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SUPREME COURT NO. 97617-1
COURT OF APPEALS NO. 78341-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BENJAMIN BATSON,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court review the published decision of the Court of Appeals in State v. Batson, No. 78341-6-I (August 12, 2019), a copy of which is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Benjamin Batson was convicted in Arizona of sexual conduct with a minor under 18, a felony.¹ As a consequence of this conviction, Arizona law requires Batson to register as a sex offender.² Batson's Arizona conviction is not comparable to any Washington offense. However, the Washington registration statute applies to Batson because it requires a person to register while residing in this state if obligated to do so in their state of conviction. Is this statutory scheme constitutional when the Washington legislature has defined every element of failing to register, and Arizona law merely controls when the registration requirement becomes operative for some individuals?

C. STATEMENT OF THE CASE

In 1984, the State of Arizona filed five charges against Batson that collectively accused him of kidnapping and forcibly raping a sixteen year-

¹ ARS 13-1405.

² ARS 13-3821(A)(4); ARS 13-3821(M).

old girl. CP 57-58; RP 101, 160. Batson ultimately pled guilty to committing sexual acts with a minor, and was sentenced to four and one-half years confinement. CP 59, 62. Under Arizona law, Batson's convictions subject him to lifetime registration as a sex offender. CP 5. Following his release, Batson was again arrested for rape in 1988 and 1999, but neither arrest resulted in a conviction. RP 101, 160. Between 2003 and 2007, Batson was convicted three times for failing to register as a sex offender in Florida.³ CP 8.

Batson eventually relocated to Washington. Washington imposes a registration requirement upon "[a]ny adult or juvenile residing...in this state who has been found to have committed or has been convicted of any sex offense..." RCW 9A.44.130(1)(a). 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" as, *inter alia*, "[a]ny federal or out-of-state conviction for an offense that under the laws

³ The trial court below excluded these convictions after finding that Batson received ineffective assistance of counsel. RP 133. This ruling is not relevant to the present petition.

of this state would be classified as a sex offense...” Former RCW 9A.44.130 (2009). 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; Werneth, 147 Wn. App. at 554-55.

Werneth and Howe created a result contrary to legislative intent, as crimes that were plainly both sexual and predatory in nature did not trigger registration. In 2010, the legislature amended the statute to close this loophole, expanding the definition of “sex offense” to include “[a]ny out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction...” RCW 9A.44.128(10)(h); LAWS OF 2010, ch. 267, § 1.

Batson was convicted in Washington for failing to register in 2011 and 2014.⁴ CP 8. Batson subsequently failed to register between August 8, 2016 and September 25, 2017, which formed the basis for the instant

⁴ The 2014 conviction was later overturned on appeal due to insufficient evidence that Batson lacked a “fixed residence.” State v. Batson, 194 Wn. App. 326, 377 P.3d 238 (2016).

prosecution. CP 406. Batson was convicted as charged following a stipulated facts trial. RP 158.

Batson raised several constitutional challenges on appeal. The Court of Appeals reached only the question of whether the legislature violated the non-delegation doctrine by requiring registration based on Batson's Arizona conviction. The court invalidated the applicable portion of the registration statute because "it transfers to Arizona the power to define whether Batson has an ongoing duty to register in Washington State" and thus was "an unconstitutional delegation of the legislative function..." State v. Batson, No. 78341-6-I at 8 (August 12, 2019).

D. REASONS REVIEW SHOULD BE ACCEPTED & ARGUMENT

RAP 13.4(b) permits review by this Court if, *inter alia*, an issue raises a significant question of law under the Washington State or United States Constitutions, or deals with an issue of substantial public interest. Both criteria are met here.

The decision below is the first Washington case to apply the non-delegation doctrine to sex offender registration requirements. The dearth of authority analyzing the doctrine in this context is apparent given that both Batson and Division I relied on State v. Dougall, 89 Wn.2d 118, 570 P.2d 135 (1977), decided over 40 years ago. The scope of the legislature's

power to incorporate foreign definitions is a significant question, and one whose implications are bound to resurface given the mobility of individuals in modern society, and the expansion of registration laws across the country since Dougall.

This case also presents a question of obvious public interest because it prevents Washington citizens from being notified of sex offenders living in their communities. Following Batson, potentially dangerous predators who move to Washington may not have any notification or registration requirements. This directly invalidates the will of the people as expressed by the legislature.

1. THE DECISION BELOW RAISES A SIGNIFICANT QUESTION OF STATE CONSTITUTIONAL LAW AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The Washington constitution vests the authority to enact laws exclusively with the legislature. WASH. CONST. art. II, § 1. 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). Courts reviewing a challenged statute must "make every presumption in favor of constitutionality," particularly when the law is reasonably related to promoting public safety. State v. Glas, 147 Wn.2d 410, 422, 54 P.3d 147 (2002).

This case involves the tension between two related constitutional principles. On the one hand, it is unconstitutional for the legislature to abdicate or transfer its legislative power to others. Brower, 137 Wn.2d at 54. On the other hand, it is perfectly acceptable for the legislature to condition a statute's operative effect on some other event, even if the specified circumstances may "arise at the discretion of others." Diversified Investment Partnership v. DSHS, 113 Wn.2d 19, 28, 775 P.2d 947 (1989).

The Court of Appeals relied on Dougall to invalidate part of the sex offender registration law. 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. This Court struck down the statute, holding in relevant part that prospectively adopting future federal laws was an impermissible delegation of legislative authority. Id. at 122-23.

Division One's analysis failed to appreciate a critical distinction between Dougall and the instant facts. Batson was convicted of having sexual contact with a 16 year-old, which is generally not illegal in Washington.⁵ Dougall might have been on-point had Washington criminalized this conduct by reference to Arizona statute. But Arizona's

⁵ An adult in Washington may be guilty of a gross misdemeanor for having sexual contact with a 16 year-old under certain circumstances, such as when the perpetrator is a school employee or has supervisory responsibility over the minor. RCW 9A.44.096.

legislature has not, and cannot, make any substantive conduct unlawful in Washington.

Washington's legislature has defined the crime of failing to register as a sex offender and all of its constituent elements. One of these elements is that the defendant must have previously been convicted of a sex offense. WPIA 49C.02. Arizona law can affect whether a person's past Arizona conduct meets Washington's definition of "sex offense." RCW 9A.44.128(10)(h). But a definition is not an element of the crime simply because it clarifies a term used by the legislature. See State v. Lorenz, 152 Wn.2d 22, 34, 93 P.3d 133 (2004); see State v. Saunders, 177 Wn. App. 259, 269, 311 P.3d 601 (2013). Furthermore, the statute does not allow Arizona to criminalize conduct in Washington, but simply controls whether the Washington registration statute becomes operative in relation to a particular individual when they reside in this state.

Whether the principle from Diversified applies when a foreign conviction causes a Washington statute to operate against certain individuals is an issue of great constitutional weight. Even beyond sex offender registration, which is itself of considerable importance, Batson's reading of the non-delegation doctrine might affect how Washington handles any number of individuals and commercial entities entering this state. Suppose, to give one example, a driver whose license was suspended

for numerous DUIs in another state attempts to become licensed in Washington, but the DUI convictions are not comparable. Would it violate the non-delegation doctrine to prohibit licensure based on foreign law? See RCW 46.21.010. These broad potential implications warrant review under RAP 13.4. See State v. Watson, 155 Wn.2d 574, 122 P.3d 903 (2005) (Issue was of great public interest when its effects spread far beyond the parties in the instant case).

Furthermore, the Court of Appeals invalidated a duly enacted piece of legislation. The highest judicial scrutiny is warranted when the clearly expressed will of the people is countermanded, especially when public safety is plainly implicated. While Batson protests that his personal criminal behavior was benign, itself a dubious proposition, other sex offenders who will be freed of their registration obligations are indisputably dangerous. See Werneth, 147 Wn. App. at 554.⁶ If legislation intended to protect Washington residents from sexual predators is to be declared invalid, that decision should be made by the State's highest constitutional authority.

⁶ In Werneth, the court found that a Georgia man convicted of molesting a child younger than 14 did not have to register in part because Washington's child molestation statute, unlike Georgia's, requires proof that the victim is not married to the perpetrator. Werneth, 147 Wn. App. at 554.

Finally, it cannot be reasonably disputed that the registration of sex offenders in our community is an issue of great public interest. 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.’”). Victims of sex offenders suffer a unique and lasting trauma categorically different from that experienced by victims of most non-sex crimes. People v. McKee, 207 Cal. App. 4th 1325, 1342, 144 Cal. Rptr.3d 308 (2012); 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 public’s interest in preventing the horrific damage sex offenders inflict upon society was the entire reason for instituting registration in the first place. See State v. Ward, 123 Wn.2d 488, 492-93, 869 P.2d 1062 (1994); Norm Maleng, The Community Protection Act and the Sexually Violent Predators Statute, 15 U. Puget Sound L. Rev. 821 (1992).

The Court of Appeals’ decision will allow some sex offenders to roam unchecked throughout Washington, including Batson, who is classified as a level three sex offender, the highest risk for recidivism. CP 5. This Court should decide an issue that will so greatly affect the safety and peace-of-mind of families across the State.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests this Court grant review of the Court of Appeals decision in this case.

DATED this 4 day of September, 2019.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 78341-6-I
)	
Respondent,)	DIVISION ONE
)	
v.)	PUBLISHED OPINION
)	
BENJAMIN BATSON,)	
)	
Appellant.)	
_____)	FILED: August 12, 2019

ANDRUS, J. — Benjamin Batson challenges the constitutionality of RCW 9A.44.128(10)(h) to the extent it imposes a duty to register as a sex offender based on an out-of-state conviction for which there is no comparable Washington crime. We conclude that the sex offender registration statute contains an unconstitutional delegation of the legislative function to another state and reverse Batson's conviction for failing to register.

FACTS

On November 14, 1984, while living in Arizona, Batson was convicted of two counts of sexual conduct with a 16 year old, a felony in Arizona.¹ The trial

¹ Arizona Revised Statutes (ARS) §13-1405(A) makes it a crime to engage in sexual conduct with a minor, which is defined as any person under the age of 18.

court sentenced Batson to prison, and ordered him to register as a sex offender while living in Arizona.²

Batson moved to Washington in 2008. At the time, Washington's registration statute did not require Batson to register as a sex offender because his Arizona conviction was not legally comparable to a crime in Washington. Former RCW 9A.44.130(1)(a)(2008) provided:

Any adult . . . whether or not the person has a fixed residence, or who is a student, is employed, or carries on a vocation in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense . . . shall register with the county sheriff for the county of the person's residence

Former RCW 9A.44.130(10)(a)(iv) defined "sex offense" 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 under this subsection." Because the comparable Washington statute only criminalized sexual contact with minors under the age of 16,³ Batson's conduct did not meet the definition of a sex offense.

In 2010, the Legislature amended RCW 9A.44.128, modifying the definition of "sex offense" to include:

Any federal or 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*; or, if not required to register in the state of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection, unless a court in the person's state of conviction has made an individualized determination that the person should not be required to register.

² ARS §13-3821(A)(4) provides that anyone convicted of sexual conduct with a minor in violation of ARS §13-1405 must register with the sheriff of the county of residence.

³ RCW 9A.44.089, Washington's child molestation statute, makes it unlawful for a person to have sexual contact with a minor at least 14 years of age but under the age of 16, if the perpetrator is at least 4 years older than the victim. Thus, the age of consent in Washington is 16 years of age.

LAWS OF 2010, ch. 267, §1 (emphasis added).⁴

The amended statute required Batson to register as a sex offender in Washington because he was required to register in Arizona. Because Batson is homeless, he must also report weekly to the sheriff of the county of registration and maintain an “accurate accounting” of each location he stayed during the week. RCW 9A.44.130(6)(b). The failure to report constitutes failure to register and is a felony. RCW 9A.44.132.

Batson was convicted of felony failure to register as a sex offender on June 21, 2011. He was again convicted of felony failure to register in 2014, but this court reversed that conviction because the State failed to prove that Batson lacked a fixed residence during the charging period. State v. Batson, 194 Wn. App. 326, 339, 377 P.3d 238 (2016). Batson challenged the constitutionality of the statute in that appeal, but this court declined to reach Batson’s constitutional challenge because it reversed his conviction on other grounds. Id. at 328.

On November 14, 2017, the State charged Batson a third time with felony failure to register. CP 1, 17. The trial court convicted Batson of this offense and sentenced him to 9 months in jail followed by 36 months in community custody. Batson appeals his conviction, again raising a constitutional challenge to RCW 9A.44.128(10)(h).

⁴ A 2011 amendment removed federal offenses from the statute. LAWS OF 2011, ch. 337, §2. The statute now reads:

Any 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; or, if not required to register in the state of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection.

RCW 9A.44.128(h). This is the current version of the statute.

ANALYSIS

Batson claims that the sex offender registration is unconstitutional. We review a statute's constitutionality de novo. State v. Bassett, 192 Wn.2d 67, 77, 428 P.3d 343 (2018). Statutes are presumed constitutional, and the defendant has the burden of proving otherwise. Id.

Batson claims that RCW 9A.44.128(10)(h) is an unconstitutional delegation of the legislative function because it allows another state's legislature to define "sex offense," an element of the crime of felony failure to register. We agree.

Article II, section 1 of the Washington State Constitution vests all legislative powers in our state senate and house of representatives. It is unconstitutional for the Legislature to "abdicate or transfer its legislative function to others." Brower v. State, 137 Wn.2d 44, 54, 969 P.2d 42 (1998). This legislative duty requires that all statutes be complete when they leave the Legislature. Diversified Inv. P'ship v. Dep't of Soc. & Health Servs. (Diversified), 113 Wn.2d 19, 24, 775 P.2d 947 (1989). To meet the rule of completeness, the Legislature must define all elements of any crime and may not transfer that legislative function to others. State v. Dougall, 89 Wn.2d 118, 123, 570 P.2d 135 (1977); State v. Ramos, 149 Wn. App. 266, 276, 202 P.3d 383 (2009).

The Legislature may make the operative effect of a statute contingent on its ongoing harmony with federal law to ensure, for example, ongoing federal funding of certain state programs. Diversified, 113 Wn.2d at 26. But it may not attempt to adopt by statute future laws enacted by other legislative bodies. Dougall, 89 Wn.2d at 123; see also State ex rel. Kirschner v. Urquhart, 50 Wn.2d 131, 135-37, 310

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P.2d 261 (1957) (Legislature cannot pass licensing law that declares that accredited medical schools shall be those thereafter established by private medical societies); Nostrand v. Balmer, 53 Wn.2d 460, 471-72, 335 P.2d 10 (1959) (statute unconstitutionally delegated to United States Attorney General the task of defining “subversive” organizations, the membership in which was prohibited), vacated in part on other grounds, Nostrand v. Little, 362 U.S. 474, 80 S. Ct. 840, 4 L. Ed. 2d 892 (1960).

The State contends that the sex offender registration statute merely makes its operative effect contingent on another state’s statute and thus is permissible under Diversified. Batson, however, argues that the portion of the statute that makes sex offender registration contingent on the future laws of another state violates the non-delegation holding of Dougall. We conclude that Dougall controls here.

In Dougall, the defendant was charged with possession of Valium after a federal order published in the Federal Register designated it as a controlled substance under federal law. 89 Wn.2d at 122. The Washington Legislature did not designate or reschedule Valium as a controlled substance under the state Uniform Controlled Substances Act, chapter 69.50 RCW, but under RCW 69.50.201(d), Valium automatically became a controlled substance under state law 30 days from the date of the federal order’s publication in the Federal Register, if the Washington State Board of Pharmacy did not object to its designation. Id. at 120.

Our Supreme Court concluded that RCW 69.50.201(d) was an unconstitutional delegation of legislative authority to the federal government because it attempted to incorporate into state law *future* federal rules. Id. at 123. It held that the statute was unconstitutional because it permitted future federal designation, rescheduling, or deletion of controlled substances in the Federal Register to become controlled substances under the Uniform Controlled Substances Act by means of Board inaction or acquiescence. Id.

A person commits the crime of felony failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130. RCW 9A.44.132(1). RCW 9A.44.130(1)(a) in turn requires any adult convicted of a sex offense to register with the county sheriff for the county of the person's residence. RCW 9A.44.128(10)(h) then defines those "sex offenses" for which registration is mandatory. The provision provides:

Any 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; or, if not required to register in the state of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection.

(emphasis added).

The duty to register thus is an element of Batson's crime. See 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 49C.02 (4th ed. 2016). The State had to establish that Batson had this duty during the period he was charged with violating RCW 9A.44.132. The only way to establish this element of the crime was to prove that during any alleged charging

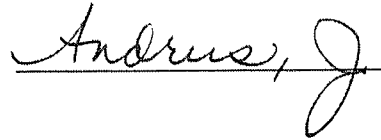
period, Batson “would be” required to register under Arizona law if he lived in that state. The definition of an out-of-state “sex offense” does not link the duty to register to any specific point in time in the past but instead conditions that duty on whether Arizona law imposes a duty to register in the future. Batson’s duty to register in this state is thus completely dependent on whether the Arizona Legislature retains or removes his crime of conviction on its list of registrable crimes. If the Arizona Legislature eliminates Batson’s crime of conviction from this list, any duty to register in Washington evaporates. If, however, the Arizona Legislature then reinstates the registration requirement, Batson’s duty under Washington law would be resuscitated. As in Dougall, the sex offender registration statute permits future Arizona law to define an element of the crime.

Diversified is not analogous. In that case, the Legislature passed a statute that provided if any part of chapter 74.46 RCW, which established a nursing facility Medicaid payment system, was found to conflict with federal law, the conflicting state statute would become inoperative pending further review by the Legislature. 113 Wn.2d at 24. Diversified challenged the constitutionality of this provision, arguing it attempted to adopt future federal law in violation of the Dougall standard. Id. at 25. Our Supreme Court distinguished the Medicaid statute from the criminal statute in Dougall, concluding that the Legislature may determine when a law, substantively complete in itself, will take effect and when it will be repealed. Id. at 26. The Medicaid statute merely conditioned its operative effect on a future specified event, whereas the controlled substance statute at issue in Dougall

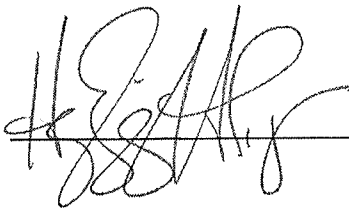
transferred power to define an element of a crime to the federal government. Id. at 28-29.


The sex offender registration statute does not provide that it becomes ineffective or inoperative if some event occurs in the future. Instead, it transfers to Arizona the power to define whether Batson has an ongoing duty to register in Washington. See State v. Green, 156 Wn. App. 96, 230 P.3d 654 (2010) (duty to register is an ongoing obligation; failure to register is ongoing course of conduct). This obligation depends entirely on Arizona law at any given point in the future. Thus, the duty to register as the result of an out-of-state conviction for which registration would be required while residing in the state of conviction is an unconstitutional delegation of the legislative function and violates article II, section 1 of the Washington State Constitution.⁶ We do not invalidate RCW 9A.44.128(10)(h) in its entirety, but do so to the extent it imposes a duty to register based on an out-of-state conviction that would not be classified as a sex offense under the other provisions of RCW 9A.44.128(10).

Reversed.



WE CONCUR:





⁶ Batson also argues the statute is an ex post facto law, violates double jeopardy and violates equal protection under the federal and state constitutions. Because we invalidate the statute under article II, section 1, we need not reach these additional constitutional claims.

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