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Supreme Court No. 100426-5
(COA No. 54067-3-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARREN RONELL SMITH JR.,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIESiii

A. INTRODUCTION..... 1

B. IDENTITY OF PETITIONER AND DECISION BELOW 2

C. ISSUES PRESENTED FOR REVIEW 3

D. STATEMENT OF THE CASE 4

E. ARGUMENT..... 7

 1. Whether mandatory sex offender registration based on a juvenile conviction is subject to the Ex Post Facto Clauses is a constitutional question of first impression for this Court. 7

 a. The Ex Post Facto Clauses prohibit the application of punitive laws that become more burdensome after the person committed the crime..... 7

 b. Sex offender registration laws have greatly increased in severity since Mr. Smith committed his offense as a 14-year-old. . 8

 c. Sex offender registration is punitive when imposed for conduct a person committed as a child. 11

 i. Sex offender registration is an affirmative disability or restraint that is punishment when it is imposed for a juvenile offense. ... 11

 ii. In-person reporting and publicly released information is a sanction that is historically considered punishment, which is why juvenile courts afford children privacy. 14

 iii. *Ward's* non-punitive justification for publicity and supervision of homeless registrants in the adult context in inapplicable in the juvenile context. 16

 iv. Registration based on a juvenile offense is excessive in relation to its stated non-punitive purpose. 18

 d. This Court should grant review because continuing to punish a person for conduct they committed as a child violates the Ex Post Facto Clauses and is a matter of substantial public concern. 23

2.	This Court should accept review to determine whether mandatory sex offender registration—imposed without a hearing to determine whether the child is a risk to sexually reoffend—violates due process.....	24
a.	A child’s right to procedural due process requires a hearing before they are subjected to mandatory sex offender registration.	24
i.	A child under juvenile court jurisdiction has a significant interest in not being subject to adult criminal laws.	26
ii.	Mandatory sex offender for a juvenile offenses carries a high risk of erroneous deprivation.	26
iii.	The government’s interest, including the fiscal and administrative burden that the additional procedure would entail is minimal.....	29
b.	Mandatory sex offender registration predicated on a juvenile offense violates substantive due process.	30
c.	This court should accept review to determine what process is due before a child is subjected to mandatory sex offender registration.	32
F.	CONCLUSION	32

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Chavez, 163 Wn.2d 262, 180 P.3d 1250 (2008)....28, 29
State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017)
.....32
State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015).....22
State v. S.J.C., 183 Wn.2d 408, 352 P.3d 749 (2015).. 13, 17, 21
State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994).....*passim*
State v. Watkins, 191 Wn.2d 530, 423 P.3d 830 (2018)....25, 27,
32

Statutes

Laws of 1990, ch. 3, § 402(6)11
Laws of 2001, Ch. 169, § 6(b).....5, 10
Laws of 2003, ch. 217, § 1(5)(a) 10, 12
Laws of 2008, ch. 98..... 10, 12
Laws of 2010, ch. 265, § 110
Laws of 2010, ch. 267, § 35, 11
RCW 13.04.02128
RCW 4.24.55012
RCW 9A.44.128 5
RCW 9A.44.130*passim*
RCW 9A.44.132 11, 26
RCW 9A.44.143 21, 22, 23

Rules

RAP 13.4(b).....*passim*

Constitutional Provisions

Const. art. I, § 23	8
Const. art. I, § 3	25
U.S. Const. amend. XIV, § 1.....	25
U.S. Const. art. I, § 10.....	8

Washington Court of Appeals Decisions

<i>State v. Boyd</i> , 1 Wn. App. 2d 501, 408 P.3d 362 (2017)	7, 10
---	-------

Federal Cases

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	28
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)	25
<i>Collins v. Youngblood</i> , 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)	9
<i>Connecticut Dep't of Pub. Safety v. Doe</i> , 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003)	28
<i>Does #1–5 v. Snyder</i> , 834 F.3d 696, 703, 705 (6th Cir. 2016) .	15
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).....	9, 11, 16
<i>Kent v. United States</i> , 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966)	26, 27, 29, 30
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)	25, 26
<i>Thompson v. Oklahoma</i> , 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988)	32
<i>United States v. Juvenile Male</i> , 590 F.3d 924 (9th Cir. 2010) .	20
<i>Weaver v. Graham</i> , 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981)	8

Authority From ther States

I.C. § 11–8–8–5(b)(2)	31
<i>In re. C.P.</i> , 131 Ohio St.3d 513, 967 N.E.2d 729 (2012).....	16
<i>N.L. v. State</i> , 989 N.E.2d 773 (Ind. 2013)	31
<i>People In Interest of T.B.</i> , 489 P.3d 752, 767 (Colo. 2021)...	13, 15, 17

Other Authorities

Amanda M. Fanniff et. al., <i>Juveniles Adjudicated for Sexual Offenses: Fallacies, Facts, and Faulty Policy</i> , 88 Temp. L. Rev. 789 (2016)	19
Amy E. Halbrook, <i>Juvenile Pariahs</i> , 65 Hastings L.J. 1 (2013)	16
Elizabeth Garfinkle, <i>Coming of Age in America: the Misapplication of Sex Offender Registration and Community Notification Laws</i> , 91 Calif. L. Rev., 163 (2003)	20, 21
Elizabeth J. Letourneau et. al., <i>Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination</i> , 24 Psychol. Pub. Pol’y & L. 105 (2018)...	14, 19
Michael F. Caldwell, <i>Quantifying the Decline in Juvenile Sexual Recidivism Rates</i> , 22 Psychol. Pub. Pol’y & L. 414, 419 (2016)	18, 30
Phoebe Geer, <i>Justice Served? The High Cost of Juvenile Sex Offender Registration</i> , 27 Dev. Mental Health L. 34 (2008)	13, 22

A. INTRODUCTION

Research on childhood sex offending establishes it reflects the same transient psychosocial deficits characteristic of all juvenile offending, and that a child who commits a sex offense is no more likely to sexually reoffend than a child who commits a non-sex offense. Still, children are subject to mandatory sex offender registration when adjudicated of a sex offense in juvenile court.

Darren Smith committed a sex offense when he was 14 years old. This juvenile adjudication required him to register as a sex offender. After his juvenile adjudication, sex offender registration became far more onerous, requiring in-person, weekly registration for low-risk homeless registrants and disclosure on public websites for noncompliance.

As an adult struggling with addiction and homelessness, Mr. Smith has been unable to regularly comply with the onerous registration requirements. He has multiple convictions

for failure to register which make him ineligible for relief from the duty to register in the foreseeable future.

Sex offender registration based on a person's conduct as a child serves no legitimate purpose and is uniquely punitive. This Court should accept review to determine whether sex offender registration based on a juvenile adjudication constitutes punishment in violation of the Ex Post Facto Clauses. RAP 13.4(b)(3). This Court should also accept review to determine whether mandatory sex offender registration based on a juvenile conviction violates due process. RAP 13.4(b)(3)-(4).

B. IDENTITY OF PETITIONER AND DECISION BELOW

Darren Smith, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review, attached as Appendix A, pursuant to RAP 13.3 and RAP 13.4.

C. ISSUES PRESENTED FOR REVIEW

1. Sex offender registration is punitive when imposed based on a person's conduct when they were a child. Research shows that requiring children to register as sex offenders has immediate, harmful consequences, and unlike adults, children who commit sex offenses pose no particular risk to sexually reoffend.

The Ex Post Facto Clauses of the federal and state constitutions prohibit the application of laws that impose greater punishment than was permitted at the time of the offense. Does the application of sex offender registration requirements that greatly increased in severity from the time Mr. Smith committed his offense at age 14 constitute punishment in violation of the Ex Post Facto Clauses because registration requirements serve no legitimate, non-penological purpose when based on a juvenile adjudication? RAP 13.4(b)(3),(4).

2. Uncontroverted research establishes that juveniles convicted of sex offenses have remarkably low rates of sexual reoffending. Yet as a result of a juvenile adjudication for a sex offense—entered without the procedural formality and constitutional protections provided in adult criminal proceedings—mandatory sex offender registration requires the court to impose strict, adult-based, registration requirements on a child without any discretion. This Court should accept review to determine if mandatory sex offender registration for juveniles violates due process. RAP 13.4(b)(3),(4).

D. STATEMENT OF THE CASE

Darren Smith pleaded guilty in juvenile court to a class A sex offense for conduct he committed as a 14-year-old in January of 2001. Ex. 13, 14. He was ordered to serve a 15-36 week sentence in the Juvenile Rehabilitation Administration (JRA). Ex. 13, p. 3. Though his case was resolved in juvenile court, he was required to register as a sex offender under the

adult criminal laws. CP 3 (citing RCW 9A.44.128, RCW 9A.44.130).

After 2001, the registration requirements became increasingly onerous for homeless, low-risk registrants. Laws of 2001, ch. 169, § 6(b); Laws of 2003, ch. 217, § 1(5)(a). The punishment for failure to register also increased. Laws of 2010, ch. 267, § 3(b).

Mr. Smith has had difficulty finding housing or employment as a registered sex offender. 9/13/19 RP 7. He suffers from depression and self-medicates through drug use. 9/13/19 RP 6, 8; *see also* CP 18 (drug convictions). Because Mr. Smith has no home, he is required to comply with the rigorous weekly, in-person reporting requirements for homeless registrants even though he is low-risk. 9/13/19 RP 6; CP 9 FF II-III; Ex. 1-10 (level I, homeless registrant).

Mr. Smith has been unable to consistently comply with these requirements, and was convicted for failure to register in 2005 at age 18, Ex. 15, and then again in 2007, 2009, and 2015.

Ex. 11, 17, 12. He failed to report weekly as a transient person and was convicted of failure to register again in the instant case. CP 3, 9, 11; FF II-III, 17.

Mr. Smith's failure to register convictions are his only additional sex offense convictions. CP 18. These prior failure to register convictions elevated the instant offense to a class B felony. CP 3, 18. The court recognized "this is a case that was driven a great deal by the fact the sentence here in the first place continues to feed itself. . . ." 9/13/19 RP 9. The trial judge sentenced Mr. Smith to the low-end range of 43 months in prison. CP 22.

On appeal, Mr. Smith argued that sex offender registration, when based on a juvenile conviction, is punitive, not merely regulatory, and his conviction for failure to comply with sex offender registration requirements violates the Ex Post Facto Clauses. Op. at 2. Mr. Smith cited to ample research and caselaw demonstrating that sex offender registration based on a juvenile offense is punitive; but the Court of Appeals found "no

authority for the proposition that youthfulness” is relevant to an ex post facto analysis. Op. at 7. The court found he did not “overcome[]” the lower court holding that sex offender registration is not punitive when based on an adult criminal offense. Op. at 7 (citing *State v. Boyd*, 1 Wn. App. 2d 501, 408 P.3d 362 (2017)). The Court of Appeals also rejected Mr. Smith’s claim that subjecting children to mandatory sex offender registration violates procedural and substantive due process. Op. at 7-9.

E. ARGUMENT

1. Whether mandatory sex offender registration based on a juvenile conviction is subject to the Ex Post Facto Clauses is a constitutional question of first impression for this Court.

- a. The Ex Post Facto Clauses prohibit the application of punitive laws that become more burdensome after the person committed the crime.

The Ex Post Facto Clauses of the state and federal constitutions prohibit punishing a person under the enactment of a law for conduct which was not punishable at the time it was committed. U.S. Const. art. I, § 10; Const. art. I, § 23. For

a criminal law to be an ex post facto violation, it must be “substantive;” “retrospective,” meaning that it applies to events occurring before its enactment; and it must “disadvantage” the person affected by the law. *Weaver v. Graham*, 450 U.S. 24, 29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); *State v. Ward*, 123 Wn.2d 488, 498, 869 P.2d 1062 (1994).

Substantive changes in the law, “whatever their form,” are those that “make innocent acts criminal, alter the nature of the offense, or increase the punishment.” *Collins v. Youngblood*, 497 U.S. 37, 46, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); *see also Ward*, 123 Wn.2d at 498 (presuming a change in the sex offender registration statute is substantive).

- b. Sex offender registration laws have greatly increased in severity since Mr. Smith committed his offense as a 14-year-old.

Ward applied the factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) to find the registration laws first passed in 1990 were not punitive in effect when imposed on an adult who

commits a sex offense. 123 Wn.2d at 500-11. These factors include whether (i) the sanction involves an affirmative disability or restraint; (ii) it has historically been regarded as a punishment; (iii) its operation will promote the traditional aims of punishment—retribution and deterrence; and (iv) an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. *Id.*

Since enactment of the 1990 registration requirements approved of in *Ward*, Washington's registration requirements for the homeless have become some of the most burdensome in the country. *See Boyd*, 1 Wn. App. 2d at 525 (Becker, J., dissenting). The homeless registration requirements substantively increased after Mr. Smith's conduct on January 26, 2001, Ex. 14, and its requirements were applied retroactively to him. Laws of 2001, Ch. 169, § 6(b) (effective date 7/22/01). Before this change in the law, a level I, low-risk homeless registrant would only be required to report on a

monthly basis. *Id.* Transient registrants are now statutorily required to keep weekly records of where they stay and provide them to the county sheriff when requested. Laws of 2010, ch. 265, § 1.

Washington implemented a statewide registered sex offender web site in 2003. Laws of 2003, ch. 217, § 1(5)(a). Level one homeless registrants who fail to make one of their weekly check-ins will be posted on a public website. Laws of 2008, ch. 98, § (5)(a).

In 2010 the legislature increased the punishment for noncompliance. When it was first criminalized, failure to register was, at most, a Class C felony. Laws of 1990, ch. 3, § 402(6). Now, a third failure to register conviction, as in Mr. Smith's case, is a Class B offense. RCW 9A.44.132(1)(b); Laws of 2010, ch. 267, § 3; CP 17.

- c. Sex offender registration is punitive when imposed for conduct a person committed as a child.

Prior Washington decisions have not considered whether the sex offender registration requirements are punitive when imposed for conduct the person committed as a child. Applying the *Mendoza-Martinez* factors to the current, far more punitive, registration requirements establishes that Mr. Smith's conviction for failing to comply with them violates the Ex Post Facto Clauses.

- i. Sex offender registration is an affirmative disability or restraint that is punishment when it is imposed for a juvenile offense.

This Court in *Ward* found registration requirements and the limited dissemination of this information to the public under the 1990 laws posed no significant burden on registrants. 123 Wn.2d at 500-02. However, the privacy safeguards that led *Ward* to this conclusion no longer exist. The public release of information of homeless registrants under RCW 4.24.550(5)(a) sweeps up even level one offenders like Mr. Smith if he misses

one of his 52-times-per-year check-ins. Laws of 2008, ch. 98, § 1(5)(a) & (b). This personal information will be publicly disclosed regardless of whether it is “relevant to and necessary for counteracting the offender’s dangerousness.” *Compare Ward*, 123 Wn.2d at 503-04.

Mandatory registration and public disclosure is an even weightier restraint for juveniles, because it limits a young person from entering the workforce and accessing education and housing due to their public status as a sex offender. Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 Dev. Mental Health L. 34, 49 (2008); *see also State v. S.J.C.*, 183 Wn.2d 408, 432, 352 P.3d 749 (2015) (a “publicly available juvenile court record has very real and objectively observable negative consequences, including denial of ‘housing, employment, and education opportunities’”). The Colorado Supreme Court recently found “[t]he dissemination of information about juvenile sex offenders thus appears more punitive in light of the presumptive confidentiality of most

other juvenile adjudications.” *People In Interest of T.B.*, 489 P.3d 752, 767 (Colo. 2021).

Studies on the social wellbeing of youth who commit sex offenses “lend[s] support to concerns that subjecting children to registration and notification carries punitive effects, and that the harm associated with these policies can be severe.” Elizabeth J. Letourneau et. al., *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination*, 24 Psychol. Pub. Pol’y & L. 105, 114 (2018). Studies of youth subjected to sex offender registration show they experience increased rates of “isolation, depression,” denial of educational and employment opportunities, and removal from their families and homes “due to residence restrictions against living.” *Id.* at 107. They are also exposed to a higher risk of violence and predation. *Id.* at 114.

The heavy burden of sex offender registration based on conduct the registrant committed as a child is a punishment that follows the child into adulthood, hobbling their access to

schools, jobs, and housing, damaging their mental health, and exposing them to predators — all of which makes it an affirmative disability.

- ii. In-person reporting and publicly released information is a sanction that is historically considered punishment, which is why juvenile courts afford children privacy.

Other courts recognize in-person reporting and searchable online databases place a significant disability and restraint on registrants that amounts to punishment when imposed on an adult who commits a sex offense. *See, e.g., Does #1–5 v. Snyder*, 834 F.3d 696, 697-98, 703, 705 (6th Cir. 2016). Dissemination of personal information for young people is even more characteristic of punishment because they “are branded with the label of sex offender before their adult lives have even begun.” *T.B.*, 489 P.3d at 767.

As recognized by the Ohio Supreme Court, publicly shaming a person for conduct they committed as a child is uniquely punitive:

With no other offense is the juvenile's wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself.

In re. C.P., 131 Ohio St.3d 513, 525, 967 N.E.2d 729 (2012);
see also Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 17 (2013) (“Humiliation and shame associated with registry status, and the risk of being exposed, often serve to isolate young people on registries”).

Publicizing personal information about a low-risk, homeless registrant's status based on failing to comply with reporting requirements is a sanction historically associated with punishment. It is far harsher a sanction when imposed for conduct the person engaged in as a child.

- iii. *Ward's* non-punitive justification for publicity and supervision of homeless registrants in the adult context in inapplicable in the juvenile context.

Ward also considered *Mendoza-Martinez's* fourth factor, whether the statute is punitive because it promotes retribution and deterrence, which are traditional aims of punishment. *Ward*, 123 Wn.2d at 508. *Ward* concluded that even if deterrence was a “secondary effect” of registration, the Legislature’s “primary intent” was to aid law enforcement to protect communities, which is not punitive. *Id.*

Where *Ward* noted the length of incarceration for an adult is clearly a “deterrent,” 123 Wn.2d at 508, this is not the case for juvenile sentences: “juvenile court is not intended to restrain criminals to the end that society may be protected and the criminal perchance reformed; it is to prevent the making of criminals.” *S.J.C.*, 183 Wn.2d at 416.

Second, the stated primary purpose of registration—public safety— does apply to juvenile offenders, who, given their capacity for reform, “are less likely to pose an ongoing

threat to public safety after completion of their treatment and probation.” *T.B.*, 489 P.3d at 768. This capacity for change is substantiated by empirical evidence. In a “meta-analysis of over thirty studies conducted over the past twenty years,” researchers “found that the recidivism rate for juvenile sex offenders is less than three percent.” *Id.* (citing Michael F. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, 22 *Psychol. Pub. Pol’y & L.* 414, 419 (2016)). This remarkably low recidivism rate for juveniles who commit sex offenses makes the primary purpose of sex offender registration—protection of the public—inapplicable in the juvenile context.

Mandatory sex offender registration is far more punitive than the punishment attached to juvenile offending and serves no demonstrable public safety purpose. This makes mandatory sex offender registration a traditional form of punishment when imposed for a juvenile offense.

iv. Registration based on a juvenile offense is excessive in relation to its stated non-punitive purpose.

As to *Mendoza-Martinez*'s fifth factor, the remarkably low rate of juvenile sexual re-offending makes mandatory sex offender registration based on a juvenile offense "excessive to its non-punitive purpose." *Ward*, 123 Wn.2d at 508.

The legislature enacted mandatory sex offender registration based on concerns about the "high" risk of sex offender recidivism. Laws of 1990, ch. 3, § 401 (declaring that "sex offenders often pose a high risk of reoffense"). *Ward* found that the legislative intent for registration was the "public interest," which required that "law enforcement have relevant and necessary information about sex offenders residing in their communities." 123 W.2d at 509. This purpose is not served where research shows that registration based on juvenile offense decreases, rather than increases public safety.

The "literature consistently indicates" that juvenile sex offenders are "similar to or *less* at-risk than other delinquent

youth to engage in future crime. Additionally, they are responsive to treatment, thus their already low risk can be decreased further by the provision of appropriate services.”

Amanda M. Fanniff et. al., *Juveniles Adjudicated for Sexual Offenses: Fallacies, Facts, and Faulty Policy*, 88 Temp. L. Rev. 789, 799 (2016).

The data does not support singling out child sex offenders as a subgroup of juvenile offenders. Juveniles who commit sex offenses show no measurable difference in sexual preferences than juveniles who are not convicted of sex offenses. Elizabeth Garfinkle, *Coming of Age in America: the Misapplication of Sex Offender Registration and Community Notification Laws*, 91 Calif. L. Rev., 163, 190 (2003). Juvenile sex offending is the result of “poor social competency skills” and “deficits in self-esteem,” rather than the “paraphilic interest and psychopathic characteristics” of adult offenders. *Id.* at 191. The psychosocial deficits of adolescence, including poor impulse control, gradually resolve upon maturation. *United*

States v. Juvenile Male, 590 F.3d 924, 940 (9th Cir. 2010),
vacated as moot, 131 S. Ct. 2860, 180 L. Ed. 2d 811 (2011).

Most young people engage in sexual activity and exploration without legal repercussions. Garfinkle, *supra*, at 180. However, poor children and children of color are more likely to have their sexual conduct criminally sanctioned and thus subject to mandatory registration laws. *See id.*; *see also*, *S.J.C.*, 183 Wn.2d at 433 (juveniles of color face disproportionately high rates of referral to juvenile court). The disproportionate impact of juvenile registration on the most disadvantaged children further establishes the punitive effect of punishment outweighs any claimed non-punitive purpose. *See* Garfinkle, *supra*, at 180.

It is of no matter to this analysis that a juvenile adjudicated of a sex offense is entitled to seek removal from the registry when certain conditions are met. Removal from the registry is entirely at the court's discretion. RCW 9A.44.143(2)-(3). Subsequent offenses are a basis for denial, and the

registrant must prove he is rehabilitated. RCW 9A.44.143(5). Conviction for failure to register delays a person's eligibility for removal from the registry for up to 60 months. RCW 9A.44.143(2)(b). And mandatory registration for juvenile offenses is a barrier to the very rehabilitation that is necessary for removal from the registry. *See* RCW 9A.44.143(2)-(3); Geer, *supra*, at 51 (sex offender registration for juveniles “turns the structures that ordinarily provide support and guidance to juveniles such as schools, neighborhoods, and workplaces—into hostile environments that further ostracize the juvenile offender and enhance the likelihood of recidivism.”).

Requiring a child to comply with the rigors of mandatory reporting in order to be relieved from it, while also suffering from the barriers to housing, education, and employment the registry creates, requires juveniles to possess a level of maturity, independence, and long-term thinking that our courts recognize juveniles as a group do not possess. *See, e.g., State v. O'Dell*, 183 Wn.2d 680, 692, 358 P.3d 359 (2015).

This is true for Mr. Smith, for whom the exacting sex offender registration requirements created a revolving door of imprisonment and ineligibility for removal from the registry. Even though Mr. Smith is low-risk and has no history of sexually reoffending, since he is unable to meet the demands for homeless registrants, he cannot qualify for relief from the registry because of his failure to register convictions, which he started to accrue when he turned 18. RCW 9A.44.143; Ex. 15 (2005), 11, 17, 12.

Finally, a system that “fails to consider the threat posed by an offender is evidence of excessiveness.” *Boyd*, 1 Wn. App 2d. at 527 (Becker, J. dissenting) (citing *Starkey*, 305 P.3d at 1029-30). Unlike juvenile sentencing, which is structured to give judges discretion to appropriately sentence youth, sex offender registration based on a juvenile “conviction” is mandatory, which subjects children to registration even when they pose no risk of re-offense.

Mandatory registration is excessive in light of overwhelming research that establishes juveniles convicted of sex offenses are not a threat to reoffend, and because it thwarts their rehabilitation.

- d. This Court should grant review because continuing to punish a person for conduct they committed as a child violates the Ex Post Facto Clauses and is a matter of substantial public concern.

Requiring a child to register as a sex offender is punitive, and continuing to punish a person for conduct they committed as a child under laws that are far more burdensome than when the child committed their offense violates the Ex Post Facto Clauses. This Court should grant review of this constitutional issue of first impression that is a matter of substantial interest affecting many poor people of color like Mr. Smith, for whom there is no end in sight to the continued, extraordinary punishment of sex offender registration for conduct he committed as a child. RAP 13.4(b)(3), (4).

2. This Court should accept review to determine whether mandatory sex offender registration—imposed without a hearing to determine whether the child is a risk to sexually reoffend—violates due process.

This Court has repeatedly emphasized the fact that children are different, but has not yet considered what these differences mean in the context of RCW 9A.44.130(1)'s mandatory registration requirements for juvenile offenders. This statute requires children to register as sex offenders without any judicial assessment of their future risk to reoffend, which violates procedural and substantive due process.

- a. A child's right to procedural due process requires a hearing before they are subjected to mandatory sex offender registration.

Juveniles charged with crimes cannot be deprived of their substantive rights of life, liberty, and property without “constitutionally adequate procedures.” *State v. Watkins*, 191 Wn.2d 530, 537, 423 P.3d 830 (2018) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)); Const. art. I, § 3; U.S. Const. amend. XIV,

§ 1. Procedural due process requires the court to identify the private interest affected by the official action, the risk of erroneous deprivation, the probable value of additional safeguards, and the State's interests. *Watkins*, 191 Wn.2d at 537 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

The adult criminal laws mandate sex offender registration for a sex offense adjudicated in juvenile court. RCW 9A.44.130(1). A juvenile adjudication is a necessary element of the crime of failure to register as a sex offender under RCW 9A.44.132. Therefore RCW 9A.44.130(1) subjects children under juvenile court jurisdiction to the requirements of the adult criminal code, without any judicial individualized inquiry.

When a juvenile is subjected to the adult criminal laws the juvenile is entitled to a hearing that “measure[s] up to the essentials of due process and fair treatment.” *Kent v. United States*, 383 U.S. 541, 562, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). Application of the *Mathews v. Eldridge* factors to the

mandatory sex offender registration statute establishes that without a hearing, mandating juvenile offenders to register as a sex offender violates due process.

- i. A child under juvenile court jurisdiction has a significant interest in not being subject to adult criminal laws.

When a child is by “statute entitled to certain procedures and benefits as a consequence of his statutory right to the ‘exclusive’ jurisdiction of the Juvenile Court,” the child is entitled to the “rights and immunities” inherent in this juvenile court jurisdiction over him. *Kent*, 383 U.S. at 556-57; *compare Watkins*, 191 Wn.2d at 536 (A child whom the legislature has subjected to adult court jurisdiction has no constitutional right to be tried in juvenile court).

- ii. Mandatory sex offender for a juvenile offenses carries a high risk of erroneous deprivation.

There is a high risk that a child will be erroneously deprived of the rehabilitative guaranties of juvenile court through mandatory sex offender registration because children are adjudicated with fewer constitutional protections than

adults, and research establishes that juveniles who commit sex offenses have a very low risk of sexual reoffending.

Courts have not required additional procedural protections before an adult is required to register as a sex offender because a “convicted offender has already had a procedurally safeguarded opportunity to contest.” *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003). This includes the right to a jury trial, which functions as a “circuitbreaker” in the State’s “machinery of justice.” *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

However, children are prosecuted in juvenile court without a jury trial, and thus lack one of the most critical procedural safeguards that ensures the reliability of adult convictions. *State v. Chavez*, 163 Wn.2d 262, 272, 180 P.3d 1250 (2008); RCW 13.04.021(2). Courts have continually found the trial right is unnecessary for juveniles because “an adult criminal conviction carries far more serious ramifications

for an individual than a juvenile adjudication, no matter where the juvenile serves his time.” *Chavez*, 163 Wn.2d at 271.

Courts have long recognized that this focus on rehabilitation in exchange for the procedural formality of criminal courts may result in the “the worst of both worlds” for a juvenile defendant, because “he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” *Kent*, 383 U.S. at 556. This is certainly true for the sex offender registration requirement under RCW 9A.44.130(1), where the juvenile is subjected to exacting registration requirements based on admissions he made through the purportedly rehabilitative juvenile court procedures.

The risk of erroneous deprivation is also high because mandatory registration will include many children who pose no risk of reoffending. Nearly “every study” on juvenile registration has found that “registration requirements fail to

identify juveniles that are at greater risk for sexual recidivism.”

Caldwell, *supra*, at 420.

Because children who commit sex offenses pose no particular risk of sexual reoffending, automatic inclusion on the sex offender registry, without an individualized inquiry about their risk to reoffend, are at risk erroneous deprivation of the privacy and rehabilitative purpose of the juvenile court. This risk becomes even greater because their convictions are entered without critical safeguards that ensure the reliability of an adult conviction.

- iii. The government’s interest, including the fiscal and administrative burden that the additional procedure would entail is minimal.

The process required before depriving a child of the juvenile court’s protections need not be burdensome. It need only “measure up to the essentials of due process and fair treatment.” *Kent*, 383 U.S. at 562.

States that require the exercise of a court’s discretion before subjecting a child to sex offender registration are

instructive. In Indiana, before a child is placed on the sex offender registry, the court holds an “evidentiary hearing,” in which the child is represented by counsel, and the court makes a “registration decision must be based solely on information admitted into evidence at such a hearing.” *N.L. v. State*, 989 N.E.2d 773, 780 (Ind. 2013). This is a minimal burden when weighed against the risk of erroneously depriving a juvenile of the juvenile court protections.

Due process requires a hearing before the juvenile is subjected to the adult criminal law’s mandatory sex offender registration requirement.

- b. Mandatory sex offender registration predicated on a juvenile offense violates substantive due process.

Our courts have long recognized that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988); *see also Watkins*, 191 Wn.2d at 544 (the

developmental differences between juveniles and adults are relevant to juvenile defendants' constitutional rights).

In *Watkins*, this Court held the automatic decline laws did not invade the juvenile's "substantive due process right to be punished in accordance with his or her culpability because adult courts can take into account the 'mitigating qualities of youth at sentencing.'" *Id.* at 546 (quoting *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017)). This discretion that allows for the child's diminished culpability to be accounted for in the adult criminal court is absent in the case of mandatory sex offender registration.

The State has a valid interest in public safety. But the State has no legitimate interest in imposing onerous, possibly life-long conditions on a person based on what they did at age 14, when the person presents a low risk of reoffending and the registration law itself impedes the child's rehabilitation.

- c. This court should accept review to determine what process is due before a child is subjected to mandatory sex offender registration.

Where juvenile court adjudications are entered without the same procedural formality as adult convictions in the name of rehabilitation, and uncontroverted evidence establishes that juveniles who commit sex offenses pose no particular risk to sexually reoffend, automatic, mandatory sex offender registration raises serious procedural and substantive due process concerns. This Court should accept review to determine what process is due before a child is deprived of the rehabilitative protections of juvenile court by the registration requirements of RCW 9A.44.130(1). RAP 13.4(b)(3)-(4).

F. CONCLUSION

Based on the foregoing, petitioner Darren Smith respectfully requests this that review be granted pursuant to RAP 13.4(b)(3),(4).

This document contains 4,997 words, excluding the parts of the document exempted from the word count by RAP 18.17

DATED this 1st day of December, 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kate L. Benward". The signature is fluid and cursive, with a large loop at the end.

KATE L. BENWARD (WSBA 43651)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

Table of Contents

Court of Appeals Opinion1

November 2, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DARREN RONELL SMITH, JR.,

Appellant.

No. 54067-3-II

UNPUBLISHED OPINION

VELJACIC, J. — The trial court convicted Darren Smith Jr. of failure to register as a sex offender. On appeal, he argues that the application of the sex offender registration statutes in this case violated the ex post facto clauses of the Washington and United States Constitutions. He also argues that his conviction violates due process because it resulted from a mandatory sex offender registration requirement imposed on a juvenile without a hearing. We affirm, but remand to the trial court to strike the community custody supervision fee.

FACTS

In January 2001, Smith committed indecent liberties with forcible compulsion. He pleaded guilty in juvenile court to the charge at the age of fifteen. Smith is classified as a level one offender. As a result of that offense, Smith was required to register as a sex offender with the county sheriff's office. Smith repeatedly failed to register with the sheriff's office and has been convicted of failure to register at least four times, one of which occurred after the present case. In September 2018, Smith informed the sheriff that he was living without a fixed address. As a result, he was required to report in person to the sheriff's office weekly and provide a list of where he

stayed for the prior week as required by RCW 9A.44.130(6)(b). Smith's prior convictions for failure to register prevented him from petitioning for relief from the registration and reporting requirements under RCW 9A.44.143(3). Under this statute, he could petition for relief from the registration requirement once he lived in the community for 24 consecutive months without committing a disqualifying sex offense or failing to register. RCW 9A.44.143(3). Smith was unable to meet this requirement.

Smith failed to report weekly from September 24, 2018 to January 1, 2019. He was charged with failing to register as a sex offender and the trial court convicted him after a bench trial. This was Smith's third conviction for failure to register as a sex offender.

ANALYSIS

I. STANDARD OF REVIEW

We review constitutional issues de novo. *State v. Boyd*, 1 Wn. App. 2d 501, 507, 408 P.3d 362 (2017). A statute is presumed constitutional and the party challenging it has the burden to prove beyond a reasonable doubt that the statute is unconstitutional. *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994).

II. EX POST FACTO

Smith argues that the registration requirements imposed after he was sentenced for indecent liberties violate the ex post facto clause because they are punishment. We disagree.

A. Statutory Sections

Under RCW 9A.44.130(6)(b), sex offenders without a fixed address must report in person weekly with the county sheriff's office. This subsection was modified in May 2001 to require weekly reporting for all offender levels. LAWS OF 2001, ch. 169, § 1. It now states:

A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day

specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

RCW 9A.44.130(6)(b).

Failure to comply with RCW 9A.44.130(6)(b) may lead to public notice under RCW 4.24.550. Under RCW 4.24.550, different levels of offender are subject to different public disclosures. For level I offenders, RCW 4.24.550(3)(a) states:

Except for the information specifically required under subsection (5) of this section, local law enforcement agencies shall consider the following guidelines in determining the extent of a public disclosure made under this section: (a) For offenders classified as risk level I, the agency shall share information with other appropriate law enforcement agencies and, if the offender is a student, the public or private school regulated under Title 28A RCW or chapter 72.40 RCW which the offender is attending, or planning to attend. The agency may disclose, upon request, relevant, necessary, and accurate information to any victim or witness to the offense, any individual community member who lives near the residence where the offender resides, expects to reside, or is regularly found, and any individual who requests information regarding a specific offender.

Subsection (5) of RCW 4.24.550 also requires the publication of level I offenders on a website when they are out of compliance with RCW 9A.44.130.

B. Constitutional Principles

The ex post facto clauses of the federal and state constitutions forbid the State from punishing an act which was not a crime when committed and from retroactively increasing the punishment of a crime after it was committed. U.S. CONST. art. 1, § 10; WASH. CONST. art. 1, § 23; *Ward*, 123 Wn.2d at 496. The ex post facto clause guarantees “fair notice and government restraint” when the State increases punishment for crimes. *Ward*, 123 Wn.2d at 496 (quoting *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 185, 814 P.2d 635 (1991)). The ex post facto clause applies only to laws inflicting criminal punishment. *Ward*, 123 Wn.2d at 499.

Over a series of cases, the United States Supreme court created a framework for evaluating ex post facto claims, which has also been adopted to evaluate the same claims under the Washington Constitution. *Id.* at 497-98. “A [criminal] law violates the ex post facto clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.” *Id.* at 498 (emphasis omitted) (quoting *Powell*, 117 Wn.2d at 185). If the court determines that the law is substantive and retrospective, it must determine whether it is disadvantageous. *Ward*, 123 Wn.2d at 498. A disadvantageous law increases the standard of punishment which existed prior to its enactment. *Id.* at 498.

To determine whether a law increases the standard of punishment for purposes of the third *Ward* factor above, *Ward* instructs that we examine the law under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). *Ward*, 123 Wn.2d at 499. First¹, we examine the legislature’s intent to determine whether the legislature was punishing or regulating conduct. *Ward*, 123 Wn.2d at 499. Even if the legislature stated a law was intended to regulate conduct, we must determine whether “the actual effect of the law is so punitive as to negate the Legislature’s regulatory intent.” *Id.* (emphasis omitted). We do this by evaluating the law under four factors, determining (1) “[w]hether the sanction involves an affirmative disability or restraint”; (2) “whether it has historically been regarded as a punishment”; (3) “whether its operation will promote the traditional aims of punishment—retribution and deterrence”; and (4) “whether it appears excessive in relation to the alternative purpose assigned.” *Id.* (quoting *Mendoza-Martinez*, 372 U.S. at 168-69). If after examining the legislature’s intent and the effect of the law

¹ The reader will note that this analysis is conducted *within* the third *Ward* factor.

under the four factors above, we conclude the law increases the standard of punishment, it would then be disadvantageous under the third *Ward* factor.

In *Ward*, the court analyzed an earlier version of RCW 9A.44.130 and concluded that the law did not violate the ex post facto clause. 123 Wn.2d at 499. Following the United States Supreme Court's example in *Mendoza-Martinez*, the court first determined the legislature's intent was to regulate conduct, not punish. *Ward*, 123 Wn.2d at 499. Next, under the ex post facto framework, the court determined that registration requirements are substantive and assumed the requirements are retrospective. *Id.* at 498-99. However, the court determined that while the law did burden released sex offenders, it did not increase the standard of punishment under the *Mendoza-Martinez* factors and was therefore not disadvantageous to *Ward*. *Id.* at 499.

Two cases of this court addressed the current version of RCW 9A.44.130. *See State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011); *Boyd*, 1 Wn. App. 2d 501. *Boyd* examined the reporting and disclosure requirements by conducting an analysis under the *Mendoza-Martinez* factors. *Boyd*, 1 Wn. App. 2d 510-13. The court relied on the analysis in *Ward* and concluded that the increased reporting and disclosure requirements did not increase the standard of punishment and therefore did not violate the ex post facto clauses of the United States or Washington Constitutions. *Id.* at 513.²

C. Analysis

Smith ask us to distinguish *Boyd* by arguing that unlike the offender in that case, Smith was a juvenile offender. Smith cites to extensive evidence that such requirements have a disproportionate impact on juvenile offenders. Contrary to Smith's argument, *Boyd* unequivocally

² *Enquist* also concluded the amended RCW 9A.44.130(6)(b) did not violate the ex post facto clause but did not analyze the issue under the *Mendoza-Martinez* factors, instead relying on *Ward*. *See Enquist*, 163 Wn. App. at 49.

holds that the amended reporting and disclosure requirements do not violate the ex post facto clauses of the United States and Washington Constitutions. 1 Wn. App. 2d at 513. However, because *Boyd* did not involve a juvenile offender, we address Smith's claim that *Boyd* is inapplicable here because Smith was sentenced as a juvenile.

Smith cites to ample legal authority that addresses juvenile criminal culpability and punishment. *See Roper v. Simmons*, 543 U.S. 551, 578-79, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding capital punishment against minors is unconstitutional under the Eighth Amendment to the United States Constitution); *State v. O'Dell*, 183 Wn.2d 680, 695-98, 358 P.3d 359 (2015) (holding youthfulness may mitigate a defendant's culpability and therefore is an acceptable mitigating factor justifying sentences below standard range under the sentencing statutes); *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (holding sentencing a minor to prison without the possibility of parole violates the Eighth Amendment's prohibition on cruel and unusual punishment).

Those cases are inapplicable here both legally and factually because they addressed claims under the Eighth Amendment, Fourteenth Amendment, or various other sentencing statutes not at issue here. In this case, Smith did not bring his challenges under the Eighth and Fourteenth Amendments. That is, he does not ask us to hold that registration is cruel and unusual punishment as applied to juvenile offenders. While the issue here does address a sentencing statute, *O'Dell* is inapplicable because the present case does not involve discretionary factors, such as youth. Here, the registration requirement is mandatory and therefore youthfulness is not and cannot be considered when the post-release registration requirement is imposed. The circumstances from the cases Smith cites are also considerably different than those present with a sex offender

registration requirement. Most notably, the weekly registration requirement does not rise to the level of capital punishment or prison without the possibility of parole.

Smith spends much of his briefing exploring how registration affects juvenile offenders and why its purpose conflicts with juvenile justice. Indeed, he observes that the Washington Supreme Court has recognized the general impact that publicly available juvenile court records have ““objectively observable negative consequences, including denial of housing, employment, and education opportunities.”” Br. of Appellant at 17 (internal quotation marks omitted) (quoting *State v. S.J.C.*, 183 Wn.2d 408, 432, 352 P.3d 749 (2015)). The effect of public safety notices on juvenile offenders may be something that would cause the legislature to revisit this topic. But Smith provides no authority for the proposition that youthfulness or any characteristic of the defendant is relevant to an ex post facto analysis, the legal argument raised here. None of the law Smith cites overcomes the holdings in *Boyd*.

We recognize that the weekly reporting requirement arising from Smith’s homelessness has had a tremendously negative impact on Smith’s life and capacity to rehabilitate. Still, under *Ward* and *Boyd*, RCW 9A.44.130(6)(b) does not violate the ex post facto clause of the United States or Washington Constitution.

III. DUE PROCESS

Smith argues that he was deprived of due process because the registration requirement does not serve the rehabilitative function of the juvenile court system. He also argues that because juvenile court has fewer constitutional protections than adult court, the juvenile court violated his right to due process when it convicted him of a crime that included mandatory registration. We disagree.

Under the Juvenile Justice Act, juvenile offenders are afforded fewer constitutional protections than adults because the purpose of juvenile court is to rehabilitate rather than punish. *State v. Chavez*, 163 Wn.2d 262, 267-68, 180 P.3d 1250 (2008). The rehabilitative function of juvenile court is reinforced by the more lenient punishments juveniles receive compared to their adult counterparts. *Id.* at 271. This leniency provides a counterbalance to the fewer constitutional protections afforded juvenile offenders.

Juvenile offenders are afforded due process protections, but the requirements to satisfy such protections are flexible. *State v. Watkins*, 191 Wn.2d 530, 537, 423 P.3d 830 (2018). The extent of the procedural requirements depend on the particular situation at issue. *Id.* “Compliance with procedural due process requires the court to identify the private interest affected by the official action, the risk of erroneous deprivation, the probable value of additional safeguards, and the State’s interests.” *Id.*

In Washington, adult sex offenders may petition the court to relieve them of the registration requirement after 10 or 15 years without committing a disqualifying offense, depending on the offense. *See* RCW 9A.44.142(1)(b), (c). By contrast, juvenile offenders may petition the court after only two years. RCW 9A.44.143(3).

Smith argues that he has an interest in not being subject to adult criminal laws. However, he was not subject to adult criminal laws. Smith had the opportunity to petition for relief after two years, eight years sooner than a comparable adult offender. *See* RCW 9A.44.142(1)(b), (c); RCW 9A.44.143(3). His argument fails.

Smith next argues that there is a high risk that he will be erroneously deprived of the rehabilitative guarantees of juvenile court by being subject to mandatory registration. Again, as a juvenile, he was subject to a considerably less lengthy registration duration than an adult offender.

The difference between being subject to registration for two years as a juvenile versus 10 as an adult recognizes the counterbalancing leniency of the juvenile justice system. Here, again, Smith's argument fails.

Smith also argues that the impact on the state would be minimal because his proposed procedure could be simple.³ However, there is already a procedure by which a juvenile may seek relief from registration. *See* RCW 9A.44.143(3).

Lastly, Smith argues that the imposition of the registration requirement on juvenile offenders violates substantive due process. He goes on to argue that the registration requirement does not recognize the reduced criminal culpability of juvenile offenders. But his argument fails because the registration requirement here does recognize the reduced culpability of juveniles by imposing a significantly lessened registration duration of two years, versus 10 to 15 years for adults.

We conclude that the registration requirement did not violate Smith's right to due process.

IV. LEGAL FINANCIAL OBLIGATIONS

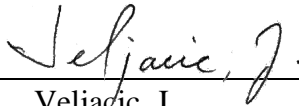
Smith argues that the court erred when it imposed community custody supervision fees after determining he was indigent. The State concedes to striking the fees. It is within the State's discretion to decide not to pursue these fees from an indigent defendant. *See State v. Spaulding*, 15 Wn. App. 2d 526, 537, 476 P.3d 205 (2020) (acknowledging community supervision fees are discretionary). We therefore accept the State's concession.

³ Smith recommends that each juvenile sex offender have a hearing before being placed on the sex offender registry.

CONCLUSION

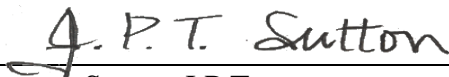
The sex offender registration statutes do not violate the ex post facto clauses of the Washington and United States Constitutions. Nor does Smith's conviction violate due process. We affirm, but remand to the trial court to strike the community supervision fees from Smith's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

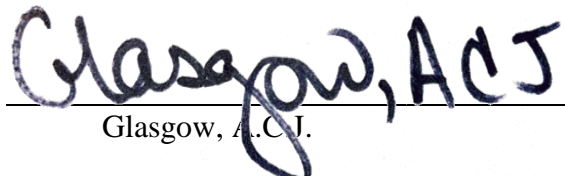


Veljacic, J.

We concur:



Sutton, J.P.T.



Glasgow, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54067-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Date: December 1, 2021

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