No. 18-39

In the Supreme Court of the United States

JASON BOYD,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Washington

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ARGUMENT IN REPLY

Jason Boyd's petition establishes that a conflict exists among lower courts regarding whether next-generation registration statutes are punitive and subject to the Ex Post Facto Clause. Indeed, the dissent in this case recognized that "Washington's statute now goes well beyond requirements that other jurisdictions have held unconstitutional in ex post facto challenges." Pet. App. 29. At least three courts have prohibited retroactive application of burdensome amendments, while others have found no ex post facto issues with substantially similar statutes. Pet. 7-13.

1. The State protests that no two statutes are precisely the same and therefore there is no conflict. Opp. 5-13. But the inevitable variation among certain subsections cannot shield state statutes from ex post facto limitations or divest this Court of its authority to review constitutional questions. The amended registration laws are more alike than different, and courts have split on whether key features of the updated statutes may be applied retroactively. Moreover, courts have diverged on the specific issue of whether frequent, in-person reporting is an affirmative disability or restraint akin to the traditional punishments of probation and parole. The Sixth Circuit, for example, has held that in-person appearance requirements resemble traditional punishment: "much like parolees, [registrants] must report in person, rather than by phone or mail." *Does #1-5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016). The New Hampshire Supreme Court similarly found "in-person requirements to be

a restraint." *Doe v. State*, 111 A.3d 1077, 1094 (N.H. 2015); *accord State v. Letalien*, 985 A.2d 4, 18 (Me. 2009). Yet the Washington Court of Appeals held a frequent, in-person reporting requirement was a mere "inconvenience," Pet. App. 10, and other courts agree with this analysis. *E.g. Kammerer v. State*, 322 P.3d 827, 836-37 (Wyo. 2014); *United States v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012). This conflict warrants a grant of certiorari.

The amended statutes are also similar in their durational burdens. As a result of the amendments enacted more than a year after his crime, Mr. Boyd is doomed to a lifetime cycle of incarceration and weekly reporting. Pet. App. 26-31. If the State had not subjected him to retroactive application of these onerous obligations, "he would have been free of the registration statute long ago and the legal jeopardy it has put him in for failure to report." Pet. App. 25. But he will never be free of the obligation because, as the State concedes, a transient individual may not be relieved of the duty to register unless he reports in-person weekly 520 times without missing a week. Wash. Rev. Code § 9A.44.130(6)(b); Wash. Rev. Code § 9A.44.140(3); Wash. Rev. Code § 9A.44.128(3). Yet the majority below found no ex post facto issue with this condition, contrary to the opinions of other courts addressing similarly lengthy registration requirements. *Compare* Pet. App. 3 *with, e.g., Doe v. State*, 111 A.3d at 1094-95. This Court should grant review to resolve this conflict and provide critical guidance on the application of the Ex Post Facto Clause to contemporary registration statutes.

2. This case is a good vehicle because it squarely presents the ex post facto issue. Although the State concedes the predicate offense occurred in February of 1998 and the amendments were not enacted until June of 1999, it nevertheless claims the amendments were not applied retroactively. Opp. 2, 13-15; Opp. App. 8-11. The State presents two theories for this assertion, both of which are wrong.

a. First, the State implies that Mr. Boyd's 2009 and 2010 convictions for failure to register were *themselves* sex offenses requiring registration. Opp. 4, 14. That is incorrect. As the State's own appendices demonstrate, these were not registrable offenses – to the contrary, failure to register was explicitly exempted from the definition of "sex offense." Opp. App. 15-16 (quoting Wash. Rev. Code § 9A.44.130 (10), (12) (2008); Wash. Rev. Code § 9.94A.030(46)(a) (2008)).[1] The crime for which Mr. Boyd was convicted of failing to register is his 1998 offense; it is this offense for which he missed a few check-ins in 2015, resulting in the conviction he currently appeals. Opp. App. 18; Reply App. 1-2. The State confuses the penalties for failing to register with the requirement to register in the first instance. Even though Mr. Boyd has registered dozens of times, each time he misses a reporting period and is convicted of failure to register, the "ten-year" clock restarts at zero. Wash. Rev. Code § 9A.44.140(3); Wash. Rev. Code § 9A.44.128 (3); Pet. App. 38-39. But he would not have had to register *at*

[1] To the extent the State claims these crimes *later* became registrable offenses, the same ex post facto problem would exist as exists with the 1998 offense.

all if not for the 1998 offense – an offense which predated the onerous amendments at issue. Reply App. 1-2.

b. Second, the State implies there is no ex post facto issue because the "conviction" (i.e., the judgment and sentence) for Mr. Boyd's 1998 predicate offense was entered in July of 1999, just after the in-person reporting requirements were added. Opp. 2, 14.[2] The date of conviction is irrelevant; it is the date of the crime that matters. Pet. App. 28. "The ex post facto prohibition forbids the Congress and the States to enact any law which imposes a punishment for an act which was not punishable *at the time it was committed*; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (emphasis added; internal quotations omitted). This is because the Ex Post Facto Clause incorporates a right to notice of the potential consequences of one's actions. *Id.* "[T]he Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Id.* at 28-29. Thus, the State's discussion of the date of conviction is immaterial.

3. Lastly, the State wrongly attempts to minimize the onerous nature of the amended registration statute. The State admits that Washington changed its statute to require weekly in-person reporting for those without homes. Opp. 3,

[2] Mr. Boyd entered a guilty plea in May of 1999, before the amendments requiring in-person reporting were enacted in June of 1999. More importantly, the crime at issue occurred in 1998.

15; *see* Pet. 4; Pet. App. 26. The burdensome nature of this obligation is self-evident. The State's contrary claim – that mandating weekly personal appearances is "modest" and "necessary" for effective regulation – is belied by the fact that most other jurisdictions do not impose such burdensome requirements. Many states have no in-person appearance obligations at all, and the majority of those that do mandate only monthly or quarterly check-ins. *See* Elizabeth Esser-Stuart, Note, *"The Irons are Always in the Background": The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 Tex. L. Rev. 811, 856 (Appendix) (2018). The Sixth Circuit concluded that, far from being necessary, "[t]he requirement that registrants make frequent, in-person appearances before law enforcement … appears to have no relationship to public safety at all." *Snyder*, 834 F.3d at 705.

Moreover, while the State cites *Smith v. Doe* for the proposition that such registration requirements are merely regulatory, *Smith* said no such thing. Opp. 15 (citing *Smith v. Doe*, 538 U.S. 84, 102 (2003)). The Alaska law this Court evaluated in *Smith* contained no in-person reporting requirement; indeed, the Ninth Circuit had found an ex post facto problem based on "a misapprehension, albeit one created by the State itself during argument below, that the offender had to update the registry in person." *Smith v. Doe*, 538 U.S. at 101. But current laws *do* require in-person updates, and this Court should address the retroactivity of these amendments.

Jason Boyd is condemned to a lifetime cycle of registration and incarceration as a result of an onerous law enacted after he committed his offense. The two-judge majority found the amendments requiring in-person reporting 52 times per year were not punitive, but the case would have come out the other way in other courts. For the foregoing reasons and those set forth in the Petition, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX

Closing Argument - Ms. Kaholokula

[p.93]

each count separately, your verdict on one should not control your verdict on the other.

So the defendant is charged with failure to register and a bail jump. So whether you find him guilty or not guilty on one doesn't control whether you find him guilty or not guilty on the other.

However, this instruction does not tell you you can only consider evidence -- how can I put this -- as to one count. In other words, there's been a number of documents that have been entered into evidence in this case. You're not required to only consider it as to one count and not the other. You can consider all of the evidence in determining whether or not I've met my burden of proof on each crime charged.

So let's turn now to instruction 6. That is the instruction that tells you what the elements of the crime of failure to register are. And these things and only these things are what I have to prove beyond a reasonable doubt.

Element number 1, I have to prove that on July 29th, 1999, the defendant was convicted of rape of a child in the third degree. All these exhibits that were admitted will go back with you. Exhibit No. 1 is the judgment and sentence for the rape of a child in the third degree, and you will see up here in the corner and

dated on the final page the date of July 29, 1999, and you'll see the defendant was

[p.94]

convicted of rape of a child in the third degree.

For element number 2, I need to prove that because of this conviction, the defendant was required to register in the State of Washington as a sex offender between January 27th and February 10th of 2015.

The testimony of Laurie Jarolimek, who is the sex offender registration coordinator, was that, once convicted of this type of crime, an offender is required to register for 10 years, but that that time period is extended if you have a disqualifying offense such as a felony or domestic violence offense. Those things will extend the time period required for registration.

In this particular case, you will receive Exhibits 5 and 6 which show convictions for felony failure to register back in 2009 that served to extend the time period that Mr. Boyd needed to register, and also the judgment and sentence dated August 5th of 2010, another felony failure to register for Mr. Boyd which also extends the time that he is required to register.

Now, the time period charged, January 27th through February 10th, Laurie Jarolimek testified that this was part of the time period that he was required to register. That time period is chosen because the last time that -- well, let me actually back up a little bit.

Mr. Boyd registered himself as being transient or