

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC G. BAHL,

Appellant.

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

The Honorable Stephen J. Dwyer, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of (respondent) appellant/ plaintiff containing a copy of the document to which this declaration is attached.

Snohomish County Prosecutor
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Patrick Mayors 2-7-2008
Name Done in Seattle, WA Date

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A. SUPPLEMENTAL ISSUE STATEMENTS

1. As they have done in many cases, should Washington courts address pre-enforcement vagueness challenges to restrictive sentencing conditions?

2. If pre-enforcement vagueness challenges to restrictive sentencing conditions are to be rejected, should this Court should review Bahl's challenges to his sentencing conditions because they infringe on his constitutional free speech rights?

3. Are prohibitions on the possession of or access to "pornographic materials," "frequent[ing] establishments whose primary business pertains to sexually explicit or erotic material," and the possession or control of "sexual stimulus materials for your particular deviancy" unconstitutionally facially vague?

4. Do the above prohibitions violate the constitutional right to free speech?

B. SUPPLEMENTAL STATEMENT OF THE CASE

A jury found the petitioner, Eric G. Bahl guilty of second degree rape and first degree burglary. CP 48-52. The trial court sentenced Bahl to concurrent standard range terms of confinement. CP 18. The court also imposed 18 months to 36 months of community custody for burglary and

community custody for life for rape. RP 13; RCW 9.94A 712(5). Among other community custody conditions were the following:

Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer [CCO]. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.

Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising [CCO] and therapist except as provided for therapeutic purposes.

CP 22; RP 14.¹ Because the statutory maximum sentence for second degree rape is life, Bahl is subject to these conditions, absent modification, for life. RCW 9A.44.050(2), RCW 9.94A.712(3)(a), (b), (5).

Bahl challenged the conditions as being unconstitutionally vague and overbroad. Brief of Appellant (BOA) at 3-14. The Court of Appeals, Division One, rejected the overbreadth argument, finding the conditions were crime-related. *State v. Bahl*, 137 Wn. App. 709, 715, 159 P.3d 416 (2007). The Court declined to reach Bahl's vagueness challenge, but expressed reservations about deciding pre-enforcement challenges to the conditions. *Bahl*, 137 Wn. App. at 716-19. Specifically, the Court said it "ha[d] 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.

¹ The trial court's Additional Conditions of Community Custody are attached as an appendix.

The court concluded, “Because Bahl has not explained why his vagueness challenge requires evaluation in a factual vacuum, we decline to review it.” *Bahl*, 137 Wn. App. at 719.

C. ARGUMENT

1. COURTS MUST REVIEW PRE-ENFORCEMENT VAGUENESS CHALLENGES TO COMMUNITY CUSTODY CONDITIONS.

The due process provisions embodied in the Fourteenth Amendment and article I, section 3 of the Washington Constitution protect citizens from impermissibly vague penal statutes. *State v. Baldwin*, 111 Wn. App. 631, 647, 45 P.3d 1093 (2002), *affirmed on other grounds*, 150 Wn.2d 448 (2003). Under the due process clause, a prohibition is unconstitutionally vague if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A vague standard may also cause a chilling effect on the exercise of sensitive First Amendment rights. *United States v. Williams*, 444 F.3d 1286, 1305-06 (11th Cir. 2006).

Bahl has launched a pre-emptive challenge to his sentencing conditions. In other words, he has not been accused of violating the

conditions. In this posture, Bahl's vagueness challenge is necessarily facial. *State v. McKee*, 141 Wn. App. 22, 35-36, 167 P.3d 575 (2007).

Identifying a particular vagueness challenge as facial as opposed to "as applied" is the starting point for the analysis, not the end as Division One found in Bahl's case. *See Bahl*, 137 Wn. App. at 716 ("In analyzing a vagueness challenge, a court's first step is to determine whether to review the rule on its face or as applied to the particular case."). Contrary to Division One in Bahl's case, this Court and other Washington appellate courts have reached the merits of pre-enforcement challenges to sentencing conditions using the traditional vagueness standard. *State v. Riles*, 135 Wn.2d 326, 348-49, 957 P.2d 655 (1998); *State v. Simpson*, 136 Wn. App. 812, 816-817, 150 P.3d 1167 (2007); *State v. Autrey*, 136 Wn. App. 460, 467-468, 150 P.3d 580 (2006); *State v. Acrey*, 135 Wn. App. 938, 947-948, 146 P.3d 1215 (2006); The same is true of various federal courts. *United States v. Antelope*, 395 F.3d 1128, 1141-42 (9th Cir. 2005) (supervised release condition prohibiting possession of "any pornographic . . . materials" impermissibly vague); *United States v. Guagliardo*, 278 F.3d 868, 872 (2002) (condition defendant not possess "any pornography" vague), *cert. denied*, 537 U.S. 1004 (2002); *United States v. Loy*, 237 F.3d 251, 263-65 (3d Cir. 2001) (same).

This Court should mandate pre-enforcement review of vagueness challenges to sentencing conditions for several reasons. In *Loy*, a case similar to Bahl's, the Third Circuit repudiated the government's claims that courts may not address pre-enforcement vagueness challenges because the attacks are not ripe and because the appellant has no standing. *Loy*, 237 F.3d at 256-261. The *Loy* court's lengthy analysis of the government's claims serves as a primer on this issue.

The court first found waiting until arrest to learn whether a condition had been violated creates an unacceptable hardship. *Loy*, 237 F.3d at 257: "[T]he fact that a party may be forced to alter his behavior so as to avoid penalties under a potentially illegal regulation is, in itself, a hardship." The court also held a pre-enforcement vagueness challenge is "fit" for judicial review because the question of whether a pornography proscription is unconstitutionally vague is "purely one of law," and "would not change between now and the time [Loy] is released from prison." *Loy*, 237 F.3d at 258. And the court found pre-enforcement review promotes judicial efficiency, holding "[t]he government's approach merely ensures multiple adjudications as defendants appeal parts of their sentences immediately . . . and parts of them later on." *Loy*, 237 F.3d at 261; *see also In re Sheena K.*, 40 Cal.4th 875, 885, 153 P.3d 282, 55 Cal.Rptr.3d 716 (Cal. Sup. Ct. 2007) (facial vagueness challenge

“does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court. Consideration and possible modification of a challenged condition of probation, undertaken by the appellate court, may save the time and government resources that otherwise would be expended in attempting to enforce a condition that is invalid as a matter of law.”).

These reasons apply with equal force in Washington. As matters currently stand, Bahl does not know what he may and may not peruse. This is an unacceptable hardship. And importantly, unlike other conditions of sentence, Bahl presently labors under this hardship; it is not a possibility, but a current reality. This distinguishes Bahl’s case from those in which courts have found challenges to conditions were premature because the challenger suffered no harm. *See, e.g., State v. Ziegenfuss*, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) (challenge to manner in which alleged violation of condition requiring \$500 Victim Penalty Assessment is adjudicated held premature because challenger has neither been found in violation nor placed in jail awaiting a violation hearing), *review denied*, 151 Wn.2d 1016 (2004); *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996) (challenge to sentencing condition requiring submission to searches not ripe until challenger subjected to

search he deems unreasonable); *State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d 42 (1992) (challenge to imposition of costs not ripe for review until state attempts to collect).

In addition, the issue here is purely legal: do the conditions violate due process vagueness standards? The Court in *Bahl* distinguished *Loy* on this point, noting that terms other than “pornography,” with which the *Loy* court dealt, are not as easily analyzed before a violation. *Bahl*, 137 Wn. App. at 718 (citing *United States v. Phipps*, 319 F.3d 177, 192-93 (5th Cir. 2003)).

The Court of Appeals suggests the *Phipps* court did not address the merits of a vagueness challenge to a sentencing condition that prohibited possession of “sexually oriented or sexually stimulating materials” and from “patroniz[ing] any place where such material or entertainment is available.” *Bahl*, 137 Wn. App. at 718; *Phipps*, 319 F.3d at 192-93. This is not true; the *Phipps* court reviewed the unobjected-to conditions for plain error. *Phipps*, 319 F.3d at 193. The court acknowledged the category of sexually oriented or sexually stimulating materials was somewhat vague, but nevertheless upheld the provision because it must be read in a commonsense manner. *Phipps*, 319 F.3d at 193. Furthermore, the court noted, the prohibition on patronizing sexually oriented

establishments was sufficiently precise because it referred to places such as strip clubs and adult theaters or bookstores. *Phipps*, 319 F.3d at 193.

Finally, pre-enforcement review not only avoids piecemeal appeals, but may also prevent needless and costly revocation proceedings in the event a community corrections officer deems as “pornography” something Bahl read. *See generally Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977) (“there is substantial reason to follow the overall policy against piecemeal appeals.”).

Under the Court of Appeals approach, any offender subject to an arguably vague sentencing restriction could challenge the condition only after being charged with violating it and going to jail. Community corrections officers may arrest or cause the arrest of an offender without a warrant when it is suspected the offender committed a violation. Upon arrest, the offender must be jailed. RCW 9.94A.631. This type of system offended one federal court:

The illogic of rejecting review at the time when the challenged probationary condition is imposed would have been illustrated even more vividly . . . had the district court imposed a monthly payment obligation of, for example, \$500,000 per month until restitution was complete. On the government's reasoning, [the offender] would have been required to violate his probation and risk incarceration before he could appeal even such an impossible order.

United States v. Ofchinick, 937 F.2d 892, 897 (3d Cir. 1991). The same illogic exists in Bahl's case. Preventing such an unfair method of addressing community custody violations is yet another reason to permit facial vagueness challenges to sentencing conditions before they are enforced.

"Federal courts have uniformly permitted defendants sentenced to probation to challenge the validity of their probation conditions on direct appeal from the judgment of conviction." *United States v. Stine*, 646 F.2d 839, 846 n.16 (3d Cir. 1981). For the reasons set forth above, Washington courts should follow this lead and endorse pre-enforcement vagueness challenges to sentencing conditions.

The *Bahl* Court expressed reservations that review of pre-enforcement vagueness challenges would make appellate court "editors" placed in a position of ordering that trial courts rewrite sentencing conditions to avoid hypothetical problems. *Bahl*, 137 Wn. App. 709, 718, 159 P.3d 416 (2007). But appellate courts must routinely address similar matters, such as whether sentencing conditions are crime-related. *State v. Jones*, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003) (trial court erred by imposing alcohol-related conditions because alcohol was not related to the crime); see *Loy*, 237 F.3d at 261 ("We review these [sentencing] conditions all the time, and, as a prudential matter, it makes sense to

review them at this stage.”). Moreover, appellate courts facing vagueness challenges need not become “editors” for skilled, experienced sentencing judges. A simple remand order directing greater specificity of a troublesome condition would suffice.

Additionally, entertaining pre-enforcement vagueness challenges places the burden to impose constitutional conditions where it belongs – on the sentencing judge. This Court should not tolerate obviously troublesome conditions like a ban on “pornography” in the face of *State v. Sansone*, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005), which held well over two years ago a sentence condition forbidding possession of pornography was unconstitutionally vague. Indeed, courts have struggled for years to draw a line between obscenity and pornography, as well as what is and is not constitutionally protected within those categories. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S. Ct. 631, 637, 9 L. Ed. 2d 584 (1963) (“line between protected pornographic speech and obscenity is “dim and uncertain”).

Finally, remanding vague conditions for more specificity in several sternly worded published opinions will serve to curb the sloppy, “check the box” method of imposing sentencing conditions that occurs all too often today. Instructing sentencing judges in this fashion will eliminate unnecessary appeals by improving sentencing procedures. Clearly stated

published opinions will also make trial judges and parties more careful with what some wrongly treat as an unimportant aspect of sentencing. This Court should reverse the Court of Appeals categorical prohibition on pre-enforcement vagueness challenges to sentencing conditions.

2. BAHL'S COMMUNITY CUSTODY CONDITIONS ARE UNCONSTITUTIONALLY VAGUE.

The trial court's condition prohibiting Bahl from "possess[ing] or access[ing] pornographic materials" is unconstitutionally vague.² *Sansone*, 127 Wn. App. at 638; *Guagliardo*, 278 F.3d at 872; *Loy*, 237 F.3d at 263. Given the well established jurisprudence in this area both in federal and Washington courts, there is no reason for this Court to find otherwise. The "pornography" portion of Bahl's sentencing condition should be remanded for constitutional specificity.

The trial court also prohibited Bahl from frequenting "establishments whose primary business pertains to sexually explicit or erotic material." CP 22. As a preliminary matter, the word "frequenting" is impermissibly vague. "Frequent" means "visit often." Webster's Third New International Dictionary 909 (1993). Does this mean Bahl may attend the establishments periodically rather than often? If so, at what point do Bahl's visits become "frequent?" The word "frequent" alone

² The court's conditions are attached as an appendix.

fails to fairly warn Bahl of what conduct to avoid. It also invites arbitrary, ad hoc, or discriminatory enforcement.

The next problematic term is “sexually explicit.” This term has been found unconstitutionally vague by several panels. In an Indiana case, defendant McVey was convicted of several child sex crimes. *McVey v. State*, 863 N.E.2d 434, 438 (Ind. App. 2007), *transfer denied*, 878 N.E.2d 206 (2007). As a probation condition, the trial court forbade McVey from “possess[ing] or view[ing] any pornographic or sexually explicit materials” *McVey*, 863 N.E.2d at 447. As a guide, the trial judge gave as examples of prohibited material “videos, television programs, DVDs, CDs, magazines, books, Internet web sites, games, sexual devices or aids, or any material which depicts partial or complete nudity or sexually explicit language or any other materials related to illegal or deviant interests or behaviors” *McVey*, 863 N.E.2d at 447. Despite this list of prohibited matter, the appellate court held McVey’s sentencing condition was unconstitutionally vague. *McVey*, 863 N.E.2d at 447-48.

In accord with *McVey* are *Fitzgerald v. State*, 805 N.E.2d 857, 866-67 (Ind. App. 2004) (sentencing condition prohibiting “pornographic or sexually explicit materials” unconstitutionally vague although condition gave as examples “videos, magazines, or any material which depicts partial or complete nudity or sexually explicit language.”) and *Smith v.*

State, 779 N.E.2d 111, 118 (Ind. App. 2002) (same, but without limiting examples), *transfer denied*, 792 N.E.2d 37 (2003).

These cases are consonant with the ordinary definition of the term “sexually explicit.” “Explicit means “characterized by full clear expression; being without vagueness or ambiguity: . . . unequivocal.” Webster’s Third New International Dictionary, 801 (1999). Coupling “explicit” with “sexually” does not a constitutional term make. “Unequivocally sexual” is no better than pornographic. A “clear expression of sexuality” is similarly unilluminating.

Would an over-the-counter supermarket fashion magazine featuring models in short skirts and sheer fabric be considered “sexually explicit?” This type of question highlights the arbitrary nature of such vague terminology and leaves offenders in an obvious quandary as to what they may read.

The same problems arise when courts employ open-ended terms like “erotic.” “Erotic” means “of, devoted to, or tending to arouse sexual love or desire.” Webster’s Third New International Dictionary 772 (1993). The late radical feminist Andrea Dworkin said, “Erotica is simply high-class pornography; better produced, better conceived, better

executed, better packaged, designed for a better class of consumer.”³ Synonyms for “erotic” include “lascivious, lecherous, lewd, obscene . . . [and] prurient.” Roget’s New Millennium Thesaurus (2008). These are all terms that can just as easily be associated with the term, “pornographic.”

Without belaboring the point, a prohibition on “sexual stimulus materials” suffers from the same shortcomings. The term provides insufficient notice of what such materials might be. It also encourages arbitrary enforcement.

Without a list of concrete examples of what is prohibited, a court’s sentencing condition that purports to ban access to “pornography,” “erotica,” “sexually explicit” material, “smut,” or another similar word is necessarily unconstitutionally vague. And that is the problem in Bahl’s case. Forcing him to wait until he finds himself in jail after violating one of these amorphous prohibitions is neither fair nor a wise use of scarce judicial resources.

³ The Columbia World of Quotations (1996), <http://www.bartleby.com/66/98/18098.html>; last accessed 2/7/2008.

3. THE SENTENCING CONDITIONS INFRINGE ON
BAHL'S CONSTITUTIONAL RIGHTS TO FREE
SPEECH.

The trial court's vague sentencing prohibitions also chill Bahl's right to free speech as guaranteed by article I, section 5 of the Washington Constitution and the First Amendment. Due process vagueness problems often implicate and overlap with first amendment concerns. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 391, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (need for fair notice and strict enforcement standards "especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights."); *Smith v. Goguen*, 415 U.S. 566, 573, 94 S. Ct. 1242, 39 L.Ed.2d 605 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."); *NAACP v. Button*, 371 U.S. 415, 432, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression.").

The challenged sentencing conditions plainly restrict Bahl's right to free speech by vaguely prohibiting him from reading certain literature or viewing particular types of entertainment. In this circumstance, "the problems of vagueness and overbreadth are, plainly, closely intertwined."

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 88 n.10, 93 S. Ct. 2628, 2650, 37 L. Ed. 2d 446 (1973) (Brennan, J. dissenting); *United States v. Jeter*, 775 F.2d 670, 678 (6th Cir. 1985) (Fifth Amendment void-for-vagueness argument “is intertwined with” First Amendment overbreadth argument; court agrees when overbroad law covering speech “and formless standards of first amendment privileges are conjoined, the result is an operative, injurious legal reality suffering due process vagueness.”), *cert. denied*, 475 U.S. 1142 (1986).

A criminal defendant may bring a facial vagueness challenge to a sentence condition when the condition implicates the First Amendment right to free speech. *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993). Such a challenge may be brought where an ordinance is not vague in all of its applications if it “reaches ‘a substantial amount of constitutionally protected conduct.’” *City of Sumner v. Walsh*, 148 Wn.2d 490, 513, 61 P.3d 1111 (2003) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 n.8, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)).

A different analysis applies where the challenged provisions implicate fundamental constitutional rights such as the freedoms of speech, assembly or association. First, a purportedly vague law might have a chilling effect on fundamental constitutional rights and important activities. *Walsh*, 148 Wn.2d at 513. Second, the discretion to selectively

enforce a vague law is especially dangerous when the law regulates a fundamental right such as speech. *Walsh*, 148 Wn.2d at 513. Third, the First Amendment needs “breathing space” and acceptable government regulation must accordingly be drawn with “narrow specificity.” *Walsh*, 148 Wn.2d at 513 (citing 4 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 20.9 (3d ed.2002) (quoting *NAACP v. Button*, 371 U.S. at 433).

The First Amendment protects the right to hear and to receive as well as to speak. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 756-57, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). Obscene speech, however, is beyond the coverage of the First Amendment. *Roth v. United States*, 354 U.S. 476, 484-85, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

A work falls outside the protective scope of the First Amendment only if (1) when taken as a whole, according to community standards, it appeals to the prurient interest, (2) it depicts, in a patently offensive way, sexual conduct as defined by state law, and (3) when taken as a whole, the work lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). Sexually-oriented work is not obscene unless all three elements of the

Miller test are satisfied. *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 135 (2d Cir.1983).

The First Amendment protects some material that is arguably pornographic because many items that might be considered pornography may not be obscene under *Miller*. *Loy*, 237 F.3d at 262-63 (citing *Various Articles of Obscene Merchandise*, 709 F.2d at 137, upholding trial court determination that the film *Deep Throat* was not patently offensive by the community standards of New York); *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1373 (5th Cir.1980) (holding the January 1978 issue of *Penthouse*, but not *Playboy*, was obscene); see also *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 334 (7th Cir.1985) (striking down on First Amendment grounds a statutory prohibition on pornographic material).

Although the scope of the term obscenity has been exhaustively examined, the term pornography has not been precisely defined by the federal courts or statutes. *Loy*, 237 F.3d at 263; cf. *Farrell v. Burke*, 449 F.3d 470, 487 (2nd Cir. 2006) (discussing two cases in which the Second Circuit found defendants had notice of the meaning of "pornography" in conditions of supervised release because statute they were convicted of violating provided detailed definition of "child pornography").

That said, it is undisputed convicted felons sentenced to a term of supervised release do not necessarily have the same unlimited rights as those enjoyed by other persons. Instead, a defendant's constitutional rights while serving community placement are subject to restrictions authorized by the SRA. *State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998). Nonetheless, in order to avoid the reach of a First Amendment challenge, a condition of supervised release must be narrowly drawn and related to protect the public and promote rehabilitation. *Loy* 237 F.3d at 264 (citing *United State v. Crandon*, 173 F.3d 122, 128 (3d. Cir.)), *cert. denied*, 528 U.S. 855 (1999).

Because the prohibitions at issue here involve Bahl's First Amendment rights, the conditions must be evaluated for vagueness on their face. *Halstien*, 122 Wn.2d at 117. Neither of the challenged conditions in Bahl's case provides an ascertainable standard of "guilt" to notify Bahl what materials are prohibited, nor does it protect against arbitrary enforcement by law enforcement. And the vagueness problem is exacerbated, not cured, by the inclusion of a requirement that pornographic materials are to be defined by the therapist. CP 22. Were Bahl to run across pornographic materials, he would be unable to ascertain whether they were pornographic without showing them to his therapist.

At that point, however, he would have already possessed, and possibly perused, the materials, subjecting him to punishment.

In summary, there are two ways this Court should reach the merits of Bahl's claims. First, the Court of Appeals erred by refusing to engage in pre-enforcement review of Bahl's vague challenges. The detailed analysis in *Loy* highlights the error of this refusal. Second, because Bahl's First Amendment rights are implicated, this Court may analyze the challenged conditions facially to determine whether they are unconstitutionally vague and therefore violated Bahl's right to due process.

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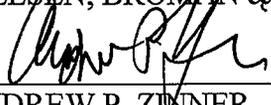
D. CONCLUSION

This Court should reach the merits of Bahl's pre-enforcement claim for the several reasons set forth above, most notably to foster judicial economy. In the alternative, this Court should acknowledge the challenged conditions of sentence implicate Bahl's First Amendment rights and therefore should be analyzed for facial vagueness.

DATED this 7 day of February, 2008.

Respectfully submitted,

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ANDREW P. ZINNER

WSBA No. 18631,

Office ID No. 91051

Attorneys for Appellant

APPENDIX

FILED

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY
THE STATE OF WASHINGTON,

2005 JUL 26 PM 4: 24

Plaintiff,
v.
BAHL, ERIC G.
Defendant.

No. 04-1-02484-1 PAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.
APPENDIX
ADDITIONAL CONDITIONS
OF COMMUNITY CUSTODY

ADDITIONAL CONDITIONS OF COMMUNITY CUSTODY:

1. Obey all laws.
2. Have no direct or indirect contact with K.G. (DOB: 1/1/73) and J.D. (DOB: 4/15/74) ^{WDS}
3. Pay the costs of crime-related counseling and medical treatment required by K.G. and J.D. ^{WDS}
4. Do not possess or access pornographic materials, as-directed by the supervising Community Corrections Officer. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.
5. Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.
- ~~6. Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale. ^{WDS}~~
7. ^{WDS} Participate in offense related counseling programs, to include sexual deviancy treatment, ~~substance abuse treatment~~ and Department of Corrections sponsored offender groups, as directed by the supervising Community Corrections Officer.
8. ^{WDS} Participate in urinalysis, breathalyzer, plethysmograph and polygraph examinations as directed by the supervising Community Corrections Officer, to ensure conditions of community custody.
9. Your residence, living arrangements and employment must be approved by the supervising Community Corrections Officer.

Dated this 26th day of July, 2005.


MATTHEW D. BALDOCK, #30892
Deputy Prosecuting Attorney


ERIC G. BAHL-Defendant


JUDGE STEPHEN J. DWYER


JON T. SCOTT, #30308
Attorney for Defendant