SUPREME COURT NO. 94883-6
COURT OF APPEALS NO. 74358-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HAI MINH NGUYEN,

Petitioner.

ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

IAN ITH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Hai Minh Nguyen, No. 74358-9-I, 2017 WL 3017516 (Wash. Ct. App. July 17, 2017).

C. ISSUE PRESENTED FOR REVIEW

The State asks this Court to deny review of the constitutional vagueness of a community custody condition prohibiting possession of sexually explicit or erotic materials because the court of appeals correctly held that the condition is sufficiently clear to survive constitutional challenge.

The State agrees that this Court should review the broader issue of crime-related prohibitions and whether, under the Sentencing Reform Act of 1981 (SRA), the subject of a crime-related community-custody prohibition must have been actually involved in the commission of the crime to be reasonably related to the circumstances of the crime. However, the State respectfully suggests that a different case, State v. Norris,[1] in which the State has cross-petitioned this Court for review on the same issue, is a

[1] Supreme Court No. 95274-4 (petition for review filed November 28, 2017), 404 P.3d 83, Court of Appeals No. 75258-8-I (Wash. Ct. App. October 30, 2017).

better case for resolving this issue more broadly and thoroughly, for reasons outlined below.[2]

D. STATEMENT OF THE CASE

Hai Minh Nguyen sexually abused a little girl for years, from age six to 13. RP 124-79. A jury convicted him of first-degree child rape, first-degree child molestation, second-degree child rape, and second-degree child molestation. CP 51-54. The trial court imposed a total of 279 months to life in prison and lifetime community custody. CP 60.

One of the "crime-related" conditions of Nguyen's community custody is that he not possess, use, access or view any sexually explicit or erotic material. CP 65. Nguyen appealed this condition as unconstitutionally vague and not crime-related. The court of appeals affirmed. State v. Hai Minh Nguyen, No. 74358-9-I, 2017 WL 3017516 (Wash. Ct. App. July 17, 2017).

E. ARGUMENT

For the reasons outlined below, this Court should deny review of the court of appeals decision regarding the constitutional vagueness of the community custody condition. However, this court should review the issue of crime-related community-custody

[2] The State was not asked to respond to any of the other issues in the petition.

prohibitions in general, and what properly constitutes a prohibition that is "reasonably related to the circumstances of the crime." However, a different case presently before this Court, State v. Norris, *supra*, presents the issue more broadly and creates a conflict between divisions of the court of appeals.

1. THE COURT SHOULD DENY REVIEW ON THE VAGUENESS ISSUE.

RAP 13.4(b) governs consideration of a petition for review. It provides that a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

In his petition for review, Nguyen largely repeats the argument he made below that the community-custody condition prohibiting possession of sexually explicit material is unconstitutionally vague, and he complains that the court of appeals did not agree. But review by this Court is unnecessary because the court of appeals' opinion on this issue is succinct,

commonsensical and in line with prior opinions of this Court. See, e.g., State v. Sanchez Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010) (community custody condition not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which actions would be prohibited). The court of appeals correctly held that the community custody condition, which references statutory definitions, is not beyond the understanding of ordinary people.

No significant constitutional issue is presented. This Court should not accept review of this issue.

2. THIS COURT SHOULD REVIEW THE BROADER ISSUE OF CRIME-RELATED PROHIBITIONS IN A DIFFERENT CASE WITH A PETITION FOR REVIEW PRESENTLY BEFORE THIS COURT.

Despite the fact that the court of appeals sided with the State here on the issue of whether the prohibition is reasonably crime-related, the State asks this Court to review more broadly the allowable breadth of a prohibition that is "reasonably related to the circumstances of the crime."

Trial courts have authority to impose "crime-related prohibitions" as conditions of community custody. RCW 9.94A.703(3)(f). "Crime-related prohibitions" must "directly relate[]

to the circumstances of the crime for which the offender has been convicted[.]" RCW 9.94A.030(10). But such conditions are usually upheld if "reasonably crime related." State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940, 947 (2008). For example, in Warren, this Court upheld a lifetime prohibition directing Warren to avoid contact with the mother of Warren's child-molestation and child-rape victims, even though the mother was not a victim. Id. at 32.

Appellate courts review the factual basis for crime-related conditions under a "substantial evidence" standard. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015). Reviewing courts will strike community custody conditions when there is "no evidence" in the record that the circumstances of the crime related to the community custody condition. Id. at 657. On the other hand, courts will uphold crime-related community custody decisions when there is some basis for the connection; there is no requirement that the prohibited activity be factually identical to the crime. Id. For example, in State v. Kinzle, also a child molestation case, the court upheld a prohibition on dating women with minor children, even though the defendant had not molested children of the women that he dated. 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Here, the court of appeals properly acknowledged the standard of review that affords discretion to the trial court in imposing such conditions. And it also acknowledged that prohibitions on possessing sexually explicit material are reasonably related to the circumstances of sexually victimizing and objectifying vulnerable people.

This Court certainly could accept review in this case to address the question of whether the prohibition at issue could only be "reasonably related" to the crime if such facts were actually involved in the commission of the crime, as opposed to being related to its circumstances, i.e., the specific nature of the offense.

However, Norris, *supra*, is a better case for the broader legal question of how narrowly construed "reasonably related to the circumstances of the crime" should be. In Norris, the court of appeals reversed a crime-related prohibition on entering sex-related businesses because such businesses were not factually involved in the commission of Norris's crimes, but it affirmed the prohibition on sexually explicit material because Norris had exchanged sex-related text messages with her victim. 404 P.3d at 87-89.

The decision in Norris by Division One conflicts with a published opinion by Division Three, State v. Magana, 197 Wn. App. 189, 194, 389 P.3d 654, 657 (2016), which held the trial court had not abused its discretion in imposing prohibitions on sex-related businesses and sexually explicit material: "Because Mr. Magana was convicted of a sex offense, conditions regarding access to X-rated movies, adult book stores, and sexually explicit materials were all crime related and properly imposed." Id. at 201.

The multiple facets of Norris would allow for more thorough consideration of the issue of whether under the Sentencing Reform Act of 1981 (SRA), the subject of a crime-related community-custody prohibition must have been actually involved in the commission of the crime to be reasonably related to the circumstances of the crime.[3] The State respectfully suggests this

[3] Nguyen has characterized the State's position as advocating for an "automatic" approach wherein prohibitions on sexually explicit materials are *always* related to *all* sex offenses *per se*. See Reply Brief of Appellant at 10. That is not what the State argued here or in Norris. While it would be difficult to imagine a situation where a prohibition on such materials was not reasonably related to a felony sex offense, the State's position is that each case should be determined separately. But what is "reasonably related to the circumstances of the crime" should not be so rigidly construed to prohibit only those things that were factually involved in the commission of the crime.

court should deny review of this issue here and accept review of it in Norris.[4]

F. CONCLUSION

The State respectfully asks that the petition for review be denied as to the issue of constitutional vagueness. While the State agrees review is warranted as to the breadth of crime-related community-custody conditions, the issue would be better reviewed in State v. Norris, Supreme Court No. 95274-4 (petition for review filed November 28, 2017), 404 P.3d 83, Court of Appeals No. 75258-8-I (Wash. Ct. App. October 30, 2017).

DATED this 7th day of December, 2017.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
IAN ITH, WSBA #45250
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

[4] In its answer and cross-petition in Norris, the State argued, similar to here, that this Court should deny review of a constitutional vagueness challenge to a community-custody condition requiring the reporting of "dating relationships."

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

December 08, 2017 - 2:11 PM

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Appellate Court Case Title:	State of Washington v. Hai Minh Nguyen
Superior Court Case Number:	14-1-06211-3

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