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No. 94883-6

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Court of Appeals
Division I
State of Washington

NO. 74358-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

HAI MINH NGUYEN,

Appellant.

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

The Honorable Mary E. Roberts, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Hai Minh Nguyen's convictions for child molestation in the first degree and child molestation in the second degree violate double jeopardy given deficiencies in the jury instructions.

2. The community custody condition prohibiting Nguyen from entering "parks/playgrounds/schools or other places where minors congregate" is unconstitutionally vague. CP 65.

3. The community custody condition prohibiting Nguyen from possessing, using, accessing, or viewing and sexually explicit material, erotic material, and depictions of sexually explicit conduct is unconstitutionally vague and is not crime-related. CP 65.

4. The community custody condition requiring Nguyen from abiding "by a curfew of 10pm-5am unless directed otherwise" is not crime-related and therefore exceeds the trial court's authority. CP 64.

Issues Pertaining to Assignments of Error

1. Nguyen was convicted of one count of first degree child rape and one count of first degree child molestation as well as one count of second degree child rape and one count of second degree child molestation. Did inadequate jury instructions expose him to multiple punishments for one criminal act, violating double jeopardy and necessitating vacation of both child molestation convictions?

2. Is the community custody condition prohibiting Nguyen from entering places were minors congregate void for vagueness?

3. Is the community custody condition prohibiting Nguyen from possessing sexually explicit and erotic materials both void for vagueness and unrelated to the crimes?

4. Does the community custody condition imposing a curfew on Nguyen exceed the trial court's sentencing authority because it is not crime-related?

B. STATEMENT OF THE CASE

The State charged Nguyen with first degree rape of a child, first degree child molestation, second degree rape of a child, and second degree child molestation by way of amended information. CP 21-22.

The charges arose from T.P.'s allegations. T.P. lived with her parents, younger sister, and Nguyen in the same house. RP 67-68, 134. T.P. testified that when she was between ages six to 13, Nguyen massaged and suckled her breasts, inserted his fingers into her vagina, and performed oral sex on her on an almost weekly basis. RP 138-40, 143-55. T.P. also testified Nguyen penetrated her vagina with his penis on one occasion when she was 11 years old. RP 157-58.

T.P.'s sister testified she witnessed one occasion in the kitchen during which T.P.'s pants and underwear were pulled down and Nguyen's

hand was in her crotch area. RP 231-34. T.P.'s sister also recounted another occasion where she saw Nguyen lying on top of T.P. when she was lying on a treadmill. RP 235-37.

The jury was provided to-convict instructions for first degree child rape, first degree child molestation, second degree child rape, and second degree child rape. CP 38, 41, 44, 47. Following each of the to-convict instructions, the jury was further instructed it "must unanimously agree as to which act has been proved." CP 39, 42, 45, 48. However, the trial court did not instruct the jury that each count must arise from a separate and distinct act in order to convict.

The jury returned guilty verdicts on all counts. CP 51-54; RP 525-28.

For the first degree child rape, first degree child molestation, and second degree child rape, the trial court imposed indeterminate, concurrent sentences of 279 months, 173.5 months, and 245 months, respectively. CP 60; RP 557. The trial court also imposed lifetime community custody on these counts. CP 60; RP 557. The trial court imposed a determinate 101.5-month sentence for second degree child molestation along with a 36-month community custody term. CP 59; RP 557.

The trial court imposed the following community custody conditions:

> 7. Abide by a curfew of 10pm-5am unless directed otherwise. Remain at registered address or address previously approved by CCO during these hours . . . .
>
> 11. Do not possess, use access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexually deviancy provider . . . .
>
> 18. [Checked box.] Do not enter any parks/playgrounds/schools and or any places where minors congregate.

CP 64-65. The trial court also waived all nonmandatory LFOs in the judgment and sentence. CP 58; RP 558.

Nguyen filed a timely notice of appeal. CP 72.

C. ARGUMENT

1. THE JURY INSTRUCTIONS VIOLATED NGUYEN'S RIGHT AGAINST BEING PLACED IN DOUBLE JEOPARDY BECAUSE THEY EXPOSED HIM TO MULTIPLE PUNISHMENTS FOR THE SAME CRIMINAL ACT

The trial court must clearly instruct the jury so that it does not convict a defendant more than once on the basis of a single act. The instructions given in Nguyen's case failed to do so, thereby subjecting Nguyen to double jeopardy. Nguyen's convictions for child molestation in the first degree and child molestation in the second degree must accordingly be vacated.

Freedom from double jeopardy under the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution "is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). Appellate courts review double jeopardy claims de novo and permit them to be raised for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

Jury instructions '"must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror."' Borsheim, 140 Wn. App. at 366 (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). On review, the court considers insufficient instructions "in light of the full record" to determine if they "actually effected a double jeopardy error." Mutch, 171 Wn.2d at 664. A double jeopardy violation occurs if it is no "manifestly apparent to the jury that each count represented a separate act." Id. at 665-66. The jury instructions used in Nguyen's fail under this standard.

The Borsheim court held that an instruction that the jury must find a "separate and distinct" act for each count is required when multiple counts of sexual abuse are alleged to have occurred within the same charging period. 140 Wn. App. at 367-68. The court vacated three of Borsheim's four child

rape convictions for failing to instruct the jury using the separate and distinct language. Id. at 371.

In Mutch, the State charged five identical counts of rape, all within the same charging period. 171 Wn.2d at 662. There was sufficient evidence of five separate acts constituting rape, but the jury was not instructed that each count must arise from a separate and distinct act in order to convict. Id. at 662-63. The possibility that the jury convicted Mutch on all five counts based on a single act created a potential double jeopardy violation. Id. at 663.

However, because the case "presented a rare circumstance where, despite deficient jury instructions," it was still manifestly apparent that jurors based each conviction on a separate an distinct act, the court found no double jeopardy error. Id. at 665. Specifically, (1) the victim, J.L., testified to precisely the same number of acts of rape (five) as there were counts charged and to-convict instructions; (2) the defense was consent and not denial; (3) Mutch admitted to a detective that he engaged in multiple sex acts with J.L.; and (4) during closing, the prosecutor discussed each of the five acts individually and defense counsel did not challenge the number of episodes, but merely argued consent. Id. The court determined that in "light of all of this, we find it was manifestly apparent to the jury that each count represented a separate act." Id. at 665-66. Thus, the court determined

beyond a reasonable doubt that no double jeopardy error occurred based on the deficient jury instructions. Id. at 666.

In State v. Land, 172 Wn. App. 593, 598-603, 295 P.3d 782 (2013), this court considered whether it violated double jeopardy where the jury was not instructed it must find separate and distinct acts of child rape and child molestation. Land was convicted of one count of child rape and one count of child molestation, both involving the same child and the same charging period. Id. at 597-98. Land argued these convictions violated double jeopardy because they might have been based on the same act of oral-genital contact. Id. at 598-99. The State argued the jury did not have to find separate and distinct acts because child molestation is not the "same offense" as child rape for double jeopardy purposes. Id. at 599.

Two offenses are not the same when '"there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other.'" Id. (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Child rape and child molestation do not have the same elements. Id. Child molestation requires proof of sexual contact," which means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). Child rape requires proof of "sexual intercourse," which includes "any act of sexual contact between persons

involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.010(1) (emphasis added). The jury in Nguyen's case was instructed with these definitions of sexual intercourse and sexual contact. CP 36-37.

In Land, this court explained that where the evidence of sexual intercourse supporting a count of child rape is evidence of penetration, "rape is not the same offense as child molestation." 172 Wn. App. at 600. The touching of sexual parts for sexual gratification constitutes molestation until the point of actual penetration. Id. At that point, the act of penetration alone supports a separately punishable conviction for child rape. Id.

However, this court made clear that where the evidence of sexual intercourse is evidence of oral-genital contact, "that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape." Id. In this circumstance, the two offenses "are the same in fact and in law because all the elements of the rape as proved are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape." Id. Because of this potential double jeopardy problem, the court considered Land's claim that the jury instructions exposed him to multiple punishments for the same offense. Id.

Land's jury was not instructed that the two counts involving the same child required proof of separate and distinct acts. Id. at 601. The child did not testify Land's mouth came in contact with her sex organs, and the only evidence of rape was the child's testimony that Land penetrated her vagina with his finger. Id. at 601-02. Consistent with this testimony, the prosecutor argued in closing that the child's testimony about penetration was the "crucial element proving rape." Id. The prosecutor also emphasized that the child's testimony about sexual contact proved the molestation and her testimony about penetration proved the rape. Id. Under these circumstances, the Land court concluded the lack of a separate and distinct instruction "did not violate Land's right to be free from double jeopardy." Id. at 603.

This case presents the same issue as Land: Nguyen was convicted of one count of child rape in the first degree and one count of child molestation degree within the same charging period. CP 21-22, 38, 41. Nguyen was also convicted of one count of child rape in the second degree and one count of child molestation within another charging period. CP 22, 44, 47. As in Land, Nguyen's jury was not instructed that the counts of child rape and the counts of child molestation must be based on separate and distinct acts. CP 38, 41, 44, 47.

Unlike Land, however, T.P. testified about signficant oral-genital contact. She testified that, during both charging periods, Nguyen put his

mouth on her vagina and also penetrated her vagina with her fingers. RP 144-46, 153-54, 163-64. T.P. also said that Nguyen penetrated her vagina with his penis on one occasion when she was 11 years old. RP 158-61. Because oral-genital contact constitutes both rape and molestation, this creates a potential double jeopardy problem. Land, 172 Wn. App. at 600.

Considering the full record, it is not manifestly apparent that the jury based each conviction on a separate and distinct act. In contrast to Mutch, Nguyen's defense was denial, not consent. Also, unlike Mutch, T.P. did not testify to the same number of incidents as were charged. Instead, she testified to one instance of penile penetration and numerous instances of digital penetration, oral-genital contact, and touching or suckling of her breasts. RP 140, 144-46, 151-54, 163-64.

In Mutch, there were five alleged incidents, five charges, and five convictions. 171 Wn.2d at 651-52. This made it apparent that "if the jury believed [the alleged victim] regarding one count, it would as to all." Id. at 666. The same is not true here.

The jury did not specify which acts it relied on to convict for rape or molestation. See State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008) (holding a verdict is ambiguous where multiple acts were alleged but the jury does not specify which act it relied on to convict). This court therefore has no way of knowing or guaranteeing that the jury did not rely on the same act

of oral-genital contact to convict for both rape and molestation. This case does not present the "rare circumstance" where the jury plainly based each conviction on a separate and distinct act. Mutch, 171 Wn.2d at 665.

Nor did the prosecutor's closing argument protect against double jeopardy. Although the prosecutor emphasized the digital penetration and oral-genital contact for the child rape counts and the rubbing of T.P.'s breasts for the molestation counts, see RP 482-84, she never informed the jury that it must not rely on oral-genital contact for both rape and molestation. For instance, the prosecutor referenced the unanimity instructions, arguing,

> The reason for that instruction is because [T.P.] described for you that these things happened to her many times, repeatedly, over years. She was able to describe for you several separate distinct incidents from the time she turned six until the last time it happened in March of 2013, but she also told you that it happened to her weekly after she turned eight or nine. And of course the charging dates that you have for Counts I or II, if you recall, are the day that [T.P.] turned six up until the day before her twelfth birthday. This particular instruction tells you that you need not decide beyond a reasonable doubt that every single act [T.P.] happened, nor do you need to decide what particular date it that it happened. You must simply agree that one act of rape of child in the first degree happened between those charging periods. And you must simply decide that one act of child molestation in the first degree happened between those charging periods. The same is true for Counts 3 and 4 . . . . You need not decide on every incident that [T.P.] described or on a particular date. You must simply decide that one act of rape of a child in the second degree happened within that charging period. And that one act of child molestation in the second degree happened within that charging period.

RP 490-91. The State proceeded to give "suggestions for how you can become clear about that when you're deliberating in this case," detailing which acts the prosecutor would rely on were she a deliberating juror. RP 491. However, nowhere in the jury instructions and nowhere in the prosecutor's argument was the jury told that it could not consider the *same* act for proving both first degree child rape and first degree child molestation or for proving both second degree child rape and second degree child molestation.

The State might argue that the prosecutor elected the acts that qualified as child rape and the acts that qualified as child molestation. But this did not cure the double jeopardy problem. Such election only prevents a unanimity error, not a double jeopardy violation. See Borsheim, 140 Wn. App. at 365-66 (explaining the different between double jeopardy and unanimity errors). And, in any event, the jury "should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). Rather, it is the judge's "province alone to instruct the jury on relevant legal standards." State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). In Kier, 164 Wn.2d at 813, moreover, our supreme court held that a prosecutor's election of a specific act in closing was insufficient to cure a double jeopardy violation because jurors were told to rely on evidence and instructions rather than counsel's

arguments. Cf. CP 28 ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you.").

The State might also stress that Nguyen's jury received a unanimity instructions. CP 39, 42, 45, 48. But, again, this fails to resolve the double jeopardy problem. In Borsheim, the trial court gave a similar instruction. 140 Wn. App. at 364. This unanimity instruction, like those here, did not "convey the need to base each charged count on a 'separate and distinct' underlying event." Id. at 367, 369-70. Although the instructions adequately informed jurors they had to be unanimous on the act that formed the basis for any given count, they failed to protect against double jeopardy. Id.

Finally, Nguyen's jury was instructed, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 34. The Borsheim court held that this instruction was insufficient to protect against double jeopardy because it fails to adequately inform jurors that each requires proof a different act. 140 Wn. App. at 367, 369-70; see also Mutch, 171 Wn.2d at 663 (agreeing with Borsheim).

The trial court's failure to instruct the jury that it needed to find separate and distinct acts of child rape and child molestation (in both the first and second degrees) exposed Nguyen to multiple punishments for a single act. This violated Nguyen's right to be free from double jeopardy. This court therefore must reverse and remand for the trial court to vacate the child molestation convictions. Borsheim, 140 Wn. App. at 371.

2. THE COMMUNITY CUSTODY CONDITION PROHIBITING NGUYEN FROM ENTERING WHERE MINORS CONGREGATE IS UNCONSTITUTIONALLY VAGUE

The trial court ordered that Nguyen not enter any places where minors congregate. CP 65. This condition is unconstitutionally vague because it insufficiently apprises Nguyen of prohibited conduct and allows for arbitrary enforcement. The condition should be stricken from the judgment and sentence.

a. The condition is void for vagueness because it does not provide fair notice and invites arbitrary enforcement

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Under the due process clauses of the Fourteenth Amendment and article I, section 3, the State must provide citizens with fair warning of prohibited conduct. Id. at 752. The vagueness 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 it does not (1) define the prohibition with sufficient definiteness such that ordinary people can understand what conduct is prohibited or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. If a community custody prohibition fails either prong, it is unconstitutionally vague. Id. at 753.

On review, courts do not presume that a community custody condition is constitutional. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). If a community custody condition is unconstitutionally vague, it is manifestly unreasonable and requires reversal. Id. at 791-92.

Recently, in State v. Irwin, 191 Wn. App. 644, 649, 364 P.3d 830 (2015), this court considered a condition like the one at issue here: "Do not frequent areas where minor children are known to congregate as defined by the supervising" community corrections officer. This court struck this condition because it was unconstitutionally vague and remanded for resentencing. Id. at 655.

The Irwin court explained, "Without some clarifying language or an illustrative list of prohibited locations . . . the condition does not give ordinary people sufficient notice to 'understand what conduct is proscribed.'" Id. (quoting Bahl, 164 Wn.2d at 753). The court

acknowledged that it "may be true that, once the CCO sets locations where 'children are known to congregate' for Irwin, Irwin will have sufficient notice of what conduct is proscribed." Id. However, the Irwin court concluded this was not sufficient because it would still "leave the condition vulnerable to arbitrary enforcement," thereby failing the second prong of the vagueness analysis. Id.

Nguyen acknowledges that the Washington Supreme Court upheld the constitutionality of a community custody condition almost identical to the one at issue in Irwin and at issue here in State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998), abrogated by Sanchez Valencia, 169 Wn.2d 782. However, the Riles court's analysis presumed the condition was constitutional, a presumption that the Sanchez Valencia court later expressly repudiated. 169 Wn.2d at 792-93.

Thus, this court in Irwin correctly concluded Riles did not control and instead relied primarily on the Washington Supreme Court's more recent decision in Bahl. There, the Washington Supreme Court held a condition prohibiting Bahl from possessing or accessing pornographic material "as directed by the supervising Community Corrections Officer" was unconstitutionally vague. 164 Wn.2d at 753. "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since

it virtually acknowledges that on its face it does not provide ascertainable standards of enforcement." Id. at 758.

As in Bahl and Irwin, the conditions prohibiting Nguyen from entering places were minors congregate fails to provide sufficient definiteness. The conditions do not tell Nguyen where he can and cannot go. Some locations, such as the parks and playgrounds enumerated in the condition are more or less obvious. But the listed prohibition on schools might or might not be places where children congregate. Institutions of higher learning or vocational programming might very well qualify as "schools," but Nguyen would have no way of knowing whether he was allowed to enter them or not. And other locations where minors congregate are much less clear: bowling alleys, places of worship, hiking trails, buses, trains, grocery stores, swimming pools, restaurants, and so on are not sufficient definite to distinguish between what is prohibited and what is allowed.[1] Because no ordinary person would know what conduct is prohibited, the conditions fail the first prong of the vagueness test.

"In addition, when a statute or other legal standard, such as a condition of community placement, concerns material protected under the

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[1] The indefiniteness of this type of condition was fully recognized by our supreme court in State v. McCormick, 166 Wn.2d 689, 692-96, 213 P.3d 32 (2009), in which McCormick was held in violation of a similar condition when he went to a food bank that happened to be in the same building as a public school.

First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms." Bahl, 164 Wn.2d at 753 (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). Vagueness concerns "'are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statutes because their consequences are more severe.'" Id. (quoting United States v. Williams, 444 F.3d 1286, 1306 (11th Cir. 2006), rev'd on other grounds, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)).

The condition prohibiting Nguyen from entering any place where minors congregate implicates the First Amendment. The condition might very well subject Nguyen to exclusion from most if not all houses of worship given children's likely presence there. Because the condition has the very real effect of precluding Nguyen's free exercise of religion and assembly, the condition must meet a more definite, clearer standard. The vague community custody condition does not satisfy the first prong of Bahl's vagueness test. This court should strike the condition and remand for resentencing.

The condition prohibiting entry into places where minors congregate also fails the Bahl vagueness test's second prong. Both Bahl and Sanchez Valencia involved delegation to a community corrections officer to define

the parameters of a condition. Sanchez Valencia, 169 Wn.2d at 794; Bahl, 164 Wn.2d at 758. Where a condition leaves so much discretion to an individual corrections officer, it suffers from unconstitutional vagueness. Sanchez Valencia, 169 Wn.2d at 795.

The condition at issue here does not delegate the parameters of the condition to anyone. See CP 65. As such, there are no ascertainable standards of guilt to protect against arbitrary enforcement. Nor is there any mechanism for obtaining such ascertainable standards from a corrections officer. Cf. Bahl, 164 Wn.2d at 752-53. The imposition of this condition thus "virtually acknowledges that on its face" the condition "does not provide ascertainable standards for enforcement. Id. at 758.

The condition prohibiting Nguyen from entering places where minors congregate is unconstitutional because it fails to provide reasonable notice as to what conduct is prohibited and exposes Nguyen to arbitrary enforcement. The condition should be stricken from Nguyen's judgment and sentence.

b. This preenforcement claim is ripe for review

Appellate courts routinely consider preenforcement challenges to sentencing conditions. Sanchez Valencia, 169 Wn.2d at 787. Such challenges are ripe for review "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." Id.

at 786 (internal quotation marks omitted) (quoting Bahl, 164 Wn.2d at 751 (quoting First United Methodist Church v. Hr'g Exam'r for Seattle Landmarks Preservation Bd., 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996))). Nguyen's challenge meets these requirements.

First, the issue is primarily legal—the pertinent question is whether the community custody condition violates due process vagueness standards. See Sanchez Valencia, 169 Wn.2d at 790-91 (condition prohibiting use of drug-related paraphernalia was ripe for vagueness review); Bahl, 164 Wn.2d at 752 (condition prohibiting perusal of pornography was ripe for vagueness review).

Second, the question is not fact-dependent. The condition provides constitutional notice and protection against arbitrary enforcement or it does not. "[I]n the context of ripeness, the question of whether the condition is unconstitutionally vague does not require further factual development." Sanchez Valencia, 169 Wn.2d at 788-89.

Third, the challenged condition is final because the trial court sentenced Nguyen to abide by it. See id. at 789 ("The third prong of the ripeness test, whether the challenged action is final, is indisputably met here. The petitioners have been sentenced under the condition at issue.").

Nguyen's preenforcement challenge to the community custody condition prohibiting him from entering places where minors congregate is

ripe for review. See Irwin, 191 Wn. App. at 651-52. Nguyen asks that this condition be stricken from his judgment and sentence.

3. THE COMMUNITY CUSTODY CONDITION PROHIBITING NGUYEN FROM POSSESSING, USING, ACCESSING, OR VIEWING SEXUALLY EXPLICIT AND EROTIC MATERIALS IS UNCONSTITUTIONALLY VAGUE AND IS NOT CRIME-RELATED

As a community custody condition, the trial court ordered,

> Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

CP 65. This condition should be stricken because it is unconstitutionally vague and because it is not crime-related.

a. The condition is void for vagueness because it does not provide fair notice and invites arbitrary enforcement

The Bahl court determined that a prohibition on perusing pornography is unconstitutionally vague. 164 Wn.2d at 754-58. The court persuasive reasoned that because definitions of pornography can and do differ widely—they may "include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo's sculpture of David," Bahl, 164 Wn.2d at 756—the prohibition on perusing pornography

is not sufficiently definite to apprise ordinary persons of what is permitted and what is proscribed.

The community custody prohibition on possessing, using, accessing, or viewing sexually explicit materials, erotic materials, and depictions of sexually explicit conduct suffers from the same vagueness. Many great works of art, literature, and film describe and depict sex and sexuality in great detail. Nguyen has no way of knowing which of these works he is allowed to possess, use, access, or view, and which he is not. This prohibitory condition on any sexually explicit or erotic materials, like the ban on pornography, is unconstitutionally vague.

This is especially true where prohibitions implicate materials protected by the First Amendment. Bahl, 164 Wn.2d at 757-58. Any restrictions on the materials Nguyen may possess or view or access implicate the First Amendment and therefore "must be clear and must be reasonably necessary to accomplish essential state needs and public order." Id. The blanket prohibition on sexually explicit or erotic materials fails to satisfy the requisite clarity to ensure Nguyen's First Amendment rights are honored. The prohibitory condition is unconstitutionally vague.

To be sure, the Bahl court discussed and approved of a condition that prohibited Bahl from "frequenting 'establishments whose primary business pertains to sexually explicit or erotic material.'" 164 Wn.2d at 758. The

court discussed discretionary definitions of "sexually explicit" and "erotic" and also noted Washington statutes provided definitions of similar terms. Id. at 758-60. However, in approving the condition, the court was careful to hold that context matters: Because "[t]he challenged terms [we]re used in connection with a prohibition on frequenting businesses," "[w]hen all of the challenged terms, with their dictionary definitions, are considered together, we believe the condition is sufficiently clear. It restricts Bahl from patronizing adult bookstores, adult dance clubs, and like." Id. at 759.

No context saves the prohibition at issue here. Nguyen was ordered not to possess, view, access, or use any sexually explicit or erotic materials. This broad prohibition gives no context that would enable an ordinary person to understand what is disallowed, distinguishing the prohibition at issue in Bahl. Because more specificity is required to inform Nguyen what is considered sexually explicit or erotic and what is not, the ban on possessing, viewing, accessing, or viewing any sexually explicit or erotic materials in unconstitutionally vague.

Nor do statutory definitions provide sufficient guidance.[2] RCW 9.68.130(2) defines "Sexually explicit material" as

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[2] The Bahl court did "not decide whether this definition [of sexually explicit material] would be sufficient notice (given that Mr. Bahl was not convicted under this statute) . . . ." 164 Wn.2d at 760. Nguyen was not convicted under statutes defining "sexually explicit material," "erotic materials," or "sexually explicit conduct," either.

> any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

"Sexually explicit conduct" is defined under RCW 9.68A.011(4) as actual or simulated

> (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or oppose sex or between humans and animals;
>
> (b) Penetration of the vagina or rectum by any object;
>
> (c) Masturbation;
>
> (d) Sadomasochistic abuse;
>
> (e) Defecation or urination for the purpose of sexual stimulation of the view;
>
> (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer . . . .; and
>
> (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the view.

"Erotic material," under RCW 9.68.050(2)

> means printed materials, photographs, pictures, motion pictures, sound recordings, and other material the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-

> masochistic abuse; and is utterly without redeeming social value . . . ."

Turning first to RCW 9.68.130(2)'s definition of sexually explicit material, it would be difficult to distinguish with certainty pictures displaying flagellation or torture in the context of sexual relationship from pictorial material that fell short of depicting such flagellation or torture. It would also be challenging to know for sure in advance whether a picture, part of which showed adult genitals, actually "emphasiz[ed] the depiction" of the genitals. And, how would an ordinary person know whether certain materials qualified as "works of art or of anthropological significance" and therefore fell outside the definition of sexually explicit material, when reasonable minds would surely differ on this point? RCW 9.68.130(2)'s definition leads to more questions than answers and therefore fails to provide adequate notice of what is prohibited. RCW 9.68.130(2)'s definition of sexually explicit material does not save the community custody condition from unconstitutional vagueness.

Neither are the definitions of "sexually explicit conduct" in RCW 9.68A.011(4) specific enough for an ordinary person to distill what is allowed from what is disallowed. Perhaps subsections (a) and (b) are sufficiently definite, but it would be difficult, if not impossible, to fairly identify images of "masturbation" or "sadomasochistic abuse" with

sufficient particularity. And to qualify as "sexually explicit conduct" in RCW 9.68A.011(4)(e), (f), and (g), the depictions must be created "for the purpose of sexual stimulation of the viewer." In other words, without knowing the purpose for which a depiction was created, it is impossible to know whether the depiction shows sexually explicit conduct or not under the statute.

The definition of erotic material in RCW 9.68.050(2) suffers from similar vagueness. Reasonable minds could differ on whether the "dominant theme" "taken as a whole" appeals to the prurient interest of minors in sex as opposed to a mere nondominant theme. And how is an offender supposed to know in advance whether such erotic materials are "utterly without redeeming social value?" The Bahl court relied in part on the Third Circuit Court of Appeals decision in United States v. Loy, 237 F.3d 251 (3d Cir. 2001). See Bahl, 164 Wn.2d at 746-48 (discussing Loy). The Loy court, addressing prohibitions on pornography, recognized that

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

237 F.3d at 264.

The same reasoning applies here. Because the prohibition on possessing, using, accessing, or viewing sexually explicit and erotic materials do not give definitive notice of what is allowed and what is disallowed, the prohibitory condition is unconstitutionally vague under the first prong of the Bahl analysis.

The prohibition is also unconstitutionally vague under Bahl's second prong because it allows enforcement in an arbitrary manner. Where a condition gives enormous discretion to an individual to define the parameters of the prohibition, the condition is unconstitutionally vague. Sanchez Valencia, 169 Wn.2d at 795; Bahl, 164 Wn.2d at 758. A corrections officer or treatment provider could classify a great breadth of materials sexually explicit or erotic by virtue of their mere mention of sex or sexuality. This would give providers unfettered discretion to define what is and what is not illegal. Moreover, to ascertain whether certain materials qualified as sexually explicit or erotic, Nguyen would have to show them to his community corrections officer or treatment provider, thereby exposing himself to the risk that they will give an after-the-fact determination that Nguyen violated the community custody condition. The conditions allow a third party to "direct what falls within the condition," which "only makes the vagueness problem more apparent since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Bahl, 164

Wn.2d at 758. The condition Nguyen challenges thus also fails under Bahl's arbitrary-enforcement prong of the vagueness test. The unconstitutionally vague conditions prohibiting possessing, viewing, using, or accessing sexually explicit and erotic materials must be stricken from Nguyen's judgment and sentence.

b. Sexually explicit materials have nothing to do with this case and the trial court has authority to impose only crime-related community custody prohibitions

Under RCW 9.94A.703(1) through (4) provide mandatory, waivable, discretionary, and special community custody conditions, respectively. Under RCW 9.94A.703(3)(f), the trial court may require an offender to "[c]omply with any crime-related prohibitions." The prohibitions on sexually explicit and erotic materials do not qualify as crime-related prohibitions and therefore must be stricken.

There was no evidence presented in this case that possessing, viewing, using, or accessing sexually explicit or erotic materials played any role in the crime. In State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), this court accepted the State's concession that a condition ordering the defendant to refrain from possessing sexually explicit materials "must be stricken because no evidence suggested that such materials were related to or contributed to his crime." Likewise, in State v. O'Cain, 144 Wn. App. 772,

775, 184 P.3d 1262 (2008), this court struck a community custody condition prohibiting the defendant's access to the internet, concluding,

> There is no evidence that O'Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Kinzle's and O'Cain's reasoning holds true here. Because the prohibition on possessing, using, accessing or viewing sexually explicit and erotic materials is not in any way related to the crimes at issue, the trial court's imposition of this prohibition exceeded its authority. This condition should accordingly be stricken.

c. This preenforcement claim is ripe for review

Conditions very similar to those at issue here were determined to be adequately ripe for review by our supreme court in Bahl. 164 Wn.2d at 751-52; see also Part C.1.b supra. Nguyen's challenge is likewise ripe for appellate review.

The issue is primarily legal: the court must answer the legal question of whether, under the due process vagueness standard, the condition is unconstitutional. The court must also answer the legal question of whether the condition exceeds the trial court's sentencing authority. These are primarily legal questions. See Sanchez Valencia, 169 Wn.2d at 790-91; Bahl, 164 Wn.2d at 752.

No further factual development is necessary because the questions are (1) whether the condition as written provides the requisite constitutional notice and protection against arbitrary enforcement and (2) whether the condition as written is related to the crime in question.

Finally, the condition at issue here is final because Nguyen has "been sentenced under the condition at issue." Sanchez Valencia, 169 Wn.2d at 789. Nguyen's challenge to the community custody condition prohibiting him from possessing, using, accessing, or viewing sexually explicit materials is ripe for appellate review.

4. THE CURFEW FROM 10:00 P.M. TO 5:00 A.M. IMPOSED AS A COMMUNITY CUSTODY CONDITION IS NOT CRIME-RELATED AND THEREFORE EXCEEDS THE TRIAL COURT'S AUTHORITY

As discussed, under RCW 9.94A.703(3)(f), the trial court may require an offender to "[c]omply with any crime-related prohibitions." The sentencing court may also order an offender to participate in rehabilitative programs or perform affirmative conduct reasonably related to the circumstances of the offense. RCW 9.94A.703(3)(d). Here, the trial court imposed a curfew between the hours of 10:00 p.m. and 5:00 a.m. CP 64. Regardless of whether this condition is treated as a prohibition or as affirmative conduct under RCW 9.94A.703, it must be stricken because it is not crime-related and thus exceeds the trial court's authority.

All the alleged child rapes and molestations testified to in this case occurred in the mid to late afternoon, not at night. See RP 137 (Nguyen got home "about the same time I did" "Around 3," and T.P.'s father would do yard work outside "for the remainder of the afternoon" after bringing T.P. home from school); RP 231 (T.P.'s sister testifying that when she first witnessed sexual abuse "It was light outside"). There is no evidence in the record that remotely indicates that Nguyen committed any crime at night or that he would have not been able to commit crimes had been confined from 10:00 p.m. to 5:00 a.m. every day. Because no evidence in the record supports a community custody condition that imposes such a curfew, the condition is not crime related. See Kinzle, 181 Wn. App. at 785; O'Cain, 144 Wn. App. at 775. The condition imposing a curfew on Nguyen must be stricken.

5. APPELLATE COSTS SHOULD BE DENIED

In the event Nguyen does not prevail on appeal, any request by the State for appellate costs should be denied.

Appellate courts indisputably have discretion to deny appellate costs. RCW 10.73.160(1) ("The court of appeals . . . may require an adult offender convicted of an offense to pay appellate cost." (emphasis added)); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (holding RCW 10.73.160 "vests the appellate court with discretion to deny or approve a request for an

award of costs"), review denied, ___Wn.2d ___, ___ P.3d ___, No. 92796-1 (Jun. 29, 2016).

There are several reasons this court should exercise discretion and deny appellate costs.

a. Nguyen is presumed indigent throughout review

The trial court determined that Nguyen was "unable by reason of poverty to pay for any of the expenses of appellate review" and that Nguyen could not "contribute anything toward the cost of appellate review." CP 69. In the notice of rights on appeal issued by the trial court, Nguyen was informed: "That I have the right, if I cannot afford it, to have counsel appointed and to have portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal." CP 68. At sentencing, the trial court likewise told Nguyen, "You have the right, if you cannot afford it, to have counsel appointed and to have portions of the trial record necessary for review transcribed at public expense." RP 559.

Based on the trial court's determination of indigence, Nguyen is presumed indigent throughout this review. RAP 15.2(f). In Sinclair, this court acknowledged, "We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve . . . . We therefore presume Sinclair remains indigent." 192 Wn. App. at 393. The same is true here. Because the trial court found Nguyen indigent, this court

should presumed he remains so and deny any request by the State for appellate costs.

b. Attempting to fund the Office of Public Defense on the backs of indigent persons when their public defenders lose their appeals undermines the attorney-client relationship and creates a perverse conflict of interest

Any reasonable person reading the order of indigency issued by the trial court would believe that Nguyen was entitled to an attorney to represent him on appeal at public expense and that Nguyen would pay nothing due to his indigency, win or lose. Under the current appellate cost scheme, however, this reasonable belief is incorrect and trial court indigency orders are falsehoods.

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not win the day, they will be assessed, at minimum, thousands of dollars in appellate costs. Unlike other lawyers whose clients pay them, the client's ability to pay does not factor into an appellate defender's representation of his or her client. Yet appellate defenders must still play the role of financial planner, hedging the strength of their arguments against the vast sums of money their clients will owe, and attempt to advise their clients accordingly. This undermines the attorney's fundamental role in advancing all issues of arguable merit on their clients' behalf and thereby undermines the relationship between attorney and client.

Not only do appellate defenders have to explain to clients they will face substantial appellate costs if their arguments are unsuccessful, they also have to explain that the Office of Public Defense gets most of the money. Many clients immediately see the perverse incentive this creates: The Office of Public Defense, through which all appellate defenders represent their clients, collects money only when the appellate defender is unsuccessful. This is readily apparent as a conflict of interest and undermines any appearance that the appellate cost scheme is fair. See RPC 1.7(a)(2) (a conflict exists where "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer"); Wood v. Georgia, 450 U.S. 261, 268-70, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (acknowledging conflict when interest of third party paying lawyer is at odds with client's interest); Winkler v. Keane, 7 F.3d 304, 308 (2d Cir. 1993) (contingent fee in criminal case creates actual conflict of interest); United States v. Horton, 845 F.2d 1414, 1419 (7th Cir. 1988) (conflict of interest arises when defense attorney must "make a choice advancing his own interest to the detriment of his client's interests").

The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the organization that funds their attorneys when they lose. Franz Kafka himself would strain to imagine such a design.

The appellate cost scheme creates a perverse conflict of interest implicating the constitutional right to conflict-free counsel. This is a good reason to exercise discretion and deny appellate costs.

c. The trial court waived all discretionary legal obligations and so should this court based on the record

The trial court waived all discretionary legal financial obligations, including court costs and fees for court-appointed counsel. CP 58; RP 558. The State did not seek any discretionary legal financial obligations for court costs or counsel fees below. To impose thousands of dollars in appellate costs now would be incongruous with the trial court's waiver of discretionary legal financial obligations. This court recently recognized that carrying an obligation to pay thousands of dollars in appellate costs plus accumulated interest "can be quite a millstone around the neck of an indigent offender." Sinclair, 191 Wn. App. at 391. There is no basis in the record to place this millstone around Nguyen's neck.

Nguyen is 54 years old. CP 7. He received an indeterminate sentence with a minimum term of 279 months (23.25 years). CP 60. Thus, Nguyen will be in his late 70s before he is released from prison. As this court concluded in Sinclair under similar circumstances, "There is no realistic possibility that [Nguyen] will be released from prison in a position to find gainful employment that will allow him to pay appellate costs." 192

Wn. App. at 393. Based on the record, this court should exercise discretion and deny any request by the State for appellate costs.

D. CONCLUSION

Because the first degree child molestation and second degree child molestation convictions violate double jeopardy, Nguyen asks that this court reverse and remand so that these convictions may be vacated. Nguyen also asks that the challenged community custody conditions be stricken from the judgment and sentence.

DATED this 22nd day of July, 2016.

Respectfully submitted,

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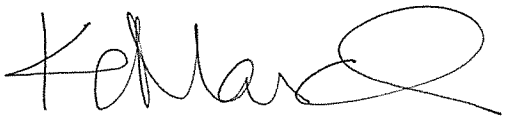

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