No. 82476-2

SANDERS, J. (dissenting)—Francis James Regan was charged with fourth degree assault and criminal trespass. A jury acquitted him of both charges.

At that time, Regan was on probation for a previous conviction. A condition of Regan's probation required that he commit "[n]o criminal violations of law . . . ." Clerk's Papers (CP) at 62. Despite his acquittal, the city of Aberdeen argued that that Regan violated his probation by committing fourth degree assault and criminal trespass. The municipal court held Regan was guilty of a criminal trespass *by preponderance of the evidence* notwithstanding the acquittal.[1] Regan was sentenced to five days' incarceration.

The dispute on this appeal is the meaning of "[n]o criminal violations of law." *Id.* Regan argues the use of "criminal" in the phrase means the city has to prove he committed *a crime* – i.e., that Regan was guilty *beyond a reasonable doubt*. However, the majority instead holds "criminal" merely denotes the violation of a *criminal* law,

[1] The municipal court did not expressly identify the standard it applied, but stated "[e]ven though he was acquitted at trial, certainly enough evidence was produced for this Court to find that he violated his probation." CP at 35. However, at a previous hearing on August 17, 2006, the court stated that probation was violated if the violation was "more likely than not," a common articulation of the preponderance of the evidence standard. CP at 30.

and thus it is not problematic that Regan was actually acquitted.

I. "No criminal violations of law"

Regan's interpretation, which was also adopted by the superior court, conforms to the language of the probation condition. Regan reasons, without "criminal," a "violation of law" could refer to any act by which a defendant *actually* transgresses the law. This interpretation provides no evidentiary standard. But adding the modifier, a "*criminal* violation of law," requires that the violation be a crime. And to be guilty of a crime, one must be convicted through the production of evidence sufficient to demonstrate guilt *beyond a reasonable doubt*. Thus, "criminal" requires a beyond a reasonable doubt burden of proof and the court cannot apply a lesser burden.

The majority disagrees, deconstructing the phrase, word by word, to finally conclude "criminal violations of law" does not refer to any specific burden of proof, but only to whether Regan *actually* committed acts that, if proved by a preponderance, would violate criminal law. Majority at 6-11.

However, this reasoning ignores the very language of the condition. The majority's use of "criminal" in the phrase merely denotes that "the condition is limited to violations of *criminal law*." *Id*. at 11 (emphasis added). For the majority's analysis to be accurate, the phrasing would have to read "no violations of criminal law," not "no criminal violations of law."

Here the adjective "criminal" does not modify "law," but rather "violations" or

"violations of law." The phrase "violations of law" is underlined on the probation form, indicating that phrase is one unit and "criminal" modifies that *unit*. *See* CP at 62 ("[n]o criminal violations of law"). Again, a *criminal* violation of law requires that the violation be a crime and a crime requires proof beyond a reasonable doubt. CP at 58.

II. Rule of lenity

Having reviewed the language of the probation condition, the arguments of the parties, and the five pages it took the majority to explain the "clear" meaning of "criminal violations of law," I believe it is obvious that the inarticulate language used in Regan's probation condition is at least ambiguous.

Since the language of Regan's probation condition is ambiguous, we must construe it in his favor. "'Where two possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused.'" *Staats v. Brown*, 139 Wn.2d 757, 769, 991 P.2d 615 (2000) (quoting *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984)). The result is no different here where Regan is bound by a probation condition rather than a statute. The rule of lenity applies with no less force: "[T]he citizen is entitled to fair notice of what sort of conduct may give rise to punishment." *McNally v. United States*, 483 U.S. 350, 375, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), *superseded by statute on other grounds as stated in United States v. Berg*, 710 F. Supp. 438 (E.D.N.Y. 1989). As the superior court adeptly reasoned, "a person with a suspended sentence should be able to clearly

understand the conditions and terms of the judgment and sentence." CP at 55.

The Court of Appeals conceded the language of the probation condition "might be ambiguous" but neglected to apply the rule of lenity because "the trial court has broad discretion in determining the conditions and whether the probationer violated them." *City of Aberdeen v. Regan*, 147 Wn. App. 538, 541 n.1, 195 P.3d 1015 (2008). I certainly disagree. Discretion is exercised when the condition is originally imposed. There is no discretion to modify or create a new condition to be applied retroactively. Furthermore, this discretion does not trump the probationer's due process right to notice of the conditions of his or her probation prior to the revocation hearing. *In re Pers. Restraint of Blackburn*, 168 Wn.2d 881, 883, 232 P.3d 1091 (2010).

III. Conclusion

The language "[n]o criminal violations of law" can be interpreted to require a criminal conviction on proof beyond a reasonable doubt and certainly to exclude an acquittal. At worst, the language is ambiguous. A probationer is entitled to fair notice of the conduct that will result in revocation of his or her probation. An ambiguity must be resolved in favor of the defendant. Regan's acquittal from the criminal allegations precluded the court from revoking his probation.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: