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NO. 94883-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

HAI MINH NGUYEN,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Is a community custody condition prohibiting Nguyen from possessing, using, accessing, or viewing “sexually explicit” and “erotic” materials not unconstitutionally vague because the terms have common and statutory definitions that ordinary people can understand?

2. Does a sentencing court retain the discretion to prohibit Nguyen, who was convicted of repeatedly raping and molesting a young girl over several years, from possessing, using, accessing, or viewing “sexually explicit” and “erotic” materials as a crime-related condition of community custody even though he did not use such materials in raping and molesting the girl?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

A King County Superior Court jury convicted Hai Minh Nguyen 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 sentence of 279 months to life imprisonment, with lifetime community custody. CP 60.

Nguyen appealed his convictions for first- and second-degree child molestation on double jeopardy grounds, and challenged certain conditions of community custody imposed by the court, including a

prohibition on possessing, using, accessing or viewing any sexually explicit or material. State v. Hai Minh Nguyen, No. 74358-9-I, 2017 WL 3017516 (Wash. Ct. App. July 17, 2017). The court of appeals affirmed Nguyen's conviction and the community custody condition regarding sexually explicit materials. 2017 WL 3017516 at \*5. It reversed two other community custody conditions and remanded for the trial court to strike or modify them. Id. at \*6.

Nguyen petitioned for review of the double-jeopardy holding and the holding pertaining to the community-custody prohibition on sexually explicit material. Petition For Review (PFR). This Court granted review only as to whether the community custody condition prohibiting possession or viewing of sexually explicit materials is crime-related and whether that community custody condition is unconstitutionally vague.

## **2. SUBSTANTIVE FACTS**

### **a. Child Rape And Molestation.**

T.P., who was born in November 1999, lived with her parents and little sister in a house in South Seattle. RP 59, 124-25, 131. T.P.'s mother worked long hours, and her father picked up T.P. and her sister from school each day. RP 60, 70-71, 130-31, 135-36, 228, 289-90. T.P.'s parents rented out a bedroom in their home to Hai Minh Nguyen. RP 67, 69, 134, 140-41, 226, 229-30, 288-89, 449. T.P. was close to Nguyen, and

referred to him as “Uncle.” RP 74, 449. Nguyen usually got home from work shortly after T.P. and her sister got home from school. RP 71, 136-37, 290, 452. Nguyen often let T.P. and her sister use his computers. RP 137, 141, 230, 450.

T.P. was about six when Nguyen first sexually abused her. RP 138. She was sitting on Nguyen’s lap at the table, watching a movie on Nguyen’s computer when Nguyen massaged her breast area underneath her shirt. RP 139-40. He asked her if it “felt good.” RP 140. At the time, T.P. thought this was normal. RP 145-46. Nguyen continued to abuse T.P. while she was very young by putting his mouth on her breasts and even biting her chest. RP 152.

One day when T.P. was eight or nine years old, she was in the kitchen when Nguyen came up behind her, put his hands down her pants, and inserted his finger into her vagina. RP 146-49, 331-32. The sexual abuse escalated to a near-weekly basis. RP 150, 154, 170, 320. He would engage in oral sex on T.P. and penetrate her vagina with his fingers. RP 150, 154, 328-29. Once when T.P. was eleven, Nguyen followed T.P. into the spare bedroom, pulled down her pants and put his penis into her vagina. RP 159-60.

T.P. did not tell her parents about the abuse. RP 151. But when she was in the seventh grade she began to realize that what Nguyen was

doing was wrong. RP 150. The last time that Nguyen sexually assaulted T.P. was when she was thirteen years old, when he licked her vagina. RP 163-65, 425.

Eventually T.P. gave her mother a note that disclosed that Nguyen had “touched her.” RP 79-80, 172-75, 240. However, when questioned by her mom, T.P. downplayed the abuse. RP 81, 175. In July of 2013, T.P. disclosed to her therapist that Nguyen had been sexually abusing her. RP 176-77. Ultimately, it was reported to the police. RP 179. When interviewed by police, Nguyen admitted that he had rubbed T.P.’s breasts on more than one occasion because he “could not control himself,” but he denied more serious abuse. RP 446, 455-56, 458-61.

b. Community Custody Condition.

As part of his sentence, the trial court imposed Special Condition 11 of community custody as a crime-related prohibition:

Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

CP 65.

c. The Court Of Appeals Affirms.

On appeal, Nguyen argued that the prohibition on sexually explicit and erotic material is unconstitutionally vague because it would be “challenging to know for sure in advance” what sexually explicit and erotic material is. Brief of Appellant (BOA) at 25-29. He also argued that the condition was not “in any way related” to his multiple convictions for raping and molesting a young girl because there was no evidence that sexually explicit material “played any role in the crime.” Brief of Appellant at 28-29.

The court of appeals disagreed. 2017 WL 3017516 at \*5-6. First, the terms of the prohibition are not vague because “the special condition expressly references the statutory definitions for ‘sexually explicit materials,’ ‘erotic materials,’ and ‘material depicting any person engaged in sexually explicit conduct,’” the appeals court concluded. Id.

Moreover, the court decided, there is no risk of arbitrary enforcement because “the condition allows a sexual deviancy provider to give Nguyen prior approval to possess such material, but does not give the provider or community corrections officer the authority to determine the definition of the prohibited material.” Id. “Consistent with the statutory definitions, the terms are not beyond the understanding of an ordinary person.” Id.

The court of appeals also held that the condition was reasonably related to Nguyen's particular sex crimes:

Here, Nguyen was convicted of rape of a child and child molestation based on numerous acts over several years. Viewed in a light most favorable to the State, these constituted acts of sexual deviancy involving the inability to control sexual conduct. Whether viewed under the sufficiency of the evidence or abuse of discretion standard, Nguyen's criminal conduct is reasonably related to restricting access to sexually explicit or erotic material because of the inherent sexual nature of the materials.

Id. at \*6.

**C. ARGUMENT**

**1. THE PROHIBITION ON SEXUALLY EXPLICIT AND EROTIC MATERIALS IS NOT VAGUE.**

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution require that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008) (citing City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A statute or community custody condition is unconstitutionally vague if it (1) does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

In determining whether a term is unconstitutionally vague, this Court considers the term in the context in which it is used. Bahl, 164 Wn.2d at 754 (citing Douglass, 115 Wn.2d at 180). When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. Bahl, 164 Wn.2d at 754 (citing State v. Sullivan, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001)). A condition of community custody is sufficiently definite “[i]f persons of ordinary intelligence can understand what [it] proscribes, notwithstanding some possible areas of disagreement.” Bahl, at 754 (quoting Douglass, at 179).

This Court held in Bahl that the term “sexually explicit . . . material” was not unconstitutionally vague in the context of a prohibition on frequenting “establishments whose primary business pertains to sexually explicit or erotic material.” Bahl, at 758-59. The court observed that the dictionary definitions of “sexual” and “explicit” indicated that the meaning of the phrase “sexually explicit materials” is “materials that are unequivocally sexual in nature,” and that the community custody condition as a whole was “sufficiently clear.” Id.

The court noted that “[i]mpossible standards of specificity’ are not required since language always involves some degree of vagueness.” Id. at 759 (alteration in original) (quoting State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)). The Bahl court also considered the dictionary

definition of “erotic,” and determined that the ordinary definition of the term “erotic materials,” in the context of the condition at issue, was sufficiently definite. 164 Wn.2d at 759.

When assessing the vagueness of a statute or community custody condition, courts also look at other statutes, “which are ‘[p]resumptively available to all citizens.’” In re Pers. Restraint of Dyer, 164 Wn.2d 274, 295-96, 189 P.3d 759 (2008) (alteration in original) (internal quotation marks omitted) (quoting State v. Watson, 160 Wn.2d 1, 8, 154 P.3d 909 (2007)); Bahl, at 760. The term “sexually explicit material” is defined in RCW 9.68.130 as

any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

RCW 9.68.130(2).

The Bahl court did not determine whether this statutory definition *alone* provides sufficient notice to defeat a vagueness challenge where the defendant is convicted under a different statute. Bahl, at 760. However, the court stated that the existence of a statutory definition bolsters the conclusion that “sexually explicit” is not unconstitutionally vague. Id.

The statutory definitions of “sexually explicit conduct” (RCW 9.68A.011(4)) and “erotic material” (RCW 9.68.050) specifically referenced in the condition Nguyen challenges similarly bolster the conclusion that the ordinary definition of those terms is sufficiently definite in this context. See Soundgarden v. Eikenberry, 123 Wn.2d 750, 758-59, 871 P.2d 1050 (1994) (the term “erotic” as used in RCW 9.68.050 is not unconstitutionally vague).

Other courts have similarly found that the term “sexually explicit” material or conduct is not unconstitutionally vague. E.g., United States v. Zobel, 696 F.3d 558, 576 (6th Cir. 2012); United States v. Thompson, 653 F.3d 688, 696 (8th Cir. 2011); United States v. Thielemann, 575 F.3d 265, 277 (3d Cir. 2009); United States v. Rearden, 349 F.3d 608, 619-20 (9th Cir. 2003).

There is no reason to conclude that the terms are any less clear here, in the context of a direct prohibition on the material itself rather than entering a business where it is sold. If ordinary people can understand the phrase “establishments whose primary business pertains to sexually explicit or erotic material,” then they necessarily can understand what “sexually explicit or erotic material” means. “Sexually explicit” and “erotic” are not indecipherable phrases for ordinary people.

Still, in his petition for review, Nguyen continued to complain about the danger of arbitrary enforcement, contending that the court of appeals opinion here somehow conflicts with Bahl. PFR at 18-19. Nguyen does not explain why his case conflicts with Bahl when Bahl directly found “sexually explicit or erotic material” to be not unconstitutionally vague. 164 Wn.2d at 758-60. If Bahl found these terms to be constitutional, it necessarily did not find a danger of arbitrary enforcement. Nguyen conflates the determination in Bahl that the term “pornographic materials” is vague with his argument about “sexually explicit or erotic material,” which this Court rejected in Bahl.

Still, Nguyen suggests that arbitrary enforcement might ensue when a community corrections officer determines what material falls within the statutory definitions. PFR at 19. But that argument would mean that *every* determination a CCO makes about whether an offender has violated a condition is arbitrary. As the court of appeals properly noted, the condition’s reference to the statutory definitions means a CCO does not have “the authority to determine the definition of the prohibited material.” 2017 WL 3017516 at \*5.

Moreover, conditions of community custody are “not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified

as prohibited conduct.” State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010). The law does not say that a prohibition is vague any time it is subject to hair-splitting. Impossible standards of specificity are not required. City of Seattle v. Eze, 111 Wn.2d 22, 26-27, 759 P.2d 366 (1988) (citing Kolender v. Lawson, 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). “Condemned to the use of words, we can never expect mathematical certainty from our language.” Grayned v. Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Nguyen’s concern about arbitrary enforcement is unwarranted.

Lastly, it should be noted that in his petition for review, Nguyen claimed for the first time that this community custody condition “places a prior restraint” on his “ability to create his own writings and depictions,” implying a First Amendment violation. PFR at 18. This Court should not consider this argument because he has not claimed error under the First Amendment, and “an issue not raised or briefed in the Court of Appeals will not be considered by this court.” State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); see also Plein v. Lucky, 149 Wn.2d 214, 222, 67 P.2d 1061 (2003) (generally, parties cannot raise a new issue in a petition for review).

This Court should hold that its previous decision in Bahl applies equally to the community-custody condition here, and that the condition is not unconstitutionally vague.

**2. NGUYEN’S COMMUNITY CUSTODY PROHIBITION ON SEXUALLY EXPLICIT AND EROTIC MATERIAL IS REASONABLY RELATED TO HIS CRIMES OF CHILD RAPE AND CHILD MOLESTATION.**

With passage of the Sentencing Reform Act of 1981 (SRA), our legislature gave sentencing courts limited discretion to impose “crime-related prohibitions” during an offender’s term of community custody, meaning they may prohibit conduct that “directly relates to the circumstances of the crime.” RCW 9.94A.703(3)(f); RCW 9.94A.030(10). Previously, sentencing judges had been using their sentencing power expansively “and a wide variety of affirmative conditions [had] commonly been required as a condition of probation.” State v. Barclay, 51 Wn. App. 404, 406, 753 P.2d 1015 (1988) (quoting DAVID BOERNER, SENTENCING IN WASHINGTON §4.4 (1985)). The intent was to narrow probation conditions from broad affirmative generalities, such as simply obeying the law, to those that had a direct relationship to the crime itself. Id.

Nonetheless, the appellate courts immediately recognized that “there is room for construction as to the scope of ‘directly relates’ and the meaning of ‘circumstances of the crime.’” Id. (quoting D. Boerner, §4.5). While the terms were meant to be narrow, importantly:

The Act does not specify how certain the sentencing judge must be that the conduct being prohibited is directly related to the crime of conviction. ... The existence of such a relationship will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge.

Id. at 407 (quoting D. Boerner, §4.5).

So as appellate courts began considering crime-related conditions under the SRA, they afforded the sentencing courts latitude to decide what reasonably relates to the circumstances of each particular crime. For example, a general condition of obedience to the law was not directly related to the crime of car prowling. Barclay, 51 Wn. App. at 407. But a condition that a marijuana dealer refrain from drug use generally and submit to urinalysis was properly within the sentencing court's discretion even though there was no evidence that he himself had ingested drugs. State v. Parramore, 53 Wn. App. 527, 532, 768 P.2d 530 (1989).

Thus, it long has been the standard in Washington that “no causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime.” State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) (prohibiting drug dealer from associating with other drug users or dealers sufficiently related to the crime). To the present day, our courts continue to recognize that a community-custody condition “need not

exactly mirror the means and methods of the charged crime to be crime related.” State v. Gonzales, 1 Wn. App.2d 809, 821, 408 P.3d 376 (2017).

For example, a molester of a four-year-old child could be prohibited from contact with all minors generally — even though there was no evidence he molested older children or teens. State v. Julian, 102 Wn. App. 296, 306, 9 P.3d 851 (2000). A man who raped his girlfriend’s 12-year-old daughter could be prohibited from having sex with *anyone* without prior approval because it reasonably related to keeping the public safe from the circumstances of his crime — “potential romantic partners may be responsible for the safety of live-in or visiting minors.” State v. Autrey, 136 Wn. App. 460, 468, 150 P.3d 580 (2006).

To present, the appellate courts continue to respect sentencing-court discretion by reversing community-custody prohibitions only where there is “no evidence” of a reasonable relationship between the prohibition and the circumstances of the crime. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015). If there is “some basis for the connection,” the condition should be upheld. Id. at 657. For example, a community-custody condition prohibiting a child molester from dating women with children was proper even though he had not victimized the children of women he dated. State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Typically, when the appellate courts have rejected conditions as not crime-related, the record is devoid of a reasonable rationale connecting the prohibition and the crime. For example, in State v. Letourneau, the court of appeals decided that former schoolteacher Mary K. Letourneau could not be prohibited as part of community custody from profiting from her story of raping a young boy because there was no evidence she raped her victim in order to profit from telling the story, and such a prohibition bore no relation to keeping her from reoffending. State v. Letourneau, 100 Wn. App. 424, 435, 997 P.2d 436 (2000). In other words, there was no reasonable relationship to the circumstances of the crime *or to preventing the circumstances of the crime from reoccurring*.

This Court, too, has recognized that the legislature entrusted sentencing judges with some latitude to consider whether a condition is “reasonably crime related” in each particular case. State v. Warren, 165 Wn.2d 17, 32-33, 195 P.3d 940, 947 (2008). That standard led this Court in Warren to conclude that 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, was not an abuse of discretion. Id.

Here, then, the court of appeals properly followed the lead of its predecessors. It recognized that the trial court was well within its

discretion to identify a reasonable relationship between Nguyen’s repeated rape and molestation of a child over the course of years — his “inability to control sexual conduct” — and accessing sexually explicit materials because of the sexual nature of the materials. Nguyen, 2017 WL 3017516 at \*6.

Though it did not elaborate, it did not need to: sexually explicit and erotic materials exist almost entirely for the purposes of sexual stimulation and ideation. It was reasonable for the trial court to decide that under the circumstances of Nguyen’s child rape and molestation, it was appropriate to prohibit Nguyen from accessing materials designed to stimulate the dangerous sexual urges that Nguyen could not control, resulting in unspeakable harm to a child.

In his argument below and in his petition for review, Nguyen proposes an unworkable narrowing of “relates to the circumstances of the crime” that would mean a prohibition is crime-related only if its subject was actually involved in the commission of the crime, not related to the circumstances, i.e., the nature of the offense. In other words, Nguyen proposes that a prohibition should be permissible only if the subject *was* a circumstance of the crime.

To elaborate, Nguyen’s argument is that a prohibition on sexually explicit material “has nothing to do with this case” because there was “no

evidence or information presented that possessing, viewing, using or accessing sexually explicit or erotic materials directly related to the circumstances of the crime.” PFR at 12. He is essentially arguing that the term “relates to” in the statute is meaningless. By his reading, the subject of a prohibition must itself have *been* a circumstance of the crime to be “related to the circumstances.” This Court should reject this interpretation. The legislature is presumed to have used no superfluous words, and our courts must accord meaning, if possible, to every word in a statute. In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 10 P.3d 1034 (2000).

If taken to its logical conclusion, Nguyen’s interpretation would prevent any number of quite reasonable community-custody conditions that are important for public safety. For example, by Nguyen’s reasoning, a felon convicted of committing a serious, violent assault by punching or kicking someone could not be prohibited from possessing weapons because a weapon was not actually involved in the commission of the crime. Such a narrow interpretation would undercut the legislature’s intent to prohibit “crime related” behavior and protect public safety. The more reasoned interpretation in this example is that prohibiting weapons directly and reasonably relates to the circumstances of violently attacking people.

In his petition for review, Nguyen offers State v. O’Cain as authority for his interpretation that crime-related must mean the subject was used in the commission of the crime. There, a prohibition barring a rapist from internet access in general was reversed because internet access in general bore no reasonable relationship to the rape.<sup>1</sup> 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). The difference here is that the prohibition on sexually explicit material is much narrower and focused on the actual circumstances of Nguyen’s crime. And the court of appeals in O’Cain did not hold that the internet must have been used in the commission of the crime to be crime-related. It merely listed that factor as one among others it considered in deciding whether such a broad prohibition was reasonable.

Nguyen will likely defend the lower court’s reasoning in State v. Norris (consolidated with this case), in which a prohibition on entering sex-related businesses was stricken because there was no evidence such businesses were involved in the commission of Norris’s crimes of molesting a boy. 1 Wn.App.2d 87, 95-99, 404 P.3d 83 (Wash. Ct. App. 2017). As discussed in the State’s supplemental briefing in that case, Norris suffers from the same untenably narrow interpretation of “directly relates to the circumstances” that Nguyen proffers — that a subject of a

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<sup>1</sup> Nguyen incorrectly asserted that the prohibition in O’Cain was “a ban on accessing sexual material on the [I]nternet.” PFR at 14. The prohibition was on internet use in general.

prohibition must itself have been a circumstance of the crime to be “related to the circumstances.”<sup>2</sup> Norris plainly conflicts with the court of appeals decision in this case, as well as the published opinion in Gonzales, *supra*. This Court should reject the Norris court’s interpretation along with Nguyen’s identical reasoning here.

The more measured and commonsense interpretation, which the court of appeals recognized here, allows sentencing courts the discretion to look at the overall circumstances of each crime to impose reasonably related prohibitions. That means, as here, that a prohibition on sexually explicit materials reasonably relates to the circumstances of sexually victimizing and objectifying a child. But a rigid interpretation that requires those materials to be actually utilized in the commission of the crime would prevent such reasonable conditions and endanger the public.

This Court should reject Nguyen’s narrow reading and hold that the trial court in this case did not abuse its discretion in imposing a prohibition on sexually explicit materials because it reasonably relates to the circumstances of Nguyen’s crimes.

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<sup>2</sup> In his petition for review, Nguyen points to several unpublished opinions that make the same mistake. Rather than consider those as authority toward his flawed interpretation, this Court should make it clear that those courts that followed that interpretation were incorrect.

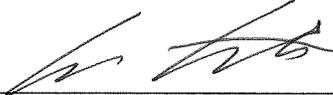
**D. CONCLUSION**

For all the foregoing reasons, the State respectfully asks this Court to affirm the decision of the court of appeals.

DATED this 16th day of March, 2018.

Respectfully submitted,

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**KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT**

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