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NO. 96313-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

FRANK WALLMULLER,
Respondent.

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

The Honorable Toni A. Sheldon, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED IN REPLY

1. The decision in *State v. Wallmuller*, 4 Wn. App. 2d 698 (2018), does not conflict with the decision in *State v. Padilla*, 190 Wn.2d 672, 416 P.3d 712 (2018).
2. The Court of Appeals correctly held that an open ended prohibition on avoiding places where children congregate is unconstitutionally vague.
3. *State v. Johnson*, 4 Wn. App. 2d 352, 421 P.3d 969 (2018), was wrongly decided.

B. STATEMENT OF FACTS

After being convicted of a child sex crime, the court entered the following condition on probation the Court of Appeals correctly held to be unconstitutionally vague. 4 Wn. App. 2d 698, 701, 703:

“The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls.”

CP 25. The state petitioned for review, claiming that the Court of Appeals decision on this matter was incorrect and that the decision in *State v. Johnson*, 4 Wn. App. 2d 352, 421 P.3d 969 (2018), which conflicts with the decision in *Wallmuller* was correct. Petition at page 5.

This brief in reply follows.

C. ARGUMENT IN REPLY

1. THE COURT OF APPEALS CORRECTLY APPLIED *PADILLA* TO HOLD THAT SENTENCING CONDITION 14, WAS UNCONSTITUTIONALLY VAGUE BECAUSE ENFORCEMENT DEPENDS ON A COMPLETELY SUBJECTIVE STANDARD

The Court of Appeals correctly determined that sentencing condition 14 is unconstitutionally vague.

“The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls.”

CP 25.

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, prohibit laws that are vague. *Padilla*, 190 Wn.2d at 68; *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). Due process requires fair warning of the proscribed conduct. *Id.*

A legal prohibition, such as a community custody condition, is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable

standards to protect against arbitrary enforcement. *Padilla*, 190 Wn.2d at 677, 679 (citing *Bahl*, 164 Wn.2d at 752-53). When either of these requirements is not satisfied, the sentencing condition is unconstitutionally vague. *Bahl*, 164 Wn.2d at 753.

Additionally, if a condition implicates First Amendment rights, like the right of assembly, it “demands a greater degree of specificity” so as not to “cause a chilling effect” on the implicated rights. *Padilla*, 190 Wn.2d at 678. There is no presumption in favor of the constitutionality of a community custody condition. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). The reviewing court applies “an abuse of discretion standard of review, and if the condition is unconstitutionally vague, it will be manifestly unreasonable.” *Valencia*, 169 Wn.2d at 793.

To determine whether a community custody provision is unconstitutionally vague, the court applies the two-prong analysis considering, first, whether the challenged language “fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.” *Padilla*, 190 Wn.2d at 679 (quoting *City of Chicago v. Morales*, 537 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d (1999)). Second, the language will be

unconstitutionally vague if it “may authorize and even encourage arbitrary and discriminatory enforcement.” *Id.*

A community custody condition is not unconstitutionally vague when a person “exercising ordinary common sense can sufficiently understand it.” *Padilla*, 190 Wn.2d at 679-80 (quoting, *Morales*, 527 U.S. at 56).

In *Padilla*, the defendant successfully challenged the term “pornographic materials” as unconstitutionally vague where the sentencing court explicitly defined the term “pornographic material” as “images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts.” *Padilla*, 190 Wn.2d at 680-81. The Court held this term to be unconstitutionally vague because the “definition does not provide adequate notice of what behaviors Padilla is prohibited from committing and also encompasses the prohibition of constitutionally protected speech. *Padilla*, 190 Wn.2d at 681-82.

The Court of Appeals decision in *Wallmuller*, is in accord with this Court’s decision in *Padilla*. The Court of Appeals correctly held that the phrase “where minor children are known to congregate” was unconstitutionally vague because an ordinary

person could not understand the breadth of the prohibited conduct, leaving its enforcement dependent on some unannounced, subjective standard. *Wallmuller*, 423 P.3d at 703 (citing *Padilla*, 190 Wn.2d at 697.)

The dictionary definition of the specific term, “congregate” does not provide notice because it is subject to endless possibility: (1) “to collect together into a group, crowd, or assembly,” (2) **“to come together, collect, or concentrate in a particular locality or group,”** and (3) “become situated together or in proximity to each other.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 478 (2002) (Emphasis added).

The Court in *Wallmuller* adopted the second definition for its analysis. *Wallmuller*, 423 P.3d at 702-03. This specific definition like the definition of “pornographic material” does not in any manner describe the prohibited conduct because it leaves open too many questions such as: (1) whether the children must have intended to congregate versus, ending up in a location; or (2) must the children actually be in a group or merely in the proximity of other children; (3) how many children make a “congregation”; (4) how frequently must the children congregate in a specific location for it to be a

place where children “congregate; and (5) is there a temporal component to how recently children congregated in any given place. *Id*; *Padilla*, 190 Wn.2d at 681-82; *State v. Norris*, 1 Wn. App. 2d 87, 95, 40 P.3d 83 (2017) (*overruled on other grounds in State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2017)).

In *Norris*, the defendant successfully challenged a condition similar to Wallmuller’s: “Do not enter any parks/playgrounds/schools and or any places where minors congregate.” *Norris*, 1 Wn. App. 2d at 95. The state conceded and the court held that a finite list would satisfy the vagueness challenge by removing the language “and or any places where children congregate”. *Norris*, 1 Wn. App. 2d at 95-96. Here, as in *Norris*, the condition is unconstitutionally vague because the endless possibilities for “where children congregate”, does not provide an ordinary person with notice of the prohibited locations. *Padilla*, 190 Wn.2d at 681; *Wallmuller*, 4 Wn. App. 2d at 704; *Norris*, 1 Wn. App. 2d at 95-96.

If the sentencing court limited the locations to those listed, as it did in *Norris*, the condition would not be vague. *Norris*, 1 Wn. App. 2d at 95-96.

Here, simply providing a list of example locations does not cure the problem because, while the list indicates specific places to avoid, the unnamed possible locations are limitless, impossible for an ordinary person to ascertain, and the phrase does not provide explicit standards to those charged with enforcing the law, to prevent “arbitrary and discriminatory”. *Padilla*, 190 Wn.2d at 679-82; *Norris*, 1 Wn. App. 2d at 95. *Wallmuller*, 4 Wn. App. 2d at 703-03.

In *State v. Irwin*, 191 Wn. App. 644, 649, 364 P.3d 830 (2015), Division One also considered a condition similar to Wallmuller’s but with a community corrections officer identifying the prohibited locations: “Do not frequent areas where minor children are known to congregate as defined by the supervising” community corrections officer. Division One court struck this condition because it was unconstitutionally vague and remanded for resentencing. *Irwin*, 191 Wn. App. at 655.

The Court in *Irwin* explained, that “[w]ithout 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 Court in *Irwin* 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.* Although the Court in *Irwin* reached the correct result, the decision is not completely on point because it focused on the subjective arbitrary enforcement by a community corrections officer. *Id.*

As well, citing to *Bahl*, the court suggested that an “illustrative” list of places would provide adequate notice. *Irwin*, 191 Wn. App. at 655 (trial court indicated that Irwin should not frequent places with high concentration of children but this condition was not placed in the sentencing order) (*citing Bahl*, 164 Wn.2d at 753). This was incorrect for several reasons. First, *Bahl*, does not stand for the proposition that a list of examples will provide adequate notice. *Bahl*, 164 Wn.2d at 753. In fact, where the decision in *Bahl* mentions a list, it does so first to indicate that a non-exclusive list is unconstitutionally vague. *Bahl*, 164 Wn.2d at 755 (*citing Fitzgerald*

v. State, 805 N.E.2d 857, 866-67 (Ind.App. 2004)). Second *Bahl* identifies in a footnote two separate statutes that define “sexually explicit conduct” and “erotic materials” in a list with many dozens of variables, all of which must be for the purpose of the sexual stimulation of the viewer. *Bahl*, 165 Wn.2d at 789 n. 7, 8 (citing RCW 9.68A.011(3); RCW 9.68A.150(3)).

Unlike the community custody condition in *Wallmuller’s* case, the condition in *Bahl*, provides an exhaustive definition of “sexually explicit material” and “erotic material”- and further limited those definitions to businesses that provide such material. *Bahl*, 164 Wn.2d at 759. In *Wallmuller’s* case, there are no such parameters or limitations in condition 14. Moreover, *Bahl* did not address a community custody provision related to places where children congregate, but rather in part addressed “places where sexually explicit material was provided”. *Bahl*, 164 Wn.2d at 758-59. *Bahl* is not on point and is not instructive.

In *Johnson*, the court addressed similar community custody condition similar to *Wallmuller’s*, and incorrectly held it to be constitutional.

“[a]void places where children congregate to include, but not limited to: parks, libraries, playgrounds,

schools, school yards, daycare centers, skating rinks, and video arcades.” CP at 41.

Johnson, 4 Wn. App. at 356. The Court wrongly determined the condition to be constitutional based on an inadequate and unconvincing reason. The Court explained that “where children congregate – modifies the clause that provides the illustrative list”- and thus the condition is not vague. *Johnson*, 4 Wn. App. at 360-61. This makes no sense because, the problem remains with not knowing all of the unnamed places where children congregate.

The Court also provided that with regard to a sex offense, the term “children” refers to children under the age of 16, and the word “congregate” means “to collect together into a group, crowd, or assembly,” thus the sentencing condition fairly instructs Mr. Johnson about what locations are prohibited. *Johnson*, 4 Wn. App. at 360-61.

This reasoning fails as well because it too fails to provide an ordinary person fair notice of the many possible places “where children congregate”. *Johnson*, 4 Wn. App. at 360-61. The list only provides fair notice of the specifically listed places the defendant must avoid, thus its enforcement depends on a completely

subjection standard for determination of places where children congregate. *Padilla*, 190 Wn.2d at 679; *Wallmuller*, 4 Wn. App. 2d at 704.

The Court in *Johnson* even cited to *United States v. Paul*, 274 F.3d 155, 165-66 (5th Cir. 2001), which supports the ruling in *Wallmuller*, which acknowledges that to avoid a vagueness challenge, the phrase “where children are likely to congregate” must be limited to a specific list of specific locations. *Wallmuller* 4 Wn. App. 2d at 704. When the list is finite, there is no uncertainty, and an ordinary person can determine the prohibited conduct.

After the decision in *Wallmuller*, a different panel in Division Two, in an unpublished 2-1 opinion, reached the opposite result than *Wallmuller*. *State v. Ramos-Ramirez*, 5 Wn. App. 2d 1041 (2018) (unpublished - Not cited for precedential value- rather for illustrative purposes).

The majority held constitutional, a very similar community custody condition to *Wallmuller*’s case. “The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and shopping malls.” The Court in *Ramos-Ramirez*, like *Irwin* mis-cited to *Bahl*, and *Irwin* for the proposition

that the illustrative list cured the vagueness problem. The *Ramos-Ramirez* majority also failed to understand that under *Norris*, for a condition with a list to be constitutional, the list must be finite. *Bahl*, 164 Wn.2d at 753; *Norris*, 1 Wn.App. 2d at 95; *Irwin*, 191 Wn. App. at 654; *Ramos-Ramirez*, 5 Wn. App. 2d at 5.

As previously indicated, the decision in *Bahl*, did not stand for the proposition that a list can cure a vagueness challenge; the court in *Irwin* mistakenly implied otherwise; and in this context, a list will only pass constitutional muster if it is finite. *Bahl*, 164 Wn.2d at 753; *Norris*, 1 Wn. App. 2d at 95; *Irwin*, 191 Wn. App. at 654.

The dissenting judge in *Johnson*, aptly understood *Irwin* to suggest “that listing places survives constitutional challenge” if the list is “exhaustive.” *Johnson*, 4 Wn. App. 2d at 366-67 (Fearing, J. Dissenting); *Accord*, *Ramos-Ramirez*, 5 Wn. App. 2d at 6 (Worswick, J. Dissenting).

Both *Johnson* and *Ramos-Ramirez* mistakenly held that the illustrative list rendered the condition constitutional. This was error under *Padilla*, because the lists do not prove an ordinary person of the ability to determine other unlisted prohibited locations. Moreover, the lists do not provide ascertainable standards to

prevent arbitrary enforcement. *Padilla*, 190 Wn.2d at 679-83, 685; *Ramos-Ramirez*, 5 Wn. App. 2d at 5; *Johnson*, 4 Wn. App. 2d at 360-61. Accordingly, this Court should deny the state's petition or grant review to affirm *Wallmuller*, 4 Wn. App. 2d at 704.

D. CONCLUSION

Mr. Wallmuller respectfully requests this Court deny review or grant review and affirm the Court of Appeals.

DATED this 11th day of February 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Mason County Prosecutor's Office timh@co.mason.wa.us and timw@co.mason.wa.us and Frank Wallmuller/DOC#321793, Washington Corrections Center, PO Box 900, Shelton, WA 98584 a true copy of the document to which this certificate is affixed on February 11, 2019.. Service was made by electronically to the prosecutor and Frank Wallmuller by depositing in the mails of the United States of America, properly stamped and addressed.



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