

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 REPLY 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. RESPONSE TO THE STATE’S STATEMENT OF THE CASE . 1

B. ARGUMENT 2

1. The legislature unconstitutionally delegated the definition of an element of the crime of failure to register to other states, with concerning policy implications. 3

 a. RCW 9A.44.128(10)(h) is an unconstitutional delegation of the legislative power to define the elements of crimes. 3

 b. Mr. Batson’s policy argument is relevant. 7

2. In light of significant changes to the registration requirements, it is time to revisit *Ward’s* holding that registration does not violate ex post facto. 8

 a. *Enquist* and *Boyd* incorrectly held that the requirements for homeless registrants are not an affirmative disability or restraint. 10

 b. The Internet age has changed the nature of registration, dissolving privacy protections and resulting in public condemnation of registrants, a historical form of punishment. 13

 c. The advent of an online sex offender database accessible to the general public substantially promotes both retribution and deterrence. 17

 d. Sex offender registration does not prevent recidivism and is thus excessive in relation to its purpose. 20

3. The registration requirements violate double jeopardy for the same reasons they violate ex post facto. 22

4. There is no rational basis for requiring individuals who have engaged in conduct that is legal in Washington to register as sex offenders.	23
5. This Court should accept the State’s concession that the \$100 DNA fee be stricken.....	25
C. CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>ACLU of Nevada v. Masto</i> , 670 F.3d 1046, 1056 (9th Cir. 2012)	14
<i>Brower v. State</i> , 137 Wn.2d 44, 969 P.2d 42 (1998)	6
<i>Diversified Inv. Partnership v. DSHS</i> , 113 Wn.2d 19, 775 P.2d 947 (1989)	3
<i>Doe v. State</i> , 167 N.H. 382, 111 A.3d 1077 (N.H. 2015)	16, 18
<i>Does #1–5 v. Snyder</i> , 834 F.3d 696 (6th Cir. 2016)	16
<i>Green v. Georgia</i> , 882 F.3d 978 (11th Cir. 2018)	7
<i>Grisby v. Herzog</i> , 190 Wn. App. 786, 362 P.3d 763 (2015).....	10
<i>In re Arseneau</i> , 98 Wn. App. 368, 989 P.2d 1197 (1999)	22
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144, 168–69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)	passim
<i>McKune v. Lile</i> , 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) .	20
<i>People v. McKee</i> , 207 Cal. App. 4th 1325, 144 Cal. Rptr.3d 1325 (Ca. 2012)	21
<i>Peugh v. United States</i> , 569 U.S. 530, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).....	7
<i>Smith v. Doe</i> , 538 U.S. 84, 99–100, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).....	12, 20
<i>Starkey v. Oklahoma Dep’t of Corrections</i> , 305 P.3d 1004, 1023, 2013 OK 43 (Ok. 2013)	16
<i>State v. Boyd</i> , 1 Wn. App.2d 501, 522–24, 408 P.3d 362 (2017) ...	8, 10, 11
<i>State v. Coria</i> , 120 Wn.2d 156, 839 P.2d 890 (1992).....	23
<i>State v. Dougall</i> , 89 Wn.2d 118, 570 P.2d 135 (1977)	4

<i>State v. Enquist</i> , 163 Wn. App. 41, 256 P.3d 1277 (2011).....	10
<i>State v. Gamez</i> , 227 Ariz. 445, 258 P.3d 263 (Ariz. Ct. App. 2011).....	23
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714, 722 (2018).....	25
<i>State v. Ramos</i> , 149 Wn. App. 266, 202 P.3d 383 (2009)	5, 6
<i>State v. Wadsworth</i> , 139 Wn.2d 724, 991 P.2d 80 (2000).....	3, 6
<i>State v. Ward</i> , 123 Wn.2d 488, 869 P.2d 1062 (1994)	passim
<i>Wallace v. State</i> , 905 N.E.2d 371 (Ind. 2009)	18

Statutes

ARS § 13-1405	23
RCW 4.24.550	9, 13, 14
RCW 43.43.7541	25
RCW 9.94A.525.....	6
RCW 9.94A.530.....	1
RCW 9A.44.130.....	3, 9, 12
RCW 9A.44.132.....	9, 12
RCW 9A.44.142.....	12

Session Laws

Laws of 1990, ch. 3, § 116.....	21
Laws of 2018, ch. 269 § 18.....	28

Other Authorities

- Adam Liptak, “Did the Supreme Court Base a Ruling on a Myth?” N.Y. Times (Mar. 6, 2017), *available at* <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html> 23
- E.K. Drake & S. Aos, “Does sex offender registration and notification reduce crime? A systematic review of the research literature,” Washington State Institute for Public Policy (2009), *available at* <http://www.wsipp.wa.gov/ReportFile/1043>..... 24
- Elizabeth Esser-Stuart, *The Irons Are Always In the Background: The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 Tex. L. Rev. 811 (2018) 13
- Ira Mark Ellman & Tara Ellman, ‘*Frightening and High*’: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 Const. Comment. 495 (2015) 23
- King County’s “OffenderWatch,” available at http://www.communitynotification.com/cap_main.php?office=54473 (last accessed January 17, 2019)..... 10, 16
- Robert Barnowski, “Sex Offender Sentencing in Washington State: Notification Levels and Recidivism,” Washington State Institute for Public Policy (Dec. 2005), *available at* https://www.wsipp.wa.gov/ReportFile/920/Wsipp_Notification-Levels-and-Recidivism_Report.pdf 920 15
- U.S. Dep’t of Justice, Bureau of Justice Statistics, “Recidivism of Sex Offenders Released from Prison in 1994” (Nov. 2003), *available at* <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf> 23

A. RESPONSE TO THE STATE'S STATEMENT OF THE CASE

On appeal, the State should not be permitted to reference unfounded allegations in an attempt to vilify Mr. Batson. The State's briefing claims that discovery related to the underlying 1984 conviction for which Mr. Batson was required to register "alleged that Batson raped the victim multiple times throughout the day and threatened her with a gun." BOR 2. The State's brief also claims that Mr. Batson was "arrested for rape in 1988 and 1999." BOR 3. However, the only references to these allegations contained in the record are (1) an email from the prosecutor to defense counsel in Mr. Batson's 2011 case for failure to register and (2) the State's reference to this email during the bench trial for the instant case. *See* RP 101, 160; CP 179; *see also* RP 162 (defense counsel objecting to the State's injection of allegations not pled or proven); RCW 9.94A.530(2) (at sentencing, it is generally improper for a trial court to rely on information that was not admitted, acknowledged, or proved at trial or at the time of sentencing).

The record contains absolutely no proof to support these allegations. The State never produced discovery concerning the 1984 conviction or any arrest records to support the claim that Mr. Batson was arrested in 1988 or 1999. What the record does reflect is that Mr. Batson pled guilty to sexual conduct a minor who was 16 years old. *See* CP 59,

248. The record also contains evidence that the sexual conduct was consensual, that the 16-year-old's mother was dating the local sheriff in town, and that there may have been an issue of racial bias that led to criminal charges being filed. RP 166–67. The State never produced any evidence to counter this version of the facts.

By the State's own admission, Mr. Batson has not been convicted of any new sex offenses since 1984. CP 402–403. The issue before this Court remains whether Mr. Batson was unconstitutionally required to register as a sex offender despite being convicted of conduct that is not criminal in Washington.

B. ARGUMENT

Mr. Batson was convicted of a sex offense in Arizona for conduct that is legal in Washington. However, because our legislature has delegated the authority to define what conduct is registrable to other states, Mr. Batson is saddled with strident and humiliating sex offender registration requirements. These requirements include reporting in-person on a weekly basis, keeping a log of his everyday whereabouts, and the publication of his personal information in an online database. This Court should recognize that these requirements violate Mr. Batson's constitutional rights.

1. The legislature unconstitutionally delegated the definition of an element of the crime of failure to register to other states, with concerning policy implications.

- a. RCW 9A.44.128(10)(h) is an unconstitutional delegation of the legislative power to define the elements of crimes.

The legislature is constitutionally prohibited from delegating its power to define the elements of crimes. *See State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000) (“It is the function of the Legislature to define the elements of a specific crime.”). Here, the legislature has defined “sex offense,” an element of the crime of failure to register, to include “[a]ny out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction.” RCW 9A.44.128(10)(h); *see also* RCW 9A.44.130(1)(a) (requiring registration for any person convicted of a “sex offense.”) The State argues this is not an unconstitutional delegation of the definition of an element of a crime, because the statutory definition “merely condition[s] [its] operative effect on another event.” *See* BOR 7. This argument has no merit, because the statutory definition of “sex offense” is not simply conditioned on another event, but actually incorporates the present and future registration laws of other states.

The State relies on *Diversified Inv. Partnership v. DSHS*, 113 Wn.2d 19, 775 P.2d 947 (1989) in support of its argument. *See* BOR 7–8.

However, the facts of *Diversified* are dissimilar to the case at bar. *Diversified* concerned a law that made certain portions of the state statutory scheme inoperative in the event they came into conflict with federal law. *See id.* at 24–25. The supreme court held that this was not an unconstitutional delegation of authority to the federal government. *Id.* at 28, 31. In doing so, the *Diversified* court distinguished *State v. Dougall*, 89 Wn.2d 118, 570 P.2d 135 (1977), which concerned a statute’s incorporation by reference of all federally designated controlled substances. *See id.* at 120. The *Diversified* court concluded that “[c]onditioning the operative effect of a statute upon the happening of a future specified event can be distinguished from a statute which attempts to adopt future federal law. When a statute attempts to adopt future federal law, the Legislature transfers the power to render judgment on an issue to a federal legislative or administrative body.” 113 Wn.2d at 28. The *Diversified* court re-affirmed *Dougall*’s holding that the adoption of future federal law constituted an unconstitutional delegation. *See id.*

Here, the legislature has incorporated the present and future sex registration laws of other states into the definition of “sex offense,” making this case more akin to *Dougall* than *Diversified*. The State acknowledges that *Dougall* “might be relevant if RCW 9A.44.128(10)(h)

criminalized conduct that might be proscribed by Arizona in the future.”¹ BOR 8. However, this is exactly what the statute in question does: it ties the definition of a criminal element to the ever-shifting laws of other states. For example, if Arizona decided to remove Mr. Batson’s crime of conviction from its list of registrable crimes, this would eliminate his duty to register in Washington. Similarly, if Arizona then decided to re-list his crime of conviction, Mr. Batson’s duty to register in Washington would be reinstated. This is exactly the kind of delegation that *Dougall* held to be unconstitutional. *See* 89 Wn.2d at 122–123. This Court should recognize that *Dougall*’s reasoning controls.

The State also argues that Mr. Batson’s reliance on *State v. Ramos*, 149 Wn. App. 266, 202 P.3d 383 (2009) is misplaced because it concerns “the delegation of decision-making authority to other branches of state government.” BOR 9. *Ramos* concerned the legislature’s unconstitutional delegation to local sheriffs to define the element of the crime of failure to register. 149 Wn. App at 271–76. *Ramos*’ reasoning is relevant here

¹ The State also argues that *Dougall* is not on point because it “relied primarily on due process grounds not relevant here.” BOR 8. However, the *Dougall* opinion had two separate, but equally valid, holdings: (1) that the statute in question violated due process, and (2) that the statute was an unconstitutional delegation. *See* 89 Wn.2d at 120–23. The *Dougall* court’s due process holding was based on the premise that “[p]rocedural due process requires that citizens be given fair notice of conduct forbidden by a penal statute.” *Id.* at 121. The court noted that such notice was impossible given potential future changes in federal designations of controlled substances. *Id.* at 122. Contrary to the State’s assertion, this reasoning is relevant here, as Washington residents may not receive fair notice of the changing registration laws of other states. *See id.*

because the legislature has delegated a similar authority—the power to define an element of the crime of failure to register—to other states. However, as Mr. Batson acknowledged in his opening brief, while *Dougall* and *Ramos* are both instructive, the question of whether our legislature may delegate the function of defining elements of a crime to another state’s legislature is a matter of first impression. AOB 11. That does not make *Ramos*’ reasoning, as the State argues, “inapposite.” BOR 9.

Finally, the State argues that the legislature is not precluded from “the factual consideration of criminal history from other states should the legislature find it expedient to do so.” BOR 9. The State points to the example of using the federal designation of crimes as felonies in offender scoring. *See id.* (citing RCW 9.94A.525(3)). However, setting the parameters for offender scoring is not the same as defining the elements of crimes, a function the legislature is constitutionally prohibited from delegating. *See Wadsworth*, 139 Wn.2d at 734; *see also Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998) (citations omitted); *Ramos*, 149 Wn. App. at 271.

In sum, the legislature has made an unconstitutional delegation in tying the definition of “sex offense,” an element of a crime, to the laws of other states. The State’s arguments to the contrary are unpersuasive.

Accordingly, this Court should recognize that Mr. Batson’s duty to register was predicated on an unconstitutional delegation of the legislative function.

b. Mr. Batson’s policy argument is relevant.

The State argues that “Batson’s policy argument is irrelevant because a statute is not unconstitutional simply because, in his opinion, it is unwise.” BOR 10 (capitalization omitted). However, as Mr. Batson explained in his opening brief, the statute is *both* unconstitutional *and* manifests deleterious real-world effects. *See* AOB 10–17. Mr. Batson’s opening brief provided illustrations of the practical effects of the legislature’s unconstitutional delegation in order to “exemplify the rationale behind the non-delegation doctrine,” not supplant the constitutional analysis.² AOB 17. The law does not exist in a vacuum, and thus courts have repeatedly recognized that real-world consequences are an important consideration in judicial-decisionmaking. *See, e.g., Peugh v. United States*, 569 U.S. 530, 543–44, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013) (taking into account “considerable empirical evidence” of the

² The State takes issue with Mr. Batson’s citation to *Green v. Georgia*, 882 F.3d 978, 980–88 (11th Cir. 2018), which upheld a registration requirement for a “sodomy” conviction. *See* BOR 11. The State argues that this case is irrelevant in part because “[t]he other party to the sexual act in *Green* was a minor.” *Id.* However, the “other party” in *Green* was sixteen years old, the age of consent in Georgia as well as Washington. *See* 882 F.3d at 980 n.1.

real-world impacts of sentencing guidelines in determining their constitutionality). Here, the law in question is unconstitutional.³ It also permits other states to determine what is criminal in Washington, with concerning results. *See* AOB 15–17. Accordingly, this Court should reverse Mr. Batson’s conviction.

2. In light of significant changes to the registration requirements, it is time to revisit *Ward’s* holding that registration does not violate ex post facto.

The State argues that whether Washington’s sex offender registration requirements violate ex post facto “has been heavily litigated for over 20 years” and is a “settled principle of law.” BOR 15. The State relies primarily on *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994), which was decided two-and-a-half decades ago. However, as articulated in his opening brief, Mr. Batson is challenging the constitutionality of the registration requirements that have been in place since 2010. *See* AOB 19. Those requirements are significantly more burdensome, and have more severe attending consequences, than the requirements considered by the *Ward* court in 1994. *See* AOB 21–25; *see also State v. Boyd*, 1 Wn. App.2d 501, 522–24, 408 P.3d 362 (2017) (Becker, J. dissenting).

³ Mr. Batson takes no position concerning the State’s argument that this Court should only strike the unconstitutional language from the statute, *see* BOR 14, because Mr. Batson would have no duty to register under the State’s proposed revisions.

The requirements currently in place mandate that individuals lacking a “fixed residence” report in person on a weekly basis, in addition to keeping a log of their daily whereabouts. *See* RCW 9A.44.130(6)(b). Further, registrants now appear on a public database maintained by the state, which includes their photograph and home address.⁴ *See* RCW 4.24.550(5). The legislature has also increased punishments for non-registration. *See* RCW 9A.44.132(1). Due to these significant changes in the law, *Ward’s* reasoning is outdated. *See Boyd*, 1 Wn. App. at 528 (Becker, J., dissenting) (“Our statute has grown steadily harsher, especially as applied to homeless offenders. I believe it is time to reconsider the ex post facto analysis of the statute in light of the changes since *Ward*.”)

The State acknowledges that the key question in determining whether the registration requirements violate ex post facto is whether they are punitive. *See* BOR 16. The State also agrees that the *Mendoza-Martinez* factors provide the correct legal framework for assessing the punitive nature of the requirements. *Id.* at 18 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)).

⁴ *See* King County’s “OffenderWatch,” available at http://www.communitynotification.com/cap_main.php?office=54473 (last accessed January 17, 2019).

However, the State argues that the requirements are not punitive based on these factors. *Id.* at 17–34. This section will respond to the State’s arguments concerning each of those factors in turn.

- a. *Enquist* and *Boyd* incorrectly held that the requirements for homeless registrants are not an affirmative disability or restraint.

The State primarily relies on *Ward* as well as *State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011) and *State v. Boyd*, 1 Wn. App.2d 501, 408 P.3d 362 (2017) to argue that the requirements for homeless registrants do not constitute an affirmative disability or restraint. *See* BOR 19–20. As previously explained, in light of significant changes to the registration requirements, it is time to revisit *Ward*’s holding. Additionally, as a threshold matter, this Court is not bound by either *Enquist* or *Boyd*, which were wrongly decided. *See Grisby v. Herzog*, 190 Wn. App. 786, 809–810, 362 P.3d 763 (2015) (“When one of our panels concludes that a previous Court of Appeals decision used a faulty legal analysis,” the panel may decline to follow the previous opinion.)

In *Enquist*, Division II assessed whether the revised registration statutes violated ex post facto. *See* 163 Wn. App. at 45–49. In concluding that registration was not punitive, the *Enquist* court relied almost entirely on *Ward* without conducting an independent analysis of the *Mendoza-Martinez* factors. 163 Wn. App. at 49 (“for the reasons articulated in

Ward, the transient registrant requirements are not punitive”); *see also Boyd*, 1 Wn. App.2d at 510 (noting that the *Enquist* court did not independently analyze the relevant factors). Parroting *Ward*, the *Enquist* court concluded that weekly in-person registration was merely burdensome, not punitive. 163 Wn. App. at 49. However, as Mr. Batson explained in his opening brief, the registration scheme is more than a mere burden; the weekly in-person reporting requirements, daily logging, and online database constitute a significant disability and restraint and are thus punitive. AOB 21–26. *Enquist’s* lack of independent analysis should not control here.

Although this Court conducted an independent analysis of the *Mendoza-Martinez* factors in *State v. Boyd*, the opinion was a split decision with a pointed dissent. *See* 1 Wn. App.2d at 522–27 (Becker, J., dissenting). The majority determined that the requirements were not punitive because there was no evidence that they “interfered with [the appellant’s] ability to get a job, find housing, or travel.” In contrast, Mr. Batson testified in the present case to the negative impacts that the duty to register has had on his life, including homelessness, concerns about his family’s safety, and repeated incarceration. RP 171–73. In light of these facts, the *Boyd* court’s assessment that the transient registration

requirements are merely burdensome as opposed to punitive should be revisited.

The *Boyd* dissent recognized that Washington’s current registration scheme was “perhaps the most burdensome in the country,”⁵ *id.* at 525, and that “to avoid criminal prosecution, homeless registrants in Washington must continue reporting, week after week for at least 10 or 15 years, no matter what evidence they may be able to offer of rehabilitation or incapacitation.” *Id.* at 527.⁶ The dissent also recognized that “an unending cycle of imprisonment” “is the paradigmatic affirmative disability or restraint.” *Id.* at 526 (citing *Smith v. Doe*, 538 U.S. 84, 99–100, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003)). The dissent concluded that the requirements for homeless registrants constituted “punitive excess.” *Id.* at 527. In light the significant restraints the registration

⁵ A fifty-state survey of registration requirements across reveals that Washington is one of only eleven states that require weekly in-person registration for homeless individuals; only one other state has a more demanding registration law. See Elizabeth Esser-Stuart, *The Irons Are Always In the Background: The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 Tex. L. Rev. 811, 835, 856 & n. 160 (2018).

⁶ The State notes that “[a] person convicted of an out-of-state offense may petition the court to relieve them of their obligation to register” if that person has “spent fifteen consecutive years in the community without being convicted of a disqualifying offense during that time period.” BOR 5 (quoting RCW 9A.44.142(2)(c)). Mr. Batson will likely never qualify for this relief, because failure to register is a “disqualifying offense.” See RCW 9A.44.128(3); RCW 9A.44.132(1). In order to qualify for relief, Mr. Batson, who is perpetually homeless, would have to have a perfect weekly registration record for fifteen consecutive years – 780 instances of in-person registration. See RCW 9A.44.130(6)(b).

scheme has placed on Mr. Batson, this Court should revisit *Boyd* and adopt the dissent's analysis.

- b. The Internet age has changed the nature of registration, dissolving privacy protections and resulting in public condemnation of registrants, a historical form of punishment.

The State acknowledges that the key issue in analyzing whether the registration requirements are akin to historical means of punishment is “whether the factual circumstances surrounding registration have changed to the extent that *Ward* is now distinguishable.” BOR 22. As explained in Mr. Batson's opening brief, the Internet age entirely undercut the privacy safeguards cited by the *Ward* court and also converted registration into a tool for public shaming. AOB 23–28. *Ward's* analysis is outdated and thus distinguishable in light of the sweeping impact of the Internet age. The State's arguments to the contrary are auxiliary and only serve to distract from this central issue.

The State first argues that the statutory protections for privacy cited in *Ward* still exist. BOR 23 (citing RCW 4.24.550(1), (3)). While it is true these statutes remain on the books, the *Ward* court was concerned with their practical effect in 1994; namely, that “in many cases, both the registrant information and the fact of registration remain confidential.” 123 Wn.2d at 502. That is simply not true today. As Mr. Batson pointed

out in his opening brief, disclosure is now the presumption, not the exception. *See* AOB 24–25.

The State next argues that widely publicizing Mr. Batson’s personal information in an online database is necessary because he is a “high risk” to reoffend based on his offender “level.” BOR 23. The State ignores the fact that Mr. Batson would appear in the online database regardless of his offender level simply because he is homeless. *See* RCW 4.24.550(5)(a). Further, Mr. Batson testified that his offender designation was incorrectly calculated due to a clerical error. RP 172. Lastly, the Washington State Institute for Public Policy has found that an individual’s offender “level” is not an accurate reflection of their recidivism risk.⁷

The State also argues that the stigma of appearing on the registration database “results not from public display for ridicule . . . but from the dissemination of accurate information about a criminal record.” BOR 25 (quoting *ACLU of Nevada v. Masto*, 670 F.3d 1046, 1056 (9th Cir. 2012)). This is simply untrue in Mr. Batson’s case. The online database entry for Mr. Batson states that he is a “Transient Level III,” for

⁷ Robert Barnowski, “Sex Offender Sentencing in Washington State: Notification Levels and Recidivism,” Washington State Institute for Public Policy (Dec. 2005), *available at* https://www.wsipp.wa.gov/ReportFile/920/Wsipp_Notification-Levels-and-Recidivism_Report.pdf 920 (notification levels “do not classify sex offenders into groups that accurately reflect their risk for reoffending.”)

“[s]exual conduct with a minor.”⁸ The entry does not state that the minor was sixteen years of age, the legal age of consent in Washington. If Mr. Batson’s database entry included this type of “accurate information,” it might be significantly less stigmatizing.

The State also argues that Mr. Batson cannot show a “specific nexus between any harm and the internet site.” BOR 25. This is untrue. Mr. Batson specifically testified that he was forced to leave the Union Gospel Mission after “somebody found out on the internet that I was a Level 3 sex offender and then the word got around the program and all that stuff, and once again, I had to go.” RP 172.

The State next argues that the potential for abuse of the database by vigilantes is an “unsubstantiated rumor,” and notes that users of the registration database must acknowledge a warning before entering the website that the information provided is not intended for the purposes of harassment, stalking, threats. *See* BOR 26 & n.8. However, the threat of vigilante justice against registrants is more than a rumor—people have been killed. *See* AOB 25 n.7. The existence of an online warning does

⁸ *See* King County’s “OffenderWatch,” available at http://www.communitynotification.com/cap_main.php?office=54473 (last accessed January 17, 2019).

not diminish this reality or invalidate Mr. Batson's concerns about threats to his or his family's safety. *See* AOB 25.

Despite these red herring arguments, the issue remains that online databases have fundamentally altered the nature of registration in a manner not anticipated by the *Ward* court. These databases now serve to identify individuals in our community "to shame or shun." *Doe v. State*, 167 N.H. 382, 406, 111 A.3d 1077 (N.H. 2015). Accordingly, numerous courts have recognized that online registration databases embody traditional and historical means of punishment. *See* AOB at 28 (collecting cases). The State avoids this issue with collateral arguments and also fails to address the weight of authority cited in the opening brief.

The State also challenges Mr. Batson's assertion that registration is analogous to probation or parole, other historical means of punishment. BOR 26–27. In doing so, the State does not address the numerous cases Mr. Batson cites, except to argue that two of them address registration requirements that restrict where offenders can live and work. BOR 27 (citing *Does #1–5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016) and *Starkey v. Oklahoma Dep't of Corrections*, 305 P.3d 1004, 1023, 2013 OK 43 (Ok. 2013)). While these living and working restrictions were a factor in the *Snyder* and *Starkey* courts' determination that registration was similar to probation or parole, they were not the only factor. In both cases,

the in-person registration requirements were an equally important consideration. *See Synder*, 834 F.3d at 703; *Starkey*, 305 P.3d at 1022–23. Further, both cases also likened registration to public shaming, a point the State does not address. *See Synder*, 824 F.3d at 702–703; *Starkey*, 305 P.3d at 1025.

Because the State’s arguments to the contrary are collateral and unpersuasive, this Court should join the weight of authority cited in Mr. Batson’s opening brief in recognizing that registration is akin to historical means of punishment. *See AOB 27–29*.

- c. The advent of an online sex offender database accessible to the general public substantially promotes both retribution and deterrence.

The fourth *Mendoza-Martinez* factor is “whether [the law’s] operation will promote the traditional aims of punishment – retribution and deterrence.” 372 U.S. at 168. The *Ward* court acknowledged that registration was a deterrent, but concluded that this was merely a “secondary effect” to “the Legislature’s primary intent” to aid law enforcement. 123 Wn.2d at 508. However, as explained by the Supreme Court of Indiana, even assuming that the promotion of retribution and deterrence are “secondary effects” of registration laws, they are still substantial enough to weigh in favor of an overall finding of punitive effect:

It is true that to some extent the deterrent effect of the registration and notification provisions of the Act is merely incidental to its regulatory function. And we have no reason to believe the Legislature passed the Act for purposes of retribution—“vengeance for its own sake.” Nonetheless it strains credulity to suppose that the Act’s deterrent effect is not substantial, or that the Act does not promote “community condemnation of the offender,” both of which are included in the traditional aims of punishment. We conclude therefore that the fourth *Mendoza–Martinez* factor slightly favors treating the effects of the Act as punitive when applied to [the appellant].

Wallace v. State, 905 N.E.2d 371, 382 (Ind. 2009) (internal citations omitted); *see also Doe v. State*, 167 N.H. 382, 408, 111 A.3d 1077 (N.H. 2015) (quoting *Wallace*).

The registration law’s deterrent and retributive effects are even more powerful since the advent of an online database providing personal information about registrants to the general public. The *Ward* court did not have the opportunity to consider the impact of this online database in 1994. The *Boyd* court simply adopted *Ward’s* analysis, relying on the “primary effect” test without considering whether the database substantially promoted deterrence and retribution. *See* 1 Wn. App.2d at 512. Accordingly, this Court should decline to follow *Ward* or *Boyd*.

The State argues that the notification goals of Washington’s registration law date back to its initial passage, implying that an online database has not created a sea change in the public accessibility of

information about registrants. BOR 28. Mr. Batson does not dispute that the legislature contemplated some form of public notification in creating a sex offender registry, but the legislature also specified that it should occur “under limited circumstances” and only when such information was “necessary and relevant.” Laws of 1990, ch. 3, § 116.

The significant limits on disclosure was a substantial reason the *Ward* court determined that the registration requirements were not punitive in nature. *See* 123 Wn.2d at 502–504 (“[I]n many cases, both the registrant information and the fact of registration remain confidential We conclude, therefore, that registration and *limited public disclosure* does not alter the standard of punishment which existed under prior law.”) (emphasis added). In contrast here, the creation of an online database means that personal information about registrants is available to anyone with an internet connection. Accordingly, *Ward’s* reasoning actually tips in favor of finding a punitive effect. *See id.* at 502 (“[*B*]ecause the Legislature has limited the disclosure of registration information to the public, the statutory registration scheme does not impose additional punishment on registrants.”) (emphasis added).

d. Sex offender registration does not prevent recidivism and is thus excessive in relation to its purpose.

The State argues that the primary purpose of the registration law is not to reduce recidivism, but to “allow communities to better protect themselves from those sex offenders who do recidivate by ensuring information concerning their whereabouts is known.” BOR 33. This argument is circular. Allowing communities to better protect themselves from recidivism is one way of reducing recidivism. However, as argued in Mr. Batson’s opening brief, sex offender registries do little to accomplish this purpose. AOB 31–35.

The State quibbles with Mr. Batson’s assertions both that sex offenders pose a low risk of reoffense and that registries do not reduce recidivism. BOR 13–14, 30–32. The State argues that “the science of sex offender recidivism is not so settled” and “other perspectives are not difficult to find.” BOR 30–31. While other perspectives exist, Mr. Batson’s arguments are supported by the weight of academic research. *See* AOB 32–33 & n. 9–11. The State’s assertions to the contrary, on the other hand, are largely not.

For example, the State cites to *Smith v. Doe*, 538 U.S. 84, 103, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) and *McKune v. Lile*, 536 U.S. 24, 33, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) to argue that sex offenders

pose a high risk of recidivism. *See* BOR 13, 31. Both *Smith* and *McKune*'s proclamations that sex offenders posed a high risk of reoffense were based in large part on a non-academic and unsourced article in a 1986 edition of *Psychology Today* that has been widely debunked.⁹ The State also cites to a 2003 Department of Justice report finding that convicted sex offenders are four times more likely to be rearrested for a sex offense than non-sex offenders. *See* BOR 31 (quoting *People v. McKee*, 207 Cal. App. 4th 1325, 1340, 144 Cal. Rptr.3d 1325 (Ca. 2012)). This statistic is startling without context, as the same report also found an overall sex offender recidivism rate of only 3.5 percent.¹⁰

Recidivism concerns aside, the State does not provide any counter-evidence to the numerous studies cited in the opening brief concerning the ineffective nature of sex offender registries. *See* AOB 33 n.10–11. The fact remains that registries do not serve their intended purpose of reducing recidivism. *See id.*; *see also* E.K. Drake & S. Aos, “Does sex offender registration and notification reduce crime? A systematic review of the

⁹ *See, e.g.*, Ira Mark Ellman & Tara Ellman, ‘Frightening and High’: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 *Const. Comment.* 495, 497–98 (2015); Adam Liptak, “Did the Supreme Court Base a Ruling on a Myth?” *N.Y. Times* (Mar. 6, 2017), *available at* <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html>.

¹⁰ *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* AOB 32 n.8.

research literature,” Washington State Institute for Public Policy (2009), *available at* <http://www.wsipp.wa.gov/ReportFile/1043> (“Regarding specific deterrence, the weight of the evidence indicates the laws have no statistically significant effect on recidivism.”). Accordingly, this Court should conclude that this factor weighs in favor of a punitive effect.

In sum, the State’s arguments that registration does not violate ex post facto rely on outdated precedent, collateral arguments, and unsubstantiated claims. This Court should revisit the *Ward* and *Boyd* decisions in light of the significant and strident changes to the registration requirements. This Court should further recognize that the application of the *Mendoza- Martinez* factors to the present-day requirements tip in favor of a finding of punitive effect, thus violating ex post facto.

3. The registration requirements violate double jeopardy for the same reasons they violate ex post facto.

The State agrees that the *Mendoza-Martinez* framework also applies to assess whether the registration requirements violate double jeopardy. BOR 34–35. Thus, if this Court concludes that the registration requirements violate ex post facto, it should conclude that they violate double jeopardy as well. *See In re Arseneau*, 98 Wn. App. 368, 379–80, 989 P.2d 1197 (1999).

4. There is no rational basis for requiring individuals who have engaged in conduct that is legal in Washington to register as sex offenders.

The registration laws violate Mr. Batson’s right to equal protection because they are “wholly irrelevant” to achieving any “legitimate state objective.” *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). The State imagines several “rational” bases for requiring Mr. Batson and others similarly situated to register. BOR 43. However, upon further inspection, the registration requirements bear no rational relation to the State’s proposed objectives.

The State first argues that Mr. Batson is a danger to the community because “he is unwilling to abide by laws regarding the age of consent.” *Id.*; *see also id.* (“Batson had sex with a 16 year-old girl when he knew it was a felony offense.”) However, Mr. Batson was convicted of a strict liability crime, and there is nothing in the record to support the assertion that Mr. Batson knew the age of the alleged victim in his 1984 case. *See* CP 57, 59–60; *see also* ARS § 13-1405; *State v. Gamez*, 227 Ariz. 445, 451, 258 P.3d 263 (Ariz. Ct. App. 2011) (recognizing that defendant’s knowledge of the victim’s age is not an element of the crime of sexual conduct with a minor under ARS § 13-1405).

Second, the State argues that “Washington’s broad definition saves time and administrative energy in resolving comparability disputes.” BOR

43. However, as Mr. Batson articulated in the opening brief, whatever time or resources is saved by the over-inclusive nature of the registration laws is made up by the time, money, and other resources that the State has expended in monitoring, prosecuting, and incarcerating Mr. Batson and others like him. AOB 41.

Third, the State argues that it “has an interest in preventing Washington from becoming a sanctuary for sex offenders.” BOR 43. However, there is no rational basis for dissuading individuals like Mr. Batson, who have not engaged in conduct that violates Washington laws, from moving here.

Finally, the State argues that requiring individuals like Mr. Batson to register creates “an efficient, workable scheme which ensures the community is protected from all sex offenders, regardless of what state they were convicted in.” BOR 43. However, as already explained, sex offender registries do little to protect the community from recidivism. Further, even if registries did serve this purpose, it makes little sense to attempt to protect the community from individuals like Mr. Batson, who have not engaged in conduct that violates state law. In sum, this Court should conclude that there is no rational basis for requiring individuals like Mr. Batson to register as sex offenders, and that the registration requirements thus violate his right to equal protection.

5. This Court should accept the State's concession that the \$100 DNA fee be stricken.

The State concedes that the \$100 DNA fee should be stricken.

BOR 44–45. This Court should accept the State's concession. As the State acknowledges, Mr. Batson was previously required to give a DNA sample pursuant to a previous felony conviction. *See* BOR 45; *see also* CP 402. Due to recent changes in state law that the supreme court has held apply retroactively to cases pending on direct review, this fee should be removed from Mr. Batson's sentence. *See* Laws of 2018, ch. 269 § 18; RCW 43.43.7541; *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714, 722 (2018).

C. CONCLUSION

For the reasons stated above, this Court should reverse the conviction and dismiss. In the alternative, this Court should remand with instructions to strike the \$100 DNA fee.

DATED this 17th day of January, 2019.

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 17TH DAY OF JANUARY, 2019, I CAUSED THE ORIGINAL **REPLY 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"/> GAVRIEL JACOBS, DPA
[paoappellateunitmail@kingcounty.gov]
[gavriel.jacobs@kingcounty.gov]
KING COUNTY PROSECUTING ATTORNEY
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> BENJAMIN BATSON
(NO CURRENT ADDRESS ON FILE)
C/O COUNSEL FOR APPELLANT
WASHINGTON APPELLATE PROJECT | ()
()
(X) | U.S. MAIL
HAND DELIVERY
RETAINED FOR
MAILING ONCE
ADDRESS OBTAINED |

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF JANUARY, 2019.



X _____

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

WASHINGTON APPELLATE PROJECT

January 17, 2019 - 4:29 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_20190117162735D1192486_7377.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.011719-11.pdf

A copy of the uploaded files will be sent to:

- gaviel.jacobs@kingcounty.gov
- 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 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190117162735D1192486