

No. 45432-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christopher Smith,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-00431-2

The Honorable Judge Stephen Warning

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Smith's failure to register conviction violated his Fourteenth Amendment right to substantive due process.
2. The registration statute is invalid on its face because it is not narrowly tailored to achieve a compelling state interest.
3. The registration statute is invalid on its face because there is no "evidentiary nexus" between its method and results.
4. The registration statute is invalid on its face and as applied to Mr. Smith because it is imprecise and fails to consider "plainly relevant considerations."

ISSUE 1: A statute is facially invalid if it impedes a fundamental right without being narrowly tailored to meet a compelling state interest. Washington's Failure to Register statute burdens the fundamental rights to travel and to freedom of movement, but treats dangerous and non-dangerous offenders alike and lacks an "evidentiary nexus" between its method and results. Does the Failure to Register statute violate the substantive component of the Fourteenth Amendment right to due process?

ISSUE 2: A statute is unconstitutionally overbroad as applied if it burdens a person's fundamental rights without being narrowly tailored under the facts of the case. Here, Mr. Smith was convicted of failure to register as a sex offender despite the fact that he is neither dangerous nor at risk of reoffending. Does the failure to register statute violate the Fifth and Fourteenth Amendment right to due process as applied to Mr. Smith?

5. Mr. Smith's failure to register conviction violated his Fourteenth Amendment right to due process because it was based on insufficient evidence.
6. The state failed to prove that Mr. Smith moved away from his registered address on Rose Place.

7. The state failed to prove that Mr. Smith asked to have his registered address changed from the Rose Place address to a residence on 9th Ave.
8. The state failed to prove that the letter purporting to request a change of registration address was sufficient to legally effectuate such a change.

ISSUE 3: A conviction must be reversed for insufficient evidence if, taking the evidence in the light most positive to the state, no rational trier of fact could have found all of the elements beyond a reasonable doubt. Here, there was no evidence that Mr. Smith sent the letter which purported to change his registration address, or that the letter had been sent in compliance with the statute. Did the court violate Mr. Smith's Fourteenth Amendment right to due process by entering a conviction for failure to register?

ISSUE 4: Failure to register requires proof of relocation combined with proof that the accused person did not notify the county sheriff of the change of address. Here, no one testified that Mr. Smith lived at the "new" address, and no one testified that he had vacated his "old" address. Was the evidence insufficient to prove that Mr. Smith failed to comply with the registration statute?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Christopher Smith was convicted of third-degree child molestation when he was eighteen years old. Ex. 1. The conviction was based on consensual sexual contact with a fourteen-year-old. RP 70. After his six-month sentence, Mr. Smith registered as a sex offender with the Cowlitz County Sheriff's office. Ex. 1, 3; RP 17-18. He later returned to the sheriff's office to update his registered address. The new address was on Rose Place in Longview. RP 23-24; Findings of Fact & Conclusions of Law (p. 1), Supp CP.

In 2011, the sheriff's office received a letter asking to change Mr. Smith's registered address from Rose Place to a house on 9th Ave. in Longview. Ex. 6; RP 25-26. As a result of the letter, the clerk at the office filled out a form changing Mr. Smith's registered address. RP 29. The clerk did not have personal or telephonic contact with Mr. Smith before changing the address of his registration. RP 29.

Olga Lozano, an investigator for the sheriff's department, visited the 9th Ave. address in early 2012. RP 33. The house was vacant. RP 34. Lozano did not go to the Rose Place address to see if Mr. Smith still lived there. RP 31-35.

The state charged Mr. Smith with failure to register as a sex offender. CP 3-4. Mr. Smith was tried by the court. RP 3; CP 2.

The letter purporting to change Mr. Smith's address was admitted into evidence. Ex. 6. The state did not introduce evidence establishing that the letter had been sent by certified mail, with return receipt requested. Ex 6; RP 12-29.

The property manager of the 9th Ave. address testified that no one lived at the home during the charging period. RP 42. He also testified that he had seen a man at that residence. RP 39-40. He did not name the man or identify Mr. Smith in court. RP 36-46. The property manager had called the phone number for the woman who rented the 9th avenue address. On some occasions, he spoke to a man on the phone. In his testimony, he did not say who the man was. RP 36-46.

At the conclusion of the evidence, the trial judge observed that the property manager had never formally identified Mr. Smith, and did not say that Mr. Smith was the person with whom he had spoken on the phone. RP 59. The court noted, however, that the witness looked at Mr. Smith during his testimony. RP 59.

The court found Mr. Smith guilty of failure to register as a sex offender. RP 61; Findings of Fact & Conclusions of Law (p. 3), Supp CP. During sentencing, the judge said that he would like to sentence Mr. Smith

below the standard range, but had no legal mechanism for doing so. RP 88. The judge said that he did not think Mr. Smith was dangerous and that he was contributing to society by caring for several children. RP 87-88.

The court sentenced Mr. Smith to fourteen months followed by thirty-six months of community custody. CP 13. This timely appeal follows. CP 21.

ARGUMENT

I. THE FAILURE TO REGISTER STATUTE VIOLATES DUE PROCESS BECAUSE IT BURDENS THE FUNDAMENTAL RIGHTS TO TRAVEL AND TO FREEDOM OF MOVEMENT AND IS NOT NARROWLY TAILORED TO MEET A COMPELLING STATE INTEREST.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 43636 -1-II, 2014 WL 710682, --- Wn. App. ---, --- P.3d --- (Wash. Ct. App. Feb. 25, 2014).

B. Due process guarantees the fundamental rights to travel and to freedom of movement.

The Fourteenth Amendment right to due process includes a substantive component. *Lawrence v. Texas*, 539 U.S. 558, 565, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). This component has “fundamental

significance in defining the rights of the person.” *Lawrence* 539 U.S. at 565. Substantive due process goes beyond mere procedural protections to actually limit the government’s ability to operate in certain realms. *Id.* at 578; *Troxel*, 530 U.S. at 65.

Due process guarantees the fundamental right to travel. *Aptheker v. Sec’y of State*, 378 U.S. 500, 505, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 901, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986); U.S. Const. Amends. V, XIV; Wash. Const art. I, § 3. The right to travel includes the right to travel within a state. *State v. Enquist*, 163 Wn. App. 41, 50, 256 P.3d 1277 (2011). The constitution also guarantees a fundamental right to freedom of movement. *State v. J.D.*, 86 Wn. App. 501, 506, 937 P.2d 630 (1997). That right is rooted in due process and the First Amendment freedom of association. *Id.*

A statute that burdens the fundamental rights to travel and to freedom of movement is subject to strict scrutiny. *Macias v. Dep’t of Labor & Indus. of State of Wash.*, 100 Wn.2d 263, 273, 668 P.2d 1278, 1284 (1983); *J.D.*, 86 Wn. App. at 508. A state law implicates the right to travel if it indirectly burdens exercise of that right by creating “any classification which serves to penalize the exercise of the right.” *Soto-Lopez*, 476 U.S. at 903 (internal citations omitted). A statute burdening a

fundamental right cannot survive strict scrutiny unless it is narrowly tailored to meet a compelling state interest. *Lawrence* 539 U.S. at 593; *J.D.*, 86 Wn. App. at 508.

C. The failure to register statute is unconstitutionally overbroad on its face.

The right to travel is one of the few rights so fundamental that statutes burdening it are subject to facial overbreadth challenges. *Sabri v. United States*, 541 U.S. 600, 610, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (citing *Aptheker* 378 U.S. 500).

Governmental intrusions into fundamental rights may not sweep unnecessarily broadly: “precision must be the touchstone of legislation affecting freedoms.” *Aptheker*, 378 U.S. at 508, 514 (internal citation omitted). A statute is not narrowly tailored if there are other reasonable ways to achieve the state’s purpose, which would place a lesser burden on constitutionally protected activity. *Soto-Lopez*, 476 U.S. at 909-10.

The sex offender registration requirements place a burden on the fundamental rights to travel and to freedom of movement. The statute requires that a person with a fixed residence who is subject to the registration requirement must register the address at which s/he spends a

majority of the week.¹ RCW 9A.44.128(5) (defining “fixed residence” as the place where the person spends the majority of the week); RCW 9A.44.130(4). A registered sex offender with a fixed address cannot travel away from home for more than three nights. By leaving home for more than three days, the person would likely be at risk of criminal prosecution.² RCW 9A.44.132.

The purpose of the registration scheme “is to assist law enforcement agencies’ efforts to protect their communities against reoffense by convicted sex offenders.” *State v. Pray*, 96 Wn. App. 25, 28, 980 P.2d 240 (1999), *review denied*, 139 Wn.2d 1010 (1999). Assuming this is a compelling interest, the statute nonetheless violates substantive due process because it is not narrowly tailored to meet that aim. *Aptheker*, 378 U.S. at 508.

1. The failure to register statute is not narrowly tailored because it burdens fundamental rights without considering a person’s “relevant characteristics.”

¹ A person without a fixed residence must register as a transient and check in with the county sheriff once a week. RCW 9A.44.128(9); RCW 9A.44.130(5).

² It is unclear from the statute whether a person with a fixed address would be permitted to re-register temporarily at a place where s/he was staying while traveling. The statutory scheme does not anticipate re-registration unless the person has changed his/her fixed residence or come to lack a fixed residence. *See* RCW 9A.44.130(4)-(5). Even if temporary re-registration were permitted by the statute, the requirement would still place a burden on the rights to travel and to freedom of movement. Accordingly, the statute would need to be narrowly tailored to meet a compelling state interest.

Legislative discrimination affecting fundamental rights must be correlated to a person's "*relevant characteristics.*" *Soto-Lopez*, 476 U.S. at 911 (italics in original). A statute is not narrowly tailored if it "excludes plainly relevant considerations" in its burden of a fundamental right. *Aptheker*, 378 U.S. at 514.

The failure to register statute is not narrowly tailored because it reaches people who are neither dangerous nor likely to reoffend. For example, the statutory scheme requires registration by people who have been convicted of nonviolent crimes. A high school junior who has *de minimis* consensual sexual contact with a freshman can be convicted of third-degree child molestation. RCW 9A.44.089. Such a person would be required to register as a sex offender and could be criminally prosecuted for failing to do so. RCW 9A.44.130; RCW 9A.44.132.

The failure to register scheme rests on the assumption that any person convicted of a sex offense is dangerous to society. But The Bureau of Justice Statistics has found that sex offenders are less likely to reoffend than people who commit other types of crimes:

In comparison to the rearrest rate for drug offenders (41.2%), larceny-theft offenders (33.9%), and those who commit nonsexual assault (22%), sex offenders are relatively unlikely to be rearrested for another sex crime.

...

Moreover, it appears that an individual is more likely to be the victim of a sex crime at the hands of a convict whose original crime was not a sex crime.

Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 La. L. Rev. 509, 521 (2013) (citing Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, U.S. Dep't of Justice, *Recidivism of Prisoners Released in 1994* 9 (2002)).

Studies have shown that people who commit sex offenses as juveniles, in particular, have very low recidivism rates. *See e.g.* Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 13 (2013); L. Chrysanthi, et al, *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 Widener L. Rev. 127, 149 (2011); Richard A. Paladino, *The Adam Walsh Act As Applied to Juveniles: One Size Does Not Fit All*, 40 Hofstra L. Rev. 269, 290-92 (2011). Nonetheless, Washington juveniles adjudicated for most sex offenses are required to register and face criminal prosecution if they do not.³ RCW 9A.44.130(a)(1); RCW 9A.44.132.

³ Some people adjudicated guilty for sex offenses as juveniles may later move for relief from the registration requirements after a period of time has passed. RCW 9A.44.143. This fact does not alter the analysis regarding whether the sex offender registration scheme is narrowly tailored during the period when they are required to register.

In short, the legislative assumption that all people convicted of sex offenses pose a danger to society is not supported by empirical evidence. Nonetheless, the registration scheme criminalizes failure to register even by people who are not dangerous or at risk of recidivating. The statute is not precise enough to justify the burden it places on the fundamental rights to travel and freedom of movement. *Aptheker*, 378 U.S. at 514.

The sex offender registration scheme is not narrowly tailored because it fails to consider the “plainly relevant consideration” of whether a person is actually dangerous or likely to commit future sex offenses. *Soto-Lopez*, 476 U.S. at 911; *Aptheker*, 378 U.S. at 514.

2. The failure to register statute is not narrowly tailored because there is no “evidentiary nexus” between its purpose and effect.

To qualify as narrowly tailored, “there must be an evidentiary nexus between a law's purpose and effect.” *J.D.*, 86 Wn. App. at 508. The Washington sex offender registration scheme is not narrowly tailored because it lacks an evidentiary nexus: evidence shows that it does not serve its stated goal of protecting the public. *Id.*

A Washington-specific study has found that the sex offender registration requirements have no statistically significant effect on recidivism. Nor do registration requirements increase public safety. Walker Wilson, 73 La. L. Rev. at 523 (*citing* Donna D. Schram & Cheryl

Darling Milloy, Wash. State Inst. for Pub. Pol'y, *Community Notification: A Study of Offender Characteristics and Recidivism* (1995)). Numerous other studies have reached the same conclusion. *Id.* at 523-24; *see also* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161 (2011) (finding that sex offender registration may actually increase recidivism); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & Econ. 207 (2011).

The Washington system of sex offender registration is not narrowly tailored because there is no “evidentiary nexus between [its] purpose and effect.” *J.D.*, 86 Wn. App. at 508.

The failure to register statute violates substantive due process on its face because it impedes the rights to travel and freedom of movement without being narrowly tailored to meet a compelling state interest. *Aptheker*, 378 U.S. at 508, 514; *Soto-Lopez*, 476 U.S. at 909-10. Mr. Smith’s failure to register conviction must be reversed. *Id.*

D. The failure to register statute is unconstitutionally overbroad as applied to Mr. Smith because the state does not achieve any compelling interest by burdening his rights to travel and to freedom of movement.

An as-applied challenge contests the application of a statute to the challenging party’s specific situation. *City of Redmond v. Moore*, 151

Wn.2d 664, 668-669, 91 P.3d 875 (2004). The reviewing court examines the statute's effect on the individual, using the level of scrutiny appropriate to the nature of the right impacted. *See, e.g., Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013) (resolving as-applied challenge under the rational basis test). A successful as-applied challenge prohibits future applications in a similar context, but the statute is not totally invalidated. *Id.*

The failure to register statute is unconstitutional as applied to Mr. Smith. The state does not have a compelling reason to restrict his rights to travel and to freedom of movement. *Soto-Lopez*, 476 U.S. at 909.

Mr. Smith's registration obligation stems from a guilty plea to child molestation in the third degree, entered when he was eighteen years old. Ex. 1.⁴ His conviction was based on consensual contact with a fourteen-year-old. CP 70. Mr. Smith has not committed any other sex offense since his conviction in 1997. CP 7. At sentencing, the court commended Mr. Smith for caring for so many children, stating that he provides a service to society by doing so. RP 87-88. Through its statements, the court demonstrated that it did not consider Mr. Smith dangerous to children or to anyone else. RP 87-88. The judge wanted to

⁴ Child molestation in the third degree criminalizes sexual contact with someone between the ages of fourteen and sixteen by a person at least forty-eight months older than the victim. RCW 9A.44.089.

sentence Mr. Smith below the standard range, but did not have a legal mechanism for doing so. RP 88.

Mr. Smith does not pose a danger to society. The registration statute does not serve a compelling interest by limiting his fundamental rights to travel and to freedom of movement. *Aptheker*, 378 U.S. at 508, 514; *Soto-Lopez*, 476 U.S. at 909-10. The sex offender registration scheme, including the failure to register statute, is unconstitutional as applied to Mr. Smith. *Aptheker*, 378 U.S. at 508, 514; *Soto-Lopez*, 476 U.S. at 909-10.

The failure to register statute violates substantive due process as applied to Mr. Smith. *Aptheker*, 378 U.S. at 508, 514; *Soto-Lopez*, 476 U.S. at 909-10. His conviction must be reversed and the charge dismissed with prejudice. *Id.*

II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. SMITH.

A. Standard of Review.

A claim of insufficient evidence admits the truth of the state's evidence and all reasonable inferences therefrom. *State v. Caton*, 174 Wn.2d 239, 241, 273 P.3d 980 (2012). A conviction must be overturned for insufficient evidence if no rational trier of fact could have found all of

the elements of the offense beyond a reasonable doubt. *State v. Drake*, 149 Wn. App. 88, 93, 201 P.3d 1093 (2009).

B. No rational trier of fact could have found that Mr. Smith had moved from the address at which he was registered.

The failure to register statute criminalizes knowing failure to comply with the registration requirements of RCW 9A.44.130. RCW 9A.44.132. A registered sex offender must notify the sheriff within three business days of “chang[ing] his or her residence address.” RCW 9A.44.130(4)(a)

Conviction requires proof that the accused person changed his or her residence address. *Drake*, 149 Wn. App. at 95. A person can’t be convicted of failure to register if there is insufficient evidence that he has changed his residence. *Id.*

Here, the state presented insufficient evidence that Mr. Smith had changed his address from the Rose Place address at which he was originally registered. Accordingly, his conviction must be reversed and the charge dismissed with prejudice. *Id.*

The registration clerk did not have personal contact with Mr. Smith before changing his registered address from the Rose Place residence to the 9th Ave residence. RP 29. No witness testified that Mr. Smith had actually written the letter asking that the address be changed. RP 13-46.

No expert verified whether the signature on the letter actually belonged to Mr. Smith. RP 13-46. In fact, no witness even offered a lay opinion claiming that the signature matched Mr. Smith's signature.⁵ RP 13-46.

The property manager of the 9th Ave. address testified that he had seen a man at that residence, but he did not identify the man as Mr. Smith. RP 36-46. He also said that he had talked on the phone to a man at the 9th Ave. address, but he did not testify that he recognized the voice as Mr. Smith's.⁶ RP 36-46.

Finally, the sheriff's investigator did not go to the Rose Place address to see if Mr. Smith still lived there. RP 31-35. Accordingly, no evidence established that he'd actually moved from his registered address on Rose Place.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Smith moved from the Rose Place address to the 9th Ave. residence, or that he asked to have his registration changed. *Drake*, 149

⁵ Nonetheless, the court found that Mr. Smith signed the letter. Findings of Fact & Conclusions of Law (p. 1-2), Supp CP. That finding is not supported by the evidence, and must be vacated. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). An appellate court does not give deference to a trial court's findings of fact regarding documentary evidence. *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990).

⁶ Based solely on the fact that the witness had looked at Mr. Smith during his testimony, the court found that the property manager had personal contact with Mr. Smith at the 9th Ave. residence. The court also concluded that the witness spoke with Mr. Smith on the telephone. Findings of Fact & Conclusions of Law (p. 2), Supp CP. The court's finding is not supported by the evidence and must be vacated. *DeVries*, 149 Wn.2d at 853.

Wn. App. at 95. Accordingly, the state presented insufficient evidence to convict Mr. Smith of failure to register. *Drake*, 149 Wn. App. at 95. Mr. Smith's conviction must be reversed. *Id.*

C. No rational trier of fact could have found beyond a reasonable doubt that the letter validly changed Mr. Smith's address of registration.

A person who moves from one fixed residence to another within the same county must send notice of the change. To be valid, the offender must send the notice via certified mail with return receipt requested. RCW 9A.44.130(4)(a).

The prosecution did not prove that the letter purporting to change Mr. Smith's address from the Rose Place to 9th Ave. complied with the statute. The sheriff's office routinely informs registrants that they may change their address either by coming to the office in person or by sending a letter via certified mail with return receipt requested. RP 16, 28. No one testified that the letter purporting to change Mr. Smith's address of registration was sent by certified mail. RP 13-30. Nor did the state present any other evidence that the letter had been sent in accordance with the statute. Ex. 6; RP 13-46.

The state failed to prove that the letter was sent via certified mail with return receipt requested. Ex. 6; RP 25-26. Accordingly, the letter

could not effectuate a valid change of registration address. RCW 9A.44.130(4)(a).

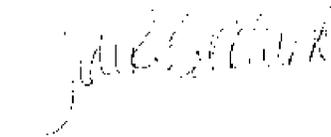
The state introduced insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Smith had changed his registered address from Rose Place to 9th Ave. *Drake*, 149 Wn. App. at 93; RCW 9A.44.130(4)(a). Mr. Smith's conviction must be reversed, and the charge dismissed with prejudice. *Drake*, 149 Wn. App. at 96.

CONCLUSION

The failure to register statute violates substantive due process on its face because it is not narrowly tailored to meet a compelling state interest. The statute is also unconstitutional as applied to Mr. Smith because the state does not achieve any interest by burdening his rights to travel and to freedom of movement. The state presented insufficient evidence that Mr. Smith had moved without changing his address of registration. Mr. Smith's conviction must be reversed.

Respectfully submitted on March 5, 2014.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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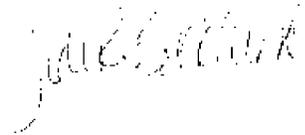
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 5, 2014.



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Transmittal Letter

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Case Name: State v. Christopher Smith

Court of Appeals Case Number: 45432-7

Is this a Personal Restraint Petition? Yes No

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

Other: _____

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