

Am 12/28/04

FILED
COURT OF APPEALS
MAY 11 2005
07 DEC 01 PM 1:13
STATE OF WASHINGTON
BY *JW*

NO. 36491-3-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

DOMINGO TORRES RAMOS, JR.,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	v
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
D. ARGUMENT	
I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT 5, 6, 9 AND 10 BECAUSE THEY ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE	11
II. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FOUND HIM GUILTY OF FAILURE TO REGISTER BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THIS CHARGE	14
<i>(1) The State Failed to Present Substantial Evidence That the Defendant Failed to Report Every 90 Days as Required by the Statute</i>	15
<i>(2) The State Failed to Present Substantial Evidence That the Defendant Was Ever Given Notice of the Date upon Which He Was Supposed to Report</i>	17
III. THE TRIAL COURT AND THURSTON COUNTY SHERIFF DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN THEY FAILED TO GIVE THE DEFENDANT AN OPPORTUNITY TO CONTEST HIS SEX OFFENDER CLASSIFICATION	20

(1) In re Meyer Recognizes Three Separate Methods for a Sex Offender to Establish a Liberty Interest in His or Her Sex Offender Risk Classification Designation 22

(2) The Defendant Meets the In re Meyer “Stigma-plus” Basis for Claiming a Liberty Interest in His Sex Offender Risk Classification Designation 24

(3) The Defendant Meets the In re Meyer “Avoidance of Further Incarceration” Basis for Claiming a Liberty Interest in His Sex Offender Risk Classification Designation 26

IV. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT REFUSED TO ALLOW HIM TO CALL WITNESSES TO PRESENT RELEVANT, EXCULPATORY EVIDENCE FOR THE DEFENSE 28

(1) The Trial Court Denied the Defendant a Fair Trial When it Refused to Allow Him to Call Dr. Trowbridge to Testify That the Defendant Was a Level I Sex Offender, Not a Level II or III Sex Offender 28

(2) The Trial Court Denied the Defendant a Fair Trial When it Refused to Allow Him to Call Two Witnesses to Rebut Officer Leischner’s Claims That He Called the Defendant Between October 8th and 16th of 2006 33

V. RCW 4.24.550(6)(b) VIOLATES THE SEPARATION OF POWERS DOCTRINE BECAUSE IT DELEGATES THE POWER TO CLASSIFY SEX OFFENDERS TO COUNTY SHERIFFS WITHOUT PROVIDING CRITERIA FOR MAKING THAT CLASSIFICATION 35

**VI. RCW 4.24.550(6)(b) VIOLATES THE DEFENDANT'S
RIGHT TO EQUAL PROTECTION UNDER WASHINGTON
CONSTITUTION, ARTICLE 1, § 12 AND UNITED STATES
CONSTITUTION, FOURTEENTH AMENDMENT BY
CREATING A SYSTEM WHEREBY SIMILARLY
SITUATED SEX OFFENDERS ARE DISPARATELY
CLASSIFIED DEPENDING UPON THE CLASSIFICATION
CRITERIA USED BY EACH COUNTY SHERIFF 45**

E. CONCLUSION 50

F. APPENDIX

1. Washington Constitution, Article 1, § 3 51

2. Washington Constitution, Article 1, § 12 51

3. United States Constitution, Fourteenth Amendment 51

4. RCW 4.24.550 52

5. RCW 9A.44.130 55

6. RCW 72.09.345 56

TABLE OF AUTHORITIES

Page

Federal Cases

Bruton v. United States,
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) 28

Chambers v. Mississippi,
410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 28

Graham v. Richardson,
403 U.S. 365, 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971) 46

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 14

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 15

McGowan v. Maryland,
366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961) 47

United States v. Nixon,
418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) 35

State Cases

Caffall Bros. v. State, 79 Wn.2d 223, 484 P.2d 912 (1971) 38, 39, 44

Carrick v. Locke, 125 Wn.2d 129, 882 P.2d 173 (1994) 35, 36

Hunter v. North Mason High School,
85 Wn.2d 810, 539 P.2d 845 (1975) 45

In re Davis, 142 Wn.2d 165, 12 P.3d 603 (2000) 17

In re Messmer, 52 Wn.2d 510, 326 P.2d 1004 (1958) 21

Jenkins v. State, 85 Wn.2d 883, 540 P.2d 1363 (1975) 45

BRIEF OF APPELLANT - v

<i>Nielsen v. Washington State Bar Ass'n</i> , 90 Wn.2d 818, 585 P.2d 1191 (1978)	46, 47
<i>Petersen v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1983)	46, 47
<i>Peterson v. Hagan</i> , 56 Wn.2d 48, 351 P.2d 127 (1960)	40, 44
<i>State v. Agee</i> , 89 Wn.2d 416, 573 P.2d 355 (1977)	11
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983)	14
<i>State v. Baldwin</i> , 150 Wn.2d 448, 78 P.3d 1005 (2003)	18
<i>State v. Coria</i> , 120 Wn.2d 156, 839 P.2d 890 (1992)	30, 46
<i>State v. Dougall</i> , 89 Wn.2d 118, 570 P.2d 135 (1977)	36, 38, 43
<i>State v. Ermert</i> , 94 Wn.2d 59, 578 P.2d 1309 (1978)	36
<i>State v. Ford</i> , 110 Wn.2d 827, 755 P.2d 806 (1988)	11
<i>State v. Furman</i> , 122 Wn.2d 440, 858 P.2d 1092 (1993)	18
<i>State v. Gilroy</i> , 37 Wn.2d 41, 221 P.2d 549 (1950)	40, 44
<i>State v. Heiskel</i> , 129 Wn.2d 113, 916 P.2d 366 (1996)	46
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	11
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983)	28
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003)	16
<i>State v. Martinez</i> , 85 Wn.2d 671, 538 P.2d 521 (1975)	31
<i>State v. McNair</i> , 88 Wn.App. 331, 944 P.2d 1099 (1997)	46, 47
<i>State v. Monday</i> , 85 Wn.2d 906, 540 P.2d 416 (1975)	36
<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972)	14

<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002)	35, 36
<i>State v. Nelson</i> , 89 Wn.App. 179, 948 P.2d 1314 (1997)	11
<i>State v. Perrigoue</i> , 81 Wn.2d 640, 503 P.2d 1063 (1972)	45
<i>State v. Sansone</i> , 127 Wn.App. 630, 111 P.3d 1251 (2005)	38
<i>State v. Savage</i> , 94 Wn.2d 569, 618 P.2d 82 (1980)	29, 30
<i>State v. Smith</i> , 117 Wn.2d 263, 814 P.2d 652 (1991)	30, 31
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963)	28
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973)	15
<i>United States Steel Corp. v. State</i> , 65 Wn.2d 385, 397 P.2d 440 (1964)	40, 44
<i>Yakima Cy. Deputy Sheriff's Ass'n</i> , 92 Wn.2d 831, 601 P.2d 936 (1979)	47

Constitutional Provisions

Washington Constitution, Article 1, § 3	14, 17, 20, 34
Washington Constitution, Article 1, § 12	30, 45, 49
United States Constitution, Fourteenth Amendment	14, 17, 20, 45, 49

Statutes

RCW 4.24.550	35, 42, 43, 48, 49
RCW 9A.44.130	15, 16, 18, 30, 31, 40, 41
RCW 72.09.345	41, 42, 49

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it entered that portion of Finding of Fact 5, 6, 9 and 10 because they are not supported by substantial evidence. CP 65-66.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it found him guilty of failure to register because the state failed to present substantial evidence on this charge. RP 1-212.

3. The trial court and Thurston County Sheriff denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when they failed to give the defendant an opportunity to contest his sex offender classification. RP 1-221.

4. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it refused to allow him to call witnesses to present relevant, exculpatory evidence for the defense. RP 167-171.

5. RCW 4.24.550(6)(b) violates the separation of powers doctrine because it delegates the power to classify sex offenders to county sheriffs without providing criteria for making that classification.

6. RCW 4.24.550(6)(b) violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment by creating a system whereby similarly situated sex offenders are disparately classified depending upon the classification criteria used by each county sheriff.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it enters findings of fact unsupported by substantial evidence?

2. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it convicts him of an offense without substantial evidence?

3. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it refuses to allow him to call witnesses to present relevant, exculpatory evidence for the defense?

4. Does a trial court or a county sheriff deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if he or she fails to give a defendant an opportunity to contest his or her sex offender classification?

5. Does RCW 4.24.550(6)(b) violate the separation of powers doctrine when it delegates the power to classify sex offenders to county

sheriffs without providing criteria for making that classification?

6. Does RCW 4.24.550(6)(b) violate equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment by creating a system whereby similarly situated sex offenders are disparately classified depending upon the classification criteria used by a particular county sheriff?

STATEMENT OF THE CASE

On April 13, 1993, the defendant Domingo T. Ramos, Jr., was convicted in Thurston County Superior Court of two counts of sexual exploitation of a minor. RP 118, Exhibit 4. The court sentenced him to 42 months in prison on each count to be served concurrently and 36 to 48 months community custody. Exhibit 2. The defendant completed his incarceration in 1995, and later completed his community custody. *Id.* At the time the defendant was convicted and at the time of his release, the defendant was not required to register as a sex offender under RCW 9A.44.130. RP 121.

In 2001, the legislature changed the registration law to include sexual exploitation of a minor as a registerable offense. Exhibit 3. Upon receiving notice of this fact, the defendant registered as a sex offender with the Thurston County Sheriff. RP 120, 178-179. Later that year, the legislature passed RCW 4.24.550(6)(b), requiring each county sheriff to classify all sex offenders as a risk level I, II, or III. RP 122; Exhibit 3. Following the implementation of this statute, the Thurston County Sheriff formed a committee for classifying sex offenders. RP 122. The committee subsequently classified the defendant as a risk level II. *Id.* Although the sheriff informed the defendant of his risk level, he did not give him the opportunity to contest that classification. RP 124-125, 178-179, 194.

In fact, the Thurston County Sheriff assigns risk levels to individual sex offenders on an “ad hoc” basis, meaning that the committee simply considers the facts surrounding the defendant’s case and assigns a risk level according to what the committee “feels” it should be. RP 77. The committee does not employ any type of actuarial methodology recognized in the psychological community as a valid method for risk assessment. *Id.* According to Dr. Brett Trowbridge, an expert in the assessment of sex offenders, the method the Thurston County Sheriff uses for classifying sex offenders has no scientific validity. RP 79; Exhibit 53. Using the “Static Risk Assessment Tool” developed by the Washington State Institute of Public Policy, Dr. Trowbridge scored the defendant as a level I offender with a low probability of reoffense. RP 24.

On September 1, 2006, the legislature again modified the sex offender registration statute to require that level II and III offenders report every 90 days to the county sheriff. RP 127-128. In July of 2006, prior to the implementation of this amendment, Detective Daryl Leischner of the Thurston County Sheriff’s Office sent out letters to all level II and III offenders informing them of the change and requiring them to report to the Thurston County Sheriff’s Office on October 16, 2006. RP 127-128; Exhibit 3. In early September, after the Thurston County District Court judges pointed out the logistical problem of having 300 sex offenders reporting to

the courthouse on a single day, the Sheriff's office decided to rent space at the fair grounds for quarterly level II and III offender reporting. RP 128. Consequently, Detective Leischner sent out new letters to all level II and III offenders, this time telling them to report at the fair grounds on October 8th instead of October 16th. RP 129, 185; Exhibit 4.

The defendant received the first letter but not the second. RP 180-184. As a result, he reported to the sheriff's office on October 16th, 2006, as he was ordered in the first letter. RP 178-179. At that time, an employee of the sheriff's office had him sign a number of forms without letting him review the documents and without giving him copies, although he did ask for copies. RP 132-133, 174-177, 181; Exhibit 2. In fact, this clerk later testified at trial that it was extremely busy in her office on October 16th, that she did not give the defendant a copy of any document, and that she does not give sex offenders copies of the new quarterly report notices. RP 92-94. As a matter of fact, she testified that they did not even have a copy machine in the section of the sheriff's office where she worked. RP 89-90.

While on the witness stand, the clerk also testified that she had no independent recollection of the defendant's presence in the sheriff's office on October 16.th RP 90-94. Neither did she claim that she orally informed the defendant of his next reporting date, or that she gave him a copy of any document that informed him of that report date. *Id.* At best, she was able to

testify that Exhibit 2 bears her signature placed on the document on October 16, 2006, and that the document also bears what purports to be the defendant's signature, apparently also affixed to the document on October 16, 2006. *Id.*

Exhibit 2 is a signal page document entitled "Sex Offender Registration Unit" printed on the letterhead of the Thurston County Sheriff's Office. *See Exhibit 2.* At the bottom it bears the defendant and the clerk's signatures, along with a date signed for both of October 16, 2006. *Id.* The document does not claim that the defendant received a copy, and by his signature the defendant does not acknowledge receipt of a copy. *Id.* Neither does the document claim that the defendant was given a chance to read it, nor that he acknowledged any information on it. *Id.* It does not claim that the defendant was orally informed of his new report date. *Id.* The document does state at one point that "[t]he next quarterly report date will be: Monday, January 8, 2007." *Id.* This statement does not bear the defendant's initials by it. *Id.* In fact, the defendant later testified he had no knowledge of this report date, and that he did not appear for the January 8th report date at the fair grounds because he was never informed that he was to report at that time and at that place. RP 173-193.

By amended information filed June 6, 2007, the Thurston County Prosecutor charged the defendant with one count of failure to register as a sex

offender. CP 5. It alleged:

that the defendant, Domingo Torres Ramos, Jr. . . . did knowingly fail to comply with [the] sex offender registration requirements, to wit: the defendant failed to comply with the requirement that the defendant, having a fixed residence and having been designated as a risk level II or III report to the Thurston County Sheriff every ninety days as directed by the Thurston County Sheriff's Office on October 9, 2006 and/or on January 8, 2007 as directed by the Thurston County Sheriff's Office and as required by law.

CP 5.

The case later came on for a trial to the bench. RP 5. At the beginning of the trial the court allowed the defense to call Dr. Trowbridge by offer of proof. RP 9-10. The state then put on its case by calling two witnesses: Detective Leischner and the clerk at the sheriff's office who witnessed the defendant signing Exhibit 3 on October 16, 2006. RP 84-158. Detective Leischner testified that the defendant had not reported at the fair grounds on October 9th, and that he had called the defendant and all of the other level II and III offenders who failed to report on the 9th. RP 130-133.

Following the close of the state's case, the defense attempted to call friends of the defendant to testify that the defendant had no telephone service during the month of October, 2006. RP 167. When the state objected that the defense had not listed them as witnesses, and that they had been sitting through the state's testimony, the defense explained that they were present only as spectators, and that the defense only realized that they would need to

be called as witnesses when Det. Leischner claimed he called the defendant during the week after October 9th. RP 167-171. By offer of proof, the defense stated that they would both testify that they were the defendant's friends, that they were aware of his financial difficulties during October of 2006, and they were both personally acquainted with the fact that the defendant neither had a telephone nor cell phone service during October, 2006. RP 168-171. The court refused to allow them to testify. RP 169.

The defendant then took the stand and testified that he had received the first letter ordering him to report on October 16th but did not receive the second letter that changed the time and date of his reporting requirement. RP 178-180. He further testified that on October 16th he reported to the sheriff's office, that he signed a number of forms, that he asked for a copy of those documents, that the clerk refused to give him either the time to read the documents or a copy, and that he did not see that he was ordered to report on January 8th. RP 180-181. The defendant also testified that he never received a telephone call from Detective Leischner in October of 2006, and could not have because he had no telephone service during that month. RP 183-184.

Following argument by counsel in this case, the court found that the state had not proven beyond a reasonable doubt that the defendant had failed to register on October 9th, 2006. RP 221. Specifically, the court found that the defendant's appearance at the Sheriff's office on October 16th pursuant to

the first letter strongly corroborated the defendant's claim that he had not received the second letter. *Id.* However, the court did find that when the defendant reported on October 16th, the sheriff's office gave him "sufficient notice" that he was ordered to report at the fair grounds on January 8th, and that he had not done so. RP 222-223. As a result, the court found the defendant guilty of failing to report on January 8th, 2007. RP 223. The court later entered findings of fact that included the following

5. Detective Leischner testified that after the defendant missed the first 90 days report date on 10/9/06, he called the defendant and told him to report immediately, informed him of the new law and the consequences for not abiding by the new provision of the sex offender registration law requiring Level II and Level III sex offenders to report in person as directed by the county sheriff where they reside.

6. Detective Leischner also told the defendant that the defendant's missed report date of 10/9/06 would be handled as a warning by the TCSO meaning charges would not be referred to the prosecutor's office.

9. The defendant failed to report as directed by the Thurston County Sheriff on 1/8/07; he had previously been notified of this report date and the consequences of failing to appear (see admitted exhibit 2).

10. On January 23, 2007, the defendant was subsequently arrested by the TCSO for felony violation of sex offender registration. CP 65-67.

Following imposition of sentence, the defendant filed timely notice of appeal. CP 53-64.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT 5, 6, 9 AND 10 BECAUSE THEY ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the case at bar, the defendant has specifically assigned error to findings of fact 5, 6, 9 and 10. These findings state:

5. Detective Leischner testified that after the defendant missed the first 90 days report date on 10/9/06, he called the defendant and told him to report immediately, informed him of the new law and the consequences for not abiding by the new provision of the sex offender registration law requiring Level II and Level III sex offenders to report in person as directed by the county sheriff where they reside.

6. Detective Leischner also told the defendant that the defendant's missed report date of 10/9/06 would be handled as a warning by the TCSO meaning charges would not be referred to the prosecutor's office.

9. The defendant failed to report as directed by the Thurston County Sheriff on 1/8/07; he had previously been notified of this report date and the consequences of failing to appear (see admitted exhibit 2).

10. On January 23, 2007, the defendant was subsequently arrested by the TCSO for felony violation of sex offender registration.

CP 65-67.

The problem with these findings is that Detective Leischner did not testify that he had an independent recollection of having a telephone conversation with the defendant. Rather, he testified that he took the list of those people who did not appear on the October 8th date, and that he then attempted to call each one of them. He did not make a list of who he called and he did not make any notes of the substance of those telephone conversations. In addition, he did not make any notation of the offenders to whom he was not able to speak. Thus, there was no evidence to support the court's written findings that there ever was a telephone conversation between the defendant and Detective Leischner between the dates of October 8th and October 16th when the defendant did report. Thus, there is no evidence in the record to support the entry of findings 5 and 6.

In addition, there is no evidence in the record to support a finding of fact that the defendant was ever informed of his new reporting date. The clerk from the sheriff's office had no independent recollection of the defendant even being in the office on October 16th, and she certainly did not testify that she orally informed the defendant of his new reporting date, that she gave the defendant a copy of a document with the new report date on it, or that she had the defendant review a document with the report date on it and then initial that he had been informed of the new reporting date. Rather, the only thing the state's evidence proves is that the clerk handed the defendant a number of documents to sign, that the defendant signed them and immediately handed them back to the clerk, and that one of those documents the defendant signed did state that there was a new quarterly report date of January 8th. This does not constitute substantial evidence to support finding number 9 that the defendant "had been notified" of the new report date. Thus, the trial court erred when it entered this finding.

Finally the record at trial only contains evidence that the defendant was arrested in January of 2007. It does not state the date the defendant was arrested. Thus, the trial court erred when it entered finding 10.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FOUND HIM GUILTY OF FAILURE TO REGISTER BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the defendant argues that the state failed to present substantial evidence on two elements of this crime: (1) that the defendant failed to report “every ninety days,” and (2) that the sheriff gave the defendant notice of his report date. The following presents these arguments.

(1) The State Failed to Present Substantial Evidence That the Defendant Failed to Report Every 90 Days as Required by the Statute.

The state in this case charged the defendant with one count of failure to register every 90 days under RCW 9A.44.130. The state alleged that the defendant violated the following portion of subsection 7 of that statute:

(7) All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during

normal business hours.

RCW 9A.44.130.

Under the rules of statutory interpretation, the court's "primary duty in interpreting any statute is to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). In fulfilling this duty, the court looks first to the language of the statute itself. *Id.* When the plain language and ordinary meaning are unambiguous, the courts "will not construe the statute otherwise." *State v. J.P.* 149 Wn.2d at 450. The plain language of the statute here in question requires offenders "designated as a risk level II or III" to report "every ninety days to the sheriff of the county where he or she is registered." Although this section allows the sheriff to specify the day for reporting, it does not allow the sheriff to require an offender to report at an interval of fewer than 90 days, such as 89 days, 88 days, 87 days, or any interval fewer than 90 days. The statutory language is specific: offenders designated as level II or III with a fixed residence "must report, in person, *every ninety days.*" (emphasis added).

In the case at bar, the uncontested evidence presented at trial reveals two salient facts: (1) the defendant reported in person at the sheriff's office on October 16, 2006, and (2) the defendant did not report into the sheriff at the fair grounds on January 8, 2007. The problem with this evidence as it relates to the charges in this case only proves that the defendant failed to

report at an interval between October 16, 2006, and January 8, 2007. This interval is not 90 days. Rather, it is 84 days. Consequently, the state's evidence proved beyond a reasonable doubt that the defendant, a person designated as a level II sex offender within Thurston County, failed to report to the county sheriff at an interval of 84 days. Under the plain language of the statute this is not a crime.

In the case at bar the state may argue that the statute is ambiguous, and that one reasonable interpretation allows the sheriff to designate a reporting day that is a week or two shorter than the 90 days the statute uses. Although the defendant does not concede that this statute is ambiguous, if it were, another reasonable interpretation would be that the sheriff cannot designate a reporting interval of fewer than 90 days. Thus, even were the statute in this case ambiguous, under the rule of lenity, this court must employ the interpretation that favors the defendant. *In re Davis*, 142 Wn.2d 165, 12 P.3d 603 (2000). Thus, in the case at bar, the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgement of conviction for failure to register because the state failed to present substantial evidence on this charge.

(2) The State Failed to Present Substantial Evidence That the Defendant Was Ever Given Notice of the Date upon Which He Was Supposed to Report.

The new quarterly reporting statute imposes a notice requirement to the defendant as a condition precedent to criminal liability under the statute. This condition precedent derives from the last line of paragraph 7 of RCW 9A.44.130, which states:

Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours.

RCW 9A.44.130(7) (in part).

By requiring reporting on a “day specified by the county sheriff,” the statute is implicitly requiring that the sheriff give notice to each defendant of the “day specified” before the defendant is liable under the statute for failure to report, and implicitly requiring the state to prove notice as an element of the crime. Although the state could argue that proof of notice is not an explicit element of the crime under this statute, any such argument would violate one of the primary rules of statutory construction, which is that all statutes should be interpreted if possible to make them constitutional. *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993). Under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state cannot impose criminal liability without first giving adequate notice of what conduct constitutes the elements of a particular offense. *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003). Thus, to comport with due process, the state must prove notice as an element of the

offense of failure to report every 90 days.

In the case at bar, the evidence at trial, seen in the light most favorable to the state, fails to prove beyond a reasonable doubt that the defendant had notice of the January reporting date. In fact, the only evidence the state presented on the issue of notice was a single page document that the defendant signed in the sheriff's office when he reported on October 16, 2006. This document does state the next quarterly report date. However, the circumstances surrounding the defendant signing this document indicate that this fact alone does not constitute notice.

These circumstances include the facts that (1) the clerk at the sheriff's office was "very busy" on October 16th and did not give the defendant an opportunity to read any documents, (2) the clerk did not orally inform the defendant of the new report date, (3) the clerk did not give the defendant a copy of the document in spite of his request and did not even have a copier available to make copies, (4) the document does not claim that the defendant either read it or received a copy of it, and (5) the clerk did not mail a copy to the defendant. In fact, the system the Thurston County Sheriff employed could not have been better calculated to fail to give a defendant notice of the new reporting date. In this day of copiers and carbonless, multi-sheet copies, one is left to wonder why the Thurston County Sheriff would use such a woefully defective system. In any event, the system the sheriff used had the

end result one would expect: the defendant left the office on October 16th without notice of the next date he was supposed to report.

The lack of any evidence presented by the state to support a conclusion that the defendant ever received notice of the quarterly reporting date must also be seen in light of two further facts: (1) the defendant's denial under oath that he ever got notice of the new reporting date, and (2) the fact that the defendant had reported for a number of years without any failures, and reported on October 16th pursuant to the letter he received. This evidence bolsters the argument that the state failed to present substantial evidence that the defendant received notice of the new reporting date. Given the lack of substantial evidence to support this essential element of the crime, this court should reverse the defendant's conviction as a violation of the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

III. THE THURSTON COUNTY SHERIFF AND THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN THEY FAILED TO GIVE THE DEFENDANT AN OPPORTUNITY TO CONTEST HIS SEX OFFENDER CLASSIFICATION.

At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a

competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958).

In the *Messmer* decision the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

In re Messmer, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)). In *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn.App. 411, 12 P.3d 1022 (2000), the Court of Appeals states this principle as follows:

The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” The Washington Constitution contains an almost identical clause. Wash. Const., art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”). At minimum, procedural due process requires notice and an opportunity to be heard. *Rivett v. City of Tacoma*, 123 Wn.2d 573, 583, 870 P.2d 299 (1994). “Generally, in looking at the degree of process that will be afforded in a particular case, the court balances the following interests: (1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government’s procedures; and (3) the government’s interest in maintaining the procedures.” For due process protections to be implicated, there must be an individual interest asserted that is encompassed within the protection of life, liberty, or property.

Silver Firs Town Homes, Inc., at 1029.

In the case at bar, the defendant argues that (1) since the state’s

classification of him as a level II or III sex offender constitutes an element of the offense of failure to register, he has a procedural due process right not only to notice of that classification, but an opportunity to contest it, and (2) since neither the sheriff nor the trial court gave him an opportunity to contest that classification, any charge of failure to register that includes that classification as an element violates his right to due process. In response, the state may argue that the Washington Supreme Court has rejected this argument in *In re Meyer*, 142 Wn.2d 608, 16 P.3d 563 (2001). As the following analysis reveals, this argument is incorrect.

(1) In re Meyer Recognizes Three Separate Methods for a Sex Offender to Establish a Liberty Interest in His or Her Sex Offender Risk Classification Designation.

In *In re Meyer, supra*, three defendants convicted of sex offenses filed personal restraint petitions arguing that the sex offender registration and community notification act of 1990 violated their rights to procedural due process in that (1) the act allowed the DOC's End of Sentence Review Committee (ESRC) to classify them without notice or an opportunity to be heard, and (2) that classification affected what information the county sheriff would disseminate about the defendant to the community. Specifically, the defendants argued that the risk classification of RCW 4.24.550 and RCW 72.09.345 infringed upon their liberty interest without notice or an opportunity to be heard. The defendant's argued that the "liberty interest"

arose from three sources: (1) the mandatory requirement of the community notification statute, (2) the right to not be wrongfully stigmatized and labeled as dangerous, and (3) the interest in avoiding further incarceration.

In rejecting the first of these three arguments, the majority opinion first quoted the following from *In re Cashaw*, 123 Wn.2d 138, 866 P.2d 8 (1994), concerning the criteria that must exist before a statute is deemed to create or affect a liberty interest for the purposes of due process. The court stated:

For a state law to create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.” *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S.Ct. 1904, 1910, 104 L.Ed.2d 506 (1989); *Swenson v. Trickey*, 995 F.2d 132, 134 (8th Cir.), *cert. denied*, [510 U.S. 999, 114 S.Ct. 568, 126 L.Ed.2d 468] (1993). Thus, laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.

In re Meyer, 142 Wn.2d at 618 (quoting *In re Cashaw*, 123 Wn.2d at 144) (brackets in original).

The majority then went on to reject the defendants’ first claim, finding that under the standard set in *Cashaw*, “[t]he sex offender registration and disclosure statutes are essentially procedural statutes; no liberty interest arises from them.”

(2) The Defendant Meets the In re Meyer “Stigma-plus” Basis for Claiming a Liberty Interest in His Sex Offender Risk Classification Designation.

The majority in *Cashaw* then went on to review the defendants’ second argument that they had a liberty interest in not being wrongfully stigmatized with an improper level classification. In addressing this argument, the court first reviewed the United State’s Supreme Court’s decision in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), wherein the court addressed whether or not a person had a “liberty” interest solely in his or her reputation. In that case, a plaintiff brought a civil rights action against a police agency that had posted his picture with an identification as an “active shoplifter” in various retail establishments. The *Meyer* court noted the following from that case:

Justice Rehnquist examined a long line of decisions in which the Court had protected an interest in reputation, and then wrote an interest in reputation is “neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law.” The Court reasoned the government’s conduct to be actionable, must not only affect the individual’s reputation, but must be accompanied by some other injury. The Court ruled “reputation alone, apart from some more tangible interests” is not deserving of protection. This holding has come to be known as the “stigma-plus” requirement.

In re Meyer, 142 Wn.2d at 620 (citations omitted).

Applying this “sigma-plus” test, the court in *In re Meyer* found no liberty interest in the defendants’ potential mis-classification by the ESRB because any potential mis-classification would harm reputation only with no

further injury. On this point, the court noted that all of the information the county sheriffs would be disseminating about level II and III sex offenders was already publically available. Thus, the majority held that although “there were authorities to the contrary, we do not believe the statutes here satisfy the stigma-plus formulation announced in *Paul*.” *In re Meyer*, 142 Wn.2d at 622 (citations omitted).

The majority in *In re Meyer* then went on to review the defendant’s third argument that they had a liberty interest in avoiding further incarceration. Specifically, two of the defendants the ESRB had classified as level III offenders argued that they had been denied early release into the community because of their erroneous level III classification. However, the court did not reach this legal argument. Rather, the court noted that DOC had disputed the defendants’ factual allegations and argued that the defendants had been denied early release into the community because that release would have violated their individual sentences. In other words, DOC denied that the defendants’ level III classification had been the basis for denying release into the community. Noting that this factual issue had not be resolved in the record below, the court refused to address the defendant’s legal argument on this point.

One salient fact has changed since the court’s decision in *In re Meyer*. At the time of the *Meyer* decision, the only thing affected by either the ESRB

or a county sheriff's classification of an offender was the type of notice and information disseminated to the community. In fact, as was reviewed above, this fact was why the defendants' arguments failed the "stigma-plus" test from *Paul v. Davis*. By contrast, the 2006 amendment to the sex offender registration act has now created a new "injury" to the offenders by increasing their reporting requirements to four times a year as a level II or III. Thus, not only does an offender suffer an injury to reputation through the dissemination of injurious information to the community, but he or she suffers the added injury and limitation to liberty that four annual reporting requirements make. Consequently, under the *Paul v. Davis* injury-plus analysis, the defendant in the case at bar has established a liberty interest in not being improperly classified as a level II or level III offender.

(3) The Defendant Meets the In re Meyer "Avoidance of Further Incarceration" Basis for Claiming a Liberty Interest in His Sex Offender Risk Classification Designation.

The defendant in the case at bar also has a recognizable liberty interest in the right to prevent further incarceration. In this case the 2006 amendment has created a new offense based upon the county sheriff's classification. Prior to this amendment, there was a single crime of failure to register as a sex offender. An offender's classification level was not an element of this offense. Following the 2006 amendment, the legislature created a new

offense of failure to register every 90 days as a level II and III offender. Under this new statutory scheme, an offender's classification level has become an element of a new crime, and an offender is subject to punishment under this statute only if the county sheriff has classified the offender as level II or III. Consequently, this classification system now subjects an offender to further punishment. As a result, an offender also has a recognizable liberty interest in being free from improper classification based upon the fact that this improper classification subjects the offender to further punishment.

Since the defendant in this case does have a recognizable liberty interest in being free from improper classification under both the second and third argument from *In re Meyer*, the Thurston County Sheriff and the trial court's failure in the case at bar to give the defendant an opportunity to be heard on the issue of his classification level has denied him minimum procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. This deprivation caused injury in this case because, as Dr. Trowbridge's testimony reveals, the Thurston County Sheriff more than likely did improperly classify the defendant as a level II offender instead of a level I offender. But for this erroneous classification, the state would not have had substantial evidence to support the conviction the defendant disputes in this case.

IV. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT REFUSED TO ALLOW HIM TO CALL WITNESSES TO PRESENT RELEVANT, EXCULPATORY EVIDENCE FOR THE DEFENSE.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

In this case, the defendant argues that two rulings by the court denied the defendant a fair trial. The first was the ruling that the testimony of Dr. Trowbridge was not relevant. The second was the ruling that the defense could not call two witnesses to rebut the testimony of one of the state's witnesses. The following presents these arguments:

(1) The Trial Court Denied the Defendant a Fair Trial When it Refused to Allow Him to Call Dr. Trowbridge to Testify That the Defendant Was a Level I Sex Offender, Not a Level II or III Sex Offender.

In this case, the defense presented the evidence of Dr. Trowbridge, an expert in sex offender risk assessment. His testimony can be distilled into

two salient points: (1) that the Thurston County Sheriff uses a scientifically invalid *ad hoc* method of risk assessment for sex offenders, and (2) under the scientifically valid method, such as the “Static Risk Assessment Tool” developed by the Washington State Institute of Public Policy, the defendant scored as a level I offender with a low probability of reoffense. The court found this evidence irrelevant on the basis that the statute only required the state to prove that the sheriff had assessed the defendant as a level II or III offender, not that the defendant really was a level II or III offender.

The error in the court’s rule is that it has created a “conclusive presumption” that the defendant must be a “level II or III” sex offender simply because the sheriff had assessed him to be one. A “conclusive” or “irrebuttable” presumption is a mandatory finding that “when fact B is proven, fact A must be taken as true, and the adversary is not allowed to dispute this at all.” *State v. Savage*, 94 Wn.2d 569, 573, 618 P.2d 82 (1980) (quoting Edward W. Cleary, McCormick’s Handbook of the Law of Evidence § 342, at 804 (2d ed.1972)). As the Washington Supreme Court holds in *State v. Savage, supra*, the use of conclusive presumptions to find an element of a crime violates due process. The court noted:

Due process prohibits the use of a conclusive or irrebuttable presumption to find an element of a criminal offense, because such use of a conclusive presumption “would ‘conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,’ and would ‘invade

[the] factfinding function' which in a criminal case the law assigns solely to the jury.”

State v. Savage, 94 Wn.2d at 573 (quoting *Sandstrom v. Montana*, 442 U.S. 510, 523, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)).

In this case, the state may argue that the statute does not create an irrebuttable presumption because the defendant “actually being” a level II or III risk is not an element of the crime. Rather, the element of the offense is only that the sheriff “assess the defendant to be” at that risk level, regardless of how erroneous that assessment is. While one could interpret RCW 9A.44.130(7) to support this argument, this interpretation would violate the constitutional requirement that there be a rational relationship between the conduct the state prohibits in a criminal statute and a legitimate governmental purpose. The following addresses this argument.

Under the equal protection clauses of both Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *State v. Coria, infra*; *See also*, Argument VI herein. In order to meet this requirement, penal statutes must meet the rational relation test. *State v. Smith*, 117 Wn.2d 263, 814 P.2d 652 (1991).

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has

a rational relationship to the purpose of the legislation.

State v. Smith, 117 Wn.2d at 279.

For example, in *State v. Martinez*, 85 Wn.2d 671, 538 P.2d 521 (1975), a defendant was convicted under a vagrancy statute that made it illegal for anyone other than a student, parent of a student, or school employee to loiter near a private or public school building. The defendant then appealed, arguing that the statute violated his right to equal protection in that its implementation bore no rational relation to a legitimate stated purpose. The Washington Supreme Court agreed and reversed, stating as follows: “In short, we think it plain that the classifications established in RCW 9.87.010(13) are not substantially related to the statute’s ostensible purpose of preventing disruption in the schools. Therefore, we hold RCW 9.87.010(13) is an unconstitutional deprivation of equal protection of the law.” *State v. Martinez*, at 684.

In the case at bar, the state undoubtedly has a legitimate interest in more closely regulating sex offenders with a moderate or high probability of reoffense. However, it does not further this legitimate interest to interpret RCW 9A.44.130(7) to allow the county sheriffs to employ a scientifically invalid method of risk assessment that neither (1) assures that those with a low level of risk are excluded from the level II and III groups, nor (2) rationally assures that those who are moderate and high risks don’t end up

with a level I assessment. Thus, any interpretation of RCW 9A.44.130(7) that does not require the state to prove that a defendant actually is a level II or III offender violates the defendant's right to equal protection because it fails to have a rational relation to a legitimate stated purpose. Consequently, this court should interpret RCW 9A.44.130(7) to require the state to prove that a defendant actually is a moderate or high level of risk as opposed to simply proving that a sheriff using an invalid method of assessment arbitrarily placed a defendant in one of those categories.

In the case at bar, the defense called Dr. Trowbridge to testify that the defendant is actually a low risk level and should be correctly assessed as a level I offender. Dr. Trowbridge also testified that the county sheriff's method of assessment was scientifically invalid. The court did not find that Dr. Trowbridge did not qualify as an expert in sex offender assessment and in assessment methodology. Rather, the court simply found his testimony irrelevant based upon its erroneous conclusion that the state did not have to prove that the defendant actually was a level II or III offender. Since this conclusion was in error, and since Dr. Trowbridge's testimony was relevant, the trial court denied the defendant a fair trial when it refused to consider this evidence.

In his testimony, Dr. Trowbridge was unequivocal that the defendant was not a level II or III offender. In addition, the state did not present any

evidence as to the validity of the assessment that the sheriff performed. Consequently, had the court admitted the testimony of Dr. Trowbridge into evidence, there is a high likelihood that it would have acquitted the defendant. Thus, the court's error in excluding this evidence denied the defendant his right to present a defense, and caused prejudice. As a result, the defendant is entitled to a new trial.

(2) The Trial Court Denied the Defendant a Fair Trial When it Refused to Allow Him to Call Two Witnesses to Rebut Officer Leischner's Claims That He Called the Defendant Between October 8th and 16th of 2006.

In the case at bar, the trial court granted the state's motion to exclude two defense witnesses who were available to testify that the defendant did not have any type of telephone in October of 2006. It did so on the basis that (1) the witnesses had been present during the testimony presented at trial, and (2) the defense had failed to discover these witness to the state. In so ruling, the trial court abused its discretion for two reasons: (1) the court had not entered an order excluding witnesses during the trial, and (2) the defendant called these witnesses in rebuttal to the officer's testimony that he called the defendant and spoke to him during the time between October 8th when the defendant did not report at the fair grounds and October 16th when the defendant did appear in person at the sheriff's officer pursuant to the first letter the sheriff sent to him. As the defense explained, the witnesses were

present at the trial as spectators, and the necessity of calling them only became apparent when the officer made the claim for the first time on the witness stand that he had made a telephone call to the defendant during a time period when the defendant did not have a telephone.

Had the court allowed these two witnesses, and had the court found their testimony credible, it would have gone a long way towards bolstering the credibility of the defendant's claims that he did not receive notice of the October 8th date and that he had reported on the 16th pursuant to the first letter the sheriff mailed. In addition, this testimony, if believed, would also have significantly damaged the officer's credibility before the court. Thus, had the court allowed these two witnesses to testify, there is a substantial likelihood that the court would have believed the defendant's testimony that he did not get actual notice of the January report date and thus acquitted him of the charge. Consequently, the trial court's refusal to allow the defense to call these relevant witnesses violated the defendant's right under Washington Constitution, Article 1, § 3 and United States Constitution, Sixth and Fourteenth Amendment to present a defense and this denial caused prejudice. As a result, the defendant is entitled to a new trial.

V. RCW 4.24.550(6)(b) VIOLATES THE SEPARATION OF POWERS DOCTRINE BECAUSE IT DELEGATES THE POWER TO CLASSIFY SEX OFFENDERS TO COUNTY SHERIFFS WITHOUT PROVIDING CRITERIA FOR MAKING THAT CLASSIFICATION.

Under the “separation of powers” doctrine, one branch of government may not impinge upon the fundamental powers of another branch of government or delegate its discretionary authority to another branch. *State v. Moreno*, 147 Wn.2d 500, 58 P.3d 265 (2002). The purpose of the separation of powers doctrine is to ensure that the “fundamental functions of each branch remain inviolate.” *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994). As the decision in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), notes, this is one of the core principles of our tripartite form of government.

[T]he “Judicial Power of the United States” vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

United States v. Nixon, 418 U.S. at 704 (quoting *The Federalist*, no. 47, at 313 (S. Mittell ed.1938)).

Although the Washington Constitution contains no explicit separation of powers clause, as does the federal constitution, the doctrine has been presumed throughout the state’s history by the division of government into

three separate branches. *Carrick v. Locke*, 125 Wn.2d at 134-35. The principle of separation of powers is violated when “the activity of one branch threatens the independence or integrity or invades the prerogatives of another,” *State v. Moreno, supra*. It is also violated when one branch of government delegates its discretionary authority to another branch. *State v. Ermert*, 94 Wn.2d 59, 578 P.2d 1309 (1978).

The power to define crimes and set punishments lies solely with the legislature and it is also the sole function of the legislature to alter the sentencing process should the judiciary find a particular criminal statute outside the bounds set by constitutional limitations. *State v. Monday*, 85 Wn.2d 906, 540 P.2d 416 (1975). Thus, while the legislature may delegate the determination of a fact that constitutes an element of a crime to another agency of government, it may only do so if it (1) provides appropriate standards to define how that fact is determined, and (2) provides procedural safeguards to control the arbitrary determination of that fact. *State v. Ermert, supra*.

For example, in *State v. Dougall*, 89 Wn.2d 118, 570 P.2d 135 (1977), the court addressed the validity of former RCW 69.50.201(d), and the methodology the legislature used in it to designate what was and what was not a controlled substance. This statute provided:

(d) If any substance is designated, rescheduled, or deleted as a

controlled substance under federal law and notice thereof is given to the [Washington State Board of Pharmacy], the substance shall be similarly controlled under this chapter after the expiration of thirty days from publication in the Federal Register of a final order designating a substance as a controlled substance or rescheduling or deleting a substance, unless within that thirty day period, the board objects to inclusion, rescheduling, or deletion. In that case, the board shall proceed pursuant to the rule-making procedures of chapter 34.04 RCW.

Former RCW 69.50.201(d).

On June 4, 1975, the federal government published an order in the Federal Register designating Valium (diazepam) as a controlled substance under federal law. The Washington legislature did not amend the Uniform Controlled Substances Act (RCW 69.50) to include Valium as a controlled substance. However, the Washington State Board of Pharmacy (Board), which had notice of the change, acquiesced in this designation by failing to object to its inclusion within the 30 days required under former RCW 69.50.201(d). On April 26, 1976, the board sent notice to all county prosecutors that Valium was now a controlled substance in Washington.

The defendant was later charged and convicted of possession of Valium under RCW 69.50. She appealed, arguing in part that RCW 69.50.201(d) delegated the authority to determine what was or was not a controlled substance to the federal government, and that by doing so it violated the separation of powers doctrine. In addressing this argument, the Washington Supreme Court first noted the following rules concerning the

delegation of legislative authority to define crimes. The court noted:

The people of this state have vested the power to legislate in the legislature. Const. Art. 2, s 1. While the legislature may enact statutes which adopt existing federal rules, regulations, or statutes, legislation which attempts to adopt or acquiesce in future federal rules, regulations, or statutes is an unconstitutional delegation of legislative power and thus void

State v. Dougall, 89 Wn.2d at 122-123 (citations omitted).

After reviewing the statute, the Washington Supreme Court reversed the defendant's conviction on the same basis, holding that RCW 69.50.201(d) was "an unconstitutional delegation of legislative authority" in that it permitted the "future federal designation, rescheduling or deletion of controlled substances in the Federal Register to become controlled or deleted substances under the Uniform Controlled Substances Act by means of Board inaction or acquiescence." *State v. Dougall*, 89 Wn.2d at 123. *See also State v. Sansone*, 127 Wn.App. 630, 111 P.3d 1251 (2005) (sentencing court's delegation of the defining of the term "pornography" to community corrections officer for defendant given condition of not possessing "pornography" constituted an improper delegation of judicial authority).

By contrast, in *Caffall Bros. Forest Prods. v. State*, 79 Wn.2d 223, 484 P.2d 912 (1971), the Washington State Department of Natural Resources held a timber auction from public lands as authorized by the legislature in RCW 79.01.004. The plaintiff was the successful bidder. However, when

the Commissioner of Public Lands refused to confirm the sale under RCW 79.01.212, plaintiff brought suit for damages equaling the difference between its bid and a later higher bid that the Commissioner did accept. In support of its claim, plaintiff argued that the legislature had violated the separation of powers doctrine in RCW 79.01.212 when it gave unfettered discretion to the Commission to refuse to confirm public sales which were not in the “best interest of the state.”

Specifically, plaintiff argued that the “best interest of the state” language was an improper delegation of legislative authority because it set no standards for the commissioner’s implementation of the statute. However, the trial court dismissed the suit, finding no improper delegation, and the plaintiff’s appealed. In addressing the improper delegation argument, the court first noted the following rules for determining whether a delegation of authority from the legislative to the executive constituted a violation of the separation of powers:

Amendment 7, of the state constitution, provides in part that ‘The legislative authority of the state of Washington shall be vested in the legislature, * * *’ It is unconstitutional for the legislature to abdicate or transfer to others its legislative function. It is not unconstitutional for the legislature to delegate administrative power. In so doing, the legislature must define (a) what is to be done, (b) the instrumentality which is to accomplish it, and (c) the scope of the instrumentality’s authority in so doing, by prescribing reasonable administrative standards.

Caffel Bros., 79 Wn.2d at 226 (quoting *Keeting v. Public Utility District No.*

1, 49 Wn.2d 761, 767, 306 P.2d 762 (1957)).

After reviewing this statute the court found no improper delegation of legislative authority based upon the fact that the statute in question set a number of specific criteria for the commissioner to use when determining what constituted the “best interests” of the state. *Cf. State v. Gilroy*, 37 Wn.2d 41, 221 P.2d 549 (1950) (invalidating legislation conferring upon the Director of Social Security power to grant or refuse certificates to individuals caring for foster children based upon “the best interest of the children” without setting any methodology for determining those “best interests”); *Peterson v. Hagan*, 56 Wn.2d 48, 351 P.2d 127 (1960) (invalidating, for lack of sufficient standards, legislation empowering the Director of the Department of Labor and Industries to promulgate regulations as to minimum wages and hours for women and children); *United States Steel Corp. v. State*, 65 Wn.2d 385, 397 P.2d 440 (1964) (invalidating legislation authorizing the Tax Commission to assess late payment penalty without prescribing standards).

Under RCW 9A.44.130, the legislature originally created the offense of failure to register as a sex offender, which required the state to prove that a defendant was a “sex offender” and that he or she failed to meet one of the numerous reporting requirements that depended on any number of criteria. In 2006, the legislature amended this statute to require that level II and III

offenders report every 90 days at a time set by their respective county sheriffs. This amendment stated in relevant part:

(7) All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours.

RCW 9A.44.130(7) (in part).

This amendment created a new offense of failing to report every 90 days as a level II or III offender. As a result, a person's status as a level II or III offender has now become an element of this offense. This fact is reflected in the amended information in this case, which alleged in part:

[T]he defendant failed to comply with the requirement that the defendant, having a fixed residence and having been designated as a risk level II or III report to the Thurston County Sheriff every ninety days . . .

CP 5.

The legislature has set up two methods for assigning sex offender risk level. The first is in RCW 72.09.345. This statute orders DOC to create an End of Sentence Review Committee (ESRC), which has the duty to assign risk levels to sex offenders prior to release. Subsection (4) of this statute states:

(4) The committee shall review each sex offender under its authority before the offender's release from confinement or start of the offender's term of community placement or community custody

in order to: (a) Classify the offender into a risk level for the purposes of public notification under RCW 4.24.550; (b) where available, review the offender's proposed release plan in accordance with the requirements of RCW 72.09.340; and (c) make appropriate referrals.

RCW 72.09.345.

The next section of this statute contains the only language that even remotely approaches a statement of criteria for setting assessment levels. It states:

(5) The committee shall classify as risk level I those sex offenders whose risk assessments indicate a low risk of reoffense within the community at large. The committee shall classify as risk level II those offenders whose risk assessments indicate a moderate risk of reoffense within the community at large. The committee shall classify as risk level III those offenders whose risk assessments indicate a high risk of reoffense within the community at large.

RCW 72.09.345.

The legislature never states what standards or methodology the ESRC is supposed to employ when determining whether or not an offender is a low, medium, or high risk for reoffense. In addition, once an offender is released into the community, or for those sex offenders such as the defendant who has never been assessed by the ESRC, risk assessment is assigned by the offender's county sheriff under RCW 4.24.550(6)(b). Subsection 6 of this statute states as follows in its entirety.

(6) Local law enforcement agencies that disseminate information pursuant to this section shall: (a) Review available risk level classifications made by the department of corrections, the department of social and health services, and the indeterminate sentence review

board; *(b) assign risk level classifications to all offenders about whom information will be disseminated*; and (c) make a good faith effort to notify the public and residents at least fourteen days before the offender is released from confinement or, where an offender moves from another jurisdiction, as soon as possible after the agency learns of the offender's move, except that in no case may this notification provision be construed to require an extension of an offender's release date. The juvenile court shall provide local law enforcement officials with all relevant information on offenders allowed to remain in the community in a timely manner.

RCW 4.24.550(6) (emphasis added).

As with the power the legislature gave the ESRB to assign risk levels, the legislature here provides absolutely no criteria, no standards, and no guidance as to how each county sheriff should come to a determination of an offender's risk level. As a result of this improper delegation of legislative authority, the legislature has created a system where each county sheriff is free to assess an offender placed in the community at a different level than the ESRB assessed the offender, and different from the assessment of any other particular county sheriff. This method of risk assessment suffers from the same defect as existed with the assignment of what constituted a controlled substance in *Dougall*. In *Dougall*, the legislature improperly assigned the task of defining what was a "controlled substance" for the purpose of the crime of possessing a controlled substance to an executive agency (the federal pharmacopoeia board and the state pharmacy board), thereby violating the separation of powers doctrine. Similarly, in the case at bar, the legislature

improperly assigned the task of defining who is a level II and III sex offender for the purpose of the crime of failing to register as a level II and III offender to an executive agency (either the Department of Corrections or the individual county sheriff), thereby violating the separation of powers doctrine.

This case is also similar to a number of cases cited in *Caffel Bros.* as examples of improper delegations of legislative authority without setting sufficient standards for administering that delegation. *See State v. Gilroy, supra; Peterson v. Hagan, supra; United States Steel Corp. v. State, supra.* Since the legislature in this case has delegated its authority to define what constitutes a level II and III sex offender to another branch of government and has not included any guiding standards at all, this delegation violates the separation of powers doctrine and is invalid. As a result, the defendant's conviction, which includes a risk assessment made under the improper delegation as an element of the offense, cannot be sustained. Consequently, this court should vacate the defendant's conviction and remand with instructions to dismiss.

VI. RCW 4.24.550(6)(b) VIOLATES THE DEFENDANT'S RIGHT TO EQUAL PROTECTION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 12 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT BY CREATING A SYSTEM WHEREBY SIMILARLY SITUATED SEX OFFENDERS ARE DISPARATELY CLASSIFIED DEPENDING UPON THE CLASSIFICATION CRITERIA USED BY EACH COUNTY SHERIFF.

Under the Fourteenth Amendment to the United States Constitution, no state may “deny to any person within its jurisdiction the equal protection of the laws.” Washington Constitution, Article 1, § 12 is similar in nature.

It states as follows:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

The equal protection guarantees found in Washington Constitution, Article 1, §12, are at least as stringent as those found in United States Constitution, Fourteenth Amendment. *Hunter v. North Mason High School*, 85 Wn.2d 810, 819 n. 9, 539 P.2d 845 (1975). Generally, any violation of the equal protection guarantees from United States Constitution, Fourteenth Amendment, also constitutes a violation of Washington Constitution, Article 1, §12. *State v. Perrigoue*, 81 Wn.2d 640, 503 P.2d 1063 (1972).

However, the constitutional guarantee of equal protection “does not require that things different in fact be treated in law as though they were the same.” *Jenkins v. State*, 85 Wn.2d 883, 888, 540 P.2d 1363 (1975) (quoting

Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif.L.Rev. 341, 344 (1949)). Rather, the equal protection clause requires that “those who are similarly situated be similarly treated.” *Jenkins*, 85 Wash.2d at 888.

In determining whether or not a specific legislative enactment violates the constitutional guarantees to equal protection, the courts employ three different levels of scrutiny, depending upon the class of people affected by the particular statute at issue. *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983). These three levels are strict scrutiny, intermediate scrutiny, and minimal scrutiny. *State v. McNair*, 88 Wn.App. 331, 944 P.2d 1099 (1997).

If a statute creates an inherently suspect classification such as one based on race, nationality, or alienage, then the statute will be subjected to “strict scrutiny.” *Graham v. Richardson*, 403 U.S. 365, 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971); *Nielsen v. Washington State Bar Ass'n*, 90 Wn.2d 818, 585 P.2d 1191 (1978). Under the “strict scrutiny” test, legislation at issue must be the least restrictive method by which to address a compelling state need. If a statute creates a classification system based on a “semisuspect” class where an important right is involved, then the “intermediate scrutiny” test is applied. *State v. Heiskel*, 129 Wn.2d 113, 916 P.2d 366 (1996). Under the “intermediate scrutiny” test, “the challenged statute must further a substantial interest of the state” in order to meet the minimum requirements of equal protection. *State v. Coria*, 120 Wn.2d 156, 839 P.2d 890 (1992).

In all other cases, equal protection challenges are analyzed under the “minimal scrutiny” test. *State v. McNair, supra*. Under the “minimal scrutiny” test, a statute that does not affect a fundamental right or create a suspect or semi-suspect classification will not be invalidated unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective. *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101, 1104-05, (1961); *Nielsen v. Washington State Bar Ass’n, supra*. Under this test, a challenged statute is presumed constitutional and the party challenging it has a heavy burden of showing there is no reasonable basis for the classification or the classification is contrary to the purpose of the legislation. *Yakima Cy. Deputy Sheriff’s Ass’n*, 92 Wn.2d 831, 601 P.2d 936 (1979).

In *Petersen v. State*, 100 Wn.2d at 445, 671 P.2d 230 (1983), the Washington State Supreme Court set a three part analysis for determining whether or not a statute meets the requirements of the minimal scrutiny test. In this analysis, the reviewing court should ask the following questions: “(1) whether the legislation applies alike to all members within the designated class; (2) whether there are reasonable grounds to distinguish between those within and those without the class; and (3) whether the classification has a rational relationship to the purpose of the legislation.” *Petersen v. State*, 100 Wn.2d at 445.

In the case at bar, the defendant argues even under the lowest level of scrutiny, RCW 4.24.550(6)(b) violates the defendant's right to equal protection. In support of this argument, it should be noted, as was set out in the preceding argument, that the legislature has set no standards for the determination county sheriffs make for the risk assessment levels of sex offenders. Indeed, as was explained through the testimony of Dr. Brett Trowbridge, the Thurston County Sheriff in this case does not even employ scientifically valid methodology for assigning risk levels to sex offenders. Rather, it simply employs an *ad hoc* analysis. Since each county sheriff is left to his or her own devices in assigning risk assessment levels, there are as many approaches to assigning risk assessment levels as there are counties. The result is that the same person could receive one risk assessment set by the ESRC, a week later receive a different risk assessment level by the county sheriff from the county in which the offender was released, and then receive yet a third risk assessment level when the offender moved to a neighboring county.

As a specific example, an offender could be assessed as a level I risk level by the ESRC at the time the officer was released into the City of Woodland in Cowlitz County. That same person, with absolutely no change in circumstances, could then be assessed as a level II sex offender by the Cowlitz County Sheriff. If the offender then moved across the street into a

new house and into Clark County (the county line runs through the city), the Clark County Sheriff would then be free to assess the defendant as a level III sex offender, once again without any changes in circumstances. Each assessment would be valid under RCW 72.09.345 and RCW 4.24.550(6) because there are no standards for the assessment of risk levels, and each assessing agency is free to use whatever criteria the agency pleases, regardless of the scientific validity of those assessment criteria.

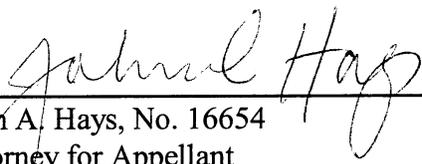
In the case at bar, the defendant is in the class of persons convicted of sex offenses and assigned at level II. As the preceding explained, RCW 72.09.345 and RCW 4.24.550(6) do not apply alike to all members within this designated class. Rather, these statutes allow for three different assessments to the same person under the same facts, depending upon the criteria a particular county sheriff decides to employ. In addition, since the assessment statutes apply no standards at all, there are no reasonable grounds to distinguish between assessment levels. Finally, a system of standardless, *ad hoc* risk assessment does not rationally relate to the legislature's legitimate purpose of protecting the public from those offenders with a moderate or high risk to reoffend because it fails to rationally identify those with a moderate or high risk. As a result, RCW 72.09.345 and RCW 4.24.550(6) violate the defendant's right to equal protection under both Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment.

CONCLUSION

The defendant's conviction should be vacated and his case remanded for dismissal because (1) the state failed to present substantial evidence of the offense charged, (2) the defendant was denied procedural due process in the determination of two of the elements of the offense, (3) the legislature improperly delegated its authority to define one of the elements of the offense, and (4) the charge violated the defendant's right to equal protection. In the alternative, the defendant is entitled to a new trial based upon the trial court's denial of his right to put on a defense.

DATED this 28th day of December, 2007.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 12**

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 4.24.550

(1) In addition to the disclosure under subsection (5) of this section, public agencies are authorized to release information to the public regarding sex offenders and kidnapping offenders when the agency determines that disclosure of the information is relevant and necessary to protect the public and counteract the danger created by the particular offender. This authorization applies to information regarding: (a) Any person adjudicated or convicted of a sex offense as defined in RCW 9A.44.130 or a kidnapping offense as defined by RCW 9A.44.130; (b) any person under the jurisdiction of the indeterminate sentence review board as the result of a sex offense or kidnapping offense; (c) any person committed as a sexually violent predator under chapter 71.09 RCW or as a sexual psychopath under chapter 71.06 RCW; (d) any person found not guilty of a sex offense or kidnapping offense by reason of insanity under chapter 10.77 RCW; and (e) any person found incompetent to stand trial for a sex offense or kidnapping offense and subsequently committed under chapter 71.05 or 71.34 RCW.

(2) Except for the information specifically required under subsection (5) of this section, the extent of the public disclosure of relevant and necessary information shall be rationally related to: (a) The level of risk posed by the offender to the community; (b) the locations where the offender resides, expects to reside, or is regularly found; and (c) the needs of the affected community members for information to enhance their individual and collective safety.

(3) Except for the information specifically required under subsection (5) of this section, local law enforcement agencies shall consider the following guidelines in determining the extent of a public disclosure made under this section: (a) For offenders classified as risk level I, the agency shall share information with other appropriate law enforcement agencies and, if the offender is a student, the public or private school regulated under Title 28A RCW or chapter 72.40 RCW which the offender is attending, or planning to attend. The agency may disclose, upon request, relevant, necessary, and accurate information to any victim or witness to the offense and to any individual community member who lives near the residence where the offender resides, expects to reside, or is regularly found; (b) for offenders classified as risk level II, the agency may also disclose relevant, necessary, and accurate information to public and private schools, child day care centers, family day care providers, public libraries, businesses and organizations that serve primarily children, women, or vulnerable adults, and neighbors and

community groups near the residence where the offender resides, expects to reside, or is regularly found; (c) for offenders classified as risk level III, the agency may also disclose relevant, necessary, and accurate information to the public at large; and (d) because more localized notification is not feasible and homeless and transient offenders may present unique risks to the community, the agency may also disclose relevant, necessary, and accurate information to the public at large for offenders registered as homeless or transient.

(4) The county sheriff with whom an offender classified as risk level III is registered shall cause to be published by legal notice, advertising, or news release a sex offender community notification that conforms to the guidelines established under RCW 4.24.5501 in at least one legal newspaper with general circulation in the area of the sex offender's registered address or location. The county sheriff shall also cause to be published consistent with this subsection a current list of level III registered sex offenders, twice yearly. Unless the information is posted on the web site described in subsection (5) of this section, this list shall be maintained by the county sheriff on a publicly accessible web site and shall be updated at least once per month.

(5)(a) When funded by federal grants or other sources, the Washington association of sheriffs and police chiefs shall create and maintain a statewide registered kidnapping and sex offender web site, which shall be available to the public. The web site shall post all level III and level II registered sex offenders and all registered kidnapping offenders in the state of Washington.

(i) For level III offenders, the web site shall contain, but is not limited to, the registered sex offender's name, relevant criminal convictions, address by hundred block, physical description, and photograph. The web site shall provide mapping capabilities that display the sex offender's address by hundred block on a map. The web site shall allow citizens to search for registered sex offenders within the state of Washington by county, city, zip code, last name, type of conviction, and address by hundred block.

(ii) For level II offenders, the web site shall contain, but is not limited to, the same information and functionality as described in (a)(i) of this subsection, provided that it is permissible under state and federal law. If it is not permissible, the web site shall be limited to the information and functionality that is permissible under state and federal law.

(iii) For kidnapping offenders, the web site shall contain, but is not limited to, the same information and functionality as described in (a)(i) of this subsection, provided that it is permissible under state and federal law. If it is not permissible, the web site shall be limited to the information and functionality that is permissible under state and federal law.

(b) Until the implementation of (a) of this subsection, the Washington association of sheriffs and police chiefs shall create a web site available to the public that provides electronic links to county-operated web sites that offer sex offender registration information.

(6) Local law enforcement agencies that disseminate information pursuant to this section shall: (a) Review available risk level classifications made by the department of corrections, the department of social and health services, and the indeterminate sentence review board; (b) assign risk level classifications to all offenders about whom information will be disseminated; and (c) make a good faith effort to notify the public and residents at least fourteen days before the offender is released from confinement or, where an offender moves from another jurisdiction, as soon as possible after the agency learns of the offender's move, except that in no case may this notification provision be construed to require an extension of an offender's release date. The juvenile court shall provide local law enforcement officials with all relevant information on offenders allowed to remain in the community in a timely manner.

(7) An appointed or elected public official, public employee, or public agency as defined in RCW 4.24.470, or units of local government and its employees, as provided in RCW 36.28A.010, are immune from civil liability for damages for any discretionary risk level classification decisions or release of relevant and necessary information, unless it is shown that the official, employee, or agency acted with gross negligence or in bad faith. The immunity in this section applies to risk level classification decisions and the release of relevant and necessary information regarding any individual for whom disclosure is authorized. The decision of a local law enforcement agency or official to classify an offender to a risk level other than the one assigned by the department of corrections, the department of social and health services, or the indeterminate sentence review board, or the release of any relevant and necessary information based on that different classification shall not, by itself, be considered gross negligence or bad faith. The immunity provided under this section applies to the release of relevant and necessary

information to other public officials, public employees, or public agencies, and to the general public.

(8) Except as may otherwise be provided by law, nothing in this section shall impose any liability upon a public official, public employee, or public agency for failing to release information authorized under this section.

(9) Nothing in this section implies that information regarding persons designated in subsection (1) of this section is confidential except as may otherwise be provided by law.

(10) When a local law enforcement agency or official classifies an offender differently than the offender is classified by the end of sentence review committee or the department of social and health services at the time of the offender's release from confinement, the law enforcement agency or official shall notify the end of sentence review committee or the department of social and health services and submit its reasons supporting the change in classification. Upon implementation of subsection (5)(a) of this section, notification of the change shall also be sent to the Washington association of sheriffs and police chiefs.

RCW 9A.44.130

(1)(a) Any adult or juvenile residing whether or not the person has a fixed residence, or who is a student, is employed, or carries on a vocation in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation, or as otherwise specified in this section. Where a person required to register under this section is in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility as a result of a sex offense or kidnapping offense, the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person.

(b) Any adult or juvenile who is required to register under (a) of this subsection:

(i) Who is attending, or planning to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW shall, within ten days of enrolling or prior to arriving at the school to attend classes, whichever is earlier, notify the sheriff for the county of the person's residence of the person's intent to attend the school, and the sheriff shall promptly notify the principal of the school;

(ii) Who is admitted to a public or private institution of higher education shall, within ten days of enrolling or by the first business day after arriving at the institution, whichever is earlier, notify the sheriff for the county of the person's residence of the person's intent to attend the institution;

(iii) Who gains employment at a public or private institution of higher education shall, within ten days of accepting employment or by the first business day after commencing work at the institution, whichever is earlier, notify the sheriff for the county of the person's residence of the person's employment by the institution; or

(iv) Whose enrollment or employment at a public or private institution of higher education is terminated shall, within ten days of such termination, notify the sheriff for the county of the person's residence of the person's termination of enrollment or employment at the institution.

(c) Persons required to register under this section who are enrolled in a public or private institution of higher education on June 11, 1998, or a public or private school regulated under Title 28A RCW or chapter 72.40 RCW on September 1, 2006, must notify the county sheriff immediately.

(d) The sheriff shall notify the school's principal or institution's department of public safety and shall provide that department with the same information provided to a county sheriff under subsection (3) of this section.

(e)(i) A principal receiving notice under this subsection must disclose the information received from the sheriff under (b) of this subsection as follows:

(A) If the student who is required to register as a sex offender is

classified as a risk level II or III, the principal shall provide the information received to every teacher of any student required to register under (a) of this subsection and to any other personnel who, in the judgment of the principal, supervises the student or for security purposes should be aware of the student's record;

(B) If the student who is required to register as a sex offender is classified as a risk level I, the principal shall provide the information received only to personnel who, in the judgment of the principal, for security purposes should be aware of the student's record.

(ii) Any information received by a principal or school personnel under this subsection is confidential and may not be further disseminated except as provided in RCW 28A.225.330, other statutes or case law, and the family and educational and privacy rights act of 1994, 20 U.S.C. Sec. 1232g et seq.

(2) This section may not be construed to confer any powers pursuant to RCW 4.24.550 upon the public safety department of any public or private school or institution of higher education.

(3)(a) The person shall provide the following information when registering: (i) Name; (ii) complete residential address; (iii) date and place of birth; (iv) place of employment; (v) crime for which convicted; (vi) date and place of conviction; (vii) aliases used; (viii) social security number; (ix) photograph; and (x) fingerprints.

(b) Any person who lacks a fixed residence shall provide the following information when registering: (i) Name; (ii) date and place of birth; (iii) place of employment; (iv) crime for which convicted; (v) date and place of conviction; (vi) aliases used; (vii) social security number; (viii) photograph; (ix) fingerprints; and (x) where he or she plans to stay.

(4)(a) Offenders shall register with the county sheriff within the following deadlines. For purposes of this section the term "conviction" refers to adult convictions and juvenile adjudications for sex offenses or kidnapping offenses:

(i) OFFENDERS IN CUSTODY. (A) Sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of that offense, of the state department of corrections, the state department of social and health services, a local division

of youth services, or a local jail or juvenile detention facility, and (B) kidnapping offenders who on or after July 27, 1997, are in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register. Failure to register at the time of release and within twenty-four hours of release constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

When the agency with jurisdiction intends to release an offender with a duty to register under this section, and the agency has knowledge that the offender is eligible for developmental disability services from the department of social and health services, the agency shall notify the division of developmental disabilities of the release. Notice shall occur not more than thirty days before the offender is to be released. The agency and the division shall assist the offender in meeting the initial registration requirement under this section. Failure to provide such assistance shall not constitute a defense for any violation of this section.

(ii) OFFENDERS NOT IN CUSTODY BUT UNDER STATE OR LOCAL JURISDICTION. Sex offenders who, on July 28, 1991, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of corrections' active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 28, 1991. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of corrections' active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to

register under this subsection (4)(a)(ii) as of July 28, 1991, or a kidnapping offender required to register as of July 27, 1997, shall not relieve the offender of the duty to register or to reregister following a change in residence. The obligation to register shall only cease pursuant to RCW 9A.44.140.

(iii) OFFENDERS UNDER FEDERAL JURISDICTION. Sex offenders who, on or after July 23, 1995, and kidnapping offenders who, on or after July 27, 1997, as a result of that offense are in the custody of the United States bureau of prisons or other federal or military correctional agency for sex offenses committed before, on, or after February 28, 1990, or kidnapping offenses committed on, before, or after July 27, 1997, must register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. Sex offenders who, on July 23, 1995, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 23, 1995. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (4)(a)(iii) as of July 23, 1995, or a kidnapping offender required to register as of July 27, 1997 shall not relieve the offender of the duty to register or to reregister following a change in residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. The obligation to register shall only cease pursuant to RCW 9A.44.140.

(iv) OFFENDERS WHO ARE CONVICTED BUT NOT CONFINED. Sex offenders who are convicted of a sex offense on or after July 28, 1991, for a sex offense that was committed on or after February 28, 1990, and kidnapping offenders who are convicted on or after July 27, 1997, for a kidnapping offense that was committed on or after July 27, 1997, but who are not sentenced to serve a term of confinement immediately upon sentencing, shall report to the county sheriff to register immediately upon completion of being sentenced.

(v) OFFENDERS WHO ARE NEW RESIDENTS OR RETURNING

WASHINGTON RESIDENTS. Sex offenders and kidnapping offenders who move to Washington state from another state or a foreign country that are not under the jurisdiction of the state department of corrections, the indeterminate sentence review board, or the state department of social and health services at the time of moving to Washington, must register within three business days of establishing residence or reestablishing residence if the person is a former Washington resident. The duty to register under this subsection applies to sex offenders convicted under the laws of another state or a foreign country, federal or military statutes for offenses committed before, on, or after February 28, 1990, or Washington state for offenses committed before, on, or after February 28, 1990, and to kidnapping offenders convicted under the laws of another state or a foreign country, federal or military statutes, or Washington state for offenses committed before, on, or after July 27, 1997. Sex offenders and kidnapping offenders from other states or a foreign country who, when they move to Washington, are under the jurisdiction of the department of corrections, the indeterminate sentence review board, or the department of social and health services must register within twenty-four hours of moving to Washington. The agency that has jurisdiction over the offender shall notify the offender of the registration requirements before the offender moves to Washington.

(vi) OFFENDERS FOUND NOT GUILTY BY REASON OF INSANITY. Any adult or juvenile who has been found not guilty by reason of insanity under chapter 10.77 RCW of (A) committing a sex offense on, before, or after February 28, 1990, and who, on or after July 23, 1995, is in custody, as a result of that finding, of the state department of social and health services, or (B) committing a kidnapping offense on, before, or after July 27, 1997, and who on or after July 27, 1997, is in custody, as a result of that finding, of the state department of social and health services, must register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence. The state department of social and health services shall provide notice to the adult or juvenile in its custody of the duty to register. Any adult or juvenile who has been found not guilty by reason of insanity of committing a sex offense on, before, or after February 28, 1990, but who was released before July 23, 1995, or any adult or juvenile who has been found not guilty by reason of insanity of committing a kidnapping offense but who was released before July 27, 1997, shall be required to register within twenty-four hours of receiving notice of this registration requirement. The state department of social and health services shall make reasonable attempts within available resources to notify sex offenders who were released before July 23, 1995, and kidnapping offenders

who were released before July 27, 1997. Failure to register within twenty-four hours of release, or of receiving notice, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

(vii) OFFENDERS WHO LACK A FIXED RESIDENCE. Any person who lacks a fixed residence and leaves the county in which he or she is registered and enters and remains within a new county for twenty-four hours is required to register with the county sheriff not more than twenty-four hours after entering the county and provide the information required in subsection (3)(b) of this section.

(viii) OFFENDERS WHO LACK A FIXED RESIDENCE AND WHO ARE UNDER SUPERVISION. Offenders who lack a fixed residence and who are under the supervision of the department shall register in the county of their supervision.

(ix) OFFENDERS WHO MOVE TO, WORK, CARRY ON A VOCATION, OR ATTEND SCHOOL IN ANOTHER STATE. Offenders required to register in Washington, who move to another state, or who work, carry on a vocation, or attend school in another state shall register a new address, fingerprints, and photograph with the new state within ten days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. The person must also send written notice within ten days of moving to the new state or to a foreign country to the county sheriff with whom the person last registered in Washington state. The county sheriff shall promptly forward this information to the Washington state patrol.

(b) Failure to register within the time required under this section constitutes a per se violation of this section and is punishable as provided in subsection (11) of this section. The county sheriff shall not be required to determine whether the person is living within the county.

(c) An arrest on charges of failure to register, service of an information, or a complaint for a violation of this section, or arraignment on charges for a violation of this section, constitutes actual notice of the duty to register. Any person charged with the crime of failure to register under this section who asserts as a defense the lack of notice of the duty to register shall register immediately following actual notice of the duty through arrest, service, or arraignment. Failure to register as required under this subsection (4)(c) constitutes grounds for filing another charge of failing to register.

Registering following arrest, service, or arraignment on charges shall not relieve the offender from criminal liability for failure to register prior to the filing of the original charge.

(d) The deadlines for the duty to register under this section do not relieve any sex offender of the duty to register under this section as it existed prior to July 28, 1991.

(5)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send signed written notice of the change of address to the county sheriff within seventy-two hours of moving. If any person required to register pursuant to this section moves to a new county, the person must send signed written notice of the change of address at least fourteen days before moving to the county sheriff in the new county of residence and must register with that county sheriff within twenty-four hours of moving. The person must also send signed written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered. The county sheriff with whom the person last registered shall promptly forward the information concerning the change of address to the county sheriff for the county of the person's new residence. Upon receipt of notice of change of address to a new state, the county sheriff shall promptly forward the information regarding the change of address to the agency designated by the new state as the state's offender registration agency.

(b) It is an affirmative defense to a charge that the person failed to send a notice at least fourteen days in advance of moving as required under (a) of this subsection that the person did not know the location of his or her new residence at least fourteen days before moving. The defendant must establish the defense by a preponderance of the evidence and, to prevail on the defense, must also prove by a preponderance that the defendant sent the required notice within twenty-four hours of determining the new address.

(6)(a) Any person required to register under this section who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence. The notice shall include the information required by subsection (3)(b) of this section, except the photograph and fingerprints. The county sheriff may, for reasonable cause, require the offender to provide a photograph and fingerprints. The sheriff shall forward this information to the sheriff of the county in which the person

intends to reside, if the person intends to reside in another county.

(b) A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff's office may require the person to list the locations where the person has stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

(c) If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (4)(a)(vii) or (viii) and (6) of this section. To prevail, the person must prove the defense by a preponderance of the evidence.

(7) All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. An offender who complies with the ninety-day reporting requirement with no violations for a period of at least five years in the community may petition the superior court to be relieved of the duty to report every ninety days. The petition shall be made to the superior court in the county where the offender resides or reports under this section. The prosecuting attorney of the county shall be named and served as respondent in any such petition. The court shall relieve the petitioner of the duty to report if the petitioner shows, by a preponderance of the evidence, that the petitioner has complied with the reporting requirement for a period of at least five years and that the offender has not been convicted of a criminal violation of this section for a period of at least five years, and the court determines that the reporting no longer serves a public safety purpose. Failure to report, as specified, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

(8) A sex offender subject to registration requirements under this

section who applies to change his or her name under RCW 4.24.130 or any other law shall submit a copy of the application to the county sheriff of the county of the person's residence and to the state patrol not fewer than five days before the entry of an order granting the name change. No sex offender under the requirement to register under this section at the time of application shall be granted an order changing his or her name if the court finds that doing so will interfere with legitimate law enforcement interests, except that no order shall be denied when the name change is requested for religious or legitimate cultural reasons or in recognition of marriage or dissolution of marriage. A sex offender under the requirement to register under this section who receives an order changing his or her name shall submit a copy of the order to the county sheriff of the county of the person's residence and to the state patrol within five days of the entry of the order.

(9) The county sheriff shall obtain a photograph of the individual and shall obtain a copy of the individual's fingerprints. A photograph may be taken at any time to update an individual's file.

(10) For the purpose of RCW 9A.44.130, 10.01.200, 43.43.540, 70.48.470, and 72.09.330:

(a) "Sex offense" means:

(i) Any offense defined as a sex offense by RCW 9.94A.030;

(ii) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree);

(iii) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes);

(iv) Any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense under this subsection; and

(v) Any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030 or this subsection.

(b) "Kidnapping offense" means: (i) The crimes of kidnapping in the

first degree, kidnapping in the second degree, and unlawful imprisonment, as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent; (ii) any offense that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a kidnapping offense under this subsection (10)(b); and (iii) any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a kidnapping offense under this subsection (10)(b).

(c) "Employed" or "carries on a vocation" means employment that is full-time or part-time for a period of time exceeding fourteen days, or for an aggregate period of time exceeding thirty days during any calendar year. A person is employed or carries on a vocation whether the person's employment is financially compensated, volunteered, or for the purpose of government or educational benefit.

(d) "Student" means a person who is enrolled, on a full-time or part-time basis, in any public or private educational institution. An educational institution includes any secondary school, trade or professional institution, or institution of higher education.

(11)(a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (10)(a) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense as defined in subsection (10)(a) of this section.

(b) If the crime for which the individual was convicted was other than a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be other than a felony, violation of this section is a gross misdemeanor.

(12)(a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony if the crime for which the individual was convicted was a felony kidnapping offense as defined in subsection (10)(b) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony kidnapping offense as defined in subsection (10)(b) of this section.

(b) If the crime for which the individual was convicted was other than

a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be other than a felony, violation of this section is a gross misdemeanor.

(13) Except as may otherwise be provided by law, nothing in this section shall impose any liability upon a peace officer, including a county sheriff, or law enforcement agency, for failing to release information authorized under this section.

RCW 72.09.345

(1) In addition to any other information required to be released under this chapter, the department is authorized, pursuant to RCW 4.24.550, to release relevant information that is necessary to protect the public concerning offenders convicted of sex offenses.

(2) In order for public agencies to have the information necessary to notify the public as authorized in RCW 4.24.550, the secretary shall establish and administer an end-of-sentence review committee for the purposes of assigning risk levels, reviewing available release plans, and making appropriate referrals for sex offenders. The committee shall assess, on a case-by-case basis, the public risk posed by sex offenders who are: (a) Preparing for their release from confinement for sex offenses committed on or after July 1, 1984; and (b) accepted from another state under a reciprocal agreement under the interstate compact authorized in chapter 72.74 RCW.

(3) Notwithstanding any other provision of law, the committee shall have access to all relevant records and information in the possession of public agencies relating to the offenders under review, including police reports; prosecutors' statements of probable cause; presentence investigations and reports; complete judgments and sentences; current classification referrals; criminal history summaries; violation and disciplinary reports; all psychological evaluations and psychiatric hospital reports; sex offender treatment program reports; and juvenile records. Records and information obtained under this subsection shall not be disclosed outside the committee unless otherwise authorized by law.

(4) The committee shall review each sex offender under its authority before the offender's release from confinement or start of the offender's term of community placement or community custody in order to: (a) Classify the

offender into a risk level for the purposes of public notification under RCW 4.24.550; (b) where available, review the offender's proposed release plan in accordance with the requirements of RCW 72.09.340; and (c) make appropriate referrals.

(5) The committee shall classify as risk level I those sex offenders whose risk assessments indicate a low risk of reoffense within the community at large. The committee shall classify as risk level II those offenders whose risk assessments indicate a moderate risk of reoffense within the community at large. The committee shall classify as risk level III those offenders whose risk assessments indicate a high risk of reoffense within the community at large.

(6) The committee shall issue to appropriate law enforcement agencies, for their use in making public notifications under RCW 4.24.550, narrative notices regarding the pending release of sex offenders from the department's facilities. The narrative notices shall, at a minimum, describe the identity and criminal history behavior of the offender and shall include the department's risk level classification for the offender. For sex offenders classified as either risk level II or III, the narrative notices shall also include the reasons underlying the classification.

