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STATE OF WASHINGTON
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NO. 94605-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMEEL PADILLA,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES

(1) The sentencing court prohibited the defendant from accessing or possessing "pornographic materials." It defined that term as meaning "images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts." Is this definition sufficiently specific to be understood by ordinary people?

(2) For the first time in the petition for review, the petitioner claims that the prohibition on "pornographic materials" is not reasonably necessary to accomplish essential state needs. Because the issue was not raised, the trial court did not specifically consider the necessity and scope of that condition. Should the case be remanded for such consideration?

II. STATEMENT OF THE CASE

The facts are accurately set out in the Court of Appeals opinion.

III. ARGUMENT

A. THE SENTENCING COURT DEFINED "PORNOGRAPHIC MATERIALS" IN A MANNER THAT CAN BE UNDERSTOOD BY AN ORDINARY PERSON.

This court granted review "only as to the sentencing condition prohibiting access to and possession of pornography." The defendant claims that the condition is "overbroad and void for

vagueness." P.R.V. at 14. This argument comingles two distinct doctrines, only one of which was raised in the Court of Appeals.

In the Court of Appeals, the sole issue raised with regard to the condition was whether it was unconstitutionally *vague*. Brief of Appellant at 2. A condition is "vague" if it does not (1) "define the [requirement] with sufficient definiteness that ordinary people can understand what conduct is proscribed" or (2) "provide ascertainable standards of guilt to protect against arbitrary enforcement." State v. Bahl, 164 Wn.2d 739, 752-53 ¶ 23, 193 P.3d 678 (2008). If material protected by the First Amendment is involved, a "heightened level of clarity and precision" is required. Id. at 753 ¶ 24.

> 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. When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. If persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite.

Id. at 754 ¶ 26 (citations omitted).

In Bahl, a sentencing condition precluded the defendant from "possessing or accessing pornographic materials." No further definition was provided. This court noted that "the term

'pornography' ... has never been given a precise legal definition." Numerous items might or might not be considered pornography, with no way to resolve the debate. Id. at 754-55 ¶ 29. Nor is there any statute that defines the term. Id. at 756-57 ¶ 34. Consequently, the undefined term "pornography" is unconstitutionally vague.

In the present case, however, the trial court provided a definition: "Pornographic materials are defined as images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts." CP 37, condition no. 6. The defendant does not point to any lack of clarity in any of the terms used in this definition. "Sexual intercourse" has a commonly understood meaning, as well as being defined by statute. See RCW 9A.44.010(1) (defining "sexual intercourse"); Debaun v. State, 213 So. 3d 747, 751 (Fla. 2017) (discussing ordinary meaning of "sexual intercourse"). The term "masturbation" likewise has a commonly understood meaning. People v. Lopez, 123 Cal. App. 4th 1306, 1313-14, 20 Cal. Rptr. 3d 801, 805-06 (2004). As for the other term, the phrase "intimate parts" is included in the statutory definition of "sexual contact." Courts have accepted this term as sufficiently specific to be applied by a person of common

intelligence. See State v. Jackson, 145 Wn. App. 814, 918 ¶ 9, 187 P.3d 321 (2008).

In Bahl, this court upheld a condition that referred to "sexually explicit or erotic material." The court concluded that these phrases provide sufficient clarity as to what conduct was proscribed. Bahl, 164 Wn.2d at 758-60 ¶¶ 40-43. The same is true of the phrases "sexual intercourse," "masturbation," and "intimate body parts."

The trial court thus defined "pornography" by using terms that are commonly understood. Although some areas of disagreement might arise, that would be true of almost *any* term that the court might employ. "Impossible standards of specificity are not required since language always involves some degree of vagueness." Bahl, 164 Wn.2d at 759 ¶ 42. The Court of Appeals correctly held that the condition is not unconstitutionally vague.

B. IN LIGHT OF SUBSEQUENTLY AVAILABLE INFORMATION, THE SENTENCING COURT SHOULD RECONSIDER THE NECESSITY AND SCOPE OF THE PROHIBITION ON "PORNOGRAPHIC MATERIALS."

Of course, the vagueness doctrine is not the only constitutional restriction on sentencing conditions. Bahl mentions (but does not apply) a second requirement: conditions that restrict

constitutional rights "must be reasonably necessary to accomplish essential state needs and public order." Bahl, 164 Wn.2d at 758 ¶ 36. The Petition for Review complains that the Court of Appeals failed to discuss this requirement. P.R.V. at 14-15. The defendant's brief, however, did not even mention the requirement. Brief of Appellant at 24-26. The Court of Appeals cannot be justly criticized for failing to consider an argument that was never raised.

The relevant constitutional standards were explained in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008). When a sentencing provisions infringes on a fundamental constitutional right, it must satisfy three requirements: (1) it must be reasonably necessary to achieve a compelling state interest, (2) it must be narrowly drawn, and (3) there must be no reasonable alternative way to achieve the State's interest. Id. at 34-35 ¶ 26. A federal court has upheld a sentencing condition barring the defendant from possessing materials depicting "sexually explicit conduct," when that condition was related to the circumstances of the offense. United States v. Thielemann, 575 F.3d 265 (3rd Cir. 2009), cert. denied, 558 U.S. 1133 (2010).

In the present case, the record at sentencing contains little information about the relationship of the "pornographic materials"

condition to the defendant's crimes. Defense counsel told the court that she was not objecting to the conditions proposed by the prosecutor, which "should assure the Court that community safety is maintained." 7/31/15 RP 120. At the time she made this statement, counsel was aware of a psychosexual evaluation that had already been completed.[1] 7/31/15 RP 118. That document explained how the use of pornographic materials was related to the defendant's offense.

Because full information was not available to the sentencing court, the court did not have an adequate opportunity to consider the scope of the "pornographic materials" condition.[2] Now that full information is available, the court should be given an opportunity to consider it. For the same reasons, this case is not a suitable vehicle for this court to explore the circumstances under which sex offenders can be restricted from accessing "pornographic materials" (however that term may be defined). Before providing guidance to trial courts on that subject, this court should have a full record

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[1] The State has filed a motion to supplement the record with this evaluation.

[2] This problem would have been avoided if the court had delayed sentencing until all pending charges were resolved.

showing how such materials can impact sex offenders. This case should be remanded for reconsideration of the challenged condition.

IV. CONCLUSION

The case should be remanded for reconsideration of the sentencing condition barring access to "pornographic materials." In all other respects, the judgment and sentence should be affirmed.

Respectfully submitted on December 27, 2017.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JAMEEL PADILLA, Petitioner.	No. 94605-1 DECLARATION OF DOCUMENT FILING AND E-SERVICE

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

Dated this 29th day of December, 2017, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

December 29, 2017 - 10:02 AM

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