No. 76544-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

95890-4

THEODORE BERNSTEIN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

Court of Appeals Case No. 76544-2
Appeal from the Superior Court Division I of the
State of Washington for King County

PETITION FOR REVIEW

Theodore Bernstein,
Appellant, pro se
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A. IDENTITY OF PETITIONER

Petitioner is Theodore Bernstein, hereafter Bernstein, a registered sex offender (hereafter a Registrant) in King County, representing himself, pro se, in the matter before the Court.

B. CITATION TO COURT OF APPEALS DECISION

Theodore Bernstein seeks review of the Court of Appeals' unpublished opinion, *Theodore Bernstein v. John Urquhart, King County Sheriff,* Case No. 76544-2-I (April 23, 2018) (App. A), affirming the King County Superior Court's order dismissing Bernstein's Petition for Writ of Review due to timeliness.

C. ISSUES PRESENTED FOR REVIEW

The questions before the Court deal with sex offender registration, when and under what circumstances a registered sex offender, a Registrant, can challenge local law enforcement's re-designation of a sex offender's registration level, and whether a petition for Writ of Review is an appropriate vehicle for such a challenge. The specifics of the case before the Court is whether the Superior Court erred in dismissing Bernstein's Petition for Writ of Review due to timeliness.

The issues before the Court are as follows:

1. Is the nature of sex offender registration, the fact the County Sheriff makes periodic visits to Registrants, and that the Sheriff can alter the registration level of an offender at any time without notice mean for all intents and purposes Bernstein has the right to file for a Writ of Review at any time regarding his designated sex offender level?
2. Did the King County Sheriff's two-year delay filing notice with the Department of Corrections of Bernstein's change in sex offender registration level, as required by RCW 4.24.550, restart the clock for when a Petition for Writ of Review may be filed?
3. Given the fact the Court has ruled that law enforcement's process for deciding a Registrant's sex offender level is a quasi-judicial process, and the Sheriff's lack of procedures for creating and maintaining a record, did the Superior Court err in denying Bernstein's motion for discovery?
4. Did the Court error in making a finding of facts when dismissing the Writ due to timeliness, when it never addressed the merits of Bernstein's petition?

D. STATEMENT OF CASE

1. Conviction, Sentence, and Level I Designation

On February 4, 2013, Bernstein pled guilty and was sentenced on two counts of violation of RCW 9.68A.070, *Possession of depictions of minor engaged in sexually explicit conduct*, a Class C felony.[1] Just prior to his release from incarceration, the End of Sentencing Review Committee (ESRC) designated Bernstein a level I offender [CABR 292-300][2], an offender with the lowest risk to reoffend. On May 1st, 2013 Bernstein was released from confinement [CABR 0095], returned to his home in North Bend, registering with the King County Sheriff as sexual offender a day later.

Upon release and return to his home, Bernstein reported to his Community Corrections Officer and continued participating in a sex offender treatment program.

2. County Sheriff Designation Level II

Subsequent to his release and return home, the King County Sheriff evaluated and changed Bernstein's sex offender risk designation from

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[1] King County Superior Court case no. 12-1-04076-8.

[2] King County Superior Court Clerk sent a letter to the Court of Appeals indicating that the Certified Appeal Board Record (CRABR #22) was available as an exhibit. The 310 pages of documents in the Certified Appeal Board Record are referenced in this brief as "CABR" with the associated bates number ending. For example, Appeal Board Record page KC000067 is identified as "CABR 67."

level I to Level II [CP 87],[3] and executed a community notification process, which included mailing cards with Bernstein's picture and information to local residents, as well as holding a community meeting to inform the public. [CP 96].

After the reclassification, on behalf of Bernstein, Attorney Brad Meryhew on September 12, 2014 sent the King County Sheriff a petition letter, with accompanying evaluation from Bernstein's treatment provider,[4] requesting reconsideration of his revised risk level designation. The letter included a statement by Bernstein's treatment provider explaining that Bernstein was a low risk offender. The Agency never gave Bernstein or his attorney a reply or acknowledgement of receiving his petition letter, which the agency admitted to in open court [TR p 9, line 23].[5] In fact, when requested that the letter be included in the agency Record, the agency indicated it could not find the letter. [TR p 12, line 23]

During the Writ of Review proceedings in Superior Court, the Sheriff issued a "Law Enforcement Risk Level Department Notice to DOC/DSHS pursuant to RCW 4.24.550 Section 1(8), dated 11/14/2016 [CABR 307], over two years after designating Bernstein a Level II offender.

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[3] CP XX refers to Clerks Papers, with xx referencing the page number.
[4] See CP 0096 for Meryhew Letter and Treatment Progress Report, dated September 12, 2014.
[5] Hearing Transcript in Superior Court

3. Appellant Files a Petition for Writ of Review

Upon completion of Bernstein's probation period, ending May 1, 2016,[6] he filed his petition for Writ of Review with the King County Superior Court, seeking judicial review of the process used to change his sex offender risk classification from a Level I to a Level II. On August 17. 2016, the Superior Court granted Bernstein his petition. [CP 50]

In his Petition, Bernstein claimed the agency's reclassification of his risk level was arbitrary, capricious, and biased, and he believes the record shows such bias, therefore the reclassification process was unlawful, and sought relief in Superior Court.

The Sheriff filed a motion to dismiss Bernstein's petition, claiming it was improperly served and due to untimeliness of filing. The Court granted the petition for review, leaving the issues of timeliness and proper serving to the assigned judge. [CP 50]

4. Motions for Disclosure and Deposition

Upon granting review, Bernstein filed motions for disclosure and depositions [CP 57-60, 63-65], seeking to obtain all information within the agency regarding Bernstein, and seeking deposition of the parties involved in re-designating Bernstein a Level II offender. Sheriff filed in opposition to the motions for discovery and motioned separately for a revised case schedule. [CP 66-69, 70-75]. The Superior Court denied Bernstein's

[6] See Superior Court case no. 12-1-04076-8, Docket # 37, NOTICE /DOC SUPERVISION CLOSURE, included in Appendix E.

motions and granted the Sheriff's motion for a revised case schedule. [CP 86-87] The revised schedule included full briefing by the parties, filing of the agency record, and scheduling a hearing on the merits.

5. Superior Court Dismisses Due to Timeliness

The first and only hearing on Bernstein's petition was held January 13, 2017, presided by Honorable Judge Benton [CP 223]. The Court stated from the beginning that it believed the matter before the Court was the issue of timeliness [TR p 4, line 21]. Counsel for Sheriff stated to the Court the issue before the Court were the merits of Bernstein's petition. [TR p 20, line 3]. The Court stated it may get to the merits depending on the Court's ruling on the issue of timeliness.

The hearing continued to address the issue of timeliness, with the court concluding that the Petition was untimely and dismissed. [CP 0223]

6. Bernstein Files Notice of Appeal

Upon dismissal of his petition, Bernstein filed a timely notice of appeal, seeking Appellate review of six assignments of error. [CP 229-234]. The Court of Appeals issued an opinion without holding oral arguments. The Court of Appeals opinion is included in App A.

E. ARGUMENT

1. <u>Law Enforcement May Change Sex Offender Level at Any Time</u>

Under RCW 72.09.345, the End of Sentencing Review Committee (ESRC) classifies offenders as Level I for low risk of reoffense; Level II for

moderate risk; and Level III for high risk. To support this classification, the ESRC has "access to all relevant records and information in the possession of public agencies relating to the offenders under review." RCW 72.09.345(3). Then, the ESRC notifies the sheriff or other local law enforcement agency in the offender's community of the recommended classification. As stated previously, the ESRC designated Bernstein a Level I offender and then notified the local Sheriff. [KC 000292 – 000306]

RCW 4.24.550 provides similar authorization to local law enforcement with the duty to review a Registrant's level and to make the final determination. In addition, if law enforcement modifies a level, it is required by statute to notify DOC:

> RCW 4.24.550 (10): "When a law enforcement agency or official classifies an offender differently than the offender is classified by the end of sentence review committee at the time of the offender's release from confinement, the law enforcement agency or official shall notify the end of sentence review committee and the Washington state patrol and submit its reasons supporting the change in classification."

The officers from the Sheriff's office came to visit Bernstein on a periodic basis, interviewing him and taking notes of their interactions. These interactions were record as an "Incident Reports" or "Follow-up Reports". [examples CABR 88-93, CABR 100 – 105]. When supervision was handed over from Det. Santos to Det. Billingsley, Det. Billingsley stated (06/25/2014):

> "*I reviewed Det. Santos's recent case and her follow up work and I concur with her recommendation to classify Mr. Bernstein as a Level 2 sex offender. Mr. Bernstein remains in counseling and is currently*

under the supervision of Dept of Corrections. I do not recommend deviating from this assessment at this time." [CABR 103]

This appears that Det. Billingsley performed another assessment of Bernstein, confirming that the Sheriff continually monitors and evaluates the registration level of each Registrant they monitor and track.

The Court of Appeals, by affirming the Superior Court's dismissal due to timeliness, forecloses for as long as Bernstein is required to register from ever having standing to challenge his sex offender level designation. However, the record shows that the Sheriff is constantly evaluating and reviewing the level of an offender, which clearly indicates the process is continuous. It is done in secrete, without an offender knowing when, by who, and how he is being evaluated. Holding Bernstein to a 30-day limit to file his Writ from the time he saw himself listed on the county web site as a level II offender is unreasonable.

2. **Sheriff Delayed Notifying DOC for over Two Years**

RCW 4.24.550 authorizes the Sheriff to perform sex offender evaluations and requires the Sheriff to notify the State DOC when modifying a leveling decision by DOC. The agency never completed its statutory requirements when designating Bernstein a Level II offender. Therefore, the Sheriff only completed the process during Bernstein's petition for Writ of Review. If the agency can take over two years to complete the process, Bernstein should not be held to a different standard.

Given the Sheriff only completed its statutory requirement during Bernstein's petition to the court, his petition is therefore was not untimely.

3. **Court Erred In Denying Motion for Discovery**

The Agency argues that the superior court rightfully denied Bernstein his motions for discovery citing *Magana v. Hyundai*, 1267 Wn. 3d 570. 220 P.3d 191, 197 (2009), implying Bernstein was abusing the discovery process. The Agency offers up a record generated primarily by one individual without a review or formal processes, and offers no justification for how the Record was generated, how it was independently reviewed, and under what quasi-judicial procedure were followed.

After filing his petition for Writ of Review, the Sheriff issued a new "Standard Operating Procedures – Registered Sex Offender Unit" on 09/13/2016. [CABR 168-189] Until that moment, the Sheriff had no written procedures or policies, none that were in effect at the time Bernstein was releveled as a Level II offender.

What reclassification process altering Bernstein's level was followed is truly unknown to anyone outside the Agency, and therefore cannot be considered by any standard to be fair and impartial process or created a record which reflects objectively on Bernstein.

The Sheriff performed a quasi-judicial function when reclassifying Bernstein, which implies some independent internal board review, a process which can be reviewed by the courts:

"Because the act of classifying Mr. Enright as a

> level III offender resembles a court function, the ESRC and the law enforcement agency participated in a quasi-judicial function that may be challenged by a writ of certiorari under RCW 7.16.040.7"[7]

This Court made clear its discomfort with a reclassification process that does not appear to be fair:

> "Notwithstanding our decision today on the petitioners' constitutional claims, we express a certain discomfort with the seeming unfairness of a process of classification in which the offenders have little involvement."[8]

In Meyer, the court was reviewing whether there was a liberty interest involved in being classified as a sex offender. This court ruled there was no liberty interest involved, however this court did say an offender could petition the court for review of a reclassification which an offender claims abuse of discretion by the classifying law enforcement agency. In Meyer, it should be noted that this court was reviewing an ESRC classification process; a process which clearly is more professional and more structured than anything the Sheriff has developed. As described in Bernstein's COA Opening Brief, the ESRC has a cast of professionals whose task is to perform classification reviews of all sex offenders released from DOC

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[7] In re Detention of Enright, 128 P.3d 1266, 131 Wash.App. 706 (Wash.App.Div.3 02/23/2006)

[8] In re Personal Restraint Petition of Meyer, 142 Wash.2d 608, 16 P.3d 563 (Wash. 01/04/2001)

confinement state wide.

What is known of the Sheriff's process, the Sheriff clearly does not have the number of personnel, nor anyone with similar expertise or qualifications, that DOC ESRC uses in its process. The Sheriff did not have written procedures as DOC has, and left it to individual detectives assigned to decide what information or documents are relevant to place in the agency record. Clearly the Sheriff has no documented record development and review process, therefore the record contains, or does not contain, information based on what one or two individuals wish to place in the record. Given the situation, the Sheriff has given up its right to prevent a more intrusive disclosure process, because it lacks any appearance of an official record developing process. When reviewed in context of evidence of bias by Detectives within the record, Bernstein should be allowed to enquire further (allowed discovery) to obtain information on how his reclassification process was truly handled, and what information was in the agency's possession, as well as what it did not have, at the time of the reclassification.

4. **The Court Erred in Making Finding of Facts**

RCW Chapter 4.16 addresses when deciding whether to grant a petition for writ of certiorari, a superior court's authority is limited to a determination of the following five questions:

> (1) Whether the body or officer had jurisdiction of the subject matter of the determination under review.

(2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.

(3) Whether, in making the determination, any rule of law affecting the. rights of the parties thereto has been violated to the prejudice of the relator.

(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

(5) Whether the factual determinations were supported by substantial evidence.

In Andrew v. King County, 21 Wn.App. 566, 574-75, 586 P.2d 509 (1978), Division One of this court held that a superior court exceeded its scope of review under RCW 7.16.120 when it made a factual determination that was within the discretionary decision-making authority of the inferior tribunal being reviewed. In so holding, the *Andrew* court reasoned:

> The Superior Court cannot. . . determine from the testimony and evidence what the facts were. Nor can we.
>
> "It seems clear that our statutory certiorari and review proceeding contemplates a review in the courts of the proceeding had in an inferior tribunal only upon the record of such proceeding made therein, and that such review is in no sense a trial de novo of the questions determined by the inferior tribunal sought to be reviewed."

21 Wn.App. at 574 (quoting State ex. Rel. Spokane & I.E.R. Co. v. State Board of Equalization, IS Wash. 90, 134 P. 695(1913)); see also Seattle Police Department v. Werner, 163 Wn.App. 899, 907, 261 P.3d 218

(2011) (When reviewing an inferior tribunal's decision under RCW 7.16.120, "an appellate court is not to substitute its own judgment for that of the fact finder.").

The Andrew court thus held that, under RCW 7.16.120, the only proper remedy from a successful writ of certiorari was to remand to the inferior tribunal for a new proceeding. 21 Wn.App. 576.

Here, RCW 4.24.550(6)(b) vested the King County Sheriff's Office with statutory authority to "assign risk level classifications to all offenders about whom information will be disseminated." In assigning a risk level classification, the Sheriff exercises a quasi-judicial function and has "significant discretion in making that decision." In re Enright, 131 Wn.App. at 715. Thus, when a court reviews a classification decision in a petition for writ of certiorari and determines that substantial evidence did not support the decision under RCW 7.16.120(5), the only proper remedy is to vacate the classification decision and to remand to the local law enforcement agency for a new classification decision. Andrew, 21 Wn.App. 576; Werner, 163 Wn.App. at 907.

In this case, the Superior Court only reviewed the timeliness issue, and the not merits of Bernstein's petition. Therefore, the Court had no authority to make factual findings when it dismissed Bernstein's petition for review. In doing so, it granted support to decisions by the Agency which the Court never reviewed. Bernstein disputes the Agency's statements of facts and believes they are erroneous and defamatory,

without basis in fact, and the Court accepted them as facts without reviewing the merits of Bernstein's claim of Agency bias.

F. CONCLUSION

The issues raised by Bernstein are of serious consequences to his ability to live in the community without harassment. The process used to designate him a level II, placing him on the public registry and subject to ridicule, was done under a process that cannot be described in any manner as fair and without bias.

Bernstein claims that the Agency employees went beyond reasonable discretion, beyond arbitrary and capricious, entering a level of abuse of power is one that requires review by the Courts. Without this Court's grant of review, Bernstein with never be able to petition for judicial review of his sex offender level designation. This Court is urged to grant Bernstein's petition for review.

Respectfully submitted,

Date: May 23, 2018

Theodore Bernstein

Appendix A

Court of Appeals, Division One
Case No. 76544-2-1

Unpublished Opinion
FILED: April 23, 2018

Theodore Bernstein

V

John Urquhart, King County Sheriff

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THEODORE BERNSTEIN, Appellant, v. JOHN URQUHART, KING COUNTY SHERIFF, Respondent.	No. 76544-2-I DIVISION ONE UNPUBLISHED OPINION FILED: April 23, 2018

MANN, A.C.J. — Over two years after the King County Sheriff's Office (KCSO) classified Theodore Bernstein a level II sex offender, he filed a petition for writ of review before the King County Superior Court. Bernstein appeals the superior court's decision dismissing his petition as untimely. Because statutory writs must be filed within "a reasonable time," and the analogous statutory rule creates a time limit of 30 days, we affirm.

FACTS

Bernstein was convicted of two counts of possession of depictions of a minor engaged in sexually explicit conduct, a class C felony. Bernstein was sentenced to 14 months of confinement and released from the King County Correctional Facility on May 12, 2013.

Just prior to his release, the End of Sentencing Review Committee (ESRC), recommended that Bernstein be classified as a level I sex offender. On May 1, 2013, KCSO Detective Jessica Santos was assigned to supervise Bernstein and assign him a risk level as a registered sex offender. After reviewing Bernstein's risk assessment, the ESRC recommendation, progress reports from his sex offender treatment, and communicating with people familiar with Bernstein's risk to the community, Detective Santos recommended Bernstein be classified as a level II Registered Sex Offender at moderate risk of sexual reoffense. The decision to classify Bernstein as a level II sex offender was finalized by KCSO on January 17, 2014. KCSO executed a community notification process shortly thereafter. Bernstein learned that he was classified as a level II sex offender on March 24, 2014.

On July 8, 2016, Bernstein filed a petition for writ of review in King County Superior Court seeking to challenge his sex offender classification. Bernstein served the KCSO on August 15, 2016. On August 17, 2016, the superior court issued a writ of review directing KCSO to certify the record and assigned Bernstein's case for consideration on the merits. The writ of review left issues of timeliness and service of process to the assigned judge.

On August 22, 2016, before the certified record was filed, Bernstein filed motions "to disclose to Plaintiff all information and records within agencies possession regarding Plaintiff." KCSO objected to the motion. KCSO argued the motion was unnecessary because they were already in the process of gathering the record for purposes of review, and argued further discovery was improper because review under RCW

7.16.070 is based on the record the agency used to reach its decision. The superior court denied Bernstein's motion on September 2, 2016.

KCSO filed a certified copy of the record on October 28, 2016, and supplemented the record on November 16, 2016. Bernstein was also permitted to supplement the record with any evidence he believed to be pertinent.

The hearing on the writ occurred on January 13, 2017. KCSO argued that Bernstein's challenge should be denied due to its untimeliness. After considering briefing and hearing argument, the superior court dismissed Bernstein's petition on the grounds that it was untimely. The court issued written findings of fact and conclusions of law dismissing the writ action on February 3, 2017. Bernstein appeals.

ANALYSIS

Timeliness of Petition for Writ of Review

The primary issue in this case is whether the superior court erred in denying Bernstein's writ of review as untimely. When review of a quasi-judicial administrative action is invoked by statutory writ of certiorari, the appellate court looks to the standards of review implicit in the certiorari statute, RCW 7.16.120. Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 29, 891 P.2d 29 (1995). We review questions of law de novo and we review questions of fact based on "[w]hether the factual determinations were supported by substantial evidence." RCW 7.16.120(3), (5); Hilltop, 126 Wn.2d at 29. We review a superior court's order granting or denying a statutory writ of review de novo. Dep't of Labor & Indus. of State v. Bd. of Indus. Ins. Appeals of State, 186 Wn. App. 240, 244, 347 P.3d 63 (2015).

Under RCW 9A.44.130(1)(a), any person who has been convicted of a sex offense must "register with the county sheriff for the county of the person's residence." Under RCW 4.24.550(6)(a), the sheriff's office "shall assign a risk level classification to all offenders." In assigning this classification, the sheriff's office is to consider

> (i) Any available risk level classifications provided by the department of corrections, the department of social and health services, and the indeterminate sentence review board; (ii) the agency's own application of a sex offender risk assessment tool; and (iii) other information and aggravating or mitigating factors known to the agency and deemed rationally related to the risk posed by the offender to the community at large.

RCW 4.24.550(6)(a). An offender is to be classified at risk level I if "he or she is at a low risk to sexually reoffend;" risk level II if "he or she is at a moderate risk to sexually reoffend;" or risk level III if "he or she is at a high risk to sexually reoffend." RCW 4.24.550(6)(b).

The statute further states, "[a]gencies may develop a process to allow an offender to petition for review of the offender's assigned risk level classification. The timing, frequency, and process for review are at the sole discretion of the agency." RCW 4.24.550(6)(d). At the time Bernstein's risk assessment was determined, no such review process had been developed. Therefore, Bernstein pursued review under the writ statute, chapter 7.16 RCW.

On review of agency actions, superior courts have the power to issue constitutional or statutory writs of certiorari. CONST. art. IV, § 6; chapter 7.16 RCW. Bernstein does not clearly determine which writ he sought at trial or on appeal.

A statutory writ of certiorari is mandated where a petitioner shows that: "(1) an inferior tribunal or officer (2) exercising judicial functions (3) exceeded its jurisdiction or

acted illegally, and (4) there is no other avenue of review or adequate remedy at law." Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 533, 79 P.3d 1154 (2003), as corrected on denial of reconsideration (Mar. 11, 2004); Clark County Pub. Util. Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 845, 991 P.2d 1161 (2000).

By contrast, the constitutional writ of certiorari embodied in article IV, section 6 of the Washington Constitution is available in somewhat narrower circumstances. Clark County, 139 Wn.2d at 845. "The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." Saldin Sec., Inc. v. Snohomish County, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). This form of review lies entirely within the trial court's discretion, and "will not issue if another avenue of review, such as a statutory writ or direct appeal, is available." Malted Mousse, 150 Wn.2d at 533 (citing Saldin, 134 Wn.2d at 293).

In this case, we hold a statutory writ was available. Bernstein is challenging an inferior tribunal or officer, the sheriff's office, the sheriff's officer was exercising a quasi-judicial function, see In re Det. of Enright, 131 Wn. App. 706, 716, 128 P.3d 1266 (2006),[1] and RCW 4.24.550 does not provide any mechanism for review of the sheriff's office assigned risk level classification.[2]

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[1] In determining whether the agency was exercising a judicial function, the court looks to four elements:

> (1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.

Because we determine a statutory writ was available in this case, we move on to whether Bernstein's writ was untimely. As both parties acknowledge, chapter 7.16 RCW does not indicate a specific time limitation under which writs must be filed. However, the Washington Supreme Court has held that a petition for a writ of certiorari must be filed within a "reasonable time." Clark County, 139 Wn.2d at 847; Akada v. Park 12-01 Corp., 103 Wn.2d 717, 718-19, 695 P.2d 994 (1985) ("we have long held that a writ of certiorari should be applied for within a reasonable time after the act complained of has been done"). "A reasonable time within which to apply for a statutory writ is the analogous statutory or rule time period." Clark County, 139 Wn.2d at 847. The most analogous statutory rule is the Rules of Appellate Procedure.

"The sex offender registration and disclosure statutes are essentially procedural statutes; no liberty interest arises from them." In re Pers. Restraint of Meyer, 142 Wn.2d 608, 619, 16 P.3d 563 (2001). "In the absence of such a liberty interest, no due process rights attach to the classification of the risk such individuals present on their release from confinement." Meyer, 142 Wn.2d at 623. In State v. Hand, 173 Wn. App. 903, 907-08, 295 P.3d 828 (2013), aff'd, 177 Wn.2d 1015, 308 P.3d 588 (2013), this court held an appeal of the revocation of a suspended sentence is governed by the

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Raynes v. City of Leavenworth, 118 Wn.2d 237, 244-45, 821 P.2d 1204 (1992) (quoting Standow v. Spokane, 88 Wn.2d 624, 630, 564 P.2d 1145). In Enright, Division Three of this court held that the act of classifying a sex offender is a quasi-judicial function because "[t]he determination of a sex offender's risk to reoffend is historically assigned to the sentencing court, and involved here the application of statutory guidelines to the past and present facts. See, e.g., RCW 71.09.060(1)." Enright, 131 Wn. App. at 716. We agree. See also RCW 9.94A.670.

[2] Our Supreme Court acknowledged this lack of review, in In re Pers. Restraint of Meyer, 142 Wn.2d 608, 624, 16 P.3d 563 (2001), in which the court "express[ed] a certain discomfort with the seeming unfairness of a process of classification in which the offenders have little involvement." The court explained, however, "such offenders are not without avenues of relief . . . These individuals may secure judicial review by writ of certiorari for arbitrary or capricious classification. RCW 7.16.040; CONST. art. IV, § 4, § 6." Meyer, 142 Wn.2d at 624.

Rules of Appellate Procedure, "which provide a right of appeal of all final orders in adjudicative proceedings." Hand, 173 Wn. App. at 908; RAP 2.2. This is because "an offender facing revocation of a suspended sentence has only minimal due process rights, the same as those afforded during revocation of probation or parole." An appeal of an offender's final classification is directly analogous to a court's decision on probation or parole, and is likewise governed by the Rules of Appellate Procedure.

Under the appellate rules, the party seeking review must file a notice of appeal within 30 days from the entry of the order. RAP 5.1, 5.2. An extension of time may be granted, but only in extraordinary circumstances. RAP 18.8. In this case, the trial court considered the length of time between the agency action, over 2 years, and the excuses provided by Bernstein to explain his delay in seeking the writ. The trial court considered Bernstein's excuse that he did not pursue an appeal because he was afraid of retaliation, then held it was not credible and was unsupported by any evidence on the record.

Bernstein argues essentially that because statutory writs do not have a set time limit, the trial court erred in ruling his writ was untimely. Bernstein relies on New Cingular Wireless PCS, LLC v. City of Clyde Hill, 185 Wn.2d 594, 604-05, 374 P.3d 151 (2016). Bernstein's reliance on New Cingular is misplaced. In New Cingular, New Cingular Wireless challenged the legality of a municipal fine in King County Superior Court by filing an action for declaratory judgment, and asked the court to invalidate the notice of violation. New Cingular, 185 Wn.2d at 597-98. The court held an action for declaratory judgment was proper because the "writ of review statute does not limit itself to being the exclusive remedy for contesting a city fine. In fact, it does the opposite by

holding itself out as the remedy of last resort. RCW 7.16.040." New Cingular, 185 Wn.2d at 604-05. Although the court acknowledges that the writ statute "fails to specify a time limit for appeal," the court did not overrule past precedent that assumes an implied time limit on appeal of agency decisions. Until our precedents are specifically overruled, they remain good law. Saleemi v. Doctor's Associates, Inc., 176 Wn.2d 368, 379, 292 P.3d 108 (2013).

Because Bernstein failed to demonstrate extraordinary and compelling circumstances justifying his two-year delay in filing this motion, we affirm the superior court's dismissal of his writ.

Denial of Discovery Motion

Bernstein next argues that the superior court erred in denying his motion to compel discovery. It is within the superior court's discretion to deny a motion to compel discovery and we will not disrupt the ruling absent an abuse of discretion. Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 183, 313 P.3d 408 (2013). A court abuses its discretion when it bases its decision on unreasonable or untenable grounds. Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 665, 989 P.2d 1111 (1999). "Under a writ of review, a municipality or agency must return a complete record concerning the challenged action. When the petition involves allegations of procedural irregularities or appearance of fairness, or raises constitutional questions, the court may consider evidence outside the record." Responsible Urban Growth Grp. v. City of Kent, 123 Wn.2d 376, 384, 868 P.2d 861 (1994).

In this case, Bernstein moved to compel disclosure of evidence before KCSO filed the certified record. Because the evidence Bernstein sought was likely to have

been included in the certified record, we hold the superior court did not abuse its discretion when denying Bernstein's discovery motion.

Written Findings and Conclusions

Finally, relying on Andrew v. King County, 21 Wn. App. 566, 586 P.2d 509 (1978), Bernstein argues the superior court exceeded its authority in issuing findings of fact and conclusions of law. In Andrew, this court held the superior court exceeded its proper scope of review when it substituted its own judgment for that of the fact finder. Andrew is inapplicable here.

In this case, the superior court did not weigh the evidence then substitute its judgment for KCSO. The court did not even consider the issues contained within the writ on the merits. The findings and conclusions in this case were in support of the trial court's legal conclusion denying the writ as untimely. This is not a finding that must be reserved for the lower authority. Moreover, even if this were a decision on the merits, while "the trial court need not enter findings of fact or conclusions of law. . . . If the trial court nonetheless enters findings and conclusions, they are treated as mere surplusage by the appellate court." Concerned Land Owners of Union Hill v. King County, 64 Wn. App. 768, 772-73, 827 P.2d 1017 (1992).

We affirm.[3]

Mann, A.C.J.

WE CONCUR:

Trickey, J

Schindler, J

[3] Bernstein also argues that the trial court erred by not considering all of the briefing before rendering its decision. Bernstein points to one occurrence at trial when the court was unable to follow Bernstein's line of argument. However, this is not evidence that the trial court failed to consider Bernstein's pleadings. The evidence on the record is that the trial court considered all of the pleadings and evidence.

SUPREME COURT

STATE OF WASHINGTON

THEODORE BERNSTEIN, Appellant, v. JOHN URQUHART, Respondent.	Case No.: 76544-2-I CERTIFICATE OF SERVICE PETITION FOR REVIEW

I certify under penalty of perjury under the laws of the State of Washington, that I caused the documents referenced below to be served as follows:

DOCUMENTS:

1. Petitioner's Petition for Review, including Appendix A;
2. This Certificate of Service.

COPY TO: Mailed to the office of:

Mari Isaacson
516 Third Avenue
Suite W400, King County Courthouse
Seattle, WA 98104

DATED this 23rd day of May, 2018.

Mathew Lawson
Pacific, WA