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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

DARREN RONELL SMITH JR.,

Appellant.

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Appeal from the Superior Court of Pierce County

No. 19-1-00723-2

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Darren Smith's contention that Washington's sex offender registration law violates the ex post facto clause of the state and federal constitutions has already been rejected by Washington's courts, as well as the United States Supreme Court. *See, e.g., State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994); *Smith v. Doe I*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Requiring a transient sex offender to comply with a registration requirement enacted after his conviction is a public safety requirement, not an imposition of punishment. *E.g., State v. Boyd*, 1 Wn. App. 2d 501, 507, 408 P.3d 362 (2017), *cert. denied, Boyd v. Washington*, 139 S. Ct. 639, 202 L. Ed. 2d 491 (2018). And there is no evidence in the record to support a claim that the registration requirement is unconstitutionally punitive as applied to Smith. As a result, Smith cannot meet his burden to show beyond a reasonable doubt that the statute is unconstitutional.

Smith's ambiguous due process argument also fails. It is well settled that defendants are not entitled to have the judge address the collateral consequences of a conviction, which do not come into existence until after the conviction. *Ward*, 123 Wn.2d at 512-15. And contrary to Smith's assertions, Washington's sex offender registration regime imposes

different requirements depending on the level of risk an offender poses to the community, and allows those sentenced of a sex crime as a juvenile to seek relief from the registration requirement many years earlier than those convicted as adults.

## **II. RESTATEMENT OF THE ISSUES**

- A. The courts have consistently held that sex offender registration requirements are not punitive, and therefore do not violate the ex post facto clauses of the federal and state constitutions. Did requiring Smith to register as a sex offender comply with the ex post facto clauses?
- B. The Washington Supreme Court has held that courts are not required to inform a defendant of the collateral consequences of a plea, and that sex offender registration requirements enacted after the sentence are a collateral consequence. Was the juvenile court required to address registration requirements for transient offenders, enacted after Smith's sentence?

## **III. STATEMENT OF THE CASE**

### **A. Washington's Sex Offender Registration Requirement**

To protect the community, Washington's Community Protection Act of 1990 requires sex offenders to register with local law enforcement and provide a variety of information, including their residential address, aliases, place of employment, photograph, and fingerprints. RCW 9A.44.130(1)-(2)(a). Local law enforcement is required to verify that the offender is living at the registered address. RCW 9A.44.135. Offenders who do not have a fixed address report weekly to indicate where they will be living that week. RCW 9A.44.130(6)(b). Transient offenders are free to

move to another county and register in the new location. RCW 9A.44.130(4)(a)(vi).

Law enforcement agencies are authorized to release information to the public regarding sex offenders, based on the offenders' risk level. RCW 4.24.550(1)-(2). For example, information regarding risk level I offenders (the level posing the least risk to the community) may only be disclosed to specific persons and entities, such as the school the offender is attending, victims, and witnesses. RCW 4.42.550(3). In contrast, information regarding risk level III offenders (the level posing the greatest risk to the community) may be disclosed to the public at large. *Id.*

The Washington Association of Sheriffs and Police Chiefs maintains a website that contains information on all registered level II and III sex offenders. RCW 4.24.550(5)(a). The lack of a fixed address is a factor in determining the risk an offender poses to the community. RCW 9A.44.130(6)(b). As a result, the Legislature has required that information be available to the public at large regarding all offenders who do not have a fixed address. *Id.*

Washington allows sex offenders to petition for relief from the duty to register after ten to fifteen years. RCW 9A.44.142. And if the sex offense was committed as a juvenile, the petition may be filed far sooner. If a class A sex offense was committed when the offender was fifteen

years of age or older, the offender may be able to file a petition as soon as five years after release from custody. RCW 9A.44.143(2)(a). If the offense occurred before the age of 15, a petition to end registration may be filed just two years after release from confinement. RCW 9A.44.143(3)(a). The trial court is given broad discretion to determine whether a petitioner is sufficiently rehabilitated to warrant removal from the sex offender registry. RCW 9A.44.143(5).

**B. Smith Is a Level I, Transient Sex Offender Who Has Repeatedly Violated the Registration Law**

In 2002, Smith pleaded guilty and was sentenced in juvenile court for Indecent Liberties with Forcible Compulsion. CP 12; CP 57 (Ex. 15). He was fourteen years old at the time he committed the crime and fifteen at the time he was sentenced. CP 57 (Ex. 13). Indecent liberties by forceable compulsion is a Class A felony sex offense. RCW 9A.44.100. The juvenile court order informed Smith that although juvenile records may be sealed in some cases, records may *not* be sealed regarding a Class A felony or a sex offense. CP 57 (Ex. 13 at 5).

After completing his sentence, Smith was required to register as a sex offender. RCW 9A.44.130(1)(a). But as an adult, Smith acquired a long list of criminal convictions, including four convictions for failing to register. CP 12; *see State v. Smith*, 154 Wn. App. 1040 (2010) (unpublished). Between February 25, 2014 and September 17, 2018,

Smith registered with the Pierce County Sheriff's Department ten times, usually indicating that he did not have a fixed residence. RP(1) 69. After September 17, 2018, Smith stopped reporting. RP(1) 69-70. Smith knew that he was obligated to report weekly. CP 9. After Pierce County determined that Smith had not reported to another county, and was not in custody, he was charged with knowingly failing to register between September 24, 2018 and January 1, 2019. RP(1) 70-71; CP 8.

**C. Procedural History**

Smith was convicted of Failure to Register as a Sex Offender—Third Offense. CP 8, 15. Because he had two prior convictions, the failure was a Class B offense, with a standard sentencing range of 43 to 57 months and maximum term of ten years. CP 15. The trial judge imposed a low range sentence of 43 months, with 36 months of community custody. RP(2) 9; CP 15.

**IV. ARGUMENT**

**A. Washington's Sex Offender Registration Does Not Implicate the State or Federal Constitution's Ex Post Facto Clauses**

Smith cannot meet his burden to show that the sex offender registration statutes violate the ex post facto clauses of the state and federal constitutions. Const. art. I, § 23; U.S. Const. art. I, § 10; *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994) (concluding that the party raising a constitutional challenge to a statute bears the burden of

proving it is unconstitutional beyond a reasonable doubt). State and federal courts have consistently held that the ex post facto clauses are not implicated by conviction for failure to register, when the registration statute was enacted after the sex offense.

**1. The courts have consistently held that Washington’s registration requirements are nonpunitive**

The three-part ex post facto clause analysis conclusively demonstrates that Washington’s sex offender registration requirements are constitutional, regardless of whether the offender was convicted of a sex offense prior to enactment or amendment of the registration requirement. The ex post facto clause is offended if a law: (1) is substantive, rather than procedural; (2) applies retroactively; and (3) “disadvantages the person affected by it.” *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 185, 814 P.2d 635 (1991); see *Ward*, 123 Wn.2d at 496 (ex post facto clause analysis is the same under the state and federal constitutions). Because “[t]he ‘sole determination of whether a law is “disadvantageous” is whether the law alters the standard of punishment which existed under prior law,’” ex post facto prohibitions are applicable only to laws that impose criminal punishment. *Ward*, 123 Wn.2d at 496 (quoting *Powell*, 117 Wn.2d at 499).

Washington courts have consistently held that Washington’s sex offender registration requirements are regulatory—not punitive. *E.g.*,

*Ward*, 123 Wn.2d at 499; *State v. Boyd*, 1 Wn. App. 2d 501, 507, 408 P.3d 362 (2017), *cert. denied by Boyd v. Washington*, 139 S. Ct. 639, 202 L. Ed. 2d 491 (2018). As the Court explained in *Ward*, registration as a sex offender may be burdensome to the offender, but it does not constitute a punishment. *Ward*, 123 Wn.2d at 499. The Court examined the legislative intent in enacting the registration statute. *Id.* The Legislature’s stated purpose in enacting the registration law was to assist law enforcement in protecting communities “by *regulating* sex offenders” by requiring registration with local law enforcement agencies pursuant to RCW 9A.44.130. *Id.* (quoting Laws of 1990, ch. 3, § 401 and citing Laws of 1991, ch. 274, § 1).

In *Ward*, the Court also considered the “actual effect” of the registration requirement and determined that it is not punitive. *Id.* at 499. The Court applied the four factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). After thorough consideration, the Court concluded that sex offender registration “does not constitute punishment.” *Ward*, 123 Wn.2d at 510-11. The Court explained:

The Legislature’s purpose was regulatory, not punitive; registration does not affirmatively inhibit or restrain an offender’s movement or activities; registration per se is not traditionally deemed punishment; nor does registration of sex offenders necessarily promote the traditional deterrent function of punishment. Although

a registrant may be burdened by registration, such burdens are an incident of the underlying conviction and are not punitive for purposes of ex post factor analysis.

*Id.*

Consistent with the Washington Supreme Court's decision in *Ward*, the United States Supreme Court held that Alaska's sex offender registration requirement did not constitute retroactive punishment when applied to a person whose sex offense predated enactment of the registration law. *Smith v. Doe I*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). The Supreme Court determined that sex offender registration requirements "impose[] no physical restraint, and so do[] not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 100. The Court explained that while Alaska's regulations require registered persons to inform local law enforcement if they alter their facial features or change their residence, "they are not required to seek permission to do so." *Id.* at 101. The same is true in Washington. Offenders are free from restraint and are not required to seek permission to move to new location.

In *Smith*, the Supreme Court also held that Alaska's online publication of sex offender information—including name, photograph, address, license plate, place of employment, crime, and whether the offender cannot be located—was nonpunitive and did not offend the ex

post facto clause. *Smith*, 538 U.S. at 105-06. The Court explained that the prior sex offense conviction is “already a matter of public record” and that any shame resulting from compulsory registration is the result of “dissemination of accurate information about a criminal record, most of which is already public.” *Id.* at 101. While posting the information on the internet makes it more accessible, this does “not render internet notification punitive.” *Id.* at 99.

Because the analysis applied under the state and federal ex post facto clauses is the same, the *Smith* decision regarding online publication is applicable in Washington as well. *See Doe A v. Washington State Patrol*, 185 Wn.2d 363, 383, 374 P.3d 63 (2016). Like Alaska the conviction addressed by the United States Supreme Court, *Smith*’s juvenile conviction was a matter of public record, as were his adult convictions for failure to register as a sex offender. As a result, any embarrassment or stigma *Smith* experienced is attributable to his sex offense. Making the public information more easily accessible to the community by posting it on the internet is not punitive.

**2. The amended requirements for transient sex offenders are not punitive**

*Smith*’s contention that Washington’s registration laws have become “increasingly punitive” for transient sex offenders is resoundingly contradicted by this Court’s decisions holding that the amendments to

Washington’s registration requirements, increasing the transient offender reporting requirement, are not punitive. Opening Br. at 8.

After the Legislature amended RCW 9A.44.130 to require transient offenders to register weekly, this Court rejected an ex post facto challenge to the amended law. *State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011). The Court held that the burdens of registration “are an incident of the underlying-conviction and are not punitive for purposes of ex post facto analysis.” *Enquist*, 163 Wn. App. 41, 49 256 P.3d 1277 (2011) (quoting *Ward*, 123 Wn.2d at 510-11.)

In 2017, this Court reexamined the four *Mendoza-Martinez* factors and confirmed that the actual effect of the transient sex offender registration requirements is nonpunitive. *Boyd*, 1 Wn. App. 2d 501. The Court found that “[w]hile the weekly, in person check-in requirement is inconvenient,” sex offenders “cannot show that the inconvenience constitutes punishment.” *Id.* at 513. With respect to the second factor, the Court of Appeals relied on *Ward’s* determination that the registration law is not akin to requirements that have traditionally been viewed as punishment. *Id.* at 511-12 (citing *Ward*, 123 Wn.2d 488 and *Smith*, 538 U.S. at 101-02). In examining the third factor, the Court held that transient sex offender registration requirements do not promote the traditional goals of punishment. “Although posting [] information online may deter future

crimes, that, as the Supreme Court recognized in *Ward*, is not a punitive effect.” *Boyd*, 1 Wn. App. 2d at 512 (citing *Ward*, 123 Wn.2d at 508).

Finally, with respect to the fourth *Mendoza-Martinez* factor, the *Boyd* Court held that transient sex offender registration requirements are not excessive in relation to their purpose. *Id.* at 512-13. The Court explained that article I, section I of the Washington Constitution endows the Legislature with “broad discretion” to determine the needs of the public and what measures are necessary to secure public safety. *Id.* (quoting *Ward*, 123 Wn.2d at 509). The “risk of recidivism posed by sex offenders is ‘frightening and high.’” *Smith*, 538 U.S. at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002)). When the Legislature added a requirement that level one sex offender information be posted if the offender is out of compliance with the registration statute, public safety was again the motivating factor. Laws of 2008, ch. 98 (codified as RCW 4.24.550(5)(a)). House Bill Rpt., HR 2786 at 2.

The Court concluded that *Boyd* had failed to show that the law was unconstitutional beyond a reasonable doubt. *Id.* at 513. Like *Smith*, *Boyd* contended that the registration statute violated the ex post facto clause as applied to him. *Boyd*, 1 Wn. App. 2d at 505; Opening Br. at 34. The Court determined that *Boyd* had not shown that the requirement was punitive as

applied to him. *Id.* at 511. Boyd had failed to register for several weeks and there was no evidence in the record that weekly, in-person reporting had impacted Boyd's ability to find housing, travel, or to obtain a job. *Id.* The same is true here: Smith has not shown that the registration requirements are punitive as applied to him. Like Boyd, Smith failed to register for an extended period, and there is no evidence in the record indicating that the reporting requirement impacted his ability to find housing, move, or obtain a job.

In essence, Smith is asking that this Court ignore the controlling Washington State case law, and instead rely on case law from other jurisdictions. The cases he cites analyze far more stringent state laws that are not analogous to Washington law. Opening Br. at 16. For example, in *Does # 1-5 v. Snyder*, 834 F.3d 696, 702 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55, 199 L. Ed. 2d (2017), the Sixth Circuit found that Michigan's sex offender registration requirements were punitive. Michigan's law regulated offenders' lives "in minute detail," and required immediate reporting for common events, such as purchase of a new vehicle or a change in an internet identifier. *Id.* at 698. Unlike Smith, the offenders in *Snyder* presented maps, data, and expert testimony showing that geographic restrictions had made it extraordinarily difficult for them to find a legal location to live or work in a densely populated city. *Id.*

Smith's reliance on cases involving state laws that imposed lifetime registration requirements and provided no opportunity for judicial consideration of continuing public risk is also misplaced. Opening Br. at 16 (citing *Starkey v. Oklahoma Dep't of Corr.*, 2013 OK 43, 305 P.3d 1004 (2013) (life time registration); *Doe v. State*, 189 P.3d 999 (Alaska 2008) (lifetime registration); *Pennsylvania v. Muniz*, 640 Pa. 699, 164 A.3d 1189 (2017) (plurality) (lifetime registration); *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996) (publication level not dependent on risk); *Doe v. New Hampshire*, 167 N.H. 382, 111 A.3d 1077 (2015) (lifetime registration without review punitive; opportunity for judicial review of continued risk held to be an appropriate remedy)). In sharp contrast, Washington allows sex offenders to petition for relief from the duty to register after ten to fifteen years. RCW 9A.44.142. And if the sex offense occurred before the age of 15, the petition to end registration may be filed just two years after release from confinement. RCW 9A.44.143(3).

In sum, Washington's registration requirements are nonpunitive and do not violate the ex post facto clause of the state or federal constitution.

**B. Smith Was Afforded Substantive Due Process**

Smith was afforded due process during the juvenile proceeding regarding his sex offense. The juvenile court is not required to inform a

defendant of the collateral, as opposed to the direct, consequences of his plea. *In re Det. of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999). The Washington Supreme Court has held that a sex offender registration requirement that comes into existence only after the guilty plea is entered is a collateral consequence. *Ward*, 123 Wn.2d at 512-15; *see also In re Pers. Restraint of Paschke*, 80 Wn. App. 439, 909 P.2d 1328 (1996) (civil commitment as a sexually violent predator is a collateral consequence of pleading guilty to a sexually violent offense).

Smith's contention that the State has imposed "onerous, possibly life-long conditions" on him "solely because of what he did when he was 14 years old," is also without merit. Opening Br. at 48. Washington's registration requirements are lessened for juvenile offenders. When an adult has been sentenced in Washington, they may petition to be relieved of the duty to register after spending at least ten consecutive years in the community without committing a disqualifying offense. RCW 9A.142(1)(b). But if the offense was committed by a fourteen-year-old, a petition to end the registration requirement may be filed as soon as two years after the completion of any term of confinement. RCW 9A.44.143(3).

When a petition is filed by an offender who was a juvenile, the court has broad discretion to end the registration requirement and order

removal from the sex offender registry. If the petitioner has not been convicted of failing to register in the last two years, and he shows by a preponderance of the evidence that he is sufficiently rehabilitated, the court may relieve him of the duty to register. *Id.* Thus, the cause of Smith's continuing duty to register is his decision—as an adult—to violate the registration requirements. *See State v. Smith*, 154 Wn. App. 1040 (2010) (unpublished) (addressing Smith's prior convictions for failure to register as a sex offender).

**C. The State Does Not Object to Striking the Supervision Fee**

The State does not object to striking the supervision fee in this case. Although the trial court had authority to impose it, the record indicates that in this case the court may have done so inadvertently. The judgement and sentence states that Smith was found indigent and that supervision fees are imposed. CP 15. But during the sentencing hear, the judge indicated that “[Smith’s] LFOs will not be imposed other than what are mandatory.” RP (2) at 9.

**V. CONCLUSION**

Boyd’s arguments have been rejected by the state and federal courts. Washington’s sex offender registration laws do not violate the ex post facto clauses of the state and federal constitutions. And there is no evidence in this record to indicate that the registration requirements are

punitive as applied to Boyd. Boyd's due process argument is also without merit. It is well settled that the juvenile court is not required to make any findings or conclusions, or provide notice, regarding the collateral consequence of sex offender registration requirements.

RESPECTFULLY SUBMITTED this 31st day of August, 2020.

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Date                      Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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