No. 94393-1
COA No. 74233-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EVAN BACON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable John P. Erlick

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Evan Bacon asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the published Court of Appeals decision in *State v. Evan Bacon*, 197 Wn.App. 772, __ P.3d __, 2017 WL 679330 (February 13, 2017), ruling that the juvenile court lacked statutory authority to declare a manifest injustice and suspend the imposition of the disposition. A copy of the decision is in Appendix A. The Court denied Evan's motion to reconsider on March 22, 2017. A copy of the Court's order is in Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Is the Court of Appeals decision in direct conflict with this Court's decision in *State v. Houston-Sconiers*, ___ Wn.2d ___, 2017 WL 825654 (March 2, 2017)?

2. Is the Court of Appeals decision in direct conflict with the decision of Division Three in *State v. Crabtree*, 116 Wn.App. 536, 66 P.3d 695 (2003)?

D. STATEMENT OF THE CASE

E.B. pleaded guilty to one count of second degree robbery. CP 31-39. E.B. admitted he grabbed a woman's purse, and then struggled with the woman when she tried to keep it. CP 36; 10/14/2015RP 12-20.

At the disposition hearing, the probation counselor described E.B. for the court:

> [E.B.] is a great kid. He just is really, has struggled with his behavior. [E.B.] is smart. He's funny. He's engaging. He has the qualities to be successful. He just needs the tools. He attempted to get the tools from the community and that didn't work. When he went to JRA, even though it was for a short time, he got his minimum, which is another plus. He got his minimum, not his maximum. It just wasn't long enough to give him all the tools that he needs, as well as time to practice those tools.
>
> This is a young man who's 15 years old, that his behavioral habits have been going on for a long time. You're not going to fix them in 15 weeks; less than 15 weeks. But I did want you to know that I think he's a great kid and that he can do this. He was insightful when I first went down to talk to him in looking at the silver lining, if you will, regarding this, that he could go about, he could get his GED at JRA. He acknowledged that he did need more skills that are decision-making skills, the ability to say no to others, and some aggression, anger management. So he's fairly insightful about what his needs are.

10/14/2015RP 24.[1]

Counsel for E.B. noted that E.B. has started to learn and apply some of things he has been taught in the programs which had been put in place as a result of a prior disposition. 10/14/2015RP 25.

> [E.B.] has services set up in the community. He is involved in SeaMar Community Health Centers. He has an individual counselor, CJ Elsworth, who he sees regularly. Ms. Ellsworth also provides individual counseling to [E.B.'s mother], and family counseling to both of them. He attends Boys and Girls Club after school and [his mother] has regular work hours so she is able to be home with [E.B.] when he is not in school or attending other activities.
>
> [E.B.] continues to work with David Humeryager of Team Child to address his specific school concerns. Last year the Bellevue School District agreed to do a comprehensive evaluation of [E.B.'s] needs. Based on this, [E.B.] has been placed at Bellevue High School to address his academic, emotional, and behavioral concerns. Until he was taken into custody for this charge, [E.B.] attended school and did not have any behavioral sanctions. This is a significant improvement over last year when [E.B.] reports he only attended 3 days.
> . . .
> [A]llowing [E.B.] to remain in the community will allow him to continue to implement the skills he has learned with the assistance of services that are already in place . . . Community supervision will provide structure to the court's conditions and will hold [E.B.] accountable.

CP 13-14.

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[1] In her conclusion as to the appropriate disposition, the counselor did recommend a standard range which included a JRA commitment. 10/14/2015RP 24-25.

Attached to E.B.'s sentencing memorandum was a report from Team Child addressing the issues facing E.B. and the community programs that had been put into place to address those issues. CP 17-21. Finally, E.B.'s mother strongly urged a manifest injustice disposition below the standard range, noting that her and E.B.'s relationship had improved significantly since the programs had been implemented. CP 79.

The State urged the court to impose a standard range disposition of 52-65 weeks of detention for E.B. CP 10; 10/14/2015RP 20-23.

The court wrestled with the appropriate disposition, noting that there were substantial risks to the community and to E.B. 10/14/2015RP 45. Ultimately, the court imposed a manifest injustice disposition below the standard range, finding that E.B. did not cause, nor contemplate that his actions would cause, serious bodily injury. CP 23, 79.

> One of the things that may be different is that school is now an anchor for [E.B.]. And I know that that can truly turn around youth. [E.B.] is bright. [E.B.] is charming. [E.B.] has some real skills. And [E.B.] is also a threat to the community. And we need to address it long term.
>
> I looked at the file and my concern was that [E.B.'s] just going to continue to do the same thing over and over unless we address it now. He did well at Echo Glen. On the other hand, I think our system has a preference, if

> possible, to keep youth in the community. He will still end up at Echo Glen if he messes up, but I will grant a manifest injustice.
>
> I'm imposing 52 to 65 weeks at JRA, and I am suspending that for a period of 12 months. And I will empower [E.B.] to stay out of JRA. Any criminal offense whatsoever will result in revocation. Even if it's an MIP or a theft 3, it's getting revoked. I need [E.B.] to attend at school. I need you to stay at home. You can't run. You can't be gone. So that is going to be the disposition of the court.

10/14/2015RP 45-46. Thus, the court concluded that "[s]uspending the time allows the respondent to utilize the community services that are currently in place." CP 80.

Further, in responding to the State's objection to the suspended disposition the court noted why it chose to suspend E.B.'s sentence:

> The fact that those services are now set up in the community, That [E.B.] has had the benefit of some treatment and programming at JRA, and that he has the strong support of his mother, and that he has an extraordinarily long JRA sentence hanging over his head and will be highly motivated to engage in treatment because if he does not, he'll go to JRA. That's the purpose of the suspended sentence.

11/3/2015RP 96.

The State subsequently appealed the manifest injustice disposition. CP 69. In its decision reversing the suspended disposition,

the Court of Appeals ruled that the juvenile court was statutorily barred from suspending the disposition. Decision at 5-6.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. This Court's decision in *Houston-Sconiers* authorizes the disposition entered in Evan's matter.

In its decision in this matter, the Court of Appeals determined that the juvenile court lacked the discretion to impose a manifest injustice disposition that included a suspended term of confinement because RCW 13.40.160(10) specifically precluded suspended dispositions except in specific enumerated situations of which this was not one. Decision at 6.

On March 2, 2017, this Court decided *Houston-Sconiers*, which found that the juvenile courts possessed just the kinds of discretion utilized by the juvenile court here. Relying on the Eighth Amendment as well as the decisions of the United States Supreme Court in *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), the Court held that:

> sentencing courts must have *complete discretion* to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the

> juvenile is there following a decline hearing or not. *To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled.* Trial courts must consider mitigating qualities of youth at sentencing and *must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.*

Houston-Sconiers, slip op. at 20 (emphasis added).

The Court further authorized the juvenile court's actions here when the juvenile court considered several factors in crafting its disposition for Evan:

> *Miller* requires such discretion and provides the guidance on how to use it. It holds that in exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth-including age and its "hallmark features," such as the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 132 S. Ct. at 2468. It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and "the way familial and peer pressures may have affected him [or her]." *Id.* And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. *Id.*

Houston-Sconiers, slip op. at 23.

The decision in *Houston-Sconiers* is important because the two juveniles in those matters had been found guilty in adult court and received 26 and 31-year sentences, all stemming from the mandatory

stacking of weapon enhancements. The trial court, while upset that it was required to impose such onerous sentences, nevertheless ruled that it lacked any discretion to deviate from the sentencing scheme because of the mandatory nature of the SRA.

In light of the decision in *Houston-Sconiers*, the juvenile court possessed the kind of discretion authorized by *Houston-Sconiers* and entered a lawful disposition despite an apparent statutory bar.

This Court must grant review and find the juvenile court possessed the discretion to enter a suspended disposition irrespective of the apparent statutory bar. As a result, the court entered a lawful disposition in Evan's matter when it considered his age and circumstances in coming to its decision.

2. The Court of Appeals decision directly conflicts with Division Three's decision in *Crabtree.*

A court may impose a disposition outside the standard range for a juvenile offender if it determines that a disposition within the standard range would "effectuate a manifest injustice." RCW 13.40.160(2); *State v. Beaver,* 148 Wn.2d 338, 345, 60 P.3d 586 (2002). In determining the appropriate disposition, a trial court may consider both statutory and nonstatutory aggravating factors. *State v. J.V.*, 132 Wn.App. 533, 540-41, 132 P.3d 1116 (2006).

Once a juvenile court concludes that a disposition within the standard range would effectuate a manifest injustice, the determinate sentencing scheme no longer applies, and the juvenile court is vested with broad discretion in determining the appropriate disposition. *State v. M.L.*, 134 Wn.2d 657, 660, 952 P.2d 187 (1998); *J.V.*, 132 Wn.App. at 545.

In *Crabtree*, the juvenile court imposed a manifest injustice sentence below the standard range, suspended the disposition, and imposed a Chemical Dependency Disposition Alternative disposition even though the juvenile did not qualify. 116 Wn.App. at 541-545. On appeal, the Court of Appeals affirmed, agreeing the juvenile was not statutorily eligible but ruling that "[o]nce a manifest injustice is declared, and the court elects to depart from the standard range, the sentencing scheme of the [JJA] no longer applies." *Crabtree*, 116 Wn.App. at 545.

The juvenile court in *Crabtree* had declared a manifest injustice, suspended the disposition and imposed an alternative disposition for which the juvenile did not qualify. In its opinion here, the Court of Appeals relied on its previous decision in *State v. A.S.*, 116 Wn.App. 309, 65 P.3d 676 (2003), in coming to a conclusion that specifically

disagreed with the decision in *Crabtree*.: "We adhere to our decision in *A.S.* and reject *Crabtree*'s broad holding . . ." Decision at 5.

This Court should grant review to resolve this conflict among the Divisions and determine the decision in *Crabtree* is consistent with the decisions of this Court which found that once a juvenile court declares a manifest injustice, the statutory sentencing scheme no longer applies, and instead, the court possesses broad powers to craft the appropriate disposition.

F. CONCLUSION

For the reasons stated, Evan asks this Court to grant review, reverse the Court of Appeals, and affirm the juvenile court's decision to impose a manifest injustice disposition below the standard range.

DATED this 14th day of April 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. EVAN BACON, D.O.B. 3/3/2000, Respondent.	)	No. 74233-7-I DIVISION ONE PUBLISHED OPINION FILED: February 13, 2017

TRICKEY, A.C.J. — Evan Bacon, a juvenile, pleaded guilty to robbery in the second degree. The juvenile court declared that the standard range disposition would effectuate a manifest injustice. The court imposed a 65 week disposition, and suspended it while placing him on community supervision. The State appeals, arguing that declaring a manifest injustice does not give the juvenile court the authority to suspend a disposition. Because the legislature has authorized juvenile courts to suspend dispositions only in limited circumstances not applicable here, we reverse.

FACTS

In September 2015, Bacon took a woman's purse against her will and used force when they struggled over it. The woman fell and scraped her knees but did not suffer serious bodily injury. Bacon pleaded guilty to robbery in the second degree. Because of Bacon's criminal history, the standard range disposition was 52 to 65 weeks of confinement.

At the disposition hearing, Bacon asked for a declaration of manifest injustice, because he was doing better, back in school, and living at home. The State and the probation officer recommended the standard range disposition. They argued that Bacon

had done well in detention but had not done well when on supervision or parole.

The court noted that Bacon had begun to make important changes in his life, but was still a "threat to the community."[1] Citing a preference to "keep youth in the community" when possible, the court granted a manifest injustice.[2] The court imposed a disposition of "65 to 65 weeks" of confinement, and suspended it, placing him instead on community supervision subject to a number of conditions.[3]

The State appealed the disposition, arguing that the record did not support a declaration of manifest injustice and, even assuming the manifest injustice was proper, declaring a manifest injustice did not give the court the authority to suspend the disposition when Bacon was otherwise ineligible for a suspended disposition.

While the State's appeal was pending before this court, the juvenile court revoked Bacon's suspended disposition because of his behavior while under community supervision. A commissioner of this court determined that the issue of whether the trial court had the authority to suspend a disposition here was moot. But the commissioner nonetheless ruled that we should address the issue because it is a matter of continuing and substantial public interest that is likely to recur in future cases.

Accordingly, the parties filed revised briefs on the sole issue of whether the trial court erred by suspending Bacon's manifest injustice disposition.

ANALYSIS

Authority to Suspend Dispositions

The State argues that the juvenile court erred when it suspended Bacon's

[1] Report of Proceedings (RP) (Oct. 14, 2015) at 45.
[2] RP (Oct. 14, 2015) at 46.
[3] Clerk's Papers at 22.

disposition because it lacked the authority to do so under the Juvenile Justice Act of 1977 (JJA), chapter 13.40 RCW. Bacon responds that, once the court has declared a manifest injustice, it may suspend a juvenile offender's sentence even if it could not usually do so under the JJA. We agree with the State.

Courts, including juvenile courts, "do not have inherent authority to suspend sentences." State v. A.S., 116 Wn. App. 309, 311-12, 65 P.3d 676 (2003). If the legislature has enacted a statute that grants a court the power to suspend a disposition, the court must follow the statute's terms. State v. Clark, 91 Wn. App. 581, 585, 958 P.2d 1028 (1998). Otherwise, the court's actions are void. Clark, 91 Wn. App. at 585.

When a statute is unambiguous, this court assumes the legislature "means exactly what it says." A.S., 116 Wn. App. at 312. This court reviews the construction of a statute de novo. A.S., 116 Wn. App. at 312.

In the JJA, the legislature granted juvenile courts the authority to suspend dispositions under certain circumstances. For example, "[i]f the offender is subject to a standard range disposition . . ., the court may impose the standard range and suspend the disposition on condition that the offender comply with one or more local sanctions and any educational or treatment requirement." RCW 13.40.0357 (option B(1)).[4]

But the legislature has limited the court's authority to suspend dispositions. The court may do so only for certain offenses described in option B and in other circumstances not relevant to this appeal, as described in other sections of the JJA: "Except as provided under subsection (3), (4), (5), or (6) of this section, or option B of RCW 13.40.0357, or

[4] Option B does not allow the court to suspend a 14-year-old juvenile offender's sentence for robbery in the second degree if the victim suffered bodily injury. RCW 13.40.0357 (option B(3)(b)(iii)). Neither party argues that Bacon qualifies for a suspended disposition under option B.

RCW 13.40.127, the court *shall not* suspend or defer the imposition or the execution of the disposition." RCW 13.40.160(10) (emphasis added).

In State v. A.S., a published per curiam decision from Division One of the Court of Appeals, the court examined the juvenile court's authority to suspend sentences. 116 Wn. App. 309, 310, 65 P.3d 676 (2003). A.S. pleaded guilty to a misdemeanor sex offense. A.S., 116 Wn. App. at 310-11, 313. Under the JJA, the juvenile court can suspend a juvenile's sentence and impose a special sex offender disposition alternative (SSODA) when a juvenile commits a felony sex offense. A.S., 116 Wn. App. at 312-13. The court lacks that authority when the sex offense is a misdemeanor. A.S., 116 Wn. App. at 313. The juvenile court imposed a 52 week manifest injustice disposition, based in part on the aggravating factor of A.S.'s sexual motivation to commit the crime. A.S., 116 Wn. App. at 311. Then the court suspended A.S.'s confinement and imposed a SSODA. A.S., 116 Wn. App. at 311.

The Court of Appeals held that the JJA "unambiguously forbids the court" to suspend a disposition unless a statutory exception applies. A.S., 116 Wn. App. at 312. It ruled that the juvenile court lacked the authority to suspend A.S.'s disposition because the sex offense was a misdemeanor, and reversed the SSODA. A.S., 116 Wn. App. at 315.

In State v. Crabtree, published a few weeks after A.S., Division Three of the Court of Appeals took a different approach. 116 Wn. App. 536, 545, 66 P.3d 695 (2003). There, the juvenile court declared a manifest injustice and imposed a disposition much shorter than the standard range. Crabtree, 116 Wn. App. at 540-41. The court then suspended the disposition and imposed a chemical dependency disposition alternative (CDDA).

Crabtree, 116 Wn. App. at 541. The State objected, arguing that the court could not impose a CDDA because the juvenile offender did not qualify for one under the statute. Crabtree, 116 Wn. App. at 545. The appellate court agreed that Crabtree did not qualify for a CDDA but upheld the disposition, holding that "[o]nce a manifest injustice is declared, and the court elects to depart from the standard range, the sentencing scheme of the [JJA] no longer applies." Crabtree, 116 Wn. App. at 545.

In both Crabtree and A.S., the juvenile court declared a manifest injustice, suspended the disposition, and imposed an alternative disposition that the juvenile offender did not qualify for under the statute. But the reviewing courts reached opposite conclusions: Crabtree's suspended disposition was affirmed, while A.S.'s was reversed.

We adhere to our decision in A.S. and reject Crabtree's broad holding for two reasons. First, in Crabtree, the court did not fully examine the statutory limits of the juvenile court's power to suspend dispositions. See 116 Wn. App. at 545-46.

Second, we disagree with Crabtree's holding that the JJA's entire "sentencing scheme" does not apply after the court has declared a manifest injustice. 116 Wn. App. at 545. If the court finds that a standard range disposition will "effectuate a manifest injustice the court shall *impose* a disposition outside the standard range." RCW 13.40.0357 (option D) (emphasis added). The juvenile court has "broad discretion in determining the appropriate sentence to impose." State v. M.L., 134 Wn.2d 657, 660, 952 P.2d 187 (1998).

All of the cases cited in Crabtree address the juvenile court's discretion to determine the length of the disposition it imposes. State v. Duncan, 90 Wn. App. 808, 815, 960 P.2d 941 (1998) (holding the court has "broad discretion to determine the length

of a manifest injustice disposition"); State v. B.E.W., 65 Wn. App. 370, 375, 828 P.2d 87 (1992); State v. Tauala, 54 Wn. App. 81, 86-88, 771 P.2d 1188 (1989); State v. P., 37 Wn. App. 773, 780, 686 P.2d 488 (1984) (holding that length of disposition was excessive and remanding "for further proceedings to determine the appropriate length of the sentence"); State v. Strong, 23 Wn. App. 789, 791, 794, 599 P.2d 20 (1979).

Imposing a disposition and suspending that disposition are not the same act. When the court chooses to suspend a disposition, it still imposes a disposition of a certain length. RCW 13.40.0357 (option B(1)). We conclude that declaring a manifest injustice gives the juvenile court discretion over what length of disposition to *impose*, but not whether to *suspend* that disposition.[5]

Here, the juvenile court declared that a standard range disposition would effect a manifest injustice, imposed a disposition of 65 to 65 weeks of confinement, and suspended the disposition. The court made no findings that Bacon's circumstances fit within any of the exceptions to the JJA's prohibition of suspending dispositions. RCW 13.40.160(10). Manifest injustice dispositions, described in RCW 13.40.160(2) and RCW 13.40.0357 (option D), are not on the list of exceptions.

Bacon has shown that the court had discretion over what length of sentence to impose, but he has not shown that the court had the discretion to suspend an imposed disposition. While the juvenile court's desire to keep Bacon connected to his school and community were important considerations, the court lacked the authority under the legislative requirements of the JJA to suspend his manifest injustice disposition.

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[5] Nothing in this opinion should be construed to limit the juvenile court's discretion to impose local sanctions when it has declared a manifest injustice. See RCW 13.40.160(2); RCW 13.40.020(18).

We reverse and remand for a new dispositional hearing.

Trickey, ACJ

WE CONCUR:

Mann, J.

Leach, J.

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Appellant, v. EVAN BACON, DOB: 03/03/2000, Respondent.	)	No. 74233-7-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, Evan Bacon, has filed a motion for reconsideration. The appellant, State of Washington, has filed a response to the motion. The court has taken the matter under consideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 22nd day of March, 2017.

FOR THE COURT:

ACJ

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74233-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: April 14, 2017

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74233-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: April 14, 2017