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Court of Appeals No. 40422-2-II
Lewis County No. 09-1-00362-3

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL EDWARD CATON.

Appellant.

BRIEF OF APPELLANT

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CATON WAS A LEVEL II SEX OFFENDER.**

**VI. THE STATE PRESENTED INSUFFICIENT EVIDENCE
THAT MR. CATON WAS A LEVEL II SEX OFFENDER.**

C. STATEMENT OF THE CASE

The State charged Mr. Caton with failing to register as a sex offender under former RCW 9A.44.130 for allegedly failing to report, in

person, to the county sheriff every ninety days as a level II sex offender. CP 1. He was found guilty after a non-jury trial. CP 7-8. The facts adduced at trial established that Mr. Caton registered as a sex offender with the Lewis County Sheriff on May 19th, 2009. CP 7 (finding of fact 1.2). The Lewis County Sheriff set Mr. Caton's offender risk level as level II, based on information provided to him by the Department of Corrections (DOC). CP 7 (finding of fact 1.4), RP 57, 63-64. At trial, the State sought admission of Exhibit 1, which is Mr. Caton's sex offender registration form. RP 57. On this document, Detective Borden of the Lewis County Sheriff's Office set Mr. Caton's offender risk level as II based on information he received from the "end of sentence review board" (ESRB). RP 57-58, 63-64. Detective Borden confirmed that there were other documents on which he relied to set that level, yet no other documents were proffered by the State or admitted into evidence. RP 63-64. Defense counsel objected to the admission of Exhibit 1. RP 58, 66-67.

Detective Borden instructed Mr. Caton to report for his ninety day reporting twenty-seven days after he registered, on June 16th, 2009. CP 7 (finding of fact 1.5). Mr. Caton did not appear to report on that date. CP 7 (finding of fact 1.9). The trial court found Mr. Caton guilty of failing to report every ninety days. CP 8 (conclusion of law 2.2). Mr. Caton was

sentenced to 50 months in prison. CP 11. This timely appeal followed.

CP 20.

D. ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. CATON FAILED TO REPORT TO THE LEWIS COUNTY SHERIFF'S OFFICE EVERY NINETY DAYS AS REQUIRED BY FORMER RCW 9A.44.130 (7), AND FAILING TO REPORT, IN PERSON, TO THE COUNTY SHERIFF ONLY TWENTY-SEVEN DAYS AFTER LAST REPORTING IS NOT A CRIMINAL ACT PROSCRIBED BY FORMER RCW 9A.44.130 (7).

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980).

When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all

inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Former RCW 9A.44.130 (7)¹ required that all level II and level III sex offender report, in person, to the sheriff of the county in which he resided every ninety days. The statute allowed the county sheriff to set the day on which the offender would report, however it did not delegate to county sheriffs the authority to create new crimes or to truncate the ninety day reporting requirement to twenty-seven days. Former RCW 9A.44.130 (7) provided:

(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

¹ RCW 9A.44.130 was amended effective June 10, 2010 to include, inter alia, the elimination of the ninety day reporting provision for level II and III sex offenders.

report, as specified, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

Former RCW 9A.44.130 (7).

Here, Mr. Caton registered with the Lewis County Sheriff on May 19th, 2009. Based on his offender classification, he was required to report to the Lewis County Sheriff in person no later than ninety days after that date. The Lewis County Sheriff, for the sole purpose of making it more convenient for himself, allows these offenders to report on only four designated dates within the calendar year. The Lewis County Sheriff could have given Mr. Caton a reporting date ninety days later but chose not to. Instead, the Sheriff decided that Mr. Caton would have to report again twenty-seven days later, and when Mr. Caton missed that reporting date (which was *not* prescribed in the statute) he was charged with the felony offense of failure to register as a sex offender.

The State, in proving that twenty-seven days had elapsed since Mr. Caton registered as a sex offender with the Lewis County Sheriff, did not prove that Mr. Caton failed to report in person “every ninety days.” The trial court did not make a finding that Mr. Caton failed to report in person every ninety days. See Findings of Fact and Conclusions of Law, CP 6-8. Rather, the trial court found merely that Mr. Caton failed to report on the date given to him by the Lewis County Sheriff. See F.F. 1.5, 1.9., CP 7.

That the statute allows the county sheriff to set the date for reporting does not translate into the county sheriff having authority to require an offender to report in person twenty-seven days after the last time he reported, and thereby subject an offender to criminal prosecution for failing to report on that date. How can Mr. Caton be deemed to have failed to report every ninety days when only twenty-seven days had expired since he last reported? The evidence presented by the State is insufficient to support the trial court's finding that Mr. Caton was guilty of failing to report, in person, to the Lewis County Sheriff every ninety-days. A level II sex offender's failure to report, in person, to the county sheriff only twenty-seven days after last reporting was not a crime under former RCW 9A.44.130 (7). Should this Court find that the evidence was sufficient to support the conclusion of guilt where the State proved only that twenty-seven days had elapsed since Mr. Caton last reported, then former RCW 9A.44.130 (7) constituted an improper delegation of authority to the county sheriff, violated the separation of powers doctrine, violated Mr. Caton's right to equal protection of the law and violated Mr. Caton's right to due process (argued below).

II. TO THE EXTENT THAT FORMER RCW 9A.44.130 (7) ALLOWED THE COUNTY SHERIFF TO ARBITRARILY SET AN OFFENDER'S REPORT DATE FOR ANY DAY WITHIN NINETY-DAYS AFTER HIS LAST REPORT DATE, IT VIOLATES MR. CATON'S RIGHT TO NOTICE

**AND DUE PROCESS UNDER WASHINGTON
CONSTITUTION, ARTICLE 1, SEC. 3 AND THE
FOURTEENTH AMENDMENT TO THE UNITED STATES
CONSTITUTION.**

Under the notice and due process requirements of Article 1, Sec. 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, statutes defining crimes must be strictly construed according to their plain meaning, and their words must give citizens adequate notice of what conduct constitutes a crime. *State v. Enloe*, 47 Wn.App. 165, 734 P.2d 520 (1987). Thus, to comport with minimum due process, criminal statutes cannot leave persons of common intelligence to guess at their meaning. *City of Seattle v. Drew*, 70 Wn.2d 405, 423 P.2d 522 (1967).

For example, in *City of Seattle v. Rice*, 93 Wn.2d 728, 612 P.2d 792 (1980), a defendant appealed his conviction for trespassing in a public building during regular business hours under a municipal ordinance that made it illegal to disobey a “lawful order” to leave. The defendant argued that the term “lawful order” failed to give notice of what conduct constituted an offense. The Supreme Court, in reviewing the ordinance, held that it was so vague as to fail to give notice of what conduct constituted a crime:

The term “lawful order” in the Seattle criminal trespass ordinance is not sufficiently specific to inform persons of reasonable

understanding of what conduct is proscribed. Many questions must be answered to determine if an order is a “lawful order.” Who is an authorized person? Was the substance of the order lawful? Was there a valid reason for the order? How long is the order to be in effect? The foregoing is but a sample of what must be considered and certainly there are many more questions which could be raised. A person receiving an order must thereupon be able to answer all such questions to know if he has received a “lawful order.”

Rice at 731-32.

In this case, former RCW 9A.44.130 (7), by its terms, requires level II and III sex offenders to report, in person, every ninety days. The statute provides no notice that an offender may be required to report in person after only twenty-seven days, or ten days, or one day, or even one hour. Under the State’s theory of the case, had the Lewis County Sheriff’s quarterly reporting date fallen on May 20th, Mr. Caton would have been required to report in person only one day after registering in person and would be properly subjected to criminal prosecution for failing to do so. Where does the statute notify an offender of such a possibility?

In Mr. Caton’s case, the sentences of RCW 9A.44.130 (7) at issue are: “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.” As with

the ordinance at issue in *Rice*, these sentences create more questions than answers, including: (1) How did the Lewis County sheriff set the reporting dates? (2) Did the Lewis County Sheriff notify offenders that they could be subjected to criminal prosecution even if fewer than ninety days had elapsed since they last reported? (3) Where are the reporting requirements utilized here published so as to give a common citizen notice? The State failed to present evidence of a public document notifying citizens that RCW 9A.44.130 (7) can only be complied with in Lewis County on four calendar days in the year, or that the Sheriff had unilaterally altered RCW 9A.44.130 to require an offender to report after only twenty-seven days where the statute plainly requires an offender to report every ninety days. This is not the type of notice envisioned by the due process clause which would inform a person of average intelligence just what conduct constitutes a crime.

In addition, the statutory provision here at issue suffers from a more fundamental notice problem. This lies in the fact that the defendant was not charged with violating an unpublished and generally unavailable policy requirement of a county sheriff. Rather, he was charged with violating former RCW 9A.44.130 (11). Under subsection (7), as quoted above, it is impossible to tell from the language of the statute itself whether or not the defendant's conduct is a crime. Mr. Caton's right to

due process was violated and his case should be remanded with instructions to dismiss.

III. FORMER RCW 9A.44.130 (7) ALLOWED THE VARIOUS COUNTY SHERIFFS TO CREATE A NEW CRIME OF FAILING TO REGISTER ON AN ARBITRARILY SET DATE, DESPITE THE STATUTE'S REQUIREMENT THAT LEVEL II AND III OFFENDERS REPORT EVERY NINETY DAYS, AND AS SUCH IT VIOLATES MR. CATON'S RIGHT TO EQUAL PROTECTION UNDER THE WASHINGTON CONSTITUTION, ARTICLE 1, SEC. 12, AND THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

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, Sec. 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, Sec. 12 are at least as stringent as those found in the 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 clause of the United States Constitution also constitutes a violation of the

equal protection clause of the Washington Constitution. *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) (internal citation omitted). Rather, the equal protection clause requires that “those who are similarly situated be similarly treated.” *Jenkins* 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. *Peterson 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.” *Nielsen v. Washington State Bar Ass’n*, 90 Wn.2d 818, 585 P.2d 1191 (1978). Under this test, the statute at issue must be the least restrictive method by which to address a compelling state interest. If a statute creates a classification system based on a “semi-suspect” 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. *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, 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 v. Board of Commissioners of Yakima County*, 92 Wn.2d 831, 601 P.2d 936 (1979).

In *Peterson v. State*, 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) where 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.” *Peterson* at 445.

In this case, Mr. Caton’s argues that even under the lowest level of scrutiny, former RCW 9A.44.130 (7) violates his right to equal protection. The legislature has set no standards for a county sheriff to use when determining when to require a level II or III sex offender to report so as to satisfy the “every ninety day” requirement. Rather, it simply leaves the implementation of this requirement to the arbitrary decision of each county sheriff. Since each county sheriff is left to his or her own devices in assigning a reporting date, the same person could be required to report ninety days after he registered in one county and required to report two days after he registered in another.

This system of standardless, ad hoc application of applying additional or inconsistent reporting requirements does not rationally relate to the legislature’s legitimate purpose of protecting the public from sex offenders. Presumably, this is why the legislature has since abandoned the ninety day reporting requirement found in former RCW 9A.44.130 (7). As a result, former RCW 9A.44.130 (7) violates Mr. Caton’s right to equal

protection under both the Washington and United States Constitution. Mr. Caton's case should be remanded with instructions to dismiss.

IV. FORMER RCW 9A.44.130 (7) ALLOWED THE VARIOUS COUNTY SHERIFFS TO CREATE A NEW CRIME OF FAILING TO REGISTER ON AN ARBITRARILY SET DATE, DESPITE THE STATUTE'S REQUIREMENT THAT LEVEL II AND III OFFENDERS REPORT EVERY NINETY DAYS, AND AS SUCH IT VIOLATED THE SEPARATION OF POWERS DOCTRINE AND CONSTITUTED AN IMPROPER DELEGATION OF AUTHORITY.

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* 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, Sec. 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. 683, 704, 94 S.Ct. 3090 (1974) (quoting The Federalist, no. 47, at 313 (S. Mittell ed. 1983)).

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* 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..." *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. *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, following her conviction for possession of Valium, appealed her conviction arguing that the legislature, by delegating the authority to determine what was or was not a controlled substance to the federal government, violated the separation of powers doctrine. The Supreme Court reversed the defendant's conviction, 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." *Dougall* 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 a defendant given the condition of not possessing pornography constituted an improper delegation of judicial authority). *Cf. Caffall Bros. Forest Products v. State*, 79 Wn.2d 223, 484 P.2d 912 (1971), holding no improper delegation where the Commissioner of Public Lands given authority to reject a sale of timber from public lands where it found such a sale to be not in the best interest of the state, because legislature had set forth a number of specific criteria for the commissioner to use when determining what constituted the best interests of the state.

The portion of RCW 9A.44.130 (7) which delegated authority to the various county sheriffs to create a new crime of failing to register as a sex offender where, as here, only twenty-seven days had elapsed since a level II sex offender last reported to the county sheriff, solely by allowing the county sheriff to arbitrarily set an offender's reporting date without any instruction as to how to apply the ninety day requirement, constituted an improper delegation of authority to the various county sheriffs. As with the power the legislature gave the county sheriff to assign risk levels (previously invalidated as an improper delegation of power by the legislature to county sheriffs in *State v. Ramos*, 149 Wn.App. 266, 202 P.3d 383 (2009)), the legislature here provides absolutely no criteria, no standards, and no guidance as to how each county sheriff should set the date on which an offender is to report "every ninety days." As a result of this improper delegation of legislative authority, the legislature has created a system where each county is free to adopt its own arbitrary standard. This method of determining this added reporting requirement suffers from the same defect as existed with the assignment of what constituted a controlled substance in *Dougall*. In the case at bar, the legislature improperly assigned the task of defining the crime of failing to register as a sex offender to an executive agency (each individual county sheriff), thereby violating the separation of powers of doctrine.

Because the legislature in this case has delegated its authority to define what constitutes the crime of failing to register as a 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. Mr. Caton's case should be remanded with instructions to dismiss.

V. MR. CATON'S SIXTH AMENDMENT RIGHT OF CONFRONTATION WAS VIOLATED WHEN THE TRIAL COURT RELIED ON TESTIMONY AND DOCUMENTATION BY DETECTIVE BORDEN THAT MR. CATON WAS A LEVEL II SEX OFFENDER.

Detective Borden was permitted to testify that Mr. Caton was a level II sex offender based exclusively on the classification information given to him by the "End of Sentence Review Board" of the DOC. Presumably to avoid a *Ramos*² inspired accusation that the Lewis County Sheriff had been granted authority to classify sex offenders through an improper delegation of authority, the State took great care to emphasize that in Mr. Caton's case, Detective Borden had relied *exclusively* on the classification given to him by DOC in setting Mr. Caton as a level II sex offender. However, the State failed to present testimony by anyone in DOC responsible for setting Mr. Caton's classification level to support its

² *State v. Ramos*, 149 Wn.App. 266, 276, 202 P.3d 383 (2009). See also *State v. Brosius*, 154 Wash.App. 714, 722, 225 P.3d 1049 (2010), distinguishing *Ramos*.

contention that Mr. Caton was, in fact, a level II sex offender, and failed to produce the document which purportedly directed Detective Borden to set Mr. Caton as a level II sex offender.

Defense counsel objected to the admission of Exhibit 1 to prove that Mr. Caton was a Level II sex offender because it was hearsay. Specifically, defense counsel objected to the admission of this document because it relied upon a conclusion that was drawn by another agency that was not present giving testimony. See RP at p. 58. The State sought to excuse this failure by saying that the document was “part of his identification file,” as though that was all that was needed to prove this element of the crime. The trial court agreed and overruled the objection. Detective Borden further explained during cross examination that he placed “level II” on Mr. Caton’s sex offender registration form based on information contained in Mr. Caton’s sex offender registration file. When asked if there are other documents which were consulted in order to write “level II” on Mr. Caton’s sex offender registration form, which in turn subjected him to a 90-day reporting requirement and the possibility of criminal prosecution for failing to report within 90 days, Borden said “yes.” The documentation that was relied upon was “the end of sentence review committee alert documentation” provided to the Lewis County Sheriff by the Department of Corrections. This document was not

admitted into evidence (nor proffered), and no one from this “end of sentence review committee” testified in this case.

When defense counsel renewed his objection to the admission of Exhibit 1 he made an objection, albeit inartful, based on Mr. Caton’s Sixth Amendment right of confrontation. Although couched in terms of hearsay and lack of foundation, defense counsel said “[T]he argument is simply that it’s based on some other documentation to indicate risk level II and that should be a prerequisite foundational requirement, prior to the admission of that document.” In other words, the State was relying upon documentation that it had not produced, and which could therefore not be confronted, in order to prove an ultimate issue, namely that Mr. Caton is a level II sex offender.

The trial court erred in admitting Exhibit 1 and in relying on it to find that Mr. Caton is a level II sex offender who was required to report in person every 90 days to the Lewis County Sheriff. Using a written declaration prepared for use in a criminal prosecution violates the Sixth Amendment right of confrontation when it serves as an out-of-court statement by non-testifying witnesses and the accused person had no prior opportunity for cross-examination. *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), *Davis v. Washington*, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006);

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *State v. Mason*, 160 Wn.2d 910, 920, 162 P.3d 396 (2007); U.S. Const. Amend. XI (guaranteeing a defendant the right “to be confronted with witnesses against him.”); Wash. Const. art. 1, Sec. 22 (guaranteeing the accused the right “to meet the witnesses against him face to face.”)

In *Melendez-Diaz*, the United States Supreme Court explained how the Sixth Amendment applies to written declarations prepared by a forensic analyst. The Court rejected numerous arguments posited by the prosecution that affidavits are not testimonial, non-accusatory, neutrally report administrative information, or are business records. *Melendez-Diaz* at 2533-39.

The *Melendez-Diaz* Court clarified that other than actual business records, such as a certified copy of a previously created record generated in the regular course of business, records generated by the government are not exempt from confrontation requirements. A clerk may authenticate a previously created record that speaks to the administration of the entity’s affairs, but a clerk may not “furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.” *Melendez-Diaz* at 2539. *Melendez-Diaz* held firm to the rule that documents attesting to certain facts fall within the “core class” of testimonial evidence for which confrontation is required under

the Sixth Amendment. *Melendez-Diaz* at 2532. A declaration following government analysis is “a declaration of fact” and “incontrovertibly” is “made for the purpose of establishing or proving some fact.” *Id.*, citing *Crawford* at 51. The document attesting to a fact in question at trial is the functional equivalent of a live witness and does precisely what a witness would do at trial on direct examination. *Id.*, citing *Davis* at 830. Moreover, if a document is prepared for the purpose of being available for use at trial, it is likely to be testimonial and *Crawford* therefore requires confrontation. *Id.*

Here, the trial court admitted and relied upon Exhibit 1 to find the essential element that Mr. Caton was a level II or III sex offender, yet this document merely recited information derived from another document that was not proffered by the State or admitted at trial. Mr. Caton was deprived of an opportunity to confront this document and cross examine the party who prepared the information contained in the document. The admission of this document was error of a constitutional magnitude because it violated Mr. Caton’s right of confrontation under the Sixth Amendment, and the error was prejudicial because it comprised the *sole evidence* that Mr. Caton was a level II sex offender. Mr. Caton’s conviction should be reversed and dismissed because the State presented insufficient evidence that Mr. Caton was a level II sex offender (argued in

Part VI, below), but should this Court disagree with that contention, he should be granted a new trial based on the erroneous admission of Exhibit 1 which violated his right of confrontation.

VI. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT MR. CATON WAS A LEVEL II SEX OFFENDER.

For this section Mr. Caton incorporates the standard of review for determining whether the evidence is sufficient to support a finding of guilt outlined in Section I, above. Here, the State was required to prove that Mr. Caton was a level II sex offender because that is the fact that triggered the requirement that he report, in person, to the Lewis County Sheriff every ninety days under former RCW 9A.44.130 (7). In so doing the State relied on Exhibit 1 which was admitted in violation of Mr. Caton's Sixth Amendment right of confrontation (argued in part V, supra). Because the State presented no other evidence proving that Mr. Caton was a level II sex offender the evidence is insufficient to support the court's finding that Mr. Caton was a level II sex offender (finding of fact 1.4). Mr. Caton's conviction should be reversed and dismissed.

E. CONCLUSION

Mr. Caton's conviction should be reversed and dismissed.
Alternatively, he should be granted a new trial.

RESPECTFULLY SUBMITTED this 20th day of August, 2010.

ANNE M. CRUSER, WSBA No. 27944
Attorney for Mr. Caton

CERTIFICATE OF MAILING

I certify that on 07/14/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Lori Smith, Lewis County Prosecutor's Office, 345 W. Main St., Fl. 2, Chehalis, WA 98532, (2) David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402, and (3) Michael Caton, Mr. Michael Edward Caton, DOC# 829354, Monroe Corrections Center, P.O. Box 777, Monroe, WA 98272.

Anne M. Cruser

ANNE M. CRUSER, WSBA No. 27944
Attorney for Mr. Caton

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[Handwritten Signature]
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