

No. 45777-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Andrew Smith,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-00997-5

The Honorable Judge Michael Evans

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by failing to hold a hearing prior to requiring that Mr. Smith be restrained during his jury trial.
2. The trial court erred by imposing restraints on Mr. Smith without adequate cause.
3. The trial court erred by imposing restraints on Mr. Smith without considering less restrictive alternatives.
4. Mr. Smith was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Defense counsel was ineffective for failing to object to the imposition of restraints on Mr. Smith, in the absence of an impelling necessity.

ISSUE 1: Prior to requiring an accused person to attend trial in restraints, a trial judge must hold a hearing to determine the necessity of shackling the person during trial. Here, the judge did not hold a hearing to determine the need for restraints, and Mr. Smith was required to attend trial in restraints. Was Mr. Smith's conviction entered in violation of his Fourteenth Amendment right to due process?

ISSUE 2: The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, defense counsel unreasonably failed to object to the needless imposition of physical restraints. Was Mr. Smith denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

6. Mr. Smith's failure to register conviction violated his Fourteenth Amendment right to substantive due process.
7. The registration statute is invalid on its face because it burdens the fundamental rights to travel and to freedom of movement, but is not narrowly tailored to achieve a compelling state interest.
8. The registration statute is invalid on its face because there is no "evidentiary nexus" between its method and results.
9. The registration statute is invalid on its face because it is imprecise and fails to consider "plainly relevant considerations."

ISSUE 3: A statute is facially invalid if it impedes a fundamental right without being narrowly tailored to meet a compelling state interest. Washington’s failure to register statute burdens the fundamental rights to travel and to freedom of movement, but treats dangerous and non-dangerous offenders alike and lacks an “evidentiary nexus” between its method and results. Does the failure to register statute violate the substantive component of the Fourteenth Amendment right to due process?

10. Mr. Smith’s conviction was entered in violation of the state constitutional requirement that facts in a felony trial be determined by a jury.

ISSUE 4: Under the state constitution, the parties to a felony prosecution may not infringe a jury’s right to hear and decide factual issues. The conviction in this case was entered without a jury determination of the facts. Was the conviction entered in violation of the state constitution’s requirement that felony cases be heard by a jury?

11. The sentencing court failed to properly determine Mr. Smith’s offender score and standard range.
12. The sentencing judge erred by sentencing Mr. Smith with an offender score of seven.
13. The prosecution failed to prove the comparability of Mr. Smith’s out-of-state convictions.
14. The sentencing judge erred by including Mr. Smith’s Oregon convictions in the offender score.
15. The sentencing judge erred by (implicitly) concluding that Mr. Smith’s Oregon convictions were comparable to Washington felonies.
16. The trial court erred by adopting Finding of Fact No. 2.2 (Judgment and Sentence).
17. The trial court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence).

ISSUE 5: An out-of-state conviction does not add a point to the offender score unless the state proves that it is comparable

to a Washington felony. Here, the court added points to Mr. Smith's offender score based on Oregon convictions for offenses which are defined more broadly than the analogous Washington offenses. Did the court err by adding points to Mr. Smith's offender score based on non-comparable out-of-state convictions?

18. The trial court erred by imposing attorney fees.
19. The trial court's imposition of attorney fees infringed Mr. Smith's Sixth and Fourteenth Amendment right to counsel.
20. The court erred by adopting Finding of Fact No. 2.5 (Judgment and Sentence).
21. The trial court erred by imposing costs and fees that were not authorized by statute.

ISSUE 6: A trial court may only impose attorney fees after finding that the offender has the present or likely future ability to pay. Here, the court imposed \$825 in attorney fees, but failed to conduct any inquiry into whether Mr. Smith could afford to pay the amount. Did the trial court violate Mr. Smith's Sixth and Fourteenth Amendment right to counsel?

ISSUE 7: A court exceeds its authority by ordering payment of legal financial obligations beyond what is permitted by statute. The court ordered Mr. Smith to pay \$100 in costs for a "fingerprint fee" that is not authorized by statute. Did the sentencing court exceed its authority?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Andrew Smith with failure to register as a sex offender. CP1. The court found Mr. Smith indigent and appointed an attorney. Clerk's Minutes (8/1/13), Supp CP.

The week before trial, Mr. Smith's attorney presented a form titled "Waiver of Jury". CP 3. The court engaged in a brief discussion:

MR. JURVAKAINEN: And I am handing forward a waiver of jury trial.

JUDGE HAAN: Okay. All right. You are Andrew Smith?

DEFENDANT: Yes, sir --

JUDGE HAAN: I have --

DEFENDANT: -- I mean, ma'am.

JUDGE HAAN: -- a waiver of jury trial. Have you read through that?

DEFENDANT: Yes.

JUDGE HAAN: And you're okay with it?

DEFENDANT: Yes.

JUDGE HAAN: All right. (Signs the document.) All right. So, with that, we'll go ahead and set the jury -- excuse me, bench trial for next Thursday, December 5th, starting at 9:00 AM in front of Judge Evans.

RP 1-2.

Mr. Smith was brought into the courtroom for his bench trial wearing cuffs. RP 5. His attorney requested that they be removed. RP 5. Judge Evans responded "I'll touch base with the Department of Corrections officer. If that's something he's comfortable with, great. If not, then we'll just make due." RP 5-6. The officer offered to take one

hand out of the cuffs, which was done. RP 6. Mr. Smith's attorney made no further comment. RP 5-6.

After hearing the evidence and the stipulations of the parties, the court found Mr. Smith guilty as charged. RP 117-124.

At sentencing, the state claimed that Mr. Smith had an Oregon sex offense conviction that counted for three points. CP 4. Mr. Smith did not contest the existence of this conviction, but did not comment on whether it was comparable to a Washington felony. RP 126-127. In fact, no one addressed the issue in court. RP 125-130. The court's sentence for Mr. Smith included that Oregon conviction, which it counted as three points. CP 6. The court further, again without argument or comment, assessed Mr. Smith \$825 for attorney's fees and \$100 for a fingerprint fee.¹ CP 8.

Mr. Smith timely appealed. CP 18.

¹ It appears no prints were taken for use in the case.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. SMITH’S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ART. I, § 3 BY ALLOWING HIM TO BE RESTRAINED AT TRIAL IN THE ABSENCE OF AN “IMPELLING NECESSITY.”

A. Standard of Review

Constitutional issues are reviewed *de novo*. *State v. Dobbs*, 87472-7, 2014 WL 980102 (Wash. Mar. 13, 2014).

B. Mr. Smith was entitled to attend trial free of shackles absent some “impelling necessity” for physical restraint.

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418 (2001); *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Restraints may not be used “unless some *impelling necessity* demands the restraint of a prisoner to secure the safety of others and his own custody.” *Finch*, 137 Wn.2d at 842 (quoting *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981) (emphasis in original)). The accused has the right to be brought before the court “with the appearance, dignity, and self-respect of a free and innocent man.” *Finch*, 137 Wn.2d at 844.

Restraints are disfavored because they undermine the presumption of innocence, unfairly prejudice the jury, restrict the defendant’s ability to

assist in the defense of his case, interfere with the right to testify, and offend the dignity of the judicial process. *Finch*, 137 Wn.2d at 845; *Hartzog*, 96 Wn.2d at 399. Close judicial scrutiny is required to ensure that the inherent prejudice of restraint is necessary to further an essential state interest. *Finch*, 137 Wn.2d at 846.

The trial court must base its decision to physically restrain an accused person on evidence that s/he poses an imminent risk of escape, intends to injure someone in the courtroom, or cannot behave in an orderly manner while in the courtroom. *Finch*, 137 Wn.2d at 850. Concern that a person is “potentially dangerous” is not sufficient. *Finch*, 137 Wn.2d at 852. Restraints may only be imposed based on information specific to a particular person; a general concern or a blanket policy will not pass constitutional muster. *Hartzog*, 96 Wn.2d 383. Finally, restraints should be used only as a last resort, and the court *must* consider less restrictive alternatives before imposing physical restraints. *Finch*, 137 Wn.2d at 850.

A trial court electing to impose restraints must make findings of fact and conclusions of law that are sufficient to justify the use of the restraints. *Damon*, 144 Wn.2d at 691-692. On direct appeal, improper use of restraints is presumed to be prejudicial. *In re Davis*, 152 Wn.2d 647, 698-699, 101 P.3d 1 (2004).

- C. The judge failed to hold a hearing or to consider less restrictive alternatives prior to requiring Mr. Smith to wear a leg brace at trial.

Mr. Smith appeared for his bench trial wearing restraints imposed by the Department of Corrections. RP 5. No mention was made of the reason for restraints. The court did not hold a hearing, hear evidence, or enter findings. Nothing in the record suggests that Mr. Smith posed an imminent risk of escape, that he intended to injure someone in the courtroom, or that he could not behave in an orderly manner. *Finch*, 137 Wn.2d at 850. Nor is there any indication that the court considered less restrictive alternatives. *Finch*, 137 Wn.2d at 850.

The restraints were improper, and their imposition requires reversal. This is so even though Mr. Smith's case was tried to the bench. The *Finch* court identified several reasons why restraints may not be imposed absent impelling necessity. These include practical consequences, such as restriction of ability to assist in the defense and interference with the right to testify. In addition, imposition of restraints without adequate cause "offend[s] the dignity of the judicial process." *Finch*, 137 Wn.2d at 845. The illegal imposition of restraints violated Mr. Smith's due process rights. *Id.*

Because the issue is raised on direct appeal, the court's improper use of restraints is presumed to be prejudicial. *Davis*, 152 Wn.2d at 698-

699. His convictions must be reversed and the case remanded with instructions to permit Mr. Smith to appear in court without restraint, absent some impelling necessity. *Id.*

II. MR. SMITH WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

D. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

E. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, art. I, § 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, § 22.

The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel

“made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

F. Defense counsel provided ineffective assistance by failing to object to the unnecessary imposition of restraints during trial.

The Sixth Amendment right to the effective assistance of counsel exists in order to protect an accused person’s fundamental right to a fair trial. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). This includes the right to appear in court free from restraint. *Wrinkles v. Buss*, 537 F.3d 804, 813-815 (2008). In light of the wealth of case law prohibiting imposition of restraints without individualized justification, a failure to object “cannot be an objectively reasonable tack under prevailing norms of professional behavior.” *Wrinkles*, 537 F.3d at 815; *see also Roche v. Davis*, 291 F.3d 473, 483 (2002).

As noted above, Mr. Smith appeared in court in restraints. RP 5. Nothing in the record suggests any reason why restraints were required, and the court failed to hold a *Finch* hearing. Despite this, defense counsel made no objection. Counsel’s failure to object and demand a *Finch* hearing was objectively unreasonable. *Wrinkles*; 537 F.3d 804; *Roche*, 291 F.3d 473.

Mr. Smith was prejudiced by his attorney’s deficient performance. Had counsel objected to the restraints, Mr. Smith would have received the

Finch hearing to which he was entitled.² Furthermore, because nothing in the record supports imposition of restraints, he would have been able to appear at trial “with the appearance, dignity, and self-respect of a free and innocent man.” *Finch*, 137 Wn.2d at 844.

A reasonable attorney would have acted to protect his client’s constitutional right to appear in court free from restraint. Because defense counsel failed to object, Mr. Smith was deprived of the effective assistance of counsel. *Wrinkles*; 537 F.3d 804; *Roche*, 291 F.3d 473. His convictions must be reversed and the case remanded for a new trial. *Id.*

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

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Dobbs*, 87472-7, 2014 WL 980102 (Wash. Mar. 13, 2014).

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

The Fourteenth Amendment right to due process includes a substantive component. *Lawrence v. Texas*, 539 U.S. 558, 565, 123 S.Ct.

² Of course, the obligation to hold a hearing rests with the court; it is not up to counsel to demand a hearing. *State v. Gonzalez*, 129 Wn. App. 895, 901, 120 P.3d 645 (2005).

2472, 156 L.Ed.2d 508 (2003); *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). This component has “fundamental significance in defining the rights of the person.” *Lawrence* 539 U.S. at 565. Substantive due process goes beyond mere procedural protections to actually limit the government’s ability to operate in certain realms. *Lawrence*, 539 U.S. at 578; *Troxel*, 530 U.S. at 65.

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

A statute that burdens the fundamental rights to travel and to freedom of movement is subject to strict scrutiny. *Macias v. Dep’t of Labor & Indus. of State of Wash.*, 100 Wn.2d 263, 273, 668 P.2d 1278 (1983); *J.D.*, 86 Wn. App. at 508. A state law implicates the right to travel if it indirectly burdens exercise of that right by creating “any

classification which serves to penalize the exercise of the right.” *Soto-Lopez*, 476 U.S. at 903 (internal citations omitted). A statute burdening a fundamental right cannot survive strict scrutiny unless it is narrowly tailored to meet a compelling state interest. *Lawrence* 539 U.S. at 593; *J.D.*, 86 Wn. App. at 508.

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

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

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

The sex offender registration requirements place a burden on the fundamental rights to travel and to freedom of movement. The statute requires that a person who is subject to the registration requirement

register as a transient or at a particular fixed residence.³ RCW 9A.44.130(1), (4), (5). A registered sex offender with a fixed address cannot travel away from home for more than three nights. By leaving home for more than three days, the person would likely be at risk of criminal prosecution.⁴ RCW 9A.44.132. Similarly, a transient sex offender must report weekly. RCW 9A.44.130(5). Additional requirements apply when a sex offender attends or works at a school or institution of higher learning. RCW 9A.44.130(1)(b).

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

³ A person without a fixed residence must register as a transient and check in with the county sheriff once a week. RCW 9A.44.128(9); RCW 9A.44.130(5).

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

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

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

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

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

In comparison to the rearrest rate for drug offenders (41.2%), larceny-theft offenders (33.9%), and those who commit nonsexual

assault (22%), sex offenders are relatively unlikely to be rearrested for another sex crime.

...

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

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

Studies have shown that people who commit sex offenses as juveniles, in particular, have very low recidivism rates. *See e.g.* Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 13 (2013); L. Chrysanthi, et al, *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 Widener L. Rev. 127, 149 (2011); Richard A. Paladino, *The Adam Walsh Act As Applied to Juveniles: One Size Does Not Fit All*, 40 Hofstra L. Rev. 269, 290-92 (2011). Nonetheless, Washington juveniles adjudicated for most sex offenses are required to register and face criminal prosecution if they do not.⁵ RCW 9A.44.130(a)(1); RCW 9A.44.132.

⁵ Some people adjudicated guilty for sex offenses as juveniles may later move for relief from the registration requirements after a period of time has passed. RCW 9A.44.143. This fact does not alter the analysis regarding whether the sex offender registration scheme is narrowly tailored during the period when they are required to register.

In short, the legislative assumption that all people convicted of sex offenses pose a danger to society is not supported by empirical evidence. A prior sex conviction is not a proxy for dangerousness. Nonetheless, the registration scheme criminalizes failure to register even by people who are not dangerous or at risk of reoffending. The statute is not precise enough to justify the burden it places on the fundamental rights to travel and freedom of movement.⁶ *Aptheker*, 378 U.S. at 514.

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

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

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

⁶ The statute could be made more precise. For example, the legislature could require registration only of those at risk to reoffend. In another context, the government uses actuarial instruments and other predictive tools to justify indefinite civil confinement. *See* RCW 71.09; *In re Det. of Kistenmacher*, 163 Wn.2d 166, 169 n. 2, 178 P.3d 949 (2008).

A Washington-specific study has found that the sex offender registration requirements have no statistically significant effect on recidivism. Nor do registration requirements increase public safety. Walker Wilson, 73 La. L. Rev. at 523 (*citing* Donna D. Schram & Cheryl Darling Milloy, Wash. State Inst. for Pub. Pol'y, *Community Notification: A Study of Offender Characteristics and Recidivism* (1995)). Numerous other studies have reached the same conclusion. *Id.* at 523-24; *see also* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161 (2011) (finding that sex offender registration may actually increase recidivism); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & Econ. 207 (2011).

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

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

IV. MR. SMITH’S CONVICTION WAS ENTERED IN VIOLATION OF THE STATE CONSTITUTION’S REQUIREMENT THAT FACTUAL ISSUES IN FELONY CASES BE TRIED BY A JURY.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Dobbs*, 87472-7, 2014 WL 980102 (Wash. Mar. 13, 2014).

B. In Washington, felony cases must be tried by a jury; the jury’s right to try the facts in a felony case cannot be waived by a party.

Washington’s constitutional jury trial right is broader than the federal right.⁷ *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Six nonexclusive factors govern analysis under the state constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *Gunwall* analysis establishes that factual disputes in felony cases must be tried to a jury. An accused person may not waive this requirement.

1. In 1889, the framers understood the language of art. I, §§ 21 and 22 to require courts to submit facts in a felony trial to a jury.

Analysis of a constitutional provision begins and ends with the text. *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 118, 178 P.3d 960 (2008). This includes an examination of the words themselves, their

⁷ The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal defendant the right to a jury trial. U.S. Const. Amends. VI, XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

grammatical relationship with one another, and their context. *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 459-460, 48 P.3d 274 (2002). The constitution must be construed as the framers understood it in 1889. *State v. Norman*, 145 Wn.2d 578, 592, 40 P.3d 1161 (2002).

Art. I, § 21 preserves the right of jury trials “inviolable.” This term “connotes deserving of the highest protection.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). This language

indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolable, it must not diminish over time and must be protected from all assaults to its essential guarantees.

Id. The strong, simple, direct, and mandatory language (“shall remain inviolable”) suggests that the present-day jury trial right must be identical to the right as it existed in 1889. As discussed below, it was almost universally believed during that time period that the right could not be waived, and the framers elected not to continue an experiment undertaken by the territorial legislature in the years prior to 1889.

Furthermore, art. I, § 21 expressly grants the legislature authority to allow waivers in civil cases, but not in felony prosecutions. Under the maxim *Expressio unius est exclusio alterius*,⁸ this express grant of authority in civil cases suggests an intent to prohibit waivers in criminal

⁸ “The expression of one thing is the exclusion of another.” *Black’s Law Dictionary* (6th ed. 1990).

cases. See, e.g., *State ex rel. Washington State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 830, 966 P.2d 1252 (1998).

Similarly, art. I, § 22 provides strong protection to the jury system. The specific mention of juries in the context of “criminal prosecutions,” and the mandatory language employed by the provision (“shall have the right... to have a speedy public trial by an impartial jury”) demand that the jury tradition be afforded the highest respect.

Thus, the language of the two provisions weighs in favor of an independent application of the state constitution in this context.

2. The state constitutional requirement that facts be tried to a jury differs from the federal constitutional right to a jury trial.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Art. I, § 21 has no federal counterpart. The Washington Supreme Court in *Mace* found this significant, and held that under the Washington constitution “no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime.” *Mace*, 98 Wn.2d at 99-100. This is in contrast to the more limited protections available under the federal constitution. *Mace*, 98 Wn.2d at 99-100.

Thus, differences in the language between the state and federal constitutions favor an independent application of the state constitution.

Even though waiver of the federal right may be found in appropriate cases, the Washington constitution prohibits jury waiver in felony prosecutions.

3. State constitutional and common law history demonstrate that drafters of the Washington constitution intended to require jury trials for all felony prosecutions.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. art. I, § 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Mace*, 98 Wn.2d at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (Smith I).

Although “little is known about what the drafters of art. I, § 22 intended in 1889,” the explicit enumeration of certain rights suggests “that the drafters of this provision believed that these rights are of great importance.” *State v. Martin*, 171 Wn.2d 521, 531, 252 P.3d 872 (2011).

In 1889, when the state constitution was adopted, there was a nearly universal understanding, throughout the states and territories, that the right to a jury trial in felony cases could not be waived. *See e.g., State v. Lockwood*, 43 Wis. 403, 405 (1877) (“The right of trial by jury, upon information or indictment for crime, is secured by the constitution, upon a principle of public policy, and cannot be waived”); *State v. Larrigan*, 66 Iowa 426 (1885); *Cordway v. State*, 25 Tex. Ct. App. 405, 417 (1888) (A

defendant “may waive any... right except that of trial by jury in a felony case”); *United States v. Taylor*, 11 F. 470, 471 (C.C.Kan. 1882)(“This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner’s consent is erroneous”); *United States v. Smith*, 17 F. 510, 512 (C.C.Mass. 1883) (Smith II) (“The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court...”)

This tradition was rooted in the common law:

There can be no question that, at common law, the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty, was a jury of twelve men. 4 Black. Com. 349; 1 Chitty’s Crim. Law, 505; 2 Hale’s Pleas of the Crown, 161; Bacon’s Abridg. tit. Juries, A.; 2 Bennett & Heard’s Lead. Cas. 327... The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was, that all questions of fact should be determined by the jury, questions of law only being reserved for the court... A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory.

Harris v. People, 128 Ill. 585, 590-591 (Ill. 1889), *overruled in part by*

People ex rel. Swanson v. Fisher, 340 Ill. 250 (1930).

The constitutional prohibition against waiver of the jury right was thought to be based in “the soundest conception of public policy.” *State v. Carman*, 63 Iowa 130, 131 (1884). According to the Iowa Supreme Court:

Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safe guards.

Carman, 63 Iowa at 131.

The prohibition against jury waivers was also viewed as a natural limitation on an accused person’s power to shape the proceedings. For example, in *Territory v. Ah Wah*, 4 Mont. 149, 168-173 (1881), the Montana Supreme Court considered the question of whether or not a defendant could waive a twelve-person jury:

By the consent of the court, prosecution and defendant, a criminal trial ought not to be converted into a mere arbitration... “[T]he prisoner’s consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law...”

“...It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction.”

Ah Wah, 4 Mont. at 168-173 (citations omitted).

As these authorities show, judges throughout the nation believed that a felony charge could only be tried to a jury. Despite this prevailing view, the Washington territorial legislature enacted a statute in 1854 allowing “[t]he defendant and prosecuting attorney with the assent of the court [to] submit the trial to the court, except in capital cases.” Laws of Washington Territory, Chapter 23, Section 249 (1854-1862). However, this experiment did not survive the passage of the constitution.^{9, 10} The framers would have been aware of both the prevailing view (described above) and the territorial legislature’s experiment. Because the framers did not explicitly permit the legislature to provide for waivers in felony cases, such permission cannot be read into the constitution.

The state constitutional and common law history shows that jury waivers are prohibited in felony cases. *Gunwall* factor three favors the interpretation of art. I, § 21 urged by Mr. Smith.

4. Although pre-existing state statutes permit jury waivers in felony cases, the constitutionality of such laws has yet to be properly analyzed.

⁹ Instead, as noted above, the constitution included language permitting the legislature to allow waiver only in civil cases.

¹⁰ The 1854 statute was implicitly repealed by the adoption of Wash. Const. art. I, § 21, because the statute was repugnant to that provision of the constitution: “All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature...” Wash. Const. art. XXVII, § 2.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, 106 Wn.2d at 62).

As noted previously, the territorial legislature provided for jury waivers in noncapital criminal cases. Laws of Washington Territory, Chapter 23, Section 249 (1854-1862). This law did not survive adoption of the constitution. Wash. Const. art. XXVII, § 2. A similar statute (RCW 10.01.060) is in effect today, and is echoed in CrR 6.1. However, the constitutionality of these enactments has never been properly analyzed under Wash. Const. art. I, §§ 21 and 22.

Instead, Washington courts have come to accept jury waivers in felony cases on the basis of *dicta*, and on authority relating to the federal jury right. Furthermore, the cases examining the issue all predate *Gunwall*, and thus are no longer binding precedent. See *State v. Brown*, 132 Wn.2d 529, 595 n. 169, 940 P.2d 546 (1997).

The first case addressing the issue in *dicta* was *State v. Ellis*, 22 Wash. 129, 132, 60 P. 136 (1900), *overruled in part by State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952). Although the opinion reversed a guilty

verdict reached by fewer than 12 jurors, the court evidently believed the jury trial right could be waived:

It would seem to the writer of this opinion that the first clause of the section, viz., “that the right of trial by jury shall remain inviolate,” was simply intended as a limitation of the right of the legislature to take away the right of trial by jury, and that it did not intend to interfere with the right of the individual to waive such privilege.¹¹

Ellis, 22 Wash. at 131, 134. From this brief *dicta*, the Washington Supreme Court eventually found constitutional authority for the legislature to authorize waiver of the jury trial right even in felony cases.

First, however, the court in *State v. Karsunky*, 197 Wash. 87, 84 P.2d 390 (1938) held that waivers of the jury trial right were statutorily prohibited in felony cases. In *State v. McCaw*, 198 Wash. 345, 88 P.2d 444 (1939), the court held that this statutory prohibition also extended to misdemeanors.

In *Brandon v. Webb*, 23 Wn.2d 155, 160 P.2d 529 (1945), the court held that a defendant could waive the right to a jury trial by pleading guilty:

¹¹ The Supreme Court expressly reserved its opinion on the effect of the second clause of art. I, § 21: “What construction might be placed upon the further provisions of the same section as indicating the intention of the members of the constitutional convention is not necessary to determine here, for the trouble with the case at bar is that the legislature has not attempted to provide any method by which the guilt or innocence of a defendant can be determined other than by a jury; and it must be conceded that, when the constitution speaks of a right of trial by jury, it refers to a common law jury of twelve men.” *Ellis*, 22 Wash. at 131-132.

The purpose of [art. I, § 21] was to preserve to the accused the right to a trial by jury as it had theretofore existed; it was not the purpose of the fundamental enactment to render the intervention of a jury mandatory, in the face of the accused person's voluntary plea of guilty to the charge, where no issue of fact was left for submission to, or determination by, the jury.

Webb, 23 Wn.2d at 159.

In *Lane*, the court denied an appeal based on invited error, where the defendant had requested the trial court to allow an eleven person jury to reach a verdict. The court also suggested in *dicta* (which relied upon the above-quoted *dicta* in *Ellis*, as well as a U.S. Supreme Court decision analyzing the federal jury right) that a waiver of the right to a jury trial would be permitted under the state constitution. *Lane*, 40 Wn.2d at 739.

Finally, in 1966, relying on *Lane*, 40 Wn.2d at 739, the Supreme Court upheld a defendant's waiver of his right to a jury trial (based on a 1951 statute authorizing such waivers). *State v. Forza*, 70 Wn.2d 69, 70-71, 422 P.2d 475 (1966).

As these cases show, the current practice of allowing waivers in felony prosecutions rests on *dicta* and on cases allowing waiver of the federal right, rather than on sound analysis of the state constitution under *Gunwall*. Because it was decided "without benefit of *Gunwall* scrutiny," *Forza* "lack[s] the precedential force which follows from this more thorough review." *State v. Rivers*, 129 Wn.2d 697, 723, 921 P.2d 495

(1996) (Sanders, J., dissenting). Because of this, *Forza* and the preceding cases do not control the issue. *Brown*, 132 Wn.2d at 595 n. 169. Thus, even though the fourth *Gunwall* factor does not support Mr. Smith's position, this factor alone should not be dispositive.

5. Structural difference between the Sixth Amendment and the state constitution require an independent application of art. I, §§ 21 and 22.

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). As in all contexts, this factor favors independent application of the state constitution. *Id.*

6. The jury trial requirement in felony cases is a matter of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The ability of an accused person prosecuted in state court to effectuate a waiver of rights guaranteed by the state constitution is purely a matter of state concern. *See Smith I*, 150 Wn.2d at 152. *Gunwall* factor number six thus also points to an independent application of the state constitutional provision in this case.

7. Conclusion: *Gunwall* analysis establishes that the parties may not dispense with the jury in a felony case.

Five of the six *Gunwall* factors indicate that the parties to a felony prosecution may not dispense with jury trials when there are issues of fact to be decided. Factor four (preexisting state law that is not of constitutional dimension) does not support Mr. Smith's position; however, it should not be permitted to influence the outcome because the preexisting state law is not controlling and rests on unsound footing.

The waiver in this case violates art. I, § 21 and § 22. In the absence of a jury determination of the disputed facts, the court's guilty finding is a nullity. Accordingly, Mr. Smith's conviction must be reversed and the case remanded to the trial court for a jury trial.

C. *Forza* does not control the outcome of this issue.

Although *Forza* was decided by the Supreme Court, it does not control Mr. Smith's case for two reasons.

First, as noted above, the *Forza* court lacked the benefit of *Gunwall*'s analytical framework.¹² Cases addressing the state constitution

¹² This court recently held that *Gunwall* analysis is not applicable to whether the state right to a jury trial can be waived in felony cases because "*Gunwall* determines the scope, not the waiver, of a constitutional right." *State v. Benitez*, 175 Wn. App. 116, 126, 302 P.3d 877 (2013). The *Benitez* decision makes an artificial distinction between "scope" and "waiver." The state constitutional prohibition against waiver defines the scope of art. I, §§ 21 and 22. The state constitution *requires* a jury trial in felony cases; it does not provide a jury as an optional privilege. Moreover, as argued elsewhere in this brief, the Supreme Court and

without benefit of *Gunwall* were implicitly overruled by *Gunwall*. *Brown*, 132 Wn.2d 529. In *Brown*, the Supreme Court addressed a capital defendant’s argument that “death qualifying” a jury violates art. I, § 22. *Brown*, 132 Wn.2d at 593-600. Although the same issue had previously been decided prior to *Gunwall*, the court did not consider the pre-*Gunwall* holding to have continuing viability in the post-*Gunwall* era:

Hughes did not analyze the six factors in *State v. Gunwall* to conclude that death qualification is allowed under the Washington Constitution. Thus, in determining whether death qualification violates the Washington Constitution, *Hughes* and the cases following *do not control at this point*.

Brown, 132 Wn.2d at 595 n. 169 (emphasis added) (additional citations omitted).

Similarly, the *Forza* decision failed to take into account matters that are essential to understanding of a state constitutional provision, and thus its result stems from a flawed understanding of art. I, § 21. It, and any subsequent cases, “do not control at this point.” *Id.*

Second, the *Forza* court did not consider waivers under art. I, § 22. *See Forza*, 70 Wn.2d at 70 (“Appellant’s sole assignment of error is that RCW 10.01.060, providing for waiver of a jury trial by an accused in non-capital cases, is unconstitutional because it contravenes art. I, § 21 of the

Divisions I and III have found that *Gunwall* does apply to waiver of a state constitutional right.

Washington State Constitution.”) (footnotes omitted). Nor did it determine whether the two provisions together protected the longstanding tradition of requiring parties to submit any issues of fact to a jury.

Mr. Smith, by contrast, brings his argument under both constitutional provisions, and makes the arguments that were not addressed in *Forza*. Accordingly, *Forza* does not control the outcome of Mr. Smith’s case.

Under the state constitution, Mr. Smith’s waiver was ineffective. His conviction is invalid, because it was achieved without involvement of a jury. His case must be remanded for a jury trial.

V. THE COURT IMPROPERLY CALCULATED MR. SMITH’S OFFENDER SCORE.

A. Standard of Review.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013).

- B. Two of Mr. Smith's out-of-state convictions should not have added points to his offender score because they are not comparable to Washington felonies.

For sentencing purposes, prior out-of-state convictions are classified according to their Washington equivalents, if any. RCW 9.94A.525(3). Where the state alleges out-of-state convictions, the prosecution bears the burden of proving comparability. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). An out-of-state conviction may not be used to increase an offender score unless the state proves that it is comparable to a Washington felony. *Id.*

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). If the elements of the out-of-state statute are broader than its Washington counterpart, it would "(at least) raise serious Sixth Amendment concerns" to attempt to discern the underlying facts that were not found by a court or jury. *Descamps v. United States*, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013) *reh'g denied*, 11-9540, 2013 WL 4606326 (2013).

The court found that Mr. Smith had a 2001 conviction for attempted first-degree sex abuse. CP 5-17. Under ORS §163.427(1),

A person commits the crime of sexual abuse in the first degree when that person:

(a) Subjects another person to sexual contact and:

(A) The victim is less than 14 years of age;

(B) The victim is subjected to forcible compulsion by the actor; or

(C) The victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless; or

(b) Intentionally causes a person under 18 years of age to touch or contact the mouth, anus or sex organs of an animal for the purpose of arousing or gratifying the sexual desire of a person.

ORS §163.427(1). The Oregon crime is most closely analogous to three different Washington crimes: second-degree child molestation, indecent liberties, and first-degree animal cruelty. Because of differences between Oregon and Washington law, the conviction should not have added three points to Mr. Smith's offender score.

First, ORS §163.427(1)(a)(A) is broader than second-degree child molestation in Washington. Second-degree child molestation requires proof that the perpetrator is "at least thirty-six months older than the victim" and not married to the victim. RCW 9A.44.086(1). Neither element is required under the Oregon offense. Because of this, ORS §163.427(1)(a)(A) is broader than its Washington counterpart.

Second, although a conviction for violating ORS §163.427(1)(b) would likely also constitute first-degree animal cruelty, the Washington offense is a Class C felony that is not a sex offense. RCW 16.52.205(3); RCW 9.94A.030(46). A conviction for the completed crime would add

only one point to the offender score, not three. RCW 9.94A.525(18). A conviction for an attempt to commit the crime would be a gross misdemeanor.¹³ RCW 9A.28.020.

The court erred by adding three points to Mr. Smith's offender score based on his Oregon conviction attempted first-degree sex abuse. Mr. Smith's sentence must be vacated, and the case must be remanded for resentencing.

C. Mr. Smith's sentence must be vacated because his 2001 Oregon conviction should have "washed out."

The state bears the burden of showing by a preponderance of the evidence that a prior conviction adds a point to the accused's offender score. *Ford*, 137 Wn.2d at 480. Prior convictions for class C felonies are not included in an offender score if the accused has spent five consecutive years in the community without conviction following his/her conviction or release from confinement. RCW 9.94A.525(2)(c).

Improper inclusion of "washed out" convictions creates a sentence beyond the court's statutory authority. *In re Cadwallader*, 155 Wn.2d

¹³ An attempt to commit first-degree animal cruelty would not add a point in this case: "If the present conviction is for failure to register as a sex offender..." priors convictions are to be counted "as in subsections (7) through (11) and (13) through (16)" of RCW 9.94A.525. RCW 9.94A.525(18). Because the statute specifically lists subsections (7) through (11) and (13) through (16), the legislature is presumed to have intentionally omitted subsections (4) and (6), both of which otherwise require sentencing courts to count attempt convictions "as if they were convictions for completed offenses." RCW 9.94A.525(4); *see also* RCW 9.94A.525(6).

867, 874, 123 P.3d 456 (2005). Such an error may be raised for the first time on appeal. *Id.*

The court found that Mr. Smith had a 2001 conviction for attempted first-degree sexual abuse in Oregon. CP 6. If (pursuant to RCW 9.94A.525(4)) the offense properly scored as a completed violation of RCW 16.52.205(3), it would be a class C felony. The court found that Mr. Smith's next offense occurred in December of 2009. CP 6. Because of the gap between Mr. Smith's 2001 conviction and his 2009 offense, the attempted first-degree sex abuse charge should have "washed out" of the offender score. RCW 9.94A.525(2).

The court's findings do not support Mr. Smith's offender score of seven. *Ford*, 137 Wn.2d at 480. The case must be remanded for resentencing. *Id.*

VI. THE COURT ERRED BY ORDERING MR. SMITH TO PAY LEGAL FINANCIAL OBLIGATIONS BEYOND WHAT IS PERMITTED BY THE CONSTITUTION AND BY STATUTE.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Dobbs*, 87472-7, 2014 WL 980102 (Wash. Mar. 13, 2014). Courts review questions of law *de novo*. *Campbell v. State Employment Sec. Dep't*, 88772-1, 2014 WL 2615375 (Wash. June 12, 2014).

- B. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).¹⁴ A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *Ford*, 137 Wn.2d at 477-78; *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).¹⁵

¹⁴ *See also State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013).

¹⁵ *See also, State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 29916-3-III, 2014 WL 1225910 (Wash. Ct. App. Mar. 25, 2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to LFOs. *Id.* The cases do not govern Mr. Smith’s claim that the court lacked constitutional and statutory authority.

- C. The court violated Mr. Smith’s right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining that he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused’s exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person’s current or future ability to pay prior to imposing costs. *Id.*

first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding “challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal”); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has “established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”).

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

The court *shall not order* a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.¹⁶ *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay

¹⁶ In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

them.” *Id.* The court noted that, under the Oregon scheme, “no requirement to repay may be imposed if it appears *at the time of sentencing* that ‘there is no likelihood that a defendant's indigency will end.’” *Id.* (emphasis added). Accordingly, the court found that “the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.*

Oregon’s recoupment statute did not impermissibly chill the exercise of the right to counsel because “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”. *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the accused has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615

(Iowa 2009) (“A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions”); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) (“In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute”).

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney’s fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns

Fuller on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

D. The record does not support the sentencing court's finding that Mr. Smith has the ability or likely future ability to pay his legal financial obligations.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

In this case, the sentencing court entered such a finding without any support in the record. CP 8. Indeed, the record suggests that Mr. Smith lacks the ability to pay the amount ordered. The lower court found Mr. Smith indigent at the beginning and end of the proceedings. Clerk's Minutes (8/1/13), Supp CP; CP 32-34. His incarceration and felony conviction will also negatively impact his prospects for employment. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. *Id.*

The lower court ordered Mr. Smith to pay \$825 in fees for his court-appointed attorney without conducting any inquiry into his present or future ability to pay. CP 8; RP 125-131. This violated his right to counsel. Under *Fuller*, the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had

the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Smith to pay \$825 in attorney fees must be vacated. *Id*

E. The court exceeded its authority by ordering Mr. Smith to pay \$100 in costs for a “fingerprint fee.”

The court may order an offender to pay “expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). The court may not order an offender to pay LFOs that are not authorized by statute. *Hathaway*, 161 Wn. App. at 651-653. Nor may the court order payment of “expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.” RCW 10.01.160.

The court exceeded its authority by ordering Mr. Smith to pay \$100 in costs for a “fingerprint fee.” CP 8. First, no statute authorizes imposition of such a fee. Second, any costs associated with taking Mr. Smith’s fingerprints were not “specially incurred by the state in prosecuting” Mr. Smith. RCW 10.01.160(2).

For these reasons, the \$100 assessment must be vacated, and Mr. Smith’s case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

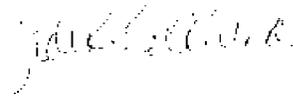
CONCLUSION

Mr. Smith's failure to register conviction must be reversed. The charge must be dismissed with prejudice, because Washington's sex offender registration scheme violates substantive due process. In the alternative, the case must be remanded for a new trial, because the court unlawfully imposed restraints and improperly accepted Mr. Smith's jury waiver.

If the conviction is not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing. At the very least, the order imposing attorney fees and a \$100 fingerprint fee must be vacated.

Respectfully submitted on June 23, 2014,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Andrew Smith, DOC #357834
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

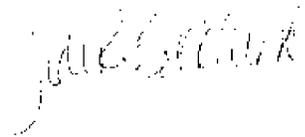
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
bours@co.cowlitz.wa.us

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

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

Signed at Olympia, Washington on June 23, 2014.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

June 23, 2014 - 2:03 PM

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