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No. 53013-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

CYRUS PLUSH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **The issues on review in *State v. Batson* apply to Mr. Plush's case and are not untimely presented.**

As articulated in the opening brief, the Supreme Court recently accepted review of whether the requirements of sex offender registration violate ex post facto and double jeopardy. *See* Order Granting Review, *State v. Batson*, 194 Wn.2d 1009, 452 P.3d 1225 (Dec. 4th, 2019) (granting review of all issues raised by the parties); Answer to Petition for Review, *State v. Batson*, No. 97617-I at 11–21 (Oct. 4, 2019) (cross-petitioning for review on the grounds of ex post facto and double jeopardy). If the Supreme Court holds that registration violates ex post facto and double jeopardy, this Court should follow the new precedent regardless of whether Mr. Plush raised these issues in his first appeal. *See Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005); *State v. Schwab*, 163 Wn.2d 664, 672–73, 185 P.3d 1151 (2008).

The State argues that Mr. Plush's raising of these issues in his second appeal is untimely. Brief of Respondent at 2. The State is wrong. While an appellant is prohibited from raising established legal challenges in a second appeal, the Court of Appeals may consider Supreme Court precedent that is issued between an appellant's first and second appeal. *Roberson*, 156 Wn.2d at 4 ("A decision of the Supreme Court directly in

point, irreconcilable with the decision on the first appeal, and rendered in the interim, *must* be followed on the second appeal.”) (internal citations and quotation marks omitted) (emphasis in the original); *accord State v. Fort*, 190 Wn. App. 202, 233–34, 260 P.3d 820 (2015); 2; *Schwab*, 163 Wn.2d at 672–73; see *also* RAP 2.5(c)(2). The State cites no authority to the contrary.

The State also argues that the issues presented in *Batson* are irrelevant to Mr. Plush’s case. Brief of Respondent at 2. Although the Court of Appeals reversed the conviction in *Batson* based on a non-delegation challenge not applicable here, the Supreme Court has accepted review of additional constitutional challenges to the registration laws that were not decided by the Court of Appeals. *Compare State v. Batson*, 9 Wn. App. 2d 546, 447 P.3d 202 (2019) *with* Order Granting Review, *State v. Batson*, 194 Wn.2d 1009, 452 P.3d 1225 (Dec. 4th, 2019) *and* Answer to Petition for Review, *State v. Batson*, No. 97617-I at 11–21 (Oct. 4, 2019). These issues include whether Washington’s current sex offender registration laws violate *ex post facto* and double jeopardy. *See* Supplemental Brief of Respondent Benjamin Batson, *State v. Batson*, No. 97617-1 at 2 (February 7, 2020) (attached here as Appendix A). Thus, contrary to the State’s assertion, the Supreme Court’s anticipated decision

on these critical issues would certainly bear on the constitutionality of Mr. Plush's failure to register conviction.

2. Mr. Plush's challenges to his legal financial obligations are both timely and meritorious.

As argued in the opening brief, Mr. Plush seeks the remittance of \$100 in legal financial obligations, the cost of supervision fees, and interest. Brief of Appellant at 8–9. Pursuant to statute, Mr. Plush may not be ordered to pay a \$100 DNA fee because his criminal history indicates that his DNA has already been repeatedly collected. RCW 43.43.7541; CP 27–28. Further, Mr. Plush should not be ordered to pay supervision fees because he is indigent. RCW 10.01.160(3); CP 35. Finally, the imposition of interest on legal financial obligations is prohibited by law. RCW 3.50.100(4)(b); CP 32.

The State argues these challenges are untimely. Brief of Respondent at 3–4. However, Mr. Plush was *resentenced* following the first appeal. CP 26–37; *see also State v. Plush*, 2018 WL 1508707 at *4, 3 Wn. App. 2d 1002 (Mar. 27, 2018) (unpublished) (remanding for resentencing). His second appeal challenges the newly entered judgment and sentence, which contains the erroneous legal financial obligations and interest. CP 8, 10–11. Accordingly, consideration of the legal financial

obligations is properly before this Court. *See* RAP 2.2(a)(1) (a party may appeal a final judgment).

The State argues that, had Mr. Plush challenged his legal financial obligations in his first appeal, it “would have agreed that under [*State v.*] *Ramirez*, non-mandatory fines and fees and any interest should be waived because [Mr. Plush] was found indigent by the trial court.” Brief of Respondent at 3. In *Ramirez*, our Supreme Court held that amendments to the discretionary legal financial obligation statutes passed in 2018 applied prospectively to cases pending on direct appeal, because these cases were not yet “final” under RAP 12.7. *State v. Ramirez*, 191 Wn.2d 732, 749 426 P.3d 714 (2018). The State’s argument that Mr. Plush could have raised a *Ramirez* claim in his first appeal is nonsensical as this Court decided his first appeal approximately six months before *Ramirez* was issued. *Compare Plush*, 2018 WL 1508707 (decided Mar. 27, 2018) with *Ramirez*, 191 Wn.2d at 749 (decided Sept. 20, 2018).

To the extent the State is arguing Mr. Plush may not raise the issue of legal financial obligations on appeal pursuant to *Ramirez* or the amended legal financial obligation statutes, it conceded the point below. *See* Brief of Respondent at 3. At sentencing, the prosecutor noted that any changes to the previous judgment and sentence had been made to comply with *Ramirez*. RP 12. Because the prosecutor acknowledged *Ramirez*

applied and the trial court accepted this concession, the State cannot prevent Mr. Plush from arguing for additional relief under the changes to the legal financial obligation statutes in his second appeal. *See State v. Cosgaya-Alvarez*, 172 Wn. App. 785, 790, 291 P.3d 939 (2013) (a concession made in the trial court prevents a party from arguing the conceded point on appeal); *accord State v. Smith*, 82 Wn. App. 153, 162–63, 916 P.2d 960 (1996); *see also State v. Barberio*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993) (where a trial court, on remand, actually reviews and rules on an issue, the issue is appealable); *accord State v. Kilgore*, 167 Wn.2d 28, 40–41, 216 P.3d 393 (2009). Accordingly, the DNA fee, supervision fee, and interest should be stricken. *Ramirez*, 191 Wn.2d at 749; RCW 43.43.7541; RCW 10.01.160(3); RCW 3.50.100(4)(b).

The State argues it “has no information as to whether or not [Mr. Plush] has or has not previously submitted to DNA testing.” Brief of Respondent at 3. This Court has recognized that if the record is “silent as to whether the State previously collected” the defendant’s DNA, the proper remedy is to remand for an evidentiary hearing. *State v. Houck*, 9 Wn. App. 2d 636, 651, 446 P.3d 646 (2019). On remand, the burden is on the State to prove the DNA has *not* been collected; otherwise the fee must be stricken. *See id.* However, because the State has already admitted it

cannot meet its burden of proof, this Court should remand with instructions to strike the DNA fee. *See* Brief of Respondent at 3.

B. CONCLUSION

For the reasons stated above, if the Supreme Court rules that registration is unconstitutional, this Court should reverse Mr. Plush's conviction. In the alternative, this Court should remand for resentencing on the legal financial obligations.

DATED this 4th day of March, 2020.

Respectfully submitted,

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APPENDIX A

Supreme Court No. 97617-1
(Court of Appeals No. 78341-6-I)
Amended Copy

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

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SUPPLEMENTAL BRIEF OF RESPONDENT BENJAMIN BATSON

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A. INTRODUCTION

Thirty-five years ago, Arizona convicted Benjamin Batson for engaging in sexual conduct with a 16-year-old. This conduct is not criminal in Washington. Regardless, Washington requires Mr. Batson to register as a sex offender because of Arizona registration requirements.

Mr. Batson is homeless. To register, he must report to his local sheriff every week of the year and maintain a daily log of his whereabouts. The government maintains a website that labels him as a sex offender. Registration creates a massive burden for Mr. Batson. These burdens have resulted in three failure to register convictions since his move to Washington about a decade ago.

This Court should hold the duty to register violates Mr. Batson's constitutional rights, running afoul of the nondelegation doctrine, ex post facto, double jeopardy, and equal protection.

B. ISSUES PRESENTED

1. The non-delegation doctrine prohibits the legislature from delegating its power to define crimes. The registration statute states that anyone convicted of an "out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction" is required to register in Washington. Mr. Batson was convicted for conduct that is not criminal in Washington but must

register as a sex offender. Did our legislature unconstitutionally delegate its power to define the crime of failure to register to other states?

2. A criminal law violates the ex post facto doctrine if it imposes a greater punishment than applied when the crime was committed. Current registration laws require homeless registrants to report in-person weekly and keep a daily log of their whereabouts. They face felony charges if they fail to comply. Registrants' personal information also appears on a government website, imposing a severe stigma and limiting registrants' ability to reintegrate into their communities. Do Washington's current sex offender registration laws violate ex post facto?

3. Double jeopardy protects defendants from multiple punishments for the same offense. Whether registration violates double jeopardy presents the same question as whether it violates ex post facto: is registration punitive?

4. Equal protection requires persons similarly situated to receive like treatment. Mr. Batson engaged in conduct that is not criminal in Washington. Unlike similarly situated individuals who have engaged in legal sexual activity in Washington, Mr. Batson is subject to stringent registration laws. Is there a rational basis for requiring people like Mr. Batson to register, when similarly situated individuals escape the same burden and stigma?

C. STATEMENT OF THE CASE

Three decades have passed since Mr. Batson pled guilty to sexual conduct with a 16-year-old in Arizona. CP 246, 248, 250–53. The act was consensual. RP 166-67. Racial bias might have contributed to the criminal charges. *Id.* Mr. Batson has not been convicted of a sex offense since.¹ CP 402–403. The conduct is not illegal in Washington. *See* RCW 9A.44.079.

Before 2010, Washington only required registration for out-of-state convictions comparable to a Washington sex offense. Laws of 1990, ch. 3, § 602. Accordingly, Mr. Batson had no duty to register. That changed in 2010 when the law was amended to require registration for “[a]ny out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction.” RCW 9A.44.128(10)(h); RCW 9A.44.130(1)(a).

Mr. Batson has spent two decades in Florida and Washington, struggling to maintain steady employment and housing because of his registration status. RP 168–69. He was unable to use housing vouchers due to his registration, despite being a veteran. RP 171–72. As a result, Mr. Batson has been homeless, living in shelters and on the streets, for most of his adult life. RP at 171–73.

¹ The State has repeatedly made unsupported allegations concerning the underlying conviction and Mr. Batson’s criminal history. These assertions should not be considered by this Court. *State v. Hunley*, 175 Wn.2d 901, 912–13, 287 P.3d 584 (2012).

In 1999, Washington began requiring registrants who lacked a “fixed residence” to report in-person at their local sheriff monthly or weekly, based on their assessed risk level. *See* Laws of 1999, 1st Spec. Sess., ch. 6, § 2. In 2001, Washington began requiring all homeless registrants to report weekly. Laws of 2001, ch. 169, § 1. In 2010, Washington added another requirement, mandating that homeless registrants provide the sheriff with an “accurate accounting” of where they stayed during the week. Laws of 2010, ch. 265, § 1.

These requirements create a huge burden for Mr. Batson. Because he is homeless, he is required to report in person fifty-two times per year and track his daily whereabouts. RCW 9A.44.130(6)(b). Unsurprisingly, he has not always been able to comply with these requirements and has been convicted for failure to register three times in Washington.

In 2001, the State built a searchable, public database of sex offenders. Laws of 2001, ch. 283, § 2. It initially only included high risk registrants. Now, however, the website contains information about all homeless registrants. RCW 4.24.550(5). The site includes photographs, names, ages, identifying characteristics, and mappable addresses.²

² *See* Washington Association of Sheriffs & Police Chiefs, sheriffalerts.com.

Mr. Batson has family in Washington but does not live with them because he fears vigilantes will find his address and threaten his family with harm. RP 171. This fear is not irrational, as sex offender registries have repeatedly been used by vigilantes to locate and murder people.³ Mr. Batson has also been forced out of shelters when he was found on the State's sex offender website. RP 172.

The Court of Appeals concluded Mr. Batson's duty to register violated the non-delegation doctrine. *State v. Batson*, 9 Wn. App. 2d 546, 447 P.3d 202 (2019). This Court accepted review of the government's petition and the issues raised in Mr. Batson's answer.

D. ARGUMENT

1. Mr. Batson's duty to register is based on an unconstitutional delegation of the legislative function.

"The legislative authority of the state of Washington shall be vested in the legislature." Const. art. II, § 1. "[I]t is unconstitutional for the Legislature to abdicate or transfer its legislative function to others." *Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998). This function includes defining the elements of crimes and setting punishments. *See State v. Wadsworth*, 139 Wn.2d 724, 734 & n.56, 991 P.2d 80 (2000).

³ See Lexi Pandell, "The Vigilante of Clallam County," *The Atlantic* (Dec. 4, 2013); Donna Gordon Blankinship, "Man held in sex offender killings, says he found victims on Web," *The Seattle Times* (Sept. 6, 2005).

Conviction of a “sex offense” is an element of the crime of failure to register. *See* RCW 9A.44.130(1)(a). In 2010, the legislature revised the definition of a “sex offense” to include “[a]ny out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction.” RCW 9A.44.128(10)(h). Tying this element to the registration requirements of other states is an unconstitutional delegation of legislative power.⁴

“A statute must be complete in itself when it leaves the hands of the Legislature.” *Diversified Inv. P’ship v. Dep’t of Soc. & Health Serv.*, 133 Wn.2d 19, 24, 775 P.2d 947 (1989). In *State v. Dougall*, this Court applied the “rule of completeness” to the controlled substances statute. 89 Wn.2d 118, 122–23, 570 P.2d 135 (1977). The statute incorporated by reference federally designated controlled substances. *Id.* at 120. Because the federal designation of controlled substances could change at any time, this Court held that “legislation which attempts to adopt or acquiesce in future federal rules, regulations or statutes is an unconstitutional delegation of legislative power and thus void.” *Id.* at 122–23.

Dougall controls here. *Batson*, 9 Wn. App. 2d at 551. By incorporating the impermanent laws of another state, “the substance of the

⁴ The statute also permits values of other states to dictate what is criminal in Washington. For example, some states require registration for public urination and streaking. *See* Human Rights Watch, “No Easy Answers: Sex Offender Laws in the US” 38–40 (2007).

law [was] incomplete when it passed the Legislature, thus transferring the power to render judgment on an issue to [another] government.”

Diversified, 113 Wn.2d at 25. “As in *Dougall*, the sex offender registration statute permits future Arizona law to define an element of the crime.”

Batson, 9 Wn. App. 2d at 552; *see also State v. Reynolds*, No. 51630-6-II & 52376-4-II (Feb. 4, 2020) (slip opinion) (adopting *Batson*’s reasoning).

The State asserts this case is analogous to *Diversified*, which concerned legislation that voided state statutes in conflict with federal law. 113 Wn.2d at 24–25. Unlike *Dougall*, the legislation at issue in *Diversified* was not an unconstitutional delegation to the federal government, because “[c]onditioning the operative effect of a statute upon the happening of a future specified event can be distinguished from a statute which attempts to adopt future federal law.” *Id.* at 28. “The sex offender registration statute does not provide that it becomes ineffective or inoperative if some event occurs in the future.” *Batson*, 9 Wn. App. 2d at 553. Rather, “it transfers to Arizona the power to define whether *Batson* has an ongoing duty to register in Washington.” *Id.* *Diversified* has no application here.

The registration statutes impose a duty to register based on out-of-state convictions that are not Washington sex crimes. The legislature cannot abdicate its duty to define the elements of a crime to the ever-shifting laws of other states. The Court of Appeals should be affirmed.

2. Registration requirements are punitive and violate the prohibition on ex post facto laws.

A criminal law violates ex post facto prohibitions if it “changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *State v. Ward*, 123 Wn.2d 488, 497, 869 P.2d 1062 (1994) (quoting *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648 (1798) (emphases omitted); U.S. Const. art. I, § 10; Const. art. I, § 23. In evaluating whether a law violates ex post facto, courts determine whether the law “is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment), and (3) disadvantages the person affected by it.” *Ward*, 123 Wn.2d at 498 (emphasis and citations omitted). The “sole determination of whether a law is ‘disadvantageous’ is whether the law *alters the standard of punishment* which existed under prior law.” *Id.* (emphasis in the original).

Ward recognized that sex offender registration was retrospective and assumed it was substantive. 123 Wn.2d at 498 & n.5. *Ward* further held that registration was not punitive because it served a regulatory function, and thus did not violate ex post facto. *Id.* at 510. Today’s registration requirements are significantly more burdensome and have more severe consequences than the requirements considered by *Ward* in 1994. Accordingly, *Ward*’s analysis is outdated.

To determine whether a law is punitive or merely “regulatory,” this Court first examines legislative intent. *Ward*, 123 Wn.2d at 499. In passing the original registration laws, the legislature found “sex offenders often pose a high risk of reoffense,” and indicated registration would assist law enforcement agencies in protecting their communities. Laws of 1990, ch. 3, § 401. *Ward* concluded this evinced a regulatory purpose but that this intent could be overcome if “the actual *effect* of the statute is so punitive as to negate the Legislature’s regulatory intent.” 123 Wn.2d at 499 (emphasis in the original).

Four factors determine whether a law is punitive in effect: if the sanction involves an affirmative disability or restraint, if it has historically been regarded as punishment, if its operation will promote retribution and deterrence, and if it appears excessive to its non-punitive purpose. *Ward*, 123 Wn.2d at 500–11. This test demonstrates that the increasingly burdensome nature of registration is punitive and violates *ex post facto*.

a. Registration is an affirmative disability and restraint.

In *Ward*, this Court determined the registration laws in effect “imposed no significant additional burdens on offenders” because they only required providing identifying information, photographs, and fingerprints. *Ward*, 123 Wn.2d at 500. This information was routinely obtained at sentencing. The Court concluded, “it is inconceivable that

filling out a short form with eight blanks creates an affirmative disability. Registration alone imposes burdens of little, if any, significance.” *Id.* at 501.

By contrast, today’s registration statutes require all individuals lacking a “fixed residence” to report in person every week—52 times a year. RCW 9A.44.130(6)(b). These registrants must “keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request.” *See id.* This is far from “filling out a short form.” *Ward*, 123 Wn.2d at 501.

Washington’s registration requirements for the homeless are some of the most burdensome in the country. *See State v. Boyd*, 1 Wn. App. 2d 501, 525, 408 P.3d 362 (2017) (Becker, J., dissenting). Only North Dakota has a more demanding registration law. Elizabeth Esser-Stuart, *The Irons are Always In the Background: The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 Tex. L. Rev. 811, 835, 856 & n. 160 (2018). The weekly reporting requirement “can readily lead to an unending cycle of imprisonment for transient offenders,” which is “the paradigmatic affirmative disability or restraint.” *Boyd*, 1 Wn. App. 2d at 525 (Becker, J., dissenting) (citation omitted). Mr. Batson’s cyclical incarceration typifies the punitive nature of these requirements.

In addition to placing a more onerous reporting burden on registrants, the legislature has increased the punishments for non-compliance. When it was first criminalized, failure to register was, at most, a Class C felony. Laws of 1990, ch. 3, § 402. Now, however, a third failure to register conviction is a Class B sex offense. RCW. 9A.44.132(1).

Ward also held registration was not punitive 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.” 123 Wn.2d at 502. “[I]n many cases, both the registrant information and the fact of registration remain confidential.” *Id.* Disclosure was only warranted where an agency had “some evidence of dangerousness in the future,” and *Ward* noted that the “geographic scope” of the disseminated information could be limited “only to the surrounding neighborhood, or to schools and day care centers.” *See id.* at 503–04. *Ward* concluded “[t]his statutory limit ensures that disclosure occurs to prevent future harm, not to punish past offenses.” *Id.* at 503.

The Internet age entirely undercut the privacy safeguards cited by *Ward*. In 2001, the state began to maintain a searchable database of sex offenders. Laws of 2001, ch. 283 § 2. In contrast to the carefully measured dissemination of information *Ward* envisioned, Mr. Batson’s mugshot is

now the first thing that appears when searching for his name. Disclosure is now the presumption, regardless of whether such information is “relevant and necessary” to prevent future threats. *Compare* 123 Wn.2d at 503–04.

Other courts recognize that in-person reporting, increased punishments, and searchable online databases place a significant disability and restraint on registrants. The Sixth Circuit concluded that Michigan’s registration laws were “direct restraints” and thus punitive. *See Does #1–5 v. Snyder*, 834 F.3d 696, 697–98, 703, 705 (6th Cir. 2016). Pennsylvania, New Hampshire, Maryland, Indiana and Maine also held that quarterly and annual in-person requirements are punitive. *See Commonwealth v. Muniz*, 164 A.3d 1189, 1211 (Pa. 2017) (plurality); *Doe v. State*, 111 A.3d 1077, 1096 (N.H. 2015); *Doe v. Dep’t of Pub. Safety and Corr. Servs.*, 62 A.3d 123, 139 (Md. 2013); *Wallace v. State*, 905 N.E.2d 371, 379–80 (Ind. 2009); *State v. Letalien*, 985 A.2d 4, 18 (Me. 2009).

Weekly in-person registration, coupled with an online database, constitutes an affirmative disability and restraint and is punitive in nature.

b. Public condemnation has historically been seen as punitive.

Ward held that “[r]egistration has not traditionally or historically been regarded as punishment.” 123 Wn.2d at 507. *Ward* compared registration to providing an address change to DMV, concluding

registration was “a traditional governmental method of making available relevant and necessary information to law enforcement agencies.” *See id.*

The Internet age changed the nature of sex offender registration. Registration is more like public shaming than providing a change of address to DMV. “Widespread dissemination of offenders’ names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts. It thus bears some resemblance to shaming punishments that were used earlier in our history to disable offenders from living normally in the community.” *Smith v. Doe*, 538 U.S. 84, 109, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (Souter, J., dissenting). 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*, 111 A.3d at 1097.

Additionally, several courts recognize sex offender registration is like probation or parole—historical forms of punishment—as registration involves continued government supervision and monitoring. *See Muniz*, 164 A.3d at 1211–13; *Synder*, 834 F.3d at 703; *Starkey v. Oklahoma Dep’t of Corr.*, 305 P.3d 1004, 1022–23 (Okla. 2013); *Dep’t of Pub. Safety and Corr. Servs.*, 62 A.3d at 139; *Wallace*, 905 N.E.2d at 380.

In light of the similarities to public shaming, parole, and probation, sex offender registration is akin to a historical means of punishment.

c. Registration promotes retribution and deterrence, the traditional aims of punishment.

In *Ward*, this Court found “the Legislature’s primary intent is to aid law enforcement agencies’ efforts to protect their communities.” 123 Wn.2d at 508. Deterrence was merely a “secondary effect.” *Id.* Even assuming the promotion of retribution and deterrence are “secondary effects” of registration, these effects are still substantial enough to be punitive. In striking down its registration statute, the Indiana Supreme Court found 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 traditional aims of punishment.” *Wallace*, 905 N.E.2d at 382 (citations omitted). Additionally, sex offender laws use “past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serv[ing] to feed suspicion that something more than regulation of safety is going on.” *Starkey*, 305 P.3d at 1027–28 (citations and quotation marks omitted). Further, the registration law’s deterrent and retributive effects are even more powerful since online databases provide personal information about registrants to the public.

The duty to register is both retributive and a deterrent, and thus promotes the goals of punishment.

d. Registration is excessive in relation to its purpose.

Ward held that registration was not excessive, finding “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.” 123 Wn.2d at 509. This Court rejected arguments that registration would “burden former offenders by making them the focus of every sex crime investigation” or would result in “a lifelong badge of infamy.” *Id.*

The legislative history of the registration statutes reveals that legislators were driven by concerns about the “high” risk of sex offender recidivism. Laws of 1990, ch. 3, § 401. Subsequent social science demonstrated that sex offender registration does not reduce recidivism, and is inherently excessive in relation to its purpose.

The legislature was wrong in declaring that sex offenders “pose a high risk of reoffense.”⁵ Sex offenders have low sex crime recidivism rates; the Department of Justice recently put the statistic at 7.7 percent,⁶

⁵ The State may assert that sex offenders pose a high risk of recidivism, relying on *Smith*, 538 U.S. at 103 and *McKune v. Lile*, 536 U.S. 24, 33, 122 S. Ct. 2017, 153 L. Ed 2d 47 (2002). Both *Smith* and *McKune*’s proclamations were based on a widely debunked non-academic and unsourced article. *See, e.g.*, Adam Liptak, “Did the Supreme Court Base a Ruling on a Myth?” N.Y. Times (Mar. 6, 2017).

⁶ *See* U.S. Dep’t of Justice, Bureau of Justice Statistics, “Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005–14) (May 2019).

and study after study has found similarly low recidivism rates.⁷ Further, the Washington State Institute for Public Safety has concluded that registration laws “have no statistically significant effect on recidivism,”⁸ a finding that is backed up by numerous studies.⁹ At least one study has found that registration databases have the potential to *increase* recidivism, perhaps due to their stigmatizing effect.¹⁰

Other courts have reached similar conclusions, holding that broad sex offender registration laws are an excessive response to the need for public safety. The Sixth Circuit concluded that “the requirement that registrants make frequent, in-person appearances before law enforcement” “appears to have no relationship to public safety at all.” *Snyder*, 834 F.3d at 705. Similarly, the Supreme Court of Oklahoma held that registration was excessive to the purpose of protecting the public because it was “imposed on a wide variety of crimes of which the severity of the crime

⁷ See, e.g., State of Connecticut, Office of Policy and Management, “Recidivism among sex offenders in Connecticut” 4 (Feb. 2012); Maine Statistical Analysis Center, “Sexual Assault Trends and Sex Offender Recidivism in Maine” 12 (2010); Stan Orchowsky & Janice Iwama, Justice Research and Statistics Association, “Improving State Criminal History Records: Recidivism of Sex Offenders Released in 2001” 17 (Nov. 2009).

⁸ E.K. Drake & S. Aos, “Does sex offender registration and notification reduce crime? A systematic review of the research literature,” Washington State Institute for Public Policy (2009).

⁹ See J.J. Prescott & Jonah E. Rockoff, “Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?” 54 J. L. & Econ. 161, 192 (2011); Amanda Y. Agan, 54 “Sex Offender Registries: Fear without Function?” 54 J. Law & Econ. 207, 235 (2011); Richard G. Zevitz, “Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration,” 19 Crim. Justice Studies 193 (2006).

¹⁰ See Prescott, *et. al.*, *supra* at note 9, at 192.

and circumstances surrounding each crime can vary greatly.” *Starkey*, 305 P.3d at 1029; *see also Wallace*, 905 N.E.2d at 384; *Doe*, 111 A.3d at 410.

Registration is excessive in relation to its proposed purpose of reducing recidivism.

e. Registration is punitive for homeless registrants.

The *Ward* factors demonstrate a punitive effect. Registration is an affirmative disability and restraint. It is akin to public condemnation and promotes the traditional aims of punishment. It is excessive to its stated purpose of reducing recidivism. Washington’s registration requirements, as applied to homeless registrants, violate the ex post facto doctrine.

3. The punitive registration requirements violate double jeopardy.

The double jeopardy clauses of the Fifth Amendment and Article I, § 9 protect “a defendant from a second trial for the same offense and against multiple punishments for the same offense.” *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). The duplicate punishments must be criminal in nature, as opposed to a “civil penalty.” *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

To evaluate whether a particular punishment is criminal, courts first examine legislative intent and determine “whether the statutory scheme was so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty.” *See*

id. (internal citations, quotation marks, and alterations omitted) . This is the same analysis that applies to ex facto challenges. See *In re Arseneau*, 98 Wn. App. 368, 379–80, 989 P.2d 1197 (1999) (citing *Ward*, 123 Wn.2d at 499). If this Court concludes that registration violates ex post facto, it must also find it violates the right not to be subject to double jeopardy.

4. There is no rational basis for requiring Mr. Batson to register and thus his duty to register violates equal protection.

Under the equal protection clause of the Fourteenth Amendment and the privileges and immunities clause of Article I, § 12, “persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.” *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). These two clauses are “substantially identical and considered by this [C]ourt as one issue.” *State v. Smith*, 117 Wn.2d 263, 281, 814 P.2d 652 (1991).

Laws that do not infringe on fundamental rights or create a suspect classification must, at a minimum, be supported by a rational basis. *State v. Smith*, 93 Wn.2d 329, 336, 610 P.2d 869 (1980). Under rational basis, “the law being challenged must rest upon a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective.” *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992).

In evaluating statutes under the rational basis test, this Court applies a three-part test: “1. Does the classification apply alike to all

members within the designated class? 2. Does some rational basis exist for reasonably distinguishing between those within the class and those outside the class? and 3. Does the challenged classification bear a rational relation to the purpose of the challenged statute?” *Morris v. Blaker*, 118 Wn.2d 133, 149, 821 P.2d 482 (1992) (citations omitted).

Here, the designated class is defined as all individuals who are required to register in Washington for out-of-state conduct that is not criminal in Washington. This class is “similarly situated” to individuals who have engaged in legal sexual activity in Washington. *Manussier*, 129 Wn.2d at 672. Before 2010, both groups “receive[d] like treatment,” *id.*, because registration requirements only applied to individuals convicted of comparable offenses. *See* Laws of 1990, ch. 3, § 602.

That similar treatment ended when the legislature eliminated the comparability requirement. Now, people with out-of-state convictions are required to register even if their offense is not a crime in Washington. Laws of 2010, ch. 267, § 1. The legislature made the change in part due to concerns over the time required to perform a “comparability” analysis under the old law. *See* Senate Committee on Human Services & Corrections, Senate Bill Report 6414, 61st Leg. at 4 (Jan. 19, 2010).

The concern about comparability analyses is not a rational basis for requiring Mr. Batson to register. Comparability analyses are performed in

almost every single instance where out-of-state crimes are considered. *See* RCW 9.41.010(8), (4); (27); RCW 9.94A.030(22)(c); (26)(b); RCW 9.94A.525(3). Far from a complex task, Washington's statutory scheme demonstrates that comparability analyses are performed daily, and thus do not provide a rational basis for Mr. Batson's unequal treatment.

Even assuming the revised statute saves time, classifying individuals like Mr. Batson differently bears no rational relation to this purpose. *See Morris*, 118 Wn.2d at 149. Any gains in administrative efficiency are lost by the time, money, and other resources the State spends monitoring and then prosecuting Mr. Batson.

There is no rational basis for treating Mr. Batson differently than others who have engaged in legal sexual conduct in Washington State. His right to equal protection is thus violated by the duty to register.

E. CONCLUSION

This Court should hold that Mr. Batson's duty to register is unconstitutional.

DATED this 7th day of February, 2020.

Respectfully submitted,
/s Jessica Wolfe

State Bar Number 52068
Washington Appellate Project (91052)

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 53013-9-II
)	
CYRUS PLUSH,)	
)	
APPELLANT.)	

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