

FILED  
Court of Appeals  
Division I  
State of Washington  
10/22/2018 4:25 PM

No. 97617-1

No. 78341-6-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN BATSON,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

---

Jessica Wolfe  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... IV

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR ..... 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE..... 5

    1. Mr. Batson is required to register as a sex offender for conduct that is legal in Washington, resulting in homelessness, poverty, and repeated incarceration. .... 5

    2. The trial court finds Mr. Batson guilty of failure to register on the stipulated facts..... 8

E. ARGUMENT ..... 9

    1. Mr. Batson’s duty to register is predicated on an unconstitutional delegation of the legislative function. .... 10

        a. The legislature has unconstitutionally delegated its responsibility to define an element of the crime of failure to register to other states’ legislatures. .... 11

        b. Other states should not define what is criminal in Washington. .... 15

    2. The duty to register is punitive and thus violates the prohibition on ex post facto laws..... 17

        a. Sex offender registration is an affirmative disability and restraint. .... 21

        b. Public condemnation has historically been regarded as punishment..... 26

        c. Sex offender registration promotes traditional aims of punishment..... 29

d. Sex offender registration is excessive in relation to its purpose.....	31
3. Requiring Mr. Batson to register as a sex offender violates double jeopardy.....	35
4. Requiring Mr. Batson to register as a sex offender violates his right to equal protection.....	36
5. This Court should remand with instructions to strike the \$100 DNA fee.....	42
F. CONCLUSION.....	43

## TABLE OF AUTHORITIES

### Cases

<i>Andersen v. King County</i> , 158 Wn.2d 1, 138 P.3d 963 (2006).....	15
<i>Associated Grocers Inc. v. State</i> , 114 Wn.2d 182, 787 P.2d 22 (1990)....	37
<i>Barry &amp; Barry, Inc. v. Dep’t of Motor Vehicles</i> , 81 Wn.2d 155, 500 P.2d 540 (1972).....	11
<i>Brower v. State</i> , 137 Wn.2d 44, 969 P.2d 42 (1998) .....	10, 11
<i>Calder v. Bull</i> , 3 U.S. 386, 1 L. Ed. 648 (1798) .....	18
<i>Collins v. Youngblood</i> , 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).....	18
<i>Demery v. Arpaio</i> , 378 F.3d 1020 (9th Cir. 2004).....	30
<i>Diversified Inv. Partnership v. Dep’t of Soc. and Health Servs.</i> , 113 Wn.2d 19, 775 P.2d 947 (1989).....	13
<i>Doe v. Dep’t of Pub. Safety and Corr. Servs.</i> , 62 A.3d 123 (Md. 2013) .	26, 28
<i>Doe v. State</i> , 111 A.3d 1077 (N.H. 2015).....	26, 28, 31, 34
<i>Does #1–5 v. Snyder</i> , 834 F.3d 696 (6th Cir. 2016) .....	25, 28, 33
<i>Gaylord v. Tacoma School Dist. No. 10</i> , 88 Wn.2d 286, 559 P.2d 1340 (1977).....	16
<i>Green v. Georgia</i> , 882 F.3d 978, 988 (11th Cir. 2018) .....	16
<i>Hudson v. United States</i> , 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).....	35
<i>In re Arseneau</i> , 98 Wn. App. 368, 989 P.2d 1197 (1999) .....	36
<i>In re Powell</i> , 117 Wn.2d 175, 814 P.2d 635 (1991).....	18
<i>Keeting v. Public Util. Dist. No. 1</i> , 49 Wn.2d 761, 306 P.2d 762 (1957).	10

<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).....	20, 29, 30, 32
<i>Morris v. Blaker</i> , 118 Wn.2d 133, 821 P.2d 482 (1992) .....	37, 39, 40
<i>Northwest Animal Rights Network v. State</i> , 158 Wn. App. 237, 242 P.3d 891 (2010).....	15
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).....	15
<i>Smith v. Doe</i> , 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ..	22, 27, 29
<i>Starkey v. Oklahoma Dep’t of Corr.</i> , 305 P.3d 1004, 1022–23 (Ok. 2013) .....	28, 34
<i>State ex. rel. Peninsula Neighborhood Ass’n v. Dep’t of Transp.</i> , 142 Wn.2d 328, 12 P.3d 134 (2000).....	10
<i>State v. Batson</i> , 194 Wn. App. 326, 377 P.3d 238 (2016) .....	7, 12, 22
<i>State v. Boyd</i> , 1 Wn. App. 2d 501, 408 P.3d 362 (2017) .....	22
<i>State v. Chavez</i> , 134 Wn. App. 657, 142 P.3d 1110 (2006) .....	11
<i>State v. Coria</i> , 120 Wn.2d 169, 839 P.2d 890 (1992).....	37
<i>State v. Crown Zellerbach Corp.</i> , 92 Wn.2d 894, 602 P.2d 1172 (1979). 10	
<i>State v. Dougall</i> , 89 Wn.2d 118, 570 P.2d 135 (1977).....	13
<i>State v. Jones</i> , 159 Wn.2d 231, 149 P.3d 636 (2006).....	9
<i>State v. Letalien</i> , 985 A.2d 4 (Me. 2009).....	26, 34
<i>State v. Manussier</i> , 129 Wn.2d 652, 921 P.2d 473 (1996) .....	36, 38
<i>State v. Noble</i> , 829 P.2d 1217 (Az. 1992).....	28
<i>State v. Noltie</i> , 116 Wn.2d 831, 809 P.2d 190 (1991) .....	35
<i>State v. Ramirez</i> , 426 P.3d 714 (2018).....	42
<i>State v. Ramos</i> , 149 Wn. App. 266, 202 P.3d 383 (2009) .....	13

<i>State v. Smith</i> , 117 Wn.2d 263, 814 P.2d 652 (1991).....	37
<i>State v. Taylor</i> , 67 Wn. App. 350, 835 P.2d 245 (1992).....	31
<i>State v. Wadsworth</i> , 139 Wn.2d 724, 991 P.2d 80 (2000).....	10, 11, 12
<i>State v. Ward</i> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	passim
<i>State v. Williams</i> , 952 N.E.2d 1108 (Oh. 2011).....	27
<i>Wallace v. State</i> , 905 N.E.2d 371 (Ind. 2009).....	26, 28, 30, 34
<i>Weaver v. Graham</i> , 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981)	19
<i>Winchester v. Stein</i> , 135 Wn.2d 835, 959 P.2d 1077 (1998).....	36
<i>Yakima Cty. Deputy Sheriff's Ass'n v. Board of Com'rs for Yakima Cty.</i> , 92 Wn.2d 831, 601 P.2d 936 (1979).....	41

#### **Washington Statutes**

RCW 4.24.550 .....	24
RCW 43.43.754 .....	42
RCW 43.43.7541 .....	4, 42
RCW 9.41.010 .....	39
RCW 9.41.040 .....	39
RCW 9.94A.030.....	39
RCW 9.94A.510.....	8
RCW 9.94A.525.....	8, 40
RCW 9A.04.100.....	12
RCW 9A.44.079.....	5, 16
RCW 9A.44.128.....	passim

RCW 9A.44.130.....	passim
RCW 9A.44.132.....	8, 12, 19, 23

**Washington Session Laws**

Laws of 1990 ch. 3, § 402.....	23
Laws of 1990, ch. 3, § 401.....	20, 32
Laws of 1999, 1st Spec. Sess., ch. 6 § 2.....	6
Laws of 2001, ch. 169, § 1.....	7
Laws of 2001, chap. 283 § 2.....	24
Laws of 2010, ch. 265, § 1.....	7
Laws of 2010, ch. 267, § 1.....	5, 19, 38
Laws of 2018, ch. 269, § 18.....	42

**Arizona Statutes**

ARS § 13-1405.....	5
ARS § 13-3821.....	5

**Constitutional Provisions**

Const. art. I, § 10.....	2, 17
Const. art. I, § 12.....	2, 36
Const. art. I, § 23.....	2, 17
Const. art. I, § 9.....	2, 35
Const. art. II, § 1.....	2
U.S. Const. amend. V.....	2, 35

U.S. Const. amend. XIV .....	2, 4, 36
------------------------------	----------

**Other Authorities**

Amanda Y. Agan, 54 "Sex Offender Registries: Fear without Function?" 54 J. Law & Econ. 207 (2011).....	33
Eugene Volokh, "Statutory rape laws and ages of consent in the U.S.," The Washington Post (May 1, 2015) .....	16
Human Rights Watch, "No Easy Answers: Sex Offender Laws in the US" (Sept. 2007).....	17
J.J. Prescott & Jonah E. Rockoff, "Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?" 54 J. L. & Econ. 161, 163 (2011).....	30, 33
King County, "Sex Offender registration information," <i>available at</i> <a href="https://www.kingcounty.gov/depts/sheriff/sex-offender-search.aspx">https://www.kingcounty.gov/depts/sheriff/sex-offender-search.aspx</a> (last accessed Oct. 22, 2018) .....	14
King County's "OffenderWatch," <i>available at</i> <a href="http://www.communitynotification.com/cap_main.php?office=54473">http://www.communitynotification.com/cap_main.php?office=54473</a> (last accessed Oct. 22, 2018) .....	24
Maine Statistical Analysis Center, "Sexual Assault Trends and Sex Offender Recidivism in Maine" (2010) .....	32
Nathaniel Hawthorne, "The Scarlet Letter" (1850) .....	27
Richard G. Zevitz, "Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration," 19 Crim. Justice Studies 193 (2006).....	33
Senate Committee on Human Services & Corrections, Senate Bill Report 6414, 61 <sup>st</sup> Leg. at 4 (Jan. 19., 2010).....	38
Stan Orchowsky & Janice Iwama, Justice Research and Statistics Association, "Improving State Criminal History Records: Recidivism of Sex Offenders Released in 2001" (Nov. 2009).....	33

State of Connecticut, Office of Policy and Management, “Recidivism among sex offenders in Connecticut” (Feb. 2012) ..... 32

U.S. Dep’t of Justice, Bureau of Justice Statistics, “Recidivism of Sex Offenders Released from Prison in 1994” (Nov. 2003)..... 32

## A. INTRODUCTION

Thirty-four years ago, Benjamin Batson was convicted of a sex offense in Arizona for engaging in sexual conduct with a 16-year-old. This conduct would not be considered criminal in Washington, where the age of consent is 16 years. Nevertheless, Washington law has required Mr. Batson to register as a sex offender since 2010, when the legislature changed the statutory scheme to require him to register because he was required to register in Arizona.

To avoid violating the registration requirements, Mr. Batson must now report to his local sheriff every week of the year as well as maintain a log of his whereabouts on a daily basis. Additionally, Mr. Batson's name, photograph, and identifying information are posted on a publicly available website that labels him as a sex offender. As a result, Mr. Batson suffers from homelessness, unemployment, and the constant threat of criminal prosecution and incarceration.

The duty to register violates Mr. Batson's constitutional rights, running afoul of the nondelegation doctrine, ex post facto, double jeopardy, and equal protection. This Court should reverse his conviction for failure to register and dismiss.

**B. ASSIGNMENTS OF ERROR**

1. Mr. Batson's conviction for failure to register as a sex offender was in error because his duty to register is predicated on an unconstitutional delegation of the legislative function under Article II, § 1.

2. The conviction was in error because Mr. Batson's duty to register is punitive and thus violates the prohibition on ex post facto under Article I, § 10 of the federal constitution and Article I, § 23 of the state constitution.

3. The conviction was in error because Mr. Batson's duty to register violates double jeopardy under the Fifth Amendment and Article I, § 9.

4. The conviction was in error because Mr. Batson's duty to register violates equal protection under the Fourteenth Amendment and Article I, § 12.

5. The trial court erred in denying the defense motion to dismiss on constitutional grounds.

6. The trial court erred in imposing a \$100 DNA fee.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The legislature may not delegate its power to define the elements of crimes. Under RCW 9A.44.128(10)(h) and RCW 9A.44.130(1)(a), anyone convicted of an "out-of-state conviction for an

offense for which the person would be required to register as a sex offender while residing in the state of conviction” is required to register in Washington. Mr. Batson was convicted for conduct that is not criminal in Washington, yet this statutory scheme requires him to register as a sex offender. Did the legislature unconstitutionally delegate its power to define an element of the crime of failure to register to other states’ legislatures?

2. A criminal law violates the ex post facto prohibition if it imposes a greater punishment than applied when the crime was committed. Mr. Batson was not required to register as a sex offender in Washington for his 1984 Arizona conviction until 2010, when the legislature changed the statutory scheme. Additionally, Washington has steadily increased the registration requirements over the past several decades, so Mr. Batson’s registration obligations now include reporting in-person on a weekly basis as well as keeping a daily log of his whereabouts. Further, Mr. Batson’s personal information now appears on a public website labeling him a sex offender. Do the changes to Washington’s sex offender registration scheme violate the prohibitions on ex post facto?

3. The double jeopardy clauses of the federal and state constitutions protect a defendant from multiple punishments for the same

offense. The duty to register as a sex offender is so punitive that it constitutes a criminal penalty. Does Washington's sex offender registration scheme violate double jeopardy?

4. Under the equal protection clause of the Fourteenth Amendment and the privileges and immunities clause of the state constitution, persons similarly situated must receive like treatment. Here, Mr. Batson is similarly situated to individuals who have engaged in legal sexual activity while under Washington's jurisdiction. The law requiring Mr. Batson to register as a sex offender was passed due to concerns over the time required by law enforcement to perform a "comparability" analysis under the old statute. Does this constitute a rational basis for requiring individuals like Mr. Batson to register, when similarly situated individuals escape the burden of weekly check-ins and being labeled a "sex offender" on a state-run website?

5. Under RCW 43.43.7541, a DNA fee should not be imposed at sentencing if "the state has previously collected the offender's DNA as a result of a prior conviction." The supreme court recently held this statute applies retroactively to cases that were pending on direct appeal when the statute was passed. Mr. Batson was previously convicted of a crime that required DNA collection. Should Mr. Batson's \$100 DNA fee be stricken?

#### D. STATEMENT OF THE CASE

**1. Mr. Batson is required to register as a sex offender for conduct that is legal in Washington, resulting in homelessness, poverty, and repeated incarceration.**

Over three decades ago, Mr. Batson was convicted in Arizona for engaging in sexual conduct with a 16-year-old. CP 246, 248. This 1984 conviction, which has haunted Mr. Batson ever since and made it nearly impossible for him to maintain steady housing and employment, would not be considered criminal conduct in Washington, where the age of consent is 16. *See* 3/29/18 RP 168–73; RCW 9A.44.079. Despite this, Washington requires Mr. Batson to register as a sex offender based solely on the fact that he would be required to register if he lived in Arizona. *See* RCW 9A.44.130(1)(a); RCW 9A.44.128(10)(h); ARS § 13-1405(A); ARS § 13-3821(A)(4).

Under Washington law, “[a]ny out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction” qualifies as a “sex offense” requiring registration. RCW 9A.44.128(10)(h); RCW 9A.44.130(1)(a). This law came into effect in 2010, after Mr. Batson moved to Washington. *See* Laws of 2010, ch. 267, § 1; CP 80. When Mr. Batson first arrived in Washington, the law only required individuals to register if they had been convicted of an out-of-state sex offense

comparable to a Washington sex offense. *See* RCW 9A.44.130(10)(iv) (2008). Because Mr. Batson’s Arizona conviction is not comparable to any sex offense under Washington law, he had no duty to register here prior to 2010. *See id.*

Mr. Batson has spent the last two decades in Florida and Washington, struggling to hold down jobs and find stable housing. *See* 3/29/18 RP 168–69. However, each time he was able to find work in construction or a fast food restaurant, discovery of his prior sex offense conviction would soon land him out of a job. *See id.* In Washington, he was unable to use housing vouchers because of his conviction, despite his status as a Vietnam veteran. *See id.* at 171–73. And he could not live with family members due to fears for their safety based on his sex offender registration. *See id.* at 173. As a result, Mr. Batson has been homeless, bouncing between shelters and the streets, for most of his adult life. *See id.* at 171–73.

In 1999, Washington State began requiring registrants who lacked a “fixed address” to report in-person at their local sheriff’s office. *See* Laws of 1999, 1st Spec. Sess., ch. 6 § 2. Registrants had to report on a monthly or weekly basis, depending on their assessed risk level. *See id.* The legislature subsequently amended the law to require *all* registrants without a fixed address to report weekly. *See* Laws of 2001, ch. 169,

§ 1. The legislature further amended the law in 2010 to require that registrants provide an “accurate accounting” of where they stayed during the week and provide it to the sheriff upon request. *See* Laws of 2010, ch. 265, § 1. This law creates a huge burden for Mr. Batson, who, simply because he is homeless, is required by law to report in person fifty-two times per year as well as track his whereabouts on a daily basis. *See* RCW 9A.44.130(6)(b).

As a result, Mr. Batson was not always able to comply with the duty to register. He was convicted of violating the sex offender registration law in 2011 and 2014, although the latter conviction was overturned by this Court based on insufficiency of the evidence. *See* CP 388; *State v. Batson*, 194 Wn. App. 326, 338, 377 P.3d 238 (2016). In his appeal of his 2014 conviction, Mr. Batson also challenged the constitutionality of his duty to register, but this Court declined to reach that issue. *See id.* at 328.

Following this previous appeal, Mr. Batson decided that he wanted to continue to challenge the constitutionality of his duty to register. 3/29/18 RP 163. This decision was informed by the immeasurable impact the duty to register has had on his life, including unemployment, homelessness, limited contact with his loved ones, and repeated incarceration. *See id.* at 169–73. In an attempt to “get finality” on the

issue and financially unable to hire a civil attorney, he made the affirmative decision not to register and was subsequently charged with failure to register. *See id.* at 163.

**2. The trial court finds Mr. Batson guilty of failure to register on the stipulated facts.**

Mr. Batson stipulated to the facts and waived his right to a jury trial. *See* CP 8–16. He also filed a motion to dismiss on several constitutional bases, including abdication of legislative power and violations of ex post facto, double jeopardy, and equal protection. CP 209–258. The trial court rejected these arguments, concluding Mr. Batson had not demonstrated that his duty to register was unconstitutional beyond a reasonable doubt. 3/20/18 RP 40–46.

Mr. Batson next brought a motion in limine to exclude several previous convictions for failure to register. CP 75–208. These convictions had the potential to “bump up” Mr. Batson’s alleged failure to register from a “Class C” to a “Class B” felony, as well as significantly increase his offender score, thus increasing the standard range sentence. *See* RCW 9A.44.132(1); RCW 9.94A.525; RCW 9.94A.510. Mr. Batson requested the exclusion of three Florida convictions from 2002, 2004, and 2007, as well as the Washington conviction from 2011 on the basis that these convictions were obtained in violation of his Sixth Amendment

Right to effective counsel. *See* CP 75. The trial court determined that all three Florida convictions were excludable, but did not exclude the 2011 Washington conviction. 3/26/18 RP 120–133.

Based on the stipulated facts trial, the court found Mr. Batson had failed to comply with the registration requirements for individuals lacking a “fixed residence,” and had received notice of these requirements by signing a registration form at the King County Sheriff’s Office. CP 405–408. Accordingly, the court found Mr. Batson guilty for failure to register as a sex offender, and sentenced him to nine months in custody, the top of the standard range based on his offender score. *See* CP 382, 384, 408. The court also imposed a \$500 Victim Penalty Assessment, \$100 DNA collection fee, and 12 months of community custody. *See* CP 383, 415.

E. ARGUMENT

Mr. Batson challenges his conviction on four separate constitutional grounds. First, his duty to register is predicated on an unconstitutional delegation of the legislative function. Second, the duty to register is punitive and thus violates the prohibition on ex post facto laws. Third, the duty to register violates double jeopardy. Fourth, Mr. Batson challenges his conviction as a violation of equal protection. This Court reviews the constitutionality of a statute *de novo*. *See State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006). A statute is presumed

constitutional unless the challenging party can prove it is unconstitutional beyond a reasonable doubt. *See State ex. rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000).

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

“The legislative authority of the state of Washington *shall* be vested in the legislature.” Art. II, § 1 (emphasis added). “[I]t is unconstitutional for the Legislature to abdicate or transfer its legislative function to others.” *Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998) (citing *Keeting v. Public Util. Dist. No. 1*, 49 Wn.2d 761, 767, 306 P.2d 762 (1957)). This legislative function includes defining the elements of crimes and setting punishments. *See State v. Wadsworth*, 139 Wn.2d 724, 734 & n.56, 991 P.2d 80 (2000).

Courts have recognized a limited exception for delegation to an administrative agency. *See Keeting*, 49 Wn.2d at 767. However, there are strict confines to this delegation. Legislative power can only be delegated: “(1) when it can be shown that the legislature has provided standards which in general terms define what is to be done and the administrative body which is to do it, and (2) when procedural safeguards exist to control arbitrary administrative action and abuse of discretionary power.” *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 900, 602 P.2d 1172 (1979)

(citing *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972)). Courts have also recognized an exception to the nondelegation doctrine when the legislature defines a prohibited act “in general terms” and leaves it to the judicial branch to determine the specifics. *See Wadsworth*, 139 Wn.2d at 743; *see also id.* at 736–37 (providing examples of proper delegations to the judiciary, including the power to establish procedures for bail-jumping, protection orders, and contempt); *State v. Chavez*, 134 Wn. App. 657, 667, 142 P.3d 1110 (2006) (“The legislature’s history of delegating to the judiciary how statutes will be specifically applied demonstrates that the practice does not offend the separation of powers doctrine.”).

Notwithstanding these exceptions, no Washington case law appears to address the constitutionality of the precise question at issue here: whether our legislature may delegate the function of defining elements of a crime *to another state’s legislature*. This is a question of first impression.

- a. The legislature has unconstitutionally delegated its responsibility to define an element of the crime of failure to register to other states’ legislatures.

The legislature may not delegate its power to define the elements of crimes “to others.” *Brower*, 137 Wn.2d at 54; *see also Wadsworth*, 139 Wn.2d at 734. Here, the legislature requires a person convicted of a “sex

offense” to register as a sex offender. RCW 9A.44.130(1)(a). The legislature has also included in the definition of a “sex offense” “[a]ny out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction.” RCW 9A.44.128(10)(h).

Conviction of a “sex offense” is an element of the crime of failure to register; it is a fact that must be proven by the State beyond a reasonable doubt. *See State v. Batson*, 194 Wn. App. 326, 330, 377 P.3d 238 (2016) (the first element of the crime of failure to register is “[t]hat the defendant was previously convicted of a felony sex offense.”); RCW 9A.04.100(1) (“No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.”). In tying this element to the registration requirements of other states, our legislature has unconstitutionally abdicated its power to define the elements of the crime.<sup>1</sup>

Although there is no binding case on point concerning delegation to another state’s legislature, the supreme court’s decision in *State v.*

---

<sup>1</sup> The legislature also cannot delegate the duty to set punishments. *See Wadsworth*, 139 Wn.2d at n.56. By permitting out-of-state failure to register convictions to “bump up” the felony classification of an in-state failure to register conviction from a Class C to a Class B, the legislature has further compounded the consequences of its unconstitutional delegation to other states. *See* RCW 9A.44.132(1).

*Dougall* is instructive. *Dougall* concerned the designation of diazepam (Valium) as a controlled substance under a state statute that incorporated by reference all federally designated controlled substances. 89 Wn.2d 118, 120, 570 P.2d 135 (1977). Noting that the designation of controlled substances could change at any time under federal law, the court held that “legislation which attempts to adopt or acquiesce in future federal rules, regulations, or statutes is an unconstitutional delegation of legislative power and thus void.” *Id.* at 122–23.

The same reasoning applies here, as the statute in question ties liability for failure to register to the fluctuating requirements of another state. *See* RCW 9A.44.128(10)(h). “A statute must be complete in itself when it leaves the hands of the Legislature.” *Diversified Inv. Partnership v. Dep’t of Soc. and Health Servs.*, 113 Wn.2d 19, 775 P.2d 947 (1989). By incorporating the impermanent laws of another state, “the substance of the law [was] incomplete when it passed the Legislature, thus transferring the power to render judgment on an issue to [another] government.” *Id.*

*State v. Ramos*, a case decided by Division II, is similarly instructive. *Ramos* concerned the delegation of legislative power to county sheriffs to classify the risk level of sex offenders. 149 Wn. App. 266, 270, 202 P.3d 383 (2009). At the time, classification as a risk “Level

II” or “Level III”<sup>2</sup> was an element of failure to register for individuals with a fixed address. *See id.* at 272. By statute, local sheriffs were directed to assign risk classifications. *See id.* at 268. However, the statute did “not give the advice as to what the levels should consist of,” *id.*, and thus sheriffs were “solely responsible” for determining an offenders’ risk level. *Id.* at 272–73.

The *Ramos* court determined the legislature had “inadequately defined the element of the crime at question (risk of reoffense) and did not provide standards to assist law enforcement agencies in establishing measurement procedures of the risk of reoffense.” *Id.* at 273. As a result, “the legislature has delegated *full responsibility* for defining offenders’ risk levels, an element of a felony, to local law enforcement agencies.” *Id.* at 276 (emphasis added). Similarly here, the legislature has delegated its full responsibility for defining an element of the crime of failure to register to another state’s legislature. As a result, another state’s elected officials are solely responsible for determining the criteria that supports an element of a Washington crime. This is an unconstitutional delegation.

---

<sup>2</sup> There are three sex offender levels, and a registrant’s level is determined by the law enforcement agency where they reside. Registrants judged to be a “Level I” “are considered at low risk to re-offend,” whereas “Level II” and “Level III” offenders are judged to be at a “moderate” and “high” risk, respectively. *See* King County, “Sex Offender registration information,” *available at* <https://www.kingcounty.gov/depts/sheriff/sex-offender-search.aspx> (last accessed Oct. 22, 2018).

*Dougall* and *Ramos* concerned legislative delegations to the federal government and local law enforcement, respectively. However, their reasoning applies when the legislature attempts to delegate to another state's government. Our legislature cannot constitutionally abdicate its duty to define the elements of a crime by surrendering that responsibility to the ever-shifting laws of other states.

b. Other states should not define what is criminal in Washington.

Washington residents have elected the legislature to represent their interests through the passage of laws. This includes the passage of criminal laws that reflect the electorate's ethics and condemn what is "abhorrent to our society." *Northwest Animal Rights Network v. State*, 158 Wn. App. 237, 245, 242 P.3d 891 (2010). By abdicating its duty to define an element of a Washington crime to another state, our legislature has circumvented the purpose of a representative democracy and its obligation to craft a statutory scheme that reflects the values of Washington residents. *See Andersen v. King County*, 158 Wn.2d 1, 38, 138 P.3d 963 (2006), *abrogated on other grounds by Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) ("It cannot be overemphasized that our state constitution provides for a representative democracy and that the people, who have consented to be governed, speak through their elected representatives.").

Mr. Batson was convicted in Arizona for conduct that is not criminal in Washington. *See* 3/29/18 RP 168–73; RCW 9A.44.079. Our legislature has determined the age of consent in Washington is 16 years of age, in agreement with 30 other states across the country and most of the Western world. *See id.*; Eugene Volokh, “Statutory rape laws and ages of consent in the U.S.,” *The Washington Post* (May 1, 2015).<sup>3</sup> However, the other 20 states in this country have set the age of consent at 17 or 18 years. *Id.*

The incongruity in sex offender laws between Washington and other states is not limited to statutory sex offenses. Several states have passed laws criminalizing and requiring registration for conduct that would not be “abhorrent” to the Washington electorate. For example, Washington decriminalized “sodomy” in 1976. *See Gaylord v. Tacoma School Dist. No. 10*, 88 Wn.2d 286, 296–97, 559 P.2d 1340 (1977). However, Charlton Green, who was convicted of “sodomy” in Georgia in 1997, would be required to register as a sex offender if he ever moved to Washington. *See Green v. Georgia*, 882 F.3d 978, 980, 988 (11th Cir. 2018) (denying writ of habeas corpus for failure to register conviction predicated on sodomy conviction). Additionally, other states have

---

<sup>3</sup> Available at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/?utm\\_term=.5f5cfa87b3e4](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/?utm_term=.5f5cfa87b3e4) (last accessed Oct. 22, 2018).

extended sex offender registration requirements to non-sexual crimes. At least thirteen states require sex offender registration for public urination. *See* Human Rights Watch, “No Easy Answers: Sex Offender Laws in the US” 39, (Sept. 2007).<sup>4</sup> And approximately 32 states require registration for exposing genitals in public, which can include streaking. *See id.* at 38–40.

These illustrations exemplify the rationale behind the non-delegation doctrine. Our legislature is elected by Washington residents to pass laws criminalizing the conduct *our* community deems abhorrent. The legislature cannot abdicate this responsibility to the legislatures of other states that are wholly unaccountable to the Washington electorate and may be out of step with our values. Accordingly, this Court should conclude the legislature engaged in unconstitutional delegation by tying the duty to register as a sex offender to the laws of other states.

**2. The duty to register is punitive and thus violates the prohibition on ex post facto laws.**

Both the federal and state constitutions forbid the legislature from passing any ex post facto law. *See* U.S. Const. art. I, § 10; Const. art. I, § 23. A criminal law violates the ex post facto prohibition if it “*changes the punishment*, and inflicts a *greater punishment*, than the law annexed to

---

<sup>4</sup> Available at <https://www.hrw.org/reports/2007/us0907/us0907webwcover.pdf>.

the crime, when committed.” *State v. Ward*, 123 Wn.2d 488, 497, 869 P.2d 1062 (1994) (quoting *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648 (1798)) (emphasis in *Ward*). In evaluating whether a law violates ex post facto, courts determine whether the law: “is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) *disadvantages the person affected by it.*” *Id.* at 498 (quoting *In re Powell*, 117 Wn.2d 175, 185, 814 P.2d 635 (1991)) (emphasis in *Ward*). The “sole determination of whether a law is ‘disadvantageous’ is whether the law *alters the standard of punishment* which existed under prior law.” *Id.* (emphasis in the original).

A law is procedural if it “refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.” *Collins v. Youngblood*, 497 U.S. 37, 45, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). Here, the law in question – RCW 9A.44.128(10)(h) – is substantive, not merely procedural, as it altered the definition of an element of a crime, imposed a duty to register on Mr. Batson, and threatened criminal liability for failure to do so. *See id.* (“‘Sex offense’ means . . . [a]ny out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction.”); *see also* RCW 9A.44.130(1)(a) (individuals convicted of a “sex offense” are required to register); RCW

9A.44.132 (criminalizing failure to register); *see also Ward*, 123 Wn.2d at 498 & n.5 (noting that the sex offender registration statute falls within the criminal code and assuming that it is substantive).

In addition, the law is clearly retrospective; it was passed in 2010, some 26 years after Mr. Batson was convicted of the predicate offense for which he is now required to register. *See Weaver v. Graham*, 450 U.S. 24, 29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981) (defining “retrospective” to mean a law that “appl[ies] to events occurring before its enactment.”); *see also* Laws of 2010, ch. 267, § 1; CP 246. Thus the sole question before this Court is whether the change in law requiring Mr. Batson to register as a sex offender altered the standard of punishment. *See Ward*, 123 Wn.2d at 498–99. “[T]he focus of [this] inquiry is whether registration constitutes punishment.” *Id.* at 499.

To determine whether a law is punitive or merely “regulatory,” this Court must first examine the legislative intent behind adopting the law. *See Ward*, 123 Wn.2d at 499. Here, the legislature noted “that sex offenders often pose a high risk of reoffense”<sup>5</sup> and that its intent in

---

<sup>5</sup> The legislature’s rationale has been found not to be supported by empirical evidence; recidivism rates of sex offenders are remarkably low. *See* U.S. Dep’t of Justice, Bureau of Justice Statistics, “Recidivism of Sex Offenders Released from Prison in 1994” 2 (Nov. 2003), *available at* <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf> (finding that only 3.5 percent of released sex offenders were convicted of a new sex crime within three years); *see also* footnote 9, *infra*. Mr. Batson’s case illustrates this data, as he has not been convicted of a new sex offense since 1984. *See* CP 402–403.

creating a sex offender registration law was to “assist local law enforcement agencies’ efforts to protect their communities by regulating sex offenders.” Laws of 1990, ch. 3, § 401. In *Ward*, the supreme court determined that this language evinced a regulatory purpose. *See* 123 Wn.2d at 499. However, the legislature’s intention to adopt a regulatory law is not determinative; this Court must also consider “whether the actual *effect* of the statute is so punitive as to negate the Legislature’s regulatory intent.” *Id.* (emphasis in the original).

To determine whether a law is punitive in *effect*, this Court applies the factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). *See Ward*, 123 Wn.2d at 499. These factors are as follows: (1) “Whether the sanction involves an affirmative disability or restraint,” (2) “whether it has historically been regarded as a punishment,” (3) “whether it comes into play only on a finding of *scienter*,” (4) “whether its operation will promote the traditional aims of punishment – retribution and deterrence,” (5) “whether the behavior to which it applies is already a crime,” (6) “whether an alternative purpose to which it may rationally be connected is assignable for it,” and (7) “whether it appears excessive in relation to the alternative purpose assigned.” *Mendoza-Martinez*, 372 U.S. at 168–69 (footnotes omitted).

The *Ward* court recognized that factors 1, 2, 4, and 7 were the most relevant in measuring the punitive effect of Washington’s sex offender registration law. *See Ward*, 123 Wn.2d at 500–511. After evaluating these four factors, the *Ward* court held that sex offender registration did not constitute punishment in violation of the ex post facto prohibition. *Id.* at 511. However, the sex offender registration law evaluated by the *Ward* court in 1994 imposed very different burdens on registrants than the modern-day version imposes on Mr. Batson. In light of these changes, the soundness of the *Ward* decision should be reconsidered.

- a. Sex offender registration is an affirmative disability and restraint.

In *Ward*, the supreme court determined that sex offender registration “imposes no significant additional burdens on offenders” because it only required providing identifying information as well as a photograph and fingerprints. 123 Wn.2d at 500. The court further noted that this information was already routinely obtained during sentencing. *See id.* The court concluded that “it is inconceivable that filling out a short form with eight blanks creates an affirmative disability. Registration alone imposes burdens of little, if any, significance.” *Id.* at 501.

In contrast, under the revised registration statute in effect today, all individuals lacking a “fixed residence” like Mr. Batson now must report in

person every week – 52 times a year. *See* RCW 9A.44.130(6)(b). Further, those lacking a fixed residence must “keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request.” *See id.* These requirements are a far cry from “filling out a short form.” *Ward*, 123 Wn.2d at 501. They place an affirmative disability and restraint on registrants: keeping a daily log and reporting weekly in person during specified hours. *Compare Smith v. Doe*, 538 U.S. 84, 101, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (concluding that Alaska’s registration statute did not violate ex post facto in part because it did not require in-person registration).

The result is a registration scheme that is “perhaps the most burdensome in the country.” *See State v. Boyd*, 1 Wn. App. 2d 501, 525, 408 P.3d 362 (2017) (Becker, J., dissenting). This weekly reporting requirement “can readily lead to an unending cycle of imprisonment for transient offenders,” which is “the paradigmatic affirmative disability or restraint.” *Id.* Mr. Batson’s cyclical incarceration typifies the extent of this disability and restraint; he has been imprisoned in Washington no fewer than three times on charges of failing to register since moving here approximately a decade ago. *See* CP 80, 402; *State v. Batson*, 194 Wn. App. 326, 377 P.3d 238 (2016).

In addition to placing a more onerous burden on registrants, the legislature has increased the punishments for non-compliance since 1994 as well. *Compare* Laws of 1990 ch. 3, § 402 (convictions for failure to register range from a gross misdemeanor to a Class C felony) *with* RCW 9A.44.132(1) (the first or second failure to register conviction is a Class C felony, and the third or more failure to register conviction is a Class B felony). Due to the two failure to register convictions on his record, Mr. Batson now faces the prospect of a Class B felony if he misses one weekly in-person registration in the future. *See* CP 402, 408.

In addition to the minimal burden of registering under the 1994 requirements, the *Ward* court found that registration was not punitive because “[t]he Legislature placed significant limits on (1) whether an agency may disclose registrant information, (2) what the agency may disclose, and (3) where it may disclose the information.” 123 Wn.2d at 502. The court noted that “in many cases, both the registrant information and the fact of registration remain confidential.” *Id.* The court further cited that disclosure was only warranted where an agency had “some evidence that the offender poses a threat to the public or, in other words, some evidence of dangerousness in the future.” *Id.* at 503. The court further considered that disclosure must only include “relevant and necessary” information, and that the “geographic scope” of the

disseminated information could be limited “only to the surrounding neighborhood, or to schools and day care centers.” *See id.* at 503–504. The court concluded that “[t]his statutory limit ensures that disclosure occurs to prevent future harm, not to punish past offenses.” *Id.* at 503.

The Internet age entirely undercut the privacy safeguards cited by the *Ward* court. Beginning in 2001, the state began to maintain a searchable database of sex offenders accessible by the general public. *See* Laws of 2001, chap. 283 § 2. Initially, the state’s sex offender website only included registrants designated as the highest risk to reoffend; now, however, the website contains information about all Level II and Level III registrants, as well as Level I registrants who are out of compliance. *See id.*; RCW 4.24.550(5). These databases include photographs, names, ages, identifying characteristics such as race, height, and weight, the predicate criminal conviction, as well as a mappable address.<sup>6</sup> In contrast to the carefully measured dissemination of information envisioned in *Ward*, Mr. Batson’s mugshot is now the first thing that appears in a Google search of his name. The statutory limits on disclosure invoked by *Ward* have eroded; disclosure is the presumption, regardless of whether such

---

<sup>6</sup> *See* King County’s “OffenderWatch,” available at [http://www.communitynotification.com/cap\\_main.php?office=54473](http://www.communitynotification.com/cap_main.php?office=54473) (last accessed Oct. 22, 2018).

information is “relevant and necessary” to prevent future threats.

*Compare* 123 Wn.2d at 503–504.

Mr. Batson testified that he has been fired from jobs due to the readily accessible nature of his sex offender registration online. *See* 3/29/18 RP 168–69. He also avoids living with family members due to fears for their safety should someone find his address on the sex offender website. *See id.* at 173. These barriers to employment and housing, as well the very real fear of vigilante violence,<sup>7</sup> constitute a significant disability and restraint for Mr. Batson.

Other courts around the country have recognized that in-person reporting, increased punishments, and searchable online databases place a significant disability and restraint on registrants. For example, the Sixth Circuit recently concluded that Michigan’s registration laws – which required quarterly or annual in-person registration, an accessible online database, and significant punishments for noncompliance – were “direct restraints” and thus punitive. *See Does #1–5 v. Snyder*, 834 F.3d 696, 697–98, 703, 705 (6th Cir. 2016). The New Hampshire, Maryland, Indiana,

---

<sup>7</sup> Sex offender registries have repeatedly been used by vigilantes to locate and murder people with listed addresses. Several of these murders have occurred here in Washington State. *See* Lexi Pandell, “The Vigilante of Clallam County,” *The Atlantic* (Dec. 4, 2013), available at <https://www.theatlantic.com/national/archive/2013/12/the-vigilante-of-clallam-county/281968/> (last accessed Oct. 22, 2018); Donna Gordon Blankinship, “Man held in sex offender killings, says he found victims on Web,” *The Seattle Times* (Sept. 6, 2005) available at <https://www.seattletimes.com/seattle-news/man-held-in-sex-offender-killings-says-he-found-victims-on-web/> (last accessed Oct. 22, 2018).

and Maine supreme courts have similarly concluded that quarterly and annual in-person reporting requirements are punitive in nature. *See Doe v. State*, 111 A.3d 1077, 1196 (N.H. 2015) (“[T]he frequent reporting and checks by the authorities,” including home visits and quarterly in-person registration, cannot be described as “*de minimus*.”); *Doe v. Dep’t of Pub. Safety and Corr. Servs.*, 62 A.3d 123, 139 (Md. 2013) (quarterly in-person registration is akin to “an additional criminal sanction.”); *Wallace v. State*, 905 N.E.2d 371, 379 (Ind. 2009) (annual in-person registration, along with other strident requirements, “imposes significant affirmative obligations and a severe stigma on every person to whom it applies.”); *State v. Letalien*, 985 A.2d 4, 18 (Me. 2009) (quarterly in-person registration “imposes a disability or restraint that is neither minor nor indirect.”).

This Court should join others in recognizing that in-person registration – particularly when required on a weekly basis for individuals without a “fixed residence” like Mr. Batson – constitutes an affirmative disability and restraint and is thus punitive in nature.

b. Public condemnation has historically been regarded as punishment.

In *Ward*, the supreme court held that “[r]egistration has not traditionally or historically been regarded as punishment.” 123 Wn.2d at 507. The *Ward* Court compared registration to providing a change of

address to the Department of Motor Vehicles or requiring individuals convicted of a crime to provide samples to a DNA data bank, and concluded that registration was merely “a traditional governmental method of making available relevant and necessary information to law enforcement agencies.” *See id.*

As previously explained, the Internet age has changed the nature of sex offender registration and guaranteed that a registrant’s name, photograph, and address are readily available to the general public. In this manner, registration is more akin to public shaming than providing a change of address to the Department of Motor Vehicles. *See State v. Williams*, 952 N.E.2d 1108, 1112 (Oh. 2011) (finding that Ohio’s statutory scheme “has changed dramatically since this court described the registration process imposed on sex offenders as an inconvenience comparable to renewing a driver’s license” and thus re-evaluation of registration’s punitive effect was warranted) (internal quotation marks omitted).

As memorialized in Nathaniel Hawthorne’s “The Scarlet Letter” (1850), shame has been employed as a powerful punitive tool since colonial times. *See Smith*, 538 U.S. at 109 (Souter, J., concurring in the judgment) (“Widespread dissemination of offenders’ names, photographs, addresses, and criminal history serves not only to inform the public but

also to humiliate and ostracize the convicts. It thus bears some resemblance to shaming punishments that were used earlier in our history to disable offenders from living normally in the community.”); *id.* at 116 (Ginsburg, J., dissenting) (sex offender websites “call[] to mind shaming punishments once used to mark an offender as someone to be shunned.”); *see also Snyder*, 834 F.3d at 703 (noting that sex offender registration “has much in common with banishment and public shaming”); *Doe*, 111 A.3d at 1097 (“[T]he internet is our town square. Placing offenders’ pictures and information online serves to notify the community, but also holds them out for others to shame or shun.”); *State v. Noble*, 829 P.2d 1217, 1222 (Az. 1992) (“registration has traditionally been viewed as punitive” and equates to an “ignominious badge.”) (internal citations omitted).

Several courts have also recognized that sex offender registration is similar to probation or parole, which are historical forms of punishment. *See Snyder*, 834 F.3d at 703 (registration “resembles the punishment of parole/probation.”); *Starkey v. Oklahoma Dep’t of Corr.*, 305 P.3d 1004, 1022–23 (Ok. 2013) (“duties imposed on offenders are similar to the treatment received by probationers subject to continued supervision.”); *Dep’t of Pub. Safety and Corr. Servs.*, 62 A.3d at 139 (registration requirements have “the same practical effect as placing Petitioner on probation or parole”); *Wallace*, 905 N.E.2d at 380 (“registration and

reporting provisions are comparable to conditions of supervised probation or parole”); *see also Smith*, 538 U.S. at 111 (Stevens, J., dissenting) (“The registration and reporting duties imposed on convicted sex offenders are comparable to the duties imposed on other convicted criminals during periods of supervised release or parole.”)

In light of the similarities to public shaming, parole, and probation, this court should recognize that sex offender registration is akin to historical means of punishment. *See Mendoza-Martinez*, 372 U.S. at 168.

c. Sex offender registration promotes traditional aims of punishment.

In *Ward*, the supreme court noted that while registrants “may be deterred from committing future offenses,” “the Legislature’s *primary* intent is to aid law enforcement agencies’ efforts to protect their communities by providing a mechanism for increased access to relevant and necessary information.” *See* 123 Wn.2d at 508 (emphasis added). Accordingly, the court determined that deterrence was merely a “*secondary* effect,” and “decline[d] to hold that such positive effects are punitive in nature.” *Id.* (emphasis added).

As already explained, *Ward* was decided prior to the enactment of laws requiring Washington’s sex offender registry to be published online. Following the creation of a publically available database, Washington’s

sex offender registration scheme shifted from simply being a “registration law” – which is “intended solely to aid law enforcement in monitoring offenders and apprehending known recidivists” and maintains the confidentiality of registrants’ information – to a “notification law,” which requires disseminating a registrant’s personal information to the public. J.J. Prescott & Jonah E. Rockoff, “Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?” 54 J. L. & Econ. 161, 163 (2011).

As a notification law, Washington’s sex offender registration scheme now promotes as its primary effect “the traditional aims of punishment – retribution and deterrence.” *Mendoza-Martinez*, 372 U.S. at 168. As explained in the previous section, sex offender registries promote the public shaming of registrants. *See* pgs. 27–28, *supra*. The “emotional discomfort” of shame is both retributive and deterrent in its aim. *Demery v. Arpaio*, 378 F.3d 1020, 1037 (9th Cir. 2004) (Bea, J., dissenting) (assessing the fourth *Mendoza-Martinez* factor and concluding that shame leads to both retribution and deterrence). These are not merely “secondary effects,” but the inherent results of a registration scheme that encourages public monitoring and ostracization of registrants. *See Wallace*, 905 N.E.2d at 382 (“[I]t strains credulity to suppose that [registration’s] deterrent effect is not substantial, or that [registration] does not promote

community condemnation of the offender, both of which are included in the traditional aims of punishment.”) (internal quotation marks and citations omitted); *see also Doe*, 111 A.3d at 1098 (quoting *Wallace* and concluding that registration has both a deterrent and retributive effect).

d. Sex offender registration is excessive in relation to its purpose.

In consider the final *Mendoza-Martinez* factor, the *Ward* court concluded the registration statute was “not excessive in relation to its purpose.” 123 Wn.2d at 508. The court considered legislative intent, and noted that “the Legislature has spoken clearly that public interest demands that law enforcement agencies have relevant and necessary information about sex offenders residing in their communities.” *Id.* at 509 (citing Laws of 1990, ch. 3, § 401). The court rejected arguments that registration would “burden former offenders by making them the focus of every sex crime investigation” or would result in “a lifelong badge of infamy.” *Id.* (internal quotation marks omitted). Accordingly, the court concluded that while registration was “disadvantageous to a registrant” it was not “punitive in overall effect.” *Id.* at 510 (quoting *State v. Taylor*, 67 Wn. App. 350, 358, 835 P.2d 245 (1992)).

However, the legislative history of the sex offender registration law reveals that legislators were not simply focused on assisting law

enforcement, but that they were driven to pass the law primarily due to concerns about the “high” risk of sex offender recidivism. Laws of 1990, ch. 3, § 401 (declaring that “sex offenders often pose a high risk of reoffense.”) The predominant purpose of the law, then, was to reduce recidivism. However, as subsequent social science research has conclusively demonstrated, sex offender registration does not reduce recidivism. Thus the law is inherently excessive in relation to its purpose. *Mendoza-Martinez*, 372 U.S. at 169.

As a threshold matter, the legislature was empirically wrong in declaring that “sex offenders often pose a high risk of reoffense.” Laws of 1990, ch. 3, § 401. Sex offenders in fact have a very low rate of recidivism: the Department of Justice puts the statistic at just 3.5 percent,<sup>8</sup> and study after study has found similarly low recidivism rates.<sup>9</sup> Further,

---

<sup>8</sup> See U.S. Dep’t of Justice, Bureau of Justice Statistics, “Recidivism of Sex Offenders Released from Prison in 1994” 2 (Nov. 2003), *available at* <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf> (finding that only 3.5 percent of released sex offenders were convicted of a new sex crime within three years).

<sup>9</sup> See, e.g., State of Connecticut, Office of Policy and Management, “Recidivism among sex offenders in Connecticut” 4 (Feb. 2012), *available at* [https://www.ct.gov/opm/lib/opm/cjppd/cjresearch/recidivismstudy/sex\\_offender\\_recidivism\\_2012\\_final.pdf](https://www.ct.gov/opm/lib/opm/cjppd/cjresearch/recidivismstudy/sex_offender_recidivism_2012_final.pdf) (finding that 2.7 percent of released sex offenders were convicted of a new sex crime within five years of release, and concluding that “[t]hese low re-offense rates appear to contradict a conventional wisdom that sex offenders have very high sexual re-offense rates”); Maine Statistical Analysis Center, “Sexual Assault Trends and Sex Offender Recidivism in Maine” 12 (2010), *available at* <https://cpb-us-w2.wpmucdn.com/wpsites.maine.edu/dist/2/115/files/2018/06/Sexual-Assault-Trends-and-Sex-Offender-Recidivism-in-Maine-201-24o3nu2.pdf> (finding that 3.8% of sex offenders were convicted of a new sex offense within three years of release); Stan Orchowsky & Janice Iwama, Justice Research and Statistics Association, “Improving

studies of the effects of sex offender registries have concluded that they do *not* reduce recidivism of sex offenses.<sup>10</sup> And some studies have even found that providing public access to registration databases has the potential to *increase* recidivism, “perhaps because of the social and financial costs associated with the public release of [registrants’] criminal history and personal information.”<sup>11</sup> Accordingly, this Court should conclude that sex offender registration is grossly excessive in relation to its purpose of preventing recidivism.

Other courts have come to similar conclusions, determining that broad sex offender registration laws are an excessive response to the need to protect the public. *See Snyder*, 834 F.3d at 705 (in analyzing the Michigan registration laws, “the requirement that registrants make frequent, in-person appearances before law enforcement . . . appears to

---

State Criminal History Records: Recidivism of Sex Offenders Released in 2001” 17 (Nov. 2009), *available at* [http://www.jrsa.org/pubs/reports/sex\\_offender\\_final.pdf](http://www.jrsa.org/pubs/reports/sex_offender_final.pdf) (assessing the recidivism rates of sex offenders in Alaska, Arizona, Delaware, Illinois, Iowa, New Mexico, and South Carolina from 1.8% to 4%);

<sup>10</sup> *See* J.J. Prescott & Jonah E. Rockoff, “Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?” 54 *J. L. & Econ.* 161, 192 (2011) (finding a “lack of empirical evidence for the recidivism-reducing benefits of registration and notification”); Amanda Y. Agan, 54 “Sex Offender Registries: Fear without Function?” 54 *J. Law & Econ.* 207, 235 (2011) (finding that the data “does not support the conclusion that sex offender registries are successful in meeting their objectives of increasing public safety and lowering recidivism rates.”); Richard G. Zevitz, “Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration,” 19 *Crim. Justice Studies* 193 (2006) (concluding that community notification had no direct effect on recidivism).

<sup>11</sup> *See* Prescott, et. al. *supra* at note 8, at 192.

have no relationship to public safety at all.”); *Starkey*, 305 P.3d at 1029 (finding Oklahoma registration law excessive in relation to the purpose of protecting the public because registration “is imposed on a wide variety of crimes of which the severity of the crime and circumstances surrounding each crime can vary greatly.”); *Wallace*, 905 N.E.2d at 384 (finding Indiana registration law excessive in part because it “makes information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk.”); *Doe*, 111 A.3d at 410 (finding New Hampshire registration law excessive in relation to goal of reducing recidivism in part because it required in-person registration, home visits twice a year, and an online database available “for anyone to access,” and “[i]f in fact there is no meaningful risk to the public, then the imposition of such requirements becomes wholly punitive.”); *see also Letalien*, 985 A.2d at 23 (finding this factor “neutral” in analyzing the Maine registration laws but noting that “[n]o statistics have been offered to suggest that every registered offender or a substantial majority of the registered offenders will pose a substantial risk of re-offending long after they have completed their sentences and probation, including any required treatment.”).

In sum, the strictures of Washington’s current sex offender registration scheme tips the four relevant *Mendoza-Martinez* factors in

favor of finding a punitive effect: First, registration is an affirmative disability and restraint, particularly for individuals lacking a “fixed address,”; second, registration is akin to public condemnation, which has historically been regarded as punishment; third, registration promotes the traditional aims of punishment through deterrence and retribution; and fourth, registration is excessive in relation to its purpose of reducing recidivism. Accordingly, this Court should conclude that Washington’s sex offender requirements, as currently drafted, constitute punishment in violation of the ex post facto prohibition.

**3. Requiring Mr. Batson to register as a sex offender violates double jeopardy.**

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

In order to evaluate whether a particular punishment is criminal in nature, courts first examine legislative intent and then apply the *Mendoza-*

*Martinez* factors in order to determine “whether the statutory scheme was so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty.” *See id.* (internal citations, quotation marks, and alternations omitted); *see also Winchester v. Stein*, 135 Wn.2d 835, 846, 959 P.2d 1077 (1998) (quoting *Hudson*).

This is the same analysis that applies to ex post facto challenges. *See In re Arseneau*, 98 Wn. App. 368, 379–80, 989 P.2d 1197 (1999). Thus if this Court concludes that sex offender registration violates Mr. Batson’s constitutional rights with regards to the prohibition on ex post facto, it must also conclude that it violates his right not to be subjected to double jeopardy. *See id.* (analyzing ex post facto and double jeopardy claims together).

**4. Requiring Mr. Batson to register as a sex offender violates his right to equal protection.**

Under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution and the privilege and immunities clause of Article I, § 12 of the state constitution, “persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.” *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); U.S. Const. XIV; Const. art. I § 12. These two clauses are “substantially identical and

considered by this [C]ourt as one issue.” *State v. Smith*, 117 Wn.2d 263, 281, 814 P.2d 652 (1991).

At a minimum, laws challenged on equal protection grounds must have a rational basis in order to be upheld as constitutional. *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). This test applies “whenever legislation does not infringe upon fundamental rights or create a suspect classification.” *Smith*, 93 Wn.2d at 336. Under the rational basis test, “the law being challenged must rest upon a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective.” *Coria*, 120 Wn.2d at 169. In evaluating statutes under the rational basis test, courts apply a three-part test: “1. Does the classification apply alike to all members within the designated class? 2. Does some rational basis exist for reasonably distinguishing between those within the class and those outside the class? and 3. Does the challenged classification bear a rational relation to the purpose of the challenged statute?” *Morris v. Blaker*, 118 Wn.2d 133, 149, 821 P.2d 482 (1992) (citing *Associated Grocers Inc. v. State*, 114 Wn.2d 182, 187, 787 P.2d 22 (1990), *cert. denied.*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 670, 112 L. Ed. 2d 663 (1991)).

Here, the designated class is defined as all individuals who, like Mr. Batson, are required to register in Washington State for out-of-state conduct that is not criminal under Washington’s laws. This class is

“similarly situated” to individuals who have engaged in legal sexual activity while under Washington’s jurisdiction. *Manussier*, 129 Wn.2d at 672. Prior to 2010, both groups “receive[d] like treatment,” *id.*, because the law required that only individuals convicted of an out-of-state offense comparable to a Washington State sex offense needed to register. *See* RCW 9A.44.130(10)(iv) (2008) (defining a “sex offense” to include “[a]ny federal or out-of-state conviction for an offense that *under the laws of this state* would be classified as a sex offense.”) (emphasis added).

However, the legislature amended the law in 2010 to eliminate the comparability requirement and require registration for “[a]ny out-of-state conviction for: [a]n offense for which the person would be required to register as a sex offender while residing in the state of conviction.” Laws of 2010, ch. 267, § 1. The bill’s history indicates that the change was made in response to concerns over the time required by law enforcement to perform a “comparability” analysis under the old statute. *See* Senate Committee on Human Services & Corrections, Senate Bill Report 6414, 61<sup>st</sup> Leg. at 4 (Jan. 19., 2010) (public testimony summary that statute change “is an important fix for law enforcement because they spend a good deal of time analyzing the out-of-state offense to determine its comparability.”). Thus the pertinent question is whether this concern constitutes a “rational basis” for requiring individuals like Mr. Batson to

register when similarly situated individuals escape the burden of weekly check-ins and being labeled a dangerous “sex offender” on a state-run website. *See Morris*, 118 Wn.2d at 149 (“Does some rational basis exist for reasonably distinguishing between those within the class and those outside the class?”).

Here, the legislative concern about comparability analyses is misplaced. In Washington, a comparability analysis is performed in almost every single instance in which criminal history is considered. For example, firearm possession is prohibited for individuals convicted of a “serious offense,” RCW 9.41.040(1)(a), which in turn is defined to include certain categories of felonies “under the laws of this state or any federal or out-of-state offense *comparable* to a felony offense under the laws of this state.” RCW 9.41.010(8) (emphasis added); *see also id.* at (24) (defining “serious offense” to include certain categories of “felonies”). Similarly, prior drug and traffic offense convictions are evaluated via a comparability analysis. *See* RCW 9.94A.030(22)(c) (defining “drug offense” to include “[a]ny out-of-state conviction for an offense that *under the laws of this state* would be a felony classified as a drug offense”) (emphasis added); *id.* at (26)(b) (defining “felony traffic offense” to include “[a]ny federal or out-of-state conviction for an offense that *under the laws of this state*

would be a felony classified as a felony traffic offense.”) (emphasis added).

In criminal sentencing, a comparability analysis is performed to determine the defendant’s offender score. *See* RCW 9.94A.525(3) (“Out-of-state convictions for offenses shall be classified according to the *comparable offense definitions and sentences provided by Washington law.*”) (emphasis added). It is worth noting that a comparability analysis was performed on Mr. Batson’s criminal history during sentencing, and his 1984 Arizona conviction was found “No comp” – not comparable to a Washington offense – and thus did not increase his offender score. *See* CP 402. Far from being a complex, time-consuming, or impossible task, our state’s statutory scheme demonstrates that comparability analyses are performed in our criminal justice system on a daily basis. There is no rational basis for distinguishing between the class of individuals like Mr. Batson and the class of individuals who have engaged in legal sexual activity in Washington’s jurisdiction.

Additionally, even assuming the revised statute saves law enforcement time and thus constitutes a rational basis, classifying individuals like Mr. Batson differently bears no rational relation to this purpose. *See Morris*, 118 Wn.2d at 149 (“Does the challenged classification bear a rational relation to the purpose of the challenged

statute?"); see also *Yakima Cty. Deputy Sheriff's Ass'n v. Board of Com'rs for Yakima Cty.*, 92 Wn.2d 831, 836, 601 P.2d 936 (1979) ("More specifically, does the difference in treatment between those within and without the designated class serve the purposes intended by the legislation?"). Any gains in administrative efficiency do not justify placing the immense burden of registration on Mr. Batson and others like him. It is not rational to require Mr. Batson to appear at his local sheriff's precinct on a weekly basis, keep a daily log of his whereabouts, live in fear of vigilante justice, and suffer loss of employment and housing opportunities for the sake of saving law enforcement a bit of time. This basis is particularly irrational considering the incredible amount of time, money, and other resources that law enforcement has spent monitoring Mr. Batson and then prosecuting and incarcerating him when he falls short of adhering to the registration law's strict requirements.

In sum, this Court should hold that there is no rational basis for treating Mr. Batson differently than others who have engaged in legal sexual conduct in Washington State, and that his rights to equal protection are thus violated by the duty to register.

**5. This Court should remand with instructions to strike the \$100 DNA fee.**

The trial court imposed a \$100 DNA collection fee pursuant to RCW 43.43.7541. CP 383. However, several months after Mr. Batson was sentenced, this statute was amended to specify that this fee should not be imposed if “the state has previously collected the offender’s DNA as a result of a prior conviction.” Laws of 2018, ch. 269, § 18; RCW 43.43.7541. The supreme court recently held that this statute applies retroactively to cases that were “pending on direct review and thus not final when the amendments were enacted.” *State v. Ramirez*, 426 P.3d 714, 722 (2018).

Washington law requires that a DNA sample is taken from all individuals convicted of a felony. *See* RCW 43.43.754. Mr. Batson’s criminal history demonstrates that he was convicted of a felony in Washington in 2011, CP 402, and thus he has already given a DNA sample. Further, the present case was pending on direct review when RCW 43.43.7541 was amended. *See Ramirez*, 426 P.3d at 722. Accordingly, in the event this Court does not reverse on constitutional grounds, this Court should remand Mr. Batson’s sentence with instructions to strike the \$100 DNA fee. *See id.* at 723.

F. CONCLUSION

For the reasons stated above, this Court should reverse the conviction and dismiss.

DATED this 22nd day of October, 2018.

Respectfully submitted,

/s Jessica Wolfe

Jessica Wolfe – WSBA 52068  
Washington Appellate Project  
Attorney for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 78341-6-I
v.	)	
	)	
BENJAMIN BATSON,	)	
	)	
Appellant.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF OCTOBER, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |   |   |  |
|---|---|--|
| <input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY<br>[paoappellateunitmail@kingcounty.gov]<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | ( )<br>( )<br>( )<br>( )<br>( )<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>E-SERVICE VIA PORTAL                             |
| <input checked="" type="checkbox"/> BENJAMIN BATSON<br>(NO CURRENT ADDRESS ON FILE)<br>C/O COUNSEL FOR APPELLANT<br>WASHINGTON APPELLATE PROJECT  | ( )<br>( )<br>( )<br>( )                      | U.S. MAIL<br>HAND DELIVERY<br>RETAINED FOR<br>MAILING ONCE<br>ADDRESS OBTAINED |

SIGNED IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF OCTOBER, 2018.



X \_\_\_\_\_

**Washington Appellate Project**  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

# WASHINGTON APPELLATE PROJECT

October 22, 2018 - 4:25 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 78341-6  
**Appellate Court Case Title:** State of Washington, Respondent v. Benjamin Batson, Appellant  
**Superior Court Case Number:** 17-1-05147-7

### The following documents have been uploaded:

- 783416\_Briefs\_20181022162407D1452546\_8842.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was washapp.102218-15.pdf*

### A copy of the uploaded files will be sent to:

- paoappellateunitmail@kingcounty.gov

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Jessica Constance Wolfe - Email: jessica@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 701  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20181022162407D1452546**