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IN THE SUPREME
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID ELVIN MCCORMICK,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES..... 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 1

 A. IT IS NOT FUNDEMENTALLY UNFAIR TO REVOKE A
 SUSPENDED SENTENCE EVEN WHEN THE DEFENDANT'S
 CONDUCT IS NOT WILLFUL WHEN THE GOALS OF
 REHABILITATION AND PUBLIC SAFETY CANNOT BE MET BY
 CONTINUED PROBATION. 1

 B. THE EVIDENCE WAS SUFFICIENT TO FIND THE
 DEFENDANT IN VIOLATION OF THE CONDITIONS OF HIS
 SUSPENDED SENTENCE. 11

IV. CONCLUSION..... 13

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Dyer</u> , 143 Wn.2d 384, 20 P.3d 907 (2001)	6
<u>State v. Dahl</u> , 139 Wn.2d 678, 990 P.2d 396 (1999)	2
<u>State v. Johnson</u> , 9 Wn. App. 766, 514 P.2d 1073 (1973)	5

FEDERAL CASES

<u>Bearden v. Georgia</u> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)	2, 3, 6, 7, 8, 10, 11
<u>Morrissey v. Brewer</u> , 408 U.S. 471, 92 S.Ct. 2593, 2599, 33 L.Ed.2d 484 (1972)	1
<u>U.S. v. Brown</u> , 899 F.2d 189 (2 nd Cir. 1990)	3
<u>Williams v. Illinois</u> , 399 U.S. 234, 90 S.Ct. 2018, 26 S.Ed.2d 586 (1970)	11

OTHER CASES

<u>Kupec v. State</u> , 835 P.2d 359 (Wyoming 1992)	6
<u>Messer v. State</u> , 145 P.3d 457 (Wyoming 2006)	6
<u>People v. Davis</u> , 462 N.E.2d 824 (Illinois 1984)	5
<u>People v. Zaring</u> , 8 Cal. App. 4 th 362, 10 Cal. Rptr. 2d 263 (1992) 6, 7	
<u>Sobota v. Willard</u> , 427 P.2d 758 (Oregon 1967)	5
<u>State v. Braaten</u> , 167 P.3d 357 (Idaho 2007)	4
<u>State v. Hill</u> , 773 A.2d 931 (2001 Connecticut)	7
<u>State v. Hodges</u> , 798 P.2d 270 (Utah 1990)	6
<u>State v. Morrow</u> , 492 N.W.2d 539 (Minn. 1992)	4
<u>State v. Williamson</u> , 301 S.E.2d 423 (N. C. 1983)	7
<u>Trumbly v. State</u> , 515 P.2d 707 (Alaska 1973)	5
<u>Van Wagner v. State</u> , 677 So.2d 314 (Florida 1996)	7

U.S. CONSTITUTIONAL PROVISIONS

Fourteenth Amendment	6
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WASHINGTON STATUTES

RCW 9.94A.670	1
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I. ISSUES

1. Is the Court required to find a willful violation prior to revoking the defendant's suspended sentence pursuant to the Due Process clause of the federal and state constitutions?

2. Was the evidence sufficient to prove the defendant violated the conditions of his suspended sentence?

II. STATEMENT OF THE CASE

The facts of this case have been adequately set out in the State's response brief.

III. ARGUMENT

A. IT IS NOT FUNDAMENTALLY UNFAIR TO REVOKE A SUSPENDED SENTENCE EVEN WHEN THE DEFENDANT'S CONDUCT IS NOT WILLFUL WHEN THE GOALS OF REHABILITATION AND PUBLIC SAFETY CANNOT BE MET BY CONTINUED PROBATION.

Parole revocation involves a two step process; (1) first the court determines whether the parolee violated a condition of parole, and (2) if so, the court then decides whether the parolee should be recommitted to prison or other steps be taken to protect society and improve chances of rehabilitation. Morrissey v. Brewer, 408 U.S. 471, 479-480, 92 S.Ct. 2593, 2599, 33 L.Ed.2d 484 (1972). This procedure is also followed when the court is asked to revoke or modify a suspended sentence under RCW 9.94A.670. Morrissey set

forth the minimum due process rights an offender has at a parole revocation hearing. Morrisey, 408 U.S. at 489, 92 S.Ct. at 2604. These rights apply during a SSOSA revocation hearing. State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999).

The rights set out in Morrisey are designed to assure that a violation is found based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the offender's behavior. Morrisey, 408 U.S. at 484, 92 S.Ct. at 2602. Morrisey did not address whether a violation must be willful in order to permit revocation and re-incarceration as a sanction for that violation.

The Supreme Court did address that issue in the context of an alleged violation for failure to pay fines and restitution in Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). Noting the sensitivity with which the court had treated indigent defendants in other contexts, the Court held that an offender may not be incarcerated for failure to pay except in two circumstances. Either the offender willfully refused to pay, or in the case of an offender who had made a bona fide effort to pay, if alternative measures of punishment other than incarceration were

insufficient to meet the State's interest in punishment and deterrence. Bearden, 461 U.S. at 672, 103 S.Ct. at 2073.

The Court specifically declined to adopt this rule for alleged violations which did not involve failure to pay fines or restitution. The Court suggested it would be irresponsible for a court to permit a person convicted of DUI to remain on probation when it becomes clear that efforts at controlling his chronic drunken driving have failed. The distinction drawn between that situation and the offender who has not paid his fines or restitution rests on the relative threat to the safety or welfare of society. Bearden, 461 U.S. at 669 n. 9.

The court rejected the argument that Bearden prohibited revocation for non-financial violations when the probation violation is not willful or voluntary in U.S. v. Brown, 899 F.2d 189 (2nd Cir. 1990). An offender should be permitted to present evidence regarding his mental state in order to demonstrate that there was a justifiable excuse for the violation or that societal interests, like community safety do not warrant revocation. However, Bearden did not prohibit revocation whenever the violation was involuntary. Brown, 899 F.2d at 194.

Other courts have found no Due Process violation when an offender's probation was revoked for a non-willful violation. Inpatient sex offender treatment was ordered as a condition of the defendant's suspended sentence in State v. Morrow, 492 N.W.2d 539 (Minn. 1992). The defendant was unable to participate in treatment due to indigency and was subsequently revoked from probation for failure to comply with the treatment condition. The court referenced the State's interest in punishment and deterrence, and lack of alternatives to prison to satisfy that interest. Under these circumstances it was not fundamentally unfair to require the defendant to receive sex offender treatment in prison rather than the community. Morrow, 492 N.W.2d at 546.

Similarly the court found no due process violation in State v. Braaten, 167 P.3d 357 (Idaho 2007). There the defendant's probation was revoked for violations including failing to satisfactorily participate in sex offender treatment. Under a state statute which permitted the court to retain jurisdiction it did so, and refused to reinstate probation because the defendant was financially unable to continue to participate in treatment. Balancing the State's strong interest in protecting society against the defendant's interest in being placed on probation, the court found no due process violation

even though the defendant's indigency was factored into the decision. Braaten, 167 P.3d at 361.

The only Washington case to address this question is State v. Johnson, 9 Wn. App. 766, 514 P.2d 1073 (1973). Johnson argued that he should have been given the opportunity to present evidence that he was insane, and did not know right from wrong, at the time he violated a condition of his probation. The Court held that the defendant's mental state was not relevant to whether or not he committed the offense. However, fundamental fairness required the defendant have the opportunity to present that information so the court may make the judgment justice demanded. Johnson, 9 Wn. App. at 771. Johnson did not mandate that due process required a suspended sentence could be revoked only when the defendant had been found to have acted willfully.

Other courts have also found that the State's interest in rehabilitation and community safety permit revocation of probation even for non-willful violations. See People v. Davis, 462 N.E.2d 824 (Illinois 1984), Sobota v. Willard, 427 P.2d 758 (Oregon 1967), Trumbly v. State, 515 P.2d 707 (Alaska 1973).

The defendant argues that fundamental fairness under the Due Process clauses of the Federal and State constitutions require

the State to prove a willful violation before revoking a suspended sentence or parole. Washington's Due Process clause does not afford broader protection than the Fourteenth Amendment. In re Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). The cases that the defendant cited do not support his position.

In Messer v. State, 145 P.3d 457 (Wyoming 2006) and Kupec v. State, 835 P.2d 359 (Wyoming 1992) the court recognized that a court may revoke a suspended sentence in the absence of a willful violation if the violation is a threat to public safety. Messer relied in Kupec and did no additional Due Process analysis. Kupec concluded that "a court cannot be prevented from revoking probation in situations where the probationer's conduct is beyond his control and such conduct create a threat to society." Kupec, 835 P.2d at 362 citing Bearden and State v. Hodges, 798 P.2d 270 (Utah 1990).

In People v. Zaring, 8 Cal. App. 4th 362, 10 Cal. Rptr. 2d 263 (1992) the court found the defendant's conduct resulting in revocation of her probation was not willful, and the trial judge abused his discretion in finding a violation had occurred. The court focused on the reasons the trial court abused its discretion. It did

not discuss whether due process required a willful violation as a prerequisite to revocation.

Like Zaring the courts in Van Wagner v. State, 677 So.2d 314 (Florida 1996) and State v. Williamson, 301 S.E.2d 423 (N. C. 1983) merely stated a violation must be willful before probation can be revoked. Neither discussed whether that mental state was a constitutionally required prerequisite to revocation.

In State v. Hill, 773 A.2d 931 (2001 Connecticut) the court discussed other authorities which stated probation revocation must be based on a willful violation of a condition of probation. In the context of a non-financial violation it found Bearden and cases which relied on it were not applicable. It distinguished other cases on the basis that they did not support the argument that willfulness was an element of the alleged violation, but rather was an affirmative defense of excuse once the violation was found. Hill 773 A.2d at 939. The court stated "if a defendant is unable to comply strictly with the conditions of probation, even for reasons beyond his control, the legislative policies underlying conditional probation should not automatically require that compliance be excused as a matter of law." Hill, 773 A.2d at 939-940. This holding is consistent with other courts which have held the

willfulness or non-willfulness of a defendant's conduct is only relevant to assessing whether the State's interest in rehabilitation and public safety may be met by continuing the defendant on probation.

The facts in this case presents a quintessential example of the kind of analysis for non-financial probation violations suggested by the U.S. Supreme Court in Bearden and approved by the court in Washington as well as other jurisdictions. Although the defendant's treatment was terminated in 2003 because he was in compliance with that treatment, he was back before the court every year for the next three years for violations of conditions of his suspended sentence. The first two times the defendant was found in violation of the sentence conditions the court ordered a sanction designed to address the State's interest in rehabilitating the defendant as well as protecting the public. After the second violation hearing the community corrections officer specifically delineated the areas where the defendant was prohibited from going. She was available to him should he have any concern a location he proposed to visit was off limits.

Despite the increasingly severe penalties for violations, and the information communicated to the defendant, the defendant

again went to a location in the heart of an area populated by two of the kinds of places he had specifically been told not to go to; schools and churches. As a result of that and other violations and the defendant's affirmative denial that he had not been where minors go, the defendant's treatment provider would no longer work with him. These circumstances led the trial court to conclude the purposes of the suspended sentence could no longer be served, and revoked the sentence. The record supports the conclusion that treatment in the community was not effective to rehabilitate the defendant or protect the public. The trial court did not err when it revoked the defendant's suspended sentence without finding the violation was willful.

The defendant has also argued that the State was required to prove the defendant knowingly violated a condition of his suspended sentence based on the language of the condition itself. The defendant was ordered not to "frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer." Because the court stated it did not know whether the defendant was unwilling or simply unable to follow the conditions and requirements set by the Court and the

Community Corrections Officer, the defendant contends the State failed to satisfy its burden of proof.

The Court's comments do not affect its ultimate decision to revoke the suspended sentence. The Court did not find the defendant did not act without knowledge he was in an area that had been defined as off limits by the Community Corrections Officer. The court's comments were a suggestion that it was possible the defendant could not control his actions, despite knowing certain places were off limits. This suggestion was appropriate in the circumstances facing the court. Despite the Community Correction Officer's specific directions to the defendant, and the defendant's prior sanction for being on the property of one of the two schools across the street from the convent food bank the defendant kept going back to the same area.

Finally the defendant has repeatedly suggested that he was sentenced to 123 months confinement in prison for a violation of the conditions of his suspended sentence. (Brief of Appellant at p. 24-25, Petition for Review at 10.) The defendant was sentenced to 123 months upon his conviction for Rape of a Child 1st degree, not for the probation violations. The U.S. Supreme Court has recognized this difference in Bearden "Ultimately it must be

remembered that the sentence was not imposed for a circumstance beyond the probationer's control 'but because he had committed a crime." Bearden, 461 U.S. at 669, n. 9 quoting Williams v. Illinois, 399 U.S. 234, 252, 90 S.Ct. 2018, 2022, 26 S.Ed.2d 586 (1970). For that reason, community safety considerations permit revocation of a suspended sentence when the defendant's conduct threatens the community despite the defendant's intent.

B. THE EVIDENCE WAS SUFFICIENT TO FIND THE DEFENDANT IN VIOLATION OF THE CONDITIONS OF HIS SUSPENDED SENTENCE.

The defendant characterizes his conduct as going to a food bank, not going to areas where minors are known to congregate. His narrow interpretation of the condition as applied to these facts undercuts the community protection purpose behind that condition.

The condition is designed to protect a particular segment of society that is especially vulnerable in the defendant's presence due to his sexual deviancy. To limit it to the four walls containing the food bank would ignore the real possibility of contact with children as the defendant came to and from the food bank, and while he waited outside the food bank for it to open and for his turn to be served. The trial court did not abuse its discretion when it considered the close proximity of the schools and church to the

convent where the food bank was housed as part of the condition for that very reason.

The defendant has attempted to compare the food bank to a thrift store associated with a church, arguing no one would reasonably believe going to the thrift store was the same as going to a church. But if the store were located on the premises of the church and near other church buildings, as the food bank was located on the premises of the school and another school building, then it is reasonable to conclude going to the thrift store resulted in going on church property. Similarly, going to a food bank housed in a building next to two schools, and in a building used by one of the schools for classes, was the same as being on the school property.

The State has also argued the evidence was sufficient to find the defendant in violation of the condition that he successfully participate in sex offender treatment in it response brief. The State rests on those arguments.

IV. CONCLUSION

For the forgoing reasons the State requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted on September 4, 2008.

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