

FILED
SUPREME COURT
STATE OF WASHINGTON
3/2/2020 4:27 PM
BY SUSAN L. CARLSON
CLERK

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.

RESPONDENT'S RESPONSE TO AMICUS CURIAE

Jessica Wolfe
Attorney for Respondent

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES III

A. INTRODUCTION 1

B. ARGUMENT 1

 1. The registration statutes were not complete upon enactment. 1

 2. The policy justifications for passing the 2010 registration laws
 have no bearing on the nondelegation analysis..... 5

 3. SORNA does not apply because the registration framework
 violates Washington’s constitution. 10

 4. The existence of other state statutes is irrelevant to the state
 constitutional issue presented to this Court. 11

C. CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Andersen v. King County, 158 Wn.2d 1, 138 P.3d 963 (2006)..... 7

Brown v. Vail, 169 Wn.2d 318, 237 P.3d 263 (2010)..... 7

Diversified Inv. P’ship v. Dep’t of Soc. & Health Servs., 113 Wn.2d 19,
775 P.2d 947 (1989)..... 1, 6, 7

Gaylord v. Tacoma School Dist. No. 10, 88 Wn.2d 286, 559 P.2d 1340
(1977)..... 8

Green v. Georgia, 882 F.3d 978, 988 (11th Cir. 2018) 9

Nostrand v. Balmer, 53 Wn.2d 460, 335 P.2d 10 (1959) 2

Nostrand v. Little, 362 U.S. 474, 80 S. Ct. 840, 4 L. Ed. 2d 892 (1960).... 2

Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015)..... 7

State Dep’t of Pub. Safety v. Doe, 425 P.3d 115 (Alaska 2018)..... 12

State ex rel. Kirschner v. Urquhard, 50 Wn.2d 131, 310 P.2d 261 (1957) 2

State v. Batson, 9 Wn. App. 2d 546, 447 P.3d 202 (2019) 4

State v. Dougall, 89 Wn.2d 118, 570 P.2d 135 (1977)..... 2, 5

State v. Feilen, 70 Wn. 65, 126 P. 75 (1912)..... 2

State v. Hall, 294 P.3d 1235 (N.M. 2012) 11

State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005) 4

State v. Reynolds, No. 51630-6-II, 2020 WL 547457 (Feb. 4, 2020) 4

State v. Torres Ramos, 149 Wn. App. 266, 202 P.3d 383 (2009)..... 5

State v. Wadsworth, 139 Wn.2d 724, 991 P.2d 80 (2000)..... 2

State v. Yishmael, 2020 WL 579202, ___ P.3d ___ (Feb. 6, 2020) 2

United States v. Johnson, 632 F.3d 912 (5th Cir. 2011)..... 13

<i>United States v. Richardson</i> , 754 F.3d 1143 (9th Cir. 2014).....	13
---	----

Statutes

34 U.S.C. § 20911.....	12
34 U.S.C. § 20927.....	13
34 U.S.C. § 20912.....	12
42 Pa. Cons. Stat. § 9799.14	15
Colo. Rev. State § 16-22-103.....	15
Ind. Code § 11-8-8-5.....	15
Md. Code Ann., Crim. Proc. § 11-704.....	15
Mo. Rev. Stat. § 589.400(7).....	15
Or. Rev. Stat. § 163A.020.....	14
RCW 69.50.4013	4
RCW 9A.44.128.....	passim
RCW 9A.44.132.....	3
S.C. Code. Ann. § 23–3–430	11

Session Laws

Laws of 2010, ch. 267, § 1.....	3
---------------------------------	---

Other Authorities

11 Wash. Prac.: Wash. Pattern Jury Instr. Crim. 50.02 (4th ed. 2016).....	5
David M. Filler, <i>Silence and the Racial Dimensions of Megan’s Law</i> , 89 Iowa L. Rev. 1535 (2004).....	10
Eugene Volokh, “Statutory rape laws and ages of consent in the U.S.,” The Washington Post (May 1, 2015)	8

Human Rights Watch, “No Easy Answers: Sex Offender Laws in the US”
(Sept. 2007)..... 9

Robert L. Jacobson, *Megan’s Laws: Reinforcing Old Patterns of Anti-Gay
Policy Harassment*, 87 Geo. L. J. 2431 (1999)..... 9

Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 Tul. L. Rev.
1739 (1993)..... 10

A. INTRODUCTION

The State, as *amicus*, urges this Court to reject Mr. Batson's nondelegation challenge as a matter of public policy. However, the nondelegation analysis does not include considerations of public policy, which are properly the province of the Legislature. Further, the State argues that the registration statutes completely defined the elements of the crime of failure to register. In doing so, the State misunderstands the Legislature's broad obligations to define criminal liability. Finally, the State asserts that federal law and the laws of other states favor the current registration framework. Yet these laws are irrelevant to the state constitutional question presented to this Court. This Court should affirm the Court of Appeals and conclude Mr. Batson's duty to register violates the non-delegation doctrine.

B. ARGUMENT

1. The registration statutes were not complete upon enactment.

As the State acknowledges, “[a] statute must be complete in itself when it leaves the hands of the Legislature” to pass constitutional muster. *Diversified Inv. P’ship v. Dep’t of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989); Amicus Curiae Brief of the State of Washington, *State v. Batson*, No. 97617-I at 3 (“State’s Amicus Brief”). Accordingly, “legislation which attempts to adopt or acquiesce” in the future laws of

other jurisdictions is an unconstitutional delegation. *See State v. Dougall*, 89 Wn.2d 118, 122–23, 570 P.2d 135 (1977); *accord Nostrand v. Balmer*, 53 Wn.2d 460, 471, 335 P.2d 10 (1959), *vacated in part on other grounds*, *Nostrand v. Little*, 362 U.S. 474, 80 S. Ct. 840, 4 L. Ed. 2d 892 (1960); *State ex rel. Kirschner v. Urquhard*, 50 Wn.2d 131, 135, 310 P.2d 261 (1957).

The Legislature is vested with the authority to define the parameters of criminal liability; “[i]t can take life, it can take liberty, it can take property, for crime.” *State v. Feilen*, 70 Wn. 65, 70, 126 P. 75 (1912); *accord State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000); *see also State v. Yishmael*, 2020 WL 579202 at *7, ___ P.3d ___ (Feb. 6, 2020) (“it is a legislative function to define the elements of a crime”). The Legislature is prohibited from delegating this authority to other jurisdictions. *See Dougall*, 89 Wn. 2d at 122–23. In 2010, the Legislature amended the sex offender registration statute to permit the impermanent laws of other states to determine registrable conduct in Washington. *See* Laws of 2010, ch. 267, § 1; RCW 9A.44.128(10)(h). These amendments were an attempt to “adopt or acquiesce” in the future laws of other states. *Dougall*, 89 Wn. 2d at 122–23. Accordingly, the Legislature unconstitutionally delegated its authority to define an element of the crime of failure to register. *See* RCW 9A.44.132(1).

The State, acting in its role as *amicus*, provides no persuasive argument to the contrary. The State first asserts the “elements” of the crime of failure to register were “complete upon enactment.” State’s Amicus Brief at 4. While the State’s articulation of this point is not entirely clear, it is apparently asserting the term “sex offense” is merely a definitional term, not an element of a crime. *See id.* at 4 & n.1. This was the same argument adopted by the dissent in *State v. Reynolds*, No. 51630-6-II, 2020 WL 547457 at *5 (Feb. 4, 2020) (Melnick, J., dissenting).

However, as the *Reynolds* majority noted, this is too narrow a reading of the Legislature’s obligations to define criminal liability. *See id.* at *4 n.3. “The elements of a crime are those facts that the prosecution must prove to sustain a conviction.” *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005) (citations and quotation marks omitted). Here, the State was required to prove Mr. Batson was convicted of a “sex offense,” *i.e.*, an offense requiring registration in Arizona. *See State v. Batson*, 9 Wn. App. 2d 546, 552, 447 P.3d 202 (2019); RCW 9A.44.128(10)(h).

As *Dougall* made clear, the delegation of any portion of a criminal element is unconstitutional. 89 Wn.2d at 122–23. In *Dougall*, the defendant was charged with possession of a controlled substance. *Id.* at 120. To convict a defendant for possession, the State must prove: (1) possession of a controlled substance and (2) that the possession occurred

in Washington. RCW 69.50.4013(1); *see also* 11 Wash. Prac.: Wash. Pattern Jury Instr. Crim. 50.02 (4th ed. 2016). This Court held that permitting the federal government to merely *define* a “controlled substance” under Washington law was an unlawful delegation of legislative powers. *Dougall*, 89 Wn.2d at 122–23.

Division II decided *State v. Torres Ramos* on similar grounds. There, the Legislature delegated the power to classify the risk level of sex offenders to county sheriffs. *State v. Torres Ramos*, 149 Wn. App. 266, 269–73, 202 P.3d 383 (2009). At the time, classification as a risk “Level II” or “Level III” was an element of the crime of failure to register for individuals with a fixed address. *Id.* at 272. As Division II recognized, permitting local governments to define this element was an unconstitutional delegation. *Id.* at 276.

Similar to *Dougall* and *Torres Ramos*, permitting another state to define the meaning of a “sex offense” unconstitutionally delegates the Legislature’s authority to define what is criminal in Washington. Due to this delegation, the statute was incomplete when it left the hands of the legislature. *Diversified*, 113 Wn.2d at 24. The Court of Appeals must be affirmed.

2. The policy justifications for passing the 2010 registration laws have no bearing on the nondelegation analysis.

The State details at length what it views as the policy rationales behind the 2010 registration amendments. State’s Amicus Brief at 4–11. The State asserts the Legislature’s “intended policy” to “close a loophole” somehow justifies the unconstitutional delegation. *Id.* at 4–5. But the Legislature’s intent to serve policy goals is not a relevant consideration in determining whether a particular law violates the nondelegation doctrine. The State, acting in its role as prosecutor, conceded this point before the Court of Appeals, recognizing “policy tradeoffs” are “irrelevant” to the nondelegation analysis. *See* Brief of Respondent, *State v. Batson*, No. 78341-6-I at 13.

To the extent policy considerations matter, there are sound reasons for not permitting other states to define what is criminal in Washington. By abdicating its duty to define an element of a Washington crime to another state, our Legislature has circumvented the purpose of a representative democracy and its own obligation to craft a statutory scheme that reflects the policy values of Washington residents. *See Andersen v. King County*, 158 Wn.2d 1, 38, 138 P.3d 963 (2006), *abrogated on other grounds by Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (“the people, who have consented to be governed,

speak through their elected representatives” on matters of public policy); *Brown v. Vail*, 169 Wn.2d 318, 331, 237 P.3d 263 (2010) (“Simply put, the legislature cannot delegate wholesale its obligation to declare public policy.”); *accord Diversified*, 113 Wn.2d at 24.

Permitting other states to define what is criminal in Washington leads to perverse and harmful results. In the case at bar, Mr. Batson was convicted in Arizona for conduct that is not criminal in Washington. *See* 3/29/18 RP 165–67; RCW 9A.44.079. Put another way, had Mr. Batson engaged in the *exact same conduct* in Washington, he would not be guilty of any crime. This is because our legislature has set the age of consent in Washington at 16 years of age, in agreement with thirty other states across the country and the majority of the Western world. *See id.*; Eugene Volokh, “Statutory rape laws and ages of consent in the U.S.,” *The Washington Post* (May 1, 2015).¹ However, the other twenty states in this country have set the age of consent at 17 or 18 years, a fact that under the 2010 amendment imposes criminal liability in Washington. *Id.*; RCW 9A.44.128(10)(h).

The incongruity in sex offender laws between Washington and other states is not limited to statutory sex offenses. Several states have

¹ Available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/?utm_term=.5f5cfa87b3e4 (last accessed March 2, 2020).

passed laws criminalizing and requiring registration for conduct that is perfectly legal in Washington. For example, Washington decriminalized “sodomy” in 1976. *See Gaylord v. Tacoma School Dist. No. 10*, 88 Wn.2d 286, 296–97, 559 P.2d 1340 (1977). However, Charlton Green, who was convicted of “sodomy” in Georgia in 1997 for consensual sexual conduct, would be required to register as a sex offender if he ever moved to Washington. *See Green v. Georgia*, 882 F.3d 978, 980, 988 (11th Cir. 2018) (denying writ of habeas corpus for failure to register conviction predicated on sodomy conviction); *see also* Robert L. Jacobson, *Megan’s Laws: Reinforcing Old Patterns of Anti-Gay Policy Harassment*, 87 *Geo. L. J.* 2431, 2431–32 (1999) (detailing the history of sex offender registries “as a tool to harass gay men.”)

Additionally, other states have extended sex offender registration requirements to non-sexual crimes. At least thirteen states require sex offender registration for public urination. *See* Human Rights Watch, “No Easy Answers: Sex Offender Laws in the US” 39 (Sept. 2007).² And approximately 32 states require registration for exposing genitals in public, which can include streaking. *See id.* at 38–40.

² Available at <https://www.hrw.org/reports/2007/us0907/us0907webwcover.pdf> (last visited March 2, 2020).

Further, there is evidence that sex offender registration is imposed in a racially disproportionate manner, particularly in Southern states. *See* David M. Filler, *Silence and the Racial Dimensions of Megan’s Law*, 89 Iowa L. Rev. 1535, 1550 (2004). Accordingly, registration “perpetuate[s] historical discrimination by relying on convictions more likely tainted by formal and informal racism.” *Id.* at 1540. In Arizona, where Mr. Batson was convicted,³ African-Americans are nearly three times as likely to be subject to notification requirements as whites. *Id.* at 1552–53. “As a consequence, African-Americans suffer these inequalities even in the absence of proof that registries work.” *Id.* at 1594.

These illustrations exemplify the rationale behind the non-delegation doctrine. Our legislature is elected by Washington residents to pass laws criminalizing the conduct *our* community condemns. The legislature cannot abdicate this responsibility to the legislatures of other states that are wholly unaccountable to the Washington electorate and may be out of step with our values.

The only case the State cites in which another state’s supreme court grappled with these policy considerations recognized the potential

³ Mr. Batson is Black and his alleged victim was white. RP 166–67. The record suggests racial bias may have contributed to criminal charges being filed against Mr. Batson. *Id.* Historically, prosecutors in rape cases have relied on stereotypes of Black men as sexual threats to white women. *See* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 Tul. L. Rev. 1739, 1754–55 (1993).

harm in adopting the registration requirements of other states. *State v. Hall*, 294 P.3d 1235, 1240–41 (N.M. 2012) (cited by *amicus* at 10). In *Hall*, the Supreme Court of New Mexico applied a comparability analysis for an out-of-state sex offense, concluding it was not comparable. *Id.* at 1241–42. The court noted that its conclusion meant some “out-of-state sex offenders will not have to register in New Mexico, even for serious offenses.” *Id.* at 1241. It further noted that the Legislature was free to amend the registration laws, but that “[i]f the Legislature is concerned about adopting other states’ registry requirements wholesale, it could also allow an affirmative defense for sex offenders whose actual conduct in the foreign state would not have constituted a registrable offense in New Mexico.” *Id.* at 1241. This is the approach adopted by South Carolina. *See* S.C. Code. Ann. § 23–3–430(A)(2015).

Regardless, these policy matters and their practical solutions are the responsibility of the Legislature to decide. *See State Dep’t of Pub. Safety v. Doe*, 425 P.3d 115, 125 (Alaska 2018) (Stowers, C.J., concurring) (“[W]hatever approach is taken is a policy decision, and policy decisions of this kind are decisions the legislature, not this court, should make.”). This Court is tasked solely with the responsibility of determining the constitutionality of the challenged registration laws. The State’s assertions to the contrary are unavailing.

3. SORNA does not apply because the registration framework violates Washington’s constitution.

The State devotes significant space to its argument that Washington’s sex offender registration scheme “is consistent with and complies with” the requirements of the federal Sex Offender Registration and Notification Act (SORNA). *See* State’s Amicus Brief at 11–15. The State appears to be arguing that RCW 9A.44.128(10)(h) is somehow *necessary* to comply with binding federal law. *See id.* at 14 (citing 34 U.S.C. §§ 20911, 20912). This argument is a distraction. As a threshold matter, SORNA “does not *require* the States to comply with its directives. Instead, the statute allows jurisdictions to decide whether to implement its provisions or lose ten percent of their federal funding otherwise allocated for criminal justice assistance.” *United States v. Johnson*, 632 F.3d 912, 920 (5th Cir. 2011) (emphasis in the original); *accord United States v. Richardson*, 754 F.3d 1143, 1146 (9th Cir. 2014) (quoting *Johnson*).

Further, SORNA’s “requirements” have no application where they “would place [a] jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction’s highest court.” 34 U.S.C. § 20927(b)(1). Put more simply, SORNA is irrelevant to this Court’s determination of whether RCW 9A.44.128(10)(h) is valid under Washington’s constitution. Should this Court conclude the current registration scheme is

unconstitutional, it would then be the responsibility of the “chief executive and chief legal officer of the jurisdiction,”—*i.e.*, the Governor and the Washington Attorney General—to engage in “good faith efforts” to accomplish substantial implementation of SORNA through reasonable alternatives in order to avoid cuts to federal funding. *See* 34 U.S.C.A. 20927(a), (b)(2)–(3). Any result of these efforts must comply with the rulings of this Court. *See id.* at (b)(2)–(3).

In sum, SORNA has no application to the constitutional questions before this Court.

4. The existence of other state statutes is irrelevant to the state constitutional issue presented to this Court.

The State points to other states that have adopted similar statutes to RCW 9A.44.128(10)(h). State’s Amicus Brief at 15–17. The State argues “[t]hese laws from sister states attest to the legislative policy” “of preventing evasion of registration requirements, establishing uniformity, and protecting the public.” *Id.* at 17. However, as already explained, policy goals, regardless of whether those goals are shared amongst many states, is irrelevant to the nondelegation analysis. Further, the existence of similar statutes in other states has no relevance to the issue this Court must resolve: whether Washington’s Legislature has delegated its authority in a manner that violates Washington’s constitution.

Tellingly, the State does not argue that the state statutes it cites have survived nondelegation challenges. *See* State’s Amicus Brief at 16–17. That is because *none* of these statutes have been challenged on similar nondelegation grounds. *See id.* (citing Or. Rev. Stat. § 163A.020(6); Colo. Rev. State § 16-22-103(3); Ind. Code § 11-8-8-5(b)(1); Md. Code Ann., Crim. Proc. § 11-704(a)(4); Mo. Rev. Stat. § 589.400(7); 42 Pa. Cons. Stat. § 9799.14(b)(23)). Accordingly, the mere existence of these statutes tells this Court little about their validity under other state’s non-delegation doctrines, let alone the validity of the Washington statute at issue here under Washington’s constitution.

C. CONCLUSION

The State’s policy arguments as *amicus* are both irrelevant and unpersuasive. This Court should affirm the Court of Appeals and hold that Mr. Batson’s duty to register violates the nondelegation doctrine.

DATED this 2nd day of March, 2020.

Respectfully submitted,

/s Jessica Wolfe

State Bar Number 52068

Washington Appellate Project (91052)

1511 Third Ave, Suite 610

Seattle, WA 98101

Telephone: (206) 587-2711

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
Petitioner,)
v.) NO. 97617-1
BENJAMIN BATSON,)
Respondent.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF MARCH, 2020, I CAUSED THE ORIGINAL RESPONDENT'S RESPONSE TO AMICUS CURIAE TO BE FILED IN THE WASHINGTON STATE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- [X] GAVRIEL JACOBS, DPA ... U.S. MAIL, HAND DELIVERY, E-SERVICE VIA PORTAL
[X] PETER GONICK, AAG ... U.S. MAIL, HAND DELIVERY, E-SERVICE VIA PORTAL
[X] KATHERINE HURLEY ... U.S. MAIL, HAND DELIVERY, E-SERVICE VIA PORTAL
[X] DAVID MONTES ... U.S. MAIL, HAND DELIVERY

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF MARCH, 2020.

Handwritten signature of Maria Arranza Riley

X _____

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

WASHINGTON APPELLATE PROJECT

March 02, 2020 - 4:27 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97617-1
Appellate Court Case Title: State of Washington v. Benjamin Batson

The following documents have been uploaded:

- 976171_Briefs_20200302162551SC318672_7895.pdf
This File Contains:
Briefs - Answer to Amicus Curiae
The Original File Name was washapp.030220-02.pdf

A copy of the uploaded files will be sent to:

- Peter.Gonick@atg.wa.gov
- cristina.sepe@atg.wa.gov
- david.montes@kingcounty.gov
- gavriel.jacobs@kingcounty.gov
- katherine.hurley@kingcounty.gov
- lbaker@kingcounty.gov
- paoappellateunitmail@kingcounty.gov
- peterg@atg.wa.gov
- sgoolyef@atg.wa.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 20200302162551SC318672