

No. 34395-2-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Respondent

v.

DAVID VASQUEZ ALCOCER,

Appellant

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY**

NO. 15-1-00274-4

SUPPLEMENTAL BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Diana N. Ruff, Deputy
Prosecuting Attorney
BAR NO. 41702
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
II. ARGUMENT	1
A. “Crime-related prohibitions” are discretionary community custody conditions by statute, and possession of sexually explicit material is “crime- related” to a sex offense, per <i>State v. Magana</i>	1
1. Whether to allow possession of sexually explicit material or not is a discretionary ruling of the trial court provided by statute	1
2. Because the defendant was convicted of a sex offense, it was not an abuse of discretion to impose a condition that he not possess sexually explicit material per <i>State v.</i> <i>Magana</i>	2
III. CONCLUSION.....	3

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Gabino, 185 Wn. App. 1025, 2015 WL 248875 (2015)2
State v. Kinzle, 181 Wn. App. 774, 326 P.3d 870 (2014).....2
State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016).....1, 2, 3
State v. Robb, 197 Wn. 1026, 2017 WL 34600 (2017).....2

WASHINGTON STATUTES

RCW 9.94A.505(9).....1
RCW 9.94A.703(3)(f).....1

I. RESPONSE TO SUPPLEMENTAL ASSIGNMENT OF ERROR

- A. A community custody condition regarding possession of pornographic materials should be remanded for clarification, not stricken, as it is allowed by statute and case law because it is crime-related.

II. ARGUMENT

- A. **“Crime-related prohibitions” are discretionary community custody conditions by statute, and possession of sexually explicit material is “crime-related” to a sex offense, per *State v. Magana*.**
1. **Whether to allow possession of sexually explicit material or not is a discretionary ruling of the trial court provided by statute.**

The defendant argues that any condition addressing possession of pornography/sexually explicit material should be stricken, not remanded for clarification, because there is no statutory authority allowing imposition of a community custody prohibition on possession of sexually explicit material in his case. This is incorrect, as RCW 9.94A.505(9) and 9.94A.703(3)(f) give the trial court discretion to order an offender to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). Discretionary rulings on community custody conditions are reviewed for abuse of discretion. *State v. Magana*, 197 Wn. App. 189, 200, 389 P.3d 654 (2016).

2. **Because the defendant was convicted of a sex offense, it was not an abuse of discretion to impose a condition that he not possess sexually explicit material per *State v. Magana*.**

It appears there is a split in the Divisions regarding whether possession of sexually explicit materials is a crime-related prohibition for sex cases involving human victims or not. The defendant cited to several unpublished cases from Divisions I and II, *State v. Gabino*, 185 Wn. App. 1025, 2015 WL 248875 (2015) (child molestation), and *State v. Robb*, 197 Wn. 1026, 2017 WL 34600 (2017) (rape of a child), respectively, and one published case from Division I, *State v. Kinzle*, 181 Wn. App. 774, 326 P.3d 870 (2014) (child molestation), all of which stand for the proposition that if there is no record at the trial court level that possession of sexually explicit material was crime-related, it should be stricken.

In Division III, we are bound by the published opinion of *State v. Magana*, 197 Wn. App. 189, which presents similar facts to those at issue here. *Magana* was convicted of Rape of a Child in the Third Degree, and a community custody condition prohibiting possession of sexually explicit material was imposed. *Magana*, 197 Wn. App. at 193-94, 200. The specific prohibition on sexually explicit material was found to be crime-related: “Because Mr. *Magana* was convicted of a sex offense, conditions regarding access to X-rated movies, adult book stores, and sexually

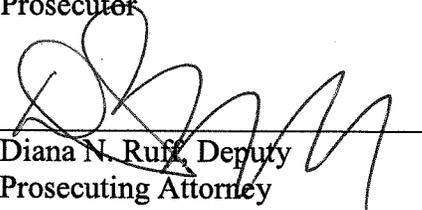
explicit materials were all crime related and properly imposed.” *Id.* at 201. The court made a clear holding that a prohibition on possessing sexually explicit material is or can be crime-related to any sex offense and that it was not an abuse of discretion to order such prohibition. Because *Magana* is the law of Division III, it should be followed and the defendant’s community custody condition regarding possession of pornographic material should be remanded for clarification as to prohibiting possession of “sexually explicit material,” not stricken in its entirety.

IV. CONCLUSION

The defendant’s community custody condition prohibiting possession of pornography should be remanded to the trial court for amendment to prohibit “sexually explicit material” as it is a crime-related prohibition allowed by statute and case law.

RESPECTFULLY SUBMITTED this 25th day of September, 2017.

ANDY MILLER
Prosecutor



Diana N. Ruff, Deputy
Prosecuting Attorney
Bar No. 41702
OFC ID NO. 91004

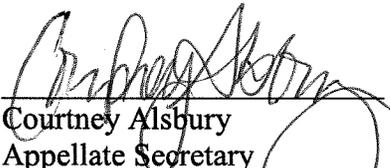
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Jennifer Winkler
Nielsen, Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122

E-mail service by agreement
was made to the following
parties: Sloanej@nwattorney.net

Signed at Kennewick, Washington on September 25, 2017.


Courtney Alsbury
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

September 25, 2017 - 9:07 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34395-2
Appellate Court Case Title: State of Washington v. David Vasquez Alcocer
Superior Court Case Number: 15-1-00274-4

The following documents have been uploaded:

- 343952_Briefs_20170925090603D3626689_8500.pdf
This File Contains:
Briefs - Respondents - Modifier: Supplemental
The Original File Name was 34395-2 Alcocer - Supp. Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- andy.miller@co.benton.wa.us
- nielsene@nwattorney.net
- winklerj@nwattorney.net

Comments:

Sender Name: Courtney Alsbury - Email: courtney.alsbury@co.benton.wa.us

Filing on Behalf of: Diana Nicole Ruff - Email: diana.ruff@co.benton.wa.us (Alternate Email: prosecuting@co.benton.wa.us)

Address:
7122 W. Okanogan Place
Kennewick, WA, 99336
Phone: (509) 735-3591

Note: The Filing Id is 20170925090603D3626689