NO. 76627-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALMSEGGETT HABTAI,

Appellant.

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

The Honorable Lori K. Smith

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it sentenced Almseggett Habtai to register as a kidnapping offender.

Issues pertaining to assignments of error.

1. Is registration as a kidnapping offender a punitive requirement that increases an offender's sentence and requires jury fact-finding or a defendant's stipulation to the prerequisite facts?

2. Where the jury made no finding and the defendant made no stipulation to establish that Gabrielle Shull was not related to Habtai, did the court violate Habtai's Constitutional right to a trial by jury?

B. STATEMENT OF FACTS

The King County Prosecutor's Office charged Habtai with attempted second-degree kidnapping. CP 1-2. The State alleged that on July 13, 2016, Habtai attempted to kidnap Gabrielle Shull and did so with sexual motivation. CP 1-2, 5-6.

At trial, the State put on the testimony of Shull, several police officers, and other witnesses as well as surveillance footage, photographs, and a Department of Licensing (DOL) vehicle registration certificate.

Annette Wilde, a Safeway courtesy clerk testified that on the day of the incident, she twice observed an orange cab driven by a black male with no passengers. RP 225-27. The first time, while cleaning the sidewalk

outside the store, she saw the cab come out of the 7-Eleven parking lot nearby and drive down 15th Street past the Safeway store. RP 220. She noticed the cab because the driver had his window down and waved at her. RP 224. Later that day, she walked into the parking lot and observed the same vehicle driving slowly through the parking lot. RP 225. She did not see the car going anywhere or stopping, and asked a coworker to go inside and call 911. RP 225-26. Wilde testified that a photograph taken of Habtai's car matched the vehicle she had seen. RP 227; see also RP 246.

Gabrielle Shull testified to the following. She had attended band camp at the Seattle Drum School last summer. RP 235. One day, she, her brother and a friend went to lunch at Subway, just across the street. RP 328. As they were returning to class, the three stood at the intersection. RP 328. Her brother and the friend decided to go to 7-Eleven to get Slurpees. RP 328. Shull remained by herself at the cross-walk, waiting for the light to turn. RP 330.

An orange vehicle with the words "orange cab" in faded letters, pulled out of the Subway parking lot and approached her. RP 330. The window was rolled down and the driver, an African-American adult male with a dark complexion, shouted to her, asking if she needed a ride. RP 330, 335-36. Shull replied, "No, thank you." RP 331. The man asked her a second time, and she again refused. RP 331, 336. Shull testified that the

man stated, "get in my car now," in a tone that was "loud," "demanding," "sharp," "like a bark," and as if it was "not really up for debate anymore." RP 331, 338. Shull became "uncomfortable," "felt threatened" and "scared," and ran across the street. RP 331, 358-59.

Within 15 seconds, she arrived back at the drum school. RP 338. She briefly told a fellow student, Sasha Poll, and later, her music teacher, Michael Stone, what had happened. RP 339, 343.

Poll called police. RP 342; see also RP 351 (Poll's testimony). Shull described the vehicle and provided a suspect description: a 21-year-old black male in a black-colored shirt. RP 351; RP 276 (Officer Kim's testimony). Shull testified that she told the operator that the man had "begged" her to get in the car, but stated her use of this word was "not very articulate" and "demanded" was more accurate. RP 359.

The suspect details were radioed to officers in the area. RP 267. Officer Steven Kim located Habtai, a 50 year old black man, in the driver's seat of an orange cab with faded letters, in the Safeway parking lot. RP 263, 268. He believed the vehicle was "really distinct" and radioed other officers that he had located a potential suspect. RP 263; see also RP 167. Kim testified that as he drove past Habtai in the parking lot, Habtai looked at him, smiled, and gestured hello. RP 269.

Within minutes, Officers William Anderson and Alan Richards arrived in a second police car, and the three officers approached Habtai's vehicle together. RP 270.

Kim and Anderson, who approached the driver's side door, testified that they saw Habtai's pants were unzipped. RP 170, 273. Anderson, who stood closest to Habtai, testified, "I noticed [Habtai] had an erect penis sticking out of his pants, [I] asked him to put his penis back in his pants," and noted Habtai's left hand was next to his penis. RP 170. Kim, and Richards who walked around to the passenger side, both observed a knife stuck in the air vent and a bottle of liquor by the front seat. RP 273, 287. Richards removed these items and poured out the liquor. RP 273, 287-88.

Anderson asked Habtai to zip up his pants and step out of the vehicle. RP 171-72. After a brief conversation, they waited for Shull to arrive for a possible identification. RP 171-72.

Shull and Stone rode in the back of Officer Oscar Gardea's police car to the Safeway parking lot to identify a potential suspect. RP 140, 345. Gardea testified his vehicle was 100 feet away from Habtai when Shull observed him. RP 141. Although Shull never left the vehicle and testified that she did not get close enough to Habtai to observe his facial features, she immediately made a positive identification based on his ethnicity and clothing. RP 345, 347, 352. Shull testified there were lots of officers in the

Safeway parking lot, but she did not speak with any of them. RP 354. Shull also testified that the photo of Habtai's vehicle matched the vehicle that had approached her at the intersection. RP 348; see also RP 246 (Habtai's car).

Immediately after the positive identification, Habtai was arrested and his vehicle was impounded. RP 291, 275. The knife and now-empty liquor bottle were returned to the vehicle before it was towed. RP 275, 419.

Detective Michelle Gallegos testified that before she searched the impounded orange cab pursuant to warrant, the contents were "in a state of disarray." 416-17, 419. During the search, she found an empty bottle of liquor (Bacardi) in between the driver's and front passenger's seat, and a wooden handled fillet knife on the front passenger seat floorboard. RP 420. A measuring tape, a business card for Orange Cab, a pair of scissors and an electrical cord with the ends cut off were also found inside the car. R 420-21. DOL documentation also confirmed that Habtai was the registered owner of the searched vehicle. RP 413.

Gallegos testified that she recovered surveillance videos from three local businesses. RP 395, 409. She testified the Brown Bear Car Wash and Chevron videos, which were played for the jury, showed an orange car approaching a person at an intersection, a female running away, and the vehicle turning into the Safeway parking lot. RP 397, 404-06. Gallegos

testified that the Q-mart video, which was not played for the jury, showed an orange cab drive through the parking lot. RP 409-10.

Shull's mother, Elizabeth Bates-Shull, testified that Shull was 12 years old at the time of the incident. RP 369. Also, three witnesses—Shull, her music instructor, Michael Stone, and another student, Sasha Poll—all testified that Shull was a minor. RP 323 (Shull: 13 at time of trial), 199, 202 (Stone: Shull attended class for 10 to 16-year-olds), 230-234 (Poll: Shull is younger than Poll who is 15).

Habtai did not stipulate to any facts and did not offer any testimony or other evidence. RP 424.

The jury found Habtai guilty of attempted second-degree kidnapping, but purposefully declined to answer the special verdict form regarding whether Habtai's actions were sexually motivated. CP 101-02; RP 517.

At the sentencing hearing, the State and defense counsel presented arguments, and Shull's mother, Bates-Shull, addressed the court. RP 526-27. Habtai declined to allocute. RP 528. The court advised the parties that it had considered the evidence at trial, statements of Bates-Shull, and sentencing memoranda and arguments of the parties, as well as the information and certification of probable cause. RP 528-29. The trial court then sentenced Habtai to 15 months of incarceration, the high end of the

standard range. CP 109; RP 529-30. Over defense objection and implicitly finding the additional required facts, the court also sentenced Habtai to register as a kidnapping offender. RP 528, 530; CP 110, 114-15.

Habtai timely appealed. CP 119-20.

C. ARGUMENT

THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY WHEN IT IMPOSED A KIDNAPPING OFFENDER REGISTRATION REQUIREMENT.

At trial, the State sought a special verdict that Habtai had committed the crime with sexual motivation. RP 435. Had the jury answered the question in the affirmative, Habtai would have been required to register as a sex offender. See RCW 9.94A.030(47)(c) ("any felony with a finding of sexual motivation ... "). However, the jury did not return an affirmative answer, and instead intentionally left the special verdict form blank. CP 101-02; RP 517. The State then sought an alternative means to impose the registration requirements, by requesting that the sentencing court find additional facts that would trigger registration as a kidnapping offender. See RP 528, 530. Over defense counsel's objection, the sentencing court obliged the State, implicitly found the additional facts, and imposed the registration requirement. RP 528, 530; CP 114-15.

In doing so, the court exceeded its sentencing authority by increasing the punishment imposed on Habtai. See Blakely v. Washington,

542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). As discussed below, although the Washington Supreme Court held the registration statute was not punitive, numerous amendments over the past 20 years have significantly increased requirements and render the statute punitive. See State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994).

RCW 9A.44.130(1)(a) requires that any Washington resident convicted of "kidnapping offense" must register as a kidnapping offender with the county sheriff. The definition of "kidnapping offense" includes attempted kidnapping in the second degree, but only "where the victim is a minor and the offender is not the minor's parent." RCW 9A.44.128(8)(a)-(b).

Here, the jury returned no special verdict finding that Shull was a minor or that Habtai was not Shull's parent. CP 101-02; RP 517. Moreover, Habtai did not testify at trial, stipulate to any facts, or even allocute during sentencing. RP 424, 528.

However, the sentencing court concluded, over defense objection, that Habtai was subject to the kidnapping registration statute, and that no special verdict form or stipulation was necessary to impose this requirement. RP 528, 530; CP 110, 114-15.

It is well-established that a court may not increase an offender's sentence on the basis of facts neither found by a jury beyond a reasonable doubt nor stipulated to by the defendant. State v. Felix, 125 Wn. App. 575, 577, 105 P.3d 427 (2005) (citing Blakely, 542 U.S. at 301; Apprendi, 530 U.S. at 490). "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' ... and the judge exceeds his proper authority." Blakely, 542 U.S. at 304 (quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)).

The central question in this case is whether registration as a kidnapping offender increased Habtai's punishment, i.e. whether the registration requirements are punitive or merely regulatory. See Felix, 125 Wn. App. 578. If they are punitive, the sentencing court exceeded its authority. Blakely, 542 U.S. at 304; see also Apprendi, 530 U.S. at 490.

To determine whether a penalty is punitive or merely regulatory, courts utilize the framework applied in *ex post facto* cases, as this framework addresses the identical question. Felix, 125 Wn. App. at 579-81 (citing Ward, 123 Wn.2d at 496; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)).

This framework involves a two-part test: first, whether the Legislature intended the statute to be punitive, and second, "whether the

actual effect of the statute is so punitive as to negate the Legislature's regulatory intent." Ward, 123 Wn.2d at 499 (citing United States v. Ward, 448 U.S. 242, 248-49, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980)).

> The following factors determine the punitive effect of a statute:
>
> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned ... .

Mendoza-Martinez, 372 U.S. at 168-69 (footnotes omitted).

In Ward, the Washington State Supreme Court first determined the Legislature unequivocally intended Washington's sex offender registration statute to be regulatory, and then applied the Mendoza-Martinez factors to conclude the effect of the statute, as it existed in 1994, was not punitive. Ward, 123 Wn.2d at 499, 511.

Critical to the Court's analysis was the scope of required disclosures. The Court found the statute required disclosure of only eight pieces of information—name, address, date of birth, place of employment, crime of conviction, date and place of conviction, aliases, and social security number—along with a photograph and finger prints. Id. at 500-01. All of this information would already be in the hands of law enforcement

officers, with the exception of address updates. Id. at 500. Moreover, the information could be mailed in, did not require in-person registration, and placed no geographic limitations on an offender's movements. See id. at 501. As such, the Court found the statute did not create an affirmative disability or restraint. Id. at 507.

The Court's analysis also relied heavily on the statute's limitations of release of registrant information to the public. Id. at 502. Under the former version of the statute, "'[p]ublic agencies are authorized to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection.'" Id. (quoting Laws of 1990, ch. 3, § 116; citing Former RCW 4.24.550(1) (eff. 1994)). Relying on the "necessary for public protection" language, the Court reasoned that the statute required some showing of an offender's future dangerousness before an agency was authorized to release any information to the public, and even then, the scope of the release was limited to only that information "relevant and necessary." Ward, 123 Wn.2d at 503. The Court reasoned that this imposed an affirmative burden on the releasing agency to gauge the needs of the public, to assess the risk of harm by the public against the offender, and to tailor releases of information accordingly. Id. at 503-04. For example, a more detailed release of information may be justified to a next-door neighbor or nearby school,

whereas those further away may receive less detailed information. Id. at 504. The Court concluded that the limitations on release of information to the general public showed that the purpose of the statute was to mitigate future dangerousness, not to punish for past harms. Id.

The Court also rejected arguments that sex offender registry was a "badge of infamy," noting that Washington's statute allowed any offender to petition for relief from registration, and that the duty to register lasts only 10 or 15 years from the date of last offense, depending on whether the person was convicted of a Class B or C felony. Id. at 509-10 (citing Former RCW 9A.44.140(1)(b)-(c), (2) (eff. 1994)).

However, the statute has been amended no less than thirty times since Ward was published in 1994.[1] As analyzed below using the Mendoza-Martinez factors, these amendments render the effect of the statute punitive.

1. Affirmative disability or restraint

The first factor is whether the act creates an affirmative disability or restraint. Mendoza-Martinez, 372 U.S. at 168-69. This factor strongly favors finding the amended requirements punitive.

[1] E.g. Laws of 2017, ch 174 § 3 (eff. July 23, 2017); Laws of 2015, ch 261 § 3 (eff. July 24, 2015); Laws of 2010, ch 265 § 1 (eff. June 10, 2010); Laws of 2006, ch 128 § 2 (eff. Sept. 1, 2006); Laws of 2003, ch 53 § 68 (eff. July 1, 2004); Laws of 1995, ch 195 § 1.

In Ward, the Court concluded that "the physical act of registration creates no affirmative disability or restraint." Ward, 123 Wn.2d at 501. However, the Ward Court was evaluating a statute that required only "filling out a short form with eight blanks" and mailing in updates regarding any change in address. Id. There were no in-person registration requirements – both initial registration and updates could be accomplished by mail, and homeless people were not required to register. Former RCW 9A.44.130 (eff. 1998); State v. Pickett, 95 Wn. App. 475, 478, 975 P.2d 584 (1999).

Since the Ward decision, the Legislature has amended the statute to impose weekly, in-person registration on homeless people. RCW 9A.44.130(6)(b). Homeless people are also now required to provide the information on where he or she stayed each night of the preceding week. RCW 9A.44.130(6)(b). Homelessness also now triggers disclosure of the registrant's information to the public at large through a State-established website. RCW 9A.44.130(6)(b); see also RCW 4.24.550 (establishing website).

This in-person weekly requirement places physical constraints on homeless registrants. If they are homeless, they must physically present themselves each week, on a day selected by local law enforcement (not a day of the registrant's own choosing) to register. RCW 9A.44.130(6)(b). These amendments create an affirmative restraint.

Jurisprudence supports that the in-person requirement is dispositive; it creates an affirmative disability or restraint and renders the statute's effect punitive. In Smith v. Doe, the lack of an in-person registration requirement was crucial to the U.S. Supreme Court's decision. 538 U.S. 84, 101, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); Alaska Stat. § 12.63.010 (requiring only written updates once per quarter). The Ninth Circuit mistakenly believed the Alaska Statute required in-person registration and held it created an affirmative restraint. Id. at 101. The U.S. Supreme Court noted the Ninth Circuit was mistaken; the statute did not require in-person registration. Id. As a result, the U.S. Supreme Court held the statute did not impose a significant disability or restraint. Id.

Other states that have amended their statutes to impose in-person registration requirements that are similar to that of Washington's, have held that their statutes do impose significant disabilities or restraints and so are punitive, rather than merely regulatory. State v. Letalien, 2009 ME 130, 18, 985 A.2d 4 (Me. 2009) (Maine Supreme Court holding statute imposing quarterly in-person registration updates was punitive); Starkey v. Oklahoma Dept. Corrections, 2013 OK 43, 305 P.3d 1004, 1022 (Okla. 2013) (Oklahoma Supreme Court holding statute imposing in-person registration requirement annually, semi-annually, or every 90 days for different classes of offenders was punitive). Other courts have also recognized that in-person

registration requirements are onerous and so impose an affirmative disability or restraint. Does #1-5 v. Snyder, 834 F.3d 696, 703-05 (6th Cir. 2016); Doe v. State, 189 P.3d 999, 1009 (Alaska 2008).

Washington's statute imposes a weekly in-person registration requirement, a more significant burden than any statute considered in the aforementioned cases, and so creates an affirmative restraint. RCW 9A.44.130(6)(b).

The Legislature has also amended the statute to impose pre-travel registration requirements for all registrants who intend to travel outside of the United States. RCW 9A.44.130(3). Registrants must provide extensive information 21 days in advance of travel, either in-person or by certified mail with return receipt requested, including a signed written plan including an itinerary (with locations, and departure and arrival dates), the purpose of the travel, and the means of travel. RCW 9A.44.130(3). 24-hours notice is permitted for "family or work emergencies" or for routine "work-related" international travel if an explanation is provided. RCW 9A.44.130(3).

This international travel restriction also creates an affirmative restraint on registrants. Unlike citizens who are not required to register, a registrant may not leave the country to take advantage of a last-minute discounted vacation, to visit a friend in the hospital, or to take a non-emergency business trip with less than 21 days of notice. Thus, a

registrant's physical movements are restricted to force compliance with these reporting requirements.

As discussed above, both the in-person, weekly registration requirement for homeless people and the international travel notice restrictions on all registrants, create affirmative restraints. Jurisprudence supports that this factor alone is dispositive, and renders the statute punitive rather than merely regulatory. See Smith, 538 U.S. at 101.

2. Sanctions historically considered punishment

The second Mendoza-Martinez factor is whether the sanctions imposed are historically considered punishment. 372 U.S. at 168-69. This factor also weighs in favor of finding the effect of the amended statute is punitive for two reasons. First, the new requirements relevant to homeless persons and international travel are akin to the traditional punishment of probation or parole supervision. Second, the scope of collected data and published data has significantly expanded and the penalty for non-compliance has increased, rendering the statutory scheme similar to traditional public shaming punishments.

i. Probation or parole supervision

As discussed above, post-Ward amendments impose requirements for in-person, weekly homeless person registration, and the 21-day advance notice for international travel. RCW 9A.44.130(3), (6)(b). These restraints

impose significant physical limitations on registrants and are akin to the traditional punishment of probation and parole supervision.

In Smith, the U.S. Supreme Court acknowledged there was "some force" to arguments that Alaska's regulatory scheme was similar to parole or probation supervision, a traditional form of punishment. Smith, 538 U.S. at 101. The Court ultimately rejected this argument because the Alaska statute did not require sex offenders to seek advance permission to move, work, borrow a car, grow a beard or seek psychiatric treatment, but only to notify authorities after the fact. Id. In addition, Alaska's statute did not impose the physical restraint of in-person registration. Id.

However, Washington's international travel restriction is more like the traditional supervision of probation or parole, in that Washington requires significant advance notice of intent to travel, and effectively prohibits certain travel where advance notice is not possible. RCW 9A.44.130(3) (excepting only family and work-related emergencies from 21-day notice requirement). The statute also leaves the registrant at the mercy of administrators, prosecutors or law-makers to determine who is "family" and what is an "emergenc[y]." RCW 9A.44.130(3). According to the reasoning of Smith, these travel restrictions are similar to the traditional punishment of probation or parole supervision. Smith, 538 U.S. at 101.

The in-person weekly registration requirement for homeless persons is also analogous to the traditional punishment of parole or probation supervision. Other courts have agreed that the imposition of a repeated, in-person registration requirement is indistinguishable from probation or parole supervision. For example, in Does #1-5, the Sixth Circuit recognized that Michigan's in-person registration requirement coupled with restrictions on work and residency within school zones, was akin to the traditional punishment of probation or parole. 834 F.3d at 703. The Maine Supreme Court similarly concluded that quarterly in-person verification for life "is undoubtedly a form of significant supervision by the state." Letalien, 985 A.2d at 18. The Maryland Court of Appeals similarly concluded that registration obligations requiring offenders to report in-person every three months, provide detailed personal information (including physical descriptions and vehicle registration), provide notice of change of address, notify law enforcement prior to travel away from home for more than seven days, among other requirements, "have the same practical effect as placing Petitioner on probation or parole." Doe v. Dept. of Pub. Safety and Corr. Servs., 430 Md. 535, 562, 62 A.3d 123 (Md. 2013).

This Court should similarly hold that Washington's in-person weekly registration for homeless persons and advance notice requirement

for international travel, are analogous to the traditional punishment of probation or parole supervision.

ii. Public shaming

The scope of information shared with the public has expanded significantly since the Ward decision, the method of sharing has also expanded to include routine posting online, and the penalty for non-compliance has increased. For all three reasons, the amended statute is comparable to the traditional punishments of public shaming.

As discussed above, the amended statute now requires collection of additional information for homeless and internationally travelling registrants. Amendments have also established a website and require posting of the following. RCW 9A.44.130; 2002 Wash. Legis. Serv. Ch. 118 (S.S.B. 6488).[2] Kidnapping offenders or level II or III sex offenders have the following information posted on the website: "name, relevant criminal convictions, address by hundred block, physical description, and photograph." RCW 9A.44.130(5)(a)(i), (iii). Level I sex offenders also have their data posted when they are out of compliance with registration requirements. RCW 9A.44.130(5)(a)(ii). Notably, homelessness also now triggers posting of this same data. RCW 9A.44.130(6)(b).

[2] Washington Association of Sheriffs and Police Chiefs Website, Sex Offender Information, available at http://www.waspc.org/sex-offender-information.

The internet posting scheme developed by these amendments does allow for some tailoring; more or less information is released based on crime classification. The required release of information for lower-level offenders who are out of compliance, however, appears to have a punitive motivation, as does the release of data for all homeless people regardless of offender class. More importantly, the statute provides for no individualized future dangerousness assessment; the Ward Court weighed this factor heavily in its conclusion, finding that the former statute was not punitive where agencies could engage in individualized dangerousness assessments and craft releases accordingly. Ward, 123 Wn.2d at 503.

The geographic reach of internet posting is also limitless. As noted on the face of the statute, the website is available to the general public and is equipped with the capability for any person to search for offenders "by county, city, zip code, last name, and address by hundred block." RCW 4.24.550(5)(a)(i). The Ward Court's holding was issued prior to internet posting, and the Court considered it highly relevant that agencies could craft data releases according to the recipient's physical proximity to the registrant, and contemplated providing less detail to those who were not next-door neighbors, for example. Id. at 503-04. The new website's capacity to search by city county, or even last name, greatly expands the reach of the information. In addition, the website is easily accessible to any

individual on the face of the earth with an internet connection. This is far beyond the scope of information release contemplated by the Ward Court and weighs heavily in favor of concluding the statute is punitive.

The Legislature has also increased the penalty for non-compliance; a failure to register as a felony kidnapping offender is a Class C felony; a comparable offense under the previous statute would have been a gross misdemeanor. Compare Former RCW 9A.44.130(7) (eff. 1994) (penalty is Class C felony only if underlying offense was Class A felony, all others are gross misdemeanors) with Current RCW 9A.44.132(3)(a) (penalties range from gross misdemeanor to Class B felony on basis of underlying offense and number of prior violations).

Both the Smith and Ward Courts rejected arguments that public disclosure was akin to the traditional punishment of public shaming, but did so in the context of different statutes. Ward, 123 Wn.2d at 509-10

The Ward Court rejected arguments that sex offender registry was a "badge of infamy," noting that Washington's statute allowed any offender to petition for relief from registration, and that the duty to register lasts only 10 or 15 years from the date of last offense, depending on whether the person was convicted of a Class B or C felony. Ward, 123 Wn.2d at 509-10 (citing Former RCW 9A.44.140(1)(b)-(c), (2) (eff. 1994)). Under the present version of the statute, some offenders such as Habtai, are required

to register for 15 years, while others are required to register for life. See RCW 9A.44.140(2); see also RCW 9A.44.140(1), (3)-(5).

However, the Ward Court's conclusion was reached in the context of a statute that limited the scope of both data collection and disclosures. Ward, 123 Wn.2d at 503-04. As discussed above, the scope has significantly expanded to include considerably more information, such as a homeless person's precise whereabouts for each day, and an international traveler's specific itinerary. Although the current form of the statute does not mandate such disclosures, the statute leaves open the possibility that this data could also be disclosed to the public. See RCW 9A.44.130. This weighs heavily in favor of finding the amended statute is more akin to traditional shaming punishments.

The Smith Court reasoned that posting of an offender's data and crimes on the internet did not expose registrants to public confrontation in the same manner as face-to-face colonial shaming punishments. Smith, 538 U.S. at 98-99. However, it is relevant that this decision was published in early 2003, almost 15 years ago. The nature of the internet has developed significantly in that time.

It is now widely recognized that internet communications can be just as interactive, personal, humiliating, and confrontational as the traditional

interactions of colonists in their town square.[3] "[T]he practical effect" of online posting of registrants' data "often subjects offenders to 'vigilante justice' which may include lost employment opportunities, housing discrimination, threats, and violence." Wallace v. State, 905 N.E.2d 371, 380 (Ind. 2009). There are even documented accounts of internet posting of data resulting in the murder of registered sex offenders motivated by such "vigilante justice."[4]

> As the New Hampshire Supreme Court noted recently:
>
> Our communities have grown, and in many ways, the internet is our town square. Placing offenders' pictures and information online serves to notify the community, but also holds them out for others to shame or shun.

Doe v. State, 167 N.H. 382, 406, 111 A.3d 1077 (N.H. 2015).

The Indiana Supreme Court and Maryland Court of Appeals similarly found registration "resembles the punishment of shaming." Wallace, 905 N.E.2d at 380; also Dept. of Pub. Safety & Corr. Servs., 430

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[3] See e.g. NEW YORK TIMES, John Schwartz, *Bullying, Suicide, Punishment* (Oct. 2, 2010) (available at http://www.nytimes.com/2010/10/03/weekinreview/03schwartz.html) (noting cyberbullying lead to depression, PTSD, and suicide in young adult colleges students); NEW YORK POST, Gabrielle Fonrouge, *Inside the Twisted Revenge Porn Site That's Ruining Women's Lives* (Sep. 22, 2017) (available at https://nypost.com/2017/09/22/revenge-porn-site-leaves-trail-of-innocent-victims/) (noting online posting of private adult content without consent resulted in loss of employment prospects, death threats, and in-person confrontations).

[4] NPR, Martin Caste, Vigilante Used Web Site to Find Sex Offenders, (Sep. 7, 2005) available at http://www.npr.org/templates/story/story.php?storyId=4836246 (discussing murder of two sex offenders in Whatcom County); U.S. NEWS, Isolde Raftery, Man sentenced to life for killing sex offenders; judge chastises supporters, (Sep. 18, 2018) available at https://archive.li/rfk6W (discussing a double murder of two sex offenders in Clallam County).

Md. at 565. The Sixth Circuit also recognized that the public nature of the registry closely "resemble[s] traditional shaming punishments." Does #1-5, 834 F.3d at 702. This Court should similarly hold Washington's online registration scheme is analogous to traditional shaming punishments.

The amended statute, including in-person reporting, pre-travel notification, internet posting, and increases in punishment, all establishes that the amended version of Washington's offender registration statute imposes penalties similar to the traditional punishments of probation or parole supervision and public shaming. The effect of the statute is punitive.

3. Traditional aims of punishment: retribution & deterrence

The third factor is whether the penalty promotes the traditional aims of punishment: retribution and deterrence. Mendoza-Martinez, 372 U.S. at 168.

Both the Ward Court and the Smith Court "acknowledge[d] that a registrant, aware of the statute's protective purpose, may be deterred from committing future offenses" but declined to find this factor dispositive. Ward, 123 Wn.2d at 508; see also Smith, 538 U.S. at 102.

Seen in light of recent amendments and internet posting as discussed above, the retribution and deterrent force of Washington's registration scheme has only increased. As such, this factor weighs more heavily in favor of finding the statute's effects punitive.

4. Rational connection to a non-punitive purpose

The fourth factor is whether the statute has a rational connection to a non-punitive purpose. Mendoza-Martinez, 372 U.S. at 168-69. The Smith Court concluded this was the "'[m]ost significant' factor" in determining whether the statute's effects were punitive. Smith, 538 U.S. at 102. (quoting United States v. Ursery, 518 U.S. 267, 290, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996)).

The Smith Court also concluded that the Alaska act was rationally related to the non-punitive purpose of protecting the public from recidivism. Smith, 538 U.S. at 103. To support its conclusion, the Court relied heavily on statistics which it believed showed that sex offenders as a class posed a "frightening and high" risk of recidivism. Id. at 103 (internal citations omitted). The Court concluded that the Legislature was entitled to make "reasonable categorical judgments" and to require registration in order to serve the rational aim of reducing recidivism. Id. at 103.

The Ward Court did not specifically address this factor, but similarly reasoned the non-punitive aim of the statue was protecting the public and reducing recidivism. See Ward, 123 Wn.2d at 504-05.

However, recent statistics show that reducing recidivism by requiring registration for kidnapping and sex offenders is anything but rational. At least one study suggests that sex offenders are less likely to

reoffend than other criminals – yet Washington's law imposes onerous burdens only upon sex and kidnapping offenders. See Does #1-5 v. Snyder, 834 F.3d at 704 (citing Lawrence A. Greenfield, Recidivism of Sex Offenders Released from Prison in 1994 (2003)). Another statistical study concluded that registration statutes "actually increase the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities." Does #1-5 v. Snyder, 834 F.3d at 704-05 (citing J.J. Prescott & Jonah E. Rockoff, *Do Sex offender Registration Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161 (2011)).

As noted by the dissent in Smith, registration statutes are more focused on past criminal conduct than future dangerousness, and this reveals their true retributive purpose. Smith, 538 U.S. at 116 (Ginsburg, J., dissenting). The recent statistics discussed above only serve to justify Justice Ginsberg's concern.

Where, as here, the relationship between the non-punitive goals and the method selected by the Legislature is not rational, this Court should find this favor weighs heavily in favor of finding the statute's effects are punitive.

5. Excessiveness in relation to non-punitive purpose

The final relevant Martinez-Mendoza factor is whether the penalty imposed is excessive in relation to the non-punitive purpose. Mendoza-Martinez, 372 U.S. at 168-69.

The Smith Court noted the excessiveness inquiry was "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." Smith, 538 U.S. at 105. The Court concluded the requirement of registration was not excessive, again relying on statistical data that the Court believed showed increased recidivism rates for sex offenders. Id. at 104.

The Ward Court similarly concluded the registration penalties were not excessive because they were rationally related to the Legislature's non-punitive purpose of law enforcement and prevention of recidivism. Ward, 123 Wn.2d at 508-10.

Both Courts relied heavily on their previous conclusions that registration would rationally serve the Legislature's aim of reducing the exceptionally high recidivism rates of sex offenders. See Smith, 538 U.S. at 104-05; Ward, 123 Wn.2d at 508-10. However, as discussed above, recent statistics no longer support that sex offender recidivism rates are high, or that onerous registration requirements will reduce them. Does #1-

5 v. Snyder, 834 F.3d at 704 (citing Greenfield (2003); Prescott & Rockoff, 54 J.L. & Econ. at 161).

In addition, as noted above, the requirements and penalties for non-compliance have increased since the Ward holding. As such, this Court should hold the registration requirements are excessive in light of the asserted non-punitive purpose, and that this factor weighs in favor of finding the statute's effects punitive.

6. Additional factors: scienter and criminal behavior

Additional Mendoza-Martinez factors include whether the penalty applies only upon a finding of scienter and is triggered only after already criminalized behavior. 372 U.S. at 168-69. As noted in Smith, these factors are not relevant here because registration requirement penalties do not require scienter and registration is triggered by a prior criminal conviction. Smith, 538 U.S. at 105; see also Ward, 123 Wn.2d at 510-11 (declining to consider scienter and criminalized behavior factors as relevant).

In summary, the factors discussed above show that the amended version of Washington's registration statute is punitive and not merely regulatory, given in-person weekly registration requirements, advance notice requirements for international travel, and the expansion of information released over the internet, allowing for immediately and far-reaching dispersal of information to any member of the public.

Because the kidnapping offender registration requirements are punitive, the sentencing court exceeded its authority by implicitly finding additional facts and imposing the registration requirement without a special jury verdict or stipulation by Habtai. Felix, 125 Wn. App. at 577 (citing Blakely, 124 S. Ct. at 304; Apprendi, 530 U.S. at 490).

D. CONCLUSION

Habtai respectfully requests that this Court strike the kidnapping offender registration requirement from his sentence and remand for resentencing.

DATED this 30th day of November, 2017.

Respectfully submitted,

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