

COURT OF APPEALS  
DIVISION II

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**NO. 38468-0-II**

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

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**STATE OF WASHINGTON,**

**Appellant,**

**vs.**

**PHILLIP WHITE FLOWERS,**

**Respondent.**

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**BRIEF OF RESPONDENT**

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## STATEMENT OF THE CASE

By information filed July 18, 2008, the Cowlitz County prosecutor charged the defendant Phillip White Flowers with one count of failure to register under RCW 9A.44.130(11). CP 4-5. Specifically, the state alleged that (1) the defendant was a convicted sex offender and a Cowlitz County resident who was required to register as a sex offender with the Cowlitz County Sheriff, (2) that the defendant was a transient, and (3) that on or about July 15, 2008, the defendant knowingly failed to “accurately report to the Cowlitz County Sheriff the locations he stayed at during the preceding week.” *Id.* The information did not allege that the Cowlitz County Sheriff had adopted a policy requiring transient sex offenders to “accurately report” the locations where they had “stayed at during the preceding week.” *Id.* Following arraignment in this case, defendant’s counsel moved to dismiss, arguing that to the extent that RCW 9A.44.130 made the defendant’s conduct a crime, the statute was constitutionally infirm on a number of different bases. CP 6. Counsel supported this motion with a lengthy memorandum and an affirmation with certain factual claims. CP 7-17, 18-20.

The parties later appeared before the court for argument on this motion, after which the trial court granted the motion to suppress on every basis argued by defense counsel, as well as on other constitutional infirmities that the court itself identified. RP 9/30/08; RP 10/14/08; CP 33-37. The

court later entered the following findings of fact and conclusions of law in support of its ruling:

### **FINDINGS OF FACT**

1. On June 18, 2001, the defendant Phillip White Flowers pled guilty in Cowlitz County Juvenile Court to three counts of first degree rape of a child. After his conviction and sentencing, he registered as a sex offender with the Cowlitz County Sheriff.

2. Following his conviction, the defendant moved his residence on a number of occasions within Cowlitz County, each time reporting that change to the Cowlitz County Sheriff as required under RCW 9A.44.130.

3. Prior to July of 2008, the defendant reported to the Cowlitz County Sheriff that he had lost his place to live and had become transient. The Deputy Sheriff in charge of registration then informed the defendant that as a transient, he was required to report to the Sheriff's office each Tuesday. The Deputy Sheriff in charge of registration also informed the defendant that pursuant to a policy adopted by the Cowlitz County Sheriff, when the defendant reported each week, he would have to fill out a written form indicating the location where he had "stayed including correct address and apartment number" for each day of the previous week.

4. On July 15, 2008, the defendant reported to the Sheriff's Office and filled out his weekly registration form. On that form he indicated that on July 12th and July 13th, he had stayed at 825 32nd Ave. #67. In fact, this information was not correct and the defendant did not stay inside the apartment indicated on those days or nights.

5. Prior to July 15, 2008, the Cowlitz County Sheriff adopted a policy that requires all transient sex offenders to report their "locations" over the previous week when they make their weekly reporting visits to the Sheriff's Office. However, there is no public document such as the Cowlitz County Code in which this policy has been published. Rather, the only way to determine whether or not the Cowlitz County Sheriff has adopted this policy is to contact the Sheriff's office and ask for this information.

6. A number of County Sheriffs in Washington State require transient sex offenders to report their daily locations when they make their weekly reporting visit to the Sheriff's Office. As of August 20, 2008, this was the policy in Clark, Cowlitz, Lewis, Thurston, Pierce, and Snohomish Counties. However, it is not the policy of all of the County Sheriffs in Washington. For example, as of August 20, 2008, the Sheriffs of King County and Spokane County did not require transient sex offenders in their county to report their location over the previous seven days. However, the King County Sheriff does occasionally require a few transient sex offenders to report their daily locations if there is some reason to suspect that particular transient sex offender has been engaging in suspicious activity.

7. On July 18, 2008, the Cowlitz County Prosecutor charged the defendant Phillip White Flowers with one count of failure to register as a sex offender. The only conduct the state alleged constituted the offense was that the defendant reported that on July 12th and July 13th he had stayed at 825 32nd Ave. #67, when he had not stayed at this location.

8. Following his appearance on this charge, the defendant filed a motion to dismiss this charge under *State v. Knapstad*, 107 Wash.2d 346, 729 P.2d 48 (1986).

### **CONCLUSIONS OF LAW**

1. Under RCW 9A.44.130(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 . . .” The requirement that a transient sex offender “list the locations where [they have] stayed during the last seven days,” is not a requirement of any portion of RCW 9A.44.130. Rather, it is a requirement of the Cowlitz County Sheriff. Thus, the failure to abide by this requirement is not a crime under RCW 9A.44.130(11)(a).

2. Under RCW 9A.44.130(6)(b), the legislature has given the Sheriffs of the various counties in Washington the discretionary authority to adopt a policy requiring that transient sex offenders “list the locations where [they have] stayed during the last seven days.” To the extent that RCW 9A.44.130(6)(b) is interpreted to create a

new crime of failing as a transient sex offender to “list the locations where [he or she has] stayed during the last seven days,” in a county where the local sheriff has adopted this requirement, the legislature has violated the separation of powers doctrine by giving to the executive branch the authority to define a crime. Thus, to the extent that RCW 9A.44.130(6)(b) is interpreted to create a new crime of failing as a transient sex offender to “list the locations where [he or she has] stayed during the last seven days,” in a county where the local sheriff has adopted this requirement, violates the Washington Constitution and is unenforceable.

3. To the extent that RCW 9A.44.130(6)(b) is interpreted to create a new crime of failing as a transient sex offender to “list the locations where [he or she has] stayed during the last seven days,” in a county where the local sheriff has adopted this requirement, violates the defendant’s right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment, because identically situated transient sex offenders are treated disparately depending solely upon the arbitrary decision of the county sheriff where the sex offender resides. In other words, had the defendant committed the same acts alleged to be a crime in this case in King County or Spokane County, instead of Cowlitz County, he would not be guilty of a crime.

4. To the extent that RCW 9A.44.130(6)(b) is interpreted to create a new crime of failing as a transient sex offender to “list the locations where [he or she has] stayed during the last seven days,” in a county where the local sheriff has adopted this requirement, it violates the defendant’s right to notice and due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, because there is no official written public notice given in the State Register, any Administrative Code, or any County Code that the failure of a transient sex offender to “list the locations where [he or she has] stayed during the last seven days,” is a crime.

CP 33-37.

Following entry of these findings and conclusions, the state filed timely notice of appeal. *See* Notice of Appeal.

## ARGUMENT

### **I. UNDER RCW 9A.44.130, IT IS NOT A CRIME FOR A TRANSIENT SEX OFFENDER TO FAIL TO ACCURATELY INFORM THE COUNTY SHERIFF WHERE HE OR SHE SLEPT OVER THE PREVIOUS SEVEN DAYS.**

When interpreting a statute, a court must first assume that the Legislature means exactly what it says. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Thus, if the statute is clear on its face, its meaning is derived from the statutory language alone. *State v. Watson*, 146 Wn.2d 947, 51 P.3d 66 (2002). In *State v. Hall*, 112 Wn.App. 164, 48 P.3d 350 (2002), Division II of the Court of Appeals puts this rule as follows:

Where the meaning of a statute is clear on its face, this court assumes that the Legislature “means exactly what it says” and we give effect to the plain language without regard to rules of statutory construction.

*State v. Hall*, 112 Wn.App. at 167 (quoting *State v. Warfield*, 103 Wn.App. 152, 156, 5 P.3d 1280 (2000)).

In addition, when looking at the meaning of any particular statute, the courts give the words within the statute their common legal or ordinary meaning unless the statute includes specific statutory definitions. *State v. Chester*, 133 Wn.2d 15, 940 P.2d 1374 (1997). One of the sources the court uses for determining the common definition of non-technical words is the dictionary. *State v. Chester*, 133 Wn.2d at 22.

The courts also discern the plain meaning of a statute from the context

of the statute containing the provision, related provisions, and the statutory scheme as a whole. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). The court also attempts to construe statutes “so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Finally, when interpreting a criminal statute, the courts “give it a literal and strict interpretation.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Under RCW 9A.44.130(11)(a), the legislature has stated that it is a crime for a sex offender who is required to register under RCW 9A.44.130 to fail to register as is required under RCW 9A.44.130. This subsection states as follows:

(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.

RCW 9A.44.130(11)(a).

The gravamen of this offense for persons required to register under the statute is to “fail[] to comply with any of the requirements of this section.” The term “this section” refers to RCW 9A.44.130. Thus, the

failure “to comply with the requirements of [RCW 9A.44.130]” is a crime. Determining just what requirements RCW 9A.44.130 contains is a feat in and of itself, as it contains statutory language so convoluted and complex that it would put a smile on the face of any dedicated Sophist. However, in the context of this case, the requirements of RCW 9A.44.130 at issue are found in subsection (6)(b), which states as follows:

(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.

RCW 9A.44.130(6)(b).

Under the plain language of this statute, a sex offender “who lacks a fixed residence” must report “weekly, in person, to the sheriff of the county where he or she is registered,” and must do so “on a day specified by the county sheriff’s office.” These are the “requirements” of this subsection. It is true that the “county sheriff’s office may require the person to list the locations where the person has stayed during the last seven days.” However, under the plain language of the statute, the duty of listing “the locations where a person has stayed during the last seven days,” if it exists, is not a requirement of the statute itself. Rather, it would only be a requirement of a

particular county sheriff. Thus, under the plain language of RCW 9A.44.130(11)(a), the failure to “list the locations where a person has stayed during the last seven days,” is not a crime because the failure to do it is not a violation of the requirements of RCW 9A.44.130. Thus, in the case at bar, the trial court did not err when it held that the state’s information failed to allege the existence of an offense cognizable under RCW 9A.44.130.

**II. TO THE EXTENT THAT RCW 9A.44.130(6)(b) CREATES A NEW CRIME OF FAILING AS A TRANSIENT SEX OFFENDER TO LIST THE LOCATION WHERE HE OR SHE STAYED DURING THE LAST SEVEN DAYS IN A COUNTY WHERE THE LOCAL SHERIFF HAS ADOPTED THIS REQUIREMENT, IT VIOLATES THE SEPARATION OF POWERS DOCTRINE.**

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

[T]he “Judicial Power of the United States” vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with

the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

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

Although the Washington Constitution contains no explicit separation of powers clause, as does the federal constitution, the doctrine has been presumed throughout the state's history by the division of government into three separate branches. *Carrick v. Locke*, 125 Wn.2d at 134-35. The principle of separation of powers is violated when "the activity of one branch threatens the independence or integrity or invades the prerogatives of another," *State v. Moreno, supra*. It is also violated when one branch of government delegates its discretionary authority to another branch. *State v. Ermert*, 94 Wn.2d 59, 578 P.2d 1309 (1978).

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

standards to define how that fact is determined, and (2) provides procedural safeguards to control the arbitrary determination of that fact. *State v. Ermert, supra.*

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

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

Former RCW 69.50.201(d).

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

69.50.201(d). On April 26, 1976, the board sent notice to all county prosecutors that Valium was now a controlled substance in Washington.

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

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

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

After reviewing the statute, the Washington Supreme Court reversed the defendant's conviction on the same basis, holding that RCW 69.50.201(d) was "an unconstitutional delegation of legislative authority" in that it permitted the "future federal designation, rescheduling or deletion of controlled substances in the Federal Register to become controlled or deleted substances under the Uniform Controlled Substances Act by means of Board inaction or acquiescence." *State v. Dougall*, 89 Wn.2d at 123. *See also State*

v. *Sansone*, 127 Wn.App. 630, 111 P.3d 1251 (2005) (sentencing court’s delegation of the defining of the term “pornography” to community corrections officer for a defendant given the conditions of not possessing “pornography” constituted an improper delegation of judicial authority).

By contrast, in *Caffall Bros. Forest Prods. v. State*, 79 Wn.2d 223, 484 P.2d 912 (1971), the Washington State Department of Natural Resources held a timber auction from public lands as authorized by the legislature in RCW 79.01.004. The plaintiff was the successful bidder. However, when the Commissioner of Public Lands refused to confirm the sale under RCW 79.01.212, plaintiff brought suit for damages equaling the difference between its bid and a later higher bid that the Commissioner did accept. In support of its claim, plaintiff argued that the legislature had violated the separation of powers doctrine in RCW 79.01.212 when it gave unfettered discretion to the Commission to refuse to confirm public sales which were not in the “best interest of the state.”

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

authority from the legislative to the executive constituted a violation of the separation of powers:

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

*Caffel Bros.*, 79 Wn.2d at 226 (quoting *Keeting v. Public Utility District No. 1*, 49 Wn.2d 761, 767, 306 P.2d 762 (1957)).

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

65 Wn.2d 385, 397 P.2d 440 (1964) (invalidating legislation authorizing the Tax Commission to assess late payment penalty without prescribing standards).

Under RCW 9A.44.130, the legislature originally created the offense of failure to register as a sex offender, which required the state to prove that a defendant was a “sex offender” and that he or she failed to meet one of the numerous reporting requirements that depended on any number of criteria. In 2001, the legislature amended subsection 6 of the statute to add the following language shown in underline and to delete the language shown in ~~strikeout~~:

(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. ~~If he or she has been classified as a risk level I sex or kidnapping offender, he or she must report monthly. If he or she has been classified as a risk level II or III sex or kidnapping offender, he or she must report weekly.~~ 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 a sex ~~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.

Laws of 2001, chapter 169 § 1 (emphasis added).

As with the power the legislature gave the county sheriff to assign risk levels, the legislature here provides absolutely no criteria, no standards, and no guidance as to how each county sheriff should come to a determination

whether or not to require a person to list the locations where he or she has stayed during the previous seven days. As a result of this improper delegation of legislative authority, the legislature has created a system where each county sheriff is free to arbitrarily require all persons in this class to meet this requirement, require no one to meet this requirement, or require some arbitrarily created subgroup to meet this requirement. Each county is then 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 *Dougall*, the legislature improperly assigned the task of defining what was a “controlled substance” for the purpose of defining the crime of possessing a controlled substance to an executive agency (the federal pharmacopoeia board and the state pharmacy board), thereby violating the separation of powers doctrine. Similarly, in the case at bar, the legislature improperly assigned the task of defining which homeless sex offenders must report their locations over the past seven days for the purpose of defining the crime of failing to register to an executive agency (each individual county sheriff), thereby violating the separation of powers doctrine.

This case is also similar to a number of cases cited in *Caffel Bros.* as examples of improper delegations of legislative authority without setting sufficient standards for administering that delegation. See *State v. Gilroy*,

*supra*; *Peterson v. Hagan, supra*; *United States Steel Corp. v. State, supra*.

Since the legislature in this case has delegated its authority to define what constitutes the crime of failure 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. As a result, the defendant's charge in this case, which seeks to impose a criminal sanction based solely upon the Cowlitz County Sheriff's arbitrary decision to require the defendant and all other transient people to report their daily locations, cannot be sustained. Consequently, this court should sustain the trial court's dismissal of the charges in this case.

**III. TO THE EXTENT THAT RCW 9A.44.130(6)(b) CREATES A NEW CRIME OF FAILING AS A TRANSIENT SEX OFFENDER TO LIST THE LOCATION WHERE HE OR SHE STAYED DURING THE LAST SEVEN DAYS IN A COUNTY WHERE THE LOCAL SHERIFF HAS ADOPTED THIS REQUIREMENT, IT VIOLATES THE DEFENDANT'S RIGHT TO EQUAL PROTECTION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 12, AND 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, § 12 is similar in nature.

It states as follows:

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

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

However, the constitutional guarantee of equal protection “does not require that things different in fact be treated in law as though they were the same.” *Jenkins v. State*, 85 Wn.2d 883, 888, 540 P.2d 1363 (1975) (quoting Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif.L.Rev. 341, 344 (1949)). Rather, the equal protection clause requires that “those who are similarly situated be similarly treated.” *Jenkins*, 85 Wash.2d at 888.

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

If a statute creates an inherently suspect classification such as one based on race, nationality, or alienage, then the statute will be subjected to

“strict scrutiny.” *Nielsen v. Washington State Bar Ass'n*, 90 Wn.2d 818, 585 P.2d 1191 (1978). Under the “strict scrutiny” test, legislation at issue must be the least restrictive method by which to address a compelling state need. If a statute creates a classification system based on a “semisuspect” class where an important right is involved, then the “intermediate scrutiny” test is applied. *State v. Heiskel*, 129 Wn.2d 113, 916 P.2d 366 (1996). Under the “intermediate scrutiny” test, “the challenged statute must further a substantial interest of the state” in order to meet the minimum requirements of equal protection. *State v. Coria*, 120 Wn.2d 156, 839 P.2d 890 (1992).

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

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

In the case at bar, the defendant argues even under the lowest level of scrutiny, RCW 9A.44.130(6)(b) violates the defendant’s right to equal protection. In support of this argument, it should be noted, as was set out in the preceding argument, that the legislature has set no standards for a county sheriff to use when determining whether or not a transient person who reports weekly should or should not report his or her locations over the previous seven days. Rather, it simply leaves the implementation of this requirement to the arbitrary application of each county sheriff. Since each county sheriff is left to his or her own devices in assigning this registration requirement, the same person could be subject to this added reporting requirement in one county, and the next day not be subject to this added reporting requirement should he or she move into another county where that sheriff does not

implement that requirement. For example, if a transient moved from Cowlitz to King County, he would no longer be required to report his location over the previous seven days. However, if the same person moved from King or Spokane County to Cowlitz County, he or she would then have this added registration requirement simply because of the move of location.

In the case at bar, the defendant is in the class of currently transient persons convicted of sex offenses. As the preceding explained, RCW 9A.44.130(6)(b) sets no standards at all for determining whether or not the county sheriff in the county in which the defendant lives should require him to report his daily locations at each weekly report. This system of standardless, *ad hoc* application of applying additional reporting requirements does not rationally relate to the legislature's legitimate purpose of protecting the public from sex offenders. As a result, RCW 9A.44.160(6)(b) violates the defendant's right to equal protection under both Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. The defendant in the case at bar should not be found guilty of the felony of failure to register with its attendant incarceration time, years of community custody requirements, and additional registration time simply because he happened to live in Cowlitz County or Clark County as opposed to King County or Spokane County. The trial court did not err in dismissing the current prosecution because it violated the defendant's constitutional right to equal

protection.

**IV. TO THE EXTENT THAT RCW 9A.44.130(6)(b) CREATES A NEW CRIME OF FAILING AS A TRANSIENT SEX OFFENDER TO LIST THE LOCATION WHERE HE OR SHE STAYED DURING THE LAST SEVEN DAYS IN A COUNTY WHERE THE LOCAL SHERIFF HAS ADOPTED THIS REQUIREMENT, IT VIOLATES THE DEFENDANT'S RIGHT TO NOTICE AND DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

Under the notice and due process requirements of Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, 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 Superior Court agreed, and the City obtained review before the state supreme court. Initially, the court noted the following concerning the

notice requirements for criminal statutes under the due process clause:

The touchstone of the “fair notice” principle is that the statute or ordinance must be sufficiently specific that “men of reasonable understanding are not required to guess at the meaning of the enactment.” *Seattle v. Drew*, 70 Wn.2d 405, 408, 423 P.2d 522, 524, 25 A.L.R.3d 827 (1967). In *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), the court stated:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

*City of Seattle v. Rice*, 93 Wn.2d at 731.

The court then went on to review the ordinance in question and affirmed the Superior Court’s determination that it was so vague as to fail to give notice of what conduct constituted a crime. The court held:

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.”

*City of Seattle v. Rice*, 93 Wn.2d at 731-732.

In the case at bar, the following italicized portion of section (6)(b) of the sex offender registration act is at issue:

(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.

RCW 9A.44.130(6)(b) (italics added)

As with the ordinance in *City of Seattle v. Rice*, the sentence “[t]he county sheriff’s office may require the person to list the locations where the person has stayed during the last seven days,” creates more questions than it answers, including the following: (1) Did the Cowlitz County sheriff create such a requirement? (2) How was such a requirement established? (3) Where is its adoption published so as to give a common citizen notice? (4) Does it apply to all transient sex offenders in Cowlitz County? and (5) How long does it apply? As the trial court in this case found, the Cowlitz County Sheriff in this case has at least attempted to adopt a policy of requiring at least some transient sex offenders to report daily locations. However, there was no public notice of such an adoption. Finding of Fact No. 5 states the following on this issue:

5. Prior to July 15, 2008, the Cowlitz County Sheriff adopted a

policy that requires all transient sex offenders to report their “locations” over the previous week when they make their weekly reporting visits to the Sheriff’s Office. However, there is no public document such as the Cowlitz County Code in which this policy has been published. Rather, the only way to determine whether or not the Cowlitz County Sheriff has adopted this policy is to contact the Sheriff’s office and ask for this information.

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The state has failed to assign error to this finding of fact and it is thus a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). As it clarifies, there is no public document in which the sheriff’s requirement has been published. Thus, one is left to contact the sheriff’s office on an *ad hoc* basis and then wonder whether or not the information provided is accurate. This is not the type of notice envisioned by the due process clause sufficient to inform a person of average intelligence just what conduct constitutes a crime.

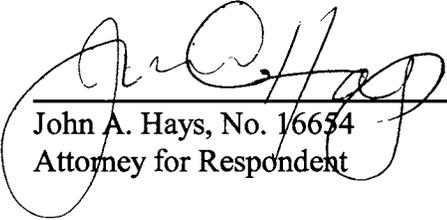
In addition, the statutory provision here at issue suffers from a more fundamental notice problem. This lies in the fact that the defendant was not charged with violating an unpublished and generally unavailable policy requirement of a County Sheriff. Rather, he was charged with violating RCW 9A.44.130(11). Under subsection (6)(a) 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. Thus, the trial court did not err when it found that RCW 9A.44.130 violated the notice requirements due process.

## CONCLUSION

The trial court did not err when it held that RCW 9A.44.130(6)(b) violated a number of constitutional provisions to the extent it creates a new crime of failure as a transient sex offender to list the location where he or she stayed during the last seven days in a county where the local sheriff has adopted this requirement. The decision of the Cowlitz County Superior Court should be affirmed.

DATED this 15<sup>th</sup> day of June, 2009.

Respectfully submitted,



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John A. Hays, No. 16654  
Attorney for Respondent

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

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

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 12**

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

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

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

**RCW 9A.44.130(6)&(11)(a)**

(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.

(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.

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,  
Appellant

vs.

FLOWERS, Phillip White  
Respondent

NO. 08-1-00782-8  
COURT OF APPEALS NO:  
38468-0-II

AFFIRMATION OF SERVICE

STATE OF WASHINGTON )  
County of Cowlitz ) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On June 15<sup>th</sup>, 2009 , I personally placed in the mail the following documents

- 1. BRIEF OF RESPONDENT
- 2. AFFIRMATION OF SERVICE

to the following:

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P.O. BOX 5000  
VANCOUVER, WA 98666-5000

PHILLIP W. FLOWERS  
607 E. PINE WAY, #C  
KELSO, WA 98626

Dated this 15<sup>TH</sup> day of JUNE, 2009 at LONGVIEW, Washington.

*Cathy Russell*  
CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS