Supreme Court No. 1003916
(CoA No. 37207-3-III)

100319-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

M.N.H. (juvenile), Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

M.N.H. petitions for discretionary review of the Court of Appeals opinion affirming a juvenile court probation sanction. She contends that her right to counsel was violated and that the juvenile court's reliance on RCW 13.40.200's standards for adjudication of juvenile probation violations was error.

II. ISSUES RAISED BY THE PETITIONER

1. Was M.N.H. denied the right to counsel at her initial appearance on the probation violation where she made inculpatory statements?
2. Was M.N.H. denied the right to counsel at a hearing where ten (10) days of detention which had previously been ordered, but suspended, was imposed?
3. Must the State prove a juvenile probation violation beyond a reasonable doubt?

4. Does the juvenile probation adjudicatory process impermissibly shift the burden of proof to the respondent?
5. Does the juvenile probation adjudicatory process function like a criminal contempt statute so as to require proof beyond a reasonable doubt?

III. BRIEF ANSWERS TO ISSUES RAISED BY THE PETITIONER

1. M.N.H. was not denied the right to counsel at the initial appearance on her probation violation because no substantive action was taken by the juvenile court or the State when counsel was not present, her inculpatory statements were spontaneous and completely unsolicited, and there is no argument that the inculpatory statements were later used against her.
2. Although M.N.H. did not have counsel present when the previously-imposed, but suspended, ten-day probation sanction was imposed, any error was

harmless because she specifically requested the juvenile court's suspended time relief mechanism at sentencing during her original probation violation disposition hearing.

3. From a statutory and due process perspective, the proper burden of proof for adjudication of a juvenile probation violation is preponderance of the evidence.
4. RCW 13.40.200 does not improperly shift the burden of proof to the Respondent.
5. Binding legal authority holds that RCW 13.40.200 is not a criminal contempt action.

IV. STATEMENT OF THE CASE

M.N.H. was adjudicated guilty of Fourth Degree Assault following her plea of guilty on March 1, 2019. *State v. M.N.H.*, __ Wn.App. 2d __, 495 P.3d 263, 265 (2021); (CP 4-17). The disposition order entered pursuant to that adjudication included a twelve (12) month period of community supervision. *M.N.H.*, __ Wn.App. 2d at __, 495 P.3d at 265; (CP 14). M.N.H.

struggled to comply with the terms of her community supervision, and she was brought before the juvenile court numerous times on allegations related to her failure to comply with the disposition order. *M.N.H.*, __ Wn.App. 2d at __, 495 P.3d at 265; (CP 18-22).

M.N.H. appeared before the juvenile court at an initial appearance on a probation violation on May 7, 2019, immediately after being taken into custody on an allegation that she had violated conditions of her probation. (RP 53). M.N.H.'s father and the attorney who typically appears to assist juveniles with those hearings, Ms. Wehrkamp, were not available to be present at the hearing. (RP 51). As a result of their unavailability, M.N.H. was held on bail and the matter was set for the following day. (RP 51-52). Upon learning that she would be held on bail until a hearing on the following day, M.N.H. spontaneously interjected inculpatory statements without any questioning or prompting by the Court. (RP 52).

Pursuant to a summons on a subsequent additional probation violation, M.N.H. appeared before the juvenile court on October 25, 2019, for a contested hearing on an allegation that she violated her community supervision. *M.N.H.*, __ Wn.App. 2d at __, 495 P.3d at 266; (CP 44; RP 99-199). The hearing included the presentation of testimony and consideration of M.N.H.'s motion disputing the lawfulness RCW 13.40.200's procedure for adjudicating probation violations. (CP 23-25; RP 104-199).

At the conclusion of this hearing, the juvenile court adjudicated M.N.H. in violation of the terms of her community supervision. *M.N.H.*, __ Wn.App. 2d at __, 495 P.3d at 266; (RP 194-199). At sentencing on the probation violation, M.N.H.'s attorney specifically requested that the juvenile court suspend any days of detention it imposed to encourage M.N.H.'s growth and improving compliance. *M.N.H.*, __ Wn.App. 2d at __, 495 P.3d at 266; (RP 214). The juvenile court granted M.N.H.'s request, and suspended ten (10) days of detention contingent upon strict compliance with her community supervision and set

a review date of November 22, 2019. *M.N.H.*, __ Wn.App. 2d at __, 495 P.3d at 266; (RP 218, 220).

On November 7, 2019, M.N.H. was brought before the juvenile court on an allegation that she again violated the terms of her community supervision. (RP 225). M.N.H. was not represented by counsel, and the juvenile court summarily imposed the suspended jail time which had been suspended during M.N.H.'s hearing on October 25, 2019. *M.N.H.*, __ Wn.App. 2d at __, 495 P.3d at 266; (RP 226). M.N.H. appealed to Division Three of the Court of Appeals. The Court of Appeals affirmed, and M.N.H. petitions this Court for discretionary review.

V. STANDARD OF REVIEW

RAP 13.4 instructs that this Court will accept discretionary review of a Court of Appeals decision

> 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 a published 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.

VI. ARGUMENT

This Court should decline to accept review because M.N.H. fails to establish that her rights were violated because the juvenile court complied with RCW 13.40.200 and the well-established due process principles associated with probation violations. M.N.H. was not denied her right to counsel when, at an initial appearance after being taken into custody on an alleged probation violation, she was brought before the court and held on bail without her attorney present. Moreover, M.N.H. has not shown how she was prejudiced by any purported denial of her right to counsel when, after being found in violation of her juvenile disposition order after a full and fair hearing, she specifically requested the benefits *and risks* of the juvenile

court's largesse to suspend the imposition of the detention sanction to see if she could comply with her disposition order.

A. M.N.H. Was Not Denied the Right to Counsel at her Initial Appearance on a Probation Violation Because the Matter was Continued so Her Defense Attorney Could be Present, No Substantive Action was Taken, and Her Spontaneous and Unsolicited Comments Were Not Used Against Her.

When M.N.H. appeared before the juvenile court, without counsel or a parent, at a May 7, 2019, detention hearing immediately after being taken into custody on an allegation that she had violated conditions of her probation, the juvenile court ordered that she be held on bail and the matter was set to the following day. (RP 51-52). After this ruling, M.N.H. spontaneously interjected inculpatory statements without any prompting by the Court. (RP 52).

The following day, M.N.H. appeared before the juvenile court with counsel and her father present. (RP 53-67). At that time, M.N.H. admitted the probation violations after consultation with counsel and was sentenced. (RP 53, 61).

Notably, M.N.H. does not show how she was prejudiced by her own spontaneous statements from the May 7, 2019, detention hearing. Ideally, counsel would have been present at the initial May 7, 2019, detention hearing; however, even the presence of counsel would not have guaranteed that M.N.H. would not have blurted out the same inculpatory statements of remorse. Moreover, the juvenile court did not seize upon, or appear to take advantage of, the absence of defense counsel at the initial appearance. Rather, the juvenile court merely informed M.N.H. that the matter would be set over one day to allow both her attorney and her father to appear. (RP 52). Even if this Court found a violation of her right to counsel, M.N.H. offers no argument describing any prejudice.

The Court of Appeals was correct not to consider this issue. Any error was waived because defense counsel did not raise the issue at the May 8, 2019, hearing before the juvenile court the day after the alleged violation. Nor was the issue raised at the October 25, 2019, hearing or in the brief which defense

counsel submitted in objection to the probation violation procedures.

Simply put, the juvenile court never had an opportunity to rule on this objection, so any claim of error is waived. *State v. Van Auken*, 77 Wn.2d 136, 143-44, 460 P.2d 277 (1969) ("We have repeatedly stated the general rule that the trial court must be given an opportunity to rule on asserted errors and to correct them; and that a failure to afford the trial court this opportunity constitutes a waiver of the right to assert that error on appeal.").

The Court should decline to accept review of this matter on the basis of an alleged violation of M.N.H.'s right to counsel at her initial appearance on a probation violation in May of 2019.

B. Even in the Absence of Defense Counsel, the Summary Imposition on November 7, 2019, of M.N.H.'s Detention Sanction Which Had Been Ordered and Suspended on October 25, 2019, was Harmless Because that Hearing Complied with RCW 13.40.200, She was Represented by Counsel at that Hearing, and She Requested the Suspended Time.

The Court of Appeals correctly refused to act upon alleged error regarding the juvenile court's November 7, 2019, summary

imposition of the ten-day sentence which it suspended during M.N.H.'s October 25, 2019, hearing.

M.N.H. complains that she did not receive the full panoply of a probationer's rights, specifically the right to counsel, at the November 7, 2019, hearing when the suspended time she requested was imposed. This claim of error is curious given that M.N.H. had expressly asked to take advantage of the juvenile court's process of conditionally suspending probation violation sentences. M.N.H. *asked* for the detention sanction to be suspended, in consultation with her attorney and aware of the risks and benefits of the approach she chose. (RP 214).

Counsel for M.N.H. specifically *requested* the suspended days: "We would ask that if the court impose (sic) any days that the court suspend them…" RP 214. M.N.H. and her attorney were aware regarding how the juvenile court treated alleged violations of conditions of suspended probation time because other violation hearings of hers involved this process. *See e.g.* RP 56 "[M.N.H.] is…asking for some suspended days, which

would be hanging over her head to get her to follow through."; RP 77 "[M.N.H.'s] position is that she'd like to be out today with suspended days."

If the juvenile court lacked authority to suspend the detention sanction on the probation violations and later summarily impose it, M.N.H. would have served that detention time immediately, so the subsequent imposition of that detention sanction on November 7, 2019, was harmless. The Court should decline to accept review on this basis because the Court of Appeals correctly identified it as moot and was harmless.

C. M.N.H.'s Due Process Rights Were Not Violated When the Juvenile Court Complied with RCW 13.40.200's Statutory Procedure for Adjudication of Juvenile Probation Violations.

At the October 25, 2019, probation violation hearing, M.N.H. was represented by counsel who had been informed of the allegations against her and had sufficient time to file a written memorandum of law objecting to the procedure to be employed in adjudicating the alleged violations.

M.N.H.'s attorney claimed that RCW 13.40.200's process for adjudicating alleged violations of disposition orders was invalid because it established a preponderance of the evidence standard, rather than proof beyond a reasonable doubt; and because it required a juvenile to make a showing that a factually-sustained violation was not willful. (CP 25-34).

M.N.H.'s attorney further claimed that any detention sanction entered pursuant to the violation found by the juvenile court would impermissibly increase the punishment M.N.H. faced in the absence of a finding of guilt beyond a reasonable doubt; and that the proceeding was effectively a criminal contempt action conducted without due process. (CP 32-34). M.N.H.'s arguments are unavailing in light of the well-understood diminished rights of probationers.

"[P]robation revocation is not a stage of the criminal prosecution, and that the defendant is not entitled to a full panoply of his constitutional rights." *State v. Smith*, 13 Wn.App. 859, 862, 539 P.2d 101 (1975).

> The revocation of a suspended sentence is not a criminal proceeding. *State ex rel. Woodhouse v. Dore*, 69 Wn.2d 64, 416 P.2d 670 (1966). Accordingly, the due process rights afforded at a revocation hearing are not the same as those afforded at the time of trial. *In re Personal Restraint of Boone*, 103 Wn.2d 224, 230, 691 P.2d 964 (1984). An offender facing revocation of a suspended sentence has only minimal due process rights. *State v. Nelson*, 103 Wn.2d 760, 763, 697 P.2d 579 (1985).

State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

The "minimal due process" rights to which a probationer is entitled are:

> written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written

> statement by the fact-finders as to the evidence relied on and reasons for revoking [probation or] parole.

City of Seattle v. Lea, 56 Wn.App. 859, 860-61, 786 P.2d 798 (1990) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 35 L.Ed.2d 656, 93 S.Ct. 1756 (1973) (*superseded by statute on other grounds as stated in Jones v. State*, 560 A.2d 1056, fn. 1 (1989)). Probation is a not a constitutional right, but rather a product of legislative grace. *City of Aberdeen v. Regan*, 170 Wn.2d 103, 108, 239 P.3d 1102 (2010) (citing *State v. Kuhn*, 81 Wn.2d 648, 503 P.2d 1061 (1972). "Few, if any constitutional guarantees attach to the status of probation." *State v. Damon*, 16 Wn.App. 845, 852, 559 P.2d 1365 (1977).

1. Preponderance of the evidence is the proper burden of proof to adjudicate a juvenile probation violation

In the context of the minimal due process rights afforded probationers during revocation proceedings, RCW 13.40.200 establishes the procedure and burden of proof for adjudication of a motion to modify a juvenile's disposition order based on an

alleged violation of its terms. During the hearing, the due process principals are the same as those which attend adult probation violation hearings. RCW 13.40.200(2). The State has the burden of proving the fact of the violation by a preponderance of the evidence. *Id*. If the violation is proven, the juvenile may then endeavor to prove that the violation was not willful. *Id*. When the violation proven by the state pertains to performance of community restitution or payment of some legal financial obligation, the juvenile must show that she or he did not have, and could not reasonably have acquired, means to comply. *Id*.

"A juvenile court probation revocation hearing is not a full blown delinquency trial (fact finding hearing). The petitioner (State) is not required to prove a violation of the law or other condition of probation beyond a reasonable doubt…" *In re Welfare of Ames*, 16 Wn.App. 239, 241, 554 P.2d 1084 (1976) (parenthetical references in original).

In the adult probation context, a suspended sentence "may be revoked where a court is reasonably satisfied that the

probationer has violated a condition of his or her probation." *Regan*, 170 Wn.2d at 111 (citing *State v. Standlee*, 83 Wn.2d 405, 409, 518 P.2d 721 (1974)). RCW 13.40.200 is more protective of juvenile probationers in that it imposes the more stringent "preponderance of the evidence" burden of proof.

2. United States Supreme Court Precedent Offered by M.N.H. Does Not Supplant RCW 13.40.200's Preponderance of the Evidence Burden of Proof.

M.N.H. incorrectly cites *United States v. Haymond*, __ U.S. __, 139 S.Ct. 2369, 204 L.Ed.2d 897 (2019) for the proposition that, "violations of supervised release that lead to confinement beyond the standard range must be proven beyond a reasonable doubt." Brief of Petitioner at 13.

The Court of Appeals succinctly and authoritatively summarizes the effect of *Haymond* on M.N.H.'s claim of error:

> Most relevant to [M.N.H.'s] argument is the four-member plurality opinion in *United States v. Haymond*, __ U.S. __, 139 S.Ct. 2369, 204 L.Ed.2d 897 (2019), a case that for the first time addressed whether additional

> confinement imposed on adults for violating conditions of supervisory relief must be based on facts proved to a jury beyond a reasonable doubt. [M.N.H.] cites *Haymond*'s plurality, but even it does not support her proposed extension of *Apprendi*. **Justice Breyer's concurring opinion, which provides the holding of the case, is fatal to her argument**.

M.N.H., __ Wn.App. 2d at ___, 495 P.3d at 268 (emphasis added).

In *Haymond*, the Court addressed the constitutionality of a federal statute pertaining to supervised release, 18 U.S.C. 3853. 139 S.Ct. at 2385-86. No single rationale received the assent of five justices in the *Haymond* written decision, so it is a plurality opinion and "'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgements on the narrowest grounds…'" *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). In *Haymond*, the lead opinion was

authored by Justice Gorsuch and joined by Justices Ginsburg, Sotomayor, and Kagan. *Haymond*, 139 S.Ct. at 2371. Justice Alito was joined by Chief Justice Roberts, and Justices Thomas and Kavanaugh in the dissenting opinion. *Id*. at 2386. Justice Breyer's deciding vote in support of the lead opinion through his narrower concurrence provided the holding of the court. *See Marks*, 430 U.S. at 193.

In his *Haymond* concurrence, Justice Breyer observed that the relevant statute mandated imposition of a minimum 5-year sentence if the person committed one of a series of enumerated crimes while on supervised release which limited the sentencing court's discretion to decide whether to imprison a probationer and for how long. *Id*. at 2386. Justice Breyer reasoned that the federal supervised release statute at issue "more closely resemble[s] the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution. And in an ordinary criminal prosecution, a jury must find facts that trigger a

mandatory minimum prison term." *Id*. (citing *Alleyne v. United States*, 570 U.S. 99, 103, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)). However, Justice Breyer's analysis of 18 U.S.C. 3853 provides no insight into how this Court should interpret RCW 13.40.200; and his concurrence in *Haymond* directly contradicts the relief for which M.N.H. petitions this court: to apply the *Apprendi* line of cases to probation revocation proceedings.

Justice Breyer's concurrence, the holding of the Court, specifically announced that he would **not** be in favor of "transplant[ing] the *Apprendi* line of cases to the supervised release context." *Haymond*, _ U.S. _, 139 S.Ct. at 2385 (emphasis added).

RCW 13.40.200 already *elevates* the standard of proof to find a juvenile in violation of her disposition order from "reasonable satisfaction of the judge" to "preponderance of the evidence" and M.N.H. has provided no relevant legal authority to justify usurping that legislative enactment and further elevating the burden of proof in a juvenile probation revocation

proceeding to beyond a reasonable doubt. This Court should decline review because the Court of Appeals correctly rejected M.N.H.'s dubious argument regarding *Haymond* which she now reiterates in her petition for discretionary review.

3. A Sanction Entered Pursuant to RCW 13.40.200 for Violation of a Disposition Order Does Not Increase the Punishment Faced by a Juvenile in Such a Way that Would Necessitate Elevating the Burden of Proof to Beyond a Reasonable Doubt.

M.N.H. argues that the probation violation sanctions imposed upon her have impermissibly increased her sentence beyond the initial thirty-day standard range available under the original disposition order.

However, the Court of Appeals addressed this very issue in *State v. W.C.F.*, 97 Wn.App. 401, 985 P.2d 946 (1999). In that case, a juvenile was sentenced to three months community supervision and sixteen hours of community service, which was a disposition at the top of the standard range for the offense at the time of sentencing. *Id*. at 402. The State subsequently sought

modification of the juvenile's disposition for allegedly using marijuana. *Id*. at 403. When the court found that the juvenile had violated the disposition, it imposed an additional three months of community supervision. *Id*. In response to the juvenile's claim that the sanction for the probation violation exceeded the standard range and was unsupported by sufficient findings, the Court of Appeals held:

> The juvenile court here did not make a manifest injustice finding. At the original disposition hearing, the court imposed three months of community supervision and 16 hours of community service. Because that disposition was within the standard range, no manifest injustice determination was required. Likewise, no manifest injustice determination was necessary at the modification because the court did not issue an order of disposition. Rather, it modified the earlier disposition on the basis of W.F.'s subsequent violation of that disposition.

Id. at 407.

M.N.H. was given a standard range disposition after she pleaded guilty to Fourth Degree Assault. (CP 12-17). None of the subsequent proceedings to modify her disposition order pursuant to RCW 13.40.200 resulted in the issuance of a new disposition order, so no manifest injustice determination was needed. *See Id*. The Court should not accept review because the sanction imposed pursuant to M.N.H.'s probation violation did not exceed the standard range disposition available at the time of sentencing.

4. RCW 13.40.200 Does Not Improperly Shift the Burden of Proof to the Respondent.

The only legal authority for M.N.H.'s assertion that RCW 13.40.200 "unconstitutionally shifts the burden of disproving an element of 'willful refusal' to the juvenile" is *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) (en banc). That decision is unhelpful to M.N.H. because *W.R., Jr.* involved an analysis regarding whether the State had the burden to prove a lack of

consent when a defendant raised a consent defense to a criminal charge of forcible rape—not a probation violation. *Id*., at 763.

The Court of Appeals rightly disposed of this argument by pointing out that M.N.H.'s reliance on *W.R.* is misplaced because the rule announced in that case is that a defendant cannot be required '"to disprove any fact that constitutes *the crime* charged.'" because it is a component of the State's burden to prove the crime beyond a reasonable doubt. *M.N.H.*, __ Wn.App. 2d at __, 495 P.3d at 270 (quoting *W.R.* 181 Wn.2d at 762) (emphasis in original).

D. The Procedure Set Forth By RCW 13.40.200 Is Not a Contempt of Court Action.

The Court should not accept review based on M.N.H.'s claim that the juvenile probation adjudicatory process implicates the criminal contempt statute. Division Three correctly held that M.N.H.'s argument is contradicted by a decision of a coordinate division of the Court of Appeals.

In *State v. Martin*, Division One specifically held that RCW 13.40.200's "sanction for a willful violation of the terms of a disposition order" is not analogous to a contempt of court sanction. 36 Wn.App. 1, 5, 670 P.2d 1082 (1983) *overruled on other grounds by State v. Martin*, 102 Wn.2d 300, 684 P.2d 1290 (1984). The Court of Appeals specifically noted that RCW 13.40.200 "does not authorize the judge to impose an additional sentence." *Id*. Instead, of being a new criminal penalty, "[t]he statutory penalty is modification of the order and imposition of confinement at the specified rate in lieu of the offender's privilege of serving his sentence in the less restrictive manner authorized by the order of disposition." *Id*. This Court should decline review pursuant to RAP 13.4.

VI. CONCLUSION

M.N.H. has failed to establish the requirements of RAP 13.4 to justify this Court's acceptance of review of the Court of Appeals' decision. The juvenile court did not violate M.N.H.'s statutory and due process rights in adjudicating her probation

violations. The juvenile court held the State to the proper burden of proof during M.N.H.'s probation violation adjudication; and M.N.H. has not presented compelling legal authority or argument which would cause this Court to believe that any prejudicial error was committed. The Court should decline review.

VII. WORD COUNT CERTIFICATION

The undersigned certifies the number of words contained in this document, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images, complies with the provisions of RAP 18.17(c)(6). The total number of words contained in State's Response to M.N.H.'s petition for discretionary review is 4,113 including footnotes, end notes, and cover sheet.

Respectfully submitted this 19th day of November, 2021.

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DECLARATION OF SERVICE

I, Bret Roberts, state that on November 19, 2021, I caused to be emailed a copy of BRIEF OF RESPONDENT to the following persons at the corresponding email addresses via the Court's online filing system.

Jessica Wolfe at Jessica@washapp.org

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of November, 2021, at Yakima, Washington.

/s/ Bret A. Roberts

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