

FILED
Court of Appeals
Division II
State of Washington
7/1/2020 4:09 PM

No. 54067-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DARREN RONELL SMITH JR.,

Appellant.

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

BRIEF OF APPELLANT

KATE L. BENWARD
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESiii

A. INTRODUCTION..... 1

B. ASSIGNMENTS OF ERROR 3

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR3

D. STATEMENT OF THE CASE..... 4

E. ARGUMENT..... 7

1. **Mandatory sex offender registration predicated on a juvenile offense is punishment that in Mr. Smith’s case, violated the ex post facto clause**..... 7

 a. Laws that increased the requirements of sex offender registration and punishment for non-compliance were applied retroactively to Mr. Smith. 7

 b. The onerous reporting requirements and public disclosure for homeless low-level offenders based on a juvenile conviction is punitive. 9

 i. Sex offender registration is an affirmative disability or restraint that is punishment, especially when based on a juvenile offense. 13

 ii. In-person reporting and publicly released information is a sanction that is historically considered punishment. 20

 iii. The publicity and supervision of homeless registrants promotes traditional aims of punishment; *Ward’s* non-punitive justification in the adult context does not apply to juvenile offenses. 24

 iv. Registration based on a juvenile offense is excessive in relation to its stated non-punitive purpose. 27

c. This ex post facto violation requires reversal of Mr. Smith's conviction for failure to register.....	33
2. Mandatory sex offender registration based on a juvenile offense violates due process because it is imposed without a hearing to determine whether the child is a risk to sexually reoffend.	34
a. Mandatory sex offender registration based on an offense adjudicated in juvenile court violates procedural due process.	35
i. A child under juvenile court jurisdiction has a significant interest in not being subject to adult criminal laws.	37
ii. The risk of erroneous deprivation is high where juvenile court procedures lack the same constitutional protections afforded adult defendants and research shows juveniles pose a very low risk to sexually reoffend.	38
iii. The government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail is minimal.	46
b. Mandatory sex offender registration predicated on a juvenile offense violates substantive due process.	47
c. Reversal and remand is required where Mr. Smith's automatic duty to register as a sex offender based on a juvenile adjudication violates due process.....	48
3. The trial court erred in imposing a discretionary legal financial obligation on Mr. Smith, who is indigent.....	49
F. CONCLUSION.....	50

TABLE OF AUTHORITIES

Washington State Supreme Court Decisions

<i>Davison v. State</i> , ____, Wn.2d. ____, No. 96766-1, 2020 WL 3455846 (June 25, 2020)	41
<i>Monroe v. Soliz</i> , 132 Wn.2d 414, 939 P.2d 205 (1997)	38, 40
<i>State v. B.O.J.</i> , 194 Wn.2d 314, 449 P.3d 1006 (2019).....	26
<i>State v. Bassett</i> , 192 Wn.2d 67, 428 P.3d 343 (2018).....	33
<i>State v. Chavez</i> , 163 Wn.2d 262, 180 P.3d 1250 (2008)	39, 40
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017)	48
<i>State v. O'Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	32, 42
<i>State v. Posey</i> , 161 Wn.2d 638, 167 P.3d 560 (2007).....	37
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	49
<i>State v. S.J.C.</i> , 183 Wn.2d 408, 352 P.3d 749 (2015) ..	17, 18, 23, 26, 30
<i>State v. Ward</i> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	7, 9, 10, 13, 14, 15, 20, 24, 25, 27, 33
<i>State v. Watkins</i> , 191 Wn.2d 530, 423 P.3d 830, 834 (2018).	35, 36, 37, 47
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006)	43
<i>Yim v. City of Seattle</i> , 194 Wn.2d 682, 451 P.3d 694 (2019), <i>as amended</i> (Jan. 9, 2020)	35

Statutes

Laws of 1990, ch. 3, § 401	10, 27, 48
----------------------------------	------------

Laws of 1990, ch. 3, § 402	14
Laws of 1999, 1st Spec. Sess., ch. 6, §2	11
Laws of 2001, ch. 169, § 6	5, 8, 11
Laws of 2003, ch. 217, § 1(5)	8, 15
Laws of 2008, ch. 98, § (5).....	8
Laws of 2008, ch. 98, § 1	15
Laws of 2010, ch. 267, § 3	5, 8, 14
RCW 10.01.160(3).....	49
RCW 13.04.021.....	39
RCW 4.24.550.....	11, 15
RCW 9.94A.510	25
RCW 9A.44.128	5
RCW 9A.44.130	5, 9, 13, 20, 34, 36, 41, 44, 49
RCW 9A.44.132	14
RCW 9A.44.138	17
RCW 9A.44.143	30, 31, 32

Washington Constitutional Provisions

Const. art. I, § 23	7
Const. art. I, § 3	34

Washington Court of Appeals Decisions

<i>State v. Boyd</i> , 1 Wn. App. 2d 501, 408 P.3d 362 (2017)....	11, 12, 13, 14, 21, 32
<i>State v. Dillon</i> , 12 Wn. App. 2d 133, 456 P.3d 1199 (2020) ...	49, 50
<i>State v. Enquist</i> , 163 Wn. App. 41, 256 P.3d 1277 (2011)	11
<i>State v. Lundstrom</i> , 6 Wn. App. 2d 388, 429 P.3d 1116 (2018)	49

Federal Constitutional Provisions

U.S. Const. amend. XIV, § 1.....	34
U.S. Const. art. I, § 10.....	7

United States Supreme Court Decisions

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)	39
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	39
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)	35
<i>Collins v. Youngblood</i> , 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).....	7, 8
<i>Connecticut Dep't of Pub. Safety v. Doe</i> , 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003)	39
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)	42

<i>In re Gault</i> , 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)	35
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)	10, 12, 24
<i>Kent v. United States</i> , 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).....	36, 37, 38, 41, 46
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)	36
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971)	40, 43
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)	32, 33
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)	35
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).....	32
<i>Smith v. Doe</i> , 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).....	9, 21
<i>Thompson v. Oklahoma</i> , 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988).....	47
<i>Weaver v. Graham</i> , 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981)	7, 9
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971).....	35

United States Court of Appeals Decisions

<i>Does #1–5 v. Snyder</i> , 834 F.3d 696, 703 (6th Cir. 2016) ...	16, 21
--	--------

United States v. Juvenile Male, 590 F.3d 924 (9th Cir. 2010)
29

Federal District Court Decisions

Harling v. United States, 111 U.S. App. D.C. 174, 295 F.2d
 161 (1961)37

Millard v. Rankin, 265 F. Supp. 3d 1211 (D. Colo. 2017).....22

Other Authorities

Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1 (2013)
23

Michael F. Caldwell & Elizabeth Letourneau, et. al, as Amici
 Curiae Supporting Juvenile Appellant, *Commonwealth v.
 Juvenile*, NO. SJC-12790 (January 2020)19, 26, 44, 45

Catherine L. Carpenter, *Against Juvenile Sex Offender
 Registration*, 82 U. Cin. L. Rev. 746, 785 (2014).....28, 29

Elizabeth Garfinkle, *Coming of Age in America: the
 Misapplication of Sex Offender Registration and
 Community Notification Laws*, 91 Calif. L. Rev., 163 (2003)
28, 29, 30

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
 (2018).....18, 27, 28

Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex
 Offender Registration*, 27 Dev. Mental Health L. 34 (2008)
17, 18, 29, 31

Rules

RAP 2.5(a)(3)8

Authority From Other States

Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017)..... 16, 22

Doe v. Dep’t of Pub. Safety and Corr. Servs., 62 A.3d 123 (Md. 2013) 16

Doe v. State, 111 A.3d 1077 (N.H. 2015)..... 16, 22

Doe v. State, 189 P.3d 999 (Alaska 2008) 16

I.C. § 11–8–8–5(b)(2).....46

In re. C.P., 131 Ohio St.3d 513, 967 N.E.2d 729 (2012) 23

N.L. v. State, 989 N.E.2d 773 (Ind. 2013).....46

People in Interest of T.B., 16CA1289, 2019 WL 2528764 (Colo. App. June 20, 2019), *cert. granted*, 2020 WL 529206 (Colo. Feb. 3, 2020).....23

Starkey v. Okla. Dept. of Corrections, 305 P.3d 1004, 1022 (Okla. 2013)..... 16, 32

State v. Letalien, 985 A.2d 4 (Me. 2009) 16

State v. Myers, 923 P.2d 1024 (Kan. 1996) 16

Wallace v. State, 905 N.E.2d 371 (Ind. 2009) 16

A. INTRODUCTION

Juvenile courts are designed to take into account a child's reduced culpability, sacrificing certain constitutional rights to promote rehabilitation, so that the child can enter adulthood unburdened by the consequences of impetuous decisions that are the hallmark feature of youth. These principles go by the wayside, however, for children adjudicated of sex offenses, who are subject to mandatory sex offender registration regardless of any evidence their juvenile offense makes them a risk to sexually reoffend.

In January of 2001, when Darren Smith was 14, he committed a sex offense and pleaded guilty in juvenile court. This juvenile offense subjected him to mandatory sex offender registration. Later that year, the registration requirements for low-risk homeless registrants increased. The legislature required weekly in-person reporting for all homeless registrants, regardless of risk level, where before, level one registrants were required to submit to only monthly in-person reporting. The registration requirements were also changed to subject low-risk-level homeless registrants to public disclosure for

noncompliance. Then, in 2010, the penalty for a person with multiple failure to register convictions increased from a class c to a class B offense.

By 2019, Mr. Smith, a low-risk-level registrant, had sustained numerous convictions for failure to register, and was prosecuted for the Class B offense of failure to register after failing to comply with the weekly homeless registrant requirements based on conduct from when he was 14 years old. The application of the laws requiring in-person, weekly registration, and public exposure for a homeless, low-risk registrant like Mr. Smith are punitive when based on a juvenile sex offense, and constitute an ex post facto violation, requiring reversal of Mr. Smith's conviction for failure to register.

In addition, this conviction that results from mandatory registration based on conduct Mr. Smith committed as a child—without a hearing to determine whether he posed risk of recidivism sufficient to justify registration under the adult criminal laws—also violates due process, undermining his conviction for failure to register.

B. ASSIGNMENTS OF ERROR

1. Mr. Smith's conviction for failure to register based on the sex offender registration statutes enacted after he committed the triggering sexual offense violates the ex post facto clauses of the state and federal constitutions.

2. Mandatory sex offender registration based on a juvenile adjudication violates the state and federal due process clauses.

3. The court erred in imposing a discretionary legal financial obligation on Mr. Smith, who is indigent.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. 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 the offense occurred. Washington has some of the most onerous requirements for sex offender registration, including now mandatory weekly in-person reporting for low-risk homeless registrants, and inclusion on the on-line registry for missing a weekly check-in that became law after Mr. Smith's conduct as a 14-year-old in 2001. These requirements constitute punishment when imposed based on a juvenile offense because they cause

particular harm to juveniles, yet research shows juveniles convicted of sex offenses pose a remarkably low risk of sexually reoffending. Mr. Smith was prosecuted for failing to comply with the onerous weekly check-ins as a level one registrant in violation of the ex post facto clause.

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 afforded in an adult criminal proceeding—mandatory sex offender registration exposes the child to adult criminal laws without any judicial assessment of risk to reoffend. This mandatory registration requirement based on a juvenile offense violates due process, requiring reversal of Mr. Smith’s conviction for failure to register.

D. STATEMENT OF THE CASE

When Darren Smith was fifteen years old, he 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, this juvenile adjudication resulted in mandatory registration as a sex offender. CP 3 (citing RCW 9A.44.128, RCW 9A.44.130).

After his offense in 2001, the registration requirements became increasingly punitive. The sex offender registration laws were amended to require even low risk, level one homeless registrants to report weekly, and subjected low level offenders to public disclosure for failure to comply with the much more rigorous reporting requirements. Laws of 2001, ch. 169, § 6(b). The punishment for failure to register also increased from a class C to a class B offense for multiple failure to register offenses. Laws of 2010, ch. 267, § 3(b).

Since he is classified as a sex offender, Mr. Smith has had difficulty finding housing or employment. 9/13/19 RP 7. This has resulted in depression that Mr. Smith self-medicates with through drug use. 9/13/19 RP 6, 8; *see also* CP 18 (drug convictions).

Because Mr. Smith is homeless, 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). He has not been able to consistently comply with these requirements, and was convicted for failure to register beginning in 2005 at age 18, Ex. 15, and then again in 2007, 2009, and 2015. Ex. 11, 17, 12. He was charged again in the instant case with failure to register. CP 3.

Mr. Smith was found guilty of this offense in a bench trial. CP 11. Mr. Smith's failure to report weekly as a transient person was the basis for his conviction for failure to register. CP 3, 9 FF II-III, 17. Mr. Smith's prior failure to register convictions elevated this to a class B felony offense. CP 3. He had no other sex offense convictions, other than his failure to register convictions. CP18. 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.

E. ARGUMENT

1. **Mandatory sex offender registration predicated on a juvenile offense is punishment that in Mr. Smith's case, violated the ex post facto clause.**
 - a. Laws that increased the requirements of sex offender registration and punishment for non-compliance were applied retroactively to Mr. Smith.

The ex post facto prohibitions of the state and federal constitutions forbid the enactment of a law which punishes an act 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,” “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). “Subtle *ex post facto* violations are no more permissible than overt ones.” *Collins*, 497 U.S. at 46. Whether there was an *ex post facto* violation is a constitutional question subject to review under RAP 2.5(a)(3).

Since 1990, when the Legislature passed laws requiring the registration of sex offenders, these laws have become increasingly punitive. The homeless registration laws changed substantively 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. The State 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 52 per year check-ins will be posted on a public website. Laws of 2008, ch. 98, § (5)(a). And in 2010, the

Legislature increased the crime of failure to register from a class C felony to a Class B felony. Laws of 2010, ch. 267, § 3(b).

These laws were applied retroactively to Mr. Smith, whose conduct occurred before these more punitive laws for low-level, homeless registrants were enacted. *See Weaver*, 450 U.S. at 29. The only question is whether the sex offender registration laws are “punishment” under the ex post facto clause.

- b. The onerous reporting requirements and public disclosure for homeless low-level offenders based on a juvenile conviction is punitive.

When the person challenging the statute shows by the “clearest proof” that despite contrary legislative intent, the requirement is a “criminal penalty,” this establishes punishment under the ex post facto clause. *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Here the registration statute—RCW 9A.44.130(1)—does not have a punitive intent; the question is whether the effect of the sex offender registration statute, when based on a juvenile offense for a low-risk offender, constitutes punishment, or is a “criminal penalty” which may not apply retroactively to Mr. Smith. *See Ward*, 123 Wn.2d at 499-500.

Ward applied several of the factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) to determine whether the registration laws of 1990 were punitive in effect, considering if (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.¹ *Ward*, 123 Wn.2d at 500-12.

Ward decided sex offender registration was not punitive. 123 Wn.2d at 510-11. But critical changes to the law for transient offenders have been imposed after *Ward*, which was decided in 1994 and considered only the 1990 registration laws:

¹ *Ward* did not consider two of the *Mendoza-Martinez* factors, “whether the regulation comes into play only on a finding of scienter” and “whether the behavior to which it applies is already a crime.” The Supreme Court has likewise determined these factors are “of little weight” in this context. *Smith*, 538 U.S. at 105.

Transient Registration Requirements	
Laws of 1990, ch. 3, § 401	<ul style="list-style-type: none"> • Transient offenders are required to register with county sheriff's office, providing their (i) Name; (ii) date and place of birth; (iii) place of employment; (iv) crime for which convicted; (v) date and place of conviction; (vi) aliases used; (vii) social security number; (viii) photograph; (ix) fingerprints; and (x) where he or she plans to stay.
Laws of 1999, 1st Spec. Sess., ch. 6, §2 (6)(b)	<ul style="list-style-type: none"> • Level II and III transient registrants are required to report, in-person weekly; Level I transient registrant required to report monthly.
Laws of 2001, ch. 169, § 6(b) (effective 7/22/01) (RCW 9A.44.130(6)(b))	<ul style="list-style-type: none"> • All levels of transient offenders must report weekly, including Level I; • Transient registrants may be required to list the locations they have stayed during the last seven days. • Lack of fixed residence shall make the offender subject to disclosure of information to the public at large under RCW 4.24.550 for failure to register.
Laws of 2010, ch. 225, §1	<ul style="list-style-type: none"> • Transient registrants now statutorily required to keep records and locations where they stayed and provide to county sheriff if requested
Laws of 2010, ch. 267 § 2 (RCW 9A.44.132)	<ul style="list-style-type: none"> • A third prior failure to register is elevated from a Class C to a Class B offense.

In *State v. Enquist*, this Court considered the 1999 laws that imposed more exacting registration requirements on the homeless. 163 Wn. App. 41, 256 P.3d 1277 (2011). *Enquist* “concluded—without discussing the *Mendoza-Martinez* factors,” that the weekly, in-person reporting requirement did not violate the ex post facto clause. *State v. Boyd*, 1 Wn. App. 2d 501, 510, 408 P.3d 362 (2017) (citing *Enquist*, 163 Wn. App. at 49).

In *Boyd*, Division I recognized the requirement for weekly, in-person registration is more burdensome than the requirements considered by the Supreme Court in *Ward*, but disagreed that the registration requirements violated the ex post facto clause. *Id.*

Boyd was a 2-1 decision in which Judge Becker dissented and “would join the jurisdictions holding that frequent in-person reporting requirements render a registration statute so punitive that applying it retroactively violates the constitution.” *Boyd*, 1 Wn. App. 2d at 528 (Becker, J., dissenting).

These decisions did not consider the more exacting registration requirements specific to the 2001 homeless registrant requirements for low-level offenders like Mr. Smith, or consider whether these requirements were punitive when imposed based on a juvenile offense. Applying the *Mendoza-Martinez* factors to the current, far more punitive, registration requirements than were considered by *Ward*, based on conduct that occurred when the registrant was a child, establishes that Mr. Smith’s obligation to register as a low-risk sex offender based on juvenile adjudication is punishment.

- i. Sex offender registration is an affirmative disability or restraint that is punishment, especially when based on a juvenile offense.

Ward determined the registration laws in effect then “impose[d] no significant additional burdens on offenders” because they only required the registrant to provide identifying information, photographs, and fingerprints. 123 Wn.2d at 500. The Court concluded that this type of information is routinely obtained and “it is inconceivable that filling out a short form with eight blanks creates an affirmative disability. Registration alone imposes burdens of little, if any, significance.” *Id.* at 501.

However, today’s registration requirements require all individuals lacking a “fixed residence” to report in person every week—52 times a year. RCW 9A.44.130(6)(b). These registrants must “keep an accurate accounting” of where they stay during the week and provide it to the county sheriff upon request. *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 weekly reporting requirement—required for even for low-

risk, level I registrants, “can readily lead to an unending cycle of imprisonment for transient offenders, particularly those who are dealing with mental health issues.” *Id.* at 526. This cycle of incarceration is “the paradigmatic affirmative disability or restraint.” *Id.* (citation omitted).

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.

Ward also held registration was not punitive because “[t]he Legislature placed significant limits on (1) whether an agency may disclose registrant information, (2) what the agency may disclose, and (3) where it may disclose the information.” 123 Wn.2d at 502. “[I]n many cases, both the registrant information and the fact of registration remain confidential.” *Id.* Disclosure was only warranted where an agency had “some evidence of dangerousness in the future,” and *Ward* noted that the “geographic scope” of the disseminated information could be

limited “only to the surrounding neighborhood, or to schools and day care centers.” *See id.* at 503–04. *Ward* concluded “the statutory limits on disclosure ensure that the potential burdens placed on registered offenders fit the threat posed to public safety.” *Id.* at 504.

These privacy safeguards cited by *Ward* have since been undone. The State implemented a statewide registered sex offender web site in 2003. Laws of 2003, ch. 217, § 1(5)(a). The public release of information related to homeless registrants under RCW 4.24.550(5)(a) sweeps up even level one offenders like Mr. Smith, putting him on the website if he misses one of his 52 in-person check-ins during the year. Laws of 2008, ch. 98, § 1(5)(a) & (b). Now, for level I sex offenders like Mr. Smith, who pose a very low risk of re-offense but are homeless and struggle to comply with the rigors of weekly in-person reporting, his personal information will be disclosed to the public, regardless of whether such information is “relevant to and necessary for counteracting the offender’s dangerousness.” *Compare Ward*, 123 Wn.2d at 503-04.

Other courts recognize that even for adults, in-person reporting, increased punishments, and searchable online databases place a significant disability and restraint on registrants, and that these restraints amount to punishment. The Sixth Circuit concluded that Michigan’s registration laws were “direct restraints” and thus punitive. *Does #1–5 v. Snyder*, 834 F.3d 696, 697-98, 703, 705 (6th Cir. 2016); *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004, 1022 (Okla. 2013) (in-person requirements “place substantial restrictions on the movements of lifetime registrants” which can amount to an affirmative disability); *Doe v. State*, 189 P.3d 999, 1009-11 (Alaska 2008) (in-person reporting, length of registration, and intrusiveness of information that is publicly disseminated is punitive); *Commonwealth v. Muniz*, 164 A.3d 1189, 1210-11 (Pa. 2017) (recognizing that monthly reporting for homeless offender is a direct restraint); *State v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) (holding that the public disclosure provisions constitute punishment); *Doe v. State*, 111 A.3d 1077, 1096 (N.H. 2015); *Doe v. Dep’t of Pub. Safety and Corr. Servs.*, 62 A.3d 123, 139 (Md.

2013); *Wallace v. State*, 905 N.E.2d 371, 379-80 (Ind. 2009);
State v. Letalien, 985 A.2d 4, 18 (Me. 2009).

Mandatory registration imposed for a juvenile offense is especially punitive 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”). For instance, a juvenile’s educational opportunities are far more directly impacted by public disclosure of their offender status because it is required in order for them to access higher education. RCW 9A.44.138. These limits impact a juvenile sex offender’s passage into adulthood, unlike when imposed on an adult who has had an opportunity to establish themselves.

The public nature of this disclosure is demonstrably punitive in contrast to the traditional confidentiality protections

afforded to juveniles: “juvenile court records should be treated as separate from, and deserving of more confidentiality than, other types of court records.” *S.J.C.*, 183 Wn.2d at 421. This is because sealing a juvenile record from public view promotes juvenile rehabilitation. *Id.* By contrast, sex offender registration and notification laws send the message that the judicial system has “given up” on these juveniles, publicly labeling them in such a way that defeats the juvenile court’s aims of rehabilitation and social reintegration. Geer, *supra*, at 51.

Studies comparing the social wellbeing of youth who commit sex offenses and who are required to register, versus those not subjected to a sex offender registry “lend 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.

Results from the first empirically rigorous evaluation of the effects of registration on juveniles revealed children suffered immediate harm because of it. Brief of Michael F. Caldwell & Elizabeth Letourneau, et. al, as Amici Curiae Supporting Juvenile Appellant, *Commonwealth v. Juvenile*, NO. SJC-12790, 34 (January 2020) (attached as Appendix). Their studies found that for youth required to register, as compared to unregistered youth in treatment based on problematic sexual behaviors, registered youth were

- Four times more likely to have reported a suicide attempt in the past 30 days than non-registered youth;
- Five times more likely to report having been approached by an adult for sex in the past year;
- Twice as likely to report having sustained hands-on sexual assault victimization in the past year.

Id. at 34-35.

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 by placing them in this category—all of which makes it an affirmative disability far more onerous and punitive than requiring registration for an adult.

- ii. In-person reporting and publicly released information is a sanction that is historically considered punishment.

Ward likened sex offender registration to “a traditional governmental method of making available relevant and necessary information to law enforcement agencies” such as providing one’s address to the Department of Motor Vehicles or requiring people to provide DNA for a data bank. *See Ward*, 123 Wn.2d at 507. This reasoning was based on the limited requirements for registration and confidentiality provisions for low-level offenders that existed at the time of *Ward*. No such analogy can be made based on the current sex offender registration requirements. As discussed in section i, *supra*, even for low-level offenders, if they are homeless and fail to comply with a single weekly in-person reporting requirement, their information will be displayed on a public website. RCW 9A.44.130(6)(b).

The requirement that a homeless registrant travel in person to the sheriff's office once a week and report all overnight locations during the past week "resembles a requirement to meet periodically with a probation or parole officer, a sanction historically regarded as punishment." *Boyd*, 1 Wn. App. 2d at 526 (Becker, J. dissenting). Because the failure to report in person can lead to incarceration, it is much like a probationer's requirements which if not followed, lead to revocation and imprisonment. *Id.* at 526-27 (citing *Snyder*, 834 F.3d at 703).

Registration is now more akin to public shaming, because a person's status as a sex offender is released to the public if he fails to show up for one of his 52 times per year requirements of in-person reporting regardless of whether he poses a low risk of re-offense. *See Snyder*, 834 F.3d at 703 (but for the sex offender registration statute's retroactive application to him, his criminal record would not be available to the public; thus "the ignominy under [the registration statute] flows not only from the past offense, but also from the statute itself."); *Smith*, 538 U.S. at 109 (Souter, J., concurring in the judgment) ("dissemination of offenders' names, photographs, addresses, and criminal history

serves not only to inform the public but also to humiliate and ostracize”).

Registration thus resembles shaming punishments historically used to disable offenders from living normally in the community. *Muniz*, 164 A.3d at 1213 (considering publication provisions of registration law, “when viewed in the context of our current internet-based world—to be comparable to shaming punishments”); *Doe*, 111 A.3d at 1097; (“[T]he internet is our town square;” therefore “[p]lacing offenders’ pictures and information online” shames and shuns); *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1227 (D. Colo. 2017) (requiring internet publication of information on the registry and permitting republication by private websites have effects that are “analogous to the historical punishment of shaming and further resemble and threaten to result in effective banishment”—a form of punishment for Eighth Amendment analysis).

As applied to juveniles, “the dissemination of information becomes even more characteristic of a punishment because the information about a juvenile’s criminal history would not otherwise be publicly available.” *People in Interest of T.B.*,

16CA1289, 2019 WL 2528764, *6 (Colo. App. June 20, 2019), *reh'g denied* (Sept. 12, 2019), *cert. granted*, 2020 WL 529206 (Colo. Feb. 3, 2020). Our Supreme Court in *S.J.C.* recognized that “the stigma of an open juvenile record and the negative consequences that follow” required confidentiality in the juvenile context. *S.J.C.*, 183 Wn.2d at 432. This need is “substantial, both for the subject of the juvenile court record and for the juvenile courts’ purpose of preventing adult recidivism.” *S.J.C.*, 183 Wn.2d at 432.

This differentiation is particularly acute when considering the consequences that juveniles face when they are required to register as sex offenders. As Ohio’s supreme court stated

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. This becomes all the more apparent when contrasted with the connection juvenile courts draw between confidentiality and rehabilitation.

- iii. The publicity and supervision of homeless registrants promotes traditional aims of punishment; *Ward’s* non-punitive justification in the adult context does not apply to juvenile offenses.

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* acknowledged the registrant may be deterred by the statute’s “protective purpose.” *Id.*

Recognizing deterrence is a traditional form of punishment, the *Ward* court also noted “the fact of conviction and punishment *served*” was also a deterrent, whether he is required to register or not. *Id.* *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.*

This “primary intent” of aiding law enforcement to monitor recidivists is far less compelling for a low-risk level I offender whose registration is based on a juvenile offense because (1) registration and its requirements amount to far more onerous and long-lasting obligations as compared to a juvenile court sentence; and (2) the need to protect the community from a person who committed a sex offense as a juvenile with no other evidence of risk to sexually reoffend is not justified because juvenile sex offenses do not predict recidivism.

Mr. Smith demonstrates this. He served a short sentence of 15-36 weeks in juvenile detention. Ex. 13. An adult range sentence for the same conduct based on an offender score of “0” is 51-68 months. RCW 9.94A.510 (seriousness level X). Where *Ward* noted the length of incarceration for an adult is clearly a “deterrent,” 123 Wn.2d at 508, this is far less true for the 15-36 week sentence that is designed to provide an opportunity for rehabilitation, not punishment: “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; *see also, State v. B.O.J.*, 194 Wn.2d 314, 326, 449 P.3d 1006 (2019) (the JJA’s purpose of providing necessary treatment is relevant to the length and form of the particular disposition imposed).

This difference between juvenile and adult offenses makes sex offender registration far more punitive when applied to a juvenile offense than in the adult context, where a lengthy prison sentence is the primary deterrent for the conduct.

The stated primary purpose of registration—public safety— does apply to juvenile offenders, for whom studies conducted during the past 15 years show “more than 97% of youth who were adjudicated for sex crimes did not reoffend with new sex crimes.” Caldwell & Letourneau, *supra*, at 15.

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

punishment when imposed for a juvenile offense and where the person presents a low risk of reoffending.

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

The remarkably low rate of juvenile sexual re-offending also makes mandatory sex offender registration based on a juvenile offense “excessive to its non-punitive purpose.” *Ward*, 123 Wn.2d at 508.

The legislative intent behind mandatory sex offender registration is due to 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.” *Ward*, 123 W.2d at 509. This purpose is not served where research shows, as discussed above, that juvenile sex offenses are different than adult sex offenses, and that children who sexually offend have remarkably low rates of sexual re-offense. Letourneau et. al., *supra* 4 Psychol. Pub. Pol’y

& L., at 115. There is no evidence to support an argument that registration based on juvenile offenses increases public safety. *Id.* at 115.

This is in part because juveniles commit sex offenses for different reasons than adults. Juveniles who commit sex offenses show no measurable difference in sexual preferences than other juveniles 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). Research on juvenile sex offending confirms that it is based on emotions such as anger or fear rather than any “predetermined trait that predicts the child’s future sexual dangerousness.” Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. Cin. L. Rev. 746, 785 (2014).

Unlike for adults, juvenile criminal sexual activity appears to result more from a lack of “appropriate channels for sexual expression than from the kind of psychological disorder attributed to adult offenders.” Garfinkle, *supra*, at 190. Indeed, research shows that non-sexual problems are the source of

juvenile offending, including “poor social competency skills” and “deficits in self-esteem,” rather than the “paraphilic interest and psychopathic characteristics” that are more common in adult offenders. *Id.* at 191. Most studies on juvenile sex offending found juvenile sexual offenders to be “heterogeneous and devoid of unique characteristics.” *Id.* at 193.

Where adult sexual offending tends to be “the result of deeply ingrained and long-standing pathology,” juvenile offending appears to be more “exploratory” and less fixed. Geer, *supra*, at 42.

Most juveniles who commit sexual offenses as adolescents cease doing so as adults because 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). The data does not support singling out child sex offenders as a subgroup of juvenile offenders. Carpenter, *supra*, at 785-86. Even when children do reoffend, they likely do so for motivations other than “serial predatory tendencies.” *Id.* at 787.

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 monitored by dependency and juvenile justice systems, which makes it more likely that their sexual conduct will be criminally sanctioned and thus subject to mandatory registration laws. *See id.*; *see also, S.J.C.*, 183 Wn.2d at 433 (it is well documented that juveniles of color face disproportionately high rates of arrest and referral to juvenile court). The disproportionate impact of juvenile registration on the most disadvantaged children further establishes the excess of the punishment in light of 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, because mandatory registration for juvenile offenses, regardless of risk to reoffend, is a barrier to the very rehabilitation that is necessary for removal from the registry. *See* RCW 9A.44.143(2)-(3).

Even if a juvenile registrant makes it to the minimum time required before they can seek relief from the registry

without being convicted of failing to register, which makes them ineligible for removal, 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). Paradoxically, eligibility for relief from registration following mandatory registration based on a juvenile offense requires proof of rehabilitation, which is directly undercut by the requirement to register, which "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." Geer, *supra*, at 51.

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. Due to limits on his life prospects since he was a child, Mr. Smith is homeless and struggles with substance abuse and depression. 9/13/19 RP 6-7. 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.

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., Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (there are fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, and impulse control); *State v. O'Dell*, 183 Wn.2d 680, 692, 358 P.3d 359 (2015); *Miller v. Alabama*, 567 U.S. 460, 477, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (the “hallmark features” of youth are “immaturity, impetuosity, and failure to appreciate risks and consequences”).

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. *See, e.g., State v. Bassett*, 192 Wn.2d 67, 74, 428 P.3d 343 (2018) (citing *Miller*, 567 U.S. at 479) (mandatory juvenile life without parole scheme that did not consider the nature of youth and “children’s diminished culpability and heightened capacity for change . . . poses too great a risk of disproportionate punishment”).

Mandatory registration is excessive in light of the unrefuted data that establishes juveniles convicted of sex offenses are not a threat to reoffend, and its mandatory requirements that hobble a child’s ability to be rehabilitated makes mandatory registration when based on a juvenile offense, punishment.

- c. This ex post facto violation requires reversal of Mr. Smith’s conviction for failure to register.

An ex post facto violation will be found if the statute is determined to be unconstitutional beyond a reasonable doubt.

Ward, 123 Wn.2d at 496. As applied to Mr. Smith, he was prosecuted based on registration requirements imposed after he committed his offense as a 14-year-old. These requirements, the most severe of which were created after the conduct triggering his duty to register, are punitive in effect when imposed on a low-level offender who is subject to mandatory registration based on a juvenile offense.

Mr. Smith's failure to register based on his non-compliance with these punitive requirements requires reversal of his conviction and remand for dismissal of the State's charge.

2. Mandatory sex offender registration based on a juvenile offense violates due process because it is imposed without a hearing to determine whether the child is a risk to sexually reoffend.

RCW 9A.44.130(1)'s mandatory registration requirement based on a juvenile offense, absent a hearing to assess future risk to reoffend, violates the procedural and substantive requirements of due process.

The State and federal constitutions guarantee that no person shall be deprived of "life, liberty, or property, without due process of law." Const. art. I, § 3; U.S. Const. amend. XIV, § 1. This protection against "the arbitrary exercise of the powers

of government” has both procedural and substantive components. *Yim v. City of Seattle*, 194 Wn.2d 682, 688, 451 P.3d 694 (2019), *as amended* (Jan. 9, 2020). “The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971).

- a. Mandatory sex offender registration based on an offense adjudicated in juvenile court violates procedural due process.

Juveniles charged with crimes have a right to procedural due process. *In re Gault*, 387 U.S. 1, 30-31, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). They 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, 834 (2018) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)). “Due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484

(1972). 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.94.132. 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 otherwise subject to the jurisdiction of juvenile court 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, its mandatory inclusion of juvenile offenders 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).

It is implicit in the Juvenile Court scheme that “non-criminal treatment is to be the rule—and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases.” *Kent*, 383 U.S. at 560-61 (citing *Harling v. United States*, 111 U.S. App. D.C. 174, 177-78, 295 F.2d 161 (1961)). Juvenile courts are designed to meet the needs of juvenile offenders, not punish them: “[W]e have found this policy as rehabilitative in nature, whereas the criminal

system is punitive.” *State v. Posey*, 161 Wn.2d 638, 645, 167 P.3d 560 (2007); *see also Monroe v. Soliz*, 132 Wn.2d 414, 420-21, 939 P.2d 205 (1997) (citing *Kent*, 383 U.S. at 557) (by proceeding in a juvenile court the State protects offenders “against [the] consequences of adult conviction . . .”)

Before depriving children of the “special rights and immunities” conferred by juvenile court jurisdiction, the child is entitled to the minimal guaranties of due process. *Kent*, 383 U.S. at 556.

- ii. The risk of erroneous deprivation is high where juvenile court procedures lack the same constitutional protections afforded adult defendants and research shows juveniles pose a very low risk to sexually reoffend.

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 do not pose a high risk of sexual reoffending.

A. Fewer procedural protections in juvenile court create a risk juveniles sex offenses are not as reliable as an adult conviction.

Adult criminal defendants are entitled to a jury determination that they are guilty of every element of the crime charged, beyond a reasonable doubt under the Sixth and Fourteenth Amendments. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The jury trial right 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). No additional procedural protections are necessary before adult offenders are included on a sex offender registry based on their conviction 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).

However, children are prosecuted in juvenile court without this critical jury trial right. *State v. Chavez*, 163 Wn.2d 262, 272, 180 P.3d 1250 (2008); *see also* RCW 13.04.021(2) (“[c]ases in the juvenile court shall be tried without a jury.”); Therefore, a “conviction” in juvenile court is not achieved with

the same procedural safeguards that ensure the reliability of an adult conviction.

Courts have long held that the jury trial right does not apply in juvenile proceedings, for fear it would “put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.” *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971). Courts believe a jury trial right would undermine the informality and flexibility of juvenile courts: “If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial.” *Id.* at 550.

Even as over the years the Juvenile Justice Act has been amended to hold juveniles more accountable for their criminal behavior, our Supreme Court still deems juvenile courts to be primarily rehabilitative. *Chavez*, 163 Wn.2d at 270. A jury trial continues to be deemed 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.” *Id.* at 271 (citing *Monroe*, 132 Wn.2d at 419-21).

In *Kent*, the Court 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.” 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 what he agreed to through the rehabilitative process in juvenile court.

The informality of juvenile proceedings has been observed to result in a system where children may not receive the same constitutional guaranties afforded in criminal court. *See, e.g., Davison v. State*, ___, Wn.2d. ___, No. 96766-1, 2020 WL 3455846, at *9 (June 25, 2020) (J. González, concurring) (noting an expert in juvenile justice reviewed the systemic failings of the Grays Harbor juvenile court system and observed a “dearth of advocacy” in which juvenile defendants were processed through

a “meet them and plead them” format). A child processed through a court system like this would be subject to mandatory sex offender registration whether the plea to the qualifying offense was adequately investigated or defended, because juveniles would be far less able to recognize their rights were not being protected and to do anything about it. *See, e.g., Graham v. Florida*, 560 U.S. 48, 78, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (“The features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings”).

This is especially untenable given the constitutional significance our courts have accorded to the fact that a child is less able to engage in the long-term decision-making that is required to fully understand the rigors and consequences of complying with sex offender registration requirements. *O’Dell*, 183 Wn.2d at 692 (the “parts of the brain involved in behavior control continue to develop well into a person’s 20s [and] studies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, [and] tendency toward antisocial behaviors”).

Though our courts do allow the use of juvenile criminal history to count in the later adult's offender score, this is after the child is given the opportunity for rehabilitation, but then reoffends as an adult. The child is thus not automatically subject to the adult criminal laws as a result of their juvenile conviction as is true under mandatory sex offender registration laws. *See State v. Weber*, 159 Wn.2d 252, 264-65, 149 P.3d 646 (2006).

In Mr. Smith's case, he received a 15-36 week sentence when he plead guilty to a serious sex offense he committed when he was 14 years old, without the right of presenting his case to a jury. Ex. 13. Presumably he benefitted from the "intimate, informal protective proceeding" of juvenile court when he entered this plea. *McKeiver*, 403 U.S. at 545. However, these principles justifying fewer constitutional protections based on the rehabilitative aspirations of juvenile court were turned on their head when Mr. Smith's juvenile adjudication resulted in mandatory sex offender registration under the adult criminal law. RCW 9A.44.130(1).

Despite constitutional limitations in juvenile proceedings, the quantifiable observations about the constitutional

deficiencies of juvenile courts, and the constitutionally significant fact that children are deemed far less capable of understanding the long-term consequences of their decisions, juveniles are subjected to mandatory sex offender registration based on a juvenile adjudication under RCW 9A.44.130(1). Requiring judicial discretion before subjecting a child to the registration requirements of RCW 9A.44.130(1) would ensure a juvenile is not unjustly deprived of the rehabilitative protections of juvenile court jurisdiction.

B. Incontrovertible research establishes that children who commit sex offenses have a very low risk of re-offense, making their exposure to adult registration laws unnecessary.

Mandatory inclusion of children in a sex offender registry risks erroneously depriving children of the rehabilitative protections of juvenile court even though research shows that juveniles pose a very low risk of sexual re-offending—defeating the legislature’s reason for subjecting them to mandatory sex offender registration.

As discussed in section 1(b), *supra*, a child who commits a sex offense has no greater risk of sexually reoffending than his

juvenile peer who is adjudicated of another, non-sex offense such as robbery or assault. *See, e.g.*, Caldwell & Letourneau, *supra*, at 15-20. The only difference is that it is more likely that the child who commits a sex offense was sexually abused. *Id.* at 18. This leads researchers to conclude that “distinguishing between youth likely to sexually reoffend or not involves more than simply knowing that a youth has a history of such offending.” *Id.* at 19.

Researchers cannot identify any “specific and stable factors” by which to “identify the very small percentage of youth sexual offenders who are at high risk of sexual recidivism.” *Id.* The most common finding among researchers “is that there is no significant relationship between specific risk factors and youth sexual recidivism. **The extant research has not identified any stable, offense-based risk factors that reliably predict sexual recidivism in adolescents.**” *Id.* (emphasis in original).

Considering that researchers uniformly conclude that a juvenile sex offense does not predict sexual offense recidivism, automatic inclusion on the sex offender registry, without an individualized inquiry about future risk, leads to the erroneous

deprivation of the privacy and rehabilitative purpose of the juvenile court.

- iii. The government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail is minimal.

The process required need not be burdensome. In *Kent*, the Court interpreted the statute that allowed a judge to waive a child into adult court "after full investigation" did not require the hearing to "conform with all of the requirements of a criminal trial or even of the usual administrative hearing." *Kent*, 383 U.S. at 547-48. It need only "measure up to the essentials of due process and fair treatment." *Id.* at 562.

States that require the exercise of a court's discretion before subjecting a child to sex offender registration are instructive. In Indiana, a child adjudicated in juvenile court is statutorily entitled to a hearing before the child may be placed on the sex offender registry. I.C. § 11-8-8-5(b)(2). The court requires an "evidentiary hearing," representation by counsel, and 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 on whether the juvenile should be 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*, the Court rejected the juvenile’s claim that notwithstanding mandatory decline laws, he was entitled to a hearing before being tried in juvenile court. *Watkins*, 191 Wn.2d at 544-46. The 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 registration based on a juvenile offense. In the context of mandatory registration requirements, a child is denied the substantive right to be treated with the reduced culpability that attaches by virtue of his young age and immaturity.

The State has a valid interest in public safety. Laws of 1990, ch. 3, § 401. However, the State has no legitimate interest in imposing onerous, possibly life-long conditions on a person solely because of what he did when he was 14 years old, when the person present a low risk of reoffending and the registration law itself impedes the child’s rehabilitation.

- c. Reversal and remand is required where Mr. Smith’s automatic duty to register as a sex offender based on a juvenile adjudication violates due process.

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 registration as a sex offender violates procedural and substantive due process. Mr. Smith's conviction for failure to register based on RCW 9A.44.130(1)'s mandatory requirements must be reversed.

3. The trial court erred in imposing a discretionary legal financial obligation on Mr. Smith, who is indigent.

Courts may not impose discretionary legal financial obligations on defendants who have been found indigent. RCW 10.01.160(3); *State v. Ramirez*, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). Supervision fees as a condition of community custody are a discretionary legal financial obligation because they “are waivable by the trial court.” *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020); accord *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Erroneously entered discretionary legal financial obligations must be stricken from the judgment and sentence. *Dillon*, 12 Wn. App. at 152.

Mr. Smith informed the court he was indigent—as was readily apparent because his conviction for failure to register conviction turned on the fact that he was homeless. The trial

court stated its intent to waive any non-mandatory costs and fees, indicating that it found Mr. Smith indigent. CP 20; *see also* CP 41 (finding Mr. Smith indigent for purposes of appeal). Nonetheless, the form judgment and sentence included as a condition of community custody that Mr. Smith “pay supervision fees.” CP 23. This Court should remand with instructions to strike the obligation to pay supervision fees. *Dillon*, 12 Wn. App. at 152.

F. CONCLUSION

Mandatory sex offender registration laws that are imposed as a result of a juvenile conviction are punishment. Mr. Smith’s conviction to register based on the retroactive application of the punitive law requiring weekly, in-person reporting for a low-level homeless registrant based on a juvenile offense violates the ex post facto clause, requiring reversal of his conviction for failure to register. The requirement that Mr. Smith register as a sex offender based on a mandatory registration requirements for juvenile offenses also violates due process, providing an independent basis for reversal of his conviction for failure to register.

DATED this 1st day of July 2020.

Respectfully submitted,

KATE L. BENWARD (WSBA 43651)
s/ Kate Benward
Washington Appellate Project
1511 Third Ave, Ste 610
Seattle, WA 98101
Telephone: (206) 587-2711
E-mail: katebenward@washapp.org

APPENDIX

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY

NO. SJC-12790

COMMONWEALTH
Appellee

v.

JUVENILE
Appellant

BRIEF OF MICHAEL CALDWELL, PSY.D., UNIVERSITY OF
WISCONSIN AND
ELIZABETH LETOURNEAU PH.D., JOHNS HOPKINS
BLOOMBERG SCHOOL OF PUBLIC HEALTH, ET AL.
AS AMICI CURIAE

Michael Caldwell, Psy.D.
University of Wisconsin
1202 West Johnson Street
Madison, WI 53706-1611
608-347-6764
mfcaldwell@wisc.edu

Kim Dawkins, President
Pathways for Change, Inc.
588 Main Street
Worcester, MA 01608
508-852-7600 ext. 110
kdawkins@pathwaysforchange.help

Elizabeth Letourneau Ph.D.
Johns Hopkins Bloomberg
School of Public Health
415 N. Washington Street
Suite 531
Baltimore, MD 21231
410-955-9913
Elizabethletourneau@jhu.edu

Kevin Creeden, Chair
Massachusetts Society for a
World Free of Sexual Harm by
Youth (MASOC)
201 East Street
Easthampton, MA 01027
413-540-0712 ext. 14
kcreeden@whitneyacademy.org

January, 2020

Maia Christopher
Executive Director
Association for the
Treatment of Sexual Abusers
(ATSA)
4900 S.W. Griffith Drive
Suite 274
Beaverton, OR 97005
503-643-1023
maia@atsa.com

Kerry Nelligan, President
Massachusetts Association for
the Treatment of Sexual Abusers
(MATSA)
P.O. Box 920811
Needham, MA 02492
857-244-1416
matsaboardpresident@gmail.com

Robert Kinscherff, Ph.D, J.D.
1 Wells Avenue
Newton, MA 02459
617-327-6777 ext. 1254
Robert_Kinscherff@williamsjames.edu

Frank DiCataldo, Ph.D.
Roger Williams University
One Old Ferry Road
Bristol, RI 02809
800-458-7144 ext. 7252
fdicataldo@rwu.edu

Raymond Knight, Ph.D.
Dept. of Psychology, MS 062
Brandeis University
415 South Street
Waltham, MA 02453
781-736-3259
Knight2@brandeis.edu

Tom Leversee, LICSW
2565 Quail Street
Lakewood, CO 80215
720-394-7386
tleversee@q.com

Ryan Shields, Ph.D.
University of Massachusetts
113 Wilder Street, Rm. 445
Lowell, MA 01854
978-934-4335
Ryan_shields@uml.edu

Phil Rich, Ed.D., LICSW
187 Shutesbury Road
Amherst, MA 01002
413-687-7098
phil@philrich.net

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE..... 9

DECLARATION PURSUANT TO MASS. R. APP. P. 17(C)5.....13

SUMMARY OF ARGUMENT.....13

I. Sexual Recidivism Rates for Youth who Sexually Offend are Low.....15

II. It is Extremely Difficult to Identify the Small Subgroup of Adolescents who Will Reoffend.....18

III. Guidelines for Classifying Youth Recidivism Risk are Flawed.....20

IV. Youth Sex Offender Registration and Notification Policies Fail to Enhance Public Safety.....22

A. Registration and notification fail to reduce youth sexual or violent recidivism rates.....23

B. Registration and notification fail to prevent first-time sex crimes by youth.....26

V. Sex offender registration and Notification policies are associated with severe harm to youth on the registry.....30

A. Registration and notification of Youth increase their risk of sustaining new nonviolent charges....30

B. Registration and notification of youth has been shown to increase their risk for attempting suicide, being approached by adults for sex, and being victims of sexual assault..32

C. Families of registered youth also face significant collateral consequences.....35

D. Other collateral consequences are triggered by downstream policies that affect only registrants.....36

VI. Youth Convicted of Sex Crimes are Responsive to Proven Treatments.....37

CONCLUSION.....42

CERTIFICATE OF COMPLIANCE.....46

CERTIFICATE OF SERVICE.....47

TABLE OF AUTHORITIES

Aos, Leib, Mayfield, Miller & Pennucci, Benefits and Costs of Prevention and Early Intervention Programs for Youth, Washington State Institute for Public Policy (2004).....	42
Basic Scientific Research to Assess Youth with Sexual Offending Eligibility, United States Department of Justice, 2013 https://nij.ojp.gov/sites/g/files/xyckuh171/files/med ia/document/NIJ-2013- 3614.pdf	20
Batastini, Hunt, Present-Koller & Dematteo, Federal Standards for Community Registration Of Juvenile Sex Offenders: An Evaluation of Risk Prediction and Future Implications, 17(3) Psychology, Public Policy, and Law, 471 (2011).....	21, 25
Borduin, Schaeffer & Heiblum, A Randomized Clinical Trial of Multisystemic Therapy With Juvenile Sexual Offenders: Effects on Youth Social Ecology and Criminal Activity, 77 Journal of Consulting and Clinical Psychology 26 (2009).....	41
Caldwell, Quantifying the Decline in Juvenile Sexual Recidivism, 22(4) Psychology, Public Policy and Law 414 (2016); https://doi.org/10.1037/law0000094	16, 19
Caldwell, Sexual Offense Adjudication and Recidivism Among Juvenile Offenders, 19(2) Sexual Abuse: A Journal of Research and Treatment 107 (2007).....	17, 18
Caldwell, What We Do Not Know About Juvenile Sexual Reoffense Risk, 7 Child Maltreatment 291 (2002).....	21
Caldwell & Dickinson, Sex Offender Registration and Recidivism Risk in Juvenile Sexual Offenders, 27 Criminal Justice and Behavior 1 (2009).....	21, 22, 26

Caldwell, Zempke & Vitacco, An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism, 14(2) Psychology, Public Policy, and Law, 89 (2008).....	19, 21, 26
Chaffin, Our Minds are Made up - Don't Confuse Us with the Facts: Commentary on Policies Concerning Children with Sexual Behavior Problems and Juvenile Sex Offenders, 13 Child Maltreatment, 110 (2008).....	32
Chan, O'Rourke, Shen, Mark & Hung, Meta-Analysis of the Cardiovascular Benefits of Intensive Lipid Lowering with Statins, 124 Acta Neurologica Scandinavica, 188 (2011) https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1600-0404.2010.01450.x	38
Comartin, Kernsmith & Miles, Family Experiences of Young Adult Sex Offender Registration, 19 Journal of Child Sexual Abuse, 204 (2010).....	35
Dr. Frank DiCataldo, Perversion of Youth: The Assessment and Treatment of Youth Sexual Offenders (2009).....	11
He & Vupputuri, Effect of Statins on Risk of Coronary Disease: A Meta-analysis of Randomized Controlled Trials, 282 Journal of American Medical Association, 2340 (1999) https://doi.org/10.1016/S1053-0770(00)70022-X ...	38
Letourneau & Armstrong, Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders, 20 Sexual Abuse: A Journal of Research and Treatment, 393 (2008).....	23
Letourneau, Bandyopadhyay, Armstrong & Sinha, Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes? 37 Criminal Justice and Behavior, 553 (2010).....	27

Letourneau, Bandyopadhyay, Sinha & Armstrong, The Influence of Sex Offender Registration on Juvenile Sexual Recidivism, 20 Criminal Justice Policy Review, 136 (2009).....	15, 17, 18 24, 31
Letourneau, Harris, Shields, Walfield, Buckman, Kahn & Nair, Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination, 24 Psychology, Public Policy and Law 105 (2018) https://doi.org/10.1037/law0000155	33, 34
Letourneau, Henggeler, Borduin, Schewe, McCart, et al., Multisystemic Therapy for Juvenile Sex Offenders: 1-year Results from a Randomized Effectiveness Trial, 23 Journal of Family Psychology, 89 (2009) doi.1037/a0014352.....	41
Letourneau & Miner, Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo, 17 Sexual Abuse: A Journal of Research and Treatment, 313 (2005) https://doi.org/10.1177/107906320501700304	21
Letourneau, Shields, Nair, Kahn, Sandler & Vandiver, Juvenile Registration and Notification Policies Fail to Prevent First-time Sexual Offenses: An Extension of Findings to Two New States, 30 Criminal Justice Policy Review 7 (2018).....	28
Lingsma, Steyerberg, Scholte, et al, Treatment After a Recent TIA or Stroke: Is Effectiveness Shown in Randomized Clinical Trials Also Observed in Everyday Clinical Practice? 122 Acta Neurologica Scandinavica, 15 (2010) https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1600-0404.2009.01247.x	38

Raised on the Registry: The Irreparable Harm of Placing Youth on Sex Offender Registries in the United States, Human Rights Watch (2013) https://www.hrw.org/report/2013/05/01/raised-registry/irreparable-harm-placing-children-sex-offender-registries-us	34
Reitzel & Carbonell, The Effectiveness of Sexual Offender Treatment for Juveniles as Measured by Recidivism: A Meta-analysis, 18 Sexual Abuse: A Journal of Research and Treatment, 401 (2006).....	39
Sandler, Letourneau, Vandiver, Shields & Chaffin, Juvenile Sexual Crime Reporting Rates are not Influenced by Juvenile Sex Offender Registration Policies, 23 Psychology, Public Policy and the Law, 131 (2017).....	28
Seto & Lalumiere, What is So Special about Male Adolescent Sexual Offending? A Review and Test of Explanations Through Meta-analysis, 136 Psychological Bulletin 526 (2010).....	18
Silovsky, Hunger & Taylor, Impact of Early Intervention for Youth with Problematic Sexual Behaviors and Their Caregivers, 25(1) Journal of Sexual Aggression, 4 (2019).....	40
St. Amand, Bard & Silovsky, Meta-Analysis of Treatment for Child Sexual Behavior Problems: Practice Elements and Outcomes, 13 Child Maltreatment, 145 (2008).....	39
Vandiver, A Prospective Analysis of Juvenile Male Sex Offenders: Characteristics and Recidivism Rates as Adults, 21 Journal of Interpersonal Violence, 673 (2006) http://dx.doi.org/10.1177/0886260506287113	22
Walker, McGovern, Poey & Otis, Treatment Effectiveness for Male Adolescent Sexual Offenders: A Meta-analysis and Review, 13 Journal of Child Sexual Abuse, 281 (2004).....	40

INTEREST OF AMICI CURIAE

Michael F. Caldwell, Psy.D, author of the most comprehensive national studies on youth sexual recidivism, is Senior Staff Psychologist at the Mendota Youth Treatment Center in Madison and Senior Lecturer in psychology at the University of Wisconsin in Madison. Dr. Caldwell has published over 40 peer-reviewed articles and book chapters related to risk assessment and treatment of violent adolescent delinquents and adolescent sexual offenders.

Elizabeth J. Letourneau, Ph.D, is a nationally and internationally recognized expert on child sexual abuse prevention whose work is published in more than 100 research-based articles and chapters in leading journals and high-impact books. Dr. Letourneau is the founding director of the Moore Center for the Prevention of Child Sexual Abuse, Johns Hopkins Bloomberg School of Public Health. She has served as a governor-appointed member of Maryland's State Council on Child Abuse and Neglect, member of the World Health Organization Group to develop guidelines for responding to the sexual abuse of children and adolescents, and currently serves on the National

Academy of Sciences' Forum on Global Violence
Prevention.

Pathways for Change, Inc. (Pathways) is a victim advocacy agency and one of the leading rape crisis centers in Massachusetts. Pathways provides assistance in the aftermath of sexual violence while at the same time building community competency to prevent such violence.

The **Massachusetts Society for a World Free of Sexual Harm by Youth (MASOC Inc.)** is a professional organization whose mission is to ensure that children and adolescents displaying problematic or abusive sexual behaviors are provided with the necessary resources, supports, and evidenced-based interventions to ensure healthy, safe and productive lives.

The **Association for the Treatment of Sexual Abusers (ATSA)** is a non-profit, international, multi-disciplinary professional association of more than 3,000 specialists dedicated to the research and prevention of sexual abuse and sexual violence.

The **Massachusetts Association for the Treatment of Sexual Abusers (MATSA)** is a non-profit, professional organization whose specific focus is on

the prevention of sexual abuse through the effective treatment and management of sex offenders.

Frank DiCataldo, Ph.D., is Professor of Psychology at Roger Williams University and the current Chair of the Certified Youth Court Clinician Committee for the Massachusetts Department of Mental Health. Dr. DiCataldo is the author of *Perversion of Youth: The Assessment and Treatment of Youth Sexual Offenders* (2009).

Robert Kinscherff, Ph.D, J.D., is a clinical/forensic psychologist and attorney. He serves as Professor at William James College (Doctoral Clinical Psychology Program) and Associate Project Director (Juvenile and Young Adult Justice) for the Center for Law, Brain & Behavior at MGH. Dr. Kinscherff is the former Director of Juvenile Court Clinic Services for the MA Trial Court and Assistant Commissioner for Forensic Mental Health for MA Department of Mental Health. He was a Member (subject matter expert with adolescents) for the MA legislative Commission on Sexual Offender Recidivism. He has published extensively on issues regarding youth sex offenders.

Raymond A. Knight, Ph.D., is Professor Emeritus of Human Relations at Brandeis University. Dr. Knight

has been doing research on sexual aggression for more than four decades and has published more than 150 articles in professional journals.

Tom Leversee, LICSW is a nationally recognized expert on the prevention, treatment and supervision of youths with problematic sexual behavior. He is a member of the Colorado State Sex Offender Management Board.

Phil Rich, Ed.D, LICSW, has 20 years of experience in the assessment and treatment of youth with sexually problematic behavior. He is a member of the advisory board for the Department of Justice Sex Offender Management and Assessment Planning Initiative, the outgoing Chair of ATSA's Juvenile Practice Committee, and the author of several books and multiple chapters and articles addressing the evaluation and treatment of adolescents who have engaged in sexually abusive behavior.

Ryan T. Shields, Ph.D., is an assistant professor in the School of Criminology and Justice Studies at the University of Massachusetts Lowell. His published work has examined policies aimed at youth with problematic sexual behavior.

Each of the above-referenced *amici* is committed to the prevention of sexual abuse. *Amici* submit this brief to describe how the scientific findings of the research community do not support the inclusion of youth on sex offender registries.

DECLARATION PURSUANT TO MASS. R. APP. P. 17(c)5

No party, party's counsel, or person or entity other than amici curiae and its counsel, authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. Neither amici curiae nor its counsel contributed money intended to fund preparing or submitting the brief. Neither amici curiae nor its counsel has either represented any of the parties to this appeal in another proceeding involving similar issues, or been or represented a party in a proceeding or legal transaction at issue in the present appeal.

SUMMARY OF ARGUMENT

Registering youth as "sex offenders" inhibits their growth and development and fails to enhance public safety. This is especially true because young people are inherently unlikely to reoffend sexually. Uncontradicted research shows that 97 percent of youth

who were adjudicated for a sexual offense did not recidivate, even when they were initially evaluated as high risk. (Pp. 15-17)

Identifying this small group of young people who are likely to reoffend is almost impossible. Risk assessment methods capable of accurately identifying adolescents at risk for sexual recidivism simply do not exist, nor have any risk factors been identified that reliably predict recidivism in this population. In fact, studies have shown no significant difference between the sexual recidivism of youth required to register as "sex offenders" and those with no history of sexual misconduct. Registration and notification of youth fail to produce the outcomes intended by registry laws, namely the reduction of sexual recidivism. (Pp. 18-25)

Registration has a "scarlet letter" effect, increasing the risk of a young person on the registry of being charged with, but not convicted of, new offenses. Youth labeled as sex offenders are more likely to become targets of sexual abuse by adults and to suffer from depression, anxiety and harassment. Registered youths are **four** times more likely to attempt suicide than their peers. At the same time,

youth are remarkably responsive to treatment.

Sexually problematic behavior in adolescence should be addressed by evidence-based interventions rather than by registration as a sex offender. Registration and notification fail to support victims, fail to prevent harm, and fail to improve public safety. (Pp. 25-42)

I. Sexual Recidivism Rates for Youth who Sexually Offend are Low.

As a group, youth adjudicated or convicted of sex crimes have been found to pose a very low risk to sexually reoffend, particularly as they age into young adulthood. Studies conducted during the past 15 years have reported an average sexual recidivism rate of 2.75% over 5 years. **That is, more than 97% of youth who were adjudicated for sex crimes did not reoffend with new sex crimes.** This figure is definitive and aligns with Letourneau and colleagues' research utilizing data on more than 1,200 male youth adjudicated for sex crimes in South Carolina. Letourneau, Bandyopadhyay, Sinha & Armstrong, The Influence of Sex Offender Registration on Juvenile Sexual Recidivism, 20 Criminal Justice Policy Review, 136-153 (2009) (hereinafter "Letourneau et al., 2009"). The rate of new adjudications or convictions

for sex crimes in that study was just 2.5% across an average 9-year follow-up period.

The most extensive review of adolescent sex offender recidivism rates reviewed 106 studies involving 33,783 youth and found an average sexual recidivism rate of 4.92% over an average 5-year follow-up. Caldwell, Quantifying the Decline in Juvenile Sexual Recidivism, 22(4) Psychology, Public Policy and Law 414-426 (2016), <https://doi.org/10.1037/law0000094> (hereinafter "Caldwell, 2016"). The Caldwell 2016 study also documented a 73% decline in adolescent sexual recidivism over the past 30 years.

Many people will argue, correctly, that sexual offense reconviction rates do not account for all sexual offenses, because many sexual offenses are not reported. Although reconviction rates will not identify all sexual reoffense incidents, or even all sexual offense victims, they will identify the majority of sexual reoffenders. This is true for two reasons: First, adolescents who were once caught and adjudicated of a sex crime are unlikely to be highly skilled at evading detection for a second one. Second, it only takes one disclosure to identify a

reoffender. With a sufficiently long follow-up period (most experts recommend at least 3 years), the likelihood that at least one victim or bystander will come forward increases, thereby increasing the validity of recidivism research findings.

When rare sexual recidivism events do occur, it is nearly always within the first few years following the original adjudication (or release from secure confinement). Moreover, even youth initially evaluated as "high risk" are unlikely to reoffend, particularly if they remain free of offending within the first few years following initial adjudication (or release from secure confinement). Thus, it is *recent* past behavior that best predicts future behavior and not merely any past behavior. Perhaps surprisingly, but again based on thousands of cases, after about three years and in the absence of new sexual offenses, the fact that a youth once engaged in problematic sexual behavior no longer predicts doing so again in the future. Caldwell, *Sexual Offense Adjudication and Recidivism Among Juvenile Offenders*, 19(2) *Sexual Abuse: A Journal of Research and Treatment* 107-113 (2007) (hereinafter "Caldwell, 2007"); Letourneau et al., 2009.

II. It is Extremely Difficult to Identify the Small Subgroup of Adolescents who Will Reoffend.

Adolescents who sexually abuse have more in common with other adolescents who engage in other types of criminal behavior than with adult sex offenders. The major difference between these teens and other teens is that they are more likely to themselves have been sexually abused. Seto & Lalumiere, What is so Special about Male Adolescent Sexual Offending? A Review and Test of Explanations Through Meta-analysis, 136 Psychological Bulletin 526-575 (2010) (hereinafter "Seto & Lalumiere, 2010"). For example, youth with sex crime adjudications were no more likely to sustain new sex crime charges or convictions than youth with assault adjudications or youth with robbery adjudications. Letourneau et al., 2009. That is, the sexual reoffense rates of these three groups did not differ in a meaningful or statistically significant manner. Likewise, another study indicated that the risk of sexual recidivism was statistically similar for youth being treated in a residential facility for either sexual or nonsexual delinquent offenses. Caldwell, 2007. A subsequent

study found no significant difference in new sexual offense charges between youth adjudicated for a sexual offense and subject to registration and a group of similar youth who had no history of sexual misconduct. Caldwell, Zempke & Vitacco, An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism, 14(2) Psychology, Public Policy, and Law, 89-114 (2008) (hereinafter "Caldwell et al., 2008"). Thus, distinguishing between youth likely to sexually reoffend or not involves more than simply knowing that a youth has a history of such offending.

A substantial body of research has attempted to identify specific and stable factors that will identify the very small percentage of youth sexual offenders who are at high risk of sexual recidivism. The most common finding is that there is no significant relationship between specific risk factors and youth sexual recidivism. **The extant research has not identified any stable, offense-based risk factors that reliably predict sexual recidivism in adolescents.** Caldwell, 2016. In addition, despite diligent and concerted efforts, researchers have failed to produce a valid and reliable risk-assessment

method that can identify youth who pose a significant risk of sexual recidivism. A recent National Institute of Justice solicitation for research proposals in this area noted "the [available] instruments do not perform in a manner that suggests or shows their ability to predict youth sexual recidivism accurately" and concluded "[t]here is a lack of consistent, independently corroborated empirical evidence concerning both the inter-rater reliability and predictive validity of youth risk assessments available for use at this time." Basic Scientific Research to Assess Youth with Sexual Offending Eligibility, United States Department of Justice, 2013, <https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/NIJ-2013-3614.pdf>. **As a result, there are no risk assessment methods that can accurately identify those adolescents who are at risk for sexual recidivism.**

III. Guidelines for Classifying Youth Recidivism Risk are Flawed.

Numerous researchers have demonstrated that federal standards for youth sex offender registration fail to distinguish between youth who will reoffend or

not. Batastini, Hunt, Present-Koller & DeMatteo, Federal Standards for Community Registration of Juvenile Sex Offenders: An Evaluation of Risk Prediction and Future Implications, 17(3) Psychology, Public Policy, and Law, 471-474 (2011) (hereinafter "Batastini et al."); Caldwell et al., 2008.

Similarly, state-specific standards for establishing youth registration requirements in New Jersey, Texas, and Wisconsin do not distinguish youth who will reoffend from those who will not. Caldwell & Dickinson, Sex Offender Registration and Recidivism Risk in Juvenile Sexual Offenders, 27 Criminal Justice and Behavior 1 (2009) (hereinafter "Caldwell & Dickinson, 2009"); Caldwell et al., 2008. The basis for these federal and state policy failures might lie, in part, with the low sexual recidivism rate of youth adjudicated for sex offenses and policy failures to correctly distinguish between youth risk levels.

Caldwell, What We Do Not Know About Juvenile Sexual Reoffense Risk, 7 Child Maltreatment 291 (2002) (hereinafter "Caldwell, 2002"); Letourneau & Miner, Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo, 17 Sexual Abuse: A Journal of Research and Treatment, 313-331 (2005),

<https://doi.org/10.1177/107906320501700304>; Vandiver, A Prospective Analysis of Juvenile Male Sex Offenders: Characteristics and Recidivism Rates as Adults, 21 Journal of Interpersonal Violence, 673-688 (2006), <http://dx.doi.org/10.1177/0886260506287113>.

In one study Caldwell and his colleague studied general risk and recidivism patterns among 172 adolescents who had been adjudicated for a sexual offense, 66 of whom were required to register and 106 who were not. Caldwell & Dickinson, 2009. The results showed that the factors that predicted which youth had been required to register were associated with *lower* reoffense rates for general, violent and sexual offenses. Thus, the registration criteria failed to identify higher risk youth.

IV. Youth Sex Offender Registration and Notification Policies Fail to Enhance Public Safety.

Youth sex offender registration and notification policies fail to improve or enhance public safety in any way. Modern registration policies were implemented in the 1990s to improve public safety from the threat posed by adult sexual offenders at high risk of recidivism. There are two principal ways in which registration policies might improve public

safety. First, these policies could be associated with reduced sexual recidivism rates. Second, these policies could be associated with deterrence (or primary prevention) of first-time sex crimes. Neither is true when it comes to youth registration.

A. Registration and notification fail to reduce youth sexual or violent recidivism rates.

Five studies examine the impact of federal and state youth registration policies on sexual and violent recidivism. None of these studies found that state registration policies when applied to adolescents resulted in reduced sexual or violent recidivism rates.

Using youth and criminal justice data from South Carolina, Letourneau and Armstrong compared the reoffense rates of 111 registered youth with 111 nonregistered youth who were matched on type of index sexual offense and the year that offense occurred, age at index offense, race, and prior violent and nonviolent offenses. Letourneau & Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, 20 *Sexual Abuse: A Journal of Research and Treatment*, 393-408 (2008). These two groups were as similar as possible except for the fact

that one group was subjected to registration and notification requirements and the other group was not. Over an average 4-year follow-up period, the sexual offense reconviction rate was less than 1%. There were only two sexual recidivism events for these 222 youth, with no differences between groups. Likewise the groups did not differ on nonsexual recidivism rates. Thus, registration and notification were not associated with reduced sexual or nonsexual recidivism.

In a subsequent study, Letourneau and colleagues examined the recidivism rates of all male youth with sexual crime adjudications in South Carolina between 1991 and 2004 (sample size = 1,275), across an average 9-year follow-up period (Letourneau et al., 2009). This study is important because the investigators studied the entire *population* of male youth offenders, and not a subsample. Population-level research carries more weight in science because it avoids problematic selection effects. The investigators used survival analysis to examine factors that might have influenced recidivism rates, including whether or not the youth was registered. Registration was not associated with reduced sexual or nonsexual

recidivism. Rather, results indicated that being registered increased the risk of youth being *charged with*, but not convicted of, new offenses. This is an interesting pattern of findings. It suggests that adults viewed registered youth as more dangerous than nonregistered youth and were more likely to report registered youth for behaviors that ultimately were not deemed criminal. The investigators interpreted this pattern of results as indicating that registration exerts a surveillance or "scarlet letter" effect on youth, subjecting them to greater scrutiny even when their behavior is fundamentally the same as nonregistered youth.

A third study used data from 108 youth adjudicated for sex crimes in Pennsylvania. Batastini et al. Batastini and colleagues reported a sexual reoffense rate of less than 2% across a 2-year follow-up. Moreover, these researchers examined the federal Adam Walsh Act system of placing offenders (including adolescents) into one of three tiers, which are supposed to indicate lower, medium, and higher recidivism risk. Batastini and colleagues found that children who met federal "Tier III" sex offender registration and notification requirements (that is,

youth purported to be highest risk for reoffending) were no more likely to reoffend than youth who did not meet federal tier III requirements.

A fourth study used data from 172 youth adjudicated for sex crimes in Wisconsin. Caldwell & Dickinson, 2009. These investigators reported no differences in the recidivism rates for registered and unregistered youth across a 4-year follow-up period.

A fifth study used data from 91 youth adjudicated for sex crimes and 174 youth adjudicated for violent non-sex crimes. Caldwell et al, 2008. Caldwell and colleagues found that neither the federal tier designations nor the state risk measures from three states - New Jersey, Texas, and Wisconsin - accurately distinguished between youth who sexually reoffended and youth who did not. In fact, youth whose initial offense was violent but nonsexual were just as likely to commit a future sexual offense as youth whose initial offense was sexual.

B. Registration and notification fail to prevent first-time sex crimes by youth.

Registration clearly fails to produce the principal outcome it is intended to produce: reduced sexual recidivism. The only other way registration

and notification policies could improve public safety is if they exerted a general deterrence or primary prevention effect. That is, these policies could, conceivably, reduce the likelihood that a youth would commit a sexual offense in the first place. They do not. A series of studies by Letourneau and colleagues evaluated the effects of registration on the prevention or deterrence of first-time sex crimes and found no evidence supporting this effect.

Their first study used data from the entire population of first-time youth sexual offenses in South Carolina, including more than 3,000 youth sexual offense cases from 1991 through 2004. Letourneau, Bandyopadhyay, Armstrong & Sinha, Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes? 37 Criminal Justice and Behavior, 553-569 (2010) (hereinafter "Letourneau et al., 2010"). They compared first-time sex crime rates for the years prior to implementation of South Carolina's youth registration and notification policy (1991-1994) and the years following policy implementation (1995-2004). There was no evidence that these policies exerted any general deterrence/primary prevention effects. Specifically, after the registration and

notification policy was enacted, there was no significant change in the likelihood that a youth would commit an initial sexual offense.

A second study used national data on tens of thousands of youth sex crime reports from four states - Idaho, South Carolina, Utah, and Virginia. Sandler, Letourneau, Vandiver, Shields & Chaffin, Juvenile Sexual Crime Reporting Rates are not Influenced by Juvenile Sex Offender Registration Policies. 23 *Psychology, Public Policy and the Law*, 131 (2017) (hereinafter "Sandler et al."). In this study, Letourneau and colleagues compared rates of reports of youth sex crimes prior to versus following policy implementation and again found no evidence for a general deterrence/primary prevention effect of these policies.

In their most recent study, Letourneau and colleagues used data from the entire population of first-time youth sex crime charges or adjudications in Oregon and in Maryland. Letourneau, Shields, Nair, Kahn, Sandler & Vandiver, Juvenile Registration and Notification Policies Fail to Prevent First-time Sexual Offenses: An Extension of Findings to Two New States, 30 *Criminal Justice Policy Review* 7 (2018).

Data included nearly 19,000 youth charged with sex crimes and more than 7,000 youths adjudicated for sex crimes from these two states. Rates of first-time sex crimes did not decline in either state following implementation of youth registration and notification policies, indicating no deterrent or preventive effects.

In summary, the entire available body of published research fails to support any public safety effect of registration and notification on sexual recidivism or first-time sex crimes. This research includes empirically and methodologically rigorous evaluations of the federal Adam Walsh Act tiering system and the registration and notification policies of eight states; it comprises tens of thousands of youth sex crime cases. Despite variation between federal and state policies and despite examining policy effects on three different outcome effects (sex crime reports, charges, adjudications/convictions), results were completely consistent across studies: Youth sex offender registration and notification are failed policies that do nothing to improve public safety.

V. Sex offender registration and notification policies are associated with severe harm to youth on the registry.

There is a growing evidence base that youth sex offender registration and public notification requirements are associated with significant harmful consequences for youth and their families. These harms include increased risk of unwarranted charges; increased risk for mental health problems and problems with peers, school, and living stability; and increased risk for suicide attempts and for sexual assault victimization. As described in detail below, subjecting youth to registration and notification requirements is associated with increased risk of those youth being sexually assaulted. Thus, youth registration and notification policies are associated with the very type of harm they were supposed to prevent.

A. Registration and notification of youth increase their risk of sustaining new nonviolent charges.

Registered youth are more visible to law enforcement, and in some instances the public, which makes them more likely to be arrested. Letourneau and colleagues found that South Carolina's registration and notification policy was associated with increased

risk of new charges but not new convictions, particularly for nonviolent offenses. Letourneau et al., 2009. Specifically, registered youth were significantly more likely than nonregistered youth to be charged with relatively minor misdemeanor offenses (e.g., public order offenses). Although it is possible that the burdens related to registration actually increase youth misbehavior, it is more likely that this increase in the detection of low-level delinquent behavior reflects a surveillance or scarlet letter effect. That is, youth who are known as "registered sex offenders" are likely to be viewed (inaccurately) as more dangerous than youth with the same history of sexual offending but without the registration label. This perception may cause members of the public to report registered youth and/or law enforcement agents to arrest registered youth for behaviors that do not trigger reports or arrests of nonregistered youth engaged in the same behaviors and that ultimately do not result in new convictions.

Requiring youth to register annually or more frequently with law enforcement has significant negative consequences for youth and is not merely inconvenient.

The process of identifying oneself as a registered sex offender and of being arrested and possibly charged with new offenses due in part to this label seems likely to cause registered youth to view themselves as "delinquent" even when they are law-abiding. Ample evidence indicates that youth who view themselves as delinquent or outside the mainstream are less likely to change patterns of offending behavior. Policies that promote youth's concepts of themselves as lifetime sex offenders will likely interrupt the development of a healthy self-identity as a valued member of society. Chaffin, Our Minds are Made Up - Don't Confuse us with the Facts: Commentary on Policies Concerning Children with Sexual Behavior Problems and Juvenile Sex Offenders, 13 Child Maltreatment, 110-121 (2008).

B. Registration and notification of youth has been shown to increase their risk for attempting suicide, being approached by adults for sex, and being victims of sexual assault.

According to treatment providers across the nation, youth subjected to registration or notification are much more likely than their peers to experience negative mental health outcomes, harassment from peers and adults, difficulty in school, and

trouble maintaining stable housing. All of these effects - increased depression and anxiety, verbal and physical harassment, problems concentrating in school, and frequent disruptions caused by having to change caregivers - are known to negatively impact the educational attainment of adolescents. Letourneau, Harris, Shields, Walfield, Buckman, Kahn & Nair, Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination, 24 Psychology, Public Policy and Law 105-117 (2018), <https://doi.org/10.1037/law0000155> (hereinafter "Letourneau et al., 2018") (Survey of 265 front-line practitioners in 48 states who provide mental health services to youth adjudicated or reported for sexual offending).

It is no surprise that those who have committed sexual offenses are perceived as the worst of the worst offenders. Registration purposely signals to others that an individual is especially dangerous, even if the registrant is a minor child. Accordingly, reactions to youth labeled as registered sex offenders can be severe. For example, there are reports of adolescents who committed suicide after being threatened with registration and reports of registered

youth who were verbally harassed, physically assaulted, and targeted by gunfire. Raised on the Registry: The Irreparable Harm of Placing Youth on Sex Offender Registries in the United States, Human Rights Watch (2013),

<https://www.hrw.org/report/2013/05/01/raised-registry/irreparable-harm-placing-children-sex-offender-registries-us>.

Letourneau and colleagues conducted the first empirically rigorous evaluation of the collateral consequences of registration on youth. They surveyed 251 male youth ages 12-17 years, all of whom were in treatment for problematic sexual behavior. Letourneau et al., 2018. These youth were recruited from 18 different states, and about 30% of them were subjected to registration policies. What they found was shocking. Compared to unregistered youth who were in treatment for problematic sexual behaviors, registered youth were:

- four times more likely to report having attempted suicide in the past 30 days. That is, they reported not only thinking about suicide more often, but actually **attempting to kill themselves**;
- five times more likely to report having been approached by an adult for sex in the past year; and

- twice as likely to report having sustained a hands-on sexual assault victimization in the past year.

In sum, Letourneau and colleagues found evidence that youth registration and notification is associated with the very type of harm it purports to prevent. It is difficult to imagine worse outcomes associated with a state policy for youth.

C. Families of registered youth also face significant collateral consequences.

Most adolescents sexually abuse other teens or children in their families or circle of friends. When the sexual abuse is within the family, registration and notification will also affect the child who has been victimized -- in essence notifying the entire community of their victimization. This unintended consequence adds harm to the victim's experiences and also puts families in the untenable position of trying to protect *both* children from family or community backlash.

In Michigan, investigators interviewed four parents whose children were listed on the state sex offender registry. Comartin, Kernsmith & Miles, Family Experiences of Young Adult Sex Offender Registration, 19 Journal of Child Sexual Abuse, 204

(2010). Parents reported feeling powerless to protect their children from harm and hopeless about the negative consequences of registration and notification on their children. They reported expending enormous resources trying to ensure their children's safety and help their children develop a positive self-identity despite the constant sex offender label. The shame and stigma of the label kept these young people from achieving their full potential, according to their parents. In particular, the shame and stigma increased the isolation of these youth, made it difficult to find and maintain employment, and increased their emotional and financial dependence upon their parents.

D. Other collateral consequences are triggered by downstream policies that affect only registrants.

Dozens of localities and states have enacted residence, education, and employment restrictions, limiting where registrants may live, work, and play. These effects are especially harmful to youth, who may be unable to return to school or may be removed from school when a parent calls to complain about the presence of a "registered child" in the school. Adolescents thrive when provided appropriately

monitored access to social, sporting, recreational, cultural and religious activities with peers. Registration and notification requirements limit and even remove access to these developmentally critical opportunities. Moreover, what is often overlooked is the fact that the sex offender's parents, cohabitants, neighborhood, and school are often effectively "registered" along with the youth, in that the addresses of registrants' housing, schools, and employment are often listed on the registry. The collateral damage to the parents and siblings of a registered youth is enormous.

**VI. Youth Convicted of Sex Crimes
are Responsive to Proven Treatments.**

Studies show that (1) adolescents with problematic behavior are remarkably responsive to treatment services, and (2) advances in appropriate treatment programming have produced methods that are highly effective at reducing illegal sexual behavior. These results can be put into perspective by comparing how effectively adolescent sex offender treatment programs prevent future sexual offending to the effectiveness of widely used medications for the prevention of heart attacks. The results of multiple

meta-analytic studies of the effectiveness of statin medications, the most widely prescribed non-psychotropic medications in the United States, have documented that the effectiveness of adolescent treatment programs is consistently greater than the effectiveness of statins on preventing heart attacks.

Chan, O'Rourke, Shen, Mark & Hung, Meta-Analysis of the Cardiovascular Benefits of Intensive Lipid Lowering with Statins, 124 Acta Neurologica Scandinavica, 188 (2011)

<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1600-0404.2010.01450.x>; He & Vupputuri, Effect of Statins on Risk of Coronary Disease: A Meta-analysis of Randomized Controlled Trials, 282 Journal of American Medical Association, 2340 (1999)

[https://doi.org/10.1016/S1053-0770\(00\)70022-X](https://doi.org/10.1016/S1053-0770(00)70022-X);

Lingsma, Steyerberg, Scholte, et al., Treatment After a Recent TIA or Stroke: Is Effectiveness Shown in Randomized Clinical Trials Also Observed in Everyday Clinical Practice? 122 Acta Neurologica Scandinavica, 15-20 (2010).

<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1600-0404.2009.01247.x>.

The effectiveness of treatment of adolescents adjudicated for sexual offenses has been studied using meta-analytic methods to combine the results of several other studies of treatment effectiveness to determine the overall effect of treatment. A limitation of this approach is the steady improvement in treatment approaches over recent decades, which means that studies that include older treatment methods likely underestimate the impact of more recent proven methods.

An early summary study completed by Reitzel and Carbonell examined the results from 9 studies with a combined sample of 2,986 youth adjudicated for sexual misconduct. Reitzel & Carbonell, *The Effectiveness of Sexual Offender Treatment for Juveniles as Measured by Recidivism: A Meta-analysis*, 18 *Sexual Abuse: A Journal of Research and Treatment*, 401 (2006). They found that every study yielded positive effects and the overall results indicated that treatment reduced the risk of sexual recidivism by more than 60%.

Other studies using a variety of methods have reported similar positive results for treatment effectiveness. St. Amand, Bard & Silovsky, *Meta-Analysis of Treatment for Child Sexual Behavior*

Problems: Practice Elements and Outcomes, 13 Child Maltreatment, 145 (2008); Walker, McGovern, Poey & Otis, Treatment Effectiveness for Male Adolescent Sexual Offenders: A Meta-analysis and Review, 13 Journal of Child Sexual Abuse, 281 (2004).

Silovsky and colleagues recently extended their intervention for child problem sexual behavior to adolescents with illegal sexual behavior. In a study involving 301 youth and their caregivers, Problem Sexual Behavior - Cognitive Behavioral Therapy ("PSB-CBT") resulted in significant reductions in parent-reported sexually abusive behaviors as well as reductions in non-sexual harmful behaviors and trauma symptoms. Silovsky, Hunger & Taylor, Impact of Early Intervention for Youth with Problematic Sexual Behaviors and their Caregivers, 25(1) Journal of Sexual Aggression, 4 (2019). Studies have also demonstrated that family-based community treatment (Multisystemic Therapy) can significantly reduce problematic sexual behavior in addition to a host of other negative outcomes. Borduin and his colleagues reported the results of a randomized clinical trial of a family-based community treatment compared to the usual community services. The youth were followed for

an average of 8.9 years following treatment. The rate of new sexual offenses was six times lower among the treated youth compared to the youth receiving generic community services. Borduin, Schaeffer & Heiblum, A Randomized Clinical Trial of Multisystemic Therapy With Juvenile Sexual Offenders: Effects on Youth Social Ecology and Criminal Activity, 77 Journal of Consulting and Clinical Psychology 26 (2009).

In a similar study, Letourneau and her colleagues reported the results of a randomized clinical trial of Multisystemic Therapy ("MST") provided to a group of 67 youth and their families compared to a group of 60 youth treated in the usual services. Both the youth and their caregivers reported that problematic sexual behaviors declined between 49% and 77% in the MST treatment program, compared to declines of 4% to 23% in problematic sexual behaviors in the comparison group. In addition, the treatment group significantly improved with respect to substance abuse problems, mental health symptoms, and general delinquency and required significantly fewer out-of-home placements. Letourneau, Henggeler, Borduin, Schewe, McCart, et al., Multisystemic Therapy for Juvenile Sex Offenders: 1-year Results from a Randomized Effectiveness Trial,

23 Journal of Family Psychology, 89 (2009). Both PSB-CBT and MST-PSB have been found to be clinically effective treatments for youth. Aos, Leib, Mayfield, Miller & Pennucci, Benefits and Costs of Prevention and Early Intervention Programs for Youth, Washington State Institute for Public Policy (2004).

CONCLUSION

In the professional opinions of the below-signed amici, and based on the research conducted by amici and others, amici find no scientific evidence that demonstrates any public safety benefit of subjecting youth to sex offender registration or notification requirements. There is no indication that subjecting youth to sex offender registration or notification schemes improves public safety. Moreover, significant harm is caused to the youth and their families as a result of these registration and notification policies.

Such laws are associated with the worst possible outcomes for youth, including increased suicide attempts, increased solicitations by adults for sex, and increased sexual assault victimization. Youth subjected to these policies face increased risk for other serious mental health problems, risks to their

physical safety, peer problems, and problems at school. The parents of youth subjected to these policies also indicate emotional distress and fear for the lives of their children, with good reason.

These risks are in no way offset by any improvement in public safety. Youth who engage in illegal sexual behavior are unlikely to repeat their offenses and are likely to respond well to evidence-based interventions. There is simply no good argument for subjecting them to registration and notification, and many arguments against such a decision.

Without question, it is important to recognize the harm caused to victims by such behaviors, and to ensure that such behaviors are not repeated. There are several well-validated, evidenced-based interventions for youth with problematic sexual behaviors. However, sex offender registration and notification are not among these effective interventions. Rather, sex offender registration and notification are failed policies that have been shown to be unnecessary, wasteful, and harmful. Youth who are labeled as sex offenders are at increased risk for the worst possible outcomes, including suicide and sexual predation by adults, and will face innumerable

barriers to successful prosocial development. None of this supports the recovery of victims or the prevention of harm. None of this improves public safety.

Respectfully submitted,

/s/ Michael Caldwell
Michael Caldwell, Psy.D.
University of Wisconsin
1202 West Johnson Street
Madison, WI 53706-1611
608-347-6764
mfcaldwell@wisc.edu

/s/ Kim Dawkins
Kim Dawkins, President
Pathways for Change, Inc.
588 Main Street
Worcester, MA 01608
508-852-7600 ext. 110
kdawkins@pathwaysforchange.help

/s/ Elizabeth Letourneau
Elizabeth Letourneau Ph.D.
Johns Hopkins Bloomberg
School of Public Health
415 N. Washington Street
Suite 531
Baltimore, MD 21231
410-955-9913
Elizabethletourneau@jhu.edu

/s/ Kevin Creeden
Kevin Creeden, Chair
Massachusetts Society for a
World Free of Sexual Harm by
Youth (MASOC)
201 East Street
Easthampton, MA 01027
413-540-0712 ext. 14
kcreeden@whitneyacademy.org

/s/ Maia Christopher
Maia Christopher
Executive Director
Association for the
Treatment of Sexual Abusers
(ATSA)
4900 S.W. Griffith Drive
Suite 274
Beaverton, OR 97005
503-643-1023
maia@atsa.com

/s/ Kerry Nelligan
Kerry Nelligan, President
Massachusetts Association for
the Treatment of Sexual Abusers
(MATSA)
P.O. Box 920811
Needham, MA 02492
857-244-1416
matsaboardpresident@gmail.com

/s/ Robert Kinscherff
Robert Kinscherff, Ph.D, J.D.
1 Wells Avenue
Newton, MA 02459
617-327-6777 ext. 1254
Robert_Kinscherff@williamsjames.edu

/s/ Frank DiCataldo
Frank DiCataldo, Ph.D.
Roger Williams University
One Old Ferry Road
Bristol, RI 02809
800-458-7144 ext. 7252
fdicataldo@rwu.edu

/s/ Raymond Knight
Raymond Knight, Ph.D.
Dept. of Psychology, MS 062
Brandeis University
415 South Street
Waltham, MA 02453
781-736-3259
Knight2@brandeis.edu

/s/ Tom Leversee
Tom Leversee, LICSW
2565 Quail Street
Lakewood, CO 80215
720-394-7386
tleversee@q.com

/s/ Ryan Shields
Ryan Shields, Ph.D.
University of Massachusetts
113 Wilder Street, Rm. 445
Lowell, MA 01854
978-934-4335
Ryan_shields@uml.edu

/s/ Phil Rich
Phil Rich, Ed.D., LICSW
187 Shutesbury Road
Amherst, MA 01002
413-687-7098
phil@philrich.net

January , 2020

CERTIFICATE OF COMPLIANCE

We, the undersigned, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to Mass.R.A.P. 17 (Amicus Briefs) and Mass.R.A.P. 20 (a)(2)(c) (Form and Length of Briefs). The brief is produced using the monospaced Courier New 12 font with 10 characters per inch, and contains 32 pages of non-excluded text.

/s/ Michael Caldwell
Michael Caldwell, Psy.D.
University of Wisconsin
1202 West Johnson Street
Madison, WI 53706-1611
608-347-6764
mfcaldwell@wisc.edu

/s/ Elizabeth Letourneau
Elizabeth Letourneau Ph.D.
Johns Hopkins Bloomberg
School of Public Health
415 N. Washington Street
Suite 531
Baltimore, MD 21231
410-955-9913
Elizabethletourneau@jhu.edu

CERTIFICATE OF SERVICE

We, the undersigned, certify that on January 21, 2020, service was made by first-class mail on counsel for the parties as follows:

Elizabeth Silverman
Assistant District Attorney
Middlesex District Attorney's Office
15 Commonwealth Avenue
Woburn, MA 01801

Elizabeth Caddick, Esq.
3 Bessom Street 155
Marblehead, MA 01945

/s/ Michael Caldwell
Michael Caldwell, Psy.D.
University of Wisconsin
1202 West Johnson Street
Madison, WI 53706-1611
608-347-6764
mfcaldwell@wisc.edu

/s/ Elizabeth Letourneau
Elizabeth Letourneau Ph.D.
Johns Hopkins Bloomberg
School of Public Health
415 N. Washington Street
Suite 531
Baltimore, MD 21231
410-955-9913
Elizabethletourneau@jhu.edu

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 54067-3-II
v.)	
)	
DARREN SMITH, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF JULY, 2020, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KRISTIE BARHAM, DPA [PCpatcecf@co.pierce.wa.us] [kristie.barham@piercecountywa.gov] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> DARREN SMITH, JR. 880826 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF JULY, 2020.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

July 01, 2020 - 4:09 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54067-3
Appellate Court Case Title: State of Washington, Respondent v. Darren Ronell Smith Jr., Appellant
Superior Court Case Number: 19-1-00723-2

The following documents have been uploaded:

- 540673_Briefs_20200701160923D2752453_1276.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.070120-11.pdf
- 540673_Designation_of_Clerks_Papers_20200701160923D2752453_8232.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was washapp.070120-10.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Kate Benward - Email: katebenward@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200701160923D2752453