**NO. 46032-7-II**

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CECIL DUDGEON,
Appellant,

v.

STEVE BOYER, SHERIFF OF KITSAP COUNTY
Respondent.

# RESPONDENT'S OPENING BRIEF

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## I. INTRODUCTION

Cecil Dudgeon is not a victim. He is a convicted sex offender with a lengthy history of molesting children. In 1984 he pled guilty to three counts of Unlawful Sexual Intercourse with a 15 year old girl. In 2001 he was convicted of the crime of Indecent Liberties with Forcible Compulsion. His victim was his own stepdaughter. When he refused to participate in a sexual offense treatment program, he was classified as a sexually violent predator and was confined to a civil commitment center for several years. As recently as 2005, he was diagnosed with pedophilia.

Mr. Dudgeon wants this court to believe that he is suffering a great injustice by being designated as a level III sex offender because he has not re-offended for the last several years. However, from 2001 through 2007 he was confined in Kitsap County jail. Then from 2007 through 2013, he was committed to a civil commitment center on McNeil Island for sexually violent predators. He was not released until February 2013. Since his 2001 conviction, Mr. Dudegon has only been among society for one year. One year of good behavior does not prove his case particularly when he has been in the community under the stricter confines of a level III designation. It does not establish that a level III sex offense designation is arbitrary or capricious. To the contrary, it just may establish that his level III designation is properly warning the public.

Mr. Dudgeon's designation as a level III sex offender is proper as a matter of law. The level III designation made by the local law enforcement authority reflects and adopts the same designation that was made by the end-of-sentence review committee prior to Mr. Dudgeon's release from confinement in 2012. While local law enforcement is required to make their own assessment of an offender's risk level, that assessment is not arbitrary or capricious as a matter of law when it is supported by the designation of the review committee, whose very purpose is to ensure that law enforcement has sufficient information to make an accurate assessment.

Regardless of the above, Mr. Dudgeon's appeal is legally futile. A reviewing court under Chapter 7.16 RCW cannot make determinations of fact or substitute its own judgment for that of a lower tribunal or officer. A reviewing court cannot, on its own discretion, modify a sex offender's risk level or direct local law enforcement to do the same. The only relief a reviewing court can offer under Chapter 7.16 RCW is to determine whether local law enforcement acted arbitrarily or capriciously and, if so, order that law enforcement make another assessment. This is not the relief that Mr. Dudgeon sought at the trial court level and it is not the relief he seeks now.

## II. STATEMENT OF THE ISSUES

1. Whether the trial court properly dismissed Cecil Dudgeon's Writ of Certiorari because the relief sought exceeded the scope of review under Chapter 7.16 RCW when Mr. Dudgeon requested that the court make determinations of fact and reclassify him as a level I sex offender rather than merely determining whether the Kitsap County Sheriff's Office acted arbitrarily or capriciously.

2. Whether the designation made by the Kitsap County Sheriff's Office is sufficient as a matter of law when that designation reflects and adopts the designation of the ESRC whose very purpose is to ensure that local law enforcement have sufficient information to make an accurate designation.

## III. STATEMENT OF THE CASE

### A. The Role of Local Law Enforcement And The ESRC In Assessing Risks Posed By Sex Offenders

RCW 4.24.550 requires local law enforcement to notify the public when a sex offender is released from confinement. This statute requires local law enforcement to assess each sex offender based upon their likelihood to reoffend and assign a risk level accordingly. RCW 4.24.550(2),(3). The risk level assigned to a sex offender dictates the level of notification required to the public. Id. A risk level of 1 is considered the lowest level and requires no public notice. Id. A risk level of III is the highest risk level and requires community notification. Id.

RCW 4.24.550 was originally enacted in 1990. *State v. Sanchez*, 177 Wn.2d 835, 840-41, 306 P.3d 935 (2013). Amid growing concerns that similarly situated sex offenders would be treated and assessed

differently by local law enforcement across the state and amid concerns that law enforcement would lack sufficient information to make accurate risk assessments, the legislature adopted RCW 72.09.345 and established an end-of-sentence review committee ("ESRC"). *Id.* RCW 72.09.345 requires that the ESRC assess the risk level of every newly-released sex offender and submit a determination of each offender's risk level to local law enforcement for consideration. *Id.*

Pursuant to RCW 4.24.550(6), local law enforcement is required to consider the assessment of the ESRC in making their own determination as to the risk posed by newly released sex offenders. If local law enforcement decides to impose a risk level inconsistent with that of the ESRC, local law enforcement must notify the ESRC of this decision and the basis for the same. RCW 4.25.550(10).

The current statutory scheme essentially requires the ESCR and local law enforcement to make parallel determinations of a sex offender's risk level based upon the same information. *Sanchez* at 843.

**B. Mr. Dudgeon Has A Lengthy History of Sex Offenses Committed Against Children**

In 1984 Mr. Dudgeon pled guilty to three counts of Unlawful Sexual Intercourse with a 15 year old and a 14 year old girl. (CP 28-29). He served a three year sentence in California for this conviction. (CP 29).

Between 1984 and 2000, Mr. Dudgeon was accused of several other instances of child molestation and rape against two other victims. One victim claimed to be molested by Mr. Dudgeon between the ages of five through nine. (CP 29). The other claimed to be molested and raped between the ages of nine through sixteen. (CP 29). No charges were filed with respect to these instances. (CP 29).

In 2001, Mr. Dudgeon was convicted of Indecent Liberties with Forcible Compulsion against his own stepdaughter. (CP 29). The stepdaughter claimed that the sexual molestation occurred from the time she was eight until she turned twenty-four. (CP 29). Mr. Dudgeon was sentenced to 68 months of imprisonment. (CP 29). During his sentence, Mr. Dudgeon was not amenable to sex offender treatment because he denied using force against his victim. (CP 30). In 2005, Mr. Dudgeon was diagnosed with pedophilia. (CP 43).

In 2007, following a hearing on a Petition for the Detention of Mr. Dudgeon as a Sexually Dangerous Person, Mr. Dudgeon was determined to be a sexually violent predator and was ordered for commitment to the Special Commitment Center. (CP 30). Mr. Dudgeon was released from civil commitment in February 2013. (CP 19).

## C. Classification of Mr. Dudgeon As A Level III Offender

Upon Mr. Dudgeon's release from confinement, the ESRC classified him as a level III sex offender. (VRP 5:14-17).

In February 2013, Detective Dillard with the Kitsap County Sheriff's Office also designated him as a level III sex offender consistent with the risk level assigned by the ESRC. (CP 2).

## D. Mr. Dudgeon's Petition Regarding the ESRC's Classification

In early 2013, Mr. Dudgeon filed a petition for writ of certiorari in Kitsap County Superior Court asking that the court direct the ESRC to rescind his level III sex offense designation. (CP 16-17). Mr. Dudgeon did not seek the court to order ESRC to make a new classification. Rather, he wanted the ESCR to rescind its classification altogether so that the Kitsap County Sheriff's Office could not rely on the ESCR determination in making its own assessment. (CP 17).

The court dismissed Mr. Dudgeon's writ on the basis that it could not grant the relief requested. (CP 17). The court held that this would unconstitutionally delegate legislative authority to the executive branch and nullify RCW 4.24.550. (CP 17).

## E. Mr. Dudgeon's Petition Regarding Kitsap County Sheriff Office's Classification

Following the dismissal of his petition regarding ESCR's sex offense classification, on December 17, 2013, Mr. Dudgeon filed a Petition for Writ of Certiorari in Kitsap County Superior Court regarding the Kitsap County Sheriff Office's classification. (CP 2). Mr. Dudgeon's petition asked the court to direct the Kitsap County Sheriff's Office to modify his sex offender risk level from III to I on the basis that he poses a low risk to commit a sexual offense. (CP 2, 7).

Kitsap County filed a motion seeking dismissal of Mr. Dudgeon's writ pursuant to CR 12(b)(6) which was heard on February 27, 2014. (VRP 1). At the hearing, Mr. Dudgeon argued that the case should not be dismissed because the court had authority to reclassify his sex offender status under RCW 7.16.040. (CP 11).

The Kitsap County Superior Court disagreed and dismissed Mr. Dudgeon's petition. (CP 90). The court held that it did not have authority or power to engage in a fact finding hearing under RCW 7.15.040 and change the Sheriff's Office designation level. (VRP 12-13). The court held its authority was limited to determining whether classification was arbitrary or capricious and then sending the matter back to the Sheriff's Office. (VRP 13).

## F. Allegations Unsupported By the Record

Mr. Dudgeon makes several allegations in his brief which are unsupported by the record.

Mr. Dudgeon claims that Detective Dillard refused, on several occasions, to review or consider additional documentation allegedly supporting his designation as a level I sex offender. Although Mr. Dudgeon cites to the record for this allegation, the record contains no evidence in support other than Mr. Dudgeon's own uncorroborated assertions.

Mr. Dudgeon alleges that the risk level classification was assigned to him by the ESRC over nine years ago. He alleges that this classification was stale and based upon outdated information. There is no evidence in the record, aside from Mr. Dudgeon's own uncorroborated assertions, to support this allegation. To the contrary, RCW 72.09.345(5) requires that the ESRC review each sex offender before the offender's release from confinement for purposes of public notification. Mr. Dudgeon was classified by ESGR in 2012. (VRP 5). He was released from civil commitment in February 2013. (CP 19).

Mr. Dudgeon argues that the information used by Kitsap County Sheriff's Office to classify Mr. Dudgeon as a level III sex offender was not current and not "substantial evidence." He also alleges that the Kitsap

County Sheriff's Office relied exclusively on the ESRC assessment. The information or documentation relied upon by local law enforcement in designating Mr. Dudgeon as a level III sex offender is not in the record. There is no evidence or testimony in the record informing this Court of the substance of the information or documents used by local law enforcement, nor should this Court be in a position to have to review and classify sex offenders. Accordingly, the record is insufficient to support Mr. Dudgeon's assertions.

Mr. Dudgeon claims he must reside separately from his wife to prevent physical and potentially deadly assault. The record also contains no evidence supporting the alleged murder of level II sex offenders near Mr. Dudgeon's home in Sequim, Washington. There is nothing in the record to support this assertion.

## IV. ARGUMENT

### A. Standard of Review

The extent of a superior court's authority to grant a writ of certiorari is a question of law that is reviewed de novo. *Federal Way School Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 764-64, 261 P.3d 145 (2011).

## B. The Trial Court Properly Dismissed Mr. Dudgeon's Writ of Certiorari Because A Reviewing Court Lacks Authority to Make Factual Determinations Regarding A Sexual Offender's Risk Level Classification

### 1. Reviewing Court Limited to Determination of Whether Lower Official's Acts Were Lawful and Substantiated By Evidence.

RCW 7.16.040 provides in part as follows:

> A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding [...].

RCW 7.16.120 outlines five questions involving the merits that a reviewing court may determine when reviewing the decision of a lower tribunal or officer. These questions are limited to (1) determining whether the lower body or officer had subject matter jurisdiction, (2) determining whether the body or officer pursued authority in according to its authority under law, (3) whether any rule of law has been violated, (4) whether there was competent proof of all the facts necessary to make the determination, (5) whether the factual determinations were supported by substantial evidence. RCW 7.16.120. Not listed among these questions is the authority to render factual determinations on the outcome of any matter. Id.

Washington case law is clear that review under RCW 7.16.040 is strictly limited to determining whether the decision below was contrary to

law and whether factual determinations are supported by substantial evidence. *City of Seattle, Seattle Police Dept. v. Werner*, 163 Wn. App. 899, 906, 261 P.3d 218 (2011); *Nichols v. Seattle Housing Authority*, 171 Wn. App. 897, 904, 288 P.3d 403 (2012)(holding that ultimately the reviewing court must determine whether the lower officer or tribunal acted arbitrarily, capriciously, or contrary to law).

If the reviewing court determines that the act or decision of the lower officer was lawful, the court will reinstate that decision. *Nichols* at 905, 908 (appellate court affirmed reviewing court's decision to reinstate order of lower officer upon finding that he acted with proper authority). If the reviewing court determines that an act or decision of the lower tribunal or officer was unlawful, it will invalidate or overturn that act or decision. *Hayes* at 713-14; *Punton v. City of Seattle Public Safety Com'n*, 32 Wn. App. 959, 650 P.2d 1138 (1982)(decision which violated due process was overturned). Upon invalidating the decision, the court will remand the issue back to the lower tribunal for additional fact finding or may re-instate the decision of an even lower tribunal or court that considered the issue. *North/South Airpark Ass'n v. Haagen*, 87 Wn. App. 765, 770, 942 P.2d 1068 (1997); *Hayes v. City of Seattle*, 131 Wn.2d 706, 710, 934 P.2d 1179 (1997). If the reviewing court determines there is insufficient

information to review the decision, the reviewing court must remand back to the lower tribunal or officer for additional fact finding. *Hayes* at 710.

However, the reviewing court does not have the authority to issue findings of fact or fashion its own remedy. *Andrew v. King County*, 21 Wn. App. 566, 575, 596 P.2d 509 (1978)(holding that superior court acting in reviewing capacity under RCW 7.16.040 exceeded its scope when it made its own determination as to whether a quarry was or was not a conforming use). A court conducting a review pursuant to statutory certiorari is not permitted to conduct a trial de novo of the facts determined by the inferior tribunal. *Id.* at 574; *City of Seattle, Seattle Police Dept. v. Werner*, 163 Wn. App. 899, 907, 261 P.3d 218 (2001). The reviewing court cannot "go further and determine from the testimony and evidence what the facts were." *Andrew at 574.* Similarly, it cannot substitute its own judgment or discretion for that of the lower tribunal or officer. *Werner* at 907 *citing Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995).

This fundamental principle has overwhelming support in Washington case law. *Werner*, 163 Wn. App. 899 (2011); *State ex. rel. Cosmopolic Consol. School District No. 99, Grays Harbor County v. Bruno*, 59 Wn.2d 366, 367 P.2d 995 (1962)(upon determining that commission's finding was erroneous, the superior court remanded to the commission); *North/South*

*Airpark Ass'n v. Haagen*, 87 Wn. App. 765, 770, 942 P.2d 1068 (1997)(holding that appellate jurisdiction under RCW 7.16.040 requires reviewing court to base its decision on the record made by the fact finder and may review the findings of fact only to see if they are supported by substantial evidence and if the findings of fact are not supported then the reviewing court should remand the issue back to the fact-finder); *State ex. rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618-19, 829 P.2d 217 (1992)(a superior court reviewing a decision under RCW 7.16.040 has only appellate jurisdiction and is not permitted to make its own findings).

The case of *Andrew* involved the issue of whether a quarry was a valid conforming land use under a county zoning code. In certiorari proceedings, the superior court reversed a decision of the King County Board of Appeals and held that the quarry was not a legal nonconforming use. *Andrew* at 568-69. The court of appeals held that the superior court erred by substituting its own discretion for that of the Board of Appeals. *Id.* The court of appeals held that the superior court should have remanded the case back to the Board for further consideration because the Board alone was the proper finder of fact, not the reviewing court. *Id.* at 570.

There was a similar result in *Werner*. In this case, a city police department appealed to the superior court by writ of certiorari the decision of

a public safety civil service commission regarding the discipline of a police officer. *Werner* at 903. The superior court determined that the decision was erroneous and remanded back to the commission to make further determinations. *Id.* This determination was affirmed by the court of appeals which held that remand back to the commission was appropriate because an appellate court cannot substitute its own judgment for that of a fact finder. *Id.* at 907.

Mr. Dudgeon is asking that this Court compel the Kitsap County Sheriff's Office to modify his risk classification from a level III to a level I. This would require the Court to make a factual and discretionary determination that a level I risk classification is the most appropriate classification for Mr. Dudgeon. The Court simply does not have the authority to make this determination.

**2. Mr. Dudgeon Misinterprets Reviewing Court's Authority to "Correct" Erroneous Proceedings.**

Mr. Dudgeon appears to misconstrue the scope of RCW 7.16.040. He argues that because RCW 7.16.040 states that a reviewing court can "correct any erroneous or void proceeding," it has the power to render findings of fact and fashion its own remedy accordingly. In doing so, Mr. Dudgeon misconstrues this statute and asks that the court enter a ruling which is contrary to extensive case law holding just the opposite. A

reviewing court's authority to correct an erroneous proceeding is clearly limited to determining that the proceeding is contrary to law, invalidating that proceeding, and then remanding it back to the lower tribunal or officer for a second consideration.

Statutes must be interpreted to ascertain and carry out the intent of the legislature. *State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). The legislative intent must be determined from the language of the statute. *Lacey Nursing Center v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). Statutory construction requires that the statute be read and considered in its entirety, including the "entire sequence of all statutes relating to the same subject matter." *In re Donnelly's Estates*, 81 Wn.2d 430, 435, 502 P.2d 1163 (1972). Such statutes should be interpreted so as to harmonize and give meaning to all the language contained therein. *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999).

If RCW 7.16.040 were interpreted as Mr. Dudgeon claims, this would render RCW 7.16.120 void and meaningless because the reviewing court would no longer be limited to five questions on the merits enumerated in that statute. Instead, the reviewing court would be required to conduct a trial *de novo* as to all relevant facts, weigh issues of credibility, enter findings of fact, and fashion its own remedy. The

language of RCW 7.16.040 and RCW 7.16.120 could not be harmonized and would be in direct conflict. Moreover, the court dockets would be flooded with a deluge of cases brought by sex offenders seeking to challenge determinations made by local law enforcement agencies and the ESRC.

### 3. Allegations of Constitutional Violations Does Not Alter Scope of Review Under Chapter 7.16 RCW

#### *a. There Is No Violation of Mr. Dudgeon's 14th Amendment Due Process Rights*

Mr. Dudgeon's classification as a level III sex offender without a hearing does not violate any constitutional rights. His classification as a level III rather than a level I sex offender similarly does not violate any constitutional rights.

Due process rights are triggered where there is a deprivation of a liberty interest. *In re Detention of Enright*, 131 Wn. App. 706, 714, 128 P.3d 1266 (2006). A liberty interest may arise from the due process clause or from state laws. *Id.*. Washington courts have held that the due process clause does not create a liberty interest for sex offenders with regard to being placed on reduced restrictions, such as less restrictive detentions. *Enright* at 714. If sex offenders do not have a liberty interest in less restrictive detentions, it is unlikely that they would have such an interest in

their risk level classification which merely dictates the level of public notification required.

Washington courts have also held that sex offense classification statutes do not create a liberty interest because they grant significant discretion to the decision maker. *Id.* at 715; *In re Meyer*, 142 Wn.2d 608, 618, 16 P.3d 563 (2001). Although local law enforcement agencies are directed by statute to classify sex offenders as a level III if they have a high risk of reoffending, the governing statute "vests" local law enforcement with "significant discretion in making this decision." *Enright* at 715; *Meyer* at 618. In addition, the statutes governing sex offender risk classifications are "procedural statutes for official decision making." *Id.* at 619. Such statutes do not create liberty interests. *Id.*

Because no liberty interest is implicated, due process rights are not triggered and sex offenders are not entitled to notice before a classification is made or information is disseminated under RCW 4.24.550. *Meyer* at 615. *Enright* at 715.

*b. No Violation of Any Other Constitutional Rights*

Mr. Dudgeon claims that his classification as a level III sex offender violates his 5th Amendment rights. Mr. Dudgeon has not explained how his classification violates this right. Similarly, Mr. Dudgeon has not explained nor provided any authority to suggest how his

current classification violates any of his rights. There is insufficient support for such assertions.

Mr. Dudgeon claims that his classification as a level III sex offender prevents him from living with his wife at his home in Sequim, Washington because sex offenders have been the victims of unprovoked murders near his home. Mr. Dudgeon has not cited to the record to support any facts regarding the alleged murders. Furthermore, whether Mr. Dudgeon would become a victim of a crime based upon his sex offender status is highly speculative. Regardless, this does not give rise to a violation of a constitutional violation and Washington courts have rejected similar arguments.

Washington courts have held that when a sex offender is rejected from private housing due to his sex offense level, there is no deprivation of a liberty interest and thus no constitutional violation because the decision of a private housing provider does not constitute governmental action. *Enright* at 714. Rather, the classification had merely an "incidental effect" of making the offender less desirable to the private housing provider. *Id.*

Similarly, even if Mr. Dudgeon could establish that his life was in danger due to a history of unprovoked murders in his home town (which he has not done), he cannot establish that this speculative danger is due to

government action. Mr. Dudgeon has not shown how potential criminal conduct of individuals constitutes a government action. At best, his sex offense classification will have merely the "incidental effect" of increasing his changes of being a target of criminal activity. This is purely conjecture.

*c. Violation of Constitutional Right Does Not Expand Scope of Review*

Not only does Mr. Dudgeon fail to establish a violation of any constitutional right, he has failed to show how the existence of a constitutional violation will change the scope of a court's review in a certiorari proceeding. Mr. Dudgeon has offered no legal support or even any argument to suggest that a constitutional violation would authorize a reviewing court to make findings of fact, to exercise its own judgment, and modify his classification. Even in cases in which the reviewing court held there to be a constitutional violation, the reviewing court's scope of review remained the same under RCW 7.16.120. *See Punton v. City of Seattle Public Safety Com'n*, 32 Wn. App. 959, 970, 650 P.2d 1138 (1982)(in which the court invalidated the decision of a lower tribunal due to constitutional violation but did not enter its own findings of fact and engaged in same scope of review). Even in such instances, the reviewing court refrained rendered its own findings of fact. *Id.*

### 4. Reviewing Court Cannot Consider New Evidence Offered By Mr. Dudgeon

Mr. Dudgeon's claim that the superior court should have considered the evidence presented by him and reclassified him based upon that evidence must fail. Washington case law is clear that the reviewing court in a certiorari proceeding cannot consider new evidence and is limited strictly to the record before the lower tribunal or officer.

The quote from *Appeal of Black*, 47 Wn.2d 42, 297 P.2d 96 (1955) provided on page 22-23 of Mr. Dudgeon's Appellate Brief supports this very conclusion. The quote from *Black* as provided by Mr. Dudgeon can be summarized as stating that the findings of a superior court in certiorari proceeding, where the findings of the lower tribunal are before the court, are not binding on an appellate court. See pages 22-23 of Mr. Dudgeon's brief. This quote is, in fact, not an actual quote from the published decision but is actually taken from a headnote. *Id.* at Headnote 3.

This statement offered by Mr. Dudgeon suggests that any findings of fact made by a superior court in reviewing a lower tribunal decision are superfluous. This is supported by the actual decision of the *Black* court which holds that "the court [in a certiorari proceeding is] limited by statute to the consideration of questions of law," *Id.* at 45, and "no evidence was

taken before the judge of the superior court, who was confined to a review of the record." *Id.* at 44.

Furthermore, Washington case law is clear that in a certiorari proceeding, the reviewing court cannot consider new evidence.

> Pursuant to RCW 7.16.060, the superior court reviews only the administrative record below and takes no new evidence. Therefore, the trial court need enter no findings of fact or conclusions of law. *King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd.*, 87 Wash.2d 536, 544, 554 P.2d 1060 (1976). Although the trial court did enter findings and conclusions herein, this does not in itself constitute grounds for reversal but is mere surplusage. *See Spokane Cy. Fire Protec. Dist. 8 v. Spokane Cy. Boundary Review Bd.*, 27 Wash.App. 491, 493, 618 P.2d 1326 (1980).

*Grader v. City of Lynwood*, 45 Wn. App. 876, 879, 728 P.2d 1057 (1986).

Mr. Dudgeon admits that he presented before the superior court a long list of scientific evaluations, professional opinions, and records of behavior to support his classification as a level I. He also alleges that the Kitsap County Sheriff's Office declined to consider this information and only considered the assessment provided by ESGR. Because the Kitsap County Sheriff's Office did not consider this new evidence presented to the superior court, it would be improper for the superior court to consider such evidence in the certiorari proceedings.

Mr. Dudgeon argues that the decision of the Kitsap County Sheriff's Office is not supported by substantial evidence because his new evidence was not considered. However, the determination of whether

factual findings are supported by substantial evidence is limited to the evidence contained in the record made before the lower tribunal or officer. *Lejeune v. Clallam County*, 64 Wn. App. 257, 263, 823 P.2d 1144 (1992)(holding that cognizable evidence to be considered when determining if findings are supported by substantial evidence is that evidence that is contained in the record made before the lower tribunal). Accordingly, the superior court had no authority to consider the new evidence presented by Mr. Dudgeon when making a determination as to whether the Sheriff's Office's classification as a level III sex offender is supported by substantial evidence.

**5. The Cases of *Hayes, Bringgold, Punton, Chaussee* Are Not Controlling**

Mr. Dudgeon cites to a number of Washington cases to support his argument that a reviewing court can modify his sex offender risk level. None of the cases cited by Mr. Dudgeon stand for this proposition.

*a. Hayes Is Not Controlling*

Mr. Dudgeon cites to *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997) for the proposition that a court is not required to find that a decision maker's action are so egregious as to be arbitrary and capricious in order to grant relief. In *Hayes*, the court referenced the five enumerated questions on the merits outlined in RCW 7.16.120 to show

that the party requesting review must establish one of the five standards. *Id.* at 714, fn. 4. The court stated that the party is not required to establish arbitrary and capricious conduct but must establish at least one of the standards enumerated in the statute. *Id.*

In addition, the "relief" sought in the writ of certiorari proceedings mentioned in *Hayes* was the invalidation of a decision of the lower tribunal and reinstatement of a decision of a hearing examiner. *Hayes* at 710. The plaintiff did not ask the reviewing court to fashion its own remedy with respect to the certiorari proceeding. *Id.* Moreover, the primary questions at issue in *Hayes* involved the plaintiff's §1983 action for damages against a city council rather than the writ of certiorari proceedings. *Id.*

*b. Bringgold Is Not Controlling*

Mr. Dudgeon cites to several cases for the proposition that the reviewing court is empowered to "render the judgment that should have been rendered by an inferior agency." He believes this language as found in Washington case law authorizes the reviewing court to make findings of fact and render a judgment. This language has been cited in Washington case law over time but it originates from the case of *Bringgold v. Spokane*, 19 Wn. 333, 336, 53 P.368 (1898).

In *Bringgold*, a board of police commissioners removed the plaintiff from his position as a police officer. *Id.* at 334-36. The plaintiff then sought a writ of review in the superior court. *Id.* A trial was then conducted in superior court and judgment was entered to restore the plaintiff to his position and aware him damages and costs. *Id.* Of importance is the fact that this court was decided in 1898 and does not mention RCW 7.16.040 or RCW 7.16.120. Also critical is the fact that the superior court in this case conducted a full trial to determine the plaintiff's right to judgment. RCW 7.16.120 and case law interpreting Chapter 7.16 RCW strictly prohibit a reviewing court from conducting a trial, making determinations of fact, and entering its own judgment.

*c. This Case Is Distinguishable From Punton*

While the language in *Bringgold* has been cited in the more recent cases of *Punton v. City of Seattle Public Safety Com'n*, 32 Wn. App. 959, 970, 650 P.2d 1138 (1982) overturned on unrelated grounds by *Danielson v. City of Seattle*, 108 Wn.2d 788, 742 P.2d 717 (1987), and *Chaussee v. Snohomish County Council*, 38 Wn. App. 630 689 P.2d 1084 (1984), none of these cases support the argument that a reviewing court may make findings of fact and fashion its own remedy or judgment under RCW 7.16.040.

In *Punton*, a police chief dismissed a police officer for unbecoming conduct. *Punton* at 960-61. This decision was reviewed by a commission which determined that the decision was made in good faith. *Id.* The officer initiated a writ of certiorari proceedings in superior court. *Id.* His proceedings also included allegations of a §1983 constitutional due process violation. *Id.* at 961. The reviewing court held that the §1983 allegations could be part of the certiorari proceedings even though the lower tribunal was not authorized to hear such allegations. *Id.* at 963-64. The reviewing court held that the lower tribunal's decision was supported by substantial evidence but the officer's due process rights had been violated such that the decision was unlawful. *Id.* at 969. The reviewing court ordered that the officer be reinstated with back pay. *Id.* The court held that the relief granted under the writ is limited to that which is necessary to set aside an action in excess of the lower tribunal's jurisdiction. *Id.* at 970.

This case is distinguished from the present case for several reasons. First of all, the writ in *Punton* included §1983 allegations for due process violations. §1983 provides a cause of action for a person who has been injured by a deprivation of rights in any "proper proceeding." This case is different because there is no cause of action for Mr. Dudgeon with regard to his classification as a sex offender. There is no cause of action

or legally supported allegation which could be coupled with Mr. Dudgeon's certiorari proceeding. Furthermore, his writ did not include §1983 allegations.

Second, unlike the officer in *Punton* who sought to have his dismissal overturned or invalidated, Mr. Dudgeon did not ask the reviewing court to overturn or invalidate the Sheriff Office's classification. Rather, he asks the court to make a determination as to what his proper classification should be and then assign him a new classification. Because the court in *Punton* merely invalidated the unlawful decision of the lower court, reinstating the officer to what would have been the status quo had the invalid decision never been made, the reviewing court in *Punton* did not have to make any findings of fact and its review was limited to issues of law. In contrast, a modification of a sex offender risk level would require extensive inquiry into the facts and require the reviewing court to render its own findings in support of the modification contrary to RCW 7.16.040.

Finally, the reviewing court in *Punton* had to invalidate the officer and order his back pay in order to correct the error of the lower tribunal in failing to provide him with a pre-termination hearing in violation of due process. The court held that reinstatement was the only remedy which could be provided to correct the due process violation because a post-

termination hearing would be insufficient. In the present case, however, there is no due process violation. Sex offense classification does not trigger due process rights and there is no right to a hearing or notice prior to classification. *In re Detention of Enright*, 131 Wn. App. 706, 714-15, 128 P.3d 1266 (2006). Because due process is not triggered, there is nothing inappropriate about remanding the issue back to the Sheriff's Office to conduct another classification. This is the proper remedy to correct potential errors.

*d. This Case Is Distinguishable From Chaussee*

In *Chaussee*, a hearing examiner and a county council determined that the plaintiff's property was subject to a local code provision. *Chaussee* at 631. The plaintiff sought review from superior court and also asked the superior court to rule on his equitable estoppel claim. *Id.* at 634. The reviewing court upheld the decision of the lower tribunals and also held that it had the authority to consider the equitable estoppel claim even though the lower tribunals did not. *Id.* However, the reviewing held that it was precluded from ruling on the equitable estoppel claim because there was insufficient evidence in the record regarding that claim. *Id.* The Court of Appeals affirmed this ruling. *Id.* at 640.

While the holding of this case, citing *Bringgold*, states that a reviewing court is to enforce the judgment which should have been rendered by the

lower tribunal, it does not support Mr. Dudgeon's claim that a reviewing court can make its own factual determinations. Because the reviewing court and the Court of Appeals in *Chaussee* both affirmed the rulings of the lower tribunals, neither court entered its own findings of fact or fashioned its own remedy. Nor does this case suggest that that would be appropriate. The courts merely held the lower tribunals acted properly.

### 6. Allowing Judicial Modification Would Undermine Law Enforcement's Statutory Obligations And Improperly Expand Due Process Rights

As outlined above, the classification of a sex offender's risk level for purposes of public notification does not trigger due process rights because it does not implicate a liberty interest. If Mr. Dudgeon's appeal were granted, this would improperly expand a sex offender's due process rights by giving offenders a right to appeal their classification to the superior court in which the court would be required to conduct a full trial as to the factual issues involved. Such an expansion of rights would permit sex offenders to obtain and present expert testimony in support of a lower classification and require courts to weigh the evidence and the credibility of expert testimony and determine the appropriate level of risk posed to the public. In short, this would create a new right to a post-classification hearing. The Legislature did not provide for such a hearing nor does the

statutory scheme governing classification of sex offenders express any intent to do so. *Meyer* at 615. *Enright* at 715.

The expansion of sex offender due process rights would provide a new appeal option and open the floodgates for all offenders who do not wish to be subjected to higher public notifications requirements. This would unduly burden the courts with the task of classifying sex offenders, a task most appropriately left to local law enforcement agencies with specialized knowledge of the risks posed to public safety and delegated to local law enforcement agencies by the legislature.[1]

Allowing sex offenders a right to a post-classification hearing in superior court would also undermine the authority of local law enforcement agencies to exercise their discretion in order to protect the safety of the public. If the superior court had the authority to reclassify sex offenders, this would no doubt interfere with the executive functions of law enforcement agencies to provide for public safety.

[1] Washington courts have held that "[w]hen the legislature assigns a judicial function to an administrative officer or board, it does so because the matters to be decided by that officer or board are best handled by those having specialized knowledge or expertise." *Appeal of Black*, 47 Wn.2d 42, 46, 287 P.2d 96 (1955).

## C. Kitsap County Sheriff's Office Did Not Act Arbitrarily or Capriciously As A Matter of Law Where Its Classification is Based Upon and Consistent With ESCR Classification.

Upon consideration of the questions on the merits outlined in RCW 7.16.120, the classification of Mr. Dudgeon as a level III sex offender, as a matter of law, is not erroneous, illegal, or arbitrary.

Kitsap County Sheriff's Office has jurisdiction over the classification of sex offenders. RCW 7.16.120(1). The legislature has expressly mandated that county sheriffs are required to classify sex offenders. RCW 4.24.550.

As a matter of law, the Kitsap County Sheriff's Office pursued its authority in the mode required by law. RCW 7.16.120(2). The determination by a county sheriff as to a sex offender's risk level is governed by RCW 4.25.550. This statute requires law enforcement to review the classifications made by the ESCR. *Id.* While the statute does not preclude county sheriffs from considering other material, it does not require sheriffs to do so. Mr. Dudgeon admits that the Sheriff's Office considered the ESCR classification as required by RCW 4.24.550(6). Accordingly, the Sheriff's Office carried out its authority as required by law.

As a matter of law, the Kitsap County Sheriff's Office did not violate Mr. Dudgeon's rights by classifying him as a level III sex offender.

Sex offense classification does not trigger a constitutional right or liberty interest. *Enright* at 715; *In re Meyer*, 142 Wn.2d 608, 615, 16 P.3d 563 (2001). In *Enright*, the court held that a convicted sex offender does not have a liberty interest in his risk classification. *Enright* at 715. The court stated that sex offender registration and disclosure statutes are procedural statutes for official decision making and do not create liberty interests. *Enright* at 715. For this same reason, courts have held that convicted sex offenders are not entitled to notice before a classification is made or information is disseminated under RCW 4.24.550. *Meyer* at 615. *Enright* at 715. If a sex offender can be classified without notice or a hearing because he has no liberty interest in his classification, that same classification cannot be the basis for a violation of rights claim.

Kitsap County Sheriff's Office's classification of Mr. Dudgeon as a level III sex offender is, as a matter of law, supported by competent proof and substantial evidence. RCW 7.16.120(4) and RCW 7.16.120(5). As explained above, while local law enforcement agencies are not precluded from considering other materials in assigning a sex offender classification pursuant to RCW 4.24.550, they are only mandated to consider one thing—the prior classification of the ESCR. Mr. Dudgeon admits the Sheriff's Office considered the ESCR classification. The level III classification made by the Sheriff's Office is the same classification as

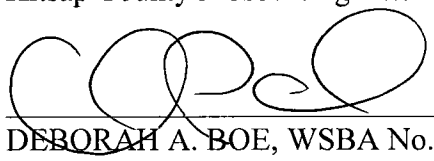
was made by the ESCR. The Sheriff's Office must only explain its classification when the classification differs from the one provided by the ESGR. RCW 4.24.550(10). This shows that the classification made by the Kitsap County Sheriff's Office is sufficiently supported by competent proof and substantial evidence as a matter of law.

## V. CONCLUSION

For the reasons outlined above, Mr. Dudgeon simply was not entitled, and the superior court was not authorized to grant, the relief he requested in the certiorari proceeding—modification of his sex offense classification from a level III to a level I. This would involve more than a simple determination as to whether the Kitsap County Sheriff Office's level III designation is supported by substantial evidence and lawful, as permitted under RCW 7.16.120, but would require that the reviewing court initiate an investigation into the facts, weigh the credibility of expert reports, and enter findings of fact to determine Mr. Dudgeon's "proper" classification. This is beyond the scope of review permitted in a certiorari proceeding which is clearly outlined in RCW 7.16.120. As a matter of law, the superior court had no authority to grant Mr. Dudgeon's request. For this reason, this Court should affirm the superior court's dismissal of Mr. Dudgeon's writ of certiorari.

RESPECTFULLY SUBMITTED this 9th day of May, 2014.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



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## CERTIFICATE OF SERVICE

I, Tracy L. Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On May 9, 2014, I caused to be served in the manner noted a copy of the foregoing document upon the following:

| |
|---|
| Cecil Dudgeon<br>4381 State Hiway 3W Apt #10<br>Bremerton, WA 98312<br><br>[X] Via U.S. Mail<br>[ ] Via Fax:<br>[ ] Via E-mail:<br>[ ] Via Hand Delivery |

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED May 9, 2014, at Port Orchard, Washington.

Tracy L. Osbourne, Legal Assistant
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# KITSAP COUNTY PROSECUTOR

## May 09, 2014 - 2:14 PM

**Transmittal Letter**

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Case Name: Cecil Dudgeon v. Steve Boyer
Court of Appeals Case Number: 46032-7

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