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No. 67935-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DONALD LAVERNE HAND,

Appellant.

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OPENING BRIEF

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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ORIGINAL

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## I. ASSIGNMENTS OF ERROR

The trial court erred in revoking Mr. Hand's SSOSA sentence.

## II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

Was the SSOSA condition barring Mr. Hand from possessing pornography unconstitutionally vague under *State v. Bahl*, 164 Wn.2d 739, 758, 193 P.3d 678 (2008); and, hence,

Must the order revoking the SSOSA sentence due in part to violation of that condition be reversed?

## III. STATEMENT OF THE CASE

### A. Mr. Hand Received an Agreed SSOSA Sentence of 123 Months, With All But 6 Months Suspended, Based on Certain Conditions

Mr. Hand was charged with one count of rape of a child in the first degree in Snohomish County Superior Court on March 18, 1999. Dkt. No. 1 (Information), CP:194. The state alleged that "on or about the 1<sup>st</sup> day of November, 1998, to the 24<sup>th</sup> day of November, 1998, [Mr. Hand] did have sexual intercourse with S.M. (DOB xx/xx/91), who was less than twelve years old and not married to the defendant and the defendant was at least twenty-four (24) months older than the victim; proscribed by RCW

9A.44.073, a felony.” *Id.* According to the Affidavit of Probable Cause, Mr. Hand was the live-in boyfriend of S.M.’s mother. Dkt. No. 2; CP:192-93.

Mr. Hand sought the SSOSA sentencing option. He agreed to a stipulated facts trial, based on agreed evidence, before the judge. Dkt. No. 20; CP:191. The agreed evidence was filed under seal at Dkt. No. 24; CP:239-52, and included the Affidavit of Probable Cause and the police reports. The state agreed that the SSOSA option was available, and recommended that if it were adopted, the court should impose a sentence of 123 months with all but six months suspended. Dkt. No. 24’s Appendix C, State’s Sentencing Recommendation; CP:246-49.

Mr. Hand was convicted as charged following that brief stipulated facts bench trial. 12/1/99 VRP:3-4.

On December 1, 1999, the sentencing court followed the SSOSA recommendation. It imposed a sentence of 123 months, with all but six months suspended. It also imposed several conditions, including sexual deviancy treatment; but the following two conditions are most important to this PRP: no contact with minor children without the presence of an adult who is aware of this

offense or approved by the CCO and no possession or viewing of pornographic materials. 12/1/99 VRP:21 .

The Judgment and Sentence, Dkt. No. 27; CP:176-87, entered on December 8, 1999, set those conditions down in writing. It incorporated by reference the conditions specified by the treatment provider, by stating that Mr. Hand must follow the conditions set forth in Appendix B to the Judgment & Sentence, paragraphs 1-16, CP:186-87, and in Roger Wolfe's letter/evaluation of July 26, 1999. Those conditions were:

1. Do not have direct or indirect contact with S.M. (DOB: xx/xx/92) or her immediate family.
2. Pay the costs of counseling or medical treatment required by S.M.
3. *Have no contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer. The only exception is the defendant's 17 year old son, with the explicit informed consent of the boy's mother.*
4. Do not seek employment or volunteer positions which place you in contact with or control over minor children.
5. Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.

6. *Do not possess pornographic materials, as directed by the supervising Community Corrections Officer.*
7. Do not date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections Officer.
8. Do not remain overnight in a residence where minor children live or are spending the night.
9. Enter into, make satisfactory progress in, and successfully complete outpatient sexual deviancy treatment with Northwest Treatment Associates. Abide by all of their rules and conditions.
10. Do not drink alcoholic beverages or use or possess illegal drugs.
11. Submit to breath and urine testing to verify compliance.
12. Submit to polygraph and plethysmograph testing as required by your Community Corrections Officer and/or therapist to verify compliance with conditions of Community Custody.
13. Your residence, living arrangements and employment must be approved by the Supervising Community Corrections Officer.
14. Prior to going on trips, vacations, or visits out of town, you must discuss with and receive permission from your therapist and Community Corrections Officer.
15. The defendant must sign a release of information which directs Northwest Treatment

Associates to be in contact with and share pertinent information regarding treatment. Those to be named on the release of information include Prosecuting Attorney's Office, Department of Corrections, victim, victim's therapist, spouse's therapist, spouse (if any), employer, and any others deemed appropriate by therapist or Community Corrections Officer.

16. Do not change treatment providers without prior approval from the Court.

Dkt. No. 27; CP:186-87 (emphasis added).

**B. Mr. Hand Successfully Completed SSOSA Treatment**

For the next eight years, Mr. Hand complied with the SSOSA conditions and the treatment conditions. Periodic reports from his treatment providers were provided to the Superior Court and filed under seal. They reflected steady progress forward, though not without some backsliding. Each time he took a step backwards, though, it was addressed by the providers, and continuation of the treatment and the SSOSA option were recommended by the treatment providers and ordered by the court from 1999 to the beginning of 2008.

For example, the treatment provider reported that Mr. Hand made steady progress from 2000-2006 despite some problems. *E.g.*, Dkt. No. 37; CP:230-34 (2/28/01 report) (sealed treatment

provider's report documenting that Mr. Hand had tested positive for cocaine and had failed to comply with rules regarding disclosure of intimate relationship with a girlfriend); Dkt. No. 39; CP:227-29 (sealed report documenting a healthy relationship and steady progress in treatment); Dkt. No. 42; CP:163-73 (Notice of Violation and to Extend SSOSA submitted by CCO Rehberg dated 8/8/02); Dkt. No. 46; CP:154-56 (9/11/02 Order extending SSOSA treatment as recommended by CCO); Dkt. No. 50; CP:216-21 (4/29/04 treatment provider's report documenting progress and problems but concluding that internalization of treatment continues "at a modest pace"); Dkt. No. 54; CP:195-99 (1/25/05 report documenting treatment progress and difficulties); Dkt. No. 55; CP:134-48 (6/9/05 letter and probation report summarizing that provider recommends another six-month extension of treatment); Dkt. No. 60; CP:110-33 (11/1/05 report re violation, recommending continuation of treatment).

In 2006, the trial court extended Mr. Hand's period of treatment. It ruled that he had been in compliance with court orders and treatment requirements, but that there was good cause to extend the treatment condition. Dkt. No. 69 (6/20/06); CP:79-82. In that Order Modifying Conditions of Community Custody or

Community Supervision and Setting Review Hearing, the court entered additional conditions incorporated by reference from the treatment provider's report. Of particular importance is condition number 7, which states: "client should not use pornography" and number 9, which states, "client should have no unchaperoned contact with minors." *Id.*, CP:82, p. 4.

As late as June 6, 2007, the treatment provider still informed the court that Mr. Hand was in compliance with his SSOSA conditions, that his risk of reoffense was low, that his attendance at programming was excellent, and that he was on track to complete the treatment program in advance of the court's review hearing date. Dkt. No. 70; CP:76-78. In fact, at a hearing on June 18, 2007, the Superior Court ruled that Mr. Hand had successfully completed Sexual Deviance Treatment; that the treatment requirement was therefore terminated; that the supervision requirement remained in effect; and then entered an Order Terminating Treatment. Dkt. No. 71; CP:75 (minutes); Dkt. No. 72; CP:72-74 (order terminating treatment, because the requirement that Mr. Hand successfully complete sexual deviancy treatment had been "satisfied"). Mr. Hand continued to comply with all court orders, and to exhibit appropriate behavior. *E.g.*, Dkt. No. 74;

CP:57-65 (1/3/08 letter and probation report concluding, "He has done extremely well on supervision and has complied with all his Court and Department of Corrections requirements").

**C. Mr. Hand's SSOSA Sentence Was Revoked For Two Violations, One of Which Was Viewing Pornography**

On February 9, 2008, however, a letter and probation report were filed alleging violations of two remaining conditions. The first allegation was that Mr. Hand had had contact with a minor child, without prior approval or knowledge of his supervising CCO, on or before 2/13/08. The second allegation was that Mr. Hand failed to comply with a court-ordered condition, specifically, that he viewed pornography, on or before 2/13/08. Dkt. No. 75; CP:38-56.

The basis for the first allegation was that Mr. Hand had been alone with a 4-month old relative, that is, the son of his niece, while his niece took a shower in his home, but that he had admitted it to his CCO and there was no allegation that anything inappropriate occurred during that time. As the CCO alleged:

On 2/13/08, Mr. Hand reported to the Monroe Field Office to take a scheduled polygraph. During the polygraph, Mr. Hand admitted to the polygraphist Bob Littlejohn, that he had been alone with a four month old child, while his niece took a shower. After the polygraph, I spoke with Mr. Hand and asked him why he chose to be alone with a minor child, for any

reason? He replied that his Judgment and Sentence said he could have contact as long as there is a "knowledgeable adult" present. He stated that his niece wanted to take a shower while he watched the baby. I asked him where his approved sponsor, Rebecca, was during this time and he said she was at work. I asked him if she knew about his being with the minor child while the mother took a shower and he said "yes".

I read to Mr. Hand, from his conditions on Appendix B, of his Judgment and Sentence, and reminded him that the "knowledgeable adult" must be pre-approved by the Community Corrections Officer. I assured Mr. Hand I had not met his niece and had heard nothing about this disclosure until the polygraph. I asked him why he had not contacted me, since he has my office phone number and my Nextel number, which is available at all times. He said that he has tried to contact me in the past and I have not always returned his call. I told him if he felt it was important enough, he would have continued to attempt contact with me. His response was, "what can I say, I screwed up".

Dkt. No. 75, p. 3; CP:71.

The basis for the second allegation was that Mr. Hand had viewed a copy of *Playboy*. The CCO alleged:

On 2/13/08, Mr. Hand reported to the Monroe Field Office to take a scheduled polygraph. During the polygraph, Mr. Hand admitted to polygraphist Bob Littlejohn, when asked "*have you looked at the cover or leafed through any sexually explicit magazine?*" Mr. Hand reported "*maybe a Playboy or something, just shuffling through it.*" When I asked Mr. Hand about this allegation, he said that "*one of the guys*" said "*hey, look at this.*" I told him that is not what he told Bob Littlejohn. He said he was "*just shuffling through it.*"

He later called me, on 02/14/08, and stated he did not think that Playboy was pornography. I advised him I would let the Court make that determination. He further stated "*I didn't look at all the pages.*" Mr. Hand reported conflicting statements, in that he said he did not look at the magazine, only that someone showed it to him, then changed his story and told me he didn't look at "*all the pages*". He also admitted on the polygraph that "*Bill, my buddy, sent me the picture about the Lopez family.*" "*It goes on and on and at the bottom was a picture of 'the family' that is topless.*"

Dkt. No. 75, p. 4; CP:42.

As the CCO accurately reported, Mr. Hand himself told him that he did not think that "*Playboy*" was "pornography." *Id.*

The CCO concluded by recommending that the court should schedule a non-compliance hearing, revoke the SSOSA, and order Mr. Hand to complete the remainder of his prison time. *Id.*, at pp. 6-7; CP:44-45,

On April 14, 2008, a revocation hearing was held. The Superior Court followed the CCO's recommendation and revoked Mr. Hand's SSOSA. Dkt. No. 86; CP:10-15 (4/28/08) (Order Modifying Judgment and Sentence). It ruled that Mr. Hand violated the conditions of his suspended sentence by:

1. Having contact with a minor child, without the prior approval or knowledge of supervising Community Corrections officer, on or before 2/13/08.

2. Failing to comply with a court-ordered condition/prohibition, by viewing pornography, on or before 2/13/08.

Dkt. No. 86, p. 1; CP:10. It ordered that, "SSOSA is VACATED, Order suspending execution of sentence REVOKED and SENTENCE EXECUTED." *Id.*, ¶ 3.2; CP:11. The court imposed 123 months of confinement on Count 1, and an additional term of community placement of 36 months. *Id.*

Mr. Hand remains in prison on that 123-month sentence.

**D. Mr. Hand Filed a Notice of Appeal and a Motion to Enlarge Time Within Which to Appeal**

No one raised the issue of the unconstitutionality of the no-pornography condition, and the unconstitutionality of revoking a SSOSA sentence based in part on reading a Playboy in violation of that condition, at the revocation/resentencing hearing. No one told Mr. Hand that he had a right to appeal the revocation decision and resentencing, either. The transcript of that hearing shows that the judge never advised him of the right to appeal. 4/14/08 VRP:5-6. That transcript shows that the prosecutor and defense lawyer never advised him of the right to appeal, either. *Id.* Mr. Hand's declaration (attached to previously-filed Motion to Enlarge Time to Appeal) shows that his lawyer never advised him that he had a right

to appeal or a potential issue to raise on appeal, either. Finally, the Superior Court file contains no document advising Mr. Hand of the right to appeal the revocation decision or resulting sentence.

In fact, Mr. Hand did have a right to appeal and a substantial meritorious issue to raise on appeal. The failure of the court and counsel to advise him about the right to appeal or about his potentially meritorious issues means that Mr. Hand could not have made a knowing, intelligent and voluntary decision to relinquish his appeal. The remedy is to enlarge the time for filing the appeal as discussed in the previously-filed Motion to Enlarge Time to Appeal.

As a result of that procedural problem, this Court has ordered that the issue of enlarging the time to appeal is referred to the panel that decides the merits of the appeal itself. The briefing on that issue has been done separately, and is completed.

#### **IV. SUMMARY OF ARGUMENT**

The Superior Court revoked Mr. Hand's SSOSA suspended sentence and imposed 123 months of imprisonment at a hearing on April 14, 2008. The revocation was based on two grounds; one of the grounds was that Mr. Hand violated the condition of his supervision barring him from viewing pornography by viewing a *Playboy* magazine.

But the no-pornography condition was unconstitutionally vague under the controlling authority of *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678. Revocation based even in part on violation of an unconstitutional condition is unconstitutional, and the remedy is to reverse the revocation order. Argument Section A.

No one raised this issue at that revocation hearing. It is, however, an issue that can be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45 (challenge to condition of community custody as unconstitutionally vague can be raised for first time on appeal). Again, the remedy is to reverse the revocation order. Argument Section B.

## V. ARGUMENT

### A. THE CONDITION BARRING USE OF PORNOGRAPHY IS UNCONSTITUTIONAL DUE TO VAGUENESS UNDER *BAHL*; THE SSOSA REVOCATION BASED IN PART ON THAT VIOLATION MUST BE REVERSED

#### 1. The Condition Barring Use of Pornography is Unconstitutionally Vague Under *Bahl*

On April 28, 2008, the Superior Court revoked Mr. Hand's SSOSA sentence because of two violations. One was that he

violated the court's bar against viewing "pornography."<sup>1</sup> Based on this finding, the Superior Court revoked Mr. Hand's SSOSA sentence, and imposed the originally suspended sentence of 123 months as a sentence of imprisonment. Order, Dkt. No. 86; CP:10-15. The court also imposed an additional term of 36 months of community placement. *Id.*

On October 9, 2008, however, the Washington Supreme Court held that a condition of community custody barring an offender from possessing pornography is unconstitutionally vague. The Court in *State v. Bahl*, 164 Wn.2d 739, 758, stated, "We conclude that the restriction on accessing or possessing pornographic materials is unconstitutionally vague."

That means that the revocation of Mr. Hand's suspended sentence was based in part on a violation that the state cannot, constitutionally, punish.

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<sup>1</sup> This is clear from Dkt. No. 86, the Order Modifying Judgment and Sentence, CP:10-15, which states that the court considered the Feb. 13, 2008, violation report and the defendant's stipulation regarding the allegation that he violated two conditions, and ruled that Mr. Hand violated the conditions of his suspended sentence by: (1) having contact with a minor child without the prior approval or knowledge of supervising Community Corrections officer, and (2) failing to comply with a court-ordered condition/prohibition by viewing "pornography" both on or before 2/13/08.

## **2. Revocation of a Suspended Sentence Based Even in Part on an Unconstitutional Reason Must be Reversed**

A defendant has the right to due process of law at a revocation hearing. *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). This protection applies with full force to SSOSA revocation hearings. *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999) (applying *Morrissey's* due process clause protections to SSOSA revocation hearing); RCW 9.94A.670(11).

That means that the trial court cannot revoke supervision for violation of a condition that is unconstitutionally vague. *State v. Bahl*, 164 Wn.2d 739, 744-45. See generally *State v. Sansone*, 127 Wn. App. 630, 638-41, 111 P.3d 1251 (2005) (sentencing supervision condition is void for vagueness if ordinary people cannot understand what conduct is prohibited).

Mr. Hand's SSOSA sentence was revoked in part because he violated a condition that the Supreme Court has now ruled was unconstitutionally vague. *State v. Bahl*, 164 Wn.2d at 758. Under controlling state Supreme Court authority, this is unconstitutional. *Id.*

It is true that, “An offender’s SSOSA may be revoked at any time if a court is reasonably satisfied that an offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment.” *State v. Dahl*, 139 Wn.2d at 683 (citing RCW 9.94A.120(8)(a)(vi)). But the court still cannot revoke the SSOSA sentence for violation of an unconstitutional condition, like the condition barring use of pornography. *State v. Bahl*, 164 Wn.2d 739, 758.

It is also true that this Court reviews a trial court decision to rely on violation of an illegal condition to revoke a SSOSA sentence for harmless error. *Dahl*, 139 Wn.2d at 682. The proper question to ask in this context, however, is whether the due process violation formed “at least [a] part” of the basis for the revocation decision. If the answer is yes, then the error is not harmless. *Dahl*, 139 Wn.2d at 689 (“Because the revocation appears to have been *based, at least in part*, on consideration of the exposure incident, the due process error was not harmless. Dahl is therefore entitled to a new hearing.”) (emphasis added). Thus, if the revocation of Mr. Hand’s SSOSA sentence was “based, at least in part, on consideration” of the violation of the unconstitutional condition, the revocation order must be reversed.

The violation of the unconstitutional, no-pornography, condition, formed more than “at least [a] part” of the basis for the revocation of Mr. Hand’s sentence. The CCO’s February 9, 2008, report, listed only two violations, and this was one of them. The first allegation was that Mr. Hand had had contact with a minor child, without the prior approval or knowledge of his supervising CCO; the second was that Mr. Hand failed to comply with a court-ordered condition, specifically, that he viewed pornography, on or before 2/13/08. Dkt. No. 75; CP:38-56.

The CCO’s report gave pretty much equal time to each allegation. As discussed above, at pp. 8-9, the basis for the first allegation was that Mr. Hand had been alone with a 4-month old relative, that is, the son of his niece, while his niece took a shower in his home, but that he had admitted it to his CCO. The CCO summarized the evidence in support of that allegation at Dkt. No. 75, at p. 4; CP:41. The basis for the second allegation was that Mr. Hand had viewed a copy of *Playboy*, see *supra* pp. 9-10. The evidence in support of that allegation was summarized at Dkt. No. 75; CP:42. The CCO devoted a few paragraphs to each violation.

The court gave pretty much equal time to both allegations, also. It discussed the first allegation at 4/14/08 VRP:5-6 (judge

agreed to State's recommendation after hearing from CCO and defense counsel); it discussed the second allegation at 4/14/08 VRP:5-6 (same). In its Order Modifying Judgment and Sentence, Dkt. No. 86; CP:10-15, it then ruled that Hand violated each of the two conditions, and again gave about equal time to each:

1. Having contact with a minor child, without the prior approval or knowledge of supervising Community Corrections officer, on or before 2/13/08.
2. Failing to comply with a court-ordered condition/prohibition, by viewing pornography, on or before 2/13/08.

Dkt. No. 86, p. 1; CP:10.

Thus, according to the CCO, the written order, and the judge's statements at the revocation hearing, both allegations formed the basis for the court's decision to revoke. This certainly meets the standard that the violation of this no-pornography condition did form at least a part of the basis for the revocation.

The error of basing the revocation decision in part on violation of the unconstitutionally vague condition was, therefore, not harmless. Following *Dahl*, the remedy is that Mr. Hand, like Mr. Dahl, is "therefore entitled to a new [revocation] hearing." *Dahl*, 139 Wn.2d at 689.

**B. THE CLAIM THAT THE REVOCATION WAS  
BASED ON AN UNCONSTITUTIONAL  
CONDITION CAN BE RAISED FOR THE  
FIRST TIME ON APPEAL**

Challenges to illegal or erroneous sentences, including challenges to a condition of supervision as unconstitutionally vague, can be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45 (challenge to condition of community custody as unconstitutionally vague can be raised for first time on appeal). See *State v. Sims*, 171 Wn.2d 436, 444 n.3, 256 P.3d 285, 290 n.3 (2011) (challenge to unconstitutional sentence can be raised for first time on appeal, citing *Bahl*); *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) (numerous supporting citations omitted); *State v. Kone*, --- P.3d ----, -- P.3d – (2011), 2011 Wash. App. LEXIS 2795 at \*30 (No. 65522-0-I), amended by 2011 Wash. App. LEXIS 2867 (Dec. 12, 2011); *State v. Steen*, 155 Wn. App. 243, 247, 228 P.3d 1285, 1287 (2010).

It can also be raised now, in 2011, despite the fact that the Judgment was originally entered in 1999 (Dkt. No. 27; CP:176-87) and there was no appeal at that time – just this appeal following revocation. The reason is that this is not a challenge to the original

Judgment. It is a challenge to the 2008 order revoking the suspended sentence, Dkt. No. 86; CP:10-15.

**VI. CONCLUSION**

For the foregoing reasons, the revocation order should be reversed.

Dated this 1<sup>st</sup> day of March, 2012.

Respectfully submitted,



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Sheryl Gordon McCloud, WSBA No. 16709  
Attorney for Appellant, Donald Laverne Hand

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1<sup>st</sup> day of March, 2012, a copy of the APPELLANT'S OPENING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Seth Fine, DPA  
Snohomish County Prosecuting Attorney's Office  
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Sheryl Gordon McCloud