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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SANG VAN NGUYEN

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Appeal from the Superior Court of Pierce County  
The Honorable Linda Lee

No. 01-1-02568-8

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**RESPONSE BRIEF**

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GERALD A. HORNE  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the proper scope of this appeal limited to whether the trial court properly denied defendant's 7.8 motion?
2. Did the court properly deny defendant's CrR 7.8 motion for resentencing when he had been properly sentenced to a standard range of 174 months of confinement with an additional 24-48 months of community custody?
3. Should this court find that the constitutionality challenges raised by defendant are not justiciable where defendant has no genuine interest in the issues raised and where the issues are not ripe?

B. STATEMENT OF THE CASE.

Appellant, SANG VAN NGUYEN, hereinafter "defendant," is appealing the court's ruling denying defendant's CrR 7.8 motion for relief from sentence. CP 50 (Notice of Appeal). A brief background of the case follows.

On May 8, 2001, defendant killed his girlfriend, Truc Phan, by shooting her twice in the head and once in the body with a .375 magnum revolver. CP 96-98.

On August 29, 2001, the Pierce County Prosecutor's Office charged appellant with murder in the first degree, and theft of a firearm. CP 1-3. On February 7, 2002, the jury convicted defendant of

manslaughter in the first degree and theft of a firearm. CP 77-81.

Additionally, the jury returned a special verdict that defendant was armed with a firearm when he committed the crime of manslaughter in the first degree. Id.

At the sentencing hearing on 15 March, 2002, the parties determined that defendant's offender score was 1 for each count. CP 82-93. The court ordered concurrent sentences, the longest of which was for manslaughter in the first degree, which with the firearm enhancement, carried a standard range of 146 to 174 months. The court imposed a sentence of 20 months for theft of a firearm. Additionally, the court determined that substantial and compelling reasons justified an exceptional sentence above the standard range, and imposed a total sentence of 260 months. Id.

Defendant appealed, arguing that his exceptional sentence violated Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). CP 20-25. The sentence was vacated and the case was remanded for resentencing within the standard range. CP 1-5. On January 6, 2006, the court sentenced defendant to 174 months, the high end of the standard range. The court imposed 24 to 48 months of community custody. Id. Defendant did not appeal his sentence.

On February 8, 2006, defendant filed a CrR 7.8 motion to modify his sentence. Defendant argued that the court, again in violation of Blakely, exceeded the statutory maximum for his conviction by adding 24 to 48 months of community custody. CP 20-25. The court determined that because additional findings are not required to impose community custody, that Blakely was not implicated and denied the defendant's motion. CP 48-49. Defendant timely appealed the court's ruling. CP 50.

C. ARGUMENT.

1. THE PROPER SCOPE OF THIS APPEAL IS LIMITED TO WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S 7.8 MOTION.

An appellate court's review of a CrR 7.8 motion is limited to only those issues raised in the motion. State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002).

Defendant's 7.8 motion, and the court's subsequent ruling denying the motion, are the only matters before this court. In his 7.8 motion, defendant argued in his motion that the court violated Blakely by imposing the high end of the standard range, plus 24-48 months of community custody. CP 20-25. However, defendant now for the first time on appeal assigns error to the court's actions at sentencing and raises issues that were not raised or addressed in his 7.8 motion. Defendant now

claims that (1) the court erred in determining defendant's offender score to be 1, (2) that the court erred in determining that defendant's convictions did not arise from the same criminal conduct, and (3) that the court erred when it sentenced defendant with an offender score of 1. (Brief of Appellant at vi). Defendant did not raise these issues in his motion, and subsequently, the court did not address them when it denied the motion. Therefore, these issues are not properly before this court and should not be considered.

2. THE COURT PROPERLY DENIED DEFENDANT'S MOTION WHERE THE TRIAL COURT PROPERLY SENTENCED DEFENDANT TO A STANDARD RANGE OF 174 MONTHS OF CONFINEMENT WITH AN ADDITIONAL 24-48 MONTHS OF COMMUNITY CUSTODY AFTER RELEASE.

The legislature mandates that when a defendant is convicted of a violent offense, that the court impose community custody without finding additional facts. RCW 69.50. By statute, when a court sentences a person for a felony offense under chapter 69.50 RCW, the court "shall in addition to other terms of the sentence, sentence the offender to community custody." RCW 9.94A.715(1)(a). The community custody shall begin upon completion of the term of confinement. *Id.* The presumptive sentence ranges for total confinement do not include periods of community placement. *In Re Caudle*, 71 Wn. App. 679, 680, 863 P.2d

570 (1993); see also State v. Bader, 125 Wn. App. 501, 504-05, 105P.3d 439 (2005) (defendant's period of confinement would not be reduced by three years, the term of his mandatory community custody). The total time served between incarceration and community custody cannot exceed the statutory maximum of the sentence for the crime. See State v. Zavala -Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005); State v. Sloan, 121 Wn. App. 220, 221 87 P.3d 1214 (2004).

Defendant argues that the court erred in denying defendant's motion where the sentencing court imposed 174 months confinement, plus 24-48 months of community custody, because together they exceed the standard range sentence of 174 months.<sup>1</sup> (Brief of Appellant at 5). Defendant's argument is without merit. As long as the term of confinement and community custody do not exceed the statutory maximum sentence, there is no error. Defendant's term of confinement and community placement total 198-222 months. CP 1-5. The combination of confinement and community custody fall well within the statutory maximum sentence of life. CP 1-5.

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<sup>1</sup> Defendant mistakenly characterizes the high end of the standard range as being the "Blakely statutory maximum." (Brief of the Appellant at 5).

3. THE CONSTITUTIONALITY CHALLENGES RAISED BY DEFENDANT ARE NOT JUSTICIABLE.

“A justiciable controversy is: (1) an actual, present, and existing dispute, (2) between parties having genuine and opposing interests, (3) that involves interests that are direct and substantial, rather than potential, theoretical, abstract, or academic, and (4) a judicial determination will be final and conclusive.” Kightlinger v. Public Util. Dist., 119 Wn. App. 501, 504-505, 81 P.3d 876 ( 2003) (citing Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)).

- a. Defendant does not have a genuine interest in the issue raised.

When the court denied defendant’s motion, it ruled that the defendant failed to show that the ruling in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2537-38, 159 L.Ed.2d 403 (2004), applies to the imposition of community custody time. The court stated the community custody statute does not require any additional findings of fact before community custody is imposed, and noted the relevant part of the community custody statute:

When a court sentences a person to the custody of the department for... a violent offense,... or a felony offense under chapter 69.50 or 69.52 RCW, committed after July 1, 2000, the court shall in addition to other terms of the sentence, sentence the offender to community custody range established under RCW 9.94A.850 or up to the period

of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer.

RCW 9.94A.715(1). The court held that because defendant was convicted of a violent offense, RCW 9.94A.715(1) requires the court to impose community custody without finding additional facts. Defendant does not challenge the constitutionality of RCW 9.94A.715(3), but rather challenges the constitutionality of two sections of the community custody statute (the SRA) that the court neither relied on nor referenced in its ruling denying defendant's motion. Defendant asserts that RCW 9.94A.715(3) and RCW 9.94.A.737(1) and (2)(c)<sup>2</sup> are not constitutional

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<sup>2</sup> RCW 9.94A.715(3) states:

If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740. RCW 9.94A.715(3)

RCW 9.94A.737(1) and (2)(c) state:

(1) If an offender violates any condition or requirement of community custody, the department may transfer the offender to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation and subject to the limitations of subsection (2) of this section.

§ 9.94A.737(1)

RCW 9.94A.737(1) and (2)(c) For an offender sentenced to a term of community custody under RCW 9.94A.505(2)(b), 9.94A.650, or 9.94A.715, or under RCW 9.94A.545, for a crime committed on or after July 1, 2000, who violates any condition of community custody after having completed his or her maximum term of total confinement, including time served on community custody in lieu of earned release, the department may impose a sanction of up to sixty days in total confinement for each violation. The department may impose sanctions such as work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or counseling sessions, supervision enhanced through electronic monitoring, or any other sanctions available in the community. §9.94A.737(2)(c).

because the statutes in theory authorize the Department of Corrections (DOC) to extend a defendant's time in custody indefinitely. (Brief of Appellant at 4). Neither provision, however, had any relevance to the court's decision. Even if this court were to find RCW 9.94A.715(3) and RCW 9.94A.737(1) and (2)(c) unconstitutional, the lower court's ruling, independent of these provisions, would still stand. Therefore, defendant does not have a "direct and substantial" interest in the constitutional issue he has raised, and the issue is not properly before this court.

- b. The constitutional issues raised by defendant are not ripe.

The ripeness doctrine exists "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Asarco, Inc. v. Dep't of Ecology, 145 Wn.2d 750, 759, 43 P.3d 471 (2002).

Defendant claims that under RCW 9.94A.715(3) and RCW 9.94A.737(1) and (2)(c), DOC could in theory extend his time in custody indefinitely, and therefore, the provisions are unconstitutional. (Brief of Appellant at 4). Defendant does not claim on appeal that his Sixth Amendment rights have been violated. Rather, defendant proposes a theoretical scenario in which his Sixth Amendment rights could possibly

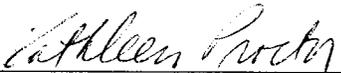
be violated. Defendant thereby asks this court for speculative relief from a future theoretical injury. The ripeness doctrine prevents this court from adjudicating the constitutional issue raised by defendant. Moreover, in order to assert that the selected sections of the SRA are unconstitutional, defendant must overlook other provisions of the SRA which guard against such injury by prohibiting custody beyond the statutory maximum. RCW 9.94A.505(5) mandates that the total time defendant serves in confinement, community supervision, community placement, or community custody must not exceed the statutory maximum sentence. See Zavala –Reynoso, 127 Wn. App. 119 at 124; Sloan, 121 Wn. App. 220 at 221.

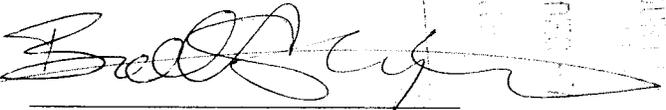
D. CONCLUSION.

For the above reasons, the State respectfully requests this Court to uphold defendant's sentence.

DATED: December 6, 2006.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

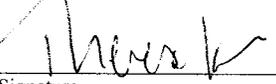
  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

  
Brett Shepard  
Appellate Intern

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/7/06   
Date Signature