

SCANNED

No. 97617-1

No. 78341-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON  
RESPONDENT

v.

BENJAMIN BATSON  
APPELLANT

2019 MAY 28 AM 11: 53

COURT OF APPEALS DIV.  
STATE OF WASHINGTON

ADDENDUM TO STATEMENT OF ADDITIONAL GROUNDS

Benjamin Batson  
Appellant, pro se

King County Correctional Facility  
500 5th Ave.  
Seattle WA, 98104

## STATEMENT OF FACTS

1. Mr. Batson previously resided in Washington from 1976 to 1982. He returned to Washington in 2008 and has resided in Washington since that time.

2. As it existed in 2008, RCW 9A.44.130 governed both the duty to register, the definition of a sex offense and the penalties for failing to register; it specifically defined an out-of-state offense giving rise to a duty to register as an offense that would be comparable to a sex offense defined by Washington statute.

3. In November 1984, Mr. Batson was convicted in Pima County, Arizona in Cause number CR-13616 on two counts of Sexual Conduct with a minor under the age of eighteen Arizona Revised Statute (ARS) Section 13-1405 based on sexual conduct with Melissa Herbst, a person sixteen years of age, occurring on July 6, 1984.

4. The age of consent for sexual conduct in Arizona under ARS 13-1405 was 18 years of age at the time of Mr. Batson's conduct giving rise to his conviction in CR-13616. The age of consent for sexual conduct in Washington under RCW 9A.44.079 was 16 years of age at the time of Mr. Batson's conviction in CR-13616, and has remained so ever since. Mr. Batson's Arizona conviction was based upon his sexual conduct with Melissa Herbst who was 16 years old at the time of said conduct. Thus, Mr. Batson did not have a legal duty to register in Washington because his Arizona conviction was not comparable to a Washington offense.

5. On April 6, 2009, King County Sheriff's deputy "TAT" erroneously advised Mr. Batsun that he had a duty to register in the state of Washington based on his conviction in Arizona in Case number 13616 and had him complete and sign an offender registration worksheet informing him of his obligations and duties while residing in Washington.

6. Prior to the King County Registration. Mr. Batsun had been informed by the Lewis County Sheriff's office that he did not have a duty to register in Washington. Mr. Batsun did not know whether or not he had a duty to register at all.

7. On June 10, 2010, the Washington legislature amended RCW 9A-44-130 and created RCW 9A-44-128 (defining a "sex offense" giving rise to the duty to register) and RCW 9A-44-132 (defining the penalties for failure to register); these revisions specifically removed the previous requirement that out-of-state sex offenses be comparable to a sex offense under Washington law and placed a duty to register upon anyone convicted of a sex offense in another state for which they would be required to register if residing in the state of conviction.

8. On May 10, 2011, the King County Superior Court arraigned Mr. Batsun on one count of failure to register as a sex offender alleged to have happened between August 10, 2010 and October 14, 2010.

9. Mr. Batsun qualified for representation by the public defender's office and Allison Warden of Society of Counsel Representing Accused Persons represented Mr. Batsun in Case number 11-1-01815-9.

10. The state of Washington provided no evidence to Ms. Warden (and no evidence exists) that Mr. Batsun was aware of

the 2010 legislative revision or that he was notified of the duty to register under the revised RCW 9A.44.128 after it took effect on June 10, 2010 or during the charging period of August 10, 2010 to October 14, 2010. Prior to June 10, 2010, Mr. Batson did not have a duty to register under Washington law.

11. During Samuel Wolf's representation of Mr. Batson in King County - Cause number 17-1-05147-7, Ms. Warden provided to Mr. Batson emails she sent pertaining to his case, Exhibit A.

12. These emails show that on May 24, 2011, Ms. Warden emailed the prosecuting attorney Sarah McCullough regarding the case in an attempt to plea bargain. In her email response, prosecuting attorney McCullough points out to Warden that the statute was amended in 2010 to eliminate the comparability requirement.

13. Ms. Warden also provided Mr. Batson's attorney, MR Wolf with copies of statutes she printed out in conducting legal research and he noticed that Ms. Warden's case file did not include RCW 9A.44.128 from which Ms. Warden could have gleaned that the comparability requirement had been eliminated only after Mr. Batson was erroneously told of his duty to register.

14. Mr. Batson met with Ms. Warden for the first time ever on June 20, 2011. Prior to that time there was no communication by phone or any jail visits. It was at this meeting she discussed his case and informed him about the state's recommendation for a 6-month sentence. It was at that time Mr. Batson informed Ms. Warden

about the conflicting information from law enforcement officers regarding whether or not he had a duty to register.

15. Ms. Warden took no action to uncover the identity of the law enforcement officer who informed Mr. Batson that he did not have a duty to register.

16. In a supplemental declaration dated May 13, 2014, Ms. Warden states that she discussed several potential defenses to the charge, four of which she outlines in her declaration, Exhibit B. She specifically mentioned the state's ability to meet the mens rea element of knowledge. Page 2.

17. Ms. Warden's email records does not reveal that she pointed out the evidentiary defect in the state's case; that is its inability to prove knowledge of the legislative amendment.

18. Ms. Warden did not discuss with Mr. Batson the existence of a complete defense stemming from the state's failure to supply him with a legally accurate notice that he had a duty to register as a sex offender.

19. Ms. Warden did, however, erroneously advise Mr. Batson that if he proceeded to trial, the state could amend the charge against him to a class B ranked felony by virtue of his prior convictions in Florida for failure to register.

20. Ms. Warden did not conduct any investigation into the constitutional validity of Mr. Batson's prior convictions for failure to register, which she apparently believed could be used to increase the maximum punishment for the crime of failure to register. Accordingly, she did not advise

Mr. Batson of potential evidentiary problems for the state stemming from claims that the prior convictions were defective.

21. Ms. Warden failed to conduct a comparability analysis to determine whether the Florida failure to register convictions could be used in Mr. Batson's offender score.

22. On June 21, 2010, Mr. Batson reluctantly pleaded guilty as charged in cause number 11-1-01865-9 for failure to register as a sex offender, an unranked felony by virtue of Mr. Batson's having never been previously convicted of failure to register in the state of Washington.

23. Mr. Batson received virtually no benefit from the state in exchange for giving a defense that amounted to actual innocence.

I Benjamin Batson, under the penalty of perjury of the laws of the state of Washington do hereby swear that the foregoing declaration is true and accurate.

dated this 22nd day of May 2019

Benjamin Batson

B.

## ARGUMENT

RCW 9A.44.130 and RCW 9A.44.132 Require Constitutionally valid Predicate Convictions as an Essential Element of the Crime of Failure to Register as a Sex Offender

RCW 9A.44.130 imposes a duty to register upon having been previously convicted of a sex offense. RCW 9A.44.132 imposes varying penalties based on prior convictions. In its information in the instant case, the state has alleged relevant prior convictions under these statutes as essential elements of the charged offense: Felony Failure to Register Having Been Twice Previously convicted of Felony Failure to Register.

A. RCW 9A.44.132 requires a constitutionally valid prior conviction.

The question of whether RCW 9A.44.132 should be interpreted to require that predicate convictions be constitutionally valid as a matter of statutory interpretation is an issue of first impression under Washington law. However the Washington Supreme Court has previously held that the term "convicted" in RCW 9A.44.040 was ambiguous to the nature of the conviction, i.e. whether the term encompassed only convictions that were constitutionally valid or all convictions. *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 207 (1984). The Gore court further held that the

Rule of lenity required that the Court resolve the ambiguity in favor of the interpretation that 9A.040 required a constitutionally valid conviction. Id. at 485-86.

The Washington Supreme Court has applied this analysis to RCW 9A.040, the Habitual Offender statute, requiring that the state must prove the Constitutional validity of predicate convictions beyond a reasonable doubt. State v. Swindell 93 Wn.2d 192, 196-97, P.2d 852 (1980), citing State v. Holsworth, 93 Wn.2d 148, 607 P.2d 845 (1980) ("In Holsworth, we... hold that once a defendant charged under RCW 9A.040 calls attention to the alleged unconstitutionality of a prior felony conviction used by the state to support a habitual criminal charge, the state must thereafter prove beyond a reasonable doubt that the prior conviction was constitutionally valid.") The Washington Court of Appeals for Division 1 has also recognized this statutory construction as it applies to predicate convictions for the crime of felony violation of a domestic violence court order. State v. Carmen 118 Wn. App. 655, 668, 77P.3d 368 (2003), overruled on other grounds by State v. Miller 156 Wn.2d 23123 P.3d 827 (2005) ("It is the court, not the jury, must determine the validity of the predicate convictions for purposes of RCW 26.050, 110(5).")

The Washington Supreme Court presumes "that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision" City of Federal Way

V. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) (citing Soprani v. Polygon Apartment Partners, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999)). Moreover, "If the Legislature is deemed to acquiesce in the interpretation of the court if no change is made for a substantial time after the decision, State v. Coe, 109 Wn.2d 832, 846, 750 P.2d 208 (1988).

In the instant case, the statutory scheme of RCW 9A.44 is substantially similar to that of RCW 9A.41.040. The Legislature is presumably well aware of the Holworth line of cases and yet has chosen not to pass legislation allowing the use of constitutionally infirm convictions in any of a number of statutes in which predicate convictions form the elements of a crime, i.e. no-contact orders (RCW 26.50.110), failure to register (RCW 9A.44.132), Unlawful possession of a firearm (RCW 9A.41.040), and indecent exposure (RCW 9A.88.010). No evidence of legislative intent suggests that the Legislature specifically desired that constitutionally infirm convictions form the basis of prosecutions pursuant to RCW 9A.44.132. Therefore, this court should hold that the same analysis and procedures used to admit predicate convictions for the purposes of RCW 9A.41.040 and RCW 26.50.110 should apply to predicate convictions offered pursuant to RCW 9A.44.132.

B. A defendant may raise the validity of a predicate conviction within the course of prosecution for the alleged crime in which said conviction is an element

Procedurally, the determination of the constitutional validity of a prior conviction is a threshold matter to be determined by the trial court at a hearing outside the presence of a jury. Carmen, 118 Wn. App. at 665. The Washington Supreme Court assigned the burden of proof as follows:

First, a defendant may raise a defense to such a prosecution by alleging the constitutional invalidity of a predicate conviction, and second, upon doing so, the state must prove beyond a reasonable doubt that the predicate conviction is constitutionally sound. In raising this defense, the defendant bears the initial burden of offering a colorable fact-specific argument supporting the claim of constitutional

State v. Summers 120 Wn.2d 801, 810, 846 P.2d 490 (1993)

C. King County cause number 11-1-01865-9 is constitutionally invalid because MR. Batson failed to receive effective assistance of counsel.

During the course of trial below, MR. Batson challenged the constitutional validity of his 2011 conviction for Failure to Register under King County cause number 11-1-01865-9 which the state alleged in its information as a prior conviction to be used as an essential element in the instant case. MR. Batson raised a colorable fact-specific claim of ineffective

assistance of counsel. The state did not carry its burden to prove the constitutional validity of the 2011 Failure To Register conviction beyond a reasonable doubt. Sommes 120 Wn.2d at 812, 846 P.2d 490.

To prevail on a claim of ineffective assistance, a defendant must not only show defective performance, but also show that counsel's deficient performance caused prejudice. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

The Sixth Amendment requires effective assistance at critical stages of a criminal proceeding, including pretrial stages. In Hill v. Lockhart 474 U.S. 52, 57, 106 S.Ct. 366 L.Ed.2d 203, the court held the two-part Strickland test applies to challenges of guilty pleas based on ineffective assistance of counsel. The performance prong of Strickland requires a defendant to show "that counsel's representation fell below the objective standards of reasonableness." Id. (quoting Strickland at 466 U.S. at 688, 104 S.Ct. 2052) In order to establish Strickland prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. 2052.

Washington courts apply the Strickland standard of proof when a petitioner claims that inadequate assistance led to a defective plea. State v. Buckman 190 Wash. 2d 51, 409 P.3d 193 (2018). Batson's plea in King County cause number 11-1-01865 was involuntary because he was

misinformed regarding his possible sentencing consequences.

A plea is knowing and voluntary only when the person pleading guilty understands the plea's consequences; including possible sentencing consequences. In re Pers. Restraint of Stockwell, 179 Wash.2d 588, 594-95, 316 P.3d (2007)

By her own account, Ms. Warden allegedly advised Mr. Batson that he could be subject to conviction for a Class B felony if he proceeded to trial. Exhibit B, P-3. "[A] guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence of a plea regardless of whether the actual sentencing range is lower or higher than anticipated." Buckman 192 Wash.2d at 59 409 P.3d 193 (quoting State v. Mendoza, 157 Wash.2d 582, 591, 141 P.3d 49 (2006)). Since Batson was misinformed of his possible sentencing consequences, this rendered his plea involuntary. Buckman 192 Wash.2d at 59, 409 P.3d 193; Mendoza 157 Wash.2d at 591, 141 P.3d 49.

In its response to Mr. Batson's motion to exclude prior convictions, prosecuting attorney Ms. Nivison asserted that the advise was not erroneous. Ms. Nivison argued that the state could have amended the charge to a class B felony based on the defendant's three prior convictions of felony failure to register out of Volusia County, Florida. Exhibit C, P-17. In a footnote Ms. Nivison explained that the prosecutor in the 2011 failure to register case mistakenly believed that she could not use Mr. Batson's Florida convictions. Contrary to Ms. Nivison's argument, the law at the time of Mr. Batson's

alleged conduct and at the time of Ms. Wardens advice, would have precluded the use of Mr Batson's Florida convictions because they were not committed in the state of Washington. See former RCW 9A-4A-132 (2010). Current RCW 9A-4A-132 did not take effect until July 22, 2011. S.S.B. 5203, 62nd Leg, ch 337, § 5 (2011).

Mr. Batson was charged for Failure to Register during the time period between August 10, 2010 and October 14, 2010. The Washington Constitution prohibits ex post facto laws. Wash. Const. art. I, Sec. 23. Under this provision, a defendant cannot be held criminally accountable for actions that were not criminal at the time they were performed, nor punished more severely than was authorized when the crime was committed. State v. Porter, 132 Wn.2d 182, 191, 937 P.2d 575 (1997); In re Pers. Restraint of Powell, 117 Wn.2d 175, 184, 814 P.2d 635 (1991). Thus, Mr. Batson could not have been punished as a class B Felony.

Had Mr. Batson been correctly informed, he would have rejected the plea offer and proceeded to trial. Ms Wardens erroneous advice caused Mr. Batson to mistakenly believe that he could be charged with and ultimately convicted of a Class B Felony which would have been considered a sex offense and imposed an independent duty to Register.

Furthermore, Mr Batson would be required to not be convicted of any disqualifying offenses for a period of 10-years rather than five before he could petition the court to remove the registration requirement. Under these circumstances, any rational person in Mr Batson's

situation would have rejected the plea and proceeded to trial. In Prosecutor McColloigh's email to Mrs Warden, she stated that Mr. Batson was lucky that the Florida FTRs "don't elevate this one in WA to prison range". In the same email she stated that she would recommend 6 months. Exhibit A, P-14

The fact is that the Florida FTRs could not possibly have elevated to prison range because they could not be counted on Mr. Batson's offender score. Consequently, Mr. Batson's offender score would have been one point. At level two on the sentencing grid his range would have been 2-6 months. Under these circumstances, any rational person would more likely than not have rejected the plea offer and proceeded to trial.

Mr Batson has demonstrated that his plea was not voluntary. In addition, Mr Batson has shown deficiency and prejudice not only by Strickland standards, but also actual and substantial prejudice as it applies to Personal Restraint Petitions. Buckman, Supra. Moreover, Mr Batson has demonstrated that the 2011 conviction in King County Cause number 11-1-01865-9 is constitutionally invalid because Mr. Batson did not receive effective assistance of counsel.

It should be evident that the state did not carry its burden to prove the constitutional validity of the 2011 conviction. The state's faulty argument regarding its ability to amend the charge to a class B clearly shows

that it did not carry its burden. Based on this fact alone, the court should rule that the 2011 ER under cause no. 11-1-01865-9 is constitutionally invalid. This court should further rule that the plea was involuntary based on ineffective assistance of counsel.

MS. Warden was also ineffective for failing to point out the defects in the state's case.

Mr. Batson pleaded guilty as charged despite the existence of a defense that was tantamount to actual innocence - there was no evidence whatsoever that he was aware of the 2010 amendment to RCW 9A44.130.

Mr. Batson registered on April 6, 2009 after he was erroneously advised by King County Sheriff's deputy "TAT" that he was required to register in the State of Washington. In the state's response to Mr. Batson's motion to Exclude the 2011 conviction, the state argues that "Whether the statement made on April 6, 2009 was incorrect as a matter of law, is irrelevant to the requisite knowledge requirement." See Exhibit C, p. 16.

Mr. Batson argued below stating that his notification and registration in 2009 would have been inadmissible for the same reasons that constitutionally infirm convictions or legally invalid no-contact orders are inadmissible in prosecutions requiring predicate convictions. See State v. Miller 156 Wn.2d 23123 P.3d 897 (2005) that is they are not relevant or applicable; such notification is not relevant under ER 401. The state had no way to prove that Mr. Batson

Knowingly failed to register under the 2010 amendment to RCW 9A.44.130. Had Ms Warden pointed out the guilty knowledge defect in the state's case and had Ms Warren pointed the existence of the knowingly fail to register defense, Mr. Batsan would have rejected the state's plea offer and proceeded to trial. It is highly likely Mr Batsan would have prevailed at trial; because the state could not carry its burden to prove requisite knowledge based on Mr. Batsan's 2009 registration which occurred when he had no lawful duty to register at all. Under these circumstances, any rational person would more likely than not have rejected the plea and proceeded to trial.

Although Ms Warden claims that she advised Mr. Batsan of a viable defense, it simply is not credible. It defies logic that she was aware of the state's inability to prove guilty knowledge, but failed to point this circumstance out when plea bargaining with the state. Even if her claim was plausible, her failure to point out this defect during plea bargaining in and of itself constitutes a violation of her duties under Lafler v. Cooper 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed. 2d 398 (2012)

Ms. Warden also stated in her declaration: "After a short series of continuances, he informed at a case setting hearing that he would like to accept the offer and request credit for time served and release". She further stated: "My impression was that the ability to request release from custody was the leading factor in his decision." Exhibit B, p-3

As previously stated, Mr. Batson was arraigned on the FTR charge on May 10, 2011. On May 24, 2011, the state made its 6 month plea offer. Exhibit A, p-14. Mr. Batson argued above that the plea offer was first made known to him on June 20, 2011, and he pleaded guilty on June 21, 2011. This calls into question: How many series of continuances can occur within a 24-hour period? It also calls into question the veracity of Ms. Warden's declaration. Furthermore, Mr. Batson is not so naive as to believe that he can simply "request release" from custody and it would automatically happen. A review of Mr. Batson's criminal history would totally refute Ms. Warden's assertion that release from custody was the leading factor in Mr. Batson's decision. Such evidence - coupled with her failure to point out to the prosecutor the evidentiary defects she claims to have discussed with Mr. Batson undermines her credibility to the point that this court simply cannot rely on her account of her legal representation of Mr. Batson.

Notwithstanding, Mr. Batson has shown that Ms. Warden's performance was deficient in failing to point out the defects in the state's case. Mr. Batson has also established prejudice in that the deficient performance precluded him from going to trial with a defense which was tantamount to actual innocence; a viable defense (requisite knowledge) in which the state had no way of proving. Therefore, under these circumstances, any rational person would more likely than not have rejected the plea, proceeded to trial and prevailed therein.

The state's contends that it could have proved guilty knowledge under the 2010 amendment based on the fact erroneous information given to Mr. Batsan by deputy 'TAT' in 2009. The state's argument is without merit. Thus, the State failed to prove the constitutional validity of the 2011 conviction beyond a reasonable doubt. Summers 160 Wn.2d at 812; 846 P.2d 490. Consequently, this court should hold that the 2011 Failure to Register Conviction Under King County Cause Number 11-1-01865-9 is constitutionally infirm based on Ineffective assistance of counsel.

Counsel failed to carry out her duty to: (1) conduct meaningful investigations; 2) assist Mr Batsan in making an informed decision; 3) reasonably evaluate the evidence against Mr Batsan; and 4) subject the prosecutor's case to meaningful adversarial testing.

The right to effective assistance of counsel extends to the plea process. State v. Estes, 188 Wash.2d 450, 457, 375 P.3d 1045 (2017); Lafley v. Cooper, 566 U.S. 156, 163, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012)

Effective assistance of counsel includes "assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." Estes, 188 Wash.2d at 464, 375 P.3d 1405 (quoting State v. A.N.J., 168 Wash.2d 91, 111, 225 P.3d 956 (2010)). At a minimum counsel must "reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case

proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." Id. (quoting A.N.J., 168 Wn.2d at 111-12, 225 P.3d 956). Failure to investigate, at least when coupled with other defects can amount to ineffective assistance of counsel. In re Brett, 142 Wn.2d at 882-83.

From the onset, it appears that MS Warden's strategy was to secure a plea. The record reveals that as early as May 16, 2011, (6 days after Mr. Batson's arraignment) Ms. Warden sought to resolve Mr. Batson's case as a gross misdemeanor. Exhibit A, P-14. It is quite clear that Ms. Warden's investigation was primarily concerned with comparability issues. Such an investigation was meaningless because the amended statute RCW 9A.44.128 removed the comparability requirement that out-of-state sex offenses be comparable to Washington sex offenses. The prosecutor informed Ms. Warden of this fact in the email dated May 24, 2011. Exhibit A, P-14. Ms. Warden provided copies of all the statutes in her work product used in conducting legal research. Notably, RCW 9A.44.128 was not among any of the statutes that Ms. Warden researched during the course of Mr. Batson case.

In the very same email dated May 24, the prosecutor informed Ms. Warden of the 6-month plea offer and the so-called "voluminous discovery" that lays out facts of the crime Mr. Batson was convicted of. Exhibit A, P-14. Ms. Warden did not request the "voluminous discovery" and neither the emails nor any other documents shows any further investigation into Mr. Batson's case. It should be

evident that Ms. Warden did no meaningful investigation. This calls into question the competency of her Representation. Counsel has a duty to assist a defendant in evaluating a plea offer. RPC 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires thoroughness and preparation reasonably necessary for the representation"). A.N.J. 168 Wash.2d at 111 205 P.3d 956. Ms. Warden could not properly evaluate the merits of the plea offer because she did not evaluate the state's evidence. She simply accepted the state's assessment of the facts of the crime contained in the "voluminous discovery."

Had Ms Warden requested the state's discovery and did an independent investigation, she would have discovered that there's absolutely nothing in the record to support the prosecutor's allegations concerning the 1984 case. The prosecutor could not rely on information that was not admitted, acknowledged or proven at trial or at the time of sentencing. It is not surprising that after blindly accepting the state's version of the facts, Ms Warden did not conduct any further investigation into Mr Batsan case or the merits of the states case.

Ms. Warden failed to actually and substantially assist Mr. Batsan in deciding whether to plead guilty. State v. Osborne 102 Wash.2d 87, 99, 684 P.2d 683 (1984)

Ms. Warden informed Mr. Batsan about the 6-month plea offer on June 20, 2011. Ms. Warden informed Mr. Batsan that she was scheduled to attend an orientation that day.

Consequently, Ms. Warden spent less than an hour discussing the state's plea offer. Ms. Warden did not discuss the strengths or weaknesses of Mr. Batson's case. "In the plea bargaining context, counsel must discuss the strengths and weaknesses of the defendant's case so that the defendant knows what to expect and can make an informed decision on whether to plead guilty." State v. James 40 Wash. App. 353, 362, 739 P.2d 1161 (1987). Since Ms. Warden did not properly evaluate the state's evidence, she could not properly evaluate the merits of Mr. Batson's plea offer. State v. Bao Sheng Zhong, 157 Wash.2d 188, 205, 137 P.3d 835 (2006). It follows, then, that Mr. Batson could not possibly make a meaningful and informed decision as to whether to plead guilty or to proceed to trial. Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial. A.N.J. 169 Wash.2d at 111, 205 P.3d 956 (2010). The A.N.J. court held: "that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." Id. at 111-12.

Had Ms. Warden properly evaluated the state's evidence she would have discovered that the state had no way of proving guilty knowledge an essential element of the failure to register charge. Under these circumstances, it would be highly unlikely that the state could convict Mr. Batson of the failure to

register charge. Had Ms. Warden informed Mr. Batsan of the existence of the guilty knowledge defense, he would have rejected the plea and elected to proceed to trial; and there is more than a reasonable probability that Mr. Batsan would have prevailed. Under these circumstances, any rational person in Mr. Batsan's situation would have rejected the plea offer and proceeded to trial.

By her own admission, Ms. Warden advised Mr. Batsan that "he could set for trial, continue to negotiate based on development of the theories discussed above, or take the plea offer." Exhibit B p-3. This advise falls far short of the representation mandated under the Sixth Amendment of the United States Constitution. In addition, the advise falls far short of the actual and substantial assistance described in *Osborne*, 102 Wash.2d 97-99, 84 P.2d 683.

Ms. Warden stated that Mr. Batsan was told by at least one Washington law enforcement officer that he no longer had a duty to register. Exhibit B, p-2. She further stated if this can be shown it "could undermine the state's ability to meet the mens rea... element of knowledge." Exhibit B, p-2. Nevertheless she failed to pursue available corroborating evidence. The state argued that it is not unreasonable for Ms. Warden "to conclude that Mr. Batsan would not be successful in his claim that someone later told him he did not have a duty to register." Exhibit 3, p-16. State's argument is speculative and without merit. "Counsel has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary" Strickland, 499 U.S. at 691, 1104 S.Ct. 2052.

A defense counsel's failure to pursue available corroborating evidence with adequate pretrial investigation may constitute constitutionally deficient performance in some cases. In re Pers. Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004).

Mr. Batson specifically informed Ms. Warden that the officer was from Lewis County and he was the detective in charge of sex offender registration for Lewis County. Ms. Warden's failure to attempt to contact the officer constitutes deficient performance and Mr. Batson was prejudiced because the officer's testimony would have corroborated the fact that Mr. Batson did not knowingly fail to register. There is more than a reasonable probability that the outcome of the proceedings would have been different. This would have straightened Mr. Batson's case tremendously. However, Ms. Warden took no action to uncover the identity of the law enforcement officer who informed Mr. Batson that he had no duty to register.

Contrary to the state's argument, it would have been more than unreasonable for Ms. Warden to conclude that Mr. Batson would not be successful in his claim that someone later told him that he did not have any duty to register. Once again the state's argument fails to prove beyond a reasonable doubt the constitutional validity of the 2011 conviction. Therefore, this court should hold that the 2011 conviction is constitutionally invalid based on ineffective assistance of counsel.

Ms. Warden failed to conduct any investigation into the constitutional validity of Mr. Batson's prior failure to register convictions out of Volusia County, Florida. Had she done so she could have ascertained that the convictions were constitutionally invalid due to ineffective assistance of counsel. It is noteworthy to mention at this point that Mr. Wolf, Counsel for Mr. Batson in cause number 17-1-05147-7, did challenge the constitutional validity of the Florida failure to register convictions and was successful. The trial court excluded these convictions after ruling that Mr. Batson had received ineffective assistance of counsel. RP133. It was discovered that Mr. Batson did not have a duty to register under Florida law.

The state argued that Ms. Warden may have made different strategic decisions than Mr. Wolf but it does not amount to defective performance or prejudice to Mr. Batson's 2011 case.

Exhibit 3, P-16. States argument is nothing more than a bald assertion and lacks any merit whatsoever. Ms. Warden had an obligation to subject the prosecution's case to meaningful adversarial testing. Counsel's failure to do so constitutes deficient performance. There is absolutely no legitimate or tactical reasons supporting Ms. Warden's failure to conduct any investigation into the constitutional validity of Mr. Batson's prior Florida failure to register convictions.

Furthermore, there was no conceivable tactical reason for Ms. Warden not to challenge the sufficiency of the state's evidence or not to request dismissal. As argued above, the state had no way of proving guilty knowledge.

Had Ms. Warden subjected the state's case to meaningful adversarial testing, the outcome of Mr. Batson's case would have been entirely different. Since the state could not have possibly established guilty knowledge, it is highly likely that—if Ms. Warden would have moved for dismissal—the state would have granted the dismissal.

In sum, Ms. Warden's representation in Batson's case, fell far below the objective standards of reasonableness. Counsel's deficient performance allowed Mr. Batson to be convicted of a crime for which he was actually innocent. Mr. Batson's plea was not knowing, voluntary, or intelligent. Buckman, 192 Wash. 2d at 59, 409 P.3d 193; Mendoza, 157 Wash. 2d at 591, 41 P.3d 49. In addition, Mr. Batson has shown deficiency and prejudice, not only by Strickland standards, but also actual and substantial prejudice.

Furthermore, Mr. Batson has demonstrated that counsel's incompetent representation precluded him from making an informed decision as to whether to plead guilty or to proceed to trial. A.N.S., 169 Wash. 2d at 111, 205 P.3d 956. Ms. Warden failed completely in failing to test the state's case.

In re Pers. Restraint of Davis, 152 Wash. 2d 647, 675, 101 P.3d 1 (2004). Bell v. Cone, 535 U.S. 685, 696-97, 122 S.Ct. 1643, 52 L.Ed.2d 94 (2002)

Finally, the state did not carry its burden to prove the constitutional validity of Mr. Batson's 2011 Failure to Register Conviction. Summers, 120 Wn. 2d at 812, 846 P.2d 490. This court should rule that the 2011 conviction is constitutionally invalid.

The punishments for failure to register enacted by RCW 9A.44.132 constitute an improper delegation of legislative authority.

RCW 9A.44.132 sets forth punishments for failure to comply with the duties enumerated in RCW 9A.44.130

#### Exhibit D

The authority to define crimes and punishments rests firmly with the legislature. State v. Ramos, 149 Wn. App. 266, 271, 202 P.3d 383 (2009) Delegation of power is only proper when the legislature provides standards to indicate what is to be done, designates the agency to do it and procedural safeguards exist to control potentially arbitrary action or abuse of discretionary power. State v. Crown Zellerbach Corp., 92 Wn.2d 894, 900, 602 P.2d 172 (1979).

Washington State's principles echo the opinion of the United States Supreme Court, which states, "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" Mistretta v. U.S., 488 U.S. 361, 372, 109 S.Ct. 647 (1989), citing J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409, 48 S.Ct. 348, 352 (1928) In Mistretta, Congress discussed the delegation of authority to the sentencing Commission. Congress specifically tasked

the Sentencing Commission with promulgating sentencing guidelines for every criminal offense. Id. at 371. However, unlike the situation in Mr. Batsari's case, Congress gave explicit authority to the Sentencing Commission and dictated specific tools, guidelines, and goals where required in order for the delegation of authority to be lawful. Id. at 374-75. This is distinctly different from Mr. Batsari's case, where Washington state does not give Arizona explicit legislative authority, nor does Washington give Arizona any guidelines for defining crimes and determining the penalties.

In keeping with the United States Supreme Court, other states similarly hold that the power to create and define criminal offenses, cannot be delegated without adequate procedural safeguards in place. *State v. All Pro Paint and Body Shop, Inc.* 639 So. 2d 707, 713-714 (1994). "When a legislative body delegates its legislative powers so loosely as to permit another legislative body or an executive board or agency to redefine and expand the criminal act in futuro and without limitation, such attempt at delegation is constitutionally invalid." *State v. Grinstead*, 157 W. Va. 1001, 1011, 206 S.E. 2d 912 (1974).

The state's interpretation of RCW 9A-44.132(1)(a)(iii) - that Mr. Batsari's failure to register in Washington is a felony because Arizona classified his conduct felonious - would have the determination of penalties for failure to register in Washington determined prospectively by other legislatures. Without the capability to require specific standards of other legislatures and put in place procedural safeguards that allow an individual to

challenge the designations of other governing bodies under Washington law, reliance on classification by a party without lawful delegation of authority is unconstitutional. Any registration violation that is not a felony under Washington law should be treated as a violation of RCW 9A.44.132(2) and charged as a misdemeanor. Given that Arizona does not meet the requirements of a lawful designee of the Washington State Legislature, any failure to register by Mr. Batson should be viewed as "not felony" and prosecuted as a misdemeanor.

### CONCLUSION

For the foregoing reasons, this court should hold that Mr. Batson's 2011 conviction for Failure to Register - Under King County Cause number 11-1-01865-9 - is constitutionally invalid based on ineffective assistance of counsel; and that any failure to Register by Mr. Batson should be viewed as "not felony" and prosecuted as a misdemeanor. Finally, this court should hold that the state did not meet its burden to prove beyond a reasonable doubt the constitutional validity of Mr. Batson's 2011 conviction for Failure to Register.

Respectfully Submitted May 22, 2019.

Benjamin Batson  
Benjamin Batson, Pro Se

Exhibit - A

**Warden, Alison**

**From:** Sanchez, Philip [Philip.Sanchez@kingcounty.gov]  
**Sent:** Tuesday, June 21, 2011 11:56 AM  
**To:** Warden, Alison  
**Subject:** RE: Batson

ok

-----Original Message-----

**From:** Warden, Alison  
**Sent:** Tuesday, June 21, 2011 11:52 AM  
**To:** Sanchez, Philip  
**Subject:** Re: Batson

Bringing to 1201, still at jail. :(

Sent from my iPhone

On Jun 21, 2011, at 11:24 AM, "Sanchez, Philip" <Philip.Sanchez@kingcounty.gov> wrote:

> Alison,  
 >  
 > I can check his NCIC. Will you be bringing it to 1201? Or scanning? Thanks.  
 >  
 > Phil  
 >  
 > Philip J. Sanchez  
 > Deputy Prosecuting Attorney  
 > King County Prosecuting Attorney's Office, Special Assault Unit Direct  
 > Line: 206-205-5524  
 > Fax: 206 205 6104  
 >  
 >

> -----Original Message-----

> **From:** Warden, Alison  
 > **Sent:** Tuesday, June 21, 2011 11:22 AM  
 > **To:** Sanchez, Philip  
 > **Subject:** Batson  
 >

> Hi Philip, have the plea form signed. Only issue is appendix B- I know it doesn't technically matter because offense is unranked and not scored, client is of impression that he has two offenses for Ftr in Fl, not four; one seems to be from same date, which makes sense that it's the same. Client wants to take deal either way, but I wanted to let you know this was client's position.  
 >

> Sent from my iPhone  
 >

> This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.  
 >  
 >

This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

**Warden, Alison**

---

**From:** Sanchez, Philip [Philip.Sanchez@kingcounty.gov]  
**Sent:** Tuesday, June 21, 2011 11:24 AM  
**To:** Warden, Alison  
**Subject:** RE: Batson

Alison,

I can check his NCIC. Will you be bringing it to 1201? Or scanning? Thanks.

Phil

Philip J. Sanchez  
Deputy Prosecuting Attorney  
King County Prosecuting Attorney's Office Special Assault Unit Direct Line: 206-205-5524  
Fax: 206 205 6104

-----Original Message-----

**From:** Warden, Alison  
**Sent:** Tuesday, June 21, 2011 11:22 AM  
**To:** Sanchez, Philip  
**Subject:** Batson

Hi Philip, have the plea form signed. Only issue is appendix B- I know it doesn't technically matter because offense is unranked and not scored, client is of impression that he has two offenses for Ftr in Fl, not four; one seems to be from same date, which makes sense that it's the same. Client wants to take deal either way, but I wanted to let you know this was client's position.

Sent from my iPhone

This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

**Warden, Alison**

---

**From:** Sanchez, Philip [Philip.Sanchez@kingcounty.gov]  
**Sent:** Tuesday, June 21, 2011 10:11 AM  
**To:** Warden, Alison  
**Subject:** RE: Benjamin Batson - today's plea at 1:30

Hi Alison,

Would you be able to send me the plea form today prior to 1pm? Otherwise I will be in case setting this afternoon in E1201.

Phil

**Philip J. Sanchez**  
Deputy Prosecuting Attorney  
King County Prosecuting Attorney's Office  
Special Assault Unit  
Direct Line: 206-205-5524  
Fax: 206 205 6104

---

**From:** Warden, Alison  
**Sent:** Monday, June 20, 2011 11:44 AM  
**To:** Sanchez, Philip  
**Subject:** Re: Benjamin Batson - today's plea at 1:30

Going to get it done now. :)

Sent from my iPhone

On Jun 20, 2011, at 11:21 AM, "Sanchez, Philip" <Philip.Sanchez@kingcountv.gov> wrote:

Do you have the plea form? If so, can I review it prior to the hearing? Scan me a copy if you are able.  
Thanks.

Phil

**Philip J. Sanchez**  
Deputy Prosecuting Attorney  
King County Prosecuting Attorney's Office  
Special Assault Unit  
Direct Line: 206-205-5524  
Fax: 206 205 6104

---

**From:** Warden, Alison  
**Sent:** Monday, June 20, 2011 10:09 AM  
**To:** McCulloch, Sara  
**Cc:** Sanchez, Philip

**Subject:** Benjamin Batson - today's plea at 1:30  
**Importance:** High

Hi! Any objection to doing sentencing today at the plea hearing for this FTR case? Also, could you please send me the state's rec? thanks so much!

I have this as an unranked, Class C, non-sex offense, because the priors in Florida were out of state. Let me know if I'm wrong and have the wrong form.

Thanks!

Alison

---

This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

---

This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

**Warden, Alison**

---

**From:** Larson, Bonnie [Bonnie.Larson@kingcounty.gov]  
**Sent:** Monday, June 20, 2011 4:22 PM  
**To:** allen, megan; Cox, Amy; Buchanan, Mackenzie; Burton, Gloria; Carson, Pamela; Carter, Jill; Chini, Neda; Chunyk, Laura; Cohen, Martha; Collins, Risa-acapd.org; Conway, Erica; Elliott, Amy; Hamaji, Leo; Igo, Karen; Spencer, Jeffery; Kessler, Ronald; Kircher, Toni; Lakhal, Hakim; Larson, Bonnie; Laura Jones; Longen, Tara; Mattson, Nancy; Neeley, Michael; nicole price; Noble, Patricia; Ostermann, John; Pauly, Elaine; Peale, Walter; priest, diane; Puloka, Sia; Salamony, John; Powers, Sasha; Sawrey, Susana; Seawell, David; Steckler, Christy; Taylor, Charlotte; Ton, Jessica; Valerio, Pat-acapd.org; Wells, Susan; Wolfe, Justin  
**Cc:** Vernon, Paul; Warden, Alison; Swaby, Christopher  
**Subject:** 6/21 plea calendar will be in E-955 with Judge Doyle  
**Attachments:** Plea\_Calendar[4].pdf

**Warden, Alison**

---

**From:** Larson, Bonnie [Bonnie.Larson@kingcounty.gov]  
**Sent:** Monday, June 20, 2011 2:46 PM  
**To:** Warden, Alison  
**Cc:** Sanchez, Philip  
**Subject:** RE: Benjamin Batson, 11-1-01865-8

Hi Alison

It's set for a plea tomorrow afternoon at 1:00. We will be in E-955 with Judge Doyle...

Thanks again,  
Bonnie

-----Original Message-----

**From:** Warden, Alison  
**Sent:** Monday, June 20, 2011 2:40 PM  
**To:** Larson, Bonnie  
**Cc:** Sanchez, Philip  
**Subject:** Benjamin Batson, 11-1-01865-8

Hi Bonnie- parties thought this client was on for plea today, but apparently not. Could we set this for tomorrow morning at 9? Plea and sentence on an FTR.

Thanks!!!!

Sent from my iPhone

This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

**Warden, Alison**

---

**From:** McCulloch, Sara [Sara.McCulloch@kingcounty.gov]  
**Sent:** Monday, June 20, 2011 12:33 PM  
**To:** Warden, Alison; Sanchez, Philip  
**Subject:** Re: Benjamin Batson - confirmations/questions

From memory, this is correct. I am not in. Phil, can you coordinate with Alison regarding sending the rec and arranging for the plea.

Sara McCulloch

On Jun 20, 2011, at 10:05 AM, "Warden, Alison" <Alison.Warden@scraplaw.org> wrote:

Hi Sara --

OK, so I am prepping this plea form. My understanding is as follows:

This FTR is a class C, unranked offense, because the prior FTRs are from out of state.

I'm doing the non-sex-offense form, as he was not convicted of the in-state offense of FTC noted in 9.94A.030(45). But it's confusing, and wanted to double check.

Could you shoot me an email with the plea agreement, etc., as well? Thanks!!!! I am going to fill in 6 months, unranked, class C.

Alison

---

This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

**Warden, Alison**

---

**From:** Sanchez, Phillip [Phillip.Sanchez@kingcounty.gov]  
**Sent:** Monday, June 20, 2011 11:22 AM  
**To:** Warden, Allison  
**Subject:** RE: Benjamin Batson - today's plea at 1:30

Do you have the plea form? If so, can I review it prior to the hearing? Scan me a copy if you are able. Thanks.

Phil

**Philip J. Sanchez**  
Deputy Prosecuting Attorney  
King County Prosecuting Attorney's Office  
Special Assault Unit  
Direct Line: 206-205-5524  
Fax: 206 205 6104

---

**From:** Warden, Alison  
**Sent:** Monday, June 20, 2011 10:09 AM  
**To:** McCulloch, Sara  
**Cc:** Sanchez, Phillip  
**Subject:** Benjamin Batson - today's plea at 1:30  
**Importance:** High

Hi! Any objection to doing sentencing today at the plea hearing for this FTR case? Also, could you please send me the state's rec? thanks so much!  
I have this as an unranked, Class C, non-sex offense, because the priors in Florida were out of state. Let me know if I'm wrong and have the wrong form.

Thanks!  
Allison

---

This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

**Warden, Allison**

---

**From:** Sanchez, Philip [Phillip.Sanchez@kingcounty.gov]  
**Sent:** Monday, June 20, 2011 10:33 AM  
**To:** Warden, Allison; McCulloch, Sara  
**Subject:** RE: Benjamin Batson - today's plea at 1:30  
**Attachments:** RICOHCRIM3-062011-1029AM.pdf

Allison,

This is an unranked, Class C, non-sex offense and he can do both plea and sentencing this afternoon. I have attached a copy of the Appendix B and REC.

Phil

**Philip J. Sanchez**  
Deputy Prosecuting Attorney  
King County Prosecuting Attorney's Office  
Special Assault Unit  
Direct Line: 206-205-5524  
Fax: 206 205 6104

---

**From:** Warden, Allison  
**Sent:** Monday, June 20, 2011 10:09 AM  
**To:** McCulloch, Sara  
**Cc:** Sanchez, Philip  
**Subject:** Benjamin Batson - today's plea at 1:30  
**Importance:** High

Hi! Any objection to doing sentencing today at the plea hearing for this FTR case? Also, could you please send me the state's rec? thanks so much!

I have this as an unranked, Class C, non-sex offense, because the priors in Florida were out of state. Let me know if I'm wrong and have the wrong form.

Thanks!  
Allison

---

This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

**Warden, Alison**

---

**From:** McCulloch, Sara [Sara.McCulloch@kingcounty.gov]  
**Sent:** Thursday, June 16, 2011 4:43 PM  
**To:** Warden, Alison  
**Subject:** Re: Question re plea forms

If it's his first felony ftr, it's non-sex. If this is his second or subsequent felony conviction for ftr, then it is a sex offense. It's not a lame question :). I am out otherwise I'd look at the file and tell you which one.

Sara McCulloch

On Jun 16, 2011, at 2:36 PM, "Warden, Alison" <[Alison.Warden@scraplaw.org](mailto:Alison.Warden@scraplaw.org)> wrote:

> Hi Sara- I apologize for the lameness of this question- sex or non-sex plea form for FTR? Particular client is Benjamin Batson.

>

> Sent from my iPhone

>

> This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

>

**Warden, Allison**

---

From: Sanchez, Philip [Philip.Sanchez@kingcounty.gov]  
 Sent: Thursday, June 16, 2011 2:50 PM  
 To: Warden, Alison  
 Subject: RE: Question re plea forms

Alison,

If it is his 1st FTR, non-sex. Any subsequent FTRs are considered sex offenses. See RCW 9.94A.030(45)

Phil

---

From: Warden, Alison  
 Sent: Thursday, June 16, 2011 2:40 PM  
 To: Sanchez, Philip; [philip.sanchez@kingcounty.gov](mailto:philip.sanchez@kingcounty.gov)  
 Subject: Fwd: Question re plea forms

Sent from my iPhone

Begin forwarded message:

From: <[Alison.Warden@scraplaw.org](mailto:Alison.Warden@scraplaw.org)<<mailto:Alison.Warden@scraplaw.org>>>  
 Date: June 16, 2011 2:34:59 PM PDT  
 To: "[sara.mcculloch@kingcounty.gov](mailto:sara.mcculloch@kingcounty.gov)<<mailto:sara.mcculloch@kingcounty.gov>>"  
 <[sara.mcculloch@kingcounty.gov](mailto:sara.mcculloch@kingcounty.gov)<<mailto:sara.mcculloch@kingcounty.gov>>>  
 Subject: Question re plea forms

Hi Sara- I apologize for the lameness of this question- sex or non-sex plea form for FTR?  
 Particular client is Benjamin Batson.

Sent from my iPhone

---

This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

**Warden, Alison**

---

**From:** Warden, Alison  
**Sent:** Tuesday, May 24, 2011 7:33 PM  
**To:** Warden, Alison  
**Subject:** Schedule To Do:

7:30-9 a.m. - coverage memo for Lester Johnson; clean office

9 a.m.

Call Erika Case

visit:

Lester

Sides

Simon

Tucker

11 a.m. - coaching

noon - lunch

1 p.m. -2:00

enter time on cases in Legalfiles

Kaye Monday/Tuesday/Wed

Case Wed

Duncan, Monday/Tuesday (staffing with Yvonne; f2f, staffing with Matt, legal research)

Trinh Tuesday

Neill

Batson

Tucker

Lester

2-3 p.m. Inv requests - Simon, Everybodytalksabout

3-4- prepare questions for Ian Johnson

4 p.m. Johnson phone call

5 fax water stuff to Wards

**Warden, Alison**

From: McCulloch, Sara [Sara.McCulloch@kingcounty.gov]  
 Sent: Tuesday, May 24, 2011 8:56 AM  
 To: Warden, Alison  
 Subject: RE: Benjamin Batson, 11-1-01865-9

I looked through this case. I have some more voluminous discovery that lays out the facts of the crime he was convicted of. In the 84 case, he held a 16 year old for about a day and raped her multiplied times, threatened her with a gun.

The fact the elements he eventually pled to don't compare exactly is why the law was amended in 2010. If he has an out of state felony- it's a felony here.

He also had an 88 case where he held a woman at knifepoint and raped her. Looks like it went to trial and he was only convicted of assault.

He also has an arrest in 1999 in Tucson, AZ for sexual assault and kidnapping. Looks like a case was never filed.

Lucky for him, his 4 prior FTRs from Florida don't elevate this one in WA to prison range. So it is unranked.

I don't see any legal issues with this case. Given his history, I can't justify any reduction. It's an unranked felony, so I will recommend 6 months (not agreed).

Sara McCulloch

-----Original Message-----

From: Warden, Alison  
 Sent: Monday, May 16, 2011 4:00 PM  
 To: McCulloch, Sara  
 Subject: Benjamin Batson, 11-1-01865-9

Hi Sara,

The underlying sex case here is a sexual conduct with a minor from Arizona. It was characterized as a "Class 6 Felony" there, but here would not have constituted criminal conduct, from best I can tell, unless a supervisory or other significant relationship could be proven. The victim was 17 years old. Discovery does not lay out the facts of this Arizona sex case, although I do see facts from an Arizona misdemeanor assault case, unrelated, with sexual assault having been alleged. This does not appear to be the underlying sex case from which his duty to register arose. That said, the sexual conduct case would not have given rise to the duty to register and would not have been a crime if it had happened in Washington (assuming no supervisory adult role, which I don't believe was present).

I know from RCW 9A.44.132 that when required to register in one state, requirement to register in others continues "indefinitely" and that no exception seems to be carved out for situations where conduct would not be a crime in one state but is a crime in another.

In any event, this crime is most comparable to a misdemeanor here - sexual misconduct with a minor in the 2nd degree, although again, the Washington crime includes the element of the adult being in some kind of supervisory position (teacher, counselor, foster parent, etc.).

My question to you is whether we could resolve this as a gross misdemeanor, since the underlying behavior is most associated with a gross misdemeanor? See RCW 9A.44.132(2) FTR is a gross misdemeanor if underlying crime was a gross misdemeanor.

Thoughts?

Thanks!  
Alison

This e-mail and any files transmitted with it are intended only for the person or entity to which it is addressed and may contain confidential material and/or material protected by law. Any retransmission, dissemination or use of this information may be a violation of that law. If you received this e-mail in error, please contact the sender and delete the e-mail and its attachments from all computers.

**Warden, Alison**

---

**From:** Warden, Alison  
**Sent:** Monday, May 16, 2011 3:32 PM  
**To:** Warden, Alison  
**Subject:** Benjamin Batson, 11-1-01865-9

Hi Sara -

I am looking at the registration requirements as applied to this case, and have a couple of questions about state's position on various things.

(1) RCW 9A.44.140: "For a person required to register for a federal or out-of-state conviction, the duty to register shall continue indefinitely." Can you shed some light on what this duty is tied to? Theoretically, if a person is no longer required to register in the state where the underlying conviction occurred, would that duty to register expire in Washington?

(2) Did the above law change? Didn't it used to be that we would compare the types of sex crime and if it would be a Class B there, it would be a Class B here, that kind of thing?

The sex offense attributed to him is "sexual conduct with a minor" from 1984. He may not be required to register anymore in Arizona, in which case, wouldn't the duty to register Can you clarify that this is indeed the subsection that you believe requires him to register?

I have some questions on the Batson case, mostly regarding your assessment of his prior. It appears that the underlying charge requiring registration is the Sexual Conduct with a Minor. Client reports that the victim was a minor. In discovery there is a fairly non-specific boilerplate plea agreement form, which does not outline the specific conduct (i.e., victim's age) of defendant.

Exhibit - B

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING

STATE OF WASHINGTON,	)	CAUSE NO. 13-1-11640-1
<i>Plaintiff,</i>	)	
v.	)	SUPPLEMENTAL DECLARATION OF
	)	ALISON WARDEN
BENJAMIN BATSON,	)	
<i>Defendant.</i>	)	

I, ALISON WARDEN, do hereby swear and affirm as follows under penalty of perjury:

1. I have previously submitted a declaration in this matter titled "Declaration of Alison Warden."
2. On February 18, 2014, defense counsel Sam Wolf contacted me requesting information about the legal advice I provided Benjamin Batson in King County Superior Court cause number 11-1-01865-9.
3. On February 24, 2014, Mr. Wolf sent me a follow-up email specifically requesting the following information: "legal advice given to Mr. Batson regarding the State's ability to prove its case as charged (unranked Class C FTR) at trial and what advice he was given regarding the State's ability to

1 prove either a ranked Class C FTR or a Class B FTR at trial if the State  
2 had chosen to amend.”

3 4. Prior to responding to Mr. Wolf's request, I reviewed Mr. Batson's file in  
4 11-1-01865-9, including discovery and my own work product.

5 5. On March 7, 2014, I responded to Mr. Wolf's initial request via email  
6 detailing my advice to Mr. Batson. The contents of said email follow,  
7 verbatim:

8 “Dear Sam,

9 I have reviewed Mr. Batson's file and recall the case.

10 At the time Mr. Batson pleaded guilty, my advice was that the state's ability to  
11 prove its case at trial was uncertain. The case was in relatively early stages and  
12 the 2010 statutory changes applying to his charge were very new. Further  
13 development of facts and legal theories (discussed below) would have been  
14 ongoing as the case developed toward trial.

15 Mr. Batson and I had discussed several potential defenses to the charge. At  
16 various stages of our discussions, the potential defenses we discussed included:  
17 (1) the possibility that Mr. Batson's requirement to register in AZ had expired and  
18 thus he would not be required to register here; (2) even if his duty hadn't expired  
19 and he was deemed under the then-new 2010 law to have a duty to register here,  
20 the Arizona offense was not equivalent to a sex offense here, and if it were  
21 equivalent, it would be closer to a gross misdemeanor than felony, and should  
22 equitably (if not also legally) be charged as only a gross misdemeanor FTR; (3)  
23 Mr. Batson reported being told by a counselor in 2009 that he had the duty to  
24 register, and then being told by at least one Washington law enforcement officer  
25 in 2010 that he no longer had a duty to register, which if shown could undermine  
26 state's ability to meet the mens rea requirement of knowing failure to register  
27 (unclear based on timing if the latter advice by law enforcement officer would  
28 have been based on old law or new law) (4) Given the conflicting advice and  
29 recent change in the law, Mr. Batson was either not aware of and/or legitimately  
30 confused by the law and his apparently changing duty to register, potentially  
31 implicating state's ability to meet the mens rea element of knowledge. Further  
32 creating confusion for Mr. Batson: under pre-2010 law, it seems that the client  
33 would not have had to register due to his AZ crime not being equivalent to a sex  
34 offense here; yet he had registered in 2009 on the advice of his counselor.

35 Early in the case I raised the defense with Sarah McCullough that the AZ crime  
36 was not equivalent to a sex offense here in Washington. As reflected in Sarah  
37 McCullough's email to me, the state was not willing to dismiss or reduce and  
38 believed it could prevail under the then-new 2010 law, which created an indefinite  
39 duty to register for any person then-required to register in the state where the  
40 conviction occurred (new in 2010), as well as for a person convicted of an offense

1 in another state that would be a sex offense in this state. She rejected the notion  
2 that a defense could be made out of the fact that the AZ crime was not a sex  
3 offense here, given the change in the law cited above.

4 I relayed to Mr. Batson Ms. McCullough's then-current unwillingness to make  
5 any concessions beyond PGAC/6 months unagreed, due to the additional  
6 discovery she'd received showing facts of the underlying crime. She also said that  
7 Mr. Batson was fortunate that his "4 listed Florida felony FTRs would not elevate  
8 this 2011 FTR to a ranked offense." (I shared with Mr. Batson that state's position  
9 on the ranked vs. unranked issue (which was welcome news). I also shared a  
10 concern that there was a risk that on the face of 9A.44.132, the state might later  
11 try to amend to a Class B if it could prove up two or more of the prior out-of-state  
12 FTRs, or a Class C ranked if it could prove up one.)

13 Mr. Batson was understandably upset that prosecutor would not dismiss. I advised  
14 he could set for trial, continue to negotiate based on development of the theories  
15 discussed above, or take the plea offer. After a short series of continuances, he  
16 informed at a case setting hearing that he would like to accept the offer and  
17 request credit for time served and release. My impression was that the ability to  
18 request release from custody was the leading factor in his decision.

19 I wish the best for Mr. Batson. Please let me know if you have any further  
20 questions regarding my advice to him in the 2011 case.

21 Sincerely,  
22 Alison Warden"

23 Dated this 13<sup>th</sup> day of May, 2014, in SEATTLE, WA.

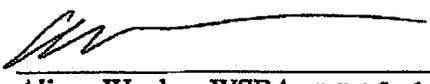
24   
25 \_\_\_\_\_  
26 Alison Warden, WSBA 33199

Exhibit - C

**FILED**  
KING COUNTY, WASHINGTON

MAR 22 2018

DEPARTMENT OF  
JUDICIAL ADMINISTRATION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 17-1-05147-7 SEA
	)	
vs.	)	
	)	STATE'S RESPONSE TO
BENJAMIN BATSON,	)	DEFENDANT'S MOTION TO
	)	EXCLUDE PRIOR CONVICTIONS
	)	
	)	Defendant.
	)	
	)	
	)	

**I. INTRODUCTION**

The defendant, Benjamin Batson, is charged in count 1 of the first amended information with Failure to Register as a Sex Offender under RCW 9A.44.132(1)(b). The defendant now contests the validity of his prior felony failure to register convictions out of the states of Florida and Washington, which elevate his current charge to a class B felony. The defendant argues that such convictions were obtained in violation of the defendant's Sixth Amendment right to effective counsel and are therefore not within the meaning of prior convictions for purposes of RCW 9A.44.132. The defendant's assertion of ineffective assistance of counsel is presented primarily through an offer of proof presented by defendant's counsel, Samuel Wolf.

II. RELEVANT FACTS

The State alleges in its first amended information that between August 8, 2016 and December 1, 2017 the defendant, having been previously convicted of two counts of Sexual Conduct with a Minor, failed to comply with the requirements of RCW 9A.44.130. The information further alleges that the defendant has been convicted in this state, or pursuant to the laws of another state, of a felony failure to register as a sex offender on two of more prior occasions. The defendant now moves to exclude the following prior convictions:

- 1. State v. Batson, Volusia County Circuit Court 02-01562CFAWS
On April 3, 2003 the defendant entered a plea of nolo contendere to two counts of Felony Failure to Register under FSA § 943.0435.
2. State v. Batson, Volusia County Circuit Court 04-33236CFAES
On August 30, 2004 the defendant was found guilty by way of bench trial to one count of Felony Failure to Register under FSA § 943.0435.
3. State v. Batson, Volusia County Circuit Court 07-33765CFAES
On September 18, 2007 the defendant entered a plea of nolo contendere to one count of Felony Failure to Register under FSA § 943.0435.
4. State v. Batson, King County 11-1-01865-9 SEA
On June 21, 2011 the defendant pleaded guilty to one count of Felony Failure to Register under RCW 9A.44.132(1)(a).

III. ARGUMENT

A. The State is not required to prove the constitutionality of the defendant's prior felony Failure to Register convictions for purposes of RCW 9A.44.132.

RCW 9A.44.132 makes felony failure to register as a sex offender a class B felony if the person has been "convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law, on two or more prior occasions." Washington courts have never addressed the defendant's ability to attack prior convictions in the context of RCW 9A.44.132. The Legislature's enactment of the collateral attack time-bar in

1 1989 (RCW 10.73.090 and 10.73.100), the 2010 amendment to RCW 9A.44, and public policy  
2 indicate that Batson should not be allowed to challenge the validity of his prior convictions in his  
3 current felony failure to register case years after his prior convictions became final.

- 4 a. RCW 10.73.090 and 10.73.100 evidence a clear legislative intent to limit the  
5 ability to invalidate convictions more than a year after the convictions are final.

6 The Court of Appeals has held that when a prior conviction is an element of an offense,  
7 the defendant has the right to “collaterally attack the voluntariness of a guilty plea upon which  
8 the prior judgment was entered.” State v. Swindell, 22 Wn. App. 626, 629, 590 P.2d 1292  
9 (1979). In State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984), the Washington Supreme Court  
10 relied on Swindell in holding that RCW 9.41.040 requires not simply an outstanding conviction,  
11 but a “*constitutionally valid* outstanding conviction.” Id. at 485 (emphasis in original). The  
12 court reached this result by finding that the statute was not “crystal clear” and applying the rule  
13 of lenity. Id. The court acknowledged that in Lewis v. U.S., 445 U.S. 55, 100 S.Ct. 915, 63  
14 L.Ed.2d 198 (1980), the United States Supreme Court interpreted the parallel federal statute as  
15 not allowing a defendant to question the validity of a prior conviction as a defense to that charge.

16 The State agrees that for purposes of RCW 9A.44.132(1)(b), the fact that the defendant has been  
17 previously convicted of a felony failure to register on two or more occasions is an element of the  
18 crime.

19 Subsequent to the Swindell and Gore decisions, the Legislature enacted RCW 10.73.090  
20 and 10.73.100 in 1989. These statutes substantially limit a defendant’s ability to collaterally  
21 attack a conviction. RCW 10.73.090 provides that a collateral attack must be filed within one  
22 year of when the judgment becomes final, unless the challenge falls within one of six narrow  
23  
24

1 exceptions provided in RCW 10.73.100.<sup>1</sup> Many constitutional challenges to a conviction are  
2 thus time-barred if not filed within one year of finality.

3 In finding this statutory scheme constitutional, the Washington Supreme Court noted in  
4 In re Runyan, 121 Wn.2d 432, 441, 853 P.2d 424 (1993), that the traditional scope of the writ of  
5 habeas corpus was limited to challenging the jurisdiction of the sentencing court. In 1947, the  
6 Legislature expanded the scope of inquiry in habeas cases to inquiry into constitutional  
7 violations, but abandoned that expansion in 1989. Id. at 443. The Runyan court held that the  
8 Legislature has both the power to expand the scope of collateral relief beyond what is  
9 constitutionally required (jurisdictional challenges) and the power to limit the scope of collateral  
10 relief to that which is constitutionally required. Id. at 445. The court held that the limits enacted  
11 in RCW 10.73.090 and 10.73.100 are valid and constitutional.

12 Before deciding Runyan, the Washington Supreme Court also decided State v. Summers,  
13 120 Wn.2d 801, 812, 846 P.2d 490 (1993). In that case, the court relied on Swindell and Gore,  
14 and held that a defendant may challenge the constitutional validity of a predicate conviction.  
15 The court held that in raising this defense, the defendant bears the burden of offering a  
16 "colorable, fact-specific argument supporting the claim of constitutional error in the prior  
17 conviction, and the State must prove "beyond a reasonable doubt that that the predicate  
18 conviction is constitutionally sound." Id. Notably, Summers was charged with unlawfully  
19 possessing a firearm on February 27, 1989, five months *before* the limits on collateral attacks  
20 were set forth in RCW 10.73.090 and 10.73.100 were enacted.

21  
22  
23 1 The exceptions are summarized as follows: (1) newly discovered evidence, (2) unconstitutional statute,  
24 (3) conviction barred by double jeopardy, (4) insufficient evidence at trial, (5) excessive sentence, (6)  
significant change in law material to conviction.

1 Since then, no reported Washington case has addressed what effect the enactment of  
2 RCW 10.73.090 and 10.73.100 have on a defendant's ability to collaterally attack the  
3 constitutional validity of a prior conviction elevating the class of felony failure to register as a  
4 sex offender. This State's Supreme Court has addressed how the enactment of the time-bar  
5 statute pertains to personal restraint petitions, however. The Court held In re Yates, 183 Wn.2d  
6 572, 353 P.3d 1283 (2015), that a defendant's claim of ineffective assistance of postconviction  
7 counsel did not warrant review of defendant's untimely personal restraint petition. The Court  
8 reached its result by finding that the defendant's claim of ineffective assistance of counsel did  
9 not fall within one of the six statutory exceptions to the one-year requirement under RCW  
10 10.73.090 and RCW 10.73.100, noting that "the time bar and its exceptions are creatures of  
11 statute and thus adding additional exceptions to the statute is a matter for the legislature, not this  
12 court." Id. at 577.

13 Division III issued an unpublished opinion in State v. Ellison, 194 Wn.App. 1033 (2016),  
14 concluding incorrectly in the State's opinion, that a prior juvenile rape conviction could not be  
15 used as predicate crime to the charge of felony failure to register where the court found the  
16 predicate charge to be invalid. The Court concluded that the trial court in Ellison's 1995 juvenile  
17 rape case should have conducted a capacity hearing because Ellison was eleven and twelve  
18 during the charging period of his rape conviction. Id. at 4. Mr. Batson's case is different for  
19 several reasons. First and foremost, he is not challenging the constitutional validity of his  
20 predicate sex offense from Arizona. Rather, he is challenging the constitutional validity of his  
21 prior felony failure to register convictions that are used to elevate the penalty he faces if  
22 convicted, not to establish a duty to register. This significant difference diminishes any  
23 persuasive value of Division III's ruling in Ellison. Secondly, the nature of the challenges are  
24

1 different. Ellison was a juvenile who in a Rape charge was not given a hearing to see if he even  
2 had the capacity to commit a crime. Batson on the other hand, was 48 years old when he entered  
3 a plea on his first failure to register as a sex offender offense in Volusia County. Batson alleges  
4 ineffective assistance of counsel, supported only by a declaration of his current counsel.

5 Given that the defendant is challenging prior convictions used to elevate the penalty of  
6 his failure to register charge, State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, (1986) is more  
7 instructive. The Washington Supreme Court held in Ammons that the State did not have an  
8 affirmative burden of proving constitutional validity of a prior conviction before it could be used  
9 in sentencing. While the current issue is not one of sentencing, the Court's decision in Ammons  
10 highlights the important difference in a challenge to the underlying predicate sex offense as in  
11 Ellison, and a challenge to prior felony failure to register convictions in Mr. Batson's case. The  
12 latter, being more analogous with Ammons.

13 RCW 10.73.090 and 10.73.100 evidence a clear legislative intent to limit the ability to  
14 invalidate convictions more than a year after the convictions become final. The broad rule set  
15 forth in Summers, that a defendant charged with unlawful possession of a firearm may challenge  
16 the constitutional validity of a prior conviction at any time, runs directly counter to RCW  
17 10.73.090 and 10.73.100. Moreover, placing the burden on the State to prove the  
18 constitutionality of a presumptively valid prior conviction also runs counter to established  
19 Washington law. In collaterally attacking a prior conviction, a defendant bears the burden of  
20 establishing both constitutional error and resulting actual and substantial prejudice. In re Matter  
21 of Cook, 114 Wn.2d 802, 792 P.2d 506 (1990).

22 In turning specifically to the statutory language of RCW 9A.44.132, there is nothing that  
23 could be interpreted as placing on the State the burden of proving anything other than the *fact* of  
24

1 a prior conviction. As the United States Supreme Court reasoned in Lewis, the sweeping  
2 prohibition on firearm possession is triggered by “the fact of a felony conviction,” not the  
3 validity of a felony conviction. Lewis, 445 U.S. at 60. The same can be said for the duty to  
4 register as a sex offender. Convicted felons possess the statutory means of timely vacating an  
5 invalid conviction through an appropriate proceeding “before obtaining a firearm....” *Id.* at 64.

6 b. Public policy and legislative history of RCW 9A.44 disfavor allowing the  
7 defendant to challenge his prior final convictions.

8 RCW 9A.44.128(10)(h), .130 and .132 were enacted specifically to promote public safety  
9 by requiring convicted sex offenders who move to Washington to register as sex offenders in  
10 Washington if they are required to register in the state of conviction. The State’s purpose of the  
11 Community Protection Act was to assist law enforcement and enhance community safety:

12 The legislature finds that sex offenders often pose a high risk of re-offense, and that law  
13 enforcement’s efforts to protect their communities, conduct investigations, and quickly  
14 apprehend offenders who commit sex offenses, are impaired by the lack of information  
15 available to law enforcement agencies about convicted sex offenders who live within the  
16 law enforcement agency’s jurisdiction. Therefore, this state’s policy is to assist local law  
17 enforcement agencies’ efforts to protect their communities by regulating sex offenders by  
18 requiring sex offenders to register with local law enforcement agencies as provided...

19 Laws of 1990, ch. 3 § 401.

20 Following the enactment of the Community Protection Act of 1990, the Legislature  
21 amended the statute in 2010, eliminating the requirement that an underlying sex offense be  
22 comparable to a Washington State sex offense and enacting a tiered approach to the sentencing  
23 scheme. *See*, Laws of 2010, Chapter 267,§3 and Laws of 2011, Chapter 337,§5. RCW  
24 9A.44.132. RCW 9A.44.132(1)(b) now reads:

If a person has been convicted of a felony failure to register as a sex offender in  
this state or *pursuant to* the laws of another state, or pursuant to federal law, on  
two or more prior occasions, the failure to register under this subsection is a class  
B felony (emphasis added).

1 RCW 9A.44.132(1)(b).

2 The language "pursuant to the laws of another state" is one more indicator that the  
3 legislature did not intend for the state to be required to prove the constitutional validity of prior  
4 felony failure to register convictions. It is certainly bad public policy to hold that a convicted  
5 sex offender can avoid a ranked felony as intended by the Legislature even if they continue to  
6 violate the sex offender registration law, simply by raising a constitutional question as to the  
7 validity of prior convictions that were final long ago. It would also be bad public policy to hold  
8 that a trial for felony failure to register as a sex offender can be turned into an appellate review of  
9 constitutional issues relating to prior convictions that should have been challenged in the proper  
10 venue and within proper time restraints.

11 Here, the defendant's 2002, 2004, 2007 and 2011 convictions are clearly beyond the one-  
12 year time limit for the defendant to challenge their constitutionality. If the defendant now wishes  
13 to challenge the constitutional validity of his prior felony failure to register convictions out of  
14 Florida, he should raise the proper challenges in Volusia County, Florida. This Court should  
15 therefore reject the defendant's claim that the State now must prove the constitutional validity of  
16 his prior convictions for felony failure to register as a sex offender and deny his motion to  
17 exclude the convictions.

18 **B. Batson has not raised a colorable, fact-specific claim of ineffective assistance of counsel**  
19 **on any of his prior felony failure to register convictions.**

20 When the existence of a prior conviction is an element to a crime, in certain limited  
21 circumstances, a defendant may challenge the validity of the prior conviction. "First, a  
22 defendant may raise a defense to such a prosecution by alleging the constitutional invalidity of a  
23 predicate conviction, and second, upon doing so, the State must prove beyond a reasonable doubt  
24 that the predicate conviction is constitutionally sound. In raising this defense, the defendant

1 bears the initial burden of offering a colorable, fact-specific argument supporting the claim of  
2 constitutional error in the prior conviction. Only after the defendant has made this initial showing  
3 does the State's burden arise." State v. Summers 120 Wash.2d 801, 812, 846 P.2d 490,  
4 496 (Wash.,1993).

5 The defendant challenges his four prior felony failure to register convictions by arguing  
6 that they were obtained in violation of the defendant's Sixth Amendment right to effective  
7 counsel. To establish ineffective assistance of counsel the defendant must prove (1) the  
8 counsel's performance fell below an objective standard of reasonableness, and (2) the deficient  
9 performance prejudiced the defense. Strickland v. Washington 466 U.S. 668, 104 S. Ct. 2052,  
10 80 L.E.2d 674 (1984). The defendant fails to meet this burden in each of his prior convictions.

- 11 a. The 2002 and 2007 convictions for failure to register as a sex offender under 02-  
12 01562CFAWS and 2007-CF033765, are constitutionally valid and admissible at  
13 trial.

14 With respect to his 2002 conviction, the defendant essentially argues that based on  
15 counsel's poor performance as outlined in the defendant's offer of proof on pages 3-4 of  
16 Defense's Motion to Exclude, Mr. Batson pleaded guilty believing he had no defense, and would  
17 have proceeded to trial if he had been aware of certain defenses. The defendant's offer of proof  
18 alleging deficiencies of counsel's performance in his 2007 conviction is contained in pages 5-6  
19 of his Motion to Exclude. To prevail, the defendant must overcome a strong presumption that  
20 counsel's performance was reasonable. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177  
21 (2009). The offer of proof submitted by the defendant fails to overcome this strong presumption.  
22 Even if the court were to find that the first part of the Strickland test was satisfied, the  
23 defendant's claim of ineffective assistance of counsel fails because he cannot establish prejudice.  
24

1           When, as here, the defendant challenges a conviction obtained by way of plea, the plea  
2 must be "intelligently and voluntarily made and with knowledge that certain rights will be  
3 waived." State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). To determine whether a  
4 plea is knowingly, intelligently, and voluntarily made, courts consider the totality of the  
5 circumstances. Branch, 129 Wn.2d at 642. The defendant argues that his plea in 02-  
6 01562CFAWS was involuntary because he was unaware that Florida law did not require him to  
7 register or that Florida law contained an implied element of notice. Def. Br. at 16. Defense cites  
8 to State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010) which held that a defendant should  
9 have been allowed to withdraw his plea because the record failed to show that he understood the  
10 nature of the charge in relation to the facts of his case.

11           This argument fails first because the defendant *was* required to register under Florida law.  
12 The Florida statute under which the defendant was convicted of for failure to register as a sex  
13 offender in effect at the time of the defendant's 2002 (and 2007) conviction provides the  
14 definition of "sexual offender". See attached Appendix A. FSA §943.0435 defines a "sexual  
15 offender" as a person who:

16           Establishes or maintains a residence in this state and who has not been  
17 designated as a sexual predator by a court of this state but who has been  
18 designated as a sexual predator, as a sexually violent predator, or by another  
19 sexual offender designation in another state or jurisdiction and was, as a result of  
such designation, subjected to registration or community or public notification,  
or both, or would be if the person were a resident of that state or jurisdiction  
(Emphasis added).

20           Former FSA §943.0435 (2002); Former FSA §943.0435 (2006). The Florida failure to  
21 register statute operates similarly to Washington's statute in looking to whether an offender is  
22 subject to registration in another state or jurisdiction, and requiring registration if another state  
23 has designated that person as a sexual offender subject to registration. In this case, the defendant  
24

1 was convicted of Sexual Misconduct with a Minor in Arizona in 1984 in violation of ARS 13-  
2 1405. See attached Appendix B. Under Arizona law, a person convicted of Sexual Conduct  
3 with a Minor pursuant to §13-1405 is required to register as a sex offender. ARS §13-3821. See  
4 attached Appendix C. The defendant would have been required to register for life if he resided  
5 in the state of Arizona. Therefore, the defendant was required to register as a sex offender under  
6 the Florida statute at the time of his 2002 and 2007 convictions, and was therefore a "sexual  
7 offender" pursuant to FSA §943.0435.

8 The defendant's argument also fails because even if the defendant was unaware of the  
9 implied element of notice required under FSA §943.0435, he cannot show he was prejudiced by  
10 this. Instead, all of the evidence contained in the record shows that the Defendant *did* know he  
11 was required to register in the state of Florida. This is established by certified copies of court  
12 records obtained by the State from Volusia County, Florida. On September 10, 2002, Batson  
13 was issued a Florida State driver's license. On September 28, 2002, Batson called the police to  
14 report that his car had been stolen. When police responded to his location, they ran the  
15 defendant's information and learned that he was a sex offender who had not registered.  
16 According to the sworn affidavit of the responding deputy, the defendant made a "spontaneous  
17 statement that 'I know I am a sexual offender, but I haven't registered yet.'" See attached  
18 Appendix D.

19 Further, On April 3, 2003, the defendant appeared in court and entered a plea of nolo  
20 contendere: the defendant did not contest the State's evidence against him. Additionally, the  
21 State obtained from Volusia County a copy of the plea form. Appendix E. In relevant part, the  
22 plea includes the following information:

- 23 4. I have read the information or indictment in this case and I understand the  
24 charges to which I am pleading. I stipulate that there is a factual basis

1 described in court documents to support the charges against me. My  
2 lawyer has explained to me... the essential elements of the crime(s) I am  
charged with, and all defenses I might have.

3 12. I have read and understand every printed or handwritten word in this plea  
4 form and have discussed it with my lawyer. I am fully satisfied with the  
services of my lawyer and have had a full opportunity to discuss this case  
5 and my plea(s) with my lawyer.

6 The defendant signed in acknowledgment.

7 The plea document also includes the following certificate of the defendant's attorney:

8 I hereby certify that, as counsel for the Defendant, I have discussed this  
9 case with my client and explained the rights, defenses and evidence  
relating to it with him/her. I have discussed this written plea form and  
10 have answered all the defendant's questions regarding it. In my  
professional opinion, as an officer of the court, the defendant understands  
11 everything in this plea form, his/her rights, and the consequences of this  
plea. His plea is being made freely, voluntarily and knowingly...

12 The judge signed the document making a finding that the plea was knowing, intelligent,  
13 and voluntarily.

14 Concerning his 2007 conviction specifically, Batson argues that he received no notice of  
15 legislative changes to the failure to register statutory scheme in Florida. He claims that he was  
16 "unaware of this legislatively imposed duty created in 2005 prior to his arrest on July 27, 2007."  
17 However, once again, the sworn affidavit of law enforcement directly contradicts Batson's  
18 claims. See attached Appendix F. According to the officer's sworn affidavit, the defendant, in  
19 fact, did have notice of his obligation because he:

20 signed, acknowledged he understood, and received a copy of FDLE  
Sexual Predator/Offender Reregistration Form on 1/23/2007. The copy the  
21 defendant received also informed the defendant of his next required  
reregistration month. The defendant's required reregistration month was  
22 February of 2007. As of March 12, 2007, the defendant was 12 days  
overdue and in violation of F.S.S. 943.0435(14)(a).

1 Given the officer's sworn statement, that Batson received notice of his duty to register in January  
2 of 2007.

3 Whether the defendant was aware of specific legislative changes to the Florida statute is  
4 irrelevant. What is relevant is the fact that the evidence shows the defendant had knowledge of  
5 his duty to register. In light of these documents, the defendant has failed to establish a claim for  
6 ineffective assistance of counsel with respect to his 2002 and 2007 convictions because he did  
7 make a knowing, intelligent and voluntary plea. The State asks that this court deny his motion  
8 to exclude these convictions at trial.

9 b. The 2004 conviction for Failure to Register as a Sex Offender under 2004-  
10 CF033236S, is constitutionally valid and admissible at trial.

11 The defendant alleges that his 2004 conviction for failure to register is constitutionally  
12 invalid because it is supported by insufficient evidence as a matter of law. First, for the reasons  
13 discussed above, Mr. Batson was within the definition of a sex offender under FSA §943.0435  
14 based on his predicate offense from Arizona which imposed a lifetime duty to register in that  
15 state. The evidence presented at his trial in 2004 supported this fact. The prosecutor offered a  
16 copy of the defendant's prior conviction for failure to register as a sex offender and Batson's  
17 FDLE Sexual Predator Sexual Offender registration dated February 6, 2004, and the State's  
18 witness Charles Lau explained the meaning of the information contained within the form. See RP  
19 6-8 (2004 trial transcript) attached as **Appendix F**.

20 Next, the evidence presented at Mr. Batson's 2004 trial was sufficient to support the  
21 conclusion that Mr. Batson failed to comply with his duty to register as a sex offender. To  
22 determine whether sufficient evidence supports a conviction, evidence is viewed in the light most  
23 favorable to the prosecution to determine whether any rational fact finder could have found the  
24 elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wash.2d 572, 576, 210

1 P.3d 1007 (2009). Specifically, following a bench trial, appellate review is limited to  
2 determining whether substantial evidence supports the findings of fact and, if so, whether the  
3 findings support the conclusions of law. State v. Stevenson, 128 Wn.App. 179, 193, 114 P.3d  
4 699 (2005).

5 The parties agree that at Mr. Batson's 2004 trial, the evidence established that the  
6 defendant registered on February 6, 2014 and provided the address of a Salvation Army shelter  
7 which only allowed him to stay for seven consecutive nights in a 30 day period. The State's  
8 witness described it as a "temporary dorm." See RP at 9. The defendant testified that after  
9 staying at the Salvation Army he was homeless and unable to establish any permanent or  
10 temporary residence. See RP at 16. The defendant later testified that after he left the Salvation  
11 Army, it was still his temporary address. See RP at 18-19. The Court found that 943.043(5)  
12 "requires that he notify, essentially, within forty-eight hours, notify the sheriff's office as to  
13 where he is so that if they need to find him, they know where he is." See RP at 30. The court  
14 goes on to find that "there's clearly no exception created for someone that doesn't have either a  
15 permanent or temporary residence, so it requires, as a condition, that you maintain one of the  
16 other." Id. This is a reasonable conclusion of law especially considering the legislative finding  
17 contained within The Florida Sexual Predators Act that:

18 The high level of threat that a sexual predator presents to the public safety, and the long-  
19 term effects suffered by victims of sex offenses, provide the state with sufficient  
20 justification to implement a strategy that includes requiring the registration of sexual  
21 predators, with a requirement that complete and accurate information be maintained and  
22 accessible for use by law enforcement authorities, communities, and the public.

21 FSA §775.21(3)(b)(3).

22 The Court applied the facts presented at trial to the law in Florida as it applied in 2004.

23 The Court, as the trier of fact found that the evidence presented at trial was sufficient to find the  
24

1 defendant guilty of failure to register as a sex offender. The trial transcript shows that the  
2 evidence when viewed in the light most favorable to the prosecution, establishes that a rational  
3 fact finder could have found Mr. Batson guilty beyond a reasonable doubt. Therefore, the State  
4 asks that the court deny the defendant's motion to exclude his 2004 conviction of failure to  
5 register as a sex offender.

6 c. The 2011 conviction for Failure to Register as a Sex Offender under 11-1-01865-  
7 9, is constitutionally valid and admissible at trial.

8 On March 11, 2011 the State of Washington charged the defendant in King County  
9 Superior Court with a violation of RCW 9A.44.132(1)(a) (a first felony failure to register charge)  
10 based on his failure to report weekly between August 1, 2010 through October 14, 2010. The  
11 defendant pled guilty and was sentenced on June 21, 2011.<sup>2</sup> The defendant argues he received  
12 ineffective assistance of counsel because his counsel at the time, Alison Warden, failed to point  
13 out when bargaining with the State "the existence of a defense that was tantamount to actual  
14 innocence." Def. Br. at 23. The defendant, through the declaration of his counsel, Sam Wolf,  
15 does not prove that Ms. Warden's performance fell below an objective standard of  
16 reasonableness which prejudiced the defense.

17 The defendant claims the State was unable to prove guilty knowledge because there was  
18 no evidence that the defendant was aware of the 2010 amendment to RCW 9A.44.130. To be  
19 very clear, the charging period for Mr. Batson's 2011 failure to register conviction was between  
20 the dates of August 10, 2010 and October 14, 2010 – after the 2010 amendment eliminating the  
21 comparability requirement had taken effect. The State would have had to prove that the  
22 defendant "knowingly" failed to register as a sex offender between those dates. This does not

23 \_\_\_\_\_  
24 <sup>2</sup> This 2011 conviction was challenged by the defendant by way of PRP which was dismissed by the Court of Appeals and denied review by the Washington State Supreme Court.

1 mean however, that the State would have had to prove that the defendant had knowledge that  
 2 RCW 9A.44.128 had been amended in 2010, just that the defendant knew he had a duty to  
 3 register. The defendant alleges now by way of declaration of defense counsel that "in early  
 4 2010, a separate law enforcement officer told Mr. Batson that he had no duty to register as a sex  
 5 offender, and Mr. Batson correspondingly did not register with the King County Sheriff  
 6 following his April 2009 registration." Def. Br. at 7. This is a bare allegation not supported by  
 7 any evidence. In fact, the evidence that does exist establishes that the defendant was told by a  
 8 King County Sheriff's Deputy "TAT" on April 6, 2009 that he *was* required to register. Whether  
 9 that statement made on April 6, 2009 was correct as a matter of law, is irrelevant to the requisite  
 10 knowledge requirement. The legal correctness of that statement in 2009 does not go to whether  
 11 the defendant had knowledge that he was supposed to register during the charging period in  
 12 2010. Further, it is not unreasonable for his attorney Ms. Warden to conclude that Mr. Batson  
 13 would not be successful in his claim that someone later told him he did not have to register.

14 After reviewing the defense counsel's offer of proof and relevant exhibits, it is apparent  
 15 that Ms. Warden and present counsel had different strategies in defending Mr. Batson on his  
 16 failure to register cases. Ms. Warden may have made different strategic decisions than present  
 17 counsel, but this does not amount to defective performance or prejudice to Batson's 2011 case.  
 18 When evaluating a claim of ineffective assistance of counsel, courts are highly deferential to  
 19 counsel's decisions and the defendant must show in the record the absence of legitimate strategic  
 20 or tactical reasons supporting the challenged conduct. State v. Jones, 183, Wn.2d 327, 339, 352  
 21 P.3d 776 (2015). While defense counsel in his declaration presumes that Ms. Warden was  
 22 "false" in her declaration (see, def. br. at 9 and 10), the law in Washington requires a strong

23  
 24

1 presumption that counsel's performance was reasonable. See, State v. Killo, 166 Wn.2d 856,  
2 862, 215 P.3d 177 (2009).

3 The defendant also argues that Ms. Warden failed to apprise him of a possible  
4 knowledge/confusion defense. However, Ms. Warden herself declared under penalty of perjury  
5 that she discussed several potential defenses to the charge, four of which she outlines in detail in  
6 her declaration. See attached Appendix G. It is a bold assertion from present counsel to allege  
7 that this was a false claim on the part of Ms. Warden, and certainly does not *prove* ineffective  
8 assistance.

9 Next, the defendant specifically argues that Ms. Warden erroneously advised Mr. Batson  
10 that if he proceeded to trial, the State could amend the charge against him to a Class B, ranked  
11 felony. This is not erroneous advice. The State *could* have amended the charge to a class B  
12 felony based on the defendant's three prior convictions of felony failure to register out of  
13 Volusia County, Florida.<sup>3</sup> As Ms. Warden points out in her declaration, she shared with the  
14 defendant her concern that on the face of 9A.44.132, the state might later try to amend to a Class  
15 B. Appendix G.

16 Finally, the defendant claims that the defendant received "virtually no benefit from the  
17 State" in pleading guilty as charged. Even though this argument has little relevance to the  
18 ineffective assistance claim because the defendant has not even established deficiency in Ms.  
19 Warden's performance, two things are worth pointing out. First, in 2011 Mr. Batson was pled  
20 guilty to an unranked class C felony failure to register even though he had three prior  
21 convictions. King County Prosecutor's office has a conservative filing policy where it is not  
22  
23  
24

1 uncommon to amend charges or add charges if/when a case proceeds to trial. Under RCW  
 2 9A.44.132, the defendant could have been charged with and ultimately convicted of a class B  
 3 felony which would have also been considered a "sex offense" and imposed an independent duty  
 4 to register. Lastly, the State agreed to recommend a six month sentence and prosecutor Sara  
 5 McCulloch made it very apparent in an email to Ms. Warden that the charge would not be  
 6 reduced based on the following:

7 I looked through this case. I have some more voluminous discovery that lays out  
 8 the facts of the crime he was convicted of. In the 84 case, he held a 16 year old  
 for about a day and raped her multiple times, threatened her with a gun...

9 He also has an 88 case where he held a woman at knifepoint and raped her.  
 10 Looks like it went to trial and he was only convicted of assault. He also has an  
 arrest in 1999 in Tucson, AZ for sexual assault and kidnapping. Looks like a  
 case was never filed.

11 **See attached Appendix H (page 14).**

12 Once again, a recommendation of six months was arguably a significant benefit for Mr.  
 13 Batson. Because the defendant has not proven that Ms. Warden's performance fell below an  
 14 objective standard of reasonableness, and because even if Ms. Warden's performance was  
 15 deficient he has not proven prejudice, the State respectfully asks this Court to deny his motion to  
 16 exclude his prior 2011 failure to register conviction from King County.  
 17

#### 18 IV. CONCLUSION

19 For the aforementioned reasons that State respectfully requests that the court deny  
 20 Batson's motion to suppress his prior convictions.  
 21  
 22

---

23 <sup>3</sup> The email exchange between the State and Ms. Warden attached as Exhibit B to Defense's Motion to Exclude,  
 24 does give the impression that the State believed it could not use Mr. Batson's Florida Failure to Register convictions  
 to elevate his offense, however it is reasonable that the State's legal theories and understanding of the newly

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

DATED this 21<sup>st</sup> day of March, 2018.

DANIEL SATTERBERG  
King County Prosecuting Attorney

By: Molly R. Nivison  
MOLLY R. NIVISON, #51124  
Deputy Prosecuting Attorney

---

amended RCW 9A.44.132 could have developed closer to trial and thus amended the charge to a Class B offense.

Exhibit - D

## WESTLAW

## 9A.44.132. Failure to register as sex offender or kidnapping offender--Refusal to provide DNA

WA ST 9A.44.132 | West's Revised Code of Washington Annotated | Title 9A. Washington Criminal Code | Effective: July 24, 2015 (Approx. 2 pages)

West's Revised Code of Washington Annotated  
Title 9A. Washington Criminal Code (Refs & Annos)  
Chapter 9A.44. Sex Offenses (Refs & Annos)

## Proposed Legislation

Effective: July 24, 2015

West's RCWA 9A.44.132

## 9A.44.132. Failure to register as sex offender or kidnapping offender--Refusal to provide DNA

Currentness

(1) A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

(a) The failure to register as a sex offender pursuant to this subsection is a class C felony if:

(i) It is the person's first conviction for a felony failure to register; or

(ii) The person has previously been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law.

(b) If a person has been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law, on two or more prior occasions, the failure to register under this subsection is a class B felony.

(2) A person is guilty of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a sex offense other than a felony and knowingly fails to comply with any of the requirements of RCW 9A.44.130. The failure to register as a sex offender under this subsection is a gross misdemeanor.

(3) A person commits the crime of failure to register as a kidnapping offender if the person has a duty to register under RCW 9A.44.130 for a kidnapping offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

(a) If the person has a duty to register for a felony kidnapping offense, the failure to register as a kidnapping offender is a class C felony.

(b) If the person has a duty to register for a kidnapping offense other than a felony, the failure to register as a kidnapping offender is a gross misdemeanor.

(4) A person commits the crime of refusal to provide DNA if the person has a duty to register under RCW 9A.44.130 and the person willfully refuses to comply with a legal request for a DNA sample as required under RCW 43.43.754(1)(b). The refusal to provide DNA is a gross misdemeanor.

(5) Unless relieved of the duty to register pursuant to RCW 9A.44.141 and 9A.44.142, a violation of this section is an ongoing offense for purposes of the statute of limitations under RCW 9A.04.080.

**Credits**

[2015 c 261 § 5, eff. July 24, 2015; 2011 c 337 § 5, eff. July 22, 2011; 2010 c 267 § 3, eff. June 10, 2010.]

**OFFICIAL NOTES**

**Application--2010 c 267:** See note following RCW 9A.44.128.

**Editors' Notes**

**HISTORICAL AND STATUTORY NOTES**

Laws 2011, ch. 337, § 5, rewrote subsec. (1), which formerly read:

"(1) A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense as defined in that section and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

"(a) Except as provided in (b) of this subsection, the failure to register as a sex offender pursuant to this subsection is a class C felony.

"(b) If a person has been convicted in this state of a felony failure to register as a sex offender on two or more prior occasions, the failure to register under this subsection is a class B felony."

**2015 Legislation**

Laws 2015, ch. 261, § 5, twice inserted ", or pursuant to federal law"; and inserted subsec. (4).

**Notes of Decisions (4)**

West's RCWA 9A.44.132, WA ST 9A.44.132

Current with effective legislation through Chapter 129 of the 2019 Regular Session of the Washington Legislature.

**End of  
Document**

© 2019 Thomson Reuters. No claim to original U.S. Government Works.