined to impose a standard condition relating to a prohibition on sexually explicit materials. RP 376. The State did not object to the court's decision. RP 376. Nonetheless, the written order entered did not strike the standard language concerning sexually explicit materials (condition 5) which says:

> 5. Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 *or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4)* unless given prior approval by your CSOTP.

CP 58 (emphasis added). J.H.-M. appealed the third clause of the condition (italicized above): "or any material depicting any

person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4)."

The Court of Appeals, in a published opinion, declined a State motion to concede error and instead affirmed the above clause as neither unconstitutionally vague nor overbroad. State v. J.H.-M., ___ Wn. App. 2d ___, 538 P.3d 644 (No. 84443-1-I (December 12, 2023)). In doing so, the Court of Appeals expressly declined to follow Sickels, as it had similarly declined in a recent unpublished decision.[2] The court pointed out that Sickels had incorrectly relied on this Court's opinion in State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018), which considered an entirely differently written condition prohibiting "pornographic materials" with no reference to any statute. J.H.-M., 538 P.3d at 647 (Slip. op. at 5-6). By contrast, the condition in J.H.-M.'s case is defined by RCW 9.68A.011(4) which "is sufficiently clear to apprise an ordinary

[2] State v. Wolff, No. 82806-1-I (unpublished, October 3, 2022), 2022 WL 4701555.

person of the proscribed conduct—regardless of whether those acts involve adults and are lawful or those acts involve children and are therefore criminalized by the statute." Id. Furthermore, "[t]he supervision condition is reasonable, related to the crime, and is designed to further J.H.-M.'s rehabilitation," and thus not overbroad. Id. at 648 (Slip op. at 6-7).

D. THIS COURT SHOULD SUMMARILY AFFIRM THIS CASE AND OVERRULE SICKELS, OR IT SHOULD ACCEPT REVIEW TO CLARIFY THAT THIS CONDITION IS NOT UNCONSTITUTIONAL

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. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). When determining whether challenged language is sufficiently definite to provide fair warning, the court must read the language in context and give it a "sensible, meaningful, and practical interpretation." City of Spokane v. Douglass, 115 Wn.2d 171, 180, 795 P.2d 693

(1990). 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). Impossible standards of specificity or mathematical certainty are not required to avoid a finding of unconstitutional vagueness "because some degree of vagueness is inherent in the use of language." State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993).

A statute is presumed constitutional, placing the burden on J.H.-M. to prove unconstitutionality beyond a reasonable doubt. State v. Myles, 127 Wn.2d 807, 812, 903 P.2d 979 (1995). A community custody condition that implicates material protected under the First Amendment to the United States Constitution is 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.

However, limitations on fundamental rights are permissible if they are sensitively imposed and narrowly tailored. State v. Johnson, 197 Wn.2d 740, 744-45, 487 P.3d 893 (2021). "[T]he interplay of sentencing conditions and fundamental rights is delicate and fact-specific, not lending itself to broad statements and bright line rules." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010). A juvenile court has broad authority to craft a disposition that furthers the goals of rehabilitation by imposing reasonable conditions that are related to the crime for which the offender was convicted. State v. K.H.-H., 185 Wn.2d 745, 755, 374 P.3d 1141 (2016).

This Court has repeatedly held that prohibiting sex offenders on community custody from viewing "sexually explicit" images, videos and the like — as opposed to "pornographic" material — does not offend the constitution. Bahl, 164 Wn.2d at 760; State v. Nguyen, 191 Wn.2d 671, 680, 425 P.3d 847 (2018); In re Pers. Restraint of Ansell, ___ Wn.2d

___, 533 P.3d 875, 882 (No. 100753-1, August 10, 2023). In Nguyen, this Court unequivocally said that the term "sexually explicit material" is not unconstitutionally vague, especially — but not necessarily — when "bolstered" by reference to a statutory definition. 191 Wn.2d at 680. This Court also directly rejected the argument that such a condition is not fair because "[c]ountless works of art, literature, film, and music explicitly describe, depict, and relate sex and sexuality. Id. Instead, this Court said, unequivocally, that persons of ordinary intelligence can discern "sexually explicit material" from works of art and anthropological significance. Id. at 680-81. Moreover, this Court said, unequivocally, that such a condition is appropriate in a sex-offense case because "[i]t is both logical and reasonable to conclude that a convicted person who cannot suppress sexual urges should be prohibited from accessing 'sexually explicit materials,' the only purpose of which is to invoke sexual stimulation." Id. at 686.

Similarly, in Ansell, this Court reaffirmed Nguyen to hold that an Indeterminate Sentencing Review Board (ISRB) condition prohibiting "possess[ing] or access[ing] sexually explicit materials," which included a definition that "[s]exually explicit materials consists of any item reasonably deemed to be intended for sexual gratification and which displays, portrays, depicts, or describes" various listed sex acts, scenarios, or nudity, was neither vague nor overbroad. 533 P.3d at 881.

Thus, the part of the condition that J.H.-M. complains about, "any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4)," is not constitutionally offensive either. This Court has settled the issue of whether a person of ordinary intelligence can understand what "sexually explicit" means. And the term is bolstered by a statutory definition that is lengthy and specific about what conduct is meant.[3] The court of appeals here

[3] "Sexually explicit conduct" means actual or simulated:

properly followed this Court's controlling authority to affirm the condition.

In other words, this debate should not be persisting. It should be settled. The problem is Sickels.

In Sickels, Division Three of the Court of Appeals considered a litany of challenges to multiple community-custody conditions imposed upon conviction of second-degree attempted child rape. 14 Wn. App. 2d at 56. The published

---

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation;

(d) Sadomasochistic abuse;

(e) Defecation or urination for the purpose of sexual stimulation of the viewer;

(f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer. RCW 9.68A.011(4).

opinion spent only two paragraphs — ten total sentences — addressing the identical "sexually explicit conduct as defined by RCW 9.68A.011(4)" clause of an identical condition.

Sickels hastily concluded that "Padilla is controlling authority that the definition incorporated from RCW 9.68A.011(4) is unconstitutionally vague" because in Padilla, a definition of "pornographic materials," — "images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts" — was itself vague. Sickles, 14 Wn. App. 2d at 65; Padilla, 190 Wn.2d at 681.

This flaw in reasoning is the cause of this persistent debate. Padilla cannot be "controlling authority" on a condition that is nothing like the condition considered in Padilla. Padilla found the phrase "pornographic materials" to be vague. 190 Wn.2d at 681-82. That does not appear in the condition here. Padilla found that the definition supporting "pornographic materials" was also vague because it included "display of intimate body parts," which could "extend[] to a variety of

works of arts, books, advertisements, movies, and television shows" and depicting nudity alone is not enough to make material legally obscene. Id. at 681 (citing Jenkins v. Georgia, 418 U.S. 153, 161, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974)).

But the definition in RCW 9.68A.011(4) does not include an unfettered prohibition on viewing nudity in general. It includes viewing *child* nudity "*for the purpose of sexual stimulation of the viewer*" and images of touching unclothed private parts "*for the purpose of sexual stimulation of the viewer*." RCW 9.68A.011(4)(f), (g) (emphasis added). In Ansell, this Court directly and very recently held that a prohibition on material defined as "reasonably deemed to be intended for sexual gratification" was not vague and that ordinary people could distinguish such images from movies like "Titanic," portrayals of nudity in works of art, or a drawing of the human anatomy in a medical textbook. 533 P.3d at 882. "An ordinary person would understand the intended purpose of those images is not for sexual gratification." Id. That, along

with Nguyen and Bahl, are the real controlling authority on this issue. Padilla cannot be "controlling authority" on a condition that does not include any of the constitutionally vague aspects that Padilla identified. The condition in this case is constitutional. Sickels' hasty conclusion has become problematic because it was published.

Two other panels of the court of appeals in Division One previously recognized the critical differences between Padilla and the condition here. State v. Dewitt, No. 78532-0-I, slip op. (Wash. Ct. App. Nov. 12, 2019), 2019 WL 5939444 at *5-*6 (unpublished) ("Unlike in Padilla, RCW 9.68A.011(4) is a narrow and more precise definition that eliminates the concerns expressed by the court in Padilla."); Wolff, 2022 WL 4701555 at *4 ("[w]e disagree with the statement [in Sickels] that 'Padilla is controlling authority that the definition incorporated from RCW 9.68A.011(4) is unconstitutionally vague'" because the "RCW 9.68A.011(4) definition was not at issue in Padilla; the prohibition in that case contained different language").

Now the Court of Appeals has published an opinion agreeing with that reasoning and pointing out Sickels' flaws. This Court should settle the matter by overruling Sickels on this issue.

This is not a complicated issue. This Court has addressed it several times already. Any additional briefing from the State would be essentially identical to that which is presented here. This Court would have no basis in law or reasoning to do as J.H.-M. asks and approve Sickels over this and the other well-reasoned appellate-court opinions. In fact, to do so would run directly counter to several recent well-reasoned opinions of this Court. Instead, this Court should simply summarily affirm the Court of Appeals' opinion here and overrule Sickels, and settle the matter for good. Or this Court can accept review (again, the State's briefing would not change appreciably in substance or length) to affirm here and overrule Sickels. Either way, this debate should not persist. It should be settled.

E. CONCLUSION

For the foregoing reasons, this Court should summarily affirm the court of appeals' opinion here and overrule Sickels. Alternatively, it should accept review to overrule Sickels and affirm the community-custody condition in J.H.-M.'s case.

This document contains 2322 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 14th day of December, 2023.

Respectfully submitted,

LEESA MANION (she/her)
King County Prosecuting Attorney

By: 
IAN ITH, WSBA #45250
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

December 14, 2023 - 2:24 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,635-8
Appellate Court Case Title:	State of Washington v. J.H-M.

The following documents have been uploaded:

- 1026358_Answer_Reply_20231214141952SC714913_5890.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 102635-8 STATES ANSWER TO PETITION FOR REVIEW.pdf

A copy of the uploaded files will be sent to:

- MoodyE@nwattorney.net
- Sloanej@nwattorney.net
- jimmy.hung@kingcounty.gov
- nielsene@nwattorney.net

Comments:

Sender Name: Bora Ly - Email: bora.ly@kingcounty.gov
Filing on Behalf of: Ian Ith - Email: ian.ith@kingcounty.gov (Alternate Email:)

Address:
King County Prosecutor's Office - Appellate Unit
W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
Phone: (206) 477-9499

Note: The Filing Id is 20231214141952SC714913