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STATE OF WASHINGTON

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NO. 82731-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ISIDRO SANCHEZ VALENCIA,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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STATE OF WASHINGTON

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ASSIGNMENT OF ERROR

Assignment of Error

The court of appeals erred when it held that the ripeness criteria set in *State v. Bahl* only apply to pre-enforcement challenges of community custody conditions that violate the United States Constitution, First Amendment.

Issues Pertaining to Assignment of Error

Are the ripeness criteria set in *State v. Bahl* applicable only to pre-enforcement challenges to community custody conditions that violate the United States Constitution, First Amendment?

STATEMENT OF THE CASE

By information filed October 26, 2006, the Clark County Prosecutor charged eight different individuals, including petitioners Isidro Valencia and Eduardo Sanchez, with possession of marijuana with intent to deliver and conspiracy to deliver marijuana. CPV 1-4; CPS 1-4.¹ Petitioners' cases later went to a joint trial, after which the jury returned verdicts of guilty on both charges against both petitioners. CPV 62-64; CPS 98-99.

The trial court later sentenced both petitioners within the standard range, imposed community custody, and then set community custody conditions that included the following:

- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CPV 106; CPS 112.

After sentencing, both petitioners filed timely notices of appeal, arguing in part, that this community custody condition was void for vagueness. CPV 116; CPS 104. By decision filed January 13, 2009, Division II of the Court of Appeals refused to address this argument, finding

¹“CPV” stands for Clerk’s Papers in Petitioner Valencia’s case. “CPS” stands for Clerk’s Papers in Petitioner Sanchez case.

that under its previous decision in *State v. Motter*, 139 Wn.App. 797, 162 P.3d 1190 (2007), this argument was not ripe for review. By order entered July 7, 2009, this court accepted review.

ARGUMENT

THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE RIPENESS CRITERIA SET IN *STATE v. BAHL* ONLY APPLY TO PRE-ENFORCEMENT CHALLENGES OF COMMUNITY CUSTODY CONDITIONS THAT VIOLATE THE FIRST AMENDMENT.

In the petition for review filed in this case, appellant Valencia presented an analysis of this court's decision in *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008), and the four criteria this court set for analyzing the ripeness of pre-enforcement challenges to community custody issues imposed in criminal sentences under the Sentencing Reform Act. Appellant then presented argument that in the case at bar (1) the Court of Appeals, Division II, had failed to follow the criteria from *State v. Bahl, supra*, by creating a new requirement beyond those set in *Bahl*, (2) that Appellant's challenge to the community custody issue before the court was ripe because Appellant met the criteria for ripeness set in *Bahl*, and (3) that this court should accept review to reaffirm the holding in *Bahl*, strike the new criteria set by the Court of Appeals, and address appellant's challenges to his community custody requirements. However, in the petition for review, Appellant did not address that portion of the Court of Appeals decision in this case that appears to hold that findings of ripeness under the criteria in *State v. Bahl* are limited solely to pre-enforcement challenges to community custody conditions that

implicate the United States Constitution, First Amendment. Appellant is now submitting this Supplemental Brief to address this issue.

In the decision of the Court of Appeals in this case, the court notes the following concerning its analysis of *Bahl*:

First, unlike the condition prohibiting the possession of pornography addressed in *Bahl*, Sanchez and Sanchez Valencia do not argue that their community custody conditions implicate any First Amendment rights. And vagueness challenges which do not involve First Amendment rights must be evaluated in light of the particular facts of each case, rather than for facial invalidity, a purely legal analysis. *City of Spokane v. Douglass*, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). Therefore, a determination of whether the condition is unconstitutionally vague as applied to Sanchez or Sanchez Valencia is premature until the condition actually causes them harm based on the specific facts alleged to violate the condition. Accordingly, Sanchez and Sanchez Valencia's challenge to the drug paraphernalia prohibition fails to satisfy the first prong of the *Bahl* test.

State v. Valencia, 148 Wn.App. 302, 320, 198 P.3d 1065 (2009).

The Court of Appeals' reliance upon the decision in *City of Spokane v. Douglass*, *supra*, for the proposition that "vagueness challenges which do not involve First Amendment rights" may only be "evaluated in light of the particular facts of each case, rather than for facial invalidity" is misplaced. In *City of Spokane v. Douglass*, the City obtained review of a lower court decision finding a Municipal Code section vague on its face. The City argued that since the code section at issue did not implicate the First Amendment, the lower court had erred in considering facial invalidity as opposed to

considering vagueness as applied to the facts of the case. The Washington Supreme Court agreed, holding as follows:

The rule regarding vagueness challenges is now well settled. Vagueness challenges to *enactments* which do not involve First Amendment rights are to be evaluated in light of the particular facts of each case. Consequently, when a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness. Rather, the ordinance must be judged as applied. Accordingly, the ordinance is tested for unconstitutionality by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope.

City of Spokane v. Douglass, 115 Wn.2d at 182 (emphasis added).

The problem with the Court of Appeals' reliance upon the holding in *City of Spokane v. Douglass* is found in the word "enactments" as highlighted above. This word, as is used in this case, means a statute or ordinance enacted by a legislative body. For the purpose of judicial review, statutes or ordinances enacted by a legislative body, or "enactments" are presumed constitutional, and the party challenging the constitutionality of such an enactment bears the heavy burden of proving the unconstitutionality of the challenged law. As part of this presumption of constitutionality, and as part of the deference that the courts must give to legislative enactments, the courts will only allow facial vagueness challenges to statutes or ordinances that impinge upon First Amendment guarantees. All other vagueness challenges can only be made on an "as applied" basis.

By contrast, in the case at bar, appellant does not make a facial vagueness challenge to an “enactment.” Rather he makes a facial vagueness challenge to a community custody condition imposed by the sentencing court. The challenged community custody is not a “law of ordinance” enacted by a legislative body and it does not merit the special deference that such enactments deserve. In *State v. Bahl*, this court specifically recognized this distinction, holding as follows:

While many courts apply to sentencing conditions the same vagueness doctrine that applies with respect to statutes and ordinances, there is one distinction. In the case of statutes and ordinances, the challenger bears a heavy burden of establishing that the law is unconstitutional. This burden exists because of the presumption of constitutionality afforded legislative enactments. A sentencing condition is not a law enacted by the legislature, however, and does not have the same presumption of validity. Instead, imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Imposition of an unconstitutional condition would, of course, be manifestly unreasonable.

State v. Bahl, 164 Wn.2d at 753.

Thus, in the case at bar, the Court of Appeals holding that appellant’s challenge to one of his community custody conditions is not ripe because the challenged conditions does not implicate the First Amendment is incorrect.

In addition, part of the Court of Appeals’ error in this case flows from its apparent misapprehension as to the nature of appellant’s vagueness

challenge and the nature of the condition itself. The challenged condition states:

- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CPV 106; CPS 112.

In its decision, the Court of Appeals notes the following concerning appellant's challenge to this condition:

Second, Sanchez and Sanchez Valencia's community custody conditions prohibit them from possessing drug paraphernalia. And, unlike pornography, a court's determination of whether Sanchez or Sanchez Valencia have been provided sufficient warning of what items they are prohibited from possessing necessarily rests on a factual record demonstrating the manner in which they used or possessed the item alleged to violate the prohibition. For example, a soda pop can used for its intended purpose is not drug paraphernalia. But when that same soda pop can is modified for use as a pipe to ingest illegal drugs, it becomes drug paraphernalia. Thus, whether Sanchez and Sanchez Valencia's community custody condition prohibits them from possessing an item such as a can of soda pop depends on how they modify it for a different use or intend to use the item. And a reviewing court cannot make that determination without context. Because a more developed factual record is necessary to resolve Sanchez and Sanchez Valencia's vagueness challenge, they fail to satisfy the second prong of the *Bahl* issue maturity test.

State v. Valencia, 148 Wn.App. 302, 320-321, 198 P.3d 1065 (2009).

This portion of the court's holding turns upon its characterization that the appellants were challenging "community custody conditions [that]

prohibit them from possessing drug paraphernalia.” The error in this analysis is twofold: (1) the challenged community custody condition did not prohibit the “possession of drug paraphernalia,” and (2) appellants intent in possessing the prohibited items was not an element of prohibition. Rather, as the plain language of the condition states, the appellants are prohibited from possessing or using “any paraphernalia that can be used for the ingestion or processing of controlled substances.” Intent is not an element of the prohibition.

The distinction is critical between a community custody condition that prohibits the possession or use of “drug paraphernalia” on the one hand, and a community custody condition that prohibits the possession or use of any item “that can be used for the ingestion or processing of controlled substances” on the other hand. The former prohibition is not necessarily vague if it is interpreted to include a requirement that the item at issue be possessed with the intent to use it as drug paraphernalia. However, the latter prohibition is vague because it does not include a requirement that the item at issue be possessed with the intent to use it as drug paraphernalia. Rather, the latter condition leaves a reasonable person to wonder what items would not be prohibited to the appellant, since no intent is required. For example, is appellant prohibited from using telephones connected to land lines? These

certainly can be used to facilitate drug transactions in the same manner as can cell phones, which he is explicitly prohibited from possessing.

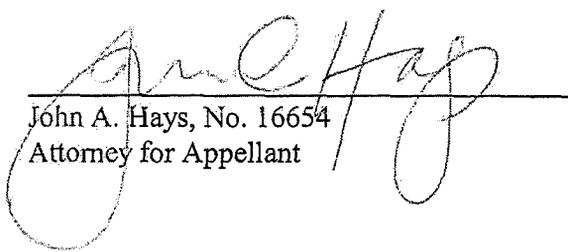
In fact, an inventive probation officer could envision any common place item as possible for use as drug paraphernalia. Paper can be used to make small bindles to hold drugs. Sandwich baggies can be used for the same purpose. Is the defendant prohibited from possessing or using paper or sandwich baggies? Since they can be used for this purpose, and are many times used for this purpose, is the defendant prohibited from possessing them? Once again, the community custody condition prohibits the defendant from possessing “any paraphernalia that can be used for the ingestion or processing of controlled substances” regardless of his intent in possessing the item. These examples illustrate the vagueness of the court’s condition. Thus, the Court of Appeals erred in both its holding that the challenge to the community custody condition was not ripe and its holding that the community custody condition was not vague.

CONCLUSION

The Court of Appeals erred when it held that appellant's challenge to one of his community custody conditions was not ripe, and when it ruled that the challenged condition was not unconstitutionally vague.

DATED this 5th day of August, 2009.

Respectfully submitted,



John A. Hays, No. 16654
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APPENDIX

**UNITED STATES CONSTITUTION,
FIRST AMENDMENT**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

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STATE OF WASHINGTON,
Respondent,

NO. 82731-1

vs.

AFFIRMATION OF SERVICE

ISIDRO SANCHEZ VALENCIA
Appellant.

STATE OF WASHINGTON)
County of Clark) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On August 5th, 2009 , I personally placed in the mail the following documents

- 1. SUPPLEMENTAL BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

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Dated this 5TH day of AUGUST, 2009 at LONGVIEW, Washington.

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AFFIRMATION OF SERVICE - 1

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