Supreme Court No. 99239-8
Court of Appeals No. 79358-6-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL OKLER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Michael Okler, the petitioner and appellant below, asks this Court to grant review of the Court of Appeals' decision terminating review.[1]

After Mr. Okler committed crimes in 1989, a law was enacted in 1990 requiring him to register as a sex offender for these crimes. The registration requirements are onerous and Mr. Okler may be criminally prosecuted for failing to comply. In 1999, the law was later amended to require weekly in-person reporting for homeless persons subject to the law. Based on these amendments requiring weekly in-person reporting, Mr. Okler pleaded guilty to failure to register.

The Court of Appeals held that Mr. Okler's conviction for failure to register did not violate the state and federal constitutional prohibitions against ex-post facto laws.

Whether it is a violation of the ex post facto prohibition to retroactively apply the requirement to register as a sex offender is an issue being reviewed by this Court in **State v. Batson, No. 97617-1**.[2] Mr. Okler asks this Court to grant his petition or stay consideration of his petition until Batson is decided.

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[1] The decision, an unpublished opinion, was issued on October 19, 2020. A copy is attached in the appendix.

[2] State v. Batson, 194 Wn.2d 1009, 452 P.3d 1225 (2019).

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Under the prohibition against ex post facto laws, it is unconstitutional to retrospectively increase a person's punishment for a crime. Homeless persons who are required to register as a sex offender must report weekly in-person to the sheriff's office. This is akin to probation, which is punishment. Does retrospective application of the registration requirements for homeless persons violate the prohibition against ex post facto laws?[3]

2. Both the state constitution prohibits ex post facto laws. This prohibition is different from the federal prohibition in its text and location. When our constitution was adopted, the rule was that a law violated the ex post facto prohibition if the law disadvantaged the person or deprived the person of a substantial right. After adhering to this rule for a century, the United States Supreme Court discarded it, narrowing the protections of the federal ex post facto prohibition. Is the "disadvantage" rule part of Washington's ex post facto prohibition? Does retrospective application of the registration requirement substantially disadvantage Mr. Okler in violation of the state constitutional prohibition against ex post facto laws?

[3] This issue may be addressed by this Court in State v. Batson, No. 97617-1.

C. STATEMENT OF THE CASE

Michael Okler is about 60 years old. CP 121. In 1990, Mr. Okler pleaded guilty to charges of first-degree child molestation, stemming from acts committed in 1989. CP 160; Br. of App., App. A, p. 1.[4] He was sentenced under a special sexual offender sentencing alternative and successfully completed it. CP 118; Br. of App., App. A, p. 3. Based on a law enacted in 1990, Mr. Okler was required to register as a sex offender. Laws of 1990, ch. 3, §§ 401-09; Br. of App., App. at A, p. 7. In the years since, Mr. Okler has not been convicted of any other sex offense, but has struggled with alcohol and drug-related issues due in part to chronic pain. CP 126, 160-61. Likely due to these struggles, Mr. Okler was convicted of failing to register in 2006 and 2010. CP 160.

On January 30, 2017, the prosecution charged Mr. Okler with failure to register. CP 179. The prosecution alleged that during a period that Mr. Okler lacked a fixed residence, he knowingly failed to report in person to the county sheriff's office. CP 179.

[4] Appendix A is a copy of the judgment and sentence for these offenses. The Court of Appeals granted Mr. Okler's request to add this document to the record in this case. Slip op. at 3, n.6.

Mr. Okler pleaded guilty to the charge. 10/4/18RP 6; CP 144-63. The court imposed a low-end sentence of 43 months' confinement and 36 months of community custody. CP 94-95;11/20/18RP 9.

On appeal, Mr. Okler contended his conviction was invalid because the registration requirement which formed the basis of the conviction was an unconstitutional ex post facto law as applied to him. He argued this was so because the requirement to register was punitive in effect. Br. of App. at 23-37. He also argued that the ex post facto prohibition in the state constitution should be independently interpreted. Br. of App. at 8-20. Under this independent interpretation, retrospective application of laws violates the ex post facto prohibition if it alters the situation of a person to his or her disadvantage. Br. of App. at 20-22. Because retrospective application of the registration requirement altered the situation of Mr. Okler to his disadvantage, the registration conviction violated the state constitution. Br. of App. at 22-23. Based on its view of the precedent, the Court of Appeals rejected Mr. Okler's arguments. Slip op. at 4-10.

D. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED.

Mr. Okler's conviction for failure to register violates the state and federal prohibitions against ex post facto laws.

1. The weekly in-person reporting requirement for homeless sex offenders is akin to probation, which is punishment. The Court should grant review to decide whether retrospective application of the weekly in-person reporting requirement for homeless offenders constitutes "punishment" in violation of the prohibition against ex post facto laws.

Both the state and federal constitutions prohibit ex post facto laws. Const. I, § 23; U.S. Const. art I, § 9 c.3; § 10 c.1. Ex post facto laws are unjust because they deprive persons of fair notice or warning of applicable laws and are often arbitrary or vindictive. See Weaver v. Graham, 450 U.S. 24, 28-29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

Laws that impose additional punishment beyond which was prescribed at the time of the crime violate the prohibition against ex post facto laws. Weaver, 450 U.S. at 28; State v. Edwards, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985). Even laws that are nominally non-punitive may violate the prohibition against ex post facto laws if they nonetheless impose or increase punishment retrospectively. Does #1-5 v. Snyder, 834 F.3d 696, 700 (6th Cir. 2016). "[I]t is the effect, not the form, of the law that determines whether it is *ex post facto*." Weaver, 450 U.S. at 31.

Whether a law violates the constitutional prohibitions against ex post facto laws is an issue of law reviewed de novo. State v. Boyd, 1 Wn. App. 2d 501, 507, 408 P.3d 362 (2017).

The legislature enacted the sex offender registration scheme in 1990. Laws of 1990, ch. 3, §§ 401-09; State v. Ward, 123 Wn.2d 488, 492-93, 869 P.2d 1062 (1994). This was after Mr. Okler committed the offenses that triggered a registration requirement on this scheme. Br. of App., App. A.

In 1994, our Supreme Court rejected an argument that retroactive application of the sex offender registration scheme violated the prohibitions against ex post facto laws. Ward, 123 Wn.2d at 496-511.

The current conviction, however, stems from the changes made to the law beginning 1999. Before 1999, homeless people with a duty to register did not have to register because they lacked a fixed address. State v. Pickett, 95 Wn. App. 475, 478, 975 P.2d 584 (1999). The legislature then amended the law to require those persons lacking a "fixed residence" and a duty to register to report *in-person weekly* to the sheriff's office. Laws of 1999, 1st sp. s. ch. 6; RCW 9A.44.130(1); Boyd, 1 Wn. App. 2d at 506.

Based on an allegation Mr. Okler failed to report to the sheriff's office in person while he lacked a fixed residence, Mr. Okler pleaded guilty to the current registration offense.[5] CP 144, 152, 179-80.

This Court should grant review and hold that Mr. Okler's conviction violates the prohibition against ex post facto laws under the state and federal constitutions. In doing so, this Court will be joining other courts that have held registration laws violate state or federal constitutional ex post facto guarantees when applied retroactively. Commonwealth v. Muniz, 640 Pa. 699, 164 A.3d 1189 (2017); Snyder, 834 F.3d at 705-06; Doe v. State, 167 N.H. 382, 111 A.3d 1077 (2015); Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535, 62 A.3d 123 (2013); Starkey v. Oklahoma Dep't of Corr., 305 P.3d 1004 (Okla. 2013); Wallace v. State, 905 N.E.2d 371 (Ind. 2009); State v. Letalien, 985 A.2d 4 (Me. 2009); Doe v. State, 189 P.3d 999 (Alaska 2008).

Properly analyzed, the restrictions imposed on Mr. Okler by the registration laws are equivalent to probation, which is punishment. State v. Ross, 129 Wn.2d 279, 285, 916 P.2d 405 (1996).

To determine whether a law is punitive in effect, courts have examined the factors set out in Kennedy v. Mendoza-Martinez, 372 U.S.

[5] Pleading guilty does not waive the right to make an ex post facto challenge. In re Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000).

144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). Smith v. Doe, 538 U.S. 84, 97, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); Ward, 123 Wn.2d at 499; Boyd, 1 Wn. App. 2d at 508-09. These factors are: (1) "[w]hether the sanction involves an affirmative disability or restraint," (2) "whether it has historically been regarded as a punishment," (3) "whether it comes into play only on a finding of scienter," (4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence," (5) "whether the behavior to which it applies is already a crime," (6) "whether an alternative purpose to which it may rationally be connected is assignable for it," and (7) "whether it appears excessive in relation to the alternative purpose assigned." Mendoza-Martinez, 372 U.S. at 168-69 (footnotes omitted). These factors are not exhaustive or dispositive, and are not intended to be a mathematical formula. Smith, 538 U.S. at 97.

Using these factors, several jurisdictions have held that registration laws violate state or federal constitutional ex post facto provisions when applied retroactively. Muniz, 640 Pa. at 699; Snyder, 834 F.3d at 705-06; Doe, 167 N.H. at 396, 410-11; Starkey, 305 P.3d at 1030; Letalien, 985 A.2d at 26; Wallace, 905 N.E.2d at 384; Doe, 189 P.3d at 1019.

As detailed in Mr. Okler's opening brief, an analysis of the Mendoza-Martinez factors establishes that the registration scheme is punitive in effect. Br. of App. at 25-37. The statute imposes significant

burdens and restraints on homeless individuals, it is like supervised probation and public shaming, it has a substantial deterrent and retributive effect, and its punitive effects outweigh the legitimate aim of protecting the public.

Most significant is the requirement of weekly in-person reporting for homeless persons, which is "perhaps the most burdensome in the country." Boyd, 1 Wn. App. 2d at 525 (Becker, J., dissenting). This weekly reporting requirement "can readily lead to an unending cycle of imprisonment for transient offenders," which is "the paradigmatic affirmative disability or restraint." Id. It is akin to probation or parole, which punitive. Id. at 526; see also Snyder, 834 F.3d at 697-98, 703, 705; Doe, 167 N.H. at 405 ("the frequent reporting and checks by the authorities," including home visits and quarterly in-person registration, cannot be described as "*de minimus*"); Doe, 430 Md. at 562 (quarterly in-person registration is akin to "an additional criminal sanction"); Wallace, 905 N.E.2d at 379 (annual in-person registration, along with other strident requirements, "imposes significant affirmative obligations and a severe stigma on every person to whom it applies"); Letalien, 985 A.2d at 18 (quarterly in-person registration "imposes a disability or restraint that is neither minor nor indirect"); Muniz, 640 Pa. at 735-36 (recognizing quarterly in-person reporting for non-homeless offender and monthly

reporting for homeless offenders were direct restraints); Commonwealth v. Lacombe, 234 A.3d 602, 615-16, 618-19 (Pa. 2020) (new registration scheme passed in response to Muniz was not punitive; scheme "reduced the frequency with which an offender must report in person").

In concluding that the weekly in-person reporting requirement did not render the law punitive, the Court of Appeals felt bound by this Court's opinion in Ward and its own more recent precedent. Slip op. at 10. But the aspects of the law that plainly render it punitive were enacted after this Court's 1994 decision in Ward. And the more recent precedent from the Court of Appeals' reached the wrong result, as explained by Judge Becker's dissent in Boyd. 1 Wn. App. 2d at 522-28 (Becker, J., dissenting).

Whether retrospective application of the weekly in-person reporting requirement violates the prohibition against ex post laws is a significant constitutional question. RAP 13.4(b)(3). The issue is also one of substantial public interest that should be decided by this Court. RAP 13.4(b)(4). As the Court of Appeals noted in this case, "RCW 9A.44.130(6)(b) imposes more onerous reporting requirements for individuals experiencing homelessness than others. This is particularly concerning given the attendant increase in the risk of prosecution and future imprisonment in light of the apparent absence of evidence that the

requirements increase public safety." Slip op. at 10 n.9 (citing ELIZABETH ESSER-STUART, "The Irons Are Always in the Background": The Unconstitutionality of Sex Offender Post-Release Laws As Applied to the Homeless, 96 TEXAS L. REV. 811, 816 (2018)). Indeed, this Court is reviewing this very issue, which indicates that it is worthy of this Court's review. State v. Batson, No. 97617-1. The Court should grant review or stay consideration of the petition until this Court issues its decision in Batson.

2. This Court should grant review to decide whether Washington's prohibition against ex post facto laws should be interpreted independently from the analogous federal prohibition. Under an independent interpretation, an ex post facto law includes laws that retrospectively disadvantage a person or deprive a person of a substantial right.

Regardless of whether the 1999 amendments to the registration scheme renders it punitive in effect, the Washington prohibition against ex post facto laws forbids retrospective application of laws that alters the situation of person to his or her disadvantage. Br. of App. at 8-22.

This was long the constitutional rule under the federal constitution. Kring v. Missouri, 107 U.S. 221, 228-29, 2 S. Ct. 443, 27 L. Ed. 506 (1883) ("an ex post facto law is one which, . . . in relation to the offense or its consequences, alters the situation of a party to his disadvantage.") (quoting United States v. Hall, 26 F. Cas. 84, 86 (No. 15, 285) (D.

Pa.1809)); accord Thompson v. Utah, 170 U.S. 343, 352-53, 355, 18 S. Ct. 620, 42 L. Ed. 1061 (1898) (law the retrospectively changed the number of jurors in a criminal case from 12 to 8 deprived the defendant "of a substantial right involved in his liberty" and "materially alter[ed] the situation to his disadvantage.")

Washington followed the same rule set out in Kring and Thompson. Edwards, 104 Wn.2d at 71. In Edwards, a man died about two years after being shot. Id. at 65. Under the common law "year and a day rule," the defendant could not be prosecuted for homicide. Id. at 65, 68-70. The legislature changed the law permitting retrospective prosecutions for homicide where the death occurred within three years and a day after the criminal act. Id. at 66. This Court held that prosecuting the defendant under this change violated the state and federal prohibitions against ex post facto laws, reasoning it "significantly disadvantages the defendants and anyone else in their situation." Id. at 72.

In 1990, however, the United State Supreme Court changed its view of the ex post facto prohibition, abandoning the "disadvantages rule" that had stood for over a century. Collins v. Youngblood, 497 U.S. 37, 50, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). The Court held the definition of

ex post facto set out by Justice Chase in Calder v. Bull[6] was the exclusive definition of an ex post facto law. Id. Justice Chase had defined an ex-post facto law as:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. 390, 1 L. Ed. 648 (1798) (opinion of Chase, J.). Under this definition, retrospective application of a Texas statute that allowed reform of an improper jury verdict (which eliminated the remedy of a new trial for this error) was not an ex post facto law. Collins, 497 U.S. at 39-40, 52.

Based on Collins and without analyzing whether article I, § 23 should be interpreted independently, this Court "clarif[ied] that the sole determination of whether a law is 'disadvantageous' is whether the law *alters the standard of punishment* which existed under prior law." Ward, 123 Wn.2d at 498. In other words, the "disadvantageous" framework was

[6] 3 U.S. 386, 1 L. Ed. 648 (1798) (opinion of Chase, J.)

redefined to fall within the Calder v. Bull definition, effectively overruling prior precedent.

But history shows that for most of Washington's existence, Washington courts interpreted article I, § 23 as providing protection *beyond* the Calder v. Bull definition. Retrospective laws that disadvantaged a person or impacted their substantial rights qualified as an unconstitutional ex post facto law.

As outlined in Mr. Okler's brief, this history and preexisting law supports an independent interpretation of article I, section 23. Br. of App. at 14-19.

The other non-exclusive factors set out in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) further support independent interpretation and retention of the "disadvantages rule." Br. of App. at 10-14, 20-23.

Washington's provision emphatically declares that "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. I, § 23 (emphasis added). This use of the word "ever" distinguishes it from the federal provision. U.S. Const. art. I, § 10 cl. 1. Further, unlike the federal provision, which is contained in the article setting out Congress's powers, Washington's provision is found in its declaration of rights. As the Pennsylvania Supreme Court recognized in holding its ex post facto provision to be more protective, "[t]he location of

[the] clause within the Declaration of Rights lends considerable force to the argument it provides even more protection than its federal counterpart." Muniz, 640 Pa. at 752.

Notwithstanding Mr. Okler's Gunwall analysis, the Court of Appeals concluded that "the Gunwall factors weigh against independent interpretation of Washington's ex post facto clause." Slip op. at 9. The Court disregarded the textual differences between the analogous provisions, ignored that article I, section 23 appears in Washington's Declaration of Rights rather than in the provision setting out the legislative powers, and incorrectly reasoned the use of the term "disadvantageous" in the precedent did not set out a more stringent rule. Slip op. at 5-9. The latter conclusion cannot be squared with this Court's decision in Edwards, which applied the "disadvantages" rule. 104 Wn.2d at 71-72.

The Court of Appeals incorrectly failed to analyze Mr. Okler's challenge using the "disadvantages" framework. See Doe, 430 Md. at 551-52, 559-68 (holding that "disadvantages" principle remains relevant under Maryland's constitution). Here, the retrospective application of the sex offender registration laws altered Mr. Okler's situation to his disadvantage and deprived him of his liberty. Without fair warning and based on what could be considered vindictive legislation enacted in 1990, Mr. Okler was required to register as a direct consequence of the criminal acts he

committed in 1989. But for these acts, Mr. Okler would not have been required to register and he would not have been convicted three times for failing to comply. "Thus, imposing registration alters the consequences for a prior crime and implicates the ex post facto prohibition." Doe, 430 Md. at 560.

Under the "disadvantages" rule, this Court "need not inquire whether [the registration requirement] is technically an increase in the punishment annexed to the crime." Lindsey v. Washington, 301 U.S. 397, 401, 57 S. Ct. 797, 81 L. Ed. 1182 (1937). "It is plainly to the substantial disadvantage" of Mr. Okler to be required to comply with all the reporting requirements associated with registration and be subject to prosecution and imprisonment for noncompliance. Lindsey, 301 U.S. at 401-02. As applied to Mr. Okler and similarly situated persons, it should be held to be an unconstitutional ex post facto law under article I, section 23.

Whether article I, section 23 should be interpreted independently from the ex post factor prohibition set out in United States Constitution is a significant constitutional question that should be decided by this Court. RAP 13.4(b)(3). And whether the "disadvantages rule" is the law under article I, section 23 implicates many convictions for failure to register. This makes the issue one of substantial public interest, further meriting review. RAP 13.4(b)(4). Review should be granted.

E. CONCLUSION

For the foregoing reasons, Mr. Okler asks this Court to grant his petition for review or stay consideration of his petition until Batson is decided.

Respectfully submitted this 17th day of November, 2020.

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. OKLER, MICHAEL CRAIG, DOB: 02/15/1960, Appellant.	)	No. 79358-6-I UNPUBLISHED OPINION

BOWMAN, J. — Michael Craig Okler challenges the condition that he register as a sex offender following his 1990 convictions for child molestation as unconstitutional because it violates ex post facto prohibitions under the state and federal constitutions. Okler concedes his argument contradicts existing case law but asks us to determine whether we should interpret the Washington State Constitution's ex post facto provision independently of its federal counterpart under State v. Gunwall.[1] We conclude that the Washington State Constitution provision does not extend broader rights than its counterpart in the United States Constitution. Because existing case law establishes that retroactive application of sex-offender registration statutes does not violate ex post facto restrictions, we affirm Okler's conviction for failure to register as a sex offender but remand to

[1] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Citations and pin cites are based on the Westlaw online version of the cited material.

strike community custody supervision fees and nonrestitution interest from his judgment and sentence.

FACTS

In September 1990, Okler pleaded guilty to three counts of first degree child molestation for acts that occurred in 1989. Okler successfully completed a special sex-offender sentencing alternative and has no subsequent criminal convictions for sex-related offenses.

Seven months earlier in February 1990, Washington had enacted a statute requiring convicted sex offenders to register with the sheriff of the county in which they reside. LAWS OF 1990, ch. 3, §§ 401-409; see RCW 9A.44.130(1)(a). A 1999 amendment to the statute requires offenders without a fixed address to report weekly, in person, to the sheriff of the county of registration. LAWS OF 1999, 1st Spec. Sess., ch. 6, § 2; see RCW 9A.44.130(6)(b). Okler's 1990 judgment and sentence required him to register as a sex offender "for 15 years after the last date of release from confinement." Okler registered as "not having a fixed residence."

In January 2017, the State charged Okler with failing to register as a sex offender while on community custody because he failed to report in person to the sheriff's office "on or about the weeks of June 8, 2016 through July 8, 2016."[2] Okler pleaded guilty as charged.

At sentencing, Okler requested an exceptional sentence downward because "physical and mental health conditions" affected his "capacity to

[2] Okler was convicted of failing to register in 2006 and 2010.

conform his conduct to the requirements of the law."[3] The trial court denied his request for an exceptional sentence downward but sentenced Okler to 43 months in prison, the low end of the standard range. The court determined that Okler was indigent and imposed the mandatory victim penalty assessment but waived all other discretionary legal financial obligations (LFOs).

Okler appeals his sentence.

ANALYSIS

Okler argues the retroactive application of the sex-offender registration statute[4] and its 1999 amendment[5] violates the prohibitions against ex post facto laws under our state constitution.[6] He also challenges imposition of certain discretionary LFOs and raises several issues in his statement of additional grounds for review (SAG).

[3] A forensic psychological assessment showed that Okler has "significant" cognitive impairment. He has a history of head injuries, chronic pain, and alcohol and drug use.

[4] RCW 9A.44.130-.140.

[5] RCW 9A.44.130(6)(b).

[6] In support of his claim, Okler moves to supplement the appellate record with his 1990 judgment and sentence showing that the acts leading to his 1990 convictions for child molestation occurred in "Summer-Fall, 1989." Generally, an appellate court does not consider evidence that was not part of the trial court record. State v. Curtiss, 161 Wn. App. 673, 703, 250 P.3d 496 (2011). RAP 9.11(a) establishes six requirements a party must show to supplement the record on review. We permit new evidence only if the party meets all six conditions. Wash. Fed'n of State Emps., Council 28, AFL-CIO v. State, 99 Wn.2d 878, 884, 665 P.2d 1337 (1983). But we also liberally interpret the RAP "to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). "Although RAP 1.2 does not provide a freestanding mechanism to admit new evidence, its direction to liberally read these procedural rules" should guide the interpretation of RAP 9.11. Randy Reynolds & Assocs., Inc. dba Reynolds Real Estate v. Harmon, 193 Wn.2d 143, 154, 437 P.3d 677 (2019). Without Okler's 1990 judgment and sentence, the record would support review of his challenge to the 1999 amendment to the sex-offender registration statute but would not support review of the 1990 statute itself. In the interests of judicial economy, and to facilitate our decision on the merits, we grant Okler's motion to supplement the record. See Wash. Fed'n of State Emps., 99 Wn.2d at 885-86.

Ex Post Facto Provisions

We presume a statute is constitutional, and the challenging party must prove it violates the constitution beyond a reasonable doubt. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994).

> The ex post facto clauses of the federal and state constitutions forbid the State from enacting any law which imposes punishment for an act which was not punishable when committed or increases the quantum of punishment annexed to the crime when it was committed.

Ward, 123 Wn.2d at 496; U.S. CONST. art. I, § 10; WASH. CONST. art. I, § 23. A law violates the ex post facto clause if it is (1) substantive, rather than procedural; (2) retrospective; and (3) disadvantages the person affected by it. Ward, 123 Wn.2d at 498.

Washington Courts have addressed ex post facto challenges to RCW 9A.44.130 through .140 and the 1999 amendment to the statute. Those challenges withstood constitutional scrutiny under the federal and state constitutions. See Ward, 123 Wn.2d at 510-11 (requirement to register as a sex offender is regulatory rather than punitive); State v. Enquist, 163 Wn. App. 41, 49, 256 P.3d 1277 (2011) (Division Two of our court determined that the "inconvenience" of in-person registration is not punishment); State v. Boyd, 1 Wn. App. 2d 501, 507-13, 408 P.3d 362 (2017) (we determined weekly in-person check-in requirement is inconvenient but does not constitute punishment).

Ward, Enquist, and Boyd provide extensive ex post facto analyses of the 1990 sex-offender registration statute and its 1999 amendment. The cases presume that the statute is substantive and retrospective, note that the ex post facto analysis is the same for both the federal and state constitutions, and

examine the statute under a single standard—whether retroactive application "disadvantages" the defendant. See Ward, 123 Wn.2d at 498, 496-97; Enquist, 163 Wn. App. at 46; Boyd, 1 Wn. App. 2d at 510, 507-08.

In Ward, the Washington Supreme Court explicitly adopted the federal interpretation of what it means to be disadvantaged—"the sole determination of whether a law is 'disadvantageous' is whether the law alters the standard of punishment which existed under prior law." Ward, 123 Wn.2d at 498. As noted above, our courts have concluded that the sex-offender registration statutes are regulatory rather than punitive and thus do not alter the standard of punishment. See Ward, 123 Wn.2d at 510-11; Enquist, 163 Wn. App. at 49; Boyd, 1 Wn. App. 2d at 513. Because the statutes do not alter the standard of punishment, retroactive application does not violate the ex post facto clauses of the state and federal constitutions. Ward, 123 Wn.2d at 511; Enquist, 163 Wn. App. at 49; Boyd, 1 Wn. App. 2d at 510, 513. Okler acknowledges this precedent but asks us to examine separately the sex-offender registration statute and its 1999 amendment under the Washington State Constitution's ex post facto provision.

In State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986), the Washington Supreme Court established six nonexclusive criteria for considering whether to interpret our state constitution independently of federal guarantees—(1) the textual language of the state constitution, (2) significant differences in the texts of the parallel provisions of the state and federal constitutions, (3) state constitutional and common law history, (4) preexisting state law, (5) differences in structure between the state and federal constitutions, and (6) matters of

particular state interest or local concern. The fifth Gunwall factor "will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power." State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Washington's ex post facto clause is found in the constitution's "Declaration of Rights" article and states, "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." WASH. CONST. art. I, § 23. It is nearly identical to the federal provision that states, in pertinent part, "No state shall . . . pass any bill of attainder . . . [or] ex post facto law." U.S. CONST. art. I, § 10. The federal clause in the United States Constitution appears in the article establishing the powers of states. The textual similarities in both provisions weigh against independent interpretation of the state provision under the first two Gunwall factors.

Okler argues that despite the similarity in language, we are free to interpret our state constitution's ex post facto provision separately from the federal provision. He asserts that "the meaning of a state constitutional provision does not change whenever the United States Supreme Court interprets an analogous federal provision." But as discussed below, an analysis of our legal history and preexisting case law shows that the Washington Supreme Court has opted to interpret our ex post facto provision consistent with that of its federal counterpart.

In the eighteenth century, the United States Supreme Court established that ex post facto analysis requires consideration of whether a statute "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." Calder v. Bull, 3 U.S. 386, 390, 3 Dall. 386, 1 L. Ed. 648 (1798). A later decision broadened the definition of an ex post facto law to

> "one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage."

Kring v. Missouri, 107 U.S. 221, 228-29, 2 S. Ct. 443, 27 L. Ed. 506 (1883) (quoting United States v. Hall, 26 F. Cas. 84, 86, 2 Wash. C.C. 366 (1809)), overruled by Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). The United States Supreme Court later concluded, "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." Lindsey v. Washington, 301 U.S. 397, 401, 57 S. Ct. 797, 81 L. Ed. 1182 (1937).

The Washington Supreme Court adopted the analysis in Calder and applied it to our state's ex post facto prohibition. State v. Edwards, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985). A law violates the ex post facto prohibition if it "permits imposition of a different or more severe punishment than was permissible when the crime was committed." Edwards, 104 Wn.2d at 70-71; see State v. Handran, 113 Wn.2d 11, 14, 775 P.2d 453 (1989). But the court also concluded that "[l]egislation further violates the provision if it is made retroactive and disadvantages the offender. Edwards, 104 Wn.2d at 71. Despite this new

language, the court continued to focus on whether a statute increased punishment:

> "[A]lterations which do not increase the punishment, nor change the ingredients of the offence [sic] or the ultimate facts necessary to establish guilt, but—leav[e] untouched the . . . amount or degree of proof essential to conviction . . ." do not violate the ex post facto provision.

Edwards, 104 Wn.2d at 71[7] (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 28 L. Ed. 262 (1884)).

The focus on "punishment" permeates Washington's ex post facto cases. See Johnson v. Morris, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976) ("statute is ex post facto when it inflicts a greater punishment for the commission of a crime than that which was originally annexed to the crime when committed"); State v. Henderson, 34 Wn. App. 865, 872, 664 P.2d 1291 (1983) (an ex post facto statute inflicts greater punishment than originally annexed to the crime when committed); In re Pers. Restraint Petition of Williams, 111 Wn.2d 353, 362-63, 759 P.2d 436 (1988) ("[e]x post facto concerns generally arise when a statute criminalizes actions that were legal when performed or when the punishment for a crime is increased beyond that in effect when the crime was committed"); State v. Elliott, 114 Wn.2d 6, 18, 785 P.2d 440 (1990) (new law violates the prohibition against ex post facto laws if it " 'permits imposition of a different or more severe punishment than when the crime was committed' ") (quoting Handran, 113 Wn.2d at 14).

[7] Alterations in original.

In Collins v. Youngblood, the United States Supreme Court overruled Kring and established that the inquiry on whether a statute violates ex post facto prohibitions is "not whether the law is a burden, or 'disadvantageous' to the defendant, but whether it makes more burdensome the punishment for the crime." Ward, 123 Wn.2d at 497 (citing Collins, 497 U.S. at 42-43). Post-Collins, Washington continues to use "disadvantageous" as part of the test for unconstitutional ex post facto statutes but explicitly tethers the term to "punishment." In re Pers. Restraint of Powell, 117 Wn.2d 175, 188, 814 P.2d 635 (1991). "The threshold question in determining whether a law which affects parole is disadvantageous to prisoners is whether the law alters the 'standard of punishment' which existed under prior law." Powell, 117 Wn.2d at 188.

Our legal history and preexisting case law do not support Okler's argument that the Washington State Constitution requires a broader reading of the term "disadvantageous" when determining whether a law goes against ex post facto restrictions. Indeed, the link between the term "disadvantageous" and the phrase "alters the standard of punishment" stems not from federal law but from the Washington Supreme Court in Powell, 117 Wn.2d at 188. We conclude that the Gunwall factors weigh against independent interpretation of Washington's ex post facto clause.[8]

[8] Okler contends the sixth Gunwall factor favors independent interpretation because criminal law is a matter of local concern delegated to the state. He is correct that "criminal law in general involves local, not national, concerns." State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994). But this does not affect our conclusion. Four of the six Gunwall factors do not support independent and broader protection under the state ex post facto clause.

Retroactive Application

Our Supreme Court has determined that retroactive application of the 1990 sex-offender registration statute does not violate the prohibition on ex post facto laws because it does not impose punishment:

> 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 facto analysis.

Ward, 123 Wn.2d at 510-11. We have similarly determined that the 1999 amendments requiring in-person registration for offenders without a fixed address are regulatory, not punitive. Boyd, 1 Wn. App. 2d at 510-13.[9] Okler fails to show that the sex-offender registration statute and its 1999 amendment as retroactively applied to him violate the ex post facto clause of the state or federal constitutions.

Legal Financial Obligations

Okler claims his judgment and sentence erroneously includes community custody supervision fees and interest on nonrestitution LFOs. We agree.

Unless waived by the court, offenders must pay supervision fees for their term of community custody. RCW 9.94A.703(2)(d). Here, the trial court imposed

[9] In following precedent in our ex post facto analysis, we note RCW 9A.44.130(6)(b) imposes more onerous reporting requirements for individuals experiencing homelessness than others. This is particularly concerning given the attendant increase in the risk of prosecution and future imprisonment in light of the apparent absence of evidence that the requirements increase public safety. See ELIZABETH ESSER-STUART, "The Irons Are Always in the Background": The Unconstitutionality of Sex Offender Post-Release Laws As Applied to the Homeless, 96 TEXAS L. REV. 811, 816 (2018).

only nondiscretionary LFOs and stated that it would "waive all other financial obligations based on indigency." Despite the court's oral ruling, Okler's judgment and sentence included discretionary community custody supervision fees. Because the record reflects Okler's indigency and the court's intent to waive all discretionary LFOs, we remand for the trial court to strike the provision. See State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020).

The State concedes that a court can no longer impose interest on nonrestitution LFOs. This concession is proper under RCW 3.50.100(4)(b), which prohibits interest accrual on financial obligations other than restitution. See Dillon, 12 Wn. App. 2d at 153. We remand to strike the interest provision from the judgment and sentence.

Statement of Additional Grounds for Review

Okler raises several issues in his SAG and asks to withdraw his 1990 guilty plea as well as his later guilty pleas to failure to register charges. Okler claims the police failed to inform him of his Miranda[10] rights at the time of his arrest for the child molestation charges. He claims the police mistreated and coerced him into signing a confession. Okler also alleges coercion by his attorneys, who "scared [him] into taking" the guilty pleas for the molestation and failure to register charges. He claims that he misunderstood his most recent plea agreement and received ineffective assistance of counsel.

[10] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

We are unable to review Okler's allegations because they pertain to matters outside the record. State v. Kinzle, 181 Wn. App. 774, 786, 326 P.3d 870 (2014). Issues that involve evidence not in the record are properly raised in a personal restraint petition rather than a SAG. State v. Calvin, 176 Wn. App. 1, 26, 316 P.3d 496 (2013), remanded on other grounds, 183 Wn.2d 1013, 353 P.3d 640 (2015).

We affirm Okler's conviction for failure to register as a sex offender but remand to strike community custody supervision fees and nonrestitution interest from his judgment and sentence.

Bremmer, J.

WE CONCUR:

Mann, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79358-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: November 17, 2020
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