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No. 69621-1

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER MICHAEL SMITH,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

When Christopher Smith pled guilty in 1998 to one count of possession of depictions of a minor engaged in sexually explicit conduct, he was explicitly told he would not have to register as a sex offender. Eight years later, the Legislature amended the statute and made the crime a registrable offense. When Mr. Smith failed to comply with the myriad requirements of registration, he was convicted of two counts of failure to register as a sex offender.

In the 23 years since the Legislature adopted the Community Protection Act, the sex offender registration requirements have become more and more onerous and the community notification provisions more and more invasive. For example, homeless offenders must now report weekly in person to the sheriff and keep an "accurate accounting" of their whereabouts to provide to law enforcement. Personal information about even the lowest-risk offenders is now readily available to anyone on the Internet for any reason. The law imposes substantial restraints on offenders that are excessive in relation to the Legislature's stated aim of protecting the public from high-risk offenders. The statute is therefore "punitive" in violation of the Ex Post Facto Clause as applied to Mr. Smith.

B. ASSIGNMENTS OF ERROR

1. Subjecting Mr. Smith to the requirements and penalties of the sex offender registration and community notification law violated the Ex Post Facto Clause of the federal constitution.

2. Subjecting Mr. Smith to the requirements and penalties of the sex offender registration and community notification law violated the Ex Post Facto Clause of the state constitution.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

In State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994), the Washington Supreme Court held that the sex offender registration and community notification law did not violate the Ex Post Facto Clause when applied to offenders who committed their underlying offenses prior to the effective date of the statute, because the law did not impose a significant additional burden on offenders or a significant disability or restraint. In the 20 years since the Ward decision, the burdens imposed on offenders subject to the law have become much more oppressive and personally invasive and are excessive in relation to the Legislature's stated purpose of assisting law enforcement to regulate high-risk offenders. Does applying the law and its penalties to Mr. Smith violate the Ex Post Facto Clause?

D. STATEMENT OF THE CASE

1. Facts of offense.

On March 10, 1998, Christopher Smith pled guilty to one count of possession of depictions of a minor engaged in sexually explicit conduct, former RCW 9.68A.070 (1990). CP 62-72. The crime occurred on October 25, 1997. CP 66. According to the affidavit of probable cause, Mr. Smith, who was then 24 years old, possessed photographs of a 16-year-old girl engaged in sexually explicit conduct. CP 48. At the time of the crime, possession of depictions of a minor engaged in sexually explicit conduct was not classified as a "sex offense" for purposes of the sex offender registration statute. See former RCW 9A.44.130(6) (1996); former RCW 9.94A.030(33) (1996).

On the guilty plea statement, the section explaining sex offender registration requirements was explicitly crossed out. CP 65; see RCW 10.01.200 (requiring guilty plea form to include written notice of registration requirements when person pleads guilty to "sex offense"). A similar paragraph on the judgment and sentence was also crossed out. CP 56. Mr. Smith understandably believed he would never be required to register as a sex offender as a result of his guilty plea and

later explained this was "the main issue with me signing the plea agreement with the prosecutor." RP 10.

Despite Mr. Smith's reasonable expectations, several years later the law changed and he was now told he must register as a sex offender. In 2006, the statutory definition of "sex offense" was expanded to include the crime of possession of depictions of a minor engaged in sexually explicit conduct. Laws 2006, ch. 139, § 5. On June 15, 2007, Mr. Smith was notified in writing of the sex offender registration requirements. CP 130-34. He began to comply with them. CP 120-21.

In 2009, Mr. Smith became homeless. CP 182. From May through October 2009, he reported weekly in person to the sheriff's office as required for homeless offenders. CP 182; see RCW 9A.44.130(5)(b) ("A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered."). But from October 2009 through October 2010, Mr. Smith did not report in person as required. CP 182, 285.

On October 27, 2010, Mr. Smith once again registered with the sheriff's office, reporting a new address in Marysville. CP 143. He signed another written notification of the registration requirements. CP

118-19. On March 20, 2011, police did a registration check at the residence. CP 143. Two other residents told police Mr. Smith no longer lived there. CP 143-44. As of April 14, 2011, Mr. Smith had not updated his address with the sheriff's office. CP 144.

Mr. Smith was charged with two separate counts of failure to register as a sex offender, under two different cause numbers. CP 33, 285. For the first count, Mr. Smith was charged with failing to report weekly in person to the sheriff's office as a homeless offender between October 2009 and October 2010. CP 285. For the second count, he was charged with failing to provide timely written notice to the sheriff after leaving his fixed residence in March 2011. CP 33.

The two charges were consolidated and Mr. Smith agreed to a stipulated bench trial. CP 29-142, 175-284. He agreed to the facts as alleged by the State but maintained that the statute was unconstitutional as applied to him. RP 5-6. Requiring him to register as a sex offender, and convicting him when he did not comply with the requirements, violated the Ex Post Facto Clause because the predicate offense of possessing depictions of a minor engaged in sexually explicit conduct was not a registrable offense at the time he committed the crime. RP 5-6. Mr. Smith explained to the court that at the time he was convicted of

the underlying offense, he was told he would not have to register as a sex offender. RP 10.

The court was sympathetic to Mr. Smith's predicament. RP 11-12. Nonetheless, the court found him guilty of the two counts as charged. RP 12-13; CP 14-24, 160-70.

2. History of Washington's sex offender registration and community notification law.

In 1990, the Legislature passed the Community Protection Act. Laws 1990, ch. 3. Part four of the Act provides for the registration of adult and juvenile sex offenders. Laws 1990, ch. 3, §§ 401–09. The requirements for sex offender registration are codified at RCW 9A.44.130-.145.

Also as part of the Act, the Legislature authorized public officials to release information to the public about sex offenders.

> Public agencies are authorized to release relevant and necessary information regarding sex offenders when the release of the information is necessary for public protection.

Laws 1990, ch. 3, § 117. The authorization for release of information about sex offenders to the public is codified at RCW 4.24.550.

Since 1990, the Legislature has amended the law numerous times, gradually expanding its application and the burdens and affirmative disabilities it imposes on offenders.

Since its original passage in 1990, the statute has required any person found to have committed, or who has been convicted of, a "sex offense" to register with the county sheriff. RCW 9A.44.130(1). An offender is required to provide the sheriff with his or her: (a) name and any aliases used; (b) residential address or, if the person lacks a fixed residence, where he or she plans to stay; (c) date and place of birth; (d) place of employment; (e) crime for which convicted; (f) date and place of conviction; (g) social security number; (h) photograph; and (i) fingerprints. RCW 9A.44.130(2).

Initially, offenders were required to register within 45 days of establishing residence in Washington, or if a current resident, within 30 days of release from confinement. Former 9A.44.130(2) (1990). Under the original law, an offender who changed his or her residence was required to notify the sheriff in writing of the new address within 10 days. Former 9A.44.130(3) (1990).

The current law is much more burdensome. It requires offenders who change their residence within the same county to

provide, by certified mail or in person, signed written notice of the change of address to the sheriff within three business days of moving. RCW 9A.44.130(4)(a). Offenders who move to a new county must register with the new county sheriff within three business days of moving and must provide the county sheriff with whom they last registered, signed written notice, by certified mail or in person, of the change of address. RCW 9A.44.130(4)(b). Low-risk offenders must verify their current residence by responding to annual certified mail inquiries made by law enforcement and high-risk offenders by responding to quarterly inquiries. RCW 9A.44.135. Law enforcement must make reasonable attempts to locate any sex offender who fails to return the verification form or who cannot be located at the registered address. RCW 9A.44.135(2).

The initial legislation did not address offenders who lacked a fixed residence. In 1999, the Legislature amended the statute to require homeless offenders to provide written notice to the sheriff of the county where he or she last registered within 14 days after ceasing to have a fixed residence. Laws 1999, sp. s. ch. 6, § 2. The amendment also required homeless offenders to report monthly, in person, to the sheriff

if he or she was a level I offender, and weekly if he or she was a level II or III offender. Id.

The requirements for homeless offenders have also become more onerous over time. In 2001, the Legislature amended the statute to require homeless offenders to provide written notice to the sheriff of the county where he or she last registered within 48 hours after ceasing to have a fixed residence.[1] Laws 2001, ch. 169, § 1. In addition, *all* homeless offenders, including level I offenders, are now required to report weekly in person to the sheriff's office. RCW 9A.44.130(5)(b). The current statute further requires homeless offenders to "keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request." RCW 9A.44.130(5)(b).

An offender who knowingly fails to comply with any of the requirements of the sex offender registration statute is guilty of the crime of failure to register as a sex offender. RCW 9A.44.132. The penalties for the crime have become more severe over time. Under the initial law, a person who knowingly failed to comply with any of the requirements was guilty of a class C felony if the predicate offense was a class A felony, and a gross misdemeanor for any other kind of

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[1] The current requirement is three business days. RCW 9A.44.130(5)(a).

predicate crime. Former 9A.44.130(6) (1990). In 1997, the Legislature amended the statute to provide that a person who failed to comply with the registration requirements was guilty of a class C felony if the predicate crime was any kind of felony, and a gross misdemeanor if the predicate crime was not a felony. Laws 1997, ch. 340, § 3. Under current law, failure to register is a class C felony if the predicate crime is any kind of felony and it is the offender's first or second conviction for failure to register. RCW 9A.44.132(1)(a). It is a class B felony if the person was convicted twice before for failure to register. RCW 9A.44.132(b). The crime is still a gross misdemeanor if the predicate offense is not a felony. RCW 9A.44.132(2).

The Legislature has also broadened the statute to include more kinds of offenders. In 1997, the Legislature added offenders convicted of a kidnapping offense to those subject to registration and community notification. Laws 1997, ch. 113, § 3. In 2006, the Legislature added offenders convicted of the crime of possession of depictions of a minor engaged in sexually explicit conduct. Laws 2006, ch. 139, § 5.

In 1998, the Legislature added students or persons employed in the state but living elsewhere to the group of sex offenders required to register. Laws 1998, ch. 220, § 1. In 2005, the Legislature passed

further legislation concerning sex and kidnapping offenders in schools. Laws 2005, ch. 380, § 1. Any adult or juvenile required to register must notify the sheriff of his or her intent to attend a public or private school, and the sheriff has the responsibility to promptly inform the principal of the school. RCW 9A.44.138(1). The principal, in turn, must disclose the information on Level II and Level III offenders to every teacher of the student and to any other personnel the principal believes should be aware of the student's background. RCW 9A.44.138(2)(a). For level I offenders, the principal must provide the information received only to personnel who, in the principal's judgment, should be aware of the student's record. RCW 9A44.138(2)(b).

Finally, an offender's duty to register extends for a significant period of time. For offenders convicted of a class A felony, the duty to register never ends. RCW 9A.44.140. For offenders convicted of a class B felony, the duty ends automatically after 15 years if the offender spends all of that time in the community without being convicted of a disqualifying offense, and for offenders convicted of a class C felony, the duty ends after 10 consecutive years in the community. Id. Any offender, however, except those determined to be

a sexually violent predator or convicted as an adult of a sex offense or kidnapping offense that is a class A felony and that was committed with forcible compulsion, may petition the court for relief from registration after spending 10 consecutive years in the community without committing a disqualifying offense. RCW 9A.44.142. The petitioner bears the burden to establish by clear and convincing evidence that he or she is sufficiently rehabilitated to warrant removal from the registry. RCW 9A.44.142(4)(a).

Just as the sex offender registration requirements have become more onerous, so have the community notification procedures become more personally invasive and increasingly divorced from the underlying aim of protecting the community from actual risk. As originally enacted, the public notification statute provided little guidance to local officials in deciding what kind of information about sex offenders to disseminate to the public but required the information be "relevant" and "necessary." Former 4.24.550 (1990). The law did not initially specify a notification system, but most jurisdictions in the state followed the guidelines developed by the Washington Association of Sheriffs and Police Chiefs (WASPC) to determine what actions to take regarding community notification. Washington State Institute for

Public Policy, Washington State's Community Notification Law: 15 Years of Change (Feb. 2006), available at: http://www.wsipp.wa.gov/rptfiles/06-02-1202.pdf [hereinafter "Community Notification Law"]. These guidelines established three levels of notification based on the individual's perceived risk to reoffend:

- Level I (low risk): Information (including a photograph) may be shared with other law enforcement agencies.
- Level II (moderate risk): Includes the actions of Level I, and, in addition, schools, neighbors, and community groups may be notified of an offender's release.
- Level III (high risk): Press releases may be issued in addition to the actions within Level I and Level II.

Id.

In the original legislation, no time frame was specified for community notification. Former RCW 4.24.550 (1990). But following an incident in the state where neighbors did not learn about a high-risk sex offender until shortly before he moved to the area, the 1994 Legislature directed that whenever possible law enforcement inform the public at least 14 days prior to the offender's release. Laws 1994, ch. 129, § 2; Community Notification Law, supra.

In 1997, the Legislature significantly modified the notification law to establish a more consistent statewide approach. Laws 1997, ch.

364, § 1. The 1997 legislation directed that a consistent means be used to determine a sex offender's risk to the community as well as a uniform notification process. Id. This work was done by a large multi-disciplinary group and resulted in adoption of the Washington State Sex Offender Risk Level Classification Tool, new notification considerations, notification formats, and suggested protocols for community meetings. Community Notification Law, supra.

The three risk levels and corresponding notification parameters were adjusted as follows:

- Level I (low risk): law enforcement shall share information with other appropriate law enforcement agencies and may disclose, upon request, relevant, necessary, and accurate information to any victim or witness and to any individual community member who lives near the residence where the offender resides, expects to reside, or is regularly found.

- Level II (moderate risk): law enforcement may also disclose relevant, necessary, and accurate information to public and private schools, child care centers, family daycare providers, businesses and organizations that serve primarily children, women, or vulnerable adults, and neighbors and community groups near the residence where the offender resides, expects to reside, or is regularly found.

- Level III (high risk): in addition to the disclosures as a Level II, law enforcement may also disclose relevant, necessary, and accurate information to the public at large.

Laws 1997, ch. 364, § 1 (codified at RCW 4.24.550(3)).

Although these community notification procedures were invasive, none of them compared with the radical change that occurred when the Legislature directed WASPC to create a statewide registered sex offender website in 2002. Laws 2002, ch. 118, § 1; see http://ml.waspc.org. After that, the dissemination of information about sex offenders to the public increased exponentially. The Legislature directed that the website must contain each offender's name, relevant criminal convictions, address by hundred block, physical description, and photograph. Laws 2002, ch. 118, § 1 (codified at RCW 4.25.550(5)(a)). The website must also provide mapping capabilities that display the sex offender's address by hundred block on a map, and allow citizens to search for registered sex offenders by county, city, zip code, last name, type of conviction, and address by hundred block. Id.

Initially, the website was to post only information about Level III registered sex offenders, i.e., those with the highest risk of reoffense. Laws 2002, ch. 118, § 1. But in 2003, the Legislature declared that all level II sex offenders shall also be added to the website. Laws 2003, ch. 217, § 1. In 2005, the Legislature added registered kidnapping offenders to the list of those included. Laws 2005, ch. 228, § 1. And in 2008, the Legislature decided that all level I

sex offenders shall also be included "during the time they are out of compliance with registration requirements under RCW 9A.44.130." Laws 2008, ch. 98, § 1. The same information and citizen access provided for Level III offenders is also provided for Level II offenders, Level I offenders while they are "out of compliance," and kidnapping offenders. RCW 4.24.550(5)(a).

Thus, personal information about even low-risk offenders and their whereabouts is now available around the clock to anyone with access to the Internet. The words "Non-Compliant" in red letters are placed next to the photographs of offenders who have not complied with all of the registration requirements. Members of the public can even sign up for email alerts and to "track this offender."[2]

Needless to say, the scope of the Community Protection Act has expanded significantly since it was first enacted in 1990, and since the Washington Supreme Court upheld the constitutionality of the Act in State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994).

[2] http://www.icrimewatch.net/register.php?AgencyID=54528.

E. ARGUMENT

Applying the Community Protection Act to Mr. Smith violates the state and federal Ex Post Facto Clauses

The Ex Post Facto Clauses of the state and federal constitutions forbid the State from enacting any law that 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; Weaver v. Graham, 450 U.S. 24, 28-29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); U.S. Const. art. I, § 10; Const. art. I, § 23.

"'Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" In re Pers. Restraint of Powell, 117 Wn.2d 175, 184, 814 P.2d 635 (1991) (quoting Weaver, 450 U.S. at 30). The lack of fair notice caused by retroactive application of the law is particularly salient here. When Mr. Smith pled guilty to the underlying crime in 1998, he was explicitly told he would *not* have to register as a sex offender. CP 56, 65; RP 10. In fact, that was a key factor in his decision to plead guilty. RP 10.

A law violates the ex post facto prohibition if it aggravates a crime or makes it greater than it was when committed; permits imposition of a different or more severe punishment than was permissible when the crime was committed; or, changes the legal rules to permit less or different testimony to convict the offender than was required when the crime was committed. State v. Edwards, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985); Calder v. Bull, 3 U.S. 386, 390, 3 Dall. 386, 1 L. Ed. 648 (1798). Legislation violates the provision if it (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the offender. Ward, 123 Wn.2d at 498; Weaver, 450 U.S. at 29; Collins v. Youngblood, 497 U.S. 37, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990). Finding a violation turns upon whether the law changes legal consequences of acts completed before its effective date. Edwards, 104 Wn.2d at 71; Weaver, 450 U.S. at 31.

A retroactive law "disadvantages the offender" if it "*alters the standard of punishment* which existed under prior law." Ward, 123 Wn.2d at 498-99. The focus of the inquiry is whether the law constitutes punishment." Id.

In Ward, our supreme court assumed that the Community Protection Act is substantive as opposed to procedural. Id. In addition, in this case, it is unquestionably retroactive, as Mr. Smith is now subject to the requirements of the Act although it did not apply to him at the time he committed his underlying offense. Thus, the question is whether the Act "constitutes punishment" as applied to Mr. Smith. Id.

In determining whether a law "constitutes punishment" for ex post facto purposes, the Court first considers the Legislature's express purpose in adopting the law. In enacting the Community Protection Act, the Legislature stated its intent was "to 'assist local law enforcement agencies' efforts to protect their communities by *regulating* sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in [RCW 9A.44.130].'" Ward, 123 Wn.2d at 499 (quoting Laws 1990, ch. 3, § 401) (emphasis in Ward). In Ward, the court concluded the Legislature's stated purpose was regulatory as opposed to punitive. Ward, 123 Wn.2d at 499.

But the Court must also consider whether the law has a punitive *effect* that outweighs the Legislature's stated intent. Id. In determining whether the effect of a law is ultimately punitive as opposed to

regulatory, the Court considers the factors set forth by the United States Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). Id. Those factors are (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment, i.e., 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. Ward, 123 Wn.2d at 499-500; Mendoza-Martinez, 372 U.S. at 168-69. The relevant factors in this context are (1), (2), (4), and (7). Ward, 123 Wn.2d at 500-10.

Applying those factors to the Community Protection Act, this Court must conclude the Act is impermissibly punitive as applied to Mr. Smith.

1. The Act imposes a significant affirmative disability and restraint on offenders.

The burdens imposed by the sex offender registration and community notification statute are significantly more onerous and disabling than in 1994 when the Washington Supreme Court issued its

opinion in Ward. In Ward, the court concluded that registration imposed no significant additional burdens on offenders. 123 Wn.2d at 500-01. That was because providing the information required, such as name, address, date of birth, and place of employment, was not in itself burdensome, and because that information was already generally available to law enforcement. Id. Also, the "physical act of registration" created no affirmative disability because "[s]ex offenders are free to move within their community or from one community to another, provided they comply with the statute's registration requirements." Id. Also, "it is inconceivable that filling out a short form with eight blanks creates an affirmative disability." Id.

These conclusions must be re-examined. When the Act was first passed, offenders who changed their residence were required to notify the sheriff in writing of the new address within 10 days. Former 9A.44.130(3) (1990). Now, offenders who move must notify the sheriff by certified mail or in person of the new address within three business days. RCW 9A.44.130(4)(a). In addition, offenders who move to a new county must register with the new county sheriff within three business days of moving and must provide the county sheriff with whom they last registered, signed written notice, by certified mail or in

person, of the change of address. RCW 9A.44.130(4)(b). Also, low-risk offenders must verify their current residence by responding to annual certified mail inquiries made by law enforcement and high-risk offenders by responding to quarterly inquiries. RCW 9A.44.135.

More important, the burdens on homeless offenders are much more substantial. All homeless offenders, regardless of their risk classification, must report weekly in person to the sheriff's office. RCW 9A.44.130(5)(b). A homeless offender must also "keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request." RCW 9A.44.130(5)(b).

The threat of prosecution for offenders who do not comply with the Act's complex and ever-changing requirements is also a significant restraint. Initially, a person who knowingly failed to comply with the Act's requirements was guilty of, at most, a class C felony, and only if the person's underlying offense was a class A sex offense; others who violated the registration requirements were guilty of only a gross misdemeanor. Former 9A.44.130(6) (1990). Now, if the predicate crime is any kind of felony, the crime of failure to register is a class C felony if it is a first or second offense, and a class B felony if the person was convicted twice before for failure to register. RCW 9A.44.132(b).

The Ward court also concluded that the provisions of the Act allowing law enforcement agencies to disseminate information about offenders to the public did not impose any additional burdens because criminal justice agencies already had authority to release criminal conviction records without restriction. 123 Wn.2d at 501. The court reasoned, "[i]t is only where the criminal history record contains non-conviction data, or where the criminal justice agency discloses that the person is a registered sex offender, that dissemination will have the potential for creating an additional restraint." Id.

This potential for additional restraint is now a substantial reality. The situation today is much different and goes far beyond the traditional ability of criminal justice agencies to release criminal records to members of the public upon request. Now, non-conviction, personal information about an offender, including the offender's address by hundred block on a map and current photograph, is available to anyone with access to the Internet and may be obtained with very little effort. RCW 4.24.550(5). Any member of the public may find out not only conviction information about an offender, but also his or her risk classification and whether he or she is in compliance with registration requirements. See http://ml.waspc.org.

Finally, the Ward court held that disclosure of registration information to the public did not impose additional punishment on offenders because "[t]he Legislature placed significant limits on (1) whether an agency may disclose registrant information, (2) what the agency may disclose, and (3) where it may disclose the information." Ward, 123 Wn.2d at 502. The court found dispositive that the statute authorized public agencies to release only "'relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection.'" Id. (quoting RCW 4.24.550(1)). The Legislature intended that information about sex offenders be released to the public only under very limited circumstances where there was an actual threat to public safety. Id. The court upheld the statute only because of these stated intentions of the Legislature. The court explicitly held that "a public agency must have some evidence of an offender's future dangerousness, likelihood of reoffense, or threat to the community, to justify disclosure to the public in a given case. This statutory limit ensures that disclosure occurs to present future harm, not to punish past offenses." Id. at 503.

These limitations on the public disclosure of sensitive information about offenders which were written into the original statute and deemed so important by the Washington Supreme Court have practically become a

nullity. Now, *every* level II and level III offender's name, relevant criminal convictions, address by hundred block, physical description, photograph, risk level classification, and compliance status is available to anyone anywhere who has access to the Internet, regardless of whether the information is "necessary" or "relevant." The same information about any level I offender, i.e., those determined to present the lowest risk to the public, is similarly available if that person is not currently in compliance with registration requirements. RCW 4.24.550(5)(a). Because the registration requirements are burdensome, especially for homeless offenders, many offenders are undoubtedly out of compliance but do not for that reason present a greater risk of reoffense.

In Smith v. Doe, 538 U.S. 84, 100, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2002), the United State Supreme Court concluded that, "[i]f the disability or restraint [of a sex offender registration and public disclosure statute] is minor and indirect, its effects are unlikely to be punitive" for ex post facto purposes. Here, under the standards set forth in Ward, Washington's current statute places undue burdens on offenders which are not justified by the risks an offender may pose to the public. This factor therefore weighs heavily in favor of finding the statutory provisions are "punitive" for purposes of the Ex Post Facto Clause.

Other courts around the country have come to similar conclusions about their state statutes. Several courts have concluded that statutory provisions similar to Washington's are akin to probation and are therefore punitive. Wallace v. State, 905 N.E.2d 371, 380 (Ind. 2009) (statute mandating registration, re-registration, disclosure of public and private information, and updating that information under threat of prosecution "imposes significant affirmative obligations and a severe stigma on every person to whom it applies"); Doe v. Dept. of Pub. Safety and Corr. Servs., 430 Md. 535, 562, 62 A.3d 123 (2013) (statutory obligations requiring offenders to report in person to law enforcement every three months, give notice to law enforcement of any change of address, notify law enforcement before being away from home for more than seven days, under threat of imprisonment, "have the same practical effect as placing Petitioner on probation or parole"); State v. Letalien, 985 A.2d 4, 18 (Maine 2009) (law requiring quarterly, in-person reporting to law enforcement "is undoubtedly a form of significant supervision by the state" that "amounts to an affirmative disability").

Other states have concluded that wide dissemination of personal information about offenders on the Internet is also punitive. The Indiana Supreme Court found such aggressive public notification of sex

offender crimes "exposes sex offenders to profound humiliation and community-wide ostracism," and therefore imposes significant affirmative disabilities on offenders. Wallace, 905 N.E.2d at 380. The Wallace court concluded the effect of the public dissemination "subjects offenders to 'vigilante justice' which may include lost employment opportunities, housing discrimination, threats, and violence." Id.; see also Doe v. Pataki, 120 F.3d 1263, 1279 (2d Cir. 1997) (finding "sex offenders have suffered harm in the aftermath of public dissemination-ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson.").

2. The burdens imposed by the law are akin to traditional forms of punishment.

In Ward, the court concluded this factor did not weigh in favor of finding the statute punitive because "[r]egistration has not traditionally or historically been regarded as punishment." Ward, 123 Wn.2d at 507. Instead, "[r]egistration is a traditional governmental method of making available relevant and necessary information to law enforcement agencies." Id.

Given the development of the law since Ward was decided, and the current regime permitting wide and indiscriminate dissemination of

personal information about offenders to the public even when not "relevant and necessary," the Ward court's conclusion regarding this factor must also be re-examined.

As noted, several state courts have compared registration requirements to supervised probation, which is a traditional form of punishment. See Wallace, 905 N.E.2d at 380; Dept. of Pub. Safety and Corr. Servs., 430 Md. at 562; Letalien, 985 A.2d at 18.

Other courts have said the wide public dissemination of personal information about sex offenders is akin to the traditional punishment of shaming. See, e.g., Wallace, 905 N.E.2d at 380-81 ("the dissemination provision at least resembles the punishment of shaming" and marks an offender as someone to be shunned); Dept. of Pub. Safety and Corr. Servs., 430 Md. at 564 ("the dissemination of Petitioner's information pursuant to the sex offender registration statute, is tantamount to the historical punishment of shaming").

3. Operation of the law promotes the traditional aims of punishment.

In Ward, the Supreme Court acknowledged "that a registrant, aware of the statute's protective purpose, may be deterred from committing future offenses." 123 Wn.2d at 508. Yet the court concluded that, "[e]ven if a secondary effect of registration is to deter

future crimes in our communities, we decline to hold that such positive effects are punitive in nature." Id.

Yet other courts have found this factor weighs in favor of finding the law to be punitive because the deterrent and retributive effects of the law can be substantial. In Wallace, for example, the Indiana court explained:

> It is true that to some extent the deterrent effect of the registration and notification provisions of the Act is merely incidental to its regulatory function. And we have no reason to believe the Legislature passed the Act for purposes of retribution—"vengeance for its own sake." Nonetheless it strains credulity to suppose that the Act's deterrent effect is not substantial, or that the Act does not promote "community condemnation of the offender," both of which are included in the traditional aims of punishment. We conclude therefore that the fourth Mendoza-Martinez factor slightly favors treating the effects of the Act as punitive when applied to Wallace.

905 N.E.2d at 382 (citations omitted).

4. The law is excessive in relation to the legitimate purposes assigned.

In Ward, the Supreme Court concluded the effects of the sex offender registration and community notification statute were not excessive in relation to its nonpunitive purpose because "the Legislature has spoken clearly that public interest demands that law enforcement agencies have relevant and necessary information about

sex offenders residing in their communities." Ward, 123 Wn.2d at 509. This conclusion must also be re-examined. Again, under the current regime, personal and damning information about offenders is now available to anyone in the public at large even when that information is not "relevant" or "necessary" to public safety.

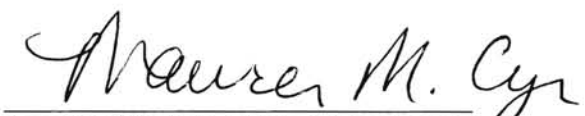
Other courts have concluded any nonpunitive purpose of their registration and notification statutes was outweighed by their punitive effects. See, e.g., Wallace, 905 N.E.2d at 384 ("In this jurisdiction the Act makes information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk."); State v. Williams, 129 Ohio St.3d 344, 952 N.E.2d 1108 (Ohio 2011) (statute unduly punitive where sex offenders required to register more often and for longer period of time and where registration requirements apply without regard to future dangerousness of offender); Letalien, 985 A.2d at 23-24 (statute unduly punitive where many persons included in registry may no longer pose danger to public and where all registrants, including those who have been successfully rehabilitated, will naturally be viewed as potentially dangerous persons by their neighbors, co-workers, and the larger community).

In sum, the current version of Washington's sex offender registration and community notification statute is "punitive" for purposes of the Ex Post Facto Clause. It imposes significant burdens and restraints on offenders, it is akin to the traditional forms of punishment of 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. The law is therefore ex post facto as applied to Mr. Smith.

F. CONCLUSION

Subjecting Mr. Smith to the requirements and penalties of the sex offender and community notification law punishes him for behavior that occurred before the effective date of the law. Because the law violates the Ex Post Facto Clause as applied to Mr. Smith, his two convictions for failure to register must be reversed and the charges dismissed. In addition, he must be relieved of any future duty to register.

Respectfully submitted this 2nd day of August, 2013.



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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69621-1-I
	)	
	)	
MICHAEL SMITH, SR.,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	CHRISTOPHER SMITH, JR. 737255 CEDAR CREEK CORRECTIONS CENTER PO BOX 37 LITTLEROCK, WA 98556-0037	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 2ND DAY OF AUGUST, 2013.

X_____

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