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NO. 34928-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON JOHNSON,

Appellant.

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

The Honorable Alexander C. Ekstrom, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR<sup>1</sup>

The community custody conditions restricting Johnson's access to sex-related businesses and sexual materials are not crime-related, unconstitutionally vague, and violate Johnson's First Amendment right to free speech.<sup>2</sup> CP 41 (conditions 17-20).

Issues Pertaining to Supplemental Assignment of Error

1. Are the community custody conditions restricting Johnson's access to sex-related businesses and sexual materials unconstitutionally vague because they fail to provide adequate notice as to what conduct is prohibited and allows for arbitrary enforcement?

2. Are the community custody conditions restricting Johnson's access to sex-related businesses and sexual materials unconstitutionally overbroad because they encompass a substantial amount of material protected by the First Amendment, without being narrowly tailored or even reasonably related to the offense?

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<sup>1</sup> On May 10, 2018, this Court ordered a supplemental brief to be filed by May 31 addressing the applicability of the Washington State Supreme Court decision in State v. Padilla, \_\_\_ Wn.2d \_\_\_, 416 P.3d 712, 2018 WL 2144529 (slip. op. filed May 10, 2018).

<sup>2</sup> Whether a community custody condition requiring that an offender convicted of child sex crimes not “possess, use, access or view any sexually explicit material” as a condition of community custody is unconstitutionally vague and/or “crime-related” when there is no evidence that the offender used such materials in the commission of his crimes, is also currently pending before the Washington State Supreme Court in State v. Nguyen (No. 94883-6). Oral argument in that case was heard on May 10, 2018.

B. SUPPLEMENTAL STATEMENT OF THE CASE

The applicable facts are set forth in the appellant's opening brief, with supplemental facts cited in the argument section below.<sup>3</sup>

C. SUPPLEMENTAL ARGUMENT

THE CONDITIONS RELATING TO SEXUAL BUSINESSES AND MATERIALS FAIL TO DEFINE THE PROHIBITION WITH SUFFICIENT DEFINITENESS AND INVITES ARBITRARY ENFORCEMENT, RENDERING IT VAGUE, AND SWEEPS IN TOO MANY FIRST AMENDMENT MATERIALS, RENDERING IT OVERBROAD<sup>4</sup>

Under the due process vagueness doctrine, community custody conditions must provide fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The due process clause also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstein, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is unconstitutionally vague if (1) it is not sufficiently definite so that ordinary persons can understand what it proscribes or (2) it does not provide ascertainable standards of guilt to protect against arbitrary

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<sup>3</sup> Johnson incorporates by reference the assignments of error, statement of the case, and arguments contained in his opening brief of appellant, filed on May 22, 2017.

<sup>4</sup> If the court agrees that the prohibitions on sexually explicit materials and sex-related businesses are not crime-related on statutory grounds, there is no need to reach Johnson's constitutional challenges. See Cnty. Telecable of Seattle, Inc. v. City of Seattle, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008).

enforcement. Bahl, 164 Wn.2d at 752-53. Conditions 17-20 fail under both prongs.

“When a statute is vague and arguably involves protected conduct, vagueness analysis will necessarily intertwine with overbreadth analysis.” United States v. Loy, 237 F.3d 251 n.2 (3d Cir. 2001). Even where an enactment is "clear and precise" it may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct. Grayned v. City of Rockford, 408 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). “A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities.” City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). To determine overbreadth, courts consider whether the condition prohibits a real and substantial amount of constitutionally protected speech relative to its legitimate sweep. State v. Riles, 135 Wn.2d 326, 346, 957 P.2d 655 (1998), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010); State v. Homan, 191 Wn. App. 759, 767, 364 P.3d 839 (2015).

“Limitations upon fundamental rights are permissible, provided they are imposed sensitively.” State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). When a condition “concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms.” Bahl, 164 Wn.2d at

753. “[A] stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition.” Id.

Sexually explicit materials, erotic materials, and depictions of sexually explicit conduct are protected by the First Amendment. Sexually explicit materials, such as adult pornography, are protected by the First Amendment. State v. Perrone, 119 Wn.2d 538, 551, 834 P.2d 611 (1992). Pornographic drawings, even of children, are also constitutionally protected. Id. (citing New York v. Ferber, 458 U.S. 747, 764-65, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)). “Books, films, and the like are *presumptively* protected by the First Amendment . . . .” Id. at 550 (citing Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 109 S. Ct. 916, 103 L. Ed. 2d. 34 (1989)). Paintings, music, poetry, and other such works are “unquestionably shielded” by the First Amendment. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).

When a sentencing condition limits an offender’s fundamental rights under the First Amendment, the condition “must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant’s rehabilitation.” Bahl, 164 Wn.2d at 757. When it touches First Amendment freedoms, the condition “must be clear and must be reasonably necessary to accomplish essential state needs and

public order.” Id. at 758. Washington courts have routinely required community custody conditions that place restrictions on fundamental rights, including First Amendment rights, to be narrowly tailored. E.g., In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010) (fundamental right to parent); State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008) (fundamental right to marriage); Bahl, 164 Wn.2d at 757-58 (freedom of speech); Riles, 135 Wn.2d at 346-50 (freedom of association); Riley, 121 Wn.2d at 37-38 (same); State v. Moultrie, 143 Wn. App. 387, 398-99, 177 P.3d 776 (2008) (freedom of speech and association).

Here the sexual material and business conditions are so broad—sweeping within its reach a significant amount of material protected by the First Amendment—that they do not give fair notice of what is allowed and what is disallowed, and therefore are unconstitutionally vague and overbroad. See CP 41 (conditions 17-20).

State v. Padilla, \_\_\_ Wn.2d \_\_\_, 416 P.3d 712 (2018), 2018 WL 2144529 (slip. op. filed May 10, 2018) is instructive in this regard. Padilla was convicted of communication with a minor for immoral purposes by electronic communication. Padilla, Slip. op. at 4. The evidence introduced at trial showed Padilla used a fictitious Facebook profile to send sexually explicit messages to nine-year-old K.M. Id. at 2-3.

On appeal, Padilla challenged the trial court's imposition of the following community custody condition:

Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer...Pornographic materials are defined as images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts.

Padilla, Slip. op. at 2, 4.

Padilla argued the term "pornographic materials" was unconstitutionally vague and that the provided definition did not save the condition from vagueness, because it encompassed a broad range of speech protected by the First Amendment. Padilla, Slip. op. at 1-2. The Supreme Court agreed. Id. at 2, 15.

The Court noted that the Padilla's prohibition against viewing simulated sex would encompass movies and television shows not ordinarily considered pornographic material. Padilla, Slip. op. at 10-11. Similarly, the Court found the prohibition against viewing depictions of intimate body parts impermissible because it extended to a variety of works of art, books, advertisements, movies, and television shows. Padilla, Slip. op. at 11.

The Court also found problematic the practical application of Padilla's pornographic condition because it did not provide adequate notice of what behaviors Padilla was prohibited from committing and

therefore left him vulnerable to arbitrary enforcement. As the Court noted, the definition of pornographic material also encompassed prohibited constitutionally protected speech. Padilla, Slip. op. at 11-12.

Finally, the Padilla Court concluded that there was no connection between Padilla's inappropriate messaging and imagery of adult nudity or simulated intercourse. As such, the pornography condition was neither sufficiently crime related nor reasonably necessary to accomplish the essential needs of the state and public order. Padilla, Slip. op. at 13-15.

For all these reasons, the Court reversed the Court of Appeals' decision upholding the condition and remanded to the trial court for further definition of the term "pornographic materials" following a determination of whether the restriction is narrowly tailored based on Padilla's offense. Padilla, Slip. op. at 14-15.

As in Padilla, here conditions 17-20 impact Johnson's ability to read certain books, view a certain paintings or films, or listen to certain songs. This broad blanket ban not only fails to provide adequate notice of what behaviors Johnson is prohibited from committing, but it also encompasses the prohibition of constitutionally protected speech under the First Amendment. Each of these conditions is therefore intolerably vague and overbroad.

Conditions 17 and 19 prohibit Johnson from possessing or viewing "material" that depict images of nudity or persons engaging in "sexual acts."<sup>5</sup> CP 41. The terms "material" and "sexual acts" are not defined and therefore allow for arbitrary enforcement. A creative corrections officer, or court, could recite several films, books, artworks, advertisements, songs, and other materials that arguably fall within the prohibition. Just as in Padilla, these prohibitions raise just as many questions. Can Johnson own the movie *Titanic*? Can he see *Schindler's List* in a theater? Can he watch a movie or television show at home that includes simulated intercourse? Can he own a medical textbook of human anatomy? Can he visit the Seattle Art Museum? Can he go to the public library to view a book containing Georgia O'Keeffe paintings, which arguably depict female genitalia? Can he display a print of Michelangelo's *The Creation of Adam* in his home? Can he read a magazine containing a Victoria's Secret advertisement? Conditions 17 and 19 encompass just as wide a range of arbitrary enforcement as the conditions at issue in Padilla.

Moreover, Johnson was convicted of a child sex offense and yet the sentencing court prohibited access to any all sexually explicit or erotic materials, including businesses portraying sexual material. CP 41

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<sup>5</sup> Although RCW 9.68A.011 criminalizes depictions of *minors* engaged in sexually explicit conduct, the conditions at issue here do not separate such depictions from those involving adults. CP 41 (conditions 17, 19, 20).

(conditions 17, 19, 20). Conditions 17 and 19 reach a considerable amount of protected speech because they do not distinguish between adult or child pornography, or artistic and obscene material. The prohibition against attending businesses involving sexual material also encompasses just as much protected as unprotected speech. CP 41 (condition 20). As in Padilla, here the State has also failed to show how restricting Johnson's access to "materials" and/or businesses which involve adult movies, books, or adult nudity, is necessary to achieve the State's needs or protect the public. There is no evidence that Johnson used artwork, movies, adult nudity, or any of the other protected speech described above to facilitate the offense.

Finally, under Padilla, the restriction on Johnson's access to "material" depicting children wearing swimwear or undergarments is equally insufficient and definite to distinguish between what is prohibited and what is allowed and therefore fails the vagueness test. CP 41 (condition 18). In Padilla, not even the inclusion of a vague definition as to what constituted "pornographic material" could save the condition from being unconstitutionally vague. Here, the prohibition against any "material" is even less informative and subjects Johnson to arbitrary and discriminatory enforcement.

As discussed above, the conditions prohibiting Johnson's access to sexual material and businesses fail because those conditions broadly encompass movies, television, books, advertisements, and works of art. Condition 18 encompasses just as wide a range of protected material as those at issue in Padilla.

In sum, conditions 17-20 are insufficiently definite and invite arbitrary enforcement and there are unconstitutionally vague. The conditions also impermissibly chill Johnson's First Amendment rights and therefore must be stricken as unconstitutionally overbroad.

D. CONCLUSION

For the reasons stated above, and in the opening brief, Johnson respectfully asks this Court to strike the unconstitutionally vague and overbroad community custody conditions, and remand to the trial court for resentencing.

DATED this 30<sup>th</sup> day of May, 2018.

Respectfully submitted,

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