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SUPREME COURT  
STATE OF WASHINGTON  
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SUPREME COURT NO. 95810-6  
COURT OF APPEALS NO. 76074-2-1

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ONELIO CARDONA-HERNANDEZ,

Petitioner.

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**ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION**

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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The Court of Appeals decision at issue is State v. Cardona-Hernandez, unpublished, No. 75258-8-I, 2018 WL 1794459, filed April 16, 2018.

**C. ISSUE PRESENTED FOR REVIEW**

Cardona-Hernandez is petitioning for review of the court of appeals' decision holding that two of his community-custody conditions — (1) requiring him to report any “dating relationships” and (2) prohibiting him from possessing, using or accessing sexually explicit or erotic materials — are not unconstitutionally vague. The State believes the court of appeals correctly decided those issues and thus review is inappropriate.

The State cross-petitions for review of the court of appeals' holding that a prohibition on entering sex-related businesses is not reasonably crime-related. The issue the State presents is 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.

All three of these issues — with essentially the same arguments — are presently before this Court in a consolidated case, State v. Hai Minh Nguyen and State v. Norris (consolidated under Supreme Court No. 94883-6).<sup>1</sup> The petition and the State's cross-petition here should be stayed pending the outcome there. This Court's opinion there will control whether review is appropriate in each of the three issues here.

**D. STATEMENT OF THE CASE**

Onelio Cardona-Hernandez was convicted of rape in the second degree, two counts of burglary in the first degree with sexual motivation, and criminal trespass in the first degree with sexual motivation. CP 243-55. The crimes involved serial attacks on college women in Seattle's University District, in which Cardona-Hernandez entered their homes in the middle of the night. RP 266-70, 431-36, 469, 563-65, 1005-09.

Cardona-Hernandez appealed his standard-range sentence on the contention that the trial court improperly considered his

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<sup>1</sup> Oral arguments in the consolidated case were heard on May 10, 2018.

allocation in imposing a high-end sentence. 2018 WL 1794459 at \*2. The court of appeals rejected his claim. Id. at \*3.

Cardona-Hernandez also appealed two of his community custody conditions as unconstitutionally vague: (1) requiring him to report any “dating relationships” and (2) prohibiting him from possessing, using or accessing sexually explicit or erotic materials. Id. at \*4-5. The court of appeals affirmed the conditions as not unconstitutionally vague. Id.

Cardona-Hernandez also appealed a condition prohibiting him from entering “sex-related businesses, including: X-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.” Id. at \*3. The court of appeals, relying on State v. Norris,<sup>2</sup> reversed the trial court and remanded for the condition to be stricken. Id. at \*4, \*8.

#### **E. ARGUMENT**

The State believes the court of appeals correctly decided the issues of constitutional vagueness of the two community-custody conditions for which Cardona-Hernandez petitions for review, and

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<sup>2</sup> State v. Norris, 1 Wn. App. 2d 87, 404 P.3d 83 (2017), review granted, 190 Wn.2d 1002, 413 P.3d 12 (2018).

thus review by this Court is not necessary. The State's briefing in the court of appeals sufficiently addressed its position on those issues. See Brief of Respondent.

For the reasons outlined below, this Court should grant the State's cross-petition to review the lower court's reversal of the condition pertaining to sex-related businesses. RAP 13.4(d). However, this entire case should be stayed pending the outcome of State v. Nguyen/Norris, because its outcome will control which issue, if any, is appropriate for review.

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.

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). “Directly related” includes conditions that are “reasonably related” to the crime. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015).

This Court reviews the factual basis for crime-related conditions under a “substantial evidence” standard. Id. 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.

The State’s position here, as in Nguyen/Norris, is that a sentencing court may look to the crimes of conviction themselves — including the elements of the offenses — in determining in individual cases whether a prohibition on entering sex-related businesses is appropriately crime-related. See State v. Alcocer, \_\_\_ Wn. App. 2d \_\_\_, 413 P.3d 1033, 1036 (Wash. Ct. App. 2018) (“An individual who has been convicted of a sex offense has demonstrated an inability to control sexual stimulation and arousal. Accordingly, the State has a legitimate interest in restricting access to sexually explicit content in an effort to reduce recidivism.”).

Cardona-Hernandez's claim here — mirroring the arguments of the petitioners in Nguyen/Norris — is that because sex-related businesses themselves were not actually circumstances of Cardona-Hernandez's crimes, then the trial court abused its discretion in imposing the prohibition. See Brief of Appellant at 19 (“There is no evidence that sex-related businesses were in any way related to the crimes of conviction.”). This is an incorrect and unworkably narrow interpretation of the discretion afforded to sentencing courts under the SRA. RCW 9.94A.703(3)(f); RCW 9.94A.030(10). The sentencing court properly exercised its discretion to prohibit Cardona-Hernandez from entering sex-related businesses as a reasonably necessary way of keeping him away from sexually explicit material, given his crimes of rape and sexually-motivated burglary. See Alcocer, supra.

If this Court in Nguyen/Norris agrees with the State's interpretation of the statutes and holds that such a prohibition was appropriate (in the case of Norris), then the decision of the court of appeals in Cardona-Hernandez's case would directly conflict with that holding. RAP 13.4(b)(1). As such, this Court should then accept review here and reverse the court of appeals' decision as to this condition.

A stay of this petition and cross-petition is necessary until the outcome of Nguyen/Norris.

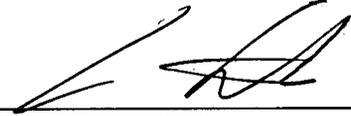
**F. CONCLUSION**

The State respectfully asks that the petition for review and the State's cross petition be stayed pending the outcome of State v. Hai Minh Nguyen and State v. Norris, consolidated under Supreme Court No. 94883-6. When this Court issues its opinion in that case, this Court should then review which, if any, of the issues presented here are appropriate for review.

DATED this 11<sup>th</sup> day of May, 2018.

Respectfully submitted,

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