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Supreme Court No. 100319-6
(Court of Appeals No. 37207-3-III)

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

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

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

PETITION FOR REVIEW

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A. INTRODUCTION

Megan, a thirteen-year-old child, faced the court alone when she was ordered to spend ten days in detention for violating the terms of her community custody. Although she had a right to counsel, the court did not inform Megan of this right. Megan did not say a word during the brief hearing.

At the time of this hearing, Megan had already completed her three-day sentence for the underlying crime, which arose out of a fight at school. And she had also already spent 64 *additional* days in detention for other violations of her community custody – more than twice the top of the standard range. Despite this, the court imposed ten more days of confinement after finding by a mere preponderance standard that Megan willfully violated the terms of her community custody.

These proceedings violated Megan's rights to counsel and due process and warrant this Court's review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

M.N.H, pseudonym “Megan,” asks this Court to review the published opinion of the Court of Appeals in *State v. M.N.H.*, ___ Wn. App. ___, 495 P.3d 263 (2021).

C. ISSUES PRESENTED FOR REVIEW

1. Washington law provides for a right to counsel for juveniles in any proceeding where the juvenile may be in danger of confinement. *See* RCW 13.40.140(2). Courts must also inform a juvenile of their right to counsel. *Id.* Here, Megan appeared twice without counsel at revocation proceedings and was not informed of her right to request counsel. In the first instance, Megan made inculpatory statements on the record. The second time, Megan was accused of new violations of her community custody and sentenced to a previously suspended period of confinement. The Court of Appeals viewed the denial of Megan’s right to counsel at these proceedings as an “alleged procedural misstep[.]” that “would

have been avoided had there been a timely objection.” *M.N.H.*, 495 P.3d at 266 n.2. This Court’s review is warranted in order to clarify as a matter of substantial public interest that juveniles are entitled to counsel at revocation hearings.

2. Pursuant to *Apprendi v. New Jersey*,¹ due process requires that any fact that increases the penalty for a crime beyond the standard range must be proved beyond a reasonable doubt. U.S. Const. amend. XIV. Further, as the U.S. Supreme Court recently recognized in *United States v. Haymond*,² revocation of supervised release is part of the penalty for the initial offense. Thus any fact that leads to the revocation of release and the imposition of a period of confinement beyond the standard range must be proved beyond a reasonable doubt. Here, the court below found Megan violated her community custody by a mere preponderance standard and imposed

¹ 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (plurality).

² 139 S. Ct. 2369, 204 L. Ed. 2d 897 (2019) (plurality); *see also id.* at 2386 (Breyer, J., concurring in the judgment).

additional confinement more than double the top of the standard range. This violated Megan's right to due process. This Court should accept review as the required burden of proof at juvenile revocation hearings raises a significant question of constitutional law.

3. The State cannot require a juvenile to disprove any fact that constitutes the crime charged. When a defense negates an element of an offense, this results in a shifting of the burden of proof in violation of due process. U.S. Const. amend. XIV. Under RCW 13.40.200(2), the court must find a juvenile's violation of a disposition order was "willful," but the burden of disproving willfulness is placed on the juvenile. Whether this statutory scheme unconstitutionally shifts the burden of proof of an essential element in violation of due process raises a significant question of constitutional law that warrants this Court's review.

4. Contempt of court is defined as disobedience of any lawful judgment or order. Accordingly, RCW 13.40.200 is a

contempt statute, as it permits a juvenile court to impose detention for willful violations of the court's disposition orders. Before a criminal contempt sanction may be imposed, juveniles are entitled to full criminal process, which includes proof beyond a reasonable doubt. U.S. Const. amend. XIV. Whether RCW 13.40.200's requirement of a mere preponderance standard violates due process raises a significant constitutional question, warranting this Court's review.

D. STATEMENT OF THE CASE

Megan grew up in an unstable household. RP 14. Her mother was in and out of prison and her father was a recovering drug addict. RP 14. As a result, her sister largely raised her. RP 14. When she was thirteen years old, Megan got into a fight at her middle school. CP 3. After spending three days in juvenile detention, she pled guilty to fourth-degree assault. RP 5–9; CP 4–11. The court sentenced her to time served, twelve months' community supervision, and 16 hours of community service. CP 14.

Over the next six months, Megan struggled to comply with the terms of her community supervision, including completing her community service hours. CP 18–22, 44–45. The court repeatedly jailed Megan for these violations. CP 18–22, 44–45. After six months, Megan had served 64 days in detention, more than double the maximum standard range of 30 days. RP 170.

Following a contested hearing, the court imposed a ten-day suspended sentence. CP 44; RP 99–224. In doing so, the court rejected defense counsel’s arguments that due process required the court to find Megan had violated the terms of her community supervision beyond a reasonable doubt, applying the statutory preponderance standard instead. CP 44, 54–57.

Approximately two weeks later, Megan was arrested again for failing to keep in contact with her probation officer. CP 61. At the hearing the following day, her probation officer made additional allegations that Megan violated the terms of her community custody by using alcohol and hydrocodone. RP

226. Without Megan’s attorney present, the court imposed the previously suspended 10-day sentence, stating, “you owe me ten days.” RP 226. Megan did not say a word during the brief hearing. RP 225–27.

On appeal, the Court of Appeals declined to address many of Megan’s claims as moot. Op. at 5. However, it issued a published opinion concluding that due process did not require the State to prove Megan willfully violated the terms of her community custody beyond a reasonable doubt. *M.N.H.*, 495 P.3d at 267–70.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Megan was denied her right to counsel at a hearing in which she was ordered to serve ten days of detention.

Washington law provides for a right to counsel in juvenile cases and imposes a duty on courts to advise children of their right to counsel. RCW 13.40.140(2). The right to counsel applies “in any proceeding where the juvenile may be in danger of confinement.” *Id.* This includes hearings where

the child may be sentenced to confinement, but the court imposes a lesser sanction. *State v. Trull*, 56 Wn. App. 795, 797, 784 P.2d 183 (1990) (child entitled to representation pursuant to statute although he only received a sentence of community supervision).

Children require legal guidance when they face the prospect of incarceration.³ Research has conclusively demonstrated that “youth misunderstand the legal system and need the assistance of lawyers to advise them not only of their rights but also of the process they are undergoing.” Jennifer K. Pokempner, et al., “The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters,” 47 Harv. C.R.-C.L.L. Rev. 529, 556

³ Washington recently expanded children’s statutory right to counsel, requiring all children to have a non-waivable consultation with an attorney before submitting to a search or custodial interrogation. Laws of 2021, ch. 328, § 1.

(2012). “Attorneys are necessary to help young clients invoke their due process rights, hold the state to its burden of proof, advocate for fair dispositions, appeal adverse rulings, and protect their clients’ interest while incarcerated or on probation.” *Id.*

Here, Megan appeared without representation at two revocation hearings before the juvenile court. At the first hearing, the court decided to continue the matter as Megan’s attorney was not present. RP 51–52. However, at this hearing, Megan made several inculpatory statements to the court, saying “I’m sorry for coming back in here, by the way. I’m sorry This will be the last time.” RP 52. Instead of telling Megan she had the right to remain silent during the hearing, the court simply said, “We’re going to get there.” RP 52; RCW 13.40.140(8) (“A juvenile shall be accorded the same privilege against self-incrimination as an adult.”).

Megan was also brought before the court without counsel several months later. RP 22. At this hearing, a probation

officer alleged Megan had “admitted to drinking alcohol and taking hydrocodone” to an unnamed third party. RP 226.

Megan was not provided an opportunity to defend against the allegations and did not say a word during the brief hearing. RP 225–27. The court imposed the previously suspended ten-day sentence, stating “you owe me ten days.” RP 226.

Because Megan was in “danger of confinement” at both hearings – and in fact was ordered to serve ten days of confinement at the second hearing – these proceedings violated her statutory right to counsel. RCW 13.40.140(2). However, the Court of Appeals refused to review this technically moot issue, dismissing the denial of counsel as an “alleged procedural misstep” that “would have been avoided had there been a timely objection.” *M.N.H.*, 495 P.3d at 266 n.2.

The Court of Appeals did not explain how a 13-year-old child would know to make a “timely objection” to their denial of the right to counsel. Youth typically lack the cognitive and emotional capacities to meaningfully participate in the legal

system. Pokempner, 47 Harv. C.R.-C.L.L. Rev. at 557.

Further, the court was required to inform Megan of her right to counsel, but did not. RCW 13.40.140(2) (“A juvenile . . . shall be advised by the court or its representative that the juvenile has a right to be represented by counsel at all critical stages of the proceedings.”) Had the court not failed in its statutory duties, Megan may have requested an attorney and, through that attorney, challenged the allegations against her as well as the imposition of ten days of confinement.

The statutory mandate is clear: children are entitled to counsel in any hearing in which they are in “danger of confinement.” RCW 13.40.140(2). However, as Megan’s case demonstrates, lower courts require guidance that this mandate unquestionably applies to revocation hearings. Review is warranted.

2. The State was constitutionally required to prove a “willful” violation of the disposition order with proof beyond a reasonable doubt.

- a. Due process requires that disposition violations be proven beyond a reasonable doubt if the violations increase the available sentence beyond the standard range.

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be . . . proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 238, 147 L. Ed. 2d 435 (2000). Applying a lesser standard, including a preponderance burden, offends due process. *See id.* at 476; U.S. Const. amend. XIV. The “statutory maximum” contemplated by *Apprendi* is the top of the standard range. *Blakely v. Washington*, 542 U.S. 296, 303–304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (citing *Apprendi*, 530 U.S. at 488). Accordingly, the State must prove any fact that increases

the sentence above the standard range beyond a reasonable doubt. *See id.*

“[P]ostrevocation sanctions [are] part of the penalty for the initial offense.” *Johnson v. United States*, 529 U.S. 694, 700, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000). In light of this, a plurality of the U.S. Supreme Court recently recognized that violations of supervised release that lead to confinement beyond the standard range must be proven beyond a reasonable doubt. *United States v. Haymond*, 139 S. Ct. 2369, 2379, 204 L. Ed. 2d 897 (2019) (plurality); *see also id.* at 2386 (Breyer, J., concurring in the judgment) (agreeing revocation of supervised release is typically understood as “part of the penalty of the initial offense,” quoting *Johnson*).

As the *Haymond* plurality recognized, post-judgment sentence modifications are criminal prosecutions if they result in an “increase in a defendant’s authorized punishment contingent on the finding of a fact.” *Haymond*, 139 S. Ct. at 2379 (quoting *Ring v. Arizona*, 536 U.S. 584, 602, 122 S. Ct.

2428, 153 L. Ed. 2d 556 (2002)). The plurality thus recognized that increasing the “legally prescribed range of allowable sentences” by a mere preponderance standard ran afoul of due process. *See id.* (citations and quotation marks omitted). In doing so, the plurality⁴ rejected the government’s argument that *Apprendi*’s reasoning did not apply to post-judgment “sentence modification[s]” that increased the standard range. *Id.* at 2379.

The Juvenile Justice Act permits a court to “modify” a disposition order if a juvenile fails to comply with the terms of the disposition. RCW 13.40.200(1). If the court makes a factual finding that the juvenile “willfully violated” the disposition, the court may impose an additional 30 days of

⁴ The Court of Appeals applied a three-part test from Justice Breyer’s concurrence to conclude that the statutory preponderance standard was not unconstitutional. *M.N.H.*, 495 P.3d at 268–69. However, the *Haymond* plurality and Justice Breyer “did not agree upon a single rationale, and because Justice Breyer’s rationale is not a logical subset of the plurality’s (or vice versa)” it does not provide the applicable holding of the Court. *See United States v. Henderson*, 998 F.3d 1071, 1083 (9th Cir. 2021) (Rakoff J., dissenting).

confinement – even if this extends beyond the standard range sentence for the underlying crime. RCW 13.40.200(2)–(3). Under these circumstances, *Apprendi* and *Haymond* require the State to prove willfulness beyond a reasonable doubt, and thus the statute’s application of a mere preponderance standard is unconstitutional. *See* RCW 13.40.200(2).

Here, Megan pled guilty to fourth-degree assault and faced a standard range sentence of zero to 30 days, and was ultimately sentenced to three days of detention. CP 12–14. Had Megan not pled guilty, the State would have been required to prove its case beyond a reasonable doubt. RCW 13.40.130(3) However, Megan ultimately spent over two months in jail – more than *twice* the maximum standard range sentence – based on community custody violations proved by a mere preponderance standard. CP 30; RCW 13.40.0357; RCW 13.40.020(18)(a); RCW 13.40.200(2). Pursuant to *Apprendi* and *Haymond*, this violated her right to due process of law and warrants this Court’s review.

- b. RCW 13.40.200 shifts the burden of disproving an element of “willful refusal” to the juvenile in violation of due process.

Prior to imposing a penalty, the court must find the juvenile “has willfully violated” the terms of the order. RCW 13.40.200(3). Under RCW 13.40.200(2), the State is only required to prove “the fact of the violation.” However, the burden is placed on the juvenile to prove their violation was “*not a willful* refusal to comply with the terms of the order.” *Id.* (emphasis added). In doing so, the statute places the burden on the juvenile to disprove a required element, *i.e.*, a willful violation.

This statutory scheme constitutes an unconstitutional burden-shifting to the juvenile. The *Haymond* plurality recognized that post-judgment sentence modifications are criminal prosecutions if a factual finding increases the sentence beyond the standard range. *Haymond*, 139 S. Ct. at 2379. It is fundamental the State must prove “every fact necessary to

constitute the crime with which [a defendant] is charged” in order to comply with due process of law. *State v. W.R.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. XIV. “A corollary rule is that the State cannot require the defendant to disprove any fact that constitutes the crime charged.” *Id.* “[W]hen a defense necessarily negates an element of an offense, it is *not* a true affirmative defense and the legislature may not allocate to the defendant the burden of proving the defense.” *Id.* (emphasis in the original).

Here, willfulness is an element the court must find prior to imposing any additional penalty on a juvenile. RCW 13.40.200(3). The legislature has assigned the juvenile the burden of disproving their own willfulness, thus essentially requiring the juvenile to disprove an essential element. RCW 13.40.200(2). Per *W.R.*, the absence of willfulness is not an affirmative defense, because it “necessarily negates an element

of an offense.” *W.R.*, 181 Wn.2d at 762. In placing the burden on a juvenile to disprove willfulness, RCW 13.40.200(2) violates due process and warrants this Court’s review. RAP 13.4(b)(3).

3. In the alternative, RCW 13.40.200 is a contempt statute requiring proof beyond a reasonable doubt in order to comport with due process.

“Contempt of court” includes disobedience of any lawful judgment or order. RCW 7.21.010(1)(b). RCW 13.40.200 is a contempt statute, as it “addresses the juvenile court’s power to enforce its own disposition orders” and punish disobedience. *State v. Martin*, 102 Wn.2d 300, 303, 684 P.2d 1290 (1984).

A contempt sanction that involves imprisonment can be coercive, and thus civil in nature, “so long as the contemnor has the power to purge the contempt.” *State v. T.A.W.*, 144 Wn. App. 22, 26, 186 P.3d 1076 (2008). In other words, a contempt sanction is civil only if the contemnor “carries the keys of his prison in his own pocket and can let himself out simply by obeying the court order.” *In re M.B.*, 101 Wn. App. 425, 439, 3

P.3d 780 (2000) (citations and quotation marks omitted). By contrast, a contempt sanction is criminal if it serves to punish past behavior and “the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense.”

International Union, United Mine Workers of America v.

Bagwell, 512 U.S. 821, 845, 114 S. Ct. 2552, 129

L. Ed. 2d 642 (1994) (citations and quotation marks omitted).

Here, Megan was held in criminal contempt, as the court sought to punish her past violations.

“[C]riminal contempt sanctions are entitled to full criminal process,” particularly when imposed in response to contemptuous actions occurring outside the presence of the court. *Bagwell*, 512 U.S. at 833; *see also In re Dependency of A.K.*, 162 Wn.2d 632, 645-46, 174 P.3d 11 (2007); U.S. Const. amend. XIV. Criminal contempt sanctions require proof beyond a reasonable doubt in order to “protect the due process rights of the parties and prevent the arbitrary exercise of judicial power.” *Bagwell*, 512 U.S. at 834.

Accordingly, courts must provide juveniles with full criminal due process prior to imposing punitive sanctions for violating the court's orders, including applying a standard of proof beyond a reasonable doubt. Pursuant to this analysis, RCW 13.40.200(2)'s application of a preponderance standard violates due process of law. *Bagwell*, 512 U.S. at 834. Review is thus warranted.

F. CONCLUSION

For the reasons stated above, this Court should accept review.

Counsel certifies this pleading complies with RAP 18.17(b) and contains 3190 words.

DATED this 21st day of October, 2021.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.) COA NO. 37207-3-III
)
 M.N.H.,)
)
 Juvenile Petitioner.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF OCTOBER, 2021, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE COURT OF APPEALS AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF OCTOBER, 2021.



X _____

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

STATE OF WASHINGTON,)	
)	No. 37207-3-III
Respondent,)	
)	
v.)	
)	
M.N.H.,)	PUBLISHED OPINION
)	
Appellant.)	

SIDDOWAY, J. — The appeal of this technically moot juvenile offender proceeding presents two issues of first impression that might often be raised in violation hearings conducted under RCW 13.40.200 and continually evade review.

The appellant, who uses the pseudonym Megan, contends that RCW 13.40.200 violates principles of due process established in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). This is because even after she had been detained for violating community supervision terms for more than the 30 days she contends was her standard range, RCW 13.40.200 authorized the juvenile court to impose additional confinement, based on proof of a violation by a preponderance of the evidence. She contends the statute further violates due process by requiring her to disprove the

willfulness of her violations, where willfulness is a fact essential to a sanctionable violation, relying on *State v. W.R.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014).

We reject Megan's challenges and affirm.

FACTS AND PROCEDURAL BACKGROUND

In March 2019, Megan, then 13 years old, pleaded guilty to fourth degree assault. The information identified the maximum sentence for the charge as 364 days. Her statement on plea of guilty and the disposition order identified her standard range sentence as local sanctions. The juvenile court entered a disposition order that imposed 3 days of confinement, 12 months of community supervision, and 16 hours of community service.

Megan repeatedly violated the conditions of her community supervision. By the end of summer 2019, this had resulted in four violation hearings and an additional 61 days of confinement.

On September 18, Megan was summoned to appear in juvenile court again, facing allegations of failing to attend school and failing to follow parental rules and curfew. This time, she contested the allegations. A hearing on the contested allegations was scheduled for October. In anticipation of the hearing, Megan filed a motion challenging the constitutionality of RCW 13.40.200, which dictates the standard and procedure for penalizing a juvenile offender's failure to comply with an order of restitution, community supervision, penalty assessment, or confinement. Megan argued that RCW 13.40.200(2)

violates due process by placing the burden of disproving the willfulness of a violation on the juvenile. Relying on *Apprendi* and *Blakely*, she also argued that although RCW 13.40.200(3) allows confinement for violations proved by a preponderance standard to be imposed until the combined total number of days spent in detention reaches an adult's maximum term of confinement for the underlying offense, the federal and state constitutions do not. She argued that once the period of a juvenile offender's confinement exceeds the high end of the standard range, the State is required to prove all elements of a willful violation beyond a reasonable doubt. She argued that in her case, the high end of the standard range was 30 days, the high end for local sanctions.¹

The juvenile court rejected Megan's challenges to the constitutionality of RCW 13.40.200. It found that she violated the disposition order and that some but not all of her violations were willful. It imposed a sentence of 10 days' additional confinement. At Megan's request, it suspended the sentence. When Megan was returned to court in early November accused of further violations, the court summarily revoked the suspension and ordered the 10 days to be served. Megan appeals the court's November order as well as a prior detention.

¹ "Local sanctions" is defined by RCW 13.40.020(18) to mean "one or more of the following: (a) 0-30 days of confinement; (b) 0-12 months of community supervision; (c) 0-150 hours of community restitution; or (d) \$0-\$500 fine."

ANALYSIS

Two technically moot issues raised by the appeal are of continuing and substantial public interest and will be reviewed

Megan’s opening brief acknowledges she has served the detention imposed, making her appeal technically moot. She nonetheless asks us to review five assignments of error, arguing that all involve matters of continuing and substantial public interest.

When an appeal is moot, meaning we can no longer provide the appellant with effective relief, we may retain it and decide if it “involves matters of continuing and substantial public interest.” *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). To determine whether the appeal presents issues of continuing and substantial public interest, we consider “[1] the public or private nature of the question presented, [2] the desirability of an authoritative determination for the future guidance of public officers, and [3] the likelihood of future recurrence of the question.” *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972) (quoting *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 622, 104 N.E.2d 769 (1952)). We may also consider “the likelihood that the issue will never be decided by a court due to the short-lived nature of the case.” *State v. B.O.J.*, 194 Wn.2d 314, 321, 449 P.3d 1006 (2019) (internal quotation marks and citation omitted) (quoting *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 712, 911 P.2d 389 (1996)). Because of the relatively short length of most juvenile offender

dispositions, appellate courts rarely have the opportunity to consider them before they become moot. *Id.*

Only two of Megan’s assignments of error warrant review under these standards: her *Apprendi*-based assignment and her *W.R.*-based burden-shifting assignment.² We first review the procedure followed by the juvenile court and then review her constitutional challenges in the order stated.

Statutory burdens of proof and authorized penalties when juvenile offenders violate conditions of community supervision

RCW 13.40.200, part of the Juvenile Justice Act of 1977, authorizes the juvenile court to modify a disposition order when a youthful offender fails to comply with its terms, including its conditions of community supervision. At a hearing on the State’s or the court’s own motion to modify the order, “[t]he state shall have the burden of proving *by a preponderance of the evidence* the fact of the violation.” RCW 13.40.200(2) (emphasis added). The juvenile court may impose a penalty of confinement “[i]f [it] finds that a respondent has *willfully* violated the terms of an order pursuant to subsections

² Megan’s first and second assignments of error involve alleged procedural missteps that were not objected to below. Given the likelihood that these alleged errors would have been avoided had there been a timely objection, they do not warrant review.

Her fifth assignment of error—that the imposition of a sanction under RCW 13.40.200 is a criminal contempt proceeding that must be prosecuted as a criminal case—has already been rejected in a published decision of this court. *See State v. Martin*, 36 Wn. App. 1, 670 P.2d 1082 (1983), *rev’d on other grounds*, 102 Wn.2d 300, 684 P.2d 1290 (1984). Megan does not persuade us that the issue should be reexamined.

(1) and (2) of [RCW 13.40.200].” RCW 13.40.200(3) (emphasis added). “*The respondent shall have the burden of showing that the violation was not a willful refusal to comply with the terms of the order.*” RCW 13.40.200(2) (emphasis added).

If the court finds that a respondent has willfully violated the terms of an order pursuant to subsections (1) and (2) of this section, “it may impose a penalty of up to thirty days’ confinement.” RCW 13.40.200(3). “Penalties for multiple violations occurring prior to the hearing shall not be aggregated to exceed thirty days’ confinement.” *Id.* “Regardless of the number of times a respondent is brought to court for violations of the terms of a single disposition order, the combined total number of days spent by the respondent in detention shall never exceed the maximum term to which an adult could be sentenced for the underlying offense.” *Id.*

This court has construed the statute’s plain language as providing that “[a]t a given violation hearing . . . a juvenile may be punished for all prehearing violations of a single disposition order, regardless of the number and nature of such violations—provided that the aggregate punishment for those violations does not exceed 30 days, and provided further that the aggregate punishment then and previously imposed does not exceed the statutory maximum term for an adult.” *State v. Barker*, 114 Wn. App. 504, 507-08, 58 P.3d 908 (2002) (emphasis omitted). The juvenile court never imposed more than 30 days’ confinement on Megan at any given violation hearing. The aggregate punishment the court imposed never came close to the 364 day maximum term to which an adult

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could be sentenced for fourth degree assault. Megan has no statutory basis for challenging the detention ordered by the court.

The State was not required by due process to prove Megan's violations beyond a reasonable doubt

The due process clause of the Fourteenth Amendment to the United States Constitution guarantees, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The United States Supreme Court has interpreted this due process guaranty as requiring the State to prove, even in juvenile *adjudicatory* proceedings, "beyond a reasonable doubt . . . every fact necessary to constitute *the crime with which [a defendant] is charged.*" *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (emphasis added).

Following *Winship*, the Supreme Court "ha[s] made clear beyond peradventure that *Winship's* due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi*, 530 U.S. at 484 (second alteration in original) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) (Scalia, J., dissenting)). In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for *a crime* beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at 490 (emphasis added). Washington law, applying article I, sections 21

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and 22 of the Washington Constitution, is in accord. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010) (citing *State v. Frazier*, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972)). The relevant statutory maximum for a Washington conviction is the high end of the standard range—the “maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 542 U.S. at 303.

Citing this case law, Megan argues that because confinement for her community supervision violations alleged in September would take her cumulative confinement well beyond the 30-day high end of local sanctions, *Apprendi* and *Blakely* apply.

Neither below nor on appeal does Megan argue that the same case law required her violation to be proved to a jury. “Juvenile adjudicatory proceedings have never been equated with a ‘criminal prosecution’ for purposes of the Sixth Amendment.” *State v. Tai N.*, 127 Wn. App. 733, 738, 113 P.3d 19 (2005) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 541, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971)). “Washington courts have also consistently held that juvenile offenders do not have a right to jury trials under the Washington Constitution.” *Id.*; *State v. Meade*, 129 Wn. App. 918, 925, 120 P.3d 975 (2005) (“We hold that *Blakely v. Washington*, which held that ‘any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury,’ is not applicable to juvenile proceedings; a sentence above the standard range does not need to be submitted to a jury.”).

Megan argues only that the case law requires proof of her violations beyond a reasonable doubt. Most relevant to Megan'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. Megan 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.

In *Haymond*, an offender convicted of possessing child pornography in violation of federal law had his supervised release revoked after an unannounced search of his computer and cellphone turned up 59 images that appeared to be child pornography. Under 18 U.S.C. § 3583(e)(3), a district judge may (but is not required to) impose a new prison term on a defendant who violates the conditions of his supervised release that is up to the maximum period of supervised release authorized for the original crime of conviction, subject to certain limits. 139 S. Ct. at 2374. The revocation of Haymond's supervised release was governed by the unusual and harsher 18 U.S.C. § 3583(k), however. Under § 3583(k), a judge who finds by a preponderance of the evidence that a defendant on supervised release committed one of several enumerated offenses, including possession of child pornography, *must* impose an additional prison term of at least five

years and up to life, without regard to the length of the prison term authorized for the defendant's crime of conviction.

The plurality held that an accused's final sentence includes any supervised release time imposed thanks to his initial offense, "and whether that release is later revoked or sustained, it constitutes a part of the final sentence for his crime." 139 S. Ct. at 2380. But it held that "a jury must find any facts that trigger a *new* mandatory minimum prison term," and must find those facts beyond a reasonable doubt. *Id.* The plurality went to great lengths to make clear its holding was based on § 3583(k)'s mandatory minimum sentence and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), saying, e.g., "we need not address the constitutionality of the statute's effect on his maximum sentence under *Apprendi*." *Haymond*, 139 S. Ct. at 2379 n.4, 2382 n.7 ("Just as we have no occasion to decide whether § 3583(k) implicates *Apprendi* . . . we do not pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*."), 2383 ("As we have emphasized, our decision is limited to § 3583(k)—an unusual provision enacted little more than a decade ago—and the *Alleyne* problem raised by its five-year mandatory minimum term of imprisonment."). Accordingly, even if the holding of *Haymond* were that of the plurality, it would not mean that *Apprendi* prevented the juvenile court in Megan's case from penalizing her violation of community supervision conditions with additional confinement up to the statutory limit, in her case, of 364 days.

The holding of *Haymond* is not that of the plurality, however. Justice Breyer concurred in the judgment, and his opinion is the Supreme Court’s holding because it supplies the narrowest ground supporting the judgment. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”) (internal quotation marks omitted). Justice Breyer agreed with the four-justice dissent that “the role of the judge in a supervised-release proceeding is consistent with traditional parole.” *Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring in judgment). He stated clearly, “I would not transplant the *Apprendi* line of cases to the supervised-release context,” citing “potentially destabilizing consequences.” *Id.*

Justice Breyer nevertheless agreed with the plurality that § 3583(k) was unconstitutional. He observed that revocation of supervised release is typically understood as “‘part of the penalty for the initial offense.’” *Id.* at 2386 (quoting *Johnson v. United States*, 529 U.S. 694, 700, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000)). And “[t]he consequences that flow from violation of the conditions of supervised release are first and foremost considered sanctions for the defendant’s ‘breach of trust’—his ‘failure to follow the court-imposed conditions’ that followed his initial conviction—not ‘for the particular conduct triggering the revocation as if that conduct were being sentenced as

new federal criminal conduct.’” *Id.* (quoting U.S. SENTENCING COMM., GUIDELINES MANUAL ch. 7, pt. A, intro. 3(b) (Nov. 2018)).

Justice Breyer found the more typical consequences for violating conditions of supervised release under § 3583(e)(3) to be consistent with this view. *Id.* He found § 3583(k) “difficult to reconcile with this understanding of supervised release,” however, continuing,

[T]hree aspects of this provision, considered in combination, lead me to think it is less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach. First, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute. Second, § 3583(k) takes away the judge’s discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. Third, § 3583(k) limits the judge’s discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of “not less than 5 years” upon a judge’s finding that a defendant has “commit[ted] any” listed “criminal offense.”

Taken together, these features of § 3583(k) more closely resemble 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. Alleyne, 570 U.S. at 103.

Id. at 2386 (emphasis added and omitted) (second alteration in original).

RCW 13.40.200 has none of the three features that Justice Breyer concluded make § 3583(k) unlike revocation of supervised release and more like punishment for a new offense. First, RCW 13.40.200 does not apply only to a discrete set of criminal offenses specified in the statute. Any willful violation of an order of restitution, community

supervision, penalty assessment or confinement can be the basis for imposing a penalty. As Megan’s case illustrates, the violation need not even be a crime; in her case, it was sometimes a failure to attend school daily or obey parental rules. Second, RCW 13.40.200 imposes only maximums for individual and cumulative penalties, something that presents no constitutional concern. It does not take away a judge’s discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. And third, it does not impose mandatory minimum penalties or limit the judge’s discretion in any other particular matter.

Since RCW 13.40.200 does not have any of the features Justice Breyer holds would cause it to be viewed as punishment for a new offense, there is nothing unconstitutional about the authority it grants to juvenile courts to impose additional confinement for violations proved by a preponderance of evidence.

Megan’s argument that the State was required to prove her violations beyond a reasonable doubt conflicts with long-standing Washington case law—case law she hoped to avoid by arguing it was abrogated by *Apprendi* and *Haymond*. It remains good law, though, and is fatal to her position. Even in the case of adult offenders, the Washington Supreme Court has held that when the State seeks revocation of probation, it is not required to prove an offender’s breach of a condition of his probation beyond a reasonable doubt. “A revocation or modification proceeding under our statutes is not a *criminal prosecution* within the contemplation of Const. Art. 1, § 22 (amendment 10)

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entitling a defendant, as a matter of right, to the privileges therein accorded.” *State v. Shannon*, 60 Wn.2d 883, 888, 376 P.2d 646 (1962) (citing *In re Jaime v. Rhay*, 59 Wn.2d 58, 365 P.2d 772 (1961)), *overruled in part on other grounds by Mempa v. Rhay*, 68 Wn.2d 882, 416 P.2d 104 (1966), *rev’d*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). At a probation revocation hearing,

the court need not be furnished with evidence establishing guilt of criminal offenses beyond a reasonable doubt. All that is required is that the evidence and facts be such as to *reasonably satisfy the court* that the probationer has breached a condition under which he was granted probation, or has violated any law of the state or rules and regulations of the Board of Prison Terms and Paroles.

State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972) (emphasis added) (citation omitted); *see also Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974) (“It is clear that there is a different level of proof applicable to revocation hearings than criminal proceedings.”); *City of Aberdeen v. Regan*, 170 Wn.2d 103, 113, 239 P.3d 1102 (2010) (“The burden in probation revocation hearings is reasonable satisfaction,” even when the condition of probation that is violated is a requirement to commit “[n]o criminal violations of law.” (alteration in original)).

Just as Justice Breyer observed in *Haymond* that penalties for violating conditions of supervised release are part of the penalty for the initial offense and the breach of trust, our Supreme Court has held that “‘revocation is not punishment for the subsequent events which violate the parole.’” *Regan*, 170 Wn.2d at 111 (quoting *Standlee*, 83

Wn.2d at 407). And the statutory penalty imposed under RCW 13.40.200 on a juvenile offender has been described by this court as “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. The statute does not authorize the judge to impose an additional sentence.” *State v. Martin*, 36 Wn. App. 1, 5, 670 P.2d 1082 (1983), *rev’d on other grounds*, 102 Wn.2d 300, 684 P.2d 1290 (1984).

There being no new punishment for a new offense, the State’s burden of proof by a preponderance of the evidence affords due process.

Due process does not require proof of the statutory element of a willful refusal to comply to be borne by the State

The same legal authority resolves Megan’s second argument that requiring her to disprove willfulness violates her right to due process. She relies on *W.R.* Yet the requirement of *W.R.* that “the State cannot require the defendant to disprove any fact that constitutes *the crime charged*” is a corollary of the due process guaranty that the State must “prove ‘beyond a reasonable doubt . . . every fact necessary to constitute the *crime* with which [a defendant] is charged.’” *W.R.*, 181 Wn.2d at 762 (emphasis added) (alterations in original) (quoting *Winship*, 397 U.S. at 364). By its terms, *W.R.* applies only to prosecutions for crimes. Hearings under RCW 13.40.200 are not prosecutions of a new crime.

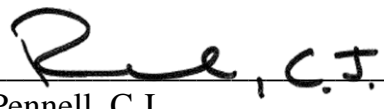
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Affirmed.




Siddoway, J.

WE CONCUR:



Pennell, C.J.



Staab, J.

*Tristen L. Worthen
Clerk/Administrator*

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*The Court of Appeals
of the
State of Washington
Division III*



September 21, 2021

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CASE # 372073
State of Washington v. M.N.H.
YAKIMA COUNTY SUPERIOR COURT No. 198000687

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please see word count rule change at <https://www.courts.wa.gov/wordcount>, effective September 1, 2021. Please file the motion electronically through this court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW:jab
Attachment

c: **E-mail**—Hon. Ruth E. Reukauf

WASHINGTON APPELLATE PROJECT

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