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SUPREME COURT NO. 94605-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMEEL PADILLA,

Petitioner.

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

The Honorable David A. Kurtz, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED IN SUPPLEMENTAL BRIEF

As a condition of community custody, the trial court ordered Jameel Padilla to “not possess or access pornographic materials, as directed by the supervising Community Corrections Officer [(CCO)],” and defined pornographic materials “as images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts.”

1. Is this condition unconstitutionally vague because it fails to provide adequate notice as to what conduct is prohibited and allows for arbitrary enforcement by Padilla’s CCO?

2. Is this condition unconstitutionally overbroad because it encompasses a substantial amount of material protected by the First Amendment, without being narrowly tailored or even reasonably related to the offense?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Padilla was convicted of communication with a minor for immoral purposes by electronic communication. CP 21; RCW 9.68A.090(2). The evidence introduced at trial showed Padilla used a fictitious Facebook profile to send sexually explicit messages to nine-year-old K.M. 4RP 123-31, 140. The trial court sentenced Padilla to 75 days of confinement and 12 months of community custody. CP 24-25.

On appeal, Padilla challenged the trial court's imposition of the following community custody condition:

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. Pornographic materials are defined as images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts.

CP 37. Padilla argued the term "pornographic materials" was previously held to be unconstitutionally vague in State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). Padilla contended the provided definition did not save the condition from vagueness, because it encompassed a broad range of speech protected by the First Amendment. Br. of Appellant, at 24-26.

The court of appeals rejected Padilla's argument, holding the condition, unlike in Bahl, "does have standards to avoid being arbitrarily enforced because the restricted material is clearly defined." Opinion, at 9. The court did not address Padilla's First Amendment argument.

Padilla petitioned for review, arguing the condition was vague and overbroad, and the court of appeals' decision conflicted with Bahl. Padilla again emphasized the condition impermissibly restricted his access to and possession of materials protected by the First Amendment, like artwork that depicts nudity. Petition, at 14-16. This Court granted review.

C. SUPPLEMENTAL ARGUMENT

This case involves the related questions of whether the pornography condition is unconstitutionally vague and overbroad. See United States v. Loy, 237 F.3d 251, 259 n.2 (3d Cir. 2001) (“When a statute is vague and arguably involves protected conduct, vagueness analysis will necessarily intertwine with overbreadth analysis.”). An illegal or erroneous sentence may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 744. Courts consider preenforcement vagueness and overbreadth challenges to sentencing conditions. Id. at 761; State v. Riles, 135 Wn.2d 326, 346, 957 P.2d 655 (1998), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). There is no presumption in favor of the constitutionality or validity of a sentencing condition. Sanchez Valencia, 169 Wn.2d at 792-93. An unconstitutional condition requires reversal. Id. at 791-93.

1. THE CONDITION IS VOID FOR VAGUENESS BECAUSE IT IS NOT SUFFICIENTLY DEFINITE AND ALLOWS FOR ARBITRARY ENFORCEMENT.

The due process vagueness doctrine requires the State to provide citizens fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is unconstitutionally vague if (1) it is not

sufficiently definite such that ordinary people can understand was conduct is proscribed; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. If either of these requirements is not satisfied, the condition is unconstitutionally vague. Id. at 753.

The term “pornography,” unlike obscenity, “has never been given a precise legal definition.” Id. at 754. In Bahl, the trial court imposed a pornography condition identical to the first sentence of Padilla’s condition. Id. at 743. This Court held the condition to be unconstitutionally vague, given the inherent vagueness of the term “pornography.” Id. at 756-58. The court further emphasized that allowing the CCO to “direct what falls within the condition only makes the vagueness problem more apparent,” because “it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Id. at 758.

Perhaps recognizing the term was vague, the trial court here attempted to define pornography “as images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts.” CP 37. The court of appeals concluded this definition distinguished Bahl because, there, “the word ‘pornographic’ was not clearly defined.” Opinion, at 9 (quoting Bahl, 164 Wn.2d at 757-58). The court reasoned

the condition here “does have standards to avoid being arbitrarily enforced because the restricted material is clearly defined.”¹ Opinion, at 9.

Contrary to court of appeals’ decision, however, the provided definition of pornography is so broad—sweeping within its reach a significant amount of material protected by the First Amendment—that it does nothing to save the condition from vagueness. The definition avoids Bahl’s thicket only to stumble headlong into another briar patch.

“Limitations upon fundamental rights are permissible, provided they are imposed sensitively.” State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Bahl recognized that when a sentencing condition “concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms.” 164 Wn.2d at 753. “[A] stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition.”² Id.; see also State v. K.H.-H., 185 Wn.2d 745, 750-53, 374 P.3d 1141 (2016)

¹ The State proposed the pornography condition. 6RP 116. Defense counsel did not object to it. 6RP 120. In its briefing below, the State did not argue defense counsel invited the error by not objecting to the unconstitutional condition. See Br. of Resp’t, 22-25. The court of appeals likewise addressed the merits of Padilla’s argument, and struck another sentencing condition as void for vagueness. Opinion, at 8-9. The State and court of appeals correctly avoided the invited error doctrine, which does not apply to a simple lack of objection. State v. Momah, 167 Wn.2d 140, 153-55, 217 P.3d 321 (2009); State v. Hood, 196 Wn. App. 127, 134-35, 382 P.3d 710 (2016), review denied, 187 Wn.2d 1023 (2017).

² Washington courts similarly require a heightened degree of particularity where search warrants include materials protected by the First Amendment. State v. Besola, 184 Wn.2d 605, 611, 359 P.3d 799 (2015).

(acknowledging more specificity is required when vague conditions implicate First Amendment rights).

The question is, then, how much protected material falls within the definition. “Images of sexual intercourse, simulated or real,” includes a wide range of protected speech. It makes no distinction between adult and child pornography. Possession of adult pornography is protected under 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)).

Thus, real images of adults engaged in sexual intercourse are likely included in the definition. Drawings or animated images of adults and/or children may also be included. Simulated sexual intercourse between adults and/or children could be encompassed by the definition. This would sweep in numerous mainstream movies and television shows, such as *Titanic* or *Game of Thrones*, where characters simulate sexual intercourse. All of the above includes protected speech.

Furthermore, “the display of intimate body parts” stretches so broadly that innumerable works of art, movies, television shows, books, and even advertisements fall within its scope. Paintings, music, poetry, and the like are “unquestionably shielded” by the First Amendment. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos., Inc., 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). Likewise, “nudity alone is not enough to make material legally obscene.”³ Jenkins v. Georgia, 418 U.S. 153, 161, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974).

Presumably “intimate body parts” includes at least genitalia, breasts, and buttocks, but possibly more. See In re Welfare of Adams, 24 Wn. App. 517, 521, 601 P.2d 995 (1979) (interpreting “intimate parts” as “parts of the body in close proximity to the primary erogenous areas,” including the hips and lower abdomen). One can quickly devise a lengthy list of famous works of art that include such depictions: Michelangelo’s sculpture of David, Botticelli’s *Birth of Venus*, Delacroix’s *Liberty Leading the People*, or Picasso’s *Les Femmes d’Alger (O. J. R. M.)*. Many Oscar-winning films, such as *Schindler’s List*, likewise include the display of intimate body parts.

³ Obscene speech is not protected by the First Amendment. Loy, 237 F.3d at 262. For material to qualify as obscene, it must meet the “exacting inquiry” set forth in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). Loy, 237 F.3d at 262.

These numerous examples raise just as many questions. Can Padilla own the movie *Titanic*? Can he see *Schindler's List* in a theater? Can he watch a movie or television show at home that includes simulated intercourse or any nudity at all? Can he possess drawings of adults engaged in sexual intercourse? Can he own a medical textbook of human anatomy? Can he visit the Seattle Art Museum? Can he go to the public library to view a book containing Georgia O'Keeffe paintings, which arguably depict female genitalia? Can he display a print of Michelangelo's *The Creation of Adam* in his home? Can he read a magazine containing a Victoria's Secret advertisement?

One can only guess the answers to these questions, and therein lies the problem. The term "pornography" is "entirely subjective." Bahl, 164 Wn.2d at 755 (quoting United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002)). Delegating its bounds to an individual CCO creates "a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating." Id. (quoting Guagliardo, 278 F.3d at 872). The Bahl court noted an example where "the parole officer had interpreted a prohibition on pornography to include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo's sculpture of David." Id. at 756. The definition in Padilla's case actually allows for such arbitrary enforcement.

This Court's decision in Sanchez Valencia provides another useful example of a vague sentencing condition. The condition there specified: "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, police scanners, and hand held electronic scheduling and data storage devices." Sanchez Valencia, 169 Wn.2d at 785.

This Court held the condition failed both prongs of the vagueness test. Id. at 794-95. Under the first prong, the term "paraphernalia," without specifying *drug* paraphernalia, was so broad that it failed "to provide the petitioners with fair notice of what they can and cannot do." Id. at 794. Likewise, "[t]he breadth of potential violations under this condition offends the second prong of the vagueness test." Id. The condition "might potentially encompass a wide range of everyday items," like sandwich bags or paper, depending on the particular CCO's whim. Id. "A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague." Id. at 795.

Like Bahl and Sanchez Valencia, the condition in Padilla's case fails both prongs of the vagueness test. First, the provided definition of pornography is so broad and far-reaching that it would be impossible for Padilla to predict what conduct is prohibited. See Loy, 237 F.3d at 267

(holding pornography condition to be unconstitutionally vague where “its breadth is unclear”). Where a condition implicates so much protected material, more definiteness is required. Bahl, 164 Wn.2d at 753, 757-58.

Second, and perhaps more significantly, the definition exposes Padilla to arbitrary enforcement. Like the infirm condition in Bahl, “pornographic materials” are to be determined “as directed” by the supervising CCO. CP 37. A creative CCO could come up with any number of movies, television shows, books, pieces of art, advertisements, or locations that fall within the definition. Even without such a wide-ranging definition, “[r]easonable minds can differ greatly about what is encompassed by ‘pornography.’” Guagliardo, 278 F.3d at 872. The definition does nothing to cabin a CCO’s discretion and, in fact, is so broad that it may serve to embolden an inventive or vindictive CCO.

This Court should reverse the court of appeals, strike the condition as being void for vagueness, and remand to the trial court for resentencing. Sanchez Valencia, 169 Wn.2d at 795.

2. THE CONDITION IS UNCONSTITUTIONALLY OVERBROAD BECAUSE ENCOMPASSES A SUBSTANTIAL AMOUNT OF PROTECTED SPEECH.

Even if the definition saves the condition from vagueness, it is unconstitutionally overbroad because it prohibits a significant amount of protected speech and is not narrowly tailored or even reasonably related to

the offense. “A clear and precise enactment may nevertheless be ‘overbroad’ if in its reach it prohibits constitutionally protected conduct.” Grayned v. City of Rockford, 408 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

- a. A condition that sweeps in so much protected material, like the one here, is not narrowly tailored.

“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). In determining whether a sentencing condition is overbroad, courts consider whether it prohibits a real and substantial amount of constitutionally protected speech relative to its legitimate sweep. Riles, 135 Wn.2d at 346; see also State v. Homan, 191 Wn. App. 759, 767, 364 P.3d 839 (2015).

The previous section demonstrated the condition’s definition of pornography reaches a considerable amount of protected speech. This is particularly true where the definition does not distinguish between adult and child pornography, or artistic and obscene material. It encompasses just as much protected as unprotected speech. The State even admitted in its briefing below that the condition includes “any display of intimate body parts without the need for a decision of whether those displays were sexually erotic or artistic.” Br. of Resp’t, at 24.

As a condition of community custody, sentencing courts may order offenders to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). A “crime-related prohibition” must “directly relate[] to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Thus, a sentencing court can restrict the material an offender may access or possess. Bahl, 164 Wn.2d at 757-58.

However, a sentencing condition that limits an offender’s fundamental rights must be more than just crime-related. Id. at 757. “[A] condition that touches on First Amendment rights must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant’s rehabilitation.” Id. Put another way, the condition “must be clear and must be reasonably necessary to accomplish essential state needs and public order.” Id. at 758.

Washington courts have routinely required sentencing conditions that restrict an offender’s fundamental rights, including First Amendment rights, to be narrowly tailored. See, e.g., In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010) (fundamental right to parent); Bahl, 164 Wn.2d at 757-58 (freedom of speech); State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008) (fundamental right to marriage); Riles, 135 Wn.2d at 346-50 (freedom of association); Riley, 121 Wn.2d at

37-38 (same); State v. Moultrie, 143 Wn. App. 387, 398-99, 177 P.3d 776 (2008) (freedom of speech and association).

The Third Circuit's decision in Loy, discussed with approval in Bahl, shows why the pornography condition is overbroad and cannot survive narrow tailoring analysis. Bahl, 164 Wn.2d at 754-56. There, Loy was convicted of knowingly receiving and possessing child pornography. Loy, 237 F.3d at 255. The trial court prohibited him from possessing "all forms of pornography, including legal adult pornography," as a condition of supervised release. Id. at 261.

Like this brief, the Loy court envisioned several examples of protected speech that might, but might not, fall within the pornography prohibition: "*Playboy*, which features nudity but not sexual conduct," film adaptations of Nabokov's *Lolita*, Manet's *Le Dejeuner sur L'Herbe*, or "even some of the Calvin Klein advertisements." Id. at 264. The court emphasized that, to be narrowly tailored, "the condition must not extend to all arguably pornographic materials," but only those directly related to the goals of protecting the public and promoting Loy's rehabilitation. Id.

The Loy court concluded, "where a ban could apply to any art form that employs nudity," the offender's First Amendment rights are "unconstitutionally circumscribed or chilled." Id. at 266. The court explained the "unusually broad condition" in Loy's case could "extend not

only to *Playboy* magazine, but also to medical textbooks.” Id.
“Restricting this entire range of material is simply unnecessary to protect
the public, and for this reason the condition is not ‘narrowly tailored.’” Id.
Thus, the court held, “to the extent that the condition might apply to a
wide swath of work ranging from serious art to ubiquitous advertising, the
condition is overly broad and violates the First Amendment.”⁴ Id. at 267.

The same is true here. Similar to *Loy*, Padilla was convicted of a
child sex offense, but the trial court prohibited his access to any and all
pornography, with no distinction between adult or child pornography. The
definition encompasses just as wide, if not wider, a range of protected
material as the condition in *Loy*. Such a condition is the antithesis of
narrow tailoring.

Below, the State contended only that the “restriction was
reasonable in that it accomplished the State’s needs of restricting [Padilla]
from keeping him from access to any display of intimate body parts”

⁴ See also *United States v. Hinkel*, 837 F.3d 111, 126-27 (1st Cir. 2016) (condition prohibiting the use of “any sex-related” websites was overbroad because it would cover, “for example, a large swath of generally accepted modern entertainment, and even news”); *United States v. Goodwin*, 717 F.3d 511, 524-25 (7th Cir. 2013) (condition prohibiting possession or control of “any material, legal or illegal, that contains nudity or that depicts or alludes to sexual activity or depicts sexually arousing material” was overbroad because it could block the offender “from possessing much of the Western literary canon—or arguably even from possessing a slip copy of this opinion”); *United States v. Zobel*, 696 F.3d 558, 577 (6th Cir. 2012) (condition prohibiting viewing, listening to, or possessing “sexually suggestive” materials was overbroad because it “would extend to a host of both highbrow and mainstream literature, art, music, television programs, and movies”).

Br. of Resp't, at 24. But the State has not shown how restricting Padilla's possession of the movie *Titanic* or a print of *The Creation of Adam* is necessary to achieve the State's needs or protect the public. Nor it is apparent how such a draconian condition promotes Padilla's rehabilitation, where it encompasses so much protected material unrelated to the crime. There is no evidence Padilla used artwork, movies, adult nudity, or any of the other protected speech described above to facilitate the offense.

The condition impermissibly chills Padilla's First Amendment rights. It should be stricken as unconstitutionally overbroad.

- b. Regardless of the standard applied, the broad condition is not reasonably related to the offense.

The State may argue that, under this Court's recent decision in K.H.-H., a lower standard than narrow tailoring applies to conditions that restrict First Amendment rights. There, K.H.-H., a juvenile, was convicted of fourth degree assault with sexual motivation. K.H.-H., 185 Wn.2d at 747-48. The trial court ordered K.H.-H. to write an apology letter to the victim as a condition of his sentence. Id. at 748. K.H.-H. argued the apology letter violated his First Amendment right to be free from compelled speech. Id. at 749.

In upholding the condition, the K.H.-H. court relied on the Ninth Circuit's decision in United States v. Clark, 918 F.2d 843 (9th Cir. 1990),

overruled on other grounds by United States v. Keys, 133 F.3d 1282 (9th Cir. 1998). There, the trial court imposed a similar condition requiring two former police officers convicted of perjury to publish apologies for their crimes. Clark, 918 F.2d at 845.

The K.H.-H. court applied the standard articulated in Clark: “a valid probation condition is one that is related to one of the purposes of the act—in this case, rehabilitation—and is done to effectuate that purpose.” 185 Wn.2d at 753. This Court explained Bahl and Clark “embrace a somewhat similar approach” that “fundamental rights may be limited if they are imposed sensitively and with a ‘keen appreciation’ that the limitation serve the purpose of the underlying act.” Id. at 752 (quoting United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975)).

In the context of K.H.-H., the court emphasized “juvenile rehabilitation is an underlying purpose” of the Juvenile Justice Act of 1977 (JJA), chapter 13.40 RCW. Id. at 754. A juvenile court therefore has “wide latitude” to impose conditions aimed at the juvenile’s rehabilitation and reformation. Id. at 755. Given this rehabilitative purpose, the court reasoned the apology letter would help K.H.-H. accept responsibility for his harmful actions towards women. Id. at 756. The letter also “recognizes the victim’s interest in receiving an apology.” Id.

Thus, the apology letter was an appropriate “rehabilitative step that attempts to improve K.H.-H.’s character and outlook.” Id.

This analysis demonstrates the K.H.-H. court did not apply a lower standard than the one articulated in Bahl. Rather, sentencing conditions that impact fundamental rights must still be sensitively imposed, given the facts of the crime and the purpose of the underlying act. Compare K.H.-H., 185 Wn.2d at 752 (conditions that limit fundamental rights must be “imposed sensitively”), with Bahl, 164 Wn.2d at 757 (conditions that restrict free speech rights must be “sensitively imposed”). As discussed, the pornography condition fails that standard because it broadly encompasses movies, television, books, advertisements, and works of art. None of this protected speech is related to Padilla’s offense, which involved online communication with a minor.

Even if the K.H.-H. court did articulate a lower standard, that standard does not apply here. K.H.-H. involved a juvenile and the JJA’s goal of rehabilitation. By contrast, the primary purpose of the Sentencing Reform Act of 1981, chapter 9.94A RCW, is to “[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history.” RCW 9.94A.010(1); see also State v. Hamedian, 188 Wn. App. 560, 569, 354 P.3d 937 (2015) (recognizing this “fundamental difference” between the JJA and the SRA).

Again, it is not at all clear how prohibiting Padilla's possession of the movie *Titanic* relates to the goal of punishment for his offense.

K.H.-H. further involved the unique scenario of compelled speech via an apology letter, rather than restriction of protected speech via a pornography condition. Clark was on point there. Bahl is on point here. The Bahl court specifically endorsed a narrow tailoring analysis for pornography conditions. Bahl, 164 Wn.2d at 757; see also Loy, 237 F.3d at 264. Moreover, Padilla's case involves a vagueness challenge, which the K.H.-H. court recognized requires a high standard, given the notice concerns. K.H.-H., 185 Wn.2d at 750-51.

Regardless of how this Court applies K.H.-H. and Bahl, however, the broad pornography condition is not crime-related—the lowest possible standard of review. Padilla sent inappropriate Facebook messages to nine-year-old K.M. Detective Klingman testified at trial he found images of naked children and children engaged in sexual activity on Padilla's home computer. 5RP 45-58. The trial court admitted this as evidence of identity and Padilla's intent in communicating with K.M. 4RP 103-05; RCW 9.68A.090(1) (requiring "immoral purposes").

There was no evidence in the record, however, that adult pornography related in any way to Padilla's online communication with a minor. Nor was there any evidence that adult nudity or simulated

intercourse—ubiquitous in both artwork and popular culture—contributed to or facilitated the offense.⁵

By way of example, in Riles, a condition prohibiting contact with “any minor-age children” had “no reasonable relationship” to the petitioner’s crime—rape of an *adult* woman. 135 Wn.2d at 349. The court explained “[i]t is not reasonable . . . to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender’s crime.” Id. at 350. Like Riles, the broad restriction on adult nudity, pornography, or simulated intercourse shares no relationship with Padilla’s crime.⁶

The trial court could have prohibited Padilla from possessing or accessing images of minors engaged in sexually explicit conduct, which is

⁵ Compare State v. O’Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (striking condition prohibiting internet access where there was “no evidence O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime”), and State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008) (striking condition prohibiting possession of cell phones or data storage devices because, although such devices may be used to further illegal drug possession, no evidence showed Zimmer used either in connection with possessing methamphetamine or that she intended to distribute methamphetamine using such devices), with Riley, 121 Wn.2d at 36-38 (upholding conditions prohibiting Riley from owning a computer, associating with other computer hackers, and communicating with computer bulletin boards where Riley was convicted of computer trespass and was a “self-proclaimed computer hacker”).

⁶ See also Perrone, 119 Wn.2d at 551 (accepting State’s concession that there was no probable cause to search for adult pornography, protected by the First Amendment, where the defendant was suspected of dealing in depictions of minors engaged in sexually explicit conduct); Besola, 184 Wn.2d at 613 (holding search warrant “similarly overbroad” to Perrone, where it encompassed adult pornography).

criminalized and defined in chapter 9.68A RCW. The Bahl court held the term “sexually explicit,” when used in context, is not unconstitutionally vague. 164 Wn.2d at 759-60. Thus, it was well within the trial court’s ability to fashion a definite, narrow, crime-related condition, without resorting to sweeping restrictions on Padilla’s First Amendment rights.

Alternatively, and in addition to vagueness, this Court should strike the condition as unconstitutionally overbroad and remand to the trial court for resentencing. Loy, 237 F.3d at 270.

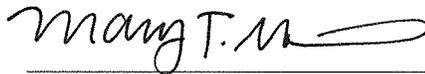
D. CONCLUSION

Padilla respectfully asks this Court to reverse the court of appeals, strike the unconstitutionally vague and overbroad community custody condition, and remand to the trial court for resentencing.

DATED this 29th day of December, 2017.

Respectfully submitted,

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