

No. 97617-1

NO. 78341-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN BATSON,

Appellant.

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

THE HONORABLE BARBARA LINDE, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. If a person is required to register as a sex offender by another state, that individual must also register while residing in Washington, regardless of whether the underlying conviction is comparable to a Washington sex offense. Does recognizing another state's sex offender classification constitute an improper delegation of legislative authority?

2. The Washington Supreme Court held in State v. Ward that sex offender registration does not violate the ex post facto clause because it is regulatory, not punitive, in nature. Should this Court disregard Ward based on more recent changes to the registration statute?

3. For the same reasons he believes registration violates the ex post facto clause, Batson argues registration also offends the double jeopardy clause. Has Batson demonstrated the "clearest proof" that his registration requirement unconstitutionally imposes multiple punishments for the same offense?

4. Batson's Arizona convictions for sexual acts with a minor would not be registerable offenses in Washington. Batson argues that his right to equal protection of the laws is violated by nonetheless requiring him to register in this state. Is there a rational basis for mandating all out-

of-state sex offenders required to register in their home states to also register in Washington?

5. The State concedes that the \$100 DNA collection fee imposed in this case should be stricken.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Benjamin Batson with one count of failure to register as a sex offender. CP 17. Batson waived his right to a jury and submitted to a stipulated facts trial. CP 12. The court adjudicated Batson guilty as charged. The court sentenced Batson within the standard range. CP 381. Batson appeals.

2. SUBSTANTIVE FACTS

In 1984, the State of Arizona filed five charges against Batson that collectively accused him of kidnapping and raping a sixteen year old girl. CP 57-58. The discovery alleged that Batson raped the victim multiple times throughout the day and threatened her with a gun. RP 101, 160; CP 57-58. Batson ultimately pled guilty to two counts admitting to sexual acts with a minor. CP 59. Batson did not plead guilty to kidnapping or engaging in non-consensual sex. CP 64. Batson was sentenced to four and one-half years total confinement. CP 62. Under Arizona law, these convictions subject Batson to lifetime registration as a sex offender. CP 5.

Following his release, Batson was again arrested for rape in 1988 and 1999. RP 101, 160. It does not appear that either of these arrests resulted in a conviction. Between 2003 and 2007, Batson was convicted three times for failing to register as a sex offender in Florida. CP 8.¹ In 2011, Batson was convicted for failing to register as a sex offender in King County. CP 8.² Batson is classified as a level three sex offender, the highest risk for recidivism. CP 5.

When Batson re-located to Washington, the King County Sheriff's Office (KCSO) notified him of his responsibility to register on at least three separate occasions, in 2009, 2011, and 2014. CP 5. Batson registered with KCSO on July 26, 2016. CP 406. Batson subsequently failed to register between August 8, 2016 and September 25, 2017, which formed the basis for the instant prosecution. CP 406. Batson claimed that he intentionally failed to register so that he could challenge the constitutionality of his registration requirement at public expense. RP 163.

¹ The trial court excluded these convictions after ruling Batson received ineffective assistance of counsel. RP 133. This finding is not relevant to the present appeal.

² Batson was also convicted in 2014 of failing to register, but that conviction was overturned on appeal due to insufficient evidence. State v. Batson, 194 Wn. App. 326, 377 P.3d 238 (2016).

C. LEGAL ARGUMENT

1. THE 2010 AMENDMENT TO RCW 9A.44.128(10) IS NOT AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER.

If an offender is required to register in another state, he must also register while residing in Washington, regardless of whether the foreign conviction is comparable to a Washington crime. Batson contends that this represents an unconstitutional delegation of legislative power. This argument is without merit. The legislature has defined the elements of this crime; one element is the existence of an out-of-state conviction. Batson has not established that the legislature's policy decision to require registration even for those convicted of a sex offense outside of Washington is an unconstitutional delegation.

a. The Legislative Scheme In Washington.

RCW 9A.44.130(1)(a) imposes a registration requirement upon “[a]ny adult or juvenile residing whether or not the person has a fixed residence...in this state who has been found to have committed or has been convicted of any sex offense...” A person commits the crime of failing to register as a sex offender “if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.” RCW 9A.44.132.

Washington law previously defined “sex offense” in relevant part as “[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...” Former RCW 9A.44.130 (2009). The legislature broadened the definition of “sex offense” in 2010 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); Laws of 2010, ch. 267, § 1.

Upon registering, offenders must inform the state of their name, date and place of birth, predicate conviction, living arrangements, place of employment, social security number, and provide a photograph and fingerprints. RCW 9A.44.130(2). If an offender is transient, they must report in-person each week to their local sheriff and provide “an accurate accounting of where he or she stays during the week” upon request. RCW 9A.44.130(6)(b).

A person convicted of an out-of-state offense may petition the court to relieve them of their obligation to register. RCW 9A.44.142. In order to qualify for this remedy, the person must have “spent fifteen consecutive years in the community without being convicted of a disqualifying offense during that time period.” RCW 9A.44.142(2)(c).

Batson was convicted of violating ARS 13-1405 (Sexual Conduct With a Minor Under 18), a class 6 felony. CP 62. Arizona law requires Batson to register as a sex offender for life based on this conviction. ARS 13-3821(A)(4); ARS 13-3821(M). Batson does not dispute that he was thus also required to register under current Washington law. RCW 9A.44.128(10)(h).

b. RCW 9A.44.128(10)(h) Does Not Delegate Legislative Authority Simply By Recognizing Foreign Sex Offense Convictions.

The Washington constitution vests the authority to enact laws exclusively with the legislature. WASH. CONST. art. II, § 1. The legislature thus carries the responsibility of defining criminal acts, including their constituent elements. State v. Ramos, 149 Wn. App. 266, 271, 202 P.3d 383 (2009). The legislature's law-making power is constrained only by the state and federal constitutions. Brower v. State, 137 Wn.2d 44, 54, 969 P.2d 42 (1998).

Statutes are presumed constitutional. State v. Peterson, 174 Wn. App. 828, 301 P.3d 1060 (2013). A reviewing court must "make every presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose." State v. Glas, 147 Wn.2d 410, 422, 54 P.3d 147 (2002). The party challenging a statute bears the "heavy

burden” of proving the law is unconstitutional beyond a reasonable doubt. Peterson, 174 Wn. App. at 845. A statute’s presumptive constitutionality should be overcome only in “exceptional cases.” City of Seattle v. Eze, 111 Wn.2d 22, 28, 759 P.2d 366 (1988). The constitutionality of a statute is reviewed *de novo*. Id.

It is a violation of state constitutional principles for the legislature to abdicate or transfer its legislative powers to others. Brower, 137 Wn.2d at 54. But courts differentiate between statutes which delegate legislative authority and those that merely condition their operative effect on another event. Diversified Investment Partnership v. DSHS, 113 Wn.2d 19, 28, 775 P.2d 947 (1989). A statute is not an unconstitutional delegation if “the decision of what event made the legislation effective was made by the Legislature, not the third party.” Brower, 137 Wn.2d at 55. It was Washington’s legislature, not Arizona’s, which determined the circumstances under which Batson must register. The legislature has simply identified a class of foreign convictions as an event creating a registration requirement in Washington. While Batson’s participation in Washington’s registration regime may, in some sense, “arise at the discretion of others,” this does not create a legislative delegation. Diversified Inv. Partnership, 113 Wn.2d at 28.

The State acknowledges that while legislative authority may be delegated in some circumstances, e.g., State v. Simmons, 152 Wn.2d 450, 455, 98 P.3d 789 (2004), the legislature may not delegate “purely legislative functions.” Diversified Inv. Partnership, 113 Wn.2d at 24-25. Batson relies heavily on State v. Dougall, 89 Wn.2d 118, 570 P.2d 135 (1977), to support his position that an unlawful delegation occurred here. The defendant in Dougall challenged a statute that prospectively categorized any drug as a controlled substance under state law if it was later so designated by the federal government. Dougall, 89 Wn.2d at 120. Our Supreme Court struck down the statute, relying primarily on due process grounds not relevant here. Id. In a secondary holding, the Court ruled that prospectively adopting future federal rules was an impermissible delegation of legislative authority. Id. at 122-23.

Dougall might be relevant if RCW 9A.44.128(10)(h) criminalized conduct that might be proscribed by Arizona in the future. It does not. Unlike in Dougall, the definition of “sex offense” is not changeable. That a defendant has previously been convicted of a “sex offense” is a fact the State must prove at trial. WPIC 49C.02 (Failure to Register as Sex or Kidnapping Offender – Elements). RCW 9A.44.128(10)(h) simply defines this element.

Batson also relies prominently on State v. Ramos, *supra*. Ramos concerned the power of county sheriff's to assign sex offender risk classifications. Ramos, 149 Wn. App. at 269. Division Two held that Ramos' classification was an improper delegation because the legislature had not provided adequate methodology to guide the sheriff's exercise of discretion. Ramos, 149 Wn. App. at 273.³ But cases involving the delegation of decision-making authority to other branches of state government are inapposite here, where the legislature has not delegated authority at all. It has simply identified the fact of out-of-state convictions as a predicate that mandates sex offender registration.

Art. II, § 1 was meant to create a representative form of government, and to ensure the protection of the people from "centralized authority and abuses of power." See State v. Rice, 174 Wn.2d 884, 900-01, 279 P.3d 849 (2012). It does not prevent the factual consideration of criminal history from other states should the legislature find it expedient to do so. The legislature has made a similar policy decision in choosing to rely upon the federal designation of crimes as felonies for purposes of including a prior federal conviction in an offender score under the Sentencing Reform Act. RCW 9.94A.525(3). Batson has not carried his

³ The practice of having county sheriffs classify sex offenders was upheld once "adequate standards" were used. State v. Brosius, 154 Wn. App. 714, 719-20, 225 P.3d 1049 (2010).

burden of proving RCW 9A.44.128(10)(h) is unconstitutional beyond a reasonable doubt.

c. Batson's Policy Argument Is Irrelevant Because A Statute Is Not Unconstitutional Simply Because, In His Opinion, It Is Unwise. In Any Event, Sound Policy Supports The Legislature's Actions.

Batson argues that the legislature has a duty to ensure Washington's laws reflect the morals of its citizens, and that RCW 9A.44.128(10)(h) circumvents this democratic principle. But legislators are well aware of both Washington values and how they might differ from those of other states. It is not for the courts to second-guess the legislature's policy decisions.

The pre-2010 definition of "sex offense" relating to out-of-state convictions required the crime to be classified as a sex offense under Washington law. Former RCW 9A.44.130. Courts interpreting that definition required the elements of the out-of-state crime to include all of the elements of the comparable Washington offense. State v. Werneth, 147 Wn. App. 549, 554, 197 P.3d 1195 (2008); State v. Howe, 151 Wn. App. 338, 343-44, 212 P.3d 565 (2009). In two cases, courts found that sex offenses against children committed in other states did not require registration in Washington because the elements were not identical to Washington crimes. Howe, 151 Wn. App. at 348 (California conviction

for lewd acts on a child under 14); Werneth, 147 Wn. App. at 554-55 (Georgia conviction for child molestation). This led to a result contrary to legislative intent, insofar as crimes that were plainly sexual did not trigger registration.

In 2010, the legislature amended the definition of “sex offense” to close this loophole, which had allowed some dangerous sex offenders who lived in Washington to avoid registration if their conviction was in another state. The legislature added the provision that Batson challenges, mandating registration for any offense that would require registration in the state of conviction. RCW 9A.44.128(10)(h).

Batson, however, argues that the registration regime as currently written could produce results in conflict with local values. To illustrate his point, Batson identifies the plight of one Charlton Green, who was required to register as a sex offender in Georgia for “sodomy.” Green v. Georgia, 882 F.3d 978, 980-88 (11th Cir. 2018). By citing Green, Batson implies that Washington’s registration law could be applied against members of the LGBT⁴ community convicted under antiquated or homophobic foreign statutes. A closer reading of Green belies this fear. The other party to the sexual act in Green was a minor. Id. at 980.

⁴ Lesbian, gay, bisexual, or transgender.

But setting that aside, Green concerned the proper venue and procedural pathway under Georgia law for challenging that defendant's underlying conviction, which had been rendered constitutionally infirm by Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).⁵ Green, 882 F.3d at 981-87.⁶ Washington would not be required to give full faith and credit to a constitutionally unsound prior offense. State v. Gimarelli, 105 Wn. App. 370, 377, 20 P.3d 430 (2001). Thus, there is no danger that a person would be required to register for an unjust conviction. It would be unsound to base sex offender registration policy on theoretical defendants who, for whatever reason, failed to challenge predicate convictions invalidated by Lawrence.

Batson similarly complains that other states might impose registration for relatively minor offenses, like public urination. But as explained in more detail below, there are a number of rational bases for the current regulatory regime. For example, the legislature could reasonably conclude that over-inclusivity was preferable to under-

⁵ Lawrence invalidated a Texas law that criminalized sexual conduct between consenting adults of the same sex. Lawrence, 539 U.S. at 578.

⁶ For example, one of the Green Court's key findings was that: "[t]o reach the holding it did, the District Court implicitly held that the [Georgia] Court of Appeals erred by not treating Green's direct appeal also as a collateral attack on his sodomy conviction...[b]ut under Georgia law, Green's failure-to-register appeal could not also have served as a forum for the collateral attack on the sodomy conviction." Green, 882 F.3d at 988. Green had also not yet exhausted his state court remedies for invalidating his sodomy conviction. Id. at 987-88.

inclusivity. It is irrelevant to a constitutional analysis that Batson believes these are poor policy trade-offs.

Batson also cites secondary sources which allege that sex offender recidivism rates have been exaggerated. The accuracy of these studies is debatable. See, e.g., Smith v. Doe, 538 U.S. 84, 103, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (“The risk of recidivism posed by sex offenders is ‘frightening and high.’”); Doe v. Pataki, 120 F.3d 1263, 1266 (2nd Cir. 1997) (Some studies have demonstrated that...convicted sex offenders are much more likely than other offenders to commit additional sex crimes.”). Even if academic authority were strongly opposed to the State’s position, it is doubtful a constitutional problem would exist. But, as noted in greater detail below, many studies support the State’s argument. Legislators are charged with weighing the credibility of academic views on the merits of sex offender registration policy. See Rousso v. State, 170 Wn.2d 70, 88-92, 239 P.3d 1084 (2010) (“It is the role of the legislature, not the judiciary, to balance policy interests and enact law.”). Subject only to constitutional limitations, the law may be changed “at the will, or even at the whim,” of the legislature. Overlake Homes, Inc. v. Seattle-First Nat. Bank, 57 Wn.2d 881, 885, 360 P.2d 570 (1961). It is not the place of the courts to question the wisdom or appropriateness of an otherwise

constitutional statute. State v. Heiskell, 129 Wn.2d 113, 122, 916 P.3d 366 (1996); State v. Wanrow, 14 Wn. App. 115, 119, 538 P.2d 849 (1975).

d. If, *Arguendo*, The Statute Unconstitutionally Delegates Legislative Authority, This Court Should Strike Only The Particular Offending Language.

If this Court determines that the 2010 amendment to RCW 9A.44.128(10)(h) was an unlawful delegation of legislative authority, the court should strike only the following language: “an offense for which the person would be required to register as a sex offender while residing in the state of conviction; or, if not required to register in the state of conviction...” The remaining language, “an offense that under the laws of this state would be classified as a sex offense under this subsection,” should not be stricken.

Ordinarily, only the constitutionally infirm part of an enactment will be invalidated, leaving the remainder intact. In re Parentage of C.A.M.A., 154 Wn.2d 52, 67, 109 P.3d 405 (2005). The court will strike the entire statute only if the legislature would not have passed the remaining portion without the invalid part, or the elimination of the invalid part defeats the purpose of the entire statute. Id. Because the challenged provision is an amendment that adds a category of offenses to the existing law, only the addition need be stricken.

2. REQUIRING SEX OFFENDERS TO REGISTER DOES NOT VIOLATE THE PROHIBITION ON EX POST FACTO LAWS.

Batson next argues that sex offender registration violates the prohibition against ex post facto laws. This question has been heavily litigated for over 20 years. Both Washington and federal courts have repeatedly rejected Batson's position. Batson has not provided a sufficient basis to re-visit this settled principle of law.

The ex post facto clauses of the federal and state constitutions "forbid the State from enacting any law which imposes punishment for an act which was not punishable when committed or increases the quantum of punishment annexed to the crime when it was committed." State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994); WASH CONST. art. I, § 23 ("No...ex post facto law...shall ever be passed"); U.S. CONST. art. 1, § 10 ("No state shall...pass any...ex post facto law."). The ex post facto analysis is identical between the state and federal constitutions. State v. Boyd, 1 Wn. App. 2d 501, 507, 408 P.3d 362 (2017).

A law violates the ex post facto clause if: (1) the law is substantive as opposed to "merely procedural"; (2) it is retrospective, meaning it applies to events that occurred before its enactment; and (3) the law "disadvantages the person affected by it." Boyd, 1 Wn. App. 2d at 507.

Whether a law is “disadvantageous” is determined solely by reference to whether it “alters the standard of punishment which existed under prior law.” Ward, 123 Wn.2d at 498. The ex post facto clause is not offended unless all three factors of the test are found. See id. at 510-11.

The State acknowledges that the retroactivity factor is satisfied. Ward, 123 Wn.2d at 498. Beginning with Ward, Washington courts have repeatedly assumed without deciding that registration laws are substantive in nature. Id. at 499; Boyd, 1 Wn. App. 2d at 510. As in Ward and Boyd, it is unnecessary for the Court to analyze this factor because it is well settled that registration laws are not punitive. The third factor of the test cannot be met, and thus Batson’s argument fails.

a. The Legislature Intended For Sex Offender Registration To Be Regulatory, Not Punitive, In Nature.

When a retroactive statute is challenged on ex post facto grounds, the initial inquiry is to determine whether the legislature intended to create civil proceedings or criminal punishment. Smith v. Doe, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); Ward, 123 Wn.2d at 499. If the legislature intended the law as punishment, it *per se* violates the ex post facto clause. Doe, 538 U.S. at 92-93. The ex post facto clause is inoperative if a law does something other than punish. Petition of Estavillo, 69 Wn. App. 401, 403, 848 P.2d 1335 (1993). A reviewing court

first looks to whether the legislature stated its intent, either expressly or impliedly. Doe, 538 U.S. at 93.

In requiring sex offender registration, the Washington legislature made the following statement of intent:

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

1990 Wash. Legis. Serv. 3 § 401.

Our state Supreme Court expressly found the legislature's intent was to regulate, rather than punish, sex offenders. Ward, 123 Wn.2d at 499. The Ninth Circuit agreed with our Supreme Court's finding that the law was intended to be regulatory. Russell v. Gregoire, 124 F.3d 1079, 1087 (1997). Batson does not appear to challenge these findings, which must therefore be accepted by this Court.

b. The Registration Statute Is Not Punitive.

Even when a law's stated objective is regulatory, courts will still analyze the "actual effect" of the statute to determine whether it is so burdensome in fact as to negate the underlying legislative intent. Ward,

123 Wn.2d at 499. To determine if a statute is regulatory or punitive in effect, Washington courts utilize the seven-factor test promulgated by the U.S. Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963):

[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 be rationally connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned...

Ward, 123 Wn.2d at 499. Although each factor should be considered, none are individually dispositive. Hudson v. United States, 522 U.S. 93, 102, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). Rather they should be collectively regarded as “useful guideposts” to inform the court’s analysis. Doe, 538 U.S. at 97. The defense must show a punitive effect by the “clearest proof” to override the legislature’s stated intent. Russell, 124 F.3d at 1088; see In re Detention of Turay, 139 Wn.2d 379, 417, 986 P.2d 790 (1999) (in double jeopardy context).

Batson argues that his present circumstances implicate factors 1, 2, 4, and 7 of the Mendoza test.

c. The Registration Requirements For Transient Sex Offenders Are Not Punitive.

In State v. Ward, our Supreme Court held that “[r]egistration alone imposes no significant additional burdens on offenders.” Ward, 123 Wn.2d at 500. The Court reasoned that “the physical act of registration creates no affirmative disability or restraint” because sex offenders are free to move about the community however they please, so long as they meet their registration obligations. Id. at 501.

Batson argues that the registration law is punitive as applied to him because he is homeless. Thus, unlike the defendants in Ward, Batson must report in-person to the sheriff each week and provide an accounting of his whereabouts if requested. RCW 9A.44.130(6). Batson believes this burden is so great it renders the statute punitive. Batson is mistaken.

Multiple divisions of this Court have already considered and rejected Batson’s position. The defendant in State v. Enquist, 163 Wn. App. 41, 49, 256 P.3d 1277 (2011), argued that transient reporting requirements made registration punitive, and thus distinguishable from Ward. After revisiting Ward’s analysis, Division Two nonetheless determined that “transient registration requirements are not punitive.” Id.

Rather, the duty to report weekly was merely inconvenient, and inconvenience alone does not equal punishment. Id.⁷

The defendant in Boyd, 1 Wn. App. 2d at 510-11, urged this Court to disagree with Enquist and find that transient reporting requirements violate the ex post facto clause. This Court declined, noting that “[w]hile we agree that the requirement for weekly, in person registration is more burdensome than the Supreme Court considered in Ward, we disagree that the registration requirements violate the ex post facto clause.” Id. This Court should adhere to its recent opinion in Boyd.

Batson also argues that because the criminal sanctions for non-compliance have increased over time, the nature of the underlying requirement is now punitive. But regardless of the sanction, the triggering act remains the same: failing to register. Batson does not explain how a harsher punishment for failing to register can be considered a burden in and of itself when it does not heighten the underlying requirement. This Court should find that a potential sanction for future non-compliance does not constitute a present restraint.

⁷ The state Supreme Court later denied Enquist’s petition for review. State v. Enquist, 173 Wn.2d 1008, 268 P.3d 941 (2012).

d. Public Disclosure Of Information About Sex Offenders Does Not Render The Statute Punitive.

The legislature's intent in creating a system of public notification was to protect the community, not punish the offender:

The legislature finds that sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is a paramount governmental interest. The legislature further finds that the penal and mental health components of our justice system are largely hidden from public view and that lack of information from either may result in failure of both systems to meet this paramount concern of public safety. Overly restrictive confidentiality and liability laws governing the release of information about sexual predators have reduced willingness to release information that could be appropriately released under the public disclosure laws, and have increased risks to public safety. Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. Release of information about sexual predators to public agencies and under limited circumstances, the general public, will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.

1990 Wash. Legis. Serv. 3 § 116. Batson does not appear to contest that the legislature's intent was regulatory, but again challenges the practical effect of the notification law.

Ward considered whether the release of identifying information about sex offenders rendered registration punitive. Ward, 123 Wn.2d at 501-02. The Court noted that "a public agency must have some evidence

of an offender's future dangerousness, likelihood of re-offense, or threat to the community, to justify disclosure to the public in a given case." Id. at 502. The Court held that Washington's statutory framework was not punitive because disclosure was limited to information relevant to legitimate public safety concerns. Id. at 501-02. The federal courts agreed with this assessment. Russell, 124 F.3d at 1090.

Batson asks this Court to reconsider Ward because the internet was in its infancy when the opinion was reasoned. The State has since begun publishing a searchable database of high risk sex offenders online. Batson believes that this increased public access to offender data is punitive. In a related argument, Batson claims that registration is punitive because it exposes him to "public shaming." Whether Ward should be overruled is not, of course, a question for this Court. This Court's analysis must be limited to whether the factual circumstances surrounding registration have changed to the extent that Ward is now distinguishable.

As an initial matter, this Court has previously rejected Batson's position in a detailed, albeit unpublished, opinion. State v. Smith, 183 Wn. App. 1001, 2014 WL 4067873 (2014 Unpublished Opinion). Smith's complaint was nearly identical to Batson's, focusing on the emergence of the internet since Ward, and in particular the amount of personal information available on the sex offender website. Id. at 4. Nonetheless,

the Smith Court was “not convinced the result under Ward should be any different in this case.” Id. at 8.

Batson argues Ward is now inapposite because its reasoning cited “significant limits” on public disclosure found in the statute. Ward, 123 Wn.2d at 502. But the statutory protections cited in Ward still exist. RCW 4.24.550(1) authorizes public agencies to release sex offender information when “that disclosure...is relevant and necessary to protect the public and counteract the danger created by the particular offender.” The statute provides detailed guidance for “determining the extent of a public disclosure” based on community risk. RCW 4.24.550(3). RCW 4.24.550(5) authorizes publication of offender information on a website, but limits internet disclosure to higher risk level II and III offenders, as well as lower level offenders who are either transient or non-compliant.

Batson is a level III sex offender, meaning he “is at a high risk to sexually reoffend within the community at large.” RCW 4.24.550(6)(b); CP 5. Batson implies he is a low-risk since his underlying conduct of conviction would not be criminal in Washington. Needless to say, it would be poor public policy to allow sex offenders to determine their own risk levels. The legislature has found that disclosure of Batson’s information is necessary to protect the general public. This finding is consistent with the reasoning of Ward.

This conclusion is supported by the U.S. Supreme Court's reasoning in Smith v. Doe, which also analyzed a registration regime that published offender data on the internet. Doe, 538 U.S. at 99. As the Doe Court noted:

The State's web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.

...

Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State [via the internet] was not so excessive a regulatory requirement as to become a punishment.

Doe, 538 U.S. at 99, 105.

On appeal, Batson complains that the online registry has caused him to be fired in the past. This is an inaccurate statement of the trial record. Batson cites to the following exchange with the trial court:

[The Court]: How did having to register make your life difficult?

[Batson]: Well, I have never registered – well, the Florida things that had changed. First of all, when I went [to Florida] I was homeless. And you know, the jobs that I got there, I can tell you that – you know, they were like mostly at restaurants and things like that. There were a few construction jobs in there, and as soon as they would find out that you know, my status as a sex offender,

I was gone. And you know, I went from places like to Popeye's to Kentucky Fried Chicken and Pic-a-Dilly's and places like that, and even tried a few places with day labor, but each time the information came out I found myself back out on the streets...

There was times when – I remember when I worked for a Florida (indiscernible), a grass company, had an opportunity probably to be a foreman in that place. But once again, that came up and I ended up out in the streets way out in the back woods country in Florida.

RP 168-69; Brief of App. at 25.

Batson never specifically claimed that an online registry, certainly not Washington's online registry, was the reason he was fired. He simply stated that information about his past came to light somehow. If the information was going to be exposed in any event, Batson cannot show a specific nexus between any harm and the internet site. As in Doe, “[t]he record in this case contains no evidence that the Act has led to substantial occupational...disadvantages...that would not have otherwise occurred through the use of routine background checks by employers...” Doe, 538 U.S. at 100.

Furthermore, any stigma experienced by Batson “results not from public display for ridicule...but from the dissemination of accurate information about a criminal record, most of which is already public.” ACLU of Nevada v. Masto, 670 F.3d 1046, 1056 (9th Cir. 2012) (quoting Doe, 538 U.S. at 98). Public notification is necessary to the purpose of sex

offender laws; the registry does not perform its function if nobody knows about it or it is too burdensome to access. See Doe, 538 U.S. at 90.

Batson claims he does not reside with his family out of concern for their safety because he “heard rumors about...sex offenders being shot and stuff like that.” RP 171. But an unsubstantiated rumor in the community does not make a regulatory statute punitive. Nor is the potential for unlawful action by private citizens punishment.⁸ Russell, 124 F.3d at 1092 (“But our inquiry into the law’s effects cannot consider the possible ‘vigilante’ or illegal responses of citizens to notifications.”).

Batson next argues that registration is punitive because it is similar to probation or parole. The analogy is misplaced. Probation is a criminal punishment imposed following conviction. State v. Reichert, 158 Wn. App. 374, 386, 242 P.3d 44 (2010). A person on probation or parole is still serving their sentence, albeit outside of prison. January v. Porter, 75 Wn.2d 768, 776, 453 P.2d 876 (1969).

Registration is not punishment, but a set of public safety regulations. Unlike a parolee, registered sex offenders can move and work

⁸ The State notes that in order to use the registry website, a citizen must affirmatively acknowledge that “[t]he information on this website has not been made available for the user or any other person to harass or threaten offenders...harassment, stalking, or threats against offenders or their families are prohibited and doing so may violate Washington State laws.” King County Community Notification, http://sheriffalerts.com/cap_office_disclaimer.php?office=54473&fwd=aHR0cDovL3d3dy5jb21tdW5pdHlub3RpZmljYXRpb24uY29tL2NhcF9tYWluLnBocD9vZmZpY2U9NTQ0NzM= (accessed 11/16/2018).

freely wherever they choose, and are unsupervised so long as they notify the authorities of their whereabouts. Doe, 538 U.S. at 101-02. Any criminal prosecution for failing to register is distinct from the original offense. Id. The purpose of the reporting requirement is not to control the offender's lifestyle, but only to ensure the registry is accurate.

Furthermore, some of the registration laws compared to probation in Batson's foreign authority are dissimilar to Washington law. For example, the statutes at issue in Does #1-5 v. Snyder, 834 F.3d 696, 703 (6th Cir. 2016), and Starkey v. Oklahoma Dept. of Corrections, 305 P.3d 1004, 1023, 2013 OK 43 (Ok. 2013), imposed restrictions on where sex offenders can live and work. Washington's registration law does not. RCW 9A.44.130.

Finally, Batson analogizes his circumstances to the fictional persecution of Hester Prynne, the protagonist from "The Scarlet Letter." Even setting aside the differences between a Puritan-era adulterer and a modern child predator like Batson, the analogy is flawed. The sanction from Nathaniel Hawthorne's novel was intended only to humiliate and ostracize. The registry is more historically analogous to "wanted" posters – documents whose primary goal was to inform the public, not punish the offender. Russell, 124 F.3d at 1092. In Batson's case, the registration requirement is intended to protect the community. Id. That registration

may have a deleterious impact on Batson's life does not change the nature or overall effect of the law.

e. Registration Laws Do Not Promote Traditional Aims Of Punishment.

Our Supreme Court in Ward found that the primary intent of sex offender registration was to aid police in protecting their communities, and that deterrence was, at most, "a secondary effect." Ward, 123 Wn.2d at 508. Batson believes that the publication of sex offender information on a website changed the nature of the statutory scheme from being a "registration law" to a "notification law," and thus rendered the entire legal framework punitive.

Batson's distinction is curious considering that while the sex offender website post-dates Ward, the notification goals of Washington's registration law does not. Public notification was contemplated in some form upon initial passage. 1990 Wash. Legis. Serv. 3 § 116.

In any event, this Court recently addressed Batson's argument in Boyd, *supra*, where the defendant urged this Court to revisit Ward's analysis because that decision predated alleged "deterrent and retributive effects of online community notification." Boyd, 1 Wn. App. 2d at 512. This Court disagreed, finding that the website did not appreciably impact Ward's bearing on this issue. Id. Like the defendant in Boyd, Batson

cannot show that the “primary effect of the registration requirement is to shame the offender or that he is shamed by registering.” Id.

Finally, the results in Boyd and Ward are consistent with U.S. Supreme Court precedent. The Alaska law considered in Smith v. Doe also involved an internet site where the public could access information about sex offenders. Doe, 538 U.S. at 90. While acknowledging that such publicity may cause personal embarrassment, the Court upheld the use of an internet site as part of a notification regime:

The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principle effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.

Id. The Court also noted that, while registration may have a deterrent effect, so do many other regulatory programs. Id. at 102. “To hold that the mere presence of a deterrent purpose renders such sanctions ‘criminal’ ... would severely undermine the government’s ability to engage in effective regulation.” Id. (quoting Hudson, 522 U.S. at 105).

This Court should adhere to its prior position in Boyd and the Supreme Court’s reasoning in Doe. While plainly internet notification can

have adverse effects on an offender's life, this remains a collateral consequence of the State's legitimate interest in informing citizens about the dangers posed by sex offenders in the community.

f. Sex Offender Registration Is Not Excessive In Relation To Its Purpose.

Our Supreme Court in Ward previously addressed this factor and “conclude[d] the registration statute is not excessive in relation to its purpose.” Ward, 123 Wn.2d at 508-09. The Court rejected arguments that registration was excessive because it would cause registrants to be the focus of every sex crime investigation, or that it constituted a “badge of infamy.” Id. Instead, the Court found that the legislature had properly used its “broad discretion” to determine “that public interest demands that law enforcement agencies have relevant and necessary information about sex offenders residing in their communities.” Id.

Batson urges this Court to subvert Ward on the basis of secondary authority purporting to show that registration does not reduce sex offender recidivism, which Batson argues was “the predominant purpose of the law.” Brief of App. at 32. Batson's argument is flawed in several respects.

First, the science of sex offender recidivism is not so settled as Batson states. While Batson cites studies suggesting the recidivism rate of

sex offenders is low, other perspectives are not difficult to find. For

example:

In a 1989 report, the DOJ reviewed the rates of recidivism of prisoners released in 11 states...in 1982 for the three-year period following their release...[T]hat report concluded sex offenders generally reoffended at a higher rate than homicide offenders, but less often than property crime offenders. Released rapists were 10.5 times more likely to have a subsequent arrest for rape than nonrapists. Also, prisoners released for other sexual assaults were 7.5 times more likely to be arrested for a subsequent sexual assault than prisoners released for offenses other than sexual assaults. In a 2003 report, the DOJ reviewed the rates of recidivism of sex offenders released from prisons in 15 states...in 1994 for the three-year period following their release. That report concluded released sex offenders were four times more likely to be rearrested for a sex offense than nonsex offenders.

...

Referring to a 2009 report of the Massachusetts Department of Corrections regarding the recidivism rates of inmates released in 2002 [Dr. David Thornton, treatment director for the Wisconsin SVP program] testified that sex offenders have a higher rate of sexual recidivism than nonsex offenders...sex offenders had a 5.76 percent recidivism rate for a sex crime, making released sex offenders about 19 times more likely to commit a sex crime [than nonsex offenders].

People v. McKee, 207 Cal App. 4th 1325, 1340, 144 Cal. Rptr.3d 1325

(Ca. 2012); McKune v. Lile, 536 U.S. 24, 33, 122 S. Ct. 2017, 153 L. Ed.

2d 47 (2002) (When convicted sex offenders reenter society, they are

much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”).

Most sex offender recidivism does not occur immediately following release, but years, or even decades, later. Doe, 538 U.S. at 104

(quoting National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, *Child Sexual Molestation: Research Issues* 14 (1997)). Thus, studies using follow-up periods of less than five years may show artificially low recidivism rates. Department of Justice, Sex Offender Management Assessment and Planning Initiative, Chapter 5: Adult Sex Offender Recidivism, Summary (https://smart.gov/SOMAPI/sec1/ch5_recidivism.html) (last accessed 11/25/2018). But some studies show that up to twenty-four percent of sex offenders have recidivated within fifteen years of release. Id. Those studies relying on shorter follow up periods “may mislabel a considerable proportion of repeat offenders as nonrecidivists, resulting in a significant underestimation of the absolute risk to public safety that sex offenders pose.” Id.

Furthermore, studies show that up to 86 percent of sex crimes against children may go unreported. Belleau v. Wall, 811 F.3d 929, 933 (7th Cir. 2016). Because sex offenses are often not reported, “researchers widely agree that observed recidivism rates are underestimates of the true re-offense rates of sex offenders.” People v. Pepitone, 2018 IL 122034, n.3 106 N.E.3d 984 (Illinois 2018).⁹

⁹ Quoting Sex Offender Management Assessment and Planning Initiative, Chris Lobanov-Rostovsky & Roger Przybylki, eds., Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, & Tracking 91 (2014).

Batson also fails to consider that sex offense recidivism is much more harmful to society than property crime recidivism, and thus direct numerical correlations are unpersuasive. See McKee, 207 Cal App. 4th at 1342. Victims of sex offenses suffer a unique and lasting trauma categorically different from that experienced by victims of most non-sex crimes. Id.; see Doe, 120 F.3d at 1266 (studies show that molested children are more likely to develop psychological problems and later be abusive themselves). The level of one's desire to mitigate harm is influenced by the severity of the harm *and* its likelihood. The State has a heightened responsibility to protect its residents from this class of offender. Citizens should rightly "ask themselves whether they should worry that there are people in their community who have 'only' a 16 percent or an 8 percent probability of molesting young children – bearing in mind the lifelong psychological scars that such molestation frequently inflicts." Belleau, 811 F.3d at 933-34.

Batson is also incorrect that the primary purpose of the law is to reduce recidivism. While reduced recidivism is a welcomed secondary benefit of registration, the primary purpose is to allow communities to better protect themselves from those sex offenders who do recidivate by ensuring information concerning their whereabouts is known. 1990 Wash.

Legis. Serv. 3 § 401. Batson has not provided good cause for this Court to countermand the binding principles from Ward.

3. SEX OFFENDER REGISTRATION REQUIREMENTS DO NOT VIOLATE DOUBLE JEOPARDY.

Both the U.S. and Washington constitutions provide protection against double jeopardy. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. Double jeopardy is violated if the State imposes “multiple punishments for the same offense.” State v. Land, 172 Wn. App. 593, 598, 295 P.3d 782 (2013).

Multiple courts have previously found that sex offender registration schemes, at least generally speaking, do not violate the double jeopardy clause. State v. Munds, 83 Wn. App. 489, 496, 922 P.2d 215 (1996) (interpreting State v. Ward as barring double jeopardy challenge to registration); ACLU of Nevada, 670 F.3d at 1058 (in context of Nevada statute); Cutshall v. Sundquist, 193 F.3d 466, 472-77 (6th Cir. 1999); Artway v. Attorney General of State of N.J., 81 F.3d 1235, 1267 (3rd Cir. 1996).

Only punitive actions implicate double jeopardy. See State v. Medina, 180 Wn.2d 282, 293, 324 P.3d 682 (2014). Sanctions that are remedial and civil in nature do not. Hudson, 522 U.S. at 99. As Batson notes, the test for whether a sanction is civil or criminal for double

jeopardy purposes is essentially identical to the ex post facto test described above. Id. at 99-100. The Court first determines whether the legislature intended an action to be civil or criminal in nature. Id. at 99. If a civil penalty was intended, the Court next uses the Mendoza factors to determine whether the action is punitive in effect. Id. at 99-100; In re Detention of Turay, 139 Wn.2d 379, 416, 986 P.2d 790 (1999).

Given that the ex post facto and double jeopardy analyses are identical, it is unnecessary to address the Mendoza factors again.¹⁰ See In re Pers. Restraint of Metcalf, 92 Wn. App. 165, 177, 963 P.2d 911 (1998) (analyzing ex post facto and double jeopardy claims together); Russell, 124 F.3d at n.6. For the same reasons expressed above, registration is a civil regulatory action, not a punitive criminal one. Batson has not shown the “clearest proof” that Washington’s registration framework violates the double jeopardy clause. ACLU of Nevada, 670 F.3d at 1058.

¹⁰ Batson’s double jeopardy challenge does not address any of the Mendoza factors not already discussed in his ex post facto argument.

4. WASHINGTON'S SEX OFFENDER REGISTRATION LAW DOES NOT VIOLATE EQUAL PROTECTION.

The 14th Amendment to the U.S. constitution and article I, § 12 of the Washington constitution each “require similar treatment under the law for similarly situated persons.” Ward, 123 Wn.2d at 515. The state and federal equal protection clauses are construed identically. State v. Jagger, 149 Wn. App. 525, 531, 204 P.3d 267 (2009). Equal protection challenges are evaluated using one of three analytical frameworks: rational basis, intermediate scrutiny, or strict scrutiny. State v. Coria, 120 Wn.2d 156, 169-70, 839 P.2d 890 (1992).

Rational basis review is appropriate where an issue does not implicate a suspect class or fundamental right. State v. Mathers, 193 Wn. App. 913, 925, 376 P.3d 1163 (2016). Our Supreme Court has previously found that sex offenders are not a suspect class, and that sex offenders’ “[l]iberty interests alone are not sufficient to subject a statute to strict scrutiny.” Ward, 123 Wn.2d at 516. Batson’s argument addresses only the rational basis test, and thus appears to concede that it provides the appropriate analytical framework. There is accordingly no need to address whether any heightened scrutiny standard applies. State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (“[T]his court will not review

issues for which inadequate argument has been briefed or only passing treatment has been made.”).

Under the rational basis test, the validity of a statute will be upheld “unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.” Coria, 120 Wn.2d at 171 (quoting Omega Nat’l Ins. Co. v. Marquardt, 115 Wn.2d 416, 431, 799 P.2d 235 (1990)). It is not relevant that a reviewing court believes a more preferable method of furthering the State’s objective exists. Heller v. Doe by Doe, 509 U.S. 312, 330, 113 S. Ct. 2367, 125 L. Ed. 2d 257 (1993). Even “rational speculation unsupported by evidence or empirical data” is sufficient, as the legislature “has no obligation to produce evidence to sustain the rationality of a statutory classification.” Id. at 320.

Washington courts have promulgated the following factors to analyze equal protection challenges under the rational basis standard:

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation.”

State v. Langstead, 155 Wn. App. 448, 454, 228 P.3d 799 (2010).

Rational basis review is “highly deferential” to the legislature. In re Detention of Thorell, 149 Wn.2d 724, 749, 72 P.3d 708 (2003). The party challenging the statute must show that the law’s classifications are

“purely arbitrary.” Coria, 120 Wn.2d at 172. In order to carry this burden, the challenger must “negative every conceivable basis which might support” the statute. Heller, 509 U.S. at 320. It is not enough simply to show that a law in practice can produce “some inequality.” Id.

Batson argues he is treated differently than other adults who have sex with 16 year old children because it is not registerable conduct in Washington. He also suggests the legislature discarded the former statutory comparability analysis only because it was cumbersome and time-consuming for law enforcement. Brief of App. at 38. Batson believes this was not a rational basis, and thus the amended statute is unconstitutional.

Batson’s claim that the amendment was intended to ease the administrative burden on law enforcement derives from the Senate Bill Report for SB 6414. However, the portion quoted by Batson is from a “Staff Summary of Public Testimony.” It seems dubious to assume that a summary of public testimony is a clear statement of legislative intent.

But even assuming, *arguendo*, that this was the legislature’s sole intent, it would constitute a rational basis. The State has a reasonable interest in simplifying the enforcement process for police officers who are not lawyers and for whom it would be burdensome to make complicated legal judgments. This interest in simplicity also serves defendants who

must understand and comply with the law. The fact that courts may undertake comparability analyses with some frequency is of no moment – the interest of the passage was to simplify the process for laypeople. And, even for lawyers, comparability can be a complex task requiring time consuming legal and factual analysis.

But the more fundamental problem with Batson’s argument is that he has misapplied the rational basis test. It is not sufficient to dispute one statement of legislative purpose. Batson must negate “every *conceivable basis* which *might* support the legislation.” King County Dept. of Adult and Juvenile Detention v. Parmelee, 162 Wn. App. 337, 359, 254 P.3d 927 (2011) (emphasis added). The court must consider even hypothetical bases for the statute in addition to the legislature’s stated goals. See F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313-15, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993) (“...it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature”). If there are “plausible reasons” for the legislature’s actions, Batson’s argument fails. Id. at 313-14.

While it does not appear that Washington courts have considered this precise question, the courts of several sister states have. In State v. Lowery, 230 Ariz. 536, 287 P.3d 830 (AZ 2012), the defendant had been convicted of an offense in Michigan that required registration under the

laws of that state. Id. at 538. Lowery subsequently moved to Arizona, where he was arrested for failing to register. Id. Similar to the facts at bar, Lowery had not been required to register in Arizona until a change in the law discarded that state's comparability analysis. Id. at 541-42. Noting that his Michigan conduct would not constitute a registrable offense in Arizona, Lowery challenged his conviction on equal protection grounds. Id. at 540-41.

The Arizona Court of Appeals rejected Lowery's argument, finding that "[r]equiring those who must register in another jurisdiction to register in Arizona is rationally related to the state's legitimate interest in protecting its communities by ensuring its registration scheme is not under-inclusive." Id. at 542. The Washington legislature could rationally have been motivated by the same concerns. For constitutional purposes, it is irrelevant whether or not this was in fact what motivated the 2010 amendment. Parmelee, 162 Wn. App. at 359.

New York also addressed this issue in People v. McGarghan, 18 Misc.3d 811, 852 N.Y.S.2d 615 (NY 2007) (aff'd by People v. McGarghan, 83 A.D.3d. 422, 920 N.Y.S.2d 329 (2011)). The defendant in McGarghan argued he should not have to register in New York because his predicate Vermont conviction did not equate to a registrable New York offense. Id. at 812. McGarghan argued equal protection was violated

because New York law treated residents from various states differently. Id. at 814.

The court rejected McGarghan's argument, finding that New York had a legitimate interest in requiring offenders to register if so mandated by their state of conviction. Id. The McGarghan Court reasoned that if it were otherwise "an offender could avoid...registration requirements simply by moving his state of residence, thereby frustrating the purpose behind sex offender registration laws." Id.

The court also noted that McGarghan's underlying premise was flawed because New York did not provide disparate treatment to similarly situated offenders. As the court explained:

[T]he analysis is therefore not whether a Vermont resident who commits a crime in Vermont and then establishes residence in New York would be treated differently than a New York resident who commits that same crime in New York. Rather, it is whether a Vermont resident who commits a crime in Vermont and then establishes residence in New York would be treated differently than a New York resident who commits the same crime in Vermont.

Id. at 815; People v. Hoyos-Sanchez, 147 A.D.3d 701, 702, 48 N.Y.S.3d 138 (2017) (same analysis).

The analysis of the New York courts can be persuasively applied to Batson. Comparing someone who commits a crime in Washington to someone who commits a crime in Arizona is a false equivalency. The true

question for equal protection is whether two individuals who each committed the same conduct in Arizona before moving to Washington are treated the same. Because these two hypothetical offenders would be treated identically, Batson's equal protection claim fails.

Several other state courts have reached similar conclusions. Hendrix v. Taylor, 353 S.C. 542, 549-52, 579 S.E.2d 320 (South Carolina 2003) (Defendant's conduct in Colorado would not require registration in South Carolina. Registration requirement was nonetheless appropriate in part "because *all* persons who must register under the Act are subject to uniform administrative and legal procedures regardless of which sexual offense they commit"); Bunch v. Britton, 802 S.E.2d 462, 466 (North Carolina 2017) (Defendant committed sex offense in Michigan that would not be a crime in North Carolina. Defendant could nonetheless be required to register in North Carolina because the State had treated Bunch identically to any other individual with a final conviction from another state that required them to register in that jurisdiction).

It is clear that a rational basis exists to classify Batson as a sex offender under Washington law. First, the legislation applies to all persons similarly situated to Batson. Any person convicted of the same crime in Arizona who then moved to Washington would be required to register. And, unlike a person who committed the same conduct in Washington,

Batson had sex with a 16 year-old girl when he knew it was a felony offense.

There are numerous reasons why Washington might have a rational interest in giving comity to the classification of another state. Batson's Arizona conviction signals that he is unwilling to abide by laws regarding the age of consent, and thus constitutes a danger to the community. Washington's broad definition saves time and administrative energy in resolving comparability disputes. The State has an interest in preventing Washington from becoming a sanctuary for sex offenders looking for a state where they do not have to register due to a lack of comparability. RCW 9A.44.128(10)(h) ensures that Washington's sex offender registration is not under-inclusive, meaning that no dangerous sex offenders will "fall through the cracks" due to technical comparability issues, as was the case in Howe and Werneth, *supra*. Even if these reasons were not fair as applied to Batson, the fact that unequal results may occur does not render a statute "purely arbitrary." Heller, 509 U.S. at 320.

All these bases bear a rational relationship to the purpose of sex offender registration: to create an efficient, workable scheme which ensures the community is protected from all sex offenders, regardless of what state they were convicted in. 1990 Wash. Legis. Serv. 3 § 401. Batson's equal protection argument fails.

5. THE STATE CONCEDES THAT THE \$100 DNA FEE SHOULD BE STRICKEN.

Batson appeals the imposition of a \$100 DNA-collection fee in the judgment and sentence, asserting that a DNA sample was previously submitted to the state as a result of a prior conviction. A legislative amendment to RCW 43.43.7541, which took effect June 7, 2018, requires imposition of the DNA-collection fee “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” The amendment applies to defendants whose appeals were pending — i.e., their cases were not yet final — when the amendment was enacted. State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714 (Sept. 20, 2018).

However, claims of error on direct appeal must be supported by the existing record on review. See RAP 9.1. A claim of error based on a factual assertion that the defendant previously submitted a DNA sample necessarily fails on direct appeal if there is nothing in the record to show the defendant actually submitted a DNA sample previously. See State v. Lewis, 194 Wn. App. 709, 721, 379 P.3d 129, review denied, 186 Wn.2d 1025, 385 P.3d 118 (2016); State v. Thornton, 188 Wn. App. 371, 374, 353 P.3d 642 (2015). The fact of a prior conviction alone is not enough to show actual submission of a DNA sample. Lewis, 194 Wn. App. at 720-21; Thornton, 188 Wn. App. at 374.

Nevertheless, in the interest of expediting the recent large volume of DNA-fee claims following Ramirez, the State will request remand for a ministerial order striking the \$100 DNA-collection fee when the State's records show the appellant submitted a DNA sample to the State prior to sentencing in the case currently under review. This approach is designed to preserve judicial resources and avoid costly and time-consuming hearings on remand to the superior court when DNA already has been collected. It makes no sense that taxpayers should fund the appointment of new counsel and a superior-court hearing on remand when the fee should not have been imposed. However, in cases where the State's records show the appellant had *not* previously submitted a sample, the State will not concede error but will rely on Lewis and Thornton.

In this case, the State's records show that this appellant's DNA was previously collected prior to sentencing and is on file with the Washington State Patrol Crime Lab. The State respectfully asks this Court to remand this case to the superior court for a ministerial order striking the \$100 DNA fee. See State v. Ramos, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (when hearing on remand involves only ministerial correction and no discretion, defendant has no constitutional right to be present).

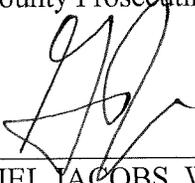
D. CONCLUSION

The State respectfully requests this Court affirm Batson's conviction for failing to register as a sex offender.

DATED this 14 day of December, 2018.

Respectfully submitted,

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