

NO. 42498-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ZUMWALT,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 09-1-01100-0

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BRIEF OF RESPONDENT

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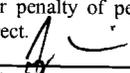
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DATED July 13, 2012, Port Orchard, WA   
**Original electronically filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....2

III. ARGUMENT.....6

A. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT’S MOTION FOR A DEPOSITION BECAUSE THE WITNESS IN THE PRESENT CASE WAS WILLING TO DISCUSS THE CASE WITH DEFENSE COUNSEL AND CRR 4.6(A) DOES NOT AUTHORIZE A DEPOSITION WHEN A WITNESS IS WILLING TO DISCUSS THE CASE WITH DEFENSE COUNSEL. ....6

B. THE DEFENDANT’S CLAIM THAT THE TRIAL COURT ERRED IN IMPOSING POLYGRAPH EXAMINATIONS AS A CONDITION OF COMMUNITY CUSTODY IS WITHOUT MERIT BECAUSE THE WASHINGTON SUPREME COURT HAS EXPRESSLY HELD THAT POLYGRAPH EXAMINATIONS MAY BE IMPOSED AS A CONDITION OF COMMUNITY CUSTODY.....11

C. THE DEFENDANT’S CLAIM THAT THE TRIAL COURT’S ORDER PROHIBITING THE DEFENDANT FROM ENTERING “SHOPPING MALLS” IS UNCONSTITUTIONALLY VAGUE IS WITHOUT MERIT BECAUSE THE PHRASE “SHOPPING MALLS” IS EASILY UNDERSTOOD AND IS NOT UNCONSTITUTIONALLY VAGUE.....18

D. THE DEFENDANT’S CLAIM THAT THE TRIAL COURT’S ORDER PROHIBITING THE DEFENDANT FROM POSSESSING SEXUALLY EXPLICIT MATERIAL IS UNCONSTITUTIONALLY VAGUE IS WITHOUT

MERIT BECAUSE THE PHRASE “SEXUALLY  
EXPLICIT MATERIAL” IS EASILY  
UNDERSTOOD AND IS NOT  
UNCONSTITUTIONALLY VAGUE. ....21

IV. CONCLUSION.....22

**TABLE OF AUTHORITIES**  
**CASES**

*In re Hawkins*,  
169 Wn. 2d 796, 238 P.3d 1175 (2010)..... 13-15

*State v. Bahl*,  
164 Wn. 2d 739, 193 P.3d 678 (2008)..... 11, 12, 18-21

*State v. Grenning*,  
142 Wn. App. 518, 174 P.3d 706 (2008).....10

*State v. Mankin*,  
158 Wn. App. 111, 241 P.3d 421 (2010)..... 7-9

*State v. Riles*,  
135 Wn. 2d 326, 975 P.2d 655 (1998)..... 12-13, 19

*State v Sanchez-Valencia*,  
169 Wn. 2d 782, 239 P.3d 1059 (2010)..... 13, 16-17

*State v. Smith*,  
72 Wn. 2d 479, 434 P.2d 5 (1967).....10

**STATUTES**

RCW 9.94A.030(10).....12

RCW 9.94A.703 .....11, 19

RCW 71.09.040 .....14, 15

RCW 71.09.096(4).....15

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court erred in denying the Defendant's motion for a deposition when the witness in the present case was willing to discuss the case with defense counsel and when CrR 4.6(a) does not authorize a deposition when a witness is willing to discuss the case with defense counsel?

2. Whether the Defendant's claim that the trial court erred in imposing polygraph examinations as a condition of community custody is without merit when the Washington Supreme Court has expressly held that polygraph examinations may be imposed as a condition of community custody?

3. Whether the Defendant's claim that the trial court's order prohibiting the Defendant from entering "shopping malls" is unconstitutionally vague is without merit when the phrase "shopping malls" is easily understood and thus not unconstitutionally vague?

4. Whether the Defendant's claim that the trial court's order prohibiting the Defendant from possessing sexually explicit material is unconstitutionally vague is without merit when the phrase "sexually explicit material" is easily understood and thus not unconstitutionally vague?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The Defendant, Christopher Zumwalt, was charged by an amended information filed in Kitsap County Superior Court with one count of Child Molestation in the First Degree. CP 32. A jury found the Defendant guilty of the charged offense. CP 61. The trial court then imposed a standard range sentence. CP 70. This appeal followed.

### **B. FACTS**

The charges in the present case arose when the victim, B.J.S., reported that the Defendant had molested her when she (the victim) was approximately seven years old. CP 11. Detective Ray Stroble from the Kitsap County Sheriff's Office then contacted the Defendant about the allegations, and the Defendant admitted that he had molested the victim. CP 12.

Prior to trial, the Defendant filed a motion asking the trial court to order a deposition of Detective Stroble. CP 13. In the motion the Defendant indicated that a defense interview of Detective Stroble had been scheduled for March 4, 2011, but that prior to the interview Detective Stroble had indicated that he would not agree to be interviewed if the defense investigator Jim Harris was present. CP 14. The Defendant then argued that this constituted a refusal to be interviewed and that the trial court should order Detective Stroble to submit to a deposition pursuant to CrR 4.6(a). CP 18.

The State filed a written response to the Defendant's Motion and explained that Jim Harris had previously worked for the Kitsap County Sheriff's Office and, for a period of time, had been Detective Stroble's supervisor. CP 22-23. In addition, Mr. Harris had been disciplined for his mistreatment of staff, including his mistreatment of Detective Stroble. CP 23. The State further explained that after it was learned that Mr. Harris was the defense investigator in the present case, Detective Stroble had advised the Prosecutor's office that he was willing to discuss the case with the defense attorney and any other defense investigator, but he was unwilling to discuss the case with Mr. Harris. CP 23. Detective Stroble also indicated that he had no objection to the interview being recorded. CP 23. Defense counsel, however, declined to discuss the case with Detective Stroble and instead filed the motion to depose him. CP 23.

As part of its response to the Defendant's motion, the State also filed an affidavit from Detective Stroble in which he stated,

Defense counsel, Jeniece Lacross, recently requested to interview me regarding my investigation of Christopher Zumwalt. I was informed through the Kitsap County Prosecutor's Office that the defense investigator is Jim Harris and that Jim Harris would be present for the interview and assisting in questioning me regarding this case.

I informed the prosecuting attorney's office that I was willing to discuss this case with Jeniece Lacross and be tape recorded for the interview. I also informed the office that I was willing to have a defense investigator present for the

interview. However, I am not willing to have Jim Harris present for the interview.

CP 20-21.<sup>1</sup>

A hearing on the Defendant's motion was held on May 17, 2011. RP (5/17) 2-5. At the hearing the trial court asked if the defense had any other defense investigators it could use, and defense counsel indicated that it did. RP (5/17) 3. Defense counsel, however, argued that Detective Stroble had effectively refused to be interviewed and that the trial court should compel a deposition. RP (5/17) 4. The trial court disagreed, and stated as follows:

“Well, it's hardly a refusal to be interviewed. He'll interview with anybody on the face of the planet except Mr. Harris because of their personal history.

The motion to compel deposition is denied.”

RP (5/17) 4. The trial court also indicated that it would hold Detective Stroble to his agreement that he could be interviewed with any other defense investigator of defense counsel's choosing and that the interview could be recorded. RP (5/17) 4. The record below demonstrates that defense counsel ultimately interviewed Detective Stroble on June 21, and that interview was recorded and transcribed. *See e.g.*, RP 28-29, 117-19,134-36.

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<sup>1</sup> Detective Stroble's affidavit also explained that he had previously given interviews and depositions concerning alleged criminal activity involving Mr. Harris and that Mr. Harris had previously been disciplined for mistreatment of staff members (including Detective Stroble). CP 21.

At trial, B.J.S. testified that the defendant is the son of her grandfather's ex-wife, making him "kind of an uncle." RP 56. B.J.S. was born on December 15, 1993, and the Defendant was born on April 29, 1982. RP 110. The two have never been married. RP 184.

Around 1999 or 2000 (when she would have been approximately 6-7 years old) B.J.S. lived with her parents in a trailer on some property in Port Orchard. RP 57-58. B.J.S.'s grandfather, his wife, and the Defendant lived in another residence on the property. RP 58. During this period of time B.J.S. saw the Defendant on a regular basis. RP 58.

B.J.S. testified that on one occasion she was in the Defendant's room in his residence with the Defendant and two cousins. RP 58. The Defendant told the two cousins to leave the room and he then locked the door. RP 58. The Defendant and B.J.S. were then sitting on the floor together and the Defendant started touching B.J.S.'s vagina underneath her clothes. RP 59. B.J.S. specifically stated that the Defendant would lick his fingers, touch her vagina, and then lick his fingers again. RP 58-59. B.J.S. did not immediately tell anyone about this incident. RP 60.

Several years later B.J.S. told a school counselor about the molestation. RP 62, 180. The school counselor then called CPS to report the disclosure. RP 181.

Eventually the Kitsap County Sheriff's Office became involved in the investigation and Detective Ray Stroble went to talk with the Defendant about B.J.S.'s disclosure. RP 107-08. Detective Stroble went to the Defendant's residence in Shelton and told the Defendant that he wasn't under arrest and that he didn't have to talk to him if he didn't want to. RP 108-09. Detective Stroble then explained to the Defendant that B.J.S. had alleged that he had touched her vagina in Port Orchard. RP 109. The Defendant responded by stating, "I did that. I admit to that." RP 109.

### III. ARGUMENT

**A. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR A DEPOSITION BECAUSE THE WITNESS IN THE PRESENT CASE WAS WILLING TO DISCUSS THE CASE WITH DEFENSE COUNSEL AND CRR 4.6(A) DOES NOT AUTHORIZE A DEPOSITION WHEN A WITNESS IS WILLING TO DISCUSS THE CASE WITH DEFENSE COUNSEL.**

The Defendant argues that the trial court erred in denying his motion for a deposition. App.'s Br. at 8. This claim is without merit because CRR 4.6(a) does not authorize a deposition when the witness, as in the present case, was willing to discuss the case with defense counsel.

Criminal Rule (CrR) 4.6(a) provides that a trial court may order a deposition of a witness in a criminal case if the witness "refuses to discuss

the case with either counsel.”<sup>2</sup>

This Court recently addressed CrR 4.6 in *State v. Mankin*, 158 Wn.App. 111, 241 P.3d 421 (2010). In *Mankin*, the defendant sought to interview several Tacoma Police Department officers involved in his case. *Mankin*, 158 Wn.App. at 115. The officers were willing to talk to defense counsel, but when the officers refused to allow defense counsel to tape record the interview the defense counsel terminated the interview. *Id* at 115. The defendant then moved under CrR 4.6(a) to depose the witnesses, arguing that the witnesses’ ability to “arbitrarily place limits” on the form of the interview interfered with his right to a fair trial, right to interview witnesses, and right to due process. *Id* at 115. The trial granted the motion and found that by refusing to allow defense counsel to tape record the interviews the officers had refused to speak with defense counsel. *Id* at 116.

The State then sought discretionary review, which this Court granted. *Mankin*, 158 Wn.App. at 117. On appeal the State argued that the trial court erred in granting Mankin’s motion to depose the witnesses under CrR 4.6(a)

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<sup>2</sup> CrR 4.6(a) specifically provides as follows:

“Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.”

because that rule does not apply when a witness is willing to discuss the case but refuses to allow counsel to record the interview. *Id* at 121. This Court agreed, finding that the plain language of the rule supported the State’s argument. *Id* at 121.

Specifically, this Court held that a criminal defendant does not have a right to depose a witness in criminal cases. *Mankin*, 158 at 121-22. Rather, CrR 4.6(a) provides that a trial court may only order a deposition if certain conditions exist, such as if a witness “refuses to discuss the case with either counsel.” *Id* at 122, quoting CrR 4.6(a). This Court then explained that because the criminal rule does not define the phrase “refuses to discuss,” the Court was required to interpret the statute. *Mankin*, 158 Wn.App. at 122. Furthermore, when “words in a court rule are plain and unambiguous, further statutory construction is not necessary and [the court is to] apply the court rule as written. *Mankin*, 158 Wn.App. at 122, citing *State v. Robinson*, 153 Wn.2d 689, 693, 107 P.3d 90 (2005). This Court then concluded that the plain language of the rule did not allow a trial court to order depositions when the witness was willing to speak with counsel as long as certain conditions were met. This Court further noted that the right to interview a witness does not mean that there is a right to have a “successful interview,” and that a witness may actually refuse to give an interview. *Mankin*, 158 Wn.App. at

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123-24, citing *State v. Clark*, 53 Wn.App. 120, 124, 765 P.2d 916 (1988) and *State v. Hofstetter*, 75 Wn.App. 390, 402, 878 P.2d 474 (1994). This Court then concluded that,

[G]iven this, it is logical to conclude that a witness may also choose under what conditions he or she is willing to give an interview, including whether it should be recorded.

*Mankin*, 158 Wn.App. at 124. This Court, therefore, vacated the deposition order. *Id* at 125.

In the present case, as in *Mankin*, there has been no showing that the witness “refused to discuss” the case with defense counsel. Rather, as the trial court noted, the witness was willing to discuss the case with defense counsel, was willing to have the interview recorded, and was willing to have any defense investigator other than Mr. Harris be present for the interview. Given these facts the plain language of CrR 4.6(a) did not allow for a deposition since the witness had not refused to discuss the case with counsel. To the contrary, the witness was clearly willing to discuss the case with defense counsel.

In short, as a deposition was not authorized pursuant to the plain language of CrR 4.6(a), the trial court did not err in denying the Defendant’s motion to depose Detective Stroble.

Finally, even if one were to assume that the trial court erred in denying the Defendant's motion, an error in a discovery request ruling must be prejudicial to a substantial right of the defendant in order to warrant reversal. *State v. Grenning*, 142 Wn.App. 518, 539, 174 P.3d 706 (2008), *aff'd*, 169 Wn.2d 47, 234 P.3d 169 (2010). A prejudicial error is one which affected the final result of the case. *State v. Smith*, 72 Wn.2d 479, 484, 434 P.2d 5 (1967).

The record below demonstrates that trial counsel was ultimately able to interview Detective Stroble prior to trial. *See e.g.*, RP 28-29, 117-19, 134-36. Thus, the record does not demonstrate any prejudice to the Defendant and the Defendant has not presented any claim that would demonstrate or even suggest that the denial of his request for a deposition changed the final result of his trial. Thus, even if one were to assume that the trial court had abused its discretion in refusing to permit a deposition in the present case, reversal would not be warranted.

**B. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN IMPOSING POLYGRAPH EXAMINATIONS AS A CONDITION OF COMMUNITY CUSTODY IS WITHOUT MERIT BECAUSE THE WASHINGTON SUPREME COURT HAS EXPRESSLY HELD THAT POLYGRAPH EXAMINATIONS MAY BE IMPOSED AS A CONDITION OF COMMUNITY CUSTODY.**

The Defendant claims that the trial court erred by ordering the Defendant to submit to periodic polygraph examinations as a condition of community custody. App.'s Br. at 15. This claim is without merit because the Washington Supreme Court has expressly held that polygraph examinations may be imposed as a condition of community custody in order to monitor an offender's compliance.

Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and may impose others. See RCW 9.94A.703; *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The conditions that may be imposed include requirements that the offender "comply with any crime-related prohibitions" and/or "Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3).

Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed only if it is manifestly unreasonable. *Bahl*, 164 Wn.2d at 753, citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In *State v. Riles*, 135 Wn.2d 326, 975 P.2d 655 (1998), the Defendants argued that a trial court did not have authority to impose polygraph testing as a condition of community custody because the SRA did not specifically authorize or require polygraph testing. *Riles*, 135 Wn.2d at 340. The Supreme Court, however, disagreed and specifically held that,

A trial court has authority to impose monitoring conditions such as polygraph testing. Although the results of polygraph tests are generally not admissible in a trial, this Court has acknowledged their validity as an investigative tool.

*Riles*, 135 Wn.2d at 342. The Court also noted that in 1997 the Legislature had amended several provisions of the SRA and authorized a trial court to order affirmative acts necessary to monitor compliance with sentencing conditions. *Riles*, 135 Wn.2d at 342-43, citing Former RCW 9.94A.030(11), 9.94A.120(14) and 9.94A.120(9)(b).<sup>3</sup> The Court explained that,

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<sup>3</sup> These sections have since been renumbered and the relevant language may now be found in the following statutes: RCW 9.94A.030(10) (“affirmative acts necessary to monitor compliance with the order of a court may be required by the department”); 9.94A.505(8) (“As a part of any sentence, the court may impose and enforce crime-related prohibitions and

These amendments suggest the Legislature intended to confirm the practice of allowing testing, such as polygraphs, for monitoring compliance with sentencing conditions.

*Riles*, 135 Wn.2d at 343.<sup>4</sup>

Given the clear holding of *Riles*, there should be no question that a trial court may require an offender to submit to periodic polygraph examinations when requested to do so by his community corrections officer. The Defendant, in fact, acknowledges that polygraphs have become an increasingly common tool used to monitor compliance with community custody conditions. App.'s Br. at 15, *citing Riles*, 135 Wn.2d 326.

The Defendant, however, argues that the continued vitality of *Riles* is called into doubt by two recent cases: *In re Hawkins*, 169 Wn.2d 796, 238 P.3d 1175 (2010) and *State v Sanchez-Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). App.'s Br. at 15-16. These cases, however, are not on point

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affirmative conditions as provided in this chapter”).

<sup>4</sup> The Court also noted that under Washington law a “subsequent amendment can be further indication of the statute’s original meaning where the original enactment was ambiguous to the point that it generated dispute as to what the Legislature intended.” *Riles*, 135 Wn.2d at 343. Thus the court stated that “One can conclude from these amendments that the Legislature intended to clarify and interpret the statute to resolve any dispute concerning its actual meaning.” *Id.* The court also cited the 1997 Final Legislative Report, Senate Bill 5519, 55th Legis., Reg. Sess., which stated as follows:

“Summary: The department is authorized to require an offender to perform affirmative acts, such as drug or polygraph tests, necessary to monitor compliance with crime-related prohibitions and other sentence conditions.”

*Riles*, 135 Wn.2d at 343 n. 56.

and in no way overrule *Riles*' clear holding that a trial court has the authority to impose monitoring conditions such as polygraph testing as a condition of community custody.

The first case cited by the Defendant, *Hawkins*, has nothing to do with community custody conditions. Rather it involved the narrow issue of whether RCW 71.09.040 authorized polygraph examinations as part of the *pre-trial* evaluation in a sexually violent predator proceeding. In *Hawkins* the State had filed a petition alleging that Hawkins was a sexually violent predator (SVP) and the trial court had found probable cause. *Hawkins*, 169 Wn.2d at 799. The case had not yet proceeded to trial, and thus no jury had yet been asked to determine the issue beyond a reasonable doubt. Pursuant to RCW 71.09.040(4) Hawkins was taken into custody by the Department of Social and Health Services (DSHS) "for an evaluation as to whether he is a sexually violent predator." *Id.* As part of that evaluation, the State sought, and the trial court ordered, a polygraph examination of Hawkins about his sexual history. Hawkins appealed that order and argued that the trial court exceeded its statutory authority in ordering the polygraph examination. *Id.*

The Supreme Court noted that the relevant statute, RCW 71.09.040(4), authorized a pre-trial "evaluation," but the statute made no mention of a polygraph examination as part of that "evaluation." *Hawkins*, 169 Wn.2d at 801-02. The Court also noted that the SVP statutes expressly

permitted compulsory polygraph examinations to be imposed on a SVP released to a less restrictive alternative (pursuant to RCW 71.09.096(4)), but no such authorization was mentioned with respect to pre-trial evaluations (pursuant to RCW 71.09.040(4)). *Id* at 803. The Court further noted that,

This distinction has intuitive appeal: those subject to RCW 71.09.096(4) are persons who have been found, beyond a reasonable doubt, to be SVPs while those subject to RCW 71.09.040(4) have not. The legislature may well find this to be sufficient reason to treat the two classes differently.

*Hawkins*, 169 Wn.2d at 803. The Court thus held that polygraph examinations were not authorized as a part of the pre-trial evaluations. *Id* at 805.<sup>5</sup>

In the present case the Defendant's claim that *Hawkins* somehow stands for the proposition that *Riles* is "no longer good law" is clearly without merit. Rather, the issue in *Hawkins* was limited to the narrow issue of whether *pre-trial* polygraph examinations may be ordered in a SVP petition case. *Hawkins*, therefore, is inapplicable to the present case as it has nothing to do with the issue of whether a polygraph examination may be ordered as a

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<sup>5</sup> The *Hawkins* Court never mentioned or discussed the use of polygraph examinations ordered a community custody condition. The Court, however, did note that many respondents in an SVP petition "Many respondents will have undergone polygraph examinations while incarcerated, whether as part of a voluntary sex offender treatment program or for other reasons." *Id.* at 804. The *Hawkins* Court, of course, did not discuss or otherwise express any opinion regarding the "other reasons" that might have lead to a polygraph examination, other than to note that such examinations may exist.

post-conviction condition of community custody.

The Defendant next argues that the case of *State v. Sanchez-Valencia* calls the continuing validity of *Riles* into doubt. App.'s Br. at 17. *Sanchez-Valencia*, however, did not involve polygraph examinations at all, and although the opinion mentioned *Riles* it did so only with respect to the limited issue of whether a sentencing condition is *presumed* to be constitutional.

Specifically, in *Sanchez-Valencia* the trial court imposed a condition of community custody that stated that the defendant shall not possess “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.” *Sanchez-Valencia*, 169 Wn.2d at 785. The defendant appealed and argued that this condition was unconstitutionally vague. *Id.* The Supreme Court ultimately agreed, noting that,

[T]he condition does not specify that the petitioners are prohibited from possessing “drug paraphernalia.” Rather, it proscribes possession or use of the much broader category of “any paraphernalia.”

...

Although the word “paraphernalia” in the popular vernacular is often linked to drug use, there is nothing in the condition as written that limits petitioners to refraining from contact with drug paraphernalia.

...

Because the condition might potentially encompass a wide range of everyday items, it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” As petitioners note, “an inventive probation officer could

envision any common place item as possible for use as drug paraphernalia,” such as sandwich bags or paper. Another probation officer might not arrest for the same “violation,” i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague. Accordingly, we hold that the condition at issue is void for vagueness.

*Sanchez-Valencia*, 169 Wn.2d at 794-95 (citations omitted).

This holding, of course, has no bearing to the present case as the Defendant has not raised a vagueness challenge to the polygraph examination condition. The *Sanchez-Valencia* opinion does briefly mention *Riles*, but only with respect to whether community custody conditions are *presumed* to be constitutional. Specifically the Court noted that it has not always been clear on this point and clarified that *Riles* erroneously stated that there was a presumption in favor of the constitutionality of a community custody condition. *Id* at 792. The Court then noted that the proper analysis is to apply an abuse of discretion standard on review, and if the condition is unconstitutionally vague then it will be manifestly unreasonable and an abuse of discretion. *Id.* at 793. The *Sanchez-Valencia* Court never mentioned or addressed *Riles*’ holding regarding polygraph examinations in any way.

In short, neither *Hawkins* nor *Sanchez-Valencia* overruled the clear holding in *Riles* that a trial court has the authority to impose monitoring conditions such as polygraph testing as a condition of community custody. The Defendant’s claim to the contrary, therefore, is without merit.

**C. THE DEFENDANT’S CLAIM THAT THE TRIAL COURT’S ORDER PROHIBITING THE DEFENDANT FROM ENTERING “SHOPPING MALLS” IS UNCONSTITUTIONALLY VAGUE IS WITHOUT MERIT BECAUSE THE PHRASE “SHOPPING MALLS” IS EASILY UNDERSTOOD AND IS NOT UNCONSTITUTIONALLY VAGUE.**

The Defendant next claims that the trial court erred prohibiting the Defendant from entering “shopping malls,” arguing that this term is unconstitutionally vague. App.’s Br. at 18. This claim is without merit because a person of ordinary intelligence can understand what the order proscribes; thus the order is sufficiently definite and is not unconstitutionally vague.

As outlined above, imposing conditions of community custody is within the discretion of the sentencing court and will be reversed only if it is manifestly unreasonable. *Bahl*, 164 Wn.2d at 753, *citing State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Imposition of an unconstitutional condition would, of course, be manifestly unreasonable. *Bahl*, 164 Wn.2d at 753. A statute or community custody condition is unconstitutionally vague if it “(1) does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *Bahl*, 164 Wn.2d at 752-53, *citing City of Spokane v.*

*Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). If either of these requirements is not satisfied, the ordinance is unconstitutionally vague. *Bahl*, 164 Wn.2d at 753.

Furthermore, in deciding whether a term is unconstitutionally vague, the terms are not considered in a “vacuum,” rather, they are considered in the context in which they are used. *Bahl*, 164 Wn.2d at 754, *citing Douglass*, 115 Wn.2d at 180. When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. *Bahl*, 164 Wn.2d at 754, *citing State v. Sullivan*, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001). Finally, if “persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite.” *Bahl*, 164 Wn.2d at 754, *citing Douglass*, 115 Wash.2d at 179.

RCW 9.94A.703(3)(b) provides that a trial a trial court may, as a condition of community custody, require an offender to “Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” In light of this statute, the Washington Supreme Court has held that it is proper for a court to order a sex offender to “not frequent places where minors are known to congregate.” *Riles*, 135 Wn.2d at 347-49.

In the present case the judgment and sentence includes the following crime related prohibition:

Do not loiter or frequent places where children congregate including, but not limited to, shopping malls, schools, playgrounds, and video arcades.

CP 68, 74. The Defendant argues that this provision is unconstitutionally vague because the phrase “shopping mall” is vague and ambiguous. App.’s Br. at 19.

As outlined above, a provision is not unconstitutionally vague if “persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite.” *Bahl*, 164 Wn.2d at 754. Here the phrase “shopping malls” is readily and easily understood, especially given its context.

The trial court could have simply ordered (as in *Riles*) that the Defendant to “not frequent places where minors are known to congregate,” but instead the trial court took the extra step of providing several examples of the types of places that were covered by this prohibition. Thus the trial court’s prohibition was actually more clear and well-defined than the prohibition approved of in *Riles*. In addition, the clear focus of this prohibition is on locations where children congregate. Thus the phrase “shopping malls” is easily understood to include those shopping malls that have shared common areas where people, especially children, often gather and congregate. There is simply nothing about the trial court’s order that unconstitutionally vague.

**D. THE DEFENDANT’S CLAIM THAT THE TRIAL COURT’S ORDER PROHIBITING THE DEFENDANT FROM POSSESSING SEXUALLY EXPLICIT MATERIAL IS UNCONSTITUTIONALLY VAGUE IS WITHOUT MERIT BECAUSE THE PHRASE “SEXUALLY EXPLICIT MATERIAL” IS EASILY UNDERSTOOD AND IS NOT UNCONSTITUTIONALLY VAGUE.**

Finally, the Defendant claims that the trial court erred in prohibiting the Defendant from possessing “sexually explicit material” as a condition of his community custody. App.’s Br. at 20. This claim is without merit because while the *Bahl* Court held that the specific term “pornography” is unconstitutionally vague, the Court did not find that the phrase “sexually explicit material” was vague.

The State acknowledges that the Washington Supreme Court has previously found that the term “pornography” as used in a community custody condition was unconstitutionally vague. *State v. Bahl*, 164 Wn.2d 739, 758, 193 P.3d 678 (2008). Specifically, the *Bahl* opinion held that the term “pornographic materials” was unconstitutionally vague. *Bahl*, 164 Wn.2d at 758. The *Bahl* court, however, found that the term “sexually explicit” was not unconstitutionally vague. *Bahl*, 164 Wn.2d at 760.

In the present case the Defendant claims that in *Bahl* the court held that a prohibition on the possession of “sexually explicit material” was

unconstitutional. App.'s Br. at 20. The *Bahl* opinion, however, made no such finding. While the State acknowledges that the term "pornography" is unconstitutionally vague pursuant to *Bahl*, the Defendant has cited no authority that has held that the phrase "sexually explicit material" suffers from the same constitutional infirmity.<sup>6</sup> His claim therefore, is without merit.

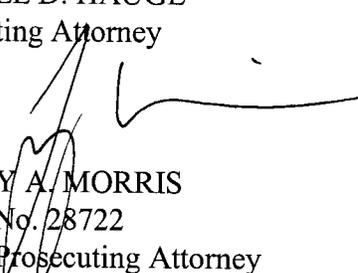
#### IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED July 13, 2012.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney



JEREMY A. MORRIS  
WSBA No. 28722  
Deputy Prosecuting Attorney

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<sup>6</sup> Although the Defendant has not assigned error to the use of the specific word "pornography" in the judgment and sentence, the State would concede that the term "pornography" should be stricken from the community custody conditions listed in the Defendant's judgment and sentence pursuant to *Bahl*. The State, however, does not concede that the Defendant is entitled to any relief other than having the specific term "pornography" stricken from the judgment and sentence.

# KITSAP COUNTY PROSECUTOR

## July 13, 2012 - 2:11 PM

### Transmittal Letter

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Court of Appeals Case Number: 42498-3

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