



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. OSCAR PENA TRUJILLO  
CR-18-0531-PR**

**PARTIES:**

*Petitioner/Defendant:* Oscar Pena Trujillo (“Trujillo”)

*Respondent:* State of Arizona (“the State”)

**FACTS:**

**Trial.** In 2015, Trujillo was indicted on one count of sexual abuse under A.R.S. § 13-1404 based on his alleged sexual contact with a minor, MAC, who was staying at an immigrant refugee facility in Tucson. MAC testified at trial that he was 15 years old when the incident occurred.

At trial’s end, Trujillo asked the court to submit an interrogatory to the jury about MAC’s age because it might affect sex-offender registration if Trujillo were convicted. The court denied the request, reasoning that MAC’s age was not an element of the offense and, in any event, sex-offender registration was discretionary under A.R.S. § 13-3821(C). It apparently overlooked that registration is mandatory under A.R.S. § 13-3821(A)(3) if the victim was less than 18 years old.

Trujillo was convicted as charged. At sentencing, the court placed Trujillo on probation and required him to register as a sex offender under A.R.S. § 13-3821(A)(3). Trujillo’s counsel objected, arguing that as the statute required registration only if the victim was under 18, the court lacked the authority to impose it because the jury did not make a finding about MAC’s age.

The court rejected counsel’s position, but the next day counsel filed a motion to modify the sentence, arguing that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), barred the imposition of sex-offender registration absent a jury finding that the victim was under 18 years old. *Apprendi* held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490. The trial court denied the motion, reasoning that *Apprendi* did not apply because, under *State v. Noble*, 171 Ariz. 171 (1992), the sex-offender “registration requirement of § 13-3821 is not punishment” and therefore “there was no requirement that the jury make the determination of the victim’s age.”

**Court of Appeals’ Opinion.** The Court of Appeals affirmed. The main issue on appeal was whether under *Apprendi* the trial court erred in imposing sex offender registration without having a jury finding regarding MAC’s age. *Noble*, on which the trial court relied, addressed whether requiring the defendants to register as sex offenders under A.R.S. § 13-3821, which was enacted after they committed their offenses, violated the Ex Post Facto Clause of the state or federal constitutions.

In *Noble*, the Arizona Supreme Court ruled that retroactive application of a statute violates the ex post facto clause only if it changes the punishment and inflicts a greater punishment than the law annexed to the crime, when committed. The Court addressed whether registration under § 13-3821 constitutes punishment and ultimately concluded that it did not. The Court found that the most significant factor was that “the overriding purpose of § 13-3821 is facilitating the location

of child sex offenders by law enforcement personnel, a purpose unrelated to punishing [the defendants] for past offenses.” *Noble*, 171 Ariz. at 175. And while the Court said that its “decision [was] close,” it nonetheless determined that “requiring convicted sex offenders to register pursuant to § 13-3821 is not punishment” and, therefore, applying the statute retroactively did not violate the Ex Post Facto Clause of the Arizona or federal constitutions. *Id.*

After summarizing *Noble*, the Court of Appeals discussed at length the case relied on by Trujillo, *Fushek v. State*, 218 Ariz. 285 (2008). It concluded that *Fushek* gave Trujillo’s argument “some facial appeal,” but it nonetheless found *Noble*’s reasoning more persuasive. It noted that Trujillo argued that changes in the pertinent statutes since *Noble* was decided might mean that *Noble* was no longer good law. The court then acknowledged that more recently, the U.S. Supreme Court had decided *Smith v. Doe*, 538 U.S. 84, 105-06 (2003), “in which—consistent with *Noble*—the U.S. Supreme Court found that Alaska’s Sex Offender Registration Act was ‘nonpunitive’ and instead a ‘civil regulatory scheme,’ making its retroactive application permissible.”

It said that *Smith* supports *Noble*’s reasoning even after the Arizona legislature removed the confidentiality provisions of sex-offender registration and required broad community notification. It stated that *Smith* explained that “[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.” (Quoting *Smith*, 538 U.S. at 99.) The court further noted that “[a]s an intermediate appellate court, we are bound by both *Smith* and *Noble*.”

From this, the Court of Appeals concluded that “*Apprendi* does not require a jury finding of the victim’s age on a conviction for sexual abuse under § 13-1404(A) before the trial court can require a defendant to register as a sex offender under § 13-3821(A)(3).” “Instead,” the court continued, “the [trial] court can make that determination and, assuming it finds the victim was under eighteen years old, must order the defendant to register.” “Accordingly,” it concluded, “the court in this case did not err in requiring Trujillo to register as a sex offender.”

The court also ruled that even if the trial court erred in making a finding about MAC’s age, any error was harmless. It noted that MAC testified that he was 15 years old when the incident occurred and that it happened on the day before his sixteenth birthday. It further noted that Trujillo did not challenge this testimony and when discussing *voir dire*, Trujillo’s counsel agreed the trial court could inform the potential jurors that “[MAC] was 16 years old” and that he “entered the United States as an unaccompanied minor.” It also acknowledged that Trujillo had never provided evidence or an offer of proof to show that MAC’s age was other than 15 when the crime occurred.

## ISSUES:

The Supreme Court has asked the parties to address three issues:

- (1) Was Trujillo entitled to a jury finding on MAC’s age when the fact increased the mandatory minimum sentence affecting sex-offender registration?
- (2) Was the error harmless?
- (3) Should this Court reconsider the opinion in *State v. Noble*, 171 Ariz. 171 (1992)?

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