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IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

BRETT HAMPTON,

Appellant.

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

The Honorable Kathryn Nelson, Judge

BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The application of the current sex offender registration statute to appellant Brett Hampton violates the ex post facto clauses of the federal and state constitutions.

2. Insofar as application of the registration statute violates the prohibition against ex post facto laws, the trial court erred in entering Finding of Fact (FOF) II, III, and V. Clerk’s Papers (CP) 100.

3. Insofar as application of the statute violates the prohibition against ex post facto laws, the trial court erred in concluding that the appellant had duty to register as a sex offender. (Conclusions of Law (CL) III, IV, and V); CP 101.

4. The trial court erred finding Mr. Hampton guilty of the crime of failure to register as a sex offender. (CL VIII); CP 102.

5. The sentencing court erred by imposing legal financial obligations [LFOs] including an interest accrual provision in the judgment and sentence following the Supreme Court's decision in *State v. Ramirez*<sup>1</sup> and after enactment of House Bill 1783.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The ex post facto clauses of the federal and state constitutions prohibit the infliction of punishment that is greater than the punishment permitted at the time of the crime. Several courts have held that although sex

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<sup>1</sup>191 Wn.2d 732, 426 P.3d 714 (2018).

offender registration statutes did not originally impose punishment, increasingly onerous amendments converted formerly regulatory statutes into punitive provisions that may not be applied to defendants whose crimes were committed before the amendments were enacted. Does the application of the registration statute via retroactive application of the Sex Offender Registration and Notification Act after Mr. Hampton's 1998 predicate offenses violate the ex post facto clauses? Assignments of Error 1, 2, 3, and 4.

2. Under the Supreme Court's decision in *Ramirez*, and after enactment of *House Bill 1783*, should the interest accrual provision and community supervision fees be stricken? Assignment of Error 5.

### **C. STATEMENT OF THE CASE**

#### **1. Procedural facts:**

Brett Hampton was convicted on November 20, 1998 of transporting a minor for prostitution and two counts of transporting an individual for prostitution in the United States District Court for the Western District of Washington. Clerk's Papers (CP) 53. Exhibit 8. The offenses occurred on December 19, 1997. 1Report of Proceedings (RP) at 73,<sup>2</sup> 2RP at 158; CP 53, Exhibit 17. Mr. Hampton was sentenced to 75 months and was released from federal prison on December 9, 2003. 1RP at 89; CP 54. At the time of

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<sup>2</sup>The record of proceedings consists of the following transcribed proceedings: March 5, 2018 (arraignment), April 18, 2018, April 25, 2018, May 8, 2018, May 23, 2018, July 24, 2018, October 15, 2018, 1RP – November 14, 2018, (CrR 3.5, non-jury trial, day 1); 2RP - November 15, 2018, (non-jury trial, day 2); 3RP – December 7, 2018, (non-jury trial, day

his release he was not required to register as a sex offender. CP 54. About one and a half years later, on June 27, 2005, Mr. Hampton was notified by the Bureau of Prisons that he was required to register as a sex offender under RCW 9A.44.130. RP at 76, 79-80. Mr. Hampton registered as a sex offender as directed by a probation officer for the Bureau of Prisons. CP 54.

After approximately thirteen years of registration, Mr. Hampton was charged by information filed on March 5, 2018 with one count of failure to register as a sex offender. RCW 9A.44.132(1)(a). CP 3. The State alleged that Mr. Hampton failed to register during the period between January 5 and March 3, 2018. CP 3.

**2. Trial testimony:**

Mr. Hampton waived his right to a jury trial and proceeded to bench trial on November 14, November 15, December 7, and December 10, 2018, before the Honorable Kathryn Nelson. 1RP at 4-95, 2RP at 98-185, 3RP at 188-259, 4RP at 262-266, and 5RP at 267-280; CP 49.

The court heard a motion pursuant to CrR 3.5 the morning of trial. The court found statements made by Mr. Hampton to Tacoma police officer Chris Yglesias were freely and voluntarily made and were admissible at trial. 1RP at 36; CP 95-97.

Christie Yglesias, a detective with the Tacoma Police Department, conducted a verification check to determine where Mr. Hampton was living.

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3); 4RP – December 10, 2018, and 5RP – February 1, 2019 (sentencing).

1RP at 51. Mr. Hampton's registered address was 2106 M Street in Tacoma, Washington. 1RP at 51. Detective Yglesias testified that Mr. Hampton was registered at the address on M Street on April 14, 2016, and he was previously verified to live there in September 2017. 1RP at 52.

Detective Christie Yglesias explained that verification checks are to determine that registered sex offenders are living where they are supposed to be living. 1RP at 48. The detective stated that she conducted a check of Mr. Hampton in January, 2018 by going to 2106 South M Street on February 14, 2018 and contacting the home owner and then went to the Rescue Mission at 425 South Tacoma Way. 1RP at 51, 53.

Tacoma police officer Chris Yglesias, the husband of Detective Yglesias, testified that as part of his duties he conducts verification checks for registered sex offenders. 1RP at 56-57. He testified that he went to the Mission shelter at 425 South Tacoma Way while looking for Mr. Hampton on March 3, 2018. 1RP at 58. After arriving at the shelter, he contacted Mr. Hampton in the bathroom while he was either shaving or brushing his teeth. 1RP at 58. Mr. Hampton had a backpack with him. 1RP at 58. Officer Yglesias handcuffed him and then recited *Miranda* warnings to Mr. Hampton. 1RP at 59. He stated that Mr. Hampton told him that had written a judge three times asking why he should not be relieved of the duty to register, that the offenses were a long time ago and that he had not reoffended. 1RP at 61. The officer asked if had been evicted from the address

at 2106 South M Street, and said that Mr. Hampton first said that he was not evicted, but “ended up saying that he had been evicted.” 1RP at 62. Officer Yglesias said that Mr. Hampton told him that he was frustrated with the system and “didn’t feel he need to register any longer.” 1RP at 63.

United States probation officer Donald Moon testified that he had supervised Mr. Hampton in 2003. 1RP at 68. Mr. Moon testified that Mr. Hampton was required to register as a sex offender and that there had been a change in the law that required him to register, but that after his initial release from custody he had not been required to register. 1RP at 70. Mr. Moon provided Mr. Hampton with notification of the change in the law in 2005 and Mr. Hampton registered and then provided proof of registration. 1RP at 79-84.

Andrea Conger, who works for the Pierce County Sheriff’s Department, testified that sex offenders are required to register with the county sheriff within three days of arrival in the county. 2RP at 146. If the person does not have a fixed address, the person is required to register as a transient and check in with the Sheriff’s Department on a weekly basis. 2RP at 151. Mr. Hampton filed out a registration packet with the sheriff’s office on April 7, 2006, following a determination by the Bureau of Prisons that Mr. Hampton was required to register. 2RP at 161-62. Exhibit 18.

Mr. Hampton filed a change of address form on April 27, 2018, indicating that his previous address was 2106 South M Street in Tacoma,

and indicating that he was now homeless. 2RP at 167. Mr. Hampton completed several other registration packets. 2RP at 171. Exhibits 26, 27, and 28.

Ms. Conger testified that Mr. Hampton was required to register again between January 5, 2018 and March 3, 2018, but that there was no record that he had done so. 2RP at 173.

Xavier Mendiola is the case manager at Tacoma Rescue Mission, which is located at 425 South Tacoma Way. 2RP at 112-13. The Tacoma Rescue Mission is a shelter that offers overnight services including showers and food. 2RP at 115. The procedure for checking into the Mission is to meet with a case manager during an intake process, after which the person will be assigned a bed. 2RP at 115. Mr. Mendiola testified that an intake for Mr. Hampton indicated that he was staying on the streets one to two weeks prior to coming to the Mission. 2RP at 121. Exhibit 6. He stated that Mr. Hampton stayed at the Mission from January 31 to February 1, 2018, left and then returned again on February 3 and stayed each night until March 2, 2018. 2RP at 125-26.

Following presentation of the State's case, the defense moved to dismiss the charge arguing that Mr. Hampton was not required to register as a sex offender. 2RP at 176-80.

After reviewing briefing provided by the parties, the court denied the motion to dismiss. 3RP at 188. Defense counsel also requested a directed

verdict, arguing that the State failed to show that Mr. Hampton moved from his residence at 2106 South M Street. 2RP at 176-79, 189-93. After hearing additional argument, the court denied the motion for directed verdict. 3RP at 195.

Mr. Hampton testified that in 2018 he lived at 2106 South M Street in Tacoma. 3RP at 196. He stated that he sometimes slept elsewhere because he was having difficulty with a former girlfriend who would come to the house and cause trouble. 3RP at 197-98. He said that he produced music and was often out all night. 3RP at 198. He denied that he moved into the Mission, stating that many times he would sign in at the Mission for shelter at night, and then stay out working as a music producer all night. 3RP at 198. He stated that he did not consider himself to have moved into the Mission, and that he did not take anything from the M Street house with him to the Mission, did not receive mail at the Mission, and did not change his mailing address from 2106 South M Street. 3RP at 199. He paid rent at the M Street or at other times would live at the house in exchange for taking care of an elderly man who lived at the house. 3RP at 199-200.

Mr. Hampton denied that he told Officer Yglesias that he was “tired of the system.” 3RP at 222. He said that there “wasn’t something right about” having register for so long. 3RP at 223, 224.

Mr. Hampton said that he went to the Mission because he was trying to avoid a girlfriend that he wanted out of his life, and to avoid other people

in the M Street house. 3RP at 228. Mr. Hampton said that he was not homeless because he had a fixed address, but that he would stay at the Mission on occasion. 3RP at 219. Mr. Hampton had registered with Pierce County Sheriff's Department that he lived at 2106 South M Street. 3RP at 200. He stated when he signed into the Mission shelter as "homeless," he did so because he did not consider himself as having a home after losing his mother's house to foreclosure following her death in 2016. 3RP at 200-01.

**a. Verdict and Sentencing:**

After hearing testimony from five witnesses for the State and from Mr. Hampton, the trial court found Mr. Hampton guilty of the offense of failing to register as a sex offender. 4RP at 262-63. The court found that Mr. Hampton "was clearly required to register during" the period from January and February, 2018, although the court stated that it had "not definitively determined when exactly [Mr. Hampton] became obligated to register," and that it could have been as late as 2010. 4RP at 262. The court also found that Mr. Hampton was living in shelters for a substantial period of time and that he had a non-fixed address. 4RP at 262. Findings of fact and conclusions of law were entered February 1, 2019. CP 98-103.

The court imposed a standard range sentence of 52 days with credit for time served, followed by twelve months of community custody. 5RP at 279; CP 108.

The court imposed a \$500.00 crime victim assessment and \$100

DNA collection fee. SRP at 279; CP 106.

The judgment and sentence states that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.” CP 107.

Timely notice of appeal was filed February 7, 2019. CP 123. This appeal follows.

**D. ARGUMENT**

**1. APPLICATION OF SORNA<sup>3</sup> TO MR. HAMPTON VIOLATES THE EX POST FACTO CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS, REQUIRING REVERSAL OF THE CONVICTION AND DISMISSAL OF THE CHARGE WITH PREJUDICE.**

*a. The ex post facto clauses prohibit the application of punishment pursuant to SORNA*

Brett Hampton was convicted on November 20, 1998 of transporting a minor for prostitution and two counts of transporting an individual for prostitution in the United States District Court for the Western District of Washington. CP 53.

The federal Sex Offender Registration and Notification Act (SORNA) 42 U.S.C. § 16901 et seq., requires those convicted of certain sex crimes to provide state governments with (and to update) information,

such as names and current addresses, for inclusion on state and federal sex offender registries. §§ 16912(a), 16913–16914, 16919(a). The Act makes it a crime for a person who is “required to register” under the Act and who “travels in interstate or foreign commerce” knowingly to “fail[] to register or update a registration....” 18 U.S.C. § 2250(a). The Act defines the term “sex offender” as including these pre-Act offenders. 42 U.S.C. § 16911(1); see *Carr v. United States*, 560 U.S. 438, 130 S.Ct. 2229, 2235–2236, 176 L.Ed.2d 1152 (2010).

On July 27, 2006, SORNA became law. SORNA's stated purpose is “to protect the public from sex offenders and offenders against children” by “establish [ing] a comprehensive national system for the registration of those offenders.” 42 U.S.C. § 16901. SORNA was enacted in part “to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks.” *Carr*, 560 U.S. at 455, 130 S.Ct. 2229. SORNA requires every state to maintain a sex offender registry conforming to SORNA's requirements, *Id.* § 16912(a); requires certain persons to register as sex offenders in each state where they reside, where they are employed, and where they are a student, *Id.* § 16913(a); and requires those persons to keep their registrations current, *Id.* § 16913(c). SORNA also authorizes the Attorney General to

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<sup>3</sup> Sex Offender Registration and Notification Act.

specify “the applicability of” SORNA to persons convicted of sex offenses before July 27, 2006. *Id.* § 16913(d).

SORNA defines the terms “sex offenders,” and “sex offense,” mandates that sex offenders register, and divides sex offenders into “tiers,” based on the severity of their crime, which determine the details of the registration requirement. *Id.* § 16911. A “sex offense” is defined as either “a criminal offense that has an element involving a sexual act or sexual contact with another,” § 16911(5)(A)(i), or “a criminal offense that is a specified offense against a minor,” § 16911(5)(A)(ii). The Act defines “sex offender” to include offenders who were convicted before the Act's effective date, 42 U.S.C. § 16911(1), and says that “the Attorney General shall have the authority to specify the applicability of the [registration] requirements” to pre-Act offenders, § 16913(d).

The State contends that Mr. Hampton is required to register as a sex offender under RCW 9A.44.132<sup>4</sup> and 9A.44.130. Under RCW

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<sup>4</sup> Subsection (1) provides: “A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

(a) The failure to register as a sex offender pursuant to this subsection is a class C felony if:

(i) It is the person's first conviction for a felony failure to register; or  
(ii) The person has previously been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law.

9A.44.130(6)(b)<sup>5</sup> sex offenders who lack a fixed residence (transient sex offenders) must report weekly to the sheriff of their county of residence.

***b. The Constitutional prohibition on ex post facto laws***

The constitutions of both the United States and Washington contain a prohibition against ex post facto laws. U.S. Const. art. I § 10; Wash. Const. art. I, § 23.<sup>6</sup> An ex post facto law is “[a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.” *Black's Law Dictionary* 662 (4th ed. 1968). The ex post facto clauses of the United States and Washington Constitutions forbid the State from enacting any law that imposes punishment for an act that was not punishable when committed or that inflicts a greater punishment than could have been imposed at the time the crime was committed. *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). The ex post facto clause, U.S. Const., art. I § 10, bars application of a law that changes the punishment, and

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(b) If a person has been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law, on two or more prior occasions, the failure to register under this subsection is a class B felony.”

<sup>5</sup> “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.”

<sup>6</sup> The language of the United States Constitution's ex post facto clause (“No state shall ... pass any ... ex post facto law ....”) is comparable to that of

inflicts a greater punishment, than the law annexed to the crime, when committed. *Calder v. Bull*, 3 U.S. (Dall.) 386, 390, 1 L.Ed. 648 (1798).

The ex post facto analysis is essentially the same in Washington as under the federal constitution. *State v. Enquist*, 163 Wn.App. 41, 256 P.3d 1277 (2011); *State v. Edwards*, 104 Wn.2d 63, 70, 701 P.2d 508 (1985).

A law violates ex post facto principles if it (1) is substantive, rather than merely procedural; (2) is retrospective, applying to events that occurred before the law's enactment; and (3) disadvantages the person affected by it. *Ward*, 123 Wn.2d at 498, 869 P.2d 1062. See also *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). A law “disadvantages” a defendant only if it enhances the punishment that existed under the prior law. *Ward*, 123 Wn.2d at 498.

The prohibition on ex post facto laws bars a legislature from enacting “any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed....” *Beazell v. Ohio*, 269 U.S. 167, 169, 46 S.Ct. 68, 70 L.Ed. 216 (1925). Statutes generally operate prospectively to give fair warning that a violation will result in a specific consequence. *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007). Ex post facto problems are avoided when a defendant is

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Washington's (“No ... ex post facto law ... shall ever be passed.”).

subject to the penalty in place the day the crime was committed. After the fact, the State may not increase the punishment. *Pillatos*, 159 Wn.2d at 475.

*c. An analysis of the Mendoza-Martinez factors shows that the registration statute is punitive*

The ex post facto prohibition only applies to penal laws and therefore, the question is whether the provisions of the registration statute are punitive or are they merely regulatory. *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718–19, 111 L.Ed.2d 30 (1990). In evaluating whether a statute imposes punishment, courts first ask whether the legislature intended the law to be punitive or regulatory. *Ward*, 123 Wn.2d at 499. But even if the legislative purpose was regulatory, if the actual effect of the law is punitive, the law may not be applied retroactively without running afoul of the ex post facto clauses. *Id.*

Mr. Hampton submits that the “intent-effects” test derived from *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) is the correct rubric to determine if the provisions of the registration statute as applied are punitive or regulatory. To determine whether a law is punitive in effect, courts consider several factors: whether the law imposes an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment (retribution and deterrence), whether the behavior to which it applies is already a crime, whether 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. *Ward*, 123 Wn.2d at 499 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)).

*i. Affirmative disability or restraint*

The first factor weighs heavily in favor of a finding that the registration statute as applied is punitive. Mr. Hampton's predicate offenses are not comparable to any Washington statute. Accordingly, at the time of the offense, there was no requirement that he register as a sex offender. RCW 9A.44.130 (1998).

It was not until a year and a half after his release from federal custody, in 2005, that he was notified by Mr. Moon that the Bureau of Prisons required him to register as a sex offender. The statute that was applied to Mr. Hampton initially required him to register in person, and if he was homeless, to register on a weekly basis. RCW 9A.44.130. Furthermore, the punishment for non-compliance is significant: failure to register is a class B felony if the person has two prior convictions for the crime. RCW 9A.44.132. The application of SORNA renders the statute punitive and the statute cannot be applied retroactively to Mr. Hampton without running afoul of the Constitution.

As is the case in Washington, some states amended their statutes to impose in-person reporting requirements, and courts have held these requirements impose a significant disability or restraint. Maine's registration

statute mandates quarterly in-person updates. See, e.g. .*State v. Letalien*, 985 A.2d 4, 18 (2009). The court held that quarterly in-person registration for life “imposes a disability or restraint that is neither minor nor indirect.” *Id.*

The Oklahoma Supreme Court held the state's statute, which required in-person registration annually for some offenders, semi-annually for other offenders, and every 90 days for habitual sex offenders, was punitive. *Starkey v. Oklahoma Department of Corrections*, 305 P.3d 1004, 1022 (2013).

In this case, the frequency of in-person registration for homeless person required to register as sex offenders under Washington’s statute, should be considered virtually dispositive.

*ii. Sanctions historically considered punishment*

Regarding the second factor, the statute includes sanctions historically considered punishment. Mr. Hampton, if homeless as the State contends, is subject to supervision, as he must report in person every week or face criminal prosecution. RCW 9A.44.130; RCW 9A.44.132. Thus, the burdens imposed on Mr. Hampton are akin to the traditional punishments of parole and probation. See *Letalien*, 985 A.2d at 18 (quarterly in-person verification for life “is undoubtedly a form of significant supervision by the state.”); *Doe v. Dept. of Pub. Safety and Corr. Servs.*, 430 Md. 535, 562, 62 A.3d 123 (2013) (statutory obligations requiring offenders to report in person to law enforcement every three months, give notice to law enforcement of any change of address, notify law enforcement before being away from home for

more than seven days, under threat of imprisonment, “have the same practical effect as placing Petitioner on probation or parole”).

The registration requirements not only contain elements similar to probation or parole, they are also similar to the historical punishment of public shaming. As noted by the Indiana Supreme Court, registration “resembles the punishment of shaming.” *Wallace v. State*, 905 N.E.2d 371, 380 (Ind. 2009). In light of its resemblance to both public shaming and parole, courts have concluded “this factor weighs in favor of finding a punitive effect.” *Doe v. State*, 167 N.H. 382, 111 A.3d 1077, 1097 (2015). This Court should reach a similar conclusion regarding this factor.

### *iii. Finding of scienter*

The third factor is whether the law comes into play only on a finding of scienter. *Mendoza-Martinez*, 372 U.S. at 168. The Washington Supreme Court did not analyze this factor in *Ward*, and the U.S. Supreme Court has stated that this factor is “of little weight” in addressing registration statutes. *Smith v. Doe*, 538 U.S. 84, 105, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003).

### *iv. Traditional aims of punishment*

The fourth factor in determining whether a statute is punitive is whether it promotes retribution and deterrence, which are traditional aims of punishment. *Mendoza-Martinez*, 372 U.S. at 168. In *Ward*, the Supreme Court acknowledged “that a registrant, aware of the statute's protective purpose, may be deterred from committing future offenses.” 123 Wn.2d at 508. But the court

concluded, “even if a secondary effect of registration is to deter future crimes in our communities, we decline to hold that such positive effects are punitive in nature.” *Id.*

***v. Whether the act applies to behavior that is already a crime***

The fifth factor is whether the act applies to behavior that is already a crime. *Mendoza-Martinez*, 372 U.S. at 168. If it does, the factor weighs in favor of finding that the effects are punitive. *Doe v. State*, 111 A.3d at 1098. The Washington Supreme Court did not find this factor relevant in evaluating registration statutes. See *Ward*, 123 Wn.2d at 500-08.

***vi. Rational connection to non-punitive purpose***

The sixth factor is “whether an alternative purpose to which the law may rationally be connected is assignable for it.” *Mendoza-Martinez*, 372 U.S. at 168-69. The legislature's stated purpose in enacting the registration statute was to assist law enforcement efforts to protect the community. See *Ward*, 123 Wn.2d at 499. However, recent statistics show that reducing recidivism by requiring registration for kidnapping and sex offenders is anything but rational. At least one study suggests that sex offenders are less likely to reoffend than other criminals - yet Washington's law imposes onerous burdens only upon sex and kidnapping offenders. See *Does # 1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016). The relationship between the non-punitive goals and the method selected by the Legislature is not rational, this Court should find this factor weighs heavily in favor of finding the statute's effects

are punitive.

*vii. Excessiveness*

The final factor is whether the statute “appears excessive in relation to the alternative purpose assigned.” *Mendoza-Martinez*, 372 U.S. at 169. In *Ward*, the Supreme Court concluded the effects of the 1994 statute were not excessive in relation to its nonpunitive purpose, 123 Wn.2d at 509, but that conclusion is no longer applicable in light of the arduous in-person registration obligations and widespread online notification. Other courts have found the nonpunitive purpose of their registration and notification statutes to be outweighed by their punitive effects. See, *Doe v. State*, 111 A.3d at 1100 (finding excessiveness where offenders must appear in person several times per year, information is put online for anyone to access, and there was no way for offender to be relieved from duty to register); *Starkey*, 305 P.3d at 1029-30 (finding excessive the retroactive application of level assignment requiring offender to register in person every 90 days for life and have personal information publicly disseminated).

In sum, the Washington's sex offender registration statute is “punitive” for purposes of ex post facto analysis. The statute imposes significant burdens and restraints on individuals required to register. Due to the nature and public ramifications of registration, it has a substantial deterrent and retributive effect, and its punitive effects outweigh the legitimate aim of protecting the public. The law therefore violates ex post facto prohibitions as applied to Mr.

Hampton. Mr. Hampton asks this Court to reverse the conviction and remand for dismissal of the charge with prejudice.

**2. THE COURT ERRED IN IMPOSING AN INTEREST ACCRUAL PROVISION**

*a. Recent statutory amendments prohibit discretionary costs for indigent defendants*

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in *Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess.* (Wash. 2018) (HB 1783) and as of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee, former RCW 36.18.020(2)(h), on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The amendment applies prospectively and is applicable to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 739, 746-50.

*House Bill 1783* amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” *Ramirez*, 191 Wn.2d at 746 (citing Laws of 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that

the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” HB 1783 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. The Supreme Court in *Ramirez* concluded the trial court impermissibly imposed discretionary LFOs and a \$200 criminal filing fee and remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. *Ramirez*, 191 Wn.2d at 750.

In this case, the court imposed a \$500 crime victim fund assessment, which HB 1783 retains as a mandatory LFO. RCW 7.68.035(1)(a). *State v. Catling*, 193 Wn.2d 252, 438 P.3d 1174 (2019) (noting that *House Bill 1783* “specifically and repeatedly” identifies the assessment fee as mandatory).

As amended in 2018, subsection (3) of RCW 10.01.160 now states, “[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3). Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

***b. The court did not inquire into Mr. Hampton’s financial situation***

The sentencing court must conduct on the record an individualized

inquiry into the defendant's present and future ability to pay before imposing discretionary costs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry requires the court to consider factors such as incarceration and a defendant's other debts, including restitution, when determining his ability to pay. *Id.* Here, the court did not engage in a *Blazina* inquiry, but imposed a \$500.00 crime victim assessment and \$100.00 DNA collection fee.

RCW 10.01.160 is mandatory: “it creates a duty rather than confers discretion.” *Blazina*, 182 Wn.2d at 838 (citing *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). “Practically speaking ... the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay.” *Id.* “Within this inquiry, the court must also consider important factors ... such as incarceration and a defendant's other debts ... when determining a defendant's ability to pay.” *Id.*

*c. Mr. Hampton was indigent*

Mr. Hampton was represented by court-appointed counsel and shortly after sentencing the court found Mr. Hampton indigent and unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 127. Thus, the record indicates that Mr. Hampton was indigent under RCW 10.101.010(3) at the time of sentencing.

*d. The trial court erred by imposing discretionary interest accrual LFOs*

The trial court found Mr. Hampton indigent at sentencing. CP 127-28.

Mr. Hampton challenges the interest accrual on non-restitution LFOs assessed in Section 4.1 of the judgment and sentence. CP 107. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence states that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. CP 107. The 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.” As amended, RCW 10.82.090 now provides:

- (1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of the effective date of this section [June 7, 2018], no interest shall accrue on non-restitution legal financial obligations.

See Laws of 2018, ch. 269.

Under RCW 10.82.090(1) and (2)(a) the interest accrual provision in the judgment and sentence pertaining to non-restitution LFOs must be stricken.

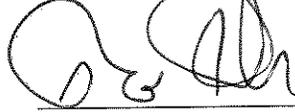
**E. CONCLUSION**

For the reasons stated, Mr. Hampton respectfully asks the Court to reverse the conviction and remand for dismissal of the charge with prejudice.

In the alternative, Mr. Hampton respectfully requests this Court remand for resentencing with instructions to strike the discretionary costs of the interest accrual provision to the extent it applies to non-restitution LFOs.  
DATED: August 8, 2019.

Respectfully submitted,

THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on August 8, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Michelle Hyer Prosecuting Attorney and copies were emailed to the following:

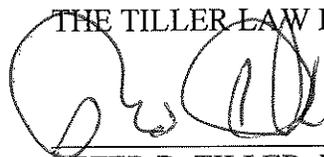
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on August 8, 2019.

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**August 08, 2019 - 2:30 PM**

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