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NO. 84861-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

WILLIAM JOSEPH SMITH, Petitioner

FROM THE COURT OF APPEALS, DIVISION II NO. 40669-1-II
CLARK COUNTY SUPERIOR COURT CAUSE NO.02-1-00234-0

SUPPLEMENTAL BRIEF IN RESPONSE TO PERSONAL
RESTRAINT PETITION

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ORIGINAL

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this matter.

B. DECISION

Mr. Smith has sought review of the dismissal of his personal restraint petition by Division II of the Court of Appeals under Court of Appeals number 40669-1-II.

C. AUTHORITY FOR RESTRAINT

Mr. Smith is restrained pursuant to the judgment and sentence of the Clark County Superior Court dated August 5, 2002, under cause number 02-1-00234-0, upon his conviction of Rape of a Child in the Second Degree and Child Molestation in the Third Degree.

D. STATEMENT OF THE CASE

William Joseph Smith has filed this personal restraint petition (his fifth) seeking to have four community custody conditions removed from his judgment and sentence, which he alleges are unconstitutionally vague. Specifically, Mr. Smith asked for the following relief in his petition: "I want this Court to vacate my sentence and remand this case to the trial court for a resentencing hearing to determine, in accordance with *Bahl*,

Sansone, and the laws of the State of Washington, whether a more specific conditions [sic] of community custody should be imposed or the conditions stricken altogether.” See Personal Restraint Petition at page 8. Mr. Smith does *not* seek withdrawal of his plea. The Acting Chief Judge of the Court of Appeals dismissed this petition as mixed and successive. See Order Dismissing Petition at page 3. This Court granted discretionary review “only on the issues of the prohibition in the judgment and sentence on pornography and possession of drug paraphernalia.” See order granting review.

E. ISSUES PRESENTED FOR REVIEW

- I. IS MR. SMITH’S JUDGMENT AND SENTENCE FACIALLY INVALID SUCH THAT THIS COURT SHOULD REVIEW THE MERITS OF HIS CLAIM?
- II. DOES RETROACTIVITY ANALYSIS APPLY TO MR. SMITH’S CASE?
- III. DOES MR. SMITH SUFFER ACTUAL PREJUDICE AS A RESULT OF THE UNCONSTITUTIONAL COMMUNITY CUSTODY PROVISIONS AT ISSUE IN THIS PETITION?
- IV. WHAT IS THE PROPER REMEDY?

F. RESPONSE TO ISSUES PRESENTED FOR REVIEW

I. IS MR. SMITH'S JUDGMENT AND SENTENCE FACIALLY INVALID SUCH THAT THIS COURT SHOULD REVIEW THE MERITS OF HIS CLAIM?

Yes. Although Mr. Smith has filed four previous personal restraint petitions and this petition was not filed within one year of his judgment becoming final, his personal restraint petition is not subject to the one-year time bar under RCW 10.73.090 (1). Mr. Smith's judgment is facially invalid because it contains two unconstitutional provisions of community custody. The unconstitutional community custody provisions are as follows:

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 and data storage devices.

Defendant shall not possess or use any pornographic material or equipment of any kind and shall not frequent establishments that provide such materials for view or sale.

See Judgment and Sentence at pages 7 and 9. These provisions are unconstitutionally vague. See *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008); *State v. Sanchez-Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). A sentence that is not authorized by law is invalid on its face. *In re Personal Restraint of Rivera*, 152 Wn.App. 794, 218 P.3d 638 (2009); *In*

re Personal Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002). In determining whether a judgment and sentence is invalid on its face, so as to allow a collateral attack on the judgment beyond the one-year statute of limitations, “invalid on its face” means the judgment and sentence evidences the invalidity without further elaboration. *Benyaminov v. City of Bellevue*, 144 Wash.App. 755, 183 P.3d 1127, *review denied* 165 Wash.2d 1020, 203 P.3d 378 (2008). Mr. Smith is entitled to have his claim reviewed on its merits as he is not subject to the one-year time bar under RCW 10.73.090 (1).

II. DOES RETROACTIVITY ANALYSIS APPLY TO MR. SMITH’S CASE?

No. It is unnecessary for this Court to engage in retroactivity analysis in order to grant Mr. Smith the relief he seeks.

The benchmark case in Washington on retroactivity is *In re Personal Restraint Petition of St. Pierre*, 118 Wn. 2d 321, 823 P.2d 492 (1992). In *St. Pierre*, this Court said:

The current retroactivity analysis may be neatly summarized in a 2-part standard:

1. A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past.

2. A new rule will not be given retroactive application to cases on collateral review except where either: (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the State to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty.

St. Pierre at 326 (internal citations omitted).

The State avers that the holdings in *State v. Bahl* and *State v. Sanchez-Valencia*, supra, did not announce a new rule for the conduct of criminal prosecutions. First, it has always been the case that courts are not empowered to enforce unconstitutional sentencing provisions. At issue in *Bahl* and *Sanchez-Valencia*, however, was the question of whether unconstitutional community custody provisions can be challenged prior to their actual enforcement. This Court held, in both cases, that such provisions are subject to pre-enforcement challenge, which is to say that they are ripe for review. See *Bahl* at 745-53; *Sanchez-Valencia* at 790.

This Court's holdings in *Bahl* and *Sanchez-Valencia*, however, merely approved of a practice that had been employed routinely by this Court and the Court of Appeals. As noted by this Court in *Bahl*:

But as *Bahl* correctly maintains, courts routinely reach the merits of preenforcement vagueness challenges to sentencing conditions, including Washington courts that have considered such challenges without addressing whether it is proper to do so in the preenforcement setting. *E.g.*, *State v. Riles*, 135 Wn.2d 326, 347-51, 957 P.2d 655 (1998) (challenges to community placement conditions prohibiting one defendant from having contact with minors

or frequenting places where children congregate, and requiring another defendant to make reasonable progress in treatment); *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992) (challenge to condition that the defendant not associate with persons using, possessing, or dealing with controlled substances); *State v. Hearn*, 131 Wn. App. 601, 607-09, 128 P.3d 139 (2006) (challenge to condition that the defendant not associate with known drug offenders); *State v. Autrey*, 136 Wn. App. 460, 466-69, 150 P.3d 580 (2006) (challenges to conditions that the defendants not have sexual contact with anyone without that individual's explicit consent and that the defendants not have sexual contact with anyone without prior approval of their therapists); *accord, e.g., State v. Simpson*, 136 Wn. App. 812, 816-17, 150 P.3d 1167 (2007); *State v. Acrey*, 135 Wn. App. 938, 947-48, 146 P.3d 1215 (2006).

Bahl, 164 Wn.2d at 745-46.

Indeed, in holding that defendants are precluded from bringing a challenge to any community custody condition prior to its attempted enforcement by the State, the Court of Appeals in both *Bahl* (reported at 137 Wn.App. 709, 159 P.3d 416 (2007) and *Sanchez-Valencia* (reported at 148 Wn.App. 302, 198 P.3d 1065 (2009), departed from the precedents cited by this Court in *Bahl*. The Court of Appeals in *Bahl* brushed off the precedent of *United States v. Loy*, 237 F.3d 251, 267 (3rd Cir. 2001), which specifically allowed for the pre-enforcement challenge to unconstitutional sentencing conditions, stating:

While we have followed *Loy* in concluding that a prohibition against possessing “pornography” is too vague

as applied to possession of the photographs in *Sansone*¹, we have not yet agreed it is appropriate to evaluate conditions of sentence for vagueness in a preenforcement challenge. We are not inclined to do so in the absence of briefing on the pros and cons of that approach. We have reservations about the wisdom of making the appellate courts routinely available as editors to demand that trial courts rewrite sentencing conditions to avoid hypothetical problems.

Bahl, 137 Wn.App. at 718.

Similarly, in *Sanchez-Valencia*, supra, Division II of the Court of Appeals, relying on its earlier opinion in *State v. Motter*, 139 Wn.App. 797, 162 P.3d 1190 (2007), adhered to its position that a challenge to a community custody condition was not ripe for review. Acknowledging this Court's contrary holding in *Bahl*, the majority in *Sanchez-Valencia* read this Court's opinion in *Bahl* to suggest that its allowance of preenforcement challenge to community custody conditions was limited to community custody provisions which implicate First Amendment rights. *Sanchez-Valencia*, 148 Wn.App. at 320. This Court disavowed that limited reading of *Bahl*. *Sanchez-Valencia*, 169 Wn.2d at 787. This Court also disapproved of *Motter*. *Sanchez-Valencia* at 791.

The State submits that the decisions of the Court of Appeals in *Bahl*, *Sanchez-Valencia*, and *Motter* represented a departure from the established practice of reviewing constitutional challenges to community

¹ *State v. Sansone*, 127 Wn.App. 630, 111 P.3d 1251 (2005).

custody conditions prior to their attempted enforcement. This case is analogous to *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004). In *Hinton*, the defendant sought relief from personal restraint based on this Court's opinion in *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2004). Having been convicted of felony murder in the second degree predicated on assault, Hinton and his co-petitioners had been convicted of a then-non-existent crime. This Court did not reach the question of retroactivity before concluding that the decision in *Andress* must be applied to the petitioners' cases. This Court said:

When this court construes a statute, setting out what the statute has meant since its enactment, there is no question of retroactivity; the statute must be applied as construed to conduct occurring since its enactment.

Hinton at 860.

Similarly, here, Mr. Smith does not need to establish that *Bahl* and *Sanchez-Valencia* are retroactive in order to gain relief. This Court's decisions in *Bahl* and *Sanchez-Valencia* did not create a new rule of criminal procedure, they merely reinstated the prior established practice of considering challenges to the constitutionality of sentencing conditions "without addressing whether it is proper to do so in the preenforcement setting." *Bahl* at 745. Mr. Smith is entitled to have the two community custody conditions at issue in this petition stricken from his judgment and

sentence without first demonstrating the retroactivity of *Bahl* and *Sanchez-Valencia* (argued in Part IV, below).

III. DOES MR. SMITH SUFFER ACTUAL PREJUDICE AS A RESULT OF THE UNCONSTITUTIONAL COMMUNITY CUSTODY PROVISIONS AT ISSUE IN THIS PETITION?

Yes. “In order to obtain relief through a personal restraint petition, petitioner must establish by a preponderance of the evidence that the constitutional error worked to his ‘actual and substantial prejudice.’” *St. Pierre* at 328; *In re Personal Restraint of Stockwell*, 161 Wn.App. 329, 334, 254 P.3d 899 (2011).

It is tempting to the State to argue that Mr. Smith should not obtain relief in this petition. As noted above, Mr. Smith could have successfully challenged these conditions of community custody by way of direct appeal back in 2002. “A PRP is not a substitute for an appeal.” *Stockwell* at 334; citing *In re Personal Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). This argument was available to him back then. This argument has likewise been available to him throughout the entire past decade in which he filed numerous personal restraint petitions seeking to withdraw his guilty plea. That he failed to challenge these conditions until now suggests he is not particularly bothered by these community custody conditions. The State is left to wonder whether he has brought the instant petition because he believes, erroneously, that a finding of facial invalidity

of his judgment and sentence is an avenue to withdraw his guilty plea. The State concedes, for the reasons stated below, that the unconstitutional sentencing conditions contained in Mr. Smith's judgment and sentence work to his actual and substantial prejudice. The State does *not* concede, however, that the erroneous imposition of these conditions rendered his guilty plea involuntary.² Further, he has not sought withdrawal of his guilty plea in this petition and that particular question is not before this Court.

Because a personal restraint petition is not a substitute for a direct appeal it is supposed to be more difficult to obtain relief through personal restraint. This is why a petitioner alleging constitutional error must show that the error caused him actual and substantial prejudice, and a petitioner alleging non-constitutional error must show that the error caused a miscarriage of justice. *Stockwell* at 334; *In re Personal Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). *State v. Bahl* and *State v. Sanchez-Valencia* were, of course, direct appeals.

A review of this Court's opinions in *Bahl* and *Sanchez-Valencia*, however, strongly point to the conclusion that the constitutional error

² Indeed, such a claim would be ridiculous on its face. Would Mr. Smith honestly claim that the presence of unconstitutionally vague community custody conditions, which substantially interfere with his liberty, *induced* him to plead guilty? That had he not been restricted from possessing pornography and drug paraphernalia (and possessing a cell phone and entering nearly every grocery store in the country) he would have resisted the plea and sought a trial?

complained of in this petition work to Mr. Smith's actual and substantial prejudice. In *Bahl* this Court observed that "[a] condition that constitutes a '[l]imitation[] upon fundamental rights' is 'permissible, provided [it is] imposed sensitively.'" *Bahl* at 757, citing *State v. Riley*, supra, at 37. In *Sanchez-Valencia*, this Court reiterated that a sentencing condition cannot survive constitutional scrutiny where it does not provide ascertainable standards of guilt:

"[T]he due process vagueness doctrine under the *Fourteenth Amendment* and *article 1, section 3 of the state constitution* requires that citizens have fair warning of proscribed conduct." *Bahl*, 164 Wn.2d at 752. This assures that ordinary people can understand what is and is not allowed, and are protected against arbitrary enforcement of the laws.

Sanchez-Valencia at 791 (some internal citations omitted). Like the defendants in *Bahl* and *Sanchez-Valencia*, the offending conditions in Mr. Smith's judgment and sentence will place "an immediate restriction on [his] conduct, without the necessity that the State take any action." *Sanchez-Valencia* at 789. Further, the *Bahl* Court rejected the State's contention that the unconstitutional sentencing condition did not subject the defendant to "current hardship" because, again, the condition will trigger immediately upon his release and because a community corrections officer is empowered to arrest an offender without a warrant "if he or she suspects the offender has violated a condition," and "if arrested, the

offender *must be jailed.*” *Bahl* at 751-52 (emphasis added); *Sanchez-Valencia* at 790. The two community custody conditions at issue in this case clearly work to Mr. Smith’s current and substantial prejudice.

The community custody condition in Mr. Smith’s judgment and sentence relating to the possession of pornography implicates his First Amendment rights, just as in *Bahl*. However, Mr. Smith’s condition is even *more* vague, in the State’s view, than the condition in *Bahl*. The condition broadly states: “Defendant shall not possess or use any pornographic material or equipment of any kind and shall not frequent establishments that provide such material for view or sale.” This condition, as read, would prohibit Mr. Smith from entering most chain grocery stores as well as any book store. The prejudice to a person subjected to such a condition lies in the fact that his liberty to act in a lawful manner (for example, shopping for groceries) will be immediately and unlawfully restricted from the very moment of his release from custody. Likewise, the condition in Mr. Smith’s judgment and sentence relating to the possession of drug paraphernalia, although it does not implicate Mr. Smith’s First Amendment rights, works to his actual prejudice because it is nearly identical to the condition struck down in *Sanchez-Valencia*. (The condition in Mr. Smith’s judgment and sentence is identical to Mr. Sanchez-Valencia’s with the following exception: Mr.

Smith is also prohibited from possessing a cell phone. See Judgment and Sentence at page 7. If anything, Mr. Smith's condition is more vague and prejudicial than Mr. Sanchez-Valencia's, not less).

The unconstitutional community custody conditions at issue in this petition must be stricken from Mr. Smith's judgment and sentence because they work to his actual and substantial prejudice.

IV. MR. SMITH'S CASE SHOULD BE REMANDED TO CLARK COUNTY SUPERIOR COURT SO THAT THE UNCONSTITUTIONAL COMMUNITY CUSTODY CONDITIONS CAN BE STRICKEN FROM HIS JUDGMENT AND SENTENCE. NO OTHER PORTION OF HIS JUDGMENT AND SENTENCE CAN BE REVISITED AS A RESULT OF THIS SUCCESSFUL PETITION.

The State asks this Court to grant Mr. Smith's petition and remand his case to the Clark County Superior Court so that the two conditions at issue in this petition can be stricken from his judgment and sentence. "It is well established that the imposition of an unauthorized sentence does not require vacation of the judgment or granting of a new trial." *State v. Eilts*, 94 Wn.2d 489, 496, 617 P.2d 993 (1980); *In re Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). "The error is grounds for reversing only the erroneous portion of the sentence imposed." *Eilts* at 496. This Court has further held: "When a judgment and sentence is facially invalid, the proper remedy is remand for correction of the error." *In re Personal Restraint of Tobin*, 165 Wn.2d 172, 176, 196 P.3d 670 (2008); *Goodwin*, *supra*, at 877; *In re*

Personal Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005). Although Mr. Smith asks to have his sentence “vacated,” (see Petition at page 8) this remedy is neither warranted nor authorized. Mr. Smith’s case must be remanded for removal of the unconstitutional community custody conditions.

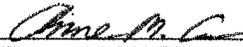
G. CONCLUSION

Mr. Smith’s personal restraint petition should be granted. His case should be remanded to the Clark County Superior Court so that the unconstitutional community custody conditions can be stricken from the judgment and sentence.

DATED this 2nd day of September, 2011.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: 
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint of:

No. 84861-1

WILLIAM JOSEPH SMITH,
Petitioner.

Clark Co. No. 02-1-00234-0

DECLARATION OF
TRANSMISSION BY E-MAIL

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Sept 2, 2011, I sent via email, directed to the below-named individuals, an electronic copy of the document to which this Declaration is attached.

TO:	Ronald Carpenter Clerk of the Supreme Court Via email: Supreme@courts.wa.gov	Lila Jane Silverstein Attorney at Law Washington Appellate Project Via email: Lila@washapp.org
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DOCUMENTS: Supplemental Brief in Response to Personal Restraint Petition

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Jennifer Cadley
Date: Sept 2, 2011.
Place: Vancouver, Washington.

OFFICE RECEPTIONIST, CLERK

To: Casey, Jennifer
Cc: lila@washapp.org
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Dear Clerk,

Attached please find the State's Supplemental Brief in Response to Personal Restraint Petition and accompanying Declaration of Transmission by Email. Please accept this document for e-filing. A copy has been sent to opposing counsel.

If you have any questions or need anything further to process this request please contact me.

Sincerely,

Jennie Casey
Clark County Prosecutor's Office
Appeals/Public Disclosure
360-397-2261 ext. 4476
Fax: 360-759-6749

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