Supreme Court No. 95722-3
Court of Appeals No. 34636-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ARISTIDES GUEVARA,
Defendant/Appellant/Petitioner.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable M Carrie Runge, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Aristides Guevara, is the appellant below and asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division III, unpublished opinion filed March 6, 2018.[1] A copy of the opinion is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

Is a community custody condition banning sexually explicit materials unconstitutionally void because it fails to provide adequate notice of prohibited materials and allows for arbitrary enforcement, and because it is so broad it encompasses a substantial amount of material protected by the First Amendment?[2]

IV. STATEMENT OF THE CASE

Aristides Guevara was convicted by a jury of two counts of first degree rape of a child and one count of first degree child molestation. CP 107, 110, 113. The jury also found aggravating factors for a pattern of

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[1] The current online version is found at *State v. Guevara*, No. 34636-6-III, 2018 WL 1169664 (Wash. Ct. App. March 6, 2018).

[2] This issue is presently before the Washington State Supreme Court in *State v. Hai Minh Nguyen*, No. 94883-6 (consolidated). The case is currently set for oral argument on May 10, 2018.

sexual abuse, and abuse of a position of trust. . CP 108–09, 111–12, 114–15. The trial court then imposed an exceptional sentence upward of 276 months. CP 130; RP 588–93. The court also imposed a plethora of community custody conditions. CP 138–39.

Guevara appealed, raising a number of issues including challenges to three of the conditions. CP 150; Appellant's Opening Brief (AOB), pp. 13–48, 41–48. The Court of Appeals affirmed one of the conditions but added modifying language. *Slip Opinion* at 10. While accepting the State's concessions that the two other conditions were invalid, the court added modifying language to "correct" them. *Slip Opinion* at 9–10.

Guevara now challenges one of the "corrected" conditions, in which the decision substitutes the phrase "materials depicting sexually explicit conduct" for "pornography" in the condition prohibiting any use or possession of such materials. He asks this Court to accept review and reverse the Court of Appeals as to this modified condition.

V. ARGUMENT IN SUPPORT OF REVIEW

In a community custody condition prohibiting use or possession, the substitution of "materials depicting sexually explicit conduct" for "pornography" does not avoid the vagueness principles at issue in *State v. Bahl* and encompasses too many First Amendment materials, rendering it overbroad.

This Court should accept review under RAP 13.4(b)(1), (2) and (3) because the issue highlights a conflict a conflict with decisions of this Court and the Court of Appeals, and presents significant constitutional questions involving a vague and overbroad community custody condition. This case, therefore, potentially affects the supervision of many probationers throughout the State. This Court should grant review and reverse the unconstitutionally vague and overbroad condition.

Guevara challenged the community custody condition stating he "[s]hall not use or possess any pornographic materials, to include magazines, internet sites, and videos." CP 139. The Court of Appeals accepted the State's concession that the condition is unconstitutionally vague, citing *State v. Bahl,* 164 Wn.2d 739, 753–58, 193 P.3d 678 (2008). Without discussion the court ordered the condition "shall be modified to read that Guevara 'shall not use or possess any materials depicting

"sexually explicit conduct," as defined in RCW 9.68A.011(4), such as magazines, internet sites, and videos." *Slip Opinion* at 9.

In making the modification the Court of Appeals' decision neglects any vagueness and overbreadth analysis and otherwise conflicts with *State v. Bahl* and other decisions of the courts. In *Bahl*, this court struck down a community custody ban against possessing pornography because it was unconstitutionally vague. The court reasoned that because definitions of pornography can and do differ widely—they may "include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo's sculpture of David"—the prohibition on perusing pornography was not sufficiently definite to apprise ordinary persons of what is permitted and what is proscribed. *Bahl*, 164 Wn.2d at 756. The same is true of the prohibition on depictions of sexually explicit conduct. Countless works of art, literature, film, and music explicitly describe, depict, and relate sex and sexuality. Guevara has no way to know which of these works he can possess, use, access, or view, and which he cannot. Like the ban on pornography, the condition here is unconstitutionally vague.

Additionally, depictions of sexually explicit conduct are protected by the First Amendment. The offending condition makes no distinction

between sexually explicit materials involving adults versus children. 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). The blanket ban on all sexually explicit materials fails to satisfy the requisite clarity to ensure First Amendment rights are honored. The condition impacts Guevara's ability to read a certain book, view a certain painting or film, or listen to a certain song. The condition is intolerably vague.

The statutory definition compounds rather than mitigates the prohibition's vagueness. "Sexually explicit conduct" under RCW 9.68A.011(4) applies to actual or simulated depictions of, in part, sexual intercourse, masturbation, sadomasochistic abuse, and touching a person's

clothed or unclothed genitals. Under this definition, could Guevara watch a movie or TV show with a sex scene that showed no actual nudity but simulated intercourse? Would this prohibition preclude viewing music videos featuring crotch-grabbing Michael Jackson or Madonna? Could Guevara view a museum's exhibit of photos by American photographer Robert Mapplethorpe, who extensively photographed the underground BDSM scene in 1960s and 1970s New York?

As the *Bahl* court pointed out in its reliance on *United States v. Loy*, 237 F.3d 251 (3rd Cir. 2001), judges and lawyers could not possibly answer these questions. *Bahl*, 164 Wn.2d at 746–48 (discussing *Loy*).

> [W]e could easily set forth numerous examples of books and films containing sexually explicit material that we could not absolutely say are (or are not) pornographic . . . . It is also difficult to gauge on which side of the line the film adaptations of Vladamir Nabokov's *Lolita* would fall, or if Edouard Manet's *Le Dejeuner sur L'Herbe* is pornographic (or even some of the Calvin Klein advertisements) . . . .

Loy, 237 F.3d at 264.

The same reasoning applies here. Because the prohibition does not give fair notice of what is allowed and what is disallowed, it is unconstitutionally vague under the first prong of *Bahl*'s vagueness analysis.

The offending condition is also infirm under *Bahl*'s second prong because it leads to arbitrary enforcement. Where a condition allows a third party to "direct what falls within the condition" it "only makes the vagueness problem more apparent since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." *Bahl*, 164 Wn.2d at 758.

In sum, the condition is insufficiently definite and invites arbitrary enforcement. Its vagueness requires that it be stricken.

The condition is also unconstitutionally overbroad. "When a statute is vague and arguably involves protected conduct, vagueness analysis will necessarily intertwine with overbreadth analysis." *Loy*, 237 F.3d at 259 n.2. "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); *State v. Homan*, 191 Wn. App. 759, 767, 364 P.3d 839 (2015). Prohibitions on materials implicated by First Amendment protections "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.

The offending condition's prohibition on all sexually explicit materials reaches significant amounts of protected speech. The condition and the statutory definition it contains do not distinguish between adult and child pornography, between artwork and obscenity, or between literature and smut. The condition carries a very real risk that reading a certain book, viewing a certain film or painting, or listening to a certain song will result in violation. It places a prior restraint on Guevara's ability to create his own writings and depictions. Neither the State nor the courts have demonstrated how restricting Guevara's access to all materials—art, literature, film, and the like—that depict or relate sex or sexuality is necessary to achieve the State's needs or protect the public. Nor is it apparent how such a condition promotes rehabilitation given that it sweeps in so much protected material that is completely unrelated to Guevara's crimes. The condition impermissibly chills Guevara's First Amendment rights and therefore must be stricken as unconstitutionally overbroad.

VI. CONCLUSION

For the reasons stated, this Court should accept review under RAP 13.4(b)(1), (2) and (3) and reverse the Court of Appeals.

Respectfully submitted on April 4, 2018.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 4, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's petition for review and Appendix A (opinion filed 3/6/18):

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April 04, 2018 - 2:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34636-6
Appellate Court Case Title:	State of Washington v. Aristides Guevara
Superior Court Case Number:	16-1-00085-5

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