NO. 38468-0-II
Cowlitz Co. Cause NO. 08-1-00782-8

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

PHILLIP WHITE FLOWERS,

Respondent.

BRIEF OF APPELLANT

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III. STATEMENT OF THE CASE

The appellee, Phillip White Flowers, was convicted of three different sex offenses: (1) First Degree Rape of a Child in Cowlitz County Cause Number 02-8-00251-2, (2) First Degree Rape of a Child in Cowlitz County Cause Number 02-8-00249-1, and (3) First Degree Rape of a Child in Cowlitz County Cause Number 02-8-00248-2. CP 10. Because of his convictions, he is required to register as a sex offender under RCW 9A.44.130. He is classified a level II offender. CP 10. At the time of the events of this case, he was registered in Cowlitz County as an offender that lacked a fixed address. CP 10.

The Cowlitz County Sheriff requires all offenders without a fixed address to list the locations they stayed during the week prior to the check-in date. CP 10. Some counties do not require this information, and some counties require it only ask selected individuals for this information. CP 10. Some counties do not require this information because of a lack of funds. CP 10. Detective Leishner of the Thurston County Sheriff's Office, and who was involved in the legislative process, indicated that the reason the statute uses "may" instead of shall in RCW 9A.44.130(6)(b) is to avoid creating an unfunded mandate. CP 10.

On July 15th, 2008, when Flowers made his weekly check-in, he told Deputy Bob Brewer of the Cowlitz County Sheriff's Department that he stayed at places that he had not actually stayed, willfully misrepresenting his previous location. CP 10. Based on this misrepresentation, charges for Failing to Register as a Sex Offender were filed.

On September 30th, 2008, Flowers argued a motion to dismiss under *Knapstad*, contending that RCW 9A.44.130(6)(b) violated the separation of powers doctrine and created an equal protection violation.

On October 14th, 2008, the trial court granted Flower's Motion to Dismiss and later entered Findings of Fact and Conclusions of Law. The State appeals.

IV. ARGUMENT

A. THE REQUIREMENT BY THE SHERIFF TO HAVE A TRANSIENT SEX OFFENDER REPORT THE LOCATIONS THEY HAD STAYED THE PREVIOUS SEVEN DAYS IS A REQUIREMENT OF RCW 9A.44.130

Initially, issues of statutory construction are reviewed *de novo*. *State v. Jacobs*, 154 Wash.2d. 596, 600, 115 P.3d 281 (2005). Where a statute is unambiguous, the court looks to the Legislature's intent from a plain language reading of the statute. *Jacobs*, 154 Wash.2d at 600, 115

P.3d 281. The court determines the plain meaning from the "context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Jacobs*, 154 Wash.2d at 600, 115 P.3d 281. The court construes statutes to give effect to their purpose and to avoid absurd or unlikely results. *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

A plain reading of RCW 9A.44.130(6)(b) in conjunction with RCW 9A.44.130(11)(a), clearly shows the Legislature's intent to make failing to accurately report the location a transient offender has stayed during the previous seven days a requirement of the statute, and thus a crime. The relevant portion of RCW 9A.44.130(6)(b) reads:

> 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. (*emphasis added*)

The statute authorizes the sheriff to require specific information from an offender. If the offender fails to provide such information, or inaccurately provides that information, it would necessarily follow that they have failed to comply with a requirement of the statute.

To find that providing location information is not a requirement of the statute, when that requirement is invoked by the sheriff, would undermine the purpose of the statute and lead to an absurd result. The house bill report for this statute goes into great detail regarding the purpose of the statute, noting:

> In the State of Washington there are 15,500 registered sex offenders living among us, however if offenders register as transient it is harder to know where these offenders are living when they do not have a fixed residence. This bill goes a long way to help the local sheriff's office to know where these sex offenders live and it makes them subject to public notification at the highest level. HB 1952, House Bill Report (1990).

It goes on to note that, "many sex offenders register as transient because they do not want the community knowing where they live." HB 1952, House Bill Report (1990). Finding that the requirement of transient offenders to provide their location is not a requirement of the statute would be contrary to the very purpose of the statute. There would be no remedy for the sheriff if the offender simply refused to report their locations, essentially giving no effect to the language in the statute. If it is not a requirement of the statute, the sheriff has no ability to make the offender comply.

Such a reading would also allow sex offenders to use their transient status as a shield against registration laws and public notification. If they can not be required to accurately report their location an offender could establish a residence, but remain registered transient, and avoid being "flyered" and any public notice requirements. The statute notes particularly that offenders without a fixed residence are "subject to disclosure of information to the public at large pursuant to RCW 4.24.550." RCW 9A.44.130(6)(b). However, without making it a requirement that they accurately report the locations they have been staying in, there is no way for the sheriff to make a public disclosure of their whereabouts. Offenders could simply refuse to tell the sheriff their location, while still checking in weekly in accordance with the statute, and avoid any public disclosure of their whereabouts, which is contrary to the purpose of the statute.

The trial court erred when it found it is not a requirement of RCW 9A.44.130 that when the sheriff, under RCW 9A.44.130(6)(b), requires an offender to provide their information, they either fail to do so or provide inaccurate information. Such a result ignores a plain reading of

the statute, the Legislative intent of the statute, and leads to an absurd result.

The Legislature did not intend to provide a shield to offenders to prevent them from having to disclose their locations when they lack a fixed residence. The whole purpose of the statute is to provide law enforcement and the public with information regarding the whereabouts of registered sex offenders, including offenders without a fixed residence.

B. ALLOWING THE SHERIFF TO REQUIRE A TRANSIENT OFFENDER TO DISCLOSE THE LOCATIONS AT WHICH THEY STAYED THE PREVIOUS SEVEN DAYS IS NOT A VIOLATION OF THE SEPARATION OF POWERS AND DOES NOT GIVE THE EXECUTIVE BRANCH THE AUTHORITY TO DEFINE A CRIME

Questions regarding the constitutionality of a statute are reviewed *de novo*. *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006), *cert. denied sub nom.*, *Thomas v. Washington*, 549 U.S. 1354 (2007). Statutes are presumed constitutional and the burden is on the challenger to prove it unconstitutional beyond a reasonable doubt. *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). Indeed, "where legislation tends to promote the health, safety, morals or welfare of the public and the legislation bears a reasonably substantial relation to that purpose, every presumption will be indulged in favor of constitutionality." *State v.*

Melcher, 33 Wn. App. 357, 360, 655 P.2d 1169 (1982), *citing Duckworth v. Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978).

The trial court erred when it ruled that giving the Cowlitz County Sheriff's Office the discretion to require transient offenders to report the locations they stayed at the previous seven days, RCW 9A.44.130(6)(b) was a violation of the separation of powers doctrine. There was no significant delegation of power by the Legislature through RCW 9A.44.130(6)(b). Even if there was such a delegation, it was not a violation of the separation of powers.

1. THERE WAS NO SIGNIFICANT DELEGATION OF DISCRETION OR POWER

As a threshold issue, there is no separation of powers violation because no significant discretion is delegated. The statute in question, RCW 9A.44.130(6)(b), only allows the sheriff to either (1) require or (2) not require, a transient offender to report the locations they stayed at during the preceding week. The sheriff creates no administrative rules, creates no new crimes, and acts only with authority expressly delegated in the statute.

The elements of failing to register as a sex offender remain the same, the differences are in the manner in which the crime may be

committed, or how the element may be proven. The sheriff does not create the element because it is already in the statute. The element is that the offender failed to comply with one of the requirements of a section of the statute.

This court examined a similar issue in *State v. Ramos*, 202 P.3d 383 (Div. 2 2009). In that case, this court was faced with the question of whether the portion of the statute that allowed the sheriff to determine an offender's risk level was an unconstitutional delegation of the separation of powers doctrine. The court found that the Legislature "inadequately defined the element of the crime at question (risk of reoffense) and did not provide standards to assist law enforcement agencies in establishing measurement procedures of the risk of reoffense." *Id.* at 386.

Though similar, *Ramos* represents a substantially different factual scenario than this case. In *Ramos*, the delegation involved the classification of a sex offender without accompanying criteria by an administrative agency. Such a classification both affects the public disclosure level and the frequency with which an offender has to report, potentially creating a significant burden on the offender. The court noted that "by failing to provide criteria or standards, the Legislature has

delegated full responsibility for defining an offender's risk level, an element of a felony, to local law enforcement agencies." *Id.* at 387. There is no such substantial delegation in the case at the bar.

The section of the statute in question here, RCW 9A.44.130(6)(b), does not delegate any real authority in terms of definition to the sheriff's office. Where in *Ramos* the sheriff had to deal with assigning risk levels, here the only concern is whether some offenders are required to report their locations for the previous seven nights on that date of their check-in. The legislative intent of the statute is clear when it applies to the sheriff's responsibilities to track sex offenders and RCW 9A.44.130(6)(b) is only a tool in that arsenal.

The elements of failure to register are already defined as a crime. The only discretion the sheriff's office has is to determine, administratively, whether the particular offender will be subject to a previously enumerated requirement. The element is compliant with the requirements of the statute, and one of the requirements may or may not be providing the sheriff's office with a list of locations at which an offender stayed.

State v. Melcher contemplated a similar scenario, examining whether the reliance of the crime of driving under the influence on protocols administered by an administrative agency constituted a violation of the separation of powers doctrine. As in *Melcher*, the authority delegated to the sheriff is not legislative, but administrative. It is "the power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *State v. Melcher*, 33 Wn.App. at 361, 655 P.2d 1169.

The danger in statutes with administrative rule making is the criminalization of conduct without notice, or use of it in such an arbitrary and capricious way as to burden the fundamental rights of individuals. No danger exists in this case, as the sheriff is not making new rules without legislative oversight, or criminalizing new drugs as in *State v. Dougall*, 89 Wn.2d 118, 570 P.2d 135 (1977).

By the text of the statute, the sheriff either requires the information or does not require it. Both outcomes are contemplated by the statute. Both outcomes, by the plain legislative language, are acceptable. There is very little discretion entrusted to the sheriff. The additional burden is minimal, as offenders under the statute are required to visit the sheriff's

office weekly in any event. The trial court erroneously ruled that the statute improperly delegates the authority to define a crime.

2. SHOULD THE COURT FIND A DELAGATION, IT IS NOT A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE

It is well established that the legislature is free to constitutionally delegate authority to an administrative agency to implement statutory directives. Moreover, "the validity of this doctrine does not depend on the branches of government being hermetically sealed off from one another." *Carrick v. Locke*, 125 Wash.2d 129, 135, 82 P.2d 173 (1994). Rather, "the separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread." *Id. citing In re Juvenile Director*, 87 Wash.2d 232, 240, 552 P.2d 163 (1976).

The question is "not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *Locke*, 87 Wash.2d at 135, 82 P.2d 173, *citing Zylstra v. Piva*, 85 Wash.2d 743, 750, 539 P.2d 823 (1975). More specifically, two requirements arise, (1) "the Legislature must provide standards to indicate

what is to be done and designate the agency to accomplish it," and (2) "procedural safeguards must exist to control arbitrary administrative action and abuse of discretionary power." *State v. Crown Zellerbach Corp.*, 92 Wash.2d 894, 900, 602 P.2d 1172 (1979), *citing Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wash.2d 155, 500 P.2d 540 (1972). The standard provided by the Legislature is the statute itself, the agency designated by the statute, the local sheriff's office, and sufficient safeguards exist to prevent what little arbitrary action is possible.

The separation of powers analysis is fundamentally different from other constitutional violations. Other violations are concerned with the individual rights of people. In a separation of powers case, the damage by the violation "accrues directly to the branch invaded." *Locke*, 125 Wash.2d at 136, 82 P.2d 172. This important difference changes the method of analysis, as "a history of cooperation within the institution in a given instance militates against a finding of a separation of powers violation." *State v. Chavez*, 134 Wash.App. 657, 666, 142 P.3d 1110 (2006), *citing Carrick v. Locke*, 125 Wash.2d at 136, 882 P.2d 173. The Washington State Supreme Court noted as much, writing, "that cooperation and coordination among the branches is to be encouraged,"

and that problems arise "only when such cooperation changes to un-warranted coercion or intrusion." *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). Historical cooperation must therefore be the cornerstone of this analysis.

The original sex offender registration statute, RCW 9A.44.130, in its current form, was passed in 1990. The statute was guided by several important factors, with the Legislature specifically finding "sex offenders often pose a high risk of re-offense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction." Laws of 1990, ch. 3, § 401.

Indeed, the purpose behind the statute, as a whole, is to "assist local law enforcement agencies" efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in [RCW 9A.44.130]." Laws of 1990, ch. 3, § 401. Cooperation was and remains the "watch-cry" of the registration statute.

Courts have observed this connection as well such as in *Vanderpool* where the court noted that "the purpose of this statute is to help law enforcement protect the public by making sex offenders easy to locate." *State v. Vanderpool*, 99 Wn.App. 709, 712, 995 P.2d 104, *review denied*, 141 Wn.2d 1017, 10 P.3d 1072 (2000). Another sex offender registration case, *State v. Ward*, noted further "registration is a traditional governmental method of making available relevant and necessary information to law enforcement agencies." *State v. Ward*, 123 Wn.2d 488, 507, 869 P.2d 1062 (1994). The essence of the statute is cooperation between the legislature and the local law enforcement agencies that would be responsible for administering such a program. It is clearly within the historical precedent to delegate to the sheriff the ability to decide whether to require an offender to report their whereabouts for the previous seven days.

Such cooperation and delegation is not without historical precedent. The court examined a similar delegation of authority in *State v. Wadsworth*, 139 Wash.2d 724, 743, 991 P.2d 80 (2000). In that case, the court was faced with a separate of powers violation based on RCW 9.41.300(1)(b), the statute that makes it a crime to take a knife into a

courthouse and giving the "local judicial authority" the power to designate the areas in court buildings where possession of a weapon is unlawful. The court noted that, "the Legislature has an established practice of defining prohibited acts in general terms, leaving to the judicial and executive branches the task of establishing the specifics." *State v. Wadsworth*, 139 Wash.2d 724, 743, 991 P.2d 80 (2000). That court also recognized that precedent allowed the "legislature [to] grant broad powers to municipal corporations, including school districts, without delineating precise standards and guidelines, so long as those powers relate to local purposes of regulation or administration." *Id.* at 738, 991 P.2d 80, *citing American Fed'n of Teachers, Yakima Local 1485 v. Yakima Sch. Dist. No. 7*, 74 Wash.2d 865, 870, 447 P.2d 593 (1968). That court also noted precedent finding that the "Legislature's grant of discretion to make rules and regulations for implementation of the statute was not an unconstitutional delegation of power." *State v. Wadsworth*, 139 Wash.2d at 738, 991 P.2d 80, *citing American Fed'n of Teachers, Yakima Local 1485 v. Yakima Sch. Dist. No. 7*, 74 Wash.2d 865, 870, 447 P.2d 593 (1968). In this case, the only delegated powers relate directly to the

sheriff's office purposes of regulating, tracking, and locating sex offenders within the communities of the State of Washington.

Another example of this principle is *State v. Ermert*, 94 Wash.2d 839, 621 P.2d 121 (1980). The defendant in that case was charged with welfare fraud for failing to disclose a trust account, funded solely by public assistance payments. One issue was whether the defendant had failed to disclose a status change as required by Department of Social and Health Services ("DSHS") administrative regulations and whether that failure could constitute a violation. The court noted that such a requirement would unconstitutionally delegate to DSHS the authority to determine a felony crime under RCW 74.08.331. Id. at 846, 621 P.2d 121. The record revealed that eligibility requirements were contained "not only in the WAC but in interoffice memos and manuals that [were] not available to the public." *Id.* at 847, 621 P.2d 121. Thus, the problem with the delegation was such that the "standards" created were not necessarily public or subject to review. This is nearly the exact opposite of the case at the bar.

In this case, the statute clearly provides only three alternatives and does NOT authorize the sheriff to create new rules or elements to a crime.

The "element" to the crime of Failure to Register is **already** in the statute. There is no danger the defendant would lack appropriate notice, as part of the burden the State carries is to show the defendant "knowingly" failed to register. Such notice is provided in the text of the statute. The sheriff does not create new regulations, procedures, or elements. The crime is simply failing to follow the requirements of the statute. The requirement in question is **in** the statute and is not a unique construct of the sheriff.

Applying the facts of this case to the two-pronged test, it is clear that the statute does not violate the separation of powers doctrine with an unlawful delegation of authority. Remembering the significant presumption for constitutionality, and taking in to account the historical connection and relationship that militates against a finding of a separation of powers violation, the trial court incorrectly ruled that the legislature failed to provide standards to indicate what must be done and the agency to do it. The legislature provided the statute, the crime, the elements of the crime, and delegated to the local sheriff the ability to decide whether to require transients to report their whereabouts the previous seven days. Essentially, the legislature gave the sheriff, the local executive authority,

and the tool to regulate and monitor sex offenders. Regulations were made and an agency was delegated.

The second prong requires that adequate procedural safeguards exist to control arbitrary administrative action and the abuse of discretionary power. The only discretion available to the sheriff is whether or not they must register. Both contingencies are allowed by the statute. There is no rule making or no administrative process. Either the requirement is there, or it is not. The denial of the ability to substantially change the nature of the reporting or the reporting requirements are all the safeguards necessary to survive the minimal showing necessary to carry the presumption of constitutionality.

Even assuming *arguendo* that such safeguards were not in place, the lack of explicit statutory safeguards is not fatal. As noted by the defendant, some counties (1) require all transients to report their whereabouts, (2) require no transients to report their whereabouts. "If the statutory delegation provides inadequate guidelines, the procedural safeguards may be provided by the administrative body." *Jorgenson Company v. Seattle*, 99 Wn.2d 861, 870, 665 P.2d 1328 (1983). Moreover the courts have noted that, "if a criminal prosecution should arise, a

defendant is entitled to all of the procedural safeguards that are afforded a defendant in a criminal prosecution." *State v. Simmons*, 152 Wash.2d 540, 98 P.3d 789 (2004). There are inherent procedural safeguards. Such safeguards are more than adequate to carry the presumption of constitutionality.

As noted in Flowers initial declaration to the trial court, a reason for not requiring all transients to report their whereabouts the previous seven days may be to avoid an unfunded mandate. CP 10. It could be that some counties could not necessarily afford to engage in such monitoring. Such a situation has been examined by the courts, also within the context of the sex offender registration statute.

Similar to this case, manpower limitations were raised in *Ward*, where the court considered whether the Legislature's decision to limit the registration requirement to sex offenders in custody or on active supervision on or before February 28, 1990 was arbitrary. The State in that case argued that the decision was based on creating a "manageable number of sex offender to notify and monitor." *Ward*, 123 Wn.2d at 517, 869 P.2d 1062. The court found this persuasive, holding that "the Legislature's classification is not arbitrary but is rationally related to the

State's legitimate interest in assisting local law enforcement." *Id.* at 517, 869 P.2d 1062. The court also noted "the Legislature has spoken clearly that public interest demands that law enforcement agencies have relevant and necessary information about sex offenders residing in their communities." *Id.* at 499, 869 P.2d 1062.

Ultimately, the strong presumption of constitutionality, the historical context that militates against a separation of powers violation, and the case law examining the issue all support the State's request that this court reverse the trial's courts decision that RCW 9A.44.130(6)(b) creates an unconstitutional separation of powers and remand for a trial on the merits.

C. RCW 9A.44.130(6)(b) DOES NOT VIOLATE THE EQUAL PROTECTION REQUIREMENTS UNDER THE STATE OR FEDERAL CONSTITUTION

RCW 9A.44.130(6)(b) simply does not create an equal protection violation. As before, questions regarding the constitutionality of a statute are reviewed *de novo*. *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006), *cert. denied sub nom.*, *Thomas v. Washington*, 549 U.S. 1354 (2007). Sex offenders are not a suspect class for purposes of equal protection review. *Ward*, 123 Wn.2d at 516, 869 P.2d 1062. When no

suspect class is involved and the only interest at stake is a physical liberty interest, "the rational basis test is the proper standard of review." *State v. Coria*, 120 Wn.2d 156, 170, 839 P.2d 890 (1992). Under this deferential standard, a legislative classification will be upheld unless the defendant can show that "it rests on grounds wholly irrelevant to the achievement of the legitimate state objectives." *Coria*, 12 Wn.2d at 171, 839 P.2d 890, *quoting Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 431, 799 P.2d 235 (1990). The defendant bears the burden of showing beyond a reasonable doubt that the classification in question is completely arbitrary and not rationally related to a legitimate state interest. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). The trial court incorrectly held that Flowers met this burden.

The three criteria for the rational basis test are (1) whether the law applies equally to all members within the designated class, (2) whether there are reasonable grounds for distinguishing between those inside and outside of the class, and (3) whether the classification has a rational relationship to the law's purpose. *Paulson v. Pierce County*, 99 Wn.2d 645, 653, 664 P.2d 1202 (1983). The class in this case is made of transient offenders registered in the state of Washington. Some individuals in the

class have to report their whereabouts for the seven days prior to their weekly visit, some do not. It is conceded that not all members of the class will be treated equally. The real issue, however, is whether there is a rational basis for such a situation.

There is a rational basis for the application of this law. First, it is important to be clear about the contemplated additional "burden." The offender, who must already report weekly to the Sheriff's office, must simply provide additional information about his or her whereabouts for the previous week. There is no real liberty interest at stake, no additional heavy burden, or anything unrelated to the purpose of the statute. As noted in the preceding argument, the aim of the statute is to make sure the sheriff is able to "protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses." Laws of 1990, ch. 3, § 401. Courts have recognized this as the fundamental purpose of the statute, noting that "the legislature has spoken clearly that public interest demands that law enforcement agencies have relevant and necessary information about sex offenders residing in their communities." *Ward*, 123 Wn.2d at 499, 869 P.2d 1062.

The trial court erroneously found that Flowers had met the burden of proving a violation of the equal protection clause beyond a reasonable doubt. No evidence or analysis was presented to show that the decisions to require some offenders to report and not requiring others offenders to report their whereabouts for the previous seven days was arbitrary and capricious. The only evidence presented was that the difference could be due to an unfunded mandate and that one of the counties that currently does not require the information soon will because of a grant. CP 10. Some counties apparently only track offenders they have received complaints about. CP 10. If anything this information, taking in the light of the court's decision in *Ward*, only shows that there is a rational basis for the difference.

Referring to the preceding argument, the court in *Ward* dealt with an equal protection challenge to this statute, where the issue was whether the cutoff point for the statute to apply to previous offenders was arbitrary and capricious. The State in that case argued that the decision was based on creating a "manageable number of sex offenders to notify and monitor." *Ward*, 123 Wn.2d at 517, 869 P.2d 1062. The court found this persuasive, holding that "the Legislature's classification is not arbitrary

but is rationally related to the State's legitimate interest in assisting local law enforcement." *Id.* at 517, 869 P.2d 1062.

This is a minimal scrutiny test. The presence or absence of standards are irrelevant for an equal protection claim, the only issue is whether there is a rational basis for the distinction. There is a rational basis for the distinction, either in funding, focusing on problem offenders, or even just based on geographical considerations. The trial court erred when it found Flowers had proven the lack of a rational basis beyond a reasonable doubt. "Registration is a traditional governmental method of making available relevant and necessary information to law enforcement agencies." *State v. Ward*, 123 Wn.2d 488, 507, 869 P.2d 1062 (1994). Making that information available, where possible, is clearly rationally related to the purpose of the statute and does not violate equal protection. Accordingly, the court should reverse the trial court's decision that the statute violates the equal protection clause and remand for a trial on the merits.

D. RCW 9A.44.130(6)(b) IS SUFFICIENTLY CLEAR TO SATISFY ANY DUE PROCESS AND THE RIGHT TO NOTICE REQUIREMENTS

The trial court erroneously ruled that RCW 9A.44.130(6)(b) violates the due process rights and right to notice under the Washington Constitution, Article 1, § 3, and the United States Constitution, 14th Amendment. It is difficult to frame this issue as the argument was not advanced by the trial counsel of the defendant during the oral argument, it was not briefed by either side, and was only brought up by the trial court shortly before it issued its ruling. RP 5, 10/15/2008. The statute clearly sets forth that RCW 9A.44.130(6)(b) allows the county sheriff to require a transient registered sex offender to report where he or she has stayed the previous seven days at the weekly check-in. There is no agency rule that lists potential requirements; the requirements themselves are listed in the statute for all the public to see. Offenders are told when they register whether they are subject to the requirement to report where they stayed. The state is also required to prove the defendant in a prosecution for failing to register did so knowingly.

Despite the trial court's insistence that the policy of the sheriff be published, there is no legal rule requiring such, where the potential requirement itself is part of the statutory scheme. There is no administrative interpretation, or set of agency rules that create criminalized conduct that is not specifically addressed in the statute. There is no danger of a due process violation.

Nor is there a vagueness problem with the statute. A statute is void for vagueness where its terms are so vague that persons of common intelligence must guess at its meaning in order to understand the proscribe conduct. *Haley v. Medical Disciplinary Bd.,* 117 Wash.2d 720, 739, 828 P.2d 1062 (1991) (*citing Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). There is no such vagueness in this statute. The trial court's ruling that RCW 9A.44.130(6)(b) violates the due process and right to notice rights of transient sex offenders should be reversed and the case should be remanded for a trial on the merits.

V. CONCLUSION

The purpose of RCW 9A.44.130 in general is to give law enforcement the tools necessary to track sex offenders, as well as provide public disclosure of information about the whereabouts of sex offenders.

This court should reverse the trial court and find that RCW 9A.44.130(6)(b) is a requirement of RCW 9A.44.130 and failure to comply with that section of the statute represents a felony offense under RCW 9A.44.130(11)(a). Any other interpretation would lead to the absurd result of allowing transient sex offenders to ignore the requirements of the sheriff without recourse, giving them a shield from the very disclosure of their whereabouts the statute is intended to provide. To read it as not being a requirement of the statute renders the language of RCW 9A.44.130(6)(b) moot and without effect. This court should reverse the trial court.

Moreover, RCW 9A.44.130(6)(b) does not represent an unconstitutional delegation of legislative authority to the executive branch. The authority that is given is administrative in nature and does not serve to define any element of the crime. The definitions are already present in the statute, RCW 9A.44.130(6)(b) only provides the sheriff with a tool to track transient offenders. Even if such a delegation is considered legislative, it is an acceptable delegation of power based on the past instances of historical cooperation and the long line of case law showing such cooperation. There is no violation of the separation of powers and

this court should reverse the trial court and find that RCW 9A.44.130(6)(b) is constitutionally sound.

Neither does RCW 9A.44.130(6)(b) present an equal protection violation. *Ward* makes clear that registration requirements are not punitive in nature, any additional burden is marginal at best, and there need only be a rational basis for any disparate treatment. Sex offenders are not a suspect or protected class under the law. The rational basis of differentiating offenders based on the manpower issues of the county in question is historically acceptable, represented in case law, and is not a constitutional violation. This court should reverse the trial court and find that RCW 9A.44.130(6)(b) does not violate principles of equal protection.

Finally, there is no due process, right to fair notice, or vagueness issue with RCW 9A.44.130(6)(b). The statute is clear in what conduct is proscribed and what information the sheriff may require. There is no danger that any sex offender, or even a member of the public, would be unable to discern what conduct is prohibited or required. In any case where this portion of the statute is at issue, the sheriff would have already informed the offender of the requirement. If for some reason the offender did not know, there would be sufficient constitutional protection in the

criminal law process to provide safeguards. This court should reverse the trial court and find that RCW 9A.44.130(6)(b) does not violate principles of due process or the right to fair notice.

For all these reasons the appellant respectfully requests that this court reverse the trial court and remand the case for trial on the merits.

Respectfully submitted this 27th day of April, 2009.

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APPENDIX A

4.24.550. Sex offenders and kidnapping offenders--Release of information to public--Web site

(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, level I registered sex offenders during the time they are out of compliance with registration requirements under RCW

9A.44.130, 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, and level I sex offenders during the time they are out of compliance with registration requirements under RCW 9A.44.130, 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.

APPENDIX B

9A.44.130. Registration of sex offenders and kidnapping offenders--Procedures--Definition--Penalties

(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.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	
	)	
Appellant,	)	
v.	)	NO. 38468-0-II
	)	08-1-00782-8
PHILLIP WHITE FLOWERS,	)	AFFIDAVIT OF MAILING
	)	
Respondent.	)	

DAVID PHELAN, being first duly sworn, on oath deposes and says: That on April 27, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

JOHN A. HAYS
ATTORNEY AT LAW
1402 BROADWAY
LONGVIEW, WA 98632

CLERK, COURT OF APPEALS
950 BROADWAY, SUITE 300
TACOMA, WA 98402

each envelope containing a copy of the following documents:

1. BRIEF OF APPELLANT
2. Affidavit of Mailing.

SUBSCRIBED AND SWORN to before me this 27th day of April, 2009.

Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: 020910