SUPREME COURT NO. 102635-8

NO. 84443-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

J.H.-M.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, JUVENILE DIVISION

The Honorable Richard Warner, Judge Pro Tem

PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner J.H.-M. seeks review of the Court of Appeals, Division One's, published decision in State v. J.H.-M., 84443-1-I (Op.), filed November 13, 2023, which is appended to this petition.

B. ISSUE PRESENTED FOR REVIEW

In a supervision condition barring J.H.-M.'s access to "sexually explicit conduct," a decontextualized reference to RCW 9.68A.011(4) results in a condition that bars child pornography "and the same acts involving adults." Op. at 7. Is this part of the condition vague and overbroad under State v. Padilla, 190 Wn.2d 627, 416 P.3d 712 (2018), because it can be read to sweep up mainstream depictions of sex in movies, television, and literature? (Yes. Division One's published opinion warrants review because it raises a question of constitutional law and substantial public interest, and it conflicts with Division Three's published decision in Pers. Restraint of Sickels, 14 Wn. App. 2d 51, 469 P.3d 322 (2020).)

C. STATEMENT OF THE CASE

A.C. and J.H.-M. met in middle school Spanish class. RP 95-96, 98-99. They sometimes talked at school, but they primarily communicated online, over Snapchat or Instagram. RP 100-04. Some of the communications were intimate. RP 113-14.

In February of 2020, when A.C. was a sophomore in high school and J.H.-M. was 15 years old, A.C. went to J.H.-M.'s apartment to retrieve $20 he owed her. RP 114-20, 165-67. The two had sexual intercourse. RP 132-40.

In April 2021, the State charged J.H.-M. with second-degree rape by forcible compulsion. CP 1, 19. The juvenile court held a fact-finding hearing in early May of 2022. RP 30.

The State argued J.H.-M. pursued A.C. online for months before luring her to his apartment and sexually assaulting her. RP 35-38. The defense argued it was a consensual encounter that

A.C. later regretted, and that she alleged rape so her mother would not discover the real source of her anxiety: a same-sex relationship she was having at the time. RP 42-43, 315-21

After closing statements, the judge announced he would take an extra day to make findings, telling J.H.-M., "I will say on the record, this is a close case for the court." RP 327-28. Ultimately, the court adjudicated J.H.-M. guilty as charged. CP 29-41; RP 350.

Consistent with the State's recommendation, the court imposed a Special Sex Offender Disposition Alternative (SSODA) consisting of 30-40 weeks' commitment, suspended for a 24-month supervision period. RP 368, 374; CP 51.

When it imposed the disposition, the court addressed each condition of supervision individually, reminding J.H.-M. that he would have to maintain employment and / or enrollment in school, comply with treatment requirements, and register, among other standard conditions. RP 374-76. The court expressly declined to impose one standard condition, however, relating to

sexually explicit materials. RP 376. With respect to that condition, the court stated:

> I am not going to impose the do not possess, use, access or view any sexually explicit material. I believe that is vague. The treatment provider will put conditions on that access. And if he or she believes it is inappropriate, you're going to follow their recommendations.

RP 376.

Despite that express ruling, the court's contemporaneous written order contains the following condition of supervision:

> 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 CSTOP.

CP 58 (condition 5).

Court of Appeals Decision

J.H.-M. appealed, arguing condition 5 was vague and overbroad, under Padilla, 190 Wn.2d 627, only insofar as it referenced RCW 9.68A.011(4). He sought only to strike that

reference, conceding the rest of the condition was consistent with First Amendment protections. Op. at 2.[1]

The State conceded the condition had been imposed in error, because the juvenile court did not intend to include it in the final disposition order. Op. at 2. The Court of Appeals, Division One, refused the State's concession and considered the issue on the merits. Op. at 2.

In a published opinion, Division One held that the reference to RCW 9.68A.011(4) in condition 5 covers materials that either (1) are illegal child pornography because they depict actual children engaged in sexual conduct or (2) depict adults engaged in the same conduct. Op. at 7. It further held that there

[1] This court upheld a condition with identical language in State v. Nguyen, 191 Wn.2d 671, 680, 425 P.3d 847 (2018). But Nguyen did not address any argument specific to RCW 9.68A.011(4), because the appellant did not raise one. 191 Wn.2d at 678-80. As Division Three recognized in Sickels, Nguyen did not address the argument J.H.-M. raises here. Sickels, 14 Wn. App. 2d at 65-66.

is nothing confusing or overbroad about this condition. Op. at 5-7.

Division One's opinion expressly disagrees with a 2020 published decision from Division Three, which addresses precisely the same condition and challenge. Op. at 5-6 & n.5 (citing Sickels, 14 Wn. App. 2d at 65-66).

A condition banning materials that *would be* illegal if they depicted actual children, but which depict only adults, is extremely confusing. Its potential chilling effect poses significant practical problems for both probationers and their supervising officers, with no benefit to public safety. Nevertheless, it appears trial courts impose this condition fairly frequently.[2]

[2] As noted, this was the condition at issue in Nguyen, 191 Wn.2d 671. Despite the constitutional problem recognized in Sickels, 14 Wn. App. 2d at 65-66, the condition appears regularly in sentencing orders. E.g., Matter of Carillo, noted at 19 Wn. App. 2d 1033, 2021 WL 4840818, at *4-*5; State v. Gray, 2019 WL 1900412, at *4-*6.

This Court should grant review, adopt Division Three's analysis, and thereby resolve the split of published authority over this constitutional question.

D. REASONS REVIEW SHOULD BE ACCEPTED

Division One's decision merits review under all four criteria in RAP 13.4(b). It conflicts with this Court's decision in Padilla, 190 Wn.2d 627, and Division Three's published decision in Sickels, 14 Wn. App. 2d 51, and it raises a significant question under the First Amendment. The decision also involves an issue of substantial public interest that should be determined by this Court, because the condition at issue here poses serious practical problems for individuals and their supervising officers.

1. The legislature drafted RCW 9.68A.011(4) to address child pornography, but condition 5 separates it from that context, so that it covers all depictions of "actual or simulated" sex and masturbation.

All three statutes referenced in condition 5 were drafted to address what we colloquially call "obscene" or "pornographic" materials. RCW 9.68.130 (regulating unlawful display of

"sexually explicit material"); Soundgarden v. Eikenberry, 123 Wn.2d 750, 756-60, 871 P.2d 1050 (1994) (RCW 9.68.050(2) codifies federal constitutional test for obscenity as to minors); State v. Gray, 189 Wn.2d 334, 343, 402 P.3d 254 (2017) (chapter 9.68A RCW enacted to combat child pornography).

But the plain terms of the third statute—RCW 9.68A.011(4)—sweep up a far broader range of material than the first two statutes do. Unlike the first two statutes referenced in condition 5, RCW 9.68A.011(4) contains no language excluding works of art or anthropological significance.[3] Its plain terms include, among other things, any depiction of "actual or

[3] Compare RCW 9.68A.011(4) with RCW 9.68.130(2) (defining "'sexually explicit material'" to exclude "works of art or of anthropological significance"); RCW 9.68.050(2) (defining "'erotic material'" to include only that which is "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value").

simulated . . . [s]exual intercourse . . . [or m]asturbation." RCW 9.68A.011(4)(a)-(c).[4]

[4] The full text of RCW 9.68A.011(4) reads:

"Sexually explicit conduct" means actual or simulated:

> (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 knew 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.

This broad sweep makes sense because—unlike the first two statutes referenced in the condition—RCW 9.68A.011(4) was drafted to address *child* pornography. RCW 9.68A.001. In this statutory context, the broad definition of "sexually explicit conduct" in RCW 9.68A.011(4) sweeps up only depictions of minors. State v. Stellman, 106 Wn. App. 283, 289-90, 22 P.3d 1287 (2001) (quoting State v. D.H., 102 Wn. App. 620, 625-26, 9 P.3d 253 (2000)).

But this limiting principle is apparent only when one reads RCW 9.68A.011(4) together with the other provisions in chapter 9.68A RCW.[5] As Division One acknowledged in this case, J.H.-M.'s condition 5 takes RCW 9.68A.011(4) out of that context, broadening it to include *all* depictions of sex and masturbation—

[5] E.g., RCW 9.68A.070(1)(a) ("a person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly possesses a visual or printed matter depicting *a minor* engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e)") (emphasis added).

or at least all those that are, in Division One's unelaborated phrasing, "unequivocally sexual." Op. at 7.

2. The reference to RCW 9.68A.011(4) in condition 5 has created a split of published authority: Division Three holds that it violates the First Amendment principles recognized in Padilla; Division One holds that it does not.

In State v. Padilla, 190 Wn.2d at 681, Mr. Padilla challenged a condition prohibiting his access to or possession of "pornographic materials," defined as "images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts." Id. at 679 (internal quotations omitted). This Court struck the condition as vague and overbroad. Id. at 674-81.

In doing so, this Court explained that the constitutional prohibition on vague conditions serves three purposes: (1) providing notice of what is prohibited; (2) preventing arbitrary enforcement by the CCO; and (3) protecting against a chilling effect, in the context of First Amendment freedoms, whereby the cautious defendant "will steer '"far wider"' than necessary in

order to ensure compliance." Id. at 679 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (quoting Baggett v. Bullitt, 377 U.S. 360, 372, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964)). It held the "pornographic material" condition implicated all three, by "encompass[ing] a broad range of speech protected by the First Amendment":

> The condition defines 'pornographic materials' as '*images of sexual intercourse, simulated or real, masturbation*, or the display of intimate body parts.' Padilla notes that *the prohibition against viewing depictions of simulated sex would unnecessarily encompass movies and television shows not created for the sole purpose of sexual gratification*. Films such as Titanic and television shows such as Game of Thrones depict acts of simulated intercourse, but would not ordinarily be considered 'pornographic material.' We agree.

Id. at 681 (emphases added).

There is absolutely no difference between the "actual or simulated . . . [s]exual intercourse . . . [or] [m]asturbation," prohibited by condition 5,[6] and the "images of sexual intercourse,

[6] RCW 9.68A.011(4)(a)-(c).

simulated or real, [or] masturbation," addressed in Padilla, 190 Wn.2d at 679. Division Three recognized this in Sickels, 14 Wn. App. 2d at 64-66, where it held that the reference to RCW 9.68A.011(4) in condition 5 violates the First Amendment principles recognized in Padilla: "Padilla is controlling authority that the definition incorporated from RCW 9.68A.011(4) is unconstitutionally vague." Id. at 65-66.

In both J.H.-M.'s case and the prior, unpublished decision, State v. Wolff, noted at 23 Wn. App. 2d 1036, 2022 WL 4701555, at *4, Division One rejected the Sickels analysis. Op. at 5-6. It purported to distinguish Padilla on two bases: first "the condition at issue in Padilla did not reference RCW 9.68A.011(4)"; second, "RCW 9.68A.011(4) provides a list of prohibited acts," and is therefore supposedly clearer than the vague condition in Padilla. Op. at 5-6.

But the "list of prohibited acts" in RCW 9.68A.011(4) includes acts that Padilla held vague and overbroad—specifically, the acts of simulated sexual intercourse and

masturbation. Even if they are included in a "list," these "acts" still occur in countless mainstream television shows and movies. And this is precisely the constitutional problem identified in Padilla.

3. This Court should grant review and affirm Division Three's analysis because the reference to RCW 9.68A.011(4) causes serious practical problems.

Individuals subject to community custody may challenge conditions, on vagueness grounds, before they are actually enforced. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). Accordingly, the case law addressing these challenges typically deals in hypotheticals—courts must speculate as to how any individual state officer might interpret the condition at issue. E.g., Padilla, 190 Wn.2d at 682 (quoting Bahl, 164 Wn.2d at 755 (quoting United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002) (observing that """vague prohibition on may ultimately translate to a prohibition on whatever the officer personally finds

titillating”””). In this case, however, no such speculation is necessary.

Undersigned counsel has recently handled two challenges to this condition. In so doing, she has observed a disorienting range of interpretations by various state agents.

As noted, the juvenile court in J.H.-M.’s case found the condition vague. RP 376.

At oral argument in Wolff, 2022 WL 4701555, the prosecutor argued the condition covered (and therefore prohibited) mainstream television and movies with occasional sex scenes, and that community custody officers should resolve the inherent resulting ambiguities on an ad hoc, case-by-case basis. Wash. Court of Appeals oral argument, State v. Wolff, No. 82806-1-I (June 3, 2022), audiovisual recording by TVW, Washington State’s Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2022061027/?eventID=2022061027, at 12 min. 07 sec.

When Division One issued its decision in Wolff, it failed to clarify whether it agreed with the prosecutor's broad interpretation of condition 5.

At pages *3-*4 and footnote 3, the Wolff court agreed that the reference to RCW 9.68A.011(4) in the community custody condition might sweep up "'contact such as simulated sexual intercourse that—engaged in by adults—*appears in mainstream media*.'" Wolff, 2022 WL 4701555 (quoting Sickels, 14 Wn. App. 2d at 65) (emphasis added). But then, at page *4, the Wolff decision concluded that the very same reference is not overbroad because—read *as if* it were *not* divorced from its statutory context—it sweeps up only child pornography. Id.

When J.H.-M. brought his challenge to condition 5, he asked Division One to clarify this ambiguity. The resulting published opinion holds that condition 5 bans depictions of any person, including an adult, engaging in conduct whose depiction would be illegal child pornography if it involved actual children. Op. at 7 ("condition [5] . . . prohibits access to a broad variety of

content depicting sexually explicit conduct, including conduct made unlawful by RCW 9.68A.011(4) and the same acts involving adults").

Undersigned counsel still cannot tell if this includes sexually explicit scenes within mainstream movies and television.[7] This uncertainty makes it impossible to effectively advise clients subject to this condition.

When such an individual is watching a movie with friends, family, or his intimate partner, and a sex scene begins, should he leave the room? If so, what content is sufficiently explicit to trigger that obligation? If the individual stays in the room and watches the scene, should he be nervous when he takes his next polygraph examination? And, if he "fails" a subsequent

[7] Division One cites to Nguyen, in its concluding analysis, for the principle that courts may prohibit convicted sex offenders from accessing materials whose "only purpose . . . is to invoke sexual stimulation." Op. at 7 (quoting 191 Wn.2d at 686). J.H.-M. agrees that such a prohibition is consistent with First Amendment protections. The problem is that condition 5 has no such limiting language.

polygraph question about sexually explicit materials, how will his community custody officer view the explanation? Will the officer regard the sex scene as prohibited material? Or will the officer disregard the polygraph result and reassure his supervisee? Should the officer even believe this innocent explanation? Or, in an abundance of caution, should the officer arrest the supervisee and let the hearing process play out?

This uncertainty is unfair to everyone affected by the community custody and juvenile probation regime: neither the supervisee nor the officer charged with enforcement should have to guess what the State demands of them. See State v. Johnson, 197 Wn.2d 740, 748, 487 P.3d 893 (2021) (conditions must be sufficiently specific to prevent arbitrary enforcement); Padilla, 190 Wn.2d at 679 (First Amendment doctrine guards against the "natural[] inhibit[ion]" that occurs when "individuals who are uncertain of the meaning of a statute will steer far wider than necessary in order to ensure compliance") (internal quotations omitted).

This uncertainty is also completely unnecessary. As this Court very recently observed, the State may prohibit convicted sex offenders from accessing "materials . . . reasonably deemed to be *intended for* sexual gratification." Matter of Ansell, 1 Wn.3d 882, 533 P.3d 875, 881-82 (2023) (internal quotations omitted, emphasis added). Inserting such qualifying language into condition 5 would solve the problem at issue here. This Court should grant review and direct an equivalent result.

E. CONCLUSION

There is a split of published authority over the reference to RCW 9.68A.011(4) in J.H.-M.'s condition 5. Division Three holds that it violates the First Amendment principles articulated in Padilla; Division One holds that it does not. Division One's analysis does not withstand scrutiny. This Court should grant review and hold that a condition banning all depictions of simulated sexual intercourse or masturbation is vague and overbroad.

I certify that this document was prepared using word processing software and contains 3,019 words excluding the parts exempted by RAP 18.17.

DATED this 12th day of December, 2022.

Respectfully submitted,
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FILED
11/13/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. J.H.-M., Appellant.	No. 84443-1-I DIVISION ONE PUBLISHED OPINION

CHUNG, J. — J.H.-M. was adjudicated guilty of rape in the second degree by forcible compulsion. His disposition included a condition of supervision prohibiting access to sexually explicit material "depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4)." J.H.-M. contends this condition is unconstitutionally vague and overbroad. We disagree and affirm.

FACTS

J.H.-M. was charged with one count of rape in the second degree by forcible compulsion based on an incident that occurred when the victim was 16 years old and J.H.-M. was 15 years old. The court adjudicated J.H.-M. guilty as charged and imposed a Special Sex Offender Disposition Alternative suspended for a 24-month supervision period. When imposing the disposition, the court addressed each condition of supervision with J.H.-M. The court specifically declined to provide a prohibition on sexually explicit material:

> I am not going to impose the do not possess, use, access, or view any sexually explicit material. I believe that is vague. The

> treatment provider will put conditions on that access. And if he or she believes it is inappropriate, you're going to follow their recommendations.

However, the State prepared conditions of supervision in the disposition that included this prohibition:

> 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 (Certified Sex Offender Treatment Provider).

J.H.-M. appeals, arguing that the language "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" is unconstitutionally vague and overbroad. He requests remand to strike that clause of the condition.

Acknowledging that the court had verbally stated it would decline to impose the condition, the State filed a motion to concede error and requested remand for correction and to strike the condition in its entirety. A panel of this court denied the motion. We now consider J.H.-M.'s constitutional arguments and the requested relief to strike only the clause relating to sexually explicit conduct as defined by RCW 9.68A.011(4).

DISCUSSION

Juvenile rehabilitation is an underlying purpose of the Juvenile Justice Act of 1977, chapter 13.40 RCW. State v. K.H.-H., 185 Wn.2d 745, 754, 374 P.3d 1141 (2016). To that end, "a juvenile court can impose and require reasonable

conditions that are related to the crime of which the offender was convicted and that further the reformation and rehabilitation of the juvenile." Id. at 755.

Juvenile courts have broad authority and discretion to craft dispositions that "adhere to the legislative intent of rehabilitation and crime-relatedness." Id. We review conditions for abuse of discretion and will reverse if a condition is manifestly unreasonable. State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). A trial court abuses its discretion if it imposes an unconstitutional condition. State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019).

I. Vagueness

J.H.-M. contends that the condition prohibiting "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" is unconstitutionally vague. A sentencing 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). When considering the meaning of a community custody condition, "the terms are not considered in a 'vacuum,' rather, they are considered in the context in which they are used." State v. Bahl, 164 Wn.2d 739, 754, 193 P.3d 678 (2008). "If persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite." City of Spokane v. Douglass, 115 Wn.2d 171,

179, 795 P.2d 693 (1990), quoted in State v. Nguyen, 191 Wn.2d 671, 679, 425 P.3d 847 (2018).

A community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the point at which the actions would be classified as prohibited. Nguyen, 191 Wn.2d at 679. However, 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 prevent a chilling effect on the exercise of those rights. Bahl, 164 Wn.2d at 753.

As defined by the dictionary, "sexually explicit" means "clearly expressed sexual materials or materials that are unequivocally sexual in nature." Bahl, 164 Wn.2d at 758-59. Applying this definition, the condition prohibits J.H.-M. from accessing material showing conduct that is "unequivocally sexual in nature." The condition provides additional explanation of the type of material prohibited by incorporating the definition of "sexually explicit conduct" from RCW 9.68A.011(4).[1] In particular, RCW 9.68A.011(4) clarifies that "sexually explicit conduct" includes both actual or simulated conduct.

[1] RCW 9.68A.011(4) includes the following definition:

"Sexually explicit conduct" means actual or simulated:
(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;

J.H.-M. urges this court to adopt the reasoning of Division Three in In re Pers. Restraint of Sickels, which relied on the Supreme Court's decision in Padilla:

> In Padilla, our Supreme Court found a prohibition on viewing " 'images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts' " vague, in part because mainstream films and television shows depict simulated sexual intercourse. Padilla is controlling authority that the definition incorporated from RCW 9.68A.011(4) is unconstitutionally vague.

14 Wn. App. 2d 51, 65-66, 469 P.3d 322 (2020) (quoting Padilla, 190 Wn.2d at 681). He also expressly disagrees with this court's decision in State v. Wolff, No. 82806-1-I (Wash. Ct. App. Oct. 3, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/828061.pdf, where we held that the same condition regarding "sexually explicit material" was not unconstitutional. We again decline the invitation to follow Sickels[2] and instead follow the reasoning in State v. Wolff.[3]

Sickels's reliance on Padilla is misplaced. The condition at issue in Padilla did not reference RCW 9.68A.011(4). More importantly, Padilla concluded the condition at issue was vague not merely because it encompassed movies and television shows not ordinarily considered "pornographic materials," but because

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(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.

[2] We are not bound by Division Three's decision in Sickels. See In re Pers. Restraint of Arnold, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018).

[3] Although Wolff is an unpublished opinion, we may properly cite and discuss unpublished opinions where, as here, doing so is "necessary for a reasoned decision." GR 14.1(c).

that breadth failed to provide adequate notice of the prohibited behavior. 190 Wn.2d at 681-82. In contrast, RCW 9.68A.011(4) provides a list of prohibited acts. While it defines a broad range of acts, RCW 9.68A.011(4) is sufficiently clear to apprise an ordinary 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.

The concern with community custody conditions that may interfere with First Amendment rights is that they must be sufficiently definite so as "to prevent a chilling effect on the exercise of those rights." Bahl, 164 Wn.2d at 753. The fact that the condition at issue prohibits certain actual or simulated acts by adults does not make the condition vague, even if such acts are not unlawful under the referenced statute. J.H.-M.'s challenge is more properly stated as an overbreadth challenge. The supervision condition defining "sexually explicit conduct" by reference to RCW 9.68A.011(4) is not unconstitutionally vague.

II. Overbreadth

We turn next to J.H.-M.'s challenge to the condition as overbroad. An overbreadth challenge "goes to the question of whether State action is couched in terms so broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well." In re Sickels, 14 Wn. App. 2d at 67. 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). Additionally, 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. K.H.-H., 185 Wn.2d at 755.

Here, the condition of supervision prohibits access to a broad variety of content depicting sexually explicit conduct, including conduct made unlawful by RCW 9.68A.011(4) and the same acts involving adults. The court adjudicated J.H.-M. guilty of rape in the second degree by forcible compulsion. In light of this disposition for a sex offense, limiting access to sexually explicit materials, whether the materials depict acts involving children or adults, is related to the goal of rehabilitation. As our Supreme Court has acknowledged, "[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." Nguyen, 191 Wn.2d at 686 (affirming condition prohibiting possession or viewing of "sexually explicit materials" where crimes of conviction were child rape and molestation). The supervision condition is reasonable, related to the crime, and is designed to further J.H.-M.'s rehabilitation. It is not overbroad.[4]

[4] An unpublished Division Three case relied on Sickels to conclude that the same language at issue in the condition here was both vague and overbroad. Matter of Pers. Restraint of Huezo, No. 38697-0-III, slip. op. at 29-30 (Wash. Ct. App. June 29, 2023)

Affirm.

Chung, J.

WE CONCUR:

Díaz, J.

Smith, C.J.

(unpublished), https://www.courts.wa.gov/opinions/pdf/386970_unp.pdf. The court reasoned simply that "sexually explicit conduct," defined to mean "actual or simulated" conduct under RCW 9.68A.011(4), was "couched in terms so broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well." We find this reasoning unconvincing, as it relies on the same error in Sickels' analysis: that because the condition impinges on constitutionally protected activity, it is unconstitutional. Our Supreme Court has stated otherwise. See, e.g., Johnson, 197 Wn.2d at 744-45 (limitations on fundamental rights are permissible if they are sensitively imposed and narrowly tailored).

NIELSEN KOCH & GRANNIS P.L.L.C.

December 11, 2023 - 5:20 PM

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